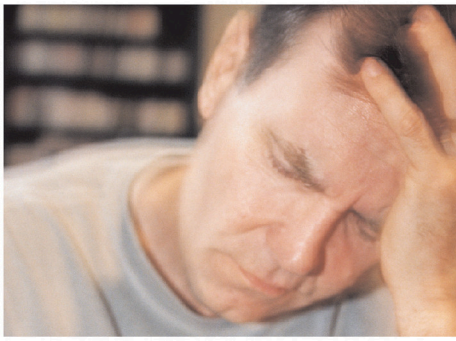
Sexual Assault Trials Handbook



Sexual Assault Trials Handbook

Judicial Commission of New South Wales

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Currency

Update 49, August 2026

The following sections have been updated:

Recent sexual assault law

- Recent case digests have been added at **[6-005] Recent sexual assault cases**.
- New articles have been added at **[6-050] Other publications**.

General directions

Updated at **[6-500]** to include links to new suggested directions:

- Suggested direction — s 61J circumstances(s) of aggravation

Relevant literature — non-legal articles

The prosecution of child sexual assault in NSW

The following article has been added at **[7-850]**:

- P Parkinson et al, "Prosecutorial discretion in cases of persistent child sexual abuse" (2026) 48 *Sydney LR* 1.

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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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Acknowledgements

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.

In 2025, the Commission welcomed her Honour Judge Mendes as General Editor of the Handbook.

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Offences

[1-000] Table — NSW and Commonwealth sexual offence provisions

Last reviewed: December 2024

The following Table provides information on NSW and Commonwealth sexual offence provisions including the time period the provision was in force (with links to the relevant legislative provisions), the maximum penalty for the offence, and Standard Non-Parole Period (SNPP) (if applicable). The table originates from the *Criminal Trial Courts Bench Book* at **[5-1300]**.

Note: In the tables below, months/years refer to months/years of imprisonment.

Note: When a linked legislative provision is clicked on, further information is accessible (where available) via links next to the provision title — for ***Judicial Information Research System (JIRS) users only***.

Further information may include:

- Bench book references
- CCA summaries
- Children's Court statistics
- Digests
- Guidelines
- Higher Court statistics
- Local Court statistics
- Maximum penalties
- NSWCCA sentence appeals
- Offence packages

Offences under the *Crimes Act 1900* (NSW)

***Crimes Act 1900* (NSW)**				
Section	**Offence**	**Time period**	**Max penalty**	**SNPP**
45	Female genital mutilation[1]	1/5/1995–19/5/2014 20/5/2014–present	7 yrs 21 yrs	
45A	Remove person from State for female genital mutilation	20/5/2014–present	21 yrs	
61B (rep)	Maliciously inflict GBH with intent to have sexual intercourse	14/7/1981–16/3/1991	20 yrs	
61C(1)–(2) (rep)	Maliciously inflict or threaten ABH with intent to have sexual intercourse	14/7/1981–16/3/1991	12 yrs	
61C(3)–(4) (rep)	Maliciously inflict or threaten ABH with intent to have sexual intercourse, in company	21/2/1988–16/3/1991	14 yrs	
61D(1) (rep)	Sexual intercourse without consent with: Person over 16 yrs	14/7/1981–20/2/1988	7 yrs	

1 Amended 27/11/2003 — "a person authorised to practise midwifery under the *Nurses Act 1991*" in s 45(7)(a) replaced with "a midwife within the meaning of the *Nurses and Midwives Act 1991*". Amended 16/6/2010 — inserting new definitions of "authorised professional", "medical practitioner" and "medical student" in s 45(7). Amended 20/5/2014 to omit s 45(2). Amended 8/1/2018 — inserting new definition of "medical student".

Crimes Act 1900 (NSW)					
Section	**Offence**		**Time period**	**Max penalty**	**SNPP**
			21/2/1988–16/3/1991	8 yrs	
		Person under 16 yrs	14/7/1981–16/3/1991	10 yrs	
61D(1A) (rep)	Sexual intercourse without consent, person under 16 yrs and under authority		23/3/1986–16/3/1991	12 yrs	
61D(1B) (rep)	Sexual intercourse without consent, in company	Person over 16 yrs	21/2/1988–16/3/1991	10 yrs	
		Person under 16 yrs	21/2/1988–16/3/1991	12 yrs	
61D(1C) (rep)	Sexual intercourse without consent, in company, person under 16 yrs and under authority		21/2/1988–16/3/1991	14 yrs	
61E(1) (rep)	Indecent assault	Person over 16 yrs	14/7/1981–16/3/1991	4 yrs	
		Person under 16 yrs	14/7/1981–22/3/1986	6 yrs	
61E(1A) (rep)	Indecent assault where person under 16 yrs and under authority		23/3/1986–16/3/1991	6 yrs	
61E(1B) (rep)	Indecent assault in company		21/2/1988–16/3/1991	6 yrs	
61E(1C) (rep)	Indecent assault where person under 16 and under authority and in company		21/2/1988–16/3/1991	8 yrs	
61E(2) (rep)	Act of indecency or incite act of indecency with person under 16 yrs		14/7/1981–16/3/1991	2 yrs	
61E(2A) (rep)	Act of indecency or incite act of indecency with person under 16 yrs and under authority		23/3/1986–16/3/1991	4 yrs	
61F (rep)	Attempt offence under ss 61B, 61C, 61D, or 61E		14/7/1981–16/3/1991	same as principal offence	
61I	Sexual assault		17/3/1991–31/1/2003	14 yrs	
			1/2/2003–present	14 yrs	7 yrs
61J(1)	Aggravated sexual assault[2]		17/3/1991–31/1/2003	20 yrs	
			1/2/2003–present	20 yrs	10 yrs
61JA(1)	Aggravated sexual assault in company[3]		1/10/2001–31/1/2003	Life	
			1/2/2003–present	Life	15 yrs
61K	Assault with intent to have sexual intercourse[4]		17/3/1991–present	20 yrs	
61KC	Sexual touching[5]		1/12/2018–present	5 yrs	

2 Amended 15/2/2008 — wording of circumstance of aggravation in s 61J(2) amended from "maliciously" to "intentionally or recklessly". Amended 1/12/2008 — wording in s 61J(2)(g) amended from "serious intellectual disability" to "cognitive impairment". Amended 1/1/2009 — inserted new circumstances of aggravation in s 61J(2)(h) and (i); inserted s 61J(3) defining "building". Amended 22/2/2010 — wording of s 61J(3) amended. Amended 1/6/2022 — wording in s 61J(2) amended from "alleged offender" to "accused person"; wording amended from "alleged victim" to "complainant".

3 Amended 15/2/2008 — wording of circumstance of aggravation in s 61JA(2) amended from "maliciously" to "intentionally or recklessly". Amended 1/6/2022 — wording in s 61JA(1)(c) amended from "alleged offender" to "accused person"; wording amended from "alleged victim" to "complainant".

4 Amended 15/2/2008 — wording amended from "maliciously" to "intentionally or recklessly".

5 Amended 1/6/2022 — wording amended from "alleged offender" to "accused person"; wording amended from "alleged victim" to "complainant".

Crimes Act 1900 (NSW)					
Section	**Offence**		**Time period**	**Max penalty**	**SNPP**
61KD	Aggravated sexual touching[6]		1/12/2018–present	7 yrs	5 yrs
61KE	Sexual act[7]		1/12/2018–present	18 mths	
61 KF	Aggravated sexual act[8]		1/12/2018–present	3 yrs	
61L (rep)	Indecent assault		17/3/1991–30/11/2018	5 yrs	
61M(1) (rep)	Aggravated indecent assault[9]		17/3/1991–31/1/2003	7 yrs	
			1/2/2003–30/11/2018	7 yrs	5 yrs
61M(2) (rep)	Aggravated indecent assault	Person under 16 yrs	1/1/2009–30/11/2018	10 yrs	8 yrs
		Person under 10 yrs	17/3/1991–31/1/2003	10 yrs	
			1/2/2003–31/12/2007	10 yrs	5 yrs
			1/1/2008–31/12/2008	10 yrs	8 yrs
61N (rep)	Act of indecency	Person under 16 yrs[10]	17/3/1991–30/11/2018	2 yrs[11]	
		Person 16 yrs or over	1/7/1995–30/11/2018	18 mths	
61O(1) (rep)	Aggravated act of indecency, person under 16 yrs[12]		17/3/1991–30/11/2018	5 yrs	
61O(1A) (rep)	Aggravated act of indecency, person 16 yrs or over[13]		1/7/1995–30/11/2018	3 yrs	
61O(2) (rep)	Aggravated act of indecency, person under 10 yrs[14]		17/3/1991–30/11/2018	7 yrs	
61O(2A) (rep)	Aggravated act of indecency, person under 16 yrs, knowing it to be filmed for producing child pornography/child abuse material[15]		1/1/2009–30/11/2018	10 yrs	
61P (rep)	Attempt to commit offence under ss 61I–61O[16]		17/3/1991–30/11/2018	same as substantive offence in ss 61I–61O	
63 (rep)	Rape[17]		31/10/1900–13/4/1955	Death	
			14/4/1955–13/7/1981	Life	

6 ibid.
7 ibid.
8 ibid.
9 Amended 1/12/2008 — wording in s 61J(2)(g) amended from "serious intellectual disability" to "cognitive impairment". Amended 1/1/2009 — age changed from 10 yrs to 16 yrs; s 61M(3)(b) omitted.
10 Amended 3/5/1992 — wording amended.
11 Amended 1/7/1995 — s 61N substituted with s 61N(1)–(2).
12 Wording amended 1/9/1999. Wording in s 61O(3) amended 1/12/2008 from "serious intellectual disability" to "cognitive impairment".
13 Wording in s 61O(3) amended 1/12/2008 from "serious intellectual disability" to "cognitive impairment".
14 Wording amended 1/9/1999.
15 Section 61O(4) inserted 1/1/2009, defining "child pornography" and meaning of an act of indecency being "filmed" for the purposes of s 61O(2A). Wording amended 17/9/2010 from "pornography" to "abuse material".
16 Expanded 1/10/2001 to include attempt to commit s 61JA offence.
17 Amended 14/7/1981 to "Common law offences of rape and attempted rape abolished". Renumbered 2/7/2018 as s 80AD.

Crimes Act 1900 (NSW)				
Section	**Offence**	**Time period**	**Max penalty**	**SNPP**
65 (rep)	Assault with intent to rape	31/10/1900–13/7/1981	14 yrs	
65A(2) (rep)	Sexual intercourse procured by non-violent threats	21/2/1988–31/12/2007	6 yrs	
66 (rep)	Carnal knowledge by false pretence or representation	31/10/1900–12/6/2003	14 yrs	
66A(1)	Sexual intercourse, child under 10 yrs	29/6/2015–present	Life	15 yrs
66A(1) (rep)	Sexual intercourse, child under 10 yrs	1/1/2009–28/6/2015	25 yrs	15 yrs
66A(2) (rep)	Aggravated sexual intercourse, child under 10 yrs	1/1/2009–28/6/2015	Life	15 yrs
66A (rep)	Sexual intercourse, child under 10 yrs	23/3/1986–31/1/2003	20 yrs	
		1/2/2003–31/12/2008	25 yrs	15 yrs
66B	Attempt, or assault with intent, to have sexual intercourse with child under 10 yrs[18]	23/3/1986–31/1/2003	20 yrs	
		1/2/2003–28/6/2015	25 yrs	
		29/6/2015–present	25 yrs	10 yrs
66C(1)	Sexual intercourse, child 10–14 yrs[19]	13/6/2003–28/6/2015	16 yrs	
		29/6/2015–present	16 yrs	7 yrs
66C(1) (rep)	Sexual intercourse, child 10–16 yrs	23/3/1986–12/6/2003	8 yrs	
66C(2)	Aggravated sexual intercourse, child 10–14 yrs[20]	13/6/2003–28/6/2015	20 yrs	
		29/6/2015–present	20 yrs	9 yrs
66C(2) (rep)	Sexual intercourse, child 10–16 yrs by person in authority	23/3/1986–12/6/2003	10 yrs	
66C(3)	Sexual intercourse, child 14–16 yrs[21]	13/6/2003–present	10 yrs	
66C(4)	Aggravated sexual intercourse, child 14–16 yrs[22]	13/6/2003–28/6/2015	12 yrs	
		29/6/2015–present	12 yrs	5 yrs
66D	Assault with intent to commit s 66C offence[23] — Attempt assault	23/3/1986–30/11/2018	same as substantive offence in s 66C	
	Assault	23/3/1986–present		
66DA	Sexual touching, child under 10 yrs	1/12/2018–present	16 yrs	8 yrs
66DB	Sexual touching, child 10–16 yrs	1/12/2018–present	10 yrs	
66DC	Sexual act, child under 10 yrs	1/12/2018–present	7 yrs	
66DD	Sexual act, child 10–16 yrs	1/12/2018–present	2 yrs	

18 Amended 1/12/2018 — wording amended from "another person" to "a child"; wording amended from "any such person" to "a child who is under the age of 10 years".

19 Amended 15/2/2008 — wording of circumstance of aggravation in s 66C(5) amended from "maliciously" to "intentionally or recklessly". Amended 1/12/2008 — wording in s 66C(5) amended from "serious intellectual disability" to "cognitive impairment". Amended 1/1/2009 — inserted s 66C(5)(h) new circumstance of aggravation. Amended 19/5/2009 — inserted new s 66C(5)(i) new circumstance of aggravation. Amended 1/12/2018 — wording in s 66C(1)–(4) amended from "another person" to "a child". Amended 1/6/2022 — wording in s 66C(5) amended from "alleged offender" to "accused person"; wording amended from "alleged victim" to "complainant".

20 ibid.

21 ibid.

22 ibid.

23 Amended 1/12/2018 — substituted with new s 66D offence removing the "attempt" element.

Crimes Act 1900 (NSW)					
Section	**Offence**		**Time period**	**Max penalty**	**SNPP**
66DE	Aggravated sexual act, child 10–16 yrs[24]		1/12/2018–present	5 yrs	
66DF	Sexual act for production of child abuse material, child under 16		1/12/2018–present	10 yrs	
66EA(1)	Persistent sexual abuse of a child[25]		15/1/1999–30/11/2018	25 yrs	
			1/12/2018–present	Life	
66EB(2)	Produce child for unlawful sexual activity[26]	Child under 14 yrs	18/1/2008–28/6/2015	15 yrs	
			29/6/2015–present	15 yrs	6 yrs
		Child under 16 yrs	18/1/2008–28/6/2015	12 yrs	
			29/6/2015–present	12 yrs	5 yrs
66EB(2A)	Meet child following grooming	Child under 14 yrs	1/1/2009–28/6/2015	15 yrs	
			29/6/2015–present	15 yrs	6 yrs
		Child 14–16 yrs	1/1/2009–28/6/2015	12 yrs	
			29/6/2015–present	12 yrs	5 yrs
66EB(3)	Groom child for unlawful sexual activity[27]	Child under 14 yrs	18/1/2008–28/6/2015	12 yrs	
			29/6/2015–present	12 yrs	5 yrs
		Child 14–16 yrs	18/1/2008–28/6/2015	10 yrs	
			29/6/2015–present	10 yrs	4 yrs
66EC	Groom person for unlawful sexual activity with child under the person's authority	Child under 16 yrs	1/12/2018–present	6 yrs	
		Child 14–16 yrs	1/12/2018–present	5 yrs	
66F(2)	Sexual intercourse with person with cognitive impairment by person responsible for care[28]		21/2/1988–present	10 yrs	
66F(3)	Sexual intercourse with person with cognitive impairment, taking advantage of impairment[29]		1/12/2008–present	8 yrs	
66F(3) (rep)	Sexual intercourse with person with intellectual disability, taking advantage of vulnerability to sexual exploitation		21/2/1988–30/11/2008	8 yrs	
66F(4) (rep)	Attempt to commit offence under s 66F[30]		21/2/1988–30/11/2018	same as substantive offence	
67 (rep)	Carnally know girl under 10 yrs		31/10/1900–13/4/1955	Death	
			14/4/1955–22/3/1986	Life	
68 (rep)	Attempt to carnally know girl under 10 yrs		31/10/1900–22/3/1986	14 yrs	

24 Amended 1/6/2022 — wording amended from "alleged offender" to "accused person"; wording amended from "alleged victim" to "complainant".

25 Amended 1/10/2001 — wording in s 66EA(12) amended to include s 61JA in definition of "sexual offence". Amended 1/12/2018 — substituted with similar but new offence.

26 Amended 1/1/2009 — s 66EB(1) expanded to include "15A"; wording of s 66EB(6), (8) amended to include s 66EB(2A), (2B).

27 Amended 1/12/2018 — s 66EB(3)(a) amended to insert "or with any financial or other material benefit".

28 Amended 1/12/2008 — wording amended from "serious intellectual disability" to "cognitive impairment". Amended 24/9/2012 — wording of defence in s 66F(7) changed from "an established de facto partner" to "the de facto partner". Amended 1/12/2018 — substituted offence inserting subsections including; s 66F(5) regarding consent not being a defence for sexual intercourse; s 66F(7) inserting defences to s 66F(2) or (3) charges; s 66F(8) requiring Attorney General's approval for prosecution of s 66F(2) or (3) charges.

29 ibid.

30 Amended 1/12/2008 — substituted with similar but new offence.

Crimes Act 1900 (NSW)					
Section	**Offence**		**Time period**	**Max penalty**	**SNPP**
71 (rep)	Carnally know girl between 10–16 yrs		1/10/1924–22/3/1986	10 yrs	
72 (rep)	Attempt, or assault with intent to carnally know girl between 10–16 yrs		1/10/1924–22/3/1986	5 yrs	
72A (rep)	Carnal knowledge of idiot or imbecile		1/10/1924–20/2/1988	5 yrs	
73(1)	Sexual intercourse with child 16 yrs under special care[31]		13/6/2003–present	8 yrs	
73(2)	Sexual intercourse with child 17 yrs under special care[32]		13/6/2003–present	4 yrs	
73 (rep)	Carnal knowledge by teacher, father, stepfather with girl 10 yrs or over and under 17 yrs who is pupil, daughter, stepdaughter[33]		1/10/1924–22/3/1986 23/3/1986–31/8/1987 1/9/1987–12/6/2003	14 yrs 8 yrs 8 yrs	
73A	Sexual touching, young person 16–18 yrs under special care[34]	Child 16 yrs	1/12/2018–present	4 yrs	
		Child 17 yrs	1/12/2018–present	2 yrs	
74 (rep)	Attempted carnal knowledge by teacher, father, stepfather with girl 10–16 yrs who is pupil, daughter, stepdaughter[35]		1/10/1924–22/3/1986 23/3/1986–12/6/2003	7 yrs 8 yrs	
76 (rep)	Indecent assault, female under 16 yrs		1/10/1924–1/8/1974 2/8/1974–13/7/1981	5 yrs 6 yrs	
76A (rep)	Commit act of indecency, girl under 16 yrs		2/8/1974–13/7/1981	2 yrs	
78A(1)	Incest/sexual intercourse with close family member who is of or above 16 yrs[36]		13/6/2003–present	8 yrs	
78A (rep)	Incest/carnal knowledge of child, sibling, parent, grandparent[37]	Victim any age	1/10/1924–22/3/1986	7 yrs	
		Female victim of or above 16 yrs	23/3/1986–12/6/2003	7 yrs	
78B	Attempt offence under s 78A[38]		1/10/1924–present	2 yrs	
78H (rep)	Homosexual intercourse, male under 10 yrs		8/6/1984–11/1/1990 12/1/1990–31/1/2003	Life 25 yrs	

31 Amended 24/9/2012 — wording of special care in s 73(3)(a) amended. Amended 21/3/2018 — inserted s 73(3)(b) to expand the meaning of "under special care"; inserted definition of "member of the teaching staff" in s 73(6). Amended 1/12/2018 — wording in s 73(1)–(2) amended from "another person" to "a young person"; wording in s 73(3)(a) amended from "foster parent" to "authorised carer". Amended 23/6/2020 — inserted s 73(3)(b)–(b1) and (f)–(g) to expand the meaning of "under special care". Amended 1/6/2022 — wording of s 73(3) amended from "the victim" to "the complainant"; "the offender" to "the accused person".

32 ibid.

33 Amended 23/3/1986 — wording amended from "of or above the age of ten years, and under the age of seventeen years" to "of the age of 16 years". Amended 28/5/1987 — wording amended from "of the age of 16 years" to "of or above the age of 16 years, and under the age of 17 years". Substituted with similar but new offence 13/6/2003.

34 Amended 23/6/2020 — inserted s 73A(3)(b)–(b1) and (f)–(g) to expand the meaning of "under special care". Amended 1/6/2022 — wording of s 73A(3) amended from "the victim" to "the complainant"; "the offender" to "the accused person".

35 Amended 23/3/1986 — wording amended from "of or above the age of ten years, and under the age of seventeen years" to "of the age of 16 years". Amended 28/5/1987 — wording amended from "of the age of 16 years" to "of or above the age of 16 years, and under the age of 17 years.

36 Amended 23/6/2020 — inserted exception to offence under s 78A(1) in s 78A(1A).

37 Amended 23/3/1986 — wording amended to insert before "his mother", "a female of or above the age of 16 years who is".

38 Amended 13/6/2003 — wording amended from "whosoever, being a male" to "any person who".

Crimes Act 1900 (NSW)					
Section	**Offence**		**Time period**	**Max penalty**	**SNPP**
78I (rep)	Attempt or assault with intent to have homosexual intercourse, male under 10 yrs		8/6/1984–31/1/2003	14 yrs	
78K (rep)	Homosexual intercourse, male between 10 and 18 yrs		8/6/1984–12/6/2003	10 yrs	
78L (rep)	Attempt, or assault male 10–18 yrs with intention to have homosexual intercourse		8/6/1984–12/6/2003	5 yrs	
78M (rep)	Homosexual intercourse with idiot or imbecile		8/6/1984–20/2/1988	5 yrs	
78N (rep)	Homosexual intercourse by a teacher, father, stepfather, with male 10–18 yrs being pupil, son or stepson		8/6/1984–12/6/2003	14 yrs	
78O (rep)	Teacher, father, stepfather attempt, or assault pupil, etc, between 10 and 18 yrs with intention to have homosexual intercourse		8/6/1984–12/6/2003	7 yrs	
78Q(1) (rep)	Male commit act of gross indecency with male under 18 yrs[39]		8/6/1984–12/6/2003	2 yrs	
78Q(2) (rep)	Solicit, procure, incite or advise male under 18 yrs to commit act of gross indecency[40]		8/6/1984–12/6/2003	2 yrs	
79 (rep)	Buggery		1/10/1924–7/6/1984	14 yrs	
80 (rep)	Attempted buggery[41]		1/10/1924–7/6/1984	5 yrs	
80A(2)	Sexual assault by forced self-manipulation[42]	Victim under 10 yrs	17/3/1991–23/3/2004	20 yrs	
		Victim over 10 yrs	17/3/1991–23/3/2004	14 yrs	
		Age not specified	24/3/2004–present	14 yrs	
80A(2A)	Aggravated sexual assault by forced self-manipulation[43]		24/3/2004–present	20 yrs	
80D(1)	Causing sexual servitude		22/3/2002–present	15 yrs	
80D(2)	Aggravated causing sexual servitude, victim under 18 yrs		22/3/2002–31/12/2008 1/1/2009–present	19 yrs 20 yrs	
80E(2)	Aggravated conduct of business involving sexual servitude, victim under 18 yrs		22/3/2002–present	19 yrs	
80G	Incite to commit sexual offence[44]		1/1/2009–present	same as substantive offence	
81 (rep)	Indecent assault upon male		31/10/1900–7/6/1984	5 yrs	
81A (rep)	Act of indecency by male with male		14/4/1955–7/6/1984	2 yrs	
81B(1) (rep)	Solicit or entice offence under ss 79, 81 or 81A		14/4/1955–7/6/1984	1 yr	

39 Amended 3/5/1992 — wording amended to insert "or towards" after "with".

40 Amended 3/5/1992 — wording amended to insert "or towards" after "with".

41 Amended 6/11/1951 — wording amended to insert "with or without the consent of such person".

42 Amended 19/6/1996 — insert "(including a surgically constructed vagina)" to the wording of s 80A(1). Amended 24/3/2004 — insert definition of "circumstances of aggravation". Amended 15/2/2008 — wording of s 80A(1) amended from "maliciously" to "intentionally or recklessly". Amended 1/12/2008 — wording in s 80A(1)(g) amended from "serious intellectual disability" to "cognitive impairment". Amended 1/6/2022 — wording of s 80A(1) amended from "alleged offender" to "accused person"; wording amended from "alleged victim" to "complainant"; omit "(including a surgically constructed vagina)".

43 Amended 15/2/2008 — wording of s 80A(1) amended from "maliciously" to "intentionally or recklessly". Amended 1/12/2008 — wording in s 80A(1)(g) amended from "serious intellectual disability" to "cognitive impairment". Amended 1/6/2022 — wording of s 80A(1) amended from "alleged offender" to "accused person"; wording amended from "alleged victim" to "complainant"; omit "(including a surgically constructed vagina)".

44 Amended 1/12/2018 — amended s 80G(5) regarding offences that do not constitute a s 80G(1) offence when incited.

Crimes Act 1900 (NSW)					
Section	**Offence**		**Time period**	**Max penalty**	**SNPP**
85A(1) (now s 86)	Kidnapping[45]		14/12/2001–20/12/2001	14 yrs	
85A(2) (now s 86)	Aggravated kidnapping[46]		14/12/2001–20/12/2001	20 yrs	
85A(3) (now s 86)	Specially aggravated kidnapping[47]		14/12/2001–20/12/2001	25 yrs	
86 (rep)	Abduct woman against will		31/10/1900–20/12/2001	14 yrs	
86(1)	Kidnapping[48]		21/12/2001–present	14 yrs	
86(2)	Aggravated kidnapping		21/12/2001–present	20 yrs	
86(3)	Specially aggravated kidnapping		21/12/2001–present	25 yrs	
87 (rep)	Abduct woman under 21 yrs against the will of parent etc		31/10/1900–20/12/2001	7 yrs	
87(1)–(2)	Abduct child under 12 yrs		21/12/2001–present	10 yrs	
90 (rep)	Abduct girl under 16 yrs		31/10/1900–21/12/2001	3 yrs	
90A (rep)	Kidnapping	Generally	15/12/1961–13/12/2001	20 yrs	
		If person liberated w/o substantial injury	15/12/1961–13/12/2001	14 yrs	
91 (rep)	Take child with intent to steal etc		31/10/1900–21/12/2001	10 yrs	
91A	Procure for prostitution[49]		1/10/1924–present	7 yrs	
91B	Procure person for prostitution by threat, drug etc		1/10/1924–present	10 yrs	
91D(1)	Promote/engage in child prostitution	Child 14 yrs or over	12/2/1989–present	10 yrs	
		Child under 14 yrs	12/2/1989–28/6/2015	14 yrs	
			29/6/2015–present	14 yrs	6 yrs
91E(1)	Obtain benefit from child prostitution[50]	Child 14 yrs or over	12/2/1989–present	10 yrs	
		Child under 14 yrs	1/1/2009–28/6/2015	14 yrs	
			29/6/2015–present	14 yrs	6 yrs
91F(1)	Premises used for child prostitution		12/2/1989–present	7 yrs	
91G(1) (rep)	Child used for pornographic purposes[51]	Child under 14 yrs	12/2/1989–31/12/2004	7 yrs	
		Child 14 yrs or over	12/2/1989–31/12/2004	5 yrs	

45 Renumbered 21/12/2001 from s 85A to s 86.
46 Renumbered 21/12/2001 from s 85A to s 86.
47 Renumbered 21/12/2001 from s 85A to s 86.
48 Amended 24/9/2012 — inserted s 86(1)(1a) "with the intention of committing a serious indictable offence, or" into the definition of the basic offence.
49 Amended 2/8/1974 — wording amended from "female under the age of twenty-one years, whether with her consent or not, with intent that some other person may have carnal knowledge of such female" to "person, whether with that person's consent or not, for purposes of prostitution". Amended 1/8/1979 — insert "(not being a prostitute)".
50 Amended 1/1/2009 — inserted "or, if the act of child prostitution involves a child under the age of 14 years, to imprisonment for 14 years" after "10 years" in s 91E(1); inserted s 91E(3).
51 Amended 25/1/1998 — wording amended in from "employs" to "uses"; amended wording in s 91G(2).

Crimes Act 1900 (NSW)					
Section	**Offence**		**Time period**	**Max penalty**	**SNPP**
91G(1)	Child used for production of child abuse material, child under 14 yrs[52]		1/1/2005–28/6/2015	14 yrs	
			29/6/2015–present	14 yrs	6 yrs
91G(2)	Child used for production of child abuse material, child 14 yrs or over[53]		1/1/2005–present	10 yrs	
91G(3)	Child used for production of child abuse material — circumstances of aggravation[54]		1/1/2022–present	20 yrs	
91H(2)	Produce, disseminate, possess child abuse material[55]		17/9/2010–present	10 yrs	
91H(2) (rep)	Possess, produce, disseminate child pornography		1/1/2009–16/9/2010	10 yrs	
91H(2) (rep)	Produce, disseminate child pornography		1/1/2005–31/12/2008	10 yrs	
91H(3) (rep)	Possess child pornography		1/1/2005–31/12/2008	5 yrs	
91HAA	Administer digital platform used to deal with child abuse material		1/1/2022–present	14 yrs	
91HAB	Encourage use of a digital platform to deal with child abuse material		1/1/2022–present	14 yrs	
91HAC	Provide information about avoiding detection		1/1/2022–present	14 yrs	
91P	Record intimate image without consent		25/8/2017–present	3 yrs	
91Q	Distribute intimate image without consent		25/8/2017–present	3 yrs	
91R	Threaten to record or distribute intimate image		25/8/2017–present	3 yrs	
93AC	Child forced marriage		1/1/2022–present	9 yrs	
316(1)[56]	Conceal serious indictable offence where maximum penalty for the concealed offence is:	General	25/11/1990–27/11/2018	2 yrs	
		Not more than 10 yrs	28/11/2018–present	2 yrs	
		More than 10 yrs but not more than 20 yrs	28/11/2018–present	3 yrs	
		More than 20 yrs	28/11/2018–present	5 yrs	
316(2)[57]	Solicit, agree or accept benefit to conceal serious indictable offence under s 316(1), where maximum penalty for the concealed offence is:	General	25/11/1990–27/11/2018	5 yrs	
		Not more than 10 yrs	28/11/2018–present	5 yrs	
		More than 10 yrs but not more than 20 yrs	28/11/2018–present	6 yrs	
		More than 20 yrs	28/11/2018–present	7 yrs	
316A(1)[58]	Conceal child abuse offence, where maximum penalty for the concealed offence is:	Generally	31/8/2018–27/11/2018	2 yrs	
		Less than 5 yrs	28/11/2018–present	2 yrs	
		5 yrs or more	28/11/2018–present	5 yrs	

52 Amended 17/9/2010 — wording amended from "for pornographic purposes" to "for the production of child abuse material"; s 91G(3) omitted. Amended 1/12/2018 — inserted s 91G(6) requiring approval of Director of Public Prosecutions to institute proceedings for a s 91G offence against a child or young person.

53 ibid.

54 ibid.

55 Amended 1/12/2018 — inserted s 91H(3) requiring approval of Director of Public Prosecutions to institute proceedings for a s 91H offence against a child or young person.

56 Amended 30/3/1998 to insert s 316(4)–(5). Amended 30/6/1998 to insert new s 316(5). Amended 1/1/2000 to replace "serious offence" with "serious indictable offence". Amended 31/8/2018 — wording in s 316(4), insert s 316(6). Amended 28/9/2020 to insert s 316(1A)-(1B), new definitions in s 316(6). Amended 22/11/2019 to become a prescribed sexual offence.

57 ibid.

58 Amended 28/11/2018 to insert s 316A(2)(g), new definitions in s 316A(9).

Crimes Act 1900 (NSW)					
Section	**Offence**		**Time period**	**Max penalty**	**SNPP**
316A(4)[59]	Solicit, agree or accept benefit to conceal child abuse offence under s 316A(1)	Generally	31/8/2018–27/11/2018	5 yrs	
		Where max penalty for child abuse offence is < 5 yrs	28/11/2018–present	5 yrs	
		Where max penalty for child abuse offence is >/= 5 yrs	28/11/2018–present	7 yrs	
		With prior conviction	23/6/2020–present	7 yrs	2 yrs

Offences under the *Criminal Code Act 1995* (Cth)

Note: references to prior convictions mean prior convictions for a child abuse offence. Minimum penalties found in *Crimes Act 1914* (Cth) ss 16AAA–16AAB.

Criminal Code Act 1995 (Cth)					
Section	**Offence**		**Time period**	**Penalty**	
				Max	**Min**
272.8(1)–(2)	Sexual intercourse with child outside Australia		15/4/2010–22/6/2020	20 yrs	
			23/6/2020–present	25 yrs	6 yrs
272.9(1)–(2)	Sexual activity (other than sexual intercourse) with child outside Australia		15/4/2010–22/6/2020	15 yrs	
			23/6/2020–present	20 yrs	5 yrs
272.10(1)	Aggravated sexual intercourse or other sexual activity with child outside Australia[60]		15/4/2010–22/6/2020	25 yrs	
			23/6/2020–present	Life	7 yrs
272.11(1)	Persistent sexual abuse of child outside Australia[61]		15/4/2010–22/6/2020	25 yrs	
			23/6/2020–present	30 yrs	7 yrs
272.12(1)–(2)	Sexual intercourse with young person outside Australia	General	15/4/2010–present	10 yrs	
		With prior conviction	23/6/2020–present	10 yrs	3 yrs
272.13(1)–(2)	Sexual activity (other than sexual intercourse) with young person outside Australia	General	15/4/2010–present	7 yrs	
		With prior conviction	23/6/2020–present	7 yrs	2 yrs
272.14(1)	Procure child to engage in sexual activity outside Australia	General	15/4/2010–present	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
272.15(1)	Groom child to engage in sexual activity outside Australia	General	15/4/2010–22/6/2020	12 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
272.15A(1)	Groom person to make it easier to engage in sexual activity with child outside Australia	General	23/6/2020–present	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
272.18(1)	Benefit from child sex offence outside Australia		15/4/2010–22/6/2020	20 yrs	
			23/6/2020–present	25 yrs	6 yrs

59 ibid.

60 Amended 23/06/2020 — wording of heading amended; s 272.10(1)(b) substituted.

61 Amended 21/9/2019 — reduced the required instances of sexual abuse from 3 or more occasions to 2 or more occasions.

Criminal Code Act 1995 (Cth)					
Section	**Offence**		**Time period**	**Penalty**	
				Max	**Min**
272.19	Encourage child sex offence outside Australia		15/4/2010–22/6/2020	20 yrs	
			23/6/2020–present	25 yrs	6 yrs
272.20(1)	Preparing for or planning offence against ss 272.8–272.11, 272.18	General	15/4/2010–present	10 yrs	
		With prior conviction	23/6/2020–present	10 yrs	3 yrs
272.20(2)	Preparing for or planning offence against ss 272.12–272.13	General	15/4/2010–present	5 yrs	
		With prior conviction	23/6/2020–present	5 yrs	1 yr
273.5(1) (rep)	Possess, control, produce, distribute, or obtain child pornography material outside Australia		15/4/2010–21/9/2019	15 yrs	
273.6(1)	Possess, control, produce, distribute, or obtain child abuse material outside Australia	General	15/4/2010–present	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
273.7	Aggravated s 273.6 offence		15/4/2010–22/6/2020	20 yrs	
			23/6/2020–present	30 yrs	7 yrs
273A.1	Possess child-like sex dolls	General	21/9/2019–present	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
273B.4	Fail to protect child at risk of child sexual abuse offence		20/3/2020–present	5 yrs	
273B.5(1)	Fail to report child sexual abuse offence based on reasonable abuse		20/3/2020–present	3 yrs	
273B.5(2)	Fail to report child sexual abuse offence based on reasonable suspicion		20/3/2020–present	2 yrs	
471.16 (rep)	Use postal or similar service for child pornography		15/4/2010–21/9/2019	15 yrs	
471.17 (rep)	Possess, control, produce, supply or obtain child pornography for use via postal or similar service		15/4/2010–21/9/2019	15 yrs	
471.19	Use postal or similar service for child abuse material	General	15/4/2010–present	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
471.20	Possess, control, produce, supply or obtain child abuse material for use via postal or similar service	General	15/4/2010–present	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
471.22	Aggravated offence — offence involving conduct on 3 or more occasions and 2 or more people		15/4/2010–22/6/2020	25 yrs	
			23/6/2020–present	30 yrs	7 yrs
471.24	Use postal or similar service to procure persons under 16 yrs	General	15/4/2010–present	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
471.25(1)–(2)	Use postal or similar service to groom persons under 16 yrs for sexual activity with sender or another person over 18 yrs	General	15/4/2010–22/6/2020	12 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
471.25(3)	Use postal or similar service to groom persons under 16 yrs for sexual activity with another person to take place in presence of sender or another person over 18 yrs	General	15/4/2010–22/6/2020	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs

Criminal Code Act 1995 (Cth)					
Section	**Offence**		**Time period**	**Penalty**	
				Max	**Min**
471.25A	Use postal or similar service to groom another person to make it easier to procure persons under 16 yrs	General	23/6/2020–present	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
471.26	Use postal or similar service to send indecent material to person under 16 yrs	General	15/4/2010–22/6/2020	7 yrs	
		With prior conviction	23/6/2020–present	10 yrs	3 yrs
474.19 (rep)	Use carriage service for child pornography[62]		1/3/2005–14/4/2010 15/4/2010–20/9/2019	10 yrs 15 yrs	
474.20 (rep)	Possess, control, produce, supply or obtain child pornography for use through a carriage service		1/3/2005–14/4/2010 15/4/2010–20/9/2019	10 yrs 15 yrs	
474.22	Use carriage service for child abuse material[63]	General	1/3/2005–14/4/2010 15/4/2010–present	10 yrs 15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
474.22A	Possess or control child abuse material obtained or accessed using a carriage service	General	21/9/2019–present	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
474.23	Possess, control, produce, supply or obtain child abuse material for use through a carriage service	General	1/3/2005–14/4/2010 15/4/2010–present	10 yrs 15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
474.23A	Create, control, promote child abuse material to commit or facilitate offence against ss 474.22(1), 474.22A(1) or 474.23		23/6/2020–present	20 yrs	5 yrs
474.24A	Aggravated offence — offence involving conduct on 3 or more occasions and 2 or more people		15/4/2010–22/6/2020 23/6/2020–present	25 yrs 30 yrs	 7 yrs
474.25A	Use carriage service for sexual activity with person under 16 yrs		15/4/2010–22/6/2020 23/6/2020–present	15 yrs 20 yrs	 5 yrs
474.25B	Aggravated s 474.25A offence		15/4/2010–22/6/2020 23/6/2020–present	25 yrs 30 yrs	 7 yrs
474.25C	Use carriage service to prepare or plan to cause harm, engage in sexual activity or procure persons under 16 yrs to engage in sexual activity		23/6/2017–present	10 yrs	
474.26	Use carriage service to procure persons under 16 yrs	General	1/3/2005–present	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
474.27(1)–(2)	Use carriage service to groom person under 16 yrs to engage in sexual activity with the sender or another adult	General	1/3/2005–22/6/2020 23/6/2020–present	12 yrs 15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs

62 Amended 15/4/2010 — s 474.19(1)(a) substituted; s 474.19(2A) inserted. Amended 10/3/2016 — wording amended to "commits" instead of "is guilty of".

63 Amended 15/4/2010 — s 474.22(1)(a) substituted; s 474.22(2A) inserted. Amended 10/3/2016 — wording amended to "commits" instead of "is guilty of".

Criminal Code Act 1995 (Cth)					
Section	**Offence**		**Time period**	**Penalty**	
				Max	**Min**
474.27(3)	Use carriage service to groom person under 16 yrs to engage in sexual activity with another child in presence of the sender or another adult	General	1/3/2005–present	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
474.27AA	Use carriage service to groom another person to make it easier to procure persons under 16 yrs	General	23/6/2020–present	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
474.27A	Use carriage service to transmit indecent communication to person under 16 yrs	General	15/4/2010–22/6/2020 23/6/2020–present	7 yrs 10 yrs	
		With prior conviction	23/6/2020–present	10 yrs	3 yrs

Offences under the *Customs Act 1901* (Cth)

Customs Act 1901 (Cth)			
Section	**Offence**	**Time period**	**Max penalty**
233BAB	Import or export child pornography/child abuse material[64]	26/5/2000–present	10 yrs and/or 2,500 pu

[1-020] Sexual offences — alternative verdicts

Last reviewed: December 2024

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

64 Amended 15/12/2001 — wording in s 233BAB(5)(a), (6)(a) amended from "knowingly or recklessly" to "intentionally"; s 233BAB(5)(b), (6)(b) substituted; s 233BAB(5A), (5B), (6A), (6B) inserted. Amended 1/3/2004 — s 233BAB(3), (4) substituted. Amended 6/3/2015 — s 233BAB(7) substituted. Amended 10/3/2016 — wording amended to "commits" instead of "is guilty of". Amended 21/9/2019 — s 233BAB(4)(g) inserted; s 233BAB(1)(h) omit "child pornography or of"; repeal s 233BAB(3); insert expanded definition of "child abuse material" in s 233BAB(4)(c)–(f).

Table — sexual offences — alternative verdicts

Offence charged	Alternative verdict(s)	Empowering provision
Criminal Procedure Act 1986		
Any indictable offence	Attempt	s 162
Crimes Act 1900		
s 61I	s 66C(3) or (4)	s 80AB(2)
	s 66F	s 80AB(5)
	s 78A or s 78B	s 80AB(4)
s 61J	s 61I	s 80AB(1)
	s 66A or s 66C	s 80AB(3)
	s 66F	s 80AB(5)
	s 78A or s 78B	s 80AB(4)
s 61JA	s 61I or s 61J	s 80AB(1A)
	s 66A or s 66C	s 80AB(3)
	s 66F	s 80AB(5)
s 61KD	s 61KC	s 80AB(1)
s 61KF	s 61KE	s 80AB(1)
s 61M (rep)	s 61L (rep)	s 61Q(1) (rep)
s 61O (rep)	s 61N (rep)	s 61Q(1) (rep)
s 66A	s 66B, s 66C(1), (2), (3), (4), s 66D, s 66DA or s 66DB	s 80AB(7)
s 66B	s 66DA or s 66DB	s 80AB(11)
s 66C	s 66D	s 80AB(10)
s 66C(1)	s 66C(3) or (4)	s 80AB(9)
s 66C(2)	s 66C(1) or (3)	s 80AB(8)
	s 66C(3) or (4)	s 80AB(9)
s 66C(4)	s 66C(1) or (3)	s 80AB(8)
s 66D	s 66DA or s 66DB	s 80AB(11)
s 66DF	s 66DC or s 66DD	s 80AB(6)
s 80D(2)	s 80D(1)	s 80F
s 80E(2)	s 80E(1)	s 80F
***Criminal Code* (Cth)**		
s 471.22(1)	471.19 or 471.20	s 471.23
s 474.24A(1)	474.22, 474.22A or 474.23	s 474.24B

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* **Alternative verdicts and alternative counts** at **[2-200]**ff.

Further resources

- *Criminal Trial Courts Bench Book* at **[5-600]**ff **Sexual assault offences**.

[1-025] Sexual offences — brief legislative history

Last reviewed: December 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 the *Sentencing Bench Book*.

Crimes Legislation Amendment (Coercive Control) Act 2022

The *Crimes Legislation Amendment (Coercive Control) Act 2022* (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 s 54F(2)(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* created new child sexual assault offences in the *Crimes Act 1900* 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–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: Subdivs 3–4**	**New child specific offences: Subdivs 6–7**
Indecent assault: s 61L [5 years]	Sexual touching: s 61KC [5 years]	Sexual touching – child under 10: s 66DA [16 years; SNPP 8 years] Sexual touching – child 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), (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

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), (2) and (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 s 66A(3)(a)–(h)
- s 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 **[5-800]**.

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* at **[5-830]**.

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.

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.

[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).

Schedule 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* [1991] 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 s 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 **[5-200]**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] Introduction

Last reviewed: August 2026

The Research and Sentencing Division of the Judicial Commission of NSW publishes digests 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 digests below may also be accessed on JIRS.

The date refers to when the digest item was posted on JIRS for ease of reference. Click on "Digest" for each entry to see full digest on JIRS.

[6-005] Recent sexual assault cases

Last reviewed: August 2026

Evidence

- 16/12/2025 — Digest — evidence — presumption of *doli incapax* — child sex offences — applicant aged between 13 and 18 at time of alleged offences — limited evidence of applicant's contemporaneous character or maturity for one count (when applicant between 13 and 15) not sufficient to rebut presumption of *doli incapax* beyond reasonable doubt — observations on nature of evidence required to rebut presumption — conviction quashed and acquittal entered for one count — *BV v R* [2025] NSWCCA 217
- 11/12/2025 — Digest — evidence — *Criminal Procedure Act 1986*, s 293 (now s 294CB) — prohibition on admitting evidence of prior sexual experience/activity — evidence suggesting nine-year-old complainant had prior sexual experience or activities with others prior to alleged offences — statutory purpose of s 293 — meaning of "disclosed or implied in the Crown case" — CCA correct in finding age alone does not imply lack of sexual experience sufficient to engage s 293(6) exception — *WHS v The King* [2025] HCA 51
- 7/11/2025 — Digest — evidence — *Crimes Act 1900*, s 66EB(2) — procuring 14–16 year old for sexual activity — evidence of online dating application conversation where person purporting to be 15 incited s 66EB(2) offence — magistrate erred by excluding evidence pursuant to s 138 of *Evidence Act 1995* on basis incitement unlawful under *Crimes Prevention Act 1916*, s 2 — *Crimes Act*, s 80G(5) expressly precludes offence of inciting s 66EB offence — inciting s 66EB offence not a "contravention of an Australian law" under s 138 — *Director of Public Prosecutions (NSW) v Beeby* [2025] NSWSC 1307
- 30/9/2025 — Digest — *Criminal Procedure Act 1986*, s 294CB(3)–(4), (6) (previously s 293) — prior sexual experience evidence inadmissible (s 294CB(3)) with exceptions (s 294CB(4)) — right to cross-examine complainant where prosecution discloses prior sexual experience and unfair prejudice caused to accused (s 294CB(6)) — no miscarriage of justice from inability to cross-examine complainant under s 294CB(6) where applicant's failure to seek such cross-examination at trial an objectively rational forensic decision — observations about s 294CB — evidence engages s 294CB(6) even if not intended to be

led by prosecution or inadmissible under s 294CB(3) — decision of admissibility under s 294CB(3)–(4) must be sought in advance of cross-examination under s 294CB(6) — *Smith (a pseudonym) v R* [2025] NSWCCA 145

Sentencing

- 30/07/2026 — Digest — historical child sexual offending — totality — aggregate sentence partially accumulated on existing sentence — overall total effective non-parole period of 80.2% inferred judge failed to consider total effective non-parole period — youth — judge improperly confined consideration of offender′s youth to assessment of objective seriousness — impact of youth on moral culpability and other factors not considered — *AM v R* [2026] NSWCCA 110
- 21/07/2026 — Digest — *De Simoni* principle — *Crimes Act 1900*, s 66C(3) — sexual intercourse with person aged 14 or 15 — applicant gave methylamphetamine to victim during offending — proper to take drug supply into account when assessing objective seriousness (*Crimes (Sentencing Procedure) Act 1999*, s 21A(2)(cb)) — no breach of *De Simoni* principle — applicant not sentenced for aggravated offence (ss 66C(4), 66C(5)(g) (or s 38 offence) where offender knowingly takes advantage of intoxication — *Smith v R* [2026] NSWCCA 106
- 24/6/2026 — Digest — *Child Protection (Offenders Registration) Act 2000 (CPOR Act)*, ss 2B(1), 3C(1) — person "sentenced" for registrable offence to be entered on register — special verdict entered of acts proven but not criminally responsible and appellant conditionally released (*Mental Health and Cognitive Impairment Forensic Provisions Act*, ss 59(1)(b), 33(1)(c)) — registrable person order not erroneous — conditional release under s 33(1)(c) is a "sentence" — *KF v Director of Public Prosecutions (NSW)* [2026] NSWCCA 79
- 17/4/2026 — Digest — sentencing — giving reasons — judge made no finding as to extent of any reduction in moral culpability and any effect on general deterrence, an issue in dispute between the parties — finding could not be inferred — separate findings to be made concerning moral culpability where offender has, for example, a mental illness, and regarding weight to be given to factors such as general deterrence — *Taylor v R* [2026] NSWCCA 32
- 15/12/2025 — Digest — sentence appeals — five-judge bench — test to be applied to challenges to factual findings — *House v The King* governs test for appellate review of sentencing decisions — relevant error includes where sentencing judge "mistakes the facts", in the sense the finding was not "reasonably open", and the error was material — *R v O'Donoghue*(unrep, 22/7/1988, NSWCCA) should no longer be followed — *Hancock v R* [2025] NSWCCA 213
- 28/11/2025 — Digest — sentencing — Crown appeal — *Crimes Act 1900*, ss 61I, 37(1A) — sexual intercourse without consent and choking respectively, committed against wife — sentences, including community correction orders for choking offences, manifestly inadequate — not open to judge to find objective seriousness of choking offences in low range or below mid-range — factors to consider in assessing objective seriousness of s 37(1A) offence — sentencing for domestic violence discussed — *R v Sabbah* [2025] NSWCCA 203
- 20/8/2025 — Digest — sentencing — *Crimes Act 1900*, s 61J(1) — aggravated sexual assault — juvenile offender — sentence not manifestly excessive — judge did not fail to have proper

regard to applicant's deprived background, mental health issues or youth — open to judge to moderate application of youth sentencing principles given applicant's "adult like conduct" — "adult like conduct" discussed — *TH v R* [2025] NSWCCA 121

- 8/8/2025 — Digest — sentencing — *De La Rosa* [2010] NSWCCA 194 principles — mental health condition — judge erred in requiring "direct causal link" for *De La Rosa* principles to apply — correct test is whether a mental health condition "contributes to the commission of the offence in a material way" — *Lane v R* [2025] NSWCCA 113

Offences

- 24/12/2025 — Digest — offences — *Crimes Act 1900*, s 61J(1), (2)(a) — aggravated sexual assault — aggravating circumstance of recklessly inflict actual bodily harm (ABH) — meaning of inflict ABH "at the time of, or immediately before, or after, the commission of the offence" — Crown must prove infliction of ABH was within prescribed timescale — whether ABH inflicted within prescribed timescale depends on circumstances — state of mind of intentionally or recklessly inflicting the harm must be contemporaneous with infliction of harm relied upon — s 61J(2)(a) does not require ABH occur *as a result of* the sexual intercourse — *OR v R* [2025] NSWCCA 234

Procedure

- 9/3/2026 — Digest — procedure — trial counsel's advice — applicant did not give evidence at trial — counsel's advice that applicant not give evidence appropriate and proper — prospects of acquittal significantly reduced had he given evidence — counsel not required to explain all pros and cons — no miscarriage of justice — relevant principles to be applied — *AA v R* [2026] NSWCCA 10
- 19/12/2025 — Digest — procedure — evidence — *Criminal Procedure Act 1986*, s 21(2) — refusal to separate trials — where counts on indictment occurred on different nights against different complainants — judge erred finding evidence cross-admissible as transaction evidence to support single joint criminal enterprise — judge erred giving state of mind direction — severing indictment required — *Decision Restricted* [2025] NSWCCA 210
- 10/9/2025 — Digest — procedure — procedural irregularities during trial — prejudicial transcript provided to jury could have affected jury's reasoning to guilty verdict — directions did not remove prejudice — care must be taken when providing transcript of trial to jury — *Jury Act 1977*, s 53C — discharge of jury — juror accessed information outside court — judge's failure to discharge jury gave rise to substantial miscarriage of justice — new trial ordered — *Seo v R* [2025] NSWCCA 131

Appeals

- 10/11/2025 — Digest — *Criminal Appeal Act 1912*, ss 6, 8 — directed acquittal vs retrial — Criminal Code (Cth), s 474.27 — use carriage service to groom persons believed to be under 16 — Crown conceded judge misdirected jury as to belief element — interests of justice do not favour directed acquittal — re-trial ordered — whether applicant ought to be retried is matter for discretion of Cth DPP — *Bredal v R* [2025] NSWCCA 181
- 29/10/2025 — Digest — *Criminal Appeal Act 1912*, s 6 — conviction appeals — inconsistent verdicts — jury found applicant guilty on three counts and unable to reach verdict for remaining nine — following second trial, jury returned not guilty verdicts for remaining nine counts — applying test of logic and reasonableness, verdicts not inconsistent

— convictions on three counts entirely explicable by jury's obligation to treat all counts separately and their entitlement to believe some of complainant's evidence and not other parts — observations on principles applicable to inconsistent verdicts — *SS v R* [2025] NSWCCA 153

- 2/9/2025 — Digest — Conviction appeals — sexual offences — observations on appellate court's role where audiovisual evidence available separately from written appeal books — whether appellate court should view recordings of evidence depends on circumstances of case and/or forensic purpose — *Radburn (a pseudonym) v R* [2025] NSWCCA 125

Directions

- 14/07/2026 — Digest — *Evidence Act 1995*, s 97 — tendency evidence — multiple child sexual offences against three complainants — while judge's tendency directions did not comply with terms recommended in *DPP v Roder*, when considered as a whole, jury not deflected from its task — however, verdicts on two counts unreasonable and acquittals entered — *BW v R* [2026] NSWCCA 104
- 20/06/2026 — Directions — extended unanimity — child sexual offences — competing evidence as to sexual touching of complainant — extended unanimity direction not required — jury not required to be unanimous as to precise evidentiary route by which they concluded applicant intentionally engaged in sexual touching — case fell into first category identified in *R v Walsh* [2002] VSCA 98 — appeal dismissed — *Lind v R* [2026] NSWCCA 41
- 15/6/2026 — Digest — Directions — consciousness of guilt — Crown alleged collusion between accused and co-accused — submission that accused's entire account was a deliberate lie evidencing consciousness of guilt — judge directed jury using Crown's terminology of "mutually false account" — *Edwards* and *Liberato* directions did not cure risk of circular consciousness of guilt reasoning — Crown closing at odds with *Liberato* direction and concerned fundamental matter — miscarriage of justice occasioned — *Paulley v R* [2026] NSWCCA 75
- 13/4/2026 — Digest — Directions — *Evidence Act 1995*, s 97 — tendency evidence — conduct establishing tendency identical to charged conduct — NSW CCA erred in finding framing of tendency evidence and reliance on charged acts to establish it was inconsistent with nature of tendency evidence and in finding judge's directions likely to deflect jury's attention from required standard of proof — *DPP (Vic) v Roder* (2024) 281 CLR 18 applied — directions as a whole did not deflect jury from correct standard of proof — trial judges should avoid inviting jury to make findings on conduct relied on to prove offence, and should instead identify evidence of alleged tendency then invite jury to consider whether tendency established — *The King v AR* [2026] HCA 10
- 30/3/2026 — Digest — Directions — sexual offences — *Crimes Act 1900*, s 61HE (rep) — consent — complainant substantially intoxicated — accused gave evidence complainant consented — trial judge's modified *Liberato v The Queen* (1985) 159 CLR 507 direction sufficient — rigid adherence to unqualified *Liberato v The Queen* direction as formulated in *De Silva v The Queen* (2019) 268 CLR 57 not required — no miscarriage of justice from judge's omission to give inferences direction from *Criminal Trial Courts Bench Book* — *Ellingford v R* [2026] NSWCCA 24
- 19/12/2025 — Digest — Directions — sexual assault — joint criminal enterprise (JCE) — consent — judge's directions on elements of JCE and knowledge of absence of consent erroneous — inadvertent recklessness as to consent not capable of coherent combination

with JCE liability — *Evidence Act 1995*, ss 116, 165(1) — judge also erred by giving unreliability warning where evidence favourable to applicants and by failing to give identification evidence warning — *Decision Restricted* [2025] NSWCCA 210

- 19/12/2025 — Digest — Directions — sexual offences — consent — *Crimes Act 1900*, s 61HE(3) (rep) — reasonable grounds for belief — judge directed that "there were no reasonable grounds for belief" the complainant was consenting instead of "the accused had no reasonable grounds for [such] belief" — read holistically and in context, including reiterations of correct test, the direction on reasonable belief and onus would not have realistically affected the reasoning of the jury to the verdict of guilty — observations on assessment of whether no reasonable grounds for belief — *Koch v R* [2025] NSWCCA 219
- 9/12/2025 — Digest — Directions — sexual offences — evidence of complainant's distress when making complaint — distress evidence capable of supporting occurrence of alleged offending — judge's directions did not invite jury to use distress evidence as independent support for complainant's account — Victorian Court of Appeal's reasoning contrary to *R v Churchill (a pseudonym)* [2025] HCA 11 — distress evidence not inadmissible under s 137, *Evidence Act 2008* (Vic) — no miscarriage of justice from prosecutor's description of distress evidence as "independent evidence" — *The King v Tsalkos* [2025] HCA 49
- 5/11/2025 — Digest — consent — sexual offences — *Crimes Act 1900*, s 61HE(4)(b) (now s 61HK(5)) — jury to ignore accused's self-induced intoxication when determining knowledge of lack of consent — no error in judge's directions — directions did not invite jury to making findings about whether applicant was intoxicated — nor did they invite jury to speculate on hypothetical person's state of mind rather than applicant's actual state of mind — *Poveda v R* [2025] NSWCCA 174
- 13/10/2025 — Digest — Directions — good character evidence — trial judge said "full" character direction would be given — judge not obliged to direct jury it could use good character evidence of "honesty and integrity" to assess applicant's credibility — no real risk jury failed to appreciate they could use evidence of applicant's honesty to assess credibility — no real risk direction deflected jury from determining whether case proven — *Neil v R* [2025] NSWCCA 160
- 18/8/2025 — Digest — Directions — sexual assault —*Crimes Act 1900*, s 61HE(3)(a) (rep) — consent — miscarriage of justice caused by Crown submission and trial judge's direction concerning knowledge of absence of consent — jury not sufficiently directed to disregard recklessness and "unreasonable belief" where Crown case confined to actual knowledge — distinctions between knowledge, thought and belief — *Kumar v R* [2025] NSWCCA 119

[6-010] Recent sexual assault legislation

Last reviewed: August 2026

- 25/11/2025 — *Crimes Legislation Amendment (Domestic Violence and Sexual Offences) Act 2025* — amends *Crimes Act 1900* — amends ss 66F(8) and 78F to provide Director of Public Prosecutions may approve prosecution for sexual offences involving cognitively impaired person (s 66F(2), (3), (6)) and incest/attempted incest offences (ss 78A, 78B) respectively (Sch 1[1]–[2]) — commenced on 24 November 2025 (s 2, LW 24/11/2025)
- 29/9/2025 — Digest — *Child Protection (Offenders Registration) Amendment Act 2024* as amended by *Child Protection (Working with Children) and Other Legislation Amendment Act 2025* — amends *Child Protection (Offenders Registration) Act 2000* — definitions

provision amended and renumbered from s 3 to s 2B — inserts s 3C to provide court that sentences person for registrable offence (unless no conviction order) must make registrable person order (RPO), unless child where additional criteria apply — expands definitions of class 1 and 2 registrable offences (s 2D) — inserts s 3I to provide reporting periods for persons subject to RPO or child protection registration order (CPRO) — inserts s 3J to provide notice court is required to give when RPO or CPRO is made — inserts ss 10, 10A, 11 to provide for registrable person's reporting obligations — creates new offence of online gaming by registrable persons on platforms allowing communication with children (s 19J) — amends *Crimes (Sentencing Procedure) Act 1999* — amends s 43(6) to permit reopening of proceedings to correct RPO error — commenced on proclamation on 29 September 2025 (s 2, see LW 29/8/2025) — Second Reading Speech — Explanatory Note — *Child Protection (Offenders Registration) Amendment Regulation 2025* — consequentially amends *Child Protection (Offenders Registration) Regulation 2025* — commenced on 29 September 2025

- 18/9/2025 — Digest — *Crimes Amendment (Sexual Offences and Female Genital Mutilation) Act 2025* — amends *Crimes Act 1900* — clarifies female genital mutilation offences (ss 45, 45A) apply regardless of victims' age — clarifies offences not limited to acts performed for ritualistic or traditional purposes — new offence of sexual act in presence of child (ss 66DC(a1)–66DF(a1)) — age threshold for child abuse material offences raised from 16 to 18 years — maximum penalty for indecent interference with corpse increased — special verdict where trier of fact satisfied sexual offence *or* misconduct regarding corpse committed, but uncertain as to time of death (Sch 1[11]) — commences on assent on 17 September 2025 (s 2(b); see LW 15/9/2025), except Sch 1[11] which commences by proclamation (see s 2(a)) — Second Reading Speech — Explanatory Note

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

[6-025] Cases

Last reviewed: August 2026

30/7/2025 — Digest — procedure — *Evidence Act 1995*, ss 97, 99 — tendency evidence — requirement to give reasonable notice — judge did not err in finding "late" service of notice was reasonable — judge did not err by not referring to s 99 or Uniform Civil Procedure Rules 2005, r 31.5 — non-compliance with rules and regulations made under s 99 is not a mandatory consideration for the purposes of s 97 — question is determined by reference to circumstances of case — *Wright v R* [2025] NSWCCA 108

23/7/2025 — Digest — Appeals — Supreme Court (Criminal Appeal) Rules 2021, r 3.5(5) — leave to appeal out of time under r 3.5(5) to be dealt with separately and before appeal — applicant's proposed ground of appeal raised constitutional issue, attracting *Judiciary Act 1903* (Cth), s 78B — once leave under r 3.5(5) granted, court cannot proceed until s 78B complied with — release application under *Bail Act 2013*, s 49 — Court has no power under *Bail Act*, s 61 to hear release application until leave under r 3.5(5) granted — *AK v R* [2025] NSWCCA 105

19/6/2025 — Digest — tort — *Evidence Act 1995*, ss 91, 92, 179 — admissibility of conviction certificates — judge misapprehended s 92 by considering conviction certificate could not establish offending conduct — conviction certificate admissible to prove commission

of offence, date, identity of offender and victim — procedural fairness denied by judge's failure to alert litigant in person to evidentiary pathway in s 92 to allow use of conviction certificate — *MTH v State of New South Wales* [2025] NSWCA 122

18/6/2025 — Digest — Cth sentencing — *Crimes Act 1914* (Cth), s 16A(2AAA)(b) — Cth child sex offender rehabilitation and, in determining sentence, whether sufficient time to undertake program — no miscarriage caused by judge imposing sentence so as to permit applicant to complete custodial rehabilitation program in accordance with s 16A(2AAA) when no evidence of what constituted sufficient time — where no evidence or submission regarding sufficient time, judge not required to refer to s 16A(2AAA)(b) — *Jbara v R* [2025] NSWCCCA 83

12/6/2025 — Digest — Conviction appeals — *Criminal Appeal Act 1912*, ss 6(2), 8(1) — acquittal or retrial following quashing of convictions — child sexual offences — Crown conceded failure to disclose evidence impacting on complainant's credibility led to miscarriage of justice — although "fresh evidence" warrants investigation, it does not meet miscarriage of justice test for acquittal in accordance with *Ratten v The Queen* (1974) 131 CLR 510 — new trial ordered — *WHS v R* [2020] NSWCCA 31

4/6/2025 — Digest — Crown appeal — sentencing — *Crimes Act 1900*, s 66EA — maintain unlawful sexual relationship with child — no error in sentencing judge relying on factors in *Burr v R* [2020] NSWCCA 282 regarding predecessor offence, focusing on "ingredient offences", in assessing objective seriousness — reference to *Burr* factors does not imply failure to consider factors in *RA v R* [2020] NSWCCA 356 — *Burr* factors not prescriptive or exhaustive — *RA* factors not to be treated as checklist — *R v LPCM* [2025] NSWCCA 78

21/5/2025 — Digest — procedure — *Criminal Procedure Act 1986*, Pt 5, Div 2 — sexual assault communications privilege — applicant sought to subpoena documents containing "protected confidences" (ss 296, 298) — in the alternative, applicant sought orders for production to allow court to inspect documents (s 299B) — necessary to consider documents to determine whether they satisfy s 299D test for leave — order for production of documents and remittal to District Court — further observations concerning scope of s 296 definition of "protected confidence" and interpretation of s 299D test — *Decision Restricted* [2025] NSWCCA 55

14/5/2025 — Digest — procedure — *Crimes (Sentencing Procedure Act) 1999*, s 25D(2) — mandatory discounts for guilty pleas — applicant's offer to plead guilty in Local Court rejected by Crown, but subsequently accepted in District Court on same terms — judge correct to apply 10% discount, not 25% — legislative intention of Div 1A is offenders will *only* be entitled to 25% discount if plea is *actually entered in Local Court* [emphasis added] — where Parliament has made clear legislative choice, plain meaning of statutory text must not be altered — *Rokovada v R* [2025] NSWCCA 64

13/5/2025 — Digest — Cth sentencing — child sex offences outside Australia — persistent sexual abuse of child (Criminal Code, s 272.11) — groom or procure child for sexual activity (ss 272.14(1), 272.15A(1)) — mandatory minimum penalty provisions (*Crimes Act 1914* (Cth), ss 16AAA–16AAC) — error in aggregate sentence being less than minimum sentence allowable — offences committed remotely and actual ages of victims uncertain — observations concerning offence elements and approach to sentencing — *R v Williams* [2025] NSWCCA 63

8/5/2025 — Digest — *Crimes Act 1900*, ss 61M(1) (rep), 61J(1), 61H(2) — sexual offences — osteopath committed offences against patients — judge did not err in directing it was open to

find aggravation circumstance that complainant "under the authority of" accused — definition includes being in care of person and being under supervision of person as separate elements — patients are "in the care of" and thus "under the authority of" health care professionals — appeal dismissed — *Hu v R* [2025] NSWCCA 66

1/5/2025 — Digest — sentencing — totality principle — in this case, aggregate sentence's non-parole period exceeding sum of indicated non-parole periods infers error — indicated non-parole periods may be examined in assessing totality in aggregate sentence — cannot have been intended for offender to be worse off by aggregate sentence, than by separate sentences for each offence, partially accumulated — *Portnoy v R* [2025] NSWCCA 60

30/4/2025 — Digest — *Evidence Act 1995*, ss 97A, 101 — tendency evidence in child sexual offence proceedings — prejudicial effect of evidence not cured by jury directions — tendency evidence wrongly admitted — "facts in issue" not equivalent to "facts in dispute" — *Decision Restricted* [2025] NSWCCA 48

15/4/2025 — Digest — Directions — sexual offences — Crown adduced evidence of complainant's distress when making complaint — trial judge did not err in jury directions on circumstantial evidence — no requirement for "causal connection" between offence and distress before distress evidence could be used by jury — historical common law requirements superseded by ss 164, 59 and 66 of *Evidence Act 2008* (Vic) and *Jury Directions Act 2015* (Vic) — Crown appeal from Victorian Court of Appeal allowed — *The King v Churchill (a pseudonym)* [2025] HCA 11

14/4/2025 — Digest — *Crimes (Sentencing Procedure) Act 1999*, s 25D(1), (2)(c) — mandatory guilty plea discount scheme under Div 1A — guilty plea entered after trial commenced and Crown submitted applicant not entitled to numerical discount — judge erred in not applying mandatory discount of 5% — Crown wrongly submitted s 25D discount unavailable — no lesser sentence warranted — observations on exercising sentencing discretion afresh — *DS v R* [2025] NSWCCA 53

9/4/2025 — Digest — Directions — *Evidence Act 1995*, s 97 — tendency evidence — child sexual offences — Crown relied on charged acts for tendency reasoning and on uncharged acts as context evidence — no anti-tendency direction given to jury about context evidence — no miscarriage of justice in circumstances of case — obligation on Crown to articulate relevance of tendency evidence in opening and closing addresses — *DP v R* [2025] NSWCCA 45

26/3/2025 — Digest — sentencing — sentence appeals — admissibility of additional evidence — applicant failed to disclose evidence earlier as he was ashamed and unaware of its significance — distinction between "fresh" and "new" evidence — distinction less significant if evidence may have real bearing on sentence outcome — miscarriage of justice occasioned — *Lawavou v R* [2025] NSWCCA 35

24/3/2025 — Digest — Directions — *Evidence Act 1995*, s 97 — tendency evidence — multiple complainants — charged and uncharged acts — standard of proof — judge erred in repeated directions that jury were to make "findings" as to tendency conduct — *JS v R* [2022] NSWCCA 145 distinguished — verdicts of acquittal entered — *New v R* [2025] NSWCCA 32

17/3/2025 — Digest — Directions — witness not called to give evidence — trial judge did not err by failing to give *Mahmood v Western Australia* [2008] HCA 1 direction — apparent from Crown's opening that witness would not be called, thus no "disappointed expectation" — absence of *Mahmood* direction aided aspect of applicant's case — nothing to suggest witness was material— *Singh v R* [2025] NSWCCA 34

11/3/2025 — Digest — Directions — *Evidence Act 1995*, s 97 — tendency evidence — conduct establishing tendency identical to conduct charged on indictment — *DPP v Benjamin Roder (a pseudonym)* and *Kanbut v R* [2022] NSWCCA 259 applied — judge's tendency directions invited circular reasoning and occasioned miscarriage of justice — retrial ordered — *AR v R* [2025] NSWCCA 22

7/3/2025 — Digest — Directions — *Evidence Act 1995*, s 97 — tendency evidence — standard of proof — charged and uncharged acts adduced as tendency evidence — judge's summing up compliant with *DPP v Benjamin Roder (a pseudonym)* — no miscarriage of justice — content of tendency directions — *Wardell v R* [2025] NSWCCA 26

3/3/2025 — Digest — sentencing — *Crimes Act 1900*, s 66EA — maintain unlawful sexual relationship with child — particulars of unlawful sexual acts constituting relationship not required (s 66EA(2), (4)(a), (5)(b)) — judge erred by requiring satisfaction beyond reasonable doubt of each incident before determining frequency of incidents — focus is on existence of particular kind of relationship — factors relevant to objective seriousness of s 66EA offence in *RA v R* [2024] NSWCCA 149 apply, not those in *Burr v R* [2020] NSWCCA 282 concerning predecessor offence — sentence remitted — *R v Lamey* [2025] NSWCCA 17

22/1/2025 — Digest — evidence — *Criminal Procedure Act 1986*, s 293 (now s 294CB) — prohibition on admitting evidence of prior sexual experience/activity — judge correct to exclude evidence suggesting nine-year-old complainant had prior sexual experience or activities with others prior to alleged offences — s 293(6) exception not engaged — prosecution did not imply complainant lacked sexual experience because of her age — acts encompassed by "sexual experience" or "sexual activity" in s 293 — *WHS v R* [2024] NSWCCA 242

5/12/2024 — Digest — *Child Protection (Offenders Registration) Act 2000* (CPOR Act), ss 3(1), 3A — person "sentenced" for registrable offence is a registrable person — appellant released on recognizance order under *Crimes Act 1914* (Cth), s 20(1)(a) for registrable offence, made "without passing sentence" — s 20(1)(a) order is a "sentence" for the purposes of CPOR Act — *Taylor v Commissioner of Police of NSW* [2024] NSWCA 285

20/11/2024 — Digest — sentencing — *Crimes Act 1900*, s 61HE(3)(b) (replaced in similar terms (s 61HK)) — recklessness as to sexual consent — recklessness made out where accused realises possibility of no consent but proceeds regardless or does not consider consent at all — no third category of recklessness where reasonable possibility of belief in consent — *Saffin v R* [2020] NSWCCA 246 discussed — reasonable possibility of belief in consent means recklessness not proven — *Slater v R* [2024] NSWCCA 210

15/11/2024 — Digest — sentencing — child sexual offences committed when applicant aged 17–23 — judge did not have regard to applicant's youth when assessing moral culpability — applicant's age, particularly for offence committed when he was 17, of particular significance — reference to *Children (Criminal Proceedings) Act 1987*, s 6, without more, does not engage with principles of sentencing child offenders — complex interplay between youth, mental illness and cognitive impairment in this case — *BAP v R* [2024] NSWCCA 206

6/11/2024 — Digest — sentencing — sentence appeals — judge did not adequately expose reasons for indicative sentences — observations concerning appeal of indicative sentences — excessive indicative sentence (latent error) on its own insufficient to impugn aggregate sentence not itself alleged to be manifestly excessive — *AJ v R* [2023] NSWCCA 158 considered — objective seriousness — no error in failing to assess objective seriousness of SNPP or non-SNPP offence by reference to notional range — *Dorsett v R* [2024] NSWCCA 192

29/10/2024 — Digest — Crown appeal — sentencing — *Crimes Act 1900*, s 66EA — maintain unlawful sexual relationship with child — prosecution not required to allege particulars of unlawful sexual acts (s 66EA(4)(a)) — sentencing judge took into account pattern of abuse against victims to demonstrate unlawful sexual acts particularised in indictment were not isolated — judge's assessment of objective seriousness erroneously limited — approach incorrect and defeats purpose of s 66EA, where "ingredient offences" not required — *R v Fisher* [2024] NSWCCA 191

13/9/2024 — Digest — procedure — *Criminal Procedure Act 2009* (Vic) (CPA (Vic)), ss 181 and 389E(1) — child sexual offence special hearings — judge gave direction for introductory meeting before special hearing — meeting not a fundamental irregularity and did not breach CPA (Vic) requirements for "hearings" — meeting was not a "hearing" and was valid under s 389E — risk of witness disclosures does not arise if such meetings are avoided or, if held, they should be recorded — *Director of Public Prosecutions v Smith* [2024] HCA 32

11/9/2024 — Digest — Directions — child sexual offences — judge alone trial — *Criminal Procedure Act 1986*, s 133 — requirements for verdict of single judge — *Liberato* and good character directions — judge did not take into account second limb of each direction — retrial ordered — *Barwick v R* [2023] NSWCCA 139

23/8/2024 — Digest — Directions — sexual offences — *Crimes Act 1900*, s 61HE(3)(b) (rep) — recklessness as to lack of consent — no error in judge's directions — judge not required to draw distinction between advertent and inadvertent recklessness in directions to jury — *Tuuholoaki v R* [2024] NSWCCA 135

19/8/2024 — Digest — evidence — *Criminal Procedure Act 1986*, s 293 (now s 294CB) — prohibition on admitting evidence of prior sexual experience — sexual offences — judge correct to exclude evidence related to complainant's employment in brothel — evidence did not fall within s 293(4) exemptions as not part of "connected set of circumstances" (s 293(4)(a)(ii)) and not "sufficiently integrated" with offending — *Cook (a pseudonym) v The King* [2024] HCA 26 applied — *Behi v R* [2024] NSWCCA 89

16/8/2024 — Digest — sentencing — *Crimes Act 1900*, s 66EA — maintain unlawful relationship with child — particulars of unlawful sexual acts constituting relationship not required to be alleged by prosecution (s 66EA(4)(a)) — judge did not err by having regard to multiple acts that would have constituted, if sufficiently particularised, unlawful sexual acts — gravamen of offence is maintenance of unlawful sexual relationship with child, not identified "ingredient offences" — *RA v R* [2024] NSWCCA 149

12/8/2024 — Digest — Cth sentencing — *Crimes Act 1914* (Cth), s 16A(2AAA) — consideration of rehabilitation objective for Cth child sex offenders — sentencing judge did not engage with s 16A(2AAA) — if provision not directly referred to in sentencing remarks, other discernable indications demonstrating engagement required — s 16A(2AAA) materially different to prospects of rehabilitation in s 16(A)(2)(n) — *Elwdah v R* [2024] NSWCCA 150

9/8/2024 — Digest — evidence — *Criminal Procedure Act 1986*, s 293 (now s 294CB) — prohibition on admitting evidence of prior sexual experience — complainant disclosed previous abuse by other uncle to appellant — majority in CCA erred by finding exception in s 293(4)(b) did not apply on basis no relationship between appellant and complainant — exception in s 293(4)(b) potentially applicable — relevant principles concerning s 293(4) — *Cook (a pseudonym) v The King* [2024] HCA 26

15/8/2024 — Digest — *Crimes Act 1900*, s 66C(2), (4) — sexual intercourse with child — complainant aged "13 or 14" years — verdict on s 66C(2) offence (child of or above 10 and under 14 years) unreasonable — open to CCA to convict on alternative count (child of or above 14 and under 16 years — s 66C(4)) — *R v JGW* [1999] NSWCCA 116 directly analogous to present case — no requirement to prove victim 14 years old — *RM v R* [2024] NSWCCA 148

6/8/2024 — Digest — sentencing — *Crimes Act 1900*, s 66EA — maintain unlawful sexual relationship with child — s 66EA(4), (5) — particulars of unlawful sexual acts not required — observations — open to sentencing judge to find unlawful sexual acts constituting offence not particularised on indictment — Crown not required to plead particulars of any unlawful sexual act (s 66EA(4)(a)), but to avoid unfairness, prosecution should provide best particulars available — *Nolan v R* [2024] NSWCCA 140

26/7/2024 — Digest — sentencing — *Child Protection (Offenders Registration) Act 2000* (CPOR Act), ss 3(1), 3A — person "sentenced" for registerable offence to be entered on Child Protection Register — plaintiff on recognizance release order (*Crimes Act 1914* (Cth), s 20(1)(a)) made "without passing sentence" for registrable offence — recognizance release order under s 20(1)(a) within definition of "sentence" in CPOR Act, s 3(1) — plaintiff a "registerable person" — *Taylor v Commissioner of Police of NSW* [2024] NSWSC 839

26/7/2024 — Digest — sentencing — *Crimes Act 1900*, s 66EA — maintain unlawful sexual relationship with child — particulars of unlawful sexual acts constituting relationship not required to be alleged by prosecution (s 66EA(4)(a)) or be satisfied of by jury to convict (s 66EA(5)(b)) — judge did not err in fact finding exercise — s 66EA(4), (5) apply to sentencing — judge not required to identify specific unlawful sexual acts — construction consistent with s 66EA's plain terms, legislative purpose and mischief it intended to address — *MK v R* [2024] NSWCCA 127

23/7/2024 — Digest — child sexual assault — conviction appeal — assessing complainant reliability — observations on child complainant responses to sexual assaults — memory of surrounding details of traumatic event has few implications for reliability — verdict not unreasonable or unsupported by evidence — *Davis v R* [2024] NSWCCA 120

16/7/2024 — Digest — Directions — sexual assault — *Crimes Act 1900*, s 61HE (rep) — consent — directions concerning relevance of complainant's substantial intoxication to the issue of consent resulted in miscarriage of justice — direction in accordance with statute and Bench Book but unnecessarily confusing — not necessary to show what was said and done to indicate consent was caused by intoxication — model direction on consent where complainant substantially intoxicated — *Smee v R* [2024] NSWCCA 121

9/7/2024 — Digest — *Crimes Act 1914* (Cth), ss 19AC(1), 16A(2AAA) — recognizance release orders (RROs) and rehabilitation for Cth child sex offenders — period of RRO not to be taken into account in determining whether sentence exceeds 3 years in s 19AC(1) — judge did not err in applying s 16A(2AAA) — s 16A(2AAA) does not require court to identify how period of custody accounts for rehabilitation objective — not inconsistent with s 16A(2AAA) to impose custodial sentence despite adverse impact on rehabilitation — *Curle v R* [2024] NSWCCA 117

19/6/2024 — Digest — 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

27/5/2024 — Digest — 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) 113 NSWLR 459 — 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

20/5/2024 — Digest — 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

15/2/2024 — Digest — 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) 113 NSWLR 459

10/5/2024 — Digest — *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

3/5/2024 — Digest — 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

18/3/2024 — Digest — 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

11/3/2024 — Digest — 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

15/3/2024 — Digest — 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

22/2/2024 — Digest — 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 — Digest — 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

7/11/2023 — 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

1/11/2023 — 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

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

16/10/2023 — Digest — *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

11/9/2023 — appeals — conviction appeal — child sexual assault — verdicts not unreasonable or unsupported by evidence — appeal dismissed — observations on complainant responses to sexual assaults — *Duncan v R* [2023] NSWCCA 223

31/8/2023 — 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

18/8/2023 — 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

14/8/2023 — 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

1/8/2023 — 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

20/7/2023 — 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 and *R v RB* [2022] NSWCCA 142 overruled — *MK v R* (2023) 112 NSWLR 96

17/7/2023 — 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

11/7/2023 — 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

5/7/2023 — 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

23/6/2023 — 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

15/6/2023 — 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) 111 NSWLR 514

5/10/2023 — 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

22/9/2023 — 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

28/7/2023 — *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 — *Stenner-Wall v R* [2023] NSWCCA 163

29/6/2023 — *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) 111 NSWLR 501

26/6/2023 — 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 — *Rassi v R* [2023] NSWCCA 119

8/6/2023 — *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) 111 NSWLR 414

26/5/2023 — 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

23/5/2023 — 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) 277 CLR 518

18/5/2023 — 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

10/5/2023 —procedure — *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

5/5/2023 — 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

1/5/2023 — 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

1/5/2023 — *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

21/4/2023 — 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

11/4/2023 — 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

14/3/2023 — *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

2/3/2023 — 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

22/2/2023 — 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

21/2/2023 — 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 — *KM v R* [2023] NSWCCA 10

16/2/2023 — 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

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

9/12/2022 — 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

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) 111 NSWLR 165

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) (rep) *Crimes Act 1900* (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

6/10/2022 — 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

20/9/2022 — 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

13/9/2022 — 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

12/9/2022 — 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

29/8/2022 — 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

19/8/2022 — 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

16/8/2022 — *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

03/8/2022 — 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

7/7/2022 — 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

1/7/2022 — *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) 110 NSWLR 339

27/6/2022 — 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

24/6/2022 — 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

16/6/2022 — 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) 108 NSWLR 181

14/6/2022 — 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

5/6/2022 — 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

25/5/2022 — 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

20/5/2022 — 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

9/5/2022 — 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 s 61M(2) or s 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

7/5/2022 — 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

28/4/2022 — 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

25/4/2022 — *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

23/4/2022 — 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

19/4/2022 — 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

12/4/2022 — 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

11/4/2023 — 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

24/3/2022 — 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

18/3/2022 — 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

14/3/2022 — 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

18/2/2022 — 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

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

14/2/2022 — 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

7/2/2022 — 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

7/2/2022 — 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

4/2/2022 — 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 — *Al Bayati v R* [2022] NSWCCA 2

17/1/2022 — 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) 274 CLR 351 distinguished — *Orreal v The Queen* (2021) 274 CLR 630

14/1/2022 — 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

14/1/2022 — 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

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) 274 CLR 351

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) 274 CLR 531

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

3/10/2021 — 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

15/9/2021 — 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

9/9/2021 — 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

1/9/2021 — 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

31/8/2021 — 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

30/8/2021 — 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

27/8/2021 — 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 — *R v WS* [2021] NSWCCA 124

17/8/2021 — 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

06/8/2021 — 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

05/8/2021 — 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

22/7/2021 — 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

21/6/2021 — *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

4/6/2021 — *Evidence Act 1995*, ss 76, 79 — opinion evidence — specialised knowledge exception — *Crimes Act 1900*, 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

4/6/2021 — *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

5/5/2021 — 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

30/4/2021 — 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

26/4/2021 — 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

25/4/2021 — procedure — *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 — *Chia v R* [2021] NSWCCA 51

25/4/2021 — 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 — *Chia v R* [2021] NSWCCA 51

19/4/2021 — 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

08/3/2021 — 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

24/2/2021 — 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

12/2/2021 — 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

02/2/2021 — 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* [2020] NSWCCA 315

28/1/2021 — 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) 271 CLR 537

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

25/9/2020 — *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

21/9/2020 — *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

31/8/2020 — offences — *Child Protection (Offenders Prohibition Orders) Act 2004*, 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

24/8/2020 — 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

24/8/2020 — procedure — *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

4/8/2020 — 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

15/7/2020 — *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 — *Uddin v R* [2020] NSWCCA 115

31/7/2020 — 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

30/7/2020 — 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

30/7/2020 — 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

29/7/2020 — 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

23/7/2020 — 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

16/7/2020 — *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

16/7/2020 — 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

18/6/2020 — 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

03/6/2020 — 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

01/6/2020 — 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

29/5/2020 — 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

20/5/2020 — 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

15/5/2020 — 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

15/5/2020 — 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

13/5/2020 — 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

8/5/2020 — sentencing — Crown appeal — *Crimes Act 1900*, s 66A(1) — child sexual assault — *Crimes (Sentencing Procedure) Act 1999*, 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

5/5/2020 — 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

1/5/2020 — 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

30/4/2020 — 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

30/4/2020 — Crown appeal — sexual assault — community correction order imposed — *Crimes (Sentencing Procedure) Act 1999*, ss 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

17/4/2020 — 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) 268 CLR 123

31/3/2020 — 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

25/3/2020 — 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) 267 CLR 480

13/3/2020 — *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

13/3/2020 — 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

10/3/2020 — 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

3/3/2020 — *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

19/2/2020 — 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

31/1/2020 — 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

28/1/2020 — 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

24/1/2020 — 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

24/1/2020 — 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

17/1/2020 — 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

4/11/2019 — 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 — *McIver v R* [2019] NSWCCA 214

8/10/2019 — 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

4/10/2019 — 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

2/10/2019 — 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

20/8/2019 — 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

6/8/2019 — 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

30/7/2019 — 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

24/7/2019 — 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

30/6/2019 — 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

26/6/2019 — 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

24/6/2019 — 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

3/6/2019 — 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

24/5/2019 — *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

15/5/2019 — 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

18/4/2019 — sentencing — Criminal Code (Cth), s 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

21/3/2019 — 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) 265 CLR 268

23/1/2019 — *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

15/1/2019 — *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) 263 CLR 338 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

11/1/2019 — 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) 266 CLR 106

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

14/8/2018 — *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 Bauer (a pseudonym)* (2018) 266 CLR 56

1/10/2018 — 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

26/9/2018 — 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 Bauer (a pseudonym)* (2018) 266 CLR 56

20/8/2018 — 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

5/7/2018 — *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

3/7/2018 — *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

24/6/2018 — 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) 266 CLR 1

20/6/2018 — 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

13/6/2018 — 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

7/6/2018 — *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 *R v GM* [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

31/5/2018 — 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

25/5/2018 — *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

6/5/2018 — *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

29/4/2019 — 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

28/3/2018 — *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

7/3/2018 — *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

29/1/2018 — 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

29/1/2018 — 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

16/1/2018 — 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

11/1/2018 — *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

30/9/2015 — *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

Last reviewed: August 2026

19/12/2024 — Digest — *Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Act 2024* (Cth) — amends *Crimes Act 1914* (Cth) — expands protections for vulnerable persons in Cth criminal proceedings — extends application of special protections to more offences — restricts admissibility of sexual reputation and experience evidence — authorises recording of evidence — prohibits cross-examination of vulnerable adult complainants by unrepresented defendants — commenced on 11 December 2024 (the day after assent: s 2) — Second Reading Speech — Explanatory Memoranda

3/9/2024 — Digest — *Criminal Code Amendment (Deepfake Sexual Material) Act 2024* (Cth) — amends Criminal Code — replaces offences in s 474.17A with new offence of

non-consensual sharing online of sexual material, including material created or altered by technology — maximum penalty of 6 years imprisonment applies — new aggravated forms of offences in s 474.17AA with maximum penalty of 7 years imprisonment —commenced 3 September 2024 (s 2) — Second Reading Speech — Explanatory Memorandum

1/7/2024 — Digest — *Crimes Legislation Amendment (Coercive Control) Act* — creates new offence of abusive behaviour towards intimate partners (s 54D(1) *Crimes Act 1900*) — amends *Crimes (Domestic and Personal Violence) Act 2007* to provide new definition of domestic abuse (s 6A) — amends *Crimes (Sentencing Procedure) Act 1999* — amends *Criminal Procedure Act 1986* — Sch 1[1] to the extent that it inserted s 54I commenced on 12 December 2022; Sch 2[1], [2], [4] and [6] commenced on 1 February 2024; Sch 1, 2[3] and [5], 3 and 4 commenced 1 July 2024 (see s 2) — Second Reading Speech — Explanatory Note

28/6/2024 — Digest — *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 21/6/2024)

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)

30/5/2022 — *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)

2/5/2022 — *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*.

30/5/2022 — *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 13/5/2022)

13/1/2022 — *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)

13/5/2021 — *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 23/11/2020). 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)

1/10/2020 — *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)

10/7/2020 — *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)

10/7/2020 — *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)

26/6/2020 — *Evidence Amendment (Tendency and Coincidence) Act 2020* — amends *Evidence Act 1995*, Pt 3.6 — new s 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 10/6/2020)

·26/6/2020 — *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 22/6/2020)

24/3/2020 — *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)

27/9/2019 — *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

07/6/2019 — *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

03/6/2019 — *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 26/11/2018) 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 31/5/2019)

15/5/2019 — *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 24/5/2019) — remaining amendments under Act commenced 1 December 2018 (s 2, LW 28/11/2018)

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 28/11/2018) — 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, s 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: August 2026

Judicial Officers' Bulletin

- P McGuire, "The objective of rehabilitation — a mandatory consideration when sentencing Commonwealth child sex offenders" (2026) 38(4) *JOB* 37
- B Mathews, "Child sexual abuse in Australia: a national evidence base on prevalence, perpetrators, disclosure, and implications for the judiciary" (2026) 38(1) *JOB* 1
- AJ George and V Lowik, "ALRC sexual violence reforms — strengthening the judicial toolkit for addressing rape myths" (2025) 37(6) *JOB* 60
- R Gilbert, "Sexual assault communications privilege — an update" (2025) 37(1) *JOB* 1
- J Quilter and L McNamara, "Research into jury directions in sexual offence trials" (2024) 36(7) *JOB* 65
- 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, "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, "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

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) — *Attrition of sexual assaults from the New South Wales criminal justice system*, 2024

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) — *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*, 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

Last reviewed: August 2025

NSW Sexual Violence Plan 2022–2027

The NSW Government released their NSW Sexual Violence Plan 2022–2027 in December 2022. The Plan puts in place an approach to guide the work of the NSW Government, specialist organisations and workers, the broader workforce, community organisations, including legal services, health professionals, academics, law enforcement, the justice sector, businesses and workplaces, and all community members.

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. 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. 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.

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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:

Complicity [2-700]ff

Last reviewed: May 2026

[2-820] Suggested direction — joint criminal enterprise and sexual assault in company

Complaint evidence [5-000]ff

Last reviewed: August 2025

[5-020] Suggested direction — where complaint evidence admitted under s 66(2) *Evidence Act 1995*

[5-030] Evidence of complaint where witness not available under s 65(2) *Evidence Act 1995*

[5-050] Suggested direction — where difference in complainant's account — prescribed sexual offences only

[5-055] Suggested direction — delay in, or absence of, complaint

[5-080] Suggested direction — delay in complaint and forensic disadvantage to the accused

Maintain unlawful sexual relationship with a child [5-700]ff

Last reviewed: August 2025

[5-720] Suggested direction — maintain unlawful sexual relationship with child (s 66EA)

Sexual intercourse without consent [5-800]ff

Last reviewed: August 2026

[5-800] Suggested direction — sexual intercourse without consent (s 61I) for offences committed before 1 January 2008

[5-820] Suggested direction — sexual intercourse without consent (s 61I) where alleged offence committed on or after 1 January 2008 and before 1 June 2022

[5-840] Suggested direction — s 61J circumstance(s) of aggravation

[5-910] Suggested direction — sexual intercourse without consent (s 61I) offences from 1 June 2022

[5-915] Suggested direction — accused's cognitive or mental health impairment a substantial cause for not ascertaining consent (s 61HK(3)–(4))

[5-930] Suggested direction — s 61J circumstance(s) of aggravation

Sexual touching [5-1100]ff

Last reviewed: August 2026

[5-1110] Suggested direction — basic offence (s 61KC) — until 31 May 2022

[5-1115] Suggested direction — basic offence (s 61KC) — from 1 June 2022

[5-1130] Suggested direction — aggravated offence (s 61KD)

[5-1150] Suggested direction — sexually touching a child under 10 (s 66DA)

Sexual act [5-1200]ff

Last reviewed: August 2026

[5-1210] Suggested direction — basic offence (s 61KE) — until 31 May 2022

[5-1220] Suggested direction — basic offence (s 61KE) — from 1 June 2022

[5-1240] Suggested direction — aggravated offence (s 61KF)

[5-1260] Suggested direction — sexual act involving a child under 10 (s 66DC)

[5-1265] Suggested direction — sexual act involving a child under 10 (s 66DC(a1))

[5-1280] Suggested direction — sexual act involving a child which is filmed (s 66DF)

[5-1285] Suggested direction — sexual act involving a child which is filmed (s 66DF(a1))

Tendency, coincidence and background evidence [4-200]ff

Last reviewed: August 2025

[4-218] Suggested tendency evidence direction — single complainant — applies to charged acts, other acts or combinations thereof

[4-220] Suggested tendency evidence direction — multiple complainants — charged acts

[4-224] Suggested direction where coincidence evidence admitted as part of a circumstantial case

[4-226] Suggested direction where coincidence evidence relied upon for joinder of counts of different complainants

[4-230] Suggested direction — context evidence

[4-234] Suggested direction — background evidence

Misconceptions about consent in sexual assault trials [5-200]ff

Last reviewed: August 2025

[5-230] Suggested direction — responses to giving evidence

[5-240] Suggested directions — ss 292A–292C, 292E *Criminal Procedure Act 1986*

Pre-recorded evidence in child sexual offence proceedings — Child Sexual Offence Evidence Program (CSOEP) [5-400]ff

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[5-420] Suggested direction — pre-recorded evidence

Relevant literature — legal articles

Evidence

Reforming the admissibility of tendency and coincidence evidence in criminal trials
P Mizzi and R A Hulme ..... [7-000]

Tendency evidence in 2020
N Broadbent and D Buchanan ..... [7-005]

Tendency, coincidence and joint trials
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Update on admissibility and use of tendency evidence in child sexual assault matters
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Jury views of psychological expert evidence about child sexual abuse
J Goodman-Delahunty and A Cossins ..... [7-040]

Children's champions/witness intermediaries
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Children's competence to testify in Australian courts
S Brubacher et al ..... [7-080]

Legislative facts and s 144 — a contemporary problem
P McClellan and A Doyle ..... [7-100]

Expert evidence to counteract jury misconceptions about consent in sexual assault cases
J Horan and J Goodman-Delahunty ..... [7-120]

Intermediaries, vulnerable people and the quality of evidence
P Cooper and M Mattison ..... [7-140]

The application of the Uniform Evidence Law to delay in child sexual assault trials
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The law on consent in sexual assault is changing
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Myths, misconceptions and mixed messages: an early look at the new tendency and coincidence evidence provisions
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Understanding adult sexual assault matters
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Further reading — legal ..... [7-495]

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 directions at [4-218] and [4-220], 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.

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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.]

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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

P McClellan and A 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.

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

[7-120] Article

J Horan and J 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.

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The law on consent in sexual assault is changing

[7-150] Article

P Mizzi and R 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.

This article was first published by Thomson Reuters in the Criminal Law Journal *and should be cited as D Hamer, "Myths, misconceptions and mixed messages: an early look at the new tendency and coincidence evidence provisions" (2021) 45* Crim LJ *232.*

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Research into jury directions in sexual offence trials

[7-170] Article

Last reviewed: August 2025

J Quilter and L McNamara, "Research into jury directions in sexual offence trials" (2024) 36(7) *JOB* 65.

Abstract

Since 1 June 2022 an expanded suite of statutory jury directions has been available in NSW sexual offence trials. In addition to existing directions that address potential misconceptions about the significance of "delay" in complaint, and differences in the complainant's account, judges may now give "corrective" directions on a range of other stereotypes and assumptions that have traditionally worked to the disadvantage of complainants and the Crown case.

The authors' recent research on sexual offence trials in NSW and Victoria, suggests that, in order to maximise the potential benefits of corrective jury directions, they should be actively deployed, not only during the traditional end of trial summing up, but at intervals throughout the trial. The authors submit that best practice suggests that this should include: at the *beginning* of the trial (including the judge's opening remarks); *during* the course of the trial at a time proximate to the evidence in question; and at the *conclusion* of the trial during the summing up.

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.

Acknowledgment: this article was prepared by Lloyd Babb and presented at the Judicial Commission of NSW, Twilight Seminar: Child Sexual Assault on 28 September 2005, Sydney. Reproduced with permission. Modified in February 2009 to incorporate amendments effected by the Evidence Amendment Act 2007, commenced 1 January 2009 (Gazette No 158 of 2008, p 12, 305). Note the Evidence Amendment Act applies to proceedings commencing on or after 1 January 2009.

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

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* Paper delivered to 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". Paper modified in December 2008 to incorporate amendments made by the *Evidence Amendment Act 2007*, commenced 1 January 2009.

(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).

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1 *Evidence Amendment Act 2007*, Sch 2, 2.3, [4].

2 The Hon Bob Debus, MP, *Hansard*, Legislative Assembly, 23 March 2005.

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

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3 Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102; Victorian Law Reform Commission, *Uniform Evidence Law Final Report*; New South Wales Law Reform Commission, *Uniform Evidence Law*, Report No 112, Sydney, 2005.

(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 e~~qually applicable to adult witnesses.)[7]

4 Australian Law Reform Commission, *Evidence*, ALRC Report 26 (Interim), 1985, Vol 1 at [631].

5 Vic Law Reform Commission, *Sexual offences,* Final Report 2004.

6 Qld Law Reform Commission, *The receipt of evidence by Queensland courts: the evidence of children*, Summary of recommendations, Report 55, 2000, Pt 2A.

7 ibid, Recommendation 13.1, at 270.

[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.

8 *Heroines of fortitude: the experiences of women in court as victims of sexual assault*, NSW Department for Women, 1996.

[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]

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9 J Cashmore and L Trimboli, "An evaluation of the NSW child sexual assault specialist jurisdiction pilot", Discussion paper, NSW Bureau of Crime Statistics and Research, September 2005.

10 Australian Law Reform Commission, "Examination and cross-examination of witnesses", *Review of the Uniform Evidence Acts,* Discussion Paper 69, July 2005, at [5.111]; p 129; available at <http://www.austlii.edu.au/cgi-bin/viewdoc/au/other/lawreform/ALRCDP//2005/69.html>.

[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.

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11 above, n 3, at 5.114.

12 above, n 3, at 5.118.

[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].

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13 Cited in *Aboriginal witnesses in Queensland's criminal courts*, Queensland Criminal Justice Commission, 1996, p 54.

14 *Materials relating to child sexual assault*, May 2003, Judicial Commission of NSW — For the Child Sexual Assault Jurisdiction Team Education Working Group.

15 ibid, at Tab L.

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]

16 The Hon Judge Donna Hackett, "Finding and following 'the road less travelled': judicial neutrality and the protection and enforcement of equality rights in criminal trial courts" (1998) 10(1) *Canadian Journal of Women and the Law* 129 at 140.

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

* Paper delivered at the District Court of New South Wales Annual Conference, 10–12 April 2007, Leura, under the original title "Section 275A of the *Criminal Procedure Act 1986*". Updated February 2009.

1 *Evidence Amendment Act 2007*, Sch 2, 2.3, [4].

2 The Act was assented to on 31 May 2005 and came into force on 12 August 2005.

(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,

3 ALRC, NSWLRC, VLRC, *Uniform Evidence Law Report*, ALRC Report 102, NSWLRC Report 112, VLRC Final Report, Sydney, 2005, at 5.118.
4 Ibid at 5.92.
5 Ibid at 5.111.
6 The Hon Bob Debus, MP, *Hansard*, Legislative Assembly, 23 March 2005.

> 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).

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7 ibid.
8 ibid.

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.

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9 ibid.

10 Above, n 3 at 5.115.

[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]

11 Part IAD was inserted by the *Measures to Combat Serious and Organised Crime Act 2001* (Cth).

[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)".

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12 *Evidence (Iterim)*, ALRC Report 26, 1985, Vol 1 at [631].

13 S Odgers, *Uniform evidence law*, 7th edn, Thomson, Sydney, 2006, p 121.

[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]

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14 ibid.
15 ibid.
16 Australian Law Reform Commission, *Seen and heard: priority for children in the legal process*, ALRC Report 84, Sydney, 1997.
17 Vic Law Reform Commission, *Sexual offences*, Final Report, 2004 at [5.146].
18 Qld Law Reform Commission, *The receipt of evidence by Queensland courts; the evidence of children*, Summary of recommendations, Report 55, 2000, Pt 2A, Rec 13.1.

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]

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19 NSW Law Reform Commission, *Questioning of complainants by unrepresented accused in sexual offence trials*, Report 101, 2003 at [2.2].

20 12 February 2003 at [101].

21 NSW Adult Sexual Assault Interagency Committee, *A fair chance: proposal for sexual assault law reform in NSW*, 2004, p 3.

22 Intellectual Disability Rights Service, Submission E101, 23 September 2005.

[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]

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23 C O'Kelly, M Kebbell, C Hatton and S Johnson, "Judicial intervention in court cases involving witnesses with and without intellectual disabilities" (2003) 8 *Legal and Criminological Psychology* 229.

24 *Heroines of fortitude*: *the experiences of women in court as victims of sexual assault*, NSW Department for Women, 1996.

25 NSW Law Reform Commission, *Sentencing: Aboriginal offenders*, Report 96, 2000 at [7.5].

26 NSW District Court Judges, Consultation, Sydney, 3 March 2005.

27 Supreme Court of ACT Judicial Officers, Consultation, Canberra, 8 March 2005.

28 B Donovan, Consultation, Sydney, 21 February 2005; T Game, Consultation, Sydney, 25 February 2005; Crown prosecutors, Consultation, Sydney, 11 February 2005; Legal Aid Office (ACT), Consultation, Canberra, 8 March 2005.

[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]

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29 Law Council of Australia, Submission E32, 4 March 2005.

30 Lloyd Babb, "What does s 41 of the Evidence Act mean to you as a judicial officer?", paper presented at Judicial Commission of New South Wales Twilight Seminar, 28 September 2005.

[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

31 Above, n 3 at 5.114.
32 Above, n 3 at 5.109.
33 J Spigelman, "The truth can cost too much: the principle of a fair trial" (2004) 78 *ALJ* 29 at 43.

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]

34 "Finding and following 'the road less travelled': judicial neutrality and the protection and enforcement of equality rights in criminal trial courts" (1998) 10(1) *Canadian Journal of Women and the Law* 129 at 140.

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?

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.

Vulnerability and the right to effective participation in the criminal justice process: the role of the witness intermediary

[7-290] Article

Last reviewed: August 2025

R Stein, "Vulnerability and the right to effective participation in the criminal justice process: the role of the witness intermediary" (2024) 36(9) *JOB* 91.

Abstract

The article examines the significant obstacles that vulnerable people face and outlines the role of the witness intermediary in the criminal justice process.

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 [6.4.2], 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.

Understanding adult sexual assault matters: insights from research and practice: an educational resource for the justice sector

[7-320] Article

N Hudson, R Moody, H McKay and R Kaspiew, *Understanding adult sexual assault matters: insights from research and practice: an educational resource for the justice sector* (2024) Melbourne: Australian Institute of Family Studies.

Abstract

This resource, published by the Australian Institute of Family Studies, aims to strengthen the capabilities of justice sector actors to understand the nature and impacts of sexual assault and implement evidence-based best practice in matters involving sexual offending against adults. It explores the realities of sexual assault through 13 insights and demonstrates approaches that may assist in counteracting the influence of false assumptions and stereotypes, to support best practice responses.

Further reading — legal

[7-495] Further reading

Last reviewed: August 2025

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 et al, *Expert evidence and criminal jury trials*, Oxford University Press, 2016, pp 93–116 (Ch 5).

The 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).

Procedural considerations

- J Cashmore and R Shackel, "Evaluation of the Child Sexual Offence Evidence Pilot: final outcome evaluation report", 2018.
- D Hamer, "Trying delays: forensic disadvantage in child sexual assault trials" (2010) 9 *Criminal Law Review* 671.

The prosecution of adult sexual assault matters

- Office of the Director of Public Prosecutions NSW (ODPP), "Sexual assault review Report" 2025.

Relevant literature — non-legal articles

Impact and sequelae of child sexual abuse

The long-term effects of child sexual abuse
J Cashmore and R Shackel ..... [7-500]

The dynamics of child sexual abuse

Child sexual abuse in Australia
B Mathews ..... [7-510]

Understanding children's medium for disclosing sexual abuse
R Shackel ..... [7-520]

How child victims respond to perpetrators of sexual abuse
R Shackel ..... [7-540]

"Because she's one who listens": children discuss disclosure recipients in forensic interviews
L Malloy, S Brubacher and M Lamb ..... [7-560]

A retrospective analysis of children's assessment reports: what helps children tell?
R McElvaney and M Culhane ..... [7-580]

Children's disclosure of sexual abuse: a systematic review of qualitative research
S Morrison, C Bruce and S Wilson ..... [7-600]

Disclosure of child sexual abuse: delays, non-disclosure and partial disclosure
R McElvaney ..... [7-620]

Factors that prevent, prompt, and delay disclosures in female victims of child sexual abuse
N Kellogg, W Koek and S Nienow ..... [7-640]

Barriers and facilitators to disclosing sexual abuse in childhood and adolescence
C Lemaigre, E Taylor and C Gittoes ..... [7-660]

Child sexual abuse and the criminal law

Child witnesses: the judicial role
J Cashmore ..... [7-680]

Child sexual abuse and the criminal justice system: what educators need to know
C Eastwood ..... [7-700]

Consequences of criminal court involvement for child victims
J Quas and G Goodman ..... [7-720]

Child sexual assault trials: a survey of juror perceptions
J Cashmore and L Trimboli ..... [7-740]

What Australian jurors know and do not know about evidence of child sexual abuse
J Goodman-Delahunty, N Martschuk and A Cossins ..... [7-760]

Validation of the child sexual abuse knowledge questionnaire
J Goodman-Delahunty, N Martschuk and A Cossins ..... [7-780]

Courtroom questioning of child sexual abuse complainants
N Westera et al ..... [7-800]

Judges' delivery of ground rules to child witnesses in Australian courts
B Earhart et al ..... [7-820]

An evaluation of how evidence is elicited from complainants of child sexual abuse
M Powell et al ..... [7-840]

The prosecution of child sexual assault in NSW

Prosecutorial discretion in cases of persistent child sexual abuse
P Parkinson et al ..... [7-850]

Fourteen-year trends in the criminal justice response to child sexual abuse reports in NSW
J Cashmore, A Taylor and P Parkinson ..... [7-860]

Sentencing and treatment of juvenile sex offenders in Australia
R Blackley and L Bartels ..... [7-880]

Victim impact statements in child sexual assault cases: a restorative role or restrained rhetoric?
R Shackel ..... [7-900]

Institutional child sexual abuse

The social dynamics and impacts of institutional child sexual abuse
D Kenny ..... [7-920]

Memory science in the *Pell* appeals: impossibility, timing, inconsistencies
J Goodman-Delahunty, N Martschuk and M Nolan ..... [7-940]

Investigation and interviewing children in child sexual abuse cases

Principles to enhance communication with child witnesses
M Powell and B Earhart ..... [7-960]

Empirical guidance on the effects of child sexual abuse on memory and complainants' evidence
J Goodman-Delahunty, M Nolan and E van Gijn Grosvenor ..... [7-980]

Legal decision making about (child) sexual assault complaints: the importance of the information-gathering process
M Martschuk, M Powell, R Blewer and J Goodman-Delahunty ..... [7-990]

Challenges facing child witnesses: special measures, witness assistance and intermediaries

Special measures in child sexual abuse cases: views of Australian criminal justice professionals
N Westera et al ..... [7-1020]

Recording evidence and evidentiary issues in child sexual abuse cases

The "good old days" of courtroom questioning: changes in the format of child cross-examination questions
R Zajac, N Westera and A Kaladelfos ..... [7-1040]

Disorder in the courtroom? Child witnesses under cross-examination
R Zajac, S O'Neill and H Hayne ..... [7-1060]

Sexual assault: forensic examination in the living and deceased
C Lincoln ..... [7-1080]

Forensic medical evaluation of children who present with suspected sexual abuse
G Wong ..... [7-1100]

The role of photographic and video documentation in the investigation and prosecution of child sexual assault
A Cossins et al ..... [7-1120]

Factors associated with child sexual abuse confirmation at forensic examinations
W Silva et al ..... [7-1140]

How to cross-examine forensic scientists: a guide for lawyers
G Edmond et al ..... [7-1180]

Model forensic science
G Edmond et al ..... [7-1200]

Forensic science evidence, wrongful convictions and adversarial process
D Hamer and G Edmond ..... [7-1220]

Mock jury and juror responses to uncharged acts of sexual misconduct
J Goodman-Delahunty and N Martchuk ..... [7-1240]

Jury reasoning in separate and joint trials of institutional child sexual abuse
J Goodman-Delahunty, A Cossins and N Martschuk ..... [7-1260]

Methods to evaluate justice practices in eliciting evidence from complainants of child sexual abuse
J Goodman-Delahunty et al ..... [7-1280]

Inconsistencies in complainants' accounts of child sexual abuse arising in their cross-examination
A Pichler et al ..... [7-1300]

Victims of sexual assault

Rape myths as barriers to fair trial process
E McDonald ..... [7-2000]

Misconceptions of sexual crimes against adult victims
P Tidmarsh and G Hamilton ..... [7-2100]

Avoiding the second assault: a guidebook for trauma-informed prosecutors
E Werner ..... [7-2110]

Specialist approaches to managing sexual assault proceedings: an integrative review
A George et al ..... [7-2120]

Scoping review of priority populations
A George et al ..... [7-2140]

First nations women and children

Aboriginal and Torres Strait Islander children
P Anderson et al ..... [7-2500]

Juvenile sex offenders

Sentencing and treatment of juvenile sex offenders
R Blackley and L Bartels ..... [7-3000]

Children with harmful sexual behaviours
Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Ch 10 ..... [7-3100]

Online exploitation

Trajectories in online child sexual exploitation offending
T Krone and RG Smith ..... [7-4000]

Child sexual abuse material on the darknet: a script analysis of how offenders operate
B Leclerc et al ..... [7-4100]

Inquiry into law enforcement capabilities in relation to child exploitation
Australian Institute of Criminology ..... [7-4200]

Further reading — non-legal ..... [7-9500]

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.

Child sexual abuse in Australia: a national evidence base on prevalence, perpetrators, disclosure, and implications for the judiciary

[7-510] Article

B Mathews, "Child sexual abuse in Australia: a national evidence base on prevalence, perpetrators, disclosure, and implications for the judiciary" (2026) 38 *JOB* 1.

Abstract

This article first explains the approach employed in the Australian Child Maltreatment Study[1] (ACMS) to measuring the prevalence and characteristics of child sexual abuse. It then outlines the key results from the ACMS about the major dimensions of this evidence base about child sexual abuse in Australia. Finally, it makes brief observations about potential implications for diverse aspects of judicial decision-making and general practice in criminal, civil and child protection jurisdictions.

1 B Mathews, R Pacella, J Scott et al, "The prevalence of child maltreatment in Australia: findings from a national survey" (2023) 218 (6 Suppl) Medical Journal of Australia S13–S18.

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.

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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

1 See IM Cordon, GS Goodman and SJ Anderson, "Children in court" in PJ van Koppen and S Penrod (eds), *Adversarial versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems*, 2003, Kluwer Academic, Plenum Publishers, New York, pp 167–189; Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84, 1997, Australian Government Publishing Service, Canberra; New South Wales Legislative Council Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions*, Parliamentary Paper 208, 2002; L Sas, *The Interaction Between Children's Developmental Capabilities and the Courtroom Environment: The Impact on Testimonial Competency*, Research Report (RR02-6e), November 2002, Department of Justice, Canada, available at <http://canada.justice.gc.ca/en/ps/rs/rep/2002/interaction/inter.pdf> (accessed 24 January 2007); JR Spencer and RH Flin, *The Evidence of Children: The Law and the Psychology*, 2nd ed, 1993, Blackstone, London.

2 Spencer and Flin, op cit n 1; JA Quas et al, *Childhood Sexual Assault Victims: Long-term Outcomes after Testifying in Criminal Court*, Monographs of the Society for Research in Child Development, 2005, Blackwell Publishing.

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)*

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3 While there are procedural and legislative differences across the various jurisdictions, the issues facing child witnesses in child sexual assault matters are strikingly similar across common law countries such as England, Scotland, Canada, and the United States. See N Bala, "Child witnesses in the Canadian criminal courts: recognizing their capacities and needs" (1999) 5(2) *Psychology, Public Policy and Law* 323–354.

M Brennan and RE Brennan, *Strange Language: Child Victims Under Cross-Examination*, 3rd ed, 1988, Charles Sturt University, Wagga Wagga, NSW; R Bessner, *The Voice of the Child in Divorce, Custody and Access Proceedings*, 2002, Background paper, Department of Justice Family, Children and Youth Section, Canada (available at <http://justice.gc.ca/en/ps/pad/reports/2002-fcy-1.html>, accessed 24 January 2007); GS Goodman et al, "Innovations for child witnesses: a national survey" (1999) 5(2) *Psychology, Public Policy and Law* 255–281; JEB Myers, "A decade of international legal reform to accommodate child witnesses: steps toward a child witness code", in BL Bottoms and GS Goodman (eds), *International Perspectives on Child Witnesses*, 1996, Sage, Newbury Park, CA, pp 221–265; Spencer and Flin, op cit, n 1.

4 J Cashmore, "Innovative procedures for child witnesses", in H Westcott, GM Davies and R Bull (eds), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice*, 2002, John Wiley & Sons, Chichester, pp 203–218.

5 *Evidence (Children) Act 1997*, ss 9–13.

6 ibid, ss 9, 18.

7 J Cashmore and L Trimboli, *An Evaluation of the New South Wales Child Sexual Assault Specialist Jurisdiction Pilot*, 2005, New South Wales Bureau of Crime Statistics and Research, Sydney.

[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.

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8 Brennan and Brennan, op cit, n 3; CA Carter, BL Bottoms and M Levine, "Linguistic, social and emotional influences on the accuracy of children's reports" (1996) 20 *Law and Human Behavior* 335–358; E Davies, E Henderson and F Seymour, "In the interests of justice? The cross-examination of child complainants of sexual abuse in criminal proceedings" (1997) 4 *Psychiatry, Psychology and Law* 217–229; E Henderson, "Persuading and controlling: the theory of cross-examination in relation to children", in H Westcott et al, op cit n 4, pp 279–293.

9 Quas et al, op cit, n 2. While adolescents may have less trouble with lawyers' language, Quas et al found that those who were adolescents at the time of the trial were more likely than younger children to have longer-term adverse outcomes 12 years later, and also to have less faith in the legal system.

10 Brennan and Brennan, op cit, n 3; Davies et al, op cit, n 8; GS Goodman et al, *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, Monographs of the Society for Research in Child Development, 1992, University of Chicago Press; R Zajac, J Gross and H Hayne, "Asked and answered: Questioning children in the courtroom" (2003) 10(1) *Psychiatry, Psychology and Law* 199–209.

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

11 Carter et al, op cit, n 8; Cordon et al, op cit, n 1; Henderson, op cit, n 8; Zajac et al, op cit, n 10.
12 Carter et al, op cit, n 8, p 336.
13 Henderson, op cit, n 8, p 280.
14 J Cashmore and K Bussey, "Judicial perceptions of child witness competence" (1996) 20(3) *Law and Human Behavior* 313–334. Similar findings are reported in Queensland: C O'Kelly et al, "Judicial intervention in court cases involving witnesses with and without learning disabilities" (2003) 8(2) *Legal and Criminological* 229–240; and the United States: Cordon et al, op cit, n 1; T Hafmeister, "Protecting child witnesses: judicial efforts to minimize the trauma and reduce evidentiary barriers" (1996) 11 *Violence and Victims* 73–91.
15 Royal Commission into New South Wales Police Service, 1996; Victorian Law Reform Commission, 2004.
16 Royal Commission into the New South Wales Police Service, 1996, Vol 5, p 1110.
17 Cashmore and Bussey, op cit, n 14, p 325.

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.

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18 Cashmore and Trimboli, op cit, n 7.

19 The number of judicial interventions was significantly "correlated with the number of objections by the prosecution lawyer during cross-examination … It was not related to the age of the child … nor was it associated with the defence lawyers' linguistic and questioning style, as rated by the researchers": Cashmore and Trimboli, op cit, n 7, p 52. O'Kelly et al, op cit, n 14 reported similar findings in relation to judicial intervention during the cross-examination of witnesses with an intellectual disability.

20 Cashmore and Trimboli, op cit n 7, p 54. Only one in five judicial interventions in the child sexual assault specialist jurisdiction evaluation study were interventions to control cross-examination and to protect the child complainant from questions which were deemed unreasonable, intimidating or harassing.

21 s 41.

22 While the defence clearly needs to be able to challenge the veracity of a witness's account of events, it is worthwhile noting that repeated accusations of lying can be very stressful for children and their level of distress can interfere with their capacity to respond to the questions. In the words of one child in the child sexual assault specialist jurisdiction evaluation: "He called me a liar. He made me really angry because he's an adult and he did not have respect." *(11-year-old complainant)*

23 Section 41 of the *Evidence Act 1995* (NSW) provides that, in any criminal proceedings, 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 is a "disallowable question", see L Babb, "What does s 41 of the Evidence Act mean to you as a judicial officer?" at [7-000] of the *Sexual Assault Handbook*.

24 In their comparison of adversarial and inquisitorial systems, van Koppen and Penrod, op cit, n 1 highlighted the importance of fairness and equality in the "contest" inherent in adversarial systems: a contest is only a real contest if it is played in a fair way and the essential feature of fair play is the formal equality of the contestants (p 2). See also Chief Justice Spigelman in *R v TA* (2003) 57 NSWLR 444; R Ellis, "Judicial activism in child sexual assault cases", paper presented at Children and the Courts Conference, National Judicial College of Australia, Sydney, 5 November 2005.

25 *R v TA* (2003) 57 NSWLR 444 at [8], per Spigelman CJ.

26 Ellis, op cit, n 24, p 10.

[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

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27 While the New South Wales Law Society now has specialist accreditation for children's lawyers, there are few specialist course available in law schools in New South Wales or Australia and specialist training in the particular areas concerning child witnesses is quite circumscribed.

28 In the absence of a "child interpreter" who can play this role as happens in some civil law jurisdictions, see Cordon et al, op cit, n 1; K Müller, "An inquisitorial approach to the evidence of children" (2001) 4(4) *Crime Research in South Africa*, available at: <www.crisa.org.za/downloads/ia.pdf> (accessed 24 January 2007), or other arrangements to present children's evidence, judicial education is necessary to assist judges and magistrates to understand what children are capable of. In various jurisdictions in Europe, and in Western Australia, for example, the whole of the evidence of the child is taken in advance of the trial, stored and eventually presented to the court without requiring the child to be present at trial to testify: Cordon et al, op cit, n 1.

29 Hafmeister op cit, n 14; J Hunter and K Cronin, *A Criminal Trial Commentary: Evidence, Advocacy and Ethical Practice*, 1995, Butterworths, Sydney.

30 J Cashmore and K Bussey, "Children's conceptions of the witness role" in JR Spencer et al (eds), *Children's Evidence in Legal Proceedings: An International Perspective*, University of Cambridge, 1989, pp 177–188; Cashmore and Bussey, op cit, n 13; R Flin, Y Stevenson, and G Davies, "Children's knowledge of legal proceedings" (1989) 80 *British Journal of Psychology* 285–297; Sas, op cit, n 1.

31 Sas, op cit, n 1, p 24.

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]

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32 These figures combine the 27 cases in the specialist jurisdiction and the 18 cases in the comparison registry. These figures were in line with the New South Wales Bureau of Crime Statistics and Research figures for delays between arrest and committal (median time = 160–180 days, depending on whether guilty or no plea) and between committal and outcome (median time = 150–250 days). See Cashmore and Trimboli, op cit, n 7, pp 26–27.

33 Quas et al, op cit, n 2. For example, in a long-term 12-year follow-up of 174 child witness complainants (aged 4 to 17 at the time of trial) example, Quas et al reported that these complainants had more adverse mental health and adjustment and negative attitudes to the court system if they had to testify more than once, and if they experienced greater distress while waiting and testifying, and did not have the support of their mothers.

34 Cashmore and Trimboli, op cit, n 7.

35 *Evidence Act 1995* (NSW), s 13.

36 JW Astington, "Children's understanding of the speech act of promising" (1988) 15 *Journal of Child Language* 157–173; F Maas and L Abbedutto, "Young children's understanding of promising: methodological considerations (1998) 25 *Journal of Child Language* 203–214.

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*?

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37 Children tend to lie to avoid getting into trouble themselves or because they are scared of the consequences of telling the truth. See P Wagland and K Bussey, "Factors that facilitate and undermine children's beliefs about truth telling" (2005) 29(6) *Law and Human Behavior* 639–655; TD Lyon et al, "Reducing maltreated children's reluctance to answer hypothetical oath-taking competency questions" (2001) 25(1) *Law and Human Behavior* 81–92.

38 Cashmore and Trimboli, op cit, n 7.

39 Lyon et al, op cit, n 37.

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]

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40 Guidance is now available to assist effective use of the technology in the New South Wales Attorney General's Department's publication *Remote Witness Video Facilities Operational Guidelines for Judicial Officers*. There are also similar guidelines for sheriff's/court officers, and support persons attending the witness room, and legal representatives, as well as a system setup checklist.

41 The small screen on the bench allows the judge/magistrate to see what the child is able to see (and sometimes that is only part of the person who is talking to them), and if the lawyer or judge/magistrate is looking to the wrong camera in court, the child sees only the back of their head.

42 *Evidence (Children) Act 1997* (NSW), s 11.

43 New South Wales Attorney General's Department, *Operational Guidelines for Sheriff's/Court Officers Attending the Witness Room*.

44 Not only should the language be developmentally appropriate, it should also be appropriate for children who are complainants in child sexual assault matters. Well-intentioned "kindly" requests to children to speak up or remove their hand from their face are not appropriately couched with references to "your pretty little mouth" for children who have allegedly been the victims of child sexual assault.

45 Cashmore and Trimboli, op cit, n 7.

46 ibid.

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.

47 It is suggested that 20 minutes is probably the length of children's attention span under these stressful circumstances although this may vary with age, temperament and the circumstances under which they are giving evidence: E Matthews and K Saywitz, *The Child Victim Witness Manual*, 1992, California Center for Judicial Education and Research.

48 See *Equality before the Law Bench Book*, Section 6 — Children and young people, Judicial Commission of New South Wales, available at <www.judcom.nsw.gov.au/publications/benchbks/equality/>

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.

Prosecutorial discretion in cases of persistent child sexual abuse

[7-850] Article

P Parkinson et al, "Prosecutorial discretion in cases of persistent child sexual abuse" (2026) 48 *Sydney LR* 1.

Abstract

This article examines the operation of laws that make it an offence to maintain an "unlawful sexual relationship" with a child or young person in NSW, Queensland, and South Australia. Drawing on prosecutor interviews, a sample of case file analyses, and conviction data, it identifies three distinct approaches to prosecutorial discretion. These approaches help explain the different levels of usage of the charge between NSW and the other two jurisdictions.

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.

This article was first published by Thomson Reuters in the Criminal Law Journal *and should be cited as J Goodman-Delahunty, N Martschuk and M Nolan, "Memory science in the* Pell *appeals: impossibility, timing, inconsistencies", (2020)* 44 Crim LJ *232.*

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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.

This article was first published by Thomson Reuters in the Journal of Law and Medicine *and should be cited as A Cossins, A Jayakody, C Norrie and P Parkinson, "The role of photographic and video documentation in the investigation and prosecution of child sexual assault", (2016) 23* JLM *925.*

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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) *Ciência & 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.

Rape myths as barriers to fair trial process

[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.

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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.

Towards a culturally safe and trauma-informed court: a scoping review of populations that experience increased susceptibility to sexual violence

[7-2140] Article

Last reviewed: December 2024

A George, V Lowik, S Rosenberg, Y Lee, Nanushka, and S Noble, "Towards a culturally safe and trauma-informed court: a scoping review of populations that experience increased susceptibility to sexual violence".

The views and recommendations expressed in this paper are those of the authors and do not necessarily reflect the views, and are not recommendations, of the Judicial Commission of NSW.

Abstract

In January 2024, the Commonwealth Attorney-General referred to the Australian Law Reform Commission an inquiry into the justice responses to sexual violence. The inquiry must consider in particular the impacts of laws and legal frameworks on populations that are overrepresented in sexual violence statistics, and on populations with intersecting identities. It is due to report in January 2025. This report provides a timely overview of the Australian literature on a selection of these intersectional "priority populations" at greater risk of sexual violence:

- First Nations communities
- LGBTIQA+ communities
- CALD communities
- people involved in sex work
- people with disabilities
- older people
- young people.

A scoping review was considered the most appropriate methodology as it is designed to swiftly identify key concepts from the evidence in a field and gaps in knowledge. It is particularly useful where the literature is fragmented and different study designs are encountered, as with these priority populations. While Australian literature was the predominant focus of the review, international literature was also included to augment the Australian research, given its paucity in many areas. Due to the pace of policy-making and potential law reforms in the sexual violence context, a rapid approach was adopted for this review to ensure that the above populations and their unique needs are acknowledged, pending further research being undertaken with victim-survivors and criminal justice system stakeholders.

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.

Further reading — non-legal

[7-9500] Further reading

Last reviewed: August 2025

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*.

The dynamics of child sexual abuse

- B Mathews et al, "Child sexual abuse by different classes and types of perpetrator: prevalence and trends from an Australian national survey" (2024) 147 *Child Abuse & Neglect*.

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 Brubacheret al, "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 et al (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 et al, "The unusual suspects: female versus male accused in child sexual abuse cases" (2017) 72 *Child Abuse & 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 Darlng and LS 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, Ch 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.

[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.

[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: "National jury research published" (2016) 28(5) *JOB* 45.

See the Jury reasoning in joint and separate trials report.

[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 impact of delayed reporting on the prosecution and outcomes of child sexual abuse cases report.

[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 An evaluation of how evidence is elicited from complainants of child sexual abuse report.

[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.

Note: This commentary is substantially derived from the Royal Commission website.

[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 McDonald 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.

1 Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report (2017) vol 3, 11.

2 Australian Institute of Family Studies, *The long-term effects of child sexual abuse* (CFCA Paper No 11, 2013) 23, accessed 5 August 2020.

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 Christine Mendes and Robyn Gilbert, Senior Solicitor, Sexual Assault Communications Privilege Service, Legal Aid NSW

[9-000] Legislative reform

Last reviewed: August 2025

The sexual assault communications privilege (SACP) was created in 1997[1] to protect counselling communications of victims and complainants. In 1999 Parliament amended the law in response to a narrow interpretation of the SACP by the NSW Court of Criminal Appeal (NSWCCA).[2] The amendments expanded the scope of records caught by the privilege and incorporated the SACP provisions into the *Criminal Procedure Act 1986* (NSW) (CPA). In 2002 the SACP provisions were further amended[3] as a result of the decision in *R v Lee*.[4] In 2010 further reforms were made[5] following a pro-bono pilot program.[6] These amendments strengthened the privilege by enhancing victims' participation in decisions affecting the confidentiality of their counselling and therapeutic records.

Presently, the provisions are in Ch 6, Pt 5, Div 2 of the CPA and require leave to:

(1) issue a subpoena requiring the production of documents recording protected confidences,

(2) produce such documents to the court, and

(3) adduce evidence that would disclose a protected confidence: s 298.

Section 298A prohibits a person from compelling a victim or alleged victim from identifying their counsellor.

The protected confider (usually, the complainant) has standing if a document is sought to be produced or evidence is sought to be adduced that would disclose a protected confidence: s 299A. An applicant for leave must give notice of such an application (s 299C), and a court must ensure that the protected confider has had a reasonable opportunity for legal advice: s 299. Since 2011, public funding has been available for legal representation for protected confiders: see **[9-600] Sexual Assault Communications Privilege Service**, below.

A court can, in certain circumstances, consider and disclose documents: s 299B.

Section 299D is "a critical provision"[7] which sets out the statutory test for the granting of leave under the Division.

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1 *Evidence Amendment (Confidential Communications) Act 1997* (NSW) which amended the *Evidence Act 1995* (NSW) (commenced 1/1/1998).

2 See *R v Young* (1999) 46 NSWLR 681.

3 By the *Criminal Procedure Amendment (Sexual Assault Communications Privilege) Act 2002* (commenced 22/7/2002).

4 *R v Lee* (2000) 50 NSWLR 289.

5 By the *Courts and Crimes Legislation Further Amendment Act 2010* (commenced 7/12/2010) which inserted new ss 297–299D into the CPA.

6 The program was run cooperatively by the Women's Legal Services (NSW), the NSW Bar Association, the NSW Office of the Director of Public Prosecutions, and a number of commercial law firms.

7 *Decision Restricted* [2025] NSWCCA 55 at [21].

There is an absolute prohibition on adducing evidence of, or seeking to compel, the production of material containing a protected confidence in preliminary criminal proceedings: s 297.

The privilege is available in all criminal proceedings (not only proceedings regarding sexual assault), proceedings for apprehended violence orders (AVO) and limited civil proceedings: s 126H *Evidence Act 1995* (NSW).

[9-100] Defining a protected confidence

Last reviewed: August 2025

The SACP applies to a "protected confidence" broadly defined in s 296(1) CPA 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.

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).[8] The party claiming that the documents in question are privileged carries the onus or burden of establishing that proposition.[9]

In *Decision Restricted*,[10] the Court observed that while the definition in s 296 is broad, it relates to the communications themselves.[11] It does not catch the mere fact or existence of counselling or the nature or kind of therapy. However, it is possible that information disclosing the nature of the therapy is communicated only through a "protected confidence".

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)". It has been suggested that "harm" in s 296(4) implies that the harm in question is that suffered by the person as a consequence of the alleged offence[12] but courts have generally adopted the broader interpretation of harm.[13]

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).

8 *ER v Khan* [2015] NSWCCA 230 at [74].
9 ibid at [84].
10 *Decision Restricted* [2025] NSWCCA 55.
11 ibid at [52].
12 See *KS v Veitch (No 2)* (2012) 84 NSWLR 172 at [16]–[19].
13 *NAR v PPC1* [2013] NSWCCA 25 at [22]. See also *R v Sigadula* [2024] NSWDC 664.

Some examples of protected communications are:

- counselling notes
- medical/clinical notes
- mental health records, including hospital and GP records
- drug and alcohol records
- financial counsellor records
- letters and referrals between health professionals
- emails from a school counsellor to a parent or teacher
- social worker reports held by Centrelink or the Department of Housing.[14]

It is important in the individual case to consider whether the person was acting as "a counsellor". In *ER v Khan*,[15] communications were found not to be protected because Joint Investigation Response Team and Department of Family and Community Services officers, although holding counselling qualifications, were performing investigative functions and were not acting as "counsellors" to the complainant when the relevant communications were made.

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).

[9-200] Purpose

Last reviewed: August 2025

When introducing the privilege in 1997, the then Attorney General indicated that the purpose of the privilege was to ensure that victims of "the grave trauma of sexual assault" can access confidential counselling and thereby be assisted in their recovery. He said:

> [T]he knowledge that details of a victim's conversations with her therapist may be used against her in subsequent criminal proceedings can inhibit the counselling process and undermine its efficacy.[16]

The 2010 amendments extended the scope of the privilege, and the then Attorney General commented that:

> 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.[17]

14 These examples are given in "Subpoena Survival Guide", p 26, accessed 23/7/2025.

15 *ER v Khan* [2015] NSWCCA 230.

16 The Hon Jeff Shaw, Second Reading Speech, Evidence Amendment (Confidential Communications) Bill 1997, NSW, Legislative Council, *Debates*, 22/10/1997, pp 1120–1121.

17 The Hon John Hatzistergos, Second Reading Speech, Courts and Crimes Legislation Further Amendment Bill 2010, NSW, Legislative Council, *Debates*, 24/11/2011; cited in full in *R v Bonanno; Ex p Protected Confider* [2020] NSWCCA 156 at [14].

The SACP recognises the public interest in victims and complainants having access to confidential counselling both as a therapeutic response for the individual and to prevent the disclosure of such records from deterring other complainants from reporting sexual violence: see *KS v Veitch (No 2)*[18] in which the NSWCCA stated while discussing the SACP:

> The purpose of protecting such confidences generally is to encourage victims of sexual assault to seek professional assistance[19]
>
> …
>
> The deterrent effect on others through a perception that disclosure is readily achieved, may undo the purpose of the statutory privilege.[20]

[9-300] Applications for grant of leave

Last reviewed: August 2025

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.[21] 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.[22]

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 will have substantial probative value as evidence in the case.[23]

The assessment of "substantial probative value" must be concerned with material that is ultimately admissible.[24]

In *Decision Restricted*[25] the Court considered the word "will" in the phrase "will … have" and found that it does not present a hurdle as high as "realistic inevitability", especially when deciding whether leave should be granted to seek production of documents under subpoena.[26] However, "will" it was said "clearly connotes something more than a possibility or being 'more likely than not'."[27]

In *BJS v R*,[28] 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".

18 *KS v Veitch (No 2)* (2012) 84 NSWLR 172.
19 ibid at [34].
20 ibid at [77].
21 *R v Bonanno; Ex p Protected Confider* [2020] NSWCCA 156 at [12].
22 ibid at [13].
23 ibid at [87], [88].
24 *KS v Veitch (No 2)* (2012) 84 NSWLR 172 at [37].
25 *Decision Restricted* [2025] NSWCCA 55.
26 ibid at [32].
27 ibid.
28 *BJS v R* [2013] NSWCCA 123 at [171].

In conducting an assessment of "substantial probative value", the Court should examine each document in question and not approach the task by looking at the documents in their "totality".[29] In *JK v R*,[30] the NSWCCA found that the District Court judge did not properly apply the s 299D(1) test by failing to examine documents produced following leave having been earlier granted to issue a subpoena. The Court held that because of the centrality of the complainant's credibility and reliability to the proceedings, examining the documents with knowledge of the issues in the trial was the only way in which the Court could determine whether the documents had probative value and "substantial probative value".

In *Rohan v R*,[31] 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". However, in *Decision Restricted*[32] the Court observed[33] that directions to be given to a jury about delay in complaint (s 294) and differences in complaint (s 293A) are not relevant to a proper assessment of the probative value of the evidence. The Court went on to note that evidence that will have a substantial probative value if accepted may nevertheless attract a strong warning.

(b) other documents or evidence concerning the matters to which the protected confidence relates are not available.

This limb of the test is designed to prevent access to counselling communications where relevant material is already available from another source such as the complainant's statements to police.[34]

(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).

This balancing exercise has been described as imposing a "significant constraint" requiring consideration of two competing public interests with access being granted only if the interest in admitting the documents "substantially outweighs" the public interest in protecting the confidences.[35] If the material casts doubt on the veracity or reliability of the complainant, this will militate in favour of disclosure where it could give rise to a doubt as to the guilt of the accused.[36]

29 *PPC v Williams* [2013] NSWCCA 286 at [67], [69].
30 *JK v R* [2025] NSWCCA 44.
31 *Rohan v R* [2018] NSWCCA 89.
32 *Decision Restricted* [2025] NSWCCA 55.
33 ibid at [79].
34 *KS v Veitch (No 2)* (2012) 84 NSWLR 172 at [33].
35 ibid at [34].
36 ibid.

[9-400] Discretionary power under s 299B to inspect ("consider") the documents

Last reviewed: August 2025

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).[37] Section 299B(1) empowers a court to inspect ("consider") the documents to identify any protected confidences and to evaluate the probative value of the evidence. Section 299B(4) provides a broad power, including to order production of the document to the Court for the purpose of facilitating its consideration.

The s 299D test does not apply to the power under s 299B "to consider the document or evidence". Error was recently found in a District Court judge applying the s 299D(1)(a) test to the question that arose under s 299B(1) and (4).[38]

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.[39] Section 299B(4) would similarly permit such a course to be taken when determining a question of sexual assault communications privilege.[40] 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.[41] It has been found to be an error to approach the task in a global way.[42]

The NSWCCA recently stated in *JK v R*[43] that:

> It is difficult to envisage how a judge can decide whether a document to which access is sought contains a protected confidence, or has substantial probative value, and to decide the matters required to be determined by s 299D, if the judge does not examine the documents.[44]

Less than a month later, and with reference to *JK v R*, the NSWCCA, in a differently constituted bench, clarified that they did not understand the Court in *JK v R* to suggest that documents must be inspected in every case[45] and that to do so would be contrary to what Basten JA said in *KS v Veitch (No 2)*[46] and what R A Hulme J said in *Rohan v R*.[47] However, in *Decision Restricted* the Court accepted that "there likely will be many cases where inspection of the documents may be important, if not determinative, in considering whether the documents or evidence in question has "substantial probative value".[48]

37 *Rohan v R* [2018] NSWCCA 89 at [58], [67]; *KS v Veitch (No 2)* (2012) 84 NSWLR 172 at [28].
38 *Decision Restricted* [2025] NSWCCA 55 at [75].
39 *ER v Khan* [2015] NSWCCA 230 at [108]; *Kennedy v Wallace* (2004) 142 FCR 185.
40 *ER v Khan* [2015] NSWCCA 230 at [108].
41 ibid at [109], [110].
42 *PPC v Williams* [2013] NSWCCA 286 at [67], [69].
43 *JK v R* [2025] NSWCCA 44.
44 ibid at [24].
45 *Decision Restricted* [2025] NSWCCA 55 at [26].
46 *KS v Veitch (No 2)* (2012) 84 NSWLR 172 at [23], [28].
47 *Rohan v R* [2018] NSWCCA 89 at [82].
48 ibid at [27].

[9-500] Scope of privilege

Last reviewed: August 2025

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,[49] but only where the SACP has been upheld in a criminal proceeding and the civil case is about the same or similar acts. The SACP does not apply in family law nor in child protection cases.

For a detailed examination of the scope of the SACP provisions and issues arising from its construction, see "Use of the sexual assault communications privilege in sexual assault trials"[50] and "Sexual assault communications privilege — an update".[51]

See also "Sexual assault communications privilege" at **[5-500]**ff in the *Criminal Trial Courts Bench Book* for further discussion.

[9-600] Sexual Assault Communications Privilege Service

Last reviewed: August 2025

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 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 has 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, including the sexual assault communications privilege.[52]

On 22 July 2025 the Legal Aid NSW Board approved a new policy to make legal aid available to a complainant in sexual assault proceedings to object (in whole or in part) to a subpoena seeking the production of their personal records. Personal records may include diaries, journals, mobile phone or access to electronic evidence such as emails, social media or chat application history.[53]

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49 The privilege applies to communications which were privileged under the SACP in criminal proceedings and the civil proceedings relate to substantially the same issues as the criminal proceedings: *Evidence Act 1995* (NSW), s 126H.

50 I Nash, "Use of the sexual assault communications privilege in sexual assault trials" (2015) 27(3) *JOB* 21.

51 R Gilbert "Sexual assault communications privilege — an update" (2025) 37(1) *JOB* 1.

52 Legal Aid NSW, Subpoena Survival Guide, accessed 23/7/2025.

53 Legal Aid NSW, "Policy Bulletin 2025/7: Civil law policy -— subpoena to a complainant", accessed 11/8/2025.

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District Court Criminal Practice Note 5

[10-100] Management of prescribed sexual offence proceedings

Last reviewed: December 2024

District Court Criminal Practice Note 5 — Management of prescribed sexual offence proceedings

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District Court Criminal Practice Note 6

[10-200] Sexual assault case list

Last reviewed: December 2024

District Court Criminal Practice Note 6 — Sexual assault case list

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District Court Criminal Practice Note 8

[10-220] Removal of judgments from the internet

Last reviewed: December 2024

District Court Criminal Practice Note 8 — Removal of judgments from the internet

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District Court Criminal Practice Note 18

[10-265] Criminal trials

Last reviewed: December 2024

District Court Criminal Practice Note 18 — Criminal trials

Readiness Hearing guidance (and forms)

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District Court Criminal Practice Note 31

[10-270] Management of proceedings under the child sexual offence evidence program

Last reviewed: May 2025

Commencement

Practice Note 31 Management of proceedings under the child sexual offence evidence program replaced Practice Note 28 and commenced 31 March 2025.

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District Court Criminal Practice Note 35

[10-275] Media access to sexual assault proceedings heard in camera

Last reviewed: November 2025

District Court Criminal Practice Note 35 — Media access to sexual assault proceedings heard in camera

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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

Last reviewed: December 2024

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.