Judicial Commission of New South Wales

JUDICIAL OFFICERS' BULLETIN

Published by the Judicial Commission of NSW

March 2019 | Volume 31 | No 2

Balancing prosecution with the right to a fair trial: the child sexual abuse reforms in NSW

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The *Criminal Legislation Amendment (Child Sexual Abuse) Act* 2018 has brought about changes to how sexual assault offences, mainly involving children, are prosecuted. This article summarises these amendments and considers some of the implications for the criminal justice system.

Background

The *Criminal Legislation Amendment (Child Sexual Abuse) Act* (the amending Act) was one of many criminal justice reforms the NSW Government enacted in 2018 in response to recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse,[1] the Child Sexual Offences Review[2] and, more broadly, to reform the way the criminal justice system deals with victims of sexual assault. The NSW Attorney General, the Honourable Mark Speakman SC, said this Act was intended to "improve the chances of successful prosecution of child sexual offences."[3]

The amending Act commenced in two stages: on 31 August 2018 when new failure to report offences and changes affecting sentencing for historical child sexual assault offences commenced and on 1 December 2018 when the balance of the Act commenced.

1 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final report recommendations*, 2017; Second Reading Speech, Criminal Legislation Amendment (Child Sexual Abuse) Bill 2018, Legislative Assembly, *Debates*, 6 June 2018, pp 3–4.
2 Second Reading Speech, ibid, p 3.
3 Second Reading Speech, above n 1, p 3.

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The amendments:

- restructure sexual assault offences in the *Crimes Act* 1900 and modernise the language used to define the types of sexual conduct associated with particular offences
- introduce a new requirement that sentencing for offences of historical child sexual assault be done in accordance with current sentencing patterns and practice
- change certain procedural requirements relating to sexual assault trials, and
- introduce provisions aimed at decriminalising certain sexual acts involving children.

Crimes Act 1900 — new sexual offences

The amending Act restructures and modernises the language used to describe the sexual offences in Pt 3, Div 10 of the *Crimes Act* and creates new failure to report offences. It separates sexual offences committed against adults (in subdivs 2–4) from those committed against children (in subdivs 5–11).[4] Other sexual offences, for example, incest and bestiality are found in subdivs 12–15.

Relevant definitions

Definitions relevant to Div 10 are in the new s 61H. As part of the modernisation of the language used to describe particular conduct giving rise to an offence, there are separate definitions for each type of sexual activity including a "sexual act" and "sexual intercourse".

"Sexual intercourse" is defined in s 61HA, in identical terms to the former s 61H(1) which has been replaced.

"Sexual touching" and "sexual act" are defined in the new ss 61HB and 61HC respectively. This conduct would previously have fallen within the ambit of the now-repealed offences of indecent assault and act of indecency.[5] Before 1 December 2018, whether or not a particular assault or act was indecent was determined by reference to the common law. Not only did that require the prosecution to prove an assault but, for the assault to be indecent, the prosecution had to prove a sexual connotation.[6] The Attorney General said the "more modern and more easily understood terminology is defined … in a way that reflects the core of the common law meaning of indecency".[7] He explained:

> Sexual touching will cover contact offences [involving] some form of physical contact with the victim. Sexual acts will cover non-contact offences [involving] sexual conduct other than touching the victim, including forcing or inciting a victim to touch themselves.[8]

"Sexual touching" is defined in s 61HB(1) as meaning one person touching another in circumstances where a reasonable person would consider the touching sexual. A "sexual act" means an act, other than sexual touching, carried out in circumstances where a reasonable person would consider the act to be sexual: s 61HC(1). In determining whether a reasonable person would consider either the touching or the act to be sexual, the following factors are to be taken into account:

a. whether the area of the body touched or involved in the act is the person's genital or anal area or breasts (whether or not the breasts are sexually developed),[9] or
b. whether the person doing the touching or carrying out the act did so to obtain sexual arousal or sexual gratification,[10] or
c. whether any other aspect of the touching or act (including the circumstances in which either was carried out) made it sexual.[11]

Touching or acts carried out for genuine medical or hygienic purposes are not sexual touching or a sexual act.[12]

"Consent" is now defined in s 61HE and is in identical terms to the former s 61HA (now repealed and replaced). However, the definition now applies not only to offences of sexual intercourse without consent but also to the new basic and aggravated offences of sexual touching and sexual acts involving adults in ss 61KC, 61KD, 61KE and 61KF.[13]

The New South Wales Law Reform Commission (NSWLRC) is undertaking a review of consent and knowledge of consent in sexual assault offences.[14]

Sexual offences

The basic and aggravated indecent assault and act of indecency offences in the former ss 61L-61O have been repealed[15] and offences of sexual touching and sexual acts without consent with respect to adults (in subdivs 3 and 4), and children (in subdivs 6 and 7) replace them.

The following table[16] identifies the old and new offences, the relevant maximum penalty and applicable standard non-parole period (SNPP):

4 Second Reading Speech, above n 1, p 6.
5 See former *Crimes Act* 1900, ss 61L–61O (rep).
6 *R v Harkin* (1989) 38 A Crim R 296 at 301. See also *Criminal Trial Courts Bench Book,* Judicial Commission of NSW, 2nd edn, 2002–, at [5-670].
7 Second Reading Speech, above n 1, pp 6–7.
8 ibid, p 7.
9 *Crimes Act*, ss 61HB(2)(a), 61HC(2)(a).
10 *Crimes Act*, ss 61HB(2)(b), 61HC(2)(b).
11 *Crimes Act*, ss 61HB(2)(c), 61HC(2)(c).
12 *Crimes Act*, ss 61HB(3), 61HC(3).
13 *Crimes Act*, s 61HE(1).
14 A discussion of issues associated with proving consent in these cases is beyond the scope of this article. However, see NSWLRC, *Consent in relation to sexual offences*, Consultation Paper, 2018 at www.lawreform.justice.nsw.gov.au/Documents/Publications/Consultation-Papers/CP21.pdf, accessed 5/3/2019.
15 *Criminal Legislation Amendment (Child Sexual Abuse) Act* 2018, Sch 1[7].
16 Prepared by Amanda Jamieson, Senior Research Officer (Legal), Research Division, Judicial Commission of NSW.

Maximum penalties and applicable standard non-parole periods (SNPP)

Repealed offences	New offences: subdivs 3–4	New child specific offences: subdivs 6–7
Indecent assault: s 61L [5 years]	Sexual touching: s 61KC [5 years]	Sexual touching — child under 10: s 66DA [16 years; SNPP 8 years] Sexual touching — child 10 or above and under 16: s 66DB [10 years]
Aggravated indecent assault: s 61M [7 years; SNPP 5 years] [10 years — victim under 16; SNPP 8 years]	Aggravated sexual touching: s 61KD [7 years; SNPP 5 years]	
Act of indecency: s 61N [18 months] [2 years — victim under 16]	Sexual act: s 61KE [18 months]	Sexual act — child under 10: s 66DC [7 years] Sexual act — child 10 or above and under 16: s 66DD [2 years]
Aggravated act of indecency: s 61O [3 years] [5 years — victim under 16] [7 years — victim under 10]	Aggravated sexual act: s 61KF [3 years]	Aggravated sexual act — child 10 or above and under 16: s 66DE [5 years] Sexual act for production of child abuse material — child under 16: s 66DF [10 years]

All offences include the incitement of the alleged victim or a third person to perform the particular act forming the basis of a given offence.[17] The circumstances of aggravation for each have not changed.

Persistent sexual abuse of children — s 66EA

The Royal Commission considered offences of persistent sexual abuse of children committed in an institutional context. Submissions made to the Commission noted the difficulty of proving the offence given the requirement that the prosecution prove, with a degree of particularity, the timing of the offending and the sexual misconduct said to underlie the offence. To give effect to the Commission's recommendation that this offence be substantially amended, the former s 66EA has been repealed and replaced.

Under the new s 66EA(1), it is an offence, with a maximum penalty of life imprisonment, for an adult[18] to maintain an unlawful sexual relationship with a child.[19] An "unlawful sexual relationship" is defined in s 66EA(2) as one in which the accused engages in two or more unlawful sexual acts with, or towards, a child *over any period*. As previously,[20] an "unlawful sexual act" is broadly defined in s 66EA(15), and extends to conduct constituting a sexual offence or sexual act engaged in with a child outside of NSW which would have constituted an offence if committed in NSW. Prosecutions can still only be commenced with the approval of the Director of Public Prosecutions (DPP).[21]

The new offence differs from the former s 66EA in three key respects:

1. only two or more unlawful sexual acts must be proved (previously the prosecution had to prove three or more such acts),
2. the prosecution no longer has to prove that each act occurred on a separate day, and
3. the jury is no longer required to be unanimous as to the unlawful sexual acts establishing the relationship.

The new provision operates retrospectively so as to apply to a relationship that existed wholly or partly before 1 December 2018 provided the accused's acts were unlawful sexual acts during the period of the relationship.[22] Therefore the prosecution can rely on the new s 66EA to prosecute offences allegedly committed many years ago.

The prosecution must still particularise the period of time over which the alleged unlawful sexual relationship existed, but is no longer required to particularise the unlawful sexual acts underpinning the relationship.[23] This may more readily facilitate proof of an offence as previously the prosecution was required not only to specify the period of the alleged offence "with reasonable particularity" but also to describe "the nature of the separate offences" allegedly committed. The greatest barrier to proving a s 66EA offence before 1 December 2018 was said to be the degree of particularisation required, resulting in it being rarely used in NSW to prosecute a course of conduct.[24]

17 See *Crimes Act*, ss 61KC(b)–(d), 61KD(b)–(d) for offences involving adults and ss 66DA(b)–(d), 66DB(b)–(d), 66DC(b)–(d), 66DD(b)–(d), 66DE(b)–(d) for offences involving children. See also s 61H(3).

18 Defined in *Crimes Act*, s 66EA(15) as a person who is 18 years or older.

19 Defined as a person who is under 16 years old: s 66EA(15). Previously a child was defined as a person under the age of 18.

20 *Crimes Act*, s 66EA(3) as at 30 November 2018.

21 *Crimes Act*, s 66EA(14).

22 *Crimes Act*, s 66EA(7).

23 *Crimes Act*, s 66EA(4).

24 See former s 66EA(6). See the discussion of submissions to the Royal Commission concerning problems associated with conducting prosecutions in NSW for offences against s 66EA, in particular, but also with similar cases interstate and overseas: Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal justice report: Pts III-VI*, 2017, pp 50–51.

Section 66EA(6) requires a judge to inform a jury of the matters in s 66EA(5) that they:

- cannot convict an accused unless they are satisfied beyond reasonable doubt that the evidence establishes an unlawful sexual relationship existed[25]
- are not required to be satisfied of the particulars of any unlawful sexual act they would have to be satisfied of if charged as a separate offence[26]
- are not required to agree on the unlawful sexual acts that constitute the unlawful sexual relationship.[27]

A court sentencing for an offence must take into account the maximum penalty for the unlawful sexual acts engaged in by the offender during the period of the unlawful sexual relationship.[28]

Generally after a trial, a judge is not obliged to sentence on a view of the facts most favourable to an offender.[29] The only constraint is that the judge's findings as to facts must be consistent with the jury's verdict.[30] Consistent with that duty, in *ARS v R* the NSWCCA held, with respect to the former s 66EA, that a judge must consider which of the foundational offences were established beyond reasonable doubt so as to sentence in accordance with the jury's verdict.[31]

The High Court questioned whether that approach was appropriate in every case in *Chiro v The Queen*. The court considered the approach to sentencing for an offence of persistent sexual abuse of a child contrary to s 50(1) of the *Criminal Law Consolidation Act* 1935 (SA) which, at the time, was in similar terms to the former s 66EA. The court concluded that in some trials for offences of persistent child sexual abuse, such as where the underlying acts of sexual exploitation ranged from what would have amounted to offences of sexual touching (using the new terminology) to sexual intercourse, it may be appropriate for a trial judge to ask the jury which of the particular unlawful sexual acts they were satisfied had been proved to the required standard.[32]

Whether a judge sentencing an offender after a trial for an offence against the new s 66EA should still consider the effect of *Chiro v The Queen* is yet to be decided. Much may depend on how the prosecution particularises an individual case. However, if the foundational offences were similar to those in *Chiro v The Queen*, a trial judge *may* decide it is appropriate to ask each juror which of the acts relied on by the prosecution they are satisfied of beyond reasonable doubt. Otherwise, it is arguable the offender should be sentenced on the basis most favourable to them.[33]

Grooming offences

The child grooming offence in s 66EB(3) now extends to providing a child with a financial or material benefit intending to make it easier to procure the child for unlawful sexual activity.

The Royal Commission recommended introducing a broader grooming offence for adults.[34] While recognising the difficulty of proving such an offence, and the likelihood it would be rarely prosecuted, the Commission concluded such an offence served an educative function as a means of emphasising the wrongfulness of grooming.[35]

Section 66EC creates a new offence of grooming an adult by providing a person (other than a child) with a financial or other material benefit intending to make it easier to procure a child under that person's authority for unlawful sexual activity. The maximum penalty is 6 years imprisonment if the child is under 14 years, or 5 years in any other case. In recognition of the difficulties associated with proving the offence,[36] prosecutions can only commence with the DPPs' approval.[37]

Sexual touching of a young person under special care

Section 73A creates a new offence of sexually touching a young person between the age of 16 and 18 under special care. The maximum penalty is 4 years imprisonment, if the young person is 16, or 2 years if aged 17. Relationships of special care (which include parents, grandparents, authorised carers, members of teaching staff of the young person's school) are defined in s 73A(3). "Authorised carer" and "member of the teaching staff" are defined in s 72B.

Failure to report and concealment offences

The new offence in s 43B responds to the Royal Commission recommendation for the creation of offences of failure to report directed to child sexual abuse in an institutional context.[38] The Royal Commission funded a research project about sentencing for child sexual abuse in institutions. The authors, while recognising prosecutions for such offences might be rare, considered such prosecutions were warranted as they "represent important normative or exhortatory statements of society's view of the reprehensibilty of [child

25 *Crimes Act*, s 66EA(5)(a).
26 *Crimes Act*, s 66EA(5)(b).
27 *Crimes Act*, s 66EA(5)(c).
28 *Crimes Act*, s 66EA(8).
29 *R v Isaacs* (1997) 41 NSWLR 374 at 378.
30 *Cheung v The Queen* (2001) 209 CLR 1 at [14]; *Chiro v The Queen* (2017) 260 CLR 425 at [70], [71].
31 [2011] NSWCCA 266 at [233].
32 *Chiro v The Queen*, above n 30 at [52]; [67].
33 *Chiro v The Queen*, above n 30 at [52].
34 Royal Commission, *Final report recommendations*, above n 1, Recommendation 25, p 99.
35 Royal Commission, *Criminal justice report: Pts III-VI*, above n 24, p 96.
36 Second Reading Speech, above n 1, p 6.
37 *Crimes Act*, s 66EC(3).
38 Second Reading Speech, above n 1, p 4; see also Royal Commission, *Final report recommendations*, above n 1, Recommendation 33, p 100; Royal Commission, *Criminal justice report: Pts III-VI*, above n 24, p 208.

sexual assault] committed in an institutional context".[39] It is an offence if:

- an adult is working as an employee, contractor, volunteer or otherwise (a "position holder") for an organisation that employs an adult worker who engages in child-related work, and
- there is a serious risk the adult worker will commit a child abuse offence against a child who is, or may come, under the care, supervision or authority of the organisation, and
- the position holder knows the risk exists and, by reason of their position, has the power or responsibility to reduce or remove that risk but negligently fails to do so.

It is not necessary to prove a child abuse offence has been committed.[40]

Definitions relevant to the section are in s 43B(3). The definition of a "child abuse offence" (which includes attempts to commit such offences) extends beyond sexual offences involving children to offences involving the physical abuse of a child, such as murder or manslaughter of a child, and wounding or grievous bodily harm with intent where the victim is a child. The Attorney General explained that the offence would apply to both forms of abuse because, "[o]ur regulatory frameworks to protect children such as the mandatory reporting framework, apply to risks of both physical harm and sexual abuse".[41]

Section 316A(1) creates an offence of concealing a child abuse offence and s 316A(4) creates an offence of soliciting a person to conceal such an offence. Both extend to information obtained on or after 31 August 2018 (when this section commenced) even if it relates to a child abuse offence occurring before that date.[42] Rather than adopting the model provisions the Royal Commission proposed, which the Attorney General described as "complex,"[43] the new s 316A builds on the offence of concealing a serious indictable offence in s 316. The Attorney General recognised that the existing offence could be used to prosecute failures to report child abuse, when the child abuse was a serious indictable offence, but that the high standard of knowledge ("knows or believes") required before a prosecution could commence meant the offence "may not address the wilful blindness by those in authority uncovered by the Royal Commission".[44]

A "child abuse offence" is defined in s 316A(9) in similar terms to s 43B(3)(b) but extends to historical offences of sexual assault where the alleged victim was a child.[45] Attempts to commit any of the offences identified also fall within the scope of the definition.[46]

An adult is guilty of an offence against s 316A(1) if they:

a. know, believe or reasonably ought to know that a child abuse offence has been committed, and
b. know, believe or reasonably ought to know they have information that might be of material assistance in securing the offender's apprehension, prosecution and conviction for that offence, and
c. fail, without reasonable excuse, to bring that information to the attention of the NSW Police as soon as it is practicable to do so.

Section 316A(2) sets out the matters that might be relevant to whether the person has a reasonable excuse for failing to bring information to the police. However, the grounds on which a reasonable excuse may be established are not limited by the matters identified in s 316A(2): s 316A(3). The matters identified include where:

- the person believes on reasonable grounds that the information is already known to police[47]
- information has been reported in accordance with other legislative reporting requirements either by the person or someone else[48]
- the person has reasonable grounds to fear for the safety of the person or another person (other than the offender) if the information were reported[49], or
- the alleged victim was an adult when the person obtained the information and the person believes on reasonable grounds the alleged victim does not want the information reported to police.[50]

Prosecutions for offences against s 316A(1) relating to information obtained in the course of practising or following a prescribed profession, calling or vocation can only be commenced with the DPP's approval.[51] The prescribed professions, callings or vocations include: legal and medical practitioners, psychologists, nurses, social workers, members of the clergy, researchers, arbitrators, mediators and, if the child abuse offence involved is an offence against s 60E (assault in a school), a school teacher including a school principal.[52]

39 A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts: Report for the Royal Commission into Institutional Responses to Child Sexual Abuse*, 2015, pp 9–10.
40 *Crimes Act*, s 43B(2).
41 Second Reading Speech, above n 1, p 4.
42 *Crimes Act*, Sch 11, Pt 35, cl 84.
43 Second Reading Speech, above n 1, p 5.
44 ibid, p 4.
45 *Crimes Act*, s 316A(9)(d).
46 *Crimes Act*, s 316A(9)(e).
47 *Crimes Act*, s 316A(2)(a).
48 For example, under the *Children and Young Persons (Care and Protection) Act* 1998 or the *Ombudsman Act* 1974 (see ss 316A(2)(b) and (c) respectively).
49 *Crimes Act*, s 316A(2)(d).
50 *Crimes Act*, s 316A(2)(f).
51 *Crimes Act*, s 316A(6).
52 *Crimes Regulation* 2015, cl 4.

Under s 316A(4), it is also an offence if a person solicits, accepts or agrees to accept any benefit for themselves or someone else in consideration for doing anything that would be an offence against s 316A(1).

The maximum penalties for the offences in s 316A, set out in the table below, depend on the maximum penalty of the child abuse offence being concealed.

Sentencing changes

The amending Act made two substantive amendments to the *Crimes (Sentencing Procedure) Act* 1999 (CSPA). Both commenced on 31 August 2018.

The first concerns the definition of a "child sexual offence" in s 21A(6). That definition operates in conjunction with s 21A(5A) which provides that when determining the appropriate sentence for a child sexual offence, an offender's prior good character or lack of previous conviction cannot be taken into account if the court is satisfied either factor assisted the offender in the commission of the offence.

In *Stanton v R*,[53] the court found the previous form of s 21A(6) was likely to be limited to existing child sexual offences. The court expressed doubt as to whether s 21A(5A) applied to the offender in that case because the offences for which he was sentenced, which had since been repealed, were not included in the definition of a "child sexual offence" in s 21A(6).[54]

Section 21A(6) now defines a "child sexual offence" more broadly to extend to both current and previous offences of child sexual assault. The definition specifically identifies the current offences in the *Crimes Act* but also includes the historic sexual offences listed in column 1 of Sch 1A (titled "Former sexual offences") of the *Crimes Act*, if the victim was under 16 years old. Section 21A(6)(f) CSPA puts the issue beyond doubt by stating such offences include "an offence under a previous enactment … substantially similar to an offence referred to in any of [(a) – (e)]". Schedule 1A was added to the *Crimes Act* by the amending Act and also commenced on 31 August 2018.

Sentencing in accordance with current sentencing patterns and practices

Until 31 August 2018, a court sentencing an offender for a historical child sexual assault offence was required to do so in accordance with the principles and practice extant when the offence was committed. In *R v Moon*,[55] Howie J suggested the following approach for addressing issues associated with identifying past sentencing practice:

- The nature of the criminal conduct proscribed by the offence and relevant maximum penalty are crucially important factors in determining the sentence to be imposed on the particular offender for the particular offence.
- Even after taking into account the offender's subjective features and all other relevant sentencing matters, including individual and general deterrence, the sentence should reflect the objective seriousness of the offence and be proportional to the criminality involved in the offence committed.
- Whether the proposed sentence meets these criteria is determined principally by considering the nature of the criminal conduct viewed against the prescribed maximum penalty.
- When sentencing an offender for offences committed many years earlier and no sentencing range current at the time of offending can be established, the offender would be sentenced in accordance with the policy of the legislature at the time of offending and consistently with the approach adopted by sentencing courts at that time.[56]

The new s 25AA(1) CSPA requires a court sentencing an offender for a child sexual offence to sentence "in accordance with the sentencing patterns and practices at the time of sentencing" and to also have regard to the trauma of sexual abuse as understood at the time of sentencing.[57] A child sexual offence is defined broadly as sexual offences committed against a person who was under 16 years old at the time of the offence,[58] and extends to former sexual offences.[59] The provision took immediate effect upon proclamation.

Maximum penalties for the offences in s 316A

Section	Maximum penalty for child abuse offence is less than 5 yrs	Maximum penalty for child abuse offence is 5 yrs or more
s 316A(1) – conceal child abuse	2 yrs	5 yrs
s 316A(4) – solicits offence of conceal child abuse	5 yrs	7 yrs

53 [2017] NSWCCA 250.
54 ibid at [116].
55 (2000) 117 A Crim R 497.
56 ibid at [70]–[71].
57 *Crime Sentencing Procedure Act* 1999, s 25AA(3).
58 CSPA, s 25AA(5).
59 Identified in *Crimes Act*, Sch 1A. See also s 25AA(5)(d) which makes clear that s 25AA(1) extends to repealed offences which are substantially similar to the offences identified in s 25AA(5)(a)–(c).

The Attorney General explained that the purpose of s 25AA "is to override the current common law rule that a court must apply the sentencing standards from the time of the offence". He explained the rationale for this saying:

> In historical cases of child sexual abuse, this is resulting in lower sentences and discounts applied to reflect the leniency of sentencing for these offences in times past. This perpetuates our past lack of understanding of how seriously these offences should be treated and our past lack of understanding of the significant impact they have on the victim. The new provision will ensure that sentences meet current community expectations to the extent possible within the upper limit of the maximum penalty from the time of the offence.[60]

Whether s 25AA can overcome those concerns remains to be seen. The section as drafted invites questions, particularly with respect to identifying current "sentence patterns". Sentence patterns for what precisely? In the context of historical offences, there are some current "sentencing patterns" for particular offences because there have been recent prosecutions, but the sentences in those cases were imposed having regard to sentencing practice at the time of the offence in accordance with the then prevailing view of the law.[61]

One factor that prevents imposing a sentence that accords with current sentences is the fact maximum penalties for some offences are higher today than they were previously. For example, in 1987 the maximum penalty for an offence of sexual intercourse without consent with a child under 16 was 10 years (see s 61D(1)) and 12 years if the child was under the offender's authority (see 61D(1A)). Today, the maximum penalty is 20 years (see s 61J(1) and s 61J(2) for the circumstances of aggravation). The maximum penalty for an offence of sexual intercourse with a child under 10 was 20 years in 1987[62] but is now life imprisonment.[63]

Such questions remain to be answered. However, the approach Howie J advocated for in *Moon* (see above) which directs attention to the objective and subjective features of an individual case while having regard to the maximum penalty for the particular offence may still be appropriate.

Procedural changes

Prosecutions where time of offence uncertain

The new s 80AF of the *Crimes Act* facilitates proof of a child sexual assault offence when there is uncertainty about the timing of a particular offence and the offence has changed over the period of the offending. The Attorney General said the section was enacted to:

> cover the complexities that currently arise for the prosecution where the offending has taken place during a period and the applicable offence changes during that period … This can be a problem for the prosecution where it is not clear which offence should apply.[64]

The section applies if:

(a) it is uncertain when during a period an alleged offence occurred

(b) the victim was a child for the whole period

(c) there was no time during that period that the alleged conduct, if proven, would not have constituted a sexual offence, and

(d) because of a change in the law or a change in the child's age during that period, the alleged conduct, if proven, would have constituted more than one sexual offence.[65]

In such circumstances, a person may be prosecuted in respect of the conduct under whichever sexual offence has the lesser maximum penalty, regardless of when the conduct actually occurred: s 80AF(2). A "sexual offence" for the purpose of s 80AF is defined in s 80AF(3) and extends to older forms of the offences. An issue has been identified as to how this provision might operate in practice. Section 80AF(2) refers to a person being prosecuted for whichever of the conduct "has the lesser maximum penalty"; however the legislation does not address the situation where there are two offences with the same maximum penalty. It is likely that legislative amendment will correct this.

Jury direction if complainant's account differs

The new s 293A of the *Criminal Procedure Act* 1986 (CPA)[66] applies to trials for prescribed sexual offences if the judge, after hearing submissions from the Crown and defence, considers there is evidence suggesting a difference in the complainant's account which may be relevant to their truthfulness or reliability.[67] The section applies to the evidence of complainants in such proceedings irrespective of their age. When the particular offence involves a child, s 293A operates in addition to ss 79 and 108C of the *Evidence Act* 1995, both of which permit expert evidence to be given about a child witness's memory or other development.

The Attorney General said that the section would:

> allow a judge to provide a jury with educative information to prevent a jury making incorrect assumptions as a result of inconsistencies in a complainant's account of a sexual offence … The direction will allow the judge to tell the jury that experience shows that people may not describe a sexual offence in the same way each time, that it is common for there to be differences each time a person gives an account of an offence, and that trauma may affect how people recall events. The direction

60 Second Reading Speech, above n 1, p 7.
61 *R v MJR* (2002) 54 NSWLR 368 at [31].
62 *Crimes Act*, s 66A.
63 *Crimes Act*, s 66A(1).
64 Second Reading Speech, above n 1, p 7.
65 *Crimes Act*, s 80AF(1).
66 Commenced 1.12.2018.
67 *Criminal Procedure Act* 1986, s 293A(1).

aims to prevent a jury from assuming that these sorts of inconsistencies mean the complainant is lying.[68]

Whether the direction should be given at all is discretionary. Where it is decided that the direction should be given, s 293A(2) provides that the judge may inform the jury of reasons why there may be differences in a complainant's account (s 293A(2)(a)) and that it is for the jury to decide whether or not any such differences are important in assessing the complainant's truthfulness and reliability (s 293A(2)(b)). There is no particular requirement as to the timing of the direction, that is, whether it should be given when the witness gives evidence or during the judge's summing-up. However, the issue was discussed in Royal Commission research on the effects of child sexual abuse on memory and on complainants' evidence.[69] The authors discussed studies which considered the effectiveness of a direction of the type permitted by s 293A(2) — one study suggested that directions given before the complainant's evidence were more effective in obtaining a conviction than those given during a summing-up.[70] An issue, acknowledged by the authors, is the individual aspect to memory and the varying reactions to abuse suggesting it will be important to consider whether the circumstances of a particular case require such a direction.[71]

Reducing criminalisation of children

Three aspects of the amending Act are directed towards reducing criminalisation of children.

Under the new s 80AG(1) of the *Crimes Act*, it is a defence to prosecutions for the offences in ss 66C(3), 66DB, 66DD, 73 or 73A if the alleged victim is 14 years or older and the age difference between the victim and accused is no more than 2 years. Where the defence is raised, the prosecution bears the onus of proof.[72]

Under the new s 91HAA, it is not an offence against s 91H (possessing child abuse material) if the person possessed the material when they were under 18 and a reasonable person would consider the possession acceptable having regard to the various matters identified in s 91HAA(b).

Additional defences for offences against s 91H include for possession offences, if the only person depicted in the material is the accused: s 91HA(9); and for production or dissemination offences, if the only person depicted is the accused and the material was produced or disseminated when they were under 18: s 91HA(10).

The accused bears the onus of proving the material only depicts them: s 91HA(12).

Proceedings for ss 91G and 91H offences against children or young persons can only commence with the DPPs' consent.[73]

Under the new s 3C of the *Child Protection (Offenders Registration) Act* 2000, a court sentencing a person for a sexual offence committed when they were a child has a discretion as to whether to make an order that they be added to the Child Protection Register. There are certain conditions which must be met before an order can be made. These are identified in s 3C(3) and include whether the victim was under 18 years old when the offence was committed; the person has no prior convictions for Class 1 or Class 2 offences (separately defined in s 3); a sentence of full-time detention or a control order (unless suspended) has not been imposed for the offence; and the court is satisfied the person is not a risk to particular children or children generally.[74]

Conclusion

The Royal Commission records decades of child sexual abuse in an institutional context and a dismissive, callous attitude to the impact of abuse on children. The growing awareness of, and sensitivity to, the impact of abuse today is in stark contrast to historic attitudes documented in the Royal Commission reports and other sources.[75]

The Attorney General stated that the reforms are, amongst others, aimed to "improve the chances of successful prosecution of child sexual offences".[76] This of course must be balanced with the requirement that the trial of an accused person be fair. Recent public discourse about appropriate responses to the Royal Commission's recommendations; how victims of sexual abuse have been, and are treated, particularly in the criminal justice context; and high profile criminal cases[77] are polarising and demonstrate the need for the criminal justice system to maintain an appropriate balance between concerns raised with respect to victims and the need for a fair trial.

68 Second Reading Speech, above n 1, pp 7–8.

69 J Goodman-Delahunty, M Nolan, E Gijn-Grosvenor, *Empirical Guidance on the effects of child sexual abuse on memory and complainants' evidence: Report for the Royal Commission into Institutional Responses to Child Sexual Abuse*, 2017.

70 ibid, p 140.

71 ibid, pp 78, 82, 88, 92.

72 *Crimes Act*, s 80AG(2).

73 *Crimes Act*, ss 91G(6), 91H(3).

74 *Child Protection (Offenders Registration) Act* 2000, s 3C(3).

75 See for example, a matter-of-fact account of abuse which occurred in the 1920s, given to English writer Evelyn Waugh (when he was teaching in Wales in 1925) by a colleague, seemingly known to be a repeat offender, who had left previous schools for similar reasons: S Hastings, *Evelyn Waugh: a biography*, Random House, 1994, p 135.

76 Second Reading Speech, above n 1, p 3.

77 Reporting of former Archbishop Phillip Wilson's acquittal of failure to report offences following a conviction appeal and the recent trial involving Cardinal George Pell for offences committed in the late 1990s.