



THE LAW SOCIETY
OF NEW SOUTH WALES

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3 November 2016

Royal Commission into Institutional Responses to Child Sexual Abuse
Criminal Justice
GPO Box 5283
Sydney NSW 2001

By email: criminaljustice@childabuseroyalcommission.gov.au

Dear Sir/Madam,

**Royal Commission into Institutional Responses to Child Sexual Abuse Consultation
Paper on Criminal Justice**

The Law Society of New South Wales welcomes the opportunity to make a submission to the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) on the issues raised in the Consultation Paper on Criminal Justice (Consultation Paper).

Given the short timeframe in which to comment, and the breadth of issues raised in the Consultation Paper, the Law Society has focused its submission on chapters 2-5, 7-8, 10-13 and 15. The Law Society's submission is attached.

The Law Society's primary concern is that the law in relation to tendency and coincidence evidence and joint trials should not be reformed. The Law Society considers that any proposals to amend the Uniform Evidence Law (and joint trials) should be referred to the Australian Law Reform Commission for appropriate review, consultation and research. The Law Society urges caution with respect to reliance on the Jury Reasoning Study report to justify reform, for reasons we detail in the submission. The Law Society strongly recommends that the Royal Commission engage in significant peer review of what can be drawn from the Study to support any proposed changes.

Any questions may be directed to Rachel Geare, Senior Policy Lawyer, on (02) 9926 0310 or rachel.geare@lawsociety.com.au.

Yours sincerely,

Gary Ulman
President

Royal Commission into Institutional Responses to Child Sexual Abuse

Consultation Paper - Criminal Justice

Chapter 2. The importance of a criminal justice response

The criminal justice system is one of a number of avenues for redress for victims. The Law Society acknowledges that the criminal justice system can be important for victims and can assist them in addressing their trauma. In an area such as child sexual assault, it should be acknowledged that the criminal justice system can present as a blunt tool in addressing the varied issues. For this reason, a criminal justice system response alone may not always meet the needs of some victims, or be the appropriate vehicle for addressing those needs. It is therefore important that there are alternative avenues available to victims, such as redress in civil courts and the use of restorative justice (where appropriate).

Chapter 3. Issues in police responses

Costs

The Law Society supports the retention of the costs provisions contained in ss116 and 117 of the *Criminal Procedure Act 1986* (NSW).

Encouraging reporting – Aboriginal and Torres Strait Islander victims and survivors

The Law Society acknowledges the release of the Royal Commission's discussion paper: *Principles of trauma-informed approaches to child sexual abuse*, which examines the implementation of trauma-informed approaches to support survivors of trauma, including survivors of child sexual abuse. The Law Society is broadly supportive of the key principles of trauma-informed care, as outlined in the discussion paper, which include:

- having a sound understanding of the prevalence and nature of trauma arising from interpersonal violence and its impacts;
- ensuring practices and procedures promote the physical, psychological and emotional safety of consumers and survivors;
- adopting service cultures and practices which empower consumers in their recovery by emphasising autonomy, collaboration and strength-based approaches;
- recognising and being responsive to the social and cultural contexts which shape survivors' needs and healing pathways; and
- recognising the importance of relationships in overcoming trauma and supporting healing.

In particular, we draw the Royal Commission's attention to the Women's Legal Services (WLS) NSW submission to the Royal Commission dated 27 November 2015: *Advocacy and Support and Therapeutic Treatment Services*.¹ In particular, we support the WLS recommendation that services working with victims of child sexual abuse must respond to a range of needs, provide support over the long-term and be accessible for everyone when and where they need it, including Aboriginal and Torres Strait Islander people, Culturally and Linguistically Diverse (CALD) communities, people with disabilities, and people living in regional, rural and remote areas.

¹ Women's Legal Services NSW, *Advocacy and Support and Therapeutic Treatment Services*, 27 November 2016, <http://www.wlsnsw.org.au/wp-content/uploads/WLS-NSW-Submission-to-RC-Issues-Paper-10-Advocacy-and-Support-fa.pdf>.

We support the WLS submission's recommendation for the need for specialised and different counselling services for victims of domestic violence, sexual assault and child sexual abuse. In particular, this requires culturally appropriate frameworks for services working with Aboriginal and Torres Strait Islander victims and survivors.

The Law Society also acknowledges the importance of community programs that provide support to Indigenous women and children, such as those detailed in the WLS submission. Culturally appropriate and community-led initiatives and support services are incredibly important to sexual assault victims and survivors and we support greater funding for such services, particularly in rural and remote areas.

The Royal Commission Consultation Paper acknowledges the particular barriers that Indigenous victims and survivors may face in reporting institutional child sexual abuse to police, including mistrust of the police and the criminal justice system; fear of children being removed; kinship connections; pressure not to report; shame; remoteness; confidentiality; and other legal issues such as reluctance to deal with police due to past criminal records or interaction with law enforcement.²

The Law Society supports the recommendation that police and other services should take steps to develop good relationships with Indigenous communities, to ensure that Indigenous victims and survivors will not be reluctant to report child sexual abuse, including institutional child sexual abuse, when it arises.³

The Law Society is also supportive of existing NSW measures to address mistrust of law enforcement services in Indigenous communities, such as the employment of Indigenous liaison officers in police units in NSW; the involvement of Indigenous staff in decisions affecting Indigenous families made by the Joint Investigative Response Teams in NSW; and the employment of Indigenous witness assistance officers.⁴

Chapter 4. Police responses and institutions

Blind reporting

Blind reporting refers to the practice of reporting to police information about an allegation of child sexual abuse without giving the alleged victim's name or other identifying details.

Blind reporting is a significant issue and requires much thought and consideration. The Law Society considers that it should be referred to the Australian Law Reform Commission (ALRC) for detailed analysis and recommendation.

Chapter 5. Child sexual abuse offences

Age of consent

The Consultation Paper notes the discrepancy in the age of consent for sexual activity across Australian jurisdictions.⁵

² Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, 5 September 2016, 118-119.

³ *Ibid*, 119.

⁴ *Ibid*, 120.

⁵ Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, 5 September 2016, 206-207.

There have been several attempts to obtain uniformity in the age of consent. The Model Criminal Code does not specify an age of consent. However, the Officers Committee recommended a uniform age between jurisdictions, as well as uniformity within each jurisdiction for females and males and for same-sex contact.⁶ The Law Society suggests that the Royal Commission should consider whether it supports the Officers Committee's recommendation.

The Law Society suggests that there should also be uniformity in the age of consent, regardless of the type of sexual activity, noting that Queensland still has a higher age of consent (18 years) for anal sex.

Sexting

The Law Society notes that sexting has become more prevalent, especially amongst young people who use social media. However, where sexting involves children, those who participate may be committing child pornography offences, even where the sexting is consensual.

The Law Society considers that children aged under 16 years can be disadvantaged by the current law's treatment of consensual sexting. For example, currently under NSW legislation, consensual sexting between two children under 16 years of age is a criminal offence as the sexting images are categorised as "child abuse material".⁷ The consequence of this categorisation is that both the child who sends the image and the child who receives the image may be found guilty of a child abuse material offence and may consequently be classed as a registrable person for the purposes of the *Child Protection (Offenders Registration) Act 2000* (NSW) ("CPOR Act").

The Law Society would support an examination of alternative legislative approaches to deal with sexting where no exploitation is involved.

Similarly, two young people under 18 years of age engaged in consensual sexting may be captured by the Commonwealth child pornography offences.⁸ The Law Society acknowledges the Law Council of Australia's submission to the Senate inquiry into options for addressing the issue of sexting by minors, which notes that:⁹

The Law Council remains concerned that as long as the child pornography offences remain the only option for dealing with sexting, there is the possibility that young people may be convicted of these serious offences in circumstances where the behaviour may not be of an exploitative nature, which these offences are primarily aimed at addressing.

The Law Society similarly agrees that consideration should be given to amending Commonwealth legislation to distinguish between the different types of conduct, which are currently captured by the child pornography provisions, such as sexting, as opposed to behaviour that should rightly be categorised as child pornography.¹⁰

⁶ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code – Chapter 5: Sexual Offences against the Person: report*, May 1999, 123.

⁷ Sections 91H(2) and 91G, *Crimes Act 1900* (NSW).

⁸ Section 474.19(1) of the *Criminal Code Act 1995* (Cth) prescribes the offence of using a carriage service for child pornography material, which states that persons under 18 years of age cannot consent to sexualised images of themselves being taken, sent or received.

⁹ Law Council of Australia, Submission No 19 to the Senate Select Committee on Cyber-Safety, *Inquiry into Options for Addressing the Issue of Sexting by Minors*, 6 August 2013, 10.

¹⁰ *Ibid*, 11.

We note that Victoria recently amended the *Crimes Act 1958* (Vic) to insert s 70AAA, making it an exception to child pornography offences for a child under the age of 18 years to take, store or send images of a child not more than two years younger.

The Law Society notes that there is inconsistency across Australian jurisdictions with respect to the definition of a child for the purposes of child pornography offences.¹¹ The relevant ages and legislation are as follows:

Jurisdiction	Definition of a child	Legislation
NSW	Under 16	<i>Crimes Act 1900</i> (NSW), s 91FA
Vic	Under 18	<i>Crimes Act 1958</i> (Vic), s 67A
Qld	Under 16	<i>Criminal Code Act 1899</i> (Qld), s 207A
WA	Under 16	<i>Criminal Code Compilation Act 1913</i> (WA), s 217A
ACT	Under 18	<i>Crimes Act 1900</i> (ACT), ss 4, 64
NT	Under 18	<i>Criminal Code Act 1983</i> (NT), ss 1, 125A
Tas	Under 18	<i>Criminal Code Act 1924</i> (Tas), s 337C
SA	Under 17	<i>Criminal Law Consolidation Act 1935</i> (SA), s 62
Cth	Under 18	<i>Criminal Code Act 1995</i> (Cth), ss 474.1, 474.19(1)

The Law Society notes, in particular, that the discrepancy between the *Crimes Act 1900* (NSW) and the *Criminal Code Act* (Cth) creates confusion amongst 16 and 17-year-olds in NSW, who can legally engage in consensual sexting from the age of 16 years according to NSW law, but who would be committing an offence under Commonwealth legislation.

The Law Society submits that there should be consistency across Australian jurisdictions, and that the age of consent to sexual activity, including sexting, should be 16 years. We agree with the recommendations of the ALRC and the NSW Law Reform Commission (NSWLRC) that:

... the age of consent for sexual offences should be set at 16 years of age... the age of consent for sexual activity should be made uniform both within and across jurisdictions, and that no distinction be made based on gender, sexuality or any other factor.¹²

See also discussion below on 'similar-age consent defences'.

Commercial child pornography

The Law Society agrees that child prostitution should be prohibited, including for children who are above the age of consent (i.e. 16 years in NSW). We note that this would include the use of children under the age of 18 years for commercial child pornography. This would be consistent with article 3 of the International Labour Organisation *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*.¹³

The Law Society supports the treatment under NSW law of child prostitution. Currently, Part 3, Division 15 of the *Crimes Act 1900* (NSW) provides for offences involving child prostitution. For the purposes of child prostitution, s 91C defines a child as under the age of

¹¹ We note that legislation varies in its terminology, referring to "child pornography" (e.g. Cth, Vic), "child abuse material" (e.g. NSW) or "child exploitation material" (e.g. WA) offences.

¹² Australian Law Reform Commission, New South Wales Law Reform Commission, *Family Violence – A National Legal Response*, Final Report, ALRC Report 114, NSWLRC Report 128, October 2010, 1141 [25.49].

¹³ Opened for signature 17 June 1999, reprinted at (1999) 38 ILM 1207 (entered into force 19 November 2000).

18 years. The definition of child prostitution would be wide enough to encompass commercial child pornography. The penalties for child prostitution offences are similar to the penalties for child abuse material offences (ranging from 10 to 14 years).

Similar-age consent defences

The Law Society notes that, in some jurisdictions, the age of consent varies because of the availability of similar-age consent defences.

The various jurisdictions' provisions are summarised below.

Jurisdiction	Similar-age consent defence	Legislation
NSW	N/A	
Vic	The defence is applicable if the complainant is at least 12 years of age and the accused is not more than two years older.	<i>Crimes Act 1958 (Vic)</i> , s 45(4)
Qld	N/A	
WA	N/A	
ACT	The defence is applicable if the complainant is at least 10 years of age and the accused is not more than two years older.	<i>Crimes Act 1900 (ACT)</i> , s 55(3)
NT	N/A	
Tas	A child between 12 and 14 years of age can consent to sex with a person not more than three years older. A child between 15 and 16 years of age can consent to sex with a person not more than five years older.	<i>Criminal Code Act 1924 (Tas)</i> , s 124(3)
SA	A child under 17 years of age can consent to sex with a person who is at least 16 years of age.	<i>Criminal Law Consolidation Act 1935 (SA)</i> , s 49(4)
Cth	N/A	

The Model Criminal Code contains a similar-age defence, which specifies an age difference of two years.¹⁴

The Law Society submits that, taking into account the power imbalance which may occur due to a substantial age difference between an accused and a child, and the prevalence of peer-on-peer abuse within institutional settings, the Royal Commission should consider whether or not a similar-age consent defence should be available for sexual activity with a child in an institutional context.

The Law Society recommends that all jurisdictions should adopt a similar-age consent defence.

We suggest that a similar-age consent defence be available in the following circumstances involving a child who is under the age of consent:

- (i) where the intercourse is consensual; and
- (ii) where the difference in age between the offender and the victim is three years or less.

¹⁴ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code – Chapter 5: Sexual Offences against the Person: report*, May 1999, 148.

Position of authority offences

The Law Society notes that all jurisdictions have legislative provisions which limit the defence of consent when the alleged offender is in a position of authority or exercising care, supervision or authority over the child. All jurisdictions, except Queensland and Tasmania, have specific provisions relating to child sexual offences.¹⁵ Under these provisions, consent is vitiated – that is, the child under authority cannot provide consent to sexual activity. However, there are inconsistencies between the jurisdictions as to what constitutes being under authority. These inconsistencies have caused difficulties in the protection of children.¹⁶

The Law Society notes that there are also differences within jurisdictions. Depending on the jurisdiction and which offence is charged, consent could be negated by the *existence* of a relationship involving a position of authority; the *exercise* of the position of authority; or the *abuse* of the position of authority.¹⁷

The purpose of position of authority offences is to impose restraint upon the accused, not the victim.¹⁸ We consider that, while it may be professionally unethical for people in a position of authority to engage in sexual activity with a person under their authority, it is a much bigger step for that conduct to be made criminal where there is no abuse of their position.

The Law Society considers that there should be consistency across the jurisdictions. We recommend that negation of consent and aggravation should be via *abuse* of a position of authority, rather than the mere existence of a position of authority. We consider that the meaning of “abuse” of a position of authority should be determined by the courts.

The Law Society considers that an exhaustive list of positions of authority provides certainty, and is even more important if position of authority offences that only require proof of the existence of a position of authority are retained. We suggest that the list of “special care” relationships under s 73 of the *Crimes Act 1900* (NSW) should be adopted as a model for all jurisdictions, whether or not abuse is a required element of the offence.

The Law Society also submits that s 73(3)(c) of the *Crimes Act 1900* (NSW), which provides that a special care relationship exists where “the offender has an established personal relationship with the victim in connection with the provision of religious, sporting, musical or other instruction to the victim”, may be drafted too broadly. We consider that the phrase “in connection with” may mean that the special care relationship extends beyond the instructor to anyone who is “connected with” the provision of instruction. For example, a 17-year-old sports mentor or captain of the team who has consensual sex with a 17-year-old team mate may be committing an offence under s 73.

¹⁵ Section 73, *Crimes Act 1900* (NSW); s 49, *Crimes Act 1958* (Vic); s 322, *Criminal Code Compilation Act 1913* (WA); ss 55A and 61A, *Crimes Act 1900* (ACT); s 128, *Criminal Code Act 1983* (NT); s 57, *Criminal Law Consolidation Act 1935* (SA); s 272.10, *Criminal Code Act 1995* (Cth).

¹⁶ This is illustrated, for example, in the case of *Queensland College of Teachers v Morrow* [2011] QCAT 184.

¹⁷ The differences between these three categories are illustrated in the cases of *R v Howes* [2000] VSCA 159; *Lydgate (a pseudonym) v The Queen* [2014] VSCA 144, and *R v King* [2013] ACTCA 23. NSW provides for the negation of consent by the *abuse* of a position of authority, or by the *existence* of a position of authority (“special care offences”): see ss 61HA(6)(c), 73 and 77, *Crimes Act 1900* (NSW). Similarly, it provides for an aggravation of offences if there is *abuse* of authority or if the victim was *under the authority* of the offender: see ss 61J(2)(e) and 61M(3)(c), *Crimes Act 1900* (NSW); s 21A(2)(k), *Crimes (Sentencing Procedure) Act 1999* (NSW).

¹⁸ *R v Howes* [2000] VSCA 159.

The Law Society submits that consideration should be given to narrowing the definition of “special care” in s 73(3)(c) to properly capture a position of authority in those circumstances, or making a similar-age consent defence available for an offence under s 73.

Chapter 7. Issues in prosecution responses

Possible principles for prosecution responses

The Law Society understands that the Royal Commission proposes to formulate principles that focus on the way that the prosecution should respond to victims and survivors of institutional child sexual abuse - essentially a best practice model.

The principles are broadly:

- Training in child sexual assault issues
- Continuity in representation
- Regular communication
- Use of Witness Assistance Services
- Not prejudging complainants on credibility issues

The Law Society understands that the NSW ODPP already recognises all of the above as best practice, but understands that some aspects are not always achieved due to resourcing and court practices. For instance, continuity is very difficult to maintain because of delays in getting trials on, inflexible listing practices and turnover of ODPP staff.

Charging and plea decisions

Accepting that there will be decisions not to proceed and negotiated pleas, the Royal Commission is looking at ways of ameliorating any distress to victims from these types of decisions. The Law Society understands that the ODPP is required to make contact with the victim and provide ongoing information about the progress of the case pursuant to the ODPP Guidelines.

Victims’ right to review

The Law Society understands that the Royal Commission is considering a mechanism for a review of decisions if requested by the victim in a timely way so that the court process is not fragmented. This is modelled on what happens in England and Wales, a jurisdiction that we note has a number of distinguishing features (particularly size, and the seniority of the initial decision maker).

Necessarily, any review would need to occur before a decision was communicated to the defence or the court. Because of the time limitations, a review mechanism would need to be limited to certain types of cases and decisions. A review mechanism would not be practical in some instances, for example, for pleas negotiated on the eve of a trial. Rather, it would only be workable in circumstances where there is enough time and where the decision was not to prosecute at all, rather than accept a lesser offence. We understand that a review process may necessitate some restructuring for the ODPP, for instance it might be necessary to have an additional Deputy Director to enable the Director to be the final arbiter.

External auditing of decisions to ensure compliance with guidelines

The Law Society understands that from the ODPP perspective, the new *Government Sector Employment Act 2013* auditing requirements are preferable to the appointment of an Inspector, a Parliamentary oversight committee, or judicial review of decisions.

The Law Society considers that the other mechanisms have the potential to interfere with the independence of the ODPP and are therefore inappropriate. The Law Society is strongly of the view that:

Independence in prosecution decision making is of crucial importance in our legal systems in order to preserve the separation of powers, the just rule of law and, ultimately, our form of democracy.¹⁹

Chapter 8. Delays in prosecutions

Specialist Courts and Prosecutors

The creation of specialist courts and prosecutors to deal with child sexual abuse matters is not supported. It is not practical, efficient, equitable or desirable for a number of reasons, as discussed in the Consultation Paper. These are: the vicarious trauma and burnout issues for prosecutors and judges; the difficulties in attracting and retaining the best judges and prosecutors; the risk of creating a separate class of law (to the detriment of both child sex offence and general criminal cases); and that greater efficiencies might be achieved if all judges remained generalists.²⁰

The Law Society notes that the Victorian ODPP moved to a Specialist Sex Offence Unit in 2007 and has recently dismantled it for the reasons outlined above. The Law Society considers that the best approach is through training and accreditation to practice in this area.

Early allocation of prosecutors

The Law Society agrees that early allocation of the Crown prosecutors is best practice, but that this is a significant resource issue, particularly if the Courts will not take into account prosecutor availability in setting trial dates.

Chapter 10. Tendency and coincidence evidence and joint trials

The Law Society commends the proposals to support child complainants through, in particular, improved pre-trial support, reduced delays and improved police and prosecutor training. An improvement in the quality of initial interviews is particularly valuable.

The Law Society is strongly of the view that the law in relation to tendency and coincidence evidence and joint trials should not be reformed. The Law Society has had the benefit of reviewing the Law Council of Australia's submission on tendency and coincidence evidence and joint trials and fully endorses the Law Council's position. We support the position that any proposals to amend the Uniform Evidence Law (and joint trials) should be referred to the ALRC for appropriate review, consultation and research.

¹⁹ Nicholas Cowdery AM QC, *The Rule of Law and a Director of Public Prosecutions*, 2010 Rule of Law in Australia Conference, 6 November 2016, 7.

²⁰Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, 5 September 2016, 336.

The Law Society urges caution with respect to reliance on the Jury Reasoning Study (JRS) report²¹ to justify reform, particularly with respect to joinder of counts and the reduction or removal of barriers to admissibility for tendency and coincidence evidence. For reasons we detail below, we strongly recommend the Royal Commission engage in significant peer review to allow legal and psychology experts to evaluate the findings of the JRS. The Royal Commission should take into account the large body of research within cognitive psychology relating to unconsciously biased reasoning. The absence of consideration of this research in the JRS is one of a number of reasons which calls for a broader review of this area of law.

The Law Society supports implementation of reforms to address institutionally supported suppression of information, poor police education, practices and understanding and a prosecutorial environment that provided far less support for complainants pre-trial and trial than occurs now.

For example, delay has been a major issue in the cases studied by the Royal Commission. In addition to policing, prosecution and complainant support reforms, delay will become less of an issue through pre-recording of evidence and case management reform. The Law Society notes the recent reforms relating to pre-recording and witness intermediaries in NSW child sexual assault cases, as well as the effectiveness of the appointment of specialist Judges to the NSW District Court to hear child sexual assault matters. We submit that these reforms should be evaluated, before making major changes to the law of evidence.

The NSWLRC, in its 2012 report on jury directions expressed the view that:

Having regard to the current uncertainties and complexity of the law, and to the desirability of securing a harmonious approach, at least in relation to the uniform *Evidence Act* jurisdictions, we consider it more appropriate for the matter to be the subject of a separate review.²²

These findings are important as the NSWLRC has already recommended that review of the law in this area is more desirable than reform; and an improvement to directions through such a review process would likely have a positive effect with regard to supporting jurors' understanding of their task, and reduce impermissible reasoning.

Further, community education arising from the media attention of the Royal Commission is likely to have impacted already on prospective jurors' willingness to understand the complexities of a child sexual assault prosecution case. We consider that going forward, child sexual assault prosecutions, enhanced by Royal Commission procedural reforms, will be better equipped to appropriately support complainants, those interviewing them and those supporting them.

The Jury Reasoning Study report

The assertions made in the JRS report about a failure of justice because of failures in prosecutions raise questions about the utility of the JRS report referring to acquittals, convictions and the factual culpability of the defendant.²³ This is because with no ground truth²⁴ (because the mock trials are based on illustrative scripts) acquittals, convictions and

²¹ Professor Goodman-Delahunty, Professor Cossins and Ms Martschuk, *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*, May 2016.

²² *Ibid*, 185.

²³ *Ibid*, 206 et seq.

²⁴ Ground truth refers to a confirmed "true" guilt or innocence in a case. This known established verdict (which may not be without controversy) provides researchers with a measure to evaluate the integrity of juror responses compared to where there is no measure, in which case the presumption of innocence must be the sole concern. The JRS mock juries took place in an artificial environment that did not replicate the case studies. There was therefore no ground truth.

culpability are potentially misleading indicators of efficacy. Even when used to measure comparative difference (whether a direction is given, a question trail is adopted, joinder or tendency appear etc.), these measures show a trend, but not whether support or otherwise for the trend has integrity.

No doubt a significant matter is the finding in the JRS “that verdicts were not based on impermissible reasoning or unfair prejudice to the defendant. These outcomes suggest that any fears or perceptions that tendency evidence – whether presented in a separate trial or a joint trial – is unfairly prejudicial to the defendant are unfounded”.²⁵ However, as factual culpability is a measure considered in relation to the dangers of impermissible reasoning, the Law Society raises a concern that this measure may need further interrogation before reliance is placed on it.

Furthermore, the arguably narrow definitions of “impermissible reasoning”²⁶ and “unfairness to the defendant”,²⁷ which the study adopts, create further concern in relation to the validity of the strong conclusions made in relation to the implications for the criminal justice system. Impermissible reasoning and unfair prejudice are much wider concepts.

Simplicity of case study trials

The Law Society notes that in each of the trials used in the JRS, the transcripts are very short, and do not reflect the actual length (and complexity) of many jury trials.

The Law Society notes that in the “limitations of the study” at p268 the authors state:

“Although the experiment was designed to replicate as closely as possible the experience and tasks of actual juries, we cannot exclude the possibility that the results obtained from this abbreviated experience may differ from those obtained in a real trial. For example, compared to the time available for juries to absorb, consider and discuss the evidence in a real trial, the mock jurors in this study performed under conditions that may have increased their cognitive load and made them more vulnerable to heuristic reasoning, confusion and errors than would be likely in a real trial, where the presentation of the evidence and deliberation typically proceed at a slower pace. Moreover, in an actual trial, a jury would have the opportunity to seek further direction or clarification from the judge, whereas that opportunity was not available in this trial simulation”

The Law Society is concerned that inadequate attention is paid to the impact of the abbreviated nature of the mock trials in the comments relating to the limitations of the study (i.e. significantly shorter, less complex and less emotionally charged than an actual trial). Given the relative brevity and mock conditions of the trials, the statements that the mock trials may have led to increased cognitive load and vulnerability to errors of confusion require peer review. We also note that the JRS’s literature review omits reference to significant research

²⁵ Ibid, 37 and 271.

²⁶ “Impermissible reasoning: Reasoning that is logically unrelated to the evidence. In this study we assessed three types of impermissible reasoning: (a) inter-case conflation of the evidence; (b) accumulation prejudice; and (c) character prejudice”, JRS, 17.

²⁷ Unfair prejudice is defined as “a real risk that the jury will misuse the evidence in a way that is unfair to the defendant, leading to a miscarriage of justice”. We note at page 40, the JRS states: “We review the three major sources of potential unfair prejudice identified by courts and law reform agencies, and explain how these might manifest in jury decision making”. The basis of the analysis of “fairness” is also noted on page 238 of the JRS: “In this section, we present a series of analyses that assessed juries’ perceptions of the fairness of the trial, broken down by type of trial. These analyses are based on mock jurors’ post-trial responses to a range of questions about the fairness of the trial; their expectations that they would be informed of any prior offending by the defendant; and the threshold they applied in interpreting the standard ‘beyond reasonable doubt’.”

by Louise Ellison and Vanessa Munro,²⁸ which focuses on jury reasoning issues in mock trial scenarios.

In addition, there appears to be an absence of acknowledging the effect of "unconscious bias". Jury reasoning towards "factual culpability" is treated as an indicator of a good strategy and underpins the authors' conclusions on "impermissible reasoning". This seems to differ from "unconscious bias", which arguably is the basis for the laws' resistance to admitting evidence of uncharged criminal allegations or joining charges.

It is for these reasons that the Law Society encourages caution with respect to changes to the law of evidence that challenge an accused's protections. There is a need to be alert to unintended consequences. Guidance on the effects of impermissible reasoning and unconscious biases within a ground truth environment²⁹ would be particularly beneficial. Similarly, with respect to the operation of the presumption of innocence, we would encourage a study that could evaluate the impact of a defendant being from a particular category (e.g. priest) prominently featured in the Royal Commission.

Question Trails

We note the finding from the JRS that the use of question trails in the relationship evidence trial meant that 'the defendant was rated significantly less factually culpable'. However, the JRS indicates that the counts and the judges' instructions took over 'a significantly greater proportion of deliberation time' and 'the mock jurors perceived that they required less cognitive effort to evaluate the defence case'. These are encouraging signs and we urge the Royal Commission to explore further the benefits available through question trails, appropriately supported by judicial education. We understand that they have been used quite extensively in other jurisdictions, chiefly in New Zealand.³⁰ If they improve jurors' ability to apply the presumption of innocence and reduce jurors' cognitive effort, they will be an asset.³¹

However, we consider that any peer review should also address the implications of the finding that 'mock juries reported significantly more difficulty in understanding the charges in a joint trial when given a question trail than when they deliberated without one'; and that '[m]ock jurors who deliberated with the assistance of a question trail reported requiring significantly more cognitive effort to understand the charges than those jurors who deliberated without a question trail'.³² Question trails direct jurors to apply the prosecution's burden of proof to elements of the offence and focus on appropriate reasoning limitations. Self-reported indicators of increased cognitive effort by jurors given question trails raises a question as to whether there is an unidentified problem in the mock trials, given that normally we would

²⁸ Ellison L, Munro VE, *Telling tales: exploring narratives of life and law within the (mock) jury room*, *Legal Studies*, 35.2, 2015, 201-225; Ellison LE, Munro VE, *A 'Special' Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials*, *Social Legal Studies*, 23.1, 2014, 3-29; Ellison LE, Munro VE, *Better the Devil You Know? 'Real Rape' Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations*, *The International Journal of Evidence & Proof*, 17.4, 2013, 299-322; Ellison LE, Munro V, *A Stranger in the Bushes, or An Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study*, *New Criminal Law Review*, 13.4, 2010, 781-801; Ellison LE, Munro, V, *Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials*, *British Journal of Criminology*, 49.3, 2009, 363-383.

²⁹ See above, n24.

³⁰ Question trails are regarded as "contemporary best practice" in criminal trials, *Singh v R* [2014] NZCA 306 at [1].

³¹ The Law Society notes the NSWLRC support for question trails in Report 136, *Jury Directions*, 2012, at page 151 'In summary, we support the use of integrated directions and written question trails, so long as certain safeguards are respected'.

³² Professor Goodman-Delahunty, Professor Cossins and Ms Martschuk, *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*, May 2016, 222, 230, see also Table 19.

expect that the use of question trails would improve understanding by jurors. We consider that a response to this from a peer review would be valuable.

Approaches in the UK and Western Australia

With reference to the discussion regarding the approaches in the UK and in Western Australia, these differ from the applications under the uniform evidence legislation (especially in NSW), but that does not mean that they are valid; rather, they are different. Further, if these jurisdictions' changes are not soundly based, there is more need for caution. Translating them into a national standard needs to be evidence-based, not intuitive. The Law Society notes that the Consultation Paper refers to the absence of miscarriages of justice in jurisdictions that have reduced defendants' protections from unfair prejudice. However, the absence of known miscarriages of justice is an imperfect measure of whether the rules of evidence are working or failing. The Law Society would suggest that the examples of failed justice uncovered by the Royal Commission is not in itself an indicator that the rules of evidence are failing.

Finally, with any proposed reduction of evidentiary burdens on the prosecution, the Law Society urges consideration of contexts in which other evidentiary protections may become contaminated. For example, a child sexual assault case could in certain circumstances give rise to stranger identification evidence issues, which are strongly implicated in miscarriages of justice. Care needs to be taken to not undermine the important identification protections by introducing a new variable associated with subconscious bias. The JRS is a study of reasoning, not of unconscious bias.

Conclusion

In sum, the Law Society welcomes the procedural changes to support complainants at the investigative and pre-trial stages, and improvements to the gathering of evidence.

However, the Law Society does not support the changes suggested at pages 44 and 45 of the Consultation Paper that refer to:

- reducing or removing admissibility requirements beyond relevance in the context of tendency evidence, coincidence evidence, or prior convictions more generally;
- changing the weighing of probative value against prejudicial effect of evidence to lighten admissibility standards;
- changing the prosecution burden for persuading the court to admit tendency evidence, coincidence evidence, or prior convictions to lighten those standards.

This is a major reform that requires ALRC and strong peer reviewed evidence to support it.

The Law Society strongly urges a peer reviewed interdisciplinary report from legal and psychology experts who are disassociated from the researchers within or related to the Royal Commission to address:

- The strengths and limitations of the JRS' design, especially in terms of a ground truth basis;
- The strength and limitations of the JRS' assumptions;
- The strength and limitations of the conclusions, but also addressing specific questions, including:
 - the relationship of factual culpability to conclusions recommending, or founding recommendations for procedural or evidentiary change;
 - the relationship of unconscious bias to impermissible reasoning, and the extent to which the conclusions of the JRS acknowledge and address this;

- the extent to which jurors' expressed assumptions or views may impact on their unconscious thoughts and impact on their deliberations and verdict;
- whether the findings could be applicable to a trial in which the defendant did not give evidence, and
- whether the conclusions would be valid in relation to trials where the plausibility of the defendant varied from that of the mock study.

Chapter 11. Judicial directions and informing juries

Jury directions have been recognised as complex in this area. The NSWLRC, in its 2012 report on jury directions, noted that:

The courts have recognised, in sexual assault cases, that the persuasive effect of evidence of other acts gives rise to a risk of the misuse of that evidence. In *ES v R (No1)*, while the court noted the theoretical distinction between its use as motive evidence and as tendency evidence, it held it was impractical to maintain that distinction.³³

And, further that:

The fact that evidence of "other acts" can potentially serve different purposes contributes to the complexity that arises in this area, both in relation to its admissibility, and in relation to the directions and warnings that are required.³⁴

The Law Society considers that, given the complexity of jury directions in this area, these questions should be referred to the ALRC for a full review. The Law Society notes the importance of an interdisciplinary approach, including involvement from both legal and psychology experts to resolve these issues.

Chapter 12. Sentencing

Good character

The Law Society notes that in NSW, s 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* excludes good character as a mitigating factor in sentencing for child sexual abuse offences as follows:

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

The Law Society does not support provision being made for good character to be an aggravating factor, where good character facilitated the offending. In NSW, this situation would likely be captured by existing aggravating features such as abuse of a position of trust or authority in relation to the victim (s 21A(2)(k) and any special vulnerability of the victim (s 21A(2)(l)).

For a factor to be treated as aggravating, it needs to be more than the ordinary run of cases; it is not enough to be simply present. Research reflected in the Consultation Paper indicated that in over half of the cases the offender had no prior record.³⁵ We submit that it would be

³³ NSW Law Reform Commission, Report 136, *Jury Directions*, 2012, 182.

³⁴ *Ibid*, 183.

³⁵ Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, 5 September 2016, 491.

anomalous to make a feature of nearly half the cases an aggravating feature. There is also the possibility of a counterintuitive result, involving (in theory) two offenders, one who is otherwise of good character and another not of good character. Both could be charged with identical offences in identical circumstances but it is only the offender who is otherwise of good character who has their offence treated as having an aggravating factor.

In the event that a 'good character' aggravating feature is recommended, the Law Society submits that where good character is present in a case, the offender should only be deprived of that benefit where that good character *was of assistance to them in offending*.

Cumulative sentencing for child sexual abuse offences

The Consultation Paper queries whether there should be a presumption in favour of cumulative sentencing for child sexual abuse offences. The Law Society does not support mandatory or presumptive provisions, especially in sentencing, where to reduce discretion can result in unjust outcomes. It is important to maintain the sentencing judge's discretion to allow the Court to respond to the infinitely variable individual cases that come before the Court, to allow sentences to be imposed that are appropriate to each individual case.

Sentencing in accordance with the sentencing standards at the time of sentencing or at the time of the offending

In NSW, the sentencing court imposes a sentence commensurate with the maximum sentence and applicable standards at the time of offending.³⁶ The Law Society supports this approach.

Departing from the historical standards approach breaches the principle against retrospectivity. It raises a degree of unfairness to the accused in the sense that they may be deprived of consideration of historical community standards that could operate to reduce the seriousness of their offending.

Chapter 13. Appeals

The Law Society considers that reform to appeals will not specifically address concerns in relation to child sexual assault. Reform is required in NSW to simplify and improve appeals; however these have been examined by the NSWLRC. The Law Society does not make any additional submission on appeals in the context of the Royal Commission's inquiry.

Chapter 15. Juvenile offenders

Introduction

The Law Society notes that child-to-child abuse has been identified by the Royal Commission as an issue that needs to be addressed.³⁷ Although Case Study 30 dealt with historical child abuse, we note that child-on-child abuse remains a contemporary issue. Child-to-child abuse can occur in a variety of institutions, most notably out-of-home care, juvenile detention centres, and schools (including boarding schools).

The Royal Commission's Interim Report noted a range of complex factors influencing whether a child shows abusive behaviours, including whether they experienced abuse.

³⁶ *R v MJR* (2002) NSWCCA 129; *MPB v R* [2013] NSWCCA 213 – the majority confirms the *R v Shore* (1992) 66 A Crim R 37 line of authority preferred in *R v MJR*.

³⁷ See interim report and Case Study 30.

The Law Society suggests that other factors that could contribute to child-to-child abuse include:

- Puberty;
- Sexual experimentation;
- Increasing sexualisation of children,³⁸ including children's increased access to sexual material that may not be child-appropriate, via, amongst other things, the media, social media, pornography; and
- Prevalence of sexting.

The Law Society notes that across all jurisdictions there has been increased legislation dealing with sexual offences. We note that this legislation sometimes does not take into account its application to juvenile offenders.

The Consultation Paper suggests that institutions may downplay child-to-child abuse.³⁹ The Law Society notes, however, that institutions are less likely to downplay child-to-child abuse, as opposed to familial abuse, due to mandatory reporting requirements.

The Law Society submits that, whether or not child-to-child abuse is "downplayed" or dealt with by institutions within the criminal justice system, child-to-child abuse requires a different approach from adult-to-child abuse. This approach must take into account the needs of both children (i.e. the accused and the complainant). We consider that extra guidance is needed across the full spectrum of the criminal justice system, from investigation through to sentencing and beyond.

The Consultation Paper notes that "[a]part from the issue of treatment, the criminal justice system's response to child-to-child sexual abuse has not been raised with us as a significant issue".⁴⁰ The Law Society considers that the Royal Commission may not have had the opportunity to speak with *contemporary child offenders*. This may be due to the privacy or confidentiality concerns of child defendants/offenders, or because they may not have worked in institutions.

The Law Society submits that there are issues regarding child-to-child abuse that require examination, and that the Legal Aid Children's Legal Service and members of the Law Society of NSW Juvenile Justice Committee, who represent these children, are best placed to inform the Royal Commission about these matters.

Age of criminal responsibility

The Law Society does not support the current minimum age of criminal responsibility of 10 years old in all Australian jurisdictions. Research into brain development is inconsistent with a minimum age of criminal responsibility of 10 years old. We consider that a primary school-aged child may not have the capacity to form the necessary intent.

We submit that the minimum age of criminal responsibility of 10 years old is inconsistent with child rights principles. The UN Committee on the Rights of the Child in its General Comment No 10 stated that:

³⁸ See the NSW Parliament Joint Committee on Children and Young People, *Inquiry into the sexualisation of children and young people*.

³⁹ Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, 5 September 2016, 547.

⁴⁰ *Ibid*, 548.

32. Rule 4 of the Beijing Rules recommends that the beginning of MACR shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity. In line with this rule the Committee has recommended States parties not to set a MACR at a too low level and to increase the existing low MACR to an internationally acceptable level. From these recommendations, it can be concluded that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable. States parties are encouraged to increase their lower MACR to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level.⁴¹

Consistent with international human rights principles, the Law Society recommends that the minimum age of criminal responsibility should be 13 years old, and that consideration should be given to continuing to increase this minimum age to a higher age level.

The Law Society notes that there is a long-established tradition of *doli incapax*, which is in keeping with empirical evidence about the social and neurological development of children. The Law Society notes that the role of *doli incapax* is particularly important for child sexual offences, especially where the child has not had the opportunity to engage in appropriate sexual education.

Police investigations

The Law Society notes the discussion in the Consultation Paper about the provision of information by the police to third parties, including schools, in relation to children who are alleged to have committed offences.⁴²

The Law Society notes the NSW Standard Operating Procedure regarding employment-related disclosure. However, we note that it does not provide guidance on how to deal with privacy matters and disclosure of information in relation to juvenile offenders.

The Law Society considers that special consideration must be given to juvenile offenders to ensure their privacy is respected. We note that s 15A of the *Children (Criminal Proceedings) Act 1987* (NSW) (CCPA) prohibits publication or broadcast where it might lead to the identification of a child who has been charged. We also note that children in conflict with the law, including those who are alleged as having committed an offence, must have their privacy fully respected at all stages of the proceedings, in accordance with article 40(2)(b)(vii) of the United Nations *Convention on the Rights of the Child* (CRC).⁴³ We submit that those children who have not been charged deserve even greater protection.

Jurisdiction and court structure

The Law Society notes that, in many jurisdictions, the Children's Court has exclusive jurisdiction to deal with children accused of committing sexual offences. Some jurisdictions allow for judicial discretion as to whether the matter is dealt with by a higher court.

The Law Society notes that NSW is the most permissive jurisdiction in allowing higher courts to deal with children accused of committing sexual offences. Many sexual offences are

⁴¹ Committee on the Rights of the Child, *General Comment No 10 (2007): Children's Rights in Juvenile Justice*, 44th sess, UN Doc CRC/C/GC/10, 25 April 2007, para 32.

⁴² Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, 5 September 2016, 554.

⁴³ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

“serious children’s indictable offences” and must “be dealt with according to law”.⁴⁴ Magistrates can also send indictable matters to higher courts under s 31 of the CCPA.

Generally, we consider that children and young people should be treated differently to adults. The UN Committee on the Rights of the Child in its General Comment No 10 stated the following:

Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require different treatment for children. The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.⁴⁵

The UN Committee on the Rights of the Child stated that the special rules of juvenile justice – in terms of both special procedural rules and of rules for diversion and special measures – should apply, starting at the minimum age of criminal responsibility set in the country, for all children who, at the time of their alleged commission of an offence, have not yet reached the age of 18 years.⁴⁶

Accordingly, the Law Society recommends that, consistent with international human rights standards, children accused of committing sexual offences who are over the minimum age of criminal responsibility should be dealt with under the juvenile justice system – that is, by the Children’s Court or under the *Young Offenders Act 1997* (YOA) in NSW (as appropriate) – rather than under an adult system.

If this recommendation is not accepted, the Law Society would support allowing for judicial discretion as to whether a matter is dealt with by a higher court, which is consistent with the approach in other jurisdictions.

Alternatives to prosecution

The Law Society is concerned that, in NSW, almost all sexual offences are excluded from the YOA.⁴⁷ We note that there is a wide range of sexual offences that are capable of being committed, and that other jurisdictions provide more opportunities for young offenders to be diverted for sexual offences.⁴⁸ We also note that there are some sexual offences that are eligible to be dealt with under the YOA, but the police have been inconsistent about whether to divert.

⁴⁴ Section 17, *Children (Criminal Proceedings) Act 1987*.

⁴⁵ Committee on the Rights of the Child, *General Comment No 10 (2007): Children’s Rights in Juvenile Justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) para 10; see also Kelly Richards, *What makes juvenile offenders different from adult offenders?*, Trends and Issues in Crime and Criminal Justice, February 2011, No 409, 1..

⁴⁶ Committee on the Rights of the Child, *General Comment No 10 (2007): Children’s Rights in Juvenile Justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007), paras 36-37.

⁴⁷ Section 8, *Young Offenders Act 1997* (NSW).

⁴⁸ For example, in South Australia, sexual offences committed by children can be dealt with by youth conferences. Research by Professor Kathleen Daly into youth conferences in South Australia indicated that the children who benefited most from this approach were those who participated in a conference and, as part of the agreement made at the conference, attended a specialist centre dealing with children who have committed sexual offences: Kathleen Daly, *Restorative Justice and Sexual Assault* (2006) 46 Brit J Criminol, 334.

For example, an offence under s 66C (Sexual intercourse—child between 10 and 16) of the *Crimes Act 1900* (NSW) is not eligible to be dealt with under the YOA. This means that consensual sex between 15 year olds cannot be dealt with through a caution or conference.

The Law Society considers that appropriate sexual offences should be capable of being dealt with under the YOA, and not automatically excluded.

Custodial sentencing options

The Law Society notes that there are fewer sentencing options available for children than for adults. We note that a child who turns 18 and is dealt with according to law can access home detention or intensive corrective orders (ICOs) whereas a child who is dealt with in the Children's Court cannot.

The Law Society submits that children should have access to the same sentencing options available to them as adults, and that consideration should be given to exploring further options that are relevant and appropriate to children. We consider that orders that take into account the child's age, individual circumstances and the offence, and that focus on rehabilitation rather than punishment, should be available to judicial officers responsible for sentencing children in NSW. We consider that child-appropriate counselling, treatment and support should be attached to any ICO imposed on a child.

Adult detention

The Law Society notes that, in NSW, children sentenced according to law for serious children's indictable offences, or for other indictable offences dealt with in higher courts, can be sentenced to imprisonment. The sentencing court may make an order under s 19 of the CCPA directing that the whole or any part of the term of the sentence of imprisonment be served as a juvenile offender.⁴⁹ However, for serious children's indictable offences, the court must be satisfied that there are special circumstances justifying detention of the person as a juvenile offender,⁵⁰ and the person's youth alone is not a special circumstance.⁵¹ Despite any s 19 order, Juvenile Justice NSW can also still administratively transfer a juvenile offender to an adult prison.⁵²

The Law Society notes that inmates who serve sentences in adult prison for child sexual offences are often at risk and put in protection. We submit that there is increased vulnerability for juvenile offenders in prison for child sexual offences.

The Law Society notes that children, by virtue of their unique vulnerability, are entitled to special protections in international law, requiring that the deprivation of liberty of a child be used only as a last resort and for the "shortest appropriate period of time" or "minimum necessary period",⁵³ and be limited to exceptional cases.⁵⁴

The Law Society recommends that, consistent with international human rights standards, children should not be subject to adult sentences, including detention in an adult prison. We submit that if custody is warranted as a last resort, a child should be held in a juvenile justice centre, and not an adult prison.

⁴⁹ Section 19(1), *Children (Criminal Proceedings) Act 1987* (NSW).

⁵⁰ *Ibid*, s 19(3).

⁵¹ *Ibid*, s 19(4A).

⁵² Section 28, *Children (Detention Centres) Act 1987* (NSW).

⁵³ See article 37(b), CRC; UN Rules for the Protection of Juveniles Deprived of their Liberty ("Havana Rules") (rule 2); Children's Legal Centre and UNICEF, *Administrative detention of children: A global report*, February 2011, 23.

⁵⁴ Rule 2, Havana Rules.

If this recommendation is not accepted, the Law Society recommends that s 19 of the CCPA should be reformed to reverse the presumption, such that the court must be satisfied that there are special circumstances justifying detention of the child as an *adult* offender, and that the child's youth, age and other individual circumstances should be taken into consideration. We submit that s 28 of the CCPA should be reformed so that an administrative transfer of a juvenile offender to an adult prison is not permitted.

Child sex offender registries

The Law Society notes that the consequences of a person committing a child sexual offence under both NSW and Commonwealth legislation is that the person may be subject to registration under the *Child Protection (Offenders Registration) Act 2000* (NSW) (CPOR Act).⁵⁵ Section 3A(2)(c) of the CPOR Act provides an exception for child offenders to not be registrable if they have committed a certain type of offence. This includes non-consensual sexual offences (e.g. a single offence of possession of child abuse material, or a single offence involving an act of indecency). Some other jurisdictions have similar lists of exceptions for juvenile offenders.

The Law Society maintains that children should not be included on the Child Protection Register.⁵⁶ In particular, we maintain that consensual sexual activity between adolescents should not be made registrable.⁵⁷

The Law Society submits that the Child Protection Register was set up ostensibly to track paedophiles, and this purpose is not served by including children. We submit that children and young people should be treated differently to adults, taking into account their lower level of intellectual and emotional maturity. We note that offences committed by children against children often arise from schoolyard fights or sexual activity between children who are of similar ages. These are very different to situations where an adult abuses a vulnerable child. We consider that the reporting requirements for juvenile offenders who are placed on the Child Protection Register are, in effect, more onerous than for adult offenders.

For example, a juvenile offender would need to report all children whom they have contact with, which would include all their friends and peers.⁵⁸ We consider that children are less likely to have the skills or the ability to comply with reporting requirements regarding changes of personal information. The life-long effects of being on the Register are in conflict with obligations under the CRC.

In the 2013 statutory review of the CPOR Act, the Law Society recommended that consideration be given to excluding consensual sex between children or young persons as a registrable offence, subject to the following circumstances:

- (i) where the intercourse is consensual; and
- (ii) where the offender is under the age of 20; and
- (iii) where the difference in age between the offender and the victim is three years or less.

⁵⁵ Section 3A, *Child Protection (Offenders Registration) Act 2000* (NSW).

⁵⁶ Law Society of NSW, Submission to the Law Council of Australia, *Royal Commission into Institutional Responses to Child Sexual Abuse Issues Paper 1: Working With Children Check*, 20 July 2013; Law Society of NSW, Submission to the Attorney General and Minister for Justice, *The impact of the Child Protection Register and the Working with Children Check on juvenile offenders*, 14 May 2012.

⁵⁷ Law Society of NSW, Submission to the Ministry for Police and Emergency Services, *Statutory Review of the Child Protection (Offenders Registration) Act 2000*, 29 August 2013; Law Society of NSW, Submission to the NSW Parliament Joint Committee on Children and Young People, *Inquiry into the sexualisation of children and young people*, 15 July 2016.

⁵⁸ Section 9(1A), *Child Protection (Offenders Registration) Act 2000* (NSW).

On the matter of sexting, the Law Society's submission to the statutory review of the CPOR Act suggested that consideration should be given to excluding from the definition of "registrable offence" offences contrary to s 91H of the *Crimes Act 1900* (NSW) where the offender is under the age of 20 and the victim appears to be, or is no more than three years younger than the offender, and the image was taken with the consent of the person depicted in it.

The Law Society notes that the sentencing court would retain the discretion to make a Child Protection Registration Order on a case-by-case basis (similar to its power to make an offender prohibition order – see 'Working with Children Check schemes' below). Factors that a sentencing court might consider when exercising discretion could include whether the victim was aged 16 or over, or if the offender and victim were of a similar age.

The Law Society recommends an amendment to the CPOR Act to exempt child offenders altogether from the Child Protection Register, but allowing a sentencing court to exercise discretion and make a registration order. If this recommendation is not accepted, we would support an expansion of the list of exceptions outlined under s 3A of the CPOR Act.

Working with Children Check schemes

The Law Society submits that NSW should amend its Working with Children Check ("WWCC") laws to include a standard definition of criminal history, in accordance with recommendation 17 of the Royal Commission's *Working with Children Checks Report* ("WWCC Report").⁵⁹ However, we are concerned with the inclusion of charges, regardless of status or outcome, including charges that were withdrawn, set aside or dismissed, and charges that led to acquittals or convictions that were quashed or otherwise overturned on appeal. We submit that more delineation between adults and children applying for a WWCC is needed.

Rehabilitation is a paramount consideration in the sentencing of child offenders. A criminal record impedes children's prospects of rehabilitation by limiting employment.

In recognition of this, several legislative provisions allow a court to deal with a child offender without conviction:

- 1) Section 14 of the CCPA provides for no conviction to be recorded against a child under the age of 14 years and the court's discretion to record a conviction;
- 2) Section 33(1)(a) of the CCPA is a sentencing option that allows the court to sentence the child offender to a caution or a bond without conviction. It is the children's equivalent of s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).
- 3) The YOA also allows for matters to be diverted, and children dealt with, without conviction. The YOA allows for cautions and conferences where children "admit" the offence, without necessarily a finding of guilt. The Act allows for referrals to cautions and conferences by the police or the court. Section 68 provides for non-disclosure of YOA outcomes.

In addition to the above, the *Criminal Records Act 1991* (NSW) provides for convictions to be spent, with specific provisions relating to children.⁶⁰

The *Child Protection (Working with Children) Act 2012* (NSW) does not define criminal history, however s 5 and Schedules 1 and 2 of the Act provide guidance about what records

⁵⁹ Royal Commission into Institutional Responses to Child Sexual Abuse, *Working with Children Checks Report*, 2015, 10.

⁶⁰ See, e.g., s 10, *Criminal Records Act 1991* (NSW).

are checked. We note that only records in relation to certain offences trigger an assessment or disqualification.

We note that the Act is silent about whether juvenile records are checked and, specifically, whether the abovementioned outcomes are checked. We note with concern that all other states and territories' WWCC laws are similarly silent about juvenile records. This fact was also noted by the Royal Commission.⁶¹

The Law Society suggests that the Royal Commission give further consideration to whether and what type of juvenile records should be subject to a WWCC, noting the need to balance the protection of children with the rehabilitation of child offenders/defendants. We maintain that if juvenile records are included, it is important to include all information about the circumstances of juvenile convictions to assist decision-makers in according the appropriate weight to the information available.⁶²

We note that recommendation 17 of the WWCC Report suggests that records that are checked should include juvenile records, but does not specify whether the abovementioned non-conviction outcomes would be subject to the checks.⁶³ Recommendation 17 also recommends that charges be taken into account, but is silent about police referrals under the YOA (i.e. where a child is diverted and not charged). There would be some unfairness if a child who is charged and dealt with via the YOA by the court is subject to a WWCC for the matter (simply because the child was charged), as opposed to a child who is dealt with under the YOA directly by the police.

We note that recommendation 20(b)⁶⁴ of the WWCC Report lists categories of offences for adult offenders which result in an automatic WWCC refusal. These include child pornography-related offences and indecent or sexual assault of children. Recommendation 20(c)⁶⁵ notes that all other relevant criminal information should trigger a WWCC risk assessment. Recommendation 21⁶⁶ provides that state and territory governments should amend their WWCC laws to specify that relevant criminal records for the purposes of recommendation 20(c) include juvenile records and/or non-conviction charges for the offences listed in recommendation 20(b).

While recommendation 21 of the WWCC Report states that relevant criminal records are not limited to those listed within the recommendation, it is not clear whether it is envisaged that relevant criminal records include juvenile records and non-conviction charges beyond the offences specified in recommendation 20(b). For example, a charge under s 66C of the *Crimes Act 1900* (NSW) (sexual intercourse with a child under 16) is not a sexual assault against a child and therefore not an offence listed in recommendation 20(b). It is not clear whether this would be included as relevant criminal information envisaged by recommendation 21.

The Law Society suggests that the Royal Commission should give further consideration and clarity regarding its recommendations in relation to juvenile records and non-conviction charges.

⁶¹ At footnote 142 of the Royal Commission's *Working with Children Checks Report*, the Royal Commission noted that "[w]hile no state or territory WWCC laws exclude juvenile records from being checked, these types of records are not expressly included in all jurisdictions' statutory definitions of criminal history".

⁶² Law Society of NSW, Submission to the Law Council of Australia, *Royal Commission into Institutional Responses to Child Sexual Abuse Issues Paper 1: Working With Children Check*, 20 July 2013.

⁶³ Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Working with Children Checks Report*, 2015, 10.

⁶⁴ *Ibid.*, 11.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

Furthermore, as noted above in relation to offender registers, we suggest that exceptions be made for juvenile offenders who engage in “consensual” sexual offending (e.g. s 66C of the *Crimes Act 1900* (NSW); see also discussion above on ‘sexting’).

Finally, recommendation 29⁶⁷ of the WWCC Report relates to appeals against adverse WWCC decisions. It recommends an exception to appeals for persons who have been convicted of certain categories of offences, and:

- a) received a sentence of full-time custody (such persons being permanently excluded from an appeal); or
- b) by virtue of the conviction, is subject to an order that imposes any control on the person’s conduct or movement, or excludes them from working with children (such persons being excluded from an appeal for the duration of that order).

We note that the category of offences listed in recommendation 29 is similar to the category of offences listed in recommendation 20(b). We note that recommendation 20(b) only relates to adult offenders. Therefore, it is unclear whether recommendation 29 relates to juvenile offenders as well.

It is also unclear, for the purposes of recommendation 29, whether a person is “convicted” of the offence if the court did not record a conviction (e.g. pursuant to s 14 of the CCPA). It is also unclear whether a suspended sentence (e.g. s 33(1B) of the CCPA) is a full-time custodial sentence for the purposes of recommendation 29(a).

Furthermore, for many of the offences listed in recommendation 29, an offender may be placed on the Child Protection Register. No specific “order” is required to be placed on the Register. The offender is on the register for life, but there are specific durations for reporting requirements. The reporting requirements impose “control over their conduct or movement” (e.g. a person is required to report before undertaking certain travel interstate or overseas).

We seek clarification of whether the placement on the Register would satisfy the requirement in recommendation 29(b). If so, we also seek clarification of the duration that the person is excluded from an appeal (whether it is the duration of reporting requirements or for life).

We note that there is a power to make a child protection offender prohibition order under the *Child Protection (Offender Prohibition Orders) Act 2004* (NSW). We suggest that recommendation 29(b) should relate to these orders and not encompass the placement of an offender on the Child Protection Register.

Unspent convictions

The Law Society notes that s 7 of the *Criminal Records Act 1991* (NSW) (“CRA”) lists several prescribed sexual offences for which convictions are not capable of becoming spent in accordance with the Act. Despite no conviction being recorded for a person under 16 and court discretion to not record a conviction for persons aged 16 or over,⁶⁸ s 7 of the CRA still operates such that convictions for these offences are not capable of becoming spent.

The Law Society is concerned that unspent convictions for juvenile offenders have far-reaching, adverse impacts for life, including with respect to insurance, accommodation, credit, jobs, volunteer work, and visas. We submit that this is inconsistent with the principle of rehabilitation of juvenile offenders.

⁶⁷ Ibid, 13-14.

⁶⁸ Section 14, *Children (Criminal Proceedings) Act 1987* (NSW).

We also note that the NSW Standing Committee on Law and Justice examined the issue of spent convictions for juvenile offenders in an inquiry in 2010.⁶⁹ While the NSW Government's response indicated in-principle support for the Committee's recommendation that sexual offences committed by juveniles should be able to become spent in certain circumstances, the response noted that the Government had not yet determined its preferred mechanism by which those offences should become spent. The Government response further noted that it would give further consideration to the recommendations contained in the Report, and where appropriate, will undertake further consultation with relevant agencies, before determining its final position on the recommendations.

⁶⁹ Standing Committee on Law and Justice, NSW Legislative Council, *Spent Convictions for Juvenile Offenders* (2010).