Children's Court of New South Wales

4 October 2017

Strengthening child sexual abuse laws - submissions
Justice Strategy and Policy
Department of Justice
GPO Box 31
Sydney NSW 2001

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

Dear Mr Andrew Cappie-Wood,

Strengthening Child Sexual Abuse Laws Discussion Paper

The Children's Court of New South Wales welcomes the opportunity to provide a submission to the Department of Justice Discussion Paper 'Strengthening Child Sexual Abuse Laws'.

The Children's Court adopts a dual perspective in this submission, reflecting its dual jurisdiction in dealing with both care and protection matters and youth offending matters.

The specialised jurisdiction of the Children's Court was created in recognition of the fact that children and young people, as both victims and as offenders, are fundamentally different to adults, and must be treated as such. In particular, the nature of criminal offending of a child or young person is fundamentally different to that of adult offending. This is especially evident in cases where children commit sexual offences against other children, as the dynamics are often significantly different to those inherent in adult sexual offending against children.

The discrete risk factors for young offenders combined with the unique capacity of young people to be rehabilitated justifies a distinct and specialised response, through both the characterisation of certain offences as well as the diversionary and rehabilitative options preserved in judicial discretion in sentencing.

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Therefore, where the same legal framework applies to both adults and children, close consideration must be given to the impacts this will have on this fundamentally different, and more vulnerable, group.

The Children's Court recommends that these discussions may be better informed by seeking professional input from the health sector, to understand what is being observed in terms of the age at which consensual sexual behaviour is engaged in by children, and whether or not certain types of sexual behaviour (sexual intercourse, 'sexting' etc.) are harmful, and why.

Firstly, this submission will canvass the key reasons why youth offending is different in nature to adult offending, and why children should be treated differently, and separately, within the criminal justice system. The submission will then respond to certain questions and recommendations, and provide some more general observations of the issues from the dual perspective of the Children's Court.

Why children should be treated differently

As the Children's Court has stated, the nature of youth offending is fundamentally different to that of adult offending for a multitude of reasons, which give rise to a philosophical, scientific and pragmatic basis for treating children differently and separately from adults.

Firstly, many of the risk factors which impact upon a young person's likelihood of committing crime are unique to, or disproportionately affect, this young cohort, including family dysfunction such as violence, child abuse and neglect, physical, intellectual and learning disabilities, mental health issues, drug and alcohol issues as well as socio-economic disadvantage, victimisation and interrupted or sporadic participation in formal education. Children and young people are often unable to mitigate or escape these circumstances, and often do not receive the help and support they need early on to improve their health, wellbeing and future outcomes.

Secondly, children and young people experience crucial stages of brain development during childhood and adolescence, which means that their mental faculties are essentially 'under construction'. A great deal of research has been undertaken in recent years to show that the pre-frontal cortex of the brain (the frontal lobes) is the last part of the human brain to develop. The frontal lobes are those parts of the brain associated with identifying and assessing risk, managing emotion, controlling impulses and understanding consequences.[1]

Children and young people are therefore especially vulnerable due to this lack of maturity, which indicates that there is a grey area between right and wrong when considering the culpability of a young offender. Whilst adolescents appear to function in much the same way as adults, they are not capable of the executive function that mature adults possess.

[1] E.C. McCuish, R. Corrado, P. Lussier, and S.D. Hart, 'Psychopathic traits and offending trajectories from early adolescence' (2014) *Journal of Criminal Justice* 42, pp 66-76.

An enlightened understanding of the importance of early development in children has also shed some important light on the life-long impacts of trauma and abuse, which can manifest itself through a cross-over of children who have had care and protection interventions in their lives into criminal offending.

Finally, the pragmatic basis for treating children differently and separately to adults reflects some important understandings in youth development and criminal justice.

Research demonstrates that most juveniles will grow out of crime and adopt law-abiding lifestyles as they mature.[2] Furthermore, there is a growing body of evidence to show that incarceration of children and young people is both less effective and more expensive than community based programs, without any increase in risk to the community. Confinement in a juvenile detention facility all but precludes healthy psychological and social development.[3]

The sentencing discretions and principles available to judicial officers in the Children's Court allows for the prioritisation of rehabilitation and consideration of the root causes of youth offending, with the aim of diverting young people away from the criminal justice system and onto better pathways.

The Children's Court submission is premised on this understanding that the nature of youth offending is significantly different to that of adult offending, and that the laws, principles and procedures governing youth offending must reflect this understanding.

2. Simplifying the legislative framework in NSW

Question 1: Should the legislative framework for child sexual abuse offences be consolidated and simplified? If yes, what is the best option for reform?

Question 2: Should the number of age categories be reduced?

The current legislative framework for sexual offences applies universally to both adults and young offenders. Judicial discretion and sentencing principles are therefore relied upon in recognising the different dynamics inherent in a child sexual offence committed by a child as opposed to a child sexual offence committed by an adult.

The Children's Court is generally supportive of the simplification and consolidation of child sexual abuse offences committed by adults. However, the Children's Court emphasises that the distinct nature of sexual offences committed by children against children gives rise to some important considerations.

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[2] 'What makes juvenile offenders different from adult offenders', Richards, K. *Trends & Issues in Crime and Criminal Justice* series 409, Australian Institute of Criminology, February 2011.
[3] M. Wald and T. Martinez, 'Connected by 25 – Improving the Life Chances of the Country's Most Vulnerable 14-24 Year Olds' (2003) Stanford University: http://www.hewlett.org/wp-content/uploads/2016/08/ConnectedBy25.pdf (accessed 18 April 2017).

Firstly, the various age categories inherent in the various child sexual assault offences hold particular relevance and importance for the sentencing of young offenders. These age categories each deal with an individual dynamic, which is crucial for assessing the criminality of the act by distinguishing between acts that are consistent with behaviour that is based on immaturity, and the more harmful or inappropriate dynamics that can occur between two children. For example, a sexual offence involving a 14 year old and a 15 year old involves a very different dynamic to an offence involving a 15 year old and a 9 year old, as consent may be a relevant issue where the offence involves a 14 and a 15 year old.

The Children's Court raises concerns that the collapsing of the age categories would increase the penalties available to a court and consequently raise the expectations of the community as to what would be an appropriate penalty for a particular category of offence without the necessary understanding of the level of culpability involved.

The Children's Court submits that there is merit in the recommendation of the NSW Sentencing Council at paragraph 2.17 to separate child sexual abuse offences into the following divisions; Division 10 – sexual assault adult; Division 10A – sexual assault child; Division 10B – sexual servitude. However, the Children's Court notes that this division is limited to separating offences involving the sexual assault of adults and the sexual assault of children, and recommends a further distinction within the proposed Division 10A to separate young offenders and adult offenders. The age categories within existing offences should remain for sexual offences committed by young offenders. A division along these lines would allow for the removal of the age categories for adult offenders, should this be deemed necessary in the interests of justice, without detrimentally impacting on young offenders.

Question 3: Should any new offences be created?

The Children's Court is not of the view that any new offences should be created or carried into a separate division for young offenders.

Question 4: Should any offences be repealed?

The Children's Court does not make any recommendation in relation to the repeal of certain offences.

3. Clarifying offences of sexual assault and sexual intercourse with a child

Question 5: Should the separate offences of aggravated sexual assault of child under 16 years (section 61J(2)(d)) and sexual intercourse with a child between 10 and 16 years (section 66C) remain? If yes, can their description be improved?

The Children's Court does not express a definitive opinion in relation to questions 5 and 6.

From a child protection perspective, the Children's Court is generally supportive of affording greater protection to vulnerable children where this is possible and desirable, including protecting them from the trauma of having to give evidence in sexual assault cases.

However, the Children's Court notes that even if the offence in s 61J(2)(d) was amended or removed, the issue of consent may still be relevant in an offence prosecuted under s 66C, where an accused is prepared to plead guilty but there is a dispute as to the facts, which could require the victim to give evidence. Therefore, the potential need for children to give evidence is not necessarily mitigated or removed by amending s 61J(2)(d).

Question 6: Should the offence of sexual intercourse with child under 10 years (section 66A) be increased to include children under 12 years?

The Children's Court does not express a definitive opinion on this question, but raises a concern that increasing the age of the child in s 66A will impact on the jurisdiction of the Children's Court, as this would require any offence where the child was under the age of 12 to be committed to the District Court. The Children's Court queries whether this is necessarily appropriate or advisable for child sexual offences involving young offenders.

4. Clarifying offences of indecent assault and act of indecency

Question 7: Should the description of the offences of indecent assault and act of indecency committed against children under 16 years be improved? If yes, what option(s) is preferable?

The Children's Court notes that the offence of indecent assault and act of indecency apply in the same way to adult offenders as they do to young offenders.

There is some merit in the suggestion to merge these offences, as it eliminates the need for a trial court to assess acts of similar criminality characterized in two separate offences. Sentencing discretion should adequately allow for the court to deal with the various contingencies and factual circumstances which would arise in acts of 'sexual touching'.

Question 8: Should the term 'indecent' and the common law definition remain?

The Children's Court does not wish to comment on this question.

5. Simplifying aggravating factors

Question 9: Should aggravating factors be removed as elements of child sexual assault offences? If yes, what is the best option for reform?

The Children's Court is supportive of option 2 at 5.6, to prescribe the same aggravating factors to apply to all aggravated child sexual abuse offences, as a means to simplify and consolidate child sexual offences.

6. Addressing difficulties arising from historic child sexual offending

Question 10: Should a provision be introduced to permit the prosecution to rely on the offence with the lesser maximum penalty where the alleged date range includes more than one offence?

The Children's Court does not wish to make submissions on this question.

Question 11: Should NSW adopt the Royal Commission's recommendation that in historic child sexual abuse matters an offender is sentenced by applying current sentencing principles but in accordance with the historic maximum penalty?

The Children's Court supports the Royal Commission's recommendation set out at 6.21; that sentences for child sexual abuse offences should be set in accordance with the sentencing standards at the time of sentencing, but with the sentence limited to the maximum sentence available for the offence at the time of offending.

Question 12: Should the repeal of the limitation period for certain child sexual assault offences committed against females aged 14 and 15 years be made retrospective as recommended by the Royal Commission?

The Children's Court is supportive of the Royal Commission's recommendation that the repeal of the limitation period for certain child sexual assault offences committed against females aged 14 and 15 years be made retrospective.

Question 13: Should the repeal of the common law presumption that a male under 14 years is incapable of having sexual intercourse be made retrospective?

The Children's Court notes that the presumption of *doli incapax* applies to offenders between the ages of 10 and 14, requiring the prosecution to rebut the presumption that a child cannot be morally culpable of an offence. As this presumption operates to protect children between the age of 10 and 14, the Children's Court is not opposed to the repeal of the common law presumption that a male under 14 years is incapable of having sexual intercourse being made retrospective.

7. Improving the offence of persistent child sexual abuse

Question 14: Should the NSW offence of persistent child sexual abuse be replaced by the model provision recommended by the Royal Commission?

The Children's Court submits that the Queensland model of an offence focused on an unlawful sexual relationship as discussed at 7.19 is the model best aligned with a child protection philosophy.

However, this submission is made on the basis that the paper assumes this offence involves an adult defendant and overlooks the possibility of the accused being under the age of 18. The Children's Court queries the possibility of this offence being prosecuted where the third 'unlawful sexual act' occurs once the accused reaches the age of 18, but the previous two acts occurred when the accused was 17. The accused would not be an 'adult' as defined in Appendix B, but it is unclear whether they would still be captured by the proposed wording in s 3(2)- "engages in 2 or more unlawful sexual acts with or towards a child over any period".

Where the 'unlawful sexual act' was consensual sexual activity with a person under the age of 16, and the offender was under the age of 18 during one or more of the 'unlawful sexual acts', it would be inappropriate for a person to be charged with the offence of persistent child sexual abuse, as this does not accurately reflect the intended target of the offence, nor the dynamics contemplated in persistent child sexual abuse.

Question 15: Should the offence of persistent child sexual abuse be retrospective as recommended by the Royal Commission?

Question 16: Should an offender being sentenced for an offence of persistent child sexual abuse receive a higher penalty than isolated offences to reflect the ongoing nature of the abuse?

Question 17: Should a course of conduct charge, as introduced in Victoria, be enacted?

Question 18: Should a course of conduct charge be available for historic offences?

The Children's Court does not make any comment in regards to questions 15 – 18.

8. Improving the offence of grooming

Question 19: Should the law be amended to implement the Royal Commission's recommendation for a broader grooming offence? If yes, should the amendments be modeled on the provisions in Queensland or Victoria?

Question 20: Should an offence of grooming a person other than the child, such as a parent, with intent to obtain access to children be introduced as recommended by the Royal Commission?

The Children's Court notes that a broader grooming offence modeled on the Queensland offence would be beneficial, as it relates broadly to 'any conduct' in procuring a child, which negates the need for an additional offence as outlined in question 20.

9. Strengthening offences against young people under care

Question 21: Should other specific relationships be included in the definition of 'special care'?

The Children's Court submits that it should be clarified that adoptive parents is a relationship falling within the definition of 'special care'. The Children's Court recommends consideration of all the possible relationships whereby a person has parental responsibility, in part or in full, to ensure that all relevant relationships are captured.

Question 22: Should 'special care' offences apply to all forms of sexual offences including indecent conduct?

The Children's Court submits that 'special care' offences should apply to all forms of sexual offences, based on the similar degree of criminality involved in this type of sexual conduct against or towards children.

10. Introducing specific offences of failing to protect and failing to report

Question 23: Should the Royal Commission's model for a targeted failure to report offence be adopted? If yes, how should it be adapted for NSW?

From a care and protection perspective, the Children's Court is generally supportive of expanding protections and safeguards for children.

In relation to a potential offence for failing to report institutional child sexual abuse, the Children's Court notes that any targeted offence must specify within the legislation whether an individual or an institution, or both, may be indicted for the proposed offence.

The Children's Court notes that consideration should also be given to the reality of the existence of conflicting, in-house policies of institutions, and the measures which would need to be taken to educate individuals of the scope of the offence.

Question 24: Should the failure to report an offence be made partially retrospective as the Royal Commission recommends?

The Children's Court does not wish to make any comment on this question.

Question 25: Should protection be afforded to people who make disclosures of child sexual abuse?

The Children's Court does not wish to make any comment on this question.

Question 26: Should the Royal Commission's model for a targeted failure to protect offence be adopted? If yes, how should it be adapted in NSW?

The Children's Court notes that in the care and protection system, the person who identifies a risk may not be the same person with the power or ability to remove or mitigate the risk. The model for an offence targeting failure to protect as recommended by the Royal Commission at 10.38 contains two distinct elements to the offence, and it is not clear how this offence would apply where the first element resides in a person who has knowledge or identifies a risk, and the second element for failure to remove or reduce the risk resides in a different individual, if the first person does not have the authority or ability to act on the risk.

The Children's Court suggests further consultation and consideration of this recommendation.

11. Introducing statutory defences

Question 27: Should a defence of honest and reasonable mistake as to age be enacted? If yes, should it apply only where the complainant is 14 or 15 years of age and should the onus be on the accused?

From a criminal justice perspective, the Children's Court is generally supportive of a statutory defence of honest and reasonable mistake of age.

The Children's Court notes that there would need to be careful consideration as to how the common law framework would apply in codified form, and whether or not the statutory defence should apply only to child victims above the age of 14. The Children's Court does not wish to express a definitive view on whether the defence should only apply to 14 or 15 year olds but recommends that input from the health sector be sought regarding this issue so that any changes in the physical maturation of children and the current landscape of the consensual sexual activity of children are taken into account in determining the appropriate policy.

The Children's Court also wishes to draw attention to the following scenario for consideration in the discussions regarding the codification of the defence of honest and reasonable mistake as to age. There are two age categories which sit below the age of consent, in s 66C(1) and s 66C(3). Where a defendant is charged with an offence under s 66C(1) (sexual intercourse with a child aged between 10 and 14), and they successfully raise the defence of honest and reasonable mistake as to age, believing that the victim was aged 15, it is unclear whether an alternative verdict can be sought under s 66E for a conviction of an offence under s 66C(3) (sexual intercourse with child aged between 14 and 16), as the victim does not fall within this age category. The fact remains that an unlawful act has been committed as both age categories fall below the age of consent, and it would be nonsensical for the defence of honest and reasonable mistake as to age to operate so as to allow for a defendant to escape all criminal sanction.

The Children's Court notes that the second option for reform as set out in paragraph 11.22 could potentially resolve this factual scenario, in narrowing the defence to circumstances where the complainant was 14 or 15 years of age.

However, further consultation and consideration of how the legal framework will apply to young offenders is needed, and should incorporate modern, evidence-based understandings of the consensual sexual activity of children.

Question 28: Should a statutory defence of similar age be enacted in NSW? If yes, how should it be framed?

The Children's Court is generally supportive of implementing a statutory defence of similar age in NSW. Where young people of a similar age engage in consensual sexual activity, a criminal justice response may be unwarranted and inappropriate. The discussion paper acknowledges the long-term consequences that a conviction may have on future opportunities and wellbeing of a young person, and the Children's Court emphasises the need to divert and protect children from unnecessary involvement in the criminal justice system.

The Children's Court suggests that consideration be given to the presumption of *doli incapax* when framing the minimum age and the maximum age difference of the defence. Where a child defendant is between the ages of 10 and 14, the prosecution must, as an element of the offence, rebut the presumption that the child is incapable of forming criminal intention to commit a crime, beyond a reasonable doubt. Where this presumption is successfully rebutted, the prosecution will have proved that the defendant knew that what they were doing was morally or gravely wrong. From both a child protection and a criminal justice perspective, it would be difficult to justify the availability of a similar age defence where a defendant has engaged in an act which they knew to be morally or gravely wrong.

The Children's Court suggests that the presumption *doli incapax* appropriately guides consideration of the culpability of child defendants under the age of 14, and that it would be appropriate for the minimum age of the child in NSW to be 14, with an age difference of between 1 and 2 years, for the defence of similar age.

These parameters reflect the reality that children and young people engage in consensual sexual activity which does not warrant a criminal justice response, whilst also acknowledging that there are limits to the acceptable boundaries of this behavior which give rise to child protection issues, such as a significant age difference between the parties.

However, the Children's Court suggests that input from professionals in the health sector regarding the sexual behaviour of young people would better inform discussions and decisions regarding the appropriate minimum age and maximum age difference for this defence.

12. Decriminalising consensual 'sexting'

Question 29: Should NSW introduce a defence to decriminalize consensual 'sexting' involving persons under 16 years? If yes, how should the defence work?

The Children's Court has previously made submissions regarding the criminalisation of 'sexting' in regards to the *Crimes Amendment (Intimate Images) Act 2017* (NSW), including a recommendation that advice and input be sought from the health sector, in order to better understand the nature of consensual 'sexting' between children and young people.

The Children's Court recommends a defence of similar age to decriminalize consensual 'sexting' involving persons under the age of 16. This defence would appropriately reflect the sociological research which demonstrates that 'sexting' is a common behavior amongst young people, and is mostly done voluntarily and consensually. The criminalisation of 'sexting' has generally occurred as part of legislative reforms which have aimed to target the production and dissemination of child abuse material and those engaging in acts of 'revenge porn'. The laws governing these areas apply in the same way to children and young people as they do to adults, and fail to recognise the fundamental differences in the nature of children and young people creating and sharing sexual material amongst peers, as opposed to the sharing and use of child abuse material by adults.

A defence such as a similar age defence, or an exception to child abuse material offences, should be available to ensure that the consensual activity of children is not conflated with the more serious offences involving child abuse material and exploitation, and subject to significant penalties.

Furthermore, it is important to consider a further impact these offences may have on children and young people, which includes registration on the Child Protection Register where the young person is convicted for producing, disseminating or possessing child abuse material. The Children's Court submits that there must be some judicial discretion available regarding registration in these circumstances, as this can have a disproportionately detrimental effect on a young person's future, including employment opportunities, travel and participation in community life. This is contrary to the distinction which has been made within the law, recognising that

young people should be treated differently due to their immaturity and to the fundamental different nature of their offending, and that the response to a young person's criminal behavior should be informed by the principles of early intervention, diversion and rehabilitation. The registration of a young person on the Child Protection Register in circumstances where the criminal conduct does not give rise to future child protection concerns or risk has a detrimental impact on this vulnerable group of people, and is contrary to principles of the youth justice system.

13. Limiting circumstances where complainants give evidence on multiple occasions

Question 30: Should the Royal Commission's recommendation to ensure that child sexual abuse complainants are not required to give evidence on multiple occasions be adopted? If yes, what is the best option to achieve this reform?

The Children's Court is acutely aware of the challenges and trauma which is involved in children and young people being required to give evidence in cases of child sexual abuse. The Children's Court is generally supportive of reviewing legislation to ensure that complainants do not have to give evidence on multiple occasions, however the Children's Court does not support the second option recommended by the Royal Commission at 13.8, which would allow juveniles charged with child sexual abuse offences to be dealt with in the adult courts along with an adult co-accused. This is incompatible with the separate juvenile criminal framework which applies distinct, discrete and specialized principles and processes to appropriately deal with young offenders.

The Children's Court notes that there may be some merit in the third option listed at 13.8 which suggests that complainants could be permitted to prerecord evidence on one occasion which can then be used for the purposes of any proceedings in both the higher courts and the Children's Court.

The Children's Court also notes that there is some merit in the first option listed at 13.9 which suggests that the Children's Court could determine to commit a young person for trial or sentence in a higher court solely on tendered documents without a hearing at which the complainant would be called to give evidence.

14. Tendency and coincidence evidence

Question 31: Should the approach to tendency and coincidence evidence proposed I the draft legislation at Appendix E be adopted If not, should aspects of that approach or any other option for reform be pursued in NSW?

The Children's Court notes that the rationale for amending the limited admissibility of tendency and coincidence evidence is that the current, restrictive framework unjustly favours the accused in child sexual offence proceedings, however it does not appear that this rationale extends to matters where the defendant is a child.

From a child protection perspective, there is merit in the argument to facilitate more admissibility of tendency and coincidence evidence where the current framework results in injustice to complainants and the community. However, from a criminal justice perspective, the jurisdiction of the Children's Court is informed and enlightened by research which demonstrates that the criminal trajectories for young offenders vary significantly from those of adult offenders, and that most young offenders will grow out of crime as they mature.

It must be questioned whether tendency evidence in relation to a child or young person carries the same force or relevance as the tendencies of an adult offender, as a young person's mental faculties are still under construction and subject to further development and improvement in logic and decision making. Whilst there undoubtedly are cases where tendency and coincidence evidence are relevant in a case involving a child defendant in sexual offences proceedings, the Children's Court queries whether the same rationale for the increased admissibility of tendency and coincidence evidence applies to young offenders.

15. Improving and codifying jury directions

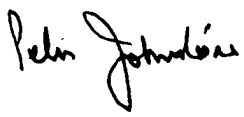
The Children's Court does not wish to comment on this section.

16. Standard non-parole periods for indecent assault offences

The Children's Court does not wish to comment on this section.

I look forward to the outcomes of this Discussion Paper. I hope some of the matters raised by the Children's Court will be of assistance in the discussions which will inform areas for improvement and reform in the child protection and criminal justice systems.

Yours faithfully,



Judge Peter Johnstone
President of the Children's Court of New South Wales