THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: PWrg1401293

5 October 2017

Mr Andrew Cappie-Wood
Secretary
Department of Justice
GPO Box 6
SYDNEY NSW 2001

By email: Julia.Dewhurst@justice.nsw.gov.au

Dear Mr Cappie-Wood,

Strengthening child sexual abuse laws in NSW

The Law Society welcomes the opportunity to make a submission to the Department of Justice on the issues raised in the discussion paper *Strengthening child sexual abuse laws in NSW*.

We note that the discussion paper covers the legislative recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission), in its Criminal Justice Report, as well as issues that have arisen out of the Child Sexual Offences Review being conducted by the Department of Justice. Our responses to the issues raised are contained in the attached submission.

We look forward to participating in the Department's upcoming roundtables to discuss the topics covered in the discussion paper in further detail.

Thank you for considering this submission. The contact person for this matter is Ms Rachel Geare, Senior Policy Lawyer, who can be contacted on 9926 0310 or at rachel.geare@lawsociety.com.au.

Yours sincerely,

Pauline Wright
President

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1. **Should the legislative framework for child sexual abuse offences be consolidated and simplified? If yes, what is the best option for reform?**

   The Law Society supports changing the structure of the child sexual assault legislation by creating separate divisions of offences, one dealing with offences against adults, and a separate division for sexual abuse offences against children. However, we do recognise the arguments in favour of retaining the age categories as noted below.

2. **Should the number of age categories be reduced? If yes, what age categories should be used?**

   We do not support reducing the number of age categories, as it would limit the use of existing sentencing case law, and, inevitably, increase maximum penalties. While acknowledging the arbitrariness of any categorisation based on strict age alone, we consider the current age categories appropriately reflect relative stages of maturity and vulnerability of complainants, and should therefore be retained.

3. **Should any new offences be created?**

   We have no objection to the creation of a targeted failure to report offence based on the Victorian model (see Question 23).

4. **Should any offences be repealed?**

   We do not support the consolidation or repeal of offences. The existing categories of offences allow for the charge to more accurately reflect the criminality of the conduct and allows for greater charge negotiation.

5. **Should the separate offences of aggravated sexual assault of child under 16 years (section 61J(2)(d)) and sexual intercourse with child between 10 and 16 years (section 66C) remain? If yes, can their description be improved?**

   The Law Society supports maintaining the two distinct offences in their current form to recognise the differing levels of criminality between the offences.

6. **Should the offence of sexual intercourse with child under 10 years (section 66A) be increased to include children under 12 years?**

   No, the current age of 10 is consistent with the age of criminal responsibility. The offence carries a sentence of life imprisonment, and there is no evidence that the deterrent effect of current available penalties for relevant offending against children under 13[1] are inadequate. Life imprisonment should be reserved for the most serious criminal offending, and any expansion of this category should be approached with caution with regard to the potential consequence of increased pleas of not guilty in respect of offences against children under 12.

7. **Should the description of the offences of indecent assault and act of indecency committed against children under 16 years be improved? If yes, what option(s) is preferable?**

   We do not support option 1, to merge the offences of indecent assault and act of indecency. Nor do we support option 2, to amend the offences of indecent assault to

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[1] *Crimes Act 1900* (NSW) section 66C(1): 16 years; section 61J(2)(d): 20 years, section 61JA: life imprisonment.

include any sexual touching between the victim and the offender. Including any sexual "touching" would risk criminalising sexual experimentation amongst teenagers.

We note that the Sentencing Council considered that there could be merit in achieving a similar definition to what was then section 50AB of the *Crimes Act 1914* (Cth), but did not consider it critical that the expression be codified.[2]

If the definition is to be adopted, then we suggest that the words "so unbecoming" removed from the proposed definition, to read:

> An act of indecency means an act that:
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> (a) is of a sexual nature; and
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> (b) involved the human body, or bodily actions or functions; and
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> (c) is so offensive that it amounts to a gross breach of ordinary contemporary standards of decency and propriety in the Australian community.

8. Should the term 'indecent' and the common law definition remain?

We support the retention of the term "indecent" and its common law definition.

9. Should aggravating factors be removed as elements of child sexual assault offences? If yes, what is the best option for reform?

We support option 1, leaving the current aggravating factors where they apply to child sexual abuse offences. In the alternative, we would consider option 2, to prescribe the same aggravating factors to apply to all aggravated child sexual abuse offences either within each section or in a separate provision, provided that an offence by offence review is conducted that provides strong arguments to do so.

We oppose option 3, to remove aggravating factors from child sexual abuse offences and increase the maximum penalty of the non-aggravated offence to the same penalty as the aggravated form of the offence.

10. Should a provision be introduced to permit the prosecution to rely on the offence with the lesser maximum penalty where the alleged date range includes more than one offence?

This proposal needs to be clearly prescribed so that it is limited to the scenario described in paragraph 6.12.

Paragraph 6.12 provides that a provision could be introduced to allow the prosecution to rely on the offence with the lowest maximum penalty *where there is uncertainty about the age of the victim at the time of the offence* and the date range falls into more than one offence.

The question as framed is broader than the option as described in paragraph 6.12 and could refer to circumstances where the elements of the offence differ, which we do not support.

Even in its limited form, the proposal would require further consideration in the context of any potential amendment to sections 66EA or 66EB or if a new course of conduct offence is introduced.

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[2] NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Volume 1, August 2008, page 25.

11. Should NSW adopt the Royal Commission's recommendation that in historic child sexual abuse matters an offender is sentenced by applying current sentencing principles but in accordance with the historic maximum penalty?

We note the degree of unfairness to the accused the proposal entails, in the sense that they may be deprived of consideration of historical community standards that would have been applied had they been sentenced at the time of offending, and also that to apply this recommendation for a limited range of offences would create an inconsistency in the application of sentencing law.

12. Should the repeal of the limitation period for certain child sexual assault offences committed against females aged 14 and 15 years be made retrospective as recommended by the Royal Commission?

While we understand the basis of the recommendation, in principle we are opposed to the retrospective application of criminal responsibility.

People are entitled to know that once a limitation period is over they can live without fear of prosecution, e.g. people should not be concerned that any time in the future their present conduct may be criminalised (such as the retrospective removal of the six month limitation for the summary offence of possess cannabis).

In particular, we are concerned about the circumstances where in the past, the prosecution may have advised an accused that a matter would not be proceeded with, because of the limitation period. In these cases we would consider it unjust for the prosecution to now proceed with such a matter.

13. Should the repeal of the common law presumption that a male under 14 years is incapable of having sexual intercourse be made retrospective?

We acknowledge that there is a difficult balance involved in this issue, in both the valid policy objective in correcting a false assumption (which we support), versus contravening the principle against retrospectivity (which we oppose).

The Royal Commission recognises the issue:

> However, we also recognise that retrospectively extending criminal liability – even to correct a presumption made by the law which is factually incorrect – is a significant step. It is likely to attract some concern that it is unfair to a perpetrator to expose them to criminal liability in circumstances where, because of the operation of the presumption, they could not have been convicted of the offence at the time they engaged in sexual intercourse.[3]

We agree with the Royal Commission that retrospectively extending criminal liability is a significant step, and for this reason, and for the reasons articulated by the Royal Commission quoted above, we do not support the repeal operating retrospectively.

14. Should the NSW offence of persistent child sexual abuse be replaced by the model provision recommended by the Royal Commission?

Section 66EA should not be replaced. We have grave concerns with the model provision recommended by the Royal Commission, which is based on the Queensland

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[3] Royal Commission into Institutional Response to Child Sexual Abuse, Criminal Justice Report, August 2017, Parts VII-X, page 420.

offence. In our view the introduction of such an offence would make it difficult to mount any defence at all, and therefore deprive the defendant of a fair trial.

We also note the concerns of the Tasmanian DPP, Mr Darryl Coates SC, that removing requirements of particularisation may impact adversely on investigation, and on the jury's assessment of the credibility of the complainant's evidence.[4]

15. Should the offence of persistent child sexual abuse be retrospective as recommended by the Royal Commission?

We do not support the introduction of the Royal Commission's model provision, as discussed above, and we do not support the retrospective application of offences.

16. Should an offender being sentenced for an offence of persistent child sexual abuse receive a higher penalty than isolated offences to reflect the ongoing nature of the abuse?

We support the status quo.

17. Should a course of conduct charge, as introduced in Victoria, be enacted?

While we do not support the creation of a new offence, the Victorian course of conduct offence, and the reform to section 66EA suggested by the NSW Sentencing Council, are preferable to the Royal Commission's model provision.

However, as noted by the Royal Commission, the Victorian provision is largely untested and it is unclear how it will operate in practice.[5] It would be preferable to further consider the impact of the Victorian provision before a decision is made to adopt it in NSW.

18. Should a course of conduct charge be available for historic offences?

No. We do not support the retrospective application of offences.

19. Should the law be amended to implement the Royal Commission's recommendation for a broader grooming offence? If yes, should the amendments be modelled on the provisions in Queensland or Victoria?

We do not support the introduction of a broader grooming offence. The Royal Commission acknowledges that broad grooming offences would be very difficult to prove.[6] We support the narrow approach of the NSW offence that appropriately covers conduct that is overtly sexual in nature and is unlikely to have an innocent explanation.

20. Should an offence of grooming a person other than the child, such as a parent, with intent to obtain access to children be introduced as recommended by the Royal Commission?

We support a narrow approach to grooming offences, and therefore do not support the introduction of an offence applying to persons other than the child. We consider there

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[4] Royal Commission into Institutional Response to Child Sexual Abuse, Criminal Justice Report, August 2017, Parts III-VI, page 55.
[5] Ibid., page 67.
[6] Ibid., page 96.

are preferable ways to educate institutions and their staff about the wrongfulness of grooming behaviour.

21. Should other specific relationships be included in the definition of 'special care'?

We are of the view that, with the exception of section 73(3)(c), the current relationships covered in the offence are appropriate.

We submit that section 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 section 73.

We note that the Royal Commission did not consider that this category of relationship should be narrowed or removed.[7] However, it did recommend that if there is a concern that one or more categories of persons in a position of authority may be too broad, and may capture sexual conduct that should not be criminalised when the child is above 16 years, consideration could be given to introducing defences such as a similar age defence.[8] If section 73(3)(c) is not amended, then we would support the introduction of a similar age defence to address this issue (as discussed at Question 28).

22. Should 'special care' offences apply to all forms of sexual offences including indecent conduct?

Yes, we support this recommendation.

23. Should the Royal Commission's model for a targeted failure to report offence be adopted? If yes, how should it be adapted for NSW?

We support the repeal of section 316 and the introduction of a targeted failure to report offence based on the Victorian model.

We oppose the proposal by the Royal Commission that the offence extend to where a person "should have suspected" that abuse was occurring, as we consider this threshold to be too low.

24. Should the failure to report an offence be made partially retrospective as the Royal Commission recommends?

No. As stated above, we do not support the retrospective application of offences.

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[7] Ibid., page 119.
[8] Ibid., Recommendation 29, page 120.

25. Should protection be afforded to people who make disclosures of child sexual abuse?

We agree that people who make disclosures of child sexual abuse should be provided with appropriate protection.

26. Should the Royal Commission's model for a targeted failure to protect offence be adopted? If yes, how should it be adapted in NSW?

We do not support the Royal Commission's model for a failure to protect offence. We consider that the policy objectives are preferably met through regulatory measures, such as mandatory reporting laws, working with children checks and the adoption of child safe practices, rather than introducing a criminal offence.

27. Should a defence of honest and reasonable mistake as to age be enacted? If yes, should it apply only where the complainant is 14 or 15 years of age and should the onus be on the accused?

Of the three options for reform, we support option 1, retaining the current common law defence of honest and reasonable mistake as to age.

If a defence is to be enacted, we see no logic to having age limits, and submit that the onus should remain on the Crown to disprove the defence if raised by the accused.

28. Should a statutory defence of similar age be enacted in NSW? If yes, how should it be framed?

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.

The minimum age of the child should be no less than 10 years; however, we suggest consulting with psychologists and experts in the area about the appropriate minimum age.

If a similar age defence is introduced, we submit that a provision should be introduced to allow people who have been convicted of a child sexual assault offence to make an application to the court to review their prior convictions, where a similar age defence would now be available.

29. Should NSW introduce a defence to decriminalise consensual 'sexting' involving persons under 16 years? If yes, how should the defence work?

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.

We consider that children aged under 16 years can be disadvantaged by the current law's treatment of consensual sexting, which can put them at risk of being found guilty of a child abuse material offence and consequent classification as a registrable person for the purposes of the *Child Protection (Offenders Registration) Act 2000*. Children

under 16 who engage in consensual sexting are also at risk of being charged and convicted under the new intimate images offences.

Further consideration could be given to introducing a defence which decriminalises sexting based on the Victorian model.

An alternative to a statutory defence would be to redefine the definition of "child abuse material" to decriminalise sexting at the front end. This could be achieved by a carve out of the types of images in child-to-child contact that are not socially unacceptable, addressing the context in which the material is disseminated, and amending section 91FB(2) which is currently very adult focussed. An alternative or additional option would be to introduce statutory exceptions: for instance the exceptions to the intimate images offences under section 91T *Crimes Act 1900*, and the change of the artistic "defence" in Division 15A to a statutory exception.

We would welcome the opportunity to be consulted further on any of these options.

30. Should the Royal Commission's recommendation to ensure that child sexual abuse complainants are not required to give evidence on multiple occasions be adopted? If yes, what is the best option to achieve this reform?

We are not opposed to measures to mitigate circumstances in which the complainant gives evidence. We support the Child Sexual Offence Evidence Pilot, and expanding the pre-recording of evidence of child complainants to the Children's Court, with witness intermediaries available for all vulnerable witnesses in child sexual assault matters.

However, it must be emphasised that the situation where a complainant is required to give evidence on multiple occasions where the accused is a young person arises very rarely. We do not consider the situation warrants amending the provisions of the *Children (Criminal Proceedings) Act 1987*. The options for reform could potentially unnecessarily change how the jurisdiction of the Children's Court operates. In our view they are not pragmatic and would undermine the longstanding basis for treating children and young people in the criminal justice system 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.*[9]

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

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[9] 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, page 1.

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.[10]

We submit that, 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 in this regard.

Much of the substantive law in NSW that is solely relevant to children in the criminal jurisdiction is compliant with, or broadly reflective of, many of the provisions of the United Nations Convention on the Rights of the Child, to which Australia is a signatory. In relation to the Children's Court this is achieved by the inclusion of principles in section 6 of the *Children (Criminal Proceedings) Act 1987*.[11] These principles highlight that children are to be treated differently and separately to adults in the criminal justice system.

We therefore consider that it is entirely appropriate for section 31 to provide a different process from a committal process for adults. The concerns raised in the Discussion Paper are preferably addressed through pre-recording provisions rather than the other options identified.

31. Should the approach to tendency and coincidence evidence proposed in the draft legislation at Appendix E be adopted? If not, should aspects of that approach or any other option for reform be pursued in NSW?

We do not support the Royal Commission's draft legislation, which would create separate rules of evidence which apply only in trials involving allegations of child sexual abuse.

The Law Society has significant reservations about the approach taken to tendency and coincidence evidence by the Royal Commission, and remains unconvinced with the findings of the Jury Research Study report.

We caution against piecemeal change to the *Evidence Act 1995* (NSW). Creating separate evidentiary requirements for trials involving allegations of child sexual abuse *is* a piecemeal alteration and these very significant set of recommendations of the Royal Commission would benefit from broader consideration. We suggest that a broad review of the *Evidence Act 1995* (NSW) across current issues and needs, including the Royal Commission recommendations, is overdue.

We also consider that such a review would be assisted by the involvement of the NSW Law Reform Commission and our preference is for an ALRC/state law reform bodies' approach, as occurred in 2005. This would enable consideration of potential improvements, (such as reviewing privilege and religious confessions), potential simplification of processes (such as to judicial directions), and the improved integration of technological change, and finally enhanced uniformity. We would encourage the New South Wales Government to support this initiative, and also support it reaching out to Queensland, South Australia and Western Australia to enable revisiting expansion of the national footprint of the uniform evidence legislation.

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[10] 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.

[11] Section 6 of the *Children (Criminal Proceedings) Act 1987* http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/cpa1987261/s6.html

32. Should jury directions be partially codified as recommended by the Royal Commission?

We do not support codification of jury directions, and note that the Royal Commission has not strongly advocated for codification either.[12] Legislation is inflexible and cannot comprehensively address the changing circumstances in which judicial directions may need to be given.

We agree with the conclusion of the NSW Law Reform Commission in its 2012 report *Jury Directions*, that jury directions should not be codified.[13] The Law Reform Commission further concluded that the existing approach provides judicial discretion and flexibility to tailor directions to the issues of each case.[14]

We note that the aims of judicial instructions are to ensure a fair trial for the accused; be accurate and adequate with regards to the law, the alleged facts and the arguments of counsel; they should be understandable to the jurors, and assist them in coming to a verdict.

It may be appropriate for the model directions contained in the *Criminal Trial Courts Bench Book* to be reviewed and possibly revised by the Judicial Commission of NSW to ensure that they are both legally accurate and readily understandable by jurors in order to ensure a fair trial. We would be happy to participate in such a review process.

The main criticism of the Royal Commission about the approach supported by the Law Reform Commission is the absence of scrutiny from outside the legal profession by social science researchers.[15] We note that the Judicial Commission of NSW's Sexual Assault Trials Handbook contains a considerable amount of social science research material, including the Royal Commission's reports.[16]

33. Are legislative amendments required to permit judges to give directions to juries earlier in the trial?

No, legislative amendments are unnecessary. Judges can, and do, give directions earlier in the trial where appropriate and necessary.

34. Should the requirement to give a Markuleski direction be abolished?

No, the *Markuleski* direction is founded on a premise in logicality of decisions. The direction should continue to be given in appropriate cases.

As referred to in our response to Question 32, we have no objection to the Judicial Commission of NSW reviewing model directions, as necessary, to ensure that they are both legally accurate and readily understandable by jurors in order to ensure a fair trial.

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[12] Royal Commission into Institutional Response to Child Sexual Abuse, Criminal Justice Report, August 2017, Parts VII-X, page 190, Recommendation 64.
[13] NSW Law Reform Commission, Jury Directions, Report 136, November 2012, page 41.
[14] Ibid., page 42.
[15] Royal Commission into Institutional Response to Child Sexual Abuse, Criminal Justice Report, August 2017, Parts VII-X, page 190.
[16] Judicial Commission of NSW, Sexual Assault Trials Handbook, August 2017, pages 95-205.

We further note that the *Markuleski* direction is not only relied upon in child sexual abuse matters.

35. **Should the Royal Commission recommendation to permit and require judges to inform the jury about children and the impact of child sexual abuse be adopted? If yes, what judicial directions should be given?**

    We do not support this recommendation.

    Experts can be called to inform the jury about children and the impact of child sexual abuse where appropriate.

    In relation to children's abilities as witnesses, we note the role of witness intermediaries in supporting the provision of evidence by child complainants and child witnesses in child sexual assault matters, to ensure that children are able to provide the best quality evidence.[17]

36. **Should the recommendation of the NSW Sentencing Council be adopted to increase the maximum penalty to 12 years and reduce the standard non-parole period to 6 years for the offence of indecent assault of child under 16 years? If not, is there another way to re-structure the maximum penalty and standard non-parole period for the offence?**

    We do not oppose this recommendation.

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[17] See the recent evaluation by the Social Research Policy Centre prepared for Victims Services, NSW Department of Justice, Cashmore, Katz, Shackel and Valentine *Evaluation of the Child Sexual Offence Evidence Pilot: Process evaluation report*, July 2017: http://www.victimsservices.justice.nsw.gov.au/Documents/CSOEP_process-evaluation_report_final.pdf