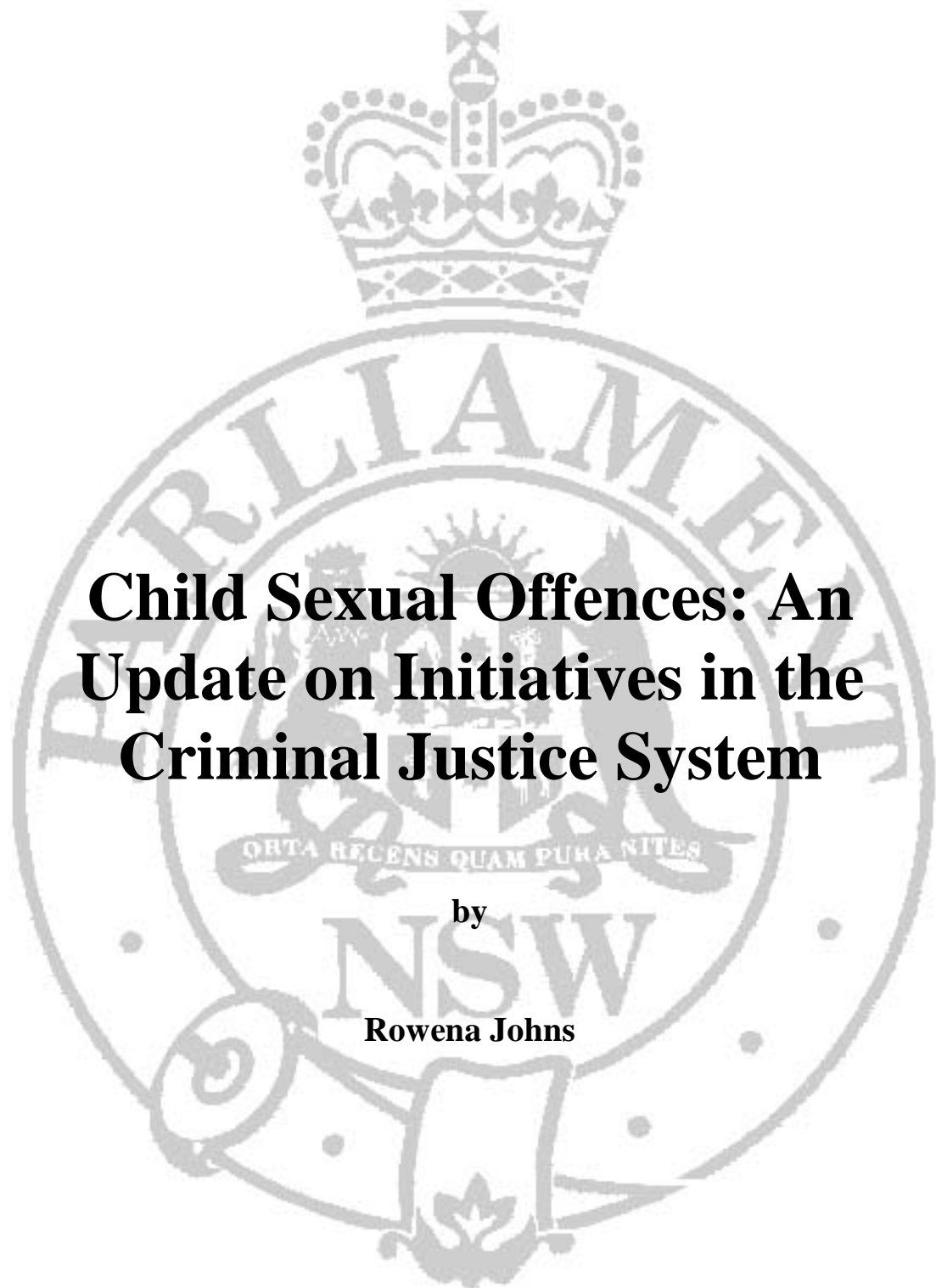


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**Child Sexual Offences: An
Update on Initiatives in the
Criminal Justice System**

by

Rowena Johns

Briefing Paper No 20/03

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EXECUTIVE SUMMARY

This briefing paper examines some of the developments in 2002-2003 in court procedures involving child sexual assault complainants. Methods of monitoring convicted child sex offenders are also explored. Whilst the paper focuses on initiatives in the New South Wales criminal justice system, comparisons are made to other Australian jurisdictions and to the United Kingdom.

General principles and statistics – The sexual offence provisions of the *Crimes Act 1900* (NSW) are outlined, with guidance on how they apply to child complainants. Information from organisations such as the Bureau of Crime Statistics and Research and the Judicial Commission is presented to indicate charge rates and types of penalties for child sexual assault and the characteristics of offenders. Studies suggest that significant attrition occurs between the reporting of alleged sexual offences against children and the obtaining of convictions (pages 2-10).

Important reports – Findings are discussed from two reports which have influenced recent legislative amendments, pilot projects, and further plans for reform in New South Wales: *The Experience of Child Complainants of Sexual Abuse in the Criminal Justice System* by Dr Christine Eastwood and Professor Wendy Patton of the Queensland University of Technology, released in July 2002; and the *Report on Child Sexual Assault Prosecutions* by the New South Wales Legislative Council's Standing Committee on Law and Justice, tabled in November 2002 (pages 11-22).

Legislative changes – A range of statutory amendments that commenced in 2003 are described, for example: the implementation of standard minimum sentences for certain child sexual offences (among other serious offences); the exemption of child sexual assault complainants from attending committal proceedings; the exclusion of periodic detention as a punishment for serious sexual offences, including sexual offences committed against children under the age of 16 years; and clarification that when evidence-in-chief at trial is given by a child in the form of a pre-recorded interview, it should not be played to the court in the presence of the child (pages 23-28).

Specialist child sexual assault court – In March 2003 a pilot program commenced that allows child sexual assault complainants to give evidence by closed circuit television from a remote witness facility at Parramatta, separate from the court house. Some of the other features of the project are: a child-friendly environment; specialist training for judicial officers involved in the pilot; a presumption in favour of using pre-recorded evidence and other special measures; and pre-trial hearings to address the needs of the child and reduce delays. The child sexual assault court is intended to be less traumatic for children than conventional court proceedings (pages 29-32).

Child sex offender registers – New South Wales established a Child Protection Register under the *Child Protection (Offenders Registration) Act 2000*, and it has been operational since October 2001. Persons found guilty of murdering a child or committing a sexual offence upon a child must advise police of their personal, employment and motor vehicle

details, and their travel intentions. Offenders remain on the register for between 8 years and life depending on the offence. The type of register operating in New South Wales was influenced by the sex offender notification requirements in the United Kingdom, which were introduced by the *Sex Offenders Act 1997* (UK). In Australia in September 2002, the Federal Minister for Justice and Customs, Senator Chris Ellison, called upon the States and Territories to set up child sex offender registers and develop consistent legislation. In July 2003, the Australasian Police Ministers Council endorsed a national approach, which would facilitate tracking child sex offenders across borders and the exchange of information with other countries (pages 33-40).

Child sex offender orders – During the campaign for the State election in March 2003, Premier Carr announced a plan to introduce child sex offender orders in New South Wales, to restrict the movement of convicted paedophiles in places frequented by children. Sex offender orders in the United Kingdom were introduced by the *Crime and Disorder Act 1998* and may be issued against various sexual offenders by the Magistrates' Court when it is satisfied that an order is necessary to protect the public from serious harm. The Sexual Offences Bill 2003 proposes to restructure sex offender orders, creating three categories: Sexual Offences Prevention Orders, Risk of Sexual Harm Orders, and Foreign Travel Orders. The Sexual Offences Bill passed the House of Lords on 17 June 2003, and had completed the Committee stage in the House of Commons at the time of writing (pages 41-43).

Paedophiles approaching children on the internet – The Carr Government in March 2003 announced that it would create a new criminal offence to target people who contact children on the internet with the ulterior motive of sexually abusing them. The United Kingdom is in the process of introducing the offence of 'Meeting a child following sexual grooming', which will apply to an adult who meets (or travels with the intention of meeting) a child under 16 years, if the adult has communicated with the child on at least two previous occasions and intends to commit a sexual offence against the child. The new offence is another initiative of the Sexual Offences Bill 2003 (pages 44-48).

1. INTRODUCTION

The criminal justice system in New South Wales has modified its approach in recent years to the conduct of court proceedings for sexual offences involving child witnesses. Greater emphasis has also been placed on monitoring convicted child sex offenders in the attempt to reduce the risk of re-offending.

Legislative amendments commencing in 2003 that were relevant to child sexual assault included: the imposition of standard minimum sentences for some sexual offences against children; the exemption of children from attending committal hearings in sexual assault matters; the exclusion of periodic detention as a punishment in serious sexual offences; and increasing the penalty for people convicted of certain sexual offences who undertake child-related employment. Some of the legislative amendments were influenced by studies that showed a relatively high level of complainant dissatisfaction with the legal system in child sexual assault cases.

Further changes may be generated by the statutory review of the *Evidence (Children) Act 1997* currently being conducted by the Attorney General's Department. The New South Wales Legislative Council's Standing Committee on Law and Justice published a *Report on Child Sexual Assault Prosecutions* in November 2002. One of its major recommendations was the establishment of a specialised court for child sexual assault cases. The Attorney General's Department commenced a pilot program, the Specialist Child Sexual Assault Jurisdiction, in March 2003 at Parramatta.

Preventative and precautionary strategies are also being employed to protect children from sexual assault. A register of child sex offenders has been operational in New South Wales since October 2001, and the Government has proposed introducing court orders to restrict the movements of convicted child sex offenders in locations frequented by children. Another new challenge is to police the sexual dangers that the internet can represent for children. The Government has signalled its intention to create a criminal offence of 'grooming' a child on the internet for sexual purposes, and similar steps are being taken in the United Kingdom.

This briefing paper concentrates on criminal conduct of a sexual nature against children, as distinct from other forms of physical, emotional, psychological or economic neglect or abuse. The expressions 'child sexual offences', 'child sexual assault', and 'child sexual abuse' are adopted at different times throughout the text, according to the source of the material being discussed. A child is generally regarded in this paper as a person under 18 years, but legislative provisions, statistics or studies may specify a narrower age limit.¹ Such age restrictions are highlighted wherever possible.

The content of this briefing paper incorporates developments up to 17 October 2003.

¹ For example, the *Evidence (Children) Act 1997*, which governs procedures for children giving evidence in court, only applies to evidence given by children who are under 16 years at the time when the evidence is given, unless a contrary intention is shown: section 6.

2. GENERAL PRINCIPLES AND STATISTICS

2.1 Scope of child sexual offences

Sexual offences appear in Part 3, Division 10 of the *Crimes Act 1900* (NSW). A number of provisions specifically identify sexual offences against children. These are clearly set out, such as attempting to (or assaulting with intent to) have sexual intercourse with a child under 10 years, pursuant to s 66B of the *Crimes Act 1900*.

However, it does not follow that the provisions that overtly refer to children are the only provisions that can be used to prosecute sexual offences committed upon victims under 18 years of age. For example, s 66A outlines the offence of sexual intercourse with a child under 10 years, and there is a separate offence of sexual intercourse with a child aged from 10 years to under 16 years at s 66C. But a person who has sexual intercourse with a 16 or 17 year old child without their consent can be charged with the standard offence of sexual assault under s 61I. This is the same provision that covers adult victims of sexual assault. The age of consent in New South Wales is 16 years for both females and males.²

Aggravated sexual offences, such as aggravated indecent assault (s 61M) and aggravated sexual assault (s 61J), are more serious versions of the standard offences. The aggravated offence is applicable if any of the factors listed in the provision is present. Two circumstances of aggravation are particularly relevant to children: that the alleged victim is under the age of 16 years; or that the alleged victim is under the authority of the alleged offender.

Sexual offences in the *Crimes Act 1900* that specify child victims

Type of offence	Section number	Maximum penalty of imprisonment
Aggravated sexual assault – the listed circumstances of aggravation include that the victim is under 16 years, or is under the authority of the offender.	61J	20 years
Aggravated indecent assault – the listed circumstances of aggravation include that the victim is under 16 years, or is under the authority of the offender.	61M	7 years, or 10 years if the victim is under 10 years of age.
Act of indecency on a person under 16 years , or inciting a person under 16 years to commit an act of indecency.	61N(1)	2 years
Aggravated act of indecency on a person under 16 years , or inciting a person under 16 years to commit an act of indecency. The listed circumstances of aggravation include that the victim is under the authority of the offender.	61O(1)&(2)	5 years, or 7 years if the victim is under 10 years of age.

² The *Crimes Amendment (Sexual Offences) Act 2003* instigated a uniform age of consent of 16 years, commencing on 13 June 2003. Previously, the age of consent for male homosexual activity was 18 years.

Sexual intercourse with a child under 10 years	66A	25 years
Attempting, or assaulting with intent, to have sexual intercourse with a child under 10 years	66B	25 years
Sexual intercourse with a child aged from 10 years to under 14 years	66C(1)	16 years
Aggravated sexual intercourse with a child 10-14 years – circumstances of aggravation include being in authority, inflicting (or threatening) actual bodily harm, being in company, or the victim having a serious physical or intellectual disability.	66C(2)	20 years
Sexual intercourse with a child aged from 14 years to under 16 years	66C(3)	10 years
Aggravated sexual intercourse with a child aged from 14 years to under 16 years	66C(4)	12 years
Attempting, or assaulting with intent, to commit an offence under s 66C	66D	Same as penalties under 66C(1)-(4).
Persistent sexual abuse of a child , by engaging in conduct that constitutes a sexual offence, on 3 or more separate days.	66EA	25 years
Sexual intercourse with a child aged from 16 years to under 18 years by a step-parent, teacher etc. The child must be under the ‘special care’ of the offender, who is a step-parent, guardian, foster parent, school teacher, instructor (eg. religion, sport, music), custodial officer, or health professional.	73	8 years if victim is aged 16 years to under 17 years. 4 years if victim is aged 17 years to under 18 years.
Incest , where a person has sexual intercourse with a close family member who is aged 16 years or above.	78A	8 years
Attempted incest	78B	2 years
Sexual assault by self-manipulation , where the offender compels a person, by means of a threat, to sexually penetrate themselves with an object.	80A	14 years, or 20 years if victim is under 10 years.
Aggravated sexual servitude – sexual servitude entails the victim providing sexual services due to the use of force or threats by another person. The listed circumstances of aggravation include that the victim is under 18 years.	80D(2)	19 years

The maximum penalties quoted above refer to the maximum period of imprisonment that may be imposed if the offender is prosecuted on indictment in the District Court. Some sexual offences may be disposed of summarily, that is, dealt with in the Local Court before a Magistrate. These offences are listed in Schedule 1 of the *Criminal Procedure Act 1986*. If prosecuted in the Local Court, the maximum penalties that may be imposed are much lower.³

2.2 Data on charge rates, offenders, conviction rates, and penalties

2.2.1 Judicial Commission study (1994)

The Judicial Commission conducted a study on child sexual assault matters in the District

³ For maximum penalties in the Local Court, see ss 267-268 of the *Criminal Procedure Act 1986*.

Court of New South Wales in 1994.⁴ During that year, 1039 offences for child sexual assault were finalised in the District Court. 55% (571) of those offences were proven.⁵ In terms of individuals, there were 501 alleged offenders, of whom 65.1% (326) were convicted of at least one charge. This conviction rate was lower than the overall rate for all offenders: 75.6% of persons charged in the District Court and Supreme Court in 1994 were convicted of at least one charge.⁶

Returning specifically to child sexual assault offences, guilty pleas were entered by 49.3% of alleged offenders either before or at the trial.⁷ The median time between arrest and finalisation was 62 weeks for listed trial cases and 35 weeks for listed sentence cases.⁸ 56% of the offenders received a full-time custodial sentence for the principal proven offence.⁹

Analysis of the offenders' profiles from 1994 showed that the overwhelming majority were male (only 3 were female), with a median age of 41 years, and often not in paid employment at the time of the offence: 24% were unemployed and 17% were on a pension or sickness benefit.¹⁰ The average number of proven offences per offender was 1.8, while the largest number was 7 offences.¹¹ 16.6% of the offenders had a prior conviction for a sexual offence, although the court may not have known about interstate or overseas convictions.¹²

2.2.2 Eastwood Report (2002)

A recent comparative study of child sexual abuse complainants in New South Wales, Queensland and Western Australia, by Dr Christine Eastwood and Professor Wendy Patton of the Queensland University of Technology, suggests a relatively low conviction rate for

⁴ Data was gathered from files held in the District Court Criminal Registry and the District Court's computer records. The study was limited to sexual offences in the *Crimes Act 1900* committed against girls aged under 16 years and boys aged under 18 years (the respective ages of consent at the time), plus the offence of carnal knowledge of a girl above 16 years and under 17 years, pursuant to s 73 (as it was in 1994): P Gallagher and J Hickey, *Child Sexual Assault: An Analysis of Matters Determined in the District Court of New South Wales During 1994*, Judicial Commission of New South Wales, 1997, pp 8-9.

⁵ Ibid, p 31.

⁶ Ibid, p 11, quoting the overall conviction rate from: *NSW Criminal Courts Statistics 1994*, NSW Bureau of Crime Statistics and Research, 1995, Table 3.13.

⁷ Ibid, p 11.

⁸ Ibid, p 31.

⁹ Ibid, p 16.

¹⁰ Ibid, p 13.

¹¹ Ibid, p 31.

¹² Ibid, p 15.

child sexual assault cases in New South Wales courts. 55.5% of the cases they examined resulted in a conviction, compared to 69.4% of cases in Western Australia.¹³ However, the size of the New South Wales sample was very small, consisting of only 9 girls aged between 11 and 16 years at the time of being interviewed by the researchers.

Other empirical data on the legal process that was presented in the report included the delays that child sexual assault complainants had to endure until the trial. The average number of months between reporting the alleged abuse and the trial was 20.8 months in Queensland, 17.5 months in Western Australia (although many children had already given pre-recorded evidence) and 16.4 months in New South Wales.¹⁴

The findings of the study are presented in greater detail below at '**3.1 Eastwood Report**' on p11.

2.2.3 Study of attrition in child sexual abuse cases (2002)

A long-term study undertaken by a team of academics and medical professionals from the University of Sydney and the Children's Hospital at Westmead traced the outcome of 183 child sexual abuse cases referred to child protection units at two children's hospitals in Sydney in 1988-1990.¹⁵ The 183 children were aged between 5 and 15 years, consisting of 143 girls and 40 boys. The hospital assessment teams believed that sexual abuse had occurred in all of the cases, due to physical evidence and/or because the child was able to give a clear, consistent description of the events. Cases that involved consensual sexual activity between peers were excluded.¹⁶

In 137 of the 183 cases (75%) there was a police investigation. In 117 cases, sufficient detail was obtained about the identity of the alleged offender to enable the case to be tracked through the records of the courts and the Office of the Director of Public Prosecutions. Searching the records up to 10 years after the abuse was reported ascertained that 45 cases had reached trial or sentence. In 32 of those 45 cases, the offender was convicted of child sexual offences. This represented a total of 27% of the 117 cases where there was sufficient information to trace the outcome.¹⁷

¹³ Dr Christine Eastwood and Prof Wendy Patton, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System*, Queensland University of Technology, July 2002, p 37. The percentage in New South Wales represents 5 out of 9 cases, while the Western Australian percentage represents 25 out of 36 cases: Appendix A.

¹⁴ Ibid, Table 3.1 on p 37.

¹⁵ Patrick Parkinson, Sandra Shrimpton, Heather Swanston, Brian O'Toole and R. Kim Oates, 'The Process of Attrition in Child Sexual Assault Cases: A Case Flow Analysis of Criminal Investigations and Prosecutions', *Australian and New Zealand Journal of Criminology*, Volume 35, Number 3, December 2002, p 347.

¹⁶ Ibid, p 351.

¹⁷ Ibid, pp 352-353.

Interviews were conducted with the children and parents in a sub-group of 84 cases, after the periods of 18 months and 5 years had elapsed since the alleged abuse, in order to explore the attrition process. The stages reached in the legal system by those 84 cases were:

Attrition of cases from intake to trial¹⁸

Stage of process	Number of cases	Number of cases Remaining
Intake at Child Protection Unit	84	84
Did not proceed – reason unknown	6	78
No police report made	9	69
No charges laid	25	44
Withdrawn before committal	3	41
Charges dismissed at committal	5	36
Committed for trial or sentencing	36	36
Case did not proceed to trial	2	34
Trial stopped	2	32
Hung jury, no retrial	1	31
Verdict obtained	31	31
Acquitted	6	25
Guilty pleas (at committal hearing)	13	12
Found guilty (after a trial)	12	0

Cases dropped out of the system for a variety of reasons, which were indicated in the records or conveyed by parents during the study:

Reasons for attrition¹⁹

Stage of process	Examples of reasons
No police report made (9 cases)	<ul style="list-style-type: none"> ▪ Parents wanted to protect their child from the ordeal of court proceedings; ▪ Perpetrator was beneath the age of criminal responsibility; ▪ Perpetrator was a juvenile with a serious developmental disability; ▪ Child did not want a report made; ▪ Child's mother sought to protect the perpetrator.
No charges laid (25 cases)	<ul style="list-style-type: none"> ▪ Perpetrator was unidentified; ▪ Parents wanted to protect their children from the distress of court proceedings; ▪ Child gave an unclear account / there was insufficient evidence; ▪ Perpetrator had moved interstate;

¹⁸ Ibid, adapted from Table 3 on p 355 and information about guilty categories on p 356.

¹⁹ Ibid, compiled from information on pp 355-356.

	<ul style="list-style-type: none"> ▪ Child did not want charges laid.
Case withdrawn before committal (3 cases)	<ul style="list-style-type: none"> ▪ Parents were concerned for the safety of the child; ▪ Accused was in poor health and sought to postpone the proceedings which would increase the likelihood of a long delay until trial.
Accused was not committed for trial (5 cases)	<ul style="list-style-type: none"> ▪ Magistrate ruled that the child's evidence was contaminated by the police interviewing process; ▪ Child's statement had not been counter-signed by the police officer; ▪ There was insufficient evidence.
Trial did not proceed to determination (5 cases)	<ul style="list-style-type: none"> ▪ Director of Public Prosecutions decided not to proceed; ▪ Child refused to testify; ▪ Child was too distressed by cross-examination to continue; ▪ Child's family was intimidated by alleged threats from the accused.

The information gathered in the study supports various observations on the legal system made by the authors. For example:²⁰

- The cases which reach trial are those which survive a long process of attrition.
- If the parents of a child in a case of extra-familial abuse are not willing to cooperate with the police, or the child is not willing to make a statement, the police have limited options to pursue the matter further.
- The police play a significant role in filtering cases, as is evident from the statistic that in 25 out of 69 cases in which a report was made to the police, no charges were laid.
- There is also a large element of discretion in the decision of the prosecution on whether to run the cases in court.
- The prospect of a conviction, the wishes of the parents, and the interests of the child are among the considerations in deciding to lay charges or prosecute cases.

The authors conclude that, while criminal prosecution remains an important child protection strategy, only a minority of cases are likely to result in a conviction. Therefore, prosecuting should be regarded as 'just one of many strategies for addressing the issue of sex offending against children.' Other methods include strict screening procedures in child-related employment and allowing certain child sex offenders who plead guilty to be diverted from the criminal justice system into treatment programs.²¹

²⁰ Ibid, pp 357-358.

²¹ Ibid, pp 359-360. For example, a treatment program is available in New South Wales under the *Pre-trial Diversion of Offenders Act 1985* for offenders who plead guilty to committing a sexual offence upon their child or step-child.

2.2.4 Bureau of Crime Statistics and Research (2002)

The latest statistics released by the Bureau of Crime Statistics and Research provide an overview of court results in 2002 in New South Wales for sexual offences committed against children.²² The data on charges determined by the Local Court, District Court and Supreme Court in 2002 confirms that people who appear in court in relation to child sexual offences often face multiple charges.

Charges in Court Appearances Finalised in 2002 - Sexual Offences Against Children²³

Court	Persons charged ²⁴	Charges
Local Court	299	460
Higher Courts ²⁵	215	480

The statistics on the results of charges in finalised court appearances do not show outcomes based on the type of offence. Therefore, the conviction rate of child sex offenders cannot be extrapolated. The sentencing information in *NSW Criminal Courts Statistics 2002* suggests a significant decrease between the number of charges and the number of sentences imposed for sexual offences against children, but the same can be said for other types of offences.

The data on penalties confirms the predominance of sentences of full-time imprisonment for child sexual offences. Non-custodial penalties are much more common in the Local Court than in the Higher Courts, reflecting the relatively less serious nature of the cases prosecuted in the Local Court.

Type of Penalty for Principal Offence – Persons Found Guilty of Sexual Offences Against Children²⁶

Penalty	Local Court	Higher Courts
Imprisonment	31	72

²² NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2002*, Statistical Services Unit, 2003.

²³ Data is extracted from Table 1.1 on p 17 and Table 3.4 on p 80. A finalised charge is one that has been fully determined by the court.

²⁴ The number of persons charged is obtained by adding the individuals who had their charge(s) finalised by the court each day. Therefore, if a person appeared at court on different days on separate matters during the period surveyed, they will be counted more than once in the statistics.

²⁵ 'Higher Courts' encompasses trial and sentence cases in the District Court and Supreme Court.

²⁶ Data is extracted from Table 1.7 on p 25 and Table 3.7 on p 85. 'Principal offence' means the offence that received the most serious penalty if the offender was found guilty of more than one offence. 'Persons found guilty' includes those who pleaded guilty, and those who were found guilty at a defended hearing or *ex parte* (in their absence).

Home detention	Nil	Nil
Periodic detention	12	5
Suspended sentence	17	Without supervision: 4 With supervision: 4
Community service order	6	1
Bond	With supervision: 15 Without supervision: 11 Without conviction: 2	With supervision: 5 Without supervision: 5 Without conviction: 1
Fine	3	Nil
No conviction recorded ²⁷	3	5
Rising of the court ²⁸		1
Total number of principal offences	100	103

Average Penalty for Principal Offence – Persons Found Guilty of Sexual Offences Against Children²⁹

Penalty	Local Court	Higher Courts
Imprisonment	7 months	32.4 months
Periodic detention	9 months	14.6 months
Suspended sentence	10.4 months	17.8 months
Community service order	275 hours	50 hours
Bond	25 months	24.6 months
Fine	\$867.00	-

Predictably, sentences of imprisonment and periodic detention are significantly longer in the Higher Courts, although there is little difference between the duration of good behaviour bonds. One of the factors influencing the shorter duration of the prison sentences imposed by the Local Court is the fact that the maximum imprisonment that the Local Court may impose for any offence is much lower than in the District Court.³⁰ No meaningful comparison can be made regarding community service orders because only one order was imposed in the Higher Courts and its duration is surprisingly low. Sentences of community service in the Higher Courts would usually be much longer than 50 hours.

Age and Gender of Persons Found Guilty of Sexual Offences Against Children³¹

²⁷ 'No conviction recorded' means that the judicial officer found the offence proven but did not proceed to a conviction. See section 10 of the *Crimes (Sentencing Procedure) Act 1999*.

²⁸ The rising of the court is a nominal penalty, whereby the person is held in court until it adjourns or 'rises'.

²⁹ Data is extracted from Table 1.9 on p 33 and Table 3.8 on p 90.

³⁰ The current maximum penalties for summary disposal of indictable offences in the Local Court are outlined by ss 267-268 of the *Criminal Procedure Act 1986*.

³¹ Data is extracted from Table 1.11 on p 39, Table 1.11a on p 42, Table 1.11b on p 45, Table

Age	Local Court	Male	Fem	Higher Courts	Male	Fem
Under 18 years	Nil	-	-	5	All	-
18 years	Nil	-	-	3	All	-
19 years	2	All	-	1	All	-
20-24 years	13	12	1	2	All	-
25-29 years	13	All	-	6	All	-
30-39 years	24	All	-	31	29	2
40-49 years	21	20	1	20	19	1
50-59 years	16	15	1	23	All	-
60-65 years	7	All	-	6	All	-
Over 65 years	4	All	-	6	All	-
Total persons	100	97	3	103	100	3
Average age	40.5 years	40.5	40.4	42.7 years	42.9	36.7

This data confirms that the overwhelming majority of child sex offenders are males. The average age of offenders is relatively old compared to most other offender profiles. In the Higher Courts, for example, the average age of people found guilty in trial and sentence cases of child sexual offences was 42.7 years, compared to 24.8 years of age for robbery, 28.2 years for unlawful entry/break and enter offences, 29 years for theft and receiving offences, 29.2 years for assault, 29.3 years for murder, 32.7 years for drug offences, 34.1 years for weapons/explosives offences, 40 years for sexual assault, and 41.3 years for fraud/deception offences.³² Across the Local Courts and Higher Courts, the age bracket of 30-39 years contained the most number of persons found guilty of sexual offences against children.

3.9 on p 93, Table 3.9a on p 96, and Table 3.9b on p 99.

3. INFLUENTIAL REPORTS ON REFORMS IN NEW SOUTH WALES

3.1 Eastwood Report

The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System is a comparative study of the treatment of child sexual abuse complainants in Queensland, New South Wales and Western Australia. Produced by Dr Christine Eastwood and Professor Wendy Patton of the Queensland University of Technology, the report was released in July 2002.³³

The main issue investigated by the authors was the experience of child complainants when giving evidence of sexual abuse, including in police interviews, committal proceedings,³⁴ and trials.

3.1.1 Methodology and limitations

The methodology of the Eastwood Report involved interviews in Western Australia, Queensland and New South Wales with 130 participants, including 63 child complainants aged 8-17 years, 39 parents/guardians, 4 judicial officers, 16 crown prosecutors and 7 defence lawyers. The sample is limited in some respects. Of the 63 child complainants, 61 were girls and only 2 were boys. The New South Wales complainants numbered only 9, all being females, so it may be problematic to generalise from their experiences to all child sexual abuse complainants in New South Wales.

Unfortunately there is no reference in the report or its appendices to when the alleged offences, or the court cases, or the interviews with the researchers took place. This omission makes it difficult to assess exactly which provisions and procedures were in force in New South Wales (or the other States) at the time.

The interviews were conducted after the completion of legal proceedings, and the authors concede it was a disadvantage not being able to obtain access to participants between the initial reporting of an offence and the trial.³⁵ The authors also make the point that 'given that a number of complainants were approached to be involved in the study but declined because their court experience was too upsetting to discuss, it should also be recognised

³³ Highlights of the study have also been published as an article: C Eastwood, 'The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System', *Trends and Issues in Crime and Criminal Justice*, No 250, May 2003, Australian Institute of Criminology (www.aic.gov.au).

³⁴ A committal is the hearing at which a Magistrate determines whether there is sufficient evidence to commit the accused to stand trial. The hearing is held in the Local Court in New South Wales, the Magistrates Court in Queensland, and the Court of Petty Sessions in Western Australia.

³⁵ 'Until gatekeepers within the criminal justice system allow access to participants to enable longitudinal studies to be undertaken, more extensive data will remain inaccessible.': p 42.

that those children most severely traumatised were not included in the study due to understandable reluctance to relive their experiences.³⁶

3.1.2 Findings and recommendations

(i) Key demographics

Some of the features of the child sexual abuse cases that can be compared across the jurisdictions are the average age of the child, relationship of the accused to the complainant, average time in reaching trial, and conviction rates.

Key demographics across jurisdictions³⁷

State	Average age of child (at interview) ³⁸	Defendants known to complainants	Average months from reporting abuse to trial	Conviction Rate
QLD	12.6 years	94.5%	20.8 months	55.5%
NSW	14.6 years	88.9%	16.4 months	55.5%
WA	14.6 years	91.7%	17.5 months	69.4%
TOTAL	13.9 years	91.7%	18.2 months	63.5%

(ii) Attitude towards reporting offences

Overall, the traumatic nature of the legal process for child complainants in sexual cases was confirmed by the study. 55% of the New South Wales children interviewed felt they had made the wrong decision to report the sexual abuse, and 45% felt they made the right decision. By contrast, 72% of the children in Western Australia believed they made the right decision.³⁹ As for speaking up in future, only 33% of the child interviewees from New South Wales stated that they would report sexual abuse again, compared 44% in Queensland and 64% in Western Australia.

Child complainants: would they report again?⁴⁰

Jurisdiction	Would Not Report	Not Sure	Would Report
QLD (18)	39% (7)	17% (3)	44% (8)

³⁶ Page 42.

³⁷ Adapted from Table 3.1 on p 37 and other information on pp 37-38.

³⁸ The age of the child at interview means the initial interview conducted for the study, not to be confused with the interview conducted by police or other interviews during the criminal justice process. The study 'gathered in-depth interview data' from the children after the legal proceedings were completed: p 36.

³⁹ Page 70.

⁴⁰ Ibid, adapted from Appendix B.

NSW (9)	56% (5)	11% (1)	33% (3)
WA (36)	17% (6)	19% (7)	64% (23)
TOTAL (63)	29% (18)	17% (11)	54% (34)

Interviewees who were legal practitioners or judicial officers were even more pessimistic. Only 33% of lawyers and judges interviewed in New South Wales said they would want their own child in the criminal justice system if the child was a victim of a serious sexual assault, compared with 46% in Western Australia and 18% in Queensland. None of the defence lawyers interviewed stated affirmatively that they would want their own child in the system (43% responded 'no' and 57% were not sure).⁴¹ Eastwood and Patton considered that the more positive responses from Western Australia might be due to the implementation of substantial reforms for child complainants in the previous decade.

(iii) Delay from reporting the offence to trial

According to the Eastwood Report, New South Wales had an average waiting time of 16.4 months between reporting the alleged offence and the trial, compared to 18.2 months in Queensland. The average delay of 17.5 months in Western Australia was offset by the fact that one third of complainants fully pre-recorded their evidence prior to trial. The report documented the detrimental effects on child complainants caused by delays and adjournments, including nightmares, depression, self-harming, and inability to concentrate on schoolwork.⁴²

(iv) Waiting to give evidence at court

Child complainants in New South Wales and Queensland waited in witness rooms that were described as cramped, windowless, boring or bare, and risked seeing the accused if they wanted to leave the room. The children in New South Wales who attended at trial waited between 5 hours and 2 days to give their evidence. By contrast, children in Western Australia waited in a special section of the court called the Child Witness Service and were provided with child-friendly facilities such as toys, videos and drinks. They waited one to two hours before giving evidence in the closed circuit television rooms inside the Child Witness Service.⁴³

(v) Use of screens and closed circuit television

The Eastwood Report criticised New South Wales and Queensland for inadequately addressing the problem of child complainants seeing alleged offenders in the court room or around the court building, despite continuing evidence that this is one of the most traumatic aspects of the legal process for children. Two thirds of the New South Wales complainants who were required to give evidence at the committal hearing were refused the use of

⁴¹ Pages 111-112.

⁴² Pages 14-116.

⁴³ Pages 116-117.

screens and closed circuit television (CCTV). Of those whose cases proceeded to trial, 43% were denied these facilities.⁴⁴ The *Evidence (Children) Act 1997* allowed child sexual assault complainants to give evidence via CCTV but judges could decide that it was not in the interests of justice to do so. Eastwood and Patton also reported that there were technical deficiencies with the CCTV equipment in some of the court houses in New South Wales and that problems arose when multiple listings were scheduled at a court with only one CCTV facility.⁴⁵

(vi) Giving evidence at committal and trial

No children among the interviewees in Western Australia were required to give evidence-in-chief in committal proceedings.⁴⁶ For the trial, 30% of the children pre-recorded their evidence-in-chief and cross-examination months in advance, negating the need to give evidence in court. The remaining 70% were all permitted to give evidence at trial by CCTV, which also alleviated the stress and embarrassment of speaking before a court full of strangers.⁴⁷

By contrast, 33% of the interviewees in New South Wales had to give evidence at committal proceedings, and all of those whose cases proceeded to trial had to do so.⁴⁸ Some were allowed to be cross-examined via CCTV, but every child interviewed from Queensland was cross-examined at both the committal and the trial.⁴⁹ All complainants reported that cross-examination was the most distressing part of the court experience, particularly when defence counsel accused them of lying, kept going over the same point, or twisted their words.⁵⁰

Eastwood and Patton argue that attendance at committals should be abolished for child complainants because the decision whether there is a *prima facie* case to commit a person to trial can be made on the written statement of the child. According to Eastwood and Patton, this would preclude committals from being used to unnerve children prior to trial and would ensure that children only had to be cross-examined on one occasion.⁵¹

⁴⁴ Page 118.

⁴⁵ Page 14.

⁴⁶ In Western Australia, since the *Criminal Law (Procedure) Amendment Act 2002* commenced on 27 September 2002, committals have become 'committal mentions'. The Magistrate merely receives the evidence, without reading or playing it in court, and commits the defendant for trial if he or she pleads not guilty, or commits the defendant for sentence if he or she pleads guilty: s 104 of the *Justices Act 1902* (WA).

⁴⁷ Page 58.

⁴⁸ Page 122.

⁴⁹ Page 123.

⁵⁰ Pages 59-62.

⁵¹ Pages 128-129.

Lawyers interviewed who supported committals spoke of the importance of testing the evidence and having an opportunity to get information in more detail. Critics of committals pointed to the tendency of some defence counsel to act aggressively towards complainants because a jury is not present. Several members of the legal profession predicted that defence practitioners in the Eastern States would strongly resist abolishing committals because of the fees they would lose, whereas there was less financial incentive in Western Australia because Legal Aid did not cover committals.⁵²

(vii) Pre-recorded evidence from children

Pre-recorded evidence entails all or part of the child's evidence being recorded on video prior to the trial and played in court. This may extend to pre-recording the cross-examination of the child as well as their evidence-in-chief. Queensland's *Evidence Act 1977* makes provision under s 21A for the evidence of a special witness, including a child under 12 years, to be videotaped instead of giving direct testimony in court. But at the time of the Eastwood Report, the provision was rarely used in practice.

The report criticised the decision of the New South Wales Children's Evidence Taskforce in 1997 to reject the pre-recording of children's evidence on the grounds that it would be too difficult to schedule the participation of the same prosecutor and defence lawyer at the recording and the trial, and that closed circuit television would provide similar benefits.⁵³ Eastwood and Patton support the Western Australian approach under the *Evidence Act 1906*. Section 106 allows the prosecutor to apply for an order that a child aged under 16 years (on the date the complaint was made) be videotaped giving evidence-in-chief, or additionally cross-examination and re-examination, at a special pre-trial hearing. If the order directs only the evidence-in-chief to be videotaped, the child is to be available at the trial for cross-examination and re-examination. The full recording of evidence is the more commonly used option.⁵⁴

(viii) Suggestions for reform

The Eastwood Report presents a range of principles that it recommends should provide the basis for legislative and procedural reforms. The principles include:⁵⁵

- Every child should wait no longer than 6 months between reporting an offence and giving evidence;
- Children should not be required to appear inside the court room unless they elect to do

⁵² Pages 102-105.

⁵³ Eastwood and Patton quoting the NSW Attorney General's Department, *Report on the Children's Evidence Taskforce: Audio and Videotaping of Children's Out of Court Statements*, Sydney, 1997, p 23.

⁵⁴ Eastwood and Patton, pp 20-22.

⁵⁵ Pages 131-132.

- so;
- Every child should give evidence once only, and pre-recording of the child's evidence should be available;
 - Every child should be permitted the use of CCTV and the choice of support persons;
 - Every child should be protected from seeing the accused at all stages of the process;
 - Legal practitioners and judges in cases of child sexual abuse need to be trained in child development and the dynamics of child sexual abuse;
 - Legal counsel should have to comply with legislative requirements on the cross-examination of children. Those counsel who persistently breach the requirements should be precluded from acting in child sexual abuse cases.

(ix) Changes in New South Wales since the Eastwood Report

The Attorney General's Department was in the process of introducing some improvements for child sexual assault complainants in New South Wales when the Eastwood Report was being compiled, and further improvements have been made since the report's release. For example:⁵⁶

- ***Delay between reporting offence and trial*** – Delay has been reduced in New South Wales since the figures for the Eastwood Report were obtained. The District Court's 'Notice of Readiness to Proceed' enables special categories of cases to be given high priority in criminal listings. Child sexual assault matters are given second highest priority behind matters where the defendant is in custody awaiting trial (refused bail). From 30 June 2001 to 30 June 2002 the median waiting time for criminal trials was reduced from 10.1 months to 6.8 months.⁵⁷
- ***Committal hearings*** – In New South Wales a committal proceeding is often conducted as a 'paper committal', that is, by tendering written statements. But the Magistrate can direct a witness to attend if satisfied that there are 'substantial reasons' why, in the interests of justice, the witness should attend to give oral evidence (or 'special reasons' in the case of an alleged victim of an offence involving violence or a prescribed sexual offence): ss 91-94 of the *Criminal Procedure Act 1986*. Recently the *Crimes Legislation Amendment Act 2003* amended s 91 to exempt child sexual assault complainants from being directed to attend committals to give oral evidence: for further details see '**4.2 Child sexual complainants exempt from committals**' on p 24.
- ***Waiting to give evidence*** – The Specialist Child Sexual Assault Jurisdiction Pilot remote facility was created to specifically address the problem of children waiting at court for long periods to give evidence. Experts in child development advised the

⁵⁶ All information on updates is from a conference paper by Rebekah Rodger, Policy Officer, Criminal Law Review Division of the Attorney General's Department (NSW), 'New Specialist Child Sexual Assault Jurisdiction for New South Wales', presented at a conference on *Child Sexual Abuse: Justice Response or Alternative Resolution*, convened by the Australian Institute of Criminology, Adelaide, 1-2 May 2003.

⁵⁷ Ibid, p 3.

Attorney General's Department on the appropriate interior decoration, facilities, and children's activities for the secure witness premises.⁵⁸ See Chapter 5 of this briefing paper on p 29.

- ***Use of closed circuit television (CCTV)*** – Prior to the release of the Eastwood Report, the Government had taken steps to address the deficiencies relating to the availability of CCTV. In November 2000, in response to reports of technical difficulties with CCTV, the Attorney General's Department coordinated a survey of users of remote witness CCTV facilities and provided feedback to the Local Courts. As a result, the Local Courts instigated a system of routine checks on remote witness facilities by technical personnel every 6-8 weeks.⁵⁹ By early 2003, the Attorney General's Department had implemented 101 remote witness CCTV facilities in 66 court locations across the State.
- ***Pre-recorded evidence*** – Section 11 of the *Evidence (Children) Act 1997* enables a child complainant to give evidence-in-chief wholly or partly in the form of an electronically recorded interview with a police officer (or other investigating official), although the child would still have to undergo cross-examination and re-examination by CCTV.⁶⁰ The Attorney General is evaluating the introduction of mandatory pre-recording of evidence from children.⁶¹

(x) Reforms in Queensland since the Eastwood Report

It should also be noted that several reforms have occurred in the Queensland legal system, which was criticised by the Eastwood Report in numerous respects for its treatment of child sexual assault complainants. For example, the *Evidence (Protection of Children) Amendment Act 2003* provides alternative means for children to give their evidence by pre-recorded videotaped interviews, audio visual links, or using screens. The capacity to pre-record evidence at a preliminary hearing has been modelled on the Western Australian scheme that has operated since 1992. The Act was assented to on 18 September 2003 but had not commenced at the time of writing.

3.2 Report of Legislative Council's Law and Justice Committee

3.2.1 Background

On 11 December 2001 the Attorney General, Hon Bob Debus MP, issued terms of reference to the Standing Committee on Law and Justice of the New South Wales

⁵⁸ Ibid, p 3.

⁵⁹ Ibid, p 4.

⁶⁰ Furthermore, s 15 entitles the judge to preclude the child from giving evidence in the form of a recording if the judge decides it is not in the interests of justice.

⁶¹ Enquiries were also being made at the time of Rebekah Rodgers' paper to ascertain why interviews between child complainants and investigating officials were not always being electronically recorded: p 4.

Legislative Council to inquire into and report on the prosecution of child sexual assault matters, including:⁶²

- (1) communication between the prosecution and the complainant about the consequences of pursuing a prosecution for child sexual assault;
- (2) the role of sexual assault counsellors in the complaint process;
- (3) the impact of the application of the rules of evidence, other legislative provisions, and court practices on prosecutions for child sexual assault offences;
- (4) alternative procedures for the prosecution of child sexual assault matters and the punishment of offenders;
- (5) possible civil responses to perpetrators and victims;
- (6) appropriate methods of sustaining ongoing dialogue between the community, government and non-government agencies about issues of common concern;
- (7) any related matter concerning approaches to child sexual assault in the justice system.

3.2.2 Findings and recommendations

The Law and Justice Committee's *Report on Child Sexual Assault Prosecutions*⁶³ identified a number of problems that increase the distress of child sexual assault complainants or reduce the success rate of prosecutions. 48 recommendations were made in response to the problems, and a selection of key recommendations are presented here.

(i) Specialist court for child sexual assault

In the Committee's opinion, a specialist child sexual assault jurisdiction could, without impinging on the rights of the accused, address shortcomings in the prosecuting of child sexual assault: Recommendation 43. The Committee envisaged that the features of a pilot specialist court would include:

- Jurisdiction over child sexual assault cases where child witnesses are under the age of 16 years, or aged from 16 to less than 18 years if the alleged offence was committed before the child reached 16 years.⁶⁴
- Trial by judge alone if both parties agree, otherwise trial by jury.
- Judicial officers, prosecutors and court staff would have specialised training in child development and child sexual assault issues, to facilitate awareness of the abilities and needs of children as witnesses.
- Increased judicial expertise in the interpretation and application of rules of evidence pertaining to child sexual assault. This could help to reduce the number of successful

⁶² The terms of reference are paraphrased slightly.

⁶³ NSW Parliament, Legislative Council, Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions*, Report 22, tabled on 13 November 2002.

⁶⁴ The same age guidelines apply to children giving evidence by closed circuit television under the *Evidence (Children) Act 1997*.

- appeals by defendants on the basis of admission of evidence or judicial warnings.
- Pre-trial hearings between judges and counsel to determine the special needs of the child and the case's readiness to proceed, thereby reducing adjournments.
 - Presumption in favour of using special measures including pre-recorded evidence.
 - Presumption that children will not be required to give oral evidence at committal hearings.
 - Child-friendly furnishings and facilities to reduce the unfamiliarity of the environment for children. Judicial officers and counsel should not wear robes.
 - High standard of electronic facilities and proper training of staff in the use of the equipment.
 - Mobile units to ensure that child witnesses in rural and remote areas have access to electronic facilities.

The Government implemented this recommendation: see '5. SPECIALIST CHILD SEXUAL ASSAULT JURISDICTION PILOT' on p 29.

(ii) Cross-examination

The Standing Committee on Law and Justice considered that cross-examination should be reformed to prevent unfair, misleading or intimidating questioning in sexual assault trials. The Committee noted that the *Evidence Act 1995* (s 41) already permits a judicial officer to intervene where cross-examination is misleading, unduly annoying, harassing, intimidating, offensive, oppressive or repetitive, but this provision had failed to prevent the distressing experiences of child witnesses. Recommendation 12 stated that the *Evidence Act 1995* should be amended to provide that: the court shall take special care to protect a witness under the age of 18 years from harassment or embarrassment; shall ensure that the questions are stated in a form that is appropriate to the age of the witness; and shall restrict unnecessary repetition: Recommendation 12.

(iii) Pre-trial recording of children's evidence

Legislative amendments should create a presumption that a child's entire testimony (evidence-in-chief, cross-examination and re-examination) will be recorded prior to trial and admitted in evidence at the committal (if necessary), the trial, and any re-trial: Recommendations 34-35, 38. Pre-recorded evidence would reduce stress on the child, avoid long delays between making a complaint and giving evidence, and enable evidence to be recorded while details of the incident are still clear in the child's memory. The child would not be required to appear in court at the trial, come into contact with the accused, or be confined to a witness room for long periods of time waiting to give evidence.

(iv) Modification of certain rules of evidence

- **Tendency evidence** is evidence of prior conduct of the accused, including other uncharged acts, that can be admitted (subject to certain criteria in Part 3.6 of the *Evidence Act 1995*) to show that the accused has a tendency to commit offences using similar methods. Recommendation 14 advocated that evidence of the accused's prior conduct, including other uncharged assaults upon the complainant, should *prima facie*

be admissible in the prosecution of a child sexual assault offence. The defendant's right to a fair trial would be maintained through the discretion under s 137 of the *Evidence Act 1995* to exclude evidence that is unfairly prejudicial.

- **Relationship evidence** enables background information to be admitted to clarify the context in which the conduct occurred. Information of this kind can explain the complainant's failure to complain earlier, or can prevent the alleged events from seeming sudden or unrealistic. Relationship evidence should *prima facie* be admissible where it is relevant to the facts in issue and is not unfairly prejudicial to the accused. The *Evidence Act 1995* should be amended to define the types of related acts that constitute relationship evidence in the context of child sexual abuse: Recommendations 15-17.
- **Recent complaint evidence** – section 66 of the *Evidence Act 1995* allows the admission of the child's complaint if the complaint was made when the alleged assault was 'fresh in the memory' of the child. Section 66 should be amended to provide that 'fresh in the memory' in sexual assault trials means that the quality of the memory has not deteriorated or changed, irrespective of the time that has elapsed between the alleged offence and the making of the allegation: Recommendation 20.

(v) *Expert witnesses*

Expert evidence should be admitted to explain child development and memory, the dynamics of child sexual assault, and typical responses of child victims. This would overcome misconceptions about children's behaviour and assist in accurately assessing the complainant's credibility: Recommendation 21.

(vi) *Modification of rules for trial joinders*

When an accused is charged with child sex offences against more than one child, it is common for the offences against each child to be tried separately, particularly where the complainants are known to each other. There is evidence to suggest that this may cause hardship to children who have to give evidence several times (in their trial and in those of the other alleged victims), and may result in a lower conviction rate.⁶⁵

The Committee advocated that the *Criminal Procedure Act 1986* should be amended to create a presumption that, in child sexual assault prosecutions, multiple counts of an indictment should be tried together. Further, when considering the severance of trials, the court should not be permitted to take into account the prior relationship or acquaintance of the complainants, and must ensure that the interests of justice are paramount:

⁶⁵ See the report of the Human Rights and Equal Opportunities Commission and Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84, 1997, p 335. Also, a Judicial Commission study of child sexual assault found that separating trials reduced the likelihood of a conviction: P Gallagher and J Hickey, *Child Sexual Assault: An Analysis of Matters Determined in the District Court of New South Wales During 1994*, Monograph series No 15, Judicial Commission, 1997, p x.

Recommendations 18-19.

(vii) Judicial warnings

The Standing Committee on Law and Justice found fault with several of the warnings that may be given by judges to juries in sexual assault trials:

- a **Crofts warning** permits the jury, in evaluating the credibility of the complainant, to take into account the delay in making a complaint.⁶⁶ The Committee argued that the *Crofts* warning should be abolished in child sexual assault cases because a child's delay in reporting sexual assault usually reflects their fear, embarrassment, shame, stress, confusion or trauma: Recommendation 22.
- a **Longman warning** suggests to the jury that when there has been a substantial delay in complaint, it would be dangerous to convict on the uncorroborated evidence of the complainant unless the jury, after scrutinising the evidence with great care, is satisfied of its truth and accuracy.⁶⁷ The purported reason for the danger is that the accused has lost the opportunity to test the allegations, which would have been available if the allegations were made soon after the event. The Committee recommended that the *Longman* warning should not be issued where there is no good reason to suppose that the accused was disadvantaged by the delay in complaint: Recommendation 23.
- a **Murray warning** advises the jury that when the allegation of a crime is uncorroborated, the evidence of that witness must be scrutinised with great care.⁶⁸ The Committee suggested that the *Murray* warning should be reformulated in child sexual assault trials so that the jury is advised that they must scrutinise the evidence with great care but that the evidence of one witness, if believed, is sufficient to prove a fact in issue in the trial: Recommendations 24-25.
- **section 165B(2)** of the *Evidence Act 1995* allows a warning to be given to the jury that the evidence of a child may be unreliable because of the child's age. The Committee advocated that s 165B(2) be amended to provide that such a warning may only be given upon request, if there is objective evidence that the particular child's evidence may be unreliable: Recommendations 26-27.

(viii) Evidence by closed circuit television

The Committee found that the capacity for children to give evidence by closed circuit television (CCTV) under the *Evidence (Children) Act 1997* has failed to provide children with uniform access to CCTV. The exercise of judicial discretion has resulted in a significant proportion of child sexual assault complainants being refused permission to give

⁶⁶ *Crofts v The Queen* (1996) 186 CLR 427.

⁶⁷ *Longman v The Queen* (1989) 168 CLR 79.

⁶⁸ *R v Murray* (1987) 11 NSWLR 12.

evidence by CCTV. The *Evidence (Children) Act 1997* should be amended to require that all child witnesses give evidence by CCTV except where the defence is able to prove that exceptional circumstances make the use of CCTV against the interests of justice: Recommendation 33. However, the right for a child to choose not to use CCTV should be retained. The Attorney General's Department is currently undertaking a statutory review of the *Evidence (Children) Act 1997*: further details are provided at '**4.8 Legislative review of Evidence (Children) Act 1997**' on p 28.

4. RECENT AND PLANNED LEGISLATIVE CHANGES IN NSW

Laws which are aimed to protect children from sexual abuse, or which punish offenders for such conduct, are regularly revisited by the Legislature. In this section, some of the recent and forthcoming amendments to legislation are summarised.

4.1 Standard minimum sentences

Standard minimum sentences were introduced in New South Wales by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*, which commenced operation on 1 February 2003. It applies to certain serious offences committed on or after that date which are dealt with in the District Court or Supreme Court, not summarily in the Local Court. The standard non-parole periods stipulated by Parliament are outlined in a table that appears after s 54D of the *Crimes (Sentencing Procedure) Act 1999*.

The sentencing court is to impose the standard non-parole period unless the court determines to set a shorter or longer period due to mitigating or aggravating factors referred to in s 21A of the *Crimes (Sentencing Procedure) Act 1999*. The court must state its reasons for deviating from the standard minimum. The Attorney General, Hon Bob Debus MP, emphasised that the scheme was not a form of mandatory sentencing but ‘provides further guidance and structure to judicial discretion. These reforms are primarily aimed at promoting consistency and transparency in sentencing and also promoting public understanding of the sentencing process.’⁶⁹

Six sexual offences are currently listed, two of which specifically focus on child victims: sexual intercourse with a child under 10 years, and aggravated indecent assault of a child under 10 years. Some of the other sexual offences are committed in circumstances of aggravation if the victim is under the age of 16 years or under the authority of the offender. The ‘standard’ offence of sexual intercourse without consent can apply to victims under 18 years as well as to adults. The standard non-parole periods for sexual offences are:

Standard non-parole periods for sexual offences under the *Crimes (Sentencing Procedure) Act 1999*

Sexual offence	Standard non-parole period	Maximum penalty of imprisonment	Section in Crimes Act
Sexual intercourse with a child under 10 years	15 years	25 years	s 66A
Aggravated indecent assault of a child under 10 years	5 years	10 years	s 61M(2)
Aggravated sexual assault – circumstances of aggravation include the	10 years	20 years	s 61J

⁶⁹ Second Reading Speech, Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill, *NSWPD*, 23 October 2002, p 5813.

victim being under 16 years or under the authority of the alleged offender			
Aggravated indecent assault – circumstances of aggravation include the victim being under 16 years or under the authority of the alleged offender	5 years	7 years	s 61M(1)
Sexual intercourse without consent	7 years	14 years	s 61I
Aggravated sexual assault in company – circumstances of aggravation include depriving the victim of liberty, inflicting actual bodily harm, etc	15 years	Life imprisonment	s 61JA

4.2 Child sexual offence complainants exempt from committals

A recent amendment to s 91 of the *Criminal Procedure Act 1986* exempts child complainants in sexual assault proceedings from being directed to attend committal hearings to give oral evidence. This applies to complainants who are under the age of 18 years, if the alleged sexual offence occurred when the complainant was less than 16 years. The Minister for Justice, Hon John Hatzistergos MLC, explained the purpose of the amendment:

Giving evidence at committal hearings can be more distressing for children than giving evidence at trial as counsel may not be as restrained at committal where a jury is not present. This amendment will reduce the number of times a child is subject to cross-examination over the course of a sexual assault prosecution, thereby reducing the re-traumatisation associated with multiple court appearances.⁷⁰

The amendment was introduced by the *Crimes Legislation Amendment Act 2003* and commenced operation on 18 August 2003.⁷¹ Previously, like all witnesses, children could be directed to attend and give oral evidence if the Magistrate found ‘substantial reasons’ why, in the interests of justice, the witness should attend, or ‘special reasons’ in the case of an offence involving violence. Child sexual assault complainants generally belonged to the ‘special reasons’ category because the meaning of ‘offences involving violence’ encompasses prescribed sexual offences such as child sexual assault.⁷²

4.3 Pre-recorded interview not to be played while child present

Section 11 of the *Evidence (Children) Act 1997* allows a child to give their evidence-in-chief in the form of a pre-recorded interview that is played to the court. The *Crimes*

⁷⁰ Crimes Legislation Amendment Bill, Second Reading Speech, *NSWPD*, 25 June 2003, p 2040.

⁷¹ *Government Gazette*, No 126 of 15 August 2003, p 7905.

⁷² Offences of violence are outlined at s 94 of the *Criminal Procedure Act 1986*, while ‘prescribed sexual offence’ is defined at s 3.

Legislation Amendment Act 2003 amends s 11 to ensure that when such a pre-recorded interview is played the child must not be present in court, or visible or audible by means of closed circuit television or similar technology, unless the child so chooses. Commencing on the date of assent, 8 July 2003, the amendment is intended to minimise the discomfort that may be experienced by children having to see or hear themselves describing the alleged offences. The Minister for Justice, Hon John Hatzistergos MLC, explained that:

Requiring the child to be observed while watching a recording of their initial disclosure to police may be unnecessarily stressful to the complainant. Further, the jury and the parties in the courtroom may misinterpret the behaviour displayed by the child while watching the recording. Arguably this also distracts the jury from the most important evidence being given on the prerecorded tape.⁷³

In addition, a transcript of the pre-recorded interview will be allowed to be provided as an 'aide memoire' to assist the court or jury to understand the recording if any of it is not clearly audible.

4.4 Exclusion of periodic detention as punishment

The *Crimes (Sentencing Procedure) Act 1999* has been amended to provide that a person who is convicted of a sexual offence against a child under 16 years of age (or convicted of a prescribed sexual offence⁷⁴ against any person) cannot be sentenced to periodic detention. The amendment was introduced by the *Crimes Legislation Amendment Act 2003* and commenced on 18 August 2003. The Government considered periodic detention to be unsuitable for punishing serious sexual offences:

Periodic detention has been held by the courts to be a salutary punishment involving the continuous obligation of complying with an order week in and week out over a lengthy period of time. By its very nature, however, periodic detention has a strong element of leniency already built into it and it is outwardly less severe in its denunciation of the crime than full-time

⁷³ Crimes Legislation Amendment Bill, Second Reading Speech, *NSWPD*, 25 June 2003, p 2040. Rebekah Rodger, n 56, pp 8-9, explores the consequences of children watching their pre-recorded evidence. If the child displays inappropriate behaviour such as laughing, the prosecution and defence might wish to call expert witnesses in child psychology to interpret the child's behaviour. Some defence lawyers believe that the jury should be able to assess the child's demeanour while watching the pre-recording, and to prevent this might provoke the defence to oppose applications for evidence being given via pre-recording. The contrary view is that the jury's assessment of whether the child is telling the truth should be based on observing the child giving evidence and during cross-examination and re-examination, not while watching themselves in a pre-recorded interview. Rodger concluded that amending the *Evidence (Children) Act 1997* could help to settle the ambiguity surrounding this issue.

⁷⁴ A prescribed sexual offence is defined as an offence under Part 3, Divisions 10 & 10A of the *Crimes Act 1900*, which is committed on a person under 16 years, or committed on a person of any age if the elements include sexual intercourse (as defined by s 61H). This extends to attempting, inciting, conspiracy, or intent to commit such an offence.

imprisonment. Periodic detention is an inappropriate punishment for these categories of offences, especially where child victims are involved.⁷⁵

4.5 Prohibited employment

The *Child Protection (Prohibited Employment) Act 1998* makes it an offence for a prohibited person to apply for, undertake, or remain in child-related employment. A prohibited person is defined as a person convicted of a sexual or indecency offence punishable by imprisonment for 12 months or more; a person convicted of an offence involving sexual servitude, child prostitution or child pornography; or a person who is on the child sex offender register established by the *Child Protection (Offenders Registration) Act 2000*. Child-related employment includes in schools and school transport, child care centres, commercial child-minding agencies, youth refuges, juvenile detention centres, clubs with a significant child membership, any religious organisation, child protection services, child health services, hospital wards where children are patients, and so on.

The maximum penalty that may be imposed on prohibited persons who apply for or engage in child-related employment was increased by the *Crimes Legislation Amendment Act 2003* to two years imprisonment and/or a fine of 100 penalty units (\$11,000), effective from 8 July 2003. Previously, the maximum period of imprisonment was 12 months. This amendment makes the penalty consistent with the maximum penalty for convicted child sex offenders who loiter near premises frequented by children, pursuant to s 11G of the *Summary Offences Act 1988*.

4.6 Reportable conduct by teachers

In September 2003 the Government announced amendments to child protection legislation, in response to a review by the Director-General of the Cabinet Office into the impact of child protection and employment-screening legislation on teachers. The review's findings included that the current system inappropriately captures some conduct, such as very low-level physical contact by teachers, which does not need to be reported to the Commissioner for Children and Young People or to the Ombudsman.⁷⁶

The *Child Protection Legislation Amendment Bill* was introduced into the Legislative Assembly on 3 September 2003. The Deputy Premier, Hon Andrew Refshauge MP, explained that:

It is important to strike the right balance between protecting children and allowing professionals in child-related employment to carry out their duties without fear of unwarranted allegations of child abuse.... This is particularly the case for teachers. Teachers have constant, often physical, contact with

⁷⁵ Hon John Hatzistergos MLC, Minister for Justice, Crimes Legislation Amendment Bill, Second Reading Speech, *NSWPD*, 25 June 2003, p 2039.

⁷⁶ Hon Andrew Refshauge MP, Child Protection Legislation Amendment Bill, Second Reading Speech, *NSWPD*, 3 September 2003, p 3115.

children throughout the course of every working day...The child protection system we have established was never intended to restrict teachers' ability to assert their authority in the school environment, or stop them from comforting distressed children. However, teachers have become unsure about what conduct is acceptable when carrying out their duties. Many teachers fear unwarranted allegations being made against them.⁷⁷

The proposed amendments stipulate the types of behaviour by employees in child-related employment that must be reported to the Ombudsman and the Commissioner for Children and Young People. The concept of 'child abuse' under the *Ombudsman Act 1974* and the *Commission for Children and Young People Act 1998* is replaced by 'reportable conduct', which includes:

- (a) any sexual offence, or sexual misconduct committed against, with, or in the presence of a child (including a child pornography offence); or
- (b) any assault, ill-treatment or neglect of a child; or
- (c) behaviour that causes psychological harm to the child.

All of the above activities would constitute reportable conduct whether or not they occurred with the consent of the child.

Reportable conduct is not intended to apply to actions that are reasonable for the purposes of the discipline, management or care of a child, having regard to the age, health, maturity or other characteristics of the child, and to any relevant codes of conduct or professional standards. Using a test of reasonableness to limit what conduct must be reported 'acknowledges that a certain level of physical contact with children is necessary in many child-focused professions.'⁷⁸ Therefore, a school teacher who touches a child to attract their attention, guide them, or comfort them, would not commit reportable conduct.

The *Child Protection Legislation Amendment Bill* passed the Legislative Assembly without amendment on 29 October 2003, and was introduced in the Legislative Council on 30 October 2003.

4.7 Proposed laws targeting paedophile activity

On 13 March 2003, during the campaign for the State election, Premier Carr announced a package of reforms to protect children from sex offenders, including 'tougher laws to crackdown on paedophiles and their activities.'⁷⁹

Among the proposed initiatives is the creation of statutory orders called Child Sex Offender

⁷⁷ Ibid, p 3115.

⁷⁸ Ibid, p 3116.

⁷⁹ Attorney General, *Media Release*, 'Government questions timing of Coalition's child protection announcement', 14 March 2003.

Orders, for the purpose of restricting the movements of convicted paedophiles. For more information about this concept see ‘**7. CHILD SEX OFFENDER ORDERS**’ on p 41 of this briefing paper.

Another part of the package targets paedophile activity on the internet. An offence would be created of using electronic communication devices such as the internet, emails, and text messages sent by mobile phones, to entice a child into illegal sexual activity. A specialist taskforce to combat internet exploitation of children will develop the laws. This issue is explored further at ‘**8. POLICING PAEDOPHILES ON THE INTERNET**’ on p 44.

4.8 Legislative review of Evidence (Children) Act 1997

The Attorney General’s Department is currently reviewing the *Evidence (Children) Act 1997* and the *Evidence (Audio and Audio Visual Links) Act 1998*. Section 35 of the *Evidence (Children) Act 1997* states that a review is to be undertaken as soon as possible after 5 years from the date of assent, 17 December 1997. A report is to be tabled in Parliament within a further 12 months. Section 23 of the *Evidence (Audio and Audio Visual Links) Act 1998* is in the same terms. It was assented to on 5 November 1998.

Written submissions from interested organisations and individuals regarding either Act are being accepted by the Legislation and Policy Division of the Attorney General’s Department until 28 November 2003. The findings of the review may result in additional legislative amendments.

5. SPECIALIST CHILD SEXUAL ASSAULT JURISDICTION PILOT

The Specialist Child Sexual Assault Jurisdiction pilot program commenced on 24 March 2003 at Parramatta.

5.1 Background

During the campaign for the State election of March 2003, the Carr Government announced a 'comprehensive, fully-funded package to protect children from sex offenders.' The package included 'Australia's first specialist court dealing with child sexual assault to reduce further trauma and victimisation of children through specialized evidence procedures, state-of-the-art audio-visual equipment and intensive victim support'.⁸⁰

The Government's decision to conduct a pilot was influenced by two recent reports: a comparative study of Queensland, Western Australia and New South Wales entitled *The Experience of Child Complainants of Sexual Abuse in the Criminal Justice System*, by Dr Christine Eastwood and Professor Wendy Patton of the Queensland University of Technology, published in July 2002; and the *Report on Child Sexual Assault Prosecutions* by the New South Wales Legislative Council's Standing Committee on Law and Justice, tabled on 13 November 2002. The pilot program implements the Law and Justice Committee's recommendation that a specialist court for child sexual assault prosecutions be operated on a trial basis.⁸¹ Both of the reports are examined in detail at '**3. INFLUENTIAL REPORTS ON REFORMS IN NEW SOUTH WALES**' on p 11 of this briefing paper.

Although the child sexual assault court is the first in Australia, similar concepts are in use overseas. For example, the Sexual Offences Courts in South Africa have dealt with sexual offences against women and children since the first court was piloted at Wynberg in 1993.⁸²

5.2 Jurisdiction and scope

The Specialist Child Sexual Assault Jurisdiction Pilot hears child sexual assault matters listed in the District Court and Local Court at Parramatta in Western Sydney. It is intended that the Pilot will be expanded late in 2003 to include Campbelltown and Penrith Courts, also in Western Sydney.⁸³

⁸⁰ Attorney General, 'Government questions timing of Coalition's child protection announcement', *Media release*, 14 March 2003.

⁸¹ Recommendation 43: NSW Parliament, Legislative Council, Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions*, Report 22, tabled on 13 November 2002.

⁸² M Sadan, L Dikweni and S Cassiem, *Pilot Assessment: The Sexual Offences Court in Wynberg & Cape Town and Related Services*, Idasa (Institute for Democracy in South Africa), 2001, p 5.

⁸³ Rebekah Rodger, Policy Officer, Criminal Law Review Division of the Attorney General's Department (NSW), 'New Specialist Child Sexual Assault Jurisdiction for New South Wales', paper presented at a conference on *Child Sexual Abuse: Justice Response or*

The pilot program follows the eligibility provisions of the *Evidence (Children) Act 1997*, which entitles children under 16 years to give evidence by closed circuit television, and children from 16 years to less than 18 years if they were under 16 years at the time when the accused was charged with the offence(s).

5.3 Features of the pilot

The main operational features of the pilot program are:⁸⁴

(i) Separate, secure child-friendly environment

The secure remote witness facility at Parramatta is separate from the court house and is not readily identifiable from the street. The premises provide a child-friendly and informal atmosphere. Prior to installation, experts in child development advised the Attorney General's Department about the appropriate interior decoration, activities and games for the remote facility. If the scheme expands to Campbelltown and Penrith, the court rooms at those locations will be linked electronically to the witness facility at Parramatta.⁸⁵

(ii) Specialist training of judicial officers

Training for judicial officers is being developed and co-ordinated by the Judicial Commission of New South Wales. The training involves the provision of educational materials to each judicial officer prior to the commencement of any trial that comes within the pilot. In addition, seminars will be conducted on topics relating to child sexual assault proceedings, including childhood development, admissibility of evidence, the role of medical evidence, and cross-cultural issues.

(iii) Presumption in favour of using special measures

Special measures include the admission of pre-recorded evidence, the use of closed circuit television (CCTV) and support persons. There has been evidence in the past to suggest that the legislative capacity permitting access to special measures in New South Wales has been under-utilised. The legislative powers that exist under the *Evidence (Children) Act 1997* include:

- admission of any electronic recording of an investigative interview as all or part of a child's evidence-in-chief under s 11;
- the transmission of a child's evidence by means of CCTV or other similar technology under s 18;

Alternative Resolution, convened by the Australian Institute of Criminology, Adelaide, 1-2 May 2003, p 2.

⁸⁴ All information is from the conference paper by Rebekah Rodger, *ibid*, unless otherwise stated.

⁸⁵ Daryl Brown, Registrar, Campbelltown Court House, 'Pilot to test new child sexual assault jurisdiction', *Butterworths Direct Link*, Volume 5, Number 12, October 2003, p DL 2.

- alternative methods such as screens and planned seating arrangements where CCTV facilities are not available (s 24);
- the presence of a support person while a child is giving evidence (s 27).

It is anticipated that judicial education and the use of the latest equipment will assist in ensuring that the legislative presumptions provided will not be undermined in the pilot.

(iv) Improved technology

State-of-the-art CCTV technology is being provided for the pilot. Early reports, however, suggest that technological issues still arise in relation to playing recorded interviews and giving evidence by CCTV.

The first trial of the pilot commenced on 24 March 2003. The child witness was a 15 year old boy who gave evidence from the newly established remote witness facility. The original video of the boy making disclosures to interviewing officers had poor audio quality, which was further degraded each time the video was edited. The Attorney General's Department liaised with the specialised unit responsible for the recording of the original video to assess whether recording procedures could be improved.⁸⁶

The second trial involved a 13 year old female complainant who made allegations against her father. When she gave evidence from the remote witness facility, technical problems were experienced with the focus of the camera equipment. This made it difficult for the girl to identify whether the Judge or the Crown Prosecutor was speaking to her, and to identify her signature on a drawing that was shown to her.

(v) Pre-trial hearings

Pre-trial hearings are used in the pilot program to determine the special needs of the child and the readiness of the matter to proceed.

Before the commencement of the first trial on 24 March 2003, two pre-trial hearings were conducted. At the second pre-trial hearing, an issue relating to the editing of the video of the child's interview was raised and the prosecution made the relevant alterations. No other pre-trial arguments were foreshadowed. However, on the first day of the trial the defence challenged the admissibility of evidence obtained pursuant to a search warrant, and raised further objections to the video which resulted in the need for additional editing. The delays meant that the child did not give evidence until the fourth day of the trial. This highlights the need for effective pre-trial hearings, so that children are not kept waiting for an undisclosed period of time at the remote facility to give evidence.

An option being considered by the Attorney General's Department is to require the defence to disclose the existence of a pre-trial issue and the length of time expected to be needed to

⁸⁶ In addition, Rebekah Rodger (n 83, p 7) suggests that, 'The problem may be addressed by a Practice Note that would require editing of the video to be finalised on transcript and then the original tape would only need to be edited once.'

address it.⁸⁷ Re-assessing the requirements for pre-trial finalisation of editing of videotaped interviews is also being contemplated.

(vi) Evaluation of the pilot

Evaluation of the pilot will be conducted by the NSW Bureau of Crime Statistics and Research. The report of the Legislative Council's Standing Committee on Law and Justice recommended that an extensive evaluation be carried out before deciding whether to establish the specialist court on a permanent basis.⁸⁸

⁸⁷ Rodger, *ibid*, p 6. The defence would not have to disclose the substance of the issue prior to the first day of the trial.

⁸⁸ Recommendation 44: NSW Parliament, Legislative Council, Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions*, Report 22, tabled on 13 November 2002.

6. REGISTRATION OF CHILD SEX OFFENDERS

The system of requiring child sex offenders to register their details with the authorities upon their release is practiced in various jurisdictions including the United Kingdom and the United States of America. In some jurisdictions, the information is only available to law enforcement agencies, but in others the information is communicated to schools, child care centres and neighbours, and may even be accessible by the general public.⁸⁹ A number of States in America passed their own registration and community notification legislation before the Federal Government in 1994 introduced requirements that the States, as a condition of funding, register all persons convicted of a criminal offence against a minor or convicted of a sexually violent offence, with State law enforcement agencies.⁹⁰

6.1 New South Wales

In 1997 the Wood Royal Commission into the New South Wales Police Service recommended that consideration be given to the introduction of compulsory registration with the Police Service of all convicted child sexual offenders: Recommendation 111.⁹¹ The Royal Commission expressed 'less concern in relation to registration requirements of the UK kind, which already occurs de facto, to some extent, in the course of probation and parole supervision.'⁹² The United Kingdom's regime under the *Sex Offenders Act 1997* does not make the registered information available to members of the public, only the authorities.

However, the Royal Commission cautioned that introducing registration legislation would be of limited value and could propel offenders interstate unless it formed part of a uniform national system.⁹³ Recommendation 117 therefore advised that 'Encouragement be given to the establishment of a National Index of Intelligence concerning paedophile offenders for use by law enforcement agencies'. Federal developments are examined in this briefing paper at '**6.4 National initiatives**' on p 36.

⁸⁹ For example, the *Registration and Notification of Release of Certain Offenders Act 1994* of New Jersey (USA), also known as 'Megan's Law', classifies sex offenders according to their level of risk: low risk (Tier 1), moderate risk (Tier 2), and high risk (Tier 3). Information is provided to law enforcement agencies about all three categories. In addition, details on moderate and high risk offenders are available to schools, day care centres and child-related community organisations. Information about high risk offenders may also be supplied to members of the community who are likely to encounter the offender.

⁹⁰ *Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program*, introduced as part of a package of legislation called the *Violent Crime Control and Law Enforcement Act 1994* (USA) and signed into law by President Clinton in September 1994. The registration provisions are located in the *United States Code* at Title 42, Chapter 136, Subchapter VI, sec 14071.

⁹¹ Royal Commission into the New South Wales Police Service, *Final Report, Volume V: The Paedophile Inquiry*, August 1997.

⁹² *Ibid*, para 18.95.

⁹³ *Ibid*, para 18.96.

A register of child sex offenders was established in New South Wales by the *Child Protection (Offenders Registration) Act 2000*, and has been operational since October 2001.⁹⁴ The legislation requires certain persons who have committed sexual offences against children to keep police informed of their name, address, employment, motor vehicle details and travel arrangements for a specified period of time. As at 5 November 2002, 636 offenders had registered with the police, representing a compliance rate of over 95%.⁹⁵

Some of the key provisions of the *Child Protection (Offenders Registration) Act 2000* and the *Child Protection (Offenders Registration) Regulation 2001* are:

- **Register of offenders** – the Commissioner of Police is to establish and maintain a register of offenders, known as the Child Protection Register: s 19 of the Act and cl 18 of the Regulation.
- **Registrable persons** – are persons found guilty and sentenced in respect of certain registrable offences committed against children (persons under the age of 18 years): s 3 of the Act.
- **Registrable offences** – two classes of registrable offences are defined under s 3 of the Act. Class 1 offences involve murder, sexual intercourse, or persistent sexual abuse of a child. Class 2 offences include acts of indecency punishable by imprisonment for 12 months or more, kidnapping, causing a child to be in sexual servitude, promoting or participating in child prostitution, and possessing or publishing child pornography.⁹⁶ The offences in both classes include anything done outside New South Wales that would constitute an offence in New South Wales.
- **Obligations** – registrable persons must attend a police station in the area in which they live, within 28 days of sentencing or release from custody or entering New South Wales (whichever is later). They must provide details of their name, date of birth, residential address, employment, motor vehicle registration, and the relevant sexual offences for which they were found guilty. A change in the information must be notified within 14 days of the change. Before leaving New South Wales for overseas, a registrable person must notify the police, indicating each country to be visited, duration of stay, and approximate return date. The same obligation applies to travel to another State or

⁹⁴ Although the Act received assent on 27 June 2000, its commencement was a gradual process. Several sections commenced on 15 September 2000, the bulk of the Act commenced on 15 October 2001 (as amended by the *Child Protection (Offenders Registration) Amendment Act 2001*), and one remaining provision commenced on 19 July 2002.

⁹⁵ Child Protection Legislation Amendment Bill, Second Reading Speech, Paul Crittenden MP, Parliamentary Secretary, *NSWPD*, 12 November 2002, p 6551.

⁹⁶ Various exceptions apply, such as persons sentenced for a single Class 2 offence where the sentence was not imprisonment, home detention, periodic detention, community service, or a supervised bond. Exceptions are outlined in the definition of 'registrable person' under s 3 of the Act.

Territory of Australia if the person intends to be absent for more than 28 days. A registrable person who leaves New South Wales for more than 28 days must also notify police of their return within 14 days of re-entering New South Wales: ss 9-12 of the Act.

- ***Period on the register*** – the period that the person stays on the register is influenced by the number and type of offences, and the existence of prior sexual convictions. For Class 1 offences, registration obligations continue for life, 15 years or 10 years, depending on other factors, and 8 years or 12 years for Class 2 offences: s 14.
- ***Breaches*** – the legislation creates offences of failing to comply with the reporting obligations without reasonable excuse, and knowingly supplying police with false or misleading information. The maximum penalty for either offence is imprisonment for two years and/or a fine of 100 penalty units (currently \$11,000): ss 17-18.

Recent amendments were made by the *Child Protection Legislation Amendment Act 2002*, commencing on 10 February 2003. For example, the *Child Protection (Offenders Registration) Act 2000* was amended to ensure that it applies to the intent to commit offences that attract the operation of the Act. (Attempting or conspiring to commit the offences, and inciting the offences, are already covered). Another amendment provided additional flexibility to the reporting arrangements under the *Child Protection (Offenders Registration) Act 2000*, enabling the police to receive information at locations other than police stations.

6.2 Queensland

Statutory provisions for child sex offenders to register with the police were introduced in Queensland in 1989.⁹⁷ The provisions are found at s 19 of the *Criminal Law Amendment Act 1945*, allowing a court (on application from the prosecution) to order a person convicted on indictment of a sexual offence against a child under 16 years to report to the police within 48 hours of being released from custody. The offender has to report their name and address, and any change of those details for as long as is specified in the order.

Recent changes to the reporting and notification requirements were made by the *Sexual Offences (Protection of Children) Amendment Act 2003*, which had commenced in full by 1 May 2003. Previously, to make a reporting order, the court had to be satisfied that a ‘substantial risk’ existed that the offender would commit another offence of a sexual nature on a child under 16 years of age. Now, the court need simply be satisfied that a ‘risk’ exists. Another amendment gives courts the power to require an offender who is subject to a reporting order to report to police at nominated intervals.

6.3 Victoria

In August 2002, the Minister for Police, Emergency Services and Corrections, Hon Andre

⁹⁷ By the *Criminal Code, Evidence and Other Acts Amendment Act 1989*.

Haermeyer MLA, announced a package of new measures to deal with sex offenders including a sex offender register to be administered by Victoria Police to monitor all serious sex offenders.⁹⁸

Operation of the register would entail the Office of the Correctional Services Commissioner advising Victoria Police of the pending release of offenders, who would then be placed on the sex offender register. The types of offenders expected to be covered by the register are those convicted of child-related sexual offences (including indecent assault or sexual penetration of a child under the age of 10 years, child pornography and child prostitution) and other serious sexual offences (including two or more sexual offences resulting in a term of imprisonment, or at least one sexual offence and one violent offence arising from the same course of conduct which resulted in a term of imprisonment). Offenders would be required to notify the police of any change in their particulars, and would remain on the register for between 8 years and life, depending on the nature of the offence and the offender's prior criminal history. The provision of false or misleading information, or failure to comply with reporting obligations, would be punishable by imprisonment for up to two years or a maximum fine of \$10,000.

Mr Haermeyer stated that the sex offender and victims' package would be drafted in consultation with Victoria Police and other stakeholders.⁹⁹ A Bill dealing with the establishment of a sex offender register had not been introduced at the time of writing.

6.4 National initiatives

In September 2002, the Federal Minister for Justice and Customs, Senator Chris Ellison, called on all State and Territory Governments to establish sex offender registers and develop consistent legislation. These measures would facilitate the tracking of sex offenders across State borders: 'Monitoring the movements and employment of people convicted of sex offences, particularly in cases which involve child victims, is an important measure to guarantee community safety.'¹⁰⁰

The Federal government agency CrimTrac already operates a National Child Sex Offender System,¹⁰¹ but it does not monitor the movement of individual offenders within a State or

⁹⁸ Minister for Corrections, Minister for Police & Emergency Services, 'Bracks Government Crackdown on Sex Offenders', *Media Release*, 25 August 2002.

⁹⁹ *Ibid.*

¹⁰⁰ Minister for Justice and Customs, 'Call for sex offenders to be tracked across Australia,' *Media Release*, 20 September 2002.

¹⁰¹ The National Child Sex Offender System is listed as one of the components of CrimTrac in the formal agreement between the Commonwealth and the States and Territories, which resolved to co-operate fully to develop and deliver the services of CrimTrac: *An Agreement Between the Commonwealth of Australia and the State of New South Wales and the State of Victoria and the State of Queensland and the State of Western Australia and the State of South Australia and the Australian Capital Territory and the Northern Territory of Australia, For the Establishment and Operation of "CrimTrac", A National Law Enforcement Information System for Australia's Police Services*, 13 July 2000, p 2 ('Recitals' D).

Territory as that is the responsibility of the respective Government. A co-ordinated effort would therefore enable more detailed information to be supplied to CrimTrac, which in turn 'will provide comprehensive and integrated information about child sex offenders for police and will provide a faster and more comprehensive national checking of child sex offenders.'¹⁰²

On 2 July 2003, Senator Ellison announced that the Australasian Police Ministers Council had endorsed a national approach to the registration of details about child sex offenders and their movements. Senator Ellison stated:

I have asked CrimTrac to convene a joint reference group representing the interests of all jurisdictions to develop the new arrangements for a system of national child protection registration. This group will determine how CrimTrac can best provide technical support and appropriate linkages between the proposed system and the National Child Sex Offender System.¹⁰³

Furthermore, a national initiative would facilitate assistance being provided to overseas agencies:

Once a national system is implemented, the Commonwealth will also be able to negotiate agreements with other countries for the exchange of information on the movement of registered child sex offenders. ...[W]hile the Australian Federal Police currently liaise with overseas law enforcement on the movement of paedophiles, a national system would greatly enhance the effectiveness of this liaison.¹⁰⁴

However, the Government did not support the release of offenders' details to the community, because in other countries public disclosure has led to attacks against offenders or innocent people being mistaken for offenders. It was also envisaged that the registration system should be vetted by privacy commissioners and Ombudsmen from each jurisdiction.¹⁰⁵

Some Government Ministers around Australia have suggested that the national register should include suspected as well as convicted child sex offenders. The Federal Minister for Children and Youth Affairs, Hon Larry Anthony MP, advocated exploring the idea further: 'Ministers are keen to investigate the issue more broadly because not all paedophiles have

Accessed at <http://www.crimtrac.gov.au/misc/ct_agreement.PDF>

¹⁰² Minister for Justice and Customs, 'Call for sex offenders to be tracked across Australia,' *Media Release*, 20 September 2002.

¹⁰³ Minister for Justice and Customs, 'National Tracking of Child Sex Offenders', *Media Release*, 2 July 2003.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

criminal convictions... Obviously, privacy, civil liberties and legal issues will have to be considered in detail, but protecting children should be our highest priority.' However, Police Ministers are expected to oppose the concept as unworkable.¹⁰⁶

6.5 United Kingdom

6.5.1 Registration under the Sex Offenders Act 1997

The *Sex Offenders Act 1997* introduced requirements for the registration of a wide range of sex offenders in the United Kingdom. A person must notify their details to the police if they have been convicted of a sexual offence identified by the Act (or cautioned, or found to have committed an offence but to be not guilty by reason of insanity, or to be under a disability). Some of the sexual offences identified by the Act are: rape, incest, indecent assault of an adult, indecent conduct towards a young child, and possession of indecent photographs of children.

The periods for which offenders must comply with the notification requirements, from the date of conviction are:

Type of offender	Applicable period of notification
Sentenced to prison for 30 months or more	Indefinite period
Sent to hospital, subject to a restriction order	Indefinite period
Sentenced to prison for more than 6 months but less than 30 months	10 years
Sentenced to prison for 6 months or less	7 years
Sent to hospital, without a restriction order	7 years
Other offenders	5 years

An offender who is subject to the notification requirements shall, within 14 days of the conviction notify the police in writing or verbally of his or her name, date of birth, and home address. If the offender changes name or home address, or stays at any other premises in the United Kingdom for a qualifying period (14 days, or lesser periods in any year amounting to 14 days), the police shall be notified within 14 days of the change.

An offender who fails to observe the requirements, without reasonable excuse, or who knowingly provides false information to the police is liable to be imprisoned for a maximum of 6 months, and/or to be fined.

The *Sex Offenders (Notice Requirement) (Foreign Travel) Regulations 2001*, effective from 1 June 2001, require sex offenders who are subject to the requirements of the *Sex Offenders Act 1997* to notify the police if they are going to travel overseas for 8 days or more, at least 24 hours before leaving the United Kingdom. Information to be disclosed includes the country or countries to be visited, the accommodation arrangements for the first night

¹⁰⁶ S Mitchell, 'Plan to list child sex suspects', *Herald Sun* online, 1 August 2003, <heraldsun.news.com.au>

outside the United Kingdom, and the intended date of return.

6.5.2 Amendments by Sexual Offences Bill 2003

The Sexual Offences Bill was first read in the House of Lords on 28 January 2003 and passed that House on 17 June 2003. It was introduced in the House of Commons on 18 June 2003, and had completed the Committee stage at the time of writing.

There were numerous influences upon the formulation of the Sexual Offences Bill, including:

- a White Paper entitled *Protecting the Public: Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences*, published on 19 November 2002;¹⁰⁷
- the Government in 1999 established an independent review of sexual offences, to make recommendations to Ministers. The report, *Setting the Boundaries*, was published for public consultation in July 2000.¹⁰⁸
- the Government conducted its own statutory review of the *Sex Offenders Act 1997*. The *Review of Part 1 of the Sex Offenders Act 1997* was published by the Home Office for public consultation in July 2001.

The Sexual Offences Bill proposes to re-enact Part 1 of the *Sex Offences Act 1997* ('Notification Requirements for Sex Offenders') with a number of amendments. Some of the changes, based on the text of the Bill as amended in Committee in the House of Commons on 14 October 2003, are:

- **Offences covered:** The obligation on offenders to register their details with the police will accompany an expanded number of sexually-related offences. Some of the **additional offences** are: meeting a child who is being sexually 'groomed', abusing a position of trust (where the offender is 20 years or older), and voyeurism. Limitations are imposed on a number of the offences, for example, by requiring the victim to be under a certain age, the offender to be over a certain age, or the sentence received to be greater than a designated amount.
- **Notification periods:** A new, lower category is to be inserted in the scale of notification periods. An adult offender who is **cautioned** for an offence will be required to be registered with police for **two years**. Previously, the shortest notification period was

¹⁰⁷ Accessed on 17 September 2003 on <<http://www.homeoffice.gov.uk/docs/ptp.pdf>> Topics dealt with in the White Paper include the sex offender register, sexual 'grooming' of children on the internet, commercial sexual exploitation, the law on consent, and so on.

¹⁰⁸ The terms of reference of the review were: to provide coherent and clear offences which protect individuals, especially children and the more vulnerable from abuse and exploitation; to enable abusers to be properly punished; and to be fair and non-discriminatory.

five years.

- ***Offenders convicted overseas:*** Police will be able to apply to a Magistrate for a notification order to make the **notification requirements binding** on a person who was convicted, cautioned, or found guilty of an **offence overseas** that is equivalent to a qualifying offence in the United Kingdom.

7. CHILD SEX OFFENDER ORDERS

7.1 New South Wales

On 13 March 2003, during the campaign for the State election, the Premier, Hon Bob Carr MP, announced a plan to introduce child sex offender orders to restrict the movement of convicted paedophiles.¹⁰⁹ This would involve issuing court orders to prohibit child sex offenders from visiting such places as children's playgrounds. The Attorney General, Hon Bob Debus MP, stated: 'Depending upon who the offender is, it will be possible to say you might not go near a park, or a cinema, or indeed to any local facility in which it is agreed by a court there will be children who are potential victims.'¹¹⁰ A specialist taskforce, which will be formed to investigate further ways to combat paedophilia, will make recommendations about the orders, for example, to decide whether an order would automatically follow conviction.¹¹¹

7.2 United Kingdom

The system of sex offender orders in the United Kingdom is one possible model for the proposed child sex offender orders in New South Wales.

7.2.1 Outline of procedures

In the United Kingdom, orders can be sought with respect to sex offenders generally, not only those who commit offences against children. The orders were introduced under the *Crime and Disorder Act 1998* (Chapter 37, ss 2-4), which commenced on 1 December 1998.

The police can apply to the Magistrates' Court for a sex offender order against any sex offender whose behaviour in the community gives the police 'reasonable cause to believe that an order...is necessary to protect the public from serious harm from him.' The definition of a 'sex offender' in s 3 covers persons who have been convicted of a sexual offence under Part I of the *Sex Offenders Act 1997*; or have been cautioned for a sexual offence; or committed the act charged but were found not guilty by reason of insanity; or were found to be under a disability; or were punished overseas for an offence that would constitute a sexual offence in the United Kingdom.

The expression 'serious harm' has the same meaning as in the *Criminal Justice Act 1991*,

¹⁰⁹ Attorney General, *Media Release*, 'Government questions timing of Coalition's child protection announcement', 14 March 2003; and AAP news release, 'Coalition proposes overhaul of child sex abuse cases', Friday 14 March 2003, 15:21 AEDT, from <<http://bulletin/prod/aap/aapwire.nsf>>

¹¹⁰ S Gibbs, 'Plan to keep sex offenders from young after release', *The Sydney Morning Herald*, 14 March 2003, p 8.

¹¹¹ *Ibid.*

being death or serious personal injury, whether physical or psychological. But this does not mean that the police have to prove beyond reasonable doubt that the offender intends to cause death or serious physical or psychological injury to obtain a sex offender order. Rather, it is a matter of the court assessing the risk that a further offence will be committed. For example, police who observe a convicted sex offender loitering outside the gates of a primary school and approaching children as they depart, could apply for an order on the basis that there is reasonable cause to believe that the offender's behaviour, if it continues, could lead to serious harm to a child.¹¹²

The minimum duration for a full order is 5 years, and there is no maximum duration. A sex offender order is a civil order, although breach of any of the conditions is a criminal offence. Breaching the order without reasonable excuse carries a maximum penalty on indictment of 5 years imprisonment and/or a fine, or a maximum penalty on summary conviction of 6 months imprisonment and/or a fine. An appeal against the granting of a sex offender order lies to the Crown Court.

Interim sex offender orders were introduced by the *Police Reform Act 2002* (inserting s 2A into the *Crime and Disorder Act 1998*), commencing on 1 December 2002. The purpose of an interim order is to place restrictions on the offender's behaviour whilst waiting for the application for the main order to be considered by the court. The *Police Reform Act 2002* also clarified that protecting 'the public' through a sex offender order could apply to the general public or to particular individuals.

7.2.2 Amendments by Sexual Offences Bill 2003

The Sexual Offences Bill was first read in the House of Lords on 28 January 2003 and passed that House on 17 June 2003. It was introduced in the House of Commons on 18 June 2003, and had completed the Committee stage at the time of writing. Therefore, the provisions discussed below are based on the Bill as amended in Committee in the House of Commons on 14 October 2003.

The Sexual Offences Bill proposes to combine sex offender orders (from the *Crime and Disorder Act 1998*) and restraining orders (from the *Sex Offenders Act 1997*) into a new civil order – a Sexual Offences Prevention Order. In addition, Risk of Sexual Harm Orders will be created specifically to protect children from sexual harm, and Foreign Travel Orders are intended to be used to prevent a convicted child sex offender from travelling to countries where the offender is at risk of abusing children.

(i) Sexual Offences Prevention Order – a civil preventative order to be obtained by police on application to the Magistrates' Court. These orders will replace, with amendments, restraining orders under s 5 of the *Sex Offenders Act 1997* and sex offender orders under s 2 of the *Crime and Disorder Act 1998*. A court may issue a Sexual Offences Prevention

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Home Office, *Guidance on Sex Offender Orders*, attachment to *Home Office Circular 66/2002*. See Section 3: Criteria for Seeking a Sex Offender Order (especially para 3.8) and Annex B: Guidance on the Use of the Term "Serious Harm". Available at <www.homeoffice.gov.uk/docs/hoc6602_guidance.pdf>

Order when it is satisfied that such an order is necessary to protect the public from ‘serious sexual harm’ from a convicted sex offender. The court may be satisfied from the circumstances of the offence or from other evidence of the defendant’s behaviour. The Explanatory Note to the Bill gives the example of the convicted child sex offender who, following his release from prison, loiters around schools or invites children back to his house.¹¹³ A Sexual Offences Prevention Order prohibits the offender from the conduct specified, for example, contacting victims, or residing in a house with children under the age of 16 years, or taking part in sporting activities that involve children. The duration of the order is planned to be the same as under the *Sex Offenders Act 1997*, that is, from a minimum period of 5 years up to an indefinite period.¹¹⁴

(ii) Foreign Travel Order – a new civil, preventative order to enable courts to prohibit those who have been convicted of a sexual offence against a child under 16 years (either in the United Kingdom or overseas) from travelling overseas to the extent necessary to protect a child or children from serious sexual harm. A Foreign Travel Order may be made on application by the police to the Magistrates’ Court. The order can prohibit travel to a specific country or countries, or give exceptions of places where the offender may travel, for example, because of family reasons. A universal ban may even be imposed on the offender travelling anywhere if the risk is sufficient.

(iii) Risk of Sexual Harm Order – the Magistrates’ Court may make a civil, preventative order upon an adult who has on at least two occasions engaged in sexually explicit activity or communication with a child under 16 years, if there is reasonable cause to believe that the order is necessary to protect children generally or any child in particular from harm from the defendant. This order does not require a prior conviction for a sexual offence or other crime. Rather, a chief officer of police may apply for the order if it appears to the police that the defendant has on two occasions done the acts in question and, as a result of those acts, there is reasonable cause to believe that it is necessary for an order to be made. An example of a person who could be subjected to a Risk of Sexual Harm Order is a person who sends pornographic images to a child over the internet. The order may prohibit the defendant from doing whatever the court considers is necessary for the purpose of protecting the child or children.

¹¹³ Commentary on clause 102 of the Bill, from the *Explanatory Note to the Sexual Offences Bill* [Bill 128-EN], prepared by the Home Office, reflecting the Bill as brought from the House of Lords on 18 June 2003. Accessed on 16 September 2003 on the House of Commons website at <<http://www.publications.parliament.uk/pa/cm200203/cmbills/128/en/03128x-.htm>>

¹¹⁴ Explanatory Note, *ibid*, clause 105.

8. POLICING PAEDOPHILES ON THE INTERNET

There is evidence from a number of countries that internet 'chat rooms', where messages can be exchanged between users of computers with an internet connection anywhere in the world, are being exploited by some adults to cultivate friendships with children for sexual purposes. Often offenders gain a child's confidence by posing as a much younger person or claiming to share similar interests, then they arrange face-to-face meetings which may lead to sexual abuse.¹¹⁵ One of the strategies in response to such behaviour is to legislate new criminal offences. There are plans to do this in New South Wales.

8.1 New South Wales

Among the child protection reforms announced by Premier Carr on 13 March 2003 during the campaign for the State election, were new laws to target paedophile activity on the internet. An offence was proposed of using electronic communication devices such as the internet, emails, and SMS text messages sent by mobile phones, to entice a child into illegal sexual activity.¹¹⁶ The laws will be developed by a specialist taskforce established to combat the internet exploitation of children.

Another recent development that may affect predatory behaviour on the internet in New South Wales was the decision by the software company Microsoft to close its internet chat rooms in Australia on 14 October 2003, as part of a worldwide campaign. Australia is one of the countries in which the chat rooms closed altogether, while several countries moved to a subscription service. The payment of subscription by credit card is anticipated to facilitate the accountability of users and monitoring of sites.¹¹⁷

¹¹⁵ A recent case in the United Kingdom, involving a 64 year old pensioner named Douglas Lindsell, typifies the methods used to approach children on the internet for sexual 'grooming'. Lindsell often posed as a teenager, using an old photo of his son and a book of text slang to seem authentic. When police seized Lindsell's computer, they discovered that in 18 months he had contacted at least 54 girls in Britain and another 19 as far afield as New Zealand and Canada. He obtained home addresses, phone numbers, and names of schools. Some girls were bombarded with text messages, telephone calls, and visited at places they frequented. On 9 October 2003, Lindsell was sentenced in Kingston Crown Court, London, to five years imprisonment, on charges including attempted abduction (for trying to entice a girl into his car), perverting the course of justice (for contacting victims and asking them to delete his text messages and emails), gross indecency to a child under 16 years, and sexual and threatening harassment: S Morris, 'Chatroom groomer preyed on 73 girls', *The Sydney Morning Herald*, Weekend Edition, 11-12 October 2003, p 37.

¹¹⁶ Attorney General, 'Government questions timing of Coalition's child protection announcement', *Media Release*, 14 March 2003.

¹¹⁷ P Gray, 'MSN to close chat rooms around world', CNETAsia News & Technology, <<http://asia.cnet.com>>, 24 September 2003. Subscription-based, unmoderated services will be available in the USA, Canada and Japan. Moderated, cost-free MSN chatrooms will remain in New Zealand, Brazil, Canada and Japan.

In Australia, the Microsoft chat rooms were accessed through NineMSN¹¹⁸ and were visited by 300,000 people a month. The site had been providing around 100 chat rooms that were not monitored and 14 that were monitored between 8.00 pm and midnight, when ‘poorly behaved’ users could be ejected. A NineMSN spokesperson stated: ‘We’ve made that decision [to close the chat rooms] because we think it will help protect users from unsolicited information and inappropriate communication, in particular towards children. We were seeing some misuses in Australia, but that is consistent with what happened around the world...Child safety and creating a safe and enjoyable environment is one of the key focuses for NineMSN.’¹¹⁹ Other companies such as ‘Yahoo!’ will continue to provide chat rooms in Australia.

8.2 United Kingdom

8.2.1 Internet Crime Forum Report

The Internet Crime Forum, an organisation which consists of representatives from Government, law enforcement agencies and the internet industry, released a report in March 2001, entitled *Chat Wise Street Wise – Children & Internet Chat Services*.¹²⁰ The report’s recommendations included measures for Government, police, internet service providers and child welfare organisations to consider, including improved supervision of ‘chat rooms’ and the display of safety messages.

In response to the report, the then Home Affairs Minister, Lord Bassam, announced a strategy meeting between Government, police, and internet providers to discuss the growing problem of paedophiles using the internet to ‘groom’ and sexually abuse children, the availability of child pornography on the internet, and related issues.¹²¹ The meeting examined four key areas:

- how to tackle the increasing problem of internet chat rooms being used by paedophiles to groom and subsequently abuse children;
- how to prevent access to child pornography available on parts of the internet;
- how internet service providers and the police can work in partnership to bring paedophiles on the internet to justice;
- how to increase the confidence of parents that their children will be safe on the internet.

¹¹⁸ A joint facility by Microsoft and the Packer family company, Publishing and Broadcasting Limited.

¹¹⁹ M Sun & M Scala, ‘Chat rooms over and out’, *The Daily Telegraph*, 25 September 2003, p2.

¹²⁰ The Internet Crime Forum Report is posted on the ICF website at <<http://www.internetcrimeforum.org.uk>> The Report was prepared by the ICF’s Internet Relay Chat sub-group, which was established in 1999.

¹²¹ Home Office, *Press Release*, ‘Government Challenges Internet Industry to Make Chatrooms “Chat Wise Street Wise”’, 20 March 2001.

8.2.2 Home Office Task Force

On 28 March 2001, the Home Secretary announced the creation of the Task Force on Child Protection on the Internet. The Task Force is a partnership between representatives of the Government (eg. Members of Parliament, Department of Education and Skills, Department of Health, Department of Trade and Industry); law enforcement (eg. Association of Chief Police Officers, National Crime Squad, Crown Prosecution Service); the internet industry (eg. Internet Service Providers' Association, Internet Watch Foundation, Microsoft, Yahoo! UK); and child welfare groups (eg. ChildLine, National Society for Prevention of Cruelty to Children, Childnet International).¹²²

The Task Force's role is to identify and implement methods by which children can be better protected when using the internet. The initial areas identified for examination by the Task Force included:

- reviewing existing legislation to ensure that the law keeps in step with changes in technology;
- enhancing co-operation between police and service providers in the course of investigations;
- developing 'safe surfing' education and awareness campaigns for parents and children;
- reviewing internet content rating systems and developing a 'kite marking' scheme for chat rooms which deliver child-friendly services.¹²³

In July 2001, the Task Force reported to the Home Secretary with proposals for:

- *Legislation to tackle paedophile 'grooming' activity on-line and off-line* – with a new criminal offence relating to meeting a child with intent to commit a sexual offence, and a new civil order to protect children from an adult making contact with them for a harmful or unlawful sexual purpose whether in person, by email, or on the internet.
- *A best practice model of Internet chat safety measures for service providers* – including a requirement for clear safety messages and tools such as 'alert' buttons to be displayed in chat rooms. In moderated chat rooms specifically for children, the Task Force advocated an alert system and a requirement for moderators to be properly recruited, screened, trained and supervised.
- *Computer awareness training for police and child protection practitioners* – to ensure that all officers know how computers can assist in the detection and investigation of crime and how to collect and preserve the integrity of digital evidence. Such training

¹²² Information obtained from the Home Office website at <<http://www.homeoffice.gov.uk>> on 16 September 2003. Select 'Crime & Policing', then 'Crime Reduction', then 'Internet Task Force'.

¹²³ Home Office, *News Release*, 'Improving Child Protection on the Internet: A Partnership for Action', 28 March 2001.

should be incorporated into the basic core curriculum for new police recruits, and be a priority for serving officers, and other professionals engaged in child protection.

- *Co-operation between police and internet experts* – to provide effective responses to concerns from the public or internet industry about on-line child protection, whether reporting suspicions or crimes, or seeking advice.
- *A public awareness campaign* – to alert parents and children to the potential dangers of the internet and to help them ‘surf’ in safety.¹²⁴

Further work was undertaken on the projects over the next 12 months. For example, the Task Force developed draft Models of Good Practice for service providers relating to chat, instant messaging and web services. The internet industry was consulted on the Models of Good Practice, which aim to encourage clear and accessible safety messages and advice, and user-friendly means for reporting abuse. The Task Force also developed, with the Internet Crime Forum, a shared system for handling child protection issues and law enforcement requests.¹²⁵

The Government presented a White Paper, *Protecting the Public: Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences*, in November 2002. It stated the Government’s intention to implement the recommendations of the Task Force on Child Protection on the Internet, to introduce a new offence of sexual ‘grooming’ of children and a new civil order to protect children from adults who are deemed to present a risk of sexual harm, irrespective of whether they are convicted sex offenders.¹²⁶

8.2.3 Grooming offence in Sexual Offences Bill 2003

The Sexual Offences Bill was first read in the House of Lords on 28 January 2003 and passed that House on 17 June 2003. It was introduced in the House of Commons on 18 June 2003, and had completed the Committee stage at the time of writing. Therefore, the provisions discussed below are based on the Bill as amended in Committee in the House of Commons on 14 October 2003.

Befriending a child on the internet for the purpose of illegal sexual activity is the subject of clause 16 of the Bill: ‘Meeting a child following sexual grooming’. It will be an offence for a person aged 18 years or over to intentionally meet a child aged under 16 years anywhere in the world (or to travel with that intention), if the adult has met or communicated with the

¹²⁴ Home Office, *Press Release*, ‘Paedophiles Face Crackdown – Online and Offline’, 19 July 2001.

¹²⁵ Home Office, *Press Release*, ‘UK at the Forefront of the Fight Against Online Paedophiles’, 16 July 2002.

¹²⁶ Home Office, *Protecting the Public: Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences*, presented to Parliament by the Secretary of State for the Home Department, November 2002, The Stationery Office, p 25.

child on at least two earlier occasions, and intends to commit a sexual offence against the child at the time of the meeting or on a subsequent occasion.

The adult might establish contact with the child through meetings, telephone conversations or communications on the internet. The capacity for the previous communications with the child to have taken place in any part of the world includes emailing the child from abroad or speaking on the telephone between different countries. The course of conduct prior to the meeting need not have an explicitly sexual content and could involve some non-sexual pretext for the meeting.

The offence will be complete either when the offender meets the child or when the offender travels to the pre-arranged meeting with the intent to commit a relevant offence against the child. Therefore, the planned offence does not have to actually take place. Evidence of the offender's intent may be drawn, for example, from the communications between the offender and the child before the meeting, or from sexually-related items taken along to the meeting by the offender. No offence is committed if the adult reasonably believes the child to be 16 years or over.¹²⁷

The maximum penalty for meeting a child following sexual grooming is 7 years imprisonment if convicted on indictment. On summary conviction, an offender is liable to a maximum of 6 months imprisonment and/or a fine.

¹²⁷

This commentary is adapted from the Explanatory Note to the Sexual Offences Bill [HL Bill 128], prepared by the Home Office, reflecting the Bill as brought from the House of Lords on 18 June 2003. Accessed on the House of Commons website at <<http://www.publications.parliament.uk/pa/cm200203/cmbills/128/en/03128x--.htm>> on 16 September 2003.

9. CONCLUSION

Some of the strategies employed in recent years by the criminal justice system in response to child sexual assault offences adopt a preventative approach, attempting to protect children from offences before they happen. This is the case with sex offender registers, sex offender orders, restrictions on child-related employment, and potentially with internet offences if a predator is apprehended before sexually interfering with a child. Other reforms build upon or alter existing laws relating to court process and evidentiary rules. Legislative amendments to procedures for children giving evidence in court in sexual assault matters indicate an increasing consciousness of child witnesses as having special needs. A child who attends court must cope with the presence of the accused and many other adults, including the judge, lawyers, jurors and court officers. Amendments to entitle children to give evidence through pre-recorded interviews and to exclude them from appearing at committals are designed to reduce the number of times that children have to give evidence in person. The specialist child sexual assault jurisdiction pilot in New South Wales will further explore the consequences of modifying the conventional court environment.

There is significant support among child psychologists, academics, social workers, and prosecution lawyers for further changes to procedures in child sexual assault cases. The Legislative Council's Standing Committee on Law and Justice in November 2002 recommended reviewing evidence laws, such as the directions that judges may issue to juries with regard to child witnesses and sexual assault complainants. Recently, Justice James Wood, the Chief Judge at Common Law of the Supreme Court of NSW, also expressed concern about judicial warnings given in sexual assault trials when there has been a delay in making a complaint.¹²⁸ However, some members of the legal profession oppose child complainants in sexual cases receiving 'special' treatment. This may be indicative of a tendency in the wider community to be cautious about believing children. For example, a study by the Australian Childhood Foundation in June 2003, among 500 members of the general public, found that 35% of respondents believed that children make up stories about being abused,¹²⁹ and numerous respondents were unaware of legal standards regarding sexual conduct.¹³⁰

¹²⁸ Hon. Justice James Wood, 'Complaint and Medical Examination Evidence in Sexual Assault Trials', *Judicial Officers' Bulletin*, Volume 15, Number 5, September 2003, p 63. Justice Wood states (at 64): '...without some firm basis for the suggestion that the delay might have affected the complainant's credibility, or some evidence pointing to actual prejudice to the accused, it is arguable that the balance has been tipped too far in these respects.'

¹²⁹ A further 20% were unsure whether children make up stories about abuse. The study did not specify the type of 'abuse': J Tucci, C Goddard and J Mitchell, *Tolerating Violence Against Children: Community Attitudes About Child Abuse in Australia*, September 2003, Australian Childhood Foundation (www.childhood.org.au), p 12. The survey was conducted by telephone with a 'representative sample' (different States, age brackets, gender, marital status etc) of adults across Australia. 15% of respondents were from New South Wales.

¹³⁰ For example, 24% of respondents believed that sexual intercourse between a 14 year old girl and an adult is not sexual abuse, or were unsure whether it is sexual abuse: *ibid*, p 11. This conduct would be a criminal offence in every Australian jurisdiction because the girl is below the age of consent.

An ongoing challenge for the law in its responses to child sexual assault is to balance competing principles, including: the protection of children; the right of accused persons to test allegations made against them; the punishment of convicted offenders; and the privacy of offenders who have served their sentences.