

**Submission
No 11**

SENTENCING OF CHILD SEXUAL ASSAULT OFFENDERS

Organisation: Police Association of New South Wales
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27th February 2014

The Chair
Joint Select Committee on Sentencing of Child Sexual Assault Offenders
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To The Joint Select Committee on Sentencing of Child Sexual Assault Offenders,

Please accept a copy of the Police Association of New South Wales submission regarding the Inquiry into the Sentencing Child Sexual Assault Offenders. The Police Association of NSW thanks the Committee for the opportunity to submit a response to its inquiry. The Police Association looks forward to the release of the final copy of the Report.

Yours sincerely

A large black rectangular redaction box covering the signature of Scott Weber.

SCOTT WEBER
President

Police Association of NSW



Inquiry into the Sentencing Child Sexual Assault Offenders

Police Association of New South Wales Submission

February 2014

Version Control

Purpose

The purpose of this document is to provide to the Joint Select Committee on Sentencing of Child Sexual Assault Offenders, the Police Association of New South Wales submission to its Inquiry into the Sentencing Child Sexual Assault Offenders.

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Inquiry into the Sentencing Child Sexual Assault Offenders

The Joint Select Committee on Sentencing of Child Sexual Assault Offenders was established to investigate and report on whether current sentencing options are appropriate and effective and 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.

“Emphasis has rightly been placed by the Crown upon the need to impose sentences in these cases which make it clear not only to the particular offender but also to others with similar impulses that if they yield to them they will meet severe punishment. That element of general deterrence is of prime importance in making the community aware of the attitude of the courts to this type of offence” from the judgement in R v Burchell (1987) 34 A Crim R 148, a case of indecent assault of three girls under the age of 16 years.

General discussion

On 1 March 2011, there were 12, 596 registered sex offenders across Australia¹. In NSW, BOCSAR conducted a study over a two year period between 2009 and 2010, and reported 495 sex offenders were convicted of child sexual assault within the said period². Prison penalties were imposed on 75 per cent of offenders convicted of aggravated child sexual assault, with an average aggregate sentence of just 5 years and 8 months, and an average minimum term of just 3 years and 3 months³. Only just last year it was reported in the media that a 55-year-old man received a mere good behavior bond even despite admitting to 22 charges of sexual assault on his daughter from the age of nine. This is only one example of how sentencing decisions do not reflect community expectations.

It is also argued that the conviction rate in sexual assault cases is lower in Australia in comparison with other offences⁴. For example, in an article published by BOCSAR in 2006, the author wrote, “each year NSW Police receive reports of approximately 7,000 sexual and indecent assault incidents. Only about one in ten of these incidents result in someone being found guilty in court”. Most sexual offences proceed no further than the investigation stage. Only 15% of sex incidents involving a child victim result in the initiation of criminal proceedings against a suspect. Among the small proportion of cases that do reach court, the conviction rate is low. Criminal proceedings are less likely to be commenced in incidents where the victim is a young child, where the incident is reported more than ten years after it occurred, where the offender is a stranger and where there are no aggravating circumstances⁵.

More recently, child abuse statistics show similar outcomes in terms of most sexual offences proceeding no further than the investigation stage and among the small proportions of cases that do reach court; the conviction rates are also low. For instance, in 2010 there were 4886 sexual offence incidents involving a victim aged 0-15 reported to NSW Police; of these incidents, just 367 persons were found guilty of at least one child sex offence. In 2009, there were 5062 sexual offence incidents involving a child victim reported to NSW Police; of these

¹ http://en.wikipedia.org/wiki/Sex_offender_registration#Australia

² Holmes, Jessie, Sentencing snapshot: Child sexual assault, 2009-2010, BOCSAR, Issue Paper no. 68, revised May 2013.

³ Holmes, Jessie, Sentencing snapshot: Child sexual assault, 2009-2010, BOCSAR, Issue Paper no. 68, revised May 2013.

⁴ Yehia, Dina, Cross-Examination of Children, 22 February 2010

⁵ Jacqueline Fitzgerald, The attrition of sexual offences from the New South Wales criminal justice system, BOCSAR, Number 92, January 2006.

incidents just 398 persons were found guilty of at least one child sex offence. Similarly in 2008 there were 4739 sexual offence incidents involving a child victim reported to NSW Police; of these incidents, just 422 persons were found guilty of at least one child sex offence. Such low rates of conviction in child sexual assault cases give reason for further reform or legislative intervention to ensue. Please see Table below.

The progress of sexual offences through the NSW Criminal Justice System

Source: <http://www.bocsar.nsw.gov.au/>

	2010	2009	2008	2007	2006
Incidents reported to police	4886 sexual offence incidents involving a victim aged 0-15 reported to NSW Police.	5062 sexual offence incidents involving a child victim reported to NSW Police	4739 sexual offence incidents involving a child victim reported to NSW Police	4488 sexual offence incidents involving a child victim reported to NSW Police	4581 sexual offence incidents involving a child victim reported to NSW Police
Cases finalized in court	603 persons appeared in NSW Local and Higher Courts charged with at least one child sex offences	627 persons appeared in NSW Courts charged with at least one child sex offence	722 persons appeared in NSW Courts charged with at least one child sex offence	599 persons appeared in NSW Courts charged with at least one child sex offence	591 persons appeared in NSW Courts charged with at least one child sex offence
Cases proven	Of the 603 persons charged, 367 were found guilty of at least one child sex offence.	Of the 627 persons charged, 398 were found guilty of at least one child sex offence.	Of the 722 persons charged, 422 were found guilty of at least one child sex offence.	Of the 599 persons charged, 340 were found guilty of at least one child sex offence.	Of the 591 persons charged, 343 were found guilty of at least one child sex offence.
Penalty	Of the 367 persons found guilty of at least one child sex offence, 214 received a sentence of full-time imprisonment and 5 received periodic detention.	Of the 398 persons found guilty, 246 received full-time imprisonment and 11 received periodic detention.	Of the 422 persons found guilty, 232 received full-time imprisonment and 12 received periodic detention.	Of the 340 persons found guilty, 187 received full-time imprisonment and 9 received periodic detention.	Of the 343 persons found guilty, 214 received full-time imprisonment and 3 received periodic detention.

Average penalties in 2010 from NSW Higher Criminal Courts

The statistics published by the NSW Higher Criminal Courts in 2010 show there were 19 persons sentenced to prison under section 66A (of the Crimes Act 1900) for the crime of sexual intercourse with a child under 10. According to the Act, the maximum penalty for this crime is imprisonment for 25 years or imprisonment for life (that is, in circumstances of aggravation). The average penalty though given to offenders in 2010 was just 4 years and 5 months.

For the same period, 18 persons were sentenced to prison under section 61J of the Crimes Act for the offence of Aggravated sexual assault. In this section the offence is any person who has sexual intercourse with another person (the alleged victims being under the age of 16 years of age) without the consent of the other person and in circumstances of aggravation and who know that the other person does not consent to the sexual intercourse. The maximum penalty for this offence is imprisonment for 20 years. The average penalty received in 2010 was just 4 years and 1 month.

Also in 2010 there were 10 persons sentenced to prison under section 66C of the Crimes Act involving sexual intercourse with a child between 10 and 16 years of age. The maximum penalty as noted in the Crimes Act is imprisonment for 20 years. The average penalty though

handed down in 2010 was just 2 years 11 months. As one can ascertain, there is quite a disparity between the maximum penalties as recorded in the Crimes Act to the actual sentences handed out to offenders. It begs the question then do these lenient decisions in sentencing reflect community expectations? Those that engage in such abhorrent behaviour must face a lengthy term of imprisonment.

The community expects paedophiles to be dealt with harshly; the community expects those who engage in child sex assault to receive a custodial sentence. As purported in the NSW Law Reform Commission's latest report on Sentencing, sentencing needs to fit the crime and individual circumstances, it needs to recognize the harm done to victims. It needs to punish the offender, deter others and protect the community⁶. How else can public confidence in the criminal justice system be maintained by sentences if they are not in step with community values? And how can the mind of a potential offender be dissuaded from committing a crime if he/she does not know it will carry a harsh punishment?

The noted high level of attrition of sexual assault cases from the justice system erodes the capacity of criminal sanctions to act as a deterrent to sexual offenders. Offenders who do not believe that they will be apprehended and convicted for the offence may be likely to offend again. It needs to be asked what steps can be taken to increase the percentage of offences reported to police that result in the initiation of a criminal prosecution and how can the success rate of prosecutions in cases of sexual assault be improved particularly when a child may be so traumatized by sexual abuse that years pass before he or she is able to understand or talk about what happened.

"This court has said time and time again that sexual assaults upon young children, especially by those who stand in a position of trust to them, must be severely punished, and that those who engage in this evil conduct must go to gaol for a long period of time, not only to punish them, but also in an endeavor to deter others who might have similar inclinations...This Court must serve notice upon judges who impose weakly merciful sentences in some cases of sexual assault upon children, that heavy custodial sentences are essential if the courts are to play their proper role in protecting young people from sexual attacks by adults..." ...From R v Fisher (1989) 40 A Crim R 442 at 445

Police Association members have been critical of the way the 'system' deals with this issue. Individual submissions to the Association poignantly detail their own cases at their respective stations, and many mention the injustice, anger and disbelief at how the 'system,' has failed to adequately deal with their respective situations. Many of the concerns result from the offender's behavior not being sanctioned and being allowed to continue in their sexual offending behavior without any appropriate treatment or adequate punishment. The need to ensure that offenders are properly sanctioned whilst at the same time enabling them to receive appropriate treatment needs to be given considerable and immediate merit.

Although the psychological response of children to sexual abuse was first reported almost 30 years ago by Summit (1983) and, despite at least 30 years of worldwide research on the phenomenon of child sexual assault and the behaviour of child sex offenders, the criminal justice system remains stuck in a time warp that denies the documented responses of children to sexual abuse, as well as the developmental and emotional barriers that prevent children acting as an empowered adult might act. In particular, the decision in Graham (Graham v R [1998] HCA 61) displays no understanding of the context in which child sexual abuse occurs and the relationship of power between the child victim and adult offender. Anne Cossins, The Hearsay Rule and Delayed Complaints of Child Sexual Abuse: The Law and the Evidence

⁶ Smith, Greg, Law Reform Commission Report on Sentencing, Media Release, 12 September 2013.

The following submission will highlight some of the issues as flagged by Police Association members when conducting child abuse investigations. The Police Association's considerations in preparing this submission have been informed by way of consultation with their members regarding their role in child sexual assault investigations in addition to a number of research reports. The issues will be detailed in terms of themes with the use of case histories as recorded and affected by our members in order to expound on the gravity of the issue at hand. As police are often the first point of contact in child sexual assault incidents they are in a unique position to respond to and intervene in such incidents.

As mentioned, five years and eight months is the average penalty given to these horrendous acts of violation that harm and destroy lives-one would think a substantial increase would therefore raise the risk factor in a potential child sexual assault offenders' mind. Feedback from Police Association members believe courts and the legal system have of late relaxed punishments especially considering the effect on the victim and victims' family. An increase in minimum sentences and minimum non-parole period could very well deter persons from committing such crimes. Sentencing for child sex abuse crimes must incur heavy legal penalties and heavy custodial sentences. It has been well-documented that the sexual abuse of children has a range of very serious consequences for victims. Zwi et al. (2007) list depression, post-traumatic stress disorder, antisocial behaviors, suicidality, eating disorders, alcohol and drug misuse, post-partum depression, parenting difficulties, sexual re-victimisation and sexual dysfunction as some of the manifestations of child sexual abuse among victims (see also Abel & Harlow 2001; Kendall-Tackett, Williams & Finkelhor 2001). There is currently a need to reflect both the severity of child sexual offenses in the sentencing process and to find a model that will better rehabilitate persons convicted of these offences and reduce recidivism.

The latest data from BOCSAR shows the number of child sexual assault victims in Cessnock, Newcastle and the Upper Hunter Shire are well above the state average. The 2012-2013 rate of reported child sexual incidences in Cessnock stands at 918.6 per 100 000 children, significantly higher than the state average of 439.6 per 100 000. The Upper Hunter shire is at 789.3 and Newcastle is not far behind on 763.5. In raw numbers this equates to 118 incidences of reported child sexual assault in Cessnock, 26 in the Upper Hunter and 236 in Newcastle. All are significantly higher than the data recorded in 2011 to 2012.

Disparity and Inadequacy in sentencing

As mentioned, our members have been involved in some of NSW's most horrendous child sexual assault cases. The details of the following case histories are mostly unedited (apart from the non-publication of names to protect the identity of victims). The said case histories are recorded by our members who raise a number of significant issues when having to deal with such abhorrent crimes. The range of offending behavior involve sexual intercourse/penetration; indecent assault; and acts of indecency. In their submissions, members unceasingly remarked on the lenient sentences imposed for all such categories of offences. Other issues observed include;

- The substantial injury, emotional harm and damage caused by the offence
- The majority of sexually abused did not report the abuse at the time it occurred
- Offenders engaged in a complex process of grooming their victims in order to initiate and maintain sexual contact and to prevent disclosure.
- The offender abused a position of trust or authority in relation to the victim
- Most of the victims were victimized by someone known to them, most commonly a family member

- Victims were as young as three years of age
- The victim was vulnerable i.e. because of the victim's age, size and innocence
- The offence involved multiple victims or a series of criminal acts
- The offender has a record of previous convictions and some were child registered offenders
- Offenders were sentenced many years after the offence with some cases by the time the sentence was handed out the offender had hardly any time left to serve.

Current sentencing manifestly inadequate

I was the Officer in Charge of the investigation Offender X. I charged Offender X with 37 charges relating to the sexual and indecent assault of both of his children. The DPP elected to prosecute Offender X with Persistent sexual abuse of a child under section 66EA(1) [persistent abuse of a child] of the Crimes Act as well as drug possession and supply, which were also relevant to the abuse of his children.

Offender X systematically abused his daughter from the age of three until she was 15, at which time she came to the Police for help. Offender X committed hundreds of offences upon his daughter, however I charged him with one count of sexual assault and indecent assault per year of abusing her, as she could not provide specific details of each assault. The assaults happened every time that Offender X had the children stay with him, which was on a fortnightly basis, with a number of assaults occurring some weekends. Offender X provided alcohol and cannabis to his children from the age of nine, often assaulting them after they were drunk or high.

Offender X also assaulted his son on occasion and even made his son assault his daughter whilst he watched. As far as child sexual assault goes, I've never heard of more heinous offending. The assaults were not at the lower end of the scale, were persistent and were clearly for no other reason than his personal gratification.

Offender X pleaded guilty to a total of 11 offences, the substantive being the offence under section 66EA. The facts represented the full scale of his offending. He was sentenced by the Judge to a maximum term of 10 years imprisonment, with a non parole period of 5 years. In his remarks His Honour noted the hardships which Offender X had experienced throughout his life, including being born deaf, himself suffering sexual abuse, drug and alcohol abuse and psychological issues.

Offender X was on the Child Protection Register for offences committed when he was a teenager. This was a historical investigation; however the offender was on the register whilst committing offences upon his daughter.

There are a range of issues with the sentencing in this matter, however I still hold the opinion that the sentence was manifestly inadequate. The DPP declined to appeal the sentence" Officer 1

The need for heavier custodial penalties for child assault crimes

The current sentences are an absolute joke. The majority of these matters are not reported in the media but the general public would be outraged if they knew the length of sentences handed out. The victims of these crimes are vulnerable children that are scarred for life from the offence.

To me the consideration on effect on the victim, component of the sentence should be extreme especially in matters where the victim was required to give evidence. Perhaps this is where different percentages/discount/increase could be used by the court to encourage guilty pleas. Add to that the fact in the difficulty involved investigating and proving, let alone be able to sentence an offender means to me the deterrent element of the sentence for others should be at the extreme end of the ledger with there being a difference in the determination of a sentence for a child sex offence. Officer 3

Sentencing needs to fit the crime and act as a deterrent

Child victims harmed by courts

Many child witnesses give evidence as complainants in sexual assault cases. Often their account is the only evidence or the primary evidence against an accused. Their evidence is therefore subject to challenge and testing by way of cross-examination. Different standards of questioning are expected from lawyers versus police. While best practice guidelines in investigative interviewing consist of open-ended non-leading questions, cross-examination largely comprises of leading and closed questions that aim to confuse and intimidate the child witness and to identify inconsistencies in their testimony. Child victims must cope not only with the emotional consequences of criminal acts but also with the potentially traumatizing effects of the legal environment. As such fears are raised that child victims of sex crimes will be further harmed by the courts. Children who testify in court under such stressful situations need to be protected. The criminal justice system needs to deal fairly and sensitively with sexual assault complainants, particularly child complainants. If victims are treated respectfully, compassionately and kept informed at all times they may be less likely to withdraw their complaint or choose not to proceed.

“...a criminal justice system that is still weighted against children who complain of sexual abuse. The adversarial system is not designed to deal with the uniqueness of child sex offences compared to other crimes, in terms of the targeting and grooming practices of offenders and the evidentiary problems that arise from a victim/offender relationship that is based on an abuse of power (Cossins 2000). Rather than being a process that aims to protect the victim (or other children) from future abuse, the adversarial trial has a well-documented history of transforming a child sexual assault trial into an inquiry into the credibility of the complainant through aggressive defence counsel tactics and judicial warnings from ALRC & HREOC 1997; NSW Parliament, Legislative Council, Standing Committee on Law and Justice 2002; Wood 2003; Cashmore & Trimboli 2005.

‘...jurors rated children’s treatment by defence lawyers during cross-examination as significantly less fair than children’s treatment by either the judges or the crown prosecutors. Children were perceived to have more difficulty understanding the questions asked by defence lawyers and were less confident and more stressed when answering these questions than when answering questions asked by crown prosecutors’. Judy Cashmore and Lily Trimboli, Child sexual assault trial: a survey of juror perceptions, Crime and Justice Bulletin, 2006

And this from a Police Association member;

I dealt with a matter that was absolutely horrific. The short facts of the story are; mum and the boyfriend gave the 13 year old victim a sleeping pill, mum carried the girl into bed with the boyfriend where mum performed oral sex on the boyfriend to get him hard so he could rape her daughter penile/vaginal while she took photographs. The sentence (followed by a guilty plea) handed out was 4 years which apparently was within the range of the case law.

A police prosecutor with about 20 years' experience in prosecuting said it was one of the worst matters he had seen. In all my years as a detective it is abhorrent and the girl gets 'raped' by the court as well. By the time the sentence was handed out the two offenders had just two years to serve. This is ridiculous. I know they pleaded guilty but a minimum sentence of 10 years in custody I believe was necessary as a deterrent, support the victim etc.

I'm still shaking my head with this one. What sort of deterrent is that!? By Officer 3

Significant disparity in child sexual assault sentencing

As a Detective Sergeant working at a NSW LAC, I dealt with two substantial LAC investigations into child sex offenders. The significant disparity in sentencing appears to be particularly relevant to the inquiry.

Case one: *AB (Non publication order on his name to protect the identity of his victims). AB was charged with 28 offences committed over a 17 year period against this three daughters and two of their friends, including incest; sexual intercourse child under ten; aggravated indecent assaults. He was also charged with possession of Child Abuse Material (over 1.2 million still pictures & 3000 videos). AB received a minimum term of 14 years and a maximum term of 17 years based on aggregate sentencing. He is appealing the sentence to the CCA. AB pleaded guilty & received a discount on sentence. Whilst the overall sentence was acceptable, due to the limitations or procedures for aggregate sentencing, the penalty imposed for the possession of child pornography was appalling. AB received a sentence of 4 years 6 months for possession of 1.2 million images for which the maximum sentence could have been ten years. I was advised that due to aggregate sentencing, the sentence for those two charges could not be increased.*

Case two: *EP (Non publication order on the victims' names). EP pleaded guilty to two counts of possess/disseminate Child Abuse Material and was convicted after a seven week trial of a further 24 counts of aggravated sexual assaults and aggravated indecent assaults on 7 young boys. He was therefore not entitled to any discount on the offences for which he was convicted at trial. His offences spanned a period of 20 years. EP received a minimum term of 9 years 6 months and a maximum term of 14 years 6 months. He was again sentenced using aggregate sentencing principles. In some respects, the two cases are similar (long periods of undetected offending; multiple victims; serious offences). However, two significant differences strike me:*

EP defended the matter and forced his seven victims to relive their experience & was therefore not entitled to any discount

EP had more victims and also more victims with more serious offences

The obvious conclusion that one might draw is that EP should have received a much longer sentence. I believe that this is a clear example of where the judge's discretion had a significant impact on sentencing. I know that the victims were devastated by the paltry individual sentences. The effect of aggregate sentencing is also a topic that the inquiry should examine. Officer 4

The need for consistency in laws to ensure justice is served

Legal reference: Tendency Evidence Section 97 Evidence Act

The following case is an example of the need for consistency in these laws in order that serious criminals are punished appropriately for their crimes and that the community can feel safe. Specifically, the issues arising from this case are (refer also to Appendix A);

- The indictment/charge of Procure Crimes Act 40/1900 Section 66EB [procure a child under 14 years for unlawful sexual activity]
- Consideration of an appeal
- Law reform regarding Tendency evidence Section 97 of the Evidence Act
- The indictment/charge of Procure Crimes Act 40/1900 Section 66EB

The accused is a 76 year old, who is registered on the CPR and also has a Child Protection Prohibition Order, (CPPO) prohibiting him from being in the unsupervised company of children. He has a 43 year history of committing sex crimes against male children.

In 2011, Police who were aware of the CPPO sighted the accused driving his vehicle with a 12 year old boy in his unsupervised company.

The accused was arrested and charged with Breaching the CPPO and his CPR requirements. He was refused bail at this point in time and investigations commenced, into his breaches of the CPR & CPPO.

The 12 year old boy was spoken to by Police and indicated that he mows lawns and other gardening tasks with the accused along with several other boys from Grafton.

As such investigations were conducted into the identity of these other boys and the activities of the accused which led to the discovery of about 5 other boys who were in the unsupervised company of the accused mowing lawns and other gardening tasks for which they were paid monies by the accused.

One such 13/14 year old boy known as JB, was identified and interviewed in the presence of his mother by JIRT. JB detailed working with the accused on a daily basis and that the accused had indecently assaulted him on several separate occasions.

All boys identified as having been accessed by the accused were interviewed and described the accused, talking of his past exploits as a first grade footballer, and sexualised talk, including masturbation competitions in the showers after the games, asking if they masturbate, asking if they have pubic hair, if they have had a head job, ask to see there penis, asking to hold his penis etc.

The accused was charged with Procuring a child, JB, for unlawful sexual activity, pursuant to section 66EB 2 of the crimes act, among a number of indecent assaults upon a 13/14 year old male victim, 6 counts or breaching the CPPO and Breaching his CPR requirements.

The accused pleaded not guilty to the Procure charge and the indecent assaults. However he pleaded guilty to Breaching the CPPO & CPR.

The Indecent Assault charges went to trial between 11 March and 22 March 2013 at Grafton District Court before the Judge, in a judge alone trial.

The prosecution raised Tendency Evidence of the accused past offending, which is similar in nature to the alleged conduct subject to the charges on trial and the evidence of the existence of the CPPO under section 97 of the evidence Act

The Judge would not allow this evidence to be led, due to its highly prejudicial nature and the trial proceeded

Evidence was called from the victim, his brother and another young male during the trial all who the judge cites as being credible witnesses.

The defence called the accused who denied the allegations.

The Judge in delivering his verdict could not find beyond reasonable doubt on the indecent assault charges citing deficiencies in the evidence of the victim and no complaint.

The Judge however acquitted the accused on the procure charge as he found that the offence had not occurred and that this was an essential element in the procure charge. This was submitted by the defence in their closing addresses.

The Judge commented during his verdict that the Crown should have proceeded with an attempt procure charge.

This is at odds with Section 66EB 2 of the crimes act and the 2nd reading speech in Parliament. The Crown Prosecutor indicated that she was intending to write to the Director of ODPP regarding an appeal in this matter, but I am not aware of the outcome or if this eventuated.

The issues arising from this trial are;

The indictment/charge of Procure Crimes Act 40/1900 Section 66EB
Consideration of an appeal.
Law reform Re Tendency evidence Section 97 of the evidence Act
The indictment/charge of Procure Crimes Act 40/1900 Section 66EB

This ruling by the Judge although not binding is influential in other cases. The Judge's ruling in this matter in effect means that an offence has to be committed for the charge of procure to be successful.

This is at odds with the intention and creation of this particular Act and section. It is the Crown's submission that the Judge made an error at law on this particular case. Sub Section 4 of 66EB clearly states that that the sexual Act need not be particularised.

This has potential ramifications for other matters due to the distinct lack of case law in this charge.

Tendency Evidence Section 97 Evidence Act

It is absolutely ludicrous that *Child sex Offenders such as this are protected by the law and their past history cannot be used against them.*

The defence in this matter successfully argued that for Tendency Evidence to be admissible the Crown, had to call the past victims **Section 91 Evidence Act**, which also has regard to **Section 178 of the Evidence act** and in any event you have to consider Section 101 of the evidence act, which states, Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution **cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.**

In effect in matters such as this it means that Tendency Evidence is inadmissible.

The reality of these Sections of the Evidence Act are that for the evidence to be admissible you have to call past victims if no admissions are made by the accused.

Firstly there are few offenders who admit to sexual assault and as many know, the vast majority of Sexual Assault victims live with the trauma for life and asking them to relive their trauma in another trial is wrong in so many ways.

This in effect means the worse the offending behaviour is the more prejudicial it is and the harder it is for the probative value of evidence to **substantially outweigh** the prejudicial effect.

The reality of the restrictions on Tendency Evidence is the worst the offending the greater the prejudicial effect and the greater the protections under the Act and case law.

In this trial mentioned this meant that the Crown could not lead the full evidence against the accused and what the investigation was initially about as this was highly prejudicial.

This resulted in the farcical situation where the Judge had difficulty comprehending how and why the accused was before his court. It was not a typical matter where there is complaint evidence which leads to the Police investigation, which results in the accused appearing for trial.

The Judge was critical of the Investigators for having the mother of the main victim present during his JIRT interview where the victim disclosed Sexual Assaults by the accused.

The Judge was never told that Police were investigating breaches of the CPPO and interviewing children who had potentially been with the accused unsupervised.

The Crown could not properly Cross Examine the accused in evidence as a lot of such questions as to the fact that the accused should not have been in the company of children were too prejudicial to be raised.

The OIC of the investigation was sworn in to evidence to,
"Tell the truth, the whole truth and nothing but the truth."

Where does this leave the OIC of the investigation in that he was allowed to tell the truth and nothing but the truth but not **the whole truth**. The whole truth was suppressed and the charade of the arrest and charging of the accused continued, perhaps there is a need to change the oath or affirmation, to tell the whole **admissible** truth.

Sentencing needs to fit the crime

As mentioned, sentencing needs to fit the crime and individual circumstances, it needs to recognise the harm done to victims, it needs to punish the offender, deter others and protect the community.

The Courts in general appear to be grossly out of touch with the public opinion and abhorrence at this type of offender and offending. Equally the courts appear to be out of touch with the very real effects that having to investigate these matters has on the long term mental health of Police. Sentences need to be of suitable length to more effectively represent the public need for offenders to be properly punished and to more properly act as a deterrent. Officer 5

Prevalence of Sexual offending

As mentioned, 495 were convicted in 2009-2010 in NSW alone. A substantial number of cases though of child sexual assault are suspected to go unreported each year and this number could be drastically larger. This factor was also cited in the Police Association's submission to the Sentencing Council's review of sexual assault offences against children. While crime victimisation surveys help to identify some of the offences that do not come to the attention of the police (and thus help to shed light on the dark figure of sexual offending), undoubtedly additional incidents are not reported in such surveys either. It is thus believed impossible to determine precisely the exact prevalence of sexual offending in the community. This problem is exacerbated by the hidden nature of sexual offending. Research has shown that victims are less likely to report to the police if the offender is known to them. Some of the factors that have been found to contribute to this include fear of retribution, fear of giving evidence and being cross-examined, fear of not being believed, a belief that the incident was not a real crime, or lack of knowledge and access to help (VicHealth, 2006, p.60).⁷

Recidivism

For many in the community, sex offenders are seen as among the most dangerous kinds of offenders in terms of both the impact that their offending has on victims' lives and because of concerns about their risk of reoffending. Akin to these concerns, Police Association members aver to the following;

Child sexual offences have a high rate of recidivism and a near-on predictable pattern of escalation. A SNPP would encourage participation in pre-release programs and allow a greater certainty in parole period for post release programs. This should reduce the risk of recidivism and escalation of offending...Feedback from Police Association member, 2013

⁷ Karen Gelb Dr, Recidivism of Sex Offenders, Research Paper, Sentencing Advisory Council, January 2007.

Prentky et al. (1997) examined recidivism rates on 115 child molesters and concluded that:

- child molesters remain at risk to reoffend long after their discharge, in some cases 15-20 years after discharge;
- there is a marked underestimation of recidivism rates.

Likewise, a review by the American Psychological Association (2003) concluded that “the research demonstrates that even sexual offenses against children that occurred long ago evince a continuing risk of recidivism by the offender.” Another perspective on the problem is offered by Anna Salter, one of the foremost experts on sex offenders in the USA. She writes the following in her book *Predators*:

“The dry research figures only confirm what I have seen over and over in this field: there are a lot of sexual offenses out there and the people who commit them don’t get caught very often. When an offender is caught and has a thorough evaluation with a polygraph backup, he will reveal dozens, sometimes hundreds of offenses he was never apprehended for. In an unpublished study by Pamela Van Wyk, 26 offenders in her incarcerated treatment program entered the program admitting an average of 3 victims each. Faced with a polygraph and the necessity of passing it to stay in the treatment program, the next group of 23 men revealed an average of 175 victims each.”

Sexual Assault against Indigenous Children

Child sexual assault in Indigenous communities has been identified as a significant problem also. A paper authored by Tania Matruglio, analyses recorded crime data over the period 2003 to 2007. The data showed that there has been a 33.2% increase in the reported rate of child sexual assault over this period and that not all children are at equal risk of becoming a victim of child sexual assault with differences evident on the basis of Indigenous status, gender, age and geographical location. Indigenous children are the reported victims of sexual assault at around double the rate of non-Indigenous children. Such findings become more significant given the reports that child sexual assault is less likely to be reported in Indigenous communities. Female children are the reported victims at 5 times the rate of male children and the most common age of reported victims is 12 to 15 years. It is important to consider though that there is evidence that shows that abuse against male children is less likely to be reported than for female children. While criminal proceedings are not commonly commenced in these matters, around half of all persons of interest who were proceeded against in the reported child sexual assault incidents from 2003 to 2007 were related to the victims and a further 38% were persons otherwise known to the victim. This finding was consistent across both Indigenous and non-Indigenous groups and is not unexpected based on what we already know about child sexual assault. There is a great need for the development of education and prevention strategies in Indigenous communities.

Interventions for sex offenders

As mentioned, the prevalence of child sexual abuse in the community is difficult to ascertain and is under estimated. Many professionals believe that most cases of sexual abuse go undetected and it is very difficult to gauge the true extent of child sexual abuse in the community. What is known is that offenders often commit many acts of abuse although they may only be convicted for a few acts. Sex offender programs are especially important then because of the very high risk of re-offending. Therefore, the development of appropriate interventions for sex offenders must be considered a high priority. The deleterious effects of sexual abuse on children and later the impacts upon them as adults is now well indicated in the research. A variety of negative consequences on physical and emotional health have been documented.

It is therefore critical to develop strategies and services for those that sexually offend against children in order to secure for children and young people a future free from such abuse.

Disclosure Reporting Child Sexual Abuse

Every published empirical study on the disclosure of child sexual abuse indicates that a high percentage of those child sexual abuse victims who report their abuse to authorities delay disclosure of their abuse, and that a significant number of children do not disclose the abuse at all. The delay between the initial occurrence and the subsequent disclosure of the abuse varies, depending on a number of factors such as the abused's age at the time of the events, the relationship between the perpetrator and the abused, the gender of the abused, the severity of the abuse, developmental and cognitive variables related to the abused, and the likely consequences of the disclosure. Consequently, child sexual abuse is significantly underreported. When victims do report that they were abused, they often do so years after the abuse occurred.

Clearly is it time for the criminal justice system to catch up with literature that has documented the phenomenon of child sexual abuse and its short and long term effects on children. The strict approach to hearsay evidence of delayed disclosure in sexual assault trials, based as it is on beliefs that contradict the evidence from the psychological literature, indicates that law reform measures are necessary to ensure that such evidence is admitted under special exception to the hearsay rule, irrespective of the time that has elapsed between the alleged events in question and the hearsay statements by the child. Such an exception could be either broadly or narrowly constructed to allow the admission of any hearsay statements by a child that are relevant to a fact in issue, or merely to allow the admission of a child's hearsay statements of delayed disclosure. From Anne Cossins, The Hearsay Rule and Delayed Complaints of Child Sexual Abuse: The Law and the Evidence, 2002.

Only 18.9 per cent of those surveyed as part of the most recent Personal Safety Survey who had experienced sexual assault in the last 12 months had reported the incident to police (Australian Bureau of Statistics, 2006d, p.21). If the perpetrator is a relative or acquaintance, victims of child sexual abuse are less likely to report the offense, or they are likely to disclose the abuse after a delay (Arata, 1998; DiPetro, 2003; Hanson et al, 1999; Smith et al, 2000; Wyatt and Newcomb, 1990).

Courts and Sexual offences

A study by the Judicial Commission of New South Wales confirmed the extent of delay in cases of child sexual assault in particular. In examining the delay between the offence and the sentence date, the authors found that (Hazlitt et al., 2004, p.23):

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

The shortest period from the offence to the sentence was 94 days and the longest was 38.5 years. Sexual offences thus represent a unique circumstance in terms of the much higher average age of detected offenders.⁸

⁸ Karen Gelb, Recidivism of Sex Offenders Research Paper, Sentencing Advisory Council, Victoria, 2007.

Public Perceptions

Gelb (2007) states public perceptions of sexual offending as a crime perpetrated by strangers are inaccurate, as the greatest danger lies within the home from someone known to the victim—this is evident in our members' case histories. The often hidden nature of such crimes makes it especially difficult to understand the costs of sexual offending, in terms of emotional and financial costs to the victim, the victim's family and to society more generally.

Misconceptions

As Gelb (2007) states, although many sex offenders claim to have been abused as children, overall most do not. It is possible that those who do claim to have been abused may be overstating their experiences of childhood behavior as a way of gaining sympathy and perhaps for their offending. Regardless of the reliability of these claims, childhood victimization should not be seen as an excuse for (or a cause of) adult offending behavior. Nonetheless, these findings highlight the importance of early detection of, and intervention with, children who have experienced sexual and physical abuse.

In Australia a criminal justice model is in place. This is supported by recent Australian research which shows that, while a large proportion of prisoners have a history of mental health problems, most (including sex offenders) are not clinically mentally ill. Smallbone and Wortley's study found that the vast majority of sex offenders against children do not have a diagnosable psychosexual disorder, although many have been treated for depression (23%), drug and alcohol abuse (18%) and anger problems (13%) (Smallbone and Wortley, 2000, p.34).

Child Protection registers

New South Wales' child protection register was established under the Child Protection (Offenders Registration) Act 2000 (Parliament of New South Wales 2009). It was modelled on the register under the Sex Offenders Act 1997 (UK), and when it began operation in October 2001 was the first of its kind in Australia (Cossins 2006). The child protection register is based on the premise that CSOs are at high risk of re-offending so convicted offenders must be monitored and managed after they serve their sentence and return to the community. The register is intended to prevent re-offending and to provide victims and their families with an increased sense of security, as well as generate information enabling the investigation and prosecution of recidivist offenders. By November 2004, more than 1650 people (nearly 98% male) were listed on the child protection register in New South Wales.

One member had the following to say regarding registrable persons;

As portfolio holder for the child protection register attached to a NSW LAC I can honestly state that sentences for registrable persons whom fail to comply with reporting obligation are not a deterrent to repeat offending. I have breached a child sex offender on at least two occasions for failing to comply with reporting obligations, where the sentence is a fine, if anything at all. It discourages proactivity in child sex offender case management. Officer 2

Officer 2 not only flags issues with registrable persons but also makes mention the issue of inappropriate sentencing; and poor supervision of case monitoring; offenders that frequently cross state borders; lack of compliance and disclosure to the terms in the legislation; misperceived definitions of the Act such as the age of a child and regular unsupervised contact; lack of access to ANCOR by policing bodies resulting in inefficiency in sharing of information regarding the management of offenders.

Although I am merely in LAC land I am quite passionate about Sex Offender Case management and have had this portfolio for five years. I have faced many hurdles with the legislation, loopholes in the legislation as well as the forms to be served of registrable persons as per the legislation, and have submitted the odd report to the registry.

I liaise with officers responsible for case management in the ACT and often sigh with regards to the effectiveness of the various legislations that combine to form confusion and loopholes especially with offenders that frequently cross state borders.

Six kilometres away a magistrate sentenced a registrable offender to imprisonment for failing to disclose a change of address. I have had the same registrable person before the same magistrate for more than one breach, whom merely get a section 9 bond, or a fine.

One person was charged with four breaches and was convicted of child homicide and already subject to probation and parole - yet sentenced to a 2 year supervision order under probation and parole when he was already under their supervision?

As a result of the lack of support for enforcement of the Child Protection (offender Registration) Act, there is no incentive for registrable persons to comply, and there is no incentive for police to proactively monitor and prosecute for breaches detected.

I probably shouldn't say this; however I have issued a warning for a breach I should have charged for, because I believe that without a prior warning, the matter would not be taken seriously at court. This is a matter where a person has particular technological prowess after being convicted of offences involving his knowledge of the internet and IT capabilities, and failed to disclose email accounts, and access to social networking sites etc.

It is not just a problem with inappropriate sentencing - it funnels right down to poor supervision of case monitoring. Some LACs have their offenders attend the station annually and then it is out of sight out of mind for the next 12 months. Offenders then transfer to another LAC where numerous breaches are detected but due to the lack of ongoing contact documented, it can be established that the offender has 'knowingly' failed to report such changes - because there is not evidence that he was regularly reminded through monitoring and interaction.

An example of a loop hole is that there is nowhere on the Form 3 that stipulates that a child by definition of the act is anyone under the age of 18. Many offenders believe (and understandably so) that the age of a child is under the age of 16. A simple definition for the offender to acknowledge in the Form 3 would close the loophole of sex offenders associating with children aged 16-18.

Another is the issue of the definition of regular unsupervised contact. Essentially, police have to catch the offender unsupervised with the same child, on three different occasions before he can be breached for non disclosure.

I have also faced hurdles where a registrable person commences a 'relationship' with a 17 year old. He has declared it...she is aware of his convictions....yet I do not believe this is an offence.

There is an offender that works as an interstate truck driver and supplies false addresses from state to state. He breaches and then relocates over the border. The breaches are not serious enough for extradition, so he continues living in the back of the truck driving around the country and not accountable to anyone.

Another issue is that The Child Protection Registry and the head offices have access to ANCOR which is the national data base. The police in LAC land responsible for the monitoring of such offenders do NOT have access to ANCOR and are not permitted such access. They therefore cannot update ANCOR with current information or retrieve current information for efficient information sharing for offender management.

NSW operational Police and the Child Protection Register

Police are the most appropriate agency to maintain the Register, but they do need to be appropriately resourced in order to carry out their duties. The health, welfare and professional development of our members is a priority and there is a large body of NSW operational police working in the field of child protection that are affected by the establishment of the Child Protection Register. The Act primarily conferred new functions on police since its inception. Our members have expressed concern with lack of staffing levels, lack of resources and unsustainable workloads that have left them with an inability to thoroughly investigate cases or seriously delay and hinder investigations. Police staffing shortages leave citizens unprotected and there is a critical need to have sufficient numbers of police and an appropriate allocation of resources available to deliver these services.

In May 2013, the Police Association of NSW conducted a survey regarding the Child Abuse Squad. In brief, the survey consisted of questions regarding the agencies working environment which focused on areas as staffing and workload; supervision and consultation. As far as it relates to this submission, some of the key findings of the survey included members' low morale and high stress levels were affecting their level of work performance as they've had to deal with the pressures from the following;

- Insufficient staffing levels
- Excessive and unsustainable workloads to staff ratios
- Poor management practices and lack of accessibility
- Ineffective investigative service conducted by Child Abuse Squad officers as a result of unsustainable workloads
- High levels of stress Child Abuse personnel
- Poor morale amongst Child Abuse personnel
- Problematic relationships with joint partner agencies
- Inadequate level of resources
- Issues with isolation, particularly in rural/remote areas

It is imperative that the issues mentioned above particularly those relating to insufficient staffing numbers and poor resource accessibility be boosted in order for police to perform their roles and responsibilities in a proficient manner that citizens have come to expect.

In terms of police powers, it's quite important that police regularly receive training and adequate guidelines about their use of powers and that their use is monitored. In the early stages when the Register was first introduced, there appeared to be confusion and uncertainty among police about what monitoring actions they could legitimately undertake without being perceived as harassing registered persons, so this needs to be made clear to police in order that they are able to operate without confusion as to how they can use their power. Monitoring guidelines containing clear directions for police about their responsibilities and a clear outline of their powers in respect of monitoring, supported by ongoing training is a must, this will go towards establishing a continued uniformity amongst all Commands and eliminate any confusion.

The management of information held on the Register is an issue that is raised by many stakeholders including operational police, registered persons, and community and government agencies. The extent to which police should disclose information about registered persons is potentially one of the most controversial issues for any registration scheme. Not surprisingly, there is a wide range of views on how information about registered persons should be managed and, in particular, who should have access to it.

It is a very complex and delicate public police balance, protecting children and the rights of the convicted offender. Nevertheless, the principal issue here is the safety and well-being of some of the most vulnerable members of our community, namely children at risk of harm and in need of care and protection.

Aggravating circumstances

Police Association members had the following to say regarding more specifically aggravating circumstances;

The fact that an offender has been charged and convicted of committing offences against multiple victims should be taken into consideration and considered as a special aggravating fact. The fact that an offender has committed against multiple victims clearly negates "one off" claims and clearly shows a desire to keep offending or an inability to not offend. Either way it is something that I believe makes them a far greater risk to the public. Offenders found to have committed offences against multiple victims should be sentenced to greater terms of imprisonment.

The filming of offending should be an aggravating fact.

The fact an offender has filmed their offending for later viewing or distribution clearly aggravates the offending. Parents may never know if the photographs or videos have been distributed to other offenders and have to live with the psychological trauma of wondering if other offenders are viewing images of their children.

Offenders found to have filmed the commission of their offences should be sentenced to greater terms of imprisonment.

Victim impact

Sentencing courts must have a regard to the harm done to victims. Victim impact statements allow victims to participate in the sentencing process.

"the undoubted proposition that a sentencing judge is entitled to have regard to the harm done to the victim by the commission of the crime. That is the rule at common law, and s5(2)(b) of the [Sentencing Act 1995 (NT)] provides that, in sentencing an offender, a court shall have regard to "the nature of the offence and how serious of the offence was, including any physical, psychological or emotional harm done to a victim."... referred by Gleeson CL, Gummnow, Hayne and Callinan JJ in from Signato v The Queen (1989) 194 CLR 656 at [29]

Impact on Family Members

Child sexual assault - a personal and destructive crime not only affects extensive areas of a young child's psychological functioning but the discovery of child sexual assault is a major stressor in the lives of a child's non-offending parent also. Numerous studies have revealed that the attachment and support of the non-offending parent, most commonly the mother, has an impact on the child's long-term adjustment to the abusive experience. Police Association members also sought input from parents' of young children that were sexually assaulted in order to reveal and confirm the psychological trauma suffered by parents. The issues raised from parents concern the leniency evident when sentencing these offenders and the problematic process in compiling victim impact statements; the need for psychological trauma experienced by parents to be taken into account by the Court at sentencing. The following correspondence was received from a parent of whose child was a victim in a child sexual assault case.

Thank you for your email and the opportunity to express my thoughts on the sentencing of child sex offenders. I have written a few points about my experience recently for you. To sit down and think about this hurts and I have been delaying even writing this because of how much it affects me and the way that I cope when I start thinking about it.

For a parent the shock that something has happened to your child is something that never really repairs. Generally a parent spends their time raising and protecting children, and to find out all of that has failed in a way to any level is heart breaking. To allow myself to think about the case and think about the video and think about what has been done stirs up feelings of anger, disappointment and sadness.

I find it's easier to shut it all out, that is why I have tried to avoid writing this!!! Knowing that once the case is "over and closed" according to the legal system hurts because it is never over for the victims or families.

As a parent of the abused child it's never "case closed" no matter how much time goes by. I lay awake at night sometimes because visions of the video pop into my head and I can't sleep. The visions never fade. Wondering if my daughter will ever fully recall or ask questions about the events in the video is a fear and burden that I will carry forever. I constantly wonder if she will recall something and wonder how I will answer her and what help is there for her to deal with it should that happen?

My child did not disclose anything in her jirt interview that indicated she knew what went on, but has said the odd thing here and there that makes me wonder if there is some knowledge of it there waiting to come out one day. A sexual abuse councillor advised me that only time will tell and to be ready if something is said.

I am now an overprotective parent to the point of people that know me but are not aware of what went on are questioning why I am so over protective. I do not allow my daughter to go anywhere without me because the fear that she may be subjected to sexual abuse by anyone at any time sits in the back of my head. I dread the day she asks to have sleep overs at friend's houses and I don't think I will ever allow her to, EVER!!

Even when my children are with family members that I fully trust I still worry that they could get hurt in some way. It is a fear that never leaves a parent after.

After discovering my daughter's involvement in this case I found it hard to be near men and my relationship with my partner at the time became very much affected.

After discovering my daughter's involvement in this case I became very isolated and distant from friends and family and did not know how to deal with what was happening and still to some degree feel very distant and un-trusting towards people around my children.

After viewing the video it has been burnt in my head forever and still hurts as much today as it did on the day I saw it. Seeing my daughter being inappropriately touched and not be able to stop it was extremely hard. At times the video was pointing in other directions and not always showing what was going on, and I still to this day lay awake at night and wonder just how much she was really violated.

After viewing the video and seeing that it was made out to be a fun game with tickling and laughing I found it hard to have fun with my kids and laugh because it made me instantly think of the video, and I couldn't handle watching other people playing with my children and laughing or having fun.

After viewing the video and seeing my daughter be tickled on the tummy and played with whilst being inappropriately touched at the same time has made me not able to "tickle" my daughter since, which should normally not be a problem or weird. The moment she says "tickle me" I have to walk away. My daughter does not understand why I am reacting this way towards her and that hurts.

Having to drop charges from 5 charges down to 1 or 2 during the court process was disappointing and disheartening because to the victim and family the charges being laid on him for what he has done are the only thing that gives a tiny bit of peace in a horrible experience. To have 5 charges standing, and then have some taken away was hard to deal with and seemed unfair.

I saw how hard the detectives on this case worked to gather and sort all evidence and lay charges and am very appreciative of their hard work. If the police saw it reasonable to charge the 5 charges then why couldn't they have remained??

The fact that I was invited to write a victim impact statement as long as it was within the page of rules and guidelines of what information it could and couldn't contain made it almost impossible to write one. I did not submit a victim impact statement because I found the rules and guidelines on writing it to be totally ridiculous. I think these rules need to be reconsidered because if a victim is given the opportunity to voice their experiences or thoughts about the case they are involved in then there can't be such strict guidelines about what you can and can't say.

Knowing that he will be released back into the community after such a short sentence scares me and the fear of possibly ever sighting him out in public is enormous. After experiencing the court and sentencing process I feel that the very light sentence given to a man that sexually abused multiple children, took inappropriate photographs and videos of children and had an interest in child pornography was an insult to every child and parent that was a victim of this case. The sentencing and punishments are nowhere near heavy enough. It is concerning to know that a paedophile will be back in the community in such a short time. I fear for anyone who may cross his path in the future and wonder how closely he can honestly be monitored by the law to ensure that he won't re-offend and ruin more people's lives.

We need to see much longer sentences or perhaps an instant mandatory minimum sentence period for all child sex offenders to serve with additional time added on-top depending on the circumstances of the case and any other interventions possible to stop them re-offending. I feel that these cases are not taken seriously enough and they must be treated more harshly. Paedophiles are not entitled to light sentences. In some countries the penalties are much harsher and that is the way it should be. In fact this whole experience has made me lose faith in the legal system and how it is run. There are too many pathways for offenders to be rewarded with leniency.

I do not believe that a person's spiritual, cultural, artistic or ethnic backgrounds e.g. aboriginal / Torres Strait islander should have a reflection on how they are sentenced, nor should if they are a first time offender. Why are we rewarding a criminal with these leniencies?? All child sex offender cases should be sentenced equally with sentences that are substantial.

As a nurse working in the medical profession I acknowledge that mental health issues and manipulative personalities are a reality in our society and both are clearly involved with a paedophile, however this should not allow them to any type of leniency or sentencing discounts. In fact this should be seen as more of a concern when they are released back into the community as they are clearly unstable people and are at a high risk of re-offending.

While a paedophile is in prison they are monitored 24hrs a day and are away from children, once a paedophile is released back into the community what is the legal system doing to ensure they are not re-offending, how are they monitored and how well are the public informed that they are around??

The legal system needs to offer more than just a jail sentence; the laws job is not over once they are released. To a victim of abuse the memories are a life time sentence, therefore it should be a lifetime sentence for the offender.

I just hope that in the future our legal system may change in the handling of these cases. My thoughts and experiences of this case that I have mentioned above are simply the left over parts that I am still yet to deal with after discovering what happened to my child and to other children.

This experience has highlighted flaws that I have seen in the legal system surrounding child sex offender and the way the cases are handled. If this at all helps to give some insight to what it's like for the victims and families during and after a case like this is over and possibly help something to change or help someone else in the future then that is good!!!

Members had also the following to say regarding the trauma felt by parents of sexually assaulted children;

Psychological harm to non-offending parents should be taken into account.

I recently had a matter before the Court where an offender was charged with a large number of indecent assaults against children under ten and filming their genital area while he offended against them. The nature and manner of his offending was such that he made a game of his actions and as such the children were not aware they were being offended against.

At sentence the Judge made comment that as the child was not aware of the offending it made it less traumatic than if they had been aware. What was not taken into account was the trauma experienced by the parents of knowing what had occurred to their children and the feeling they experienced of not having been able to protect their children. Rightly or wrongly all the parents felt they had let their children down. That psychological trauma experienced by parents needs to be taken into account by the Court at sentence. From Officer 6

Effective therapy

Paedophilia is a psychiatric illness and while it can be treated, successful rehabilitation is *not* guaranteed. There have been a number of studies to show that treatment programs, in particular cognitive behavioural approaches, can be effective. One study by Marshall in 1993 found that while 60% of untreated offenders re-offended over a five year period only 15% of treated offenders re-offended. Another comprehensive study in New Zealand over a ten year follow-up of 238 prisoners who undertook the Kia Marama treatment program in its first three years of operation, found that the treated group had a recidivism rate of 8% compare with a recidivism rate of 21% for the control group. Despite concerns regarding the variability of results and methodology, Donato et al state 'that there is substantial evidence to support the thesis that treatment programs reduce recidivism rates.

Members on the other hand comment on the manipulative nature of sex offenders and their chances of successful rehabilitation;

Offenders can easily deceive the court with regards to rehabilitation.

Offenders against children are often in positions of authority or display a persona of being child friendly. There are able to deceive all around them that they are not a threat or risk to children, when clearly this is not the case.

That same deceptive character can easily be used to deceive the Court that they are sorry for their wrong doing and will not offend again. A robust and thorough analysis of the offender and their underlying personality traits should be undertaken before sentence to try the court a better opportunity of making a correct decision as to the true. From Officer 7

Types of Treatment Programs in Australia and Overseas

In the United Kingdom, United States, Canada and Australia it is accepted that the most effective program to address sexual offending against children is a group based cognitive therapy, which focuses on attitudes and victim awareness. In addition, these programs also include relapse prevention. There are, however, differences in delivery, depending on the settings, for instance, in the prison or in the community and the type of agency providing the service, for instance correctional services or health services.

An investigation into sex offender treatment programs throughout Australia undertaken by Professor Freda Briggs found that there was no national agreement on what constituted treatment and records were not routinely being kept relating to either their cost of offenders' recidivism rates. In order to evaluate the success of treatment and deliver information to the community on outcomes, treatment programs in and out of prison must ensure that proper long-term evaluation is built in. A suitable model to consider is that which is used in the UK.

Again, international literature tells us that contemporary sex offender treatment programs employ a multidimensional approach that includes cognitive-behavioral techniques, relapse prevention strategies and psychopharmacology to treat child sex offenders. Although there is no "cure" for individuals who sexually molest children, these treatment approaches appear to be successful with regard to reducing recidivism rates ((Barbaree & Marshall, 1991; Eccles & Walker, 1998; Fisher & Beech, 1999; Wood et al., 2000; Aytes et al., 2001).

Similar findings are made in a 2007 Australian report authored by Dr Karen Gelb, titled *Recidivism of Sex Offenders*. Gelb examines the evidence about the prevalence and nature of sexual offending, characteristics of sex offenders, recidivism rates among different kinds of sex offenders and the efficacy of treatment programs. As Gelb states, studies to date on sex offenders have reached a number of consistent conclusions:

- Sexual offences that come to the attention of police represent only a small proportion of all sexual offences that occur in the community.
- Sex offenders who are imprisoned represent only a small proportion of all sex offenders who enter the criminal justice system.
- Most victims of sexual offences are victimised by someone known to them, most commonly a family member.
- The overwhelming majority of sex offenders are men.
- Sex offenders tend to be older than other offenders.
- Only a small minority of sex offenders report having been sexually abused in childhood.
- Most sex offenders are not mentally ill.
- The risk of reoffending is greatest for those offenders who started offending at an early age, have stable deviant sexual preferences, have multiple convictions for sexual offending, have committed diverse sexual offences and who target male child victims.
- Sex offenders tend to have versatile criminal careers, with their sexual offending embedded in more general offending behavior.
- Sex offenders are not a homogeneous group, with different types of sex offender exhibiting different patterns and precursors of offending.
- Sex offender treatment programs, especially those delivered in the community, have a small but significant effect on reducing sexual offence recidivism.

Chemical castration

Chemical castration involves the injection of anti-androgen drugs designed to suppress the production of testosterone and reduce libido and sexual activity, and is intended to preventing sex offenders from re-offending (Deutsche Welle 2009, Sample 2007).

In November 2009, the French National Assembly was reported to be debating a new bill which would authorise the chemical castration of repeat sex offenders (Deutsche Welle 2009). The bill was proposed after a series of violent sex crimes, including the kidnapping and rape of a 5-year-old boy by a 63-year-old man with previous multiple convictions for child sex crime. France (along with other European nations such as Poland, Sweden and Denmark) already allows chemical castration to be performed on offenders voluntarily. The procedure was initially tested on 48 volunteer offenders in 2005, with the intention that it could become obligatory for sex offenders in France.

Along with the European countries mentioned above, Canada and eight US states offer chemical castration to sex offenders (Sample 2007). Chemical castration has been publicly discussed and rejected by Australian legislators on several occasions (Collerton 2009); nonetheless, it was recently reported that about a dozen sex offenders in NSW were taking testosterone-blocking drugs. Of 16 sex offenders on extended supervision orders at the end of August 2009, 11 were reportedly taking anti-libidinal medications as a condition of release (Robotham 2009).

Despite the apparently increasing enthusiasm of various nations and Australian states for chemical castration of sexual offenders, the evidence for the effectiveness of the treatment has been described as being of poor quality (Sullivan, Mullen and Pathé 2005). Study populations have been highly selected or have involved extremely diverse subjects, sample sizes have been small and follow-up short.

Concluding Remarks

Child sexual assault remains a complex, unpredictable and challenging area of the law and one that the legal system such as the Judicial Commission needs to continue to monitor with considerable interest and attention. There is a need to produce research regarding for instance measuring the relationship between the offender and the victim and the particular nature of the assault (eg particular type and duration of sexual assault), in order to measure patterns of offending behaviour that has or may not have changed in any significant way. The Judicial Commission has in the past published such monographs. These are particularly important especially in today's legal climate of incessant legislative reforms (including the analysis and the effectiveness of these reforms) and developments in case law. As a multifaceted area of the law the Judicial Commission needs to continuously monitor child sexual assaults as different parts of government deal with child protections, policing, and the prosecution of sex offenders against children which can often conflict in terms of policies, principles and beliefs. Conflicts can arise sometimes from collaboration because of the different governing and operating processes between organizations.

As purported in a research paper conducted by the Judicial Commission, it is difficult to conceptualize all the particular problems and features of the criminal justice system's response to child sexual abuse and to understand how the crime is unique compared to other criminal offences. Although today we have extensive knowledge of the incidence of child abuse assault in the community-there needs to be a closer marriage between this knowledge base and the prosecution of child sex offences. The unique features of child sexual assaults require a uniquely different response from the criminal justice system and one that addresses rather than ignores those features. Refer also to Appendix B, Table: The adversarial trial processes in child sexual assault cases. This Table demonstrates the complexity of successfully prosecuting a child sex offence and the inability of the criminal justice system to effectively reduce the incidence of child sexual assaults in the community. It documents the generally inadequate responses of the criminal justice system to the key features of a child sexual assault case:

- i. one witness to the crime, giving rise to a case of word against word
- ii. the young age of the victim
- iii. lack of forensic evidence
- iv. effects of the power imbalance between victim and offender
- v. delay in complaint
- vi. the effect of experiences of multiple offences
- vii. multiple victims
- viii. the status of the child's first complaint, and
- ix. the focus of the trial on the child's credibility.

Professor Bagaric argues that the current sentencing system is flawed because "it lacks transparency and an overarching rationale", and he submits that a principal objective of the sentencing system must be to ensure that offenders get their "just deserts". This "is best secured by setting penalties for all offences by way of a pre-determined grid – with mandatory terms of imprisonment only for crimes that cause the most distress to victims". He argues that none of the criticisms of mandatory sentencing "has a veneer of plausibility, where the design of the grid is informed by a clear rationale and research data" From Lenny Roth, Mandatory Sentencing laws, e-brief, NSW Parliament

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Appendix A

CRIMES ACT 1900 - SECT 66EB

Procuring or grooming child under 16 for unlawful sexual activity

66EB Procuring or grooming child under 16 for unlawful sexual activity

1. Definitions In this section:

"**adult person**" means a person who is of or over the age of 18 years.

"**child**" means a person who is under the age of 16 years.

"**conduct**" includes:

- (a) communicating in person or by telephone, the internet or other means, or
- (b) providing any computer image, video or publication.

"**unlawful sexual activity**" means an act that constitutes an offence under this Division or Division 10A, 15 or 15A (or, in the case of an act occurring outside this State, that would constitute such an offence if it occurred in this State).

2. Procuring children

An adult person who intentionally procures a child for unlawful sexual activity with that or any other person is guilty of an offence.

Maximum penalty:

- (a) in the case of a child who is under the age of 14 years-imprisonment for 15 years, or
- (b) in any other case-imprisonment for 12 years.

(2A) Meeting child following grooming

An adult person:

- a) who intentionally meets a child, or travels with the intention of meeting a child, whom the adult person has groomed for sexual purposes, and
- b) who does so with the intention of procuring the child for unlawful sexual activity with that adult person or any other person, is guilty of an offence.

Maximum penalty:

- a. in the case of a [child](#) who is under the age of 14 years-imprisonment for 15 years, or
- b. in any other case-imprisonment for 12 years.

(2B) For the purposes of subsection (2A), a [child](#) has been "**groomed for sexual purposes**" by an [adult person](#) if, on one or more previous occasions, the [adult person](#) has engaged in [conduct](#) that exposed the [child](#) to indecent material.

3. Grooming [children](#) An [adult person](#):

- a) who engages in any [conduct](#) that exposes a [child](#) to indecent material or provides a [child](#) with an [intoxicating substance](#), and
- b) who does so with the intention of making it easier to procure the [child](#) for [unlawful sexual activity](#) with that or any other [person](#), is guilty of an offence.

Maximum penalty:

- a) in the case of a [child](#) who is under the age of 14 years-imprisonment for 12 years, or
- b) in any other case-imprisonment for 10 years.

4. (4) [Unlawful sexual activity](#) need not be [particularised](#) In any proceedings for an offence against this section, it is necessary to prove that the [child](#) was or was to be procured for [unlawful sexual activity](#), but it is not necessary to specify or to prove any [particular unlawful sexual activity](#).

5. Fictitious [children](#) A reference in this section to a [child](#) includes a reference to a [person](#) who pretends to be a [child](#) if the [accused](#) believed that the [person](#) was a [child](#). In that case, a reference in this section:

- a) to [unlawful sexual activity](#) includes a reference to anything that would be [unlawful sexual activity](#) if the [person](#) were a [child](#), and
- b) to the age of the [child](#) is a reference to the age that the [accused](#) believed the [person](#) to be.

6. Charge for aggravated offence The higher maximum penalty under subsection (2), (2A) or (3) in the case of a [child](#) under the age of 14 years does not apply unless the age of the [child](#) is set out in the charge for the offence.
7. Defence It is a defence in proceedings for an offence against this section if the [accused](#) reasonably believed that the other [person](#) was not a [child](#).
8. Alternative verdict If on the trial of a [person](#) charged with an offence against subsection (2) or (2A) the jury is not satisfied that the offence is proven but is satisfied that the [person](#) has committed an offence against subsection (3), the jury may acquit the [person](#) of the offence charged and find the [person](#) guilty of an offence against subsection (3). The [person](#) is liable to punishment accordingly.

EVIDENCE ACT 1995 - SECT 97

The tendency rule

(1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless:

- a) the [party](#) seeking to adduce the evidence gave reasonable notice in writing to each other [party](#) of the [party](#)'s intention to adduce the evidence; and
- b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the [party](#) seeking to adduce the evidence, have significant probative value.

(2) Paragraph (1)(a) does not apply if:

- a) the evidence is adduced in accordance with any directions made by the court under section 100; or
- b) the evidence is adduced to explain or contradict tendency evidence adduced by another [party](#).

Note: The tendency rule is subject to specific exceptions concerning character of and expert opinion about accused persons (sections 110 and 111). Other provisions of this Act, or of other laws, may operate as further exceptions.

EVIDENCE ACT 1995 - SECT 91

Exclusion of evidence of judgments and convictions

- (1) Evidence of the decision, or of a finding of fact, in an Australian or overseas proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding.
- (2) Evidence that, under this Part, is not admissible to prove the existence of a fact may not be used to prove that fact even if it is relevant for another purpose.

Note: Section 178 (Convictions, acquittals and other judicial proceedings) provides for certificate evidence of decisions.

EVIDENCE ACT 1995 - SECT 178

Convictions, acquittals and other judicial proceedings

- (1) This section applies to the following facts:
 - a. the conviction or [acquittal](#) before or by an [applicable court](#) of a person charged with an offence;
 - b. the sentencing of a person to any punishment or pecuniary penalty by an [applicable court](#);
 - c. an order by an [applicable court](#);
 - d. the pendency or existence at any time before an [applicable court](#) of a civil or criminal proceeding.
- (2) Evidence of a fact to which this section applies may be given by a certificate signed by a judge, a magistrate or a registrar or other proper officer of the [applicable court](#):
 - a. showing the fact, or purporting to contain particulars, of the record, indictment, conviction, [acquittal](#), sentence, order or proceeding in question; and
 - b. stating the time and place of the conviction, [acquittal](#), sentence, order or proceeding; and
 - c. stating the title of the [applicable court](#).
- (3) A certificate given under this section showing a conviction, [acquittal](#), sentence or order is also evidence of the particular offence or matter in respect of which the conviction, [acquittal](#), sentence or order was had, passed or made, if stated in the certificate.
- (4) A certificate given under this section showing the pendency or existence of a proceeding is also evidence of the particular nature and occasion, or ground and cause, of the proceeding, if stated in the certificate.
- (5) A certificate given under this section purporting to contain particulars of a record, indictment, conviction, [acquittal](#), sentence, order or proceeding is also evidence of the matters stated in the certificate.

(6) In this section:

"acquittal" includes the dismissal of the charge in question by an [applicable court](#).

"applicable court" means an Australian court or a foreign court.

Note: Section 91 excludes evidence of certain judgments and convictions.

EVIDENCE ACT 1995 - SECT 101

Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

- (1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.
- (2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.
- (3) This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant.
- (4) This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the defendant.

Appendix B

Table 1: The adversarial trial processes in child sexual assault cases⁹

Characteristics of child sexual abuse	Criminal justice response
<p>Only one witness: word against word</p> <p>CSA involves a sexual act that mostly occurs in private with no eyewitnesses so that the child is the only witness. Extensive grooming by the offender to test the child’s response to sexual overtures, desensitise the child to sexual touching, implicate the child in the offender’s behaviour, prevent the child from reporting the abuse, maintain sexual access to the child (Berliner & Conte 1990; Phelan 1995; Bagley & Thurston 1996).</p>	<p>Use of a lay jury: no expertise about frequency/effects of CSA or grooming methods used by offenders.</p> <p>Criminal burden of proof is a floating standard that varies from case to case and according to case type (Aronson & Hunter 1998:716). In a CSA case, arguably, that standard is higher because:</p> <ul style="list-style-type: none"> (i) CSA is a cultural taboo — lay jury may be reluctant to accept the validity of the complaint, (ii) cultural belief that children fantasise or lie for revenge (Cossins 2000), (iii) belief that CSA is committed by deviant men, mostly strangers, whereas the majority of children are abused by men known to them (Cossins 2001), (iv) reluctance of juries to accept evidence about cruel, sustained or unusual sexual behaviour.¹⁰ <p>Adversarial trial processes prevent an inquiry being undertaken in relation to the complaint compared to Family Court proceedings where procedures require the court to investigate allegations of sexual abuse.</p> <p>Common law warnings are not excluded by the <i>Evidence Act</i>, a Murray direction is given if there is only one witness to a crime; this warns the jury the child’s evidence “must be scrutinized with great care”¹¹ before a guilty verdict is given which raises “a question mark over the reliability and/or credibility of the complainant” (Wood 2003:8). C (1993) 70</p>

	<p>A Crim R 378; F (1995) 83 A Crim R 502.</p> <p>The difficulties of experts being able to conclude that a child’s psychological state is evidence that s/he has been sexually abused.¹² Courts’ reluctance to accept such opinion evidence when it is available.¹³</p>
<p>Young age of complainant</p> <p>A child complainant is a person under the age of 16 years (in NSW).</p>	<p>The psychological effects of CSA make children peculiarly vulnerable as witnesses (Bagley & Thurston 1996), even though evidence can be given via CCTV.¹⁴</p> <p>Recently children have been exempt from giving oral evidence at committal proceedings (s 91(8) <i>Criminal Procedure Act</i> 1986), thus saving them from being cross-examined at committal.¹⁵</p> <p>Most children give evidence within the court precinct which increases the likelihood the child will see the accused/his supporters outside the courtroom.</p> <p>Susceptibility of children to confusion and intimidation from defence counsel. No formal regulation of defence exploitation of the mental immaturity of children, in terms of style/content of cross-examination. Provisions to disallow questions are not drafted with children in mind; such provisions have limited effect at trial (Eastwood & Patton 2002; Wood 2003), although there is now an onus on NSW trial judges to prevent certain questions.¹⁶</p> <p>Although s 165A <i>Evidence Act</i> (1995) prohibits a general warning being given to a jury “of the danger of convicting on the uncorroborated evidence of any child witness”, under s 165B a jury can be warned the child’s evidence may be unreliable because of age. Although the</p>

	<p>defence must request such a warning, when a child is targeted as a sexual object because of their age, it is contradictory to permit the reliability of the child's evidence to be questioned on the <i>grounds</i> of age.</p> <p>Common law warnings are permitted in relation to the unreliability of a child's evidence because of age.</p>
<p>Lack of forensic evidence</p> <p>A child sex offence does not always involve sexual penetration/ejaculation leading to a lack of forensic evidence. Some forensic evidence is equivocal in relation to whether penetration has occurred due to the elasticity of the tissues involved (see <i>M v R</i> (1994) 181 CLR 487). Delay in complaint also contributes to a lack of forensic evidence.</p>	<p>Lack of medical knowledge of judges/jurors and the need for expert evidence on such matters: "of concern is the circumstance that ... expert evidence of human sexual behaviour whether normal or abnormal, and of victim response is not admissible" (Wood 2003:7).</p> <p>Although judges are no longer <i>required</i> to give a corroboration warning under s 164 <i>Evidence Act</i>, the warning was not been abolished. If a complainant's evidence is uncorroborated, a corroboration warning is still generally given in NSW. But a new provision (which has not yet come into effect), s 294AA <i>Criminal Procedure Act</i>, means that a judge must not warn or suggest that complainants are, as a class, unreliable witnesses and cannot warn a jury "of the danger of convicting on the uncorroborated evidence of any complainant".</p> <p>Limits on the admissibility of the forensic medical examination of the child as opinion evidence since such evidence must be given in a way that does not bolster the complainant's credibility (<i>R v RTB</i> [2002] NSWCCA 104). It was suggested in <i>R v Dann</i> [2000] NSWCCA 185 that the defence and prosecution could agree not to call any medical evidence or raise any issue about it at trial.</p>
<p>Power imbalance between victim and</p>	<p>The common law does not deal with the reasons children do not report. It assumes</p>

offender: delay in complaint

Studies on offender behaviour show that the grooming process creates emotional and/or economic dependence by the child on the offender; creates a power relationship between victim/offender (Berliner & Conte 1990; Phelan 1995; Colton & Vanstone 1996). Grooming contributes to **delay in complaint** and **lack of corroborative evidence**. Victim report studies show that the vast majority of children do not complain at the time of the abuse (Fleming 1997; Cossins 2000).

children have the same mental capacity and knowledge as adults to protect themselves by reporting without delay. In nearly every case of delay, a **Longman warning** must be given: that “it would be dangerous to convict on that evidence alone unless the jury, scrutinising the evidence with great care ... were satisfied of its truth and accuracy”.¹⁷ In *R v BWT* [2002] NSWCCA 60 at [14]–[15], Wood CJ at CL observed that the effect of *Longman* is to “give rise to an irrebuttable presumption that the delay has prevented the accused from adequately testing ... the complainant’s evidence ... irrespective of whether or not the accused was in fact prejudiced in this way”. Recently the *Longman* warning, although not abolished, has been amended by s 294(3)–(5), *Criminal Procedure Act* in an attempt to confine the warning to situations where the defendant has suffered a “significant forensic disadvantage” as a result of delay.

The Crofts warning¹⁸ must be given if a s 294 direction is given.¹⁹ This direction informs the jury that delay does not necessarily indicate a false allegation and there may be good reasons why a complainant delays. The *Crofts* warning contradicts a s 294 direction since it warns the jury the delay can be used to evaluate the complainant’s evidence and credibility. Recently, the *Crofts* warning was amended in NSW by s 294(2)(c) so that a judge must not warn a jury that delay in complaint is relevant to the complainant’s credibility unless there is sufficient evidence to justify the warning.

Multiple offences

Victim report studies show that CSA often involves **multiple offences** over weeks, months or years (Cossins 2000). Commonly, offenders will be charged with more than

Where sex offences are alleged to have been committed on three or more separate occasions occurring on separate days, the prosecution does not have to prove the dates/exact circumstances of each alleged occasion (s 66EA *Crimes*

<p>one count of sexual assault. Multiple offences can make it very difficult for children to remember precise details of every individual offence.</p>	<p><i>Act</i> 1900 (NSW).²⁰</p> <p>Where more than one count is prosecuted, the <i>KRM</i> direction²¹ may apply: the jury may be told they are to consider each count separately unless the evidence relating to one count is admissible as evidence in relation to another. The jury may also be told that if they have a reasonable doubt about the child’s credibility in relation to one or more counts, that must be taken into account in assessing her/his credibility in relation to the remaining counts.</p>
<p>Multiple victims</p> <p>Offenders may abuse more than one child and commonly target children from the same family, class, sporting club etc (Colton & Vanstone 1996).</p>	<p>Tendency or coincidence evidence generally not admitted except in the form of relationship evidence.²²</p> <p>Discretion to order separate trials²³ if the victims know each other, in order to prevent the evidence of one being admitted in the trial involving the offences against the other. Based on the belief that complainants who know each other (prior to complaint) have had an opportunity to concoct their complaints.</p> <p>If propensity/tendency evidence is admitted for a non-propensity/tendency purpose, a <i>BRS</i> direction²⁴ requires the trial judge to warn the jury of the limited use to which the evidence can be put.</p>
<p>A child’s first complaint</p> <p>Because of the secrecy surrounding CSA and issues of shame, embarrassment and self-blame, the child’s first complaint is likely to be to someone they trust at a time when they feel it is safe to tell.</p>	<p>Exceptions to the hearsay rule prevent evidence by a child’s confidant being admitted for its hearsay purpose (Cossins 2002), if, when the child told her/his confidant, the allegation of sexual abuse was not “fresh” in her/his memory.²⁵ Freshness is to be measured in hours or days.²⁶</p>
<p>Child’s credibility</p> <p>The combination of delay in complaint, lack of eyewitness evidence and/or corroborative forensic evidence means that the credibility of the complainant will be central to the</p>	<p>No evidentiary onus on the defence to produce evidence of accusations that undermine the complainant’s credibility, such as motivations for revenge.</p> <p>Obligation on the trial judge to maintain an</p>

<p>accused's defence. The most unregulated aspect of the trial is cross-examination.</p>	<p>impartial role and not interfere in defence lines of inquiry.</p> <p>No obligation on the accused to give evidence and be cross-examined on accusations made against the complainant or face cross-examination about his own credibility.</p> <p>The jury cannot draw an adverse inference from the accused's failure to give evidence;²⁷ this principle applies in all criminal trials.</p> <p>If the accused gives evidence, the prosecution is not permitted to cross-examine him about the complainant's reasons for lying.²⁸</p> <p>Lack of pre-trial defence disclosure. Sexual assault cases rely heavily on the evidence of the complainant and "lend themselves ... to the defence approach of pre-trial silence, and even trial by ambush" (Wood 2003:28).</p>
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Notes to table:

⁹(i) Some of the warnings, procedures, rules of evidence and legal principles discussed are *specific* to sexual assault trials or child sexual assault trials; others are rules of general applicability to all criminal trials. Whether the rules are of specific or general application, they may weigh heavily against securing a conviction in a child sexual assault trial.

(ii) The table sets out the judicial warnings and rules of evidence as they apply in only one jurisdiction, NSW, due to the complexity of doing so for all eight Australian jurisdictions.

¹⁰Number (iv) is based on a personal communication from Judge Helen O'Sullivan, District Court, Queensland, July 2004.

¹¹*R v Murray* (1987) 11 NSWLR 12 at 19, per Lee J.

¹²See *HG v R* (1997) 197 CLR 414 at 428, per Gleeson CJ.

¹³*C* (1993) 70 A Crim R 378; *F* (1995) 83 A Crim R 502.

¹⁴See s 6 *Evidence (Miscellaneous Provisions) Act 1991* (ACT); s 21A *Evidence Act* (NT); ss 21A and 21AP–AR *Evidence Act 1977* (Qld); Pt 6 of Ch 6 of *Criminal Procedure Act 1986*, (NSW); s 13 *Evidence Act 1929* (SA); *Evidence (Children and Special Witnesses) Act 2001* (Tas); ss 106N and 106R *Evidence Act 1906* (WA); s 37C *Evidence Act 1958* (Vic).

¹⁵See also ss 69(3), 104 *Justices Act 1902* (WA); s 21AB *Evidence (Protection of Children) Act 2003* (Qld); s 57A *Justices Act 1959* (Tas).

¹⁶See s 41 *Evidence Act 1995* (NSW).

¹⁷*Longman v R* (1989) 168 CLR 79 at 91, per Brennan, Dawson and Toohey JJ. See, further, *Crampton v R* (2000) 206 CLR 161; *Doggett v R* (2001) 208 CLR 343; *R v BWT* [2002] NSWCCA 60.

¹⁸*Crofts v R* (1996) 186 CLR 427.

¹⁹Section 294 *Criminal Procedure Act 1986* (NSW). Analogous provisions in other jurisdictions include: s 61 *Evidence Act 1958* (Vic); s 71 *Evidence (Miscellaneous Provisions) Act 1991* (ACT); s 36BD *Evidence Act 1906* (WA); s 34I *Evidence Act 1929* (SA); s 371A *Criminal Code Act 1924* (Tas); s 4 *Sexual Offences (Evidence and Procedure) Act* (NT).

²⁰Analogous provisions in other jurisdictions include: s 47A *Crimes Act 1958* (Vic); s 229B *Criminal Code Act 1899* (Qld); s 74 *Criminal Law Consolidation Act 1935* (SA); s 321A *Criminal Code* (WA); s 125A *Criminal Code Act 1924* (Tas); s 131A *Criminal Code* (NT); s 56 *Crimes Act 1900* (ACT).

²¹*KRM v R* (2001) 206 CLR 221.

²²Sections 97 and 98 *Evidence Act 1995* (NSW); see *De Jesus v R* (1986) 68 ALR 1; *Hoch v R* (1988) 165 CLR 292; *R v OGD* (No 2) (2000) 50 NSWLR 433.

²³There is a general discretion to order separate trials under s 21 *Criminal Procedure Act 1986* (NSW).

²⁴*BRS vR* (1997) 191 CLR 275.

²⁵Section 66(2) *Evidence Act 1995* (NSW). Such evidence might be admissible for a non-hearsay purpose; if so, s 60 *Evidence Act 1995* (NSW) would apply.

²⁶*Graham v R* (1998) 195 CLR 606.

²⁷*Azzopardi v R* (2001) 205 CLR 50; s 20 *Evidence Act* (1995).

²⁸See *R v Gilbert* NSWCCA, 10 December 1998; *R v Dennis* [1999] NSWCCA 23.