

Answers to Questions on Notice

to the

Sentencing of Child Sexual Assault Offenders

to the

Joint Select Committee on Sentencing of Child Sexual Assault Offenders

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17 May 2014

1. Introduction

On Wednesday 30 April 2014, Dr David Phillips (FamilyVoice National President) and Mr Graeme Mitchell, (FamilyVoice NSW State Officer) gave evidence to the NSW Joint Select Committee on Sentencing of Child Sexual Assault Offenders. During the hearing, Dr Phillips took several questions on notice from the committee for further consideration. The questions on notice have been answered below and the fourth matter (child sexual assault registers) has been addressed because the question was asked of other groups giving evidence but we had not addressed it in our original submission.

2. Standard non-parole periods

Question: Do you still consider standard non-parole periods (SNPPs) a good idea and is the SNPP still relevant and effective?

The SNPPs introduced in New South Wales in 2003 are generally a good idea as they are able to provide general guidelines to the judiciary that reflect community expectations.¹

Before the 2011 High Court Muldrock² decision, the Judicial Commission of New South Wales found that SNPPs were generally resulting in tougher sentencing.

A 2010 report by the Judicial Commission of New South Wales found overall that SNPPs had led to:

a greater uniformity of, and consistency in, sentencing outcomes. It also confirms the early claims that there would be an increase in the severity of penalties imposed and the duration of sentences of full-time imprisonment. This is, in part, a result of the relatively high levels at which the standard non-parole periods were set for some offences. However, the study also found significant increases in sentences for offences with a proportionately low standard non-parole period to maximum penalty ratio.³

This trend has not necessarily been occurring for child sexual assault offences; however, the *Muldrock* decision has changed how SNPPs are viewed by the courts.

Barrister Richard Wilson from the Public Defenders Chambers in March 2013 wrote about the effects of *Muldrock*:

1. The general principles in sentencing for SNPP offences

The standard non-parole period is not the starting point in sentencing for a mid-range offence after conviction: Muldrock at [31], nor does it have determinative significance in sentencing an offender: Muldrock at [32] ...

In determining the appropriate sentence, I am not required to assess whether or not, having regard to the standard non-parole period, the offence is within the middle range of objective seriousness

2. Reduced significance of SNPP

"the standard non-parole period cannot have "determinative significance" - see Muldrock at [32]

3. Sentencing as for other offences but with an additional guidepost

the standard non parole period for Part 4, Division 1A Crimes (Sentencing Procedure) Act 1999 offences operates as a factor additional to other factors under s 21A of the same Act and additional to the maximum penalty for the offence: Muldrock at [26]

4. Likely increase in penalties where a SNPP has been specified

In Muldrock (at [31]) the High Court foreshadowed the possibility that non-parole periods for some SNPP offences might increase as a result of the introduction of the standard non-parole period It may be, as the Court of Criminal Appeal observed in Way, that for some Div 1A offences there will be a move upwards in the length of the non-parole period as a result of the introduction of the standard non-parole period.

The court went on to explain the reason for the likely increase:

[31] ... This is the likely outcome of adding the court's awareness of the standard non-parole period to the various considerations bearing on the determination of the appropriate sentence. It is not because the standard non-parole period is the starting point in sentencing for a midrange offence after conviction.

5. Non-custodial sentences and very short non-parole periods

There is nothing to prevent, in an appropriate case, the imposition of a non parole period which is very short in comparison with the SNPP. (See Muldrock at [4].)

6. SNPPs and relative seriousness: De Simoni

In Cassidy [2012] NSWCCA 68 it was held that, for the purposes of the De Simoni principles, where two offences have the same maximum penalty, but only one has a SNPP, the one with the SNPP is to be considered more serious.⁴

Therefore, SNPPs are still effective and relevant, albeit less so than the legislature intended. This intention is mitigated by the need for all the relevant facts of a case to be adhered to, so that injustices are not added into the system accidentally. Mandatory minimum sentences have the capacity to add injustices and fail to allow a judge to be unrestrained in their exercising of mercy.

The *Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act 2013* was intended to specifically address some issues that were left unclarified in the *Muldrock* decision. The Act essentially addressed what Richard Wilson and others already found, though it does not deal with the entire scope of unclarified elements from that decision. It is too early to fully understand the effect of the Act as it was only introduced last year and insufficient data exists to make a valid judgement of its effectiveness.

With SNPPs being viewed as another guidepost, they should be used more widely, as per recommendation 3 in our submission made to the committee:

Standard non-parole periods should be introduced for additional child sexual assault offences, in particular for offences under s66C (Sexual intercourse – child between 10 and 16) and s66EA (Persistent sexual abuse of a child) of the Crimes Act 1900.

3. Victim consultation

Question: Should the victim should be consulted as part of the negotiations of “favourable consideration” of guilty pleas?

It is important that the victim’s sense of justice be satisfied in the sentencing of a convicted offender. Plea bargaining can result in key facts being omitted from the sentencing process, which

has resulted in dissatisfaction and a lack of closure for the victim. This lack of closure can hinder the overall recovery process for the victim. These issues and more were noted in the Honourable Gordon Samuels AC CVO QC Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts.⁵

One instance of plea-bargaining not providing full justice to the offender was in the case of *R v Laupama [2001] NSWSC 1082*. In this case Kelly Parker's *de facto* partner killed her five year old daughter. A plea bargain was entered into and the guilty party was charged with lesser offences pleading guilty to manslaughter but not murder. Kelly complained to the Department of Public Prosecutions, Nicholas Cowdery QC, about the lack of information received from his staff and in particular, that she had not been advised before the prosecution accepted the plea to manslaughter.⁶

Recommendation 1:

In order for the victim to feel that justice has been done, they must be consulted before any decisions regarding plea bargaining.

4. Adequacy of penalties

Question: are the current legislative or judiciary penalties adequate?

While some individual offences are sensationalized by the media without adequate understanding, the fact of the inadequacy in the minds of the community remains a problem.

Barrister Stephen Odgers SC of the NSW Bar Association argued that increased sentences will not lead to further deterrence.

*The fact is—and the New South Wales Bureau of Crime Statistics and Research and a Victorian report have shown—that what matters in terms of discouraging crime is the prospect of being arrested and prosecuted. Increasing sentences does not have a deterrent effect.*⁷

That may be true. However, increased sentences will lead to two other functions of the law:

1. Protection of the community through removal of the offenders – incapacitation. The community has a right to live in a safe environment.
2. Fair justice that fits the relative weight of the offence. The victims and the community also want to see that justice is done and seen to be done through fair sentences that fit the measure of the crime.

Some groups like “Aussie Sex Offenders”, who “Publicly Name and Shame Convicted Sex Offenders living in Australia for our own protection”⁸ are taking the law into their own hands because of their insecurity.

If the community does not feel safe, then measures need to be adopted to help them. Even if the judiciary is doing its job properly, the community should be informed of how they are kept safe, and what they can do if they do not feel safe.

Stephen Odgers told the Committee that jurors who had been present for a trial, when asked about an appropriate sentence, generally came to the same sentence as the judge.⁹ Thus the problem is not necessarily the leniency of the sentence but a lack of community understanding. This sentencing

information could be made more widely available for people who feel the judiciary system is failing them.

Recommendation 2:

The reality of community dissatisfaction with the leniency of sentences cannot be ignored. It should be met with either stricter enforcement of SNPPs or adequate information on how the community is being kept safe.

5. Child Sexual Offender Registers

A number of other witnesses provided information on sex offender registers, with particular questions from the committee on the effectiveness of the Western Australian model, which enables the public to access information on offenders.

The Western Australian model allows parents to access information on child sex offenders in their area online providing they provide their driver's licence details and their name. However, all requests for information do have to be approved by the police commissioner or an assistant commissioner. In order to prevent parents from distributing this information online, a watermark across the page contains the person's name.¹⁰ This is a model that is also being considered by other states that are waiting to see the results of the WA model.

Similar models to those currently used in WA have also been adopted in the USA. These registers have resulted in instances of vigilantes. They also do not necessarily provide the public with the full information of the nature of the offence. In one instance, a young 19-year-old man was murdered for being on a register, which he was placed on for having consensual sex with his underage girlfriend who was some three years younger. In this instance, being placed on a register that also includes serial paedophiles would appear to be a gross injustice that resulted in the murder of a young man. Such a register fails to give people with a low risk of re-offending a fair chance of rehabilitation. Therefore, the Western Australian model in its current format is not acceptable.

If the principle of community protection allows such a public model, the principle should also apply to other deviant behaviour, such as murderers and other sex offenders. However, such an extension would punish offenders twice and compromise rehabilitation efforts.

The current system of mandatory Working with Children Checks¹¹ prevents people who have offended from working with children, even on a volunteer basis. It also protects the offenders from being punished further, as the record of their crime remains in police hands. The exemptions list could be reviewed as a possible way to improve this scheme.

Recommendation 3:

Child protection registers need to protect the safety of the community while allowing the offender to reform his life and become a law-abiding citizen. Therefore the WA model should not be adopted by NSW.

6. Endnotes

¹ Part 4, Div 1A (ss 54A–54D) was inserted into the *Crimes (Sentencing Procedure) Act* 1999 by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002; see Patrizia Poletti and Hugh Donnelly, *The impact of the standard non-parole period sentencing scheme on sentencing patterns in New South Wales*, Judicial Commission of New South Wales, 2010, p 1:
<http://www.judcom.nsw.gov.au/publications/research-monographs-1/research-monograph-33/monograph33.pdf>

² *Muldock v The Queen* [2011] HCA 39, 5 October 2011,
<http://www.austlii.edu.au/au/cases/cth/HCA/2011/39.html>

³ Patrizia Poletti and Hugh Donnelly, p 60.

⁴ R. Wilson, *Sentencing since Muldrock: The impact of the High Court's decision on sentencing for standard non-parole offences in NSW*, 2013, pp 1-8,
<http://www.publicdefenders.lawlink.nsw.gov.au/agdbasev7wr/pdo/documents/pdf/sentencing%20since%20muldrock.pdf>.

⁵ R. Johns, pp 58-64.

⁶ R. Johns, pp 61-62.

⁷ Report of proceedings before Joint Select Committee on Child Sexual Assault Offenders, *Inquiry into sentencing of Child Sexual Assault Offenders*, 28 April 2014.

⁸ Aussie Sex Offenders, <http://aussiesexoffenders.wordpress.com/>, accessed 13 April 2014.

⁹ Report of proceedings before Joint Select Committee on Child Sexual Assault Offenders, *Inquiry into sentencing of Child Sexual Assault Offenders*, 28 April 2014, p 43.

¹⁰ L. Kippist, WA police community protection register tells parents where pedophiles are lurking, *News Limited*, 15 October 2012, <http://www.news.com.au/national/wa-police-community-protection-register-tells-parents-where-padedophiles-are-lurking/story-fndo4eg9-1226496344985>.

¹¹ Office of the Children's Guardian, NSW, "New Working with Children Check", <http://www.kids.nsw.gov.au/Working-with-children/New-Working-With-Children-Check/New-Working-with-Children-Check> (accessed online - 15 May 2014).

[REDACTED]

From: Adam FACA <[REDACTED]>
Sent: Tuesday, 6 May 2014 1:34 AM
To: ChildSexualOffencesCommittee
Subject: Follow up questions required from Fighters against child abuse Australia.

Follow Up Flag: Follow up
Flag Status: Flagged

Greetings, As per the request of the committee I have included the questions we asked our members when doing our research for the submission. Also included is a light demographic of the respondents and a letter from a member that we found to be the typical response when we asked them about justice. If anyone on the commission has any further questions please do not hesitate to ask.

To gather the information for the submission that FACA made we interviewed 100 survivors of child abuse who had sought justice and had seen it through to the end of the process (either successful or not with all appeals exhausted according to the DPP) The respondents ages ranged from 9 years old (assisted in writing by his mother) through to 54. The breakdown was 62% Female and 38% male. The state by state breakdown was 64 from NSW 17, from QLD, 12 from Victoria, 4 from Tasmania, 2 from SA, 1 from WA. The vast majority of interviews were conducted either face to face or over Skype which was recorded with the permission of the respondent and kept confidential on an offline computer along with all notes and anything else relating to the study. Those that could not be done via face to face or Skype were done over the phone (only 4 cases).

1. Please describe your ordeal in as much or as little detail as you wish to go into.
2. Please describe your pursuit of justice.
3. Do you believe that justice was served in your case.
4. Would you describe your experience with the DPP as positive or negative, if so why ?
5. Did the DPP plea your attacker out, how did this make you feel ?
6. What made you seek justice in the first place ?
7. How would you describe our nation's justice system ?
8. Do you have any suggestions to improve this process ?
9. Do you as a person not holding a law degree see anything that could be improved from a legal standpoint, if so why ?
10. Would you say that you have faith that justice will be served in other cases ?
11. If you could give advice to someone else seeking justice what would it be and why ?
12. Were you happy with the support services provided to you during your pursuit of justice ?

13. Do you have any ideas to improve these support services ?
14. Do you feel that an improved justice system would encourage others to come forward and seek justice ?
15. How big a problem do you see child abuse as in today's society ?
16. Do you feel that social attitudes towards child abuse are constructive for those seeking justice for child abuse cases ?
17. Did you understand your rights and responsibilities while seeking justice ?
18. What do you think could be done to improve the system from the point of view of those seeking justice ? why ?
19. How did you find the process of getting representation ? did you utilize legal aid ?
20. Do you feel like you were heard by the courts an/or your legal counsel (in the case of civil action)
21. Is there anything else you would like to add ?

[REDACTED]

[REDACTED]

We would like to thank the committee once again for giving the FACAA the opportunity to speak and also for being so open and listening to our cases. We are a young group but we speak for a lot of survivors who were all very excited and pleased to hear out the reception that the FACAA received at the committee hearing. Thank you from all 28 thousand of our active members.

Kindest regards,

Adam Washbourne

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