Report for the Royal Commission into
Institutional Responses to Child Sexual Abuse

August 2016

THE IMPACT OF DELAYED REPORTING ON THE PROSECUTION AND OUTCOMES OF CHILD SEXUAL ABUSE CASES

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Preface

On Friday 11 January 2013, the Governor-General appointed a six-member Royal Commission to inquire into how institutions with a responsibility for children have managed and responded to allegations and instances of child sexual abuse.

The Royal Commission is tasked with investigating where systems have failed to protect children, and making recommendations on how to improve laws, policies and practices to prevent and better respond to child sexual abuse in institutions.

The Royal Commission has developed a comprehensive research program to support its work and to inform its findings and recommendations. The program focuses on eight themes:

1. Why does child sexual abuse occur in institutions?
2. How can child sexual abuse in institutions be prevented?
3. How can child sexual abuse be better identified?
4. How should institutions respond where child sexual abuse has occurred?
5. How should government and statutory authorities respond?
6. What are the treatment and support needs of victims/survivors and their families?
7. What is the history of particular institutions of interest?
8. How do we ensure the Royal Commission has a positive impact?

This research report falls within theme 5.

The research program means the Royal Commission can:

- obtain relevant background information
- fill key evidence gaps
- explore what is known and what works
- develop recommendations that are informed by evidence, can be implemented and respond to contemporary issues.

For more on this program, please visit www.childabuseroyalcommission.gov.au/research.

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BACKGROUND

Children and young people who have been sexually abused sometimes disclose that abuse soon after the event or events occurred, or at least later during childhood. However, many children and young people do not tell anyone about the abuse until decades later, long after they reach adulthood. An unknown number, the 'dark figure', never tell anyone or if they do, do not report it to the police.

Delayed disclosure and reporting are associated with various characteristics of the victim and perpetrator, and the relationship between them. Older children, for example, are more reluctant to disclose than younger children, and boys are more reluctant than girls. Delayed reporting is particularly common in cases of institutional child sexual abuse; for example, where the abuser is a trusted church member, a teacher, or a staff member in a boarding school or residential care facility. In some cases, the victim has told someone at the time, but has not been believed, or the complaint has not reached the police.

Where an adult has reported sexual abuse committed against them as a child, particular forensic difficulties stand in the way of prosecution that do not apply to contemporary reports. These include needing to prove the offence as it was on the statute book at the time it occurred, and addressing issues about the reasons for the delayed complaint. Another barrier to successful prosecution is the likelihood of 'degraded evidence'. As time goes on, memories fade and evidence which may have corroborated some aspects of the complainant's account may have been lost; for example, due to the death of another witness.

THIS STUDY

This report examines how the criminal justice systems in New South Wales 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

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.[1]

RESEARCH QUESTIONS

The research focuses on the following questions:

1. What are the trends in recorded reports to police of historical child sexual abuse over a recent 20-year period compared with reports made during childhood in two Australian states – New South Wales and South Australia?
2. What are the trends in the number of prosecutions of cases of historical child sexual abuse over a recent 20-year period compared with child sexual abuse reported during childhood in two Australian states?
3. What factors – including characteristics of the complainant, the type of offence, the relationship between the complainant and the alleged offender, and the delay in reporting to police – are associated with the matter proceeding from a report to the police to prosecution?
4. What is the likelihood of cases reported in childhood and in adulthood resulting in conviction?
5. What factors (as above) are associated with the matter resulting in a conviction or not, and a custodial or other type of sentence?
6. Is there any difference in the rate of appeals, the grounds of appeals, and the outcome of appeals in cases in New South Wales:
    - where there are delayed complaints compared with cases reported in childhood?
    - that involved 'institutional' child sexual abuse compared with intra-familial cases of abuse and other extra-familial cases?

DATA

The data addressing research questions one to five were derived from police and court records in both New South Wales and South Australia, and from case file analysis and discussions with legal and other professionals in New South Wales. New South Wales and South Australia are the only two states with equivalent statistical analysis bodies that can produce multi-year 'clean' datasets for both the police and court collections – the Bureau of Crime Statistics and Research in New South Wales (BOCSAR) and the Office of Crime Statistics and Research

[1] The findings in this report are based on sexual offences against a child that are reported to the police. It is well known that these represent only a small proportion of offences, with a large 'dark' figure that are not reported, estimated in a range of studies of attrition at about 85–92 per cent.

(OCSAR) in South Australia. These two states also provide a useful basis of comparison in terms of different population sizes and some differences in legislative and policy provisions.

Both the police and court data in each state are administrative datasets, and are not designed with research as the primary focus. Ideally it would be possible to track matters from reporting to police, through the investigation and prosecution process to court, and finalisation at court via conviction and sentencing. The nature of these administrative databases means, however, that it is not possible to map the police data directly onto the court data. The police and court data in each state have therefore been analysed separately. The data addressing research question six comprise 291 decisions on appeals against conviction and sentencing involving child sexual offences in the New South Wales Court of Criminal Appeal from 2005 to 2013.

The *definition of 'child'* used in this report refers to persons under the age of 18, consistent with the Royal Commission's Terms of Reference. This means that offences against children above the age of consent (16 in New South Wales and 17 in South Australia) are included. The term 'victim' is used in accordance with the terminology used by New South Wales and South Australian Police, even though there has been no finding or substantiation of an offence at the time the 'offence' is reported. The alleged perpetrator is known as a 'person of interest'.

'Child sexual abuse' was defined broadly to include all offences relating to child sexual abuse, and to encompass the various offences relating to the Royal Commission's definition of child sexual offences. The Royal Commission has defined child sexual abuse for its purposes as:

> Any act which exposes a child to, or involves a child in, sexual processes beyond his or her understanding or contrary to accepted community standards. Sexually abusive behaviours can include the fondling of genitals, masturbation, oral sex, vaginal or anal penetration by a penis, finger or any other object, fondling of breasts, voyeurism, exhibitionism, and exposing the child to or involving the child in pornography. It includes child grooming, which refers to actions deliberately undertaken with the aim of befriending and establishing an emotional connection with a child, to lower the child's inhibitions in preparation for sexual activity with the child (2014, Vol 1: 95).

It is important to note that the term 'child sexual assault' is often used interchangeably with child sexual abuse in the literature and in research studies to include both penetrative and non-penetrative sexual offending. In this report 'sexual assault' refers to penetrative sexual offences and the distinction is made between cases of sexual assault and cases of indecent assault based upon the statutory definitions in the relevant state.

NEW SOUTH WALES POLICE DATA

Reports of child sexual assault have more than doubled from 1,274 incidents in 1995 to 3,030 in 2014. There has, in particular, been an upward trend in the number of sexual assaults on girls. Complaints of indecent assault have fluctuated.[2]

Just over 80 per cent of reports of child sexual offences in New South Wales over this period were made during childhood. Around 66 per cent were reported within 12 months of the incident, but nearly 25 per cent were not reported until five or more years later. About 20 per cent of all reports were delayed into adulthood. There have been periods when adult reports have been particularly high, for example in the late 1990s during the Royal Commission into the New South Wales Police Service (the Wood Royal Commission). Such media focus appears to generate a greater number of complaints from adults.

Where the person of interest was not known to the victim, the incident was likely to be reported with less delay than where the child knew or had any type of relationship with the suspect.[3] Conversely, the greatest likelihood of delayed reporting involved persons of interest in a position of authority in relation to the child such as a teacher, clergy, carer or youth leader.

Overall, levels of adult reporting of child sexual abuse offences have remained fairly consistent since 2003, while reports from children have increased fairly consistently over the same period. It follows that the increase in children who report child sexual offences cannot be explained by saying that victims of abuse are now simply reporting much earlier than a generation ago.

Even taking into account the modest increase in the number of children in New South Wales over the period included in this study, the increase in complaints of sexual offences against children is substantial. For example, in 1999 a total of 2,875 offences were reported in childhood. In 2014, the total was 4,397 reports, an increase of nearly 53 per cent. Most of that increase occurred from 2007 onwards. The increase in reports may represent a real increase in prevalence, an increase in public awareness, and/or an increase in reporting. It is possible that the prevalence of child sexual abuse in the community has not changed, but that the level of reporting, or of recording reports, has increased. There has also been a 132 per cent increase in the overall rate of reported sexual assault, 96 per cent increase in other reported sexual offences including indecent assault (against both adults and children), and a 67 per cent increase in assault since 1990 (Goh and Ramsey, 2015).

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[2] The report focuses on sexual assault and indecent assault based on the statutory definitions in the relevant state. In both jurisdictions during the period under study, sexual assault has involved fellatio, cunnilingus, or penetration by some part of the body or an object, of the vagina or anus of the victim. Indecent assault is an offence of sexual contact that does not involve sexual assault or penetration. Examples include forced masturbation and fondling.

[3] Please see the discussion on the definition of child sexual abuse in institutional contexts for the purposes of this report on page 53.

Characteristics of victims in New South Wales

Overall, three out of four incidents involved female victims, mostly as the only victim per incident.

The age group with the most numerous victims of sexual assault was 14–17 year olds, followed by 10–13 year olds; 35 per cent of incidents were victims under 10. There was some difference by gender in the age distribution for sexual assault incidents, with boys under 10 comprising nearly half of the male victims and girls the same age comprising just under one-third of female victims. Boys made up 28 per cent of victims under 10 but only 12.5 per cent of those aged 14–17.

Indecent assault showed a somewhat different pattern, with those aged 10–13 having the most numerous reports (34 per cent). The age and gender differences were not the same as for sexual assault.

A relatively small proportion of sexual assault incidents (4.8 per cent) and a higher proportion of indecent assault incidents (7.5 per cent) involved persons in positions of authority in relation to the child, a conservative proxy for 'institutional abuse'.[4] Family members were the most common persons of interest for both sexual assault and indecent assault, involved in around 40 per cent of incidents. Almost the same percentage, 38 per cent, involved another known person who was unrelated to the victim (for example, a friend). The vast majority were therefore someone known to or related to the child.

What proportion of cases proceed to prosecution in New South Wales?

Criminal proceedings are commenced against a suspect or person of interest in New South Wales when police issue a court attendance notice or summons. This requires that a suspect can be identified, and that police consider the evidence to be strong enough to proceed.

In 1995, a person of interest was identified in 94 per cent of all child reports of sexual assault, and was proceeded against in 63 per cent of these incidents. In 2014, a person of interest was identified in only 55 per cent of reported incidents, and was proceeded against in only 33.5 per cent of these incidents. Overall, legal proceedings were commenced in less than 19 per cent of sexual assault incidents reported to police in 2014 compared with 59 per cent in 1995. The trend is similar but less marked for indecent assault.

Although there has been a substantial decrease in the proportion of cases in which a person of interest was identified, this does not seem to be the result of increased sexual abuse by strangers. The number and proportion of persons of interest not known to the child decreased from 7.6 per cent to 4.1 per cent between 2003 and 2014. There is also no marked increase in

[4] Please see the discussion on the definition of child sexual abuse in institutional contexts for the purposes of this report on page 53.

the number of younger children who were reported victims of sexual assault over time, that might be associated with less 'success' in identifying the person of interest. There has, however, been an increase in reports involving peers where the age difference between the victim and the person of interest was less than two years, and less than five years. It is possible that complaints are now more routinely recorded but that a person of interest may not be identified or recorded if the person of interest is a child (particularly under the age of criminal responsibility), or if the victim is unwilling to proceed or if family members want to shield the child from the criminal justice process. The decrease in cases proceeding to court may also reflect resource constraints and perhaps an increase in the time required to investigate and prepare matters to proceed to court.

There is a similar downward trend in the number of sexual assault and indecent assault incidents reported during adulthood in which legal proceedings commenced. In 1995, 65 per cent of all adult reports of child sexual assault proceeded to court, with a person of interest identified in almost all cases. In 2014, only 20 per cent of all such matters proceeded to court, or 25 per cent of the cases where a person of interest was identified. The drop in cases proceeding to court for adult reports of indecent assault was less marked, but still substantial.

Delayed reporting

The proportion of incidents in which an identified person of interest was proceeded against has been consistently highest for offences reported in adulthood. This is contrary to the expectation that delayed reporting into adulthood is necessarily associated with degraded evidence or unavailable witnesses and a reduced likelihood of proceeding to prosecution. It may mean that where adults do report, they are committed witnesses and better able to articulate their evidence.

There has been a sharp decline in the probability that a child sexual assault case will proceed to court since the 1990s. In 2014, if a child reported a sexual assault incident on the same day as it occurred, the probability that it would proceed to court was only 13 per cent. If the child reported the next day, the probability that it would proceed to court was only 10 per cent. These percentages were even lower in the four years before 2014. It may be that cases of disclosure on the same day or the next day in childhood involve more situations where parents, having made an initial report to the police, decide that they do not want to 'go through with' the prosecution. The highest probability of proceeding to court in 2014 for a sexual assault offence was 38 per cent where the delay was between one and five years, and 36 per cent for a delay of five to 10 years. For indecent assault, the patterns were similar.

These estimates of probability take into account the age of the child. So while the lowest probability of a reported incident of child sexual abuse resulting in legal proceedings was in cases where the child was younger than six at the time of the report, overall the age of the child is not a factor that explains the declining likelihood of prosecution over time. That is, when, for example, a 10-year-old child or a 14-year-old child reported the incident on the same day or next day, it was much less likely to lead to a prosecution in the last five years than it was

in the 1990s. The peak probability of proceeding to court (62 per cent) was for adolescents aged 14–17 at the time of the incident, and aged 19–29 when they reported it.

Incidents involving persons in positions of authority in relation to the child (a proxy for 'institutional abuse') that were reported either in childhood or in adulthood were more likely to proceed than other matters. When reported in childhood, the matter was least likely to proceed when the person of interest was a sibling, a boyfriend or girlfriend, or a person not known to the victim. For reports made in adulthood, the most likely to proceed were those that involved parents or guardians, household members, or boyfriends (although the number of reports against boyfriends was small).

In summary, these findings indicate that there has been a substantial increase in the number of reports of sexual offences against children reported during childhood in New South Wales from the mid to late 1990s through to 2014. There has been a relatively constant level of adult reporting of historical child sexual abuse. Despite the very large increase in child reports, however, there has been a substantial decline in the likelihood of legal action being initiated for sexual offences against a child. That is, the trends of reporting and proceeding to court are heading in opposite directions.

NEW SOUTH WALES COURTS DATA

A total of 16,042 persons were prosecuted for at least one sexual offence against a child in finalised matters from 1994 to 2014; 97.5 per cent were male. At finalisation, the average age of defendants across the period was 42 years. Nearly 43 per cent were charged with at least one sexual assault offence, alone or in combination with other types of offences; most of the sexual assault charges (70 per cent) were heard in the higher courts. Just under one in three defendants (31 per cent) faced an indecent assault charge, heard in either the higher courts or Local Court. Ten per cent were charged with a child pornography offence, procuring or grooming; the remaining 16 per cent faced charges relating to acts of indecency.

In the higher and lower courts, the number of adult defendants who pleaded guilty to at least one child sex offence has trended upwards to around 60 per cent, despite some fluctuation. In the cases that proceeded to trial in the higher courts (mostly District Court matters), 43 per cent were convicted on at least one charge. One in six defendants had all charges dismissed without a hearing. Overall, 62 per cent of persons with finalised appearances in the higher courts were convicted; 69 per cent of these offenders received a full-time custodial sentence. The longer the interval between the offence and finalisation in the higher courts, the greater the probability of a prison sentence.

Guilty pleas and conviction rates were lower in the Local Court and Children's Court. Overall, 33 per cent of defendants pleaded guilty and 45 per cent of offenders were convicted in the Local Court. Overall, in the Children's Court, 37 per cent pleaded guilty and 48 per cent had proven offences. In the Local Court, where less serious offences are dealt with, the likelihood of imprisonment as the principal penalty was 35 per cent for both indecent assault and child

pornography. Around one in four offenders were imprisoned for sexual assault and for an act of indecency. The most common penalty for those appearing in the Children's Court was a probation order (41 per cent); 11.0 per cent of young offenders received a control order, the most serious penalty in the Children's Courts.

Delays in the court process

Once the court process began, the time from committal to finalisation in the higher courts was on average nearly 10 months; and from first appearance to finalisation in the Local Court it was 5.8 months. The higher courts and the Local Court differ significantly in the likelihood of conviction when taking into account the length of the interval between the earliest offence date and the finalisation date. The likelihood of a conviction for the most serious offence with which a defendant was charged (mostly sexual assault) in the higher courts remained fairly consistent (between 54 per cent and 63 per cent) for 'time gaps' between the offence and finalisation of the matter ranging from less than a year to more than 20 years. In the Local Court, however, the probability of a conviction trends downwards as the interval gets longer, and this drop-off is quite marked beyond 20 years. This is despite the greater probability overall of a conviction for indecent assault than for sexual assault in the Local Court; indecent assault is more commonly heard in the Local Court.

APPEALS AGAINST CONVICTION AND SENTENCING

The success rate of appeals against conviction for the period 2005–13 (28.1 per cent) has dropped from the earlier rates reported by the Judicial Commission of NSW: for 2000–03, it was 55.9 per cent reported by Hazlitt et al. (2004), and for 2003–07, it was 50.3 per cent reported by Donnelly et al. (2011). However, the success rate for appeals by the accused against sentence has increased from 44.4 per cent (40 out of 90 cases) in 2000–03 to 60.8 per cent (96 out of 158 cases) from 2005–13. Crown appeals against the leniency of the sentence were upheld in 22 of 34 appeals (64.7 per cent) for 2005–13 and in seven of 12 such appeals in the period 2000–03 reported by Hazlitt et al. (2004). It is noted that the number of appeals in each year was quite low, and there was significant fluctuation in results over the years 2000-2013.

Twenty-nine cases were identified as cases of 'institutional' child sexual abuse; 17 were historical matters. They involved teachers, church youth leaders, music teachers and sports coaches, a child care and residential care worker, and a nurse. Just under half of these cases revealed a delay in complaint/reporting of 20 years or more. Less than one in three (11 out of 29 cases) were successfully appealed from 2005 to 2013.

Of the 17 historical cases, six involved an appeal against conviction only, four an appeal against sentence only, and four were appeals against both conviction and sentence. Only three were Crown appeals, two against sentence, and the other an interlocutory appeal. Nine were successful on appeal, whether wholly or in part. Eight were dismissed. Five of the nine successful historical 'institutional' cases involved an appeal by the accused against conviction;

four were appeals against conviction only, and the fifth also included an appeal against sentence.

One in four cases (74 cases, 25.4 per cent) involved delay as an appeal issue, two-thirds were historical cases and appeals in these matters were more likely to succeed than those that were not historical.

In the last decade, some changes in law and practice have arguably streamlined, clarified and minimised potential error in judicial warnings and directions in a case. However, judicial misdirections appear to be a continuing source of error in child sexual assault trials, generating a basis for overturning convictions and jury verdicts. Most of the judicial errors related to giving inadequate warnings to the jury, unbalanced judicial summing-up, and failure to correctly direct the jury.

The *Child Sexual Offence Appeals in the NSW Criminal Court 2005-2013* report can be found in Appendix: Appeals study, with further material related to that study available online (www.childabuseroyalcommission.gov.au).

SOUTH AUSTRALIA

The South Australian courts dataset is based on cases that were heard and finalised between 1992 and 2012. As far as possible, the analyses of the data applied the same inclusion criteria and similar coding and categorisation of variables as used in the New South Wales analyses. A significant difference between the two states, however, was the barrier to prosecutions of historical offences imposed by the statute of limitations until 2003 in South Australia.

POLICE DATA

The trend patterns in the South Australian data for the period 1992–2012 are somewhat different from those in New South Wales but, similarly, the reporting peaks coincided with the conduct of two major inquiries into child protection and the abuse of children in state care.

The number of reported incidents generally increased with victim age for all offences. As in New South Wales, those aged 14–17 were the most likely age group to have been the victims of sexual assault (48 per cent), comprising just under half of all victims. More than one-third of the victims of sexual assault were under 10, similar to New South Wales. As in New South Wales, boys were more likely than girls to be in the two younger age groups – under six, and six to nine. The most common relationship was someone known to the child but not related: 45 per cent of sexual assault and 41 per cent of indecent assault incidents. In both states, about 20 per cent involved young persons of interest under the age of 18 (siblings, other family and household members, and other known peers). Only 7.5 per cent of the persons of interest in sexual assaults and 12.9 per cent in indecent assaults were not known to the victim. As in New South Wales, the proxy for 'institutional abuse' involved a 'person in a position of authority',

and this comprised only a very small proportion of incidents.[5] In South Australia, that category included teachers; foster parents; step-parents or guardians of the child; religious officials or spiritual leaders; medical practitioners; psychologists or social workers providing professional services to the child; correctional officers; and employers or managers of the child.

Overall, 84 per cent of reports were made in childhood. The number of reports made in adulthood varied, with peaks associated with the abolition of the statute of limitations on historical offences, and the Commission of Inquiry into Children in State Care (the Mullighan Inquiry).

As in New South Wales, most sexual offences against children were reported within three months of the offence, but nearly one in four sexual assaults were reported more than five years after the offence. Male complainants were also more likely than female complainants to delay reporting, particularly for more than 20 years. Where the person of interest was in a position of authority, there were much higher proportions of both sexual assault and indecent assault incidents in which the delay was 10 years or longer.

Cases proceeding to prosecution

In contrast to New South Wales, the patterns of cases proceeding to court in South Australia were fairly consistent. Overall, legal proceedings commenced in 49 per cent of child reports of sexual assault incidents from 1992 to 2012. The pattern is similar for child reports of indecent assault.

Both sexual assault and indecent assault reported as an adult show slight upward trends in the number of reported incidents and the number in which legal action was commenced. This was in contrast to the downward trend for child reports.

The highest proportion of reported sexual assault cases in which legal action was initiated was for matters reported in childhood involving a parent or guardian (63 per cent), followed by other known person (60 per cent). Legal action was commenced in just over half (52.5 per cent) of matters involving a person in a position of authority, and in less than one-third of matters (30 per cent) involving a sibling. Arrest or apprehension was somewhat less likely for sexual assault incidents reported in adulthood. The pattern was quite similar for indecent assault.

It was much more likely that a case reported immediately by a child would proceed to court in South Australia than in New South Wales. If a sexual assault was reported on the same day as it was alleged to have occurred, there was a 58 per cent chance it would proceed to court. For an indecent assault, the figure was 43 per cent. The likelihood of arrest or report for both types

[5] Please see the discussion on the definition of child sexual abuse in institutional contexts for the purposes of this report on page 53.

of offence dropped to around 35 per cent when the delay between the incident and the report was 5–20 years or more.

The probability of arrest or apprehension was generally higher when the alleged offender was a person in a position of authority in relation to the child.

For all age groups, there was a substantial drop in the likelihood of a matter leading to arrest or apprehension for reports made more than five years after the alleged incident.

SOUTH AUSTRALIAN COURTS DATA

A total of 7,095 persons were prosecuted on at least one sexual charge against a child in finalised matters in the four courts from 1992 to 2012. This is just under half (44 per cent) of the number prosecuted in New South Wales from 1994 to 2014, with defendants facing a similar total number of charges in both states. This is despite the population in South Australia being about 22 per cent of that in New South Wales (September 2015).

Similar proportions of persons were dealt with in the higher and lower courts in both states, except that only 4.1 per cent were young persons in the South Australian Youth Court compared with 10.4 per cent in the New South Wales Children's Court.

There is a general upward trend in South Australia in the number of defendants before the courts, especially the Magistrates Court and the District Court. This likely reflects a bump in the numbers following the Mullighan Inquiry, and the removal of the statute of limitations in 2003.

Overall, in South Australia about 42 per cent of accused persons pleaded guilty in the higher courts and about 40 per cent pleaded guilty in the Youth Court compared with only 17 per cent on average in the Magistrates Court. Whereas the plea rates are increasing in New South Wales, in South Australia, the trend for plea rates is flat or, for the Magistrates Court, falling.

The conviction rate for sexual assault in the higher courts was relatively steady over the period 1992–2012, averaging 41 per cent. Indecent assault followed a very similar pattern, averaging 43 per cent. More than 25 per cent of accused persons in the higher courts had all charges dismissed with or without a hearing, mostly because the charges were withdrawn on the application of the prosecution (nolle prosequi, 'white certificates' or no evidence tendered).

The conviction rate for indecent assault in the South Australian Magistrates Court was much lower than in New South Wales – it decreased from 46 per cent in 2001 to 12 per cent in 2012 compared with a low of 33 per cent in 2005 and a high of 54 per cent in 2011 in New South Wales. In the Magistrates Court and Youth Court, 65 per cent and 57.5 per cent, respectively, of accused persons had all charges dismissed with or without a hearing. Thus while a high number of cases with a larger number of charges per defendant (in terms of population) went to court in South Australia compared with New South Wales, the prosecution was much more likely to abandon these matters.

Overall, the conviction rates (including guilty pleas) in both the higher and lower courts in South Australia were much lower than in New South Wales. The imprisonment rate was also substantially lower; for example, 56 per cent of convicted persons were imprisoned by the South Australian higher courts compared with 69 per cent in the New South Wales higher courts. In the Magistrates Court in South Australia, offenders were much more likely to receive a suspended sentence (42 per cent) than a custodial sentence (15 per cent), whereas the pattern was reversed in New South Wales Local Court (31.7 per cent received a custodial sentence, and 19.5 per cent a suspended sentence). In the Youth Court, by far the most common penalties were a probation order or bond.

Compared with New South Wales, cases in South Australia are more likely to be prosecuted, but charges are also more likely to be withdrawn, a guilty plea is less likely, a conviction is less likely, and a convicted offender is less likely to be sentenced to a term of imprisonment.

SUMMARY OF FINDINGS

In summary, less than half the cases that have come to the attention of the police over the last decade in either state have resulted in charges that proceeded to trial or a guilty plea. There are a number of reasons that a case may not reach court, including a decision by the family to withdraw the charges or by the Office of the Director of Public Prosecutions that the case should not proceed. Some caution is needed in drawing comparisons between the two states because of differences in legislation and definitions, in police recording practices, and in police policy and practice relating to investigation and charging.

Between the states, the proportion of reported incidents that resulted in legal action in the most recent three years differed markedly; there were also differences between child and adult reports and between sexual assault and indecent assault reports.

In New South Wales, legal action commenced in nearly 17 per cent of child reports and 33 per cent of adult reports of sexual assault; for indecent assault, the figures were 19 per cent for child reports and 35 per cent for adult reports.

In South Australia, in the three years from 2010 to 2012, the proportions were markedly higher, especially for child reports. Just over half (55 per cent) of the sexual assault reports and nearly 46 per cent of the indecent assault reports reported in childhood resulted in arrest or apprehension; for sexual and indecent assaults reported in adulthood, the proportions were 45.5 per cent and 49 per cent, respectively. However, as noted, a much greater proportion of matters were withdrawn or dismissed in South Australia compared with New South Wales. The proportion of cases withdrawn by the prosecution in South Australia has been consistently higher than other states and in Australia as a whole, as noted in other research studies (Daly and Bouhours, 2010) and in Australian Bureau of Statistics reports on Criminal Courts.

ANSWERS TO RESEARCH QUESTIONS

1. The trends in the reporting of historical child sexual abuse over the last 20 years or so have been relatively consistent, but substantially affected by the publicity associated with major public inquiries. The patterns for child sexual abuse reported during childhood vary substantially between the two states. Reports in South Australia have changed comparatively little over time whereas there has been a sharp increase in New South Wales, especially for sex offences against girls reported in childhood.
2. In New South Wales, it is more likely that cases of historical child sexual abuse will be prosecuted than sexual abuse reported during childhood. The opposite is the case in South Australia.
3. The factors associated with a matter proceeding from a police report to prosecution vary significantly between the two states, but in both states cases involving persons in a position of authority in relation to the child, were more likely to be prosecuted.
4. The most significant trend in cases resulting in conviction in New South Wales is that there is a marked downward trend in the probability of a conviction in the Local Court as the interval between the offence and court proceedings gets longer: from 35 per cent for the shortest gap of less than a year to a low of only 8 per cent for a gap of more than 20 years. There is no drop-off in the higher courts.
5. Overall, historical matters are more likely to result in legal action being commenced and, contrary to expectations, are more likely to result in a conviction and imprisonment. This may be because those adults who report being sexually abused as children may be more determined complainants who are better able to articulate their evidence than child complainants. They may already have had counselling and are ready to take action in relation to events they see as having had some impact on their lives.
6. The success rate for appeals against conviction in New South Wales for the period 2005–13 was 28.1 per cent, which has fallen from 55.9 per cent in 2000–03 and 50.3 per cent for 2003–07. However, the success rate for appeals by the accused against sentence has increased from 44.4 per cent in 2000–03 to 62 per cent in 2003–07. There was a small number of Crown appeals against lenient sentences each year from 2000 (average of four); overall 64 per cent were upheld and resulted in a new sentence. Twenty-five per cent of cases involved delay as an appeal issue, most of which were historical cases; appeals in historical matters were more likely to succeed than those that were not historical. Twenty-nine cases were identified as ‘institutional’ cases of child sexual abuse. Slightly less than 33 per cent of ‘institutional’ abuse cases were successfully appealed in the period 2005–13.

1 THE PROSECUTION OF CHILD SEXUAL ABUSE

Child sexual abuse is widely recognised by prosecutors and legal commentators as one of the most difficult crimes to investigate and prosecute, primarily because there is often little physical or corroborative evidence, and there are a number of difficult legal and evidentiary barriers (Cashmore, 1995; Cossins, 2001, 2006; Eastwood, Kift and Grace, 2006; Shead, 2014; Walsh, Jones, Cross and Lippert, 2010). Child sexual abuse is typically committed in secrecy by someone known and trusted by the child and their family. Many children do not tell anyone about the abuse at the time, or during their childhood or adolescence; an unknown number never tell anyone (Cossins, 2010a; London, Bruck, Ceci and Schuman, 2005; Priebe and Sevedin, 2008). Some report the abuse as adults, and for some, this does not occur until many years after the abuse (Cashmore and Shackel, 2014). Delayed reporting is particularly common in cases of institutional child sexual abuse where, for example, the abuser is a trusted church member (Parkinson, Oates and Jayakody, 2010), or a staff member in a boarding school or residential care facility.

This report focuses on how the criminal justice system deals with these matters when they are reported early and when there are lengthier delays in reporting. This has been the subject of much debate and criticism over the last four decades or so from professionals, academics and commentators in a number of countries. There have been consistent and strong concerns about the attrition of cases as they move through the system, the difficulties for complainants in being heard and believed, and the adverse impact of involvement in the investigation and prosecution process (Daly and Bouhours, 2010). The challenges for prosecutors in child sexual abuse cases include the typical absence of eyewitnesses and other corroborative physical or medical evidence, and the stress for victims of giving evidence about deeply personal issues that may cause them to feel a deep sense of shame (Cashmore, 2008; Cossins, 2006; Spencer and Flin, 1990).[6]

1.1 EARLY COMPLAINT

Some children disclose sexual abuse at or close to the time it occurred, although some do so 'accidentally' rather than purposefully. In some cases, the abuse is witnessed or 'discovered' as a result of physical evidence (Campis, Hebden-Curtis and DeMaso, 1993; Fontanella, Harrington and Zuravin, 2000; Shackel, 2009; Schaeffer, Leventhal and Asnes, 2011). Several studies suggest that accidental disclosure of child sexual abuse may be particularly common among younger children (Shackel, 2009, pp 382–85). Finkelhor et al. (1988), in an earlier US study of sexual abuse in day care, found that many young children did not disclose

[6] Cossins (2006) provides a detailed outline of how the various features of the criminal justice system's response to child sexual abuse inhibit the prosecution of child sexual abuse and make the experience more difficult and painful for child victims/witnesses.

purposefully. Only 37 per cent of initial disclosures in this study were made directly by the victim. The remaining 63 per cent of initial disclosures were prompted by an adult, after noting some suspicious behaviour or symptoms. Campis et al. (1993) found that the average age of children who accidentally disclosed sexual abuse was significantly younger than that of children who made purposeful disclosures; 87.5 per cent of pre-school children (aged 23 months to six years) who disclosed did so accidentally. Farrell (1998) found that self-disclosed reports of father–daughter incest increased as the victim's age increased: only 3 per cent of victims aged three and 5 per cent of victims aged 4–7 self-disclosed compared with 64 per cent of victims aged 12–17.

Schaeffer et al. (2011) provide important confirmatory evidence of the reasons children are reluctant to disclose sexual abuse. Their study also provides information about who they tell, and how they come to do so. Children suspected of being abused were asked in forensic interviews at a child sexual abuse clinic (CSAC) of Yale-New Haven Children's Hospital how they came to tell someone. There were three main reasons: feeling upset and angry, or having nightmares and other signs of disturbance; being directly asked about it; and the abuse being seen or evident to others. The reasons children delayed disclosure or were reluctant to tell included: threats being made by the perpetrator; fear of the consequences and reactions of others; not feeling that they had the appropriate opportunity to tell; not understanding that the abusive behaviour was unacceptable; and not wanting to jeopardise their relationship with the perpetrator (p 343). The 'grooming' behaviours of perpetrators operate on these fears and feelings and are deliberately intended to gain and maintain children's compliance, secrecy and loyalty (Erooga, 2012). This contributes to children's confusion, denial and feelings of being complicit and responsible for the abuse (Paine and Hansen, 2002; Parkinson et al., 2010).

When children do disclose the abuse at or close to the time it occurred, the key issue in terms of a criminal justice system response is the extent and reliability of the evidence (Cashmore, 2008; Walsh, Jones, Cross and Lippert, 2010). The child's statement is typically the main evidence, so the way children are questioned both during the investigation process and at court can have a significant impact on the quality, quantity and the credibility of the information children are able to provide (Brown and Lamb, 2015). Australian states and territories and other countries now have specialist investigative teams to interview children in these circumstances, and generally video-record interviews to preserve an accurate record (Cashmore, 2002; Davies et al., 1995; New South Wales Children's Evidence Taskforce, 1997). To some extent, this guards against the impact of delays on the quality and completeness of children's evidence, and on their willingness to remain engaged in the prosecution process. The challenge remains, however, to elicit quality evidence from children, especially young children and those with particular emotional and cognitive needs who may not be adequately catered for during the investigation and trial process (Lamb, Hershkowitz, Orbach and Esplin, 2008; NSW Standing Committee on Law and Justice, 2002; Powell and Hughes-Scholes, 2009).

1.2 DELAYED COMPLAINT

As outlined above, there are a number of reasons why children are reluctant to tell anyone and either do not report sexual abuse or delay their disclosure. Indeed, Cossins (2010b, p 82) argues that 'delay is a *typical*, rather than an aberrant, feature of child sexual abuse'. For example, most of the children being assessed for sexual abuse in various studies delayed their disclosure of the abuse for periods ranging from six months to five or more years (DeVoe and Faller, 1999; Goodman et al., 1992; Henry, 1997; Sas and Cunningham, 1995). In a review of a number of studies that included adults who alleged they were abused as children, and children undergoing sexual abuse evaluations, London et al. (2005) found that only about one-third of victims disclosed the abuse to anyone during childhood. Based on a representative sample of adults from Quebec, Hébert et al. (2009) reported that almost 58 per cent of the victims of child sexual abuse delayed disclosure for five years or more, and 20 per cent never disclosed.

Delayed disclosure and reporting are associated with various characteristics of the victim and perpetrator, and the relationship between them. Older children, for example, are more reluctant to disclose than younger children, and boys are more reluctant than girls (Cashmore and Shackel, 2014; Easton, 2013; Goodman-Brown, Edelstein, Goodman, Jones and Gordon et al., 2003). Children have also been found to be less likely to disclose and more likely to delay if the perpetrator is a parent or parent figure, or a person in a position of trust and authority than an unknown or unrelated person (Arata, 1998; Goodman-Brown et al., 2003; Paine and Hansen 2001; Smith et al., 2000). The research evidence for an association between the type and frequency of the abuse is more mixed, with more serious abuse more likely to be reported in some studies, less likely in some, and no association noted in others (Hershkowitz et al., 2007; Paine and Hansen, 2002; Schaeffer et al., 2011; Smith et al., 2000).

Victim's gender

The research evidence relating to gender differences in disclosure is consistent. A number of studies have found that boys and adolescent males are less likely than their female counterparts to disclose child sexual abuse at the time of the abuse. When they do disclose, they take longer to do so, and make fewer and more selective disclosures (Connolly, Chong, Coburn and Lutgens, 2015; Gries, Goh and Cavanaugh, 1996; Hébert et al., 2009; Hunter, 2011; O'Leary and Barber, 2008; Priebe and Svedin, 2008). For example, in O'Leary and Barber's (2008) study, only one in four males who had been sexually abused as children or adolescents disclosed at or around the time of the abuse whereas nearly two-thirds of the females did so. For nearly half the men (45 per cent), it took at least 20 years for them to discuss their abuse compared with 25 per cent of the women.

Similar patterns are also evident in relation to church-related abuse. In a retrospective study of 191 cases of complaints of child sexual abuse in the Anglican Church of Australia, Parkinson, Oates and Jayakody (2010) found that boys who were sexually abused by members of the clergy were less likely than girls to report the abuse during childhood and took, on average, 25 years to make a complaint compared with 18 years for girls. Parkinson et al. also found that 'media reporting of child sexual abuse in the Church was a major factor in encouraging victims

to come forward' (p 183). There were similar findings in a large-scale study of child sexual abuse in the Catholic Church in the United States (John Jay College, 2004).

There are several socio-cultural explanations for the particular barriers to disclosure and reporting for boys and men. These include their fear of being labelled 'homosexual' (Alaggia, 2005; Alaggia and Millington, 2008); the perception that boys do 'not get sexually abused' (Alaggia, 2005; Easton, 2014; Sorsoli, Kia-Keating and Grossman, 2008); and the belief that boys who have been sexually abused are likely to become sexual abusers (Cashmore and Shackel, 2013; Richards, 2011). Being a 'victim' also challenges cultural views of masculinity. There is also evidence that the attempts by boys and men to discuss or report child sexual abuse were not believed or taken seriously, even in therapy (Alaggia and Millington, 2008).

Evidentiary challenges with delayed reporting

When a report of child sexual abuse is finally made – months, years or decades after the abuse occurred – there are a number of challenges for the investigation and prosecution of the alleged offences. The main challenge is the likelihood of 'degraded evidence' (Newbury, 2014; Read and Connolly, 2007). As Newbury (2014) points out, 'the availability and reliability of evidence is often highly uncertain' by the time police become aware of historical offences, in some cases 40 to 50 years later:

> With time, offenders have the opportunity to escape, dispose of evidence and construct alibis; victim and witness memories fade or are distorted; witnesses become hard to locate or identify, and in some cases die; and crime scenes and exhibits are obliterated or contaminated (p 44).

Similarly, Shead (2014), an experienced prosecutor, states that:

> The passing of time means that police and ultimately prosecutors are faced with an inevitable loss of evidence: memory, scientific and medical evidence, written records and living or competent witnesses. Generally speaking, with witnesses who can be located, recall is diminished … There is often no overt evidence of this type of offence occurring. There is usually no injury, no eyewitness, and no DNA evidence: no independent support (p 746).

There are also a number of evidentiary and admissibility issues, including witness credibility and reliability, and associated directions to juries in relation to the impact of delay on the capacity of the accused to mount a defence (for example, see Connolly et al., 2009, 2010; Cossins, 2010b; Donnelly, 2007; Flatman and Bagaric, 1997–98; Hamer, 2010; 2015). Of course, the defendant's capacity to contest 'old' evidence is also diminished as time goes on. Witnesses who might have corroborated or contradicted the evidence of the complainant may have died or may be untraceable. In addition, in such cases the issue of the reliability of the identification of the accused may be significant, at least where the complainant had little or no prior relationship with the accused. Newbury (2014) argues that the legal restrictions on the admissibility of confessions and admissions, including those obtained by telecommunications

intercepts, pretext calls, and the use of documentary and electronic exhibits, should and could be eased without negating the right of the accused to a fair trial.

The possible advantage in historical matters is that complainants who report child sexual abuse as adults are often committed to seeing the investigation and prosecution through and may be seen as more credible in terms of having little incentive to go through what can be a very painful process after a number of years without good cause. Adult complainants may also have less difficulty than children in understanding and answering questions in cross-examination about their evidence, apart from possible problems in recalling details. There is also some suggestion that judges view adult complainants in child sexual abuse cases more positively (as more cognitively competent) than complainants who are children at the time of the trial, though children were generally seen as more honest (Connolly, Price and Gordon, 2010).

1.3 ATTRITION FROM REPORTING TO PROSECUTION AND BEYOND

What is clear from both Australian and international research over several decades is that when complaints of child sexual abuse are reported to the police, only a very small proportion result in prosecution and conviction. The most consistent figure ranges between 8 per cent and 15 per cent (Bunting, 2014; Daly and Bouhours, 2010; Eastwood et al., 2006; Fitzgerald, 2006; Kelly, Lovett and Regan, 2005). This report focuses on the extent to which the investigation and prosecution outcomes vary with the delay in reporting and prosecution, especially into adulthood for historical matters.

There are various points in the process where the allegations are assessed and where decisions are made by police, prosecutors and others as to whether or not the case will proceed. The first, and possibly most significant, point of attrition is the 'failure to report the crime' to the police or any other statutory authority (Daly and Bouhours, 2010; Kelly et al. 2005). This is the 'dark figure' of child sexual abuse, the unknown proportion of the offences that are committed. One indication of the extent of lack of reporting comes from a Norwegian survey of more than 4,400 adolescent school students about sexuality and sexual abuse; 65 per cent of the girls and 23 per cent of the boys reported some form of sexual abuse experience that included peer-related unwanted sexual contact or non-contact abuse; only 8.3 per cent had talked to a professional, and only 6.8 per cent indicated that the incident had been reported to the authorities or police (Priebe and Svedin, 2008, p 1098).

From reporting to investigation and commencement of criminal proceedings

For offences that are reported to the police, the next point of attrition is the investigation stage (between reporting and clear-up), where police may decide for various reasons not to proceed or victims and their families may become unwilling to do so (Bunting, 2008, 2014; Cossins, 2010a; Daly and Bouhours, 2010; Fitzgerald, 2006; Kelly et al., 2005; Lievore, 2003).

Even after reporting to the police, the victim may still decide not to proceed. For example, O'Brien, Jones and Korabelnikoff (2008: p 5) found a decline over six years in the number of

both adult and child victims of a sexual offence who were willing to proceed to court in New South Wales. In 2006, one-third (32.5 per cent) of victims in their detailed analysis did not want to proceed compared with 21.5 per cent in 2000. Two UK studies found similar proportions of victims who withdrew from the investigation. Bunting's (2008) study in Northern Ireland found that 28.2 per cent of child victims and 38.7 per cent of adult victims who reported sexual offences declined to proceed. Kelly et al.'s (2005) study of both adult and child sexual offence allegations in three areas of England found that the 'victim declining to complete the initial investigative process and withdrawing accounted for a third of the cases lost at the police stage' (p xi). Wundersitz (2003a) also found that in 2003 in South Australia victims 'requesting no further action' was the main reason child sexual abuse cases were cleared without the apprehension of a suspect. The proportion of cases varied, however, according to the relationship between the alleged victim and offender. Nearly double the number of cases involving an intimate family member (31.9 per cent) was 'cleared' because the victim requested no further action than when the person was known but not a family member (17.7 per cent). The victim requested no further action in only 9 per cent of cases where the alleged offender was a stranger.

In a recent Australian study of 659 identified cases reported to the police in one (unidentified) Australian jurisdiction in 2011, the parents or the child withdrew the complaint in 52 matters and the child refused to engage in the forensic interview in a further 18 cases. In 69 cases, the child did not disclose the abuse or particularise the offence, and it is not clear whether this was a function of capacity or preparedness (Christensen, Sharman and Powell, 2016a). Older children (aged 13–15) and those closer in age and known to the suspect were more likely to withdraw their complaint, therefore not proceeding to a forensic interview; so also were those where the complaint related to a single incident rather than repeated abuse.

Even where the complainant and their family are willing to proceed, there are several reasons why the police may decline to do so. These include not being able to identify or locate the suspect, an assessment that there is insufficient evidence to justify a prosecution or that there is no evidence that a crime has been committed, including a decision that the allegation is unfounded (O'Brien, 2008; Wundersitz, 2003a). Christensen et al. (2016a) found that the police did not lay charges in just over half of the 659 cases (51.1 per cent) in which a child sexual offence was reported to them. The main reason was insufficient evidence (43.6 per cent), followed by the child not disclosing the abuse in the early assessment interview or not particularising the elements of the offence (20.5 per cent). A suspect not being identified (11.6 per cent) or no offence being identified (8.0 per cent) were less common reasons. Even less common was a determination that the child was deemed too young or did not appear credible (5.3 per cent). Cases involving children aged 7–12 were, however, more likely to proceed at the point of the forensic interview than those involving younger children (under seven), and also adolescents aged 13–15 (Christensen et al, 2016b). This curvilinear association between the age of the child and the likelihood of the child disclosing and of the case proceeding is consistent with the findings of several other studies (Bunting, 2008; Leach, Powell and Anglim, 2015; London et al., 2005; Walsh et al., 2010).

Allegations deemed unfounded comprise only a very small proportion of cases. In Wundersitz's (2003) South Australian study, allegations were deemed unfounded in 4.8 per cent of cases, but in 8 per cent of matters involving family members. The comparable figure for false allegations of sexual assault offences with mostly adult female victims in Kelly et al.'s (2005) English study was 8 per cent.

In Bunting's (2014) study of 2,079 police records in Northern Ireland (2008–10), about one-quarter of the reported cases of childhood sexual abuse were reported during adulthood. This study confirmed the influence of age at the incident and delay in police decision-making, as well as gender. The probability of matters proceeding from the police to prosecution was highest for children aged seven to 12 who reported immediately (0.28), with little diminution for delays within a year of occurrence (0.25) and more than a year after occurrence (0.22); for adolescents aged 13 to 17, the probability dropped from 0.21 to 0.11 when the delay extended to more than one year. The lowest probability of proceeding was for children six and under (ranging between 0.06 and 0.12). Therefore, among child reporters adolescents were the most disadvantaged by delayed reporting. For those who reported as adults (aged 18 and over), there was a marked difference between males and females, with cases involving females whose alleged offence occurred under the age of 13 significantly more likely to proceed (0.20) than those involving older (aged 13–17) female adolescents (0.04) and male child victims of any age (0.7 to 0.10). Thus, as delay in the reporting time increased, adult women reporting offences that occurred when they were aged 12 or younger appeared to benefit in relation to the proportion of offenders charged, summonsed or cautioned, but this was not the case for adult men. Twice as many cases involving female child reporters proceeded compared with male child reporters (16.4 per cent compared with 8.3 per cent).

Similarly, Fitzgerald's (2006) study of attrition in sexual assault cases in New South Wales found that the age and gender of the victim and less extensive delays in reporting the offence increased the likelihood of criminal proceedings commencing. Cases where the victim was female, older than 10 at the time of the offence, knew the alleged offender, and made the report to the police within 10 years of the offence, were more likely to proceed (Fitzgerald, 2006, p 11). Fitzgerald found that, overall, criminal proceedings commenced in only 15 per cent of sexual offence incidents in 2004 that involved a child victim.

Prosecutorial discretion

The next point at which cases may drop out of the criminal justice system is associated with the prosecution, which has discretion in terms of what charges should be prosecuted or whether the case should be discontinued. Basic tests include assessments of whether there is a reasonable prospect of a conviction based on the strength of the evidence and whether it is in the public interest to prosecute (Corns, 2014, pp 189–92; Davis et al., 1999; Lievore, 2003; NSW ODPP, 2007). In cases involving child sexual offences where the main evidence is that of the child complainant, the capacity and willingness of the witness to provide reliable evidence to support the prosecution is critical. Prosecutorial guidelines refer to a range of factors that prosecutors must take into account, including the credibility of the witness, how well the

witness is likely to cope with testifying, the availability of corroborative evidence, and the likelihood of evidence being excluded and trials being separated (Corns, 2014). A substantial body of research also indicates that prosecutorial decisions are influenced by legal and non-legal factors such as:

- the age of the victim at time of the offence, reporting and prosecution (Cossins, 2010a; Gray, 1993; Fitzgerald, 2006; Spears and Spohn, 1996; Stroud et al., 2000)
- the level of family support for the victim
- the nature and circumstances of the alleged abuse (Brewer et al., 1997; Goodman-Delahunty, Granhag, Hartwig and Loftus, 2010; Goodman-Delahunty et al., 2011, 2014; Sedlak et al., 2008).

The quality of the interview with the complainant is also a consideration in determining the adequacy and reliability of the evidence (Beichner and Spohn, 2005; Blackwell and Seymour, 2014; Burrows and Powell, 2014; Pipe et al. 2013). Communication with police and with the victim and the family are part of this process, but little is known about the decision-making processes nor how police and prosecutors exercise discretion and determine which cases proceed and which do not (Cossins, 2010a; Ernberg, Tidefors and Landström, 2016; Muldoon, Taylor and Norma, 2013; Taylor and Gassner, 2009; Tinsley, 2011).

Attrition at court

The next point in the criminal justice system where attrition may occur is when the matter is moved past prosecutors for listing in court, and whether it remains in the court process (Daly and Bouhours, 2010). Even at this stage, charges may be withdrawn, victims may decide to withdraw and no evidence may be tendered by the prosecution. For example, Daly and Bouhours (2010) reported that a high rate of sexual assault cases did not proceed further, with about one in three cases dismissed or withdrawn in South Australia. For cases that remain in the court system, there are obstacles in the way of obtaining a conviction, with or without a guilty plea, even when the evidence gathered by the police seems strong. Over the last few decades, considerable concern has focused on the problems that child witnesses face in the adversarial and adult-oriented environment of the court, which contribute to the difficulties of achieving a conviction in these cases. Until the mid to late 1980s in Australia and other common law countries, children were treated as inherently unreliable witnesses, and relatively few children met the stringent statutory and procedural requirements for giving evidence.[7]

[7] The rules of evidence and the competency requirements were based on legal suspicion about children's evidence, outlined by Heydon (1984) [former Australian High Court Judge] and cited by Spencer and Flin (1990, p 285) in their seminal book on child witnesses:

With the relaxation of competency requirements, more children, and especially younger children, have been witnesses in child sexual offence cases.[8] However, the early experience in New South Wales indicates that the increased rate of prosecutions has not led to a commensurate increase in the number of convictions for child sexual abuse. Cashmore (1995) found that the conviction rate in New South Wales dropped sharply as the number of prosecutions increased. In 1992, the number of cases accepted for prosecution was more than four times the number in 1982 (1982, 34 cases; 1992, 143 cases). During the same period, the guilty plea rate dropped from 83.6 per cent to 58 per cent and the overall conviction rate fell from 92.3 per cent to 76.5 per cent. Thus, while more prosecutions were being brought, and with younger child witnesses than might have been the case 10 years earlier, defendants were less likely to plead guilty and the chances of obtaining a conviction declined.

Two more recent comparable studies in New South Wales indicate that the rate of convictions and guilty pleas fell even further after 1992. In a study of all child sexual abuse matters in the District Court in 1994, Gallagher, Hickey and Ash (1997) found that just under half (49 per cent) of the alleged offenders pleaded guilty; overall, 65 per cent were convicted on at least one charge. In 2004, the overall conviction rate was 57 per cent: 45 per cent pleaded guilty and 12.3 per cent were found guilty of at least one charge at trial (Fitzgerald, 2006). This study also found that defendants charged with sexual offences against a child in 2004 were somewhat less likely than those charged with sexual offences against an adult to have their charges dismissed in the higher courts without a hearing (18 per cent compared with 23 per cent); these figures were also substantially higher than for defendants charged with assault (8.2 per

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> First, any child's powers of observation and memory are less reliable than an adult's. Secondly, children are prone to live in a make-believe world, so that they magnify incidents which happen to them or invent them completely. Thirdly, they are also very egocentric, so details seemingly unrelated to their own world are quickly forgotten by them. Fourthly, because of their immaturity they are very suggestible and can easily be influenced by adults and other children. One lying child may influence others to lie; anxious parents may take a child through a story again and again so that it becomes drilled in untruths. Most dangerously, a policeman taking a statement from a child may without ill will use leading questions so that the child tends to confuse what actually happened with the answer suggested implicitly by the question. A fifth danger is that children often have little notion of the duty to speak the truth, and they may fail to realise how important their evidence is in a case and how important it is for it to be accurate. Finally, children sometimes behave in a way evil beyond their years. They may consent to sexual offences against themselves and then deny consent. They may completely invent sexual offences. Some children know that the adult world regards such matters in a serious and peculiar way, and they enjoy investigating this mystery or revenging themselves by making false accusations. (Heydon, 1984, p 84)

[8] According to changes to the rules on admissibility of children's evidence, for example, in the Uniform Evidence Jurisdictions (NSW, Vic, Tas, ACT, NT) children are now presumed competent to give sworn evidence unless a child's competency is specifically called into question (Section 12). Nevertheless, even where the criteria for giving sworn evidence is not met, children may still provide unsworn evidence (Sections 13(4) and 13(5)).

cent) and across all offences (8.4 per cent). However, the plea and conviction rates for child sexual offences were higher than for those charged with adult sexual offences (plea rate of 23 per cent and overall conviction rate of 34.9 per cent). For cases that proceeded to trial, 38.8 per cent of defendants facing child sexual offences were found guilty of at least one charge compared with 26.3 per cent of those on trial for adult sexual offences. Overall, however, a conviction was significantly more likely across the board for all offences (80.2 per cent) and for assault (73.3 per cent).

Measures to ease the prosecution process for child witnesses

Over the last 25 years or so, significant steps have been taken in Australia, as in other jurisdictions, to make it easier for children to give evidence by removing them from both the courtroom and the presence of the accused. This has been achieved by using closed circuit television and pre-recording the investigative interview for use as evidence-in-chief (Cashmore, 2002; Connolly et al., 2015; Richards, 2000; McWilliams et al., 2014). Research in New South Wales found that jurors accept and understand the need for such measures (Cashmore and Trimboli, 2006).

Child witnesses also have some protection under the uniform evidence legislation – and similar provisions in other states – that imposes either a positive duty on the court, or gives the judge discretion, to disallow questioning of witnesses at trial that is harassing, intimidating, offensive or oppressive.[9] However, earlier research indicates that judges are reluctant to intervene in the absence of an objection by the prosecution and it remains a challenge for judges to recognise when language that is so familiar to them is difficult and uncomfortable for non-lawyers and particularly for children (Cashmore, 2007; Cashmore and Trimboli, 2006). Further changes to introduce intermediaries[10] to try to reduce the language difficulties (following the lead of England) and to allow all of the child's testimony, including cross-examination, to be pre-recorded (following the lead of Western Australia) are currently being implemented in New South Wales (Plotnikoff and Woolfson, 2015).

Special measures generally apply only to child witnesses under the age of 16 at the time of the hearing, and do not benefit those who delay their reporting and any subsequent prosecution of child sexual offences until the witness is 16 or older.

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[9] *Evidence Act 1995* (NSW), s 41; *Evidence Act 1995* (Cth), s 41 (which applies in the ACT); *Evidence Act 2001* (Tas), s 41. Section 41 of the *Evidence Act 2011* (NT) and *Evidence Act 2008* (Vic) impose such positive action only in the case of 'vulnerable' witnesses; otherwise, judicial intervention is discretionary. Vulnerable witnesses include all children aged under 18 (s 41(4)). Similar provisions exist in the non-uniform states: *Evidence Act 1997* (Qld), s 21; *Evidence Act 1906* (WA), s 26; *Evidence Act 1929* (SA), s 25. In SA, the statutory provision requires mandatory exclusion of improper questions whereas in WA and Qld exclusion is discretionary.

[10] *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act* 2015.

Judicial warnings and directions to the jury

All sexual offence matters, and particularly historical cases involving child sexual offences, may also be the subject of particular warnings or directions to the jury about the impact of delay on the assessment of the evidence.[11] The three most common judicial warnings in child sexual abuse cases over the last 20 to 30 years relate to delay in complaint (*Longman* and *Crofts* warnings) and lack of corroborative evidence (*Murray* direction) (Cossins, 2010).[12] The 'recent complaint doctrine' that applied only to sexual offences was based on the expectation that victims would report such allegations at the first opportunity and that failure to do so cast doubt on the credibility of the allegation (Connolly et al., 2015). Similarly, a lack of corroborative evidence, particularly where the child was unsworn, effectively acted as a barrier to conviction (Cashmore, 2008; Cossins, 2006; Spencer and Flin, 1990).

The *Murray* direction (*R v Murray* (1987)) permits the judge to warn the jury in cases where there is only one witness asserting the commission of the crime (as is typical in sexual abuse cases) that the evidence of that witness 'must be scrutinised with great care' before deciding upon a guilty verdict.[13]

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[11] The complexity of judicial directions at common law and pursuant to legislation has been widely recognised both judicially and extra-judicially (*R v BWT* (2002) at 251, per Wood CJ at CL). Judicial directions in child sexual assault cases pose a challenge not only for judges who must decide what warning and directions to give jurors but also for jurors who must make sense of such directions and apply them to their decision-making and assessment of the evidence in the case.

[12] Other warnings that may arise in child sexual assault cases include a *BRS* direction (judge required to warn the jury of the limited use that may be made of propensity/tendency evidence when admitted for a non-propensity/tendency purpose); *KRM* direction (except where evidence relating to one count charging sexual assault is admissible in relation to another count/s alleging a separate occasion of such assault, the jury must consider each count separately based on evidence pertaining only to that count; and where appropriate such a direction should be balanced by a reminder to the jury that if they have a reasonable doubt concerning the credibility of the complainant's evidence on one or more counts, they can take it into account when assessing reliability on the other counts; any warning required in the face of a ruling concerning the use that may be made of evidence of a complaint or delay in complaint in adjudging credibility or as evidence of the facts asserted; any warning necessary in relation to coincidence evidence).

[13] However, as the NSW Judicial Commission *Sexual Assault Trials Handbook* states, there are further qualifications on the use of this warning. 'For proceedings commenced after 1 January 2007, it is impermissible to suggest that complainants as a class are unreliable witnesses and a trial judge is prohibited from warning the jury of the danger of convicting on the uncorroborated evidence of any complainant: s 294AA *Criminal Procedure Act*. For proceedings commenced after 1 January 2009, it is impermissible to suggest that children as a class are unreliable witnesses: s 165A(1) *Evidence Act'* (p 307, June 2015 update).

The *Crofts* direction (*Crofts v Queen* (1996)) requires that if a jury is informed, pursuant to section 294[14], that a delay in complaint does not necessarily indicate that the allegation is false and that there may be good reasons why a victim of sexual abuse hesitates to complain, then the jury should also be informed that the absence of a complaint or a delay in complaint may be taken into account in evaluating the evidence of the complainant, and determining whether to believe him or her. In New South Wales, legislative amendment has sought to limit the circumstances when a judge can direct the jury that the delay in complaint can be taken into account in assessing the complainant's credibility.[15]

Arguably the most important and problematic of these warnings is the *Longman* warning. The *Longman* warning requires the judge to warn the jury that because of the passage of many years between the alleged offence and the time of complaint, it would be 'dangerous to convict' on the complainant's evidence alone, unless the jury is satisfied of its truth and accuracy, having scrutinised the complainant's evidence carefully. This warning has been the subject of considerable criticism from judges, the New South Wales Court of Criminal Appeal, law reform commissions in Victoria and Tasmania, and the Australian Law Reform Commission (Cossins, 2010a; Nicholson, 2008; Wood DCJ, 2003) and academic commentators (Cossins, 2010b; Hamer, 2010). The criticisms of the *Longman* warning concern:

- the 'illogicality' of the presumption of the loss of evidence and consequent forensic disadvantage to the defendant where there is 'no evidence available capable of contradicting the complainant, let alone in a case where the accused was guilty of the offence charged' (Wood, 2003)
- the lack of requirement that the defendant demonstrate the probative significance of the loss of evidence or specific disadvantage
- the unbalanced treatment of forensic disadvantage – 'the potential for lost evidence to go either way' (Hamer, 2010, p 682)
- the lack of definition or guidance on 'delayed complaint', with earlier cases having defined 'delay' as being in the realm of hours or days, but more recent cases considering six months to be a relevant delay (Cossins, 2010b)

[14] Section 294 of the *Criminal Procedure Act 1986* (NSW) requires that where evidence is given or a question is raised about a delay in complaint in a sexual offence case, a judge must warn the jury that the absence of complaint, or delay in complaining, does not necessarily indicate that the allegation is false, and must inform the jury that there may be good reasons why a victim of a sexual abuse may hesitate in making, or may refrain from making, a complaint about the abuse.

[15] For proceedings commenced on or after 1 January 2007, s 294(2)(c) requires that the judge must not give the direction required by s 294(1) of the *Criminal Procedure Act 1986* (NSW) 'unless there is sufficient evidence to justify such a warning.'

- the link between delay and complainant credibility, and conflation of the 'specific issue of forensic disadvantage with the credibility of the complainant' (Cossins, 2010b)
- the inconsistency of the warning with the findings of psychological literature about the patterns of disclosure of victims of child sexual abuse (Cossins, 2010b)
- the possibility that a jury may perceive the term 'dangerous to convict' as a direction to acquit (Cashmore and Trimboli, 2006; *BWT* (2002)).

While legislative reforms and guidance in the New South Wales *Sexual Assault Trials Handbook*[16] have attempted to limit the scope and strength of the warning, High Court judgments arguably maintained its role (Cossins, 2010b; Hamer, 2010). The *Longman* warning has been the subject of a number of successful appeals in New South Wales against conviction for child sexual assault trials; these occurred mostly prior to 2004, with nine of the 26 resulting in an acquittal and 17 in a retrial (Donnelly, Johns, Poletti and Buckland, 2011; pp 208–13). The law has since been substantially changed by s 165B *Evidence Act 1995* (NSW) which provides that a warning may be given where the cost is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of the delay.[17]

In addition, careful directions must also be given to jurors where tendency or coincidence evidence is led by the prosecution that draws on evidence of sexual incidents that are not the subject of any charge. In such cases, the jury must be reminded that evidence of an uncharged incident is not direct evidence that the accused committed any of the charged acts, and that any charged incident must be proved beyond reasonable doubt (*Gipp v The Queen* (1998); *R v MM* (2000)).

These warnings and directions give rise to complex considerations in sexual abuse cases and focus attention on the characteristics of such cases, namely, that often there is a delay in laying a complaint in such cases and that the allegations are uncorroborated. These warnings are likely to affect how juries assess the evidence in child sexual abuse cases involving delayed complaint (Cossins, 2010a). The challenges raised by judicial warnings in such cases are reflected by the high number of appeals against conviction in child sexual assault cases that

[16] For proceedings commencing on or after 1 January 2009 in NSW, s 165B of the *Evidence Act 1995* applies. Section 165B(2) provides that, if the court, on application by a party, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence. The mere passage of time is not to be regarded as a significant forensic disadvantage. The section is intended to make it clear that (contrary to the tendency at common law following *Longman v The Queen* (1989) 168 CLR 79 for judges to routinely give warnings in relation to forensic disadvantage arising from delay) information about forensic disadvantage need only be given if a party applies for it, and should only be given where there is an identifiable risk of prejudice to the accused. Such prejudice should not be assumed to exist merely because of the passage of time. Section 165B(4) says that a judge cannot suggest to a jury that it would be unsafe to convict because of delay or forensic disadvantage suffered because of the consequences of the delay.

[17] See *New South Wales Criminal Trial Courts Bench Book* [2.640].

succeed on the grounds of judicial misdirection. This is also an area of interest and analysis in this report and the related full report (Shackel, 2016).

Overall attrition

The difficulties of bringing such cases to trial is illustrated by a number of Australian and international studies on the extent to which cases involving sexual offences against children have proceeded from initial identification in hospitals or by child protection authorities through to criminal proceedings and conviction. These are all early complaint studies. In an analysis of cases seen at the Royal Children's Hospital in Melbourne, Goddard and Hiller (1992) tracked 104 cases of child sexual abuse. They found that only 14 per cent of the cases in which the police were involved resulted in a conviction. In one other case, a juvenile was cautioned.

Hood and Boltje (1998) analysed the progress of 500 cases referred to a hospital-based child protection service in Adelaide that provided a specialist medical and psycho-social evaluation service for the state child protection system. Two-thirds (66 per cent) of the cases in the sample were sexual abuse cases. Of the referrals, 356 were assessed by the service and 230 (64.6 per cent of those assessed) were substantiated by clinicians. Of the 230, the police investigated 144 and agreed with the assessment that there had been abuse in 135 cases. Prosecution occurred in 63 cases and there were 39 convictions. The conviction rate was 17 per cent of the cases substantiated by the clinicians.

Similarly, Parkinson et al. (2002) examined the process of attrition in relation to 183 child sexual abuse cases referred to two child protection units in Sydney in the late 1980s. Of the 183 cases, the name of the offender was known in 117 cases. Forty-five cases reached trial and 32 resulted in a conviction. A sub-cohort of 84 children and their families was interviewed in detail to determine why many cases did not proceed to criminal investigation and prosecution and why other cases dropped out of the criminal justice system. Among this sub-cohort, the offender was identifiable in 67 cases; in 13 cases, the offender pleaded guilty, and in 12 was found guilty at trial. Reasons for not proceeding to trial included the offence not being reported to police; parents wishing to protect their children, the perpetrator or other family members; the evidence not being strong enough to warrant proceeding; the child being too young or too distressed; and the offender threatening the family.

These findings are consistent with findings from the US and UK. Tjaden and Thoennes (1992) found in their study of substantiated child maltreatment cases in three US states that only 17 per cent of cases of sexual abuse resulted in prosecution. In a study conducted in Chicago, Martone, Jaudes and Cavins (1996) tracked a sample of cases where sexual abuse was diagnosed by clinicians in a hospital setting. Of these, 324 cases were regarded as being probable sexual abuse and 269 alleged perpetrators were identified; 136 (51 per cent) were charged. In a study in the North of England, San Lazaro, Steele and Donaldson (1996) tracked the cases of 160 children who were seen in a specialist paediatric facility in a public hospital and who were deemed by the researchers to have made an unequivocal allegation of sexual abuse that required police investigation. The children named 145 males and nine females as

perpetrators. None of the women were prosecuted. Of the 145 males, 124 (86 per cent) were known to have been interviewed by the police. Fifty-four (37 per cent) went to trial, of which 49 (86 per cent) were convicted. Five others were cautioned. Overall, 44 per cent of the cases investigated by police resulted in convictions or cautions.

Two other US studies examined various features of the progress of cases through the criminal justice system. Stroud, Martens and Barker (2000) compared cases that resulted in prosecution and those that did not among 1,043 children who completed forensic interviews about child sexual assault allegations in New Mexico. Just under half of the cases were not referred to the prosecutor. These cases were more likely to involve younger children (aged under four), boys, and cases in which the child did not make a disclosure, and where the alleged perpetrator was a family member. The characteristics of the assault – the type of abuse (fondling, oral sex and penetration), its duration and the force used – did not differ significantly between the cases that were referred and those that were not. Of the 587 cases that were referred, 320 (54.5 per cent) were rejected or dismissed, 168 (28.6 per cent) resulted in a guilty plea, 13 were tried by a jury, and the resolution of the matter was still pending or unknown for 86 (14.7 per cent). Overall, only 16 per cent of the interviews involving 1,043 children resulted in a conviction.

Edelson and Joa's (2010) study of the legal outcomes for 137 female and 34 male children and adolescents, some of whom were seen at Child Abuse Assessment Centers (CAAC) or Child Advocacy Centers, built on an earlier study by Joa and Edelson (2004). This study found that children seen at a CAAC were more likely to have their cases pursued by the District Attorney's (DA's) office, to have more counts charged, and the defendants were more likely to plead guilty or be found guilty than in cases where children were not seen at such a centre. The follow-up study by Edelson and Joa (2010) focused on the differences in legal outcomes for male and female children and adolescents. They found that cases involving female complainants were more likely to proceed (be filed), with more counts, and to have a greater likelihood of the defendant pleading guilty than cases with male complainants. There was no significant gender difference in the conviction rate but the defendant was more likely to be found guilty at trial where the complainant was male than female. There was a non-significant trend for offenders against females to be more likely to go to prison than offenders against males, and to receive a longer sentence, despite the fact that they were more likely to have pleaded guilty. The overall conviction rate for offenders against both male and female complainants was more than 70 per cent for the cases that proceeded, but significantly lower as a proportion of the children initially referred to a CAAC or DA's office.

1.4 APPEAL MATTERS

The final step in the criminal justice system where decisions are made about the outcome of cases is the appeals process, which can overturn the findings of other courts in relation to conviction and sentencing. For example, some convictions may be overturned and sentencing appeals may lead to a different and in some cases a more lenient sentence.

Thus, appeals data are an important part of the overall picture of how many cases reported to the police result in convictions. The available appeals data, though rather limited, indicate that a substantial number of child sexual assault cases are successfully appealed by the accused. In a study of conviction and sentence appeals in the New South Wales Court of Criminal Appeal over a four-year period (2000–03), Hazlitt, Poletti and Donnelly (2004) reported that appeals against conviction in child sexual assault cases were upheld in more than half of the cases (55.9 per cent). Appeals against severity of sentencing were successful in 44.4 per cent of cases. The success rate of appeals against conviction showed a marked increase, from 43.5 per cent in 2000 to 73.3 per cent in 2003 (Hazlitt et al., 2004, p 47). A further study of appeals by Donnelly, Johns and Poletti (2011) found that child sexual assault appeals represented nearly one in four (22.5 per cent) successful conviction appeals in New South Wales over the period 2001–07. The success rate for sexual assault appeals involving a child victim (50.3 per cent) was significantly higher than for those involving an adult victim (32.4 per cent). The acquittal rate following a successful appeal was also higher in child sexual assault cases (42.7 per cent) than adult sexual assault cases (27.3 per cent), though this difference was not statistically significant. Judicial misdirection was the most prevalent source of error in successful sexual assault appeals (22.1 per cent), followed by judicial error in admissibility of evidence (19.2 per cent).

Further discussion on these issues can be found at Part 4.9 and in the Appendix of this report.

2 AIMS OF THE RESEARCH AND METHODOLOGY

This research aims to examine the prosecution process for cases of child sexual abuse that are reported to the police in adulthood compared with those reported in childhood. In this report, the term 'child sexual abuse' is used to describe the offending behaviour generally. In presenting detailed statistics, it will be necessary to distinguish between child sexual assault and other sex offences against children. The research seeks to investigate the trends in delayed disclosure and reporting of child sexual abuse, and to map the prosecution process and outcomes associated with varying degrees of delay in reporting to the police, together with other case characteristics such as the age of the complainant, and the relationship between the complainant and alleged offender. The focus of the Royal Commission's work is the sexual abuse of children in institutional contexts so the relationship between the complainant and alleged offender is of particular importance though it was not possible using the available data to match the Commission's definition of institutional abuse.

2.1 RESEARCH QUESTIONS

This research focuses on the following questions:

1. What are the trends in recorded reports to police of historical child sexual abuse over a recent 20 year period compared with reports made during childhood in two Australian states?
2. What are the trends in the numbers of prosecutions of cases of historical child sexual abuse over a recent 20 year period compared with child sexual abuse reported during childhood in two Australian states?
3. What factors – including characteristics of the complainant, the type of offence, the relationship between the complainant and the alleged offender, and delay in reporting to police – are associated with the matter proceeding from a report to the police to prosecution?
4. What is the likelihood of cases reported in childhood and in adulthood resulting in a conviction?
5. What factors (as above) are associated with the matter resulting in a conviction or not, and a custodial or other type of sentence?
6. Is there any difference in the rate of appeals, the grounds of appeals, and the outcomes of appeals in cases in New South Wales:
    - where there are delayed complaints compared with cases that were reported in childhood?
    - that involve 'institutional' child sexual abuse compared with intra-familial cases of abuse and other extra-familial cases?

2.2 METHODOLOGY

The data that form the basis of this research were derived from police and court data in New South Wales and South Australia, and from case file analysis and discussions with legal and other professionals in New South Wales. New South Wales and South Australia are the only two states with equivalent statistical analysis bodies that can produce multi-year 'clean' datasets for both the police and court collections – the Bureau of Crime Statistics and Research in New South Wales (BOCSAR) and the Office of Crime Statistics and Research (OCSAR) in South Australia. These two states also provide a useful basis of comparison in terms of different population sizes and some differences in legislative and policy provisions.

The data used for this study included:

- unit record *police* data provided by the New South Wales BOCSAR and the South Australian OCSAR
- unit record *court* data provided by New South Wales BOCSAR and the South Australian OCSAR
- a sample of case files in which the defendant was a person in a position of authority in relation to the child (a proxy for institutional abuse) and familial child abuse matters held by the New South Wales Office of the Director of Public Prosecutions (ODPP)
- focus groups held with New South Wales ODPP solicitors and Crown prosecutors to discuss the evidentiary issues involved in prosecuting child sexual abuse cases and particularly historical cases
- appeal data relating to 291 appeal decisions involving child sexual offences in the New South Wales Court of Criminal Appeal (NSWCCA) from 2005 to 2013.

Members of the research team also discussed the issues with members of the ODPP Sexual Assault Review Committee (New South Wales) at a meeting in December 2014. This committee included representatives from NSW Police, ODPP, Health and other agencies. The findings were also discussed with NSW Police.

The research has ethics approval from the Human Research Ethics Committee at the University of Sydney. The assistance of BOCSAR, OCSAR and the New South Wales ODPP is gratefully acknowledged.

2.3 ISSUES CONCERNING DATA ANALYSIS

Even in a single state, tracking child sexual abuse prosecutions over time is complex due to:

- changes in record-keeping
- changes in offence categories
- differences between the types of records kept by the police and the ODPP (especially where, due to plea bargaining or otherwise, the offence as charged by the police is not the offence for which the defendant is convicted)
- gaps and errors in data entry.

Data cleaning and checking

Administrative datasets generally require data cleaning and checking as part of the preliminary analysis. For this research, this involved discussions and querying the fields and interpretation with the data custodians in both New South Wales and South Australia before, during and after analysis of the police and court data. Appendix 1 (NSW) outlines the series of steps taken in extracting, cleaning and managing the data for both states.

The main changes to the original databases excluded cases that did not meet the most important criteria for inclusion – the offence must be a *sexual offence* against a *child*. This meant excluding entries where the offences were other than sexual offences and 'cases' where the victim/complainant[18] was aged 18 or older at the time of the offence. Incidents/cases where the only victim or all the victims were aged 18 or older at the date of the offence/incident were excluded.[19]

The limitations of the data

Both the police and court data in each state are administrative datasets, and are not designed with research as their focus. For example, the primary purpose of the NSW Police Computerised Operational Policing System (COPS), as explained by the Australian Bureau of Statistics (ABS), is to record 'all police activities by NSW Police'; a 'secondary purpose' is to provide extracted data for BOCSAR and the ABS to produce crime statistics for New South Wales. It includes 'information on all reported criminal incidents, data on police actions, and other occurrences attended by, or reported to, police'. The 'extract from the COPS database, in the BOCSAR Recorded Crime Statistics Database, includes verified records of criminal incidents, persons of interest and victims'.[20]

Like other administrative databases, both the police and court data are subject to changes in recording practices and directions, and also to the willingness and attention to detail of police and court staff in completing fields. Some information fields are mandatory and data entry for a matter cannot be completed without entering information in those fields; others are not mandatory and may be deemed unnecessary or less important, and often may not be filled in. NSW Police have also indicated that in 2003 and 2008, changes were introduced to improve the rigour of data entry and checking processes. At the same time, changes have also been made in the investigation of child sexual offences, especially with the introduction and

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[18] The terms 'victim' and 'complainant' are used as a form of shorthand throughout the report, rather than 'alleged victim'.

[19] For example, in NSW 468 incidents/cases were excluded where the only victim or all the victims were aged 18 or older at the date of the offence/incident.

[20] Source: Australian Bureau of Statistics, available at www.abs.gov.au/AUSSTATS/abs@.nsf/7d12b0f6763c78caca257061001cc588/dfd6faea24f68ad6ca257235001cd238!OpenDocument

expansion of Joint Investigation Response Teams (JIRTs), involving NSW Police and Department of Family and Community Services staff.

Problems linking police and court data

Ideally it would be possible to track matters from reporting to police, through the investigation and prosecution process to court, and finalisation at court via conviction and sentencing. However, the nature of these administrative databases means it is not possible to map the police data directly onto the court data for several reasons, even where there is a common linking case number. In New South Wales, the link between police records and ODPP records is through the 'H number' but this link is lost if, as frequently happens, the charges, as eventually taken to trial or the subject of a guilty plea, are different from those laid by the police.[21]

As Fitzgerald (2006) pointed out in relation to New South Wales data in a similar exercise:

> The counting units are not the same; the police data show recorded criminal incidents and the court data show finalised defendants and charges. A single defendant can be involved in multiple incidents and a single incident can give rise to multiple charges. Secondly, the court statistics for a given year do not necessarily arise from incidents recorded by police in the same year due to the time it takes to investigate an offence and for charges to be finalised in court (p 2).

Similarly, Wundersitz's technical paper (2003a) and research report (2003b) outlined in some detail the difficulties in trying to trace cases using South Australian police and court data. As Wundersitz pointed out, the flow of cases through the criminal justice system is 'neither simple nor linear'. This is despite the fact that South Australia has the advantage of 'the assignment of a unique personal identification number (Police Identification Number, PIN) to every individual who comes into contact with the criminal justice system' (both as a victim and as a person of interest or accused), which remains constant across time, being re-assigned to that individual on each occasion that he/she has dealings with the system' (p 1). However, as Wundersitz (2003a) pointed out, the unique identifier in South Australian data is not sufficient to allow tracking across the police, court and corrections systems because:

- a single incident report may lead to the apprehension of multiple offenders, or conversely, multiple incident reports may be 'solved' by one apprehension
- a single apprehension report may contain charges arising from a number of incidents, some of which are extraneous to the ones targeted for the study

[21] The difficulty with losing the link through a PIN, or H number in NSW, is that the police data include information about the victim (for example, age, gender and relationship to the offender) whereas the court data include information about the alleged offender, the charges and the outcomes of prosecution, so it can be difficult or impossible to conduct analyses of court data that refer to victim characteristics.

- charges arising from the one apprehension report may be split among different court files, and take different paths through the court system
- a particular court file may, as the case progresses, be consolidated with other court files relating to the same offender, even though they may contain charges arising from incidents and apprehension reports unrelated to the 'targeted' incident (p 2).

The police and court data in each state have therefore been analysed separately, exploring within the police data trends and the factors associated with greater or lesser likelihood of the matter proceeding to court, and within the court data the likelihood of a plea, conviction and type of sentence. Appendix 1 (NSW) for each state also outlines the data analysis processes, including aggregation, and explains the relevant unit of analysis – incident/major offence/victims/accused/court.

The appeal data

The appeal cases were identified for the period 2005–13 using AustLII and the NSWCCA database and relevant keywords. All cases that involved a victim under 18 in the principal offence were included. 'Child sexual abuse' was defined broadly to include all offences relating to child sexual abuse, and to encompass the various offences relating to the Royal Commission's definition of child sexual offences. The cases were summarised and coded based on the grounds of appeal, outcomes and categories (whether historical child sexual abuse and whether intra-familial, extra-familial or 'institutional'). The study was limited to NSWCCA cases with published judgments, and these were not consistent in the amount of background information provided, so it was sometimes difficult to reconstruct context. It is also possible that some appeals may have been missed despite thorough and systematic searches of the relevant case databases. See Appendix: Appeals Study for the *Child Sexual Offence Appeals in the NSW Criminal Court 2005-2013* report by Associate Professor Rita Shackel.

2.4 DEFINITIONS OF SEXUAL OFFENCES AGAINST CHILDREN

The Royal Commission adopted a working definition of child sexual abuse that sets the parameters for the behaviours and activities that are captured by the legal definitions of child sexual assault, indecent assault, acts of indecency, grooming and child pornography. It includes 'abuse' perpetrated by an adult or another child, though in legal terms it does not include the above legally proscribed behaviours perpetrated by a child under the age of 10, since this is the age of criminal responsibility in Australian states and territories. The Royal Commission definition is:

> *Any act which exposes a child to, or involves a child in, sexual processes beyond his or her understanding or contrary to accepted standards. Sexually abusive behaviours can include the fondling of genitals, masturbation, oral sex, vaginal or anal penetration by a penis, finger or any other object, fondling of breasts, voyeurism, exhibitionism and exposing the child to or involving the child in*

pornography (Bromfield, 2005). It includes child grooming which refers to actions deliberately undertaken with the aim of befriending and establishing an emotional connection with a child to lower the child's inhibitions in preparation for sexual activity with the child.

There is a very large number of offences that may be charged, depending on the jurisdiction and the year in which the alleged offences occurred; they are charged under the relevant provisions at that time and in that jurisdiction. The analyses in this report include data from both New South Wales and South Australia so the legislative provisions and definitions that apply will vary by state, though there are considerable commonalities (Boxall, Tomison and Hulme, 2014).

Comparisons across states and the analysis of large-scale administrative datasets are both complex and difficult processes for several reasons. First, states have different legislation that includes different definitions of the elements of sexual offences (for example, 'sexual assault'); differences in the age cut-offs that apply in the offences, and different penalties. Second, the relevant legislation has changed considerably since the 1950s, and these changes occur at different times across states, though there is some similarity in developments across Australia with one state following the law reform trajectory of another.

Definition of 'child'

The definition of 'child' used in this report refers to persons under the age of 18, consistent with the Royal Commission's Terms of Reference, and the definition of 'child' in the *United Nations Convention on the Rights of the Child 1989*. This means that offences against children above the age of consent are included. The age of consent in New South Wales is 16 years, and in South Australia it is 17 years for heterosexual and homosexual sexual acts involving penetration but 16 years for all other sexual acts (Boxall et al, 2014).

Definition of sexual offences against children

Sexual offences against children have been categorised in this report into four main types of offence:

- *sexual assault* involving sexual intercourse/penetration – without consent or as defined as unlawful because of the age of the victim and/or the relationship between the victim and the offender
- *indecent assault* – contact sexual offence not involving sexual intercourse/penetration
- *acts of indecency* – non-contact sexual offences
- *child pornography*.

These categories are in line with the definitions and categories of sexual offences used by the New South Wales BOCSAR, the Judicial Commission of New South Wales and the South Australian OCSAR. The use of these generic categories is 'a broad indicator of the seriousness of the offence' though as Hazlitt et al. (2004) pointed out, 'there are difficulties in grouping sexual offences this way given the broad range of offending that can occur within the three categories. An overlap also occurs between the statutory maximum for offences that constitute these categories' (p 22), especially given the various changes in definition of sexual

intercourse/penetration and the changes in statutory maximum penalties, especially for historical offences. Table 1 outlines the definitions of various sexual offences in the New South Wales Police database (COPS).[22]

Table 1. Definitions of sexual offences in the New South Wales Police COPS database

Offence type	Defined as
Sexual assault	Where any person has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse. Includes carnal knowledge, in reference to historical matters only* and incest** where a person under 18 was involved
Indecent assault	Where any person assaults another person and, at the time of, or immediately before or after, the assault, commits an *act of indecency* on or in the presence of the other person
Act of indecency	Where any person commits an act with or towards another person that offends the currently accepted standards of decency and has some sexual connotations
Grooming/procuring	Procuring or grooming child aged under 16 for sexual activity
Possess/disseminate child pornography	Possess/disseminate child exploitation material

* 'Carnal knowledge' is a legacy offence that was included with 'sexual assault' on the advice of the Chief Statistician of NSW Police though the two are not quite equivalent. For current instances of sex with a person under 16 years, the police are directed to use 'aggravated sexual assault' or other suitable category.

** Incest is defined as sexual intercourse by any person with a close family member who is 16 or older.

Boxall et al. (2014) provide detailed explanations of the changes since the 1950s and especially since the 1980s, in the relevant legislation in all states, including New South Wales and South Australia. These changes relate to the expansion of the definition of sexual intercourse or penetration, the decriminalisation of homosexual sexual acts, the specific inclusion of further categories of persons in a position of trust or authority in relation to a child, and the inclusion and expansion of child pornography offences.

For example, in New South Wales *sexual intercourse* is defined in the *Crimes Act 1900* (NSW) s 61H and this definition has been expanded several times since 1980. First, as a result of changes made by the *Crimes (Sexual Assault) Amendment Act 1981*, sexual intercourse/penetration was

[22] It is important to note that the term 'child sexual assault' is often used interchangeably with child sexual abuse in the literature and in research studies to include both penetrative and non-penetrative sexual offending. In this report, 'sexual assault' refers to penetrative sexual offences.

expanded to include the penetration of the vagina or anus of a person by any part of the body of another person; or by an object manipulated by another person; or fellatio or cunnilingus (oral to body contact). As a result of changes made by the *Crimes Legislation (Amendment) Act 1992*, it is sufficient that the accused penetrated 'to any extent' the genitalia of a female or the anus of any person. Then in 1996, the definition of 'vagina' was expanded to include surgically-constructed vaginas (*Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996*) (Boxall et al., 2014, p 30). Similar changes were made in South Australian legislation in 1976, 1985 and 2008.

The definition of *indecent assault* in the *Crimes Act 1900* (NSW) s 61L is that an assault has been committed on a person and 'at the time of, or immediately before or after, the assault,' the accused 'commits an act of indecency on, or in the presence of, the person'. For there to be an assault, typically there is touching of the body of the victim that was not accidental and did not occur in the course of the ordinary exigencies of everyday life. For the assault to be indecent, it must have a sexual connotation. It includes forced manipulation and masturbation, and fondling.

The offence of *act of indecency* 'with or towards a person' carries a higher sentence if the victim was under 16 years (*Crimes Act 1900* (NSW) s 61N). An example would be exposing one's genitalia to someone else (who did not invite it) in an act popularly known as 'flashing'.

Child pornography offences were introduced in New South Wales in 1977 and in South Australia in 1978, and have been amended several times since to be more inclusive and specifically criminalise the 'production, dissemination and possession of child pornography' (Boxall et al. 2014, p 59). Child pornography material is defined in the South Australian *Criminal Law Consolidation Act 1935* as material that:

> 'describes or depicts a child under, or apparently under, the age of 17 years engaging in sexual activity or consists of, or contains, the image of (or what appears to be the image of) a child under, or apparently under, the age of 17 years, or of the bodily parts of such a child, or in the production of which such a child has been or appears to have been involved; and that is intended or apparently intended:
>
> i. to excite or gratify sexual interest; or
>
> ii. to excite or gratify a sadistic or other perverted interest in violence or cruelty.' (Boxall et al., 2014, p 46).

Child sexual abuse in institutional contexts

The Royal Commission's Terms of Reference provide a broad and inclusive definition of institutional child sexual abuse in relation to the persons involved, the premises, and the circumstances or conditions that create, facilitate or contribute to the risk of child sexual abuse

in relation to the institution's activities. [23] The abuse may occur on the premises of the organisation or elsewhere. [24] It includes, but is not limited to, sexual abuse perpetrated by:

- institutional staff or volunteers who work directly with children, that is, 'a person in authority' (for example, teacher, scout leader, clergy, foster carer, childcare worker, manager, residential care worker or correctional facilities worker)
- institutional staff, volunteers and contractors in an ancillary role (for example, cleaner, bus driver, gardener, caretaker)
- other minors in circumstances where the institution is *in loco parentis* (for example, classmate, peer during a school camp, child in a residential care facility).

The data available from the police and court databases do not allow a close match with the Royal Commission's definition of 'institutional abuse'. The closest match (with the minimum missing data) is provided by using the relationship of the person of interest to the victim in the police incident and victim databases, and reference in the particular offence to the alleged offender being a 'person in authority' in relation to the child.[25] Both New South Wales and South Australia have had specific offences that explicitly criminalise sexual contact between children and persons in a position of authority that have been expanded in various ways from 1935 in South Australia and from 1950 in New South Wales. The current provisions in both states cover a range of professions and positions of power and authority in relation to a child.[26]

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[23] The Royal Commission's Terms of Reference adopt a very broad definition of an 'institution' to mean:

> *Any public or private body, agency, association, club, institution or other entity or group of entities of any kind (whether incorporated or unincorporated) and however described and includes for example an entity or group or entities (including an entity or groups of entities that no longer exists) that provides or has at any time provided, activities, facilities, programs or services of any kind that provide the means through which adults have contact with children including through their families and does not include the family.*

[24] The Royal Commission's Terms of Reference define *child sexual abuse in institutional contexts* as when it occurs 'on the premises of an institution, where activities of an institution take place, or in connection with the activities of an institution'; or 'it is engaged in by an official of an institution in circumstances (including circumstances involving settings not directly controlled by the institution) where you consider that the institution has, or its activities have, created, facilitated, increased, or in any way contributed to, (whether by act or omission) the risk of child sexual abuse or the circumstances or conditions giving rise to that risk'; or in any other circumstances where an institution is considered to be 'or should be treated as being, responsible for adults having contact with children'.

[25] Further information was also used in some analyses in relation to the location of the offence and the occupation of the person of interest.

[26] For example, in SA 'the *Criminal Law Consolidation (Rape and Sexual Offence) Amendment Act 2008* expanded the categories to encompass a range of individuals in a position of authority in relation to the victim, namely: teachers engaged in the education of the child; foster parents, step-parents or guardians of the child; religious

Under the South Australian *Criminal Law Consolidation Act 1935*, 'a person in authority' includes:

- teachers engaged in educating the child
- foster parents, step-parents or guardians of the child
- religious officials or spiritual leaders providing pastoral care or religious instruction to the child
- medical practitioners, psychologists or social workers providing professional services to the child
- persons employed or providing services in a correctional institution or a training centre
- employers of the child or other individuals who have the authority to determine significant aspects of the child's terms and conditions of employment or to terminate the child's employment (regardless of whether the work is paid or volunteer) (citing Boxall et al., 2014, p 58).

The *Crimes Act 1900 (NSW)* does not define a person in authority but the 'circumstances of aggravation' for sexual offences include circumstances in which 'the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender'.[27]

officials or spiritual leaders providing pastoral care or religious instruction to the child; medical practitioners, psychologists or social workers providing professional services to the child; persons employed or providing services in a correctional institution or a training centre, and; employers of the child or other individuals who have the authority to determine significant aspects of the child's terms and conditions of employment or to terminate the child's employment (regardless of whether the work is paid or volunteer)' (Boxall et al., 2014, p 58). The categories in NSW are similar but specifically include those in a position of authority or relate to 'intellectually disabled individuals and those who, in connection with a facility or program providing intellectual disability services, are in a position of authority relative to the victim (*Crimes (Personal and Family Violence) Amendment Act 1987* (NSW))' and make the 'person in authority' relationship an aggravating circumstance (*Crimes (Amendment) Act 1989* (NSW)) (Boxall et al., 2014, p 31). Further, in 2003, NSW introduced 'a small number of offences into the *Crimes Act 1900* that criminalised sexual contact between an adult and a child (16–17 years old) under their 'special care' (*Crimes Amendment (Sexual Offences) Act 2003)*. The legislation identified a series of scenarios in which the child would be considered as being under special care if the offender: is the step-parent, guardian or foster parent of the victim; is a school teacher and the victim is a pupil of the offender; has an established personal relationship with the victim in connection with the provision of religious, sporting, musical or other instruction to the victim; is a custodial officer of an institution of which the victim is an inmate; or is a health professional and the victim is a patient of the health professional' (p 31).

[27] 'Under the authority of the alleged offender' is included as one of the 'circumstances of aggravation' in several sections of the Act: for example, see s 61J(2) (e) in relation to aggravated sexual assault; and s 66C(5)(d) in relation to sexual intercourse-child between 10 and 16; s 61M (3)(c) in relation to aggravated indecent assault, and 61O(3)(b) in relation to aggravated act of indecency.

The information in the New South Wales and South Australian police databases relating to persons in 'positions of authority' in relation to the child[28] provides a narrower and more conservative definition of institutional sexual abuse than the Royal Commission's more expansive definition and is therefore likely to underestimate the incidence of institutional abuse as defined by the Royal Commission.

Historical child sexual abuse

Historical child sexual abuse is defined in this report as abuse that occurred when the victim was a child (under 18) but was not reported until adulthood.[29] This, by definition, brings in some element of delayed reporting (from childhood to adulthood) but there may be substantial variation in the length of that delay. As Newbury (2014) points out, 'historicity is always a matter of degree' (p 44). For that reason, the actual length of delay from the offence date to the date of reporting is also used in the analyses in this report.

Other terms

The term 'victim' is used in accordance with the terminology used by New South Wales and South Australian Police, and by BOCSAR and OCSAR, although there has been no finding or substantiation of an offence at the time the 'offence' is reported.

'Offender' is defined by BOCSAR as 'persons of interest who have a legal action commenced against them by the police; this can include referral to court, caution or criminal infringement notice'.[30]

[28] With some additional information, as outlined, on the relevant charges, occupation and location.

[29] It should be noted that different research studies apply different definitions of historical matters: for example, Connolly, Chong, Coburn and Lutgens (2015) defined cases as 'historic' when they 'were prosecuted more than two years after the alleged abuse ended' (p 550).

[30] Source: NSW Bureau of Crime Statistics and Research (BOCSAR) glossary of terms, available at www.bocsar.nsw.gov.au/Pages/bocsar_crime_stats/bocsar_glossary.aspx#I

3 NEW SOUTH WALES POLICE DATA

3.1 GENERAL TRENDS IN REPORTING OF CHILD SEXUAL OFFENCES TO POLICE

When an alleged offence is reported to NSW Police, information is recorded in COPS. The information relates to the criminal 'incident', which is defined as an activity detected by or reported to police, which:

- involves the same offender(s) and the same victim(s)
- occurs at the one location, during one uninterrupted period of time
- falls into one offence category and into one incident type (for example, 'actual', 'attempted', 'conspiracy').

For example, one incident may involve two offenders sexually assaulting the same victim. This is recorded as one sexual assault incident if the offence fell into the same category. If more than one offence type is alleged at the same time, involving the same offenders and victims, this is recorded as a separate incident.[31] Incidents are the main unit of analysis used by BOCSAR, and the following analyses are commonly based on incidents as well as the 'person of interest' and the 'victim'.

Figure 1a presents the number of reported incidents for the four main types of sexual offences against children in New South Wales for the period 1995–2014. There is some variation by offence type, with only sexual assault showing a fairly consistent upward trend over this period, more than doubling from 1,274 incidents in 1995 to 3,030 in 2014. After closely following the sexual assault figures until 2002, the trend in the number of indecent assault incidents showed a marked decrease until 2007 (with a low of 1,406 incidents in that year). Reports of sexual assault, indecent assault and acts of indecency all peaked in 1997–98 just after the Wood Royal Commission, which exposed sexual offending against children in churches, and the failure of various government agencies including the departments of Community Services, Juvenile Justice, and Sport and Recreation. The review of the *Children and Young Persons (Care and Protection) Act 1998* (NSW), which followed the Wood Royal Commission and came into effect in 2000, also mandated the reporting of children at 'risk of harm' and later at 'risk of significant harm'.[32]

[31] Each offender or alleged offender is counted only once for each event. Note that multiple criminal incidents may be associated with a single event. More information is available at www.bocsar.nsw.gov.au/Pages/bocsar_crime_stats/bocsar_glossary.aspx#P

[32] Medical practitioners have been required by law to report physical and sexual abuse since 1977, and the categories of professionals and others required to report sexual abuse was expanded in 1987, and again, more

In 2004 and 2007, new criminal offences were added to the statute book concerning 'procuring or grooming' a child for pornography or prostitution. The number of reported incidents under these provisions has gradually increased from only 20 in 2008 to 274 in 2014 (see Figure 1a).

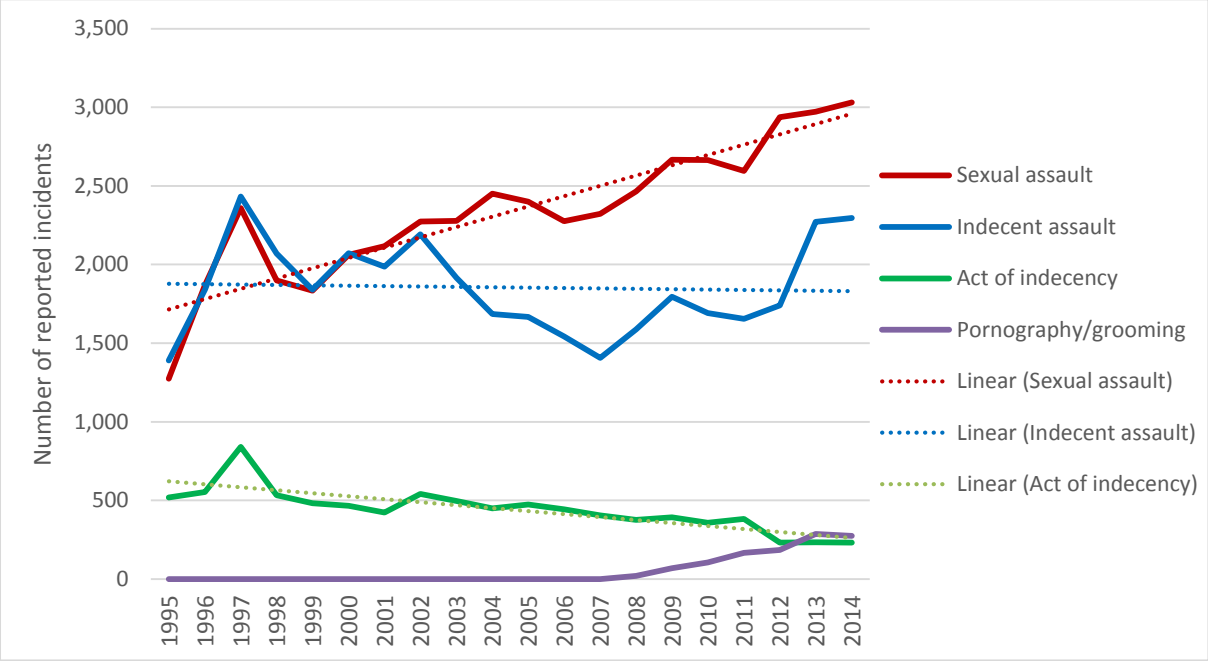


Figure 1a. Number of incidents involving sexual offences against a child reported to NSW Police by offence type from 1995 to 2014

Figure 1b shows the total number of reported sexual assault or indecent assault offences committed against children between 1995 and 2014. It shows a sustained upward trend, almost doubling between 1995 (2,625 reports) and 2014 (5,200 reports).

substantially, from 18 December 2000 in s 27 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW), to include anyone who:

> '(a) in the course of his or her professional work or other paid employment delivers health care, welfare, education, children's services, residential services or law enforcement wholly or partly to children under the age of 16 years; or
>
> (b) holds a management position in an organisation the duties of which include direct responsibility for or direct supervision of a person referred to in (a), and that person has reasonable grounds (that arise as a consequence of their employment) to suspect that a child is at risk of harm.'

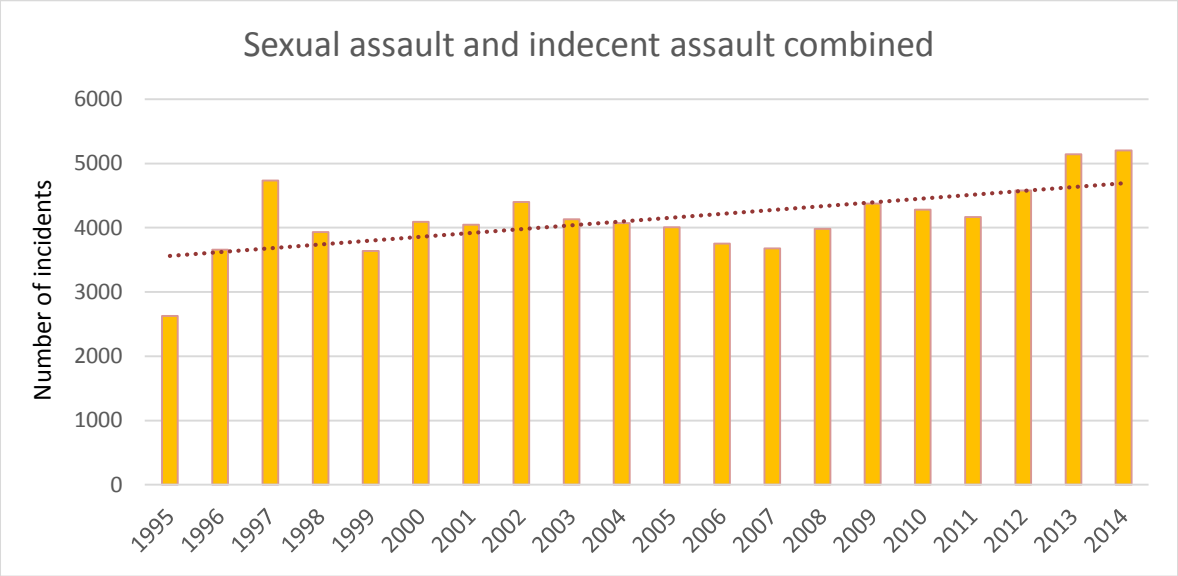


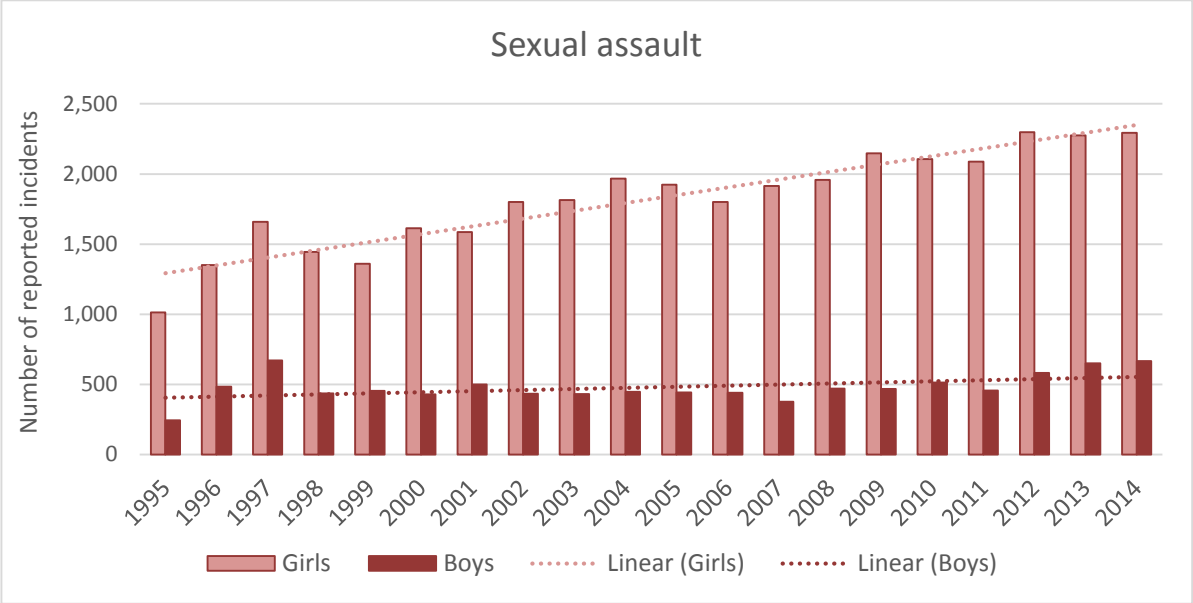
Figure 1b. Number of incidents involving sexual assault or indecent assault against a child reported to NSW Police from 1995 to 2014

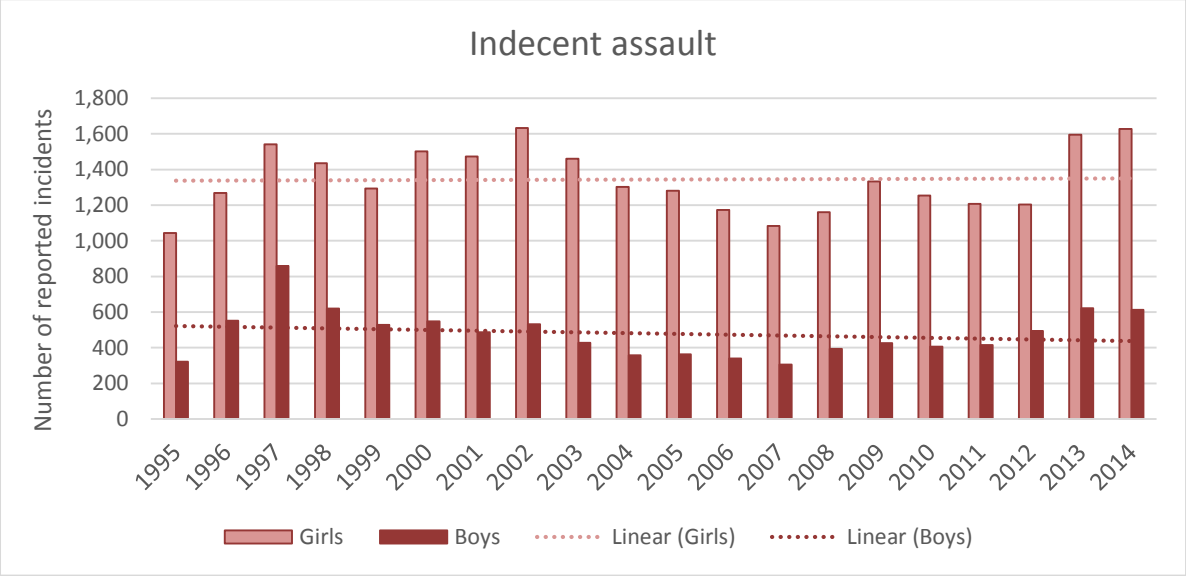
Gender of victim

Consistent with the typical gender breakdown for child sexual abuse, the majority of victims were female. Overall, three out of four incidents (*n* = 76,088, 74.9 per cent) involved female victims, mostly as the only victim per incident (*n* = 71,848, 94.4 per cent of all incidents involving females).[33] About one in five of the reported incidents (*n* = 23,563, 23.2 per cent) involved a single male victim and a further 1.2 per cent involved more than one male victim; a very small proportion of incidents (*n* = 1,944, 1.9 per cent) involved a combination of male and female victims. The proportion of male victims was somewhat higher for indecent assault (29.5 per cent) than for sexual assault (23.8 per cent).

Figures 2a and 2b show the number of child sexual assault and indecent assault incidents reported to NSW Police involving male and female victims by year.

[33] A given incident could have multiple victims, offenders and charges but only one offence category.





Figures 2a and 2b. Number of reported incidents of (a) sexual assault and (b) indecent assault from 1995 to 2014 in New South Wales

Figure 2a shows an upward trend in the number of sexual assault incidents for both girls and boys, with both more than doubling in number from 1995 to 2014. In contrast, the trend lines for indecent assault in Figure 2b are fairly flat with some fluctuation for both male and female victims and a peak for males in 1997–98, around the time of the Wood Royal Commission.

Age of victim

Figure 3 shows the breakdown by age of the victim(s) for each offence category. The most numerous age group for victims of sexual assault was those aged 14–17 (32.2 per cent) followed by those aged 10–13 (28.6 per cent); victims younger than 10 together comprised 35.3 per cent of reported incidents of sexual assault. Indecent assault showed a somewhat different pattern with those aged 10–13 being the most numerous age group (34.1 per cent) with proportionately fewer victims aged 14–17 (20.5 per cent), and more victims younger than

10 (42.0 per cent). A small number of incidents (3.3 per cent) involved two or more victims who fell into different age categories. Most child victims of child pornography, procuring or grooming (87.1 per cent) were aged 10 and older.

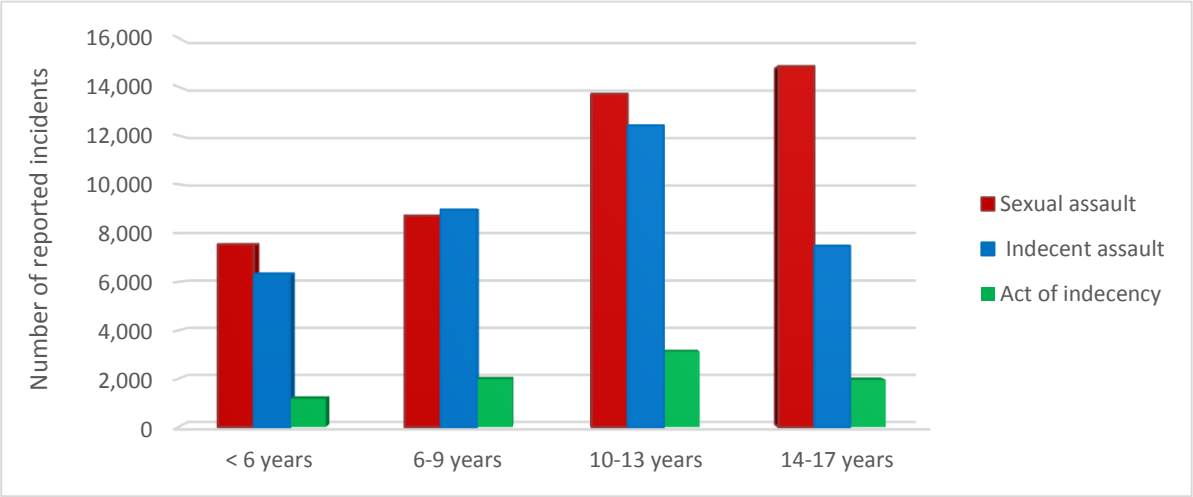


Figure 3. Number of reported incidents by age of victim and type of offence in New South Wales

There was some difference by gender in the age distribution for sexual assault incidents, with boys under 10 comprising nearly half (48.2 per cent) of the male victims and girls of the same age comprising just under one-third (32.1 per cent) of female victims.[34] More than one-third of female victims (36.0 per cent) were aged 14–17 compared with just under one-fifth of boys (19.7 per cent). Correspondingly, the proportion of male victims decreased with age. Boys made up 28 per cent of victims under 10 but only 12.5 per cent of those aged 14–17.

[34] *Note*: A given child could occur more than once depending on how many incidents they were involved in.

Table 2. Number and percentage of sexual assault incidents involving male and female victims by age

	Female		Male		Male and female		Total
Age	*n*	%	*n*	%	*n*	%	*N*
Under 6	5,311	14.8	2,094	22.3	127	18.4	7,532
6–9 years	6,208	17.3	2,433	**25.9**	73	10.5	8,714
10–13 years	10,851	**30.2**	2,806	**29.8**	52	7.5	13,709
14–17 years	12,936	**36.0**	1,850	19.7	51	7.4	14,837
Combination of ages	597	1.7	228	2.4	389	56.2	1,214
Total	35,903		9,411		692		46,006

This pattern by gender and age was less evident for indecent assault; in 46.7 per cent of incidents involving males, the victims were aged under 10 compared with 40.5 per cent for females.

Relationship of the person of interest to the victim

Of particular relevance to the Royal Commission's focus on child sexual abuse in an institutional context are offences where the person of interest or the alleged offender[35] is in a position of authority or trust in relation to the child.[36] The relationship of the person of interest, and in particular, relevant recoding of 'persons in authority' was used as a proxy for institutional

[35] As explained earlier, a 'person of interest' becomes an alleged offender when the police lay charges and take legal action against them.

[36] This information on the relationship of the 'offender' to the victim has several limitations in terms of missing data and some questionable coding since it appears that sometimes the 'victim–person of interest relationship' is recorded, rather than the 'POI to victim relationship' (for example, 'child' rather than 'parent') or perhaps the relationship of the person of interest to one of the child's parents is recorded. For example, the incidents in which the 'person of interest–victim relationship' was coded as 'child' were cross-checked and the average age of the person of interest at the time of the incident was 38 years; the vast majority of these incidents (83 per cent) were categorised as 'not recorded' in the field 'by whom committed' in the offender database so they do not fit the definition of 'child' or 'student'. For this reason, the categories 'child', 'spouse/partner', and 'ex-spouse/ex-partner' are excluded from the figures. The incidents that fell into these categories constituted only 1.6 per cent of all sexual or indecent assaults from 2003 to 2014.

abuse, correcting for missing data where possible.[37] The relevant recoding of 'persons in authority' includes teachers, clergy ('religious representatives'), youth leaders, employers and managers, 'carers' and ancillary staff such as caretakers, cleaners and drivers. This is narrower than the Royal Commission's definition of 'institutional child sexual abuse' and it is therefore likely to underestimate the incidence of institutional abuse as defined by the Royal Commission.

The following analyses exclude the years prior to 2003 because there was a preponderance of missing information on the person of interest–victim relationship until 2003, with the vast majority of incidents marked as 'Not recorded' in this field.

A small percentage of incidents, on average 5.6 per cent, from 2003 to 2014 involved persons in authority (ranging from 4.0 per cent in 2011 to 7.6 per cent in 2014). The vast majority of offenders were male (96.5 per cent). The average age was 39.6 years at the time of the incident. Just under half of the victims were female (47.3 per cent); just over half (53.4 per cent) involved indecent assault and 40.9 per cent involved sexual assault. Overall, 4.3 per cent of reported sexual assaults and 7.5 per cent of reported indecent assaults involved a person in authority.

Overall, 22 per cent of the incidents involved a person of interest under 18; of these, 43.1 per cent was a known but unrelated person; 13.3 per cent were siblings and a further 21.2 per cent another family member. Where the location of the incident was an educational institution, over half (56.2 per cent in total) involved a child or young person under 18 (mostly male, 96.2 per cent) as the person of interest; 67 per cent of the victims were aged 10–15.

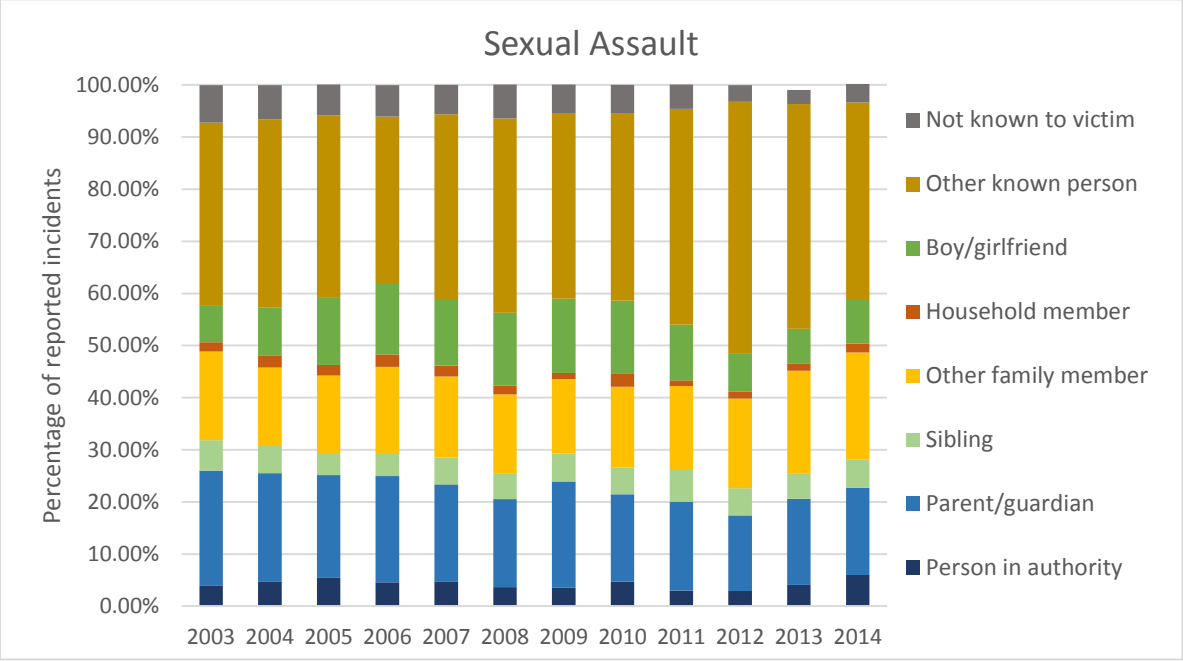
Figure 4a shows the percentage of sexual assault incidents by the relationship between the person of interest and the victim, excluding those in which this information was not recorded.[38] In just under 5 per cent (4.8 per cent) the person of interest was a person in authority. Family members together comprised nearly 40 per cent (39.8 per cent) of the persons of interest in sexual assault incidents over this period, with 18.2 per cent being parents, 5.1 per cent siblings, and 16.5 per cent other family members. In 69.9 per cent of the incidents involving siblings, the person of interest was aged under 16 at the time of the incident; 84.4 per cent were aged under 18. For 38.0 per cent of incidents over this period, the person of interest was a person

[37] This involved some recoding of the 'person of interest–victim relationship' field in the incident database to combine 'persons in authority' with 'carers', as well as cross-checking using the variable 'by whom committed' in the offender database to capture cases in which information in the 'by whom committed' field provided missing information; for example, 'religious representative', 'youth leader' and 'teacher' where the 'POI to victim relationship' was marked as 'not recorded'.

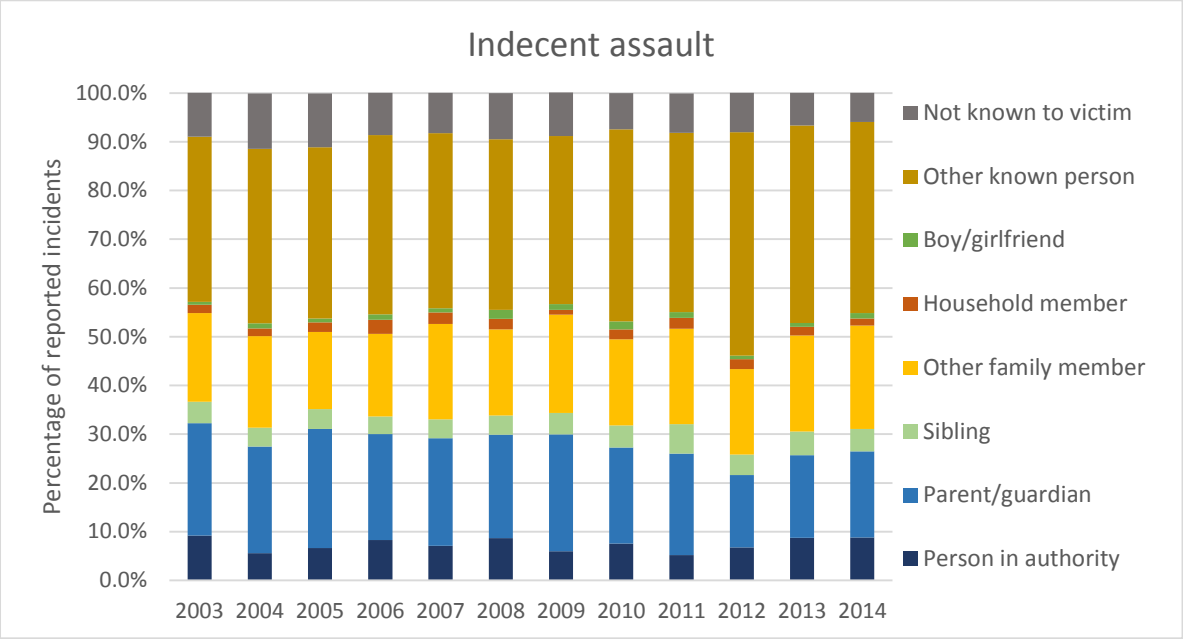
[38] There was an increase in the proportion of incidents for which the relationship of the person of interest to the victim was not recorded from 0.3 per cent in 2007 to 12.4 per cent in 2013.

known to but unrelated to the child (including friends) (32.1–48.2 per cent). Another 1.8 per cent on average were household members, and 10.9 per cent were boyfriends or girlfriends.[39] Therefore, the most common relationship was someone known to but not related to the child. Only 5.2 per cent of persons of interest were not known to the victim.

Figure 4b shows a similar pattern for indecent assault incidents. However, a somewhat greater proportion involved a person in authority, ranging from 5.6 per cent to 9.2 per cent and averaging 7.5 per cent. The proportion of parents and other family members was also slightly higher than for sexual assault (overall average of 43.7 per cent), with parents at 20.6 per cent, siblings 4.4 per cent, and other family members 18.7 per cent. The age distribution for sibling persons of interest at the time of the incident was very similar to that for sexual assault (70.4 per cent were aged under 16, 84.5 per cent were under 18, and 95 per cent were under 24). Only 1.1 per cent were boyfriend/girlfriend and 1.9 per cent were a member of the household. A slightly higher percentage (8.5 per cent) than for sexual assault was unknown to the victim.



[39] The vast majority were male (boyfriends, 96.6 per cent) and were child reports (94.1 per cent) of sexual assault. Of the reports, 28.5 per cent of those involving 'girlfriends' concerned same-sex female victims but only 2.2 per cent involving 'boyfriends' concerned same-sex male victims. Almost 43 per cent (42.5 per cent) of the boyfriends/girlfriends were under 18 at the time of the incident and 38.5 per cent were under 18 at report; the youngest was 11 years old and the oldest for females was 49 years; the oldest for males was 60 years. There was no significant difference in age between male and female persons of interest in this category.



Figures 4a and 4b. Percentage of sexual assault and indecent assault incidents by the person of interest–victim relationship from 2003 to 2014 in New South Wales

3.2 DELAYS IN REPORTING

Delayed reporting is common for child sexual offences; this is a central issue for this research. In most cases, child sexual assault offences are reported while the victim is still a child but in a substantial proportion of cases, the report is not made until adulthood, with delays extending in some cases to well over 20 years.

As Figure 5 shows, the great majority of reports of child sexual offences[40] in New South Wales between 1995 and 2014 were made in childhood. Overall, 80.6 per cent of incidents were reported while the victim was still a child (under 18), and 19.5 per cent were adults reporting their victimisation during childhood.[41]

[40] Pornography is not included in these analyses because it is often not possible to establish the actual date of the offence or indeed the victim.

[41] 'Incidents reported in childhood' means that the victim(s) reported the incident to the police while they were under 18; 18 rather than 16 (the age of consent) was used as the threshold for both the age at offence and age at report. The change in age threshold to 18 'brought in' an additional 400 cases where the incident occurred when the child was aged 16 or 17 and/or where the report was made when the complainant was aged 16 or 17, but this made little difference to the analyses.

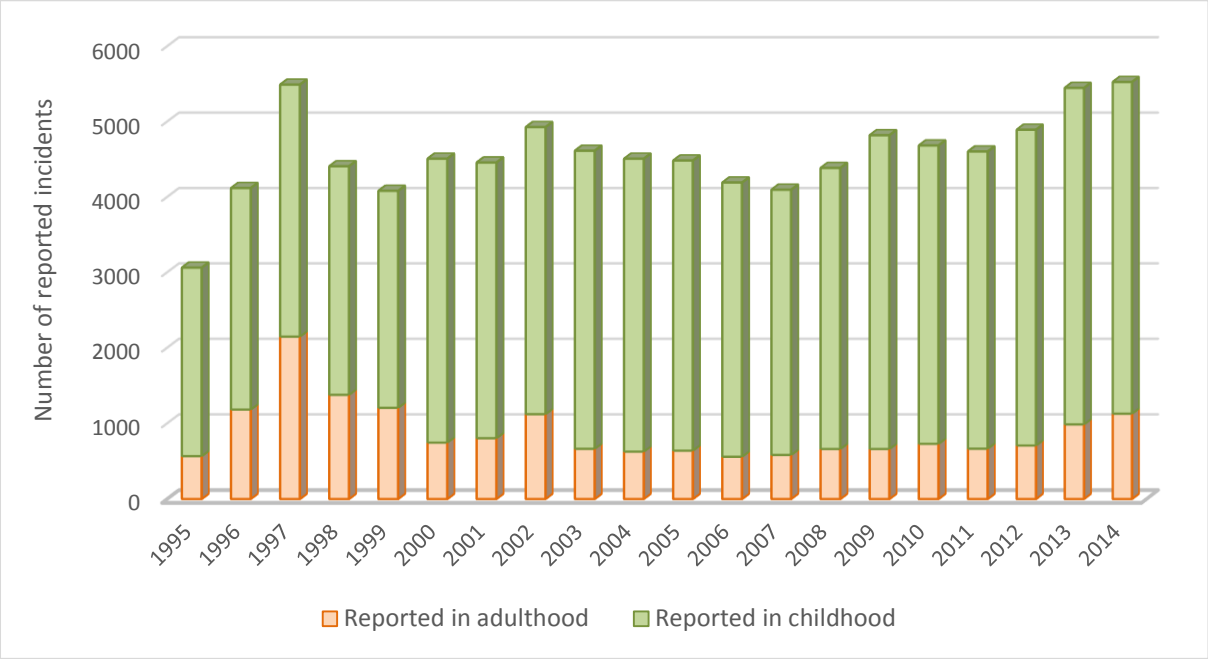
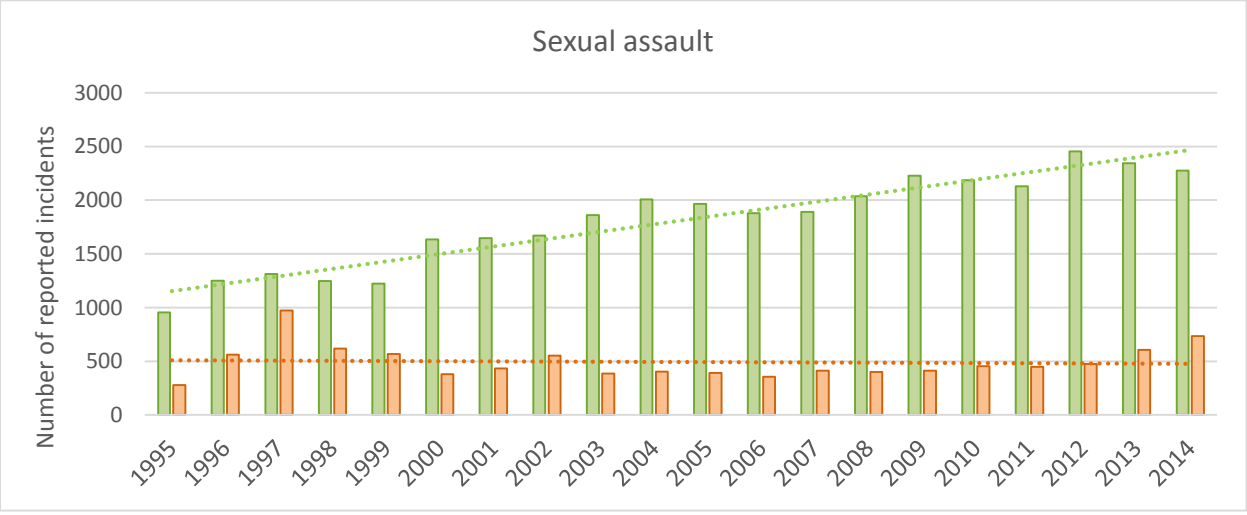
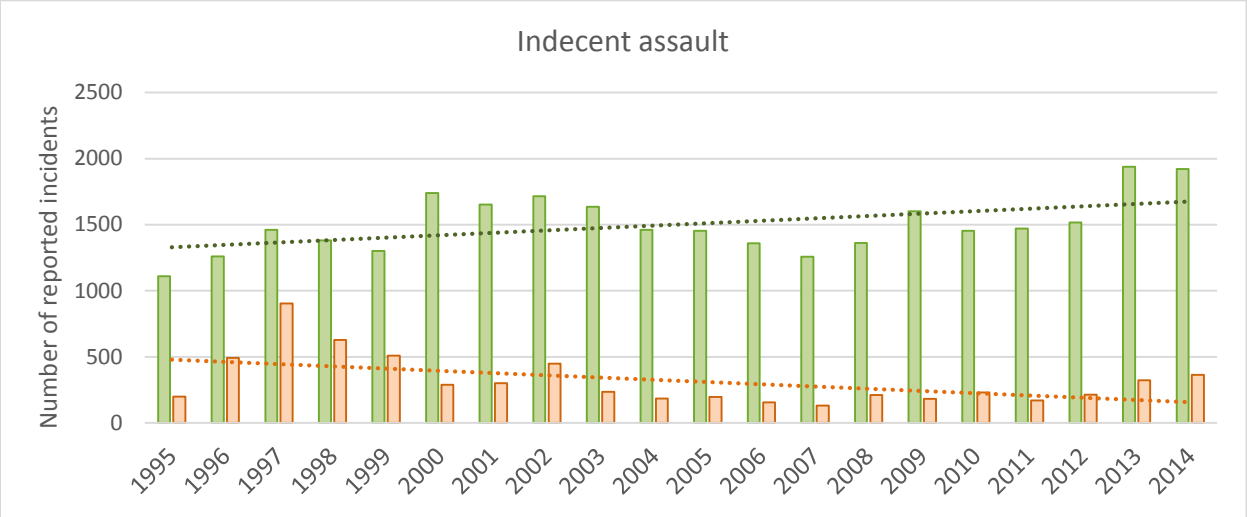
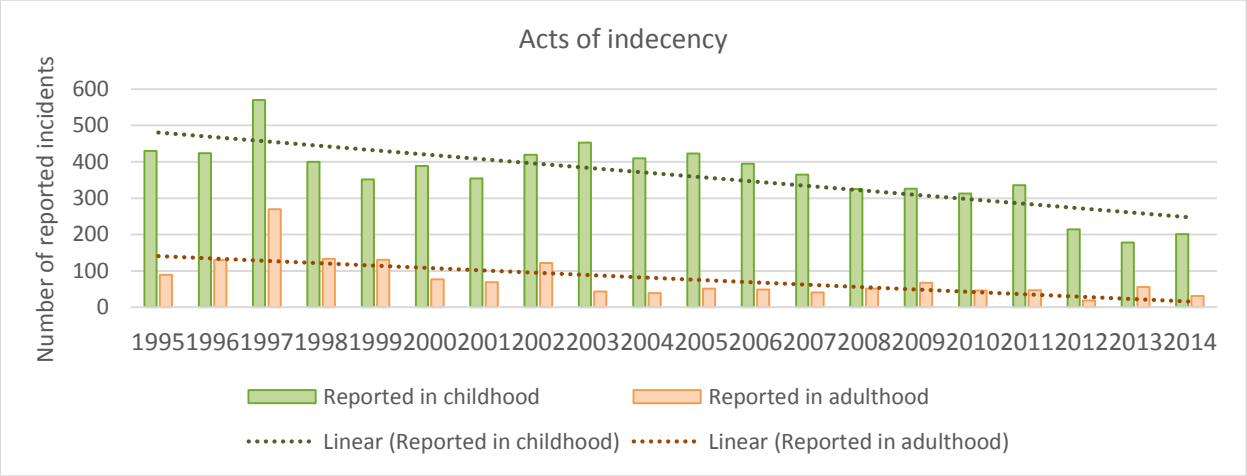


Figure 5. Number of incidents of child sexual offences reported in adulthood and childhood from 1995 to 2014 in New South Wales

There have also been periods when adult reports were considerably higher, particularly in 1997–99 following significant media attention during the Wood Royal Commission. Media focus appears to generate a greater number of complaints from adults (Parkinson et al., 2010). For example, the number of reports in 1997 was double that for 1995, prior to the Wood Royal Commission. In 1995, there were 2,495 child reports (81.5 per cent) and 566 adult reports (18.5 per cent). In 1997, there were 3,343 child reports (60.9 per cent) and 2,146 adult reports (39.1 per cent). As Figures 6(a), (b) and (c) show, the proportion of reports made in adulthood also varies by the type of offence, with sexual assault more likely to be reported during adulthood (21.4 per cent) than indecent assault (17.4 per cent) and acts of indecency (17.3 per cent).







Figures 6a, 6b and 6c. Number of incidents of (a) sexual assault and (b) indecent assault and (c) acts of indecency reported in adulthood and childhood from 1995 to 2014 in New South Wales

Child reports

Figure 7 shows the increase in child reports of sexual offences against them. Even taking into account the modest increase of about 6 per cent in the number of children in the population in New South Wales over that period,[42] this is still substantial. For example, in 1999, there were 2,875 child report incidents. In 2014, the total was 4,397 reports, an increase of nearly 53 per cent. Most of that increase occurred from 2007 onwards, for sexual and indecent assault.

[42] In June 1995, there were an estimated 44,176 10-year-old boys and 42,101 10-year-old girls in NSW, and in June 2015, 47,332 10-year-old boys and 44,585 10-year-old girls, an increase of 7.1 per cent for boys and 5.9 per cent for girls (ABS, Population, 2015).

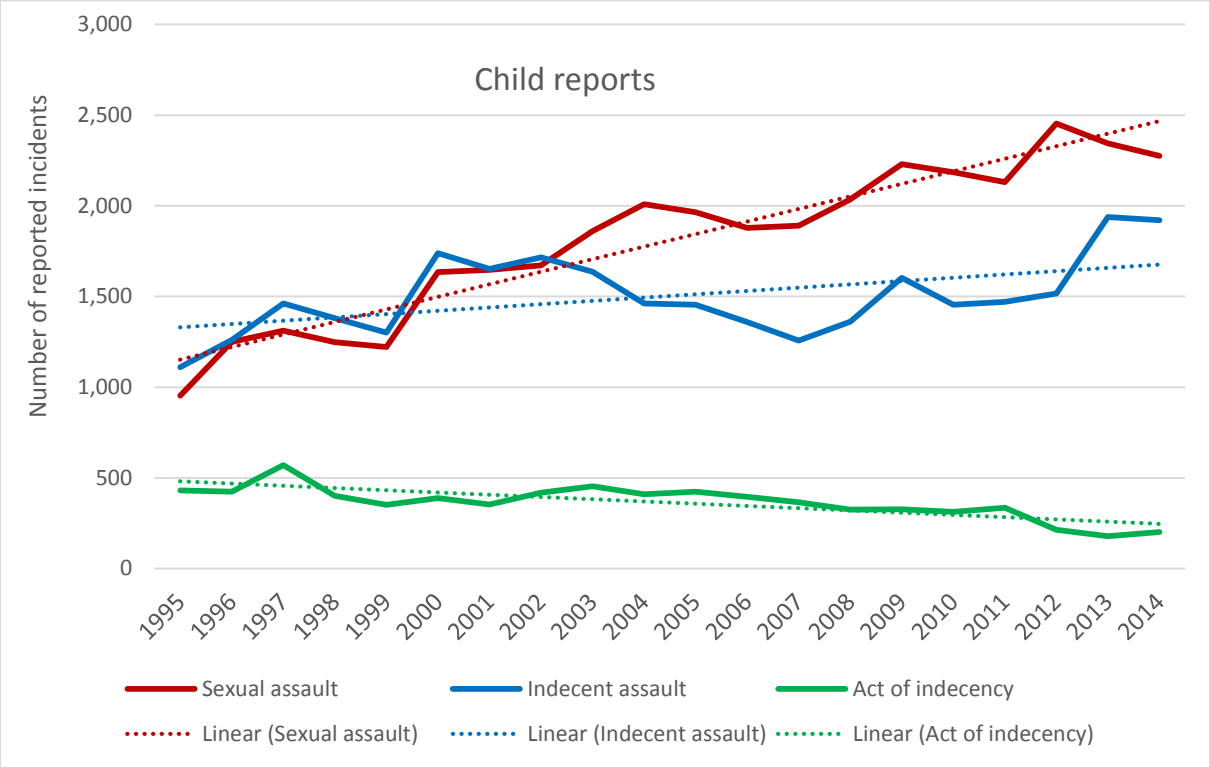


Figure 7. Number of child sexual offence incidents reported in childhood by offence from 1995 to 2014 in New South Wales

Another measure of the level of child sexual abuse is the number of substantiated cases of sexual abuse reported to the child protection statutory authority.[43] Is there a similar trend over time? The Australian Institute of Health and Welfare figures[44] for the number of children involved in substantiated child sexual abuse matters reported to the New South Wales Department of Family and Community Services[45] indicate a similar increase over much of this period, and particularly since 2004–05 (Figure 8).[46] The main changes to recording reports of suspected child abuse and neglect in New South Wales coincided with the introduction of the

[43] 'A substantiation indicates there is sufficient reason (after an investigation) to believe the child has been, is being or is likely to be, abused, neglected or otherwise harmed.' *Child Protection Australia 2014–15* (p 3).

[44] These figures are derived from the appendices of the Australian Institute of Health and Welfare's Child Welfare series of publications on child protection from 1999 to 2015; for example, in the most recent publication, *Child Protection Australia 2014–15,* see 'Table A7 – Children who were the subjects of substantiations of notifications received during 2014–15, by type of abuse or neglect and sex, states and territories' (p 74).

[45] The Department of Family and Community Services, which has undergone a number of name changes, is the statutory authority that receives and assesses reports of suspected child abuse and neglect and harm to children in New South Wales; Departmental staff members have also been involved in Joint Investigation Teams with NSW Police since 1997.

[46] These substantiation figures also indicate an increasing proportion of incidents involving boys – up from 24.8 per cent of children involved in substantiated sexual abuse in 1999–2000 to 30.8 per cent in 2013–14.

Children and Young Persons (Care and Protection) Act 1998 (NSW), which came into force in December 2000. This legislation extended the grounds for reporting 'current concerns for the safety, welfare or well-being' of a child (s 23) and expanded the mandatory reporting requirements to all those who manage or deliver services to children (s 27).[47]

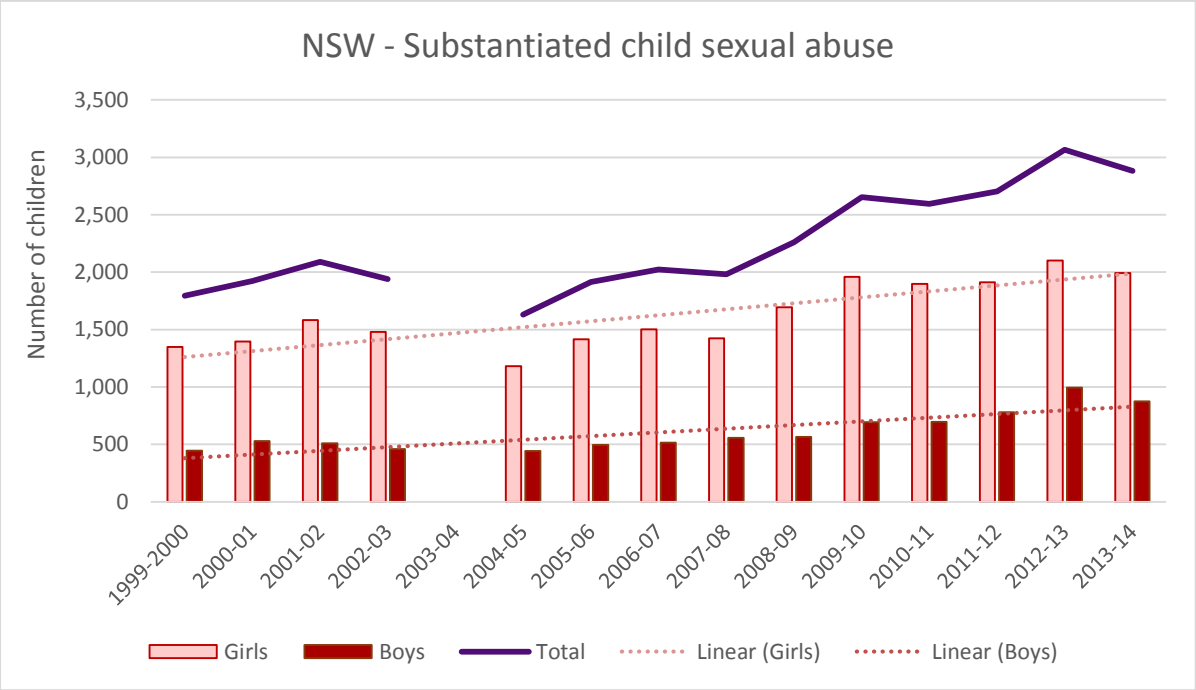


Figure 8. Number of children by gender in substantiated child sexual abuse reports to the New South Wales statutory authority

Note: There were no figures for New South Wales for the year 2003–04.

Adult reports

The trend for adult reports (Figure 9) is somewhat different, with the overall number of child sexual offences peaking in 1997 at the time of the Wood Royal Commission – this increased pattern of reporting lasted until 1999. The level of reporting of child sexual assault in adulthood remained relatively constant from 2000 to 2012 but increased from 2012 to 2014 (474 to 733). This coincides with when the Royal Commission was announced and commenced its work. The number of reports of indecent assault declined from 2002 to 2007, but has almost tripled from 2007 to 2014 (130 to 363).

[47] Mandatory reporting requirements had been in place since 1977 in New South Wales for certain professions (teachers and medical professionals) to report physical and sexual abuse.

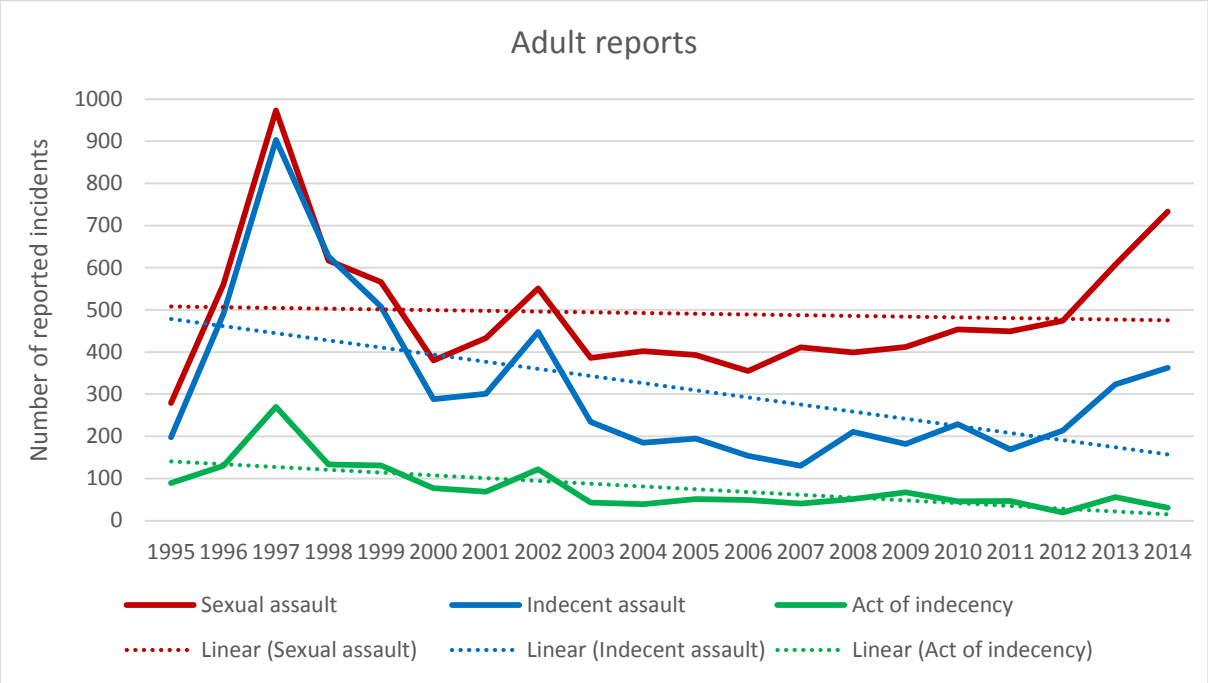
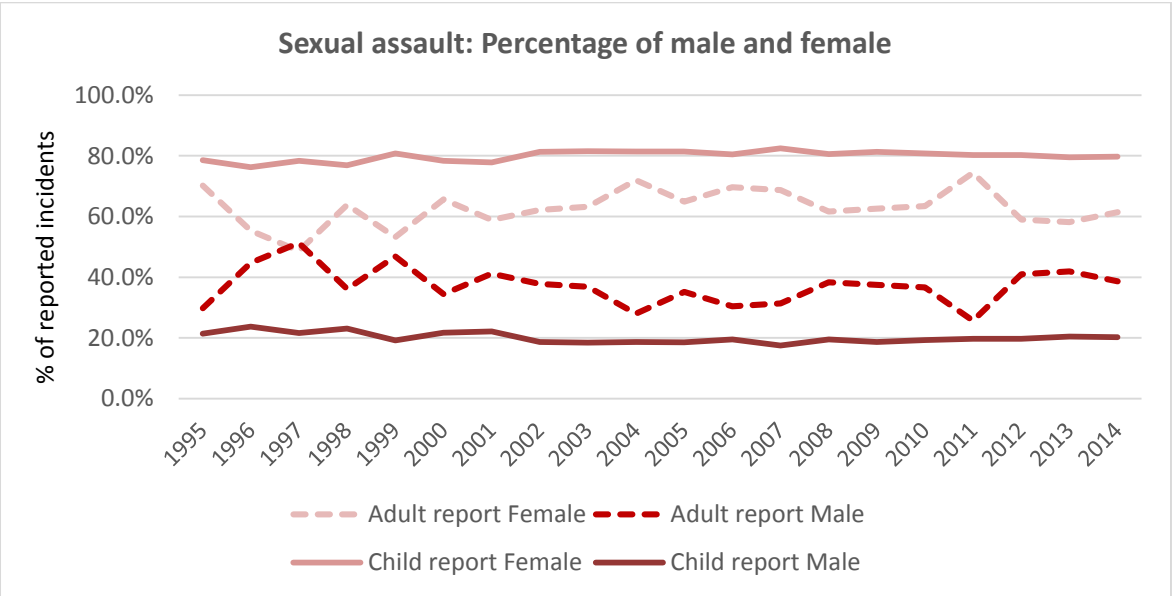
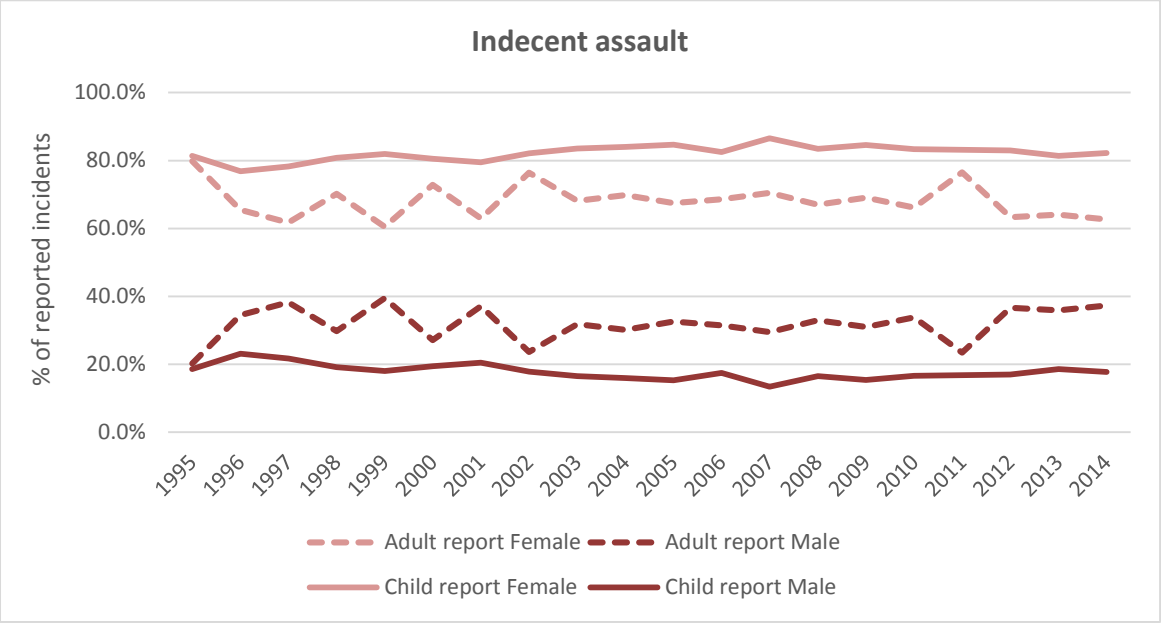


Figure 9. Number of child sexual offence incidents reported in adulthood from 1995 to 2014 in New South Wales

Figures 10a and 10b show little variation over time in the proportion of male and female victims of sexual and indecent assault reported in childhood (solid lines), but substantial variation for the same offences reported in adulthood (dashed lines). Generally, more females than males reported child sexual assault in adulthood. However, in 1997 at the time of the Wood Royal Commission, 50 per cent of reports of historical sexual assault involved male victims (1,182). Overall, the proportion of male victims was higher for adult reports than for reports made in childhood for both sexual assault (37.2 per cent of adult reports compared with 20.1 per cent of child reports) and indecent assault (31.9 per cent and 17.8 per cent, respectively).





Figures 10a and 10b. Percentage of male and female victims making child and adult reports of (a) sexual assault and (b) indecent assault from 1995 to 2014 in New South Wales

Overall, levels of adult reporting of child sexual abuse offences have remained fairly consistent since 2003, while child reports have increased fairly consistently during the same period. Of course, we do not know from these statistics whether this represents a real increase in prevalence as opposed to an increase in reporting. It is possible that the prevalence of child sexual abuse in the community has not changed, but that the level of reporting, or of recording reports, has increased. What is clear, however, is that it is quite common for some delay in the reporting of sexual offences against children, in some cases into adulthood and for long periods.

The following figures and tables take a more detailed look at the actual delay in terms of days, months and years.

The extent of delay

Sexual offences against children were more likely to be reported within the first three months of the incident, but nearly one in four (24.2 per cent) were not reported until five or more years later. Both Figure 11 and Table 3 show the delay between the offence and the date of reporting for the three main offence types, as the number of reported incidents (Figure 11) and percentage of reported incidents (Table 3) for each type of offence. It is important to note that an incident is defined by the New South Wales BOCSAR 'as an activity detected by or reported to police which: involved the same offender(s), and the same victim(s), which occurred at the one location, during one uninterrupted period of time, and falls into one offence category and one incident type'.

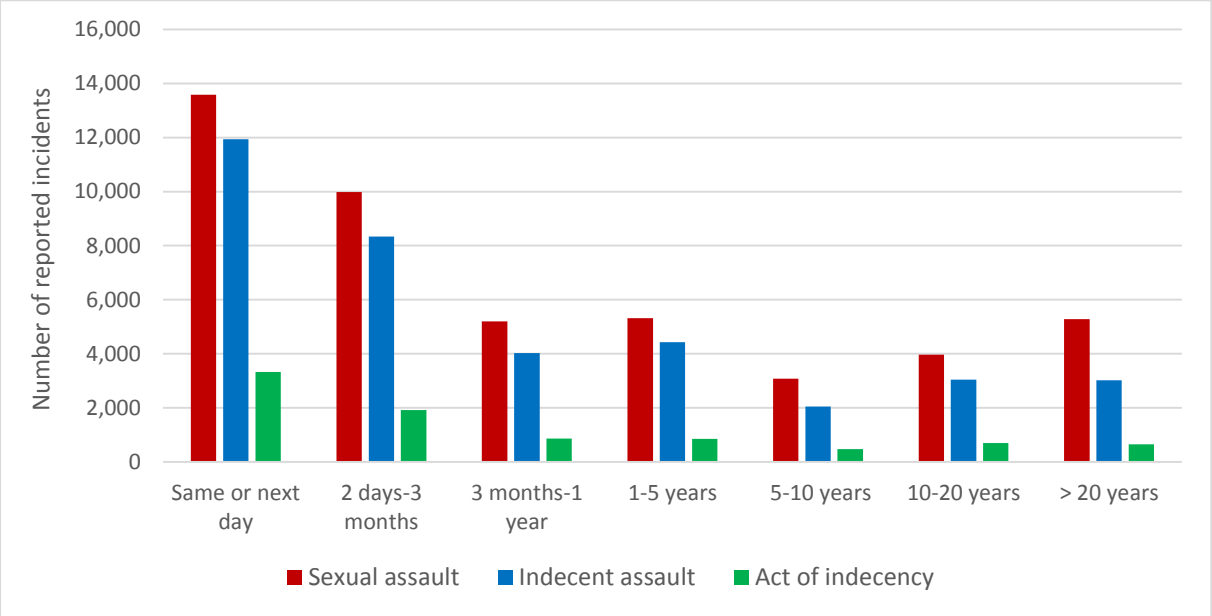


Figure 11. Number of incidents by delay between offence and report to NSW Police by offence from 1995 to 2014 in New South Wales

As Table 3 shows, just over half of the reported incidents for all three offences were reported within three months of the offence: sexual assault, 55 per cent; indecent assault, 55.0 per cent; and acts of indecency, 59.7 per cent. Nearly two-thirds were reported within a year of the offence. However, one in five (19.9 per cent) sexual assault incidents, and about 16 per cent of indecent assaults and acts of indecency took at least 10 years to be reported, and one in 10 sexual assault incidents (11.4 per cent) were reported after 20 years.

Table 3. Percentage of incidents reported to NSW Police with varying periods of delay

Time between offence and report	Sexual assault		Indecent assault		Act of indecency	
	n	%	*n*	%	*n*	%
Same or next day	13,586	29.3	11,934	32.4	3,330	38.0
2 days to 3 months	9,983	21.5	8,333	22.6	1,913	21.8
3 months to 1 year	5,192	11.2	4,029	10.9	856	9.8
1–5 years	5,319	11.5	4,427	12.0	845	9.6
5–10 years	3,080	6.6	2,045	5.6	475	5.4
10–20 years	3,964	8.5	3,035	8.2	699	8.0
>20 years	5,277	11.4	3,013	8.2	652	7.4
Total	**46,401**	100.0	**36,816**	100.0	**8,770**	100.0

As Table 4 shows, males were more likely than females to delay reporting for more than 10 years across all three offence types. Male complainants reported about double the proportion of all three types of sexual offence 10 years or more after the offence compared with female complainants. Figure 12 shows the number of sexual assault incidents by gender.

Table 4. Percentage of incidents reported to NSW Police with varying periods of delay by victim gender and offence*

Time between offence and report	Sexual assault		Indecent assault		Act of indecency	
	Female %	Male %	Female %	Male %	Female %	Male %
Same or next day	30.4	24.5	33.6	28.4	41.2	27.9
2 days to 3 months	22.6	17.3	23.8	19.2	22.1	20.6
3 months to 1 year	11.6	9.4	11.6	9.1	9.7	9.6
1 to 5 years	11.6	11.0	12.7	10.3	9.1	11.4
5 to 10 years	6.5	7.4	5.9	4.9	5.1	6.7
10 to 20 years	7.6	12.3	6.3	13.9	6.4	12.8
>20 years	9.7	18.1	6.2	14.1	6.4	11.0

*Note: Incidents involving both male and female complainants in the same incident were excluded (*n* = 1,287) from this table.

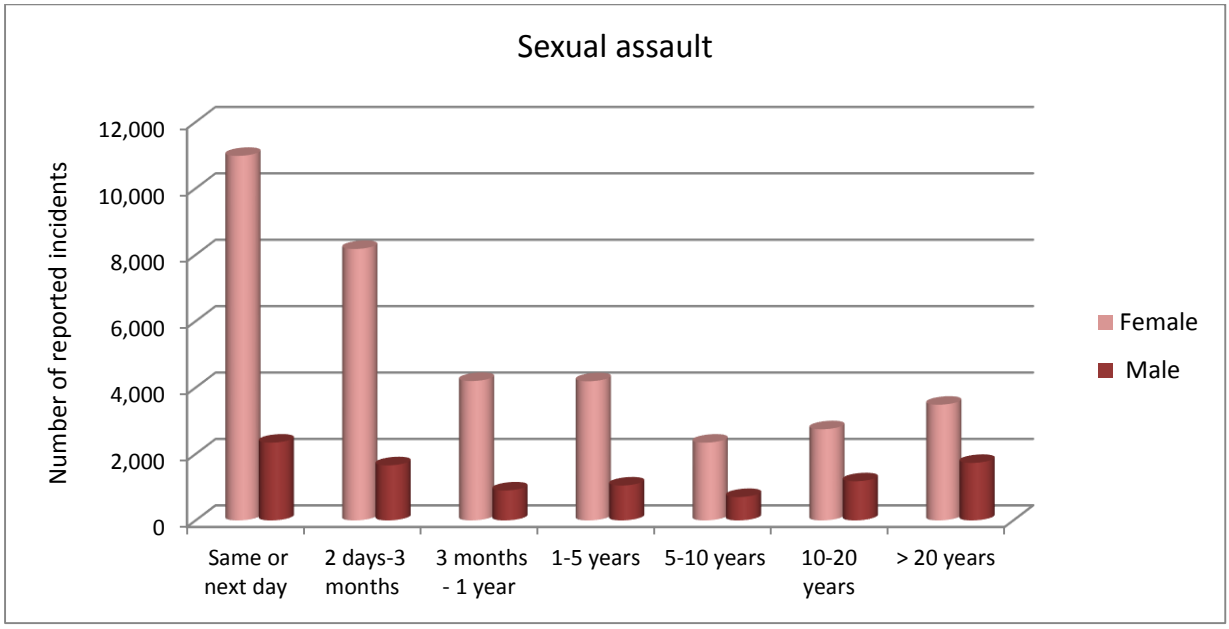
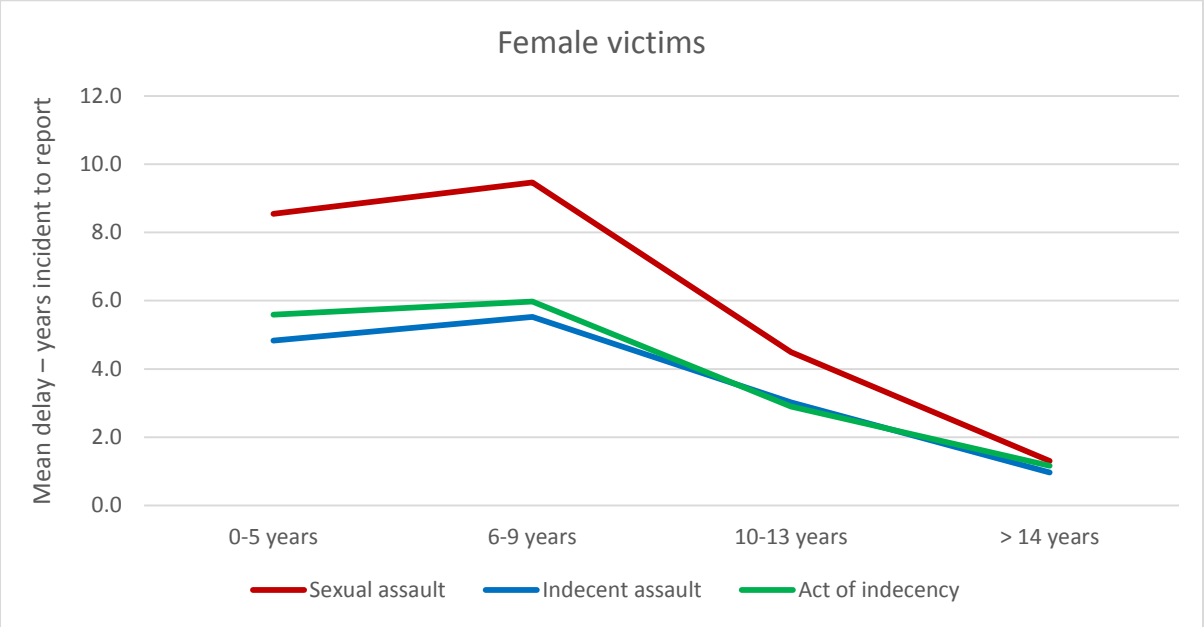
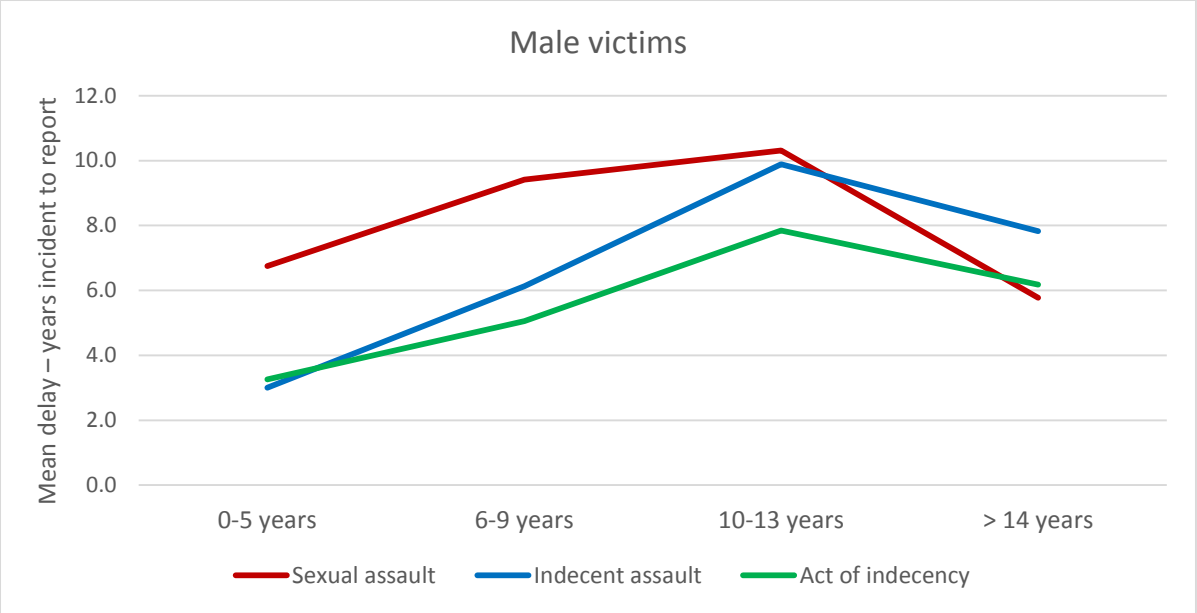


Figure 12. Number of sexual assault incidents by delay between offence and report and by victim gender

Figures 13a and 13b show another measure of delay in reporting that takes into account the age of the child at offence and at report – the mean difference between the age at offence and at report. The biggest difference was for girls aged 6–9, and for boys 10–13 at the time of the incident. For girls who were 14–17 at the time of the incident, on average there was approximately a year between the incident and the report to police (1.2 years for sexual assault, 0.97 years for indecent assault and 1.2 years for act of indecency); it was substantially longer for boys – 5.8 years for sexual assault, 7.8 years for indecent assault, and 6.2 years for acts of indecency. Figures 13a and 13b also show that the mean delay in reporting was generally greater for sexual assault offences than for indecent assault and for acts of indecency – except for boys who were 10 or older at the time of the incident.





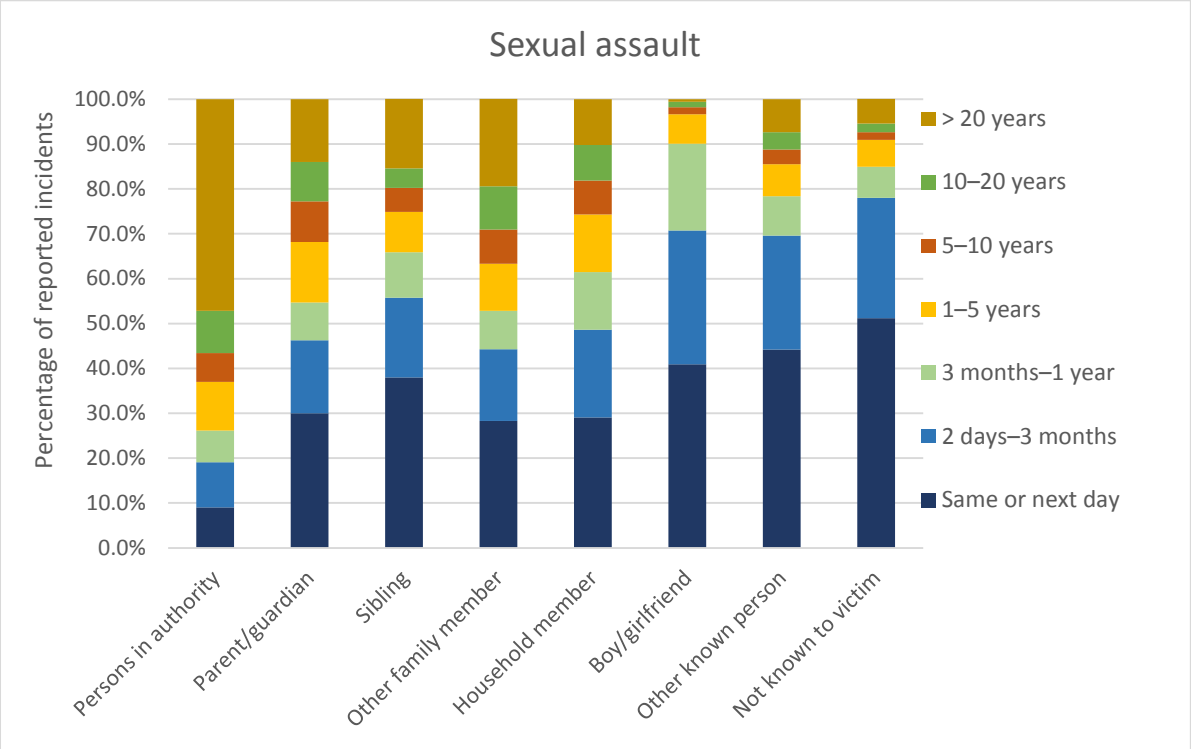
Figures 13a and 13b. Mean delay between age at incident and age at report for (a) female and (b) male victims

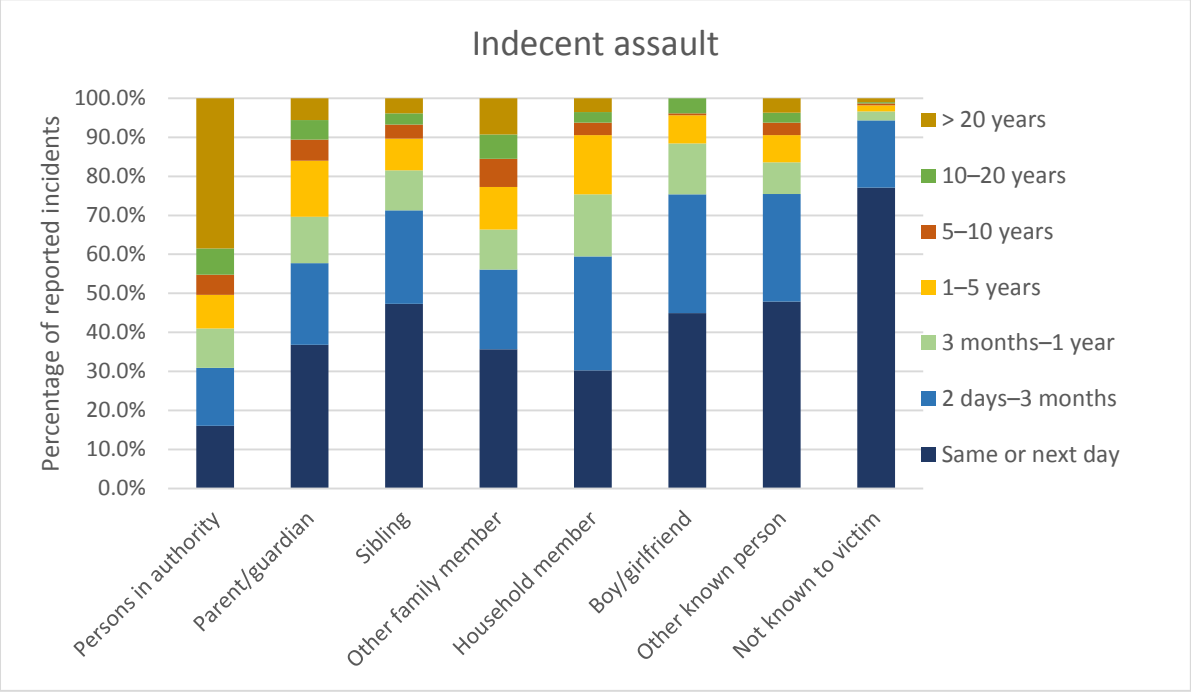
Figures 14a and 14b show the delay in reporting for different types of relationship between the person of interest and the victim. The longest delays were for cases involving persons in positions of authority, with more than half of these sexual assault incidents (56.5 per cent) reported more than 10 years later; almost half (47.1 per cent) reported more than 20 years later; and only one in five (19.1 per cent) reported within three months. The figures for indecent assault were similar but not quite as marked: 45.3 per cent were reported more than 10 years later; 38.5 per cent were reported more than 20 years later; and nearly one in three (30.9 per cent) were reported within three months. Most of these were adult reports, with only 6.3 per cent of sexual assault and 6.9 per cent of indecent assault incidents reported within 10 years. Again, male victims were more likely to wait longer to report persons in positions of

authority: 65 per cent of such incidents involving males were reported more than 20 years later compared with 27.8 per cent for female victims.

Where the person of interest was not known to the victim, the delay in reporting was likely to be shorter than for any other type of relationship: 78 per cent of sexual assault incidents and 94.3 per cent of indecent assault incidents were reported within three months; and 77.1 per cent of indecent assault incidents with a person of interest not known to the child were reported on the same or next day.

The delay in reporting sexual assault involving a family member (parent, guardian, sibling or other family member) was longer than for incidents involving a household member, boyfriend/girlfriend or other known person, including friend. Incidents involving a boyfriend or girlfriend were very likely to be reported within three months (70.7 per cent of sexual assault incidents and 75.3 per cent of indecent assault incidents). Indecent assault incidents involving siblings were also likely to be reported within three months (71.2 per cent compared with 55.8 per cent for sexual assault).





Figures 14a and 14b. Percentage of reported incidents by delay for each person of interest-victim relationship: (a) sexual assault and (b) indecent assault in New South Wales

In summary, the delay in reporting was longer for boys than for girls, across all offence types, and greater for sexual assault than for other offence types. It was also more common for the delays to be extensive (10 years or more) when the incident involved a person in a position of authority than when the person of interest was a relative or someone known to the child.

3.3 CASES PROCEEDING TO PROSECUTION

Criminal proceedings are commenced when police issue a court attendance notice or summons (Fitzgerald, 2006) to a person of interest.[48] This, of course, requires that a suspect can be identified, that an investigation can produce evidence to support the charges (in particular available witnesses), and that the police consider the evidence to be strong enough to proceed. At any stage of this process, a case can drop out of the system – if a person of interest cannot be identified; if the child or the family is unwilling to proceed; or if police have doubts about the evidence; for example, where the child is deemed too young to give reliable evidence.

One of the main research questions compares child sexual offences reported in childhood with those reported in adulthood, and the likelihood that each will proceed to prosecution. A number of factors may affect the likelihood of the matter proceeding, including:

- the characteristics of the complainant
- the type of offence
- the relationship between the victim and the alleged offender
- the extent of the delay in reporting to police, since a long delay may affect the availability and reliability of the evidence.

Sexual offences reported during childhood

Figure 7 showed differences between the three main types of sexual offences against children reported in childhood, and that acts of indecency were relatively uncommon. Therefore, the following analyses focuses on sexual assault and indecent assault.[49]

Figure 15 shows the number of incidents of sexual assault reported during childhood, together with the number of such incidents in which the police identified a person of interest, and also the number in which legal proceedings were commenced against the person of interest.

[48] Referral to court is usually by a Court Attendance Notice (CAN) (bail or no bail CAN). 'Person of interest proceeded to court' does not necessarily mean that court action followed. Please see www.bocsar.nsw.gov.au/Pages/bocsar_crime_stats/bocsar_glossary.aspx#P

[49] A person of interest could be included under different offence categories if charged with more than one type of offence. Also see Appendix 2 (NSW) for an explanation of the analysis using 'events' rather than 'incidents'.

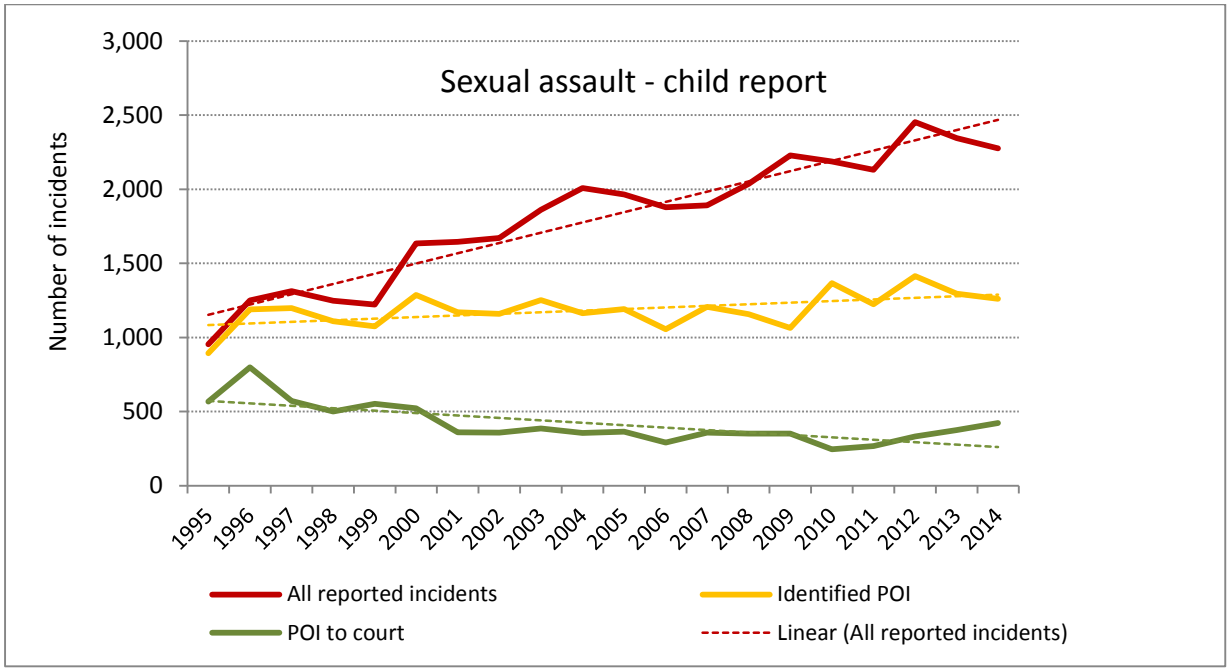


Figure 15. Number of sexual assault incidents reported as a child, number with an identified person of interest, and with person of interest proceeding to court in New South Wales

Figure 15 indicates:

- a marked increase in the number of incidents of sexual assault reported as a child, more than doubling from 954 in 1995 to a peak in 2012 of 2,453 (157 per cent increase) [50]
- some fluctuation in the number of such incidents with an identified person of interest, but with a slow increase overall (rising from 894 in 1995 to a high of 1,414 in 2012, a 58 per cent increase);
- a substantial decrease in the number of incidents in which legal proceedings commenced, from 567 in 1995 to 245 in 2010 (44 per cent decrease). However, this has increased significantly since 2010 from a low of 245 to 423 in 2014.

This means that in 1995 a person of interest was identified in 94 per cent of all child reports of sexual assault, and was 'proceeded against'[51], in 63 per cent of these incidents. In 2014, a person of interest was identified in only 55.4 per cent of reported incidents, and proceeded against in only 33.5 per cent of these incidents. Overall, legal proceedings were commenced in only 18.6 per cent of the 2,285 sexual assault incidents reported to police in 2014 compared with 59 per cent in 1995.[52]

[50] This was not a function of any systematic change in the number of offenders per incident.

[51] 'Proceeded against' is shorthand for 'legal proceedings being commenced' or legal action taken against the person of interest. O'Brien et al. (2008) defined 'legal proceedings being commenced' in terms of the person of interest 'being charged or given a Court Attendance Notice/summons' (p 10).

[52] These figures are in line with the 15 per cent of sexual offences against children reported by Fitzgerald (2006).

Therefore Figure 15 shows two effects: an increasing divergence between the number of reported incidents and the number in which a person of interest is identified, and a divergence between the number of incidents in which the person of interest is identified/recorded and the number in which criminal proceedings were initiated. Both effects are consistent with O'Brien et al.'s (2008) findings of a marked decrease in police clear-up rates in sexual assault incidents between 1995 and 2006, as well as a drop in the number and percentage of cases where police laid charges against an offender; however, that study did not separate out offences against children and adults.

The trend is similar but less marked for indecent assault (see Figure 16). For example, legal proceedings commenced in 51.1 per cent of the 1,370 indecent assault incidents in 1997 compared with 32 per cent of the 1,144 incidents in which a person of interest was identified in 2014; the 2014 figure of 32 per cent is, however, somewhat higher than the 24.4 per cent in 2012.

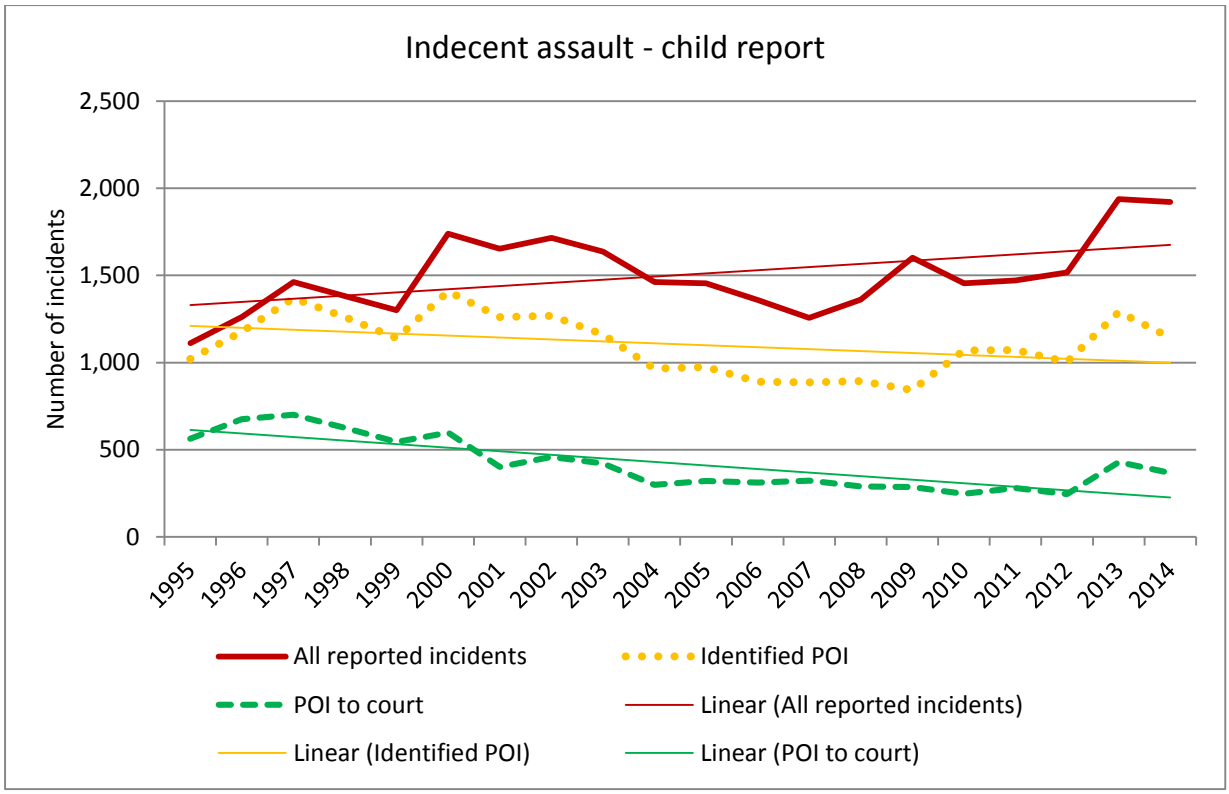


Figure 16. Number of indecent assault incidents reported as a child, number with an identified person of interest, and number where the person of interest proceeded to court in New South Wales

There may be several reasons for the downward trend in the number of child sexual assault and indecent assault matters proceeded against, relating to the work involved in investigating and identifying the person of interest, and then having that case proceed to court.

The increasing gap in New South Wales between the number of reported incidents and the number of cases proceeding to prosecution is mostly a result of a decrease in the proportion of cases in which a person of interest is identified. While the number of reports has increased,

the number of persons of interest identified has not. In 2014, a person of interest was identified in only 57 per cent of reported incidents compared with 94 per cent in 1995. This is consistent with O'Brien et al.'s (2008) analysis of the decline in clear-up rates of sexual offences (from 1995 to 2006 for both adult and child victims) that indicated an increase from 10 per cent to nearly 40 per cent in the proportion of sexual assault incidents reported to police where no suspected offender was identified or recorded on COPS (p 6).

There are several possible explanations for the decreasing likelihood of a person of interest being identified: strangers were involved more often; children or their families were less willing or able to identify the offender; or there has been an increase in the number of peer-to-peer incidents. There is no evidence of more strangers being involved. In only a minority of cases throughout was the person of interest a stranger, making identification more difficult – the number and proportion of persons of interest not known to the child decreased between 2003 and 2014 (from 155, 7.6 per cent, to 132, 4.1 per cent). There is also no indication of a marked increase in the number of younger children who might be less able to identify the person of interest.

There is, however, an increase in the number of incidents in which the person of interest is under 18 and the age difference between the victim and the person of interest is less than two years, in peer-to-peer incidents: from 2.2 per cent in 1997 to a peak of 9 per cent in 2011. In cases with an age difference of up to five years, there has been a four-fold increase from 4 per cent in 1997 to 17.3 per cent in 2011. There has even been a seven-fold increase from a very small base in the proportion of incidents in which the person of interest was younger than the victim: from 0.5 per cent in 1997 to 3.6 per cent in 2013. The police and child protection response to a child or young person of interest (and the likelihood of a case proceeding to court) is likely to be quite different, and quite appropriately so depending on the facts, when it involves a peer-to-peer incident with a small age difference than an adult person of interest. Further, no police action is possible when the person of interest is a child under 10, the age of criminal responsibility.

Another possibility is that the increasing number of (recorded) reports reflects both mandatory reporting and a change in recording practices, particularly with the advent and expansion of the JIRTs from the late 1990s.[53] NSW Police are cautious about the reliability of figures prior to 2003, and suggest that the increase in child reports of sexual offences against children may reflect greater attention to recording reports. O'Brien et al. also noted a marked reduction in the number of cases where no information was recorded to indicate whether criminal proceedings were initiated. It is possible that the police were likely to record child sexual offences in the early years only when a person of interest was identified, but tightened policy and practices have left the police with little or no discretion over recording such offences,

[53] Joint Investigation Response Teams were established in 1997 following earlier pilot trials in 1994 and attention from the Wood Royal Commission (*Summary Report: Evaluation of the Joint Investigation Team (JIT)/ Joint Investigation Response (JIR) Strategy*, June 2002).

whether or not charges are likely. The discretion may lie in identifying and recording the person of interest where there is deemed to be little substance in the report or when the person of interest is a child.

Another aspect of Figure 15 is the gap between the number of persons of interest who are identified and proceeded against. In relation to the likelihood of police charging suspects and cases proceeding to court, O'Brien et al. (2006) also reported a substantial drop from 1997 (during the Wood Royal Commission) to 2006 in the numbers of persons of interest proceeded against and 'a corresponding increase in the number of persons of interest who were not proceeded against' (p 4).[54] While their analysis included sexual offences against both children and adults, they found no association between the proportion of incidents involving victims aged 10 or younger (approximately 25 per cent per year) and the likelihood of police charging suspected offenders.

O'Brien et al. also suggested that the profile of such cases coming to police attention may have 'shifted in ways that make victims less likely to give evidence against suspected offenders and police less likely to have the evidence required to mount an effective prosecution' (p 8). Although they caution that 'it is impossible to give a definitive explanation for this conclusion', they cited the possible decrease in victim willingness to give evidence against the offender and the wish of families to shield children from the court process. Discussions with ODPP solicitors and Crown prosecutors in our study support the suggestion that victim unwillingness to proceed or family members' understandable desire to shield children from the process were major factors in cases being dropped, though they do not generally see cases, except for advising, until after charges are laid.

Another possible explanation is resource constraints and perhaps an increase in the time required to investigate and prepare matters to proceed to court. To understand more about the reasons for the divergence between the number of cases reported where a person of interest is identified, charges are laid and legal proceedings commenced, requires more information than is available for analysis from the COPS database, and more inquiry into police and prosecutorial discretionary decision-making, and consultation with families and victims.

Child sexual offences reported in adulthood

Comparing adult and child reports of sexual and indecent assault against children is important because it may throw light on the possible factors associated with the number of cases in which there was an identified person of interest, and the police proceeded.

Figures 17 and 18 show the corresponding patterns for both sexual assault and indecent assault. In contrast to these same offences reported as children, the number of incidents of

[54] O'Brien et al. (2008) suggested that the 'decline in clear-up rates' was 'driven by a decrease in the rate at which alleged offenders have been charged in relation to sexual assault matters' (p 4).

both sexual and indecent assault reported by adults follows closely the number of incidents in which a person of interest was identified, though the gap has increased in more recent years. The close mapping is not surprising since it is likely that someone reporting child sexual offences as an adult knows the perpetrator. Until the early 2000s, there were only a small number of incidents each year in which the person of interest was not identified, and according to ODPP solicitors and the police this was sometimes because the victim could report the position or relationship that person held but not necessarily their exact identity; for example, a family friend or a teacher at school. In some cases, the alleged perpetrator had died. It is also possible that reports were reliably recorded only when a person of interest could be or was identified.

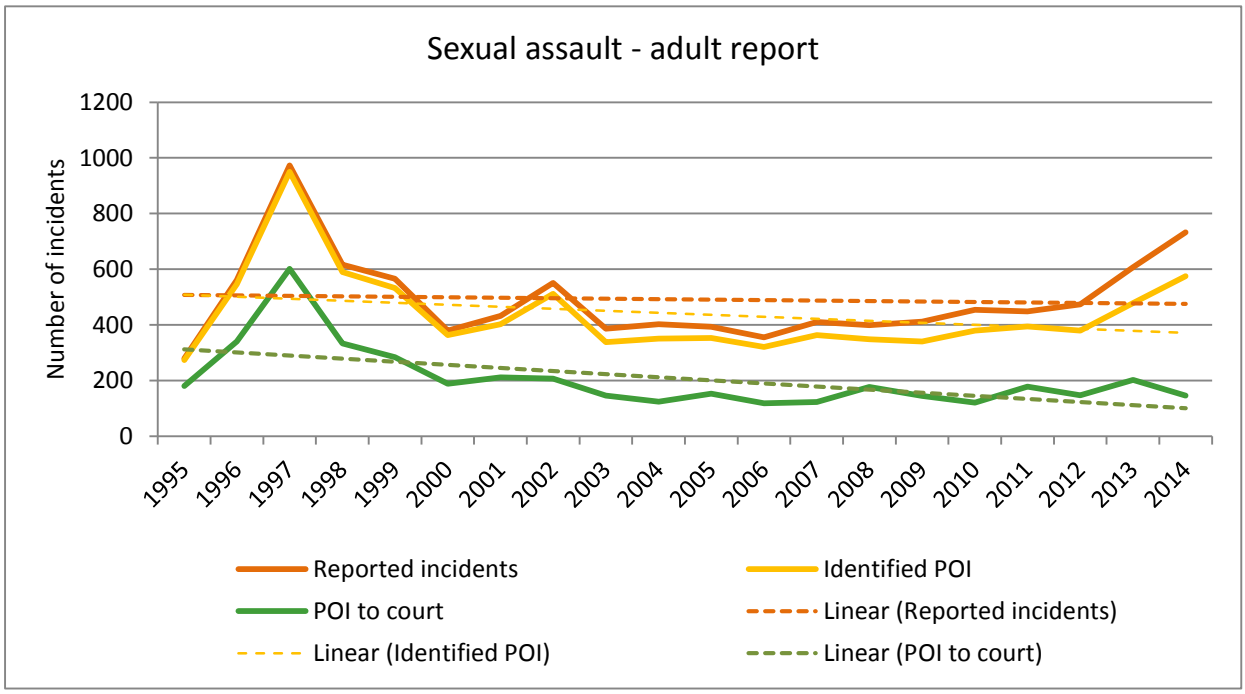


Figure 17. Number of sexual assault incidents reported as an adult, number with an identified person of interest, and number where the case proceeded to court in New South Wales

However, like the incidents reported during childhood, there is a downward trend in the number of incidents for both offences in which legal proceedings commenced. For example, for sexual assault:

- in 1995, prior to the Wood Royal Commission, there were 279 adult reports of child sexual assault, with a person of interest identified in all but five cases, and 181 were proceeded against – representing 64.9 per cent of all adult reports of child sexual assault in that year, and 66 per cent where a person of interest was identified
- in 2014, there were 733 adult reports of child sexual assault, with a person of interest identified in 575 cases, but only 146 were proceeded against – representing only 19.9 per cent of all such matters reported in that year, and 25.4 per cent where a person of interest was identified.

Therefore, there was a substantial drop in the proportion of child sexual assault incidents reported in adulthood with an identified person of interest where legal action proceeded – from 66 per cent to 25.4 per cent, similar to the drop for child reports from 63 per cent to 33.5 per cent. The drop for adult reports of indecent assault was less marked but still substantial – from 72.5 per cent in 1997 to 44.3 per cent in 2014 – and was less than for child reports of indecent assault – 51.1 per cent in 1997 to 32 per cent in 2014.

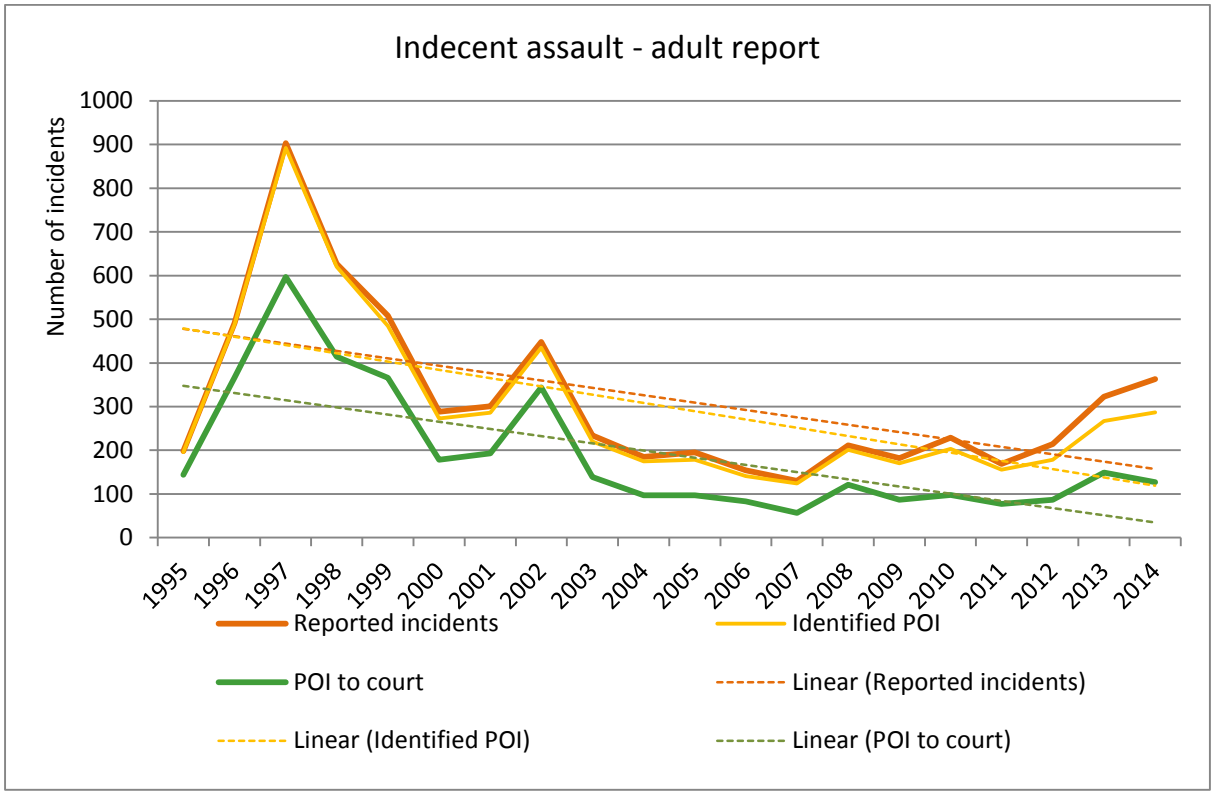


Figure 18. Number of indecent assault incidents reported as an adult, number with an identified person of interest, and number where the case proceeded to court in New South Wales

Figure 19 pulls these figures together and shows the proportion of incidents of sexual and indecent assault reported as a child or as an adult, with an identified person of interest, in which legal action was initiated.

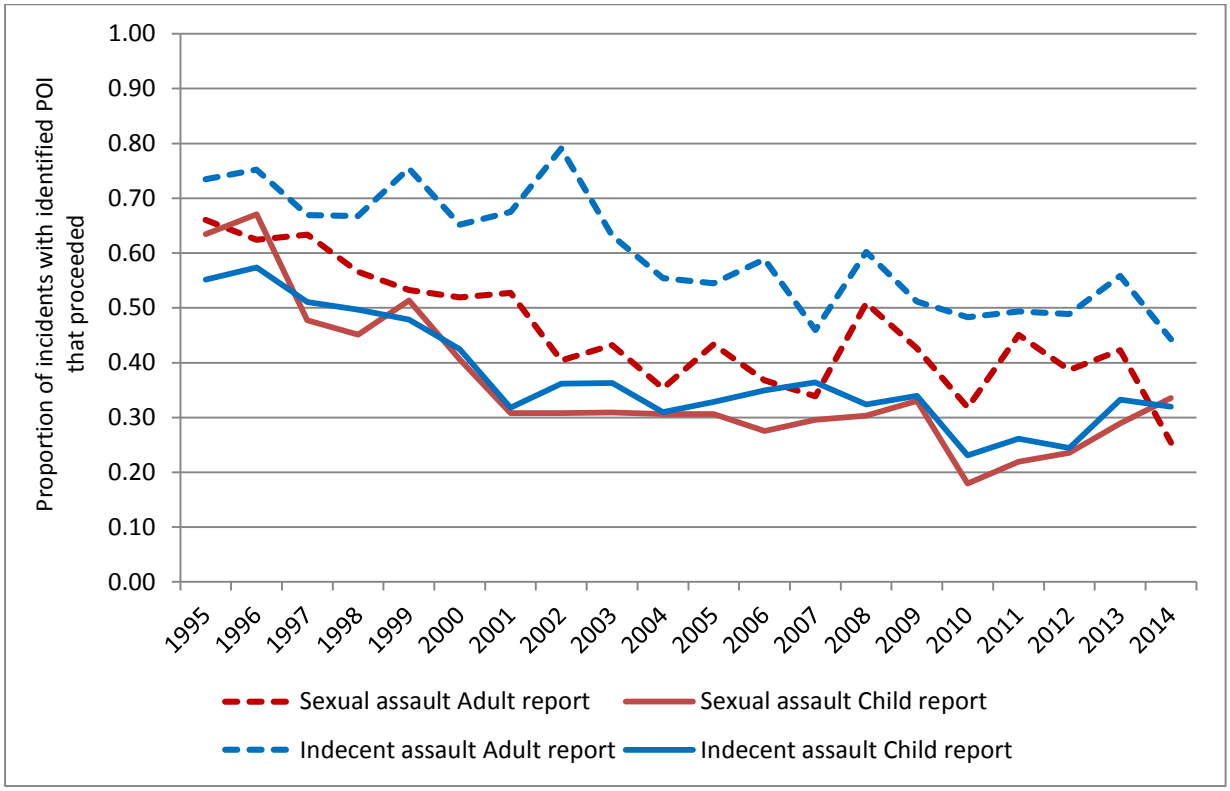


Figure 19. Proportion of sexual assault and indecent assault incidents with an identified person of interest reported before or after age 18 in which legal action was initiated in New South Wales

Figure 19 shows that the proportion of incidents in which an identified person of interest was proceeded against has been consistently higher for indecent assault offences reported in adulthood, followed by adult reports of child sexual assault. Incidents of sexual and indecent assault reported during childhood, although more numerous, were less likely to proceed than those reported during adulthood, although the trend has reversed since 2010; the yearly pattern is very similar for these two offences reported in childhood. This is contrary to the expectation that delayed reporting into adulthood is necessarily associated with degraded evidence or unavailable witnesses and a reduced likelihood of proceeding to prosecution. It may mean that where adults do report, they are committed witnesses and keen for the case to proceed. These cases then constitute a selected group of cases of child sexual offences where the victim complainant elects to report as an adult.

Probability of legal proceedings commencing

Logistic regression[55] was used to model the association between the probability of legal action being initiated and factors including:

[55] Logistic regression allowed the simultaneous testing of the various factors included in the model (for example, year of report and offence category) and assessed their effects while holding other factors constant. The

- the type of offence – sexual assault or indecent assault
- the age of the child at the time of the offence[56]
- the gender of the child[57]
- the interval between the offence and reporting to police (delay in reporting)[58]
- the year the report was made (1995–2014).

As well as testing the individual effects of these variables, the analyses also tested interactions between the variables. For example, the interaction between offence category and year of report was assessed to see whether there were any differences between offence categories in terms of the likelihood of a person of interest being proceeded against over different reporting years.[59]

When considering these results, it should be borne in mind that the effects discussed are those obtained when all other variables and interactions in the model are held constant. Therefore, the patterns of results may be different from the patterns observed when no adjustment is made for other variables.

The four significant interactions were:

- a three-way interaction – involving type of offence, extent of delay and year that the incident was reported
- three two-way interactions – involving age of victim by extent of delay; age of victim by type of offence; and age by gender of victim.

All of the tested variables were involved in at least one interaction; their effects are considered in the context of these interactions (explained below), starting with the three-way interaction, shown in Figures 20a and 20b. Each bar in Figures 20a and 20b shows the adjusted or

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correlations between the results for related incidents were taken into account by using the COPS variable event number as a clustering variable according to the methodology described by Williams (2000) and implemented in Stata 13 (Statacorp, 2013). Only incidents involving sexual assault and indecent assault were included in the analyses because of the smaller number of incidents involving pornography and procurement and the different characteristics of these incidents.

[56] Age of the child was categorised as: 5 years and younger, 6–9 years, 10–13 years, 14–17 years (the relatively small numbers of incidents involving children of different ages were excluded).

[57] The small number of incidents involving a combination of male and female children were excluded.

[58] The delay in reporting was categorised as: same day, next day, two days to three months, three months to one year, 1–5 years, 5–10 years, 10–20 years, more than 20 years.

[59] In the analysis, a reduction process was used to eliminate non-significant interactions starting with a series of models containing all two- and each three-way interaction, in order to arrive at a model that contained all the individual variables plus any interactions that were significant (at the nominated alpha level of .001) plus two-way interactions that were contained in the retained three-way interaction.

conditional probability of a case (reported incident) proceeding to court for that type of offence (sexual assault or indecent assault) for each delay category and for the year in which it was reported.[60] The higher the bar, the higher the probability that a case would proceed. The different colours of the bars represent the increasing delays between the incident and reporting to the police. These effects were adjusted for the age of the child and other interactions. The statistical detail including the odds ratios are included in Appendix 3 (New South Wales).

The predicted probability of legal action being initiated for a reported incident of both types of offence – sexual assault and indecent assault – differed according to the year in which the report was made and the extent of delay in reporting. The overall pattern is that a reported incident of child sexual assault was significantly more likely to proceed in the mid-1990s than more recently, consistent with the pattern in Figure 19.[61] The likelihood of a case proceeding also tended to increase with longer delays[62], although this dropped off for the longest delay, of greater than 20 years.[63] For example, the probability of sexual assault incidents reported on the same day or the next day proceeding to court decreased markedly from the early 1990s to 2000, and throughout the 2000s to 2014, and to a much greater extent than in matters in which the delay ranged between one year and 10 years.

[60] The three-way interaction was highly significant: χ^2 = 200.4, 133 *df*, *n* = 78, 843, *p* <.0001.

[61] Odds ratios (ORs) based on effect coding, which ranged from 3.04 for 1996 to .67 for 2014, showed a reduction (with some variation) in the likelihood of a case proceeding over the years covered by the study (χ^2 = 1012.3, 19 *df*, *n* = 78, 843, *p* <.0001.)

[62] ORs ranged from .53 to 2.14: χ^2 = 1095.9, 7 *df*, *n* = 78, 843, *p* <.0001.

[63] OR = 1.49.

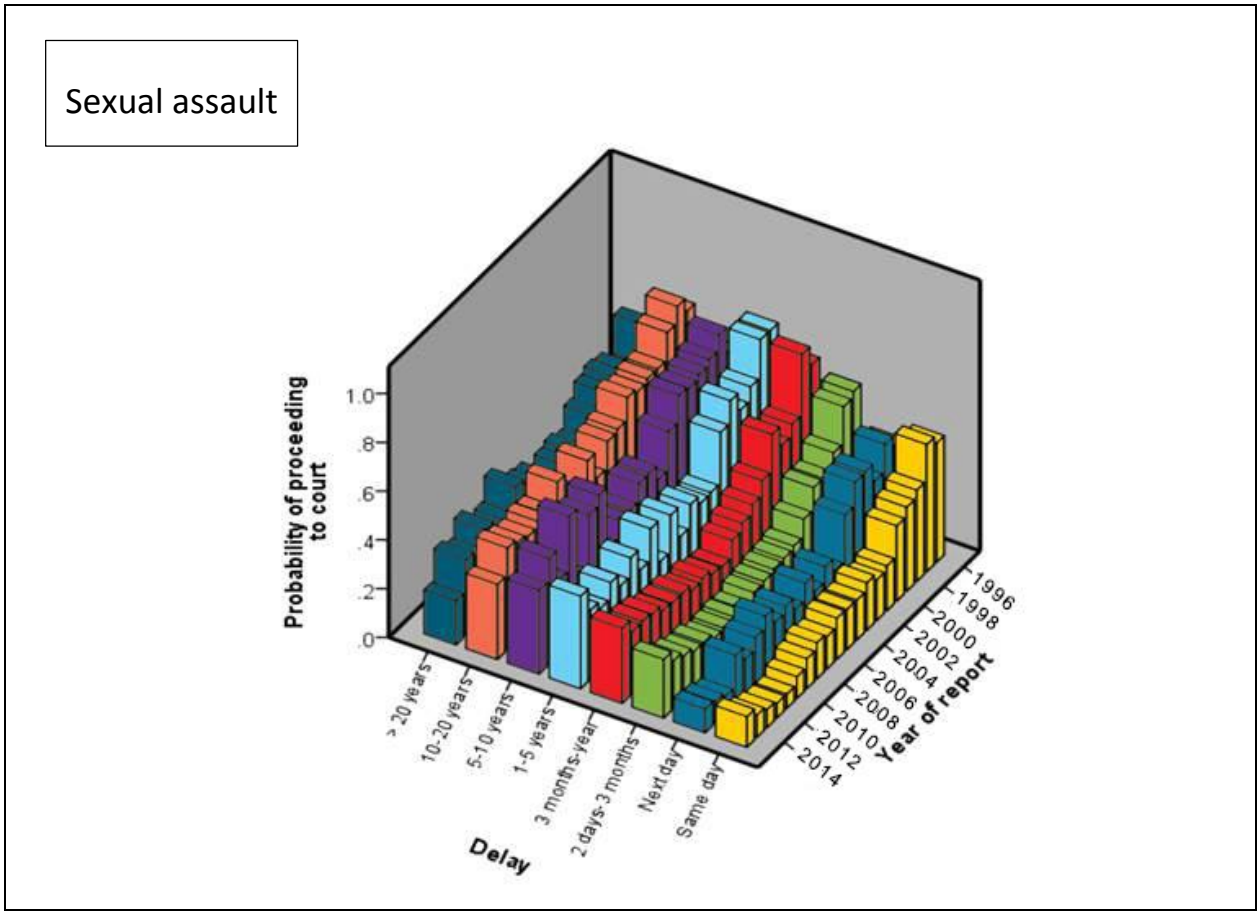


Figure 20a. Predicted probability of the person of interest in reported incidents of sexual assault proceeding to court by delay between offence and report and by year of report from 1995 to 2014 in New South Wales

Note: The figure shows 1995 to 2014 but the odd years are not marked on the z axis.

The *highest* probability of proceeding was in the mid-1990s: 0.71 or 71 per cent with delays of three months to five years, and 0.72 or 72 per cent for delays between 10 and 20 years. In stark contrast, the probability of a sexual assault incident proceeding if reported on the same or the next day was only 0.13 (13 per cent) and 0.10 (10 per cent) in 2014, and even lower in the four years before 2014. In 2014, the highest probability of proceeding for a sexual assault offence was 0.38, with a delay of between one and five years. While these figures reflect the characteristics of the cases included in these years and with this delay, these analyses also held constant the age of the child at offence. That is, the age of the child is not a factor that explains the declining likelihood of prosecution over time. In addition, the number of cases contributing to each of the bars in Figure 20a is significant so small numbers cannot explain the pattern.

For indecent assault, the patterns were very similar, as Figure 20b shows, but the extent of the differences was greater, and the odds of a case proceeding were 1.17 greater for indecent

assault than for sexual assault.[64] The significant two-way interaction between offence type and delay[65] indicates that the increase in the likelihood of a case proceeding with longer delays tended to be greater for indecent assault than for sexual assault.[66] For example, indecent assault (reported to police after longer delays) had the highest probability of proceeding in the mid-1990s (0.81 or 81 per cent with a delay of between 10 and 20 years), and this was higher than for sexual assault. The lowest probability for indecent assault was 0.12 for an incident reported the same or the next day in 2010.

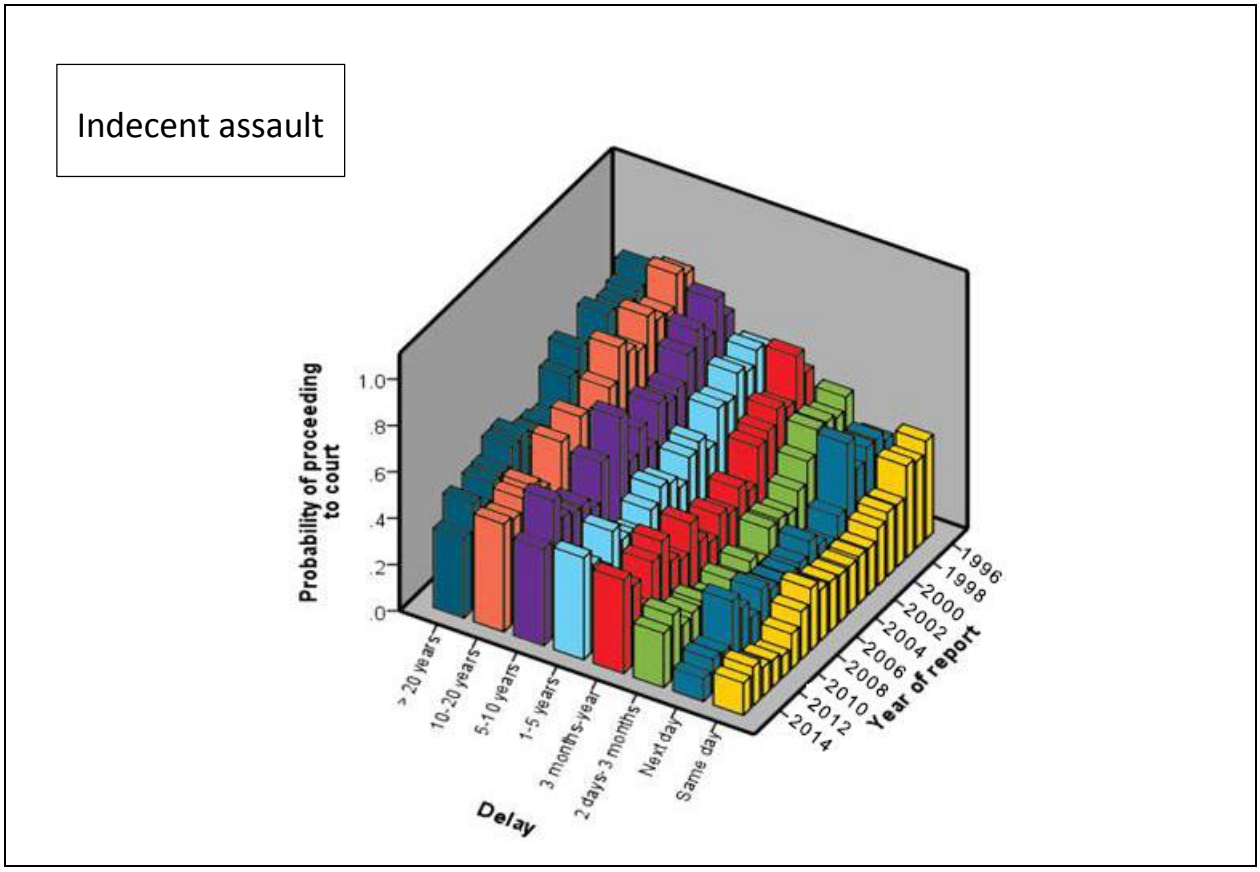


Figure 20b. Predicted probability of the person of interest in reported indecent assault incidents proceeding to court by delay between offence and report and by year of report from 1995 to 2014 in New South Wales

All three two-way interactions involve the age of the victim: with delay, offence type and gender. The interaction between delay and the age of the victim is shown in Figure 21.[67] Not surprisingly given the likely evidentiary issues for young children, the *lowest* probability of a

[64] χ^2 = 135.1, 1 *df*, *n* =78, 843, *p* < .0001.

[65] χ^2 = 73.7, 7 *df*, *n* =78, 843, *p* < .0001.

[66] ORs for the effect-coded interaction contrasts increased from 0.89 to 1.29.

[67] χ^2 = 100.0, 21 *df*, *n* = 78, 843, *p* < .0001. The year of reporting and the type of offence were taken into account/held constant in this interaction.

reported incident of sexual assault or indecent assault resulting in legal proceedings was in cases where the child was aged five or younger (consistent with Bunting, 2014). When an incident involving a child of this age was reported almost immediately (same or next day report), the probability of it proceeding was only 0.10 but this tripled when reporting was delayed for 10 years or more (0.32 for a delay of 10 to 20 years, and 0.29 for more than 20 years).[68]

Perhaps counterintuitively, increasing delay was associated with a fairly steady increase in the likelihood of the matter proceeding for the three older age groups.[69] This was so, at least till the five-year to 10-year mark for adolescents aged 14–17 years, and the 10-year to 20-year mark for those aged 6–13 at the time of incident, after which the likelihood dropped away to around 0.42 or 42 per cent. There was also little difference between these three older age groups except when the delay was between five and 10 years. The peak probability of proceeding to court (0.62 or 62 per cent) was for older adolescents (aged 14–17 at the time of the incident, and 19–29 at the time it was reported). This compares with 0.37 for children aged 6–9 at the time of the offence (aged 11–16 at report) and 0.52 for those aged 10–13 (aged 15–23 at report).

[68] The ORs for the comparisons between the youngest and other age groups ranged from almost 2 to just over 6, all statistically significant. For comparisons among the three older age groups, they were generally close to 1 for delays of up to three months to a year, but reflected significant differences for longer delays in which cases tended to be more likely to proceed for older age groups. For example, the OR for the comparison of the 14–17 and 6–9 age groups in which the reporting was delayed for 5-10 years was close to 3.

[69] Odds ratios comparing the likelihood of a case proceeding if it was reported on the day that it occurred and at later times were generally significantly greater than 1, varying between 1.1 and 5.5, and generally increased with longer delays (except for the longest delay of greater than 20 years) reflecting the general increase in probability, and the variations, evident in Figures 20 and 21.

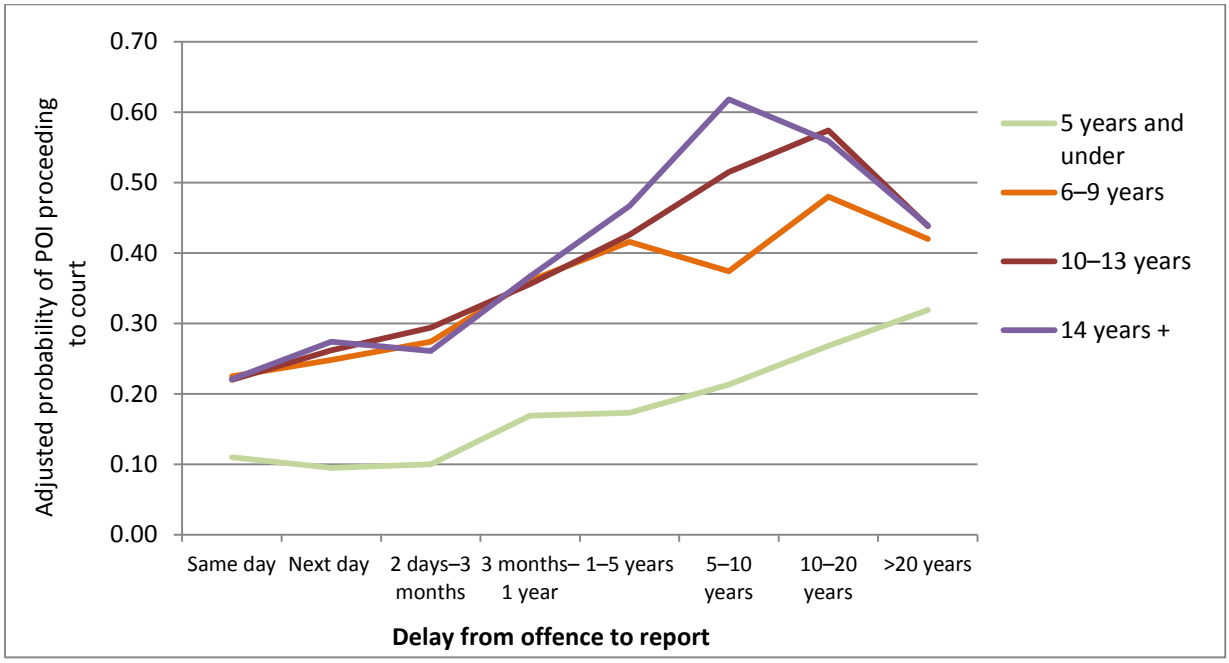
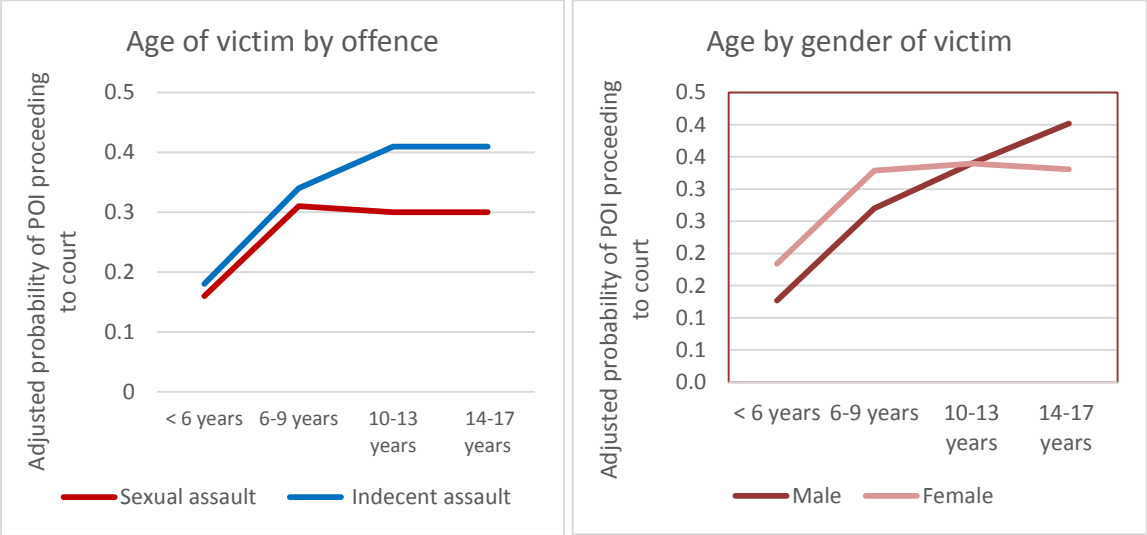


Figure 21. Adjusted probability of the person of interest proceeding to court for reported incidents of sexual assault or indecent assault by age of victim at time of offence and delay between incident and report in New South Wales

The second and third significant two-way interactions, shown in Figure 22, also involve the age of the victim. The interaction between the age of the victim and the type of offence[70] (Figure 22a) indicates that there is little difference in the probability of indecent assault and sexual assault cases proceeding to court for young children, but for older children indecent assaults are more likely to proceed to court than sexual assault cases. Cases involving young children aged under six were just as unlikely to proceed when the charge was indecent assault as sexual assault (0.18 or 18 per cent) but for older adolescents (14–17), there was a 40 per cent probability that an indecent assault matter would proceed compared with 30 per cent probability for a sexual assault.[71]

[70] $\chi^2 = 50.03$, $df = 3$, $p < .0001$.

[71] The odds ratio comparing the increase in probability from the under 6 age group to the 6-9 years age group for the two offence types was not significantly different from 1, while those for a similar comparison between the two oldest groups and the under 6 age group were 1.21 and 1.58, respectively, and were both significantly different from 1.



Figures 22a and 22b. Adjusted probability of the person of interest proceeding to court for (a) reported incidents of sexual assault or indecent assault by age of victim, and (b) age and gender of victims in New South Wales

The interaction between the age and gender of the victim[72] (Figure 22b) is the result of an increasing probability of legal action commencing for sexual offence incidents involving boys aged 6–9 (.27) to the oldest group (aged 14–17) (.40) relative to a flatter probability for girls from that age (.33 at 6–9 years, .34 at 10–13 years, and .33 for females aged 14–17). Bunting (2014), however, noted that cases reported in adulthood involving female pre-adolescent victims were more likely to proceed than those involving males.

Several other factors of interest were not included in the logistic regression because of the amount of missing information on these variables and the small proportion of incidents involved. These were the relationship between the suspect/person of interest and the victim, the location of the incident, and the Indigenous status of the victim and offender. Additional analysis also focused on the age difference between the victim and the person of interest.[73]

[72] The two-way interaction (age of victim by gender) was highly significant: $\chi^2 = 79.60$, 3 *df*, *n* = 78, 843, *p*< .0001.

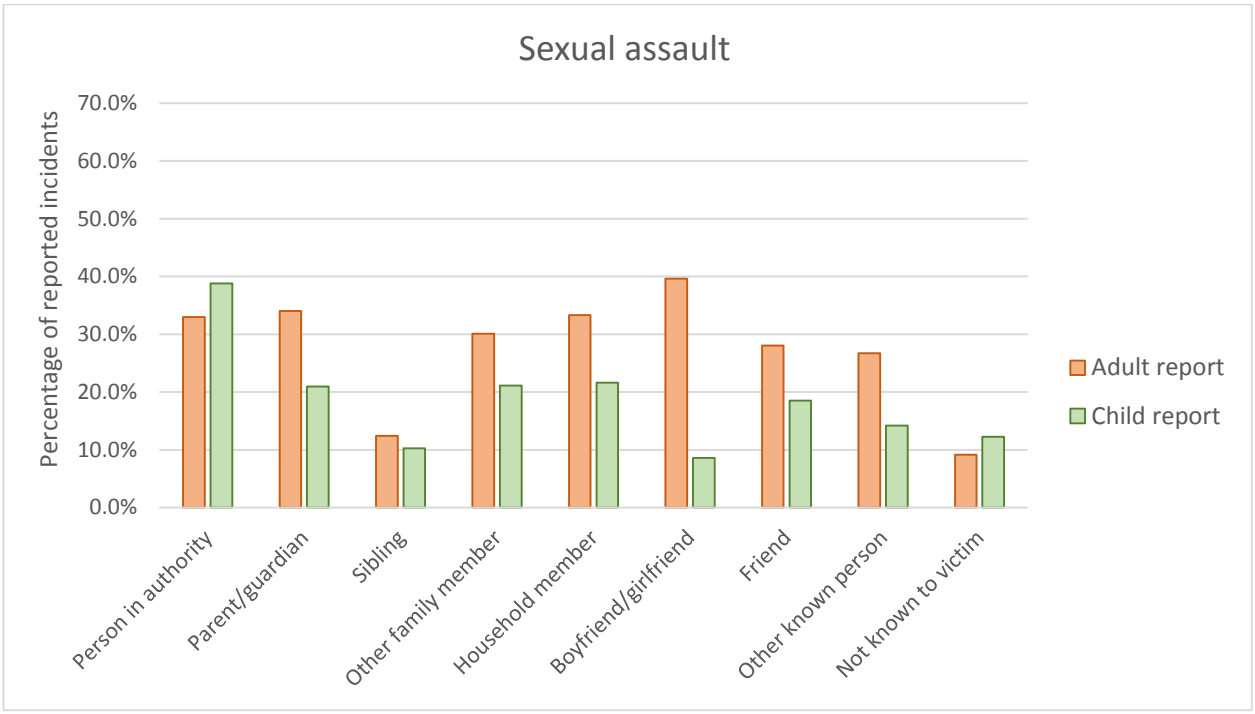
[73] Similar analyses are not presented for South Australia because 78 per cent of records had missing data on Indigenous status and the age difference was inaccurate because of the de-identification process in which birth dates were removed.

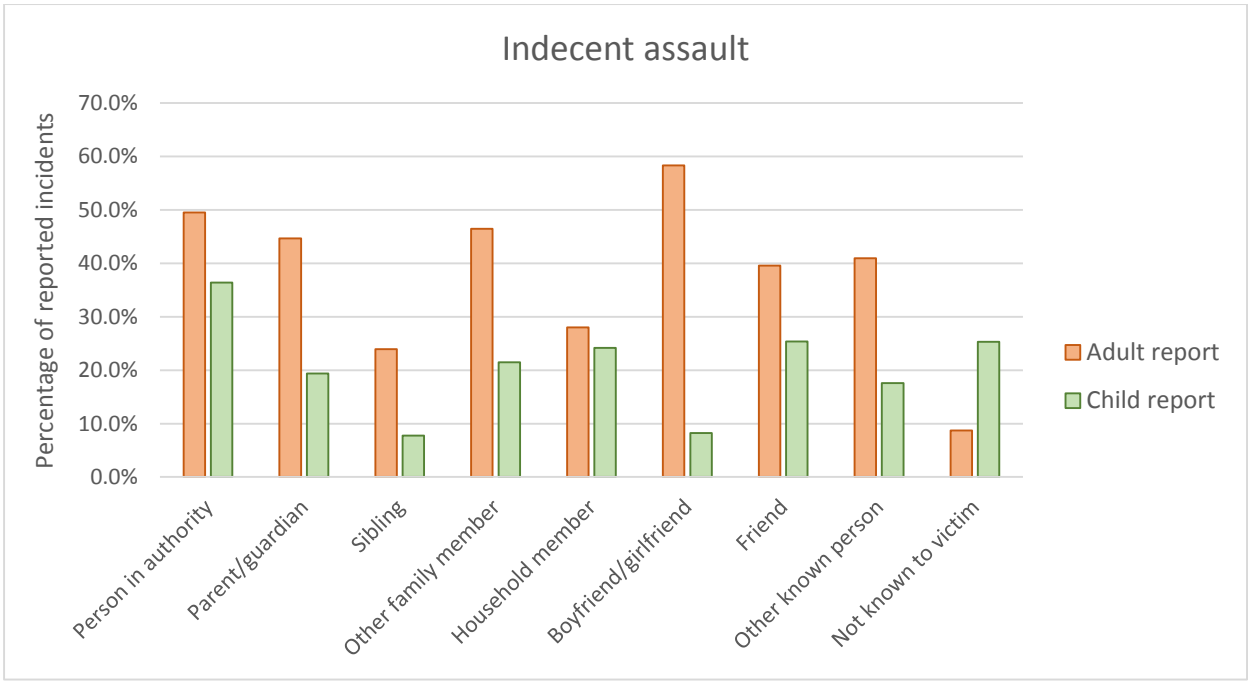
Relationship of the person of interest to the victim

The probability of matters proceeding also varied with the relationship between the person of interest and the victim.[74] Figure 23a shows the proportion of sexual assault incidents in which the person of interest was proceeded against for each type of relationship for incidents that were reported in childhood and those where the report was delayed into adulthood. When reported in childhood, the matter was least likely to proceed when the person of interest was a sibling, boyfriend/girlfriend or not known to the victim, with only about one in 10 of these matters proceeding. The most likely to proceed were incidents involving persons in positions of authority abuse (37.7 per cent) reported in childhood. For reports made in adulthood, the most likely to proceed involved boyfriend/girlfriends (39.6 per cent, 44 of 111 incidents), parents and guardians (34 per cent), other family members (30.1 per cent) and those involving persons in positions of authority (33.0 per cent). The least likely to proceed were those involving siblings (12.5 per cent) and persons unknown to the victim (9.2 per cent).

For indecent assault (Figure 23b), the highest percentage of both child and adult reports in which legal action commenced involved persons in positions of authority (49.5 per cent for adult reports and 36.3 per cent for child reports). More than double the percentage of incidents involving parents and guardians proceeded when the incident was reported in adulthood (44.7 per cent) than in childhood (19.3 per cent). Similarly, double the percentage of incidents involving other family members proceeded in the case of adult (45.9 per cent) compared with child reports (20.8 per cent). The least likely to proceed were child reports of indecent assault involving siblings (7.8 per cent) and boyfriends/girlfriends (8.2 per cent), but the numbers for each were quite low (62 incidents for siblings, and 16 for boyfriends/girlfriends).

[74] The relationship of the person of interest to the victim was not tested in the logistic regression because there was a preponderance of missing information on the person of interest–victim relationship prior to 2003. It was explored in a supplementary analysis based on incidents and information about the relationship of the person of interest to one of the victims associated with each incident. The analysis was based on type of incident (sexual or indecent assault) and the age of the victim when the incident was reported. This supplementary analysis was not adjusted for the other variables. The overall differences were significant: $\chi^2 = 491.8$, $df = 9$, $p < .0001$.





Figures 23a and 23b. Percentage of (a) sexual assault and (b) indecent assault incidents, reported as a child or adult, in which the person of interest proceeded to court, by relationship of the person of interest to the victim in New South Wales

Note. Incidents involving reports of indecent assault against boyfriends/girlfriends are not included in Figure 24b because the number of adult reports was so low (12 incidents of which only seven proceeded) that they give a misleading impression in a comparison with child reports (194 incidents of which only 16 proceeded). They comprised only 0.5 per cent of adult reports of indecent assault and 1.1 per cent of child reports.

Age difference between the victim and the person of interest

Another important aspect of the relationship between the victim and the person of interest is the age difference. Although little research has specifically addressed this issue, sexual activity or sexual offending is judged to be more serious when the age gap is greater (Daly and Bouhours, 2010). Figure 24 shows the probability of legal action being initiated by victim age and the age difference between the victim and the person of interest. Where the person of interest is within two years of the victim's age, or younger, the probability of legal action is very low, with 12–16 per cent of cases proceeding. When the age difference is less than five years, the probability rises to 23 per cent when the victim is aged 10–12. Where the age difference is at least five years, the curvilinear relationship reported in other studies is evident (Bunting, 2008; Leach et al., 2015; Walsh et al., 2010). The highest probability of a case proceeding is when the age difference is 10 years or more and the victim is 10 to 15 years old (52 per cent).

There are several likely explanations. For younger children, there appears to be a threshold (under seven years) below which child victims are likely to be seen as 'too young' for police or prosecutors to proceed or their families may be less willing for them to do so (Daly and Bouhours, 2010, p 617). For young victims where there is an age difference of less than five years, the person of interest may also be under the age of criminal age of responsibly (10 years). For older victims, and particularly where there is an age difference of less than five years, the matter may bring up issues of consent if both the person of interest and the victim are close to or over the age of consent (16 years). However, older children were also more likely to be the victim in sexual assault incidents than younger children and these matters were more likely to proceed.

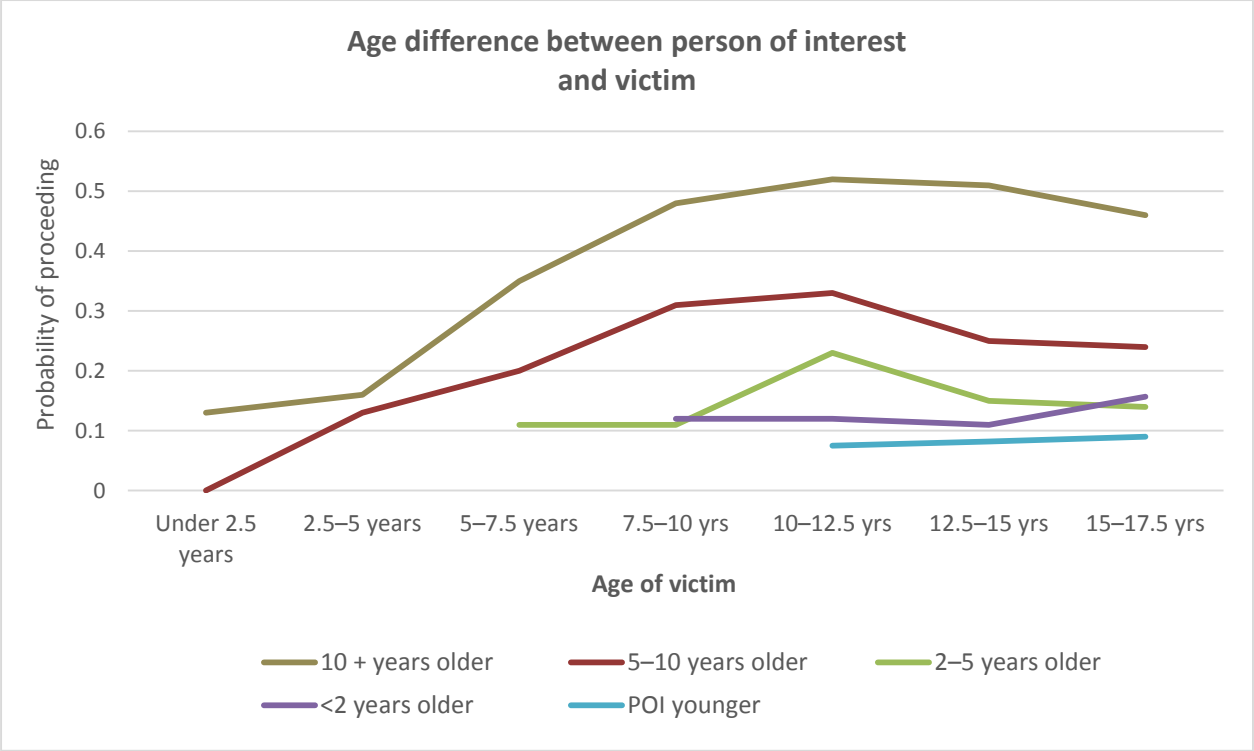


Figure 24. Probability of legal action by age of victim and age difference between victim and person of interest

More than half (56 per cent) of the incidents which occurred in educational institutions involved persons of interest who were under 18 and in two-thirds of these, the victim was aged 10–15. Matters involving young persons of interest (under 18) were much less likely to proceed than those aged between 25 and 50 (18 per cent compared with 61 per cent).[75]

Indigenous status

A small proportion of incidents involved victims (7.3 per cent) and offenders (4.7 per cent) who were identified as Indigenous (Aboriginal or Torres Strait Islander); 4.2 per cent involved victims and offenders who were both Indigenous. The likelihood of legal action being initiated was lower when the victim was Indigenous (around 30 per cent) than non-Indigenous (40 per cent) or status unknown (46 per cent). A person of interest was somewhat less likely to be identified where the victim was Indigenous. This is consistent with the recent findings reported for Aboriginal children in Western Australian communities (Bailey, Powell, and Brubacher, under review).

3.4 SUMMARY

Taking into account the complexity of the various interactions and main effects from these analyses, it is clear that the probability of legal action being initiated:

- decreased steadily from 1995 to a low in 2010 with a small upward trend to 2014
- decreased with an increase in the delay between the offence and the report, with the greatest probability for a delay of one to five years and 10 to 20 years (relative to same-day report) and the lowest probability for a report the next day – a somewhat counterintuitive finding
- increased with the age of the victim at the time of the alleged offence and with the difference in age between the victim and the person of interest
- was relatively quite high for both child and adult reports involving persons in positions of authority, though these incidents of sexual assault and indecent assault comprised only 4.3 per cent and 7.5 per cent, respectively, of reported incidents[76]
- was lower when either the victim or suspect or both were Indigenous.

[75] The proportion of young persons of interest and the likelihood that the matter would proceed to court also differed for private versus public secondary schools; 79.7 per cent (*n* = 1,155/1.449) of the persons of interest in public secondary schools were under 18 and legal action was initiated for 17.9 per cent whereas only 25.2 per cent of incidents in private schools (*n* = 204/801) involved persons of interest under 18 and legal action was initiated in 25.5 per cent of cases. The person of interest was much more likely to be aged 30 to 50 (49.6 per cent) in incidents located in private schools than in public secondary schools (11.1 per cent) and just as likely to have the matter proceed (67 per cent compared with 61 per cent).

[76] As defined by the available data as outlined earlier.

In summary, these findings indicate a substantial increase in the number of reports of child sexual assault and indecent assault reported during childhood in New South Wales from the mid to late 1990s to 2014. The level of adult reporting of child sexual assault has been relatively constant. Only in the category of indecent assault has there been a decline in adult reporting. However, despite the very large increase in child reports, there has been a substantial decline in the likelihood that court proceedings would be initiated for sexual assault or indecent assault offences against a child. That is, the trends of reporting and proceeding are heading in opposite directions.

4 NEW SOUTH WALES COURTS DATA

Sexual offences against a child may be prosecuted in the following courts in New South Wales: the New South Wales Children's Court, Local Court and the higher courts (District Court and Supreme Court), depending upon the age of the defendant, the seriousness of the charges and the consequent severity of the possible penalties.

4.1 NUMBER OF PERSONS PROSECUTED

A total of 16,042 persons were prosecuted for at least one sexual offence against a child in finalised matters in the Children's Court, a Local Court or in the higher courts in 1994–2014 in relation to 38,099 charges. A 'person' in these figures is defined as a person charged with 'a group of one or more charges which are finalised by the court on the same date'.[77] Persons are therefore not 'distinct persons' – as outlined in the explanatory notes in the *New South Wales Criminal Courts Statistics 2014*:

> If an accused person is in more than one case finalised on different dates during the counting period [ie year], they will be counted more than once. However, separate charges finalised on the same date for one accused person are consolidated and counted as one person (p 155).

Figure 25 shows the trend by year and by court. The largest number of defendants or accused persons with finalised charges over the period 1994–2014 was in the Local Court (*n* = 7,528, 46.9 per cent); followed by the higher courts (*n* = 6,841, 42.6 per cent); and then the Children's Court (*n* = 1,673, 10.4 per cent).

The overwhelming majority of defendants were male (*n* = 15,641, 97.5 per cent). There were 265 female defendants in the Local Court (*n* = 400, 3.5 per cent), and fewer than 2 per cent in both the higher courts (*n* = 105, 1.5 per cent) and Children's Court (*n* = 30, 1.8 per cent).

The majority of defendants in the Local Court and Children's Court were facing only one charge (per finalisation date): 66.1 per cent in the Local Court and 62.5 per cent in the Children's Court. About

[77] These analyses use the same counting rules as the NSW Bureau of Crime Statistics and Research, outlined in the explanatory notes in the *New South Wales Criminal Courts Statistics 2014* (pp 143, 149, 155). Similarly, in relation to the Local Court, *persons charged* is explained in the following terms:

> Data in JusticeLink are case-based, with each case containing one or more charges against a single individual. When different charges within the same case are finalised on either the same or different dates, these are counted as one finalised court appearance and therefore reported as one person. An individual may also be involved in multiple JusticeLink cases. Only when these cases are finalised on the same date they are reported as one person (p 149).

90 per cent in both courts involved three or fewer charges. In the higher courts, however, only 35.1 per cent of finalisations involved only one charge, another 26.1 per cent involved two charges; 74.6 per cent involved up to three charges. The figures for the higher courts are similar to those for all offences in the 2014 *New South Wales Criminal Courts Statistics*: 34.5 per cent of persons were charged with one offence and 22.7 per cent with two offences.[78]

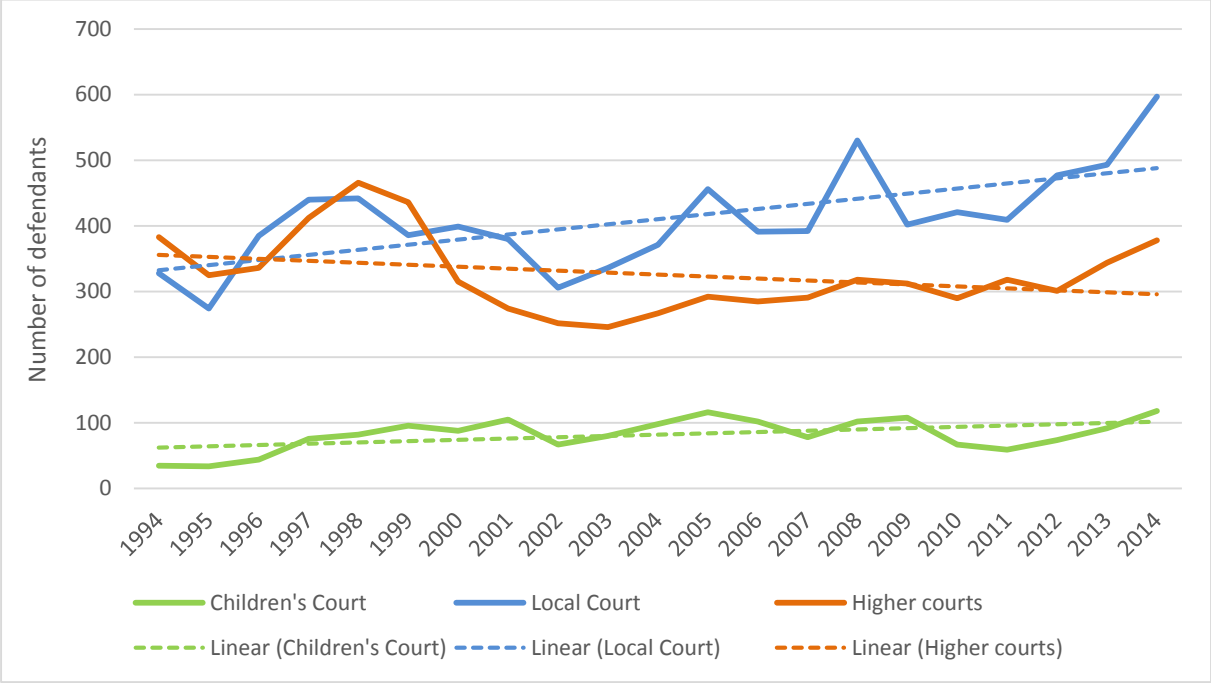


Figure 25. Number of persons with at least one finalised charge of a sexual offence against a child, by year and court in New South Wales

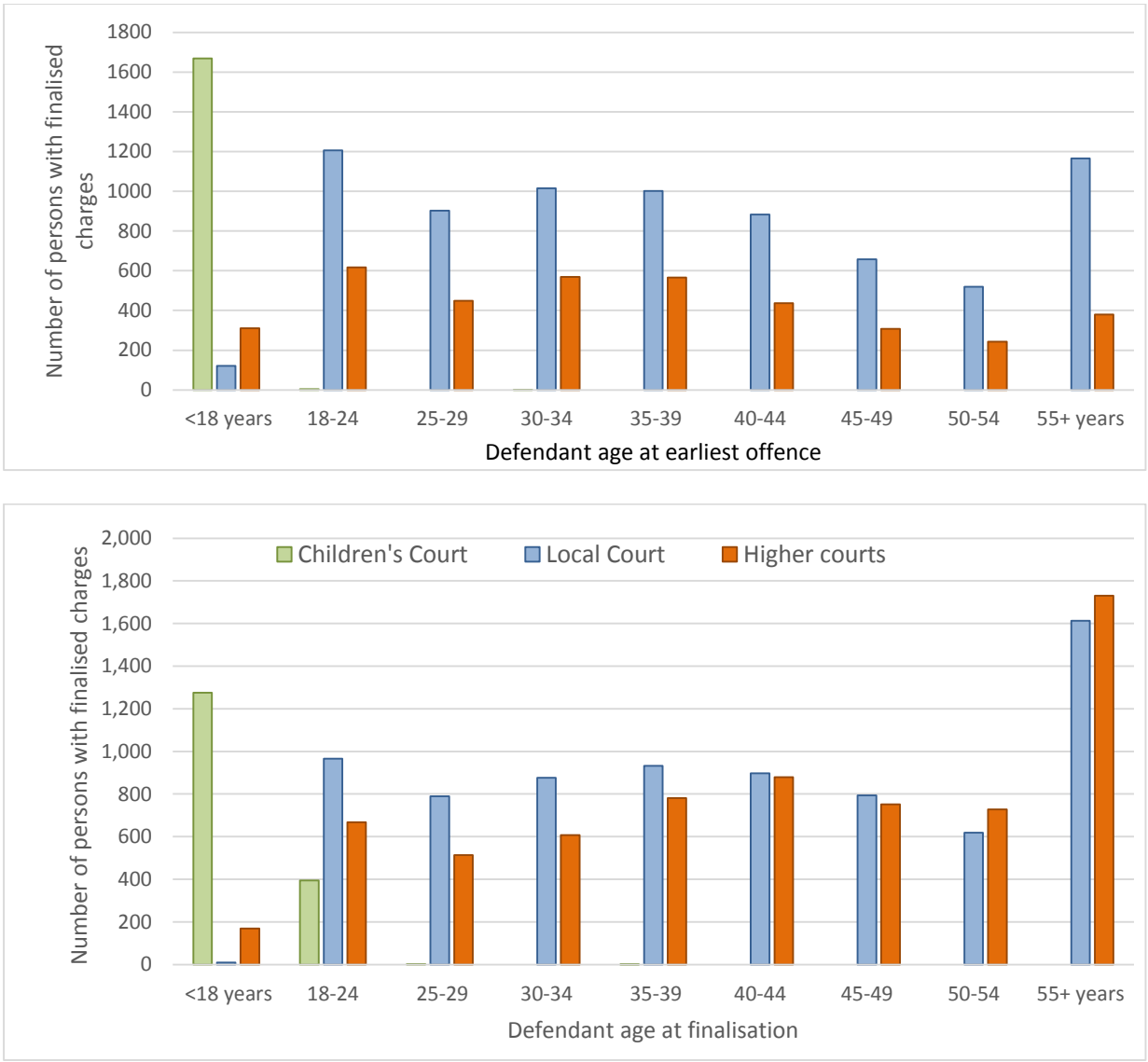
The number of persons with at least one finalised charge of a sexual offence against a child shows an upward trend for the higher courts from 2003 (a low of 246 defendants) to a high of 378 in 2014. Both the higher courts and the Local Court show a post-Wood Royal Commission 'bulge' in the late 1990s (in 1998, there was a high of 466 in the higher courts and 442 in the Local Court), consistent with the number of sexual assault and indecent assault incidents reported to the NSW Police just before that (see Figures 1a and 1b). The numbers in the Local Court have fluctuated around a steeper trend line. The numbers in the Children's Court have ranged from a low of 35 in 1995 to a high of 116 in 2005 and 118 in 2014.

Figure 26a shows the age of defendants *at the time of the offence* for the Local Court and higher courts. The overwhelming majority (79.4 per cent) of those under 18 at the time of the offence were dealt with in the Children's Court, but a small number with serious offences were dealt with in the Local Court (*n* = 121) or higher courts (*n* = 311). The highest number and proportion of

[78] The figures were very similar for 2013 (see *New South Wales Criminal Courts Statistics 2014*, p 13 and Table 3.5, p 103); no equivalent figures are provided for the Local Court or Children's Court.

defendants in the Local Court were under 30 or 55 or older at the time of the offence, and in the higher courts, were between 30 and 45. One in 10 persons in the higher courts was aged 55 or over, as were 14.9 per cent in the Local Court. The average age at the time of the (earliest) offence for persons appearing in the Local Court was 39.1 years and 37.1 years in the higher courts; the average age in the Children's Court was 14.9.

At finalisation, the average age of persons in the period 1994–2014 was 42.1 years in the Local Court; 43.9 years in the higher courts; and 16.2 years in the Children's Court. A comparison of Figures 26a and 26b shows the number of defendants aged 55 or over at finalisation is significantly higher than age at offence, reflecting the delay in reporting and prosecution in historical cases.



Figures 26a and 26b. Number of persons with finalised charges of at least one sexual offence against a child by age of defendant at (a) earliest offence and (b) finalisation by a court in New South Wales

4.2 TYPES OF OFFENCES

Table 5 presents the most common charges prosecuted according to the sections of the *Crimes Act 1900* (NSW), including offences relating to persons in positions of authority (for example, sexual assault, indecent assault or an act of indecency on a child under authority by a teacher). The offences in Table 5 comprise 88 per cent of the charges laid over the period 1994–2014. The most commonly charged offences (each comprising between 7 per cent and 13 per cent of charges), in order, were:

- aggravated indecent assault (s 61M(1)) – 13.3 per cent[79]
- aggravated indecent assault with a child under 10 years (s 61M(2)) – 13.2 per cent
- sexual intercourse/penetration with a child between 10 and 14 years (s 66C(2)) and between 10 and 16 years (s 66C(1)) – 10 per cent
- act of indecency (s 61N) – 7.2 per cent
- production, dissemination or possession of child abuse material (s 91H(2) and (3)) – 7.0 per cent
- sexual intercourse/penetration with a child under 10 years (s 66A) – 6.9 per cent
- aggravated sexual assault (s 61J) – 6.9 per cent.[80]

These offences fall into the four main categories used in the analyses and shown in Table 5: sexual assault (sexual intercourse/penetration), indecent assault, acts of indecency and child pornography. There was also a small number of charges (0.6 per cent) associated with procuring or grooming, and meeting with a child with the intention of engaging the child in sexual activity.

One offence (s 66EA(1)), persistent sexual abuse of a child, was introduced in 1998 'to overcome the problems of proving particulars (time, date and place) following the decision of the High Court in *S v The Queen* (1989) 168 CLR 266' in recognition of the difficulties that children may have in pinpointing and articulating these particular details. The offence provides that 'a person who, on three or more occasions occurring on separate days during any period, engages in conduct in relation to a particular child that constitutes a 'sexual offence', is liable to imprisonment for 25 years'.[81] This offence is rarely charged, however; there have been only 62 charges under s 66EA since 2000, with an average of four charges per year, and ranging between two and 10.

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[79] 'Aggravated' sexual offences include those where 'the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender' (*Crimes Act 1900* (NSW) s 61J(2)(e)).

[80] Five of these were also the most common offences sentenced in Hazlitt et al.'s (2004) study of sentencing of child sexual offences in the NSW District Court (not included in this list were s 61n and s 91H offences).

[81] *Crimes Act 1900* (NSW) s 66EA(1). See Judicial Commission of New South Wales JIRS website: http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/sexual_offences_against_children.html#p17-500

Table 5. Number and percentage of most common charges by section of the *Crimes Act 1900* (NSW)

Section of *Crimes Act 900*	*n*	%	Category of offence	Penalty
SEXUAL ASSAULT				
61D(1)	**874**	**2.2**	Sexual intercourse (category 3) without consent – **child under 16 and under authority; and in company**	8–14 years
61J(1)	**2,613**	**6.9**	**Aggravated sexual assault**	20 years
66A(1)	**2,682**	**6.9**	Sexual intercourse – child under 10 years	25 years, prev. 20 years
66C(1)	**2,562**	**6.7**	Sexual intercourse – child between 10 and 16 years	16 years
66C(2)	**1,245**	**3.3**	Sexual intercourse – child between 10 and 14 years	20 years
66C(3), 66C(4) and 66D	**1,837**	**4.8**	Sexual intercourse – child between 14 and 16 years; **Aggravated** sexual intercourse – child between 14 and 16 years; Attempt same act	10 years, 12 years
78H-O	**939**	**2.4**	Sexual intercourse/penetration with male child	5–25 years
INDECENT ASSAULT				
61M(1)	**5,078**	**13.3**	**Aggravated indecent assault**	7 years
61M(2)	**5,019**	**13.2**	Indecent assault – **Aggravated** child under 10 years	10 years
76	**1,288**	**3.4**	Indecent assault – girl under 16 [replaced by s 61E(1)]	4–6 years
ACT OF INDECENCY				
61N & 61N(1)	**2,751**	**7.2**	Act of indecency	2 years
61O(1) and (2)	**2,030**	**5.4**	Aggravated act of indecency, including child under 10 years	5 years, 7 years
61E(1) and 61E1(A)	**1,838**	**4.9**	Sexual assault category 4 – indecent assault and act of indecency (s 61E) [replaced by s 61M(1), (2)]	4 years; 6 years if aged under 16
61E(2)	**484**	**1.3**	Act of indecency [replaced by 61N]	2 years
61E(2A)	**226**	**0.6**	Act of indecency – **Child under 16 and under authority** [replaced by s 61N(1)]	4 years
CHILD PORNOGRAPHY				
91H(2) & H(3)	**2,661**	**7.0**	Production, dissemination or possession of child abuse material	10 years
TOTAL	**33,643**	**88.3**		

The number of persons in finalised appearances by year, type of offence and court[82] is shown in Figures 27–29. The more serious offence, sexual assault, was the most common offence dealt with in the higher courts. Again, there was a peak in sexual assault charges dealt with following the Wood Royal Commission (315 in 1998) with lows of 182 in 2004 and 193 in 2012. There has been an increase since 2012 to a high of 239 in 2014, the highest number since 2000. The pattern for indecent assault matters has been broadly similar to that for sexual assault charges throughout, with a similar increase from 2012 to 2014. The number of pornography, grooming and procurement matters has gradually increased since 2006. The number of persons with finalised charges of acts of indecency in the higher courts has remained relatively low, ranging between 43 and 85.

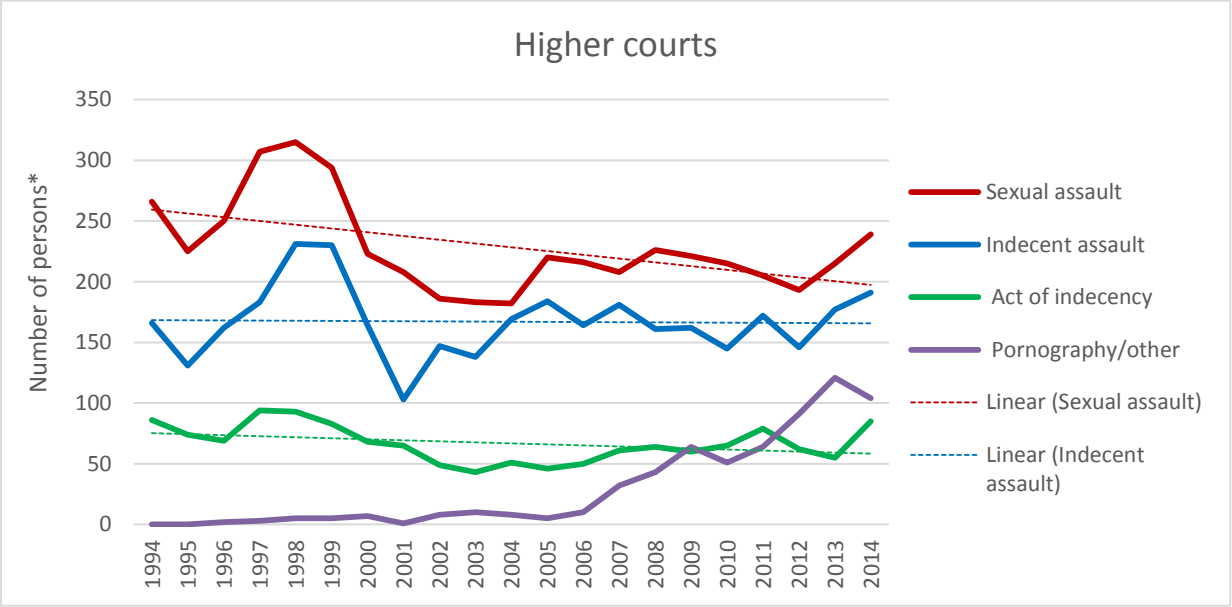


Figure 27. Number of persons with finalised charges in New South Wales higher courts by type of offence from 1994 to 2014

The number of defendants with finalised appearances in the Local Court varied considerably in 1994–2014, with 2014 seeing the highest number of prosecutions (*n* = 511) since an overall low of 290 in 1995. The number of indecent assault matters was generally higher than for other offence types, particularly in 1998–2008, peaking at 226 in 2001, with another high of 198 in 2008. The number of persons with finalised charges of sexual assault has fluctuated between 26 in 2003 and 74 in 2008. Matters involving pornography, grooming and procuring children for sexual activity have increased markedly from 14 in 2000 to 167 in 2014.

[82] In these figures, persons are counted for each finalisation, without taking into account the combinations of offences; therefore, a person could appear in each offence type if they were facing charges in more than one type of offence (for example, both sexual assault and indecent assault if they had one or more charges in each type of offence).

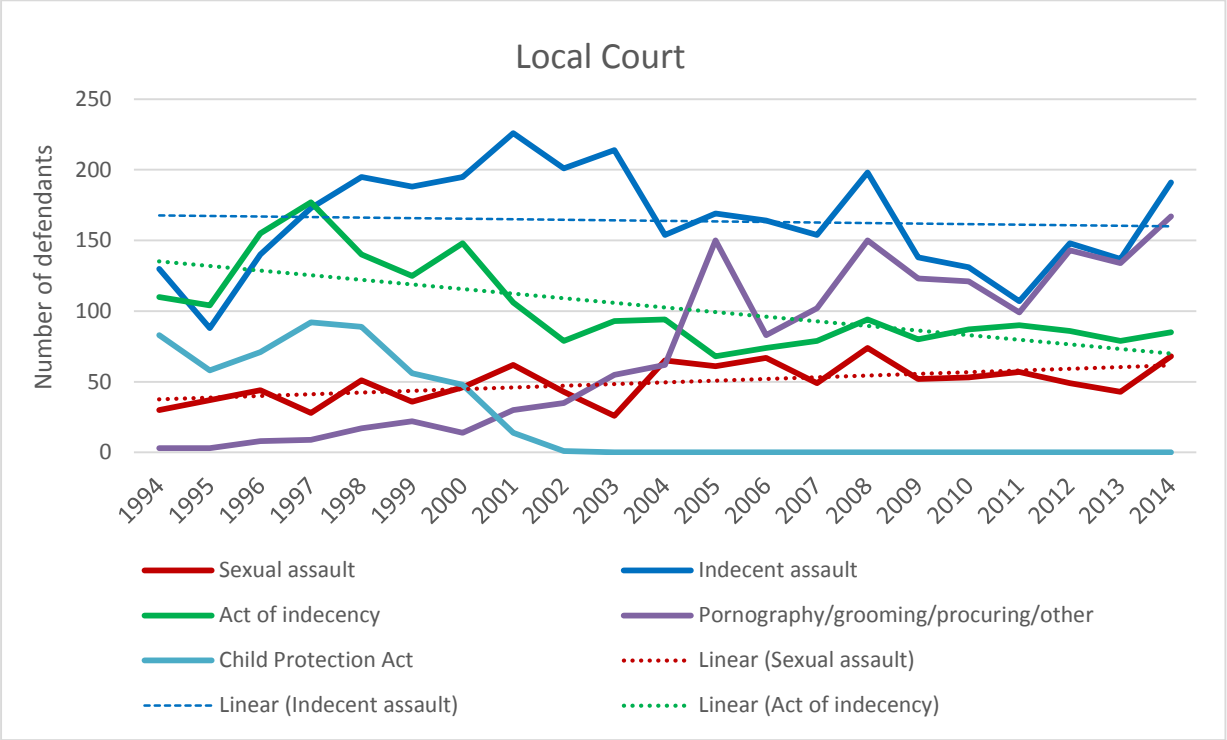


Figure 28. Number of persons with finalised charges in New South Wales Local Court by type of offence from 1994 to 2014

There has been considerable fluctuation in the number of defendants in the Children's Court with finalised charges of sexual assault and indecent assault, the two most common charges of sexual offences against children and young persons in that court. The pattern for indecent assault matters broadly followed the trends for sexual assault matters, with steady increases in both from 2011 to 2014. Forty-eight young persons were committed to a higher court for the more serious offences of sexual assault and indecent assault (these young persons are not included in Figure 29).

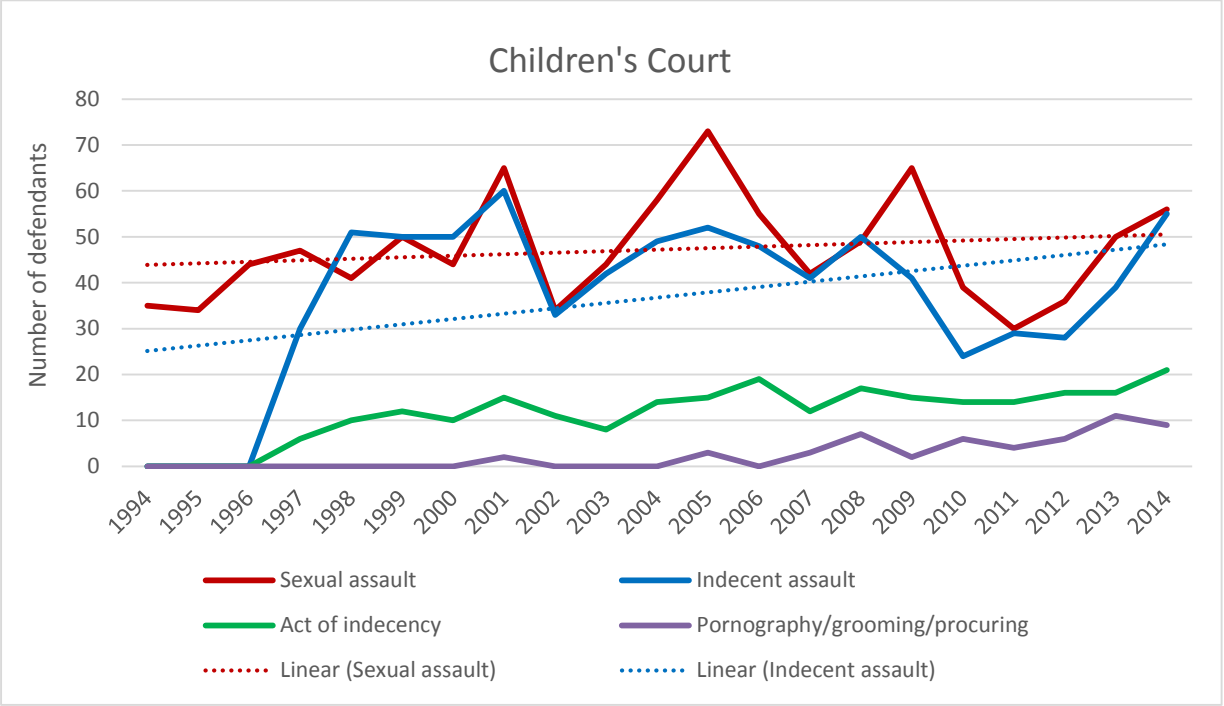


Figure 29. Number of persons with finalised charges in New South Wales Children's Court by type of offence from 1994 to 2014

4.3 PERSONS PLEADING GUILTY

A guilty plea provides some acknowledgement for the victim of the validity of their complaint though they will still need to give evidence unless the defendant pleads guilty to all charges against them. In the higher courts, 35.1 per cent of defendants had only one charge and, of those, 46 per cent pleaded guilty to that offence; in the Local Court and the Children's Court, the proportion with one charge was higher, at 66 per cent and 62.5 per cent, respectively; of those, 31.6 per cent pleaded guilty to that charge in the Local Court and 39.2 per cent in the Children's Court.

Figure 30 shows the number of persons in finalised appearances with at least one guilty plea to a sexual offence against a child. In both the higher courts and the Local Court, the number of persons with at least one guilty plea has shown an upward trend despite some fluctuation. The two peaks in the higher courts occurred in 1998 (*n* = 201) and in 2014 (*n* = 228). The number in the Local Court varied between 78 in 1995 and 185 in 2008 and in 2014.

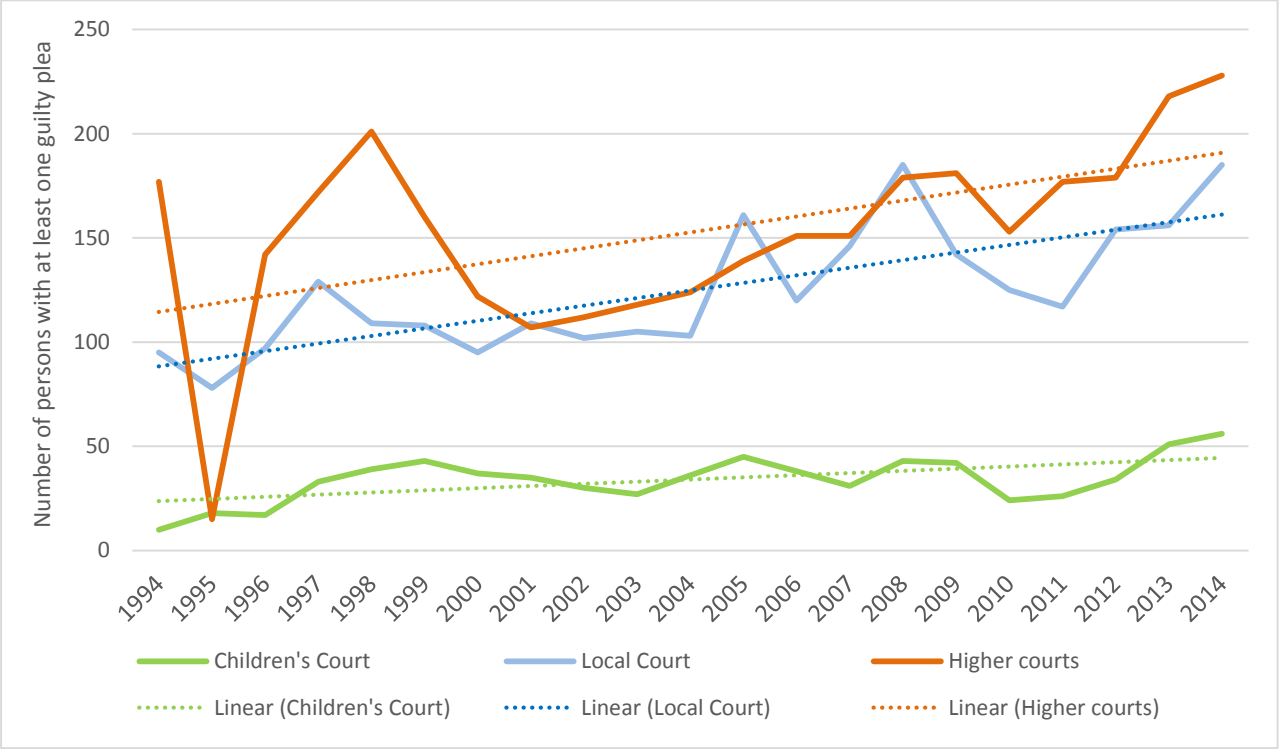


Figure 30. Number of persons in finalised appearances with at least one guilty plea by court by year in New South Wales

Figure 31 shows the *proportion* of persons in finalised appearances with at least one guilty plea to a sexual offence against a child. Again, a person could appear in more than one finalised matter in a year or across years and is counted in each matter. The plea rate is defined as the proportion of persons with at least one charge of a sexual offence against a child who have pleaded guilty to at least one charge. There has been a fairly steady upward trend in the higher courts from around 0.4, or 40 per cent in 2000, to 0.6, or 60 per cent, in 2013 (.63) and 2014 (.60).[83] The plea rate is generally higher than for the Local Court and the Children's Court. There is little variation in the Local Court around the overall average of 0.35 or 35 per cent. The overall average plea rate of 0.49 or 49 per cent in the higher courts is greater than for the Local Court and the Children's Court (both 0.43 or 43 per cent).

[83] This in line with the 45.4 per cent rate reported by Fitzgerald (2006) for sexual offences against a child in 2004; this is lower than the plea rate for assault (65.1 per cent) and all offences (70.7 per cent) at that time.

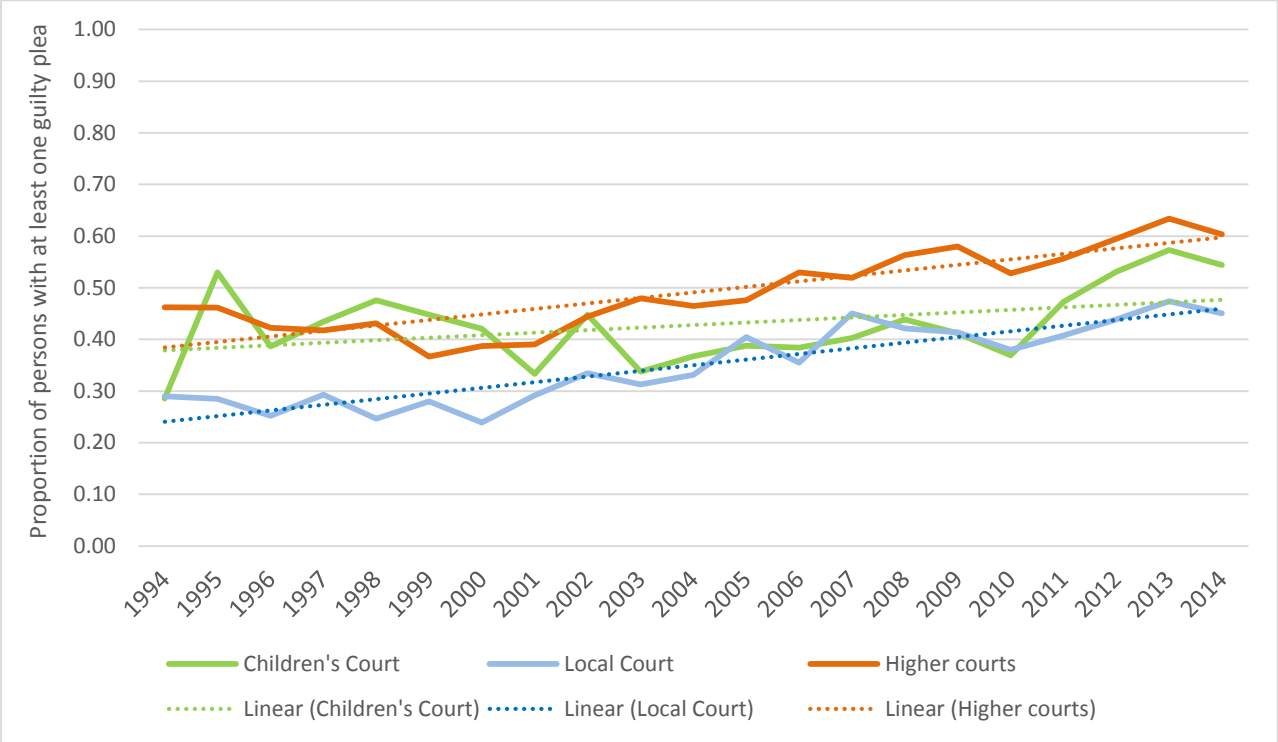


Figure 31. Proportion of persons in finalised appearances with at least one guilty plea by court by year in New South Wales

There was an increase in the higher courts from 2010 followed by a drop-off from 2013 to 2014. The increasing plea rate may reflect the effect of the standard non-parole period legislation, and the later drop-off may be explained by the removal of an incentive to plead guilty as a consequence of the High Court's decision in *Muldrock v The Queen*.

4.4 COURT OUTCOMES

Table 6 presents the outcomes for persons with finalised charges in the higher courts over the period 1994–2014. Just over one-third proceeded to trial (35.2 per cent), and of those, 42.9 per cent were convicted on at least one charge. Guilty pleas were entered for 47.1 per cent of persons who then proceeded to sentence. One in six (16.5 per cent) had all charges dismissed without a hearing. Overall, 62.3 per cent of persons with finalised appearances in the higher courts were convicted.

Table 6. Outcomes for persons with finalised charges of sexual offence against a child in the higher courts

	Number of persons	% of persons	% of persons at trial
Proceeded to trial	**2,407**	*35.2*	
Acquitted of all charges[i]	1,375	20.1	57.1
Convicted of at least one charge[ii]	992	14.5	41.2
Acquitted, had other guilty plea	40	0.6	1.7
Proceeded to sentence only – guilty plea	**3,225**	**47.1**	
No charges proceeded with[iii]	1,020	14.9	
All charges otherwise disposed of[iv]	184	2.7	
Total	**6,841**	100.0	
Total guilty[v]	**4,257**	**62.3**	

Categories and notes taken from Fitzgerald (2006) p 9 and *New South Wales Criminal Courts Statistics 2014*. See New South Wales Appendix 4 (NSW) Table A: ***Explanatory Notes for Tables 6 and 7*** for an explanation of the outcome categories in this table.

i. This includes three persons found not guilty by reason of mental illness.

ii. This includes two persons with proven outcome that is not further described.

iii. These are most commonly applications for no further proceedings by the Crown.

iv. These are most commonly cases where the accused either failed to appear or died.

v. This includes persons who pleaded guilty and those who were found guilty – as well as three for whom it was not known whether the proven outcome was by plea or verdict.

Table 7 shows the outcomes for persons with finalised appearances in both the Local Court and Children's Court. Proportionately, fewer persons were dealt with via a defended hearing than in the higher courts (28.8 per cent in the Local Court and 32.0 per cent in the Children's Court) and fewer pleaded guilty and were sentenced (33.1 per cent in the Local Court and 37.1 per cent in the Children's Court compared with 47.1 per cent in the higher courts). A higher proportion (34.1 per cent in Local Court and 27.4 per cent in Children's Court compared with 14.9 per cent in the higher courts) had all charges dismissed without hearing, most commonly where no evidence was offered by the prosecution. Overall, fewer than half were convicted in both the Local Court (44.7 per cent) and the Children's Court (47.9 per cent) compared with 62.3 per cent in the higher courts.

Table 7. Outcomes for persons with finalised charges of sexual offence against a child in New South Wales Local Court and Children's Court

	Local Court		Children's Court	
	Number of persons	**%**	**Number of persons**	**%**
Defended hearing	**2,171**	**28.8**	**536**	**32.0**
All charges dismissed	1,311	17.4	370	22.1
Convicted on at least one charge	831	11.0	131	7.8
Other outcome	25	0.3	33	1.97
Proven outcome not further described[iv]	4	0.05	2	0.1
Sentenced after guilty plea	**2,494**	**33.1**	**621**	**37.1**
Convicted ex parte[i]	35	0.5	47	2.8
All charges dismissed without hearing[ii]	2,568	34.1	458	27.4
All charges otherwise disposed of[iii]	260	3.5	11	0.6
Total	**7,528**	**100.0**	**1,673**	**100.0**
Guilty[iv]	**3,364**	***44.7***	**801**	***47.9***

Categories and notes taken from Fitzgerald (2006), p 9 and *New South Wales Criminal Courts Statistics 2014*. See New South Wales Appendices Table B for an explanation of the outcome categories in this table.

i. This outcome means the defendant was convicted in his or her absence.

ii. Most commonly these are cases where no evidence was offered by the prosecuting authority.

iii. Most commonly these cases stood out of the list.

iv. This includes persons who pleaded guilty and those who were found guilty.

Figure 32 shows the number of defendants with at least one charge of a sexual offence against a child in a given offence category in which there was at least one conviction, either by plea or by finding, by court. A person was counted once per finalisation date in each court. There is a gradual upward trend in the number of persons convicted in each court.

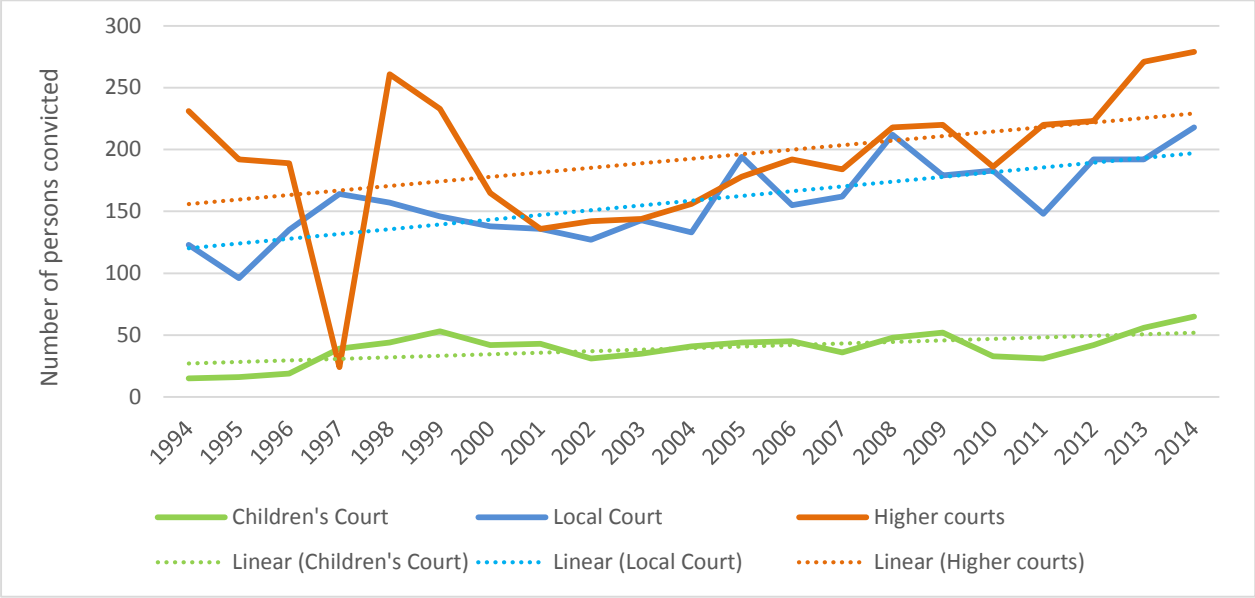


Figure 32. Number of persons convicted of at least one charge by court by year in New South Wales

The number of persons convicted of at least one offence is broken down by offence category and by court in Figures 33–35. The figures show the number of defendants with at least one charge of a sexual offence against a child in a given offence category in which there was at least one conviction, either by plea or by finding, by court. A person was counted once per finalisation date for each offence category in which they had a guilty plea or finding in each court. For example, if their matter was finalised on a given finalisation date and they pleaded guilty or were found guilty of several counts of sexual assault and several counts of indecent assault, they would contribute once to each of the lines in the graph for that court for sexual assault and for indecent assault.

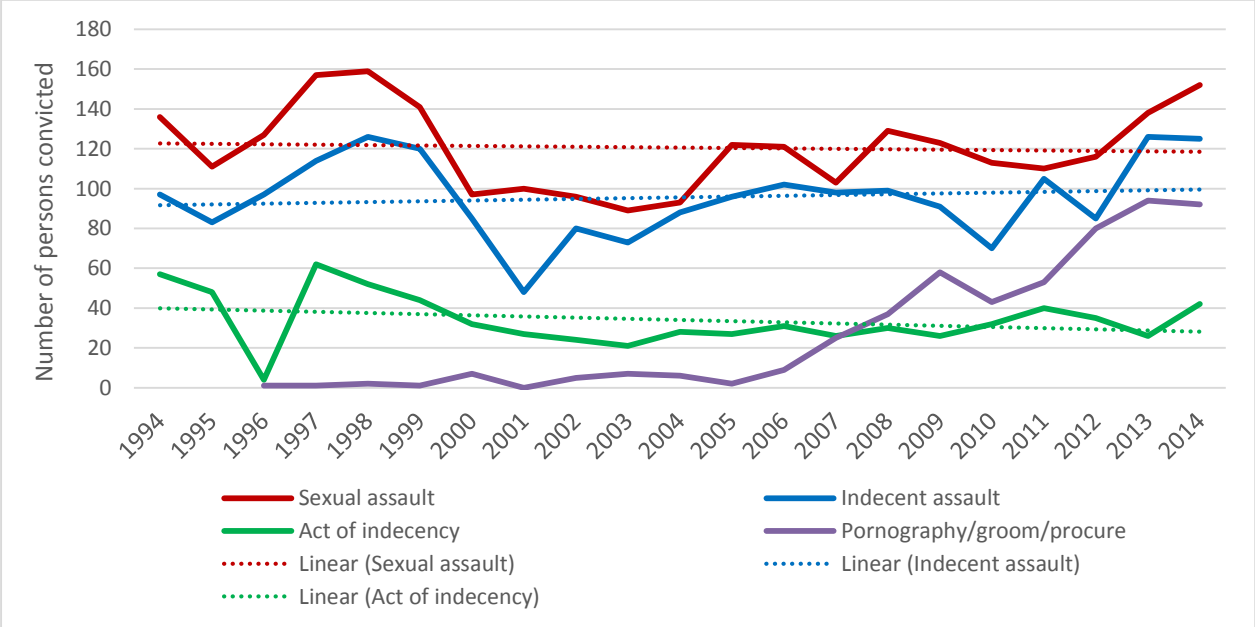


Figure 33. Number of persons convicted of at least one major sexual offence against a child in the New South Wales higher courts by year

The majority of persons convicted of a sexual offence against a child in the higher courts were convicted of child sexual assault, with a peak of 159 after the Wood Royal Commission, and 152 in 2014 following an upward trend since 2011. The overall low was 89 in 2003. There is a similar pattern for indecent assault convictions, and a steady increase in the number of persons convicted of at least one child pornography charge since the mid-2000s from a very low base previously.

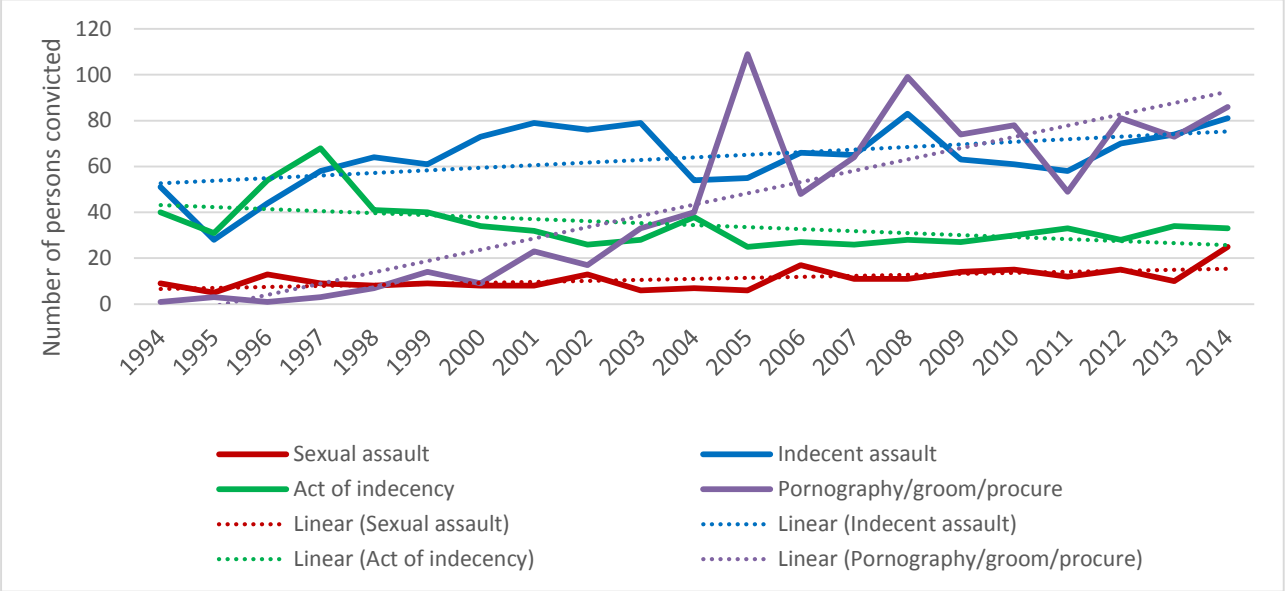


Figure 34. Number of persons convicted of at least one major sexual offence in New South Wales Local Court by year

More persons were convicted of indecent assault in the Local Court than for any other sexual offence against a child until the mid-2000s, when there was a strong increase, with spikes in 2005 and 2009, in the numbers convicted on at least one child pornography charge. Relatively few and fairly stable numbers of persons were convicted of sexual assault charges in the Local Court.

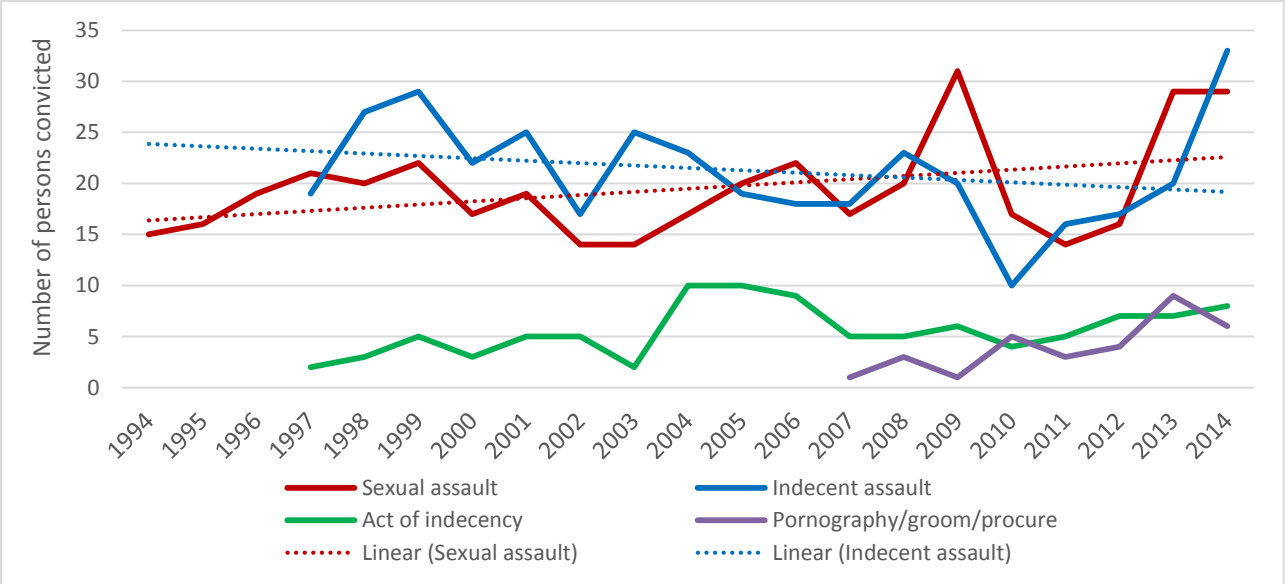


Figure 35. Number of persons convicted of at least one major offence in New South Wales Children's Court by year

In the Children's Court, the trends for sexual assault and indecent assault were broadly similar, generally with more young people convicted of indecent assault than sexual assault, with significant fluctuations for both. Fewer than 10 young people were convicted of acts of indecency per year.

4.5 PROBABILITY OF A CONVICTION

Figures 36–38 show for each court the proportion of persons who were convicted (after pleading guilty or being found guilty at trial or hearing) on at least one charge in the major offence categories. Each person is counted in each offence category for which they had charges for each finalisation date.[84] The proportions vary around the overall average of 0.53 and range between 0.42 and 0.64 for sexual assault, indecent assault and acts of indecency. The proportion of persons convicted of pornography, grooming and procurement offences since 2007 is substantially higher, ranging between 0.78 and 0.95; fewer than 10 persons were convicted of these offences before 2007, so the proportions are not reported. Figure 36 shows the proportion of persons who were convicted for each type of offence and indicates fairly flat trend lines for each offence with slowly increasing conviction rates for sexual assault and indecent assault between 2010 and 2014, with highs of 0.64, 0.65 and 0.71.

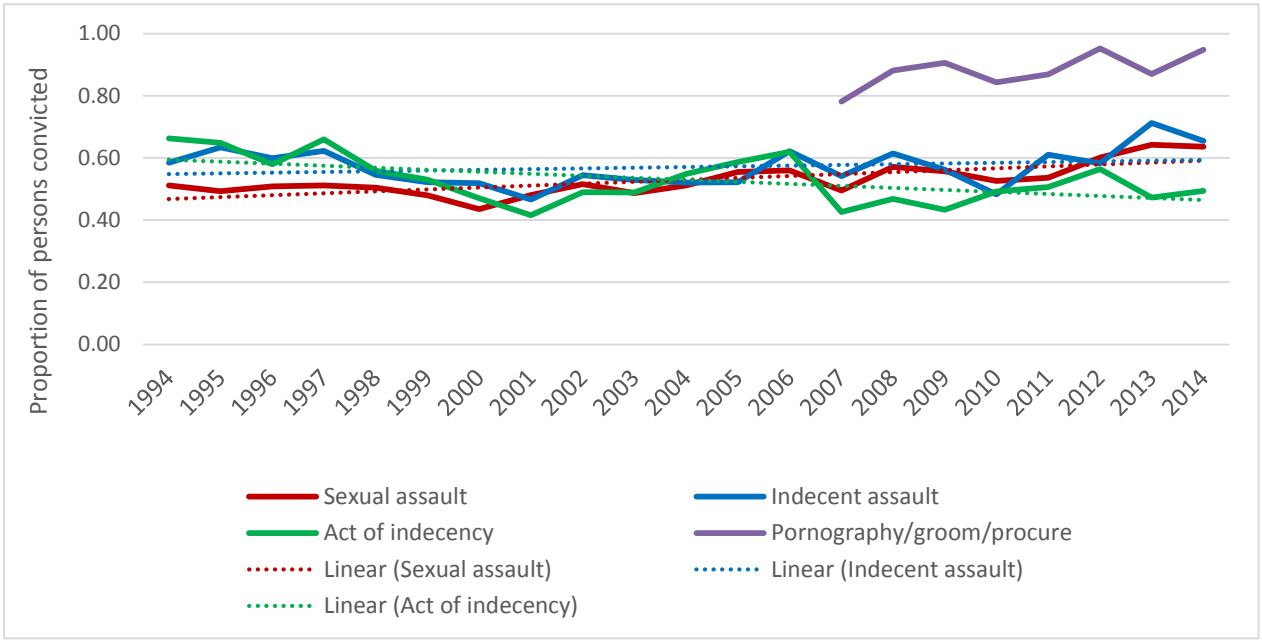


Figure 36. Proportion of persons in New South Wales higher courts convicted of at least one major offence against a child by year

[84] These figures exclude categories of offence by court in which the number of persons per cell was less than 10 across the board since a small number base was associated with high proportions.

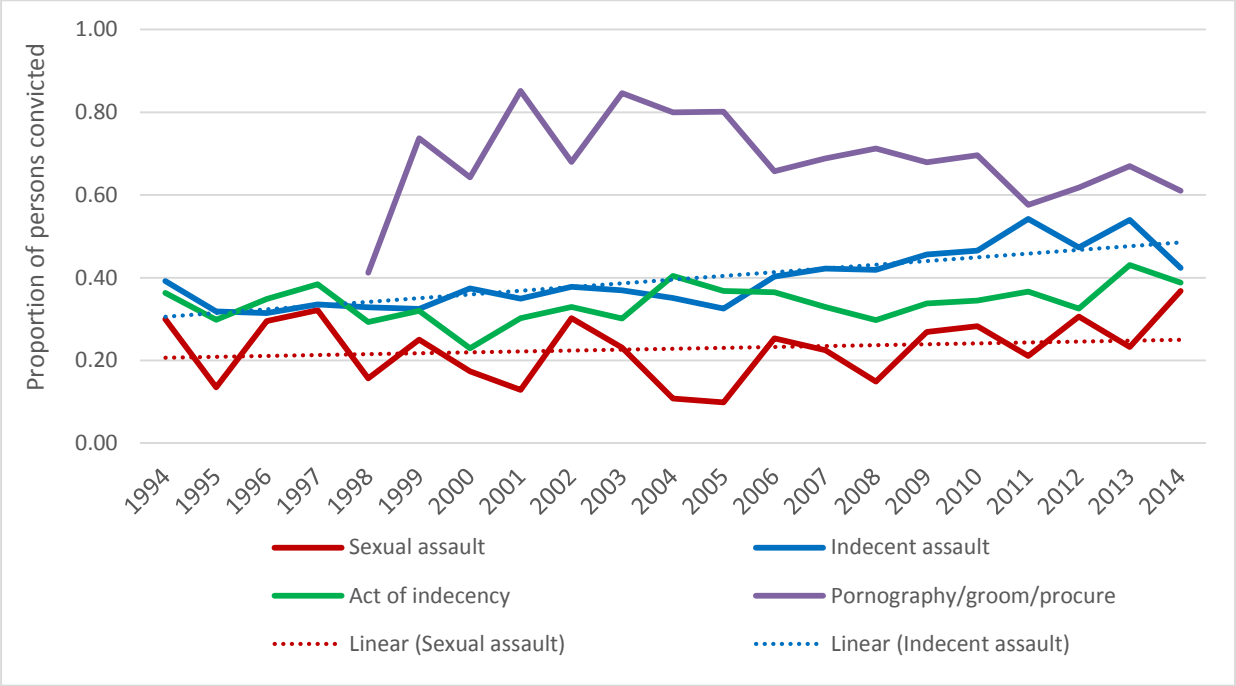


Figure 37. Proportion of persons in New South Wales Local Court convicted of at least one major sexual offence against a child by year

In the Local Court, the conviction rates are substantially lower than in the higher courts. The proportion of persons convicted of indecent assault, the most common offence in this court, has varied between 0.23 in 2000 and 0.54 in 2011 and 2013 (Figure 37). Similarly, the figures for acts of indecency have fluctuated around 0.34, the overall average. The conviction rate for sexual assault, a less common offence heard in this court, has been low averaging 0.23, ranging from 0.10 in 2004 and 2005 to 0.37 in 2014, though the number of persons facing sexual assault offences in this court has been relatively low (see Figure 28). The highest conviction rate in the Local Court since the late 1990s has been for child pornography, procuring and grooming (averaging 0.69) but until 2004, there were fewer than 50 persons per year charged with this offence.

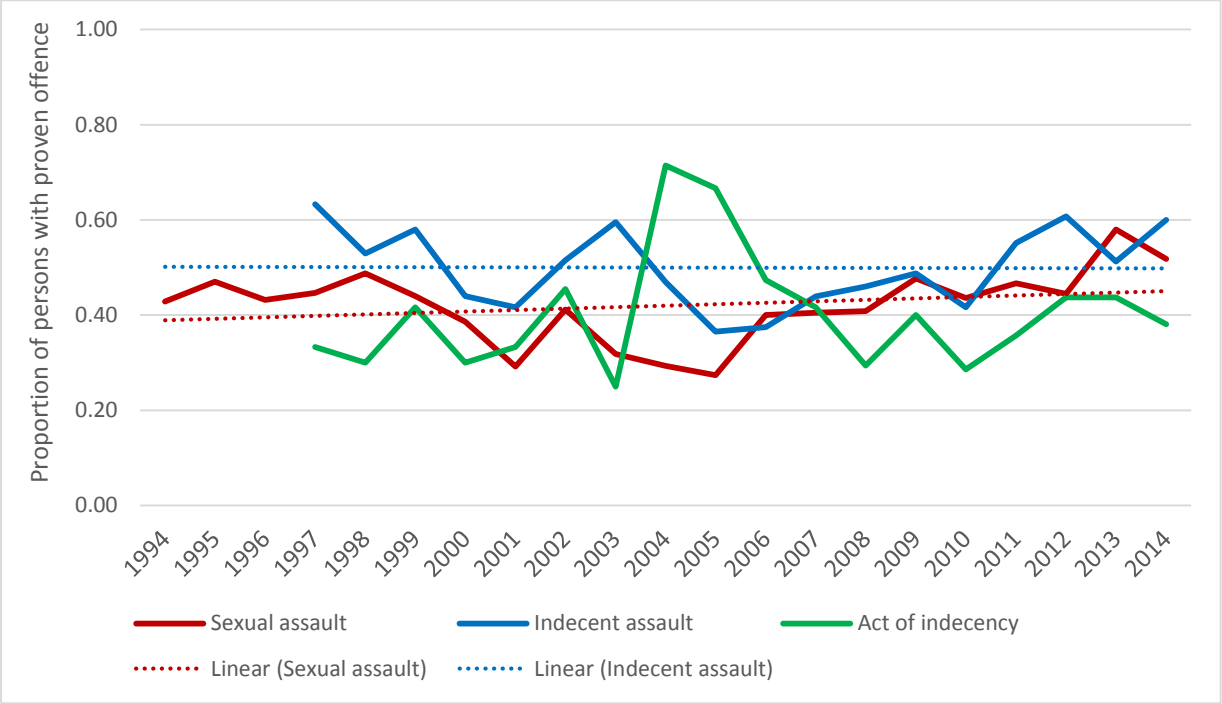


Figure 38. Proportion of persons in New South Wales Children's Court convicted of at least one major sexual offence against a child by year

The proportion of children and young persons appearing before the Children's Court who had proven offences for at least one sexual offence against a child averaged 44 per cent across the period since 1994, with the highest overall for indecent assault (0.50), ranging between 0.37 in 2005 and 0.60 in 2014. The graph for acts of indecency should be treated with some caution given the low numbers of children and young people charged with this offence and having a proven offence (ranging between six in 1997 and 21 in 2014). Grooming and pornography offences were not included because very few young persons were convicted of these offences with less than 10 for pornography in all years except 2013, and ranging between zero and 11.

4.6 DELAYS AT COURT

The earlier analyses focused on the time from the date/s of the alleged offence/s to the date on which a report was made to the police. The following analyses focus on the time matters take to be finalised within the criminal justice system from first appearance in the Local Court to determination, or from committal to finalisation in the higher courts. The amount of time from the date of the offence to the date on which all related charges are finalised is made up of a series of time periods before and after reporting to the police. The main overall measure, however, is the

interval between the date of the offence and the date on which it was finalised. This is the best available overall measure of delay in the court data across both the Local Court and higher courts.[85]

Ideally it would be useful to examine the time from report to police to arrest, from arrest and charging to first appearance, and from first appearance to determination. However, the court data do not include information on the date of reporting or the date of arrest.[86] It would also have been useful to be able to compare the court process for reports initially made to the police when the victim/complainant was a child with those made during adulthood; however, the court data do not provide any information on the age of the child at the time of the offence and at report so this is not possible. There is also no systematic data collection for tracking the time that cases take to proceed through all parts of the court system.

Time between offence and finalisation

The time between the offence and court finalisation is shown in Figure 39. Most matters, across all years in both the Children's Court (84.8 per cent) and the Local Court (72.7 per cent) were finalised within two years of the date of the offence. The median period between the date of the offence and finalisation in the Local Court was 11 months, and the mean was 38.4 months (SD = 75.4)

Matters heard in the higher courts had markedly longer periods between the offence and finalisation than those in the lower courts. Only one-third (33.6 per cent) were finalised within two years of the offence and 40.8 per cent were finalised five or more years after the offence; 15.4 per cent were clearly historical matters, finalised 20 years or more after the offence. The median period was 40 months, and the mean was 101.4 months or more than eight years (SD = 123.7 months), similar figures to those reported by Hazlitt et al. (2004) for child sexual assault matters *sentenced* in the District Court in the period 2000–02 (median of 4.9 years and mean of 9.6 years).

[85] If there was more than one offence, the earliest date was selected.

[86] The date of arrest was in the dataset but the amount of missing data meant it was not useful.

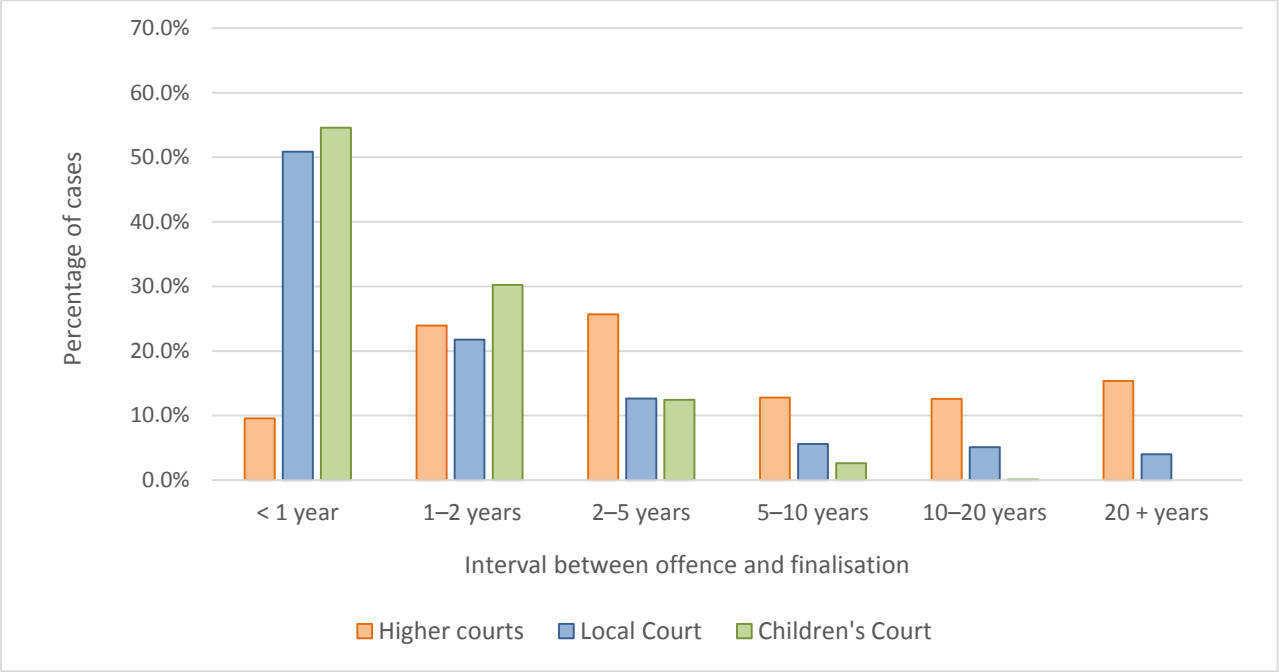
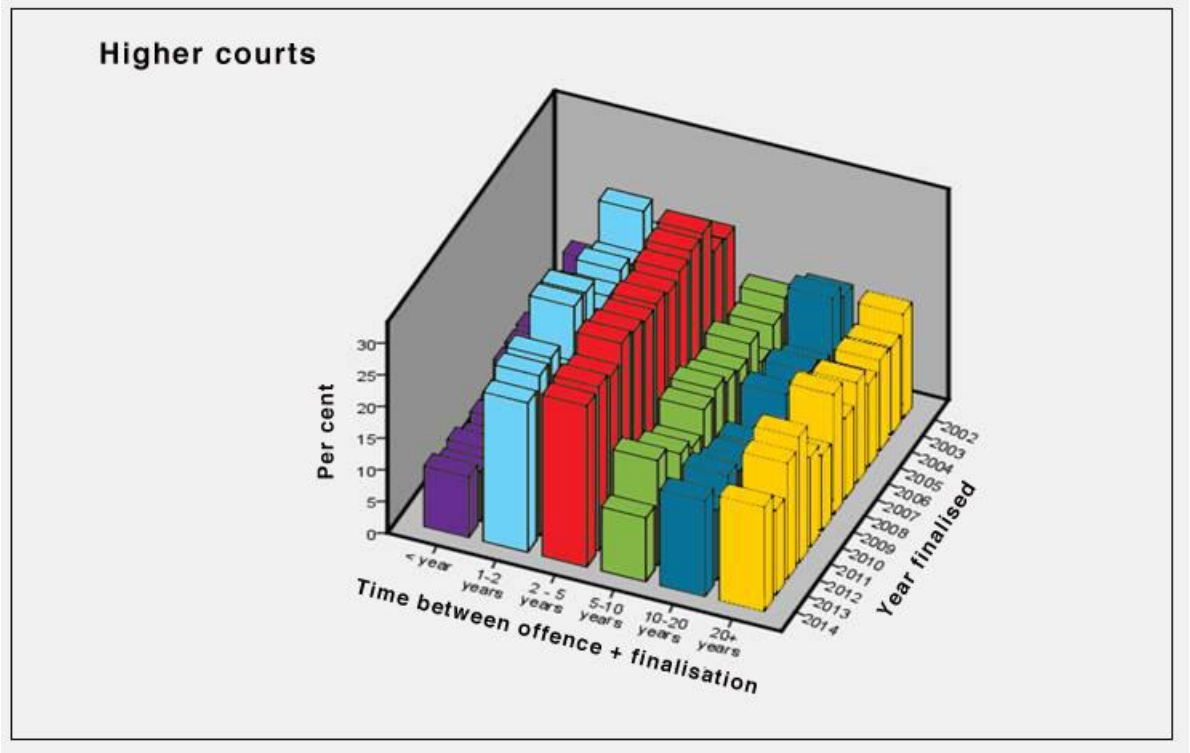
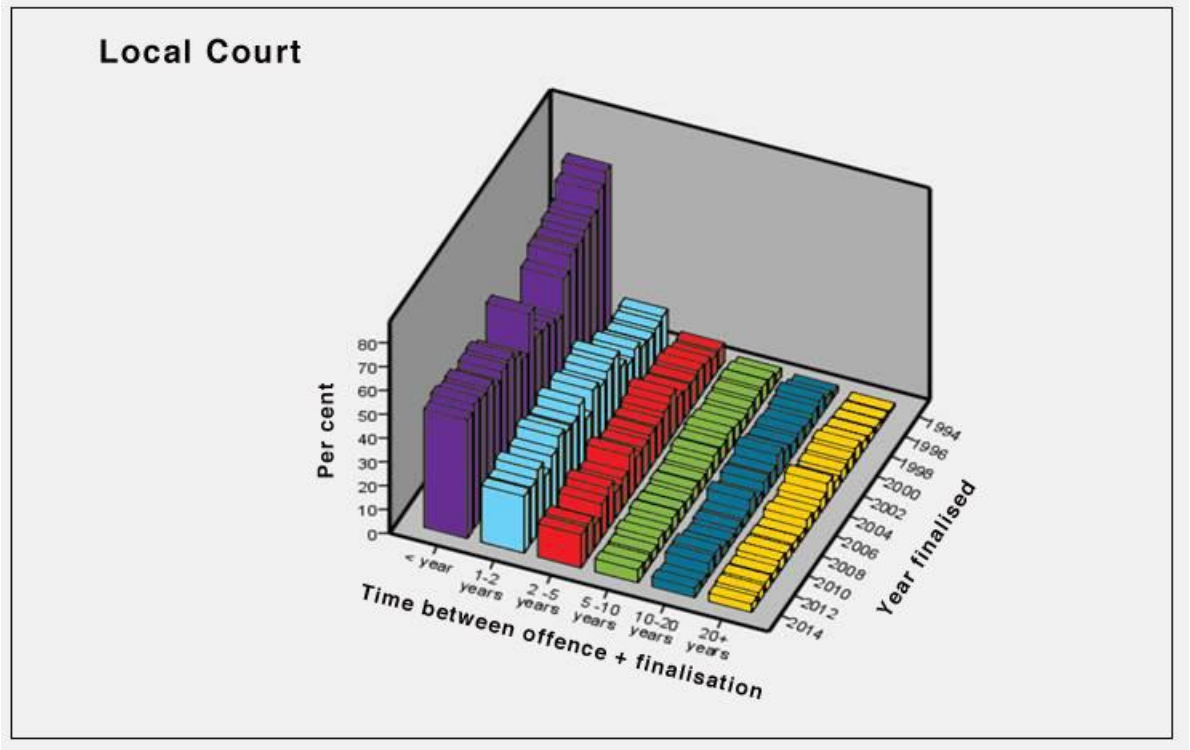


Figure 39. Percentage of defendants by interval between offence and finalisation by court in New South Wales

Note: The period for the higher courts is for 2002–14 because offence dates are not available in the dataset for the higher courts before 2002.

Figures 40a and 40b show the interval between the offence and court finalisation by year of finalisation for both the higher courts and Local Court. In the Local Court, most cases were finalised within two years of the offence (purple and blue bars) but the proportion of short finalisations (within a year) fell substantially from the 1990s – from 65.2 per cent in 1994 to 23.6 per cent in 2004 – before rising to 66 per cent in 2014. Few matters are finalised in the Local Court beyond five years of the offence and that has been consistent over the period 1994–2014. The pattern is very different in the higher courts, where a substantial proportion of matters over the period are finalised at least five years after the date of the (earliest) offence. The highest proportion were finalised within two to five years.





Figures 40a and 40b. Interval between date of offence and finalisation by year of finalisation by (a) higher courts and (b) Local Court in New South Wales

Within this overall period, there are several time measures for the higher courts, Local Court and Children's Court. An unknown proportion of the time from offence to committal (for higher court matters) or first appearance (for lower court matters) is a result of the delay between the offence and the report to the police, which is beyond the control of the criminal justice system. However, once the matter reaches court, there are significant time periods before finalisation, as Table 8 shows.

Table 8. Intervals between offence and stages at court

Higher courts	**(Earliest) offence to committal**	**Committal to finalisation**
Median	28 months	8 months
Mean	91.1 months	9.9 months
Range	19–655 months	2–378 months
From earliest offence to finalisation		
	Median = 40 months	Mean = 101.5 months

Local Court	**Offence to first appearance**	**First appearance to finalisation**
Median	5 months	5 months
Mean	42.0 months	5.8 months
Range 19-65 months	0–685 months	0–95 months
From earliest offence to finalisation		
	Median = 12 months	Mean = 48.2 months

As Table 8 shows, the interval between the earliest offence and committal in the higher courts is considerably longer than the interval between the offence date and the first appearance in the Local Court. This probably reflects both the greater number of historical matters in the higher courts and the longer time to report more serious offences, and the longer delays in getting to the District Court. Once in the court process, the time from committal to finalisation in the higher courts (mean is 9.9 months) is longer than the time from first appearance to finalisation in the Local Court (mean is 5.8 months); it is also commensurate with the average time between committal and finalisation reported by Weatherburn and Fitzgerald (2015).

Another measure available for the Local Court and Children's Court is the number of adjournments before the matter is finalised. In both courts, few cases have no or only one adjournment – only 15.7 per cent in the Local Court and 8.8 per cent in the Children's Court. The median number of adjournments in the Local Court was 4 (mean = 4.4) and in the Children's Court 5 (mean = 5.4). These figures indicate that delay and adjournments are a common feature of the criminal justice system once a matter proceeds and adds to the uncertainty of the process for the victim/complainant.

What then is the association between delay (as measured by the time between the earliest offence and finalisation) and the probability of a conviction in the different courts? And what other factors predict the likelihood of a conviction?

4.7 PREDICTING THE LIKELIHOOD OF A CONVICTION

Logistic regression[87] was used to model the association between the probability of a conviction (by verdict, plea or proven offence) and factors such as:

- the type of offence – sexual assault and indecent assault
- the court in which the case was heard (Local Court or higher courts)
- the interval between the date of the offence and the finalisation date for that matter[88]
- the year the matter was finalised[89] (using data from 2002 onwards)
- the gender of the defendant
- the age of the defendant at finalisation.

All possible three-way interactions between the six predictor variables were tested individually in models that contained all main effects and two-way interactions.[90] One three-way interaction was

[87] The logistic regression allowed the simultaneous testing of the various factors included in the model (for example, year of report and offence category) and assessed their effects while holding the other factors in the model constant.

[88] When there was more than one offence, and they occurred at different dates, this was based on the date of the earliest offence. The categories for intervals were <1 year, 1–2 years, 2–5 years, 5–10 years, 10–20 years and >20 years.

[89] The model was based on data from 2003 because of missing data on the date of the offence; hence the delay between the date of the offence and finalisation date for the higher courts before 2002.

[90] For this analysis, the data were aggregated such that a given defendant was included for each finalisation date, for each offence type (sexual assault or indecent assault) for which they were charged, and also for each type of court in which they appeared. For example, a person could appear more than once in a year if they had two different finalisation dates in that year (this was rare) and/or if they had charges in more than one of the offence categories (this was much more common). The total number of observations in the aggregated dataset was 7,659, although the number used in analyses was reduced to 7,630 because of missing data. The possible effect of the lack of independence of observations

retained, and the model was then further reduced by removing two-way interactions that were not contained in the three-way interaction and were not significant at the nominated alpha of .001.

The final reduced overall model was significant[91] and the main and interaction effects were:

- a significant three-way interaction between the type of offence, the court in which it was finalised and the defendant's age at finalisation[92]
- a significant two-way interaction between court and the interval between the date of the offence and the finalisation date (referred to as the delay)
- year of finalisation.

The main effect of year was not involved in any significant interactions. It showed an overall increase across the period 2003–14 in the likelihood of a conviction adjusted for all other effects.[93]

The only main effect (other than year of report, which was not involved in an interaction) was the gender of the defendant, which was not statistically significant; the overwhelming majority of the defendants were male.

The interaction of most interest is shown in Figure 41 – the delay between the offence and finalisation by court. Figure 41 shows a significant difference in the likelihood of conviction associated with the length of the interval between the earliest offence date and the finalisation date in the Local Court, but not in the higher courts. The probability of conviction in the higher courts for the most serious offence with which a defendant was charged (mostly sexual assault) remained fairly consistent (ranging between 54 per cent and 63 per cent) over the different 'time

for the same person, both within and between finalisation years, was taken into account during significance testing using the methodology described by Williams (2000) and implemented in Stata 13 (Statacorp, 2013).

[91] χ^2 (N = 7,630) = 404.4, *df* = 30, *p* <.0001.

[92] The odds ratio for the three-way interaction, involving the type of offence, court and age of the defendant (χ^2 (N = 7,630) = 56.4, *df* = 1, *p* <.0001), resulted from the relatively low probability of a conviction for sexual assault charges in the Local Court for defendants who were older at the time of finalisation. While statistically significant, these are not important effects given the relatively small number of defendants facing sexual assault charges in the Local Court and the low overall conviction rate in that court for this offence; as Figure 28 shows, the numbers fluctuated between 26 in 2003 and 74 in 2008, with 68 in 2014. Defendants facing sexual assault offences in the Local Court were significantly less likely to be convicted than those facing indecent assault charges in that court (OR = 0.13), or in the higher courts (OR = 0.50). The odds of a conviction for sexual assault in the higher courts were 13.7 times those for the Local Court.

[93] From 2008 onwards, the odds ratios comparing the conviction rates for each year with those in 2003 were all greater than one, significantly so in 2013 and 2014.

gaps' between the offence and finalisation of the matter.[94] However, in the Local Court, there is a marked downward trend in the probability of a conviction as the interval gets longer: from 35 per cent for the shortest gap of less than a year to a low of only 8 per cent for a gap of more than 20 years.[95] This is despite the greater probability overall of a conviction for indecent assault, the more common offence in the Local Court, than for sexual assault. The probability of conviction was significantly greater in the higher courts than in the Local Court at all levels of delay.[96] It is worth noting that matters heard in the higher courts were finalised with markedly longer periods between the offence and finalisation than those in the lower courts. As outlined earlier, the median interval between the date of the offence and finalisation in the Local Court was 11 months, and the mean was 38.4 months (SD = 75.4). In the higher courts, the median interval was 40 months, with a mean of 101.4 months (SD = 123.7 months). More than one in four (28 per cent) was finalised at least 10 years after the offence (see Figure 39).

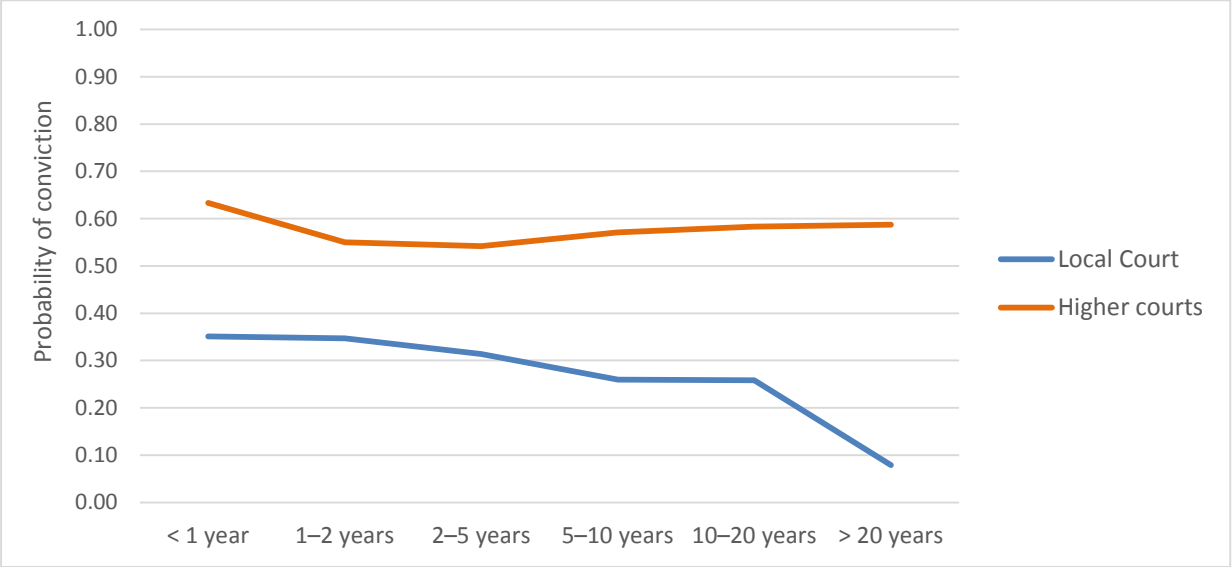


Figure 41. Adjusted probability of conviction by court and interval between the offence and court finalisation in New South Wales

[94] The odds ratios for the comparison between the shortest delay and each successive delay ranged between 0.71 and 0.82 and, except for delays between two and five years, did not differ significantly from 1.

[95] The odds ratios ranged from 0.13 to 0.98.

[96] Another way of illustrating this is with reference to the odds ratios comparing the odds of conviction in the higher courts versus those in Local Court over the delays: at the shortest delay, the odds ratio is 13.7; it then drops to 9.9 for a delay of 1–2 years, subsequently rising through 11.5, 17.3 and 19.4 to 83.5 for a delay of 20+ years.

4.8 SENTENCING ON MOST SERIOUS OFFENCE

The legislation relating to sexual offences against children provides for a range of penalties, the most serious of which is imprisonment for adult offenders and control orders for juveniles. However, the legislation has undergone considerable changes since the 1950s, both in relation to the definition of sexual assault and the associated penalties.[97] While changing community attitudes to child sexual assault have led to longer sentences, when sentencing offenders who are convicted years after the offences were committed, the courts are required to have regard for the penalties in force at the time the offence was committed, rather than at the time of sentencing.[98] As Hazlitt et al. (2004) point out, the changes and the number of offences and statutory maximum penalties present a very complex and difficult picture for the courts to deal with.

The following data on penalties and sentencing are based on the principal sexual offence of which the offender was convicted. This is in line with the approach of the New South Wales BOCSAR in its reports and the Judicial Commission of New South Wales (Hazlitt et al., 2004).[99] The principal offence is defined as the offence that receives the most severe penalty among the sentences imposed on an offender.[100]

Table 9 shows the principal or most severe penalty imposed on the 8,104 persons whose matters were finalised in the higher courts, Local Court and Children's Court over the period 1994–2014. The most common principal penalty in the higher courts (*n* = 2,721, 68.9 per cent of persons) was imprisonment (full-time custodial sentence), with an additional 5.4 per cent on periodic or home detention or an intensive correction order, and 14.0 per cent receiving a suspended sentence, with or without supervision.

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[97] Hazlitt et al. (2004) outlined the various changes in the legislation and the increased sentences for child sexual offences to 2002. They focused on sentencing offenders convicted of child sexual assault in the District Court over the period 2000–02.

[98] Hazlitt et al. (2004, p 4) stated that the Court of Criminal Appeal in MJR [R v MJR (2002) 54 NSWLR 368] held that sentences should reflect the pattern or standard of sentences imposed at the date of the offence. A specially constituted five-judge bench ruled that a court is '… to take into account the sentencing practice as at the date of the commission of an offence when sentencing practice has moved adversely to an offender'. Citing (2002) 54 NSWLR 368 at [31] per Spigelman CJ, Grove J, Newman AJ and Sully J with Mason P dissenting.

[99] There are, however, differences between the data used by the NSW Bureau of Crime Statistics and Research (BOCSAR) and the Judicial Commission of New South Wales in that the Commission's data are corrected to reflect the outcome of successful appeals, whereas BOCSAR's data are not; BOCSAR provided the data in this report. In addition, the Commission reports median sentences rather than means or averages, and also the total head sentence rather than the non-parole period reported by BOCSAR.

[100] Where an offender was sentenced for multiple offences in a single finalised court appearance, the offence that attracted the highest penalty in terms of type and quantum of sentence is selected as the principal offence, in terms of the hierarchy presented in Table B in Appendix 4 (NSW).

In the Local Court, the most common principal penalty was also imprisonment (31.7 per cent), followed by a bond with or without supervision (29.5 per cent), and then a suspended sentence (19.5 per cent).

In the Children's Court, the most common penalty was a probation order (40.7 per cent), followed by a bond with or without supervision (26.9 per cent). Just over one in 10 (11.0 per cent) young persons received the most serious penalty in the Children's Court, a control order, a fixed-term or non-parole period of detention in a Juvenile Justice New South Wales facility (see explanatory notes for the New South Wales Crime Statistics in Appendix 4 (New South Wales) Table B).

Table 9. The principal penalty* (number of persons) by court

	Higher courts		Local Court		Children's Court		Total
	n	%	*n*	%	*n*	%	N
Imprisonment	2,721	68.9	1,055	31.7	–	–	**3,776**
Control order**	*19*	*0.5*	–	–	91	11.0	**110**
Periodic and home detention	173	4.4	142	4.3	–	–	**315**
Intensive correction order**	*16*	*0.4*	11	0.3	–	–	**27**
Suspended sentence with/without supervision	403	1.0	650	19.5	83	10.0	**1,136**
Community service order	123	3.1	234	7.0	18	2.2	**375**
Probation order**	*13*	0.3	–	–	337	40.7	**350**
Bond with/without supervision	443	11.2	981	29.5	223	26.9	**1,647**
Fine	1	–	124	3.7	1	0.1	**126**
Nominal sentence and conviction without penalty	5	0.1	6	0.2	6	0.7	**17**
Dismissed with caution	3	0.1	–	–	65	7.8	**68**
S 10 bond without conviction/no conviction recorded/other	27	0.7	125	0.4	5	0.6	**157**
Number of persons – offenders	**3,947**	100.0	**3,328**	100.0	**829**	100.0	**8,104**

* The order in the table (rank order and numeric code) provided by the New South Wales BOCSAR determines the rank of the penalty as provided. Imprisonment is the most punitive penalty and ranked 1 (Hazlitt et al., 2004). The types of penalty are explained in Table C in the New South Wales appendices.

** A small number of young people (offenders under the age of 18 at the time of the offence) were dealt with in the higher courts rather than in the Children's Court and their penalties are shown in italics.

Figures 42a, 42b and 42c provide a breakdown of the principal penalty (generally for the most serious offence) for each major offence category by court. As Figure 42a shows, the most common principal penalty in the higher courts was imprisonment across all four major offence categories; it was highest for sexual assault (*n* = 1,778, 78.2 per cent) and child pornography (*n* = 254, 67.9 per cent). Other forms of detention (home and periodic detention) added 4 per cent to 7 per cent for each offence type (ranging from 3.9 per cent for sexual assault and 7.5 per cent for indecent assault). Suspended sentences, with and without supervision, added a further 18.5 per cent for child pornography, 13.8 per cent for indecent assault, 7.5 per cent for sexual assault and 5.8 per cent for an act of indecency. The next most common penalty in the higher courts was a bond, with or without supervision, for an act of indecency (34.1 per cent), but this was the least common offence dealt with in these courts (*n* = 208 for the period 1994–2014).

The likelihood of imprisonment as the principal penalty in the Local Court (Figure 42b) was much lower, at 35.3 per cent for indecent assault, 34.9 per cent for child pornography, and around one in four for both sexual assault (24.2 per cent) and an act of indecency (25.2 per cent).[101] A bond with or without supervision was the most common penalty for sexual assault (38.4 per cent) and for an act of indecency (42.9 per cent). The next most common penalty for child pornography was a suspended sentence (27.0 per cent).

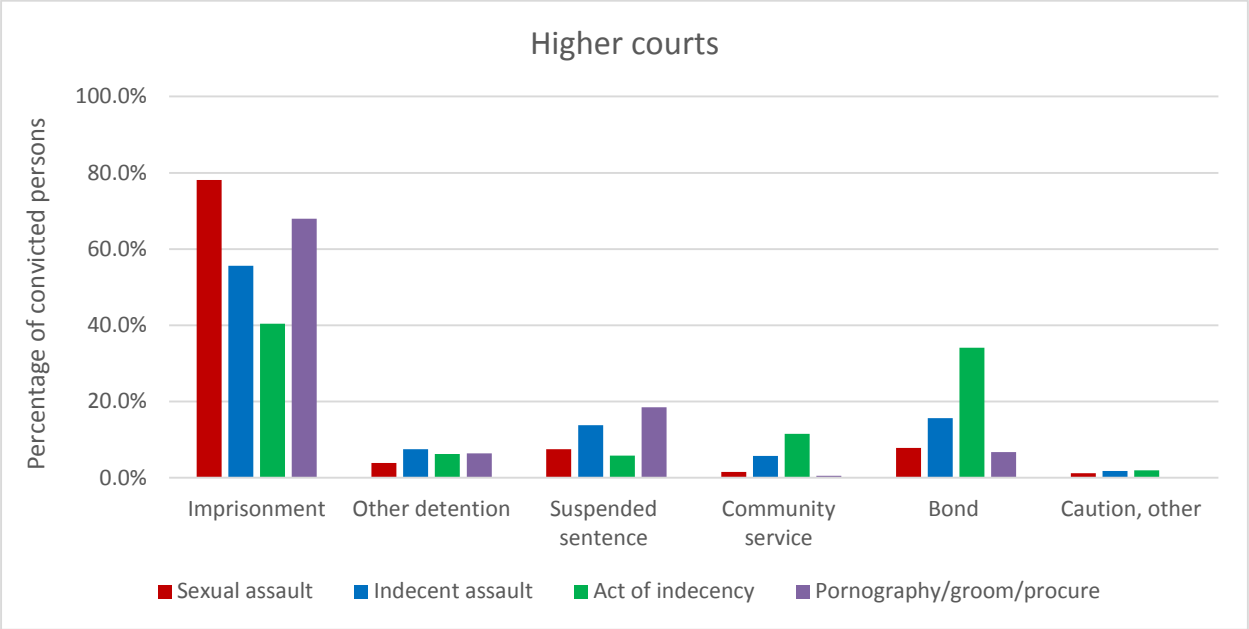


Figure 42a. Percentage of convicted persons with principal penalty by major offence category in the New South Wales higher courts

[101] Some of the delayed reporting of acts of indecency may have involved gross acts of indecency with a male under s 78Q of the *Crimes (Amendment) Act 1984* (NSW), which carried a penalty of two years imprisonment – s 78Q was repealed in 2003 and replaced by s 61N(1), s 61N(2) and s 61O(1) and s 61O(2).

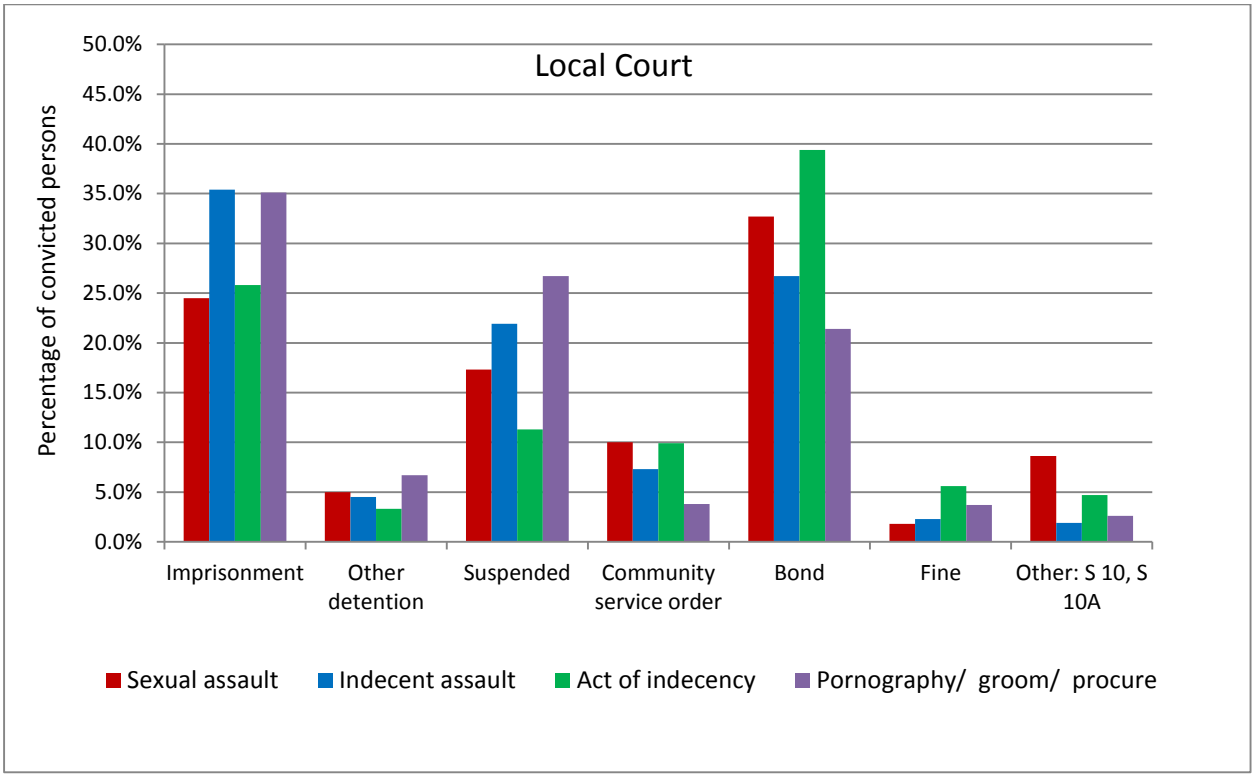


Figure 42b. Percentage of convicted persons with principal penalty by major offence and court in the New South Wales Local Court

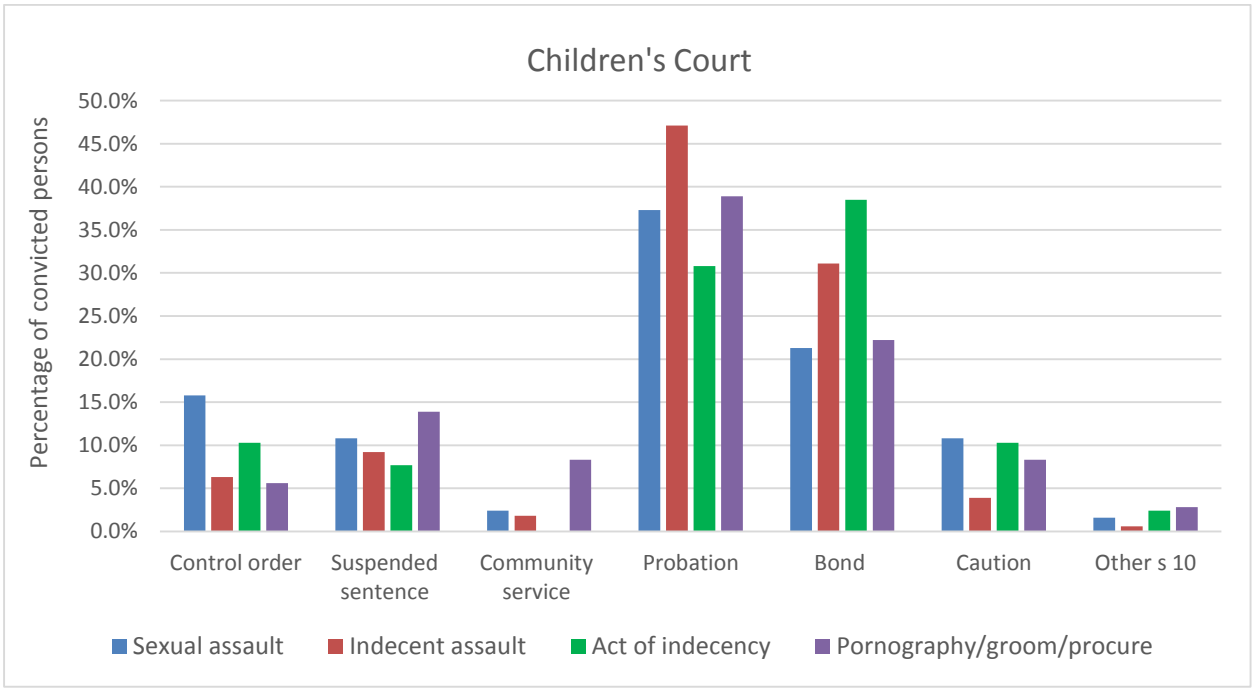


Figure 42c. Percentage of convicted persons with principal penalty by major offence and court in the New South Wales Children's Court

The most common principal penalty for those appearing in the Children's Court was probation (Figure 42c), particularly for indecent assault (*n* = 149, 47.6 per cent) and sexual assault (*n* = 130,

36.5 per cent); the percentage for child pornography was relatively high (41.9 per cent) but the overall number of young people receiving penalties for child pornography (*n* = 31) was low. The next most common penalty in the Children's Court was a bond, more commonly with supervision than without. One in 10 (*n* = 80, 10.4 per cent) of the 767 young people receiving a penalty in the Children's Court were given a custodial sentence (control order).

Imprisonment

As outlined above, imprisonment was the most common principal penalty in the higher courts and relatively common in the Local Court (after a bond). On average, those who were imprisoned received 2.99 sentences (SD = 3.77) in the higher courts (median of 2.0) and 1.98 sentences (SD = 1.72) in the Local Court (median of 1.0).

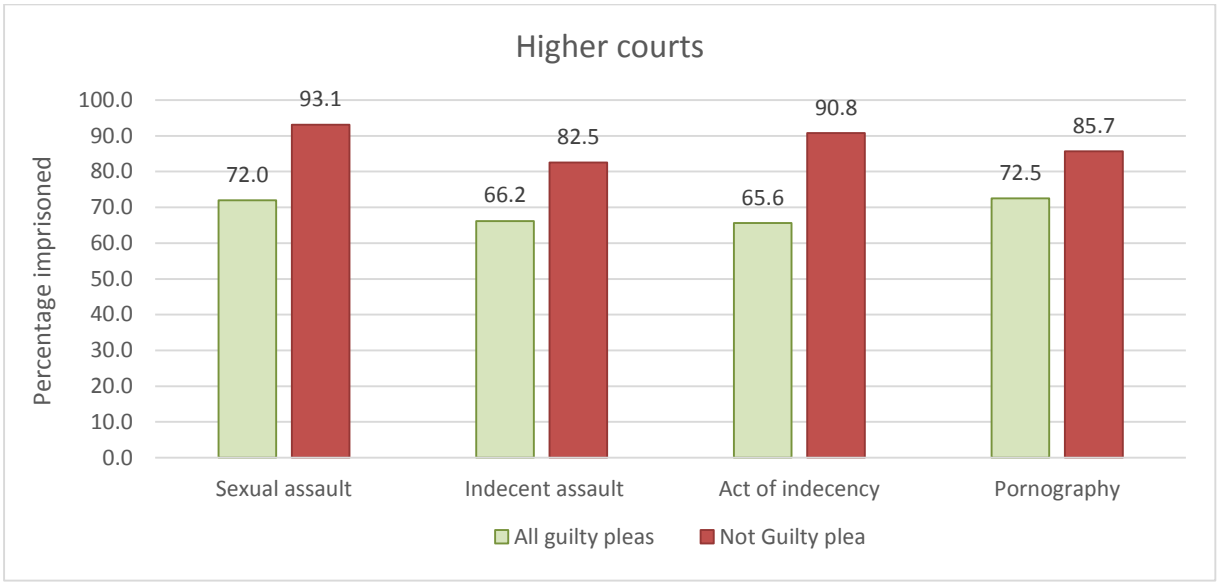
The following table indicates the quantum or median length as well as the mean length of the non-parole period for each court for the main offence categories. The term 'median' refers to the length of sentence that lies in the middle of the range of values; the advantage of the median is that compared with the mean, it is much less affected by extreme values or outliers (Hazlitt et al., 2004). By far the longest sentences (with a non-parole period) were imposed on offenders convicted of sexual assault offences in the higher courts; these were approximately twice as long as those for indecent assault imposed by the same court. In the Local Court, there was less difference in the length of sentence for the two offences.

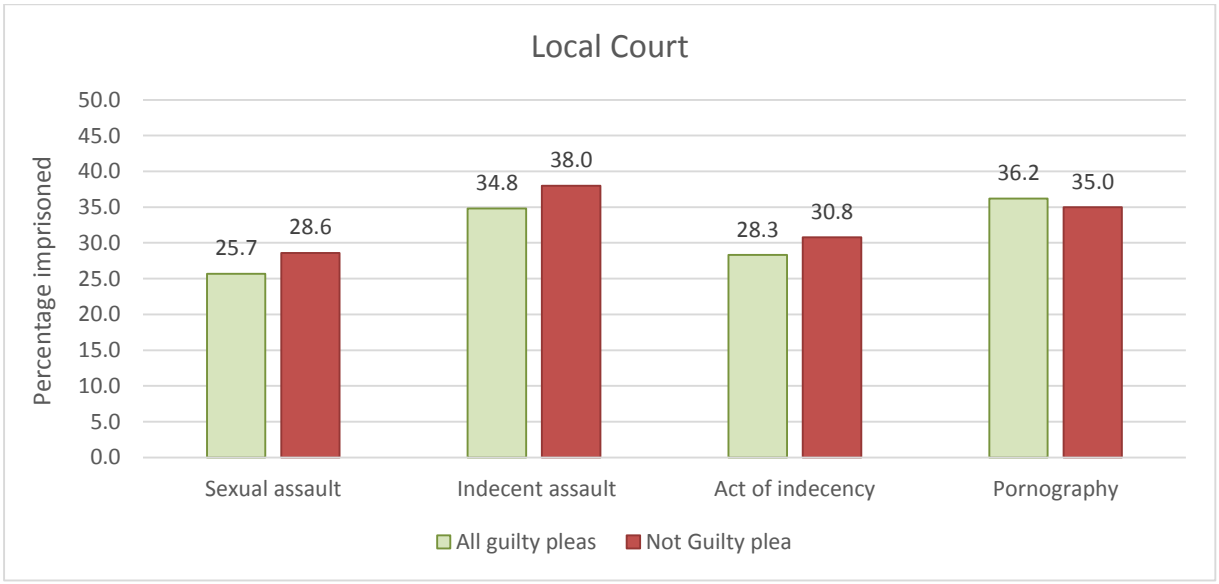
Table 10. Non-parole period (months) for full-time custodial sentences by type of offence

	Higher courts			**Local Court**		
	n	Median	Mean	*n*	Median	Mean
Sexual assault	1,778	31.7	37.4	54	8.5	9.6
Indecent assault	602	15.0	19.7	456	8.0	8.3
Act of indecency	84	12.0	14.9	158	6.0	7.2
Pornography	254	13.1	17.3	312	8.5	8.5
Total	**2,718**	**24.0**	**30.9**	**980**	**7.5**	**8.3**

Figures 43a and 43b show the percentage of offenders who received a full-time custodial sentence as a function of whether or not they pleaded guilty to all charges and were therefore sentenced without trial or a defended hearing. A discount is applied for pleading guilty because it saves court time and costs, and also avoids the need for complainants to give evidence. In the higher courts, 75.3 per cent of those who were convicted pleaded guilty to all charges, consistent with Hazlitt et al.'s (2004) finding that most offenders in the District Court pleaded guilty (at a rate of

approximately three to one). In the higher courts, those who pleaded guilty were markedly less likely than those who pleaded not guilty to receive a full-time custodial sentence, but they may have been pleading to modified or negotiated charges with a lesser penalty. In the higher courts, more than nine in 10 (93.1 per cent) of those convicted of sexual assault after pleading not guilty received a prison sentence compared with 71.5 per cent of those who pleaded guilty. As indicated, the rates of imprisonment in the Local Court were lower, and the difference by plea in the likelihood of a prison sentence was much less marked than in the higher courts (within 4 to 5 percentage points).

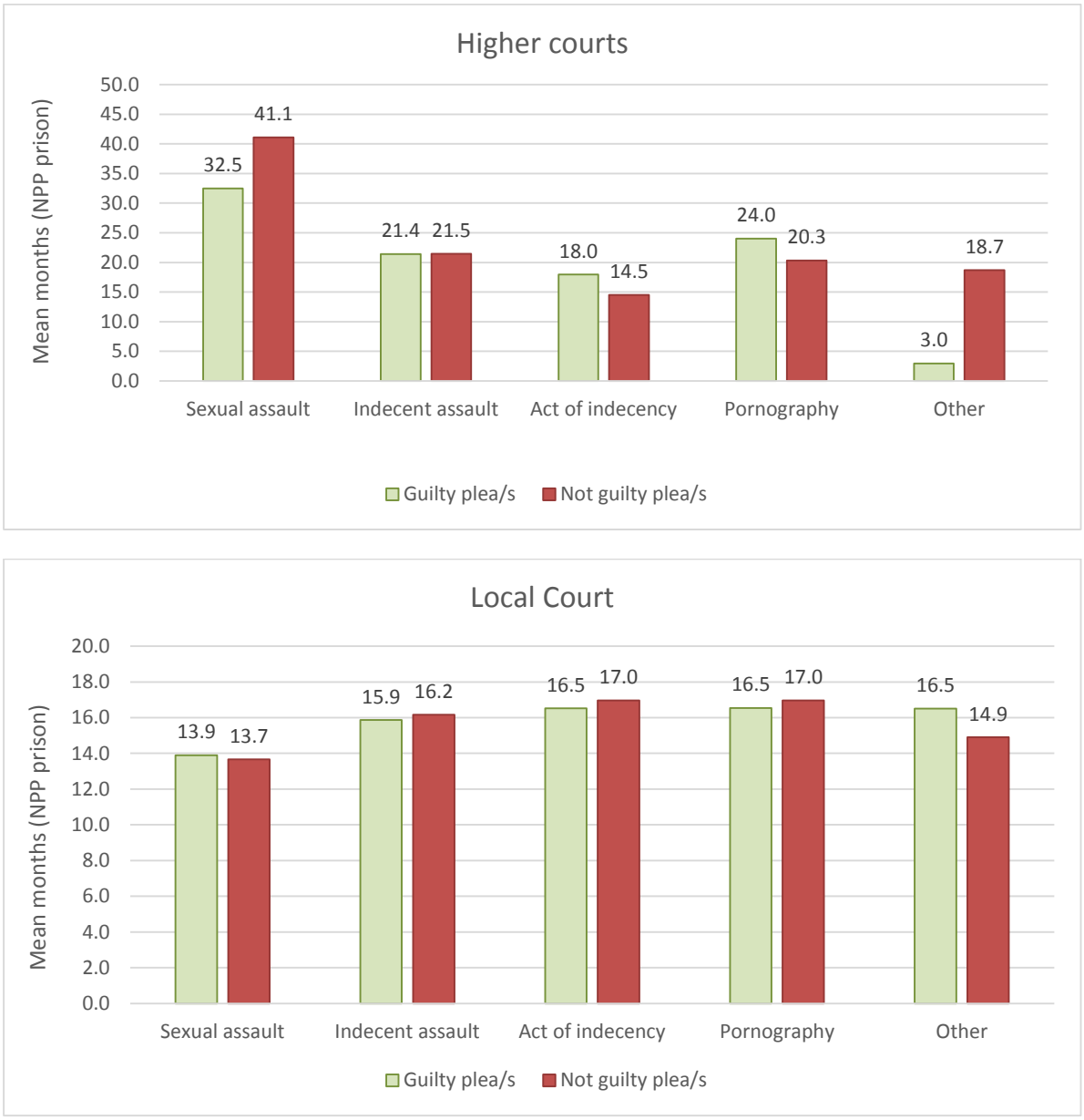




Figures 43a and 43b. Percentage of convicted persons who receive a full-time prison sentence by major offence category in New South Wales Local and higher courts

Note: The Local Court axis extends only to 50 per cent.

The average length of imprisonment (with a non-parole period) was also shorter for offenders who pleaded guilty to sexual assault in the higher courts than for those who did not; it was 32.5 months compared with 41.1 months, but there was little difference for the other offences or for offenders convicted in the Local Court (Figures 44a and 44b).

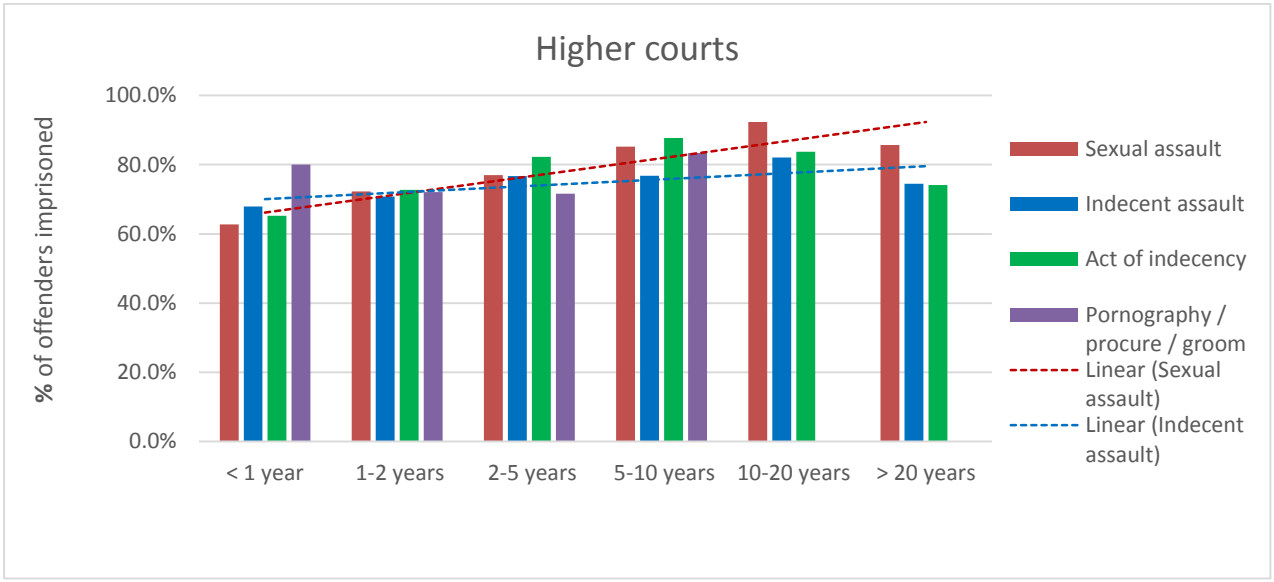


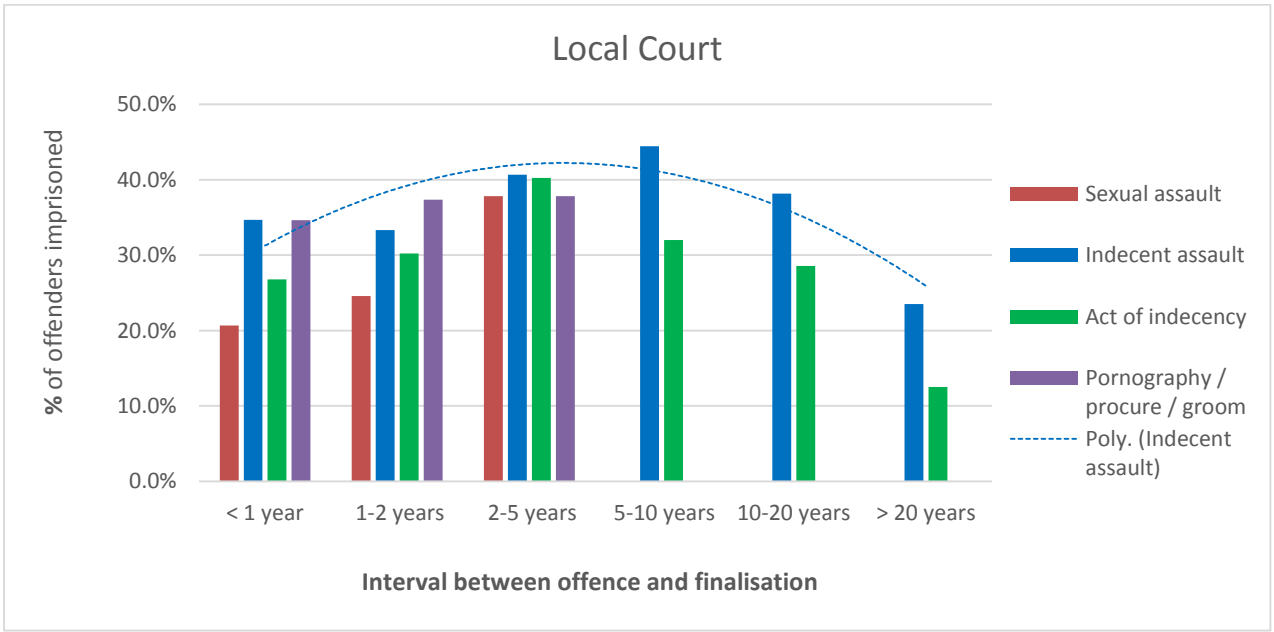
Figures 44a and 44b. Mean length of prison sentence by major offence category and plea in New South Wales (a) higher courts and (b) Local Court

The probability of a full-time custodial sentence also varied by the length of the delay between the offence and finalisation, and by the offence type and court (Figures 45a and 45b). In the higher courts, the longer the interval between the offence and finalisation at court for sexual assault offences, the higher the probability of an offender being given a prison sentence. With an interval of at least five years, the probability of a prison sentence was at least 85 per cent, but was greatest

for an interval of 10 to 20 years (92.4 per cent). The trend was similar for indecent assault and acts of indecency, but not for pornography, grooming and procuring a child for sexual activity; few if any offenders were convicted of pornography after an interval of 10 years or more from the date of offence.

In the Local Court (Figure 45b), the number of offenders convicted of indecent assault was generally substantially higher than for either sexual assault or an act of indecency. As Figure 40b shows, relatively few matters were finalised in the Local Court beyond five to 10 years from the date of the (earliest) offence. Sexual assault and pornography are excluded from Figure 45b beyond the five to 10-year interval because the very low numbers mean that any percentages would be misleading. The proportion of offenders receiving a custodial sentence increases, however, up to the 5-year period, particularly for sexual assault. In the Children's Court, only 11 per cent of young persons received a detention order for a sexual offence against a child.





Figures 45a and 45b. Proportion of those convicted who were imprisoned by gap between offence and finalisation by offence type in New South Wales (a) higher courts and (b) Local Court

In summary, the majority of persons convicted in the higher courts of a sexual offence against a child received a custodial sentence, with the length of that sentence (non-parole period) reflecting the seriousness of the offence and the absence of a guilty plea. A bond with or without supervision was more common in the Local Court, with between one-quarter and one-third of those convicted receiving a prison sentence. In the higher courts and Local Court, those who pleaded guilty were less likely to receive a custodial sentence, and if they did, it was significantly shorter than for those who pleaded not guilty. The highest proportion of custodial sentences was associated with convictions in the higher courts for (historical) child sexual assault offences (involving penetration) where the interval between the offence and finalisation was at least five years.

4.9 APPEALS AGAINST CONVICTION AND SENTENCE 2005–13

Appeal decisions represent the final step in the prosecution of child sexual assault cases in which the decisions of juries and other courts may be overturned on appeal against conviction and/or sentencing. A successful appeal against conviction may lead to acquittal or retrial. Sentencing appeals may lead to sentences being varied, and result in a more lenient sentence.

The primary aim of the appeal study was to investigate whether there were any differences in the grounds of appeal and outcomes in historical cases of child sexual abuse compared with those involving a child complainant/witness in appeals against conviction and sentencing, taking into account the characteristics of those cases.

There were 291 appeal cases over the period 2005–13. The vast majority (89 per cent) involved appeals by the accused; 54 per cent were against conviction and 64 per cent against sentence. The estimated rate of appeal against conviction and/or sentence in child sexual abuse cases was almost 17 per cent. This suggests a marked reduction in the proportion of child sexual abuse appeals against conviction between 2000 and 2013, from 61.3 per cent in 2000 to 31.4 per cent in 2013. For appeals against conviction alone, Donnelly et al. (2011) reported an appeal rate against child sexual assault convictions of 52.6 per cent for the period 2000–07, and 50.3 per cent for sexual assault offences involving an adult victim compared with about 33 per cent across all categories of offences (xii, 199).

Outcome of sentencing and conviction appeals

More than half of the 291 appeals (156, 54 per cent) were successful, wholly or in part, on appeal. The Crown lodged 34 appeals against the leniency of the sentence; 22 (64.7 per cent) were upheld and a new sentence ordered; seven of 12 such appeals from 2000 to 2003 were successful (Hazlitt et al., 2004).

Appeals by the accused against the severity of a sentence were successful in 96 of the 158 cases (60.8 per cent), substantially higher than the 44.4 per cent success rate for 2000–03 reported by the Judicial Commission of New South Wales (Hazlitt et al., 2004).

Conviction appeals were upheld in 39 of the 139 cases (28.1 per cent) – a marked decrease from the 55.9 per cent success rate for the period 2000–03 (Hazlitt et al., 2004) and 50.3 per cent for the period 2001–07 (Donnelly et al., 2011). Most of the successful conviction appeals resulted in a new trial (76.9 per cent) and 23.1 per cent in an acquittal. This acquittal rate is lower than the 51.5 per cent rate reported by Hazlitt et al. (2004) and 42.7 per cent reported by Donnelly et al. (2011). The reason for this drop-off in acquittal rates is unclear. It is possible it reflects changes in the law over this period which has impacted on judicial directions, such as changes relating to Longman directions that have made such directions less susceptible to error and to miscarriages of justice.

Just over half of the appeals against conviction included argument on the basis that the verdict of the jury was unreasonable or could not be supported having regard to the evidence; 10 per cent of these cases were successful on this basis.

About one-third of the appeals against conviction included argument that the verdict should be overturned on the basis of an error on a question of law (with objection raised at trial), and of these one-quarter were successful. Just under three-quarters of the conviction cases raised miscarriage of justice on any other ground, and a little over one-quarter were successful.

A majority of appeals against conviction were argued on more than one ground. The findings suggest that judicial misdirections remain a significant source of error in child sexual assault trials, which generate a basis for overturning convictions and jury verdicts; 16.5 per cent of all conviction appeals succeeded on this basis and more than half of the successful appeals against conviction cases involved judicial misdirection.

Historical and non-historical matters

Of the appeals, 28.9 per cent (84 out of 291) were identified as historical matters where the complainant/victim reported the abuse or offence as an adult. Almost 60 per cent of historical cases of child sexual abuse were intra-familial.

One in four (74 cases, 25.4 per cent) involved delay as an issue on appeal; 48 were historical and 26 were not. Of the appeals, 21 (43.8 per cent) of the historical matters and six (23 per cent) of the non-historical matters succeeded. Not surprisingly, this suggests that delay continues to be more of an issue in historical cases than non-historical cases, though the numbers are small and caution is warranted.

Fifteen cases raised an appeal related to a *Longman* direction; nine were historical matters. Of these 15 cases, only four – all historical matters with delay ranging from six to 20 years – were successful on the basis of a *Longman* misdirection.

There were few other substantive differences between historical and non-historical child sexual abuse appeal cases. Overall, historical child sexual abuse appeals (against both conviction and sentencing) were more successful than non-historical appeal cases in the period 2005–13, but this has reduced over time and with a fair amount of fluctuation.

Institutional child sexual abuse cases

Twenty-nine cases were identified as institutional child sexual abuse involving persons in positions of authority in relation to the child, such as teachers, clergy and youth workers; 17 of these were historical matters. Just under half of these cases revealed delay in complaint/reporting of 20 years or more. Less than one in three appeals relating to institutional sexual abuse (11 out of 29) were successful in the period 2005–13.

Of the 17 historical cases, six involved an appeal against conviction only, four an appeal against sentence only, and four were appeals against both conviction and sentence. Three were appeals by the Crown, two against the leniency of the sentence, and the third an interlocutory appeal. Nine were successful wholly or in part and eight were dismissed on appeal. Five of the nine successful appeals in historical 'institutional sexual abuse' cases involved an appeal by the accused against conviction; four out of the five were successful on the grounds of conviction, one of which was also partly successful on the grounds of sentencing; three were conviction-only appeals, and two were conviction and sentencing appeals. Four of the five were successful on their conviction ground, one of which was also successful in part on its sentencing grounds.

In summary, the success rate for appeals against conviction for the period 2005–13 (28.1 per cent) appears to have dropped from the earlier rates reported in two reports by the Judicial Commission of New South Wales: for 2000–03 (55.9 per cent) reported by Hazlitt et al. (2004) and for 2003–07 (50.3 per cent) by Donnelly et al. (2011). However, the success rate for appeals by the accused against sentence has increased from 44.4 per cent (40 out of 90 cases) in 2000–03 to 60.8 per cent (96 out of 158 cases). Twenty-two of the 34 (64.7 per cent) Crown appeals against the leniency of a sentence were upheld for 2005–13; all resulted in a new sentence being ordered. In the earlier period (2000–03), seven of the 12 Crown appeals against sentence were successful (Hazlitt et al., 2004).

One in four cases involved delay as an appeal issue, most of which were historical cases; the appeals in historical matters were more likely to be successful than appeals in those that were not historical.

Over the last decade, some changes in law and practice have arguably streamlined, clarified and minimised potential error in judicial warnings and directions. However, judicial misdirections appear to be a continuing source of error in child sexual assault trials, generating a basis for overturning convictions and jury verdicts. Most of the judicial errors related to giving inadequate warnings to the jury, unbalanced judicial summing-up in a case, and failure to correctly direct the jury.

5 SOUTH AUSTRALIAN POLICE DATA

The South Australian data provide a useful comparison for New South Wales. Although it is a smaller state, it is the only other state with a body that undertakes statistical analysis equivalent to BOCSAR. Like BOCSAR, OCSAR can produce 'clean' datasets for both the police and court data collections.

OCSAR provided the data in accordance with a Notice to Produce issued by the Royal Commission. The data comprise two *police* datasets and a *court* dataset. The police record victim and offence data on police incident reports[102]; they record data on the arrest, and on the suspect or 'offender' on police apprehension reports.[103] According to OCSAR (2014):

> When police identify a person suspected of having committed an offence and they have sufficient information to proceed against that individual by way of an apprehension, an apprehension report is filed, detailing the offences alleged against the suspect … The same individual may be apprehended more than once during the year, and therefore be the subject of more than one apprehension report. Moreover, each apprehension report may contain more than one offence or multiple counts of the same offence (Profile of Apprehensions in South Australia, OCSAR, 2014).

The data extraction was designed to draw out all sexual offences against children using the JANCO codes[104] from 1992 to 2012 by matching the two police datasets using a master Police Identification Number (PIN).[105] (See Appendix 1 (South Australia) for further details about the data management process.)

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[102] In the South Australian data, a given 'incident' always involves a single victim but a given victim may be associated with multiple incidents.

[103] It should also be noted that one apprehension report may clear multiple incident reports as the accused may have committed multiple offences against multiple victims. In some instances, multiple apprehension reports can also clear a single incident report where one victim was victimised by multiple offenders.

[104] 'The JANCO classification system is the South Australian adaptation of the Australian Bureau of Statistics' offence classification system ANCO (Australian National Classification of Offences, 1985, Catalogue No. 1234.0)' – Office of Crime Statistics and Research, *JANCO Classification System,* Technical Paper, October 2011, p 1.

[105] The Police Identification Number (PIN) is assigned to individuals upon initial contact with police and is a *unique identifier* that is used across the justice system (police, courts and corrections) for the life of the individual. An individual's PIN may appear in both the victim and accused datasets as they may have been both a victim and a sexual offender at some stage in their history.

The OCSAR *court* dataset is based on cases that were heard and finalised in the courts between 1992 and 2012.[106] It does not include cases that were still in the court process at the time the data was extracted (post-2012).

As far as possible, the South Australian data analyses included the same criteria and similar coding and categorisation of variables as was used in the New South Wales data analyses. For example, offence type was coded in line with the New South Wales data to create four main categories:

- sexual assault defined as sexual intercourse/penetration
- indecent assault
- act of indecency/aggravated act of indecency
- child pornography/grooming for pornography and other sexual offences.

As outlined earlier, law reform since the 1980s in both New South Wales and South Australia, as in all Australian states, has made significant changes to the relevant legislation by:

- expanding the definition of sexual intercourse or penetration
- decriminalising homosexual sexual acts
- including further categories of persons in a position of trust or authority in relation to a child
- including and expanding child pornography offences (Boxall, 2014).

While there are differences in the wording and timing of these changes, and the penalties attached to these offences, the overall effect is similar.

However, a significant difference between the two states was the barrier to prosecuting historical offences imposed by the statute of limitations in South Australia. The statute of limitations was abolished in June 2003, with the *Criminal Law Consolidation (Abolition of Time Limit for Prosecution of Certain Sexual Offences) Amendment Act 2003*, which deleted s 76A and inserted s 72A: 'Any immunity from prosecution arising because of the time limit imposed by the former section 76A is abolished' (See Appendix 2 (South Australia)). A minor difference is the age of consent for sexual intercourse – it is 17 years for both heterosexual and homosexual intercourse in South Australia rather than 16 years in New South Wales, and most other Australian states; it is 16 years in South Australia for other sexual acts (Boxall, 2014).

[106] A matching process using the 'master PINs' set for 'accused offenders' was performed on the courts' finalised cases dataset (all cases finalised in 1992–2012) to extract all cases finalised in court against the accused offenders. The data for 1991 was excluded because of missing matching data.

5.1 GENERAL TRENDS IN REPORTING OF CHILD SEXUAL OFFENCES TO POLICE

The trend patterns in the South Australian data for the period 1992–2012 (Figure 46) are somewhat different to those in New South Wales but, like New South Wales, the reporting peaks coincided with the conduct of two major inquiries, one into child protection (the Layton Inquiry) and another into the abuse of children in state care (the Mullighan Inquiry). Reports of both sexual assault and indecent assault[107] peaked between 2003 and 2007, when these inquiries were being run.[108] The Mullighan Inquiry was established in 2004 and reported in 2008; it heard from 792 people who reported being victims of child sexual abuse. Some people made allegations against more than one perpetrator. Even where there was just one allegation of an act of child sexual abuse, it could involve more than one perpetrator. Victims of child sexual abuse made 1,592 allegations with some dating back to the 1930s against 1,733 alleged perpetrators of child sexual abuse (Mullighan, 2008, p 24). While 533 of these people did not come under the terms of reference of the inquiry because their alleged abuse did not occur when they were in state care, a number of these people and the 242 who had been abused in state care[109] may have reported their abuse to the police. The media coverage may also have motivated others to report to their abuse to police.

Both the reported acts of indecency and of child pornography have a lower base and show different trends – a slight downward trend in the number of reported incidents of acts of indecency and an upward trend in child pornography (Figure 46).

[107] The number of sexual assault incidents peaked at 670 in 2003 and 602 in 2007, and indecent assault incidents peaked at 595 in 2004.

[108] The Layton and Mullighan inquiries reported in 2003, 2005 and 2008. The 2003 child protection review (the *Layton Report*) by Robyn Layton QC, is available at *Our best investment: a state plan to protect and advance the interests of children*. The Hon EP Mullighan QC, Commissioner, presented the full report to the South Australian Parliament in 2008 and it is available at *Children in State Care Commission of Inquiry: Allegations of sexual abuse and death from criminal conduct*. Please also see the Mullighan Inquiry, Children on the APY Lands Inquiry, 2008.

[109] At the time of the alleged abuse, 242 people – 124 males and 118 females – were children in state care. They made 826 allegations against 922 alleged perpetrators (Mullighan report, p 24).

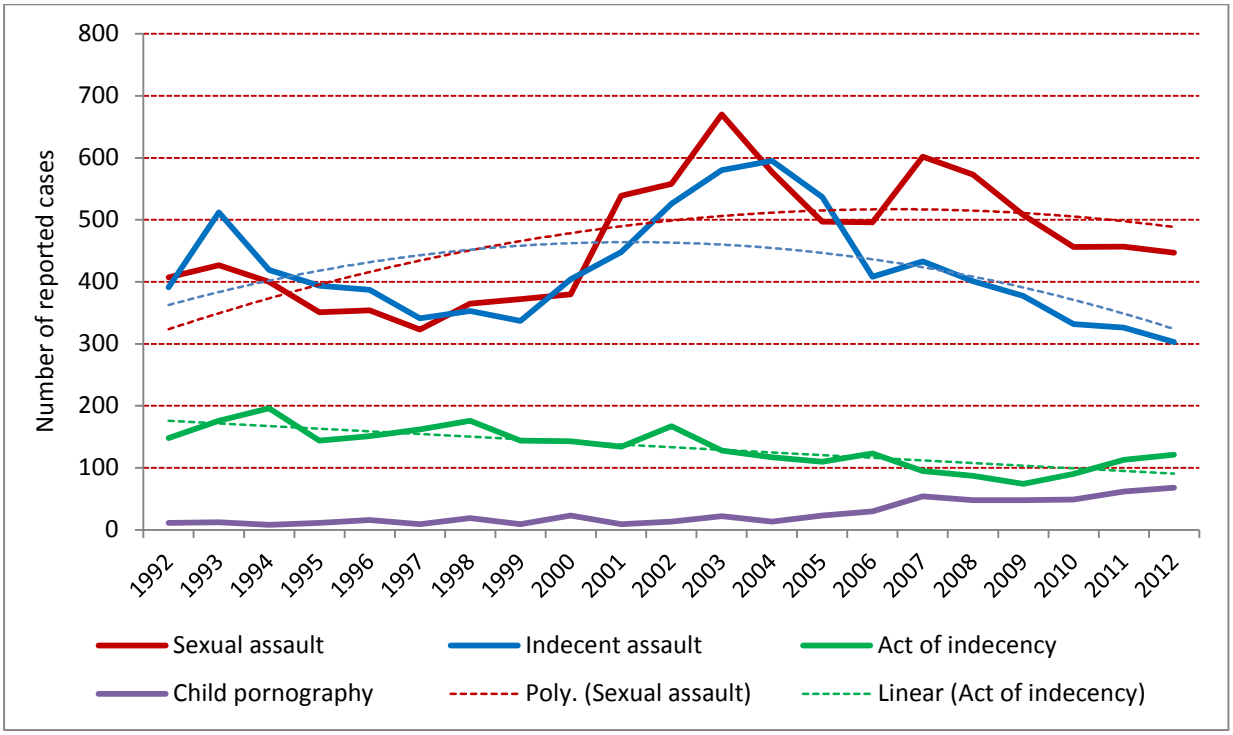


Figure 46. Number of incidents of sexual offences against children reported to South Australia Police

Gender of victim

Figure 47 shows the number of reported child sexual offence incidents involving male and female victims. As in New South Wales, the majority of victims were female (78.7 per cent). The proportion of victims in indecent assault incidents (25.1 per cent) who were male was substantially higher than for sexual assault (17.8 per cent); this latter figure was somewhat lower than for New South Wales (21.7 per cent).

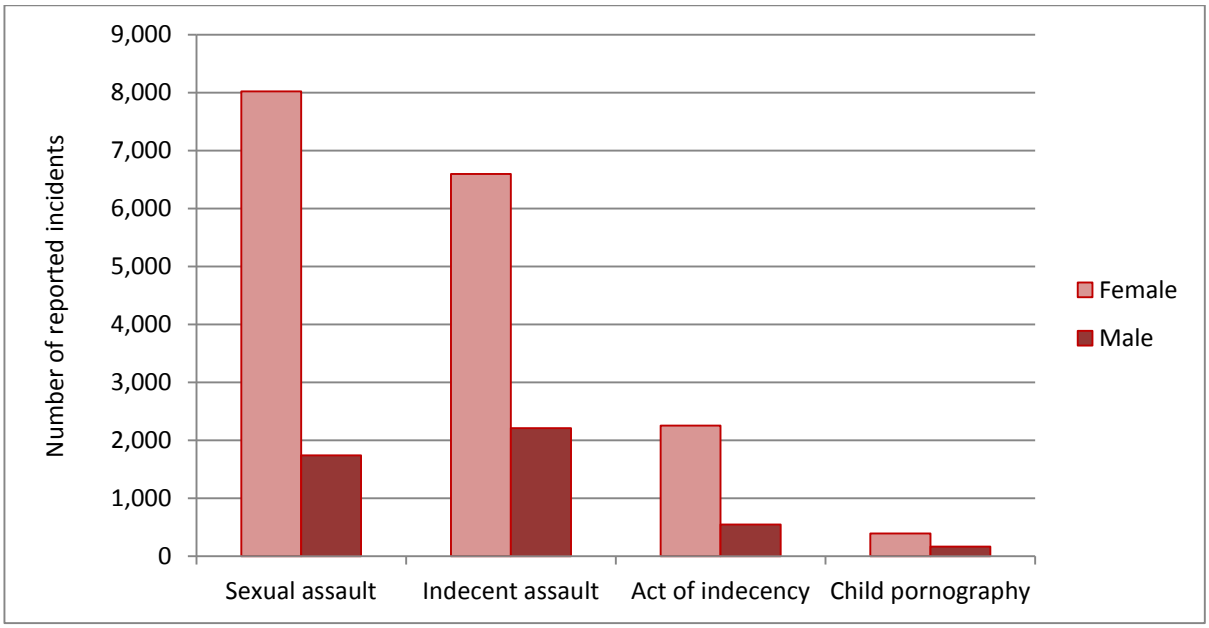


Figure 47. Number of reported incidents by victim gender and type of offence in South Australia

Age of victim

Figure 48 shows the breakdown by age of the victim for each offence category. The number of reported incidents generally increased with age for all offences, though more victims aged 10–13 were involved in indecent assault than for other age groups. As in New South Wales, those aged 14–17 were most likely to have been the victim in sexual assault incidents (*n* = 4,180), comprising 47.7 per cent of the victims of sexual assault and just over half (51.9 per cent) of those aged 14–17. More than one-third (36.2 per cent) of the victims of sexual assault were under 10; similarly, the New South Wales figure was 35.3 per cent. Again as in New South Wales, most children involved in child pornography were 10 and older (81.0 per cent in South Australia and 87.1 per cent in New South Wales).

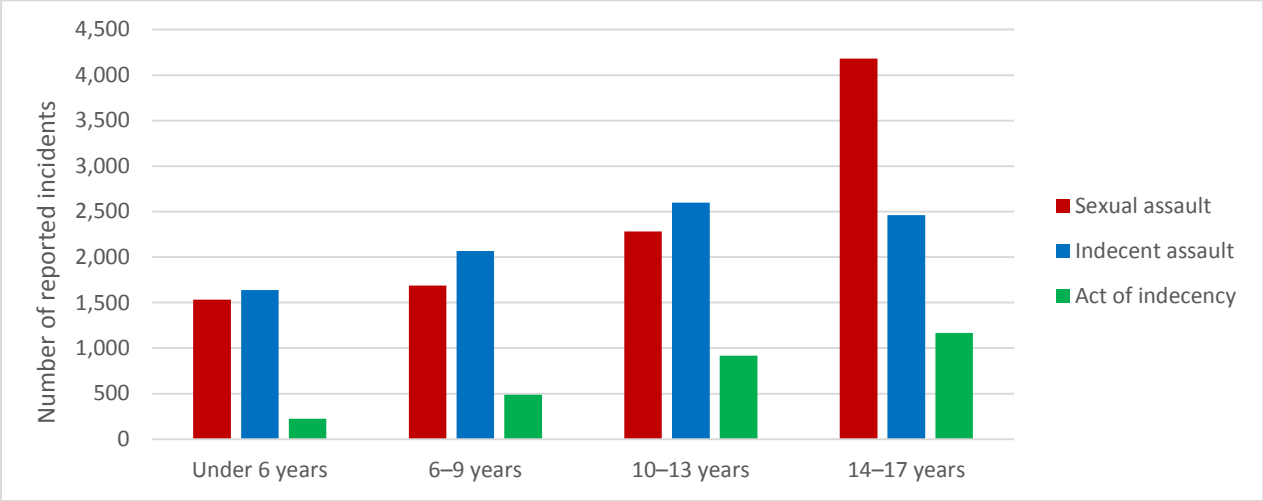


Figure 48. Number of reported incidents by victim age and type of offence in South Australia

As in New South Wales, boys were more likely than girls to be in the two age groups under 10; nearly half (47.9 per cent) of the boys were under 10 compared with just under one in three girls (32.1 per cent). Unlike New South Wales, in South Australia the discrepancy in the pattern by gender and age was marked across all three main offence types.

Table 11. Number and percentage of incidents involving male and female victims by age

	Female		Male		Total	
Age	***n***	**%**	***n***	**%**	***n***	**%**
Under 6 years	2,461	14.3	972	20.9	3,433	15.7
6–9 years	3,058	17.8	1,251	27.0	4,309	19.8
10–13 years	4,588	26.7	1,411	30.3	5,999	27.5
14–17 years	7,061	41.1	997	21.3	8, 058	37.0
Total	**17,168**	**78.9***	**4,631**	**21.1***	**21,799**	**100.0**

* Percentage of total

Relationship of the suspect/person of interest to the victim

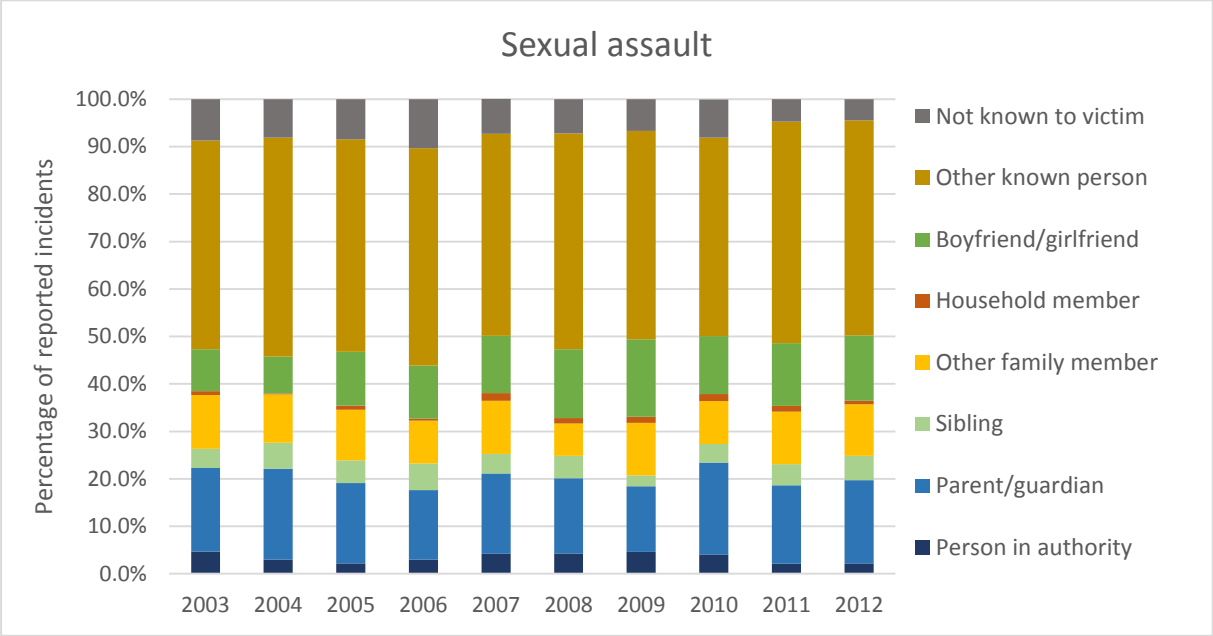
To facilitate comparison with the New South Wales data, only sexual assault and indecent assault incidents reported from 2003 to 2012 were considered. In addition, the detailed coded categories for the relationship between the victim and the suspect were grouped to match those used for New South Wales.[110] The variety of offences was dealt with by categorising each incident according to the major offence, as described earlier in this report.

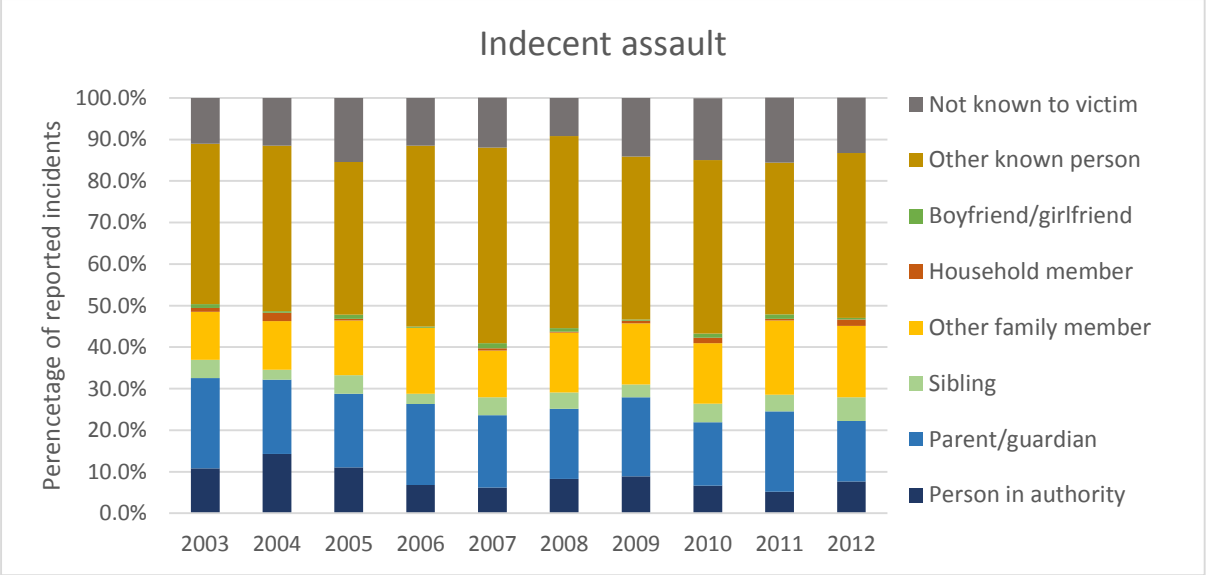
Figures 49a and 49b show the percentage of sexual assault and indecent assault cases, respectively, by the relationship between the victim and the suspect. As in New South Wales, only a very small proportion of incidents involved a person in a position of authority in relation to the child such as a teacher, member of the clergy, carer, or youth worker (a proxy for institutional abuse).[111] The percentage of 'institutional abuse' incidents was somewhat higher for indecent assault than for sexual assault, peaking at 14.3 per cent for indecent assault in 2004. The overall percentage for indecent assaults was 9.2 per cent and 3.5 per cent for sexual assault. The higher figures in the years 2003 to 2005 may reflect the impact of the Layton and Mullighan inquiries.

Family members were involved in about one-third of the sexual assault incidents (on average 32.4 per cent) and 36 per cent of indecent assault incidents. Parents and guardians were on average involved in 16.8 per cent of sexual assaults and 17.9 per cent of indecent assaults. Siblings were involved in a small number – about 4 per cent on average. For 44.6 per cent of sexual assault incidents and 40.9 per cent of indecent assault incidents reported over this period, the person of interest was another known person but unrelated to the victim (ranging from 37 per cent to 47 per cent). Another 12 per cent of sexual assault incidents but less than 1 per cent of indecent assault incidents involved a boyfriend or girlfriend. Less than 1 per cent of sexual assault and indecent assault incidents involved a household member.

[110] Some of these codes appear to have been subject to the same coding variations in 'viewpoint' as those from New South Wales. Accordingly, the South Australian categories 'detainee', 'ex-partner/de facto', 'ex-partner opposite sex', 'ex-spouse', 'grandchild', 'partner opposite sex', 'partner same sex', 'partner/de facto', 'prisoner', 'son/daughter', 'spouse', 'step-child' and 'patient' were omitted. These made up from 0.6 per cent to 1.8 per cent of the combined sexual and indecent assault cases each year from 2003 to 2012.

[111] The South Australian data included a smaller set of categories in the victim dataset for the relationship of the suspect to the victim. The category 'persons in authority' as a proxy for 'institutional abuse' included carers, clergy, health professionals (doctors and nurses), police officers, teachers and tutors, employers and youth leaders.





Figures 49a and 49b. Percentage of (a) sexual assault and (b) indecent assault incidents by suspect-victim relationship by year in South Australia

The most common relationship was someone known to the child but not related: 45 per cent of sexual assaults and 41 per cent of indecent assaults. Only 7.5 per cent of suspects in sexual assaults and 12.9 per cent in indecent assaults were not known to the victim.

Overall, just under 20 per cent (19.7 per cent) of persons of interest were under 18 and a further 9.5 per cent were under 20. Over half (56.7 per cent) of the persons of interest who were under 18 were known to the child but not related, 16 per cent were siblings, and another 11 per cent were another family member. Just under a third (31.8 per cent) of those recorded as a boyfriend or girlfriend of the victim were under 18 but just as many (31.8 per cent) were 20 to 40 years old.

5.2 DELAYS IN REPORTING

Reports made in childhood and adulthood

South Australian reports to the police of sexual offences against children were, like those in New South Wales, primarily reports made while the victim was a child (aged under 18). Overall 84.3 per cent of reports were made in childhood, with peaks in excess of 1,000 reports in 1993 (1,034) and 2002 (1,093). The number of reports made in adulthood (Figure 50) shows a somewhat different pattern, increasing from 39 (4.3 per cent of all reports in 1992) to a peak of 406 in 2004 and 360 in 2007 (32 per cent and 31.9 per cent of all reports, respectively, compared with an overall average of 15.7 per cent). These peaks coincide with the Mullighan Inquiry, during which 792 people reported their sexual abuse as children; the vast majority of these complainants (84 per cent) were aged over 18 when they reported abuse that occurred decades earlier, in some cases dating back to the 1930s. A number of these were reported to the police during the inquiry. The peak in 2004 and the higher numbers beyond are also likely to be associated with the abolition of the statute of limitations in June 2003, which removed the time limit on the prosecution of sexual offences against children. Significantly, South Australia Police established the Paedophile Task Force to deal with the 20-year backlog of cases that could then be prosecuted, as well as the cases arising from the Mullighan Inquiry.

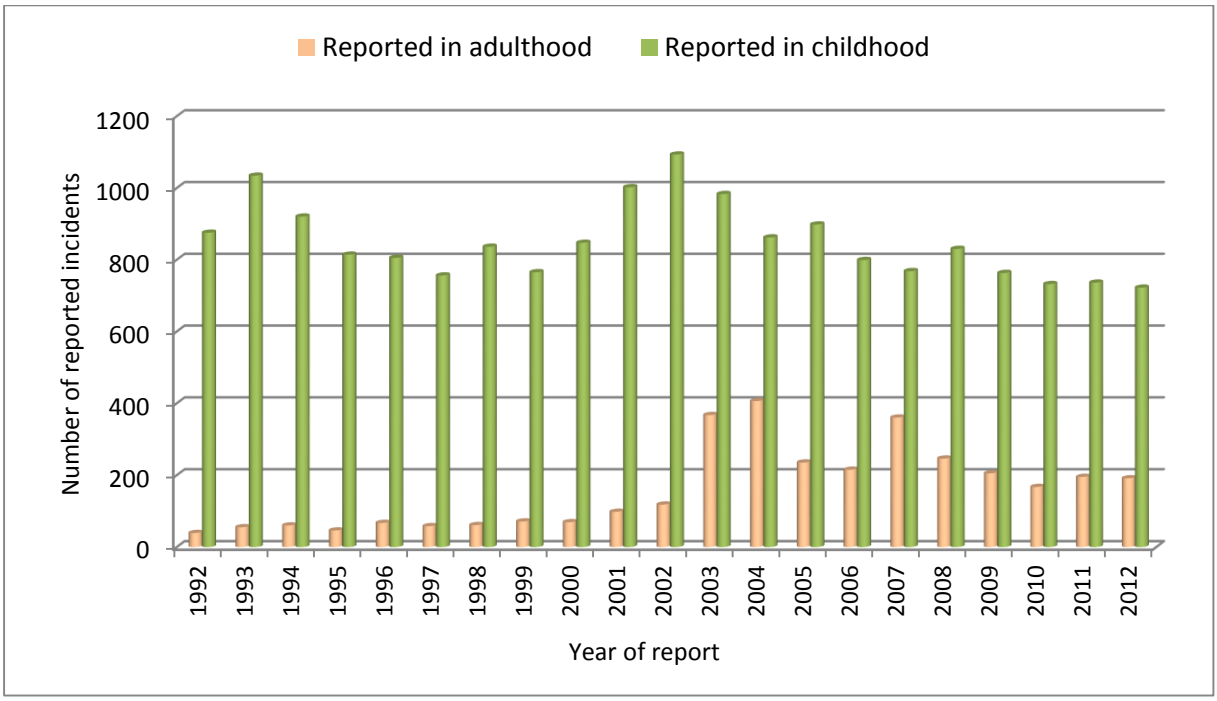
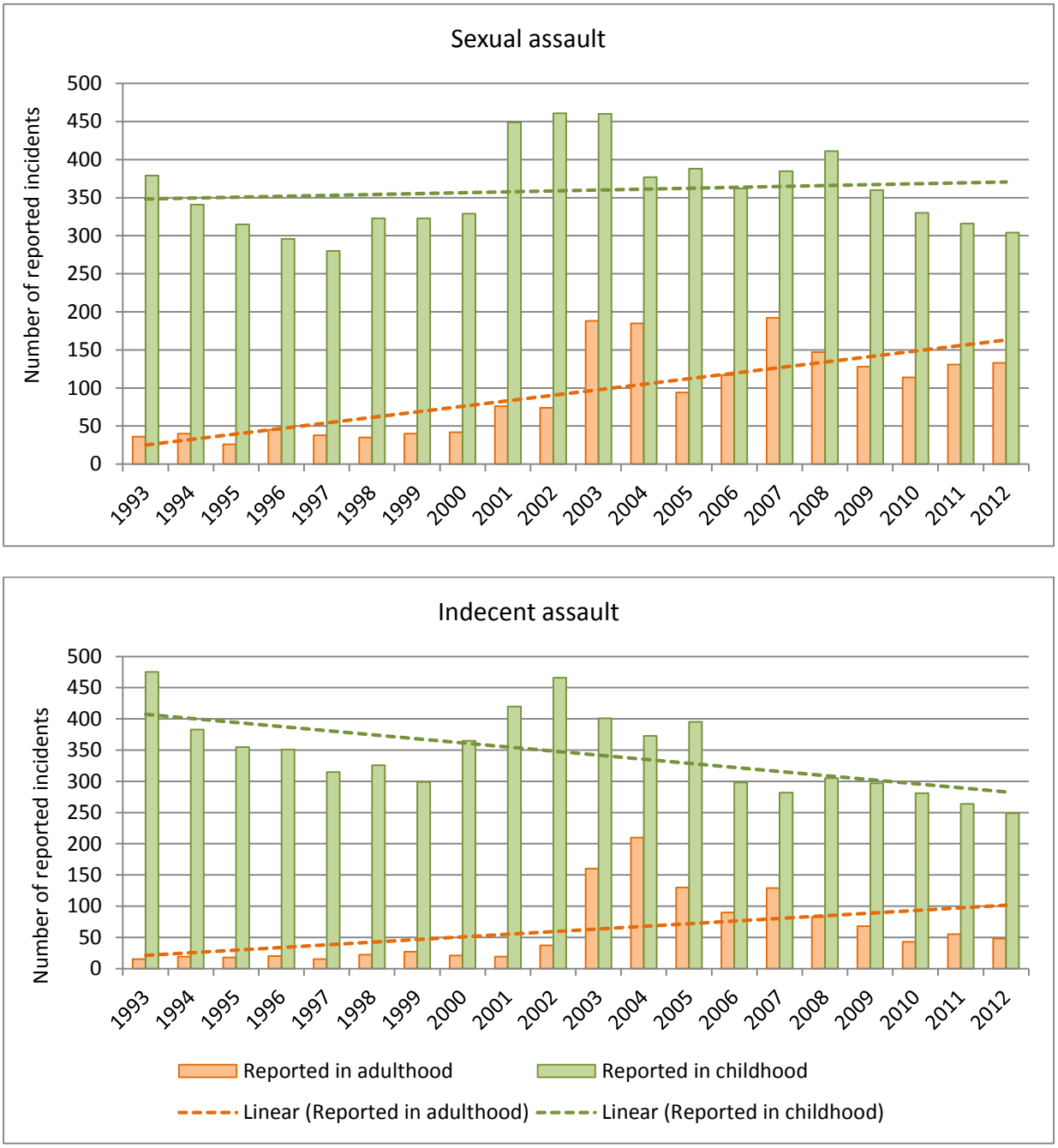


Figure 50. Number of child sexual offence incidents reported in adulthood and childhood in South Australia

Figures 51a and 51b show the number of sexual assault and indecent assault incidents reported in childhood and adulthood. Although the patterns for both types of offence are quite similar, overall sexual assault was more likely to have been reported during adulthood (19.8 per cent) than indecent assault (14.3 per cent), with peaks in both in certain years (in 2007, about one in three

sexual assaults and indecent assaults were reported in adulthood). There were very few acts of indecency reported in adulthood – averaging six per year with the exception of 19 in 2003.



Figures 51a and 51b. Number of incidents of (a) sexual assault and (b) indecent assault reported in adulthood and in childhood in 1993–2012 in South Australia

Figure 52 shows the number of cases reported while the complainant was still a child for the three main offence types. The pattern is very similar for sexual assault and indecent assault, again with peaks in 1993 and between 2001 and 2003, and then declining. There is, however, a downward trend in the number of indecent assaults over the whole period.

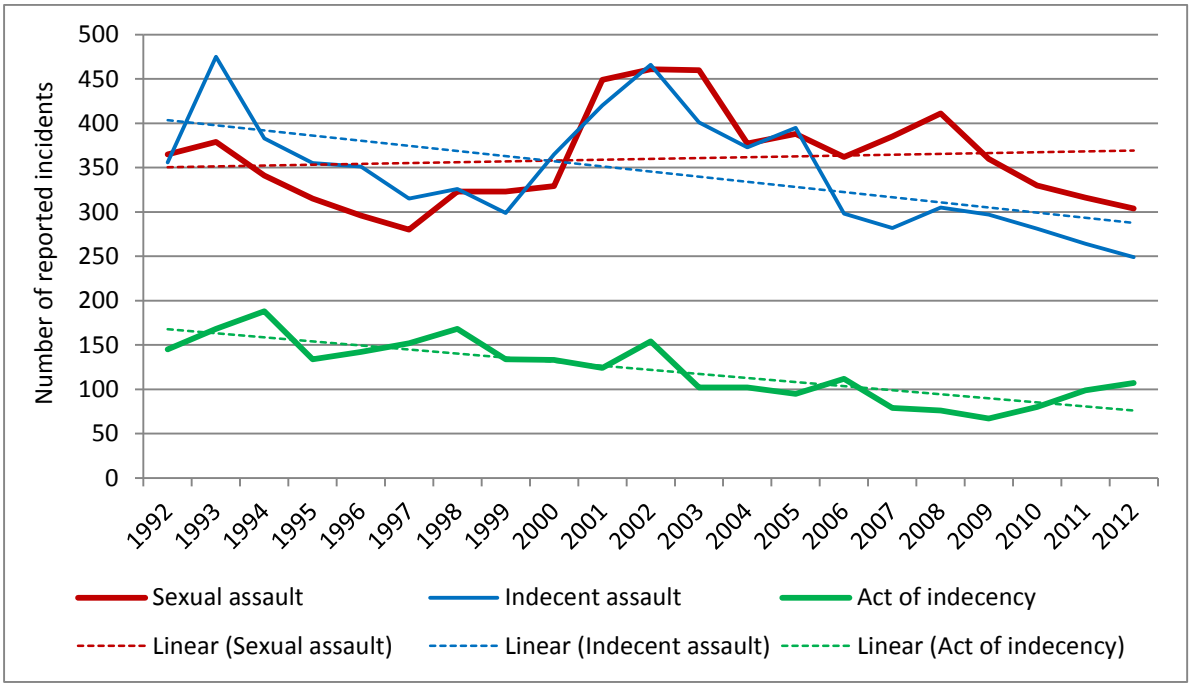


Figure 52. Number of child sexual offence incidents reported in childhood by offence in 1992–2012 in South Australia

The decreasing (indecent assault) or flat (sexual assault) trend lines in South Australia for child reports are quite different to the increasing trend lines in New South Wales (Figure 7).

In contrast, the number of sexual assault and indecent assault cases reported in adulthood (Figure 53) shows a steep increase in 2003 and 2004, with another peak in 2007 for sexual assault, and to a lesser extent for indecent assault. The number of acts of indecency reported in adulthood is very low, averaging only six, with a high of 19 in 2003.

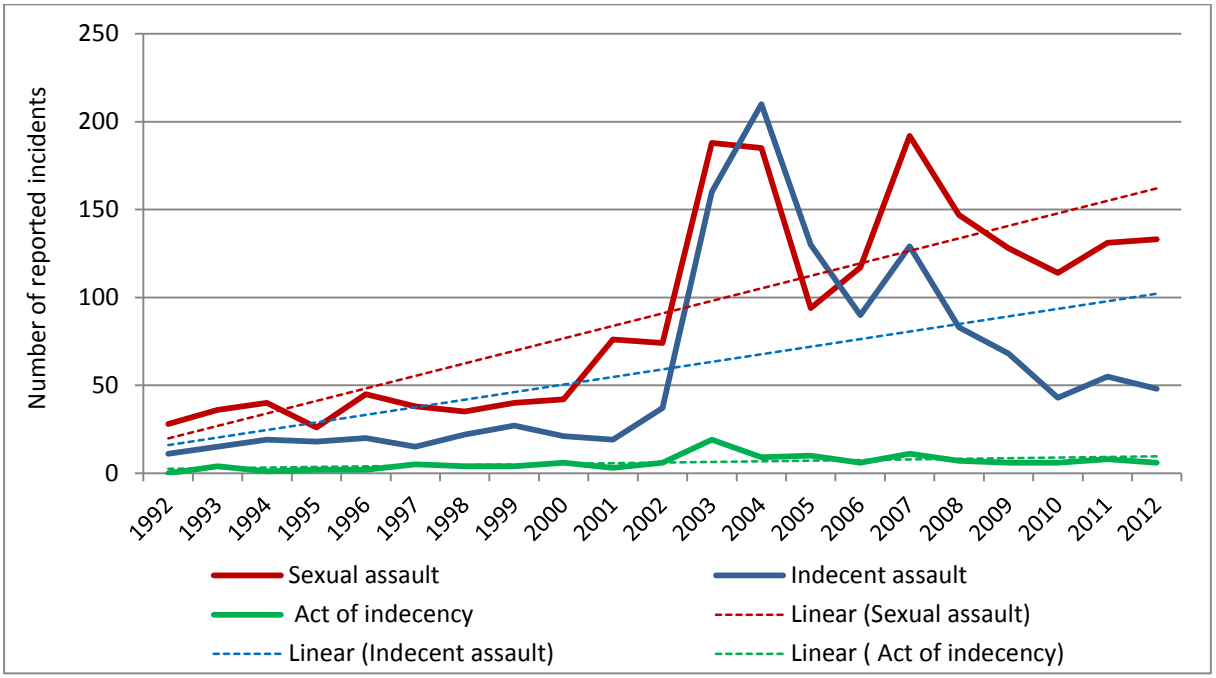
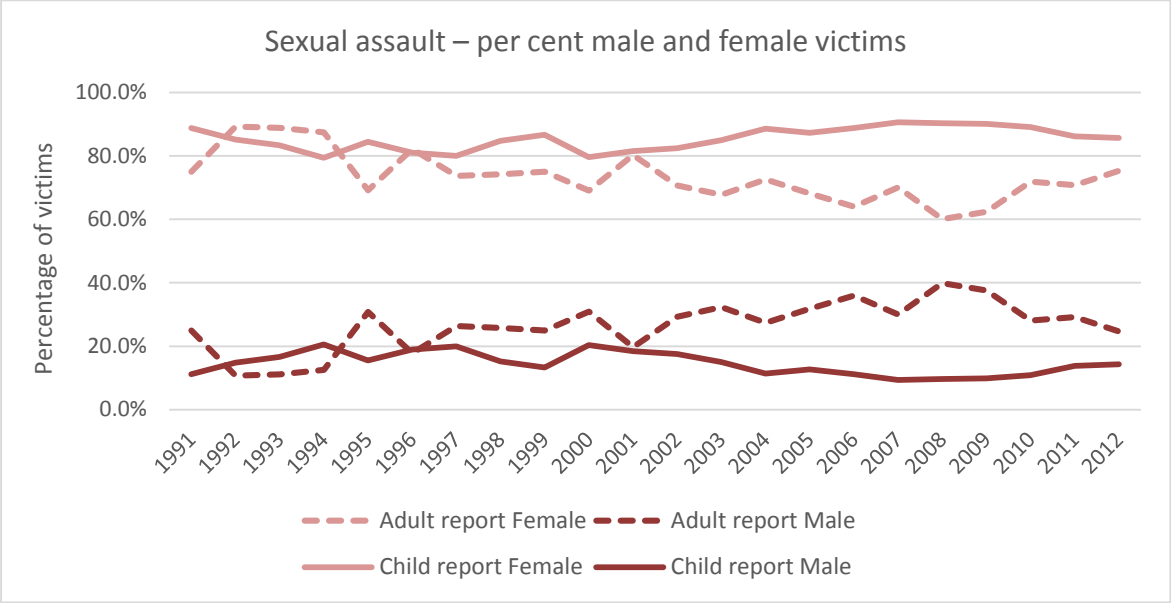
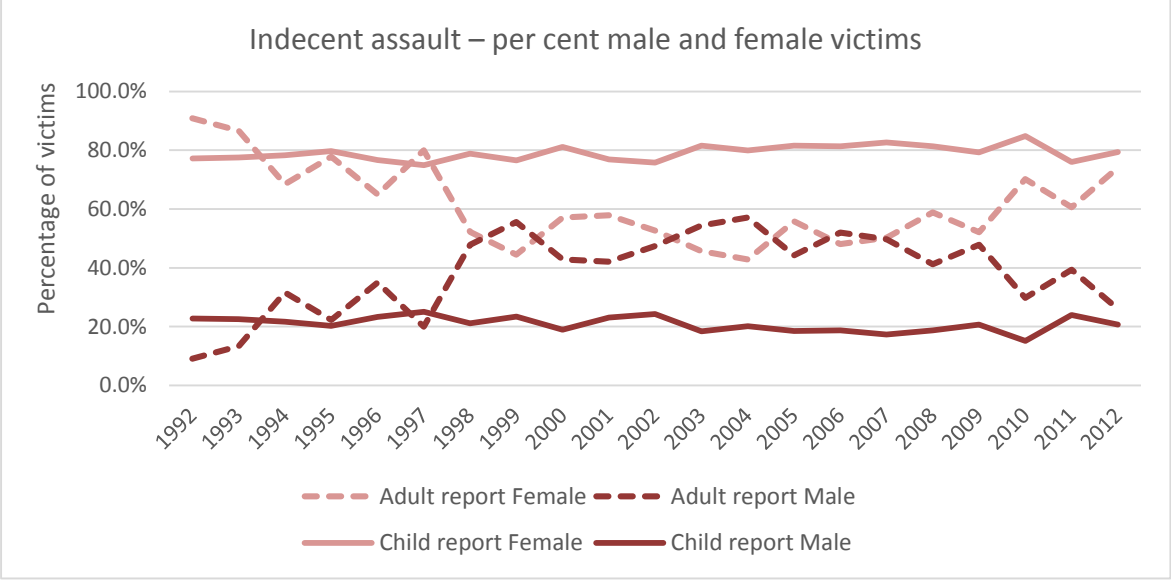


Figure 53. Number of child sexual offence incidents reported in adulthood by offence in 1992–2012 in South Australia

Figures 54a and 54b show the proportion of male and female victims for both sexual and indecent assault by year. The pattern is similar to that for New South Wales in terms of the higher proportion of male adult reports of indecent assault, but the rise in that proportion in 1999 precedes the Layton and Mullighan child abuse inquiries in South Australia. Unlike New South Wales, the proportion of male victims of indecent assault exceeds that of female victims during some periods. The highest proportion of female victims throughout is for child reports of sexual assault, ranging between 79.5 per cent and 90.7 per cent.





Figures 54a and 54b. Percentage of male and female victims for child and adult reports of (a) sexual assault by year in 1991–2012 and (b) indecent assault by year in 1992–2012 in South Australia

In summary, while the majority of sexual offences against children were reported during childhood, adult reports of child sexual assault and indecent assault increased over time, especially from 2003, peaking between 2003 and 2007. In 2004 and 2007, adult reports comprised about one-third of the total number of reports in those years (32 per cent). This fits with the abolition of the statute of limitations for certain sexual offences in 2003, and also the influx of cases associated with the Mullighan Inquiry.

The extent of delay

As in New South Wales, most sexual offences against children were reported within three months of the offence, but rather than the more immediate reports seen in New South Wales, in South Australia, the most common delay was between two days and three months (Figure 55).

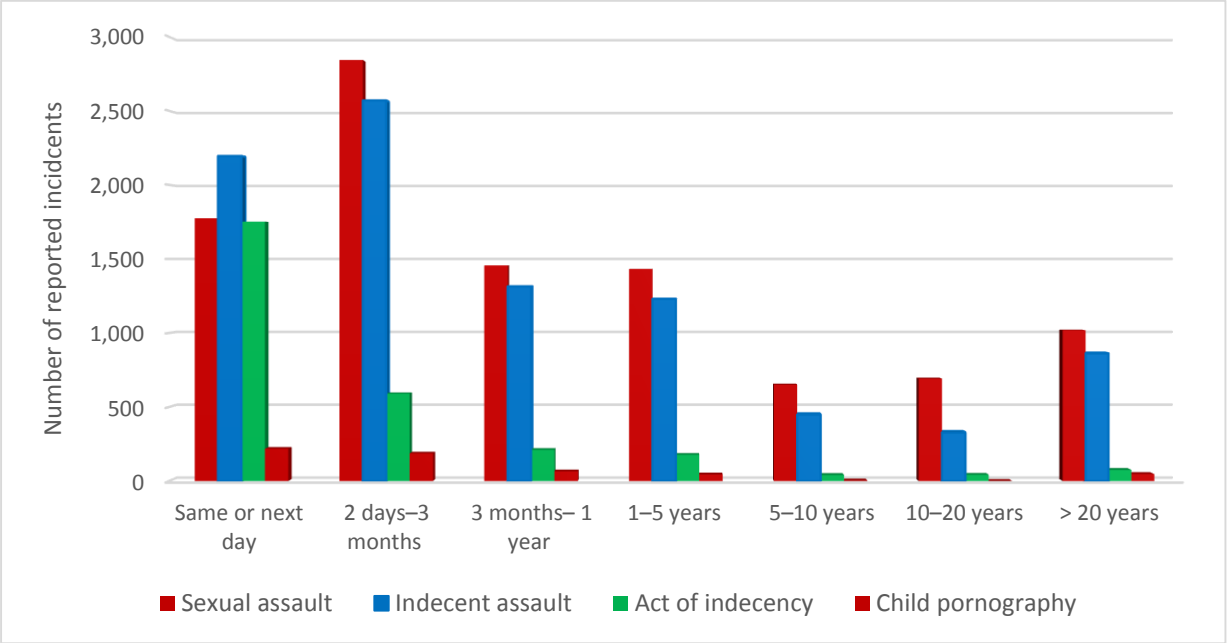


Figure 55. Delay between offence and report to the South Australia Police by offence type

As in New South Wales, nearly one in four sexual assaults (24.2 per cent) were reported more than five years after the offence, with the number increasing for reports after 20 years. As Table 12 shows, the more serious offences of sexual assault and indecent assault were much less likely than an act of indecency to be reported immediately (same or next day) or within three months: 46.6 per cent of sexual assaults, 53.1 per cent of indecent assaults compared with 80.8 per cent for acts of indecency. One in six (*n* = 1,708, 17.7 per cent) of the sexual assaults and 13.6 per cent (*n* = 1,186) of the indecent assaults, but only 4.2 per cent of the acts of indecency, took at least 10 years to be reported.

Table 12. Number and percentage of incidents reported to South Australia Police by delay periods

Time between offence and report	Sexual assault		Indecent assault		Act of indecency	
	n	%	*n*	%	*n*	%
Same or next day	1,729	17.9	2,142	**24.5**	1,668	**59.9**
2 days to 3 months	2,782	**28.7**	2,506	**28.6**	581	20.9
3 months to 1 year	1,419	14.7	1,274	14.6	205	7.4
1–5 years	1,400	14.5	1,199	13.7	169	6.1
5–10 years	629	6.5	441	5.0	41	1.5
10–20 years	690	7.1	324	3.7	42	1.5
>20 years	1,018	10.5	862	9.9	75	2.7
Total	**9,667**	**100.0**	**8,748**	**100.0**	**2,781**	**100.0**

Again as in New South Wales, male complainants were also more likely than females to delay reporting, particularly for more than 20 years, for both sexual assault and indecent assault (Table 13 and Figure 56). For example, 29.3 per cent of male complainants delayed reporting sexual assault incidents for 10 years or longer compared with 17 per cent for female complainants. One in five male complainants of sexual assault (20 per cent) and indecent assault (19.0 per cent) took more than 20 years to report; for female complainants, the figures were 8.3 per cent and 6.5 per cent.

Table 13. Percentage of incidents reported to South Australia Police by delay and gender of complainant

Time between offence and report	Sexual assault		Indecent assault		Act of indecency	
	Female %	Male %	Female %	Male %	Female %	Male %
Same or next day	19.1	12.2	27.1	16.6	64.6	40.9
2 days to 3 months	30.2	22.3	30.6	22.9	20.5	22.6
3 months to 1 year	15.0	13.1	14.2	15.5	6.4	11.3
1–5 years	14.2	15.8	13.5	14.2	5.2	9.8
5–10 years	6.3	7.4	4.7	6.1	1.2	2.8
10–20 years	6.7	9.3	3.2	5.3	0.9	3.9
>20 years	8.5	20.0	6.7	19.4	1.2	8.9
Total	**7,943**	**1,724**	**6,555**	**2,193**	**2,240**	**541**

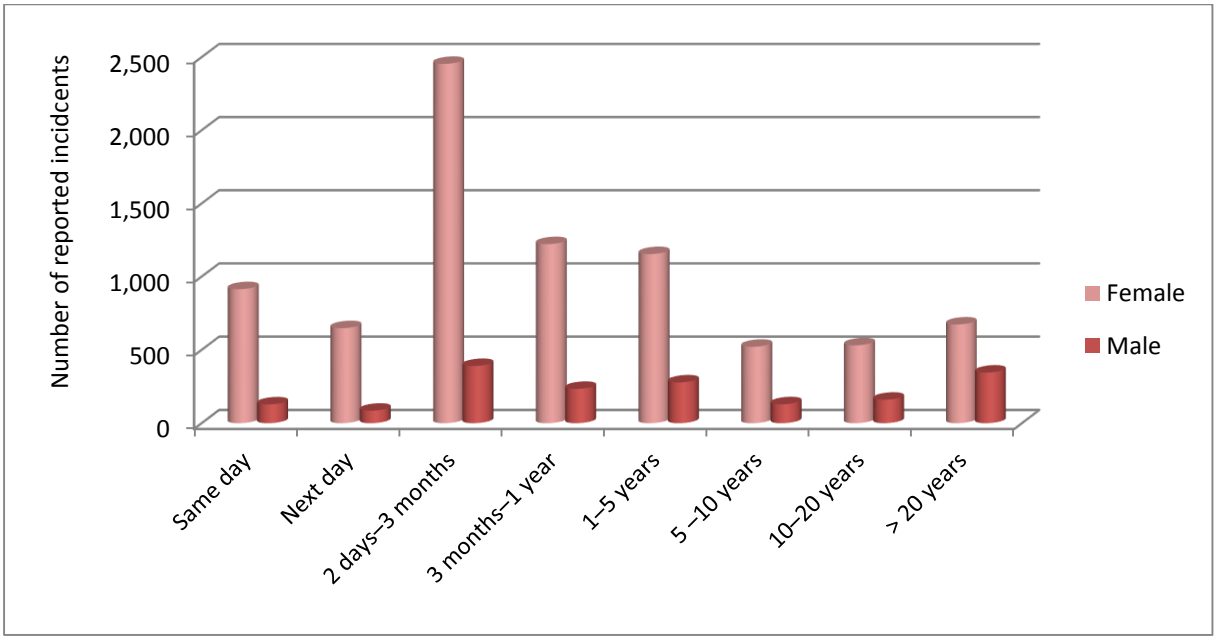
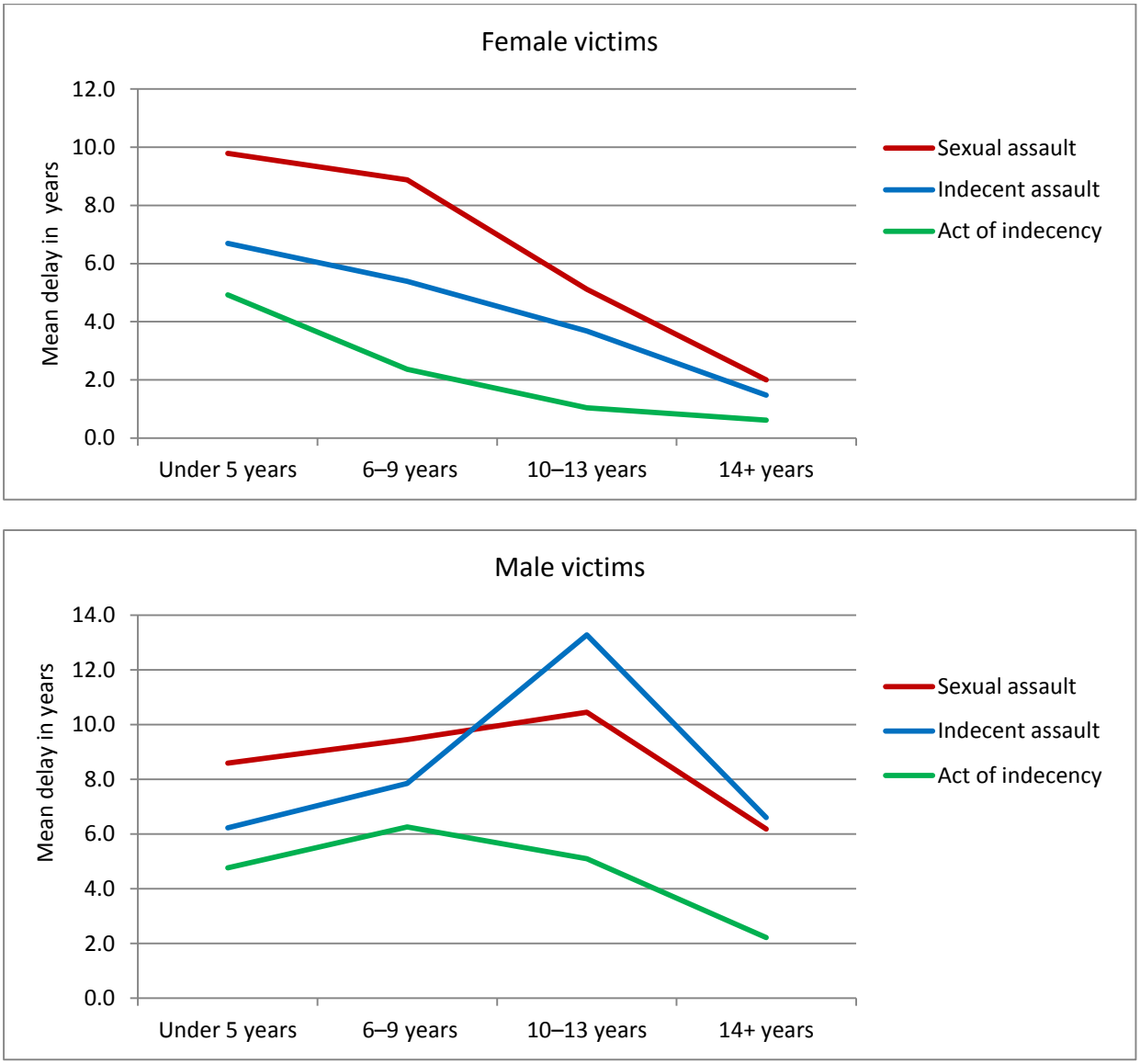


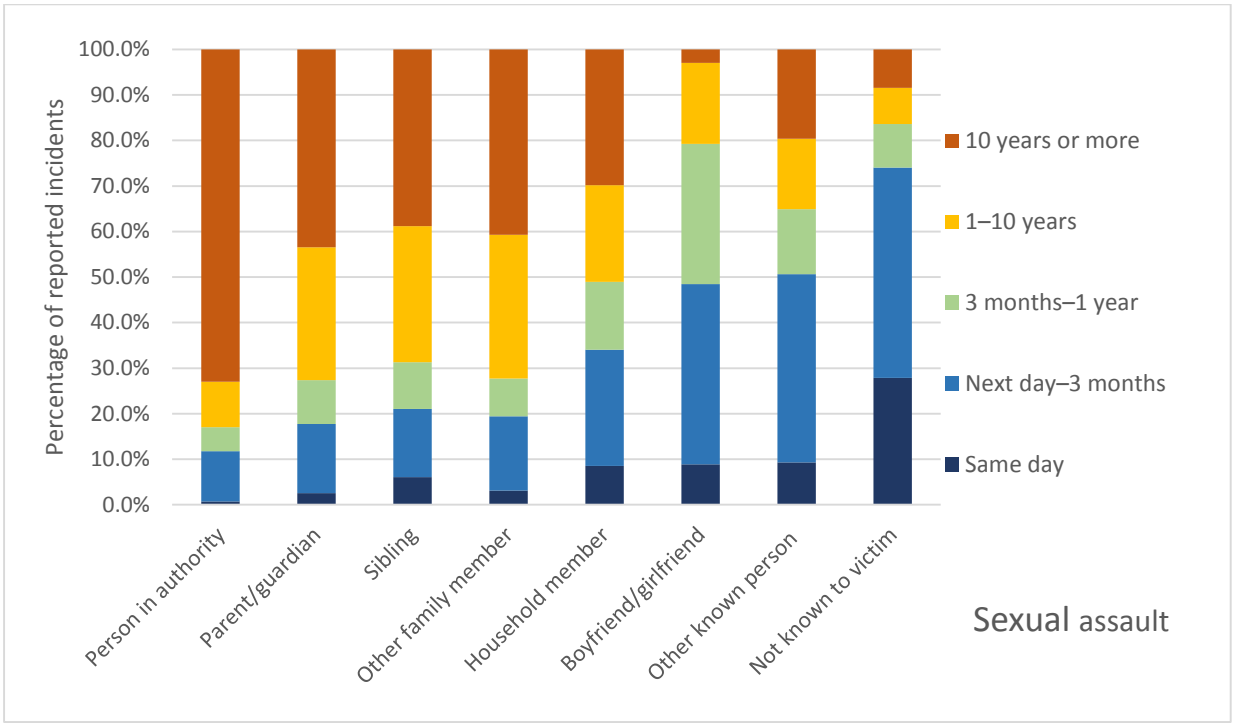
Figure 56. Number of sexual assault incidents by delay between offence and report by gender to South Australia Police by victim gender

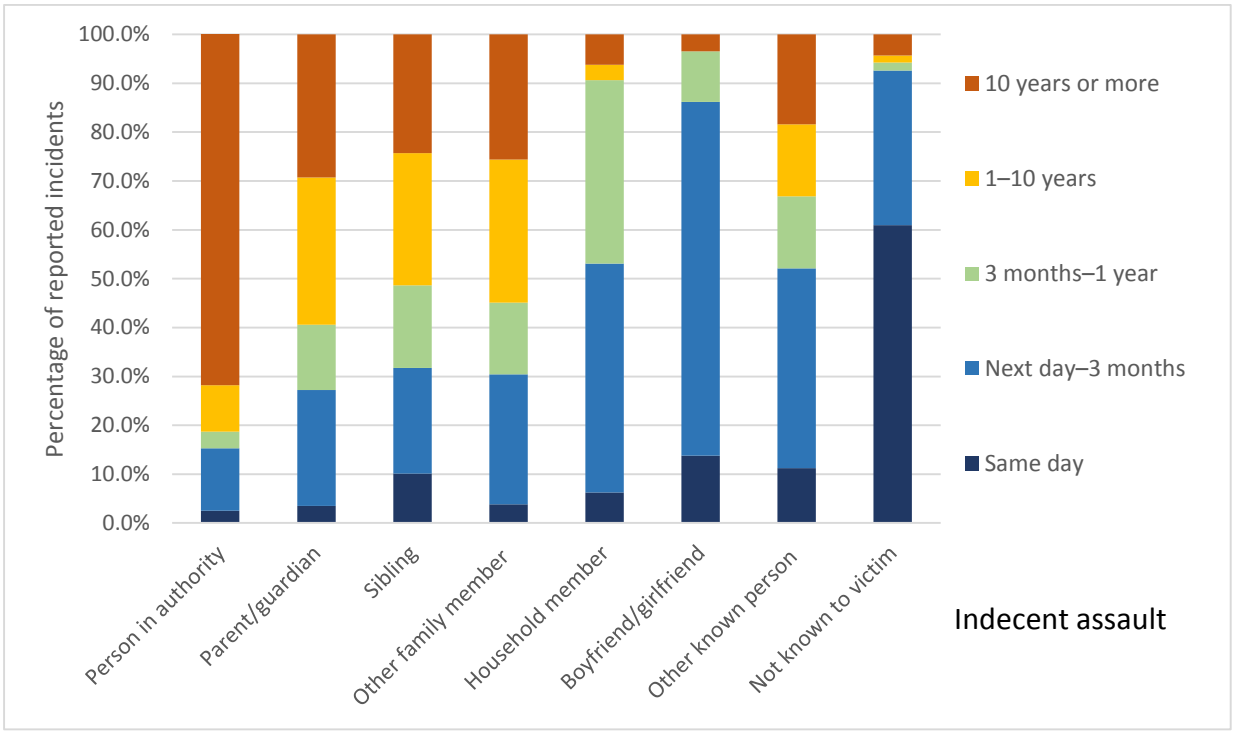
Figures 57a and 57b show the mean difference between age at offence and age at report for both male and female complainants by offence type. It is generally consistent with the New South Wales pattern (Figures 13a and 13b), with the peak age difference at offence and at report for male complainants aged 10–13 at the time of the incident. As in New South Wales, the average mean difference for females aged 14–17 at the time of the incident was between 0.6 years (for act of indecency) and 2.0 years (for sexual assault), but these were much higher for males (6.2 and 6.5 years for sexual assault and indecent assault, respectively) and especially so for boys aged 10–13 (10.5 years mean delay for sexual assault and 13.3 years for indecent assault). Again, the patterns in Figures 57a and 57b for both male and female complainants are similar to those in New South Wales (Figures 13a and 13b). The mean delay in reporting is generally greater for both male and female complainants for sexual assault offences except for boys who were aged 10–13 at the time of the incident.



Figures 57a and 57b. Mean difference between age at incident and age at report for (a) female and (b) male victims in South Australia

Figures 58a and 58b show the delay in reporting for different types of relationship of the suspect or person of interest to the victim. As in the New South Wales data, 'persons in authority' and 'carers', as a proxy for 'institutional abuse', involved much higher proportions of both sexual assault and indecent assault incidents in which the delay was 10 years or longer: 73 per cent of sexual assaults and 72 per cent of indecent assaults. For parents and other family members, between 25.6 per cent and 43.5 per cent of these sexual and indecent assaults were reported 10 years or more after the incident. Same-day reporting of indecent assaults was highest (61 per cent) when the person of interest was not known to the victim: 27.9 per cent for sexual assault and 61 per cent for indecent assault.





Figures 58a and 58b. Percentage of reported incidents by delay for each person of interest-victim relationship for (a) sexual assault and (b) indecent assault in South Australia

In summary, reports were most likely to be substantially delayed when they involved sexual assault, male complainants, and persons in positions of authority. More immediate reports were made in cases involving persons not known to the child, and acts of indecency with female complainants.

5.3 CASES PROCEEDING TO PROSECUTION

The analyses of the South Australian data relating to cases in which legal action commenced are based on police clearance status data.[112]

Just over 40 per cent of incident reports (40.9 per cent overall) were cleared by arrest/report of the suspect or person of interest. About one in five (19.1 per cent) were cleared with no further action[113] or no offence being revealed, and a further one in three (37.6 per cent) were 'not cleared with little or no prospect of proceeding'.[114] The 'not cleared' rate is consistent with Wundersitz's (2003a) finding for similar earlier data in 2003 (34.4 per cent). A small proportion of incidents were cleared due to the death of the person of interest (*n* = 108) or the complainant (*n* = 4). In 3.1 per cent of incidents, the matter was cleared and marked as 'no offence being revealed'. This is similar to the figure of 2.9 per cent Wundersitz (2003b) reported for 'unfounded reports'.

To ensure a similar approach to the New South Wales data analyses, the incidents were categorised as 'legal action being commenced' when they were cleared by arrest or report; this does not mean that all the matters in which a person was apprehended or arrested proceeded to court. It was not possible to be definitive about exactly which incidents involved 'identified' suspects or persons of interest, apart from excluding those where the coding indicated that the suspect had died or was clearly not identified.[115]

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[112] 'Clear-up' status was coded by South Australia Police using 24 codes, which were collapsed following extensive discussions with OCSAR about the categories, into:

- 'cleared by arrest, report or the issue of a warrant' – equivalent to the code 'legal proceedings commenced/legal action taken' used for the New South Wales data
- 'cleared' with no further action or no offence revealed (including insufficient evidence), as well as various codes for incident reports that had not been cleared where the case had been 'filed' and there was no further action
- 'cleared' with no legal action possible – this involved 108 cases where the accused had died and four where the complainant had died
- 'not cleared open cases' where the person of interest had not been identified.

[113] The data do not indicate the reasons for 'no further action' but Wundersitz (2003b) does indicate that in 2003, 23.6 per cent of police incident reports involved the victim requesting no further action (Table 2, p 6).

[114] These comprised a small proportion of incidents (5 per cent) that were 'not cleared and were still being investigated' and a further 2.1 per cent where the 'suspect was flagged as wanted'. In a technical report on the methodological issues of tracking from incident report to finalisation in court in the South Australian data, Wundersitz (2003b) reported that about one-third of the police incident reports in 2000–01 had not been cleared, but that 'other analyses undertaken by OCSAR indicate that incidents which are not cleared within the first 12 months have a very low probability of being cleared after that time' (p 6). Fitzgerald (2006) made a similar observation in relation to New South Wales data (Note 5, p 12): 'The proportion of incidents with a Person of Interest (POI) criminally proceeded against went from 17.8 per cent 180 days after reporting to 19.9 per cent 365 days after reporting.'

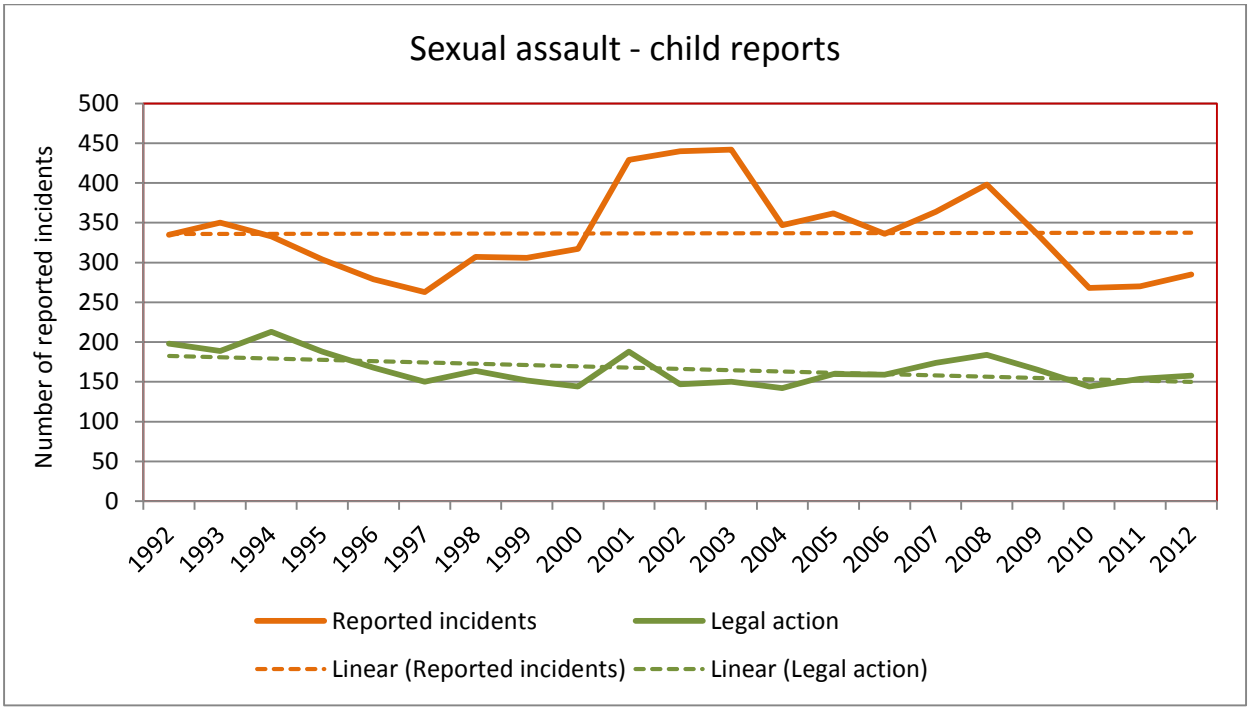
[115] This excluded 2,028 of the 21,919 incidents (9.3 per cent), leaving a total of 19,891 incidents.

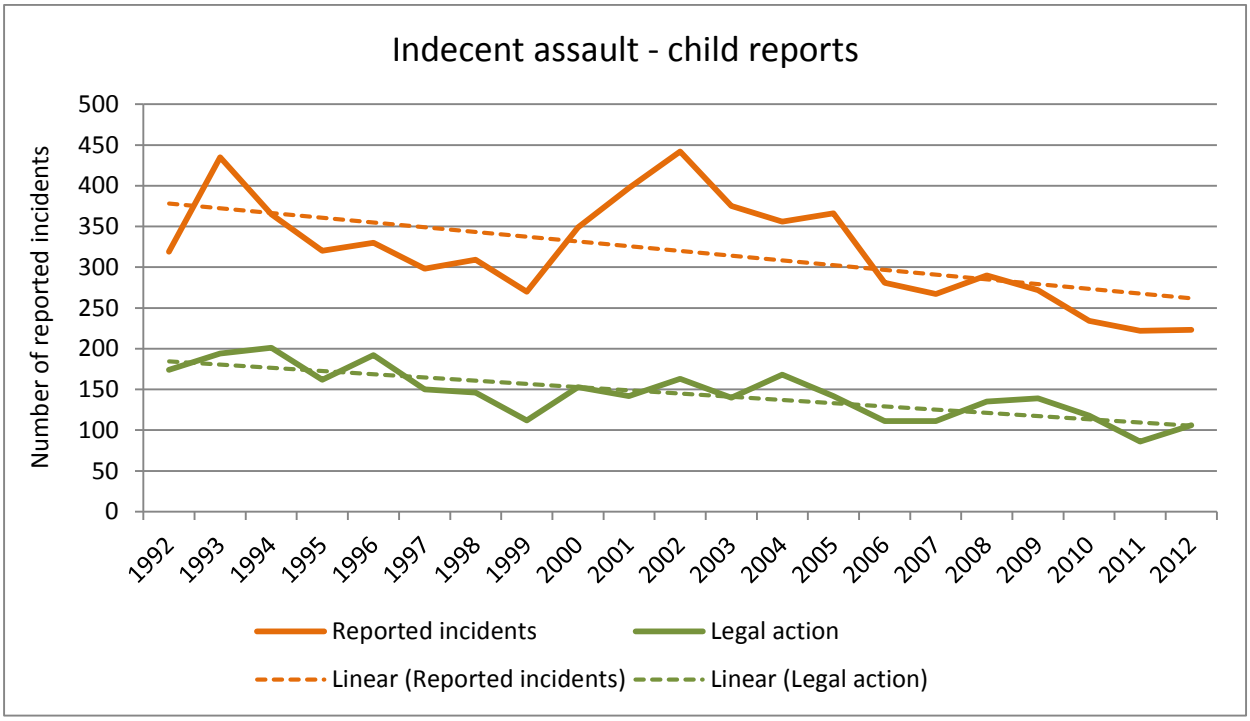
The following figures (Figures 59a and 59b and Figures 61a to 61b) show the number of incidents reported as a child and as an adult since 1992, together with the numbers in which legal action was commenced via arrest or report for both sexual assault and indecent assault.

Sexual offences reported during childhood

Figure 59a shows the number of incidents in which legal action commenced for child reports of sexual assault fairly closely follows the pattern of the number of reported incidents per year. Both trend lines are relatively flat but there is much more variation in the numbers reported (ranging from 263 in 1997 to 442 in 2003) than in the numbers proceeding (ranging from a high of 213 in 1994 to a low of 142 in 2004). Overall, legal proceedings commenced in 49.4 per cent of child reports of sexual assault incidents from 1992 to 2012: 59 per cent in 1992 and 55 per cent in 2012.

The pattern is similar for child reports of indecent assault (Figure 59b), again with less variability in the number of matters 'proceeded against' compared with the number of reported incidents. There is, however, more of a downward trend in the number of indecent assault incidents compared with sexual assault incidents, and the number resulting in arrest or report.





Figures 59a and 59b. Number of incidents of (a) sexual assault and (b) indecent assault reported as a child and number in which the person of interest was proceeded against in South Australia

These patterns for child reports of sexual assault and indecent assault in South Australia are quite different to those for New South Wales, where there is increasing divergence between the growing number of child reports and the number of reports in which the suspect or person of interest was proceeded against. However, in both states the trend lines for the number of matters in which legal action was initiated are flat or downward.

Unlike New South Wales, these patterns of child reports are not consistent with the trends in the number of children involved in substantiated (child protection) reports made to the statutory department. In South Australia, the declining number of substantiated reports of sexual abuse until 2007–08 (Figure 60) is in marked contrast to the peak numbers of sexual assaults and indecent assaults reported to South Australia Police between 2001 and 2004–05 (Figures 59a and 59b). The number of substantiated reports involving boys fell to a low of 12 in 2006–07 and 63 for girls in 2007–08 (Australian Institute of Health and Welfare reports, 1999–2015).

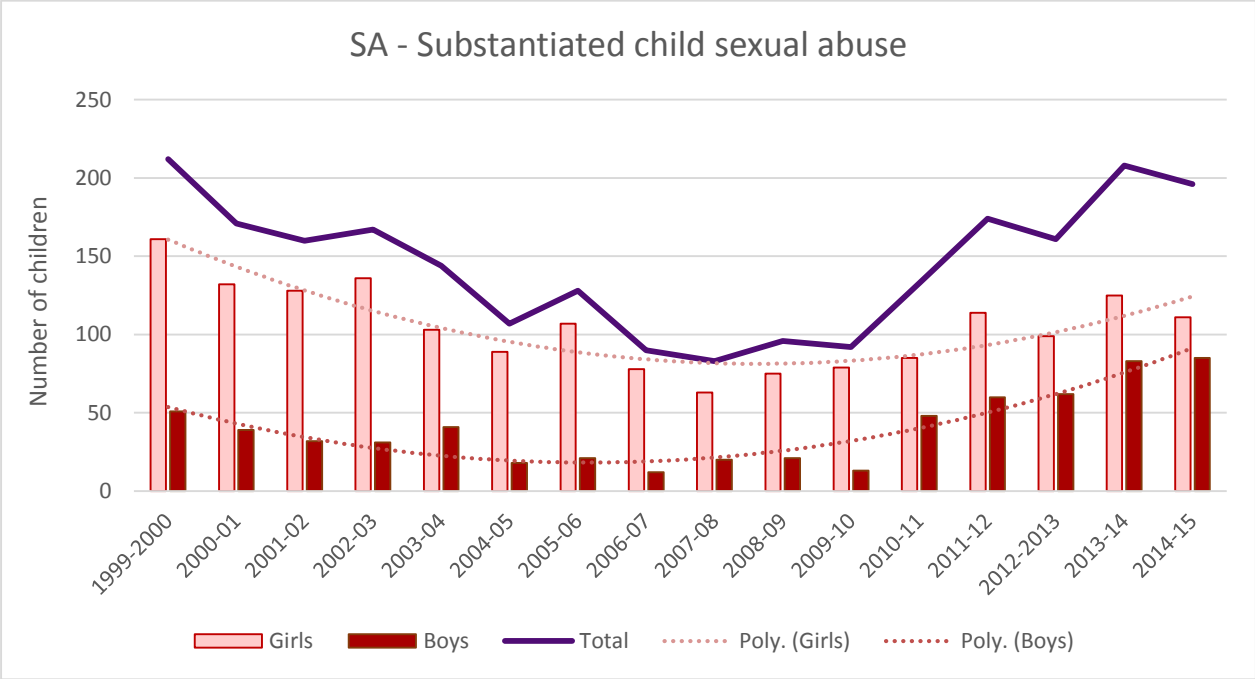


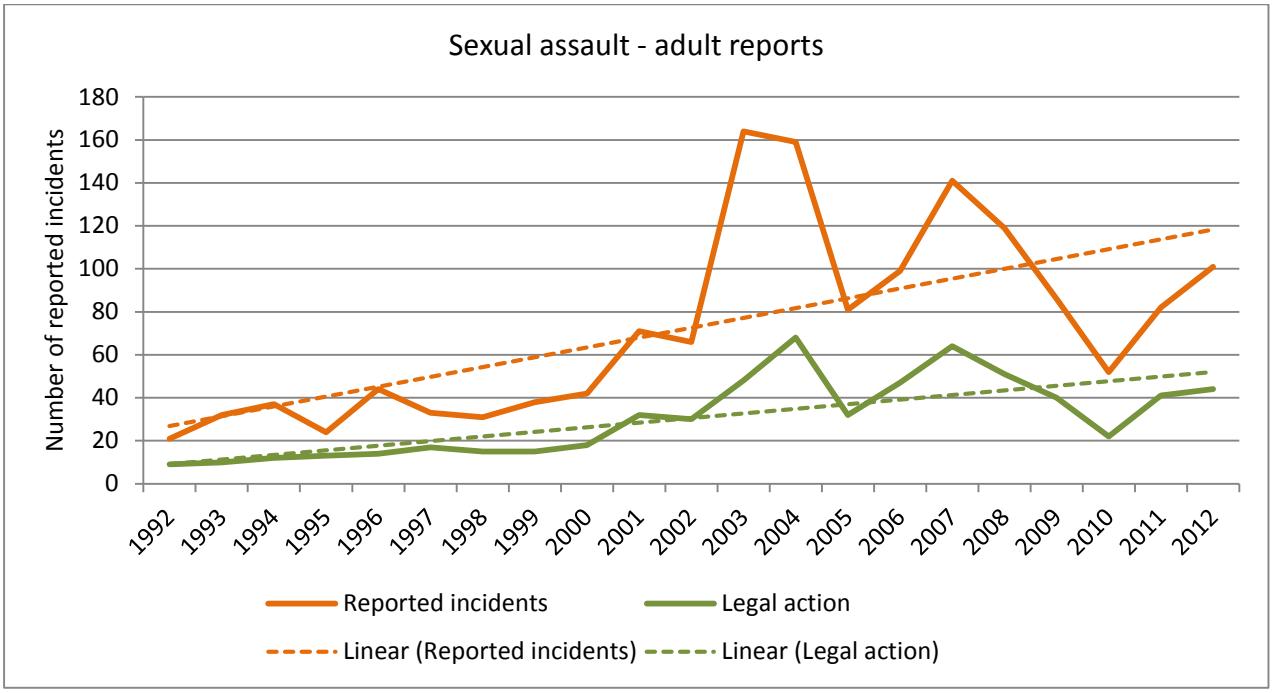
Figure 60. Number of children in substantiated sexual abuse reports made to the South Australian statutory authority

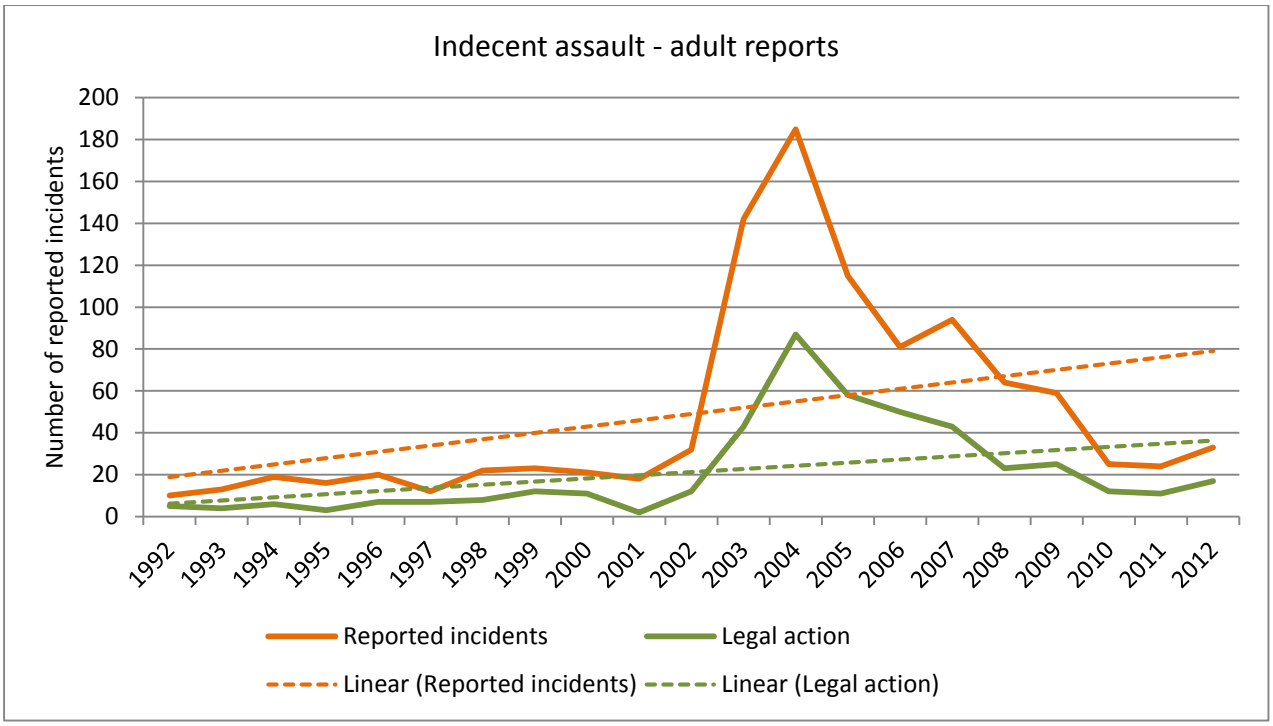
The rate of substantiated child sexual abuse reports to the statutory department is also much lower in South Australia than in New South Wales, which has one of the highest rates in Australia. The rate of substantiated sexual abuse for the period 2008–13 was 0.4 per 1,000 children in South Australia, and four times that at 1.6 per 1,000 children in New South Wales.[116] Substantiated sexual abuse reports to the statutory authority in South Australia also made up a smaller proportion of substantiated child protection reports (8.1 per cent) than in New South Wales (18.9 per cent) over the period 2008–14.

[116] Rates per 1,000 children for the period 2008–14 are based on Australian Institute of Health and Welfare data from the *Child Protection Australia* reports for 2008–09, 2009–10, 2010–11, 2011–12, 2012–13 and 2014–15.

Child sexual offences reported in adulthood

Figures 61a and 61b show the number of adult reports of sexual assault and indecent assault, respectively, together with the number of cases in which the suspect or alleged offender was proceeded against via arrest or report. The trend lines and the pattern of the two lines are generally very similar for both types of offence, with the number of cases involving arrest following the pattern of the overall number of reported incidents but with a dampened range. The spikes in the number 'proceeded against' in 2004 and 2007 again are likely to reflect the abolition of the statute of limitations in 2003 and the Mullighan Inquiry dealing with historical matters up to and including 2007. The biggest disparity between the number of reported incidents and the number of suspects apprehended occurred at the time of these spikes, suggesting a resource constraint or a possible change in the nature and quality of the reports. In contrast to the incidents reported as a child, both sexual assault and indecent assault reported as an adult show an upward trend in the number of reported incidents and the number in which legal action was commenced.

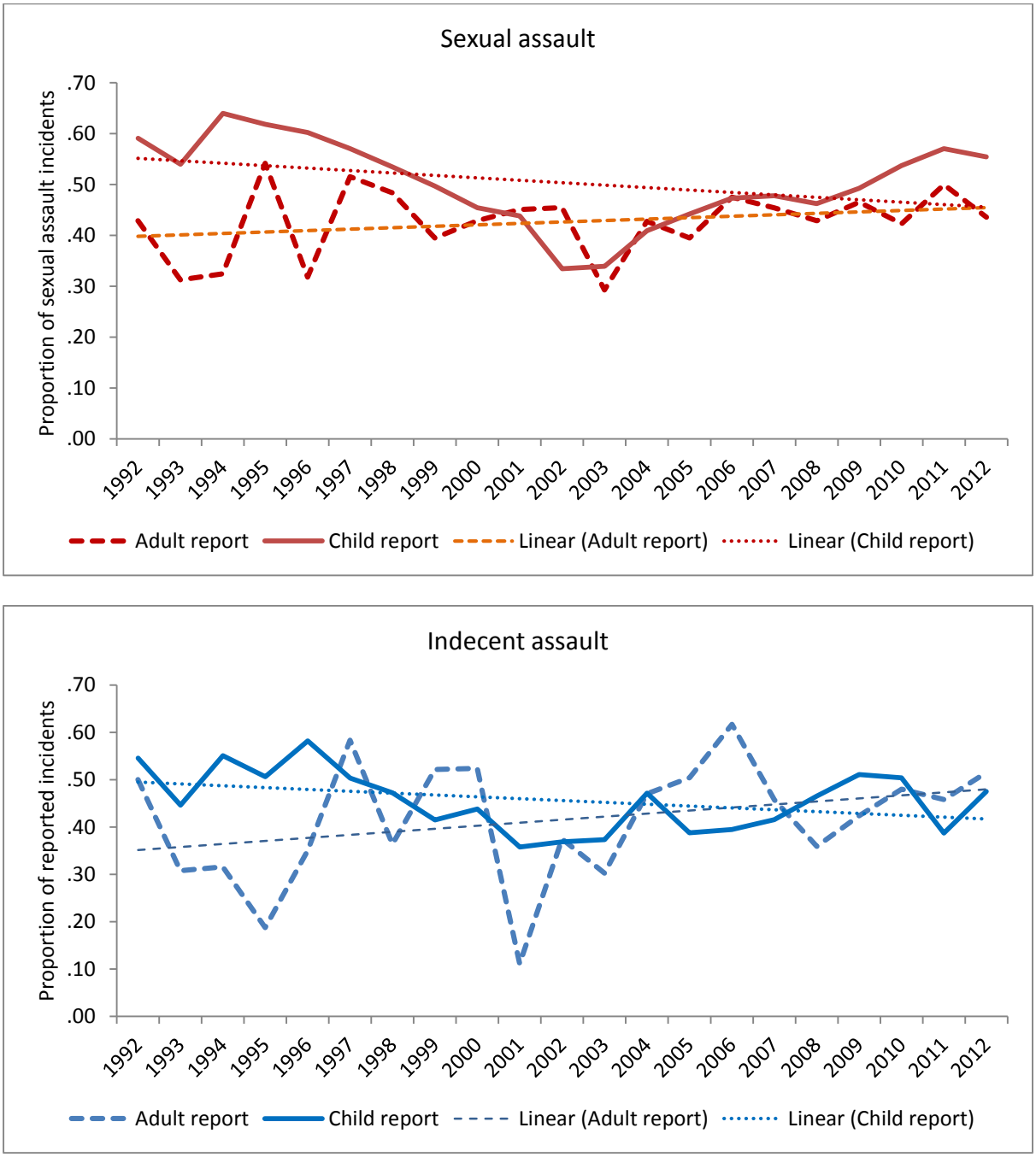




Figures 61a and 61b. Number of incidents of (a) sexual assault and (b) indecent assault reported as an adult and number in which the person of interest was proceeded against in South Australia

The probability of arrest for sexual offences reported in childhood and adulthood

Figures 62a and 62b show the proportion of sexual assaults and indecent assaults, respectively, reported to South Australia Police in which legal action was commenced via arrest or report. Sexual assault and indecent assault are presented separately because of the degree of overlap and level of fluctuation in both, in contrast to the more parallel patterns for New South Wales.

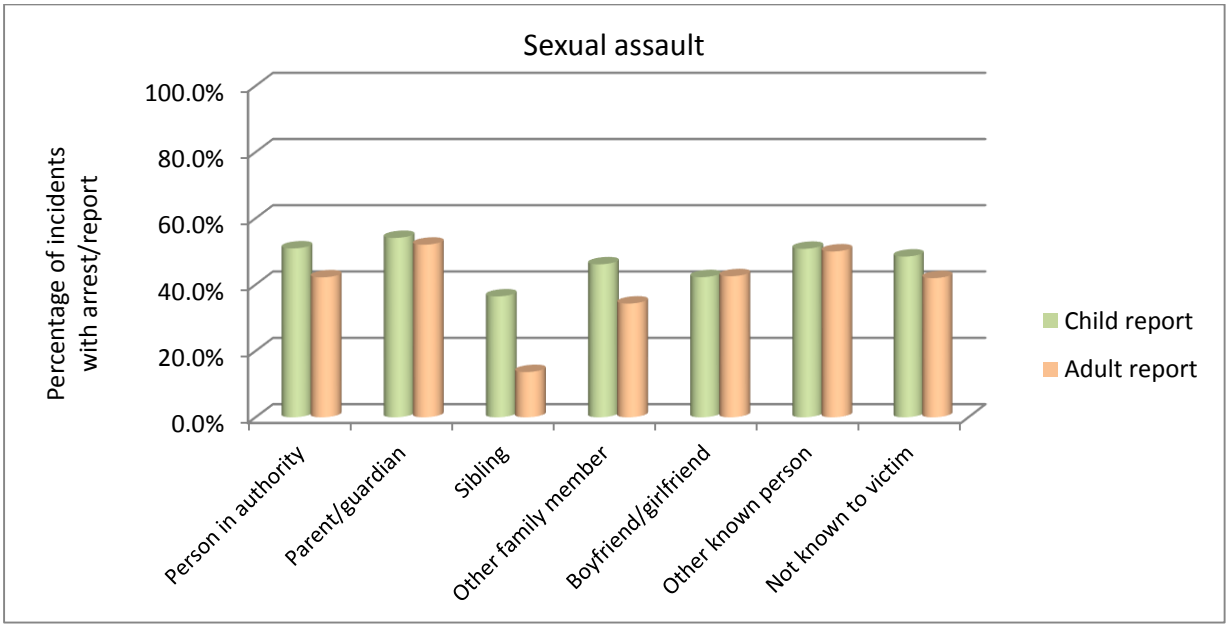


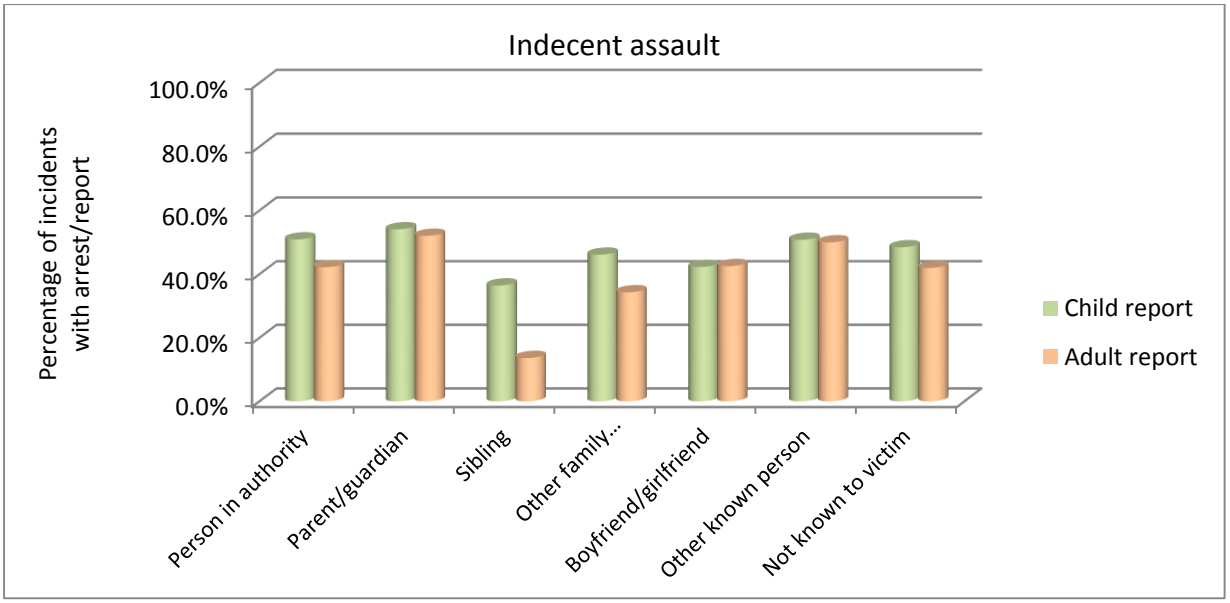
Figures 62a and 62b. Proportion of (a) sexual assault and (b) indecent assault incidents reported before or after age 18 (as a child or adult) in which the person of interest was proceeded against in South Australia

As Figure 62a shows, despite a downward trend, sexual assault incidents reported during childhood were more likely to proceed than those reported in adulthood until 2002; in the period 2000–09, there was little difference between adult and child reports. There was a similar pattern for indecent assaults but there was greater fluctuation in the adult reports of indecent assault (Figure 62b).

Relationship of suspect to victim by adult or child report

As Figure 63a shows, the highest percentage of reported sexual assault cases in which legal action was initiated by arrest or report was for matters reported in childhood involving a parent or guardian (63 per cent), followed by other known person (60 per cent). Legal action was commenced in just over half (52 per cent) of the matters involving persons in a position of authority, and in less than one-third of matters (30 per cent) involving a sibling. Apprehension by arrest or report was somewhat less likely for sexual assault incidents reported in adulthood, particularly those involving a parent or guardian (40 per cent) or another family member (20 per cent).





Figures 63a and 63b. Proportion of (a) sexual assault and (b) indecent assault incidents reported as a child or adult in which person of interest was proceeded against by arrest or report by relationship of suspect to victim in South Australia

The pattern was similar but flatter for indecent assault (Figure 63b) – 54 per cent for a parent or guardian, and 51 per cent for a person in authority and other known person. There was also a smaller differential between child and adult reports, except for incidents involving siblings (14 per cent for adult reports and 36 per cent for child reports). About 40 per cent of sexual assault and 42 per cent of indecent assault reports in adulthood involving a person in authority resulted in the commencement of legal action against the suspect by arrest or report. This does not necessarily mean that these matters actually reached or were dealt with at court.

Probability of legal proceedings commencing

Logistic regression was used to model the association between an arrest or report being commenced and, while holding some factors constant, specific police clear-up categories and the following factors were used, with the same coding as for the New South Wales analysis:

- type of offence – sexual assault and indecent assault
- age of the children at the time of the offence
- gender of the children
- extent of the delay between offence and reporting
- relationship of the suspect to the victim [117]
- year the report was made (2003–12 in line with NSW).

The police clear-up categories involving the arrest or report of the suspect were treated as the binary outcome measure ('arrest/report' and 'not proceed'). The unit of analysis was the incident: records in the police database of victims were aggregated by incident number.[118] The overall model was significant.[119] No three-way interactions met the 0.001 criterion for statistical significance, but seven two-way interactions, four of which involved the delay variable, and three the relationship with the alleged offender, were significant. All variables in the model involved at least one interaction so, for the reasons outlined in the description of the results of logistic regression analysis of the NSW Police data, the effects of individual variables are described in the context of the interactions of which they are a part. The focus is on those interactions that involve delay in

[117] This field had more complete data than New South Wales so was included in the analysis.

[118] Records bearing the same incident number always concerned a single victim, and a single report date, but the offence and the age of the victim at the time of the offence – and hence the delay between the offence and its report – could vary over records. However, the number of aggregated incidents that had combinations of ages and delays was very small – 118 and 150 for sexual and indecent assault, respectively, out of the 18,961 incidents in which the major offence was either sexual or indecent assault – and were excluded from the analysis.

[119] χ^2 (N = 18,114) = 1,672.25, *df* = 313, *p* <.00001.

reporting and the relationship of the alleged offender or suspect to the victim; other significant interactions are described in Appendix 3 (South Australia).

Delay by year of report

Figure 64 shows the (adjusted) probability of arrest or report by the extent of the delay between the offence and reporting of that offence by the year of the report.[120] The delay 'effect' is not as clearly differentiated by year in the South Australian data as it is in the New South Wales data, and it also appears to show a reverse trend with short delays being associated with a higher probability of legal action being taken (represented by higher bars), especially in more recent years.[121] However, with delays beyond a year the likelihood of legal action being taken, as in New South Wales, decreased over time, with the early cases in the 1990s having a greater chance of proceeding than those in more recent years.[122]

[120] $\chi^2 = 187.25$, $df = 80$, $p < .00001$.

[121] For the delay variable, odds ratios obtained with effect coding, which allowed comparisons of each delay category with the average likelihood of legal action, were: 0.94, 0.83, 1.07, 1.57 and 0.77, showing a gradual increase from a delay of two days to three months to 1–5 years, followed by a drop to 0.77 for the longest delay. The odds ratio for 1–5 years (1.57) was significantly different to that at the 0.001 level and that for the 5–20+ years delay was marginally so ($p = 0.006$). The ratios for the interaction contrasts generally did not depart significantly from 1 and did not appear to show any systematic trends apart from those already discussed.

[122] The patterns of odds ratios comparing the likelihood of legal action over years with 2002 as the reference category were considered separately for each delay category. Odds ratios generally varied between approximately 3 and 0.6 within years, and the differences leading to the interaction were evident: in the shortest delay category, there was relatively little variation, while in the middle three delay categories there was more variation and a tendency for the odds ratios to be lowest in the middle of the range of years. In the longest delay category, the odds ratios showed a consistent downward trend.

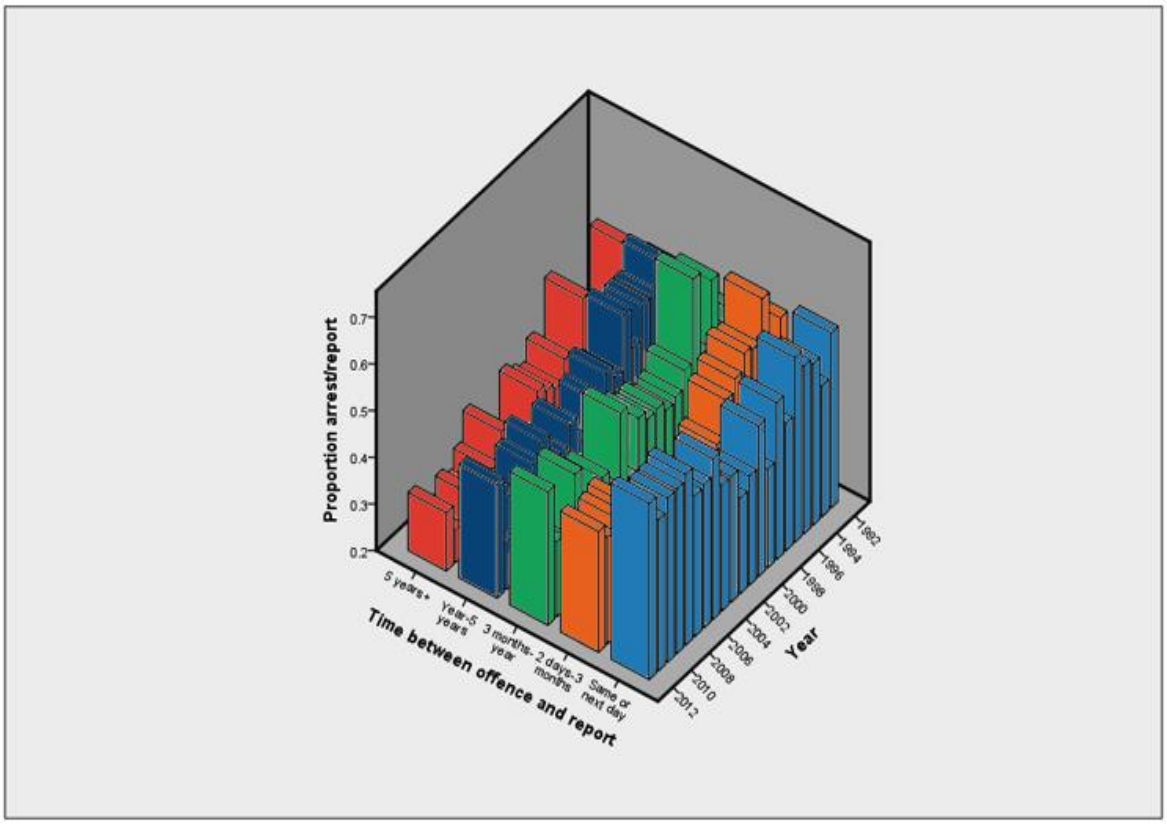


Figure 64. Adjusted probability of arrest or report by delay and year of report in South Australia

Delay by type of offence

As Figure 65 shows, if a sexual assault was reported on the same day as it was alleged to have occurred, it was more likely to lead to an arrest report than an indecent assault incident (0.58 versus 0.43, OR = 2.0).[123] For longer delays, the rates of arrest or report were similar for the two types of offence.[124] The likelihood of an arrest or report dropped for both types of offence when the delay between the incident and the report was 5–20 years or more (0.36 and 0.33).[125]

[123] The interaction was significant: $\chi^2 = 48.31$, $df = 4$, $p < .00001$.

[124] The odds ratios ranged from 1.22 through to 1.17 and 0.88; all were non-significant.

[125] The delay categories combined 5–10 years and 10–20 years, and more than 20 years because of the low numbers in these categories.

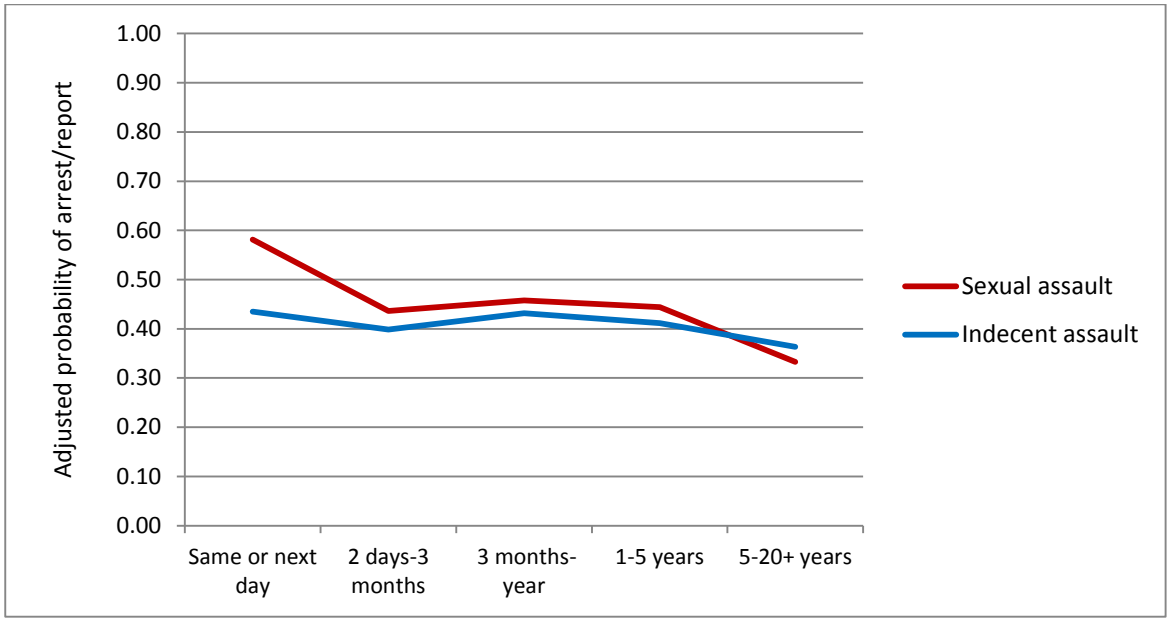


Figure 65. Adjusted probability of arrest or report by delay and type of offence in South Australia

Delay by relationship of alleged offender to victim

This significant interaction between the delay in reporting and the relationship of the suspect to the victim was a function of a complex pattern of differences as Figure 66 shows, but the focus here is on the effects involving persons in a position of authority in relation to the child.[126] The adjusted probability of apprehension by arrest or report was generally more likely than not (mostly over 0.5) where the alleged offender was a person in authority but dropped to almost half of its high of 0.62 to 0.33 when the report was delayed by more than five years (Figure 66). For both family members (other than parents) and siblings, the probability of arrest generally decreased with increasing delay.[127]

[126] $\chi^2 = 102.9$, $df = 28$, $p < .00001$.

[127] The odds ratios (obtained with effect coding) showed that the probability of arrest or report was significantly higher than the overall rate for persons in authority (odds ratio = 1.58), other family members (1.48), other known people (1.21) and parents or guardians (1.20). It was significantly lower for alleged offenders known to the victim (0.46). With some variation, this pattern was seen at all delays. A notable variation at a delay of 5–20+ years, where the likelihood of siblings being arrested or apprehended, was significantly lower than the average at that delay (odds ratio = 0.53).

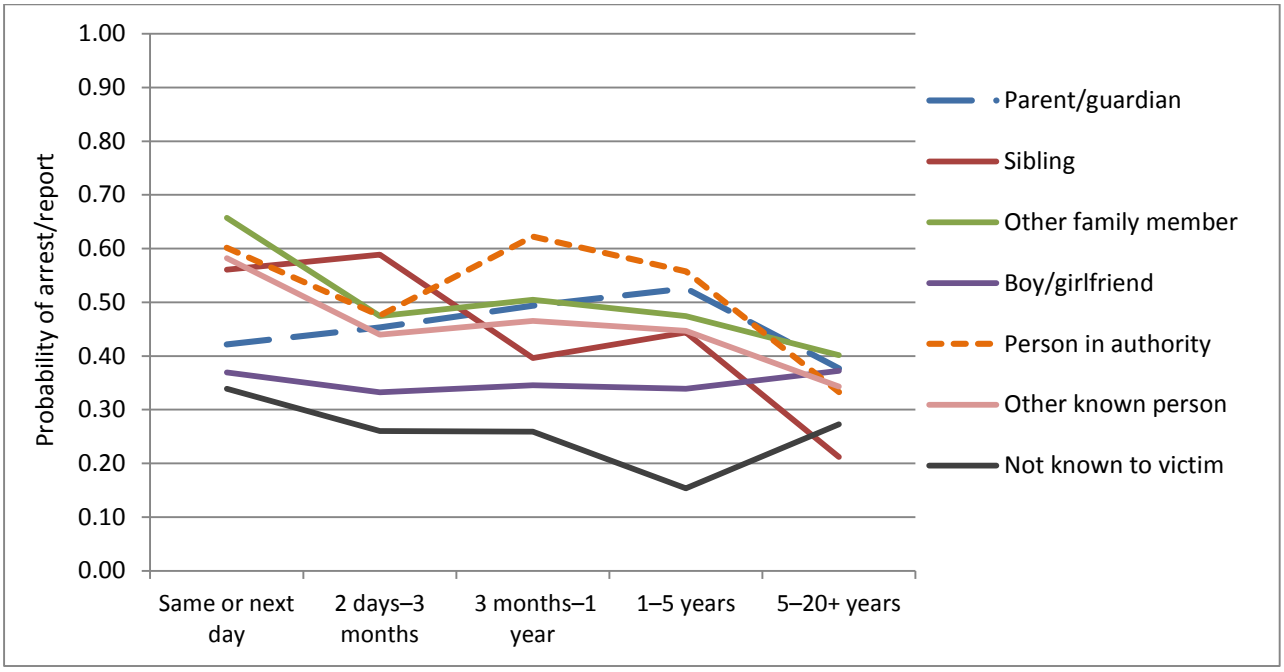


Figure 66. Adjusted probability of arrest or report by delay and relationship of suspect to victim in South Australia

Delay by age of victim

Figure 67 indicates that for delays of up to a year between the alleged incident and reporting, incidents involving younger children (aged under six) and adolescents (aged 14–17) were less likely to lead to arrest or apprehension report than those for children in the 6–9 and 10–13 age groups.[128] This difference was reduced for longer delays, and for all age groups, there was a significant drop in the probability of a matter leading to apprehension for reports made more than five years after the alleged incident.[129]

[128] $\chi^2 = 39.97$, $df = 12$, $p < .0001$.

[129] In terms of the simple effects of age, the odds ratios showed that delays of 1–5 years deviated strongly from the overall pattern, while the odds ratio for victims in the 10–13 age group (effect coded), which was significantly greater than at all other delays, was not statistically significant.

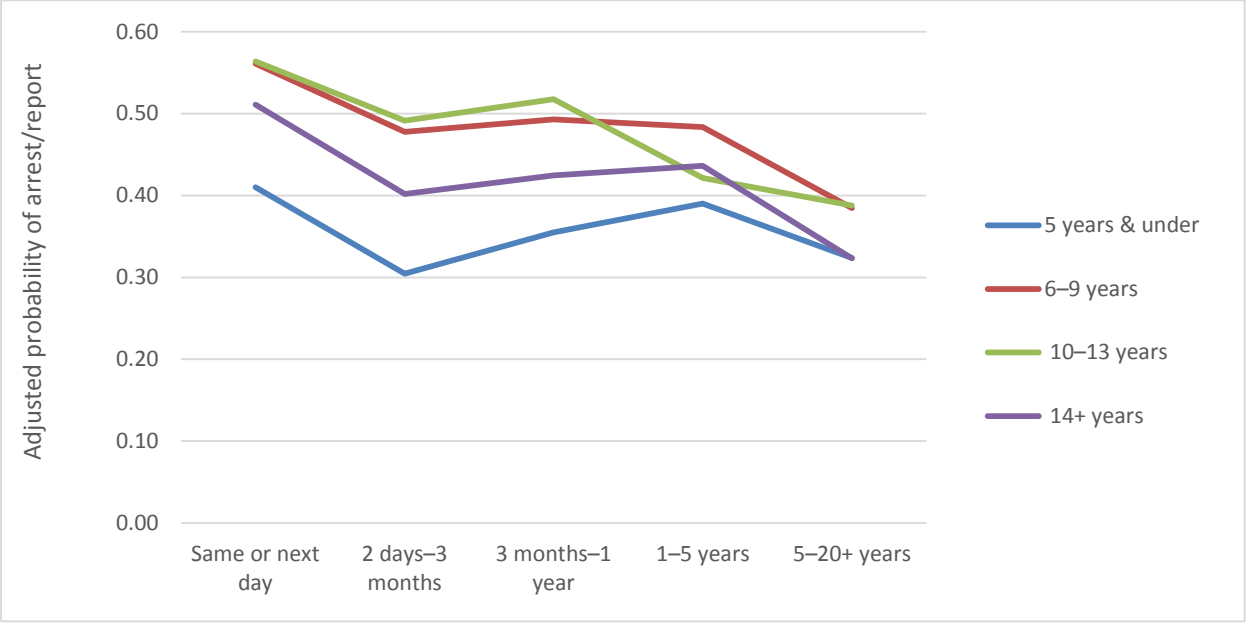


Figure 67. Adjusted probability of arrest or report by delay and age of victim in South Australia

In summary:

The probability of a report to South Australia Police resulting in an arrest and legal action decreased with increasing delay, especially with delays of five or more years, for both indecent assault and sexual assault, but more so for sexual assault; a sexual assault was almost twice as likely to proceed if reported within several days than if it was reported five or more years later.

Around three-quarters of sexual and indecent assault incidents involving a person in a position of authority were not reported within 10 years of the date of the alleged offence and the likelihood of legal action being initiated in these matters also decreased with increasing delay.

The most likely matters to proceed involved girls aged 6–9 and 10–13 at the time of the alleged offence.

The least likely matters to proceed were those involving children under six and those where the person was unknown to the child.

6 SOUTH AUSTRALIAN COURT DATA

Sexual offences against a child in South Australia may be prosecuted in the higher courts (Supreme Court and District Court), the Magistrates Court and the Youth Court, depending on the age of the defendant, the seriousness of the charges and the severity of the possible penalties.

6.1 NUMBER OF PERSONS PROSECUTED

A total of 7,488 persons were prosecuted[130] on at least one sexual charge against a child in finalised matters in the four courts over the period 1992–2012. The average number of sexual charges per finalised appearance was 3.4 (SD = 4.4) with a median of 2. Most persons had a finalised appearance in the Magistrates Court (45.4 per cent), excluding committals,[131] or the District Court (38.0 per cent). A relatively small number of cases were dealt with in the Youth Court (12.5 per cent) or the Supreme Court (4.1 per cent).

Figure 68 indicates a general upward trend in the number of defendants before the courts, especially in the District Court and Magistrates Court. There was a sharp increase from 2005 in the District Court and from 2008 in the Magistrates Court. Again, this probably reflects a bump in the numbers with some lag time before matters reached the courts following the Mullighan Inquiry.

[130] Persons are defined here as 'persons in finalised appearances', not distinct persons, as in the New South Wales data. In 4.1 per cent of finalisation dates, there was more than one case ID indicating that cases were heard together, with more than one defendant. Since South Australia has a unique PIN for each person in contact with the criminal justice system, the number of distinct persons was 5,394; 72.7 per cent had only one finalisation date, 19.7 per cent had two and the remaining 7.6 per cent had three or more. This excludes 428 young persons whose matters were dealt with by way of a family conference.

[131] As in the New South Wales data, persons in the Magistrates Court who were committed for trial and for sentence are not included since these are not counted as finalised matters, though they are finalised in an administrative sense for the Magistrates Court. The total count of 'persons' by the date of finalisation and case ID was 10,085 if committals are included.

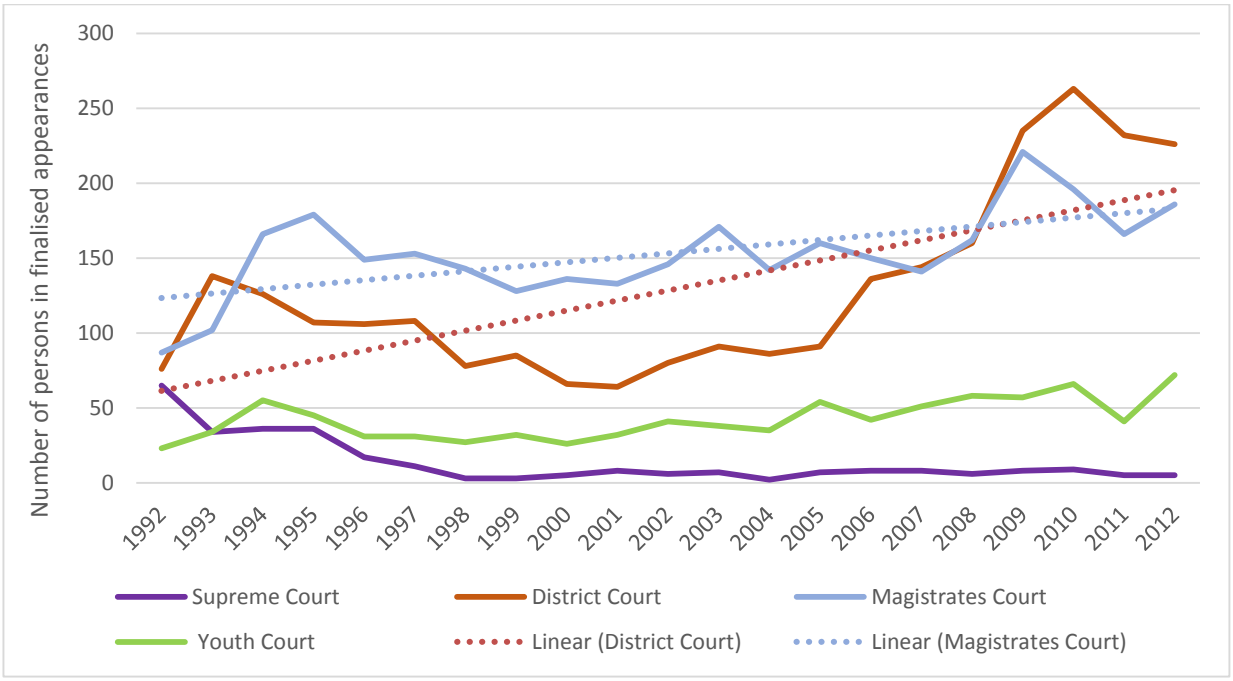


Figure 68. Number of persons charged with at least one sexual offence against a child by year in South Australia

6.2 TYPE OF OFFENCES

Table 14 presents the main categories of offences charged according to the JANCO codes and descriptions under South Australian legislation. The subcategories relating to age differ from those charged in New South Wales (for example, under 12 years in South Australia versus under 10 years in New South Wales; and a higher age of consent, 17 years in South Australia). The subcategories also include more gender-specific offences (for example, unlawful sexual intercourse with female 12 to 16 years inclusive). In addition to the age and gender-specific categories (N = 27,756), the frequencies in Table 14 include cases in the non-age and gender-specific categories (for example, attempted unlawful sexual intercourse with female age unspecified) in which the victim's age was under 18 (N = 8,307). The overall total number of offences was 36,063.

A small number of offences were specifically charged (*n* = 820, 2.3 per cent) as offences by 'a person in a position of authority in relation to the victim'.

Like s 66EA(1) in New South Wales, South Australia has an offence relating to persistent sexual exploitation or abuse of a child (s 50), which carries severe penalties. There were 436 offences under this category from 1996 to 2012. This offence is rarely charged in either state, but in South Australia more charges have been laid each year in 2010–12 (69, 82 and 114, respectively) than the New South Wales total of 62 charges since 2000.

These offences fall into the four main categories used in the analyses and shown in Table 14: sexual assault (sexual intercourse/penetration), indecent assault, acts of indecency and child pornography. The offence categories in Table 14 are the most common JANCO

categories, comprising 78 per cent of the sexual offence categories for charges laid over the period 1992–2012 in South Australia. The most common categories of child sexual offence charged in South Australia (each comprising between 8 and 12 per cent of offences) in order were:

- indecent assault – age or gender unspecified (11.8 per cent)
- rape or unlawful sexual intercourse of a female 12 to 16 years inclusive (10.4 per cent)
- rape or unlawful sexual intercourse of a female under 12 years (10.1 per cent)
- indecent assault of a female under 12 years (9.1 per cent)
- rape or unlawful sexual intercourse – age or gender unspecified (8.2 per cent).

These are listed in Table 14 according to the JANCO codes and the associated penalties under the *Criminal Law Consolidation Act 1935* (SA).

Table 14. Number and percentage of JANCO offence categories for most common offences charged for victims identified as under 18 years

Aggregated categories of offence (based on JANCO and *Criminal Law Consolidation Act 1935* (SA).	***n***	**% of total *n* of offences**	**Maximum penalty**
SEXUAL ASSAULT			
Unlawful sexual Intercourse by person in position of authority (for example, teacher/guardian)	820	**2.3**	s 49(5) – 10 years
Incest	485	**2.4**	s 70, s 72(1) – 10 years
Rape/unlawful sexual intercourse:			
Rape/unlawful sexual intercourse (SI) – female under 12/attempt	3,642	**10.1**	*s 48 – life s 49(1) – life where child under 14 years s 49(3) – 10 years where child under 17 years s 49(5) – 10 years where in position of authority
Rape/unlawful sexual intercourse (SI) – female 12–16 years inclusive	3,731	**10.4**	
Rape/unlawful sexual intercourse (SI) – male under 12/attempt	927	**2.6**	
Rape/unlawful sexual intercourse (SI) – male 12–16 years inclusive	624	**1.7**	
Rape/unlawful sexual intercourse (SI) – age or gender unspecified/17+	2939	**8.2**	
Persistent sexual abuse of female/male/unspecified child	436	**1.2**	s 50 – life
INDECENT ASSAULT			
Indecent assault female under 12 years	3,266	**9.1**	s 56(1)(A) – 8 years s 56(1)(B) – 10 years if aggravated – victim under 14 years
Indecent assault female 12–16 years inclusive	839	**2.3**	
Indecent assault male under 12 years	1,095	**3.0**	
Indecent assault male 12–16 years inclusive	348	**1.0**	
Indecent assault – age or gender unspecified/17+	4,251	**11.8**	
Act of indecency			
Gross indecency, incite or procure gross indecency female under 16 years	1,691	**4.7**	s 58 – 3/5 years first /subsequent offence s 65B – 10 years, 12 years position of authority
Gross indecency or incite male under 16 years	1,000	**2.8**	
Child pornography	1,575	**4.4**	
Total most common offence categories charged	**27,669**	**78% of total offences**	

* s 48(1)(A), s 48(1)(B), s 48(2)(A), s 48(2)(B), s 48(2)C and s 49(1) of *Criminal Law Consolidation Act 1935* (SA) (CLC Act)

** s 58(1)(A), s 58(1)(B) and s 58(1)(C) of CLC Act – 5 years; s 63B(1)(B)(1) of CLC Act *Basic Offence* – 10 years; s 63B(1)(B)(1) of CLC Act *Aggravated Offence* – 12 years

Table 15 presents the number of persons prosecuted in relation to the four child sexual offence categories (*n* = 9,577).[132] The highest number of persons (4,140, 43.2 per cent) were charged with sexual assault, with most dealt with in the higher courts (62.3 per cent). One-third of the finalised appearances (3,541 persons, 37.0 per cent) were facing indecent assault charges in both the higher courts and the Magistrates Court. Only 6.6 per cent (630 persons) were charged with a child pornography offence, again mostly in the Magistrates Court (54.1 per cent).

Table 15. Number and percentage of persons by offence type in finalised appearances by court in South Australia

	Higher courts	Magistrates Court	Youth Court	Total	
	n	*n*	*n*	*n*	%
Sexual assault	2,579	940	621	4,140	43.2
Indecent assault	1,544	1,600	397	3,541	37.0
Act of indecency	463	711	92	1,266	13.2
Child pornography	269	341	20	630	6.6
Total	**4,855**	**3,592**	**1,130**	**9,577**	**100.0**

6.3 PERSONS PLEADING GUILTY

Figure 69 shows the number of persons with at least one charge of sexual offence against a child in a given offence category in which there was at least one guilty plea. In the higher courts, there has been a marked increase in the number of persons pleading guilty to at least one offence since 2005 compared with relatively flat trends in the two lower courts. In contrast, New South Wales showed a downward trend but any comparison also needs to be seen against the number of persons appearing in each jurisdiction. This is taken into account in terms of the proportion of persons pleading guilty to at least one offence (see Figure 70).

[132] Persons within each court are counted for each offence type they are charged with in each finalised appearance.

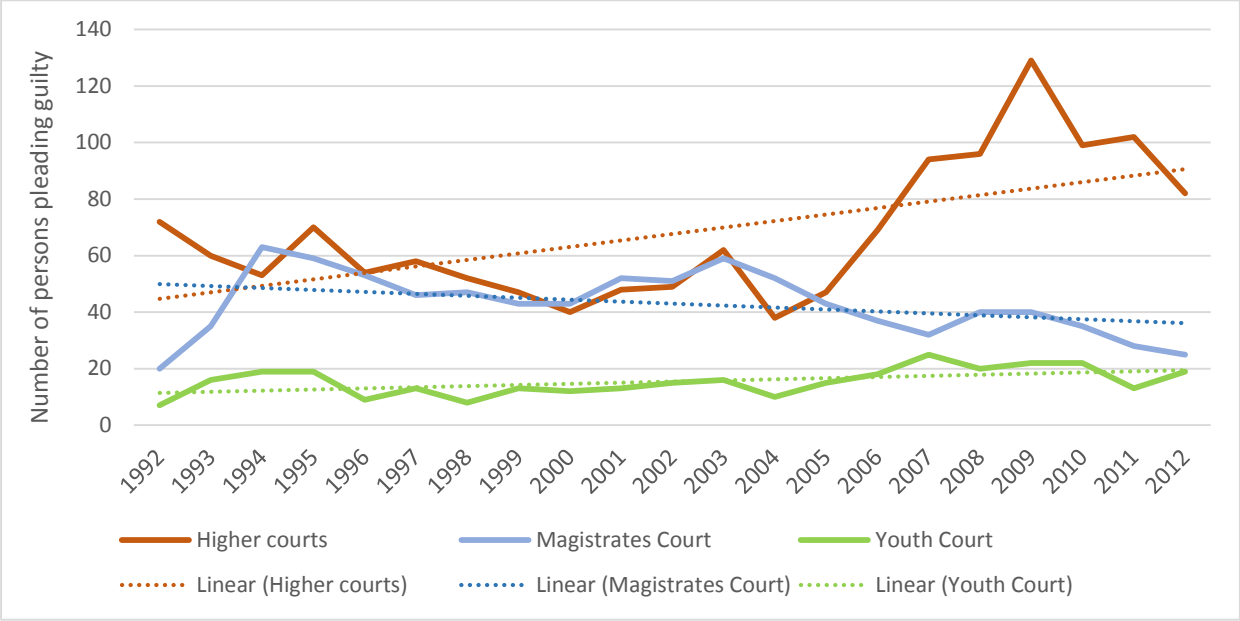


Figure 69. Number of persons with at least one guilty plea by court by year in South Australia

Figure 70 shows the *proportion* of persons with at least one charge who pleaded guilty to at least one sexual offence against a child. As in New South Wales, there is significant variation across courts and over time. Unlike New South Wales, where the proportion pleading guilty has an increasing trend, the trend lines are fairly flat or downward in South Australia, with a low of only 31 per cent of persons pleading guilty in the higher courts in 2012 compared with 60 per cent in New South Wales in 2014. Overall, fewer persons pleaded guilty in finalised appearances in the Magistrates Court (overall average of 17 per cent) than in either the Youth Court (36 per cent) or higher courts (42 per cent average).

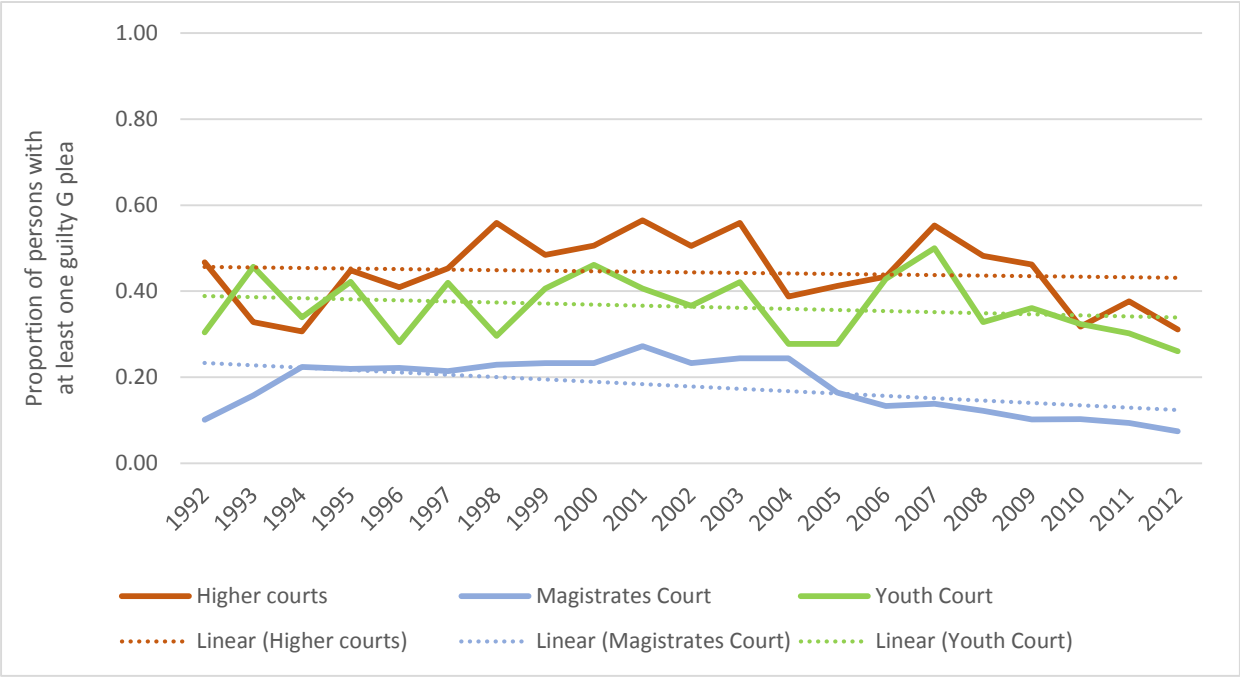


Figure 70. Proportion of persons who pleaded guilty to at least one charge by court by year in South Australia

6.4 COURT OUTCOMES

Table 16 presents the outcome for persons with finalised charges in the higher courts in South Australia over the period 1992–2012. Just over half (57.4 per cent) were convicted of at least one offence by being found guilty at trial (46.4 per cent) or pleading guilty and proceeding to sentence (10.9 per cent). Another 15.4 per cent were acquitted or had all charges dismissed at trial. A substantial proportion of persons (26.7 per cent) in the higher courts had all charges dismissed prior to or without a hearing.[133] This included nolle prosequi (20.3 per cent in the District Court, and 17.6 per cent in the Supreme Court) followed by white certificates (4.4 per cent in the District Court and 0.7 per cent in the Supreme Court).[134]

Table 16. Court outcome for persons with finalised charges of a sexual offence against a child in the higher courts in South Australia

	Number of persons	% of persons	% of persons at trial
Proceeded to trial	2,073	61.8	
Acquitted/other charges dismissed at trial*	515	15.4	24.8
Convicted of at least one charge	1,517	45.2	73.2
Proven offence but with no conviction recorded	41	1.2	2.0
Proceeded to sentence only – guilty plea	**367**	**10.9**	
All charges dismissed/not proceeded with prior to trial**	895	26.7	
Total	**3,355**	**100.0**	
Total guilty	**1,925**	**57.4**	

* Includes 17 persons found not guilty by reason of mental health or insanity.

** Most were nolle prosequi, white certificates or charges withdrawn by the prosecution; in addition, 19 accused persons died.

[133] In South Australia, the court outcomes included in the category 'withdrawn by the prosecution' are: dismissed under the *Summary Procedure Act 1921* (SA], information quashed, nolle prosequi, not proceeded with, withdrawn, and white certificate. Again, citing Hunter and Castle (2004): 'The ODPP defines a "white paper" or "white certificate" as "where the director declines to prosecute any charge and files prior to arraignment, a notice pursuant to the *Criminal Law Consolidation Act* section 276". According to the ODPP, this commonly occurs where the committal process is conducted in the country and there is no ODPP involvement prior to committal. In such instances, once assessed by the ODPP following committal, the ODPP may decide that the complaint or information should be more appropriately heard in the Magistrates Court (as a summary or minor indictable offence) or should not proceed at all. A 'white paper' is then lodged with the court.' (p 6).

[134] It also includes other 'outcome' codes relating to charges withdrawn on the application of the prosecution at trial and prior to trial, and combinations of these categories.

Table 17 shows the outcomes for persons with finalised charges in both the Magistrates Court and Youth Court. In the Magistrates Court, 889 persons (31.3 per cent) were found or pleaded guilty to at least one charge; 148 persons had proven offences but no conviction recorded. A small proportion of persons were acquitted (3.6 per cent). Again a very high proportion of persons (65.1 per cent) had all charges withdrawn prior to a hearing, most commonly when there was no evidence tendered by the prosecution. Committals in the Magistrates Court for trial or for sentence are not included in this count.

In the Youth Court, 349 (39.2 per cent) young defendants had a proven offence; for 263 of those young persons (75.4 per cent), no conviction was recorded. Likewise, a high proportion of young persons (57.5 per cent) had all charges dismissed without a hearing. Nine young people were committed for trial to a higher court.

Table 17. Outcome for persons with finalised charges of sexual offence against a child in the Magistrates Court and Youth Court in South Australia

	Magistrates Court		Youth Court	
	Number of persons	**%**	**Number of persons**	**%**
Convicted of at least one charge	741	26.1	86	9.7
Proven offence but with no conviction recorded	148	5.2	263	29.6
Not guilty/all other charges dismissed at court	101	3.6	29	3.3
All charges dismissed prior to hearing*	1,850	65.1	512	57.5
Total	**2,840**	**100.0**	**890**	**100.0**
Guilty/proven/convicted**	**889**	**31.1**	**349**	**39.2**

* Most commonly, the Crown made applications for no further proceedings, and with no evidence tendered and no hearing. Includes 10 persons who died.

** Includes persons who pleaded guilty and those who were found guilty as well as 148 persons with proven offence but with no conviction recorded.

Further analysis of the cases in which all charges were withdrawn or dismissed in South Australia across the four courts indicates that relatively few persons with the same PIN had further charges laid in relation to sexual offences against a child within three years of their charges being withdrawn or dismissed. Most cases were heard in the Magistrates Court for both the earlier and later finalised appearances (56 per cent), and the conviction rate for the subsequent appearance was also 25 per cent for any sexual offence against a child. The subsequent conviction rate was higher for the District Court (55.1 per cent) for the lesser number of cases in which the earlier appearance in any court had resulted in all charges being withdrawn or dismissed.

Figure 71 shows the number of defendants with at least one conviction for a sexual offence against a child, either by plea or by finding, by a court. The number of persons found guilty in the Magistrates Court showed an upward trend from 2004 with a peak of 473 in 2010. The number of persons in the higher courts was consistently lower but showed a very similar pattern.

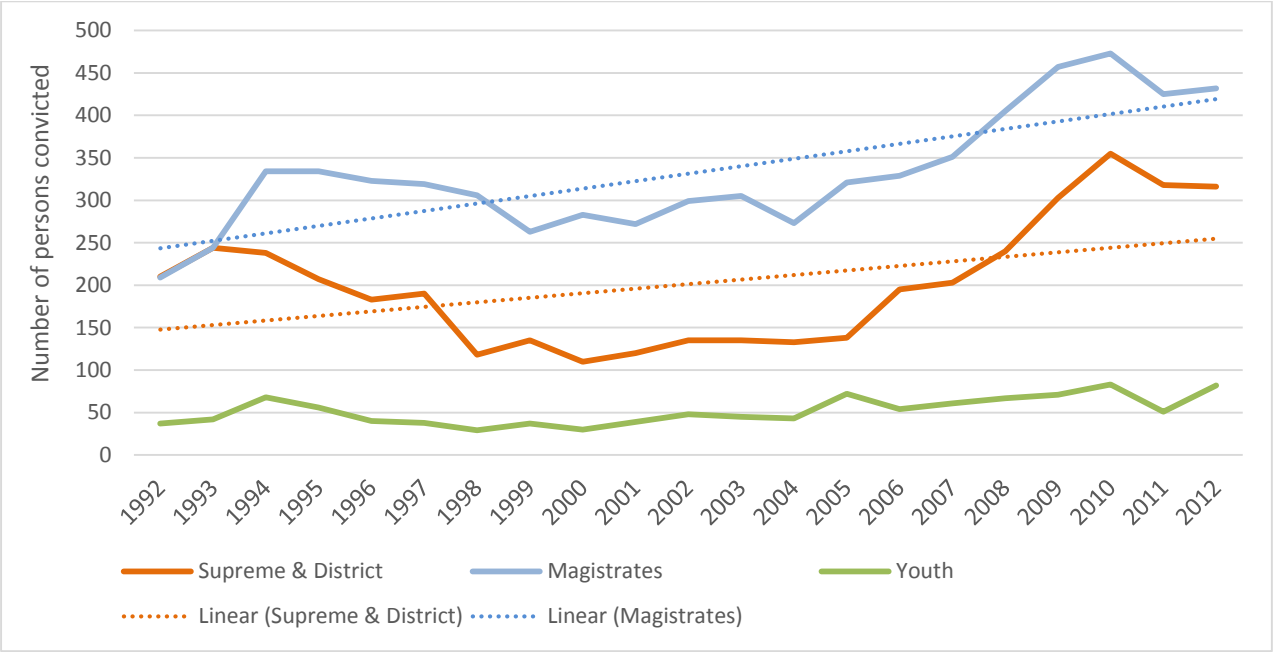


Figure 71. Number of persons convicted of at least one charge by court by year in South Australia

The number of persons convicted of at least one offence is broken down by the main offence categories in Figures 72a to 72c.

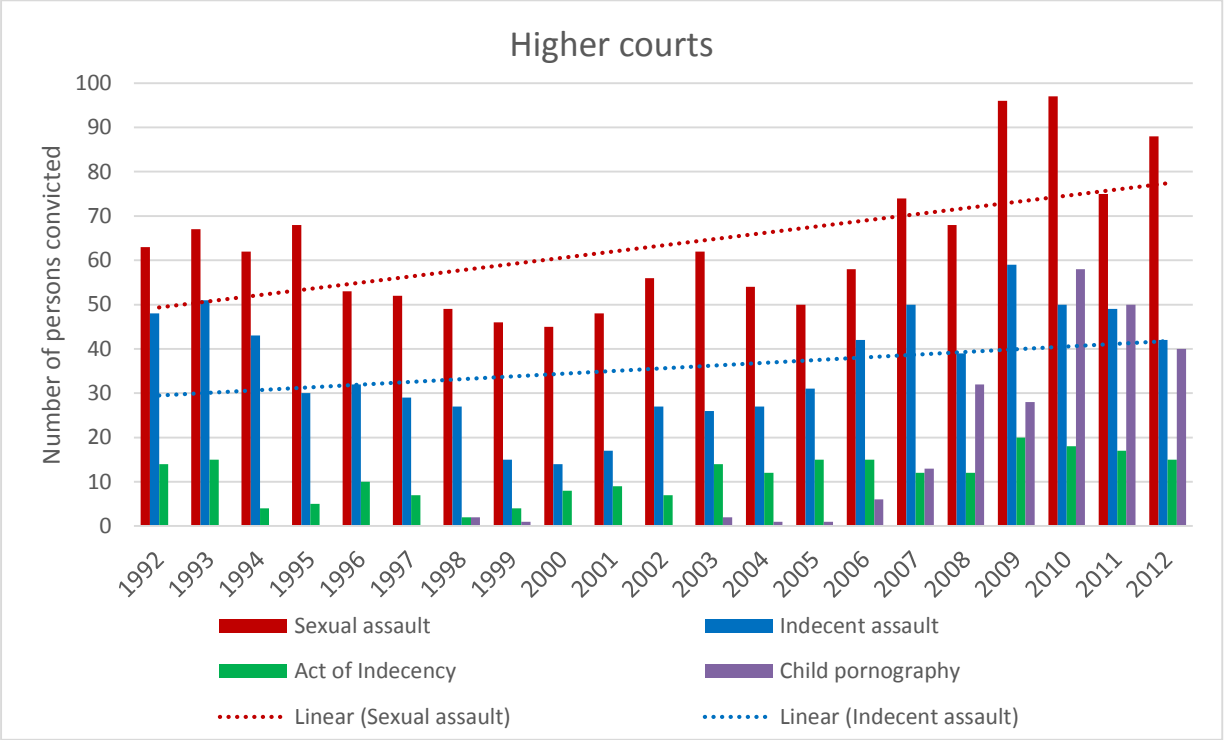


Figure 72a. Number of persons convicted of at least one major sexual offence against a child in the higher courts by year in South Australia

As in New South Wales, the majority of persons convicted of a sexual offence against a child in the higher courts were convicted of sexual assault (52.2 per cent). Again, there was significant variation in the numbers convicted of sexual assault, with a steep increase from a low of 45 in 2000 to a peak of 97 in 2010, and an overall yearly average of 63. About 30 per cent of matters in which a person was found guilty in the higher courts related to indecent assault. The numbers convicted of an act of indecency with a child in the higher courts were very low, averaging 13; these matters were generally dealt with in the Magistrates Court. Convictions for child pornography and related offences appeared from 2002 but the numbers increased from 13 in 2007 and ranged from 28 to 58 from 2008 to 2012.

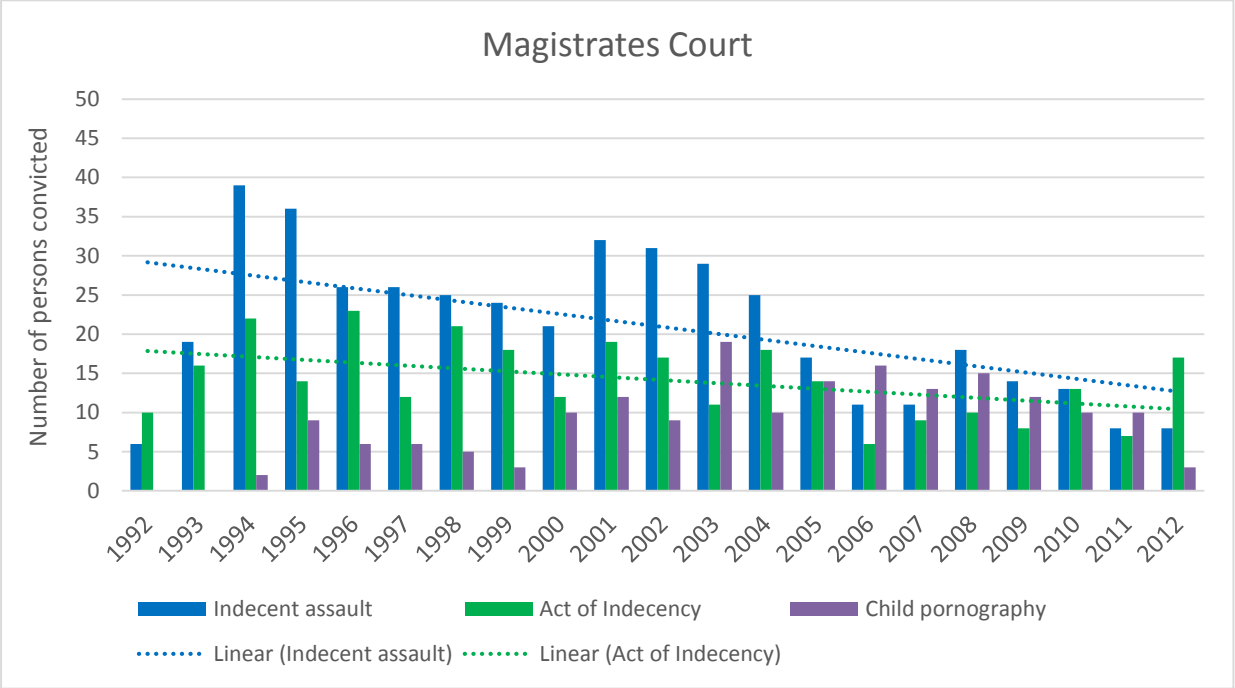


Figure 72b. Number of persons convicted of at least one major sexual offence against a child in the Magistrates Court by year in South Australia

The number of persons convicted in the Magistrates Court of indecent assault shows a downward trend with peaks in the mid-1990s and early 2000s. Just under half (46.6 per cent) were convicted of indecent assault; 31.5 per cent were guilty of an act of indecency and 19.5 per cent of child pornography.

The number of young people with at least one proven sexual offence against a child in the Youth Court was low (averaging 10 for sexual assault and 7.6 for indecent assault), with very few for acts of indecency or pornography. Note the changing scale on the three figures (Figures 72a to 72c) reflecting the much larger numbers in the higher courts.

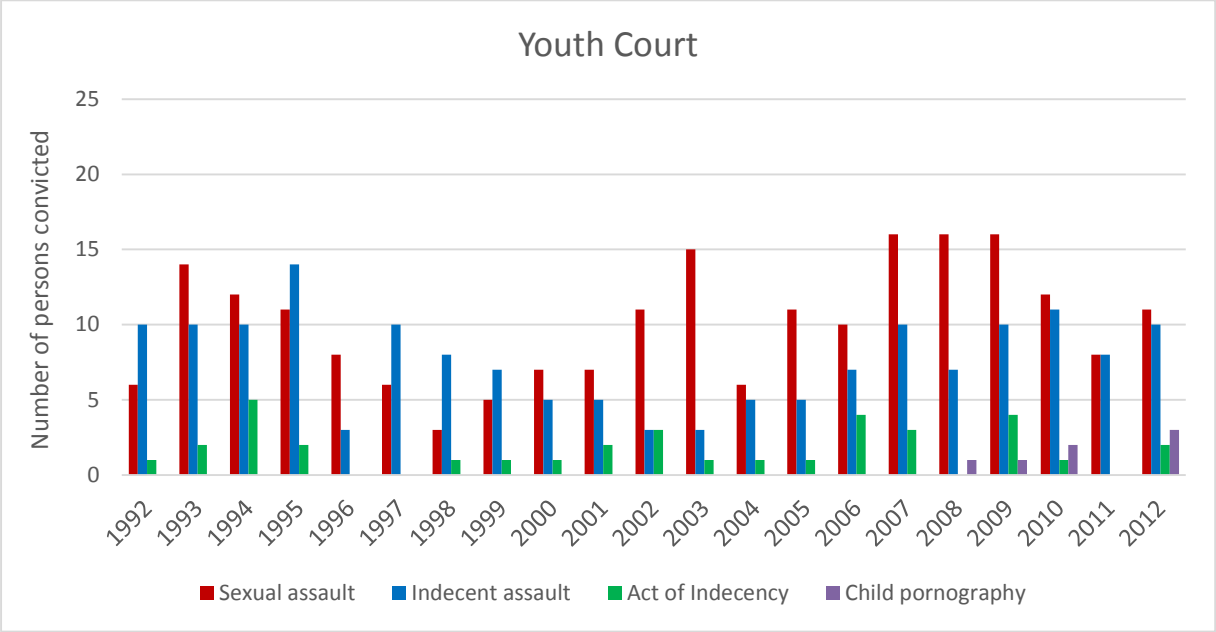


Figure 72c. Number of persons found guilty of at least one offence type in the Youth Court by year in South Australia

6.5 PROBABILITY OF A CONVICTION

Comparison of the major offence on which a person was convicted with that with which they were charged indicates that about 60 per cent of defendants in the higher courts were convicted on the same major charge (or one with the same maximum penalty – 63 per cent in the Supreme Court, 58 per cent in the District Court). Those figures were higher in the lower courts (Magistrates Court, 76 per cent; Youth Court, 67.9 per cent).

Figure 73 shows the proportion of persons who were convicted in the higher courts (after pleading guilty or being found guilty at trial or a hearing) of at least one charge by the major offence categories.[135] The 'conviction rate'[136] for sexual assault was relatively steady over the period 1992–2012, ranging between 45 per cent and 62 per cent, and averaging 52 per cent. Indecent assault followed a similar pattern, averaging 48 per cent. Acts of indecency and child pornography are not included in this graph because of the small numbers involved, but since 2008, the proportion of

[135] These figures exclude categories of offence by jurisdiction in which the number of persons per cell was less than 20 across the board because a small number base was associated with high proportions. This includes acts of indecency heard in the higher courts.

[136] The conviction rate includes those with a proven offence with no conviction recorded; a number of persons in this category received a penalty, mostly a supervision order or conditional release.

those charged with child pornography who were found guilty has been high – ranging between 82 per cent and 97 per cent.

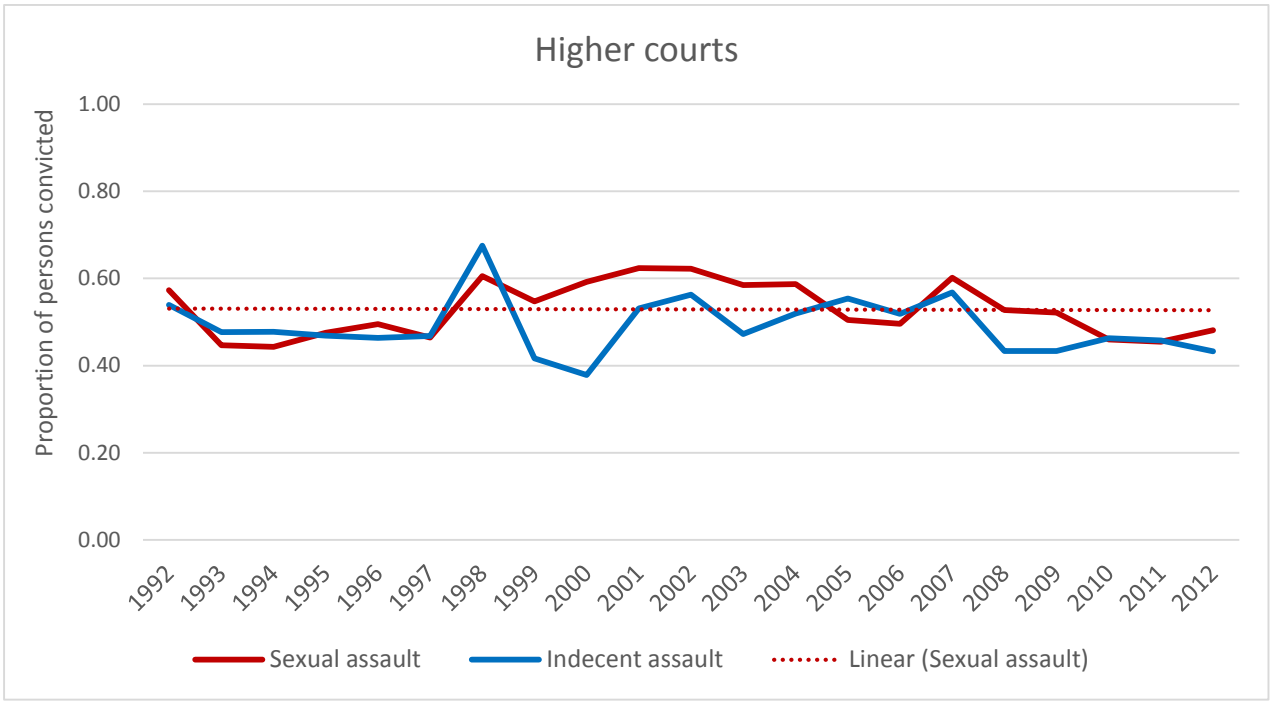


Figure 73a. Proportion of persons in the higher courts convicted of at least one sexual offence against a child by year in South Australia

In the Magistrates Court, there is a downward trend in the proportion of persons convicted of both indecent assault and an act of indecency. For indecent assault, the most common sexual offence against a child being prosecuted in the Magistrates Court, the overall average conviction rate was 27 per cent but since 2009 it has fluctuated around 15 per cent. The highest conviction rates throughout were for acts of indecency, with an overall average of 42 per cent, and for pornography, averaging 54 per cent but with smaller numbers contributing to the fluctuation (Figure 73b).

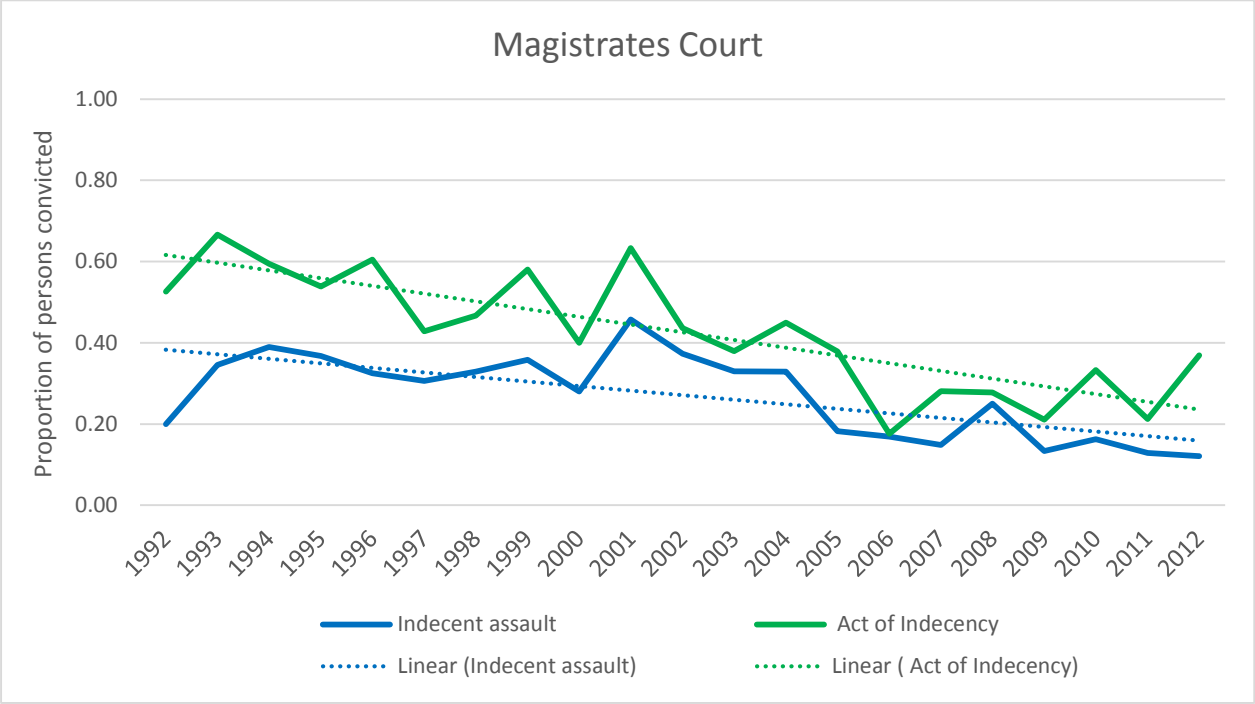


Figure 73b. Proportion of persons in the Magistrates Court convicted of at least one sexual offence against a child by year in South Australia

The rates of proven offences for children and young persons appearing before the Youth Court on sexual assault and indecent assault offences both show a downward trend, probably reflecting diversionary practices (averaging 34 per cent for sexual assault and 41 per cent for indecent assault, again with considerable fluctuation).

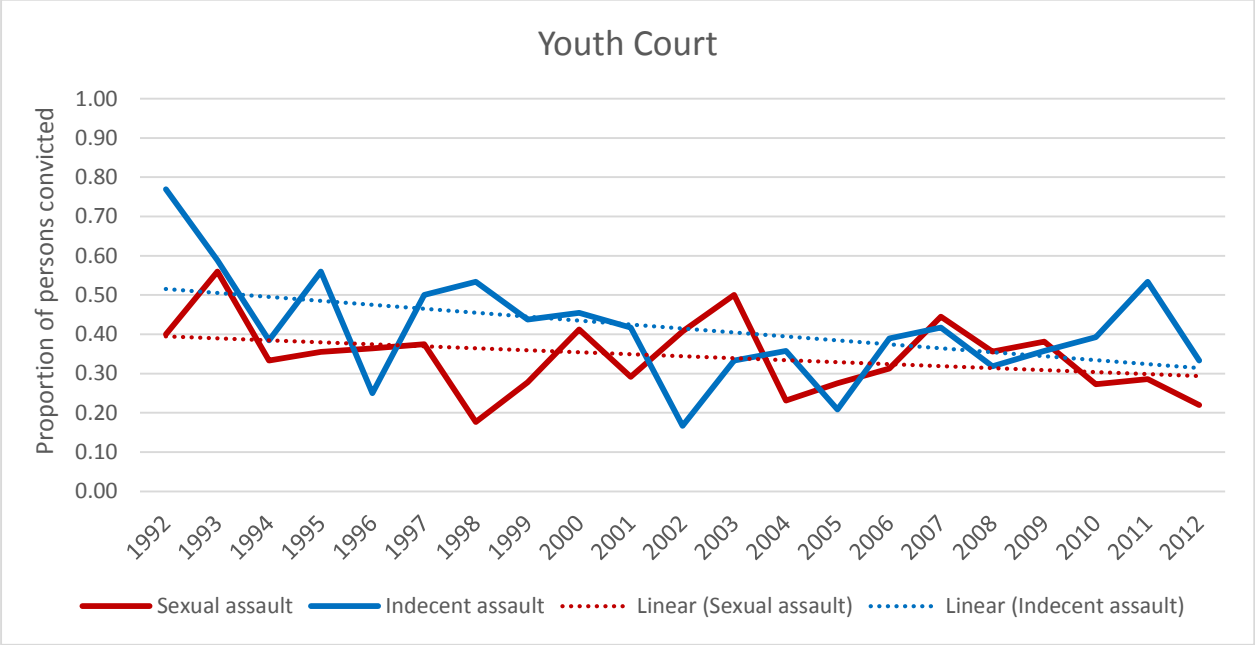


Figure 73c. Proportion of persons in the Youth Court with a proven offence for at least one sexual offence against a child by year in South Australia

6.6 TIME BETWEEN OFFENCE AND FINALISATION

Figure 74 shows the time between the offence and finalisation at court. Most matters, across all years in both the Magistrates Court (72.5 per cent) and the Youth Court (77.1 per cent) were finalised within two years of the date of the offence. Only 13.7 per cent were finalised in the Magistrates Court five years or longer after the offence. Matters heard in the higher courts were finalised over longer periods from the date of the offence than those in the lower courts; 54 per cent were finalised within two years of the offence but one in four (25.3 per cent) were finalised five or more years after the offence.

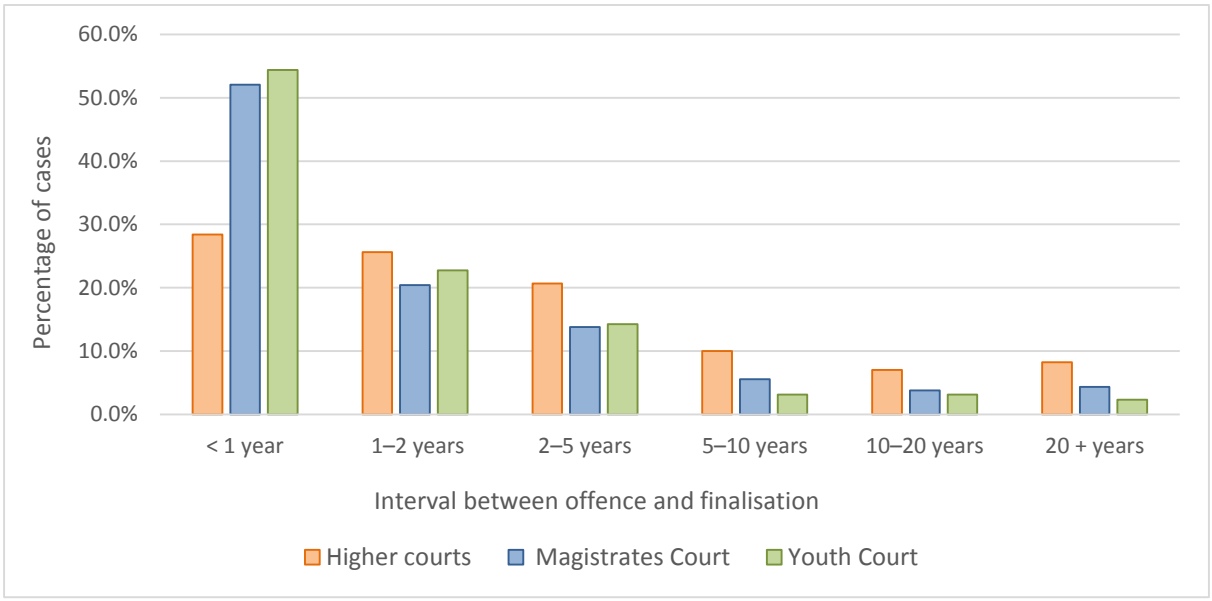
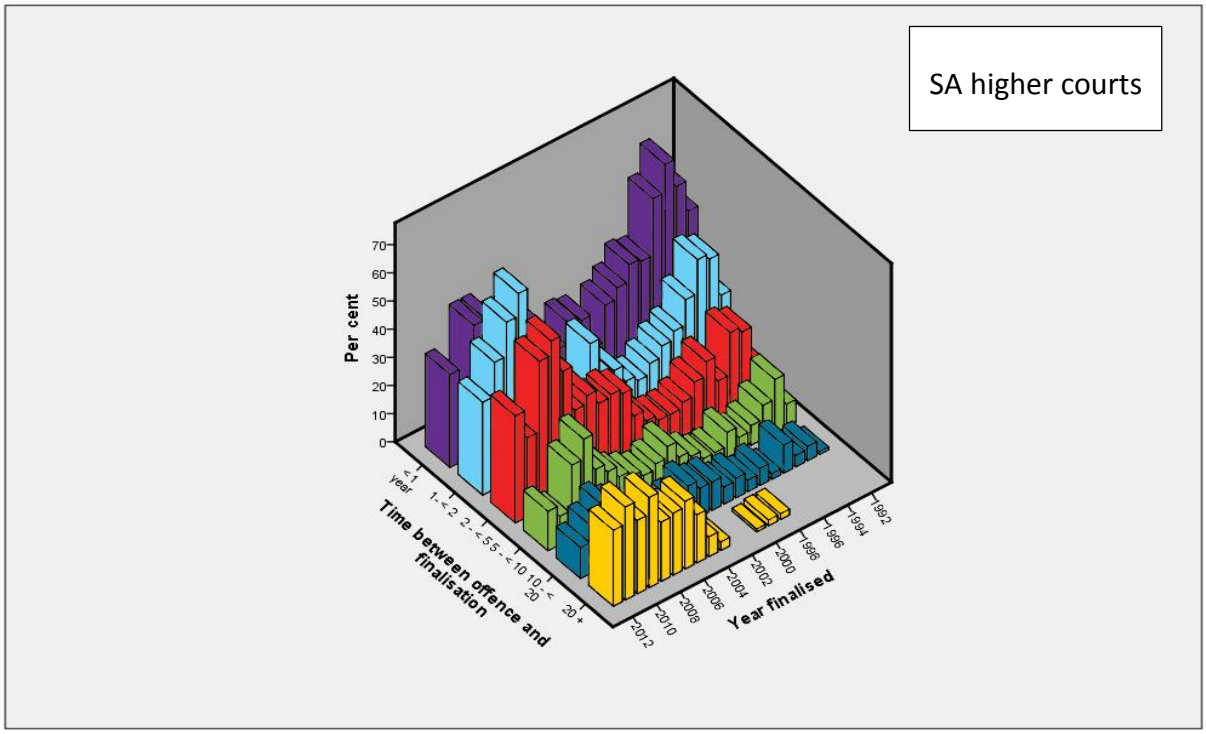
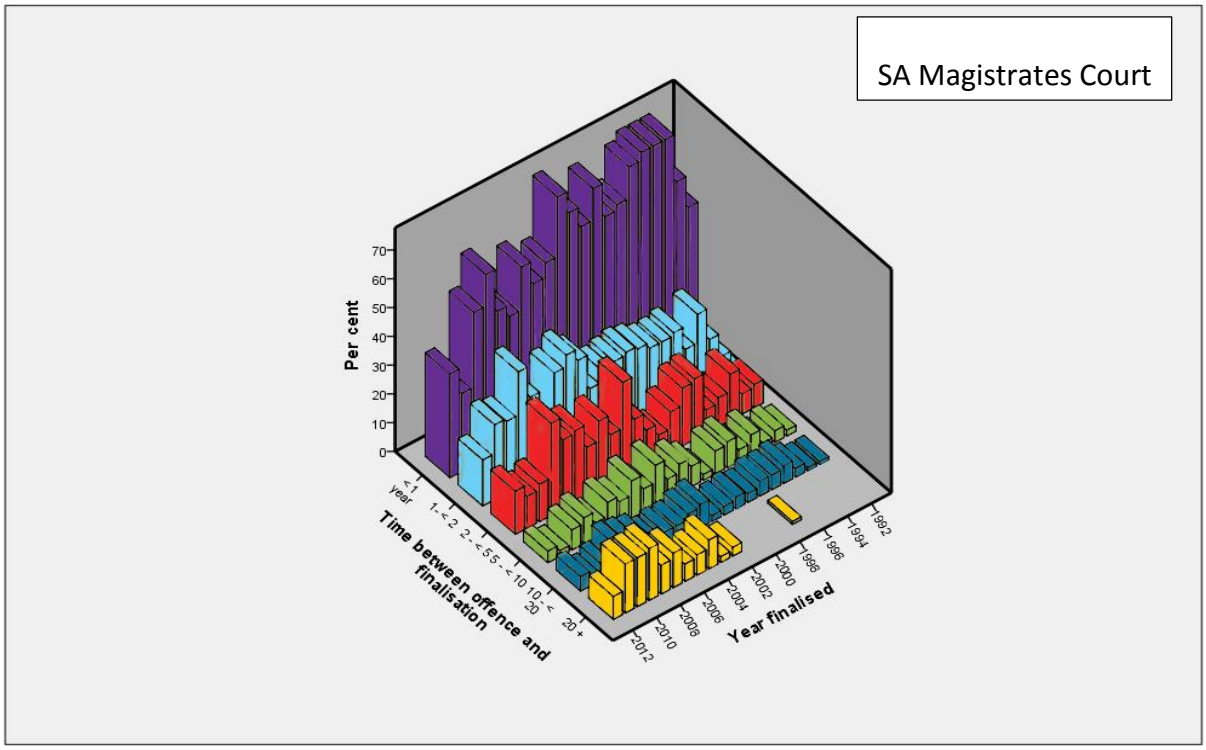


Figure 74. Percentage of defendants by interval between offence and finalisation by court in South Australia

Note: The period for the higher courts is for 2002–12 because offence dates are not available in the dataset before 2002.

Figures 75a and 75b show the time between the offence and court finalisation by year of finalisation for both the higher courts and the Magistrates Court. In the Magistrates Court, the vast majority of cases were finalised at court within a year of the offence, though this proportion has been decreasing since the mid-2000s (height of purple bars). As Figure 74 shows, a small proportion of matters are finalised beyond five years of the date of the offence in the Magistrates Court. The pattern is quite different in the higher courts, where the proportion finalised within a year dropped during the mid-2000s; at the same time, there was a sharp emergence in cases being finalised 20 years or more after the offence. A similar but less marked pattern appears in the Magistrates Court, and both courts reflect the impact of the statute of limitations in South Australia. This was in place until 2003, which meant that few historical cases of child sexual abuse were heard until the mid-2000s, in contrast to New South Wales, where the patterns in both the higher courts and the Local Court (Figures 40a and 40b) are quite different from South Australia.





Figures 75a and 75b. Time between offence and finalisation by year of finalisation in (a) higher courts and (b) Magistrates Court in South Australia

Table 18 shows the length of time for matters to be heard on first appearance following the offence. That time is significantly longer in the higher courts than in the Magistrates Court, including committals for trial and sentence. As in New South Wales, this probably reflects both the greater

number of historical matters in the higher courts and the longer time to report more serious offences, and longer delays in getting to and having the matter finalised in the District Court. Once the matter reaches court, the time to finalisation from the first appearance is relatively short, averaging between 5.8 months in the higher courts and 5.6 months in the Magistrates Court. The overall median time from the earliest offence to finalisation at court is 21 months in the higher courts, 11 months in the Magistrates Court, and 11 months in the Youth Court: the means are 65.8 months, 39.5 months, and 27 months, respectively. The median time to finalisation of 21 months in the higher courts is about half the time taken in New South Wales (40 months), which may be partly related to the much higher rate of withdrawal of matters in South Australia.

Table 18. Intervals between offence, first appearance and finalisation at court

	Offence to first appearance (months)			First appearance to finalisation (months)		
	Mean	SD	Median	Mean	SD	Median
Higher courts	59.5	106.1	14.0	5.8	7.8	4.0
Magistrates Court	33.4	87.2	5.0	5.6	10.3	3.0
Youth Court	22.0	55.8	4.0	5.2	6.7	4.0

6.7 PREDICTING THE LIKELIHOOD OF A CONVICTION

Logistic regression was used to model the association between the probability of a conviction (either by verdict or plea or a finding that the offence was proven) and factors such as:

- the type of offence – sexual assault and indecent assault137
- the court in which the case was heard (higher courts and Magistrates Court)
- the gap between the date of the offence and the finalisation date for that matter
- the year the matter was finalised (1992–2012)138
- the gender of the defendant
- the age of the defendant at finalisation.

[137] Only incidents involving sexual assault and indecent assault were included in the analyses.

[138] The overall 21-year period 1992–2012 was grouped into seven three-year periods because of the relatively small number of cases available for analysis.

It should be noted that some cases could not be linked to accused data so the cases used for the analysis are a subset of those that occurred in the time period covered. The data-matching process (using the unique apprehension number) meant there was a considerable loss of cases, so this set of analyses needs to be treated with caution. The difficulties of tracking from the police data to court data are clearly explained by Wundersitz (2003a), as outlined earlier.

The overall model was significant [139] and there were three statistically significant two-way interactions. The more important interaction in terms of the research questions was the interaction between the court and interval between the offence and finalisation, a proxy for delayed reporting. Figure 76 shows that the likelihood of a conviction in the higher courts was greater than in the Magistrates Court (p <.0023). With increasing intervals beyond five years, the likelihood of a conviction increased in the higher courts but dropped slightly in the Magistrates Court. This is a variation on the trend in New South Wales, where there was also a drop-off in the probability of a conviction with increasing intervals between the offence and finalisation in the Local Court but not in the higher courts. As Figures 75a and 75b showed, only a small proportion of cases in South Australia were dealt with where the delay between the offence and finalisation was longer than five years, presumably because of the statute of limitations.

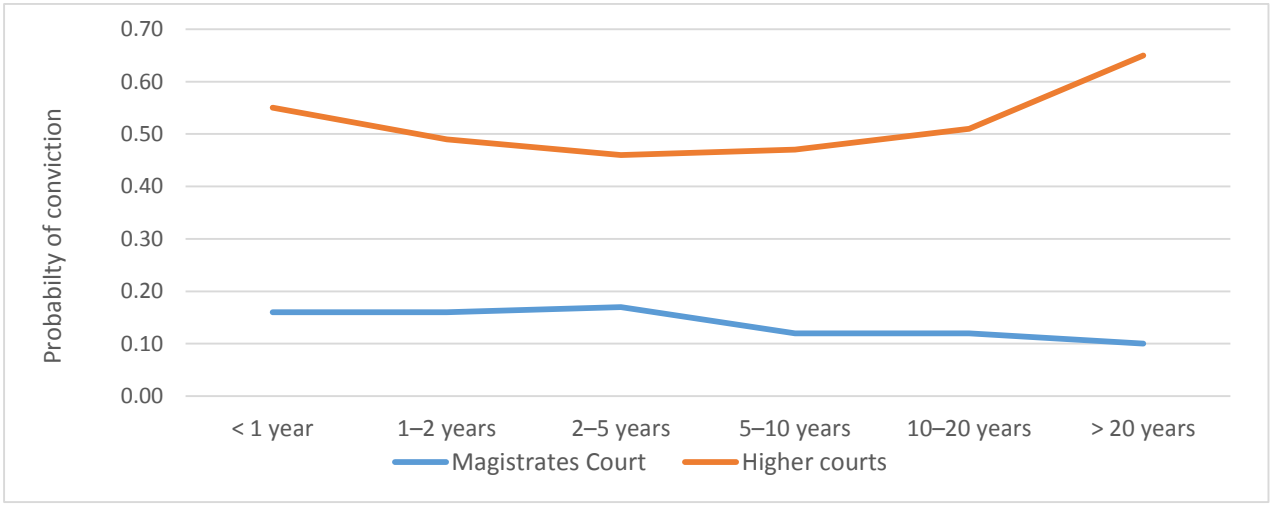


Figure 76. Adjusted probability of conviction by court and interval between the offence and court finalisation in South Australia

The other two interactions are not substantively important in terms of the research questions: between the type of court and the type of offence, and between the type of offence and the age

[139] χ^2 (n = 5,159) = 421.4, df = 15, p <.0001.

of the defendant at finalisation. The interaction between the type of offence and the court is simply a function of a conviction for indecent assault being more likely in the higher courts than in the Magistrates Court, as above (OR = 2.6). There was no difference in the likelihood of a conviction for indecent assault compared with sexual assault in the higher courts (OR = 0.90).[140] As noted earlier, the high rate of matters with all charges withdrawn or dismissed in the Magistrates Court clearly lowers the conviction rate. The interaction with the type of offence and the age of the defendant is a function of older defendants being less likely to be convicted of sexual assault than indecent assault.[141] None of the other variables (year of the offence and gender of the offender) had a significant main effect.

6.8 SENTENCING ON THE MOST SERIOUS OFFENCE

The following data on penalties and sentencing are based on the principal sexual offence of which the offender was convicted. The principal offence is defined as the offence that receives the most severe penalty among the sentences imposed on an offender.

Table 19 shows the principal or most severe penalty for the 2,761 persons whose matters were finalised in the higher court, Magistrates Court and Youth Court in South Australia over the period 1992–2012. The most common principal penalty in the higher courts (56.1 per cent of persons) was imprisonment; 36.3 per cent received a suspended sentence; a much less frequent penalty was a supervision order or conditional release (5.2 per cent).

In the Magistrates Court, a suspended sentence (42.0 per cent) was much more common than a custodial sentence (15.4 per cent) or the next most common supervision order or conditional release (20.8 per cent).

In the Youth Court, by far the most common penalty was a supervision order (66.6 per cent). One in five young offenders (20.1 per cent) received a suspended sentence, and a very small proportion, 3.6 per cent, received the most serious or punitive penalty, a detention order.

[140] χ^2 (n = 5,159) = 141.7, df = 1, p <.0001.

[141] χ^2 (n = 5,159) = 19.4, df = 1, p <.0001. For indecent assault, a test of simple slope showed there was no significant relationship between the age of the offender and the likelihood of a guilty verdict (OR = 1.0). For sexual assault, however, the likelihood of a guilty verdict declined with increasing age, OR = 0.98.

Table 19. The principal penalty (number of persons) by court

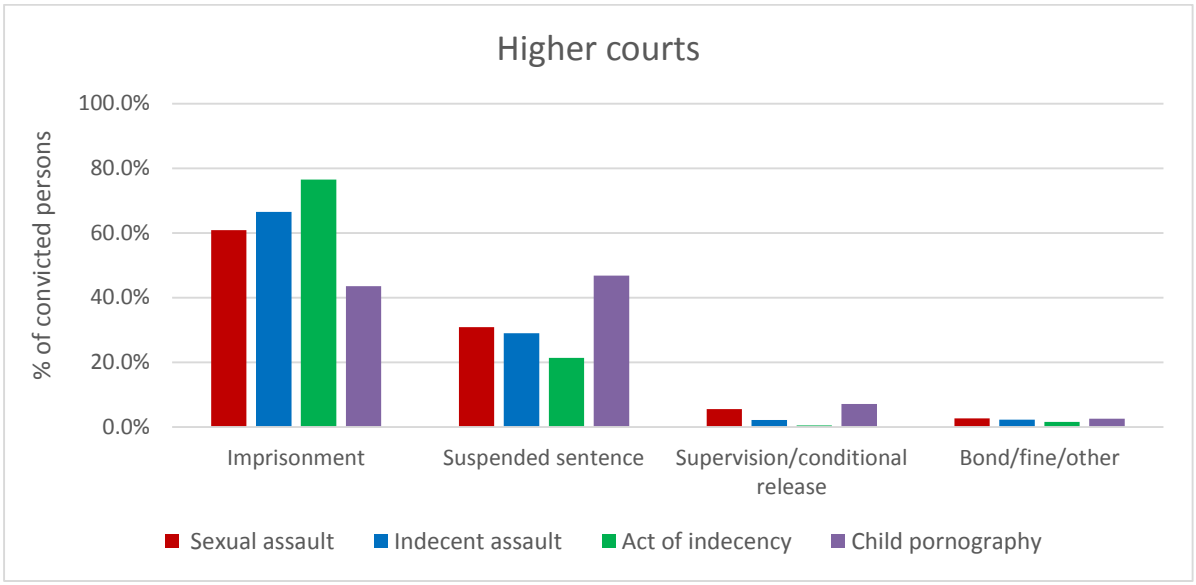
	Higher courts		Magistrates Court		Youth Court		Total
	n	*%*	*n*	*%*	*n*	%	N
Imprisonment	883	56.1	135	15.4	11	3.6	**1,029**
Supervision order/detention	2	0.1	–	–	–	–	**2**
Suspended sentence	571	36.3	369	42.0	62	20.1	**1,002**
Community service order	7	0.4	24	2.7	6	1.9	**37**
Supervision order/conditional release	82	5.2	183	20.8	205	66.6	**470**
Bond with/without supervision	15	1.0	17	1.9	2	0.6	**34**
Fine	11	0.7	147	16.7	17	5.5	**175**
Other	4	0.3	3	0.3	5	1.6	**12**
Number of persons – offenders	**1,575**	100	**878**	100	**308**	100	**2,761**

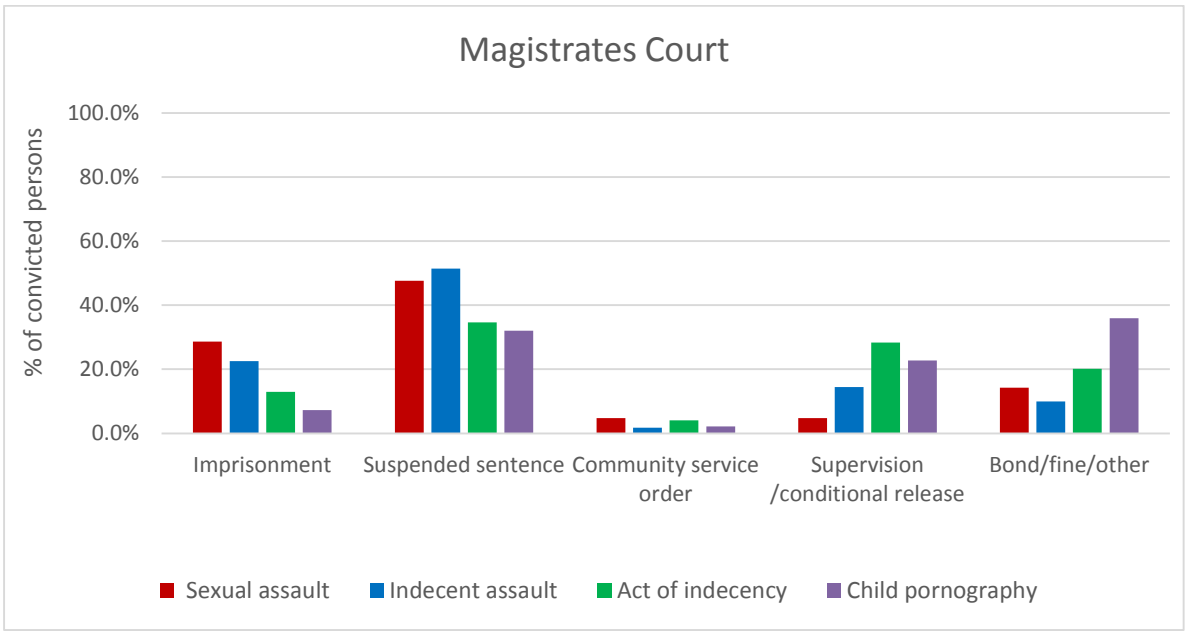
Figures 77a, 77b and 77c present a breakdown of the principal penalty (generally for the most serious offence) for each major offence category for each of the three courts. As with New South Wales, the most common principal penalty in the higher courts (Figure 77a) was imprisonment across all four major offence categories; unexpectedly it was slightly higher for an act of indecency, including procuring a child for gross indecency (76.5 per cent) and indecent assault (66.5 per cent), than for sexual assault (60.9 per cent).[142] The number of those convicted of an act of indecency (*n* = 196) is much lower than for sexual assault (*n* = 1,093). Those found guilty of child pornography in the higher courts were a little more likely to receive a suspended sentence (46.8 per cent) than a custodial sentence (43.5 per cent). Other forms of penalty such as supervision or a fine were much less common, and less so than in New South Wales.

In the Magistrates Court, for all four types of offence, a suspended sentence was much more likely than a custodial sentence (Figure 77b). For indecent assault, which was the most common offence leading to a conviction in the Magistrates Court, the most common principal penalties were a suspended sentence (51.4 per cent), a custodial sentence (22.5 per cent) and a supervision order (14.5 per cent). The principal penalty for child pornography was fairly evenly divided between a fine (34.3 per cent), a suspended sentence (32.0 per cent) and a supervision order/conditional release (22.7 per cent).

[142] This may reflect 'global sentencing' where the sentence will be 'the same' across all offences for an offender.

In the Youth Court (Figure 77c), a bond/supervision order was the most common principal penalty for all offence categories; child pornography is not included in the graph because of the small number of cases (*n* = 7). Detention was reserved for a small number of young persons (*n* = 14); half (*n* = 7) had proven offences of sexual assault.





Figures 77a and 77b. Percentage of convicted persons with principal penalty by major offence category for the (a) higher courts and (b) Magistrates Court in South Australia

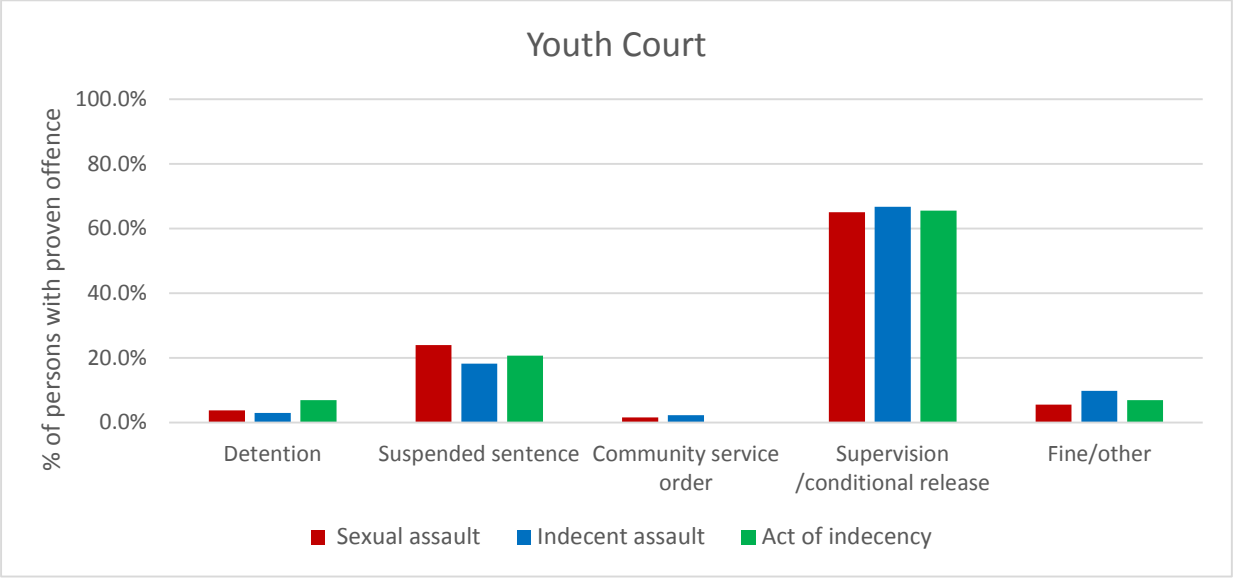


Figure 77c. Percentage of convicted persons with principal penalty by major offence category for the Youth Court in South Australia

Imprisonment

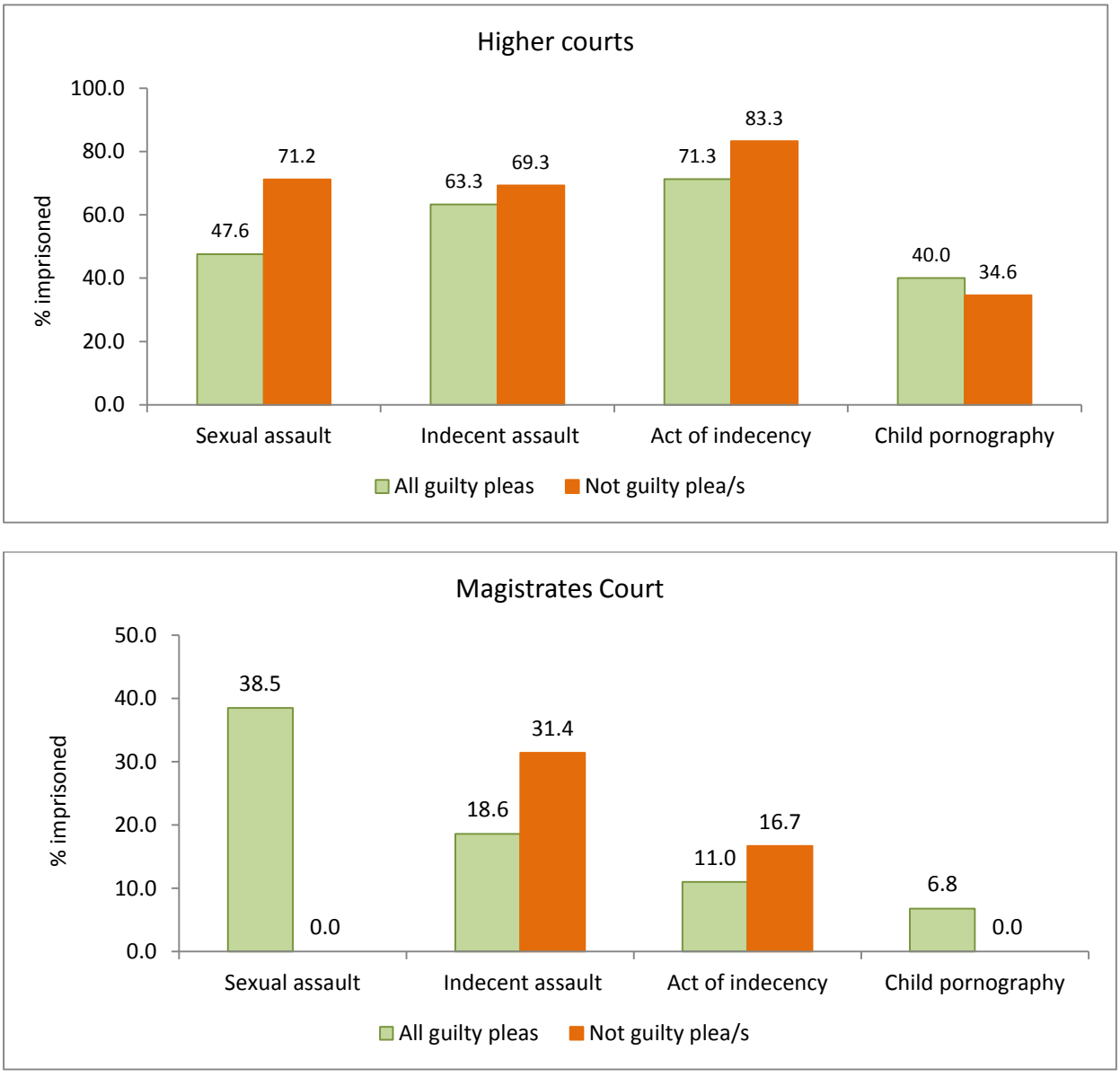
As outlined above, imprisonment was the most common principal penalty in the higher courts for all offences except child pornography, but much less common in the Magistrates Court. In total, 1,116 offenders (58.7 per cent of those found guilty) were sentenced to imprisonment in the higher courts and 223 in the Magistrates Court (9.2 per cent).

Table 20 indicates the quantum or median length of the sentence for the higher courts and the Magistrates Court for the main offence categories, together with the means. The longest terms of imprisonment were for sexual assault offences sentenced in the higher courts: mean of 71.4 months (SD = 48.7) and median of 60 months or five years.

Table 20. Length of full-time custodial sentences (months) by principal offence in South Australia

	Higher courts			Magistrates Court		
	n	Median	Mean	*n*	Median	Mean
Sexual assault	663	60.0	71.4	6	11.5	16.7
Indecent assault	420	48.0	63.2	102	15.4	16.6
Act of indecency	167	54.0	68.6	35	9.0	10.8
Pornography	67	20.0	37.8	13	6.0	9.2
Total persons	**1,299**	**60.0**	**68.9**	**156**	**14.0**	**14.7**

Figures 78a and 78b show the percentage of offenders who received a full-time custodial sentence as a function of whether they pleaded guilty or not to all charges. Those who pleaded guilty to the most commonly prosecuted and convicted offence in the two courts were less likely to receive a custodial offence than those who did not: in the higher courts for sexual assault, and in the Magistrates Court for indecent assault. The number of persons convicted of sexual assault in the Magistrates Court was small, and all pleaded guilty; five received a custodial sentence.



Figures 78a and 78b. Percentage of persons found guilty who receive a full-time prison sentence by major offence category in (a) higher courts and (b) Magistrates Court in South Australia

Note: The number of persons convicted of sexual assault in the Magistrates Court was small and all pleaded guilty.

Note: The scale on (b) Magistrates Court is to 50 per cent.

As in the New South Wales higher courts, the average and median length of custodial sentences was shorter for offenders who pleaded guilty in the higher courts to sexual assault and indecent

assault than for those who did not (Figure 79), but it was not shorter for those convicted of acts of indecency or pornography. There was little difference for offenders who pleaded guilty and those who did not in the Magistrates Court, similar to the pattern in New South Wales. Given the number of withdrawn and dismissed cases, these offenders may have pleaded to lesser charges in plea negotiation with lesser penalties.

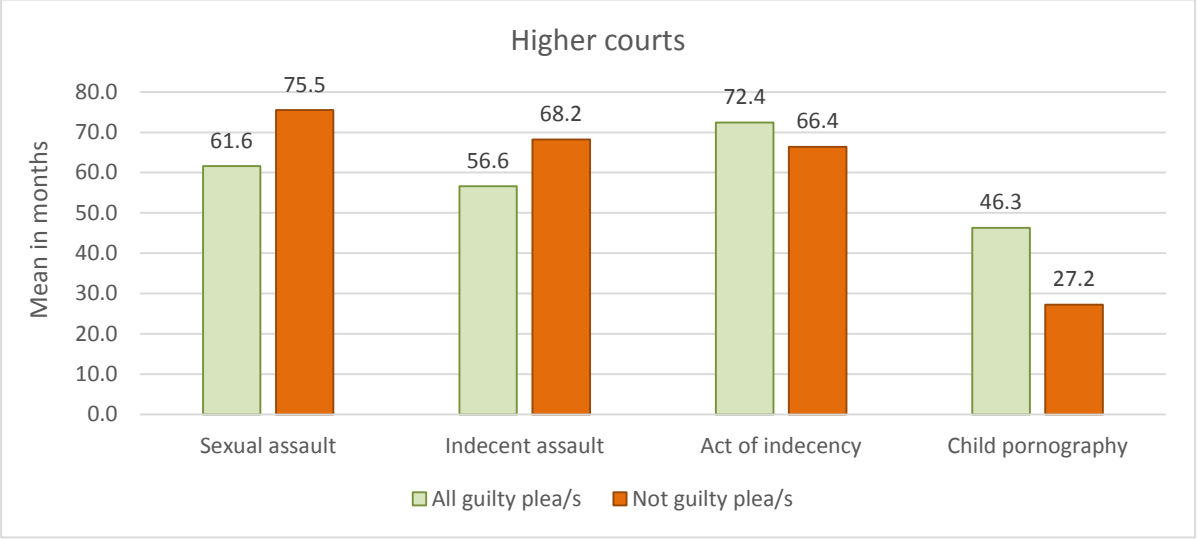


Figure 79. Mean length of prison sentence by major offence category and plea in higher courts in South Australia

Again, as in New South Wales, the probability of a full-time custodial sentence varied with the interval between the offence and finalisation. In the higher courts, the proportion of offenders who received a custodial sentence increased as the interval between the offence and finalisation increased for both sexual assault and indecent assault, and also for the smaller number of acts of indecency. The longer the interval between the offence and finalisation at court, the higher the probability of a prison sentence (Figure 80). Few offenders were convicted of pornography after an interval of five years or more from the date of the offence, and the proportion of pornography offenders who were imprisoned decreased as the interval increased. Child pornography offences are relatively recent so there is a cap on the interval from the offence to finalisation. There was a similar linear pattern for indecent assault in the Magistrates Court: 15.2 per cent received a custodial sentence when the interval between the offence and finalisation was less than a year, but this increased to 37.5 per cent and 38.5 per cent when the interval was 10 to 20 years, and over 20 years.

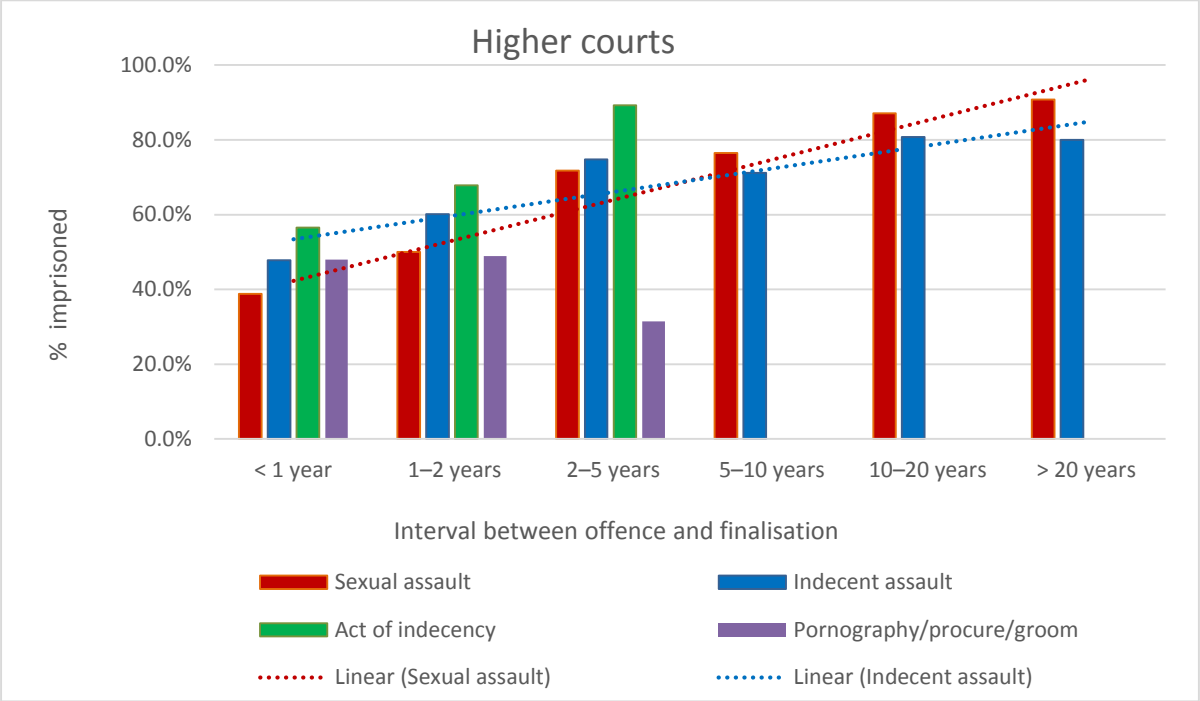


Figure 80. Percentage of offenders who were imprisoned by gap between offence and finalisation by offence type in the higher courts in South Australia

In summary, most persons convicted in the higher courts of the more serious offences of sexual assault and indecent assault received a custodial sentence, with the length of the sentences and the probability of a custodial sentence increasing with the absence of a guilty plea and with a longer interval between the offence and finalisation. In a high proportion of matters, all charges were withdrawn or dismissed in the Magistrates Court.

7 COMPARING NEW SOUTH WALES AND SOUTH AUSTRALIA

This section outlines the main similarities and differences between the New South Wales Police and South Australia Police and court data, based on the analyses of data from both states over about 20 years. The cautions concerning the interpretation of these data relate to the limitations of administrative data, differences and changes in recording practices, and legislative and policy changes.

Comparisons *over time* are complicated by numerous and significant changes in legislation that include changes in the offences and penalties, in the age of consent for homosexual sexual acts, and in South Australia, the abolition of the statute of limitations (Boxall, 2014). Matters that are reported some years after the alleged offence are required to be dealt with according to the legislation at the time of the offence rather than at the time of prosecution.

Comparisons *across jurisdictions* are complicated by differences between the states in legislation and the particular offences and penalties, policies and practices, and the way data are recorded and managed in the relevant police and court administrative databases.

7.1 TRENDS IN REPORTING

The number of reports to police of sexual offences against children in New South Wales and South Australia show some marked differences in trends. In New South Wales, the number of reports of sexual assault steadily increased from 1995 to 2014, but not for the other offences. In South Australia, the pattern of reports for child sexual assault and indecent assault ran together from 1992 to 2006, but separated from 2006 onwards, with a more marked downward trend for indecent assault. In both states, the peaks in reporting numbers coincided with or closely followed large inquiries into the police, child protection and out-of-home care systems – notably in New South Wales, the Wood Royal Commission Paedophile Inquiry which reported in 1997, and the Wood Special Commission of Inquiry into Child Protection Services which reported a decade later in 2008, and the Layton and Mullighan inquiries in South Australia, which reported in 2003, 2005 and 2008. Such inquiries attract considerable media attention, increasing public awareness, and generally result in changes to child protection policy and practice that are likely to increase reporting.

Both states, however, show very similar patterns for the main features relating to the victims, the types of offence, the proportion of child and adult reports, and the relationship of the person of interest/suspect to the victim. Consistent with the typical gender breakdown for child sexual abuse, the majority of victims were female in both states: 75.3 per cent in New South Wales and 78.7 per cent in South Australia (Australian Institute of Health and Welfare, 2015; O'Leary and Barber, 2008; Priebe and Svedin, 2008). In both states, the proportion of male victims was somewhat higher for indecent assault than for sexual assault. In South Australia, 25.1 per cent of indecent assault

incidents involved male victims compared with 17.8 per cent for sexual assault. In New South Wales, the figures were 26.3 per cent for indecent assault and 20.9 per cent for sexual assault. The child sexual abuse substantiation figures reported by the Australian Institute of Health and Welfare also indicate a higher proportion of boys with substantiated reports in New South Wales than in South Australia, which is consistent with the higher proportion of males reporting to police across a number of years.

The age pattern for victims is also very similar across the two states. In both states, the number of reported sexual assault and indecent assault incidents rose with increasing age, with the exception that victims of indecent assault aged 10–13 in South Australia were more numerous than their younger or older counterparts.[143] When gender was added to the picture, boys were more likely than girls to be aged under 10. In both states, those aged 14–17 were significantly more likely than other age groups to have reported sexual assault than other types of offence. This is consistent with the findings of Australian crime victimisation surveys with respect to sexual assault; indeed, the highest rate of sexual assault victimisation in 2013 was for females aged 10–14 (at 559 per 100,000 members of the female population compared with 419 for the next highest group of females aged 15–24) (Australian Institute of Criminology, 2016, p 15). The patterns of the relationship of the person of interest/suspect to the victim were also very similar across the two states. These patterns are consistent with research findings indicating that the vast majority of sexual offences against children are perpetrated by someone known to the child, and quite commonly a family or household member (Finkelhor, 1994). Most common, however, is another person known but unrelated to the victim, a number of whom were under 18. In both states, about 7 per cent of matters (in which the relationship of the suspect to the victim was recorded) involved 'persons in authority' (as a proxy for 'institutional abuse' as defined by the limitations of the police databases); and in both states was higher for indecent assault than for sexual assault. In New South Wales, the proportion of indecent assault reports to police involving 'persons in authority' was on average 7.5 per cent and 4.3 per cent for sexual assault. In South Australia, the comparable figures for persons in a position of authority in relation to the child were 9.2 per cent for indecent assault (with a high of 14.3 per cent in 2004) and 3.5 per cent for sexual assault. The higher proportion in the early to mid-2000s in South Australia likely reflects the activity of the Layton and Mullighan inquiries.

When considering persons of interest or suspects in relation to child sexual abuse, the focus is generally on adults, and in relation to 'institutional abuse', on adults who are in positions of authority. However, a significant and increasing proportion of the persons of interest or suspects in both states were children or young persons under 18 – 22 per cent in New South Wales and 20 per cent in South Australia. They included siblings, another family or household member and most

[143] The number of 10-year-old children in New South Wales increased by 12 per cent from 1990 to 2015 compared with a flat 0.3 per cent for boys and 2 per cent for girls in South Australia over the same period. But this is likely to provide only a partial explanation of the different trends of reports made in childhood in both states (Australian Bureau of Statistics, 2010, 2015).

commonly, other persons known to the victim. Where the location of the incident was an educational institution, over half of the suspects were under 18, children or young persons as opposed to adults. The majority of the victims were aged 10–15.

7.2 DELAYS IN REPORTING

In both New South Wales and South Australia, about 80 per cent of the reports were made when the complainant was still a child (aged under 18). The proportion of child reports was slightly higher in South Australia (84.3 per cent) than in New South Wales (80.6 per cent); this may be because the statute of limitations was in place until 2003 in South Australia. However, the year by year trends for the type of offence differed, and in some cases were reversed from New South Wales to South Australia. The most marked trend in New South Wales was a steady increase in child reports of sexual assault, but a generally flat pattern for adult reports after the peak following the Wood Royal Commission.

By contrast, in South Australia, reports to the police during childhood for sexual assault were flat, and there was an overall downward trend for indecent assault. Unlike New South Wales, the pattern of reports to the police did not reflect the number of children in substantiated child sexual abuse reports to the child protection statutory authority. The substantiation rate for sexual abuse in New South Wales (for the period 2008–13) is one of the highest in Australia, and four times that of South Australia. It is not clear to what extent these differences might relate to differences in the paths that reports to child protection and to police take in the two states, how they are recorded, and the way they are dealt with; New South Wales has had a specialist investigatory response to child sexual abuse and serious physical abuse involving police and child protection since the mid-1990s.

Again in contrast to New South Wales, adult reports of child sexual assault in South Australia showed an upward trend with strong peaks for both sexual and indecent assault between 2003 and 2007. The most likely explanation for the growth in adult reports in South Australia is the abolition of the statute of limitations in June 2003 and the backlog of prosecutions once this barrier was removed.

In both states, most reports were made within three months of the incident, but there was an upward trajectory in the number of reports made beyond 10 years after the offence date, especially for sexual and indecent assault. In both states too, males were more likely to delay their reporting, and for longer, than females. The longest delays occurred when the person of interest/suspect was a person in a position of authority. For these suspects, the majority of reports were made at least 10 years after the incident, especially in South Australia; 75 per cent of reports of sexual assault involving persons in a position of authority in South Australia were made 10 years or more after the incident compared with 56.5 per cent in New South Wales. The state difference was much more marked for indecent assault: 72.1 per cent in South Australia and 45.3 per cent in New South Wales. This may reflect the abolition of the statute of limitations and the impact of the Mullighan Inquiry.

In summary, in both states, reports to the police of sexual offences against children are more likely to involve girls, and suspects known to the child, including family members; where the report concerned sexual assault, children were likely to be older (aged 14–17). About 20 per cent in both states involved persons of interest under 18 including siblings, family and household members and other peers at school. Only a small proportion (about 7 per cent) involved persons in a position of authority, but when they did, the majority of those reports were made with long delays, 10 years or more after the incident. Delayed reports were also more common for boys than for girls.

7.3 LIKELIHOOD OF CASES PROCEEDING

A minority of cases that came to the attention of the police in New South Wales and around half the cases in South Australia resulted in legal action being commenced against the suspect or alleged offender. However, the commencement of legal action by arrest, report or issuing a court attendance notice does not necessarily mean the suspect appeared in court. As outlined earlier, there are a number of reasons a case may not reach court, including a family deciding to withdraw after the suspect is arrested or the Office of the Director of Public Prosecutions deciding that a case should not proceed. Some caution is also needed in comparing the two states because of likely differences in recording practices and in defining incidents in the police databases. Overall averages can also hide significant differences associated with a number of factors: time or year of report; type of offence; gender of the child and age at the time of the offence; and whether it was reported when the victim was a child or an adult.

First, there is substantial variation over time, which also varies with the type of offence and year of report. For example, the person of interest was more often identified for adult reports than for child reports in New South Wales, and more likely to be proceeded against for adult reports than for child reports of both sexual and indecent assault. In New South Wales, the proportion of reports in which legal action was initiated against the person of interest has shown a downward trend for both adult and child reports of both sexual assault and indecent assault. The patterns were somewhat different for South Australia, where there has been an upward trend in legal action being initiated for adult reports, and especially for indecent assault; again this likely reflects the abolition of the statute of limitations and the activity of the Mullighan Inquiry. However, child reports in South Australia are trending downward, in contrast to child reports in New South Wales.

The proportion of reported incidents that resulted in legal action in the *most recent three years* in each state was somewhat different between the two states, and again between child and adult reports of sexual assault and indecent assault. Figure 81 summarises the number of reports of sexual assault and indecent assault for the years 2012–14 for New South Wales and 2010–12 for South Australia, together with the proportion of both types of offence in both states in which legal action was initiated. In New South Wales, legal action commenced in 16.6 per cent of child reports and 33.0 per cent of adult reports of sexual assault. Indecent assaults accounted for 19.3 per cent of child reports and 35.1 per cent of adult reports.

In South Australia, in the three years from 2010 to 2012, the proportions were markedly higher, especially for child reports, though the number of reports was much lower. The proportions of child and adult reports cleared by arrest/report were also more even. These proportions were calculated as the proportion of reported incidents in which the suspect was apprehended (via arrest/report). More than half (55.4 per cent) of the sexual assault reports and 45.7 per cent of the indecent assault reports made in childhood resulted in an arrest or report; for sexual and indecent assault reported in adulthood, the proportions were 45.5 per cent and 48.8 per cent, respectively.

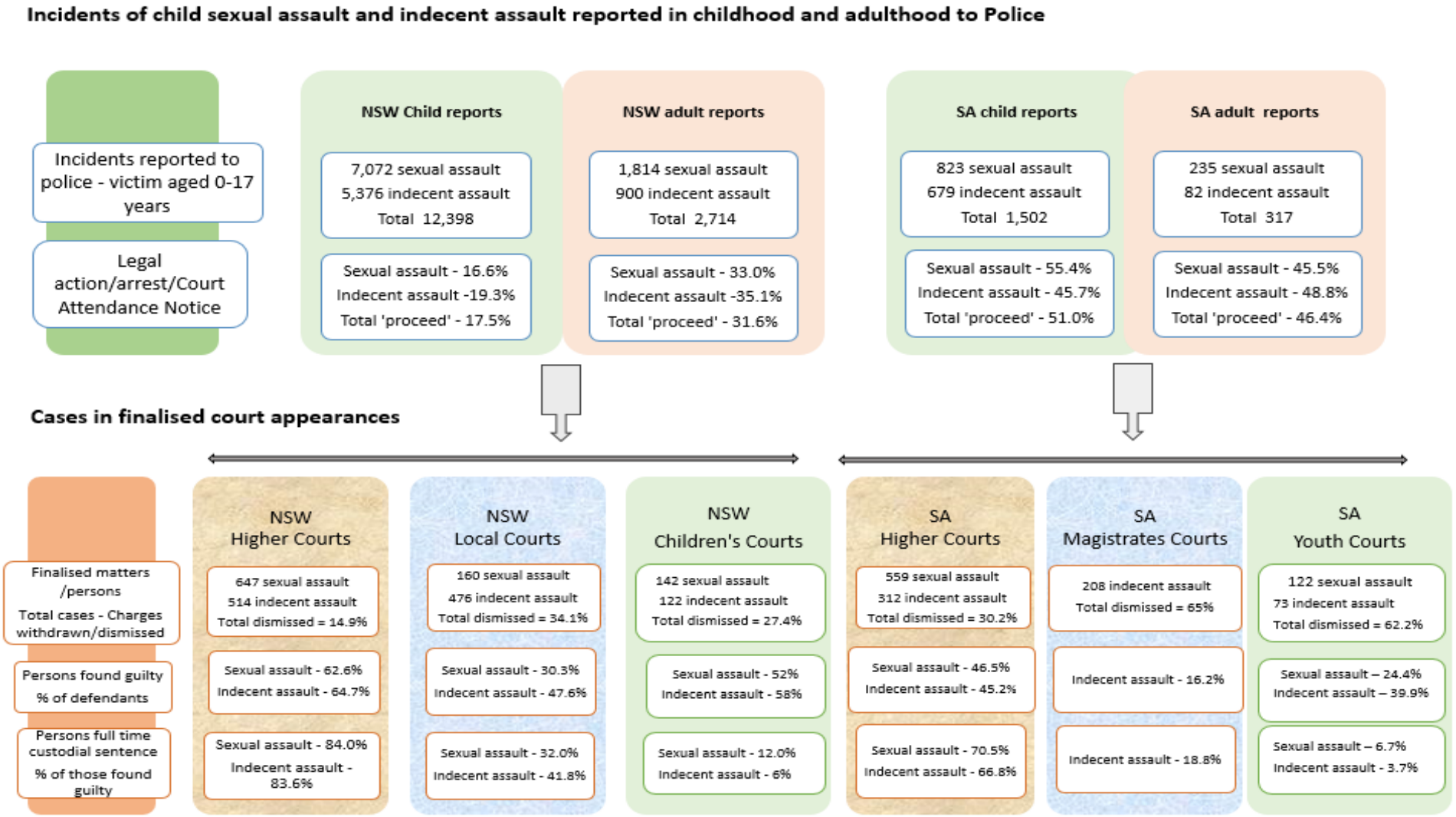


Figure 81 – Numbers of child sexual assault and indecent assault incidents reported in childhood and adulthood and cases in court for 2012–14 in New South Wales and 2010–12 in South Australia

Clearly, there are marked differences between the two states in overall reporting trends and in comparisons of recent years. The policies and practices relating to recording reports are likely to differ between the two states, but it is unlikely that this explains the different *trends* over time in both states. In New South Wales, the growing gap between the increasing number of child reports and the number in which legal action is initiated is of concern – though there has been a small reduction in the size of that gap recently. As outlined earlier, the Australian Institute of Health and Welfare child protection figures for the number of children involved in substantiated child sexual abuse reports are consistent with this upward trend in child reports in New South Wales. As outlined in more detail earlier, there are several possible explanations for increased recording of reports, even where the person of interest is not identified. The increased recording of reports coincided with the establishment and expansion of the Joint Investigation Response Teams; changes to the *Children and Young Persons (Care and Protection) Act 1998* (NSW), which came into effect in 2000; the expansion of mandatory reporting; and the introduction of a centralised helpline and recording system for child protection matters.

In New South Wales, the decreasing trend in the proportion of matters in which legal action was initiated may be a result of resource constraints in terms of cases taking more time to prepare for court. O'Brien et al. (2006) found similar trends for an earlier period (1995 to 2006 for both child and adult victims of sexual offences), with an increase in the proportion of incidents reported to police where the suspected offender was identifiable but a decline in clear-up rates, and a substantial drop in the number of persons of interest proceeded against. Both O'Brien et al.'s (2006) study and the current research confirmed that these patterns were not associated with greater numbers of younger complainants coming forward for whom investigation and prosecution is likely to be more difficult. The increasing proportion of peer to peer reports may, however, contribute to the reduction in the proportion of cases in which legal action is taken because they are likely to be dealt with differently by the police and child protection workers, especially where the 'suspect' and the 'victim' are of similar age.

Not surprisingly given the likely evidentiary issues for young children, reported incidents of sexual assault or indecent assault were least likely to result in legal proceedings where the child was aged six or younger (Bunting, 2014). In New South Wales, there was a clear curvilinear relationship between the probability of a case proceeding and the age of the victim when the age difference between the victim and the suspect was at least five years. Legal action was more likely to be initiated for children aged 7–15. In South Australia, there was a slight curvilinear trend in the likelihood of arrest or report for a sexual assault or indecent assault by age, with cases involving children under six least likely to proceed, followed by older adolescents aged 14-17, and then children aged 6–13. This age-related finding is consistent with the curvilinear relationship reported in several other studies (Bunting, 2008; Leach et al., 2015; London et al., 2005; Walsh et al., 2010). In both states, incidents involving boys were also more likely to 'proceed' with increasing age at the time of the alleged offence. The lower proportions for child reports also suggest that adults coming

forward to report offences that occurred in childhood may be more willing and able to identify the suspect, and may perhaps be more determined complainants. This issue is discussed in more detail later.

There were similarities between the two states in that legal action was more likely for suspects who were persons in a position of authority, for children aged 7–12 at the time of the incident, for adolescent boys compared with adolescent girls, and when the incident was reported as an adult.

7.4 PROSECUTION AND THE LIKELIHOOD OF CONVICTION

The trends in the number of defendants in finalised appearances in South Australia and New South Wales courts were again rather different. In South Australia, there was a general upward trend in the number of defendants with at least one sexual offence against a child, in both the District Court and the Magistrates Court after 2008. This is consistent with the increased likelihood of the police initiating legal action, especially for sexual and indecent assaults reported in adulthood, and with the lag in increased numbers following the various inquiries in South Australia. In New South Wales, the trend in the number of defendants appearing in both the Local Court and higher courts is flatter after the Wood Royal Commission bulge, and also tends to follow the pattern of reported incidents in which the police initiated legal action.

The plea rate, as measured by the proportion of persons in finalised appearances who pleaded guilty to at least one charge, also differed between the two states, across courts, and across time. In New South Wales, the plea rates were higher in the higher courts (fluctuating around 49 per cent) than in the Local Court (fluctuating around 35 per cent); both showed an upward trend over time. In South Australia, the plea rates were the reverse; lower in the District Court (fluctuating around 20 per cent) than in the Magistrates Court (fluctuating around 30 per cent), with a downward trend over time. The plea rates in the higher courts in South Australia were also markedly lower than those in New South Wales (an overall average of 20 per cent compared with 49 per cent), despite concern in New South Wales that the High Court's decision in *Muldrock v The Queen* (2011), which held that the standard non-parole periods apply even if the defendant pleads guilty, reduced the incentive to plead guilty.[144]

[144] As outlined earlier, the increase in the plea rate in New South Wales from about 2007 may reflect the effect of the standard non-parole period legislation; the drop-off from 2011 may reflect the removal of an incentive to plead guilty following the High Court's decision in *Muldrock v The Queen*. A seven-member bench of the High Court in *Muldrock v The Queen* (2011) 244 CLR 120 considered the application of Part 4 Division 1A of the *Crimes (Sentencing Procedure) Act 1999* (the Act) when sentencing offenders convicted of standard non-parole period offences. The Court of Criminal Appeal had held that the non-parole period imposed upon Mr Muldrock was inappropriate and was critical of the

The conviction rates, like the plea rates, also differed between the two states, more so in the higher courts (62.3 per cent in New South Wales and 51.3 per cent in South Australia) than in the lower courts (44.7 per cent in New South Wales and 39.4 per cent in South Australia). The conviction rate was also somewhat higher in the New South Wales Children's Court (47.9 per cent) than in the South Australian Youth Court (41.4 per cent). The conviction rates also differed relative to the length of time between the offence and finalisation at court. In New South Wales, the conviction rate showed little variation in the higher courts (fluctuating between 54 per cent and 63 per cent) as the interval between the offence and finalisation increased, but there was a significant drop-off in the Local Court when the gap increased beyond two years (from 35 per cent for 1–2 years to only 8 per cent for longer than 20 years). There was a similar but not significant trend in South Australia, but the statute of limitations was a barrier to prosecution until 2003.

A significant difference between the two states, and one that affects the calculation of the conviction rates and may also affect plea rates, depending on when the charges are withdrawn or dismissed, is the much greater proportion of matters that are withdrawn or dismissed in South Australia compared with New South Wales. In both the higher and lower courts, the rates in South Australia are about double those in New South Wales. In the recent three-year period 2010–12, 30.2 per cent of persons in finalised appearances in the higher courts in South Australia had all charges dismissed prior to a hearing compared with 14.9 per cent in New South Wales in 2012–14 (see Figure 81). Most of these cases in South Australia were by way of nolle prosequi, white certificates or charges withdrawn by the prosecution, and combinations of these categories. In the Magistrates Court and the Youth Court, the rate was even higher at 65 per cent and 62.6 per cent, respectively, compared with 34.1 per cent and 27.4 per cent in New South Wales.

The higher proportion of such matters 'withdrawn by the prosecution' in South Australia compared with other states was the subject of a special report by OCSAR in 2004 in response to information published by the Australian Bureau of Statistics (ABS) based on 2001–02 higher court matters (Hunter and Castle, 2004). The OCSAR report analysed 80 cases where the South Australian ODPP queried the classification or method of finalisation in the ABS 2001–02 report; in half the cases withdrawn by the prosecution, fresh information was laid. The OCSAR report, like the ABS report, dealt with all offences, not just child sexual offences, and concluded that, apart from counting rule errors, the higher rate in South Australia 'could reflect:

- Differences in the application of the 'reasonable prospect of conviction' test in deciding whether to prosecute a criminal offence …

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sentencing judge's failure to consider the 'objective seriousness' of the offence and the part that the standard non-parole period should play in determining the appropriate sentence. This was overturned in the High Court, but the reasoning of that court indicated that the standard non-parole periods in the legislation were a guidepost for all sentencing decisions, whether or not the defendant pleaded guilty. The court held that *R v Way* (2004) 60 NSWLR 168 was wrongly decided.

- Whether the ODPP or police prosecutions handle matters prior to committal.'

The 2004 OCSAR finding that fresh charges were laid in 40 of the 80 cases initially withdrawn by the prosecution suggests that, in South Australia, the ODPP may withdraw charges and lay new ones to start a new prosecution rather than change the charges, as is the case in New South Wales. If this was the case, it would inflate the number of finalised appearances and substantially increase the cases that are withdrawn or that have all charges dismissed, reducing the calculated conviction rate. However, our analysis of the cases in which all charges were withdrawn or dismissed in South Australia over the period 1992–2012 does not support this hypothesis. While 37 per cent of cases before courts in that period were withdrawn or dismissed, relatively few persons with the same PIN had further charges laid in relation to sexual offences against a child within three years of their charges being withdrawn or dismissed.

An OCSAR follow-up review in January 2013 of the withdrawal rates for all offences in the higher courts in South Australia confirmed that the rate is higher than for Australia as a whole, and has been 'steadily increasing' since 2004–05 (OCSAR, 2013, p 1). For example, in 2010–11, 29.1 per cent of defendants in South Australian higher courts had withdrawn matters compared with 13.5 per cent for Australia as a whole (ABS, 2012). The withdrawal rate for sexual assault and related offences was higher than for other offences (32.2 per cent in South Australia and 20.0 per cent for Australia). The review examined the reasons for cases being withdrawn via a white certificate or nolle prosequi in ODPP briefs and reported that the main reasons were the complainant not proceeding (not being willing or able to do so), poor or insufficient evidence, and the complainant not being up to proof. The OCSAR review indicated that acceptance of a plea to a lesser charge was apparent in a very small percentage of cases. The percentage of white papers was substantially higher in the circuit courts (though the number of circuit court matters was much smaller) than in the Adelaide courts, probably reflecting differences when the prosecution is initially run by Police prosecutors rather than ODPP solicitors. In South Australia, the Committal Unit within the ODPP assesses all major indictable offences in the metropolitan area prior to committal, while South Australia Police performs this role in regional areas. The ODPP annual report suggested that matters where the ODPP is not involved prior to committal are more likely to be withdrawn by way of a white paper, which is rarely used, if at all, in other states.

It seems then that there are differences in the application of prosecutorial discretion in South Australia and New South Wales. As Figure 81 indicates, a much higher proportion of cases proceed via arrest or report than in New South Wales, though this does not necessarily mean they get to court. A much higher proportion of cases are withdrawn once they get to court in South Australia than in New South Wales, with a large number of cases withdrawn by the prosecution or by no further proceedings via nolle prosequi or white certificates. One reason for this may be the late assessment of the quality of the evidence and the willingness and capacity of the complainant to proceed, as well as possible overcharging.

7.5 LIKELIHOOD OF IMPRISONMENT

Consistent with the greater penalties imposed by the legislation in both states for sexual assault offences, relative to indecent assault and acts of indecency, the rate of imprisonment was significantly greater for sexual assault, and in the higher courts where defendants were more commonly charged with sexual assault as their principal offence. The rate of custodial sentences over the last three years was, however, higher in New South Wales than in South Australia: in New South Wales, the overall rate of imprisonment in the higher courts was around 84 per cent for both sexual assault and indecent assault compared with 52.3 per cent for sexual assault and 59.6 per cent for indecent assault in South Australia.

The higher rate of imprisonment in New South Wales is consistent with Brignell and Donnelly's (2015) cross-jurisdictional comparison of full-time imprisonment for child sexual assault offences. Brignell and Donnelly (2015) explain the difficulty of making such comparisons for child sexual assault (broadly defined as 'sexual penetration'). This is because of the 'large number and different types of child sexual offences within each jurisdiction' and the different delineations according to the age of the victim and the circumstances of offending, such as the child being under the care, supervision and authority of the offender (p 15).

In New South Wales, the age delineations are for children aged under 10, 10–14 and 14–16, with greater penalties for younger victims, and for aggravated circumstances; the child being under the guardianship or care of the offender is an aggravating factor. The statutory maximum penalties for the three age groups without aggravation are 25, 16 and 10 years, respectively; in aggravated circumstances, the statutory maximum penalties increase to natural life, 20 and 12 years, respectively. In South Australia, the age delineations are for children aged under 12 and under 17. For the under 12 age group, the statutory maximum penalty is life; for the under 17 age group, it is 10 years. There is no difference in the penalty when the person is in a position of authority, in which case, the age of the victim extends to persons aged under 18, rather than 17.[145]

Comparing and interpreting sentencing over time and across jurisdictions is also complicated by the proportion of historical cases (reported as an adult) that result in a conviction, with the requirement that the court sentence be determined according to the legislation and penalties as they were at the time of the offence. There are also complex differences in sentencing regimes and the calculation of sentences (Freiberg, Donnelly and Gelb, 2015).

In summary, there are similarities relating to the characteristics of the victims, delayed reporting and imprisonment rates. There are also unexpected differences relating to reporting trends and the

[145] In a comparison of the penalties for sexually assaulting a child aged under 10, New South Wales has a much higher rate of full-time imprisonment than either Victoria or Queensland (89 per cent in New South Wales, 76 per cent in Victoria and 70 per cent in Queensland). The median head sentences were also much higher (84 months in New South Wales, 72 months in Queensland and 48 months in Victoria) (Brignell and Donnelly, 2015).

likelihood of legal action being initiated after a report is made to police, and in conviction and imprisonment rates.

8 THE IMPACT OF DELAYED REPORTING

There are several main sources of delay in the reporting and prosecution of child sexual offences, and indeed any crime: the time the complainant takes to report the alleged offence to the police; the time the police take to investigate and determine whether to lay charges; and the time the courts take to deal with matters referred for prosecution. This report focuses on the time complainants take to report the alleged offence to the police and its associated effects. In particular, this report has focused on the differences between matters that are reported while the victim is still a child, aged under 18, and those reported in adulthood, in some cases years or even decades later.

8.1 DIFFERENCES BETWEEN HISTORICAL MATTERS AND THOSE REPORTED IN CHILDHOOD

Few studies have compared reporting to the police and the prosecution of child sexual assault offences according to whether they were reported in childhood or adulthood. Most of the comparisons have been between adult and child victims, not according to the time at which the alleged offence was reported but according to the age of the victim when the alleged offence occurred.

Bunting's (2014) study of police records in Northern Ireland found that about one-quarter of child sexual offences were reported during adulthood. This is consistent with, but somewhat higher than, 19.4 per cent in New South Wales and 16 per cent in South Australia. Consistent with the findings of other studies in Australia and elsewhere, males were more likely than females to delay for longer before reporting to the police in both New South Wales and South Australia (Bunting, 2014; O'Leary and Barber, 2008; Priebe and Svedin, 2008). For example, in Bunting's study, males comprised 15 per cent of child reporters and 28 per cent of adult reporters; the vast majority of adult reporters had delayed their report to police for 11 years or longer.

8.2 DIFFERENCES IN THE LIKELIHOOD OF PROCEEDING TO PROSECUTION

The association between adult and child reporting, the length of delay, and the likelihood of the matter proceeding was not straightforward in Bunting's study in relation to female and male victims of different ages at the time of the offence. Bunting's (2014) study of 2,079 reports to police in Northern Ireland reported a lower likelihood overall for adult reports to proceed (10.2 per cent compared with 14.2 per cent for child reports). For adult females who had been very young at the time of the offence and who had delayed reporting till many years later, the likelihood of legal action being taken increased as the delay increased; this was not the case for females who were adolescents, nor for males of any age, at the time of the offence. As Bunting (2014) concluded:

> While teenagers were found to be the group most disadvantaged by reporting delay, increased delay actually appeared advantageous for some groups, notably adult females reporting offenses

> that occurred when they were 0 to 6 years old. Conversely, adult males reporting child sexual abuse did not appear to benefit from increased delay. (p 557)

Bunting interpreted these findings in terms of police reluctance to proceed with very young witnesses because of concerns about the children's credibility and capacity to withstand questioning in court, overriding concerns about memory recall and the admissibility and evidentiary issues of 'older' cases (Connolly and Read, 2006; Ernberg et al., 2016). It is also likely that a selection effect is operating, in that adults may be less likely to report offences when they were very young if there was no corroborating evidence. However, it is not clear why this would apply to females and not males; in Bunting's study, matters in which adult males reported alleged offences at this very young age were the least likely to proceed.

The association between the New South Wales and South Australia Police data on the likelihood of legal action being initiated in adult and child reports was not straightforward either; nor was it similar to that reported by Bunting (2014). Bunting found that cases were more likely to proceed when the victim was pre-adolescent (aged 7 to 12 years) at the time of the offence, both for child and adult reports; reports made immediately or within a year of occurrence were the most likely to proceed. In New South Wales, legal action was more likely with increasing delay, until the delays extended to 10 to 20 years, after which the likelihood of legal action decreased. In South Australia, the pattern was quite different – reports of sexual assault were somewhat more likely to result in legal action with immediate reporting but there was little difference for indecent assault. Clearly, there is no simple, straightforward association between reporting delay and the likelihood of legal action being taken when a number of factors are taken into account. Indeed, in the most recent South Australian data for the period 2010–12, there was little difference between the likelihood of arrest or report for child and adult reported offences (see Figure 81: 51 per cent compared with 46.4 per cent).

There are several possible explanations for the perhaps counterintuitive finding of delayed reports in New South Wales being more likely to proceed than those reported more quickly. One explanation articulated by a Crown prosecutor was that the complainants in historical matters are generally willing to proceed in contrast to those involved in recent reports:

> Very often if they have delayed reporting for some time, and now they are reporting, they are quite vehement about proceeding whereas if you have a child where it's just been reported, the parents are trying to balance whether this is in the best interests of the child to proceed.

In contrast, cases of same day or next day disclosure in childhood may involve more situations where parents, having made an initial report to the police, decide that they do not want to proceed with the prosecution. Christensen, Sharman and Powell's (2016a and b) recent studies throw some light on the characteristics of cases in which either parents or children decide to withdraw their complaint. Complaints involving older children (adolescents aged 13–15) and those with suspects outside the family, and involving single incidents were more likely to be withdrawn than other cases. The proposed explanations are similar to those outlined by Bunting (2008): that older

children are more likely to understand the negative implications of the investigation and court process, and may see themselves as more blameworthy or want to protect the suspect. It is also possible that the parents of older children may be less supportive (Christensen et al., 2016a and b). Where a single incident involves someone outside the family, parents may be more reluctant to proceed, wanting their children to move on with their lives rather than have to keep it 'alive' in their memory for the course of legal proceedings. Solicitors and Crown prosecutors also suggested that the wider availability of counselling may mean that some people see it as an alternative way of dealing with their experiences rather than trying to get some closure from a criminal conviction. They also indicated that parents are more aware than they were a few years ago of the stresses and strains of going through the criminal justice system, despite special provisions, including closed-circuit television, to remove the child from the courtroom.

Another explanation relates to police being more likely to charge when there is corroboration and supporting evidence, though corroboration and physical or medical evidence are not common in child sexual abuse matters (Christensen, Sharman and Powell, 2015; Powell, Murfett and Thomson, 2010; Walsh, Jones, Cross and Lippert, 2010). In Walsh et al.'s US study, 46 per cent of child sexual abuse cases had no supporting evidence; not surprisingly, they found that alleged offenders were more likely to be charged in 'cases with a child disclosure, a corroborating witness, an offender confession, or an additional report against the offender … controlling for case characteristics' (p 436).

One solicitor commented that if a child discloses on the day of the abuse or the next day, without direct evidence, corroboration may be difficult. With historical child sexual assault, however, corroboration may come from the child telling somebody else at the time or soon afterwards (as evidence of first complaint). Evidence may also be led as to other people the complainant has told about the abuse in the intervening years. There may also have been multiple complainants over time in historical child sexual assault matters, so the police, looking at records, may discover complaints from a number of children who are now adults who tell similar stories. There may also be a selection factor with adult reporters more likely to come forward when they have corroboration and supportive evidence, which also removes some of the burden from the complainant witness.

8.3 DIFFERENCES IN THE LIKELIHOOD OF CONVICTION

Child sexual abuse matters, and particularly historical matters, are generally regarded as among the most difficult cases to prosecute because of the degrading effects of time on the evidence and the difficulty of finding the correct charges, as well as evidentiary and admissibility issues with delayed complaint. If the wrong charges are laid and prosecuted as a result of uncertainty about the timing of the offences under the relevant legislation at the time, it may not be possible to obtain a conviction. For example, one solicitor observed that it is much easier to find an appropriate charge for a female victim than for a male victim because various charges were eliminated when

homosexual behaviour was decriminalised. In some cases, uncertainty about the timing of the abuse may make it very difficult to lay the correct charge and to obtain a conviction.

In contrast to the view that adult complaints of historical sexual abuse are determined and credible, ODPP solicitors and prosecutors also said that these witnesses are often 'damaged' by the abuse and may not be able to provide sufficient detail to support the elements of the charges. If their accounts contain inconsistencies and lack details, and if there is little other corroborative evidence, their credibility when giving evidence is likely to be poor.

Perhaps surprisingly then, there was no drop-off in convictions for sexual assault with increasing delays between the offence and finalisation in the higher courts in either state. This was not the case for indecent assaults or cases heard in the lower courts. This is likely to be at least partly a function of both the seriousness of the offence and the type of court. ODPP solicitors and Crown prosecutors suggested that both the police and ODPP lawyers are likely to prepare the brief more thoroughly for the higher courts than the lower courts, and sexual assaults are more likely to be dealt with in these courts.

The fact that there was no diminution in the conviction rate with longer delays in the higher courts is counterintuitive given concerns about evidentiary issues and the impact of warnings to the jury about the dangers of delayed complaints (Cossins, 2002, 2010b; Flatman and Bagaric, 1997–98). ODPP solicitors, like a number of commentators, were critical of the law regarding directions to juries, which they saw as making it very difficult to achieve a conviction, especially in relation to delayed complaint (Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, 1997; Cossins, 2012; Mirfield, 2015; Shead, 2013). But there was a general consensus among Crown prosecutors that the changes to the *Longman* warning had brought a substantial improvement.

However, there is some indication that judges may view adult witnesses more positively than children, in terms of cognitive ability, even though all the complainants were children at the time of the alleged offence/s (Connolly, Price and Gordon, 2010). ODPP lawyers also suggested that juries may be likely to believe a complainant-victim in 'old' matters with long delays; in the words of one, 'otherwise why would you come forward after all these years?' There is also the possible selection factor, and the view that testifying in such matters is very stressful and complainants are unlikely to go through all it entails unless they are determined and reliable witnesses. As outlined earlier in relation to corroborative evidence, multiple complainants against one suspect or defendant may lend credibility to each other if tendency and coincidence evidence is admissible. For example, in one historical matter involving a scoutmaster, five complainants had very similar experiences of abuse as young adolescents but had not discussed it with each other until 10 or more years later. They sought legal advice from a solicitor and reported to the police together. Their matter proceeded relatively quickly and smoothly, apart from several adjournments and an aborted trial, and the scoutmaster was convicted and received a custodial sentence (*see case study 1)*.

The problems in leading similar factual evidence in separate trials can make prosecuting cases with multiple complainants very difficult. Both solicitors and Crown prosecutors observed considerable variation between judges in allowing tendency or coincidence evidence to be heard and in ordering separate trials where there are multiple victims or offenders (Hamer, 2015). ODPP solicitors reported seemingly strong cases which resulted in acquittals after the judge ordered separate trials.

Solicitors and Crown prosecutors said one explanation may be that the evidence the jury hears from a child is difficult to understand or accept if the charges against the individual are treated in isolation from the context. For example, one solicitor spoke of a case in which a nine-year-old child gave evidence about his sexual assault by a paedophile ring. Without the benefit of knowing that the child had first been groomed and abused by perpetrator A, and then passed on to perpetrator B, it must have made little sense to the jury that the child could have engaged in anal sex with Mr B, a 40-year-old perpetrator, without knowing him and without apparent resistance. The jury was not allowed to know the context that would have made sense of the child's evidence.

In another case, a music teacher had already been convicted of offences against two teenage boys, A and B, in two separate trials. He stood trial again for alleged offences against two other boys, C and D. He was convicted. On appeal, the Court of Criminal Appeal held that separate trials should have been held in relation to the charges relating to these two boys. In the first retrial for the alleged offences against C, the accused was acquitted on all counts. In the second retrial, dealing with the alleged offences against D, the trial judge discharged the jury during the Crown case. The same occurred on a third retrial. On a fourth retrial, the accused was acquitted on all counts in judge-alone proceedings.

During the retrials for the matters of C and D, these complainants each appeared as a witness in the others' matters. However, unlike their previously jointly-run trial, they were now not permitted to give evidence or indeed mention in any way their own abuse, only that which they observed occurring to the other. Many of the offences involved the accused assaulting B, C and D simultaneously or, under the command of the accused, the boy's performing sexual acts upon each other. This ruling, according to prosecutors involved in the retrials, had a devastating effect on the case, such as:

- the boys having to choose their words so carefully – so as not to fall foul of the ruling and risk another mistrial – that they appeared hesitant, unsure and evasive in their evidence
- the boys evidence did not flow, seemed out of context, and appeared artificial
- the high risk that the jury, unaware of the restrictions, were negatively influenced by the way in which the boys gave their evidence.

CASE STUDY 1: Institutional child sexual abuse – scoutmaster: five adult complainants

Five male complainants were aged 24 to 27 years in 2012 when they reported to the police indecent assault by their scoutmaster some 10 to 12 years earlier, when they were young adolescents. The first disclosure

was made in 2009, when one of the five told a close friend, not a complainant, and then later the same year, told another who had been in the same scouting group. He also sent texts to two others, and when they met, they each disclosed that they had been subjected to the same forms of indecent assault. Together they went to a solicitor and made separate statements. The solicitor then contacted the police on their behalf and an investigation was opened. The younger brother of one of them also later made a statement, after initially refusing to do so.

A month later, MR was arrested and charged. The matter was referred to the ODPP three weeks later and MR was charged with 10 counts of aggravated indecent assault in relation to each of the five complainants (s 61M(2) – person under 16 years old). MR was released on bail under the supervision of his treating psychiatrist and directed not to frequent or visit any place where Scouts NSW meets or holds meetings or activities. He waived his right to a committal hearing. The case proceeded on these charges.

The initial mention date was in October 2012, but there were several adjournments, mostly related to outstanding brief items before the first trial date, in October 2013. The first trial was aborted on day two when a jury member sent a note to a court officer that she knew one of the witnesses. The entire jury was discharged on the basis of possible contamination. A second jury was empanelled the following week.

The trial began with lengthy legal argument about tendency and coincidence evidence.[146] In this case, the Crown argued that the specifics of the acts alleged were so strikingly similar in nature they could not be mere coincidence. The judge found in favour of the Crown and the tendency and coincidence evidence was admitted. The accused was found guilty on nine of the 10 counts of aggravated indecent assault. He was sentenced in December 2013. He had no prior criminal record. His overall sentence was four years imprisonment, consisting of a non-parole period of two years, six months imprisonment, and an additional period of one year, six months. The sentences ranged from a fixed term of nine months' imprisonment on one count to three years imprisonment on the longest sentence.

8.4 DIFFERENCES IN THE LIKELIHOOD OF IMPRISONMENT

In both New South Wales and South Australia, the probability of a full-time custodial sentence varied with the interval between the offence and finalisation. In the higher courts, in both states, the longer the interval between the offence and finalisation at court, the higher the probability of

[146] Tendency evidence is evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, which is adduced to prove that the 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. Coincidence evidence is evidence that two or more events occurred, and is adduced 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, it is improbable that the events occurred coincidentally. The test for admissibility under the *Evidence Act* is whether the tendency or coincidence evidence has significant probative value that substantially outweighs any prejudicial effect it may have on the defendant.

a prison sentence for sexual assault.[147] It is not clear why there should be this difference in sentencing for sexual assault reported in childhood or in adulthood; indeed, since offenders need to be sentenced in accordance with the legislation at the time of the offence, and the penalties have generally increased substantially over the last few decades, it seems counterintuitive. One possibility is that historical cases may be prosecuted in relation to multiple children at the same time, resulting in many convictions and a higher likelihood of imprisonment, though separated trials may result in fewer convictions overall, and hence a lower likelihood of imprisonment. Another possibility is that the abuse and its effects may be more serious or longstanding for those who have delayed reporting the abuse for many years. That impact may be one reason they decide to report, and their victim impact statement detailing these effects may also be taken into account.

CASE STUDY 2: Institutional child sexual abuse – police officer with church affiliation

In 2010, Rebecca* (pseudonym), 23, received an anonymous email with a link to a website containing graphic images of a naked 15-year-old girl performing fellatio on the cameraman. She realised she was the girl in the photo. She had joined her local church youth group as a shy 14 year old, and was taken under the wing of the group's leader, 31-year-old police officer, JN. He was a popular and trusted youth leader, a talented artist and keen photographer. He 'groomed' Rebecca with gifts and handwritten letters, convincing her to have sex with him and to pose naked for photos. He ensured her silence with romantic tales of clandestine lovers and threats about losing his job and his life being ruined if anyone found out.

JN had also groomed another group member, Eve, who was very upset when she saw JN kissing Rebecca. She spoke to the church's senior pastor and his wife, disclosing that she had been having sex with JN since she was 15. The pastor indicated that he did not believe her story and she was soon asked to leave the church. The pastor also wrote to JN warning him that: '*This ministry is full of dangers which can be as damaging to yourself and for the youth work of this church' …* [To] *'protect you and to protect ourselves in times of accusation, do not allow Rebecca to express her affection to you physically on church grounds.'*

Eve's report to the police was also met with disbelief; JN told his fellow police officers she 'was not to be believed', that she was 'crazy' and had been 'thrown out of the church for causing trouble'. Accessing the police computer system, JN made a series of unauthorised enquiries about the matter, and coerced Eve into retracting her complaint, preparing two letters for her to sign.

The website Rebecca saw contained photos of other girls she recognised from her church youth group. They were in the same bedroom, with the same wallpaper and in the same explicit poses. She also recognised JN's 10-year-old neighbour.

JN was arrested in August 2010. On the grounds that he faced a significant delay in proceedings, he was granted strict conditional bail. In August 2012, JN was arraigned on an indictment containing 52 counts relating to four complainants. The charges included multiple counts of sexual intercourse with a child

[147] The pattern was not consistent for indecent assault, increasing in New South Wales but with a curvilinear relationship in South Australia.

between 10 and 16 years, aggravated indecent assault, using a child for pornographic purposes, and disseminating child pornography, with one count of perverting the course of justice.

JN pleaded not guilty. The first trial was aborted after a jury member with narcolepsy was noticed repeatedly falling asleep. JN was found guilty of 44 of the charges in the second trial.

JN was sentenced in December 2012 to a total of 10 years and 11 months imprisonment with a non-parole period of seven years and five months. The judge described JN as a 'serial seducer of underage females who betrayed the trust of all those who entrusted their daughters with him. He demonstrates a callous disregard for the rights of the vulnerable and used his position of power and influence over his victims for his own sexual exploitation and gratification'. He was sentenced to five years jail for perverting the course of justice but lodged an appeal.

Rebecca's victim impact statement described the impact on her of the betrayal of what she thought was love. Eve described feeling isolated, alone and without the support of the church she had trusted:

> He was the minister of the church and I told him and it just got disregarded. JN isolated me from my parents and made me think they were against me. People from the church that I was friends with, he told them to stay away from me, that I was a big liar. He used scare tactics to bully me. I just wanted things to go back to the life I had.

9 SYSTEM DELAYS

The delays that complainants have little or no control over are system delays: the time taken for reports to be investigated; complainants and suspects interviewed; evidence collected; charges laid; referrals made to the ODPP; pleas negotiated; and court dates set. Unexpected delays also occur. Perhaps more difficult for complainant/witnesses to deal with are the unexpected and sometimes multiple adjournments, cases not being reached in the court list, lengthy legal argument and voir dire, and aborted trials. The uncertainty that comes with these delays can be very stressful, both emotionally and practically. In some cases, complainants/witnesses simply want to get on with their lives and may be unwilling to continue. Of course if complainants/witnesses decide to withdraw before a hearing or after an aborted trial, the prosecution case has to be withdrawn, and a potential conviction is avoided.

9.1 ADJOURNMENTS AND DELAYED HEARINGS

Proceedings are adjourned for a number of reasons. Data on the number of adjournments are available only in the Local Court and Children's Court in New South Wales, but it indicates that more than 40 per cent of matters in the Local Court have between two and four adjournments and a further 42 per cent have at least five. Trials in the higher courts are also postponed or aborted for a variety of reasons. The case files and discussions with ODPP solicitors and Crown prosecutors pointed to numerous cases with delays of many months before the trial began because judges, defence counsel, interpreters or key witnesses were not available; trial dates were vacated to gather further evidence; the defendant was ill; or new lawyers were appointed.

A backlog of trials also means that cases may not be reached when listed. Weatherburn and Fitzgerald's (2015) study of delays at the New South Wales District Court found that since 2012, there has been a steady increase in the number of trials pending in that court, with the average time between committal and finalisation increasing since 2010. This is due to an increase in the number and percentage of persons committed for trial who actually proceed to trial, and an increase in the number charged with strictly indictable offences, including historical sexual offences (pp 4, 7). Weatherburn and Fitzgerald also found that the number of late guilty pleas, with nearly 30 per cent of defendants committed for trial changing their plea to guilty on the day of trial, is contributing to congestion and delays in the District Court. It also means that the court needs to list an increased number of trials to ensure that court time is not wasted (New South Wales Law Reform Commission, 2014). This is consistent with a common complaint from solicitors and Crown prosecutors in New South Wales that cases are listed for trial but are not reached because more cases are being listed than there are courts or court time available to proceed. While the courts may try to prioritise child sexual assault trials, as the Crown prosecutors observed, there are more trials than judges, Crown prosecutors and courtrooms. The result is that some cases that are ready for trial cannot go ahead. The shortage of court time also means that where the hearing

cannot be completed within the set time, the complainant's evidence is interrupted; in one case, this involved a six-month wait from evidence-in-chief to cross-examination.

CASE STUDY 3: Delays

The case involved indecent assault charges against the grandfather of a 16-year-old complainant, heard in a Local Court. The offences were reported in September 2013, four years after they were alleged to have been committed. The accused was charged a month later, and the first mention at court followed a month after that. It was listed for summary hearing six months later. On the first day, the complainant attended but did not commence giving evidence. The second day of the hearing was set down for six months later, and the complainant completed her evidence-in-chief, watching her recorded investigative interview. During the hearing, the defendant was reported to be unwell, and the hearing was adjourned. It was then a further six months until the complainant was able to be cross-examined. These long delays occurred because these were the first available court dates. This meant a wait of at least 18 months from the first court mention to beginning cross-examination, and longer to complete it. The complainant was reportedly visibly distressed by these delays.

CASE STUDY 4: Court file – Institutional child sexual abuse

In a case involving the sexual assault of a teenage girl by the principal of her school, there were seven adjournments after the initial court mention following charges being laid.

Reasons for the adjournments included finalising the date range of the offending, negotiating with the defence about appropriate charges, plea negotiations, and obtaining material relevant for sentencing such as the accused's medical records.

On nearly all these occasions, the girl and her mother made a seven-hour drive to Sydney from their country town, each time having to pay a qualified person to stay at their farm and provide 24-hour care for another relative. Eighteen months later, the school principal pleaded guilty.

A recent case of historical sexual assault illustrates the kinds of delays that complainants, other witnesses and lawyers may experience after the decision is made to prosecute. In this case, there were multiple complainants. The first of these complaints was made in August 2011. In September 2012, charges were laid against the accused. Nearly a year later, in August 2013, the accused was committed for trial. In May 2014, the trial was adjourned on application by the defence because an expert report had not been obtained. In August 2014, there was a voir dire hearing. The matter was listed for hearing in April 2015, the first date that suited defence counsel. Those dates were subsequently vacated to allow the defence to appeal against the voir dire ruling in April 2015 in the Court of Criminal Appeal. Four years after the report to police, it was still not clear whether the trial would go ahead.

9.2 IMPACT OF DELAYS, ADJOURNMENTS AND RETRIALS

Delays and retrials can have significant emotional and practical costs for complainants and their families. They can have a rollercoaster effect on complainants, who prepare emotionally for a committal hearing and the setting of a trial date, only to see the trial adjourned. They then have to be emotionally ready again, with other possible setbacks before the matter reaches a conclusion. Crown prosecutors indicated that by the time cases reach them, the parents have often been waiting for a very long time. Sometimes they have reached 'the end of their tether' – or they have been living in hope of a guilty plea which does not eventuate. One solicitor also pointed out that the process of going through the criminal justice system may be counter to the counselling the complainant is receiving. That counselling may involve moving on from the abuse, whereas the criminal justice process requires the complainant and their family to keep being prepared to remember it in great detail. The stress and the delay sometimes cause victims to give up.

CASE STUDY 5: Delays

A case listed for hearing in the District Court in Sydney involved two male complainants of child sexual offences, both of whom were 18 at the time of the hearing. They were required to attend court on a Tuesday. Initially, legal argument was expected about having separate trials, and the two complainants would need to give evidence on a voir dire. However, no judge was available to hear the matter that day. The complainants waited until lunchtime and then were told to return the next day. They did so. They waited until 2 pm the next day and because no judge was available, they were told to return the following day. A judge was allocated to the case the following morning. The judge heard legal argument, and ordered that the trials be separated. One of the trials began that afternoon. The second complainant and his family had to return home to await the start of a separate trial seven months later. In the end, both trials resulted in hung juries. The cases were listed again for trial nine months later, but neither complainant wanted to continue with the matters, so both were 'no billed'.

Complainants and their families can also face significant practical costs. In one case a one-day adjournment was followed by a decision to vacate the trial dates. The three complainants all resided a long way from Sydney – two of them in other states. One complainant took all his holiday leave from work to attend the trial. In another case, the complainant took voluntary redundancy from his work so that he could give evidence without the stress of being at work, and to ensure that he was emotionally ready. The trial dates in his case were vacated due, initially, to a legal aid issue. The case was set down again for the following week, then adjourned again for another two weeks. Meanwhile, new complainants emerged and the case had to be adjourned again. It was rescheduled for six months later.

Appeals may also result in retrials and a lengthy process. ODPP solicitors outlined a case that involved a successful appeal against conviction; the Appeal Court held that certain evidence should not have been admitted. This was followed by a hung jury at the second trial, and a conviction again at the third trial. When the prosecution began, the complainant victim was 17 years old. By the

time the offender was convicted, he was 22. His late adolescence and early adulthood were affected by the need to give evidence at three trials that were attended by delays and uncertainty.

9.3 ISSUES CONCERNING POLICE AND COURT DATA

Monitoring of the criminal justice system and policy development in this area would benefit from databases that can 'speak to each other' and allow cases to be tracked across the different stages of the reporting, investigation and prosecution process. As outlined earlier, it is currently not possible to track matters from reporting to the police, through the investigation and prosecution process to court, and finalisation at court including pleas, conviction and sentencing. For example, in New South Wales, the link between police and court data is lost when the ODPP alters the charges from those originally laid by the police (Fitzgerald, 2006). According to ODPP solicitors, this is common, particularly in relation to plea and charge negotiations. If the final ODPP charges included a reference to the original police 'H number', then the New South Wales Bureau of Crime Statistics and Research (BOCSAR) would be able to use the administrative JusticeLink system to track matters from police to court. However, matching across matters is still difficult, even where there is a common linking case number, as in South Australia. As Wundersitz (2003b) pointed out, the flow of cases through the criminal justice system is 'neither simple nor linear' (p 2).

A second issue in relation to court data is the lack of information about the complainants/victims. The court data have several functions in relation to administration and reporting of crime statistics, but using such data for research into serious crimes against the person, including child sexual offences, is difficult and time-consuming because court data do not include information about the age or gender of the victim. The sections of the Act under which charges are laid provide the information used in this report, as outlined earlier, but this may miss cases where the charges laid are not age-referenced (for example, aged under 10, under 14, 14 to 16 years). The analyses of the South Australian data in this report indicate, for example, that about 22 per cent of the cases identified as involving victims aged under 18 related to JANCO codes for charges where the age or gender of the child was unspecified or related to 17 year olds. Administrative planning and policy development would benefit from a clearer understanding of how many children of various ages are witnesses in matters where there are guilty pleas, and no pleas, and who need special provisions such as closed-circuit television and the use of intermediaries, which is currently being introduced in New South Wales.

More importantly for the Royal Commission, the data on institutional abuse are inadequate. Information about the relationship of the alleged offender to the victim has frequently been missing and determining whether a case involves institutional abuse is not at all straightforward.

As Weatherburn and Fitzgerald (2015) point out, court data are also inadequate for understanding and managing the recent increasing delays in the District Court:

There are no routinely collected data, for example, on the number of times trial cases are listed for trial; the percentage that proceed to trial at first listing; the time required to obtain the results of forensic testing or transcripts of tape-recorded evidence; the duration of trials involving different times of offence; or the amounts of time spent by the District Court hearing trials, sentence matters and appeals. (p 8)

10 CONCLUSION

While the available police and court databases have shortcomings in relation to identifying institutional child sexual abuse and tracking cases as they move through the criminal justice system from report to the police and through the court system, the comparison across states and over time is valuable for several reasons. Such comparisons highlight the attrition processes at each point in the criminal justice system, and, importantly, help answer some questions about the impact of delays on the prosecution of sexual offences against children. There has been little research to date, either in Australia or internationally, comparing reporting to the police and the prosecution of sexual offences against children according to whether they were reported in childhood or adulthood. Some of the findings are rather unexpected, with historical matters more likely to result in legal proceedings, or at least legal action being commenced. In the higher courts, convictions were just as likely and imprisonment more likely with longer delays to finalisation.

The other unexpected finding was the increasing and relatively high proportion of reports (20 per cent) involving young persons under 18 as the person of interest. With the option for other diversionary processes and appropriate exercise of discretion, these peer to peer reports are the least likely to result in legal action, especially when there is little age difference. While the focus of sexual abuse has generally been on adult offenders, there is increasing recognition that the risks to children may also come from other children and young persons, not just from bullying, but from sexually abusive behaviours (Finkelhor, Ormrod and Chaffin, 2009).

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Criminal Procedure Act 2009 (Vic)

Criminal Law Consolidation Act 1935 (SA)

Evidence Act 1995 (NSW)

NSW Children and Young Persons (Care and Protection) Act 1998

12 APPENDICES

The appendices are organised by state (New South Wales and South Australia) followed by the *Child Sexual Offence Appeals in the NSW Criminal Court 2005-2013 Report* by Associate Professor Rita Shackel.

Note: Appendix 1 (NSW) outlines the data cleaning and management processes for both New South Wales and South Australia.

13 APPENDICES: NEW SOUTH WALES

Appendix 1 (New South Wales)

Appendix 1 provides an outline of the data analysis processes and the relevant unit of analysis – incident/major offence/victims/accused/court. It also includes an explanation of the COPS analysis using 'events' rather than 'incidents', and the use of the 18-year cut-off for children rather than the 16-year cut-off used in COPS.

Data cleaning and aggregation processes

Four datasets were provided by the New South Wales Bureau of Crime Statistics and Research (BOCSAR):

- One each for incidents; victims; and persons of interest (POIs), derived from the NSW Police COPS database, and
- Courts database.

The incident file contained one record per incident, and each incident is part of an 'event'. The majority (approximately 90 per cent) of events consisted of a single incident, and incident was used as the unit of analysis (in line with BOCSAR's usual reporting practice). The incident file contained, among other information, the date of the incident and its report, a classification of the incident type, and whether proceedings had occurred with respect to one or more POIs.

A criminal incident is defined in the New South Wales Bureau of Crime Statistics and Research data as an activity detected by or reported to police that:

- involves the same offender(s)
- involves the same victim(s)
- occurs at the one location
- occurs during one uninterrupted period of time
- falls into one offence category
- falls into one incident type (for example, 'actual', 'attempted', 'conspiracy').

For example, one incident may involve two offenders sexually assaulting the same victim. This is recorded as one sexual assault incident if the offence fell into the same category.

Incident type was recoded to create five categories that aligned with the categories used by the Judicial Commission and with the court data. These are:

- sexual assault defined as sexual intercourse
- indecent assault
- act of indecency/aggravated act of indecency

- child pornography/grooming for pornography and other sexual offences[148]
- other sexual offences

The three datasets derived from COPS and provided by BOCSAR could be linked by the incident number, which was contained in each file. More than one victim and POI record could be associated with a given incident. The strategy used to combine the incident, victim and POI data was to make 'wide' versions of the latter two files which contained as many instances of a variable as there were victims or POIs. The datasets were merged by incident number to produce a wide dataset for use in descriptions and analyses. The summary variables had to accommodate information for more than one person. For example, both girls and boys could be associated with an incident, and there could be a mixture of ages. It should be remembered though, that in the majority of cases, only one victim (in approximately 90 per cent of incidents) and one POI (in 86 per cent of incidents) was associated with a given incident.

Courts data

Consistent with the New South Wales Bureau of Crime Statistics and Research definitions, the counting unit is persons charged in finalised court appearances *or* persons found guilty in finalised court appearances *or* the number of finalised charges.

Each record in the court data file concerned a single defendant, who could be represented in the file more than once in a year (approximately half occurred only once) associated with different charges, different finalisation dates and, sometimes, different courts. Those who were committed for trial were not counted in the Local Court, and those who were committed for sentence in the higher courts were included in that court's count ('Proceeded to sentence').

In principle, court and POI data (and thus incident and victim data) could be linked using a code created by police which identifies the offence (called the H number or code). However, the linkage was from complete because the number was changed or simply omitted if the DPP changed the charges, which is often the case. In theory, the date of birth of the accused, and other information, could be used to augment the H number to allow the linkage, but missing data and other factors left some POIs unlinked or linked with some uncertainty. Following preliminary investigations, and discussion with BOCSAR, no attempt was made to link the court data with the data derived from COPS.

[148] 'Grooming/procuring' and the 'child pornography' categories may include reports of crimes that affected a particular victim, and other matters where police intervention led to the arrest of an offender but no specific victim was involved. Arrests for possession of child exploitation material frequently relate to images of children who are not identified and are almost certainly not Australian citizens. On advice from the Chief Statistician for NSW Police, we checked and excluded 'proactive' matters from our analyses 'by filtering out the matters which have no victim, or for which there is no victim date of birth'.

Other modifications and exclusions for the New South Wales data

- New variables were created using age 18 rather than age 16 (age of consent) as the threshold for both the age at offence and age at report. 'Child' is defined in the NSW Police COPS data as 'under 16', since the age of consent in New South Wales is 16. The category or variable 'child victim reported as a child' in the COPS data therefore means the victim/complainant was under 16 years at the time of the offence and also at the time of the report; 'child victim reported as an adult' means that the victim was over 16 by the time of the report. The change in age threshold to 18 'brought in' an additional 400 cases where the incident occurred when the child was 16 or 17 years old and/or where the report was made when the complainant was 16 or 17.[149] The analyses based on the 16- and 18-year thresholds were very similar.

See also Explanatory Notes in BCSR Annual Reports.

[149] This involved some data reconciliation and cross-checking since we were advised by the Chief Statistician of the New South Wales Police Force (email 14 March 2014) that: 'The COPS data using the four categories (child sexual assault reported as a child, reported as an adult, and indecent assault reported as a child, and reported as an adult) were subjected to data cleaning to remove incident reports with anomalous date of birth information when these four categories were created several years ago, across the available years to 1992. If you get a new download that is defined based only on the date of incident, date of report and victim date of birth then it may be the case that checking and rectification of anomalous dates will have to be re-done.'

13.1 APPENDIX 2 (NEW SOUTH WALES): ANALYSES TO COMPARE THE 'EFFECTS' OF:

We compared the effects of:

- using 'incident' or 'event' to analyse the likelihood of proceeding with at least one person of interest (POI) per 'event'
- defining child as 'under 16' or 'under 18' (in line with the Royal Commission's definition).

Further analyses were carried out using EVENT rather than INCIDENT as the unit of analysis and also to check whether there were any substantive differences in using age 16 as the cut-off for 'child reporting' as is in the case in COPS (where 16 is the age of consent) rather than 18 (as defined by the Royal Commission in line with the UN Convention on the Rights of the Child).

The COPS data dictionary defines:

> An 'incident' as an occurrence of something of interest to the Police, involving one group of parties, occurring at the one place at the one time or over a period of time, and falling into the same incident category (INCCAT1).
>
> An event is made up of a group of related incidents. An event requires Police to initiate a chain of actions which must be seen through to an accountable outcome. An event may involve one or more possible breaches of the law and there are some events which do not involve any breaches of the law, but still require some action by Police. An incident does not have to involve a breach of the law but BOCSAR is only interested in incidents which do.

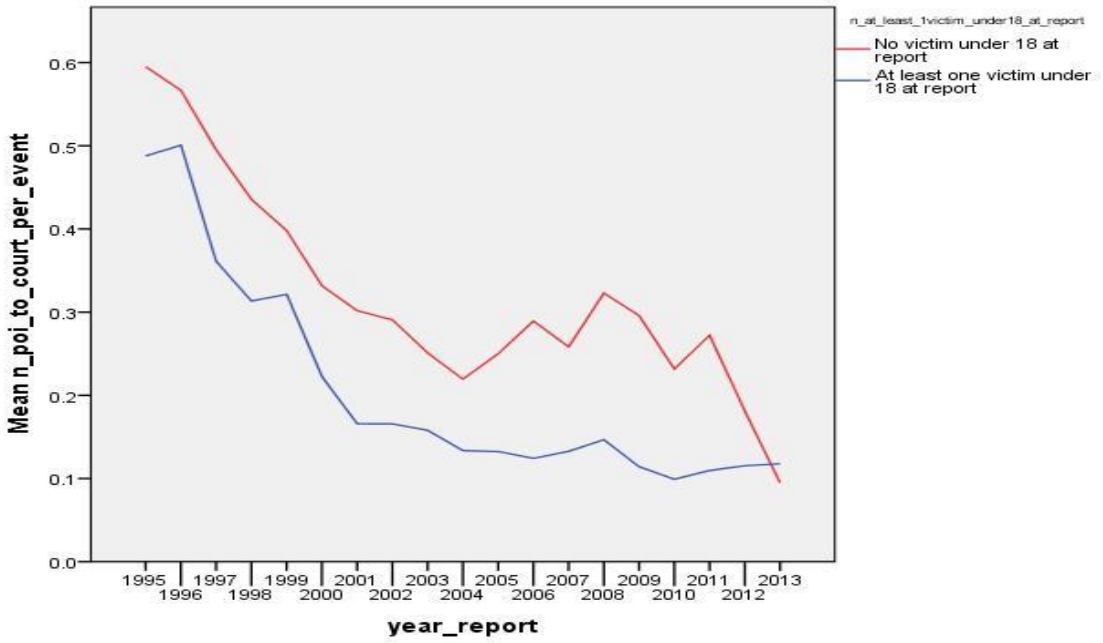
The original incident data were aggregated into *events* by year of report. An event was classified as involving a sexual assault if at least one of the incidents making up the event was said to involve sexual assault. The same approach was used with indecent assault. Thus an event could involve both sexual assault and indecent assault. Using information attached to the incident file from the victim file, an event was said to involve *a victim under 18* at the time of report if at least one of the incidents involved a victim under 18 at the time of the report. Note that the decision about whether an incident or event was reported by a child (under 18) did not come from the variable in the incident file, but from the aggregated data in the victim file. If at least one of the incidents associated with an event had resulted in legal action commencing for the, the event was said to have resulted in proceeding with a POI.

The first graph shows the probability of at least one POI proceeding *per event* by year and age at report for events which involved sexual assault. Note that a POI 'proceeding' may not have involved the sexual assault – it could have arisen from a charge arising from some other incident associated with that event.

The number of incidents per event

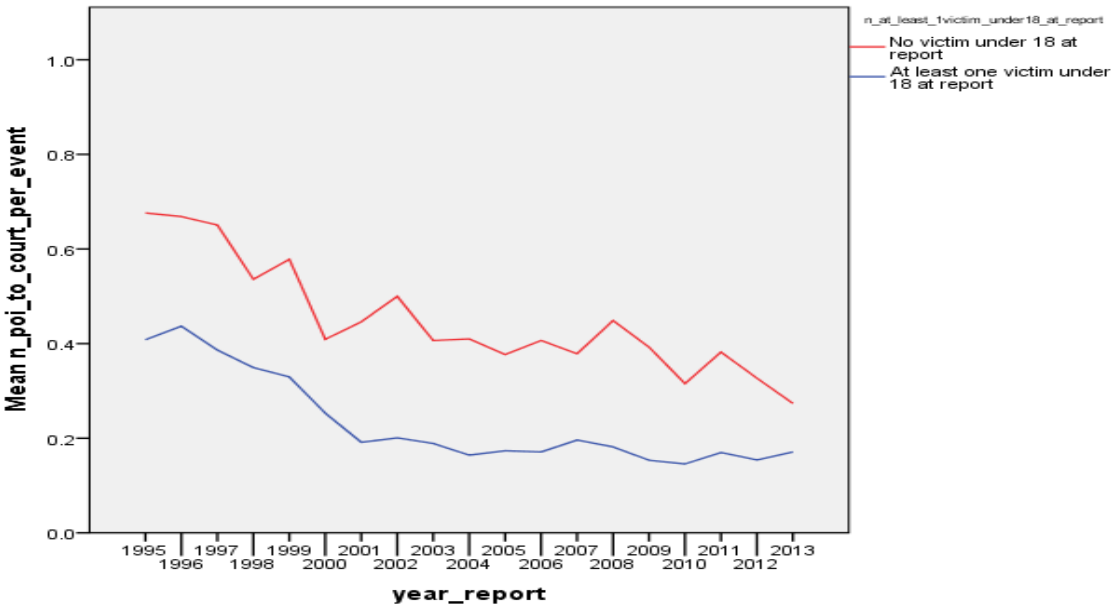
It is worth noting that the large majority of events consist of a single incident. For example, 85.7 per cent of events involved only one incident of sexual assault, 6.8 per cent involved two incidents and there were six or fewer incidents in 98 per cent of events. The figures were similar for indecent assault with 90 per cent of events involving one or two incidents.

SEXUAL ASSAULT – child under 18



The second graph shows the same kind of data for indecent assault.

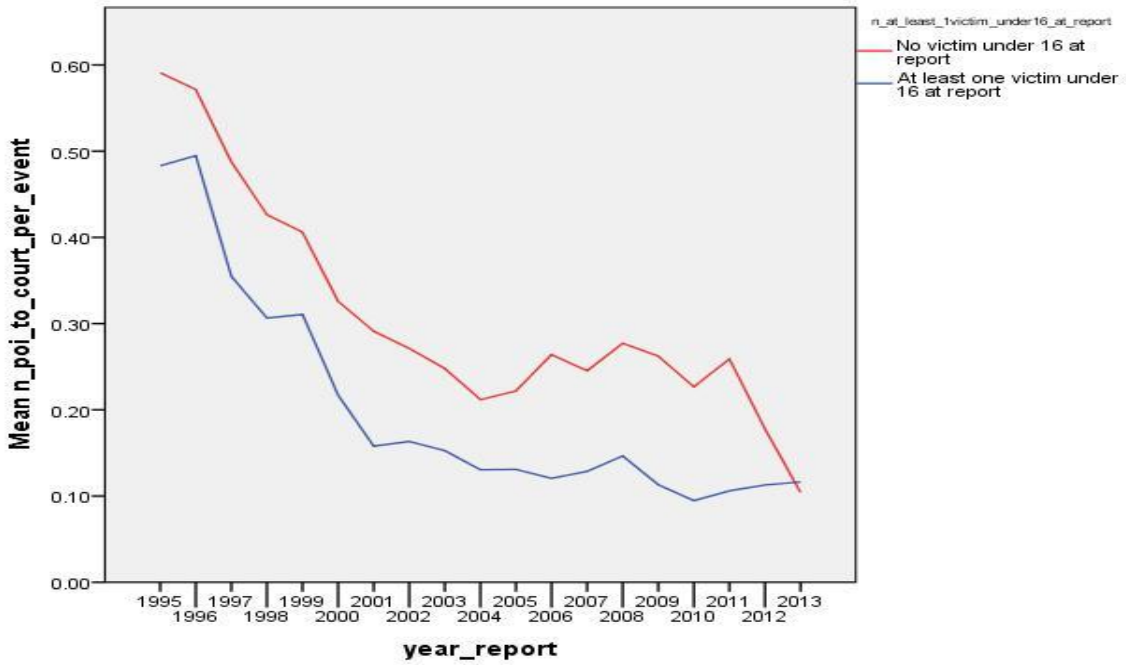
INDECENT ASSAULT – child under 18



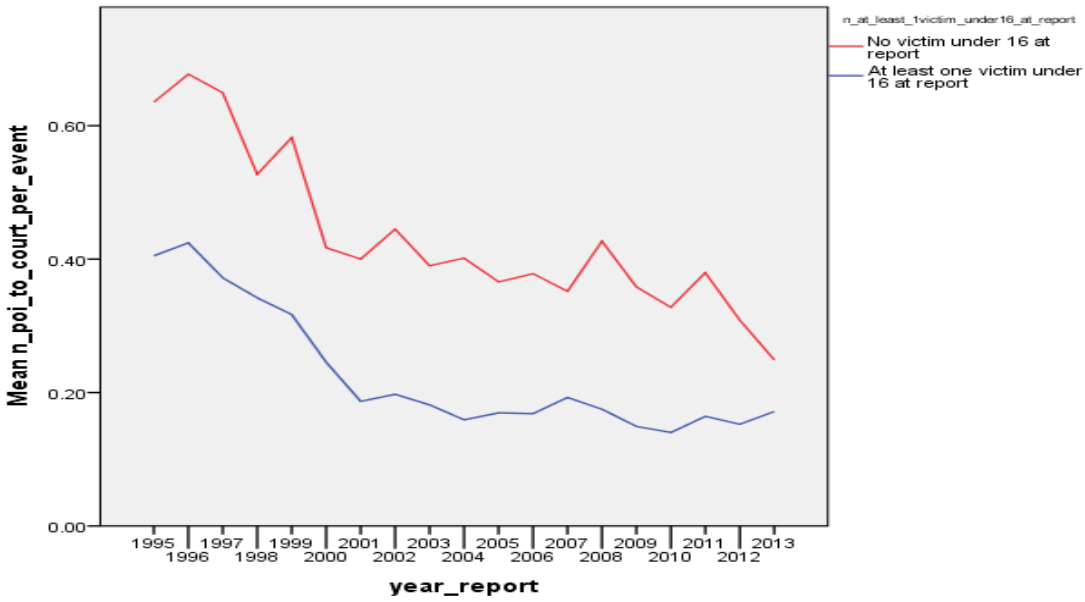
Using 16 rather than 18 as the cut-off age

When age 16 is used as the cut-off age for child reporting instead of 18, the results are very similar to those obtained where the cut-off is 18, as the figures below indicate.

SEXUAL ASSAULT – child under 16



INDECENT ASSAULT – child under 16



13.2 APPENDIX 3 (NSW): NOTES ABOUT LOGISTIC REGRESSION - COPS DATA

These notes relate to the logistic regression predicting the probability of legal action commencing in relation to a sexual offence against a child based on the New South Wales COPS data. See page 68–9 of this report.

When two or more variables are involved in an interaction, their effects are conditional; that is, given an interaction *A*B*, the effects of *A* on the dependent variable differ, depending on the value of *B*. Depending on the way categorical variables involved in interactions are coded, it may be inappropriate (and could be misleading) to interpret the 'main effect' of a variable involved in an interaction. In general, the effects of a variable involved in an interaction may best be interpreted within the context of the interaction, and simple effects – the effects of *A* (for example) at each level of *B* – can be examined. Accordingly, the interactions will be considered first.

Given the number of terms involved in the three-way interaction, effect, or deviation, coding was used for all variables in order to facilitate interpretation. Effect coding allows the comparison of each effect with an 'average' effect, rather than with a specific level, as in dummy or indicator coding, which is the default method used in the analyses reported here

In the logistic regression predicting the likelihood of legal action being initiated ('proceeding to court'), for example, the analyses yielded odds ratios (ORs) based on effect coding, which ranged from 3.04 for 1996 to .67 for 2014, showed that there was a reduction (with some variation) in the likelihood of a case proceeding over the years covered by the study (χ^2 = 1,012.3, 19 *df*, *n* =78, 843, $p < .0001$.) For the similarly coded delay variable, ORs showed that the likelihood of a case proceeding tended to increase with longer delays (ORs ranged from .53 to 2.14, : χ^2 = 1095.9, 7 *df*, *n* =78, 843, $p < .0001$.) although the likelihood tended to decrease for the longest delay, of greater than 20 years (OR = 1.49), The OR for offence type indicated that the odds of a case proceeding was 1.17 greater for indecent assault than for sexual assault (χ^2 = 135.1, 1 *df*, *n* =78, 843, $p < .0001$). There was a significant two-way interaction between offence type and delay (χ^2 = 73.7, 7 *df*, *n* =78, 843, $p < .0001$) which indicated that the increase in the likelihood of a case proceeding with longer delays tended to be greater for indecent assault than for sexual assault (ORs for the effect-coded interaction contrasts increased from .89 to 1.29). The ORs for the three-way interaction contrasts showed departures in some years from the patterns described above; there did not appear to be any consistent variations.

13.3 APPENDIX 4 (NEW SOUTH WALES): EXPLANATORY NOTES

Table A: Explanatory notes for Tables 6 and 7 – outcome of appearances (NSW)

Table 6 presents the court outcomes for persons charged in the New South Wales District and Supreme Courts.

The outcome categories are as outlined in *New South Wales Criminal Courts Statistics 2014* – Explanatory Notes (p 157):

Proceeded to trial

Acquitted of all charges: Persons in this category were found not guilty of any offence following a trial. This may include some charges not being proceeded with or being otherwise disposed of.

Not guilty by reason of mental illness/health: In published reports prior to 2012, these were recorded in the 'Acquitted of all charges' category. This data is available from 2008 on request.

Found guilty of at least one charge: Persons in this category were found guilty of at least one of the offences charged.

Other: Persons in the 'Other' category are those who were acquitted of one or more charges following a trial but pleaded guilty to at least one other charge.

Proceeded to sentence only

Trial committal: Persons committed for trial who entered a guilty plea after committal, either before or during the trial. Persons who entered a guilty plea and were also found guilty/ acquitted of other charges at trial are excluded.

Sentence committal: Persons committed for sentence after entering a guilty plea in the lower court.

No charges proceeded with

Persons in this category were not proceeded against by the Director of Public Prosecutions to trial.

All charges otherwise disposed of

Included in this category are accused persons who died or were referred to the Drug Court.

TABLE 7: OUTCOME OF APPEARANCES IN LOCAL AND CHILDREN'S COURTS

Table 7 presents court outcomes for persons charged. The outcome categories areas outlined in *New South Wales Criminal Courts Statistics 2014* – Explanatory Notes (pp 144–45, 150):

Proceeded to defended hearing

Defended hearings include where a 'not guilty plea' is entered or 'no plea' is recorded and the defendant was present when the matter was finalised.

All charges dismissed: Appearances in this category involved the defendant being found not guilty of any offence following a defended hearing. Such appearances may have included some charges being dismissed without hearing.

Guilty of at least one charge: In this category the defendant pleaded not guilty, but was found guilty by the court of at least one of the offences charged.

Other: Appearances in this category include persons for whom one or more charges were dismissed after a defended hearing, but who either (i) pleaded guilty to other charges or (ii) were convicted ex parte of other charges.

Proven outcome not further described

Appearances in this category include persons who received a sentence but there was insufficient data to indicate whether they had proceeded to a defended hearing or were sentenced after entering a guilty plea.

Sentenced after guilty plea

This category includes appearances where the defendant pleaded guilty to at least one charge, and any other charges were dismissed or otherwise disposed of.

Convicted ex parte

Includes charges where the defendant either: (i) lodged a written guilty plea and was convicted and sentenced in his/her absence, or (ii) failed to appear, was convicted and sentenced by the court on the evidence presented. This outcome does not include where a conviction warrant was issued by the court for the offender to be brought before the court for sentencing.

All charges dismissed without hearing

This category includes where all charges were dismissed by the court, but there was no defended hearing. For instance, the prosecution may not have offered any evidence in respect to the charges or the defendant may have died prior to finalisation.

All charges otherwise disposed of

This category includes where charges have been adjourned (previously known as 'stood out of list'). A matter can also be stood out of the court list for various reasons; this outcome allows the prosecution to re-enter the matter at a later time.

Table B: Explanatory notes for principal offence and penalties

Table C provides explanations of the penalty types used in the higher courts. Penalties shown in the tables indicate the principal penalty imposed for the principal offence.

The order in the table (rank order and numeric code provided by the New South Wales Bureau of Crime Statistics and Research) determines the rank of the penalty as provided. Imprisonment is the most punitive penalty and ranked 1 (Hazlitt et al., 2004). The types of penalty are explained below for the higher courts, Local Court and Children's Court.

PENALTY HIERARCHY FOR PRINCIPAL OFFENCE IN NEW SOUTH WALES

The penalty hierarchy for the calculation of principal offence is shown below. Penalties are listed from the most to the least serious.

1. Imprisonment
2. Juvenile detention (control order)
3. Home detention
4. Intensive Correction Order
5. Suspended sentence with supervision
6. Suspended sentence
7. Community Service Order
8. Good behaviour bond with supervision
9. Good behaviour bond without supervision
10. Probation order
11. Fine
12. Children's Court bond
13. Nominal sentence (Rising of the Court)
14. Dismissed with caution
15. Conviction without penalty
16. Good behaviour bond without conviction
17. No conviction recorded

From the *NEW SOUTH WALES CRIMINAL COURTS STATISTICS 2014* – APPENDICES p 165

Table C (continued): Explanatory notes for Principal offence and Penalties

Principal offence

The *principal offence* is defined as the offence which received the most serious penalty according to the following rules:

a) Where an offender was found guilty of more than one offence, that offence which received the most serious penalty type is the principal offence. Appendix 2 lists the hierarchy of penalty type seriousness used for this calculation.

b) Where there were two or more offences which received the same penalty type, that offence which received the greatest quantum of that penalty type is the principal offence. (Note that for this calculation if multiple counts of the same offence type received different penalties they are treated as separate offences).

c) If there was more than one offence with a custodial penalty, the offence with the longest total sentence is selected as the principal offence.

d) If there was more than one offence with a custodial penalty with the same quantum of total sentence, the offence with the longest non-parole period is selected as the principal offence.

e) If there was more than one offence which received the same quantum of the same penalty type, including the same quantum of total sentence and non-parole period, the offence with the highest Median Sentence Ranking (see the Bureau's Crime and Justice Bulletin No.142 'Measuring Offence Seriousness') is selected as the principal offence.

f) Where an offence received more than one penalty, a principal penalty for that offence is first calculated following the rules set out above. The determination of principal offence is then calculated on the principal penalty for each offence.

Imprisonment

When sentencing an offender to imprisonment, the court sets a total term and may impose a non-parole period. The non-parole period must not be less than three quarters of the term unless there are special circumstances which the court must note. The court may decline to set a non-parole period, noting the reasons. For imprisonment sentences of six months or less, the court may not set a non-parole period.

Note: The *New South Wales Criminal Courts Statistics 2014* indicates that the 'average durations' in their publication 'includes only the non-parole period where a non-parole period has been specified and the total term where no non-parole period has been set. Cumulative terms of imprisonment are excluded from these tables. Where a cumulative term was imposed, only the non-parole duration for the principal offence is shown.'

Home detention

Home detention orders are an alternative means of serving sentences of full-time imprisonment of up to 18 months. The conditions of the Order constrain the offender's liberty to an extent that approximates confinement in minimum security custody with access to day release programs.

Intensive Correction Order

Intensive Correction Orders are served in the community for a period of up to two years. Under Clause 175 of the *Crimes (Administration of Sentences) Regulation* 2008, the offender is subject to intensive supervision, which may include random home visits, searches, drug testing, electronic monitoring and curfews. In addition, offenders issued with Intensive Correction Orders are required to do a minimum of 32 hours community service work per month and to 'engage in activities to address the factors associated with his or her offending'. Intensive Correction Orders replaced the penalty of periodic detention in October 2010.

Suspended sentence

Under S 12 of the *Crimes (Sentencing Procedure) Act* 1999, a court may impose a sentence of imprisonment of up to two years duration and then suspend the sentence on the condition that the offender enters into a good behaviour bond.

Community Service Order

The offender is ordered to perform a specified number of hours of unpaid community service work.

Bond (or Commonwealth recognizance)

There are several different types of bonds which may be imposed. Generally they require the offender to be 'of good behaviour' for a certain length of time. Conditions may also be included, for example:

- report to the Probation and Parole Service on a regular basis (bond with supervision);
- attend alcohol counselling;
- reside in a certain area.

This category includes persons charged for certain categories of child sexual assault who have been diverted into the NSW Pre-Trial Diversion of Offenders Program (Cedar Cottage). Please note that persons charged after 1 September 2013 were not eligible for diversion. In 2013, two people were referred to Cedar Cottage.

Nominal sentence

This is a nominal penalty where the offender is held in custody until the court adjourns (also referred to as 'Rising of the Court').

Conviction without penalty

Under Section 10A of the *Crimes (Sentencing Procedure) Act 1999*, the court may, where it finds a charge proved, record a conviction and dispose of the proceedings without imposing any other penalty.

Bond without conviction and No conviction recorded

Under Section 10 of the *Crimes (Sentencing Procedure) Act 1999*, a court may, where it finds a charge proved, elect not to proceed to a conviction, but to either discharge the offender with no penalty, with some nominal penalty, with a good behaviour bond, or with an agreement to participate and comply with an intervention program.

Principal penalties in the Children's Court

Principal offence

The *principal offence* is defined as the offence charged which received the most serious penalty according to the following rules:

Where an offender is found guilty of more than one offence, the offence which received the most serious penalty type is the principal offence. The hierarchy of Children's Court penalties are:

(i) **Control order** – a fixed term or non-parole period of detention in a Juvenile Justice NSW facility

(ii) **Community Service Order**

(iii) **Probation Orde**r – probation orders with Juvenile Justice NSW supervision, probation orders with other supervision and probation without supervision

(iv) **Fine**

(v) **Bond** – includes bond, suspended control order and conditional discharge, with supervision and without supervision

(vi) **Dismissed with caution**

(vii) **Other proven outcomes** – includes dismissed after Youth Justice Conference, no action taken on a breach of court orders, nominal sentence (rising of the court), conviction with no other penalty, disqualified driver and compensation.

14 APPENDICES: SOUTH AUSTRALIA

14.1 APPENDIX 1 (SOUTH AUSTRALIA): OCSAR EXTRACTION NOTES AND LIST OF VARIABLES

The South Australian Office of Crime Statistics and Research (OCSAR) supplied two datasets based on SA police data, one concerning victims and one concerning the accused, and a third dataset based on court information.

Method of extraction

South Australia Police datasets

The Police Identification Number (PIN) for victims of sexual offences and pornography/ censorship offences (JANCO '13' and '57') dating between 1/1/1991 and 31/12/2012 were extracted from the Police victim/offence dataset. These PINs were the 'master PINs' used to match back to the victim/offence dataset to extract the entire victimisation history (includes other offences other than JANCO '13' and '57') from 1991 to 2012 for these particular victims (as seen in Police – Victims).

The **Victims dataset** is sorted by incno, PIN_IR and offcode.

The same method was repeated for the **Police Apprehension dataset** to obtain the 'master PINs' for accused offenders. These PINs were used to match back to the apprehension dataset to extract the entire offending history (includes other offences other than JANCO '13' and '57') from 1991 to 2012 for these particular offenders (as seen in Police - Accused).

The Accused dataset is sorted by apphno, PIN_AP and offcode.

South Australian Courts dataset

The 'master PINs' set for accused offenders was then used to match to the Courts finalised cases dataset (all cases finalised between 1991–2012) to extract all cases finalised in court against the accused offenders (as seen in Courts). The Courts dataset is sorted by PIN.

Key notes in relation to the data:

- Victims and offence data are recorded by Police on Police Incident Reports while data in relation to the apprehension (via arrest or report) of accused offenders are recorded by Police on Police Apprehension Reports.
- It is from the data entered on these reports that OCSAR derives its Police datasets.

The OCSAR courts finalised cases dataset is based only on cases that have been heard and finalised in the courts. It does not include cases that are still in the process of court proceedings.

As the data is matched based on the 'master PINs' for each corresponding police dataset, it is not indicative of all offences recorded by Police.

- The same can be said for the courts data. As it is based on the master PINs of accused offenders of sexual offences, the data is not indicative of all cases finalised in courts for the given periods.
- The Police Identification Number (PIN) is assigned to individuals upon initial contact with Police and is a unique identifier that is carried over across the justice system (Police, Courts and Corrections) for the life of the individual.
- An individual's PIN may appear in both the Victims and Accused datasets as they may have been both a victim and an offender of a sex related offence at some stage in their history. As a result their PIN may also appear in the courts data.
- It should be noted that one Apprehension Report may clear multiple Incident Reports as the accused offender may have committed multiple offences against multiple victims.
- It should also be noted that in some instances, multiple Apprehension Reports can clear a single Incident Report. This is where the one victim was victimised by multiple offenders.

Data cleaning, coding, counting rules and aggregation of files for data analysis

Cases (victims etc) where the victim was 18 or older at the time of the offence were excluded from the databases. The age-specific 13 Janco codes were checked and cases where the victim was under 18 with a non-age specified JANCO offence code were included.

Victim records were aggregated by *incno* and year, and summary variables were created for such variables as the nature and date of the offence, and the delay between the offence and the report. In the South Australian data, a given 'incident' always involves a single victim but a given victim may be associated with multiple incidents.

The Police Identification Number (PIN) is assigned to individuals upon initial contact with Police and is a **unique identifier** that is carried over across the justice system (Police, Courts and Corrections) for the life of the individual. An individual's PIN may appear in both the Victims and Accused datasets as they may have been both a victim and an offender of a sexual offence at some stage in their history.

Records from the **accused dataset** contained a variable which showed the incident report number 'cleared' by the apprehension (of the accused) report, referred to here as *clr_num*. Using this variable, accused data which had been restructured to 'wide' format (as described in the appendix section on New South Wales data) to accommodate multiple accused for a given incident, was, for some analyses, linked to the aggregated victim/incident data. Some accused records had no *clr_num* code and there were accused records which found no match in the aggregated victim/incident data.

The **court dataset** contained information about the accused, identified by a police identification number (*PIN*), the disposition (finalisation) date, the major offence with which they were charged, and the court outcome. For some analyses it was necessary to add information about the accused to the court data. A matching process using the 'master PINs' set for 'accused offenders' was used to match to the Courts finalised cases dataset (all cases finalised between 1992 and 2012) to extract all cases finalised in court against the accused offenders. The data for 1991 was excluded because of missing matching data. The combined file was aggregated to produce records for combinations of *pin*, caseid, court and finalisation date.

Analyses of the South Australian data applied the same inclusion criteria and similar coding and categorisation of variables as used in the New South Wales data analyses, as far as possible. Offence type, for example, was coded to create four main categories in line with the New South Wales data.

- Sexual assault defined as sexual intercourse/penetration
- Indecent assault
- Act of indecency/aggravated act of indecency
- Child pornography/grooming for pornography and other sexual offences.

As for New South Wales, persons in the Magistrates Court who were committed for trial and for sentence are included in the counts for the higher courts since these are non-finalised appearances in the Magistrates Court.

The closest equivalent of the New South Wales 'POI proceed to court' variable in the South Australian data was 'Clear-up' status.

This was coded by SA Police using 24 codes which were collapsed following extensive discussions with OCSAR into the following categories:

- cleared by arrest, report or the issue of a warrant: equivalent to the code 'legal proceedings commenced/legal action taken' used for the New South Wales data
- 'cleared' with no further action or no offence revealed (including insufficient evidence), as well as various codes for incident reports which have not been cleared where the case has been 'filed' and there is no further action
- 'cleared' with no legal action possible – 108 cases where the accused had died and four where the complainant had died
- 'not cleared 'open cases' where the person of interest has not been identified.

*One Apprehension Report may clear multiple Incident Reports as the accused offender may have committed multiple offences against multiple victims. In some instances, multiple Apprehension Reports can also clear a single Incident Report where the one victim was victimised by multiple offenders.

14.2 APPENDIX 2 (SOUTH AUSTRALIA): STATUTE OF LIMITATION

South Australia has a statute of limitation of 2 years on all summary offences, irrespective of the category of offence (s52 *Summary Procedure Act 1921* (SA)). Some sex crimes, like indecent behaviour and gross indecency (s23 *Summary Offences Act 1953* (SA)) are still summary, and therefore captured by this limitation. However, the vast majority of sex crimes are indictable offences and therefore have no limitation (see Part 3 Divisions 8-15 of the *Criminal Law Consolidation Act 1953* (SA)).

South Australia used to have a three-year statute of limitations for indictable sex offences, but this has now been repealed. This was introduced in 1982 under s76a of the *Criminal Law Consolidation Act 1935* (SA), barring the prosecution of any such pre-1979 offences.

The statute of limitations was abolished on 17 June 2003 with the *Criminal Law Consolidation (Abolition of Time Limit for Prosecution of Certain Sexual Offences) Amendment Act 2003*, which deleted s76a and inserted s72A: 'Any immunity from prosecution arising because of the time limit imposed by the former section 76A is abolished'.

On a practical note, the abolition of the statute resulted in a backlog of cases that could then be prosecuted; this led to the establishment of the Paedophile Task Force (located within SCIB) to work through the 20-year backlog. That Taskforce also dealt with the matters emerging from the Mullighan Commission of Inquiry into Children in State Care.

14.3 APPENDIX 3 (SA): INTERACTION EFFECTS IN LOGISTIC REGRESSION ANALYSIS

Predicting probability of arrest/report [case proceeding]

Age of victim by gender

The significant interaction between the age and gender of the victim is shown in Figure A 2.1 ($\chi^2 = 57.12$, $df = 3$, $p < .0001$). For victims in the two younger age groups, legal action against the alleged offender was more likely if the victim was female than male but for older victims (aged 10 or older), the matter was more likely to lead to arrest or report if the victim was male. The highest probability (.54), and indeed the only one in which arrest was marginally more likely than not, was for males aged 10 to 13 years. The least likely to proceed were those involving boys under 5 (.32). This cross-over pattern for age and gender is similar to, but not the same as, that for New South Wales. The odds ratios (ORs) comparing females with males for the two youngest age groups (.85 and .81) were not significantly from 1, but they were significant for the two oldest age groups (1.47 and 1.59). The ORS comparing age groups for female victims indicated significant differences in the likelihood of arrest/report between 6–9 year olds and 10–13 year olds.

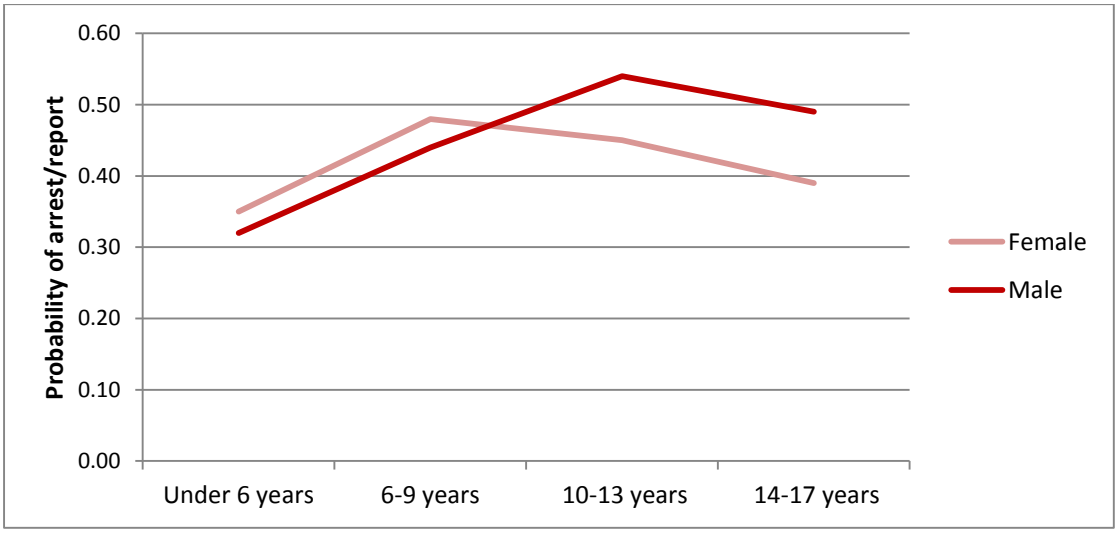


Figure A 2.1. Adjusted probability of arrest/report by age and gender of victim in South Australia

Age of victim by type of offence

The significant interaction between the age of the victim and the type of offence is shown in Figure A 2.2 ($\chi^2 = 48.31$, $df = 4$, $p < .0001$). As Figure A 2.2 shows, when the victim was aged nine or younger, the likelihood of arrest/report tended to be higher for sexual assault than for indecent assault. Also, for both types of assault the likelihood of arrest/report was lower for victims aged five or younger compared with those aged six to nine and older.

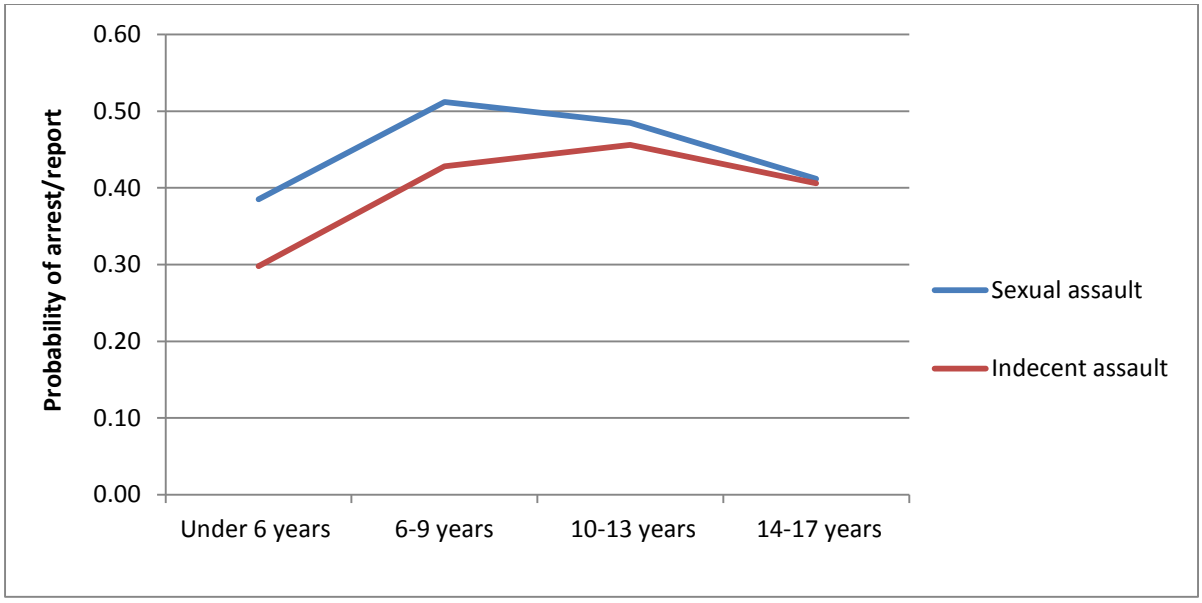


Figure A 2.2. Probability of arrest/report by victim age and type of offence in South Australia

Type of offence by relationship to alleged offender

Figure A 2.3 shows the probability of arrest or report for both sexual assault and indecent assault by the relationship of the suspect to the victim ($\chi^2 = 39.40$, $df = 7$, $p < .00001$). The probability of arrest or report was higher when the alleged offender was a person in a position of authority, a parent or guardian or other member of the family, and lowest when it was a stranger or person not known to the child or a boyfriend/girlfriend. The probability of arrest or report was also generally higher for sexual assault than for indecent assault except for sibling relationships and persons known but not related to the child. The odds ratios indicate that, for an offence in which the accused was a parent or guardian, arrest and legal action were significantly less likely for indecent assault offences than for sexual assault (OR = .54), and that the same was true for offences involving boyfriends or girlfriends (.63) or another known person (.84). Boyfriend/girlfriend comprised 12 per cent of sexual assaults but only 0.7 per cent of indecent assaults. Siblings comprised 4.5 per cent of sexual assault and 3.9 per cent of indecent assault incidents.

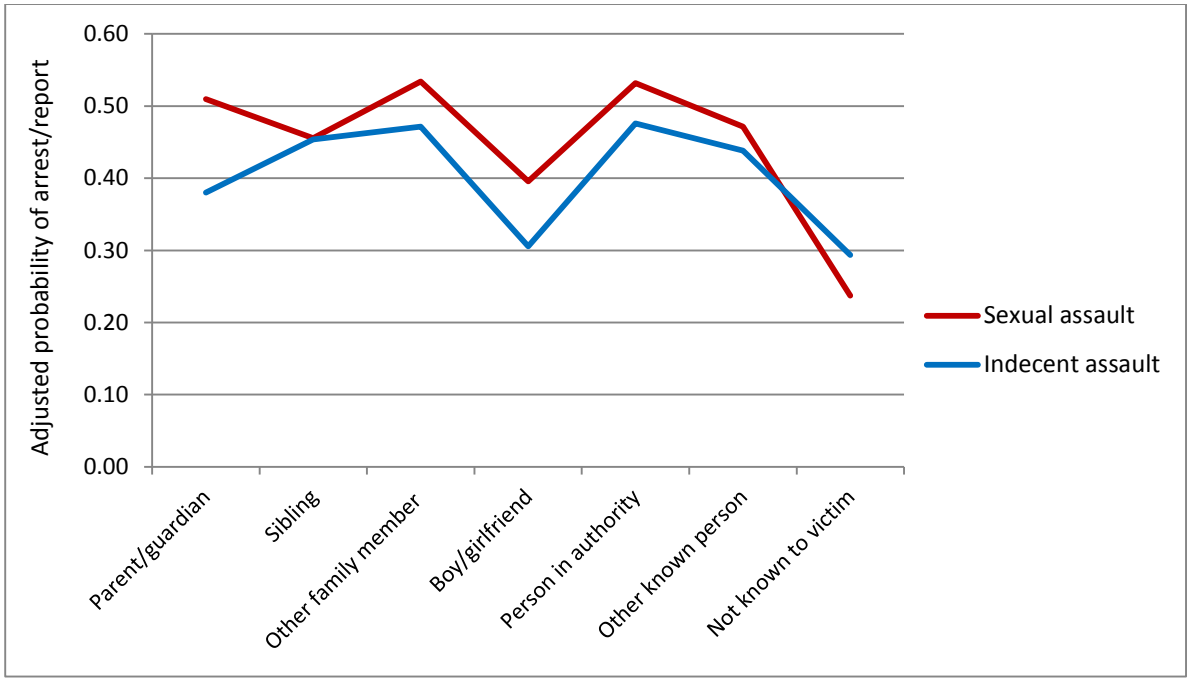


Figure A 2.3. Adjusted probability of arrest/report by relationship of the suspect to the victim and type of offence in South Australia

Predicting probability of conviction

The interaction between the type of offence and the age of the offender (χ^2 = 30.4, *df* = 1, $p < .0001$) in Figure A2.4 below indicates that the adjusted likelihood of being convicted of indecent assault was unrelated to the age of the offender (37 per cent), but that for sexual assault, the probability of being found guilty decreased with increasing age (32 per cent, 26 per cent and 21 per cent for mean ages 24, 39, and 54 years, respectively). The odds ratio (OR) for the simple slope of the age variable for sexual assault was 1.98 was significantly different from 1 and means that as the age of the defendant increased, the probability of conviction reduced. For indecent assault, the equivalent OR was 1, showing that there was no association between age and likelihood of conviction.

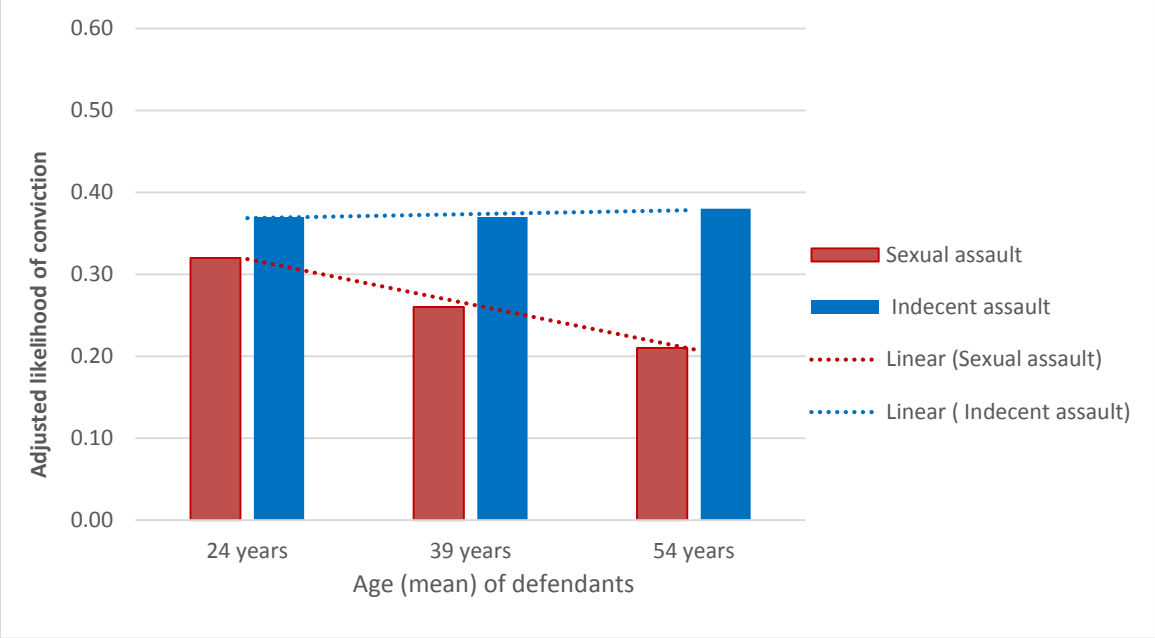


Figure A 2.4. Probability of a conviction by age of defendant and type of offence in South Australia

Child sexual offence appeals in the New South Wales Court of Criminal Appeal 2005–13

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August 2016

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15.1 INTRODUCTION AND BACKGROUND

This study covers the outcomes of appeals in child sexual offence matters in the New South Wales Court of Criminal Appeal (NSWCCA) over nine years from 2005 to 2013. It focuses on the trends in appeals against conviction, rather than appeals against sentence, though there is analysis and comment on some aspects of sentencing appeals in child sexual assault cases. In particular, this study examines the implications and impact of delay on the outcome of such appeals and compares appeals against conviction for historical child sexual offences (those reported when the victim was an adult) with those in which the victim was a child at the time of reporting and prosecution. It also examines how different grounds of appeal against conviction are argued in child sexual abuse appeal cases and the outcome of such appeals. Given the Royal Commission's focus on institutional matters, it provides a detailed analysis of the grounds for, and outcomes of, appeals in institutional cases of child sexual abuse over the study period.

Few studies have specifically examined the outcomes of appeal decisions in child sexual assault cases in a systematic way. In Australia, over the last 10 years only two studies, which were both produced by the Judicial Commission of New South Wales, have examined some aspects of appeal outcomes in child sexual assault cases; both focused largely on New South Wales data. The first, by Hazlitt et al. (2004), examined the sentencing of 467 convicted child sexual assault offenders in the District Court between 2000 and 2002. This study also reviewed the decisions of the NSWCCA in child sexual assault cases for the period 2000–03. The second study, by Donnelly et al. (2011), examined some aspects of appeals against conviction in child sexual assault cases for the period 2001–07. This study was part of a larger project dealing with appeals against conviction across the board in New South Wales (Hazlitt, Donnelly and Poletti, 2004; Donnelly et al., 2011). In addition, systematic data is available in relation to final sentencing outcomes following appeals against sentence in cases involving convicted child sex offenders (for example, Hazlitt et al., 2004; New South Wales Parliament, Joint Select Committee on Sentencing of Child Sexual Assault Offenders (Joint Select Committee), 2014; Holmes, 2011).[150]

These studies and data indicate that appeals in child sexual assault matters constitute a substantial number of appeal matters[151], and have a significant success rate. Donnelly et al. (2011, p 198) reported that child sexual assault appeals represented nearly one-quarter (22.5 per cent) of all successful appeals against conviction, and almost 70 per cent of all successful sexual assault appeals in New South Wales in the period 2001–07. Hazlitt et al. (2004, p 46) reported that appeals against conviction in child sexual assault cases in the NSWCCA were

[150] See also Sentencing Advisory Council, *Sentencing Snapshots (Complete Series)*, Vic.

[151] See, also for example, findings from Courtin (2006, p 268) that more than half of the convictions relating to child sex abuse cases are appealed (between two and six times the appeal rate for other crimes).

upheld in more than half the cases (55.9 per cent) studied over the period 2000–03. Appeals by the accused against severity of sentencing were successful in 44.4 per cent of cases. Although the number of appeals against conviction involving child sexual offences decreased, the success rate of appeals against conviction showed a marked increase, from 43.5 per cent in 2000 to 73.3 per cent in 2003.

In the Donnelly et al. (2011, p 198) study, the success rate for child sexual assault appeals was found to be significantly higher than for sexual assault appeals involving an adult victim (50.3 per cent and 32.4 per cent, respectively) and higher than for all appeals against conviction (35.5 per cent). A higher acquittal rate, while not statistically significant, was seen in child sexual assault cases that succeeded on appeal; 42.7 per cent succeeded compared with 27.3 per cent in sexual assault appeals involving an adult victim (Donnelly et al., 2011, p 198). Judicial misdirection was reported to be the most prevalent source of error in all successful sexual assault appeals (53.8 per cent), irrespective of whether the case involved a child or adult complainant. Judicial error in admissibility of evidence was identified in 19.2 per cent of all successful sexual assault appeals (Donnelly et al., 2011, p xix–xx). These errors appear to arise as frequently in cases of both child and adult sexual assault and, based on anecdotal evidence alone, are likely to occur even more often in cases involving a child victim/complainant (discussions with Director of Public Prosecutions solicitors and Crown prosecutors; Quadara, 2014; Shead, 2014).

15.2 THE CURRENT STUDY – RESEARCH QUESTIONS

In line with the Royal Commission's brief, this study aimed to address the following questions:

1. What is the rate of appeal in child sexual offence cases – including appeals by both the accused and the Crown, and the rate of appeal against conviction and sentence?
2. What are the outcomes and the success rate of child sexual assault appeals?
3. What are the main grounds of appeal in child sexual assault cases?
4. Is there evidence that some grounds of appeal are more likely to succeed than others?
5. Is there any difference in the rate of appeals, the grounds of appeals and the outcomes of appeals in cases:
    a. where there is delayed complaint, compared with cases reported immediately in childhood?
    b. involving institutional abuse, compared with intrafamilial abuse and other extrafamilial cases?

15.3 METHODOLOGY

This study analysed a sample of appeal decisions involving child sexual offences in the NSWCCA over nine years from 2005 to 2013. Relevant cases for inclusion in the study were identified by searching AustLII and the NSWCCA database for this period, using combinations of the following keywords and phrases:

> child sexual assault; child sexual abuse; child sex crimes; child sex offences; persistent sexual abuse; aggravated child sexual offences; indecent assault; child pornography; gross indecency; carnal knowledge; aggravated sexual assault; and sexual intercourse with a child.

All cases that involved a child victim under the age of 18 in the principal offence were included. Child sexual abuse was defined broadly to include all child sex-related offences, and to encompass the various offences relating to the Royal Commission's definition of child sexual offences.[152] Cases were not coded for analysis based on offence type, as this information was at times incomplete in the appeal judgment and was considered beyond the scope of this study. However, Appendix A15.2 (see *Online appendices to the appeals study*, available at www.childabuseroyalcommission.gov.au) provides a summary breakdown of offence categories in the sample of cases studied, both by type of abuse (intrafamilial, extrafamilial and institutional) and whether disclosure was in childhood or adulthood, based on the information (where available) provided in the appeal judgment. This summary (albeit incomplete) reveals that charges involving allegations of sexual intercourse with a child are common, as are charges involving circumstances of aggravation. Cases involving complainants aged under 10 are also not uncommon.[153] The offence of persistent sexual abuse of a child (pursuant to section 66EA(1) of the *Crimes Act 1900* (NSW)) is charged infrequently.

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[152] The Royal Commission has defined child sexual assault or abuse for its purposes as:

'Any act which exposes a child to, or involves a child in, sexual processes beyond his or her understanding or contrary to accepted community standards. Sexually abusive behaviours can include the fondling of genitals, masturbation, oral sex, vaginal or anal penetration by a penis, finger or any other object, fondling of breasts, voyeurism, exhibitionism, and exposing the child to or involving the child in pornography. It includes child grooming, which refers to actions deliberately undertaken with the aim of befriending and establishing an emotional connection with a child, to lower the child's inhibitions in preparation for sexual activity with the child' (2014, vol 1, p 95).

[153] Some information about offences charged is also provided in relation to the sub-sample of historical child sexual abuse cases studied; see Appendix A15.12 (see O*nline appendices to the appeals study,* available at www.childabuseroyalcommission.gov.au).

A total of 291 cases were identified as involving offences against a child victim or complainant; all 291 appeal judgments were summarised and coded for grounds of appeal and outcomes (see discussion below).[154] Cases were also categorised, to the extent possible, as involving either historical child sexual abuse or non-historical child sexual abuse, and as intrafamilial, extrafamilial or institutional abuse (see pages 288–89) for a discussion of relevant definitions). Data was housed in an Excel database and analysed both manually and via the database. The data analysis in this study is primarily descriptive, though some relevant quantitative data analyses are also presented.

Several limitations in sampling should be noted. First, the study was limited to appeals in the NSWCCA with a published judgment. Second, it is possible that some child sexual offence–related appeals were not identified, despite thorough and systematic searches of the relevant case databases; therefore, the sample of cases studied for this period could be incomplete. Third, since the study was largely based on information extracted from appeal judgments, the type of information and detail contained in the appeal judgments was not consistent across the sample of cases. Some judgments provided more background information about the nature of the offences while others provided very little, simply focusing on the issue(s) on appeal; therefore, at times, the broader context of a case was difficult to reconstruct and understand in full.

15.4 FINDINGS

Table A15.1 breaks down, by year, the number of cases included in this study and the number of finalised appeal cases in the NSWCCA. The 291 child sexual assault appeals constitute 7.7 per cent of the total number of finalised appeals in the NSWCCA over this period.[155] This is relatively stable by year, ranging from 6.1 per cent to 9.8 per cent, and a little lower than the 10 per cent reported by Hazlitt et al. (2004, p 45) for appeals involving child sexual assault in the four-year period 2000–03. Hazlitt et al. (2004, p 46) reported that compared with overall appeals, the proportion of appeals in the NSWCCA for sexual offences against children declined from 12.7 per cent in 2000 to 9.4 per cent in 2003.

In comparison, in the period 2000–07, of all appeals against conviction in the NSWCCA, homicide and related offences made up 16.9 per cent and illicit drug offences accounted

[154] To organise the data for systematic analysis, an initial textual analysis of descriptors/keywords used in the judgments was undertaken to broadly characterise the grounds of appeal in each case. These descriptive codes were not treated as discrete categories and were not formulaic in nature, but rather were used to identify the range of often multiple issues on appeal in any given case.

[155] See Table 3.4 in New South Wales Bureau of Crime Statistics and Research (2005, p 79; 2006, p 79; 2007, p 79; 2008, p 79; 2009, p 79; 2010, p 89; 2011, p 89; 2012, p 89; 2013a, p 97).

for 20.1 per cent. These figures do not include sentencing appeals (Donnelly et al., 2011, p 9). All sexual assault and related offences comprised just over a quarter of all conviction appeals.

Appendix A15.1 (see *Online appendices to the appeals study*, available at www.childabuseroyalcommission.gov.au) provides a case list of the 291 appellate decisions included in this study.

Table A15.1: Breakdown of appeal cases for the period 2005–13

Year	n	Percentage of study sample	Number of finalised appeal cases in NSWCCA[156]	Child sexual assault cases as a percentage of finalised cases in NSWCCA
2005	34	11.7	536	6.3
2006	39	13.4	501	7.8
2007	27	9.3	444	6.1
2008	39	13.4	414	9.4
2009	30	10.3	391	7.7
2010	37	12.7	417	8.9
2011	21	7.2	340	6.2
2012	33	11.3	336	9.8
2013	31	10.7	381	8.1
Total	291	100.0	3760	7.7

The calculation for the rate of appeal for child sexual abuse cases – the number of cases appealed as a proportion of convictions for those offences – contains several likely sources of variation and error. First, there is a difference in the counting rule when using the number of *persons* charged in the New South Wales higher courts and the number of *cases* involving a child sexual offence in the NSWCCA. The number of persons charged and the number of cases

[156] Data on the number of disposals in the NSWCCA for the period 2005–09 are sourced from the Supreme Court of New South Wales *Annual Review* (2009, p 55). Data on the number of disposals in the NSWCCA for the period 2009–13 are sourced from the Supreme Court of New South Wales *Provisional Statistics* (2014, p 2)

may differ as multiple accused persons may be tried jointly in a case[157]; it is common in New South Wales for each sexual assault matter to be tried separately (Goodman-Delahunty, Cossins and Martschuk, 2016).[158] Second, appeal matters are likely to occur in a different year to the first court case.

Noting these limitations, Table A15.2 provides estimated rates of appeal for the period 2005–13. These rates are based on the number of persons found guilty of child sexual offences by the District Court and the Supreme Court[159] and the number of child sexual abuse appeal cases in the NSWCCA identified in the present study. This provides an overall estimated rate of appeal against conviction and sentencing for the period 2005–13 of approximately 16.7 per cent.

Donnelly et al. (2011) calculated that about 33 per cent of convictions across all categories of offences in the New South Wales District and Supreme Courts were appealed, and that the appeal rate against sexual assault convictions involving a child victim was 52.6 per cent for the period 2001–07. This is similar to the figure of 50.3 per cent (Donnelly et al, 2011: xii, p 199) for sexual assault offences involving an adult victim.

The marked difference between the rate of appeal against convictions involving a child victim reported in Donnelly et al.'s study and our estimated rate of appeal in child sexual assault cases involving a child victim may be explained by possible differences in the sources of data and the methods used to calculate the rate of appeal; these differences would significantly widen the numbers we relied upon compared with Donnelly et al.[160]

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[157] The explanatory notes for this data indicate that these figures were calculated on the basis that accused persons in more than one case finalised on different dates were counted twice, but if separate charges were finalised on the same day, they were counted only once: New South Wales Bureau of Crime Statistics and Research (2013a, p 153).

[158] See *Criminal Procedure Act 1986* (NSW); Attorney General's Department of New South Wales Criminal Justice Sexual Offences Taskforce (2005, p 82); NSW Parliament Joint Select Committee (2014, p 96).

[159] Based on data the New South Wales Bureau of Crime Statistics and Research (BOCSAR) finalised for persons found guilty in the higher courts.

[160] Regarding the BOCSAR data we used, BOCSAR states: 'In both the District and Supreme Courts, a person charged refers to a group of one or more charges, against a single accused person, which are finalised by the court on the same date. Section 3 of this report does not distinguish "distinct" persons. If an accused person is in more than one case finalised on different dates during the counting period, they will be counted more than once. However, separate charges finalised on the same date for one accused person are consolidated and counted as one person. Where there are outstanding charges against the accused, this would be counted as a new person in a subsequent counting period. For these reasons there is no direct relationship between the persons registered in trial and sentence cases … and the number of persons with cases finalised.' (BOCSAR, 2013, p 153). As a result, the numbers used in our calculations are likely to be higher than the Donnelly numbers.

Table A15.2: Estimated rate of appeals in child sexual abuse cases

Year	Child sexual assault appeal cases in our sample	Persons found guilty in the higher courts of child sexual assault offences[(a)]	Percentage of appeals lodged by persons found guilty in the higher courts of child sexual assault offences
	N	N	%
2005	34	166	20.5
2006	39	170	22.9
2007	27	167	16.2
2008	39	182	21.4
2009	30	213	14.1
2010	37	176	21.0
2011	21	204	10.3
2012	33	210	15.7
2013	31	255	12.2
Total	291	1,743	16.7

Note: (a) This represents persons found guilty of sexual offences against children in the New South Wales District Court and Supreme Court.[161]

Appellant

The vast majority of cases included in this study involved an appeal by the accused. In 89 per cent of cases, an appeal was lodged by the accused alone or in conjunction with the

Furthermore, the difference in numbers may also be due to different definitions. The BOCSAR categories are for 'sexual offences against children' and may include a wider range of cases than the Donnelly study, which uses 'sexual assault against children'; for example, the former category may include child pornography offences, which the latter may not. This may have the effect of widening the numbers significantly.

[161] Statistics from 2009–13 were sourced from the NSW Bureau of Crime Statistics and Research (BOCSAR) (2014); statistics for 2005–08 sourced from tables 1.7 and 3.7 in BOCSAR (pp 25, 85).

Crown. In 84.9 per cent of cases, the accused alone appealed; in 11 per cent the Crown only[162] appealed; and in 4 per cent both the accused and the Crown appealed. Table A15.3 provides a breakdown by year of the number of appeals by the accused and the Crown for the period 2005–13. No notable changes in appellant trends are discernible overall in the study period, although there were fewer appeals by the accused in 2011. This may reflect natural variations from year to year, given the small numbers in each year.

Table A15.3: Breakdown of appellants by year

Year	Appeals – accused only		Appeals – Crown only		Appeals – accused and Crown		Total
	n	%[a]	n	%[(a)]	n	%[(a)]	
2005	30	88.2	4	11.8	0	0.0	34
2006	34	87.2	5	12.8	0	0.0	39
2007	24[(b)]	88.9	1	3.7	2	7.4	27
2008	35	89.7	4	10.3	0	0.0	39
2009	25	83.3	2	6.7	3	10	30
2010	27	73.0	6	16.2	4	10.8	37
2011	16	76.2	3	14.3	2[b]	9.5	21
2012	28[b]	84.8	5	15.2	0	0.0	33
2013	28	90.3	2	6.5	1	3.2	31
Total	247	84.9	32	11.0	12	4.1	291

Notes:

(a) This represents the percentage of total yearly sample under study.

(b) This figure includes one instance of an interlocutory appeal by the accused.

[162] Crown appeals are infrequent, serving a limited purpose of establishing principle: *R v DH* [2014] NSWCCA 326 at [19]; *R v Tuala* [2015] NSWCCA 8 at [98]; *Green v The Queen* (2011) 244 CLR 462; *Quinn v The Queen* [2011] HCA 49; 244 CLR 462. See also NSW *Prosecution Guidelines*: 'Prosecution/Crown appeals are and ought to be rare, as an exception to the general conduct of the administration of criminal justice they should be brought to enable the courts to establish and maintain adequate standards of punishment for crime, to enable idiosyncratic approaches to be corrected and to correct sentences that are so disproportionate to the seriousness of the crime as to lead to a loss of confidence in the administration of criminal justice.' [Guideline 29].

Appeal type

Overall, the majority of child sexual abuse appeal cases for the period 2005–13 involved the accused appealing against sentence. Of the 291 cases, 165 involved the accused appealing against sentence (56.7 per cent of all cases and 63.7 per cent of appeals by the accused). This compared to 139 involving the accused appealing against conviction (47.7 per cent of all cases and 53.7 per cent of appeals by the accused). In 16.5 per cent of cases, the accused appealed against both conviction and sentence.

Over the study period, a greater proportion of appeals by the accused were against sentence rather than against conviction, but this was not consistent for every year. For example, in 2013, in 22 cases the accused appealed against sentence and in 11 cases appealed against conviction. This compared with 2008, when the accused appealed against conviction in 22 cases, and in only 14 cases did the accused appeal against sentence. Table A15.4 provides a breakdown by year of the number of cases involving an appeal by an accused against conviction and/or sentence. There were no notable patterns of change in the types of appeals being brought by the accused over the study period.

Table A15.4: Breakdown of appeal types by accused by year

Year	Accused appealed against sentence only		Accused appealed against conviction only		Accused appealed against conviction and sentence		All cases in which accused appealed against conviction	All cases in which accused appealed against sentence	All cases in which accused appealed
	n	%[(a)]	n	% [a]	n	%[(a)]	n	n	N
2005	19	55.9	6	17.6	5	14.7	11	24	30
2006	11	28.2	16	41.0	7	17.9	23	18	34
2007	7	25.9	11	40.7	7[(b)]	25.9	18	14	26[(c)]
2008	13	33.3	14	35.9	8	20.5	22	21	35
2009	15	50.0	10	33.3	3	10.0	13	18	28
2010	12	32.4	14	37.8	5	13.5	19	17	31
2011	11	52.4	2	14.3	4	14.3	6	15	18[(c)]
2012	11	33.3	11	33.3	5	15.2	16	16	28[(c)]
2013	18	58.1	7	22.6	4	12.9	11	22	29
Total	117	40.2	91	35.7	48	12.0	139	165	259

Notes:

(a) This represents the percentage of the total yearly sample under study.

(b) This includes one case in which there were two appellants; one appealed against conviction, but the other did not.

(c) The numbers for 2007, 2011 and 2012 do not tally to this total, as each of these years includes an instance of interlocutory appeal by the accused.

Over the nine-year period, 44 cases (15.1 per cent) involved an appeal by the Crown – in 34 cases (77.3 per cent) this related to sentencing. Table A15.5 shows appeals by the Crown by year.

Table A15.5: Crown appeals by year

Year	Total appeals by Crown	Appeals by Crown related to sentencing
2005	4	3
2006	5	4
2007	3	2
2008	4	3
2009	5	5
2010	10	7
2011	5	4
2012	5	4
2013	3	2
Total	44*	34

* Of the other Crown appeals, 10 were interlocutory appeals.[163]

Further analysis of grounds and outcomes of appeals

Of particular interest in this study were possible associations between different types of child sexual abuse cases and different grounds of appeal appellants relied on; of more specific interest were possible associations between certain grounds of appeal and whether the case was historical or non-historical child sexual abuse, as well as possible associations between the type of abuse (intrafamilial, extrafamilial or institutional), grounds argued and outcomes in the case.

Unfortunately, appeal judgments do not always use clear and consistent language or formats in discussing grounds of appeal, and there is no broader systematised or uniform approach to how grounds of appeal are approached in cases. Appellants have some flexibility as to how they frame their appeal (Donnelly et al., 2011, p xiii); therefore, comparing the grounds of

[163] Interlocutory appeals under section 5F of the *Criminal Appeal Act 1912* (NSW) are infrequent. For the period 2005–13, there were only 116 such appeals in all types of cases (NSW Law Reform Commission, 2014, p 210).

appeal across cases and the decisions of different courts can be challenging. As Donnelly et al. stated, 'The task of grouping the appeals for the purpose of identifying systemic error presents a significant challenge' (2011, p 45).

For making comparisons with previous research, we used three broad categories of appeals – appeals against severity of sentence, appeals against conviction and Crown appeals – in line with the approach used by Hazlitt et al. (2004).[164]

Table A15.6 presents the current data alongside Hazlitt et al.'s data (2004, p 45, in Table 6). This reveals a mixed picture. Focusing first on our current data, the number of conviction appeals did not change in absolute terms from 2005 to 2013 (n=11 cases), although considerable fluctuation is seen between years. However, as a percentage of the total of all appeals, a marked decline is seen between 2006, where conviction appeals accounted for 53.4 per cent of child sexual abuse appeals, and 2013, where this figure fell to 31.4 per cent. When also taking into account the Judicial Commission's data for the period 2000–03, we see a marked decline in both the absolute number of conviction appeals – from 46 in 2000 to 11 in 2013 – and the number as a percentage of the three categories of appeal, from 61.3 per cent in 2000 to 31.4 per cent in 2013. However, the percentage of conviction appeals as a percentage of all three categories of appeal had already markedly declined in the Judicial Commission's data, from the high watermark of 61.3 per cent in 2000 to 37.5 per cent in 2003 (see Figure A15.1).

In terms of appeals against sentence severity, the number of appeals did not change in absolute terms, from 2005 to 2013 (n=22 cases). This represents only a marginal increase in percentage terms, from 59.5 per cent to 62.8 per cent of the number of cases each year across the three categories. Taking into account the data from the Judicial Commission, the number of appeals against sentence severity, in absolute terms, decreased minimally, from 24 in 2000 to 22 in 2013; however, this represents a marked increase in the percentage change across the three categories of appeal, from 32 per cent in 2000 to 62.8 per cent in 2013. Again, it is noteworthy that the percentage of appeals against sentence severity, as a percentage of the

[164] Note that for tables A15.6 and A15.7, we adopted the same methodology as Hazlitt et al. (2004) for the purposes of comparison. This results in different totals for some of these categories as compared to the figures from tables A15.4 and A15.5. For tables A15.6 and A15.7, the total number of appeals against sentencing severity included sentencing-only appeals, and conviction and sentencing appeals, where either the conviction appeal was dismissed or only allowed in part. This results in a lower number of sentencing appeal cases (150 cases) when compared with the number of appeals involving sentencing given earlier (165 cases). Similarly, for Crown cases, tables A15.6 and A15.7 are limited to Crown-only sentencing appeals and combined accused and Crown appeals where the conviction appeal was dismissed, and interlocutory appeals are excluded; whereas the total given earlier from Table A15.5 (34 cases) includes cases with a successful appeal against conviction and one interlocutory appeal on sentencing grounds.

three categories of appeal, had already increased to 52.5 per cent in the Judicial Commission's data in 2003 (see Figure A15.2).

Changes in Crown appeals are relatively unremarkable over the period 2000–13, and the numbers involved in this category of appeals are small (see Figure A15.3).

The number of child sexual abuse appeals in the NSWCCA decreased in absolute terms, from 65 cases in 2000 to 30 cases in 2013. However, quite a bit of fluctuation occurred in the period 2005–13, with a low of 20 cases in 2011 and a high of 38 cases in both 2006 and 2008 (see Figure A15.4). As discussed above, this absolute decrease in child sexual abuse cases in the period 2000–13 reflects an overall decrease in child sexual abuse cases as a percentage of all appeal cases before the NSWCCA.

Over the period 2000–13, the number of appeals against conviction and sentence severity fluctuated, with several peaks and troughs (see figures A15.1 and A15.2). However, it is interesting to note that the 2013 data is relatively comparable, across all three categories of child sexual abuse appeals, with the Judicial Commission's 2003 data; this is highlighted in yellow in Table A15.6. In other words, although we see fluctuations in appeal trends in child sexual abuse cases over the period 2003–13, the picture in 2013 is actually (at least overall) not dissimilar to what it was in 2003 (see figures A15.1–A15.4). The possible reasons for the fluctuations over this period are difficult to identify.

Table A15.6: Pattern of appeals against conviction and sentence for the period 2000–13

Type of appeal	2000[165]		2001		2002		2003		2005		2006		2007		2008		2009		2010		2011		2012		2013	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%
Conviction[(a)]	46	61.3	32	59.3	25	49.0	15	37.5	11	30.6	23	53.4	18	52.9	22	47.8	13	36.1	19	46.3	6	25.0	16	44.4	11	31.4
Severity of sentence[(b)]	24	32.0	21	38.9	24	47.1	21	52.5	22	61.1	16	37.2	14	41.2	21	45.7	18	50.0	15	36.6	14	58.3	16	44.4	22	62.8
Crown[(c)]	5	6.7	1	1.9	2	3.9	4	10	3[(f)]	8.3	4	9.3	2	5.9	3	6.5	5	13.9	7[(f)]	17.1	4	16.7	4	11.1	2	5.7
Total	75	100	54	100	51	100	40	100	36	100	43	100	34	100	46	100	36	100	41	100	24	100	36	100	35	100
Total appeals[(d)]																										
Child sexual assault[(e)]	65	12.7	48	9.4	46	8.7	38	9.4	34	6.3 20.5	38	7.6 22.4	25	5.6 15.0	38	9.2 20.9	30	7.7 14.1	34	8.2 19.3	20	5.9 10.0	31	9.2 14.8	30	7.9 11.8
All offences[166]	511		508		527		405		536 166		501 170		444 167		414 182		391 213		417 176		340 204		336 210		381 255	

[165] Data for the years 2000–03, as extracted from Table 6 in Hazlitt et al. (2004, p 45).

[166] Data for all offences for 2005–13 refers to finalised appeal cases in the NSWCCA, as per Table A15.1 above. The percentage representation for child sexual abuse cases in Table A15.6 differs slightly to Table A15.1, as a narrower inclusion criterion was applied in this table for parity with the Judicial Commission's data (namely, exclusion of interlocutory appeals included in Table A15.1).

Notes:

(a) This data includes conviction-only appeals, and appeals against conviction and sentence severity – and covers only appeals by the accused.

(b) This data includes severity of sentence-only appeals, and appeals for conviction and severity where the conviction appeal was dismissed. It includes cases that were only partially successful on conviction appeal or where the sentence was appealed on different counts; therefore, an order was made on sentencing grounds. There were three such cases in our sample: two in 2006 had successful appeals against sentence and one in 2008 was unsuccessful on the grounds of sentencing. The data covers only appeals by the accused.

(c) This data includes Crown-only appeals, conviction and Crown appeals where the conviction appeal was dismissed, and sentencing and Crown appeals, as well as the case referred to in footnote (f). Crown interlocutory appeals were excluded from this category.

(d) This data excludes other types of appeal, including interlocutory, stated cases, costs, permanent stay of proceedings and guideline judgments.

(e) This represents a combined appeal; for example, an appeal against conviction and sentence was counted only once in the totals.

(f) This year included one case that was a combination Crown and accused appeal, where there were multiple appellants and multiple counts. Though the conviction appeal was successful, it only pertained to some counts and the Crown sentencing appeal was still heard for the remaining counts.

Numbers marked in red are derived from persons found guilty in higher courts of child sexual assault offences, as per Table A15.2 above.

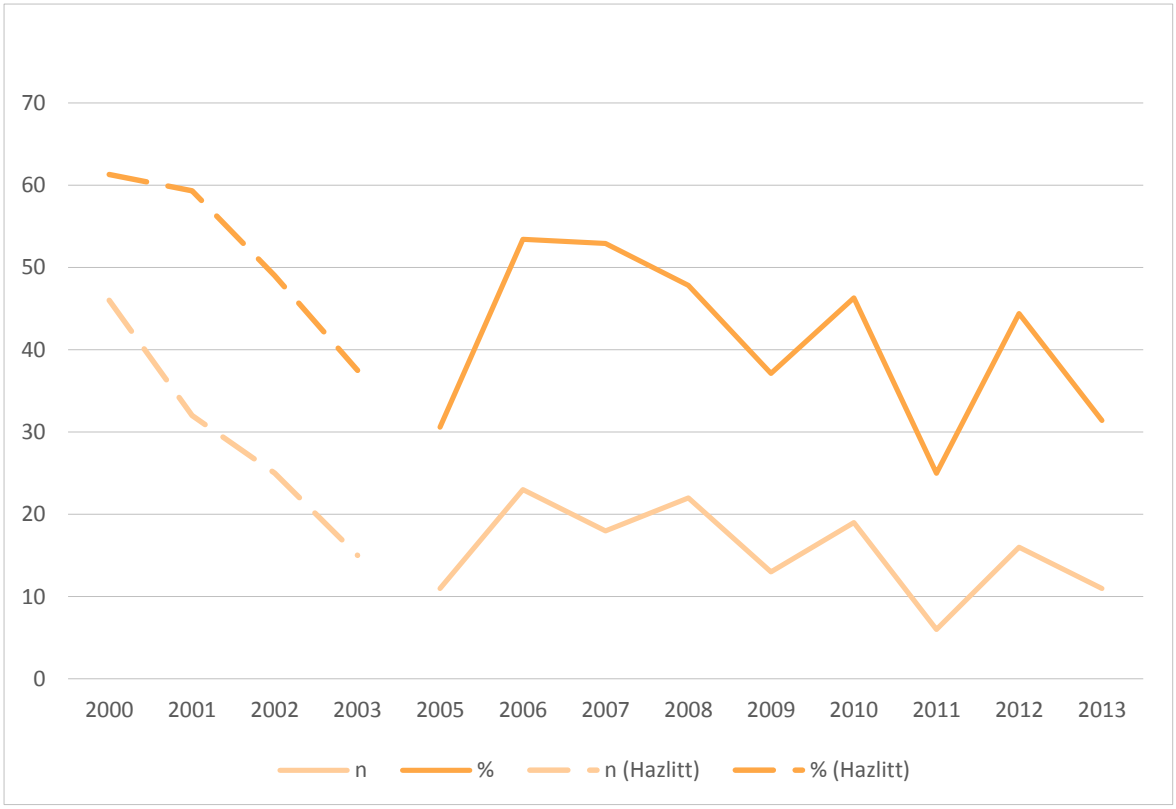

Figure A15.1: Pattern of appeals against conviction in the period 2000–13

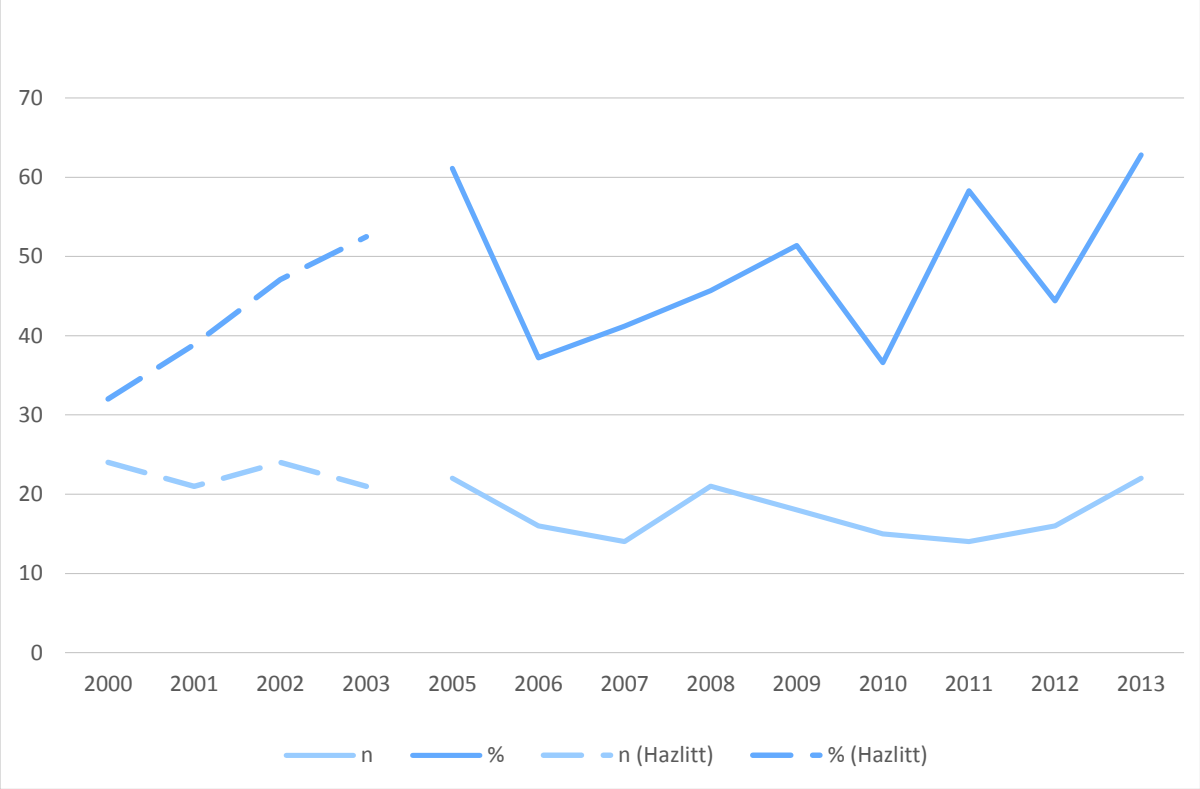

Figure A15.2: Pattern of appeals against sentencing in the period 2000–13

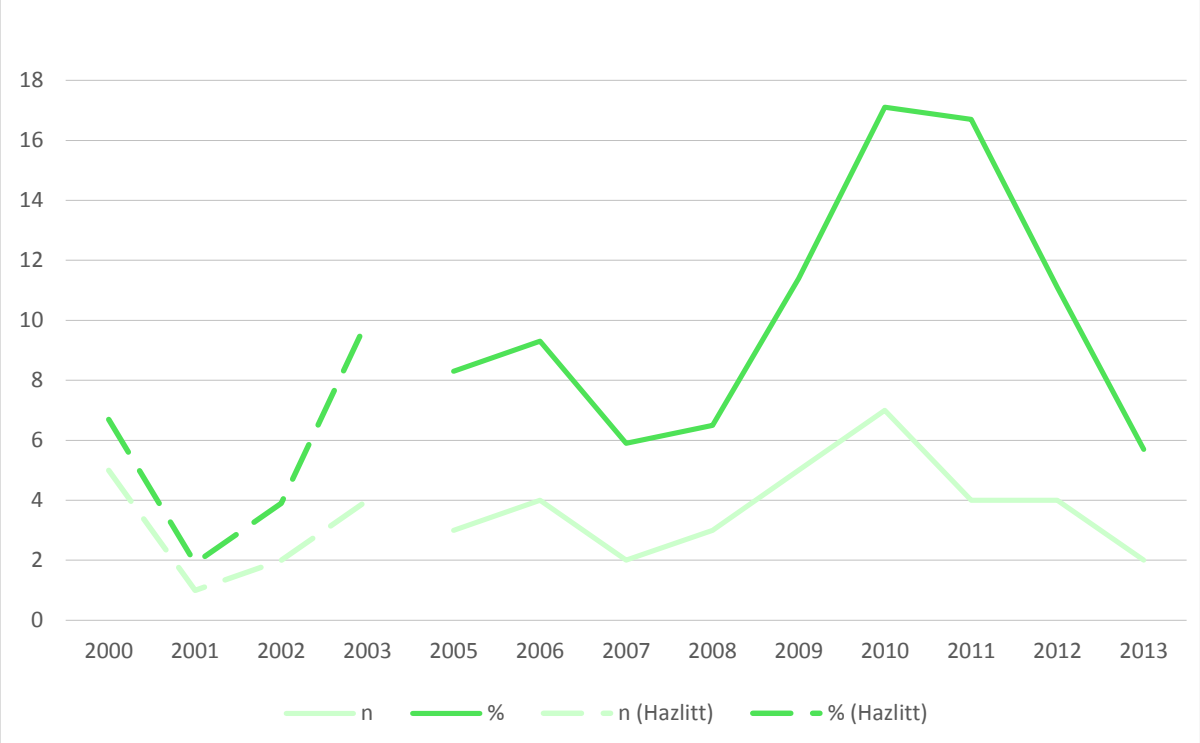

Figure A15.3: Pattern of appeals by the Crown in the period 2000–13

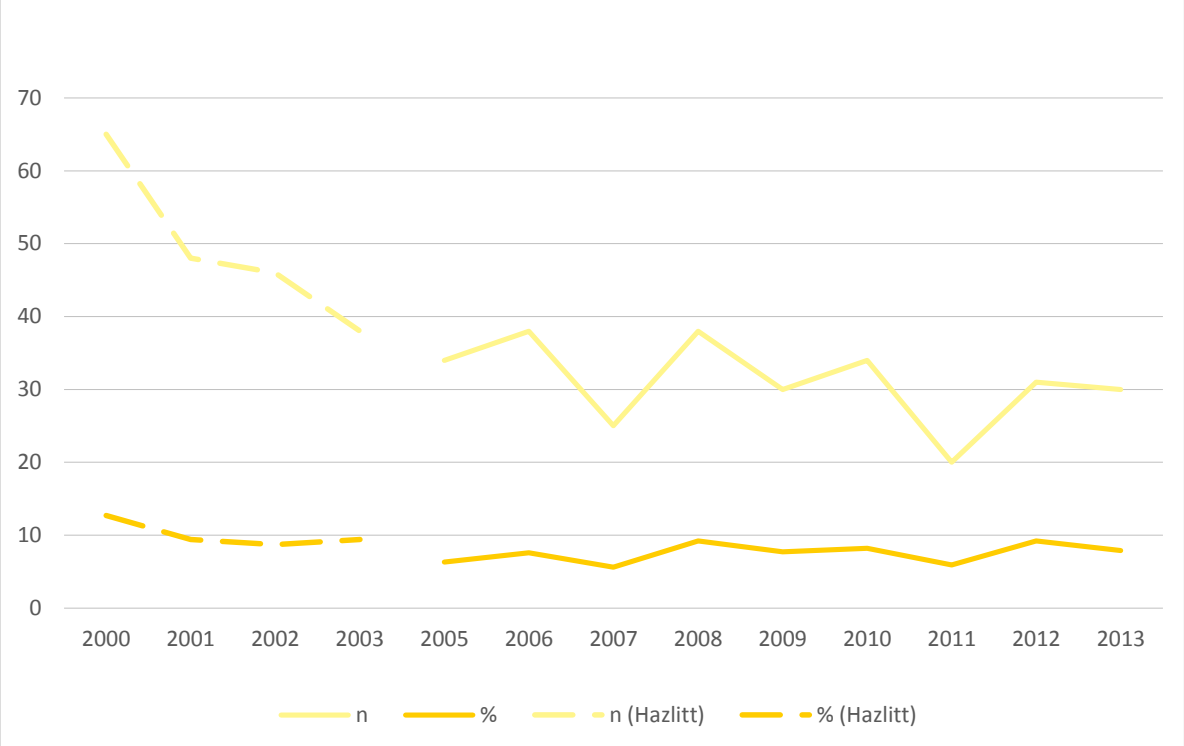

Figure A15.4: Pattern of appeals – total appeals in the period 2000–13

We also analysed the outcomes in our sample of cases to allow direct comparison with the outcomes data in Hazlitt et al. (2004).

Table A15.7 presents our findings for the period 2005–13 alongside the findings of the Judicial Commission for the period 2000–03. For the period 2005–13, 157 (or more than half (54.0 per cent)) of the 291 appeals were successful. This is comparable to the overall success rate of 57.4 per cent reported by the Judicial Commission for the period 2000–03 (Hazlitt et al., 2004, p 46).

However, a closer examination reveals some significant differences between our findings for the period 2005–13 and those of the Judicial Commission for the period 2000–03. First, over the period 2005–13, appeals against severity of sentence (n=158) represented (albeit marginally) the most common type of appeal for sexual offences against children, followed by appeals against conviction (n=139). For the period 2000–03, the Judicial Commission reported the opposite trend – appeals against conviction (n=118) were marginally more common than sentence severity appeals (n=90) (Hazlitt et al., 2004, p 46).

Our data reveals that conviction appeals were upheld in 28.1 per cent of cases – a marked decrease from the 55.9 per cent success rate reported by the Judicial Commission for the period 2000–03. This figure is also lower than that reported by Donnelly et al. (2011, p 198) for the period 2001–07. They reported a success rate of 50.3 per cent for child sexual assault appeals. In contrast, we found a success rate of 60.8 per cent in appeals against sentence

severity for the period 2005–13 (96 of 158 cases).[167] This is substantially higher than the success rate of 44.4 per cent reported by the Judicial Commission for the period 2000–03. Overall, 22 Crown appeals were successful. Our calculated success rate in Crown appeals (64.7 per cent) was higher than that reported by the Judicial Commission (58.3 per cent); however, given the small numbers involved, these figures are comparable.

Our results reveal an erratic pattern of success in appeals against conviction over the period 2005–13, ranging from two successful cases out of 13 (in 2009) to 10 successful cases out of 23 (in 2006). Overall, the rate of success in appeals against conviction increased very slightly, from two out of 11 in 2005 to three out of 11 in 2013. Similarly, the rate of success in appeals against sentence severity was erratic over the period 2005–13, ranging from eight successful cases out of 22 (in 2005) to a high of 13 successful cases out of 16 (in 2012). Overall, the rate of success in sentence severity appeals increased from eight out of 22 in 2005 to 12 out of 22 in 2013.

The success rate of Crown appeals also fluctuated over the period 2005–13, with an overall drop from four out of four successful appeals in 2003 to one out of two in 2013. However, the findings in relation to Crown appeals should be treated cautiously given the relatively small number of Crown appeals per year (and overall) in the study period.

Of the conviction appeals that succeeded 30 (76.9 per cent) resulted in a retrial and nine (23.1 per cent) in an acquittal.[168] These findings are markedly different to those of the Judicial Commission for the period 2000–03, where just over half (51.5 per cent) of the conviction appeals resulted in acquittal and just under half (48.5 per cent) resulted in a retrial.[169] This clearly begs the question as to why a markedly higher percentage of conviction appeals in the period 2005–13 ended in a retrial, compared with 2000–03. It also begs the question as to

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[167] We calculated 158 cases using the same methodology of Hazlitt et al. According to this methodology, the total number of accused appealing against sentence includes accused sentencing-only appeals and conviction and sentencing appeals where the conviction appeal was dismissed. As such, it does not tally with the earlier figure given of 165 appeals against sentencing by the accused, which included accused appeals against conviction and sentencing where the conviction appeal was successful.

[168] One case resulted in acquittal on one count and a retrial on two other counts; as such, the percentages totalled more than 100 per cent.

[169] Donnelly et al. (2011, p 198) reported an acquittal rate of 42.7 per cent in child sexual assault appeals for the period 2001–07. Based on Table A15.7 below, the acquittal rate in child sexual assault appeals for the equivalent period of 2001–07 is 42.6 per cent (absent data for 2004). As Hazlitt et al. (2004) covered the period 2000–03, and our study covered the period 2005–13, a detailed analysis of child sexual abuse appeals for 2004 is unfortunately missing. In any case, this consistency in our findings provides some cross-validation of the data between the three studies.

the outcome of these cases on being retried. The answer to this question is beyond the scope of this study; however, Donnelly et al. (2011, p 219) reported a reconviction rate of 30.2 per cent in child sexual assault cases retried.[170] For successful appeals against severity of sentence in the period 2005–13, the NSWCCA ordered a new sentence in 92.7 per cent of cases. It restructured the sentence in 6.3 per cent of cases; these percentages are comparable to the findings of the Judicial Commission for the period 2000–03. All 22 successful Crown appeals resulted in a new sentence being ordered in the period 2005–13 compared with 57.1 per cent of successful cases for the period 2000–03 (Hazlitt et al., 2004).

[170] In sexual assault cases involving an adult victim, the authors reported a rate of 63.6 per cent for reconviction on being retried.

Table A15.7: Outcome of appeals against conviction and sentence for the period 2005–13[c]

Type of appeal	2000		2001		2002		2003		2005		2006		2007		2008		2009		2010		2011		2012		2013	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	N	%
Conviction	46		32		25		15		11		23		18		22		13		19		6		16		11	
Successful outcome	20	43.5	21	65.6	14	56	11	73.3	2	18.2	10	43.5	3	16.7	7	31.8	2	15.4	7	36.8	1	16.7	4	25.0	3	27.3
Result of outcome																										
Acquittal	12	60.0	11	52.4	6	42.9	5	45.5	0	0	2	20.0	2	66.6	2[h]	28.6	0	0.0	1	14.3	0	0.0	2	50.0	0	0.0
New trial ordered[i]	8	40.0	10	47.6	8	57.1	6	54.5	2	100	8	80.0	1	33.3	6	85.7	2	100	6	85.7	1	100	2	50.0	3	100
Severity of sentence	24		21		24		21		22		16		14[f]		21		18		15		14		16		22	
Successful outcome	10	41.7	10	47.6	9	37.5	11	52.4	8[d]	36.4	12	75	8[g]	57.1	11	52.4	13	72.2	9	60.0	10	71.4	13	81.3	12	54.5
Result of outcome																										
New sentence	8	80.0	10	100	9	100	11	100	7	87.5	10	83.3	7	87.5	10	90.9	12	92.3	9	100	9	90.0	13	100	12	100
Sentence restructure[a]	2	20.0	0	0	0	0	0	0	1	12.5	2	16.7	0	0	1	9.1	1	7.7	0	0	1	10.0	0	0	0	0
Crown	5		1		2		4		3[e]		4		2		3		5		7		4		4		2	
Successful outcome	3	60.0	0	0	1	50.0	3	75.0	3	100	3	75.0	0	50.0	2	66.7	4	100	5	71.4	1	25.0	3	75.0	1	50.0
Result of outcome																										
New sentence	3	100	0	0	1	100	0	0	3	100	3	100	0	100	2	100	4	100	5	100	1	100	3	100	1	100
Remit for re-sentence	0	0	0	0	0	0	3	100	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Total appeals[b]	65		48		46		38		33		38		25		38		30		34		20		31		30	
Successful outcome	33	50.8	31	64.6	24	52.2	25	65.8	13		24[f]	60.5	11	40.7	20	52.6	19	63.3	21	56.8	12	57.1	20	60.6	16	51.6

Notes:

(a) If a sentence is restructured, it does not alter the individual sentence for an offence, but varies the aggregate sentence to be served by altering the start and end dates of the sentence.

(b) Combination appeals were counted only once in the total.

(c) Data for years 2000–03 was extracted from Table 6 in Hazlitt et al. (2011, p 45).

(d) One case from 2005, *R v Pearson*, had one ground accepted, but no intervention was ordered. This has not been included in the number of successful sentencing cases for this year.

(e) One case from 2007, *GAC v The Queen*; *WC v The Queen* [2007] NSWCCA 287, involved appeals against conviction by two appellants. One of the appellants also appealed against his sentence, and was successful. This has been included in the sentence severity numbers, as it failed on its appeal grounds against conviction for both appellants.

(f) This column adds up to more than 23, as two cases from 2006 were only partially successful on appeal against conviction, and therefore had orders made on sentencing grounds. These were included in the totals for sentencing severity, but excluded from the total number of successful cases in 2006 to avoid double counting.

(g) One case from 2007, *CTM v R [2007] NSWCAA 131*, was remitted to the District Court for resentencing. It is included in this total and the total number of successful outcomes, but is not included under either category of 'results of outcome' because it was the sole case of its kind in the sample. Thus, the percentages for 2007 under 'results of outcome' add to less than 100 per cent.

(h) One case from 2008, *AE v R [2008] NSWCAA 52*, resulted in acquittals on some counts and retrials in respect of other counts. Thus, this column does not add up to 100 per cent.

(h) Includes a new special hearing ordered due to the appellant's intellectual disability.

Numbers and methodology reprised from A15.Table 6; interlocutory appeals were excluded from these totals.

15.5 APPEALS AGAINST CONVICTION – A CLOSER EXAMINATION

In examining more closely the outcomes in appeals against conviction, we mirrored the analysis undertaken by Donnelly et al. (2011). This was done with a view to building on the findings of this earlier study, to the greatest extent possible, in relation to child sexual assault appeals specifically.

We categorised appeals against conviction according to the legislative framework of the *Criminal Appeal Act 1912* (NSW).

In New South Wales, a person convicted on indictment may appeal against their conviction, pursuant to section 5 of the *Criminal Appeal Act*. A Court shall allow an appeal in accordance with section 6(1):

> if it is of opinion that the verdict of the jury should be set aside on the ground that *it is unreasonable, or cannot be supported, having regard to the evidence,* or that the judgment of the court of trial should be set aside on the ground of the *wrong decision of any question of law,* or that on *any other ground whatsoever there was a miscarriage of justice,* and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.[171]

All 291 cases in our sample were classified using the approach Donnelly et al. (2011) adopted on the basis of the three limbs of section 6(1), as follows:

- *Limb 1* – draws attention to the evidence against the appellant and asks whether, having regard to the evidence, the jury's verdict is unreasonable or cannot be supported. This is a question of fact which the court must decide, based on its own independent assessment of the evidence (*M v The Queen*, 1994: 493; *SKA v The Queen*, 2011: [14]; *BCM v The Queen,* 2013: [31]; *MFA v The Queen*, 2002: [25]).

[171] Emphasis added. This is the common form of provision for appeal against a conviction in all Australian jurisdictions, although it is framed a little differently in the ACT: *Supreme Court Act 1933* (ACT) s 37O(2). For the Victorian approach, see *Criminal Procedure Act 2009* (Vic) ss 274, 276; for the approach of other Australian jurisdictions, see *Criminal Law Consolidation Act 1935* (SA) ss 352, 353; *Criminal Code Act 1924* (Tas) ss 401, 402; *Criminal Appeals Act 2004* (WA) ss 23, 30; *Criminal Code 1899* (Qld) ss 668D, 668E; *Criminal Code Act* (NT) ss 410, 411.

- *Limb 2* – asks whether there has been a wrong decision on any question of law. This limb is directed to decisions made during the trial.
- *Limb 3* – asks whether, on any other ground whatsoever, there has been a miscarriage of justice.[172]

Our definition and interpretation of the three limbs of section 6(1) reflects the approach outlined in Judicial Commission *Monograph 35* (see Chapters 3 and 4). In particular, we note that, in including cases within limb 2, we required that the appellant objected to or sought either a jury direction or a ruling as to the admissibility of evidence, or some other intervention at the trial; this is consistent with the approach taken by the Judicial Commission. For those grounds of appeal where the appellant did not object, and sought no direction or ruling or other intervention at trial, cases were classified as falling within limb 3. We found that 38.5 per cent of the total number of limb 2 and limb 3 appeals (successful and unsuccessful) involved an objection at trial. Moreover, we found that 46.9 per cent of limb 2 and limb 3 appeals raised admissibility errors, and 70 per cent raised an issue of misdirection.[173]

Our analysis differs from that conducted by Donnelly et al. in two significant ways. First, our study focused only on appeals against conviction in child sexual assault cases; Donnelly et al. examined all offence categories, drilling down to sexual assault offences generally, and only examined child sexual assault cases more specifically in some respects.[174] Secondly, we did not restrict our analysis initially to only those cases with successful outcomes on appeal, as was done by Donnelly et al. We examined all child sexual abuse appeal cases against conviction (successful and unsuccessful), and the grounds of appeal raised were categorised according to the three limbs of section 6(1) (as outlined above). We then examined the rate of success of appeals within each limb. Table A15.8 below summarises the rate of success of conviction appeals by limb in our sample, and compares this to Donnelly et al.'s findings for all sexual assault conviction appeals. Appendices A15.3–A15.5 (see *Online appendices to the appeals study*, available at www.childabuseroyalcommission.gov.au) present the categorisation of cases by limb argued, alongside the outcome in the case. Appendix A15.6 follows the format of Appendix A in Donnelly et al., summarising successful

[172] This definition and interpretation of the three limbs of s 6(1) reflects the approach used by Donnelly et al. (2011), outlined in NSW Judicial Commission *Monograph 35* (see chapters 3 and 4). Where the appellant did not object, and sought no direction or ruling or other intervention at trial, cases were classified as falling within limb 3.

[173] There were a number of cases that raised both issues; those cases are included in these percentages.

[174] The analysis presented by Donnelly et al. (2011, pp 199–217) draws on all successful sexual assault appeals in the period 2001–07.

appeal cases by limb, successful grounds of appeal, and orders entered in successful cases (2011, p 253). A breakdown of successful admissibility and misdirection grounds is provided in appendices A15.7 and A15.8; these tables replicate the analysis provided by Donnelly et al. in their appendices B and C, for the current study sample.

Table A15.8: Basis and outcome of appeals against conviction

Category of appeal	All child sexual assault appeals		Successful child sexual assault appeals		All successful sexual assault appeals[175] %
	n	%(a)	n	%(b)	
Limb 1	71	51.1	7	17.9	22.1
Limb 2	50	35.9	13	33.3	26.9
Limb 3	117	84.2	29	74.4	58.7

Notes:

(a) The data represents the percentage of all appeals against conviction for child sexual assault (n=139).

(b) The data represents the percentage of all successful appeals against conviction for child sexual assault (n=39).

The columns add up to more than 100 per cent as cases were argued and/or succeeded on more than one limb.

n equals the number of cases (cases were not counted more than once, even where multiple grounds of appeal were raised within each limb).

In our sample, 71 cases (51.1 per cent) raised a limb 1 argument against conviction (that is, they argued that the verdict of the jury was unreasonable or could not be supported having regard to the evidence).[176] Of these cases, only seven were successful in whole or in part (representing 17.9 per cent of all successful appeals against conviction in our sample). This is a little lower than the percentage of limb 1 appeals reported by Donnelly et al. (22.1 per cent) in all successful sexual assault appeals against conviction. Fifty cases in our sample raised a limb 2 argument on appeal against conviction (that is, they argued the verdict should be overturned on the basis of error on a question of law, with objection raised at trial). Of these cases, 13 were successful on a limb 2 argument (33.3 per cent of all successful convictions against appeal in our sample). This represents a higher percentage of successful limb 2 appeals compared with all appeals against conviction for sexual assault (26.9 per cent) as reported by Donnelly et al. (2011, p 199). In 117 cases, a miscarriage of justice was raised on other grounds under limb 3. Of these, 29 cases[177] were successful (74.4 per cent of all

[175] Sourced from Donnelly et al. (2011, p 199) for the period 2001–07 but excluding 2004.

[176] Cases were only counted once in each limb, even though multiple grounds of appeal may have been raised in a case within each limb.

[177] This number includes cases that also succeeded on limb 2 grounds.

successful appeals against conviction). This is a higher percentage compared to all successful sexual assault conviction appeals (58.7 per cent) reported by Donnelly et al. (2011, p 199).

Of the 50 cases in our sample that raised a limb 2 argument, 37 also raised a limb 3 argument on appeal; of these, six were successful on both limb 2 and limb 3 arguments. Two cases did not succeed on the limb 2 argument, but succeeded on the limb 3 argument.

Of the 117 cases that raised a limb 3 argument, 80 cases raised only a limb 3 argument (that is, they did not raise a limb 2 argument). Of these 80 cases, 21 cases were successful.

Further analysis revealed that a majority of limb 1 cases were argued on the basis of the conviction not being supported by the evidence (85.9 per cent). Of the limb 1 cases, 36.7 per cent were argued on the basis of inconsistent verdicts and 22.5 per cent were argued on the basis of both the evidence not supporting the conviction and inconsistent verdicts. Of the seven successful limb 1 cases in our sample, five cases succeeded on the basis that the evidence did not support the verdict[178], four succeeded on the basis of inconsistent verdicts[179], and two cases succeeded on both counts. In relation to sexual assault appeals generally, Donnelly et al. (2011, p 199) reported that verdicts were set aside in 78.3 per cent of successful limb 1 appeals on the basis of being inconsistent and in 21.7 per cent on the basis of not being supported by the evidence.

Of the 13 successful limb 2 appeals in our sample, eight involved an error in the admission or rejection of evidence and six involved an error on judicial directions or warnings. Of the 29 successful limb 3 cases in our sample, three involved an error in the admission or rejection of evidence, and 17 involved an error on judicial directions or warnings. Thus, of the successful limb 2 and 3 appeals in our study, 29.7 per cent involved an error relating to admission or non-admission of evidence and 62.2 per cent involved judicial error on warnings or directions. By comparison, Donnelly et al. (2011, p 205) found that 53 per cent of all successful appeals against conviction involved a judicial error in warnings or directions. Moreover, sexual assault and related offences accounted for 33.5 per cent of misdirection cases (constituting the most common offence type) (Donnelly et al., 2011, p xvi). Drilling down further, Donnelly et al. (2011, p 205) found the *Longman* misdirection was the most common misdirection in all sexual assault appeals, occurring in 46.4 per cent of cases.

Appendices A15.7 and A15.8 (see *Online appendices to the appeals study*, available at www.childabuseroyalcommission.gov.au) provide a further breakdown of the successful

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[178] *NWL v The Queen* [2006] NSWCCA 67; *Norris v The Queen* [2007] NSWCCA 235; *DJV v The Queen* [2008] NSWCCA 272; *SKA v The Queen* [2012] NSWCCA 205; *SI v The Queen* [2007] NSWCCA 181.

[179] *Norris v The Queen* [2007] NSWCCA 235; *SI v The Queen* [2007] NSWCCA 181; *AE v The Queen* [2008] NSWCCA 52; *R v Tyrone Chishimba; Tyrone Chishimba v The Queen; Likumbo Makasa v The Queen; R v Likumbo Makasa; Mumbi Peter Mulenga v The Queen; R v Mumbi Peter Mulenga* [2010] NSWCCA 228.

admissibility and misdirection appeals in this study. The vast majority of successful admissibility cases involved issues raised at the trial, which were carried into appeal. The majority of successful admissibility appeals related to tendency and coincidence evidence (discussed further below), though the numbers overall are small (see Appendix A15.7 in *Online appendices to the appeals study*, available at www.childabuseroyalcommission.gov.au). The vast majority of successful misdirection appeals did not raise error at trial. In the pre-2010 appeal cases, *Longman* misdirections were over-represented. Overall, a substantial proportion of successful appeals related to misdirections about context or relationship evidence and tendency or coincidence evidence, though numbers are relatively small (see Appendix A15.8 in *Online appendices to the appeals study*, available at www.childabuseroyalcommission.gov.au). We probed our data a little further based on the findings above, to explore some issues in child sexual assault cases that raised special challenges, examining three categories of evidence (see Quadara, 2014; Shead, 2014).

1. Character evidence

Only four appeals in our sample of cases raised the use of character evidence on appeal.[180] Three of these appeals failed, but one succeeded. Donnelly et al. (2011, p 200) found that 20 per cent of admissibility cases over character evidence succeeded on appeal, accounting for 14.3 per cent of admissibility errors in all sexual assault matters. This suggests that issues around character may arise more in adult sexual assault cases than in child sexual assault cases.

[180] *Clark v The Queen* [2008] NSWCCA 122; *ALS v The Queen* [2013] NSWCCA 63; *PGM v The Queen* [2006] NSWCCA 310; *Makarov v The Queen (No 1)* [2008] NSWCCA 291.

2. Tendency and/or coincidence evidence

Eighteen cases (12.9 per cent of all appeals against conviction) in our sample raised the use of tendency and/or coincidence evidence in appeals against conviction.[181] Appendix A15.9 (see *Online appendices to the appeals study*, available at www.childabuseroyalcommission.gov.au) outlines the grounds, reasoning and outcomes in these cases – six were allowed (four were historical cases and four were intrafamilial cases).[182] The relevance of tendency and coincidence evidence, and judicial misdirection related to such evidence, supported a number of successful appeals against conviction. In our sample, 15.4 per cent of successful conviction appeals involved tendency and/or coincidence evidence, representing more than one-third of successful admissibility appeals. Donnelly et al. (2011, p 200) found tendency and/or coincidence evidence made up 10 per cent of admissibility cases, or 7.1 per cent of admissibility errors in all sexual assault cases. This suggests that tendency and/or coincidence evidence may more often give rise to errors in child sexual assault cases than in adult sexual assault cases. However, caution is warranted in drawing conclusions as the number of cases is relatively small.

3. Relationship/context evidence

A number of cases in our sample raised the use of relationship or context evidence on appeal.[183] However, only two cases were successful on this ground.[184]

Appendix A15.7 (see *Online appendices to the appeals study*, available at www.childabuseroyalcommission.gov.au) summarises the different grounds in successful admissibility appeals.

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[181] *R v Fletcher* [2005] NSWCCA 338; *R v Richard Norman Mearns* [2005] NSWCCA 396; *AE v The Queen* [2008] NSWCCA 52; *Clark v The Queen* [2008] NSWCCA 122; *DJV v The Queen* [2008] NSWCCA 272; *AW v The Queen* [2009] NSWCCA 1; *BP v The Queen; R v BP* [2010] NSWCCA 303; *ES v The Queen (No 1)* [2010] NSWCCA 197; *ES v The Queen (No 2)* [2010] NSWCCA 198; *KTR v The Queen* [2010] NSWCCA 271; *LJW v The Queen* [2010] NSWCCA 114; *RWC v The Queen* [2010] NSWCCA 332; *FB v The Queen; R v FB* [2011] NSWCCA 217; *R v SK; SK v The Queen* [2011] NSWCCA 292; *BJS v The Queen* [2013] NSWCCA 123; *Colquhoun v The Queen (No 1)* [2013] NSWCCA 190; *Colquhoun v The Queen (No 2)* [2013] NSWCCA 191; *Peter Versi v The Queen* [2013] NSWCCA 206.

[182] *AE v The Queen* [2008] NSWCCA 52; *DJV v The Queen* [2008] NSWCCA 272; *RWC v The Queen* [2010] NSWCCA 332; *ES v The Queen (No 1)* [2010] NSWCCA 197; *Colquhoun v The Queen (No 1)* [2013] NSWCCA 190; *Colquhoun v The Queen (No 2)* [2013] NSWCCA 191. Four were limb 2 appeals on grounds of tendency and coincidence: *AE v The Queen* [2008] NSWCCA 52; *DJV v The Queen* [2008] NSWCCA 272, *ES v The Queen (No 1)* [2010] NSWCCA 197, *RWC v The Queen* [2010] NSWCCA 332. Two were limb 3 appeals on grounds of tendency and coincidence: *Colquhoun v The Queen (No 1)* [2013] NSWCCA 190; *Colquhoun v The Queen (No 2)* [2013] NSWCCA 191.

[183] See for example: *R v AMN* [2005] NSWCCA 124; *Qualtieri v The Queen* [2006] NSWCCA 95; *DTS v The Queen* [2008] NSWCCA 329; *Rodden v The Queen* [2008] NSWCCA 53; *ARS v The Queen* [2011] NSWCCA 266; *DJV v The Queen* [2008] NSWCCA 272; *Colquhoun v The Queen (No 2)* [2013] NSWCCA 191.

[184] *DJV v The Queen* [2008] NSWCCA 272; *Colquhoun v The Queen (No 2)* [2013] NSWCCA 191.

Judicial misdirections

Child sexual assault cases frequently involve a number of judicial directions and warnings over and above the common directions given in a criminal trial, or even in sexual assault trials generally (that is, involving an adult complainant) (see Judicial Commission of New South Wales, 2007, p 27; Judicial College of Victoria, 2014). The law with respect to judicial directions and warnings in child sexual assault cases is complex. Over the last decade, there has been increasing recognition that too many directions are given during the trial, and that jurors often do not understand them (NSW Law Reform Commission, 2008, [1.23]; Donnelly et al., 2011, p 203; Shead, 2014; Australian Law Reform Commission, 2010, Chapter 28). At the outset of a trial, a judge may be required to warn the jury of the potentially traumatic nature of sexual assault. The judge may also issue various other warnings (depending on the case) relating to the use of pre-recorded witness testimony and closed-circuit television (CCTV) (Judicial Commission, 2007, [3-020]). In some circumstances, a judge will also provide comment during the Crown case in relation to CCTV, pre-recorded witness statements or where a court-appointed person cross-examines the complainant (Judicial Commission, 2007, [3-060]). However, most jury directions and warnings will come during summing-up. In *BWT* (2002), Wood CJ at CL (as he then was) per [32] set out eight directions and warnings that might be given in summing-up in sexual assault trials at the time:

> (a) the *Murray* direction (*R v Murray*, 1987), to the effect that, where there is only one witness asserting the commission of a crime, the evidence of that witness "*must be scrutinised with great care*" before a conclusion is arrived at that a verdict of guilty should be brought in;
>
> (b) The *Longman* direction (as reinforced in *Crampton* and *Doggett*), that by reason of delay, it would be "*unsafe or dangerous*" to convict on the uncorroborated evidence of the complainant alone, unless the jury – scrutinising the evidence with great care, considering the circumstances relevant to its evaluation, and paying heed to the warning – was satisfied of its truth and accuracy;
>
> (c) The *Crofts* direction (*Crofts v The Queen*, 1996), where, if a jury is to be informed, in accordance with s 107 of the *Criminal Procedure Act*, that a delay in complaint does not necessarily indicate that the allegation is false, and that there may be good reasons why a victim of sexual assault may hesitate in complaining about it, *then* it should also be informed that the absence of a complaint or a delay in the making of it may be taken into account in evaluating the evidence of the complainant, and in determining whether to believe him or her (but not in terms reviving the stereotyped view that complainants in sexual assault cases are unreliable or that delay is invariably a sign of the falsity of the complaint: *Crofts* at 451);
>
> (d) The *KRM* direction (*KRM v The Queen*, 2001), to the effect that, except where the evidence relating to one count charging sexual assault is admissible, in relation to another count or counts alleging a separate occasion of such an assault, the jury must consider each count separately and only by reference to the evidence which applies to it; this direction should be balanced, where appropriate, by a reminder that if the jury has a reasonable doubt concerning the credibility of the complainant's evidence on one or more counts, they can take that into

account when assessing his or her reliability on the other counts (see *R v Markuleski*, 2011: [259]-[263]);

(e) Any warning which may be required by reason of a ruling that limits the use of evidence concerning a complaint, or delay in complaint, to the question of credibility (e.g. under s 108(3) of the *Evidence Act*, as an exception to the credibility rule), or alternatively that allows it to be taken into account (e.g. under s 66 of the *Evidence Act*, as an exception to the hearsay rule) as evidence of the facts asserted;

(f) The *Gipp* warning (conveniently so called, although there was divided reasoning in *Gipp v The Queen*, 1998), concerning the way in which evidence of uncharged sexual conduct between an accused and a complainant can be taken into account as showing the nature of the relationship between them, but not so as to substitute satisfaction of the occurrence of such conduct for proof of the act charged;

(g) Any warning that may be necessary in relation to the use of coincidence evidence (under s 98 of the *Evidence Act*) where the accused is charged in the one indictment with sexual assault against two or more complainants, requiring the jury to be satisfied beyond reasonable doubt, firstly, of the offences alleged in respect of one complainant, and then of the existence of such a substantial and relevant similarity between the two sets of acts as to exclude any acceptable explanation other than that the accused committed the offences against both complainants;

(h) A *BRS* direction (*BRS v The Queen*, 1997) that, where evidence revealing criminal or reprehensible propensity is admitted, but its use is limited to non-propensity or tendency purposes (for example, those considered proper in that case), then it is to be used only for those purposes, and not as proof of the accused's guilt.

Changes over the last decade in law and practice have arguably streamlined, clarified and minimised unfairness, prejudice and potential error in judicial warnings and directions.[185] However, as the findings of this study suggest, judicial misdirections may continue to be a source of error in child sexual assault trials, generating a basis for overturning convictions. Appendix A15.8 (see *Online appendices to the appeals study*, available at www.childabuseroyalcommission.gov.au) summarises types of successful judicial

[185] See for example, s 165B *Evidence Act 1995* (NSW); s 294AA *Criminal Procedure Act 1986* (NSW), which heavily regulates the *Longman* direction. See also *Jarret v The Queen* (2014); s 294AA *Criminal Procedure Act 1986* (NSW) – from 2007, a court cannot suggest complainants as a class are unreliable, and a prohibition was introduced on warning the jury of the danger of convicting on uncorroborated evidence. From 2007, a *Crofts* direction is only to be given if sufficient evidence exists to justify such a warning: s 294(2)(c) *Criminal Procedure Act 1986* (NSW); s 165 *Evidence Act 1995* (NSW) – from 1 January 2009, it is impermissible for a court to suggest that state children as a class are unreliable witnesses.

misdirection cases in the study sample. Most of the judicial errors related to giving inadequate warnings to the jury, unbalanced judicial summing-up, and failure to correctly direct the jury.

Against this backdrop, we examined those appeal cases that raised issues relating to the following judicial directions and warnings, which are recognised as being particularly problematic in child sexual assault prosecutions (Shead, 2014).

Fifteen cases in our sample raised an appeal related to a *Longman* direction; most of these, were historical child sexual abuse cases (nine out of 14).[186] Of these 15 cases, only four succeeded on the basis of a *Longman* misdirection. All four were historical cases, with delay ranging from six to 20 years. Appendix A15.10 (see *Online appendices to the appeals study*, available at www.childabuseroyalcommission.gov.au) presents the cases in our sample that appealed on the basis of a *Longman* ground, and the grounds of the successful cases. Three of the successful *Longman* appeals were decided on the basis of the pre-amended legislation, and a fourth case, *ST v The Queen*[187], centred on the misapplication of the new legislation by the trial judge.[188] This suggests that reforms have been successful in reducing *Longman*-related misdirections.

Five cases raised an appeal related to a *Murray* direction; only one of these was successful. Three cases related to a *Markuleski* direction, two to a *Crofts* direction and one to a *Black* direction[189]; all of these were unsuccessful. Three cases involved an appeal against an *Edwards* warning[190]; all were successful on the grounds of the *Edwards* warning.

Appendix A15.8 (see *Online appendices to the appeals study*, available at www.childabuseroyalcommission.gov.au) provides a summary of the grounds in successful misdirection appeals.

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[186] One of the 15 cases could not be classified as being a historical or non-historical case of child sexual assault.

[187] [2010] NSWCCA 5.

[188] The *Criminal Procedure Amendment (Sexual and Other Offences) Act 2006* (NSW), s 294, affected the operation of the *Longman* warning. Under the amendments, judges may issue warnings if '(a) the delay in making a complaint by the person on whom the offence is alleged to have been committed is significant, and (b) the Judge is satisfied that the person on trial for the offence has suffered a significant forensic disadvantage caused by that delay'. Under the same act s 294(5), the 'mere passage of time is not in itself to be regarded as establishing a significant disadvantage'. This amendment has since been repealed, but is replicated in substance in s 165B of the *Evidence Act 1995* (NSW).

[189] Where the jury indicates that it is unable to reach a verdict and the preconditions for allowing a majority verdict are not satisfied, a direction should be given: *Black v The Queen* (1993, at 50–1). This recognises that the jury must be free to deliberate without any pressure being brought to bear upon it.

[190] An *Edwards* warning should be given in a case if the prosecution contends that a lie is evidence of guilt: *Edwards* (1993).

15.6 CASE CHARACTERISTICS

The following analyses address research question five:

> Is there any difference in the rate of appeals, the grounds of appeals and the outcomes of appeals in cases:
>
> a. where there is delayed complaint, compared with cases reported immediately in childhood?
>
> b. involving institutional abuse, compared with intrafamilial cases of abuse and other extrafamilial cases?

To address the second part of this question, the cases in our sample were classified into three broad categories: Intrafamilial, extrafamilial and institutional cases.

Intrafamilial cases were defined to include a complainant–perpetrator relationship that is biological, or borne of marriage/cohabitation; thus, stepfathers or de facto partners living together with a parent, complainant or other family member were classified as intrafamilial. Extrafamilial cases were defined as those that fell outside the scope of intrafamilial cases, and typically included family friends, partners who are not live-in and strangers, but did not include abuse occurring within an institutional or organisational setting. There is no precise definition of what constitutes institutional child sexual abuse. The Royal Commission has taken a broad view of what is encompassed by institutional child sexual abuse, extending to sexual abuse of a child that occurs in private and public settings, including in childcare, cultural, educational, religious, sporting and other institutions.[191]

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[191] The Royal Commission's Terms of Reference (2014) define '*institution*' to mean:

> any public or private body, agency, association, club, institution, organisation or other entity or group of entities of any kind (whether incorporated or unincorporated), however described, and:
>
> i. includes, for example, an entity or group of entities (including an entity or group of entities that no longer exists) that provides, or has at any time provided, activities, facilities, programs or services of any kind that provide the means through which adults have contact with children, including through their families; and
>
> ii. does not include the family.
>
> Child sexual abuse happens in an '*institutional context*' if, for example:
>
> i. it happens on the premises of an institution, where the activities of an institution take place, or in connection with the activities of an institution; or
>
> ii. it is engaged in by an official of an institution, in circumstances (including circumstances involving settings not directly controlled by the institution) where you consider that the institution has, or its activities have, created, facilitated, increased, or in any way contributed to (whether by act or omission) the risk of child sexual abuse, or the circumstances or conditions giving rise to that risk; or
>
> iii. it happened in any other circumstances where you consider that an institution is, or should be treated as being, responsible for adults having contact with children.

Using this broad definition, 29 of the 291 cases (10.0 per cent) in our sample were classified as institutional child sexual abuse. Six cases (2.1 per cent) could not be classified as intrafamilial, extrafamilial or institutional on the information available to us.[192] While these three categories were not treated as mutually exclusive, ultimately one case was classified as both institutional and intrafamilial[193], and one as both institutional and extrafamilial.[194] Three cases were both intrafamilial and extrafamilial.[195]

Of the appeals, 142 cases (48.8 per cent) involved intrafamilial abuse and 119 cases (40.9 per cent) involved extrafamilial abuse. Table A15.9 presents a breakdown, by year, of these three categories of abuse.

[192] *SH v The Queen* [2012] NSWCCA 79; *RJ v The Queen* [2010] NSWCCA 263; *TJ v The Queen* [2009] NSWCCA 257; *Carlton v The Queen* [2008] NSWCCA 244; *Goss v The Queen* [2009] NSWCCA 190; *RA v The Queen* [2007] NSWCCA 251.

[193] *R v Cunningham* [2006] NSWCCA 176.

[194] *R v PFC* [2011] NSWCCA 117.

[195] *R v O* [2005] NSWCCA 327; *Ross v The Queen* [2012] NSWCCA 207; *RS v The Queen* [2013] NSWCCA 227.

Table A15.9: Comparison of types of abuse

Year	Intrafamilial child sexual abuse		Extrafamilial child sexual abuse		Institutional child sexual abuse		Unclear	
	n	%[(b)]	n	%[(b)]	N	%[(b)]	n	%[(b)]
2005	16	47.1	15	44.1	4	11.8	0	0.0
2006	21	53.8	15	38.5	4	10.3	0	0.0
2007	12	44.4	12	44.4	2	7.4	1	3.7
2008	13	33.3	19	48.7	6	15.4	1	2.6
2009	14	46.7	12	40.0	2	6.7	2	6.7
2010	20	54.1	14	37.8	2	5.4	1	2.7
2011	12	57.1	7	33.3	3	14.3	0	0.0
2012	14	42.4	15	45.5	4	12.1	1	3.0
2013	20	64.5	10	32.3	2	6.5	0	0.0
TOTAL	142	48.8	119	40.9	29	10.0	6	2.1

Notes:

(a) The figures don't add up to 100 per cent, and the total number of cases adds up to 296, due to five cases falling into more than one category of abuse (as listed above).

(b) The data is a percentage of the yearly sample.

There is notable variation in the percentage representation of intrafamilial and extrafamilial cases between years in the period 2005–13. Although there is an overall increase in the percentage representation of intrafamilial cases on appeal, from 47.1 per cent in 2005 to 64.5 per cent in 2013, there is considerable fluctuation over this period. The opposite pattern is apparent in relation to extrafamilial cases, with a decrease from 44.1 per cent in 2005 to 32.3 per cent in 2013; however, similarly, fluctuations are marked over this period.

Table A15.10 provides a breakdown of the three categories of abuse by either their historical or non-historical status. Overall (as expected), historical child sexual abuse is over-represented in institutional cases.

Table A15.10: Types of abuse by historical child sexual abuse (HCSA) or non-historical child sexual abuse (non-HCSA)

Year	Intrafamilial child sexual abuse				Extrafamilial child sexual abuse				Institutional child sexual abuse			
	HCSA	%[(a)]	Non-HCSA	%[(a)]	HCSA	%[(a)]	Non-HCSA	%[(a)]	HCSA	%[(a)]	Non-HCSA	%[(a)]
2005	5	31.3	11	68.8	1	6.7	14.0	93.3	2	50.0	2	50.0
2006	11	52.4	10	47.6	1	6.7	14.0	93.3	2	50.0	2	50.0
2007	6	50.0	6	50.0	3	25.0	9.0	75.0	2	100.0	0	0.0
2008	4	30.8	9	69.2	3	15.8	16.0	84.2	5	83.3	1	16.7
2009	5	35.7	9	64.3	1	8.3	91.7	83.3	1	50.0	1	50.0
2010	7	35.0	13	65.0	4	28.6	10.0	71.4	1	50.0	1	50.0
2011	2	16.7	10	83.3	1	14.3	6.0	85.7	1	33.3	2	66.6
2012	2	14.3	12	85.7	4	26.7	11.0	73.3	2	50.0	2	50.0
2013	8	40.0	12	60.0	0	0.0	10.0	100.0	1	50.0	1	50.0
Total	50	35.2	92	64.8	18	15.1	101.0	84.9	17	58.6	12	41.4

Notes:

(a) This represents a percentage of the yearly sample.

Unclear non-historical child sexual abuse cases counted as non-historical child sexual abuse for the purposes of this table.

Institutional cases on appeal

Appendix A15.13 (see *Online appendices to the appeals study*, available at www.childabuseroyalcommission.gov.au) lists the 29 cases of institutional abuse that were the subject of appeal in the period 2005–13, and summarises the key features of these cases. This is not a large sample of cases (10 per cent of the study sample). A qualitative analysis of these institutional cases was undertaken to examine what challenges and/or issues arose in these cases as they moved through the prosecutorial process; few systemic issues were discernible from this review.

Of the 29 institutional cases on appeal, 17 were historical child sexual abuse; just under half revealed delay in complaint or reporting of 20 years or more. Of these 17 historical cases, six involved an appeal against conviction only; four involved an appeal against sentence only; four were appeals against both conviction and sentence; two were appeals by the Crown against sentence; and one was an interlocutory appeal by the Crown.

Of the historical institutional cases, nine succeeded on appeal (at least in part). Of the non-historical cases, six succeeded on appeal (six of 12). Accordingly, in total, 15 of 29 institutional cases were successfully appealed.

Drilling down further, five of the nine successful historical institutional cases involved an appeal by the accused against conviction; three were appeals against conviction only; and two were appeals against both conviction and sentencing. Four of the five succeeded on the conviction ground, one of which also succeeded in part on its sentencing grounds. Two of these cases succeeded on the basis of judicial misdirection. For example, in *Healey v The Queen*[196], the appeal succeeded on the basis of judicial failure to direct the jury in relation to uncharged instances of sexual misconduct. In *Healey v The Queen*[197], the appeal succeeded on the basis of an inappropriate *Longman* warning, failure to direct the jury regarding the evidentiary standard, and a failure in the judicial summing-up to jury.

Turning to the six successful non-historical institutional cases, five involved an appeal by the accused, but only one of these was a successful appeal against conviction. In this case, *Galvin v The Queen*[198], the appeal succeeded on the basis of the admission of inadmissible evidence. Three appeals against sentence succeeded, as did two Crown appeals.

Comparison of historical versus non-historical child sexual abuse appeal cases

As noted earlier, this study relied largely on published judgments of the NSWCCA. The facts of a case documented in appeal judgments are variable and inconsistent in focus and detail; in some cases, they are difficult to distil or not included in the appeal judgment. In order to obtain more complete information on the facts of a case, we referred to the reported decision at first instance. For example, it was not always apparent from the appeal judgment whether the case was a historical matter. However, in eight cases (2.7 per cent)[199], the decision at first instance was not reported, so some of the factual data necessary to categorise the case as either historical child sexual abuse or non-historical child sexual abuse was simply not accessible to us.[200] These cases were excluded from this part of the study, as documented below.

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[196] [2008] NSWCCA 229.

[197] [2006] NSWCCA 235.

[198] [2006] NSWCCA 66.

[199] In one of these cases, *Cargnello v DPP* [2012] NSWCCA 162, there was no specific complainant and, as such, it was grouped with the unclear cases.

[200] This points to a broader challenge in the systematic analysis of child sexual abuse cases, being a lack of consistent information about cases and clearly established metrics for comparison of cases and samples in research and study.

15.7 DEFINITIONAL LIMITATIONS

Historical cases of child sexual abuse may be variously defined, and there is no clear definition of what constitutes a historical case of child sexual abuse (Newbury, 2014). In this study, we defined historical child sexual abuse as a case of child sexual abuse reported by an adult complainant and non-historical child sexual abuse as a case involving a child complainant. We used this definition based on the information most readily extractable from our dataset, allowing us to compare historical and non-historical child sexual abuse. Historical child sexual abuse, however, may arguably be more appropriately defined by other markers (for example, lapse in time between alleged abuse and disclosure and/or reporting or charges being laid). However, even this approach raises difficult questions about how much time must lapse between onset and reporting before a case becomes historical in nature; 'historicity is always a matter of degree' (Newbury, 2014, p 44).

This problem is exemplified by a number of 'grey' cases of historical child sexual abuse identified in our sample. For example, consider a case where abuse occurs when the complainant is aged three and disclosure and reporting occurs when they are aged 15 (as in *MM v The Queen* [2011] NSWCCA 262). Here, the lapse in time between onset of abuse and reporting and/or charges is 12 years, but the complainant is still not an adult. Using the definition adopted in this study, this case is categorised as a non-historical child sexual abuse case. However, qualitatively how is this case different to a case where the abuse starts when the victim is aged 14 and reporting occurs when the complainant is aged 26 (as in *KNP v The Queen* [2006] NSWCCA 213)? The latter case is categorised as a historical child sexual abuse case in this study, but both cases have an equivalent lapse in time between onset and reporting. This points to clear limits in our definition of historical child sexual abuse. It also points to the fact that our categorisation on the basis of the age of the complainant at the time of reporting or charges assumes a qualitative difference in a case involving a child compared with an adult complainant (which may or may not be relevant or reflected in the issues on appeal). For example, there may be differences in the type and quality of evidence that may be available in the case which, while relevant at trial, may not arise as an issue on appeal.

15.8 THE FINDINGS

The majority of child sexual offence cases on appeal in our sample were not historical cases of child sexual abuse (that is, they most commonly involved a child complainant and not an adult complainant). In total, over the nine-year period under study, 84 cases (28.9 per cent) were historical. Table A15.11 and Figure A15.5 provide a breakdown by year of the number of historical and non-historical appeal cases. Appendices A15.11 and A15.12 (see *Online appendices to the appeals study*, available at www.childabuseroyalcommission.gov.au) provide, respectively, a full list and detailed summary of the identified historical child sexual

abuse cases in the study sample. The percentage of historical cases fluctuated around an average of 28.9 per cent over the period, peaking at 40.7 per cent in 2007. The low of 14.3 per cent in 2011 is not readily explainable. There was no apparent significant trend in the number of historical cases on appeal over the study period.

Table A15.11: Number and percentage of historical and non-historical child sexual abuse cases by year

Year	Historical cases		Non-historical cases		Unclear cases		Total
	N	%[(a)]	n	%[(a)]	n	%[(a)]	
2005	8	23.5	25	73.5	1	2.9	34
2006	14	35.9	25	64.1	0	0.0	39
2007	11	40.7	15	55.6	1	3.7	27
2008	12	30.8	27	69.2	0	0.0	39
2009	7	23.3	20	66.7	3	10.0	30
2010	12	32.4	24	64.9	1	2.7	37
2011	3	14.3	17	81.0	1	4.8	21
2012	8	24.2	24	72.7	1	3.0	33
2013	9	29.0	22	71.0	0	0.0	31
Total	84	28.9	199	68.4	8	2.7	291

Note:

(a) These are percentages of the total sample by year.

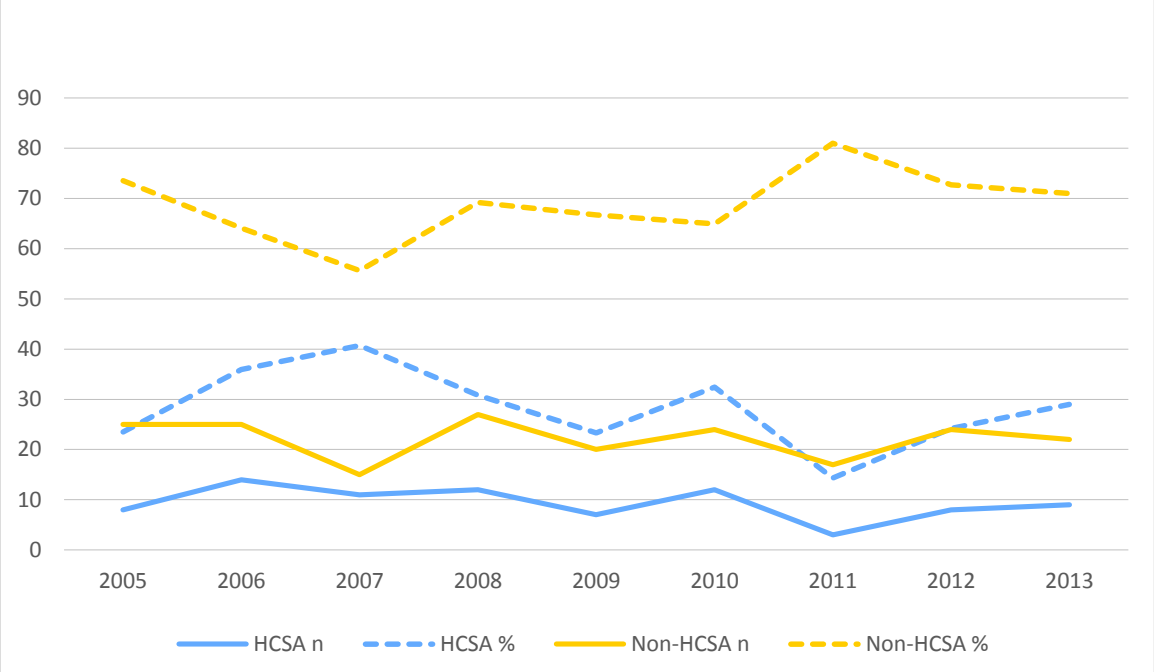

Figure A15.5: Number and percentage of historical child sexual abuse (HCSA) and non-historical child sexual abuse (non-HCSA) cases by year

Historical child sexual abuse cases are of special interest in this report because a large proportion of institutional cases of child sexual abuse – the focus of the Royal Commission's brief – are historical cases.[201] Also, such cases are often acknowledged as presenting marked challenges for the prosecution, often giving rise to evidentiary challenges (Quadara, 2014; Shead, 2014). Delayed reporting often arises as an issue in the case (Shead, 2014; Esposito, 2014).

A majority of the historical child sexual abuse cases in the study sample were intrafamilial (59.5 per cent). None of the historical child sexual abuse cases in our sample involved a stranger. Of these cases, 32 (38.1 per cent) involved a complainant aged younger than 10, 33 (39.3 per cent) involved a complainant aged between 10 and 12, and 31 cases (36.9 per cent) involved a complainant older than 12.[202]

Analysis revealed few substantive differences between historical child sexual abuse and non-historical child sexual abuse cases in terms of the grounds of appeals argued and outcomes of appeals.

[201] For example, analysis of the Royal Commission's private sessions between 17 January 2013 and 30 April 2014 found that survivors took an average of 22 years to disclose institutional abuse after it began; see *Royal Commission into Institutional Reponses to Child Sexual Abuse Interim Report Volume 1* (2014, p 158).

[202] Percentages add to more than 100 per cent as some cases involved multiple complainants across different age groups.

Table A15.12 provides a comparison of historical child sexual abuse cases and non-historical child sexual abuse cases, on the basis of the grounds of appeal. Table A15.13 presents a comparison of outcomes in the cases.

Table A15.12: Types of appeal in historical and non-historical child sexual abuse cases

Type of appeal	Historical cases			Non-historical cases		
	n	%[a]	%[b]	N	%[c]	%[b]
Appeal against conviction only (n=82)	26	31.0	31.7	56	27.1	68.3
Appeal against sentence by accused only (n=117)	29	34.5	24.8	88	42.5	75.2
Appeal against conviction and sentence by accused only (n=47)	18	21.4	38.3	29	14.0	61.7
Crown-only appeals against sentence (n=23)	6	7.1	26.1	17	8.9	73.9
Interlocutory appeals[d] (n=11)	3	3.6	27.3	8	3.8	72.7
Joint appeals by Crown and accused (n=11)	2	2.4	18.2	9	4.3	81.9

Notes:

(a) The data represents the percentage of all historical child sexual abuse cases (n=84).

(b) The data represents the percentage of all cases in the relevant type of appeal.

(c) The data represents the percentage of all non-historical child sexual abuse cases (n=207).

(d) The data includes interlocutory appeals by both the Crown and the accused.

Non-historical child sexual abuse figures here include cases where the status of historical child sexual abuse could not be determined.

Table A15.13: Comparison of outcomes between historical and non-historical child sexual abuse cases by limb

Type of appeal	Historical cases			Non-historical cases		
	N	%[a]	%[b]	N	%[c]	%[b]
Limb 1 grounds (percentage of successful cases)	23 (3)	27.4 (3.6)	32.4	48 (4)	23.2 (1.9)	67.6
Limb 2 grounds (percentage of successful cases)	18 (5)	21.4 (6.0)	36.0	32 (8)	15.5 (3.9)	64.0
Limb 3 grounds (percentage of successful cases)	39 (8)	46.4 (9.5)	33.3	78 (21)	37.7 (10.1)	66.7

Notes:

(a) The data represents the percentage of all historical child sexual abuse cases (n=84).

(b) The data represents the percentage of all cases in the relevant type of appeal.

(c) The data represents the percentage of all non-historical child sexual abuse cases (n=207).

Non-historical child sexual abuse figures here include cases where the status of historical child sexual abuse could not be determined.

Limb 1 refers to conviction appeals on the grounds of whether, having regard to the evidence, the jury's verdict is unreasonable or cannot be supported.

Limb 2 asks whether there has been a wrong decision on any question of law. This limb is directed to decisions made during the trial.

Limb 3 asks whether there has been a miscarriage of justice.

Table A15.12 shows little difference between historical and non-historical child sexual abuse appeal cases in terms of the rate of appeal against conviction only (31.0 per cent and 27.1 per cent respectively). A modestly lower percentage of historical child sexual abuse cases (34.5 per cent) involved appeals against sentence only by the accused compared with non-historical child sexual abuse cases (42.5 per cent). A higher percentage of historical child sexual abuse cases (21.4 per cent) involved appeal against conviction and sentence by the accused compared with non-historical child sexual abuse cases (14 per cent). Although the numbers are small, a smaller percentage of historical child sexual abuse cases (7.1 per cent) involved Crown-only appeals against sentence compared with non-historical child sexual abuse cases (8.9 per cent). Similarly, a lower percentage of historical child sexual abuse cases involved a joint Crown–accused appeal (2.4 per cent) than did non-historical child sexual abuse cases (4.3 per cent). The significance of these modest differences in types of appeal between the two types of abuse is not readily apparent.

As Table A15.13 reveals, in terms of the grounds of appeal, a similar percentage of historical and non-historical child sexual abuse cases (27.4 per cent compared with 23.2 per cent, respectively) raised an appeal under a limb 1 ground on the basis of the verdict of the jury being unreasonable or unsupported by the evidence. A greater proportion of historical cases

succeeded with a limb 2 ground; 21.4 per cent of historical cases raised a limb 2 ground compared with 15.5 per cent of non-historical cases, and 6 per cent of historical cases succeeded on a limb 2 argument compared with 3.9 per cent of non-historical child sexual abuse cases. The only other discernible difference in this data is that a greater proportion of historical child sexual abuse appeal cases raised a limb 3 ground (that is, a miscarriage of justice not raised at trial) compared with non-historical appeal cases (46.4 per cent of historical child sexual abuse cases raised a limb 3 ground compared with 37.7 per cent non-historical cases; overall, 10.1 per cent of non-historical cases succeeded on a limb 3 ground compared with 9.5 per cent of historical cases).

Table A15.16 below provides a detailed comparative breakdown of the outcomes of appeals for historical and non-historical child sexual abuse cases across the three broad categories of appeal cases – conviction, sentence severity and Crown appeal.

Overall, historical child sexual abuse appeals (both against conviction and sentence, including by the Crown) were marginally more successful than non-historical child sexual abuse appeals in the period 2005–13, with an overall rate of 59.3 per cent and 54.5 per cent respectively. In 2013 only, non-historical cases (56.5 per cent) were markedly more successful on appeal overall compared with historical cases (25 per cent). Over the period 2005–13, the overall success rate for historical cases decreased from 50 per cent to 25 per cent, but there was considerable fluctuation in the success rate. The opposite trend is seen for non-historical cases, with the overall rate of successful appeals increasing from 32 per cent in 2005 to 56.5 per cent in 2013; a similar degree of fluctuation is seen in historical child sexual abuse cases over this period.

Of successful appeals against conviction (n=39), 66.7 per cent were non-historical cases compared with 33.3 per cent of historical child sexual abuse cases. Of the historical cases on appeal, 24 (28.6 per cent) included an appeal by the accused on the basis of admission or rejection of evidence and 32 (38.1 per cent) included an appeal related to judicial misdirection. Around 28 per cent of appeals against conviction succeeded: 46 were historical and 93 were non-historical child sexual abuse cases. In a majority of successful historical child sexual abuse appeals against conviction, delay was in issue. Eight historical child sexual assault cases succeeded on grounds of admissibility of evidence and 16 succeeded on the basis of judicial misdirection. Most successful appeals against conviction resulted in an acquittal, with no real difference discernible in the rates between historical and non-historical child sexual abuse cases.

Historical child sexual abuse cases resulted in more successful appeals against sentence severity compared with non-historical cases. Of the successful appeals against sentence severity, 68.8 per cent were non-historical cases compared with 31.3 per cent of historical cases. However, 68.2 per cent of appeals against sentence in historical child sexual abuse cases succeeded compared with 57.6 per cent of appeals in non-historical cases. The outcomes in successful appeals against sentence showed little difference between historical

and non-historical child sexual abuse cases. Of the 30 successful historical child sexual abuse appeals against sentence, one resulted in a varied sentence and 29 in a new sentence (96.7 per cent). Of the successful appeals against sentence in non-historical child sexual abuse cases, five resulted in a varied sentence (four of these involved a reduction of the non-parole period)[203] and 61 in a new sentence (92.4 per cent).

A detailed summary of the characteristics and outcomes of the 84 historical child sexual abuse cases is presented in Appendix A15.12 (see *Online appendices to the appeals study*, available at www.childabuseroyalcommission.gov.au).

In how many cases was delay raised as an issue on appeal?

In the study sample, 74 cases (25.4 per cent) were positively identified as raising the issue of delay on appeal; 217 cases (74.6 per cent) were identified as not giving rise to delay as an issue on appeal. Table A15.14 presents the percentage of cases where delay was an issue on appeal for both historical and non-historical matters.[204] A majority of the historical cases (57.1 per cent) involved delay as an issue compared with only 12.6 per cent of non-historical cases. Indeed, nearly two-thirds (64.9 per cent) of the cases that raised delay were historical; this is not surprising. Table A15.15 presents a comparative view of success on the issue of delay in historical and non-historical cases. Although numbers are small and caution is warranted, the findings presented in Table A15.15 suggest that delay continues to be more of an issue in historical than in non-historical child sexual abuse cases. Almost 78 per cent of appeals that succeeded on the basis of delay were historical cases and only 22 per cent were non-historical cases.

[203] *MLP v The Queen* [2006] NSWCCA 271; *Clare v The Queen* [2008] NSWCCA 30; *MAJW v The Queen* [2009] NSWCCA 255; *NW v The Queen* [2011] NSWCCA 178; *TJC v The Queen* [2006] NSWCCA 413.

[204] Appendix A15.12 (see *Online appendices to the appeals study*, available at www.childabuseroyalcommission.gov.au) marks historical cases in which delay was in issue.

Table A15.14: Number and percentage of historical and non-historical cases in which delay was raised on appeal

Year	Delay as issue		Historical child sexual abuse with delay as issue		Non-historical child sexual abuse with delay as issue		Percentage with delay as an issue in historical child sexual abuse cases
	n	%	n	%	n	%	
2005	12	35.2	7	87.5	5	19.2	58.3
2006	13	33.3	7	50.0	6	24.0	53.8
2007	11	40.7	10	90.9	1	6.3	90.9
2008	7	17.9	4	33.3	3	11.1	57.1
2009	7	23.3	3	42.9	4	17.4	42.9
2010	7	18.9	6	50.0	1	4.0	85.7
2011	3	14.3	0	0.0	3	16.7	0.0
2012	5	15.1	4	50.0	1	4.0	80.0
2013	9	29.0	7	77.8	2	9.1	77.8
TOTAL	74	25.9	48	57.1	26	12.6	64.9

Notes:

All percentages are calculated as a proportion of the yearly sample or subgroup (the yearly historical or non-historical child sexual abuse sample).

Cases that could not be categorised as historical or non-historical child sexual abuse were included in the non-historical child sexual abuse figures.

Table A15.15: Number of successful appeals by year on the basis of delay

Year	Total cases successful on delay		Historical cases successful on delay		Non-historical cases successful on delay	
	n	%[a]	N	%[b]	n	%[b]
2005	2	16.7	2	100.0	0	0.0
2006	3	23.1	2	66.7	1	33.3
2007	4	36.4	4	100.0	0	0.0
2008	4	57.1	3	75.0	1	25.0
2009	4	57.1	3	75.0	1	1.0
2010	3	42.9	2	66.7	1	33.3
2011	1	33.3	0	0.0	1	100.0
2012	3	60.0	3	100.0	0	0.0
2013	3	33.3	2	66.7	1	33.3
Total	27	36.5	21	77.8	6	22.2

Notes:

(a) The data represents a percentage of cases in the year in which delay was raised as an issue on appeal.

(b) The data is a percentage of appeals that succeeded each year on the basis of the issue of delay.

Table A15.16: Breakdown of historical child sexual abuse (HCSA) and non-historical child sexual abuse (non-HCSA) outcomes

	2005				2006				2007				2008				2009				2010				2011				2012				2013			
	Non-HCSA		HCSA		Non-HCSA		HCSA		Non-HCSA		HCSA		Non-HCSA		HCSA		Non-HCSA		HCSA		Non-HCSA		HCSA		Non-HCSA		HCSA		Non-HCSA		HCSA		Non-HCSA		HCSA	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n		n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%
Conviction	5		6		15		8		11		7		15		7		12		1		10		9		6		0		13		3		6		5	
Successful outcome	0	0.0	2	33.3	7	46.7	3	37.5	2	18.2	1	14.3	3	20.0	4	57.1	2	16.7	0	0.0	4	40.0	3	33.3	1	16.7	0	0.0	4[b]	30.8	0	0.0	3	50	0	0.9
Result of appeal																																				
Acquitted[a]	0	0.0	0	0.0	1	14.3	1	33.3	1	50.0	1	100	0	0.0	1	25.0	0	0.0	0	0.0	1	25.0	0	0.0	0	0.0	0	0.0	3		0		0		0	
New trial ordered	0	0.0	2	100	6	85.7	2	66.7	1	50.0	0	0	3	100	3	75.0	2	100	0	0.0	3	75.0	3	100	1	100	0	0.0	2		0		3	100	0	

	2005				2006				2007				2008				2009				2010				2011				2012				2013			
	Non-HCSA		HCSA		Non-HCSA		HCSA		Non-HCSA		HCSA		Non-HCSA		HCSA		Non-HCSA		HCSA		Non-HCSA		HCSA		Non-HCSA		HCSA		Non-HCSA		HCSA		Non-HCSA		HCSA	
	n	%	n	%	N	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n		n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%
Severity of sentence	18		4		9[c]		7		7		7		16		5		11		7		13		2		13		1		11		5		16		6	
Successful outcome	5	27.8	3	75	7	77.8	5	71.4	3	42.9	5	71.4	9	56.3	2	40.0	7	63.7	6	85.7	8	61.5	1	50.0	9	81.9	1	100	9	80.0	4	80.0	9	56.3	3	50.0
Result of appeal																																				
New sentence	5	100	2	66.7	5	71.4	5	100	2	66.7	5	100	8	88.9	2	100	6	85.7	6	100	8	100	1	100	8	88.9	1	100	9	100	4	100	9	100	3	100
Restructured sentence[a]	0	0.0	1	33.3	2[c]	28.6	0	0.0	0	0.0	0	0.0	1	11.1	0	0.0	1	14.3	0	0.0	0	0.0	0	0.0	1	11.1	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0

	2005				2006				2007				2008				2009				2010				2011				2012				2013			
	Non-HCSA		HCSA		Non-HCSA		HCSA		Non-HCSA		HCSA		Non-HCSA		HCSA		Non-HCSA		HCSA		Non-HCSA		HCSA		Non-HCSA		HCSA		Non-HCSA		HCSA		Non-HCSA		HCSA	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n		n	%	n	%	n	%	n	%	n	%	n	%	n	%
Crown	**3**		**0**		**3**		**1**		**2**		**0**		**2**		**1**		**4**		**0**		**4**		**3**		**3**		**1**		**3**		**1**		**1**		**1**	
Successful outcome	**3**	100	**0**	0	**2**	66.7	**1**	100	**1**	50.0	**0**	0.0	**1**	50.0	**1**	100	**4**	100	0	0.0	2	50.0	3	100	1	33.3	0	0.0	2	66.7	1	100	1	100	0	0
Result of appeal																																				
New sentence	**3**	100	**0**	0.0	**2**	100	**1**	100	**1**	100	**0**	0.0	**1**	100	**1**	100	**4**	100	0	0.0	2	100	3	100	1	100	0	0.0	2	100	1	100	1	100	0	0.0
Remit for re-sentence	**0**	0.0	**0**	0.0	**0**	0.0	**0**	0.0	**0**	0.0	**0**	0.0	**0**	0.0	**0**	0.0	**0**	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0

	2005				2006				2007				2008				2009				2010				2011				2012				2013			
	Non-HCSA		HCSA		Non-HCSA		HCSA		Non-HCSA		HCSA		Non-HCSA		HCSA		Non-HCSA		HCSA		Non-HCSA		HCSA		Non-HCSA		HCSA		Non-HCSA		HCSA		Non-HCSA		HCSA	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%
Total appeals	25		10		26		15		20		14		33[e]		13		27		8		27		14		22		2		26		9		23		12	
Successful outcome	8	32.0	5	50.0	15[d]	57.7	8[d]	53.3	6	30.0	6	42.9	13	39.0	7	53.8	13	48.1	6	75.0	14	51.9	7	50.0	11	50.0	1	50.0	15	57.7	5	55.6	13	56.5	3	25.0

Notes:

(a) Cases where the order was 'conviction set aside' with no other information were counted as acquittals.

(b) One non-historical child sexual abuse case in 2012 ordered both acquittal and new trials on different counts of the appeal; as such, this column tallies to more than 100 per cent.

(c) Includes a case where one count was dismissed and the sentence was varied on the other count.

(d) Two cases from 2006 were only partially successful on appeal against conviction; therefore, orders were made on sentencing grounds. These were included in the totals for sentencing severity, but excluded from the overall total number of successful cases in 2006, to avoid double counting.

Methodology used reprises that of tables A15.6 and A15.7; any notes for those tables apply equally here.

Unclear cases are included in the non-historical child sexual abuse tallies.

15.9 OTHER CASE CHARACTERISTICS

We also briefly examined possible associations between some other case characteristics that emerged as potentially interesting, and appeal trends and outcomes in our sample of cases.

Guilty pleas

We examined the link between plea in the case and outcome on appeal. Table A15.17 provides a breakdown, by year, of the plea in the case. In our sample, 42.3 per cent of cases involved a guilty plea. The number of cases with at least one guilty plea decreased in absolute terms from 21 in 2005 to 15 in 2013, and in percentage terms from 61.8 per cent to 48.4 per cent; the number of cases with a guilty plea fluctuated between years in the period 2005–13. In 2007, only seven of the cases in our sample involved at least one guilty plea – the lowest number seen in the period under study.

Table A15.17: Number and percentage of cases involving a guilty plea

Year	Cases with at least one guilty plea		Cases without a guilty plea	
	n	%[(a)]	n	%[(a)]
2005	21	61.8	13	38.2
2006	12	30.8	27	69.2
2007	7	25.9	20	74.1
2008	13	33.3	26	66.7
2009	19	63.3	11	36.7
2010	14	37.8	23	62.2
2011	9	42.9	12	57.1
2012	13	39.4	20	60.6
2013	15	48.4	16	51.6
TOTAL	123	42.3	168	57.7

Notes:

(a) The data represents a percentage of each year's sample under study.

Table A15.18 shows the relationship between guilty pleas and the historical nature of the case. Historical and non-historical cases both involved a guilty plea in about 42.5 per cent of

cases. There is erratic fluctuation in the percentage of cases in the period 2005–2013 involving a guilty plea for both historical and non-historical cases.

Table A15.18: Relationship of cases involving a guilty plea to historical and non-historical child sexual abuse

Year	Historical abuse		Non-historical abuse	
	n	%[(a)]	n	%[(b)]
2005	3	37.5	18	72.0
2006	5	35.7	7	28.0
2007	4	36.4	3	20.0
2008	6	50.0	7	25.9
2009	6	85.7	13	65.0
2010	2	16.7	12	50.0
2011	1	33.3	8	47.1
2012	4	50.0	9	37.5
2013	3	33.3	12	54.6
TOTAL	34	42.7	88	42.5

Notes:

(a) The data represents a percentage of historical child sexual abuse appeal cases in each year in the sample.

(b) The data represents a percentage of non-historical child sexual abuse appeal cases in each year in the sample. Cases that could not be categorised as historical or non-historical child sexual abuse are included in the figures for non-historical child sexual abuse cases for this table.

Table A15.19 shows the percentage of extrafamilial and intrafamilial cases with at least one guilty plea. Of intrafamilial cases, 44.4 per cent involved at least one guilty plea compared with 42.9 per cent of extrafamilial cases. Eleven institutional cases involved a guilty plea. The percentage of guilty pleas by year is erratic – no trends are discernible over this period.

Table A15.19: Relationship between guilty plea and type of abuse

Year	Intrafamilial		Extrafamilial	
	At least one guilty plea in case	%[(a)]	At least one guilty plea in case	%[(b)]
2005	10	62.5	10	66.7
2006	8	38.1	4	26.7
2007	5	41.7	1	8.3
2008	7	53.8	5	26.3
2009	9	64.3	9	75.0
2010	4	20.0	10	71.4
2011	6	50.0	3	42.9
2012	5	35.7	4	26.7
2013	9	45.0	5	50.0
TOTAL	63	44.4	51	42.9

Notes:

(a) This data represents the percentage of total intrafamilial cases.

(b) This data represents the percentage of total extrafamilial cases.

15.10 JUVENILE OFFENDERS

Another interesting characteristic that emerged in our analysis, and which we decided to probe, was the number of appeal decisions involving a juvenile offender. Notwithstanding the difficulties of identifying cases that potentially involved a juvenile offender, we found that 5 per cent of appeal decisions were identified as involving a juvenile. This does not mean that 95 per cent of cases involved a non-juvenile offender; rather, it means that, based on the information available in the appeal judgment, we could only positively identify 16 cases as involving a juvenile accused. Table A15.20 provides a breakdown, by year, of the number of cases we identified as involving a juvenile offender. Appendix A15.14 (see *Online appendices to the appeals study*, available at www.childabuseroyalcommission.gov.au) summarises the basis and outcome of these cases. The majority of these cases (12) were sentencing appeals. Eight of these cases were extrafamilial cases of abuse. Half of the cases (eight of 16) resulted in the appeal being upheld, in whole or in part.

Table A15.20: Cases identified with juvenile offenders

Year	n	Percentage of yearly sample
2005	7	20.6
2006	2	5.1
2007	2	7.4
2008	2	5.1
2009	1	3.3
2010	1	2.7
2011	1	4.8
2012	0	0.0
2013	0	0.0
TOTAL	16	5.5

15.11 SUMMARY OF KEY FINDINGS

There has been limited research examining outcomes in child sexual offence cases that are appealed. The primary aim of this study was to fill some gaps in our understanding of the outcomes in such cases – and identify possible associating factors – through a systematic review. We examined 291 child sexual abuse cases on appeal in the NSWCCA between 2005 and 2013. The study focused in particular on the possible differences in grounds of appeal and outcomes in historical cases of child sexual abuse compared with cases involving a child complainant.

The first question was designed to determine the rate of appeal in child sexual offence cases, including appeals by the accused and by the Crown, and the rate of appeals against conviction and sentence. The study confirmed that child sexual abuse appeals are not uncommon, and that a significant number of child sexual abuse cases give rise to an appeal against conviction and/or sentence. We estimated the rate of appeal in child sexual abuse cases for the period 2005–13 at almost 17 per cent. While the number of child sexual abuse appeals over the nine-year period 2005–13 has remained relatively stable, taking into account the findings of

previous research, a decrease in the proportion of child sexual abuse appeals was noted compared with appeals overall since 2000.

The vast majority of child sexual abuse cases in this study involved appeals by the accused (89 per cent); of these, more were against sentence (59.5 per cent) than against conviction (54.1 per cent). One of the most marked findings was the decline in child sexual abuse conviction appeals between 2000 and 2013, with conviction appeals decreasing from 61.3 per cent of all child sexual abuse appeals in 2000 to 31.4 per cent in 2013. A corresponding increase, although not quite as marked, was observed in appeals against sentence severity. These overall trends, while clear, did not reveal linear trajectories of change; fluctuations with multiple peaks and troughs were noted over the period 2000–13. Moreover, the number of cases each year is low, so caution is warranted in interpreting these findings.

Secondly, we examined the outcome and success rate of child sexual assault appeals. More than half of the appeals in our sample succeeded, either wholly or in part. The rate of success in appeals overall, and for appeals against conviction and sentence severity, was erratic over the period under study, with unremarkable change overall. Our findings in relation to the success rates of appeals differ significantly from the earlier findings of the Judicial Commission.[205]

The vast majority of conviction appeals in our study resulted in a new trial. This finding is also at odds with earlier research conducted by the Judicial Commission, which reported significantly higher rates of acquittal.[206] The reason for this difference is not clear.

Thirdly, we probed the main grounds of appeal in child sexual assault cases and examined whether there is evidence that some grounds of appeal are more likely to succeed than others. We found that just over half of the appeals against conviction in the study included argument on the basis that the verdict of the jury was unreasonable, or could not be supported having regard to the evidence. Ten per cent of these cases were successful on this basis. One-third of the appeals against conviction included argument that the verdict should be overturned on the basis of error on a question of law (with objection raised at trial); of these, one-quarter were successful. Just under three-quarters of the conviction cases raised miscarriage of justice on any other ground; a little over one-quarter were successful. A majority of appeals against conviction were argued on more than one ground. The findings suggest that judicial misdirections remain a significant source of error in child sexual assault trials, generating a basis for overturning convictions and jury verdicts; 16.5 per cent of all conviction appeal cases succeeded on this basis and more than half of the successful appeals against conviction involved judicial misdirection.

[205] See pp 269–70.

[206] See pp 270.

Finally, the study examined possible associations between certain case characteristics, grounds and outcomes of appeal in child sexual abuse cases. We were particularly interested in examining whether there is any difference in the rate of appeals, the grounds of appeals and the outcomes of appeals in cases:

a. where there is delayed complaint compared with cases reported immediately in childhood?
b. involving institutional abuse compared with intrafamilial and other extrafamilial abuse cases?

Only 29 cases in this study involved institutional child sexual abuse; of these, 17 were historical cases of abuse. There were more intrafamilial (48.8 per cent) cases than extrafamilial (40.9 per cent) cases in our total sample. In our sample, 84 cases (28.9 per cent) involved historical child sexual abuse. In 74 cases, delay was an issue on appeal; of these, 57.1 per cent were historical cases of abuse. More than 60 per cent of the appeals in historical cases involved delay as an issue; a much smaller proportion (12.6 per cent) of non-historical appeal cases involved delay. These findings suggest that delay continues to be an issue in the prosecution of historical cases of child sexual abuse. Almost 60 per cent of historical cases of child sexual abuse were intrafamilial. Few other substantive differences were found between historical and non-historical child sexual abuse appeal cases in our sample. Overall, historical child sexual abuse appeals (against both conviction and sentencing) were more successful than non-historical appeal cases in the period 2005–13. However, over this period, the overall success rate for historical cases noticeably decreased, but with considerable fluctuation between years. The opposite trend was found for non-historical cases, with the overall rate of successful appeal noticeably increasing from 2005 to 2013. A similar degree of fluctuation between years was found in non-historical cases.

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Criminal Code 1899 (Qld)

Criminal Code Act (NT)

Criminal Code Act 1924 (Tas)

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Criminal Procedure Amendment (Sexual and Other Offences) Act 2006 (NSW)

Evidence Act 1995 (NSW)

Supreme Court Act 1933 (ACT)

ONLINE APPENDICES TO THE APPEALS STUDY

These online appendices are part of the *Child sexual offence appeals in the New South Wales Court of Criminal Appeal 2005–13* report by Rita Shackel. The report is an appendix to *The impact of delayed reporting on the prosecution and outcomes of child sexual abuse cases* by Judy Cashmore, Alan Taylor, Rita Shackel and Patrick Parkinson.

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35.	*Shaw v R* [2010] NSWCCA 23
36.	*ST v Regina* [2010] NSWCCA 5
37.	*Vincent Egan v R* [2010] NSWCCA 235
2011	
1.	*AAT v R* [2011] NSWCCA 1
2.	*ARS v R* [2011] NSWCCA 266
3.	*BIP v R* [2011] NSWCCA 224
4.	*DJF v R* [2011] NSWCCA 6
5.	*FB v R; R v FB* [2011] NSWCCA 217
6.	*HJWG v R* [2011] NSWCCA 50
7.	*Ingham v R* [2011] NSWCCA 88
8.	*IS v R* [2011] NSWCCA 142

9.	*LB v R* [2011] NSWCCA 220
10.	*MM v R* [2011] NSWCCA 262
11.	*Mokhaiber v R* [2011] NSWCCA 10
12.	*MRW v R* [2011] NSWCCA 260
13.	*NLR v R* [2011] NSWCCA 246
14.	*NW v R* [2011] NSWCCA 178
15.	*PWB v R* [2011] NSWCCA 84
16.	*Regina v KB; Regina v JL; Regina v RJB* [2011] NSWCCA 190
17.	*R v NJK* [2011] NSWCCA 151
18.	*R v PFC* [2011] NSWCCA 117
19.	*R v SK; SK v R* [2011] NSWCCA 292
20.	*Salman v DPP* [2011] NSWCCA 192
21.	*Smith v R* [2011] NSWCCA 163
2012	
1.	*BG v R* [2012] NSWCCA 139
2.	*Burrows v R* [2012] NSWCCA 113
3.	*Cargnello v DPP* [2012] NSWCCA 162
4.	*Cross v R* [2012] NSWCCA 114
5.	*DF v R* [2012] NSWCCA 171
6.	*DS v Regina* [2012] NSWCCA 159
7.	*GEH v R* [2012] NSWCCA 150
8.	*GN v R* [2012] NSWCCA 96
9.	*JAD v R* [2012] NSWCCA 73
10.	*Jones v R* [2012] NSWCCA 262
11.	*JRM v R* [2012] NSWCCA 112
12.	*KSC v R* [2012] NSWCCA 179
13.	*LG v R* [2012] NSWCCA 249
14.	*Mark McKey v Regina* [2012] NSWCCA 1
15.	*Martin v R* [2012] NSWCCA 253
16.	*MJ v R* [2012] NSWCCA 146
17.	*PGM (No 2) v R* [2012] NSWCCA 261
18.	*PK v Regina* [2012] NSWCCA 263

19.	*R v Brown* [2012] NSWCCA 199
20.	*R v DAJ* [2012] NSWCCA 143
21.	*R v GWM* [2012] NSWCCA 240
22.	*R v Jarrett* [2012] NSWCCA 81
23.	*R v Muldrock* [2012] NSWCCA 108
24.	*R v SBR* [2012] NSWCCA 233
25.	*RLS v R* [2012] NSWCCA 236
26.	*RJT v R* [2012] NSWCCA 280
27.	*Ross v R* [2012] NSWCCA 207
28.	*RM v R* [2012] NSWCCA 35
29.	*SH v Regina* [2012] NSWCCA 79
30.	*Simpson v R* [2012] NSWCCA 246
31.	*SKA v Regina* [2012] NSWCCA 205
32.	*Van Der Bann v R* [2012] NSWCCA 5
33.	*Wong v R* [2012] NSWCCA 39
2013	
1.	*Adam v Jolly* [2013] NSWCCA 76
2.	*AG v R* [2013] NSWCCA 264
3.	*ALS v R* [2013] NSWCCA 63
4.	*BJS v R* [2013] NSWCCA 123
5.	*Colquhoun v R* (No 1) [2013] NSWCCA 190
6.	*Colquhoun v R* (No 2) [2013] NSWCCA 191
7.	*Dawson v R* [2013] NSWCCA 61
8.	*DJM v R* [2013] NSWCCA 101
9.	*FD v R* [2013] NSWCCA 139
10.	*Franklin v R* [2013] NSWCCA 122
11.	*Kertai v R* [2013] NSWCCA 252
12.	*KW v R* [2013] NSWCCA 31
13.	*LA v R* [2013] NSWCCA 146
14.	*Leslie v R* [2013] NSWCCA 48
15.	*Lipchin v R* [2013] NSWCCA 77
16.	*LP v Regina* [2013] NSWCCA 330

17.	*Magnuson v R* [2013] NSWCCA 50
18.	*MJ v R* [2013] NSWCCA 250
19.	*MPB v R* [2013] NSWCCA 213
20.	*O'Brien v R* [2013] NSWCCA 197
21.	*Peter Versi v R* [2013] NSWCCA 206
22.	*R v DKL* [2013] NSWCCA 233
23.	*R v XY* [2013] NSWCCA 121
24.	*RO v R* [2013] NSWCCA 162
25.	*RP v R* [2013] NSWCCA 192
26.	*RRS v R* [2013] NSWCCA 94
27.	*RS v R* [2013] NSWCCA 227
28.	*Steadman v R* (No 1) [2013] NSWCCA 55
29.	*SW v R* [2013] NSWCCA 255
30.	*TDP v R; R v TDP* [2013] NSWCCA 303
31.	*Trevor Essex v R* [2013] NSWCCA 11

APPENDIX A15.2: CATEGORIES OF OFFENCES

2005-2013	Type of abuse			Disclosure type		
Categories of offences	**Intra-familial**	**Extra-familial**	**Institutional**	**Non-historical**	**Historical**	**Unclear**
Child pornography	25	18	5	34	11	2
Intentionally imported goods and digital images containing child pornography		1		1		
Disseminating child pornography	2			2		
Attempt to use a child under 14 for pornographic purposes	1			1		
Use of child for pornographic purposes	2	1	1	3	1	
Using child under 14 for pornographic purposes	6			6		
Using child over 14 for pornographic purposes			1		1	
Using child under 18 for pornographic purposes		2			1	
Possession of child pornography	6	5	2	9	4	
Producing child pornography	5	1		5	1	
Publication of child pornography						
Importation of child pornography	1	1		1		1 (*Cargnello v DPP* [2012])
Use of internet to access child pornography		1				1 (*Cargnello v DPP* [2012])
Use of internet to transmit child pornography		1			1	
Use of a carriage service to transport child pornography						
Use of a carriage service to access child pornography		1	1	2		
Transmitting child pornography	1			1		
Accessing child pornography	1			1		
Aggravated film of a person in a private act		1			1	

Exposing child to indecent material with intent to procure child for sexual activity		1			1	
Abusing a child for pornographic purposes		1		1		
Procuring a child under 14 for pornographic purposes		1		1		
Indecency / Assault	139	98	31	145	115	8
Act of indecency	6	3	2	4	6	1 (*PG v Regina* [2010])
Act of indecency with child under 10	4	2		5	1	
Act of indecency with child under 16	10	10	1	10	11	
Act of gross indecency	1		2		3	
Act of gross indecency with male under 18		1	1		2	
Aggravated act of indecency upon child under 16	7	3	3	8	5	
Aggravated act of indecency of child under 10		1			1	
Aggravated act of indecency	4	2	1	3	4	
Common assault	1	1		1	1	
Assault	2	1		1	2	
Assault with an act of indecency against child under 10	1	1		2		
Indecent assault	16	12	7	8	27	
Indecent assault on child under 10	12	9	2	21	2	
Indecent assault on child under 16	16	8	2	9	16	
Indecent assault on female under 16	7	2		2	6	1 (*PG v Regina* [2010])
Aggravated indecent assault	24	23	7	41	12	2 (*Regina v Campbell* [2005], *Bryan v R* [2007],
Aggravated indecent assault of a child under 10	9	1	1	6	4	1 (*PG v Regina* [2010])

Aggravated indecent assault of a child under 16	15	12	2	17	10	2 (*NLR* [2011], *Franklin* [2013])
Aggravated indecent assault in company		2		2		
Aggravated indecent assault with an act of indecency	1				1	
Persistent abuse of child	1			1		
Maliciously inflict grievous bodily harm with intent		1		1		
Assault occasioning actual bodily harm	2				1	1 (*Regina v Campbell* [2005])
Maliciously inflicting actual bodily harm with the intent to have sexual intercourse		1		1		
Assault with intent to commit rape		1		1		
Kidnapping with intent to have sexual intercourse		1		1		
Carnal Knowledge	11	3	1	2	13	0
Attempt to unlawfully and carnally know victim		1			1	
Unlawful carnal knowledge	4				4	
Carnal knowledge of a child under 10	2			1	1	
Carnal knowledge of a person between 10-16	2	1	1	1	3	
Carnal knowledge of a girl between 10-17	1				1	
Unlawful carnal knowledge of person under 16		1			1	
Detaining with intent to have carnal knowledge	1				1	
Carnal knowledge by father	1				1	
Sexual intercourse	147	123	21	190	100	7
Attempted sexual intercourse with a child under 10	5	5		9	1	
Attempted sexual intercourse with a child between 10-14			1	1		

Attempted sexual intercourse with a child between 10-15	2	1		2	1	
Attempted sexual intercourse with child between 10-16	1		1	1	1	
Attempted intercourse with child 14-16		1		1		
Attempted sexual intercourse without consent	2	1		2	1	
Attempted homosexual intercourse with male 10-18	1				1	
Attempted aggravated sexual assault	1			1		
Attempted aggravated sexual assault of child 10-16	1				1	
Attempted sexual intercourse with child under 16	1				1	
Attempted aggravated sexual intercourse with child under 16	1				1	
Attempted aggravated sexual intercourse without consent		1		1		
Rape (s 63)	1				1	
Sexual intercourse		2		1	1	
Sexual intercourse without consent	4	8	1	5	8	
Sexual intercourse with child		2		2		
Sexual intercourse with child under 10	39	27	2	53	13	2 (*PG v Regina* [2010], *NLR* [2011])
Aggravated Sexual intercourse with a child under 14 under authority	2			2		
Aggravated Sexual intercourse with a child under 16 [under authority]	3			3		
Sexual intercourse with a child under 16	12	10		10	12	
Sexual intercourse without consent with a child under 16	6	5		5	6	
Sexual intercourse with a child between 10-14	2	4	1	5	2	
Sexual intercourse with a child between 14-16	4	11	1	14	3	

Sexual intercourse with child 10-16	11	8	1	6	13	1 (*Bryan v R* [2007])
Sexual intercourse with male between 10-18		2		1	1	
Sexual intercourse with person under 18		1		1		
Aggravated sexual intercourse	1		1	1	1	
Aggravated sexual intercourse with a child under 10	1	4		5		
Aggravated sexual intercourse with child under 14		2	1	3		
Aggravated sexual intercourse with a child between 10-14	3	1		4		
Aggravated sexual intercourse with a child between 10-16	7	3	1	6	5	
Aggravated sexual intercourse with a child between 14-16	3	3	1	5	1	1 (*Franklin* [2013])
Aggravated sexual intercourse with a child between 14-17	1	1		2		
Aggravated sexual intercourse with person under 16	7	3		5	4	1 (*KAF v R* [2009])
Aggravated sexual intercourse without consent	10	6	2	14	3	1 (*PG v Regina* [2010])
Aggravated sexual assault with child 10-16	1				1	
Aggravated sexual assault with child under 10		1		1		
Aggravated sexual assault	5	8	1	10	4	
Persistent sexual abuse of a child	5			4	1	
Sexual assault on child	2			2		
Homosexual intercourse with child aged 10-18	2	4	6	1	10	1 (*Bryan v R* [2007])
Incest	1				1	
Sexual intercourse with person under 16 outside Australia		1		1		
Maliciously inflicting ABH with intent to have sexual intercourse		1			1	
Aiding and abetting	9	6	2	10	6	1
Encouragement of sexual intercourse with a child under 16 outside Australia.		1				1 (*Cargnello*

						v DPP [2012])
Incitement to commit an act of indecency on a child under 10	2			1	1	
Inciting an act of indecency against child under 16	1				1	
Procuring a female under 21 for another to have carnal knowledge	1				1	
Procuring an act of indecency			1		1	
Inciting a child under 10 to commit an act of indecency	3	2		5		
Inciting a child under 16 to commit an act of indecency		1			1	
Inciting a child under 16 to commit an act of indecency (aggravated)	1			1		
Inciting a child under 16 to commit an act of indecency outside Australia		1		1		
Inciting a child above 16 to commit an act of indecency			1		1	
Inducing a child to participate in an act of child prostitution	1			1		
Aiding and abetting sexual intercourse with a child under 10						
Aiding and abetting sexual assault		1		1		
Other offences	9	16	6	21	10	0
Detaining for advantage	1	2	1	3	1	
Use of offensive weapon with intent to intimidate	1				1	
Possessing child abuse material	1			1		
Using a carriage of services a reasonable person would regard offensive	1			1		
Robbery with an offensive weapon		1		1		
Act intended to pervert the course of justice	1		1	1	1	
Kidnapping		2		2		
Contravention of AVO	1	1		2		
Buggery	3	1	1		5	
Supply prohibited drug		2		1	1	

Possessing prohibited drug			1	1		
Murder		3		3		
Administering stupefying drug to enable aggravated sexual assault without consent			1	1		
Hindering police in the exercise of their duty			1	1		
Second degree principal to another person intending to hinder the investigation of a serious indictable offence		1		1		
Possessing an offensive weapon with intent to commit an indictable offence		1		1		
Breaking and entering a dwelling and committing a serious indictable offence		1		1		
Possess		1			1	
TOTAL:	**340**	**264**	**66**	**402**	**255**	**18**

Notes:

For the purpose of this table, each offence is recorded only once per case, irrespective of the number of counts charged in the case.

Offence categories map onto corresponding sections of the *Crimes Act 1900* (NSW) and other relevant legislation.

Charges were not ascertainable in the following cases and accordingly are not reflected in this table: *Regina v RGTS* [2005] NSWCCA 293; *R v RAG* [2006] NSWCCA 343; *JJT v Regina* [2006]; *DRE v Regina* [2006] NSWCCA 280; *Carlton v R* [2008 NSWCCA 244]; *Clark v R* [2008] NSWCCA 122; *TJ v R* [2009] NSWCCA 257; *Goss v R* [2009] NSWCCA 190; *Director of Public Prosecutions (NSW) v JG* [2010] NSWCCA 222; *RJ v R* [2010] NSWCCA 263; *KTR v R* [2010] NSWCCA 271.

APPENDIX A15.3: LIMB 1 CASES

Year	Case Name	Successful?
2005		
1.	*R v AMN* [2005] NSWCCA 124	N
2.	*R v BJB* [2005] NSWCCA 441	N
3.	*R v Grattan* [2005] NSWCCA 306	N
4.	*R v Richard Norman Mearns* [2005] NSWCCA 396	N
5.	*R v WSP* [2005] NSWCCA 427	N (but successful on Limb 3)
6.	*Regina v NZ* [2005] NSWCCA 278	N
7.	*Regina v R T I* [2005] NSWCCA 337	N (but successful on Limb 3)
8.	*Regina v RTGS* [2005] NSWCCA 293	N
2006		
9.	*Healey v Regina* [2006] NSWCCA 235	N (but successful on Limb 3)
10.	*Leonard v Regina* [2006] NSWCCA 267	N
11.	*NWL v Regina* [2006] NSWCCA 67	Y, in part
12.	*PGM v Regina* [2006] NSWCCA 310	N (but successful on Limb 2)
13.	*Qualtieri v Regina* [2006] NSWCCA 95	N (but successful on Limb 3)
14.	*Wilson v Regina* [2006] NSWCCA 217	N
2007		
15.	*Anthony Boulattouf v Regina* [2007] NSWCCA 102	N
16.	*Bryan v R* [2007] NSWCCA 351	N
17.	*CJG v Regina* [2007] NSWCCA 190	N
18.	*CTM v R* [2007] NSWCCA 131	N
19.	*DJB v R; R v DJB* [2007] NSWCCA 209	N
20.	*GAC v Regina, WC v Regina* [2007] NSWCCA 287	N
21.	*Kamm, William v Regina* [2007] NSWCCA 201	N
22.	*Norris v Regina* [2007] NSWCCA 235	Y (also successful on Limb 2)
23.	*Pavitt v Regina* [2007] NSWCCA 88	N
24.	*R v KRL* [2007] NSWCCA 354	N
25.	*RJS v Regina* [2007] NSWCCA 241	N (but successful on Limb 3)
26.	*Rolfe v Regina* [2007] NSWCCA 155	N

27.	*Rowney v R* [2007] NSWCCA 49	N
28.	*SI v R* [2007] NSWCCA 181	Y
29.	*Smith v Regina* [2007] NSWCCA 156	N
2008		
30.	*AE v R* [2008] NSWCCA 52	Y (also successful on Limb 2)
31.	*AGW v Regina* [2008] NSWCCA 81	N (but successful on Limb 3)
32.	*Clark v R* [2008] NSWCCA 122	N
33.	*DJV v R* [2008] NSWCCA 272	Y (also successful on Limb 2 and 3)
34.	*Fernando v R* [2008] NSWCCA 97	N
35.	*Hogan v Regina* [2008] NSWCCA 150	N
36.	*Makarov v R (No 1)* [2008] NSWCCA 291	N
37.	*Makarov v R (No 2)* [2008] NSWCCA 292	N
38.	*Perez v Regina* [2008] NSWCCA 46	N
39.	*Rylands v Regina* [2008] NSWCCA 106	N
2009		
40.	*Cusack v R* [2009] NSWCCA 155	N
41.	*GSH v R; R v GSH* [2009] NSWCCA 214	N
42.	*JDK v R; R v JDK* [2009] NSWCCA 76	N (but successful on Limb 2)
43.	*Orkopoulos v R* [2009] NSWCCA 213	N
44.	*SKA v R; R v SKA* [2009] NSWCCA 186	N
45.	*Toalepai v R* [2009] NSWCCA 270	N
2010		
46.	*BG v R* [2010] NSWCCA 301	N
47.	*LJW v R* [2010] NSWCCA 114	N
48.	*PG v Regina* [2010] NSWCCA 216	N
49.	*R v Tyrone Chishimba; Tyrone Chishimba v R; Likumbo Makasa v R; Mulenga v R; R v Mumbi Peter Mulenga* [2010] NSWCCA 228	Y
50.	*RWC v R* [2010] NSWCCA 332	N (but successful on Limb 2)
51.	*ST v Regina* [2010] NSWCCA 5	N (but successful on Limb 3)
52.	*Vincent Egan v R* [2010] NSWCCA 235	N
2011		
53.	*FB v R; R v FB* [2011] NSWCCA 217	N

54.	*MM v R* [2011] NSWCCA 262	N
2012		
55.	*BG v R* [2012] NSWCCA 139	N
56.	*Burrows v R* [2012] NSWCCA 113	N
57.	*JAD v R* [2012] NSWCCA 73	N (but successful on Limb 3)
58.	*Jones v R* [2012] NSWCCA 262	N
59.	*KSC v R* [2012] NSWCCA 179	N
60.	*MJ v R* [2012] NSWCCA 146	N
61.	*PGM (No 2) v R* [2012] NSWCCA 261	N
62.	*Ross v R* [2012] NSWCCA 207	N
63.	*SKA v Regina* [2012] NSWCCA 205	Y, in part (also successful on Limb 3)
64.	*Wong v R* [2012] NSWCCA 39	N
2013		
65.	*ALS v R* [2013] NSWCCA 63	N (but successful on Limb 3)
66.	*Colquhoun v R (No 1)* [2013] NSWCCA 190	N (but successful on Limb 3)
67.	*Colquhoun v R (No 2)* [2013] NSWCCA 191	N (but successful on Limb 3)
68.	*LP v Regina* [2013] NSWCCA 330	N
69.	*MJ v R* [2013] NSWCCA 250	N
70.	*Peter Versi v R* [2013] NSWCCA 206	N
71.	*RO v R* [2013] NSWCCA 162	N

APPENDIX A15.4: LIMB 2 CASES

Year	Case Name	Successful?
2005		
1.	*R v Fletcher* [2005] NSWCCA 338	N
2.	*R v Grattan* [2005] NSWCCA 306	N
3.	*R v MDB* [2005] NSWCCA 354	N
4.	*Regina v Rymer* [2005] NSWCCA 310	N
2006		
5.	*DRE v Regina* [2006] NSWCCA 280	N
6.	*Galvin v Regina* [2006] NSWCCA 66	Y (also successful on Limb 3)
7.	*KNP v Regina* [2006] NSWCCA 213	N
8.	*LAB v Regina* [2006] NSWCCA 202	N
9.	*Magrin v Regina* [2006] NSWCCA 17	N
10.	*PGM v Regina* [2006] NSWCCA 310	Y
11.	*Peter John Reed v Regina* [2006] NSWCCA 314	N
12.	*Regina v Poole* [2006] NSWCCA 93	Y (also successful on Limb 3)
13.	*Sepulveda v R* [2006] NSWCCA 379	N
14.	*Sharwood v Regina* [2006] NSWCCA 157	N
15.	*Sharyn Ann Munn v Regina; Thomas Miller v Regina* [2006] NSWCCA 61	Y (also successful on Limb 3)
16.	*Sheehan v Regina* [2006] NSWCCA 233	Y
17.	*TJC v Regina* [2006] NSWCCA 413	Y (also successful on Limb 3)
2007		
18.	*Anthony Boulattouf v Regina* [2007] NSWCCA 102	N
19.	*Kamm, William v Regina* [2007] NSWCCA 201	N
20.	*Norris v Regina* [2007] NSWCCA 235	Y (also successful on Limb 1)
21.	*Pavitt v Regina* [2007] NSWCCA 88	N
22.	*Rolfe v Regina* [2007] NSWCCA 155	N
23.	*Rowney v R* [2007] NSWCCA 49	N
2008		

24.	*AE v R* [2008] NSWCCA 52	Y (also successful on Limb 1)
25.	*Clark v R* [2008] NSWCCA 122	N
26.	*DJV v R* [2008] NSWCCA 272	Y (also successful on Limb 1 and 3)
27.	*Gordon-King v R* [2008] NSWCCA 335	N
28.	*Langbein v R* [2008] NSWCCA 38	N
29.	*Makarov v R (No 3)* [2008] NSWCCA 293	N (but successful on Limb 3)
30.	*Philopos v R* [2008] NSWCCA 66	N
31.	*Rodden v Regina* [2008] NSWCCA 53	N (but successful on Limb 3)
2009		
32.	*AW v R* [2009] NSWCCA 1	N
33.	*JDK v R; R v JDK* [2009] NSWCCA 76	Y
34.	*MAJW v R* [2009] NSWCCA 255	N
2010		
35.	*Chivers v R* [2010] NSWCCA 134	Y
36.	*DJS v R* [2010] NSWCCA 200	N
37.	*EK v R* [2010] NSWCCA 199	N
38.	*ES v R (No 1)* [2010] NSWCCA 197	Y (also successful on Limb 3)
39.	*KTR v R* [2010] NSWCCA 271	N
40.	*LJ v Regina* [2010] NSWCCA 289	N
41.	*LJW v R* [2010] NSWCCA 114	Y
2011		
42.	*ARS v R* [2011] NSWCCA 266	N
43.	*R v SK; SK v R* [2011] NSWCCA 292	N
2012		
44.	*BG v R* [2012] NSWCCA 139	N
45.	*Cargnello v DPP* [2012] NSWCCA 162	N
46.	*GEH v R* [2012] NSWCCA 150	N
2013		
47.	*BJS v R* [2013] NSWCCA 123	N
48.	*Peter Versi v R* [2013] NSWCCA 206	N
49.	*RRS v R* [2013] NSWCCA 94	N
50.	*TDP v R; R v TDP* [2013] NSWCCA 303	N

APPENDIX A15.5: LIMB 3 CASES

Year	Case Name	Successful?	Limb 2 as well?
2005			
1.	*R v AMN* [2005] NSWCCA 124	N	
2.	*R v BJB* [2005] NSWCCA 441	N	
3.	*R v Fletcher* [2005] NSWCCA 338	N	Y
4.	*R v Grattan* [2005] NSWCCA 306	N	Y
5.	*R v MDB* [2005] NSWCCA 354	N	Y
6.	*R v Richard Norman Mearns* [2005] NSWCCA 396	N	
7.	*R v WSP* [2005] NSWCCA 427	Y	
8.	*Regina v NZ* [2005] NSWCCA 278	N	
9.	*Regina v R T I* [2005] NSWCCA 337	Y	
10.	*Regina v RTGS* [2005] NSWCCA 293	N	
11.	*Regina v Rymer* [2005] NSWCCA 310	N	Y
2006			
12.	*DPW v Regina* [2006] NSWCCA 295	N	
13.	*Galvin v Regina* [2006] NSWCCA 66	Y (also successful on Limb 2)	Y
14.	*Gorrick v Regina* [2006] NSWCCA 232	N	
15.	*Healey v Regina* [2006] NSWCCA 235	Y	
16.	*JJB v Regina* [2006] NSWCCA 126	N	
17.	*JJT v Regina* [2006] NSWCCA 283	N	
18.	*KNP v Regina* [2006] NSWCCA 213	N	Y
19.	*LAB v Regina* [2006] NSWCCA 202	N	Y
20.	*Leonard v Regina* [2006] NSWCCA 267	N	
21.	*NWL v Regina* [2006] NSWCCA 67	N (but successful in part on Limb 1)	
22.	*PGM v Regina* [2006] NSWCCA 310	N (but successful on Limb 2)	Y
23.	*Qualtieri v Regina* [2006] NSWCCA 95	Y	
24.	*Regina v Poole* [2006] NSWCCA 93	Y (also successful on Limb 2)	Y
25.	*RELC v Regina* [2006] NSWCCA 383	Y	
26.	*Sharwood v Regina* [2006] NSWCCA 157	N	Y
27.	*Sharyn Ann Munn v Regina; Thomas Miller v Regina* [2006] NSWCCA 61	Y (also successful on Limb 2)	Y
28.	*TJC v Regina* [2006] NSWCCA 413	Y (also successful on Limb 2)	Y

29.	*Wilson v Regina* [2006] NSWCCA 217	N	
2007			
30.	*Anthony Boulattouf v Regina* [2007] NSWCCA 102	N	Y
31.	*CTM v R* [2007] NSWCCA 131	N	
32.	*DJB v R; R v DJB* [2007] NSWCCA 209	N	
33.	*GAC v Regina, WC v Regina* [2007] NSWCCA 287	N	
34.	*JMW v Regina* [2007] NSWCCA 187	N	
35.	*Kamm, William v Regina* [2007] NSWCCA 201	N	Y
36.	*KJR v R* [2007] NSWCCA 165	N	
37.	*Norris v Regina* [2007] NSWCCA 235	N (but successful on Limb 1 & 2)	
38.	*Pavitt v Regina* [2007] NSWCCA 88	N	Y
39.	*Picken v Regina; Regina v Picken* [2007] NSWCCA 319	N	
40.	*RJS v Regina* [2007] NSWCCA 241	Y	
41.	*Rolfe v Regina* [2007] NSWCCA 155	N	Y
42.	*SI v R* [2007] NSWCCA 181	N (but successful on Limb 1)	
43.	*Smith v Regina* [2007] NSWCCA 156	N	
2008			
44.	*AGW v Regina* [2008] NSWCCA 81	Y	
45.	*AJO v Regina* [2008] NSWCCA 28	Y	
46.	*Carlton v Regina* [2008] NSWCCA 244	N	
47.	*Clark v R* [2008] NSWCCA 122	N	Y
48.	*DJV v R* [2008] NSWCCA 272	Y (also successful on Limb 1 and 2)	Y
49.	*DTS v Regina* [2008] NSWCCA 329	N	
50.	*Gordon-King v R* [2008] NSWCCA 335	N	Y
51.	*Healey v R* [2008] NSWCCA 229	Y	
52.	*Hogan v Regina* [2008] NSWCCA 150	N	
53.	*Hudson v R* [2008] NSWCCA 90	N	
54.	*Jeffrey Wayne Davie v R* [2008] NSWCCA 2	N	
55.	*Kamm, William v Regina* [2008] NSWCCA 290	N	
56.	*Langbein v R* [2008] NSWCCA 38	N	Y
57.	*Makarov v R (No 1)* [2008] NSWCCA 291	N	

58.	*Makarov v R (No 2)* [2008] NSWCCA 292	N	
59.	*Makarov v R (No 3)* [2008] NSWCCA 293	Y	Y
60.	*McCarthy v Regina* [2008] NSWCCA 320	N	
61.	*Perez v Regina* [2008] NSWCCA 46	N	
62.	*Philopos v R* [2008] NSWCCA 66	N	Y
63.	*Rodden v Regina* [2008] NSWCCA 53	Y	Y
64.	*Rylands v Regina* [2008] NSWCCA 106	N	
2009			
65.	*AW v R* [2009] NSWCCA 1	N	Y
66.	*CPG v R* [2009] NSWCCA 120	N	
67.	*Cusack v R* [2009] NSWCCA 155	N	
68.	*DGB v R* [2009] NSWCCA 307	N	
69.	*Johnston v R* [2009] NSWCCA 82	Y	
70.	*MAJW v R* [2009] NSWCCA 255	N	Y
71.	*Orkopoulos v R* [2009] NSWCCA 213	N	
72.	*Pease v R* [2009] NSWCCA 136	N	
73.	*TJ v R* [2009] NSWCCA 257	N	
74.	*Toalepai v R* [2009] NSWCCA 270	N	
2010			
75.	*BG v R* [2010] NSWCCA 301	N	
76.	*BP v R; R v BP* [2010] NSWCCA 303	N	
77.	*CC v Regina* [2010] NSWCCA 337	Y	
78.	*EK v R* [2010] NSWCCA 199	N	Y
79.	*ES v R (No 1)* [2010] NSWCCA 197	Y (also successful on Limb 2)	Y
80.	*ES v R (No 2)* [2010] NSWCCA 198	N	N
81.	*GG v Regina* [2010] NSWCCA 230	N	
82.	*KTR v R* [2010] NSWCCA 271	N	Y
83.	*LJW v R* [2010] NSWCCA 114	N	Y
84.	*McGrath v R* [2010] NSWCCA 48	N	
85.	*R v Tyrone Chishimba; Tyrone Chishimba v R; Likumbo Makasa v R; Mulenga v R; R v Mumbi Peter Mulenga* [2010] NSWCCA 228	N (but successful on Limb 1)	
86.	*RJ v R* [2010] NSWCCA 263	Y	
87.	*RWB v R; R v RWB* [2010] NSWCCA 147	N	
88.	*RWC v R* [2010] NSWCCA 332	N (but successful on Limb 2)	Y
89.	*ST v Regina* [2010] NSWCCA 5	Y	

90.	*Vincent Egan v R* [2010] NSWCCA 235	N	
2011			
91.	*ARS v R* [2011] NSWCCA 266	N	Y
92.	*DJF v R* [2011] NSWCCA 6	Y	
93.	*FB v R; R v FB* [2011] NSWCCA 217	N	
94.	*Ingham v R* [2011] NSWCCA 88	N	
95.	*MM v R* [2011] NSWCCA 262	N	
96.	*MRW v R* [2011] NSWCCA 260	N	
2012			
97.	*Cargnello v DPP* [2012] NSWCCA 162	N	Y
98.	*DF v R* [2012] NSWCCA 171	N	
99.	*DS v Regina* [2012] NSWCCA 159	N	
100.	*JAD v R* [2012] NSWCCA 73	Y	
101.	*Jones v R* [2012] NSWCCA 262	N	
102.	*KSC v R* [2012] NSWCCA 179	N	
103.	*Mark McKey v Regina* [2012] NSWCCA 1	Y	
104.	*PGM (No 2) v R* [2012] NSWCCA 261	N	
105.	*Ross v R* [2012] NSWCCA 207	N	
106.	*SH v Regina* [2012] NSWCCA 79	Y	
107.	*SKA v Regina* [2012] NSWCCA 205	Y (also successful on Limb 1)	
2013			
108.	*ALS v R* [2013] NSWCCA 63	Y	
109.	*BJS v R* [2013] NSWCCA 123	N	Y
110.	*Colquhoun v R (No 1)* [2013] NSWCCA 190	Y	
111.	*Colquhoun v R (No 2)* [2013] NSWCCA 191	Y	
112.	*LP v Regina* [2013] NSWCCA 330	N	
113.	*MJ v R* [2013] NSWCCA 250	N	
114.	*Peter Versi v R* [2013] NSWCCA 206	N	Y
115.	*RO v R* [2013] NSWCCA 162	N	
116.	*Steadman v R* (No 1) [2013] NSWCCA 55	N	
117.	*TDP v R; R v TDP* [2013] NSWCCA 303	N	Y

APPENDIX A15.6: SUCCESSFUL CONVICTION APPEAL CASES BY LIMB, SUCCESSFUL GROUND OF APPEAL AND ORDERS ENTERED

CASE NAME	LIMB 1	LIMB 2			LIMB 3			ORDER
	Verdict unsupportable and inconsistent	Admissibility	Misdirection	Other error	Admissibility	Misdirection	Other acts or omissions	
Regina v R T I [2005] NSWCCA 337								New trial
R v WSP [2005] NSWCCA 427								New trial
Galvin v Regina [2006] NSWCCA 66								New trial
Healey v Regina [2006] NSWCCA 235								New trial
NWL v Regina [2006] NSWCCA 67								Acquittal
PGM v Regina [2006] NSWCCA 310								New trial
Qualtieri v Regina [2006] NSWCCA 95								New trial
Regina v Poole [2006] NSWCCA 93								New trial
RELC v Regina [2006] NSWCCA 383								New trial
Sharyn Ann Munn v Regina; Thomas Miller v Regina [2006] NSWCCA 61								New trial
Sheehan v Regina [2006] NSWCCA 233								New trial
TJC v Regina [2006] NSWCCA 413								Acquittal
Norris v Regina [2007] NSWCCA 235								Acquittal
RJS v Regina [2007] NSWCCA 241								New trial
SI v R [2007] NSWCCA 181								Acquittal
AE v R [2008] NSWCCA 52								New trial & acquittal (on different counts)
AGW v Regina [2008] NSWCCA 81								New trial
AJO v Regina [2008] NSWCCA 28								Acquittal

DJV v R [2008] NSWCCA 272								New trial
Healey v R [2008] NSWCCA 229								Decision left to DPP
Makarov v R (No 3) [2008] NSWCCA 293								New trial
Rodden v Regina [2008] NSWCCA 53								New trial
JDK v R; R v JDK [2009] NSWCCA 76								New trial
Johnston v R [2009] NSWCCA 82								New trial
CC v Regina [2010] NSWCCA 337								New trial
Chivers v R [2010] NSWCCA 134								New trial
ES v R (No 1) [2010] NSWCCA 197								Decision left to DPP
R v Tyrone Chishimba; Tyrone Chishimba v R; Likumbo Makasa v R; Mulenga v R; R v Mumbi Peter Mulenga [2010] NSWCCA 228								Acquittal
RJ v R [2010] NSWCCA 263								New trial
RWC v R [2010] NSWCCA 332								New trial
ST v Regina [2010] NSWCCA 5								New trial
DJF v R [2011] NSWCCA 6								New trial
JAD v R [2012] NSWCCA 73								New trial
Mark McKey v Regina [2012] NSWCCA 1								Acquittal
SH v Regina [2012] NSWCCA 79								Acquittal
SKA v Regina [2012] NSWCCA 205								Acquittal & new trial (on different counts)
ALS v R [2013] NSWCCA 63								New trial
Colquhoun v R (No 1) [2013] NSWCCA 190								New trial
Colquhoun v R (No 2) [2013] NSWCCA 191								New trial

Note:

This table is presented using a format similar to that used by Donnelly et al. (2011) in Appendix A but it does not provide a breakdown of the number of times each ground of appeal was successful in a single case, as done in Donnelly et al. (2011: 253); it only indicates whether a ground was successful at least once (or in part) in each case.

APPENDIX A15.7: SUCCESSFUL ADMISSIBILITY CASES BY SUCCESSFUL GROUND OF APPEAL

	Character evidence	Context/relationship evidence	Miscellaneous evidence	Prejudicial evidence	Tendency/coincidence evidence	Number of successful admissibility grounds
Galvin v Regina [2006] NSWCCA 66				1		1
PGM v Regina [2006] NSWCCA 310	1					1
Regina v Poole [2006] NSWCCA 93			1			1
Sharyn Ann Munn v Regina; Thomas Miller v Regina [2006] NSWCCA 61			1			1
AE V R [2008] NSWCCA 52					1	1
DJV v R [2008] NSWCCA 272		2			1	3
ES v R (No1) [2010] NSWCCA 197				1	1	2
RJ v R [2010] NSWCCA 263			1			1
RWC v R [2010] NSWCCA 332				1	1	2
Colquhoun v R (No 1) [2013]					1	1
Colquhoun v R (No 2) [2013]		1			1	2

Total number of admissibility errors	1	3	3	3	6	16
Objection taken	1	2	2	3	4	12
No objection taken	0	1	1	0	2	4

APPENDIX A15.8: SUCCESSFUL MISDIRECTION CASES BY SUCCESSFUL GROUND OF APPEAL

	Context/relationship evidence	*Edwards* warning and/or consciousness of guilt	*Longman* warning	Miscellaneous misdirections	*Murray* direction	Tendency/coincidence evidence	Unbalanced judicial summing up	Unreliability warning	Number of successful misdirection grounds
R v WSP [2005] NSWCCA 427			1						1
Galvin v Regina [2006] NSWCCA 66				2					2
Healey v Regina [2006] NSWCCA 235	1		2				1		4
Qualtieri v Regina [2006] NSWCCA 95	1							1	2
RELC v Regina [2006] NSWCCA 383								1	1
Sheehan v Regina [2006] NSWCCA 233			1						1
TJC v Regina [2006] NSWCCA 413				1					1
Norris v Regina [2007] NSWCCA 235				2					2
RJS v Regina [2007] NSWCCA 241				1					1
AGW v Regina [2008] NSWCCA 81				1					1
DJV v R [2008] NSWCCA 272				1		1			2
Healey v R [2008] NSWCCA 229		1							1
Rodden v Regina [2008] NSWCCA 53	1					1			2
JDK v R; R v JDK [2009] NSWCCA 76	1								1
CC v Regina [2010] NSWCCA 337		1					1		2

Chivers v R [2010] NSWCCA 134				1	1				2
ES v R (No 1) [2010] NSWCCA 197						1			1
ST v Regina [2010] NSWCCA 5			1						1
RWC v R [2010] NSWCCA 332						1			1
DJF v R [2011] NSWCCA 6	1								1
Mark McKey v Regina [2012] NSWCCA 1	1								1
SKA v Regina [2012] NSWCCA 205				1		1			2
Colquhoun v R (No 2) [2013] NSWCCA 191	1								1

Total number of misdirection errors	**7**	**2**	**6**	**8**	**1**	**5**	**2**	**2**	**35**
Objection taken	1	0	1	2	1	2	0	0	7
No objection taken	6	2	5	6	0	3	2	2	28

APPENDIX A15.9: TABLE OF TENDENCY/COINCIDENCE EVIDENCE CASES

	Case	Overall appeal successful?	Context of CSA	Basis for appeal (grounds relating to tendency and/or coincidence evidence)	Appellant submissions	Held
1.	***Colquhoun v R (No 1)*** **[2013] NSWCCA 190** **Appeal against conviction**	Yes	Extrafamilial – Non-historical child sexual abuse	Ground 1: • A miscarriage of justice occurred as a result of the admission and/or use of evidence of sexual interest in the appellant.	Ground 1 Appellant: • The evidence the subject of ground 1 can be particularised as follows: ◦ (a) Photographs and video recordings of the complainant in the appellant's possession; ◦ (b) Telephone conversation between the complainant's mother and the appellant subsequent to the alleged offences. • As regards (a), the CDs were not relevant except to show sexual interest of the appellant in the complainant; this evidence therefore amounted to tendency evidence and was, in the absence of compliance with *Evidence Act* 1995 s 96, inadmissible. (at [19]) • As regards (b), the statements attributed to the appellant that he was missing the complainant, and that the psychiatrist with whom he had spoken had suggested he had separation anxiety, amounted to evidence of sexual interest in the complainant and were therefore inadmissible as tendency evidence. (at [33]) Ground 1 Crown: • As regards (a), the evidence was admissible as context evidence [20]. ◦ It provided independent support for the complainant's evidence of the types of recreational activities that he enjoyed with the appellant. Furthermore, the evidence did not suggest any sexual interest of the appellant in the	Held Ground 1: Accepted in part • As no objection was made at trial, leave is required under r 4 of the *Criminal Appeal Rules* in order to rely upon this ground [12]. • As regards (a): • The Crown has implicitly accepted that if the evidence did in fact suggest a sexual interest, compliance with ss 97 and 101 of the *Evidence Act* 1995 would have been required. No direction on the evidence was sought or given at trial [20]. • Even if the evidence was admitted purely as context evidence, where the impugned evidence is that an accused had a sexual interest in a child complainant and acted upon that interest, the need for a tendency direction is apparent [21]. ○ The case law has gone further and treated evidence of an accused's sexual interest in a child complainant as being tendency evidence subject to the strictures of ss 97 and 101 of the *Evidence Act,* even when the evidence does not suggest that the accused had previously committed an unlawful sexual act in relation to the child [22]. ○ See: *R v AH* (1999) 42 NSWLR 702,708-9; *Qualtieri v R* [2006] NSWCCA 95; 171 A Crim R 462, [87]; *DJV v R* [2008] NSWCCA 272; 200 A Crim R 206, [30, [39]; *ES v R (No 1)* [2010] NSWCCA 197, [38]-[40];

					complainant.	*ES v R (No 2)* [2010] NSWCCA 198, [67]; *RWC v R* [2010] NSWCCA 332, [126]-[128]; *BBH v R* [2012] HCA 9; 245 CLR 499, [152]; *Steadman v R (No 1)* [2013] NSWCCA 55, [10]. ○ 'Whilst I have some misgivings as to whether evidence which is in effect no more than evidence of motive (because it is simply evidence of a sexual interest of the accused in the complainant which has not been acted upon) should be treated as tendency evidence, the Court must accept the existing approach, at least where, as here, there has been no specific challenge to it' [22]. • Whilst many photographs were admissible as context evidence, many were not; many showed the complainant, and were close-up photographs of the complainant's body. This character of the photos was emphasised by the evidence of the complainant's mother, and was emphasised in cross-examination by the Crown [25]. • Similarly, the video footage (which paused and focused upon the complainant's crotch) was the basis of implication and assertion concerning the nature of the relationship [26]. • The trial judge's summing-up was a plain invitation to the jury to form a view as to whether the footage indicated a sexual interest in the complainant, and therefore to engage in impermissible tendency reasoning [27]. • The photographs and film should not have been admitted, except insofar as they were reasonably necessary for purposes of context [29]. • Direction should have been given as there was a real risk of impermissible tendency reasoning. The evidence was "a significant feature of the trial, without which it is realistically possible that the outcome of the trial might have been different (*R v Wilson* [2005] NSWCCA 20; 62 NSWLR 346, [20]-[21])."

						The proviso to s 61(1) of the *Criminal Appeal Act* is inapplicable (at [29]). • Leave under r 4 of the *Criminal Appeal Rules* should be given [30]. • As regards (b): ○ This evidence "was comprehensible as simply indicating a close friendship between the appellant and the complainant and thus supporting the complainant's evidence of that. It was not suggested to this Court that at the trial this evidence had been sought to be used as evidence of sexual interest." [33]. • This second aspect of the first ground of appeal should be rejected [34]. Ground 1 accepted (in part); Grounds (2)-(8) rejected. Leave under ground 1 allowed. Appellant's convictions quashed. New trial of the charges; the appellant was convicted.

2.	***Colquhoun v R (No 2)* [2013] NSWCCA 191**
	
	Appeal against conviction
		Yes	Extrafamilial – Non-historical child sexual abuse	Ground 1:
				A miscarriage of justice occurred as a result of the admission and/or use of evidence of sexual interest of the appellant.
				
				Ground 2:
				The trial judge misdirected the jury with respect to the use of evidence of uncharged conduct.
					Appellant submissions:
					Grounds 1 and 2:
					• The grounds relate to the following evidence:
					  ◦ (a) Photographs and video recordings of children possessed by the appellant;
					  ▪ The Crown emphasised that the photographs were of children and not adults, and that were many were partially clothed; it was suggested that they were "the sort of photographs that one might find in a family album" and were "consistent with unusual interest" [11]-[12].
					  ◦ (b) The evidence of child witnesses WA and EG.
					  ▪ The Crown submitted that the appellant had an "usual relationship" with boys in the area and had a "focus on dealing with adolescent or near-adolescent boys" [14].
						Held Ground 1 and 2: Accepted
						• Not all of the evidence can be characterised as context evidence, as affirmed by its volume and content and the way it was utilised at trial [20].
						• It was not permissible for the jury to have regard to evidence of uncharged acts to establish a sexual desire or feeling of the appellant for the complainant, as the summing up suggested [21].
						• The summing up constituted an invitation to engage in impermissible tendency reasoning [21].
						• It was not permissible for the trial judge to indicate to the jury, without precise explanation, that the evidence was able to be used 'to show the relationship between the accused and the complainant' [22].
						
						Grounds (1) and (2) accepted, Grounds (3)-(11) rejected. Appeal allowed, appellant's convictions quashed, new trial directed

					Crown submission: Grounds 1 and 2: • The evidence was admissible to support the complainant's evidence that he regularly spent time with the appellant, swimming and fishing, in a context that was likely to be enjoyable for a young boy [19]. • Whilst the trial judge's direction on the use of the evidence was erroneous, the Court should nevertheless apply the proviso to s 61(1) of the *Criminal Appeal Act* and dismiss the appeal [23].	
3.	***RWC v R* [2010] NSWCCA 332** **Appeal against conviction**	Yes	Intrafamilial – historical child sexual abuse	Ground 3: The learned trial judge erred in law by permitting the crown to lead evidence from [KC] in that: • the evidence was irrelevant to any issue pertaining to the appellant's guilt of the offences; • the evidence was entirely prejudicial and lacked any or any proper probative value; and/or • the probative value of the evidence was clearly outweighed by its prejudicial effect. Ground 4: • The learned trial judge erred in law in failing to direct the jury on the use that could be made of the evidence of [KC] (complainant's sister) in determining the guilt of the appellant.	Ground 3 and 4: at trial the counsel made the following submissions: • "Your Honour it there assumes the sort of relevar really that one is really thinking about here to the facts in issue, to a fact in issue. Namely, whether not this was an example of unnatural passion or grooming or something of that nature and my submission is that the probative value does not a assume such a height that it outweighs the prejudicial effect of such material, particularly as not related to a point in time. " [103] • *"It's really very, very marginal but its prejudicial effect in my submission outweighs the probative value* … so really that's what the defence is saying there." (AB 376-377, italics added) [103]	Held Grounds 3 and 4: Accepted • The evidence in question was, on its proper evaluation, tendered as tendency evidence and that is the only relevance it could have had [130]. • The trial judge was denied the assistance, from both counsel, that he was entitled to receive. Neither made any attempt properly to identify the nature of the evidence, nor the appropriate tests to apply with respect to its admission. (at [132]) • There having been no notice given (and no application for dispensation), and the tests provided in s 97 and s 101 of the *Evidence Act 1995* not having been applied, the evidence ought not to have been admitted. (at [103]) • The written submissions filed on behalf of the appellant asserted categorically that the evidence of KC "surely was" background or relationship evidence. If that were correct, the admissibility test is that contained in s 137, to which no reference was made. Senior counsel for the Crown agreed. Senior counsel for the Crown was driven to take this position. If the evidence was properly categorised as tendency evidence, then it is clear that the appropriate steps (for example notice) had not been taken, and the appropriate tests (s 97, s 101) had not been applied. [124]

						Grounds 3 and 4 accepted. Appeal allowed, convictions quashed. New trial ordered on all counts, new trial ordered.
4.	***ES v R (No 1)* [2010] NSWCCA 197** **Appeal against conviction**	Yes	Intrafamilial - historical child sexual abuse	At [33] Ground 1: "The trial judge erred in admitting the tendency evidence of the complainant's sister 'K' observation of the appellant touching the complainant's genitalia." Ground 2: "The trial judge failed to adequately direct the jury and/or misdirected the jury in relation to this evidence."	-	Held Ground 1: Accepted • If evidence of uncharged acts is to be used in any way other than as context evidence, the requirements or tendency evidence need to be satisfied (*Qualtieri v R* [2006] NSWCCA 95). • The evidence potentially had considerable probative force as corroborating the complainant; but it would have that force only as motive/tendency evidence [43]. • The evidence was not admissible as motive/tendency evidence because of a failure to comply with *Evidence Act* s 97. • The admission over objection of this evidence was a miscarriage of justice [44]. Held Ground 2: Accepted • The trial judge said the jury was entitled to take K's evidence into account as corroboration of the complainant's evidence if satisfied beyond reasonable doubt that it had occurred [45]. ◦ The requirement of beyond reasonable doubt would only arise if K's evidence was admitted as tendency evidence, which it was not [46]. • Trial judge failed to combat the prejudicial effect of the wrongly admitted evidence; trial judge encouraged its use as corroboration, which it could not legitimately [46]. All 3 grounds of appeal accepted. Appeal allowed. Convictions and sentence quashed, new trial ordered.
5.	***DJV v R* [2008] NSWCCA 272**	Yes	Intrafamilial – non-historical child sexual abuse	Ground 3: The admission of the evidence of TB as 'context' evidence resulted in an unfair trial.	-	Held in regards to all grounds collaboratively: • Statutory framework: ○ Per s 97, evidence of character, reputation, conduct or tendency is inadmissible unless notice is given or the

	Appeal against conviction			Ground 4: The admission of the evidence of uncharged acts as 'context' or 'relationship' evidence resulted in a trial that was unfair. Ground 5: Her Honour failed to direct the jury that, before they could use the evidence of uncharged acts as evidence of tendency, they must be satisfied of that evidence beyond reasonable doubt.		Court deems it to have 'significant probative value' [11]. ○ Per s 101, the probative value of the evidence must substantially outweigh any prejudicial effect upon the defendant [12]. • The Court reviewed the decision of the High Court in *HML v R* [2008] HCA 16, and its discussion of tendency and context evidence and the common law: [19]-[27]. • The accepted position in NSW is that evidence of 'relationship' may be admitted unless excluded after consideration has been given to s 135 or s 137 of the *Evidence Act* [28]. • Context evidence does not require a direction that it be proved beyond reasonable doubt [31]. • The judge who made the evidentiary rulings acknowledged that the Crown did not rely on the 'uncharged acts' as tendency evidence. Instead, the Crown relied upon it as evidence of the 'relationship' between the appellant and complainant, in the sense considered in *Gipp v The Queen* [1998] HCA 21 [33]. • Because the Crown said it did not tender it as tendency evidence, consideration of its admissibility was confined to s 135 and s 136 of the *Evidence Act* [33]. • The relevant test: ○ It is true that each event forms part of the 'relationship' between the appellant and complainant; however, that is not the touchstone for admissibility [36]. ○ There must be an issue in relation to the charged act(s) which justifies the admission of evidence of other events, including other occasions of sexual abuse. Unless there is such an issue, the evidence is likely to only be admissible, if at all, as tendency evidence [36]. ○ Thus, only if the evidence of the incident(s) in the Daintree assisted in explaining the context within the relationship in which the charged acts

						occurred would it have been relevant [36]. • Application in the present appeal: ○ This was undoubtedly tendency evidence. Because there was no issue which justified the admission of the evidence as relationship evidence and it was not proffered as tendency evidence so it should have been rejected [39]. All grounds (1)-(5) accepted. Appeal upheld, conviction quashed, matter remitted back to district court for new trial.
6.	***AE v R* [2008] NSWCCA 52** **Appeal against conviction**	Yes	Intrafamilial – non-historical child sexual abuse	Ground 2: The admission of tendency and/or coincidence evidence had resulted in an unfair trial	Ground 2: • The trial judge erred in admitting tendency and/or coincidence evidence of alleged incidents with complainant 1 (PNE – stepdaughter) in the trial of the counts involving complainant 2 (CNE – daughter) By way of background: • In respect of tendency and coincidence, the Crown prosecutor at trial submitted that "the tendency relied upon by the Crown [...] is the tendency of the accused to engage in unwanted sexual activity with a young daughter [complainant 2] and a young step-daughter [complainant 1] who were under his authority. The coincidence evidence relied upon by the Crown is the improbability of the events as described by each complainant occurring as a matter of coincidence or chance." [38] • The trial judge held that the evidence had significant probative value under the tendency rule and coincidence rule due to the following features: [39] ○ "Both complainants were of a similar age when the assaults commenced – [complainant 1] was nine years of age and [complainant 2] was 11 years of age";	Held Ground 2: 1. At [37]-[50] per curiam: Bell JA and Hulme and Latham JJ: • The trial judge erred in admitting the evidence of complainant 1 at the trial of the counts involving complainant 2 under the coincidence rule: [43] and [46]. ○ The Crown on appeal conceded that "the allegations made by [complainant 1] were not of events that were substantially and relevantly similar to the allegations made by [complainant 2] nor were the circumstances in which they occurred substantially similar" [43]. ○ Complainant 2 complained of only one incident whereas complainant 1 described a history of sexual molestation [42]. ○ In that light, the similarities that the judge identified (see above) "were, in reality, unremarkable circumstances that are common to sexual offences against children" [42]. • The trial judge erred in admitting the evidence of complainant 1 at the trial of the counts involving complainant 2, under the tendency rule: [44] and [46].

					○ "Assaults on both complainants occurred at the appellant's residence in a bedroom"; ○ "Each of the complainants were [sic] residing with the appellant in a family unit when the assaults took place"; ○ "At the time of the assaults the appellant and the complainant were the only people present in the bedroom"; ○ "The first assault on each complainant was in 'largely identical terms'"; ○ "The appellant had warned each complainant, 'Don't tell anyone, he would always remind not to tell anyone and the accused told her she would get into trouble if she told'" • The trial judge also accepted that the Crown excluded the possibility of joint concoction (i.e. that complainant 1 and complainant 2, together, planned and fabricated the complaints against the appellant)	○ Whether the assaults occurred was in issue at the trial, so the possibility of joint concoction was essential [44]. ○ The trial judge applied the correct test (i.e. whether the evidence had substantial probative value). ○ Where the question of whether the assaults actually occurred is in issue, the possibility of joint concoction (where complainants, together, plan and fabricate the complaints) will be determinative of whether the evidence has substantial probative value. ○ The trial judge erred in finding there was no possibility of joint concoction: "the complainants were sisters and were in contact with one another at the time each made her complaint" [44]. ○ The possibility of joint concoction meant that, contrary to his Honour's finding, the evidence of complainant 1 did not possess significant probative value in proof of the allegation that the appellant assaulted complainant 2 [44]. ○ The prejudicial effect on the appellant is likely to have been great – there is a risk the jury was overwhelmed by the evidence of the long course of sexual misconduct against complainant 1 in considering whether to convict on the counts against complainant 2 [45]. Appeal allowed in respect of ground (2) (relating to counts 14 and 15), and new trial directed. At [11]: • "Count 14 – during the winter in 1995 CNE came home after a game of netball. The appellant was

						only person at home. He asked her to come over the bed on which he was lying. He pulled her nex him and put his hand under her underpants inser his fingers into her vagina." • Count 15 – this offence related to the same incident as that charged in count 14. The appellant touched CNE on the breasts. This was charged as an indecent assault." Appeal against conviction allowed for all (2) grounds. Appeal allowed. Verdicts and convictions on counts 11, 14 and 15 set aside. Verdict of acquittal substituted on count 11. New trial directed on counts 14 and 15.
7.	***Peter Versi v R* [2013] NSWCCA 206** **Appeal against conviction**	No	Intrafamilial – historical child sexual abuse	Ground 3: There was a miscarriage of justice in that the direction to the jury on tendency was unclear, confusing and misleading. Ground 7: There was a miscarriage of justice in that the directions by the trial judge, in addition to the directions on tendency and coincidence, were confusing and misleading when considered separately or in combination.	Ground 3 • There were unclear/confused directions as to the use to which the evidence of tendency (that the Appellant had a sexual interest in the complainant) might be put. Ground 7: • There is a risk that the jury was confused or misled on the facts and the law by the summing up.	Held Ground 3: Rejected • "Whilst there were some obscurities and misspeaking in the judge's directions, they were not such as to have led to any real risk that the jury might have been confused or misled" [144]. • "The judge warned that the jury must not reason that because the accused had committed one offence or more on another occasion, that he must have committed others" [143]. • "I am fortified in this conclusion by the fact that Mr Odgers did not seek any redirection upon this ground" [144]. Held Ground 7: Rejected • Whilst the directions from the judge were not always happily phrased, they were clear and there was no redirection sought from counsel at the time. All grounds of appeal (1)-(8) rejected. Appeal dismissed.
8.	***BJS v R* [2013] NSWCCA 123**	No	Institutional – historical child sexual abuse	Ground 2: The sentencing judge erred in permitting the Crown to rely upon tendency evidence.	Ground 2: • There should have been 4 separate trials with no tendency/coincidence evidence. • The tendency evidence did not have the requisite significant probative value that	Held Ground 1: Rejected • The sentencing judge's summary of the tendency evidence was accurate – he focused on the consistency of the relevant tendency, not the factual differences.

	Appeal against conviction and sentence			Ground 8:
				That sentencing judge erred in refusing to discharge the jury consequent upon permitting the Crown Prosecutor to cross-examine the Appellant as to tendency.
					substantially outweighed any prejudicial effect on the accused.
					• The tendency sought to be proved was that:
					  ○ the Appellant had a tendency to have a sexual interest in girls aged 7-17;
					  ○ the Appellant used his position of authority and relationships with families to gain access to girls with whom he wished to engage in sexual activities;
					  ○ that the particular activities he attempted to engage in were similar.
					• There were substantial differences in the behaviour alleged by each of the complainants – different sexual forms of offending alleged to have been committed upon girls of different ages in a variety of circumstances.
					• A risk of contamination/concoction of the evidence – sibling relationship between some of the complainants and tendency witnesses and media reporting.
					
					Ground 8:
					• At trial, questions were put by the Crown to the Appellant as to his interest in "young girls and young women."
					  ○ The phrase "young girls and young women" went beyond the tendency that was advanced in support of the tendency evidence (an inference that the Appellant had indecently assaulted other young girls and young women beyond those who had given evidence).
					• The Appellant was asked about witnesses "coming along" to give evidence, and if they were mistaken in the evidence which they gave.
					  ○ These questions were impermissible because the Appellant was being asked questions about whether a
						• The sentencing judge was well aware of the risk of contamination and excluded some proposed tendency evidence on this basis.
						• The sibling relationships in question did no more than establish a mere speculative chance of concoction, and any publicity was limited in its terms.
						
						Held Ground 8: Rejected
						• "There was no suggestion in any of the evidence that other unspecified young girls and young women had been the objects of sexual interest by the Appellant." [189]
						• The question asked of the Appellant fell well short of asking him to explain or speculate on why witnesses had given evidence. He was not asked why a witness gave particular evidence. He was asked whether a witness was mistaken to suggest error, rather than invite an opinion as to the basis for the contradictory evidence. [195].
						
						All grounds of appeal (1)-(10) rejected. Grounds (1)-(9) appeal dismissed.
						Leave to appeal ground 10 granted, but appeal dismissed.

					complainant, or other witness, had a motive to lie.	

9.	***R v SK; SK v R* [2011] NSWCCA 292** **Appeal against interlocutory judgement as to the admission of evidence**	No	Intrafamilial – historical child sexual abuse	Ground 1: Judicial error in concluding that the probative value of the evidence substantially outweighed the prejudicial effect Ground 2: Judicial error in concluding that there was no specific prejudice to the applicant in a joint trial and that the allegations by KD, WS and DiS (3 female complainants) could be tried together Grounds of Appeal by Crown: Ground 1: Judicial error in finding that the evidence of offences against DaS (fourth complainant, male) could not be used as tendency evidence in respect of the female complainants.	Appellant submissions: Ground 1: • The Judge expressed some reservations with respect to the probative value of the evidence and that reservation was inconsistent with her Honour's finding that the evidence had significant probative value [20]. • The temporal difference between the events alleged by the complaints, up to 8 years, is indicative of the limited capacity of the evidence in each case to rationally affect the probability that the applicant committed sexual assaults upon any of the complainants [20]. Ground 2: • Judge erred in stating that "no specific risk of what prejudice the accused will suffer, other than this generality has been referred to" when the oral and written submissions of counsel for the appellant had cited a number of cases in support of the proposition that there was a "real risk that the evidence might be misused by the jury in some unfair way" [31]. Crown Submission: Ground 4: • The evidence of DaS was entirely consistent with the proposed evidence of the female complainants, in that it demonstrated a modus operandi or pattern of behaviour towards young relatives between 6-12 years, who visited the premises where the applicant lived with his mother. When WS and DiS attained the age of 13 or 14, the only remaining children in the extended family were two boys, one of whom was DaS. As such, the appellant turned his attention to DaS. [41]	Appellant Held Ground 1: Rejected • There was no inconsistency between the Judge's remark and the finding that the evidence had significant probative value. The applicant's submissions overlook the distinction between a finding that evidence is capable of rationally affecting the probability that the applicant committed the assaults, on the one hand, and a finding that the jury would ascribe to that evidence, when taken together with other evidence in the trial, probative value of a significant degree [25]. • The lapse of time between the alleged assaults is a powerful factor in reasoning towards the commission of these offences by the applicant. The Crown case is that the appellant would stop the assault when the children were of an age that he could no longer have influence over them. • In the absence of any prejudicial effect being identified by the applicant, beyond the generic prejudice inherent in tendency evidence (that a person with an established tendency will yield to that tendency whenever the opportunity arises), the applicant has not demonstrated that it was not open to the Judge to have found the test under s 101 was satisfied [28]. Held Ground 2: Rejected • The applicant did not identify how the risk of misuse of the evidence by the jury could arise. It is not prejudicial simply because it tends to prove the commission of the offences. That constitutes, subject to proper directions, appropriate use of the evidence, not its misuse [34]. • The admissibility of the tendency evidence dictated the fate of the separate trial application – because the tendency evidence was correctly admitted, this ground of appeal failed. Crown: Held Ground 4: Allowed

						• Gender was no aspect of the Crown's reliance upon the tendency evidence. The tendency evidence acquired its force from the age of the complainants, the applicant's ability to control the abusive environment, and his ability to exercise influence over the complainant. It was incorrect to reject the evidence of DaS as tendency evidence. The inevitable consequence of this is that the trial of the applicant ought to proceed on all charges [42-3]. Grounds (1)–(3) rejected. Ground (4) Rejected. Appeal by appellant as to the admission of evidence dismissed. Appeal by Crown as to the exclusion of evidence allowed.

10.	***FB v R; R v FB* [2011] NSWCCA 217** **Appeal against conviction and sentence**	No	Institutional – Non-historical child sexual abuse	Ground 1: • Trial judge erred in admitting the tendency evidence of witness, MD (witness also allegedly assaulted by appellant), pursuant to section 97 *Evidence Act*. There was a miscarriage of justice due to the failure by the legal representatives of the appellant to adduce evidence of the specific contents of media reports relating to the witness, MD.	Ground 1: • At trial, appellant agreed that he had performed oral sex on MD and also had sexual intercourse on the first occasion. He denied, however, that she was initially asleep and that he had given her pills. He claimed the sexual acts were consensual. • There was a miscarriage of justice because appellant's legal representation did not admit evidence of a newspaper report that showed that SE (complainant) could have discovered that another person had made allegations that she was drugged and raped. The two limited ways in which the appellant argued that the evidence had significance were first, its capacity to bear on the tendency argument and secondly, its general ability to enlarge the environment in which there was discussion in the Grafton area concerning the accused's aberrant sexual behaviour [52].	Held Ground 1: Rejected

						• Evidence may be offered simply to show a tendency to act in a particular way, not necessarily in a criminal manner. Indeed, it is not necessary that the tendency to commit a particular crime or, for that matter, to commit a crime at all. The trial judge correctly recognised that, in order for MD's evidence to have significant probative value as required by section 97, the Crown had to establish that the evidence possessed a degree of relevance to the events charged, such that it could be said that it was "important or of consequence". The trial judge identified the relevant fact in issue in the trial. This was whether or not SE (complainant) had been subjected to the appellant's sexual activity in the way she had asserted [24-25]. • It was clearly open to his Honour to find, as he did, that the evidence of MD made it significantly more likely that the appellant had carried out the acts alleged by SE, as the Crown case asserted. • His Honour noted, in both decisions, that mere contact or the possibility of contact does not, in itself, necessarily lead to an indication of a real chance of concoction. Overall, his Honour was satisfied that, on the whole of the material before him, at the time of the initial determination, that there was no real chance of concoction [36]. • Trial judge concluded that none of the material as to SE's friendship with either AD (MD's Brother) or TB (AD's girlfriend), nor the contents of the brief telephone conversation between the two young women, raised even a hint of suspicion that there had been concoction or collusion between them [38]. • It is not necessary for me to traverse every single matter sought to be relied on by Newton under the headings of either contamination or concoction. His honour carefully examined all the matters which were argued before him, they generally being those matters presently raised before this court. He rejected the

						submission that, individually or collectively, the matters relied upon pointed to a real chance of concoction or contamination. In my opinion, it was clearly open to his honour to make the findings that he did [45]. • There is no evidence from which it could be said that the failure to obtain the newspaper article (if that is what happened) demonstrates 'flagrant incompetence' on the part of trial counsel [54]. Importantly, there was no reference in the article to the two white tablets nor that the girl fell asleep. This level of detail – critical to the complainant's evidence is not disclosed in the articles and cannot be inferred from the simple use of the word 'drugging'. In any event the complainant was clear in her evidence at trial that she had not seen articles in any newspaper or magazine [54]. The failure to adduce evidence of the articles could have been a tactical error but even if it was not, overlooking this evidence does not clear that bar to permit appellate intervention. Rejected on all grounds of appeal against conviction (1)-(4). Appeal against sentence ground (5) accepted. Appeal against conviction dismissed. Crown Appeal against sentence accepted. Sentence quashed. New sentence imposed.
11.	***LJW v R* [2010] NSWCCA 114** **Appeal against conviction**	No	Intrafamilial – Non-historical child sexual abuse	Ground 2: • The trial judge erred in admitting into evidence an alleged observation by the complainant of the accused masturbating in a motor vehicle in the course of a trip between Sydney and Muswellbrook Ground 3: • Trial judge erred in his directions to the Jury concerning tendency evidence	Ground 2: It is submitted that the trial judge erred in: (a) "Admitting the evidence as relevant to the state mind of the accused and part of the *res gestae* of sequence of events leading up to the arrival and sleeping arrangements at Muswellbrook; (b) Applying the test of "unfair" prejudice which is no part of the test under s 101(2) Evidence Act. (c) Failing to determine on what counts the evidence would be admissible (d) Failing to consider how an accused was likely to b prejudiced if evidence was admitted for the purp of tendency reasoning on one or more counts bu not on others;	Held Ground 2: Rejected • "In my opinion that kind of reasoning would not be reasoning that the appellant was a type of person with a tendency to engage in sexual activity in the presence of boys. Rather, it was reasoning that, on this particular day, the appellant exhibited a state of mind displaying interest in and a lack of inhibition from such activity, a state of mind as to which it could be inferred that it was probable that it continued until the night-time of that day" [51]. • "In my opinion, what the trial judge said sufficiently indicates that he did address and determine the tests contained in s 101(2) and s

					(e) Failed to perform the balancing exercise required under s 101(2). *R v Blick* (2000) 111 A Crim R 326 [20] (f) Alternatively the trial judge failed to give consideration to the exercise of discretion pursuant to s 137 Evidence Act." [43] Ground 3: • "It is submitted that the trial judge's directions concerning the tendency evidence were incorrect and misleading in the circumstances of the case in: […] • (b) failing to direct the jury that they could not use tendency reasoning in respect to the "alleged events in the car" in part of their reasoning in respect to the 1st and 2nd counts ○ The judge's directions are from SU 6-9 14/3/08 ○ The Courts have emphasised the need for care in identifying the basis upon which the evidence is admitted, either tendency or context ○ It is submitted that a specific "BRS" direction was required. Where evidence revealing criminal or reprehensible propensity is admitted, but its use is limited to non propensity or tendency purposes, for example those considered proper in that case, then it is to be used only for those purposes and not as proof of the accused's guilt otherwise: *BRS v The Queen* [1997] HCA 47; (1997) 191 CLR 275" [54]	137; and I see no error in that determination. I do not think there was any significant prejudice to the appellant and certainly not any unfair prejudice in admitting this evidence as tendency evidence on counts 3 and 4 but not on counts 1 and 2" [53]. Held Ground 3: Rejected • "In my opinion what the trial judge said could not reasonably have been understood as a suggestion by him that what occurred in the car could amount to a crime"[56]. • "The written and oral directions clearly set out how the jury were permitted to use evidence of the events in the car: that is, as to state of mind and res gestae in relation to counts 1 and 2, and as tendency evidence in relation to counts 3 and 4" [57]. • "The trial judge referred to the possibility that the appellant was 'giving way to thoughts in his mind of sexual activity ahead with the boys'… In the context of the whole summing up and the written directions, in my opinion, these are references to what the jury might infer about the appellant's state of mind on that particular occasion and not to some general 'guilty passion'" [58-59]. All grounds (2)-(9) rejected. Appeal dismissed.
12.	***KTR v R* [2010] NSWCCA 271** **Appeal against conviction**	No	Intrafamilial – historical child sexual abuse	Ground 2: Directions in relation to evidence of violence were inadequate	Ground 2: • The trial judge should have directed the jury on the evidence of violence, both at the time the evidence was given and in the summing up. This direction should have told in clear terms that the evidence was tendered as background to the relationships, and could not be used as tendency evidence. Citing *R v JDK* [2009] NSWCCA 76: [17]	Held Ground 2: Rejected • The appellant's contention reflects a misunderstanding of *R v JDK* [2009] NSWCCA 76 [118]. ○ The evidence in question explained the complainants' apparent acquiescence and failure to report; as the trial judge directed the jury at the conclusion of KG's evidence, this was sufficient as the jury would have 'readily understood the

					Ground 3: • The Crown Prosecutor 'exceeded the boundaries permitted to a prosecutor' by making submissions on material not in evidence and making 'intemperate or inflammatory comments tending to arouse prejudice or emotion in the jury'. Citing *R v Livermore* (2006) 67 NSWLR 569; *R v DDR* [1998] 3 VR 380 [126]. • The address sought to "collapse the boundaries between the appellant's violent conduct and the charged sexual acts" by inviting the jury to use the evidence impermissibly as tendency evidence [122]. • The tendency notice identified sexual intent, not violence; the Prosecutor thereby invited the jury to reason directly from the appellant's violence to guilt vis-à-vis the sexual offences [125].	purpose for which similar evidence from the other witnesses was admitted'. [120]. ○ The directions 'did not elevate the evidence beyond its appropriate significance' and trial counsel raised no issue. Rule 4 applies. Held Ground 3: Rejected ○ The Crown Prosecutor's address was strong, but not inappropriate; the evidence justified the submission made by the Crown [123]. ○ Whilst the evidence of MW should have been excluded, the force of the admissible evidence suggests that its admission was not significant to the jury's verdict [124]. ○ No application was made by counsel at trial for a direction; this suggests that "the adverse impact now suggested […] may not have been the experience of those in the Court" [127]. ○ The evidence of violence contextualised the sexual abuse and affirmed that "any inclination they had to resist or complain was understandably influenced" by the appellant's violent behaviour [128]. All grounds of appeal (1)-(3) rejected. Appeal dismissed.
13.	***ES v R* (No 2) [2010] NSWCCA 198** **Appeal against conviction**	No	Intrafamilal – historical child sexual abuse	Ground 1: The trial miscarried by virtue of the reception of inadmissible and prejudicial evidence, and the treatment of the same by the Crown Prosecutor and the trial judge.	Ground 1: • This evidence lacked any probative value as context and its admission as tendency evidence under ss 97 and 101 of the *Evidence Act* was not satisfied. Item (4) was particularly prejudicial [52]. • There was no direction to the jury at the time of admission of this evidence; the directions given in the summing up were inadequate [43].	Held Ground 1: Rejected • As regards evidence of the mother, it was relevant in filling out a 'realistic picture' of the relationship between complainant and appellant. However, to the extent that it could be considered as providing corroboration, it would be evidence of a sexual interest normally admissible only as tendency evidence. [67]. ◦ On the other hand, its relevance as context evidence is strong. Whilst if objected to, it ought to have been rejected, the evidence was not objected

						to and in fact used to advance the appellant's case; it does not now give rise to a miscarriage of justice justifying leave under r 4 [69]. • Trial judge failed to direct the jury adequately on the tendency evidence. However, in absence of a request for further direction, no miscarriage of justice justifies leave under r 4 [71]. Ground 1 (only ground of appeal) rejected. Appeal dismissed.
14.	***BP v R; R v BP* [2010] NSWCCA 267** **Appeal against conviction**	**No**	Intrafamilial - historical child sexual abuse	Ground 1: There was a miscarriage of justice because the trial judge did not order separate trials in respect of the counts as to the complainants. Ground 2: There was a miscarriage of justice as a result of the trial judge's directions in respect of tendency/coincidence evidence.	Ground 1: • The trial judge erred in holding that "evidence in respect of charges in relation to each complainant was admissible in respect of charges relating to other complainants as tendency and/or coincidence evidence, and on that basis rejecting the application for separate trials" [98]. • The trial judge was in error in holding that the probative value was not really challenged, and for failing to give reasons for holding that the evidence did have significant probative value [99]. • The real assertion made by the tendency and coincidence notices was that the appellant had a sexual interest in young children • The trial judge further erred in dealing with the question of concoction and/or contamination. (at [101]-[104]) Ground 2: The misdirections of the trial judge resulted in a miscarriage of justice. Specifically, the trial judge misdirected the jury in the following respects: [127] • "(1) In categorising the appellant's alleged tendency as "an obsession with young prepubertal females and their sexual organs", thereby suggesting that the appellant was the kind of person who would commit the charged offences; • (2) In telling the jury that they may be satisfied	Held Ground 1: Rejected • The probative value of the evidence depends upon its probative value in establishing the tendency and on the probative value of the tendency (if established) in relation to an issue in the case. To be admissible, the evidence "must have *significant* probative value. It must be capable of rationally affecting the probability of the existence of a fact in issue to a significant extent, meaning (at least) an extent greater than required for mere relevance" [107]. • "[F]eatures of the appellant's conduct described by each complainant were sufficiently similar and sufficiently unusual for the evidence of each of them to have significant probative value in showing the specified tendencies". *O'Keefe* and *CGL* are distinguishable. (at [112]-[114]) • The finding of the trial judge as to concoction was upheld; there was no real chance of concoction and consideration of the question does not alter the conclusion regarding the probative value of the evidence. (at [115]-[120] • There must be a risk of contamination that goes "to the substance of the evidence, and not merely to incidental details of no materiality". In any case, no error was shown in the trial judge's reasoning. (at [121]-[124]) • Since the evidence of the different complainants was admissible as tendency

					that the person who did one act *must* have done the others, and that the improbability of events occurring coincidentally *establishes* that the accused committed the offence; • (3) In confusing tendency and coincidence reasoning: *R v Phan* (1990) 54 SASR 561 at 567, *R v DCC* [2004] VSCA 230; (2004) 11 VR 129; and • (4) In not making it clear that, before they could use other acts to support a finding concerning any of the charged acts, they had to be satisfied beyond reasonable doubt of those other acts."	evidence in each of the cases, in my opinion there was no error in the trial judge's decision to permit the trials of complaints by SP, TP and TM proceeding together [125]. • The significant probative value of the evidence "substantially outweighed any prejudicial effect it may have had" [126]. Held Ground 2: Rejected • [The first, second, and third points were not accepted] ○ Each comment was either qualified or must be viewed in its complete context. (at [128]-[130]) • As regards the third point, there was "not in this case the sharp distinction between tendency and coincidence reasoning identified" in *R v DCC* [2004] VSCA 230. In the present case, the "commission of some [acts] could evidence a tendency and thereby increase the probability that the appellant committed others" [133]. • As no direction was sought at trial, leave is required to rely on this alleged misdirection. "[E]ven if the trial judge did err in failing to clearly distinguish tendency and coincidence reasoning, there was no miscarriage of justice such as would justify leave" [134]. All grounds against conviction (1)-(3) rejected. Appeal against conviction dismissed.
15.	***AW v R* [2009] NSWCCA 1** **Appeal against conviction**	No	Intrafamilial, Non-historical child sexual abuse	Ground 3: Evidence admitted as tendency evidence lacked the degree of probative force that was capable of substantially outweighing any prejudicial effect upon the appellant (the threshold test of s97(1)(b) and s101(2) Evidence Act)	Ground 3: • Compared to other similar cases (*R v MM* [2004] NSWCCA 364), the tendency evidence at trial lacked sufficient detail and was unsupported by objective evidence.	Held Ground 3: Rejected • "There was a degree of particularity and contemporaneity in the tendency evidence that allowed the trial judge to reach the conclusion that it was significantly probative" [48]. All grounds of appeal (1)- (4) rejected. Appeal dismissed.
16.	***Clark v R* [2008]**	No	Non-historical child sexual	Ground 1:	Ground 1:	Held Ground 1: Rejected In respect of the tendency evidence:

	NSWCCA 122 **Appeal against conviction**		abuse, extra-familial	The trial miscarried for a number of reasons (Ground 3): There was insufficient evidence to convict on the first (recruiting for child pornography) and second (indecent assault) counts (Ground 4): The verdicts on the first and seconds counts were unsafe or unreasonable	• The trial judge erred in admitting evidence as tendency evidence • The trial judge did not identify the count to which the tendency evidence (some of which was adduced by the appellant, which the appellant believed would go to his defence) related [103]. • Some of the evidence in the tendency notices was inadmissible under section 94 of the *Evidence Act* because it was directed to facts in issue [107]. • Some of the evidence tendered by the appellant contained highly prejudicial material and asserted that the appellant committed other criminal acts [110]. Ground 3: "The evidence of the complainant did not prove the case and [...] his Honour must have used tendency reasoning, relying on the statements of other youths" [159]. Ground 4: • The trial judge was "apparently impressed by the evidence of witnesses as to tendency/coincidence evidence called by the Crown" [198].	• A failure to link the tendency evidence to a count did not make the evidence inadmissible [104] • The evidence in the tendency notices the appellant claimed was inadmissible under section 94 was not inadmissible: the evidence was incapable of proving tendency and was not tendered for that purpose [108] • The trial judge did not take into account any of the evidence tendered by the appellant asserting that the appellant committed other criminal acts [111] In respect of use of witness statements • The trial judge did not use the statements for a tendency purpose [142] • In any event the statements did not harm the appellant [142] Held: Ground 3: Rejected • Per Barr J with whom Bell JA and Buddin J agreed: ○ The trial judge was entitled on the evidence to find that the appellant had tried to recruit the complainant to take part in the production of pornographic photographs Held: Ground 4: Rejected In respect of the tendency / coincidence evidence • The appellant's submission that the trial judge was "apparently impressed by the evidence of witnesses as to tendency / coincidence evidence called by the Crown" was not correct [199]. • The tendency evidence was not called by the Crown, it was called by the appellant [199]. • In any event, the trial judge did not have regard to it other than if it assisted the defence [199]. All grounds of appeal rejected, appeal dismissed.
17.	***R v Richard Norman***	No	Intrafamilial, non-historical	Ground 1:	Ground 1:	Held Ground 1: Rejected

	***Mearns* [2005] NSWCCA 396** **Appeal against conviction and sentence**		child sexual abuse	The trial judge erred by giving inadequate and incorrect directions in respect of the relationship evidence.	• The evidence of uncharged acts was effectively left to the jury as (i) relationship evidence, and (ii) tendency evidence. This was despite the evidence being admitted only for the purposes of relationship evidence [53]. • The direction of the trial judge fell short of what was required to prevent the jury from using the evidence on a tendency basis [53]. • The trial judge inadvertently introduced notions of 'guilty passion' and therefore tendency evidence at [60].	• The Court reviewed pre- and post-*Evidence Act* authority on directions of this nature and its relationship to the *Evidence Act*, particularly the broad conceptions of 'guilty passion' and 'contextual evidence'. In essence, the Court reiterated that evidence of uncharged acts as demonstrative of 'guilty passion' now required compliance with the Act under the statutory requirements for the admission of tendency evidence [57]-[65]. • The trial judge substantially relied on the direction in *Regina v Sydney Wickham* (17 December 1991, unreported) and thereby overlooked the critical distinction between that case and the present trial [66]. • The question therefore arises whether the direction and the omission of a specific anti-propensity warning gave risk to a risk of impermissible tendency reasoning, to be determined by examination of trial conduct and the summing up [67]. • The appellant's counsel made no reference to the acts in the closing address, the evidence only surfacing in the summing up by the Crown prosecutor [70]. • An extensive direction was given on the issue of delay in complaint, including the difficulties faced by the appellant in meeting allegations extending over a number of years [70]. • The whole of the direction, but for two sentences which 'obliquely' raised aspects of tendency evidence, was entirely in conformity with restricting the use of the evidence to understanding the broader sexual history or context within which the charged acts occurred [71]. • "The appellant's counsel at trial, a person who is attuned to the discernment of potentially prejudicial directions, did not interpret those sentences in that way. Still less would a number of lay persons divine such a meaning from these unfortunate words" [71]. • There was no miscarriage of justice and rule 4 applies.

						All grounds (1)-(5) rejected. Leave against conviction dismissed. Leave to appeal against sentence granted. Appeal dismissed.
18.	***R v Fletcher* [2005] NSWCCA 338** **Appeal against conviction**	No	Institutional – historical child sexual abuse	Ground 1: "The learned trial judge erred in law in admitting the evidence of [GG – Witness who had sexual encounters with appellant), because: • it was not tendency evidence within the meaning of the Evidence Act s97; • it did not have significant probative value; • the probative value of the evidence did not substantially outweigh its prejudicial effect on the appellant (s101); • there was no ground for its admission." Ground 2: "If the evidence of [GG] was admissible (which the appellant denies) the learned trial judge erred in law in directing the jury that the evidence could be used as showing a tendency to commit each and all of the offences charged in the indictment and its use should have been confined to showing a tendency to commit the offence the subject of Count 4" [31].	Ground 1: The appellant argued that the evidence of GG was not admissible under s97 because [53]: 1. "Evidence did not have significant probative value. 2. The probative value of the evidence did not substantially outweigh the prejudice to the accused. 3. It was evidence of two acts of one type remote in time and circumstance from any of the acts charged. The only similarity was to the single act charged in Count 4. It was too remote in time and circumstance to be admissible as evidence relevant to Count 4. Even if admissible in respect of the act alleged in Count 4, it was irrelevant to all the other counts and its use as tendency evidence should have been restricted to Count 4. 4. The evidence did not pass the stringent test posed by s 101(2) and therefore could not have survived the narrow 'unfair prejudice' test in s 135 or s 137. 5. Had the appellant been charged with the two offences alleged by [GG], it is highly likely he would have succeeded in an application to have the [GG] charges tried separately from the [charges concerning the complainant], because evidence of the former would not get in as evidence of the latter. 6. The effect of the evidence was to permit evidence of irrelevant bad character to taint the jury's deliberations and to deprive the appellant of the real chance of an acquittal on each charge."	Held Ground 1: Rejected • The challenge to the admission of the evidence is, therefore, effectively an attack upon the decision making process at each step of the sequence involved in a consideration of the admission of evidence under s 97 [54]. • The present appellant's argument focused too narrowly upon a tendency to have sexual intercourse in a particular fashion. • The DPP's explanation, provided to the appellant's legal advisors, shows that the "tendency" which it sought to establish was wider, and more detailed. • Tendency evidence is able legitimately to be used to prove that the appellant has a tendency to commit a crime of the kind and circumstances alleged. • But in order to find the appellant guilty, there would need to be evidence that proves, beyond a reasonable doubt, that the alleged crime was committed. • In the current proceedings, the evidence of that crime was given by the complainant and accepted by the jury. • It would be impossible, given the nature of the allegation made, to find that this crime had been committed against the complainant and not find that the appellant was the perpetrator. • Therefore the identity of the perpetrator (and by deduction tendency evidence making the identification more probable) becomes of substantially less importance in the proceedings and the tendency evidence has far less significance when weighing it against the necessary prejudice [124] • The trial judge was asked, primarily, to admit the evidence on the basis of s 97 of the Act, which he did in relation to GG, to prove the

						conduct of the appellant when the major issue was conduct by any person. However, where that which is in issue is not the identity of the perpetrator but the happening of the event or conduct that was criminal, the tendency of the alleged perpetrator will less often meet the tests in the Act. Indeed, on one view, the tendency of the perpetrator may be irrelevant to that question [126]. • Tendency evidence will be rationally probative of the fact that a particular person, out of the class of persons with opportunity, may have engaged in certain conduct. • It will not, by proving the tendency of a particular person, prove, in the manner required to satisfy the admissibility tests required by the Act, that otherwise unproven conduct has occurred. • This has particular application when one is dealing with evidence that is said to be tendency or coincidence evidence. • Evidence that is relevant within the meaning of s 55, to either the occurrence of an event or the identity of the perpetrator (the major and a minor issues in these proceedings), but rendered inadmissible or unable to be used, by operation of either the requirement in s 7(1)(b) and s 98(1)(b) or the requirement imposed by s 101(2) of the Act, to prove tendency or lack of coincidence, is admissible for the purpose of assessing the credibility of a witness, subject to the provisions of s 137 of the Act [134] • Applying the above analysis to the current circumstances one is faced with the following scenario. • Firstly, the evidence of prior conduct (previously referred to as either the tendency conduct or other conduct) is not admissible and may not be relevant to prove the occurrence of the conduct charged. • The trial judge has allowed the tendency evidence to be used in an impermissible manner and, even though it would, on the above analysis, possibly be admissible for a

						different use, it would need to be, and was not, subject to specific directions to the jury as to its use nor was it subjected to s 137 of the Act [140]. • There is clearly more than sufficient evidence upon which the appellant could have been convicted and, assuming the complainant were to be believed, would have been convicted. • This is so even disregarding the evidence sought to be impugned in this appeal. • The problem is that the effect of the tendency evidence admitted was to taint the deliberations of the jury by using the evidence in a manner it could not legitimately do. • In those circumstances, the only proper course is for there to be a new trial on the charges [142]. Held Ground 2: Rejected • Despite the complaint about directions contained in the ground as framed, the substance of this ground is the admission of the evidence of GG in relation to all counts in the indictment. • Since in considering the above ground it was concluded that the evidence was admissible in relation to all counts, it follows that this ground cannot succeed [73]. Appeal against conviction dismissed.

APPENDIX A15.10: CASES RAISING A *LONGMAN* GROUND

	Case name	historical child sexual abuse	Categorisation	Success of case	Grounds of success where relevant
1.	***R v MDB* [2005]**	No	Extrafamilial	No	_
2.	***R v WSP* [2005] NSWCCA 427**	Yes 13 year delay (1995-2002) and 6 year delay (1989-2002), although both had disclosed prior without action taken	Intrafamilial	Yes, on *Longman*	Four grounds of appeal were raised in relation to two separate trials concerning the same offender; three of these, including a *Longman* ground, were for one trial and one, also a *Longman* ground, was raised in relation to the second trial. Only the *Longman* ground for the second trial was successful, with two of three judges allowing the appeal. Hulme J noted that the difference between his judgment and that of the dissenting judge, Spigelman CJ, "lies in impression" – first, of the strength of the warning required by *Longman*, and secondly, of the strength of the warning actually given by the trial judge [184]. Sully J concurred with these general reasons, adding that he believed the appellant was entitled to a "dangerous to convict" direction [93].
3.	***Sepulveda v R* [2006] NSWCCA 379**	Yes	Extrafamilial	No	_
4.	***Healey v Regina* [2006] NSWCCA 235**	Yes ~20 year delay (1987 – unclear disclosure)	Institutional	Yes, on *Longman*	Two *Longman* grounds were made out. First, the trial judge was held to have erred in extending a *Longman* warning to possible forensic disadvantage suffered by the Crown. Though in *R v* MDB, such a warning was allowed by virtue of being an "error of no effect", it could not be said that this was the case here. There was a possibility of impermissibly advantaging the Crown's case, and as such, the ground was upheld. Second, the *Longman* warning given was held to be inadequate, in that it failed to specifically warn about "the fragility of youthful recollection." Due to the particular facts in the case, including his age (around puberty) and history, and the length period of delay, the judgment stated that "the risk of fantasy and distortion could not be ignored."
5.	***JJB v Regina* [2006] NSWCCA 126**	Yes 9 year delay (offence 1987, report 1996 but accused failed to appear, arrested 2004)	Intrafamilial	No	_

6.	***Sheehan v Regina* [2006] NSWCCA 310**	Yes 19 year delay (1981-2000), although mother was aware	Intrafamilial	Yes, on *Longman*	The singular ground of appeal was that the trial judge erred by giving an inadequate *Longman* direction, in that: 1) the instructions were not framed as a warning, 2) they lacked the necessary strength, 3) they were undermined by other directions, 3) there was no warning concerning the difficulties of testing the evidence. There was no use of the words "dangerous to convict" for counts 1-9, which was described as "puzzling" by the appeal judgement. A distinction was drawn between different grounds; for counts 1-7, there was no corroboration. There was a substantial delay, and the allegations took place when the complainant was quite young in age. As such, for Counts 1-7, the appeal was allowed, as there was a possibility the appellant may not have been convicted had the *Longman* warning been adequate. However, for Count 10, the appeal was rejected, since the Crown case was "overwhelming," and thus no substantial miscarriage of justice could be made out.
7.	***Leonard v Regina* [2006] NSWCCA 267**	Yes 13 year delay (1989-2002)	Intrafamilial	No	-
8.	***Sharyn Ann Munn v Regina; Thomas Miller v Regina* [2006] NSWCCA 61**	No	Extrafamilial	Yes, but not on *Longman*; on grounds of 1) failure to discharge jury when at least one juror had bias against accused and 2) judicial error in interpretation of s 293 *Criminal Procedure Act* 1986.	-
9.	***DRE v Regina* [2006] NSWCCA 280**	No	Extrafamilial	No	-
10.	***KJR v R* [2007] NSWCCA 165**	Yes ~20 years (1979- unclear disclosure)	Intrafamilial	No	-
11.	***Perez v Regina* [2008] NSWCCA 46**	No	Extrafamilial	No	-

12.	***TJ v R* [2009] NSWCCA 257**	Unclear	Unclear (relationship not described)	No	-
13.	***AW v R* [2009] NSWCCA 1**	No	Intrafamilial	No	-
14.	***ST v Regina* [2010] NSWCCA 5**	Yes 7 years (1999-2006)	Extrafamilial	Yes, on *Longman*	The appeal succeeded on its *Longman* ground, namely that the trial judge failed to give a *Longman* warning as a result of the 6 year delay between the commission of the crime and eventual police complaint. An error was made in that the trial judge believed the relevant legislation to be s 294 of the *Criminal Procedure Act*. Under the amendment, the trial judge was required to determine whether "significant forensic disadvantage" had occurred before warning about delay, and that "the mere passage of time is not in itself to be regarded as establishing delay." However, the Act was amended before the trial but *after* the accused was tried, and *TJ v R* had previously held that in such circumstances, the amendments did not apply. As such, a *Longman* direction was required; however, only a *Murray* direction was given, which was insufficient.
15.	***GG v Regina* [2010] NSWCCA 230**	Yes 16 years (1984 – police report 2008, although informed friend in 1987, DOCS in 1988; first police report in 1996, but accused not located)	Intrafamilial	No	-

Note:

Green shaded cells signifies case was successful on *Longman* ground.

APPENDIX A15.11: CASE LIST – HISTORICAL CHILD SEXUAL ABUSE CASES

Year	Case name
2005	**n = 8**
1.	*R v BJB* [2005] NSWCCA 441
2.	*R v EGC* [2005] NSWCCA 392
3.	*R v Fletcher* [2005] NSWCCA 338
4.	*Regina v R T I* [2005] NSWCCA 337
5.	*R v Grattan* [2005] NSWCCA 306
6.	*R v WSP* [2005] NSWCCA 427
7.	*Regina v AEL* [2005] NSWCCA 148
8.	*Regina v Rymer* [2005] NSWCCA 310
2006	**n = 14**
9.	*D'Amico v Regina* [2006] NSWCCA 316
10.	*FV v Regina* [2006] NSWCCA 237
11.	*Gorrick v Regina* [2006] NSWCCA 232
12.	*Healey v Regina* [2006] NSWCCA 235
13.	*JJB v Regina* [2006] NSWCCA 126
14.	*KNP v Regina* [2006] NSWCCA 213
15.	*Leonard v Regina* [2006] NSWCCA 267
16.	*Lozanovski v R* [2006] NSWCCA 143
17.	*R v TWP* [2006] NSWCCA 141
18.	*RJP v R* [2006] NSWCCA 149
19.	*NWL v Regina* [2006] NSWCCA 67
20.	*Sepulveda v R* [2006] NSWCCA 379
21.	*Sheehan v Regina* [2006] NSWCCA 233
22.	*Sheehan [No 2] v Regina* [2006] NSWCCA 332
2007	**n = 11**

23.	*AJB v Regina* [2007] NSWCCA 51
24.	*GAT v R* [2007] NSWCCA 208
25.	*Kamm, William v Regina* [2007] NSWCCA 201
26.	*KJR v Regina* [2007] NSWCCA 165
27.	*MJL v Regina* [2007] NSWCCA 261
28.	*Nelson v Regina* [2007] NSWCCA 221
29.	*Norris v Regina* [2007] NSWCCA 235
30.	*Pavitt v Regina* [2007] NSWCCA 88
31.	*GAC v Regina, WC v Regina* [2007] NSWCCA 287
32.	*R v KRL* [2007] NSWCCA 354
33.	*Rowney v R* [2007] NSWCCA 49
2008	**n = 12**
34.	*AE v R* [2008] NSWCCA 52
35.	*AJO v Regina* [2008] NSWCCA 28
36.	*Dousha, Malcom Ross v R* [2008] NSWCCA 263
37.	*DTS v Regina* [2008] NSWCCA 329
38.	*Featherstone v R* [2008] NSWCCA 71
39.	*Healey v R* [2008] NSWCCA 229
40.	*Ivimy v R* [2008] NSWCCA 25
41.	*Kamm, William v Regina* [2008] NSWCCA 290
42.	*Makarov v R (No 2)* [2008] NSWCCA 292
43.	*Makarov v R (No 3)* [2008] NSWCCA 293
44.	*NRW v R* [2008] NSWCCA 318
45.	*R v Katon* [2008] NSWCCA 228
2009	**n = 7**
46.	*CPW v R* [2009] NSWCCA 105
47.	*Giles v DPP* [2009] NSWCCA 308
48.	*GRD v R* [2009] NSWCCA 149
49.	*Orkopoulos v R* [2009] NSWCCA 213

50.	*PH v R* [2009] NSWCCA 161
51.	*SDS v R* [2009] NSWCCA 159
52.	*Simpson v R* [2009] NSWCCA 297
2010	**n = 12**
53.	*BP v R; R v BP* [2010] NSWCCA 303
54.	*Chivers v R* [2010] NSWCCA 134
55.	*ES v R (No 1)* [2010] NSWCCA 197
56.	*ES v R (No 2)* [2010] NSWCCA 198
57.	*GG v Regina* [2010] NSWCCA 230
58.	*KTR v R* [2010] NSWCCA 271
59.	*LJ v Regina* [2010] NSWCCA 289
60.	*R v Jarrold* [2010] NSWCCA 69
61.	*Regina v PWD* [2010] NSWCCA 209
62.	*RWB v R; R v RWB* [2010] NSWCCA 147
63.	*ST v Regina* [2010] NSWCCA 5
64.	*BG v R* [2010] NSWCCA 301
2011	**n = 3**
65.	*IS v R* [2011] NSWCCA 142
66.	*R v SK; SK v R* [2011] NSWCCA 292
67.	*R v PFC [2011] NSWCCA 117*
2012	**n = 8**
68.	*DF v R* [2012] NSWCCA 171
69.	*KSC v R* [2012] NSWCCA 179
70.	*Martin v R* [2012] NSWCCA 253
71.	*R v Brown* [2012] NSWCCA 199
72.	*RLS v R* [2012] NSWCCA 236
73.	*RM v R* [2012] NSWCCA 35
74.	*Simpson v R* [2012] NSWCCA 246
75.	*Wong v R* [2012] NSWCCA 39

2013	**n = 8**
76.	*Magnuson v R* [2013] NSWCCA 50
77.	*MPB v R* [2013] NSWCCA 213
78.	*R v DKL* [2013] NSWCCA 233
79.	*RP v R* [2013] NSWCCA 192
80.	*Steadman v R* (No 1) [2013] NSWCCA 55
81.	*Versi v R* [2013] NSWCCA 206
82.	*RO v R* [2013] NSWCCA 162
83.	*LP v Regina* [2013] NSWCCA 330
84.	*BJS v R* [2013] NSWCCA 123

APPENDIX A15.12: SUMMARY OF HISTORICAL CHILD SEXUAL ABUSE CASES, 2005–13

Year	Case name (judgment date)	Nature of appeal	Offences	Age[1]	Relationship[2]	Period of delay	Evidentiary issues on appeal	Judicial misdirection on appeal	Outcome/s
2005	**n = 8**								
Successful Cases									
1.	*R v BJB* [2005] NSWCCA 441* (16/12/05)	Against conviction & sentence	2 counts indecent assault, 2 counts buggery	8 y	Intrafamilial: Accused was complainant's uncle	30 year delay in disclosure (1970 – committal hearing 2003)	Inconsistencies in the complainant's evidence in issue	N/A	Appeal against conviction not allowed. Sentence appeal allowed in part – erroneous understanding of maximum sentence available for count 1 (indecent assault on a victim under 16) Original effective sentence of 5 years' imprisonment (with 3 years non-parole) reduced to 4 years' imprisonment (with 3 years non-parole)

[1] Age of complainant at offence/onset of abuse.

[2] Perpetrator/accused-complainant relationship.

2.	*Regina v R T I* [2005] NSWCCA 337* (20/9/05)	Against conviction	2 counts of sexual intercourse with a person under the age of 16, 3 counts of sexual intercourse without consent, 1 count maliciously inflicting ABH with intent to have sexual intercourse, 1 count of assault.	15y	Extrafamilial: (school friend's father, but living with him at the time). Complainant intellectually handicapped.	Uncertain (offences occurred in 1983; issues with recollection and memory at trial)	Issues with uncertainty and inconsistencies of evidence in relation to complainant's age at time of offence. Admission of relationship evidence at issue.	Directions as to complainant's reliability at issue.	Appeal against conviction allowed – miscarriage of justice. At the special hearings, the judge failed to enquire as to whether the appellant properly understood the nature of the election to proceed judge alone. The determinations that the appellant had committed all offences set aside, and new special hearings ordered.
3.	*R v WSP* [2005] NSWCCA 427* (14/12/05)	Against conviction & sentence	3 counts of indecency in aggravating circumstances, 1 count of sexual intercourse with child under 16 and 2 counts of secual intercourse with child between 10 and 16 years	12 y 14 y	Intrafamilial: Accused was complainant's de facto father	13 year delay (1995-2002) and 6 year delay (1989-2002), although both had disclosed prior without action taken	Jury's use of prior sexual misconduct not the subject of charges at issue	Failure to give sufficiently strong *Longman* warning at issue.	Appeal against conviction dismissed (counts 1–2) Appeal against conviction allowed (counts 4–7). New trial ordered in respect of these charges
4.	*Regina v Rymer* [2005] NSWCCA 310* (6/9/05)	Against conviction & sentence	2 counts sexual intercourse with a child (under 10), 1 count sexual intercourse with a child (10-16 years)	9 y	Intrafamilial: Accused was mother's de facto partner	8 year delay in disclosure (1994-2002)	Exclusion of exculpatory statements by accused	N/A	Appeal against conviction dismissed Appeal against sentence allowed – original sentence exceeded maximum available penalty for counts 2–3 Original sentence of 9 years' imprisonment (with 6 year non-parole) reduced to 5 years 6 months' imprisonment (with 3 year non-parole)
Unsuccessful Cases									
5.	*R v EGC* [2005] NSWCCA 392* (21/11/05)	Against sentence	3 counts sexual intercourse with child (under 10), 1 aggravated indecent assault on person under 16	7 y 4 y	Intrafamilial: Accused was stepfather of complainant	16 year delay (1986-2002, although disclosed in 1991 without	N/A	N/A	Sentence appeal not allowed.

						formal complaint)			
6.	*R v Fletcher* [2005] NSWCCA 338* (23/9/05)	Against conviction	1 count act of indecency, 8 counts homosexual intercourse with a male (10-18 years)	14 y	Institutional: Accused was parish priest	~15 year delay (1989-2004 pre-trial hearings)	Admission of tendency evidence	Direction of jury as to use of evidence	Appeal against conviction not allowed
7.	*R v Grattan* [2005] NSWCCA 306* (2/9/05)	Against conviction	5 counts act of indecency, 1 count sexual intercourse with child (under 16), 1 count attempted sexual intercourse with child (under 16), 3 counts aggravated sexual intercourse	10 y	Intrafamilial: Accused was complainant's uncle	9 year delay (1993/4-2002)	Evidence of uncharged acts at issue	Directions as to the complaint's distressed condition at issue	Appeal against conviction dismissed
8.	*Regina v AEL* [2005] NSWCCA 148 (20/4/05)	Against sentence	1 count of sexual intercourse with person under 16 years, 1 count of aggravated indecent assault.	13y 14y	Institutional: ('spiritual leader' with many 'spiritual wives', association between the complainant and accused lasted for 20 years)	N/A	N/A	N/A	Appeal against sentence not allowed
2006	**n = 14**								
Successful Cases									
9.	*D'Amico v Regina* [2006] NSWCCA 316 (10/10/06)	Against sentence	1 count aggravated act of indecency, 2 counts aggravated sexual assault, 1 count aggravated indecent assault	12 y	Accused was the complainant's uncle by marriage	8 year delay (1995-2003)	N/A	N/A	Appeal against sentence allowed – error in application of discount for appellant's plea of guilty Original effective sentence of 8 years 3 months' imprisonment (with 5 years 6

									months non-parole) reduced to 7 years 3 months' imprisonment (with 5 years 4 months non-parole)
10.	*FV v Regina* [2006] NSWCCA 237 (17/8/06)	Against sentence	1 count aggravated indecent assault, 1 count attempted aggravated sexual intercourse, 1 count aggravated sexual intercourse	12 y	Accused was the complainant's father	7 year delay (1997-2004)	N/A	N/A	Appeal against sentence allowed in part – error in (1) assessing the objective seriousness of count 2, and (2) accumulating the sentence for count 2 onto that for count 3 Sentences for counts 1 and 3 confirmed; sentence for count 2 reduced to 6 years' imprisonment (with 3 years non-parole). Original effective sentence of 8 years 3 months imprisonment (with 5 years 6 months non-parole) reduced to 7 years 3 months imprisonment (with 4 years 3 months non-parole)
11.	*Healey v Regina* [2006] NSWCCA 235* (4/8/06)	Against conviction	3 counts sexual intercourse with a male child (10-18 years)	13 y	Accused was a nurse at a facility for behaviour problems	13 year delay (1987-2000)	N/A	Inappropriate Longman direction, inadequate Crofts direction	Appeal against conviction allowed – miscarriage of justice resulting from a series of misdirections from the trial judge, including in his summing up New trial ordered
12.	*Lozanovski v R* [2006] NSWCCA 143 (5/5/06)	Against sentence	4 counts indecent assault on a child, 2 counts sexual intercourse with consent with a child, 1 count sexual intercourse without consent, 1 count detain for advantage	9 y	Accused was the complainant's uncle	~20 year delay (1982 – unclear disclosure)	N/A	N/A	Appeal against sentence allowed in part. Effective sentence was manifestly excessive – partial accumulation produced an aggregate head sentence beyond the range appropriate to the totality of the appellant's criminality Original effective sentence of 8 years 6 months imprisonment (with 6 years non-parole) reduced to 5 years 6 months (with 4 years non-parole)
13.	*R v TWP* [2006] NSWCCA 141 (1/5/06)	Crown against sentence.	1 count indecent assault, 2 counts aggravated indecent assault, 1 count incest, 1 count common assault, 12 counts	7 y 10 y 11 y	Accused was the complainant's father	20 year delay (1984-2004)	N/A	N/A	Crown appeal allowed on sentence – original sentence was manifestly inadequate Original effective sentence of 10 years' imprisonment (with 7 years 6 months non-

			sexual intercourse with a child (10-16 years)						parole) increased to 12 years non-parole with 4 years balance of term
14.	*NWL v Regina* [2006] NSWCCA 67 (29/3/06)	Against conviction & sentence	9 counts of aggravated indecent assault, 2 counts of inciting a person above the age of 16 years to commit an act of indecency.	12y	Extrafamilial (golf coach).	10 year delay (1993 – 2003 report to police)	N/A	Failure to adequately refer to evidence in directing jury on issue of consent at issue. Failure to direct jury on issue of consent.	Appeal against conviction allowed in part. Conviction and sentence quashed (count 8 – inciting a person above the age of 16 to commit an act of indecency), on the basis of being unsupported by evidence Appeal against sentence allowed in part. Sentences quashed (counts 2–7, 9 and 11), and sentences entered in compliance with the *Crimes (Sentencing Procedure) Act* as in force at the time of the offences Original effective sentence of 6 years imprisonment (with 4 years non-parole) reduced to 5 years imprisonment (with 3 years non-parole)
15.	*Sepulveda v R* [2006] NSWCCA 379* (29/11/06)	Against conviction	10 counts indecent assault, 5 counts of buggery	9 y 12 y	Accused was the complainant's neighbour	20 year delay (1979-1999)	Admission of clandestinely recorded conversation at issue	Failure to give a Longman direction	Appeal against conviction not allowed
16.	*Sheehan v Regina* [2006] NSWCCA 233* (16/8/06)	Against conviction	8 counts sexual intercourse without consent with child (under 16)	6 y	Accused was the complainant's stepfather	19 year delay (1981-2000), although mother was aware	N/A	Failure to give Longman direction	Appeal against conviction allowed in part. Convictions and sentences quashed (counts 1–7), because of judge's failure to give appropriate *Longman* warning, and because complainant's evidence was uncorroborated. Conviction (count 10) confirmed, because despite the delay before disclosure, complainant's evidence was corroborated by her mother Convictions and sentences (counts 1–7) quashed, and new trial in respect of these counts ordered

17.	*Sheehan [No 2] v Regina* [2006] NSWCCA 332 (3/11/06)	Against sentence	8 counts sexual intercourse with a child under 16	10 y	Accused was the complainant's father	~20 year delay (1981 – unclear disclosure)	N/A	N/A	Appeal against sentence allowed in part – sentence for count 10 excessive in light of convictions for counts 1–7 being quashed Original sentence (count 10 only) of 7 years 6 months (with 5 years non-parole) reduced to 6 years' imprisonment (with 4 years non-parole)
Unsuccessful Cases									
18.	*Gorrick v Regina* [2006] NSWCCA 232* (3/8/06)	Against conviction & sentence	7 counts sexual intercourse with a child (10-16 years)	14 y	Accused was complainant's de facto father	~15 years delay (around 1989 – 2004 trial)	ERISP evidence admission at issue	N/A	Appeal against conviction not allowed Appeal against sentence not allowed
19.	*JJB v Regina* [2006] NSWCCA 126* (26/4/06)	Against conviction	2 counts sexual intercourse without consent with child (10-16 years)	6 y	Accused was the complainant's uncle	9 year delay (offence 1987, report 1996 but accused failed to appear, arrested 2004)	N/A	Inadequate direction of forensic disadvantage due to delay	Appeal against conviction not allowed
20.	*KNP v Regina* [2006] NSWCCA 213* (20/7/06)	Against conviction	4 counts indecent assault, 3 counts homosexual intercourse, 2 counts gross indecency	13 y	Accused was the complainant's stepfather	~12 year delay (1988- early 2000s)	Admission of prior disclosure at issue	Inadequate direction as to lack of corroborating evidence and delay in complaint	Appeal against conviction not allowed
21.	*Leonard v Regina* [2006] NSWCCA 267* (31/8/06)	Against conviction	5 counts act of indecency, 1 count sexual intercourse with a child (under 16)	7 years	Accused was the complainant's stepfather	13 year delay (1989-2002)	Admission of evidence of prior disclosure to mother at issue	Inadequate Longman direction	Appeal against conviction not allowed
22.	*RJP v R* [2006] NSWCCA 149 (16/5/06)	Against sentence	1 count carnal knowledge of a girl (under 10), 1 count act	9 y	Accused was the complainant's brother	~35 year delay (1968 – 2004 trial)	N/A	N/A	Appeal against sentence not allowed

			of indecency on a child (under 16)						
2007	n = 11								
Successful Cases									
23.	*AJB v Regina* [2007] NSWCCA 51* (5/3/07)	Against sentence	5 counts indecent assault of a child (under 16)	6 y	Accused was the stepfather of the complainant	~14 year delay (1979 – disclosure to police hotline in 1993 but no action taken, further complaint with action taken in 2005. Had disclosed to mother in 1982)	N/A	N/A	Appeal against sentence allowed – original sentence manifestly excessive Original effective sentence of 4 years' imprisonment (with 3 years non-parole) reduced to 3 years' imprisonment (with 1 year 6 months non-parole)
24.	*GAT v R* [2007] NSWCCA 208 (14/05/07)	Against sentence	1 count carnal knowledge of a person between the age of 10 and 16 years. 1 count indecent assault of person under age of 16, 1 count indecent assault of person under the age of 16 years, 1 count of act of indecency with person under the age of 16 years, 1 count aggravated sexual intercourse with person aged between 14 and 16 years.	13y 14y 11y	Accused was the father of one complainant and the grandfather of the other two complainants.	20 year delay (1985 – other victims disclose in 2005 prompting first complainant to disclose)	N/A	N/A	Appeal against sentence allowed – the starting point of the sentence was too high, and the principle of totality was misapplied Original effective sentence of 13 years' imprisonment (with 9 years 6 months non-parole) reduced to 10 years 6 months imprisonment (with 7 years non-parole)
25.	*MJL v Regina* [2007]	Against conviction & asentence	6 counts indecent assault of child under 16, 2 counts indecent	6 y	Accused was the father of the complainant	~25 years (disclosure of offences from	N/A	N/A	Appeal against conviction not allowed

	NSWCCA 261* (4/9/07)		assault, 1 count carnal knowledge of a girl (10-17 years)			1974 were prompted by instance of abuse of grandchild)			Appeal against sentence allowed – the sentence was manifestly excessive, and the judge erred in not finding special circumstances pursuant to section 44(2) of the *Crimes (Sentencing Procedure) Act* Original effective sentence of 12 years' imprisonment (with 9 years non-parole) reduced to 9 years' imprisonment (with 6 years non-parole)
26.	*Nelson v Regina* [2007] NSWCCA 221* (25/7/07)	Appeal against sentence	1 count indecent assault	16 y	Accused was a friend of women who had cared for complainant at children's home	~30 year delay (1972-unclear disclosure)	N/A	N/A	Appeal against sentence allowed – the offence was mischaracterised as mid-range in objective gravity; sentence was decided on the basis of the commission of other, unproved offences; and sentence was manifestly excessive Original effective sentence of 14 months imprisonment (8 months non-parole) reduced to 4 months imprisonment
27.	*Norris v Regina* [2007] NSWCCA 235* (6/8/07)	Appeal against conviction	1 count indecent assault, 1 count sexual intercourse with a child under 16	11 y	Accused was a friend of the complainant's father	~20 years (1983 – disclosure to police 2003, although disclosed to boyfriend 1993)	N/A	Judicial misdirection as to how to consider the separate counts on indictment	Appeal against conviction allowed. The convictions for counts 1–2 were unreasonable, having regard to both the evidence, and the jury's verdicts of not guilty on counts 3–4 Convictions quashed
Unsuccessful Cases									
28.	*Kamm, William v Regina* [2007] NSWCCA 201* (09/7/07)	Against conviction & sentence	1 count of act of indecency upon child, 1 count sexual intercourse with child (10-16 years)	14 y	Accused was the leader of the complainant's religious community	9 year delay (1993-2002)	N/A	N/A	Appeal against conviction not allowed Appeal against conviction not allowed

29.	*KJR v Regina* [2007] NSWCCA 165* (29/6/07)	Against conviction & sentence	4 counts carnal knowledge, 1 count indecent assault, 1 count assault occasioning ABH	9 y	Accused was the complainant's father	~20 years (1979- unclear disclosure)	N/A	Directions as to tendency evidence and failure to give Longman direction at issue	Appeal against conviction not allowed Appeal against sentence not allowed
30.	*Pavitt v Regina* [2007] NSWCCA 88* (2/4/07)	Appeal against conviction	4 counts of sexual intercourse without consent, 1 count of buggery, 2 counts of indecent assault	12 y	Accused was the elder brother of complainant's school friends	19 years (1983-2002)	Admission of recorded conversation and prior consistent representation by complainant at issue	Summary of the relevant evidence in judicial summing up at issue	Appeal against conviction not allowed
31.	*GAC v Regina, WC v Regina* [2007] NSWCCA 287 (10/10/07)	Against conviction	4 counts aggravated indecent assault; 1 count sexual intercourse with person under the age of 10 years, 1 count sexual intercourse with a child under 16 years, 1 count sexual intercourse without consent.	5y	Mother and stepfather (multiple offenders)	17 year delay (1987 – 2004)	Admission of evidence of interview with police in 1995 (where complainant did not disclose) at issue.	N/A	Appeal against conviction not allowed
32.	*R v KRL* [2007] NSWCCA 354* (18/12/07)	Against conviction	1 count assault on female under 16	10 y	Accused was the complainant's father	~35 years (1965 – unclear disclosure)	N/A	N/A	Appeal against conviction not allowed
33.	*Rowney v R* [2007] NSWCCA 49* (27/12/07)	Against conviction	3 counts sexual intercourse with a person under 10, 1 count indecent assault	13 y	Accused lived nearby to the complainant	~15 years delay (1987 – unclear disclosure)	Rejecting evidence that the defence sought to tender	N/A	Appeal against conviction not allowed
2008	n =12								

Successful Cases									
34.	*AJO v Regina* [2008] NSWCCA 28* (21/12/08)	Against conviction & sentence	2 counts indecent assault, 1 count carnal knowledge of a girl (10-16 years), 2 counts sexual intercourse without consent of child (under 16), 1 count sexual intercourse with a child (10-16years) 2 counts aggravated sexual intercourse without consent	11 y 13 y	Accused was the brother and uncle of the complainants.	~20 years (1980 – unclear disclosure)	N/A	N/A	Appeal against conviction allowed in part – conviction and sentence on count 4 quashed, and a verdict of acquittal entered on that count. However, since sentence for count 4 was being served concurrently, no change to overall effective sentence Appeal against sentence on other counts dismissed Original effective sentence of 9 years 3 months imprisonment (with 5 years 3 months non-parole) maintained
35.	*AE v R* [2008] NSWCCA 52* (20/3/08)	Against conviction	2 counts sexual intercourse with a child under 16, 1 count indecent assault	9 y 11 y	Accused was stepfather and father	22 year delay (1983-2005)	Admission of tendency evidence at issue	N/A	Appeal against conviction allowed. Verdict on count 11 inconsistent, having regard to the verdict on other counts re: complainant 1. Verdict unreasonable on counts 14–15 re: complainant 2, on account of admission of tendency and/or coincidence evidence resulting in an unfair trial Conviction quashed; verdict of acquittal substituted (count 11), and new trial ordered (counts 14–15)
36.	*Dousha, Malcom Ross v R* [2008] NSWCCA 263	Against sentence	6 counts act of indecency on child under 16, 1 count sexual intercourse with child (10-16 years), 1	8 y	Accused lived in the same unit block.	18 years (1986-2004)	N/A	N/A	Appeal against sentence allowed in part – sentence for count 8 does not reflect the finding of special circumstances (section 44 of *Crimes (Sentencing Procedure) Act*) in appellant's favour

	(1/12/08)		count sexual intercourse with a child (under 10)						Sentence on count 8 of 6 years 6 months imprisonment (3 years non-parole) reduced to 6 years 6 months imprisonment (1 year non-parole) Therefore, original effective sentence of 10 years 6 months imprisonment (with 7 years non-parole) reduced to 10 years 6 months imprisonment (with 5 years non-parole)
37.	*Featherstone v R* [2008] NSWCCA 71* (23/4/08)	Against sentence	3 counts indecent assault, 3 counts procuring act of indecency, 5 counts homosexual intercourse with male (10-18 years), 1 count gross act of indecency on male under 18	11 y	Accused was a music teacher at complainant's school	21 year delay (1982-2003, disclosure prompted by publicity of conviction for child pornography)	N/A	N/A	Appeal against sentence allowed – misapplication of the principle of totality; failure to find special circumstances other than accumulation of sentences; and manifestly excessive individual and total sentences Original effective sentence of 16 years 11 months imprisonment (with 12 years 11 months non-parole) reduced to 12 years 7 months imprisonment (with 7 years non-parole)
38.	*Healey v R* [2008] NSWCCA 229* (2/10/08)	Against conviction	3 counts homosexual intercourse with a male (10-18 years)	13 y	Accused was nurse at clinic for behavioural problems where complainant attended	~20 year delay (1987- unclear disclosure)	N/A	Judicial direction as to whether lies could be taken as a consciousness of guilty at issue	Appeal against conviction allowed – trial judge erred in directing the jury that appellant's lies could be taken into account as consciousness of guilt Convictions quashed. The DPP allowed to determine whether, in light of both the imminent expiry of the non-parole period and of time served, the appellant should be put on trial again

39.	*Makarov v R (No 3)* [2008] NSWCCA 293 (9/12/08)	Against conviction	5 counts homosexual intercourse with a child (10-18 years), 1 count gross indecency, 4 counts aggravated indecent assault on a person under 16	13y	Accused was music teacher	6 year delay (1998-2004)	N/A	Judicial directions as to the use of relationship evidence at issue	Appeal against conviction allowed – failure to sever counts relating to different applicants; admission of relationship/context evidence that was unfairly prejudicial; various failures to direct the jury Convictions and sentences quashed; new, separate trials ordered
40.	*R v Katon* [2008] NSWCCA 228 (2/10/08)	Crown appeal	2 counts act of indecency on person under 16, 3 counts sexual intercourse with person under 16, 2 counts possession of child pornography, 2 counts use of child under 18 for pornography	13 y	Complainant did odd jobs at the accused's house	~5 years (1998-disclosure to police in 2003, formal complaint made 2006)	N/A	N/A	Appeal by Crown allowed – allowance of concurrent sentences produced a total effective sentence that was manifestly inadequate, and did not reflect the totality of criminality involved in the offences Original effective sentence of 5 years' imprisonment (with 3 years non-parole) increased to 7 years' imprisonment (with 5 years non-parole)
Unsuccessful Cases									
41.	*DTS v Regina* [2008] NSWCCA 329* (19/11/08)	Against conviction	1 count aggravated indecent assault	12 y	Accused was family friend	~10 year delay (1991 – unclear disclosure)	N/A	Murray direction and direction as to relationship evidence at issue	Appeal against conviction not allowed
42.	*Kamm, v Regina* [2008] NSWCCA 290* (10/12/08)	Against conviction	1 count of act of indecency upon child, 1 count sexual intercourse with child (10-16 years)	14 y	Accused was the leader of the complainant's religious community	9 year delay (1993-2002)	N/A	N/A	Appeal against conviction not allowed
43.	*Makarov v R (No 2)* [2008] NSWCCA 292	Against conviction	3 counts aggravated act of indecency, 1 count aggravated sexual	14 y	Accused was music teacher	7 year delay (1997-2004)	Admission of context evidence at issue	N/A	Appeal against conviction not allowed

	(9/12/08)		intercourse with person (10-16 years), 5 counts homosexual intercourse with child (10-18 years)						
44.	*Ivimy v R* [2008] NSWCCA 25 (19/12/08)	Against sentence	8 counts aggravated indecent assault, 4 counts aggravated indecent with an act of indecency, 1 count indecent assault	7 y	Accused was the complainant's de facto father	~10 years (1992 – unclear disclosure)	N/A	N.A	Appeal against sentence not allowed
45.	*NRW v R* [2008] NSWCCA 318 (18/12/08)	Against sentence	4 counts sexual intercourse with a child (under 10), 1 count aggravated act of indecency, 2 count aggravated sexual assault, 1 count attempted homosexual intercourse (10-18 years), 1 count homosexual intercourse with a child (10-18 years)	8 y 6 y	Accused was de facto father	18 year delay (1989-2007)	N/A	N/A	Appeal against sentence not allowed
2009	n =7								
Successful Cases									
46.	*CPW v R* [2009] NSWCCA 105* (23/4/09)	Against sentence	2 counts indecent assault, 3 counts aggravated indecent assault, 1 count act of indecency, 1 count sexual intercourse with a child, 4 counts indecent assault on a child, 2 counts sexual intercourse without consent with a child	16 y 11 y 14 y 10 y	Accused was the grandfather of the complainants	24 years (1982-2006, disclosure for historical child sexual abuse prompted by additional recent instances of abuse)	N/A	N/A	Appeal against sentence allowed in part. The ratio of the non-parole period to head sentence was disproportionate (93%) Sentences for 3 of 13 counts confirmed, and for all other counts quashed; appellant re-sentenced Original effective sentence of 12 years 6 months imprisonment (with 11 years 8 months non-parole) reduced to 12 years imprisonment (with 8 years non-parole)

47.	*Giles v DPP* [2009] NSWCCA 308 (18/12/09)	Against sentence	1 count aggravated act of indecency, 7 counts sexual intercourse with a child (10-16 years)	11 y	Accused was the complainant's step-father	11 years (1995-2006)	N/A	N/A	Appeal against sentence allowed – notional starting points for each individual sentence exceeded the maximum penalty Original effective sentence of 16 years imprisonment (with 11 years non-parole) reduced to 11 years 6 months imprisonment (with 9 years 6 months non-parole)
48.	*GRD v R* [2009] NSWCCA 149* (22/5/09)	Against sentence	6 counts indecent assault upon a child, 3 counts act of indecency with a child	9 y	Accused was the complainant's step father	29 years (1976-report to police in 2005, although complained to sister in 1980)	N/A	N/A	Appeal against sentence allowed – sentence was manifestly excessive in light of sentencing practices at the time of offences Original effective sentence of 6 years imprisonment (with 3 years non-parole) reduced to 4 years imprisonment (with 2 years non-parole)
49.	*Orkopoulos v R* [2009] NSWCCA 213 (25/8/09)	Against conviction & sentence	1 count sexual intercourse without consent, 2 counts indecent assault, 1 count aggravated indecent assault, 8 counts sexual intercourse with a male (10-18 years)	15y	Accused was a family friend	~10 years (1995 – unclear disclosure)	N/A	Judicial directions as to tendency evidence at issue	Appeal against conviction dismissed Appeal against sentence allowed – failure to grant leniency in circumstances where the offence has been abolished Original effective sentence of 13 years 11 months imprisonment (with 9 years 3 months non-parole) reduced to 13 years 8 months imprisonment (with 9 years non-parole)
50.	*PH v R* [2009] NSWCCA 161* (26/6/09)	Against sentence	8 counts indecent assault, 3 counts carnal knowledge with child, 7 counts carnal knowledge by father	15 y 11 y	Accused was the complainants' father	~35 years (1966-2002)	N/A	N/A	Appeal against sentence allowed – misapplication of the principles in *Pearce v The Queen*; manifestly excessive sentence in light of sentencing practices at the time of offences Original effective sentence of 17 years imprisonment (with 12 years non-parole), but typographical error recorded it as 20 years. Reduced to 14 years 6 months imprisonment (6 years 6 months non-parole)

51.	*Simpson v R* [2009] NSWCCA 297* (17/12/09)	Against sentence	1 count sexual intercourse without consent, 2 counts sexual intercourse with a child (10-16 years), 3 counts aggravated indecent assault on child	12 y	Accused was family friend	5 years (2000-2005)	N/A	N/A	Appeal against sentence allowed in part
Unsuccessful Cases									
52.	*SDS v R* [2009] NSWCCA 159 (10/6/09)	Against sentence	4 counts sexual intercourse with a child (10-16 years)	14 y	Accused was the brother-in-law of the complainant	~10 years (1997- unclear disclosure)	N/A	N/A	Appeal against sentence not allowed
2010	n =12								
Successful Cases									
53.	*BP v R; R v BP* [2010] NSWCCA 303* (13/12/10)	Against conviction and Crown appeal	3 counts indecent assault on child, 5 counts aggravated indecent assault on child, 2 counts sexual intercourse with a child	5 y 6 y 8 y	Accused was the complainants' father and grandfather	~35 years (1970-2003, disclosure of historical child sexual abuse prompted by recent incidents of abuse)	N/A	Judicial direction as to tendency evidence and risk of concoction at issue	Appeal against conviction not allowed Crown appeal allowed – judge's failure to apply principles in *Pearce v The Queen*; aggregate sentence failed to properly reflect the objective seriousness of the offences Original effective sentence of 2 years 8 months imprisonment (1 year 4 months non-parole) increased to 4 years' imprisonment (with 2 years 3 months non-parole)
54.	*Chivers v R* [2010]	Appeal against	3 counts sexual intercourse without	10 y	Accused was family friend	23 years (1983-2006)	N/A	Murray direction at issue	Appeal against conviction allowed for count 4 (sexual intercourse without consent);

	NSWCCA 134* (30/7/10)	conviction & sentence	consent, 2 counts act of indecency						conviction and sentences quashed, and new trial ordered Appeal against sentence not considered
55.	*ES v R (No 1)* [2010] NSWCCA 197* (6/9/10)	Against conviction	5 counts indecent assault of a person under the age of 16 years, 1 count act of indecency towards a person under the age of 16 tears, 1 count indecent assault.	12y	Accused was partner of the complainant's mother.	(1974 – 2007)	Admission of witness evidence as to seeing appellant touch complainant.	Failure to adequately direct/misdirect jury in relation to evidence.	Appeal against conviction allowed – judge erred in admitting tendency evidence; judge misdirected the jury in relation to tendency evidence; miscarriage of justice resulting from admission of inadmissible and prejudicial evidence Convictions and sentences quashed; new trial ordered
56.	*LJ v Regina* [2010] NSWCCA 289 (10/12/10)	Against sentence	1 count aggravated sexual assault	14 y	Accused was a family friend	~12 years (1996-2008/9)	N/A	N/A	Appeal against sentence allowed – sentencing judge erred in applying the utilitarian value of the guilty plea, and in failing to take into account the provisions of the *Criminal Case Conferencing Act*. Original effective sentence of 2 years 2 months imprisonment (with 1 year 4 months non-parole) reduced to 1 year 6 months imprisonment (with 1 year non-parole)
57.	*R v Jarrold* [2010] NSWCCA 69 (3/5/10)	Crown appeal	2 counts indecent assault, 3 counts production of child pornography, 1 count use of internet to transmit child pornography, 1 count possession of child pornography, 1 count exposing child to indecent material	12 y 14 y	Accused was friend of father	30 years (1978/9 – 2008, action prompted by police search for child pornography)	N/A	N/A	Crown appeal allowed. 9 grounds of appeal accepted, most relating to errors in judge's exercise of discretion; consequently, sentence was manifestly inadequate Original effective sentence of 5 years' imprisonment (with 3 years non-parole) increased to 7 years 5 months imprisonment (with 5 years 6 months non-parole)
58.	*Regina v PWD* [2010] NSWCCA 209 (17/9/10)	Crown appeal	10 counts indecent assault	14 y	Accused was school teacher	~30 years (1977 – unclear disclosure)	Ruling as to admission of tendency evidence at issue	N/A	Crown appeal allowed – judge erred in ruling that tendency evidence was inadmissible

									Rulings made by trial judge vacated, and tendency evidence held to be admissible. All counts on the indictment to be tried together
59.	*RWB v R; R v RWB* [2010] NSWCCA 147 (12/7/10)	Appeal against conviction & Crown appeal	6 counts sexual intercourse with a child under 10, 1 count inciting an act of indecency against a child, 3 counts indecent assault, 2 counts sexual intercourse with a child under 10	6 y	Accused was the complainant's uncle	16 years (1990-2006)	N/A	Judicial direction on beyond reasonable doubt at issue	Appeal against conviction not allowed Crown appeal allowed –judge erred in failing to apply principles in *Pearce v The Queen*, and in considering evidence of hardship in custody, in the absence of any evidence; sentence was manifestly inadequate as a result of failure to properly reflect the objective seriousness of the offences Original effective sentence of 5 years' imprisonment (2 years 6 months non-parole) increased to 11 years 4 months imprisonment (with 8 years 6 months non-parole)
60.	*ST v Regina* [2010] NSWCCA 5* (10/2/10)	Against conviction	2 counts sexual intercourse with a child under 10	5 y	Accused was acting as babysitter to the complainant	7 years (1999-2006)	N/A	Longman direction at issue	Appeal against conviction allowed – failure to give a Longman warning resulted in a miscarriage of justice Convictions quashed; new trial ordered
Unsuccessful cases									
61.	*BG v R* [2010] NSWCCA 301* (13/12/10)	Against conviction	1 count carnal knowledge of girl, 1 count act of indecency, 2 counts gaining with intent to have carnal knowledge, 3 counts of rape, 1 count procuring female under 12 for another to have carnal knowledge, 1 count buggery	12 y	Accused was de facto partner of complainant's mother	~35 years (1970 – unclear disclosure)	N/A	N/A	Appeal against conviction not allowed

62.	*ES v R (No 2)* [2010] NSWCCA 198 (6/9/10)	Against conviction	4 counts indecent assault, 1 count act of indecency	11 y	Accused was step-grandfather	~9 years (1999 – unclear disclosure)	Admission of generalised evidence of ongoing misconduct and uncharged acts at issue	Failure to give direction as to use of tendency evidence.	Appeal against conviction not allowed
63.	*GG v Regina* [2010] NSWCCA 230* (12/10/10)	Against conviction and sentence	3 counts sexual intercourse without consent with a child, 2 counts indecent assault on child	12 y	Accused was the complainant's step father	16 years (1984-police report 2008, although informed friend in 1987, DOCS in 1988, first police report 1996 but accused no located)	N/A	Longman direction at issue	Appeal against conviction not allowed Appeal against sentence not allowed
64.	*KTR v R* [2010] NSWCCA 271 (3/12/10)	Against conviction	15 counts sexual assault	12 y 10 y	Accused was stepfather of complainants	27 years (1979-2006)	Admission of evidence of violent behaviour by appellant at issue	Judicial direction as to evidence of appellant's violence at issue	Appeal against conviction not allowed
2011	n = 3								
Successful Cases									
65.	*IS v R* [2011] NSWCCA 142 (6/7/11)	Against sentence	2 counts sexual intercourse with child, 2 counts aggravated indecent assault on child, 1 count persistent sexual abuse of child, 1 count act of indecency towards child	9 y	Accused was complainant's father	10 years (1997-2007)	N/A	N/A	Appeal against sentence allowed in part – judge erred in failing to find special circumstances (count 4), and in setting both an individual (count 4) and overall sentence with disproportionate parole and non-parole periods Original effective sentence of 11 years 8 months 29 days imprisonment (with 9 years 2 months 28 days non-parole) reduced to 11 years 8 months 29 days (with 8 years 8 months 28 days non-parole)

66.	*R v SK; SK v R* [2011] NSWCCA 292 (1/4/11)	Against conviction & Crown appeal	19 counts indecent assault, sexual intercourse and attempted sexual intercourse	6 y	Accused was complainant's uncle	~30 years (1980 – unclear disclosure)	Ruling on the admission of evidence of acts against three complainants at joint trial at issue	N/A	Appeal against conviction now allowed Crown appeal against interlocutory judgment re: admission of evidence allowed – judge erred in finding tendency evidence inadmissible Tendency evidence held to be admissible
Unsuccessful Cases									
67.	*R v PFC [2011] NSWCCA 117*	Appeal against sentence by Crown	2 counts aggravated indecent assault on child, 2 counts attempted sexual intercourse with child, 2 counts aggravated sexual intercourse with child, 10 counts sexual intercourse with child, 1 count use of child for pornographic purposes	11-15 years	Extrafamilial - Accused was acquaintance (for two complainants, was father of their acquaintance)	(CA: offences occurred between 1 Aug 1997 to 11 Feb 2009, convicted at first trial on 26 June 2009… so no period of delay [at 2])	N/A	N/A	Crown appeal against sentence dismissed.
2012	n = 8								
Successful Cases									
68.	*DF v R* [2012] NSWCCA 171* (17/8/12)	Against conviction & sentence	3 counts indecent assault, 3 counts attempt to unlawfully and carnally know	10 y	Accused was an acquaintance	32 years (1978-2006, although reported to friend in 1986)	N/A	Direction in accordance with *R v Markuleski* (effect of the complainant's credibility on verdict) at issue	Appeal against conviction not allowed Appeal against sentence allowed
69.	*KSC v R* [2012] NSWCCA 179*	Against conviction & sentence	3 counts aggravated sexual assault of a child, 1 count aggravated indecent assault, 1	12 y	Accused was the uncle by marriage of the complainant	~10 year (1997 – unclear disclosure)	N/A	Inadequate direction as to forensic disadvantage	Appeal against conviction not allowed Appeal against sentence allowed. Sentence for count 11 (common assault) manifestly

	(23/8/12)		count aggravated act of indecency, 3 counts attempted aggravated sexual assault of child, 1 count assault, 1 count aggravated sexual assault					caused by delay and use of context evidence of uncharged act at issue.	excessive; however, no reduction in sentence resulted, as this sentence was wholly concurrent with other sentences being served Original effective sentence of 15 years' imprisonment (with 10 years non-parole) maintained
70.	*Martin v R* [2012] NSWCCA 253 (13/12/12)	Against sentence	2 counts aggravated indecent assault on child under 10, 1 count aggravated indecent assault on child under 16, 2 counts producing child pornography, 2 counts filming a person in a private act	7 y	Accused was family friend	16 years (1992-2008, although disclosed to police in 1994 but no action taken)	N/A	N/A	Appeal against sentence allowed – finding of special circumstances not reflected in judge's maintenance of overall statutory ratio between total non-parole period and total head sentence Original effective sentence of 5 years 2 months imprisonment (with 3 years 11 months non-parole) reduced to 5 years (with 3 years 7 months non-parole)
71.	*R v Brown* [2012] NSWCCA 199 (18/9/12)	Crown appeal	20 different victims: 2 counts buggery, 4 counts of homosexual intercourse with a male aged 10-18, 2 counts of committing an act of indecency with a male, 1 count of committing an act of gross indecency, 1 count of indecent assault, 1 count of sexual intercourse without consent and 16 counts of assault on a male accompanied by an act of indecency.	8-17y	Accused was a youth group leader	~25 years (1974 – unclear disclosure)	N/A	N/A	Appeal by Crown allowed – judge failed to apply principle of totality; judge erred in approach to anal penetration; judge misunderstood the maximum penalty for count 19 Original effective sentence of 10 years' imprisonment (with 6 years non-parole) increased to 20 years' imprisonment (with 12 years non-parole)
72.	*RM v R* [2012] NSWCCA 35* (19/3/12)	Accused appeal (interlocutory). Special hearing	2 counts act of indecency on a child, 1 count incitement to commit an act of indecency on a child, 1	8 y	Accused was the complainant's cousin	20 years (1989 – 2009)	N/A	N/A	Appeal allowed against interlocutory judgment refusing a permanent stay on criminal proceedings

		before a judge alone	count persistent sexual abuse						Matter remitted to trial judge to consider afresh the question of whether a stay should be granted
73.	*Simpson v R* [2012] NSWCCA 246* (23/11/12)	Against sentence	1 count aggravated act of indecency, 1 count aggravated indecent assault, 1 count sexual intercourse with a person under 10	8 y	Accused was a neighbour of the complainant	13 years (1997 – 2010)	N/A	N/A	Appeal against sentence allowed for count 3 (sexual intercourse with a person under 10) – non-parole period maintained, but additional term manifestly excessive in light of the range of sentences imposed for this offence at the time of the offences Original effective sentence of 6 years 9 months imprisonment (with 3 years 9 months non-parole) reduced to 4 years 9 months imprisonment (with 3 years 5 months non-parole)
Unsuccessful Cases									
74.	*RLS v R* [2012] NSWCCA 236 (15/11/12)	Against sentence	2 counts indecent assault, 4 counts homosexual intercourse, 2 counts act of gross indecency	13 y 14 y x 2	Accused was a family friend	~25 years (1980 – unclear disclosure)	N/A	N/A	Appeal against sentence not allowed
75.	*Wong v R* [2012] NSWCCA 39 (5/4/12)	Against conviction	1 count aggravated sexual assault, 1 count indecent assault	12 y	Accused was a friend of the complainant's father	~10 years (2002 – unclear disclosure)	N/A	N/A	Appeal against conviction not allowed
2013	n = 9								
Successful cases									
76.	*Magnuson v R* [2013] NSWCCA 50* (1/3/13)	Against sentence	13 counts indecent assault on child, 8 counts sexual intercourse with child, 2 counts inciting person under 16 to commit an	8 y 7 y 9 y	Accused was the complainants' stepfather and cousin	~35 year delay (1977 – unclear disclosure)	N/A	N/A	Appeal against sentence allowed – non-parole period calculated incorrectly; sentences imposed were manifestly excessive; judge erred in finding certain factors as aggravating

			act of indecency, 1 count act of indecent, 1 count ravish and carnal knowledge						Original effective sentence of 19 years' imprisonment (with 13 years non-parole) reduced to 16 years' imprisonment (with 9 years non-parole)
77.	*MPB v R* [2013] NSWCCA 213* (16/9/13)	Against sentence	4 counts indecent assault on female under 16, 2 counts indecent assault on child under 10, 1 count attempted sexual intercourse on child under 10	7 y	Accused was the father and grandfather to the complainants	~35 years (1972 – unclear disclosure prompted by recent incident of abuse with granddaughter)	N/A	N/A	Appeal against sentence allowed – sentence was manifestly excessive in light of sentencing patterns at the time of offences; failure to accumulate certain sentences Original effective sentence of 8 years 6 months imprisonment (with 5 years 6 months non-parole) reduced to 7 years 3 months imprisonment (with 4 years 3 months non-parole)
78.	*RP v R* [2013] NSWCCA 192 (22/8/13)	Against sentence	1 count indecent assault on female under 16, 2 counts sexual intercourse with a child under 10, 2 counts aggravated sexual intercourse without consent, one count sexual intercourse with a child (10-16 years), 1 count aggravated indecent assault, 1 count possession of child pornography	11 y	Accused was uncle and grandfather to the complainants	~30 years (1978 – unclear disclosure promoted by recent incident of abuse with granddaughters)	N/A	N/A	Leave to appeal granted. Appeal allowed. Sentence quashed. Sentence for the first indictment changed to 2 months – partially accumulated by 1 month.
Unsuccessful Cases									
79.	*R v DKL* [2013] NSWCCA 233* (18/10/13)	Crown appeal	1 count sexual intercourse with a child under 10, 1 count use of offensive weapon with intent to intimidate	11 y 13 y 7 y	Accused was complainants' father	18 years (1993 – police complaint with action in 2011, although reported to police without	N/A	N/A	Crown appeal not allowed

						action in 1997 and 2005)			
80.	*Steadman v R* (No 1) [2013] NSWCCA 55 (13/3/13)	Against conviction	3 counts indecent assault on child	12 y	Accused was complainant's uncle	~30 year delay (1983 – unclear disclosure)	Admission of context evidence at issue	Judicial direction on context evidence at issue	Appeal against conviction not allowed
81.	*Versi v R* [2013] NSWCCA 206* (14/11/13)	Against conviction & sentence	1 count act of indecency with a child, 1 count sexual intercourse with a child (10-16 years)	11 y	Accused was the complainant's step father	~25 years (1985 – unclear disclosure)	Admission of coincidence evidence at issue	Judicial directions on coincidence and tendency evidence at issue	Appeal against conviction not allowed Appeal against sentence not allowed
82.	*RO v R* [2013] NSWCCA 162* (9/7/13)	Against conviction & sentence	2 counts indecent assault on child under 16	13 y	Accused was complainant's stepfather	~15 year delay (1994 – unclear disclosure)	N/A	N/A	Appeal against conviction not allowed Appeal against sentence not allowed
83.	*LP v Regina* [2013] NSWCCA 330* (23/12/13)	Against conviction	1 count assault with an act of indecency, 2 counts unlawful carnal knowledge, 2 counts sexual intercourse without consent	11 years	Accused was the complainant's stepfather	24 years (1982-2006, although disclosed to mother in 1984)	Admission of evidence suggesting appellant had admitted offences at issue	N/A	Appeal against conviction not allowed
84.	*BJS v R* [2013] NSWCCA 123	Appeal against conviction and sentence only by accused.	11 counts of indecent assault on child under 16	11/12 y 12/13 y 7-9 years	Institutional - Accused was a Catholic priest	~25-30 years (1980-1981 – unclear disclosure)	Multiple, including admission/use of tendency/coincidence evidence	Multiple, including direction to jury re use of tendency/coincidence evidence	Grounds (1)-(9) appeal Dismissed. Leave to appeal ground 10 granted but appeal dismissed.

Notes:

Yellow highlighted cells indicate institutional cases in the sample of historical child sexual abuse (n = 17).

* and purple highlighted cells indicate delay was in issue (n= 49).

APPENDIX A15.13: SUMMARY OF INSTITUTIONAL CASES, 2005–13

Case name and context of abuse	Grounds of appeal	Evidentiary issue on appeal	Judicial misdirection on appeal	Judicial reasoning	Outcome and Limb classification[3]
historical child sexual abuse cases					
Successful Cases on Appeal					

[3] Limb classification: according to s6(1) *Criminal Appeal Act* 1912 (NSW).

1. *R v Brown* [2012] NSWCCA 199 **Applicant was a church youth group leader, who perpetrated 20 different victims over 22 years 25 years (1974 – unclear disclosure).**	**Grounds of Appeal Against Sentence by Crown:** 1. The sentencing Judge failed to reflect the principle of totality in the aggregate sentence 2. The sentencing Judge erred in his approach to the offences of anal penetration 3. The sentencing judge erred in erroneously identifying the maximum penalty for count 19 as 2 years when it was 5 years The sentence was manifestly inadequate.	N/A	N/A	**Held in respect of Ground (1) and (4) - Accepted** • The high level of criminality in the respondent's conduct is not only obvious in the commission of very many serious offences over a very long period of time but in the circumstance, pointed to by the Crown prosecutor, that the respondent constantly found new victims. When he found them, he accompanied his behaviour with the accoutrements of the experienced sexual predator, showing his victims pornographic films and plying them on occasions with alcohol and drugs. The aggregate sentence imposed by his Honour was manifestly inadequate to reflect the seriousness of the offending over 22 years upon 20 victims [39]. **Held in respect of Ground (2) - Accepted** • There is substance in the Crown's submission that what seems to have been applied is a 'blanket' assessment. Putting to one side for the moment whether 5 years itself (or 4 years) is shown to be inadequate, the variations in the criminality, which are obviously apparent in the elements constituting the crimes for which sentenced needed to be assessed, do not lead to a conclusion that individual criminality has been assessed. **Held in respect of Ground (3) - Accepted** • Upholding this ground does not call for an isolated order affecting Count 19 but the error contributes an element to determination of whether the aggregate sentence was manifestly inadequate and, if so, what re-sentence should be applied.	**Outcome:** Crown appeal against sentence allowed, sentences quashed, appellant re-sentenced. **Limb:** N/A
2. *Regina v PWD* [2010] NSWCCA 209 **School teacher assaulted 4 students at St Stanislaus' College.** **30 year delay**	**Crown interlocutory** **Grounds of appeal against evidence exclusion by Crown:** (1) Her honour erred in ruling that the tendency evidence was inadmissible.	**Inadmissibility of tendency evidence (Ground 1)** **Crown Submission:** • The trial judge erred in making the lack of similarity between the sexual acts or surrounding circumstances the determining factor in assessing the probative value of the evidence [50]. • The trial judge's focus on the lack of modus operandi, system or pattern with common	N/A	**Judicial reasoning regarding (Ground 1) - Accepted** • Tendency evidence, even if relevant, is inadmissible by virtue of s 97 *Evidence Act* unless, relevantly, para (b) is satisfied. Even if so satisfied, court must reject evidence unless s 101(2) is satisfied, that is, its probative value substantially outweighs its prejudicial effect on the defendant [57]-[65]. • Two issues arise: [74] ○ 1) Did the trial judge err in rejecting the tendency evidence as not having a significant probative value: s 97(1)(b), or because its probative value outweighed its prejudicial effect: s 101(2). ○ 2) Should there be two trials in the matter, as raised in the course of argument. • On its proper reading, PNJ is distinguishable from the present case [81]-84]. • The trial judge also erred in considering the question of innocent association [85]. • The evidence of the four complainants and the other two tendency	**Outcome:** Appeal Allowed. Orders: • Vacate the rulings made by Flannery DCJ on 7 May 2010; • The evidence of tendency that the prosecution intends to produce pursuant to the Evidence Act 1995, s 97(1) contained in the notice dated 19 April 2010 is

		thread as the basis for exclusion, was erroneous for the purposes of establishing tendency [50]. • Identity, where system or pattern is often of importance, was not in issue in this case. The trial judge's reliance upon *PNJ v DDP* [2010] VSCA 88 brought about this misconception. That case was about coincidence, not tendency evidence. [50]. **Respondent submission:** The differences in the sexual activity alleged in relation to the complainants and the other witnesses, and the absence of relevant similarity in the circumstances in which the conduct was said to have occurred, were such that there were no unifying features of the case to warrant a finding that the evidence relied upon as tendency evidence had significant probative value [54].		witnesses is capable of rationally affecting the assessment of the probability of the respondent having engaged in the conduct alleged and had a sexual interest in doing so [88]. • The evidence upon which the Crown seeks to rely is not excluded by s 101(2) [89]. • The trial judge erred in finding that whatever significant probative value there may be in the evidence, that did not substantially outweighed its prejudicial effect [89]. • There can be no doubt that the case in respect of each complainant will be substantially weakened if the evidence of each complainant is not cross-admissible as tendency evidence and the evidence of the other two witnesses is not admissible in respect of each complainant [94]. ○ Section 5F(3A) is satisfied.	admissible; • Order that counts 1-10 on the indictment be tried together. **Limb:** N/A
3. *Makarov v R (No 3)* [2008] NSWCCA 293 **Foreign music teacher,**	**Appeal against conviction only by accused.** (1) The learned trial Judge erred in failing to sever the counts relating to one complainant from the counts relating to the other and to order separate trials relating to	**Failed to reject relationship evidence (Ground 8)**	**Judicial directions as to the use of relationship evidence at issue (Ground 5)** **Failed to direct jury in response to questions (Ground 7)**	**Judicial reasoning regarding:** **(Ground 5) - Accepted** Application: • This was a case in which two complainants made broadly similar allegations of sexual molestation against the appellant. The evidence of one was not admissible in order to prove the appellant's guilt of the offences involving the other because such probative value as it possessed did not substantially outweigh any prejudicial effect it may	**Outcome:** Appeal Allowed, conviction and sentence quashed. **Limb:** 2, 3

complainants were his students. **6 year delay**	each. (2) The learned trial Judge erred in failing to discharge the jury on the application of defence counsel on 12 September 2005. (3) The learned trial Judge erred in failing to discharge the jury on the application of defence counsel on 2 and 13 September 2005. (4) The trial miscarried and there was a miscarriage of justice as a result of the prejudice arising out of the matters raised under grounds 1, 2 and 3 above. (5) The trial Judge failed adequately to direct the jury in relation to a. (i) the prejudicial evidence; (ii) the issues that arose following upon the joinder of the counts' (iii) the use that could be made of the evidence of 'relationship'; (iv) the use that could be made of the evidence of one complainant in the counts relating to the other; (v) the standard of proof in relation to the evidence of the "improper sexual relationship" between the appellant and the complainants. (6) The trial miscarried and there was a miscarriage of justice as a result of perjury that C and B committed against the appellant during proceedings in relation to the evidence concerning: a. (i) the exclusively professional			have on the appellant, per s 101(2) [73]. • The risk of misuse of the evidence, in the circumstances, was of a very high order [74]-[80]. Decision: • The decision to permit the trial to proceed on the indictment charging counts involving the two complainants, in circumstances in which the evidence of the allegations made by one was not admissible on the trial of the allegations involving the other, was productive of a miscarriage of justice [82]. • The trial judge's directions were not capable of overcoming the prejudice that arose as the result of the joint trial and the admission of all the evidence of the appellant's other sexual misconduct [82]. • As regards ground (5)(v), in sexual assault cases the standard of proof of tendency evidence is beyond reasonable doubt [30]. McClellan CJ (with whom Hidden and Fullerton JJ agreed) held that evidence admitted as context evidence does not require a direction that it be proved beyond reasonable doubt [85]. **(Ground 7) - Rejected** • The trial judge made no errors of the nature alleged [98]-[110]. **(Ground 8) - Rejected** • Where it is relevant, evidence of other sexual misconduct is admissible notwithstanding that the allegations have not been the subject of investigation in the jurisdiction in which the misconduct is said to have occurred or that any investigation has not led to charges being preferred against the accused [111]-[112].	

	(musical, psychological and psychiatric) issues; (ii) the "relationship" evidence; (iii) the Counts No 2 and 5; (iv) the Count No 3; (v) the Counts No 7 and 8. (7) The trial Judge failed adequately to direct the jury in relation to the jurors' questions concerning the lack of proof, transcript of summing-up and impossibility to reach the verdicts on eight counts out of 10. (8) The trial judge erred in failing to reject the "relationship" evidence, which had been related to the jurisdiction of Ukraine and had not been investigated nor by Australian or Ukrainian Police on the territory of Ukraine. (9) The trial Judge erred in failing to provide for the appellant as a former foreigner with English as a second language an access to an interpreter t[h]rough the simultaneous headphone translation or proper conditions for simultaneous translation of interpreter – with intervals for translation – that international law and standards required. (10) The trial miscarried and there was a miscarriage of justice as a result of the Crown Prosecutor and Trial Judge misconduct in relation to the time of the essence offences No 2, 5 and 3.				

4. *Healey v R* [2008] NSWCCA 229 **Nurse at clinic for behavioural problems, complainant was patient.** **20 year delay**	Appeal against conviction only by accused. (1) Verdict was unreasonable and unsupportable on the evidence. (2) Trial judge erred in his summation of the case because his Honour did not put the defence case to the jury. (3) Trial judge erred by extending a *Longman* direction to possible forensic disadvantage suffered by the Crown (4) The *Longman* warning was inadequate because it failed to specifically warn the jury about the fragility of youthful recollection (5) The trial judge erred by failing to direct the jury that they needed to be satisfied that uncharged criminal conduct occurred before they could use evidence of the conduct against the appellant. (6) The trial judge erred by (a) suggesting to the jury that their determination would involve accepting one version as opposed to the other and (b) failing to direct the jury that they did not have to believe that the appellant was telling the truth before he was entitled to be acquitted. (7) The trial judge erred by failing to direct the jury that rejection of the complainant's motive to lie does not mean that the	N/A	Judicial direction as to whether lies could be taken as consciousness of guilty, at issue. **Failing to direct jury regarding use of evidence (Ground 5)** **Appellant submission:** • The Crown led two instances of uncharged sexual misconduct by the appellant on M. The appellant complained that the judge omitted to direct the jury that they could only use evidence of criminal acts against the appellant if they were first satisfied that the acts occurred. **Judge erred in suggestion to jury (Ground 6)** **Failing to direct jury regarding truthfulness of statement (Ground 7):** • M admitted in cross-examination that both he and his de facto wife had virtually no assets. They had a car each that was all. It was suggested that M might have lied for financial gain. **Inadequate Crofts direction (Ground 8):** Appellant submission: • The appellant complains that the trial judge repeated the direction about the explicable	**Judicial reasoning regarding:** **(Ground 5) - Accepted** • The jury has been told as to the use they could make of evidence of uncharged acts of sexual assaults without being told that they have to be satisfied that they occurred. There is a real basis for doubting whether they did occur. There has been a miscarriage of justice. **(Ground 6) - Rejected** • The judge reminded the jury that the Crown had to prove the case beyond reasonable doubt and the jury was warned that it would be dangerous to convict on M's evidence alone. On two occasions the judge told the jury that merely because the accused gave evidence that did not mean that he had to prove or disprove anything. Sometime later in the summing-up the judge instructed the jury that before that could accept M's (complainant) evidence as establishing beyond reasonable doubt that these offences have been committed they would have to be satisfied beyond reasonable doubt that M was reliable, accurate, consistent and telling the truth. When the summing up is taken as a whole the jury would have understood that they had to be satisfied beyond reasonable doubt of the accuracy, reliability, consistency and truthfulness of M's evidence before they could convict [107]. **(Ground 7) - Rejected** • Having regard to the terms of the summing-up and its emphasis upon the Crown having to prove its case beyond reasonable doubt and the various warnings which were given there was no reasonable possibility that the jury might consider that there had been a reversal of the onus of proof in relation to the existence of a motive to lie. In the circumstances of the present case, the suggested direction was not necessary. **(Ground 8) - Rejected** • While greater emphasis was given to the explanation for the delay than for the delay itself, I do not think that the directions exceeded the permissible bounds. The jury were made fully aware of the delay. While the issues of delay in complaint was one of the issues relied upon by the appellant, the issues relating to the conduct and opportunities for the appellant at the clinic were at the center of the trial. **(Ground 9) - Rejected** • It was not unfairly prejudicial to elicit the prime facts of the meeting at Bondi Junction and the trip to his unit and the friendship which formed. However, the cr0ss-examination went further in seeking to establish, and obtain admissions that the appellant had seriously	**Outcome:** Appeal Allowed, convictions set aside, new trial ordered. **Limb:** 3

	complainant is necessarily telling the truth (8) The trial judge erred by giving an inadequate Crofts direction (9) Trial judge erred by failing to direct the jury that they should disregard evidence and arguments concerning the inappropriateness of the appellant's conduct		delay in complaint both before and after the Croft direction and that the Crofts direction was entirely subsumed by the judge's remarks about why a delay in complaint was understandable. The complaint was as to a lack of balance. **Failure to direct jury about evidence regarding inappropriate conduct (Ground 9):** • The appellant submitted that the Crown Prosecutor cross-examined the appellant at length and repetitively about what as described as 'inappropriate conduct'. The appellant complained that these questions sought to emphasise that in forming a friendship with M the appellant had acted unethically and had perpetrated an abuse of trust. This generated unfair prejudice.	failed in his professional duty… While no objection could correctly be taken to the question eliciting primary facts showing the relationship between the appellant and M, objection was not taken by the appellant's trial counsel to questions suggesting serious failure of professional duty. • The now challenged evidence having been admitted without objection… it is too late for these matters to be raised… The jury would not have thought that they were dealing with a case of professional misconduct and they were clearly directed as to what the Crown had to prove before they could convict the appellant. The unfairly prejudicial portions of cross-examination and of the prosecutor's address to which I have referred would, to put it mildly, not have helped the appellant when the jury were assessing his credit and considering his evidence.	
***5. Featherstone v R* [2008] NSWCCA 71** **Music teacher at school, the victims were students. Applicant met one complainant through a YMCA**	Appeal against sentence only by accused. 1. [*Not identified*] 2. [*Not identified*] 3. [*Not identified*] 4. [*Not identified*] 5. [*Not identified*] 6. His Honour erred by failing to find special circumstances other than to deal with the	N/A	N/A	**Judicial reasoning Regarding (Grounds 6, 7, 8):** • **All Grounds Accepted** • Central to the challenge against the individual sentences and to the aggregate sentence is that the sentencing judge was required to sentence the applicant by reference to sentencing patterns applicable at the time of the offences: *R v MJR* [2002] NSWCCA 129 [33]. ○ [The Court reviewed a number of unreported cases identified the applicant: [38]-[44]. ○ This small sample of cases involving broadly similar sexual offences supports the applicant's submission that there has been a significant	**Outcome:** Grant leave to appeal. Appeal allowed and sentences quashed, re-sentenced. **Limb:** N/A

camp, the second through a Boys' home for wards of the state, and the third through mutual friend. **21 year delay**	accumulation of sentences. 7. The individual sentences and the total effective sentence is manifestly excessive. 8. His Honour erred in the manner in which he accumulated sentences and by failing to give proper effect to the principle of totality.			upward trend in the length of sentences for offences of this character in recent years. [45]. • Demonstrated error: o Error has been demonstrated in that the overall sentence is outside the range when regard is had to the pattern of sentencing of paedophile offenders for multiple offences over the period of the commission of these offences [45]. o The challenge of individual sentences is made good with respect to the s 81A offences (Counts 2,4, 6) [46]. o Error has also been demonstrated in the structure of the sentences, which produced an effective non-parole period that is approximately 75% of the aggregate sentence. Taking into account the pattern of sentences in the period, it was an error not to give effect to the finding of special circumstances and therefore fix an effective non-parole somewhat more in line with the pattern of the time [47]. • Error having been established, it is not necessary to deal with the other grounds of appeal, save for particular comments [48]. • The effect upon the victims: o The victim impact statements serve as 'an eloquent reminder, if it were needed, of the long-term impact of sexual abuse on children and, as MCL puts it, the mental toll that it takes on the victim' [50]. o SP describes his distress at learning that he had been videorecorded as a child in a sexually compromising position. PP reports continued difficulty in developing appropriate relationships both with men and women [50]. • [The Court reviewed subjective aspects of the case and character affidavits: [55]-[64]. • The pleas of guilty followed negotiations and were relatively late; a discount of 10% is appropriate [66]. • It was submitted that there was evidence towards rehabilitation, the pattern f offending having concluded more than 13 years prior to the applicant's arrest. Having reviewed the evidence, the applicant's likelihood of re-offending is low and his prospects of rehabilitation are reasonable [67]. • The references to the offence being 'representative of his conduct' are to be taken in the context of depriving the offender of a submission that the offences were isolated lapses [74]. • In the absence of any material relating to the conditions of the applicant's confinement, this Court will not accord significant weight to the circumstance that the applicant is a protection prisoner [75]. • Following the re-sentence, the applicant will be subject to an effective non-parole period of 7 years of an aggregate term of 12 years 7 months [76]. • In relation to counts 1, 2, 4, 5, and 12 the sentences are to be fixed	

				terms without a non-parole period [77].	
6. *Nelson v Regina* [2007] NSWCCA 221 **Accused was a friend of women who had cared for complainant at children's home.** **30 year delay**	**Ground of Appeal against sentence by Applicant:** 1. His Honour sentenced on the basis that the applicant had committed other offences against the complainant, in the absence of any evidentiary foundation for that approach. 2. His Honour gave disproportionate weight to considerations of general deterrence. 3. His Honour erred in characterising the offence as mid-range in terms of its objective gravity. 4. The sentence was manifestly excessive.	**Sentencing without evidentiary foundation (Ground 1)**	N/A	**Judicial Reasoning regarding:** **(Ground 1) - Accepted** • There was no evidence before his Honour of the complainant's date of birth, or her age as at December 1971, when the sexual relationship commenced [10]. • There was nothing to contradict the submission that the sexual relationship between them was consensual, up until the complaint decided that it was 'adulterous' and she rebuffed the applicant [10]. • There was nothing in the Victim Impact Statement that justified the conclusion that other offences had been committed [10]. • Whilst the ground is made out, it does not follow that a custodial sentence should not have been imposed. The complainant regarded the applicant's wife as the mother she had always wanted. She longed to be part of the applicant's family. Not only did the applicant prey upon the complainant's natural affections, but his conduct towards her put an end to any prospect of an adoption. When, despite the applicant's threats, the complainant reported his behaviour, the applicant denied any wrongdoing and the complainant was branded as a liar [12].	**Outcome:** Leave to appeal granted, appeal allowed, sentence quashed. **Limb:** N/A

7. *NWL v Regina* [2006] NSWCCA 67 **Applicant is a golf coach of the complainant who attended his classes.** **10 year delay**	**Grounds of Appeal against conviction by Appellant:** 1. The verdicts of the jury on Counts 2,3,4,5,6,7,9 and 11 are unreasonable and cannot be supported, having regard to the evidence. 2. The learned judge failed adequately to refer to the relevant evidence in directing the jury on the issue of consent as it bore upon the aforesaid counts 3. The learned judge wrongly directed and omitted to direct, the jury on the issues of consent. 4. The convictions on counts 8, 10 were unsupported by evidence and neither they nor count 12 can stand if any of the foregoing grounds are made good.	**Unsupported evidence for convictions (Ground 4):** • It was conceded by the Crown that the appeal against the conviction on count 8 had to succeed. • With regard to the convictions on count 10 and 12, it was submitted on behalf of the appellant that there was insufficient evidence from the complainant to enable the jury to be satisfied beyond reasonable doubt that the element of the offence charged, that the appellant had 'incited' the complainant to commit an act of indecency had been proved. Encouragement or asking were insufficient.	**Judge failed to adequately direct jury regarding evidence (Grounds 2 & 3):** • Appellant submission • In the summing-up the trial judge had wrongly conflated the two notions of the accused being a reluctant participant and the accused not consenting. The accused could have been a reluctant participant and yet have consented.	**Judicial reasoning regarding:** **(Grounds 2 & 3) - Rejected** • Even if in other contexts 'reluctance' might not be inconsistent with the giving of consent, in the passage in the present summing-up the trial judge, having used the expression 'reluctant participant' immediately went on to define what he meant by that expression – 'in other words he was not consenting'. The trial judge had already directed the jury that the Crown had to prove that the complainant had not consented, that consent involved conscious and voluntary permission by the complainant to the appellant to engage in the sexual act and that consent obtained after persuasion was still consent. • It was submitted that the jury had not been directed that the issue of consent had to be considered by them on each count in its context and the jury had not been told that they could decide the issue differently on different counts. However, the trial judge in his summing up had summarised the evidence on each count individually and had not been asked by counsel for the appellant at trial to go into any further detail. **(Ground 4) – Rejected** • In my opinion, on the evidence given by the complainant, which was not objected to, that he had been asked or encouraged by the appellant to masturbate the appellant, particularly in the context of all of the evidence given by the complainant, it was open to the jury to be satisfied beyond reasonable doubt on each of counts 10 and 12 that the appellant had incited the complainant.	**Outcome:** Appeal against conviction on count 8 allowed, all others dismissed. Appeal against sentence allowed in part. **Limb:** 1, 3
***8. Healey v Regina* [2006] NSWCCA 235**	Appeal against conviction only by accused. (1) Verdict was unreasonable and unsupportable on the evidence.	N/A	Inappropriate *Longman* direction, inadequate *Crofts* direction.	**Judicial reasoning regarding:** **(Grounds 3 & 4) - Both Accepted** • The effect of introducing the notion of disadvantage to the Crown through the delay and consequent loss of supportive evidence on its part was the risk of thereby enhancing the Crown case impermissibly	**Outcome:** Appeal Allowed, conviction set aside, new trial ordered.

Nurse at clinic for behavioural problems. **20 year delay**	(2) Trial judge erred in his summation of the case because his Honour did not put the defence case to the jury. (3) Trial judge erred by extending a *Longman* direction to possible forensic disadvantage suffered by the Crown. (4) The Longman warning was inadequate because it failed to specifically warn the jury about the fragility of youthful recollection. (5) The trial judge erred by failing to direct the jury that they needed to be satisfied that uncharged criminal conduct occurred before they could use evidence of the conduct against the appellant. (6) The trial judge erred by (a) suggesting to the jury that their determination would involve accepting one version as opposed to the other and (b) failing to direct the jury that they did not have to believe that the appellant was telling the truth before he was entitled to be acquitted. (7) The trial judge erred by failing to direct the jury that rejection of the complainant's motive to lie does not mean that the complainant is necessarily telling the truth. (8) The trial judge erred by giving an inadequate Crofts direction.		**Inappropriate *Longman* Direction (Grounds 3& 4).** **Failure to direct jury regarding evidentiary standard (Ground 5)** **Appellant submission:** The Crown led two instances of uncharged sexual misconduct by the appellant on M (complainant). The appellant complained that the judge omitted to direct the jury that they could only use evidence of criminal acts against the appellant if they were first satisfied that the acts occurred. **Erred in suggestion to jury (Ground 6)** **Failing to direct jury about motive (Ground 7)** Appellant submitted: • M admitted in cross-examination that both he and his de facto wife had virtually no assets. They had a car each, that was all. It was suggested that M might have lied for financial gain. **Inadequate Crofts direction (Ground 8)** • The appellant complains that the trial judge repeated the direction about the explicable delay in complaint both before and after the Croft direction and that the Crofts direction was entirely subsumed by the	and watering down the effect of the Longman warning. The appellant did not receive the benefit of warning having the effect to which he was entitled and the Crown received an advantage to which it was not entitled. • A long period of time elapsed. M was a lad with a troubled history and he was of an age where sexual matters were likely to be of great interest as he developed. The risk of fantasy and distortion could not be ignored. A warning to this effect was justified **(Ground 5) - Accepted** • The jury has been told as to the use they could make of evidence of uncharged acts of sexual assaults without being told that they have to be satisfied that they occurred. There is a real basis for doubting whether they did occur. There has been a miscarriage of justice **(Ground 6) - Accepted** • The judge reminded the jury that the Crown had to prove the case beyond reasonable doubt and the jury was warned that it would be dangerous to convict on M's evidence alone. On two occasions the judge told the jury that merely because the accused gave evidence that did not mean that he had to prove or disprove anything. Sometime later in the summing-up the judge instructed the jury that before that could accept M's evidence as establishing beyond reasonable doubt that these offences have been committed they would have to be satisfied beyond reasonable doubt that M was reliable, accurate, consistent and telling the truth. When the summing up is taken as a whole the jury would have understood that they had to be satisfied beyond reasonable doubt of the accuracy, reliability, consistency and truthfulness of M's evidence before they could convict [107]. **(Ground 7) - Rejected** • Having regard to the terms of the summing-up and its emphasis upon the Crown having to prove its case beyond reasonable doubt and the various warnings which were given there was no reasonable possibility that the jury might consider that there had been a reversal of the onus of proof in relation to the existence of a motive to lie. In the circumstances of the present case, the suggested direction was not necessary. **(Ground 8) - Rejected** • While greater emphasis was given to the explanation for the delay than for the delay itself, I do not think that the directions exceeded the permissible bounds. The jury were made fully aware of the delay. While the issues of delay in complaint was one of the issues relied upon by the appellant, the issues relating to the conduct and	**Limb:** 1, 3

	(9) Trial judge erred by failing to direct the jury that they should disregard evidence and arguments concerning the inappropriateness of the appellant's conduct.		judge's remarks about why a delay in complaint was understandable. The complaint was as to a lack of balance. **Failing to direct jury about when to disregard evidence (Ground 9)** The appellant submitted that the Crown Prosecutor cross-examined the appellant at length and repetitively about what as described as 'inappropriate conduct'. The appellant complained that these questions sought to emphasise that in forming a friendship with M the appellant had acted unethically and had perpetrated an abuse of trust. This generated unfair prejudice	opportunities for the appellant at the clinic were at the center of the trial. **(Ground 9) - Rejected** • It was not unfairly prejudicial to elicit the prime facts of the meeting at Bondi Junction and the trip to his unit and the friendship which formed. However, the cross-examination went further in seeking to establish, and obtain admissions that the appellant had seriously failed in his professional duty… While no objection could correctly be taken to the question eliciting primary facts showing the relationship between the appellant and M, objection was not taken by the appellant's trial counsel to questions suggesting serious failure of professional duty. The now challenged evidence having been admitted without objection… it is too late for these matters to be raised… The jury would not have thought that they were dealing with a case of professional misconduct and they were clearly directed as to what the Crown had to prove before they could convict the appellant. The unfairly prejudicial portions of cross-examination and of the prosecutor's address to which I have referred would, to put it mildly, not have helped the appellant when the jury were assessing his credit and considering his evidence.	

9. *Orkopoulos v R* [2009] NSWCCA 213 **Appellant was a councilor and member of parliament. Appellant supplied teenage boys with drugs and alcohol and then engaging them in sexual acts.** **10 year delay**	**Grounds of Appeal against conviction by appellant:** 1. That the verdicts are unsafe and unsatisfactory 2. Judicial failure in giving adequate directions regarding the tendency evidence adduced against each complainant in respect of the evidence of other complainants **Grounds of appeal against sentence by appellant:** 3. The head sentence was excessive 4. Judicial failure to account in sentencing for matters involving s 78K Crimes Act 1900 that leniency should be granted in circumstances where the offence has been abolished.		**Failure to give adequate directions to jury (Ground 2):** **Appellant submission:** • Trial judge should have directed the jury that they must be satisfied of the tendency evidence beyond reasonable doubt. • Trial judge did not make specific directions about the confined use that the jury could make of the tendency evidence.	**Judicial Reasoning regarding (Ground 2) - Rejected** • The summing up of the trial judge directed the jury that they ought to be satisfied of the tendency evidence – this direction was sufficient. The directions were sufficient and were discussed with the parties during the trial.	**Outcome:** Appeal against conviction dismissed, appeal against sentence upheld in part, appellant re-sentenced. **Limb:** 1, 3
Unsuccessful Cases on Appeal					
10. *RLS v R* [2012] *NSWCCA 236* **The Appellant attended the same Jehova's Witness Church as the complainant's family. Interaction with the appellant occurred through the Church.**	**Grounds of appeal against sentence by Appellant:** 1. Sentencing judge did not properly apply the principle of totality 2. Sentencing judge erred in taking into account the record of prior convictions as an aggravating factor. (Not argued at the hearing) 3. Sentencing judge erred in refusing to find special circumstances	N/A	N/A	**Held in respect of Ground (1) - Rejected** • His Honour was required to consider the totality of the criminal behavior arising from the child sexual assault offences which were before him. In my view it is evidence that he did so. In particular, he made specific reference to totality principles, and to the relevant authorities, in the course of his reasons. No error is made out. **Held in respect of Ground (3) - Rejected** • The principal reason for his Honour declining to make any adjustment between the non-parole period and the parole period was because he formed the view that the parole period was, of itself, long enough to allow for adequate supervision and support. In my view there is nothing	**Outcome:** Appeal Dismissed. **Limb:** N/A

25 years (1980 – unclear disclosure).	4. Sentence imposed was manifestly excessive 5. Sentencing judge was mistaken as to the maximum penalty for the child pornography offences 6. Sentencing judge erred in not fixing a non-parole period for the child pornography offence 7. Sentence for the child pornography offences is manifestly excessive			within his Honour's reasons which would suggesting that his discretion miscarriage. **Held in respect of Ground (4) - Rejected** • The issue of the sentencing practice which existed at the time of the offending was not raised by either party before the sentencing judge. The sentencing judge should have taken into account the fact that at the time of the offending, and in the absence of any statutory restriction being placed upon the length of a non-parole period, the practice was to set a non-parole period between one-third and one half of the term. His Honour's failure in this respect amounts to error. • However, all the factors of the offences mandated the imposition of a significant term of imprisonment. Having regard to all of these errors and notwithstanding the error which has been established, I am not of the opinion that some other sentence was warranted in law and should have been passed. This sentence was not manifestly excessive. **Held in respect of Ground (5) - Not Decided** • It is common ground between the parties that having regard to the legislative history of s91H under which the applicant was charged, the maximum penalty was in fact 5 years imprisonment (sentencing judge said that it was 10 years). This establishes an error. • I have considered the question of whether some other sentence is warranted in law and should have been passed according to ground (7). **Held in respect of Ground (6) - Not decided** • The construction of his Honour's reasons which has been advanced by the applicant is, in my view, the only reasonable construction which is open. His Honour's imposition of a fixed term of imprisonment and the absence of any variation to the statutory ratio when the sentences are considered as a whole are inconsistent with his finding of special circumstances. The error is made out but doesn't necessarily require intervention. **Held in respect of Ground (7) - Rejected** • The applicant's commission of the child pornography offences came against a background of offending in a manner which exhibited an illegal sexual interest in teenage boys. The plea of guilty was hardly entered at an early time. • The possession of child pornography is an important contributing element to the general problem which exists in the community arising from the creating and distribution of child pornography.	

				This offence, particularly at a time when the offender was still on parole for the previous offences, reflects a degree of recidivism as far as his criminal sexual interest in children is concerned. Persons who yield to such an interest, particularly if they have a history of doing so in one form or another, should expect significant punishment. For these reasons, and notwithstanding the identified errors on the part of the sentencing judge, I am not satisfied that any lesser sentence was warranted in law.	
11. *Regina v PFC* [2011] NSWCCA 117 **Respondent took on mentoring role for complainant who was experiencing family dysfunctions. Complainant came into respondent's care with approval of the Department of Community Services.**	Grounds of appeal against sentence by Crown: 1. Judicial error in failing to order an effective degree of partial accumulation, thus resulting in an overall sentence that fails to adequately reflect the totality of the respondent's criminality. 2. Judicial failure to properly assess the objective seriousness of the pervert the course of justice offences and erred in taking into account that the pervert the course of justice offences did not ultimately result in any miscarriage of justice. 3. Judicial error in imposing an effective total term and effective non-parole period which were manifestly inadequate.	N/A	N/A	**Held in respect of Grounds (1) and (3) - Rejected** • The sheer number and seriousness of the offences meant that some degree of concurrency and partial accumulation was inevitable. His Honour was required to take into account that a number of the offences were interrelated. • Appropriate sentences are to be passed in respect of each offence but then the sentencing judge needs to apply the complementary principles of proportionality and totality in order to formulate a final sentence which is appropriate for the totality of the criminality. To accumulate all of those offences which involved different complainants and different periods of time would produce a total sentence which was crushing. • Once a sentencing judge has set individual sentences for each offence, the questions of accumulation and/or concurrence are discretionary matters… The process followed by his honour of setting discrete sentences for each offence and then determining the overall sentence so as to have regard to proportionality and totality was fully in accord with principle and authority. In any event, the total sentence passed was a not insignificant one [63]. **Held in respect of Ground (2) - Rejected** • His Honour did err in taking in to account on the question of objective seriousness, the fact that the acts intended to pervert the course of justice did not succeed. This, however, does not end the matter. Even though his Honour erred in taking that matter into account when assessing objective seriousness, the sentences imposed were still well within the range available and have not been challenged by the Crown.	**Outcome:** Crown appeal against sentence dismissed. **Limb:** N/A
12. *Makarov v R (No 2)* [2008] NSWCCA 292	**Grounds of Appeal against conviction only by accused.** (1) The trial miscarried and there was a miscarriage of justice as a result of the perjury of A	Admission of context evidence at issue.	**Failure to adequately direct jury (Ground 6):** **Appellant's submission:** • The Appellant complains about the way in which the	**Judicial reasoning in regards to:** **(Ground 6 & 7) - Rejected** • The Crown submissions were both open on the evidence and	**Outcome:** Appeal against conviction Dismissed.

Foreign music teacher, complainants (A) were his students. **7 year delay**	(complainant) committed against the Appellant during the trial in relation to the evidence concerning the exclusively professional (musical, psychological and psychiatric) issues. (2) The trial miscarried and there was a miscarriage of justice as a result of the false testimony under oath that both A and Mr W Thomson committed against the Appellant during proceedings in relation to the date of A's very last performance in Sydney in July 1997. (3) The trial miscarried and there was a miscarriage of justice as a result of the false testimony under oath that both A and Mr W Thomson committed against the Appellant during proceedings in relation to the reasons and circumstances of A's moving from Mr Thomson's place to the Appellant's place in October 1999. (4) The trial miscarried and there was a miscarriage of justice as a result of the trial judge and Crown Prosecutor's misconduct in relation to the evidence of the Appellant concerning the reasons and circumstances of A's moving from Mr Thomson's place to the Appellant's place in October 1999. (5) The "*fresh*" evidence as a proof of the fact that the verdicts of the jury had been reached on the grounds of	**Failure to prove elements to requisite standard (Ground 7)** Appellant submits: • That the crown failed to prove the elements to the requisite standard of proof. They also submitted that the Crown unfairly attacked the applicant's character during cross-examination. **Crown's submissions:** • The trial prosecutor was not unfairly discrediting witnesses in her address to the jury, and in suggesting that the witnesses were not impartial, the Crown was accurately summarising the effect of the evidence. The crown submits that the passages relied upon by the appellant do not demonstrate that the Crown attacked his character, nor raised evidence of bad character in the trial. **Failing to reject context evidence (Ground 10)** **Appellant submissions:** • The appellant submits that evidence of sexual acts toward the complainant outside of the Australian jurisdiction should be excluded. • Contends that context evidence could only be introduced on the basis of	Crown Prosecutor referred to Exhibit 1 in her closing address to the jury [101]. • The Appellant complains that the Crown Prosecutor's address completely distorted the essence of the evidence in Exhibit 1. It had not been the aim of the Appellant to show complete 45-minute lessons. The Appellant had edited 18 master tapes and made a videotape of short duration especially for the court proceedings. The Appellant submitted that the Crown had misled the jury by suggesting that the jury *"might get a very distorted impression"* and by suggesting that the *"movements in and out"* of the room had been selectively recorded. **Crown's submission:** • The Crown submits that the arguments of the Crown Prosecutor on this issue were entirely appropriate. It was consistent with evidence of A to the effect that *"the video* [has] *been compiled especially to fish out those interruptions"* and *"every excerpt of every student has people coming in, that is definitely not the frequency people were coming in"* (T55). The Appellant's evidence was to a similar effect (T146, T168-169, T184).	appropriate; there was no breach of the principles enunciated in *R v Livermore* (2006) 76 NSWLR 659, nor of the prosecutor's duties [105], [111], [123]-[124]. • The comments of the Crown were not raising bad character. It is clear that one of the issues in the trial was the extent to which the Appellant exercised a degree of control over A, which may throw light upon the circumstances in which the offences charged were said to have occurred, his ability to continue to perform as a concert pianist and A's reasons for not making earlier complaint with respect to them [128]. • The use of the word 'harem' was unfortunate but it was not repeated and was withdrawn [135]. **(Ground 10) - Rejected** • The ground is misconceived. The law does not provide that sexual acts must occur within New South Wales before evidence of them is admissible as context evidence [155]. • The appellant does not contend that the context evidence should not have been admitted for any other reason [156]. • The trial judge gave clear directions to the jury concerning the permitted use of context evidence at the time it was led from A, and again during the summing up. No further direction was sought by defence counsel in this respect. No error has been established nor has a miscarriage of justice been demonstrated [157].	**Limb:** 1, 3

	the false evidence that A and Mr Thomson provided under oath during proceedings in relation to the "*relationship"* evidence and Counts 1-9. (6) Both the trial judge and Crown Prosecutor failed adequately to direct the jury in relation to: a. (i) an examination the area of the musical performing under stress [sic]; (ii) an examination of the evidence of the Defence's witnesses, Mr Virag and Mr Novikov; (iii) the Exhibit 1 [video recordings of the piano lessons interruptions in Room 34 of the Kharkov Music School in Ukraine]; (iv) the legal concept of the Crown Prosecutor's status. (7) The trial miscarried and there was a miscarriage of justice as a result of the nature and quality of the evidence relied upon by the trial Crown Prosecutor and violation by the trial Crown Prosecutor of the legal principles of burden of proof, proof, standard of proof and presumption of innocence. (8) The trial miscarried and there was a miscarriage of justice as a result of unfair conduct by the trial Crown Prosecutor in relation to the trial separation rule. (9) The acquittal of the Appellant on Count 9 as a proof of the jurors' reasonable doubt concerning A's credibility and truthfulness.	legal investigation in Ukraine. [151] As the alleged acts had not been investigated in Ukraine, it ought not to have been admitted. [152] **Crown's Submissions:** • Submits that the Appellant's argument is misconceived. There is no requirement that the conduct must occur within the NSW jurisdiction before it can be admitted into context evidence. Further, there is no requirement that the admission purpose of this evidence be for official investigation before it can be admitted. [153] the Crown further submitted that the trial judge gave very clear directions to the jury regarding the permitted use of this evidence at the time it was lead. [154].			

	(10) The trial judge erred in failing to reject the context evidence, which had been related to the jurisdiction of Ukraine and had not been investigated by Australian or Ukrainian police on the territory of Ukraine. (11) The trial judge erred in failing to provide for the Appellant, as a former foreigner with English as a second language an access to an interpreter through the simultaneous headphone translation or proper conditions for simultaneous translation of interpreter - with the intervals for translation - that international law and standards required. (12) The trial miscarried and there was a miscarriage of justice as a result of improper investigation, DPP and Crown Prosecutor conducted in relation to the time of the essence of the Offences 4-8, that caused a misconduct of the trial judge and Crown Prosecutor on the same issue.				
13. *Kamm v R* [2008] NSWCCA 290 **Leader of religious community.** **9 year delay**	**Grounds of Appeal against conviction only by accused.** (1) The trial miscarried because counsel for the appellant did not answer serious allegations of impropriety made against him by a witness during examination. (2) The trial miscarried because the prosecution asked questions of the	**Improper questions posed to witness (Ground 3):** • The prosecutor's cross-examination of a witness (assistant of the appellant and member of the religious community of which the appellant was the head) should not have been permitted to the extent that the witness was	N/A	**Judicial reasoning regarding (Ground 3) - Rejected** • (per Giles JA [57]): • The cross-examination had substantial probative value in questioning the witness's credibility [57]. • There was no outweighing danger of unfairness to the appellant [57]. The jury would not have thought any less of the appellant simply through it being shown that the witness was one of the appellant's "queens" [57].	**Outcome:** Dismissed. **Limb:** 3

	complainant's mother in cross-examination that were either irrelevant or lacked substantial probative value and which in any event were offensive such that they caused unfair prejudice to the appellant. (3) The trial miscarried because the prosecution asked questions of a witness which were irrelevant or which lacked substantial probative value and which in any event were offensive and caused unfair prejudice to the appellant.	asked about whether she was one of the appellant's "queens" / "mystical spouses" (sexual partners) and was prepared to lie for the appellant [53]. • The cross-examination lacked substantial probative value and unfairly prejudiced the appellant in creating a "very dark cloud of suspicion" over him [53].			
14. Kamm, William v Regina [2007] NSWCCA 201 **Leader of religious community.** **9 year delay**	Appeal against conviction and sentence by accused. (1) The trial judge erred in permitting the Crown Prosecutor to amend the indictment, following the close of the Crown case and during the presentation of evidence for the defence, by changing the terms of count 4 on the indictment, in such a manner that it required the applicant to be re-arraigned in relation to that count alone (at [26]). (2) The trial proceedings on count 4 were a nullity in that, following the re-arraignment of the appellant on that count, he was never put in charge of the jury, nor were the jury ever properly sworn by being required to take an oath to bring in a verdict according to the evidence on that count (at [26]).	N/A	**Inadequate judicial direction to jury and failure to discharge jury** **(Grounds 3 & 4)** **Appellant submission:** • That, in order to avoid at least the perception of an unfair trial, the judge had no option but to discharge the jury: *R v. Maric* (1978) 52 ALJR 631[46]. • The manner in which the appellant's defence was prejudiced was irremediable. "A" was the most important witness for the appellant, since her evidence called into question the complainant's evidence on count 4, the most serious charge [47]. • The jury's note indicated more than an observation	**Judicial reasoning:** **(Ground 4) - Rejected** • There was plainly nothing improper in the conduct of the jury [49]. • Juries are correctly encouraged to observe witnesses giving evidence so they can assess their reliability, and are entitled to observe and take into account what witnesses say and do when they are not actually giving evidence: cf. *Government Insurance Office of NSW v. Bailey* (1992) 27 NSWLR 304 at 314 [50]. • If what is observed was not in view of Counsel, then it may be necessary that it be disclosed and dealt with by evidence and/or submissions: *R v. Martin* (2000) 78 SASR 140 at [34]; *R v. White* (1987) 49 SASR 154 [50]. • It is inevitable that jurors will sometimes form impressions of witnesses as they give evidence, and sometimes ones the judge would disagree with [52]. • The assessment of witnesses is a matter for the jury; and the fact that jurors may form impressions about witnesses as a case proceeds, is not a reason for thinking they will not do their duty and come to a conclusion at the end of the case having regard to all the evidence, and if appropriate, revise impressions formed earlier [52]. • If the judge is told by the jury of observations that the judge thinks are highly improbable, it may be appropriate for the judge to express his view and warn the jury against acting on those observations [53]. • In this case, if anything, the judge's directions were too favourable to the appellant, in that they gave an unequivocal direction that the observations had no relevance and that the jury should disregard them [54].	**Outcome:** Dismissed. **Limb:** 1, 2, 3

	(3) The trial proceedings miscarried, and the judge erred in failing to discharge the jury, after the jury sent in a note, during the course of defence evidence, disclosing the fact that one or more members of the jury had formed the view that a witness called by the defence was being "coached" by another defence witness [26]. (4) The directions given by the trial judge seeking to address the problem created by the jury's action in ground three above was inadequate and insufficient to overcome the overwhelming prejudice and unfairness created by their action. The perception of prejudgment by the jury of the weight to be given to evidence given by witnesses for the defence was in all the circumstances irremediable [26]. (5) The verdicts of the jury on all of the counts on the indictment are unreasonable having regard to the evidence [26].		about a witness, namely a conclusion she was doing something improper, thus indicating a real risk of pre-judgment on an important matter that went to the fairness of the trial [48]. Despite the directions given by the judge, there remained a perception that the jury had pre-judged the matter unfavorably to the appellant [48].	The fact that the jury drew the judge's attention to the matter, rather than indicating prejudice or pre-judgment suggests that the jury was very concerned to act fairly, and to obtain guidance from the judge. It should not be assumed that the jury did not act on the judge's directions: *Gilbert v The Queen* (2000) 201 CLR 414 at 425 [54].	
15. *R v Fletcher* [2005] NSWCCA 338 **Church based** **15 year delay.**	Appeal against conviction only by accused. (1) "The learned trial judge erred in law in admitting the evidence of [GG], because: a. it was not tendency evidence within the meaning of the *Evide Act* s97; b. it did not have significant proba	**Admission of tendency evidence (Ground 1):** • The appellant argued that the evidence of GG was not admissible under s97 because [53]: (1) "It did not have significant probative	**Misdirection of Jury as to use of tendency evidence (Ground 2)**	**Judicial Reasoning regarding (Ground 1):** (per Simpson J with whom McClellan CJ at CL agreed): • In *Mickelberg v The Queen* [1989] HCA 35; 167 CLR 259 the decision made by the trial judge was made prospectively, on the basis of the statements before him, including the statements of the complainant. • Hence, to establish a "wrong decision of [a] question of law" in these circumstances, it would be necessary that the appellant show that the decision to admit the evidence was wrong *at the time it was*	**Outcome:** By Majority Appeal Dismissed. **Limb:** N/A

	value; c. the probative value of the evidence did not substantially outweigh its prejudicial effect on the appellant (s101); d. there was no ground for its admission. (2) If the evidence of [GG] was admissible (which the appellant denies) the learned trial judge erred in law in directing the jury that the evidence could be used as showing a tendency to commit each and all of the offences charged in the indictment and its use should have been confined to showing a tendency to commit the offence the subject of Count 4."	value. (2) The probative value of the evidence did not substantially outweigh the prejudice to the accused. (3) It was evidence of two acts of one specific sort remote in time and circumstance from any of the acts charged. The only similarity at all was to the single act charged in Count 4. It was too remote in time and circumstance to be admissible as evidence relevant to Count 4. Even if admissible in respect of the act alleged in Count 4, it was irrelevant to all the other counts and its use as tendency evidence should have been restricted to Count 4. (4) The evidence did not pass the stringent test posed by s101(2) and therefore could not have survived the narrow 'unfair prejudice' test in s135 or s137. (5) Had the appellant been charged with the two offences alleged by [GG],		*made*. • it is implicit in the decision that the judge concluded that the evidence of GG in the two paragraphs of his statement that he admitted was capable of rationally affecting the probability of the existence of a fact in issue, and that, in the light of other evidence he anticipated would be adduced (presumably, principally, that of the complainant), he assessed that the jury would ascribe to it significant probative value. • In order properly to determine the ground as pleaded, this court really should have access to the actual material that was before the trial judge, and not the evidence that was subsequently given in the trial. • If, on that material, it was open to the judge to make the assessment that he did (and no error of the **House** kind is demonstrated), then this ground of appeal must be rejected [39]-[40]. • There is no error in the (implicit) conclusion that the jury would ascribe to the evidence significant probative value [68]. • Equally plainly, however, the evidence had a significant prejudicial effect. • The question which arises under s101(2) (as it has been construed) is whether the probative value of the evidence substantially outweighed the prejudice to the appellant. • If, in the trial judge's view, it did not, then pursuant to s101(2) (on the conventional construction), he was obliged to reject it. • That exercise, involved the judge putting himself, so far as he could, in the shoes of the jury, and predicting what use they would make of it [69]. • If the evidence had been limited to the bald assertions of sexual intercourse contained in the two paragraphs which the trial judge specifically mentioned, then it may be that the probative value did not substantially outweigh its prejudicial effect. • However, the circumstances that allowed the evidence to pass the s97(1) test were also material in this evaluation. • The prejudicial effect was significant, but it was open to the judge to conclude that the prejudicial effect was substantially outweighed by the probative value.	

		it is highly likely he would have succeeded in an application to have the [GG] charges tried separately from the [charges concerning the complainant], because evidence of the former would not get in as evidence of the latter. (6) The effect of the evidence was to permit evidence of irrelevant bad character to taint the jury's deliberations and to deprive the appellant of the real chance of an acquittal on each charge." **Crown submission:** • The DPP's explanation, provided to the appellant's legal advisors, shows that the "tendency" which it sought to establish was wider, and more detailed. • The DPP sought to establish a pattern of behaviour, or even a *modus operandi*, in the appellant's behaviour. This included the use of his position as parish priest in meeting Catholic families and involving himself in their lives, developing a		• There was thus no error of law in the decision to admit the evidence [70]. **Held (Ground 1) per Rothman J - Accepted** • Even the use of the evidence of prior conduct for the purpose set out in paragraph 137(b) would be impermissible because the tests in s.98 and s.101(2) have not been satisfied [138]. • In the current proceedings, the evidence would be admissible, subject to the operation of s.137 of the Act, only for the purpose expressed in the direction in sub-paragraph (c) above, because, as previously outlined, the evidence, although relevant, is not admissible under s.97 or s.98 and cannot be used, even if admitted, for that purpose or effect because of the operation of s.101(2) of the Act. • It would be then extraordinary for the evidence, in those circumstances, to be admitted even on the narrower basis in paragraph (c) above [139]. • The trial judge has allowed the tendency evidence to be used in an impermissible manner and, even though it would, on the above analysis, possibly be admissible for a different use, it would need to be, and was not, subject to specific directions to the jury as to its use nor was it subjected to s.137 of the Act [140]. • There is clearly more than sufficient evidence upon which the appellant could have been convicted and, assuming the complainant were to be believed, would have been convicted. • This is so even disregarding the evidence sought to be impugned in this appeal. • The problem is that the effect of the tendency evidence admitted was to taint the deliberations of the jury by using the evidence in a manner it could not legitimately do. • In those circumstances, the only proper course is for there to be a new trial on the charges [142]. **Judicial Reasoning regarding (Ground 2):** (per Simpson J with whom McClellan CJ at CL agreed): • **Rejected** • Despite the complaint about directions contained in the ground as framed, the substance of this ground is the admission of the evidence of GG in relation to all counts in the indictment.	

		special relationship with the families, the children of the families, and in particular with a child the focus of his attention; and the introduction of the child to sexually explicit material and, eventually, inappropriate sexual behavior [67].		• Since in considering the above ground it was concluded that the evidence was admissible in relation to all counts, it follows that this ground cannot succeed [73].	
16. *Regina v AEL* [2005] NSWCCA 148 **Leader of a spiritual discussion group which the complainant attended. Had relations with each other over 20 years.** **Second complainant: 12 years**	**Appeal against sentence only by accused.** 1. The sentencing judge erred in pronouncing that aggravated indecent assault was an offence for which the authorities and sentencing precedents require the imposition of prison sentences. The sentence imposed for count 2 was manifestly excessive.	N/A	N/A	**Held in respect of ground (1):** • **Rejected** • It may be accepted, as argued at first instance, that indecent assault generally or in its aggravated form does not necessarily require the imposition of a custodial sentence. [11]-[12] • His Honour's words meant no more than that by reference to the authorities and the precedents, and looking at the facts of the case, a custodial sentence was necessary. [14] • In the circumstances, however, any sentence less than one of full time custody for theses serious offences would have been inadequate. [12] **Held in respect of ground (2):** • **Rejected** • The sentencing judge was entitled to take a 'particularly strong view' on count 2 [17]. ○ (i) The complainant was the daughter of the applicant subject to his control and the offence was accordingly a 'very gross breach of trust' [17]. ○ (ii) This was not an isolated offence; one of the Victorian offences, with which the sentence was made partly concurrent, was for an indecent assault the applicant perpetrated during 1987 and 1988 [17]. ○ (iii) The complainant suffered 'substantial psychological damage' [18]. ○ (iv) Courts have often observed the difficult of drawing anything but broad conclusions from sentencing statistics. Here, they only suggest that the sentence imposed was high in the range of existing sentences [19]. ○ (v) The net effect of the sentences was to increase the non-parole	**Outcome:** Dismissed **Limb:** N/A

				period by a little over 9 months and the head sentence by about 2½ years. These periods are 'no inconsiderable' for a man of the applicant's age and health. However, it is not suggested that the applicant will be unable to receive proper medical attention by virtue of incarceration [20]. • The appeal should be dismissed on account of: • the 'very serious nature and consequences' of the offence; and [19]. • the fact that it cannot be said that the applicant's age and state of health were such as to render impermissible the resulting extension of the period of incarceration [21].	
17. *BJS v R* [2013] NSWCCA 123 **Former catholic priest welcomed into the homes of the victims by their Catholic parents. He took advantage of his position/status by befriending the parents and often attending their homes, and staying overnight.**	Appeal against conviction and sentence by accused. **Against conviction:** (1) The sentencing judge erred in ordering that all of the counts of each complainant be tried together; (2) The sentencing judge erred in permitting the Crown to rely upon tendency evidence; (3) The sentencing judge erred in finding hypnosis evidence to be irrelevant to the issue of two witnesses' reliability and thus he refused to exclude the evidence. (4) The sentencing judge erred in upholding an objection preventing the defendant being permitted to cross-examine CP (witness claiming to also have beeen assaulted by appellant) and MG (complainant) about the content of the counselling sessions. (5) The sentencing judge erred in excluding expert evidence in the defence case bearing upon the reliability of witnesses MG and CP. (6) The sentencing judge erred in refusing to discharge the jury	Multiple, including admission and use of tendency/coincidence evidence. **Regarding tendency and coincidence evidence: (Ground 2)** Appellant submitted that: • The tendency evidence did not have the requisite significant probative value that substantially outweighed any prejudicial effect on the accused. • The tendency sought to be proved was that: ○ the Appellant had a tendency to have a sexual interest in girls aged 7-17 ○ the Appellant used his position of authority and relationships with families to gain access to girls whom he wished to engage in sexual activities	Multiple, including direction to jury re use of tendency /coincidence evidence. **Misdirection regarding expert evidence (Ground 4)** Appellant submitted: • This ground relates to the matters covered by grounds 3 & 5. The judge incorrectly directed that Mr Lyleson's counselling notes regarding MG should not be produced because they did not pass the communication privilege provisions test (ss 295 - 300 of the Act). • The trial miscarried because the examination/cross-examination of CP and MG concerning their psychological counselling sessions was not permitted and the cross-examination of Mr Lyleson and Ms Schaan as well as the calling of Dr	**Judicial reasoning regarding Tendency and Coincidence evidence (Ground 2) - Rejected** • The sentencing judge's summary of the tendency evidence was accurate – he focused on the consistency of the relevant tendency, not the factual differences. • The sentencing judge was well aware of the risk of contamination and excluded some proposed tendency evidence on this basis. • The sibling relationships in question did no more than establish a mere speculative chance of concoction, and any publicity was limited in its terms. **Judicial reasoning regarding expert evidence on hypnosis (Grounds 3 & 5) - Rejected** • The recollections of MG and CP were never forgotten and were reported to witnesses before undergoing therapy. They were not dealing with the issue of recovered memory. • Further, Mr Lyleson and Mrs Schaan denied engaging in hypnotic techniques. It was speculative on the part of Dr Roberts to assert that because certain techniques described by Ms Schaan 'could' be associated with hypnosis, that this was so. • There was no attempt to enhance or recover any memory for either witness and Dr Roberts was not able to explain how hypnosis might adversely affect a witness's memory where the hypnosis was not directed towards that memory. • The judge looked at the probative value of the evidence of MG and CP, and balanced that against its prejudicial effect. He also went further and made an assessment of the reliability of the evidence, a step which on one view of s137 he should not have taken (should be a matter for the jury) but which could only favour the Appellant. **Judicial reasoning regarding misdirection (Ground 4): Rejected**	**Outcome:** Grounds 1-9 appeal dismissed. Leave to appeal ground 10 granted but appeal dismissed. **Limb:** 2, 3

	in circumstances where the Crown was permitted to adduce evidence of the psychiatric history of witness "Y" (CP) despite the judge's earlier ruling that such evidence was not relevant to the issues to be tried. (7) The sentencing judge erred in ruling that the Crown Prosecutor be permitted to cross-examine the Appellant. (8) That sentencing judge erred in refusing to discharge the jury consequent upon permitting the Crown Prosecutor to cross-examine the Appellant as to tendency. (9) That sentencing judge erred in directing the jury after they commenced their deliberations that they could "reluctantly agree" as to their verdict. **Against sentence:** (10) The sentence imposed was too severe.	○ that the particular activities he attempted to engage in were similar • There were substantial differences in the behaviour alleged by each of the complainants – different sexual forms of offending alleged to have been committed upon girls of different ages in a variety of circumstances. • A risk of contamination/concoction of the evidence – sibling relationship between some of the complainants and tendency witnesses and media reporting. **Expert evidence regarding hypnosis (Grounds 3 & 5)** Appellant submission put forward that: • The sentencing judge had not properly applied s137 of the *Evidence Act* to the evidence of MG and CP who had undertaken treatment with psychologists CP (Mr Lyleson and Mrs Schaan) which was akin to hypnosis and he had not taken into account the effect of hypnosis on	Roberts should also be allowed. • CP and MG were the only witnesses hypnotised and allowing their evidence to be given in the trial as tendency evidence would create an unfair prejudice to the accused because he would not be able to cross-examine them about the fact that they had been hypnotised and would not be able to suggest to them that because of that hypnotism their memories of what occurred were affected. **Trial judge erred in directing jury to "reluctantly agree" to a verdict (Ground 9)** • The sentencing judge referred to 'reluctant' agreement, giving analogies of when someone might agree to something reluctantly. The analogies might have distorted the reasoning process followed by the jury.	• For the same reasons set out for rejecting Grounds 3 & 5, the sentencing judge was correct in not allowing these documents to be tendered in evidence. The probative value of the counselling notes was of a very low order and could not be characterised as having "substantial probative value". • There is no evidence to suggest that either of the witnesses has a false or entrenched memory as a result of hypnotism. • The evidence that could be given by Mr Lyleson, Mr Schaan or Dr Roberts could not do anything more than raise a bare possibility that their memories may have been affected in some way. **Judicial reasoning regarding misdirection to jury about verdict (Ground 9): Rejected** • Whilst the analogies were not helpful and had the potential to be misunderstood by the jury, the judge's direction, as a whole, reminded the jury of the standard of proof and did not disadvantage the Appellant.	

		the probative value of their evidence. • The opinion of Dr Roberts shows that the process of hypnosis is prone to creating memories of events that may not have occurred, to distorting recollections and to make evidence unreliable, even when hypnosis may not have been directed to treating those memories. • Therefore, the probative value of the evidence given by MG and CP was seriously reduced, so as not to satisfy the balancing test required by s137.			
Non-historical child sexual abuse Cases					
Successful cases on Appeal					
18. *Cross v R* [2012] NSWCCA 114 **Applicant operated a sporting school, the victim attended.**	**Grounds of Appeal against sentence:** (1) Sentencing judge erred when imposing a fixed term for Count 1. (2) Sentencing judge erred by misdirecting himself as to the correct maximum penalty for Count 2 and so fell into error in arriving at an appropriate sentence for the offence. (3) The overall sentence was manifestly excessive.	N/A	**Trial judge misdirected himself (Ground 2)**	**Judicial Reasoning regarding (Ground 2) - Ground of appeal not decided – considered in light of ground - Accepted** • In his sentencing remarks, the sentencing judge mentioned that the maximum penalty was 15 years for Count 2. In fact, the correct maximum penalty was 10 years before the offences were committed before the maximum penalty was raised. The Crown accepted that this was a material error but claimed that a less severe sentence than that which was handed out was not warranted [37].	**Outcome:** Leave to appeal granted, Appeal allowed. Sentences quashed, appellant re-sentenced. **Limb:** N/A

19. R v Woods [2009] NSWCCA 55 **Appellant was a youth liaison officer and coached a sporting team which the complainant was a member.** **No Delay**	Appeal by crown and appellant respond **Grounds:** (1) Sentence was manifestly inadequate.	N/A	N/A	**Judicial reasoning for sentence –** • **Accepted** • The manner in which the Judge chose to group the offences was appropriate to the circumstances of this case [47]. • In the sentencing remarks, it appears that the absence of aggravating features in relation to the offences justifies a downward revision in the assessment of objective gravity. 'The logical extension of this proposition is that the greater the number of aggravating actors missing from the commission of a child sexual assault offence, the lower will be its objective criminality. This is problematic, to say the least [52]. • 'The structure of the offences and the legislative policies underpinning them, assume that young children are not capable, by and large, of understanding the significance of sexual activity (hence the absence of informed consent) or of asserting their will over that of an adult. How then, can the fact that a victim co-operates with an offender be relevant to an assessment of the objective gravity of an offence of this type? That is not to say that evidence of a victim's resistance and/or an offender's efforts to restrain a victim are not relevant to an assessment of objective gravity for offences of this type. Such a circumstance would aggravate a child sexual assault offence. But the absence of struggle or resistance (that is, the child's co-operation) cannot in our view, mitigate such an offence' [53]. • 'The judge's assessment of the criminality inherent in the offence… was generous to the respondent… This offence should have attracted a more significant penalty than imposed by the judge' [56]. 'The fact is that almost every charge of a sexual nature against the respondent was based solely upon admissions made by him during the record of interview with the police… It is a well-established principle that a significant discount on sentence should be allowed in relation to a person who comes forward and admits to offences which the authorities would not otherwise have known about… The discount applied by the Judge did not adequately reflect the degree of assistance given by the respondent n this case. A discount of 40% would more appropriately reflect the combination of the respondent's early plea of guilty and his significant assistance to the authorities' [70].	**Outcome:** Appeal allowed, sentences quashed, appellant re-sentenced. **Limb:** N/A

20. *Galvin v Regina* [2006] NSWCCA 66 **Appellant owned theatrical business which the complainant (AM) attended. Appellant and complainant were close friends.**	**Appeal against conviction only by accused.** (1) The trial judge erred by admitting into evidence the video taped interview between MW (complainant who committed suicide) and Senior Constable Alison Forbes dated 9 September 2002. (2) The trial judge erred by admitting into evidence the portions of the video taped interview between AM (Complainant) and Senior Constable Alison Forbes dated 4 September 2002 wherein AM suggested that the accused had engaged in improper acts with MW and Kristen Andrews. (3) The trial judge erred by failing to direct the jury that MW's evidence relating to uncharged sexual acts was to be used as evidence of the relationship that existed between the appellant and the complainant and could not be used for any other purposes; (4) (abandoned); (5) The trial miscarried because of the failure to deal properly with the complainant's evidence.	Admission of inadmissible evidence; miscarriage due to failure to deal properly with complainant's evidence. **Admission of inadmissible evidence (Ground 1)** Appellant's submission: • That errors of principle occurred such that the decision to admit the evidence, notwithstanding s 137 of the *Evidence Act,* miscarried [18]. • That the trial judge misconceived the proper way in which the jury could use the evidence and that his reasons for admitting the evidence disclosed an inconsistency that went to the very heart of his decision [18]. **Trial judge erred by admitting evidence of complainant's interview with police (Ground 2)** **Appellant's submission:** • That these two portions of the interview were irrelevant but raised a suggestion that the appellant had been	Failure to direct/warn jury as to use of particular pieces of evidence. **Failure to direct/warn jury about evidence relating to uncharged events (Ground 3)** **Held:** • It is unnecessary to determine this ground of appeal (at [50]). • It will be a matter for the trial judge to formulate what warning and directions to give if any part of MW's edited interview is admitted into evidence [50]. • The chief criticism of the summing up was that: ○ the trial judge did not repeat to the jury the basis upon which MW's evidence could be used as context evidence ○ He did not warn the jury against using it as a basis for propensity reasoning [51]. • No such direction was sought [51]. • It might be thought inadvisable to introduce the notion of tendency to the jury simply to warn	**Judicial reasoning regarding admission of inadmissible evidence (Ground 1) - Accepted** • MW's interview contained: 1. Evidence of uncharged sexual activity between the complainant and the appellant. 2. Allegations that had not been supported by the evidence of the complainant herself [19]. • Such claims were relatively minor relative to the complainant's allegations [19]. • Admissibility of such evidence depends on the purpose of admission and its probative value for that purpose ○ If admitted as context evidence, its probative value depends on the need for the complainant's specific allegations giving rise to the charges to be put into context so the jury can understand the full nature of the allegations. ○ If the evidence is being used to prove a tendency of the accused to indulge in sexual activity with the complainant, it has to satisfy s 97 and s 101 of the *Evidence Act* [19]. • Context evidence and tendency evidence impact upon the complainant's credibility but in different ways. ○ <u>Context Evidence:</u> makes the complainant's account more intelligible and may explain aspects of her conduct, such as the absence of complaint. ○ <u>Tendency Evidence:</u> makes it more probable that the complainant is telling the truth in respect of the particular allegations because the accused is likely to have acted in the way that the complainant said he did [20]. • The interview of MW contained four discrete types of evidence: 1. Direct evidence of one of the counts in the indictment; 2. Direct evidence of uncharged allegations of sexual assaults by the appellant upon the complainant; 3. Evidence of complaint by the complainant to MW about sexual acts committed by the appellant; 4. An alleged confession by the appellant to MW of sexual activity with the complainant [21].	**Outcome:** Appeal Allowed, convictions and sentences quashed, new trial ordered. **Limb:** 2

	The trial judge erred by failing to warn the jury in relation to MW's evidence: (i) that they should not draw any inference adverse to the appellant or give the evidence any greater weight because the evidence was given in video form.	acting in a similar way with Ms Andrews [45]. • That the reference to MW in the first passage referred to an earlier question and answer excised from the interview before the jury where the complainant referred to the appellant sexually assaulting MW [45].	them against such reasoning [51]. • However evidence of other sexual acts is so prejudicial when coming from someone other than the complainant that such a warning should always be given [51]. • There is a very significant risk that the jury might use evidence in that way without understanding that they were prohibited from doing so [51]. • During the summing up the trial judge repeated to the jury the two-step approach to take with MW's evidence without indicating again the purpose for which it was before them and at least warning that it could not be used for any other purpose [52]. • What the trial judge said during the summing up or when the evidence was first introduced was insufficient to warn the jury against using the evidence in some other way [52]. • There was a real risk in this case that the jury	• At the trial no or insufficient attention was given to the distinction between the different types of evidence and how the jury might use each of them [21]. • Because no attention was given to the different types of evidence contained in the interview of MW, it was dealt with in a general way by the trial judge when deciding whether to exclude it under s137 [27]. • Although the trial judge ultimately approached the question by weighing the probative value against its prejudicial effect, he did not give sufficient regard to [27]: o The nature of the evidence, o The purpose for which it could be used by the jury, and o Its potential for unfair prejudice having regard to that purpose. • If that had been done, it is not clear that all of the edited interview would have been admitted [27]. • The trial judge determined there would be no danger of unfair prejudice outweighing the evidence's probative value for two reasons [28]. • The complaint was made that the judge did not consider the possibility that the jury might conclude that MW committed suicide [35]. • It is not likely that the jury would have done so [35]. • It was submitted that the trial judge's discretion miscarried because, when considering whether to exclude the evidence under s 137 of the Act, he contemplated that the evidence would be subject of warnings under s 165 but he did not give those warnings in summing up [36]. • The only warning given was that the evidence was hearsay, untested by cross-examination [36]. • Defence counsel sought no other warning [36]. • There was no error in the trial not giving these warnings [37]. • The ground having been made out, the appeal must be allowed, the verdicts quashed and a new trial ordered. [38]. • It is unsatisfactory that the appeal must be allowed because of the Crown's desire to admit MW's interview [42]. • The Crown case against the appellant was strong even without this	

			might use the evidence as tendency [52]. • The jury should have been warned against such an approach [52]. • There was no need for the trial judge to direct the jury against using allegations of other sexual acts made by MW to replace any counts on the indictment [52]. • There was no real risk that they would do so [52]. **Failure to warn jury about MW's evidence (Ground 6)** **Crown's submission:** • That s14 did not apply to MW's video evidence because it was admitted under s 65 of the *Evidence Act* not under the *Evidence (Children) Act* (at [58]).	material [42]. **Held in respect to (Ground 2) – Rejected** • It was open to the trial judge to allow the evidence [46]. • The evidence was significant because it was part of the circumstances in which the complaint to Ms Andrews arose [46]. • Although it was prejudicial to the applicant, that prejudice was not great in these circumstances [46]. • It was open to the trial judge to conclude that it should not be rejected under s 137 [46]. • Not informing the jury about the acquittal was unnecessary [46]. • Even without that knowledge, the jury would not have used that evidence to the prejudice of the accused such as to cause a miscarriage of justice [46]. • Evidence was led that the appellant had no convictions and was a person of good character [46]. • Appropriate directions were given as to the use of that evidence [46]. • The second passage does not raise by itself or with the other passage, a suggestion of misconduct by the appellant with anybody but the complainant and perhaps Ms Andrews [47]. • It was open to the trial judge to admit the evidence as part of the circumstances leading up to the complaint to AM's parents [47]. • The jury were not aware of any of the allegations by either AM or MW of sexual assaults against MW [48]. • One should not read too much into what was put before the jury with knowledge they did not have [48]. • The trial judge was not required to reject that part of the conversation under s137 on the basis that the jury might conclude that the complainant had told Ms Andrews about sexual assaults against MW [48]. • The jury knew of two incidents involving MW in allegations of sexual assaults upon the complainant from the portion of MW's interview [48]. • The jury could easily have concluded that this was what the complainant was referring to [48]. **Held regarding (Ground 6) - Rejected**	

				• It is unnecessary at present to determine whether s14 applies for MW's evidence [58]. • It would be a cautious approach to give such a warning whenever evidence was given in this form [58]. • The failure to give the warning, even if required under s14 could not have led to a miscarriage of justice [58]. • As the jury knew MW was dead, they could not have drawn any adverse inference about the use of video-evidence against the appellant [58]. • The rest of the s14 warning concerns the weight given to the evidence [58]. • The only potential prejudice to the appellant could be that the jury was not warned against giving greater weight to the evidence because of its form [58]. • Given the directions about the hearsay nature of the evidence and that MW could not be cross-examined, no prejudice could have been suffered by failing to give this warning [58]. • The part of s25 omitted in the trial judge's direction was that he did not direct the jury not to give more or less weight to the evidence because of its method [61]. • Regarding prejudice to the appellant, the only relevant omission was to tell the jury that they were not to give the evidence more weight because it was taken by CCTV [61]. • The risk of the jury giving that evidence more weight for that reason was so slight that the failure to warn did not result in a miscarriage of justice [61].	
21. *R v Cunningham* [2006] NSWCCA 176 **Tutor, ran business in his home. Also assaulted child as de facto father.**	Appeal against sentence only by accused. 1. The sentencing judge erred in finding that emotional harm caused by the offences was substantial. Sentences were manifestly excessive.	N/A	N/A	**Held in respect to (Ground 1) -** Ground of Appeal not decided. **Held in respect to (Ground 2) - Appeal allowed in part** • It is necessary to re-sentence on count 5 because the starting point of 16 years 3 months was beyond the bounds of sound discretion. I consider that the starting point for the sentence for the offence of attempted sexual intercourse should be 13 years imprisonment. Allowing the applicant the discount of 20% of the utilitarian value of his plea, the sentence is 10 years and 3 months.	**Outcome:** Appeal against sentence Allowed in part:

					• Appeal against sentence for count 5 (attempted sexual intercourse) quashed, new sentence imposed. • Appeal of other counts dismissed. **Limb:** N/A
22. *FB v R; R v FB* [2011] NSWCCA 217 **Headmaster of complainant's school. Offences did not occur at school but at the appellant's home. Complainant (SE) had family difficulties and appellant suggested to parents that SE spend two weeks at his family home for a "time out".**	Appeal by Crown on sentencing and appeal by accused against conviction and sentence. (1) Trial judge erred in admitting the tendency evidence of witness, MD, pursuant to section 97 Evidence Act. There was a miscarriage of justice due to the failure by the legal representatives of the appellant to adduce evidence of the specific contents of media reports relating to the witness, MD. (2) Trial judge failed to take into account matters adverse to the credibility of the complainant in accepting her evidence. (3) Excessive judicial questioning created a real danger that the trial was unfair. (4) The verdict was unreasonable and incapable of being supported by the evidence.	Admission use of tendency/coincidence evidence; unreasonable verdict; failure to take adverse matters into account re credibility evidence. **Admission of tendency evidence (Ground 1):** **Appellant submission:**	Excessive judicial questioning. **Excessive judicial questioning created a real danger that the trial was unfair (Ground 3):** • Judicial questioning attempted to elicit evidence to bolster the prosecution case [102] and was conducted impermissibly, even though this was a judge only trial.	**Judicial reasoning regarding the admission of tendency evidence (Ground 1) - Rejected**	**Outcome:** Dismissed. Appeal against conviction dismissed. Crown Appeal against sentence accepted. Sentence quashed. new sentence imposed . **Limb:** 3

		• At trial, appellant agreed that he had performed oral sex on MD (witness) and also had sexual intercourse on the first occasion. He denied, however, that she was initially asleep and that he had given her pills. He claimed the sexual acts were consensual. • There was a miscarriage of justice because appellant's legal representation did not admit evidence of a newspaper report that showed that SE (complainant) could have discovered that another person had made allegations that she was drugged and raped. The two limited ways in which the appellant argued that the evidence had significance were first, its capacity to bear on the tendency argument and secondly, its general ability to enlarge the environment in which there was discussion in the Grafton area concerning the accused's aberrant sexual behaviour [52]. **Verdict incapable of supporting evidence (Ground 4):** • **Appellant submission:** • The verdict was said to be unreasonable and incapable of being		• Evidence may be offered simply to show a tendency to act in a particular way, not necessarily in a criminal manner. Indeed, it is not necessary that the tendency to commit a particular crime or, for that matter, to commit a crime at all. The trial judge correctly recognised that, in order for MD's evidence to have significant probative value as required by section 97, the Crown had to establish that the evidence possessed a degree of relevance to the events charged, such that it could be said that it was "important or of consequence". The trial judge identified the relevant fact in issue in the trial. This was whether or not SE had been subjected to the appellant's sexual activity in the way she had asserted [24-25]. • It was clearly open to his Honour to find, as he did, that the evidence of MD made it significantly more likely that the appellant had carried out the acts alleged by SE, as the Crown case asserted. • His Honour noted, in both decisions, that mere contact or the possibility of contact does not, in itself, necessarily lead to an indication of a real chance of concoction. Overall, his Honour was satisfied that, on the whole of the material before him, at the time of the initial determination, that there was no real chance of concoction [36]. • Trial judge concluded that none of the material as to SE's friendship with either AD (school friend of SE & MD's brother) or TB (AD's girlfriend), nor the contents of the brief telephone conversation between the two young women, raised even a hint of suspicion that there had been concoction or collusion between them [38]. • It is not necessary to traverse every single matter sought to be relied on by Newton (counsel for appellant) under the headings of either contamination or concoction. His honour carefully examined all the matters which were argued before him, they generally being those matters presently raised before this court. He rejected the submission that, individually or collectively, the matters relied upon pointed to a real chance of concoction or contamination. It was clearly open to his honour to make the findings that he did [45]. • There is no evidence from which it could be said that the failure to obtain the newspaper article (if that is what happened) demonstrates 'flagrant incompetence' on the part of trial counsel [54]. Importantly, there was no reference in the article to the two white tablets nor that the girl fell asleep. This level of detail – critical to the complainant's evidence is not disclosed in the articles and cannot be inferred from the simple use of the word 'drugging'. In any event the complainant was clear in her evidence at trial that she had not seen articles in any	

		supported by the evidence because (a) the complainant's evidence was uncorroborated, (b) the complainant failed to make any complaint consistent with what was asserted by her at trial until she spoke to the police in mid-2009, (c) the complainant gave inconsistent earlier "complaints" (d) the appellant was recovering from significant surgery and had wounds that made the suggested conduct very unlikely, (e) the complainant sent a thank you card to the appellant for allowing her to stay, (f) the complainants mother's evidence suggested that the complainant behaved better after returning from the appellant's house.		newspaper or magazine [54]. The failure to adduce evidence of the articles could have been a tactical error but even if it was not, overlooking this evidence does not clear that bar to permit appellate intervention. **Judicial reasoning regarding excessive judicial questioning (Ground 3) - Rejected** • It was perfectly appropriate for his Honour to seek clarification… It was plainly designed to ascertain precisely when it was, according to the statement of the police officer, that the complainant became teary. In a case where her credibility, reliability and possible contamination by other witnesses were in issue, it was entirely proper for his Honour to make the enquiry. It was the trial judge's duty to determine the facts. Moreover he did it in a polite and courteous way. He did not interrupt counsel [102]. • In every case, the questioning was clearly relevant to an issue that required clarification. Secondly, the questioning was invariably carefully introduced and politely stated. The witness, once asked, was allowed to answer as he or she wished. Thirdly there was not attempt to traduce or browbeat the witness. The overall impression was that the trial judge was simply endeavouring to clarify issues and obtain information to resolve issues that were troubling him [103]. • It is obvious that, in the course of clarifying the evidence, and throwing a clearer light on the issues at trial, a judge may, without taking sides one way or the other, involuntarily or inevitably, assist either the prosecution or the defence. This unintended consequence, if that is what happened, makes such an intervention inappropriate [109]. **Judicial reasoning regarding verdict and supporting evidence (Ground 4) - Rejected** • The case against the appellant was a strong one. The ultimate issues at trial were relatively simple and straightforward, even if the factual matrix was, as it often is in cases of this kind, somewhat complex and not without difficulty. If the complainant's evidence were accepted and the appellant's evidence rejected, a finding of guilt was not unreasonable. There is no doubt whatsoever that the complainant's evidence should be accepted [121]. • The complainant's evidence has the ring of truth about it. Of course, there were inconsistencies and there was an absence of complaint for considerable time. Those matters have to be weighed in the balance…	

				She positively did not wish her mother to find out what had happened. This also explains her reluctance to tell her friends exactly what happened and her aversion to revealing the gruesome details [121].	
23. *Majid v R* [2010] NSWCCA 121 **Applicant was manager of store at which complainant worked.** **No delay**	**Grounds of appeal against sentence by Applicant:** 1. The sentencing judge erred in applying s 44 *Crimes (Sentencing Procedure) Act* 1999. He set a total sentence of 14 years with a non-parole period of 10 years, contrary to s 44(2), and with no finding of 'special circumstances' for the extension of the total sentence by approximately eight months. 2. The sentencing judge gave insufficient weight to the fact that the applicant was suffering from PSTD at the time of, prior to and after the commission of the offences. 3. The sentencing judge gave insufficient weight to the applicant's expression of contrition and remorse. 4. The sentencing judge gave insufficient weight to the fact that the applicant would be serving his sentence in protective custody. The sentences imposed are manifestly excessive.	N/A	N/A	**Held in respect of ground (1):** (per Johnson J, Simpson and McCallum JJ agreeing -**Accepted** • The sentencing judge erred in applying s 44 and no finding of 'special circumstances' was made, nor did the judge apply *Hejazi v R* [2009] NSWCCA 282 at [35]-[36]. ([36]) • There was error in the calculation of the head sentence on the second count. [37] **Held in respect of ground (2):** (per Johnson J, Simpson and McCallum JJ agreeing) - **Rejected** • Per *Stephens v R* [2009] NSWCCA 240 at [16]-[18], there are inherent problems in expressing a ground in terms of 'insufficient weight' being given to different aspects of the applicant's subjective case in passing sentence. It tacitly concedes that some weight had been given to the factor. This point is equally relevant to grounds (2), (3) and (4) [40]. • 'It is difficult to see how the applicant's condition could have warranted greater weight on sentence in the circumstances of this case' [42]. **Held in respect of ground (3):** (per Johnson J, Simpson and McCallum JJ agreeing) - **Rejected** • The applicant had pleaded not guilty to the charges and proceeded to trial. Admission of guilt and contrition was not expressed until after he was convicted in April 2008 [47]. • As a sentencing judge is not obliged to accept assertions of contrition, the judge was entitled to approach this submission as a belated concession made only after the reality of conviction by jury [48]. • No error has been demonstrated in the sentencing judge's evaluation of the purported remorse and contrition. **Held in respect of ground (4):** (per Johnson J, Simpson and McCallum JJ agreeing) - **Rejected** • The relevance of protective custody on sentence will depend upon a variety of factors; there is no automatic conclusion or formula to be applied, and no error has been demonstrated in the reasoning of the sentencing judge [58].	**Outcome:** Leave to appeal granted, appeal dismissed with respect to sentences imposed on counts 1, 3 and 4. New sentence ordered on count 2. **Limb:** N/A

				Held in respect of ground (5): (per Johnson J, Simpson and McCallum JJ agreeing) - **Rejected** • Whether the sentences are manifestly excessive is considered in terms of whether they are 'unreasonable' or 'plainly unjust'. Citing *Markarian v The Queen* (2005) 228 CLR 357 [52]. The separate offences were serious offences upon a 15-year old girl, involving a breach of trust and the use of force. Assessments of the objective seriousness of the offences (just short of mid-range and mid-range, respectively) were not challenged. The applicant had a range of previous offences [63]-[65].	
Unsuccessful Cases on Appeal					
24. *SW v R* [2013] NSWCCA 225 **Applicant was the victim's mother's School teacher who was later befriended. Applicant visited victim's home often and started spending time alone with victim as parents fell ill.** **No delay**	**Appeal by Appellant and Crown against sentence:** (1) The sentencing judge erred in her application of the standard non-parole period legislation in light of the principles identified in Muldrock. (2) The sentencing judge erred in her assessment of the objective gravity of the offence. (3) The sentencing judge erred in finding that the age of the complainant was a "highly aggravating factor". (4) The sentencing judge erred in finding that the offence was committed for sexual gratification. (5) (abandoned). (6) The sentence is manifestly excessive.	N/A	N/A	**Held in respect of ground (1):** (at [44] to [45] per Johnson J with whom Hoeben J and Bellew J agreed) **- Rejected** • The sentencing judge had regard to objective and subjective factors, before turning to the imposition of sentence itself. She considered the facts, matters and circumstances relevant in reaching an appropriate sentence. • Further, it is difficult to see how the standard non-parole period (15 years) has been accorded determinative weight given the imposition of a 5-year non-parole period. **Held in respect of grounds (2), (3) & (4)** • ([47] to [58] per Johnson J with whom Hoeben J and Bellew J agreed) - **Rejected** • Re ground 3, the victim was of an age well removed from the statutory ceiling of this offence – this may aptly be described as a highly aggravating factor. • Re grounds 2 and 4, there was no error in the findings re the act which constituted the offence. • Significant act of violation of a young child in the care of the offender, in a place he ought to have been safe, causing physical hurt and substantial ongoing emotional harm. • The child had no difficulty with constipation – no valid reason. Appellant denied act following arrest and psychologist report suggests denial and minimisation of responsibility – common.	**Outcome:** Appeal Dismissed. Extension of time to appeal refused. **Limb:** N/A

				• Offence correctly found to fall below the mid range of such an offence. **Held in respect of ground (6) - Rejected** [55] per Johnson J with whom Hoeben J and Bellew J agreed: • The Appellant does not demonstrate that the sentence is unreasonable or plainly unjust.	
25. *LG v R* [2012] NSWCCA 249 **Appellant and co-accused were involved with the instruction at youth group where the complainant was a member.**	(1) Trial judge erred by imposing cumulative sentences in relation to each offence (2) Sentence overall was manifestly excessive	N/A	N/A	**Held in respect of Grounds (1) and (2):** • The applicant was involved with her co-offender in a variety of sexual acts upon the complainant. Each act involved separate criminality of varying degrees of significance. Although part of an overall event, the sentencing judge was required to identify a sentence appropriate for each separate act. No complaint is made about the term of any of the individual sentences. The sentencing judge was mindful of the principle of totality. Although I may have provided a different structure, his Honour's structure of the sentences was open to him and I am not persuaded that the sentencing discretion has miscarried.	**Outcome:** Appeal Dismissed **Limb:** N/A
26. *MM v R* [2010] NSWCCA 262 **Child care facility operated from appellant's mother's home.** **11 year delay**	Appeal against conviction only by accused. (1) Each of the verdicts is unreasonable and cannot be supported on the evidence: s 61(1) *Criminal Appeal Act* 1912. (6) The trial judge erroneously granted leave to the Crown to amend counts 1, 2, 3 and 4 to enlarge the timeframe within which the offences were allegedly committed.	Unreasonable verdicts not supported by the evidence. **Unreliability of evidence (Ground 1)** **Appellant submissions:** • Evidence in the trial, was unreliable in a number of critical respects which, taken together, would justify the Court in finding that it was not open to be satisfied beyond reasonable doubt of the appellant's guilt [67]. • The features of unreliability were identified as [68]: o Medical evidence	**Trial judge erroneously granted leave to the Crown. (Ground 6)** **Appellant submission:** • As argued at the time leave was sought to amend, trial counsel's diligent preparation and his cross-examination of the complainant was neutralised by the amendment [61].	**Judicial reasoning regarding unreliability of evidence (Ground 1) - Rejected** • The question is whether upon the whole of the evidence it was not open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt, notwithstanding that there is evidence to sustain a verdict as a matter of law. • This is a question of fact, requiring independent assessment of the evidence both as to its sufficiency and quality. *SKA v R* [2011 HCA 13 [66]. • As to the appellant's contention about the complainant's understanding: • The Court is not ready to assume that the complaint would know what full penile penetration of a vagina meant and how it was achieved, particularly in light of the fact that upon physical examination the complainant's hymen was intact. Further, no questions were asked (nor could they have been) as to the extent of her sexual experience [73]. • There is also force in the Crown submission that because of the lack of precision in the complainant's description of the	**Outcome:** Appeal against conviction Dismissed. **Limb:** 1, 3

	NB: *Seven* grounds of appeal filed; only the first and sixth grounds were relied upon at the hearing.	rendered it unlikely that the assaults occurred; there was an absence of any trauma when complainant physically examined at age 16. ○ Complainant's recollection were unreliable; recollection of being sexually assaulted on multiple occasions when as young as 3 years old constituted by full penile penetration on 12 or 13 occasions with the occasion the subject of the counts on the indictment being detailed as to time, place and the manner of the assaults and the appearance of the accused including the clothing he was wearing. ○ The complainant's early childhood recollection of sexual assault may have been a 'recovered' memory. • The complainant's evidence was undermined by grave doubts about her reliability generally, in particular her evidence about the extent of penetration [70]. ○ Nothing in the complainant's evidence operated to qualify her assertion that the appellant assaulted her		mechanics of the penetrative assaults, questions of perception were rife and were properly a matter for Dr Kirkwood to comment upon [74]. • It was open to the jury to accept that there was penetration of her vagina by some degree properly constituted as penetration as a matter of law, and that the complainant perceived that the penis had entered her vagina such that she could describe it as fully in her vagina, but that the penetration was well short of complete penetration [75]. • There were legitimate questions raised by the evidence: [76] • concerning the timing and circumstances of the complaint; • the fact the earlier 'triggered memory' of the assaults did not result in complaint; and • there were discrepancies in the complainant's description of events and places relative to other evidence. • However, either standing alone or considered with the issue of penetration, it is not established that this undermines the strength of the evidence relied upon by the Crown, particularly when the jury had the advantage of seeing the complainant give her evidence and the appellant give his evidence an advantage which the Court does not have [76]. **Judicial reasoning regarding (Ground 6):** • The trial judge made reference to ss 20 and 21 of the *Criminal Procedure Act 1986* and applied *Borodin v R* [2006] NSWCCA 83: there was no actual prejudice to the accused by the amendment and the fact that an accused may lose a tactical advantage by reason of an amendment is, without more, not sufficient prejudice for leave to be refused [59]. • The only matter that changed in the Crown case at trial was the time when the family resided in the blue and white house which had been fixed by reference to direct evidence and that, as a a result, the complainant could not have been aged 3 at the time of the assault but rather between the ages of 3 and 5 [59]. • The trial judge provided detailed reasons for permitting the amendment of the indictment and the appellant has not identified any error in the reasons given [62]. • It is not clear how cross-examination of the complainant might have been significantly different had the indictment been amended at an earlier point [64]. • Moreover, it is of significance that no application was made to have the complainant recalled before the Crown formally closed its case [64].	

		in excess of ten or a dozen times. The potential for the complainant's evidence concerning the extent of penetration 'to have sourced from her memory as a teenager of her perception as a child of what the appellant did' was not open on her evidence [71]. ○ Dr Kirkwood conceded in cross examination that, whilst the normal genital examination did not preclude the assaults as occurring as described, the examination was also consistent with no sexual assault having occurred [52]. ○ The Court should approach Dr Kirkwood's evidence as leaving no room for the complainant's evidence to be regarded as other than wholly implausible [71]. • Counsel also sought to emphasise that at the time of the interview with police she was almost 16 and by the trial, she was 17 and that we should assume that she would know what full penile penetration of a vagina meant and how it was achieved [73]. **Crown submission (Ground 1):**			

		• The matters identified as unreliable were 'all agitated in the trial, in counsel's addresses and were the subject of careful directions from the trial judge'. Coupled with the advantage the jury had of considering the appellant and the complainant as witnesses, the Court should be well satisfied that the appellant is guilty of the offences on the indictment [69]. • As to the complainant's understanding of what occurred, the Court should not readily conclude that the complainant was describing any particular component of the complex structure of her genitalia when she referred to the appellant's penis being "injected into in her vagina" or that he "put his penis into her vagina" or even "all the way in her vagina" or that she had any current exposure to the genitalia of a male (other than the appellant's ten years earlier) [74].			
27. *Makarov v R (No 1)* [2008] NSWCCA 291 **The applicant was the music teacher of the complainant.**	**Grounds of appeal against conviction by appellant:** (1) The trial miscarried and there was a miscarriage of justice as a result of perjury committed by D against the appellant during the proceedings in relation to the evidence concerning:	**Character evidence (Ground 6):** Miscarriage of justice as a result of impossibility of introducing the appellant's character. **Evidence not proven to the requisite legal evidentiary**	**Trial judge failed to adequately direct jury regarding legal concepts around evidence (Ground 2).**	**Judicial reasoning regarding (Ground 2) - Rejected** As regards ground (2)(i): • The contention is the same as that raised in *Makarov No 2* (at [110]-[112]) and for the same reasons, this ground is rejected [76]-[78]. As regards ground (2)(ii): • The trial judge's direction as to the content of 'beyond reasonable doubt' was in accordance with the accepted position that the test is a subjective one applicable to each individual juror. [84]. As regards ground (2)(iii):	**Outcome:** Appeal against conviction Dismissed. **Limb:** 1, 3.

No Delay	a. (i) the exclusively professional (musical, psychological, psychiatric) issues; (ii) the counts 8, 9; (iii) the time frame of the counts 1 to 3; (iv) the chapter from the autobiography and letter to the appellant's fiftieth birthday; (v) the time factor for counts 1, 4 to 9; (vi) the pornography showing and CD's placement issues – counts 4 to 8; (vii) oral sex issue. (2) The trial judge failed adequately to direct the jury in relation to: . (i) the legal concept of the Crown prosecutor status; (ii) the legal concept of "beyond reasonable doubt"; (iii) the evidence concerning the time frame of the deleted computer files; (iv) the evidence of Mr Szakos and Mrs George; (v) the evidence concerning oral sex; (vi) the written records of the piano lessons." (3) The trial miscarried and there was a miscarriage of justice as a result of the prejudiced decision the trial judge made in relation to the evidence of the Ukrainian Students (A, B and C) concerning the appellant's 'admissions' and the evidence concerning the deleted computer files. (4) The trial judge erred in failing to provide for the appellant, as a former foreigner with English as a second language, access to an interpreter through the simultaneous	**standard (Ground 7):** The nature and quality of the evidence relied upon by the trial Crown prosecutor and violation by the trial Crown prosecutor of the legal principles of burden of proof, proof, standard of proof, and presumption of innocence. **Incompetence on behalf of the appellant's legal representatives and their failure to lead evidence (Ground 8).**		• The judge gave careful directions as to the drawing of inferences, which included a direction that it was a matter for them whether they drew the inference contended for by the Crown, and whether that inference confirmed the evidence of D. These directions were accurate and fair [86]-[89]. As regards ground (2)(iv): • The fact that counsel for the appellant, who was alive to the issues in the trial and immersed in its atmosphere, did not seek a correction suggests that the error with respect to Mr Szakos was not significant [94]. • The appellant's complaint in respect of Mrs George and the judge's remarks is without force. The judge's remarks were entirely accurate [96]. As regards ground (2)(v): • The Judge had earlier reminded the jury that the appellant relied on inconsistencies between the out of Court statements and the evidence in Court on the oral sex issue as going to D's reliability. The Judge may have placed a different emphasis on that issue but ultimately the assessment of the inconsistencies was a matter for the jury [102]. As regards ground (2)(vi): • The appellant's contention that the trial judge intimated that the appellant bore an onus of proof is without basis. Each of the impugned remarks was preceded by a clear qualification or, in context, does not bear the character alleged [103]-[108]. **Regarding (Ground 6) – Rejected** • This submission proceeds on a misconception. Evidence of the appellant's good character was not excluded by any decision of the trial Judge. The appellant's Counsel stated that he would be endeavouring not to put character into play (T133.25). It would have been open to the appellant to adduce evidence of his good character but, as the trial Judge correctly warned, that course carried the risk that some of the evidence of the Ukrainian students would have become admissible. The appellant's Counsel was wise to avoid that risk [163]. **Regarding (Ground 7) – Rejected** • The evidence of the complainant D was admissible to prove the elements of the offences alleged in the indictment. The insinuation that the Crown's frequent repetition of D's allegations may be likened to a form of sorcery is absurd and must be firmly dismissed [167]. • The students were Crown witnesses. It was entirely appropriate for	

	headphone translation or proper conditions for simultaneous translation of interpreter – with the intervals for translation – that international law and standards required. (5) The trial miscarried and there was a miscarriage of justice as a result of the trial judge's bias against the appellant. The alleged bias is evident in: a. (i) prejudiced behaviour towards the appellant's counsel; (ii) prejudiced decisions; (iii) legal errors; and (iv) the trial judge's use of 'a special technology of psychology programming the jury against the appellant'. (6) The trial miscarried and there was a miscarriage of justice as a result of impossibility of introducing the appellant's character. (7) The trial miscarried and there was a miscarriage of justice as a result of the nature and quality of the evidence relied upon by the trial Crown prosecutor and violation by the trial Crown prosecutor of the legal principles of burden of proof, proof, standard of proof, and presumption of innocence. (8) The trial miscarried and there was a miscarriage of justice as a result of the appellant's legal representative's incompetence in failing to uncover and lead the evidence that may have affected the result.			the Crown prosecutor to identify the evidence she anticipated calling. The suggestion that the jury would have speculated about other matters is itself speculative [171]. **Regarding (Ground 8) –Rejected** • The critical question for the purpose of ground 8 is whether the appellant has satisfied the onus of establishing that the failure to renew the objection (admission of Exhibit F) was negligent or incompetent and has resulted in a miscarriage of justice. He has not. [135]. • Much of this ground assumed the acceptance of other grounds which have been rejected [179].	

	(9) The acquittal on Count 8 was proof of the jury's reasonable doubt concerning D's credibility and truthfulness. (10) The trial miscarried and there was a miscarriage of justice as a result of the Crown prosecutor and trial judge's misconduct in relation to the time of the essence of the offences in counts 1-7 and count 9.				
28. *Regina v Lawson* [2005] NSWCCA 227 **Appellant was a youth leader at Baptist church. Victim attended youth group events.**	Appeal against sentence only by accused. (1) The trial judge failed to adequately discount for the appellant's guilty plea and contrition. (2) The trial judge erred in her finding that there was little evidence of true remorse. (3) The trial judge erred in giving little weight to the circumstance that the applicant had only one prior conviction and that he was not in breach of the good behaviour bond which he had received for that offence. (4) The trial judge failed to give weight to the fact that the prior conviction was twelve years old. (5) The trial judge failed to give any discount to the applicant by reason of his offer to give assistance. (6) The sentences were manifestly excessive.	N/A	N/A	**Discount for guilty plea (Ground 1) - Rejected** • Pleas were not made at the earliest opportunity [16]. • Although, it was accepted that the applicants pleas had significant utilitarian value and the evidence in support of some counts was stronger than that in relation to others, the guideline judgment in *R v Thomson and Houlton* (2000) 49 NSWLR 383 contemplates an assessment in a range of 10 to 25 percent. There was therefore no miscarriage of justice in the trial judge's discount of 15 percent [18]. **Little evidence of remorse (Ground 2) - Rejected** • That gross understatement of the applicant's criminal activity contradicts the applicant's claim to have genuine remorse [20]. • A plea of guilty is capable of manifesting remorse but it is not inevitably the case [22]. • The trial judge's conclusion as to little evidence of remorse fortified by the content of a psychological pre-sentence report which stated that the applicant "denied the substance of most of the charges for which he has pleaded guilty" and has "strongly minimised his own sexual motivation" [23]. **Weight given to evidence (Grounds 3 & 4) - Rejected** • Breach of a good behaviour bond aggravates an offence but it does not become a factor of mitigation [25]. • The trial judge did adequately take into account the length in time since the previous conviction by expressly noting the year of its occurrence [25]. **Offer of assistance (Ground 5) - Rejected** • The assistance offered by the applicant was not of the kind which gave evidence against co-offenders [28] or crimes of which the	**Outcome:** Appeal against sentence dismissed. **Limb:** N/A

				authorities would have been unaware but for the frank confession of the offender [29]. • The authorities were well aware of the applicant's activity by reason of the courage of one of the victims in coming forward and reporting it [29]. **Manifestly excessive sentence (Ground 6) - Rejected** • Whilst it is appropriate for a sentencing judge to take cognizance of established sentencing patterns, such are not derived from comparison with a single case [31]. • It is established that committing sexual offences whilst the victim has been drugged adds a significant degree of culpability to the administration of the drug intending to commit the offence: *R v TA* 2003 57 NSWLR 444 [31]. • In the present case the offences were premeditated and carefully planned as demonstrated by the order for the nitrous oxide [33].	

29. *R v Boulad* [2005] NSWCCA 289
 	
Offender was the victim's 'boyfriend' however victim was a ward of the state and suffered recognised psychiatric illness and was underage.
	Appeal against sentence only by accused.
	(1) The sentencing judge erred in holding that an aggravating factor of the victim being vulnerable was present because the victim was young.
	(2) The sentencing judge erred in increasing the sentence for each count to reflect the fact that the applicant was being sentenced for multiple counts.
	(3) The sentences are manifestly excessive.
		N/A	N/A	**Held in respect to (Ground 1) - Rejected**
				• The Crown correctly conceded this ground [21].
				
				Held in respect to (Ground 2) - Accepted
				• The sentencing judge imposed entirely concurrent sentences and took a 'global' approach, influenced by the fact the offences were committed over a relatively short period and involved the same victim [23].
				• As the Crown concedes, the sentencing judge has fallen into error by approaching sentencing in a 'global fashion' without regard to what sentence was appropriate for each individual offence [24].
				• This approach does not conform with *Pearce v The Queen* (1998) 194 CLR 60 [24].
				
				Held in respect to (Ground 3) - Rejected
				• The conduct cannot be described as falling 'at the lower end of the spectrum [31]:
				  • There was a significant age discrepancy between applicant and complainant.
				  • The complainant's vulnerability had added significance because of her intellectual disability, moderate though it may have been.
				  • Despite the absence of direct evidence on the applicant's
					Outcome:
					Against sentence.
					
					Leave to appeal granted. Appeal Dismissed.
					
					Limb: N/A

				knowledge of this disability, he was well are of her age, background and propensity for engaging in risk-taking activities; he had professed to be concerned about her welfare in such matters. • The offending extended over a three month period and involved 19 separate incidents. • Not withstanding the applicant's favourable subjective features, it is not demonstrated that the sentences were manifestly excessive. Furthermore, despite the demonstrated errors, it is not established that another sentence was warranted in law: s 6(3) of the *Criminal Appeal Act* 1912.	

APPENDIX A15.14: BASIS AND OUTCOME OF APPEALS INVOLVING A JUVENILE OFFENDER

Year	Case	Type of abuse	Basis of appeal	Outcome of appeal
2005	*Regina v AD* [2005] NSWCCA 208	Extrafamilial	Appeal against sentence – excessive sentence; judge failed to take into account s 6 *Children (Criminal Proceedings) Act 1987* (NSW); judge erred in characterisation of offence; judge failed to give sufficient weight to applicant's guilty plea and offer of assistance.	Appeal dismissed.
2005	*Regina v MSS* [2005] NSWCCA 227	Extrafamilial	Appeal against sentence – excessive sentence; failure to sentence according to *Children (Criminal Proceedings) Act 1987* (NSW).	Appeal dismissed.
2005	*Regina v NZ* [2005] NSWCCA 278	Extrafamilial	First two grounds concerned consistency of verdicts given by the jury in respect of accused and co-accused; second two grounds concerned use of videotaped interviews of Crown witnesses.	Appeal dismissed.
2005	*Regina v H* [2005] NSWCCA 282	Extrafamilial	10 grounds of appeal against sentence – overall sentence unduly harsh and severe; SJ erred in sentencing for aggravated sexual assault in respect of particular offence; SJ erred in determining an offence was of the worst type; SJ erred in assessing seriousness of offence; SJ made inadmissible assumptions of fact; SJ failed to give sufficient regard to applicant's guilty plea, contrition and assistance to authorities; SJ failed to give sufficient regard to applicant's developmental disability/mental illness.	Appeal allowed and sentence imposed in DC quashed. Revised, lesser sentence imposed.
2005	*R v JSS* [2005] NSWCCA 225	Intrafamilial	Appeal against sentence – condition of bond unreasonably onerous/imprecise; length of bond excessive; SJ erred in dealing with applicant according to law.	Bond quashed; 3rd ground of appeal rejected.
2005	*Regina v JTAC* [2005]	Intrafamilial	Appeal against sentence – SJ erred in considering vulnerability of victims an aggravating factor; SJ erred in having regard to	Appeal dismissed

	NSWCCA 345		preventative detention in imposing sentence; excessive sentence.	
2005	*Regina v JDB* [2005] NSWCCA 102	Intrafamiilial	Appeal against sentence – TJ erred in applying s 21A(2) of C(SP) Act 1999; excessive sentence.	Appeal upheld. Sentence imposed by DC quashed and revised, lesser sentence imposed.
2006	*Regina v MMK* [2006] NSWCCA 272	Extrafamilial	Appeal against sentence – sentences manifestly inadequate.	Appeal dismissed.
2006	*RJP v R 2006* [2006] NSWCCA 149	Intrafamilial	Appeal against sentence – SJ failed to regard applicant's youth; SJ erred in application of s 21A(3)(g) *Crimes (Sentencing Procedure) Act 1999* (NSW); SJ erred in application of principle of totality; excessive sentence.	Appeal dismissed
2007	*AEL v R* [2007] NSWCCA 97	Intrafamilial	Appeal against sentence – excessive sentence.	Appeal upheld. Sentence quashed and revised sentence imposed
2007	*CTM v R* [2007] NSWCCA 131	Extrafamilial	Appeal against conviction – verdict unsafe/incapable of being supported by evidence; TJ erred in directions on onus and standard of proof; TJ erred by failing to apply *Children (Criminal Proceedings) Act 1987* (NSW); excessive sentence.	Appeal against conviction dismissed; appeal against sentence upheld, sentence quashed and remitted to DC.
2008	*IE v R* [2008] NSWCCA 70	Extrafamilial	Appeal against sentence – judge failed to have adequate regard to applicant's age; failed to regard applicant's youth when considering objective seriousness of offence; excessive sentence.	Appeal dismissed
2008	*AJO v Regina* [2008] NSWCCA 28	Intrafamilial	Four grounds of appeal: (1) in relation to anticipated quashing of conviction and sentence on count 4; (2) SJ erred in failing to take into account that counts 1 and 2 should have been dealt with in Children's Court; (3) sentence for count 2 excessive; (4) penalty for count 10 excessive.	Appeal allowed in part – conviction and sentence on single count quashed; appeal against sentence dismissed

2009	*OM v R, MH v R, AA v R, AS v R* [2009] NSWCCA 267	Extrafamilial	Disparity in sentences between co-accused.	Appeal allowed.
2010	*Regina v XY* [2010] NSWCCA 181	Intrafamilial	Judge erred in ruling that the evidence was not 'fresh in the memory' and therefore not within hearsay exception.	Appeal allowed and matter remitted to DC.
2011	*PWB v R* [2011] NSWCCA 84	Intrafamilial	5 grounds. (1) TJ erred in having regard to standard non-parole period for one of the offences; (2) sentence for count 1 excessive; (3) overall sentence excessive – cumulative, not concurrent; (4) TJ erred in failing to consider moral culpability of applicant in regards to sexual abuse suffered himself; (5) TJ erred in failing to regard delay as mitigating circumstance.	Grounds 1, 2, 3, 5 accepted; ground 4 rejected. Appeal allowed, sentences quashed and appellant re-sentenced.

Notes:

SJ = Sentencing judge.

TJ – Trial judge.

DC = District Court.