Submission No 18

SENTENCING OF CHILD SEXUAL ASSAULT OFFENDERS

Organisation: New South Wales Bar Association

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Mr Troy Grant MP
Chair
Joint Select Committee on Sentencing of Child Sexual Assault Offenders
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Mr Grant

Inquiry into the Sentencing of Child Sexual Assault Offenders

Thank you for giving the New South Wales Bar Association the opportunity to make a submission to the Inquiry.

The Association generally supports the proposals contained in the 2013 NSW Law Reform Commission Report No 139, *Sentencing*. That report makes proposals regarding sentencing options in general and would, accordingly, have application to child sexual assault offenders. The Association does not support changes to the current system other than those proposed by the NSWLRC.

A specific question asked in the Terms of Reference is 'whether greater consistency in sentencing and improving public confidence in the judicial system could be achieved through alternative sentencing options, including but not limited to minimum mandatory sentencing and anti-androgenic medication'.

Minimum mandatory sentences

The Association has always opposed the use of mandatory sentences. The Association's primary objection to such laws is that they remove judicial sentencing discretion, with the consequence that the actual circumstances of the offence and the offender will not be taken into account, and unjust sentences will result.

The preservation of sentencing discretion is central to the ability of the criminal courts to ensure justice is done in all the extraordinary variety of circumstances of individual offences and individual offenders.

In addition, mandatory minimum sentences are likely to lead to a substantial increase in the prison population, with the prospect of overcrowding and/or the building of new prisons. Yet it is a waste of resources to incarcerate individuals for a period of time that does not reflect the circumstances surrounding the offence, or other mitigating factors.

Further, the introduction of mandatory minimum sentences will inevitably substantially increase the number of accused who plead not guilty, since there can be no lower sentence than the mandatory minimum regardless of whether there is a plea of guilty. The result will be a large increase in the number of trials, greater cost to the community, delays for other cases, and a greater deal of stress for the victim and/or his or her family.

Quite apart from the fact that mandatory minimum sentences will have a number of serious negative consequences, they will not have any positive consequences. Research has clearly established that tougher penalties do not deter offenders. For example, a 2012 NSW Bureau of Crime Statistics and Research study found that 'increasing the length of stay in prison beyond current levels does not appear to impact on the crime rate after accounting for increases in arrest and imprisonment likelihood' and concluded that policy makers should focus more attention on strategies that increase the risk of arrest and less on strategies that increase the severity of punishment.[1]

It may be accepted that judges exercising sentencing discretion do not always impose an appropriate sentence. Judicial officers have extremely difficult jobs, and they take those jobs very seriously. In passing sentence, they are required to consider the interests of the community, the victim and the offender. It will never be a perfect science but the availability of an appeal mechanism means that there is the scope for review. An appeal against an inadequate sentence may be brought by the DPP or the Attorney-General. In addition, the Parliament may provide guideposts to appropriate sentences in a number of ways. One method that has been adopted in recent years is the standard non-parole period. While this does not unduly fetter sentencing discretion in the same way as mandatory minimum sentences, it has resulted in increases in the sentences imposed for the offences to which such periods apply.

Anti-androgenic medication

Anti-androgenic medication – also known as anti-androgen therapy, anti-libidinal medication and chemical castration – is a medical treatment aimed at reducing the risk that a male sex offender will reoffend. The most common anti-androgens are cyproterone acetate (CPA) and medroxyprogesterone acetate (MPA) often known by the trade name

[1] Wan W-Y et al, 'The effect of arrest and imprisonment on crime', Crime and Justice Bulletin 158, 2012

Depo-Provera. Anti-androgens work by limiting the production of testosterone which, in turn, reduces the man's sexual interest and his ability to become sexually aroused.

Various jurisdictions around the world have introduced the option of administering anti-androgenic medication to sex offenders, including several US states, a number of European countries, and several Australian states. However, in most cases, the availability of this option is subject to tight restrictions, and courts have not employed it widely. The limited use of anti-androgenic medication within the criminal justice system reflects a number of concerns and caveats, outlined below. This option is a long way from being a silver bullet in the war against the sexual assault of children.

First, it should be noted that anti-androgenic medication will only have the capacity to reduce the risk of reoffending with a limited range of offenders. Its potential is limited to cases where the offender suffers from paraphilia[2] and the cause of the offender's behaviour is intense and uncontrollable sexual arousal. Where the cause is more a generalised compulsivity or not motivated by the desire for sexual gratification anti-androgens will have little effect.[3]

In view of this, it is clear that a court should not order anti-androgenic treatment without a detailed psychiatric and medical report on the offender. Further, given that this is a medical treatment, the drugs would need to be prescribed, possibly administered (eg, in the case of intravenous drugs) and monitored by health professionals, including an endocrinologist. Anti-androgens carry the risk of a range of serious side-effects, including weight gain, depression, osteoporosis, cardiovascular disease and gynaecomastia.[4] While the offender may receive psychological benefits – being freed from his sexual obsessions – the medical appropriateness of the treatment is not always clear.[5]

Accordingly, while anti-androgens appear to have the potential of reducing the risk of reoffending, their efficacy is subject to a number of variables. Individual cases have been reported where anti-androgens appear to have succeeded,[6] and significantly lower recidivism rates have been reported.[7] Most commentators accept that anti-androgens do reduce the risk of reoffending,[8] but reliable statistical studies are extremely limited,[9] and

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[2] This condition appears in the Diagnostic and Statistical Manual of Mental Disorders (4th ed, 2000) (DSM IV-TR).

[3] Louis J Gooren, 'Ethical and Medical Consideration of Androgen Deprivation Treatment of Sex Offenders' (2011) 96 *Journal of Clinical Endocrinology & Metabolism* 3628, 3629.

[4] EJ Giltay and LJ Gooren, 'Potential side effects of androgen deprivation treatment in sex offenders' (2009) 37 *Journal of American Academy of Psychiatry and Law* 53.

[5] Editorial, *British Medical Journal*, BMJ 2010; 340: c74; Gooren above.

[6] 'The Case for Castration: A "shot" towards rehabilitation of sexual offenders' (2013) 37 Law and Psychology Review 193, 201-202.

[7] Gooren, above, 3629; BMJ above.

[8] Gooren, above, 3629.

[9] Steven Brockett, 'Are the principles of substance abuse treatment transferrable to sex offenders? A review of the methods and effectiveness of sex-offender treatment programs' (2012) 41 *Hofstra Law Review* 341, 348;

the factors impacting on success are not fully understood. For example, it has been suggested that the where offenders are *compelled* to take anti-androgens, recidivism rates are no lower than for the general sex offender population.[10]

The Association is not aware of any comprehensive survey of the use of anti-androgens in Australia. Such a study should be conducted before any reform extending their use is considered. In September 2013 it was widely reported in the media that WA courts stopped ordering anti-androgen treatment because of concerns about side-effects.[11]

It appears that currently in NSW the only situation in which offenders are ordered to use anti-androgens is under the *Crimes (High Risk) Offenders Act 2006* as a condition of an interim or extended supervision order. As such, anti-androgens are not used as a punishment, but purely to facilitate rehabilitation and reduce the risk posed by the offender on his release. In most if not all cases the offender has agreed to the condition, although this may be with some reluctance on the basis that the alternative is detention.[12]

It would be inappropriate to extend the use of anti-androgens to other offenders, not covered by the *Crimes (High Risk) Offenders Act 2006*. Clearly, the only legitimate sentencing purposes of anti-androgens are protection of the community and rehabilitation of the offender.[13] While chemical castration, unlike surgical castration, does not involve mutilation and is reversible, it is still extremely invasive and potentially harmful. Imposing this upon an offender as retribution or to deter him or others is totally out of step with the values underpinning the modern Australian criminal justice system and international human rights law.[14]

Further, given the invasive nature of the anti-androgen treatment and the risk of side-effects, this option should only be considered in cases where the risk of re-offending is high. In view of this, the *Crimes (High Risk) Offenders Act 2006* provides a more appropriate framework than the general sentencing legislation (currently the 2001 Act). Protection of the community and rehabilitation of the offender are the objects of the 2006 Act (s 3), and orders under the Act may only be made in regard to offenders posing a 'high risk' of committing a further sexual offence (s 5B).

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citing Friedrich Lösel & Martin Schumucker, 'The effectiveness of treatment for sexual offenders: A comprehensive meta-analysis' (2005) 1 *Journal of Experimental Criminology* 117.

[10] Brocket above, 349, citing R Karl Hanson & Andrew Harris, 'Where should we intervene? Dynamic predictors of sexual offence recidivism' (2000) 27 *Criminal Justice & Behavior* 6, 23-24.

[11] eg, http://www.abc.net.au/news/2013-09-20/sex-offender-medication-stopped/4971502; cf http://www.watoday.com.au/wa-news/wa-sex-offender-released-under-supervision-20131002-2usba.html.

[12] Eg, *NSW v Hayter* [2009] SC 611 [8], [11]

[13] *Crimes (Sentencing Procedure) Act 2001* s 3A(c),(d); NSWLRC 139 [2.113]-[2.114],[2.118]

[14] eg Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN 1984); *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth)

A further restriction should operate on the making of an anti-androgen treatment order. Such an order should only be made with the consent of the offender. It appears, in practice, that this requirement is already respected to a degree.[15] Informed consent is a well-established prerequisite for medical procedures, particularly ones like anti-androgens with the risk of harmful side-effects. Whether or not this restriction operates on the court, the court would have trouble co-opting medical professionals where informed consent has not been obtained. Health professionals are increasingly expressing concern about the ethics of participating in anti-androgen programs.[16] A further practical consideration is that the treatment is unlikely to be effective where the offender is unwilling to take it. The offender may simply not take the anti-androgenic medication or, where it is administered by a health professional, the offender may seek to subvert it by taking testosterone medication.

Standard non-parole periods

While it was noted above that standard non-parole periods are preferable to mandatory minimum sentences, the Association is certainly not calling for an expansion of the number of child sexual assault offences to which standard non-parole periods apply.

Overall, the Association does not favour the extension or even the maintenance of the system of standard non-parole periods. Clearly the imposition of such periods has led to an increase in the general level of sentencing, and an increase in the prison population. It has also led to sentencing outcomes that can be seen to be unjust and inconsistent. That serves to diminish public confidence in the administration of criminal justice.

The Association advocates the removal of standard non-parole periods for child sexual assault offences. Whilst it is accepted that this category of offence is particularly serious and carries with it a high level of community concern and abhorrence, it must also be recognised that sentencing for such matters is often extremely complex and difficult. The introduction of a standard non parole period creates additional and unwelcome complexity and often results in appealable errors.

If they are retained, they should only be imposed for offences which have all the following characteristics: very serious offences carrying high maximum penalties, where the range of objective criminality is relatively narrow, where there has been no guideline judgment and where there is evidence of either inconsistency in sentencing or a pattern of inadequate sentences.

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[15] 'Anti-androgen therapy is generally only given with the informed consent of the patient': *Qld v PHG* [2010] QSC 406 [15], quoting from a report of Dr Grant.

[16] Even where some kind of consent has been obtained, given that detention is threatened in its absent, is the consent genuine?: eg, Gooren above, 3629. On the other hand, 'it is not clear why this should not be part of the person's calculation': BMJ above.

If there is anything in relation to this submission that you would like to discuss, please do not hesitate to contact me or the Association's Executive Director Mr Philip Selth on [redacted] or at [redacted]

Yours sincerely

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Phillip Boulten SC
President