

**Submission  
No 21**

## **SENTENCING OF CHILD SEXUAL ASSAULT OFFENDERS**

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**Date Received:** 13/03/2014

## Submission of the Centre for Law, Governance and Public Policy at Bond University

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Broadly speaking, all Australian jurisdictions have implemented lengthy statutory maximum penalties for sexual assault. Table A (below) provides a range of statutory maximum penalties for sexual assault. Sexual assault of a child is ordinarily an aggravating factor, or caught by other provisions, particularly in New South Wales,<sup>4</sup> and could therefore affect the length of a prison sentence:

**Table A**<sup>5</sup>

Jurisdiction	Statutory Maximum
Tasmania	21 years
New South Wales	14 years – natural life
Victoria	25 years
Queensland	Life
South Australia	Life
Western Australia	14 years – 20 years

Over the two-year period from 2009 and 2010, 495 offenders were convicted of child sexual assault. The most common penalty imposed on an offender convicted of child sexual assault was a prison sentence. Prison penalties were imposed on 75 per cent of offenders convicted of aggravated child sexual assault, with an average aggregate sentence of 68 months, and an average minimum term of 39 months.<sup>6</sup>

The maximum penalty for an offence is an indication of how seriously the offence is viewed by Parliament and increases in the maximum penalty have been interpreted by the courts as evidence of Parliament's intention that the offence should attract a heavier penalty than in the past.<sup>7</sup> In *Ryan*,<sup>8</sup> Justice McHugh reflected on current community standards in the sentencing of child sexual assault offenders:

*under the notion of giving the offender his or her "just deserts", the retributive aspect has re-asserted itself in recent years. In the case of offences by paedophiles, it is currently the most*

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<sup>4</sup> *Crimes Act 1900* (NSW) sections: 61J-61N and 66A-EB.

<sup>5</sup> Judicial Commission of New South Wales (2007) *Full-time imprisonment in New South Wales and Other Jurisdictions: A National and International Comparison*, Monograph 29, 15 (with the addition of Tasmania and with the NZ/US deleted).

<sup>6</sup> Holmes, Jessie (2013) *Sentencing Snapshot: Child Sexual Assault, 2009-2010*, Bureau Brief, Issue Paper No 68 (NSW Bureau of Crime Statistics and Research).

<sup>7</sup> *Baumer v The Queen* (1988) 166 CLR 51, 56.

<sup>8</sup> *Ryan v R* (2001) 206 CLR 267. The judgments in this case reflect a range of opinions about issues relating to sentencing of child sex offenders.

*important factor in the sentencing process because their crimes are committed against one of the most vulnerable groups in society and they almost invariably have long term effects on their victims. According to current community standards, it is proper that paedophiles should be severely punished for their crimes.”<sup>9</sup>*

There is no doubt that the NSW Parliament has constitutional power to legislate for mandatory minimum penalties for child sexual assault offenders. The size of mandatory minimum sentences is a matter for the Government. However in exercising its legislative power, the Parliament should be guided by the twin goals of protection of children and the effective rehabilitation of sex offenders.

In public and media discourse, child sex offenders are often constructed as compulsive recidivists who are virtually certain to reoffend. For example, in a second reading speech to the Legislative Council of South Australia about the *Criminal Law (Sentencing) (Mandatory Imprisonment of Child Sex Offenders) Amendment Bill*, one Parliamentarian described child sex offenders as ‘beings of a subhuman category...[they are]...the least rehabilitatable (sic) people’.<sup>10</sup> While there are limitations associated with any of the available research (limitations as to the geography of a study, its timing, the definition of ‘recidivism’ etc.), it is apparent from many studies that sex offenders (a wide category that includes a diverse range of offenders including rapists, child sex offenders and exhibitionists, to name a few) are *not necessarily* more likely to re-offend than other categories of offenders.<sup>11</sup> Despite public perceptions that some sex offenders compulsively sexually reoffend, recidivism has been said to be around 6.5% (5 year post-release into the community). Compared to this relatively low recidivism rate, the recidivism rate for all types of crime is in the order of 30% (5 year post release into the community).<sup>12</sup> Of course these statistics need to be considered with care, for the reasons set out above. Research also indicates that among a subset of child sex offenders—those who target male victims outside of their family—reoffending in the long term is more likely than for child sex offenders who target female and/or family member victims.<sup>13</sup> Different offences and different offenders may require different prison sentences incorporating different therapeutic modalities. This is the principal reason why mandatory minimum sentences, while serving a retributive purpose, may serve no other worthwhile purpose.

There is no doubt that child sex offending is a serious problem. During 2010, there were 17,757 victims of sexual assault recorded by police, with 25% of these victims aged 10 to 14 years.<sup>14</sup> 73% of child victims do not tell anyone about the abuse for at least a year and 45%

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<sup>9</sup> *Ryan v R* (2001) 206 CLR 267 at 283.

<sup>10</sup> Bressington A 2010. *Hansard: Criminal Law (Sentencing) (Mandatory Imprisonment of Child Sex Offenders) Amendment Bill*. Adelaide: Legislative Council of South Australia.

<sup>11</sup> Tasmanian Law Reform Institute Reports, ‘Sentencing [2008] TAsLRI 11’, Part 6: Sexual Offenders, 41.

<sup>12</sup> See, generally: Coyle, I.R., Field, D., Wilson, P., Cuthbert, C. & Miller, G. (2009). Out of the mouths of babes: the case for an increased use of expert evidence in rebuttal of sexual abuse allegations by child witnesses. *Criminal Law Journal*, 33, 139-164. Coyle, I.R., Field, D., Wilson, P., Cuthbert, C. & Miller, G. (2010). Response to Lumley. *Criminal Law Journal*, 34, 14-15. Coyle, I. R. (2011). The cogency of risk assessments. *Psychiatry, Psychology and Law*, 18 (2), 270-296. Coyle, I. R. & Field, D. (2013). Psychology from the bench. *Psychiatry, Psychology and Law*, 20 (1), 91-104.

<sup>13</sup> *Ibid.*

<sup>14</sup> Australian Bureau of Statistics (2011). 2010 Recorded Crime - Victims. Canberra [ACT]: Australian Bureau of Statistics.

of victims do not tell anyone for at least 5 years. Some never disclose.<sup>15</sup> It should not be overlooked that many crimes are not reported, go uninvestigated, and the perpetrators of those crimes never face justice.<sup>16</sup> It is for this reason that the NSW Government should support research that seeks to answer the question *why sex offenders in New South Wales re-offend and why they do not re-offend*. However we must also research the question *why don't people in New South Wales report child sex offending?*

As to the development of penal policy in NSW, international human rights instruments provide important yardsticks and reinforce the point made above about the need for two principles to be advanced by contemporary penal policy: the protection of children and the advancement of rehabilitation.

The Committee would no doubt be aware of Article 19(1) of the *Convention on the Rights of the Child*, which states:

*States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*

However Article 10(3) of the *International Covenant on Civil and Political Rights* is also relevant. It states that 'the penitentiary system shall comprise treatment of prisoners with the essential aim of which shall be their reformation and social rehabilitation'.

Finally, Article 15 of the *Council of Europe Convention on the Protection of Europe Children against Sexual Exploitation and Sexual Abuse*, while obviously not binding in any way, makes the useful suggestion that:

*Each Party shall ensure that persons who fear that they might commit any of the offences established in accordance with this Convention may have access, where appropriate, to effective intervention programmes or measures.*

The focus of the Parliament should not be restricted to sentencing, but should extend to consider the treatment system generally. At present, there is minimal evidence that gaol-based sex offender treatment programs in Australia have had any measurable effect on reducing sexual-reoffending, although there is some indication that such programs have resulted in reduced recidivism vis-à-vis other sorts of crimes.

An idiographic, rather than a "one size fits all" model of treatment holds promise. This requires high levels of clinical and forensic expertise, which is often unavailable in gaol-based programs and, for that matter, in the community.<sup>17</sup>

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<sup>15</sup> Broman-Fulks, J. J., Ruggiero, K. J., Hanson, R. F., Smith, D. W., Resnick, H. S., Kilpatrick, D. G., & Saunders, B. E. (2007). Sexual assault disclosure in relation to adolescent mental health: Results from the National Survey of Adolescents. *Journal of Clinical Child and Adolescent Psychology*, 36: 260 – 266.

<sup>16</sup> Kelly Richards, 'Misperceptions about child sex offenders', *Trends and Issues in Crime and Criminal Justice*, No 429, Australian Institute of Criminology: Canberra, September 2011.

<sup>17</sup> Långström, N., Enebrink, P., Laurén, E.V., Lindblom, J., Werkö, S., Hanson, R.K. (2013). Preventing sexual

As McHugh J also observed in *Ryan v R*:<sup>18</sup>

“The fact that judges do not have a free hand in sentencing but must apply established principles does not mean, of course, that they cannot try new solutions or methods conforming with those principles. But their capacity to do so is often limited by the failure or inability of the Executive government to provide the facilities and institutions which would enable those solutions and methods to be carried out. This is a factor of some importance in sentencing paedophiles. It is a factor that must bear on the formulation of principles or guidelines concerning the sentencing of paedophiles. The evidence of Dr Westmore, who examined the appellant, suggests that at least in New South Wales appropriate "psychological or psychiatric" treatment "in the prison setting remain limited and restricted at this time".

Again, the focus of the Parliament should not be restricted to sentencing of child sex offenders, but should extend to consider the child protection system generally.<sup>19</sup> Changes to the sentencing of child sex offenders should be grounded in evidence of best rehabilitative techniques. In particular, the NSW Government should consider the need for a Risk Management Authority, along Scottish lines, which pools expertise, provides high quality interventions and contemplates staggered release into the community for high risk offenders generally.

Finally, child protection is key. As Kelly Richards has observed:

*According to the Australian Bureau of Statistics' (2005) Personal Safety Survey, of all those who reported having been victimised sexually before the age of 15 years, 11.1 percent were victimised by a stranger. More commonly, child sexual abuse was perpetrated by a male relative (other than the victim's father or stepfather; 30.2%), a family friend (16.3%), an acquaintance or neighbour (15.6%), another known person (15.3%), or the father or stepfather (13.5%; see Figure 1). It should be noted that these totals add to more than 100 percent (103.7%); this indicates that a small proportion of child sexual abuse victims (3.7%) were abused by perpetrators belonging to more than one category.*

The NSW Government needs to support programs for public awareness of child sexual abuse in families and neighbourhoods; public awareness campaigns that are well-researched and carefully designed to encourage detection, punishment and treatment of child sex offenders.

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abusers of children from reoffending: systematic review of medical and psychological interventions. *British Medical Journal*, 347; 4630. Levenson, J & Prescott, D.S. (2014). Déjà vu: from Furby to Långström and the evaluation of sex offender treatment effectiveness. *Journal of Sexual Aggression*, <http://dx.doi.org/10.1080/13552600.2013.867078>

<sup>18</sup> As above n 17, 50.

<sup>19</sup> NSW Government, (2009), 'Keep Them Safe' (A shared approach to child wellbeing) Department of Premier and Cabinet, 23.