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SENTENCING FOR CHILD SEXUAL ASSAULT: WITH PARTICULAR EMPHASIS ON THE LAW OF NSW

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Sentencing for Child Sexual Assault: With particular emphasis on the law of NSW

There is no secret or magical formula for sentencing offenders who sexually assault children. The sentencing process relating to such offenders is very much the same as sentencing those who commit other forms of serious crime; each case is unique and the sentencing judge or magistrate must set about evaluating all the relevant circumstances of the particular case, both objective and subjective, and apply the relevant sentencing principles and policy considerations that have been established under the common law and under an increasingly active legislature.

There are, however, in child sexual assault cases, some patterns or commonly recurring considerations to which the sentencing judge or magistrate should pay particular regard if the sentencing discretion is not to miscarry. These considerations form the subject matter of this paper.

Changing face of the law

Society has witnessed in the second half of the twentieth century, beginning with the sexual revolution of the 1960's, an increasingly permissive attitude with regard to sexual mores, conduct and relationships. However certain taboos remain, including the fundamental principle that sexual activity that is not consensual constitutes a criminal offence. Children remain in a special category on account of their vulnerability to sexual exploitation and assault and the law provides special provisions in an attempt to protect them from this form of crime.

Bronitt and McSherry in their textbook *Principles of Criminal Law*, suggest that Australian sex laws are being reshaped by moral panics concerning "the spread of HIV/AIDS, organized (homosexual) paedophile rings, pornography on the internet[1] and sexual trafficking."[2] To this list we might add the emergence of "racism" or at least the concern that there may be ethnically or culturally distinct groups of individuals or gangs within the community that appear to regard the abduction and sexual exploitation of others as fair game.[3] Whatever forces may be operating in society there can be no doubt that sexual assault, and particularly child sexual assault, is a major concern and occupies a significant proportion of the resources of the criminal justice system.

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[1] On 1 January 2005 the *Crimes Amendment (Child Pornography) Act 2004* (NSW) amended the *Crimes Act* 1900 (NSW) in relation to child pornography offences and, amongst other things, increased maximum penalties. This indicates the Government's increased concern for these types of offences.

[2] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law*, LBC Information Services, Pyrmont, NSW, 2001 at 632.

[3] I refer particularly to the manifestation initially, of a small number of gang rapes in the Sydney area over recent years, see for example *R v AEM & Ors* [2002] NSWCCA 40: *R v Bilal Scaf* [2005] NSWCCA 297. Amongst other things, such cases have infected the mood and temper of the community and spilled over into pockets of racially motivated violence in the form of sporadic gang assaults and vigilante activity at some prominent beachside locations. Reports, such as the one published on page 5 of *The Sun –Herald* on 5 February 2006, entitled, "Violence returns to Bondi" have been running in the tabloid press for several months now.

The crime of child sexual assault covers a wide range of offences carrying an equally wide range of maximum penalties. Indeed, child sexual assault may be sub-categorized by reference not only to the type of assault but to the age group of the victim, thus presenting a complexity that is not shared by offences directed against adults. The date of the commission of the crime is also important as it will be indicative of whether current or earlier patterns of sentencing should be taken into account in the sentencing process – a topic which will be discussed in more detail in the latter part of this paper.

Child sexual assault is not always about adults assaulting children, but children or a mix of children and young adults assaulting other children, as is well illustrated in *R v AEM & Ors* [2002] NSWCCA 40, in *R v AD* [2005] NSWCCA 208 and in *R v Scaf* [2005] NSWCCA 297. In the latter case, for example, the ringleader, at almost 19 years of age, was the oldest of a group of offenders, two of whom were also 18, two were 17 and two others were just 15 years of age, at the time they committed their offences.[4] Even when tried at law for serious crime, the sentencing of children generally attracts a degree of leniency with less emphasis on the principle of general deterrence than in comparable cases committed by adults.[5]

The typical case, if there be such a thing, is the father or step-father who sexually abuses his own child. The more extreme case is the predatory paedophile who spends the greater part of his (usually it will be an adult male) career or occupation, placing himself in a position of trust that provides ready access to children in order to exercise authority over them, such as in schools or at church, within sporting groups or camping expeditions. The *modus operandi* involves facilitating the opportunity to sexually abuse children for personal gratification.

The law does not stand still. Instead it continues to evolve as the community learns more about the long term consequences of child sexual assault, uncovers the extent of the problem and devises measures to protect children not just from the offences or the offenders but from having to undergo further trauma triggered by the investigation, interrogation, prosecution and court processes themselves.[6] In all this the law must proceed without prejudicing an offender's right to a fair trial. The development of the criminal law and the procedures for bringing offenders to justice simply reflect the society's best efforts to find an appropriate path to what presents as an intractable problem.

The penalties have increased

Keen observers of legislative activity relevant to sexual assault crime in New South Wales will have noted major reforms in the substantive and procedural laws and in the penalty regimes applicable to them. In the last 25 years since the abolition of the offence

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[4] see *R v Bilal Skaf* [2005] NSWCCA 297 at [61]

[5] *R v GDP* (1991) 53 A Crim R 112; *R v XYJ* NSW CCA 15 June 1992 (unreported); *R v JDB* [2005] NSWCCA 102.

[6] A useful summary of initiatives designed to reduce the trauma of children giving evidence in child sexual assault cases is given in a concise article by the NSW Attorney General, the Hon. Bob Debus MP entitled "Minimising the Impact of the Court Process on Child Victims" (2006) Vol 18 No 2, *Judicial Officers Bulletin* 12–13.

of rape in New South Wales many sex offences have been redefined, the definition of sexual intercourse widened, gender neutral provisions introduced, and concepts such as "in authority" and "in company" adopted.[7]

New South Wales has witnessed the repeal of the four tiered offence structure that formed the basis of the quite radical scheme introduced by the *Crimes (Sexual Assault) Amendment Act* 1981. It is worth reflecting on the penalties prescribed under that Act. The highest graded offence, sexual assault category 1: inflicting grievous bodily harm with intent to have sexual intercourse—carried a maximum penalty of 20 years penal servitude, while sexual assault category 3: sexual intercourse without consent—carried a maximum penalty of 7 years penal servitude. However, the latter offence also provided that if it related to a person under the age of 16 years the offender would be liable to a maximum penalty of 10 years penal servitude.

Within a decade the four tiered structure was replaced by three basic tiers of offences with three aggravated versions of each of these offences. The maximum penalty for sexual assault jumped to 14 years penal servitude and the aggravated form of the offence which included sexual intercourse where the victim was under the age of 16 jumped to 20 years penal servitude.[8]

These reforms were introduced pursuant to the *Crimes Amendment Act* 1989 (NSW) on the basis that the law was lagging behind community standards. Since the introduction of legislation relating to standard non-parole periods, sexual assault (*Crimes Act* s 61I) and aggravated sexual assault (*Crimes Act* s 61J) now carry standard non-parole periods of 7 years and 10 years imprisonment, respectively. In short the standard minimum non-parole periods prescribed for these offences equate to the old maximum sentences that were prescribed under the *Crimes (Sexual Assault) Amendment Act* 1981 Act.[9]

There are now also a number of offences which carry a maximum penalty of 25 years imprisonment, including the offence of having sexual intercourse with a child under 10 (*Crimes Act* s 66A) and the offence of attempting, or assaulting with intent, to have sexual intercourse with a child under 10 years of age (*Crimes Act* s 66B). Section 66A also carries a standard non-parole period of 15 years.

The *Crimes Amendment (Aggravated Sexual Assault in Company) Act* 2001 (NSW) inserted s 61JA into the *Crimes Act* 1900 to make sexual assault carried out in the company of others and accompanied by the infliction of harm, the threat of harm or the deprivation of liberty, an offence carrying a maximum penalty of life imprisonment.[10]

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[7] See generally, P Gallagher, J Hickey D Ash, *Child Sexual Assault*, Monograph Series No 15, 1997, Judicial Commission of New South Wales, at 6.

[8] *Crimes Act* ss 61I and 61J respectively.

[9] In other words, the penalty value (the maximum penalty) designated for offences which once fell into the worst category of offences under the four tiered penalty regime is now regarded as appropriate only for the non-parole period of offences falling into the middle range of objective seriousness.

[10] At the time of writing the following two *Crimes Act* 61JA cases were considered by the NSWCCA: *R v MRK* [2005] NSWCCA 271; *R v Hoang* [2003] NSWCCA 380, aggregate sentences of 10 yrs, npp 5 yrs and 15 yrs, npp 9 yrs 3 mths were imposed, respectively.

This Act may be seen as the high watermark in the Government's attempt to curb the incidents of gang rape in Sydney.[11]

In this context "life imprisonment" means "natural" or "never to be released" life imprisonment, an indication that the legislature means business when it comes to sentencing for these kind of offences.

It is apparent that the laws continue to evolve in response to changing community perceptions about the nature and extent of serious sexual assault and in recognition of the harm that these offences occasion. The penalties palpably demonstrate, either by incremental steps or sometimes by quite dramatic leaps and bounds, an upward movement in severity in cases of sexual assault and particularly in cases of child sexual assault.[12]

Child Sexual Assault Register

The State however, has not been content to leave the problem of child sexual assault in the hands of the sentencing courts alone, as shown by the Child Sexual Assault Register established pursuant to the terms of the *Child Protection (Offender's Registration) Act* 2000.

Under this legislation offenders convicted of particular sex offences are required to provide to police, either after sentencing or release from prison, details about themselves including their residential address, their employer, the nature of their employment and even details relating to any car they own or regularly drive. The reporting obligations can be quite onerous and last for some considerable time—8 years or 15 years, depending on the classification as either a Class I or Class2 offence and depending also on the number of offences or prior offences committed. Life long reporting is also possible, although there is power to suspend this term.[13]

In *R v KNL* [2005] NSWCCA 260 the Court of Criminal Appeal kept open the possibility that the question of extra-curial punishment might arise from the requirements of the *Child Protection (Offender's Registration) Act 2000*. However, in the particular circumstances of that case, the Court rejected the notion that recording a conviction instead of imposing a non-conviction bond resulted in additional penal consequences because the offender would fall under the requirements for registration. In deciding this way, the court expressed the view that the offender was not likely at the time of sentence or in the future, to pursue an occupation which gave him access to children.

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[11] For a detailed discussion of this topic see, R Johns, G Griffith and R Simpson "Sentencing "Gang Rapists": The Crimes Amendment (Aggravated Sexual Assault in Company) Bill 2001", Briefing Paper 12/2001, NSW State Library, Sydney.

[12] It is impossible in a short paper of this kind to encapsulate the intricacies of the many legislative reforms that have taken place since the 1980's but reference you to the Judicial Commission's monograph, *Sentencing Offenders Convicted of Child Sexual Assault* where you will find a brief legislative history of developments in this area of the law. I will say more about that study shortly.

[13] *Child Protection (Offender's Registration) Act* 2000 (NSW), s 14A.

The relevance of maximum penalties

The significance of the maximum penalty that is prescribed for the offence is as much relevant to child sexual assault offences as it is to other crimes. When penalties are raised, as in the case of many sexual assault offences, it sends a message to the courts that harsher penalties should be imposed. Spigelman CJ in *R v Way* (2004) 60 NSWLR 168 described the maximum penalty as the first important point of reference which must be considered in the sentencing exercise. In *Markarian v The Queen* (2005) at [30] to [31] Gleeson CJ, Gummow, Hayne and Callinan JJ explained that in some cases the maximum sentence available may be of great relevance as a sentencing yardstick and that it invites comparison between the worst possible case and the case before the court. This principle, together with the principle of proportionality as set out in *Veen (No 2)* (1988) 164 CLR 465, provides the limits within which the sentencing judge must work to frame his or her sentence.

Further it has been held that when an offence is defined to include several categories of conduct, the heinousness of the conduct depends on the facts of the case. However, there is no implication that each category of sexual assault is as heinous as another if done without consent. *Ibbs v The Queen*[14] held that the task of the sentencing judge is to "consider where the facts of a particular case lie in a spectrum at one end of which lies the worst type of sexual assault perpetrated by any act which constitutes sexual penetration as defined." In assessing offence seriousness there will be many considerations including matters going to the level of exploitation of the child. For example this may encompass not merely the age of the complainant at the time of the offence, but also the age disparity between the complainant and the offender.[15]

In *R v Scaf* at [54] the CCA observed that "it would be both undesirable and inappropriate to seek to define the category of the worst class of case" and in following *Veen (*No 2) said that to qualify as a worse case it is not necessary that it be possible to envisage an even worse case. On the other hand "more is required than that the case be regarded as a very serious one" before the maximum penalty should be imposed.

Deterrence and community protection

While the penalties have moved upwards the general principles and approach to sentencing child sexual offenders have remained relatively constant. In this regard the cases reveal a consistent and unrelenting preference for custodial sentences with particular emphasis on protecting the community through the application of deterrent sentences.

For example, in *R v Burchell* (1987) 34 A Crim R 148, the Crown appealed against sentences of periodic detention imposed upon the respondent in respect of numerous counts of indecent assault committed against his stepdaughter, his daughter and his niece at a time when they were infant children. These offences were representative counts not isolated incidents. The Court of Criminal Appeal held that the sentencing

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[14] (1987) 163 CLR 447.

[15] *Shannon v R* [2006] NSWCCA 39 at [23].

court had erred because it had given too great an emphasis to the subjective circumstances of the respondent and particularly to the hardship and isolation that the respondent would face in prison because of his offences. The Court emphasized the primary importance of general deterrence as the means for ensuring that the community is made aware of the policy of the courts to this type of offence and substituted full time custodial sentences upon the respondent.

Another early decision illustrating the court's approach to sentencing child sex offenders is that of *R v Fisher* (1989) 40 A Crim R 442. In that case the applicant sought leave to appeal against sentences aggregating to 18 years penal servitudes with a non-parole period of nine years and six months imposed in respect of 10 counts of various sexual assault offences. These offences were perpetrated upon four boys aged between 8 and 12 years and took place over a period of about two years when the applicant was their cricket coach. The applicant was 51 years of age, had no prior convictions and had confessed and pleaded guilty at an early stage of the proceedings.

On the applicant's behalf it was submitted that the total sentence of 18 years was a crushing sentence in all the circumstances and should be reserved for a worst case not one such as this where in addition to the mitigating circumstances already referred to, there was no bashing or physical violence. This submission was unsuccessful. A further submission that concurrent sentences rather than consecutive sentences should have been imposed also was rejected on the basis that cumulative sentences were appropriate in cases of multiple victims committed at different times.

Yeldham J, delivering the leading judgment dismissing the appeal, said:

> This Court has said time and time again that sexual assaults upon young children, especially by those who stand in a position of trust to them, must be severely punished, and that those who engage in this evil conduct must go to gaol for a long time, not only to punish them, but also to endeavour to deter others who may have similar inclinations.[16]

And later in his reasons Yeldham J said:

> This Court must serve notice upon judges who impose weakly merciful sentences in some cases of sexual assault upon children that heavy custodial sentences are essential if the courts are to play their proper role in protecting young people from sexual attacks by adults, which cases come in ever increasing numbers before them, and which are rapidly reaching epidemic proportions.[17]

In *R v Bustos* unreported NSWCCA 27 June 1995 at 5 Gleeson CJ said that the primary purpose of criminal sanctions for conduct of this kind was to protect vulnerable children and young people. Such conduct involves a serious form of taking improper advantage

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[16] (1989) 40 A Crim R 445. Note that the *Crimes (Sentencing Procedure) Act* 1999 (NSW) s 21A(2)(k) now states as an aggravating factor that " The offender abused a position of trust or authority in relation to the victim". Other provisions, ss 21A(2)(l) and 21A(2)(m) list vulnerability of the victim due to age and multiple victims or a series of criminal acts, as aggravating factors. These simply reflect the position at common law.

[17] Ibid.

of a relationship. Victims are entitled to the protection of the law and society is entitled to expect offenders will be dealt with appropriate severity.

At the risk of excessive repetition I pause here to emphasise the following: the general principles relating to the sentencing of child sexual assault are well established. As a general proposition, the need to protect the community and to impose deterrent sentences takes priority over the interests of the offender. This also applies to young offenders who behave like adults and commit offences which are close to the worst category of case.[18]

Of course the application of subjective factors must also be considered. Thus the utilitarian guilty plea and evidence of remorse remain relevant mitigating factors for:

> It is always desirable for a sentencing judge to address specifically the issue of a plea of guilty and to deal with its utilitarian value and the question of any discount.[19]

Further, the courts have held that the otherwise good character and "good works" of the offender may carry some weight, but not significant weight by way of mitigation of penalty, the leading authority being the paedophile priest case of *Ryan v The Queen* (2001) 206 CLR 267.[20] In the latter case the Court of Criminal Appeal shaved one year off the appellant's original sentence and non-parole period, leaving the offender with aggregate sentences totalling 20 years and a non-parole period of 14 years to serve for his offences.

In short the objective circumstances generally prevail over the subjective ones in these types of cases. In exceptional cases, such as offenders suffering from an intellectual handicap, for example, a non-custodial sanction may be appropriate,[21] but more usually custodial sentences are imposed. This much is clear from the results of the research conducted by the Judicial Commission of New South Wales, to which reference will be made shortly.

Course of conduct and representative charges

Many child sexual assaults are not isolated or aberrant incidents but involve a course of conduct over extended periods of time, as described for example, in *Burchell* above. Such offences may involve only one victim or many victims. In order to avoid the evidentiary and substantive difficulties in cases of multiple sexual assault cases (see *S v The Queen* (1989) 168 CLR 266 for example) some jurisdictions have introduced legislation that requires proof of only three offences in cases where there has been a course of conduct of illegal sexual behaviour over time. Some jurisdictions have an offence of maintaining an unlawful sexual relationship.

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[18] see for example *R v AEM Snr, KEM, MM* [2002] NSWCCA 58.

[19] *R v Scaf* [2005] NSWCCA 297 citing *R v Thomson; R v Houlton* [200] NSWCCA 309.

[20] See also *R v Gent* [2005] NSWCCA 370 where the principles relating to the application of good character as a mitigating factor to various offences are discussed.

[21] R v Allpass (1994) 72 A Crim R 651 at 563.

Section 125A of the *Criminal Code* of Tasmania provides a useful illustration. It provides that a person who maintains a sexual relationship with a young person, to whom she is not married, is guilty of a crime. To be made out, the offence requires that the offender committed an unlawful act (which is further defined) on at least three occasions. A plea to this offence represents acknowledgment that three unlawful sexual acts have been committed.

Sentencing under this provision was considered in *DPP(Tas) v M* [2005] 154 A Crim R 475. The agreed facts were that the offender had sexually assaulted his step-daughter on a regular basis over a 5 year period commencing from when she was 12 years old. The DPP appealed on the basis that the sentencing judge had erred in restricting his sentences to just three offences charged in the indictment.

In considering this issue Slicer J referred to cases decided in other jurisdictions, including the South Australian case of *R v D* (1997) 96 A Crim R 364. In that case the prosecution submitted that the offences that were part of a course of conduct should also attract sentences, but this approach was resoundingly rejected by the Court.

In R v *D*, Doyle CJ expressed the view that an approach which required the sentencing court to identify the number of offences with precision would simply reintroduce the problem that the offence was intended to ameliorate. Instead, the court should identify the three offences, pay regard to the duration and frequency of offending and sentence on the basis that the offences were part of a course of conduct. The Chief Justice ruled out any notion that the approach should involve identifying each offence in the course of conduct and accumulate maximum penalties in respect of these.

In New South Wales, s 66EA of the *Crimes Act* 1900 provides as follows:

> 66EA (1) A person who, on 3 or more separate occasions occurring on separate days during any period, engages in conduct in relation to a particular child that constitutes a sexual offence is liable to imprisonment for 25 years.
>
> (2) It is immaterial whether or not the conduct is of the same nature, or constitutes the same offence, on each occasion.
>
> (3) It is immaterial that the conduct on any of those occasions occurred outside New South Wales, so long as the conduct on at least one of those occasions occurred in New South Wales.
>
> (4) In proceedings for an offence against this section, it is not necessary to specify or to prove the dates or exact circumstances of the alleged occasions on which the conduct constituting the offence occurred.

The interpretation of this provision was first considered in *R v Fitzgerald* (2004) 59 NSWLR 493 and the Court followed *R v D,* Sully J holding that a prosecution under s66EA should not be any harsher in outcome

> "than sentencing for a course of conduct had it crystallized into convictions for a number of representative charges".

A similar approach was taken in *R v Manners* [2004] NSWCCA 181. In the light of this interpretation of the legislation one wonders whether there can be any forensic advantage of prosecuting under this provision.

Relevance of prisoner's safety and hardship in gaol

The issue of hardship and the prisoner's safety often arises in cases of child sex offenders and drug informers.[22] As recently as *York v The Queen* (2005) 76 ALJR 1919 the High Court confirmed the principle that the offender's safety in prison (including the conditions under which a term of imprisonment is to be served) is a matter that a sentencing judge is entitled to take into account when deciding what sentence should be imposed and whether it should be suspended. However Gleeson CJ at [6] also agreed with the Queensland Court of Appeal when it said that threats of criminal activity cannot justify refusing to send a criminal to gaol where that is the only appropriate penalty available under the law.

In the same case Hayne J at [39] considered that the Court of Appeal erred by first determining that the appropriate penalty was a term of imprisonment before taking into account the effect of imprisonment on the offender and the conditions under which it would be served. In his Honour's view the appellant's safety should have been considered with other relevant circumstances of the case in determining whether imprisonment was appropriate in the first place.

Study by the Judicial Commission of NSW

In a study entitled *Sentencing Offenders Convicted of Child Sexual Assault*[23] the Judicial Commission of New South Wales reviewed some 34 different types of child sexual assault offences by reference to the penalties imposed in the District Court of New South Wales. The period covered was from January 2000 to the end of December 2002 and involved a total of 467 cases where child sexual offences was recorded as the only offence or the principal offence where other offences were also prosecuted.

This total comprised 186 child sexual assault sentencing decisions handed down in 2000, 153 cases in 2001 and 128 cases in 2002.[24]

From the overall total of 467 cases the study found that 304 or 65.1% of the offenders received a full time custodial sentence. This figure increased to 83.1% if periodic detention and suspended sentences were included in the total number of prison sentences handed down.

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[22] For further reading on protective custody and sentencing, see L Barnes "Protective Custody and Hardship" *Sentencing Trends* No 21, Judicial Commission of New South Wales, February 2001.

[23] G Hazlitt, P Poletti and H Donnelly, *Sentencing Offenders Convicted of Child Sexual Assault* , Monograph Series 25 Judicial Commission of New South Wales, September 2004.

[24] These figures should not be confused with the total number of sexual assault offences committed or prosecuted during those years.

When those convicted of sexual intercourse/penetration offences only were analysed, it was found that full time custodial sentences were imposed in 82.7% of the cases with a median term of imprisonment of 48 months.

The latter figure may be contrasted with a median term of 30 months imprisonment for the indecent assault offence category and 9 months for the act of indecency category.

Other interesting findings include the fact that just under one-quarter of the offenders or 23.7% were given consecutive sentences and the median aggregate sentence was 6 years and 6 months with terms of imprisonment ranging from two and a half years to 30 years.

The authors of the study also took the opportunity of comparing the sentencing patterns in this study with the patterns of sentences handed down for similar offences in 1994. Not surprisingly the analysis demonstrated that overall penalties had increased over the two periods. Offenders who commit child sexual assault offences may anticipate being sentenced more severely today than in the past.

Special circumstances

Generally in NSW a term of imprisonment (other than a fixed term) consists of two parts: first, a non-parole period which is the minimum term an offender is required to serve as a punishment for the offence and second, the balance of the sentence, that is the time during which the offender is eligible to be considered for release on parole.

Pursuant to s 44(2) of the *Crimes Sentencing Procedure Act* 1999 (NSW) the balance of the term of the sentence must not exceed one-third of the non-parole period, unless the court decides that there are special circumstances for increasing that proportion.

The Commission's study found that in 81.3% of cases the balance of the term exceeded one third of the non-parole period, meaning that court found special circumstances in the order of 8 out of 10 cases. It also revealed that the most common proportion between the non-parole period and the head sentence was 50% and this was imposed in almost a fifth of all the cases. Indeed, about 4 out of every 10 sentences were made up of a non-parole period of 50% or less of the head sentence.[25]

At first blush one might think that the courts must have erred in finding special circumstances in such a high proportion of the cases. However this figure can be explained on the basis that for these types of cases it is often in the public interest to monitor such offenders in the community for a reasonable length of time following their release from prison and attempt to work with them in order to provide the best opportunity for their rehabilitation.

However where the court does not consider that the offender is amenable to rehabilitation a relatively short balance of sentence may be held to be adequate. This is

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[25] Hazlitt, Poletti and Donnelly, op cit, at n 19.

well illustrated in the high profile case of *R v Dunn* [2004] NSWCCA 364, where the Court of Criminal Appeal, comprising Handley, JA James and Howie JJ, considered that the offender lacked insight into his offending, lacked contrition and was unlikely to be rehabilitated. It specified terms of imprisonment totalling 20 years with a non-parole period totalling 18 years.

The most common offences

The Commission's study showed that about half or 51.8% of the 467 child sexual assault cases consisted of just five types of offences. These were as follows:

- ***Aggravated indecent assault*** under *Crimes Act* 1900 s 61M(1) [26]—maximum penalty 7 years imprisonment – 61cases or 13.1% of the total.
- ***Aggravated sexual assault*** under *Crimes Act* 1900 s 61J[27]—maximum penalty 20 years: 52 cases or 11.1% of the total number of cases. In *R v AD* [2005] NSWCCA 208 it was held that this section creates only one offence and even though there may be present more than one aggravating circumstance this does not raise this offence to a higher level and thereby offends the *De Simoni* principle.[28]

- ***Sexual intercourse/penetration with a child under 10 years*:** under *Crimes Act* 1900 s 66A[29]—maximum penalty at the time of the study 20 years—47 cases or 10.1% of the total cases.

Note that the maximum penalty for this offence was increased to 25 years for offences committed after 1 February 2003 and that offence now carries a standard non-parole period of 15 years.[30]

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[26] 61M Aggravated indecent assault

(1) Any person who assaults another person in circumstances of aggravation, and, at the time of, or immediately before or after, the assault, commits an act of indecency on or in the presence of the other person, is liable to imprisonment for 7 years. (2) …

(3) In this section, "*circumstances of aggravation*" means circumstances in which: (a) the alleged offender is in the company of another person or persons, or (b) the alleged victim is under the age of 16 years, or (c) the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender, or (d) the alleged victim has a serious physical disability, or (e) the alleged victim has a serious intellectual disability.

[27] 61J Aggravated sexual assault (1) Any person who has sexual intercourse with another person without the consent of the other person and in circumstances of aggravation and who knows that the other person does not consent to the sexual intercourse is liable to imprisonment for 20 years.

(2) In this section, "circumstances of aggravation" means circumstances in which: (a)

at the time of, or immediately before or after, the commission of the offence, the alleged offender maliciously inflicts actual bodily harm on the alleged victim or any other person who is present or nearby, or (b) at the time of, or immediately before or after, the commission of the offence, the alleged offender threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument, or (c) the alleged offender is in the company of another person or persons, or (d) the alleged victim is under the age of 16 years, or (e) the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender, or (f) the alleged victim has a serious physical disability, or (g) the alleged victim has a serious intellectual disability.

[28] *R v AD* [2005] NSWCCA 208 at [22].

[29] 66A Sexual intercourse—child under 10 Any person who has sexual intercourse with another person who is under the age of 10 years shall be liable to imprisonment for 25 years.

- ***Sexual intercourse/ penetration with a child between 10 years and 16 years of age***: under Crimes Act 1900 s 66C(1)[31]—maximum penalty at the time of the study 8 years – (also) 47 cases or 10.1% of the total.

Note that this section was amended by the *Crimes Amendment (Sexual Offences) Act* 2003 (NSW), and commenced on 13 June 2003. In summary it now provides:

  - first, for an offence against a child aged between 10 and 14 years—a maximum penalty of 16 years imprisonment increasing to 20 years if the offence is committed in circumstances of aggravation;
  - second, for an offence against a child aged between 14 and 16 years—a maximum penalty of 10 years, increasing to 12 years if the offence occurs in circumstances of aggravation.

- ***Aggravated indecent assault with a child under the age of 10 years***: 61M(2)[32] maximum penalty of 10 years: 35 cases or 7.5% of the total . Note that this offence now carries a standard non-parole period of imprisonment for 5 years.

The standard non-parole period

The standard non-parole period for an offence is the non-parole period set out opposite the offence in the Table set out in Division 1A of Part 4 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).[33] It is taken to indicate the non-parole period for an offence in the middle of the range of objective seriousness for such an offence. It has

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[30] Introduced pursuant to the *Crimes {Sentencing Procedure) Amendment {Standard Minimum Sentencing) Act* 2002.

[31] 66C Sexual intercourse—child between 10 and 16

(1) Child between 10 and 14

Any person who has sexual intercourse with another person who is of or above the age of 10 years and under the age of 14 years is liable to imprisonment for 16 years.

(2) Child between 10 and 14—aggravated offence

Any person who has sexual intercourse with another person who is of or above the age of 10 years and under the age of 14 years in circumstances of aggravation is liable to imprisonment for 20 years.

(3) Child between 14 and 16

Any person who has sexual intercourse with another person who is of or above the age of 14 years and under the age of 16 years is liable to imprisonment for 10 years.

(4) Child between 14 and 16—aggravated offence

Any person who has sexual intercourse with another person who is of or above the age of 14 years and under the age of 16 years in circumstances of aggravation is liable to imprisonment for 12 years.

(5) In this section, "*circumstances of aggravation*" means circumstances in which: (a)

> at the time of, or immediately before or after, the commission of the offence, the alleged offender maliciously inflicts actual bodily harm on the alleged victim or any other person who is present or nearby, or (b) at the time of, or immediately before or after, the commission of the offence, the alleged offender threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument, or (c) the alleged offender is in the company of another person or persons, or (d) the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender, or (e)the alleged victim has a serious physical disability, or (f)the alleged victim has a serious intellectual disability, or (g) the alleged offender took advantage of the alleged victim being under the influence of alcohol or a drug in order to commit the offence.

[32] 61M Aggravated indecent assault (1) …

(2) Any person who assaults another person, and, at the time of, or immediately before or after, the assault, commits an act of indecency on or in the presence of the other person, is liable to imprisonment for 10 years, if the other person is under the age of 10 years.

[33] *Crimes(Sentencing Procedure) Act* 1999 (NSW), s 54 A(1).

been described as a reference point or benchmark above or below the middle of the range of objective seriousness for the specified offence.[34] A departure from the standard is permitted:

> wherever the objective seriousness of the individual offence is either lesser or greater than that of an offence in the middle range of seriousness.[35]

Way's case makes it plain that the maximum penalty for the offence remains the reference point for the legislative intent of offence seriousness. However it also observes at [53] that the focus shifts to the standard non-parole period as the expression of the legislative intention as to the minimum period of actual imprisonment for the offence. The new regime does not displace discretionary nature of the sentencing process, the legislation was not intended to be "a straight jacket for judges" and permits reference to be made to a range of circumstances that would justify a departure from the standard non-parole period.[36]

The standard non-parole period reference point has been interpreted as applying to cases going to trial as opposed to guilty plea cases. Those unfamiliar with the legislation may be bamboozled by the apparent complexity in this area of the law. This problem is exacerbated by the fact that many child sexual assault offences come to light and are prosecuted many years after they have been committed. This means that in many cases, that is offences committed prior to 1 February 2003 and still to come before the courts, standard non-parole periods will be inapplicable and courts will need to look back at the sentencing patterns that existed at the time of the offence. Difficulties may arise in pattern of conduct cases where offences fall on either side of 1 February 2003 a problem that arises whenever the same offence is governed by different rules or practices. This problem will continue to arise whenever, or as long as, there is a substantial lag between the commission of the crime and the sentencing process.

The issue of delay

It is common knowledge that many child sexual assault offences come to light many years after they have been committed. The Judicial Commission of New South Wales looked at the lag time between the commission of child sex offences and sentencing and found that over the three year period of the study 38%, or close to 4 out of 10 cases, involved sentences which were handed down more than 10 years after the offence was committed.

This figure reduces to 29% or approximately 3 cases out of 10 for sentences handed more than 15 years after they were committed, and to 18% or just under 2 out of 10 imposed more than 20 years after they were committed. I do not think any other category of offending can match these figures.

The courts have grappled with these so called stale crimes. In certain circumstances delay may be a mitigating factor as outlined in the leading case of *R v Todd* [1982] 2

[34] see generally *R v Way (2004) 60 NSWLR 168* at [49].

[35] ibid at [66].

[36] ibid at [59].

NSWLR 517 at 519. However, more usually in sexual offences committed against a child, the offence is concealed from others for some considerable time and is first revealed by the child to a third person after the child has matured. In such circumstances delay between the offences and sentencing carries little weight as a factor in mitigation of penalty. [37] It has been held also that there is little mitigation by reason of delay where the offender remains silent in the face of an accusation.[38]

Another issue of considerable importance relating to the issue of delay is the question of whether the sentencing exercise should be approached by reference to current patterns of sentencing or by reference to the patterns of sentencing existing at the time that the offence was committed. Obviously this can make a significant difference to an appropriate sentence for a particular offence when legislative maxima are raised over time.

This issue was recently reviewed by the Court of Criminal Appeal in *R v Dunn* [2004] NSWCCA 346 – the Court having the challenging task of comparing and contrasting the sentences imposed upon child sex offenders of great notoriety – offenders who were engaged in predatory activity involving multiple counts of child sexual assault.

The principal submission on the appeal against sentence was that the sentences imposed were manifestly excessive having regard to sentences imposed in other similar cases .In support of this submission a number of cases were presented for consideration by the Court, including:

> *R v AB* (unreported Court of Criminal Appeal 7 July 1997; unreported CCA 6 December 2000); *R Fisk* (unreported Court of Criminal Appeal 21 July 1998); *R v Bell* (unreported District Court Davidson DCJ 12 February 1999); *R v Allen* (unreported District Court Phelan DCJ 7 November 2000); and, particularly, *R v Hill* (unreported Court of Criminal Appeal 7 July 1992).[39]

The Court of Criminal Appeal noted two conflicting decisions, *R v Shore* (1992) 66 A Crim R 37, and *R v PLV* (2001) 51 NSWLR 736. The first decision advocated the approach that courts should, so far as they are able, seek to impose a sentence appropriate not only to then applicable statutory maxima but also to the then appropriate sentencing patterns. *PLV* took a contrary view, urging that current sentencing practice should apply. However the Court said it was bound to follow the decision in *R v MJR* (2002) 54 NSWLR 368, a decision of five justices of the Court of Criminal Appeal. This case had overruled *PLV* (which incidentally had not been overruled at the time that the sentencing judge had handed down his decision in *Dunn*).The principle in *Shore* has prevailed.

Thus the law on this matter in New South Wales is quite clear. Sentencing judges must evaluate the nature of the criminal conduct against the policy of the legislation current at the time of offending rather than at the time of sentencing. This is particularly required

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[37] *R v Dennis* NSW CCA l, unreported, 14 December 1992

[38] *R v Hathaway* [2005] NSWCCA 368; *Shannon v R* [2006] NSWCCA 39 at [30].

[39] *R v Dunn* [2004] NSWCCA 346 at [109]

when, as noted in *R v MJR*, (2002) 54 NSWLR 368, current sentencing practice has moved adversely against an offender.[40]

Conclusion

Without a doubt sentencing child sex offenders remains a very difficult and challenging enterprise. With laws and penalties in this area changing at what appears to be at an unprecedented rate, together with the problems presented in many cases, of multiple offending and of long delay between the commission of offence and the sentencing process, those who work towards achieving a just outcome in sentencing for child sexual assault face an unenviable task.

In such a climate it is difficult to expect, let alone achieve, consistency in the sentences imposed. The identification of the pattern of sentences, if there be one at all, is not a simple task, and neither statistics nor individual sentencing decisions can be relied upon as a yardstick in this area of the law. Cases differ markedly. With regard to similar cases, the Court of Criminal Appeal, commencing with *R v Morgan* (1993) 70 A Crim R 368 at 371, warned against the practice of directly comparing the sentences imposed (other than for co-offenders) where two offenders may share the same characteristics and may have committed similar crimes.

I fear that the identification of a range or ranges of sentences imposed for child sexual assault will continue to remain elusive while the penalties themselves are constantly varied by Parliament and while a significant proportion of offenders continue to be called up for sentence many years after the commission of their crimes. This is not a criticism of the courts but rather an inevitable consequence of the secretive nature of these offences many of which come to light years after they have been committed and of a changing legal and social environment struggling to find the best approach within the confines and safeguards of our justice system.

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[40] *R V MJR* (2002) 54 NSWLR 368 at [31].