Submission No 19

SENTENCING OF CHILD SEXUAL ASSAULT OFFENDERS

Organisation: New South Wales Ombudsman

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By email: childsexualoffencescommittee@parliament.nsw.gov.au

Dear Mr Grant

NSW Ombudsman submission to the Joint Select Committee on Sentencing of Child Sexual Assault Offenders

Thank you for the opportunity to allow my office to attend the Committee's background briefing last year and to provide a submission.

We note that the Terms of Reference require the Committee to consider whether mandatory minimum sentencing could be utilised to achieve greater consistency in sentencing and improve public confidence in the judicial system.

As the Committee is aware, the NSW Ombudsman conducted an audit of the implementation of the *NSW Interagency Plan to Tackle Child Sexual Assault in Aboriginal Communities*. Our final report, tabled in Parliament in January 2013, considered a wide range of issues relating to the criminal justice system's response to child sexual assault. This submission seeks to highlight those aspects of our audit that the Committee has indicated will be of particular relevance to its deliberations.

Introduction

As outlined in the *Crimes (Sentencing Procedure) Act 1999*, the sentencing of offenders has a range of purposes, including to ensure the offender is adequately punished, to prevent crime, to protect the community, to promote rehabilitation of the offender and to make the offender accountable for his or her actions.[1] The difficulty of balancing these considerations is exacerbated in the context of sentencing child sex offenders given the seriousness which the community views child sex offences, the difficulties involved in prosecuting and convicting offenders, the complexities involved in meeting the needs of victims (particularly, as is often the case, if the offender is known to the victim), and the need for offenders to be reintegrated into the community following any custodial sentence.

The fact that child sexual abuse often occurs in the context of other types of disadvantage and dysfunction, and the significant ongoing challenges in responding to, and preventing, child sexual abuse more generally, should also be taken into account when considering issues relating to sentencing of those convicted of sex offences against children.

[1] *Crimes (Sentencing Procedure) Act 1999*, section 3A.

Minimum mandatory sentencing

It appears that the rationale for mandatory minimum sentences is that existing sentences imposed on offenders are inadequate, in that they do not sufficiently punish or deter offenders, and fail to meet community expectations thereby undermining confidence in the criminal justice system.

Our consultations with Aboriginal communities highlighted that community members typically had negative perceptions of the ability of the criminal justice system to address child sexual assault and that the perceived inadequacy of sentences was one of the factors leading to such perceptions. However, as discussed in chapter 12 of our report *Responding to child sexual assault in Aboriginal communities* the reasons why offenders receive particular sentences in child sexual assault matters are often not straightforward.

It is well documented that a substantial proportion of sexual assaults and other incidents of sexual abuse are not reported to police, and of those that are formally reported, only a minority result in criminal charges. Even fewer result in convictions. Due to the nature of child sex offences, the successful prosecution of these matters is often largely reliant on the evidence of the victim, however, many victims are reluctant to become involved in a prosecution (because of the nature of the offence, and delays and difficulties in the investigation and court process). In our review of 37 child sexual assault matters involving Aboriginal victims, for example, 30% of the matters were withdrawn prior to hearing. A significant contributor to this attrition was the decision by victims that they did not want to participate in the court process.

In order to obtain a conviction, without requiring the involvement of the victim during a trial, prosecutors will often seek to have the defendant enter a guilty plea. In fact, in a majority of cases where a defendant is convicted of a matter involving a sex offence, the conviction will be secured as a result of a guilty plea by the defendant. Usually a guilty plea is obtained through the process of 'charge negotiation'.

Between 2007 and 2011, there were 2,130 sex offence matters involving a child victim finalised in NSW which resulted in a conviction for at least one offence. Of these convictions, 1,673 (79%) were achieved by way of a plea. We do not have state-wide data as to the proportion of these pleas which involved a process of charge negotiation. However, our review of a sample of 13 child sex offence matters where a conviction was reached due to a guilty plea identified that there were only three matters where the defendants pled guilty to all of the charges against them. In the remaining ten matters, a plea was entered to a lesser charge.

As we state in our report:

> *Charge negotiations are frequently utilised as a tool by prosecutors to secure a conviction against an offender without having to require a victim to give evidence at a trial. While the sentence received may ultimately be reduced, this is often considered to be a better outcome for the victim than having to go through the traumatic process of a trial or hearing. It also provides a mechanism to achieve a conviction in cases where the likelihood of a conviction at a hearing or trial may not be high. Depending on the nature of the charges, a conviction may result in the offender being placed on the Child Protection Register, enabling police to have greater powers to monitor the offender's behaviour once released from prison.*[2]

In this context, while the introduction of minimum mandatory sentences may result in an increase in the sentence severity for those offenders who are convicted, there is a very real risk that it could simultaneously result in a decrease in the number of offenders who are convicted, as fewer offenders may be willing to plead guilty. This should be weighed up in any consideration of a mandatory minimum sentencing scheme, particularly given that the issue of low conviction rates was identified as a further issue that undermined victims' satisfaction with the criminal justice system, and which

[2] NSW Ombudsman, *Responding to Child Sexual Assault in Aboriginal communities*, December 2012, p.152.

contributes to victims being reluctant to become involved in the prosecution of offenders. Irrespective of any future reforms to the sentencing process, there is a clear need to ensure that the communication and education for victims and their families about the sentencing process and the variables which impact on individual sentences is strengthened.

Appropriate sentencing options for children and young people

While it is difficult to determine accurate estimates of the prevalence of sexually abusive behaviours by children and young people, it is increasingly recognised that it forms a significant proportion of all child sexual abuse – both the Mental Health Coordinating Council[3] and the NSW Sentencing Council[4] quote research that estimates that children and young people are responsible for about a third of all child sexual abuse.

While all sex offenders are a heterogeneous group, and there is no 'one size fits all' approach to adult or juvenile offenders, it is increasingly accepted that children and young people who display sexually abusive behaviours require, as a group, a different response to adult offenders.

There is wide agreement that the vast majority of children and young people who engage in sexually abusive behaviours, including a substantial proportion of those convicted of sexual offences, do so because of the particularities of their context or situation rather than as a result of some pre-existing sexual predilection for children.[5]

In this regard, clinicians experienced in treating problematic or abusive sexual behaviours by children and young people emphasise that it is extremely rare for a child's sexualised behaviour to be their only behavioural issue of concern or area of therapeutic need. This is reflected in the disproportionately high rates of social disadvantage, and poor mental and physical health, affecting young people in juvenile detention.

As a result, strategies to respond to juvenile sexual offending must be flexible enough to engage both those who need specialist help, and the general rule breakers whose offending has a sexual element. However there are limits to the current capacity, both of Juvenile Justice and community-based treatment programs, to fulfil this need. One possible solution is to develop a restorative justice approach for certain young offenders. This option is further discussed below; however it is important to note that the success of a restorative justice approach depends heavily on there being a close alignment between the criminal justice system and the health and welfare sectors. There is no real benefit in allowing sex offences committed by young people to be handled differently by courts if the service sector does not have the capacity to provide the necessary therapeutic response. In addition, a therapeutic approach of this type should also involve sufficient levers to divert high-risk young people into treatment.

We believe that the comprehensive scheme introduced by the Victorian Government in 2007 includes a number of elements which could be used to establish an integrated service response framework for children and young people who commit sexually abusive acts in NSW.

The scheme, established under the *Children, Youth and Families Act 2005* (Vic) provides that when police or the Children's Court report concerns about young people aged 10-14 who display sexually abusive behaviours to Child Protection, the matter must be referred to the Therapeutic Treatment Board. The Board, made up of police, the Office of Public Prosecutions, community services and human services representatives, then provides advice about whether there is a need for a therapeutic treatment order (TTO) to require the young person to participate in a treatment program. Where required, the court may also make a therapeutic treatment placement order requiring the young person to live in accommodation that enables and supports the treatment.

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[3] Mental Health Coordinating Council, *Reframing Responses, Stage Two: Supporting women survivors of child abuse – an information resource guide and workbook for community managed organisations*, 2010, p.11.
[4] NSW Sentencing Council, *Penalties relating to sexual assault offences in New South Wales, Volume 3*, May 2009, p.109.
[5] O'Brien, W, Australian Crime Commission, *Australia's response to sexualised or sexually abusive behaviours in children and young people*, 2010.

Although TTOs are in addition to, not instead of, any criminal charges, one effect of a such an order is to suspend criminal proceedings while treatment is provided. If, at the end of the TTO, the court is satisfied that the young person has attended and participated in the program, it must discharge the young person without any further hearing of the criminal proceedings relating to the sexually abusive behaviours.

During our audit, clinicians from New Street[6] and Juvenile Justice's Sex Offender Program expressed interest in the Victorian scheme. We recommended that consideration be given to developing a similar framework in NSW. The Government has indicated that it supports this recommendation, however, we are not aware of any specific actions which have yet been taken to progress it.

Restorative justice

The use of restorative justice models for sexual offences has been debated for a number of years – including through the NSW Sentencing Council's 2009 report on penalties relating to sexual assault offences, and the Attorney General's 2010 report on the review of the *Crimes (Serious Sex Offenders) Act 2006*. While there has been support raised for restorative justice options being made available in certain circumstances, generally speaking there remains a reluctance to implement a pre-sentencing restorative justice model for adults who commit sex offences.

Our consultations with community members and other stakeholders did however highlight that there is considerable support for a different approach being made available for certain sex offences committed by young people.

The youth justice conferencing scheme in NSW – the current restorative justice model available to young offenders – excludes those young people who have committed a sex offence from participating. In two recent studies, BOCSAR found that there were no significant differences in terms of re-offending between offenders dealt with in a youth justice conference and those dealt with in court. However the Director of BOCSAR, Dr Don Weatherburn, noted that a possible explanation of this finding was the fact that single conferences 'do not address the underlying causes of juvenile offending.'[7]

In this regard, a strong theme to emerge from our consultations with practitioners who work with young people is that expanding the youth justice conferencing regime to include minor sexual offences, without also ensuring that therapeutic interventions and intensive case management support form part of the response, is unlikely to produce better results than the mainstream court process.

This type of model – a conferencing model for young people who have displayed sexually abusive behaviours, which builds in therapeutic treatment and case management – has been adopted with a considerable degree of success in South Australia. Research conducted in order to determine which intervention was preferable from a victim's perspective found that conferences outperformed courts in terms of victim satisfaction. In addition, those young people who had no previous history of sexual offending, who were dealt with by conference, and who participated in an associated intensive therapeutic intervention program had significantly lower rates of re-offending than those dealt with by the court.[8]

In our report *Responding to child sexual assault in Aboriginal communities*, we recommended that the Department of Attorney General and Justice should give consideration to whether the youth justice conferencing scheme should be extended to include certain sex offences committed by juvenile offenders; in particular Aboriginal juveniles. We have been advised that the Government is progressing our recommendations in this area through the current review of the *Young Offenders Act 1997* and the *Children (Criminal Proceedings) Act 1987*.

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[6] New Street is NSW Health's therapeutic program for responding to children and young people aged 10-17 years who sexually abuse.

[7] Dr Don Weatherburn, *The effect of Youth Justice Conferencing on re-offending*, 15 March 2012.

[8] Kathleen Daly, 'Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases', *British Journal of Criminology* 46(2), 2006, pp.334-356.

As outlined above, the efficacy of the inclusion of any sex offences in the youth conferencing scheme will be dependent on participating young people also having access to appropriate therapeutic treatment. In this regard it is relevant to note that we identified a number of challenges in the availability and capacity of appropriate therapeutic services in NSW for young people who display sexually abusive behaviours.[9] It will be necessary for these issues to be addressed as part of any expansion of the youth conferencing scheme if it is to be successful.

We also recommended that – if youth justice conferencing is extended to include certain sex offences – the Department of Attorney General and Justice and NSW Health consider establishing a trial restorative justice model for Aboriginal young people in one or more Aboriginal communities in NSW.[10] This will require agencies to work in partnership with Aboriginal leaders to ensure that Aboriginal leaders are involved in the design and implementation of the program.

Supervising sex offenders in the community

Corrective Services, currently supervises between 600 and 700 sex offenders in the community each year, including those on parole and those given a community based sentence. Around half of these are offenders who were sentenced for sexually abusing children.[11]

The effective management of sex offenders in the community is a critical aspect of protecting children from sexual abuse and maintaining community confidence in the criminal justice system. In order for offenders to be managed effectively it is important for Corrective Services and Police to have the capacity to adequately assess the level of risk which offenders pose, and also to effectively manage that risk.

Chapter 17 of our report *Responding to Child Sexual Assault in Aboriginal communities* discusses issues relating to the management of child sex offenders in the community. While our report highlights a number of major developments in NSW to enhance the management of such offenders in the community, we also highlighted a number of ongoing challenges that must be addressed to ensure supervision of offenders is effective and sentencing outcomes achieved.

We outlined, for example, a number of limitations with the risk assessment tools which are used to identify the level and type of monitoring required for offenders in the community. Corrective Services acknowledges that while these tools can help identify and provide guidance on the types of issues that may need to be addressed when managing sex offenders in the community, they are not able to predict the behaviour of an individual with any degree of certainty. In addition, there are concerns about the validity of using these tools on particular groups of offenders, such as Aboriginal offenders and juveniles. In order for risk assessment of offenders to reflect international best practice it is crucial that Corrective Services conducts ongoing evaluation of the tools used, and where relevant, ensures systems are updated and improved.

Our report also identified that Corrective Services faces significant challenges in managing offenders who wish to return to rural and remote communities, including the capacity to source appropriate accommodation options; the availability of appropriate therapeutic treatment; and the significant resource implications of supervising offenders in non-metropolitan areas. Corrective Services also faces difficulties ensuring that juvenile offenders in the adult system are appropriately managed post-release, given that the responsibility for developing appropriate management strategies and identifying post-

[9] NSW Ombudsman, *Responding to Child Sexual Assault in Aboriginal Communities*, December 2012, chapter 16.
[10] NSW Ombudsman, *Responding to Child Sexual Assault in Aboriginal Communities*, December 2012, Recommendation 57, p.161. We note that the Community Holistic Circle Healing (CHCH) process developed in Hollow Water, Canada has a number of components which are worth considering in the development of a restorative justice model for young offenders, particularly for young Aboriginal offenders. This model is discussed in NSW Ombudsman, *Responding to Child Sexual Assault in Aboriginal Communities*, 2012, chapter 13.
[11] For example, on 30 June 2012, Corrective Services estimated it was actively supervising 348 child sex offenders in the community. NSW Ombudsman, *Responding to Child Sexual Assault in Aboriginal Communities*, December 2012, p.223.

release supports often falls upon staff who have little direct experience in planning for the specific educational and other developmental needs of young people.

Addressing these issues is crucial because, if the monitoring and supervision of child sex offenders – particularly those who are deemed high risk - is undertaken effectively, and strategies are put in place to minimise the risks posed by these offenders when they are released into the community, recidivism will be reduced and the community's confidence in the criminal justice system overall will be enhanced. For this reason, it is important to consider the operation of the Child Protection Register (CPR), when considering sentencing of child sex offenders, even though registration requirements are not, strictly speaking, part of an offender's 'sentence'.

We have made a number of observations about the operation of the CPR and associated initiatives, such as Child Protection Watch Teams and Child Protection Prohibition Orders in chapter 17 of our report *Responding to Child Sexual Assault in Aboriginal communities* and also in our submission to the statutory review of the *Child Protection (Offenders Registration) Act 2000* (which can be accessed at www.ombo.nsw.gov.au).

In particular we have noted the significant ongoing challenges faced by the NSW Police Force in managing the continually expanding number of offenders who are registered on the CPR. This is particularly difficult for those Local Area Commands who are responsible for a large number of total registrants, or a high proportion of registrants who are classified as high risk. It is our view that it would be timely for a comprehensive evaluation of the CPR to be undertaken.

Anti-Androgenic medication

We are of the view that any consideration as to the appropriateness and utility of providing child sex offenders with anti-androgenic medication will need to take into account the current challenges faced by government agencies and the service sector in providing offenders with adequate and appropriate therapeutic treatment, case management, monitoring, supervision and support.

I hope that the committee will find our submission to be of assistance. Please do not hesitate to contact Ms Julianna Demetrius, Director, Strategic Projects Division, on [redacted] should you require any further information.

Yours sincerely,

[redacted]

Bruce Barbour
NSW Ombudsman