Child Sexual Assault

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Judicial Commission of New South Wales
CHILD SEXUAL ASSAULT
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An Analysis of Matters Determined in the District Court of New South Wales During 1994

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Despite the hype and glamour of the print and electronic media that inevitably seem to accompany anything touching the subject of child abuse, there can be no doubt that the problem of child sexual assault is widespread in the community. For the year 1995, for example, the Australian Bureau of Statistics reported that there were over 2,000 victims of child sexual assault incidents reported to police in New South Wales alone. Given the nature of many of these offences, and particularly having regard to the vulnerability and powerlessness of the victims and the hidden and very private nature of these offences, one cannot help thinking that the offences that are reported represent just the tip of the iceberg. For this reason the criminal justice system has a very important part to play in prosecuting those persons who are identified as child abusers and indicating to the community that such behaviour is not only unacceptable but that those found to take part in such conduct cannot expect to be dealt with leniently by the courts.

The present study is concerned with an analysis of child sexual assault cases prosecuted in the District Court of New South Wales in 1994. It looks at the profiles of the offenders and the victims, the types of offences prosecuted, the outcomes and the sentences imposed. In addition, the Monograph, together with the Appendices, present a review of the literature and the history of legislative changes which have taken place over the last two decades. Consideration is also given to the rules of evidence which have been introduced in recent times to help relieve the burden faced by victims of child sexual assault in the courtroom.

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Research Director
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Disclaimer

The views expressed in this monograph are the views of the individual authors and do not represent any official views of the Judicial Commission of New South Wales, nor are they necessarily shared by the members of the staff of the Commission. Whilst all reasonable care has been taken in the preparation of this publication, no liability is assumed for any errors or omissions.
Executive Summary

This study examines child sexual assault cases finalised in the District Court of New South Wales in 1994. It is supported also by three appendices which summarise two decades of legislative changes to both child sexual assault offences and to the rules of evidence pertaining to these offences.

The study indicates that child sexual assault is being taken more seriously, with more frequent reporting, more rigorous prosecution and a less lenient penalty profile.

**Increasing number of prosecutions**

It is well documented that child sexual assault is seriously under-reported and that many of the incidents which are reported to various government agencies fail to be processed through the criminal justice system. However, this study found that in absolute terms, more prosecutions are occurring and more convictions are recorded in New South Wales than was the case in 1982.\(^1\) This is due in part no doubt, to the extensive law reform in this area in the last decade, particularly the evidentiary and procedural provisions which have made it somewhat easier for children to give evidence. However, the difference in the number of incidents reported to police and those prosecuted, suggests that the process remains a very difficult and painful task for victims.

**Fewer guilty pleas**

The study also found that there was a lower guilty plea rate overall. Approximately three-quarters (77%) of proven offenders (or half of all alleged offenders) pleaded guilty either before or at trial. This represents a very low plea rate compared with that found in earlier studies of child sexual assault, reflecting perhaps the increased readiness of agencies to prosecute cases where a guilty outcome is not assured. Thirty-five proven offenders (11%), had a lesser plea accepted in full discharge of the indictment.

**Lower conviction rate but more imprisonment**

Fewer guilty pleas, not surprisingly, have resulted in a lower conviction rate than was the case in 1982. However, an increased proportion of those convicted now receive a

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\(^1\) As documented in J Cashmore and M Horský, “Prosecution of Child Sexual Assault” (1988) 21 *Australian and New Zealand Journal of Criminology* 241-252.
custodial sentence. Over half (56%) of the proven offenders were ultimately sentenced to full-time imprisonment and a further 13% to periodic detention. Fifteen percent received a common law bond or a s 558 bond (usually with supervision) and 12% received a community service order. The remaining 4% of dispositions included s 556A bond and s 556 dismissal and a fine.

**Low conviction rate for multiple trial cases**

The majority of offenders who offended against more than one victim were dealt with in the one trial. However, of 43 offences which were dealt with in multiple trials, only six had a guilty outcome. Looking at verdict outcomes only, the proportion of guilty and not guilty verdicts were quite similar when there was one trial, while for multiple trials the vast majority resulted in not guilty verdicts.

**Diversity of offence types**

Although the most common proven offences were indecent assaults (ss 61M(1) and 61E(1A)) and sexual intercourse with a child under ten (s 66A), they accounted for only one-third of all proven offences, reflecting the diversity of offences with which an offender could be charged. These were also the most common offences for female victims, reflecting their predominance in the sample. However, two of the three most common proven offences involving male victims were the gender specific offences of indecent assault (s 81) and homosexual intercourse with a male between ten and 18 years (s 78K)—the other being aggravated indecent assault: s 61M. It appears that there is a preference for prosecuting under these gender specific offences, even though there are equivalent non gender specific offences available, probably because higher maximum penalties are available with the former.

**Conviction rates and offender profiles**

Two-thirds (64%) of alleged offenders were convicted. As expected, most proven offenders were male and the age profile was older than for the general offender population. The median age was 41 years and all age groups were represented. Most (43%) were either married or in a de facto relationship and a substantial number (41%) were not in employment at the time of the offence. One-third of proven offenders had prior convictions for either sexual or violence offences. As expected, prior convictions were associated with more severe penalties, particularly where the prior conviction was for a sexual offence.

**Delay between commission and reporting of offence**

There was a notable difference between the median age of offenders at the time of the commission of the offence (35 years) and the time of arrest (41 years). A number of charges concerned adults who were making complaints regarding offences which occurred in their childhood, which may account for some of the delay. Clearly however, victims continue to have difficulty in reporting this offence immediately.
EXECUTIVE SUMMARY

Conduct attracting custodial penalties

The penalty profile was not lenient, with over half of the convicted offenders receiving a full-time custodial sentence. Almost all offenders who engaged in acts of penile penetration of the victim received custodial sentences, and they were also very common where the offender performed cunnilingus, forced the victim to perform fellatio, performed fellatio on the victim or engaged in acts of digital penetration. Custodial sentences were less common for touching offences.

Persons in position of trust

Offences which relate to offenders who hold positions of trust or authority in relation to the victim at the time of the offence have higher maximum penalties than other child sexual assault offences. Offenders who were “in authority” received longer sentences than where such a relationship was not an element of the offence. This is in recognition of the helplessness of a child against an assault by someone who is entrusted with their care. Most of those prosecuted under these provisions were fathers of the victims. Both natural and non-biological fathers were far more likely to receive a full-time custodial penalty for their principal proven offence than strangers, however, longer minimum terms of imprisonment applied only to natural fathers. A small number of offences which could have been prosecuted under the “in authority” provisions, were not so prosecuted.

Profile of victims

Victim characteristics were generally in accordance with other studies. Almost three-quarters were female, and some sex differences emerged. Most female victims had been abused by family members or by those known to them—very frequently their fathers—in their own homes, over a prolonged period. Males were more likely to be assaulted by non-family members known to them or their family, in the home of the accused. They were also more often the victims of single assaults.

Duration and pattern of abuse

This differed according to the sex of the victim. Most female victims (41%) had suffered prolonged assaults (almost always prosecuted by way of representative charges), 25% complained of occasional incidents and 34% suffered single assaults. In contrast males were more likely to have been the victims of single assaults (41%), followed by occasional (31%) and prolonged (28%) assaults. Excluding single assaults, the median duration of abuse was approximately four months. Three-quarters of the victims were abused for up to a year and 10% for over two years. The longest proven offence had a duration of six years. It should be remembered that this does not reflect the actual duration of abuse, merely the interval between the first and last offences which could be confidently determined by the victim.
Legal representation

Most convicted offenders were represented either by Legal Aid (47%) or by private legal representation (45%).
This study examines child sexual assault cases finalised in the District Court of New South Wales in 1994. The prosecution and sentencing of child sexual assault offenders is a complex task which has been subject to numerous legislative changes in recent years. The particular enduring effects of child sexual assault and the diversity of offender circumstances contributes to the complexity in sentencing child sexual assault offenders. This study aims to give an overview of the types of offenders who have been charged with child sexual assault offences, their victims and, where convictions or admissions of guilt are made, their sentences.

DEFINITIONS

The number of cases of child abuse and child sexual assault reported to the police, hospitals or notified government departments such as the Department of Community Services (DOCS) has risen dramatically in recent years. DOCS defines child abuse as:

"any act which exposes a child to, or involves a child in, sexual processes beyond his or her understanding or contrary to accepted community standards. Sexual abuse also includes a child's 'inappropriate sexual behaviour' suggesting that the child has been sexually abused."

The more general term child abuse usually refers to any physical, sexual or emotional abuse and neglect of a child. Recent media attention has focused on the activities of paedophiles, that is, individuals who are sexually attracted to pre-pubescent children. However, paedophilia itself is not an offence in New South Wales. Sexual assault offences against children are contained in the Crimes Act 1900 (NSW): see generally ss 61J–78Q.

The specific offence of incest was established in the Crimes Act in 1924: s 78A. Formerly the offence was an ecclesiastical, not a criminal offence and an expression "of

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1 Definition given by the Information and Planning Group, DOCS, Ashfield, NSW.
2 American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 4th ed, 1994, Washington DC.
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the strength and status of the social purity movement". The offence refers to consensual sexual activity between members of a family within certain specified degrees of "consanguinity" above the age of consent. The age of consent at this time was raised from 14 to 16 years. It now refers to any situation where a male "has carnal knowledge of a female of or above the age of 16 years who is his mother, sister, daughter, or grand daughter", or where a female "of or above the age of sixteen years, with her consent permits her grandfather, father, brother, or son to have carnal knowledge of her": s 78A. The maximum penalty is seven years penal servitude. Any offences prosecuted under this section have always been conditional upon the consent of the Director of Public Prosecutions: s 78T.

THE PATH TO CONVICTION

It is always difficult to assess the actual prevalence of crime in the community. This is particularly true in relation to child sexual assault. Some insight into the incidence of child sexual assault can be obtained from an examination of various data sources including the Department of Health, DOCS, the Australian Bureau of Statistics, the Police Service and the NSW Bureau of Crime Statistics and Research; see Figure 1.

In 1994, DOCS received 6 949 notifications which warranted investigation, of which 3 351 (48%) were substantiated. From the Department of Health statistics, the figures for child presentations to sexual assault services are similar—2 288 presentations or 3 554 if adult survivors of child sexual assault are included. This includes some overlap between agencies via referrals. From these figures it can then be estimated that at least 3 000 children a year in New South Wales may have been victims of some form of sexual abuse.

In 1995 according to the National Crime Statistics, 2 143 alleged victims of child sexual assault in New South Wales reported incidents to police.

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5 The figures cited relate to the calendar year 1994. The Department of Health figures are for the 1993–1994 financial year and the Australian Bureau of Statistics figures are for 1995, as child sexual assault was not documented prior to that.
6 Information provided by the Information and Planning Group, DOCS, Ashfield, NSW.
7 NSW Health Department, Victims of Sexual Assault, Initial Contact at NSW Sexual Assault Services 1992/93–1993/94, 1995.
8 1 040 (45%) of the victims presenting at child sexual assault services had been referred by DOCS and a further 289 (13%) by police.
It is important to note that DOCS receives fewer notifications regarding male victims (32%) and correspondingly, less complaints regarding male victims are substantiated (28%). Similarly, only 24% of presentations to the Department of Health are male victims. The figure is substantially less where male adult survivors of child sexual assault are included (13%). Approximately 22% of alleged victims in New South Wales who reported child sexual assault to police were male.

Why is child sexual assault difficult to detect?

Many child sexual assaults are not reported. Reasons for not reporting include:

- the sensitive and intrusive nature of the offence;
- coercion by the offender;
- lack of witnesses to support allegations;
- fear of retribution from the perpetrator (who is often known to the victim);
- victims' doubts they will be believed; and
- victims' fear of the consequences for themselves, the family unit and perhaps even the perpetrator. 

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10 Information provided by the Information and Planning Group, DOCS, Ashfield, NSW.
11 NSW Health Department, op cit.
12 Sex of victim was not available from the 1995 National Crime Statistics, op cit. It was available from the NSW Bureau of Crime Statistics and Research for part of 1994.
In an American study, Abel et al\(^\text{14}\) estimated that the ratio of arrests to child sexual assault convictions was 1:30, based on self reports by offenders, and of course offenders may have been active for a number of years prior to apprehension.

There is considerable evidence in the literature that child sexual abuse is vastly under-reported, particularly where the victim is male.\(^\text{15}\) A recent British study of a children’s telephone helpline in Britain identified two main reasons for anonymity: fear of giving evidence in court and a concern that the offender not be imprisoned.\(^\text{16}\) Where disclosure is made the catalyst is often either family conflict, incidental discovery by a third party, or awareness instilled by child protection agencies or education programs.\(^\text{17}\)

### The problems associated with reporting and police investigations

Complaints of child sexual abuse may be reported to DOCS or directly to the Police Service (NSW). Since 1985, it has been mandatory for some professions including doctors, teachers and social workers to report allegations or reasonable belief of abuse to DOCS.\(^\text{18}\)

If a report is made to DOCS, its professional staff decide whether the report warrants investigation, and if so, a determination is made as to whether abuse is considered “on the balance of probabilities” to have occurred, that is, whether or not the complaint is substantiated. Given that victims may not wish to pursue the matter or that it may be appropriate to deal with the matter as a welfare issue, not all substantiated reports are referred to police.

Upon receipt of a report from DOCS or a complaint from an alleged victim, the police undertake an investigation. The Independent Commission Against Corruption\(^\text{19}\) has noted the difficulties associated with obtaining a conviction for this type of offence, including trauma to victims and cogency of evidence.

The decision to prosecute more serious sexual assaults is a matter for the Director of Public Prosecutions. Less serious assaults can be prosecuted summarily by police prosecutors. It is possible to discontinue or change the charges throughout the prosecution process.

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\(^\text{15}\) M James, Paedophilia, 1996, Trends and Issues in Crime and Criminal Justice No 57, Australian Institute of Criminology, Canberra.


\(^\text{18}\) Community Welfare Act 1982 (NSW), s 102. The obligation to report child abuse currently falls under the Children (Care and Protection) Act 1987 (NSW), s 22.

\(^\text{19}\) Independent Commission Against Corruption, op cit.
INTRODUCTION

Why child sexual assault is difficult to prosecute

In any criminal matter, there are tensions between the interests of the community and the need to protect the rights of accused persons. In child sexual assault cases where the child is often the central, if not the only witness, these tensions render the prosecution process particularly onerous. In particular, the experience is inevitably painful for the victim as the accused is often a family member.

Problems associated with adducing evidence from child witnesses include:

• age;
• limited competency to understand questions and answer them;
• lack of corroboration;
• delay in complaint; and
• relationship between victim and offender.

Recent legislative and procedural modifications in New South Wales have addressed these issues (see Appendix 3).

In the past, a focus by the defence on the sexuality of older victims, while not legally relevant, could prejudice the case. However, the New South Wales Government has disallowed this, on the recommendation of the Child Sexual Assault Task Force (1984–1985). 20

The sentencing of offenders

There is general community consensus that serious child sexual assault offenders deserve a prison sentence. This, it is hoped, will act as a specific deterrent to the individual sentenced and also as a general deterrent by signalling to potential offenders that this behaviour will not be tolerated or dealt with leniently. It also definitively prevents the abuse from continuing for a specified period.

Community attitudes also demand that justice be seen to be done. Allowing offenders to plead guilty to reduced charges which fail to reflect or even misrepresent the true features of their offences reflects negatively on the criminal justice system. There is also the possibility that if the offender commits future offences, any prior record will not reflect the seriousness of the previous offences.

Arguments against custodial sentences usually revolve around concerns for the welfare of the family unit, including the victim who can retain an attachment to the perpetrator. Another argument is that custodial sentences encourage denial by the perpetrator, whereas a less threatening penalty might procure a guilty plea and the possibility of treatment via a non-custodial sentence—which allows scope for conditions such as treatment and supervision.

The treatment option has emerged because of the perceived failure of traditional methods to deter re-offending. It is suggested that the compulsion to sexually offend is

not responsive to rational persuasion and the underlying causal factors must be addressed through therapeutic intervention. Treatment, it is argued, offers the chance of a real change in attitudes and behaviour, which prison does not.

However, apart from the lack of definitive conclusions as to their efficacy, the mechanisms for ensuring delivery and monitoring of such services are problematic. In addition, there are strong arguments that the offence should not be minimised simply because the victim is a child or because the conduct is a "family matter".

The least damaging outcome to a child is a confession from the abuser, together with an acceptance of blame. Aside from the obvious fact that a confession relieves the child of the trauma of court, it may also increase the likelihood that the child is believed and not blamed by other family members for the consequences. However, there is always the danger that the offender may subsequently not accept blame, claiming instead that the plea of guilty was made to avoid prison.

THE LEGISLATIVE FRAMEWORK

In New South Wales, child sexual assault offences are contained in the Crimes Act 1900. In the last two decades there have been a number of legislative reforms in this area as a result of successive governments introducing amendments to the Act and associated legislation. Specifically the definition of sexual intercourse has been widened (s 61H); gender neutral provisions have been introduced (ss 66A–66D); and the concepts of "in authority" (ss 61D, 61E(2), 61E(2A)) and "in company" (ss 61C(3), (4), 61D(1B), (1C), 61E(1C)) were also introduced. In addition, the offences have been regraded and the maximum penalties applicable increased: ss 61I, 61J and 61L–O.

There have also been a number of evidentiary changes relating to the giving of evidence by children in child sexual assault hearings. Traditionally, the evidence of children as a class generally, and particularly in these hearings, was regarded as inherently suspect. Conversely, few procedures taking account of the difficulties facing children who gave evidence in court were available. The changes have addressed both areas. First, changes to the rules of competency and corroboration have moved the position of a child witness closer to that of an adult. Second, special procedures for the giving of evidence have been developed, including the use of screens and closed-circuit television to shield the witness from the accused, and the availability to the child of support persons.

The present study was interested in examining the sentencing outcomes and any differences between prosecutions under the gender specific offences compared to the

23 Eg, amendments to the Oaths Act 1900, now consolidated in the Evidence Act 1900.
24 Eg, most recently the Crimes Amendment (Children's Evidence) Act 1996.
gender neutral offences. Where the victim was male, a comparison was made of charges prosecuted under these new sections versus the pre-existing gender specific sections. The relationship of the victim and offender was also studied, and offences prosecuted under sections which stipulate this criterion were examined.
2 Methodology

Scope of the study

The first step in this project was to identify variables to be collected. A data collection form was then designed and piloted. Information was collected for all indictable charges, with the main focus being on proven offences.

Sources of data

The information was collected from two main sources:
- the Justice Information System (JIS), a statistical collection system for the District Courts; and
- District Court files held at the District Court Criminal Registry (DCCR).

Selection of variables and design of data collection form

The study was based on all specific child sexual assault offences proscribed in the Crimes Act 1900 as well as general sexual assault offences in that Act which have provisions for assaults against children. In accordance with the legal definition of offences against children, data was only collected for females under 16 years of age and males under 18 years of age, with one notable exception. Section 73 of the Crimes Act 1900 specifically prohibits carnal knowledge of a girl above the age of 16 years and under the age of 17 years.

The prosecution of child sexual assault offences sometimes occurs well after the commission of the offences and, in some cases, once the child has reached adulthood. Therefore the dataset included some offences under repealed sections of the Crimes Act. A list of all offences appearing in the dataset can be found at Appendix 2.

A list of the relevant offenders dealt with in the District Court during 1994 was extracted from the JIS. Additional information about each offender including age, prior record and plea was also extracted. These variables, together with other variables such as the victim's age, sex and relationship to offender, formed the basis of the draft data collection form. The draft form was then piloted on a sample of files randomly selected from the DCCR. This process resulted in the identification of several more variables of relevance to the study.
The data collection form was then revised and finalised. A list of variables that were collected is contained in Appendix 4.

**Collecting the data**

Each District Court file was carefully analysed and the relevant information recorded on the data collection forms in accordance with the previously defined counting rules and definitions. The data collection process was conducted over a period of two months by a small team who were also responsible for ensuring a consistent and accurate approach to the data collection task. Where files could not be located at the DCCR (for example, they were located in regional registries) data was collected from files maintained at the Office of the Director of Public Prosecutions.

Where a trial was conducted, the court file contained most of the following documents:
- the indictment;
- exhibits (often including statements made by victims);
- New South Wales Police Service Antecedent Report Form (P16);
- psychological and/or psychiatric reports and in some cases pre-sentence reports (where the accused was convicted); and
- a transcript of proceedings.

Where an offender pleaded guilty, the court file typically also contained:
- a statement of agreed facts; and
- a copy of the police brief including statements made by the victim(s).

**Coding and analysis**

The information contained in the data collection forms was coded and entered into an Excel database which was then transferred into a statistical application package (SAS) for statistical analysis.

**Methods used to count the cases**

The present study is essentially offence-based, which leads to a separate record for each charge. If a single charge involved more than one victim, then for analysis of victim features only, a separate record was created for each victim. This ensured that data on all victims was captured in the collection process without duplication of charges.

**Definitions**

In order to ensure that no ambiguity arises a precise terminology has been employed throughout the results:
- “offences”—all matters contained on the indictment;
- “proven offence”—an offence which resulted in a guilty plea or convicted outcome;
- “alleged offender”—an individual who has been indicted;
- “proven offender”—an alleged offender who has at least one proven offence;
- “alleged victim”—an individual who has alleged at least one matter on the indictment;
- “proven victim”—an alleged victim who was the subject of at least one proven offence; and
- “principal proven offence”—the offence which attracted the severest penalty in the set of proven offences for proven offenders.
3 Who Were The Offenders?

THE PATH TO CONVICTION

There were 501 alleged offenders of whom almost two-thirds (326 or 65.1%) were convicted of at least one charge. This is a lower conviction rate than for offences overall—75.6% of persons charged in the higher courts in 1994 were convicted of at least one charge.¹

The vast majority (81.2% or 407) of alleged offenders were committed for trial. Only 94 offenders entered pleas of guilty in the Local Court (18.8%). However, 153 offenders entered pleas of guilty either at arraignment or sometime before trial. Sixty-two alleged offenders had their proceedings “no-billed” before trial. Two alleged offenders died before proceedings were completed. Of those alleged offenders who proceeded to trial, 111 were acquitted and 79 were convicted.

For offenders found guilty at trial, 48 (60.8%) received a full-time custodial sentence, ten (12.7%) were sentenced to periodic detention and 21 (26.6%) received non-custodial sentences. For late pleas of guilty, 79 offenders (51.6%) received a full-time custodial sentence, 21 (13.7%) were sentenced to periodic detention and 53 (34.6%) received non-custodial sentences. For early pleas of guilty, 57 offenders (60.6%) were sentenced to full-time custody, 11 (11.7%) received a sentence of periodic detention and 26 (27.7%) had non-custodial sentences imposed.

Overall, 247 offenders (49.3% of alleged offenders) pleaded guilty either before or at trial which represents a very low plea rate compared with that found in earlier studies of child sexual assault. Cashmore and Horsky;² analysing matters finalised in New South Wales in 1982, found that the majority of defendants pleaded guilty at either committal or trial with less than a quarter of cases actually reaching trial by jury: see Figure 2.

Figure 2: Committal proceedings
OFFENDER CHARACTERISTICS

There were 326 proven offenders of whom seven were sentenced for principal proven offences which were not of a sexual nature. Those offenders were not further analysed. The following analysis deals with the remaining 319 proven offenders.

Sex

The vast majority of proven offenders were male, although there were three female proven offenders:
- one mother who incited her nine year old daughter to commit an act of indecency;
- one mother who forced her nine year old son to engage in mutual oral intercourse and also attempted to have penile vaginal intercourse with him; and
- a woman who assaulted by digital penetration a fellow six year old female inmate of a State home.

Age

The median age for proven offenders at the time of arrest was 41 years. This is substantially older than the general offender population. Most data on other forms of criminal activity suggest that the average offender age is less than 30 years. In contrast, only 25% of proven offenders in this study were aged 28 years or under while 50% were aged between 30 and 50 years. The oldest proven offender was aged 81 and the youngest proven offender was 14 years old.

There is a substantial difference between the age of offenders at the time of the commission of the offence (median = 35) and at the time of arrest (median = 41). This is due to the fact that the offences may form a long pattern of offending, there may be a delay in complaint due to the age of the child and the process of investigation may sometimes be attenuated: see Figure 3.

Occupation

A relatively large number of proven offenders (41%) at the time of the offence were not in employment: 24% were unemployed and 17% were on a pension or sickness benefit.

Due to the relatively small size of the group and the wide distribution of employment types, it was not possible to draw any conclusions about individual occupations. However, when grouped according to the Australian Bureau of Statistics' broad occupational descriptions, most proven offenders could be broadly classified as:

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3 NSW Bureau of Crime Statistics and Research, New South Wales Criminal Courts Statistics 1995, 1996, Attorney General's Department, Sydney; NSW Bureau of Crime Statistics and Research, Crime and Justice Facts 1995, 1995, Attorney General's Department, Sydney. However, it should be noted that some forms of criminal activity which typically involve older offenders, such as white collar crime or domestic violence, may be under reported.
It should be noted that these are occupations with high frequencies in the overall population. Other groups such as clerks, para-professionals, sales/service personnel and plant/machine operators represented 2–3% each in this study.

Three ministers of religion were sentenced for a total of nine proven offences (five of these offences each involving 41 matters taken into account). The victims were all male.

Five proven offenders, who committed 11 proven offences, were teachers. Although teaching was recorded as the offender’s occupation at the time of offence, only one offender was in a relationship of teacher to the victim. Of the other four offenders, one was a school principal, who had sexually assaulted his daughter, two were boyfriends of the victim’s mother and one was a friend of the victim. Five teachers (of whom three were teachers of the alleged victims) were acquitted or were subject to no further proceedings.

**Marital status**

Figure 4 details the marital status of proven offenders at the time of the commission of the principal proven offence.
Prior convictions

A small proportion of proven offenders (53 or 16.6%) had a prior conviction for sexual offences, 23 of whom (7.2%) had served a prison term. A similar proportion of proven offenders (54 or 16.9%)—not necessarily the same individuals—had a prior conviction for violent offences, 11 of whom (3.4%) had served a prison term.

This variable may underestimate offenders who have a prior record as offences committed in other States or overseas are not always brought to the attention of the court.

Legal representation

Nearly half (47%) of the proven offenders received Legal Aid and a similar proportion (45%) were recorded as having private legal representation. Only 2% were unrepresented. Information was not available for 6%.

Plea

Out of the 319 proven offenders, most pleaded guilty (75.2%), although the plea was more likely to be entered in the District Court than at committal. Of natural fathers,
76.2% pleaded guilty (n=32), as did 69.2% of non-biological fathers (n=36). Relatively high plea rates were apparent with uncles (22 or 81.8%) and neighbours (20 or 90.0%).

**Police charges and indictment matters**

A comparison was made of all items recorded on the police charge sheets with those offences for which the offender was ultimately dealt with in the District Court. Five categories were used:
- substantially the same;
- police charges less severe because of fewer counts;
- police charges less severe because of different charges;
- police charges more severe because of more counts; and
- police charges more severe because of different charges.

For the majority of proven offenders (52%) the police charges and the final charges were substantially the same. If they differed, it was more likely that the original police charges were more severe, either because they had more counts or charges (19%) or because the charges were different (12%). A small proportion of proven offenders (6%) were initially charged with fewer counts or offences and 4% were charged with different, less serious offences.

**Schedule 9 matters (Form 2)**

One-tenth of proven offenders (31 or 10%) had other matters taken into account. The number of matters taken into account was between one and eight, except for one offender who was convicted of five proven offences on a male victim, with 41 matters taken into account.

**Liberty status**

At the time of offence, the vast majority of proven offenders (87%) were at liberty, a small proportion (5%) were on a bond and 2% were on probation or parole. Only one proven offender was serving periodic detention at the time of the offence. Liberty status was unknown for the remaining 6%.

**Penalties**

More than half (56%) of the proven offenders received a full-time custodial sentence in relation to the principal proven offence. An additional 13% received periodic detention, 15% received a common law or s 558 bond (usually with supervision) and 12% were sentenced to a community service order. The remaining four per cent of dispositions included s 556A bond and s 556 dismissal, a fine, and pre-trial diversion. Pre-trial diversion was undertaken by four offenders who were all fathers (one non-biological) of female victims. All had pleaded guilty (as is required for this disposition) to a total of seven offences. All cases involved a prolonged course of conduct and representative charges were laid: see Figure 5.
Figure 5: Penalty for offender's principal offence

- Minimum term: 51.7%
- Periodic detention: 13.2%
- CSO: 11.6%
- Bond with supervision: 10%
- Bond: 4.7%
- Fixed term: 4.1%
- s 558 deferred with suspension: 1.6%
- Pre-trial diversion: 1.3%
- s 556 dismissal: 0.6%
- Rising of court: 0.3%
- s 558 deferred: 0.2%
- s 556A recognizance: 0.3%
- Fine: 0.3%
Penalty for principal proven offence compared by type of assault

Whilst recognising that the statutory maximum penalty available for each offence varies and that the particular maximum penalty is the starting point for the determination of the length of any custodial penalty, it is nevertheless insightful to compare the nature of the conduct actually involved with the type and duration of the sentence imposed.

An analysis of the type of conduct (that is, the actual behaviour involved as recorded in the court files) indicated that most proven offenders (84%) whose principal proven offence involved penile penetration of the vagina or anus received a full-time prison sentence. The remaining proven offenders sentenced for the same conduct received periodic detention orders (5%), community service orders (5%) or common law bonds (4%). One proven offender was sentenced to the rising of the court for a single offence of penetration inflicted on a 13 year old female neighbour.

A high proportion (66%) of proven offenders whose principal proven offence involved digital penetration received a prison sentence, as did those who performed (62%) or received fellatio (65%) and those who performed cunnilingus on the victim (75%). One offender who performed cunnilingus was allowed to undertake pre-trial diversion.

There were two proven offenders who were sentenced for penetration of the victim with an object. One proven offender received a minimum term of 42 months, with an additional term of 30 months. This proven offender was the father of two female victims, aged five and six years, whom he had abused on numerous occasions. He also had a previous conviction for violence. The second proven offender was a friend of the eight year old female victim's family, who offended on one occasion. This proven offender received 12 months imprisonment to be served by way of periodic detention.

Where the principal proven offence was masturbation of the victim or the offender, the penalty profile was less severe with only 39% of offenders receiving a full-time custodial sentence. Similarly touching the victim with hands or rubbing with the penis resulted in only 30% of offenders being sentenced to full-time custody. Two of the latter group received a s 556A dismissal. One of these was a 19 year old offender who had been touching his 12 year old stepsister over a prolonged period. The other was a 28 year old friend of the 11 year old male victim’s family, who on one occasion touched the boy with his penis. The offender was 16 at the time of the offence and at arrest had had no sexual convictions, but he had a conviction for violence.

Although this data did not include offences involving exposing a victim to or using a victim in pornography, one offender had photographed his nine year old female victim.

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4 Cell frequencies were sometimes small in this part of the analysis because it only includes the principal proven offence for each proven offender and the length of penalty only includes those who received a full-time custodial sentence.

5 Pornography offences prescribed under the Crimes Act 1920, s 91 and the Children Care and Protection Act 1987, s 51 were not included in the dataset.
naked, as well as touched her. This was a single offence by a neighbour of the victim and he received a common law bond.

Three proven offenders’ principal offence was exposure. One proven offender, who had been found guilty on other charges, received a community service order. The other two proven offenders received common law bonds with supervision.

As expected, there were some differences in the lengths of prison terms given for the various types of assault. Table 1 gives medians for each type of assault.

Table 1: Length of minimum/fixed prison terms for principal offence

<table>
<thead>
<tr>
<th>Type of assault</th>
<th>Median (months)</th>
<th>Number of offenders</th>
</tr>
</thead>
<tbody>
<tr>
<td>Penile vaginal penetration</td>
<td>42</td>
<td>48</td>
</tr>
<tr>
<td>Penile anal penetration</td>
<td>30</td>
<td>21</td>
</tr>
<tr>
<td>Digital vaginal penetration</td>
<td>21</td>
<td>24</td>
</tr>
<tr>
<td>Digital anal penetration</td>
<td>45</td>
<td>1</td>
</tr>
<tr>
<td>Fellatio/cunnilingus on victim</td>
<td>18</td>
<td>19</td>
</tr>
<tr>
<td>Fellatio on offender</td>
<td>18</td>
<td>11</td>
</tr>
<tr>
<td>Masturbation on victim</td>
<td>12</td>
<td>6</td>
</tr>
<tr>
<td>Masturbation on offender</td>
<td>9</td>
<td>5</td>
</tr>
<tr>
<td>Touching victim with hands</td>
<td>12</td>
<td>20</td>
</tr>
<tr>
<td>Touching victim with penis</td>
<td>12</td>
<td>12</td>
</tr>
</tbody>
</table>

Where the victim was female, the sentences were slightly longer for anal intercourse (median 33 months, n=4), having the victim perform fellatio (median 22 months, n=8), and touching with hands (median 15 months, n=13). As masturbation of the offender involved only five victims (three female and two male), a comparison of medians is inappropriate. However, the offences on females resulted in six, nine and 12 month sentences, and those on males, six and 21 months. Similarly, touching with the penis involved only ten female and two male victims. In the two cases involving male victims the sentence lengths were eight and nine months.

Cumulative sentences

There were 371 sentences of full-time imprisonment of which 187 were second or subsequent sentences which were either concurrent or cumulative sentences. There were in fact 23 cumulative sentences which were imposed on 16 proven offenders (5% of proven offenders). An additional seven sentences, involving seven proven offenders, were cumulative on an existing sentence.

Almost half (46.7%) of the proven offences resulting in a cumulative sentence involved more than one victim. This contrasts with around 27.7% for all proven offences.
More than half of the proven offences resulting in a cumulative sentence involved assaults which were prolonged (59.3%), mostly with representative charges. This is more than for proven offences overall, which was 42.0%.

The characteristics of the 23 proven offenders receiving cumulative sentences were as follows:

- one had previous convictions for both sexual and violence offences (serving prison for the sexual offences);
- three had previous convictions for sexual offences (two having served prison terms);
- three had previous convictions for violence offences (one having served a prison term); and
- 16 had no previous convictions.

**Comparison of sentences for fathers with other offenders**

As fathers are in a position of trust, it was expected that they would receive more severe sentences than other offenders. Both natural and non-biological fathers were far more likely to receive a full-time custodial penalty for their principal proven offence than strangers. The relative proportions were 74% of natural fathers (n=42) and 73% of non-biological fathers (n=52) gaol, compared with 33% of strangers (n=15).

For proven offenders who received a gaol sentence, natural fathers had the longest minimum or fixed term (median=42 months, n=31), followed by strangers (median=30 months, n=5), then non-biological fathers (median=24 months, n=38).

Penalties were examined for fathers of female and male victims. Statistical analysis was not feasible due to the small number of male victims. Eighty-five convicted fathers had assaulted female children, while only nine had assaulted male children.

**Offenders involved in multiple trials**

Where charges involve multiple victims, some evidentiary advantage may be lost if separate trials are conducted. Separate trials may be ordered when the indictment contains more than one offence for more than one victim. There were 201 such offences and the majority were dealt with in one trial (n=158). The remaining 43 offences were mainly dealt with in two trials, with one offender having five trials—Table 2 provides the outcome frequencies for these trials.

Figure 6 shows that a “not guilty” verdict is the most common in cases where two or more trials were held. There were very few guilty pleas in such cases.

Looking at jury verdicts overall, there are more not guilty verdicts (65) than guilty (38). However, Figure 7 shows that the proportion of guilty and not guilty verdicts are quite close when there is one trial, while for multiple trials, the vast majority result in not guilty verdicts.

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6 This was complicated by the fact that some proven offenders may have assaulted children of both sexes. In such cases the principal offence was selected.
Penalty and legal representation
There were no differences in penalty according to whether offenders were represented by private firms or Legal Aid. Seven proven offenders were unrepresented.
Penalty and prior sexual convictions

As expected, prior convictions were associated with more severe penalties, particularly where the prior conviction was for a sexual offence. Of proven offenders with at least one prior conviction for a sexual offence, but none involving prison, two-thirds (20 out of 30) were sentenced to full-time custody compared with only half of proven offenders (50%) with no known prior convictions for sexual offences. Of those with a prior sexual offence for which they had been imprisoned, 87% (20 out of 23) received a prison term. The remaining three proven offenders received supervised common law bonds. One was a 38 year old offender, with at least one previous conviction for violence and a total of six periods of imprisonment, who incited a 16 year old male to indecently touch the offender. The second case was a 48 year old friend of the victim’s family, who masturbated an 11 year old boy. The third was a 43 year old, also with previous imprisonment for violence, who touched an eight year old girl in a shop.

Penalty and prior violence convictions

Almost two-thirds (65% or 28 out of 43) of proven offenders with at least one prior conviction for violence offences, but none involving a prison term, received a full-time custodial sentence whereas just over half (53%) of the proven offenders with no known prior convictions for violence offences received a full-time custodial sentence.
Of those with a prior violence offence for which they had been imprisoned, 64% (or seven out of 11) were sentenced to imprisonment for the current offence. Those with previous imprisonment for violence who received non-custodial sentences consisted of a 40 year old proven offender who received a deferred sentence for an aggravated act of indecency on a 14 year old girl, and three proven offenders who received supervised common law bonds.
4 Who Were The Victims?

In most cases, multiple victims were dealt with by separate charges, but in some cases they were dealt with under the same charge, using multiple counts. For consistency, when examining victim-related variables, data on these victims (involving 78 charges) were included as separate charges.

The task of identifying alleged and proven victims was somewhat problematic because variables such as age of victim, duration of abuse and location of abuse vary between offences and within the same offence. Variables can also be influenced by the way in which record selection is determined. The following criteria were used:

• for age of victim, the youngest age for any offence or the age at commencement of abuse, was selected;
• for duration of abuse, the charge involving the longest period for any one victim was selected;
• for type of assault the most serious type was selected according to a predetermined order of seriousness; and
• for pattern of abuse, the order of selection was (i) prolonged if any, (ii) occasional if any, (iii) single.

Sex of victims

The number of alleged victims was 630 and the number for whom at least one offence involving them was proven, was 404 (64%). Of the 630 alleged victims, 455 (75%) were female and 156 (25%) were male.¹ Of the 404 proven victims, 281 (72%) were female and 111 (28%) were male.²

It follows that 64% of alleged victims had at least one of the offences involving them proven. Male complainants (71%) were more likely to have at least one offence proven compared with females (62%).

¹ The data was unavailable for 19 victims.
² The data was unavailable for 12 victims.
WHO WERE THE VICTIMS?

Age of victim

The age of the victim when the offence occurred has been separately calculated. This age may vary for a victim where there were multiple offences or where the one offence covered a prolonged period.

Of primary interest was the age of the victim when abuse commenced. Therefore, where there were multiple offences for one victim, or the abuse occurred over a period of years, the earliest age was selected for that victim. This age does not reflect the actual age at which victims began to be abused, it is rather the age at which the earliest offence could be nominated.

The median commencement age was nine years for female victims and ten years for male victims. The youngest girl was one year old while the youngest boy was three years old.¹

As noted previously, female victims were over represented in general, being 72% of proven victims, and this over representation held across all age groups. They were significantly over represented in the younger commencement age groups. For example 79% of victims under five years, and 80% of those between five and seven years, were female. Conversely, while 28% of proven victims were male, 34% of the 14-16 age group were male: see Figure 8.

Figure 8: Age of victims

![Figure 8: Age of victims](image)

Relationship of victim to offender

There were no substantial differences in profiles for alleged victims and proven victims. In accordance with other studies, it was found that most (46%) proven victims had been abused by family members. Immediate family members accounted for 31%—almost all were abused by the father. Other immediate family offenders were brothers, stepbrothers

¹ The different median age may be affected by the differential age of consent.
or mothers. An additional 15% of victims were abused by a relative, such as an uncle, grandfather or cousin. Figure 9 shows the relationship of offender to victim by the sex of the victim.

The next major category was adults known to the victim or her/his family (for example, neighbour, friend or mother's boyfriend) who were responsible in the case of 44% of proven victims. Non-family members who were in authority over the victim, such as teachers, clergy or babysitters were the abusers for only 5% of victims. Only 5% of victims were assaulted by strangers.

Male victims were much more likely than female victims to be abused by adults known to them or their family. While 57% of female proven victims were abused by family members, the figure is only 28% for male proven victims. Conversely, while 68% of male proven victims were abused by adults they know, for female proven victims the figure is only 35%.

Analysis of offender occupations and relationship to victim indicated that of five proven offenders who were teachers at the time of the offence, only one was a teacher of the victim involved. Conversely, it emerges from examining the victim's relationship to the offender that in fact five offenders were, or had been, teachers of victims, although their occupations were not coded as teacher: two were unemployed, one was a pensioner, one was a clerk and one was described as a sportsperson (he was in fact the victim's tennis coach).

There were five cases where the accused was the victim's boyfriend. While consent is not a defence in relation to female victims under 16 years, some leniency is often shown where the relationship developed consensually. Only two of these offences were proven. An 18 year old male offender had had vaginal intercourse on two occasions with the 14 year old victim—a four year common law bond was imposed. The second proven offence involved a 24 year old male offender who had had sexual intercourse several times over a month with a 13 year old female. He was charged under s 66C(1), sentenced to a four year common law bond and fined $1 800.

Type of conduct

In the main, the type of assault was reflected in the charges laid, as applicable at the date of offence. Frequencies were calculated for male and female proven victims, to take into account gender specific types of conduct. Table 3 gives the frequencies for all types of conduct.

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4 Where the offence was an attempt, it was included in the appropriate substantive category. In the cases of multiple offences upon a victim, the most serious offence was selected. For this purpose, anal or vaginal penetration with penis or object and fellatio on offender were ranked 1 (most serious); digital penetration or oral sex performed on victim were ranked 2; offences involving masturbation of victim or offender were ranked 3; touching and offences involving pornography were ranked 4; exposure was ranked 5.
WHO WERE THE VICTIMS?

Figure 9: Relationship of offender to victim

![Bar chart showing the relationship of offender to victim by gender and type of assault.]

Table 3: Type of assault by gender of victim

<table>
<thead>
<tr>
<th>Type of conduct</th>
<th>Female victims</th>
<th>Male victims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Touching with hands</td>
<td>76</td>
<td>20</td>
</tr>
<tr>
<td>Penile vaginal penetration¹</td>
<td>64</td>
<td>0</td>
</tr>
<tr>
<td>Penile anal penetration</td>
<td>3</td>
<td>28</td>
</tr>
<tr>
<td>Digital (vaginal or anal) penetration²</td>
<td>46</td>
<td>3</td>
</tr>
<tr>
<td>Cunnilingus or fellatio on victim</td>
<td>21</td>
<td>26</td>
</tr>
<tr>
<td>Masturbation on offender</td>
<td>20</td>
<td>6</td>
</tr>
<tr>
<td>Touch or rub victim with penis</td>
<td>17</td>
<td>9</td>
</tr>
<tr>
<td>Fellatio on offender</td>
<td>14</td>
<td>9</td>
</tr>
<tr>
<td>Masturbation on victim</td>
<td>7</td>
<td>9</td>
</tr>
<tr>
<td>Exposure</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Used in pornography</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Victim made to masturbate</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Other (inciting, etc)</td>
<td>9</td>
<td>0</td>
</tr>
</tbody>
</table>

¹ Includes two cases of penetration with object.

² There were no instances where digital anal penetration was the most serious type of assault for female victims.
Although the largest single category for all proven victims is "touching with the hands" (96 victims), when penetrative behaviours are aggregated it becomes clear that more victims suffer this type of abuse (either penile penetration (n=95) or digital penetration (n=49)).

**Pattern of conduct**

Thirty-eight per cent of victims had suffered prolonged assaults (almost always prosecuted by way of representative charges), 26% complained of occasional incidents and 36% of victims suffered single assaults. Over one-quarter of offences involving occasional incidents were prosecuted by the use of representative charges.

For the small group of male victims, these proportions were partially reversed—they were most likely to have encountered only a single assault. Table 4 gives the gender breakdown.

<table>
<thead>
<tr>
<th>Conduct</th>
<th>Female victims (%)</th>
<th>Male victims (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prolonged</td>
<td>41</td>
<td>28</td>
</tr>
<tr>
<td>Occasional</td>
<td>25</td>
<td>31</td>
</tr>
<tr>
<td>Single</td>
<td>34</td>
<td>41</td>
</tr>
</tbody>
</table>

**Duration of conduct**

Excluding single offences, the duration of conduct was calculated from the first and last dates related to each proven offence. As duration can differ for victims of multiple offences, the proven offence with the longest duration was selected.

For proven victims:
- the median duration of the conduct (excluding single offences) was 17 weeks;
- a quarter involved durations of up to two months;
- three-quarters involved durations of approximately one year or less;
- 10% involved durations exceeding two years; and
- the longest proven offence had a duration of six years.

**Location of incident**

Overall, almost half (45.7%) of all proven offences occurred in the victim's home, consisting of 33.9% in a home shared by the victim and offender, and 11.8% in the home of the victim only. An additional 34.7% occurred in the home of the offender. Other locations such as vehicles, motels, offender's workplace and public toilets accounted for only 19.6% of proven offences: see Figure 10.

---

7 Where the pattern differed for one victim over multiple offences, the record with the most severe pattern was selected.
8 Number equals 380 as the data was unavailable for 24 victims.
<table>
<thead>
<tr>
<th>Location</th>
<th>% of proven offences</th>
</tr>
</thead>
<tbody>
<tr>
<td>Family Home</td>
<td>36</td>
</tr>
<tr>
<td>Accused's Home</td>
<td>41</td>
</tr>
<tr>
<td>Victim's Home</td>
<td>80</td>
</tr>
<tr>
<td>Vehicle</td>
<td>14</td>
</tr>
<tr>
<td>Residence</td>
<td>26</td>
</tr>
<tr>
<td>Other Private</td>
<td>17</td>
</tr>
<tr>
<td>Public Place</td>
<td>10</td>
</tr>
<tr>
<td>Motel</td>
<td>10</td>
</tr>
<tr>
<td>Bush</td>
<td>17</td>
</tr>
<tr>
<td>Accused's work</td>
<td>0.07</td>
</tr>
<tr>
<td>School</td>
<td>0.07</td>
</tr>
<tr>
<td>Toilet</td>
<td>0.07</td>
</tr>
</tbody>
</table>

**Figure 10: Location of assault**
The location of the proven offence was another factor that was found to be related to the sex of the victim. For proven offences involving female victims, the range of locations was similar to the overall profile, except that none occurred in public toilets. For male victims, the pattern was different from the overall profile in that the most common location was the home of the offender (45.8%) followed by the victim's home (29.0%) of which 15.5% was the victim's own home and 13.5% in a home shared by victim and offender.
5 What Were The Offences?

There were 1,039 offences for child sexual assault finalised in New South Wales District Courts during 1994 of which the great majority (846 or 81.4%) were initially committed for trial. Overall, there were 571 (55.0%) proven offences.

The average number of offences per alleged offender was 2.1 while the largest number was 13. The average number of proven offences per proven offender was 1.8 while the largest number was seven. The vast majority of offences were in regard to either one count (67%) or two counts (18%). The largest number of counts was 18 for a proven offence and 58 for an alleged offence.

All proven offences were committed by individual proven offenders acting alone. Three offences, each involving two alleged offenders, resulted in no further proceedings as the outcome. In one case the victims who had previously been sexually assaulted by their mother’s friend, were then sexually assaulted by their mother.

The greatest number of alleged victims for one offender was seven, accounting for 12 offences (2%). Two-thirds (67%) of proven offences involved only one victim.

Delay between arrest and finalisation

The median time between arrest and finalisation was 35 weeks for listed sentence cases and 62 weeks for listed trial cases. The median time between committal and finalisation was 13 weeks for listed sentence cases and 18 weeks for listed trial cases.

Trial by judge alone

A total of 24 offences (2.3%) (involving 13 alleged offenders) were dealt with in trials by judge alone. Of these, only two were proven offences, involving two offenders.

Act and section number

General

The most common proven offences were as follows:
• s 61M(1)—aggravated indecent assault (90 or 15.8% of proven offences);
• s 61E(1A)—indecent assault on person less than 16 by person in authority (53 or 9.3% of proven offences); and
• s 66A—sexual intercourse with a child under ten (43 or 7.5% of proven offences).
They account for nearly one-third of all proven offences, reflecting the diversity of offences available. These sections, all gender neutral offences, were also the three most common (alleged) offences overall.

The most common gender specific proven offences were s 76, indecent assault of a female (33 or 5.8% of proven offences) and s 81, indecent assault on a male (28 or 4.9% of proven offences).

Sex of victim

When the data is analysed by the sex of the victim (as opposed to the sex specified in the legislation), the most common proven offences involving a female victim were:

- s 61M(1)—aggravated indecent assault (69 or 16.6% of proven offences involving female victims);
- s 61E(1A)—indecent assault on person less than 16 by person in authority (47 or 11.3% of proven offences involving female victims);
- s 66A—sexual intercourse with a child under ten (34 or 8.2% of proven offences involving female victims);
- s 61E(1)—indecent assault (34 or 8.2% of proven offences involving female victims).

These were the same as for the overall population (that is, the three gender neutral offences listed above). This reflects the fact that the majority of victims were female and that the majority of offences involving female victims (other than carnal knowledge) occurred after the introduction of the gender neutral offences. Only 23.6% of offences on females occurred before 23 March 1986 (when all female specific offences were repealed) therefore the majority of offences on females could not be prosecuted under gender specific sections.

A similar analysis for male victims provides a markedly different result. The most common offence was a gender specific offence, s 81, indecent assault on a male which accounted for 24 (out of 129) or 18.6% of proven offences involving male victims. This section was repealed in 1984 and offences recorded under this section all occurred prior to that date, although they were not finalised until 1994.

The second most common proven offence involving male victims was s 61M, aggravated indecent assault (18 out of 129 male victims or 13.9%). The third most common proven offence involving male victims was s 78K, homosexual intercourse with a male between ten and 18 years. Both ss 81 and 78K could also be prosecuted under the gender neutral offences in the Crimes Act. However it appears that the gender specific offence is preferred. In fact, of 13 such proven offences which occurred after the introduction of s 61J (on 17 March 1991), only three were prosecuted under the new section, compared with ten under s 78K.

Comparisons between the use of various sections

Similar incidents committed at different times may be prosecuted under different sections of the Crimes Act 1900. This is particularly the case in relation to male victims,
where the earlier gender specific offences were not repealed when the more recent gender neutral offences were introduced. The older male specific offences are still in common use. Of proven offences on males occurring after March 1991, when all offences on males could be prosecuted under gender neutral sections, 39.7% were prosecuted under the current male offence sections and 60.3% under the current non-specific sections.

A comparison of current gender neutral sections with gender specific sections involving male victims highlights the difference in sentencing such offences. Where the penalty was custodial, gender specific offences such as s 78K (homosexual intercourse victim ten to 16 years) resulted in a median minimum term of 36 months. Conversely, the gender neutral offence under s 66C(1) (sexual intercourse child ten to 16 years) received a median minimum term of 13 months. Further, a far greater proportion (50% or 36) of s 66C offences resulted in non-custodial sentences compared with the gender specific s 78K offences (12% or 16).

It is interesting to compare sentences imposed for gender neutral offences by sex of victim. The results are summarised in Table 5, below.

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Median minimum term</th>
<th>Where victim male</th>
<th>Where victim female</th>
</tr>
</thead>
<tbody>
<tr>
<td>s 61J</td>
<td>Aggravated sexual intercourse without consent (including attempts)</td>
<td>42 months (n=3)</td>
<td>21 months (n=16)</td>
<td></td>
</tr>
<tr>
<td>ss 66A, 66B</td>
<td>Sexual intercourse and attempted sexual intercourse child under 10 years</td>
<td>21 months (n=5)</td>
<td>36 months (n=28)</td>
<td></td>
</tr>
<tr>
<td>s 66C</td>
<td>Sexual intercourse, child 10-16, including when under authority</td>
<td>12 months (n=3)</td>
<td>28 months (n=30)</td>
<td></td>
</tr>
</tbody>
</table>

This table suggests that a harsher penalty was imposed for s 66C offences with female victims. However, a much larger proportion of offences involving female victims resulted in a non-custodial sentence (57% or 30) than offences involving male victims (one in six). It may be that those offences involving females which resulted in a custodial sentence were of a particularly serious nature.

The sentencing of offences committed by offender in authority

Offences which relate to offenders who hold positions of trust or authority in relation to the victim at the time of the offence have higher maximum penalties than other child sexual assault offences. The interpretation of sentencing statistics associated with these offences is complicated by various legislative changes. The general “in authority”
provisions were introduced in July 1981. Indecent assault by a person in authority was an available charge between July 1981 and March 1991. In the current legislation “in authority” is considered an aggravating circumstance for indecent assault. The sexual intercourse offences retain separate subsections that deal with persons in authority.

There were 134 proven offences prosecuted under sections specifying that the offender was in authority, where the actual relationship between the victim and the offender was recorded. Table 6 shows the frequencies and percentages of each relationship category.

Table 6: Offences prosecuted under sections involving offenders in authority

<table>
<thead>
<tr>
<th>Relationship of offender to victim</th>
<th>Frequency</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Natural father</td>
<td>58</td>
<td>43.3</td>
</tr>
<tr>
<td>Non-biological father</td>
<td>42</td>
<td>31.3</td>
</tr>
<tr>
<td>Mother</td>
<td>2</td>
<td>1.5</td>
</tr>
<tr>
<td>Teacher</td>
<td>3</td>
<td>2.2</td>
</tr>
<tr>
<td>Grandfather</td>
<td>7</td>
<td>5.2</td>
</tr>
<tr>
<td>Uncle (including non-biological)</td>
<td>6</td>
<td>4.5</td>
</tr>
<tr>
<td>Brother</td>
<td>1</td>
<td>0.7</td>
</tr>
<tr>
<td>Mother’s boyfriend</td>
<td>1</td>
<td>0.7</td>
</tr>
<tr>
<td>Family friend</td>
<td>6</td>
<td>4.5</td>
</tr>
<tr>
<td>Friend/known to victim</td>
<td>8</td>
<td>6.0</td>
</tr>
</tbody>
</table>

As this table shows, while fathers were responsible for the majority of these offences, offenders in several other classes of relationship were also considered to be in authority. Most of those coded as offenders known to the victim were actually fathers of the victims’ friends. Of the remainder, one was an unqualified masseur who was informally treating the victim. Another had employed the victim on a casual basis. Of those coded as friends of the family, one offender was employed by the victim’s father, and one lived intermittently with the victim’s family and sometimes acted as a babysitter.

Although this table does not contain prosecutions where the offender was a religious instructor such as a priest, there were such offenders. However, at the dates of those offences by religious instructors, the in authority offences were not operative. In one case, the minister of religion was not practising as such at the time of the offence.

The data was analysed for those offenders who stood in an unambiguous relationship of authority to the victim (for example, parents, teachers—including religious instructors—doctors and persons entrusted with the child’s care). Not all of these cases were prosecuted as in authority offences.

In total there were 245 such proven offences of which 104 (42%) were charged under in authority sections. Of the 141 proven offences which were not prosecuted under in authority sections, the majority (86 or 61.0%) occurred either before these sections were
introduced ($n=31$) or after they were repealed ($n=55$). Prior to July 1981 in authority sections were only available for carnal knowledge involving teachers or fathers. The above 31 offences were almost all offences other than carnal knowledge committed by fathers.

This leaves 55 offences (22% of the 245 offences) which could have been, but were not prosecuted under sections which specified an in authority relationship. Ten of these were by persons babysitting the children involved and the remainder were by fathers or stepfathers.

There was only one proven offence of incest: s 78A. The offender was the father of the victim, a 15 year old girl. The assaults (cunnilingus performed on the victim) took place over nine months, so there were representative charges. The offender was sentenced to a minimum term of three years with an additional term of one year.

Most fathers were imprisoned for offences involving cunnilingus and the median term for this type of assault by natural fathers was 24 months ($n=6$). For non-biological fathers it was 18 months ($n=5$). The median term for this type of assault where the offender was not the victim’s father or surrogate father was 16.5 months ($n=6$).

**Adult complainants of childhood incidents**

Some adults make complaints of conduct which occurred in childhood. To capture such cases, offences which happened prior to the July 1981 legislation were examined. There were 78 proven charges (14% of all proven charges) and 49 offences involved female victims (63%):

- most were for indecent assault—29 under s 76, indecent assault of a female and 22 under s 81, indecent assault of a male;
- one was for attempted rape;
- 18 were for carnal knowledge offences—five for carnal knowledge of a girl under ten or attempts, three for a girl aged ten to 16 and ten for carnal knowledge by a teacher or father;
- there was one act of indecency with a girl and three with a boy;
- one offence was of homosexual intercourse with a boy under ten; and
- three were buggery offences on male victims.

There were no particular differences between this group of offences and the general profile.

**Plea accepted in discharge of indictment**

Thirty-five proven offenders (11%) had a lesser plea accepted in full discharge of the indictment.

The original matters on the indictment and the plea accepted for lesser offences can be categorised in the following way:
original sexual intercourse charges pleaded down to indecent assault and acts of indecency charges (63%);
• original sexual intercourse charges pleaded down to other charges of sexual intercourse with less severe maximum penalties (15%);
• original charges pleaded down to attempts (9%);
• original sexual assault charges pleaded down to non-sexual assault charges (8%); and
• original indecent assault charges pleaded down to act of indecency charges (5%).

APPELLATE REVIEW OF CASES IN THE STUDY

There were 46 proven offenders (14% of proven offenders) who either sought leave to appeal to or were the subject of a Crown appeal to the Court of Criminal Appeal. The cases which were appealed can be divided into four categories: see Table 7.

<table>
<thead>
<tr>
<th>Appeal type</th>
<th>Frequency</th>
<th>Successful</th>
<th>Successful (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence only</td>
<td>18</td>
<td>5</td>
<td>27.8</td>
</tr>
<tr>
<td>Conviction only</td>
<td>17</td>
<td>8</td>
<td>47.1</td>
</tr>
<tr>
<td>Conviction and sentence(^2)</td>
<td>8</td>
<td>2</td>
<td>25.0</td>
</tr>
<tr>
<td>Total</td>
<td>43</td>
<td>15</td>
<td>34.9</td>
</tr>
<tr>
<td>Crown appeal</td>
<td>3</td>
<td>3</td>
<td>100.0</td>
</tr>
</tbody>
</table>

\(^2\) One applicant was successful on both sentence and conviction, and another had the appeal upheld only on sentence.
Before discussing the sentencing patterns identified in this study, it is useful to briefly outline some of the relevant sentencing principles.

**GENERAL SENTENCING PRINCIPLES**

**Objective gravity of the offence**

The abhorrence with which the community regards the sexual assault of children is illustrated by the provision of heavy maximum penalties by the legislature. The courts in turn, must give effect to the concerns manifested by Parliament. The 1989 amendments to the *Crimes Act*, which substantially increased the maximum penalties for sexual assaults, were designed to reflect the seriousness with which the community regards such offences.

In *Veen v The Queen (No 2)* the court emphasised that each crime has its own objective gravity and that a sentence should be “proportionate to the gravity of the offence” having regard to all the circumstances of the case. The NSW Court of Criminal Appeal acknowledged in *R v Dodd* that in seeking to determine the sentence appropriate to a particular crime, it is important “to have regard to the gravity of the offence viewed objectively, for without this assessment the other factors requiring consideration in order to arrive at the proper sentence to be imposed cannot properly be given their place”. The maximum penalty fixed by the legislature defines the limits of a sentence for cases in the most grave category.

The wide variety of circumstances in which sexual assault against children occurs is reflected in the range of penalties imposed by the courts. The sentencing judge must determine where the facts of each particular case lie on a spectrum “at one end of which lies the worst type of sexual assault perpetrated by any act which constitutes sexual penetration as defined”.

The degree to which the offender is seen to have exploited the youth of a female victim is a significant factor which determines where a particular offence is to be placed in the spectrum of child sexual assault offences. In *R v Dent* the court stated that children of tender years are entitled to be free from defilement and psychological difficulties in later life and are often too embarrassed, afraid or inhibited by guilt feelings to report a complaint. As stated in *R v L*, young children are virtually helpless against sexual attack by the male parent. In addition, there is a real risk that victims of child sexual assault will suffer later in life in ways which cannot be foreseen. For these reasons, sentences must be of a severe nature.

Where the criminality involved is well towards the lower end of the range of sexual offences but still involves victims in the ten to 16 year old age bracket, a very short custodial sentence or a sentence of periodic detention may be warranted.

**Totality**

In the majority of sexual assault cases the offender is convicted of more than one offence. It is incumbent on sentencing judges to give due consideration to the overriding principle of totality by relating the combined effect of all sentences to the total criminality involved. The total sentence imposed upon an offender must be “just and appropriate” and reflect the totality of the criminal behaviour. In respect of multiple offences arising

6 *Reynolds v Wilkinson* (1948) 51 WALR 17 at 18 per Dwyer CJ; affirmed in *R v Roach* (unreported, 29 September 1994, NSW CCA) per Finlay J.

7 *Ibbs v The Queen* (1987) 163 CLR 447 at 452.

8 *R v Sea* (unreported, 13 August 1990, NSW CCA) per Badgery-Parker J at 4.

9 (Unreported, 14 March 1991, NSW CCA) per Lee J at 5.

10 (Unreported, 4 May 1990, NSW CCA).

11 *R v Barrett* (unreported, 26 July 1995, NSW CCA) per Allen J at 3.

12 *R v Evans* (unreported, 24 March 1988, NSW CCA); *R v L* (unreported, 3 July 1986, NSW CCA); *R v Welcher* (unreported, 9 November 1990, NSW CCA) per Lee CJ at CL at 15; *R v Bamford* (unreported, 23 July 1991, NSW CCA) per Lee CJ at CL at 5.

13 *R v Agnew* (unreported, 6 December 1990, NSW CCA) per Loveday J; see also *R v McClymont* (unreported, 17 December 1992, NSW CCA) per Gleeson CJ.


15 *Mill v The Queen* (1988) 166 CLR 59 at 62 per Wilson, Deane, Dawson, Toohey and Gaudron JJ; *R v Close* (1992) 65 A Crim R 55 at 57 per Hunt CJ at CL where a number of previous decisions are cited.
out of one incident, sentences imposed are usually concurrent. Where there is no explicit error of fact or error in application of sentencing principles, the Court of Criminal Appeal may still correct the totality of a sentence which they hold to be manifestly excessive. In *R v H*, the Chief Justice developed this contention by reference to a detailed comparison of sentences imposed in other similar cases.

A sentencing judge may also take into account additional matters of sexual misconduct by the offender for two reasons: as evidence that the specific offences charged were not isolated instances but part of an admitted wider pattern of unlawful activity; and for the purposes of understanding the relationship between the parties. Where the offence is committed in the context of other similar offences, the possibility of discounting the sentence to be imposed on the basis that the offence for which the offender was sentenced was a one off event, is removed from consideration. Although the offences may clearly be part of a course of conduct by the offender over a period of time, the degree of that conduct is not relevant in determining the sentence which should be imposed.

In a recent Court of Criminal Appeal case, Priestly JA stated that where an offender pleads guilty to representative charges, the history of the conduct from which representative charges were based “should not be used as the basis for sentencing the convicted person for charges other than those in the indictment or as a matter of aggravation of those charges”. In that case, the sentencing judge was held to have been influenced by a very lengthy history of numerous offences in fixing the overall term and the sentence was reduced.

**Intersection of the purposes of punishment**

Gleeson CJ stated in *R v Bustos* that:

“the primary purpose of the law which attaches criminal sanctions to conduct of this kind is the protection of vulnerable children and young people. In the eyes of the law, conduct of the kind here in question involves a serious form of taking improper advantage of a relationship ... Young females in the position of the complainant are entitled to the protection of the law, and society is entitled to expect that persons who offend will be dealt with appropriate severity.”

16 *R v Ruane* (1979) 1 A Crim R 284 at 286.

17 (1994) 74 A Crim R 41 at 43 per Gleeson CJ; *R v C E S* (unreported, 26 November 1996, NSW CCA) per Priestly JA.


21 Ibid at 11. Sentence reduced from an effective total of 16 years comprised of a minimum term of 13 years to an effective minimum term of ten years and an additional term of three years.

22 *R v Bustos* (unreported, 27 June 1995, NSW CCA) per Gleeson CJ at 5.
In that case the Court of Criminal Appeal held that the sentencing judge was correct in finding that cases of child sexual assault raise substantial questions of general deterrence, despite the fact that the particular offender was unlikely to reoffend. The element of general deterrence is of prime importance in child sexual assault cases in order to emphasise to the general community that this type of conduct is not tolerated by the courts.\(^{23}\) It was observed in \textit{R v Barrett} that sexual assault offences notoriously often go undetected because the victims are too confused or ashamed to make a complaint. When a complaint is made, parents are often reluctant for the child to be exposed to any form of legal process which might add to the trauma the child has already suffered. The deterrence element and the real possibility of gaol are therefore of particular importance to those who are committing these offences or who might commit them.\(^{24}\) Deterrent sentences are a particularly important and necessary factor in sentencing where there has been a breach of trust and aggravating circumstances.\(^{25}\)

In addition, the courts must denounce such crime so that the moral outrage of the community is taken into account.\(^{26}\) Denunciation is of vital importance if deterrence is to be achieved.\(^{27}\) The potential rehabilitation of the offender may also play a role in the determination of the appropriate sentencing outcome for the particular offender.\(^{28}\)

**Personal characteristics of offenders**

The Court of Criminal Appeal in \textit{R v Baxter} emphasised the importance of considering the nature of the assault, the existence and extent of any penetration, the victim’s age, and any other features relevant to the case in sentencing child sexual assault offenders.\(^{29}\)

**Good character**

Insufficient weight to prior sex offences has been a ground for appellate intervention.\(^{30}\) However, in assessing the appropriate sentence for the sexual abuse of young children, good character is less important than in other crimes. This is partly because the offender may have led an exemplary life which has helped to conceal the crime or used the public
disgrace that must follow exposure to deter the victim from revealing the crime. An offender who has been sexually abused cannot excuse his or her unlawful behaviour on these grounds. An unfortunate background and having been a victim of sexual abuse provides an explanation but not an excuse for committing sexual offences against children.

Offender’s age

Generally the age of an offender will be taken into account at sentencing when the offender is either very young, or elderly and in ill-health. However, the amount of weight attached to an offender’s age in sentencing needs to be assessed in light of the objective gravity of the offence. In 

R v Gallagher a Crown appeal was upheld on the grounds that the sentencing judge attached too much weight to the respondent’s age and did not pay due regard to the objective gravity of the offence. In that case, however, the offender’s age and ill-health, the fact that it was his first time in custody and that he would serve his sentence in protective custody justified a finding of “special circumstances” under s 5(2) of the Sentencing Act.

Sentencing principles differ in respect of young offenders. In general, age reduces responsibility, less emphasis is given to general deterrence and special consideration is given to the prospects of rehabilitation. However, the general effect of s 17 of the Children (Criminal Proceedings) Act 1987 is that a child offender who is charged with a “serious indictable offence” is treated no differently from an adult for sentencing purposes. Regardless of age, there must always be a reasonable relationship between the objective seriousness of the crime and the sentence imposed. There is a point at which the seriousness of the crime committed by a youth is of such a nature that the principle pertaining to youth offenders must give way in the public interest: “deterrence and retribution do not cease to be significant merely because persons in their late teens are the persons committing grave crimes”.

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32 R v Evans (unreported, 24 March 1988, NSW CCA); R v L (unreported, 3 July 1986, NSW CCA); R v Welch (unreported, 9 November 1990, NSW CCA) per Lee CJ at CL at 15; R v Bamford (unreported, 23 July 1991, NSW CCA) per Lee CJ at CL at 5; R v Brackenrig (unreported, 25 July 1998, NSW CCA).
33 R v Lumsden (unreported, 31 July 1996, NSW CCA).
34 R v Holyoak (unreported, 1 September 1995, NSW CCA); R v Allpass (1994) 72 A Crim R 561.
35 (Unreported, 29 November 1995, NSW CCA); R v Dodd (1991) 57 A Crim R 349 applied.
36 The Children (Criminal Proceedings) Act 1987 applies special principles in the case of children to the exercise of criminal jurisdiction (s 6); penalties (Pt 2, Div 4); and penalties in the Children’s Court (Pt 3, Div 4); see also R v GDP (1991) 53 A Crim R 112 at 114.
Contrition and guilty plea

A plea of guilty may be taken into account as a mitigating factor. A plea of guilty by an offender generally “demonstrates contrition and remorse and enables a judge to view the sentencing process in a different light. Account is taken of the avoidance of the trauma and embarrassment occasioned to the victim and the victim’s family and also the advantages to the State of speedy resolution of trials.” The fact that an offender voluntarily takes steps towards rehabilitation by attending counselling sessions and consulting appropriate practitioners may also be taken into account in sentencing.

SENTENCING PATTERNS BY SECTION

The offences contained in this study were graded by available maximum penalty and type of conduct involved in order to compare sentences. Due to the fact that the following statistics relate only to offenders who were sentenced in the one calendar year, 1994, some of the numbers are quite small.

Sexual intercourse where child less than ten years old

In R v Allpass, a case of digital penetration of a nine year old girl by an elderly offender of prior good character, the Court of Criminal Appeal, constituted by Gleeson CJ, Hunt CJ at CL and McInerney J, said:

Table 8: Median sentence for sexual intercourse where child less than ten years old

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
<th>Prison</th>
<th>Total sentenced</th>
<th>Median full (months)</th>
<th>Median minimum (months)</th>
<th>Maximum penalty (years)</th>
</tr>
</thead>
<tbody>
<tr>
<td>s 67 (rep)</td>
<td>Carnal knowledge of girl under 10</td>
<td>4</td>
<td>4</td>
<td>78</td>
<td>48</td>
<td>Life</td>
</tr>
<tr>
<td>s 78H</td>
<td>Homosexual intercourse with male less than 10</td>
<td>8</td>
<td>9</td>
<td>65</td>
<td>36</td>
<td>25</td>
</tr>
<tr>
<td>s 66A</td>
<td>Sexual intercourse with child aged less than 10</td>
<td>25</td>
<td>33</td>
<td>60</td>
<td>30</td>
<td>20</td>
</tr>
<tr>
<td>s 61J(2)(d), (e)</td>
<td>Aggravated sexual assault where victim less than 16 and under authority</td>
<td>15</td>
<td>17</td>
<td>36</td>
<td>18</td>
<td>20</td>
</tr>
</tbody>
</table>

39  R v Roach (unreported, 29 September 1994, NSW CCA).
40  R v Brackenrig (unreported, 25 July 1995, NSW CCA) per Bruce J at 4.
“Offences against s 66A ordinarily merit, and receive, custodial sentences. Information taken from the Sentencing Information System maintained by the Judicial Commission of New South Wales indicate that, over the period from 1990 to 1992, in relation to offenders who had no previous convictions, 73 per cent of sentences imposed under s 66A involved full-time custody, and 5 per cent involved periodic detention. However, in exceptional cases, persons have been given bonds for such offences. We have been referred to a number of decided cases in which that has occurred. It is impossible rigidly to define the cases which are to be regarded as being out of the ordinary. However, to mention one example, offenders suffering from intellectual handicap have been given bonds. We do not refer to those cases as being of direct relevance to the present but, rather, as an illustration of the way in which the subjective features of a case can have an important role in the sentencing process.”

The vast majority of offenders sentenced for offences of this type received prison terms (83%). Of those offenders who were not imprisoned, five received a bond with supervision and four received terms of imprisonment to be served by way of periodic detention. One offender satisfied the requirements of entering the pre-trial diversion programme and another offender received a community service order for 300 hours.

The average offender convicted under s 66A, sexual intercourse with a child aged less than ten, received a median term of five years comprised of a minimum and additional term of two and a half years. Offenders convicted under s 61J which carries the same maximum penalty as s 66A (20 years imprisonment), on average received a full term of three years comprised of a minimum and additional term of 18 months. However, more offenders received a non-custodial penalty under s 66A than under s 61J. Offenders sentenced under the repealed s 67 (carnal knowledge with a girl less than ten) and s 78H (sexual intercourse with a male less than ten) received longer sentences, reflecting the heavier maximum prescribed in the Crimes Act (life and 25 years respectively).

The Court of Criminal Appeal has indicated that anal penetration calls for a custodial sentence which will usually be of a longer duration than sentences given for offences where oral intercourse occurs. Although anal intercourse is a more serious crime than oral intercourse, the latter will ordinarily require a custodial sentence, sometimes as severe as with anal intercourse depending on the age of the victim and the circumstances of the case. In R v McKenna Lee AJ observed: “it is a matter of real significance in considering a proper sentence in the case of fellatio that the Legislature has expressly included it in a section proscribing homosexual intercourse: s 78H. This takes it altogether out of the category of what are often referred to as ‘indecent assaults’ which are provided for in s 78Q of the Crimes Act 1900.” Lee AJ also noted that a lesser sentence such as periodic detention will rarely be

42 R v O’Donnell (unreported, 1 July 1994, NSW CCA) per Hunt CJ at CL at 12; Simpson and Abadee JJ dissenting.

43 R v McKenna (unreported, 16 October 1992, NSW CCA) per Lee AJ at 9.
appropriate for these types of offences because such a sentence lacks the element of denunciation of the crime and therefore may not be of use as a deterrent.\textsuperscript{44}

In this study, 62\% of offenders received a full-time custodial sentence where they committed an act of fellatio on the victim and 65\% of offenders received a full-time custodial sentence where they forced the victim to perform fellatio. Eighty-four per cent of offenders in this study received a custodial penalty where penile penetration of the victim’s anus or vagina occurred.

**Sexual intercourse where child aged between ten and sixteen**

Offenders who were “in authority” (ss 61D and 66C(2)) received longer sentences than where that relationship was not an element of the offence. This is a reflection of the maximum penalty available where this type of relationship exists.

The median sentence for offenders convicted under s 78K, homosexual intercourse with a male aged between ten and 18, was a full term of five years, three months comprised of a minimum term of three years, three months and an additional term of two years. Offenders convicted of this sentence were subject to similar penalties as those offenders convicted under the gender neutral s 66C(2) which carries the aggravating element of “under authority”. The median term for s 66C(2) was a full term of five years, six months with a minimum term of three years.

**Table 9: Median sentence for sexual intercourse where child aged between ten and 16 (18 for males)**

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
<th>Prison (n)</th>
<th>Total sentenced (n)</th>
<th>Median full (months)</th>
<th>Median minimum (months)</th>
<th>Maximum penalty (years)</th>
</tr>
</thead>
<tbody>
<tr>
<td>s 61D (rep)</td>
<td>Sexual intercourse with person under 16 and under authority</td>
<td>6</td>
<td>6</td>
<td>56</td>
<td>30</td>
<td>12</td>
</tr>
<tr>
<td>s 66C(2)</td>
<td>Sexual intercourse with child aged between 10 and 16 and under authority</td>
<td>18</td>
<td>20</td>
<td>66</td>
<td>36</td>
<td>10</td>
</tr>
<tr>
<td>s 66C(1)</td>
<td>Sexual intercourse with child aged between 10 and 16</td>
<td>10</td>
<td>24</td>
<td>36</td>
<td>17</td>
<td>8</td>
</tr>
<tr>
<td>s 71 (rep)</td>
<td>Homosexual intercourse with male aged between 10 and 18</td>
<td>3</td>
<td>3</td>
<td>54</td>
<td>18</td>
<td>10</td>
</tr>
<tr>
<td>s 78K</td>
<td>Carnal knowledge of girl aged between 10 and 16</td>
<td>8</td>
<td>10</td>
<td>63</td>
<td>39</td>
<td>10</td>
</tr>
</tbody>
</table>

\textsuperscript{44} Ibid.
Offenders convicted under the repealed s 61D received shorter full and minimum term sentences than those convicted under s 66C(2) which replaced that offence, even though there is a higher maximum penalty available under s 61D. That is, offenders convicted under s 66C(2) which carries a maximum penalty of ten years, were sentenced to an average full term of 66 months with a minimum term of 36 months; offenders convicted under the repealed s 61D which carries a maximum penalty of 12 years, were sentenced to an average full term of 56 months with a minimum term of 30 months.

Where there was no authority relationship in the offence, the sentences imposed were less severe. For example, offenders convicted under s 66C(1) received an average full term sentence of three years comprised of a minimum term of one year, five months and an additional term of one year, seven months. Section 66C(1) offenders were also more likely to receive a non-custodial sentence than any other offence in this category. Offenders convicted of this offence were sentenced either to imprisonment to be served by way of periodic detention (17%); a community service order (25%); or given a bond (13%). In addition, one offender was sentenced to the rising of the court.

**Homosexual offences**

The parliament has recognised the vulnerability of young boys to male predators in ss 78H–78Q of the *Crimes Act*. In *R v McKenna* the court stated that the purpose of s 78K of the *Crimes Act* (homosexual intercourse including fellatio, by males with males under 18) is to protect young boys or youths against male predators, even when the former consent. 45

There are two obvious anomalies relating to homosexual offences that arise from the *Crimes Amendment Act* 1984: first the difference in the maximum penalties available and secondly the differential age of consent for male and female victims in the gender specific and gender neutral provisions.46

Both ss 66A and 78H apply to offenders who have had sexual intercourse with children under ten years of age. However, the maximum penalty available to the courts to sentence offenders convicted of s 78H, which relates to homosexual assaults only, is 25 years whereas

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45 Ibid.
46 Premier Wran stated that the higher age of consent for males was a necessary compromise to ensure the passage of the Crimes Amendment Bill 1984 which was strongly opposed by conservative and moral groups. This was the fourth attempt at reforming homosexual laws since 1981: see *New South Wales Parliamentary Debates (Hansard)*, Legislative Assembly, 11 November 1981, pp 443-452; 25 November 1981, pp 815-880; 26 November 1981, pp 956-986; 2 December 1981, pp 1331-1371; I McClintock and J Andrews, "Homosexual Law Reform in NSW—Who is satisfied?" (1984) 9(3) *Legal Service Bulletin* 138-141. Since then many other groups have argued and recommended that the age of consent for homosexual activity be the same as for heterosexual activity: Department of Community Services and Health, Australia, 1989, consultation paper, p 8; C Gallois, P North and B Raphael, The Queensland Psychologists for Social Justice Committee, *Submission to the Parliamentary Criminal Justice Commission*, Queensland, 1990; as cited in M Bull, S Pinto and P Wilson, *Homosexual Law Reform in Australia*, 1991, Trends and Issues in Crime and Criminal Justice, No 29, Australian Institute of Criminology, Canberra. The Royal Commission into the NSW Police Service is currently examining this issue.
offenders convicted under s 66A may be sentenced to a 20 year maximum penalty. Similar differences in penalty are applicable to ss 66C(1) and 78K, and ss 66C(2) and 78N.47

Offenders convicted of an offence against s 66A in this study received a full term of five years comprised of a minimum and additional term of two and a half years; offenders convicted of an offence against s 78H received a full term of five years, five months with a minimum term of three years: only slightly more severe sentences. Similarly, offenders convicted under the gender neutral offence of s 66C(2) received a full term of five years, six months with a minimum term of three years, whilst offenders convicted under the gender specific offence of s 78K received a full term of five years, three months with a minimum term of three years, three months.

An essential element of the offence of s 66C(2) is that the offender be in a position of authority over the victim. There is no such criteria with s 78K. If the penalties given to offenders who are convicted of the equivalent gender neutral offence (s 66C(1)) are compared to penalties given to offenders convicted under the gender specific offence of s 78K, there is a marked difference in the sentences awarded. In addition, offenders are more likely to receive a non-custodial penalty when convicted under the gender neutral offence than when convicted under s 78K (50% compared to 12%). However, s 66C(1) carries a lower maximum penalty than s 78K so it is not surprising that offenders receive a lower sentence for the gender neutral offence. These figures also reflect the general pattern of more female victims than male victims: there were 39.7% male only offences and 60.3% gender neutral offences which means there is a smaller sample size of male specific offences on which to draw conclusions.

As there were no s 78N offenders in this study, it is impossible to compare the “in authority” element of this offence with s 66C(2). It should be noted, however, that there have only been two offenders dealt with under this section since 1990.48

Sexual intercourse where a special relationship between offender and victim exists

Most of these offenders were sentenced to full-time imprisonment. The average sentence for an offender convicted under s 73 was a six year, two month full term, comprised of a minimum term of four years, six months and an additional term of one year, eight months. Of particular interest is the fact that sentences given under ss 73 and 66C(2) are more severe than those given for offences committed under ss 66A, 61J or 78H which all carry higher maximum penalties (all current offences).

47 Section 66C(1) carries a maximum penalty of eight years and applies to offenders who have sexual intercourse with children between the ages of ten and 16. Section 78K carries a maximum penalty of ten years and applies to offenders who have homosexual intercourse with a male aged between ten and 18 years; s 66C(2), sexual intercourse with a child where the child is under the authority of the offender and aged between ten and 16, carries a maximum penalty of ten years; whilst s 78N, sexual intercourse with male by teacher, father, etc carries a maximum penalty of 14 years and again applies where the victims are aged between ten and 18.

Table 10: Median sentence for sexual intercourse where there was a special relationship between offender and victim

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
<th>Prison</th>
<th>Total sentenced</th>
<th>Median full (months)</th>
<th>Median minimum (months)</th>
<th>Maximum penalty (years)</th>
</tr>
</thead>
<tbody>
<tr>
<td>s 78A (rep)</td>
<td>Incest</td>
<td>1</td>
<td>1</td>
<td>48</td>
<td>36</td>
<td>7</td>
</tr>
<tr>
<td>s 73</td>
<td>Carnal knowledge by teacher, father, stepfather of daughter, female pupil etc</td>
<td>8</td>
<td>8</td>
<td>74</td>
<td>54</td>
<td>14^49</td>
</tr>
<tr>
<td>s 61D (rep)</td>
<td>Sexual intercourse with person under 16 and under authority</td>
<td>6</td>
<td>6</td>
<td>56</td>
<td>30</td>
<td>12</td>
</tr>
<tr>
<td>s 66C(2)</td>
<td>Sexual intercourse with child aged between 10 and 16 and under authority</td>
<td>18</td>
<td>20</td>
<td>66</td>
<td>36</td>
<td>10</td>
</tr>
</tbody>
</table>

Breach of trust by those in a position of authority

Offenders who have a relationship with the victim where they are in a position of authority are treated very seriously by the courts. The court has stated on numerous occasions that the gravity of a sexual offence is magnified in circumstances where the offender is in a position to abuse the trust of the child or the trust of the parent who has placed the child in the offender’s care. Lee J reaffirmed this principle in *R v L*: 50

“it is fundamental that the court recognise that your children are, in the family situation, virtually helpless against sexual attack by the male parent. The very intimacy and privacy of family life makes it possible for the parent seeking to gratify his lust on a child to do so with virtual impunity ... If the court is to apply any rule in protecting children from sexual molestation in the family it can only do so by meting out sentences of a salutary nature.”

This abuse of trust not only refers to parents or step-parents but can also include professional positions such as medical practitioners,^51 pharmacists,^52 teachers,^53 swimming

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^49 Prior to 23 March 1986, s 73 applied to girls aged ten to 17 and the maximum penalty was 14 years. Since then, the offence applies only in respect of girls aged 16 and the maximum penalty is eight years. In this study, all s 73 offences took place prior to 1986.

^50 *(Unreported, 3 July 1986, NSW CCA)* per Lee J at 5-6; *R v Muldoon* (unreported, 13 December 1990, NSW CCA).

^51 *R v Arvind* (unreported, 8 March 1996, NSW CCA) per Grove J at 16.

^52 *R v Villanyi* (unreported, 6 October 1995, NSW CCA) per Dunford J at 13.

^53 **Crimes Act** 1900, s 73.
coaches\textsuperscript{54} and babysitters.\textsuperscript{55} In \textit{R v Lumsden} the Court of Criminal Appeal held that a limited construction should not apply to the expression in s 73 of the \textit{Crimes Act} which imposes a liability upon, inter alia, a schoolmaster, teacher or “other teacher” committing carnal knowledge against a pupil. The submission that the legislature did not intend the expression to apply beyond the classroom was rejected. The court stated that the examples of swimming coaches, riding instructors or music teachers were appropriate illustrations of those who would fill the statutory prescription of “other teacher”. According to Grove J “the reference to ‘other teacher’ clearly recognises in Parliament’s words that there will be persons who have authority over children educating them in many facets of life and living other than the conventional classroom relationship. Education relates to body as well as mind.”

\textit{Di Simoni principle and sexual assault offences}

In imposing sentences, judicial officers are entitled to consider all of the conduct of the accused, including any conduct which aggravates the offence. However, the \textit{Di Simoni} principle precludes the sentencing judge from taking into account any circumstances of aggravation which would have warranted a conviction for a more serious offence.\textsuperscript{56} This principle has significant ramifications to child sexual assault offences, particularly where, by way of the offender’s relationship with the victim, the offence inherently contains aggravating features. For example, under s 71 of the \textit{Crimes Act} unlawful carnal knowledge of a girl between ten and 16 years is prohibited and carries a maximum penalty of ten years. In \textit{R v Lumsden} the court held that the sentencing judge had erred in taking into account a breach of trust in the relationship between a coach and pupil as an aggravating circumstance which effectively made him guilty of s 73 which carried a maximum penalty then of 14 years.\textsuperscript{57}

\textit{Incest}

The offence of incest (\textit{Crimes Act}, s 78) appears to be rarely invoked.\textsuperscript{58} Only one offender was convicted of an s 78 offence in this study. He received a minimum term of three years and an additional term of one year. The Criminal Law Revision Committee in England has suggested that the offence of incest should be maintained as an essential part of the protection of the young and vulnerable against sexual exploitation. They contend that victims of incest are often denied the support and comfort of the family as the perpetrators

\textsuperscript{54} \textit{R v Lumsden} (unreported, 31 July 1996, NSW CCA) per Grove J.

\textsuperscript{55} \textit{R v Eagles} (unreported, 16 December 1993, NSW CCA) per Hunt J.

\textsuperscript{56} \textit{R v Di Simoni} (1984) 147 CLR 383 at 389 per Gibbs J.

\textsuperscript{57} (Unreported, 31 July 1996, NSW CCA).

\textsuperscript{58} Only nine offenders have been convicted of incest since 1990: Judicial Information Research System, \textit{Sentencing Statistics 1990-1996}, 1996, Judicial Commission of NSW.
of the assault are within the family. However there is a counter view that this offence should not be treated as a separate crime when there are other more general offences which cover the exploitation of children and that "any threat to the family unit or eugenic arguments about alleged intensification of the risk of recessive traits being passed on to children do not justify criminalisation".

**Indecent assault**

In an examination of the current indecent assault provisions, offenders convicted under s 81, indecently assaulting a male, received similar minimum terms to those where there was an aggravating feature of the offence (s 61M(1), (2)) even though the maximum penalty available for this offence was lower. Offenders convicted of the simple indecent assault offence (s 61L), which has the same maximum penalty as s 81, did not receive any custodial terms of imprisonment.

In indecent assault cases, whilst ordinarily a custodial sentence would be appropriate, the court has stated that imprisonment is neither necessarily required nor inevitable in every case. The courts must have regard to the degree of criminality involved. Fellatio and digital penetration may be regarded as indecent assaults (although within the statutory definition of “sexual intercourse”) but they are serious indecent assaults as can be imagined and call for heavy sentences.

Two-thirds of offenders convicted of indecent assault received a penalty other than full-time custody. Twenty-seven indecent assault offenders were sentenced to imprisonment to be served by way of periodic detention (an average of 15 months) and 25 community service orders were imposed (average around 330 hours). Bonds with supervision were also common, and generally were for three and a half years (n=23).

**Act of indecency**

In *R v Baxter* the court declined to lay down a requirement that a custodial sentence should ordinarily be imposed in relation to the charge of act of indecency. Most offenders who were convicted of an act of indecency were given a custodial sentence or a bond with supervision (43% and 34% respectively). Periodic detention and community service orders were given to the remaining offenders (14% and 9% respectively).

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61 *R v O'Sullivan* (unreported, 20 October 1989, NSW CCA) per Priestly JA at 4-5.


63 (Unreported, 26 May 1994, NSW CCA) per Hunt CJ at 4.
### Table 11: Sentences for indecent assault

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
<th>Prison</th>
<th>Total sentenced</th>
<th>Median full (months)</th>
<th>Median minimum (months)</th>
<th>Maximum penalty (years)</th>
</tr>
</thead>
<tbody>
<tr>
<td>s 61M(2)</td>
<td>Aggravated indecent assault where child aged less than 10</td>
<td>9</td>
<td>23</td>
<td>36</td>
<td>12</td>
<td>10</td>
</tr>
<tr>
<td>s 61M(1)</td>
<td>Aggravated indecent assault where child aged between 10 and 16</td>
<td>18</td>
<td>46</td>
<td>24</td>
<td>12</td>
<td>7</td>
</tr>
<tr>
<td>s 61E(1A) (rep)</td>
<td>Assault and commit act of indecency on person under 16 and under authority</td>
<td>4</td>
<td>20</td>
<td>30</td>
<td>18</td>
<td>6</td>
</tr>
<tr>
<td>s 76 (rep)</td>
<td>Indecent assault of female</td>
<td>4</td>
<td>11</td>
<td>25</td>
<td>8</td>
<td>6</td>
</tr>
<tr>
<td>s 61L</td>
<td>Indecent assault</td>
<td>0</td>
<td>5</td>
<td>—</td>
<td>—</td>
<td>5</td>
</tr>
<tr>
<td>s 81</td>
<td>Indecent assault on male</td>
<td>7</td>
<td>13</td>
<td>24</td>
<td>12</td>
<td>5</td>
</tr>
<tr>
<td>s 61E(1) (rep)</td>
<td>Assault and commit act of indecency</td>
<td>6</td>
<td>25</td>
<td>23</td>
<td>12</td>
<td>4</td>
</tr>
</tbody>
</table>

**THE USE OF SPECIAL CIRCUMSTANCES UNDER THE SENTENCING ACT 1989, S 5(2)**

Pursuant to s 5(2) of the Sentencing Act, judicial officers may vary the statutory ratio between the minimum and additional term in prison sentences. Factors such as unemployment, lack of education, alcohol abuse, unstable personality, responses to recent personal tragedies, likelihood of re-offending and prospects for rehabilitation may be taken into account by the sentencing judge and lead to a finding that the prisoner standing for sentence would benefit from a longer than ordinary period on parole rather than a finding that a minimum term should be reduced.64 Except for one offence (s 73), the median custodial sentence imposed in relation to each child sexual assault offence had an additional term which was more than one-third of the full term.

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64 *R v Daley* (unreported, 30 October 1995, NSW CCA).
This appendix summarises two decades of substantive changes to child sexual assault offence legislation in New South Wales and outlines changes to relevant rules of evidence in the same period. A more detailed summary of the latter changes appears in Appendix 3.

Prior to 1981, the small number of proscribed sexual offences against children in the Crimes Act had been amended relatively infrequently. In the 1980s, the government introduced a series of amendments to the Act and to associated legislation as part of a framework of sexual legislative reform. Many of these amendments addressed child sexual assault, whilst others had an indirect effect on its prosecution.

**CRIMES (SEXUAL ASSAULT) AMENDMENT ACT 1981 (NSW)**

The Crimes (Sexual Assault) Amendment Act made considerable changes to the definition and prosecution of sexual assault offences. The Act sought to:

- remedy major defects in the law relating to rape and sexual assault;
- encourage the reporting of sexual assault;
- educate the community about changing attitudes to sexual assault; and
- facilitate the administration of justice and the conviction of guilty offenders while preserving the rights of the accused.

These amendments were evaluated by the Bureau of Crime Statistics and Research. The resulting reports concluded that since the amendments there had been:

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2 Amendments relating to procedure and evidence are often confined in the relevant provision to "prescribed sexual offences". This term has been redefined as further amendments have come into effect. It is defined in s 4(1) and currently includes offences under Pt 3 except under ss 66, 73, 78A, 78N, 78Q, 79 or 80.


• an increase in the reporting of sexual offences;
• an increase in police acceptance of reports;
• an increase in guilty pleas to charges of sexual assault;
• a decrease in acquittals;
• a higher proportion of offenders convicted and sentenced for the offence originally charged; and
• a higher proportion of offenders sent to prison.

Substantive changes

The main amendment effected by the Act was the replacement of the common law offence of rape with a series of four graduated offences of sexual assault with a distinct range of penalties.\(^5\) Particular emphasis was placed on violence rather than sexual contact.\(^6\) Other amendments included the abolition of the common law immunity of males under 14 who committed sexual assault. Of particular interest in child sexual assault cases was the broadening of the definition of sexual intercourse from the concept of penile vaginal penetration to include penetration of any part of the body of another person, by any part of the body or by any object “manipulated by another person”. This definition encompassed oral intercourse and also specified the continuation of sexual intercourse.\(^7\)

Evidentiary changes

Significant changes were made to the admissibility of evidence relating to, or the inferences which could be drawn from, the prior sexual history of the complainant and the absence of or delay in making complaints. Rules relating to warnings by judges to juries in respect of uncorroborated evidence were ameliorated.

CRIMES AMENDMENT ACT 1984 (NSW)

In 1984, the then Premier of NSW, Neville Wran QC instigated further change in an effort to partially decriminalise consenting sexual activity between males aged 18 and over. In particular, the crimes of buggery and indecent assault were abolished where both parties were 18 or over and acting consensually.\(^8\) Non-consensual acts of this kind

\(^5\) Category 1: inflict grievous bodily harm with intent to have sexual intercourse; Category 2: inflict actual bodily harm with intent to have sexual intercourse; Category 3: sexual intercourse without consent; Category 4: indecent assault and act of indecency; see G Woods, Sexual Assault Law Reform in NSW: A Commentary on the Crimes (Sexual Assault) Amendment Act 1981 and Cognate Acts, 1981, Department of the Attorney General and of Justice, Sydney, pp 12-13.

\(^6\) Woods, op cit, p 8. This fundamental premise has been challenged in recent years by feminists and others concerned that sexual assault should not just be about violence.

\(^7\) Defined in s 61H(b), (c) and (d) of the Crimes Act 1900.

\(^8\) The offences of buggery, indecent assault on male and act of indecency on male by male (Crimes Act 1900, ss 79, 81 and 81A) were repealed by Sch 1(6) and (8) of the Crimes Amendment Act 1984.
are included in the degendered sexual assault provisions of s 611 and are subject to a maximum penalty of 14 years penal servitude.

The Crimes Amendment Act introduced a new range of offences in ss 78H–78Q which prohibited sexual assaults by males against males under 18. Sections 78H, 78K, 78M and 78N prohibit respectively homosexual intercourse with a male under ten (with a maximum penalty of penal servitude for life, later reduced to 25 years imprisonment); with a male between ten and 18 (penal servitude for ten years); with an idiot or imbecile (penal servitude for five years); and with a male between ten and 18 by a school master, teacher, father or stepfather (penal servitude for 14 years). “Homosexual intercourse” includes both anal and oral intercourse and the continuation of either of these activities: s 78G.

Section 78Q(1) prohibits an act of gross indecency by a male on a male under 18 and s 78Q(2) makes it an offence for any person to solicit, procure, incite or advise any male person under 18 to commit or be party to the commission of an act of homosexual intercourse or an act of gross indecency with a male. Both of these offences carry a maximum penalty of two years imprisonment.

Other important changes effected by the Act included requiring the Attorney General’s permission to undertake a prosecution under any of these sections where the accused is under 18 at the date of the commission of the offence; the requirement that prosecutions for homosexual intercourse with a person between 16 and 18 must be commenced within 12 months of the offence; and that no person may be charged with any common law offence in respect of any act committed upon another person which could have been the subject of a charge under the now abolished buggery, solicitation and indecency provisions in ss 79–81B.

One change unrelated to homosexual reform was the broadening of the definition of carnal knowledge of a female to include both anal and vaginal penetration by the penis of any person and the continuation of that sexual connection: s 62(2).

**CHILD SEXUAL ASSAULT TASKFORCE: 1984–1985**

The Child Sexual Assault Taskforce was established in 1984 by the Attorney General to:

- examine the laws relating to the sexual assault of children;
- make appropriate recommendations regarding the reporting of child sexual assault and investigative procedures; and
- make recommendations concerning the substantive and procedural law relating to the prosecution, trial and disposition of cases of child sexual assault.

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9 Crimes Act 1900, s 78T(2); applies to ss 78H, 78I, 78K, 78L, 78M, 78N, 78O and 78Q.
10 Crimes Act 1900, s 78T(1); applies to ss 78K and 78L.
The main objectives of the taskforce were to increase the incidence of reporting, increase public awareness of child sexual assault, co-ordinate the work of the various agencies involved in this area and improve the procedures followed in the investigation and prosecution of offences. In November 1985, the recommendations made by the taskforce were implemented in the Crimes (Child Assault) Act and its cognate acts.

**CRIMES (CHILD ASSAULT) AMENDMENT ACT 1985 (NSW)**

**Substantive changes**

Offences of carnally knowing a girl were repealed and replaced by a new range of child sexual assault offences which, with one exception, applied equally to male and female children. The new definition of sexual intercourse encompassing oral and digital penetration introduced in the 1981 amendments was adopted for child sexual assault offences: s 61A. Sections 61D (sexual intercourse without consent); 61E(1A) (indecent assault); and 61E(2) and (2A) (act of indecency) were amended to introduce the concept of "person in authority". This inclusion and the increase in the maximum penalty where the offender has this relationship with the victim reflect the community attitude that children ought to be protected from sexual assault offenders whom they trust or who have trust placed in them by parents. Section 73, carnal knowledge by a teacher, father, or stepfather of a girl between ten and 17 years, was amended to apply only to matters where the female victim was 16. The maximum penalty for this offence was decreased from 14 years to eight years.

**Evidentiary changes**

These changes should be considered with the 1985 amendments to the Oaths Act 1900 and Evidence Act 1898: see below. The Crimes (Child Assault) Amendment Act 1985 extends to children the protection given to adult complainants in sexual assault cases by the 1981 amendments to the Crimes Act. The requirement that an accused person could not be convicted on the unsworn evidence of a child of tender years without corroboration was abolished and the range of offences for which a judge in a jury trial was required to have regard to the evidence of a child of tender years was extended to all crimes except treason and piracy.

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13 Crimes Act 1900, ss 67, 68, 71 and 72 (carnal knowledge of girl under ten; attempt that offence; carnal knowledge of girl between ten and 16; attempt that offence) were replaced by ss 66A–66D (sexual intercourse with child under ten; attempt that offence; sexual intercourse with child ten to 16; attempt that offence). The exception is that the age of consent for male and female children differs between the "gender neutral" provisions and the homosexual provisions.

14 Hon Terry Sheahan, Attorney General, New South Wales Parliamentary Debates (Hansard), Legislative Assembly, 19 November 1985, p 9893.

15 Crimes (Child Assault) Amendment Act 1985, s 12, Sch 2; attempt offence (s 74) also amended.

16 Previously s 418 Crimes Act.
to warn the jury against inferences from a lack of or delay in complaint, introduced in 1981, was extended: s 405B. In addition, the Act makes a spouse a compellable witness in the trial of a husband or wife in respect of child sexual assaults and provides that a support person may be permitted to be present in court in the interest of the child: s 77A. The prohibition of publication of information identifying child victims irrespective of the wishes of the accused person was also introduced in the Act: s 578.

**OATHS (CHILDREN) AMENDMENT ACT 1985 (NSW)**

At common law, a child was competent only to give sworn evidence. For a child to give sworn evidence, he or she had to take the oath, having shown to the court's satisfaction a sufficient knowledge of its nature and consequences. It follows that the evidence of a child who did not satisfy the court as to his or her understanding of the oath was inadmissible. Legislation in New South Wales has long permitted the giving of unsworn evidence by children. Under the 1985 Act, where a person authorised to administer an oath is satisfied that a child is sufficiently intelligent to justify giving evidence, and understands the duty of speaking the truth and promises to do so at all times, evidence is permitted in court proceedings.

**EVIDENCE (CHILDREN) AMENDMENT ACT 1985 (NSW)**

The rule of practice that a judge in a jury trial warn a jury that it would be unsafe to convict an accused on the uncorroborated evidence of any complainant in a trial for sexual assault was abolished in 1981. However, the rule of practice that a judge warn the jury that it would be unsafe to convict an accused on the uncorroborated sworn evidence of a young child still stood. This Act abolishes that requirement. The cumulative effect of the abolitions meant that, in respect of prescribed sexual offences against children after commencement of the second amendment, it was neither necessary nor appropriate "to give the traditional warnings about the inherent danger of convicting ... simply because of the fact of the nature of the allegations, or the gender or age of the complainant" unless circumstances of a case made a warning appropriate and necessary.

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17 *Crimes Act* 1900, s 407AA; s 407AA was introduced in the *Crimes (Domestic Violence) Act* 1982 to overcome the common law spousal immunity rule but had applied only in respect of offences committed on the partner.


19 *R v Brasier* (1779) 1 Leach 199 at 200; 168 ER 202 at 203.


21 See above and Appendix 3.

22 *Evidence (Children) Amendment Act* 1985, s 39; inserts new s 42A in the *Evidence Act* 1898.

23 *R v L* (unreported, 4 May 1990, NSW CCA).
COMMUNITY WELFARE (CHILD ASSAULT) AMENDMENT ACT 1985 (NSW)

This Act established an obligation for various categories of people to report suspected cases of sexual abuse of children. Medical practitioners, teachers, physiotherapists, counsellors, child care workers, social workers, psychologists, speech therapists, nurses and police who have a reasonable suspicion that a child has been sexually assaulted or abused are required to report their suspicions to DOCS.24

PRE-TRIAL DIVERSION OF OFFENDERS ACT 1985 (NSW)

The pre-trial diversion programme established by this Act allows child sexual assault offenders to participate in a specified treatment programme rather than conventional criminal prosecution, subject to their plea of guilty at committal proceeding and adherence to the plea in the District or Supreme Courts: s 17. Decisions regarding the suitability of the offender for the programme are made by the prosecution prior to the commencement of committal proceedings: s 15. Offenders with prior convictions are expressly excluded: s 4. Where an offender completes the programme requirements, no further proceedings will be taken against that person for that offence and the offender will not have a sentence recorded: ss 23, 30.

CHILDREN (CARE AND PROTECTION) ACT 1987 (NSW)

The Children (Care and Protection) Act allows that proceedings may be initiated in the Children's Court on behalf of children who have been abused. Child abuse includes sexual and physical abuse; ill treatment of children; and exposing or subjecting the child to behaviour that is psychologically harmful: s 3. This Act places a duty on medical practitioners, social workers, teachers and others to report cases where they hold a reasonable belief that a child who is under 16 has been abused, is in danger of being abused or is a child in need of care: s 22.

CRIMES (PERSONAL AND FAMILY VIOLENCE) AMENDMENT ACT 1987 (NSW)

The Crimes (Personal and Family Violence) Amendment Act introduced the concept of “in company” to several offences25 and inserted a new s 66F dealing with sexual

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24 Community Welfare (Child Assault) Amendment Act 1985, s 4(1) inserted a new s 102 in the Community Welfare Act 1982. This Act was repealed in 1987 by the Miscellaneous Acts (Community Welfare) Repeal and Amendment Act 1987, s 4. The obligation to report suspected child abuse is now contained in s 22 of the Children (Care and Protection) Act 1987.

25 Crimes Act 1900, s 61C(3) and (4) (inflict actual bodily harm with intent to have sexual intercourse); s 61D(1B) and (1C) (sexual intercourse without consent with person under age of 16 and under the authority); and s 61E(1C) (indecent assault and act of indecency with person under age of 16 and under authority).
intercourse with a person who has an intellectual disability. This repealed ss 72A and 78M which dealt respectively, with carnal knowledge of, and homosexual intercourse with, an idiot or imbecile.

The Act made important amendments to the means of receiving evidence from children, providing for the use of closed circuit television in court in relation to the giving of evidence of a child under ten and allowing the court to prescribe alternative seating or other arrangements where the child is under 16.26 It also substituted and made more comprehensive the provision allowing a court to direct that certain proceedings, including most sexual assault matters, be in camera, that is, closed. This Act also introduced a general prohibition on publication of material identifying (or which is likely to lead to identification of) a complainant in a prescribed sexual offence: 

Crimes Act 1900, s 578A(2).

JUSTICES (PAPER COMMITTALS) AMENDMENT ACT 1987 (NSW)

This Act inserted s 48EA into the Justices Act 1902 which provides that complainants of crimes including prescribed sexual offences are excused from giving evidence at committal proceedings unless the court is satisfied that there are “special reasons why the alleged victim should, in the interests of justice, attend at [the] proceedings to give oral evidence”.27

CRIMES AMENDMENT ACT 1989 (NSW)

Substantive changes

In 1989 the four tiered structure of sexual offences enacted in the Crimes (Sexual Assault) Amendment Act 1981, was replaced by a more simplified structure consisting of “three basic offences, three aggravated versions of each, and one additional offence of assault with intent to have sexual intercourse”.28 These amendments did not commence until 17 March 1991.

It was thought that the existing sexual assault provisions were “lagging behind community standards”, that the penalty was too low for the criminality involved, and that the existing scheme was confused and convoluted.29 Sections 61A–61G were repealed

26 Crimes Act 1900, ss 405D and 405E; followed the Report of the Violence Against Women and Children Law Reform Task Force, 1987 recommendation that a child witness should not have to face the accused in court: see also ss 405F (alternative arrangements for child victim’s evidence); 405H (warning to jury); and 405I (validity of proceedings not affected by a failure to give evidence in accordance with a s 405D or s 405F order or direction); see now Crimes Amendment (Children’s Evidence) Act 1996, discussed in Appendix 3.

27 The legislature is considering a proposal to apply the restriction in favour of any prosecution witness: Justices Amendment (Committals) Bill 1996, Schs 1[6], [7].


29 Ibid.
and replaced by ss 61I, 61J, 61L, 61M, 61N and 61O, accompanied by an increase in penalties. Aggravating factors were further extended to encompass violence, the threat of violence and whether the victim had a serious physical or intellectual disability. Aggravating factors were grouped so that only one factor need be present in order to
charge the aggravated offence. The increase in penalties for aggravated indecent assault and act of indecency where the child is less than ten was in recognition of the “extreme vulnerability” of children of that age.\textsuperscript{30}

The need to prove non-consent in s 61J (aggravated sexual intercourse) was reintroduced, but was dispensed with in the new s 61K (assault with intent to have sexual intercourse). Section 61K carries a maximum penalty of 20 years. The question of consent is not relevant to this section as the infliction of violence is a prerequisite. Another new section of sexual assault by forced sexual manipulation was introduced with a maximum penalty of 14 years; 20 years for an offence on a person less than ten: s 80A.

Section 66E was amended to provide for alternative verdicts in child sexual assault matters to remedy existing omissions in the law. The jury is able to bring in alternative verdicts under ss 66B and 66D (attempt/assault with intent to have sexual intercourse with child less than ten/child aged ten to 16) when an accused is charged with ss 66A or 66C (sexual intercourse with child less than ten/child aged ten to 16). This omission had previously allowed offenders to be improperly acquitted.

**Procedural changes**

The indictable offences of indecent assault, aggravated indecent assault, act of indecency and aggravated act of indecency (ss 61L-61O) may be heard summarily with the consent of the accused: s 476. Further, these offences may also be heard summarily without the consent of the accused in some circumstances: s 495. The advantage of this procedural change is that it reduces the number of times the victim is required to give evidence and the matter is resolved more quickly.\textsuperscript{31}

**OATHS (CHILDREN) AMENDMENT ACT 1990 (NSW)**

Despite the 1985 amendments to the *Oaths Act*, courts continued to experience difficulty in assessing the competency of young children to give evidence. This Act created a presumption of competency while leaving open the possibility that judges may have to make an assessment of that competency.\textsuperscript{32} The judge requests the child to make a declaration to the court such as “I will not tell any lies to this court”. The provisions were again replaced by the *Evidence Act* 1995.

\textsuperscript{30} Ibid, p 13 571.

\textsuperscript{31} Ibid, p 13 572.

CRIMINAL LEGISLATION (AMENDMENT) ACT 1992 (NSW)

This Act amended the definition of sexual intercourse under s 61H(1) from “penetration of vagina ... or anus of any person” to “penetration to any extent of the genitalia of a female person or the anus of any person”. The intention of parliament was to clarify that “the identification of a particular part of the female genitalia, namely the vagina, may lead to the conclusion that the penetration of those parts of the female genitalia which are external to the vagina would not be sufficient to constitute sexual intercourse”.

EVIDENCE ACT 1995 (NSW)

The Evidence Act 1995 is a comprehensive attempt by the legislature to reiterate the primary purpose of the law of evidence as a focus on relevance. A number of its general reforms will have great impact on the hearing of child sexual assault matters. For example, it affects the rules regarding hearsay (and so the rules relating to admissibility of complaint of sexual assault).

In addition, the Act consolidates, abrogates or amends a number of rules relating to the competency and compellability of child witnesses and to the need for corroboration of their evidence, which changes are generally consistent with the policy of the Act to allow the court in determining admissibility and other matters more discretion than formerly.

CRIMES AMENDMENT (CHILDREN’S EVIDENCE) ACT 1996 (NSW)

On 28 March 1997, the Crimes Amendment (Children’s Evidence) Act 1996 commenced. It has created more general rights for children in respect of supportive persons, evidence given by closed-circuit television and evidence given by alternative arrangements. Under the amendments, in respect of the giving of evidence by closed-circuit television or by alternative arrangements in a jury trial, the judge must inform the jury that it is standard procedure for children’s evidence in such cases to be given by those means and warn the jury not to draw any inference adverse to the accused or give the evidence any greater or lesser weight because of the use of those means.

33 Whether the definition applies to transsexuals can only be determined with regard to the circumstances of the transsexual: see R v Harris and McGuiness (1988) 17 NSWLR 158; Brown, Farrier, Neal and Weisbrot’s Criminal Laws, 2nd ed, 1996, Federation Press, Sydney, p 859.

34 Crimes Act 1900, s 405H.
Appendix 2 Child Sexual Assault Offences: *Crimes Act 1900* (NSW)

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
<th>Maximum penalty (years)</th>
<th>Repeal date</th>
</tr>
</thead>
<tbody>
<tr>
<td>61C</td>
<td>(a) maliciously inflict; or (b) threaten to inflict actual bodily harm with intent to have sexual intercourse</td>
<td>12</td>
<td>rep 17/3/91</td>
</tr>
<tr>
<td>61D(1)</td>
<td>sexual intercourse without consent; sexual intercourse without consent and less than 16</td>
<td>8</td>
<td>rep 17/3/91</td>
</tr>
<tr>
<td>61D(1A)</td>
<td>(a) sexual intercourse under 16; and (b) under authority</td>
<td>10</td>
<td>rep 17/3/91</td>
</tr>
<tr>
<td>61D(1B)</td>
<td>sexual intercourse in company; sexual intercourse in company and less than 16</td>
<td>12</td>
<td>rep 17/3/91</td>
</tr>
<tr>
<td>61E(1)</td>
<td>assault and commit act of indecency</td>
<td>4</td>
<td>rep 17/3/91</td>
</tr>
<tr>
<td>61E(1A)</td>
<td>assault and commit act of indecency where: (a) under age of 16 years; and (b) under authority</td>
<td>6</td>
<td>rep 17/3/91</td>
</tr>
<tr>
<td>61E(2)</td>
<td>commit act of indecency towards person less than 16 or incite act of indecency under 16</td>
<td>2</td>
<td>rep 17/3/91</td>
</tr>
<tr>
<td>61E(2A)</td>
<td>commit act of indecency where: (a) under age of 16 years; and (b) under authority</td>
<td>4</td>
<td>rep 17/3/91</td>
</tr>
<tr>
<td>61I</td>
<td>sexual intercourse without consent</td>
<td>14</td>
<td></td>
</tr>
<tr>
<td>61J</td>
<td>sexual intercourse in circumstances of aggravation: (2)(d) victim less than 16; (2)(e) victim under authority</td>
<td>20</td>
<td></td>
</tr>
<tr>
<td>61L</td>
<td>indecent assault</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>Section</td>
<td>Description</td>
<td>Penalty</td>
<td>Reference</td>
</tr>
<tr>
<td>---------</td>
<td>------------------------------------------------------------------------------</td>
<td>---------</td>
<td>------------</td>
</tr>
<tr>
<td>61M(1)</td>
<td>aggravated indecent assault: (3)(b) victim aged less than 16 years</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td>61M(2)</td>
<td>indecent assault, victim less than 10 years</td>
<td>10</td>
<td></td>
</tr>
<tr>
<td>61N</td>
<td>commit or incite act of indecency with/towards person less than 16</td>
<td>2</td>
<td></td>
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<tr>
<td>61O(1)</td>
<td>commit or incite act of indecency with/towards person less than 16 in circumstances of aggravation</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>61O(2)</td>
<td>commit or incite act of indecency with/towards person less than 10 years</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td>63</td>
<td>rape</td>
<td>Life</td>
<td>rep 14/7/81</td>
</tr>
<tr>
<td>65</td>
<td>attempted rape or assault with intent to rape</td>
<td>14</td>
<td>rep 14/7/81</td>
</tr>
<tr>
<td>66A</td>
<td>sexual intercourse with child under 10</td>
<td>20</td>
<td></td>
</tr>
<tr>
<td>66B</td>
<td>attempt sexual intercourse with child under 10 or assault with intent to have intercourse with child under 10 years</td>
<td>20</td>
<td></td>
</tr>
<tr>
<td>66C(1)</td>
<td>sexual intercourse with child between 10 and 16</td>
<td>8</td>
<td></td>
</tr>
<tr>
<td>66C(2)</td>
<td>sexual intercourse with person who: (a) is between 10 and 16 years; and (b) under authority of the person</td>
<td>10</td>
<td></td>
</tr>
<tr>
<td>66D</td>
<td>attempt offence under s 66C or assault with intent to commit such offence liable to same penalty</td>
<td>8</td>
<td>10</td>
</tr>
<tr>
<td>67</td>
<td>carnal knowledge of girl under 10 years</td>
<td>Life</td>
<td>rep 23/3/86</td>
</tr>
<tr>
<td>68</td>
<td>attempt carnal knowledge of girl under 10 years</td>
<td>14</td>
<td>rep 23/3/86</td>
</tr>
<tr>
<td>71</td>
<td>carnal knowledge of girl 10-16 years</td>
<td>10</td>
<td>rep 23/3/86</td>
</tr>
<tr>
<td>73</td>
<td>carnal knowledge by teacher, father, stepfather with pupil, daughter or stepdaughter being above 16 and less than 17 years [only in respect of girl of 16 from 23/3/86]</td>
<td>8</td>
<td></td>
</tr>
<tr>
<td>76</td>
<td>indecent assault of female under 16 years</td>
<td>6</td>
<td>rep 14/7/81</td>
</tr>
<tr>
<td>76A</td>
<td>act of indecency with girl under 16 years</td>
<td>2</td>
<td>rep 14/7/81</td>
</tr>
<tr>
<td>78A</td>
<td>incest: male have carnal knowledge of female above 16 who is his mother, sister, daughter or granddaughter; or female above age of 16 permits consent whether relationship of full or half blood</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td>78H</td>
<td>homosexual intercourse with male under 10</td>
<td>25</td>
<td></td>
</tr>
<tr>
<td>78I</td>
<td>attempt homosexual intercourse with male under 10 or assault with intent</td>
<td>14</td>
<td></td>
</tr>
<tr>
<td>78K</td>
<td>homosexual intercourse with male between 10 and 18</td>
<td>10</td>
<td></td>
</tr>
<tr>
<td>78N</td>
<td>teacher, father, stepfather have homosexual intercourse with male between 10 and 18 being his pupil, son or stepson</td>
<td>14</td>
<td></td>
</tr>
<tr>
<td>Section</td>
<td>Description</td>
<td>Count</td>
<td></td>
</tr>
<tr>
<td>---------</td>
<td>-----------------------------------------------------------------------------</td>
<td>-------</td>
<td></td>
</tr>
<tr>
<td>78O</td>
<td>teacher, father, stepfather attempt to have homosexual intercourse with male between 10 and 18 being his pupil, son, or stepson</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td>78Q(1)</td>
<td>male commit act of gross indecency with male less than 18</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>78Q(2)</td>
<td>solicit, procure, incite or advise male under 18 to commit act of gross indecency</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>79</td>
<td>bestiality</td>
<td>14</td>
<td></td>
</tr>
<tr>
<td>80</td>
<td>attempt to commit bestiality</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>81</td>
<td>indecent assault on male</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td></td>
<td>rep 8/6/84</td>
<td></td>
<td></td>
</tr>
<tr>
<td>81A</td>
<td>act of indecency by male with male</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td></td>
<td>rep 8/6/84</td>
<td></td>
<td></td>
</tr>
<tr>
<td>61D/61F</td>
<td>attempt to commit sexual intercourse without consent; where person under 16 years</td>
<td>rep 17/3/91</td>
<td></td>
</tr>
<tr>
<td>61E/61F</td>
<td>attempt indecent assault or act of indecency</td>
<td>rep 17/3/91</td>
<td></td>
</tr>
<tr>
<td>61J/61P</td>
<td>attempt to commit aggravated sexual assault</td>
<td></td>
<td></td>
</tr>
<tr>
<td>61M/61P</td>
<td>attempt to commit aggravated indecent assault; person less than 10</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

NB: This is not an exhaustive list of all offences as some less common offences did not occur in our data.
Appendix 3 The Evidence of Children

INTRODUCTION

In the last two decades, information regarding the sexual abuse of children has become more widely available, thereby increasing community awareness and concern. Two types of change are apparent in courtrooms. First, rules of practice which restricted the admissibility of children’s evidence have been modified and judges have more discretion to receive children’s evidence upon assessment of its cogency and probative value. Secondly, procedures for taking evidence which took no account of the age or vulnerability of children have been ameliorated to recognise that child sexual abuse victims have special needs.

It may be argued that these changes are contradictory: the first suggests that children are not a special class of witnesses, while the second suggests they are. This apparent contradiction is an example of the difficulties of acknowledging and dealing with the needs of children in an adult criminal justice system. Further, the primary issue before any criminal court is the guilt of the accused. While today’s courts have greater discretion than before to determine the best method to receive a child’s evidence, doubts regarding the application of rules and the construction of statutory provisions in a criminal hearing should be resolved in favour of the liberty of the accused.¹

These changes are considered in this appendix. Readers should note that the data examined in this monograph relates to New South Wales cases finalised in 1994 and that the evidentiary rules applicable to a given case may differ from those applicable to similar cases finalised before or since. In particular, the Evidence Act 1995 (NSW), which commenced after the matters considered were finalised, made substantial changes to the relevant rules.

¹ See eg R v Morgan (1993) 67 A Crim R 526 at 534 per Mahoney JA. A criminal hearing may be contrasted with: (1) an allegation of child abuse which arises in family law proceedings, where the welfare of the child, not proof of criminality, is the paramount issue (M v M (1988) 63 ALJR 108); and (2) child care proceedings in which the welfare and interests of the child are to be given paramount consideration: Children (Care and Protection) Act 1987 (NSW), s 55(a).
THE NATURE OF CHILDREN’S EVIDENCE

“Children are very vulnerable to sexual abuse. They are vulnerable also to abuse by the legal system. It is less likely that their complaints will result in convictions than those made by adults. Despite all our knowledge of child development gained especially during the 20th Century there is still a pervasive myth that children are essentially unreliable and untruthful, hence juries frequently find it very difficult to convict in these matters where it is usually the child’s word against that of an adult who has usually established over a much longer lifetime a reputation that can be called in aid. Suggestibility and its consequences must be distinguished from untruthfulness.”

“The enactment of specific provisions altering the general rules of practice as to the directions given to a jury concerning the reliability of the evidence of alleged victims of sexual offences [does] not affect the requirement to give specific and particular warnings where they [are] necessary to avoid a perceptible risk of a miscarriage of justice arising from the circumstances of the case.”

At common law, rules of practice were developed to regulate the admission of children’s evidence, because a child’s evidence was thought less valuable than that of an adult, and because it was thought that evidence of a complainant in a sexual offence matter, whether a child or an adult, should be subject to rules which the evidence of an ostensibly independent witness was not. While the admissibility of children’s evidence is circumscribed by evidentiary rules which should not be regarded in isolation from each other, it is convenient to consider in sequence five major areas:

- competency and compellability;
- corroboration;
- delay in or absence of complaint;
- pre-trial statements; and
- pre-trial statements on video.

Competency and compellability

At common law, a child was competent only to give sworn evidence. For a child to give sworn evidence, he or she had to take an oath, having shown to the court’s satisfaction a sufficient knowledge of its nature and consequences. It follows that the evidence of a child who did not satisfy the court as to his or her understanding of the oath was inadmissible.
Legislation in New South Wales has long permitted the giving of unsworn evidence by children.6 (The effect of the difference on the requirement of corroboration is considered in that section, below.) The current position is set out in the Evidence Act 1995, which provides that a person is not competent to give evidence if incapable of understanding that in giving evidence he or she is under an obligation to give truthful evidence. A person may, however, be competent to give unsworn evidence where:
• the court is satisfied that the person understands the difference between the truth and a lie;
• the court tells the person that it is important to tell the truth; and
• the person indicates, by responding appropriately when asked, that he or she will not tell lies in the hearing.7

The Evidence Act, s 13(3) also provides that a person “who is incapable of giving a rational reply to a question about a fact is not competent to give evidence about the fact, but may be competent to give evidence about other facts”. The provision recognises that a child at a certain level of cognitive development may be able to answer simple factual questions but not questions requiring the drawing of inferences and may be competent, whether giving sworn or unsworn evidence, to give evidence about some facts but not about others.8

A person competent to give evidence is compellable to give that evidence: s 12(b).9 However, under s 18 a child or other relative of an accused in criminal proceedings may object to giving evidence. The objection must be made before giving evidence or as soon as practicable after becoming aware of the right to object: s 18(3). The evidence must not be given if the court finds that there is a likelihood of harm to the witness or to the relationship between the witness and the accused, and that the harm outweighs the desirability of having the evidence given: s 18(6). However, consistent with earlier reform regarding domestic offences, including child sexual abuse, s 18 does not apply to most of the offences considered in this monograph: Evidence Act 1995, s 19 and Crimes Act 1900, s 407AA.

In any proceedings for an indictable offence, the judge or the accused, but not the prosecutor, may comment on the failure of the accused’s child to give evidence, but the

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6 For a history, see Cheers v Porter (1931) 46 CLR 521 per Evatt J.
7 Evidence Act 1995, s 13(1), (2). The section is substantially similar to the former provision in the Oaths Act 1900 (NSW), which was introduced by the Oaths (Children) Amendment Act 1990 (NSW) and is discussed in J Cashmore and P Parkinson, “The Competency of Children to Give Evidence—Changes to the Oaths Act” (1991) 3(1) Judicial Officers Bulletin 1. For discussion of the “Mr Bubbles” case of 1989 and the defects of the Act’s predecessor, see P Parkinson, “The Future of Competency Testing for Child Witnesses” (1991) 15 Criminal Law Journal 186. One difference is applicability—the current provision applies to persons; the former provisions applied only to persons under 12: Oaths Act 1900, s 32 (rep).
8 The equivalent Commonwealth provision is discussed in G Bellamy and P Meibusch, Commonwealth Evidence Law, 1995, AGPS, Canberra, paras [13.4]–[13.6].
9 Formerly Evidence Act 1898, s 6 (rep).
comment must not suggest that the accused was guilty of the offence or that the child believed the accused guilty: *Evidence Act*, s 20.10

**Corroboration**

At common law and under statute, the evidence of some classes of witnesses must be corroborated.11 If the evidence is not corroborated, it may mean a person cannot be convicted on that evidence alone,12 or it may mean that a judge in a jury trial is required to warn any jury that it would be dangerous to convict on the basis of that evidence alone. Under the common law relating to child sexual assault hearings, a child complainant’s membership of two classes, sexual assault victims and children, impugned his or her evidence.

Firstly, it was a rule of practice that a judge must warn a jury that it would be unsafe to convict an accused on the uncorroborated evidence of a complainant in a trial for sexual assault.13 The second rule of practice required a similar warning to be given *in any criminal matter* where the witness was a young child who gave sworn evidence.14 The first rule was abolished in 1981 by the *Crimes (Sexual Assault) Amendment Act 1981* and the second in 1985 by the *Crimes (Child Assault) Amendment Act 1985* and the *Evidence (Children) Amendment Act 1985*. While the rules should not be confused,15 the cumulative effect of the abolitions meant that, in respect of prescribed sexual offences16 against children after commencement of the second amendment and prior to commencement of the *Evidence Act 1995*, it was neither necessary nor appropriate “to give the traditional warnings about the inherent danger of convicting ... simply because of the fact of the

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10 “Child” is widely defined: Dictionary, Pt 1 and Pt 2, cl 10.

11 “Corroboration is evidence from a source other than the alleged victim implicating the accused in the commission of the offence”: *R v E* (unreported, 24 May 1996, NSW CCA). Eg evidence by a third party of the complainant’s distress after the alleged assault may tend to corroborate: *R v Ryan* (unreported, 10 April 1994, NSW CCA); see also “In what circumstances pre-trial statements may be admitted”, below.

12 Prior to the *Crimes (Child Assault) Amendment Act 1985*, an accused could not be convicted for sexual assault on the uncorroborated unsworn evidence of a child: *Crimes Act 1900*, s 418 (rep).

13 For the basis of the rule, see *R v Longman* (1989) 43 A Crim R 463 at 466-467 per Brennan, Dawson and Toohey JJ; at 471-473 per Deane J; and at 481-482 per McHugh J.

14 For the basis of the rule, see *R v B* (1992) 63 A Crim R 225 at 238 per Dawson and Gaudron JJ. The rule is couched in terms of sworn evidence, as prior to 1985 a child’s uncorroborated unsworn evidence could not alone lead to a conviction in a sexual offence: see above. The New South Wales provisions permitting unsworn evidence of children no longer impose a corroboration requirement and there seems no reason to import one or to distinguish otherwise unsworn evidence as a matter of law or of practice: see S Odgers, *Uniform Evidence Law*, 1995, Federation Press, Sydney, para [13.4]; *R v Wills* (1985) 39 SASR 35 at 36 per King CJ.

15 *R v B* (1992) 63 A Crim R 225 at 237 per Dawson and Gaudron JJ.

16 *Crimes Act 1900*, s 405C. The meaning of “prescribed sexual offence” in the Act has been enlarged by amendment a number of times. It is defined in s 4(1) and currently includes offences under Pt 3 except under ss 6, 73, 78A, 78N, 78Q, 79 or 80.
nature of the allegations, or the gender or age of the complainant” unless circumstances of a case made a warning appropriate and necessary.\textsuperscript{17}

Section 405C of the \textit{Crimes Act} was repealed in 1995 upon the commencement of the \textit{Evidence Act} in 1995. The effect of the Act may be summarised as follows: it is unnecessary that evidence—sworn or unsworn—be corroborated (s 164) and further, “[d]espite any rule, whether of law or practice, to the contrary, but subject to the other provisions” of the Act, it is not necessary in a jury trial for the court to warn the jury that it is dangerous to act on uncorroborated evidence or give a warning to the same or similar effect, or to give a direction relating to the absence of corroboration: s 164(3).

However, in respect of “evidence of a kind that may be unreliable”, which includes “evidence the reliability of which may be affected by age”, the accused in a jury trial is entitled to ask the court to give the jury a warning that the evidence may be unreliable, and the court must give it, in the absence of good reasons not to do so.\textsuperscript{18} It is not necessary that a particular form of words be used (s 165(4)) and the provision does not affect any other power of the judge to give a warning to or inform the jury: s 165(5).

It has been held by the Full Federal Court that “kind” means “class”, which “would require a generalised assessment and not one based upon a particular witness’ account in proceedings”.\textsuperscript{19} Similarly, the Court of Criminal Appeal has held that evidence of a kind which falls within one or more of the kinds mentioned is evidence to which the provision applies, “without the need for any further enquiry into whether the particular evidence may be unreliable”.\textsuperscript{20}

In \textit{R v Beattie}, the “kind” of evidence was certain: it was identification evidence. The relevant kind of evidence in child sexual assault matters is evidence “which may be affected by age”, and the basis upon which a court may make a generalised assessment—as the provision appears to require—is not clear. (By comparison, a court determining competency “may inform itself as it thinks fit”: s 13(7).)

Where the accused establishes that the evidence is of a kind which is unreliable and otherwise satisfies the requirements of s 165, it appears that a judge in a jury trial is bound to give an appropriate warning. Apart from this, it appears that the general position under the former provision continues, that is, it is neither necessary nor appropriate to give a warning unless circumstances of a case make it appropriate and necessary.

\textsuperscript{17} \textit{R v L} (unreported, 4 May 1990, NSW CCA).

\textsuperscript{18} \textit{Evidence Act} 1995, s 165; whether reasons must be expressed depends on the case: \textit{R v Beattie} (unreported, 20 August 1996, NSW CCA).

\textsuperscript{19} \textit{Lane v The Queen} (unreported, 16 May 1996, Full Federal Court).

\textsuperscript{20} \textit{R v Beattie} (unreported, 20 August 1996, NSW CCA).
Delay in or absence of complaint

A complaint made long after an event has two problems: it tends to suggest worse, not better, recall, and it invites the question why the complaint was not made sooner. Yet an increasing volume of research offers a range of explanations for a child’s failure to complain promptly or at all.\(^{21}\)

Since 1981, a judge in a jury trial for a prescribed sexual offence has been required to give the jury a warning that absence or delay in making a complaint does not necessarily indicate that the allegation is false and to inform the jury that there may be good reasons why a victim may hesitate in making a complaint.\(^{22}\)

However, this requirement does not preclude the judge warning the jury that the absence of complaint, or the delay in making it, may be taken into account in evaluating the evidence of the complainant with regard to his or her credit. The provision “should not be seen as standing the law on its head to exclude what in common fairness and common experience should also be taken into account in favour of the accused”.\(^{23}\) Conversely, it is not mandatory that such a balancing warning be given: it is for the court to determine whether anything beyond the statutory warning should be given, according to the facts of the case.\(^{24}\)

In what circumstances pre-trial statements may be admitted

“Often the child victim’s out-of-court statements constitute the only proof of the crime of sexual abuse. Witnesses other than the victim and perpetrator are rare as people simply do not molest children in front of others ... Most often the offender is a relative or close acquaintance who has the opportunity to be alone with the child ... Depending on the type of sexual contact, corroborating physical evidence may be absent or inconclusive ... The child may be unable to testify at trial due to fading memory, retraction of earlier statements due to guilt or fear, tender age, or inability to appreciate the proceedings in which he or she is a participant. Therefore, these hearsay statements are usually necessary to the proceedings as the only probative evidence available.”\(^{25}\)

\(^{21}\) There is research which suggests that a child’s delay, far from indicating fabrication, may be a feature of abuse which indicates the truth of the complaint. However, the use of expert evidence in relation to reactions of victims and the extent to which characteristic reactions are accepted as scientifically established by professionals in the area are moot: see P Budai, “Rehabilitation of Children’s Evidence in Child Sexual Assault Cases” (1995) 7(2) Current Issues in Criminal Justice 223-230. Allegations by adults of sexual assault upon them as children raise special forensic issues: see Standing Committee on Social Issues, Sexual Violence: Addressing the Crime, 1996, Legislative Council, Parliament of New South Wales, Report No 9, pp 296-297; I Freckleton, “Repressed Memory Syndrome: Counterintuitive or Counterproductive?” (1996) 20 Criminal Law Journal 7; and R v Bartlett (unreported, 26 June 1996, Vic CA; ALMD Advance, No 15, 13 August 1996).

\(^{22}\) Crimes Act 1900, s 405B(2). For “prescribed sexual offence”, see above.

\(^{23}\) R v Davies (1985) 3 NSWLR 276 at 278 per Hunt J.

\(^{24}\) R v Murray (1987) 30 A Crim R 315 at 320-321 per Lee J.

\(^{25}\) State v Myatt 697 P 2d 836 (1985) at 841 per Schroeder CJ.
The basis for many rules of evidence under the common law is that the best evidence of a witness is that given at the hearing and that a person who makes claims should make them in court, subject to cross-examination. In particular, the common law rule against hearsay restricts admission of statements made out of court by complainants (or by people taking the complaints) as evidence of truth of the complaint. Special concerns regarding a complaint are that it might have been concocted or, in the case of the person to whom the complaint is made, that the person has misunderstood the nature of the complaint.

At common law there are exceptions to the general rule that hearsay is inadmissible. In prosecution of a child sexual assault trial, the two most relevant exceptions are the sexual complaint rule and the res gestae rule. Under the sexual complaint rule, evidence of complaint is admitted not as evidence of its truth but to avoid any inference by the jury that the victim did not complain and it may go to the credit of the victim. It is not admissible as self-corroboration of the victim’s complaint. To be admissible, the words must bear some characteristic of a complaint of a sexual nature. In the case of an adult victim, the complaint also must have been made at the first reasonable opportunity. When dealing with young complainants the question of delay must be looked at in the context of the age of the complainant and his or her circumstances, and the courts have developed a flexible attitude.

The Evidence Act 1995 made substantial change to the sexual complaint rule. First, it provides that evidence relevant only to a witness’s credibility is not admissible: s 102. As a result, apart from the giving of evidence re-establishing credibility (s 108), evidence of complaint is no longer admissible upon the basis that it goes only to the credit of the complainant.

26 Strictly the rule against hearsay applies only to assertions by persons other than the witness; the rule against self-corroboration in respect of previous assertions of the witness is separate. However, it is widely accepted that the latter is subsumed by and dealt with by the principles relating to the former: for a history, see Byrne and Heydon, op cit, paras [31001]-[31030].

27 The complaint may enhance credibility where it is in substantially the same terms as the complainant’s sworn evidence and it may detract from the credibility where it is in substantially different terms: R v E (1996) 39 NSWLR 450 at 457 per Sperling J.

28 Ibid at 457–458 per Sperling J.

29 R v Colquhoun (unreported, 28 October 1992, NSW CCA).

30 Kilby v The Queen (1973) 47 ALJR 369 at 371.

31 R v Gilmont (unreported, 13 April 1992, NSW CCA).

32 R v T J K (unreported, 6 October 1992, NSW CCA). The spontaneous question of a seven year old child to its parent about erection or ejaculation may indicate abuse and may not be a complaint as commonly understood. Some jurisdictions in the USA have statutory hearsay exceptions allowing, eg, statements “describing any act of sexual conduct performed with or on the child by another”: D Whitcomb, “Child victims in court: the limits of innovation” (1986) 70(2) Judicature 90 at 92-93; see also the Evidence Act 1929 (SA), s 34CA.

33 For a discussion see R v Hall (unreported, 28 February 1997, NSW CCA).

34 R v Hall (unreported, 28 February 1997, NSW CCA).
However, s 66(2), which applies to a representation made when the occurrence of the asserted fact is “fresh in the memory” of the representor, enables “the victim of a sexual assault to give evidence of the terms of his or her complaint if its terms (rather than the fact that the complaint was made) are relevant to a fact in issue at the trial”.35

Neither s 66(2) nor most other exceptions to the hearsay rule in the Act enable the use of “a previous representation to prove the existence of an asserted fact if, when the representation was made, the person who made it was not competent to give evidence about the fact because he or she was incapable of giving a rational reply to a question about the fact”.36

It should be noted that the Evidence Act gives a court discretion to limit the use of evidence if there is a danger that a particular use of the evidence might be unfairly prejudicial to a party or be misleading or confusing: s 136.

The res gestae rule applies to an otherwise hearsay statement which is admissible as evidence of an incident’s truth on account of its contemporaneity with or spontaneity in connection with the event. The range of the rule is not settled.37 In respect of agitating events such as assaults, it seems that evidence of a victim’s statement will be admissible as to its truth when made in approximate contemporaneity with the assault and the trial judge is satisfied that in the circumstances the event was so unusual, startling or dramatic as to dominate the thoughts of the victim so that the possibility of concoction or distortion is excluded.38 For example, a cry alleging an assault to a passerby at a service station from a woman restrained by her assailants in a motor vehicle in which the assault had just taken place may be admissible as evidence of the truth of the allegation.39 The extent to which the Act alters the rule has not been determined, although its relevance in child sexual assault cases may not be frequent, as attacks tend not to take place in front of or in the vicinity of others.40

35 Bellamy and Meibusch, op cit, para [66.4].
36 Evidence Act 1995, s 61(1); s 61 does not extend to s 72 (the admissibility of contemporaneous representations about a person’s health, etc): s 61(2).
37 See Byrne and Heydon, op cit, paras [37005] ff.
39 Cf R v Nikolovski (unreported, 5 December 1990, NSW CCA) in which the statement was made at a garage in respect of an assault which had occurred in a flat. In the circumstances, the statement was admissible not as to its truth under the res gestae rule, but as to the complainant’s credit under the sexual complaint rule.
40 The Act makes provision for admissibility of prior statements which are contemporaneous representations about “the person’s health, feelings, sensations, intention, knowledge or state of mind” of the representor: Evidence Act 1995, s 72. This exception to the hearsay rule is not dependent on competency: s 61(2). It may be that a very young child’s evidence that “something hurts”, otherwise inadmissible because of competency, is made admissible as an exception to the hearsay rule.
**Videotaping statements**

A New South Wales Government working party, the Children's Evidence Taskforce, is considering the acceptance of pre-trial statements of children recorded on video. There is currently no provision for their admissibility. Commentator Paul Byrne has stated that there is no argument "of logic or fairness" which should prevent acceptance of pre-trial statements recorded on video, provided that "the statement was reasonably contemporaneous with the event in question and was not induced by improper interviewing techniques". Commentators have suggested that this method will increase reliability, lessen the likelihood of contamination, and be less traumatic for the child.

Queensland has made admissible a statement on video of a fact by a complainant under 12 years, where oral evidence of the fact would be admissible: Evidence Act 1977 (Qld), s 93A. The requirements are:
- the child has personal knowledge of the matters in the statement;
- the statement has been made before or soon after it appears that the child is a potential witness; and
- the child is available to give evidence.

The evidence may be rejected at the court's discretion if for any reason it appears "inexpedient in the interest of justice that the statement should be admitted": s 98. One judge has cautioned about admitting evidence which includes irrelevant and prejudicial material, such as answers to questions which are not directly related to the alleged offence.

**SPECIAL PROTECTION FOR CHILDREN GIVING EVIDENCE**

"There is a proper concern today that people upon whom offences are committed should not be deterred from giving evidence in court against the accused person. However, the concern cannot be allowed to reduce the standard of proof required in a criminal charge."
The question of whether the alleged victims of child sexual assault should receive special treatment in the course of a trial goes to the heart of its purpose. As suggested by the word “alleged”, the purpose of a criminal trial is to determine whether the accused person is guilty of the offence charged. It follows that the court’s major focus (unlike the focus in family law or child care proceedings) is the position of the accused, requiring proof of guilt beyond reasonable doubt. However, both legislation and common law provide for the special needs of children in an adult criminal justice system.

The nature of children’s evidence is considered above: this section focuses on how it is given and how the courts are empowered to recognise the special pressures on children while preserving the rights of the accused. This section lists the important features of the main protections for children. It does not deal in a comprehensive manner with qualitative issues raised, including the questions of whether children’s evidence is more reliable because of the protections and what a jury is likely to infer from any order of the court directing that evidence be given in a particular manner.

The main areas relating to evidence by child complainants in sexual assault matters are:

- a bar on having to give evidence at committal hearings;
- court closure;
- non-publication orders;
- restriction on evidence regarding the victim’s prior sexual experience and sexual reputation;
- the admission of pre-trial statements made on video;
- supportive persons;
- alternative arrangements for the giving of evidence, including the use of screens; and
- the use of closed-circuit television.

On 27 September 1996, the *Crimes Amendment (Children’s Evidence) Act* 1996 received assent. When proclaimed, it will create more general rights for children in respect of supportive persons, evidence given by closed-circuit television and evidence given by alternative arrangements. The amendments are considered below.

It should be noted that a court has an inherent jurisdiction to control its own proceedings. While the limits of the jurisdiction are not settled, the discretion under the power is specifically reserved only in the provisions dealing with alternative arrangements.

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46 Children are not the only types of witnesses for whom special provision is made: see “Non-publication orders” and “Restriction on evidence regarding the victim’s prior sexual experience and sexual reputation”, below.


48 *Crimes Act* 1900, s 405F(4); cf after commencement of the *Crimes Amendment (Children’s Evidence) Act* 1996, when the reservation is omitted in respect of alternative arrangements; it is inserted in respect of supportive persons: *Crimes Act* 1900, s 405CA(6).
A bar on having to give evidence at committal hearings

Committal hearings are preliminary hearings held before a magistrate to determine whether there is sufficient evidence to commit an accused for trial. Although tendering a witness's written statement as prosecution evidence at committal proceedings is the normal procedure, it is possible for the court or for an accused to render the statement inadmissible and require appearance of the witness: Justices Act 1902, s 48E. However, in the case of certain classes of witness (including since 1987 complainants of prescribed sexual offences), the court may only give the direction if it is of the opinion that there are special reasons why, in the interests of justice, the witness should attend to give oral evidence: subs (2). While fairness might dictate that the information in a statement is the best a complainant can give and that this should be formally stated, there is nothing special in a case where the Crown case heavily depends upon the complainant’s account of certain events, and the accused is anxious to have the opportunity to cross-examine the complainant about those events.

Court closure

It is fundamental that courts conduct public hearings. There is no blanket exception at common law for matters involving children, even child sexual assault matters. A mere desire to consider feelings of delicacy is insufficient.

Under the Crimes Act, a court may direct that proceedings be in camera, that is closed, in a range of offences including most sexual assaults: s 77A. The court may make the order on its own motion or at the direction of any party: s 77A(4).

Under the provision, the court must consider the needs of the complainant to have any person excluded, the need of the complainant to have any person present, the interests of justice and any other relevant matter: s 77A(5). Regarding the need to have any person present, the court has the power to exempt any person from the direction absolutely or subject to conditions and “to the extent necessary to allow that person to be present as a support”: s 77A(3). It may be that a supportive person cannot remain.

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49 For “prescribed sexual offence”, see “Corroboration”, above. An effect of the provision may be to deny an accused natural justice to the extent that he or she is not permitted to confront the accuser, at least at this stage. As to the right of confrontation, see “Alternative arrangements for the giving of children’s evidence, including the use of screens”, below.

50 R v Colby and Kennedy (1995) 84 A Crim R 125 at 128 per Gleeson CJ.

51 Anderson (unreported, 15 February 1994, NSW CCA).

52 Scott v Scott [1913] AC 417.

53 Ibid at 439 per Lord Haldane LC.

54 Sexual offences not included are those prescribed in ss 78A, 79 and 80.

55 At common law, the basis for the exception to the principle that courts should be open and subject to publicity is the more fundamental principle that justice be done in accordance with the law: Scott v Scott [1913] AC 417 at 437 per Lord Haldane LC.

56 See also “Supportive persons”, below.
in court because of a procedural difficulty. For example, the person may be a potential witness. It may be that the court makes direction about where the person places themselves relevant to a child complainant’s line of vision, while the child is giving evidence, because of concern of influence.57

In addition, mandatory provisions apply to any matter in which the accused is less than 18 at the hearing.58 Any person not directly interested is excluded from the hearing, unless the court otherwise directs: Children (Criminal Proceedings) Act 1987, s 10(1)(a). However, a person “engaged in preparing a report on the proceedings for dissemination through a public news medium” is entitled to remain at the hearing unless the court otherwise directs: s 10(1)(b).59 In addition, the court has power to direct that a person other than the accused or any other person directly interested in the proceedings leave during the examination of a witness, if the court “is of the opinion that it is in the interests of the child that such a direction be given”: s 10(2).

Where the court has power to order that a hearing proceed in camera, it appears that the court is empowered to make an order prohibiting publication of the proceedings.60 Because the latter power relies upon the former, it should not be confused with any power of a court to make a non-publication order where the hearing is open: see below.61

Available material regarding the conduct of child sexual assault matters in New South Wales suggests that an application that proceedings be in camera is likely to succeed.62

Non-publication orders

At common law, New South Wales courts, including the Supreme Court, have no general power to make orders for the non-publication of evidence at a hearing.63

57 J Cashmore, The Evidence of Children, Monograph No 11, 1995, Judicial Commission of New South Wales, Sydney, p 63; see also “Alternative arrangements for the giving of children’s evidence, including the use of screens”, below.

58 A matter involving an accused child is generally within the jurisdiction of the Children’s Court. When the accused is less than 18 but not less than ten at the time of the offence and less than 21 when charged, the court has jurisdiction, subject to certain exceptions: Children (Criminal Proceedings) Act 1987, ss 5, 28. The court has jurisdiction in respect of all committals and hearings except for serious indictable offences. “Serious indictable offences” are defined in s 3(1) and include certain offences under the Crimes Act 1900, ss 61J or 61K. By the Children (Criminal Proceedings) Regulation 1995, cl 5, the definition also includes the sexual offences prescribed in ss 66A, 66B and 781, and certain types of the offence prescribed in s 80A.

59 See also “Non-publication orders”, below.


61 The basis and the extent for the subsidiary power are considered in Attorney General (NSW) v Mayas Pty Ltd (1988) 14 NSWLR 342 at 345-346 per Mahoney JA, although his Honour’s view of the width of the non-publication power remains open: see R v Mr C (1993) 67 A Crim R 562 at 563.


Common law elaboration of the powers of a court performing its curial functions does not import it. There is a common law qualification which allows the use of a pseudonym for a witness, such as a blackmail victim or a police informer. The basis of the exception is not tenderness towards the victim but the public interest in securing convictions in such cases, where experience shows that the complainants will not come forward unless they are given this kind of protection. While it is arguable that such reasoning is eminently applicable to child sexual assault matters, other longstanding statutory qualifications render its application unnecessary.

First, all courts administering the criminal law in New South Wales have power to order the non-publication of evidence given in the hearing of certain offences including sexual assault: *Crimes Act 1900*, s 578. The order cannot be made if either party indicates to the judge that "it is desired that any particular matter given in evidence should be available for publication": s 578(1). Since 1985, the provision has been "subject to any Act or law under which evidence relating to a child under the age of 18 years, or a report or account of that evidence, may not be published": s 578(3).

Secondly, there is a general prohibition on publication of material identifying or which is likely to lead to identification of a complainant in a prescribed sexual offence: s 578A(2). The prohibition continues even after the proceedings have been finally disposed of: s 578(3). The prohibition does not apply where the court has sought and considered the views of the complainant and is satisfied that publication is in the public interest (s 578(4)(a), (5)), or where a complainant who is 14 years or older at the time of the publication consents (s 578(4)(b)), or where the publication is made after the complainant’s death: s 578(4)(f).

Thirdly, there is a general prohibition on publication or broadcast of material identifying or which is likely to lead to identification of a child who is a witness or who is mentioned or otherwise involved in any criminal proceedings, even after the proceedings are disposed of.

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64 John Fairfax Group v Local Court of NSW (1992) 26 NSWLR 131 at 148 per Kirby P. The relevant court in that case was an inferior tribunal, but the weight of authority supports application of the principle to courts generally.


66 The power extends to the Court of Criminal Appeal: R v Mr C (1993) 67 A Crim R 562 at 563; and, since 1987, includes committal proceedings: s 578(4).

67 For “prescribed sexual offence”, see “Corroboration”, above.

68 s 578(4) includes other exceptions.

69 *Children (Criminal Proceedings) Act* 1987, s 11. “Child” means a person under 18: s 3(1). Where the child is under 16 at the time of the publication or broadcast, the court may consent to publication or broadcast: s 11(4)(b)(i). That consent shall not be given except with the concurrence of the child or, if the child is incapable of concurring, where the court is of the opinion that the public interest so requires: s 11(4A). Where the child is 16 or older at the time of the publication or broadcast, the child may consent: s 11(4)(b)(ii).
Restriction of evidence of the victim’s prior sexual experience and reputation

Since 1981 in prescribed sexual offence hearings, admission of evidence regarding the sexual reputation or experience of a complainant (of any age) has been restricted: Crimes Act 1900, s 409B.\(^{70}\) Evidence regarding the former is excluded (s 409B(2)), while evidence of the latter is admissible in prescribed circumstances and if its “probative value outweighs any distress, humiliation or embarrassment which the complainant might suffer as a result of its admission”; s 409B(3). The prescribed circumstances are exhaustive.\(^{71}\) Where certain matters are put into evidence by the prosecution, a limited right of cross-examination is preserved for the accused: s 409B(5). Although the exclusion of evidence under the section may amount to unacceptable prejudice to an accused, it is a valid enactment of the legislature. The appropriate course for the accused in such a case is not an application for a stay of proceedings but an appeal on the basis “that the conviction is unsafe and unsatisfactory, or that there has been a miscarriage of justice”.\(^{72}\)

The admission of pre-trial statements made on video

This method, which is not the subject of legislation in New South Wales, is not only a matter of special protection but raises issues of reliability. It is considered above, in “Videotaping statements”.

Supportive persons

The Crimes Act currently only provides for a supportive person where an order is made closing a court or allowing a child to give evidence by means of closed-circuit television.\(^{73}\)

The Crimes Amendment (Children’s Evidence) Act 1996, creates a right for children under 16 at the time of giving evidence to choose a person whom the child would like to have present when giving evidence.\(^{74}\) The provision applies to matters including all criminal matters.\(^{75}\) Without limiting the right, the person may be a parent, guardian, relative, friend or support person and may be with the child as an interpreter, for the

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\(^{70}\) For “prescribed sexual offence”, see “Corroboration”, above.

\(^{71}\) R v M (1993) 67 A Crim R 549; for comment regarding reform, see R v Bernshaler (unreported, 17 December 1993, NSW CCA) per Kirby P and Badgery-Parker J.

\(^{72}\) R v PE (unreported, 9 October 1995, NSW CCA) per Cole JA and see the judgments of Grove and Sperling JJ; followed in R v Grills (unreported, 12 December 1995, NSW CCA). Application for special leave to appeal both matters was refused by the High Court: Grills v The Queen (1996) 70 ALJR 905; cf the concerns expressed, prior to the former decisions, by Dr Sandra Egger in Standing Committee on Social Issues, Sexual Violence: Addressing the Crime, 1996, Legislative Council, Parliament of New South Wales, Report No 9, p 27.

\(^{73}\) See “Court closure”, above, and “Closed-circuit television”, below.

\(^{74}\) Crimes Act 1900, s 405CA(2).

\(^{75}\) Crimes Act 1900, s 405CA(1)(a).
purpose of assisting the child with any difficulty in giving evidence associated with a disability, or for the purpose of providing the child with other support. To the extent the court considers it reasonable, it must make whatever direction is appropriate to give effect to a child’s decision to have the person present within the child’s sight when the child is giving evidence. The court may permit more than one supportive person to be present with the child if the court thinks that it is in the interests of justice to do so. Nothing in the section limits any discretion of the court with respect to the conduct of proceedings of any case.

Alternative arrangements for the giving of children’s evidence, including the use of screens

In the United States of America, the right of the accused to be confronted with the witnesses for the prosecution is found in the Constitution. While the accused in New South Wales enjoys no such constitutional or legislative protection, it may be regarded as a fundamental right. Conversely, there is research suggesting that children in sexual assault hearings fear most having to confront the accused.

From 1990–1996, a court in any criminal proceedings could, on its own motion or on application of the prosecution, direct that alternative arrangements be made for the giving of evidence by a child who was the victim of a personal assault offence. The provision was general, but referred to seating arrangements, the use of screens and adjournment of the hearing or part of it to other premises. Orders for screens have often been sought to restrict visual contact between the child and the accused.

Where alternative arrangements were made, the court in a jury trial had to warn the jury not to draw any inference adverse to the accused or to give the evidence any greater or lesser weight because of the arrangements: Crimes Act 1900, s 405H(2). There was no statutory obligation for the court to explain why the order had been made or to explain whether the order was usually made.

Only a child under 16 at the time of giving evidence could give evidence this way: s 405F(5). A court had power to vary or revoke any order, either on its own motion or

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76 Crimes Act 1900, s 405CA(3).
77 Crimes Act 1900, s 405CA(4).
78 Crimes Act 1900, s 405CA(5).
79 Crimes Act 1900, s 405CA(6).
80 Constitution of the United States of America, Sixth Amendment.
81 Kant v DPP (1994) 73 A Crim R 481 at 495-496 per Kirby P. In R v Gun; Ex parte Stephenson (1977) 17 SASR 165, Zelling J refers to the “natural justice” of confrontation; see also the International Covenant on Civil and Political Rights, Art 14.3.
82 Eg Cashmore, 1995, op cit, pp 29-32.
83 Crimes Act 1900, s 405F. A “personal assault offence” includes all sexual offences in Pt 3; s 405F(5)(a).
84 Cashmore, 1995, op cit, pp 64-66.
on application by a party: s 405F(3). The failure of a child to give evidence in accordance with an order for alternative arrangements did not affect the validity of the proceedings or any decision made in connection with them: s 405I. There was no provision for pre-trial application for an order.

The Crimes Amendment (Children’s Evidence) Act 1996 replaces s 405F and creates a right for children under 16 at the time of giving evidence to have alternative arrangements for giving evidence made where:

- closed-circuit television or similar technology is not available and the court does not move the proceedings;
- the child chooses not to give evidence by those means; or
- the court orders that the child may not give evidence by those means.\(^{85}\)

In the proceedings, the court must make alternative arrangements for the giving of evidence by a child in order to restrict contact (including visual contact) between the child and any other persons. Those arrangements may include the use of screens, planned seating arrangements for people who have an interest in the proceedings (in which regard may be had to the level at which they are seated and the people in the child’s line of vision), and the adjournment of proceedings to other premises\(^ {86}\) (which are deemed to be part of the court\(^ {87}\)). Where a child chooses not to use such arrangements, the court must direct that the child be permitted to give evidence in the ordinary way.\(^ {88}\)

An additional right to alternative arrangements is created for children giving evidence when the accused is unrepresented.\(^ {89}\) The court may appoint a person to conduct the examination in chief, cross-examination or re-examination of any witness other than the accused.\(^ {90}\) Such a person must act on the instructions of the accused.\(^ {91}\) The court may choose not to appoint such a person if the court considers that it is not in the interests of justice to do so.\(^ {92}\) The provision applies whether closed-circuit television or similar technology is used and whether alternative arrangements are otherwise used.\(^ {93}\)

Where such evidence is given in a jury trial under the general provision for alternative arrangements or under the provision relating to an unrepresented accused, the judge must inform the jury that it is standard procedure for children’s evidence in such cases to be given by those means and warn the jury not to draw any inference adverse to the

\(^{85}\) Crimes Act 1900, s 405F.
\(^{86}\) Crimes Act 1900, s 405F(3).
\(^{87}\) Crimes Act 1900, s 405F(5).
\(^{88}\) Crimes Act 1900, s 405F(4).
\(^{89}\) Crimes Act 1900, s 405FA.
\(^{90}\) Crimes Act 1900, s 405FA(2).
\(^{91}\) Crimes Act 1900, s 405FA(3).
\(^{92}\) Crimes Act 1900, s 405FA(4).
\(^{93}\) Crimes Act 1900, s 405FA(5).
acused or give the evidence any greater or lesser weight because of the use of the means.\textsuperscript{94}

**Closed-circuit television**

From 1990–1996, a court in any criminal proceedings could, on application of the prosecution, order that a child who was the victim of a prescribed sexual offence give evidence by means of closed-circuit television: \textit{Crimes Act 1900}, s 405D(1).\textsuperscript{95} The order could be made only when the court was satisfied that it was likely that (1) the child would suffer mental or emotional harm if required to give evidence in the ordinary way or (2) the facts would be better ascertained if the child’s evidence was given in accordance with such an order: s 405D(3).\textsuperscript{96}

The court had power to vary or revoke any order, either on its own motion or on application by a party: s 405D(4). Guidelines and restrictions regarding the use of closed-circuit television were set out in the \textit{Crimes Act} and could be made by regulation: s 405E. In particular, they were to be operated in such a manner that the accused was able to see the child and any person present with the child on a monitor: s 405E(1). Only a child under 16 at the time of giving of evidence could give evidence this way: s 405E(1). A court without facilities or which otherwise considered it appropriate could adjourn the proceedings to a court equipped with such facilities: s 405D(2). The failure of a child to give evidence in accordance with an order did not affect the validity of the proceedings or any decision made in connection with them: s 405I. There was no provision for pre-trial application for an order.

The Act provided a limited role for a supportive person. Where, pursuant to an order, the evidence was permitted to be given from other premises, the court could also order a court officer or any other person to be present as a support or interpreter or both: s 405D(2A), inserted in 1991.

As for alternative arrangements, where closed-circuit television was used in a jury trial, a court had to warn a jury not to draw any inference adverse to the accused or to give the evidence any greater or lesser weight because of the use of the facilities: s 405H(2). Again, there was no statutory obligation to explain why the order had been made or to explain whether the order was usually made.

The \textit{Crimes Amendment (Children’s Evidence) Act 1996} creates a right for children under 16 at the time of giving evidence to give that evidence by closed-circuit television or other similar technology prescribed.\textsuperscript{97} The provision applies to matters including all

\textsuperscript{94} \textit{Crimes Act 1900}, s 405H(4).

\textsuperscript{95} For “prescribed sexual offence”, see “Corroboration”, above. This should not be confused with video evidence of prior statements, which is considered above.

\textsuperscript{96} For comment on the test, see the summary of the position of the Child Protection Council set out in the Report of the Children’s Evidence Taskforce, \textit{Taking Evidence in Court}, 1994, NSW Attorney-General’s Department, Sydney, p 27.

\textsuperscript{97} \textit{Crimes Act 1900}, s 405D.
matters listed in Pt 3 of the Act. The child may choose not to give evidence by those means. The child must not give evidence by those means if the court orders—such an order may only be made if it is not in the interests of justice for the evidence to be given by such means or the urgency of the matter makes their use inappropriate.

The court may make, vary or revoke any order under the provision on its own motion or on a party's application. Separate provision is made where the child is the accused. Where the evidence is given at a location outside the court, the location is taken to be part of the court. The court may order that a supportive person be present at that place, without limiting a child's general rights as set out in s 405CA. Further, if the court is not equipped with suitable technology to hear such evidence or otherwise considers it appropriate to do so, it may adjourn to another place for that purpose.

A child entitled to give evidence in such a manner may not give identification evidence by those means. However, such a child is entitled to refuse to give identification evidence until after the completion of the child's other evidence and the court must ensure that the child is not in the presence of the accused for any longer than is necessary for the child to give identification evidence.

Where such evidence is given in a jury trial, the judge must inform the jury that it is standard procedure for children's evidence in such cases to be given by those means, and warn the jury not to draw any inference adverse to the accused or give the evidence any greater or lesser weight because of the use of the means.

Section 405E continues to govern the use of closed-circuit television and now covers similar technology.

98 Crimes Act 1900, ss 405C, 405D(1)(a).
99 Crimes Act 1900, s 405D(3).
100 Crimes Act 1900, ss 405D(4), (5).
101 Crimes Act 1900, s 405D(6).
102 Crimes Act 1900, ss 405D(7), 405DA.
103 Crimes Act 1900, s 405DB(1).
104 Crimes Act 1900, s 405DB(2).
105 Crimes Act 1900, s 405DB(3).
106 Crimes Act 1900, s 405DD.
107 Crimes Act 1900, s 405DC(1).
108 Crimes Act 1900, s 405DC(2).
109 Crimes Act 1900, s 405DC(3).
110 Crimes Act 1900, s 405H(1).
111 Crimes Amendment (Children's Evidence) Act 1996, Sch 1[3].
CONCLUSIONS

The primary objective of the court in the conduct of a criminal trial is the assessment of the value of the facts with due regard to protection of the accused. Doubts will generally be resolved in favour of the accused, in accordance with that primary objective. The difficulty of protecting children as well is not solvable in one legislative or judicial reform. The approach of the courts and the legislature is to leave the balancing process at the discretion of the court and the jury.

Matters which remain the subject of controversy include:

- the extent to which evidence on the characteristics of sexually assaulted children may be received as expert evidence;
- the extent to which the Evidence Act 1995 has abrogated the rule against hearsay;
- the extent to which prior statements, including statements made on video, can be received; and
- whether protection matters should be considered pre-trial, to avoid delay and discomfort to the child.
## Appendix 4  List of Variables

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**HANSARD**


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