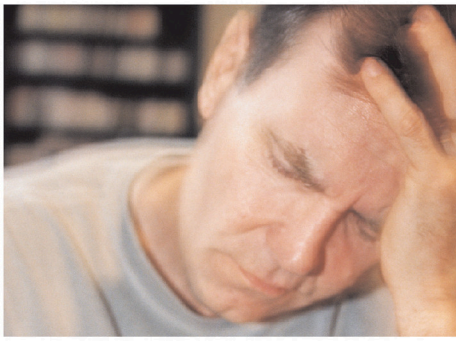
Sexual Assault Trials Handbook





Sexual Assault Trials Handbook

Judicial Commission of New South Wales

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The review and updating of the Handbook is now the responsibility of Commission staff. Suggestions for additions or amendments to the Handbook are welcome and may be emailed to handbook@judcom.nsw.gov.au

Currency

Update 43, July 2024

The following sections have been updated:

[1-025] Sexual offences — brief legislative history has been revised to incorporate amendments to the *Crimes Act 1900*, *Criminal Procedure Act 1986*, *Crimes (Sentencing Procedure) Act 1999* (commenced 1 July 2024), and the *Crimes (Domestic and Personal Violence) Act 2007* (commenced 1 February 2024) by the *Crimes Legislation Amendment (Coercive Control) Act 2022*.

The *Crimes Legislation Amendment (Coercive Control) Act 2022* creates the new offence of abusive behaviour towards intimate partners (s 54D(1) *Crimes Act 1900*).

[6-000] Recent sexual assault law on JIRS

The following **recent cases** have been added:

Evidence

- *Davidson (a pseudonym) v R* [2024] NSWCCA 60 — *Evidence Act 1995*, ss 97A, 101 — child sexual offences — tendency evidence derived from single witness and involved acts different from charged offence — no "exceptional circumstances" to allow consideration of s 97A(5) factors to rebut s 97A(2) presumption of significant probative value — judge correctly admitted tendency evidence of sexual interest in person with similar characteristics to complainant — jury directions ameliorated danger of unfair prejudice
- *SA v R* [2023] NSWCCA 50 — Evidence — context evidence — *Evidence Act 1995*, s 137 — exclusion of prejudicial evidence — trial judge did not err in admitting, as context evidence, parts of complainant's statement disclosing earlier abuse, including fellatio — judge properly considered test in s 137 — evidence went to complainant's continuing fear and delay in complaint — any prejudice met by appropriate directions — s 137 not engaged for those portions of context evidence not objected to at trial

Offences

- *Grant v R* [2024] NSWCCA 78 — *Crimes Act 1900*, ss 66EA, 81 (rep) — historic indecent assaults (s 81 (rep)) constituting maintain unlawful relationship offence (s 66EA) — acts committed by female — s 81 offence can only be committed by male: *Lam v R* [2024] NSWCCA 6 — appellant's relationship not unlawful as s 66EA applies retrospectively if sexual acts making up unlawful relationship were illegal at time committed — indictment quashed and acquittal ordered

Sentencing

- *R v Bredal* [2024] NSWCCA 75 — Cth sentencing — Crown appeal — *Crimes Act 1914* (Cth), s 20(1)(b)(iii) — Cth child sex offender not to be immediately released on recognizance unless exceptional circumstances — online grooming (Criminal Code (Cth), s 474.27(1)) — open to sentencing judge to find exceptional circumstances on combination of matters including respondent's voluntarily withdrawal from offending — meaning of "exceptional circumstances" discussed

Appeals

- *R v Carey* [2024] NSWCCA 90 — Crown sentence appeal — historical child sexual offences — sentence manifestly inadequate — *Crimes (Sentencing Procedure) Act 1999* (C(SP)

Act), ss 19, 21B (formerly s 25AA) — applicable maximum penalties, and sentencing in accordance with patterns and practices at time of sentencing — limited number of truly comparable cases — cases to be from period when maximum penalty (or SNPP) was same or similar, and after introduction of s 25AA(1) — residual discretion — respondent resentenced

Recent sexual assault legislation

- *Crimes High Risk Offenders Legislation Amendment Act 2024* — Incorporation of strangulation offences — Schedules 1[2] and [3] respectively expand the definitions of "serious sex offence" in s 5(1)(b) and "offence of a sexual nature" in s 5(2)(b) of the *Crimes (High Risk Offenders) Act 2006* to include offences under *Crimes Act 1900*, s 37(2) [choking, suffocation and strangulation with intent to enable commission of another indictable offence] — commenced on proclamation on 21 June 2024 (s 2, LW 21.06.24)

Update 42, April 2024

[6-000] Recent sexual assault law on JIRS

The following **recent cases** have been added:

Evidence

- *GN v R* [2024] NSWCCA 39 — Evidence — *Criminal Procedure Act 1986*, s 293 (now s 294CB) — evidence of prior sexual experience — sexual offences — 11-year old complainant described applicant's ejaculation to police 12 months after offence — judge's inference such a detailed description unlikely unless actually experienced not contrary to s 293 — reasoning did not depend on judicial notice but was common sense — Crown's closing address suggesting 11-year old unable to give such detail unless subject to applicant's conduct did not cause miscarriage of justice

Sentencing

- *Hurt v The King; Delzotto v The King* [2024] HCA 8 — Cth sentencing — *Crimes Act 1914* (Cth), s 16AAB — mandatory minimum sentences for child sexual abuse offences — Criminal Code (Cth), s 474.22A(1) — possess child abuse material accessed by carriage service — transitional provision — s 16AAB applies if offender possesses material after provision commenced, regardless of when accessed — mandatory minimum sentences serve double function of providing yardstick, the opposite of maximum penalty, and restricting sentencing power to the minimum sentence subject to limited exceptions
- *Xerri v The King* [2024] HCA 5 — Sentencing — *Crimes Act 1900*, s 66EA(1) — maintain unlawful sexual relationship with child — offending conduct committed while predecessor offence in force — applicant sentenced on basis of current s 66EA which carries life imprisonment — former s 66EA carried 25 years imprisonment — CCA majority correct to conclude current offence applies retrospectively so life imprisonment applies — current s 66EA is a new offence such that s 19 of the *Crimes (Sentencing Procedure) Act 1999* does not apply
- *BB v R* [2024] NSWCCA 13 22/02/2024 — Sentencing — *Children (Criminal Proceedings) Act 1987* (C(CP) Act), ss 16, 18 — applicability of Children's Court sentencing regime — *Crimes Act 1900*, s 61J(2)(d) — aggravated sexual assault (victim under 16) committed by applicant when a child — although judge misstated s 61J offences were "serious children's indictable offences" (C(CP) Act, s 3), they were to be dealt with according to law as applicant over 21 when charged — judge did not err by failing to consider lost opportunity for applicant to be sentenced under Children's Court regime

- *Stein v R* [2023] NSWCCA 324 — Sentencing — sexual assault — sentencing judge did not err in finding moral culpability relevant to objective seriousness — applicant's state of mind relevant in assessing moral culpability and objective seriousness — applicant's knowledge of lack of consent elevated blameworthiness and offence seriousness — *Bugmy* principles — no error in judge refusing to reduce sentence because of childhood deprivation — applicant claimed sexual activity consensual, not that early dysfunction left him unable to understand consent
- *Pender v R* [2023] NSWCCA 291 — Sentencing — *Crimes Act 1900*, s 61HE(3), (4) (rep) — knowledge of sexual consent and offender's self-induced intoxication — *Crimes (Sentencing Procedure) Act 1999*, s 21A(5AA) — self-induced intoxication not mitigatory — applicant convicted of sexual assault after jury trial — judge found applicant knew victim not consenting — no error in judge's approach — s 21A(5AA) prohibits taking into account applicant's self-induced intoxication as mitigating factor — *Fisher v R* [2021] NSWCCA 91 (Fullerton and Adamson JJ) followed
- *Melville v R* [2023] NSWCCA 284 — Sentencing — extra-curial punishment — applicant convicted of child sexual offences was subject to public/media attention regarding previous like offending — judge did not err by finding applicant not subject to extra-curial punishment — public denunciation following conviction does not generally constitute extra-curial punishment — media reporting naming offender ordinary consequence of such offences — personal consequences including loss of employment may still be relevant on sentence

Offences

- *Lam v R* [2024] NSWCCA 6 — Offences — *Crimes Act 1900*, s 81 (rep) — historic indecent assault — offences allegedly committed by female — s 5F(3) *Criminal Appeal Act 1912* — appeal against orders refusing demurrer and refusing to quash indictment — offence not known at law — s 81 offence can only be committed by males — indictment quashed

[6-050] Other publications

The following publication from NSW Bureau of Crime Statistics & Research (BOCSAR) has been added:

- *Experience of complainants of adult sexual offences in the District Court of NSW: A trial transcript analysis* (2023)

[8-520] Bugmy Bar Book — the impact of child sexual abuse

Links have been updated to the *Bugmy Bar Book*, an online resource summarising key research relating to experiences of disadvantage and deprivation: see *Bugmy Bar Book*.

[10-270] District Court Practice Note 28

District Court Practice Note 28 — Child sexual offence evidence practice note has been added. Practice Note 28, commenced 29 January 2024, replaces Practice Note 11 published 6 August 2019 and applies to proceedings commenced after 29 January 2024.

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Foreword

Practice Notes 5 and 6 have introduced a new focus on sexual assault cases in the District Court and, in particular, the need for these cases to be heard as quickly as possible and with appropriate consideration being given to the needs of both the complainant and the accused. A key strategy in implementing the court's policies is to ensure that the judges hearing sexual assault cases are provided with all the material they need to ensure the trial proceeds and is finalised without unnecessary interruptions.

This *Sexual Assault Trials Handbook* has been compiled by judges who are experienced in conducting these trials and it will be of immense value to trial judges conducting these cases. The Handbook will be of particular significance for judges on circuit because 53 per cent of all sexual assault cases are in the country lists. This Handbook will provide judges with immediate access to all the material they need to conduct these trials. That will result in the trials proceeding more quickly and the judges having access to all the relevant legislation and decisions of the Court of Criminal Appeal in one convenient volume.

I express the gratitude of the court to those judges who have compiled the Handbook.

The Honourable Justice R O Blanch, AM
Chief Judge
September 2007

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Introduction

Sexual assault proceedings are a difficult and sometimes controversial part of the work of judicial officers. In recent years, there have been significant case law and legislative developments which have had an impact on the trial process.

The Handbook is designed to provide a practical and academic reference point for judicial officers dealing with sexual offence proceedings. Substantive material is accessed via links.

The Handbook provides offence tables, recent sexual assault cases and legislation, relevant legal and non-legal resource materials regarding sexual assault and other resources and District Court Criminal Practice Notes relevant to sexual assault proceedings. The Handbook does not cover substantive evidentiary issues which arise in all types of criminal trials, such as character and hearsay evidence. These are dealt with in the *Criminal Trial Courts Bench Book*.

On behalf of the Education Committee of the District Court, the Handbook was designed for the Judicial Commission of NSW by a working group which comprised her Honour Judge Helen Murrell SC (Chair), his Honour Judge Roy Ellis, his Honour Judge Brian Knox SC and the then Education Director of the Judicial Commission, Ruth Windeler. The working group acknowledges the invaluable research and other work undertaken by Margaret Nakagawa.

The review and updating of the Handbook is now the responsibility of Commission staff. Suggestions for additions or amendments to the Handbook are welcome and may be emailed to handbook@judcom.nsw.gov.au.

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Offences

[1-000] Sexual offences involving child victims

Table 1 contains both current and historical NSW and Commonwealth sexual offences which refer specifically to children (including, information about the period of operation of each offence).

Table 1 sets out the maximum penalties for offences where the offences are dealt with on indictment according to law.

- For those indictable sexual offences in the *Crimes Act 1900* which may be dealt summarily under the *Criminal Procedure Act 1986*, Ch 5, the maximum penalties are set out in the "Specific Penalties and Orders" chapter in the *Local Court Bench Book*.
- Section 15 of the *Crimes (Sentencing Procedure) Act 1999*, which applies to all offences dealt with on indictment (other than offences for which the penalty that may be imposed includes a fine), provides that a court may impose a fine not exceeding 1,000 penalty units in addition to, or instead of, any other penalty that may be imposed for the offence.

Table 1 also identifies offences which attract a standard non-parole period (SNPP) under the *Crimes (Sentencing Procedure) Act*, Pt 4, Div 1A.

- As to the application of SNPPs, see *Muldrock v The Queen* (2011) 244 CLR 120 and H Donnelly, "The diminished role of standard non-parole periods" (2012) 24(1) *JOB* 1; RA Hulme, "After Muldrock — sentencing for standard non-parole period offences in NSW" (2012) 24(10) *JOB* 8.
- SNPPs do not apply to offenders who were under the age of 18 years at the time the offence was committed: *Crimes (Sentencing Procedure) Act*, s 54D(3): *Crimes Amendment (Sexual Offences) Act 2008*, Sch 2.4[4] (commenced on 1 January 2009).

Table 1 specifies whether a particular offence is a "prescribed sexual offence" for the purposes of the *Criminal Procedure Act*, s 3. A "prescribed sexual offence" includes nearly all offences found in Pt 3 Div 10 of the *Crimes Act 1900*. Prescribed sexual offences also attract particular provisions of the *Crimes (Sentencing Procedure) Act* (in relation to victim impact statements); the *Children (Criminal Proceedings) Act 1987* (s 10(3A) in relation to hearings); and multiple provisions in the *Criminal Procedure Act 1986*. Section 67 of the *Crimes (Sentencing Procedure) Act* (intensive correction not available for certain sexual offences), contains its own definition of "prescribed sexual offence" which is different to the definition of that term in the *Criminal Procedure Act*, s 3.

Table 1 also indicates (by the inclusion of note (a)) which offences (or forms of offences) are a "serious children's indictable offence" for the purposes of the *Children (Criminal Proceedings) Act*, s 3.

- The Children's Court has no jurisdiction to hear and determine proceedings in respect of these offences (or forms of offences) and they must be dealt with according to law by higher courts: s 3 definition of "serious children's indictable offence" (a), (b), (c), (c1), (d), (e); *Children (Criminal Proceedings) Regulation 2016*, cl 4.

For each offence (as available), online access is provided to commentary in the *Sentencing Bench Book*, suggested directions and commentary in the *Criminal Trial Courts Bench Book*, and Judicial Commission research publications, including *Sentencing Trends & Issues* and *Research Monographs*.

For each offence (as available), online access is also provided for ***Judicial Information Research System (JIRS) users only*** to:

- point-in-time offences
- amending Acts which commence, repeal or amend particular offences — to access these, click on the dates appearing in the columns: "Operation" and "Max penalty and SNPP"
- NSW Criminal Court of Appeal case summaries prepared by the Judicial Commission
- Advance notes prepared by the Office of the Director of Public Prosecutions (NSW)
- NSW Court of Criminal Appeal table of SNPP appeals
- sentencing statistics — higher courts (District and Supreme Courts) and Children's Court
- relevant articles in other Judicial Commission publications, including the *Judicial Officers' Bulletin* and *The Judicial Review*.

Table 1 is available in the html version of the handbook.

[1-010] Sexual offences — other

Table 2 contains current and repealed sexual offences in the *Crimes Act 1900* other than those which specifically refer to children (see Table 1 at [1-000]). It sets out the maximum penalties (on indictment) for each of these offences and specifies those which attract a SNPP. It also specifies whether offences are "prescribed sexual offences" and/or "serious children's indictable offences". As with Table 1, links are provided in Table 2 to Judicial Commission resources.

Table 2 is available in the html version of the handbook.

[1-020] Sexual offences — alternative verdicts

Table 3 sets out the statutory alternative verdicts available in proceedings for sexual offences.

Table 3 is available in the html version of the handbook.

As to the power of the jury to return an alternative verdict to any offence stated in the indictment at common law, see *Criminal Trial Courts Bench Book* at [2-200] and ff.

Further resources

- *Criminal Trial Courts Bench Book* at [2-200], [2-210], [2-250], [2-260], [2-270], [5-710], [5-1570].

[1-025] Sexual offences — brief legislative history

Last reviewed: July 2024

The following discussion briefly describes the significant reforms to the laws relating to sexual assault in the past 30 years (in descending date order). This material previously appeared in *Sentencing Bench Book* at [20-605].

Crimes Legislation Amendment (Coercive Control) Act 2022

The *Crimes Legislation Amendment (Coercive Control) Act 202*2 (the Act) inserts Div 6A into Pt 3 of the *Crimes Act 1900*, commenced 1 July 2024. Section 54D(1) in Div 6A creates an offence of abusive behaviour towards current or former intimate partners punishable by a maximum penalty of imprisonment for 7 years. Section 54D(1) criminalises a course of conduct of abusive behaviour by an adult against an intimate partner that:

- is intended to coerce or control; and
- a reasonable person would consider is likely, in all the circumstances, to cause: fear that violence will be used, or a serious adverse impact on the capacity of the person to engage in some or all of their ordinary day-to-day activities (whether or not the fear or impact is in fact caused).

Section 54F defines abusive behaviour as behaviour that consists of or involves violence or threats against, or intimidation of, a person, or coercion or control of the person against whom the behaviour is directed. Relevant to sexual offences in particular, s 54F(2)(i) provides a non-exhaustive list of behaviour that may constitute abusive behaviour which includes "behaviour that deprives a person of liberty, restricts a person's liberty or otherwise unreasonably controls or regulates a person's day-to-day activities." The legislation includes as an example for para (i) as "making unreasonable demands about how a person exercises the person's personal, social or sexual autonomy and making threats of negative consequences for failing to comply with the demands".

Schedule 2 of the Act also inserts s 6A of the *Crimes (Domestic and Personal Violence) Act 2007*, being a definition of domestic abuse, commenced 1 February 2024. Relevant to sexual offences in particular, a non-exhaustive list of behaviours that may constitute domestic abuse if engaged in or threatened in s 6A(2) includes "behaviour that is sexually abusive, coercive or violent"(s 6A(2)(b)) and a mirror provision to s 54F(2)(i) *Crimes Act* (s 6A(2)(k)) .

The Amending Act also amends the *Crimes (Sentencing Procedure) Act 1999* to include s 54D(1) among the offences to which Div 2, regarding victim impact statements, applies, and the *Criminal Procedure Act 1986* to include s 54D(1) in Sch 1 as an indictable offence triable summarily.

Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021

The *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* amends the *Crimes Act 1900* and the *Criminal Procedure Act 1986* in relation to sexual consent. The Act commenced on 1 June 2022. See [1-030] **Meaning of "sexual intercourse"** and [1-040] **Meaning of "consent" / "sexual touching"/ "sexual act"** below.

Modern Slavery Act 2018

The *Modern Slavery Act 2018* (NSW) created new child sexual assault offences in the *Crimes Act* 1990 to address cyber-sex trafficking. The Act commenced 1 January 2022. Amendments to s 91G of the *Crimes Act 1900* create an aggravated offence of using a child for the production of child abuse material, where certain factors are present, and sets out increased penalties for circumstances of aggravation, including imprisonment of up to 20 years (s 91G(3)–(3C)). Sections 91HAA to 91HAC created the offences of administering a digital platform used to deal with child abuse material (s 91HAA); encouraging use of a digital platform to deal with child abuse material (s 91HAB); and providing information about avoiding detection (s 91HAC).

Criminal Legislation Amendment (Child Sexual Abuse) Act 2018

The amending Act, relevant sections of which commenced on 1 December 2018 substituted the former s 61HA with a new s 61HA which defines "sexual intercourse" for the purpose of Pt 3, Div 10 of the *Crimes Act 1900*.

The new consent provision, s 61HE, inserted and expanded the definition of consent to "sexual activity" in the *Crimes Act 1900* to include sexual intercourse, sexual touching or a sexual act and applies to offences under under ss 61I, 61J, 61JA, 61KC, 61KD, 61KE and 61KF. This section also expanded "knowledge of consent" to include the incitement of the alleged victim or inciting a third person to engage in sexual activity with or towards the alleged victim.

Sections 61L, 61M, 61N, 61O and 61P were repealed with effect from 1 December 2018, although these provisions continue to apply to offences committed or alleged to have been committed before 1 December 2018.

The indecent assault and act of indecency offences found in the former ss 61L-61O were repealed and replaced with offences of sexual touching and sexual acts without consent and sexual touching and sexual acts involving children as follows:

Repealed offences	**New offences: subdivis 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 between 10 and 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 between 10 and 16: s 66DD [2 years] Aggravated sexual act – child between 10 and 16: s 66DE [5 years] Sexual act for production of child abuse material – child under 16: s 66DF [10 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]	

Section 66EA (persistent sexual abuse of a child) was repealed and replaced: Sch 1[20]. Under the new provision:

- an adult who maintains an unlawful sexual relationship with a child (where an adult engages in 2 or more unlawful sexual acts with or towards a child over any period) is guilty of an offence: s 66EA(1), s 66EA(2)
- the maximum penalty is life imprisonment
- a child is someone "under the age of 16 years": s 66EA(15).

The jury must be satisfied beyond reasonable doubt that the unlawful sexual relationship existed: s 66EA(5)(a). The jury is no longer required to agree on which unlawful sexual acts constituted the unlawful sexual relationship: s 66EA(5)(c). The new provision extends to a relationship that existed wholly or partly before 1 December 2018 provided the accused's acts were unlawful sexual acts during the period the relationship existed: s 66EA(7).

The offence of grooming a child under s 66EB(3) was expanded to include circumstances where an adult provides a child with "any financial or other material benefit" intending to make it easier to procure the child for unlawful sexual activity.

Section 66EC created a new offence of an adult 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.

Section 73A created a new offence of sexually touching a young person between 16 and 18 under special care. The maximum penalty is 4 years if the young person is aged 16, and 2 years for a young person aged 17. Section 73A(3) defines a relationship of special care. New s 72B includes definitions of an "authorised carer" and a "member of the teaching staff".

New s 80AF(1) provides for prosecuting a sexual offence (defined in s 80AF(2)) against a child when:

(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.

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).

New s 80AG(1) provides a defence to prosecutions for offences against ss 66C(3), 66DB, 66DD, 73 or 73A if the alleged victim is of or above 14 years old and the age difference between the alleged victim and the accused is no more than 2 years: Sch 1[46]. Where the defence is raised, the prosecution bears the onus of proving beyond reasonable doubt that the alleged victim was less than 14 years old or the age difference was more than 2 years: s 80AG(2).

New s 91HAA provides for an exception to an offence under s 91H of possessing child abuse material where the accused possessed the material when they were under 18 years old and a reasonable person would consider the possession acceptable having regard to the matters identified in s 91HAA(b): sch 1[52].

New s 91HA(9)–(12) provides for additional defences for offences against s 91H:

- 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 in the material is the accused and the production or dissemination occurred when they were under 18: s 91HA(10).

Crimes Amendment (Intimate Images) Act 2017 (No 29)

The amending Act, which commenced 25 August 2017, created new offences to address the non-consensual sharing of intimate images (also known as revenge porn). New ss 91P–91R

created personal violence offences for a person to intentionally record or distribute, or threaten to record or distribute, an intimate image of another person without that person's consent. Each new offence has a maximum penalty of 100 penalty units, or imprisonment for three years.

Crimes Legislation Amendment (Child Sex Offences) Act 2015

This amending Act, which commenced on 29 June 2015, repealed the existing basic and aggravated offences of sexual intercourse with a child under 10 under ss 66A(1) and 66A(2) respectively (as implemented by the *Crimes Amendment (Sexual Offences) Act 2008*). The provisions were replaced by one consolidated s 66A offence, carrying a maximum penalty of life imprisonment. The Act also introduced standard non-parole periods for 13 child sex offences, including under ss 66B, 66C(1), 66C(2) and 66C(4).

Crimes Amendment (Sexual Offences) Act 2008

This amending Act, which commenced on 1 January 2009, created several new sexual offences:

- s 61O(2A): aggravated act of indecency offence where the act of indecency is filmed for the purposes of producing child pornography — maximum penalty of 10 years imprisonment
- s 66A(2): aggravated offence of having sexual intercourse with a child under the age of 10 years — maximum penalty of life imprisonment. The circumstances of aggravation are set out in ss 66A(3)(a)–(h)
- ss 66EB(2A) and (2B): grooming offences — maximum penalty of 15 years imprisonment where the child involved is under 14 years of age, and 12 years imprisonment in any other case
- s 80G: inciting a person to commit a sexual offence
- ss 91I–91M: offences of voyeurism and related offences.

The amending Act also increased maximum penalties for some offences:

- s 61M (aggravated indecent assault against a child aged under 16 years): maximum penalty increased from 7 to 10 years imprisonment
- s 91E(1) (benefits derived from child prostitution): maximum penalty increased from 10 to 14 years imprisonment
- s 91H(2) (possessing child pornography): maximum penalty increased from 5 to 10 years imprisonment.

Crimes Amendment (Sexual Procurement or Grooming of Children) Act 2007

This amending Act inserted a new definition of consent for the purposes of offences under ss 61I, 61J, and 61JA *Crimes Act*, effective 1 January 2008. This is discussed in the *Criminal Trial Courts Bench Book* in Sexual intercourse without consent at [5-1568].

Crimes Amendment Act 2007

This amending Act, which commenced on 15 February 2008, replaced the term "malicious" with the modern fault element of "intention or recklessness" in offences under ss 61J, 61JA, 61K, 66C, 80A and 95.

Crimes Amendment (Consent—Sexual Assault Offences) Act 2007

This amending Act inserted a new definition of consent for the purposes of offences under ss 61I, 61J, and 61JA *Crimes Act*, effective 1 January 2008. This is discussed in the *Criminal Trial Courts Bench Book* in Sexual intercourse without consent at [5-1568].

Crimes (Serious Sex Offenders) Act 2006

This Act created a statutory scheme for applications by the Attorney General (NSW) for the extended supervision and continuing detention of persons convicted of a "serious sexual offence" after their sentence has expired. The fact that an application might be made in the future by the Attorney General is not relevant to the determination of a non-parole period: *MG v R* [2008] NSWCCA 4 at [64]–[79]. The fact that the offender has or may become the subject of an order under the Act is not a matter of mitigation at sentence: s 24A(1) *Crimes (Sentencing Procedure) Act 1999*.

Crimes Amendment (Sexual Offences) Act 2003

This amending Act standardised the age of consent for both males and females at 16 years and amended the Crimes Act 1900 by inserting a new range of offences relating to sexual intercourse with a child aged between 10 and 16 years consisting of two offences: sexual intercourse with a child of or above the age of 10 and under 14 years and sexual intercourse with a child who is of or above 14 and under 16 years. Basic and aggravated forms of the offence were created.

See further, *Sentencing Bench Book* — Sexual offences against children at [17-420].

Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002

This amending Act repealed ss 78H and 78I — homosexual intercourse with a child under 10 years and attempt to commit that offence. It replaced each with gender neutral offences under ss 66A and 66B. The maximum penalties were increased from 20 years to 25 years. The Act also introduced standard non-parole periods for offences under ss 61I, 61JA, 61I, 61M(1), (2) and 66A.

Crimes Amendment (Aggravated Sexual Assault in Company) Act 2001

This amending Act, which commenced on 1 October 2001, created the offence of aggravated sexual assault in company under s 61JA with a maximum penalty of life imprisonment.

Crimes Amendment Act 1989

This amending Act, which commenced on 17 March 1991, repealed ss 61A–61G and inserted ss 61H, 61I, 61J, 61L, 61M, 61N, 61O and 61P. Maximum penalties for sexual offences were also substantially increased (see below). Parliament recognised the particular vulnerability of children less than 10 years of age by increasing the penalties for aggravated indecent assault and acts of indecency. Section 61I created the offence of sexual intercourse without consent and s 61J the same offence but in circumstances of aggravation. The *Criminal Legislation (Amendment) Act 1992* amended the definition of sexual intercourse as defined in s 61H to include penetration, to any extent, of the genitalia of a female person or the anus of any person.

Further resources

- *Criminal Trial Courts Bench Book* at [5-710]ff, [5-1550]ff and [5-1700]ff.

[1-030] Meaning of "sexual intercourse" / "sexual touching"/ "sexual act"

Prior to 14 July 1981

Prior to 14 May 1981, sexual assault offences were divided into rape offences and related sexual offences and the term "sexual intercourse" was not defined in the *Crimes Act 1900*. Under the common law, rape required "carnal knowledge": penile penetration of the vagina of a woman who was not the accused's wife without consent: *Papadimitropoulos v The Queen* (1957) 98 CLR 249 at 261.

Between 14 July 1981 and 30 September 1996

Crimes (Sexual Assault) Amendment Act 1981

The *Crimes (Sexual Assault) Amendment Act 1981* commenced operation on 14 July 1981. This Act amended the *Crimes Act 1900* by introducing a statutory definition of sexual intercourse:

(a) sexual connection occasioned by the penetration of the vagina of any person or the anus of any person by:

  (i) any part of the body of another person, or

  (ii) an object manipulated by another person,

  except where the penetration is carried out for proper medical purposes

(b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person

(c) cunnilingus, or

(d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c): s 61A(1) (rep).

The amending Act also:

- abolished the common law offences of rape and attempted rape: s 63 (rep)
- introduced four categories of sexual assault (according to the degree of seriousness of the offence in terms of the level of violence) with different penalty structures: ss 61B, 61C, 61D and 61E (rep)
- removed marital immunity: s 61A(4) (rep)
- removed immunity for children aged under 14 years: s 61A(2) (rep)
- introduced limitations on the admission of evidence about the complainant's sexual experience and reputation: s 409B (rep).

Crimes (Amendment) Act 1989

The *Crimes (Amendment) Act 1989* commenced operation on 17 March 1991. The Act amended the *Crimes Act 1900* by replacing the four categories of sexual assault with a new offence structure: three basic and aggravated forms of offences (sexual assault, indecent assault and act of indecency) and an offence of assault with intent to have sexual intercourse: ss 61I—61P.

The amending Act also:

- repealed ss 61A—61G
- re-enacted the definition of "sexual intercourse" in s 61H.

Criminal Legislation (Amendment) Act 1992

The *Criminal Legislation (Amendment) Act 1992* commenced operation on 3 May 1992. The Act amended the *Crimes Act 1900* by amending the definition of sexual intercourse to include "sexual connection occasioned by the sexual penetration **to any extent of the genitalia** of a female person or the anus of any person …": s 61H [emphasis added].

Schedule 1(16) of the amending Act inserted Sch 11, Pt 2 into the *Crimes Act 1900*. The savings and transitional provisions purported to give retrospective operation to the amended meaning of "sexual intercourse" in s 61H from 14 July 1981:

> It is declared that, from 14 July 1981 (being the date of commencement of the amendments made by the *Crimes (Sexual Assault) Amendment Act 1981*) [the date upon which the definition of

> sexual intercourse in s 61A came into force] until the commencement of the amendment made by the *Criminal Legislation (Amendment) Act 1992* to section, 61H, an act has been an act of sexual intercourse within the meaning of this Act at the relevant time if the act has comprised sexual intercourse within the meaning of section 61H, as amended by the *Criminal Legislation (Amendment) Act 1992*.

As to the retrospective operation of this provision: see comments by Sully J (Newman AJ agreeing) in *R v MJR* (2002) 54 NSWLR 368 at [97]:

> As her Honour explains, correctly, in her remarks on sentence, that amending legislation "retrospectively converted what was at the time of the commission of the offences indecent assault to the significantly more serious offence of sexual intercourse".

From 1 October 1996

The *Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996*, Sch 3[1] commenced operation on 1 October 1996. The Act amended the *Crimes Act 1900* by amending the definition of sexual intercourse to include "sexual connection occasioned by the sexual penetration to any extent of the genitalia (**including a surgically constructed vagina**) of a female person or the anus of a person …": s 61H [emphasis added].

From 1 December 2008

The *Crimes Amendment (Cognitive Impairment — Sexual Offences) Act 2008* commenced operation on 1 December 2008. The Act amended the *Crimes Act 1900* by inserting a new section defining the term "cognitive impairment": s 61H.

From 1 December 2018

The *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (relevant provisions commenced 1 December 2018) restructures and modernises the language used to describe the sexual offences in Pt 3, Div 10 of the *Crimes Act*. "Sexual touching" and "sexual act" are defined in the new ss 61HB and 61HC respectively. The definition of "sexual intercourse", previously in s 61H(1), was inserted into s 61HA.

Meaning of "Sexual touching"

New offences of "sexual touching" (s 61KC) and aggravated sexual touching (s 61KD) were inserted into the *Crimes Act 1900* by the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (commenced 1 December 2018). Sexual touching is defined in s 61HB.

New s 73A creates a new offence of sexually touching a young person between 16 and 18 under special care: Sch 1[34].

Meaning of "Sexual act"

New offences of "sexual act" (s 61KE) and aggravated sexual act (s 61KF) were inserted into the *Crimes Act 1900* by the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (commenced 1 December 2018). "Sexual act" is defined in s 61HC.

From 1 June 2022

The *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (relevant provisions commenced 1 June 2022, LW 13/5/2022) updates and clarifies the definitions of "sexual intercourse", "sexual touching" and "sexual act" in Pt 3, Div 10 of the *Crimes Act* (Legislative Assembly, *Debates*, 20 October 2021, p 7513).

Sch 1[1] inserts s 61H(4) which provides that, for the purposes of the Division, it is not relevant whether a part of the body referred to is surgically constructed or not. Sch 1 [2], [5] and [20] make consequential amendments to s 61HA(a)–(c) Meaning of "sexual intercourse", s 61HB(2)(a) Meaning of "sexual touching" and s 61HC(2)(a) Meaning of "sexual act".

[1-040] Meaning of "consent"

From 17 March 1991

Section 61R was inserted into the *Crimes Act 1900* by the *Crimes Amendment Act 1989* (commenced 17/3/1991), and read:

61R Consent

(1) For the purposes of sections 61I and 61J, a person who has sexual intercourse with another person without the consent of the other person and who is reckless as to whether the other person consents to the sexual intercourse is to be taken to know that the other person does not consent to the sexual intercourse.

(2) For the purposes of sections 61I and 61J and without limiting the grounds on which it may be established that consent to sexual intercourse is vitiated:

(a) a person who consents to sexual intercourse with another person:

(i) under a mistaken belief as to the identity of the other person, or

(ii) under a mistaken belief that the other person is married to the person, is to be taken not to consent to the sexual intercourse, and

(b) a person who knows that another person consents to sexual intercourse under a mistaken belief referred to in paragraph (a) is to be taken to know that the other person does not consent to the sexual intercourse, and

(c) a person who submits to sexual intercourse with another person as a result of threats or terror, whether the threats are against, or the terror is instilled in, the person who submits to the sexual intercourse or any other person, is to be regarded as not consenting to the sexual intercourse, and

(d) a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse.

Section 61R(2)(a1) was inserted in 1992 (by the *Criminal Legislation (Amendment) Act 1992*, commenced 3.5.1992) as a result of the decision in *R v Mobilio* [I991] 1 VR 339. The new subsection provided that "a person who consents to sexual intercourse with another person under the mistaken belief that the sexual intercourse is for medical or hygienic purposes is taken not to have consented to the sexual intercourse". In 2003, the words "(or any other mistaken belief about the nature of the act induced by fraudulent means" were inserted in 61R (2)(a1) (by the *Crimes Amendment (Sexual Offences) Act 2003*, commenced 13.6.2003).

Section 61R was repealed by the *Crimes Amendment (Consent—Sexual Assault Offences) Act 2007*, Sch 1[1], commenced 1 January 2008.

From 1 January 2008

Section 61HA was inserted into the *Crimes Act 1900* by the *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (the Act), which commenced 1 January 2008. The amendment followed an extensive review of sexual assault in NSW and the adequacy of existing law. The Criminal Justice Sexual Offences Taskforce Report, published in 2006,

contained 70 recommendations. A broad range of government and non-government agencies were represented on the Taskforce including those representing women's and victims' interests such as the NSW Rape Crisis Centre and the Women's Legal Service NSW; judicial officers and the Judicial Commission; the legal profession including members of the Bar Association, the Law Society, NSW Public Defenders Office, the Director of Public Prosecutions; the courts; NSW Police, NSW Health, Department of Community Services and academics. See L Wells, "Recent statutory reform of consent in sexual offences" (2008) 20 *JOB* 1.

The object of the Act was to amend the *Crimes Act 1900* to:

(a) create a statutory definition of "consent" as being a free and voluntary agreement to sexual intercourse

(b) expand the circumstances when consent to sexual intercourse is negated (vitiated)

(c) provide circumstances when consent to sexual intercourse may be negated

(d) expand the element of knowledge of consent to also provide an objective fault test that a person commits sexual assault if the person has no reasonable grounds for believing that the other person consents to the sexual intercourse.

From 23 October 2014

The *Crimes Legislation Amendment Act 2014* amended s 61HA (commenced 23 October 2014) to apply the statutory definition of consent to attempts to commit sexual assault offences and also negated consent to sexual intercourse in circumstances where consent has been given under a mistaken belief that the sexual intercourse is for health purposes. This expanded the circumstances in section 61HA(5)(c) in which consent is negated, which were then limited to medical or hygienic purposes.

From 1 December 2018

The *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (relevant sections commenced 1 December 2018), substituted the former s 61HA with new s 61HA which defines "sexual intercourse" for the purpose of Pt 3, Div 10. New s 61HE, inserts and expands the definition of consent to "sexual activity" in the *Crimes Act 1900* to include sexual intercourse, sexual touching or a sexual act (s 61HE(11)). Section 61HE and applies to offences under ss 61I, 61J, 61JA, 61KC, 61KD, 61KE and 61KF: s 61HE(1) and is no longer limited, as previously, to "sexual intercourse". The existing consent provision, s 61HA, was repealed.

Section 61HE(3) has also expanded "knowledge of consent" to include the incitement of the alleged victim or inciting a third person to engage in sexual activity with or towards the alleged victim.

The *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* amends a number of Acts to implement recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse and the Child Sexual Offences Review Team. The Second Reading Speech stated that the amendments aim to "rationalise and consolidate our offence framework and improve the chances of successful prosecution of child sexual offences" (Legislative Assembly, 6 June 2018).

From 1 June 2022

The *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021*, which commenced 1 June 2022 (LW 13/5/2022), amends the *Crimes Act 1900* and the *Criminal Procedure Act 1986* in relation to sexual consent.

The amendments arose from the NSW Law Reform Commission (NSWLRC) review of s 61HA of the *Crimes Act 1900* (NSW): see NSWLRC, *Report 148: Consent in relation to sexual offences*, September 2020, p 5. The Attorney General's reference required the NSWLRC to have regard to: whether s 61HA should be simplified or modernised; the experiences of sexual assault survivors in the criminal justice system; sexual assault research and expert opinion; and the impact or potential impact of relevant case law and developments in law, policy and practice by the Commonwealth, in other States and Territories of Australia, and internationally, on the content and application of s 61HA.

Former s 61HA(3)(c) *Crimes Act* provided:

> (3) **Knowledge about consent**
>
> A person who has sexual intercourse with another person without the consent of the other person knows that the other person does not consent to the sexual intercourse if:
>
> […]
>
> (c) the person has no reasonable grounds for believing that the other person consents to the sexual intercourse.

The Attorney General's reference was prompted by community concern over the *Lazarus* case: *Lazarus v R* [2016] NSWCCA 52; *R v Lazarus* (unrep, 4/5/17, NSWDC); *R v Lazarus* [2017] NSWCCA 279. The *Lazarus* case, which involved a trial, a retrial and two appeals, highlighted significant issues within the law of consent and the way it is applied in practice, in particular, what constitutes consent to sexual activity (for example, whether and how it should be communicated), and whether and, if so, how the law should address the "freeze" response to non-consensual sexual activity: see NSWLRC, *Report 148: Consent in relation to sexual offences*, September 2020, p 41.

The NSWLRC report recommended several reforms to the law of consent and knowledge of non-consent: see NSWLRC, *Report 148: Consent in relation to sexual offences*, p 7.

The amending Act replaces s 61HE (former s 61HA) *Crimes Act* with a new Pt 3, Div 10, Subdiv 1A "Consent and knowledge of consent" containing new ss 61HF–61HK.

Section 61HF provides that an objective of the Subdivision is to recognise that: (a) every person has a right to choose whether or not to participate in a sexual activity, (b) consent to a sexual activity is not to be presumed, and (c) consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity. "Sexual activity" is defined in s 61HH to mean "sexual intercourse, sexual touching or a sexual act".

Section 61HI provides a new definition for "consent" generally, including that:

(1) A person consents to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity.

(2) A person may, by words or conduct, withdraw consent to a sexual activity at any time.

(3) Sexual activity that occurs after consent has been withdrawn occurs without consent.

(4) A person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity.

(5) A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity.

(6) A person who consents to a sexual activity with a person on one occasion is not, by reason only of that fact, to be taken to consent to a sexual activity with—

(a) that person on another occasion, or

(b) another person on that or another occasion.

Section 61HJ provides circumstances where there is no consent. Section 61HK updates circumstances where the accused has knowledge of a lack of consent.

New ss 292–292E of the *Criminal Procedure Act 1986* provide for jury directions in relation to misconceptions about consent which apply to trials commencing on or after 1 June 2022. See the *Criminal Trial Courts Bench Book* chapter, "Directions — misconceptions about consent in sexual assault trials", at [2-980]ff which addresses these amendments and contains suggested directions.

See further the Legislation digest item on the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* on JIRS.

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Recent sexual assault law

[6-000] Recent sexual assault law on JIRS

Last reviewed: July 2024

The Research and Sentencing Division of the Judicial Commission of NSW publishes summaries of recently enacted criminal legislation, relevant case law and other important sentencing developments on the Legal digests and announcements page of its online Judicial Information Research System (JIRS). The summaries below may also be accessed on JIRS.

The date refers to when the digest item was posted on JIRS for ease of reference.

Recent sexual assault cases

Evidence

- 10/05/2024 — *Evidence Act 1995*, ss 97A, 101 — child sexual offences — tendency evidence derived from single witness and involved acts different from charged offence — no "exceptional circumstances" to allow consideration of s 97A(5) factors to rebut s 97A(2) presumption of significant probative value — judge correctly admitted tendency evidence of sexual interest in person with similar characteristics to complainant — jury directions ameliorated danger of unfair prejudice — *Davidson (a pseudonym) v R* [2024] NSWCCA 60
- 03/05/2024 — Evidence — context evidence — *Evidence Act 1995*, s 137 — exclusion of prejudicial evidence — trial judge did not err in admitting, as context evidence, parts of complainant's statement disclosing earlier abuse, including fellatio — judge properly considered test in s 137 — evidence went to complainant's continuing fear and delay in complaint — any prejudice met by appropriate directions — s 137 not engaged for those portions of context evidence not objected to at trial — *SA v R* [2023] NSWCCA 50
- 15/03/2024 — Evidence — *Criminal Procedure Act 1986*, s 293 (now s 294CB) — evidence of prior sexual experience — sexual offences — 11-year old complainant described applicant's ejaculation to police 12 months after offence — judge's inference such a detailed description unlikely unless actually experienced not contrary to s 293 — reasoning did not depend on judicial notice but was common sense — Crown's closing address suggesting 11-year old unable to give such detail unless subject to applicant's conduct did not cause miscarriage of justice — *GN v R* [2024] NSWCCA 39
- 16/10/2023 — *Criminal Procedure Act 1986*, ss 306U, 306Y — child sexual offences — child witness' evidence in chief recorded in police interview — application to exclude interview on basis not in "interests of justice" to tender recording — judge did not err in dismissing application — *Evidence Act 1995*, ss 165, 165A — judge did not err in directions about unreliability of witness' evidence — *LF v R* [2023] NSWCCA 232
- 22/09/2023 — Evidence — sexual offences — accused convicted of three counts — complainant only made immediate and clear complaint about one count — equivocal or delayed complaint about remaining counts — verdicts not unreasonable — observations on malleability of witnesses' memory — *Arizabaleta v R* [2023] NSWCCA 217
- 28/07/2023 —*Evidence Act*, ss 97, 97A, 101— tendency evidence — child sexual offences — cross-admissibility of tendency evidence of three complainants — tendency notice

alleged acts less serious than some charged offences — no error in judge excluding evidence under s 101 — danger of unfair prejudice outweighed probative value — observations on "exceptional circumstances" in s 97A — Decision Restricted [2023] NSWCCA 163

- 29/06/2023 — *Evidence Act 1995*, ss 97A, 101(2) — child sexual offences — cross-admissibility of tendency evidence for three complainants — judge erred in considering s 97A(5) factors to rebut s 97A(2) presumption of significant probative value in absence of "exceptional circumstances" — circumstances must be more than just sufficient to enliven s 97A(5) factors to be "exceptional" — *R v Clarke* [2023] NSWCCA 123
- 08/06/2023 — *Criminal Appeal Act 1912*, s 5F(3) — appeal of "interlocutory judgment or order" — child sexual offences — judge refused leave for applicant to recall child witnesses who gave pre-recorded evidence under *Criminal Procedure Act 1986*, Sch 2, cl 87 — refusal of leave not appellable under s 5F(3) — no jurisdiction to hear appeal — *PJ v R* [2023] NSWCCA 105
- 18/05/2023 — Evidence — assessing reliability — child sexual assault — complainant socially disadvantaged, deprived and behaviourally troubled — system of individual justice relies on jury assessing witness' evidence, not based on assumed social or material worth — no class of child witness inherently incapable of truthfulness or accuracy — verdict not unreasonable or unsupported by evidence — *Murray v R* [2023] NSWCCA 79
- 14/03/2023 — *Evidence Act 1995*, s 79 — expert opinion evidence — children's responses to sexual abuse — type of evidence adduced approved in *AJ v R* [2022] NSWCCA 136 — evidence did not fall outside expert's qualifications and expertise — no invariable requirement for direction that expert evidence not relevant to credibility of particular complainants — no miscarriage of justice — *BQ v R* [2023] NSWCCA 34
- 22/12/2022 — Evidence — *Criminal Procedure Act 1986*, s 293 (now s 294CB) — prohibition on admitting evidence of prior sexual experience/activity — victim disclosed to applicant previous abuse by another 18 months before subject offences — judge correctly excluded evidence — events too far apart in time and not sufficiently related (s 293(4)(a)(i)) — "connected set of circumstances" in s 293(4)(a)(ii) does not include reporting of previous offences or related committal proceedings — *Cook (a pseudonym) v R* [2022] NSWCCA 282
- 22/12/2022 — Evidence — *Criminal Procedure Act 1986*, s 293 (now s 294CB) — prohibition on admitting evidence of prior sexual activity/experience — *Crimes Act 1900*, s 61I — sexual intercourse without consent — judge correct to exclude evidence of complainant's conversation with applicant after offence regarding prior sexual assault five years earlier — evidence did not fall within s 293(4) exceptions as temporal requirement in s 293(4)(a)(i) not satisfied, and evidence not relevant — *Elsworth v R* [2022] NSWCCA 276
- 19/12/2022 — *Evidence Act 1995*, ss 65, 106(1) — exceptions to hearsay and credibility rules — child sexual assault — complainant an unfavourable witness — judge erred in admitting complainant's police statement — silence not sufficient to establish denial of substance of evidence under s 106(1)(a)(ii) — witness was not "unavailable" under s 65 — "all reasonable steps" not taken by Crown to compel witness to give evidence — conviction quashed and re-trial ordered — *RC v R* [2022] NSWCCA 281
- 25/10/2022 — Evidence — *Jury Act 1977*, ss 68A, 68B, 73A — jury deliberations — sheriff's investigations — historical child sex offences — sheriff's report under s 73A regarding alleged bias and consideration of irrelevant material inadmissible due to "exclusionary rule" in *Smith v Western Australia* (2014) 250 CLR 473 — no evidence to support grounds of appeal — *Vella v R* [2022] NSWCCA 204

- 01/07/2022 — *Evidence Act 1995*, ss 79, 108C — specialised knowledge of behaviour of child sexual abuse victims — judge erred by admitting evidence related to opinion that sexual offending against children often occurred in brazen settings — such statements not within expertise of expert relied on by Crown — observations concerning preferred approach trial judges may take to such evidence — *AJ v R* [2022] NSWCCA 136
- 25/04/2022 — *Evidence Act 1995*, ss 79, 108C — expert evidence on children's responses to sexual abuse — "opinion" includes conclusions drawn from others' research — evidence admitted without objection at trial — no miscarriage of justice caused by admission of evidence in particular circumstances of this case — *Aziz (a pseudonym) v R* [2020] NSWCCA 76

Sentencing

- 20/05/2024 — Cth sentencing — Crown appeal — *Crimes Act 1914* (Cth), s 20(1)(b)(iii) — Cth child sex offender not to be immediately released on recognizance unless exceptional circumstances — online grooming (Criminal Code (Cth), s 474.27(1)) — open to sentencing judge to find exceptional circumstances on combination of matters including respondent's voluntarily withdrawal from offending — meaning of "exceptional circumstances" discussed — *R v Bredal* [2024] NSWCCA 75
- 18/03/2024 — Cth sentencing — *Crimes Act 1914* (Cth), s 16AAB — mandatory minimum sentences for child sexual abuse offences — Criminal Code (Cth), s 474.22A(1) — possess child abuse material accessed by carriage service — transitional provision — s 16AAB applies if offender possesses material after provision commenced, regardless of when accessed — mandatory minimum sentences serve double function of providing yardstick, the opposite of maximum penalty, and restricting sentencing power to the minimum sentence subject to limited exceptions — *Hurt v The King; Delzotto v The King* [2024] HCA 8
- 11/03/2024 — Sentencing — *Crimes Act 1900*, s 66EA(1) — maintain unlawful sexual relationship with child — offending conduct committed while predecessor offence in force — applicant sentenced on basis of current s 66EA which carries life imprisonment — former s 66EA carried 25 years imprisonment — CCA majority correct to conclude current offence applies retrospectively so life imprisonment applies — current s 66EA is a new offence such that s 19 of the *Crimes (Sentencing Procedure) Act 1999* does not apply — *Xerri v The King* [2024] HCA 5
- 22/02/2024 — Sentencing — *Children (Criminal Proceedings) Act 1987* (C(CP) Act), ss 16, 18 — applicability of Children's Court sentencing regime — *Crimes Act 1900*, s 61J(2)(d) — aggravated sexual assault (victim under 16) committed by applicant when a child — although judge misstated s 61J offences were "serious children's indictable offences" (C(CP) Act, s 3), they were to be dealt with according to law as applicant over 21 when charged — judge did not err by failing to consider lost opportunity for applicant to be sentenced under Children's Court regime — *BB v R* [2024] NSWCCA 13
- 22/12/2023 — Sentencing — sexual assault — sentencing judge did not err in finding moral culpability relevant to objective seriousness — applicant's state of mind relevant in assessing moral culpability and objective seriousness — applicant's knowledge of lack of consent elevated blameworthiness and offence seriousness — *Bugmy* principles — no error in judge refusing to reduce sentence because of childhood deprivation — applicant claimed sexual activity consensual, not that early dysfunction left him unable to understand consent — *Stein v R* [2023] NSWCCA 324

- 30/11/2023 — Sentencing — *Crimes Act 1900*, s 61HE(3), (4) (rep) — knowledge of sexual consent and offender's self-induced intoxication — *Crimes (Sentencing Procedure) Act 1999*, s 21A(5AA) — self-induced intoxication not mitigatory — applicant convicted of sexual assault after jury trial — judge found applicant knew victim not consenting — no error in judge's approach — s 21A(5AA) prohibits taking into account applicant's self-induced intoxication as mitigating factor — *Fisher v R* [2021] NSWCCA 91 (Fullerton and Adamson JJ) followed — *Pender v R* [2023] NSWCCA 291
- 24/11/2023 — Sentencing — extra-curial punishment — applicant convicted of child sexual offences was subject to public/media attention regarding previous like offending — judge did not err by finding applicant not subject to extra-curial punishment — public denunciation following conviction does not generally constitute extra-curial punishment — media reporting naming offender ordinary consequence of such offences — personal consequences including loss of employment may still be relevant on sentence — *Melville v R* [2023] NSWCCA 284
- 07/11/2023 — Sentencing — *Crimes (Sentencing Procedure) Act 1999*, s 21A(2)(k) — aggravating factor of abuse of trust/authority — *Crimes Act 1900*, s 66A(1) (since amended) — sexual intercourse with child under 10 — Crown and applicant accepted s 21A(2)(k) satisfied — judge erred by relying upon matters falling within aggravated s 66A(2) offence (under authority) — *De Simoni* error — *HA v R* [2023] NSWCCA 274
- 25/10/2023 — Sentencing — aggravating features — applicant sentenced for child sexual offences including sexual intercourse and act of indecency with child (*Crimes Act 1900*, ss 66C(1), 61N (rep) respectively) — judge referred to applicant's position of authority as "aggravating feature" — judge did not conclude aggravated offence or *Crimes (Sentencing Procedure) Act*, s 21A(2)(k) feature of statutory aggravation, had been made out — position of authority can be considered as part of instinctive synthesis — *Kilby v R* [2023] NSWCCA 247
- 05/10/2023 — Sentencing — Crown appeal — *Crimes (Sentencing Procedure) Act 1999*, s 21A(2)(g) — substantial harm — respondent committed sexual offences against live-in housekeeper and disseminated intimate images which damaged victim's relationship with her family in Nepal — judge failed to take into account significant emotional harm suffered by victim as an aggravating factor under s 21A(2)(g) — *R v Packer* [2023] NSWCCA 87
- 14/08/2023 — Sentencing — *Crimes Act 1900*, s 61HA(3) (since amended) — knowledge of non-consent — respondent convicted of sexual offences after trial — judge's finding respondent's state of mind in "least serious" category of knowledge (s 61HA(3)(c): no reasonable grounds for believing consent) open — if judge not satisfied beyond reasonable doubt of more culpable forms of knowledge in s 61HA(3)(a), (b), finding of knowledge in s 61HA(3)(c) necessary default — in assessing objective seriousness, generalised phrases or range labels not useful — *R v RE* [2023] NSWCCA 184
- 11/07/2023 — Sentencing — Crown appeal — *Crimes Act 1900*, s 61I — sexual intercourse without consent — Community Correction Order (CCO) imposed — penile-vaginal intercourse offence committed with knowledge of non-consent within context of other consensual sexual activity — not open to judge to characterise offending as just above low range — CCO manifestly inadequate — observations regarding social media apps, the pandemic and sexual consent — *Kramer v R* [2023] NSWCCA 152
- 05/07/2023 — Sentencing — sexual and violent offences perpetrated against partner — applicant relied upon psychiatric/psychological reports with inconsistencies in histories

provided by applicant — judge failed to take into account relevant mitigatory matters and erred in rejecting parts of subjective case — while open to judge to regard applicant's inconsistent hearsay to experts with scepticism, rejection of part of the evidence did not justify rejection of almost entire subjective case — *Giacometti v R* [2023] NSWCCA 150

- 15/06/2023 — Sentencing — five-judge bench — *Crimes (Sentencing Procedure) Act 1999* (C(SP) Act), s 25AA(2) — standard non-parole period (SNPP) at time of offence applies for child sexual offences — C(SP) Act, Sch 2, cl 91 — retrospective application of increased SNPP for indecent assault of child under 10 (*Crimes Act 1900*, s 61M(2) (rep)) — increased SNPP does not have retrospective application — scope of s 25AA(2), in clear language, not limited by earlier enacted transitional provision — *GL v R* [2022] NSWCCA 202 correctly decided — *AC v R* [2023] NSWCCA 133
- 26/05/2023 — Sentencing — historical child sexual offences — good character — no offending from 1986 — judge's assessment of applicant's character of "little weight" open — conviction-free period distinct from factual finding that offender has not reoffended — delay in complaint — judge did not err in considering delay — delay result of child sexual offending's nature and not a mitigating factor — *Richards v R* [2023] NSWCCA 107
- 23/05/2023 — Criminal responsibility — sexual offences allegedly committed by child between 10 and 14 — *Criminal Code* (Qld), s 29(2) — presumption of incapacity of child between 10 and 14 rebuttable by evidence of capacity to know they ought not do act — presumption of incapacity under s 29(2) not equivalent to moral wrongness required by common law (*RP v The Queen* (2016) 259 CLR 641) but is informed by it — *BDO v The Queen* [2023] HCA 16
- 01/05/2023 — Sentencing — *Crimes (Sentencing Procedure) Act 1999* (C(SP) Act), s 25AA(2); Sch 2, cl 68 — applicable standard non-parole periods (SNPPs) for child sexual offences — transitional provisions — *Crimes Act 1900*, s 66C(2) — aggravated sexual intercourse with child aged 10 to 14 committed before 1 January 2015 — judge erred by applying SNPP which commenced 29 June 2015: C(SP) Act, s 25AA(2); Sch 2, cl 68 — sentencing judge led into error by parties — counsel have responsibility to properly assist court — *DC v R* [2023] NSWCCA 82
- 21/04/2023 — Sentencing — child sexual offences — Crown appeal — judge erred imposing indicative sentences below proper range — aggregate sentence manifestly inadequate — indicative sentences can signal error in aggregate sentences: *Lee v R* [2020] NSWCCA 244 — *Crimes (Sentencing Procedure) Act 1999*, s 25AA(3) — Crown to identify trauma of sexual abuse on child victim where not self-evident from facts — relevance of uncharged acts in sentencing — *DPP (NSW) v TH* [2023] NSWCCA 81
- 02/03/2023 — Sentencing — *Crimes (Sentencing Procedure) Act 1999*, s 53A — aggregate sentences — sexual offending against multiple victims — judge did not fail to give effect to totality principle — no requirement to specify notional cumulation and concurrency across offences and complainants when imposing aggregate sentence — *Benn v R* [2023] NSWCCA 24
- 22/02/2023 — Sentencing — *Crimes (Sentencing Procedure) Act 1999*, s 21A(5A) — good character in child sexual offences — applicant was victim's parents' friend before victim's birth — judge erred by not taking good character into account — no evidence applicant actively used good character to gain access to victim — *Bhatia v R* [2023] NSWCCA 12
- 21/02/2023 — Sentencing — child sexual offences — *Crimes (Administration of Sentences) Regulation 2014*, cl 214A — parole supervision limitation — judge's refusal to find special

circumstances open — while limitation generally a significant factor in determining special circumstances, limitation not only factor considered by judge — observations regarding findings of objective seriousness — *Decision Restricted* [2023] NSWCCA 10

- 16/02/2023 — Sentencing — multiple child sexual offences — judge did not err in not specifying objective seriousness by reference to scale of seriousness — judge satisfied requirement to clearly state findings of objective seriousness noting differences in that assessment reflected in indicative sentences — whilst not an error to assess objective seriousness on hypothetical continuum of seriousness, failure to do so not erroneous — *DH v R* [2022] NSWCCA 200
- 09/12/2022 — Sentencing — Crown appeal — *Crimes Act 1914* (Cth), ss 16AAB, 16AAC — mandatory minimum penalties for specified child sexual offences — judge did not err by imposing mandatory minimum (pre-discount) — not the case that, unless offence within least serious category, mandatory minimum term or higher must, as a matter of law, be imposed — mandatory minimum fixes lower limit, and discretion to impose it to be determined on established principles — *R v Taylor* [2022] NSWCCA 256
- 11/10/2022 — Sentencing — *Crimes (Sentencing Procedure) Act 1999*, s 25AA — sentencing for child sex offences under current practices — standard non-parole period (SNPP) at time of offence applies (s 25AA(2)) — SNPP for s 61M(2) *Crimes Act 1900* (rep) (aggravated indecent assault) increased after offence committed and had retrospective operation — judge erred by applying higher SNPP — more appropriate to apply clear words of s 25AA than transitional provisions — *GL v R* [2022] NSWCCA 202
- 20/09/2022 — Sentencing — aggravating factors — "threat" — sexual assault — applicant and complainant strangers — applicant told complainant not to inform anyone of assaults — judge did not err in finding statement to be a threat and therefore an aggravating factor — not necessary for precise consequences to be spelled out — statement carried implication of adverse consequences due to criminal nature of conduct — *Baker v R* [2022] NSWCCA 195
- 13/09/2022 — Sentencing — *Crimes Act 1900*, s 80AF — historic child sex offences — uncertainty about offence date — majority of NSW Court of Criminal Appeal erred by finding s 80AF was "procedural" only and operated retrospectively — s 80AF changed the law concerning elements of offence itself — provision can only be invoked at commencement of trial — no application to trials already commenced — acquittal on relevant counts — *Stephens v The Queen* [2022] HCA 31
- 12/09/2022 — Sentencing — *Crimes Act 1900*, ss 78, 78T (both rep), Sch 11, cl 82 — sexual offences — repeal of historic sexual offence limitation periods — s 66C(1) prosecutions not statute-barred under s 78 because words of Sch 11, cl 82 make clear s 78 repealed retrospectively — however s 78K (rep) prosecutions statute-barred under s 78T — miscarriage of justice occasioned by incompetence of trial counsel — verdict for some offences unreasonable and not supported by evidence — *Madden v R* [2022] NSWCCA 196
- 29/08/2022 — Sentencing — Crown appeal — child sexual offences — sentence manifestly inadequate — observations providing guidance for sentencing judges — summary of facts must be accurate and include material facts bearing upon objective seriousness — where Form 1, sentence should be longer than for primary offence alone if appropriate — special circumstances must be sufficiently "special" to justify variation of statutory ratio — *R v Lau* [2022] NSWCCA 131
- 19/08/2022 — Sentencing — child sexual offences — applicant had deprived background but no evidence of causal link to offending — judge did not err by not reducing applicant's

moral culpability — full weight otherwise given to deprived upbringing in instinctive synthesis, notwithstanding no causal link to offending — *Bugmy v The Queen* (2013) 249 CLR 571 and *Dungay v R* [2020] NSWCCA 209 applied — *DR v R* [2022] NSWCCA 151

- 03/08/2022 — Sentencing — *Crimes Act 1900*, s 61J — aggravated sexual assault — multiple counts — no error in finding objective seriousness of each sexual assault affected by proximate commission of other sexual assaults — course of conduct relevant to applicant's state of mind and victim's vulnerability — *Ragg v R* [2022] NSWCCA 150
- 07/07/2022 — Sentencing — Crown appeal — *Crimes Act 1900*, s 66EA — maintain unlawful sexual relationship with a child — fact finding on sentence after jury verdict of guilty — judge erred in determining respondent should be sentenced on basis of two least serious unlawful sexual acts and by making no factual findings — *Chiro v The Queen* (2017) 260 CLR 425 does not apply — matter remitted for sentence — *R v RB* [2022] NSWCCA 142
- 27/06/2022 — Sentencing — Crown appeal — *Crimes Act 1914* (Cth), ss 16AAA, 16AAB — mandatory minimum penalties — possess child abuse material accessed by carriage service — judge erred by failing to approach minimum penalty in accordance with *Bahar v R* [2011] WASCA 249 — sentence below mandatory minimum not appropriate for offence in mid-range of seriousness — minimum penalty reserved for least serious offending — *R v Delzotto* [2022] NSWCCA 117
- 24/06/2022 — Sentencing — child sexual offences — delay — applicant sentenced as an adult for childhood offending — delay resulted in lost opportunities for Children's Court sentencing, more lenient sentencing options, consideration of good character, and cycle of abuse to be addressed earlier — applicant's significantly deprived background a "classic *Bugmy* case" — sentence manifestly excessive — *Young (a pseudonym) v R* [2022] NSWCCA 111
- 16/06/2022 — Sentencing — *Crimes Act 1900*, ss 61H(2), 66C(2) — aggravated sexual intercourse with child aged 10-14 (under authority) — complainant was applicant's daughter — *Crimes (Sentencing Procedure) Act 1999*, s 21A(2)(k) — aggravating factors — abuse of trust — judge did not err by taking aggravating factor of abuse of trust into account — abuse of authority not an element of offence — each case depends on relationship between offender and child, and circumstances of offending — *PC v R* [2022] NSWCCA 107
- 14/06/2022 — Sentencing — Crown appeal — *Crimes Act*, s 61E(1A) (rep) — historical indecent assault of child under authority — respondent had already served 3 year sentence of imprisonment for like offending committed around same time — subsequent community correction order (CCO) not manifestly inadequate — judge correct to conclude imprisonment not appropriate — relevant question whether total sentencing outcome (previous imprisonment and CCO) encompassed whole criminality — *R v Obbens* [2022] NSWCCA 109
- 5/06/2022 — Sentencing — *Criminal Code* (Cth), s 474.24A — *Crimes Act 1900*, s 91H(2) — child pornography offences — *Child Protection (Offenders Registration) Act 2000*, s 17(1) — failure to comply with reporting obligations — effective sentence not manifestly excessive — significant accumulation between State and federal offences appropriate — breach of reporting obligations involved distinct criminality — subsuming breach into subsequent offences would undermine objectives of child protection regime — *Bisiker v R* [2022] NSWCCA 110

- 12/04/2022 — Sentencing — Crown appeal — child sexual assault by stepfather — judge erred by treating registration under the *Child Protection (Offenders Registration) Act 2000* as a mitigating factor — community correction orders manifestly inadequate given repetition, persecutory nature and extended period of offending — observations on *Children (Criminal Proceedings) Act 1987*, s 15A(1)(a) — impact of restriction on publication of child victim's name — s 15A prevents general deterrent effect of inter-familial child sex offence sentences — *R v PC* [2022] NSWCCA 59

- 24/03/2022 — Sentencing — *Crimes Act 1914* (Cth), s 16A(2AAA) — Commonwealth child sex offender rehabilitation — judge erred by failing to refer to mandatory considerations in s 16A(2AAA) — court required to consider applicant's rehabilitation, including in imposing conditions and fixing sentence length — applicant resentenced with recognisance release order and treatment/rehabilitation condition — *Darke v R* [2022] NSWCCA 52

- 18/03/2022 — Sentencing — *Crimes (Sentencing Procedure) Act 1999* (C(SP) Act), s 21A(3)(e), (f) — good character — *Crimes Act 1900*, s 73(2) — sexual intercourse with person under special care aged 17 — school teacher/student — judge erred by not taking into account applicant's good character and lack of criminal history as mitigating factors — C(SP) Act, s 21A(5A) does not apply to s 73 offence — good character evidence entitled to some weight — *Fenner v R* [2022] NSWCCA 48

- 14/03/2022 — Sentencing — Crown appeal — *Criminal Code* (Cth), ss 272.11(1), 272.19(1), 474.19(1) (rep) — *Criminal Code* (Qld), s 228D — sexual offences involving children outside Australia — total effective sentence failed to adequately reflect overall criminality which included exploiting a child's economic vulnerabilities,and seeking to procure another child through the first child — *R v Harrison; ex parte DPP (Cth)* [2021] QCA 279

- 14/03/2022 — Sentencing — *Crimes (Sentencing Procedure Act)* 1999, s 21A(2)(ea) — aggravating factors — judge erred by finding offence aggravated because it occurred in presence of child — double-counting to assess objective seriousness having regard to victim's age and treating age as separate aggravating factor when child the victim of offence — *Arvinthan v R* [2022] NSWCCA 44

- 14/01/2022 — Sentencing — *Crimes Act 1900*, s 61M(2) (rep) — indecent assault of child under 10 years — applicant complainant's father — sentence not manifestly excessive — judge found motivation for offences to "bond" with complainant — supposed absence of sexual motivation unlikely to affect assessment of objective seriousness — sexual character of conduct an inherent feature of offence — *BB v R* [2021] NSWCCA 283

Offences

- 27/05/2024 — Offences — *Crimes Act 1900*, ss 66EA, 81 (rep) — historic indecent assaults (s 81 (rep)) constituting maintain unlawful relationship offence (s 66EA) — acts committed by female — s 81 offence can only be committed by male: *Lam v R* [2024] NSWCCA 6 — appellant's relationship not unlawful as s 66EA applies retrospectively if sexual acts making up unlawful relationship were illegal at time committed — indictment quashed and acquittal ordered — *Grant v R* [2024] NSWCCA 78

- 15/02/2024 — Offences — *Crimes Act 1900*, s 81 (rep) — historic indecent assault — offences allegedly committed by female — s 5F(3) *Criminal Appeal Act 1912* — appeal

against orders refusing demurrer and refusing to quash indictment — offence not known at law — s 81 offence can only be committed by males — indictment quashed — *Lam v R* [2024] NSWCCA 6

- 01/11/2023 — Offences — *Crimes Act 1900*, ss 61M(1)(rep), 61E(1)(rep) — historical indecent assault of children — no "indecent intent" required — majority decision in *R v Court* [1989] 1 AC 28 not followed — *Evidence Act 1995*, ss 66, 108(3)(b) — complaint evidence relevant to re-establishing credibility — *Van Gestel v R* [2023] NSWCCA 263
- 20/07/2023 — Offences — *Crimes Act 1900*, s 66EA — persistent sexual abuse of child — five-judge bench — statutory interpretation — offence requires existence of relationship "in which" unlawful sexual acts were committed — word "maintains" in s 66EA(1) adds nothing to *actus reus* beyond satisfaction of s 66EA(2) — no requirement for sexual relationship over and above unlawful sexual acts — judges' directions conformed with proper construction — *RW v R* [2023] NSWCCA 2 (restricted) and *R v RB* [2022] NSWCCA 142 overruled — *MK v R* [2023] NSWCCA 180
- 18/02/2022 — Offences — *Criminal Code* (Cth), ss 474.19 (rep), 474.22, 474.22A — use carriage service to access and possess child pornography/child abuse material — application for permanent stay of "access offences" — judge did not err by refusing stay — offences overlap but are not duplicitous as they involve different elements and criminality — *Pearce v The Queen* (1998) 194 CLR 610 applied — no double jeopardy or abuse of process — *Allison (a pseudonym) v The Queen* [2021] VSCA 308

Procedure

- 10/05/2023 — *Child Protection (Offenders Registration) Act 2000*, ss 3(3), 3A(2), (5) — *Crimes Act 1900*, s 91H(2) — possess child abuse material — juvenile offender — judge erred by declaring respondent's entry on Child Protection Register erroneous on basis exception in s 3A(2) applied — meaning of "registrable person" and "arising from the same incident" in s 3A — possessing child abuse material involving actual children is an offence committed against those children — *Commissioner of Police, NSW Police Force v TM* [2023] NSWCA 75
- 05/05/2023 — Procedure — judge-alone trials — child sexual assault — judge erred by making adverse findings on applicant's credibility based on his demeanour in dock and insignificant evidentiary point, without notice — *Criminal Procedure Act 1986*, s 133 — obligation to give reasons in judge-alone trials — reasons did not disclose how demeanour affected credit — applicant denied procedural fairness — *Gardiner v R* [2023] NSWCCA 89
- 25/05/2022 — Procedure — *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*, ss 4, 28 — mental health impairment — criminal responsibility — child sexual offending — judge correct to conclude sexsomnia, a form of parasomnia, not a mental health impairment and to acquit respondent — respondent's condition made his actions involuntary — absence of volition while asleep is universal and not a disturbance of volition — common law defence of "sane automatism" continues to apply — *R v DB* [2022] NSWCCA 87
- 09/05/2022 — Procedure — *Crimes Act 1900*, ss 61M(2) (rep), 66DB, 80AF — aggravated indecent assault, replaced by sexual touching of child — uncertainty when offending occurred — judge erred in applying standard non-parole period for s 61M(2) offence — open to Crown to prosecute under ss 61M(2) or 66DB pursuant to s 80AF where same maximum penalty applies — alternative interpretation results in inability to prosecute and frustrates object of s 80AF — *Smith v R* [2022] NSWCCA 88

- 07/05/2022 — Procedure — *Criminal Procedure Act 1986*, s 133 — judge-alone trial — applicant found guilty of historical child sexual offences — convictions unreasonable — judge placed undue weight on demeanour of complainants' and applicant — unchallenged evidence in defence case meant judge should have had a reasonable doubt — *Hodgson v R* [2022] NSWCCA 72

- 28/04/2022 — Procedure — *Costs in Criminal Cases Act 1967*, ss 2, 3 — applicant acquitted of historical child sexual assault charges on appeal — application for costs certificate dismissed — decision to prosecute charges not unreasonable given all "relevant facts" — institution of proceedings not necessarily unreasonable where verdict unreasonable within *Criminal Appeal Act 1912*, s 6(1) — *Higgins v R (No 2)* [2022] NSWCCA 82

- 23/04/2022 — Procedure — *Criminal Procedure Act 1986*, s 293 — evidence complainant had prior sexual experience or had taken part in sexual activity — s 293(4)(c) exception — presence of semen, pregnancy, disease or injury attributable to alleged offence — miscarriage of justice caused because evidence complainant sexually assaulted by another man near date of offence not led at trial — probative value of evidence outweighed "distress, humiliation and embarrassment" complainant might suffer — *WS v R* [2022] NSWCCA 77

- 19/04/2022 — Procedure — *Criminal Procedure Act 1986*, s 133(2) — historical child sexual assault charges — obligation to give reasons in judge-alone trial — respondent acquitted — judge erred in not explaining assessment of tendency evidence in judgment — s 133(2) requires trial judges to expose their reasoning process linking principles applied with findings of fact to justify findings and verdict — notwithstanding error, acquittal affirmed — *R v BK* [2022] NSWCCA 51

- 04/02/2022 — apprehended bias — *Crimes Act 1900*, s 61M(2) (rep)— aggravated indecent assault — Crown added s 61M(2) offence to indictment during retrial on trial judge's urging — test for apprehension of bias satisfied and miscarriage of justice resulted — judge provided advice to Crown and conduct departed from role to adjudicate impartially — retrial ordered on original charges on indictment — *Decision Restricted* [2022] NSWCCA 2

- 16/02/2022 — Procedure — *Crimes Act 1900*, s 578A(2) — non-disclosure of complainants of prescribed sexual offences — applicant acquitted of *Crimes Act 1900*, s 61I offence (a prescribed sexual offence) but appealed conviction for other offences — appropriate that s 578A(2) still operates as appeal would identify complainant — *Z (a pseudonym) v R* [2022] NSWCCA 8

- 14/01/2022 — Procedure — apprehended bias — judge-alone trial — historical sexual assault where verdict based on complainant's credibility — at trial, judge recognised complainant as an attendant at shop she frequented 18 years earlier — judge ought to have recused herself — fair-minded lay observer might reasonably apprehend unconscious predisposition in favour of complainant — *McIver v R* [2020] NSWCCA 343

Appeals

- 19/06/2024 — Crown sentence appeal — historical child sexual offences — sentence manifestly inadequate — *Crimes (Sentencing Procedure) Act 1999* (C(SP) Act), ss 19, 21B (formerly s 25AA) — applicable maximum penalties, and sentencing in accordance with patterns and practices at time of sentencing — limited number of truly comparable cases —

cases to be from period when maximum penalty (or SNPP) was same or similar, and after introduction of s 25AA(1) — residual discretion — respondent resentenced — *R v Carey* [2024] NSWCCA 90

- 11/09/2023 — Appeals — Conviction appeal — child sexual assault — verdicts not unreasonable or unsupported by evidence — appeal dismissed — observations on complainant responses to sexual assaults — *Decision Restricted* [2023] NSWCCA 223

- 18/08/2023 — Appeals — unreasonable verdicts — *Criminal Appeal Act 1912*, s 6(1) — judge-alone trial — judge did not err in resolving conflicting evidence of complaint — complaint "limited" and not especially memorable — error in judge's reasoning process resolving disputed facts not challengeable under "first limb" of s 6(1) (unreasonable verdict) but challengeable under "third limb" (miscarriage of justice) — *Dansie* supersedes any suggestion in *Filippou v The Queen* that errors in reasoning process can engage first limb of s 6(1) — verdict not unreasonable — *EE v R* [2023] NSWCCA 188

- 01/08/2023 — Appeals — fitness to be tried — *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*, s 44 — applicant raised fitness to be tried for first time on appeal — despite new legislative regime prescribing different decision-maker (judge-alone, not jury), applicable test still that in *R v RTI* (2003) 58 NSWLR 438 — question of principle on appeal not based on identity of decision-maker but rather whether miscarriage of justice occurred — *Roberts v R* [2023] NSWCCA 187

- 01/05/2023 — *Criminal Appeal Act 1912*, s 6(1) — unreasonable verdicts — child sexual offences — guilty verdicts not inconsistent with acquittals — plausible explanation for verdicts specific to the evidence — complainant's credibility and general reliability of her other evidence not damaged — observations on credibility and reliability — *Barney v R* [2023] NSWCCA 85

- 06/10/2022 — Conviction appeal — *Crimes Act 1900*, s 61I — sexual assault — unreasonable verdict ground — appeal dismissed — intermediate appellate courts must avoid rigid stereotypical expectations in sexual assault matters as to how complainants should behave — court not assisted by reliance upon such arguments when contending unreasonable conviction ground — verdicts not unreasonable or unsupported by evidence — *Harper v R* [2022] NSWCCA 211

- 16/08/2022 — *Crimes Act 1900*, s 66DC(a) — sexual act "with or towards" a child — Crown appeal — stay of proceedings — phrase "with or towards" in s 66DC(a) creates two separate offences — "towards" requires intention to engage with another — no error in judge's finding mere presence of complainant insufficient — *DPP (NSW) v Presnell* [2022] NSWCCA 146

- 07/02/2022 — Crown appeal — *Crimes (Sentencing Procedure) Act 1999*, s 10(1)(b) — conditional release order (CRO) without conviction — numerous sexual offences against boy aged 14 — respondent victim of extensive and severe child sexual abuse and was on remand for 8½ months — s 10(1)(b) CRO not manifestly inadequate — unique case — despite serious offending, criminality did not deserve community denunciation by recording conviction — *R v AB* [2022] NSWCCA 3

- 07/02/2022 — Crown appeal — *Crimes Act 1900*, s 66A — sexual intercourse with child under 10 — *Crimes (Sentencing Procedure) Act 1999*, s 33(4)(b) — error to place offence

carrying life imprisonment on Form 1 — matter remitted to District Court for sentence — inappropriate for CCA to resentence when that decision might inform sentencing outcome — *R v JH* [2021] NSWCCA 299

- 17/01/2022 — Appeals — child sex offences — evidence appellant and complainant had herpes irrelevant and prejudicial — trial judge erred by failing to direct jury to disregard that evidence — Qld Court of Appeal erred by finding no substantial miscarriage of justice and applying proviso — error to place weight on verdicts which may have been affected by impugned evidence — *Hofer v The Queen* [2021] HCA 36 distinguished — *Orreal v The Queen* [2021] HCA 44

Directions

- 31/08/2023 — Directions — sexual offences — consent — *Crimes Act 1900*, s 61HE(3)(b), (c) (rep) — "non-advertent" recklessness not abolished by unreasonable belief in consent — no error in judge's directions — *Criminal Procedure Act 1986*, ss 292A–249E — mandatory consent directions only apply if accused arraigned after commencement of provisions — *Lee v R* [2023] NSWCCA 203
- 17/07/2023 — Directions — child sexual offences — child accused — Crown disclaimed consciousness of guilt reasoning in case but used it to rebut *doli incapax* presumption — judge gave no *Edwards* or *Zoneff* directions to jury — absence of direction in light of Crown's conduct of trial occasioned miscarriage of justice — acquittal entered — *AB v R* [2023] NSWCCA 165
- 26/06/2023 — Directions — *Criminal Procedure Act 1986*, s 161A — tendency evidence — standard of proof — charged and uncharged acts of varying seriousness adduced as tendency evidence — judge's directions did not invite circular reasoning — *Decision Restricted* [2023] NSWCCA 119
- 23/06/2023 — Directions — right to silence — applicant answered questions in electronically recorded interview until allegations of offending raised — judge failed to adequately direct jury on applicant's right to silence — right to silence only referred to in summing up — where evidence is led by Crown of applicant's right to silence, conviction ordinarily set aside where no direction given — *Rahman v R* [2021] NSWCCA 290
- 11/04/2023 — Directions — sexual offences — accused gave evidence — judge erred in giving incomplete *Liberato v The Queen* (1985) 159 CLR 507 direction — *Criminal Procedure Act 1986*, s 294(2)(c) — judge erred in directing jury that delay in complaint not relevant to credibility — insufficient evidence to justify direction — omission of some alternative counts from indictment liable to confuse — retrial ordered — *Park v R* [2023] NSWCCA 71
- 20/05/2022 — Conviction appeal — directions — 10 child sexual offences involving complainants JU and KK — applicant found guilty on only count involving JU corroborated by KK — although *Markuleski* direction appropriate, direction that doubt about one complainant's evidence could not affect assessment of count involving other complainant erroneous — not anticipated jury would take path of reasoning that led to acquittals on all counts other than only count corroborated by other complainant — *Sita v R* [2022] NSWCCA 90
- 11/04/2023 — Directions — sexual offences — accused gave evidence — judge erred in giving incomplete *Liberato v The Queen* (1985) 159 CLR 507 direction — *Criminal Procedure Act 1986*, s 294(2)(c) — judge erred in directing jury that delay in complaint

not relevant to credibility — insufficient evidence to justify direction — omission of some alternative counts from indictment liable to confuse — retrial ordered — *Park v R* [2023] NSWCCA 71

- 14/02/2022 — Directions — *Crimes Act 1900*, s 61J — aggravated sexual intercourse without consent — aggravating circumstance (s 61J(2)(f)) that complainant had "serious physical disability" (cerebral palsy and dystonia) — no error in judge's directions — "serious physical disability" is a question for jury and does not require explication — open on evidence for jury to find aggravating circumstance made out — *JH v R* [2021] NSWCCA 324

Recent sexual assault legislation

- 28/06/2024 — *Crimes High Risk Offenders Legislation Amendment Act 2024* — Incorporation of strangulation offences — Schedules 1[2] and [3] respectively expand the definitions of "serious sex offence" in s 5(1)(b) and "offence of a sexual nature" in s 5(2)(b) of the *Crimes (High Risk Offenders) Act 2006* to include offences under *Crimes Act 1900*, s 37(2) [choking, suffocation and strangulation with intent to enable commission of another indictable offence] — commenced on proclamation on 21 June 2024 (s 2, LW 21.06.24)
- 19/10/2022 — *Crimes (Sentencing Procedure) Amendment Act 2022* — amends *Crimes (Sentencing Procedure) Act 1999* — replaces s 25AA(1) with new s 21B(1) — court must sentence (or resentence) in accordance with practices at time of sentencing — court may sentence according to practices at time of offending if offence not a child sexual offence and exceptional circumstances exist — inserts new s 67(2)(h) — expands definition of prescribed sexual offences so that ICOs cannot be made for certain sexual offences regardless of when committed or which provision is charged — commenced on assent on 18 October 2022 (s 2)
- 30/05/2022 — *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* — amends *Crimes Act 1900* — replaces s 61HE with new ss 61HF–61HK — s 61HI provides new definition of "consent" — s 61HJ provides circumstances where no consent — s 61HK updates circumstances where accused has knowledge of lack of consent — amends *Criminal Procedure Act 1986* — new ss 292–292E provide for jury directions in relation to misconceptions about consent — commenced on proclamation on 1 June 2022 (s 2)
- 02/05/2022 — *Crimes Legislation Amendment Act 2021* — amends *Crimes (High Risk Offenders) Act 2006*, s 5 to update offences classified as a "serious sex offence" and "offence of a sexual nature" — amendments commenced on assent on 8 December 2021 (s 2):

  Sch 1.2[1] replaces s 5(1)(b4)–(b5) to add to the definition of "serious sex offence" the offences in the *Criminal Code* (Cth) relating to:

  – Grooming a person to make it easier to engage in sexual activity with, or procure, a child: ss 272.15A, 471.25A, 474.27AA; and
  – The use of electronic services to commit or facilitate the commission of particular child abuse material offences: s 474.23A.

  Sch 1.2[2] replaces s 5(2)(h3)–(h4) to add to the definition of "offence of a sexual nature" the offences in the *Criminal Code* relating to the possession or control of child abuse material: ss 273A.1, 474.22A. It also omits references to repealed provisions of the *Criminal Code.*
- 13/01/2022 — *Modern Slavery Act 2018* — amends *Crimes Act 1900* — amends s 91G to introduce aggravated form of offence of using child for production of child abuse material — creates new offences relating to administering and encouraging use of digital platforms for child abuse material (ss 91HAA, 91HAB, 91HAC) — inserts s 93AC relating to child forced marriages — commenced on 1 January 2022 (s 2)

Note: See JIRS Legal digests and announcements for summaries of all items in this list. Content on JIRS is ***only*** available to NSW judicial officers and other JIRS subscribers.

[6-020] Older sexual assault cases and legislation

Last reviewed: November 2023

Cases

21/12/2021 — Sentencing — Crown appeal — *Crimes Act 1900*, s 61I — pharmacist sexually assaulted customer under guise of medical examination — respondent's status as registered health professional reflects trust placed in them and informs seriousness of breach of trust — *Crimes Act*, s 61HE — knowledge of non-consent not a separate aggravating factor but informs abuse of position of trust — non-parole period manifestly inadequate but appeal dismissed — *R v Ibrahim* [2021] NSWCCA 296

30/11/2021 — Appeals — *Criminal Appeal Act 1912*, s 6(1) — sexual offences — prejudicial cross-examination of appellant by Crown Prosecutor on credit matters caused a miscarriage of justice — Court of Criminal Appeal correct to dismiss conviction appeal — no substantial miscarriage of justice — appellate court to consider impact of error on particular proceedings when determining whether to apply proviso — *Hofer v The Queen* [2021] HCA 36

24/11/2021 — Sentencing — *Crimes Act 1900*, s 66EA(1) — maintain unlawful sexual relationship with child — unlawful sexual acts committed before repeal of predecessor offence — replaced s 66EA created new offence — clear legislative intent that new offence operate retrospectively — new s 66EA not subject to s 19 *Crimes (Sentencing Procedure) Act 1999* — judge correct to sentence on basis maximum penalty was life imprisonment — *Xerri v R* [2021] NSWCCA 268

16/11/2021 — *Evidence Act 1995*, s 97 — tendency evidence — historical sexual offences against multiple child complainants — judge did not err by permitting evidence of offences in two institutions as cross-admissible as sexual tendency evidence — no requirement for judge to direct jury on standard of proof necessary for uncharged acts used as tendency evidence — principle in *The Queen v Bauer* (2018) 266 CLR 56 at [86] applies where multiple complainants — *Greenaway v R* [2021] NSWCCA 253

12/11/2021 — Directions — anti-tendency warnings — appellant convicted of sexual offences against his three children — counts tried together — appellant asserted concoction between complainants and mother — CCA correct to conclude no miscarriage — judge did not err by not giving anti-tendency direction where not sought at trial — risk of engaging in tendency reasoning remote and credibility overwhelmingly likely to be decisive of guilt — *Hamilton (a pseudonym) v The Queen* [2021] HCA 33

15/10/2021 — Directions — sexual intercourse without consent — jury note during deliberations appeared to reverse onus of proof for consent — judge should have given specific redirection on consent even though summing up unimpeachable — re-trial ordered — *Gage v R* [2021] NSWCCA 222

03/10/2021 — Sentencing — *Crimes Act 1900*, ss 61I, 66J(1), 86(2)(b) — detention involving repeated physical and sexual violence against domestic partner — judge did not err in application of totality principle — sufficient to reference need for overall sentence to reflect totality of criminality — no particular formula of words required — *Hall v R* [2021] NSWCCA 220

15/09/2021 — Appeals — *Criminal Appeal Act 1912*, s 6(3) — re-sentencing — on finding error appellate court re-exercises sentencing discretion afresh — in doing so court may adopt but is not bound by sentencing judge's findings — *Kentwell v The Queen* (2014) 252 CLR 601 applied — *Young (a pseudonym) v R* [2021] NSWCCA 163

09/09/2021 — Offences — *Crimes Act 1900*, s 61KC — sexual touching without consent — magistrate did not properly consider requirements of s 61HE concerning consent — error to conclude victim required to communicate lack of consent to defendant — reasons inadequate — did not indicate consideration of reasonable steps taken by defendant to ascertain whether complainant consented — *DPP (NSW) v Wright and the Local Court of NSW* [2021] NSWSC 1086

1/09/2021 — Directions — *Criminal Procedure Act 1986*, ss 306X, 306ZI — warnings not to give greater or lesser weight to complainant evidence given by AVL — judge did not err by failing to give warning when complainant's evidence given — warning's timing a discretionary decision to be made in context of particular trial issues — *Long (a pseudonym) v R* [2021] NSWCCA 212

31/08/2021 — Sentencing — *Crimes Act 1900*, s 66EA — maintain unlawful sexual relationship with child — judge erred by finding objective seriousness of offence aggravated by repeated incidents of ejaculation — principles in *Burr v R* [2020] NSWCCA 282 for old s 66EA offence apply to current version of offence — *GP (a pseudonym) v R* [2021] NSWCCA 180

30/08/2021 — Sentencing — judge misinformed by Crown that child sex offences aggravated by breach of conditional liberty — applicant conceded breach in conflicting submissions — judge led into error as a result — Crown advised court it could not prove breach after sentence passed — fundamental obligation of parties to assist Court not met — *McGovern aka Lanesbury v R* [2021] NSWCCA 176

27/08/2021 — Directions — historical child sexual assault — Crown impermissibly addressed on basis appellant's answers in recorded conversation were admissions — no defence objection at trial — judge erred by failing to direct jury as to how answers could be used — notwithstanding lack of objection judge had overriding obligation to ensure appellant's trial was fair — *Decision Restricted* [2021] NSWCCA 124

17/08/2021 — Sentencing — *Crimes Act 1900*, s 61I — sexual intercourse without consent — judge did not err in assessment of objective seriousness — prior or existing relationship does not lessen offence seriousness — circumstances of relationship require consideration — sexual assault involves degradation of victim regardless of who commits offence — *Bussey v R* [2020] NSWCCA 280 applied — *Kiss v R* [2021] NSWCCA 158

06/08/2021 — Directions — *Criminal Law Consolidation Act 1935* (SA), s 50 (similar to *Crimes Act 1900*, s 66EA) — maintain unlawful sexual relationship with child — judge erred by not directing jury as to elements of underlying sexual offences — proof of "unlawful sexual relationship" requires proof of at least two unlawful sexual acts — not sufficient to generally establish relevant acts of sexual or indecent nature — *JJP v The Queen* [2021] SASCA 53

05/08/2021 — Procedure — historical child sexual assaults — defence led evidence accused never angry or violent — Crown permitted to lead rebuttal evidence in response — judge did not err by permitting rebuttal evidence — evidence not admissible in Crown case and issue of accused never being angry or violent not foreseeable — *The Queen v Chin* (1985) 157 CLR 671 applied — *Croft v R* [2021] NSWCCA 146

22/07/2021 — Procedure — historic child sex offences — *Crimes Act 1900*, ss 78K, 78T, 81 (each rep), 80AF — uncertainty about offence date — indictment amended after arraignment and after s 80AF had commenced — judge did not err by applying s 80AF — s 80AF retrospective and applies to pending proceedings — procedural only — does not make past acts criminal, create offence or alter pre-existing offence — s 78K offence statute-barred — *Stephens v R* [2021] NSWCCA 152

21/06/2021 — *Evidence Act 1995*, s 106 — credibility rule exception — no miscarriage of justice by not admitting witness's convictions — s 106 directed at denial of convictions, not offending conduct — jury aware witness convicted of like offences involving 27 victims — convictions for two further victims would not significantly impact witness' credibility or verdict — *O'Hearn (formerly DAO (No 4)) v R* [2021] NSWCCA 103

04/06/2021 — *Evidence Act 1995*, ss 76, 79 — opinion evidence — specialised knowledge exception — *Crimes Act 1900*, s 61N(1) (rep) — act of indecency — GP's evidence concluding abnormality on applicant's penis inadmissible — GP did not have relevant specialised knowledge — conviction quashed — *Denton v R* [2020] NSWCCA 341

04/06/2021 — *Evidence Act 1995*, ss 66(2)–(2A), 137 — judge did not err by refusing to exclude complainant's evidence under s 137 on basis she had EMDR therapy — EMDR not used to revive memory — no error to admit complaint evidence under exception to hearsay rule in s 66(2) — events traumatic and complaints made repeatedly in similar terms — delayed complaints may be "fresh in the memory" — *Kassab (a pseudonym) v R* [2021] NSWCCA 46

05/05/2021 — Sentencing — *Crimes (Sentencing Procedure) Act 1999*, s 21A(2)(g) — historical child sexual offences against three nieces — victim impact statements (VIS) — judge did not err in finding harm disclosed in VIS greater than ordinarily attaches to child sexual offences — finding of substantial harm as an aggravating factor was open — *Culbert v R* [2021] NSWCCA 38

30/04/2021 — Directions — *Crimes Act 1900*, ss 61HA (rep), 61HE, 61I — consent — sexual intercourse without consent knowing complainant not consenting — judge incorrectly applied current consent provision (s 61HE) when predecessor provision (s 61HA) applied — judge misdirected jury in respect of substantial intoxication and complainant's capacity to consent — comparison of consent provisions in ss 61HE and 61HA — *Beattie v R* [2020] NSWCCA 334

26/04/2021 — Sentencing — *Crimes Act 1900*, s 66EA (since amended) — persistent sexual abuse of child — ingredient offences occurred in NZ and NSW — no error in judge's approach to s 66EA — gravamen of offence reflected in 25 year maximum penalty which provides sentencing yardstick — maximum penalties for ingredient offences in NSW assist only as a guide to objective seriousness — *Hillman v R* [2021] NSWCCA 43

25/04/2021 — *Criminal Procedure Act 1986*, s 293 — evidence of complainant's prior sexual activity or experience — sexual intercourse without consent — judge erred by excluding, under s 293(3), part of appellant's ERISP concerning complainant's sexual experience — exception in s 293(4) applied — probative value of evidence outweighed complainant's distress, humiliation or embarrassment if admitted — *Decision Restricted* [2021] NSWCCA 51

25/04/2021 — Evidence — *Criminal Procedure Act 1986*, s 293 — evidence of complainant's prior sexual activity or experience — sexual intercourse without consent — judge erred by excluding, under s 293(3), part of appellant's ERISP concerning complainant's

sexual experience — exception in s 293(4) applied — probative value of evidence outweighed complainant's distress, humiliation or embarrassment if admitted — *Decision Restricted* [2021] NSWCCA 51

19/04/2021 — Sentencing — *Crimes (Sentencing Procedure) Act 1999*, s 53A — aggravated sexual intercourse with cognitively impaired victim — judge did not err in approach to totality — aggregate sentence determined by assessing totality of criminality in all offending — principles concerning accumulation and concurrency do not apply to aggregate sentences — *Aryal v R* [2021] NSWCCA 2

08/03/2021 — Sentencing — *Crimes Act 1900*, s 73(2) — sexual intercourse with person under special care aged 17 — judge did not err in assessing objective seriousness of offences as being in mid-range — position of victim within age range of very little significance — foundation for contact based on teacher-student relationship — offences constituted egregious breach of trust — *Gale v R* [2021] NSWCCA 16

24/02/2021 — Directions — lies — applicant's statements in ERISP inconsistent with his evidence at trial — defence counsel did not seek direction on lies — miscarriage of justice occasioned by judge failing to direct jury on lies — Crown's closing address on lies risked impermissible consciousness of guilt reasoning — despite defence counsel's forensic decision, judge had overriding obligation to ensure fair trial — *DC v R* [2019] NSWCCA 234

12/02/2021 — Directions — *Evidence Act 1995*, s 165B — forensic disadvantage — child sexual assault — 3-year-delay in complaint — no error in judge declining to give forensic disadvantage direction — not unexpected for delay in complaint when offences involve family members and threats made — applicant's misconduct (threats) relevant to whether direction should be given — *Cabot (a pseudonym) v R (No 2)* [2020] NSWCCA 354

02/02/2021 — Crown appeals — sexual assaults committed by teacher-mentor on student — judge erred in assessing objective seriousness of offences as bottom of range — role of intermediate appellate court — cannot increase sentence unless manifest inadequacy established even where patent error found — discussion of *DPP (NSW) v Burton* [2020] NSWCCA 54 — sentence manifestly inadequate — *Manojlovic v R; R v Manojlovic* [2020] NSWCCA 315

28/01/2021 — Sentencing — *Crimes Act 1900*, s 67 (rep) — carnal knowledge of girl under 10 — juvenile offender — 16/17 years old — sentence manifestly excessive — applicant need not demonstrate a clear sentencing range by reference to statistics or comparable cases to establish manifest excess — *RA v R* [2020] NSWCCA 356

24/12/2020 — Procedure — witness intermediaries — *Criminal Procedure Act 1986*, Sch 2, Pt 29, Div 3, cl 89(5) — judge erred by declining to revoke intermediary's appointment — intermediary assisted witness in professional capacity before appointment — cl 89(5)(b) does not require subjective inquiry into intermediary's impartiality and not limited to direct therapeutic assistance — court retains discretion to revoke appointment — *SC v R* [2020] NSWCCA 314

01/12/2020 — Sentencing — *Crimes Act 1900*, ss 63, 71, 78A (all rep) — rape, carnal knowledge of girl aged 10-16, incest — representative counts — predatory sexual offending against sibling over many years in the 1960s/70s — judge did not err by finding offence committed when victim 16 towards top of range for rape — substantial sentence not manifestly excessive — *Franklin v R* [2019] NSWCCA 325

27/11/2020 — Sentencing — *Crimes Act 1900*, s 61J(1) — aggravated sexual intercourse without consent — prior intimate relationship between victim and offender cannot mitigate objective seriousness of offence — no error in judge's approach to sentencing — *Bussey v R* [2020] NSWCCA 280

26/11/2020 — Directions — historic sexual assaults — multiple complainants — lies — judge erred by directing certain lies could be considered as consciousness of guilt — those lies not relied on by Crown in that way — good character — judge erred by refusing to admit evidence applicant had no prior convictions — concern for what might occur at a subsequent trial irrelevant — *Pethybridge v R* [2020] NSWCCA 247

24/11/2020 — Sentencing — child sex offences — judge erred by failing to give weight to applicant's prior good character — necessary to first determine if offender is of good character then consider weight to be given to that factor — *Ryan v The Queen* (2000) 206 CLR 267 applied — *BG v R* [2020] NSWCCA 295

12/11/2020 — *Evidence Act 1995*, s 110 — character evidence — appellant convicted of assault and indecent assault of his children — good character raised in defence case and Crown relied on rebuttal evidence — judge correctly directed rebuttal evidence could be used to determine appellant's character — no requirement to also warn jury not to use character in determining guilt as would have undermined defence case — *FB v R* [2020] NSWCCA 137

06/11/2020 — Directions — sexual assault — Crown case at trial wholly dependent on accepting complainant's evidence — appellant did not give evidence — Qld Court of Appeal erred by finding judge's directions regarding appellant's silence did not cause miscarriage of justice — *Azzopardi v The Queen* (2001) 205 CLR 50 direction required in almost all cases — *GBF v The Queen* [2020] HCA 40

29/10/2020 — *Evidence Act 1995*, ss 12, 13 — witness competence — 5-year-old child complainant diagnosed with autism spectrum disorder and hearing impairment — judge did not err by finding complainant competent to give unsworn evidence — Witness Intermediary Assessment Report indicated complainant able to give evidence if appropriately questioned — question of reliability separate to competence — *Gray v R* [2020] NSWCCA 240

29/10/2020 — Sentencing — sexual assault — observations concerning inappropriateness of exchange between sentencing judge and counsel about appropriate sentence — judge's role to determine sentence — JIRS statistics not a starting point for calculating sentence — *Barbaro v The Queen* discussed — *Tatur v R* [2020] NSWCCA 255

23/10/2020 — Sentencing — *Criminal Code* (Cth), ss 474.19(1)(a)(iv), 474.27(1) — cybersex offences — 14-year-old victim — judge failed to give discount for utilitarian value of guilty pleas for Cth offences — judge correctly assessed objective gravity of offences — primacy of general deterrence and denunciation for offences involving procuring children for child abuse material offences using internet — *Small v R* [2020] NSWCCA 216

13/10/2020 — Sentencing — *Crimes Act 1900*, ss 61HA (now ss 61HE), 61J — aggravated sexual intercourse without consent — judge did not err by finding beyond reasonable doubt applicant reckless as to consent — not inconsistent to also find reasonably possible applicant believed victim consenting — no requirement to sentence according to state of mind proffered by Crown but according to what evidence proves — *Saffin v R* [2020] NSWCCA 246

25/09/2020 — *Evidence Act 1995*, s 87 — admissions in furtherance of common purpose — judge erred in approach to s 87 and by admitting representations of third party as admissions

— satisfaction of s 87(1)(c) criteria does not render representation admissible at trial without further evidentiary decision — common purpose must be that alleged in those proceedings — *Higgins v R* [2020] NSWCCA 149

21/09/2020 — *Criminal Appeal Act 1912*, s 5F(3) — *Crimes Act 1900*, ss 61J, 61H(1) (see now s 61HA) — digital penetration during medical examination — "proper medical purposes" exception — judge erred by finding that to exclude exception Crown must prove sexual gratification was sole purpose of penetration — *Decision Restricted* [2020] NSWCCA 138

31/08/2020 — Offences — *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW), s 13(1) — *Child Protection (Offenders Registration) Act 2000*, ss 3A, 17(1) — contravening child protection prohibition orders — orders invalid as applicant not a "registrable person" within s 3A — appropriate to remit matter to District Court for sentence — *Watson v R* [2020] NSWCCA 215

24/08/2020 — Directions — child sexual assault — judge's summing up unfair and unbalanced — summing-up of defence case cursory — caused miscarriage of justice — *Evidence Act 1995*, ss 60, 66 — complaint evidence — judge erroneously directed jury complaint evidence was independent of other evidence given by complainant — *SB v R* [2020] NSWCCA 207

24/08/2020 — *Criminal Procedure Act 1986*, s 133(2), (3) — trial by judge alone — child sexual assault — sufficiency of reasons — judge erred by failing to address a critical part of defence case — reasons did not explain why evidence of Crown experts preferred over defence experts — re-trial ordered — *Toohey v R* [2020] NSWCCA 166

04/08/2020 — Directions — *Evidence Act 1995*, ss 97, 101 — tendency evidence — context evidence — charged counts on indictment used as tendency evidence — judge did not err by omitting aspects of suggested tendency direction in *Criminal Trial Courts Bench Book* — suggested Bench Book directions advisory and must be adapted to circumstances of individual case — *BRC v R* [2020] NSWCCA 176

15/07/2020 — *Criminal Procedure Act 1986*, s 293 — prohibition on cross-examination concerning prior sexual experience or activity — judge erred by refusing a voir dire to determine whether exclusions in s 293(3) or exceptions in s 293(4) applied — admissibility of evidence to be determined by ordinary evidentiary principles — *Decision Restricted* [2020] NSWCCA 115

31/07/2020 — Procedure — *Criminal Procedure Act 1986*, s 293 — prohibition on questioning complainant about prior sexual activity or experience — judge correct to refuse stay application — judge also correct to conclude s 293 extends to evidence of false complaint — *M v R* (1993) 67 A Crim R 549 correctly decided — *Jackmain (a pseudonym) v R* [2020] NSWCCA 150

30/07/2020 — Offences — *Criminal Law Consolidation Act 1935* (SA), s 50 (similar to s 66EA *Crimes Act 1900* (NSW)) — maintain unlawful sexual relationship with child — stated case — elements of offence — meaning of "relationship" — duration, nature and continuity of interactions to be considered — relationship elements must comprise more than alleged unlawful sexual acts alone — *R v Mann* [2020] SASCFC 69

30/07/2020 — Offences — *Criminal Law Consolidation Act 1935* (SA), s 50 — maintain unlawful sexual relationship with child (similar to previous and current *Crimes Act 1900*,

s 66EA) — elements — relationship a separate element of offence — actus reus of offence is maintenance of relationship during which adult engages in two or more unlawful sexual acts with child — relationship in this case familial — *R v M, DV* [2019] SASCFC 59

29/07/2020 — Sentencing — Crown appeal — *Crimes Act 1900*, s 91H(2) — produce child abuse material — online chats between offenders describing sexual acts involving their children — judge erred by assessing offences as just below mid-range — *R v Hutchinson* [2018] NSWCCA 152 factors relevant considerations — relationship of children to offenders and circumstances in which material produced also relevant — *R v LS* [2020] NSWCCA 148

23/07/2020 — Procedure — *Criminal Procedure Act 1986*, ss 299, 299C, 299D — sexual assault communications privilege — judge erred by granting leave to issue subpoena without considering legislative requirements — *R v Bonanno; ex parte Protected Confider* [2020] NSWCCA 156

16/07/2020 — *Evidence Act 1995*, ss 97, 101 — tendency evidence — judge did not err by admitting evidence that applicant had a tendency to have a sexual interest in young girls and to act on that interest — tendency evidence should not be considered in isolation — unusual case of tendency but offence charged and tendency evidence shared sufficiently common features — *Vagg v R* [2020] NSWCCA 134

16/07/2020 — Sentencing — *Criminal Code* (Cth), ss 474.27, 474.19(1) — cybersex offences against young girls — 18 year old offender — presumption children suffer harm because of prohibited sexual activities applies to cybersex offences — *Adamson v R* (2015) 47 VR 268 applied — sentence failed to reflect judge's finding that less weight given to specific and general deterrence because of applicant's immaturity and mental condition — judge erred by relying on dissimilar decisions to identify sentencing range — *Kannis v R* [2020] NSWCCA 79

18/06/2020 — Sentencing — *Crimes (Sentencing Procedure) Act 1999*, ss 31, 32, 33(2) — judge erred by taking Form 1 offences into account across multiple offences — offences on a Form 1 can only be taken into account on one principal offence — parties must ensure principal offence and offences to be taken into account are clearly identified — *LS v R* [2020] NSWCCA 27

03/06/2020 — Sentencing — *Crimes (Sentencing Procedure) Act 1999*, s 22 — guilty plea discounts — *Criminal Procedure Act 1986*, s 166 — procedures for back-up charges — approach to determining sentence where indictable offence dealt with summarily — judge did not err by indicating sentence higher than jurisdictional limit for related offence before applying discount for plea —jurisdictional limit does not equate to maximum penalty — *R v Doan* (2000) 50 NSWLR 115 applied— *Park v R* [2020] NSWCCA 90

01/06/2020 — Procedure — *Crimes (High Risk Offenders) Act 2006*, s 13(1) — revocation of extended supervision order (ESO) — no serious offences committed in 19 years since ESO imposed — no high risk of sexual offending — impact of ESO and incarceration for relatively minor breaches adversely affecting prospects of rehabilitation — *State of NSW v Carr* [2020] NSWSC 643

29/05/2020 — Sentencing — historical child sexual offences — sentence not manifestly excessive notwithstanding strong subjective case — evidence relating to COVID-19 pandemic not fresh evidence and not admissible to support manifest excess ground — risks of COVID-19 in prison system moderated by controls introduced by Corrective Services — *Cabezuela v R* [2020] NSWCCA 107

20/05/2020 — Sentencing — practice of referring to sentence reasons as "remarks on sentence" — phrase is not outdated and has contemporary legislative status — observations to opposite effect in *You v R* [2020] NSWCCA 71 questioned — *Maxwell v R* [2020] NSWCCA 94

20/05/2020 — Conviction appeal — *Evidence Act*, s 97(1) — tendency evidence — judge's directions pre-*Bauer* — judge did not err by directing jury that criminal standard of proof required for tendency evidence — evidence not elevated to essential intermediate fact — no real risk jury improperly used tendency evidence — *Jackson v R* [2020] NSWCCA 5

15/05/2020 — Sentencing — Appeals — re-sentencing — child sexual assault — 72-year-old applicant with pre-existing medical conditions — sentence manifestly excessive given exceptional nature of case — potential impact of COVID-19 pandemic considered on re-sentence — *Scott v R* [2020] NSWCCA 81

15/05/2020 — Offences — *Crimes Act 1900*, ss 61L (rep) and 61I — sexual assault — verdicts not unreasonable — observations concerning cross-examination of witnesses, including complainant, about behaviour during and after assaults — futile to assess complainants' behaviour by reference to stereotypical expectations — *Maughan v R* [2020] NSWCCA 51

13/05/2020 — Procedure — prosecution duty of disclosure — duty satisfied by entirety of electronic material seized from applicant's phone being made available to defence — prosecution not required to draw potentially unfavourable or exculpatory documents from the electronic material to the defence's attention — no miscarriage of justice established — *Edwards v R* [2020] NSWCCA 57

08/05/2020 — Sentencing — Crown Appeal — *Crimes Act 1900*, s 66A(1) — child sexual assault — *Crimes (Sentencing Procedure) Act*, ss 17B, 17C, 17D, 89 — judge erred by imposing CCO without first obtaining a sentence assessment report — proposed work condition not available — sentence manifestly inadequate — residual discretion exercised — offender aged 76 vulnerable to COVID-19 due to existing health issues — *RC v R* [2020] NSWCCA 76

05/05/2020 — Sentencing — historical child sexual assault — *Crimes (Sentencing Procedure) Act 1999*, s 25AA — provision abolishes requirement to sentence in accordance with sentencing principles at time of offence — observations concerning whether s 25AA applies following successful sentence appeal if did not apply to original proceedings — no error in judge's approach to determining appropriate non-parole period — no requirement that non-parole period be fixed at 50% of head sentence — *Corliss v R* [2020] NSWCCA 65

01/05/2020 — Sentencing — *Crimes (Sentencing Procedure) Act 1999*, ss 21A(2)(k), (l), 22 — aggravating factors — multiple child sexual assaults — no error in judge finding offences aggravated because victims vulnerable and under applicant's authority — judge did not breach principle in *The Queen v De Simoni* or double-count — uniform guilty plea discount appropriate given limited plea negotiation information — *Davies v R* [2019] NSWCCA 45

30/04/2020 — Procedure — *Law Enforcement (Powers and Responsibilities) Act 2002*, ss 48, 65 — search warrants — issuing officer's obligations to record basis for granting warrant — warrant invalid — efficiency considerations do not justify police practice of presenting applications which presuppose outcome — *Doyle v Commissioner of Police* [2020] NSWCA 11

30/04/2020 — Crown appeal — sexual assault — community correction order imposed — *Crimes (Sentencing Procedure) Act 1999*, ss s 21A(5AA), (2)(k) — judge erred by taking into

account self-induced intoxication as mitigating fac tor (s 21A(5AA)) — judge did not err by not taking into account abuse of trust (s 21A(2)(k)) — residual discretion exercised — appeal dismissed — *DPP (NSW) v Burton* [2020] NSWCCA 54

17/04/2020 — Appeal — historical child sexual assault — Victorian Court of Appeal majority failed to properly consider whole of evidence when determining conviction appeal — evidence as a whole not capable of excluding a reasonable doubt as to applicant's guilt — *SKA v The Queen* (2011) 243 CLR 400 considered — appellate court should only view recordings of evidence in exceptional cases — verdicts unreasonable — acquittals entered — *Pell v The Queen* [2020] HCA 12

31/03/2020 — Sentencing — *Criminal Code* (Cth), ss 272.9(1), 272.11(1), 272.14(1) — child sex offences outside Australia — judge did not err in assessment of objective seriousness — factors identified in *DPP (Cth) v Beattie* [2017] NSWCCA 301 relevant to assessing objective seriousness of offences against ss 272.11 and 272.14 — *Baden v R* [2020] NSWCCA 23

25/03/2020 — Sentencing — *Criminal Law Consolidation Act 1935* (SA), s 50 — persistent sexual exploitation of a child — sentencing judge erred by not sentencing applicant on facts most favourable to him as required by *Chiro v The Queen* (2017) 260 CLR 425 — *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA), s 9(1) not engaged — judge did not make findings about acts of sexual exploitation he found proved — facts on sentence adverse to offender must be proved beyond reasonable doubt — sentence remarks should make findings clear — *KMC v DPP (SA)* [2020] HCA 6

13/03/2020 — *Evidence Act 1995*, ss 102–104, 110, 112, 192 — irrelevant evidence led during Crown's cross-examination of appellant concerning his credit and good character — trial miscarried because cross-examination impermissible and prejudicial — further miscarriages of justice resulting from character directions and replaying complainant's evidence without warnings — *IW v R* [2019] NSWCCA 311

13/03/2020 — Conviction appeal — sexual assault/act of indecency offences against child — applicant convicted of four counts and acquitted of another four counts — verdicts unreasonable as complainant's lack of credibility affected all counts — jury verdict neither logical nor reasonable — *Wheeler v R* [2019] NSWCCA 255

10/03/2020 — Sentencing — sexual assault offences — sentencing judge did not err by explaining cunnilingus was sexual assault to non-Australian offender — judge merely discharging duty to provide reasons and explaining scope of definition of sexual intercourse — observations concerning differing manners of giving reasons — *Rahman v R* [2020] NSWCCA 13

03/03/2020 — *Evidence Act 1995*, s 89A — special caution — right to silence exercised by appellant on legal advice — miscarriage of justice because not open to jury to draw adverse inference from exercise of right — onus on Crown to establish appellant's silence was because he had no innocent explanation — s 89A abrogates common law right to silence — miscarriage caused by Crown undermining good character evidence led at trial — prejudicial to suggest appellant's work with vulnerable children suspicious — verdict of acquittal ordered — *Hogg v R* [2019] NSWCCA 323

19/02/2020 — Procedure — joint trials — child sexual assault offences — no real injustice caused by appellant being jointly tried with co-accused — no unacceptable risk of unfair

prejudice to appellant arising from tendency evidence admissible only against co-accused — Crown case against appellant not significantly weaker than that against co-accused — risk of prejudice mitigated by judge's directions — *DR v R* [2019] NSWCCA 320

31/01/2020 — Procedure — sexual assault of child under 10 — *Criminal Procedure Act 1986*, s 133 — warnings a judge should consider in judge alone trials — *Evidence Act 1995*, ss 165, 165A — warnings concerning unreliable evidence and children's evidence — judge did not err by taking warning ordinarily given to jury about reliability of complainant's evidence into account — no miscarriage of justice — *GBB v R* [2019] NSWCCA 296

28/01/2020 — Sentencing —*Crimes Act 1900*, ss 66A, 66B, 66C — child sexual assault — sentence imposed was manifestly excessive — approach to comparable cases — need to consider particular facts in cases underlying statistics — analysis of cases relied on during appeal — *Facer (a pseudonym) v R* [2019] NSWCCA 180

24/01/2020 — Sentencing — *Crimes Act 1900*, s 323(a) — persuade witness to withhold true evidence — applicant acquitted of sexual assault but convicted of persuading complainant not to give true evidence of sexual assault — verdicts not unreasonable or inconsistent — sentencing — judge did not err by failing to take into account absence of threats of violence when assessing objective seriousness — *Vasilevski v R* [2019] NSWCCA 277

24/01/2020 — Conviction appeal — indecent assault on person under 16 — applicant did not give evidence at trial but his record of interview was admitted into evidence — failure of judge to give an *Azzopardi* direction did not occasion a miscarriage of justice — rational choice of trial counsel not to seek a direction — *JPM v R* [2019] NSWCCA 301

17/01/2020 — Sentencing — *Crimes Act 1900*, ss 81, 61E(1A), 61M(1) (all repealed), 66C — historical child sexual offences — *Crimes (Sentencing Procedure) Act 1999*, s 25AA(1) — considering current sentencing practices and the importance of expressly stating s 25AA(1) has been applied — four prosecutions over 25 years — judge erred by giving delay and rehabilitation a "dominant role" on sentence — totality — sentence failed to reflect seriousness of whole conduct — *R v Cattell* [2019] NSWCCA 297

17/12/2019 — Directions — onus and standard of proof — sexual offences — appellant did not give evidence at trial but denied offences in police interview — Qld Court of Appeal correct to conclude Liberato direction not required — trial judge's directions on onus and standard of proof clear and correct — *Liberato v The Queen* (1985) 159 CLR 507 direction may apply where accused's version of events not on oath — suggested re-framing of *Liberato* direction — *De Silva v The Queen* [2019] HCA 48

20/11/2019 — Sentencing — *Criminal Code*(Cth), ss 474.19(1) (rep), 474.27A(1) — *Crimes Act 1900*, s 91H(2) — possess/transmit/solicit child pornography/child abuse material and transmit indecent communication to child — general deterrence a primary consideration for offences involving sexual predatory conduct towards children — sentence not manifestly excessive — *Martin v R* [2019] NSWCCA 197

11/11/2019 — Procedure — *Crimes Act 1900*, s 61I— sexual assault — no miscarriage of justice caused by prosecutor's cross-examination of accused about evidence not previously put to Crown witnesses — prosecutors should rarely use rule in *Browne v Dunn* to attack credit of accused — *Hofer v R* [2019] NSWCCA 244

07/11/2019 — Sentencing — *Crimes (Sentencing Procedure) Act 1999*, s 25AA — historical child sexual offences — *Crimes Act 1900*, s 81 (rep) — indecent assault on male — s 25AA

requires consideration of current sentencing practices — factors such as breadth of offending, maximum penalty and lack of standard non-parole period relevant considerations — *O'Sullivan v R* [2019] NSWCCA 261

04/11/2019 — Directions — *Evidence Act 1995*, s 165B — delay in prosecution — historical child sexual assault — judge did not err by failing to consider specific directions concerning delay to be given during trial — directions regarding prejudicial delay must conform with s 165B not principles in *Longman v The Queen*(1989) 168 CLR 79 — no error to refuse to permanently stay proceedings — *Decision Restricted* [2019] NSWCCA 214

08/10/2019 — Sentencing — *Crimes Act 1900*, ss 61HA, 61J(1), 61M(1) (rep) — aggravated sexual intercourse without consent — aggravated indecent assault — victim with serious physical disability — no error in assessment of objective seriousness of offences as "slightly above mid-range" — absence of aggravating factors does not diminish gravity of offences — no hierarchy of sexual offences ranked by type of penetration or sexual connection — *Tindall v R* [2019] NSWCCA 136

04/10/2019 — Sentencing — *Crimes Act 1900*, ss 61M(2) (rep), 66A — child sexual assault — juvenile offenders — judge erred by failing to take into account applicant's age and mental condition when determining objective seriousness of offence — both relevant to assessment of objective seriousness when causative of offending — limited sentencing options available following commencement of community-based sentencing options on 24 September 2018 — *BM v R* [2019] NSWCCA 223

02/10/2019 — Conviction appeal — *Crimes Act 1900*, Pt 3, Div 10 — sexual offences — counsel's failure to lead evidence of appellant's good character caused substantial miscarriage of justice — issue of character notoriously important in serious sexual assault cases involving word on word factual disputes — likely that failure to lead evidence of character affected trial outcome particularly since Crown case not strong — verdict of acquittal entered — *Xu v R* [2019] NSWCCA 178

20/08/2019 — Sentencing — *Crimes Act 1900*, s 61J — aggravated sexual assault — judge erred by failing to give reasons concerning application of totality principle — sentencing judges required to provide insight into determination in reasons — offenders and community entitled to know how and why a sentence of imprisonment has been assessed — no lesser sentence warranted — *Porter v R* [2019] NSWCCA 117

19/08/2019 — Sentencing — Crown appeal — *Crimes Act 1900*, s 66A(2) — aggravated sexual intercourse — 11 month old victim — respondent serving sentence for manslaughter of victim at time of s 66A offence — judge misapplied totality principle — inappropriate to characterise criminality of s 66A(2) offence as substantially reflected in manslaughter offence — *R v Toohey* [2019] NSWCCA 182

06/08/2019 — Sentencing — *Crimes Act 1900*, s 66A(2) — child sexual assault — no error in sentencing judge's finding that offences "within the worst category" — judge undertaking task of placing offences on scale of objective gravity "near the top of the range" — sentence not manifestly excessive — legislative history of s 66A(2) a relevant consideration — sentences must be commensurate with offending and reflect community revulsion for such offences — *Gibbons (a pseudonym) v R* [2019] NSWCCA 150

30/07/2019 — Directions — sexual assault — consent — judge erred by directing jury that accused could be convicted if they were satisfied beyond reasonable doubt he did not care

whether or not complainant consented — directions reversed onus of proof — suggested jury was to decide between two competing versions not determine lack of consent beyond reasonable doubt — *Yu v R* [2018] NSWCCA 201

24/07/2019 — Sentencing — *Crimes Act 1900*, s 66EB(2), (2A) — procure child for unlawful sexual activity — travel to meet child under 14 following grooming — judge erred in degree of accumulation allowed between sentences — no error deciding not to impose wholly concurrent sentences but degree of accumulation excessive — no double counting of "grooming" which was an element of s 66EB(2A) offence but not s 66EB(2) offence — *Milliner v R* [2019] NSWCCA 127

30/06/2019 — Conviction appeal — sexual offences committed by 11- to 13-year-old — evidence in Crown case did not rebut presumption of doli incapax — no evidence of applicant's maturity or intelligence — circumstances of offending incapable of rebutting presumption — *Evidence Act 1995*, ss 97, 101 — tendency evidence correctly admitted — common features of each incident sufficiently specific and of significant probative value — directions to jury about use of tendency evidence ameliorated its prejudicial effect — *BC v R* [2019] NSWCCA 111

26/06/2019 — Sentencing — *Criminal Code* (Cth), ss 272.14, 474.19, 474.26, 474.27A — procure child to engage in sexual activity outside Australia — use carriage service to transmit indecent communication to child/procure child for sexual activity — general deterrence important for such offences — very lengthy term of imprisonment not necessarily appropriate — sentence excessive given applicant not procuring for sexual activity with himself, no masking of identity, and no inducement or arrangements for activity — comparisons with other cases often difficult, if not meaningless, for such offences — *McNiece v R* [2019] VSCA 78

24/06/2019 — Sentencing — *Crimes Act 1900*, s 61J(1) — aggravated sexual intercourse without consent — judge did not err in approach to assessing objective seriousness of offences — incorrect to characterise Crown written sentence submissions that offences in low-range of objective seriousness as a concession — *McClelland v R* [2019] NSWCCA 59

03/06/2019 — Sentencing — *Criminal Code* (Cth), s 474.19(1) — animated child pornography in CETS Category 6 — not a "victimless crime" — not substantially different from other categories — material normalises exploitative sexual activity of children — judge did not err by considering applicant's employment as AFP officer an aggravating factor — *R v Edwards* [2019] QCA 15

24/05/2019 — *Evidence Act 1995*, ss 55, 137 — *Crimes Act 1900*, ss 61M(2) (rep) and 66C(3) — child sex offences — judge correct to conclude photographs of penis not admissible for comparison with complainant's drawings of same — any probative value of evidence outweighed by unfair prejudice — *R v Denton* [2019] NSWCCA 81

15/05/2019 — Sentencing — *Crimes Act 1900*, s 61J(1) — aggravated sexual intercourse without consent — no error in description of objective seriousness of offence — determining objective seriousness by reference to a point on a spectrum of culpability not a necessary component of sentencing task — *Criminal Appeal Act 1912*, s 5D — Crown appeal — sentence manifestly inadequate — appropriate to intervene because sentence did not address sentencing principles, gravity of offending or physical and psychological impact on complainant — *R v DP* [2019] NSWCCA 55

18/04/2019 — Sentencing — *Criminal Code* (Cth), ss 474.26 — use carriage service to procure person under 16 for sexual activity — manifestly excessive sentence failed to reflect

applicant's youth and immaturity which materially contributed to offending — observations concerning Crown's reliance on comparative cases with significant distinguishing features — *Clarke-Jeffries v R* [2019] NSWCCA 56

21/03/2019 — Appeals — proviso — erroneous jury direction given in relation to complainant's lies — complainant's credibility and reliability central issue at trial — appellate court erred in applying proviso — misdirection cannot be assumed to have had no effect upon jury's verdict —misdirection effectively precluded jury from adopting a reasoning process open and favourable to appellant — *OKS v State of Western Australia* [2019] HCA 10

23/01/2019 — *Criminal Procedure Act 1986*, ss 298, 299B, 299D — sexual assault communications privilege — judge not precluded from exercising independent discretion when determining whether to grant access to protected confidence documents where another judge previously granted leave for subpoena to produce — judge required to consider s 299D when determining whether access should be granted — satisfying conditions in s 299B(3) necessary, but not sufficient, requirement for access — *PPC v Stylianou* [2018] NSWCCA 300

15/01/2019 — *Evidence Act 1995*, ss 97, 101(2) — tendency evidence — child sexual assault offences — judge erred by relying on dissenting reasons in CCA judgment of *McPhillamy v R* [2017] NSWCCA 130 when High Court judgment reserved — judge should have applied principles in *Hughes v The Queen* (2017) 92 ALJR 52 and other decided cases — incorrect to conclude probative value of evidence outweighed by prejudicial effect — appropriate directions could address prejudice — *DPP (NSW) v RDT* [2018] NSWCCA 293

11/01/2019 — Sentencing — *Crimes Act 1900*, s 66C — aggravated sexual intercourse with child between 10 and 14 — under authority — victim 12 years old — applicant 21-year-old babysitter — judge's findings regarding objective seriousness of offences not reasonably open — aggravating circumstance had to be analysed in context of range of aggravating circumstances prescribed by s 66C(5) — *Dawkins v R* [2018] NSWCCA 27

14/11/2018 — *Evidence Act 1995*, s 97(1)(b) — tendency evidence — historical sexual offences — majority of NSW CCA erred by finding evidence of prior sexual offending against different complainants committed a decade earlier admissible as tendency evidence — evidence did not meet threshold requirement of significant probative value in s 97(1)(b) — features of previous conduct and present offending insufficient to link two together — *McPhillamy v The Queen* [2018] HCA 52

31/10/2018 — *Evidence Act 1929* (SA), s 34P(2) — context evidence — historical child sexual assault — SA Court of Appeal correct to conclude evidence of uncharged acts to explain otherwise implausible aspects of complainant's evidence admissible — probative value of evidence substantially outweighed any prejudicial effect on appellant — directions adequately explained use jury could make of context evidence — no substantial miscarriage of justice — *Johnson v The Queen* (2018) 92 ALJR 1018; [2018] HCA 48

30/10/2018 — Directions — miscarriage of justice occasioned by judge's directions responding to jury question about counsel's questioning of complainant — directions erroneously left jury in a position to assess appellant's credibility on basis of their determination of a false issue — capacity of jury to fairly and properly assess appellant's credibility seriously impaired — *Llewellyn v R* [2011] NSWCCA 66

14/08/2018 — *Court Suppression and Non-publication Orders Act 2010*, ss 8, 14 — appeal against revocation of interim non-publication order — judge did not err in approach to determining whether order in the public interest — accurate reporting of sexual assault

trial shows applicant not criminally involved — no prospect of applicant being humiliated or embarrassed by publication — legislation does not operate to prevent mere discomfit to witness — *Qiangdong Liu v Fairfax Media Publications Pty Ltd* [2018] NSWCCA 159

18/10/2018 — Evidence — *Criminal Procedure Act 2009* (Vic), s 381(1) — admissibility of complainant's recorded evidence from previous trial — Victorian provision broadly similar to s 306I, *Criminal Procedure Act 1986* — Victorian Court of Appeal's approach to determining question of complainant's willingness to give evidence incorrect — this determination a question of degree to be determined by reference to other factors in s 381(1) — Court erred by concluding evidence of complaint not admissible as a previous representation within *Evidence Act 2008* (Vic), s 66 (identical to *Evidence Act 1995*, s 66) because not fresh in the memory — further error to conclude probative value of evidence of complaint outweighed by danger of unfair prejudice under *Evidence Act*, s 137 (identical to Evidence Act 1995, s 137) — *The Queen v Dennis Bauer (a pseudonym)* (2018) 92 ALJR 846; [2018] HCA 40

01/10/2018 — Directions — historical indecent assault — judge erred by addressing matters associated with complainant's credibility in a way contrary to agreement between parties as to conduct of trial — directions suggested jury need not consider reasonable possibilities put by defence arising from evidence in trial — re-direction did not cure error — *SY v R* [2018] NSWCCA 6

26/09/2018 — Directions — *Evidence Act 2008* (Vic), ss 97, 135, 137 (identical to *Evidence Act 1995*, ss 97, 135, 137) — tendency evidence — multiple sexual offences committed against single complainant — suggested jury directions in single complainant sexual offence cases where evidence of uncharged acts admitted as tendency evidence — judge should not ordinarily direct jury they may only act on evidence of uncharged acts if satisfied they are proved beyond reasonable doubt — NSW practice of directing in these terms should not continue — *The Queen v Dennis Bauer (a pseudonym)* (2018) 92 ALJR 846; [2018] HCA 40

20/08/2018 — Sentencing — multiple child sex offences — judge indicated same term for numerous offences — no error in assessment of objective seriousness of each offence — judge adopted discriminating rather than "broad-brush" approach — little variation in objective seriousness for many of the offences — no requirement for judge to rank offences according to scale of seriousness — *Rampe v R* [2018] NSWCCA 163

05/07/2018 — *Evidence Act 1995*, ss 97, 100(1), 192(2) — tendency evidence — application to dispense with notice requirements — judge erred by treating lack of sufficient explanation for non-compliance as mandatory and determinative of application — additional error to treat perceived need to correct Crown's systemic non-compliance as relevant to "interests of justice" — failure to refer to matters relevant under s 192(2) — *R v AC* [2018] NSWCCA 130

03/07/2018 — *Crimes Act 1900*, ss 66EB, 66C(1) — procure child for unlawful sexual activity — father arranged marriage of 12-year old daughter — judge did not err by finding "procure" in s 66EB(2) means "to cause or bring about" — sentencing — sentence not excessive given very serious nature of offending — fact applicant motivated by religious beliefs rather than sexual gratification did not ameliorate sentence — *ZA v R* [2018] NSWCCA 116

24/06/2018 — Procedure — judge-alone trial — adequacy of reasons — *Criminal Law Consolidation Act 1935* (SA), s 50 — persistent sexual exploitation of a child — judge's reasons sufficiently identified and disclosed basis for concluding two or more acts of sexual exploitation proved — adequacy of reasons depends on issues in particular case — *DL v The Queen* (2018) 92 ALJR 636; [2018] HCA 26

20/06/2018 — Sentencing — *Crimes Act 1900*, ss 91G, 91K(3), 91L(3) — voyeurism offences — eight victims aged 12 to 16 years — offences committed over 7-year period — aggregate sentence of 6 years not manifestly excessive — offences involved serious violation of privacy — fact victims unaware of filming, images not published, and no physical contact involved did not reduce seriousness of offences — objective gravity not assessed by absence of features which would elevate offence to different category of seriousness or different type of offence — *TM v R* [2018] NSWCCA 88

13/06/2018 — Sentencing — *Crimes Act 1900*, s 66A — sexual intercourse with child under 10 — juvenile offender — judge erred by finding Crown's concession, that alternative to full-time custody was within range, was "contrary to sentencing principle" — serious sexual offending by young children does not necessarily result in full-time custody — additional error for judge not to consider alternatives to full-time custody — *Campbell v R* [2018] NSWCCA 87

07/06/2018 — *Evidence Act 1995*, ss 97, 101 — tendency evidence — judge did not err by ruling tendency evidence admissible and refusing separate trial application — possibility of concoction or contamination relevant in determining whether evidence has significant probative value — observations by Button J in GM v R [2016] NSWCCA 78 that NSWCCA jurisprudence continues to apply approved — test remains whether there are competing inferences that deprive the evidence of significant probative value — *BM v R* [2017] NSWCCA 253

31/05/2018 — Offences — *Criminal Code* (Cth), ss 473.1, 474.19 — meaning of "child pornography material" — judge correct not to direct jury that verdicts of acquittal should be entered — appellant's communications drafted in future tense fell within scope of definition in s 473.1 — definition and offence provisions extend to descriptions of past, present and future sexual activity — *Innes v R* [2018] NSWCCA 90

25/05/2018 — *Evidence Act 1995*, ss 55, 137 — context evidence — no error in judge's finding that evidence of one uncharged act was relevant to fact in issue — a single act is capable of, but faces higher hurdle in, meeting test for relevance as context evidence — no error in application of s 137 — evidence was of significant probative value — risk of tendency reasoning was only danger of unfair prejudice and could be addressed by jury directions — *CA v R* [2017] NSWCCA 324

06/05/2018 — *Criminal Procedure Act 1986*, ss 298(1), 299B, 299D — sexual assault communications privilege — judge erroneously found power to order production of documents under s 299B irrelevant — finding that documents sought did not have "substantial probative value" nonetheless correct — *Rohan v R* [2018] NSWCCA 89

29/04/2019 — Sentence appeal — *Crimes Act 1900*, ss 61J, 66C, 66EB — child sexual assault — procure child for sexual activity — offences committed against applicant's daughter by partner — no error in assessment of objective criminality of offences — fact offending arose from joint criminal enterprise limited conclusions which could be reached about applicant's involvement — no error to conclude removing applicant's children from her care did not amount to extra-curial punishment — mere fact sentence for procuring offence highest imposed cannot establish manifest excess — *RH v R* [2019] NSWCCA 64

28/03/2018 — *Crimes Act 1900*, s 91D(1)(b) — participate as client in act of child prostitution — factors relevant to assessment of objective seriousness discussed — judge erred by finding offending below mid "and possibly towards lower end" of range of seriousness — type of sexual service provided relevant to objective seriousness given broad definition under s 91C — aggregate sentence manifestly inadequate — *R v Darwich* [2018] NSWCCA 46

07/03/2018 — *Crimes Act 1900*, s 61D (rep) — historical sexual intercourse without consent — Crown case presented on basis appellant reckless as to consent — not unreasonable for jury to conclude Crown had proved appellant was reckless about whether complainant consented — complainant's age and sexual ignorance relevant to question of consent — judge's directions correctly identified how consent to be proved — *Morgan v R* [2017] NSWCCA 269

29/01/2018 — Sentencing — *Crimes Act 1900*, ss 73, 76 (both rep) — historical child sex offences — judge did not allow own memory of historical sentencing patterns and practices to dictate sentences — doubtful whether "judicial memory" should be used to establish historical sentencing patterns — settled propositions about changes in sentencing practices for child sexual assault offences — *MC v R* [2017] NSWCCA 316

29/01/2018 — Sentencing — *Criminal Code (Cth)*, ss 272.8(2), 272.9(2) — sex offences against children outside Australia — relevant sentencing factors and principles — judge erred in approach to totality — overall sentence failed to reflect harm done to each child — when applying totality principle where separate victims involved, temporal proximity of offences not determinative — *DPP (Cth) v Beattie* [2017] NSWCCA 301

16/01/2018 — Directions — *Evidence Act 1995*, s 165B — forensic disadvantage resulting from delay in complaint — Crimes Act 1900, s 66A — sexual intercourse with person under 10 — judge did not err by failing to warn jury about consequences of delay — "significant forensic disadvantage" in s 165B requires examination of consequences of delay not its extent — lack of DNA evidence caused by delay not usually evidence within s 165B(2) — *Binns v R* [2017] NSWCCA 280

11/01/2018 — *Crimes Act 1900*, ss 91FB, 91G(1), 91H(2) — child pornography offences — "private parts" in s 91FB refers to unclothed genitals and breasts with a visible degree of sexual development — extended definition in s 91I does not apply to s 91FB — judge not required to make express findings as to objective seriousness of each offence — *Turner v R* [2017] NSWCCA 304

30/09/2015 — *Criminal Appeal Act,* s 5F(3AA(c)) — *Criminal Procedure Act 1986*, ss 296 , 299B — sexual assault communications privilege — "counselling communication" in s 296(1) must involve counselling provided by a counsellor — onus is on person asserting the privilege to show communication privileged — documents in this case were not "counselling communications" within s 296 — focused and specific evidence required to ground claim for privilege — statements by judge explaining each ruling in relation to the privilege were sufficient having regard to the circumstances — *ER v Khan* [2015] NSWCCA 230

Legislation

30/05/2022 — *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* — amends *Crimes Act 1900* — replaces s 61HE with new ss 61HF–61HK — s 61HI provides new definition of "consent" — s 61HJ provides circumstances where no consent — s 61HK updates circumstances where accused has knowledge of lack of consent — amends *Criminal Procedure Act 1986* — new ss 292–292E provide for jury directions in relation to misconceptions about consent — commences on proclamation on 1 June 2022 (s 2, LW 13.05.2022)

13/01/2022 — *Modern Slavery Act 2018* — amended before commencement by *Modern Slavery Amendment Act 2021* — amends s 91G *Crimes Act 1900* to introduce aggravated form of offence of using child for production of child abuse material — creates new offences relating to administering and encouraging use of digital platforms for child abuse material (ss 91HAA, 91HAB, 91HAC) — commenced on 1 January 2022 (s 2)

13/05/2021 — *Justice Legislation Amendment Act (No 2) 2019* — amends *Criminal Procedure Act 1986* — The list of "prescribed sexual offences" in s 3 is amended to include female genital mutilation offences (*Crimes Act*, ss 45, 45A) and the offence of concealing a serious indictable offence (*Crimes Act*, s 316), if the concealed offence is a prescribed sexual offence: Sch 1.10[1]–[3]

26/11/2020 — *Stronger Communities Legislation Amendment (Domestic Violence) Act 2020* — amends *Criminal Procedure Act* 1986 — inserts Div 5, ss 289T–289VA — creates scheme so domestic violence complainants can give evidence by alternative means or arrangements, amongst other things (partly commences on assent and proclamation) — provides for jury warnings when delayed or no complaint (ss 294(3) and 306ZR) — commenced on assent on 25 November 2020 unless otherwise indicated (see s 2, LW 23.11.20). New s 289T provides that the division applies to domestic violence offence proceedings and AVO proceedings where the defendant is charged with a domestic violence offence and the protected person is the alleged victim. If the complainant is a person against whom a prescribed sexual offence is alleged to have been committed by the accused, the division applies in addition to Pt 5 relating to apprehended personal violence orders

29/10/2020 — *Stronger Communities Legislation Amendment (Miscellaneous) Act 2020* — amends *Criminal Procedure Act 1986* — creates presumption that offences be heard together if allegedly committed by same person and relied on as tendency and coincidence evidence (s 29A) — inserts directions on standard of proof for tendency and coincidence evidence (s 161A, commenced 1 March 2021)

01/10/2020 — *Stronger Communities Legislation Amendment (Crimes) Act 2020* — inserts s 316(1A) in *Crimes Act 1900* to introduce reasonable excuse for concealment of domestic or sexual violence offences on certain grounds commenced on assent on 28 September 2020 (s 2, LW 28.9.2020)

10/07/2020 — *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth) — amends *Crimes Act 1914* (Cth) — s 16A(2)(g) amended to provide greater guidance for considerations relevant to guilty plea — s 16(2)(ma) added — requires consideration of whether an offender's standing in community aided commission of offence — s 16A(2) amendments commence 20 July 2020 — s 20AB amended to add residential treatment orders as sentencing alternative for intellectually disabled offenders — inserts provisions relevant to sentences for Cth child sexual abuse offences — new ss 16AAA, 16AAB and 16AAC introduce mandatory minimum sentences for certain child sexual abuse offences — s 19 amended to add presumption of accumulation of sentences — s 20 now requires particular conditions for Cth child sexual abuse offenders released on recognizance — amends *Criminal Code* (Cth) — inserts new aggravated offences for child sexual abuse, grooming offences and offences related to providing electronic services to facilitate dealings with online child abuse material — increases maximum penalties for certain Cth child sex offences — unless indicated otherwise commenced 23 June 2020 (s 2)

10/07/2020 — *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act* 2020 (Cth) — amends *Crimes Act 1914* — new s 15AAA introduces presumption against bail for Cth child sex offences — s 15YM amended to provide that recording of interview with vulnerable witness admissible as evidence-in-chief — new s 15YHA prohibits cross-examination of vulnerable witness at committal — ss 19AA, 19APB,

19AQ, 19AR, 19AS amended as to procedures related to revocation of parole order or licence — s 19AU(3) amended to insert community safety as factor relevant to revocation of federal offender's parole — commenced on 23 June or 20 July 2020 as indicated (s 2)

26/06/2020 — *Evidence Amendment (Tendency and Coincidence) Act 2020* — amends *Evidence Act 1995*, Pt 3.6 — new ss 94(4) and (5) clarify matters that may or may not be taken into account when determining admissibility of tendency and coincidence evidence — adds s 97A which sets out rules for admissibility of tendency evidence in proceedings for child sexual offences — inserts s 98(1A) to extend coincidence rule to evidence of witnesses claiming to be victims of accused — amends test in s 101(2) to one where evidence inadmissible unless its probative value outweighs danger of unfair prejudice — commenced 1 July 2020 (s 2, LW 10.6.20)

·26/06/2020 — *Crimes Amendment (Special Care Offences) Act* 2020 — amends *Crimes Act 1900* special care sexual offences involving 16-and 17-year-old young people — creates new special care categories in ss 73(3)(f), (g) and 73A(3)(f), (g) — amends ss 73 and 73A by adding ss 73(3)(b1), (3)(c) and 73A(3)(b1), (3)(c), (3)(f) so that for certain special care categories there is a requirement that victim be "under the authority" of offender — inserts new s 78(1) to include defence for young people for some incest offences — commenced on assent on 23 June 2020 (s 2, LW 22.06.2020)

24/03/2020 — *Combatting Child Sexual Exploitation Legislation Amendment Act 2019* (Cth) — amends Criminal Code (Cth) — Sch 1 inserts Div 273B "Protection of children" — creates offences related to Commonwealth officers who fail to protect children from, or report, child sexual abuse — commenced on proclamation on 20 March 2020 (s 2) — amends *Crimes Act 1914* (Cth), s 15Y — extends protections to vulnerable persons in *Crimes Act*, Pt IAD to proceedings for offences in Div 273B

23/10/2019 — *Combatting Child Sexual Exploitation Legislation Amendment Act 2019* (Cth) — amends *Criminal Code* (Cth) — repeals and replaces definition of forced marriage, and defence of marriage for child sex offences — creates new offences including possession of child-like sex doll and possession of child abuse material obtained using a carriage service — redefines 'child pornography material' as 'child abuse material' — commenced 21 September 2019, except Sch 1 (s 2)

27/09/2019 — *Justice Legislation Amendment Act 2019* — amends *Crimes Act 1900*, s 80AF to clarify the position where uncertainty exists about time when sexual offence against child occurred

07/06/2019 — *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (Cth) — amends *Criminal Code* (Cth) — inserts new Div 474, Subdiv H "Offences relating to use of carriage service for sharing of abhorrent violent material" — creates new offences under ss 474.33 and 474.34 for ISPs, or content or hosting services of failing to notify AFP of, or failing to remove, abhorrent violent material — maximum penalty for ISP or internet content host failing to notify AFP of child pornography under s 474.25 increased — commenced on 6 April 2019

03/06/2019 — *Justice Legislation Amendment Act (No 3) 2018* — amends *Crimes Act 1900* — adds new aggravating circumstance to aggravated sexual assault in s 61J — amends *Criminal Procedure Act 1986* to enable expert evidence to be given concurrently or consecutively — new provisions and offences with respect to sensitive evidence — amends various Acts to increase maximum judicial retirement age to 75 years — commenced on 28 November 2018 (s 2, see

LW 26 November 2018) except relevantly 1.4 [1] and [4], 1.17 [1] and [4] which commence on proclamation — Sch 1.11 [1] and [2] commenced 17 December 2018 — Sch 1.20 commenced 28 February 2019 — Sch 1.2 [1]–[3] commenced on 31 May 2019 (s 2, LW 31.05.19)

15/05/2019 — *Crimes Legislation Amendment (Victims) Act 2018* — amends *Crimes (Sentencing Procedure) Act 1999* — repeals and replaces Pt 3, Div 2 relating to victim impact statements (VIS) — extends VIS provisions to additional victims— introduces right for all victims to have support person present when reading VIS — new provisions related to VIS in mental health and cognitive impairment forensic proceedings — these amendments commenced on proclamation on 27 May 2019 (s 2, LW 24.05.19) — remaining amendments under Act commenced 1 December 2018 (s 2, LW 28.11.18)

30/11/2018 — *Crimes Legislation Amendment (Victims) Act 2018* — amends *Children (Criminal Proceedings) Act 1987* — introduces new procedures for determining applications by prosecution for child sexual assault offences to be dealt with according to law — amends Criminal Procedure Act 1986 to extend protections associated with giving evidence to additional witnesses — amends *Crimes (Domestic and Personal Violence Act)* 2007 to require certain AVO proceedings be closed to the public — these amendments commenced on 1 December 2018 (s 2(2), LW 28.11.18) — balance of amendments commence on proclamation (s 2(1))

30/11/2018 — *Justice Legislation Amendment Act (No 3) 2018* — amends *Crimes Act 1900* — adds new aggravating circumstance to aggravated sexual assault in s 61J — amends *Criminal Procedure Act 1986* to enable expert evidence to be given concurrently or consecutively — new provisions and offences with respect to sensitive evidence — commenced on 28 November 2018 (s 2, see LW 26 November 2018) except relevantly Sch 1.2 [1]–[3], 1.4 [1] and [4], 1.17 [1] and [4], 1.20 which commence on proclamation — Sch 1.11 [1] and [2] commence on 17 December 2018

30/11/2018 — *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018*, certain provisions, commenced on 1 December 2018 (LW 30.11.2018) — these provisions restructure and modernise sexual offences in *Crimes Act 1900*, Pt 3, Div 10 — new s 80AF permits prosecution when there is uncertainty about when child sexual offence occurred — the new consent provision, s 61HE, expands the definition of consent to "sexual activity" which includes sexual intercourse, sexual touching or a sexual act (s 61HE(11)) and applies to offences under ss 61I, 61J, 61JA, 61KC, 61KD, 61KE and 61KF: s 61HE(1) and it is no longer limited, as previously, to "sexual intercourse" — the existing consent provision, s 61HA, is repealed — new s 80AG is inserted and is aimed at decriminalising certain acts engaged in by children for offences against ss 66C(3), 66DB, 66DD, 73 or 73A if the alleged victim is of or above 14 years old and the age difference between the alleged victim and the accused is no more than 2 years — new s 293A is inserted into the *Criminal Procedure Act 1986* to enable judges to give jury directions to address difference in accounts given by complainant

[6-050] Other publications

Last reviewed: April 2024

Judicial Officers' Bulletin

- J Cashmore and R Shackel, "Research on sexual assault to inform the courts and legal professionals" (2022) 34(2) *JOB* 15
- P Mizzi and R Beech-Jones, "The law on consent in sexual assault is changing" (2022) 34(1) *JOB* 1

- P Mizzi and RA Hulme, "Reforming the admissibility of tendency and coincidence evidence in criminal trials" (2020) 32(11) *JOB* 113
- K Nomchong SC, "Sexual harassment and the judiciary" (2020) 32(6) *JOB* 55
- N Cowdery, J Hunter and R McMahon, "Sentencing and disadvantage: the use of research to inform the court" (2020) 32(5) *JOB* 43–47
- P Hora, "The trauma-informed barrister" (2020) 32(2) *JOB* 11
- P Mizzi, "Balancing prosecution with the right to a fair trial: the child sexual abuse reforms in NSW" (2019) 31(2) *JOB* 11
- P Mizzi, "The sentencing reforms — balancing causes and consequences of offending with community safety" (2018) 30(8) *JOB* 73
- I Nash, "Use of sexual assault communications privilege in sexual assault trials" (2015) 27(3) *JOB* 21
- P McClellan, "Adults surviving child abuse: the work of the Royal Commission" (2014) 26(11) *JOB* 95
- RA Hulme, "After Muldrock — sentencing for standard non-parole period offences in NSW" (2012) 24(10) *JOB* 81
- M Ierace SC, "Judge-alone trials" (2012) 24(9) *JOB* 73
- H Donnelly, "Assessing harm to the victim in sentencing proceedings" (2012) 24(6) *JOB* 45
- H Donnelly, "The diminished role of standard non-parole periods" (2012) 24(1) *JOB* 1
- P van de Zandt, "The sexual assault communications privilege" (2011) 23(11) *JOB* 100

Criminal Trial Courts Bench Book — *Special Bulletin 30* — relationship evidence in sexual assault cases — *Norman v R* [2012] NSWCCA 230 — *SKA v R* [2012] NSWCCA 205 — **case digest item** (posted 23/11/2012)

Custody Based Intensive Treatment program — paper by Mark Howard, Corrections Research Evaluation and Statistics, Corrective Services NSW — "Process evaluation of the Custody Based Intensive Treatment (CUBIT) program for sex offenders: within-treatment change" (Research Bulletin No 50, September 2021) — study examines intermediate outcomes of participation in the Custody Based Intensive Treatment (CUBIT) program in treating dynamic risk factors that are expected to have an influence on offenders' likelihood of sexual reoffending — sample included sex offenders who had participated in CUBIT over the lifespan of the program, and had completed psychometric measures administered before and after treatment

NSW Bureau of Crime Statistics & Research (BOCSAR) — *Experience of complainants of adult sexual offences in the District Court of NSW: A trial transcript analysis*, 2023

NSW Bureau of Crime Statistics & Research (BOCSAR) — *Exploring justice system experiences of complainants in sexual offence matters: An interview study*, 2023

NSW Bureau of Crime Statistics & Research (BOCSAR) — *The progress of sexual offences through the NSW criminal justice system*, 2019

NSW Bureau of Crime Statistics & Research (BOCSAR) — *Does the Custody-based Intensive Treatment (CUBIT) program for sex offenders reduce re-offending?* — Evaluation Report, Number 193, 2016

NSW Bureau of Crime Statistics & Research (BOCSAR) — *Offenders sentenced to prison in 2010 for child sex offences (see child_sex_offences_imprisonment)*, 2014

NSW Bureau of Crime Statistics & Research (BOCSAR) — *Sentencing snapshot: sexual assault, 2009–2010* — Bureau Brief, Issue Paper 72, 2011 (revised January 2012)

NSW Bureau of Crime Statistics & Research (BOCSAR) — *Sentencing snapshot: child sexual assault, 2009–2010* — Bureau Brief, Issue Paper 68, 2011 (revised January 2012)

NSW Bureau of Crime Statistics & Research (BOCSAR) — *Re-offending in NSW*, Bureau Brief, Issue Paper No 56, 2011 (revised January 2012*)* — **case digest item** (posted 20/5/2011)

Protective custody — paper by Domenic Pezzano, Superintendent Operations Branch, Corrective Services NSW — "Information for the ODPP/Courts on options for inmates who request Protective Custody: Limited Association and Non-Association" (revised December 2010) — procedure when inmate placed in protective custody — what placement options are available for inmates and what security ratings are required for specific Correctional Centres — what programs are available for inmates in protective custody — **case digest item** (posted 25/3/2011)

[6-100] Government reviews and papers

Consent in relation to sexual offences

In May 2018, the NSW Law Reform Commission was asked by the Attorney General to review s 61HE of the *Crimes Act 1900* (NSW), which deals with consent in relation to sexual offences. The terms of reference were received on 3 May 2018. The Law Reform Commission published some preliminary submissions in response to the terms of reference. These can be accessed at https://lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Consent/Preliminary-submissions.aspx. Report 148 — *Consent in relation to sexual offences* was tabled in Parliament on 18 November 2020.

The *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* commenced 1 June 2022. See Second Reading Speech, Legislative Assembly, *Debates*, 20 October 2021, p 7506.

NSW Sexual Assault Strategy 2018–2021

The NSW Government released their NSW Sexual Assault Strategy 2018–2021 in July 2018. The strategy is a comprehensive framework to improve prevention and response to sexual assault and delivers a three year, whole-of-government approach to sexual assault in NSW for the first time.

The Strategy aims to improve the existing service system for adults and children who experience sexual assault, while holding perpetrators to account. It also seeks to raise community awareness of sexual violence while improving prevention and education measures in families and the wider community.

Final Report of the Joint Select Committee on Sentencing of Child Sexual Assault Offenders

In September 2017, the NSW Government prepared a discussion paper that identified issues and posed questions about possible options for child sexual abuse law reform. The paper considered the recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse in its Criminal Justice Report,

released in August 2017, and the recommendations of the NSW Parliament's Joint Select Committee on Sentencing of Child Sexual Assault Offenders: see Final Report of the Joint Select Committee on Sentencing of Child Sexual Assault Offenders at https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/ReportAcrobat/5741/Final%20Report%20of%20the%20Joint%20Select%20Committee%20on%20Sent.PDF. The purpose of the discussion paper is to examine child sexual offences in NSW to simplify the current framework, revise current offences and identify whether any new offences should be created to fill any gaps in the existing framework. See Discussion paper: Strengthening child sexual abuse laws in NSW at www.justice.nsw.gov.au/justicepolicy/Documents/strengthening-child-sexual-abuse-laws.pdf

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Relevant literature — legal articles

Evidence

The judicial role

Procedural considerations

Reforming the admissibility of tendency and coincidence evidence in criminal trials

[7-000] Article

P Mizzi and R A Hulme, "Reforming the admissibility of tendency and coincidence evidence in criminal trials", (2020) 32 *JOB* 113.

Abstract

The article outlines reforms to the *Criminal Procedure Act 1986*, intended to improve the admissibility of tendency and coincidence evidence in all criminal trials, but especially child sexual assault cases, following recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.

See further commentary under "Tendency, coincidence and background evidence" at [4-200]ff, including a suggested tendency direction at [4-227], in the *Criminal Trial Courts Bench Book*.

Tendency evidence in 2020

[7-005] Article

N Broadbent and D Buchanan, "Tendency evidence in 2020", paper presented at the Legal Aid NSW Conference, November 2020, Sydney.

Abstract

This paper sets out recent amendments to the law of tendency evidence in NSW. The amendments to both evidence and criminal procedure, which in large part came into force following the *Evidence Amendment (Tendency and Coincidence) Act 2020* and the *Stronger Communities Legislation Amendment (Miscellaneous) Act 2020*, substantially affect the law as it pertains to tendency, and in particular child sexual assault matters. It is noted that the amendments do not substantially alter the existing High Court authority in relation to other cases where tendency evidence is to be adduced. This paper summarises several High Court authorities which preceded the amendments to the *Evidence Act 1995* (NSW). The paper next summarises recent amendments, which broaden the scope for admissibility of tendency evidence, particularly in cases involving allegations of child sexual assault. An update of recent Court of Criminal Appeal cases which highlight the growing prevalence of tendency evidence in these kinds of matters is also provided. Despite substantial changes, it is suggested that because the major amendments are confined to child sexual assault cases, arguments against the admission of tendency evidence in cases which do not involve child sexual assault remain available and viable.

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Tendency, coincidence and joint trials

[7-010] Article

T Gartelmann, "Tendency, coincidence and joint trials", paper presented to the 2018 Public Defenders Conference, 17 March 2018, Sydney. Acknowledgment to Carly Berrigan for assistance in preparation of the paper.

Abstract

Tendency evidence and coincidence evidence are among the more complicated and controversial areas of evidence law in criminal cases.

This article should be read in light of the High Court decision in *The Queen v Bauer* [2018] HCA 40, particularly at [47]–[60], [67]–[69], [86]. Suggested directions in single complainant sexual offences cases where evidence of uncharged acts is admitted as tendency evidence are set out in the judgment at [86]. Readers should refer to commentary and directions in the section of the *Criminal Trial Courts Bench Book* titled "Tendency, coincidence and background evidence" at [4-200]ff.

Tendency, coincidence and joint trials

His Honour Judge Timothy Gartelmann

Editor's note: This article should be read in light of the High Court decision in *The Queen v Bauer* [2018] HCA 40, particularly at [47]–[60], [67]–[69], [86]. Suggested directions in single complainant sexual offences cases where evidence of uncharged acts is admitted as tendency evidence are set out in the judgment at [86]. Readers should refer to commentary and directions in the section of the Criminal Trial Courts Bench Book titled "Tendency, coincidence and background evidence" at [4-200]ff. Current as at 17 March 2018.

Introduction

Tendency evidence and coincidence evidence are among the more complicated and controversial areas of evidence law in criminal cases.

The issues that may arise in connection with tendency and coincidence evidence are many and varied. An examination of the full range of issues is beyond the scope of this paper. This paper seeks rather to address the central elements of the tests for admissibility and use of tendency and coincidence evidence.

The High Court in *IMM v The Queen* (2016) 257 CLR 300 and *Hughes v The Queen* (2017) 92 ALJR 52 determined a number of important questions relating to the tests for admissibility and use of tendency and coincidence evidence. This paper therefore extracts a number of statements of principle in the judgments in these cases.

An appreciation of the processes of reasoning underlying tendency evidence and coincidence evidence is necessary for a sound understanding of the operation of the tests for their admissibility and use. This paper extracts a number of statements of principle from decisions of intermediate appellate courts regarding these processes of reasoning.

Some particular issues frequently arise in connection with questions of admissibility and use of tendency evidence and coincidence evidence. This paper attempts to summarise the ways in which appellate courts have approached some of the more commonly arising issues.

Finally, decisions regarding admissibility and use of tendency and coincidence evidence often have ramifications for whether trials of multiple counts will be joint or separate. This paper briefly addresses when joint or separate trials of multiple counts may be appropriate following determinations regarding the admissibility and use of tendency and coincidence evidence.

Tendency

Overview

Evidence known as tendency evidence under the *Evidence Act 1995* was known as propensity evidence at common law.

The provisions of the Act are the primary source in considering questions of *admissibility* of such evidence, rather than the pre-existing common law: see *IMM* at [35]. However, the reasoning process underlying use of tendency evidence under the Act is cognate with that underlying the use of propensity evidence at common law.

The common law treated propensity evidence as a form of circumstantial evidence: see *Pfennig v The Queen* (1995) 182 CLR 461 at 482–3.

In *Elomar v R* [2014] NSWCCA 303 at [359]–[360], the court (Bathurst CJ; Hoeben CJ at CL; Simpson J) described the reasoning process underlying the admission of tendency evidence as follows:

> Tendency evidence is evidence that provides the foundation for an inference. The inference is that, because the person had the relevant tendency, it is more likely that he or she acted in the way asserted by the tendering party, or had the state of mind asserted by the tendering party on an occasion the subject of the proceedings. Tendency evidence is a stepping stone. It is indirect evidence. It allows for a form of syllogistic reasoning.
>
> The process of reasoning is:
>
> - on an occasion or occasions other than an occasion in question in the proceedings, a person acted in a particular way;
> - it can therefore be concluded or inferred that the person had a tendency to act in that way;
> - by reason of that tendency, it can therefore be concluded or inferred that, on an occasion in question in the proceedings, the person acted in conformity with that tendency.
>
> Alternatively:
>
> - on an occasion or occasions other than on an occasion in question in the proceedings, a person had a particular state of mind;
> - it can therefore be concluded or inferred that the person had a tendency to have that state of mind;
> - by reason of that tendency, it can therefore be concluded or inferred that, on an occasion in question in the proceedings, the person's state of mind conformed with that tendency.
>
> Tendency evidence is a means of proving, by a process of deduction, that a person acted in a particular way, or had a particular state of mind, on a relevant occasion, when there is no, or inadequate, direct evidence of that conduct or that state of mind on that occasion.

In *Hughes* at [16], the majority (Kiefel CJ, Bell, Keane and Edelman JJ) summarised the reasoning process as follows:

> The trier of fact reasons from satisfaction that a person has a tendency to have a particular state of mind or to act in a particular way to the likelihood that the person had the particular state of mind or acted in a particular way on the occasion in issue.

Gageler J (in the minority) summarised it as follows (at [70]–[71]):

> Applied to evidence of past conduct, tendency reasoning is no more sophisticated than: he did it before; he has a propensity to do this sort of thing; the likelihood is that he did it again on the occasion in issue.
>
> Tendency reasoning, as courts have long recognised, is not deductive logic. It is a form of inferential or inductive reasoning…

Authorities dealing with tendency evidence under the Act thus treat the underlying reasoning process as a form of inferential reasoning.

Evidence Act 1995 provisions

The Dictionary to the Act defines tendency evidence as evidence of a kind referred to in s 97(1) that a party seeks to have adduced for the purpose referred to in that subsection.

The purpose for which the evidence is tendered therefore defines it as tendency evidence: *David L'Estrange v The Queen* (2011) 214 A Crim R 9 at [59]; *CA v R* [2017] NSWCCA 324 at [81].

Accordingly, evidence that is tendered for a non-tendency purpose (for example, as context or relationship evidence) but which could also be used as tendency evidence, need not satisfy the conditions for admissibility of tendency evidence.

Section 95 of the Act provides that:

> (1) Evidence that under this Part is not admissible to prove a particular matter must not be used to prove that matter even if it is relevant for another purpose.
>
> (2) Evidence that under this Part cannot be used against a party to prove a particular matter must not be used against the party to prove that matter even if it is relevant for another purpose.

Section 97(1) of the Act provides that:

> Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless:
>
> (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence, and
>
> (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

Section 99 of the Act provides that:

> Notices given under section 97 or 98 are to be given in accordance with any regulations or rules of court made for the purposes of this section.

Section 101(2) of the Act provides that:

> Tendency evidence about a defendant … that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.

Notice

Sections 97(1)(a), 98(1)(a), 99 and 100 of the Act create a "novel system requiring notice": *R v Ellis* (2003) 58 NSWLR 700 at [80].

The purpose of the requirement for notice pursuant to s 97(1)(a) is not simply to ensure the other party is informed of the intention to adduce tendency evidence but to ensure the asserted tendency is properly articulated and the evidence proposed to be adduced in support of it is clearly identified.

In *Hughes* at [105], Gageler J described the function of a tendency notice as follows:

> Making the evaluative judgment required of a court in the implementation of the tendency rule is facilitated by the procedural requirement that a party must ordinarily give notice of an intention to seek to adduce tendency evidence. The utility of the tendency notice goes beyond providing procedural fairness to other parties. The tendency notice provides the court, at the critical time of assessing the admissibility of tendency evidence, with a statement of the particular tendency which the party seeking to adduce the tendency evidence seeks to prove by it. The importance

> of explicitly identifying in the notice the particular tendency that is asserted, as Howie AJ put it in *Bryant v R*, "should be obvious: how else is the court going to be able to make a rational decision about the probative value of the evidence". By identifying the particular tendency that the evidence is asserted to prove, the notice allows the court to evaluate the strength of the connection between the evidence and the tendency and the strength of the connection between the tendency and the fact in issue.

Section 97 determination

Significant probative value

The Dictionary to the Act defines the probative value of evidence as the extent to which the evidence could rationally affect the assessment of the probability of the existence of facts in issue in the proceedings.

"Significant probative value" has been interpreted as connoting "something more than mere relevance but something less than a 'substantial' degree of relevance": *R v Lockyer* (1996) 89 A Crim R 457 at 459; *DSJ v The Queen* (2012) 84 NSWLR 758 at [58] and [60].

The majority in *Hughes* adopted (at [40]) the following description of "significant probative value" from Campbell JA's judgment in *R v Ford* (2009) 201 A Crim R 451 at [125]:

> [T]he disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence charged.

In *IMM* at [103], Gageler J observed that:

> To the extent that similes can help elucidate the statutory measure of "significant", the capacity of the evidence to contribute to the proof or disproof of the existence of the fact in issue does not need to be "substantial" but does need to be "important" or "of consequence".

The determination whether probative value is significant is an evaluative judgment about which minds may differ, as the majority in *Hughes* noted (at [16]):

> [T]he open-textured nature of an enquiry into whether "the court thinks" that the probative value of the evidence is "significant" means it is inevitable that reasonable minds might reach different conclusions.

The majority in *Hughes* made clear that the determination whether tendency evidence has significant probative value requires two separate evaluations: first, whether the evidence supports the asserted tendency; and secondly, whether the asserted tendency supports the elements of the offence.

The majority said (at [41]):

> The assessment of whether the evidence has significant probative value involves consideration of two interrelated, but separate matters. The first is the extent to which the evidence supports the asserted tendency. The second is the extent to which the tendency makes more likely the facts making up the charged offence. Where the question is not one of the identity of a known offender but is instead a question concerning whether the offence was committed, it is important to consider both matters. By seeing that there are two matters involved it is easier to appreciate the dangers in focusing on single labels such as "underlying unity", "pattern of conduct" or "modus operandi". In summary there is likely to be a high degree of probative value where (i) the evidence by itself or together with other evidence strongly supports proof of a tendency and (ii), the tendency strongly supports the proof of a fact that makes up the offence charged.

The majority in *Hughes* also made clear that these evaluations must be made of the evidence in relation to each count (at [40]):

> Of course, where there are multiple counts on an indictment, it is necessary to consider each count separately to assess whether the tendency evidence which is sought to be adduced in relation to that count is admissible.

It is clear following *Hughes* that identification of the facts in issue in the proceedings is fundamental to a proper determination of the admissibility of tendency evidence. The majority said (at [16]):

> The starting point requires identifying the tendency and the fact or facts in issue which it is adduced to prove. The facts in issue in a criminal proceeding are those which establish the elements of the offence.

Nevertheless, the facts in issue in the proceedings should not be equated with the facts directly establishing the elements of the alleged offence.

The majority in *Hughes* illustrated the manner in which an asserted tendency may bear on facts in issue (at [40]):

> In the trial of child sexual offences, it is common for the complainant's account to be challenged on the basis that it has been fabricated or that anodyne conduct has been misinterpreted. Logic and human experience suggest proof that the accused is a person who is sexually interested in children and who has a tendency to act on that interest is likely to be influential to the determination of whether the reasonable possibility that the complainant has misconstrued innocent conduct or fabricated his or her account has been excluded.

The Victorian Court of Appeal in *Dennis Bauer (pseudonym) v R (No 2)* [2017] VSCA 176 at [62] summarised the way in which the tendency evidence bore on the facts in issue in *Hughes*:

> In essence, the tendency evidence in *Hughes* had significant probative value because it made probable that which would otherwise be regarded as improbable; that is, engaging in sexual conduct in circumstances in which the appellant ran a real risk of discovery by other adults.

It should be noted that in the absence of agreed facts or admissions in the proceedings, the court may proceed on the assumption all facts are in issue in assessing the probative value of the evidence (cf *Stubley v State of Western Australia* (2011) 242 CLR 374).

Considerations

A number of particular questions commonly arise in the context of the assessment of probative value of tendency evidence. Some of these are discussed below.

Similarities

Until the High Court's decision in *Hughes*, controversy existed as to whether similarity between the conduct the subject of the tendency evidence and that the subject of the charged offence was necessary for the tendency evidence to have significant probative value.

The controversy manifested in the differing approaches of the NSW Court of Criminal Appeal and the Victorian Court of Appeal.

The NSW Court of Criminal Appeal approach was exemplified in *R v Ford* (2009) 201 A Crim R 451 and *R v PWD* (2010) 205 A Crim R 75, which rejected the contention that conduct the subject of the tendency evidence was required to be "closely similar" with that the subject of the charged offence.

The Victorian Court of Appeal approach was exemplified in *Velkoski v The Queen* (2014) 45 VR 680. In *Velkoski* at [164], the court (Redlich, Weinberg and Coghlan JJA) stated:

> Section 97(1)(b) is intended to address the risk of an unfair trial through the use of tendency reasoning by ensuring a sufficiently high threshold of admissibility. We consider the approach currently taken by the New South Wales Court of Criminal Appeal to tendency and coincidence goes too far in lowering the threshold to admissibility. To remove any requirement of similarity or commonality of features does not in our respectful opinion give effect to what is inherent in the notion of "significant probative value". If the evidence does no more than prove a disposition to commit crimes of the kind in question, it will not have sufficient probative force to make it admissible. This view, we think, clearly represents the present.

The controversy culminated the majority's statement in *Hughes* (at [39]) that:

> Commonly, evidence of a person's conduct adduced to prove a tendency to act in a particular way will bear similarity to the conduct in issue. Section 97(1) does not, however, condition the admission of tendency evidence on the court's assessment of operative features of similarity with the conduct in issue. The probative value of tendency evidence will vary depending upon the issue that it is adduced to prove. In criminal proceedings where it is adduced to prove the identity of the offender for a known offence, the probative value of tendency evidence will almost certainly depend upon close similarity between the conduct evidencing the tendency and the offence. Different considerations may inform the probative value of tendency evidence where the fact in issue is the occurrence of the offence.

In *Dennis Bauer (pseudonym) v R (No 2)* [2017] VSCA 176 at [55], the Victorian Court of Appeal acknowledged the effect of *Hughes* for its previous jurisprudence regarding the significance of similarities in the assessment of the probative value of tendency evidence:

> Much of the accepted approach to tendency evidence in this State — digested and explained in *Velkoski* — must now be significantly qualified in light of the treatment of the subject by the majority in Hughes.

Nevertheless, the nature and extent of any similarities between the conduct the subject of the tendency evidence and that the subject of the charged offence remain relevant to the assessment of the probative value of tendency evidence: *Hughes* at [39].

Basten JA explained in *Saoud v R* (2014) 87 NSWLR 481 at [44] that the nature of the similarities required for tendency evidence "will depend very much on the circumstances of the case".

The significance of similarities for the assessment of the probative value may be less where the fact in issue is the occurrence of the offence rather than the identity of the offender (*Hughes* at [41]).

Other evidence

The terms of s 97(1)(b) make clear that the probative value of the evidence must be considered having regard to other evidence adduced or to be adduced.

The majority in *Hughes* emphasised that in considering whether tendency evidence has significant probative value it should not be viewed in isolation but rather in conjunction with other evidence adduced or to be adduced (at [40]):

> The only qualification to this is that it is not necessary that the disputed evidence has this effect by itself. It is sufficient if the disputed evidence together with other evidence makes significantly more likely any facts making up the elements of the offence charged.

However, while the other evidence adduced or to be adduced must be taken into account, it may be productive of circular reasoning to take into account other evidence in support of the alleged offence in considering whether the asserted tendency exists if this is then relied upon as proof of the same alleged offence.

Generality and particularity

The generality or particularity with which an asserted tendency is stated may have ramifications for the assessment of the probative value of tendency evidence. A tendency stated with a high degree of generality may be compromised in its capacity to achieve significant probative value having regard to the facts in issue in the case: *Sokolowskyj v R* (2014) 239 A Crim R 528 at [40]; *Ibrahim v Pham* [2007] NSWCA 215 at [264].

In *Hughes* at [40], the majority said:

> The particularity of the tendency and the capacity of its demonstration to be important to the rational assessment of whether the prosecution has discharged its onus of proof will depend upon a consideration of the circumstances of the case.

In *Hughes* at [64], the majority said:

> A tendency expressed at a high level of generality might mean that all the tendency evidence provides significant support for that tendency, but it will also mean the tendency cannot establish anything more than relevance. In contrast a tendency expressed at a level of particularity will be more likely to be significant.

Reliability and credibility

Until the High Court's decision in *IMM*, controversy existed as to whether issues of reliability and credibility were to be taken into account in the assessment of probative value of tendency evidence.

The controversy manifested in the differing approaches of the NSW Court of Criminal Appeal and the Victorian Court of Appeal. The Victorian Court of Appeal approach exemplified in *Dupas v The Queen* (2012) 40 VR 182 contrasted with that of the NSW Court of Criminal Appeal exemplified in *R v Shamouil* (2006) 66 NSWLR 228 and *R v XY* (2013) 84 NSWLR 363.

In *Dupas*, the Victorian Court of Appeal held that questions of reliability but not credibility were to be taken into account in the assessment of probative value.

In *Shamouil*, Spigelman CJ held that questions of reliability and credibility were not to be taken into account in the assessment of probative value. A five-judge bench of the NSW Court of Criminal Appeal in *XY* effectively approved *Shamouil* (although there were some differences of opinion among members of the bench).

The controversy culminated in the High Court's decision in *IMM*. The judgments of the members of the court differed significantly regarding this question. French CJ, Kiefel, Bell and Keane JJ in a joint judgment held that questions of reliability and credibility were inseparable and neither was to be taken into account in the assessment of probative value (at [51]–[52], [54]):

> At a practical level, it could not be intended that a trial judge undertake an assessment of the actual probative value of the evidence at the point of admissibility. As Simpson J pointed out in *R v XY*, the evidence will usually be tendered before the full picture can be seen. A determination of the weight to be given to the evidence, such as by reference to its credibility or reliability, will depend not only on its place in the evidence as a whole, but on an assessment of witnesses after examination and cross-examination and after weighing the account of each witness against each other.
>
> Once it is understood that an assumption as to the jury's acceptance of the evidence must be made, it follows that no question as to credibility of the evidence, or the witness giving it, can arise. For the same reason, no question as to the reliability of the evidence can arise. If the jury are to be taken to accept the evidence, they will be taken to accept it completely in proof of the facts stated. There can be no disaggregation of the two — reliability and credibility — as *Dupas v The Queen* may imply. They are both subsumed in the jury's acceptance of the evidence.
>
> …
>
> The view expressed in *Dupas v The Queen*, which reserved a particular role for the trial judge with respect to the reliability of evidence, did not have its foundations in textual considerations of the *Evidence Act*, but rather in a policy attributed to the common law. The *Evidence Act* contains no warrant for the application of tests of reliability or credibility in connection with ss 97(1)(b) and 137. The only occasion for a trial judge to consider the reliability of evidence, in connection with the admissibility of evidence, is provided by s 65(2)(c) and (d) and s 85. It is the evident policy of the Act that, generally speaking, questions as to the reliability or otherwise of evidence are matters for a jury, albeit that a jury would need to be warned by the trial judge about evidence which may be unreliable pursuant to s 165.

Gageler J considered that questions of reliability but not credibility were to be taken into account in the assessment of probative value (at [94]–[96]):

> Having laboured the point that the difference between the competing approaches is not often likely to be of great consequence, I turn squarely to address the underlying issue of statutory construction. My conclusion, like that of Nettle and Gordon JJ, is that the view of McHugh J is to be preferred to the view of Gaudron J.
>
> Unlike Nettle and Gordon JJ, I gain no assistance in reaching that conclusion from construing the Evidence Act against the background of the common law. As Spigelman CJ observed in *R v Ellis* in a passage which was given prominence in the report of the joint review of the Uniform *Evidence Acts* in 2005:
>
> > "It is ... noteworthy that the Act provides a definition of 'probative value' ... Although the definition could well have been the same as at common law, the fact that such a term was defined at all suggests an intention to ensure consistency for purposes of the *Evidence Act* for the words, which appear in a number of different sections ... This suggests that the Act, even if substantially based on the common law, was intended to operate in accordance with its own terms.
> >
> > The common law did not employ the concept of probative value with statutory precision, and the common law developed no general rule to the effect that reliability (in the sense now used in the *Evidence Act*) was or was not to be assumed in assessing probative value

> for all purposes of determining admissibility. For some purposes, such as determining the admissibility of tendency evidence or of coincidence evidence, it came to be established that the assessment of probative value was required to proceed on the assumption that the truth of the evidence would be accepted. For other purposes, such as considering the discretion to exclude prosecution evidence, the probative value of which was outweighed by the risk of unfair prejudice to the accused, it has been acknowledged that considerations indicating evidence to be unreliable might on occasions be sufficient to deprive the evidence of probative value."

> Together with Nettle and Gordon JJ, I consider the view of McHugh J — that an assessment of probative value necessarily involves considerations of reliability — to be a view that is compelled by the language, structure and evident design of the *Evidence Act*. To think of evidence that is relevant as evidence that has some probative value and to go on to think of probative value as a measure of the degree to which evidence is relevant is intuitively appealing. It is elegant; it has the attraction of symmetry. For many purposes, it may not be inaccurate. But it is not an exact fit for the conceptual framework which the statutory language erects. The statutory description of relevance requires making an assumption that evidence is reliable; the statutory definition of probative value does not provide for making that assumption. The conceptual framework which the statutory language erects therefore admits of the possibility that relevant evidence will lack probative value because it is not reliable.

Nettle and Gordon JJ considered that questions of reliability and credibility were both to be taken into account in the assessment of probative value (at [182]):

> The admission of the complaint evidence involves different considerations because it was contended that the complaint evidence should have been excluded under s 137. In light of what has been said about the proper construction of s 137, it follows that the judge erred in the application of s 137 by assuming that the complaint evidence would be accepted and, therefore, by failing to have regard to the credibility and reliability of the evidence in determining whether it was of such probative value as not to be outweighed by the danger of unfair prejudice to the appellant.

In essence, *IMM* approved the approach of the NSW Court of Criminal Appeal in *Shamouil* and *XY*, and rejected that of the Victorian Court of Appeal in *Dupas*.

In assessing the probative value of evidence following *IMM*, a trial judge must assume the jury will accept the evidence, and it is not the function of the trial judge to assess its credibility or reliability, or to predict how the jury may treat it.

However, questions remain following *IMM* as to the extent to which a trial judge may consider competing inferences arising from the evidence in the assessment of probative value (see *Shamouil* at [61]–[65]; *DSJ v R*; *NS v R* (2012) 84 NSWLR 758 at [98] and [132]; and *XY*).

Concoction and contamination

The question whether the possibility of concoction or contamination may be taken into account in the assessment of probative value of tendency evidence is also unsettled.

Basten JA explained the terms "concoction" and "contamination" in *McIntosh v R* [2015] NSWCCA 184 at [46]:

> The concept of "concoction" suggests a deliberate fabrication of the evidence. By contrast, the term "contamination" may involve an unconscious process of suggestion being adopted.

A line of NSW Court of Criminal Appeal authority continues to support the proposition that the possibility of concoction or contamination may be taken into account in assessing the probative value of tendency evidence.

In *Jones v R* (2014) 246 A Crim R 425 at [88]–[90], Bellew J (Gleeson JA and Schmidt J agreeing) stated that while it was not the function of the trial judge to make assessments of credibility or reliability, or to predict how the jury would treat the evidence, it was conceivable there may be cases where the issue of concoction or contamination may give rise to competing inferences relevant to the determination of probative value, and that the trial judge may take into account, without determining acceptance or rejection of, such competing inferences as arise from evidence.

In *DJW v R* [2015] NSWCCA 164 at [41]–[42], RA Hulme J (Simpson and Bellew JJ agreeing) noted *Jones* and accepted that the possibility of concoction or contamination might be taken into account in assessing probative value.

In *McIntosh* at [47], Basten JA (Hidden and Wilson JJ agreeing) rejected the proposition that the possibility of concoction or contamination could be taken into account in determining whether tendency evidence has significant probative value:

> Whilst, in determining probative value as a question of capability to affect the assessment of a fact in issue, the court is not required to disregard inherent implausibility, on the other hand, contestable questions of credibility and reliability are not for the trial judge, but for the jury. Accordingly, the suggestion that the possibility of concoction is a factor which must be taken into account in determining whether particular evidence has significant probative value should not be accepted.

The judgment of the plurality in *IMM* endorsed this approach (see [59] and the reference in footnote 45 to the judgment of Basten JA in *McIntosh*).

Authorities since *IMM* have differed on this question.

In *R v GM* [2016] NSWCCA 78 at [100], Hoeben CJ at CL (Hall J agreeing; and Button J agreeing in separate reasons), referred to *Jones*, *DJW* and *McIntosh*, and concluded that competing inferences arising from the possibility of concoction or contamination may, but contestable questions of credibility and reliability may not, be taken into account in evaluating the probative value of the evidence.

In *Abbott (a pseudonym) v R* [2017] NSWCCA 149 at [16], Basten JA (McCallum J agreeing; Fagan J agreeing in separate reasons) referred to *IMM* at [59], and stated there was "no reason" for the possibility of concoction or contamination to be taken into account in evaluating the probative value of the evidence.

Sole complainant source

In *IMM*, the High Court also considered the question whether tendency evidence could have significant probative value where its source was the evidence of a sole complainant.

French CJ, Kiefel, Bell and Keane J jointly stated (at [62]–[64]):

> In a case of this kind, the probative value of this evidence lies in its capacity to support the credibility of a complainant's account. In cases where there is evidence from a source independent of the complainant, the requisite degree of probative value is more likely to be met. That is not to say that a complainant's unsupported evidence can never meet that test. It is possible that there may be some special features of a complainant's account of an uncharged incident which give it significant probative value. But without more, it is difficult to see how a complainant's evidence of conduct of a sexual kind from an occasion other than the charged acts can be regarded as having the requisite degree of probative value."
>
> Evidence from a complainant adduced to show an accused's sexual interest can generally have limited, if any, capacity to rationally affect the probability that the complainant's account of the charged offences is true. It is difficult to see that one might reason rationally to conclude that X's account of charged acts of sexual misconduct is truthful because X gives an account that on another occasion the accused exhibited sexual interest in him or her.
>
> For these reasons the tendency evidence given by the complainant did not qualify as having significant probative value and was not admissible under s 97(1)(b).

Gageler J stated at [105]–[108]:

> Provided the jury could rationally find the complainant to be credible, her tendency evidence was of some probative value: if the jury were to find the complainant to be credible, the evidence provided a basis on which the jury could go on rationally and indirectly to infer that there was an increased probability that the appellant committed one or more of the sexual offences against the complainant with which he was charged. The real question is whether that probative value was capable of warranting the label of significant.
>
> The difficulty of concluding that the complainant's testimony about the massage incident was capable of having significant probative value was not just that the testimony was uncorroborated. Her testimony about the massage incident was uncorroborated within a context in which the credibility of the whole of her testimony was in issue. There was nothing to make her uncorroborated testimony about that incident more credible than her uncorroborated testimony about the occasions of the offences charged. There was no rational basis for the jury to accept one part of the complainant's testimony but to reject the other. The increased probability of the appellant having committed the offences which would follow from the jury accepting that part of the complainant's testimony which constituted tendency evidence could in those circumstances add nothing of consequence to the jury's assessment of that probability based on its consideration of that part of the complainant's testimony which constituted direct testimony about what the appellant in fact did on the occasions of the offences. The probative value of the tendency evidence could not be regarded as significant.
>
> For that reason, in my view, the tendency evidence was improperly admitted in the present case, and application of the correct test of probative value could not have resulted in the tendency evidence having been properly admitted.

Unusual features

It is not a condition of admissibility of tendency evidence that the evidence relate to conduct of the accused involving unusual features; commonplace features may be significant in the context of the facts in issue in a given case: *BC v R* [2015] NSWCCA 327.

However, where the evidence discloses conduct of the accused involving "striking similarities", "unusual features", "underlying unity", "system" or "pattern", this may increase the probative value of the evidence: *R v Fletcher* (2005) 156 A Crim R 308 at [60], [165]; *Saoud* at [39], [42].

In *Hughes* the majority illustrated the manner in which conduct that was considered "unusual" was of significance in the context of the facts in issue in the case (at [57]):

> An inclination on the part of a mature adult to engage in sexual conduct with underage girls and a willingness to act upon that inclination are unusual as a matter of ordinary human experience. Often, evidence of such an inclination will include evidence of grooming of potential victims so as to reveal a "pattern of conduct" or a "modus operandi" which would qualify the evidence as admissible at common law. But significant probative value may be demonstrated in other ways. In this case the tendency evidence showed that the unusual interactions which the appellant was alleged to have pursued involved courting a substantial risk of discovery by friends, family members, workmates or even casual passersby. This level of disinhibited disregard of the risk of discovery by other adults is even more unusual as a matter of ordinary human experience. The evidence might not be described as involving a pattern of conduct or modus operandi — for the reason that each alleged offence involved a high degree of opportunism; but to accept that that is so is not to accept that the evidence does no more than prove a disposition to commit crimes of the kind in question.

Offence or misconduct

It is not necessary that tendency evidence relate to the accused's commission of an offence or some other form of misconduct but rather that the evidence makes significantly more likely the facts making up the charges: *Hughes* at [41].

Conversely, the fact that tendency evidence discloses merely the commission of another offence of the same kind may not make significantly more likely the facts making up the charged offences.

Number of instances

The fact that tendency evidence relates to a single instance of conduct of the accused will affect its probative value but may not be such as tonecessarily entirely deprive it of the capacity to have significant probative value: *Aravena v R* [2015] NSWCCA 288 at [89]; *R v F* (2002) 129 A Crim R 126.

Section 101 determination

Prejudicial effect

Section 101(2) refers to the prejudicial effect the evidence may have on the accused. Notably, the provision omits use of the adjective "unfair" (in contrast to s 137 which refers to "unfair" prejudice).

Authorities on s 101(2) have consistently equated its reference to prejudicial effect with the concept of "unfair" prejudice in s 137: see eg *Hughes* at [69].

"Unfair prejudice" in the context of s 137 has been described as a real risk that the evidence would be misused by the jury in some unfair way that is logically unconnected with the purpose of its tender: *Papakosmas v The Queen* (1999) 196 CLR 297 at [91]; *R v Shamouil* at [72]–[73].

Prejudicial effect of tendency evidence cannot be equated with any prejudice to the accused; all tendency evidence is prejudicial to the accused.

Tendency evidence may have a prejudicial effect on the accused in various ways. The majority in *Hughes* outlined a number of ways in which tendency evidence may have a prejudicial effect (at [17]):

> The reception of tendency evidence in a criminal trial may occasion prejudice in a number of ways. The jury may fail to allow that a person who has a tendency to have a particular state of mind, or to act in a particular way, may not have had that state of mind, or may not have acted in that way, on the occasion in issue. Or the jury may underestimate the number of persons who share the tendency to have that state of mind or to act in that way. In either case the tendency evidence may be given disproportionate weight. In addition to the risks arising from tendency reasoning, there is the risk that the assessment of whether the prosecution has discharged its onus may be clouded by the jury's emotional response to the tendency evidence. And prejudice may be occasioned by requiring an accused to answer a raft of uncharged conduct stretching back, perhaps, over many years.

Other circumstances in which tendency evidence has been recognised to have a potentially prejudicial effect on the accused include where it may provoke an irrational or emotional response in the jury: *R v MM* [2014] NSWCCA 144 at [43].

Tendency evidence may also have a prejudicial effect where it is liable to cause confusion or distraction of the jury from the primary issues in the trial: *Saoud* at [59].

Tendency evidence may also have a prejudicial effect where the jury may use the evidence in impermissible ways despite directions to the contrary: *DJV v R* (2008) 200 A Crim R 206 at [31].

Tendency evidence may also have a prejudicial effect where it discloses bad character of an accused person in a context separate from the issues in the trial: *Derwish v The Queen* [2016] VSCA 72 at [77].

The question whether the possibility of concoction or contamination should be taken into account in assessing the prejudicial effect of tendency evidence remains unsettled following *IMM*.

In *IMM*, the plurality noted (at [59]) that the approach in *Hoch v The Queen* (1988) 165 CLR 292 was inconsistent with determinations for admissibility of tendency evidence pursuant to provisions of the Act:

> The premise for the appellant's submission – that it is "well-established" that under the identical test in s 98(1)(b) the possibility of joint concoction may deprive evidence of probative value consistently with the approach to similar fact evidence stated in *Hoch v The Queen* – should not be accepted. Section 101(2) places a further restriction on the admission of tendency and coincidence evidence. That restriction does not import the "rational view ... inconsistent with the guilt of the accused" test found in *Hoch v The Queen*.

However, the plurality went on to acknowledge that the question whether the possibility of concoction or contamination should be taken into account in assessing the prejudicial effect of tendency evidence may need to be addressed when it arose in a concrete factual setting (at [59]).

In evaluating the extent to which the evidence may have a prejudicial effect on the accused, directions that would be given to the jury must be taken into account.

It is necessary that the prejudicial effect be precisely identified for the purpose of the weighing exercise and consideration of whether directions may ameliorate it: *BC v R* [2015] NSWCCA 327 at [107]–[110].

It is conventional to presume directions to the jury will be an effective safeguard against the potential prejudicial effect of evidence on the accused. *Gilbert v The Queen* (2000) 201 CLR 414 is commonly cited as authority for this presumption. In *Gilbert* at [31], McHugh J said:

> The criminal trial on indictment proceeds on the assumption that jurors are true to their oath, that, in the quaint words of the ancient oath, they hearken to the evidence and that they obey the trial judge's directions. On that assumption, which I regard as fundamental to the criminal jury trial, the common law countries have staked a great deal. If it was rejected or disregarded, no one – accused, trial judge or member of the public – could have any confidence in any verdict of a criminal jury or in the criminal justice system whenever it involves a jury trial. If it was rejected or disregarded, the pursuit of justice through the jury system would be as much a charade as the show trial of any totalitarian state. Put bluntly, unless we act on the assumption that criminal juries act on the evidence and in accordance with the directions of the trial judge, there is no point in having criminal jury trials.

However, a number of authorities have acknowledged that it cannot be presumed directions to the jury will necessarily be effective to neuter any and all prejudicial effect that tendency evidence might have: *Sokolowskyj* at [52]–[56]. It has been recognised that directions may not be effective entirely to confine the purposes for which the jury might use tendency evidence in some circumstances: *DJV* at [31].

In considering the potential prejudicial effect of tendency evidence on the accused arising from the possibility of concoction or contamination, directions that would be given to the jury should be taken into account: *R v GM* [2016] NSWCCA 78 at [123].

Directions to be given to the jury would stress that the jury must be satisfied there is no reasonable possibility of concoction or contamination of the evidence of the witnesses concerned before the jury may use their evidence for tendency purposes: *R v GM* [2016] NSWCCA 78 at [125].

Directions

In the event tendency evidence is permitted, the jury should be directed as to the necessity to be satisfied of the facts relied on to establish the asserted tendency as well as the existence of the asserted tendency (consistently with the steps involved in the determination of admissibility of tendency evidence identified in *Hughes*).

Conventional directions where tendency evidence has been admitted or tendency use has been permitted include directions against substitution of the tendency evidence for that the subject of the charges; reasoning the accused is generally a person of bad character; or reasoning that the accused may have done something wrong on one occasion that he/she is the sort of person who would have done something wrong on the occasion the subject of the charge (see the model directions in the *Criminal Trial Courts Bench Book* at [4-227]ff).

Standard of proof

The standard of proof applicable to tendency evidence remains unsettled.

In *Doyle v R* [2014] NSWCCA 4 at [129], there was said to be "no doubt" that conduct relied upon for tendency purposes had to be established beyond reasonable doubt (citing *DJV v R* [2008] NSWCCA 272 at [29] and [30]–[31]).

In *DJV*, McClellan CJ at CL cited *HML v The Queen* (2008) 235 CLR 334 as authority for the proposition that until the High Court held otherwise juries in child sexual assault trials should continue to be directed that tendency evidence must be established beyond reasonable doubt.

However, in *Campbell v R* [2014] NSWCCA 175 at [325]–[333], Simpson J queried the proposition that under the Act tendency evidence was required to be proved beyond reasonable doubt. Simpson J noted that *HML* was cited as authority for the proposition but was a case on the common law with conflicting judgments, and was in any event unclear as to whether either or both the acts relied on to establish the asserted tendency or the asserted tendency itself had to be proved beyond reasonable doubt. However, it was considered unnecessary to decide the question in *Campbell*, as it was in *McPhillamy v R* [2017] NSWCCA 130.

The *Criminal Trial Courts Bench Book* model directions at [4-232] assume the standard of proof applicable remains beyond reasonable doubt for child sexual assault cases. The Bench Book directions require instruction to the jury both that the acts relied on to establish the asserted tendency be proved beyond reasonable doubt and that the asserted tendency itself be proved beyond reasonable doubt.

Anti-tendency

Numerous categories of evidence relating to conduct of an accused person on occasions other than that the subject of the alleged offences may be admissible for purposes other than as tendency evidence.

The most commonly arising category of such evidence is context evidence. Conduct of the accused on occasions other than that the subject of the alleged offences may be relevant as context evidence in various ways.

For example, context evidence was relevant in numerous ways in the circumstances of *KJS v R* (2014) 86 NSWLR 603, as McClellan CJ at CL summarised (at [34]):

(i) To demonstrate that there was a process of habituating ISS to physical contact with the appellant so that such contact seemed unremarkable.

(ii) To place count 1 in its proper context so that rather than appearing to be an extraordinary assault which had suddenly occurred, it could be seen as a result of a course of conduct in which sexual touching had been established between the appellant and ISS as a normal activity and had progressed to a more serious form of indecent touching

(iii) To provide a proper basis for the jury to make an assessment of the description by ISS of count 1 and more particularly her failure to resist the appellant, to cry out for help or to otherwise express surprise at what was, viewed in isolation, an almost unbelievable anomaly in the father/daughter relationship.

(iv) To place count 2 in its proper context so that, rather than appearing to be another isolated and quite extraordinary sexual attack upon ISS, the offence was seen as the continuation and culmination of a consistent course of conduct over a period of years

(v) To provide some explanation for the failure of ISS to complain about her father's conduct. Without the evidence of what could readily be considered as a slow process of habituating ISS to sexual activity, the jury might well have found it incredible that after the occurrence of count 1 (and later count 2), ISS made no complaint.

However, there is frequently confusion regarding the purpose for which such evidence is admitted resulting in numerous appeals where the evidence was not properly admitted, because of a failure to identify a proper basis for its admission; or where the evidence was properly admitted, because of a failure properly to explain the purpose and limited use that may be made of the evidence. Thus in *DJV* at [80], McClellan CJ at CL stressed the need carefully to consider the basis for the admission of context evidence.

In the event evidence capable of being used as tendency evidence is admitted for another purpose, it will be necessary for the jury to be directed against a tendency use of the evidence: *CA* [2017] NSWCCA 324 at [82]–[83].

In the event no proper basis exists for the evidence as context evidence, its admission may give rise to the real risk of its use as tendency evidence when it has not been admitted for that purpose: *Norman v R* [2012] NSWCCA 230 at [35].

In *Qualtieri v R* (2006) 171 A Crim R 463 at [80], McClellan CJ at CL (Latham J agreeing; Howie J agreeing with separate reasons) said of context evidence:

> If admitted the trial judge must carefully direct the jury both at the time at which the evidence is given and in the summing up of the confined use they may make of the evidence. They should be told in clear terms that the evidence has been admitted to provide background to the alleged relationship between the complainant and the accused so that the evidence of the complainant and his/her response to the alleged acts of the accused, can be understood and his/her evidence evaluated with a complete understanding of that alleged relationship. The jury must be told that they cannot use the evidence as tendency evidence.

Coincidence

Overview

Evidence known as coincidence evidence under the *Evidence Act 1995* was known as similar fact evidence at common law.

In *R v Ellis* (2003) 58 NSWLR 700 at [75]–[78], Spigelman CJ noted that the use of different terminology in the Act with precise and comprehensive definitions manifested an intention to state the principles comprehensively and afresh.

At common law, the test for admissibility of similar fact evidence was whether there was a rational view consistent with the innocence of the accused: *Pfennig* at 483.

The five-judge bench of the NSW Court of Criminal Appeal in *Ellis* concluded that the common law test in *Pfennig* was inconsistent with the provisions of the Act. The trial judge was therefore not in error in ruling coincidence evidence and admissible without applying the *Pfennig* test.

The High Court granted but revoked special leave to appeal in *Ellis*, stating that Spigelman CJ's analysis of the Act was correct: [2004] HCA Trans 488.

Spigelman CJ's analysis in *Ellis* suggests the scope for coincidence reasoning is now broader than it was with similar fact evidence at common law.

The reasoning process underlying coincidence evidence is a form of inferential reasoning.

In *R v Gale; R v Duckworth* (2012) 217 A Crim R 487 at [25], Simpson J (McClellan CJ at CL and Fullerton J agreeing) described the reasoning process underlying coincidence evidence as follows:

> At its heart, s 98 is a provision concerning the drawing of inferences. The purpose sought to be achieved by the tender of coincidence evidence is to provide the foundation upon which the tribunal of fact could draw an inference. The inference is that a person did a particular act or had a particular state of mind. The process of reasoning from which that inference would be drawn is:
>
> - two or more events occurred; and
> - there were similarities in those events; or there were similarities in the circumstances in which those events occurred; or there were similarities in both the events and the circumstances in which they occurred; and

- having regard to those similarities, it is improbable that the two events occurred coincidentally;
- therefore the person in question did a particular act or had a particular state of mind.

In some circumstances, the same body of evidence may potentially support both coincidence and tendency reasoning. For example, in a joint trial of an accused for sexual offences against multiple complainants, coincidence reasoning may support the rational inference that the accused did the acts alleged because of the improbability of multiple individual complainants making similar allegations about the same person. However, the evidence of one or more complainant may also be relied upon to establish a tendency of the accused to act in a particular way or have a particular state of mind that may be relevant to the determination of facts in issue in respect of alleged offences against another complainant, particularly where the allegations involve relevant similarities.

In *El Haddad v R* (2015) 88 NSWLR 93 at [46], Leeming JA said (McCallum and RA Hulme JJ agreeing):

> The "tendency rule" and the "coincidence rule" are distinct, although it is trite that there is an overlap between the two, as was observed, for example, in *KJR v R* [2007] NSWCCA 165; 173 A Crim R 226 at [46]. More recently, in *Saoud v R* [2014] NSWCCA 136 at [43], Basten JA observed that there is awkwardness in separating "tendency" evidence and "coincidence" evidence where there is no dispute as to the identity of the alleged offender but what is in issue is whether the offences occurred: in a sexual assault case, evidence of an accused's conduct on another occasion is apt to support reasoning to the effect both that it is improbable that two complainants made independent complaints of similar conduct and that the offender has a tendency to conduct himself in a particular way. The "overlap" or "awkwardness" comes about because of the generality of the modes of proof described in ss 97 and 98, and because tendency evidence will usually depend on establishing similarities in a course of conduct. As Basten JA said in *Saoud* at [48], "where relevant and appropriate, a proper consideration of similarities will constitute an essential part of the application of s 97, as this Court has accepted on numerous occasions".

In other circumstances, coincidence and tendency reasoning may not both be available because of the differences in the respective reasoning processes. Tendency reasoning is inherently sequential in nature; proof of the asserted tendency logically precedes its use in proof of facts in issue. Coincidence reasoning is inherently holistic in nature; proof of facts in issue depends on inferences to be drawn from a number of events. For example, in a case where the fact in issue is the identity of the offender, coincidence reasoning may be available from evidence of a number of events with relevant similarities but tendency reasoning may not be available because proof of the asserted tendency of the accused cannot be presumed (see eg *R v Matonwal; R v Amood* [2016] NSWCCA 174).

The High Court did not consider the overlap between tendency and coincidence evidence in *Hughes*, as the Crown had not relied on the improbability of multiple complainants falsely making the allegations the accused (see at [43]).

Evidence Act 1995 provisions

The Dictionary to the Act defines "coincidence evidence" as evidence of a kind referred to in s 98(1) that a party seeks to have adduced for the purpose referred to in that subsection.

Accordingly, the purpose for which the evidence is tendered therefore defines it as coincidence evidence (as with tendency evidence).

Section 95 of the Act provides that:

> (1) Evidence that under this Part is not admissible to prove a particular matter must not be used to prove that matter even if it is relevant for another purpose.
>
> (2) Evidence that under this Part cannot be used against a party to prove a particular matter must not be used against the party to prove that matter even if it is relevant for another purpose.

Section 98(1) of the Act provides that:

> Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless:
>
> (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence, and
>
> (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.
>
> **Note:** One of the events referred to in subsection (1) may be an event the occurrence of which is a fact in issue in the proceeding.

In considering authorities on coincidence evidence, it is important to note that amendments to s 98 were introduced in 2007. Prior to the amendments, the provision referred to "two or more related events". Admissibility depended on these related events being substantially and relevantly similar and the circumstances in which they occurred was substantially similar. Further, the concluding note was inserted in the amendments.

Section 99 of the Act provides that:

> Notices given under section 97 or 98 are to be given in accordance with any regulations or rules of court made for the purposes of this section.

Section 101(2) of the Act provides that:

> [C]oincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.

Notice

Notice is as important to the determination of admissibility of coincidence evidence as it is with respect to tendency evidence.

In *Bryant v R* [2011] NSWCCA 26 at [50], Howie J said:

> The importance of explicitly identifying the related events for the purpose of s 98 and the asserted tendency for the purpose of s 97 should be obvious: how else is the court going to be able to make a rational decision about the probative value of the evidence?

In *R v Zhang* (2005) 158 A Crim R 504 at [131], Simpson J stated that a properly drafted coincidence notice required identification of four matters:

- the two or more related "events" the subject of the proposed evidence;
- the person whose conduct or state of mind is the subject of the proposed evidence;

- whether the evidence is to be tendered to prove that a person did a particular act, and, if so, what that "act" is;
- whether the evidence is to be tendered to establish that that person had a particular state of mind, and, if so, what that "state of mind" is.

Section 98(1) determination

Significant probative value

Authorities regarding the meaning of the expression "significant probative value" in the context of tendency evidence are equally applicable in the context of coincidence evidence: *JG v R* [2014] NSWCCA 138 at [105]; *R v Matonwal; R v Amood* [2016] NSWCCA 174 at [78].

In *R v Zhang* (2005) 158 A Crim R 504 at [139], Simpson J set out the process for the determination of the probative value of coincidence evidence as follows:

(i) coincidence evidence is not to be admitted if the court thinks that evidence would not, either by itself, or having regard to other evidence already adduced, or anticipated, have significant probative value

(ii) probative value is the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue (see the Dictionary to the Evidence Act)

(iii) the actual probative value to be assigned to any item of evidence is a question for the tribunal of fact — here, the jury

(iv) the probative value actually to be assigned to any item of evidence cannot finally be determined until all of the evidence in the case is complete

(v) the task of the judge in determining whether to admit evidence tendered as coincidence evidence is therefore essentially an evaluative and predictive one. The judge is required, firstly, to determine whether the evidence is capable of rationally affecting the probability of the existence of a fact in issue; secondly (if that determination is affirmative) to evaluate, in the light of any evidence already adduced, and evidence that is anticipated, the likelihood that the jury would assign the evidence significant (in the sense explained by Hunt CJ at CL in *Lockyer* (1996) 89 A Crim R 457) probative value. If the evaluation results in a conclusion that the jury would be likely to assign the evidence significant probative value, the evidence is admissible. If the assessment is otherwise, s 98 mandates that the evidence is not to be admitted.

In *DSJ v R* (2012) 215 A Crim R 349, a five-judge bench of the NSW Court of Criminal Appeal addressed the trial judge's role in assessing the probative value of coincidence evidence. Bathurst CJ said (at [10]):

> However, as Whealy JA has pointed out (at [78]–[81]), the trial judge in forming a view as to whether the evidence has significant probative value must consider by reference to the evidence itself or other evidence adduced or to be adduced by the party tendering it, whether there is a real possibility of an alternate explanation inconsistent with (in this case) the guilt of the party against whom it is tendered. This is because the availability of such an alternative hypothesis will be relevant to forming the view required by the section that the evidence has significant probative value. However, this does not involve either undertaking the fact-finding analysis suggested by senior counsel for *DSJ* or reaching a conclusion that the explanation for the coincidence proffered by the party seeking to tender the evidence was more probable than an alternative hypothesis. Each of these approaches go beyond what is required by the terms of s 98(1)(b) of the Act and would involve the judge usurping the fact-finding role of the jury.

Whealy JA, in the passages mentioned above, said:

> In this appeal the Crown has conceded that, in performing the task under s 98, a trial Judge may, in an appropriate case, have regard to an alternative explanation arising on the evidence. The Crown, however, insisted that, in so doing, the trial Judge is restricted to examining whether the Crown hypothesis has cogency, that is, whether the Crown evidence is capable of being regarded as significant in its ability to prove the Crown case. If the coincidence evidence, either by itself or having regard to other evidence in the Crown case, positively and forcefully suggested an explanation consistent with innocence, then the coincidence evidence could scarcely be regarded as important or of consequence in proving the fact or facts in issue. What is required is this: the trial Judge must ask whether the possibility of such an alternative explanation substantially alters his (or her) view as to the significant capacity of the Crown evidence, if accepted, to establish the fact in issue. Does the alternative possibility, in the Judge's view, rob the evidence of its otherwise cogent capacity to prove the Crown's case? If it does not, the trial judge may safely conclude that the evidence has significant probative value.
>
> In a practical sense, there are two avenues of approach to be taken. First, in examining the coincidence evidence (together with other material already in evidence or to be adduced) the trial Judge is required to ask whether there emerges, from a consideration of all the Crown evidence, a possible explanation inconsistent with guilt. For regard to be had to the alternative explanation, it must be a real possibility, not a fanciful one. It must be a broad or overarching possibility, capable of being stated in general terms, even though it may derive from an individual piece or pieces of evidence or the evidence taken as a whole.
>
> Secondly, the trial Judge must ask whether that possibility substantially alters his (or her) view as to the otherwise significant capacity of the coincidence evidence to establish the fact or facts in issue. Of course, if the trial Judge has already concluded that the coincidence evidence does not reach that level of significance in terms of its capacity, he will have rejected the evidence in terms of s 98. In that situation, the possibility of an alternative inference may, for the time being, be set to one side. Later in the trial, when the evidence has concluded, that possibility will become a matter for the jury to assess and determine when it comes to consider whether the Crown has proved its case beyond reasonable doubt.
>
> The Crown, in making its concession, however, stressed that at no stage in this process was the trial Judge required or entitled to assess the actual weight of any part of the evidence, or to make any actual assessment concerning the probabilities of any alternative theory. Nor was the trial judge required or entitled to make a comparison of the Crown theory and the probabilities of any alternative theory. This proposition appears consistent with established authority. Any attempt by the trial Judge to anticipate the actual weight the jury would attach to the evidence is prohibited, as I have explained.

Accordingly, competing inferences may, but questions of credibility and reliability may not, be taken into account in assessing the probative value of coincidence evidence.

In *Gale; Duckworth* at [25]–[26], Simpson J (McClellan CJ at CL and Fullerton J agreeing) revisited the question of the role of the trial judge in assessing the probative value of coincidence evidence:

> What is important to recognise, in my opinion, is that this process of reasoning and the drawing of the inferences (that the person did the act or had the state of mind) is for the tribunal of fact: see *DSJ v R; NS v R* [2012] NSWCCA 9. Part of that process involves findings of fact. Did the two (or more) events occur? Were there relevant similarities? Where the party tendering the evidence relies upon a number of asserted similarities, the tribunal of fact must identify which, if any, of those similarities have been established. Before asking itself the penultimate question — is it improbable that the two events occurred coincidentally? — it must discard any asserted similarities not established.

> The task for the judge in determining the admissibility of evidence that would permit the jury to undertake that reasoning process, and draw the ultimate inference, is what is presently in issue. Provided the evidence is such that would permit the jury, acting reasonably, to reach that conclusion or draw that inference, the evidence could be held to have significant probative value. It is a question of the capacity of the evidence to have that effect: *DSJ* at [8], [11], [55]. Subject to s 101, the evidence would, following that reasoning, be admissible.

In *Gale; Duckworth* at [30]–[31], Simpson J identified the proper approach for the determination of the admissibility of coincidence evidence as follows:

> The factual underpinnings of the s 98 decision to admit or reject coincidence evidence are:
>
> - that there is evidence capable of establishing the occurrence of two or more events; and
> - that there is evidence capable of establishing similarities in the two or more events; or
> - that there is evidence capable of establishing similarities in the circumstances in which two or more events occurred;
> - that there is evidence capable of establishing both similarities in the two or more events and similarities in the circumstances in which the two events occurred.
>
> In a case in which it is found that there is such evidence, then, in my opinion, the correct process in the determination of the admission of evidence under s 98 involves a series of steps, as follows:
>
> - the first step is to identify the "particular act of a person" or the "particular state of mind of a person" that the party tendering the evidence seeks to prove;
> - the second step is to identify the "two or more events" from the occurrence of which the party tendering the evidence seeks to prove that the person in question did the "particular act" or had the "particular state of mind";
> - the third step is to identify the "similarities in the events" and/or the 'similarities in the circumstances in which the events occurred' by reason of which the party tendering the evidence asserts the improbability of coincidental occurrence of the events;
> - the fourth step is to determine whether "reasonable notice" has been given of the intention to adduce the evidence (or, if reasonable notice has not been given, whether a direction under s 100(2) ought to be given, dispensing with the requirement);
> - the fifth step is to make an evaluation whether the evidence will, either by itself or in conjunction with other evidence already given or anticipated, "have significant probative value";
> - in a criminal proceeding, if it is determined that the evidence would have "significant probative value", the sixth step is the determination whether the probative value of the evidence "substantially outweighs" any prejudicial effect it may have on the defendant (s 101(2));
> - the sixth step necessarily involves some analysis both of the probative value of the evidence in question and any prejudicial effect it might have: *R v RN* [2005] NSWCCA 413, and a balancing of the two.

In *El Haddad v R* (2015) 88 NSWLR 93 at [79], Leeming JA (McCallum and RA Hulme JJ agreeing) described the inquiry whether coincidence had significant probative value as follows:

> The question is whether there is a real possibility of an alternative explanation inconsistent with the appellant's guilt, based on the evidence together with the other evidence in the Crown case. If there is such an alternative possibility, then that may rob the evidence of its significant probative value, in the manner described by Bathurst CJ and Whealy JA in *DSJ* at [10] and [78]–[81].

Considerations

Some particular questions that frequently arise in the context of considering the probative value of coincidence evidence are discussed below.

Cumulative effect

In assessing the probative value of coincidence evidence, it is necessary to consider the evidence as a whole, rather than separately to consider each particular circumstance relied upon (consistently with its nature as a form of circumstantial evidence).

As Beech-Jones J (Hoeben CJ at CL agreeing) observed in *R v MR* [2013] NSWCCA 236 at [79]:

> [G]iven that s 98 is addressing evidence that is put forward to invite the trier of fact to engage in a particular form of probabilistic reasoning, it necessarily follows that the assessment of whether the evidence of the relevant events has either probative or significant probative value requires a consideration of the combined effect of all the relevant similarities. Unless they are all considered then the "basis" upon which the evidence is put forward, namely that it is "improbable that the events occurred coincidentally" and that instead the events are explicable by reason of the particular act or state of mind sought to be proved, such as the involvement of the same offender or offenders in all the events, cannot be properly addressed.

It is therefore the cumulative effect of each of the features relied upon as coincidence evidence that must be considered in evaluating its probative value: *R v Matonwal; R v Amood* [2016] NSWCCA 174 at [75].

Other evidence

The terms of s 98(1)(b) make clear that the probative value of the evidence must be considered having regard to other evidence adduced or to be adduced.

Accordingly, it is erroneous to assess the probative value of coincidence evidence in isolation from other evidence adduced or to be adduced: *Matonwal; Amood* at [75].

Similarities

Section 98(1), in contrast to s 97(1), is premised on the existence of similarities in the events the subject of the proposed coincidence evidence, and/or the circumstances in which the events occurred: *R v PWD* (2010) 205 A Crim R 75 at [79]; *Saoud* at [45].

Accordingly, the determination of the probative value of coincidence evidence inevitably involves a consideration of the nature and extent of similarities in the events and/or the circumstances in which they occurred.

However, identification of dissimilarities does not necessarily mean coincidence evidence will be deprived of significant probative value.

In *Selby v R* [2017] NSWCCA 40, the court (Leeming JA, Schmidt and Wilson JJ) responded to a contention regarding the significance of dissimilarities for the determination to permit coincidence evidence as follows (at [23]–[24]):

> [I]t is not to the point merely to identify various dissimilarities. One way of explaining why this is so is to observe that one incident occurred on a Monday, the other on a Friday. That particular dissimilarity has no bearing whatsoever on the process of inferential reasoning that it permitted.
>
> The questions posed by ss 98 and 101 ultimately turn on a mode of reasoning based on the improbability that something was a coincidence. That mode of reasoning is not displaced by the

> fact that the two (or more) events bear some dissimilarities. Two (or more) events will always be dissimilar in some respects. The question is whether the dissimilarities undercut the improbability of something being a coincidence.

Assertions of events

The note to s 98 states that one of the events referred to in subsection (1) may be an event the occurrence of which is a fact in issue in the proceeding.

However, a combination of mere assertions cannot establish two or more "events" with relevant similarities to support coincidence reasoning in proof of facts in issue.

In *Gale; Duckworth* at [37], Simpson J described as a "serious logical fallacy" the prosecution's reliance on a number of mere assertions to establish similarities in events which were in turn relied upon to prove the improbability of the fact in issue occurring coincidentally.

Unusual features

The nature of the events may affect the assessment of the probative value of coincidence evidence.

The common law emphasised the significance of the nature of the events for the assessment of the probative value of similar fact evidence. In *Hoch v The Queen* (1988) 165 CLR 292, 294–5, Mason CJ, Wilson and Gaudron JJ explained the reasoning underlying this as follows:

> The fact that the evidence reveals "striking similarities", "unusual features", "underlying unity", "system" or "pattern" such that it raises, as a matter of common experience and logic, the objective improbability of some event having occurred other than as alleged by the prosecution.

The scope for the availability of coincidence reasoning under the Act (discussed above) is such that it is not a condition of admissibility that the evidence relates to events with unusual features. However, evidence relating to events with unusual features may more readily have significant probative value than evidence relating to commonplace events.

Concoction and contamination

Where the evidence of multiple complainants comprises relevant similarities, coincidence evidence probative value because of "the improbability of the witnesses giving accounts of happenings having requisite degree of similarity unless those happenings occurred" (*Hoch* at 295). In such cases, the evidence of the multiple complainants is admitted to bolster the credibility of each other: see, eg *R v F* (2002) 129 A Crim R 126.

However, the improbability that a number of complainants would give accounts of similar events unless the accounts were true ceases to exist where there is a possibility of concoction or contamination.

The discussion regarding the significance of the possibility of concoction or contamination for the assessment of the probative value of tendency evidence is equally applicable to coincidence evidence.

Section 101 determination

Prejudicial effect

The discussion of the prejudicial effect that tendency evidence may have on an accused is equally applicable to coincidence evidence.

In *El Haddad v R* (2015) 88 NSWLR 93 at [79], Leeming JA (McCallum and RA Hulme JJ agreeing) made the following observations regarding the determination required under s 101(2):

> Section 101 will apply with much greater force when the only way in which evidence is said to be relevant is because of tendency or coincidence reasoning (for example, a sexual assault case where evidence is called of another complainant in respect of whom no charges have been laid). Where, as here, the evidence which was sought to be used for coincidence and tendency reasoning was (a) relevant to other charges which were able to be determined fairly at the same trial and (b) not said to be inherently unfairly prejudicial in its own right, then it is apt to be difficult for s 101 to apply so as to preclude tendency or coincidence reasoning based on it.

An example of circumstances in which coincidence evidence was considered to have "obvious" prejudicial effect not substantially outweighing its probative value is *Gale; Duckworth* (see at [34], [49]).

However, coincidence evidence will not be unfairly prejudicial to the accused merely because it has the capacity powerfully to implicate the accused in the commission of the subject offence: see *Ceissman v R* [2015] NSWCCA 74 at [46].

Directions

Standard of proof

The standard of proof applicable to coincidence evidence differs from that applicable to tendency evidence.

As coincidence evidence is a form of circumstantial evidence, which is generally not required to be proved beyond reasonable doubt unless it relates to an essential intermediate fact, coincidence evidence may not need to be proved beyond reasonable doubt unless it is not relied on as an indispensable link in proof of guilt.

In *Folbigg v R* [2005] NSWCCA 23 at [103], it was accepted that there was no requirement that the coincidence evidence concerned was required to be proved beyond reasonable doubt in a case where the evidence was not relied on as an essential intermediate fact but one of several facts relied on to prove guilt.

Concoction and contamination

In a case where the improbability of multiple complainants independently making similar allegations against the accused unless they were true is permitted as coincidence reasoning, it will be invariably necessary for the jury to be directed that the possibility of concoction or contamination must be excluded.

Joint Trials

Criminal Procedure Act 1986 provisions

Section 21(2) of the *Criminal Procedure Act 1986* provides that:

> If of the opinion:
>
> (a) that an accused person may be prejudiced or embarrassed in his or her defence by reason of being charged with more than one offence in the same indictment, or
>
> (b) that for any other reason it is desirable to direct that an accused person be tried separately for any one or more offences charged in an indictment, the court may order a separate trial of any count or counts of the indictment.

Section 29(1) of the *Criminal Procedure Act 1986* provides that:

> A court may hear and determine together proceedings related to 2 or more offences alleged to have been committed by the same accused person in any of the following circumstances:
>
> (a) the accused person and the prosecutor consent,
>
> (b) the offences arise out of the same set of circumstances,
>
> (c) the offences form or are part of a series of offences of the same or a similar character.

General principles

Generally, the answer to the question whether or not the evidence on one count is cross-admissible on another count will likely be determinative of whether an order for separate trials is in the interests of justice.

Where evidence on counts relating to different complainants is not cross admissible, separate trials of counts relating to each complainant will generally be appropriate: *De Jesus v The Queen* (1986) 61 ALJR 1.

Where tendency and/or coincidence evidence is admitted, such that the evidence on counts relating to different complainants is cross-admissible, a joint trial of counts relating to all the complainants will often be appropriate: see eg *Abbott (a pseudonym) v R* [2017] NSWCCA 149 at [15]; *Donohoe v R* [2017] NSWCCA 174 at [93].

In *Hughes*, the majority considered the hypothesis of separate trials for each complainant, with the only evidence against the appellant being the evidence of that complainant to highlight the importance of the tendency evidence (at [59]):

> [I]n isolation, JP's evidence might have seemed inherently unlikely: the appellant, a family friend, at dinner in JP's home, absented himself from the party and came into her bedroom, and without making any attempt to ensure her silence, commenced to invasively sexually assault her while his daughter lay sleeping in the same bed. The jury might well be disinclined to accept JP's evidence […] Proof of the appellant's tendency to engage in sexual activity with underage girls opportunistically, notwithstanding the evident risk, was capable of removing a doubt which the brazenness of the appellant's conduct might otherwise have raised.

In cases involving a single complainant but a number of counts, evidence of all the complainant's allegations will often be relevant otherwise than as tendency evidence (for example, as context evidence). In these circumstances, a joint trial of multiple counts relating to a single complainant will also often be appropriate.

Where tendency evidence is not admitted in a trial of multiple counts relating to a single complainant, and it is considered that any directions against tendency reasoning would be ineffective to eradicate the risk of prejudice to the accused arising from use of the evidence for tendency reasoning, an order for separate trials may be warranted.

Finally, whether or not tendency and/or coincidence evidence is admitted, there will of course always be cases where some feature of the evidence in respect of one or more counts gives rise to the risk of prejudice to the accused such that an order for separate trials of these counts will be in the interests of justice.

Bauer and McPhillamy — update on admissibility and use of tendency evidence in child sexual assault matters

[7-020] Article

S Bouveng, *"Bauer* and *McPhillamy* — update on admissibility and use of tendency evidence in child sexual assault matters", conference paper presented at the Public Defenders Conference, 16 March 2019, Sydney.

Abstract

The law regarding the admissibility and use of tendency evidence has again "evolved" since the audience at the 2018 conference was updated by his Honour Judge Gartelmann SC. This paper reviewed High Court developments in the admissibility of tendency evidence in 2018, with a focus on its use in child sexual assault matters.

Jury views of psychological expert evidence about child sexual abuse

[7-040] Article

Professor Jane Goodman-Delahunty and Professor Annie Cossins, "Jury views of psychological expert evidence about child sexual abuse", presentation to the Public Defenders Criminal Law Conference, 13 February 2016, Sydney.

Abstract

Section 79(2) of the *Uniform Evidence Act 1995* was inserted in 2005 as an exception to the opinion rule (s 76) which permits the admission of expert opinion evidence about children's behaviour and reactions to child sexual assault (CSA) to bolster a child's credibility in a CSA trial.

The researchers investigated the impact of both research and clinical expert evidence in a simulated CSA trial to explore the extent of jurors/laypeople's misconceptions about children and CSA. The researchers randomly assigned 334 deliberating and 325 non-deliberating jurors to one of three experimental conditions: a control group, with no expert evidence presented to it; a research group with specialised CSA knowledge, presented by an experimental/research psychologist; and a clinical group with specialised CSA knowledge presented by a clinical psychologist who interviewed the complainant. Participants in the study viewed a professionally-acted video-trial, 45–55 mins long, which included opening and closing addresses by legal counsel; examination-in-chief and cross-examination of 13-year-old complainant; examination-in-chief and cross-examination of the complainant's grandmother; no evidence from defendant; and summing-up with standard judicial directions. The researchers generally observed that jurors struggled with how to interpret the expert's evidence and how much weight to give it; there was considerable variation in the amount of time spent discussing the expert's evidence, from less than a minute to more than half-an-hour; clinical expert evidence generated more deliberation than research expert evidence; jurors used expert evidence for a credibility purpose; and jurors applied the same amount of skepticism to the expert's evidence as other witnesses' evidence.

Children's champions/witness intermediaries

[7-060] Article

Professor P Cooper, "Children's champions/witness intermediaries".

This presentation was given on 17 and 26 February 2016 as part of the District Court of NSW Seminar Series.

Note: The Child Sexual Offence Evidence Pilot is now a permanent program as described in the abstract below.

Abstract

The presentation provides information regarding the role of witness intermediaries, in preparation for the commencement on 31 March 2016 of the Child Sexual Offence Evidence Pilot (now a permanent program: Child Sexual Offence Evidence Program (CSOEP)) in the District Court of NSW. The CSOEP provides for children's champions or witness intermediaries and the pre-recording of evidence of child witnesses: *Criminal Procedure Act 1986*, Sch 2, Pt 29.

The pilot scheme began in 2016 in two court locations — the Sydney (Downing Centre) District Court and Newcastle District Court — as well as in the corresponding South-West Metropolitan, Central Metropolitan, and parts of the Northern Police Districts. The CSOEP was established as a permanent fixture in its initial locations in 2018, and from 1 July 2023 the CSOEP is expanded to every District Court and Police District in NSW: see "Greater support for child sex abuse victims", media release, NSW Communities and Justice, Sydney, 1 February 2023.

Topics covered in the presentation include:

- the role of the witness intermediary
- lessons learnt from the English and Northern Irish intermediary schemes
- training assessment and recommendations
- pre-trial case management
- the new witness/intermediary cross-examination dynamic
- case law
- further reading.

[Please find a link to "The Advocate's Gateway" toolkit referred to in slide 7 of Professor Cooper's presentation.]

Children's competence to testify in Australian courts: implementing the Royal Commission recommendation

[7-080] Article

S Brubacher, N Hodgson, J Goodman-Delahunty, M Powell and N Westera, "Children's competence to testify in Australian courts: implementing the Royal Commission recommendation" (2019) 42(4) *UNSW Law Journal* 1386.

Abstract

In 2017, the Royal Commission into Institutional Responses to Child Sexual Abuse recommended reforms to the law of competence of child witnesses. This article examines Australian judges' practices in assessing children's competence to give sworn evidence. Trial transcripts from 56 victims revealed that 64% were posed competence questions, with fewer to older children. The most frequent manner of posing such questions was to ask children to evaluate the morality of truths and lies. Most questions were yes/no format, and children nearly always answered these satisfactorily. When questions were 'wh-' format, children provided a satisfactory response only 51% of the time. Only nine children testified unsworn, and they were asked more than twice as many competence questions as sworn children. Competence inquiries have been challenged for underestimating children's abilities, and because responses to questions about truths and lies are not predictive of behaviour. This article discusses how reforms could be implemented.

Legislative facts and s 144 — a contemporary problem

[7-100] Article

Justice Peter McClellan and Amber Doyle "Legislative facts and s 144 — a contemporary problem".

This presentation was given at the Supreme Court of NSW Annual Conference 2015, 4 September 2015. It is also published in (2016) 12(4) *The Judicial Review* 421.

Abstract

In the past, judges have relied on their own observations and assumptions about human behaviour, and the evidence of children was treated with caution as children were considered unreliable witnesses. Judges' assumptions about how complainants behave, and how memory works, became embedded in common law and had consequences for complainants in sexual assault cases. These assumptions have been challenged by the work of the Royal Commission into Institutional Response to Child Sexual Abuse. For example, delay in making complaint, which was once assumed to be an indication of falsity, has been shown to be typical in child sexual abuse. Similarly, the assessment of harm done to the victim for the purposes of sentencing has changed so that there is greater awareness of the effects of child sexual abuse, but can still be problematic if the victim's impact statement is not consistent with the judge's perceptions of harm. This article discusses the means by which courts can use available learning in relation to the sexual abuse of children in the trial and sentencing process, and the effect of s 144 of the *Evidence Act 1995* on the operation of the common law doctrine of judicial notice.

Expert evidence to counteract jury misconceptions about consent in sexual assault cases: failures and lessons learned

[7-120] Article

Associate Professor Jacqueline Horan and Professor Jane Goodman-Delahunty, "Expert evidence to counteract jury misconceptions about consent in sexual assault cases: failures and lessons learned" (2020) 43(2) *UNSW Law Journal* 707.

Abstract

This century has seen dramatic changes in the way in which sexual offences, particularly against children, are prosecuted in Australia, Canada, New Zealand, the United Kingdom and the United States of America. These jurisdictions have acknowledged the potential of myths and misconceptions about how a victim will behave, both during and after a sexual assault, to exert an undue influence on jurors. Expert evidence to educate jurors about common rape myths that apply to issues of consent has been used to redress this issue. However, such expert evidence poses significant challenges for the lawyers and experts. This article explores the effectiveness of educative expert evidence through analysis of an illustrative contemporary Australian child sexual assault case where the authors interviewed some of the jurors and other trial participants about their perceptions of the expert evidence. Practical suggestions to improve educative expert evidence are identified and explained.

Intermediaries, vulnerable people and the quality of evidence: an international comparison of three versions of the English intermediary model

[7-140] Article

P Cooper and M Mattison, "Intermediaries, vulnerable people and the quality of evidence: an international comparison of three versions of the English intermediary model" (2017) 21(4) *The International Journal of Evidence & Proof* 351.

Abstract

Since 2004, witness intermediaries have been utilised across the justice system in England and Wales. Two witness intermediary schemes based on the English model have also been introduced in Northern Ireland (2013), and more recently, in New South Wales, Australia (2016). The purpose of the intermediary in these jurisdictions is to facilitate the questioning of vulnerable witnesses, but there are clear differences in the application of the role. This paper presents the first comparative review of the three related intermediary models, and highlights the pressing need for further research into the efficacy and development of the role in practice.

The application of the Uniform Evidence Law to delay in child sexual assault trials

[7-145] Article

PA Cossins and J Goodman-Delahunty, "The application of the Uniform Evidence Law to delay in child sexual assault trials" in A Roberts and J Gans (eds), Critical perspectives on the Uniform Evidence Law, The Federation Press, 2017, p 104.

Abstract

This chapter looks at how the Uniform Evidence Law (UEL) operates in relation to child sexual assault. It summarises the basis behind the common law position on the admission of complaint evidence. It discusses the first two cases heard by the High Court on complaint evidence under the UEL, subsequent reform and differences in approaches between states. Scientific evidence about the impact on memory caused by delay and by the nature of the event is discussed and reform options are considered.

The law on consent in sexual assault is changing

[7-150] Article

P Mizzi and the Honourable Justice Robert Beech-Jones, "The law on consent in sexual assault is changing" (2022) 34 *JOB* 1.

Abstract

This article summarises the changes that the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021*, commencing June 2022, will introduce as well as the legislated jury directions added to the *Criminal Procedure Act 1986*. The directions address perceived misconceptions about the conduct of a sexual assault complainant and the possible manner of such complainants giving evidence.

Myths, misconceptions and mixed messages: an early look at the new tendency and coincidence evidence provisions

[7-155] Article

D Hamer, "Myths, misconceptions and mixed messages: an early look at the new tendency and coincidence evidence provisions" (2021) 45 *Crim LJ* 232.

Abstract

This article discusses reforms made to the tendency and coincidence evidence provisions in the Uniform Evidence Law jurisdictions following the recommendations of the Royal Commission into Child Sexual Abuse. The author argues that the reforms are unnecessarily complex, and that rather than improve understanding of the inferential value of other misconduct evidence, the reforms may sow confusion, wasting the resources of courts, and creating associated costs for complainants, defendants, and other participants.

Judicial activism in child sexual assault cases

[7-160] Article

R Ellis, "Judicial Activism in Child Sexual Assault Cases" paper presented to National Judicial College of Australia, Children and the Courts Conference, 5 November 2005, Sydney.

Editor's note: To the extent the author discusses Common Law warnings at [26]–[27] of this article, these are now found in s 165A (Warnings in relation to children's evidence) of the *Evidence Act 1995*. See also District Court Criminal Practice Note 5, Management of Prescribed Sexual Offence Proceedings.

Abstract

This paper argues that appropriate judicial activism is a positive thing. Trial judges should be more hands on in their approach to child sexual assault cases in pre-trial management and trial process.

The paper provides that judicial activism should begin with effective case management of child sexual assault trials. The longer the delay the greater the impact on a child complainant and the more likely the child will decide he or she does not wish to proceed or does not wish to remember and the more damaging the memory loss. A large number of "causes" of delay can be prevented or minimised by better management practices, however, not without the co-operation of judicial officers.

Awareness of the inhospitable nature of a court room environment, especially for children is an essential starting point. If a child feels uncomfortable the judge needs to be personable. The judge needs to readily, clearly and pleasantly introduce the child to the court process and to demonstrate approachability, fairness and understanding of the child's predicament.

Judicial activism should address the practical issues of court attendance by children. Use of remote location facilities should be encouraged. Judges should actively seek to minimise the waiting time and ensure that adult support is available. Appropriate comfort breaks should be enforced having regard to lower concentration levels, shorter attention spans and the greater impact of bodily needs upon children.

Further it is important that trial judges recognise the need to monitor the language used by trial counsel as there can be no procedural fairness if a child does not understand the question, if the question is ambiguous, if double negatives are used or if the question contains multiple propositions. It is argued that continuing judicial education should be enforced upon judicial officers.

Acknowledgment: this article was prepared by Judge Ellis and presented at the National Judicial College of Australia, Children and the Courts Conference, 5 November 2005, Sydney. Reproduced with permission.

Judicial Activism in Child Sexual Assault Cases*

His Honour Judge Roy Ellis

District Court of New South Wales

Introduction

[1] The question posed by this paper is whether judges should be more "hands on" in their approach to child sexual assault cases and the practicality of such a "hands on" judicial approach. In this paper the term judicial activism is not a reference to the role of appellant courts in moulding and defining the law, rather, it refers to the active involvement of trial judges in pre-trial management and the trial process.

[2] Judicial activism in the civil area has been encouraged over recent years, both in Australia and overseas, in order to promote the resolution of disputes, meaning a proactive approach to promoting settlement, to promoting alternative systems of dispute resolution and controlling costs. Notwithstanding the greater challenges presented by criminal trials, procedural fairness within the context of a fair criminal trial is achievable. The Honourable John Doyle AC, Chief Justice of South Australia, in a paper delivered to the National Australasian Judicial Orientation Program on 6 August 2000 opined:

> We must ensure that as an institution the judiciary is forward looking. We must aim to administer justice in a way that reflects contemporary conditions and is consonant with contemporary attitudes. But equally we must adhere to the principles on which the institution is founded. We must not unthinkingly adopt transient fashions or anything that would compromise the fundamental principles of justice.

[3] The recently released report prepared by Judy Cashmore and Lily Trimboli entitled "*An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot*", New South Wales Bureau of Crime Statistics and Research, 2005 (the Report), provides valuable insight into potential problem areas of current practice and procedure in child sexual assault prosecutions. While there is legitimate scope for differences of opinion regarding some of the findings and observations, the Report properly and usefully focuses attention on the need for better court management in a number of problem areas. The goal of better managing court operations in all areas might be a relatively new concept, at least within the last 10 years, but it is hardly revolutionary and is a reality that must and should be addressed despite natural judicial conservatism.

[4] The desire to constantly seek new and better means to manage our courts is a logical extension of the judicial goal of providing an efficient, ethical and effective system of criminal justice in which the community can have complete faith. The need for ongoing reform and improvement should not be justified by a desire to increase conviction rates or by beliefs that all complainants tell the truth or that all accused are guilty. Rather it is justified by the need to ensure procedural fairness to all witnesses (including the accused and defence witnesses) within the context of a fair trial where the Crown bears the onus and burden of proof and the accused has the benefit of a presumption of innocence. In my view, the community will always maintain faith with a criminal justice system that strives for improvement while holding closely to the basic tenet of procedural fairness for all within the context of a fair trial for an accused.

[5] Public perception of the judicial system is intrinsically linked to public confidence in the administration of justice. Effective judicial activism is likely to impact favourably on public

perception and, in turn, on the level of public confidence in the system. In fact, judicial activism is one of the few ways a court can impact public perceptions even if for no reason other than by reducing the occurrence of incidents likely to be the subject of unfavourable media coverage.

[6] The question of judicial activism during child sexual assault trials goes to the heart of the role of the judiciary in criminal trials. Many judges in the criminal jurisdiction have adopted, and still adopt, a passive judicial role in that they allow trials to flow without interruption unless called upon to adjudicate on an issue raised by either the Crown or defence — even if they are aware of witness trauma, mistakes, misconceptions, incompetence or omissions during the Crown or defence case. Minds may, and do, differ in respect to this passive approach. To my mind the role of a trial judge is to ensure a fair trial. In order to do so it is necessary, on occasion, to actively intervene to correct a mistake or misconception, raise an omission, enforce a Bar rule, or act to prevent unfairness.

[7] Justice is not a game to be determined by the tactical approach, level of competence or experience of trial counsel. Justice is rarely advanced by an unsupervised adversarial system where opponents can adopt questionable tactical practices solely in the interests of their partisan cause. Intervening to ensure a fair trial process does not denigrate from, but rather, enhances the prospects of, a fair trial.

[8] Accepting that some judicial activism is appropriate, it then remains to determine the degree, frequency and nature of such activism. In my experience, child sexual assault cases regularly generate considerable potential for judicial activism. In fact during the last 20 years or so there has been a significant change in the approach of the criminal justice system to child sexual assault cases. It is a question of "How far have we come and how much further should we go?"

[9] Historically, judicial activism in child sexual assault cases has been prompted by legislative reform, although cultural factors have no doubt played some part in changed judicial attitudes to offences against women generally and children in particular. Fortunately, we have left behind the days when the uncorroborated word of a child was insufficient to sustain a conviction. On the other hand, it is all too clear that some suggested changes to the system seem to be based on the assumption that all complaints by children are truthful and that therefore all accused are guilty. Apart from the fact that such a gross generalisation is basically flawed, this approach also fails to acknowledge the basic tenet of our criminal justice system that all accused are presumed innocent unless and until their guilt has been established by the Crown beyond reasonable doubt.

[10] The momentum for change should not be this subjective belief that all children tell the truth or that all accused are guilty, but rather the need to ensure procedural fairness to all witnesses (including the accused and defence witnesses) within the context of a fair trial where the Crown bears the onus and burden of proof and the accused has the benefit of a presumption of innocence. This eminently desirable outcome of procedural fairness is very difficult if not impossible to achieve without judicial activism.

[11] A fair trial process will ensure more informed jury decisions and therefore decisions that are more likely to be correct. It will also engender greater confidence in our criminal justice system and is likely to encourage genuine complainants while at the same time protecting the rights of the accused.

Case management and listing practices

[12] Judicial activism can and should begin with effective case management of child sexual assault trials. It must be accepted that lengthy trial delays or false starts are potentially very traumatic to accused and complainant alike. Delays before complaint and charge can be very detrimental

to an accused and appellate courts have acknowledged this and juries are warned accordingly. However, from a tactical point of view an accused generally has more to gain from such delays and false starts after committal than a complainant. The longer the delay the greater the impact on a child and the more likely the complainant will decide she or he does not wish to proceed or does not wish to remember and the more damaging the memory loss.

[13] Turning to some of the major issues highlighted in the Report it seems to me that there is no controversy in seeking to reduce delays. The Report identified a number of "causes" of delay, some of which it is not possible to prevent, such as sudden illness of counsel, witnesses or accused. It should also be noted that a number of problems relate to prosecutorial management practices often outside the control or influence of the court, for instance, where the Crown requires a complainant to be at court or at the closed circuit television (CCTV) room well before the she or he could ever possibly be called to give evidence. However, a large number of "causes" of delay can be prevented or minimised by better management practices.

[14] Although it is not a panacea for all problems, effective case management is capable of addressing many of the issues raised. The difficulty is that case management is a fickle creature whose success, at least anecdotally, appears to depend upon the individuals (judge, Crown and defence counsel) involved, that is, their personalities, people skills, practical experience and commitment to the process. My experience is that it can be made to work but not without the co-operation of the main players. The bigger the caseload and the larger the pool from which Crown and defence counsel are drawn, the more difficult and less effective case management is likely to be. However, the potential of improved efficiency is well worth the judicial effort and the more familiar with it the legal profession becomes the more likely it is to produce results. The case management system I have implemented at the Parramatta District Court has been well received by the local profession and it is my experience that counsel from the city have adapted to the system reasonably well and generally in a fairly gracious manner.

[15] An effective case management system can reduce the number of occasions a complainant is required to attend court and the time she or he is required to remain. It should ensure that all trials are prepared early and as well as possible. The first advantage of case management is that trial counsel, Crown and defence, become involved well before the trial date. Such early involvement can result in pleas of guilty or directions for no further proceedings before, rather than on the day of trial. Once pleas on the day of trial are minimised, trial listings can be reduced, which in turn reduces the over listing that can lead to "not reached" trials or changes of venue resulting in significant disruption and often trauma to child witnesses. Early and continued involvement of counsel through the case management process often leads to settlement of many issues before trial that would otherwise generally be decided by the trial judge during the course of the trial. This can significantly reduce the number and length of interruptions to the trial process thereby reducing the time a child witness is required to spend in the witness box or waiting to return to give their evidence.

[16] For those issues that cannot be resolved and which have the potential to disrupt the evidence of a child witness, for example, rulings that may result in the need to edit the child's video interview, case management can clarify the need for, and arrange for, necessary pre-trial hearing for such issues.

Judicial people skills

[17] Awareness of the inhospitable nature of the courtroom environment, especially for children, is an essential starting point for any judicial officer. It is the judicial officer who determines the

atmosphere within the court as our own experience with difficult or impatient judges has taught us. If a child is to feel comfortable the judge needs to be personable in her or his dealings with the child. She or he needs to readily, clearly and pleasantly introduce the child to the court process and to demonstrate approachability, fairness and understanding of the child's predicament.

[18] These matters and others going to fairness of court processes do not depend upon any assessment of the reliability of the particular child witness. Ensuring fairness in the court process comes first, and certainly before there is even an opportunity to assess the reliability of the witness. A judge who demonstrates these appropriate people skills should not be taken by reason of that fact to have formed any view at all about the witness, and there is no reason why a jury can't be told that one of the judicial functions is to ensure procedural fairness, and that in relation to children that means de-mystifying the court so that a child is confident and comfortable enough to be able to give their evidence. In any event, most of the groundwork involved in making a child comfortable can be done by the trial judge in the absence of the jury. In my view, a jury will respect a trial judge who is sympathetic and reasonable with all witnesses and misunderstanding or suspicion of judicial bias is unlikely.

Logistics of court attendance

[19] Judicial activism can and should address the practical issues of court attendance by children. Use of remote location facilities should be encouraged. It is clear from the Report that the physical improvements made to the District Court at Sydney West, for instance, have been well received and well worth the expenditure. On the other hand it is also clear that the all too familiar facilities of most court complexes act as a disincentive to complainants, parents and staff alike. Judges should actively seek to minimise the waiting time for child witnesses and ensure that adequate adult support is made available. Appropriate comfort breaks should be enforced by judges having regard to lower concentration levels, shorter attention spans and the greater impact of bodily needs upon children. Judges should ensure as far as is reasonably possible that each child witness is comfortable, understands what is to take place, understands how long it may take, and understands that they should indicate lack of understanding or need for a short break. Judges should monitor the emotional state of the child witness and take short breaks where necessary to prevent a child becoming overwrought.

[20] It has been suggested that it should be the accused rather than the child witness who leaves the courtroom. It is argued that the accused loses nothing by watching the proceedings from a remote location. It is noted that instructions are rarely taken on the run and, if that does occur, instructions can be taken by the solicitor in the remote location, at the next adjournment, or during a short break granted specifically for that purpose. On the other hand, when the child witness leaves, the jury are denied the opportunity of closely watching and assessing the child witness as she or he gives evidence. Most importantly it is said that the impact of cross-examination cannot be properly assessed when the child can only be seen on a television screen positioned across the other side of a large courtroom. It is true that the Crown bears the onus and burden of proof and it usually relies upon the jury's acceptance of the child as a witness of truth in order to prove its case. In these circumstances it seems legitimate to question the fairness of restricting the child witness's access to the jury (and vice versa) to a distant figure on a dehumanising CCTV screen metres away.

Linguistic issues

[21] It is very important that trial judges recognise the need to monitor the language used by trial counsel when dealing with child witnesses. The language used should not be patronising or

condescending but it needs to be pitched at the level of understanding of the particular child witness. The level of understanding can vary markedly from child to child. Accurately assessing a child's level of understanding is very challenging but it is very necessary. There can be no procedural fairness if a child does not understand the question, if the question is ambiguous, if double negatives are used or if the question contains multiple propositions.

Judicial education

[22] Judges have different backgrounds, approaches and levels of insight. Some are more flexible than others. Some are more empathetic or attuned to others. Judges have different levels of experience with regard to adult complainants, child witnesses and even children generally. They have different levels of understanding in relation to issues such as cultural neglect, second language difficulties, gratuitous concurrence, suggestibility and problems associated with the concepts of sequence and time. Some judges are more amenable to education than others.

[23] An experienced judge may well be aware of many or all of these issues but it is very difficult to see how it could ever be said that further education in relation to particular areas is unnecessary. There are many experts outside the law who can provide judicial officers with valuable insight in their particular area of expertise. For instance, a paper given at the judges Induction program that I attended in 2003 by a linguist dealing with the everyday problems facing an interpreter was, I believe, for every judge present, very informative, insightful and invaluable.

[24] Continuing judicial education should not be forced upon judicial officers, but every judicial officer who is "fair dinkum" about their role in ensuring a fair trial and procedural fairness should welcome whatever assistance can be gleaned from experts in various fields from child development, mental illness to cultural issues and problem areas within the Aboriginal, Muslim or Pacific islander cultures, to name but a few.

[25] The success of judicial education will depend upon the receptiveness of judicial officers, the method and style adopted by those who sell it and the need for those experts who sell it to accept the legal constraints under which judges operate.

Appellate approach to judicial activism

[26] Over the last 15 years the appellate courts have required trial judges to become far more active in the trial process in terms of warnings required to be given to juries, especially in sexual assault trials: see, for example, the warnings required by *Longman v The Queen* (1989) 168 CLR 79; *Crofts v the Queen* (1996) 186 CLR 427; *Crampton v The Queen* (2000) 75 ALJR 133; *Doggett v The Queen* (2001) 208 CLR 243; *R v Murray* (1987) 11 NSWLR 12; *R v Johnston* (1998) 45 NSWLR 362; *R v Markuleski* (2001) 52 NSWLR 82.

[27] Another example of appellate approval of judicial activism can be found in the area of cross-examination where a reasonably wide discretion to intervene was confirmed in *Wakely v The Queen* (1993) ALR 79; and *R v TA* (2003) 57 NSWLR 444. In *R v TA*, Chief Justice Spigelman stated at [8]:

> Judges play an important role in protecting complainants from unnecessary, inappropriate and irrelevant questioning by or on behalf of an accused. That role is perfectly consistent with the requirements of a fair trial, which requirements do not involve treating the criminal justice system as if it were a forensic game in which every accused is entitled to some kind of sporting chance.

Judicial intervention in cross-examination

Legislative provisions

[28] Although, legislative provisions vary from State to State regarding the regulation of cross-examination, the uniform *Evidence Act 1995* contains a number of provisions that provide trial judges with reasonably wide discretionary powers to control cross-examination: see ss 29, 41, 42 and 192.

[29] It is also important to note that the court has always been able to direct the attention of counsel to any appropriate Bar rule or Director of Public Prosecutions guideline as a means of controlling inappropriate or irrelevant cross-examination.

[30] In any consideration of judicial activism in terms of intervention during cross-examination it should be borne in mind that there is a considerable imbalance between professional lawyers and child witnesses. It is a very moot point whether the presently accepted defence questioning styles and methods, effectively test the efficacy of evidence. Arguably, it is more likely that it allows lawyers to unfairly discredit evidence without providing any genuine enlightenment as to the truth or otherwise of testimony.

[31] The need for judicial intervention in examination in chief does arise from time to time. A failure by a Crown prosecutor to ask an essential question can raise significant fairness issues. Should a court simply wash its hands of responsibility in such instances with the result that a complainant is never given an opportunity to give the omitted evidence? Is the accused entitled to a technical acquittal as a consequence of legal error? How fair is that to the complainant? Bearing in mind the community's two-fold interest in a fair trial, that is, fair to the Crown as well as the defence, is judicial intervention to provide the complainant with an opportunity to give the relevant evidence justified? In my view there is no procedural fairness to a child complainant if she or he is denied an opportunity to give evidence on a topic the absence of which grounds a technical acquittal. In my view, in the absence of the witness and the jury, the court should draw the omission to the attention of counsel thus ensuring procedural fairness.

NSW legislative amendments — Evidence Act 1995, s 41

[32] In New South Wales the recent amendments to s 41 of the *Evidence Act 1995* (which adopt the provisions of s 275A of the *Criminal Procedure Act 1986* but apply them to both civil and criminal proceedings) focus the attention of judicial officers on what the new legislation terms "*disallowable questions*". This focusing of attention is likely to improve the level of protection of complainants from inappropriate questioning. The legislation creates a new more extensive definition of "*disallowable questions*". *Ethnic and cultural background, gender, language background and skills, level of maturity and understanding* are now added to the matters that a court must take into account although it is highly likely that these matters would have been considered by a court in any event.

[33] More significantly the legislation provides that the duty imposed to disallow a disallowable question applies whether or not objection is made. In practice that will mean a duty to listen closely to the evidence and to make a determination in all appropriate cases (that is where a question may fall within any of the prohibited categories) as to whether the question is a disallowable question.

[34] If, having considered the section and the subject question, a court is of the opinion that the question is a disallowable question, it *must* disallow the question. Previous provisions, including the former version of s 41 of the *Evidence Act 1995*, provided that a court "*may* disallow" an offending question.

[35] Traditionally, trial judges have been very careful about interrupting or restricting cross-examination. It is likely that this reluctance stems from concern about jeopardising a fair trial for the accused and/or concern regarding the approach to be taken by the Court of Criminal Appeal. The potential for mistake and the consequential ordering of a new trial are all too real and no trial judge wants to make a mistake that may cause an accused and complainant to endure a re-trial. Anecdotally this seems to me to have caused trial judges to err on the side of caution, which means to err in favour of the accused and permit questionable cross-examination from time to time.

[36] Having regard to the terms of the new legislation it is apparent that a number of practical problems are likely to arise from the need for a court to have some background information regarding a witness so as to be able to determine whether a question asked is a disallowable question. How does a court assess whether a witness has any particular frailties? How are problem classes of witnesses identified? What is an acceptable method of informing oneself regarding the relevant characteristics of a witness? Of what can a judge take judicial notice? Not all judges are the same or even equal so how is consistency of approach assured? What is the best method of intervention? How does a judge avoid destroying the credibility of the counsel who has asked the "disallowable question"?

[37] In a sense these problems have existed to one degree or another in the past whenever a court has exercised its discretionary powers under the *Evidence Act 1995*. Taking into account, as a court must under the new provision, characteristics such as "*age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality*" and "*any mental, intellectual or physical disability of which the court is, or is made, aware*" is impossible unless a court is provided with such information. Clearly, this may well be a problematic area. However, a common sense and reasonable approach may ensure that these problems rarely arise. Information of this type can often be provided to a court by agreement between the parties. Sometimes it will be all too apparent from the evidence in chief. Other times it may be necessary for information to be elicited from a witness in the absence of the jury. Criminal trials produce practical problems every day and yet solutions are usually found and implemented without any adverse impact on fairness.

Conclusion

[38] In my view appropriate judicial activism is a positive thing and it would appear that it is here to stay. It seems to me that if judges are not prepared to voluntarily move with the times in terms of case management and procedural fairness issues, it is likely that our hands will be forced by the increasing use of legislation mandating judicial activism.

Jury directions in sexual assault trials: Murray/Ewan, significant forensic disadvantage and delay in complaint

[7-180] Article

B Neild, "Jury directions in sexual assault trials: Murray/Ewen, significant forensic disadvantage and delay in complaint", a paper presented at the Public Defenders Criminal Law Conference, 18 March 2017, Sydney.

Abstract

This paper examines three key directions, each of which has been the subject of important case law or legislative reform, being the *Murray/Ewen* direction, the significant forensic disadvantage direction (s 165B of the *Evidence Act 1995*) and the delay in complaint direction (s 294 of the *Criminal Procedure Act 1986*). Consideration is also given to the overall role of directions in sexual assault trials and the need to shape directions in order to meet the specific requirements of justice in the case in which they are to be given.

What does s 41 of the Evidence Act mean to you as a judicial officer?

[7-200] Article

L Babb, "What does s 41 of the Evidence Act mean to you as a judicial officer?" paper presented at the Judicial Commission of NSW, Twilight Seminar: Child Sexual Assault, 28 September 2005, Sydney, under the original title "What does s 275A of the Criminal Procedure Act mean to you as a judicial officer?".

Abstract

This paper closely examines s 41 of the *Evidence Act 1995* on improper questioning. Section 41 has adopted s 275A of the *Criminal Procedure Act* and applied this section to both civil and criminal proceedings. Section 41 places a positive duty on judicial officers to act to prevent improper questions to help elicit the best evidence given by a witness free from harassment, intimidation or abuse. It outlines that judicial intervention to actively protect witnesses from improper questioning is not inconsistent with the judicial role nor is it an impediment to a fair trial. It is an attempt to create a movement away from the tacit acceptance of improper behaviours that cut across fundamental fair trial principles.

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What does s 41 of the Evidence Act mean to you as a judicial officer?*

Lloyd Babb

Director, Criminal Law Review Division

[1] Judges play an important role in protecting complainants from unnecessary, inappropriate and irrelevant questioning by or on behalf of an accused. That role is perfectly consistent with the requirements of a fair trial, which requirements do not involve treating the criminal justice system as if it were a forensic game in which every accused is entitled to some kind of sporting chance: per Spigelman CJ in *R v TA* (2003) 57 NSWLR 444 at 446.

Section 41 — improper questions

(1) The court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question (referred to as a *disallowable question*):

(a) is misleading or confusing, or

(b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or

(c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or

(d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture or ethnicity, age or mental, intellectual or physical disability.

(2) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account:

(a) any relevant condition or characteristic of the witness of which the court is, or is made, aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality, and

(b) any mental, intellectual or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject, and

(c) the context in which the question is put, including:

(i) the nature of the proceeding, and

(ii) in a criminal proceeding — the nature of the offence to which the proceeding relates, and

(iii) the relationship (if any) between the witness and any other party to the proceeding.

(3) A question is not a disallowable question merely because:

(a) the question challenges the truthfulness of the witness or the consistency or accuracy of any statements made by the witness, or

(b) the question requires the witness to discuss a subject that could be considered to be distasteful to, or private by, the witness.

(4) A party may object to a question put to a witness on the ground that it is a disallowable question.

(5) However, the duty imposed on the court by this section applies whether or not an objection is raised to a particular question.

(6) A failure by the court to disallow a question under this section, or to inform the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness in response to the question.

Note: A person must not, without the express permission of a court, print or publish any question that the court has disallowed under this section — see s 195.

Introduction

[2] Section 41 of the *Evidence Act 1995* (which commenced on 1 January 2009) adopts, with some modification, s 275A of the *Criminal Procedure Act* (now repealed) and applies it to both civil and criminal proceedings. Note that s 275A continues to apply to proceedings the hearing of which began before the commencement of the new s 41.[1] When s 275A was inserted into the *Criminal Procedure Act 1986* by the *Criminal Procedure Further Amendment (Evidence) Act 2005*, the Attorney General stated in the second reading speech that the section:

> … sets a new standard for the cross-examination of witnesses in criminal proceedings, including, by referring, for the first time, to the manner or tone in which a question is asked … This amendment places a positive duty on judges to act to prevent improper questions, thereby ensuring that witnesses are able to give their evidence free from intimidation and fear.[2]

[3] In addition to the prohibition on improper questions, this Act amended the *Criminal Procedure Act 1986*:

(a) to prevent the circulation, and the unauthorised copying, of sensitive evidence: ss 281A–281F

(b) to require any part of proceedings for a sexual offence in which evidence is given by the complainant to be held in camera: ss 291–291C

(c) to confer an entitlement on a complainant in such a case to have one or more persons present near the complainant when giving evidence: s 294C

(d) to simplify and standardise the coverage of various provisions of the Act that relate to the protection of a complainant in sexual offence proceedings, and

(e) to make it clear that a complainant in a sexual offence proceeding is entitled to give evidence by use of arrangements to restrict contact between the complainant and the accused person, instead of by the use of closed-circuit television, whether or not closed-circuit television facilities are available in the proceedings: s 294B.

[4] New s 41 imposes a duty on a court to disallow improper questions that are put to witnesses in cross-examination. The duty arises if the court is of the opinion that the question is disallowable (see below).

The circumstances in which the court is required to disallow questions put to a witness in cross-examination or inform the witness that the question need not be answered

Proceedings to which the section applies

[5] New s 41 of the *Evidence Act* applies to all civil and criminal proceedings.

Who does it apply to?

[6] The provision applies to *all* witnesses equally in cross-examination.

What is a disallowable question?

(a) misleading or confusing

(b) unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive

(c) put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate

(d) has no basis other than a stereotype based on sex, race, culture, ethnicity, age or mental, intellectual or physical disability.

[7] However, a question is not disallowable merely because it:

- challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness, or
- requires the witness to discuss a subject that could be considered to be distasteful or private.

Objections by the parties

[8] While the section allows any party to the proceedings to object to a question put to a witness on the ground that it is a disallowable question, the duty imposed on the court applies whether or not any objection is raised.

Effect of the court's failure to invoke the section

[9] An important feature of the provision is that a failure by the court to disallow a question under the section, or inform the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness in response to the question. This amendment therefore does not open a new avenue of appeal points for accused persons, a view noted by the Australian Law Reform Commission (ALRC) and the New South Wales Law Reform Commission (NSWLRC) in the Final Report into the Uniform Evidence Law at 5.115.[3]

The factors the court should take into account in determining whether to disallow a question

[10] Without limiting the matters that the court may take into account in determining whether to disallow a question, the section requires the court to take into account:

(a) any relevant condition or characteristic of the witness of which the court is, or is made, aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality, and

(b) any mental, intellectual or physical disability of which the court is, or is made, aware and to which the witness is or appears to be subject, and

(c) the context in which the question is put, including:

  (i) the nature of the proceeding, and

  (ii) in a criminal proceeding — the nature of the offence to which the proceeding relates, and

  (iii) the relationship (if any) between the witness and any other party to the proceeding.

[11] These criteria replicate those in the former s 275A with the addition of having to consider the context in which the question is put listed in s 41(2)(c).

History of the amendments

Section 41 of the *Evidence Act 1995*

[12] The former version of s 41 in the uniform Evidence Acts granted the court the power to disallow improper questions asked in cross-examination as follows:

> (1) The court may disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the question is:
>
> (a) misleading, or
>
> (b) unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.
>
> (2) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account:
>
> (a) any relevant condition or characteristic of the witness, including age, personality and education, and
>
> (b) any mental, intellectual or physical disability to which the witness is or appears to be subject.

[13] This section was introduced following an inquiry by the Australian Law Reform Commission (ALRC) into the law of evidence, with the ALRC intending for the section to bring together and clarify common law and legislative provisions that set limits on cross-examination:

> The proposals provide for the judge to disallow the question, or to inform the witness that he need not answer but may if he wants to do so. In this way the judge can prevent a slanging match developing, or let the witness answer the question nonetheless.[4]

The inadequacy of former s 41 to protect witnesses from improper questions

[14] In its report on *Sexual Offences*,[5] the Victorian Law Reform Commission (VLRC) concluded that former s 41 was insufficient to ensure that child witnesses were protected against inappropriate questions. The VLRC supported a recommendation of the Queensland Law Reform Commission (QLRC)[6] that included, as well as the considerations in s 41, consideration of the content, manner and language of questioning, and the culture and level of understanding of the child. (It is important here to note that the QLRC acknowledged that the recommendation may be equally applicable to adult witnesses.)[7]

[15] The VLRC recommended that there be a duty on the court to ensure, as far as possible, that in the case of questions asked of children under 18 years of age:

- neither the content of a question nor the manner in which a question is asked is misleading or confusing, phrased in inappropriate language or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive, and
- the questions are not structured or sequenced in a way that is intimidating, harassing, confusing, annoying or misleading
- in deciding whether to disallow a question, the court is to take into account any relevant condition or characteristic of the witness, including age, culture, personality, education and level of understanding and any mental, intellectual or physical disability of the witness.

[16] The VLRC was not the first to recognise the shortcomings of s 41 in providing adequate protection for witnesses. In 1996, the *Heroines of Fortitude* report[8] called for greater utilisation by judges of the *Evidence Act* provisions to limit questions that are insulting, degrading, humiliating or irrelevant during cross-examination.

[17] The report concluded at p 180 that "… on the whole judicial officers and prosecutors are reluctant to limit irrelevant and inappropriate cross-examination even when it is clear the complainant is suffering distress. In this way judges may well be sanctioning the revictimisation of complainants in court."

[18] The shortcomings of former s 41 had also been recognised by members of the NSW judiciary.

[19] In his February 2003 paper, *Sexual Assault and the Admission of Evidence*, Wood CJ at CL expressed the view about former s 41 of the *Evidence Act*:

> This is a power which is seldom invoked, possibly out of fear that the defence will use it to its advantage, by attracting counter sympathy from the jury that it is not being given a "*fair run"*. In truth, such fear is misguided because an aggressive and unfair cross-examination can be suitably dealt with by the Judge in the absence of the jury.

[20] In a 2004 paper entitled *Child Witnesses — Best Practice for Courts*, Wood CJ at CL, noted:

> The careful exercise of this power, and proper control of the cross-examination of child witnesses, has not always been well managed by the judges, who very often have felt reluctant to interfere, particularly in the absence of an objection. This may well have arisen from lack of experience, or training, or even attention, on the part of trial judges to the inherent disadvantages of child witnesses. It is a matter which requires careful consideration, and vigilance to intervene when questions are put that are age inappropriate, or overly complex (involving for example double negatives), or unduly offensive or aggressive.

[21] In November 2004, the NSW Adult Sexual Assault Interagency Committee released its report to the NSW Government on evidential and procedural issues regarding criminal law sexual offences. In concluding that the legislative protection provided by former s 41 was "under-utilised", the Committee recommended the following three reforms:

- introduction of practice directions to assist judges in utilising s 41 of the *Evidence Act 1995* (NSW) to regulate the conduct of cross-examination of the complainant.
- Amendment of s 41 of the *Evidence Act 1995* (NSW) to place greater restrictions on tone and manner of questions that may be put to the complainant in cross-examination (in addition to content of questions).
- Amendment of s 41 to model s 21 of the *Evidence Act 1977* (Qld), to further allow the court to consider whether a question is improper having regard to the level or understanding of the witness, cultural background or relationship to any party to the proceeding.

[22] BOCSAR published its evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot in September 2005.[9] One of the report's observations was that there was a relatively high incidence of improper questions being put to child witnesses, which was met with varying degrees of judicial intervention (or none at all). The report recommended at p 63:

> To provide a "more level playing field" for child witnesses in the "contest" against adult lawyers, it is necessary to re-evaluate the role of cross-examination where children are involved and to encourage greater judicial understanding and judicious intervention.

[23] The ALRC as part of its review into the uniform Evidence Acts, proposed in Discussion Paper 69 (July 2005: Proposal 5–2) that:

> Section 41 of the uniform Evidence Acts should be amended to allow that the court may disallow an improper question put to a witness in cross-examination, or inform the witness that it need not be answered. An improper question should be defined as a question that is misleading

> or confusing, or is annoying, harassing, intimidating, offensive, humiliating, inappropriate (including because it is humiliating, belittling or otherwise insulting) or has no basis other than a sexual, racial, cultural or ethnic stereotype.

[24] The ALRC proposed that a positive duty to disallow improper questions should only apply where a witness is considered vulnerable because of their age, mental or intellectual disability (Proposal 5–3). In my view, the test then envisaged by the ALRC would have created real problems in the court environment with lengthy contests as to whether a witness suffered from an intellectual or mental disability such as to invoke the "duty" to disallow the question. This should not be the focus of the provision. Rather, a judicial officer should be guided by whether a question is misleading or confusing for the witness and should intervene accordingly, regardless of whether the person has a particular vulnerability.

[25] At this stage, the ALRC did not support a general duty on the court to disallow improper questions, stating that "[i]t must be recognised that examination of witnesses occurs in the context of an adversarial system. At times, counsel may seek to gain forensic advantage by allowing the other party to question witnesses in a certain manner".[10]

[26] In response to that, however, the case law makes it clear that, even in an adversarial system, where much of the conduct of proceedings is in the hands of the parties, ultimate control resides with the presiding judicial officer. The duty of the judicial officer is to regulate proceedings in a way that is fair not only to the parties but also to the witnesses.

[27] In the case of *R v TA* (2003) 57 NSWLR 444, Spigelman CJ observed at 446:

> In any event, in my opinion, his Honour was entitled to reject the line of cross-examination by applying s 41 of the *Evidence Act*. The difficulties encountered by complainants in sexual assault cases in the criminal justice system has been a focus of concern for several decades. Judges play an important role in protecting complainants from unnecessary, inappropriate and irrelevant questioning by or on behalf of an accused. That role is perfectly consistent with the requirements of a fair trial, which requirements do not involve treating the criminal justice system as if it were a forensic game in which every accused is entitled to some kind of sporting chance.

[28] In the final report into the operation of the uniform evidence legislation, the ALRC and the NSWLRC (but not the VLRC) were persuaded by submissions that s 275A of the *Criminal Procedure Act* "provides a comprehensive model for the protection of all witnesses from improper cross-examination".[11] The report therefore recommended that there no longer be a discretion under s 41 but a mandatory duty to disallow inappropriate questions. The provisions under s 275A have therefore been adopted under new s 41 of the uniform Evidence Acts. The Commissions' report concluded that:

> … the protections offered to witnesses in criminal matters should be no more comprehensive than in civil matters.[12]

The importance of effective judicial intervention to prevent improper cross-examination

[29] It is hoped that the use of s 41 will assist in the process of eliciting the best evidence able to be given by a witness (which includes the accused), free from harassment, intimidation, or abuse.

[30] The section is not designed to limit relevant cross-examination. The High Court has acknowledged that "the limits of cross-examination are not susceptible of precise definition": *Wakeley and Bartling v The Queen* (1990) 93 ALR 79 per Mason CJ, Brennan, Deane, Toohey and McHugh JJ at 86. If a question is relevant, but put in an improper form it can be rephrased in an admissible way.

[31] Judicial intervention to actively protect witnesses from improper questioning is not inconsistent with the judicial role nor is it an impediment to a fair trial.

[32] The duty to intervene in cross-examination has since 1995 existed within s 42(3) of the *Evidence Act*, which requires the court to "disallow the question, or direct the witness not to answer it, if the court is satisfied that the facts concerned would be better ascertained if leading questions were not used".

Knowledge of factors relevant to the assessment of disallowable questions under s 41

[33] In order to comply with the provision, judicial officers must obtain and maintain a requisite degree of awareness of issues affecting particular classes of witnesses, together with an understanding of how these issues touch upon the witness's ability to respond to questions put to them during cross-examination.

[34] Judicial officers will need to be especially vigilant in regard to cross-examination of particular classes of witnesses, for example:

- children
- Aboriginal persons
- persons who speak English as a second language
- persons with intellectual or physical disabilities

[35] Notice of the calling of these classes of witness should act as "triggers" or "alerts" to the need for preparation in advance of the witness being called, as well as extreme concentration during the giving of their evidence.

[36] Northern Territory Supreme Court Justice, Justice Mildren, expressed this point with respect to Aboriginal witnesses, when he stated:

> My experience is that, in cases involving Aboriginal witnesses and/or accused persons, the trial judge must be fully prepared for the trial and ready, if necessary, to intervene more frequently than would be necessary in ordinary trials. I have found that it is essential to read the committal proceedings, first because cross-examination on issues of credit is bound to occur, and the prosecutor may not object even where he plainly should, [and to consider whether to allow counsel to put] leading questions in cross-examination. There is a greater danger of inadmissible evidence being introduced if the witnesses do not know what is expected of them, and counsel may, if inexperienced with Aboriginal people, not realise that a witness is repeating what is common knowledge or "shared" knowledge, contrary to the hearsay rule, for example. Adequate preparation by the Judge can often avoid problems from occurring.[13]

[37] There are resources available to assist.

[38] A useful resource is the Queensland Criminal Justice Commission, 1996 Report, *Aboriginal Witnesses in Queensland's Criminal Courts*. Chapter Four of that report is extremely relevant and contains important observations about "Judicial Control of Court Proceedings".

[39] The Judicial Commission compiled and distributed to all judicial officers in May 2003 as part of the Child Sexual Assault Jurisdiction Pilot Project a folder of materials which contains a range of materials on child development, child thought processes and communication strategies.[14] A number of the materials in the folder focus specifically on the cross-examination of child witnesses, including a paper by Rachel Manley that was presented to the Judges

Conference in Perth in 2002 entitled, "Management of child witnesses — practical problems judges should know about".[15] Tab L p 12 is the beginning of the section entitled "The Comprehension of Children: Communicating with Children".

[40] More recently, the Judicial Commission has compiled this *Sexual Assault Trials Handbook* which contains various articles on questioning vulnerable complainants. See for example, Dr J Cashmore, "Child witnesses: the judicial role"; Judge R Ellis, "Judicial activism in child sexual assault cases" at [7-160]; Dr C Eastwood, "Child sexual abuse and the criminal justice system: what educators need to know" at [7-700].

Conclusion

[41] Section 41 does not herald the end of judicial impartiality. On the contrary, it is an attempt to ensure that all witnesses are treated equally and to create a movement away from the tacit acceptance of improper behaviours that cut across fundamental fair-trial principles.

[42] Just as our laws evolve with the changing society towards whom they apply, so too must our notion of what constitutes judicial impartiality. As one Canadian judicial officer has observed:

> If our laws and society were unchanging, judicial impartiality would be a simple matter. Judges could simply sit back and let counsel "go to it". In reality, however, our laws and society are ever-changing. If judicial impartiality means that judges should ignore equality issues unless counsel raise them, then "judicial impartiality" will be a barrier to the protection and enforcement of equality rights. True judicial impartiality requires judges to take the road less travelled and step away from our legal past and assumptions about its continued correctness in order to integrate equality into the interpretation and application of our laws, when appropriate.[16]

Section 41 of the Evidence Act 1995

[7-220] Article

This article was originally published as CE O'Connor QC, "Section 275A of the Criminal Procedure Act 1986" a paper presented at the District Court of New South Wales Annual Conference, 10–12 April 2007, Leura: modified February 2009.

Abstract

This paper closely examines s 41 of the *Evidence Act 1995* which adopts the provisions of s 275A of the *Criminal Procedure Act* and was inserted into the *Evidence Act* on 1 January 2009 by the *Evidence Amendment Act 2007*. The paper outlines the development of s 41 of the *Evidence Act 1995* and s 275A of the *Criminal Procedure Act 1986*. While the former version of s 41 retained a discretion to disallow a question, s 275A imposed a positive duty on the court in criminal proceedings to disallow an improper question in cross-examination.

A court must apply s 41 even if no objection is taken by counsel. Further, s 41 adds to the type of questions that are to be disallowed including humiliating questions, questions that are put in a tone that is belittling, insulting or otherwise inappropriate, and questions that have no basis other than a stereotype based on sex, race, culture or ethnicity, age or mental, intellectual or physical disability.

Section 41 also adds to the matters the court may take into account to determine if the questions are to be disallowed. These include age, education, ethnic or cultural background, gender, language, background and skills, level of maturity and understanding and personality.

Explicit reference to the types of questioning may serve to bring them to judicial attention and provide greater guidance as to how the duty to limit cross-examination should be exercised.

Acknowledgment: this article was prepared by his Honour Judge O'Connor QC and presented at the District Court of New South Wales Annual Conference, April 2007 and updated in February 2009. Reproduced with permission.

Section 41 of the Evidence Act 1995*

His Honour Judge C E O'Connor QC

District Court of New South Wales

Introduction

[1] Section 41 of the *Evidence Act 1995* adopts the provisions of s 275A of the *Criminal Procedure Act 1986* and applies them to both civil and criminal proceedings. Section 41 was inserted into the *Evidence Act* by the *Evidence Amendment Act 2007* which commenced on 1 January 2009 (Gazette No 158 of 2008, p 12,305). Note that s 275A continues to apply to proceedings the hearing of which began before the commencement of new s 41.[1]

[2] Section 275A was inserted into the *Criminal Procedure Act 1986* (NSW) in 2005 by the *Criminal Procedure Further Amendment (Evidence) Act 2005*.[2]

[3] Section 41 is in the following terms:

> **41 Improper questions**
>
> (1) The court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question (referred to as a "***disallowable question***"):
>
> (a) is misleading or confusing, or
>
> (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or
>
> (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or
>
> (d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).
>
> (2) Without limiting the matters the court may take into account for the purposes of subsection (1), it is to take into account:
>
> (a) any relevant condition or characteristic of the witness of which the court is, or is made, aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality, and
>
> (b) any mental, intellectual or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject, and
>
> (c) the context in which the question is put, including:
>
> (i) the nature of the proceeding, and
>
> (ii) in a criminal proceeding — the nature of the offence to which the proceeding relates, and
>
> (iii) the relationship (if any) between the witness and any other party to the proceeding.
>
> (3) A question is not a disallowable question merely because:
>
> (a) the question challenges the truthfulness of the witness or the consistency or accuracy of any statements made by the witness, or

(b) the question requires the witness to discuss a subject that could be considered distasteful to, or private by, the witness.

(4) A party may object to a question put to a witness on the ground that it is a disallowable question.

(5) However, the duty imposed on the court by this section applies whether or not an objection is raised to a particular question.

(6) A failure by the court to disallow a question under this section, or to inform the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness in response to the question.

Note: A person must not, without the express permission of a court, print or publish any question that the court has disallowed under this section — see s 195.

[4] Revised s 41 was inserted into the *Evidence Act 1995* following a recommendation contained in the Final Report into the Uniform Evidence Law by the Australian Law Reform Commission (ALRC) and New South Wales Law Reform Commission (NSWLRC).[3] The Law Reform Commissions had been given a joint reference to review the operation of the uniform evidence legislation following its first decade of operation. The Commissions found in Discussion Paper 69 that the discretion to disallow improper questions in former s 41 of the *Evidence Act* was under utilised. However, the Commissions recommended that a duty to disallow improper questions only apply to vulnerable witnesses.[4] The Final Report, published in December 2005, recommended that the discretion in s 41 be replaced with a general duty on the courts to disallow an improper question, in effect, to adopt s 275A of the *Criminal Procedure Act* in relation to both civil and criminal proceedings.[5]

[5] The precursor to s 41, s 275A, was one of a number of amendments made to the *Criminal Procedure Act* in 2005. The focus of the amendments was in the area of sexual assault prosecutions although the terms of s 275A had wider application and the section was not restricted to sexual assault prosecutions.

[6] The Attorney General, in his Second Reading Speech, said in relation to the Bill:

> This Bill is part of the government's legal reform in the area of sexual assault prosecutions.[6]

[7] The Attorney went on to observe in relation to a difficulty experienced by complainants in sexual assault cases the following:

> And, by its very nature, giving evidence of a sexual assault is like no other evidence. Sexual assault complainant evidence must include precise and explicit details of sexual acts and of intimate sexual violence. Evidence may include swear words, slang usage for body parts, name-calling, derogatory terms or remarks of a personal nature. It is embarrassing and humiliating evidence to give. It can come as no surprise that many victims feel reluctant to come forward and report sexual assaults and, of those that do, their efforts to have their day in court is nothing short of heroic.[7]

[8] Other sections of the amending legislation included provisions that:

- prevent the circulation and unauthorised copying of sensitive evidence,
- allow evidence of a complainant to be held in camera,
- entitle a complainant to have support persons near when giving evidence,
- entitle a complainant in sexual assault proceedings to give evidence by utilising alternative arrangements such as screens instead of closed circuit television.

[9] The Attorney went on to say in the Second Reading Speech when dealing with s 275A:

> This amendment sets a new standard for the cross-examination of witnesses in criminal proceedings, including, by referring for the first time, to the manner or tone in which a question is asked … this amendment places a positive duty on judges to act to prevent improper questions, thereby ensuring that witnesses are able to give their evidence free from intimidation and fear.[8]

The nature of proceedings to which s 41 applies

[10] The section applies to both criminal and civil proceedings.

What is the duty of the court in relation to improper questions

[11] Improper questions are referred to as "***disallowable questions***": s 41.

[12] If the court is of the opinion that the question is a disallowable question there are two options:

(a) the court must disallow the question put to the witness in cross-examination, or

(b) inform the witness that it need not be answered.

Description of a disallowable question

[13] A disallowable question is one that:

(a) is misleading or confusing, or

(b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or

(c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or

(d) has no basis other than a stereotype based on sex, race, culture, ethnicity, age or mental, intellectual or physical disability: s 41(1)(d).

[14] However, a question is not disallowable merely because it:

- challenges the truthfulness of the witness or the consistency or accuracy of any statements made by the witness or,
- requires the witness to discuss a subject that could be considered to be distasteful or private: s 41(3).

Whether question is a disallowable question

[15] Factors to be taken into account in order to determine whether the question is a disallowable question include:

- any relevant condition or characteristic of the witness of which the court is, or is made aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality, and
- any mental, intellectual or physical disability of which the court is, or is made, aware, to which the witness is or appears to be subject, and
- the context in which the question is put including the nature of the proceedings; if it is a criminal proceedings, the nature of the offence, and the relationship (if any) between the witness and any other party to the proceedings: s 41(2).

[16] The court is not limited by the above and may consider other matters in determining whether the question is a disallowable question.

Objections

[17] A party may object to a question put to a witness on the grounds that it is a disallowable question, however the duty imposed on the court by the section applies whether or not an objection is raised to a particular question: s 41(4)–(5).

Failure of the court to disallow a disallowable question

[18] A failure by the court to disallow a question under the section or to inform the witness that it need not be answered, does not affect the admissibility in evidence of an answer given by the witness in response to the question.

[19] The Attorney General in the Second Reading Speech dealing with s 275A said:

> This amendment does not open a new string of appeal points for accused persons.[9]

[20] This view was noted in the Final Report to the Uniform Evidence Law.[10]

Comment

[21] As mentioned, one can see by the terms of the section that it has a wider application than prosecutions for sexual assault. Additionally, the section applies to all witnesses, equally, whether called by the prosecution or the defence.

Background to amendments

Approach of appellate courts to judges disallowing questions without objection before legislation

[22] The guidance from appellate courts was, it seems, to exercise caution when disallowing questions not the subject of objection by counsel.

[23] In *R v Burl Lars* (1994) 73 A Crim R 91 a ground of appeal relied on was the rejection of questions asked by defence counsel, which were not the subject of objection by the Crown prosecutor, or counsel for any of the other accused.

[24] The court held at 126:

> The power of the judge to reject a question in the absence of objection should also be exercised with circumspection … What is clear is the circumstances in which a judge should reject a question without objection are obviously limited and the decision whether or not to intervene must always be taken by the trial judge with due regard to the undesirability of an interruption to the flow of cross-examination and above all and especially in a jury trial with regard to the undesirability of interventions which may give the appearance that the judge has descended into the arena and aligned himself with one or other of the combatants … It is also worth remarking that a judge who (except in the case of an offensive or ambiguous or potentially misleading question) rejects a question in the absence of any objection from counsel runs the risk of falling into error and of excluding evidence which ought properly to have been admitted.

[25] The issue of judicial interference in the conduct of counsel was also visited by the High Court in *Wakeley v The Queen* (1990) 64 ALJR 321.

[26] The court said at 325:

> The limits of cross-examination are not susceptible of precise definition … Nor is there any general test of relevance which a trial judge is able to apply in deciding … whether a particular question should be allowed … Although it is important in the interests of the administration of justice that cross-examination be contained within reasonable limits, a judge should allow counsel

> some leeway in cross-examination in order that counsel may perform the duty … of testing the evidence given by an opposing witness … It is the duty of counsel to ensure that the discretion to cross-examine is not misused. That duty is more onerous because counsel's discretion cannot be fully supervised by the presiding judge. Of course there may come a stage where it is clear that the discretion is not being properly exercised. It is at that stage that the judge should intervene to prevent both an undue strain being imposed on the witness and an undue prolongation of the expensive procedure of hearing and determining a case. But until that stage is reached — and it is for the judge to ensure that the stage is not passed — the court is, to an extent, in the hands of cross-examining counsel.

Examples of improper questions at common law

[27] Under existing common law, it is regarded as impermissible to ask questions of the following type:

- putting to one witness that his or her evidence is to the contrary of others and expressly or impliedly inviting an opinion as for the reasons for the contradiction: *R v Booty* (unrep, 19/12/94, NSWCCA)
- a witness ought not be asked whether another witness is telling lies or has invented something
- it is improper to ask a witness to speculate about the reasons someone else did or said something: *Palmer v The Queen* (1998) 193 CLR 1
- unless the witness is an expert permitted to give opinion evidence, a witness should not be asked to respond to a hypothetical question: *Rolfe v Katunga Lucerne Mill Pty Ltd* [2005] NSWCA 252
- double questions
- argumentative questions
- questions likely to produce answers that are confusing
- repetitive questions.

Legislative power to control questions before s 41

Evidence Act 1995

General powers of a court, s 11

[28] The general power of the court to control the conduct of proceedings

[29] It has been held that this provision does not provide any basis for applying evidentiary rules, which are inconsistent with other provisions of the Act: *Lane v Jurd [No 2]* (1995) 40 NSWLR 708 at 709.

Court's control over questioning of witnesses, s 26

[30] The section is in the following terms:

> The court may make orders it considers just in relation to:
>
> (a) the way in which witnesses are to be questioned, and
>
> (b) the production and use of documents and things in connection with the questioning of a witness, and
>
> (c) the order in which parties may question a witness, and
>
> (d) the presence and behaviour of any person in connection with the questioning of witnesses.

Leading questions, s 42

[31] This section deals with the power of the court to control leading questions and is in the following terms:

> (1) A party may put a leading question to a witness in cross-examination unless the court disallows the question or directs the witness not to answer it.
>
> (2) Without limiting the matters that the court may take into account in deciding whether to disallow the question or give such a direction, it is to take into account the extent to which:
>
> (a) evidence that has been given by the witness in examination in chief is unfavourable to the party who called the witness, and
>
> (b) the witness has an interest consistent with an interest of the cross-examiner, and
>
> (c) the witness is sympathetic to the party conducting the cross-examination, either generally or about a particular matter, and
>
> (d) the witness's age, or any mental, intellectual or physical disability to which the witness is subject, may affect the witness's answers.
>
> (3) The court is to disallow the question, or direct the witness not to answer it, if the court is satisfied that the facts concerned would be better ascertained if leading questions were not used.
>
> (4) This section does not limit the court's power to control leading questions.

Crimes Act 1914 (Cth)

Protection of children in proceedings for sexual offences, Pt IAD

[32] Commonwealth legislation includes a number of provisions that provide for the protection of child witnesses and child complainants in certain sexual offence cases (including in relation to child sex tourism and sexual servitude offences).[11]

[33] In particular, there is a specific provision for the court to disallow a question put to a child in cross-examination if the question is inappropriate or unnecessarily aggressive, having regard to the witness's personal characteristics, including age, culture, mental capacity and gender: *Crimes Act 1914* (Cth) s 15YE.

Prelude to s 275A

Former s 41 Evidence Act 1995

[34] The former version of s 41 granted a discretion to disallow improper questions asked in cross-examination. The section was in the following terms:

> **41 Improper questions**
>
> (1) The court may disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the question is:
>
> (a) misleading, or
>
> (b) unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.
>
> (2) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account:
>
> (a) any relevant condition or characteristic of the witness, including age, personality and education, and
>
> (b) any mental, intellectual or physical disability to which the witness is or appears to be subject.

ALRC comments on former s 41

[35] The ALRC explained the rationale behind the proposal on which this provision is based.[12]

> It is intended that the categories of questions include misleading or oppressive questions (eg which assume the existence of disputed facts that the witness has not admitted), repetitive questioning and questions which are hectoring or abusive. The proposals provide for a judge to disallow the question, or to inform the witness that he need not answer but may if he wants to do so. In this way the judge can prevent a slanging match developing, or let the witness answer the question nonetheless.

[36] The word "*unduly*" in s 41(1)(b) applied to each of the adjectives in s 41(1)(b) and not just "*annoying*".

[37] The word "*unduly*" required the court to take into account the right of a party in an adversarial system to test an opposing witness's account and balances that right against the stress experienced by the witness. Effective cross-examination may involve a form of "*harassment*". It may cause embarrassment. However, it may be justifiable nonetheless. It may not be "*undue*" in the particular circumstance of the case.

[38] An important consideration in this balancing exercise would be the probative value and importance of the evidence sought to be elicited by the cross-examination.[13]

[39] In *R v TA* (2003) 57 NSWLR 444 at [12], Spigelman CJ, with whom Dowd J agreed, observed that if the probative force of an anticipated answer is likely to be slight, "even a small element of harassment, offence or oppression, would be enough for the court to exercise its discretion under s 41(1)(b)".

[40] Former s 41(2) made it clear that the circumstances of the particular witness will be relevant. Some witnesses are less able than others to cope with, and more likely to be traumatised by, intense or embarrassing cross-examination.[14]

[41] In *R v TA*, Spigelman CJ referred to the difficulties encountered by complainants in sexual assault cases in the criminal justice system and the need for a court to consider the effect of cross-examination of the trial experience upon a complainant when deciding whether cross-examination is unduly harassing, offensive or oppressive. His Honour noted at [8]:

> That role is perfectly consistent with the requirement of a fair trial, which requirements do not involve treating the criminal justice system as if it were a forensic game in which every accused is entitled to some kind of sporting chance.

[42] Odgers observed:

> Of course the public interest in minimising the risk of convicting an innocent person must also mean that the boundaries or legitimate cross-examination should not be circumscribed "unduly".[15]

Background to the understanding of s 275A

[43] The Australian Law Reform Commission (ALRC), New South Wales Law Reform Commission (NSWLRC), Victorian Law Reform Commission (VLRC) and Queensland Law Reform Commission (QLRC), all made and received submissions as to the adequacies of former s 41 to protect witnesses, and in particular, vulnerable witnesses, from improper questions.

[44] The commissions consulted widely receiving submissions from a number of interested groups. It was argued that the previous legislative provisions and the common law in practice had not provided a sufficient degree of protection for vulnerable witnesses.

[45] The ALRC was considering amending s 41. It had at this stage s 275A as a potential model for proposed amendments. The submissions received were also no doubt relevant to the New South Wales Government's decision to introduce s 275A.

[46] In their inquiry into children and the legal process the ALRC noted significant and distressing evidence that child witnesses, particularly in child sexual assault cases, are often berated and harassed to the point of breakdown during cross-examination.[16]

[47] Concerns were raised about the role of lawyers, and also about the role of judges and magistrates as the "referees" of the trial. In ALRC 84, the ALRC made recommendations for the development of guidelines and training programs to assist judges, magistrates and lawyers in dealing with child witnesses.

[48] In its report on sexual offences the VLRC concluded that general provisions regulating cross-examination, such as s 41 were insufficient to ensure that child witnesses are protected against inappropriate questions.[17]

[49] The VLRC supported a recommendation of the QLRC that included, as well as the considerations in s 41, consideration of the content, manner and language of questioning and the culture and level of understanding of the child.[18]

Complainants in sexual assault matters

[50] It was noted that complainants in sexual assault were in a particularly vulnerable and distressing position in a court room. The NSWLRC recognised that there are at least three factors that make sexual offence trials particularly distressing for complainants:

- the nature of the crime
- the role of consent with its focus on the credibility of the complainant
- the likelihood that the complaint and the accused knew each other before the alleged assault.[19]

[51] The NSWLRC found that the treatment of such matters in cross-examination is a particular concern, with the complainants likely to be cross-examined for a longer period of time than victims of other types of assaults. Complainants have appealed for greater control of cross-examination to make the process less stressful.

[52] Justice Wood, in a paper entitled "Sexual assault and the admission of evidence", when dealing with s 41 expressed the view that:

> Perhaps regrettably this is a power which is seldom invoked, possibly out of fear that the defence will use it to its advantage, by attracting counter sympathy from the jury that it is not being given a "*fair run*". In truth such fear is misguided because an aggressive and unfair cross-examination can be suitably dealt with by the judge in the absence of the jury."[20]

[53] In November 2004, the New South Wales Adult Sexual Assault Interagency Committee released its advice to the New South Wales Government on evidentiary and procedural issues regarding criminal law sexual offences. That report also found that provisions in place to address improper questioning are underutilised.[21] The Committee's report recommended, inter alia, the following reforms:

- amendment to s 41 to place greater restrictions on tone and manner of questions that may be put to the Complainant in cross-examination.
- amendment to s 41 to model s 21 of the *Evidence Act 1977* (Qld) to further allow the court to consider whether a question is improper by having regard to the level of understanding of the witness, cultural background or relationship to any party to the proceeding.

Other vulnerable witnesses

[54] The Intellectual Disability Rights Service submitted that cross-examination using misleading or suggestive questioning techniques can adversely affect the ability of a person with an intellectual disability to recall an event accurately, and repetition of questions can cause a person with an intellectual disability to change his or her answers. It was submitted that this may result in the witness giving the questioner a response which the questioning process has led the witness to believe to be the "correct" answer even though the witness may effectively be agreeing to something which is not true. The service submitted that it was their experience that some judges demonstrated an unwillingness to limit inappropriate or offensive cross-examination of witnesses with an intellectual disability.[22]

[55] The above view was consistent with a study undertaken in 2003, which found that judges were no more likely to intervene for witnesses with a learning disability than for witnesses in the general population.[23]

[56] Another organisation that recognised the shortcomings of the former version of s 41 in providing adequate protection for witnesses was the Department for Women. In 1996, the *Heroines of fortitude* report[24] called for greater utilisation by judges of the *Evidence Act* provisions to limit questions that are insulting, degrading, humiliating or irrelevant during cross-examination.

[57] The report concluded that, on the whole judicial officers and prosecutors are reluctant to limit irrelevant and inappropriate cross-examination even when it is clear that the complainant is suffering distress. In this way judges may well be sanctioning the re-victimisation of complainants in court.

Aboriginal and Torres Strait Islander witnesses

[58] The NSWLRC has identified a number of areas where communication difficulties may occur between Aboriginal and non-Aboriginal people in a courtroom setting:

- Aboriginal society values the use of silence in conversation more than non-aboriginal society, which can lead to misunderstanding in court and can be incorrectly seen as guilt, ignorance or reflection of a communication breakdown
- Aboriginal witnesses may agree gratuitously with whatever the questioner has put to him or her. This occurs particularly where many "*yes – no*" questions are being asked by someone in a position of authority
- Aboriginal people frequently do not use numbers or other quantative means of describing events, such as days of the week, days or time. Consequently, if specific answers are sought to questions like "*how*" or "*when*" Aboriginal witnesses are frequently seen as vague.[25]

[59] The ALRC received submissions with a view to recommending amendments to s 41 of the *Evidence Act* and took into consideration the New South Wales model, namely s 275A.

[60] The inquiry asked a number of judicial officers and senior advocates whether s 41 was used often to limit inappropriate or offensive cross-examination.

[61] Some New South Wales District Court judges indicated that they were more likely to use the court's general powers to control proceedings rather than specifically make reference to s 41.[26]

[62] A number of judges in the Australian Capital Territory Supreme Court agreed that advocates can often be dissuaded from a line of questioning without the formality of mentioning s 41.[27]

[63] A number of senior practitioners made the point that, in their experience, the section is not often invoked by judges.[28]

[64] The Office of the Director of Public Prosecutions in New South Wales submitted that the use of former s 41 was inconsistent and depended upon the particular judicial officer and prosecutor.

[65] The Law Council noted that former s 41 gave no indication as to how the discretion to disallow questions is to be exercised — there is no discernible judicial policy in respect of the discretion and its exercise is left to all the facts and circumstances of the individual case.[29]

ALRC's view on amendments to former s 41

[66] At the time the ALRC was considering such amendments it had, as mentioned, s 275A as a model.

[67] The ALRC made the following observations in its Discussion Paper 69:

- The use of s 41 to control improper questions during cross-examination is "patchy and inconsistent" and supported the VLRC and others that the approach in s 41 is too limited to provide sufficient protection to vulnerable witnesses in some types of matters.
- It supported s 275A to the extent that it set out a more comprehensive and detailed list of questions that are inappropriate. It noted that whilst those types of questions could and should already have been disallowed under s 41 as it stands, explicit reference to these types of questions may serve to bring them to judicial attention and provide greater guidance as to how the discretion to limit cross-examination should be exercised.
- It advocated a different approach from s 275A in two regards:
  - (i) The protection offered to witnesses in criminal matters should be no more comprehensive than in civil matters. A witness in a negligence or civil assault may be equally vulnerable to attack in cross-examination as a victim of a crime. Any amendment to s 41 should apply equally to civil and criminal matters.
  - (ii) In Discussion Paper 69, the ALRC did not support imposing a general duty on the court to disallow improper questions. It noted that it should be recognised that examination of witnesses incur in the context of an adversarial system. In such an environment the ALRC observed that counsel may seek to gain forensic advantage by allowing the other party to question witnesses in a certain manner. It was of the view that in the case of an ordinary witness the objections of counsel and discretionary power under s 41 would be sufficient to ensure the appropriate questions are asked of witnesses.
- In relation to vulnerable witnesses such as child witnesses and witnesses with a cognitive impairment, it recommended additional protection be offered. It noted:

> Courts have a duty to protect vulnerable witnesses and it must be mandatory for judicial officers to disallow improper questions in these circumstances. Questioning which must be disallowed includes confusing or repetitive questions and questions structured in a misleading or confusing way.

[68] Lloyd Babb, Director, Criminal Law Review Division, was of the view that the test envisaged by the ALRC would create problems in the court environment with lengthy contest as to whether a witness suffers from an intellectual or mental disability such as to invoke the "*duty*" to disallow the question. He argued that this should not be the focus of the provision but rather a judicial officer should be guided by whether a question is misleading or confusing for the witness and should intervene accordingly, regardless of whether the person has a particular vulnerability.[30]

[69] The Director made the following observations concerning the knowledge of facts as relevant to the assessment of disallowable questions under s 275A which are worthy of note:

> In order to comply with the provision, judicial officers must obtain and maintain a requisite degree of awareness of issues affecting particular classes of witness together with an understanding of how these issues touch upon the witness's ability to respond to questions put to them during cross-examination.
>
> Judicial officers will need to be especially vigilant in regard to cross-examination of particular classes of witnesses, for example:
>
> - children
> - Aboriginal persons
> - persons who speak English as a second language
> - persons with intellectual or physical disabilities.
>
> Notice of the calling of these classes of witness should act as "triggers" or "alerts" to the need for preparation in advance of the witness being called, as well as extreme concentration during the giving of their evidence.

[70] In its Final Report published in December 2005, the ALRC and the NSWLRC (but not the VLRC) were "persuaded that s 275A … provides a comprehensive model for the protection of all witnesses from improper cross-examination".[31] Submissions to the Commission inquiry indicated that former s 41 was under utilised and there remained concerns with judicial control of cross-examination. Furthermore, the Commissions noted the concerns raised in submissions that the proposed definition of a vulnerable witness in Discussion Paper 69 was "too narrow" and that expanding the categories of "vulnerability" to include other groups may be insufficient and lead to "drawn out argument as to whether a witness suffers from a sufficient level of intellectual disability to be considered vulnerable".[32]

[71] The Final Report therefore recommended that the duty to disallow improper questions should have general application to both civil and criminal proceedings.

Cultural change

[72] The Criminal Law Review Division submitted that the imposition of a duty to disallow questions under s 275A did not compromise judicial impartiality, but instead demonstrated a move away from "the tacit acceptance of improper behaviours that cut across fundamental fair trial principles."

[73] Chief Justice Spigelman has acknowledged the dynamic nature of the principle of a fair trial:

> In particular, it enables the court to acknowledge fundamental changes in community expectations as to the requirements of a fair trial. What is regarded as fair, particularly in the context of a criminal trial, has always varied with changing social standards and circumstances."[33]

[74] In a similar mood the Honourable Judge Donna Hackett, a Canadian judge observed:

> If our laws in society were unchanging, judicial impartiality would be a simple matter. Judges could simply sit back and let counsel "go to it." In reality however, our laws in society are ever changing. If judicial impartiality means that judges should ignore equality issues unless counsel raise them, then "judicial impartiality" will be a barrier to the protection and enforcement of equality rights. True judicial impartiality requires judges to take the road less travelled and step away from our legal past and assumptions about its continued correctness to integrate equality in to the interpretation and application of our laws, when appropriate.[34]

Procedure in prescribed sexual offence cases

[7-240] Article

R Tupman, "Procedure in prescribed sexual offence cases", paper presented at the District Court of New South Wales Annual Conference, 10–12 April 2007, Leura (revised February 2009).

Abstract

This paper addresses specific procedures which must be considered in cases involving prescribed sexual offences, largely as a result of specific legislation. Sections 290–294C of the *Criminal Procedure Act 1986* must be adopted during the evidence of the complainant in all proceedings for prescribed sexual offences, whether adult or child complainant. For instance, evidence of the complainant must be held in camera: s 291. All complainants are entitled to give evidence from outside the courtroom by CCTV or give evidence in court behind a screen: s 294B(3). A complainant is entitled to have a support person: s 294C. An unrepresented accused may not examine a complainant: s 294A.

There are special procedures applying to retrials under ss 306A–306G. For instance, the prosecutor may tender a record of the evidence given by the complainant in the first trial as the evidence in the retrial under s 306B. Sections 306H–306L relate to retrials where a previous trial has been discontinued for any reason including a hung jury, a discharged jury otherwise or if discontinued for any other reason. In such a case the prosecutor may tender as the evidence of the complainant, the original evidence which is defined in the same way as for retrials after appeal.

All vulnerable persons (a child or a cognitively impaired person) are entitled to give evidence-in-chief by way of a recording of their evidence made previously by an investigating official under s 306U of the *Criminal Procedure Act 1986*. Where evidence-in-chief is given via a recording pursuant to these provisions, the judge must warn the jury not to draw any inference adverse to the accused or give the evidence any greater or lesser weight because of the evidence being given in this way: s 306X.

Note: The *Evidence (Children) Act 1997* was repealed by s 5 of the *Criminal Procedure Amendment (Vulnerable Persons) Act 2007* (commenced 12 October 2007). The *Evidence (Children) Act* continues to apply to proceedings that were pending immediately before the repeal of that Act and those proceedings are to continue to be dealt with as if the *Evidence (Children) Act* had not been repealed: *Criminal Procedure Act*, Sch 2, Pt 14, cl 56.

The *Criminal Procedure Amendment (Vulnerable Persons) Act 2007* initially defined a vulnerable person to be "an intellectually impaired person" in s 306M(1). However the *Crimes Amendment (Cognitive Impairment—Sexual Offences) Act 2008* (commenced on 1 December 2008) omitted "an intellectually impaired person" and inserted "a cognitively impaired person".

The 2008 Act did not have transitional provisions addressing whether the new cognitively impaired person definition extends to any proceedings commenced before the commencement of the amendments. This is apparently because the amendments in the 2008 Act merely involved a change in the terminology used for this class of vulnerable persons. For this reason the transitional provision for the 2007 Act (referred to above) continues to have application.

The provisions apply to cognitively impaired persons "only if the court is satisfied that the facts of the case may be better ascertained if the person's evidence is given in such a manner": s 306P(2).

Acknowledgment: this article was prepared by her Honour Judge Tupman and presented at the District Court of New South Wales Annual Conference, April 2007. Reproduced with permission. Updated February 2009.

Procedure in prescribed sexual offence cases

Her Honour Judge Robyn Tupman

Overview

[1] This paper addresses specific procedures which must be considered in cases involving "prescribed sexual offences", largely as a result of specific legislation. They are mainly relevant in jury trials, but also apply to judge-alone trials and appeals involving prescribed sexual offences. The paper will also suggest some other procedures which should be considered and applied in such trials.

Legislative provisions requiring special procedures

[2] Procedures applying to both adult and child complainants, as specified by legislation, are found in the *Criminal Procedure Act 1986* Ch 6, Pt 5, "Evidence in Sexual Offence Proceedings", ss 290–306L. They apply specifically to all proceedings for a "prescribed sexual offence". Specific additional provisions applying only to vulnerable complainants (a child or a cognitively impaired person) are also found in Pt 6 of Ch 6 of the *Criminal Procedure Act 1986*.

What are prescribed sexual offences?

[3] They are defined in s 3 of the *Criminal Procedure Act 1986* as all of the sexual assault offences in Pt 3, Div 10 of the *Crimes Act 1900*, or any such offence that was prescribed by the *Crimes Act 1900* as a sexual assault offence at the time it was committed under now repealed provisions of that Act, or any offence that involves the commission of, or intention to commit, such a sexual assault or any act which involves an attempt, conspiracy or incitement to commit such a sexual assault. The definition just about covers the field of any form of sexual offence that might come before the court, with the possible exception of carnal knowledge which is still occasionally to be found in some older allegations and which is probably not covered by the definition.

[4] The definition would also cover an offence of detain for advantage, the alleged advantage being with the intention of having sexual intercourse with the complainant and so the special procedures would need to be adopted in such a trial.

Procedures pursuant to *Criminal Procedure Act 1986*

(a) Sections 290–294C of the Criminal Procedure Act 1986

[5] The following special procedures must be adopted during the evidence of the complainant in all proceedings for prescribed sexual offences, whether adult/child complainant.

(i) Evidence in camera

[6] The evidence of the complainant *must* be held in camera unless otherwise directed by the court (s 291(1)), even if the evidence is being given via CCTV or any of the other alternative means of giving evidence in person: s 291(2). Such evidence is only to be given in open court if requested by a party, and it is either in the "special interests of justice" or the complainant consents: s 291(3). Finding the "special interests of justice" involves a limited exercise of discretion because s 291(4) specifically provides that the principle that proceedings should generally be in open or in public and/or that justice should be seen to be done etc, does *not* constitute the "special interests of justice" in determining whether or not the complainant should give evidence in open court. There are no decided cases yet defining the extent of this discretion.

Commentary

- The need for proceedings to be held in camera when a witness is giving evidence from somewhere outside the courtroom via CCTV seems unnecessary, particularly as the witness can see no more of the courtroom than the bench and the middle of the bar table.
- It is far from certain that members of an accused's family or a friend can be permitted to remain in court when a complainant gives evidence in camera, even when the evidence is being given via CCTV and only if it is found to be "in the special interests of justice". Whilst that might be easy to establish in some cases, for example, if the accused is a juvenile or someone with special needs, this provision on its face can mean that none, including the family and friends of an accused who is ultimately convicted, who probably have only ever heard his/her version of events, will ever hear or know the basis on which he is convicted. That is apt to undermine confidence in the system. A judge is well capable of protecting the interests of a complainant, by excluding any particular person where appropriate or ensuring that they do not sit in the line of sight of a complainant if evidence is being given in court. The NSW Bar Association is currently making a suggestion for amendment of the provision to enable family members of the accused to remain present in court but at the discretion of the judges.

(ii) Media access to proceedings in camera

[7] The court may allow media representatives to remain in court when the evidence of a complainant is being given via CCTV or similar electronic method, even though the proceedings are in camera: s 291C(1).

Commentary

[8] This provision appears somewhat unusual in that a media representative may be present in court when a complainant is giving evidence via CCTV, but the family of an accused may not. It is suggested that reform is needed in the interest of fairness and confidence in the system.

[9] Where the complainant gives evidence in person and the proceedings are held in camera, the media may not be present, but the court may make arrangements for them to view the CCTV evidence in another part of the court premises or to view a recording of the evidence: s 291C(2).

Commentary

[10] This provision does not appear to have been used yet and it is hard to envisage how in practical terms it would work given the technical difficulties that seem to arise and the very limited space otherwise available. If there is media interest, however, in a particular trial and the complainant is giving evidence in person in the courtroom, it is arguably far preferable that the media be present in court, subject to judicial scrutiny and direction, reporting on what is actually given as evidence rather than relying on second-hand versions or possibly on what might have been in a police statement.

(iii) Alternatives methods of giving evidence — CCTV and others

[11] All complainants, whether adult or child, are entitled to give evidence from outside the courtroom by CCTV or similar electronic system or to give evidence in the courtroom from behind a screen or by removing people from the line of sight of the complainant: s 294B(3). Complainants may choose not to take advantage of these alternatives, but if they do make such a choice there is some discretion in the court, either of its own motion or on the application of a party, to refuse to allow the evidence to be given in this way, but only if there are "special reasons in the interests of justice" for this not to occur: s 294B(5) and (6). There are no decided cases defining this provision. Where these methods are used in a jury trial, the jury must be

informed by the judge that this is standard procedure, that they must not draw any inference adverse to the accused because this procedure is being used and must not give the evidence any greater or lesser weight: s 294B(7).

Commentary

Difficulties arising when evidence given via CCTV

- Technical problems, for example, does the equipment work? Can the complainant both hear what is happening in the courtroom and be heard and seen in the courtroom by all involved such as the jury and accused? If the complainant is a child, is she/he tall enough to be seen on the screens in court? The use of a booster seat may be needed. These problems all need to be addressed in the absence of the jury so that any limitations are obvious and can be solved before evidence is given and delays are minimised. Also the judge needs to familiarise himself/herself with the equipment, for instance, how to switch from full-view room to face-view of the complainant and when to do that.
- Are there physical exhibits to be identified or tendered? If evidence is being given from a remote location that needs to be addressed pre-trial, and photographs and documents made available to the court officers at the remote site. It can otherwise lead to delays and disjointed evidence.
- There are more basic issues such as not forgetting that the witness still needs to be sworn/affirmed via the court officer in the remote room. Also not forgetting that the visage of the presiding judge is on one of the two screens in front of the witness in the remote location at all times, and so the sorts of things that can be done in a normal trial with a witness in the witness box without any concern, for example, reaching for a glass, scratching your nose, looking down at something, eye movements, looking away, talking to the associate, are much more pronounced to such a witness than they would be if she/he was in the courtroom looking out to the body of the court. A wrong impression can be given to a witness from such movements and it has been reported back that it can be quite distracting.

Difficulties when giving evidence from behind a screen

[12] It can be very difficult to position a screen so that the jury can see the witness, the accused can see the witness, the jury can see the accused in court (particularly if he is in the dock) but the witness cannot see the accused. Given the position of cameras in the courtrooms in the Downing Centre, it is impossible to position a complainant behind a screen and make an audio-visual recording of the evidence at the same time, thus making full compliance with s 306B difficult (see below).

(iv) Presence of support person

[13] A complainant of any age is entitled to have a support person or persons present when they are giving their evidence either in court or via CCTV or similar: s 294C. The person is to be near the complainant and within his/her sight. This person can be almost anyone including relative, friend or professional advisor. The accused is not entitled to object to the suitability of the support person (s 294C(4)), and the court cannot of its own motion disallow the person chosen by the complainant unless that choice would prejudice the accused's right to a fair trial, for example, if the person was a witness or similar.

Commentary

- It is a desirable practice to have the name of the support person recorded. In practice, most of these people are independent counsellors, support people or similar, but the potential for

problems can arise. Recording the name at least, ensures that the person does not remain anonymous, which is particularly important where that person remains in a CCTV room with a complainant, and the risk of any undue influence may arise during adjournments or out of sight of the camera.

- The suggested preferred course for such people where a complainant gives evidence in court, is that they sit in the public gallery but within eyesight of the complainant in the witness box. Not up close to the complainant which may provide some form of distraction for the jury.

(v) Arrangements for complainant's evidence when accused unrepresented

[14] An unrepresented accused may not examine a complainant but the court may appoint a person to do so: s 294A(2). This applies whether the evidence is being given in person in the courtroom or via CCTV. The appointed person is not entitled to give the accused independent legal advice (s 294A(4)), and may only ask the complainant questions as requested by the accused: s 294A(3). Where this is done in a jury trial, the jury must be informed that it is standard procedure and they are not entitled to draw an inference adverse to the accused, or give the evidence lesser or greater weight as a result of this procedure being used: s 294A(7).

Commentary

[15] This would be a difficult provision to put into effect whilst at the same time preventing a trial from "running off the rails" or becoming unduly lengthy. It has been found to be constitutionally valid: *R v MSK and MAK* [2004] 61 NSWLR 204; [2004] NSWCCA 308. The author of this paper is unaware that it has ever been put into effect. In *R v MSK*, the section itself was not in fact used because the accused declined to accept the offer of an appointed person to ask questions of the complainants. The sorts of practical problems in implementing the section, however, were referred to by Justice Wood in the CCA at 219:

> In their submissions the appellants pointed to what were suggested to be concerns in relation to uncertain aspects of the section, or problems in its practicable implementation. This was related to issues which were said to arise concerning the way in which the Court might appoint a suitable person; the way in which an accused might convey to the court-appointed person those questions which he wished to have put, particularly those that might arise in the running of the trial; and the way in which arguments as to their admissibility might be resolved: concern was also identified in relation to why it was that the section contemplated the court-appointed person examining and re-examining the complainant, as distinct from cross-examining that witness.
>
> None of these matters, it seems to me, operates as an effective obstacle to a fair trial. There is no difficulty in the way of the trial judge considering, before the commencement of the trial, the appointment of a suitable person who is either nominated by the accused, or who is made available on a pro bono basis following representations either to the Court or to the Law Society or the Bar Association. Such person need not be legally qualified and could come from a wide cross section of the community.
>
> Obviously the accused would be entitled to speak to that person in advance of and during the trial, and in the course thereof, to identify the questions which he wished to be asked. That would not be confined to submitting questions in writing. Nor is it the case that the accused would be denied the opportunity of a short adjournment during the trial, if necessary, to formulate fresh questions.
>
> The restriction in the section relating to the giving of legal advice, which has an obvious relevance so as to relieve the court-appointed person from the duties which might otherwise have attached to a person who had accepted instructions or a brief from the accused, does not restrict the formulation of questions.

> Equally obviously, any ruling on the admissibility of the questions will be determined in the absence of the jury after the accused is heard, and in circumstances where the accused would be given the opportunity, if need be, to reformulate the question in an admissible form.

[16] They are all obvious practical difficulties. The best solution in terms of procedure is to ensure that all accused in such trials are in fact represented; but in procedural terms, if it looks to be inevitable that an accused will be unrepresented, it is suggested that there would need to be precise pre-trial mentions and directions, well before the trial was due to commence, well before the complainant was in the vicinity of the court and well before any jury was empanelled, so that these issues could all be canvassed.

(b) Retrials of sexual offence proceedings — ss 306A–306G

[17] There are special procedures applying to retrials:

(i) A retrial for these provisions is defined as a circumstance where a person has been convicted of a prescribed sexual offence and, on appeal, a new trial has been ordered. In such retrials, the prosecutor may tender a record of the evidence given by the complainant in the first trial (the original evidence) as the evidence in the retrial: s 306B. This includes all of his/her evidence including evidence-in-chief, cross-examination and re-examination. The prosecutor must give written notice to the court and the accused of an intention to adduce the evidence in this form at least 21 days before the retrial. The evidence is admissible as an exception to the hearsay provisions of the *Evidence Act*, and also admissible to prove any fact asserted by the complainant during the course of the evidence presented in that form. The court has no discretion to exclude the evidence being presented in this form (s 306B(5)), but may make rulings rejecting and editing out portions of this earlier evidence if, in accordance with the usual rules and practice, they would be inadmissible if the evidence were to be given orally: s 306B(6).

(ii) **Form of the original evidence** — It must be the best record available and the records must be authenticated. Pursuant to s 306E(2), the best record is defined as being a audio-visual recording of the evidence; or if that is not available then an audio recording of the evidence; or if neither of those is available, then a transcript of the evidence. Where the evidence-in-chief of a child complainant was presented via pre-recording (see below), then that is the best available record of that part of the original evidence: s 306B(3).

(iii) **Access to the original audio-visual recording or visual evidence** — An accused or his/her legal representative is not entitled to be given possession of a copy of the original audio or audio-visual evidence, but are entitled to have reasonable access to it: s 306F.

(iv) **Further oral evidence of complainant on these retrials** — The complainant is not a compellable witness where the original evidence is tendered pursuant to these provisions; but may become compellable and be called to give further oral evidence, only with leave of the court, and where considered necessary to clarify matters raised in the original evidence, or to canvass matters which have arisen since the original trial or are in the interests of justice, but only where the complainant agrees to give such further oral evidence: ss 306C and 306D. Any further oral evidence is subject to all of the more general provisions in ss 290–294C, discussed above.

Commentary

- Some courts in the Downing Centre and at least one courtroom in Campbelltown and Parramatta (and perhaps other centres as well) have provision for audio-visual recording the evidence of a complainant in all sexual assault offence proceedings. It is desirable that such

trials only be conducted in these courtrooms where the complainant gives evidence in court, because an audio-visual version is the best available record if later relied on in a retrial. All evidence of such complainants via CCTV is also now recorded and can be available for later use. The system for recording in-court evidence is a little cumbersome and there needs to be a pause after every adjournment whilst the court officer "fires the system up".

- There is currently no uniform system of direction in place about what to do with this evidence once it is recorded. The recording is made onto a hard drive which then needs to be copied to a DVD if it is to be retained following a conviction. Some of the equipment copies in real time, making that task slow and cumbersome. It is suggested that directions should be given to court officers to burn DVDs of such evidence every day so that if, at the end of the trial there is a conviction, the DVDs can be marked as an MFI in the trial and retained with the court record. If this direction is left until any conviction at the end of a trial, then it is possible that there may be no court officer available to spend the considerable time necessary to burn the DVD of two or three days evidence. It stays on the hard drive and then, as often happens, it gets lost, recorded over, the system crashes or some similar catastrophe. Suggestions about who and how authentication occurs in those circumstances are welcomed.
- To date, original evidence presented in retrials has been limited to reading from a transcript, which carries its own problems. That is, if it is read out, is it "acted" or read in "deadpan"? Should there be two or more voices, the questioners and the complainant? Should they be the same gender as the original speakers?
- The provision preventing a legal practitioner from having a copy of the original audio or audio-visual evidence is curious, and presents significant practical difficulties likely to cause delays in trials. This is one important aspect of procedure that must be addressed well before a retrial is to commence to ensure there are no delays and to limit the impact on the jury.

(c) Subsequent trials of sexual offence proceedings — ss 306H–306L

[18] These provisions relate to retrials where a previous trial has been discontinued for any reason including a hung jury, a discharged jury otherwise or if discontinued for any other reason. In such a case the prosecutor may tender as the evidence of the complainant, the original evidence which is defined in the same way as for retrials after appeal. The provisions are almost identical as for retrials after successful appeal.

- The original evidence of the complainant is admissible with the same notice provisions as applying in retrials: s 306I(3). The same exceptions to the hearsay rule apply to this original evidence as in appeal retrials (s 306I(4)); the same provisions apply for editing or altering the original evidence to remove statements which would have been inadmissible in accordance with the normal rules had the evidence been given orally (s 306I(6)); the same provisions apply in relation to the compellability of the complainant and election to give further evidence as apply to appeal retrials (ss 306J and 306K); and exactly the same provisions apply in relation to the form of the original evidence, access to it, etc: s 306L.
- The difference or distinction between the use of such original evidence on retrial in this category is in s 306I(5), which provides a broad discretion as follows:

> Despite subsection (3), the court hearing the new trial proceedings may decline to admit a record of the original evidence of the complainant if, in the court's opinion, the accused would be unfairly disadvantaged by the admission of the record, having regard to the following:
>
> (a) the completeness of the original evidence, including whether the complainant has been cross-examined on the evidence,

(b) the effect of editing any inadmissible evidence from the original evidence,

(c) the availability or willingness of the complainant to attend to give further evidence and to clarify any matters relating to the original evidence,

(d) the interests of justice,

(e) any other matter the court thinks relevant.

Commentary

- See above regarding similar provisions for post-appeal retrials.
- The potential for longer pre-trial proceedings exists where the prosecution has given notice of an intention to rely on the original evidence in these types of retrials. Thus there is an increased need to identify these problems early during a pre-trial process, well before the trial has been set down for hearing, the jury empanelled and witnesses notified. The risk of further delay is significant and may have an impact on a complainant where he/she has been told that the original evidence is to be relied on, but that ultimately does not occur.

Procedures for vulnerable persons

[19] A child under 16 or a cognitively impaired person (defined as a "vulnerable person" in s 306M of the *Criminal Procedure Act 1986*) are entitled to give evidence-in-chief by way of a recording of their evidence made previously by an investigating official. This applies not only to sexual assault proceedings and complainants in such cases, but to all vulnerable witnesses and all offences, but is most relevant for trials involving child and cognitively impaired complainants in sexual assault trials.

[20] Section 306U and following sections of the Act defines this procedure:

- The vulnerable person is entitled to and may give their evidence-in-chief by way of a previously recorded statement taken by an investigating official.
- A recorded statement made when the child was less than 16 years of age may be admitted into evidence "no matter what age the person is" at the time of the trial: s 306U(2).
- The vulnerable person must not be present in the court or audible to the court via CCTV while that evidence is played.
- The vulnerable person may choose to be present while this recorded evidence-in-chief is played.
- A vulnerable person who gives evidence-in-chief in this manner must be made available for cross-examination and re-examination subsequently, either orally in the courtroom or via CCTV or similar.
- The court may order that the evidence-in-chief not be given in this way but only if there is a finding that it is in interests of justice for that to occur: s 306Y. It is important to note that this does not require it to be in the "special interests of justice".
- The court may order that a transcript of this recorded evidence be made available to the court and the jury to aid its comprehension: s 306Z. But note, *R v NZ* [2005] 63 NSWLR 628; [2005] NSWCCA 278 which considers the practical application of this section (then s 15A of the *Children (Evidence) Act 1997*) and how to deal with the video tape of this evidence-in-chief. It should not be tendered as an exhibit but if this does occur ought not, in general terms, be sent to the jury with other exhibits. Nor should the transcript of any such

recording be left with the jury and if they request such a transcript it should, in general terms, only be provided if the transcript of cross-examination and other evidence is also provided. To do so will not necessarily amount to a miscarriage of justice, however, depending on the circumstances: *Wilson v R* [2006] NSWCCA 217.

[21] Section 306V provides such a recording is admissible as an exception to the hearsay rule, but is not to be admitted unless it is proved that the accused person and his/her lawyer were given a reasonable opportunity to listen to and/or view the recording in accordance with the regulations.

[22] The *Criminal Procedure Regulations* 2005 Pt 5A provide that the prosecuting authority must give notice of intention to adduce evidence-in-chief via this method. The notice must be in writing; must specify each recorded interview that it intends to adduce; provide information that the accused and his/her lawyer are entitled to view these interviews at a police station or other place nominated by the prosecuting authority; and give the name of the person responsible for arranging this access. This notice must be given at least 14 days before the evidence is given in the proceedings: cl 19D(3). The regulations go on to provide that the accused may then give a written notice requiring access to the recording, which must be given at least seven days before the proceedings, and when that is received the responsible person must give access to the recording within seven days.

[23] As for all other prosecution evidence, a written statement must be served of the evidence to be led; and pursuant to s 76 of the *Criminal Procedure Act 1986*, where the vulnerable person's evidence-in-chief is to be by way of recording, then a transcript of that recording may form that written statement. That transcript must be certified by an investigating official as an accurate transcript. Section 76(4) provides that nothing requires the prosecutor to serve a copy of the actual recording of an interview on the accused and his/her lawyer.

[24] Where evidence-in-chief of a vulnerable person is given via recording pursuant to these provisions, the judge must warn the jury not to draw any inference adverse to the accused, or give the evidence any greater or lesser weight because of that procedure being used: s 306X.

Alternative methods of giving evidence in personal assault offences

[25] In personal assault offences, including sexual assault offences, vulnerable persons have a right to give evidence via CCTV: s 306ZB. This applies to all vulnerable persons in proceedings where it is alleged that a person has committed a personal assault offence, and in other proceedings as defined in s 306ZA. This also applies to witnesses between 16 and 18 at the time of trial, who were under 16 the time the charge was laid. The vulnerable person may choose not to use this alternative method and the court may order that it not be used, but only if satisfied that there are special reasons, in the interests of justice, for that not to occur: s 306ZB(5). When giving evidence via this method, vulnerable persons have the same entitlement as adult complainants (see above) to the presence of a support person. The alternative of screens is also available to all vulnerable witnesses as an alternative to CCTV, similar to adult complainants, where CCTV is not available or not chosen by the witness.

[26] Section 306ZL also provides similar provisions to adult complainants preventing examination of a vulnerable witness by an unrepresented accused, with similar provisions about an appointed person asking such questions.

Commentary

- While these recordings of vulnerable witnesses can have the advantage of providing a reasonably contemporaneous version of the evidence and preventing further distress to a

vulnerable witness, particularly in a sexual assault allegation, procedurally they present considerable difficulties. Almost invariably they contain inadmissible material which must be edited out before the evidence can be played.

- The arrangements for access to these videotapes is unwieldy and causes delay in the court process. It is suggested that the limitation on copies being provided to legal representatives should be repealed, that such video tapes should be provided as part of the prosecution brief of evidence like any other piece of evidence, but that the limitations remain on copies being made available to an accused. Further there should be directions requiring these copies to be returned to the court immediately at the conclusion of proceedings and undertakings to that effect given by legal practitioners.
- Often these videotaped recordings are poor quality, are hard to hear and not close enough to the witness, particularly when compared ultimately to the way the witness is seen when being cross-examined via CCTV. Better training in recording these videos is required.

Court directions to deal with these procedures

[27] *District Court Criminal Practice Note 5* deals with the management of prescribed sexual offence proceedings. It deals with the myriad of practical problems which arise in these trials, particularly given the special procedures which must be adopted. It is suggested that the following additional matters need to be addressed pre-trial, whether in a special callover list or alternatively at the beginning of an individual trial, before the jury is empanelled. Where it seems these issues are likely to take a little while to resolve, the complainant has been allowed to leave the court complex.

- Will there be any objections to matters raised in the statement of a complainant? These statements are often very lengthy, written in a discursive style, often with answers given to questions couched in a therapeutic manner rather than styled to present as evidence in a criminal trial and it is not always be clear what portions will and will not be led by the prosecution.
- Is this a retrial or subsequent trial and will the evidence be given by previous recording? If so, in what form? Has anyone looked to see if it works in the courtroom? Are there any applications that it not be given in such a way? Are there any applications to exclude portions of that previous recording in general terms?
- Will "complaint" evidence be called? If so, is it relied on as complaint or as re-establishing credit? What is it? Are there proper statements setting out exactly what the complaint evidence are alleged to be? Is there any argument about the admissibility of the evidence and if admissible, in what capacity?

Trying delays: forensic disadvantage in child sexual assault trials

[7-260] Article

D Hamer, "Trying delays: forensic disadvantage in child sexual assault trials" (2010) 9 *Criminal Law Review* 671.

Abstract

This article considers the possible consequences of delayed prosecutions for child sexual assault offences, particularly the forensic disadvantages faced by defendants. With reference to Australian and UK case law, the article examines the scope for delay to cause evidence to be lost, whether the loss must be proven, whether regard should be had to lost peripheral evidence and whether existing evidence may compensate for what is lost. The article argues for a balanced response to lost evidence with no allowances being made in a defendant's favour, and for convictions to be based upon the strength of the prosecution evidence.

Special measures in child sexual abuse trials: criminal justice practitioners' experiences and views

[7-280] Article

E Lee, J Goodman-Delahunty, M Fraser, M Powell and N Westera, "Special measures in child sexual abuse trials: criminal justice practitioners' experiences and views" (2018) 18(2) *QUT Law Review — Special issue: Contemporary legal and ethical challenges in children's health: reproduction, technology, capacity, medicine and violence* 1.

Abstract

Special measures have been implemented across the globe to improve evidence procedures in child sexual assault trials. The present study explored the day-to-day experiences and views on their use by five groups of Australian criminal justice practitioners (N =335): judges, prosecutors, defence lawyers, police officers and witness assistance officers. Most practitioners reported routine use of pre-recorded police interviews and CCTV cross-examination of child complainants, but rare use with vulnerable adults. Despite persistent technical difficulties and lengthy waiting times for witnesses, high consensus emerged that special measures enhanced trial fairness and jury understanding. The perceived impact of special measures on conviction rates diverged widely. Defence lawyers disputed that this evidence was as reliable as in-person testimony. All practitioner groups endorsed expanded use of expert witness evidence and witness intermediaries. Ongoing professional development in all practitioner groups will further enhance justice outcomes for victims of child sexual abuse.

Oaths, affirmations and declarations

[7-300] Article

Judicial Commission of New South Wales, *Equality before the Law Bench Book*, Section 6 — Children and young people "Oaths, affirmations and declarations" at [6.3.2], Sydney.

Abstract

The *Equality before the Law Bench Book* presents assessments that need to be made when a child or young person gives unsworn evidence.

The court must first be satisfied that the particular child or young person understands the difference between the truth and a lie. This also requires the court to tell the child or young person that it is important to tell the truth and then gain the child's or young person's agreement that they would not lie during the proceedings under s 13 of the *Evidence Act 1995*. It focuses on questioning techniques to get the best answers.

Evaluation of the child sexual offence evidence pilot: final outcome evaluation report

[7-320] Article

J Cashmore and R Shackel, Evaluation of the Child Sexual Offence Evidence Pilot: final outcome evaluation report.

This final outcome evaluation report was prepared for Victims Services, NSW Department of Justice in August 2018.

Abstract

The Child Sexual Offence Evidence Pilot (the Pilot) introduced three special measures:

- witness intermediaries to assess children's needs and communication capacities both at the police interview and at court, broadly based on the UK Witness Intermediary Scheme
- the use of pre-recorded evidence hearings for child complainants and witnesses giving their evidence prior to the balance of the trial, and
- the appointment of two specialist District Court judges to manage the pre-recorded evidence hearings in prescribed child sexual offence matters.

This is the final report of the evaluation of the Child Sexual Offence Evidence Pilot in NSW. It outlines the findings of the outcome evaluation and presents an assessment of the impact and effectiveness of the special measures introduced by the Pilot and recommendations for possible improvements to, and future development of those measures, related processes, and implications for a wider and sustainable roll out. Some key challenges and risks for expansion of the Pilot are identified.

[7-495] Further reading — legal

Note: The following books and chapters are also recommended as further reading. The Judicial Commission has not reproduced these within the Sexual Assault Trials Handbook.

Evidence

- I Freckelton, J Goodman-Delahunty, J Horan and B McKimmie, *Expert evidence and criminal jury trials*, Oxford University Press, 2016, pp 93-116 (Ch 5).

Judicial role

- D Hamer, "Delayed complaint, lost evidence and fair trial: epistemic and non-epistemic concerns" in P Roberts and J Hunter (eds), *Criminal evidence and human rights: reimagining common law procedural traditions*, Hart Publishing, 2012, pp 215-237 (Ch 9).

Relevant literature — non-legal articles

Impact and sequelae of child sexual abuse

The dynamics of child sexual abuse

Child sexual abuse and the criminal law

The prosecution of child sexual assault in NSW

Institutional child sexual abuse

Investigation and interviewing children in child sexual abuse cases

Challenges facing child witnesses: special measures, witness assistance and intermediaries

Recording evidence and evidentiary issues in child sexual abuse cases

Adult victims of sexual assault

First nations women and children

Juvenile sex offenders

Online exploitation

The long-term effects of child sexual abuse

[7-500] Article

J Cashmore and R Shackel, *The long-term effects of child sexual abuse*, CFCA Paper No. 11, Australian Institute of Family Studies, 2013.

Abstract

This paper is a useful summary of recent Australian and international research on long-term effects of child sexual abuse, including the link between the abuse and adverse mental health consequences.

Understanding children's medium for disclosing sexual abuse — a tool for overcoming potential misconceptions in the courtroom

[7-520] Article

R Shackel, "Understanding children's medium for disclosing sexual abuse — a tool for overcoming potential misconceptions in the courtroom" (2009) 16(3) *Psychiatry, Psychology and Law*, 379–393.

Abstract

Complainants in child sexual assault trials are often questioned by the defence about disclosure of the alleged abuse. The defence will often ask the child how they disclosed the alleged sexual abuse including to whom the initial disclosure was made. Such questions are legitimate and directed towards testing the complainant's allegations. Sometimes, such questions are used to impeach the complainant's credibility. It is not uncommon in such instances for the defence to suggest that certain modes of disclosure are more consistent with having been sexually victimised and that a complainant who has disclosed otherwise is more likely to have fabricated the allegations of abuse. This paper reviews the findings of empirical research on who victims of child sexual abuse most commonly disclose their abuse to and by what means such disclosure is commonly made. This understanding is important to challenge misconceived views about how victims disclose child sexual abuse.

Acknowledgement: R Shackel "Understanding children's medium for disclosing sexual abuse — a tool for overcoming potential misconceptions in the courtroom" (2009) 61(3) *Journal of the Australian and New Zealand Association of Psychiatry, Psychology and Law*, 379–393, Taylor & Francis Ltd at <www.informaworld.com/1321-8719>.

See also an abridged version of this article in R Shackel, "Overcoming misconceptions in the courtroom on how children disclose sexual abuse" (2011) 23(4) *JOB* 29.

How child victims respond to perpetrators of sexual abuse

[7-540] Article

R Shackel, "How child victims respond to perpetrators of sexual abuse" — some of the material contained in this paper was presented at the 8th Annual International Association of Forensic Mental Health Services Conference, July 2008, Vienna, Austria in a paper entitled "Responses of child victims to the perpetrators of sexual abuse".

Abstract

This paper reviews the findings of psychological research on how sexually victimised children "typically" respond to the offender and compares the findings of this research to generally held adult expectations of child victim's behaviour. This analysis reveals that adult expectations of child victims' responses are often inconsistent with the findings of relevant empirical research. This suggests that many adults, despite a greater societal awareness and understanding of child sexual abuse generally, may still continue to be poorly informed about the behaviour of sexually abused children and the underlying dynamics of such abuse. Consequently, in a forensic context, decision-makers in child sexual assault cases may unfairly rely on misconceived beliefs about how child victims respond to sexual abuse in evaluating such cases.

Acknowledgement: R Shackel "How child victims respond to perpetrators of sexual abuse" (2009) 61(Supplementary) *Journal of the Australian and New Zealand Association of Psychiatry, Psychology and Law,* s55–s63, Taylor & Francis Ltd at <www.informaworld.com/1321-8719>.

Children discuss disclosure recipients in forensic interviews

[7-560] Article

L Malloy, S Brubacher and M Lamb, "'Because she's one who listens': children discuss disclosure recipients in forensic interviews" (2013) 18(4) *Child Maltreatment* 245.

Abstract

The current study examined investigative interviews using the National Institute of Child Health and Human Development (NICHD) Investigative Interview Protocol with 204, five- to thirteen-year-old suspected victims of child sexual abuse. The analyses focused on who children told, who they wanted (or did not want) to tell and why, their expectations about being believed, and other general motivations for disclosure. Children's spontaneous reports as well as their responses to interviewer questions about disclosure were explored. Results demonstrated that the majority of children discussed disclosure recipients in their interviews, with 78 children (38%) explaining their disclosures. Only 15 children (7%) mentioned expectations about whether recipients would believe their disclosures. There were no differences between the types of information elicited by interviewers and those provided spontaneously, suggesting that, when interviewed in an open-ended, facilitative manner, children themselves produce informative details about their disclosure histories. Results have practical implications for professionals who interview children about sexual abuse.

A retrospective analysis of children's assessment reports: what helps children tell?

[7-580] Article

R McElvaney and M Culhane, "A retrospective analysis of children's assessment reports: what helps children tell?" (2017) 26(2) *Child Abuse Review* 103.

Abstract

In this study, retrospective analysis of children's file data was evaluated as a method of gathering information about children's experiences of informal disclosure of child sexual abuse. The files were from children professionally evaluated as having provided a credible account of abuse. The strengths and limitations of this method are identified by comparing findings from the files with findings from a small sub-sample of children who were interviewed, and it is suggested that further exploration with a larger sample size would be worthwhile.

Children's disclosure of sexual abuse: a systematic review of qualitative research

[7-600] Article

S Morrison, C Bruce and S Wilson, "Children's disclosure of sexual abuse: a systematic review of qualitative research exploring barriers and facilitators" (2018) 27(2) *Journal of Child Sexual Abuse* 176.

Abstract

This paper is a systematic review of the qualitative evidence of factors relating to children's decisions to disclose experiences of sexual abuse, given the long-term impacts of such abuse and the access to support and protection that disclosure makes possible. Seven studies were evaluated and synthesised, from which six themes were developed: fear of what will happen; others' reactions: fear of disbelief; emotions and impact of the abuse; an opportunity to tell; concern for self and others; and feelings toward the abuser. These themes can be used by agencies to promote practices that facilitate children's disclosure of sexual abuse.

Disclosure of child sexual abuse: delays, non-disclosure and partial disclosure

[7-620] Article

R McElvaney, "Disclosure of child sexual abuse: delays, non-disclosure and partial disclosure. What the research tells us and implications for practice" (2015) 24(3) *Child Abuse Online Review* 159.

Abstract

This review looks at delays in disclosing, non-disclosure, and partial disclosure of child sexual abuse. The prevalence of delays and non-disclosure is revealed by large-scale national probability studies. Smaller qualitative studies show the complexity of individual experiences. Understanding why children are reluctant to disclose their experiences is important for child protection, legal and therapeutic professionals. Dynamics of disclosure, such as young people's need to maintain control over the process, the role of peers, adults' responses and opportunities for disclosure, must be understood in order to help young people disclose their experiences sooner.

Factors that prevent, prompt, and delay disclosures in female victims of child sexual abuse

[7-640] Article

N Kellogg, W Koek and S Nienow, "Factors that prevent, prompt, and delay disclosures in female victims of child sexual abuse" (2020) 101 *Child Abuse & Neglect* e104360.

Abstract

This study looks at factors that prevent, prompt and delay disclosure of child sexual abuse in patients presenting for medical evaluations of sexual abuse or assault, and identifies differences in disclosure tendencies among female pre-adolescents and adolescents. Young age (<11 years) at the onset of abuse was the strongest predictor of disclosure delay in both age groups. Fear of consequences to self was the most common reason for delay in both groups. Three other factors predicted delays for pre-adolescent females: severity of abuse; adult perpetrator; and self-blame. The paper concludes that disclosure tendency is likely influenced strongly by social and moral development during middle childhood. Reducing fear of consequences should be included in strategies designed to promote disclosure.

Barriers and facilitators to disclosing sexual abuse in childhood and adolescence

[7-660] Article

C Lemaigre, E Taylor and C Gittoes, "Barriers and facilitators to disclosing sexual abuse in childhood and adolescence: a systematic review" (2017) 70 *Child Abuse & Neglect* 39.

Abstract

This systematic review of research relating to child and adolescent disclosures of sexual abuse found a range of factors in the empirical studies. Multiple barriers to disclosure include limited support, perceived negative consequences, and feelings of self-blame. Disclosure is facilitated by being prompted or asked to disclose. The paper identifies that there is a need for robust, longitudinal studies to replicate research findings and that developmentally appropriate school-based intervention programs should be developed to facilitate disclosure. It also finds that prevention programmes should encourage family, friends, and professionals to identify clues of sexual abuse, to explicitly ask about it and to respond supportively to any disclosures.

Child witnesses: the judicial role

[7-680] Article

J Cashmore, "Child witnesses: the judicial role" (2007) 8(2) *The Judicial Review* 281.

Abstract

This paper discusses the problems child witnesses face in an adversarial adult-orientated system. These include children being required to answer questions from a number of different people about what happened, waiting months and even years before the case gets to court, having to face the alleged offender and being asked complex and difficult questions by lawyers unaccustomed to speaking to children in language they can understand.

There have been a number of changes in investigative and court procedure to try and accommodate the needs of child witnesses while still protecting the rights of the accused. However, despite these changes child witnesses report feeling they could not give a full and proper account of their evidence. Research indicates that the consistency and completeness of their testimony and their emotional state are affected by the way they are questioned. Research also highlights the significant imbalance of power, language skills and familiarity with the court process between the child witnesses and the legal professionals involved.

Research in a number of jurisdictions has also shown that a number of judges show a marked reluctance to intervene or simply do not intervene to assist or protect vulnerable witnesses during cross-examination. Changes in the law and other encouragement to intervene are not sufficient. The ability to recognise that questioning is developmentally inappropriate, oppressive or intimidating for a child witness is not intuitive and needs to be part of legal training and judicial education.

Judges and magistrates should set the tone of the courtroom and can model appropriate behaviours and ways of interacting with child witnesses that are respectful and allow children to testify in a full and fair manner. Judicial leadership is probably the most effective means within the existing adversarial system of changing the culture of the courtroom to offset the imbalance between professional lawyers and child witnesses. Minor changes like minimising delay, appropriate competence testing, ensuring the use of special measures, making the unfamiliar less intimidating and providing breaks can provide a more equal playing field for child witnesses which would improve the reliability of children's evidence and make the court process fairer and less intimidating for child witnesses without disturbing the rights of the accused to a fair trial.

Acknowledgment: this article was first published in full in the (2007) 8(2) Judicial Review 281. Reproduced with permission.

Child witnesses: the judicial role

Judy Cashmore

[1] *Dr Cashmore examines the role of the judiciary in the experience of child witnesses in the courtroom and ways in which judicial leadership can improve the experience such as appropriate intervention in relation to questioning, case management to minimise delays, and fitting use of technological aids.*

[2] With the easing of the restrictions associated with competence and corroboration requirements, children now appear more frequently as witnesses in child sexual assault prosecutions than they did several decades ago. As more children and younger children have come before the courts as witnesses, the problems they face in an adversarial adult-oriented system have become more evident. A multitude of research studies, government reports and inquiries in Australia and other common law countries have documented the difficulties. These include children being required to answer questions from a number of different people about what happened, waiting months and even years before the case goes to court, having to face the alleged offender, and being asked complex and difficult questions by lawyers unaccustomed to speaking to children in language they can understand.[1] Quite often children will to go through this process more than once, having to testify in pre-trial hearings or when there are multiple trials, with demonstrated adverse consequences.[2]

[3] Concerns about the stressful and potentially harmful effects on children and the possibly detrimental effect on the reliability and completeness of their evidence have led to a number of changes in investigative and court procedures to try to accommodate the needs of child witnesses while still protecting the rights of the accused.[3] These changes fall into three categories:[4]

- modifications to the court environment and innovative procedures to alleviate the main stressors for children in court;
- empowering children by preparing them for the court experience; and
- increasing the skills of the professionals involved in the investigative and court process.

[4] In particular, the use of technological aids in the form of closed-circuit television and pre-recorded interview evidence now allow children's evidence to be fully or partially presented in the form of a pre-recorded interview[5] and to testify via closed-circuit television away from the court room itself, and the gaze of the accused.[6]

[5] Despite these changes, child witnesses — and for that matter, many adult complainants in sexual assault matters — indicate dissatisfaction with their experience as witnesses, reporting in particular that they feel they were not heard. The recent evaluation of the pilot specialist child sexual assault jurisdiction in Sydney found, for example, that most children had difficulty with the questions they were asked and did not feel that they had the chance to say what they wanted to say or tell what happened in a coherent story.[7]

[6] There were several reasons children felt they could not give a full and proper account of their evidence. First, they were constrained by the questions and by the directions they were given about how they could answer. Several children were upset that they could not "tell the truth, the

whole truth, and nothing but the truth", because they were told by either the judge or the lawyer, to "just answer the question that was asked". They also reported being cut off or interrupted by the lawyer. For example:

> It was very hard because he [lawyer] would not let me speak. He would ask me a question and he would not let me respond to it. He'd just cut me off. *(15-year-old complainant)*

> Like I'd go to tell him what happened and he'd just say, "No, just answer the question". Like, you want to tell them the whole story, and they say, "No, you can't say that. If you don't say it this way, you can't say it at all". *Who was saying that?* The other guy, the defence guy. *(11-year-old complainant)*

[7] Second, some felt constrained by admissibility issues and by having to carefully edit their 'stories' to suit. For example, Alice, a 16-year-old, was giving evidence in relation to a series of sexual assaults against her in one trial, and in relation to assaults against several other complainants in two other separate trials. She spoke of her difficulty in trying to answer questions 'out of context' — without referring to the other complainants — and her consequent discomfort at appearing hesitant and unreliable before the jury.

> No, I had been told that I could not mention any other cases but some questions that they asked, you couldn't answer without mentioning the other people because that's how it worked, that's how it happened. So I was thinking, "Am I going to look like I am lying because I am hesitating? — because I didn't know how to answer without mentioning them. I feel negative about the court experience now because there are just so many things you can't say which makes it very hard for the jury to understand a lot of other things you know are connected to them" *(15-year-old complainant)*

[8] Third, some children had difficulty in understanding the questions, consistent with the findings of numerous other studies on the difficulty of "legal language".[8] For example:

> It was quite hard … and a bit annoying. They were speaking mumbo jumbo. Words I could not understand *(15-year-old complainant)*

[9] Finally, some child witnesses were clearly frustrated by what they saw as unnecessary questioning about irrelevant details by the defence lawyer and dissatisfied that their attempts to give honest answers were used to make them appear to be an unreliable witness. For example:

> There were so many questions that you cannot possibly remember the details over two years. He asked questions about things that were really irrelevant, like how long did Petra stay for, so he got me saying a number of times "I don't really remember". And it worked; so then he could say to the jury that she doesn't remember. *(16-year-old complainant)*

Telling the truth — if the court allows it

[10] Children's frustration and dissatisfaction with the process, and with cross-examination in particular, means that the legal system does not meet their expectation that they should be able to "tell the truth, the whole truth, and nothing but the truth"; it also diminishes their faith in the fairness of that system.[9] Their perceptions that they have not been able to give full and reliable evidence are also supported by research that indicates that the consistency and completeness of their testimony, and their emotional state, are affected by the way they are questioned.[10]

[11] Research also highlights the significant imbalance of power, language, skills, and familiarity with the court process between child witnesses and the legal professionals involved. The assumption underpinning the adversarial process is that "persistent questioning" and

challenging a witness's account of events during cross-examination will expose the unreliability of witness evidence. There is, however, good reason to question this and research evidence that this assumption is invalid and unwarranted in the case of children.[11]

[12] As Carter, Bottoms and Levine concluded:[12]

> attorneys are skilled at discrediting child witnesses in the courtroom by using conversational strategies that intimidate them into silence, contradictions, or general emotional and cognitive disorganization …

[13] Indeed, the various strategies that lawyers use to cross-examine children are often stress-inducing, developmentally inappropriate, suggestive and "evidentially unsafe".[13] They are, however, widely used and generally acceptable to lawyers and judicial officers as an integral part of the adversarial process.

Judicial intervention in relation to questioning

[14] Judicial intervention to prevent inappropriate or oppressive questioning is an obvious and important means by which judges and magistrates can ensure that questioning is fair and understandable to child witnesses, and indeed to all witnesses. However, research and various inquiries here in New South Wales and in other jurisdictions indicate that a number of judges show a marked reluctance to intervene or simply do not intervene to assist or protect vulnerable witnesses during cross-examination.[14] Several inquiries in Australia have also commented on the reluctance of judges to intervene.[15] The New South Wales Royal Commission noted, for example, that:[16]

> Our adversary system has not encouraged judges to intervene in the conduct of the examination of witnesses unless objection is taken, or the advocate has plainly exceeded the bounds of proper questioning. Some judges fear that undue intervention, even if justified, will excite concern as to prejudice, or cause the jury to be sympathetic to the accused.

[15] One judge explained his reluctance in the following way:[17]

> I think it's very important when cross-examination is proceeding … to permit the evidence to be properly tested and if that means, as it inevitably does, that the child has to be distressed, I'm afraid it's part of the system.

[16] Similarly, the court observation study that was undertaken as part of the recent evaluation of the specialist jurisdiction for child sexual assault trials in Sydney found that there was considerable variation between judicial officers in their rate of intervention, and their style of interaction with child witnesses.[18] While judges intervened more often when there were more objections from the prosecuting lawyer, they were not likely to intervene more for younger children or where the linguistic style of the defence lawyer was rated by the research observers as more difficult.[19] This suggests that most judges were reluctant to intervene in the absence of any objection and/or were not sensitive to the difficulties that child witnesses had with the linguistic style of the defence lawyer during cross-examination.[20]

[17] Legislative change may, however, help to overcome appeal-driven judicial concern about intervening. Recent amendments to the *Evidence Act 1995* in New South Wales now require judicial officers to disallow inappropriate questioning, whether or not objection is made.[21] Inappropriate questions include those that are misleading or confusing, unduly annoying, intimidating, offensive, oppressive, humiliating repetitive, or harassing, intimidating, offensive, oppressive, humiliating or repetitive and asked in a manner or tone way that is belittling, insulting[22] or otherwise inappropriate.[23] At the same time, there is encouragement for judges

to take a more active role from leading judges and those within their own ranks as well as academic lawyers and commentators.[24] The Chief Justice of New South Wales has indicated clear approval for greater judicial intervention:[25]

> Judges play an important role in protecting complainants from unnecessary, inappropriate and irrelevant questioning by or on behalf of an accused. That role is perfectly consistent with the requirements of a fair trial, which requirements do not involve treating the criminal justice system as if it were a forensic game in which every accused is entitled to some kind of sporting chance.

[18] Similarly, Judge Ellis of the District Court of New South Wales stated:[26]

> It is a very moot point whether the presently accepted defence questioning styles and methods effectively test the efficacy of evidence. Arguably, it is more likely that it allows lawyers to unfairly discredit evidence without providing any genuine enlightenment as to the truth or otherwise of testimony.

[19] But changes in the law and other encouragement to intervene are not sufficient. The ability to recognise that questioning is developmentally inappropriate, oppressive or intimidating for a child witness is not intuitive and needs to be part of legal training[27] and judicial education.[28]

The importance of judicial leadership in improving the experience of child witnesses

[20] Judicial intervention to prevent inappropriate or oppressive questioning and to ensure that questioning is fair and understandable to a child is not the only way that judges and magistrates can improve the court experience for child witnesses. Importantly, judges and magistrates set the tone of the courtroom and can model appropriate behaviour and ways of interacting with child witnesses that are respectful and allow children to testify in a full and fair manner.

[21] Clearly the judicial role in the criminal trial process is pivotal. Judicial officers exercise considerable discretion in the use of special measures, the admissibility of evidence, controlling questioning, "modelling child conscious court practice", and giving directions and warnings to the jury.[29] Their key role is well accepted by children who perceive them to be the most important "player" in court and one of whom they have high and sometimes unrealistic expectations.[30] Sas, for example, states that:[31]

> Children's feelings of goodwill and their high expectations of the adults in court are especially extended towards the judiciary. Children cannot understand how a judge will not believe them when they are telling the truth. Many children have unrealistic expectations of the judge, seeing the judge as some one who will right all the wrongs that have been committed by the accused. It is not surprising that explanations of how a judge arrives at a decision employing a standard of *beyond a reasonable doubt* is so hard for child witnesses to comprehend. They expect the judge to see the events from their perspective. This is one of the reasons why court preparation is so important for child witnesses.

[22] As Sas pointed out, it is important that children are properly prepared for their role as a witness but it is equally important that the professionals — judicial officers and lawyers — whose interaction with them is critical to the reliability of their evidence and their perceptions of the court process are well prepared. It is important that they know and understand what is reasonable to expect from children in these circumstances, and what they are capable of in relation to language and conceptual understanding.

[23] Judicial leadership is probably the most effective means within the existing adversarial system of changing the culture of the courtroom to offset the imbalance between professional

lawyers and child witnesses. There are a number of relatively minor changes that can be made to provide a more equal playing field for child witnesses without disturbing the rights of the accused to a fair trial.

Minimising delay

[24] Children testifying in child sexual assault matters often have to wait many months and even years before the case goes to court. In the child sexual assault specialist jurisdiction evaluation, the overall time from arrest to outcome for the 45 cases ranged from 166 to 1523 days (median of 405 days). While the time from arrest to committal is clearly outside the control of the court system, the time in the court system from committal to outcome was still lengthy (median of 209 days), especially in terms of children's sense of time.[32] Such long delays for children can exacerbate the difficulties they face and may have adverse effects on children's testimony and effects on children's long-term outcomes.[33]

[25] Measures to minimise delays and adjournments in cases involving children are therefore important. Appropriate case management by judicial officers can assist greatly in ensuring that the various parties and professionals are prepared, that preliminary legal issues are resolved, and that the special arrangements for child witnesses are in place. Where adjournments are requested, the likely effect on the child and the number of prior adjournments and delays need to be considered. In the evaluation of the child sexual assault specialist jurisdiction, the cases were listed on average 5.1 times for arraignment and trial prior to the trial being held or the defendant pleading guilty. When children are prepared and expecting to attend court and testify, it is very stressful to have the matter adjourned, especially on several occasions as happens in some cases. Where adjournments are unavoidable, major events in the child's or young person's life such as school examinations, holidays, significant sporting or cultural events may also need to taken into account.

[26] It is also very helpful to children and their families if they can be given some reasonably accurate estimate of when the child will testify so that they are not kept waiting at court for long periods before they give evidence. This is particularly important if the court does not have a separate waiting space that is specially designed to be child/young person-friendly (that is, with suitable distractions, appropriate décor and a support person or people present). Not surprisingly, the worst aspect of the court process for some children and their parents is "all the waiting".[34]

Competence testing

[27] Children are presumed to be competent and can give unsworn evidence if the court is satisfied they understand the difference between the truth and a lie.[35] This presumption is reasonable given the research findings on children's understanding of truth and lies, and promises.[36] Children as young as four or five recognise deliberately false statements as lies but tend to be over-inclusive and more stringent than older children and adults because they tend to include incorrect guesses and exaggerations as lies. They also expect to be caught out and to be punished if they lie.[37]

[28] Despite the presumption of competence, some children are still subjected to inappropriate questioning about their understanding of truth and lies. Several children and a parent/carer in the child sexual assault specialist jurisdiction evaluation study[38] commented on the confusing nature of the questions about truth-telling. One 15-year-old with a learning difficulty said, for example:

> He made me confused. He asked me what the truth was, and I was thinking about it and he said "Did you listen to me, young man?" and he just kept asking the same thing.

[29] His foster mother also commented on his difficulty:

> His speech goes when he is really nervous, and he was struggling to talk. That was hard for him because the judge did not give him time to answer. He said "Are you listening, can you understand what I'm saying" and that just flustered him more and he could not get his answers out. And when that happens, he just clams up, and he just says "yep", "nup".

[30] It is very difficult, even for adults, to respond to abstract questions asking them to explain the conceptual difference between the truth and a lie. Attempts to ask more concrete questions may, however, raise other difficulties.[39] For example:

- *Would it be the truth or a lie if **I said** (if asked by a judge/magistrate)?* There are two problems with this question. First, it asks the child to call the judge/magistrate a liar. Secondly, asking children whether a given statement matches reality (for example, colour of clothing) does not indicate whether they know the difference between a truth and a lie. A lie requires the *intention* to deceive or mislead.
- ***If** I said there were eight people in the room, **and if** there were only* …? This question requires the child to keep in mind two conditional or hypothetical statements, in addition to the problem alluded to above.
- *Have you ever told a lie? **No.*** Children are likely to be very uncomfortable admitting that they have lied, especially in court to a judge or lawyer.
- *What would happen to you if you told a lie here today?* A child who answers by saying "nothing" may be seen as not understanding the consequences of lying but some children do not accept the premise of the question — they have no intention of lying — so they may say "nothing".
- For example, one exchange between an adult and a child: *If you tell a lie, will you get into trouble*? ***No***.

[31] *You won't get into trouble? **No … But I am not going to tell a lie.***

[32] Since some children may not elaborate and give a reason for their answer, it would therefore be better to ask — "*If your brother/sister/friend broke a plate and said you broke it to save getting into trouble, would that be the truth or a lie*?

Ensuring the appropriate use of special measures

[33] The use of special measures such as pre-recorded interviews, closed-circuit television, and support persons are intended to make the court experience easier and less stressful for child witnesses. Sometimes, however, poor management of the practical aspects of these measures counteracts the benefits for the child and the reliability of their testimony.[40] In terms of the technology, judges and magistrates need to be sure that the child is able to hear properly and can see the person who is asking the questions if closed-circuit television (CCTV) is being used[41] because children will not necessarily say that they cannot. Children should also not be able to see the accused and should not be visible to the court.[42] Nor should they be required to watch the tape while their pre-recorded investigative interview is played to the court. The child is entitled to a support person if they so choose. That person should be allowed to be near the child and/or within their sight, and under new guidelines[43] may "bring to the attention of the sheriff/court officer issues affecting the child such as their need for a break, need to go to the toilet, health problems etc. The sheriff/court officer should inform the court (via phone connection) if there is any malfunction of the equipment in the remote witness room (such as problems with the sound quality or vision, or the accused being in sight, or the failure of air-conditioning, heating etc)."

Making the unfamiliar less intimidating

[34] While judicial officers and legal professionals are likely to feel quite comfortable in an environment that they know well, courts are formidable and intimidating environments for witnesses and others unfamiliar with their facilities and the processes. It is therefore important for children to feel welcome and to be introduced to the process. While court preparation can clearly help, judicial officers are well placed at the start of a child's testimony to introduce themselves and the main players in court to the child, and to explain how things will be done — in developmentally appropriate language.[44] Children should also be informed when the link to the courtroom via CCTV is about to be broken for legal argument or other reasons. With the child in another room, or in other remote facilities, those in the courtroom can be forgetful of the child's experience — "out of sight, out of mind". Children have been left "out of contact" and unsure when the CCTV link is to be switched on again, in some cases even after the court has adjourned for lunch.[45]

Providing breaks

[35] The court observation study in the child sexual assault specialist jurisdiction evaluation found that children's testimony lasted on average between two to three-and-a-half hours hours.[46] While the scheduled breaks for morning tea and lunch provided some respite for children from the questioning and being "on show", sessions that extend beyond 90 minutes are well beyond the attention span of most children and many adolescents, particularly when they are under this level of stress.[47] Judicial officers can assist, however, by telling children they can have a break if they need one (to go to the toilet, for example) but also by monitoring the child's state and offering a break rather than requiring the child to ask for one. Some signs to watch for include fidgeting, evasiveness, an increasing number of "I don't knows", silence/stopping answering altogether, hyperventilation, confused answers, trying harder and harder to find an answer they think might be wanted, and increasing distress or crying.[48] These signs indicate that the child or young person may be "tuning out" or distressed and that some judicial intervention is necessary.

Conclusion

[36] There are therefore a number of ways that judicial officers can assist child witnesses and improve their court experience without affecting the rights of the accused to a fair trial. More importantly, by being sensitive to the needs of the child, they can model appropriate behaviour and set the tone of the court. While some aspects may appear to be little more than common sense, seeing the world through the "eyes" of a child is not intuitive and other aspects require more specialised knowledge — for example, understanding what children are capable of in terms of their language, their conceptual understanding of time, sequence, and causality and an understanding of the dynamics of child sexual assault and children's likely reactions.

[37] There are a number of opportunities for judicial education and resources to assist judicial officers and others, including the recently published *Equality before the Law Bench Book* produced by the Judicial Commission of New South Wales. These resources and further discussion of the associated issues will hopefully increase the likelihood that judicial officers will see the need to intervene and do so appropriately to improve the reliability of children's evidence and to make the court process fairer and less intimidating for child witnesses.

Child sexual abuse and the criminal justice system: what educators need to know

[7-700] Article

C Eastwood, "Child sexual abuse and the criminal justice system: what educators need to know" (2003) 8(1) *Australia and New Zealand Journal of Law and Education* 109.

Abstract

This paper presents a summary of findings from a report on the experiences of child complainants of sexual abuse in the criminal justice system in Queensland, New South Wales and Western Australia. The aim of the research was to investigate the consequences of involvement in the criminal justice system from the perspective of the child complainant.

Following their experiences, when asked if they would ever report the sexual abuse again, only 44 per cent of children in Queensland, 33 per cent in NSW and 64 per cent in Western Australia indicated that they would. There was widespread belief that the process was not worth the trauma suffered.

The paper argues that most worthwhile, explicit and repeated recommendations remain ignored and unimplemented in relation to the three problem areas identified by the children in the current study: the long delay between the reporting and trial, being forced to see the accused, and damaging cross-examination at committal and/or trial.

The paper outlines that educators need to be aware of the effect of the justice process on the child in order to address the child's needs, offer appropriate support and to facilitate educational outcomes during the child's involvement in the criminal justice process.

Acknowledgment: this article was first published in full in the (2003) 8(1) Australia and New Zealand Journal of Law and Education 109. Reproduced with permission.

Consequences of criminal court involvement for child victims

[7-720] Article

J Quas and G Goodman, "Consequences of criminal court involvement for child victims" (2012) 18(3) *Psychology, Public Policy, and Law* 392.

Abstract

This paper reviews research on the links between child victims' involvement in criminal prosecutions and subsequent outcomes. The complex ways in which children can participate in the criminal justice system are discussed, including single interviews, multiple interviews or evaluations and court appearances. The review falls into two sections: first, the emotional and mental health consequences for children following legal involvement; and second, legal involvement by children and justice attitudes. The authors conclude that the evidence supports children being directly involved in criminal proceedings. It is also suggested that children in many circumstances will not suffer any significant long-term emotional harm from such involvement. Appropriate support before, during and after testimony is necessary.

Child sexual assault trials: a survey of juror perceptions

[7-740] Article

J Cashmore and L Trimboli, "Child sexual assault trials: a survey of juror perceptions" New South Wales Bureau of Crime Statistics and Research, Attorney General's Department of NSW, Sydney, 2000.

Abstract

This study explored the perceptions of 277 jurors from 25 juries hearing child sexual assault trials held in four District Courts in Sydney between May 2004 and December 2005. The aim of the survey was to explore jurors' perceptions of the fairness of the trial process where CCTV and pre-recorded evidence are used and their understanding of the reasons for the use of these special measures. The survey also explored the jurors' perceptions of the fairness of the trial process for the child complainants and the defendants; and their perceptions of various aspects of the child complainants' behaviour.

Jurors indicated that they understood the reasons why special measures were used to present children's evidence, and that they perceived them to be fair to both the child complainant and the defendant. Consistent with previous research, the more confident and consistent children appeared to the jurors, the more convincing or credible their testimony was perceived to be.

Also consistent with previous research and with the concerns outlined by a number of inquiries, jurors rated children's treatment by defence lawyers during cross-examination as significantly less fair than children's treatment by either the judges or the crown prosecutors. Children were perceived to have more difficulty understanding the questions asked by defence lawyers and were less confident and more stressed when answering these questions than when answering questions asked by crown prosecutors. Jurors perceived that the court treatment of defendants was fair and respectful.

Acknowledgment: this article was first published in full in the Crime and Justice Bulletin, Number 102, September 2006, a publication of the NSW Bureau of Crime, Statistics and Research. Reproduced with permission.

What Australian jurors know and do not know about evidence of child sexual abuse

[7-760] Article

J Goodman-Delahunty, N Martschuk and A Cossins, "What Australian jurors know and do not know about evidence of child sexual abuse" (2017) 41 *Crim LJ* 86.

Abstract

Non-empanelled jurors responded to a series of brief statements about forensically relevant issues common to many child sexual abuse cases. They were asked to indicate the extent to which they agreed with statements about typical evidential features of child sexual offences, children's responses to sexual abuse, and the suggestibility and reliability of child witnesses. Results indicated the content of jurors' knowledge, as well as matters about which they are unsure and need guidance. Three key issues fell into the second category: more than half of the jurors did not know or were uncertain about evidence contemporaneous with the alleged abuse, the reliability of children's evidence and children's post-abuse reactions.

Validation of the Child Sexual Abuse Knowledge Questionnaire

[7-780] Article

J Goodman-Delahunty, N Martschuk and A Cossins, "Validation of the Child Sexual Abuse Knowledge Questionnaire" (2017) 23(4) *Psychology, Crime & Law* 391.

Abstract

A validation study of the Child Sexual Abuse Knowledge Questionnaire, which contains items derived from empirical findings on common misconceptions, was conducted on a sample of non-empanelled jurors. Those misconceptions were about typical features of abuse offences, children's responses to child sexual abuse, and their ability to give reliable evidence.

Courtroom questioning of child sexual abuse complainants

[7-800] Article

N Westera et al, "Courtroom questioning of child sexual abuse complainants: views of Australian criminal justice professionals" (2019) 7(1) *Salus Journal* 20.

Abstract

This study interviewed judges, prosecutors, defence counsel and witness assistance officers from four Australian jurisdictions about the questioning of children in the courtroom. It found agreement among participants that current questioning guidelines are sufficient but poorly enforced by judges, that there is a need for more professional development for lawyers and judges in this area, and that judicial intervention is not always effective. See pp 27–33.

Judges' delivery of ground rules to child witnesses in Australian courts

[7-820] Article

B Earhart et al, "Judges' delivery of ground rules to child witnesses in Australian courts" (2017) 74 *Child Abuse & Neglect* 62.

Abstract

This study examines the use of ground rules directions delivered in court to 57 child complainants by 24 presiding judges in 52 trials held in three jurisdictions. More than one third of the children received no ground rules directions from the judge, and the remaining 65% received directions on an average of 3.5 types of ground rules out of a maximum of 11 types. This study illustrates that there is room for improvement both in terms of the number of ground rules that judges present to child witnesses, and the ways in which they confirm children's understanding of these rules.

An evaluation of how evidence is elicited from complainants of child sexual abuse

[7-840] Article

M Powell et al, *An evaluation of how evidence is elicited from complainants of child sexual abuse*, Research Report, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016.

Abstract

This study examined whether, and to what extent, judges and lawyers are intervening during complainant questioning through analysing court transcripts. Results show that while judges are intervening in cross-examination, interventions regarding the substance of questions made up less than 1% of all interventions: see pp 232–239. This is somewhat alarming considering there is evidence that defence lawyers continue to ask questions rooted in stereotypes.

With reference to recording evidence and evidentiary issues in child sexual abuse cases, the study analysed transcripts of evidence from 63 complainants of child sexual abuse in NSW, Victoria and WA: pp 187–195. Central issues include the length of questions posed to child witnesses, use of complex, leading questions, the significance attached to the witness's age, and the effect of questions asked on the complainant's response. The study concluded that "the length and complexity of questioning is clearly not being tailored to the age of the complainant, and leading questions are frequent, particularly among defence lawyers": p 195.

The study also analysed 120 transcripts of complainant evidence from 94 child sexual abuse cases heard in three Australian jurisdictions (NSW, Victoria and WA): see pp 204–218. It found that, in order to improve the fairness of cross-examination, it is essential to "critically evaluate the actual nature and prevalence of the tactics that defence lawyers use when questioning the complainant": p 205.

Fourteen-year trends in the criminal justice response to child sexual abuse reports in NSW

[7-860] Article

J Cashmore, A Taylor and P Parkinson, "Fourteen-year trends in the criminal justice response to child sexual abuse reports in NSW" (2020) 25(1) *Child Maltreatment* 85.

Abstract

This article examines trends in criminal justice responses by analysing police and court administrative data in NSW over a 14-year period. It compares prosecution of child sexual offences reported when the complainant is a child with prosecutions reported when the complainant is an adult. It provides a comprehensive explanation of attrition.

Sentencing and treatment of juvenile sex offenders in Australia

[7-880] Article

R Blackley and L Bartels, "Sentencing and treatment of juvenile sex offenders in Australia" (2018) 555 *Trends & issues in crime and criminal justice*, Australian Institute of Criminology.

Abstract

This paper examines sentencing and treatment practices for juvenile sex offenders in Australia and the challenges of reconciling the imperatives of rehabilitation, accountability and community protection. It begins with an overview of juvenile offenders and the juvenile justice system, including the principles for sentencing young offenders. It then considers the complex lives and offending patterns of juvenile sex offenders, before providing examples of judicial reasoning in sentencing. It concludes by examining best practice in treatment for sexually abusive behaviours and innovative justice responses to juvenile sex offending, such as therapeutic treatment orders and restorative justice conferencing.

Acknowledgement: R Blackley and L Bartels, "Sentencing and treatment of juvenile sex offenders in Australia" (2018) 555 *Trends & issues in crime and criminal justice*, Australian Institute of Criminology.

Victim impact statements in child sexual assault cases: a restorative role or restrained rhetoric?

[7-900] Article

R Shackel, "Victim impact statements in child sexual assault cases: a restorative role or restrained rhetoric?" (2011) 34(1) *UNSW Law Journal* 211.

Abstract

This article looks at the use of victim impact statements in sentencing child sexual assault offenders, given the growing recognition of their communicative, therapeutic and other social benefits. It finds that the potential usefulness of victim impact statements is undermined in practice by factors such as evidentiary barriers and restrictive judicial interpretations that limit their use by sentencing courts.

The social dynamics and impacts of institutional child sexual abuse

[7-920] Article

D Kenny, "The social dynamics and impacts of institutional child sexual abuse" (2017) 29 *JOB* 67.

Abstract

This article provides a summary of the background to the Royal Commission into Institutional Responses to Child Sexual Abuse. It discusses the extent of institutional child abuse in Australia, factors that enable child sexual abuse in institutional contexts, factors that increase a child's vulnerability to child sexual abuse in institutions, disclosure of child sexual abuse and the impact of child sexual abuse.

Memory science in the *Pell* appeals: impossibility, timing, inconsistencies

[7-940] Article

J Goodman-Delahunty, N Martschuk and M Nolan, "Memory science in the *Pell* appeals: impossibility, timing, inconsistencies" (2020) 44 *Crim LJ* 232.

Abstract

This study examines the appeals from the conviction of Cardinal Pell in terms of memory. It describes how assumptions about memory operated in the legal decisions, including an assumption that memory about routine practice was to be believed in the face of a complainant's memory. It questions whether a complainant's episodic memory was under-valued, and schematic recall of repeated events by witnesses potentially overly relied on.

Principles to enhance communication with child witnesses

[7-960] Article

M Powell and B Earhart, "Principles to enhance communication with child witnesses" (2018) 30 *JOB* 85.

Abstract

This article describes practical strategies for communicating with children and other vulnerable witnesses engaged in the legal system. The article addresses common misconceptions about interviewing, then summarises four interviewing principles, grounded in research, that maximise the quality of communication with vulnerable witnesses. The focus is on questioning that minimises miscommunication and error, and makes interviewees feel heard during the process. The article draws on recent research to demonstrate the relevance of these recommendations to current courtroom practice.

Empirical guidance on the effects of child sexual abuse on memory and complainants' evidence

[7-980] Article

J Goodman-Delahunty, M Nolan and E van 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.

Abstract

This paper discusses best-practice features of interviews to enhance memory, including eliciting a full account of events, the use of multiple interviews, eliciting reliable information, interview aids, and accommodating individual differences. Useful discussions are found in the report on pp 60–62, 63–75, 88–95 and 136–138.

Legal decision making about (child) sexual assault complaints: the importance of the information-gathering process

[7-990] Article

M Martschuk, M Powell, R Blewer and J Goodman-Delahunty, "Legal decision making about (child) sexual assault complaints: the importance of the information-gathering process" (2022) 34(1) *Current Issues in Criminal Justice* 58.

Abstract

The authors seek to address why legal systems still struggle with prosecuting sexual offences, particularly against children, despite over a century of reform in the way evidence of adult and child sexual assault complainants is received during the common-law adversarial trial process. The authors review the information gathering strategies used to date and propose reforms to better align contemporary procedures with sound evidence-based practice. The authors argue that decision makers, including police, lawyers, clinical and forensic practitioners and judiciary need to better understand the science to bring about overdue change.

Special measures in child sexual abuse cases: views of Australian criminal justice professionals

[7-1020] Article

N Westera et al, "Special measures in child sexual abuse cases: views of Australian criminal justice professionals" (2020) 32(2) *Current Issues in Criminal Justice* 224.

Abstract

This study looked at criminal justice professionals' views on how well special measures for child complainants of sexual abuse work in practice. Interviews were conducted with judges, prosecutors, defence counsel and witness assistance officers. Professionals indicated that special measures improve processes but also identified four concerns: a lack of skilled personnel; problems with technology and logistics; a lack of flexibility in recognising that each witness is unique; and possible negative effects of special measures on trial fairness.

The “good old days” of courtroom questioning: changes in the format of child cross-examination questions over 60 years

[7-1040] Article

R Zajac, N Westera and A Kaladelfos, “The ‘good old days’ of courtroom questioning: changes in the format of child cross-examination questions over 60 years” (2018) 23(2) *Child Maltreatment* 186.

Abstract

This article compares how Australian child sexual abuse complainants were cross-examined in the 1950s with how these complainants are cross-examined now. It found that the format of cross-examination has remained largely the same over time, with leading questions still making up the bulk of questions asked. However, there were also some alarming changes. Cross-examination questions now were more likely to be complex and less likely to be open-ended, and the number of questions put to complainants is three times more than in the 1950s.

Disorder in the courtroom? Child witnesses under cross-examination

[7-1060] Article

R Zajac, S O'Neill and H Hayne, "Disorder in the courtroom? Child witnesses under cross-examination" (2012) 32 *Developmental Review* 181.

Abstract

There are two main questioning phases in an adversarial criminal trial: direct examination, for which children are sometimes given special provisions, and cross-examination, which research has shown does not conform to the principles that elicit completeness and accuracy of children's evidence. This paper discusses how children respond to cross-examination questions and the effect of cross-examination on the accuracy of children's reports.

Sexual assault: forensic examination in the living and deceased

[7-1080] Article

C Lincoln, "Sexual assault: forensic examination in the living and deceased" (2018) Dec 8(4) *Academic forensic pathology* 912–923.

Abstract

This article, written by a medical practitioner, provides an overview of various components of forensic sexual assault examination in both living and deceased persons. The detection of injury and biological material to support or exclude sexual activity requires a careful, methodical approach to ensure robust evidentiary value and an understanding of genito-anal anatomy and sexual physiology to interpret its significance for the courts.

Forensic medical evaluation of children who present with suspected sexual abuse: how do we know what we know?

[7-1100] Article

G Wong, "Forensic medical evaluation of children who present with suspected sexual abuse: how do we know what we know?" (2019) 55(12) *Journal of Paediatrics and Child Health* 1492.

Abstract

Many children's genital findings which were seen as diagnostic of sexual abuse in the past are now understood to be normal variants, the result of other medical conditions, or insufficiently specific to support a definite diagnose of abuse. This review article provides updates on medical evidence gathered from child sexual abuse complainants, the current understanding of how to interpret genital findings in children and remaining gaps in knowledge.

The role of photographic and video documentation in the investigation and prosecution of child sexual assault

[7-1120] Article

A Cossins et al, "The role of photographic and video documentation in the investigation and prosecution of child sexual assault" (2016) 23 *JLM* 925.

Abstract

This paper discusses the use of colposcopy to document ano-genital examination. Specifically, the authors explore the impact that gathering such evidence has on the complainant, whether the use of such evidence improves the reliability of the medical assessment, and whether the use of such evidence affects trial outcomes.

Factors associated with child sexual abuse confirmation at forensic examinations

[7-1140] Article

W Silva et al, "Factors associated with child sexual abuse confirmation at forensic examinations" (2018) 23(2) *Ciênda & Saúde Coletiva* 599.

Abstract

This Brazilian study discusses the identification of potential factors associated with finding evidence of child sexual abuse in forensic examinations. In particular, see discussion on pp 604–605.

How to cross-examine forensic scientists: a guide for lawyers

[7-1180] Article

G Edmond et al, "How to cross-examine forensic scientists: a guide for lawyers" (2014) 39 *Aust Bar Rev* 174.

Abstract

This article uses a series of examples to help lawyers explore the probative value of forensic science evidence on the voir dire and at trial. Questions cover topics including relevance, the expression of results, codes of conduct, limitations and errors. It also includes commentary, supported by reference to research and reports, on the reliability and validity of forensic science techniques.

This article was first published by LexisNexis in the Australian Bar Review*, (2014) 39* Aust Bar Rev *174.*

Model forensic science

[7-1200] Article

G Edmond et al, "Model forensic science" (2016) 48(5) *Australian Journal of Forensic Sciences* 496.

Abstract

This article presents, in accessible form, the dangers with prosecution expert evidence in criminal trials, revealed in recent US and UK government reports. It explains the responsibilities and duties that expert witnesses, such as forensic practitioners, owe when preparing for and presenting evidence and why forensic practitioners must respond to the expectations and rules of legal institutions.

Forensic science evidence, wrongful convictions and adversarial process

[7-1220] Article

D Hamer and G Edmond, "Forensic science evidence, wrongful convictions and adversarial process" (2019) 38(2) *University of Queensland Law Journal* 185.

Abstract

This article highlights risks of wrongful conviction raised by reliance on prosecution forensic evidence and magnified by the shortcomings of the adversarial process. It suggests that courts should take a more interventionist approach to such evidence.

Mock jury and juror responses to uncharged acts of sexual misconduct: advances in the assessment of unfair prejudice

[7-1240] Article

J Goodman-Delahunty and N Martchuk, "Mock jury and juror responses to uncharged acts of sexual misconduct: advances in the assessment of unfair prejudice" (2020) 228(3) *Zeitschrift für Psychologie* 199.

Abstract

This experimental study looks at jury responses to relationship evidence in the form of uncharged sexual acts by the same perpetrator against the victim. While admissible incriminating evidence of uncharged acts by an accused is internationally presumed to be unfairly prejudicial, the study found that there was little danger of unfair prejudice, based on multiple convergent measures.

Jury reasoning in separate and joint trials of institutional child sexual abuse: an empirical study

[7-1260] Article

J Goodman-Delahunty, A Cossins and N Martschuk, *Jury reasoning in separate and joint trials of institutional child sexual abuse: an empirical study*, Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, 2016.

Abstract

This study investigates the extent to which joint trials with cross-admissible tendency evidence infringe defendants' rights. It also analyses whether jury reason and decisions in joint trials result in unfair prejudice to defendants.

Methods to evaluate justice practices in eliciting evidence from complainants of child sexual abuse

[7-1280] Article

J Goodman-Delahunty et al, "Methods to evaluate justice practices in eliciting evidence from complainants of child sexual abuse" (2017) 12 *Newcastle Law Review* 42.

Abstract

This article evaluates how scientific methods are used and how complainants are questioned about child sexual abuse, based on 17 studies commissioned by the Royal Commission into Institutional Responses to Child Sexual Abuse. Qualitative and quantitative methods were used to assess the practices and processes used to manage witnesses' vulnerability and psychological distress to draw out more credible and reliable evidence. The evaluation found a range of practices based on unsupported assumptions about victim behaviour and memory, judicial instructions and interventions, cross-examination strategies and quality issues with recordings of pre-interview and CCTV cross-examination by police.

Inconsistencies in complainants' accounts of child sexual abuse arising in their cross-examination

[7-1300] Article

A Pichler et al, "Inconsistencies in complainants' accounts of child sexual abuse arising in their cross-examination" (2020) *Psychology, Crime & Law* 1.

Abstract

In this study of cross-examination of 73 complainants in child sex abuse trials, inconsistencies were found to have been raised in relation to 94.5% of complainants. Most inconsistencies were between what was said in police interview compared with cross-examination. A larger proportion of inconsistencies were associated with specific questions, compared with open-ended questions.

Adult victims of sexual assault and barriers to justice

[7-2000] Book

E McDonald, "Rape myths as barriers to fair trial process: comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot (2020)", (online pdf), Canterbury University Press, 2020.

Abstract

This book examines how and why rape trials can re-traumatise complainants. It examines 30 matters prosecuted over a five-year period (January 2010 to September 2015) as well as 10 rape trials from the New Zealand Sexual Violence Court Pilot (November 2017 to November 2018) in relation to adult acquaintance rape cases where the central issue in dispute is consent. The researchers have captured the type and content of questions asked during a rape trial that cause the most distress to complainants. These include: challenges to memory and inconsistencies based on a failure to recall peripheral details of the event; accusations of lying about the events; questions about complainants' behaviour; questions that rely heavily on rape myths; and questions that suggest the complainants were responsible for what occurred. The authors document other trial practices that also cause unnecessary distress for complainants such as: being confronted (without warning) with exhibits, including photos of the location where the rape took place; or being questioned about (and having to navigate) text message schedules with a high volume of messages, multiple columns and numerical data and questions which required complainants to know and use "correct" terms for genitalia and sex acts, which they were not necessarily familiar with or comfortable using.

Misconceptions of sexual crimes against adult victims

[7-2100] Article

P Tidmarsh and G Hamilton, ""Misconceptions of sexual crimes against adult victims: barriers to justice" *Trends & Issues in crime and criminal justice*, No 611, Australian Institute of Criminology, November 2020.

Abstract

Despite the prevalence of sexual offending in our communities, there is a lack of understanding about the nature and dynamics of sexual crimes. Myths and misconceptions about sexual offending are common and may contribute to the high attrition rates of sexual offence cases throughout the criminal justice system. This study synthesises over 40 years of research evidence to present an accurate and updated picture of sexual offending. With specialist knowledge, we can improve criminal justice responses and outcomes for victims of sexual crime.

Avoiding the second assault: a guidebook for trauma-informed prosecutors

[7-2110] Article

E Werner, "Avoiding the second assault: a guidebook for trauma-informed prosecutors" (2021) 25(2) *Lewis & Clark Law Review* 573.

Abstract

This extensive article discusses how trauma may impact a victim of crime and provides a guide for prosecutors for best practices at each stage of a prosecutor's involvement in a case so as to avoid re-traumatisation in the process. The article seeks to inform prosecutors and those working in the criminal justice system of the neurobiological impact that surviving trauma can have on a victim's brain and provides suggestions for trauma-informed prosecutors centered on the principles of choice, transparency, privacy, and connection. This article has particular relevance for adult victims of sexual assault.

Specialist approaches to managing sexual assault proceedings: an integrative review

[7-2120] Article

A George, V Lowik, M Suzuki, and N Corbett-Jarvis, "Specialist approaches to managing sexual assault proceedings: an integrative review", AIJA and Commonwealth Attorney-General's Department Report, 2023.

Abstract

This report was commissioned by AIJA and Commonwealth Attorney General's Department as part of a joint research project between AIJA, Commonwealth Attorney-General's Department, CQUniversity College of Law and Queensland Centre for Domestic and Family Violence Research, in order to progress the Standing Council of Attorneys-General *Work Plan to Strengthen Criminal Justice Responses to Sexual Assault 2022–2027*.

The report addresses two principal concerns in the management of sexual assault proceedings: systemic barriers to reporting sexual violence, and the re-traumatisation experienced when engaging with the criminal legal system. The authors identify and evaluate the specialist measures designed to address these concerns in sexual offences courts/lists, and in three comparative domains: child sexual offences courts/lists, DFV courts/lists and specialist prosecution units.

Aboriginal and Torres Strait Islander children and child sexual abuse in institutional contexts

[7-2500] Report

P Anderson et al, "Aboriginal and Torres Strait Islander children and child sexual abuse in institutional contexts", Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney, 2017.

Abstract

This Report examines the question of Aboriginal and Torres Strait Islander children's past and contemporary vulnerability to child sexual abuse in institutional contexts. The Royal Commission into Institutional Responses to Child Sexual Abuse commissioned and funded this research project. It was carried out in collaboration between The Telethon Kids Institute, the research advisory group and Dr Sharni Chan at the Royal Commission.

Sentencing and treatment of juvenile sex offenders in Australia

[7-3000] Article

R Blackley and L Bartels, "Sentencing and treatment of juvenile sex offenders in Australia", in Australian Institute of Criminology, *Trends & issues in crime and criminal justice*, No 555, 2018.

Abstract

This paper considers current sentencing and treatment practices for juvenile sex offenders in Australia and examines how the competing challenges of rehabilitation, accountability and community protection are met. The paper begins with an overview of juvenile offenders and the juvenile justice system, and outlines the principles for sentencing young offenders. It then looks into understanding the needs and deeds of juvenile sex offenders. The paper concludes with a focus on sentencing and treatment for sexually abusive behaviours by young people as well as barriers to treatment and treatment innovations.

Children with harmful sexual behaviours

[7-3100] Report

Royal Commission into Institutional Responses to Child Sexual Abuse, “Children with harmful sexual behaviours”, Final Report, 2017, Vol 10.

Abstract

Volume 10 of the Final Report of the Royal Commission into Institutional Responses to Child Sexual Abuse examines child sexual abuse in institutions by children with harmful sexual behaviours. The report looks at the nature and extent of the problem, how institutions and governments currently address it, and what can be done to improve responses to children with harmful sexual behaviours, particularly therapeutic interventions.

Trajectories in online child sexual exploitation offending

[7-4000] Article

T Krone and RG Smith, "Trajectories in online child sexual exploitation offending", in Australian Institute of Criminology, *Trends & issues in crime and criminal justice*, No 524, 2017.

Abstract

This paper reports on an exploratory study aimed to improve understanding of the risks posed by those investigated by the Australian Federal Police for online-only offences. The study examined data relating to a sample of offenders convicted of online child sexual exploitation offences under Australian Commonwealth law, to determine how online forms of child sexual exploitation and offline child sexual exploitation, or contact offending, are related. The criminal trajectories of offenders were examined to determine whether there were any features that distinguished those with more extensive criminal convictions from those with fewer. The paper also considers prior research into child sexual exploitation, and the extent of the problem.

Child sexual abuse material on the darknet: a script analysis of how offenders operate

[7-4100] Article

B Leclerc, et al, "Child sexual abuse material on the darknet: a script analysis of how offenders operate", in Australian Institute of Criminology, *Trends & Issues in Crime and Criminal Justice*, No 627, 2021.

Abstract

This paper examines the emergence of child sexual abuse material over the internet and darknet. It reports the findings of a study using data obtained from interviews with online investigators and crime script analysis to reconstruct step-by-step how sex offenders operate on the darknet. The paper covers production and distribution of child sexual abuse material online, crime script analysis, and what can be done to boost law enforcement capacity to detect, investigate and prevent child sexual abuse material on the darknet.

Inquiry into law enforcement capabilities in relation to child exploitation

[7-4200] Report

Australian Institute of Criminology, "Inquiry into Law Enforcement Capabilities in Relation to Child Exploitation", Submission to the Parliamentary Joint Committee on Law Enforcement, 2021.

Abstract

The Australian Institute of Criminology submission to the Parliamentary Joint Committee on Law Enforcement examines the link between both online and offline sexual offending against children against a background of evidence that sharing of child sexual assault material on the internet is growing. The submission contends that the crime of viewing, sharing and production of child sexual abuse material is constantly evolving. Several major issues that arise from online sexual offending against children are explained: most offending remains undetected, offenders are encouraged by others online to sexually abuse children, online grooming leading to sexual abuse, and live streaming of child sexual abuse.

[7-9500] Further reading — non-legal

Note: The following books and chapters are also recommended as further reading. The Judicial Commission has not reproduced these within the *Sexual Assault Trials Handbook*.

Child sexual abuse and the criminal law

- J Cashmore, "Child witnesses" in L Young, MA Kenny and G Monahan (eds), *Children and the law in Australia*, 2nd edn, LexisNexis, 2017, pp 575-580.

Investigation and interviewing children in child sexual abuse cases

- S Brubacher, M Benson, M Powell, J Goodman-Delahunty, and N Westera, "An overview of best practice investigative interviewing of child witnesses of sexual assault" in I Bryce and W Petherick (eds), *Child sexual abuse: forensic issues in evidence, impact, and management*, Elsevier Academic Press, 2020, pp 445-466 (Ch 22).
- M Lamb, L Malloy and D La Rooy, "Setting realistic expectations: developmental characteristics, capacities and limitations" in M Lamb, L Malloy, D La Rooy and C Katz (eds), *Children's testimony: a handbook of psychological research and forensic practice*, John Wiley & Sons, 2011.
- N Westera, M Powell, R Milne and J Goodman-Delahunty, "Police interviewing of sexual assault victims: current organizational responses and recommendations for improvement" in R Bull and I Blandon-Gitlin (eds), *The Routledge international handbook of legal and investigative psychology*, Routledge, 2020, pp 182-196.

Challenges facing child witnesses: special measures, witness assistance and intermediaries

- J Goodman-Delahunty, N Martschuk, M Powell, N Westera, "Prosecutorial discretion about special measure use in Australian cases of child sexual abuse" in P Stenning and V Colvin (eds), *The evolving role of the prosecutor, internationally and domestically*, Routledge, 2019, pp 169-187.
- A Pichler, J Goodman-Delahunty, S Sharman and N Westera, "A review of the use of special measures for complainants' evidence at trial" in I Bryce and W Petherick (eds), *Child sexual abuse: forensic issues in evidence, impact, and management*, Elsevier Academic Press, 2020, pp 467-518 (Ch 23).*Challenges facing child witnesses: special measures, witness assistance and intermediaries*

First Nations women and children

- M Guggisberg, "Aboriginal women's experiences with intimate partner sexual violence and the dangerous lives they live as a result of victimization" (2019) 28(2) *Journal of Aggression, Maltreatment & Trauma* 186

Female offenders

- C Weinsheimer, D Woiwod, P I Coburn, K Chong, and D Connolly, "The unusual suspects: female versus male accused in child sexual abuse cases" (2017) 72 *Child Abuse and Neglect* 446–455.
- G McIvor, "Female sex offenders" in T Sanders (ed), *The Oxford handbook of sex offences and sex offenders*, Oxford University Press, 2017, p 199.
- A J Darling and L S Christensen, "Female child sex offenders" in I Bryce and W Petherick, *Child sexual abuse: forensic issues in evidence, impact and management*, Academic Press, Elsevier, 2020, p 119.

Juvenile sex offenders

- C Bijleveld, C van den Berg, and J Hendriks, "The juvenile sex offender: criminal careers and recidivism risk" in T Sanders (ed.), *The Oxford Handbook of Sex Offences and Sex Offenders*, Oxford University Press, 2017, p 220.

Online exploitation

- M Seto, *Internet sex offenders*, American Psychological Association, 2013, Chapter 6 ("The connection between online and contact offending").
- K Babchishin et al, "Online child pornography offenders are different: a meta-analysis of the characteristics of online and offline sex offenders against children" (2015) 44 *Archives of Sexual Behavior* 45.

Challenges in investigation and prosecution of historical child sex offences

- K Shead, "Responding to historical child sexual abuse: a prosecution perspective on current challenges and future directions" (2014) 26(1) *Current Issues in Criminal Justice* 55
- D Connolly, P Coburn and K Chong, "Twenty-six years prosecuting historic child sexual abuse cases: has anything changed?" (2017) 23(2) *Psychology, Public Policy, and Law* 166–177

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Royal Commission into Institutional Responses to Child Sexual Abuse

[8-000] Background

The Royal Commission was established to inquire into the sexual abuse of children within Australian institutions in 2013. The Hon. Justice Peter McClellan AM was the Chair of the Royal Commission and the other five Commissioners were Mr Bob Atkinson AO APM, Justice Jennifer Coate, Mr Robert Fitzgerald AM, Professor Helen Milroy and Mr Andrew Murray.

The Royal Commission into Institutional Responses to Child Sexual Abuse investigated how institutions like schools, churches, sports clubs and government organisations have responded to allegations and instances of child sexual abuse. The Royal Commission was concerned to uncover where systems failed to protect children; and recommend how to improve laws, policies and practices. It was empowered to look at any private, public or non-government organisation that is, or was in the past, involved with children.

An Interim Report was released on 30 June 2014. On 15 December 2017 the Royal Commission presented a Final Report to the Governor-General detailing the culmination of a five-year inquiry into institutional responses to child sexual abuse and related matters. The Final Report made recommendations to support and inform Australian governments, institutions and the general public in preventing and responding to child sexual abuse in institutional contexts.

See the Final Report at: www.childabuseroyalcommission.gov.au/final-report

[8-100] Criminal Justice report

On 5 September 2016, the Royal Commission published the Consultation paper: Criminal justice (the Consultation Paper). A wide range of submissions were received in response to the Consultation Paper. In November and December 2016, all six Commissioners sat for the public hearing in relation to issues raised in the Consultation Paper. Responses to the Consultation Paper and the public hearing helped to inform the final recommendations on criminal justice. As recognised in the Letters Patent, while the Royal Commission did not specifically examine the issue of child sexual abuse and related matters outside institutional contexts, the recommendations of the Royal Commission are likely to improve the response to all forms of child sexual abuse in all contexts.

See the Criminal Justice report at: http://childabuseroyalcommission.gov.au/about-us/our-reports

[8-200] Jury reasoning in joint and separate trials

This study investigated the extent to which joint trials with cross-admissible tendency evidence infringed defendants' rights, and the extent to which joint trials posed a risk of unfair prejudice to the defendant. In particular, the Royal Commission investigated the reasoning processes of juries in a simulated joint trial of sex offences involving three complainants versus a separate trial involving a single complainant. This jury deliberation and reasoning study investigated these issues by presenting 10 different versions of a videotaped trial involving the same core evidence to a total of 1,029 jury-eligible mock jurors. The study tested the impact of

evidence strength, the number of charges and the presence of specific judicial directions on jury decision-making in joint versus separate trials. See an article about this study at (2016) 28(5) *JOB* 45.

See the report at: www.childabuseroyalcommission.gov.au/policy-and-research/our-research/published-research/jury-reasoning-in-joint-and-separate-trials.

[8-300] The impact of delayed reporting on the prosecution and outcomes of child sexual abuse cases

This report examines how the criminal justice systems in NSW and South Australia deal with complaints of child sexual abuse reported to the police in childhood compared with those in which the report is delayed until adulthood, which is often referred to as historical child sexual abuse. The research investigates the trends in delayed disclosure and reporting of child sexual abuse, and maps the prosecution process and outcomes associated with varying degrees of delay in 18 cases reporting to the police, together with other case characteristics such as the age of the complainant victim, and the relationship between the complainant and the alleged offender.

See the report at: www.childabuseroyalcommission.gov.au/policy-and-research/our-research/published-research/the-impact-of-delayed-reporting-on-the-prosecution.

[8-400] An evaluation of how evidence is elicited from complainants of child sexual abuse

Child sexual abuse is difficult to prosecute and has one of the highest attrition rates of all criminal offences. Part of the difficulty in prosecuting these cases is that offending is often hidden from public view, leaving only the complainants' evidence to establish the defendants' guilt beyond reasonable doubt. The ability of child sexual abuse complainants to give quality evidence is crucial for successful prosecution, but it can be problematic for complainants to give such evidence. For both child and adult complainants, a willingness to engage in the justice process, and the accuracy and usefulness of the evidence they give, can be affected by anxiety and stress, delays in the trial process and how professionals question them. Over the past two decades, jurisdictions have attempted to address these concerns by introducing alternate measures and guidelines for eliciting evidence from child sexual abuse complainants.

See the report at: www.childabuseroyalcommission.gov.au/policy-and-research/our-research/published-research/how-evidence-is-elicited-from-complainants-of-chil.

[8-500] Empirical guidance on the effects of child sexual abuse on memory and complainants' evidence

This transdisciplinary report reviews contemporary scientific psychological research on memory of child sexual abuse and how these experiences affect complainants' evidence in legal proceedings. This report is particularly relevant for police officers, legal practitioners, judges and juries who must assess child sexual abuse victims' memory capabilities and the reliability of their memories. The purpose of the report is to summarise what is known about how victims remember experiences of abuse, how victims optimally remember their experiences, and how this affects their reporting and the evidence given at trial.

This report aimed to gather contemporary psychological scientific research evidence that police, lawyers and juries should be aware of when responding to victims of child sexual abuse, in general, and to victims of child sexual abuse in institutional contexts, in particular. The report

summarises what victims can be expected to remember about experiences of child sexual abuse, how they can be assisted to optimally remember those experiences, and how these experiences affect their reporting to police and their evidence in legal proceedings.

This empirical guidance on memory in cases of child sexual abuse applied a transdisciplinary approach to optimise the way in which the scientific and psychological research was translated for use by police, legal practitioners, judges, juries and law reformers. Based on this empirical review, a stand-alone summary of key guidance on the effects of child sexual abuse on memory and complainants' evidence was prepared, presenting the main findings derived from the report. This guidance was fully cross-referenced to evidence-based sources in each of the substantive chapters of the report.

See the report at: www.childabuseroyalcommission.gov.au/policy-and-research/our-research/published-research/the-effects-of-child-sexual-abuse-on-memory-and-co.

Note: This commentary is substantially derived from the Royal Commission website at www.childabuseroyalcommission.gov.au

[8-520] Bugmy Bar Book — the impact of child sexual abuse

The Royal Commission into Institutional Responses to Child Sexual Abuse found that the impacts of child sexual abuse are "interconnected in complex ways", making specific impacts difficult to isolate.[1] A "robust body of research evidence now clearly demonstrates the link between child sexual abuse and a spectrum of adverse mental health, social, sexual, interpersonal and behavioural as well as physical health consequences".[2]

The Bugmy Bar Book Committee has developed an online resource summarising key research relating to experiences of disadvantage and deprivation: see *Bugmy Bar Book*. The purpose of this resource, for practitioners, is to assist in the preparation and presentation of evidence to establish the application of the *Bugmy v The Queen* (2013) 249 CLR 571 principles.

Childhood sexual abuse has been taken into account by sentencing courts in relation to persons convicted of child sexual assault offences, as well as other types of offences, such as contextualising substance addiction considered to have contributed to the relevant offending. The potential relevance of evidence of childhood sexual abuse in sentencing proceedings includes an assessment of moral culpability; moderating the weight to be given to general deterrence; and determining the weight to be given to specific deterrence and protection of the community. There may also be issues relating to the likelihood of hardship in custody, a finding of special circumstances and the shaping of conditions to enhance prospects of rehabilitation.

The chapter relating to childhood sexual abuse can be accessed at https://bugmybarbook.org.au/chapters/childhood-sexual-abuse/.

An article explaining the background and how to use the resource has been published in the *Judicial Officers' Bulletin*. See Nicholas Cowdery AO QC, Jill Hunter and Rebecca McMahon, "Sentencing and disadvantage: the use of research to inform the court" (2020) 32 *JOB* 43.

[8-600] Further reading

L Mc Donald and P O'Leary, "Issues of justice in mediated outcomes for survivors of sexual abuse in State care?" (2020) 30 *ADRJ* 105.

A Freiberg, "Institutional responses to the sentencing recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse" (2020) 44 *Crim LJ* 127.

A Mackay and J Giuffrida, "Implications of the Royal Commission into Institutional Responses to Child Abuse for the protection of vulnerable witnesses: Royal Commission procedures and introduction of intermediaries and ground rules hearings around Australia" (2020) 29 *JJA* 136.

J Maxwell, "Liability of educational institutions for child abuse" (2019) 93 *ALJ* 477.

Sexual assault communications privilege

Acknowledgement: The Judicial Commission gratefully acknowledges the assistance of her Honour Judge Sarah Huggett and Jasmine Stanton, Senior Solicitor, Sexual Assault Communications Privilege Service, Legal Aid NSW

[9-000] Legislative reform

In 1997, the *Evidence Amendment (Confidential Communications) Act 1997* (NSW) amended the *Evidence Act 1995* (commenced 1 January 1998) to protect the counselling communications of sexual assault complainants. It aimed to introduce protections for confidential communications in two ways:

- By providing a judicial discretion allowing the courts to exclude evidence of a confidential communication. The exercise of that discretion is to be guided by factors set out in the legislation.
- By providing a rebuttable presumption that evidence of a confidential communication made to a counsellor by a victim of sexual assault should not be admitted in evidence. Such material will be admissible only where the court is satisfied that the probative value of the material is so high as to substantially outweigh the public interest in protecting the confidentiality of sexual assault victims in counselling relationships.[1]

Parliament amended the law in 1999 in response to a narrow interpretation of the sexual assault communications privilege (SACP) by the Court of Criminal Appeal (NSWCCA): see *R v Young* (1999) 46 NSWLR 681 which held that the privilege did not apply to the production of documents on subpoena. The amendments expanded the scope of records "caught" by the privilege. Further, the SACP provisions were removed from the *Evidence Act* and incorporated into Pt 5, Div 2 of the *Criminal Procedure Act 1986* (NSW).[2] The SACP provisions were further amended in 2002[3] as a result of the decision in *R v Lee* (2000) 50 NSWLR 289. Lee had held that the privilege was restricted to counselling relationships where expert advice was provided by "persons skilled, by training or experience, in the treatment of mental or emotional disease or trouble".[4] The 2002 amendments were made to ensure that the privilege extended to confidential communications made in connection with counselling provided by counsellors who lacked formal training or qualifications in the diagnosis of psychiatric and/or psychological conditions.[5]

In December 2010, further reforms strengthened the privilege[6] following a pro-bono pilot program run cooperatively by the Women's Legal Services (NSW), the NSW Bar Association, the Office of the Director of Public Prosecutions, and a number of commercial law firms. The 2010 amendments enhanced victims' participation in decisions affecting the confidentiality of their counselling and therapeutic records by:

- enlarging the standing for a protected confider (ordinarily the complainant) to appear in criminal proceedings or preliminary criminal proceedings if a document is sought to be produced or evidence is sought to be adduced that may disclose a protected confidence: ss 299A; 299C; s 5F(3AA) *Criminal Appeal Act 1912*.
- requiring parties to seek leave from the court to compel (by subpoena or otherwise) production of privileged material: s 298(1)

- expanding the factors a court must consider before granting leave to disclose records: s 299D
- providing that a court must ensure a protected confider is aware of the relevant provisions of the protections has been given a reasonable opportunity to seek legal advice: s 299

[9-100] Defining a protected confidence

The SACP applies to a "protected confidence" defined in s 296(1) as "a counselling communication that is made by, to or about a victim or alleged victim of a sexual assault offence". A "counselling communication" is defined in s 296(4) as a communication:

(a) made in confidence by a person (the "counselled person") to another person (the "counsellor") who is counselling the person in relation to any harm the person may have suffered, or

(b) made in confidence to or about the counselled person by the counsellor in the course of that counselling, or

(c) made in confidence about the counselled person by a counsellor or a parent, carer or other supportive person who is present to facilitate communication between the counselled person and the counsellor or to otherwise further the counselling process, or

(d) made in confidence by or to the counsellor, by or to another counsellor or by or to a person who is counselling, or has at any time counselled, the person.

The term "harm" is defined in s 295(1) to include "actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear)". Judicial minds have disagreed as to the scope of the term "harm" in s 296(4) and whether harm contemplates causal conduct by another person: see *KS v Veitch (No 2)* (2012) 84 NSWLR 172.

A person who "counsels" for the purposes of s 296 has "undertaken training or study or has experience that is relevant to the process of counselling persons who have suffered harm, and listens to and gives verbal or other support or encouragement to the other person, or advises, gives therapy to or treats the other person, whether or not for fee or reward.": s 296(4).

Some examples of protected communications are:

- counselling notes
- medical/clinical notes
- mental health records
- drug and alcohol records
- financial counsellor record
- letters and referrals between health professionals
- emails from a school counsellor to a parent or teacher
- social worker reports held by Centrelink or Department of Housing.[7]

Counselling communications may be protected that were made before the acts constituting the relevant sexual assault offence occurred or are alleged to have occurred, or were not made

in connection with a sexual assault offence or alleged sexual assault offence or any condition arising from a sexual assault offence or alleged sexual assault offence: s 296(2). However note the concerns raised in relation to the temporal reach of this definition expressed in *KS v Veitch (No 2)* (2012) 84 NSWLR 172 at [16] and *R v Veitch* (2013) 16 DCLR (NSW) 181 at [23].

[9-200] Purpose

The SACP limits the disclosure and use of a broad range of counselling communications in criminal, apprehended violence order (AVO) and limited civil proceedings. The SACP recognises the public interest in victims having access to confidential counselling both as a therapeutic response for individual victims and to prevent the disclosure of such records from deterring other complainants from reporting sexual violence: see *KS v Veitch (No 2)* in which the NSWCCA states while discussing SACP:

> The purpose of protecting such confidences generally is to encourage victims of sexual assault to seek professional assistance[8]
>
> and
>
> The deterrent effect on others through a perception that disclosure is readily achieved, may undo the purpose of the statutory privilege.[9]

The SACP is designed to limit the disclosure of protected confidences at the earliest point possible: for a complainant who has gone to a counsellor to discuss the sexual assault, it is little comfort to her or him if the documents are not to be adduced [used] in evidence at the trial if they have already unnecessarily been disclosed to the defence by an order of the court. The privilege is not just designed to prevent the unnecessary adduction of evidence of protected confidences before a jury, but is designed to prevent the inappropriate subpoena of such confidences in the first place, and then the inappropriate granting of access to them.[10]

[9-300] Applications for grant of leave

The NSWCCA in *PPC v Stylianou* [2018] NSWCCA 300 has recently clarified that s 298 creates a requirement for leave at two stages: at the issue of a subpoena that would require the production of a protected confidence, and when adducing evidence of a protected confidence. Section 298(2) does not create a requirement for leave to inspect a document, but provides that if leave has not been given to issue a subpoena, the person named in the subpoena must not produce a document recording a protected confidence to the court: at [12]-[17].

Section 299D(1) provides that a court cannot grant an application to issue a subpoena to compel production of a counselling communication unless it is satisfied that:

(a) the document or evidence has substantial probative value as evidence in the case. In *BJS v R* [2013] NSWCCA 123 at [171], the NSWCCA dismissed an appeal from a decision of the District Court in applying the SACP, agreeing with the trial judge that the probative value of counselling notes in issue was of a very low order and could not be characterised as having "substantial probative value". In *Rohan v R* [2018] NSWCCA 89, the NSWCCA agreed with the finding of a District Court judge that counselling records did not have "substantial probative value" for the purposes of s 299D(1)(a). The application for leave under s 298(1) was based upon the prospect that the complainant may have failed to take up an opportunity during counselling to complain about sexual abuse by the applicant. Given

such evidence would invoke a warning under s 294 to the effect that absence of complaint does not necessarily indicate a false allegation and that good reasons may exist to explain it, the documents would have no "substantial probative value".[11]

(b) other documents or evidence concerning the matters to which the protected confidence relates are not available, and

(c) the public interest in disclosure substantially outweighs the public interest in non-disclosure. In determining the public interest in preserving the confidentiality of protected confidences and protecting the principal protected confider from harm, the court must take into account the matters listed in s 299D(2).

A decision concerning whether or not to issue a subpoena cannot be made until the court has considered the matters listed in ss 299C and 299D: *R v Bonanno; ex parte Protected Confider* [2020] NSWCCA 156 at [12]. Non-compliance will result in an error of law and the potential invalidity of the grant of leave to issue a subpoena and the subpoena itself. If left to go unchecked, errors of law can result in a mistrial of the accused and may cause substantial harm to others, including the protected confider. It is important to consider how the specific terms of the legislation apply in the circumstances of an individual case; counsel also have a responsibility to assist in this regard: *R v Bonanno; ex parte Protected Confider* at [13].

In assessing a claim of privilege, it is necessary to determine whether there existed a "counselling communication" within one of the four categories established by s 296(4).[12] The onus is on the applicant to establish that the documents in question were privileged.[13]

In determining a claim for SACP, s 299B provides that a court may consider both the documents in question and/or evidence about them or their contents and a judge may compel the production of documents in order to determine a question of leave to issue a subpoena under s 298(1).[14] Section 299B(4) confers power on the court to make orders that facilitate the task of determining whether sexual assault communications privilege exists. It has been observed in relation to client legal privilege, that a court may make orders allowing evidence to be given in confidence under such conditions as to preserve the claimed privilege.[15] Section 299B(4) would similarly permit such a course to be taken when determining a question of sexual assault communications privilege.[16] Without evidence that addresses the facts said to found the privilege, the task of a judge will be essentially an interpretative exercise based wholly upon an examination of each document in question.[17] It has been found to be an error to approach the task in a global way.[18]

There is an available discretion under s 299B for a judge to compel the production of documents in order to determine a question of leave to issue a subpoena under s 298(1): *Rohan v R* at [58], [67]; *KS v Veitch (No 2)* (2012) 84 NSWLR 172 at [28]. Section 299B is relevant "[i]f a question arises under this Division relating to a document or evidence".

[9-400] Inspection of documents

The SACP will also be relevant when a party seeks access to documents recording protected confidences. Such access can only be granted if leave has been given and disclosing the document is consistent with that leave: s 299B(3). The court may not grant such access "unless" one of the conditions stated in s 299B(3) is satisfied. The court may have to examine the documents to determine whether access should be granted to them. Compliance with s 299B(3) is not however a sufficient or necessary condition to entitle parties to an order granting them access to protected counselling documents: *PPC v Stylianou* [2018] NSWCCA 300 at [22].

[9-500] Scope of privilege

The privilege is expansive and applies in all criminal cases, including pre-trial and interlocutory proceedings and AVO proceedings in NSW. It also applies in some civil cases,[19] but only where SACP has been upheld in a criminal proceeding and the civil case is about the same or similar acts. SACP does not apply in family law. It generally does not apply in child protection cases.

For a detailed examination of the scope of the SACP provisions and issues arising from its construction, see I Nash, "Use of the sexual assault communications privilege in sexual assault trials" (2015) 27(3) *JOB* 21.

See also "Sexual assault communications privilege" at [1-895]–[1-899] in the *Criminal Trial Courts Bench Book* for further discussion.

[9-600] Sexual Assault Communications Privilege Service

The Sexual Assault Communications Privilege Service (SACPS) was established at Legal Aid NSW in late 2011. It provides free legal representation for sexual assault victims in privilege matters in NSW. All sexual assault victims, whether child or adult, who need legal help about the privilege can now access a free lawyer. SACPS lawyers have been specially trained and can go to any criminal court in NSW. SACPS also provides education, legal and policy advice to the health, community and welfare sectors, as well as police and the legal profession, to promote awareness of the privilege.

Legal Aid NSW have produced a Guide for people working in a health or welfare role in NSW who keep confidential client records, which focusses on protections relevant to subpoenas relation to sexual assault communications privilege. [20]

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District Court Criminal Practice Note 4

[10-000] Media access to sexual assault proceedings heard in camera

1. The purpose of this practice note is to provide arrangements under s 291C(2) of the *Criminal Procedure Act* for the media to access sexual assault proceedings held in camera.
2. In circumstances where s 291C(2) applies, and such arrangements are sought, the media representative should contact the registrar of the court where the proceedings are to be held.
3. Upon application by a media representative, the registrar will discuss with the media representative the reasonable and practical options available. Wherever possible, the application is to be made prior to the date of hearing. The longer the period of notice given to the registrar the more likely it will be that a practical arrangement can be made.
4. The registrar will discuss with the media representative the options available and then provide a written report to the court advising what is reasonably practical to provide pursuant to s 291C(2). The court will then determine what arrangements should be made and these will usually be announced in court.
5. Any additional costs incurred in making arrangements pursuant to s 291C(2) are to be met by the media representative (eg cost of installing live audio/visual feeds, cost of a sheriff/court officer to supervise access to a remote audio/visual feed, cost of providing a real time or a daily transcript). The registrar may require an undertaking to be given by the media representative to pay the additional costs.
6. If the media is given electronic access to the evidence, the media must not make an electronic recording of the proceedings.

The Hon Justice RO Blanch
Chief Judge
28 November 2005

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District Court Criminal Practice Note 5

[10-100] Management of prescribed sexual offence proceedings

The purpose of this Practice Note is to ensure the timely management and expeditious hearing of trials for prescribed sexual offences, by requiring orders relating to the hearing to be made prior to the trial date wherever possible.

1. **Children's evidence**

   1.1 The following issues are to be addressed before the day of trial — the way in which the child is to give evidence; the editing of the recording of the child's statement; and, any other matters relating to the rights of the child prescribed under the *Evidence (Children) Act 1997*. The prosecution is to identify the issues to be addressed and raise these with the defence prior to the trial date being set.

   1.2 At the time of setting a trial date, the prosecution is to advise the court or callover registrar (for circuit sittings) of any pre-trial orders sought, including any request relating to the use of CCTV or other technology. If a pre-trial application cannot be dealt with at the time of setting a trial date, the pre-trial application will be listed on a date prior to the trial date. Where a pre-trial order is sought before a callover registrar, the registrar will contact the Manager, Criminal Listings and Judicial Arrangements, to seek instructions for arranging a pre-trial hearing.

   1.3 To enable the provisions of the *Criminal Procedure Amendment (Sexual Offence Case Management) Act 2005* to apply to a pre-trial order, an indictment is to be presented before a pre-trial order is made.

2. **Adult complainants**

   2.1 The procedure outlined in paragraphs 1.2 and 1.3 above also apply to an adult complainant in proceedings for a prescribed sexual offence.

3. **Managing exhibits where CCTV used (for child or adult)**

   3.1 Where a witness is to give evidence via CCTV and a party proposes to have the witness physically examine an exhibit, that party is to make arrangements with the court officer to facilitate this. Any defence exhibit provided to the court officer may be sealed to preserve confidentiality until such time as it is required to be shown to the witness.

   3.2 The arrangements referred to above should be made before the trial commences.

The Hon Justice RO Blanch
Chief Judge
19 December 2005

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District Court Criminal Practice Note 6

[10-200] Sexual assault case list

The purpose of this Practice Note is to create separate lists for sexual assault cases coming before the District Court to ensure all such cases are kept under close management and are dealt with as expeditiously as possible.

1. Each Registry of the Court should maintain a separate list of cases involving sexual assault charges. The list should indicate when the matter was committed for trial. In the callovers to list trials and monitor the status of trials, these cases should be called over as a separate section of the general list. Matters involving a child complainant should be identified and given priority over matters involving adult complainants.

2. In fixing these cases for trial they should wherever possible be listed for trial within four months of the date of committal for trial but in no case later than six months from committal. The longer period of six months is only to make allowance for country areas where the court sits on a circuit basis. Generally the court has the capacity to list cases within the four month period and if Registry Managers have difficulties in listing such cases within the specified time standards, they should communicate with the Manager, Criminal Listings and Judicial Arrangements, in Sydney because any appropriate cases can be transferred to Sydney or Sydney West where early dates are always available.

   In sexual assault cases the impact on the complainant will be a primary consideration. Counsel accepting a brief to appear in these cases in committal proceedings should do so on the basis that they will be able to appear in the trial within four months after committal for trial.

3. If there should occur a situation where a particular court has more trials listed in the week than can be accommodated, priority should be given to sexual assault cases being heard subject only to cases where an accused is in custody solely on some other charge. Care should be taken when listing country circuits not to over list sexual assault matters where this could result in the cases not being reached.

4. In the management of sexual assault cases every effort should be made to identify when a complainant will be required to give evidence in order to avoid unnecessary anxiety in the complainant.

5. In cases involving charges of sexual assault, complainants who are required to give evidence are often anxious about the trial process, the need to confront the accused, give evidence and be cross-examined. The level of that anxiety naturally increases as the trial approaches and can be expected to reach its highest level on the day of trial.

   When the case is adjourned on the day of trial or the accused pleads guilty on the day of trial, that anxiety is not avoided.

   Practitioners should notify the court as soon as possible of an intention to seek to vacate the trial or to enter a plea of guilty. This can be done by listing the case for mention before the trial date (see Practice Note 5). It can also be done by letter, facsimile or email. This is to ensure there is a record of the notification. A copy of any such notification should also be sent to the prosecution.

Where no such notification is received prior to the trial date, the court record will reflect this and if the plea is on the day of trial that will normally be taken into consideration when passing sentence.

6. During the course of sexual assault trials it is desirable to provide some certainty to complainants as to when they will give evidence and where possible the giving of evidence should be arranged accordingly.

7. Generally speaking it is not appropriate for a sexual assault trial to commence unless a daily transcript is available. Appropriate arrangements should be made with Reporting Services Branch to ensure in advance that a daily transcript will be available.

The Hon Justice RO Blanch
Chief Judge
27 April 2007

District Court Criminal Practice Note 8

[10-220] Removal of judgments from the internet

Commencement

1. This Practice Note commences 1 December 2008.

Application

2. This Practice Note applies to criminal jury trials.

Definitions

3. In this Practice Note:

   Accessible repository includes, but is not limited to, the NSW Caselaw and the Australian Legal Information Institute (AustLII) judgment repositories on the Internet

   Application to the court includes a written application

   Judgment includes the reasons, orders, catchwords and other identifying details

   Identified judgment means any judgment that may impact on jury deliberations in a particular criminal trial

   Medium neutral citation means the year, court identifier and decision number of a judgment, for example, [2008] NSWDC 12.

Introduction

4. The purpose of this Practice Note is to ensure, for jury trials, that an electronic version of a judgment, which details specifics of the proceedings or related proceedings, is removed from the Internet for the duration of the trial or another appropriate period.

Process

5. A party that locates an identified judgment in an accessible repository is to bring the judgment and its location to the attention of the court and all parties to the case.
6. For an identified judgment to be removed from an accessible repository, a party must make an application to the court, no less than five working days before a jury is to be empanelled in the trial. The application must contain grounds for the request.
7. The application to the court should contain the following information about the identified judgment:
   - the case title
   - the medium neutral citation
   - date of the judgment
   - the jurisdiction of the judgment
   - an estimated length of time before the identified judgment can be returned to the accessible repository.
8. The court will determine the application and may direct the identified judgment to be temporarily removed from the accessible repository for the duration of the trial, or another appropriate period.

The Hon Justice RO Blanch
Chief Judge
21 October 2008

District Court Criminal Practice Note 11 (repealed; only for proceedings commenced before 29 January 2024)

[10-260] Child sexual offence evidence program scheme — Downing Centre

Note: For proceedings commenced after 29 January, see District Court Practice Note 28 at **[10-270]**.

Commencement

This Practice Note revises the version published 17 December 2015.

Introduction

The purpose of this Practice Note is to facilitate operation of the Child Sexual Offence Evidence Program Scheme, which commenced on 31 March 2016, in the Sydney District Court. The Scheme has been extended to 30 June 2022. The *Criminal Procedure Act* 1986 ("CP Act") was amended by the *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015* No 46, which came into force on 6 November 2015. The Act inserted Part 29 into Schedule 2 of CP Act.

The Part generally applies to proceedings for prescribed sexual offences commenced after the commencement of the Part (s 83).

Summary of amendments

1. All evidence of a child under 16 must be given by way of pre-recorded evidence, and such evidence may be given for a child under 18 (s 84). Pre-recorded evidence hearings are conducted where additional oral evidence in chief, cross-examination and re-examination is recorded before Judge Traill or Judge Shead SC. The Prosecution and Defence are represented to conduct any additional evidence in chief, cross-examination and re-examination of the child complainant. This is the evidence of the complainant at the balance of the trial.
2. Witness intermediaries, who are officers of the Court, are appointed to assist the parties and the Court to communicate with child complainants. Their role includes explaining questions to, and the answers of, child complainants (ss 88-90). A ground rules hearing concerns the provision of information to the Court about how counsel should question the witness to elicit reliable evidence.

Practice direction

1. From 6 August 2019, all prescribed sexual offences (s 3 CP Act) committed for trial from the Local Court to the **Downing Centre District Court**, where the complainant is under 18 at the time of committal for trial, are to be listed for arraignment and case management call over on a **Monday at 9.15am**, no later than 14 days after committal for trial.
2. This list will be known as the **Child Sexual Assault List** and will be managed separately from the general arraignments list.
3. For matters in the Child Sexual Assault List, the Court expects the Prosecution to be represented by either the Crown Prosecutor or Solicitor Advocate briefed to appear at trial and will also expect Counsel who represents the accused at trial to appear. Judges in the Downing Centre will be requested, as much as possible, to accommodate Counsel who are required to appear in the Child Sexual Assault List.

4. The Court will expect the Prosecution to present an indictment at least in accordance with s 129 of the CP Act (within 4 weeks of committal for trial) and with an expectation that an indictment be filed in court as soon as possible after committal.
5. For matters in the Child Sexual Assault List, the Judge will set a timetable for the filing of the Prosecutor's Notice (s 142 of the CP Act), the Defence Response (s 143 of the CP Act) and the Prosecutor's Response to the Defence Response (s 144 of the CP Act), bearing in mind the provisions of the amending legislation that pre-recorded hearings are to be "held as soon as practicable" after the first appearance in court: s 85(1).
6. The Court will set a ground rules hearing date (GRH), a pre-recorded evidence date (PRH) and fix a trial date for the balance of the trial, following the pre-recorded evidence hearing. A witness who gives evidence at a pre-recorded evidence hearing cannot give further evidence without the leave of the Court (s 87).
7. The Court will appoint a witness intermediary in accordance with the provisions of Division 2, s 89.
8. The GRH will ordinarily be set down at least one week before the PRH.
9. There is an expectation that representatives for both the Crown and Defence appearing at the pre-recorded hearing will continue as representatives in the balance of the trial.
10. Practitioners should ensure that Legal Aid applications have been lodged and finalised immediately after committal for trial and representatives briefed both for the Crown and Defence will be available for a pre-recorded hearing within approximately 2 months and thereafter at the balance of the trial.
11. The Crown should provide the Court with a copy of the indictment, Crown Case Statement, s 142 Notice and s 143 Notice, JIRT interviews, discs and exhibits at least 2 weeks prior to the PRH.
12. The Child Sexual Assault List will be conducted in a Court to be advised in the Downing Centre.

The Hon Justice D Price AM

Chief Judge of the District Court

6 August 2019

District Court Criminal Practice Note 18

[10-265] Criminal Trials

1. This Practice Note revises and consolidates District Court Criminal Practice Notes 1, 9 and 12.

Commencement

2. This Practice Note commences on 6 April 2020.

Application

3. This Practice Note applies to all proceedings on indictment committed to the District Court for trial on or after the commencement date, with the exception of committals to the Child Sexual Offence Evidence Program Scheme, to the Rolling List at Sydney and to the court at Bega, Bourke, Broken Hill, Coonamble, Goulburn, Grafton, Moree, Nowra, Port Macquarie, Queanbeyan and Taree. For these regional venues, the AVL call-over system will apply in accordance with District Court Criminal Practice Note 19.

Introduction

4. Following the implementation of the Early Appropriate Guilty Plea reforms in 2018, changes to the practice of pre-trial procedures have been identified to improve efficiencies and procedural fairness.

5. The prosecutor and the legal representatives for the accused person are expected to have attended a case conference that has been held in accordance with s 70 of the Criminal Procedure Act 1986 (NSW) ("CP Act") before the accused person is committed to the court for trial. An objective of the case conference is "to facilitate the resolution of other issues relating to the proceedings against the accused person, including identifying key issues for the trial of the accused person and any agreed or disputed facts": CP Act s 70(3)(b).

6. As such, the prosecutor and the legal representative for the accused person who attend the arraignment are expected to have full knowledge of the state of the proceedings and to identify the key issues for the trial.

7. Accordingly, the purpose of this Practice Note is to:

   (a) ensure that matters are dealt with efficiently and in a manner consistent with the obligations of the prosecution and an accused person under Chapter 3, Part 3 of the CP Act;

   (b) establish case management procedures from the time an accused person is first arraigned;

   (c) refine the disclosure obligations of the prosecution and an accused person;

   (d) reduce avoidable delays; and

   (e) promote procedural fairness

Definitions

8. In this Practice Note:

   "accused person" includes an Australian legal practitioner representing an accused person;

"court" means the District Court of New South Wales;

"prosecutor" has the same meaning as in the *Criminal Procedure Act 1986*;

"Readiness Hearing" means a hearing to ascertain the readiness of the trial to proceed on the allocated trial date;

"service" of documents required under this Practice Note may be effected by service on the legal representatives for an accused person or by service personally on an accused who is not legally represented.

Listing for arraignment

9. When committing an accused person to the court at Sydney for trial, the magistrate will direct the accused person to appear for arraignment on the last sitting day of the week (usually a Friday) four weeks after the date of the committal.

10. A similar procedure is to apply to all other District Court venues but the arraignment day will vary from court to court. Practitioners should ascertain the relevant day which is nominated by the list judge or resident judge.

Arraignment Procedure

11. On the day fixed for the arraignment, the Director of Public Prosecutions shall, unless otherwise ordered, present an indictment to the court and provide copies of the indictment to each accused person.

12. The Director of Public Prosecutions is also to file and serve on each accused person, no later than 10 days prior to the date fixed for the arraignment, the Crown case statement, an index to brief material, and a copy of the indictment intended to be presented at the arraignment.

13. The legal representative for the accused person is to file and serve on the prosecution, no later than 5 days prior to the date fixed for the arraignment, a Notice of Appearance.

Entering a plea

14. The accused must be present on the day fixed for the arraignment either in person or by way of audio visual link.

15. Upon presentment of the indictment, the accused will be arraigned by the court and shall enter his or her plea.

Trial Management

16. The arraignment date will also serve as the first trial management listing. Where a plea of not guilty is entered to any of the charges, the court will fix a date for the trial and for a Readiness Hearing. The Readiness Hearing is to be listed at least eight weeks before the date fixed for trial or earlier at the discretion of the judge.

17. At the arraignment, the prosecutor and the legal representative for the accused person are to provide the court with:

    (a) An outline of issues in dispute to the extent that it is possible and any agreement as to facts;

    (b) An accurate estimate of the length of the trial as well as dates suitable for witnesses and counsel briefed to appear at trial. The estimate of the trial is to include allowance for pre-trial argument, counsels' addresses to the jury and the trial judge's summing up;

    (c) Any requirement for remote witness facilities;

(d) Any requirement for interpreters, including the language and number; and

The legal representative for the accused person must advise whether a question may arise under Chapter 6, Part 5, Division 2 of the CP Act (sexual assault communications privilege) for determination by the court and whether leave may be required for the issue of subpoena or for evidence to be adduced with respect to protected confidences.

18. If the accused is not legally represented, a further purpose of the first trial management listing is to ensure that representation is provided for at the earliest opportunity.

Standard Directions

19. Unless the court otherwise orders, the standard directions that are to apply at the arraignment are:

(a) Where leave of the court is required for the production of a document or the giving of evidence under s 298 of the CP Act, the legal representative for the accused person must make an application for leave under s 299C of the CP Act no later than six weeks prior to the date fixed for the Readiness Hearing.

(b) The prosecution is to file and serve on the accused person, no later than six weeks prior to the date fixed for the Readiness Hearing, the notice of the prosecution case in accordance with s 142 of the CP Act. In addition to the requirements of s 142, the notice is to include a statement as to the basis upon which the prosecution will contend that the accused person is criminally responsible in respect of the alleged offence(s).

(c) In the case of State matters, the prosecution is to file and serve on the accused person, no later than eight weeks prior to the date fixed for the Readiness Hearing, an affidavit by the police officer or law enforcement officer in charge of the case which:

(i) confirms compliance with the duty of disclosure as set out in s 15A of the Director of Public Prosecutions Act 1986 (NSW); and

(ii) details any further evidence the police are yet to obtain.

NaNIn the case of Commonwealth matters, the prosecution is to file and serve on the accused person, no later than eight weeks prior to the date fixed for the Readiness Hearing, an affidavit by an appropriate officer of the relevant investigating agency which:

(i) confirms compliance with the duty of disclosure as set out in paragraph 3 of the Commonwealth Director of Public Prosecutions "Statement on Disclosure in Prosecutions conducted by the Commonwealth"; and

(ii) details any further evidence the police are yet to obtain.

NaNThe defence is to file and serve on the prosecution, no later than three weeks prior to the date fixed for the Readiness Hearing, the notice of the defence response in accordance with s 143 of the CP Act.

NaNThe prosecution is to file and serve on the accused person, no later than one week prior to the date fixed for the Readiness Hearing, the notice of the prosecution response to the defence response in accordance with s 144 of the CP Act.

NaNIf the prosecution intends to adduce tendency and/or coincidence evidence pursuant to ss 97 or 98 of the Evidence Act 1995 (NSW), notice in writing must be given to the defence no later than six weeks prior to the date fixed for the Readiness Hearing.

NaNIf the defence intends to adduce tendency and/or coincidence evidence pursuant to ss 97 or 98 of the Evidence Act 1995 (NSW), notice in writing must be given to the prosecution no later than three weeks prior to the date fixed for the Readiness Hearing.

NaNThe defence is to provide notice of alibi within the period prescribed in s 150 of the CP Act.

NaNThe parties are to hold a pre-trial conference pursuant to s 140 of the CP Act no later than two weeks prior to the date fixed for the Readiness Hearing to determine whether the parties can reach agreement regarding the evidence to be admitted at trial. The parties are also to consider the issues in paras 27 and 28 of this Practice Note. This does not apply if the accused is not legally represented.

NaNThe prosecution must file the pre-trial conference form within the time frame stipulated in s 140(8) of the CP Act, but in any event no later than one week prior to the date fixed for the Readiness Hearing.

Expert Witnesses

20. The obligation of the prosecution to comply with the court's directions includes the service by the prosecution in accordance with s 142(1)(h) of the CP Act of a copy of the report of any expert witness that the prosecution proposes to call at trial.

21. The obligation of the accused person to comply with the court's directions includes the service by the defence in accordance with s 143(1)(h) of the CP Act of a copy of the report of any expert witness that the defence proposes to call at trial.

Readiness Hearing

22. Each party must separately file and serve a statement identifying the key issues in the trial no later than one week prior to the date fixed for the Readiness Hearing. The prosecution's statement is to be signed by the prosecutor who is appearing at trial. The accused person's statement is to be signed by the legal representative who will be appearing for the accused person at trial. The Key Issues Statement is to be in the form annexed to this Practice Note.

23. The following persons must be present during the Readiness Hearing:

    (a) the prosecutor;

    (b) the legal representative for the accused person; and

    (c) the accused, if not legally represented and not in custody.

24. For the avoidance of doubt, the accused is not required nor expected to be present at the Readiness Hearing provided he or she is legally represented.

25. For Sydney matters, if the accused is not legally represented and is in custody, the Readiness Hearing will be vacated and the matter will be listed for directions in Court 3.1.

26. The prosecutor and the legal representative for the accused person who attend the Readiness Hearing are expected to have full knowledge of the state of the proceedings.

27. At the Readiness Hearing, the prosecutor and legal representative for the accused person must inform the court:

    (a) the key issues in the trial;

    (b) of any intention by the accused person to make an application for severance of counts on the indictment;

(c) of any intention by the accused person to make an application for a separate trial;

(d) of any other issues that will involve pre-trial argument;

(e) of any matters for the court's determination under s 299B of the CP Act (protected confidence);

(f) of any facts that are agreed;

(g) of any issues that may prevent the trial commencing on the trial date (or delay the empanelment of the jury);

(h) of any intention to apply to the court for an order that the accused person by tried by a judge alone in accordance with s 132 of the CP Act;

(i) of the availability of any expert witnesses that the parties intend to call at trial; and

(j) of the accurate estimate of the length of the trial, which must include an allowance for the pre-trial argument that has been identified by the parties, counsels' addresses to the jury and the trial judge's summing up.

28. At the Readiness Hearing;

(a) further matters about which the prosecutor must inform the court include:

(i) any intention to amend the indictment upon which the accused person was arraigned;

(ii) any evidence the prosecution intends to rely upon at trial that has not been served on the accused person;

(iii) any failure by the prosecution to comply with the directions of the court;

(iv) any requirement for interpreters for prosecution witnesses, including the language and number; and

(v) the need for remote witness facilities.

(b) further matters about which the legal representative for the accused person must inform the court include:

(i) whether para 19(a) of this Practice Note has been complied with;

(ii) any expert evidence the defence intends to rely upon at trial that has not been served on the prosecution;

(iii) any failure by the accused person to comply with the directions of the court;

(iv) any requirement for interpreters for the accused or defence witnesses, including the language and number;

(v) any concerns held regarding the fitness of the accused to stand trial, so far as practicable; and

(vi) any requirement for edits to ERISP, JIRT interviews and/or surveillance or intercept material.

29. At the Readiness Hearing, the court may make further orders, determinations or findings, or give further directions or rulings as it thinks appropriate for the efficient management and conduct of the trial.

Trial

30. By the date fixed for the trial, the matter must be ready to proceed. If there is an unavoidable problem or change to the conduct or the length of the trial the parties are to notify at the earliest possible stage the list judge or resident judge at venues other than Sydney, and for Sydney trials the Criminal Listing Director.

31. Any application to vacate a trial date:

    (a) is to be made by way of filing and serving a Notice of Motion with a supporting affidavit, setting out the grounds for the application;

    (b) For Sydney trials, the application is to be listed in Court 3.1; and

    (c) For venues other than Sydney, the application is to be made to the list judge or resident judge.

Non-compliance with the court's directions

32. If it appears to the court that a party has not complied with this Practice Note, or with any other direction made by the court, the court may contact the offending party directly or list the matter for mention, either on the court's own initiative or at the request of either party.

33. Without limiting the court's power otherwise to deal with a failure to comply with a direction, the court may order the offending party to file an affidavit, or give evidence in court, explaining the failure to comply.

The Hon Justice D Price AM

Chief Judge of the District Court

6 March 2020

District Court Criminal Practice Note 28 (for proceedings commenced after 29 January 2024)

[10-270] Child sexual offence evidence

Last reviewed: April 2024

Commencement

Practice Note 28 Child Sexual Evidence replaced Practice Note 11 (published 6 August 2019) and commenced 29 January 2024.

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Supreme Court Practice Note No SC CL 8

[10-280] Supreme Court Common Law Division – Media Access to Sexual Assault Proceedings Heard in Camera

Commencement

1. This Practice Note commences 1 December 2005.

Application

2. This Practice note applies to proceedings under Part 2A of the *Criminal Procedure Act 1986*.

Definitions

3. None applicable.

Introduction

4. The purpose of this Practice Note is:

- to provide arrangements under s291C(2) of the *Criminal Procedure Act 1986* for the media to access sexual assault proceedings heard in camera

Media representatives to contact the registrar

5. In circumstances where s291C(2) applies, and such arrangements are sought, the media representative should contact the registrar of the court where the proceedings are to be held.

6. Upon application by a media representative, the registrar will discuss with the media representative the reasonable and practical options available. Wherever possible, the application is to be made prior to the date of hearing. The longer the period of notice given to the registrar the more likely it will be that a practical arrangement can be made.

7. The registrar will discuss with the media representative the options available and then provide a written report to the court advising what is reasonably practical to provide pursuant to s 291C(2). The court will then determine what arrangements should be made and these will usually be announced in court.

Responsibility for costs incurred

8. Any additional costs incurred in making arrangements pursuant to s 291C(2) are to be met by the media representative (eg cost of installing live audio/visual feeds, cost of a sheriff/court officer to supervise access to a remote audio/visual feed, cost of providing a real time or a daily transcript). The registrar may require an undertaking to be given by the media representative to pay the additional costs.

Electronic recordings not to be made

9. If the media is given electronic access to the evidence, the media must not make an electronic recording of the proceedings.

JJ Spigelman AC

Chief Justice of the New South Wales

1 December 2005

Related information

Practice Note SC CL 8 was issued and commenced on 1 December 2005.

Parramatta District Court

[10-300] Case Management Form

In the matter of Regina v .....

District Court No .....

Committal date .....

Solicitor for DPP ..... Crown prosecutor .....

Solicitor for accused ..... Counsel for accused .....

Trial date .....

Estimate of trial length .....

Previously not reached? ..... Re-trial? .....

Custody This matter only? .....

Other matters? .....

Details .....

Indictment in final form? .....

All Crown statements and exhibits served? .....

Any outstanding particulars .....

Reasons for priority (if any) .....

Sexual assault matter? .....

Child sexual assault matter? .....

CCTV Defence objection: Yes/No

Notices pursuant to Evidence (Children) Regulation 1999 .....

Evidence of children by way of recorded interview Defence objection: Yes/No

Video editing arrangements .....

Total number of Crown witnesses .....

Witnesses required by defence .....

Expert witnesses Required: Yes/No

Available dates for experts during trial .....

Expert statements or reports *served*? .....

Overseas/interstate witnesses .....

All witnesses available? .....

Section 77 orders for witnesses in custody .....

Agreed admissions/facts .....

Interpreters required .....

Fitness issue .....

Judge alone trial .....

Separate trial application .....

Notices pursuant to Evidence Act .....

Outstanding subpoenas .....

Trial issues (legal and factual) .....

Pre-trial issues .....

Editing of ERISP .....

Availability of copies of —
indictment/transcripts/maps/photographs/other exhibits .....
Crown plea offer .....
Defence plea offer .....

Solicitor for accused	Solicitor/Crown prosecutor

Important general directions in sexual assault trials

The *Criminal Trial Courts Bench Book* provides commentary on the following topics as well as suggested jury directions for use in sexual assault trials:

Complaint evidence [2-550]ff

[2-570] Suggested direction — where complaint evidence admitted under s 66(2) *Evidence Act 1995*

[2-618] Direction where difference in complainant's account — prescribed sexual offences only

[2-620] Suggested direction — delay in, or absence of, complaint

[2-650] Suggested direction — delay in complaint and forensic disadvantage to the accused

Sexual intercourse without consent [5-1550]ff

[5-1550] Suggested direction — sexual intercourse without consent (s 61I) for offences committed before 1 January 2008

[5-1566] Suggested direction — sexual intercourse without consent (s 61I) where alleged offence committed on or after 1 January 2008 and before 1 June 2022

[5-1570] Suggested direction — s 61J circumstance(s) of aggravation

[5-1590] Suggested *R v Markuleski* (2001) 52 NSWLR 82 direction — multiple counts

Tendency, coincidence and background evidence [4-200]ff

[4-215] Suggested direction — context evidence

[4-222] Suggested direction — background evidence

[4-227] Suggested tendency evidence direction — applies to charged acts, other acts or combinations thereof

[4-230] Tendency evidence in child sexual assault proceedings — s 97A

[4-237] Suggested direction where coincidence evidence admitted as part of a circumstantial case

[4-240] Suggested direction where coincidence evidence relied upon for joinder of counts of different complainants

Directions — misconceptions about consent in sexual assault trials [2-980]ff

[2-986] Suggested direction — responses to giving evidence

[2-988] Suggested directions — ss 292A–292C, 292E *Criminal Procedure Act 1986*

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