Submission No 2

SENTENCING OF CHILD SEXUAL ASSAULT OFFENDERS

Organisation: Family Voice Australia

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Submission

on the

Sentencing of Child Sexual Assault Offenders

to the

Joint Select Committee on Sentencing of Child Sexual Assault Offenders

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1. Introduction and terms of reference

The NSW Legislative Assembly on 15 August 2013 and the Legislative Council on 21 August 2013 passed the following motion to establish a Joint Select Committee to hold an inquiry into the sentencing of child sexual assault offenders:

> *That:*
>
> *(1) A Joint Parliamentary Select Committee be appointed to inquire into and report on:*
>
> *(a) whether current sentencing options for perpetrators of child sexual assault remain effective; and*
>
> *(b) 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.*
>
> *(2) In examine this issue the Committee should have regard to:*
>
> *(a) the current sentencing patterns for child sexual assault;*
>
> *(b) the operation of the standard minimum non-parole scheme;*
>
> *(c) the experience of other jurisdictions with alternative sentencing options; and*
>
> *(d) the NSW Law Reform Commission's Report 139 on Sentencing.*

The Select Committee has invited written submissions addressing these issues.[1] Submissions are due by 28 February 2014.

2. Minimum mandatory sentencing

The High Court has most recently upheld the constitutional validity of mandatory minimum sentences in dismissing an appeal against the imposition of such a sentence in a people smuggling case.[2]

In his concurring opinion Keane J explained that it was within the competence of the legislative arm of government to enact sentences for particular offences, including mandatory minimum sentences:

> *The work of the legislature in laying down norms of conduct and attaching sanctions to breaches of those norms is anterior to the function of the judiciary. As was said in the Supreme Court of Canada in* R v McDonnell*:*
>
> > *"[I]t is not for judges to create criminal offences, but rather for the legislature to enact such offences."*
>
> *The enactment of sentences by the legislature, whether as maxima or minima, involves the resolution of broad issues of policy by the exercise of legislative power. A sentence enacted by the legislature reflects policy-driven assessments of the desirability of the ends pursued by the legislation, and of the means by which those ends might be achieved. It is distinctly the province of the legislature to gauge the seriousness of what is seen as an undesirable activity affecting the peace, order and good government of the Commonwealth and the soundness of a*

view that condign punishment is called for to suppress that activity, and to determine whether a level of punishment should be enacted as a ceiling or a floor.

In laying down the norms of conduct which give effect to those assessments, the legislature may decide that an offence is so serious that consideration of the particular circumstances of the offence and the personal circumstances of the offender should not mitigate the minimum punishment thought to be appropriate to achieve the legislature's objectives, whatever they may be.[3]

However, it is also helpful to bear in mind the *dicta* from Barwick CJ cited in lead judgement in this case:

It may be that, as Barwick CJ said in Palling v Corfield:

"It is both unusual and in general ... undesirable that the court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases and it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime."[4]

In short, the High Court has affirmed that state parliaments have the power to impose mandatory minimum sentences, in order to provide for the peace, order and good government of society.

The community is naturally outraged by the crime of child sexual assault. Calls for mandatory minimum sentences for child sexual assault offences are therefore understandable.

A case that has attracted recent media comment involved a man convicted of repeated sexual assaults on his daughter from the age of nine.[5] The man was one of the last subject to pre-trial diversion to the Cedar Cottage program pursuant to regulations made under the *Pre-Trial Diversion of Offenders Act 1985*. The regulations were repealed in September 2012 and the program phased out.

The diversion program applied only to child sexual assault offenders where the offences involved incest and there were was no violence apart from the sexual assault itself. The program imposed a good behaviour bond with imprisonment resulting from non-compliance with the rigorous treatment program. A research study found that the Cedar Cottage program, which involved repeatedly confronting participants with the seriousness of their offences and the impact on their victims, resulted in fuller disclosure by participants of the extent of offending and in significantly decreased rates of recidivism.[6]

Over the two year period 2009 and 2010 of 236 persons convicted of child sexual assault offences 74.6% received a sentence of imprisonment; 15.3% received a suspended sentence; 7.2% were placed on a bond; and 2.5% were diverted to the Cedar Cottage program.[7]

Commenting on these statistics a spokesperson for the District Court of New South Wales noted that statistics did not tell the whole story and any serious inquiry into child sex assault sentencing must canvass the specific details of individual cases.

This is because the application and interpretation of the term 'sexual intercourse' varies widely, from inappropriate touching on the external part of the body to the most serious sexual assault. Unfortunately, in the absence of all the facts pertaining to each case - which a judge is privy to - the community generally assumes 'sexual intercourse' to mean serious sexual assault, therefore sometimes leading to unjustified criticisms of imposed sentences.[8]

NSW Attorney-General Greg Smith said research by two barristers had not uncovered a pattern of trivial sentencing.[9]

As the community would expect, the rate of sentences involving imprisonment is higher for the more serious offences. For example, between 2003 and 2007 there were 30 convictions for offences under s66A of the *Crimes Act 1900*, that is "sexual intercourse with a child under 10". Of these 96.7% (29 out of 30) resulted in a sentence of imprisonment.[10]

Mandatory minimum sentences can hamper the judiciary from considering all the factors in each particular case. They may result in injustice where, in an exceptional case, a court is unable to impose other than the minimum mandatory sentence.

Only as a last resort, where other approaches to aligning community expectations and judicial practice have clearly failed, should mandatory minimum sentences be introduced.

The case for mandatory minimum sentencing for child sexual assault offences has not been made out.

Recommendation 1:

No minimum mandatory sentences for child sexual assault offence should be introduced at the present time.

3. A guidance judgement for child sexual assaults?

Division 4 of the *Crimes (Sentencing Procedure Act) 1999* provides for courts to issue guideline judgements, including in relation to sentencing for particular offences. A guideline judgement can be issued in response to an application from the Attorney-General or on the own motion of the court.

Nicholas Cowdery has observed that:

> *Guideline judgments go some way to redressing the unfortunate impression, driven by the media's concentration on specific, aberrant instances of unusually lenient sentences, that sentences in general are too lenient. They can have a tendency to increase sentences for particular offences. They improve consistency in sentencing.*
>
> *They can have a general deterrent effect.*[11]

A guideline judgement for one or more of the child sexual assault offences may be useful in ensuring more consistency in sentencing for these offences.

Recommendation 2:

The Attorney General and the superior courts should consider whether a guideline judgement for one or more child sexual assault offences would be helpful in ensuring more consistent sentencing for these offences.

4. Anti-androgenic medication

In a 2012 paper Florence Thibaut summarised the recommendations for the treatment of *paraphilias* (or sexual deviations) of the World Federation of Societies of Biological Psychiatry[12] as follows:

> *Antiandrogens, and mostly GnRH analogues, significantly reduce the intensity and frequency of deviant sexual arousal and behavior, although informed consent is necessary in all cases. GnRH analogue treatment constitutes the most promising treatment for sex offenders at high risk of sexual violence, such as pedophiles or serial rapists. SSRIs remain an interesting option*

in adolescents, in patients with depressive or OCD disorders, or in mild paraphilias such as exhibitionism.

Pharmacological interventions should be part of a more comprehensive treatment plan including psychotherapy and, in most cases, behavior therapy.[13]

These recommendations are based on a thorough review of all the available studies on the effectiveness of pharmacological treatment of paraphilias.

Thibaut points out that not all sex offenders suffer from a paraphilia so that pharmacological treatments for paraphilias are not going to be appropriate for these offenders.

The evidence base for the effectiveness of pharmacological treatments of paraphilias is necessarily limited because of the difficulty of conducting double blind trials.

Anti-androgens and GnRH (gonadotrophin-releasing hormone) analogues all have serious side effects which must be taken into account in prescribing treatment. In particular, "Hormonal agents cannot be easily used in the treatment of juvenile sex offenders with paraphilia owing to possible interference with the development of puberty".[14]

Thibaut summarises the ethical considerations for subjecting convicted sex offenders to hormonal treatment:

From an ethical point of view, the patient may be subjected to hormonal treatment only if all of the following conditions are met:

- *The person has a paraphilic disorder diagnosed by a psychiatrist after a careful psychiatric examination.*
- *The person's condition represents a significant risk of serious harm to his health or to the physical or moral integrity of other persons.*
- *No less intrusive treatment means of providing care are available.*
- *The psychiatrist in charge of the patient agrees to inform the patient and receive his or her consent, to take the responsibility for the indication of the treatment and for the follow up including somatic aspects with the help of a consultant endocrinologist, if necessary.*

In some cases, coerced treatment may be used in sex offenders with paraphilia.

The decision to subject a sex offender to coerced treatment should be taken by a court or another competent body. The court or other competent body should:

- *Act in accordance with procedures provided by law based on the principle that the person concerned should be seen and consulted;*
- *Not specify the content of the treatment (hormonal or not) but force the person to comply with the treatment plan negotiated with the psychiatrist;*
- *The decision to subject this person to hormonal treatment must be taken by a psychiatrist with the requisite competence and experience and not by the judge, after examination of the person concerned and only after his or her informed consent has been obtained. While treatment may facilitate improvement and release or discharge, this may not be necessarily the case;*

- *In some cases, failure of the offender to accept any kind of treatment could lead to sanctions by the court.*[15]

These considerations are appropriate and any inclusion of orders for treatment as part of sentencing options for child sexual assault offenders should only be supported if a framework is in place to ensure that such considerations are adhered to rigorously.

Recommendation 3:

Sentencing options for child sexual assault offences should not make specific reference to anti-androgenic drugs. However, sentencing options could include reference to compliance with a treatment program prescribed by a qualified psychiatrist as a condition for a variation in sentence. The principle of informed consent must be fully acknowledged and no forced or non-consensual administration of anti-andronegic or similar drugs countenanced.

5. Standard non-parole periods

Standard non-parole periods (SNNPs) were introduced in New South Wales for a range of offences, including some child sexual assault offences, in 2003.

A 2010 report by the Judicial Commission of New South Wales found overall that SNNPs had led to an increase in sentence length especially where the SNPP was a high proportion of the maximum sentence and for offenders who pleaded not guilty. SNNPs also contributed to greater consistency in sentencing.[16]

It is too early to tell whether the High Court's 2011 decision in *Muldrock*[17], let alone the expected passage of the *Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Bill 2013*, which is designed to give guidance to the courts on how to apply SNNPs post-*Muldrock*, will affect these trends.

Nonetheless new section 54B (2)-(3) of the *Crimes (Sentencing Procedure) Act 1999* which would be introduced by the Bill would provide that:

> *(2) The standard non-parole period for an offence is a matter to be taken into account by a court in determining the appropriate sentence for an offender, without limiting the matters that are otherwise required or permitted to be taken into account in determining the appropriate sentence for an offender.*
>
> *(3) The court must make a record of its reasons for setting a non-parole period that is longer or shorter than the standard non-parole period and must identify in the record of its reasons each factor that it took into account.*

There are some noted inconsistencies in which child sexual assault offences have associated SNPPs and which do not.

In particular the lack of an SNPP for the serious s66EA offence of "persistent sexual abuse of a child", which carries a maximum term of 25 years imprisonment, has perhaps contributed to the courts not viewing this offence in the same light as the legislature.[18]

There is a clear inconsistency between having an SNPP (5 years) for the s61M (2) offence of aggravated indecent assault with a person under the age of 16 years, which has a maximum sentence of 10 years and the lack of an SNPP for the more serious s66C offences which have maximum sentences of 16 years for sexual intercourse with a child between 10 and 14 years; 20 years for

aggravated sexual intercourse with a child between 10 and 14 years; 10 years for sexual intercourse with a child between 14 and 16 years and 12 years for aggravated sexual intercourse with a child between 14 and 16 years.

Recommendation 3:

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.

6. Restitution for victims

United States federal law, as well as the law in several States, provides for restitution for victims of various offences, including victims of child sexual assault offences.[19]

Restitution is additional to any other criminal penalty. It differs from civil compensation where the victim must initiate an action in the civil courts, and from criminal compensation where the State pays compensation to the victim. Restitution is paid by the offender pursuant to an order from the criminal court following conviction for an offence.

The amount of restitution is determined by the court and, in the case of the federal law, is intended to cover the full amount of the victim's losses attributable to the offence including:

any costs incurred by the victim for—

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, as well as other costs incurred; and

(F) any other losses suffered by the victim as a proximate result of the offense.

In New South Wales the *Victims Rights and Support Act 2013* provides for a Victims Support Scheme, which may make payments to victims of violence offences including victims of child sexual assault. The Act provides for recovery of such payments form convicted offenders by orders for restitution. Additionally the Act provides for an alternative scheme in which a court, on convicting an offender of a crime of violence, including a child sexual assault offence, may directly order the convicted offender to pay compensation for loss and injury to the victim.

Recommendation 4:

Restitution to victims of child sexual assault by offenders is an essential component of justice. The operation of the Victims' Rights and Support Act 2013 is subject to a statutory review after three years operation.[20] This review should look in particular at how the Act has worked in relation to restitution for victims of child sexual assault offences.

7. Endnotes

1. Joint Select Committee on sentencing of child sexual assault offenders: http://www.parliament.nsw.gov.au/childsexualoffencescommittee

2. *Magaming v The Queen* [2013] HCA 40 (11 October 2013): http://www.austlii.edu.au/au/cases/cth/HCA/2013/40.html

3. *Ibid.*, Keane J at 104-106.

4. *Ibid.*, French CJ et al. at 27.

5. Janet Fife-Yeomans, "Rapist father's legal loophole", *The Daily Telegraph,* 18 July 2013: http://www.dailytelegraph.com.au/news/rapist-fathers-legal-loophole/story-fni0cx4q-1226680990690

6. Tony Vinson, "O'Farrell must not let outrage at the crime rob victims of support", *Sydney Morning Herald*, 3 September 2012: http://www.smh.com.au/federal-politics/political-opinion/ofarrell-must-not-let-outrage-at-the-crime-rob-victims-of-support-20120903-25adc.html

7. Jessie Holmes, *Sentencing snapshot: child sexual assault 2009-2010*, NSW Bureau of Crime Statistics and Research, May 2013, Table 3 on p 3: http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/bb68.pdf/%24file/bb68.pdf

8. Janet Fife-Yeomans, "Child abusers avoid penalty on section 10s", *The Daily Telegraph,* 1 May 2013: http://www.dailytelegraph.com.au/child-abusers-avoid-penalty-on-section-10s/story-e6freuy9-1226632613706

9. *Ibid.*

10 Patrizia Poletti, 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 36: http://www.judcom.nsw.gov.au/publications/research-monographs-1/research-monograph-33/monograph33.pdf

16. Nicholas Cowdery, "Guideline judgments: It seemed like a good idea at the time", delivered at the *International Society for the Reform of Criminal Law 20th International Conference*, 2-6 July 2006 Brisbane, p 4: http://www.isrcl.org/Papers/2006/Cowdery.pdf

12. Florence Thibaut et al., "The World Federation of Societies of Biological Psychiatry (WFSBP) Guidelines for the biological treatment of paraphilias", *The World Journal of Biological Psychiatry*, 2010, 11:604–655: http://www.wfsbp.org/fileadmin/user_upload/Treatment_Guidelines/Paraphilias_Guidelines.pdf

13. Florence Thibaut, "Pharmacological Treatment of Paraphilias", *Israel Journal of Psychiatry & Related Sciences*, 2012, Vol. 49:297-305: http://doctorsonly.co.il/wp-content/uploads/2013/03/09_-Pharmacological-treatment.pdf

14. *Ibid.*, p 303.

15. *Ibid.*, pp 298-299

16. Patrizia Poletti, 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 60: http://www.judcom.nsw.gov.au/publications/research-monographs-1/research-monograph-33/monograph33.pdf

17. *Muldrock v The Queen* [2011] HCA 39, 5 October 2011: http://www.austlii.edu.au/au/cases/cth/HCA/2011/39.html

18. *R v Manners* [2004] NSWCCA 181 at 21; *R v Fitzgerald* (2004) 59 NSWLR 493 at 13.

19. *Mandatory Restitution for Sexual Exploitation of Children Act*, 18 U.S.C. sect. 2259: http://law.justia.com/codes/us/2010/title18/parti/chap110/sec2259/

20. *Victims' Rights and Support Act 2013,* Section 119.