



PARLIAMENT OF NEW SOUTH WALES

Joint Select Committee on Sentencing of Child Sexual Assault Offenders

REPORT 1/55 — OCTOBER 2014

**EVERY SENTENCE TELLS A STORY -
REPORT ON SENTENCING OF
CHILD SEXUAL ASSAULT OFFENDERS**



New South Wales Parliamentary Library cataloguing-in-publication data:

New South Wales. Parliament. Joint Select Committee on Sentencing of Child Sexual Assault Offenders.

Every sentence tells a story – Report on sentencing of child sexual assault offenders / Joint Select Committee on Sentencing of Child Sexual Assault Offenders. [Sydney, N.S.W.] : the Committee, 2014. [182] pages ; 30 cm. (Report ; no.1/55).

Chair: Troy Grant, MP.

“October 2014”.

ISBN 9781921012051

1. Child molesters—New South Wales.
2. Child sexual abuse—New South Wales.
3. Sentencing (Criminal procedure)—New South Wales.
 - I. Title
 - II. Grant, Troy.
 - III. Series: New South Wales. Parliament. Joint Select Committee on Sentencing of Child Sexual Assault Offenders. Report ; no 1/55.

362.7609944 (DDC22)

The motto of the coat of arms for the state of New South Wales is “Orta recens quam pura nites”. It is written in Latin and means “newly risen, how brightly you shine”.

Contents

Membership _____	iv
Terms of Reference _____	v
Chair’s Foreword _____	vii
List of Findings and Recommendations _____	ix
Glossary _____	xiii
CHAPTER ONE – INTRODUCTION _____	1
CHAPTER TWO – CURRENT LEGISLATIVE FRAMEWORK _____	2
CHILD SEXUAL ASSAULT OFFENCES IN NEW SOUTH WALES _____	2
COMMONWEALTH CHILD SEXUAL ASSAULT OFFENCES _____	9
OTHER RELEVANT LEGISLATION _____	10
REVIEWING THE NSW LEGISLATION _____	15
CHAPTER THREE – SENTENCING PRINCIPLES AND PRACTICES _____	19
PURPOSES OF SENTENCING _____	19
PRINCIPLES EMPLOYED IN SENTENCING _____	20
STANDARD NON-PAROLE PERIOD SCHEME _____	27
ROLE OF THE LOCAL COURT _____	36
CHAPTER FOUR – SENTENCING PATTERNS _____	47
USE OF SENTENCING DATA AND STATISTICS IN SENTENCING DECISIONS _____	47
CURRENT LIMITATIONS OF AVAILABLE DATA _____	55
ADEQUACY OF DATA COLLECTION _____	58
CHAPTER FIVE – REFORM OPTIONS _____	68
EFFECTIVENESS OF CURRENT SENTENCING OPTIONS _____	68
MANDATORY MINIMUM SENTENCING _____	73
GUIDELINE JUDGMENTS _____	83
PRE-RECORDING OF EVIDENCE _____	88
JOINT TRIALS _____	95
SPECIALIST CHILD SEXUAL ASSAULT COURT _____	100
CHAPTER SIX – TREATMENT AND MANAGEMENT OF OFFENDERS _____	108
BACKGROUND _____	108
AVAILABLE TREATMENT PROGRAMS _____	109
TREATMENT RESOURCING _____	125
TREATMENT CO-ORDINATION _____	129
CHILD PROTECTION REGISTER _____	131

APPENDIX ONE – LIST OF SUBMISSIONS _____	137
APPENDIX TWO – LIST OF WITNESSES _____	138
APPENDIX THREE – EXTRACTS FROM MINUTES _____	141
APPENDIX FOUR – <i>CRIMES (SENTENCING PROCEDURE) ACT 1999, S21A</i> _____	162
APPENDIX FIVE – RECOMMENDATION 4.2 OF THE NSW LAW REFORM COMMISSION REPORT 139 <i>SENTENCING</i> _____	165

Figures

Figure 1 - Penalty Type for the Principal Offences - <i>Crimes Act 1900</i> - s66A(1) - sexual intercourse - child <10 - SNPP (Item 10)	50
Figure 2 – Suspended Sentences – 1 and 2 of 6 - Case Details - <i>Crimes Act 1900</i> - s66A(1) - sexual intercourse - child <10 - SNPP (Item 10)	50
Figure 3 – Term of Sentence for the Principal Offence - consecutive and non-consecutive terms - <i>Crimes Act 1900</i> - s66A(1) - sexual intercourse - child <10 - SNPP (Item 10)	52
Figure 4 - Penalty Type for the Principal Offence - <i>Crimes Act 1900</i> - s66C(3) - sexual intercourse with child between 14 and 16	60
Figure 5 - JIRS drop down menu for penalty type	60

Tables

Table 1 - Maximum penalties imposed for key child sexual assault offences under the <i>Crimes Act 1900</i>	2
Table 2 - Maximum penalties imposed for child pornography, child abuse and grooming under the <i>Criminal Code Act 1995</i> (Cth)	9
Table 3 - Sexual offences under the <i>Crimes Act 1900</i> subject to the SNPP scheme	27
Table 4 - List of possible <i>Crimes Act 1900</i> offences for inclusion under the SNPP scheme	30
Table 5 - Offences under s66A of the <i>Crimes Act 1900</i> that are subject to the SNPP scheme	34
Table 6 - Offences under the <i>Crimes Act 1900</i> tried in the Local Court	36
Table 7 - <i>Crimes Act 1900</i> offences tried in Local and District Courts - 2008-2012	38
Table 8 - Recent Local Court sentencing under the <i>Crimes Act 1900</i> - percentage of sentences imposed at jurisdictional limit	39
Table 9 - Recent sentences under s66A(2) of the <i>Crimes Act 1900</i>	64
Table 10 - Guidelines judgments issued by the New South Wales Court of Criminal Appeal	83

Membership

CHAIR	The Hon. Troy Grant MP
DEPUTY CHAIR	The Hon. Melinda Pavey MLC
MEMBERS	Mr Charles Casuscelli RFD MP Ms Melanie Gibbons MP (From 10 Sep 13) The Hon. Paul Lynch MP Rev the Hon. Fred Nile ED MLC The Hon. Gabrielle Upton MP (Until 10 Sep 13) The Hon. Helen Westwood MLC
CONTACT DETAILS	Joint Select Committee on Sentencing of Child Sexual Assault Offenders Parliament of New South Wales Macquarie Street Sydney NSW 2000
TELEPHONE	02 9230 2843
FACSIMILE	02 9230 3309
E-MAIL	childsexualoffencescommittee@parliament.nsw.gov.au
URL	www.parliament.nsw.gov.au/childsexualoffencescommittee

Terms of Reference

First session of the 55th Parliament

Legislative Assembly Votes and Proceedings, Thursday 15 August 2013, no 156 (18).

Legislative Council Minutes, Wednesday 21 August 2013, no 157 (19).

That:

1. A Joint Parliamentary Select Committee be appointed to inquire into and report on:
 - a) whether current sentencing options for perpetrators of child sexual assault remain effective; and
 - b) whether greater consistency in sentencing and improving public confidence in the judicial system could be achieved through alternative sentencing options, including but not limited to minimum mandatory sentencing and anti-androgenic medication.
2. In examine this issue the Committee should have regard to:
 - a) the current sentencing patterns for child sexual assault;
 - b) the operation of the standard minimum non-parole scheme;
 - c) the experience of other jurisdictions with alternative sentencing options; and
 - d) the NSW Law Reform Commission's Report 139 on Sentencing.
3. The Committee to consist of seven members as follows:
 - a) four from the Government, three being members of the Legislative Assembly and one a Member of the Legislative Council;
 - b) two from the Opposition, one being a Member of the Legislative Assembly and one a Member of the Legislative Council; and
 - c) one cross-bench member of the Legislative Council.
4. The members shall be nominated in writing to the Clerk of the Legislative Assembly and Clerk of the Parliaments by the relevant party leaders and the cross-bench members respectively by Friday 23 August 2013. In the absence of any agreement concerning the membership of the Committee the matter is to be determined by the relevant House.
5. That at any meeting of the Committee four members shall constitute a quorum, provided that the Committee meets as a joint committee at all times.
6. The Committee have leave to make visits of inspection within the State of New South Wales and other states and territories of Australia.

Second session of the 55th Parliament

Legislative Assembly Votes and Proceedings, Tuesday 9 September 2014, no 1 (21).

Legislative Council Minutes, Tuesday 9 September 2014, no 1 (17).

That:

1. A Joint Parliamentary Select Committee be re-appointed to inquire into and report on:
 - a) whether current sentencing options for perpetrators of child sexual assault remain effective; and
 - b) whether greater consistency in sentencing and improving public confidence in the judicial system could be achieved through alternative sentencing options, including but not limited to minimum mandatory sentencing and anti-androgenic medication.
2. In examine this issue the Committee should have regard to:
 - a) the current sentencing patterns for child sexual assault;
 - b) the operation of the standard minimum non-parole scheme;
 - c) the experience of other jurisdictions with alternative sentencing options; and
 - d) the NSW Law Reform Commission's Report 139 on Sentencing.
3. The Committee to consist of seven members as follows:
 - a) four from the Government, namely Mr Casuscelli, Ms Gibbons, Mr Grant, who shall be Chair, and Mr Lynch; and
 - b) three members of the Legislative Council.
4. That at any meeting of the Committee four members shall constitute a quorum, provided that the Committee meets as a joint committee at all times.
5. The Committee have leave to make visits of inspection within the State of New South Wales and other states and territories of Australia.

Chair's Foreword

There is one crime which goes completely against human nature and human instinct. This abhorrent crime is the sexual abuse of children.

The nature of this crime and the power imbalance between perpetrators and their victims make it imperative that the criminal justice system response matches the severity of the crime. Child sexual abuse devastates individuals, families, local communities and societies and the sentencing for this level of devastation must be consistent.

The sexual abuse of children is a dark stain on the collective consciousness of every community.

The community expects Government and the judiciary to stand up for the protection of children and to deter future child abuse by sending a strong and clear message to perpetrators that such crimes are simply unacceptable.

The need to rehabilitate and reform offenders is imperative, so they don't pose a further risk when they re-enter the community.

Furthermore, victims must be protected from the psychological stresses imposed by prolonged and complicated court proceedings, leading to what may seem to some as insufficient sentences which do not reflect the level of damage inflicted on young children.

This Committee was asked to examine the effectiveness of the current sentencing system for child sexual assault offenders and to specifically report on ways to improve consistency of judicial decision making, thereby increasing confidence in the court system. As part of its investigations, the Committee has also reviewed alternative sentencing options and compared the practices in other jurisdictions.

A central issue determining public confidence in the judicial system is whether the length and nature of sentences handed down is commensurate with community expectations, based on the seriousness of the offence.

As detailed in the report, sentencing judges must take account a broad range of factors in order to resolve the tension between exercising individual discretion and applying a consistency of approach. While the length of sentences is determined by access to statistical information about past cases and the application of relevant legal principles, it is more than a question of numerical equivalence. The report spells out the complexity of this process and makes recommendations designed to improve its transparency and public accessibility.

The human dimension of sentencing also requires that offenders be provided with opportunities to atone for their crimes and receive treatment to prevent reoffending. As well as addressing the underlying causes of the criminal behaviour, effective treatment of offenders

serves to further protect children from harm. The report makes a case for increased resources for treatments and better coordination of services between custodial and community settings.

The court process itself may serve to further compound the damage to victims, by subjecting child witnesses to an adversarial process which forces them to relive the experience of an assault. The Committee has made a series of recommendations to reduce the stress and necessity for children to appear multiple times in court to retell details of such crimes. These measures include the increased use of pre-recorded evidence and joint trials for child sexual assault cases. Courts in other jurisdictions have already implemented such procedures.

Furthermore, the Committee's report proposes a series of reforms, including convening a child sexual assault taskforce to establish a Child Sexual Assault Specialist Court in NSW. The establishment of a specialist court, with expertise in the area of child sexual assault should alleviate some of the concerns expressed to the Committee about court delays in hearing cases and reduce the stresses imposed on children caught up in the current court process.

Due to the complex and controversial nature of the matters considered as part of the inquiry, the Committee convened a series of background briefing sessions in advance of conducting formal public hearings. These private round table sessions were held with representatives from relevant Government agencies to discuss legal, sentencing and statistical issues and with therapeutic specialists to discuss rehabilitation and treatment.

On behalf of Committee Members, I would like to express my sincere gratitude to all those who made submissions and provided background briefings to assist in this important inquiry. I also particularly thank the individuals, whose private testimony and sharing their experiences with the Committee gave greater insight into the impact of sexual assaults on children.

I would also like to acknowledge the Committee Members and the secretariat, who digested much disturbing, emotive and unpalatable subject matter content, yet professionally and with good grace worked diligently to arrive at the recommendations contained in the report.

It is hoped that by adopting the Committee's recommendations, the role of the judiciary will be enhanced in the eyes of the community. Importantly, the creation of more supportive legal processes for child victims and better resourcing of treatment options for offenders should serve to foster more positive outcomes of benefit to the whole community.

As a society we must act today in taking greater responsibility for the protection of our children and in implementing practices to break the cycle of abuse for future generations.

The Hon. Troy Grant MP
Chair

List of Findings and Recommendations

Recommendation 1 _____ 17

The Committee recommends that the NSW Government reviews all offences and other provisions in NSW which are particularly relevant to child sexual assault offences and offenders with a view to:

- Consolidating and simplifying the current framework, where possible, so that it is more user-friendly for the legal community and victims.
- Identifying areas where current offences could be consolidated or revised.
- Identifying whether any new offences should be created, to fill any gaps in the existing framework.

Recommendation 2 _____ 17

The Committee recommends that, as part of the review, the NSW Government consults with relevant stakeholders including but not limited to: the NSW Police Force; the Department of Police and Justice; NSW Courts; the Department of Family and Community Services; the Director of Public Prosecutions; and NSW Health.

Recommendation 3 _____ 18

The Committee recommends that the review be carried out and finalised as a matter of high priority, taking into account similar legislative provisions relating to child sexual assault in other States and Territories within Australia and in overseas jurisdictions.

Recommendation 4 _____ 27

The Committee recommends the replacement of Section 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) with an amended section containing a non-exhaustive set of sentencing factors listed in recommendation 4.2 of the NSW Law Reform Commission Report 139 *Sentencing*.

The Committee further recommends the retention of s 21A(5A) as a stand-alone provision in the *Crimes (Sentencing Procedure) Act 1999* (NSW).

Recommendation 5 _____ 35

The Committee recommends, when reviewing recommendation 1, that the maximum penalty for an offence against section 66A(1) of the *Crimes Act 1900*, or consolidated offences or new offences of sexual intercourse with a child under 10, be amended from 25 years imprisonment to life imprisonment.

Recommendation 6 _____ 35

The Committee recommends that the standard non-parole period for an offence against section 66A(1) of the *Crimes Act 1900* remains at 15 years.

Recommendation 7 _____ **36**

The Committee recommends that the Attorney General examines specifying a consistent starting point for a Standard Non-Parole Period offence as a percentage of the maximum penalty, with the final figure no more than 50% of the maximum penalty.

Recommendation 8 _____ **36**

The Committee recommends that the following offences in the Crimes Act 1900 be added to the Standard Non-Parole Periods scheme, namely: sections 66B; 66C(1); 66C(2); 66C(4); 91G(1); 66EB(2); 66EB(2A); 66EB(3); 91D; and 91E of the *Crimes Act 1900*.

Recommendation 9 _____ **55**

The Committee recommends that the NSW Department of Justice examines strategies to improve available public information on sentencing outcomes for child sexual assault matters by:

- Presenting the information in a clear and concise form that is easy to interpret.
- Describing the limitations of the data for interpretive purposes.
- Providing a more comprehensive measure of the totality of sentences handed down to child sexual assault offenders, in order to overcome perceived claims of judicial leniency.

Recommendation 10 _____ **58**

The Committee recommends that the NSW Bureau of Crime Statistics Research collates and compiles information to be uploaded by the NSW Judicial Commission onto the Judicial Information Research System on a six monthly basis, so that data concerning child sexual assault cases is able to be accessed without a significant time delay.

Recommendation 11 _____ **58**

The Committee recommends that the NSW Bureau of Crime Statistics Research and the NSW Judicial Commission examine options to enhance the data available through the Judicial Information Research System to include sentence-based statistics and details on all cases, with advanced search options to enable easy access to data in a range of formats.

Recommendation 12 _____ **61**

The Committee recommends that the NSW Government surveys the judiciary to ascertain how valuable they find the Judicial Information Research System database, how useful it is for the sentencing process and what improvements should be made to improve its utility and functionality.

Recommendation 13 _____ **62**

The Committee recommends that the judgments of all cases involving child sexual assault heard in all NSW court jurisdictions be uploaded onto the Judicial Information Research System database, in the same way that NSW Court of Criminal Appeal cases are routinely uploaded, to strengthen the utility, transparency and integrity of the database.

- Recommendation 14** _____ 62
 The Committee recommends that the NSW Judicial Commission provides data, through the Judicial Information Research System, on all historical child sexual assault cases.
- Recommendation 15** _____ 67
 The Committee recommends that the NSW Government conducts information sessions for journalists engaged in court reporting on serious child sexual offence cases.
- Recommendation 16** _____ 73
 The Committee recommends that the Attorney General investigates publishing all sentencing decisions of child sexual assault cases heard in each jurisdiction as soon as practicable after a decision has been handed down.
- Recommendation 17** _____ 88
 The Committee recommends that the Attorney General considers applying for a guideline judgment, or judgments, for child sexual assault offending.
- Recommendation 18** _____ 88
 The Committee recommends that the NSW Sentencing Council be given an expanded role in the guideline judgment process, as recommended by the NSW Law Reform Commission in Report 139 *Sentencing* and that the NSW Sentencing Council be adequately resourced to fulfil this expanded role.
- Recommendation 19** _____ 95
 The Committee recommends that the NSW Government introduces trial measures to expand the use of pre-recorded evidence to include all evidence given by child victims (similar to the Western Australian and Victorian models) with a view to assessing whether this approach effectively lessens the stress and duration of court proceedings for child witnesses, without affecting the defendant’s right to a fair trial.
- Recommendation 20** _____ 100
 The Committee recommends that the NSW Government investigates the feasibility of amending the *Criminal Procedure Act 1986* (NSW) to provide for a presumption of joint trials in child sexual assault cases, similar to other Australian jurisdictions.
- Recommendation 21** _____ 107
 The Committee recommends that the NSW Government establishes a Child Sexual Assault Offences Taskforce to investigate and report to the Government on a preferred model for a Child Sexual Assault Offences Specialist Court in NSW.
- Recommendation 22** _____ 107
 The Committee recommends that the NSW Government ensures that the Taskforce contains members who represent victim services, the courts, the legal community, NSW Police, the academic community, NSW Health and NSW Family and Community Services.

Recommendation 23 _____ 107

The Committee recommends that the Taskforce gives particular consideration to the features and effectiveness of specialist courts for sex offences and child sex offences in other jurisdictions, including, but not limited to, South Africa, the United States of America and Canada.

Recommendation 24 _____ 113

The Committee recommends that Corrective Services NSW and NSW Health develop alternative diversionary programs to replace Cedar Cottage and to complement the range of treatment programs available to low risk offenders.

Recommendation 25 _____ 123

The Committee recommends the development of a standard policy in NSW for referring offenders for assessment for suitability for anti-libidinal treatment. This should prioritise assessment of high risk offenders.

Recommendation 26 _____ 123

The Committee recommends that the NSW Government allocates increased resources to assessing child sexual assault offenders for anti-libidinal medication so that all offenders who may benefit from such voluntary treatment have been assessed, and treatment commenced with appropriate monitoring in place, prior to being released from custody.

Recommendation 27 _____ 129

The Committee recommends that the NSW Government increases the use of extended supervision orders as an effective re-offender rehabilitation tool.

Recommendation 28 _____ 131

The Committee recommends that the NSW Government establishes an inter-agency working group with representation from Corrective Services NSW, NSW Health, Family and Community Services NSW, NSW Police Force and any other relevant NSW government agencies. The group should have responsibility for devising pre-release strategies for child sexual assault offenders, including:

- Identification and review of legislation, policies or practices that may unreasonably prevent offenders being able to re-integrate successfully into the community.
- Identification of appropriate assistance and support mechanisms, prior to release from custody, to optimise re-integration into the community.

Recommendation 29 _____ 131

The Committee recommends that the inter-agency working group develops strategies for child sexual offenders with tasks including, but not limited to, the following:

- Preparing for, and obtaining, employment.
- Locating suitable housing.
- Finding appropriately qualified health practitioners so that any relevant treatment and rehabilitation can be commenced and/or continued.

Glossary

ANCOR	Australian National Child Sex Offender Register
ANZATSA	Australia and New Zealand Association for the Treatment of Sexual Abuse
BOCSAR	New South Wales Bureau of Crime Statistics and Research
CBT	Cognitive Behaviour Therapy
CCA	Court of Criminal Appeal
CORE	CUBIT Outreach
COS	Community Offender Services
CPPO	Child Protection Prohibition Order
CPR	Child Protection Register
CSNSW	Corrective Services New South Wales
CUBIT	Custody Based Intensive Treatment Program
DPP	Director of Public Prosecutions
EPRD	Earliest possible release date
FACAA	Fighters Against Child Abuse Australia
FACS	Department of Family and Community Services
FPS	Forensic Psychology Services
JIRS	Judicial Information Research System
JIRT	Joint Investigation Response Teams
NSW	New South Wales
NSWLRC	New South Wales Law Reform Commission
ODPP	Office of the Director of Public Prosecutions (New South Wales)
PREP	Preparatory Program for Sex Offenders
RANZCP	Royal Australian and New Zealand College of Psychiatrists
SMAP	Special Management Area Placement
SNPP	Standard Non-Parole Period
SSRI	Selective Serotonin Reuptake Inhibitors
SVOTP	Sex and Violent Offender Therapeutic Programs
VATE	Video and audio taped evidence
VLRC	Victorian Law Reform Commission
WA	Western Australia

Chapter One – Introduction

- 1.1 The Joint Select Committee on Sentencing of Child Sexual Assault Offenders was appointed in August 2013 to inquire into and report on whether current sentencing options for perpetrators of child sexual assault remain effective and whether greater consistency in sentencing and improving public confidence in the judicial system could be achieved through alternative sentencing options, such as minimum mandatory sentencing and anti-androgenic medication.
- 1.2 The Committee called for submissions, advertising the inquiry on the Parliament's website, in the *Sydney Morning Herald* and by writing to relevant legal and professional bodies, non-government organisations and government agencies. While the closing date for lodgement of submissions was 28 February 2014, a few late submissions were also accepted.
- 1.3 In total, the Committee received 24 submissions and 2 supplementary submissions from private citizens, legal and professional bodies, non-government organisations and government agencies. A full list of the submissions received can be found at Appendix One and copies of the submissions are available on the Committee's website.
- 1.4 As part of the inquiry, the Committee also held three public hearings in Sydney, on 28 April, 30 April and 15 May 2014. The public hearings gave the Committee an opportunity to further explore the issues raised in submissions and to examine a range of stakeholder views concerning the sentencing process and alternative sentencing options.
- 1.5 A full list of witnesses who appeared before the Committee can be found at Appendix Two. Transcripts of the evidence provided are available on the Committee's website. Details of the Committee's meetings are provided in the extracts of minutes at Appendix Three.
- 1.6 The Committee also held four private briefings with key stakeholders and subject matter experts, on 11 and 18 November 2013, and 27 February and 19 June 2014. The private briefings provided the Committee with detailed background information and advice, which helped shape the focus of the inquiry and inform Members' views on key issues. These briefings were conducted on the basis that they remained confidential to the Committee.
- 1.7 The Committee ceased to operate on 8 September 2014, following the prorogation of Parliament by Her Excellency the Governor, and the termination of the First Session of the 55th Parliament. The Committee was reappointed with identical terms of reference on the same day, after the commencement of the Second Session of the 55th Parliament.

Chapter Two – Current Legislative Framework

It is critical that safeguards are in place to reduce the likelihood of children being sexually assaulted. The NSW Government has an ongoing commitment to its statutory responsibilities to protect the safety and wellbeing of all children.¹

CHILD SEXUAL ASSAULT OFFENCES IN NEW SOUTH WALES

- 2.1 Child sexual assault offences and crimes against children in NSW are dealt with under a multiplicity of State and Commonwealth statutes and associated instruments which are described in this chapter. This includes 38 offences in the *Crimes Act 1900* (NSW), as well as other provisions in associated pieces of legislation relevant to child sexual assault offending.
- 2.2 This chapter describes the legislative arrangements governing child sexual assault, the nature, history and categories of these offences, and reviews the adequacy and appropriateness of current arrangements.
- 2.3 In NSW, most child sexual assault offences are contained in the *Crimes Act 1900*. The table below highlights the key child sexual assault offences and the maximum penalties that may be imposed.²

Table 1 - Maximum penalties imposed for key child sexual assault offences under the *Crimes Act 1900*

Section	Offence	Maximum penalty
61J(2)	Aggravated sexual assault where the aggravated circumstance is that the victim is under 16	20 years
61M(2)	Aggravated indecent assault where the aggravated circumstance is that the victim is under 16	10 years
61N(1)	Act of indecency involving a victim under 16	2 years
61O(1)	Aggravated act of indecency involving a victim under 16	5 years
61O(2)	Act of indecency involving a victim under 10	7 years
61O(2A)	Act of indecency involving a victim under 16 where the act is filmed for production of child abuse material	10 years
61P	Attempts to commit offences under sections 61J-61O	Liable to same maximum penalty as the offence
66A(1)	Sexual intercourse with a child under 10	25 years
66A(2)	Aggravated sexual intercourse with a child under 10	Life
66B	Attempting sexual intercourse with a child under 10 or assault with intent	25 years

¹ Submission 22, NSW Government, p.3.

² Adapted from Submission 22, New South Wales Government, pp6-7; Judicial Commission of New South Wales, *Sentencing Bench Book*, May 2014, paragraph [17-420].

SENTENCING OF CHILD SEXUAL ASSAULT OFFENDERS
CURRENT LEGISLATIVE FRAMEWORK

Section	Offence	Maximum penalty
66C(1)	Sexual intercourse with a child between 10 and 14	16 years
66C(2)	Aggravated sexual intercourse with a child between 10 and 14	20 years
66C(3)	Sexual intercourse with a child between 14 and 16	10 years
66C(4)	Aggravated sexual intercourse with a child between 14 and 16	12 years
66D	Attempt to commit an offence under s66C or assault with intent	Liable to same maximum penalty as the offence
66EA	Persistent child sexual abuse (3+ occasions)	25 years
66EB(2)(a)	Procuring a child under 14 for sexual activity	15 years
66EB(2)(b)	Procuring a child aged 14 or above for sexual activity	12 years
66EB(2A)(a)	Meeting a child under 14 following grooming	15 years
66EB(2A)(b)	Meeting a child aged 14 or above following grooming	12 years
66EB(3)(a)	Grooming a child under 14	12 years
66EB(3)(b)	Grooming a child aged 14 or above	10 years
73(1)	Sexual intercourse with a child in special care who is 16 or above but under 17	8 years
73(2)	Sexual intercourse with a child in special care who is 17 or above but under 18	4 years
73(4)	Attempts for section 73 offences	Liable to same maximum penalty as the offence
80A	Aggravated sexual assault by forced self-manipulation where the aggravated circumstance is that the victim is under 16	20 years
80D(2)	Causing sexual servitude of a person under 18	20 years
80E(2)	Conducting a sexual servitude business involving a victim under 18	19 years
80G	Incitement. Does not apply to sections 61N or 61O where the offence constituted by inciting a person to commit an act of indecency. Does not apply to attempts or section 66EA.	Liable to same maximum penalty as the offence
91D	Promoting or causing child prostitution involving a child under 14	14 years
91D	Promoting or causing child prostitution involving a child who is 14 or above	10 years
91E	Obtaining a benefit from child prostitution involving a child under 14	14 years
91E	Obtaining a benefit from child prostitution involving a child who is 14 or above	10 years
91F	Using premises for child prostitution	7 years
91G	Use of child under 14 for child abuse material	14 years
91G	Use of child who is 14 or above for child abuse material	10 years

Section	Offence	Maximum penalty
91H	Production/dissemination/possession of child abuse material	10 years
91J	Aggravated voyeurism where the aggravated circumstance is that the child is under 16	5 years
91K	Aggravated filming of a person engaged in a private act without consent for the purpose of sexual gratification where the aggravated circumstance is that the child is under 16	5 years
91L	Aggravated filming of a person's private parts without consent for the purpose of sexual gratification where the aggravated circumstance is that the child is under 16	5 years

Nature and Categories of Offences

2.4 Child sexual assault offences in NSW have various features, some of which apply to more than one offence, and can be categorised in a number of ways, as illustrated below.

Maximum penalty ranges

2.5 Child sexual assault offences in the *Crimes Act 1900* 'encompass an extremely broad spectrum of offending behaviour'.³

2.6 This is reflected in the wide range of maximum penalties that can apply for such offences. Sentences can vary from imprisonment for two years for an act of indecency involving a victim under 16, to life imprisonment for aggravated sexual intercourse with a child under 10.⁴

General vs. child-specific offences

2.7 Within the category of sexual assault, offences can apply generally to adults and children or can specifically target child sexual assault. When the victim is a child, this generally means the offence was committed in aggravated circumstances. For example, section 61J of the *Crimes Act 1900* makes it an offence for a person to have sexual intercourse with any person without their consent and in circumstances of aggravation. The provision lists various examples of aggravated circumstances, including that the victim is less than 16 years of age.

2.8 An example of a sexual assault offence that only relates to children is section 66A(1) of the *Crimes Act 1900*, which specifically makes it an offence to have sexual intercourse with a child under the age of 10.

Age-based offences

2.9 Child sexual assault offences in the *Crimes Act 1900* are often divided into different age groups, with offences against younger children carrying higher maximum penalties. For example, sexual intercourse with a child is categorised as offences against victims under 10, victims between 10 and 14 and victims between 14 and 16. While an offence involving a child under 10 carries a

³ Submission 22, New South Wales Government, p8.

⁴ See for example, *Crimes Act 1900*, s61N(1) and s66A(2).

maximum penalty of 25 years imprisonment, the same offence against a child between 14 and 16 carries a maximum penalty of 10 years imprisonment.⁵

Sexual intercourse vs. indecent assault

2.10 Some offences specifically refer to sexual intercourse with a child, which is defined to include penetration to any extent of the genitalia of a woman or the anus of any person along with fellatio and cunnilingus.⁶ However, other offences deal with acts of indecency. The NSW Government described indecent assault as follows:

Indecent assault is an act of indecency in the presence of the victim at the time or, immediately before or after an assault. An assault is either physical contact or a threat to the victim involving a reasonable apprehension of immediate and unlawful violence. The assault itself is indecent if it has a sexual connotation having regard to where the victim is touched or what part of the accused's body was used. If sexual connotation of the act is unclear, there must be an intention to obtain sexual gratification. If the assault took place separately to the act of indecency, the act of indecency must be in the presence of the victim. Indecent assault can include kissing, or touching of a person's breasts, bottom or genitalia.⁷

Aggravated offences

2.11 Some child sexual assault offences can be committed in circumstances considered to be aggravated. For example, sexual intercourse with a child between 14 and 16 will have been committed in aggravating circumstances if any one or more of the following apply:

- The perpetrator intentionally or recklessly inflicted actual bodily harm on the victim or any other person present or nearby (or threatened to inflict such harm by means of an offensive weapon or instrument).
- The perpetrator was in the company of another person/s.
- The victim was under the authority of the offender.
- The victim has a serious physical disability or cognitive impairment.
- The offender took advantage of the victim being under the influence of alcohol or a drug in order to commit the offence.
- The offender deprived the victim of their liberty before or after the offence.
- The offender broke into premises with the intention of committing either the sexual assault offence or another serious indictable offence.⁸

2.12 While the general sexual assault offence involving a child between 14 and 16 carries a maximum penalty of 10 years imprisonment, the aggravated offence has a maximum penalty of 12 years.⁹

⁵ *Crimes Act 1900*, s66A(1), s66C(1) and s66C(3).

⁶ *Crimes Act 1900*, s61H; Submission 22, New South Wales Government, p7.

⁷ Submission 22, New South Wales Government, p7.

⁸ *Crimes Act 1900*, s66C(4).

Other categories of offences

- 2.13 Other examples of offences that can fall within the child sexual assault category, and which are highlighted in the table in the previous section, include offences relating to:
- Procuring children for sexual activity.
 - Sexual servitude.
 - Grooming.
 - Child prostitution.
 - Using a child for child abuse material or producing, disseminating or possessing such material.
 - Voyeurism and filming private acts or parts without consent.¹⁰

History of Offences

- 2.14 Child sexual assault offences in the *Crimes Act 1900* have changed over time, resulting in some offences having been created, removed or amended. Examples of changes to specific offences are discussed below.

Sexual intercourse with a child under 10

- 2.15 Section 66A of the *Crimes Act 1900*, which makes it an offence to have sexual intercourse with a child under 10, was originally introduced in 1985 with a maximum penalty of imprisonment for 20 years.¹¹ In 2002, the maximum penalty was increased to 25 years imprisonment¹², with Attorney General, the Hon. Bob Debus MP, explaining that this better reflected community expectations:

These are abhorrent offences which call for the strongest denunciation by way of punishment. We must do all within our powers to protect young children from the evils perpetrated by sexual predators. The Government, therefore, believes that it is appropriate to increase the maximum penalties for these offences to reflect community values and expectations with respect to the protection of young children.¹³

- 2.16 In 2008, the aggravated form of the offence was introduced with a maximum penalty of life imprisonment.¹⁴

Aggravated indecent assault with a child under 16

- 2.17 Section 61M was introduced into the *Crimes Act 1900* in 1989. At that time, the provision included the general offence of aggravated indecent assault, which can

⁹ *Crimes Act 1900*, s66C(3) and s66C(4).

¹⁰ See for example *Crimes Act 1900* s66EB, s80D and ss91D-L.

¹¹ *Crimes (Child Assault) Amendment Act 1985*, Schedule 2(5).

¹² *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*, Schedule 2[1].

¹³ New South Wales, Legislative Assembly, *Parliamentary Debates*, 23 October 2002, p5818 (The Hon. Bob Debus, Attorney General).

¹⁴ *Crimes Amendment (Sexual Offences) Act 2008*, Schedule 1[9].

apply to a child or an adult, along with an offence of aggravated indecent assault against a person under the age of 10 years.¹⁵ The provision was amended in 2008 to increase the age limit from 10 years to 16 years.¹⁶ The penalties remain unchanged.

Children not to be used for production of child abuse material

- 2.18 Section 91G of the *Crimes Act 1900*, which creates offences relating to using children in the production of child abuse material, was introduced in 1988. At that time, the offence was described as, 'Children not to be employed for pornographic purposes'. The maximum penalty was originally 5 years imprisonment or, if the child was under 14, 7 years imprisonment.¹⁷
- 2.19 In 1997, the language of the provision was changed from 'employing' a child for pornographic purposes to 'using' a child.¹⁸ However, the section was completely re-worked in 2004 and the maximum penalties were increased to 10 years imprisonment for an offence relating to a child who is 14 years or above and 14 years imprisonment if the offence involved a child under 14.¹⁹ These remain the current maximum penalties.
- 2.20 Further changes were made to the provision in 2010, including changing the description of the offence from using children for pornographic purposes to using children for the production of child abuse material, which is how the offence is currently described.²⁰

Impact of changes to maximum penalties on sentencing

- 2.21 Where the maximum penalty for an offence has increased, the increased penalty only applies to offences that are committed after the increase takes effect.²¹ This is particularly relevant to child sexual assault cases where there can be significant delays (for various reasons) between the commission of the offence and sentencing. In particular, a study by the Judicial Commission of NSW found that:
- 37.9% of offenders were sentenced more than 10 years after the offence occurred.
 - 28.9% of offenders were sentenced more than 15 years after the offence occurred.
 - 18.2% of offenders were sentenced more than 20 years after the offence occurred.

¹⁵ *Crimes (Amendment) Act 1989*, Schedule 1(3).

¹⁶ *Crimes Amendment (Sexual Offences) Act 2008*, Schedule 1 [3] to [4].

¹⁷ *Crimes (Child Prostitution) Amendment Act 1988*, Schedule 1[3].

¹⁸ *Crimes Amendment (Child Pornography) Act 1997*, Schedule 1 [2] to [4].

¹⁹ *Crimes Amendment (Child Pornography) Act 2004*, Schedule 1[3].

²⁰ *Crimes Amendment (Child Pornography and Abuse Material) Act 2010*, Schedule 1 [7] to [8].

²¹ *Crimes (Sentencing Procedure) Act 1999*, s19.

- 9.4% of offenders were sentenced more than 25 years after the offence occurred.²²

2.22 The legislative changes to child sexual assault offences over time affect the sentencing statistics in this area. For example, the NSW Government noted that historic child sexual assault offences carried far lower maximum penalties than current offences.²³ While the impact of historic offences on sentencing decisions will be discussed in more detail in chapter 4 of the report, the case study below illustrates its application.

Case study: historic offence involving s66A of the Crimes Act 1900

2.23 On 16 January 2007, District Court Judge Murrell SC issued a sentencing decision for Lindsay Ronald Jensen, who was convicted of four counts of indecent assault involving a victim under 10 and one count of sexual intercourse with a child under 10. Each of the incidents occurred between 28 February 2002 and 1 January 2003. The victim was the child of a family friend. The incidents occurred when the offender was looking after the victim while her mother was recovering from serious injury.

2.24 The offence against section 66A of the *Crimes Act 1900*, sexual intercourse with a child under 10, involved the offender digitally penetrating the victim for a few seconds. The victim reported that it 'really hurt' and the victim was concerned that she may have been permanently injured.

2.25 For the conduct relating to section 66A, the court sentenced the offender to four years in prison with a two and a half year non-parole period. However, the court decided that the sentences for the counts of indecent assault should be served concurrently and that the sentence relating to section 66A should be partly accumulated on the indecent assault offences. In effect, this resulted in the court imposing a total sentence in the case of five years' imprisonment, of which the offender would have to serve three years before he would be eligible for parole.

2.26 Some of the issues that the Judge took into account in sentencing the offender included the following:

- The victim's psychological suffering, although the victim did not provide direct information regarding the impact of the offences upon her.
- That the sexual intercourse offence fell below the mid-range of objective seriousness – it was a brief incident and did not involve penile penetration or other penetration of a very serious nature - there was also no evidence of physical injury.
- The aggravating factor that the offences occurred while the offender had the immediate responsibility for the victim's welfare and was therefore in a position of trust and authority.

²² Mr Hugh Donnelly, Mr Graham Hazlitt and Ms Patrizia Poletti, *Sentencing offenders convicted of child sexual assault*, Judicial Commission of New South Wales, 2004, p23; Submission 11, Police Association of New South Wales, p14.

²³ Submission 22, New South Wales Government, p4.

- The mitigating factor that the offender had no previous convictions and was a person of otherwise good character.
- General deterrence was of great importance in a case of this kind.
- The offender needed to be supervised for a long time because the Judge had doubts about the offender’s prospects of re-offending.²⁴

2.27 At the time the offence against section 66A was committed, the maximum available penalty was 20 years’ imprisonment, not 25 years, which is the current maximum penalty. The aggravated version of the offence, which applies in various circumstances including where the victim is under the authority of the offender, had also not been introduced at that time. Aggravated sexual intercourse with a child under 10 now carries a maximum penalty of life imprisonment. Because of the age of the offence, no standard non-parole period would have applied.

COMMONWEALTH CHILD SEXUAL ASSAULT OFFENCES

2.28 Apart from offences contained in the *Crimes Act 1900* (NSW), the *Criminal Code Act 1995* (Cth) also contains some offences relating to child pornography, child abuse and grooming. Examples of these offences are highlighted in the table below.

Table 2 - Maximum penalties imposed for child pornography, child abuse and grooming under the *Criminal Code Act 1995* (Cth)

Section	Offence	Maximum penalty
471.16	Using a postal or similar service for child pornography material	15 years
471.17	Possessing, controlling, producing, supplying or obtaining child pornography for use through a postal or a similar service	15 years
471.19	Using a postal or similar service for child abuse material	15 years
471.20	Possessing, controlling, producing, supplying or obtaining child abuse material for use through a postal or similar service	15 years
471.22	Aggravated offence if offend against one or more of sections 471.16, 471.17, 471.19 and 471.20 on three or more occasions and involving two or more people	25 years
471.24	Using a postal or similar service to procure persons under 16 years	15 years
471.25	Using a postal or similar service to groom persons under 16	12 to 15 years depending on which subsection is involved
471.26	Using a postal or similar service to send indecent material to persons under 16	7 years

²⁴ See *R v Lindsay Ronald Jensen* [2007] NSWDC 15.

JOINT SELECT COMMITTEE ON SENTENCING OF CHILD SEXUAL ASSAULT OFFENDERS
CURRENT LEGISLATIVE FRAMEWORK

Section	Offence	Maximum penalty
474.19	Using a carriage service (such as a telephone or internet service ²⁵) to access, transmit (or cause to be transmitted to himself or herself), make available, publish, distribute, advertise, promote or solicit child pornography material	15 years
474.20	Possessing, controlling, supplying or obtaining child pornography material for use by the offender or another person to commit an offence against section 474.19	15 years
474.22	Using a carriage service to access, transmit (or cause to be transmitted to himself or herself), make available, publish, distribute, advertise, promote or solicit child abuse material	15 years
474.23	Possessing, controlling, producing, supplying or obtaining child abuse material for use by the offender or another person to commit an offence against section 474.22	15 years
474.24A	Aggravated offence if offend against one or more of sections 474.19, 474.20, 474.22 and 474.23 on three or more occasions and involving two or more people	25 years
474.25A	Using a carriage service for sexual activity with persons under 16 years of age	15 years
474.25B	Aggravated offence if commit an offence against section 474.25A and the child has a mental impairment and/or the offender is in a position of trust or authority in relation to the child, or the child is otherwise under the care, supervision or authority of the person	25 years
474.26	Using a carriage service to procure persons under 16 years of age	15 years
474.27	Using a carriage service to groom persons under 16 years of age	12 to 15 years depending on which subsection is involved
474.27A	Using a carriage service to transmit indecent communication to persons under 16 years of age	7 years

OTHER RELEVANT LEGISLATION

2.29 A range of other legislative provisions also applies to child sexual assault offenders covering issues such as sentencing, high risk offenders and monitoring in the community. These are set out below.

Crimes (High Risk Offenders) Act 2006

2.30 The *Crimes (High Risk Offenders) Act 2006* permits the extended supervision and continuing detention of serious sex offenders to ensure the safety and protection

²⁵ Australian Communications and Media Authority, *Carriers & carriage service providers*, <<http://www.acma.gov.au/Industry/Telco/Carriers-and-service-providers/Licensing/carriers-carriage-providers-licensing-i-acma>>, viewed 20 June 2014.

of the community, and to encourage such individuals to undertake rehabilitation.²⁶

- 2.31 The State of NSW may apply to the Supreme Court for a continuing detention order or an extended supervision order.²⁷ Continuing detention orders may be sought while an offender is in custody and extended supervision orders may be sought while an offender is serving a sentence.²⁸
- 2.32 Before making such an order, the Court has to be satisfied that there is a high degree of probability that the offender poses an unacceptable risk of committing a serious sex offence.²⁹
- 2.33 The effect of a continuing detention order is that an offender will remain in custody after their term of imprisonment has expired. This can be for a period of up to five years.³⁰
- 2.34 Under an extended supervision order, an offender will be subject to intensive supervision and monitoring in the community.³¹ Some of the conditions that an offender may be subject to include the following:
- Visits from representatives of Corrective Services NSW.
 - Participation in treatment and rehabilitation programs.
 - Wearing electronic monitoring equipment.
 - Not associating with certain persons or engaging in certain conduct.³²
- 2.35 Extended supervision orders can last for up to five years and subsequent applications can be made.³³
- 2.36 The Committee notes that a Crimes (High Risk Offenders) Amendment Bill 2014 was introduced by the Attorney General and Minister for Justice in the Legislative Assembly on 10 August 2014. The amended legislation will supplement conditions imposed on extended supervision orders, increase certain penalties and establish a High Risk Offenders Assessment Committee. The Committee will be responsible for the ongoing review, assessment and management of high-risk offenders.

Child Protection (Offenders Registration) Act 2000

- 2.37 In 2001, the NSW Child Protection Register (CPR) was established by the *Child Protection (Offenders Registration) Act 2000*.³⁴

²⁶ Submission 22, New South Wales Government, pp23-24.

²⁷ *Crimes (High Risk Offenders) Act 2006*, s5H and s13A.

²⁸ Submission 22, New South Wales Government, p24.

²⁹ Submission 22, New South Wales Government, p24.

³⁰ Submission 22, New South Wales Government, p24.

³¹ Submission 22, New South Wales Government, p24.

³² *Crimes (High Risk Offenders) Act 2006*, s11.

³³ Submission 22, New South Wales Government, p24.

JOINT SELECT COMMITTEE ON SENTENCING OF CHILD SEXUAL ASSAULT OFFENDERS
CURRENT LEGISLATIVE FRAMEWORK

- 2.38 Certain convicted child sex offenders and other persons who have committed serious offences against children are required to report personal information to the Police such as their address, details of any children they live with, their place of work and the kind of vehicle they drive.³⁵
- 2.39 Offenders are required to report to the police at least annually, unless there are changes to their information in the meantime.³⁶
- 2.40 An offender will be placed on the register where they have been convicted of, and sentenced in relation to, either a 'Class one' offence or a 'Class two offence'. Class one offences include sexual intercourse with a child, persistent sexual abuse of a child, or similar offences. Class two offences include acts of indecency against children where the penalty is imprisonment of 12 months or more, procuring or grooming a child under 16 for unlawful sexual activity, and similar acts.³⁷
- 2.41 Apart from Class one and Class two offences, courts also have the power to make an order that an offender be placed on the register in other cases, where the court is satisfied that the offender poses a risk to the lives or sexual safety of one or more children or of children generally.³⁸
- 2.42 Individuals are required to comply with the reporting obligations under the register according to differing timeframes. For example, an offender will be on the register for life if they have committed a Class one offence followed by another registrable offence.
- 2.43 An offender who has committed a Class one offence or more than one registrable offence will be on the register for 15 years, whereas a person who has only ever been convicted of a Class two offence will be on the register for eight years.³⁹ If an offender was a child at the time of committing the offence, they will be on the register for half the period that would apply to an adult offender, or seven and a half years if they committed offences which would otherwise result in lifetime registration.⁴⁰
- 2.44 Failing to comply with reporting obligations associated with the register is an offence which carries a maximum penalty of \$55,000 and/or imprisonment for five years.⁴¹
- 2.45 A more detailed discussion of the operation of the Register is contained in chapter 6 of the report.

³⁴ Submission 22, New South Wales Government, p22.

³⁵ Submission 22, New South Wales Government, p22.

³⁶ *Child Protection (Offenders Registration) Act 2000*, s10 and s11.

³⁷ *Child Protection (Offenders Registration) Act 2000*, s3.

³⁸ *Child Protection (Offenders Registration) Act 2000*, s3D.

³⁹ *Child Protection (Offenders Registration) Act 2000*, s14A.

⁴⁰ *Child Protection (Offenders Registration) Act 2000*, s14B.

⁴¹ *Child Protection (Offenders Registration) Act 2000*, s17.

Child Protection (Offenders Prohibition Orders) Act 2004

- 2.46 Under the *Child Protection (Prohibition Orders) Act 2004*, the police can apply to the Local Court for a prohibition order against a child sexual assault offender who is subject to the Child Protection Register (CPR) reporting requirements. A prohibition order prevents an individual from engaging in certain conduct where the court considers that there is reasonable cause to believe that the individual poses a risk to the sexual safety or life of one or more children, or to children generally.⁴²
- 2.47 A prohibition order can be made for up to five years. Contravention of such an order carries a maximum penalty of \$55,000 and/or imprisonment for five years.⁴³
- 2.48 The Act also allows the NSW Police Force to apply to the Local Court for a contact prohibition order. This prevents an individual from contacting co-offenders or victims if there are reasonable grounds to suspect that contact may occur. Contact prohibition orders can be made for up to 12 months. Contravention of such an order carries a maximum penalty of \$5,500 and/or imprisonment for twelve months.⁴⁴

Crimes (Sentencing Procedure) Act 1999

- 2.49 The *Crimes (Sentencing Procedure) Act 1999* is the key piece of legislation that deals with sentencing of offenders who have been found guilty of a crime in NSW. It does not specifically target child sexual assault offences. The NSW Court of Criminal Appeal has described the Act as follows:
- ...provid[ing] the framework upon which a court determines the sentence to be imposed upon a particular offender for any offence. The Act provides the sentencing practice, principles and penalty options that operate in all courts exercising State jurisdiction. There are also the sentencing principles and practices derived from the common law that have been preserved by the provisions of the Act.⁴⁵
- 2.50 Various provisions of this Act will be discussed in more detail later in this report. However, in July 2013, the NSW Law Reform Commission recommended that a revised piece of sentencing legislation should replace the *Crimes (Sentencing Procedure) Act 1999*.⁴⁶ Proposed changes are yet to be implemented.
- 2.51 Similar to the provisions under the *Child Protection (Offenders Prohibition Orders) Act 2004*, the *Crimes (Sentencing Procedure) Act 1999* also allows NSW courts to impose general non-association orders and place restriction orders for offences that are punishable by six months imprisonment or more. This applies more broadly than to child sexual assault offences. The court has to be satisfied that it

⁴² Submission 22, New South Wales Government, p23.

⁴³ Submission 22, New South Wales Government, p23.

⁴⁴ Submission 22, New South Wales Government, p23.

⁴⁵ *Application by the Attorney General under section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment concerning the offence of high range prescribed concentration of alcohol under section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No. 3 of 2002)* (2004) 61 NSWLR 305 per Howie J at [45], referred to in Judicial Commission of New South Wales, *Sentencing Bench Book*, May 2014, [2-010].

⁴⁶ New South Wales Law Reform Commission, *Sentencing*, Report 139, July 2013, p10.

is reasonably necessary to make such an order to ensure that the offender does not commit any further offences.⁴⁷

- 2.52 A non-association order prohibits an offender from associating with a specified person for a specified term. A place restriction order prohibits an offender from frequenting or visiting a particular place or district for a specified term. Such orders cannot be made for more than 12 months.⁴⁸

Child Protection (Working with Children) Act 2012

- 2.53 Under the *Child Protection (Working with Children) Act 2012*, an individual is not permitted to carry out child-related work unless they have a working with children clearance check. However, clearance cannot be given where an individual has been convicted, as an adult, of certain offences referred to in the Act, including child sexual assault offences.⁴⁹

Criminal Records Act 1991

- 2.54 Under the *Criminal Records Act 1991*, some convictions are capable of becoming 'spent'. This means that once a certain period of time has elapsed (generally 10 years from the date of the conviction), the offender is no longer required to disclose their conviction and questions referring to the offender's criminal history are taken to only refer to any other convictions which are not spent.⁵⁰
- 2.55 There are, however, some exceptions to the spent convictions scheme. For example, if an individual is applying for certain kinds of employment, such as a teacher, police officer or judge, they will have to disclose any spent convictions. The courts will also still have access to such information in relation to judicial proceedings.⁵¹
- 2.56 However, if an individual has been convicted of a sex offence, including child sexual assault, their conviction will never become spent. This means that child sexual assault offenders are not afforded the benefits of the spent conviction scheme and will have to continue to disclose their offences, even decades after the convictions.⁵²

Summary Offences Act 1988

- 2.57 In NSW, apart from the child sexual assault offences in the *Crimes Act 1900*, once an individual has been convicted of child sexual assault, there is also an offence in the *Summary Offences Act 1988* aimed at offenders who loiter near premises frequented by children.⁵³
- 2.58 In particular, it is an offence for a convicted child sexual assault offender to loiter, without reasonable excuse, in or near a school or another public place that is

⁴⁷ *Crimes (Sentencing Procedure) Act 1999*, s17A.

⁴⁸ *Crimes (Sentencing Procedure) Act 1999*, s17A.

⁴⁹ Submission 22, New South Wales Government, p22.

⁵⁰ *Criminal Records Act 1991*, s7, s8, s9 and s12.

⁵¹ *Criminal Records Act 1981*, s15 and s16.

⁵² *Criminal Records Act 1981*, s7.

⁵³ *Summary Offences Act 1988*, s11G.

regularly frequented by children and in which children are actually present at the time the person is found loitering. The maximum penalty is \$11,000 and/or two years imprisonment.⁵⁴

REVIEWING THE NSW LEGISLATION

- 2.59 As highlighted in the sections above, there are a number of different offences, both at a State and Commonwealth level, and various provisions in legislation which are relevant to child sexual assault offenders. Evidence provided to the Committee indicated that it may be useful to review the range and number of these offences. In particular, Mr Anthony Whealy QC, Deputy Chair, NSW Sentencing Council, suggested that there is 'great scope' to review child sexual assault offences and the way they are structured:
- There are a lot of anomalies and I think there could be some good work done on restructuring all of the sexual offences, rewriting them, rethinking about them, assigning importance to some that are more serious where culpability is likely to be higher than others. I think they have grown a bit like topsy and they have not been reviewed for a long while.⁵⁵
- 2.60 Chief Superintendent Anthony Trichter, Commander, Police Prosecutions Command, NSW Police Force, agreed with Mr Whealy and noted that there is a great deal of variation within child sex offences.⁵⁶ Mr Anthony King from the Police Association of NSW also commented that there are a lot of small offences which, while sometimes useful, can also complicate the issues.⁵⁷
- 2.61 Mr Lloyd Babb SC, Director of Public Prosecutions, said that some offences get used very infrequently and therefore a body of case law and sentencing statistics has not really been developed. However, Mr Babb SC warned that changes could hide inconsistencies if there are fewer offences, as there would be a greater variety of offending within the same offence.⁵⁸
- 2.62 Judge Graeme Henson, Chief Magistrate, Local Court of NSW, also emphasised that there are different activities that can justify having a separate offence and commented that changes may reduce the ability to charge bargain from a defended matter to a plea of guilty.⁵⁹
- 2.63 In the NSW Sentencing Council's 2008 report, *Penalties relating to sexual offences in NSW*, the Council received submissions which called for child sexual assault offences to be reviewed. However, the Council did not deal with this issue

⁵⁴ *Summary Offences Act 1988*, s11G.

⁵⁵ Mr Anthony Whealy QC, Deputy Chair, New South Wales Sentencing Council, Transcript of evidence, 28 April 2014, p22.

⁵⁶ Chief Superintendent Anthony Trichter, Commander, Police Prosecutions Command, New South Wales Police Force, Transcript of evidence, 28 April 2014, p22.

⁵⁷ Mr Anthony King, Executive Member, Police Association of New South Wales, Transcript of evidence, 30 April 2014, p44.

⁵⁸ Mr Lloyd Babb SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of evidence, 28 April 2014, p28.

⁵⁹ Judge Graeme Henson, Chief Magistrate, Local Court of New South Wales, Transcript of evidence, 28 April 2014, p71.

directly, as the terms of reference were primarily focused on examining whether the penalties for sexual offences were appropriate.⁶⁰

2.64 In particular, the DPP submitted to the Council that the legislative framework for sexual offences and their associated penalties is complicated and premised on concepts that are out of step with contemporary life to the point where there should be a complete review of the relevant provisions.⁶¹

2.65 The NSW Ombudsman also submitted to the Council that there is little justification for having different penalties depending on the age of victims.⁶² The Council did not agree with this wholeheartedly, but recognised some difficulties with the current framework, such as the following:

[The NSW Sentencing Council] recognise[s] that there are difficulties in dealing with these offences where they are part of a continuing course of conduct which spans a number of years and ages.

It also recognises that the age brackets can operate in an arbitrary way, and that there is little justification for regarding a sexual assault of a child aged 10 years and 1 month as less serious than one involving a child aged 9 years and 11 months. The artificiality of age distinctions is heightened when it applies to the mid adolescent years given contemporary experience with maturation rates.

However, the Council recognises that there has to be a determined age of consent, and there is merit in providing some direction for sentencing judges in relation to circumstances of potential aggravation, including the age of the victim...⁶³

2.66 Some other jurisdictions within Australia and overseas deal with the age categories for child sexual assault offences in other ways. Victoria and Queensland both have child sexual assault offences that have different penalties depending on whether or not the child is under 12 or under 16.⁶⁴ The *Sexual Offences Act 2003* (UK) also contains various child sexual assault offences, many of which refer to either children under 13 or children under 16.⁶⁵

2.67 In private briefings with legal representatives, the broad range of legislative instruments, their complexity and the number of categories of offences was also raised with the Committee. The case was made that the current provisions are messy and overly complicated and contribute to difficulties in sentencing.

2.68 The point was reiterated that other jurisdictions only had two age categories for children and that there is merit in looking at simplifying the current provisions into one set of legislation dealing with child sexual offending.

⁶⁰ New South Wales Sentencing Council, *Penalties relating to sexual assault offences in New South Wales*, Vol. 1, August 2008, p2.

⁶¹ New South Wales Sentencing Council, *Penalties relating to sexual assault offences in New South Wales*, Vol. 1, August 2008, p25.

⁶² New South Wales Sentencing Council, *Penalties relating to sexual assault offences in New South Wales*, Vol. 1, August 2008, p26.

⁶³ New South Wales Sentencing Council, *Penalties relating to sexual assault offences in New South Wales*, Vol. 1, August 2008, pp26-27.

⁶⁴ See for example, *Crimes Act 1958* (Vic), ss45; *Criminal Code* (Qld), ss210 and s215.

⁶⁵ See for example, *Sexual Offences Act 2003* (UK), ss9-12.

Conclusions

- 2.69 The Committee agrees with evidence that child sexual assault offences would benefit from review and that such a review should be carried out as a matter of high priority. Such a review should also include consideration of other NSW legislative provisions which are particularly relevant to child sexual assault offenders, such as those highlighted earlier in this chapter.
- 2.70 In the Committee's view, the review should consider whether the current legislative framework can be consolidated or simplified.
- 2.71 For example, the Committee notes that there are currently legislative provisions in various Acts that may be relevant once an offender has been convicted of, or sentenced for, a child sexual assault offence – the *Child Protection (Offenders Registration) Act 2000*, the *Crimes (High Risk Offenders) Act 2006*, the *Child Protection (Offenders Prohibition Orders) Act 2004*, the *Child Protection (Working with Children) Act 2012*, etc.
- 2.72 There appear to be similarities or overlaps between some of these provisions, such as the prohibition orders that can be made under the *Child Protection (Offenders Prohibition Orders) Act 2004* versus the non-association orders and place restrictions orders that can be made, in broader circumstances, under the provisions of the *Crimes (Sentencing Procedure) Act 1999*.
- 2.73 In the Committee's opinion, it is important for the review to consider whether there are any current offences that could be consolidated or revised. This would include whether it is appropriate to retain various age categories for child sexual assault offences in NSW or to merge some of these categories, as is the case in other jurisdictions. The review should also identify whether there are any gaps in the existing legislative framework, for example, offences that may not be covered by laws of NSW or the Commonwealth.

Recommendation 1

The Committee recommends that the NSW Government reviews all offences and other provisions in NSW which are particularly relevant to child sexual assault offences and offenders with a view to:

- **Consolidating and simplifying the current framework, where possible, so that it is more user-friendly for the legal community and victims.**
- **Identifying areas where current offences could be consolidated or revised.**
- **Identifying whether any new offences should be created, to fill any gaps in the existing framework.**

Recommendation 2

The Committee recommends that, as part of the review, the NSW Government consults with relevant stakeholders including but not limited to: the NSW Police Force; the Department of Police and Justice; NSW Courts; the Department of Family and Community Services; the Director of Public Prosecutions; and NSW Health.

Recommendation 3

The Committee recommends that the review be carried out and finalised as a matter of high priority, taking into account similar legislative provisions relating to child sexual assault in other States and Territories within Australia and in overseas jurisdictions.

Chapter Three – Sentencing Principles and Practices

Almost every aspect of sentencing concerns the inherent and unavoidable tension between the exercise of individual judicial discretion, and the consistency of approach that is required in order to maintain public confidence in the criminal justice system. This tension lies at the heart of much debate and criticism of sentencing...⁶⁶

- 3.1 This chapter outlines the current sentencing arrangements in NSW with particular reference to child sexual assault offenders. A description of the purposes and principles of sentencing and available sentencing options is followed by a discussion of the aggravating and mitigating factors to be taken into account as part of the sentencing process.
- 3.2 The operation of the standard non-parole period scheme and the role of the local court in relation to child sexual assault offences are also discussed.

PURPOSES OF SENTENCING

- 3.3 Section 3A of the *Crimes (Sentencing Procedure) Act 1999* sets out the purposes for which a court may impose a sentence on an offender, namely:
- (a) To ensure that the offender is adequately punished for the offence.
 - (b) To prevent crime by deterring the offender and other persons from committing similar offences.
 - (c) To protect the community from the offender.
 - (d) To promote the rehabilitation of the offender.
 - (e) To make the offender accountable for his or her actions.
 - (f) To denounce the conduct of the offender.
 - (g) To recognise the harm done to the victim of the crime and the community.⁶⁷
- 3.4 Section 3A was inserted into the *Crimes (Sentencing Procedure) Act 1999* in 2002 by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill 2002*. This was one of a number of amendments to the *Crimes (Sentencing Procedure) Act 1999* aimed at 'promoting consistency and

⁶⁶ New South Wales Law Reform Commission, *Sentencing*, July 2013, [1.28], p6.

⁶⁷ *Crimes (Sentencing Procedure) Act 1999* (NSW), s3A.

transparency in sentencing and also promoting public understanding of the sentencing process.⁶⁸

- 3.5 This provision has been interpreted as a codification of the purposes of criminal punishment.⁶⁹ As stated in the High Court case *Veen v The Queen [No 2]*:

The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.⁷⁰

- 3.6 In discussing the sentencing task, Judge Graeme Henson, Chief Magistrate of the Local Court of NSW, made reference to its complexity, with particular reference to the range of considerations to be addressed:

... Across the different instances of an offence, a broad spectrum of offending behaviour can be observed, and within any single sentencing occasion the synthesis of processes and considerations is required. The diversity of the legislative list of purposes for which a court may impose a sentence set out in s 3A of the *Crimes (Sentencing Procedure) Act 1999* is indicative of this complexity.⁷¹

- 3.7 The NSW Ombudsman also commented on the sentencing process and the difficult task of balancing the range of factors to be addressed when sentencing child sexual assault offenders:

The difficulty of balancing these considerations is exacerbated in the context of sentencing child sex offenders given the seriousness which the community views child sex offences, the difficulties involved in prosecuting and convicting offenders, the complexities involved in meeting the needs of victims (particularly, as is often the case, if the offender is known to the victim), and the need for offenders to be reintegrated into the community following any custodial sentence.⁷²

PRINCIPLES EMPLOYED IN SENTENCING

- 3.8 A number of common law principles assist judges in sentencing an offender and these are reflected in section 3A of the *Crimes (Sentencing Procedure) Act 1999*.⁷³ With reference to case law, the following list of principles apply more generally:

- Instinctive synthesis approach, which requires the sentencing judge to identify all the relevant factors, assess their significance and make a value judgement on the appropriate sentence (*Muldock v The Queen*; *Markarian v The Queen*).

⁶⁸ The Hon. Bob Debus MP, *Parliamentary Debates*, New South Wales Legislative Assembly, 23 October 2002, p5813.

⁶⁹ *Muldock v The Queen* [2011] HCA 39 [20].

⁷⁰ *Veen v the Queen [No 2]* [1988] 164 CLR 465 at 476 as cited in New South Wales Law Reform Commission, *Sentencing*, Report 139, July 2013, [2.4], p14.

⁷¹ Submission 16, Local Court of New South Wales, pp 3-4.

⁷² Submission 19, New South Wales Ombudsman, p1.

⁷³ New South Wales Law Reform Commission, *Sentencing*, Report 139, July 2013, [3.1] and [3.3], pp 41-42.

- The maximum penalty is a sentencing yardstick that must be given careful attention (*Markarian v The Queen*).
- The sentence imposed must be proportionate to the offence and the circumstances of the offender (*Veen v The Queen (No. 2)*).
- Equal justice requires that like cases be treated alike and differential treatment of persons according to the difference between them (*Green v The Queen; Quinn v The Queen*).
- Consistency in sentencing means consistency in the application of relevant legal principles, not some numerical or mathematical equivalence (*Hili v The Queen; Jones v The Queen*).⁷⁴

3.9 The NSW Law Reform Commission Report 139 on *Sentencing* discusses a number of key sentencing principles and notes that not all of these principles are in statutory form. The Commission recommends that the *Crimes (Sentencing Procedure) Act 1999* be amended to include well-established sentencing principles.⁷⁵

Aggravating and Mitigating Factors

Crimes (Sentencing Procedure) Act 1999, Section 21A

- 3.10 Section 21A of the *Crimes (Sentencing Procedure) Act 1999* lists 22 aggravating and 13 mitigating factors to be taken into account as part of the sentencing process. These are listed at Appendix 4.
- 3.11 When sentencing an offender, the court must take into account any factors which are relevant and known to the court and any other objective or subjective factors affecting the relative seriousness of the offence.⁷⁶ Section 21A provides that the aggravating and mitigating factors are additional to any other matters required or permitted to be taken into account under any Act or rule of law.⁷⁷
- 3.12 In its consideration of aggravating factors, the court is not to have additional regard to any aggravating factor if it is an element of the offence.⁷⁸ The section also provides that, despite the presence of any aggravating or mitigating factor, the court is not required to increase or reduce the sentence accordingly.⁷⁹
- 3.13 Of particular relevance to the inquiry, the section provides a special rule for child sexual assault offences. Section 21A(5A) provides:

(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

⁷⁴ Submission 22, New South Wales Government, pp 9-10.

⁷⁵ New South Wales Law Reform Commission, *Sentencing*, Report 139, July 2013, Recommendation 3.1, [3.50], p55.

⁷⁶ *Crimes (Sentencing Procedure) Act 1999*, ss21A(1)(a) and (b); s21A(1)(c).

⁷⁷ *Crimes (Sentencing Procedure) Act 1999*, s21A(1).

⁷⁸ *Crimes (Sentencing Procedure) Act 1999*, s21A(2).

⁷⁹ *Crimes (Sentencing Procedure) Act 1999*, s21A(5).

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.

NSW Law Reform Commission Report on Sentencing

- 3.14 The NSW Law Reform Commission's Report on *Sentencing* describes the advantages and disadvantages of section 21A in its current form. After consultation and deliberation, the Commission recommended that the section be replaced with six general factors, listed at Appendix 5.
- 3.15 According to the Commission, courts should consider these factors as part of the sentencing process, with the detail left to principles developed from common law.⁸⁰ In particular, the Commission considered that these factors should not be divided into aggravating and mitigating factors.⁸¹
- 3.16 In recommending the replacement of section 21A, the Commission was persuaded by specific problems associated with its current application. These include:
- The risk of appeals from double counting or where a court has overlooked a particular factor.⁸²
 - The division of factors into a binary list of aggravating and mitigating factors, which has been criticised as being unhelpful.⁸³
 - The lists of factors, while appear comprehensive, are subject to qualifications and limitations that arise under common law.⁸⁴
 - Appeals based on section 21A take up the time of the NSW Court of Criminal Appeal without any impact on the outcome of the case.⁸⁵
- 3.17 The Commission recommended retaining section 21A(5A), which provides that good character or lack of previous convictions not to be taken into account as a mitigating factor in child sexual assault offenders. However, the Commission also recommended that this provision should not apply to juvenile offenders convicted of sexual offences.⁸⁶

Other Considerations

- 3.18 Some inquiry participants made reference to the added complexity that section 21A brings to the sentencing exercise. In evidence, Mr Babb SC, Director of Public Prosecutions, commented:

I think it has brought in some anomalies in that when it was introduced it was almost a mirror – there were aggravating features and then mitigating features that

⁸⁰ New South Wales Law Reform Commission, *Sentencing*, Report 139, July 2013, Recommendations 4.1 and 4.2, pp69,81 and 83.

⁸¹ New South Wales Law Reform Commission, *Sentencing*, Report 139, July 2013, [4.39], p79.

⁸² New South Wales Law Reform Commission, *Sentencing*, Report 139, July 2013, [4.40], p79.

⁸³ New South Wales Law Reform Commission, *Sentencing*, Report 139, July 2013, [4.23], p75.

⁸⁴ New South Wales Law Reform Commission, *Sentencing*, Report 139, July 2013, [4.42], p80.

⁸⁵ New South Wales Law Reform Commission, *Sentencing*, Report 139, July 2013, [4.43], p80.

⁸⁶ New South Wales Law Reform Commission, *Sentencing*, Report 139, July 2013, Recommendation 4.6, p105.

mirrored each other – and that is not always the case. Some of those features warp the sentencing process and from memory the Law Reform Commission recommended the abolition of section 21A in their report on sentencing and I would support the abolition of it.⁸⁷

- 3.19 Other inquiry witnesses acknowledged that applying relevant factors of aggravation and mitigation constituted an important aspect of providing individualised justice. The Hon Anthony Whealy QC, Deputy Chair, NSW Sentencing Council, commented that some serious offences warrant the severest penalties and mitigating factors will have a limited role to play. However, there were times when the individual circumstances of an offender may be relevant to consider:

As has been said by my colleagues on the left, you have to look at the range of circumstances in any case. If my son committed an offence while under the influence of drugs and mixed with people who were drug taking and then committed an offence but was otherwise a nice young fellow of 16 or 17 years of age, why would it not be appropriate to take into account his prospects of rehabilitation, his remorse, the fact that he is unlikely to offend again, the fact that he has learnt his lesson and he did not actually harm anyone in a physical way. I am just giving you that as an example. The circumstances then become so important and if you fail to take those into account in such a case you would be seen by the community, even the people you represent, as heartless, I think, and failing in your duty.⁸⁸

- 3.20 Mr Babb SC, also acknowledged that where there is serious objective criminality, no mitigating factors should be given disproportionate weight. He commented that judges generally do a good job in not letting mitigating factors outweigh the objective criminality of the offending whilst still leaving some scope for taking into account individual justice.⁸⁹

- 3.21 Mr Mark Ierace SC, Senior Public Defender, Legal Aid NSW, commented that while the application of certain mitigating factors can be viewed as troubling, sentencing judges deal with these factors appropriately:

I know how lame the rough childhood mitigation claim can sound to the community. Sentencing judges deal with it by throwing it into the mix and acknowledging it without indicating how much weight they are giving to it and move on. Ultimately it is given very little weight, especially in relation to child sex offenders. That is because it is outweighed by the protection of the community.⁹⁰

- 3.22 With particular reference to child sexual assault offences, Dr Phillips, President of FamilyVoice Australia, considered that an important factor to be taken into account was whether there had been an abuse of trust:

⁸⁷ Mr Lloyd Babb SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of evidence, 28 April 2014, pp25-26.

⁸⁸ The Hon. Anthony Whealy QC, Deputy Chair, New South Wales Sentencing Council, Transcript of evidence, 28 April 2014, p21.

⁸⁹ Mr Lloyd Babb SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of evidence, 28 April 2014, p28.

⁹⁰ Mr Mark Ierace SC, Senior Public Defender, Legal Aid New South Wales, Transcript of evidence, 28 April 2014, p58.

One expects a higher level of responsibility from people in positions of trust and if they breach that trust then their culpability is greater and the offence is a more severe offence. A victim who has been abused by a person in a position of trust may result in the victim feeling a sense of betrayal that may be different to a situation where the perpetrator is not in a position of oversight. Those factors are important in determining the severity of the offence and sentence.⁹¹

3.23 A submission from a child sexual assault victim proposed that a number of mitigating factors should be disregarded in child sexual assault cases, including:

- The social and financial consequences of being convicted as a child sex offender.
- Good behaviour, as this is often used to commit the crimes.
- Late guilty pleas should not receive a large discount. Early guilty pleas should be encouraged, as they protect victims.⁹²

3.24 In its submission, the Police Association of NSW suggested that factors which should be taken into account as special aggravating factors in child sexual assault cases include:

- Where an offender has been charged and convicted of multiple offences against multiple victims.
- Where an offender has filmed the commission of their offence.⁹³

Discount on Sentence for Guilty Plea

3.25 Section 22 of the *Crimes (Sentencing Procedure) Act 1999* permits a court to take into account an offender's early guilty plea. The discount allowed for a plea of guilty should be in the range of 10%-25% and determined by reference to the guideline judgment in *R v Thomson & Houlton*.⁹⁴

3.26 The discount for a guilty plea is applied in order to reflect:

- The offender's remorse.
- The utilitarian value of the plea to the efficiency of the criminal justice system.
- The value in avoiding witnesses having to provide evidence, especially for crimes involving sexual assault.⁹⁵

3.27 The appropriateness of applying a discount for an early guilty plea for child sexual assault offences was raised in evidence to the inquiry. Many inquiry participants considered that providing an incentive to plead guilty was useful to retain, as it protected victims from the trial process. Ms Jacqueline Walk, Chief Executive,

⁹¹ Dr David Phillip, National President, FamilyVoice Australia, Transcript of evidence, 30 April 2014, p20.

⁹² Submission 10, Name Suppressed, pp15-16.

⁹³ Submission 11, Police Association of New South Wales, p18.

⁹⁴ *R v Thomson & Houlton*, [2009] 49 NSWLR 383.

⁹⁵ Submission 22, New South Wales Government, p 15.

Community Services, Department of Family and Community Services, commented:

A guilty plea involves a bit more control. When I say “victim”, I mean the child and the non-offending parent. Some of the research done by the royal commission suggests that those people who felt they had more control over the process had better outcomes, right through the process from disclosure.⁹⁶

3.28 Ms Penny Musgrave, Director, Criminal Law Review Division, Department of Police and Justice, added:

There are very good reasons to provide an incentive for a plea of guilty. You get certainty of conviction and avoid the victim having to give evidence again. It is so much about the engagement of the parties and confidence in and understanding of that result.⁹⁷

3.29 Dr Phillips, representing FamilyVoice Australia, also considered that a negotiated sentence option for a plea of guilty, provided it was handled correctly, was not only in the interests of the victim but also puts moral responsibility on the offender to accept the crime they have committed. This acceptance could assist in their rehabilitation.⁹⁸

3.30 Other inquiry participants had reservations about applying discounts for early guilty pleas. From the results of anonymous interviews, Fighters Against Child Abuse Australia recommended that for child sexual assault cases, offenders should not be given a significantly reduced sentence for pleading guilty. They further opposed offenders being given an option to plead guilty to a lesser crime.⁹⁹

3.31 In his evidence before the Committee, Mr Adam Washbourne, President of Fighters Against Child Abuse Australia, acknowledged that while a plea of guilty may assist victims in avoiding the trial process, many of the victims interviewed indicated they did not see a plea of guilty as a true admission of guilt.

... I cannot think of anyone off the top of my head who thought it was an admission of guilt. They all saw it as a way out of getting the maximum sentence because quite often the main problem we saw was not the fact that they were pleading guilty, but the fact they were pleading down their charges in exchange for a guilty plea. That kind of took away the whole ownership of their crime, if that makes sense.¹⁰⁰

3.32 Mr Graham Bargwanna, Chief Executive, Scouts Australia (NSW) acknowledged the positive impact a plea of guilty may have in protecting victims from the court process. At the same time, he expressed concerns over the impact any reduction might have on the overall length of sentence for child sexual assault offenders.

⁹⁶ Ms Jacqueline Walk, Chief Executive, Community Services, Department of Family and Community Services, Transcript of evidence, 28 April 2014, p5.

⁹⁷ Ms Penny Musgrave, Director, Criminal Law Review Division, Department of Police and Justice, Transcript of evidence, 28 April 2014, p5.

⁹⁸ Dr David Phillip, National President, FamilyVoice Australia, Transcript of evidence, 30 April 2014, p19.

⁹⁹ Submission 9, Fighters Against Child Abuse Australia, pp9-10.

¹⁰⁰ Mr Adam Washbourne, President, Fighters Against Child Abuse Australia, Transcript of evidence, 30 April 2014, p26.

Yes. There is some distastefulness about a reduced sentence for an administrative process but I agree with what you say about the impact that it can have on the victim to hear that the person has pled guilty. Again that is all well and good but if the end result is as we are getting, that is what is unsatisfactory.¹⁰¹

- 3.33 Ms Hetty Johnston, Chief Executive, Bravehearts, held similar views, commenting that more emphasis needs to be placed on mandatory minimum sentences:

I think there has to be something. The short answer is yes, if it has to be a reduction in sentence because that is what works then that is what works. But, personally, I think that there is a minimum mandatory sentence there for that offence because that is what the person has done. If that is the offence the person has committed then that is what they should be getting.¹⁰²

Conclusions

- 3.34 The Committee agrees that determining the extent to which aggravating and mitigating factors should be weighed up as part of the sentencing process is extremely complex. The Committee appreciates that applying mitigating factors to serious crimes such as child sexual assault can be a source of confusion and concern to victims and the community.
- 3.35 The Committee accepts, however, that a system which allows for individually based justice is the most favoured approach. It is critical that such a system is as straightforward and transparent as possible in order to promote consistency and public confidence in the sentencing process.
- 3.36 The Committee considers there is scope to simplify the sentencing process in this area and supports the reforms recommended by the NSW Law Reform Commission. To this end, the Committee agrees to the replacement of section 21A of the *Crimes (Sentencing Procedure) Act* by a revised set of sentencing factors as set out in the Commission's report on *Sentencing*. These factors should be non-exhaustive and not categorised into aggravating and mitigating factors.
- 3.37 The Committee supports the retention of section 21A(5A) as a stand-alone provision in the *Crimes (Sentencing Procedure) Act 1999*. This provision ensures that good character, which is often used as a means to facilitate child sexual assault offences, is not to be taken into account as a mitigating factor.
- 3.38 The Committee also notes the comments made by inquiry participants in relation to discounts for early guilty pleas. The Committee was persuaded by the value this incentive provides in protecting victims from what can be lengthy and traumatic court processes. The Committee considers this incentive, provided it is applied transparently, should be retained.

¹⁰¹ Mr Graham Bargwanna, Chief Executive, Scouts Australia (New South Wales), Transcript of evidence, 30 April 2014, p32

¹⁰² Ms Hetty Johnston, Chief Executive, Bravehearts, Transcript of evidence, 30 April 2014, p51.

Recommendation 4

The Committee recommends the replacement of Section 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) with an amended section containing a non-exhaustive set of sentencing factors listed in recommendation 4.2 of the NSW Law Reform Commission Report 139 *Sentencing*.

The Committee further recommends the retention of s 21A(5A) as a stand-alone provision in the *Crimes (Sentencing Procedure) Act 1999* (NSW).

STANDARD NON-PAROLE PERIOD SCHEME

3.39 The Standard Non-Parole Period (SNPP) scheme, set out in Part 4 Division 1A of the *Crimes (Sentencing Procedure) Act 1999*, applies to a relatively small number of serious offences. It was inserted into the *Crimes (Sentencing Procedure) Act 1999* in 2002 by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill 2002*.

3.40 The SNPP scheme was intended to give further guidance and structure to sentencing discretion. The second reading speech, given when the scheme was introduced, identified the SNPP as being a further important reference point for certain offences.

3.41 As stated in the second reading speech, the SNPP scheme was not introduced as a form of mandatory sentencing, but as a measure to provide further guidance and structure to judicial discretion.¹⁰³ According to the then Attorney General, the Hon. Bob Debus MP:

These reforms are primarily aimed at promoting consistency and transparency in sentencing and also promoting public understanding of the sentencing process.¹⁰⁴

3.42 There are four sexual assault offences subject to the SNPP scheme involving children, as set out below:

Table 3 - Sexual offences under the *Crimes Act 1900* subject to the SNPP scheme

Section	Offence	Maximum penalty	SNPP
61J(2)	Aggravated sexual intercourse; circumstances of aggravation: victim under 16 years	20 years	10 years
61M(2)	Aggravated indecent assault; victim under 16 years	10 years	8 years
66A(1)	Sexual intercourse child under 10	25 years	15 years
66A(2)	Sexual intercourse child under 10; aggravated	Life	15 years

3.43 The NSW Court of Criminal Appeal initially determined the manner in which the SNPP scheme would be applied in practice in *R v Way*.¹⁰⁵ In substance, that

¹⁰³ The Hon. Bob Debus MP, *Parliamentary Debates*, New South Wales Legislative Assembly, 23 October 2002, p5813.

¹⁰⁴ The Hon. Bob Debus MP, *Parliamentary Debates*, New South Wales Legislative Assembly, 23 October 2002, p5813.

¹⁰⁵ *R v Way* [2004] NSWCCA 131; 60 NSWLR 168.

decision required a court, when sentencing for a SNPP offence, to determine whether the offence was in the midrange of objective seriousness and, if this was the case, to ask whether there were reasons for not imposing the SNPP. This required the court to carefully examine the subjective circumstances of the offender.

- 3.44 Importantly, the SNPP scheme was seen as ensuring not only greater consistency in sentencing but also that proper regard is given to the community expectation that punishment is imposed that is commensurate with the gravity of the crime. Each SNPP was said to take into account the 'community expectation that an appropriate penalty will be imposed having regard to the objective seriousness of the offence'.¹⁰⁶
- 3.45 The manner in which these general principles were to be taken into account and applied to each offence was not, however, disclosed. This subsequently led to a general criticism of the scheme as lacking transparency and delivering some anomalous sentencing outcomes.
- 3.46 A clarification of the application of the SNPP scheme resulted from a 2011 High Court ruling in the case of *Muldrock v R*.¹⁰⁷ In its judgment, the High Court noted that the SNPP was a guidepost to sentencing and 're-emphasised the need to apply the instinctive synthesis approach rather than one effectively requiring a two-step approach.'
- 3.47 As a result of the *Muldrock* decision, amendments were made to the *Crimes (Sentencing Procedure) Act 1999* in October 2013, to provide clarity for the operation of the scheme and confirm the approach adopted in *Muldrock*.¹⁰⁸
- 3.48 The Judicial Commission of NSW compared the proportion of convicted offenders imprisoned specifically for SNPP offences before and after the scheme commenced and found that the scheme had 'generally resulted in a greater uniformity of, and consistency in, sentencing outcomes.'¹⁰⁹
- 3.49 Due to the limited duration of the operation of the SNPP scheme post *Muldrock*, recent trends in SNPP sentencing are yet to be evaluated.

NSW Sentencing Council Report: Standard Non-Parole Periods

- 3.50 In September 2013, the former Attorney General, Mr Greg Smith SC MP, asked the NSW Sentencing Council to review aspects of the standard non-parole period scheme.

¹⁰⁶ The Hon. Bob Debus MP, *Parliamentary Debates*, New South Wales Legislative Assembly, 23 October 2002, pp5815-5816.

¹⁰⁷ *Muldrock v R* [2011] HCA 39; 244 CLR 120.

¹⁰⁸ *Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act 2013*.

¹⁰⁹ Ms Patricia Poletti and Mr Hugh Donnelly, *The impact of the Standard Non-parole Period sentencing Scheme on Sentencing Patterns in New South Wales*, Research Monograph 33, Judicial Commission of New South Wales, 2010, p60.

- 3.51 The Council was asked to report on the following aspects of the scheme:
- (a) The offences which should be included in the standard non-parole period Table.
 - (b) The standard non-parole periods for those offences.
 - (c) The process by which any further offences should be considered for inclusion in the Table and any further standard non-parole periods set and advise on options for reform of these aspects of the scheme.¹¹⁰
- 3.52 After the commencement of this inquiry, the Council was asked to give immediate consideration to aspects of the SNPP scheme as it relates to child sexual assault offences, as follows:
- a) Identification of child sexual assault offences that should be included in the standard non-parole period Table; and
 - b) Whether there are specific factors that should be taken into account to determine the standard non-parole periods for child sexual assault offences and, if so, what those factors are.¹¹¹

Child sexual assault offences to be added to the SNPP scheme

- 3.53 As part of its remit, the Council considered a number of principles to determine whether an offence should be part of the SNPP scheme, including if the offence:
- Has a significant maximum penalty.
 - Is triable on indictment only.
 - Involves elements of aggravation.
 - Involves a vulnerable victim.
 - Involves special risk of serious consequences to the victim and the community.
 - Is prevalent.
 - Is subject to a pattern of inadequate sentencing.
 - Is subject to a pattern of inconsistent sentences.
- 3.54 The paper issued as part of the Sentencing Council's consultation process made reference to the particularly heinous nature of sexual assault offences against children and the need for sentences to reflect the seriousness of persistent abuse.¹¹²

¹¹⁰ New South Wales Sentencing Council, *Standard Minimum Non-Parole Periods Consultation Paper*, September 2013, p1.

¹¹¹ New South Wales Sentencing Council, *Standard Minimum Non-Parole Periods Consultation Paper*, September 2013, p1.

¹¹² New South Wales Sentencing Council, *Standard Minimum Non-Parole Periods Consultation Paper*, September 2013, pp 12-13.

3.55 Based on the Council’s approach and consideration of additional child sexual assault offences to be subject to SNPPs, the gravity of the following offences may be considered as suitable for inclusion in a more comprehensive list under the scheme:

Table 4 - List of possible *Crimes Act 1900* offences for inclusion under the SNPP scheme

Section	Offence
66B	Attempt or assault with intent to have sexual intercourse with a child under 10
66C(1)	Sexual intercourse with a child aged 10 to 14; aggravated
66C(2)	Sexual intercourse with a child aged 10 to 14; aggravated
66C(4)	Sexual intercourse with a child aged between 14 and 16; aggravated
91G(1)	Use (or allow) child under 14 to produce child abuse material
66EB(2)	Procuring or grooming a child; procuring children
66EB(2A)	Procuring or grooming a child; meeting child following grooming
66EB(3)	Procuring or grooming child; grooming children
91D	Promoting or engaging in acts of child prostitution: child under 14 only
91E	Obtaining benefit from child prostitution: child under 14 only

Proportionality of SNPPs to maximum penalties

- 3.56 In its consultation paper, the NSW Sentencing Council highlighted the absence of any consistent proportionality between the SNPP and maximum penalties for offences under the scheme. According to the Council, this engenders concerns about the lack of transparency in the process by which SNPPs are determined.
- 3.57 The Council further commented that the significant variation in the proportion that the SNPP bears to the maximum available sentences for all SNPP offences also raises questions about how SNPPs were initially determined.¹¹³
- 3.58 One possible remedy may be to specify that a range for a SNPP under the scheme commences as a fixed percentage of the maximum penalty, with the final SNPP figure capped at no more than 50% of the maximum penalty.
- 3.59 Background information provided to the Committee by the Sentencing Council has stipulated a set of conditions in order to determine the appropriate proportion to be applied, namely:
- The special need for deterrence.
 - The need to recognise the exceptional harm which the offence may cause.
 - The potential vulnerability of those who may be victims.
 - The extent to which the offence may involve a breach of trust or abuse of authority.

¹¹³ New South Wales Sentencing Council, *Standard Minimum Non-Parole Periods Consultation Paper*, September 2013, p27.

- Sentencing statistics and practice, including relevant appellate guidance as to appropriate levels of sentencing for the offence.

Inquiry Evidence

- 3.60 Submissions and evidence taken at hearings overwhelmingly support the SNPP scheme being retained, with most inquiry participants also supporting its expansion to include additional child sexual assault offences. The evidence also highlights the number of inconsistencies within the current SNPP scheme.
- 3.61 FamilyVoice Australia argued that inconsistencies relating to the application of the SNPP scheme to some but not other offences, may contribute to the courts not viewing offences in the same light as the legislature.¹¹⁴ The organisation highlighted the lack of a SNPP for the offence of persistent sexual abuse of a child, which carries a maximum term of 25 years imprisonment.¹¹⁵
- 3.62 In addition, FamilyVoice submitted that there is clear inconsistency between having a SNPP for the offence of aggravated indecent assault, with a maximum term of imprisonment of 10 years, and other child sexual assault offences which carry more serious penalties.¹¹⁶
- 3.63 Bravehearts expressed support for the use of standard non-parole periods, commenting that:
- ... the prescription of standard non-parole periods allows for coherency in sentencing, promotes the proportionality principle and, as such, is consistent with one of the basic premises of our justice system – that the punishment must fit the crime.¹¹⁷
- 3.64 Bravehearts also supported consistency in the application of the SNPP scheme, stating that any sexual or serious violent offence that carries a maximum sentence of 10 years or more should be subject to a standard non-parole period.¹¹⁸
- 3.65 The Office of the Director of Public Prosecutions (ODPP) considered that standard non-parole periods are a useful guidepost and supported the retention of the scheme. According to the ODPP, the scheme should be expanded to include a number of offences currently not subject to a standard non-parole period.¹¹⁹ This expansion corresponds to the list of offences resulting from the consultations undertaken by the Sentencing Council, referred to earlier in the chapter.
- 3.66 In contrast to other inquiry participants, the NSW Bar Association submitted that while standard non-parole periods are preferable to mandatory minimum

¹¹⁴ Submission 2, FamilyVoice Australia, p5.

¹¹⁵ *Crimes Act 1900*, s66EA

¹¹⁶ Submission 2, FamilyVoice Australia, pp5-6.

¹¹⁷ Submission 17, Bravehearts, p7.

¹¹⁸ Submission 17, Bravehearts, p7.

¹¹⁹ Submission 20, New South Wales Office of the Director of Public Prosecutions, p2.

sentencing, they do not support the expansion or maintenance of the standard non-parole period scheme.¹²⁰

3.67 With particular reference to child sexual assault offences, the NSW Bar Association argued:

Whilst it is accepted that this category of offence is particularly serious and carries with it a high level of community concern and abhorrence, it must also be recognised that sentencing for such matters is often extremely complex and difficult. The introduction of a standard non-parole period creates additional and unwelcome complexity and often results in appealable errors.¹²¹

3.68 If standard non-parole periods are retained for child sexual assault offences, according to the NSW Bar Association, they should only apply to offences with the following characteristics:

- Serious offences carrying high maximum penalties where the range of objective criminality is narrow.
- Offences where there are no guideline judgments.
- Offences where there is evidence of either inconsistency in sentencing or a pattern of inadequate sentences.¹²²

Proportionality of SNPPs to maximum penalties

3.69 The unclear and inconsistent proportionality between SNPPs and maximum penalties for some offences under the scheme was also raised by inquiry witnesses. In evidence before the Committee, Mr Babb SC commented:

... I think the Sentencing Council has looked at the inconsistency of it. It needs to be approached in a more realistic way. It was hard to work out how the numbers were arrived at initially. That lack of clarity in the thinking has added at times to it being not as effective a guide post as it could be.

I think you are able to point to many instances where a sentence is well below the standard non-parole period. Then again, some of those standard non-parole periods were unrealistic in that that non-parole period would mean that you must impose the maximum sentence once you added on a parole period.¹²³

3.70 Mr Stephen Odgers SC, Chair, Criminal Law Committee, NSW Bar Association, commented:

There is a really extraordinary range in percentages for standard non-parole periods compared with maximum penalties – up to 80 per cent for aggravated indecent assault in some cases and down to something like 25 per cent in other offences. It

¹²⁰ Submission 18, New South Wales Bar Association, p5.

¹²¹ Submission 18, New South Wales Bar Association, p5.

¹²² Submission 18, New South Wales Bar Association, p5.

¹²³ Mr Lloyd Babb SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of evidence, 28 April 2014, pp29-30.

ranges. We have never understood how those numbers were determined. It has never been publicly explained.¹²⁴

Sentence length not reflecting standard non-parole period

3.71 During the inquiry, the Committee's attention was drawn to the average length of sentences being received for certain child sexual assault offences subject to the SNPP scheme, in particular section 66A offences. The average sentence lengths imposed were far below the standard non-parole period set for those offences.

3.72 In discussing section 66A sentence statistics, the Hon. Anthony Whealy QC, Deputy Chair, NSW Sentencing Council, commented:

It is impossible to tell from that statistic. On its face it looks rather alarming. I do not think anyone could deny that. Unless you conduct a proper analysis of all these charges and see just what is really behind these sentences, it really is quite difficult to draw a simple conclusion.¹²⁵

3.73 The Hon Anthony Whealy QC, Deputy Chair of the NSW Sentencing Council, further commented:

... With standard non-parole periods, you have to bear in mind that they are not all they seem to be by their nature because the standard non-parole period is a hypothetical figure that represents an offence in the mid-range of seriousness but it does not take into account any subjective circumstances of the offence and it does not really take into account very many of the circumstances of the offence.¹²⁶

3.74 Mr Hugh Donnelly, Director, Research and Sentencing, Judicial Commission of NSW, provided the Committee with further information regarding sentencing statistics and their interpretation. Mr Donnelly commented:

In respect of sentencing statistics, one point that needs to be emphasised is that it is a process whereby we are excising or taking one sentence out of a process and then deriving a macro figure, if you like.

...

Even in the area of 66A, Parliament in 2009 increased the maximum penalty for the aggravated form of the offence to life imprisonment. What it means is that when you look at those figures, it is necessary to divide the various statutory regimes: before the standard non-parole period; the standard non-parole period and then the life sentence. So you have this problem of actually trying to reason with lots of legislative activity. In the area of child sexual assault at the time, 15 years was considered a very high figure, not for any personal opinion but because relative to murder and other offences it was very high.¹²⁷

¹²⁴ Mr Stephen Odgers SC, Chair, Criminal Law Committee, New South Wales Bar Association, Transcript of evidence, 28 April 2014, p46.

¹²⁵ The Hon. Anthony Whealy QC, Deputy Chair of the New South Wales Sentencing Council, Transcript of evidence, 28 April 2014, p15.

¹²⁶ The Hon Anthony Whealy QC, Deputy Chair of the New South Wales Sentencing Council, Transcript of evidence, 28 April 2014, p16.

¹²⁷ Mr Hugh Donnelly, Director, Research and Sentencing, Judicial Commission of New South Wales, Transcript of evidence, 28 April 2014, p17.

- 3.75 Mr Ernest Schmatt PSM, Chief Executive, Judicial Commission of NSW, also provided more information on sentencing statistics:

... I noticed earlier there was a reference to an average sentence of four years. I think it was for an offence under s 66A. According to the information we provided earlier – and in reporting our research studies we do not use averages or means, we use medians – you might recall that we mentioned on the last occasion that we had undertaken some research, particularly in relation to standard non-parole periods and we published the results of that in May 2010.

The results were quite interesting because what it found was that both the severity of penalties imposed and the duration of sentences have increased since standard non-parole periods were introduced in 2003 and that sentences had become both more consistent and the guilty plea rate for standard non-parole period offences had increased.¹²⁸

- 3.76 More extensive coverage of issues relating to sentencing patterns and statistics can be found in chapter 4 of the report, which provides a more detailed discussion of current shortcomings, along with suggestions for improvements to the statistical data base for sentencing.

Conclusions

- 3.77 The Committee is persuaded by the overwhelming support for the retention of the standard non-parole period scheme. To this end, the Committee supports comments made in the second reading speech of the scheme's introduction and considers the SNPP scheme a means of providing judicial guidance without the need to introduce mandatory sentencing.
- 3.78 The Committee does, however, have concerns regarding internal inconsistencies and the absence of serious child sexual assault offences within the scheme. As such, the Committee supports a more robust and comprehensive expansion of the scheme.
- 3.79 While acknowledging the limitations of sentencing statistics, the Committee is concerned about the length of sentences for offences against section 66A of the *Crimes Act 1900* (sexual intercourse with a child under 10).
- 3.80 There are currently two offences in section 66A, both subject to the SNPP scheme:

Table 5 - Offences under s66A of the *Crimes Act 1900* that are subject to the SNPP scheme

Section	Offence	Maximum penalty	SNPP
66A(1)	Sexual intercourse with child under 10 years	25 years	15 years
66A(2)	Sexual intercourse with child under 10 years; aggravated	Life	15 years

¹²⁸ Mr Ernest Schmatt PSM, Chief Executive, Judicial Commission of New South Wales, Transcript of evidence, 28 April 2014, pp16-17.

- 3.81 To reflect the heinous nature of these offences, the Committee recommends that the maximum penalty for an offence against section 66A(1) be amended to imprisonment for life. The Committee considers there is precedent to increase this maximum penalty, given that section 66A(2) also has a maximum penalty of life imprisonment.
- 3.82 With the maximum penalty increased to life, the SNPP for an offence against section 66A(1) will remain at 15 years. This corrects the anomaly associated with the high SNPP to maximum penalty ratio for this offence.
- 3.83 In making this recommendation, the Committee seeks to reflect the exceptionally serious nature of this offence.

Recommendation 5

The Committee recommends, when reviewing recommendation 1, that the maximum penalty for an offence against section 66A(1) of the *Crimes Act 1900*, or consolidated offences or new offences of sexual intercourse with a child under 10, be amended from 25 years imprisonment to life imprisonment.

Recommendation 6

The Committee recommends that the standard non-parole period for an offence against section 66A(1) of the *Crimes Act 1900* remains at 15 years.

- 3.84 The Committee acknowledges criticisms made regarding the lack of available information about how the SNPP scheme settings were first determined and the lack of coherence in the criteria employed. In order to improve the robustness of the SNPP scheme and to increase transparency in the determination of the scheme's settings, the Committee recommends putting the scheme on a stronger conceptual and policy base.
- 3.85 To this end, the Committee supports a process whereby specifying a SNPP for an offence under the scheme should assume a consistent starting point as a percentage of the maximum penalty, with the final figure no more than 50% of the maximum penalty. This should also take into account the following matters:
- The special need for deterrence.
 - The need to recognise the exceptional harm which the offence may cause.
 - The potential vulnerability of those who may be victims.
 - The extent to which the offence may involve a breach of trust or abuse of authority.
 - Sentencing statistics and practice, including relevant appellate guidance as to appropriate levels of sentencing for the offence.

Recommendation 7

The Committee recommends that the Attorney General examines specifying a consistent starting point for a Standard Non-Parole Period offence as a percentage of the maximum penalty, with the final figure no more than 50% of the maximum penalty.

- 3.86 In order to address concerns raised during the inquiry about a number of serious child sexual assault offences not currently subject to the SNPP scheme, the Committee recommends expanding the scheme to include additional offences. These are set out in Table 4 of the report and will provide an additional 10 sexual offences against children to be included in the SNPP scheme.

Recommendation 8

The Committee recommends that the following offences in the Crimes Act 1900 be added to the Standard Non-Parole Periods scheme, namely: sections 66B; 66C(1); 66C(2); 66C(4); 91G(1); 66EB(2); 66EB(2A); 66EB(3); 91D; and 91E of the Crimes Act 1900.

ROLE OF THE LOCAL COURT

- 3.87 While some child sexual assault offences are strictly indictable, the majority are tried summarily in the Local Court. The current sentencing jurisdiction of the Local Court is two years imprisonment for a single offence, or five years for consecutive or concurrent offences, regardless of the maximum sentence for the offence. These offences are outlined in the table below.¹²⁹

Table 6 - Offences under the Crimes Act 1900 tried in the Local Court

Section	Offence	Table*	SNPP**	Maximum penalty	Local Court limit
61M(1)	Indecent assault; aggravated	1	5 years	7 years	2 years
61M(2)	Aggravated indecent assault; victim under the age of 16	1	8 years	10 years	2 years
61N(1)	Act of indecency; victim under the age of 16	2		2 years	2 years
61O(1)	Aggravated act of indecency; victim under the age of 16	2		5 years	2 years
61O(2)	Aggravated act of indecency; victim under the age of 10	1		7 years	years

*Table 1 and 2 of Schedule 1, *Criminal Procedure Act 1986*.

**The standard non-parole period is applicable where the offence is dealt with on indictment.

- 3.88 In a majority of cases, a decision to consider these matters summarily in the Local Court or on indictment in the District Court is a matter for the prosecution.¹³⁰ The police prosecutor or police officer in charge of the case will consider whether

¹²⁹ *Criminal Procedure Act 1986 (NSW)*

¹³⁰ Submission 16, Local Court of New South Wales, p2. The defence may also make an election to have the matter dealt with on indictment in the case of Table 1 offences (see section 260 of the *Criminal Procedure Act 1986*), 'though in practice it will rarely do so.'

the matter is sufficiently serious and likely to attract a sentence outside the Local Court jurisdiction, such as to warrant a referral to the ODPP.¹³¹

- 3.89 After referral to the ODPP, a recommendation is made to a managing lawyer or trial advocate for decision and the police prosecutor advised. If the ODPP decides not to pursue the matter, it is generally returned to the police.
- 3.90 Guideline 8 of the ODPP, concerning whether an offence is to be dealt with on indictment, provides that an election should not be made unless:
- i the accused person's criminality (taking into account the objective seriousness and his or her subjective considerations) could not be adequately addressed within the sentencing limits of the Local Court; and/or
 - ii for some other reason, consistently with these guidelines, it is in the interests of justice that the matter not be dealt with summarily (eg. a comparable co-offender is to be dealt with on indictment; or the accused person also faces a strictly indictable charge to which the instant charge is not a back-up).¹³²
- 3.91 Judge Graeme Henson, Chief Magistrate of the Local Court of NSW, told the Committee that in certain circumstances:
- ...a more serious, strictly indictable offence is brought [by the ODPP] in the first instance, with a back-up charge of a table one offence or a table two offence [ie. an offence which can be dealt with summarily in the Local Court]. If the ODPP decides not proceed with the strictly indictable offence they can then decide to leave the other matter in the Local Court for determination.¹³³
- 3.92 The Chief Magistrate also outlined instances where the ODPP can intervene to take over a matter between the charging and the sentencing process and elect to proceed by way of indictment. He stated that cases which don't attract the attention of the ODPP, because the police did not find it appropriate to refer, are infrequent.¹³⁴
- 3.93 While proceedings determined in the Local Court are usually prosecuted by NSW Police Force Prosecutors, the ODPP also prosecutes a limited number of offences in the Local Court. This applies where there is a special public interest involved, such as cases involving the sexual assault of children.¹³⁵
- 3.94 The Chief Magistrate provided the Committee with the following Table to illustrate the number of such cases which are heard in the Local and District Courts¹³⁶:

¹³¹ New South Wales Sentencing Council, Report: *An examination of the sentencing powers of the Local Court in NSW*, December 2010, p8.

¹³² Office of the Director of Public Prosecutions, *Guideline 8 – Election for offence to be dealt with on indictment*, <http://www.odpp.nsw.gov.au/prosecution-guidelines>, accessed 19 August 2014.

¹³³ Judge Graeme Henson, Chief Magistrate, Local Court of New South Wales, Transcript of evidence, 28 April, p62.

¹³⁴ Judge Graeme Henson, Chief Magistrate, Local Court of New South Wales, Transcript of evidence, 28 April, p62.

¹³⁵ NSW Sentencing Council, Report: *An examination of the sentencing powers of the Local Court in NSW*, (December 2010) p9.

¹³⁶ Submission 16, Local Court of New South Wales, p3. Source: NSW Bureau of Crime Statistics and Research.

Table 7 - Crimes Act 1900 offences tried in Local and District Courts - 2008-2012

Section	Offence	Court	2008	2009	2010	2011	2012
61M(1)	Indecent assault in circumstances of aggravation (where victim under the age of 16)	Local Court	137	92	35	21	21
		District Court	82	91	62	33	32
61M(2)	Aggravated indecent assault – victim under the age of 16	Local Court	48	34	72	71	99
		District Court	36	45	46	95	75
61N(1)	Act of indecency – victim under the age of 16	Local Court	33	42	55	52	52
		District Court	9	10	11	10	9
61O(1)	Aggravated act of indecency – victim under the age of 16	Local Court	8	3	5	11	5
		District Court	9	5	9	11	10
61O(2)	Aggravated act of indecency – victim under the age of 10	Local Court	11	7	12	11	11
		District Court	3	3	4	6	5
Local Court total			237	178	179	166	188
District Court total			139	154	132	155	132
TOTAL			376	332	311	321	320

Increasing the Jurisdiction of the Local Court

Supporting arguments

3.95 In his evidence to the Committee, the Chief Magistrate argued that the two year jurisdictional limit of the Local Court leads to sentences for child sexual assault offences which do not reflect their objective criminality. On this basis, the Chief Magistrate made a case for an increase in Local Court jurisdiction.

3.96 To support his position, the Chief Magistrate submitted data from JIRS. This indicates that between October 2011 and September 2013, a total sentence at the Court's jurisdictional limit was imposed in 6.2% of sentences of full-time imprisonment for offences under section 61(M)(2). This represents 4.0% of all sentences for such offences, an increase from 3.9% and 2.9% respectively in the previous two-year period.¹³⁷ The data is summarised in the following table:

¹³⁷ Submission 16, Local Court of New South Wales, p5.

SENTENCING OF CHILD SEXUAL ASSAULT OFFENDERS
SENTENCING PRINCIPLES AND PRACTICES

Table 8 - Recent Local Court sentencing under the *Crimes Act 1900* - percentage of sentences imposed at jurisdictional limit

Sentences at jurisdictional limit (2 years)	Oct 2009 – Sep 2011					October 2011 – Sep 2013					All				
	Cust	All	At JL	% Cust	% All	Cust	All	At JL	% Cust	% All	Cust	All	At JL	% Cust	% All
61M(2) agg indecent assault – person <16	51	68	2	3.9%	2.9%	65	101	4	6.2%	4.0%	116	169	6	5.2%	3.6%
61N(1) act of indecency – person <16	14	29	0	0.0%	0.0%	16	27	0	0.0%	0.0%	30	56	0	0.0%	0.0%
61O(1) agg act of indecency – person <16	1	4	0	0.0%	0.0%	3	5	0	0.0%	0.0%	4	9	0	0.0%	0.0%
61O(2) agg act of indecency – person <10	2	4	1	50.0%	25.0%	2	5	0	0.0%	0.0%	4	9	1	25.0%	11.1%

Cust = Custodial

JL = Jurisdictional Limit

agg = aggravated

- 3.97 The Chief Magistrate also submitted that the Local Court was unable to hand down a sentence that approaches the SNPP for offences of aggravated indecent assault under sections 61(M)(1) and (2).¹³⁸ Furthermore, he claimed that there were some matters which troubled various members of his court as to whether they were in the right jurisdiction.¹³⁹
- 3.98 Both the Chief Magistrate and the Commander of Police Prosecutions Command, Chief Superintendent Anthony Trichter, supported an extension of the jurisdiction of the Local Court, due to the timeliness of the court process when compared to the District Court.¹⁴⁰
- 3.99 The Chief Magistrate indicated that the workload of the District Court has increased by almost 50% in the last 12 months without a concomitant increase in resources.¹⁴¹ He stated that the average delay in the Local Court for a defended matter was around 14 weeks from charging to determination, compared to more

¹³⁸ Submission 16, Local Court of New South Wales, p5.

¹³⁹ Judge Graeme Henson, Chief Magistrate, Local Court of New South Wales, Transcript of evidence, 28 April 2014, p61.

¹⁴⁰ Chief Superintendent Anthony Trichter, Commander, Police Prosecutions Command, New South Wales Police Force and Judge Graeme Henson, Chief Magistrate, Local Court of New South Wales, Transcript of evidence, 28 April 2014, pp20 and 63.

¹⁴¹ Judge Graeme Henson, Chief Magistrate, Local Court of New South Wales, Transcript of evidence, 28 April 2014, p63.

than 12 months in the District Court.¹⁴² He outlined the following impacts of delay on victims:

The longer the process goes between arrest and determination the more the evidence begins to corrode in terms of the failing of memory and the more the concerns arise on the part of the victim as to whether or not justice is going to arrive at its due destination.¹⁴³

- 3.100 In further evidence, the Chief Magistrate claimed that the Local Court would be able to cope with an increased workload if its jurisdiction were to increase. He stated that matters that end up in the District Court are first considered in the Local Court for the committal process and there would be an increase in the nature of the workload, rather than the fact of the workload.¹⁴⁴
- 3.101 When questioned about how the court would cope with an increasing caseload, given the recent and proposed reduction in the number of magistrates, the Chief Magistrate said:
- My view on increasing the jurisdiction was developed before the economic reality of the Local Court. It is actually four [magistrates] down. It will be six down by the end of July and then eight down in July next year but to be fair the caseload has dropped as well. We are managing ok at the moment.¹⁴⁵
- 3.102 When further asked about the impact of the proposed increase in cases on consistency in sentencing, due to the larger cohort of magistrates compared to District Court judges, the Chief Magistrate provided the following comments:
- You cannot protect against one person's opinion being different from another person's opinion. As the High Court said, what is aimed for is consistency in the application of the law not some sort of mathematical outcome. It is a difficult question to answer convincingly for that reason.¹⁴⁶

Opposing arguments

- 3.103 Mr Lloyd Babb SC, NSW Director of Public Prosecutions stated that his office generally directed child sexual assault matters towards the appropriate court. He pointed to the ODPP guidelines for determining the election of an offence on indictment and considered that his office sought to deal with these matters in a principled way.
- 3.104 The DPP argued that the Local Court is the appropriate jurisdiction to deal with some child sexual assault cases, as it is better for the complainant in a number of ways, as follows :

¹⁴² Judge Graeme Henson, Chief Magistrate, Local Court of New South Wales, Transcript of evidence, 28 April 2014, p63.

¹⁴³ Judge Graeme Henson, Chief Magistrate, Local Court of New South Wales, Transcript of evidence, 28 April 2014, p63.

¹⁴⁴ Judge Graeme Henson, Chief Magistrate, Local Court of New South Wales, Transcript of evidence, 28 April 2014, p63.

¹⁴⁵ Judge Graeme Henson, Chief Magistrate, Local Court of New South Wales, Transcript of evidence, 28 April 2014, p63.

¹⁴⁶ Judge Graeme Henson, Chief Magistrate, Local Court of New South Wales, Transcript of evidence, 28 April 2014, p65.

You are dealt with quickly. You do not have wigged and gowned people cross-examining you. You do not have a jury—that can put pressure on to use jury time and keep the matter running. If a complaint gets very upset in the Local Court it is much easier to take an adjournment and come back to it later in the day or on another day than it is with a jury waiting.¹⁴⁷

3.105 In terms of differences in timeliness between the Local Court and District Court, the DPP stated:

The delay between charging and a final determination in the District Court is much lengthier than the delay between charging and a determination in the Local Court because there are two court processes that are gone through before you get to it plus there are quite lengthy delays at present in the District Court. So where a matter can be dealt with in the Local Court jurisdictional limit it should be.¹⁴⁸

3.106 The DPP also explained that the time at which an offence was committed is a factor which is taken into account when determining the appropriate jurisdiction. Mr Babb stated:

... historical sexual offending is subject to the penalty that was in place historically and the sentencing range is limited by the penalty that could and should have been imposed had the complaint been made at a time that that section was in place.¹⁴⁹

3.107 In support of his assertion that his office is appropriately directing cases to the Local Court, the DPP said that very few of the sentences for child sexual assault cases dealt with in the Local Court cases reach the jurisdictional maximum. He elaborated:

Were it the case that I was incorrectly keeping matters down in the Local Court that should be dealt with in the higher courts one would expect that the jurisdictional limit of the Local Court would be reached in a large proportion of matters, and it is not. So taking, for example, aggravated indecent assault, of the 108 matters that were dealt with in the Local Court only eight received a two-year sentence—so less than 7 per cent of matters—and the large majority of matters did not receive a custodial sentence at all. So that just indicated to me in looking at them—which I constantly do—that we have chosen the jurisdiction correctly.¹⁵⁰

3.108 The DPP also stated that he had not received feedback from the Local Court, either directly from the head of jurisdiction or from judicial officers in their remarks on sentencing, that matters are being inappropriately directed to the Local Court. He continued as follows:

The other thing I would expect is that I would be getting feedback from the court to say, "This matter should not have been dealt with in this jurisdiction because I feel hamstrung." I do not get that feedback. However, I do get feedback from the courts

¹⁴⁷ Mr Lloyd Babb SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of evidence, 28 April 2014, p26.

¹⁴⁸ Mr Lloyd Babb SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of evidence, 28 April 2014, p26.

¹⁴⁹ Mr Lloyd Babb SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of evidence, 28 April 2014, p26.

¹⁵⁰ Mr Lloyd Babb SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of evidence, 28 April 2014, p26.

in a number of ways—either from heads of jurisdiction or from remarks on sentence where a judicial officer specifically says, "I ask that these remarks be taken out and forwarded to the Director of Public Prosecutions so that he can understand that there was a problem with this matter." I have not had those sorts of remarks sent to me nor had the issue raised with me, so I think we are making the right decisions in most cases.¹⁵¹

- 3.109 After further questioning about whether he supported an increase in the jurisdiction of the Local Court from two years to five years, the DPP countered that matters are currently being dealt with in the appropriate jurisdiction. He further stated that the majority of child sexual assault cases should be dealt with in the District Court to reflect the serious nature of the offences:

That is very much a policy decision and there are arguments for and against it... In a way I think we are getting the decisions right and having them dealt with in the right sort of jurisdiction. I think the majority of child sex offending needs really condign sentences of imprisonment and they are usually dealt with in the District Court. I think that is appropriate. They should be dealt with seriously and should have serious penalties available.¹⁵²

- 3.110 Mr Stephen Odgers SC, Chair, Criminal Law Committee, NSW Bar Association, indicated that it is strongly opposed to any increase in the jurisdiction of the Local Court. Mr Odgers argued that the District Court is the appropriate jurisdiction for serious criminal offences due to the different standards for prosecutors. He stated:

In the District Court prosecutors are Crown Prosecutors independent of the executive and subject to substantial ethical responsibilities while in the Local Court they are often members of the Police Force who may be legally trained but are neither independent lawyers nor members of an independent office of public prosecutions.¹⁵³

- 3.111 Mr Odgers further claimed that an increase in the number of cases in the Local Court would dilute the fundamental idea of a jury trial for serious criminal offences, as there is no right to a trial by jury in the Local Court.¹⁵⁴ He argued that trial by jury is an important right in our society and an important way of infusing community values into the criminal justice system.¹⁵⁵

- 3.112 The Legal Aid Commission echoed these concerns. Mr Mark Ierace SC, Senior Public Defender, commented that the community has more confidence when

¹⁵¹ Mr Lloyd Babb SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of evidence, 28 April 2014, p26.

¹⁵² Mr Lloyd Babb SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of evidence, 28 April 2014, p27.

¹⁵³ Mr Stephen Odgers SC, Chair, Criminal Law Committee, New South Wales Bar Association, Transcript of evidence, 28 April 2014, p44.

¹⁵⁴ Mr Stephen Odgers SC, Chair, Criminal Law Committee, New South Wales Bar Association, Transcript of evidence, 28 April 2014, p44.

¹⁵⁵ Mr Stephen Odgers SC, Chair, Criminal Law Committee, New South Wales Bar Association, Transcript of evidence, 28 April 2014, p44.

serious matters, where the accused pleads not guilty, are dealt with by a jury rather than a single judicial officer.¹⁵⁶

3.113 According to Mr Ierace, an advantage of going to the District Court is that the appeal is to the Court of Criminal Appeal and District Court judges are bound to follow the appeal judgments.¹⁵⁷ If a matter is dealt with at the Local Court level, appeal is to the District Court and fellow District Court judges are not obliged to follow it.¹⁵⁸ Mr Ierace argued that this would undermine the extent to which the system provides a high degree of consistency.¹⁵⁹

3.114 The NSW Bar Association also argued that the cost of Legal Aid for defendants appearing before the Local Court was lower than for the District Court. Mr Odgers stated that:

... while the Legal Aid Commission does generally fund cases where people have a risk of going to jail... the nature of the funding and the actual resources that are provided in the Local Court for criminal defendants is not to the same level as it is in the District Court.¹⁶⁰

Standard non-parole offences and the Local Court

3.115 The Chief Magistrate of the Local Court made further comment on a particular issue affecting the Local Court, relating to the structuring of sentences for offences to which a SNPP would apply if dealt with on indictment.¹⁶¹ This is due to section 45 of the *Crimes (Sentencing Procedure) Act 1999* precluding the imposition of a fixed term of imprisonment for such offences, even where dealt with in the Local Court, requiring a non-parole period to be set for such an offence.¹⁶² The Chief Magistrate indicated that this creates an anomalous situation between SNPP offences and other offences dealt with in the Local Court.¹⁶³

3.116 The Chief Magistrate used the following example to illustrate the anomaly:

... it would be possible for the Local Court to impose a sentence of 2 years imprisonment without parole for an offence of indecent assault under s 61L of the Crimes Act 1900 (which carries a maximum penalty at law of 5 years imprisonment). A fixed sentence of this length would typically involve the application of *R v Doan* (2000) 50 NSWLR 115. That decision confirmed the legislative limits upon the Local Court's sentencing powers are jurisdictional limits rather than maximum penalties that must be reserved for worst-case offences.

¹⁵⁶ Mr Mark Ierace SC, Senior Public Defender, Legal Aid New South Wales, Transcript of evidence, 28 April 2014, p58.

¹⁵⁷ Mr Mark Ierace SC, Senior Public Defender, Legal Aid New South Wales, Transcript of evidence, 28 April 2014, pp58-59.

¹⁵⁸ Mr Mark Ierace SC, Senior Public Defender, Legal Aid New South Wales, Transcript of evidence, 28 April 2014, pp58-59.

¹⁵⁹ Mr Mark Ierace SC, Senior Public Defender, Legal Aid New South Wales, Transcript of evidence, 28 April 2014, pp58-59.

¹⁶⁰ Mr Stephen Odgers SC, Chair, Criminal Law Committee, New South Wales Bar Association, Transcript of evidence, 28 April 2014, p44.

¹⁶¹ Submission 16, Local Court of New South Wales, p5.

¹⁶² Submission 16, Local Court of New South Wales, p5.

¹⁶³ Submission 16, Local Court of New South Wales, p5.

This may be contrasted with a case of aggravated indecent assault of a child under 16 under s 61M(2), which carries a maximum penalty at law of 10 years imprisonment. Although the penalty is higher than that for indecent assault, they carry the same jurisdictional limit of 2 years imprisonment where a sentence is imposed in the Local Court. However, because aggravated indecent assault is a SNP offence, it is impermissible to impose a fixed term sentence. Although the reasoning in Doan may be applicable, a parole period must nonetheless be built into the scheme.

The anomalous net result is that a serious case of indecent assault may receive a fixed term of 2 years imprisonment, but a serious case of aggravated indecent assault must always receive a non-parole period of less than 2 years imprisonment in sentences imposed by the Local Court.¹⁶⁴

NSW Sentencing Council Report

3.117 In December 2010, the Sentencing Council's report, *Examination of the Sentencing Powers of the Local Court in NSW*, investigated increasing the length of Local Court sentences of imprisonment from two years to five years.¹⁶⁵ In conducting the review, the Sentencing Council considered the following matters:

- An analysis of any cases currently heard in the Local Court in which there is an identifiable concern that the jurisdictional limit is leading to sentences that do not adequately reflect the objective criminality of the offences.
- The impact of the proposals on the workloads of affected agencies including the Local and District Courts, police prosecutors, the Office of the Director of Public Prosecutions, Legal Aid Commission, Aboriginal Legal Service, Corrective Services NSW and the State Parole Authority and their capacity to accommodate the change in jurisdiction.
- Whether existing avenues of appeal are adequate.
- The potential impact of the proposals on the incidence of guilty pleas and jury trials.
- The likely effect on rural, remote and Aboriginal communities.
- Any other matter.¹⁶⁶

3.118 The Sentencing Council recommended against increasing the jurisdiction of the Local Court for the following policy reasons:

- Any significant increase in the Local Court jurisdiction would have a real impact on the courts, increasing the workload of the Local Court and decreasing the workload of the District Court, with a consequent risk of delay

¹⁶⁴ Submission 16, Local Court of New South Wales, pp5-6.

¹⁶⁵ New South Wales Sentencing Council, Report: *An examination of the sentencing powers of the Local Court in NSW*, December 2010, p2.

¹⁶⁶ New South Wales Sentencing Council, Report: *An examination of the sentencing powers of the Local Court in NSW*, December 2010, pp3-4.

in the Local Court and an inability to use the resources of the District Court to their full extent.

- While the Local Court has an advantage in that proceedings in that Court are likely to be quicker, more cost effective and less intimidating, any increase in its summary sentencing jurisdiction, risks reducing the incidence of trial by jury.
- A significant consequence of any such increase would be a likely increase in appeals to the District Court with adverse consequences for its trial lists and for the costs of those involved in such cases; as well as a potential reduction in the opportunity for appellate review by the Court of Criminal Appeal whose decisions provide clear and published direction on sentencing issues.
- Any such increase would increase the workload of Police Prosecutors, requiring the provision of additional training and resources, or alternatively an increase in deployment of solicitor advocates attached to the ODPP to handle more serious cases.
- There is a possibility of an increase resulting in sentence creep, in which event there would be consequences for Corrective Services NSW and the NSW State Parole Authority.
- Additional pressure would be imposed on Legal Aid when determining whether election for jury trial would be required in cases likely to attract higher sentences in the Local Court, or in providing adequate representation if those cases remain in the Local Court.
- A greater proportion of cases would be conducted by police prosecutors who although subject to a number of ethical or service requirements, are not subject to the same provisions and obligations attaching to legal practitioners.¹⁶⁷

3.119 The Sentencing Council considered that, rather than increasing the jurisdictional limit of the Local Court, there should be a discretion for Local Court magistrates to refer a case to the District Court for sentencing, where, following a guilty plea or conviction after a hearing, it is satisfied that any sentence it could impose would not be commensurate with the seriousness of the offence.¹⁶⁸

3.120 The Council found that this discretion should be narrowly confined and available as a backstop or safety valve for the exceptional case, which would otherwise risk attracting an inappropriate sentence.¹⁶⁹ The Council further outlined a number of

¹⁶⁷ New South Wales Sentencing Council, *Report: An examination of the sentencing powers of the Local Court in NSW*, (December 2010) pp39-40.

¹⁶⁸ New South Wales Sentencing Council, *Report: An examination of the sentencing powers of the Local Court in NSW*, (December 2010) p45.

¹⁶⁹ New South Wales Sentencing Council, *Report: An examination of the sentencing powers of the Local Court in NSW*, (December 2010) p45.

procedures and safeguards which they considered would be necessary for the operation of the scheme.¹⁷⁰

- 3.121 These types of referral powers are available in a number of other jurisdictions, including Victoria, Queensland, Western Australia, South Australia, Tasmania, the ACT and the Northern Territory.¹⁷¹ Such a power was previously available in NSW under section 476 of the *Crimes Act 1900*. This section was removed with effect from 1 September 1995 by the then Attorney General, who explained:

Magistrates continue to exercise the discretion to offer the defendant summary jurisdiction at varying stages in the course of proceedings. The law presently allows for the exercise of the discretion both at the close of the prosecution case and at the close of the defendant's case. This uncertainty is compounded by the fact that summary jurisdiction may be ordered and accepted at the close of the defendant's case only to have the offer withdrawn as soon as the magistrate becomes aware of the defendant's criminal history. While the exercise of the discretion requires a magistrate to have regard to the defendant's criminal history, it is also fundamental to the integrity of our criminal justice system that the trier of facts not be privy to that information before arriving at a verdict so that undue prejudice does not flow to the defendant. The prosecution and the defendant are in a far better position to determine jurisdiction. The bill recognises this fact by removing from the magistrate any discretion relating to the choice of jurisdiction.¹⁷²

Conclusions

- 3.122 The Committee is not persuaded that the sentencing jurisdiction of the NSW Local Court in relation to child sexual assault offences needs to be increased at this time. The Committee notes that the Local Court currently has jurisdiction to impose terms of imprisonment for up to two years for single offences and five years for multiple offences and that the referral system is operating appropriately.
- 3.123 The Committee also agrees that the District Court is the appropriate jurisdiction for serious criminal offences due to the different standards for prosecutors and that the majority of child sexual assault cases should be dealt with in the District Court, to reflect the serious nature of the offences and to preserve the right to trial by jury.
- 3.124 Chapter 5 of the report makes recommendations to consider the establishment of a Child Sexual Assault Specialist Court, which the Committee considers to be preferable to increasing the jurisdiction of the Local Court. In the Committee's view, a specialist court can develop specific expertise in prosecuting and hearing child sexual assault matters and provide specialist victim services.

¹⁷⁰ New South Wales Sentencing Council, *Report: An examination of the sentencing powers of the Local Court in NSW*, (December 2010) pp45-46.

¹⁷¹ New South Wales Sentencing Council, *Report: An examination of the sentencing powers of the Local Court in NSW*, (December 2010) pp190-6, Annexure G.

¹⁷² New South Wales Sentencing Council, *Report: An examination of the sentencing powers of the Local Court in NSW*, (December 2010) pp42-43.

Chapter Four – Sentencing Patterns

The setting of bounds to the available range of sentences in a particular case must... be distinguished from the proper and ordinary use of sentencing statistics and other material indicating what sentences have been imposed in other (more or less) comparable cases. Consistency of sentencing is important. But the consistency that is sought is consistency in the application of relevant legal principles, not numerical equivalence.¹⁷³

USE OF SENTENCING DATA AND STATISTICS IN SENTENCING DECISIONS

- 4.1 Sentencing decisions involve a complex set of factors, which pose many challenges for judges and magistrates. As part of the sentencing task, these factors have to be weighed to reflect the nature of the crime, the context in which it was committed and available data on previous sentencing trends and statistics for similar offences.
- 4.2 Due to the serious and concerning nature of child sexual assault offences, these sentencing decisions are generally given extensive coverage in the media and stimulate broad discussion in the general community. Such discussion often centres on the appropriateness of the sentences delivered.
- 4.3 Community perceptions of sentencing decisions are guided by the extent to which the available information accurately and comprehensively reflects the complexity of the case and the factors contributing to the commissioning of the offence.
- 4.4 This chapter examines the adequacy and utility of sentencing statistics, databases and other information resources available to inform sentencing decisions. Consideration is also given to the use of this baseline data in providing trends in sentencing and the extent to which such trends provide a useful guide as to how sentencing decisions accurately reflect changing legal, cultural and community attitudes over time.

Data Sources

- 4.5 Legal practitioners have access to a range of information not generally available to the public. Comprehensive data and statistics, derived from court records, are made available to the legal profession as an aid to inform the sentencing process.
- 4.6 Based on detailed information provided through the court system and refined by the NSW Bureau of Crime Statistics and Research (BOCSAR) and the Judicial Commission of NSW, the judiciary is able to compare and calibrate sentencing decisions to recent and past cases. This information serves as a useful marker by which to determine the appropriateness of a particular judgment within a sentencing spectrum. It can also be used by the prosecution and defence when preparing for and presenting cases in court.

¹⁷³ *Barbaro v The Queen; Zirilli v The Queen* [2014] HCA 2 at [40].

- 4.7 It is important to note that sentencing data is one of many factors available to aid and inform such decision making. Statistics alone will not determine the appropriateness of a sentence, or act as a precedent or baseline from which other decisions should be made. Judicial discretion and the application of individualised justice are also intrinsically reflected in these statistics.
- 4.8 Providing a quantifiable measure may give misleading information and enable misinterpretation of the sentencing outcome. At first glance, it could suggest that sentences are alarmingly low, and at face value, this may appear to be the case. However, statistics alone are not indicative of whole of sentence outcomes. In fact, it is very difficult to correlate sentencing statistics with the actuality of the cases from which they are derived.
- 4.9 Statistics are presented in a way that is designed to be of most use to legal practitioners, not as a measure of the court's performance. This cannot be appreciated without a full analysis of the cases that comprise the sample.
- 4.10 The following observation was made in a NSW Sentencing Council report dealing with the penalties for sexual assault offences in NSW:
- Data analysis, and more specifically, the ability to draw conclusions from this process, has been hampered by the limited sample size for most offences dealt with in the higher courts, particularly in relation to the imprisonment rates. For example, there were over 46 separate sexual offences for which offenders were sentenced to imprisonment during the measuring periods. Restricting analysis to instances where in excess of 10 sentences of imprisonment had been imposed limited the review to 15 offences overall.
- The small number of cases renders statistical analysis deeply problematic and subject to error. In this situation it is virtually impossible to draw any meaningful conclusions about sentencing trends. Only two of the offences reviewed yielded a sample of offenders of a sufficient size to minimise the possibility of a handful of outliers giving a misleading impression of trends, and even in those two offences that possibility cannot be eliminated.¹⁷⁴
- 4.11 Caution is therefore required when considering raw sentencing data, as it does not, on its own, provide a clear and representative indication of the full sentences handed down.¹⁷⁵ Despite these drawbacks, statistical data is an important source of information and a useful tool in assisting the sentencing decision making process.

Judicial Information Research System

- 4.12 Sentencing statistical information is provided through the Judicial Information Research System (JIRS), which has been developed and maintained by the Judicial Commission of NSW. JIRS is hosted on the Commission's intranet site and is

¹⁷⁴ New South Wales Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Vol. 3, May 2009, p7.

¹⁷⁵ Ivan Potas, *The Use and Limitations of Sentencing Statistics*, No. 31, December 2004, Judicial Commission of New South Wales, <<http://www.judcom.nsw.gov.au/publications/st/st31>>, accessed on 7 July 2014.

available, on a subscription basis, to other interested parties.¹⁷⁶ JIRS is described as an aid to decision making, aimed at providing information to promote consistency in approach to sentencing, rather than consistently similar sentences.¹⁷⁷

- 4.13 Sentencing statistics are derived from Local, Children's, District and Supreme Courts records. This raw data is collated by BOCSAR, before being provided to the Judicial Commission. The Judicial Commission conducts an additional audit before it is uploaded onto the JIRS database and made available to subscribers.
- 4.14 The Committee received a private briefing and demonstration on the use of JIRS from the Judicial Commission and BOCSAR and was impressed with its functionality in providing quick access to available data. The Commission acknowledged that there were concerns about using JIRS data from a macro perspective, stating:
- Statistics alone do not reflect an overall sentence, i.e. actual time being served by an offender.
 - Statistics do not reflect the principle of totality (ie a measure of total criminality).
 - It is necessary to consider statistics within certain statutory regimes (historic vs. contemporary).¹⁷⁸
- 4.15 In some instances, JIRS allows the extraction of information regarding specific cases that go beyond the type of sentence handed down. This enables users to enter a range of variables related to the offender (age group, prior record and liberty status at time of offence) and the penalty (penalty type, term of sentence, term of non-parole period, fine amounts etc.).¹⁷⁹ This additional information assists in understanding the context of sentencing outcomes. JIRS can also assist users in accessing the cases comprising the sample, where this information is available.
- 4.16 As an illustration of how JIRS statistics are presented and can be utilised, Figure 1 provides information in relation to offences under section 66A(1) of the *Crimes Act 1900*, namely sexual intercourse with a child under 10 years of age. This shows that for the 26 documented cases, 20 offenders (77%) received a term of imprisonment and six offenders (23%) received suspended sentences.
- 4.17 As a means of interrogating the raw data, JIRS enables users to bring up limited details of each case comprising this sample. The available information relating to

¹⁷⁶ See Judicial Commission of New South Wales, *Judicial Information and Research System (JIRS)*, <<http://www.judcom.nsw.gov.au/research-and-sentencing/judicial-information-research-system-jirs/?searchterm=jirs>>, accessed on 7 July 2014.

¹⁷⁷ Mr Ivan Potas, *The Use and Limitations of Sentencing Statistics*, No. 31, December 2004, Judicial Commission of New South Wales, <<http://www.judcom.nsw.gov.au/publications/st/st31>>, accessed on 7 July 2014.

¹⁷⁸ Mr Hugh Donnelly, Director, Research and Sentencing, Judicial Commission of New South Wales, Transcript of evidence, 28 April 2014, p17.

¹⁷⁹ Mr Ivan Potas, *The Use and Limitations of Sentencing Statistics*, No. 31 December 2004, Judicial Commission of New South Wales, <<http://www.judcom.nsw.gov.au/publications/st/st31>>, accessed on 7 July 2014.

JOINT SELECT COMMITTEE ON SENTENCING OF CHILD SEXUAL ASSAULT OFFENDERS
SENTENCING PATTERNS

the six suspended sentence offenders provides a narrow range of offender characteristics, such as age, plea, term of sentence and penalty. These details are set out for two of the six offenders at Figure 2. The absence of other relevant information severely restricts its usefulness in contrasting a current case with previous judgments handed down.

Figure 1 - Penalty Type for the Principal Offences - Crimes Act 1900 - s66A(1) - sexual intercourse - child <10 - SNPP (Item 10)¹⁸⁰

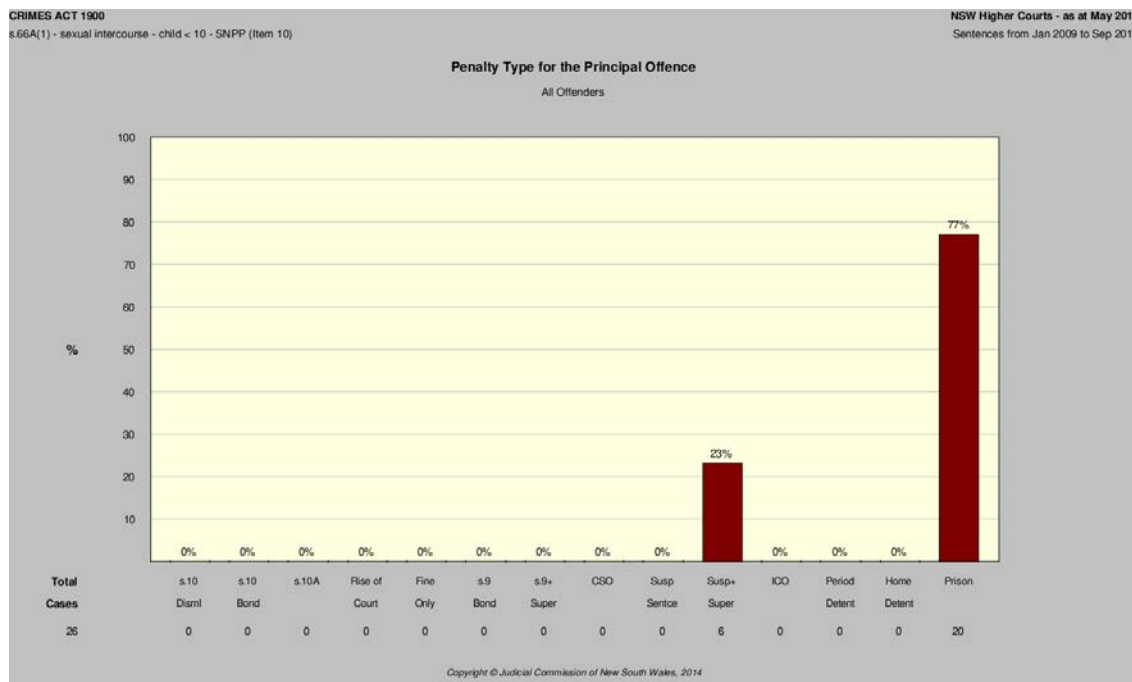


Figure 2 – Suspended Sentences – 1 and 2 of 6 - Case Details - Crimes Act 1900 - s66A(1) - sexual intercourse - child <10 - SNPP (Item 10)¹⁸¹

(1) JusticeLink Case Number:	2012/00398271
Offence Date:	11/12/2012
Sentence Date:	23/09/2013
Offender Characteristics:	Individual — One Offence — No Form 1 Matters No Priors — Plea Guilty — Age 10-17 years
Penalty:	Suspended Sentence with Supervision
Term:	18 months

¹⁸⁰ See Judicial Commission of New South Wales, *Judicial Information and Research System (JIRS)*, <<http://www.judcom.nsw.gov.au/research-and-sentencing/judicial-information-research-system-jirs/?searchterm=jirs>>, accessed on 7 July 2014.

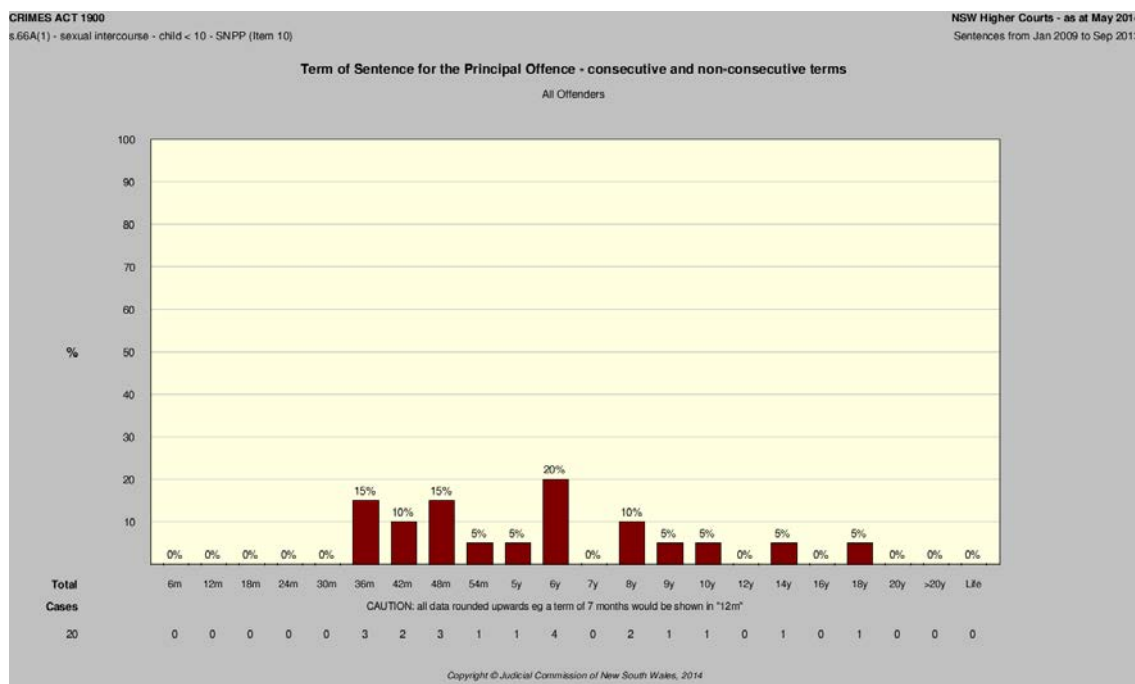
¹⁸¹ See Judicial Commission of New South Wales, *Judicial Information and Research System (JIRS)*, <<http://www.judcom.nsw.gov.au/research-and-sentencing/judicial-information-research-system-jirs/?searchterm=jirs>>, accessed on 7 July 2014.

(2) JusticeLink Case Number:	2012/00162627
Offence Date:	06/01/2011
Sentence Date:	07/03/2013
Offender Characteristics:	Individual — More Than One Offence — Form 1 Matters No Priors — Plea Guilty — Age 10-17 years
Penalty:	Suspended Sentence with Supervision
Term:	2 years

- 4.18 Identical case details relating to the 20 custodial sentence offenders are available on the JIRS database. Additionally, a detailed judgment is available for one case, which was appealed in the NSW Court of Criminal Appeal.
- 4.19 When cases are appealed in the Court of Appeal, published judgments are uploaded on the JIRS database, thereby providing detailed contextual information about the case. The lack of access to the full judgment in cases which have not been appealed renders any comparison or contrasting of similar sentencing decisions impracticable, using JIRS alone.
- 4.20 In relation to offenders found guilty under section 66A(1) of the *Crimes Act 1900*, Figure 3 shows the broad range of sentence terms handed down. It is important to note that figures show only the weighting applied to the section 66A(1) offence and do not provide for the principle of totality.
- 4.21 The totality principle of sentencing requires a judge who is sentencing an offender for a number of offences to ensure that the aggregation of the sentences appropriate for each offence is a just and appropriate measure of the total criminality involved. Where necessary, the Court must adjust the prima facie length of the sentences downward in order to achieve an appropriate relativity between the totality of the criminality and the totality of the sentences.¹⁸²

¹⁸² *Postiglione v The Queen* [2010] HCA 26, 189 CLR 295.

Figure 3 – Term of Sentence for the Principal Offence - consecutive and non-consecutive terms - Crimes Act 1900 - s66A(1) - sexual intercourse - child <10 - SNPP (Item 10)¹⁸³



Consistency in Sentencing

4.22 The issue of statistics not reflecting the principle of totality was highlighted when the Hon. Anthony Whealy QC, Deputy Chair, NSW Sentencing Council, was asked to consider the average sentences for section 66A(1). He commented that:

It is impossible to tell from that statistic. On its face it looks rather alarming. I do not think anyone could deny that. Unless you conduct a proper analysis of all of these charges and see just what is really behind these sentences, it really is quite difficult to draw a simple conclusion. I am agreeing, I think, as the Sentencing Council would agree, that these figures are very much lower than the standard non-parole period and very much lower than the maximum penalty, but we simply do not know why unless we can conduct that detailed analysis.¹⁸⁴

4.23 Similarly, Legal Aid NSW submitted that:

Consistency is not demonstrated by, and does not require, numerical equivalence. Presentation of the sentences that have been passed on federal offenders in numerical tables, bar charts or graphs is not useful to a sentencing judge. It is not useful because referring only to the lengths of sentences passed says nothing about why sentences were fixed as they were...¹⁸⁵

¹⁸³ See Judicial Commission of New South Wales, *Judicial Information and Research System (JIRS)*, <<http://www.judcom.nsw.gov.au/research-and-sentencing/judicial-information-research-system-jirs/?searchterm=jirs>>, accessed on 7 July 2014.

¹⁸⁴ The Hon. Anthony Whealy QC, Deputy Chair, New South Wales Sentencing Council, Transcript of evidence, 28 April 2014, pp15-16.

¹⁸⁵ Submission 12, Legal Aid New South Wales, p2.

- 4.24 Mr Whealy QC and Legal Aid NSW both highlight a fundamental point, namely that a detailed analysis of the cases that comprise the statistical sample is the only means by which to extract any value from statistics and use them for the purpose of sentencing determinations.

R v Bloomfield

- 4.25 The use of statistics for sentencing is not clear cut, for reasons highlighted in *R v Bloomfield*, where the Hon. Justice Spigelman AC listed eight points to consider in the use of sentencing statistics:

- (i) The sentence to be imposed depends on the facts of each case and for that reason bald statistics are of limited use.
- (ii) Statistics may be less useful than surveys of decided cases, which enable some detail of the specific circumstances to be set out for purposes of comparison.
- (iii) Caution needs to be exercised in using sentencing statistics, but they may be of assistance in ensuring consistency in sentencing.
- (iv) Statistics may provide an indication of general sentencing trends and standards.
- (v) Statistics may indicate an appropriate range, particularly where a significant majority or a small minority fall within a particular range. Also when a particular form of sentence such as imprisonment is more or less likely to have been imposed.
- (vi) Statistics may be useful in determining whether a sentence is manifestly excessive or inadequate.
- (vii) Statistics are least likely to be useful where the circumstances of the individual instances of the offence vary greatly, such as manslaughter.
- (viii) The larger the sample the more likely the statistics are likely to be useful.¹⁸⁶

- 4.26 The considerations identified by Justice Spigelman are regularly cited in the use of JIRS sentencing data and other statistics and also supported by the decision in *R v BGS*.¹⁸⁷ In *R v BGS*, the Hon. Justice Virginia Bell AC noted that statistics may be less useful than surveys of decided cases when comparing sentences.¹⁸⁸

- 4.27 Furthermore, in *Wong v R*, Justices Gaudron, Gummow and Hayne JJ observe:

The actual sentence which a court imposes on an offender reveals very little about the reasons which the court had for fixing that sentence...the sentence itself gives rise to no binding precedent. What may give rise to precedent is a statement of principles which affect how sentencing discretion should be exercised, either generally or in particular kinds of case. It is, therefore, fundamentally wrong to speak of 'qualitative aspects' of discretionary decisions.¹⁸⁹

¹⁸⁶ *R v Bloomfield* [1998] 44 NSWLR 734.

¹⁸⁷ *R v BGS* [1999] NSWCCA 89.

¹⁸⁸ Mr Ivan Potas, *The Use and Limitations of Sentencing Statistics*, No. 31, December 2004, Judicial Commission of New South Wales, <<http://www.judcom.nsw.gov.au/publications/st/st31>>, accessed on 7 July 2014.

¹⁸⁹ *Wong v R* [2001] 207 HCA 64 at [57].

4.28 These observations reflect the weighting and interrelated underlying considerations which inform sentencing, indicating that the outcome of each case depends on its own particular circumstances. While statistical information can help to inform the decision making process, it does not provide the judiciary with binding precedents. When viewed in this context, the value of statistics can be better appreciated.¹⁹⁰

4.29 The Local Court of NSW submitted that:

As the NSW Court of Criminal Appeal has noted, the JIRS sentencing data should be approached as “reflect[ing] what was regarded as appropriate in the wide variety of circumstances in the cases reported in those statistics.”¹⁹¹

4.30 In summary, Mr Ivan Potas of the NSW Judicial Commission writes:

...as an aid to the sentencing exercise, statistics and analogous cases should not be seen as in competition but as operating in tandem. What works best is to analyse and compare individual cases with other cases in conjunction with the statistics. This enables other decided cases to be located in the statistical range and helps to provide valuable reference points. Assuming the range and the cases are regarded as relevant and useful, placement of the sentence to be imposed within the statistical range or checking the sentence to be imposed against the statistical range then becomes a more concrete and simpler task.¹⁹²

Conclusions

4.31 The Committee recognises the inherent difficulties in using statistical data to understand and interpret sentencing decisions. Even though patterns can be established for individual offences, it is clear that a whole of sentencing outcome cannot easily be measured given the wide range of variables and complexities of the sentencing process.

4.32 The Committee notes that sentencing data is one of many tools that the judiciary has available when considering the appropriateness of sentencing decisions. As previously described, statistics are of limited use on their own and need to be considered in context. Based on the evidence received, the judiciary is mindful of this and uses the available data as a limited but useful guide for sentencing, without relying unduly on any trend figures.

4.33 The Committee is concerned by the limited availability of judgments and cases through JIRS. Although the point has been reinforced during the inquiry that a thorough analysis based on individual cases is required to make an informed judgement about sentence appropriateness, there is still a common perception that many sentences imposed for serious offences may be too lenient.

4.34 The judicial database provides restricted access to judgments which have not been appealed and this is a fundamental weakness of JIRS and limits its utility.

¹⁹⁰ Mr Ivan Potas, *The Use and Limitations of Sentencing Statistics*, No. 31, December 2004, Judicial Commission of New South Wales, <<http://www.judcom.nsw.gov.au/publications/st/st31>>, accessed on 7 July 2014.

¹⁹¹ Submission 16, Local Court of New South Wales, p5; See *R v Lao* [2003] NSWCCA 315.

¹⁹² Mr Ivan Potas, *The Use and Limitations of Sentencing Statistics*, No. 31, December 2004, Judicial Commission of New South Wales, <<http://www.judcom.nsw.gov.au/publications/st/st31>>, accessed on 7 July 2014.

The lack of more detailed case information is also reflected in media reporting and contributes to the public narrative that sentencing for serious crimes is too lenient and not commensurate with the gravity of offences.

- 4.35 The Committee is concerned that available sentencing data does not allow for an appreciation of the reasons for the leniency or severity of sentences handed down in child sexual assault cases. While appreciating that statistical summaries and cumulative data on sentencing have a role, more should be done to inform the public about the limitations of the data system and to improve transparency outside the legal system.

Recommendation 9

The Committee recommends that the NSW Department of Justice examines strategies to improve available public information on sentencing outcomes for child sexual assault matters by:

- **Presenting the information in a clear and concise form that is easy to interpret.**
- **Describing the limitations of the data for interpretive purposes.**
- **Providing a more comprehensive measure of the totality of sentences handed down to child sexual assault offenders, in order to overcome perceived claims of judicial leniency.**

CURRENT LIMITATIONS OF AVAILABLE DATA

- 4.36 As described above, current limitations of the JIRS data derives from the inherent nature of the database itself. The presentation of complex decision making processes in graphical form has drawbacks and there may be scope to improve current statistical representations by addressing the following categories and areas of reporting:

- Offender-based statistics.
- Variances caused by the date of sentencing and rounding off.
- Time delays associated with the uploading of data.

Offender-Based Statistics

- 4.37 Sentencing data reported in JIRS only reflects principal offences. In instances where an offender is sentenced for a number of different offences, JIRS will record only one sentence, namely the highest or 'head' sentence, for statistical purposes. This is so that the number of single entries in the database reflects the number of offenders dealt with by the courts. It is acknowledged that this means of presenting data produces statistics that are 'offender-based', rather than 'sentence-based'.¹⁹³

¹⁹³ Mr Ivan Potas, *The Use and Limitations of Sentencing Statistics*, No. 31, December 2004, Judicial Commission of New South Wales, <<http://www.judcom.nsw.gov.au/publications/st/st31>>, accessed on 7 July 2014.

- 4.38 While this narrows the scope of the data provided by the courts, measuring sentences by reference to a principal offence provides for ease of comparison, but does not give a clear indication of the full sentence imposed on an offender. It also gives rise to fewer offences being included in the JIRS statistics, which can restrict usable comparisons for 'lesser offences'. This is further compounded when consecutive sentences are handed down.
- 4.39 Following *Pearce v The Queen*, the judiciary is required to give an appropriate sentence for each offence.¹⁹⁴ Thus, when a number of offences accumulate and form part of one judgment, JIRS statistics do not reveal the aggregate sentence for an offender or reflect the objective seriousness of a single stand-alone offence.
- 4.40 This can further distort the raw statistics and skew any sentencing trends which may be revealed if an offender is charged with a number of offences. Again, it is necessary to look at the cases that comprise the sample for a better appreciation of the spectrum of offences.
- 4.41 In the case of *R v Lindsay Ronald Jensen*, the District Court of NSW sentenced the offender on five counts, to be served concurrently, with a cumulative total of five years imprisonment and eligibility for parole after three years. Only one of these counts will have been recorded in JIRS as the principal offence under section 66A(1), for sexual intercourse for a child under 10 years of age. Thus, the sentence for this count is less than the overall sentence, which will not be reflected in the statistics. The effect of this is illustrated in the judgment below:

Sentences

- Count 1.
9 month fixed term 18.12.06 – 17.09.07
- Count 2.
2 ½ year non-parole period 18.06.07 – 17.12.09
2 year balance of term, expiring 17.12.11
- Count 3.
2 year fixed term 18.12.06 – 17.12.08
- Count 4.
18 month fixed term 18.12.06 – 17.06.08
- Count 5.
21 month fixed term 18.12.06 – 17.09.08

The offender is eligible for release on parole on 17.12.09. In effect, I have imposed a sentence of 5 years' imprisonment, of which the offender will serve 3 years before he is eligible for release to parole.¹⁹⁵

Variations Caused by the Date of Sentencing and Rounding Off

- 4.42 The precision of JIRS statistics is also affected by data variance. This is a process by which successful appeals are made to override original sentences. Corrected sentences are re-uploaded onto JIRS by the Sentencing Council and may appear

¹⁹⁴ Mr Ivan Potas, *The Use and Limitations of Sentencing Statistics*, No. 31, December 2004, Judicial Commission of New South Wales, <<http://www.judcom.nsw.gov.au/publications/st/st31>>, accessed on 7 July 2014; See *Pearce v The Queen* [1998] 194 CLR 610.

¹⁹⁵ *R v Lindsay Ronald Jensen* [2007] NSWDC 15.

at the lower range of sentencing (as amended) to show a more conservative sentence than the one first handed down.¹⁹⁶

- 4.43 At the other end of the spectrum, as observed by Mr Whealy QC, a number of successful appeals have had their sentences increased considerably, revealing inadequate sentencing in the first instance.¹⁹⁷
- 4.44 A further illustration of sentencing variability applies where sentences may have factored in time already spent in custody, which will result in the imposition of a shorter sentence. Again, this has the capacity to show a more lenient sentence than was effectively the case and skews the statistical sample.
- 4.45 As a final marker of variability, sentences are rounded up for charges exceeding two years. For statistical purposes, a sentence of four years and six months will be recorded as a five year sentence.¹⁹⁸
- 4.46 These adjustments to the data result in variances which affect the comparability and accuracy of the sentencing statistics presented in JIRS and also contribute to misleading perceptions of sentence leniency and severity.

Uploading of Data

- 4.47 Another limitation to the utility of JIRS data is its currency and how often it is uploaded. The Committee understands that after the provision of data by BOCSAR, the Judicial Commission conducts its own audit before uploading new data onto JIRS. As the JIRS website only displays data from the most recent five year period, this prevents the display of data beyond the five year limit, which is redacted when new data is added.
- 4.48 A further issue arises in relation to the currency of the data contained at Figure 1 and Figure 3. The latest Information, accessed on 7 July 2014, covers the period from January 2009 to September 2013. This indicates that no new information has been uploaded for the better part of a year.

Conclusions

- 4.49 Current data utilised to inform sentencing decisions is subject to a range of limitations concerning comprehensiveness, timeliness and accuracy. As previously stated, the JIRS database is designed as a statistical tool to assist the judiciary and to provide a reference base for the legal profession.
- 4.50 The Committee is concerned that only the principal sentence for each offender is entered into JIRS. Offender-base statistics may make for a more simplified means of providing a statistical summary of and uploading data into JIRS, but this also compromises the data available for less serious offences.

¹⁹⁶ Mr Ivan Potas, *The Use and Limitations of Sentencing Statistics*, No. 31, December 2004, Judicial Commission of New South Wales, <<http://www.judcom.nsw.gov.au/publications/st/st31>>, accessed on 7 July 2014.

¹⁹⁷ The Hon. Anthony Whealy QC, Deputy Chair, New South Wales Sentencing Council, Transcript of evidence, 28 April 2014, pp 15-16.

¹⁹⁸ Ivan Potas, *The Use and Limitations of Sentencing Statistics*, No. 31, December 2004, Judicial Commission of New South Wales, <<http://www.judcom.nsw.gov.au/publications/st/st31>>, accessed on 7 July 2014.

- 4.51 The Committee is also concerned about the time delay in uploading data onto JIRS. This means that the most recent sentencing information available on JIRS is up to 12 months out of date.

Recommendation 10

The Committee recommends that the NSW Bureau of Crime Statistics Research collates and compiles information to be uploaded by the NSW Judicial Commission onto the Judicial Information Research System on a six monthly basis, so that data concerning child sexual assault cases is able to be accessed without a significant time delay.

Recommendation 11

The Committee recommends that the NSW Bureau of Crime Statistics Research and the NSW Judicial Commission examine options to enhance the data available through the Judicial Information Research System to include sentence-based statistics and details on all cases, with advanced search options to enable easy access to data in a range of formats.

ADEQUACY OF DATA COLLECTION

- 4.52 As well as the data limitations covered earlier in the chapter, four additional deficiencies have been identified regarding the adequacy of JIRS data, namely:

- Availability of judgments.
- Transparency.
- Local Court statistics.
- Availability of historical data.

- 4.53 Addressing these deficiencies will inevitably involve more or better targeted resourcing and improvements to existing practices and procedures.

Availability of Judgments

- 4.54 As previously outlined, JIRS does not provide a direct link to judgments for the majority of sentences. The Judicial Commission informed the Committee that one of the strengths of JIRS was its capacity to drill down to case level, so as to better understand the reasoning behind sentences and to identify outliers. As the database is currently configured, this is simply not possible in the majority of cases as only a handful of judgments are uploaded to JIRS.

- 4.55 The Committee has been told that reviewing full judgments is critical for sentencing statistics to be fully appreciated. This is problematic when the only judgments made available and uploaded onto JIRS are cases that have been appealed. This is a key weakness of the JIRS database and does not support the Committee's initial impression of its scope.

- 4.56 The Committee understands that it is possible to use JusticeLink Case numbers, available through JIRS, as a means of identifying and obtaining detailed

judgments for specific cases. However, this needs to be sought from the Law Courts Library for NSW District Court cases.

- 4.57 In order to obtain a transcript, a judicial officer must apply directly to the court for a copy of the judgments, which may be time consuming and costly. Therefore, unless these judgments are already available, additional delays may be incurred.
- 4.58 The above considerations make JIRS much less usable. In the absence of individual case details readily available as a link through JIRS, as is the case where an appeal has been made to a higher court, judicial officers have access to a database with raw statistics but without qualifying information, significantly limiting its usefulness.

Transparency

- 4.59 The rationale for the court's decision making process, and its outcomes, are not apparent to anyone outside the legal fraternity. Providing public access to JIRS is of little practicable use without the context of the judgments themselves.
- 4.60 It would appear that no real effort has been made to assist the public in its understanding of sentencing decisions. Currently, raw statistics are available with the disclaimer that they cannot be appreciated without analysing individual cases, only accessible to those in the legal profession.
- 4.61 Mr Mark Ierace SC, Senior Public Defender, Legal Aid NSW, remarked to the Committee:
- I would like to see judgments placed online before they are handed down. If the judge can have it typed before it is handed down then surely with a small increase in resources it could be put on the website immediately after it is handed down. I am very encouraged to see the Chief Justice providing summaries of sentencing judgments so that the media can, if they want to, get a fair encapsulation of all of the relevant features. That would capitalise on what the research is telling us; that is, that when people have all the information they are happier about sentences.¹⁹⁹
- 4.62 The Committee supports Mr Ierace's comments. JIRS statistics are compromised by lack of direct access to the cases that comprise the sample. While such information may be available to legal practitioners on request, access can be resource intensive, costly and onerous. Without this information, the efficacy of the database is significantly undermined.

Local Courts Statistics

- 4.63 Reference has already been made to the disparity in sentencing context provided in JIRS for judgments made in lower court jurisdictions, as opposed to cases decided in district and appeals courts. In the Local Court, it is not possible to review case details or access judgments through the JIRS database.
- 4.64 Figure 4 (below) shows sentences handed down in NSW Local Courts for offences under section 66C(3) of the *Crimes Act 1900*, sexual intercourse with a child

¹⁹⁹ Mr Mark Ierace SC, Senior Public Defender, Legal Aid New South Wales, Transcript of evidence, 28 April 2014, p58.

JOINT SELECT COMMITTEE ON SENTENCING OF CHILD SEXUAL ASSAULT OFFENDERS
SENTENCING PATTERNS

between 14 and 16. While providing raw sentencing data, it does not allow the user to access a table of case details or links to judgments in the same way as cases that are heard in the District Court and NSW Court of Criminal Appeal, respectively.

4.65 As an illustration of the benefit of enriching the available data, Figure 5 shows the dropdown menu that would allow access to this level of detail, contrasted with Figure 4, where this is not available.

Figure 4 - Penalty Type for the Principal Offence - *Crimes Act 1900 - s66C(3) - sexual intercourse with child between 14 and 16*²⁰⁰

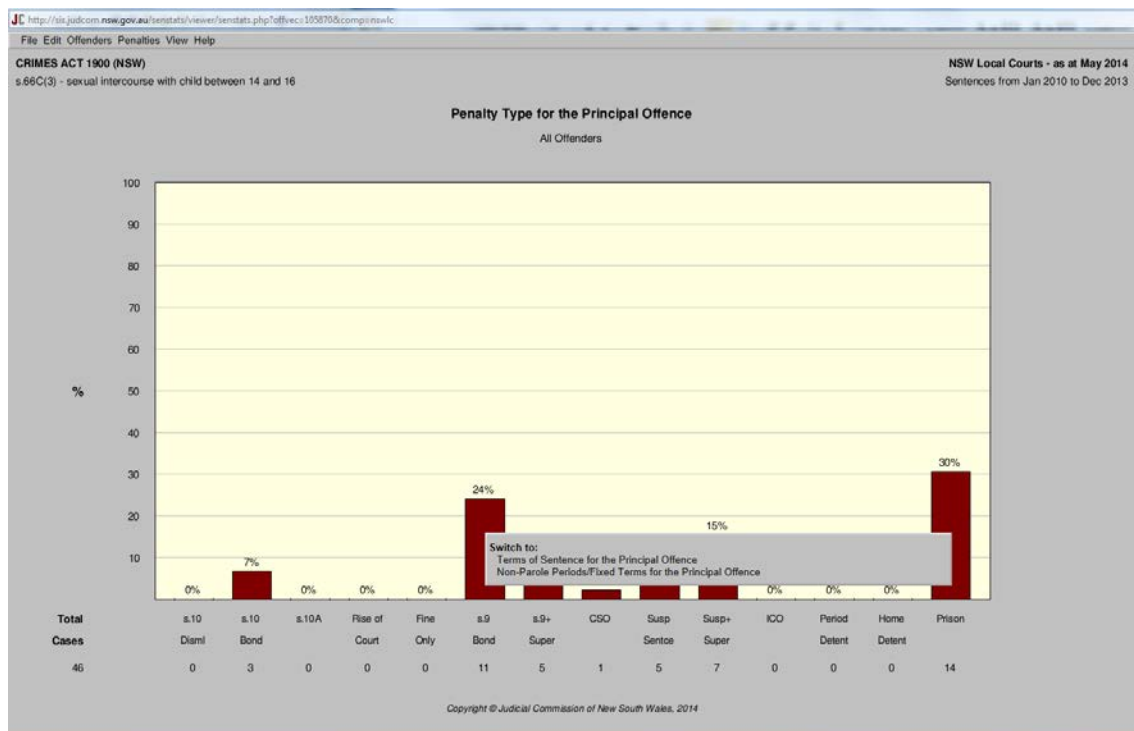


Figure 5 - JIRS drop down menu for penalty type²⁰¹

Switch to:

- Term of Sentence for the Principal Offence - consecutive and non-consecutive terms
- Term of Sentence for the Principal Offence - non-consecutive terms only
- Non-parole Period/Fixed Term for the Principal Offence - non-consecutive terms only
- Term of Sentence for the Principal Offence - consecutive terms only

OR

Display a table of case details, including judgments where available

²⁰⁰ See Judicial Commission of New South Wales, *Judicial Information and Research System (JIRS)*, <<http://www.judcom.nsw.gov.au/research-and-sentencing/judicial-information-research-system-jirs/?searchterm=jirs>>, accessed on 7 August 2014.

²⁰¹ See Judicial Commission of New South Wales, *Judicial Information and Research System (JIRS)*, <<http://www.judcom.nsw.gov.au/research-and-sentencing/judicial-information-research-system-jirs/?searchterm=jirs>>, accessed on 7 August 2014.

Historical Data Availability

- 4.66 After the development of the JIRS database in 1988, the Judicial Commission made aggregate sentencing information available for all cases dating from 1989, including all judgments from the Court of Criminal Appeal.
- 4.67 In the area of child sexual assault cases, many of the offences coming to light were committed prior to 1989. This means that significant numbers of cases are not registered on JIRS, thereby denying the Court and legal representatives easy access to relevant sentencing information when prosecuting such offences.
- 4.68 This also raises the question of whether the sentencing patterns that existed at the time of the offence should be applied or the more recent patterns of the offence at the later date of the conviction. A resolution to this question was provided by the specially constituted five-judge bench of the Court of Criminal Appeal in *R v MJR*, which held that a court is:
- ... to take into account the sentencing practice as at the date of the commission of an offence...²⁰²
- 4.69 As much public criticism of the apparent leniency of sentencing for serious offences does not take account of the historical nature of the crimes and the appropriate sentencing terms applicable at the time, such information would assist in providing greater context for sentencing decisions.

Conclusions

- 4.70 The Committee considers that the lack of detailed sentencing information and limited access to judgments through the JIRS database is a source of concern affecting all levels of courts in NSW, but particularly the lower courts. The Committee agrees with Mr Ierace SC that, with a modest increase in resourcing, the judiciary should be able to provide all judgments for incorporation into JIRS, as a matter of course.
- 4.71 The Committee recognises that it would be resource intensive to provide data for historical cases and for cases heard in NSW District Courts. However, not doing so limits the usefulness of currently available data for a significant proportion of cases concerning child sexual assault.
- 4.72 Much more can be done to strengthen the range and depth of statistical data currently available.

Recommendation 12

The Committee recommends that the NSW Government surveys the judiciary to ascertain how valuable they find the Judicial Information Research System database, how useful it is for the sentencing process and what improvements should be made to improve its utility and functionality.

²⁰² *R v MJR* [2002] 54 NSWLR 368.

Recommendation 13

The Committee recommends that the judgments of all cases involving child sexual assault heard in all NSW court jurisdictions be uploaded onto the Judicial Information Research System database, in the same way that NSW Court of Criminal Appeal cases are routinely uploaded, to strengthen the utility, transparency and integrity of the database.

Recommendation 14

The Committee recommends that the NSW Judicial Commission provides data, through the Judicial Information Research System, on all historical child sexual assault cases.

CURRENT SENTENCING PATTERNS

- 4.73 As indicated earlier in the chapter, current sentencing data is subject to a number of deficiencies, thereby reducing its value in comparing historical and current sentencing decisions and limiting its credibility in charting trends.
- 4.74 Any consideration of current sentencing patterns must also recognise and take into account a number of related contexts in which sentencing decisions are made. These include law reform, variations between sentences, the impact of guilty pleas, and the availability of suitable treatment programs.

Law Reform

- 4.75 In its report on Sentencing, the NSW Law Reform Commission (NSWLRC) outlined that current sentencing patterns in NSW occur in the following contexts:
- The high rate of imprisonment in NSW compared with other Australian jurisdictions.
 - Community concerns about the overrepresentation of certain groups in the prison population, including Aboriginal people and Torres Strait Islanders and people with cognitive and mental health impairments.
 - The complexity of existing sentencing law.
 - A history of piecemeal legislative enactments that now sees sentencing practice and administration embodied in several statutory instruments.²⁰³
- 4.76 The Commission also noted that sentencing law in NSW has moved away from regarding retribution through imprisonment as the prime response to criminal offending. This move recognises that ‘full time imprisonment is a blunt instrument that can be counterproductive for the offender and is invariably expensive for the state.’²⁰⁴
- 4.77 The Commission outlined that both within NSW and other Australian jurisdictions there has been a ‘significant shift in sentencing theory towards improving alternatives to imprisonment to facilitate rehabilitation and reduce the risk of

²⁰³ New South Wales Law Reform Commission, *Sentencing*, Report 139, July 2013, p2.

²⁰⁴ New South Wales Law Reform Commission, *Sentencing*, Report 139, July 2013, p3.

harm to the community'.²⁰⁵ NSW examples include the introduction of intensive correction orders, home detention, diversionary intervention programs and the establishment of the Drug Court.

- 4.78 The Commission further outlined that legislation was enacted in 2006, permitting the NSW Supreme Court to make a continuing detention order or an extended supervision order in relation to a serious sexual offender. This applies when, prior to the person's release, it is satisfied to a high degree of probability that the offender poses an unacceptable risk of committing a serious sex offence if he or she is not kept under supervision.
- 4.79 The NSW Government has extended these provisions to high-risk violent offenders in response to a report from the New South Wales Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options*, (2012).
- 4.80 Section 21A of the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW) commenced on 1 February 2003. As well as specifying the factors that a court is required to take into account when sentencing, this Act introduced a more extensive statutory statement of the purposes of sentencing.
- 4.81 As indicated earlier in the report, the section provides a special rule for child sexual offences in stating that 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 [section 21A(5A)].
- 4.82 Additionally, as previously described in chapter 3, the introduction of the Standard Non-Parole Period (SNPP) Scheme inserted into the *Crimes (Sentencing Procedure) Act 1999* by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill 2002*, has resulted in changes to sentencing patterns and trends.
- 4.83 A further consideration would be the extent to which any future expansion in the issuing of Guideline Judgments may result in additional changes to sentencing patterns. A discussion of Guideline Judgments is provided in the following chapter.
- 4.84 It is therefore important to consider sentencing trends in the broader legal context and the way in which the justice system evolves to reflect societal and community views and attitudes and develops legislative strategies to respond to these changes.

Sentencing: 2003 vs 2012

- 4.85 BOCSAR data highlights that there has been an upward trend in the percentage of people convicted of sexual assault who are then imprisoned (from 64.4% in 2003,

²⁰⁵ New South Wales Law Reform Commission, *Sentencing*, Report 139, July 2013, p3.

to 78.5% in 2012) and the percentage of people convicted of child sexual assault imprisoned (from 57.8% in 2003, to 77.0% in 2012).²⁰⁶

- 4.86 There have also been upward trends in the average duration of imprisonment for child sexual assault (from 30 months in 2003, to 34 months in 2012), and the proportion of offenders imprisoned for a child sexual assault offence compared with offences involving adult victims (from 50% in 2003, to 66% in 2012). Child sexual assault offenders in custody now outnumber those who commit sexual assault offences against an adult victim.²⁰⁷

Recent sentences under s66A(2)

- 4.87 An illustration of more recent custodial sentence increases for aggravated child sexual assault offences is derived from information contained in JIRS relating to convictions recorded between January 2009 and December 2013 and set out below. JIRS reported that 29 custodial sentences were imposed in relation to offences arising out of section 66A(2) of the *Crimes Act 1900*, where this offence was the principal offence. On average, the overall sentence was 14% higher than the section 66A(2) principal offence sentence.

Table 9 - Recent sentences under s66A(2) of the *Crimes Act 1900*

Offender	Term for section 66A(2) principal offence	Total sentence	Percentage increase
1	30 months	30 months	-
2	60 months	69 months	13 %
3	72 months	72 months	-
4	84 months	120 months	30 %
5	84 months	144 months	42 %
6	84 months	96 months	12 %
7	75 months	108 months	31 %
8	96 months	108 months	11 %
9	96 months	120 months	20 %
10	96 months	108 months	11 %
11	94 months	100 months	6 %
12	90 months	96 months	6 %
13	108 months	108 months	-
14	108 months	180 months	40 %
15	108 months	144 months	25 %
16	108 months	112 months	4 %
17	120 months	168 months	29 %
18	110 months	122 months	10 %

²⁰⁶ Submission 22, New South Wales Government, p5.

²⁰⁷ Submission 22, New South Wales Government, p5.

SENTENCING OF CHILD SEXUAL ASSAULT OFFENDERS
SENTENCING PATTERNS

19	117 months	123 months	5 %
20	120 months	168 months	29 %
21	144 months	156 months	8 %
22	144 months	144 months	-
23	144 months	144 months	-
24	126 months	144 months	12 %
25	132 months	132 months	-
26	156 months	216 months	28 %
27	180 months	213 months	15 %
28	216 months	225 months	4 %

Application of existing offence provisions to young offenders

4.88 It is noteworthy that the data includes historic child sexual assault cases as well as cases of consensual sexual intercourse between two young people of a similar age, where one or both were under the age of 16. Such offenders receive lower penalties, with historic child sexual assault offences carrying far lower maximum penalties than present offences.

4.89 In its submission to the Inquiry, the NSW Government outlined that in the last 12 months, 4037 young people have entered custody on either remand or control and of these, 32 or 0.8% entered custody for child sexual assault offences. Young people found guilty of child sexual assault offences are generally required to attend a specific sexual offending treatment program. In NSW, consent is not a defence to the child sexual assault offences set out in section 77 of the *Crimes Act 1900*, including the sexual intercourse offences under section 66C.²⁰⁸

Sentencing Pattern Variation

4.90 In its submission to the inquiry, the Local Court stated that sentencing consistency relates to ‘consistency in the application of the relevant legal principles, not some numerical or mathematical equivalence’ that is achieved by ‘having proper regard not just to what has been done in other cases, but why it was done’.²⁰⁹

4.91 Note should also be taken of the diversity of the legislative list of purposes for which a court may impose a sentence as set out in section 3A of the *Crimes (Sentencing Procedure) Act 1999*. The Local Court emphasised that sentencing involves considerable challenges for the court in seeking to arrive at an outcome that is just in all the circumstances of the offence and having regard to the object of consistency of approach.²¹⁰

4.92 The Local Court also highlighted that the sentencing data captured by JIRS cannot of itself identify whether a sentence in any particular instance is within the range

²⁰⁸ Submission 22, New South Wales Government, pp17-18.

²⁰⁹ Submission 16, Local Court of New South Wales, p4, quoting *Hill v R; Jones v R* [2010] HCA 45 at [18].

²¹⁰ Submission 16, Local Court of New South Wales, p5.

of sentences that may be appropriate for a given offence, but rather is simply indicative of the general pattern of sentencing.²¹¹

- 4.93 In addition, the Local Court brought the Committee's attention to the standard non-parole period SNPP for offences against sections 61M(1) and (2) being five years and eight years respectively. Given that the Local Court routinely deals with offences under sections 61M(1) and (2), and the Local Court is limited to imposing a two year sentence for a single offence, it is not possible for an offender sentenced by the Local Court to receive a sentence prescribed by the SNPP. The Local Court noted that the SNPP scheme does not apply to offences dealt with summarily.
- 4.94 JIRS data outlines that between October 2011 and September 2013, a total sentence at the Local Court's jurisdictional limit was imposed in 6.2% of sentences of full-time imprisonment for offences under section 61M(2) or 4.0% of all sentences for such offences. This represents an increase from 3.9% and 2.9% respectively in the period October 2009 through to September 2011.²¹²

Guilty Plea Impact on Sentencing

- 4.1 The NSW Ombudsman has provided evidence that between 2007 and 2011, there were 2,130 sex offence matters involving a child victim finalised in NSW which resulted in a conviction for at least one offence. Of these convictions, 1,673 (79%) were achieved by way of a plea. The Ombudsman's Office reviewed a sample of 13 child sex offence matters where a conviction was reached due to a guilty plea and identified that there were only three matters where the defendants pleaded guilty to all of the charges against them. In the remaining ten matters, a plea was entered to a lesser charge.
- 4.2 As the Office of the Ombudsman stated in its report:
- Charge negotiations are frequently utilised as a tool by prosecutors to secure a conviction against an offender without having to require a victim to give evidence at a trial. While the sentence received may ultimately be reduced, this is often considered to be a better outcome for the victim than having to go through the traumatic process of a trial or hearing. It also provides a mechanism to achieve a conviction in cases where the likelihood of a conviction at a hearing or trial may not be high. Depending on the nature of the charges, a conviction may result in the offender being placed on the Child Protection Register, enabling police to have greater powers to monitor the offender's behaviour once released from prison.²¹³
- 4.3 A review of the JIRS database indicates that in relation to child sexual assault offences under section 66A(1) of the *Crimes Act 1900*, 19 out of 24 offenders who received custodial sentences entered guilty pleas. Similarly, 23 of the 29 offenders sentenced under the aggravated child sexual assault provisions outlined in section 66A(2) of the Act entered a guilty plea.

²¹¹ Submission 16, Local Court of New South Wales, p5.

²¹² Submission 16, Local Court of New South Wales, p6.

²¹³ New South Wales Ombudsman, *Responding to Child Sexual Assault in Aboriginal Communities, A Report Under Part 6A of the Community Services (Complaints, Reviews and Monitoring) Act 1993*, December 2012, p152.

Treatment and Management of Child Sex Offenders

- 4.4 Chapter 6 of the report details the range and availability of current custodial and community based treatments for child sexual assault offenders. As well as describing the nature of these programs and their administration, the Committee highlights shortcomings with the current operation of these programs and makes recommendations for their expansion and improvement.
- 4.5 The identified issues related to the administration of the existing treatment and rehabilitation system has, of necessity, influenced their take-up and guided sentencing decisions and trends.
- 4.6 Increased availability of better targeted treatment programs, supplemented with research based evidence of their success in reducing reoffending, should serve to increase their usefulness as an alternative to exclusive incarceration and may further affect judgments and sentencing trends.

Conclusions

- 4.7 The Committee's examination of sentencing patterns reinforces the views expressed earlier in the chapter that the complexity of the sentencing process does not lend itself to quick and easy interpretation. The limitations of the data gathering and recording system, combined with the wide range of contextual factors to be considered, makes this less than a precise science in determining patterns and trends.
- 4.8 The requirement to weigh the particular circumstances of each individual case and deliver a just outcome makes a reliance on raw data an imperfect means of assessing the appropriateness of outcomes. The Committee reiterates its already expressed views that improvements should be made to the JIRS database to assist the legal profession and the broader community.
- 4.9 While it is clear that the overall length of sentences for serious child sexual assault offending has increased, this has to be seen in the broader context of legislative changes and altered community attitudes to such offending. It is important, nevertheless, to ensure that the media and broader community are made aware of the nature of the sentencing process and the way sentencing information is collected and disseminated.
- 4.10 In a recent development, changes to the broadcasting of court proceedings set out in the *Courts Legislation Amendment (Broadcasting Judgments) Act 2014* will assist in making the delivery of verdicts, not subject to exclusionary rules, a more transparent process and further assist the openness of court proceedings.

Recommendation 15

The Committee recommends that the NSW Government conducts information sessions for journalists engaged in court reporting on serious child sexual offence cases.

Chapter Five – Reform Options

As a victim of sex crime, I do not want my assailants to be treated unjustly, I do not wish for them to be subjected to a crushing sentence or have their rights abused. However, I do not want their crimes to be denied, diminished or excused either. Deficient sentences damage the courts' reputation in the eyes of all victims of child sexual assault. This deters victims from making complaints, which would help protect them and society.²¹⁴

- 5.1 This chapter discusses the effectiveness of current sentencing options available for child sexual assault offenders. Additionally, the Committee canvasses the role of mandatory minimum sentencing and the opportunity that guideline judgments present to promote consistency in sentencing.
- 5.2 Several other reform options were also discussed as part of the inquiry. In this context, the Committee has examined the option of introducing a specialist child sexual assault court and the potential to revise criminal court procedures for child sexual assault trials in order to improve efficiency and reduce trauma for victims.

EFFECTIVENESS OF CURRENT SENTENCING OPTIONS

Public Confidence in Sentencing

- 5.3 Public confidence in sentencing has been the subject of numerous reports and studies over recent years. As the former NSW Chief Justice, James Spigelman AC QC commented:
- ... sentencing engages the interest, and sometimes the passion, of the public at large more than anything else judges do.²¹⁵
- 5.4 In 2008 the NSW Sentencing Council and NSW Bureau of Crime Statistics and Research surveyed public attitudes on sentencing. Key findings included:
- A majority (66%) of NSW residents believe that sentences handed down by the courts are too lenient.
 - A majority (62%) of NSW residents think that the criminal justice system does not meet the needs of victims.
 - A vast majority (over 98%) of NSW residents overestimated the proportion of crime that involves violence or the threat of violence.
 - The most influential sources of information about the criminal justice system came from television/radio news (73.9%), broadsheet newspaper (48.2%) and local newspaper (41.2%)

²¹⁴ Submission 10, Name Suppressed, p4.

²¹⁵ The Hon. J Spigelman AC QC, *A new way to sentence for serious crime*, Address for the annual opening of Law Term Dinner of the Law Society of NSW, Sydney, 31 January 2005 as cited in New South Wales Parliamentary Research Service, *Public opinion on sentencing: recent research in Australia*, E-brief 08/2014, June 2014, p1.

- Lower levels of confidence in the criminal justice system were most prevalent among older people; those who were less educated and well off; and those who report drawing information about justice from talk-back radio, the experience of others and television/radio.²¹⁶
- 5.5 In response to the joint survey, the then Attorney General, the Hon. John Hatzistergos MLC, announced a series of sentencing information sessions to be held across the State to help those interested better understand the sentencing system.²¹⁷
- 5.6 In 2012, the NSW Bureau of Crime Statistics and Research conducted a follow up survey, with the result being that the proportion of respondents who thought sentences were too lenient had dropped from 66% to 59%.²¹⁸
- 5.7 A recent Australia wide study conducted over two years also looked at public opinions on sentencing.²¹⁹ Its findings suggest that while the public were dissatisfied with sentences imposed by the courts, there was support for the use of alternatives to imprisonment for a range of offences.²²⁰ The study also concluded:
- ... the findings of this research provide a good indication that people can be moved by the provision of relevant information, the opportunity to discuss arguments, and the chance to deliberate about a preferred position on issues of immediate relevance to criminal justice policymakers.²²¹

Identified Issues

- 5.8 The suitability and effectiveness of current sentencing options was central to many contributions to the inquiry, resulting in a wide range of views being expressed and presented in evidence. The range of identified issues is detailed below.

Inconsistent sentencing

- 5.9 It is the view of the NSW Police Force that sentences for child sexual assault offenders are inadequate. In his evidence to the inquiry, Chief Superintendent Anthony Trichter, Commander, Police Prosecutions Command, NSW Police Force, commented:

²¹⁶ New South Wales Sentencing Council, *Public Confidence in the NSW Criminal Justice System*, Monograph 2, May 2009, pp3-4.

²¹⁷ *Justice experts to lead public forums on crime and sentencing*, Media release, the Hon. John Hatzistergos MLC, Wednesday, February 18, 2009.

²¹⁸ NSW Parliamentary Research Service, *Public opinion on sentencing: recent research in Australia*, E-brief 08/2014, June 2014, p4.

²¹⁹ Mackenzie G et al, *Sentencing and public confidence: Results from a national Australian survey on public opinions towards sentencing*, (2012) Australian & New Zealand Journal of Criminology 45(1).

²²⁰ Mackenzie G et al, *Sentencing and public confidence: Results from a national Australian survey on public opinions towards sentencing*, (2012) Australian & New Zealand Journal of Criminology 45(1) at 46.

²²¹ Mackenzie G et al, *Measuring the Effects of Small Group Deliberation on Public Attitudes towards Sentencing: Benefits and Challenges*, (2014) 25 (3) Current Issues in Criminal Justice 745 as cited in New South Wales Parliamentary Research Service, *Public opinion on sentencing: recent research in Australia*, E-brief 08/2014, June 2014, p7.

JOINT SELECT COMMITTEE ON SENTENCING OF CHILD SEXUAL ASSAULT OFFENDERS
REFORM OPTIONS

What I would like to state and urge the Committee to consider in particular is that when the Police Force says that sentences currently are inadequate, it is not for the mere fact of the community expectation that the Police Force puts forward that position but, more so, for the utilitarian value in a higher sentence for these particular kinds of offences.²²²

5.10 Miss Jemima Whitford echoed these sentiments in her submission to the inquiry:

Australian sentences given to perpetrators of this abusive and societally destructive crime are too light and neither provide a deterrent, to the committing of this crime by punishing it strongly nor does it provide a punishment which reflects the severity of the acts the victims have been subjective to.²²³

5.11 Mr Jonathan O’Dea MP, Member for Davidson, expressed his view that many judges are currently not meeting community expectations for sentencing child sex offenders.

I believe that many judges are currently not reflecting the view of the broad community when making decisions about minimum sentences for perpetrators of crimes on children and those committing violent assault against innocent individuals in public.²²⁴

5.12 The NSW Police Association voiced concern about the disparity between maximum penalties and the actual sentences imposed on offenders. The Association submitted that the community expects child sexual assault offenders to receive a custodial sentence.²²⁵

5.13 The ODPP made a similar argument, commenting:

In our view full time imprisonment is the required and necessary penalty for adults convicted of child sexual assault. Such offending is such a serious breach of the criminal law that full time prison sentences must be imposed.²²⁶

5.14 Scouts Australia (NSW) submitted that a review of sentencing laws for child sexual assault offenders must be made:

If the Committee is to be seen as genuinely concerned with alleviating the impact of abuse that has already occurred, a review of sentencing laws for child abuse offenders must be made, with the intention of increasing the penalties.²²⁷

5.15 In addressing the question of inconsistency in sentencing, Ms Penny Musgrave, Director, Criminal Law Review Division, Department of Police and Justice, responded that the critical issue was whether there is a system to deal with inconsistencies. In particular, Ms Musgrave referred to the appellate system in

²²² Chief Superintendent Anthony Trichter, Commander, Police Prosecution Command, New South Wales Police Force, Transcript of evidence, 28 April 2014, p15.

²²³ Submission 7, Ms Jemima Whitford, p1.

²²⁴ Submission 3, Mr Jonathan O’Dea MP, p1.

²²⁵ Submission 11, New South Wales Police Association, p5.

²²⁶ Submission 20, New South Wales Office of the Director of Public Prosecutions, p 1. The ODPP indicated that children may be treated differently however with particularly serious child offending, the youth of the offender will not necessary mitigate the appropriate sentence.

²²⁷ Submission 14, Scouts Australia (New South Wales), p6.

NSW and the capacity to review decisions which are manifestly inadequate or excessive.

There is no simple yes/no answer to that question. ... The critical thing is to check and to ensure that we have a system that is capable of addressing inconsistency in the sense that we have the ability to track it and that our data collection is appropriate.

... We have an appellate system in New South Wales that is capable of addressing inconsistencies in sentencing because that is what it is there for. It looks at whether the sentence is inconsistent with others and it would be a ground for appeal to say that a sentence is manifestly inadequate or excessive.²²⁸

5.16 Legal Aid NSW also submitted the view that the appellate system is a means of correcting any inappropriate sentences and that the courts exercise their discretion to arrive at appropriate sentences.²²⁹

5.17 In relation to concerns about consistency in sentencing and improving public confidence in the judicial system, Mr Stephen Odgers SC, Chair, Criminal Law Committee, NSW Bar Association, commented:

It is desirable to have consistency in sentencing, but not at the expense of producing injustice. For example, we could all adopt the Old Testament notion of an eye for an eye or a tooth for a tooth, or something comparable. That would be simple and consistent, but it would not fit with modern, civilised views about how people should be sentenced. That reflects the proposition that not all offences are the same, even an offence that falls within a particular statutory definition.²³⁰

Judicial officers out of touch

5.18 The approach to sentencing adopted by judicial officers was also raised as a source of frustration. Some witnesses considered that judicial officers require broader training in this area. Ms Hetty Johnston, Chief Executive, Bravehearts, commented:

I just think they are dinosaurs. They do not like to be told by the community what to do. I think a lot of them have a legally cultural view that, you know, done the crime, done the time. There is a lot of listening in the courts about the offenders but not a lot about what is going on for victims....

They need education but you try to tell a judge—I cannot even get an appointment with one—that they actually need to be educated on this. Not all of them, I should not say that. I think even with them there is an intention. A lot of them really want to give that higher sentence but they will be appealed because of case law so they do not do it.²³¹

²²⁸ Ms Penny Musgrave, Director, Criminal Law Review Division, Department of Police and Justice, Transcript of evidence, 28 April 2014, p4.

²²⁹ Submission 12, Legal Aid New South Wales, p2.

²³⁰ Mr Stephen Odgers SC, Chair, Criminal Law Committee, New South Wales Bar Association Transcript of evidence, 28 April 2014, p40.

²³¹ Ms Hetty Johnston, Chief Executive, Bravehearts, Transcript of evidence, 30 April 2014, p47.

- 5.19 Mr Adam Washbourne, President, Fighters Against Child Abuse Australia expressed a desire to see judicial officers held more accountable where sentences are lenient.

The Parliament has done its job and put in these guidelines that say minimum 15 years but it is not happening. So for us we would probably want the judges to be held accountable. Who is making these light sentences and not doing their job? At the end of the day the justice system is there to serve the people and, essentially, to implore people to not want to commit crimes. If the recommendation of 15 to 25 years is tendered and they are getting six to eight years someone is not doing their job, and as far as we are concerned it is the judges who are handing down the sentences.²³²

Improved communication of sentencing decisions

- 5.20 Questions concerning how best to convey sentencing decisions and the sentencing process to the community was raised during the inquiry. Dr David Phillips, National President, FamilyVoice Australia, acknowledged the difficulty in explaining sentencing principles and considered that the Parliament, and in particular the Minister responsible, should act where appropriate.

Given the Reverend the Hon. Fred Nile's comment that there is angst in the community that the current sentences are too lenient there are two answers: Either they are too lenient and need to be tightened and Parliament needs to act in that way; or the appropriateness of the current sentencing is being inadequately conveyed to the public and in that case the Minister responsible has a responsibility to get out and talk to the media and convey the message that we have talked about earlier.²³³

- 5.21 Mr Mark Ierace SC, Senior Public Defender, Legal Aid NSW suggested that making judicial remarks on sentences available online would be of great benefit to practitioners. He thought this would enable the media and the public to have access to all information used by the judge to determine the appropriate sentence.

The tabloid media is frustrating in that it focuses on the extreme examples and does not give the full picture. I would like to see judgments placed online before they are handed down. If the judge can have it typed before it is handed down then surely with a small increase in resources it could be put on the website immediately after it is handed down. I am very encouraged to see the Chief Justice providing summaries of sentencing judgments so that the media can, if they want to, get a fair encapsulation of all of the relevant features. That would capitalise on what the research is telling us; that is, that when people have all the information they are happier about sentences. I think that that gets back to the concern about the community's reaction. If I can say so, politicians are in a difficult position.²³⁴

²³² Mr Adam Washbourne, President, Fighters Against Child Abuse Australia, Transcript of evidence, 30 April 2014, p24.

²³³ Dr David Phillips, National President, FamilyVoice Australia, Transcript of evidence, 30 April 2014, pp21-22.

²³⁴ Mr Mark Ierace SC, Senior Public Defender, Legal Aid New South Wales, Transcript of evidence, 28 April 2014, p58.

Conclusions

- 5.22 Public confidence in our criminal justice system is of paramount concern to the Committee, particularly concerning child sexual assault offending. Confidence in our justice system can encourage and assist victims in reporting abuse and also act as a deterrent.
- 5.23 The Committee accepts this is an ongoing and difficult issue. Ensuring that the public understands the principles underpinning our system of law is a complex task and will not always be welcomed. In the Committee's view, making the system as simple and transparent as possible would assist in promoting public understanding and confidence.
- 5.24 Recommendations made in chapter 4 of the report, to increase the availability and transparency of available data and to contextualise sentencing decision making will assist in this regard. In chapter 2 of the report, the Committee has also recommended a review of current legislation with a view to consolidating and simplifying the current framework.
- 5.25 In addition, the Committee considers access to sentencing decisions of judicial officers could be enhanced. Legal practitioners, the media and the public need to understand why and how a judge has arrived at a particular sentence. If sentencing remarks for all child sexual assault cases, heard in all courts, could be viewed by the public when they were made, this would provide much needed context and serve to better inform the public.

Recommendation 16

The Committee recommends that the Attorney General investigates publishing all sentencing decisions of child sexual assault cases heard in each jurisdiction as soon as practicable after a decision has been handed down.

MANDATORY MINIMUM SENTENCING

Role of Mandatory Sentencing

- 5.26 A mandatory sentence is a fixed penalty set by Parliament for committing a criminal offence.²³⁵
- 5.27 Although fixed penalties can be prescribed for minor regulatory offences such as a fine for a driving offence, administrative penalties of this nature are not strictly mandatory as they can be reviewed by a court. In such cases, a judge can exercise discretion in the matter and may impose a different sanction to the one originally contained in the infringement notice.²³⁶
- 5.28 In Australia, most criminal laws set a maximum, rather than a minimum penalty for an offence, leaving judges with significant discretion to tailor an appropriate

²³⁵ Dr K Gelb and Dr A Hoel, *Sentencing matters: mandatory sentencing*, Sentencing Advisory Council of Victoria, Melbourne, August 2008, p2.

²³⁶ N Cowdery AM QC, *Mandatory sentencing*, Sydney Law School Distinguished Speakers Program, 15 May 2014, p3; Dr K Gelb and Dr A Hoel, *Sentencing matters: mandatory sentencing*, Sentencing Advisory Council of Victoria, Melbourne, August 2008, p2.

sentence for each individual case.²³⁷ Mandatory sentences, on the other hand, generally prescribe both the kind and minimum level of the sanction imposed.²³⁸ While a mandatory sentence can involve any type of sentence, it is usually referred to in the context of imprisonment.²³⁹

Examples of Mandatory Sentencing in Australia

5.29 Mandatory sentencing already applies to certain Commonwealth offences, as well as for offences in several States and Territories.²⁴⁰ Examples of this include the following: New South Wales, for murder of a police officer; Queensland, in relation to repeat serious child sex offences; and in the Commonwealth, for aggravated people smuggling offences.

New South Wales – murder of a police officer

5.30 In 2011, the *Crimes Act 1900* was amended to prescribe a mandatory sentence of life imprisonment in certain circumstances where a person murders a police officer in New South Wales.²⁴¹

5.31 Under relevant provisions, an offender will only receive a mandatory sentence if all of the following can be proven

- The offender committed the offence while the police officer was on duty or as a consequence of or in retaliation for actions of that or another police officer while executing their duty.
- The offender knew or ought reasonably to have known that the victim was a police officer.
- The offender intended to kill the police officer or engaged in criminal activity that risked serious harm to police officers.²⁴²

5.32 Mandatory sentences do not apply to:

- Offenders under 18.
- Offenders who had a significant cognitive impairment, which was not temporarily self-induced, at the time of committing the offence.²⁴³

5.33 The legislation provides that nothing in any other Act or law authorises a court to impose a lesser or alternative sentence, in circumstances where an individual

²³⁷ L Roth, *Mandatory sentencing laws*, New South Wales Parliamentary Research Service e-brief, Sydney, January 2014, pp1-2.

²³⁸ Dr K Gelb and Dr A Hoel, *Sentencing matters: mandatory sentencing*, Sentencing Advisory Council of Victoria, Melbourne, August 2008, p2.

²³⁹ Dr K Gelb and Dr A Hoel, *Sentencing matters: mandatory sentencing*, Sentencing Advisory Council of Victoria, Melbourne, August 2008, p2.

²⁴⁰ See for example, N Cowdery AM QC, *Mandatory sentencing*, Sydney Law School Distinguished Speakers Program, 15 May 2014, pp3-4.

²⁴¹ *Crimes Amendment (Murder of Police Officers) Act 2011* (NSW).

²⁴² *Crimes Act 1900* (NSW), s19B(1).

²⁴³ *Crimes Act 1900* (NSW), s19B(3).

meets the criteria to receive a mandatory sentence of life imprisonment for the offence.²⁴⁴

- 5.34 In October 2013, Michael Jacobs was the first person to receive a mandatory life sentence under these provisions. Mr Jacobs' car was being followed by a police officer who suspected that he was driving while disqualified. After having been stopped by a police officer and advised that he was to be breath-tested, Mr Jacobs produced a gun and killed the police officer.²⁴⁵

Queensland – repeat serious child sex offences

- 5.35 In 2012, Queensland introduced mandatory life imprisonment for repeat serious child sex offenders.²⁴⁶

- 5.36 There are a number of offences that are designated as serious child sex offences including: carnal knowledge with or of a child under 16; incest; rape; sexual assault; and maintaining a sexual relationship with a child.²⁴⁷ To be captured by the mandatory sentencing scheme:

- Offences must have been committed in relation to a child under 16 and in circumstances where the offender would be liable to imprisonment for life.²⁴⁸
- The offender must have committed at least two serious child sex offences while the offender was an adult.²⁴⁹

- 5.37 An offender who meets the criteria for a repeat serious child sex offence is liable to imprisonment for life, despite any other penalty imposed by the *Criminal Code*. There is no scope to vary or mitigate the sentence under any other law.

- 5.38 Alternatively, an offender can receive an indefinite sentence, which is a prison sentence for an indefinite term, to be reviewed under the *Penalties and Sentences Act 1992* and continuing until a court orders that the sentence is discharged.²⁵⁰

- 5.39 A prisoner who is serving a mandatory term of life imprisonment for a repeat serious child sex offence must serve a minimum of 20 years before being eligible for parole.²⁵¹

Commonwealth – aggravated people smuggling offences

- 5.40 In 2001, the Commonwealth introduced mandatory minimum sentencing for certain aggravated people smuggling offences.²⁵² Under section 233C of the

²⁴⁴ *Crimes Act 1900* (NSW), s19B(4).

²⁴⁵ Facts from *R v Jacobs (No 9)* [2013] NSWSC 1470, summarised in L Roth, *Mandatory sentencing laws*, NSW Parliamentary Research Service e-brief, Sydney, January 2014, p5.

²⁴⁶ *Criminal Law (Two Strike Child Sex Offenders) Amendment Act 2012* (Qld).

²⁴⁷ *Penalties and Sentences Act 1992* (Qld), Schedule 1A.

²⁴⁸ *Penalties and Sentences Act 1992* (Qld), s161D.

²⁴⁹ *Penalties and Sentences Act 1992* (Qld), s161E(1).

²⁵⁰ *Penalties and Sentences Act 1992* (Qld), ss161E(2) and 162.

²⁵¹ *Corrective Services Act 2006* (Qld), s181A.

²⁵² *Border Protection (Validation and Enforcement) Act 2001* (Cth).

Migration Act 1958, an individual may be subject to the mandatory sentencing provisions if they organise or facilitate to smuggle at least five people into Australia. The maximum penalty for this offence is 20 years imprisonment and/or \$340,000.²⁵³

5.41 If the offender was 18 or older when the offence was committed, the mandatory minimum sentencing scheme applies. The court must impose a sentence of at least five years' imprisonment with a non-parole period of at least three years and, in the case of a repeat offence, at least eight years' imprisonment with a non-parole period of at least five years.²⁵⁴

5.42 In October 2013, the High Court decided in a 6:1 majority that the mandatory minimum sentencing provisions in the *Migration Act 1958* were constitutionally valid.²⁵⁵ The appellant was found guilty of the offence referred to above. He was sentenced to the mandatory minimum term of five years' imprisonment with a non-parole period of three years.²⁵⁶

5.43 However, the High Court noted the sentencing judge's dissatisfaction with the mandatory minimum sentencing scheme:

In sentencing the appellant, the Chief Judge of the District Court (Chief Judge Blanch) said that it was "perfectly clear that [the appellant] was a simple Indonesian fisherman who was recruited by the people organising the smuggling activity to help steer the boat towards Australian waters." Chief Judge Blanch said that the seriousness of the appellant's part in the offence fell "right at the bottom end of the scale" and that, in the ordinary course of events, "normal sentencing principles would not require a sentence to be imposed as heavy" as the mandatory minimum sentence.²⁵⁷

5.44 Other judges have also expressed their dissatisfaction with the mandatory minimum sentencing provisions in the *Migration Act 1958*. For example, in May 2011, Justice Kelly of the Supreme Court of the Northern Territory sentenced Mr Edward Nafi for a repeat people smuggling offence. Her Honour was required to impose the mandatory sentence of eight years' imprisonment with a minimum non-parole period of five years, and made the following points in the judgement:

Had it not been for the mandatory minimum sentencing regime, taking into account the maximum penalty prescribed for this offence and the factors I have already set out I would have considered an appropriate penalty to have been a term of imprisonment for three years with a non-parole period of 18 months.

I therefore recommend that the Commonwealth Attorney General exercise his prerogative to extend mercy to you, Mr Nafi, after you have served 18 months in

²⁵³ *Migration Act 1958* (Cth), s233C.

²⁵⁴ *Migration Act 1958* (Cth), ss236B(3) and (4).

²⁵⁵ *Magaming v The Queen* [2013] HCA 40.

²⁵⁶ *Magaming v The Queen* [2013] HCA 40 at [6].

²⁵⁷ *Magaming v The Queen* [2013] HCA 40 at [7].

prison. There is no guarantee that this will occur. It is a matter for the Attorney General whether this recommendation is accepted.²⁵⁸

5.45 In August 2012, the Commonwealth Attorney General gave a direction to the Commonwealth Director of Public Prosecutions only to carry out prosecutions under section 233C of the *Migration Act 1958* against crew members of people smuggling ventures in the following circumstances:

- The offence is a repeat offence.
- The person's role in the venture extends beyond that of a crew member.
- A death occurred in relation to the venture.²⁵⁹

5.46 The Commonwealth Director of Public Prosecutions' website also notes the following in relation to the Attorney General's direction:

The Direction also requires the CDPP to consider instituting, carrying on or continuing to carry on a prosecution against the person pursuant to section 233A of the *Migration Act 1958* in accordance with the *Prosecution Policy of the Commonwealth*. Section 233A is an offence of people smuggling which is committed when a person organises or assists in bringing a non-citizen without a valid visa to Australia and carries no mandatory minimum penalty.²⁶⁰

5.47 The above cases illustrate the controversial nature of mandatory minimum sentencing. This was also reflected in the evidence presented to the Committee.

Opposing Views on Mandatory Minimum Sentencing

5.48 Evidence received in response to the inquiry has resulted in a range of views regarding the introduction of mandatory minimum sentencing for child sexual assault offences. While a minority supported mandatory sentencing, some acknowledged that it may be useful only as a last resort, or in very limited circumstances.

5.49 The overwhelming majority of contributors were opposed to mandatory sentencing, citing concerns ranging from judges not being able to adequately tailor sentences to individual circumstances, to its impact on increasing the prison population. The conflicting views are canvassed below.

Support for mandatory sentencing

5.50 Stakeholders who support mandatory sentencing for child sexual assault offences, such as Mr Scott Weber, President, Police Association of NSW, highlighted the serious nature of these crimes and their impact on vulnerable children:

²⁵⁸ N Cowdery AM QC, *Mandatory sentencing*, Sydney Law School Distinguished Speakers Program, 15 May 2014, pp6-7.

²⁵⁹ Commonwealth Director of Public Prosecutions, viewed 8 July 2014, <<http://www.cdpp.gov.au/crimes-we-prosecute/people-smuggling/>>.

²⁶⁰ Commonwealth Director of Public Prosecutions, viewed 8 July 2014, <<http://www.cdpp.gov.au/crimes-we-prosecute/people-smuggling/>>.

I think a mandatory minimum sentence is definitely needed. We are dealing with the most horrendous and horrific crime of hurting the innocent. We need to protect the innocent. If that means taking away offenders' rights, so be it.²⁶¹

5.51 Mr Jonathan O'Dea MP echoed similar concerns in his support for mandatory minimum sentencing:

[The victim] is commonly unable to defend themselves or report their concerns to authorities due to their age, emotional and physical immaturity, the threat of violence made against their family by the perpetrator and in many cases, the relationship of the perpetrator to the victim.²⁶²

5.52 In expanding on their views, Mr O'Dea said that mandatory minimum sentences ensure that those affected by child sexual assault can be satisfied that justice has been served and that their loss is 'fully understood and recognised'.²⁶³ Mr Weber suggested that sentences should be 'well into double figures' to adequately reflect the crimes.²⁶⁴

5.53 Bravehearts, who lobbied for the mandatory sentencing structure in Queensland, prescribed the details of a mandatory sentencing scheme for child sexual assault offences in New South Wales in the following terms:

- The scheme applies to adult offenders only.
- A mandatory term of detention and compulsory treatment be imposed for any first conviction of a contact child sexual assault offence.
- A mandatory sentence of 20 years' imprisonment for any second serious child sexual assault offence.²⁶⁵

Mandatory sentencing as a last resort or in very limited circumstances

5.54 As previously indicated, some inquiry participants acknowledged that mandatory minimum sentencing for child sexual assault offenders may be appropriate in very limited circumstances, or as a last resort. One individual, who was opposed to mandatory sentencing in most circumstances, suggested that such a scheme may be useful for particular kinds of cases:

For most crimes I oppose mandatory sentencing. Ideally, a judge should be able to tailor the sentence to the special circumstances of each case, so long as his or her discretion is exercised within the limits imposed by the expectations of society. However, if judges are not able to use current laws effectively, parliament should intervene. Even in the area of child sexual assault, I do not support mandatory sentences across the board. However, in cases of multiple victims, persistent abuse or assault under authority, mandatory sentences should be considered.²⁶⁶

²⁶¹ Mr Scott Weber, President, Police Association of New South Wales, Transcript of evidence, 30 April 2014, p38.

²⁶² Submission 3, Mr Jonathan O'Dea MP, p1.

²⁶³ Submission 3, Mr Jonathan O'Dea MP, p1.

²⁶⁴ Mr Scott Weber, President, Police Association of New South Wales, Transcript of evidence, 30 April 2014, p38.

²⁶⁵ Submission 17, Bravehearts, p9.

²⁶⁶ Submission 10, Name Suppressed, p15.

- 5.55 FamilyVoice Australia suggested that mandatory sentencing for child sexual assault offences should not be introduced at this time and argued that such a scheme should only be introduced as a 'last resort, where other approaches to aligning community expectations and judicial practice have clearly failed.' FamilyVoice Australia was particularly concerned about mandatory minimum sentences interfering with judges' capacity to consider all relevant factors in individual matters.²⁶⁷
- 5.56 Chief Superintendent Anthony Trichter, Commander, Police Prosecutions Command, NSW Police Force, observed that mandatory minimum sentences come with other problems and was not convinced that introducing such a scheme would address the relevant issues. He did acknowledge, however, that there could be some utility in a system where the mandatory minimum adequately raised sentences to an appropriate level.²⁶⁸

Specific concerns about mandatory minimum sentencing

- 5.57 A majority of stakeholders raised concerns about introducing mandatory minimum sentencing for child sexual assault cases. Some of the key concerns are discussed below.

Mandatory sentencing limits judicial discretion

- 5.58 The Committee was told by the legal and treatment communities that mandatory sentencing limits judicial discretion, because judges are prevented from tailoring sentences to offenders' individual circumstances.²⁶⁹ The Australian and New Zealand Association for the Treatment of Sexual Abuse outlined their position in the following terms:

A "one-size-fits-all" approach to sentencing of child sex offenders is likely to be ineffective in providing either justice for survivors of child sexual assault or enhancing community safety. The dynamics of child sexual abuse are complex and varied and it is vital that the Courts are able to respond to individual cases with consideration of each of the unique factors at play. Judicial discretion is a vital aspect of this.²⁷⁰

- 5.59 Many other participants spoke about the complex nature of sentencing in this area.²⁷¹ In particular, the Chief Magistrate of the Local Court of NSW confirmed that across the different instances of an offence, there is a broad spectrum of

²⁶⁷ Submission 2, FamilyVoice Australia, p3.

²⁶⁸ Chief Superintendent Anthony Trichter, Commander, Police Prosecutions Command, New South Wales Police Force, Transcript of evidence, 28 April 2014, p20.

²⁶⁹ See for example, Submission 5, Australian Psychological Society, p9; Submission 15, The Australian and New Zealand Association for the Treatment of Sexual Abuse, p2; Submission 20, Office of the Director of Public Prosecutions, p2; Mr Lloyd Babb SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of evidence, 28 April 2014, p30; Ms Jessica Pratley, Executive Committee Member, Australia and New Zealand Association for the Treatment of Sexual Abuse, Transcript of evidence 28 April 2014, p32; Mr Stephen Odgers SC, Chair, Criminal Law Committee, New South Wales Bar Association, Transcript of evidence, 28 April 2014, p41.

²⁷⁰ Submission 15, The Australian and New Zealand Association for the Treatment of Sexual Abuse, p6.

²⁷¹ See for example, Submission 12, Legal Aid New South Wales, p1; Mr Stephen Odgers SC, Chair, Criminal Law Committee, New South Wales Bar Association, Transcript of evidence, 28 April 2014, p41.

offending behaviour and that within any individual sentencing decision, there are a number of processes and considerations.²⁷²

5.60 The NSW Government also gave examples of potential differences between various kinds of child sexual assault offending:

Very few adults who sexually offend meet the diagnostic criteria for paedophilic disorder, and even fewer adolescents who are charged with child sexual assault offences meet the criteria, which include being at least 16 years old. There are many differences amongst child sexual assault offenders including:

- Number of offences committed.
- Whether offences committed over a long period of time or in one episode.
- Different types of sexual acts committed.
- Whether the offences involved one single victim or multiple victims.
- Age of the offender.
- Age of victim.²⁷³

5.61 Mr Stephen Odgers SC, Chair, Criminal Law Committee, NSW Bar Association, gave examples of the various factors to be taken into account in determining how an offence was committed. This includes the range and nature of circumstances involved, the offender's motives and the offender's state of mind at the time.

In a civilised sentencing system all of these factors are properly taken into account in determining an appropriate sentence. In addition, sentencing is not only about sentencing for an offence; it is sentencing an offender. Offenders are not all the same; they vary enormously. Again, many factors bear on the appropriate sentence that an offender should receive. Of course, considerations of specific deterrence, general deterrence and so on play an important part. But so do considerations of rehabilitation. For example, if in the eyes of a sentencing court an offender is someone who is very unlikely to offend again, that person is appropriately dealt with in a very different way from someone who has shown a high level of recidivism and where there is no reasonable prospect of rehabilitation.²⁷⁴

5.62 Mr Mark Ierace SC, Senior Public Defender, Legal Aid NSW, argued that with mandatory sentencing, we take a 'huge risk' that someone will be given the wrong sentence, which could be very damaging.

It is important to keep in mind with mandatory sentencing that we are talking about the mandatory minimum sentence, in other words, that is, the mandatory bottom of the range. So the sentences to be imposed if we have a mandatory sentencing

²⁷² Submission 16, Judge Graeme Henson, Chief Magistrate, Local Court of New South Wales, pp3-4.

²⁷³ Submission 22, NSW Government, p17.

²⁷⁴ Mr Stephen Odgers SC, Chair, Criminal Law Committee, New South Wales Bar Association, Transcript of evidence, 28 April 2014, p40.

regime for a particular offence will start from there but will mostly be way above that in terms of the non-parole period.²⁷⁵

- 5.63 Several stakeholders, including the NSW Bar Association, pointed out that in the current sentencing system, if there are concerns that a judge has imposed an inappropriate sentence, the Crown could consider appealing the matter:²⁷⁶

It may be accepted that judges exercising sentencing discretion do not always impose an appropriate sentence. Judicial officers have extremely difficult jobs, and they take those jobs very seriously. In passing sentence, they are required to consider the interests of the community, the victim and the offender. It will never be a perfect science but the availability of an appeal mechanism means that there is the scope for review. An appeal against an inadequate sentence may be brought by the DPP or the Attorney General.²⁷⁷

Mandatory sentencing may increase not guilty pleas

- 5.64 Both the NSW Ombudsman and the NSW Bar Association warned the Committee that introducing mandatory minimum sentencing for child sexual assault offences could increase the number of accused who plead not guilty. This is due to the fact that an individual cannot receive a sentence that is lower than the mandatory minimum, whether they plead guilty or not guilty.²⁷⁸

- 5.65 Ms Penny Musgrave, Director, Criminal Law Review, Department of Police and Justice, outlined the 'very good reasons' to provide an incentive for a plea of guilty, because the offender will be convicted and the victim will not have to give evidence again.²⁷⁹

- 5.66 There were also concerns raised that fewer guilty pleas could result in fewer convictions, as explained by the NSW Ombudsman:

In this context, while the introduction of minimum mandatory sentences may result in an increase in the sentence severity for those offenders who are convicted, there is a very real risk that it could simultaneously result in a decrease in the number of offenders who are convicted, as fewer offenders may be willing to plead guilty. This should be weighed up in any consideration of a mandatory minimum sentencing scheme, particularly given that the issue of low conviction rates was identified as a further issue that undermined victims' satisfaction with the criminal justice system, and which contributes to victims being reluctant to become involved in the prosecution of offenders.²⁸⁰

²⁷⁵ Mr Mark Ierace SC, Senior Public Defender, Legal Aid New South Wales, Transcript of evidence, 28 April 2014, p55.

²⁷⁶ See also for example, Submission 12, Legal Aid New South Wales, pp1-2.

²⁷⁷ Submission 18, New South Wales Bar Association, p2.

²⁷⁸ Submission 18, New South Wales Bar Association, p2; Submission 19, New South Wales Ombudsman, pp2-3.

²⁷⁹ Ms Penny Musgrave, Director, Criminal Law Review, Department of Police and Justice, Transcript of evidence, 28 April 2014, p5.

²⁸⁰ Submission 19, New South Wales Ombudsman, pp2-3.

- 5.67 The NSW Bar Association also suggested that fewer guilty pleas would result in 'a large increase in the number of trials, greater cost to the community, delays for other cases, and a greater deal of stress for the victim and/or his or her family.'²⁸¹

Mandatory sentencing may increase the prison population

- 5.68 The NSW Bar Association and Mr Anthony Whealy QC, Deputy Chair, NSW Sentencing Council, argued that mandatory minimum sentencing will substantially increase the prison population, resulting in overcrowding and the need to build new prisons.²⁸² The NSW Bar Association commented that 'it is a waste of resources to incarcerate individuals for a period of time that does not reflect the circumstances surrounding the offence, or other mitigating factors.'²⁸³
- 5.69 Inquiry participants also questioned the effectiveness of increasing prison sentences for child sexual assault offenders. Mr Odgers QC, Chair of the NSW Bar Association's Criminal Law Committee, claimed that whereas the prospect of being arrested and prosecuted discourages crime, increasing sentences does not:

The research invariably shows that what matters in terms of whether people commit crimes is their consideration of the probabilities of being apprehended and convicted. They do not turn their minds to the maximum penalties, and they certainly do not factor in increases in penalties when they are deciding whether to commit a crime, assuming they even turn their minds to those kinds of considerations.²⁸⁴

- 5.70 The Australian Psychological Society told the Committee about the growing body of research which shows that incarceration is not a particularly effective deterrent for a large minority of offenders:

Incarceration can serve the purpose of incapacitation, and protection of the community, but equally can serve to criminalise a low-risk offender and increase the likelihood of the development of criminal attitudes in someone not initially programmed in that fashion.²⁸⁵

Conclusions

- 5.71 The Committee finds that mandatory minimum sentencing should not be introduced for child sexual assault offences in New South Wales.
- 5.72 The Committee is persuaded by the concerns raised in evidence about the consequences of introducing mandatory sentencing for child sexual assault matters. Child sexual assault cases are highly complex and, in the Committee's view, judges need sufficient discretion to tailor sentences to the circumstances of individual offenders and apply the specific circumstances to the case at hand.

²⁸¹ Submission 18, New South Wales Bar Association, p2.

²⁸² Submission 18, New South Wales Bar Association, p 2; Mr Anthony Whealy QC, Deputy Chair, New South Wales Sentencing Council, Transcript of evidence, 28 April 2014, p16.

²⁸³ Submission 18, New South Wales Bar Association, p2.

²⁸⁴ Mr Stephen Odgers SC, Chair, Criminal Law Committee, New South Wales Bar Association, Transcript of evidence, 28 April 2014, p41.

²⁸⁵ Submission 5, Australian Psychological Society, p7.

- 5.73 The Committee is particularly concerned about claims that mandatory sentencing may result in fewer guilty pleas. Providing incentives for guilty pleas in child sexual assault cases can assist child victims by ensuring convictions and minimising the trauma of participation in otherwise lengthy trial processes.
- 5.74 The Committee considers that the Standard Non-Parole Period Scheme is a preferable mechanism for assisting the judiciary with sentencing in complex matters such as these, ensuring consistency in sentencing, and improving public confidence in the judicial system.
- 5.75 The Committee believes that the changes it has recommended in chapter 3 of this report to the Standard Non-Parole Period Scheme will further strengthen and enhance the utility of the SNPP as a sentencing tool.

GUIDELINE JUDGMENTS

- 5.76 Part 3 Division 4 of the *Crimes (Sentencing Procedure) Act 1999* sets out the operation of the guideline sentencing scheme in New South Wales. The guideline sentencing scheme was introduced in 1998 by the *Criminal Procedure Amendment (Sentencing Guidelines) Bill 1998*. The Second Reading Speech highlighted that sentencing guidelines:

... promote greater consistency in sentencing, without inappropriately fettering judicial discretion. That is important. Public confidence in the administration of criminal justice requires both consistency in sentencing decisions and flexibility to ensure that the sentence meets the particular circumstances of each case.²⁸⁶

- 5.77 The Division allows the NSW Court of Criminal Appeal (CCA) to issue a guideline judgment at the request of the Attorney General or on its own motion.²⁸⁷ A guideline judgment can contain either:
- Guidelines that apply generally.
 - Guidelines that apply to particular courts or classes of courts, to particular offences or classes of offences, to particular penalties or classes of penalties or to particular classes of offenders.²⁸⁸

- 5.78 The Court of Criminal Appeal has issued the following guideline judgments:

Table 10 - Guidelines judgments issued by the New South Wales Court of Criminal Appeal

Guideline Judgment	Area
<i>Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (No 3 of 2002)</i> [2004] NSWCCA 303	High range prescribed concentration of alcohol (PCA)
<i>Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (No 1 of 2002)</i> [2002] NSWCCA 518	Taking former offences into account

²⁸⁶ The Hon. Gabrielle Harrison MP, Parliamentary Debates, New South Wales Legislative Assembly, 28 October 1998, p9190.

²⁸⁷ *Crimes (Sentencing Procedure) Act 1999*, ss37 and 37A.

²⁸⁸ *Crimes (Sentencing Procedure) Act 1999*, s36.

<i>R v Thomson & Houlton</i> [2000] NSW CCA 309	Guilty plea
<i>R v Ponfield</i> [1999] NSWCCA 435	Break, enter and steal
<i>R v Henry</i> [1999] NSWCCA 111	Armed robbery
<i>R v Whyte</i> [2002] NSWCCA 343	Dangerous driving

5.79 It has been held that guideline judgments operate as a ‘check’ or ‘sounding board’ or ‘guide’ but not as a ‘rule’ or ‘presumption’.²⁸⁹ If a guideline is not applied then reasons are expected to be given.²⁹⁰

NSW Law Reform Commission Report on Sentencing

5.80 The NSW Law Reform Commission discussed the guideline judgment system in Report 139, *Sentencing*. The Commission recommended enhancing the current system by broadening the range of information that the CCA is permitted to consider.²⁹¹

5.81 The Commission proposed an enhancement to the system, by allowing the CCA to consider additional information such as victim impact data, offender demographics and stakeholder views. They also recommended that the role of the NSW Sentencing Council could be expanded to achieve this aim.

Inquiry Evidence

5.82 There was general support from inquiry participants for guideline judgments. The NSW Office of the Director of Public Prosecutions (ODPP) submitted that a way of providing greater consistency in sentencing is through the use of sentencing guidelines, arguing that ‘a strong Sentencing Guidelines system would provide additional guidance above and beyond the SNPP system.’²⁹²

5.83 Mr Lloyd Babb SC, Director of Public Prosecutions, further submitted that guideline judgments would assist in the same way they have for offences where a guideline judgment has been issued.

For example, driving in a manner dangerous occasioning death, the Jurisic and Whyte guideline judgments, and in relation to armed robbery, the Henry guideline judgement. It brings a consistency of approach in that those guideline judgments have highlighted factors that are aggravating and that should lead to a particular sentence being imposed. In my submission it would lead to a greater consistency in sentencing.²⁹³

5.84 The ODPP agreed with recommendation 18.2 of the NSW Law Reform Commission Report 139 *Sentencing* to continue the system of guideline

²⁸⁹ *R v Whyte* [2002] NSWCCA 343; 55 NSWLR 252 [113] as cited in NSW Law Reform Commission, *Sentencing*, Report 139, July 2013, [18.43], p384.

²⁹⁰ *R v Whyte* [2002] NSW CCA 343; 55 NSWLR 252 [73], [114] as cited in NSW Law Reform Commission, *Sentencing*, Report 139, July 2013, [18.43], p384.

²⁹¹ New South Wales Law Reform Commission, *Sentencing*, Report 139, July 2013, Recommendation 18.2, p393.

²⁹² Submission 20, New South Wales Office of Director of Public Prosecutions, pp3-4.

²⁹³ Mr Lloyd Babb SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions for New South Wales, Transcript of evidence, Wednesday 30 April 2014, p25.

judgments and to provide for an expanded role of the NSW Sentencing Council to provide further information to the NSW Court of Criminal Appeal.²⁹⁴

- 5.85 In evidence before the Committee, Mr Mark Ierace SC, representing Legal Aid NSW, commented that guideline judgments should be utilised as a means of elevating sentencing patterns.

Finally, a general point coming very much from Public Defenders as well as Legal Aid is that I think guideline sentencing has been overlooked. It was fashionable, if I could use that word, in the early part of the first decade of the millennium and it has fallen out of use. It should be revisited because it is a vehicle which enables the court to elevate the sentencing pattern significantly where appropriate beyond what it currently is and to have regard to a wide range of material when it does that go outside simple cases.²⁹⁵

- 5.86 FamilyVoice Australia recommended that the Attorney General and superior courts consider whether the issuing of a guideline judgment for one or more child sexual assault offences may assist in ensuring more consistency in sentencing for these offences.²⁹⁶

- 5.87 Dr David Phillips, National President, FamilyVoice Australia, elaborated on this position in evidence before the Committee:

There is no end to the individual circumstances of individual cases but the provision of sentencing guidelines means that the judge can be held accountable. Any departure from the sentencing guidelines must be argued by the judge and if the argument is not strong enough then he or she can be called to account for that.²⁹⁷

- 5.88 Guideline judgments are not without complications. As Mr Stephen Odgers SC, explained, the greater variety of offences and circumstances can make issuing a guideline judgment difficult, stating:

In subsequent years and with statutory support there have been guideline judgments handed down in a number of areas but the greater the variety of offences within a particular offence the more the variety of circumstances in which offences are committed, and the greater the variety of offenders who commit those offences the harder it is to provide a suitable guideline—an example was a guideline given in respect of a burglary or break and enter offence and the court ultimately could not do much more than say, "There are all these factors you take into account."²⁹⁸

- 5.89 Despite these practical difficulties, Mr Odgers considered that guideline judgments are an appropriate opportunity for the highest court to provide guidance to lower courts.

²⁹⁴ Submission 20, New South Wales Office of the Director of Public Prosecutions, p3.

²⁹⁵ Mr Mark Ierace SC, Senior Public Defender, Legal Aid New South Wales, Transcript of evidence, 28 April 2014, p56.

²⁹⁶ Submission 2, FamilyVoice Australia, p3.

²⁹⁷ Dr David Phillips, National President, FamilyVoice Australia, Transcript of evidence, Wednesday 30 April 2014, p17.

²⁹⁸ Mr Stephen Odgers SC, Chair, Criminal Law Committee, New South Wales Bar Association, Transcript of evidence, Monday 28 April 2014, p47.

I think it is fair to say that the practical difficulties of providing appropriate judgments may well explain the fact that they have declined in terms of having been adopted.... The bottom line is that they are a great idea in principle because they are a way in which the highest court in our jurisdiction can give greater guidance to sentencing judges and magistrates – because it applies to magistrates in the Local Court as well.²⁹⁹

- 5.90 When questioned about the benefits of guideline judgments, Judge Graeme Henson, Chief Magistrate, Local Court of NSW, responded by saying that they may assist in some but not all areas. He elaborated:

...the range of child sexual assault is so diverse from aggravated down to indecent assault of a child. For which ones do you want guideline judgments?³⁰⁰

Role of NSW Sentencing Council

- 5.91 The NSW Law Reform Commission recommended that the guideline judgment system be expanded to broaden the range of information that the Court of Criminal Appeal can consider. The Commission proposed that the NSW Sentencing Council have the specific function of preparing a research and advisory report for either the Attorney General or the Court of Criminal Appeal. Such a report would see the Council:

... undertake public consultations and provide the Court with an expert report that presented factual information including statistical data on the frequency of the offence, current sentencing trends, victim impact data, and reoffending statistics.³⁰¹

- 5.92 While the recommendation that the NSW Sentencing Council provide information to the Attorney General and the CCA was largely supported, the question concerning how best to consult the public was raised as an issue during the inquiry. The Hon. Anthony Whealy QC, Deputy Chair, NSW Sentencing Council, commented:

The constitution of the Sentencing Council at the moment is pretty broad. We have four community members. It is possible you could have more, you could expand it if you wished. I think that seems to me to be a better way than simply having, as it were, a telephone hook-up with the community saying: What do you think? I think you would get some very unreliable opinions being expressed if you were to do it that way.³⁰²

- 5.93 Mr Lloyd Babb SC, NSW Director of Public Prosecutions and member of the NSW Sentencing Council, also considered this issue and indicated that having community members on the Council partly addresses the question. He also

²⁹⁹ Mr Stephen Odgers SC, Chair, Criminal Law Committee, New South Wales Bar Association, Transcript of evidence, Monday 28 April 2014, p47.

³⁰⁰ Judge Graeme Henson, Chief Magistrate, Local Court of New South Wales, Transcript of evidence, 30 April 2014, p67.

³⁰¹ New South Wales Law Reform Commission, *Sentencing*, Report 139, July 2013, [18.63], p389.

³⁰² The Hon. Anthony Whealy QC, Deputy Chair, New South Wales Sentencing Council, Transcript of evidence, 28 April 2014, p18.

indicated that consulting the public effectively and accurately was a more difficult task.³⁰³

5.94 Mr Mark Ierace SC, also a member of the NSW Sentencing Council, commented:

It is an issue that we have not resolved to our own satisfaction. We have engaged in one-way communication having town hall meetings in regional centres such as Dubbo and Tamworth to explain how sentencing works and they have been quite successful but we have not yet come up with a mechanism to obtain community feedback other than in that instance where we combined our resources with the Bureau of Crime Statistics and Research and engaged in a telephone survey of over 1,000 people. That was quite effective as far as it went.³⁰⁴

5.95 Mr Ierace supported the role of the NSW Sentencing Council more generally. He highlighted the impact guideline judgments have on the resources of the Office of the Director of Public Prosecutions and the NSW Public Defenders and considered that an expanded role for the NSW Sentencing Council would assist in this regard.

One of the issues with guideline judgments is the fact that they are resource intensive both for the Director of Public Prosecutions, Public Defenders because we have a role in them, Legal Aid and so on. I think that the Sentencing Council could take some of that burden; it would need further resources but I think the overall picture of resources could be reduced.³⁰⁵

Conclusions

5.96 The Committee was encouraged by the evidence received voicing support for guideline judgments and promoting an expanded role for the NSW Sentencing Council. It is clear that guideline sentencing is seen as an opportunity to promote consistency without the need for mandatory sentencing.

5.97 The Committee recommends that the Attorney General explore options for guideline judgments in this area. The Committee notes the practical difficulties in issuing guideline judgments where there are a variety of offences and a wide range of offending behaviour, which is the case for child sexual assault offending. The Committee considers this should not act as a deterrent and suggests guideline judgments for the most serious offences in the first instance.

5.98 The Committee acknowledges that applications for guideline judgments can have a significant impact on resources of the Office of the Director of Public Prosecutions, NSW Public Defenders and other parties. To this end, the Committee supports an expanded role for the NSW Sentencing Council to assist in this area and agrees with Recommendation 18.2 of the NSW Law Reform Commission Report 139 *Sentencing*.

³⁰³ Mr Lloyd Babb SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of evidence, 28 April 2014, p29.

³⁰⁴ Mr Mark Ierace SC, Senior Public Defender, Legal Aid New South Wales, Transcript of evidence, 28 April 2014, p56.

³⁰⁵ Mr Mark Ierace SC, Senior Public Defender, Legal Aid New South Wales, Transcript of evidence, 28 April 2014, p56

- 5.99 Under this recommendation, the NSW Sentencing Council would have the specific function of preparing a research and advisory report for consideration by the NSW Court of Criminal Appeal. In preparing this report, the Council could seek the views of the public and relevant stakeholders.

Recommendation 17

The Committee recommends that the Attorney General considers applying for a guideline judgment, or judgments, for child sexual assault offending.

Recommendation 18

The Committee recommends that the NSW Sentencing Council be given an expanded role in the guideline judgment process, as recommended by the NSW Law Reform Commission in Report 139 *Sentencing* and that the NSW Sentencing Council be adequately resourced to fulfil this expanded role.

PRE-RECORDING OF EVIDENCE

- 5.100 As part of the inquiry, the Committee was alerted to the inherent difficulties experienced by children giving evidence in sexual assault cases in NSW. These relate to time delays, the way in which individual victim experiences are recounted through a 'process of disclosure', and the levels of stress experienced by children giving evidence.
- 5.101 These factors make it difficult to obtain accurate and complete evidence and add urgency to the need to elicit such information in a way that better accommodates young and vulnerable witnesses.
- 5.102 In criminal trials, evidence is presented and tested during two stages, as follows:
- An initial interview between police and the witness, if admissible.
 - Other formal evidence given by the witness (including examination in chief, cross-examination and re-examination) in court.
- 5.103 Child sexual assault cases heard in NSW, where the complainant is less than 16 years of age, allow the initial interview recorded between the complainant and the Joint Investigation Response Team (JIRT) to be used in court. This is contrasted in other Australian jurisdictions, such as Western Australia (WA) and Victoria, where all parts of a child's evidence, including cross-examination and re-examination are recorded for use in court. Legislation governing these procedures is set out later in this section.
- 5.104 The rationale for the admissibility of all recorded evidence in these jurisdictions is to prevent a child witness from having to endure the stress of prolonged delays before giving evidence or be required to appear or reappear months or even years later. All of the evidence is pre-recorded in a shorter timeframe, prior to the formal commencement of the trial, and admissible as evidence in full at court.

Current NSW Practice

- 5.105 In NSW, an initial pre-recorded interview is admissible as evidence in chief, where a witness is less than 16 years of age at the time the recording is made and the matter proceeds to trial. All other evidence, including cross-examination and re-examination, is then tested, either in person in the courtroom or by means of alternative arrangements, including CCTV. This evidence cannot currently be pre-recorded in the same manner.³⁰⁶
- 5.106 For each case, the initial interview is conducted by a Joint Investigation Response Team (JIRT), a coordinated response between NSW Police and officers from the Department of Community Services. The interview serves the dual purpose of gathering evidence about the alleged assault and assessing the child's care and protection needs.
- 5.107 A JIRT officer requires specific skills in eliciting information about the event, while complying with the rules of evidence. This interview often forms the evidentiary basis for the prosecution.³⁰⁷ The remainder of the child's evidence, cross-examination and re-examination, may be delivered via live CCTV or in person, when a trial commences.
- 5.108 In order to accommodate the needs of child complainants, evidence can be gathered at an early stage of proceedings, while it remains fresh and at the forefront of the child's mind. NSW courts also allow for evidence to be delivered via CCTV, in order to remove the stress of being in a courtroom with the accused.
- 5.109 While these concessions are beneficial to young witnesses and may alleviate some concerns about the pressures of participating in the court process, they do not match the reforms which have been implemented in other jurisdictions.

Procedural limitations

- 5.110 Outlined below are a number of inherent difficulties that remain unaddressed:
- A child will still have to give evidence in court.
 - There are likely to be significant time delays between giving initial evidence and appearing, or re-appearing, in court.
 - Using a JIRT interview is not the most effective tool for the prosecution and is open to additional scrutiny.
- 5.111 Disclosing the details of a sexual assault is a traumatic event for the most resilient of witnesses. The process is even more stressful for young children, who will often not want to relive or recount the experience.
- 5.112 Ms Katherine Alexander, Executive Director, Office of the Senior Practitioner, Department of Family and Community Services (FACS), told the Committee that

³⁰⁶ Judicial Commission of New South Wales, Criminal Trials Courts Bench Book, *Evidence given by alternative means*, 1-372 and *Criminal Procedure Act 1986* (NSW), s306U and s294B.

³⁰⁷ Attorney General's Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: the way forward*, December 2005, pp106-107.

waiting for a trial is stressful for a child. She described child witnesses as vulnerable and nervous, resulting in the stress of a trial putting additional pressure on them and deterring them from participating.³⁰⁸

5.113 The Director of Public Prosecutions elaborated on the stress experienced by child witnesses in the following terms:

At the moment part of the ordeal is the waiting around and the uncertainty of when you are going to be giving your evidence. We have tried to push for defence pre-trial disclosure and early resolution of issues with some real success but we still have not got to the stage where a young child can be told with confidence, "You will be giving your evidence on Monday and it will be over on Monday." They might be waiting around for a court and for pre-trial rulings till the Monday of the next week, which to me is completely unacceptable. They are vulnerable, they are nervous and it puts pressure on them to say, "I can't go through with this". I think that is an idea that is worth considering from Western Australia and Victoria.³⁰⁹

5.114 An additional factor highlighted in background Committee briefings is that a child's recollection of events under cross-examination becomes particularly unreliable and that it is preferable to gather evidence at the earliest possible stage.

5.115 While evidence is elicited at a JIRT interview, the child will later be cross-examined or re-examined, when their version of events is subject to a greater level of scrutiny and can be deconstructed. The inherent unfairness of the process is demonstrated by the fact that a child's evidence is elicited in the same way as that of an adult.

5.116 A further limitation is the effect of using a JIRT interview alone as evidence in chief. Mr Babb SC told the Committee that using a JIRT process has drawbacks in that the interview itself is given as evidence and may present facts out of chronological order and without the benefit of conventional evidence taking.³¹⁰

5.117 The NSW Criminal Justice Sexual Offences Taskforce reinforced the major shortcomings of the use of JIRT interviews as evidence in the following terms:

- Disclosure is a complex process and a single taped interview may only give a fragmented or incomplete description of an assault.
- The child still has to be cross-examined, and may later be re-examined.

³⁰⁸ Ms Katherine Alexander, Executive Director, Office of the Senior Practitioner, Department of Family and Community Services, Transcript of evidence, 28 April 2014, pp2-4.

³⁰⁹ Mr Lloyd Babb SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of evidence, 28 April 2014, p28.

³¹⁰ Mr Lloyd Babb SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of evidence, 28 April 2014, p29.

- The electronic recording will increase the level of scrutiny on the child's evidence and by implication, the interviewing process, the skills of the interviewer and the interviewer training program.³¹¹

Past recommendations

5.118 Previous reviews dealing with the use of pre-recording of evidence have generally supported its use in trials involving young children. The Wood Royal Commission supported the use of pre-trial recordings on the basis that:

- Evidence is received while it is fresh in a child's mind.
- It enables a child to put traumatic events behind them and move on with their lives.
- It allows counselling to begin at an earlier stage, where this might be postponed so as not to affect the integrity of a child's evidence.
- In the event of a re-trial or appeal, the child's evidence can be presented in the form of a videotape; therefore they are not required to reappear.
- Where inadmissible evidence is received, it can be deleted by editing the recording.³¹²

5.119 This approach was also supported in a previous inquiry conducted by the NSW Legislative Council Standing Committee on Law and Justice. In its report on Child Sexual Assault Prosecutions, the Committee made recommendations to enable:

- Child witnesses' evidence to be recorded in full prior to the trial.
- The electronic-recording to be admitted into evidence at trial to replace the child's evidence-in-chief, cross-examination and any re-examination.
- The court to order the editing of the video recording in order to omit irrelevant or prejudicial material prior to the trial.
- Courts to order that a child's evidence not be pre-recorded or admitted into trial if, in the specific circumstances of the trial, it is not in the child's best interests, or the child prefers not to have the evidence pre-recorded or admitted electronically, or particular circumstances render it contrary to the interests of justice for the evidence to be pre-recorded or admitted electronically.
- That a child witness is not required to attend the trial for further examination, unless further examination is required in circumstances that make an additional pre-trial recording unfeasible.³¹³

³¹¹ Attorney General's Department of New South Wales, Criminal Justice Sexual Offences Taskforce, Responding to Sexual Assault: the way forward, December 2005, p107. See Diana McConachy, *Evaluation of the Electronic Recording of Children's Evidence: Final Report*, May 2002.

³¹² Attorney General's Department of New South Wales, Criminal Justice Sexual Offences Taskforce, Responding to Sexual Assault: the way forward, December 2005, p115.

5.120 These recommendations are yet to be adopted.

Approaches in Other Jurisdictions

5.121 As previously outlined, courts in Westerns Australia and Victoria have addressed the issues raised and introduced pre-recording for all evidence received from complainants in child sexual assault cases. The details of these arrangements is outlined below:

Western Australia

5.122 In Western Australia, a pre-recorded examination in chief and cross-examination may be applied for and undertaken at a special hearing, before it is used later in court. This is set out in s106I of the *Evidence Act 1906 (WA)*, which states:

106I. Visual recording of child's evidence, application for directions

(1) Where a schedule 7³¹⁴ proceeding has been commenced in court, the prosecutor may apply to a judge of that court for an order direction –

[(a) deleted]

(b) that the *whole* of the affected child's evidence (including cross-examination and re-examination) be –

(i) taken at a special hearing and recorded on a visual recording; and

(ii) presented to the court in the form of that visual recording.

(2) The accused is to be served with a copy of, and is entitled to be heard on, an application under subsection (1).³¹⁵

5.123 Further, s106K expands on how a special hearing is conducted, including those who may be present, those who have access to the evidence and how the hearing is conducted.

106K. Child's evidence in full, special hearing to take and record

(1) A judge who hears an application under section 106I(1)(b) may make such order as the judge thinks fit which is to include –

(a) directions, with or without conditions, as to the conduct of the special hearing, including directions as to –

(i) whether the affected child is to be in the courtroom, or in a separate room, when the child's evidence is being taken; and

(ii) the persons who may be present in the same room as the affected child when the child's evidence is being taken;

(b) subject to section 106HB(3), directions, with or without conditions, as to the persons, or classes of persons, who are authorised to have possession of the visual recording of the evidence, and, without limiting section 106M but subject to section 106HB(3), may include directions and conditions as to the giving up of possession and as to the playing, copying or erasure of the recording.

³¹³ New South Wales Legislative Council Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions*, Report No. 22, October 2002.

³¹⁴ Schedule 7 offences under the *Evidence Act 1906 (WA)* include sexual offences and other serious crimes.

³¹⁵ *Evidence Act 1906 (WA)*, s106I.

(2) An order under subsection (1) may be varied or revoked by the judge who made the order or a judge who has jurisdiction co-extensive with that judge.

(3) At a special hearing ordered under subsection (1) —

(a) the accused —

(i) is not to be in the same room as the affected child when the child's evidence is being taken; but

(ii) is to be capable of observing the proceedings by means of a closed circuit television system and is at all times to have the means of communicating with his or her counsel; and

(b) no person other than a person authorised by the judge under subsection (1) is to be present in the same room as the affected child when the child's evidence is being taken; and

(c) subject to the control of the presiding judge, the affected child is to give his or her evidence and be cross-examined and re-examined; and

(d) except as provided by this section, the usual rules of evidence apply.

(4) If an order is made under subsection (1), nothing in this section or section 106I prevents a visually recorded interview from being presented under section 106HB as the whole or a part of the affected child's evidence in chief at the special hearing, and in that event the judge may give directions as to the manner in which the visually recorded interview is to be —

(a) presented at the special hearing; and

(b) recorded on, incorporated with or referred to in the visual recording of the evidence taken at the special hearing.

(5) Where circumstances so require, more than one special hearing may be held under this section for the purpose of taking the evidence of the affected child, and section 106I and this section are to be read with all changes necessary to give effect to any such requirement.³¹⁶

5.124 Since these amendments were made in 1995 to the *Evidence Act 1906 (WA)*, Judge Jackson commented that the legal fraternity in WA have accepted the amendments without difficulty, stating:

...there is no basis for the suggestion that the legislative, administrative and judicial steps taken in Western Australia have impacted adversely on the rights of the accused to a fair trial. They have, however, reduced the unfairness to children and other vulnerable witnesses. The two are not in competition.³¹⁷

5.125 The WA model for the use of pre-recorded evidence in child sexual assault trials was also considered by the Victorian Law Reform Commission (VLRC) before introducing their own provisions for such evidence.

Victoria

5.126 In the Victorian context, video and audio taped evidence (VATE) can be obtained from a witness by a trained Victorian Police Officer and recorded according to the

³¹⁶ *Evidence Act 1906 (WA)*, s106K.

³¹⁷ Judge H H Jackson, 'Child Witnesses in the Western Australian Criminal Courts', 27(4) *Criminal Law Journal* 199, 2003, at 210.

VATE Procedural Guidelines. The VATE interview may then be submitted (either wholly or partly) as the evidence-in-chief of the witness.³¹⁸ While similar to interviews conducted by a JIRT in NSW, it applies to persons up to 18 years of age, with the capacity to alter the recording, as appropriate. The defence is also able to use the VATE recording in all future legal proceedings.

- 5.127 As in Western Australia, the defence may choose to apply for a direction to obtain the whole of the evidence (including cross-examination and re-examination) at a special hearing for child sexual assault matters.³¹⁹ Here, the evidence is recorded and shown to the jury at the trial.
- 5.128 A special hearing must occur within three months of trial committal.³²⁰ The *Criminal Procedure Act 2009* (VIC) details how such a special hearing is conducted.³²¹ This Act also makes provisions for introducing evidence at a later date, or recalling a witness in exceptional circumstances.³²²
- 5.129 These measures were first considered by the Victorian Law Reform Commission in 2004.³²³ The Commission considered the following issues:
- The impact of taped vs. ‘live’ evidence on a jury.
 - That pre-recording could occur when the defence is not adequately prepared.
 - That the opportunity to introduce contrary or inconsistent evidence (including at a later date) is not provided for.
 - Resourcing implications.³²⁴
- 5.130 These concerns were ultimately resolved and juries are instructed not to adversely consider or afford lesser weight to VATE evidence. The Commission also examined the impact of the changes on preparation time and resourcing and came to the view that these costs were justified.³²⁵

Conclusions

- 5.131 The Committee considers the pre-recording of evidence, in line with the practice adopted in WA and Victoria, to be in the best interests of child witnesses in

³¹⁸ Judicial College of Victoria, *Sexual Assault Manual – 4.5 Video and taped or recorded evidence (VATE/VARE)* <http://www.judicialcollege.vic.edu.au/eManuals/SAM/index.htm#29183.htm> and s. 367 *Criminal Procedure Act 2009* (VIC).

³¹⁹ *Criminal Procedure Act 2009* (VIC), s370.

³²⁰ *Criminal Procedure Act 2009* (VIC), s371.

³²¹ See *Criminal Procedure Act 2009* (VIC).

³²² *Criminal Procedure Act 2009* (VIC), s376.

³²³ See Victorian Law Reform Commission, *Sexual Offences – Final Report*, July 2004.

³²⁴ Attorney General’s Department of New South Wales, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: the way forward*, December 2005, p115 and Victorian Law Reform Commission, *Sexual Offences – Final Report*, July 2004.

³²⁵ Attorney General’s Department of New South Wales, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: the way forward*, December 2005, p115 and Victorian Law Reform Commission, *Sexual Offences – Final Report*, July 2004.

sexual assault trials. Queensland and the United Kingdom have similar provisions, indicating that the pre-recording of evidence is widely accepted and practised.³²⁶

- 5.132 While the current NSW approach of using a JIRT interview goes some way towards alleviating the stress experienced by children appearing before the court, it does not resolve a range of issues successfully addressed in other jurisdictions. These include:
- The delay between the interview and proceeding to trial.
 - The manner in which a child discloses their experience.
 - The stress of being cross-examined in court.
- 5.133 The Committee is of the view that pre-recording of evidence better accommodates vulnerable child witnesses and improves fair and impartial evidence gathering. The Committee recognises that adopting this approach across NSW courts may result in additional resource demands on the court system.
- 5.134 However, in the interests of protecting child witnesses and to take advantage of the benefits derived from the experiences of other jurisdictions, the Committee is persuaded to adopt already tried and tested models operating in Western Australia and Victoria.
- 5.135 As has been shown in other jurisdictions, it is possible to accommodate and protect child witnesses without compromising the integrity of the trial processes or disadvantaging the defendant.

Recommendation 19

The Committee recommends that the NSW Government introduces trial measures to expand the use of pre-recorded evidence to include all evidence given by child victims (similar to the Western Australian and Victorian models) with a view to assessing whether this approach effectively lessens the stress and duration of court proceedings for child witnesses, without affecting the defendant's right to a fair trial.

JOINT TRIALS

- 5.136 As part of the inquiry's examination of strategies to minimise adverse impacts of court proceedings on child sexual assault victims, reference has been made to the practice of conducting joint trials, based on processes adopted in other Australian jurisdictions.
- 5.137 Common law principles maintain that where evidence admissible to prove one offence is not admissible to prove another offence, these should be tried separately, given the inherent risk of prejudice towards the accused. Sexual offences have been cited as a special class of offences where separate trials

³²⁶ Attorney General's Department of New South Wales, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: the way forward*, December 2005, p117.

should take place because of the risk of prejudice where evidence is not admissible to prove all counts.³²⁷

- 5.138 In NSW, when an accused is charged with more than one offence, or offences against more than one person, it is common practice for each matter to be tried separately, particularly for sexual assault matters.³²⁸ Contrastingly, other Australian jurisdictions have made specific amendments to provide for an exception to the common law principle, specifically for matters of a sexual nature, which allows these matters to be heard jointly.

Current Practice in New South Wales

- 5.139 The conduct of separate trials in NSW is determined by the following provisions of the *Criminal Procedure Act 1986* (NSW):

Section 21 - Orders for amendment of indictment, separate trial and postponement of trial

(2) If of the opinion:

(a) that an accused person may be prejudiced or embarrassed in his or her defence by reason of being charged with more than one offence in the same indictment, or

(b) that for any other reason it is desirable to direct that an accused person be tried separately for any one or more offences charged in an indictment

the court may order a separate trial of any count or counts of the indictment.³²⁹

Section 29 - When more than one offence may be heard at the same time

(3) Proceedings related to 2 or more offences or 2 or more accused persons may not be heard together if the court is of the opinion that the matters ought to be heard and determined separately in the interests of justice.³³⁰

- 5.140 A decision concerning the appropriateness of a separate or joint trial for an indictment is also influenced by rules governing tendency and coincidence evidence. This was elaborated on in a previous Legislative Council Standing Committee *Report on Child Sexual Assault Prosecutions*, as follows:

4.77 The tendency rule is relevant to consideration of whether to order separate trials. As explained in the Wood Royal Commission report, for a joinder of charges relating to offences against more than one child, the evidence of one child must be considered admissible (under tendency or coincidence rules) in the charges relating to another child:

An indictment may contain counts alleging the commission of offences against a number of different complainants. Again, the trial judge has a discretion to direct

³²⁷ Attorney General's Department of New South Wales, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: the way forward*, December 2005, p82.

³²⁸ See *Criminal Procedure Act 1986* (NSW) and Attorney General's Department of New South Wales, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: the way forward*, December 2005, p82.

³²⁹ *Criminal Procedure Act 1986* (NSW), s21(2).

³³⁰ *Criminal Procedure Act 1986* (NSW), s29(3).

that there be separate trials. Unless the evidence in respect of the allegations made by one complainant is admissible in respect of the trial of the counts relating to the other complainant(s), a trial judge should direct that there be separate trials.

Evidence relating to one complainant is admissible in the trial of a charge relating to another complainant, if it has significant probative value within the 'tendency and coincidence' rules contained in Part 3.6 of the Evidence Act...

4.78 As with tendency and coincidence evidence, the possibility of joint concoction and the potential for prejudice against the accused are issues in determining whether to try charges separately.

4.79 The Court of Criminal Appeal, in *De Jesus'* case, made clear its belief that joint charges can work an injustice on the accused. The case involved four separate complainants, each under 10 years of age, which was successfully appealed on the grounds that corroborating evidence from each complainant should not have been admitted at trial. The DPP explained:

*The new trial was ordered on the basis that a jury having heard the evidence supporting one of the girls may not have approached the determination of the balance of the charges with a fresh and independent mind.*³³¹

5.141 Against this background, the NSW Office of the Director of Public Prosecutions (ODPP) made the following comment in an earlier submission to another inquiry:

...sexual assault indictments in NSW involving more than one victim are regularly severed; indeed, it could be said anecdotally [that] there is a presumption in favour of separation.³³²

5.142 The conduct of separate trials in NSW is therefore designed to avoid a perceived prejudice against the accused (advertently or inadvertently, by the jury) and/or concoction between witnesses. As a principle of common law, this is adhered to in all instances, including cases involving child sexual assault offences.

Limitations of current practice

5.143 While the subject of joint trials for child sexual assault offences was not covered extensively during the inquiry, the Committee is keen to explore ways to reduce the stress and trauma experienced by children in the court environment. As it stands, children can be required to give evidence on more than one occasion, while a jury will be unaware of multiple accusations against the same defendant.³³³

5.144 An account of the impact of separate trials on child witnesses is illustrated in the following case:

³³¹ New South Wales Legislative Council Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions*, Report No. 22, October 2002, p103.

³³² Office of the Director of Public Prosecutions New South Wales, *Submission FV 158*, 25 June 2010. As cited in New South Wales Law Reform Commission, *Family Violence – a National Legal Response*, Vol. 1, October 2010, p1224.

³³³ Attorney General's Department of New South Wales, *Criminal Justice Sexual Offences Taskforce, Responding to Sexual Assault: the way forward*, December 2005, p73.

JOINT SELECT COMMITTEE ON SENTENCING OF CHILD SEXUAL ASSAULT OFFENDERS
REFORM OPTIONS

The fact that there were two trials meant a duplicity of stress for my children. As it stands now, one daughter's trial has been completed with a Not Guilty verdict brought in...[it was] very distressing for the girls to go back once more for the second trial two days later – back to back. The second trial was mistrialed after two days...Now my children have to go back to court [on a specific date] to suffer this hell once again.³³⁴

5.145 It is also important to acknowledge the difficulty in balancing the impact of a child's exposure to harsh courtroom proceedings against a need to provide fairness for the accused.

5.146 Mr Lloyd Babb SC, Director of Public Prosecutions for NSW, made the following observations:

Queensland and Tasmania have a law in place that says that offending against multiple victims will be heard in the one trial and that the possibility of concoction is a question for the jury. I think that is an excellent provision because we separate trials on the possibility of concoction and then we knock off multiple offending one by one, so you end up getting sentenced for the one offence where there were three other complaints. I think juries are well capable of assessing the possibility of concoction and in many instances I think we are having separate trials where they should be joint trials. So I think Queensland and Tasmania do that better than New South Wales.³³⁵

5.147 Mr Babb SC further argued that separate trials should be held more frequently and that this would allow more cases to be heard at the District Court level, thereby reducing delays in court and the stress experienced by child witnesses.

5.148 The NSW Police Royal Commission Paedophile Inquiry has previously recommended to the NSW Government that:

...consideration be given to permitting judges to take into account, as a relevant circumstance, in any application to sever counts in a trial, involving more than one complainant, any adverse impact that may have on complainants aged under the age of 16 years.³³⁶

5.149 The Wood Royal Commission was broadly supportive of joint trials, holding that judicial discretion could enable weight to be given to the impacts on child witnesses when deciding whether or not to hold joint or separate trials.

5.150 In evidence to the Committee, Mr Stephen Odgers SC, Chair of the Criminal Law Committee, NSW Bar Association, expressed his opposition to joint trials.

³³⁴ Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, 1997, pp134-135. As cited in Attorney General's Department of New South Wales, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: the way forward*, December 2005, p82.

³³⁵ Mr Lloyd Babb SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of evidence, 28 April 2014, p27.

³³⁶ Police Royal Commission: Paedophile Inquiry (Volumes 4-6), (1997) at 1098 at [15.158]. As cited in Attorney General's Department of New South Wales, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: the way forward*, December 2005, p82.

The reason you have more than one trial is to avoid unfair trials...we have rules of evidence which provide that, for example, tendency evidence, that is evidence showing that an offender has done something similar in the past to that with which he or she has been charged, may only be admitted in certain circumstances...

The point is if the evidence is not admissible then it is impossible to accept a trial in which a jury is going to be told you are hearing all the evidence in relation to the two complainants and when considering the case against each you should disregard what you heard in relation to that complainant when considering the prosecution case against another complainant...

If the evidence is not cross-admissible, that is if the evidence of one complainant is not admissible in the trial of the other complainant, because of the operation of the rules of evidence, then it is essential, to avoid unfair prejudice to an accused, that the trials be separated.³³⁷

- 5.151 According to Mr Odgers SC, it would be impossible for a jury to consider evidence taken at a joint trial and apply parts of the evidence in isolation, leading to a degree of prejudice in the jury's deliberations. This combined with existing laws of evidence, namely the admissibility of propensity and tendency evidence, in his view, would result in joint trials being inherently unfair for the accused.

Approaches in Other Jurisdictions

- 5.152 In other Australian jurisdictions, the issues of concoction and/or collusion on the part of the victims and the possibility of prejudice are matters for the jury. To varying degrees, these jurisdictions have made provisions for joint trials, in cases involving sexual assault.

- 5.153 Examples of such legislative provisions in other jurisdictions are set out below:

Victoria

- 5.154 Under section 194 of the *Criminal Procedure Act 2009* (VIC), if two or more charges for sexual offences are joined together in the same indictment, the presumption is that the charges are tried together. This presumption is not rebutted if evidence on one charge is inadmissible on another charge.³³⁸

South Australia

- 5.155 In its *Criminal Law Consolidation Act 1935*, the South Australian legislation also deals with joint charges. Section 278 of the Act provides that, unless an accused may be prejudiced in his defence by being charged with multiple offences, two or more counts of sexual offences involving different victims may be joined in the same information.³³⁹

Northern Territory

- 5.156 Section 341A of the *Criminal Code Amendment (Presumption for Joint Trials) Act 2014* (NT) makes a presumption of joint trials for sexual offences. Therefore, an

³³⁷ Mr Lloyd Babb SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of evidence, 28 April 2014, pp43-44.

³³⁸ *Criminal Procedure Act 2009* (VIC), s194 (2) and (3).

³³⁹ *Criminal Law Consolidation Act 1935* (SA), s278 (2).

accused person charged with more than one sexual offence in the same indictment will be tried on all charges together. This presumption is not rebutted by the possibility of collusion or suggestion.³⁴⁰

Conclusions

- 5.157 The Committee is generally supportive of joint trials, in order to reduce the impact on children of appearing multiple times in court to give evidence.
- 5.158 The Committee notes that other Australian jurisdictions have introduced amendments which provide for joint trials in sexual assault cases, not limited to child sexual assaults.
- 5.159 The Committee also notes the contrasting views of the DPP and the NSW Bar Association. The benefits of joint trials in lessening the time spent in court by children has to be weighed against the inherent unfairness of introducing tendency or propensity evidence to a jury that may not consider and apply such evidence in isolation.
- 5.160 The Committee's earlier recommendation to expand the use of pre-recorded evidence should act to reduce the necessity for children to be subjected to lengthy court processes and may mitigate the stress impact of multiple appearances.
- 5.161 The Committee therefore considers that, prior to the introduction of amendments to the *Criminal Procedure Act 1986 (NSW)* to enable the conduct of joint trials, further investigation should be conducted to examine:
- The experiences of other jurisdictions in the conduct of joint trials, including the perceived benefits to witnesses and disadvantages of the process.
 - The safeguarding of the right of an accused to a fair trial.
 - Whether greater use of pre-recorded witness evidence would lessen the need for joint trials.

Recommendation 20

The Committee recommends that the NSW Government investigates the feasibility of amending the *Criminal Procedure Act 1986 (NSW)* to provide for a presumption of joint trials in child sexual assault cases, similar to other Australian jurisdictions.

SPECIALIST CHILD SEXUAL ASSAULT COURT

- 5.162 The establishment of a specialist court to deal solely with child sexual assault cases was considered by the inquiry as a means of overcoming shortcomings of the current court process identified earlier in the report. Central to the Committee's interest was the potential to expedite child sexual assault matters and to provide a more supportive environment for children giving evidence.

³⁴⁰ *Criminal Code Amendment (Presumption of Joint Trials) Act 2014 (NT)*, s341A (1) and (2).

5.163 The benefit of a specialist child sexual assault court has been considered previously in NSW and in other jurisdictions and has resulted in the establishment of specialist sex offence courts elsewhere, as set out below.

NSW Pilot Program

5.164 In 2003, a pilot program to improve court processes for child sexual assault cases was established in the Sydney West District Court registry following recommendations of the Standing Committee on Law and Justice.³⁴¹ The pilot program, commenced at Parramatta in March 2003, was later extended to Penrith, Campbelltown and Dubbo.³⁴²

5.165 The main aims of the pilot program were to:

- Reduce delays.
- Improve the physical environment of the court and use special innovative measures to assist children to give evidence.
- Increase the skills of the legal professionals involved in the court process.³⁴³

5.166 An initiative of the program included upgrading Local and District courtrooms with technology to enable child witnesses to provide evidence via CCTV and providing child friendly facilities including a waiting room and play area.³⁴⁴

5.167 An evaluation of the program was conducted in 2005 by the NSW Bureau of Crime Statistics and Research.³⁴⁵ In summary, the evaluation found that the improvements made for child witnesses to provide evidence via a remote witness suite were a positive outcome of the program. BOCSAR found, however, that few other real changes had resulted.

While the remote witness suite was well received and benefited those children who were able to use it, in practice there were few other real changes. The concerns about delays, problems with the technology and the way children are treated in court, especially during cross-examination, remain valid.³⁴⁶

³⁴¹ New South Wales Legislative Council Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions* Report 22 – November 2002.

³⁴² Dr A Cossins, *Alternative models for prosecuting child sex offences in Australia – Report of the National Child Sexual Assault Reform Committee*, 2010, p285

³⁴³ J Cashmore and L Trimboli, *An evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot*, NSW Bureau of Crime Statistics and Research, (2005) pix

³⁴⁴ Dr A Cossins, *Alternative models for prosecuting child sex offences in Australia – Report of the National Child Sexual Assault Reform Committee*, 2010, p285-6

³⁴⁵ J Cashmore & L Trimboli, *An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot*, NSW Bureau of Crimes Statistics and Research, 2005

³⁴⁶ J Cashmore & L Trimboli, *An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot*, NSW Bureau of Crimes Statistics and Research, 2005 p64

Other jurisdictions

5.168 A number of overseas jurisdictions have established specialist courts for sex offences. Examples include Manitoba in Canada, New York State in the United States of America and a number of Sexual Assault Courts in South Africa.³⁴⁷

Family Violence Court in Manitoba, Canada

5.169 The Family Violence Court in Manitoba was established in 1990 and prosecutes most cases of child sexual assault. The court deals with first appearances, remands, guilty pleas and trials for spousal abuse, child abuse (including child sex abuse) and elder abuse cases.³⁴⁸

5.170 For child sex abuse cases, the court's achievements include:

- Significantly higher convictions rates compared with National Data for Canada.
- A higher percentage of offenders convicted of child sexual abuse in Winnipeg receiving a jail sentence compared to offenders nationwide.
- A dramatic increase in the length of sentences with the specialist court sentencing 37% of convicted offenders to imprisonment for two years or more, compared with National Data which showed that only 6% of convicted offenders were sentenced to imprisonment for two years or more.³⁴⁹

Sex Offence Courts in New York State

5.171 In 2006, the first adult Sex Offence Courts were established in Oswego, Winchester and Nassau Counties in New York State. By August 2009, eight sex offence courts were in operation in different counties in New York.³⁵⁰

5.172 The Courts are part of each County's Supreme Court and bring together the police, probation, parole, corrections and other criminal justice personnel and judges along with treatment providers, lawyers and victim service providers.³⁵¹

5.173 The Courts adopt a victim-centred approach which provides counselling and other social services to victims at the start of their involvement with the criminal justice system.³⁵²

5.174 Data from the Oswego Sex Offence Court shows that of the 105 cases dealt with between January 2006 and May 2007, no cases were dismissed and all defendants either pleaded guilty or were found guilty.³⁵³

³⁴⁷ Note the information extracted below has been sourced from Dr A Cossins, *Alternative models for prosecuting child sex offences in Australia – Report of the National Child Sexual Assault Reform Committee*, 2010, pp291-310.

³⁴⁸ Dr A Cossins, *Alternative models for prosecuting child sex offences in Australia – Report of the National Child Sexual Assault Reform Committee*, 2010, p299

³⁴⁹ Dr A Cossins, *Alternative models for prosecuting child sex offences in Australia – Report of the National Child Sexual Assault Reform Committee*, 2010, p301

³⁵⁰ Dr A Cossins, *Alternative models for prosecuting child sex offences in Australia – Report of the National Child Sexual Assault Reform Committee*, 2010, p302

³⁵¹ Dr A Cossins, *Alternative models for prosecuting child sex offences in Australia – Report of the National Child Sexual Assault Reform Committee*, 2010, p302

³⁵² Dr A Cossins, *Alternative models for prosecuting child sex offences in Australia – Report of the National Child Sexual Assault Reform Committee*, 2010, p305

Sexual Offences Courts, South Africa

- 5.175 The Wynberg Sexual Offences Court was established in South Africa in 1993 and was the first of its kind. By 2007, there were 59 Sexual Offence Courts across South Africa.³⁵⁴
- 5.176 The Wynberg Sexual Offences Court provides a 'world's best model', according to the UN General Assembly, for combating gender violence by co-ordinating a vast array of functions and services through the Thuthuzela Care Centre including investigative, prosecutorial, medical and psychological services. The Court deals with offences committed against women and children.³⁵⁵
- 5.177 Characteristics of the Court include:
- Victims Service Co-ordinators carrying out pre-trial consultation with complainants, pre and post-counselling and referrals for long term counselling.
 - Although trials are adversarial, there is no jury, with magistrates sitting on a rotational basis.
 - Each court is manned by two dedicated, specially trained prosecutors who are paid more than other prosecutors to encourage people to take up the role.³⁵⁶
- 5.178 The overall achievements of the sex offences courts in South Africa include the development of legal expertise resulting in more efficient prosecutions and adjudication; and the overall conviction rate (guilty pleas and verdicts) is also considerably higher than for sex offences in non-specialist regional courts.³⁵⁷

Inquiry Evidence

- 5.179 The Committee received a range of views and evidence opposing and supporting the establishment of a specialist child sexual assault court. Submissions and witnesses highlighted the advantages and disadvantages of its establishment, as set out below.

Advantages

- 5.180 Corrective Services NSW commented that the level of expertise available in a specialised court would be more concentrated. This would give judges and

³⁵³ Dr A Cossins, *Alternative models for prosecuting child sex offences in Australia – Report of the National Child Sexual Assault Reform Committee*, 2010, p304

³⁵⁴ Dr A Cossins, *Alternative models for prosecuting child sex offences in Australia – Report of the National Child Sexual Assault Reform Committee*, 2010, p294

³⁵⁵ Dr A Cossins, *Alternative models for prosecuting child sex offences in Australia – Report of the National Child Sexual Assault Reform Committee*, 2010, p296

³⁵⁶ Dr A Cossins, *Alternative models for prosecuting child sex offences in Australia – Report of the National Child Sexual Assault Reform Committee*, 2010, p296

³⁵⁷ Dr A Cossins, *Alternative models for prosecuting child sex offences in Australia – Report of the National Child Sexual Assault Reform Committee*, 2010, p299

magistrates a more detailed description of the range of programs and level of monitoring that Corrective Services could provide to sexual assault offenders.³⁵⁸

- 5.181 The NSW Police Force supported further discussion and exploration of the operation of a specialist court. Chief Superintendent Trichter considered that such could have the following advantages:
- There may be a greater capacity to bring together all the specialists required in the process.
 - It would enable practitioners and others involved to become specialised and provide greater skill and sophistication in the prosecution of child sexual assault offences.
 - A specialist court may reduce the number of appealed cases as there may be increased opportunities for the appropriate sentence to be given at first instance.³⁵⁹

- 5.182 Mr Lloyd Babb SC, Director of Public Prosecutions considered there to be merit in a child sexual assault court. He indicated that child sexual assault is a specialised area for the prosecution, defence and judiciary and a specialist court could develop expertise in these matters. However, the DPP also highlighted the emotional impact on staff as a potential concern.

One of the down sides of specialisation is that it is a very emotionally draining area and for my staff, for example, there would be concerns in having people for lengthy periods of time specializing solely in the area because of the emotional toll it can take on people. There is definitely vicarious trauma that you get through dealing with complainants and hearing their stories. There are arguments for and against a specialist court.³⁶⁰

- 5.183 In response to questioning about providing a less formal environment for children to provide evidence, while still having the sentencing capacity of a District Court, the DPP commented:

Why not? Really I heard the last panel say that we were doing everything we can: we are not doing everything we can. We have got to find ways of making it easier for people to give evidence and making it quicker. Yes, the conviction rates are good but the drop-out rates are too high. It is an ordeal and people will very often indicate that they cannot go through with it. Anything we can do to make it less formal and less of a trauma we should be doing.³⁶¹

³⁵⁸ Mr Jayson Ware, Director, Offender Services and Programs, Corrective Services New South Wales, Transcript of evidence, 28 April 2014, p13.

³⁵⁹ Chief Superintendent Anthony Trichter, Commander, Police Prosecutions Command, New South Wales Police Force, Transcript of evidence, 28 April 2014, p18.

³⁶⁰ Mr Lloyd Babb SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of evidence, 28 April 2014, p25.

³⁶¹ Mr Lloyd Babb SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of evidence, 28 April 2014, 27.

- 5.184 The Australian and New Zealand Association for the Treatment of Sexual Abuse indicated that a specialist child sexual assault may assist in encouraging offenders to admit guilt.

I think if we were able to introduce the idea of specialist sexual assault courts and if there was a focus on rehabilitation and treatment—and that includes supervision, surveillance and sanctions, those things need to be a part of that, alongside treatment—if those two principles were offered together, maybe that would affect that.³⁶²

- 5.185 Mr Mark Ierace SC, Senior Public Defender, cautioned against the possibility of creating a fractured court system. He was, however, supportive of the ability of a specialist court to develop appropriate treatment for offenders.³⁶³

- 5.186 Bravehearts supported a child sexual assault court as a means of allowing experts and professionals in child linguistics to assist judges listen to child witnesses.

We would love to see courts being convened by people who understand this issue. That probably gets back to that point we were just making before, whether it is a judge informed by professionals who are in their field of child linguistics, the children are not being heard in the court. We might be seeing them in video but we are not actually listening to children. There is a whole bunch of myths around children and their testimony: children lie and mothers concoct stories and plant them in the minds of their children.³⁶⁴

Disadvantages

- 5.187 The NSW Department of Police and Justice expressed concern about the potential for the court to become immune to the horrors of crimes dealt with on a daily basis and thought this should be further investigated.

When you are looking at a specialised court that is prosecuting those offenders, you would have to explore things around the burnout of that court—it becoming immune to the horror of what it is seeing today.³⁶⁵

- 5.188 The Hon. Anthony Whealy QC, Deputy Chair, NSW Sentencing Council, expressed some reservations about a specialist sexual offences court, stating that specialist courts can tend to become protective of their specialisation and may impose less severe penalties.

I have my doubts, personally about whether it is a good idea. It seems to me that it would be better, by guideline judgments and the selection of appropriate standard non-parole periods, to educate the Judiciary and to have a very good appellate

³⁶² Ms Jessica Prattley, Executive Committee Member, Australian and New Zealand Association for the Treatment of Sexual Abuse, Transcript of evidence, 28 April 2014, p34.

³⁶³ Mr Mark Ierace SC, Senior Public Defender, Legal Aid New South Wales, Transcript of evidence, 28 April 2014, pp59-60.

³⁶⁴ Ms Hetty Johnston, Chief Executive, Bravehearts, Transcript of evidence, 30 April 2014, p48.

³⁶⁵ Ms Penny Musgrave, Director, Criminal Law Review, Department of Police and Justice, Transcript of evidence, 28 April 2014, p12.

system to correct them if they are wrong. That seems to me to be a better way to go, to spread it across the whole range.³⁶⁶

5.189 The NSW Bar Association expressed support for a streamlined system, where there are special prosecutors and investigators designed to minimise stress and trauma for complainants. Nevertheless, they were not in favour of a special judicial group sitting only on child sexual assault cases.

They would spend their entire time doing those kinds of cases and supposedly bringing a level of expertise that is not held by all judges or magistrates in the system. We oppose that.³⁶⁷

5.190 The Chief Magistrate of the Local Court raised a number of concerns with the idea of a specialist court. He particularly questioned how to provide such specialisation across New South Wales, making particular reference to the Local Court:

Because of the very nature of the Local Court I have never been a great fan of specialist courts. We are expected to provide access to justice from Wentworth on the corner of Victoria, South Australia and New South Wales, from Broken Hill to Tweed Heads, down to Eden and all points in between. Specialisation cannot be everywhere.³⁶⁸

5.191 The Chief Magistrate further warned of a problem with specialisation, when specialists retire.

But specialisation does create a problem. What happens when your specialist retires? You have to start all over again. These are the pragmatic issues that are of concern. The overriding concern is that sexual assault is not confined to central Sydney; it happens all over New South Wales.³⁶⁹

Conclusions

5.192 While noting the diversity of views regarding the establishment of a child sexual assault court, the Committee has found, in principle, that such a specialist court would be a useful mechanism for achieving the following:

- Developing specialist expertise in child sexual assault cases.
- Ensuring that victims are treated with compassion and sensitivity.
- Providing a more informal environment than the District Court.
- Dealing with matters in a more timely manner.

³⁶⁶ The Hon. Anthony Whealy QC, Deputy Chair, New South Wales Sentencing Council, Transcript of evidence, 28 April 2014, p18.

³⁶⁷ Mr Stephen Odgers SC, Chair, Criminal Law Committee, New South Wales Bar Association, Transcript of evidence, 28 April 2014, p45.

³⁶⁸ Judge Graeme Henson, Chief Magistrate, Local Court of New South Wales, Transcript of evidence, 28 April 2014, p63.

³⁶⁹ Judge Graeme Henson, Chief Magistrate, Local Court of New South Wales, Transcript of evidence, 28 April 2014, p63.

- 5.193 To this end, the Committee supports the establishment of a Child Sexual Assault Offences Taskforce to investigate and report to the Government on a preferred model for a Child Sexual Assault Offences Specialist Court in NSW.
- 5.194 The Committee notes the earlier pilot program conducted in NSW and the operation of specialist sex offences courts in a number of other jurisdictions. The Committee considers the evaluation of the pilot program and the lessons learned from experiences in other jurisdictions could assist in determining an appropriate model for NSW.

Recommendation 21

The Committee recommends that the NSW Government establishes a Child Sexual Assault Offences Taskforce to investigate and report to the Government on a preferred model for a Child Sexual Assault Offences Specialist Court in NSW.

Recommendation 22

The Committee recommends that the NSW Government ensures that the Taskforce contains members who represent victim services, the courts, the legal community, NSW Police, the academic community, NSW Health and NSW Family and Community Services.

Recommendation 23

The Committee recommends that the Taskforce gives particular consideration to the features and effectiveness of specialist courts for sex offences and child sex offences in other jurisdictions, including, but not limited to, South Africa, the United States of America and Canada.

Chapter Six – Treatment and Management of Offenders

Sending convicted offenders of child abuse to jail is not really a good solution since it does not solve the problem. People sentenced to jail will only repeat the offences once they have been released. My story did involve this type of abuse before I entered the mental health system. My treatment has saved me from going to jail as well as making me aware of the damage that I had been doing to young people. Treatment has also enabled me to live a more normal life not plagued by recurring sexual thoughts about children. As well, my offending ceased.³⁷⁰

BACKGROUND

6.1 In the discussion of general sentencing principles set out in previous chapters, reference is made to the mutual objectives of punishment and treatment of offenders to prevent further criminality and to protect the community from future harm. This chapter deals with the range of treatment options available to provide this balance in the application of the principles of sentencing and the purposes of criminal punishment.

6.2 A general treatise on the treatment of prisoners was set out in 1955, in a document resulting from the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders. This document contains Standard Rules for the Treatment of Prisoners, with the following provisions:

65. The treatment of persons sentenced to imprisonment or a similar measure shall have as its purpose, so far as the length of the sentence permits, to establish in them the will to lead law-abiding and self-supporting lives after their release and to fit them to do so. The treatment shall be such as will encourage their self-respect and develop their sense of responsibility.

66. (1) To these ends, all appropriate means shall be used, including religious care in the countries where this is possible, education, vocational guidance and training, social casework, employment counselling, physical development and strengthening of moral character, in accordance with the individual needs of each prisoner, taking account of his social and criminal history, his physical and mental capacities and aptitudes, his personal temperament, the length of his sentence and his prospects after release.

66. (2) For every prisoner with a sentence of suitable length, the director shall receive, as soon as possible after his admission, full reports on all the matters referred to in the foregoing paragraph. Such reports shall always include a report by a medical officer, wherever possible qualified in psychiatry, on the physical and mental condition of the prisoner.³⁷¹

³⁷⁰ Submission 1, Confidential.

³⁷¹ Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957).

- 6.3 The rules and principles contained in the document described above are reflected in the approach to the treatment of child sexual assault offenders in custody and under supervision in the community as part of the sentencing regime in NSW.
- 6.4 Section 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) delineates the purposes for which a court may impose a sentence on an offender as follows:
- (a) To ensure that the offender is adequately punished for the offence.
 - (b) To prevent crime by deterring the offender and other persons from committing similar offences.
 - (c) To protect the community from the offender.
 - (d) To promote the rehabilitation of the offender.
 - (e) To make the offender accountable for his or her actions.
 - (f) To denounce the conduct of the offender.
 - (g) To recognise the harm done to the victim of the crime and the community.³⁷²
- 6.5 These purposes provide overlapping objectives and cannot be considered in isolation from one another. From the perspective of individual offenders, the purposes must be weighed as part of the sentencing process to provide a balanced outcome which protects the community, acts as a deterrence and provides the opportunity for rehabilitation.
- 6.6 The design and availability of treatment programs are part of the strategy to lessen the risk of reoffending and to safeguard other members of the community. Ms Jessica Pratley, Executive Member, Australia and New Zealand Association for the Treatment of Sexual Abuse (ANZATSA), in appearing before the Committee, reinforced the need to balance punishment with rehabilitation in the following terms:

The key message here is that restrictions, surveillance and sanctions alone do not reduce recidivism. It is the combination of supervision and treatment that reduces recidivism and thus enhances public safety, which is what we are all aiming for.³⁷³

AVAILABLE TREATMENT PROGRAMS

- 6.7 Current sentencing procedures include the following options:
- Custodial sentences with full time imprisonment.
 - Custodial sentences with community release under home detention orders or intensive corrections orders.
 - Early intervention and diversionary programs.
- 6.8 According to figures cited in the NSW Government submission, in December 2012 there were 1277 sentenced sexual assault offenders in custody, with a further 81

³⁷² *Crimes (Sentencing Procedure) Act 1999*, s3A.

³⁷³ Ms Jessica Pratley, Executive Member, Australia and New Zealand Association for the Treatment of Sexual Abuse, Transcript of evidence, 28 April 2014, p32.

in custody still to be sentenced. Furthermore, approximately 400 sexual offenders were managed in the community across the State, including 167 on parole and 233 in receipt of community sentences.³⁷⁴

6.9 Corrective Services NSW (CSNSW) provides a range of assessment and treatment services for sexual offenders in custody and under supervision in the community. Assessments conducted by Sex Offender Programs psychologists at different stages of the sentencing process include the following components:

- a) Pre-sentence assessments for the sentencing authorities/court.
- b) Case management planning assessments completed shortly after the commencement of a sexual offender's custodial sentence.
- c) Pre-release assessments at the request of the State Parole Authority. These are completed prior to an offender's earliest possible release date and assist the State Parole Authority to determine whether or not to release an offender and under what conditions.
- d) Risk assessment/management assessments for probation/parole staff on how to best manage sexual offenders in the community.

6.10 Assessments report on the following criteria:

- a) The offender's risk of committing further sexual offences.
- b) The appropriate intensity of sexual offender treatment program required and its availability.
- c) The individual treatment (criminogenic) needs of the offender and how these are best delivered.
- d) Recommendations for other treatment/interventions programs and services and its availability.
- e) Managing the offender's risk in the community upon release.³⁷⁵

6.11 The range of currently available programs is set out below.

Diversionsary and Early Intervention Programs

6.12 An example of a previously conducted pre-trial diversionsary program is Cedar Cottage. This was operated by NSW Health with the following set of objectives:

- To help child victims and their families resolve the emotional and psychological trauma they have suffered.
- To help other members of the offender's family avoid blaming themselves for the offender's actions and to change the power balance within their family so the offender is less able to repeat the sexual assault.
- To stop child sexual assault offenders from repeating their offences.³⁷⁶

³⁷⁴ Submission 22, New South Wales Government, p25.

³⁷⁵ Submission 22, New South Wales Government, p26.

- 6.13 Established pursuant to the provisions of the *Pre-Trial Diversion of Offenders Act 1985* (NSW), the purpose of Cedar Cottage was to provide for the protection of children who had been victims of sexual assault by a parent or by a parent's spouse or de facto partner. In order to qualify for the program under the Act, offenders had to satisfy certain criteria, including lack of prior convictions and the absence of violence when committing the offence. Additionally, the offender must have entered a guilty plea.³⁷⁷
- 6.14 The *Pre-Trial Diversion of Offenders Regulation 2005*, which provided for referral and assessment of offenders to the program, lapsed on 1 September 2012. This was due to the determination by the NSW Government that the program did not reflect community expectations in relation to the consequences of such serious offences against children. The decision was made despite the findings of two independent evaluations of the program, which recommended its expansion. The evaluations concluded that diversion from standard prosecution increased protection for victims and their families by dramatically reducing risks of reoffending by low-risk sex offenders.³⁷⁸
- 6.15 Further testimony concerning the benefits of the Cedar Cottage program was provided by Ms Pratley who was also employed by the program. In evidence to the Committee, Ms Pratley stated:
- Research was conducted showing that the program reduced recidivism in offenders who participated in the program. I also conducted research which showed that the fathers who came into the program actually disclosed significantly more about their sexual offences than the children had initially disclosed. That is really important because we know that the best outcomes for children are seen when they are believed, when they are supported and when their experience is validated.³⁷⁹
- 6.16 The cessation of the Cedar Cottage program means that there are no available adult diversionary programs for child sex offenders charged after 1 September 2012. This was cited in the submission from the Australian Psychological Society (APS), which highlighted that the lack of this option will increase the likelihood that offenders will plead not guilty.
- 6.17 According to the APS, the lack of diversionary programs as an alternative to imprisonment will "result in a lengthy trial process and, in the worst case scenario, the traumatising of the non-offending parent of an abused child, or even the child, by the requirement to give evidence against their partner or parent in open court."³⁸⁰
- 6.18 The benefits of such programs are also reinforced in the submission from ANZATSA, which argues that avoidance of the judicial adversarial process benefits survivors and their families. For this reason, the Association supports an

³⁷⁶ Submission 22, New South Wales Government, p20.

³⁷⁷ New South Wales Sentencing Council, *Penalties relating to sexual assault offences in NSW*, May 2009, p20.

³⁷⁸ Louise Butler, Jane Goodman-Delahunty, 'Effectiveness of Pretrial Community-Based Diversion in Reducing Reoffending by Adult Intrafamilial Child Sex Offenders', *Criminal Justice and Behaviour*, April 2012, pp 493-513.

³⁷⁹ Ms Jessica Pratley, Executive Member, Australia and New Zealand Association for the Treatment of Sexual Abuse, Transcript of evidence, 28 April 2014, p38.

³⁸⁰ Submission 5, Australian Psychological Society, p10.

alternative and similar sentencing scheme developed collaboratively between health and correctional agencies.³⁸¹

- 6.19 In certain cases, early intervention programs are offered to low risk offenders such as young people or cognitively impaired individuals who might otherwise proceed to more serious forms of offending. As described in the submission from the NSW Government: "These programs are designed to provide benefit to the victim, offender and the broader community...and enable eligible offenders to be diverted prior to trial or sentencing to receive appropriate assistance including rehabilitation, counselling and/or treatment."³⁸²
- 6.20 This approach is supported by the NSW Sentencing Council, which reported that restorative justice programs, while not suitable for high risk offenders, through early intervention provide value for that group of young, or cognitively impaired persons, displaying inappropriate sexual behaviour, who might otherwise progress to more serious forms of offending. The Council is of the view that this kind of intervention is one that should be encouraged and favours the expansion of these programs.³⁸³
- 6.21 An early intervention program which provides support for young people who sexually abuse is the New Street Adolescent Service. This program, although designed for adolescents between the ages of 10 and 17, gives priority to those aged 10 to 14 years. It operates as a holistic service, supporting families of children in a highly structured program that involves a combination of individual, group and family/conjoint work. The main focus of the program is relapse prevention, restitution, empathy development, and other issues related to the specific needs of individuals who have engaged in sexually abusive behaviour.
- 6.22 A major difference between New Street and other treatment programs for adults, such as Cedar Cottage, is that young people in New Street are not referred to or regarded as 'sex offenders' as this is deemed detrimental to their self-identity. This is reflected in one of the eligibility criteria, namely that prior to referral, a decision is made that the individual will not be charged. Furthermore, involvement of parents/caregivers is encouraged and deemed essential to help promote responsible and appropriate behaviours.³⁸⁴
- 6.23 An evaluation study, involving 34 participants, provided strong evidence that New Street was effective in protecting young people from being victims of crime and/or abuse, with only one out of 34 of those completing such treatment reoffending.³⁸⁵ The program was extended to rural areas in 2009, with the opening of the Rural New Street Service in Tamworth, servicing the rural and indigenous population.

³⁸¹ Submission 15, Australian and New Zealand Association for the Treatment of Sexual Abuse, p3.

³⁸² Submission 22, New South Wales Government, p20.

³⁸³ New South Wales Sentencing Council, Penalties relating to sexual assault offences in NSW, May 2009, pxxxiii.

³⁸⁴ New South Wales Sentencing Council, Penalties relating to sexual assault offences in NSW, May 2009, p22.

³⁸⁵ Laing, Mikulsky, and Kennaugh, 'Valuation of the New Street Adolescent Service', *Social Work & Policy Studies*, Faculty of Education and Social Work, University of Sydney, 2006.

- 6.24 Such diversionary programs provide another option for treatment in a non-custodial setting for young people who exhibit sexually abusive behaviour and contribute to the effective management of child sex offenders.

Conclusions

- 6.25 The Committee supports the value and benefits provided by diversionary programs. These benefits include reducing recidivism and reoffending by low-risk offenders, avoiding adversarial judicial processes for victims and their families and assisting young people or cognitively impaired individuals who might otherwise proceed to more serious forms of offending.
- 6.26 The closure of Cedar Cottage and the lack of a replacement program mean that there are no available adult diversionary programs for low-risk child sex offenders. Such programs enable eligible offenders to be diverted prior to trial or sentencing to receive appropriate assistance including rehabilitation, counselling and/or treatment, thereby reducing the legal and community costs associated with custodial sentences.

Recommendation 24

The Committee recommends that Corrective Services NSW and NSW Health develop alternative diversionary programs to replace Cedar Cottage and to complement the range of treatment programs available to low risk offenders.

Custodial Treatment Programs

- 6.27 Corrective Services NSW has provided recent statistics relating to participation levels in custody-based treatment programs. Based on figures available from the Custody-Based Sex Offender Programs referral database, as at 4 July 2014 there were 43 child sexual assault offenders in custody-based treatment, and a further 40 offenders with adult sexual assault convictions participating in such programs.³⁸⁶
- 6.28 A number of programs are currently available in NSW correctional facilities to treat individuals convicted of sexual offences. These are provided via the Sex and Violent Offender Therapeutic Programs (SVOTP) area of Corrective Services NSW. SVOTP offers a range of assessment and treatment services delivered in custodial and community settings.
- 6.29 The focus of treatment programs has changed from therapeutically based approaches prior to 1980, to cognitive behavioural therapies (CBT) emphasising relapse prevention. According to the NSW Government submission:
- Cognitive behavioural therapy targets a range of criminogenic needs and teaches relevant skills in a manner appropriate for the learning style and receptivity of the individual offender. Relapse prevention teaches offenders to recognise risks for reoffending and provides them with mechanisms for avoiding this behaviour.³⁸⁷
- 6.30 All treatment programs are voluntary and comprise the following elements:

³⁸⁶ Corrective Services New South Wales, Response to questions on notice, 9 July 2014, p1.

³⁸⁷ Submission 22, New South Wales Government, p26.

JOINT SELECT COMMITTEE ON SENTENCING OF CHILD SEXUAL ASSAULT OFFENDERS
TREATMENT AND MANAGEMENT OF OFFENDERS

- An emphasis on continuity of treatment services throughout custody and in the community.
- Separate programs to prepare/motivate, treat and maintain the treatment gains of sexual offenders.
- Programs tailored to meet the needs of each participating sexual offender.
- Programs varying in intensity according to the risk of re-offending and needs of the offender.
- Content and structure based on up-to-date international research findings.
- Emphasis placed upon making programs culturally appropriate for Aboriginal sexual offenders.
- Innovative programs implemented for specific sexual offenders (e.g., deniers and self-regulation [disability] programs).
- Psychologists treating sexual offenders receive a high level of supervision and support, and training from local and international experts.
- Demonstrated effectiveness in reducing sexual and non-sexual reoffending.³⁸⁸

6.31 In relation to custodial programs, eligibility for participation is subject to the following requirements:

- The offender consents to undertake treatment.
- The offender consents to being SMAP (Special Management Area Placement) status for the duration of their time in treatment. SMAP is a location or area within a centre where protective custody inmates may be housed following an assessment of their individual circumstances.
- The offender has a C (minimum) security classification, with the exception of CUBIT (Custody Based Intensive Treatment) at Parklea.
- There is sufficient time remaining on their sentence to complete the treatment prior to their earliest possible release date (EPRD) or sentence expiry date should they already be past their EPRD.
- The offender's history indicates that they are able to function effectively within a treatment program without risk to self or others.
- The offender acknowledges some level of responsibility for their sexual offence(s) (with the exception of the Deniers Program).
- The offender is not appealing the conviction for which he is in custody.³⁸⁹

6.32 The main treatment programs currently available are set out below.

³⁸⁸ Submission 22, New South Wales Government, p27.

³⁸⁹ Submission 22, New South Wales Government, p27.

Preparatory Program for Sex Offenders

- 6.33 The Preparatory Program for Sex Offenders (PREP) program is aimed at increasing offender motivation and readiness and reducing resistance to participation in treatments. It is, of itself, not a treatment program or a prerequisite for other treatment programs and is run in an open group format, with 1 to 2 sessions per week for up to 14 sessions.

Custody Based Intensive Treatment

- 6.34 Custody Based Intensive Treatment Program (CUBIT) is a residential therapy treatment program designed to reduce sexual recidivism for male offenders who have sexually abused adults and/or children. It is offered towards the end of an offender's sentence. Participation in the program is voluntary, although to be eligible for CUBIT, offenders need to be serving a sentence for a convicted sexual offence, have a previous conviction for a sexual offence, or have a current or prior conviction for a non-sexual offence where the underlying motivation is deemed to have been sexual.
- 6.35 The program is designed to help offenders change their thinking, attitudes, and feelings which led to their offending behaviour. Offenders are expected to take responsibility for their offending behaviour and their future, examine victim issues, identify how and why they offended, develop new strategies and skills to use in relationships and in coping with their emotions, and develop detailed self-management plans to assist in their release planning. It is offered to moderate or high risk/needs sexual offenders as a 6-10 month program with three sessions per week.
- 6.36 Offering CUBIT towards the end of an offender's sentence is intended to enable issues such as readiness, motivation, mental health and AOD issues to be dealt with. In particular it:
- Avoids potential erosion of treatment gains.
 - Enhances the transition from therapeutic community to the community.
 - Allows readiness issues such as literacy and mental illness to be dealt with first.
 - Allows for the fact that appeals against conviction are finalised in the earlier stages of the sentence.
 - Facilitates preparation for release through rehearsals for release and development and strengthening of family support networks.³⁹⁰
- 6.37 Research has found that CUBIT significantly reduces the dynamic risk factors associated with sexual reoffending and that men who completed the program are found to have an increased use of effective coping strategies, to have less

³⁹⁰ New South Wales Sentencing Council, *Penalties relating to sexual assault offences in NSW*, May 2009, p93.

cognitive distortions that support sexual offending, and to have an improved ability to form close, meaningful personal relationships and friendships.³⁹¹

CUBIT Outreach

6.38 CUBIT Outreach (CORE) is a moderate intensity treatment program that caters for low to low-moderate risk sex offenders and targets the core issues common to sex offenders. It requires offenders to take responsibility for their offence, to identify their offending cycle and offence pathway and to examine victim issues. The duration of this program is 6 to 8 months, with 2 sessions per week. Offenders who successfully complete the CORE program then move on to the custodial maintenance program.

Deniers Program

6.39 The Deniers Program is provided for men who have been convicted of sexually abusing adults or children but maintain their innocence. The Deniers Program is an adaptation of the CORE program where the risk factors associated with sexual offending are addressed without participants needing to admit to the actual offending. The goal is to help each offender identify problems that led to being in a position where they could be accused of sexual offending and to develop strategies to prevent this from happening again. It is a 6 month program consisting of two sessions per week.

Self-Regulation Program

6.40 The self-regulation program is provided for men who have sexually abused adults and/or children and who have an intellectual disability or other cognitive impairment and have limited adaptive skills in the gaol environment. It is offered to moderate and high risk/needs sexual offenders within a designated self-contained Additional Support Unit setting and comprises a 12-18 month program with 3 sessions per week.

Maintenance Program

6.41 The maintenance program is an integral part of sexual offender treatment and management, aimed at retaining and reinforcing treatment outcomes. It is designed to assist participants to generalise skills, implement strategies developed in treatment and demonstrate behaviour change in a supportive environment. Furthermore, it is used to strengthen self-management and release plans and available to men who have completed a Sex Offender Treatment Program.

Community Based Treatment Programs

6.42 Eligibility for community based treatment is provided on the basis that the offender agrees to satisfy the following set of criteria:

- Provision of consent to undertake treatment.
- Agreement to be under the supervision of parole and probation.

³⁹¹ New South Wales Sentencing Council, *Penalties relating to sexual assault offences in NSW*, May 2009, p95.

- Have sufficient time remaining on their sentence to complete the treatment program.
- Have reasonable arrangements in place to ensure he could attend the location where the treatment group is held.
- Acknowledgement of some level of responsibility for his sexual offence(s).³⁹²

6.43 The range of therapeutic programs for sexual assault offenders serving a community based order or in the community on parole under the supervision of CSNSW includes:

- Community-based Sex Offender Programs treatment groups for low-moderate and moderate-high risk/needs sexual offenders.
- Individual risk management intervention for high risk/needs sexual offenders.
- Community-based maintenance groups for offenders who have completed CSNSW Sex Offender Programs.
- Rural after-care, a form of community-based maintenance for offenders in regional locations of NSW who have completed CSNSW Sex Offender Programs.³⁹³

6.44 Details of programs currently available are set out below.

Forensic Psychology Services treatment programs

6.45 Forensic Psychology Services (FPS) programs provide community based maintenance treatment for moderate risk sexual offenders who have completed CUBIT/CORE in custody and are still under sentence. It is also available for offenders who have not received a custodial sentence or for those who completed a custodial sentence but were unable to participate in a sex offender treatment program whilst incarcerated. It involves a 6 - 12 month program with one session per week. FPS psychologists have an extensive involvement with each offender's parole officer and any other agency/service involved in his case management.

Regional treatment programs

6.46 A moderate risk/needs community-based treatment program is also available in the Northern (Newcastle District Office) and South-West regions (Wollongong District Office), co-facilitated by the Sex Offender Programs Regional Supervisors and the cluster Community Offender Services (COS) senior psychologist.

High risk/high needs offenders

6.47 While Corrective Services NSW does not currently have an intensive treatment program for untreated high risk/high needs offenders in the community,

³⁹² Submission 22, New South Wales Government, p29.

³⁹³ Corrective Services New South Wales, *Sex and Violent Offender Therapeutic Programs*, <<http://www.correctiveservices.nsw.gov.au/programs/sex-and-violent-offender-therapeutic-programs>> accessed 7 July 2014.

community-based staff are able to provide risk management sessions to these offenders. These sessions may cover identification of risk factors, warning signs and a self-management plan. This does not address causal factors underlying the offending behaviour.

- 6.48 Although evaluations of community based treatment programs indicate reduced rates of recidivism for offenders who have completed a program, caution should be exercised when comparing results of community-based rehabilitation with custodial-based rehabilitation. Custodial treatment programs for prisoners tend to focus on high-risk inmates, while community based programs often target lower risk offenders (who are able to be in the community).³⁹⁴

Community maintenance and parole programs

- 6.49 Community maintenance programs are provided for high risk sexual offenders who have successfully completed sex offender treatment in custody, usually as a parole condition. Participants are expected to attend a session every week until they are no longer under the supervision of CSNSW.
- 6.50 A parole order is generally subject to the standard conditions imposed by s128 of the *Crimes (Administration of Sentences) Act 1999* (NSW), and any additional conditions imposed by the sentencing court or by the Parole Authority. The Parole Authority may impose additional conditions, or vary or revoke any additional conditions which have been imposed, provided that they are not inconsistent with the standard conditions imposed by the Act.
- 6.51 The standard conditions of parole include the requirements that offenders released on parole must:
- Be of good behaviour.
 - Not commit any offence.
 - Adapt to normal lawful community life.³⁹⁵
- 6.52 Other conditions that may be imposed include counselling for drug or alcohol abuse, a requirement to attend for psychiatric treatment or groupwork programs, as well as place, association, and residential restrictions.
- 6.53 Failure to abide by the conditions may result in revocation of the parole order and return to gaol. Probation and Parole Officers monitor compliance with parole conditions and implement a case management plan which seeks to address offending behaviour and to reduce the potential for reoffending. Participation in community-based sex offender maintenance programs of the kind referred to earlier in this chapter is usually a condition of parole for sex offenders.³⁹⁶
- 6.54 Offenders who are demonstrating successful reintegration into the community are required to attend less frequently with some offenders only attending every

³⁹⁴ Submission 22, New South Wales Government, p31.

³⁹⁵ *Crimes (Administration of Sentences) Regulation 2008*, Reg. 224.

³⁹⁶ New South Wales Sentencing Council, *Penalties relating to sexual assault offences in NSW*, May 2009, p120.

four weeks. It allows offenders to further develop and implement their self-management plans and support networks in the community.

- 6.55 Offenders who have completed treatment programs in custody who live in remote and regional areas beyond the reach of FPS are provided with a rural after-care service either directly by the regional supervisor or psychologist under the supervision of the regional supervisor. These services are not deemed equivalent to attendance at the formal maintenance program.³⁹⁷

Pharmacological Treatment

- 6.56 Another treatment approach for high risk sexual assault offending is the use of anti-libidinal (otherwise known as anti-androgenic) drugs. These serve to lower testosterone levels and reduce sexual arousal and aggression. Arguments in favour of the use of these drugs rest on the assumption that the reduction of testosterone levels will increase the effectiveness of associated psychological treatment and that their effects are reversible once the treatment has ceased.
- 6.57 A variety of medications have an anti-libidinal effect. Those utilised in the management of sex offenders include Selective Serotonin Reuptake Inhibitors (SSRI's) medication and hormonal agents. The hormonal agents and the SSRI's have been shown in a variety of studies to reduce sexual interest, libido, sexual fantasies, urges and behaviours, arousal and sexual performance.
- 6.58 While some studies have shown a decrease in recidivism for treated offenders, the sample size of most of these studies is small and results have relied heavily on self reporting. Moreover, chemical treatment is not suitable for all high risk offenders. In the United Kingdom, it is reported that the number of offenders who may benefit from the medication is likely to be between five and 10 per cent of the population taking part in probation and prison programs.³⁹⁸
- 6.59 A confidential submission to the inquiry reported on the experience of a child sexual assault offender who has received anti-libidinal treatment and who is still being monitored by NSW Health. According to the author, the treatment has enabled him to live without being obsessed with intrusive fantasies about children and has prevented any reoffending over the last thirty years.
- 6.60 The use of such medication was also supported by Mr Andrew Tink AM, who provided a personal account of his experience with anti-androgen and androgen deprivation medicine as a result of a diagnosis with prostate cancer.³⁹⁹
- 6.61 In evidence to the Committee, Mr Tink AM provided the following comments:

I know the doctors have issues about prescribing things against people's will. Danny Sullivan, who is a forensic psychiatrist in Melbourne, is very much in favour of the LHRH drug being used for this purpose and also referred to the experience in Oregon where they have been doing this since the early 1990s. I will quote him, "The

³⁹⁷ Submission 22, New South Wales Government, pp28-29.

³⁹⁸ Prof. Don Grablin, 'The Use of Medication in the treatment of Sex Offenders', *Prison Service Journal*, Issue 178, p43.

³⁹⁹ Submission 6, Mr Andrew Tink AM, pp1-2.

JOINT SELECT COMMITTEE ON SENTENCING OF CHILD SEXUAL ASSAULT OFFENDERS
TREATMENT AND MANAGEMENT OF OFFENDERS

published studies very clearly have shown that of those assessed as needing it [and] who took it, reoffending rates were extraordinarily low. Those who were assessed as needing who refused to take it, around a third reoffended.⁴⁰⁰

- 6.62 There are concerns regarding the side-effects of the medication. Furthermore, anti-libidinal medication does not affect cognitive distortions and maladaptive thinking patterns, and as a result, pharmacological treatment cannot replace psychological therapy. As motivation from the offender is critical for treatment to work effectively, the weight of opinion is that chemical treatment should be administered only on a voluntary basis.
- 6.63 For this reason, informed consent is required for their prescription, which should include an explanation of their experimental status in the treatment of sex offenders. This is reinforced in the submission from FamilyVoice Australia, which recommends that no forced or non-consensual administration of such drugs should be allowed.⁴⁰¹
- 6.64 At a health professional level, the Royal Australian and New Zealand College of Psychiatrists (RANZCP) and the Australian Psychological Society also express ethical concerns and recommend patient consent prior to undertaking pharmacological treatments. The RANZCP submission further warns that “Mandating the prescription of anti-androgens has the potential to shift the doctor’s focus from the best interests of the patient to one of public safety.”⁴⁰²
- 6.65 Elaborating on the College’s position in relation to mandating biological treatments, Dr Jeremy O’Dea, Consultant Forensic Psychiatrist, Royal Australian and New Zealand College of Psychiatrists, further commented that:
- ...it falls into a number of different categories, depending on what mandating is. For argument's sake, psychiatrists under the Mental Health Act mandate, if you like, an enforced treatment regularly on the basis of their clinical assessment and judgement. The issue in this case is, first of all, the understanding would be that the court would mandate the treatment and that would have a concern for psychiatrists because then if they were going to provide that treatment they would be doing it on the basis of courts mandating it rather than necessarily on their own clinical judgement. That is our concern.⁴⁰³
- 6.66 This view is reinforced by the NSW Bar Association. In evidence to the inquiry Dr David Hamer, Member, Criminal Law Committee, stated:
- It should be noted that anti-androgen treatments are already being used under the *Crimes (High Risk Offenders) Act 2006*. They are now being used and the Bar Association's position is that there should be no extension beyond their current use. Under the Act, they are used with the consent of the offender as a condition of release from detention under a supervision order. The Association believes that if they are to be used, that is appropriate. In particular, the Association believes it would be inappropriate for the law to be reformed to enable anti-androgen

⁴⁰⁰ Mr Andrew Tink AM, Transcript of evidence, 28 April 2014, p51.

⁴⁰¹ Submission 2, FamilyVoice Australia, p5.

⁴⁰² Submission 13, Royal Australian and New Zealand College of Psychiatrists, p3.

⁴⁰³ Dr Jeremy O’Dea, Consultant Forensic Psychiatrist, Royal Australian and New Zealand College of Psychiatrists, Transcript of evidence, 30 April 2014, p14.

treatments to be imposed on an offender without consent. There are a couple of reasons for that. One is that these treatments involve quite serious medical intervention. Prior to their being used there should be a proper assessment of the offender involving both their medical and psychological conditions to determine whether the treatment would be beneficial.⁴⁰⁴

6.67 Dr Hamer further elaborated on the Bar Association's position in the following terms:

A further point that I want to make on behalf of the Bar Association is that it would be inappropriate to view anti-androgen treatments as achieving the goals of retribution or deterrence. Under the Crimes (High Risk Offenders) Act the objects of that Act are rehabilitation of the offender and, primarily, protecting the community. The goals of protecting the community and rehabilitating the offender are appropriate goals that may be achieved by anti-androgen treatments. But it would be inappropriate for anti-androgen treatments to be used to achieve the goals of retribution or deterrence because anti-androgen is a highly invasive medical treatment. It directly changes the offender's biology and their personality. It may be justified to try and achieve this through drugs, to change the offender's biology and personality, if the view is taken that this change would benefit the offender because they are suffering from urges that they cannot control, which would impact their life. It may be justified from the point of view of rehabilitation.⁴⁰⁵

6.68 According to the NSW Government submission:

Anti-libidinal medications form only part of any treatment approach and, as a risk management tool address only the sex drive component of the management. Other dynamic risk factors such as intoxication, dysphoric mood states, mental illness, antisocial associates, persistent attitudes that condone sexual offensive behaviours, opportunity, social isolation and social stressors can increase the risk despite anti-libidinal treatment. These are risk factors that would need to be managed in an ongoing treatment program.⁴⁰⁶

6.69 As described earlier, most treatment programs also comprise individual or group therapy, most commonly utilising a cognitive behavioural approach.

Medication management

6.70 At present, offenders may be referred by Corrective Services NSW to Justice Health to be assessed for anti-libidinal medication. Because suitable offenders would generally take such medication once they are released from custody, or shortly prior to release, Justice Health can only do the initial assessment or 'work up' for the offender. Ultimately, the offender's anti-libidinal treatment will need to be managed by private sector health providers or NSW Health, once the offender is in the community.

6.71 Although anti-libidinal medication is only suitable for a small number of offenders, those offenders are also often in the high risk category. In the

⁴⁰⁴ Dr David Hamer, Member, Criminal Law Committee, New South Wales Bar Association, Transcript of evidence, 28 April 2014, p42.

⁴⁰⁵ Dr David Hamer, Member, Criminal Law Committee, New South Wales Bar Association, Transcript of evidence, 28 April 2014, p42.

⁴⁰⁶ Submission 22, New South Wales Government, p 32.

Committee's view, it is important that offenders who may benefit from anti-libidinal medication are identified and assessed just prior to leaving custody.

6.72 The Committee understands that several years ago, Justice Health ran a small support clinic from the Corrective Services NSW's CUBIT program which assessed all sexual assault offenders. Practitioners at the clinic would prescribe medication as appropriate, including psychiatric or anti-libidinal drugs.

6.73 In addition, the clinic provided a follow up service for those sex offenders who completed the CUBIT program and assisted with maintenance programs once released into the community. Justice Health resided in one of the community locations and provided follow up service to those particular offenders. Funding for this operation was terminated a few years ago.

6.74 Due to the cessation of this arrangement, there is currently no state-wide CSNSW policy or procedure for referring an inmate to Justice Health for the purposes of assessing their suitability for anti-libidinal medication. Such referrals are generally made by psychologists working within CSNSW Sex Offender Programs (custody or community), using criteria developed in consultation with Justice Health. These criteria include that:

- The offender has been assessed as high risk of sexual re-offending.
- The offender is sexually preoccupied or has intrusive deviant fantasies.
- Where psychological treatment specific to the sexual deviance has not been successful.⁴⁰⁷

6.75 All prescription of anti-libidinal medication is used to supplement psychological treatment (not as an alternative). The process of referral from CSNSW to Justice Health will differ depending on local prison operations.

6.76 The lack of a consistent referral process and issues with continued management of offenders post release was addressed by Dr Tobias Mackinnon, Statewide Clinical Director, Forensic Mental Health, Justice Health and Forensic Mental Health Network. In evidence to the inquiry, Dr Mackinnon discussed this in the following terms:

When it comes to a decision about commencing an offender in custody on anti-libidinals, generally we are happy to consider that but it is a very difficult situation to consider starting an offender on an anti-libidinal if we cannot map out a pathway for them, post-release, to continue in an appropriate way both in terms of the prescription of the anti-libidinal but also the monitoring and management of that within a more comprehensive multidisciplinary setting that is focused not only on the biological treatment but also on the wider needs of that offender in the community to keep them safe.

The involvement of our service in anti-libidinal assessment and treatment is that at times an offender may be referred to Justice Health by Corrective Services and we could begin what is called a work-up for the appropriateness of anti-libidinal medication in the custodial setting and make recommendations about what should

⁴⁰⁷ Submission 22, New South Wales Government, p 32.

be made available to them in the community. Unfortunately, though, as we have no agency or power in the community, we cannot access any specific treatment for that offender post-release.⁴⁰⁸

Conclusions

- 6.77 The Committee considers that anti-libidinal medication has a role to play in the treatment regimen for high-risk offenders (whether or not they are subject to the *Crimes (High Risk Offenders) Act 2006*) and other offenders who are assessed as being suitable candidates to take this medication on a voluntary basis.
- 6.78 The Committee supports the current position where treatment with anti-libidinal medication may, for example, be a condition of an extended supervision order for high risk offenders under the *Crimes (High Risk Offenders) Act 2006* and that treatment with this medication may also be factored into parole for other offenders.
- 6.79 However, the Committee has found that treatment with anti-libidinal medication should not become an alternative sentencing option in lieu of a custodial sentence. Rather, anti-libidinal medication treatment should be offered on an informed voluntary basis in addition to any sentence imposed by the court and used in combination with other appropriate treatment options.
- 6.80 The Committee is concerned about the absence of a standardised and consistent referral process for non-libidinal treatment and agrees that current referral processes should be improved. It is also important that such assessment and future treatment management should be undertaken prior to completion of a custodial sentence.

Recommendation 25

The Committee recommends the development of a standard policy in NSW for referring offenders for assessment for suitability for anti-libidinal treatment. This should prioritise assessment of high risk offenders.

Recommendation 26

The Committee recommends that the NSW Government allocates increased resources to assessing child sexual assault offenders for anti-libidinal medication so that all offenders who may benefit from such voluntary treatment have been assessed, and treatment commenced with appropriate monitoring in place, prior to being released from custody.

- 6.81 Currently, offenders in the community (including those on Extended Supervision Orders) who require anti-libidinal medication must consult their own GP who needs to find a forensic psychiatrist who specialises in anti-libidinal medication.⁴⁰⁹

⁴⁰⁸ Dr Tobias Mackinnon, Statewide Clinical Director, Forensic Mental Health, Justice Health and Forensic Mental Health Network, Transcript of evidence, 15 May 2014, p4.

⁴⁰⁹ Submission 22, New South Wales Government, p33.

- 6.82 The WA Department of Corrective Services, in its submission to the inquiry, describes its experience of administering anti-libidinal medication for child sexual assault offenders. A major issue raised relates to the availability of suitably qualified medical practitioners to assume the management and supervision of offenders in the community. The Department recommends a multi-disciplinary approach for this task.⁴¹⁰
- 6.83 The resourcing of treatment options is covered later in this chapter.

Psychological vs. Biological Treatments

- 6.84 While there is a paucity of studies directly comparing the efficacy of psychological versus biologically based treatments, a meta-analysis of 12 treatment studies conducted in 1995 showed the most effective treatment programs were those that were either based on cognitive behavioural therapy (CBT) or anti-libidinal medications. It was noted that whilst one third of participants dropped out of CBT programs, the drop-out rate for the anti-libidinal group was more than 50%.
- 6.85 In a separate large scale meta-analysis of sex offender treatment effectiveness, biological treatments had a much higher impact on recidivism rates than psychological treatments, although it was noted that the main source for the difference was a very strong effect of surgical castration.⁴¹¹
- 6.86 Hormonal treatments, however, were statistically more effective than psychological treatments, although in the larger scale meta-analysis it was noted that the studies using hormonal treatments often had psychological treatment as well. It was concluded that rather than being “better” than psychological treatments, hormonal treatments should be used to augment psychological treatment.
- 6.87 There appears to be a consensus amongst researchers that for a small sample of high risk sexual offenders the use of medications for an anti-libidinal purpose is likely to be an effective and important treatment approach when combined with CBT treatment. In one study it was stated that “the weight of clinical evidence suggests that [such agents] have a temporary role to play in reducing risk in a select group of dangerous sex offenders if given intramuscularly (so that compliance can be ascertained)”.⁴¹²
- 6.88 It was further noted that given the lack of controlled studies over sufficient duration with large enough numbers of subjects, the effectiveness of anti-libidinal medications cannot definitely be proven at this time. There is also consensus, however, that the strongest evidence for the use of medications with sex offenders comes from clinical studies and to a lesser extent the few available controlled studies.

⁴¹⁰ Submission 8, Western Australian Government Department of Corrective Services, p4.

⁴¹¹ Lösel and Schmucker, ‘The effectiveness of treatment for sexual offenders: A comprehensive metaanalysis’, *Journal of Experimental Criminology*, (1/2005), pp117-146.

⁴¹² Maletzky, Tolan and McFarland, ‘The Oregon Depo-Provera Program: A five year follow-up’, *Sexual Abuse: A Journal of Research and Treatment*, (18/2006), p400.

- 6.89 Most researchers argue that further research is necessary, where this has been less extensive. On the basis of the available evidence, it appears sensible to include the option of anti-libidinal prescribing in strategies relating to the treatment and management of high risk sex offenders, particularly for the highest risk sexual offenders who pose an immediate risk.⁴¹³
- 6.90 RANZCP considers that Corrective Services NSW should regularly publish and make available recidivism rates for offenders who have undertaken sexual offender treatment in order to inform treatment options.⁴¹⁴
- 6.91 As previously stated, the most successful approaches to treatment will involve a range of complementary approaches to optimise outcomes and reduce recidivism. This is supported by mental health specialists appearing before the Committee.
- 6.92 Dr O’Dea told the Committee that:
- There is no good evidence, despite many years of research and clinical practice in this area, that psychological treatments alone have a significant impact, if any, on recidivism rates. I am aware that the psychological treatments are the treatments that are offered in custody, but there is no good evidence to date that they are effective. In fact there is evidence, and the best evidence to date is that they are not effective. The biological treatments—with medication, which would always be provided within a psychotherapeutic framework—are the ones that have been shown to be the most effective. There is an argument that they could be commenced in custody leading up to the person's release. As a clinical practitioner in this area, that is something we are frequently managing. It can be commenced either in the community or in the weeks leading up to release.⁴¹⁵

TREATMENT RESOURCING

- 6.93 Lack of adequate funding support for treatments both in custodial and community settings is a major concern and has been commented on in evidence received by the Committee. Health care specialists have specifically drawn attention to this issue as part of a series of workshops conducted as background to the inquiry.
- 6.94 In evidence taken at public hearings, specialists working in the treatment area of sex offenders have stressed the lack of resources available for successful rehabilitation and therapeutic management. While discussing intervention programs across jurisdictions, Dr Christopher Lennings, a Clinical and Forensic Psychologist working with sex offenders, commented that:

There is a similar kind of intervention that has been established in New South Wales called the custody-based intensive treatment [CUBIT] program, but that has nowhere near the capacity to deal with the number of offenders who are currently in gaol. I know it has been rolled out to various other prisons, which is a necessary thing. I am also aware that they have difficulties in finding staff for that and

⁴¹³ Submission 22, New South Wales Government, p34.

⁴¹⁴ Submission 13, Royal Australian and New Zealand College of Psychiatrists, p4.

⁴¹⁵ Dr Jeremy O’Dea, Consultant Forensic Psychiatrist, Royal Australian and New Zealand College of Psychiatrists, Transcript of evidence, 30 April 2014, p10.

JOINT SELECT COMMITTEE ON SENTENCING OF CHILD SEXUAL ASSAULT OFFENDERS
TREATMENT AND MANAGEMENT OF OFFENDERS

difficulties in their liaison with the prison officers about the best way to conduct running those programs.⁴¹⁶

- 6.95 This claim is supported in evidence provided to the Committee in response to questions on notice. Corrective Services NSW indicated that there are currently 323 offenders with child sexual assault convictions on the custody-based treatment waiting list.⁴¹⁷
- 6.96 As well as the costs of running programs in prison, reference was also made to the lack of suitably qualified and accredited professionals to treat, supervise and monitor offenders in the community. This is compounded in rural and regional parts of NSW, where psychology and psychiatric services are not available on the ground and practitioners have to travel from regional centres to deliver services to local communities. The lack of direct access by patients compromises treatment due to limits to the frequency and duration of visits by therapists.
- 6.97 According to the evidence received, each offender, prior to discharge into the community, should be comprehensively assessed to optimise recovery and rehabilitation. This may include determining housing and employment needs, as well as continuing treatment plans, to assist with integration into community life. Such an approach raises questions about the adequacy of resourcing to provide comprehensive individual case plans for each offender.
- 6.98 The shortage of qualified specialists was stressed in evidence provided by Mr Jayson Ware, Director, Offender Services and Programs, Corrective Services NSW, in the following terms:

I have been working for the department since 2005 and there are very few sex offender psychologists still working with us who were working back then. We lose experience quite quickly. The challenge then is getting new, often fresh graduates from university who have very little life experience to then work in a group of 10 sex offenders who have been predatory of children for a long period of time or adults for that matter—it is a very big ask.

One of the additional resource constraints for us is to make sure that we do lots of training. We supervise and do integrity monitoring and quality assurance of our sex-offender programs. So even though on paper it looks like a very sort of resource-intensive practice it is because we need to ensure the quality of the work that we do.⁴¹⁸

- 6.99 Discussing the additional challenges faced in rural and regional areas, Mr Ware elaborated further:

...that is partly why most of our treatment programs are based in the metropolitan Sydney area. Even though the perpetrators are often committing crimes out in the regions, to attract and retain psychologists we then have our treatment programs in Sydney. That is a difficulty for us because when we have looked at some of the

⁴¹⁶ Dr Christopher Lennings, a Clinical and Forensic Psychologist, Australian Psychological Society, Transcript of evidence, 30 April 2014, p4.

⁴¹⁷ Corrective Services New South Wales, Response to questions on notice, 9 July 2014.

⁴¹⁸ Mr Jayson Ware, Director, Offender Services and Programs, Corrective Services New South Wales, Transcript of evidence, 28 April 2014, pp10-11.

reasons why sex offenders have chosen not to come to our treatment programs, it is often that they have been way out in the regions. They have chosen to spend the 12 months being close to their families rather than coming to Sydney and being away from their families for the treatment program. In an ideal world we would take our treatment practice to them and that would take away that issue.⁴¹⁹

6.100 In supplementary evidence provided in response to questions asked at public hearings, Mr Ware indicated that very few private sector clinicians with expertise in treating sex offenders are based in non-Sydney locations. As a further resource constraint, Mr Ware commented that because Corrective Services NSW does not outsource sex offender treatment, cost becomes an issue because it is not funded through Medicare.⁴²⁰

6.101 The shortage of mental health specialists outside major metropolitan settings was reinforced by Dr Lennings, who told the Committee that:

My firm alone accounts for one-third of all psychologists registered for working in the private sector in Sydney. We employ more than one-third of all available private psychologists working in this sector. Once you get outside of Sydney it is slim pickings indeed. There are a couple in Wollongong, I do not do not think there are any in Newcastle and there is one in Coffs Harbour. We are looking at a limited pool of available experts. Not a lot of people want to do this work. It is really hard work and the accountabilities are really high.

If you have someone who gets depressed and they have a relapse, providing they do not kill themselves, it is not the end of the world but if you have someone who is a sex offender and they relapse all kinds of things fall down on top of your head. It is a terrible, terrible business and most people do not want to get involved in it. If there was, I think, greater support for it, because there are a lot of people who go through the Corrective Services and Juvenile Justice domain who go into the private practice and they are capable of doing the work, but there is no incentive or they do not want to have the grief of doing that work.⁴²¹

6.102 The medical practitioner rural workforce issue has been identified as a major priority by the NSW Ministry of Health. In further information provided in response to questions on notice, Justice Health refers to initiatives being undertaken by NSW Health to increase the availability of rural training positions for Psychiatrists and Psychologists.⁴²²

6.103 In relation to the scale of the funding and resourcing required for continuing treatment in the community, Dr Lennings made the following observations:

The average treatment that a moderate- to high-risk offender would need would be maybe a year or 18 months. I have had some of my own clientele for three years. We are talking about very extensive treatments for which there is no funding. The result is, not only for my own group but also for the other people I know who work in this

⁴¹⁹ Mr Jayson Ware, Director, Offender Services and Programs, Corrective Services New South Wales, Transcript of evidence, 28 April 2014, p11.

⁴²⁰ Corrective Services New South Wales, Response to questions on notice, 9 July 2014.

⁴²¹ Dr Christopher Lennings, a Clinical and Forensic Psychologist, Australian Psychological Society, Transcript of evidence, 30 April 2014, p5.

⁴²² Justice Health New South Wales, Response to questions on notice, 2 July 2014.

JOINT SELECT COMMITTEE ON SENTENCING OF CHILD SEXUAL ASSAULT OFFENDERS
TREATMENT AND MANAGEMENT OF OFFENDERS

field, that we carry a certain number of clients for free because the alternative is not acceptable.

In my own group, for instance, we run one of the two group programs that are available in New South Wales from the private sector and we subsidise that. We pay \$1,000 per month to split between two people because we feel it is unfair that they should work for such little money. As a small private business we nonetheless subsidise the people who run that group because there is no financial incentive whatsoever. To be perfectly honest, if you are in the private sector you have to make a living. So there is no financial incentive for being involved in this work because you are doing a lot of free work, you are doing a lot of work that people do not think highly of you for doing, and if something goes wrong you feel wretched.⁴²³

- 6.104 In private briefings to the inquiry, Corrective Services NSW made the same point that offenders who receive sentences of less than 12 months duration are not able to participate effectively in intensive treatment programs. The CUBIT program was cited as an example of this, whereby the 12 month duration of the program would require a sentence of at least 18 months.
- 6.105 While longer sentences may provide greater opportunities for rehabilitative treatment participation, more emphasis on integrated treatment both inside and outside custodial settings needs to be provided. In this way, offenders on parole can complete a maintenance program in the community, although the level of treatment intervention in the community would be less intensive.
- 6.106 Another option is the imposition of extended supervision orders under the *Crimes (High Risk Offenders) Act*. One of the objects of the extended supervision regime is to promote rehabilitation and to increase the participation of serious high-risk offenders in CUBIT towards the end of the sentence.
- 6.107 The current maximum duration of these orders means that extension to the orders has to be applied for six months in advance of expiry, according to Corrective Services NSW. This limitation reduces the efficacy of treatment programs, as the need to monitor and review progress is very resource intensive.
- 6.108 In the submission from the Australian Psychological Society, emphasis is given to resourcing the treatment and supervision needs of offenders in addition to incarceration resources. The APS considers this essential in order to adequately address the issue of sex offending in the community, once an offender has been identified.
- 6.109 According to the APS, "Understanding that it is difficult to resource such a broad focus, a government/private partnership approach is probably best suited to provide the treatment needs for offenders in the community, given the current demand. In particular, there is a need to utilise risk assessment procedures in assessing the disposition of an offender, allowing judicial discretion on sentencing to reflect the need to balance deterrence, punishment, and rehabilitation."⁴²⁴

⁴²³ Dr Christopher Lennings, a Clinical and Forensic Psychologist, Australian Psychological Society, Transcript of evidence, 30 April 2014, p5.

⁴²⁴ Submission 5, Australian Psychological Society, p11.

Conclusions

- 6.110 The primary objective of any treatment plan should be to prevent reoffending and assist with the offender's reintegration into the community. The Committee agrees with evidence that treatment and rehabilitation programs can reduce recidivism and that these programs are an important component in the management of offenders. The greater application of extended supervision orders can assist in this regard.
- 6.111 It is apparent that Corrective Services NSW does not have sufficient resources to provide treatment and rehabilitation to all child sexual assault offenders in custody. There are also resourcing and cost issues associated with offenders accessing appropriately qualified health practitioners in the community for treatment.
- 6.112 On the basis that the purposes of sentencing include protecting the community and promoting the rehabilitation of the offender, it is essential that offenders receive appropriate treatment and rehabilitation both in custodial and community settings as part of their sentence.

Recommendation 27

The Committee recommends that the NSW Government increases the use of extended supervision orders as an effective re-offender rehabilitation tool.

TREATMENT CO-ORDINATION

- 6.113 Another important component of successful treatment and rehabilitation is the management of offenders between custodial and community settings. The Australian Psychological Society highlights the current lack of planning for offenders after their release from custody and recommends a 'through care model' between custody and community, and communication between agencies and practitioners charged with the responsibility for detention, supervision and treatment of adjudicated sex offenders.
- 6.114 According to the APS, the 'through care model' needs to take into consideration sentencing requirements and judicial remarks, as well as best practice guidelines for treatment.⁴²⁵
- 6.115 In a similar vein, the Royal Australian and New Zealand College of Psychiatrists emphasised that treatment of offenders is a shared responsibility between the justice and health sectors that genuine cross-agency collaboration is essential. The RANZCP argues that cross-agency collaboration will assist ethical and appropriate patient treatment. This must be done, however, without eroding patient confidentiality.⁴²⁶
- 6.116 Justice Health, in its appearance before the Committee, reinforced the importance of a collaborative and multidisciplinary approach across custodial and community settings to optimised treatment outcomes:

⁴²⁵ Submission 5, Australian Psychological Society, p4.

⁴²⁶ Submission 13, Royal Australian and New Zealand College of Psychiatrists, p4.

The sort of efforts in improving access and availability of rehabilitation programs both in the custodial setting and in the community setting would be comprehensive rehabilitation programs that adopt a multidisciplinary approach using a variety of disciplines as well as a comprehensive, what we call in medicine, biosocial approach—looking at the body, the mind and the society. For example, not just relying on an anti-libidinal approach purely but considering, where appropriate and consensual, looking at a comprehensive psychological program based on best evidence.

I believe the Committee already has heard about the current shift in evidence-based practice in treating sex offenders with psychological programs to cognitive behavioural therapy-based programs and having well-trained and well-informed multidisciplinary teams of workers who can manage that group of patients in the community or in the custodial setting. If those sorts of comprehensive treatment programs were available in both of those settings, that would go some way to reducing, but certainly not eliminating, the risk of reoffending.⁴²⁷

6.117 Even within the prison system, as previously described, there is a lack of coordination across agencies involved in the treatment of offenders. Justice Health is limited in its ability to increase treatment effectiveness in the custodial setting, due to its current role. In the words of the Ms Julie Babineau, Chief Executive, Justice Health and Forensic Mental Health Network:

Our current remit is really about the treatment, advice, monitoring and assessment of health problems. The rehabilitative pathway or the custody-based intensive treatment program is a remit that is with Corrective Services. We have no involvement inside for any of these rehabilitative programs. It is not our role to play. It has nothing to do with who they are. We believe it is really important to have health separate from Corrective Services. We believe it is important because we are there for treatment. We are not there to know why they are in, who they are, what they have done. We are there to assess them and treat them. It is a different role for both organisations.⁴²⁸

Conclusions

6.118 The coordination of treatment plans across custodial and community settings is of critical importance in optimising rehabilitation and minimising the risk of reoffending. In order to address this lack of coordination, the Committee considers that an inter-agency working group should be set up to assist child sexual assault offenders, prior to their release from custody.

6.119 This working group should develop strategies designed to re-integrate offenders into the community and reduce their risk of being left in vulnerable circumstances, thereby compromising access to treatment, employment and housing. The lack of adequate case management strategies serves to increase the risk of further offending.

⁴²⁷ Dr Tobias Mackinnon, Statewide Clinical Director, Forensic Mental Health, Justice Health and Forensic Mental Health Network, Transcript of evidence, 15 May 2014, p7.

⁴²⁸ Ms Julie Babineau, Chief Executive, Justice Health and Forensic Mental Health Network, Transcript of evidence, 15 May 2014, p9.

Recommendation 28

The Committee recommends that the NSW Government establishes an inter-agency working group with representation from Corrective Services NSW, NSW Health, Family and Community Services NSW, NSW Police Force and any other relevant NSW government agencies. The group should have responsibility for devising pre-release strategies for child sexual assault offenders, including:

- Identification and review of legislation, policies or practices that may unreasonably prevent offenders being able to re-integrate successfully into the community.
- Identification of appropriate assistance and support mechanisms, prior to release from custody, to optimise re-integration into the community.

Recommendation 29

The Committee recommends that the inter-agency working group develops strategies for child sexual offenders with tasks including, but not limited to, the following:

- Preparing for, and obtaining, employment.
- Locating suitable housing.
- Finding appropriately qualified health practitioners so that any relevant treatment and rehabilitation can be commenced and/or continued.

CHILD PROTECTION REGISTER

6.120 As part of the Committee's examination of post release offender management mechanisms, chapter 2 of the report has made reference to the operation of the Child Protection Register. This instrument is designed to protect children from further harm and to safeguard the community from child sexual assault offenders, once they have completed a custodial sentence.

NSW Register

6.121 The NSW Child Protection Register, the first such State based register in Australia, was set up under the *Child Protection (Offenders Registration) Act 2000* and is modelled on the register established under the *Sex Offenders Act 1997* (UK).⁴²⁹ It is managed by the Child Protection Registry, State Crime Command, NSW Police Force.

6.122 When introducing the legislation, the then Minister for Police spelt out the benefits of the new Register in the following terms:

- Increasing and improving the accuracy of child sex offender intelligence held by police.

⁴²⁹ Submission 11, New South Wales Police Association, p15.

JOINT SELECT COMMITTEE ON SENTENCING OF CHILD SEXUAL ASSAULT OFFENDERS
TREATMENT AND MANAGEMENT OF OFFENDERS

- Assisting in the investigation and prosecution of child sex offences committed by recidivist offenders.
 - Providing a deterrent to re-offending.
 - Assisting in the monitoring and management of child sex offenders in the community.
 - Providing child abuse victims and their families with an increase sense of security.⁴³⁰
- 6.123 Under the legislation, persons convicted of certain violent or sexual offences against children are required to register at the police station in their local area within 28 days of sentencing, release from custody, or entering NSW after being found guilty of a registrable offence in another jurisdiction.
- 6.124 Offenders are advised of their reporting obligations:
- By the court, after sentencing.
 - By the supervising authority, on release from custody.
 - By the NSW Police Force, in relation to offenders who were convicted in another jurisdiction.⁴³¹
- 6.125 Such persons are required to provide NSW Police Force with certain personal information, travel plans and any changes to this information. Offenders are required to report to the Police at least annually, unless there are changes to their information in the meantime.⁴³²
- 6.126 A person will be placed on the register where they have been convicted of, and sentenced in relation to, either a 'Class one' offence or a 'Class two offence'. Class one offences include sexual intercourse with a child, persistent sexual abuse of a child, etc. Class two offences include acts of indecency against children where the penalty is imprisonment of 12 months or more, procuring or grooming a child under 16 for unlawful sexual activity, etc.⁴³³
- 6.127 Apart from Class one and Class two offences, courts also have the power to make an order that an offender be placed on the register where the court is satisfied that the person poses a risk to the lives or sexual safety of one or more children or of children generally.⁴³⁴
- 6.128 Different timeframes apply under which a person will be required to follow the reporting obligations for the register, for example:

⁴³⁰ New South Wales Legislative Assembly, Parliamentary Debates, 1 June 2000, p6475.

⁴³¹ *Child Protection (Offenders Registration) Act 2000*, ss4,6-7.

⁴³² *Child Protection (Offenders Registration) Act 2000*, ss10-11.

⁴³³ *Child Protection (Offenders Registration) Act 2000*, s3.

⁴³⁴ *Child Protection (Offenders Registration) Act 2000*, s3D.

- An offender will be on the register for life if they have committed a Class one offence followed by another registrable offence.
- If an offender has committed a Class one offence or more than one registrable offence, then they will be on the register for 15 years.
- If an offender has only ever been convicted of a Class two offence, they will be on the register for eight years.⁴³⁵
- If an offender was a child at the time of committing the offence, they will be on the register for half of the period or seven years if they committed offences which would otherwise result in lifetime registration.⁴³⁶

6.129 An offender can be removed from the register in any of the following circumstances:

- The person's conviction is quashed or set aside by the court.
- The person's sentence is reduced or altered so that they would no longer fit the criteria to be a registrable person.
- If a court has specifically ordered that a person be placed on the child protection register, where that order is subsequently quashed on appeal or otherwise ceases to have effect under the legislation.⁴³⁷

6.130 A registrable person can apply to the NSW Civil and Administrative Tribunal in limited circumstances to have their reporting obligations suspended, for example, if they are required to report for life and fifteen years have passed since sentencing or their release from custody. However, the Tribunal can only make such an order if it considers that the person does not pose a risk to the safety of children.⁴³⁸

6.131 The monitoring and investigation of registrable persons and offences under the Act is undertaken by Local Area Commands and the Sex Crimes Squad.

National Register

6.132 As well as the NSW Register, sex offender registers are in use across Australia, forming a national database which allows police to share information. The national database, the Australian National Child Offender Register (ANCOR), is a web-based record system designed to assist police agencies achieve a nationally consistent approach to child offender registration and to support the management of these reportable offenders.

6.133 The national register allows authorised police officers to register, case manage, monitor and share mandatory information about a reportable offender between

⁴³⁵ *Child Protection (Offenders Registration) Act 2000*, s14A.

⁴³⁶ *Child Protection (Offenders Registration) Act 2000*, s14B.

⁴³⁷ *Child Protection (Offenders Registration) Act 2000*, s3B.

⁴³⁸ *Child Protection (Offenders Registration) Act 2000*, s16.

police agencies and assists all agencies to comply with respective State and Territory child protection legislation.

- 6.134 A link to the ANCOR database is provided via CrimTrac. CrimTrac is a Commonwealth agency established to give police across Australian jurisdictions the ability to access and share information. It also enables alerts to be generated when registered persons notify that they are planning to travel interstate or overseas. All Australian police jurisdictions actively use the register.⁴³⁹

Legislative Changes

- 6.135 When the legislation establishing the NSW Child Protection Register was introduced in 2000, the Ombudsman was required to review its operation. This review was completed in May 2005 and a report tabled in Parliament in November 2007. The Ombudsman concluded that the Act had been largely successful in implementing its aims.⁴⁴⁰
- 6.136 During the course of the Ombudsman's review, the Act was amended and the *Child Protection (Offenders Prohibition Orders) Act 2004* was enacted, thereby allowing orders to be made by the Local Court restricting the behaviour of persons registered under the Act.
- 6.137 Further amendments in 2009 have enacted a further type of order, namely "Contact Prohibition Orders", where a Local Court may restrict a registrable person's contact with their victim or co-accused.
- 6.138 Additional legislative reform in NSW was introduced on 6 August 2014 through the *Child Protection (Offenders Registration) Amendment (Statutory Review) Act 2014*. This Act strengthens the operation of the Register by a range of provisions, including: expanding the classes of registrable offences; increasing the length of child protection registration orders; improving notifications of registrable persons; and extending reporting obligations for failure to comply.

Inquiry Evidence

- 6.139 The Committee received evidence from a range of witnesses concerning the utility of the Child Protection Register in NSW and in favour of its current operation. One of the main issues raised relates to its level of accessibility.
- 6.140 When questioned about making offender details on the Register available to the public, Detective Inspector Peter Yeomans, Child Abuse Squad, NSW Police Force, responded as follows:

I would be against that, or there could be very limited access. Things have happened in the United States involving vigilantes. That is a real problem. On the other side, we have had situations in the past where people on the register are near schools and those sorts of things. Having it monitored by the local area commands should be

⁴³⁹ Department of Human Services Victoria, *Child Protection Practice Manual*, November 2012, p1.

⁴⁴⁰ New South Wales Ombudsman, *Review of the Child Protection Register - Report under s25(1) of the Child Protection (Offenders Registration) Act 2000*, May 2005.

sufficient to ensure that that does not happen. We would be going into unknown territory if we were to start publishing the register.⁴⁴¹

- 6.141 This view was reinforced by Ms Jessica Pratley, Executive Committee Member, Australia and New Zealand Association for the Treatment of Sexual Abuse, who told the Committee that the Register should be protected:

By "protected", we mean keeping it closed and not accessible by members of the public. The reason that we recommend that is based on experience in other countries where they have systems such as community notification or registers that are searchable by the public. What we see in those communities is a decrease in compliance, with people who are registrable persons not reporting to the police as they need to. Whereas the system in New South Wales, based on our contact with the police who manage the Child Protection Register, is that they have a very high level of compliance with that register. The rate of compliance is that 95 to 99 per cent of people supposed to be registered are registered. That rate drops if the register is accessible by the public.⁴⁴²

- 6.142 In a similar vein, Ms Hetty Johnston, Chief Executive, Bravehearts, provided the following comment in response to Committee questioning:

Open registers like that just do not work. If what we are trying to do is to stop offenders from offending—and that costs a bucket of money to run and to maintain—it is not the best option.⁴⁴³

- 6.143 As part of its examination of this issue, the Committee was alerted to the public information access provisions concerning sexual offenders operating in Western Australia. Amendments to the *Community Protection (Offender Reporting) Act 2004* (WA), enacted in October 2012, provide public disclosure of information held on the WA Sex Offender Register on a Community Protection Website. The website enables any member of the public to access photographs and certain information on Western Australia's most dangerous and high risk sexual offenders.

- 6.144 The website allows parents and guardians to make enquiries to Western Australia Police about any person who has unsupervised contact to their child or children. The website provides three tiers of information access to "ensure that families and the public have information on known sex offenders, which will assist with the protection and safety of children and the community. The Community Protection Website does not publish the photograph, personal details or release any information of an offender who is under the age of 18 years".⁴⁴⁴

- 6.145 In the absence of any detailed evaluation of the operation of the website, any identified issues surrounding the expanded access provisions are yet to be explored.

⁴⁴¹ Detective Inspector Peter Yeomans, Child Abuse Squad, New South Wales Police Force, Transcript of evidence, 28 April 2014, p23.

⁴⁴² Ms Jessica Pratley, Executive Committee Member, Australia and New Zealand Association for the Treatment of Sexual Abuse, Transcript of evidence, 28 April 2014, p35.

⁴⁴³ Ms Hetty Johnston, Chief Executive Officer, Bravehearts, Transcript of evidence, 30 April 2014, p49.

⁴⁴⁴ Community Protection Western Australia, Western Australian Government, <<https://www.communityprotection.wa.gov.au/About>> accessed on 21 August 2014.

- 6.146 A separate issue raised in evidence was the current adequacy of resourcing of the NSW Register. The NSW Police Association expressed concern that management and staffing support for the Register was lacking in some regional areas of the State. The Committee received a background briefing from senior members of the NSW Police Force to address the resourcing question and is satisfied that this concern has now been addressed.

Conclusions

- 6.147 The Committee notes that there is a nationally coordinated approach to the maintenance of State based Child Protection Registers and is assured that the NSW Child Protection Register is fulfilling its intended role. There is still, however, a need to maintain vigilance in relation to its operation and to its continuing use and interoperability with registers in other States.
- 6.148 There would be merit in conducting further research into whether the Register has contributed to a reduction in child sex offences or recidivism, to add to the current evidence base.
- 6.149 While it is the view of the Committee that the Register has significant benefits in enhancing community safety, it is just one aspect of a broad range of child protection measures in place in NSW. It should not be seen as a solution in itself or create a false sense of security as being the single answer to protecting children from sex offenders.

Appendix One – List of Submissions

1	Confidential
2	FamilyVoice Australia
3	Mr Jonathan O’Dea MP
4	Professor Jane Goodman-Delahunty
5	Australian Psychological Society
6	Mr Andrew Tink AM
6a	Mr Andrew Tink AM
7	Miss Jemima Whitford
8	Department of Corrective Services (Western Australia)
9	Fighters Against Child Abuse Australia
10	Name Suppressed
10a	Name suppressed
11	Police Association of New South Wales
12	Legal Aid New South Wales
13	Royal Australian and New Zealand College of Psychiatrists
14	Scouts Australia (New South Wales)
15	Australian and New Zealand Association for the Treatment of Sexual Abuse
16	Local Court of New South Wales
17	Bravehearts
18	New South Wales Bar Association
19	New South Wales Ombudsman
20	Office of the Director of Public Prosecutions (New South Wales)
21	Professor Patrick Keyzer
22	New South Wales Government
23	Confidential
24	Mr Greg Walsh OAM

Appendix Two – List of Witnesses

28 April 2014, Macquarie Room, Parliament House

Witness	Organisation
Mr Jayson Ware Director, Offender Services and Programs	Corrective Services New South Wales
Ms Penelope Musgrave Director, Criminal Law Review	Department of Police and Justice
Ms Maree Walk Chief Executive, Community Services	Department of Family and Community Services
Ms Katherine Alexander Executive Director, Office of the Senior Practitioner	
Mr Ernest Schmatt PSM Chief Executive	Judicial Commission of New South Wales
Mr Hugh Donnelly Director, Research and Sentencing	
The Hon. Anthony Whealy QC Deputy Chair	New South Wales Sentencing Council
Chief Superintendent Anthony Trichter Commander, Police Prosecutions Command	New South Wales Police Force
Detective Superintendent Peter Yeomans Child Abuse Squad	
Detective Senior Sergeant David Bennett Child Abuse Squad	
Mr Lloyd Babb SC Director of Public Prosecutions	Office of the Director of Public Prosecutions (New South Wales)
Ms Jessica Pratley Executive Committee Member	Australian and New Zealand Association for the Treatment of Sexual Abuse
Mr Stephen Odgers SC Chair, Criminal Law Committee	New South Wales Bar Association
Mr David Hamer Member, Criminal Law Committee	
Mr Andrew Tink AM	Private Citizen

SENTENCING OF CHILD SEXUAL ASSAULT OFFENDERS
LIST OF WITNESSES

Witness	Organisation
Mr Mark Ierace SC Senior Public Defender	Legal Aid New South Wales
Ms Pilar Lopez Solicitor	
Judge Graeme Henson Chief Magistrate	Local Court of New South Wales

30 April 2014, Macquarie Room, Parliament House

Witness	Organisation
Confidential Witness	Private Citizen
Dr Chris Lennings Clinical and Forensic Psychologist	Australian Psychological Society
Dr Andrew Ellis Forensic Psychiatrist	Royal Australian and New Zealand College of Psychiatrists
Dr John Kasinathan Consultant Forensic Psychiatrist	
Dr Jeremy O’Dea Consultant Forensic Psychiatrist	
Dr David Phillips National President	FamilyVoice Australia
Mr Graeme Mitchell New South Wales State Officer	
Mr Adam Washbourne President	Fighters Against Child Abuse Australia
Mr Graham Bargwanna Chief Executive	Scouts Australia (New South Wales)
Mr Scott Weber President	Police Association of New South Wales
Mr Tony King Executive Officer	
Ms Vicki Sokias Research Officer	
Ms Hetty Johnston Executive Director	Bravehearts

15 May 2014, Macquarie Room, Parliament House

Witness

Organisation

Ms Julie Babineau
Chief Executive

Justice Health and Forensic Mental Health
Network

Dr Tobias Mackinnon
Statewide Clinical Director, Forensic Mental
Health

Appendix Three – Extracts from Minutes

Minutes of Proceedings of the Joint Select Committee on Sentencing of Child Sexual Assault Offenders (No. 1)

1.45pm, Thursday, 29 August 2013
Room 1136, Parliament House

Members present

Mr Casuscelli, Mr Grant, Mr Lynch, Rev Nile, Mrs Pavey, Ms Upton, Ms Westwood.

1. Introduction

The Clerk-Assistant (Committees and Corporate) opened the meeting and the following extracts from the Votes and Proceedings of the Legislative Assembly, previously circulated, were taken as read:

Legislative Assembly Votes and Proceedings, Thursday 15 August 2013, no 156 (18) –

18. JOINT SELECT COMMITTEE ON SENTENCING OF CHILD SEXUAL ASSAULT OFFENDERS

Mr Brad Hazzard moved, by leave, that:

- (1) A Joint Parliamentary Select Committee be appointed to inquire into and report on:
 - (a) whether current sentencing options for perpetrators of child sexual assault remain effective; and
 - (b) whether greater consistency in sentencing and improving public confidence in the judicial system could be achieved through alternative sentencing options, including but not limited to minimum mandatory sentencing and anti-androgenic medication.
- (2) In examining this issue the Committee should have regard to:
 - (a) the current sentencing patterns for child sexual assault;
 - (b) the operation of the standard minimum non-parole scheme;
 - (c) the experience of other jurisdictions with alternative sentencing options; and
 - (d) the NSW Law Reform Commission's Report 139 on Sentencing.
- (3) The Committee to consist of seven members as follows:
 - (a) four from the Government, three being members of the Legislative Assembly and one a Member of the Legislative Council;
 - (b) two from the Opposition, one being a Member of the Legislative Assembly and one a Member of the Legislative Council; and
 - (c) one cross-bench member of the Legislative Council.
- (4) The members shall be nominated in writing to the Clerk of the Legislative Assembly and Clerk of the Parliaments by the relevant party leaders and the cross-bench members respectively by Friday 23 August 2013. In the absence of any agreement concerning the membership of the Committee the matter is to be determined by the relevant House.

JOINT SELECT COMMITTEE ON SENTENCING OF CHILD SEXUAL ASSAULT OFFENDERS
EXTRACTS FROM MINUTES

- (5) That at any meeting of the Committee four members shall constitute a quorum, provided that the Committee meets as a joint committee at all times.
- (6) The Committee have leave to make visits of inspection within the State of New South Wales and other states and territories of Australia.
- (7) A message be sent to the Legislative Council requesting the Legislative Council to agree to the resolution, and to fix a time and place for the first meeting.

Legislative Assembly Votes and Proceedings, Wednesday, 21 August 2013, no 158(20) –

20. MESSAGE FROM THE LEGISLATIVE COUNCIL—JOINT SELECT COMMITTEE ON SENTENCING OF CHILD SEXUAL ASSAULT OFFENDER

The Acting Speaker (Ms Melanie Gibbons) reported the following message from the Legislative Council:

Madam SPEAKER

The Legislative Council desires to inform the Legislative Assembly that it has this day agreed to the following resolution:

1. That this House agrees to the resolution in the Legislative Assembly's message of Thursday 15 August 2013 relating to the appointment of a Joint Select Committee on sentencing of child sexual assault offenders.
2. That the time and place for the first meeting be Thursday 29 August 2013 at 1.45 pm in Room 1136.

Legislative Council
21 August 2013

NATASHA MACLAREN-JONES
Deputy President

Legislative Assembly Votes and Proceedings, Tuesday, 27 August 2013, no 160(11) –

11. JOINT SELECT COMMITTEE ON SENTENCING OF CHILD SEXUAL ASSAULT OFFENDERS

The Clerk, in accordance with the resolution of 15 August 2013, announced receipt of correspondence nominating the following members of the Legislative Assembly as members of the Joint Select Committee on Sentencing of Child Sexual Assault Offenders:

Government Members – Mr Charles Casuscelli, Mr Troy Grant and Ms Gabrielle Upton.

Opposition Member – Mr Paul Lynch.

Mr Brad Hazzard moved, that a message be sent informing the Legislative Council of the Legislative Assembly members appointed to the Committee.

Question put and passed.

Legislative Assembly Votes and Proceedings, Tuesday, 27 August 2013, no 160(18) –

18. MESSAGE FROM THE LEGISLATIVE COUNCIL—JOINT SELECT COMMITTEE ON SENTENCING OF CHILD SEXUAL ASSAULT OFFENDERS

The Assistant Speaker reported the following message from the Legislative Council:

Madam SPEAKER

The Legislative Council desires to inform the Legislative Assembly that the following members of the Legislative Council have been nominated for membership to the Joint Select Committee on sentencing of child sexual assault offenders:

Government: Mrs Pavey

Opposition: Ms Westwood

Cross bench: Rev Nile.

Legislative Council
27 August 2013

DON HARWIN
President

2. Election of Chair and Deputy Chair

Pursuant to Standing Order 282, resolved on the motion of Mrs Pavey, that Mr Grant be elected Chair of the Committee.

Mr Grant was declared Chair.

Pursuant to Standing Order 282, resolved on the motion of Ms Upton, that Mrs Pavey be elected Deputy Chair of the Committee.

Mrs Pavey was declared Deputy Chair.

Mr Grant took the Chair and addressed the Committee.

3. Standard procedural motions

Resolved, on the motion (in globo) of Ms Upton, seconded Rev Nile:

1. That during any committee meeting, if a division or quorum is called in the Legislative Assembly, or either House in the case of joint committees, the proceedings of the committee shall be suspended until the committee regains its quorum at the conclusion of the division or quorum call.
2. That pursuant to Legislative Assembly Standing Order 297, draft reports, evidence, submissions or other documents presented to the committee which have not been reported to the House are not to be disclosed or published by any member or by any other person unless first authorised by the committee or the House.
3. That press statements on behalf of the committee be made only by the Chair after approval in principle by the committee or after consultation with committee members.

4. That the Chair and the nominated Committee Director be empowered to negotiate with the Speaker through the Clerk of the Legislative Assembly for the provision of funds to meet expenses in connection with advertising, operating and approved incidental expenses of the committee.
5. That persons having special knowledge of the matters under consideration by the committee may be invited to assist the committee, in accordance with the Legislative Assembly's policy on secondees or consultants.
6. That the Chair be empowered to advertise and/or write to interested parties requesting written submissions.
7. That arrangements for the calling of witnesses and visits of inspection be left in the hands of the Chair and the Inquiry Manager to the committee.
8. That, unless otherwise ordered, witnesses appearing before the committee shall not be formally represented by any member of the legal profession or other advocate.
9. That, unless otherwise ordered, when the committee is examining witnesses, the press and public (including witnesses after examination) be admitted to the hearing being conducted by the committee.
10. That, unless otherwise ordered, access to transcripts of evidence taken by the committee be determined by the Chair and not otherwise made available to any person, body or organisation: provided that witnesses previously examined shall be given a copy of their evidence; and that any evidence taken in camera or treated as confidential shall be checked by the witness in the presence of the Inquiry Manager to the committee or another officer of the committee.
11. That the Chair and the Inquiry Manager make arrangements for visits of inspection by the members nominated by the committee, which members are expected to participate in the full itinerary as scheduled.

The Committee discussed the application of the Standard Procedural Motions.

4. Introduction of committee staff

The Chair introduced Mr Bjarne Nordin (Inquiry Manager), Meg Banfield (Research Officer), James Newton (Committee Officer) and Rachel Simpson (Director) to the Committee.

5. General business

The Chair addressed the Committee on the terms of reference and the conduct of the inquiry. Discussion ensued. Committee staff were directed to prepare an inquiry plan and proposed timetable for consideration at the next deliberative meeting.

A briefing note prepared by the NSW Parliamentary Research Service was distributed for the information of committee members.

The committee adjourned at 2:06 pm until sine die.

Minutes of Proceedings of the Joint Select Committee on Sentencing of Child Sexual Assault Offenders (No. 2)

1.00pm, Thursday, 17 October 2013
Room 1254, Parliament House

Members present

Mr Grant (Chair), Mr Casuscelli, Ms Gibbons, Mr Lynch, Rev Nile, Ms Pavey, Ms Westwood.

Staff in attendance: Bjarne Nordin, James Newton.

The Chair commenced the meeting at 1.02pm.

1. Committee membership

The Chair welcomed Ms Gibbons to her first meeting with the Committee.

2. Confirmation of minutes

Resolved, on the motion of Rev Nile, that the draft minutes of the deliberative meeting conducted on 29 August 2013 be confirmed.

3. Correspondence

The Committee noted correspondence sent and received by the Committee.

4. Private background briefings

The Chair discussed the content and format of private briefings proposed to be held in November 2013.

Ms Westwood asked if professionals working in the area of victim care and counselling would be heard. It was agreed to include such practitioners and that submissions would assist in identifying appropriate witnesses to call. It was noted that participants invited to appear on 18 November 2013 were practitioners and social scientists with research experience in the area.

Resolved, on the motion of Mr Lynch, that a number of individuals/organisations be invited to appear confidentially as participants in private briefings on 11 and 18 November 2013.

The Committee agreed that the names of any additional participants be circulated to Members for comment.

Rev Nile asked if consideration had been given to hearing from current or former judges.

Discussion ensued.

Resolved, on the motion of Mr Lynch, that the question of hearing from current or former members of the judiciary be taken on notice for further consideration.

5. Adjournment

The Committee adjourned at 1.13pm until 2.00pm Monday, 11 November 2013 at Parliament House.

Minutes of Proceedings of the Joint Select Committee on Sentencing of Child Sexual Assault Offenders (No. 3)

1.50pm, Monday, 11 November 2013
Waratah Room, Parliament House

Members present

Mr Grant (Chair), Mr Causcelli, Ms Gibbons, Mr Lynch, Rev Nile, Ms Pavey, Ms Westwood.

Staff in attendance: Bjarne Nordin, Meg Banfield, Elspeth Dyer, James Newton.

The Chair commenced the meeting at 1.55pm.

1. Confirmation of minutes

Resolved, on the motion of Ms Westwood, that the draft minutes of the deliberative meeting conducted on 17 October 2013 be confirmed.

2. Private background briefing

Individuals and representatives from organisations were admitted to confidentially brief the Committee on legal and sentencing issues.

The guest participants withdrew.

3. Adjournment

The Committee adjourned at 4.55pm until 1.50pm Monday, 18 November 2013 at Parliament House.

Minutes of Proceedings of the Joint Select Committee on Sentencing of Child Sexual Assault Offenders (No. 4)

1.30pm, Monday, 18 November 2013
Waratah Room, Parliament House

Members present

Mr Grant (Chair), Mr Casuscelli, Ms Gibbons, Mr Lynch, Ms Pavey, Ms Westwood.

Staff in attendance: Bjarne Nordin, Meg Banfield, Elspeth Dyer, James Newton.

Apology

Rev Nile.

The Chair commenced the meeting at 1.40pm.

1. Confirmation of minutes

Resolved, on the motion of Ms Gibbons, that the draft minutes of the deliberative meeting conducted on 11 November 2013 be confirmed.

2. Advertising and call for submissions

The Committee deliberated on the future program for the inquiry.

Resolved, on the motion of Ms Pavey, that the Committee advertise the inquiry on the Committee's website and in the Sydney Morning Herald on 27 November 2013.

Resolved, on the motion of Ms Gibbons, that the closing date for submissions be 28 February 2013.

Resolved, on the motion of Mr Lynch, that the Committee write to individuals and organisations on the list circulated and as amended by the inclusion of further stakeholders informing them of the inquiry and inviting submissions.

Resolved, on the motion of Mr Casuscelli, that letters also be sent specifically to all Chairs of the Ministerial Consultative Committees requesting them to share the information with all members of their respective Committees, and inviting the MCC members to inform their communities through their respective networks.

3. Private background briefings

Individuals and representatives from organisations were admitted to confidentially brief the Committee on rehabilitation, treatment and recidivism issues.

The guest participants withdrew.

4. Adjournment

The Committee adjourned at 4.20pm until 1.00pm Thursday, 27 February 2014 at Parliament House.

Minutes of Proceedings of the Joint Select Committee on Sentencing of Child Sexual Assault Offenders (No. 5)

1.00pm, Wednesday, 27 February 2014
Speaker's Dining Room, Parliament House

Members present

Mr Grant (Chair), Mr Casuscelli, Ms Gibbons, Mr Lynch, Ms Pavey, Ms Westwood.

Staff in attendance: Bjarne Nordin, Carly Maxwell, Jessica Falvey, Ben Foxe, James Newton.

The Chair commenced the meeting at 1.03pm.

Apologies

Rev Nile.

1. Confirmation of minutes

Resolved, on the motion of Ms Westwood, that the draft minutes of the deliberative meeting conducted on 11 November 2013 be confirmed.

2. Private background briefing

Representatives from the NSW Bureau of Crime Statistics and Research and the Judicial Commission of NSW were admitted to brief the Committee on data collection and sentencing patterns.

The guest participants withdrew.

3. General business

The Chair provided the Committee with an update on submissions that had been made to the Inquiry to date, explaining that late submissions were expected and would be accepted.

The Committee agreed that it would next meet when the Committee Secretariat has received and analysed all submissions, and made recommendations as to their publication status.

4. Adjournment

The Committee adjourned at 2.14pm until a time and date to be determined.

Minutes of Proceedings of the Joint Select Committee on Sentencing of Child Sexual Assault Offenders (No. 6)

1.00pm, Thursday, 27 March 2014
Room 1136, Parliament House

Members present

Mr Grant (Chair), Ms Gibbons, Mr Lynch, Rev Nile, Ms Pavey, Ms Westwood.

Staff in attendance: Bjarne Nordin, Jessica Falvey, Ben Foxe, James Newton.

The Chair commenced the meeting at 1.02pm.

Apologies

Mr Casuscelli.

1. Confirmation of minutes

Resolved, on the motion of Mr Lynch, that the draft minutes of the deliberative meeting conducted on 27 February 2014 be confirmed.

2. Consideration of submissions

Resolved, on the motion of Ms Gibbons:

- That the Committee authorise publication of submissions 2 to 9 and 11 to 22 and that the submissions be placed on the Committee's website.
- That the Committee authorise partial publication of submission 10 with the exception of the submission author's name and details that identify a current legal case which are to remain confidential, and that the redacted submission be placed on the Committee's website.
- That submissions 1 and 23 remain confidential.

3. Consideration of proposed witnesses

Resolved, on the motion of Ms Pavey, that the Committee invite the following persons to attend public hearings on 28 and 30 April 2014:

- Representatives from the NSW Government.
- Representatives from the Office of the NSW Director of Public Prosecutions.
- Representatives from the NSW Ombudsman.
- Representatives from Legal Aid NSW.
- Representatives from the NSW Bar Association.
- Representatives from the Local Court of NSW.
- Representatives from the Police Association of NSW.
- Mr Andrew Tink AM.
- A confidential witness.
- Representatives from the Australian Psychological Society.
- Representatives from the Royal Australian and New Zealand College of Psychiatrists.
- Representatives from the FamilyVoice Australia.
- Representatives from Bravehearts NSW.
- Representatives from Scouts Australia (NSW).
- Representatives from the Australia and New Zealand Association for the Treatment of Sexual Abuse.
- Representatives from Fighters Against Child Abuse Australia.

4. General business

The Chair raised the possibility of the Committee meeting for a half day workshop on 5 May 2014 to discuss the evidence received so far. Discussion ensued.

5. Adjournment

The Committee adjourned at 1.14pm until 28 April 2014.

Minutes of Proceedings of the Joint Select Committee on Sentencing of Child Sexual Assault Offenders (No. 7)

8:45am, Monday, 28 April 2014
Macquarie Room, Parliament House

Members present

Mr Grant (Chair), Mr Casuscelli, Ms Gibbons, Mr Lynch, Rev Nile, Ms Pavey, Ms Westwood.

Staff in attendance: Carly Maxwell, Jessica Falvey, Emma Wood, James Newton.

The Chair commenced the meeting at 8:48am.

1. Confirmation of minutes

Resolved, on the motion of Ms Pavey, that the draft minutes of the deliberative meeting conducted on 27 March 2014 be confirmed.

2. Additional submission

Resolved, on the motion of Ms Pavey, that the Committee receives and authorises the publication of a supplementary submission received from Bravehearts, and orders that it be placed on the Parliament's website.

3. Conduct of hearing

a) Admission of media

Resolved, on the motion of Rev Nile, that the Committee authorises the audio-visual recording, photography and broadcasting of the public hearing on 28 April 2014 in accordance with the Legislative Assembly's guidelines for the coverage of proceedings for parliamentary committees.

b) Transcript publication

Resolved, on the motion of Mr Casuscelli, that the corrected transcript of evidence given today [and any tendered document, which are not confidential] be authorised for publication and uploaded on the Committee's website.

4. Public hearing

The Chair opened the public hearing at 8:59am. The public and the media were admitted.

The following witnesses were affirmed and examined:

- Mr Jayson Ware, Director, Offender Services and Programs, Corrective Services NSW.
- Ms Penelope Mary Musgrave, Director, Criminal Law Review, Department of Police and Justice.
- Ms Jacqueline Maree Walk, Chief Executive, Community Services, Department of Family and Community Services.
- Ms Katherine Susan Alexander, Executive Director, Office of the Senior Practitioner, Department of Family and Community Services.

Ms Gibbons joined the proceedings at 9:40am.

Evidence concluded, the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Hugh Donnelly, Research Director, Judicial Commission of NSW.
- Mr Ernest John Schmatt, Chief Executive, Judicial Commission of NSW.

- Mr Anthony Gerard Whealy QC, Deputy Chair, NSW Sentencing Council.
- Mr Anthony Trichter, Chief Superintendent, NSW Police Force.
- Mr Peter Yeomans, Detective Inspector, Child Abuse Squad, NSW Police Force.
- Mr David Allan Bennett, Detective Senior Sergeant, NSW Police Force.

Evidence concluded, the witnesses withdrew.

Mr Lloyd Babb, Director of Public Prosecutions, was sworn and examined.

Evidence concluded, the witness withdrew.

Ms Jessica Pratley, Executive Committee Member, Australia and New Zealand Association for the Treatment of Sexual Abuse, was affirmed and examined.

Evidence concluded, the witness withdrew.

The Committee adjourned at 12:48pm and the Chair left the proceedings. The public and the media withdrew.

The Committee resumed at 1:45pm with the Deputy Chair presiding over the proceedings in the absence of the Chair. The public and the media were re-admitted.

The following witnesses were affirmed and examined:

- Mr Stephen James Odgers SC, Chair, Criminal Law Committee, NSW Bar Association.
- Mr David Acton Hamer, Member, Criminal Law Committee, NSW Bar Association.

Evidence concluded, the witnesses withdrew.

Rev Nile left the proceedings at 2:35pm.

Mr Andrew Tink, Adjunct Professor, Macquarie University Law School, was affirmed and examined.

Mr Tink tendered a document entitled, 'Supplementary submission on sentencing'.

Evidence concluded, the witness withdrew.

The following witnesses were affirmed and examined:

- Ms Pilar Lopez, Solicitor, Legal Aid NSW.
- Mr Mark Joseph Ierace, Senior Public Defender, Legal Aid NSW.

Evidence concluded, the witnesses withdrew.

Mr Graeme Leslie Henson, Chief Magistrate, Local Court of NSW, and District Court Judge, was sworn and examined.

The Chair re-joined the proceedings at 4:19pm and presided over the remainder of the proceedings.

Evidence concluded, the witness withdrew.

The Chair closed the hearing at 4:43pm. The public and the media withdrew.

5. Adjournment

The Committee adjourned at 4:43pm until 30 April 2014.

Minutes of Proceedings of the Joint Select Committee on Sentencing of Child Sexual Assault Offenders (No. 8)

8:50am, Wednesday, 30 April 2014
Macquarie Room, Parliament House

Members present

Mr Grant (Chair), Ms Gibbons, Mr Lynch, Rev Nile, Ms Pavey, Ms Westwood.

Staff in attendance: Carly Maxwell, Jessica Falvey, Emma Wood, James Newton.

The Chair commenced the meeting at 8:50am.

Apologies

Mr Casuscelli.

1. Confirmation of minutes

Resolved, on the motion of Mr Lynch, that the draft minutes of the meeting conducted on 28 April 2014 be confirmed.

2. Conduct of hearing

a) In camera witness

Resolved, on the motion of Rev Nile, that the Committee agrees to take evidence from the first witness at today's hearing *in camera*.

b) Witness photographs

Resolved, on the motion of Rev Nile, that the Committee authorises the taking of still photographs of witnesses appearing on behalf of FamilyVoice Australia.

c) Admission of media

Resolved, on the motion of Mr Lynch, that the Committee authorises the audio-visual recording, photography and broadcasting of the public hearing on 30 April 2014, in accordance with the Legislative Assembly's guidelines for the coverage of proceedings for parliamentary committees.

d) Transcript publication

Resolved, on the motion of Mr Lynch, that the corrected transcript of evidence given today [and any tendered documents, which are not confidential] be authorised for publication and uploaded on the Committee's website.

3. NSW Health

The secretariat updated the Committee about a possible future appearance by NSW Health witnesses. Discussion ensued.

4. Submission by NSW Police Force

Resolved, on the motion of Mr Lynch, that the Committee send the draft correspondence to the NSW Police Force as circulated at the meeting.

5. Questions on notice

Resolved, on the motion of Mr Lynch, that witnesses be requested to return answers to questions taken on notice during hearings held on 28 and 30 April within 14 days of the date on which questions are forwarded to the witness by the Committee Clerk.

Resolved, on the motion of Mr Lynch, that the Committee authorise publication of the answers to questions on notice [which are not confidential and with appropriate redactions].

6. Additional submissions

Resolved, on the motion of Mr Lynch, that the Committee receives and authorises the publication of a supplementary submission received from Mr Andrew Tink AM, and orders that it be placed on the Parliament's website.

Resolved, on the motion of Mr Lynch, that the Committee receives a supplementary submission to Submission No. 10, and orders that it be kept confidential to the Committee.

Resolved, on the motion of Mr Lynch, that the Committee receives and authorises the publication of an amendment to the submission received from the Australian and New Zealand Association for the Treatment of Sexual Abuse, and orders that it be placed on the Parliament's website.

7. In camera evidence

The Chair opened the in camera session with a private citizen at 8:59am. The witness was affirmed and examined.

Ms Westwood joined the proceedings at 9:11am.

Ms Gibbons jointed the proceedings at 9:18am.

Evidence concluded, the witness withdrew.

8. Public hearing

The Chair opened the public hearing at 9:50am. The public and the media were admitted.

Dr Christopher John Lennings, Clinical and Forensic Psychologist, Australian Psychological Society, was affirmed and examined.

Evidence concluded, the witness withdrew.

JOINT SELECT COMMITTEE ON SENTENCING OF CHILD SEXUAL ASSAULT OFFENDERS
EXTRACTS FROM MINUTES

Dr John Kasinathan, Consultant Forensic Psychiatrist, Royal Australian and New Zealand College of Psychiatrists, was sworn and examined and the following witnesses from the Royal Australian and New Zealand College of Psychiatrists were affirmed and examined:

- Dr Jeremy Francis O’Dea, Consultant Forensic Psychiatrist.
- Dr Andrew Kenneth Ellis, Forensic Psychiatrist.

Evidence concluded, the witnesses withdrew.

The following witnesses from FamilyVoice Australia were sworn and examined:

- Dr David Phillips, National President.
- Mr Graeme Mitchell, NSW State Officer.

Evidence concluded, the witnesses withdrew.

Mr Adam Washbourne, President, Fighters Against Child Abuse Australia, was sworn and examined.

Evidence concluded, the witness withdrew.

The Committee adjourned at 12:49pm. The public and the media withdrew.

The Chair resumed the public hearing at 2:00pm. The public and the media were re-admitted.

Mr Graham David Bargwanna, Chief Executive, Scout Association of Australia, New South Wales Branch, was sworn and examined.

Evidence concluded, the witness withdrew.

The following witnesses from the Police Association of NSW were sworn and examined:

- Ms Vicki Sokias, Researcher.
- Mr Scott David Weber, President.
- Mr Anthony James King, Executive Member.

Evidence concluded, the witnesses withdrew.

Ms Hetty Johnston, Chief Executive, Bravehearts Incorporated, was sworn and examined.

Ms Johnston tendered the following documents:

- Michael L Bourke and Andres E Hernandez, *The ‘Butner Study’ redux: A report of the incidence of hands-on child victimization by child pornography offenders*, 2008.
- Bravehearts Inc, *Position paper: The use of polygraph testing in monitoring child sex offenders*, 2007.
- Bravehearts Inc, *Position paper: The management and treatment of child sex offenders*, 2006.

- Bravehearts Inc, *Position paper: Two strikes and they're out! Mandatory sentencing and child sex offenders*, 2009.
- Bravehearts Inc, *Position paper: Balancing rights: arguments for the continued detention of dangerous sex offenders*, 2012.
- Bravehearts Inc, *Position paper: Community notification of sex offenders*, 2014.

Evidence concluded, the witness withdrew.

The Chair closed the hearing at 4:19pm. The public and the media withdrew.

9. Adjournment

The Committee adjourned at 4:19pm until 5 May 2014.

Minutes of Proceedings of the Joint Select Committee on Sentencing of Child Sexual Assault Offenders (No. 9)

1:38pm, Monday 5 May 2014
Macquarie Room, Parliament House

Members present

Ms Pavey (Deputy Chair), Mr Casuscelli, Mr Lynch, Rev Nile, Ms Westwood.

Staff in attendance: Carly Maxwell, Jessica Falvey, Emma Wood, James Newton.

The Deputy Chair commenced the meeting at 1:38pm.

Apologies

Mr Grant (Chair), Ms Gibbons.

1. Consideration of late submission

Resolved, on the motion of Rev Nile, that the Committee receives and authorises the publication of the late submission received from Greg Walsh and Co Solicitors, with personal details redacted as appropriate, and orders that it be placed on the Parliament's website.

2. Workshop

The Deputy Chair opened the workshop on issues relating to the inquiry. Discussion ensued.

3. Adjournment

The Committee adjourned at 4:22pm *sine die*.

Minutes of Proceedings of the Joint Select Committee on Sentencing of Child Sexual Assault Offenders (No. 10)

4:28pm, Thursday, 15 May 2014
Macquarie Room, Parliament House

Members present

Mr Grant (Chair), Mr Casuscelli, Ms Gibbons, Rev Nile, Ms Pavey, Ms Westwood.

Staff in attendance: Carly Maxwell, Jessica Falvey, Emma Wood, James Newton.

Apologies

Mr Lynch.

1. Deliberative meeting

In the absence of the Chair, the Deputy Chair opened the deliberative meeting at 4:28pm.

a) Confirmation of minutes

Resolved, on the motion of Rev Nile, that the draft minutes of the meetings conducted on 30 April and 5 May 2014 be confirmed.

b) Admission of media

Resolved, on the motion of Mr Casuscelli, that the Committee authorises the audio-visual recording, photography and broadcasting of the public hearing today in accordance with the Legislative Assembly's guidelines for the coverage of proceedings for parliamentary committees.

c) Transcript publication

Resolved, on the motion of Mr Casuscelli, that the corrected transcript of evidence given today [and any tendered documents, which are not confidential] be authorised for publication and uploaded on the Committee's website.

d) Questions on notice

Resolved, on the motion of Rev Nile, that witnesses be requested to return answers to questions taken on notice during the hearing today within 14 days of the date on which questions are forwarded to the witness by the Committee Clerk.

Resolved, on the motion of Rev Nile, that the Committee authorise publication of the answers to questions on notice [which are not confidential and with appropriate redactions].

2. Public hearing

The Chair and Ms Westwood joined the proceedings. The Chair opened the public hearing at 4:32 pm. The public and the media were admitted.

The following witnesses from the Justice Health and Forensic Mental Health Network were affirmed and examined:

- Ms Julie Babineau, Chief Executive.
- Dr Tobias Mackinnon, Statewide Clinical Director, Forensic Mental Health.

Evidence concluded, the witnesses withdrew.

The Chair closed the hearing at 5:18pm. The public and the media withdrew.

3. Adjournment

The Committee adjourned at 5:18pm *sine die*.

Minutes of Proceedings of the Joint Select Committee on Sentencing of Child Sexual Assault Offenders (No. 11)

4:17pm, Thursday 19 June 2014
Macquarie Room, Parliament House

Members present

Mr Grant (Chair), Mr Casuscelli, Ms Gibbons, Mr Lynch, Rev Nile, Ms Pavey, Ms Westwood.
Staff in attendance: Bjarne Nordin, Carly Maxwell, Jessica Falvey, Emma Wood, James Newton.

1. Confirmation of minutes

Resolved, on the motion of Ms Westwood, that the draft minutes of the meeting conducted on 15 May 2014 be confirmed.

2. Conduct of final workshop

The Committee discussed items to be addressed at the final workshop for the current inquiry into sentencing of child sexual assault offenders.

3. Inquiry into the sentencing of child sexual assault offenders

Resolved, on the motion of Mr Lynch, that the Committee admit confidential guests for the purpose of providing a private background briefing in relation to the Committee's inquiry.

Discussion ensued.

The guest participants withdrew.

The Committee adjourned at 5:55 pm until a date and time to be determined.

Minutes of Proceedings of the Joint Select Committee on Sentencing of Child Sexual Assault Offenders (No. 12)

4:07pm, Wednesday 13 August 2014
Room 1153, Parliament House

Members present

Mr Grant (Chair), Ms Gibbons, Mr Lynch, Rev Nile, Ms Pavey, Ms Westwood.

Staff in attendance: Bjarne Nordin, Carly Maxwell, Emma Matthews, James Newton.

Apology

Mr Casuscelli

1. Confirmation of minutes

Resolved, on the motion of Mr Lynch, that the draft minutes of the meeting conducted on 19 June 2014 be confirmed.

2. Consideration of supplementary submission

Resolved, on the motion of Mr Lynch, that the Committee receives and authorises the publication of the confidential supplementary submission, with identifying details redacted as appropriate, and orders that it be placed on the Parliament's website.

3. Final workshop

The Chair opened the workshop on issues relating to the inquiry. Discussion ensued.

4. General Business

The Chair offered a personal vote of thanks to the Members of the Committee, noting that he was proud to serve on a committee with Members who were so dedicated to the task at hand and with such careful attention to detail. The Chair thanked the support staff, particularly Bjarne Nordin, Carly Maxwell and Jessica Falvey.

The Chair noted the standing orders of the Legislative Council and Legislative Assembly governing Committee Report debates. He outlined that he was liaising with the Leader of Government Business in the Legislative Assembly to provide greater time for Committee Members to speak to the report and noted the views of Members from the Legislative Council that there was sufficient time for debate in that chamber.

The Committee adjourned at 4:38pm until a date and time to be determined.

Minutes of Proceedings of the Joint Select Committee on Sentencing of Child Sexual Assault Offenders

1.00pm, Thursday, 18 September 2014
Room 1043, Parliament House

Members Present

Mr Grant (Chair), Mr Casuscelli, Ms Gibbons, Mr Lynch, Ms Pavey, Ms Westwood.

Staff in attendance: Bjarne Nordin, Emma Matthews, James Newton and Jonathan Elliott.

The Chair commenced the meeting at 1.05pm.

1. Committee reappointment

The Chair noted the extracts from the Legislative Assembly Votes and Proceedings, dated 9 September 2014, no 1 (21) and the Message from the Legislative Council, dated 9 September 2014, no 1 (17) reappointing the Joint Select Committee on Sentencing of Child Sexual Assault Offenders.

2. Election of Deputy Chair

Pursuant to Standing Order 282, **resolved** on the motion of Mr Lynch, that Ms Pavey be elected Deputy Chair of the Committee.

3. Standard Procedural Motions

Resolved, on the motion (in globo) of Mr Lynch:

1. That during any committee meeting, if a division or quorum is called in the Legislative Assembly, or either House in the case of joint committees, the proceedings of the committee shall be suspended until the committee regains its quorum at the conclusion of the division or quorum call.
2. That pursuant to Legislative Assembly Standing Order 297, draft reports, evidence, submissions or other documents presented to the committee which have not been reported to the House are not to be disclosed or published by any member or by any other person unless first authorised by the committee or the House.
3. That press statements on behalf of the committee be made only by the Chair after approval in principle by the committee or after consultation with committee members.
4. That the Chair and the nominated Committee Director be empowered to negotiate with the Speaker through the Clerk of the Legislative Assembly for the provision of funds to meet expenses in connection with advertising, operating and approved incidental expenses of the committee.
5. That persons having special knowledge of the matters under consideration by the committee may be invited to assist the committee, in accordance with the Legislative Assembly's policy on secondees or consultants.
6. That the Chair be empowered to advertise and/or write to interested parties requesting written submissions.
7. That arrangements for the calling of witnesses and visits of inspection be left in the hands of the Chair and the Inquiry Manager to the committee.
8. That, unless otherwise ordered, witnesses appearing before the committee shall not be formally represented by any member of the legal profession or other advocate.
9. That, unless otherwise ordered, when the committee is examining witnesses, the press and public (including witnesses after examination) be admitted to the hearing being conducted by the committee.
10. That, unless otherwise ordered, access to transcripts of evidence taken by the committee be determined by the Chair and not otherwise made available to any person, body or organisation: provided that witnesses previously examined shall be given a copy

of their evidence; and that any evidence taken in camera or treated as confidential shall be checked by the witness in the presence of the Inquiry Manager to the committee or another officer of the committee.

11. That the Chair and the Inquiry Manager make arrangements for visits of inspection by the members nominated by the committee, which members are expected to participate in the full itinerary as scheduled.

4. Confirmation of minutes

Resolved, on the motion of Mr Lynch, that the draft minutes of the deliberative meeting conducted on 13 August 2014 be confirmed.

5. Report Consideration

The Committee deliberated on the Chair's draft report on Sentencing of Child Sexual Assault Offenders.

Resolved, on the motion of Ms Westwood, that the Committee consider the report recommendation by recommendation.

Recommendation 1, on the motion of Ms Westwood, agreed to.

Recommendation 2, on the motion of Ms Gibbons, agreed to.

Recommendation 3, on the motion of Ms Westwood, agreed to.

Recommendation 4, on the motion of Ms Westwood, agreed to.

Recommendation 5, amended by inserting "when reviewing recommendation 1" after "recommends" and inserting "or consolidated offences or new offences of sexual intercourse with a child under 10" after "Crimes Act 1900" and, on the motion of Ms Gibbons, agreed to.

Recommendation 6, on the motion of Ms Westwood, agreed to.

Recommendation 7, on the motion of Mr Lynch, agreed to.

Recommendation 8, on the motion of Mr Lynch, agreed to.

Recommendation 9, on the motion of Ms Gibbons, agreed to.

Recommendation 10, on the motion of Mr Casuscelli, agreed to.

Recommendation 11, amended by deleting "strengthen", substituting "enhance" and, on the motion of Ms Pavey, agreed to.

Recommendation 12, on the motion of Ms Pavey, agreed to.

Recommendation 13, on the motion of Mr Casuscelli, agreed to.

Recommendation 14, on the motion of Ms Pavey, agreed to.

Recommendation 15, amended by deleting all words after "case" and, on the motion of Ms Gibbons, agreed to.

Recommendation 16, on the motion of Mr Casuscelli, agreed to.

Recommendation 17, on the motion of Mr Lynch, agreed to.

Recommendation 18, on the motion of Ms Pavey, agreed to.

Recommendation 19, on the motion of Ms Gibbons, agreed to.

Recommendation 20, on the motion of Ms Westwood, agreed to.

Recommendation 21, on the motion of Mr Lynch, agreed to.

Recommendation 22, on the motion of Mr Lynch, agreed to.

Recommendation 23, on the motion of Mr Casuscelli, agreed to.

Recommendation 24, on the motion of Ms Westwood, agreed to.

Recommendation 25, on the motion of Ms Pavey, agreed to.

Recommendation 26, amended by deleting “funding and” and, on the motion of Ms Pavey, agreed to.

Recommendation 27, replaced by “The committee recommends that the NSW Government increases the use of extended supervision orders as an effective re-offender rehabilitation tool.” and, on the motion of Ms Westwood, agreed to.

Recommendation 28, on the motion of Mr Casuscelli, agreed to.

Recommendation 29, amended by deleting “to assist”, substituting “for” and, on the motion of Ms Gibbons, agreed to.

Resolved, on the motion of Mr Lynch, that the Committee adopts the amended draft report, signed by the Chair for presentation to the House, authorises the Secretariat to make appropriate final editing and stylistic changes, and publishes the tabled report on the Committee's website.

The Committee adjourned at 1.31pm sine die.

Appendix Four – *Crimes (Sentencing Procedure) Act 1999, s21A*

21A Aggravating, mitigating and other factor in sentencing

- (1) General In determining the appropriate sentence for an offence, the court is to take into account the following matters:
- (a) the aggravating factors referred to in subsection (2) that are relevant and known to the court,
 - (b) the mitigating factors referred to in subsection (3) that are relevant and known to the court,
 - (c) any other objective or subjective factor that affects the relative seriousness of the offence.

The matters referred to in this subsection are in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law.

- (2) Aggravating factors The aggravating factors to be taken into account in determining the appropriate sentence for an offence are as follows:
- (a) the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work,
 - (b) the offence involved the actual or threatened use of violence,
 - (c) the offence involved the actual or threatened use of a weapon,
 - (ca) the offence involved the actual or threatened use of explosives or a chemical or biological agent,
 - (cb) the offence involved the offender causing the victim to take, inhale or be affected by a narcotic drug, alcohol or any other intoxicating substance,
 - (d) the offender has a record of previous convictions (particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences),
 - (e) the offence was committed in company,
 - (ea) the offence was committed in the presence of a child under 18 years of age,
 - (eb) the offence was committed in the home of the victim or any other person,
 - (f) the offence involved gratuitous cruelty,

- (g) the injury, emotional harm, loss or damage caused by the offence was substantial,
- (h) the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability),
- (i) the offence was committed without regard for public safety,
- (ia) the actions of the offender were a risk to national security (within the meaning of the National Security Information (Criminal and Civil Proceedings) Act 2004 of the Commonwealth),
- (ib) the offence involved a grave risk of death to another person or persons,
- (j) the offence was committed while the offender was on conditional liberty in relation to an offence or alleged offence,
- (k) the offender abused a position of trust or authority in relation to the victim,
- (l) the victim was vulnerable, for example, because the victim was very young or very old or had a disability, or because of the victim's occupation (such as a taxi driver, bus driver or other public transport worker, bank teller or service station attendant),
- (m) the offence involved multiple victims or a series of criminal acts,
- (n) the offence was part of a planned or organised criminal activity,
- (o) the offence was committed for financial gain,
- (p) without limiting paragraph (ea), the offence was a prescribed traffic offence and was committed while a child under 16 years of age was a passenger in the offender's vehicle.

The court is not to have additional regard to any such aggravating factor in sentencing if it is an element of the offence.

- (3) Mitigating factors The mitigating factors to be taken into account in determining the appropriate sentence for an offence are as follows:
- (a) the injury, emotional harm, loss or damage caused by the offence was not substantial,
 - (b) the offence was not part of a planned or organised criminal activity,
 - (c) the offender was provoked by the victim,
 - (d) the offender was acting under duress,
 - (e) the offender does not have any record (or any significant record) of previous convictions,
 - (f) the offender was a person of good character,
 - (g) the offender is unlikely to re-offend,

- (h) the offender has good prospects of rehabilitation, whether by reason of the offender's age or otherwise,
- (i) the remorse shown by the offender for the offence, but only if:
 - (i) the offender has provided evidence that he or she has accepted responsibility for his or her actions, and
 - (ii) the offender has acknowledged any injury, loss or damage caused by his or her actions or made reparation for such injury, loss or damage (or both),
- (j) the offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability,
- (k) a plea of guilty by the offender (as provided by section 22),
- (l) the degree of pre-trial disclosure by the defence (as provided by section 22A),
- (m) assistance by the offender to law enforcement authorities (as provided by section 23).⁴⁴⁵

⁴⁴⁵ *Crimes (Sentencing Procedure) Act 1999, s21A(1-3).*

Appendix Five – Recommendation 4.2 of the NSW Law Reform Commission Report 139 *Sentencing*

A revised Crimes (Sentencing) Act should provide that:

- (1) When imposing a sentence, the court must take into account such of the factors as are known to the court that relate to the following matters:
 - (a) the nature, circumstances and seriousness of the offence
 - (b) the personal circumstances and vulnerability of any victim arising because of the victim's age, occupation, relationship to the offender, disability or otherwise
 - (c) the extent of any injury, emotional harm, loss or damage resulting from the offence or any significant risk or danger created by the offence, including any risk to national security
 - (d) the offender's character, general background, offending history, age, and physical and mental condition (including any cognitive or mental health impairment)
 - (e) the extent of the offender's remorse for the offence, taking into account, in particular, whether:
 - (i) the offender has provided evidence that he or she has accepted responsibility for his or her actions, and
 - (ii) the offender has acknowledged any injury, loss or damage caused by his or her actions or voluntarily made repatriation for such injury, loss or damage (or both)
- (2) These matters are in addition to any other matters that the court is required or permitted to take into account under any Act or rule of law.
- (3) The court is not to have any regard to any factor in sentencing if it would be contrary to any Act or rule of law to do so.
- (4) The fact that any such factor is relevant and known to the court does not require the court to increase or reduce the sentence for the offence.
- (5) The following definitions apply:
 - (a) **Cognitive impairment** means an ongoing impairment in comprehension, reason, adaptive functioning, judgement, learning or memory that is the result of any damage to, dysfunction, developmental delay, or deterioration of the brain or mind. Such cognitive impairment may arise from, but is not limited to, the following:
 - (i) intellectual disability;
 - (ii) borderline intellectual functioning;

- (iii) dementias;
 - (iv) acquired brain injury;
 - (v) drug or alcohol related brain damage;
 - (vi) autism spectrum disorders.
- (b) **Mental health impairment** means a temporary or continuing disturbance of thought, mood, volition, perception, or memory that impairs emotional wellbeing, judgement or behaviour, so as to affect functioning in daily life to a material extent. Such mental health impairment may arise from but is not limited to the following:
- (i) anxiety disorders;
 - (ii) affective disorders;
 - (iii) psychoses;
 - (iv) severe personality disorders;
 - (v) substance induced mental disorders (which include ongoing mental health impairments such as drug-induced psychoses, but exclude substance abuse disorders (addiction to substances) or the temporary effects of ingesting substances).
- (6) In assessing the nature, circumstances and seriousness of the offence, the court must have regard to the matters personal to the offender that are causally connected with, or materially contributed to, the commission of the offence including, for example, the offender's motivation in committing the offence, as well as the degree to which the offender participated in its commission.⁴⁴⁶

⁴⁴⁶ New South Wales Law Reform Commission, *Sentencing*, Report 139, July 2013, [4.58], p83.