

INQUIRY INTO SENTENCING CHILD SEXUAL ASSAULT OFFENDERS

Legal Aid NSW submission

to the Parliament Joint Select Committee on

Sentencing of Child Sexual Assault Offenders

February 2014

Introduction

Legal Aid NSW welcomes the opportunity to provide comments in response to the inquiry into the sentencing of child sexual assault offenders. The Legal Aid NSW submission will address key aspects of the inquiry's terms of reference.

Consistency in sentencing for child sexual assault

There is a broad consensus among researchers that there is extensive variation in child sexual offending as well as in the context or circumstances accompanying the acts that constitute the offence.¹ This is Legal Aid NSW's frontline experience. Equally, there is substantial and significant variation in the objective and subjective characteristics of the perpetrators.

As a result, sentencing perpetrators of child sexual offences is a highly complex exercise.

Judicial Commission statistics show a wide range in penalties for these offences. However, this does not mean that courts are not consistent.

¹ Smallbone S & Wortley R (2001) Child sexual abuse: Offender characteristics and modus operandi. *Trends & Issues in Crime and Criminal Justice* 193. Canberra: Australian Institute of Criminology.

'Consistency is not demonstrated by, and does not require, numerical equivalence. Presentation of the sentences that have been passed on federal offenders in numerical tables, bar charts or graphs is not useful to a sentencing judge. It is not useful because referring only to the lengths of sentences passed says nothing about why sentences were fixed as they were...'

The consistency that is sought is consistency in the application of the relevant legal principles. And that requires consistency in the application of Pt IB of the Crimes Act. When it is said that the search is for "reasonable consistency", what is sought is the treatment of like cases alike, and different cases differently. Consistency of that kind is not capable of mathematical expression.¹²

It is our experience that the court exercises its discretion in child sexual assault matters to arrive at appropriate and just sentences. When this is not the case in a particular matter there are robust appeal provisions open to the Crown.

It is therefore our view that measures such as mandatory sentencing and the application of standard non parole periods that curb the discretion of the judiciary should not be applied to child sexual offences.

Improving public confidence

The terms of reference also ask whether alternative sentencing options, including but not limited to minimum mandatory sentencing and anti-androgenic medication could improve public confidence in the judicial system. This inquiry coincides with an ongoing Australia wide study into public opinions on sentencing.³ Present findings of the study suggest that public opinion is significantly nuanced and that although the respondents expressed desire for harsher penalties there was widespread support for the use of alternatives to imprisonment for young, mentally ill and non-violent offenders.⁴ This is in line with Canadian studies which indicate that the public want a 'response' but this need not involve imprisonment and that they were receptive to alternatives to imprisonment when presented with a specified alternative.⁵

² *Hili v R; Jones v R* [2010] HCA 45; (2010) 242 CLR 520, [48]–[49]

³ Mackenzie G et al., (2012) Sentencing and public confidence: Results from a national Australian survey on public opinions towards sentencing. *Australian & New Zealand Journal of Criminology* 45(1): 45-65

⁴ *Ibid* at 56-57.

⁵ Doob AN (2000) Transforming the Punishment Environment: Understanding Public Views of What Should be Accomplished at Sentencing. *Canadian Journal of Criminology* 42: 323-340.

In the experience of Legal Aid NSW, Cedar Cottage was a good example of an effective alternative to imprisonment. Our frontline experience has now been corroborated with studies that show that the Cedar Cottage program reduced the rate of sexual reoffending and the time taken to reoffend was longer.⁶ Legal Aid NSW would welcome the re-evaluation of this program or consideration of other alternative sentencing options that reduce the rate of recidivism.

Legal Aid NSW does not support the use of chemical castration. It is unclear whether the mention of anti-androgenic pharmacotherapy in the terms of reference is intended to refer to the use of this technique for punishment or treatment of the offender. This distinction is pivotal and would have to be clearly articulated by Parliament as part of any proposed scheme. If it were proposed for treatment of the offender, this should require the informed consent of the individual.

It is already possible to consider the need for medication on a case-by-case basis through applications under the *Crimes (High Risk Offenders) Act 2006*. Legal Aid NSW does not consider it appropriate that legislation mandates the use of medication. This is a clinical issue and should be left to the treating clinician in accordance with the latest practice standards and the needs of the individual.

While Legal Aid NSW does not claim any expertise in the area of clinical medical management of offenders it is our experience that the contraindications for the use of anti-androgenic medication mean that many offenders are deemed unsuitable on medical grounds in any event.

Conclusion

The fact there is a wide range in the penalties handed down in child sexual offences does not indicate that courts are being inconsistent in their application of sentencing laws. It is the experience of Legal Aid NSW that courts generally exercise their discretion in child sexual assault matters to arrive at appropriate and just sentences.

Public opinion about sentencing is significantly nuanced and includes widespread support for the use of alternatives to imprisonment for young, mentally ill and non-violent offenders. Such alternatives should be explored.

⁶ Butler L et al., (2012) Effectiveness of Pretrial Community-Based Diversion in Reducing Reoffending by Adult Intrafamilial Child Sex Offenders. *Criminal Justice and Behaviour* 39: 493-513.

Thank you for the opportunity to provide these comments. Should you have any further questions, please contact Pilar Lopez at Pilar.Lopez@legalaid.nsw.gov.au or on (02) 9219 5933.

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the assistance, with a particular focus on the needs of disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in grants of aid to private practitioners. Legal Aid NSW also funds a number of provided by non-government organisations, including 35 community legal centres and 28 Women's Domestic Violence Court Advocacy Services

The Legal Aid NSW criminal law practice provides legal advice and representation in criminal courts at each jurisdictional level throughout the State, including proceedings in Local Court, Children Court, District Court, Supreme Court and Court of Criminal Appeal in summary hearings, committals, indictable sentences and trials, and appeals. Legal Aid NSW specialist criminal law services include the Children's Legal Service, Prisoners' Legal Service and the Drug Court.