The Commission for Children and Young People

The Commission for Children and Young People was established by the Commission for Children and Young People Act 1998 (the Act). The Act lays down three statutory principles that govern the work of the Commission:

a) the safety, welfare and wellbeing of children are paramount considerations;
b) the views of children are to be given serious consideration and taken into account; and
c) a co-operative relationship between children and their families and community is important to the safety, welfare and well-being of children (s10).

The Commission is required to give priority to the interests and needs of vulnerable children (s12).

Children are defined in the Act as all people under the age of 18 years and the terms ‘child’ and ‘children’ will be used in this submission to refer to children and young people under the age of 18 years.

It is one of the principal functions of the Commission to make recommendations to government and non-government agencies on legislation, policies, practices and services affecting children (s11(d)).

This submission

The Commission thanks the Law and Justice Standing Committee for its invitation to the Commission to make a submission on its Inquiry into the circumstances surrounding the prosecution of child sexual assault matters. The submission will address the Terms of Reference of the Inquiry in turn.

The Inquiry takes place within an increasing awareness of the occurrence of child sexual assault in the community both within Australia and overseas over the last 25 years. The result of this development has been concomitant achievements in policy and law aiming to respond to and prevent the occurrence of child sexual assault.

In proposing further developments, it is important to refer to the United Nations Convention on the Rights of the Child. The Convention provides Australia with clear guidance in relation to protecting children involved in the legal process. This includes an obligation to make the best interests of children a primary consideration in all actions concerning children,¹ to enable children and young people to express their

¹ Article 3(1).
own views freely in judicial proceedings,\(^2\) and to take all appropriate measures to promote the psychological recovery of a child victim.\(^3\)

Broadly, the Commission recommends that wherever possible, a focus on the best interests of the child should be woven into all responses to children involved in the prosecution of child sexual assault cases.

(1) **Communication between the police and the complainant, and the complainant and the prosecution concerning the consequences of pursuing a prosecution for child sexual assault**

*Communication between the police and the complainant*

Effective communication between the police and the child complainant is vital during the investigation of a sexual assault complaint. It minimises the potential trauma caused to the child by the process of investigation and even the potential recanting of a child’s evidence.

Communication between the police and the child complainant should ideally achieve desired investigative results and take place in a co-ordinated, holistic, child focused way. It should produce reliable evidence, at no cost to the child and in fact draw on the opportunity of investigating the alleged offence to positively, rather than negatively, impact on the child concerned.

Child complainants require age appropriate information in relation to the prosecution process from the initial investigative stage, including information about the general conduct of investigations and how they fit into the court based prosecution system. Ideally, a child complainant and his or her family will have one constant point of contact for such information and support.

At present, the Joint Investigation Response Teams (JIRT) dominate communication between the police and the child complainant. As such they have a crucial role in ensuring effective communication between the police and the child complainant. With an emphasis on consistency, the Commission recommends each JIRT should select a case manager from existing JIRT staff. The case manager would be specially trained and formally designated to serve as a communication focal point for each child and his or her family, from the investigative stage, through to and including the prosecution itself.

The tasks of the case manager would include communicating with the child victim and his or her family and notifying them of significant events in the investigation. They could also liaise with a representative from the DPP Witness Assistance Programme, co-ordinating communication with the prosecution in that sense. This would enable the case manager, child complainant and family to form a relationship, centred on effective communication over an extended period of time. It would also

\(^2\) Article 12(2).
\(^3\) Article 39.
provide a link between pre-trial investigative procedures, court proceedings and post court counselling if required.

In proposing this means of ensuring effective communication, it is important to clarify that the provision of a designated case manager must not become a substitute for open access to information provided by other members of the JIRT team.

**Recommendation 1:** There should be consistency of information and support for a child complainant and his or her family through the process of a child sexual assault prosecution from the earliest investigative stage. Within the context of the accessibility of all JIRT members, a designated, especially trained case manager should act as a focal point for on-going communication and information from within the JIRT through the prosecution process for each child’s case.

The Commission recommends that within the management of a particular child’s case, the JIRT should respond with equal emphasis to investigative processes as well as to risk assessment and care concerns. As a multidisciplinary team, it is important that when a child is brought within the ambit of a JIRT, the investigative/forensic process does not dominate communication. The JIRT system is a valuable opportunity to approach and respond to a child or young person who has made an allegation of sexual abuse, from a number of different perspectives.

**Recommendation 2:** There should be an equal weighting within each JIRT on the different processes intrinsic to the JIRT response. As such, there should be equivalent emphasis in responding to a child or young person who has made an allegation of abuse, in terms of a forensic investigation conducted by NSW Police, a risk assessment and care response co-ordinated by the Department of Community Services and a response to potential health and safety concerns pursued by NSW Health.

The Commission recommends that NSW Police in consultation with the Department of Community Services, formally evaluate the on-going performance of the JIRT including their ability to effectively communicate with child complainants. This could be undertaken by specifying clear outcomes, with a view to measuring and reporting on corresponding outputs.

Suggested outcomes for effective communication between the police and the child complainant are that:

1. Children will have minimal negative experiences of their participation in the investigative/risk assessment process; and
2. JIRT staff will provide accessible and consistent information to child complainants and their families within a long term view of the prosecution process.
Measurable outputs associated with these outcomes:

In relation to outcome 1:

1. There will be a minimal period of time between initial allegation of abuse and conduct of primary investigative interview.
2. There will be a minimal number of investigative interviews with a child complainant.
3. Video-taping will be used to record primary investigative interviews in a maximum number of cases.
4. There will be a high level of contact between the JIRT Case Manager and the child complainant.

In relation to outcome 2:

1. All JIRT staff will achieve minimum standards of specialist training in dealing with child sexual assault victims.
2. There will be consistency of individual JIRT Case Managers allocated to a particular child complainant’s case until the completion of that matter in court or otherwise.

It is important to note that these outcomes and outputs do not constitute a full evaluation of the JIRT and only relate to communication between the JIRT and child complainant.

Recommendation 3: NSW Police and the Department of Community Services should evaluate the performance of JIRT, including effective communication with child complainants, across New South Wales, by specifying key outcomes and outputs with a view to concomitant increases in resources if required.

Communication between the prosecution and the complainant

To minimise the negative impact of child sexual assault prosecutions, child complainants also require age appropriate information and support about the court process. Such information includes knowledge of the way the adversarial system works, information about likely outcomes and events within the course of the prosecution as well as timely updates as to the progress of their individual case.

A key obstacle to effective communication between the prosecution and the child complainant is the language of the court process and particularly the language sometimes used by DPP solicitors. This submission will focus on prosecution solicitors in light of the Terms of Reference, however it should be noted that this concern is relevant to the language and conduct of defence solicitors as well.

Solicitors must be sensitive to the experiences and potential trauma that the process of investigation and preparation for court can cause to children. This includes the stress of delays in attending court and a child’s fear in meeting the accused and apprehension about giving evidence in court, causing tension for both the child victim and their family.
The Commission recommends that whilst prosecution is a speciality in and of itself, all DPP solicitors involved in child sexual assault prosecutions must place emphasis on achieving mandatory specialist training in the effects of child sexual assault and the stress of a child sexual prosecution on children.

On the understanding that the DPP currently offers training for DPP solicitors prosecuting child sexual assault and in light of the DPP Child Sexual Assault Policy and Guidelines Manual (DPP Guidelines), the Commission recommends such training particularly focus on the use of appropriate language when communicating with child sexual assault victims as well as techniques for interviewing children, particularly with regard to considerations of different backgrounds and culture.

**Recommendation 4:** DPP solicitors should be adequately trained and supported in their understanding of all aspects of child sexual assault prosecutions, with an emphasis on the importance of appropriately communicating with the child complainant and his or her family, on a regular basis. The DPP should monitor and report on levels of training achieved by all relevant prosecutors in their Annual Report and the targets they have achieved in having all cases prosecuted by trained solicitors.

The Commission also recommends the DPP place greater emphasis on practically ensuring consistency of legal counsel for every child sexual assault case wherever possible.

**Recommendation 5:** The DPP should achieve consistency of legal counsel in 95 per cent of child sexual assault cases. The DPP should monitor and report on the targets for the levels of consistency of legal counsel in their Annual Report.

The Commission has previously made submissions to the Hon Gordon Samuels in relation to his review of DPP Guidelines on charge bargaining and the tendering of agreed facts. The Commission recommended, amongst other things, that DPP solicitors include child victims and where appropriate parents, more fully in the prosecution process.

The Commission recommended reversing the onus currently in place in the DPP Guidelines from an onus on victims to seek information about the progress of an investigation or the laying of charges, to an onus on prosecutors to inform child victims and their families about the prosecution of an accused. This is considered of special importance in child sexual assault prosecutions where the trauma of a prosecution on a child may be significantly reduced, and subsequent ‘satisfaction’ with the prosecution significantly enhanced, by effective communication between the prosecution and the child complainant and his or her family.

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4 Review by the Hon Gordon Samuels AC CVO QC of the *NSW Director of Public Prosecutions Policy and Guidelines* for charge bargaining and the tendering of agreed facts.

The Commission recommended introducing a mechanism for graduated consultation between instructing solicitors, child complainants and where appropriate a parent, parents or guardian, in relation to prosecutorial decisions such as charge bargaining and tendering of agreed facts. In this way, DPP solicitors would offer to consult with the parent of a child under 10 years, with both a child and his or her parent for those children aged between 10 years and 14 years and with the child alone for young people aged 15 years or more.

**Recommendation 6**: The DPP should require solicitors to take the initiative in communicating with child victims and their families and they should amend the DPP Guidelines by reversing the onus on victims to obtain information, to an onus on DPP Prosecutors to provide information as outlined above, with regard to prosecutorial decisions including charge bargaining and tendering of agreed facts.

(2) The role of sexual assault counsellors in the complaint process

In line with the best interests approach adopted in relation to child sexual assault prosecutions generally, sexual assault counselling must be conducted separately from considerations of the prosecution of a child sexual assault offence. The decision of when and how to approach psychological counselling of a child should not be influenced by the occurrence of a prosecution. Rather, sexual assault counselling must be distinct from the prosecution of an offence if it is not to undermine the integrity and quality of the counsellor’s opportunity for therapy with a child victim.

As such, the Commission supports the current provisions in the *Evidence Act 1995 (NSW)* in relation to professional confidential relationship privilege, and protected confidences, the sexual assault communications privilege for civil proceedings, and the counselling communication in the *Criminal Procedure Act 1986 (NSW)*.

The Commission also approves of the Criminal Procedure (Sexual Assault Communications Privilege) Bill 2002 (NSW) combating potential incursions into this legislative structure, through common law developments narrowly interpreting the law. It is vital that complainants’ and particularly child complainants’ counselling and treatment is not hindered by considerations of the availability of such information for prosecution purposes.

However, the possibility that the process of counselling could be perceived as potentially contaminating a child’s evidence and the fact that counselling records may be liable to be produced in court, is impetus for containing the process by which a child gives their evidence for the purposes of a sexual assault prosecution within a discrete and minimal timeframe. Means to achieve this are discussed below in relation to the impact of court practices on children.

Children also require counselling and support in relation to court proceedings in their role as witnesses. This includes how to give evidence in court if required to do so, de-briefing after court, managing expectations as to the process of a trial and referral

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to substantive counselling services if necessary. Crucial actors in this process are DPP solicitors and particularly the DPP Witness Assistance Service.

Without diminishing the role of existing services, the Commission believes that a specifically designated Child Witness Service could be another means of improving the circumstances surrounding children’s involvement in the prosecution of child sexual assault matters. Such a Service could operate from the Attorney General’s Department, in a similar way to the system currently in place in Western Australia. The Service could serve as a source of information and support to child witnesses and their families in all court matters, including child sexual assault prosecutions. A Child Witness Service could therefore attend to civil matters in which children are requested to be witnesses, in relation to apprehended violence orders, or matters where a child witness is asked to appear for the defence.

The Service could also serve as a clearinghouse and a hub for research and gathering statistical information in relation to child witnesses, including child sexual assault matters, separate from and without duplicating the work of the DPP Witness Assistance Service or the substantive counselling work of other child sexual assault services.

The Commission notes that the benefits of a Child Witness Service independent from services provided by the prosecution was a recommendation of the Australian Law Reform Commission and Human Rights and Equal Opportunity Commission Report into the involvement of children in the legal process. The Commission believes that such a Service may fill a current gap in ensuring the protection of children involved in the legal system.

**Recommendation 7**: The Attorney General’s Department should consider establishing a Child Witness Service to promote the interests of child witnesses and ensure they receive information and support independent from the prosecution of child sexual assault cases.

(3) **The impact of the application of the rules of evidence, other legislative provisions and court practices in prosecutions for child sexual assault offences**

*The impact of the rules of evidence*

At present, judges in child sexual assault trials retain a discretion to warn juries about the unreliability of uncorroborated evidence, even though the mandatory common law warning in relation to uncorroborated evidence has been abolished. The usual form

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8 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report No 84 Seen and heard: priority for children in the legal process, 1997 at Recommendation 106: “Specialist child witness support units should be established…They should provide individualised assistance to children appearing as witnesses in civil and criminal proceedings”.

9 See s164, Evidence Act 1995 (NSW).
of this warning is that such uncorroborated evidence must be scrutinised with great care following the formulation in *R v Murray*.

It is highly likely that the form of the *Murray* corroboration warning, along with other warnings, affects the likelihood of an individual's conviction even though clinical and prevalence studies have found that lack of corroboration of evidence is a typical rather than aberrant characteristic of the crime of sexual assault. The Commission recommends that further empirical work be conducted to assess the impact of this particular judicial practice in relation to children’s evidence with a view to potentially reforming the law in this regard.

**Recommendation 8:** The Judicial Commission should assess the impact of judges’ practice of warning juries in relation to the need for corroboration of children’s evidence in child sexual assault cases.

Judges in jury trials, on the request of a party may also warn juries about evidence that is unreliable on the basis of the age of a witness under s165(1)(c) of the *Evidence Act 1995* (NSW). There is however no stipulation or definition of ‘age’ so that s 165(1)(c) potentially applies to the evidence of all children.

Although there is no requirement that a warning must always be given where the complainant in the trial of a child sexual assault offence is of a young age, it is feasible that judicial warnings under s165(1)(c) of the *Evidence Act 1995* (NSW) may be given on the basis that a child’s evidence is unreliable because of their age. This may be due to the assumption that children’s evidence falls into the category of evidence that is unreliable per se.

In light of recent case law, s165 is a non-exclusive list of classes of evidence that may be considered unreliable. It is not a statement of classes of evidence that are unreliable as a matter of course. As such, *whether the evidence in respect of which a request for a warning is made comes within one of the designated categories is a matter for the trial judge to determine.*

On the basis of extensive empirical research, it is also generally accepted that children’s evidence is unlikely to be dishonest, fabricated or otherwise unreliable. It may therefore be appropriate that judges are assisted in the exercise of their discretion to warn juries about children’s evidence, and that up to date and accurate information is disseminated amongst the legal profession, in relation to the reliability of the child witness.

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10 (1987) 11 NSWLR 12 at 19 per Lee J.
**Recommendation 9:** The Judicial Commission should provide judges with empirical information in relation to the inherent reliability of children’s evidence in order to ensure consistency in the exercise of judge’s discretion in relation to warning juries about the unreliability of evidence on the basis of age under s165(1)(c) of the *Evidence Act 1995* (NSW). The Law Society and Bar Association should also provide legal practitioners with such information to ensure consistency in the application for such orders.

The impact of court practices

The Commission recommends that all court practices involving children require minimal involvement of the child or young person in the court proceeding itself. This is ideally achieved by developing child-centred processes in which children can give evidence that obviously also maintain the right of the accused to a fair trial.

Testifying in court can be a traumatic experience for children.\(^{15}\) The Commission therefore supports the use of video recording children’s primary investigative interview and/or evidence in chief to protect the child witness from this experience. In New South Wales children’s primary investigative interview may currently be used as their evidence in chief.\(^{16}\) In Western Australia, such evidence may be taken in a special hearing. NSW Police are currently evaluating the impact of the current system of video recording on reducing children’s levels of stress being interviewed and giving evidence in court.\(^{17}\) The Commission’s comments are therefore made in the context of this on-going evaluation.

However, it is generally recognised that cross-examination is the most rigorous aspect of the court process for any witness.\(^{18}\) As stated by McLachlin J in the Canadian Supreme Court: where trauma to the child is at issue, there is little point in sparing the child the need to testify in chief, only to have him or her grilled in cross-examination.\(^{19}\) As such the Commission recommends that the option of video-taping a child’s evidence is extended to cross examination. This way, examination in chief, cross-examination and re-examination could all take place within a special pre-recorded hearing. In Western Australia, a videotaped preliminary hearing can be used as a substitute for the child’s entire at trial testimony so that the child need not attend the trial.\(^{20}\)

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\(^{16}\) s 11 of the *Evidence (Children) Act 1997* (NSW).

\(^{17}\) Diana McConachy, Evaluation of Electronic Recording of Children’s Evidence- Progress Report: January 2002 for the NSW Police Service.

\(^{18}\) Ibid.

\(^{19}\) *R v Khan* (1990) 59 CCC (3d) 92 at 105 (Supreme Court of Canada).

\(^{20}\) See *Evidence Act 1906* (WA) s106I

**Video taping of a child’s evidence, application for directions**

(1) Where a Schedule 7 proceeding has been commenced in a Court, the prosecutor may apply to a judge of that Court for an order directing ….

(a) ….

(b) that the whole of the affected child’s evidence (including cross-examination and re-examination) be

(i) taken at a special hearing and recorded on video-tape; and
This system would enable a child to give evidence in a timeframe that is more suited to the best interests of the child rather than dominated by the progress of the prosecution case through the court system. This option would exist in tandem with the option for children to give evidence by closed circuit television in cases where pre-recording cross-examination is not considered appropriate by the court.

Recommendation 10: The child complainant’s best interests must be the focus of obtaining evidence from children. On the direction of the court, a child’s evidence and subsequent cross-examination should be able to be conducted in a special child-focused hearing.

(4) Alternative procedures for the prosecution of child sexual assault matters including alternative models for the punishment of offenders

There are a number of alternatives to the prosecution of child sexual assault matters. Alternative procedures must preserve the rights of the accused and promote the public policy objectives of protecting the interests of the child complainant and preventing further sexual abuse. Alternative procedures might include a specialised court system and/or an investigative system.

The National Child Sexual Assault Reform Committee is currently inquiring into alternative models for prosecuting child sexual assault and the Commission will participate in this Inquiry. The Committee will explore major reforms to the adversarial system in relation to child sexual assault including a review of the criminal standard of proof and the right to silence as well as the viability of specialised or investigative models as outlined above.

However, there are serious implications when diverging from the adversarial system of prosecuting child sexual assault. Alternatives to prosecution of child sexual assault cases run the risk of achieving particular goals at the cost of diminishing the procedural integrity and public censure intrinsic to an adversarial prosecution.

One alternative procedure for the prosecution of adult sex offenders within the current adversarial system is pre-trial diversion. The Commission supports this alternative to the prosecution of parental incest offenders and the work of programs such as Cedar Cottage in Westmead. The Commission supports this option because children can make a complaint, without being placed on trial, in the context of a

(ii) presented to the Court in the form of that video-taped recording, and that the affected child need not be present at the proceeding.


program that aims to promote guilty pleas, avoid full-scale prosecutions and rehabilitate the offender.22

Responding to young people who have demonstrated sexually abusive behaviours is a related matter of concern. The Commission is aware there is a trend against prosecuting juveniles in instances of intra-familial sexual assault between siblings.23 The Commission is concerned that this trend is creating a gap in responding to young people, who if not charged with a sex offence are not included within the ambit of the Department of Juvenile Justice, but may in fact pose a risk to themselves and to other children.

The Commission supports providing treatment for those children and young people who have demonstrated sexually abusive behaviours and who are not dealt with in the criminal justice system. In this context, it is relevant to note research that a majority of adult sex offenders can trace the origins of their sexual difficulties to their adolescence,24 and that treatment of adolescent sex offenders has a positive effect on reducing their future offending behaviour.25 Research has also demonstrated the power of treating young offenders, in achieving positive outcomes in terms of re-offending behaviour, in comparison with results achieved in treating adult offenders.26

This is a solid basis on which to increase funding to appropriate agencies offering treatment programs for children and young people who demonstrate sexually abusive behaviours. The provision of such therapeutic care would include formulating treatment plans and focusing on long term relapse prevention planning.27 In order to be equitable and effective however, intensive care and support for such young people must be provided by well trained, skilled staff in appropriate and responsive facilities and therefore must be adequately resourced.

Recommendation 11: The Government should increase funding for appropriate agencies to support treatment for children and young people who have demonstrated sexually abusive behaviours in order to ensure treatment programs are sufficiently resourced, have appropriate and adequate facilities and to ensure the training and participation of skilled staff.

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22 “Avoiding the Court: Diversion of Child Sex Offenders”- Interview with Dale Tolliday in Polemic about the Pre-Trial Diversion of Offenders Program (Cedar Cottage, Westmead) for parental incest offenders, their child victims and families.
23 Telephone conversation with Dale Tolliday, Director, Cedar Cottage and New Street Adolescent Service, 18 January 2002.
(5) **Possible civil responses to perpetrators and victims of child sexual assault**

The Commission recommends that the essential civil response to the victims of child sexual assault is the principle that the best interests of the child must prevail in decisions concerning child victims.

**Recommendation 12:** The judiciary and legal profession should be encouraged to recognise that the best interests of the child must be the primary focus of all proceedings involving child sexual assault complainants.

The Commission emphasises the civil response to perpetrators of child sexual assault that is encompassed by the Working with Children Check and legislation in relation to offender registration. The Commission stresses the importance of the complete response that this legislative framework provides in terms of reacting to and preventing the occurrence of child sexual assault in the community.

The Commission has also established the first accreditation scheme for professionals who work with adults and/or children who sexually offend against children. The Child Sex Offender Counsellors Accreditation Scheme identifies counsellors who have the necessary skills, training and support to work effectively with people who sexually offend against children. There are three separate levels of accreditation and applications are assessed quarterly.

At present, s 11(j) of the *Commission for Children and Young People Act 1998* provides that one of the principal functions of the Commission is to develop and administer the *voluntary accreditation scheme for persons working with persons who have committed sexual offences against children*. In light of the importance of effective treatment for adult and adolescent offenders, the Commission is investigating extending the ambit of the accreditation scheme. This might include extending the scheme in terms of the voluntary accreditation of both individuals and appropriate treatment programs, as well as developing and monitoring best practice standards. It is also envisaged that the Commission could undertake a formal review process to assess the effectiveness of new initiatives on a 3 yearly basis, for example.

(6) **Appropriate methods of sustaining ongoing dialogue between the community, government and non-government agencies about issues of common concern with respect to child sexual assault**

The Commission considers that sustaining effective communication between key agencies is important in meeting on-going community, government and non-government expectations and concerns with respect to child sexual assault.

It is important to bring Government, non-government and community organisations together to discuss issues of particular concern as they arise. As such the Commission proposes that an appropriate method of sustaining on-going dialogue is to provide a mechanism whereby Child Protection Chief Executive Officers, can
convene meetings with representatives from concerned non-government and community agencies to liaise, discuss and respond to particular issues as they occur.

**Recommendation 13**: Child Protection Chief Executive Officers should establish a mechanism to ensure regular and meaningful on-going dialogue between all concerned community members and government and non-government agencies when issues arise requiring debate and action.