

6 October 2017

Mr Paul McKnight
Executive Director
Justice Strategy and Policy
NSW Department of Justice

By email: policy@justice.nsw.gov.au

Dear Mr McKnight,

Strengthening child sexual abuse laws in NSW

1. Women's Legal Service NSW (WLS NSW) thanks the NSW Department of Justice for the opportunity to comment on the discussion paper on 'Strengthening child sexual abuse laws in NSW' (Discussion Paper).
2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.
3. WLS NSW has provided legal advice and support to victim-survivors of child abuse over several decades. This has primarily been through helping victim-survivors to access victims support in NSW. Additionally, we acted on behalf of 13 survivors of child sexual assault in civil litigation that was the subject of the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) Case Study 19 into Bethcar Children's Home (Bethcar litigation).
4. We welcome the NSW Government's prompt response to the release of the Royal Commission's *Criminal Justice Report* through the release of a Discussion Paper regarding implementation of the Royal Commission recommendations. Due to the overwhelming number of inquiries and discussion papers to which we are asked to respond and our limited capacity we limit our response to addressing only a few questions, primarily those we focused on in our response to the Royal Commission's Child Sexual Abuse Criminal Justice consultation paper.



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5. In summary, WLS NSW supports:
 - 5.1 The retrospective application of the repeal of the limitation period for certain child sexual assault offences committed against females aged 14 and 15 years.
 - 5.2 The introduction of a targeted offence for failure to report institutional sexual abuse.
 - 5.3 The introduction of a targeted offence for failure to protect against institutional sexual abuse.
 - 5.4 The amendment of the legislation governing the admissibility of tendency and coincidence evidence in child sexual abuse proceedings, to facilitate greater admissibility in relation to proceedings for adult sexual offences as well as child sexual offences.
 - 5.5 The introduction of a presumption in favour of joint trials for all charges where there are allegations of a sexual nature made by one or more complainants.
 - 5.6 Further discussion about codification of judicial directions.
 - 5.7 Regular and ongoing training about complex trauma for all professionals working with victims-survivors of child sexual abuse and sexual assault.
 - 5.8 Witness intermediaries should be available for children as well as other witnesses who have a disability that affects communication.

Limitation period for prosecution of certain child sexual assault offences

Q12. 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?

6. WLS NSW is concerned that certain serious child sexual assault offences that occurred prior to 3 May 1992, where the victim was a girl aged 14 or 15 years at the time of the offence, are currently statute barred. WLS NSW notes that this is because section 78 (repealed) of the *Crimes Act 1900* provided for a limitation period of 12 months in relation to those offences. Though this section was repealed effective from 3 May 1992, the repeal did not apply retrospectively.
7. WLS NSW considers that it is an anomaly as outlined in the *Discussion Paper* that “Apart from the limited application of section 78, there are no other limitation periods that apply to child sexual assault prosecution as there is no time limitation on the prosecution of indictable offences”.¹ WLS NSW supports the Royal Commission’s recommendation that the repeal of the limitation period for section 78 of the *Crimes Act 1900* (repealed) should apply retrospectively.

¹ NSW Department of Justice, *Discussion Paper: Strengthening child sexual abuse laws in NSW*, paragraph 6.34.

8. Whilst we acknowledge the importance of the common law principle that laws should not have retrospective application, it is unjust that the prosecution of certain child sexual assault offences is statute barred. These exceptional circumstances warrant a departure from the common law principle in the interests of justice. Isaacs J has commented that *"what may seem unjust when regarded from the standpoint of one person affected may be absolutely just when a broad view is taken of all who are affected"*.² We agree with the Royal Commission that:

*Where a perpetrator has sexually abused a child, they should not retain the benefit of an immunity from prosecution for the offences which was granted at a time when the nature and impact of such offending was so poorly understood.*³

9. We have advised client victims-survivors of child sexual assault affected by this anomaly in the law, and the impact on them has been profound, exacerbating the injustice they have experienced.

Failure to report

Q23. Should the Royal Commission's model for a targeted failure to report offence be adopted? If yes, how should it be adopted for NSW?

10. Noting that section 316 is rarely used in relation to concealing child sexual abuse, WLS NSW supports the Royal Commission's recommendation to introduce a targeted offence covering the failure to report institutional child sexual abuse in NSW.
11. We note the NSW Law Reform Commission's 1999 review into section 316 of the *Crimes Act 1900 (NSW)*⁴ heard that friends and family who may have been given information about a sexual offence within a relationship of trust and confidentiality are captured by the provision.⁵
12. We therefore emphasise that the offence should be targeted at *"any adult person who is an owner, manager, staff member or volunteer of a relevant institution."*⁶ The offence should apply in circumstances where the adult person *"know[s], suspect[s], or should have suspected and it was criminally negligent for the person not to suspect"*⁷ and we add *"that an adult associated with the institution was perpetrating or had perpetrated sexual abuse within the context of the institutional setting"*.

² *George Hudson Limited v Australian Timber Workers' Union* (1923) 32 CLR 413, 434 cited in Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (2 March 2016), 13.48 <<https://www.alrc.gov.au/publications/justifications-encroachments-20>>.

³ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* cited in NSW Department of Justice *Discussion Paper: Strengthening child sexual abuse laws in NSW*, paragraph 6.31.

⁴ NSW Law Reform Commission, *Review of section 326 of the Crimes Act 1900 (NSW)* (December 1999), <<http://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-93.pdf>>.

⁵ NSW Law Reform Commission, *Review of section 326 of the Crimes Act 1900 (NSW)* (December 1999), 23

⁶ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, (2017) Recommendation 33

⁷ *Ibid.*

13. We recommend the offence extend to "sexual abuse" so that in addition to capturing failure to report child sexual abuse it also captures failure to report sexual abuse in other institutional settings, such as the sexual abuse of people with disability in institutional settings, sexual abuse of people in aged care and sexual abuse in other institutional settings.

Failure to protect

Q26. Should the Royal Commission's model for a targeted failure to protect offence be adopted? If yes, how should it be adopted in NSW?

14. WLS NSW supports the Royal Commission's recommendation for a targeted offence of failure to protect a child against institutional child sexual abuse. Again we recommend the offence extends to "sexual abuse" so in addition to protecting children, people with disabilities in institutional settings, people in aged care facilities and people in other institutional settings are also protected.

Tendency and coincidence evidence

Q31. 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?

15. WLS NSW supports the amendment of the legislation governing the admissibility of tendency and coincidence evidence in child sexual abuse proceedings, to facilitate greater admissibility in relation to proceedings for adult sexual offences as well as child sexual offences.
16. From our experience working with adult victims-survivors of sexual assault, we consider that there is a need to also improve the admissibility of tendency and coincidence evidence in proceedings of adult sexual offences. The existing law is unjustifiably weighted in favour of the interests of accused persons, without adequately responding to the interests of victims-survivors. The practice of separating trials for separate counts to prevent the possibility of concoction and prejudice to the accused, and the exclusion of much tendency and coincidence evidence, means that juries do not get a full picture of the context and circumstances of the alleged offence.
17. WLS NSW also supports the establishment of a presumption that when multiple charges for sexual offences are joined in the same indictment, the charges are to be heard together. This presumption should not be rebutted merely because evidence on one charge is inadmissible on another charge. This was recommended by the Australian Law Reform Commission and the NSW Law Reform Commission's comprehensive report *Family Violence – A National Legal Response*, and is already in place in Victoria under section 194 of the *Criminal Procedure Act 2009*.
18. The creation of a presumption for joint trials in sexual offence cases would still allow courts to order that trials be held separately when it was deemed to be necessary. However a presumption is necessary to increase the number of trials heard together

given that the separation of trials decreases the likelihood of conviction, and increases survivors' distress.

19. WLS NSW considers that a presumption in favour of joint trials would provide increased certainty for victim-survivors of how the proceedings will take place and may help reduce their anxiety.
20. WLS NSW clients have been the complainants in unsuccessful prosecutions where the same accused was convicted by a different court with respect to offences perpetrated against another family member. In these cases it is likely the accused would have been convicted for the offences against our client if the trials had been joined. In many cases, inconsistent outcomes between family members can cause more distress than no conviction at all. We have had clients express to us the trauma of not being believed, and particularly of not being believed when another victim was.
21. We have also spoken to clients who have not reported sexual assaults, but indicate they would if other victims were to come forward. This indicates that the severing of trials is likely to lead to attrition at the time when individuals are told the trial is to be severed.

Jury directions

Q35. 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?

22. From our experience of working with victims-survivors of child sexual abuse and adult victims-survivors of sexual assault, we believe that juries should be provided guidance to help understand that trauma can affect how a victim-survivor recalls the details of a sexual offence.
23. WLS NSW supports the Royal Commission recommendation of further discussion about the codification of judicial directions particularly as the Royal Commission acknowledges that Victoria has established a precedent.⁸
24. The work of Victoria and the work of the National Child Sexual Assault Reform Committee which was established in 1999 and referred to in the *Discussion Paper* should be carefully considered in this process.

Additional comments

Q37. Submissions are also welcome about matters relating to child sexual abuse offences not covered in the discussion paper.

Issues in police responses

25. Police, as all other professionals, should be trained to understand complex trauma. An understanding of complex trauma will be the foundation for an appropriate first

⁸ Royal Commission, *Criminal Justice Report*, Note 6, Recommendation 64.

response to someone who is reporting sexual assault. This will be crucial both to their recovery and to the decisions that they will make about reporting and following through with their complaint through the criminal justice process.

26. Some clients have reported to us that they have enduring high regard and appreciation for police officers who have provided respectful, believing, supportive responses to their complaints of child sexual assault and who have kept in touch with them through the process and provided the support they need to continue through the prosecution process.
27. Other clients have felt the police made incorrect assumptions about why they reported. Additionally, because the child sexual abuse was historical these clients have felt that police did not prioritise their case. In many instances we provided significant advocacy on the part of a client, including drafting a full statement to provide to the police before charges were laid. In another case it was more than 3 years after reporting to police that charges were laid. To have such significant delays even before the trial commences is very difficult for survivors of child sexual abuse, particularly when they have been living with the trauma of the abuse for such a long time.

Witness intermediaries

28. WLS NSW supports the proposal to make witness intermediaries available for children and other witnesses who have a disability that affects communication.
29. We agree with the comments of Professor Cooper that all people have a right to participate in the justice system, and that witness intermediaries can facilitate this participation for certain vulnerable witnesses.⁹
30. We submit that in child sexual abuse cases, the hearing of effective prosecution evidence and the consequent likelihood of achieving convictions, should not be hindered by the very fact that the offences are perpetrated against children, who lack the capacity of most adults to effectively communicate in a court room.
31. The introduction of an intermediary scheme is also important to reduce the traumatic impact of giving evidence on survivors of child sexual abuse. This is consistent with the Royal Commission's commitment to reform that supports survivors to seek criminal justice responses. While intermediaries are impartial and are not to act as support people, their role should include informing the Court and legal practitioners about the witness' needs, informing the Court if the witness becomes distressed, and ensuring the witness understands what is happening. These functions are likely to make the process of giving evidence less distressing for survivors. We note that evaluation of the intermediary program in the United Kingdom found that intermediaries 'helped witnesses cope with the stress of giving evidence'.¹⁰

⁹ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Consultation Paper* (2016), 381.

¹⁰ Joyce Plotnikoff and Richard Woolfson, *The 'Go-Between': Evaluation of Intermediary Pathfinder Projects'*

32. WLS NSW supports the use of intermediaries not just for child witnesses, but for adult witnesses whose ability to communicate is affected by a disability. There is no principled reason to not extend witness intermediaries to adult survivors with disabilities, especially noting the Royal Commission's findings that girls with a disability are 'significantly more likely to be victims of abuse'. It is important that access to the criminal justice system is facilitated for these survivors who often do not report until they are adults.

If you would like to discuss any aspect of this submission, please contact me or Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours faithfully,

Women's Legal Service NSW

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Principal Solicitor