



Victims Of Crime Assistance League Inc NSW



**Submission to New South Wales
Department of Justice:
Strengthening child sexual abuse
laws in NSW**

1 October 2017



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I. Introduction

Victims of Crime Assistance League (VOCAL) Inc. NSW supports men, women and children who are victim-survivors of any crime type across the state of NSW. Support is wide-ranging in scope, and includes trauma-informed client case work, advocacy, Victims Services counselling and financial assistance applications, court preparation and court support.

VOCAL has two main arms. Our Victim Support Unit receives funding from NSW Department of Justice largely to assist people in the Hunter region. VOCAL Inc NSW additionally operates as an incorporated charity, providing information, guidance and support to individuals and families. We also act in a consultative capacity across the state on matters pertaining to victims' rights.

II. Scope of submission

VOCAL welcomes the opportunity to provide feedback on proposed reforms to NSW legislation for child sexual abuse. Our submission is informed by our diverse experience working with victim-survivors of child sexual abuse and their families over the last two decades. VOCAL's response concentrates on select questions raised in the Department of Justice's discussion paper, *Strengthening child sexual abuse laws in NSW*, which are dealt with below in sequential order as they appear in that paper.

III. Issues arising

Should the legislative framework for child sexual abuse offences be consolidated and simplified?

VOCAL recommends separating adult and child sexual offences into separate divisions, therefore making the provisions and penalties easier for victims and their families to understand. However, VOCAL holds concern about the consolidation of sexual offences in general. Legislative consolidation and subsequent charge negotiations will appear to minimise the impact of abuse for the victim. For many of our clients, charge negotiations are difficult to accept and the consolidation of offences will only impede their access to due justice. In order to appropriately validate the harm done to the victim and their family, therefore, it is essential that the charge(s) reflect the criminality of the abuse and are as specific as possible.

Definition of a child

In an area of practice where there are vast inconsistencies, a single definition of 'child' is needed to reduce confusion. We recommend adopting a consistent definition across NSW and Federal jurisdictions, which encompasses Child prostitution, Child Support and Family Court legislation.

Element of consent in offences of sexual assault and sexual intercourse with a child

For most victims, giving evidence and being cross-examined about consent compounds the trauma of their assault. In relation to offences of sexual assault or abuse, questions about the presence or absence of consent is especially traumatic and leaves victims feeling ashamed and blamed. Sadly, children are more vulnerable to the harmful effects of trauma than at any other stage in the life cycle due to their stage of cognitive development. Also for this reason, children are unable to articulate to the required legal standard their actions around consent. Additionally,

it is worth noting that the complex psychodynamics implicated in matters of consent where grooming is also present creates challenges even for adults to articulate.

Most importantly, neuroscientific knowledge suggests children are cognitively *unable* to engage in the decision-making processes involved in giving consent. Thus, the question of a child providing consent is misguided. For these reasons, VOCAL takes the view that questioning a child about consent in relation to these offences should be avoided

VOCAL also notes that questioning around consent shifts focus to a victim's actions, which is incredibly disempowering and suggests an underlying attitude of 'victim blaming', which has no place in NSW legislation.

Should the offence of *sexual intercourse with child under 10 years* be increased to include children under 12 years?

VOCAL supports the proposal of increasing the age to 12 years in section 66A. This will avoid the need for children under the age of 12 to give evidence about consent, for the same reasons as stated above.

Should the term 'indecent' and the common law definition remain?

Many of VOCAL's victims are unclear as to the meaning of 'indecent' in relation to offences of *indecent assault* and *act of indecency*. To address this, VOCAL recommends replacing the term 'indecent' with a more modern expression and updating common law accordingly. Exemplary is Victoria's stance that it is an offence to touch a child under 16 years if the touching is sexual and contrary to community standards of acceptable conduct.

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?

VOCAL agrees that in sentencing, principles at the time of sentencing should be applied rather than those in place at the time of offending. However, it is our view that retaining the historic maximum penalty permits leniency to the offender and is out of touch with contemporary community expectations relating to sexual abuse crimes against children.

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?

VOCAL strongly supports the retrospective repeal of section 78 of the Crime Act 1900. It has become increasingly clear in recent times that victims of childhood sexual abuse are more confident in disclosing, or attempted to disclose, the identities of offenders. Making the changes retrospective reflects the now common knowledge that it can often take several decades for a victim to feel able to report the abuse (s)he experienced.

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

VOCAL strongly agrees that the repeal of the common law presumption that a male under 14 years is incapable of having sexual intercourse should be made retrospective, providing victims with better opportunity to obtain justice.

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

It is our view that the offence of persistent child sexual abuse needs strengthening. In practice, VOCAL acknowledges that the current offence is not frequently used due to its complexity, and agrees that it should be replaced by the model provision recommended by the Royal Commission.

Strengthening the offence removes an enormous amount of pressure from the victim to recall specific times, dates and sequences of events. Extensive research into the impact of trauma on memory shows that implicit memory, while largely unconscious, is more relevant to trauma memories such as a sound, smell and taste. One VOCAL client who survived historical sexual abuse has said, "I remember every detail of the abuse like it was yesterday," but has been unable to provide exact times and dates. Another client is able to recall the time of year - "I remember it was winter because I had a jumper on, and he was wearing winter robes" - however has been unable to identify the date of the offence.

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?

If the offence of *persistent child sexual abuse* continues to exist, VOCAL supports the recommendation by the Royal Commission that it apply retrospectively and that offenders be sentenced to a higher penalty compared to isolated offences. A higher penalty is in line with community expectations and better addresses the ongoing nature of the psychological and physical harm suffered by the victim. Victims anecdotally report that the ongoing – and unpredictable – nature of when the abuse would occur significantly added to their fear. As a result, the overall impact on their psychological wellbeing is enormous. One victim describes this fear: "the punishment of detention was random and had nothing to do with my behaviour. It was at the whim of the offender. I would go to school each day on edge, wondering if I was going to be given detention, which meant I was his target that day."

Should the law be amended to implement the Royal Commission's recommendation for a broader grooming offence?

The predatory style of a grooming can have a long term, damaging effect on the victim's mental health. Grooming can take place over several years, and involves a subtle pattern of manipulative behaviours. Often, these behaviours are difficult to define and detect. VOCAL recommends that NSW adopt a broader grooming offence that captures any conduct aimed at involving a child in sexual activity. This includes the exertion of control via electronic communication.

In addition, we support the introduction of legislation to extend a broad grooming offence to the grooming of persons other than the child. Evidence shows that some form of manipulation of a parent or caregiver is typically present in instances of child sexual abuse, in order to gain access to the child.

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

VOCAL supports extending the list of specific relationships included in the definition of 'special care' to include adoptive parents, school teacher or school employee (regardless of whether the victim is a direct pupil under that person's instruction), and supported employment providers.

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

Any relationship between an adult and a child or an adult and a young person involves a power imbalance. As such, VOCAL supports broadening the types of sexual conduct covered by special care offences to include indecent assault and/or conduct. Appropriately, this shifts focus to the power imbalance of the relationship.

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

Sexual abuse against children will continue to occur at the current alarming rate until serious penalties are created for failure to protect and failure to report. This is a national issue that causes tremendous harm to not just the mental and physical health of our children and young people, but also to those around them and to a community's social fabric. VOCAL agrees that the Royal Commission's model for a targeted failure to protect offence should be adopted. This should occur in line with the Victorian legislation governing failure to protect a child from risk of sexual abuse offence.

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

We believe that it should be adopted as per the recommendations and be made partially retrospective. While acknowledging the necessary separation of powers between state and federal jurisdictions, VOCAL strongly recommends that charges of failure to report in relation to child sexual abuse are also made a Commonwealth offence and cover employees in the Federal Circuit Court of Australia. In the Hunter region, the Family Court frequently makes orders that see children placed in the care of sexual violence perpetrators, despite the presence of disclosures and related reporting. The argument of separate jurisdictions is wholly inappropriate and continues to fail those children who are at risk of sexual abuse.

IV. Summary

Victims of Crime Assistance League Inc NSW are grateful for the work of the Royal Commission into Institutional Responses to Child Sexual Abuse. VOCAL is willing to provide further specific consultation around victims' rights and experiences within the legal system.

We would like to thank you for the opportunity to contribute to this discussion.



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