

Report for the Royal Commission into  
Institutional Responses to Child Sexual Abuse

JULY 2015

# SENTENCING FOR CHILD SEXUAL ABUSE IN INSTITUTIONAL CONTEXTS

**ARIE FREIBERG**

FACULTY OF LAW, MONASH UNIVERSITY

**HUGH DONNELLY**

JUDICIAL COMMISSION OF NEW SOUTH WALES

**KAREN GELB**

CONSULTANT CRIMINOLOGIST

# **Sentencing for Child Sexual Abuse in Institutional Contexts**

**Arie Freiberg**

**Emeritus Professor, Faculty of Law, Monash University**

**Hugh Donnelly**

**Director, Research and Sentencing, Judicial Commission of  
New South Wales**

**Karen Gelb**

**Consultant Criminologist**

**July 2015**

The Royal Commission into Institutional Responses to Child Sexual Abuse commissioned and funded this research project. The following researchers carried it out:

Arie Freiberg, LL.D

Hugh Donnelly, LL.M

Karen Gelb, Ph.D

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## **Preface**

On Friday, 11 January 2013, the Governor-General appointed a six-member Royal Commission to inquire into how institutions with a responsibility for children have managed and responded to allegations and instances of child sexual abuse.

The Royal Commission is tasked with investigating where systems have failed to protect children, and making recommendations on how to improve laws, policies and practices to prevent and better respond to child sexual abuse in institutions.

The Royal Commission has developed a comprehensive research program to support its work and to inform its findings and recommendations. The program focuses on eight themes:

1. Why does child sexual abuse occur in institutions?
2. How can child sexual abuse in institutions be prevented?
3. How can child sexual abuse be better identified?
4. How should institutions respond when child sexual abuse has occurred?
5. How should government and statutory authorities respond?
6. What are the treatment and support needs of victims/survivors and their families?
7. What is the history of particular institutions of interest?
8. How do we ensure the Royal Commission has a positive impact?

This research report falls within theme five.

The research program means the Royal Commission can:

- obtain relevant background information
- fill key evidence gaps
- explore what is known and what works
- develop recommendations that are informed by evidence, can be implemented and respond to contemporary issues.

For more on this program visit:

[www.childabuseroyalcommission.gov.au/research](http://www.childabuseroyalcommission.gov.au/research)

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# **Executive Summary**

## **Introduction**

This report forms one part of the larger inquiry conducted by the Royal Commission on child sexual abuse (CSA) in institutional contexts.

A criminal justice response to CSA entails a long and difficult process of reporting, detection, prosecution, trial and disposition. Sentencing is one of the final stages of this process, however the number of people convicted and sentenced of CSA represents a very small proportion of those who commit such offences. Attrition rates are very high and accordingly very few offenders are held to account, and only a small number of victims can be vindicated through this process. While CSA occurs in a variety of contexts – most frequently in a familial environment – CSA offences in an institutional context, which is the focus of this inquiry, amount to only a small fraction of all CSA offences. However, the institutional focus of this report requires particular attention to be given to systemic, rather than individualistic, issues and responses to CSA.

### **The scope of this report**

This report examines sentencing law and practice, the principles of sentencing, sentencing standards and the range of non-sentencing statutory measures available to detain offenders in custody, as well as restrictions and monitoring of their movement. It also considers organisational responsibility for CSA and the sanctions that may be imposed upon institutions.

In this report, we do not endorse a particular response to institutional CSA. Rather, we highlight the approaches adopted both in jurisdictions around Australia and overseas. The intention of this report is to collate disparate information on responses to institutional CSA to provide a resource for those seeking reform in this area.

## **Sentencing and the Criminal Justice System**

### **Sentencing and attrition rates**

The sentencing process sits at the end of a series of decisions: by victims to report a crime; by law enforcement officers to record and investigate it or divert a person to other agencies or to use sanctions; by prosecutors to take the case to court, and if so, on what and how many charges; by juries and judicial officers whether to convict or acquit, and finally, by judicial officers as to the nature and severity of the sanction.

For CSA offences, progress through these decisions can be daunting. Attrition rates for CSA are much higher than for offences generally; the high attrition rates for institutional CSA can be partly attributed to the long period of time that has elapsed in most cases. The majority of cases involve events that took place many decades ago, creating problems obtaining evidence, and determining charging practices that will be sufficient to support a conviction in court.

These high attrition rates must be borne in mind when considering the applicable sentencing purposes and practices and the various legislative options we present in this report. Sentencing applies only to those few offenders finally prosecuted and convicted.

## **Purposes of Sentencing**

The purposes of sentencing are well established. Retribution, deterrence, rehabilitation, denunciation and community protection have all been articulated and elaborated in innumerable judgments and in academic literature. Generally, no one purpose is given greater weight than any other purpose, although the High Court has indicated that, in the absence of a legislative direction to the contrary, the concept of proportionality is a 'fundamental principle' in sentencing that sets the limits of permissible retribution.

However, communal revulsion against CSA offences has produced a range of legislative directions to sentencers that require them to consider some purposes as more important than others in specified circumstances. These directions include those that allow a court to impose a disproportionate punishment in relation to certain types of offences and offenders, and those that specifically identify the protection of the community as a factor in sentencing, and in order to do so, allow sentencers to impose disproportionate sentences, or indefinite sentences, or supervision or detention orders, or to mandate certain parole periods.

Only two Australian jurisdictions expressly provide in their sentencing legislation that one purpose of sentencing is to recognise 'the harm done to the victim of the crime and the community'. Most jurisdictions have provisions that require a court to take into account the harm caused to the victim or the effect of the crime upon them.

The importance of vindication of the victim is now widely recognised as a key aspect of bringing offenders to account. And while vindication does not necessarily require that a severe sentence be imposed, reports show that victims want to see consequences for the perpetrator and vindication of the harm caused to them by organisations that failed in their duty of care to protect them. Vindication of the victim applies equally well to institutional CSA as it does to non-institutional instances.

The complex interaction between the various and sometimes competing purposes of sentencing, together with use of the sentencing methodology of instinctive synthesis which renders sentencing outcomes somewhat opaque, makes it difficult to determine whether the sentencing purposes and principles discussed above, in and of themselves, significantly influence sentencers' decision-making and act to deter criminals or work effectively to protect the community.

## **Sentencing Factors**

Courts consider numerous factors when sentencing. None, however, specifically relates to the circumstance that the offences were committed within an institutional context.

Increasing statutory maximum penalties is one way of signalling the community's views of the seriousness of a crime, but there is no evidence as to either the general or specific deterrent effect of a maximum penalty, nor whether offenders take into account either the statutory maximum penalty or the sentencing practices of the courts when considering whether to commit an offence. Statutory maxima differ across Australia, but there is a question whether increasing already high maximum penalties makes a significant difference to crime rates or sentencing practices. Increases in statutory maxima do not necessarily produce proportionate changes in sentencing practices.

The gravity of a crime is increased if the offence is carefully planned and executed. Offences committed in an institutional context are rarely spontaneous or impulsive. In the CSA context, predatory behaviour is referred to as 'grooming' and some jurisdictions have made it an offence to groom for sexual conduct with a child under the age of 16.

The prevalence of a crime is a factor that may be taken into account in considering the gravity of an offence, but determining the prevalence of CSA generally, and CSA in institutions in particular, is difficult. Although it appears that the reporting or disclosure of CSA has increased, it is uncertain whether its incidence has also increased. This report questions whether a more severe sentence should be imposed on offenders presently being sentenced for offences committed in the distant past for deterrent purposes if there is evidence that its incidence has declined, though at the time of sentencing, its reporting and the number of trials, has increased.

Breach of trust and the abuse of trust or authority are statutory aggravating factors in some jurisdictions or have been created as separate offences. There is evidence that sentences imposed are more severe where the offence is one that is committed against a person who was under the care, supervision or authority of the offender.

An offender's prior criminality has a strong influence on sentencing. It can increase the statutory powers of the sentencer, the choice of sanction and the weight given to the various purposes of sentencing.

Sex offenders are reputed to be highly recidivist and many in the community, including policymakers, hold the view that they are likely to continue to offend unless physically, or chemically, constrained. However, the empirical evidence is to the contrary.

Many consequences may follow from a person having been earlier convicted of a relevant offence. These include habitual criminal legislation; dangerous offender legislation; imposition of indefinite sentences; imposition of a supervision or detention order; imposition of mandatory sentences; imposition of mandatory non-parole periods; presumption of cumulation of sentences; liability to be found guilty of an offence of loitering or similar crime; liability to be registered as a sex offender; liability to be prevented from working with children; and liability to be the subject of a civil preventive order. This report explores these in detail.

Good character is usually a mitigating factor in sentencing, but a court may not allow a claim of good character if there is evidence that the offender has been committing a series of undetected offences over a lengthy period. Two jurisdictions, South

Australia and New South Wales, have legislated to limit the effect of ostensible good character in sentencing for sexual offences if the court is satisfied that the defendant's alleged good character or lack of previous convictions helped the defendant commit the offence.

Long delays between committing an offence or offences and the prosecution, conviction and sentencing of an offender are common in cases of CSA. The Commission has found that the average time between offending and reporting of those who gave evidence in private sessions was 22 years. Where there has been a long delay between the offence and the date of conviction, generally courts sentence the offender by reference to sentencing principles and practices as they existed when the offence was committed, or by reference to sentencing patterns and principles applicable at the time of sentencing. However, the law is uncertain about the scope of this approach and its practicality. In the United Kingdom, sentencing guidelines provide that the sentence accord with the sentencing regime applicable at the date of sentence.

## **Sentencing Standards**

The substantive criminal law relating to CSA and sentencing law are almost exclusively state and territory matters. Other than Commonwealth offences, there is no requirement for state and territory courts to achieve numerically equivalent sentencing outcomes. The respective parliaments have enacted specific sentencing legislation and created their own offence provisions. There are substantial differences between Australian jurisdictions in the manner in which offences are cast and the prescribed maximum penalties. There are also considerable differences in sentencing outcomes between jurisdictions.

Only a handful of studies examine sentencing for child sexual assault and even fewer compare sentencing standards across Australian jurisdictions. No studies have examined sentencing practices for CSA in an institutional context. The studies reveal that some jurisdictions are generally more punitive than others, and some will vary in relation to the relative ranking of offence seriousness. Sentencing for CSA in each jurisdiction must be understood within the context of that jurisdiction's general sentencing practices. This may be because crime rates may generally be lower, or the need for deterrence may be less, or the penal culture or climate is different to other jurisdictions. Penal values or cultures will also change over time, reflecting changes in population, crime rates, media interest in crime and punishment, and the political complexion of the government in power.

A critical component of this report is its unique sentencing study, undertaken specifically on cases of institutional CSA.

## **The Institutional CSA Sentencing Study**

In order to obtain a more nuanced understanding of the ways in which common law principles and statutes are applied to cases of institutional CSA, a database of 248 relevant cases has been established. Available information on a range of factors was collected for each case. This included the type of institution; the offender's age; court

level; sentence date; principal offence; offence date (the first date in the case of multiple offences); plea; whether a Form 1/ Schedule was taken into account; penalty imposed; number of offences; head sentence and non-parole period for the principal offence; overall head sentence and non-parole period (where applicable); the offending period; the offender's occupation; the victim/victims' relationship to the offender; whether grooming occurred; whether the offence was an isolated incident; whether the charge was a representative count; or a form of conduct of principal offence; the victim's age; offender's prior record; whether the court applied past sentencing practice; and finally, the institution's response to offending (if any).

A close analysis of 84 cases of institutional CSA finalised in the District Court of New South Wales provided some insight into the types of institutions involved, the relationship between offender and victim, the offences committed, the period between the offence and sentence, the offender's age and sentencing patterns.

## **Perceptions of Child Sexual Abuse Offences, Sentencing and Sanctions**

Generally, studies have shown that people have extensive misconceptions about the nature and extent of crime, about court outcomes and about the use of imprisonment and parole. For sexual offences, the myths and misconceptions are arguably even more pronounced, and public opinion about sex offenders – and appropriate criminal justice responses – is among the most punitive.

Limited research in Australia or internationally specifically examines perceptions of sentencing for sexual offences. Some Australian studies show that when respondents have more information about the nature of the offence and the offender, their views of sentencing for sex offences are nuanced – they vary according to the offence presented and the circumstances of each case.

Some consistent themes have emerged within diverse perceptions of sentencing for sexual offences. The primary theme is that the characteristics of the offender and the victim have a significant effect on people's perceptions. Thus, offences against children and young people are felt to be particularly serious, perhaps due to the long-term harm, the wide circle of people affected by the offence, and the particular vulnerability of the victim/survivor. Repeated offending is also identified as warranting a particularly long custodial sentence.

Studies of policy responses to sexual offences have examined perceptions of sex offender registries, community notification schemes and residence restrictions. Others have considered the 'collateral consequences' of such sex offender policies, such as offenders' difficulties in finding housing, felon disenfranchisement and reoffending.

Public opinion research has identified particularly punitive attitudes towards sex offenders in general, and child sex offenders in particular. Arguably, the primary explanation for perceiving sex offenders, and child sex offenders, differently from other offenders is the prevalence of myths and misconceptions about their characteristics and their amenability to treatment. A secondary component that may



be founded in these misconceptions is the emotional response that sex offenders, and child sex offenders in particular, elicit – one of fear, disgust and contempt – that allows them to be treated as a special case, separate from other offenders.

## **Ancillary Orders and Special Provisions for Sex Offenders**

Although no specific provisions exist for offenders convicted of CSA in institutional contexts, a range of legislative provisions and orders relating to sex offenders generally are also applicable to offenders in cases of institutional CSA.

This report examines the ancillary orders and special provisions for sex offenders in Australia, and provides data on the use of these orders in each jurisdiction. Such data have never before been collated.

Many of the orders discussed in this report are predicated on the belief that all sex offenders are inveterate recidivists. Sophisticated methodologies such as meta-analysis have been used to examine sex offender recidivism over time. Despite the commonly held view that most sex offenders will reoffend after sentencing, the evidence does not support this. Research based on official reports of offending and self-reports of offenders consistently shows that sex offenders typically have lower rates of recidivism following sentencing than other types of offender, and these rates vary for different sub-groups of sex offender.

This report examines legislative measures that allow for preventive detention through indefinite sentences, extended supervision and detention orders, mandatory, minimum and presumptive sentences, cumulative sentences, restrictions on parole and a number of orders intended to restrict the movement and activities of this group of offenders.

The number and variety of laws aimed at dangerous offenders, and the judicial reactions to them, reflect an ongoing discourse, and a tension between the legislative and judicial branches of government.

A survey conducted for this report on the uses of many of these orders and provisions reveals that most are infrequently used. Their purpose appears to relate more to the goal of assuaging public concern than reducing crime.

There are no comprehensive studies of the general strategy of preventive detention, indefinite sentences and the swathe of laws to extend the custody of sex offenders and restrict their activities and movements. Studies of individual measures tend to conclude that there is no evidence that they reduce crime in a cost-effective manner, or that it is very difficult to judge their effectiveness. The difficulties of measuring what has not, nor may not, have occurred in the future – namely, the crimes that a purported dangerous offender has been prevented or deterred from committing due to the legal interventions and their cost – are patent.

## **Institutional Offending: The Limits of the Law**

The criminal law has encountered significant difficulties in applying principles of corporate criminal responsibility in other contexts, such as occupational health and safety and environmental law, let alone in relation to CSA.

This report provides an overview of the current limits of the criminal law and sentencing in relation to corporate criminal responsibility and CSA. While retributive and denunciatory outcomes may vindicate the harm done to those already victimised they do little to protect future victims.

The individualistic orientation of the criminal trial and sentencing tends to produce explanations for offending behaviour grounded in the individual offender's motivations or pathologies. However, focusing on individual motivations for crime fails to recognise organisational and institutional contributions to the problem of CSA. Institutions themselves may be criminogenic.

If institutions or organisations are directly or indirectly responsible for criminal behaviour such as CSA, then the law should hold them to account. Historically, attempts to ascribe criminal responsibility to organisations have been difficult.

There are many ways of holding organisations to account, but the basic principle advocated in this report is that an organisation should be held criminally responsible for the creation, management and response to risk when it has materialised in harm to a child.

A number of existing offences could be applied or adapted to organisations, and new offences could be created to hold them responsible for CSA. These offences need to take into account the definition of an organisation, the persons for whom the organisation may be responsible, the nature of organisational criminal liability and the sanctions that can be imposed upon organisations.

A number of new offences relating to organisational criminal liability are proposed, including offences of being negligently responsible for the commission of an offence, of failure to protect, of concealing crimes and of institutional child sexual abuse.

The final component of a comprehensive system of institutional responsibility for CSA is the development or application of a range of sanctions that is appropriate and effective for organisations that have been involved in CSA. Some of the aims of the criminal law apply equally to institutions as they do to individuals, including retribution, denunciation and deterrence.

As an organisation or institution cannot be imprisoned, and a fine will usually be inappropriate in relation to institutions involved in CSA, it is necessary to move beyond the traditional sanctions to find those that can address the institutional failings that contributed to the offending behaviour of individuals within that organisation, and move the focus from personal reform to organisational change.

A number of existing sanctions involve some form of court or government supervision, organisational change, or reparation to the community. These include probation

orders, supervisory intervention orders, community service orders and enforceable undertakings.

A feature of some of these orders is a condition relating to compliance programs, the purpose of which is to ensure that persons within an organisation are aware of their responsibilities and obligations in respect of the contravening conduct. Compliance programs may require that an organisation implement education and training programs, revise internal operations, appoint qualified staff or consultants, conduct risk assessments, and implement complaints handling systems and like programs. Compliance programs would be required for institutions found guilty of offences relating to CSA. These would need to be focus on addressing the organisational failures that rendered them unsafe for children. They would need to address the systemic issues the Commission identified in relation to organisational failure, such as the adequacy of policies and practices in preventing, reporting and responding to CSA; the recruitment and induction of staff working with children; the training and supervision of staff working with children; and elements of a child-safe organisation relating to childcare.

The National Framework for Creating Safe Environments for Children: Guidelines for Building the Capacity for Child-Safe Organisations identifies policies, procedures, practices and strategies that can contribute to a child-safe environment. It could be the basis for an appropriate compliance standard or program that could be required as part of a probation order, supervision order or enforceable undertaking.

# Chapter 1

## Sentencing: Background and Context

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### Introduction

Children have been physically, sexually and emotionally abused throughout history and in most societies. Over time, concepts of childhood have changed (Aries, 1962), as have societal views of the nature and effect of abuse. Although the prevalence and severity of abuse changes over time, what has changed more significantly is the communal response to abusive behaviour. From not recognising abuse of children as a harm, to recognising it as some harm, and then as a serious criminal harm, the journey has been long.

A criminal justice response is only one of a number of legal reactions to child sexual abuse (CSA). Civil redress is also possible through the courts by way of compensation (Royal Commission, 2014a), criminal injuries compensation is available in all jurisdictions even in the absence of conviction (Royal Commission, 2014b), and regulatory interventions can be made through registration and licensing authorities where offenders hold such licences or registrations. None of these alone, however, will be able to address the interests of victims in ‘participation, voice, validation, vindication and offender accountability’ (Daly, 2014: 5).

This report is one of a number of studies into the relationship between the criminal justice system and CSA in institutional contexts.<sup>1</sup> It is one part of the larger inquiry conducted by the Royal Commission (the Commission) on this topic, which in turn is one of a number of recent inquiries into this serious social problem in Australia (eg Cummins et al., 2012; Victoria, Family and Community Development Committee, 2013; New South Wales, 2014) and overseas (Australian Institute of Family Studies, 2013).

A criminal justice response to CSA entails a long and difficult process of reporting, detection, prosecution, trial and disposition. Sentencing is one of the final stages of this process<sup>2</sup>; however, the number of people convicted and sentenced of CSA represents a very small proportion of those who commit the crime. Attrition rates are very high and, accordingly, very few offenders are held to account, and only a small number of victims ever feel vindicated through this process.

While CSA occurs in a variety of contexts – most frequently in a familial environment – CSA in an institutional context, which is the focus of this inquiry, amounts to only a small fraction of all CSA offences. In Chapter 7, we suggest creating a number of new offences to deal with organisational criminality. While recognising that such offences may be rarely prosecuted, such offences are intended to represent important

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1 See Royal Commission, Research Program, Government Responses, [www.childabuseroyalcommission.gov.au/policy-and-research/research-program/government-responses](http://www.childabuseroyalcommission.gov.au/policy-and-research/research-program/government-responses).

2 This report also examines some post-sentence dispositions such as supervision and detention orders; see Chapter 6.

normative or exhortatory statements of society's view of the reprehensibility of CSA committed in an institutional context.

### **The scope of this report**

This report examines sentencing law and practice in relation to adult offenders<sup>3</sup>, organisational responsibility for CSA and the sanctions that may be imposed upon institutions, the principles of sentencing, sentencing standards and the range of non-sentencing statutory measures available to detain offenders in custody, restrict or monitor their movement. It does not discuss the range and adequacy of sentencing options available to courts in sentencing offenders, such as imprisonment, intermediate or community-based sanctions, deferred sentences, the nature and effectiveness of correctional services provided to those on sentencing orders, the parole system, treatment programs for sex offenders, whether in or out of custody, or issues relating to chemical castration.<sup>4</sup> Nor does it discuss issues relating to the concepts of 'dangerousness' or 'risk' in the sentencing context, though these are embedded in many of the legislative provisions that apply to sex offenders (see generally McSherry and Keyzer, 2009: Chapter 2; McSherry and Keyzer, 2011: Part III). Post-sentence schemes such as sex offender registration and working with children checks are the subject of separate Commission inquiries.<sup>5</sup> And while there is an extensive and growing literature on the role of specialist courts and non-adversarial and restorative justice approaches to CSA offences, these are also outside the scope of this study.<sup>6</sup>

Any discussion of sentencing, whatever the context, requires an analysis of several perennial issues. How do we, as a society, balance the various and competing principles of sentencing? How do we balance the various and competing interests of the state, the victim and the offender? How do we balance the principle of consistency of sentencing with the desire to individualise a sentence so that it is appropriate to all the circumstances of the offence and the offender? How do we ensure that the sentences imposed on offenders are not so disproportionately high or low as to undermine public confidence in the justice system? How do we determine what is an appropriate and proportionate sentence in relation to particular offences and offenders? Finally, how do we determine which sanctions are effective, against whom and in what circumstances? This report focuses on sentencing for CSA in an

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3 This report does not deal with offences committed by children or young persons against each other in institutional contexts. All of the cases in this study relate to adult offenders. The New South Wales study discussed in Chapter 4 found that the youngest offender was 18.6 years at the time of the offence. Because offences committed by children are heard in children's courts, judgments are not published and therefore not publicly accessible. This is not to say that sex offending by children and young persons against children is infrequent or not serious. Warner and Bartels (2015) report that a considerable proportion of sex offences against children are committed by other children or young persons, including siblings. They state that 'although sexual offending comprises only a small proportion of youth offending (and a smaller proportion still of all recorded crime), juveniles account for a relatively high proportion of sexual offences committed' (Warner and Bartels, 2015: 49). They also suggest that although the data are limited, there is evidence that offences by young people may amount to 30–60 per cent of CSA.

4 See discussion in New South Wales Parliament, 2014: Chapter 6.

5 See Royal Commission, Research Program, Prevention, <http://www.childabuseroyalcommission.gov.au/policy-and-research/research-program/prevention>.

6 See generally New South Wales Parliament, 2014: Chapter 5.

institutional context and accordingly, discussion of the relevant sentencing law and practice is, where possible, narrowed to these issues.

The remainder of this chapter discusses some of the definitional constraints on the Commission's inquiry generally, and the importance of understanding, and dealing with, the institutional and systemic dimensions of CSA. It briefly traces the history of concepts of dangerousness and the legislative responses to dangerous sex offenders. The second part of the chapter provides the criminal justice context in which sentencing occurs. By identifying the process of attrition of cases from reporting to conviction, it notes that of all cases of sexual assault, only a very small proportion results in conviction and sentence. At the time of sentence, sentencers' powers may be constrained by the number and nature of the offences of which an accused person has been found guilty. This may be due to plea negotiation or the practical difficulties of charging or proving multiple offences, especially historical ones. This chapter also briefly discusses the role of the victim in the prosecution process.

Chapter 2 discusses the principles and purposes of sentencing, albeit with an emphasis on legislative provisions and judicial decisions that particularly relate to CSA. Many of the legislative measures are intended to modify or reverse the basic principles of the common law of sentencing. The factors that the courts take into account in sentencing for offences related to CSA are discussed in detail in Chapter 3. Statutory provisions and decisions, especially those affecting offenders convicted of CSA offences, are identified and discussed. The practical difficulties of sentencing for historical cases are discussed in some detail, as are the problems of sentencing for multiple offences.

The standards of sentencing and sentencing practices in a number of Australian jurisdictions are presented in Chapter 4, which identifies differences between states and territories. The methodological difficulties of such an exercise are outlined in this chapter, which also cautions against attempts to identify 'correct' sentences. This chapter also presents the findings of an original study of sentencing practices for CSA in an institutional context, based on cases identified from a search of the Commission's database and other sources.

Chapter 5 provides an extensive summary and analysis of the growing Australian and overseas literature on public perceptions and attitudes to CSA offences, sentencing, sentencing policies and sanctions. It critically examines the various myths and misconceptions relating to sex offenders. It notes the special sensitivity of the public to sex offenders generally and to child sex offenders in particular.

Chapter 6 identifies and discusses the large number and wide range of statutory provisions enacted with the aim of protecting the community from habitual or dangerous offenders, especially sex offenders. These measures include those that allow for preventive detention through indefinite sentences, extended supervision and detention orders, mandatory, minimum and presumptive sentences, cumulative sentences, restrictions on parole, and a number of offences intended to restrict the movement and activities of this group of offenders. Many are intended to restrict judicial discretion and reverse common law principles of sentencing. Empirical evidence of the extent of use of many of these orders is provided, though empirical evidence of their effectiveness in reducing crime is almost non-existent. Indeed, a

feature of almost all of the measures discussed in this report is the many assertions about their effectiveness with almost no supporting evidence. Too frequently, sentencing measures are symbolic, nominal or rhetorical, and only rarely do they contribute substantially to the safety of the children they purport to protect.

The final chapter, Chapter 7, examines the institutional dimensions of criminal responsibility for CSA and the difficulties that the criminal law has faced in holding organisations to account for offences they have committed, either vicariously or directly. It suggests that a number of new offences be created to hold organisations criminally responsible, and that existing sanctions be adapted so that they can be imposed to produce organisational change that would reduce the risk of CSA occurring within an institutional context. It suggests that the public response to such measures would be positive.

## Definitions

The Royal Commission has defined child sexual assault or abuse for its purposes as (Royal Commission, 2014, Vol 1: 95):

Any act which exposes a child to, or involves a child in, sexual processes beyond his or her understanding or contrary to accepted community standards. Sexually abusive behaviours can include the fondling of genitals, masturbation, oral sex, vaginal or anal penetration by a penis, finger or any other object, fondling of breasts, voyeurism, exhibitionism, and exposing the child to or involving the child in pornography. It includes child grooming, which refers to actions deliberately undertaken with the aim of befriending and establishing an emotional connection with a child, to lower the child's inhibitions in preparation for sexual activity with the child.

An institution is defined to mean<sup>7</sup>:

... any public or private body, agency, association, club, institution, organisation or other entity or group of entities of any kind (whether incorporated or unincorporated), and however described and;

- (i) includes, for example, an entity or group of entities (including an entity or group of entities that no longer exists) that provides, or has at any time provided, activities, facilities, programs or services of any kind that provide the means through which adults have contact with children, including through their families; and
- (ii) does not include the family.

Child sexual abuse in an 'institutional context' will occur if, for example<sup>8</sup>:

- (iii) it happens on premises of an institution, where activities of an institution take place, or in connection with the activities of an institution; or

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7 Letters Patent.

8 Letters Patent.

- (iv) it is engaged in by an official of an institution in circumstances (involving settings not directly controlled by the institution) where you consider that the institution has, or its activities have, created, facilitated, increased, or in any way contributed to, (whether by act or omission) the risk of child sexual abuse or the circumstances or conditions giving rise to that risk; or
- (v) it happens in any other circumstances where you consider that an institution is, or should be treated as being, responsible for adults having contact with children.

### **Child sexual abuse in institutions**

While CSA must be understood in its broader context – offenders within and outside institutions will share many of the same characteristics – the institutional focus of this report necessitates a systemic rather than an individualist approach to CSA.

Throughout Australia’s history, there has been no lack of inquiries into institutions providing out-of-home care for children. Swain has documented 83 such inquiries between 1852 and 2013, which she categorises into three types: establishing and refining the child welfare system; responding to allegations of abuse; and focusing on hearing survivor testimony (Swain, 2014).

Interest in the institutional dimensions of child physical abuse is relatively recent, dating back to 1979, when the United States Senate conducted the first public inquiry into institutional abuse of children (Daly, 2014: 5). Since the 1980s, a plethora of inquiries has been conducted in 15 jurisdictions following the ‘discovery’ of child physical abuse a decade earlier (Daly, 2014: 5–8). Although historically there had been awareness of the mistreatment of children in institutions<sup>9</sup> and the effects of institutionalisation on young people, a number of factors changed societal responses to CSA within institutions. Among these were an increased awareness of the sexual nature of the harm to children, its prevalence due to the publicity given to egregious cases of abuse, the commissioning of public inquiries into institutional abuse, and their often shocking findings. Finally, there were the growing number of accusations and documented cases of institutions, including law enforcement bodies – but in particular respected religious institutions – that had failed to protect children in their care, or had actively ignored or concealed long-term and extensive criminal activity by their members, employees or associates (Daly, 2014; Daly, 2014a: 17).

Mounting concern over, and sensitivity to, sexual offences against children and the growing awareness of the role of institutions in contributing to such offences, has culminated in this Commission and its particular focus on the institutional dimensions of abuse. As Swain observed of the 83 inquiries she catalogued (Swain, 2014: 11):

The long list of institutions named in these reports is evidence of the blindness to sexual abuse which marked earlier investigations. The limitations of the discourse around sexuality and sexual abuse in the past made it unlikely that earlier inquiries would make this a focus of their work. The feminist recasting

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<sup>9</sup> Swain identifies only three cases in which sexual abuse was an explicit focus of an inquiry: one in 1865–66, one in 1897–98 and one in 1992–93.



of such discourses, which dates from the 1980s, created a new language in which behaviours previously seen as the acts of individual ‘perverts’ or ‘sex fiends’ could be seen as systemic, and represented as the core transgression of childhood innocence. Institutions praised in the past for their order and economy now stand condemned for their failure to protect the children in their ‘care’. As recent inquiries have found, sexual abuse was endemic in institutional settings. The inability of previous enquiries to recognise this reality, and their willingness to individualise the problem where it could not be ignored, may well have served the interests of the government and non-government institutions that provided child welfare services across Australia, but it did little to protect the children entrusted to their ‘care’.<sup>10</sup>

### **Sentencing individualism**

Because the criminal law has historically concentrated on individual responsibility, it has been less able to address the systemic problems that have produced, or been conducive to, the criminal behaviour manifested in offences of CSA (Law Commission of Canada, Executive Summary, 2000: 4). The Commission’s Letters Patent address the importance of addressing systemic issues explicitly:

AND it is important that claims of systemic failures by institutions in relation to allegations and incidents of child sexual abuse and any related unlawful or improper treatment of children be fully explored, and that best practice is identified so that it may be followed in the future both to protect against the occurrence of child sexual abuse and to respond appropriately when any allegations and incidents of child sexual abuse occur, including holding perpetrators to account and providing justice to victims.

In its report on child abuse in Canadian institutions, the Law Commission of Canada noted the limitations of the criminal trial in gaining a better understanding of systemic issues and the ability of the courts to hold institutions to account (Law Commission of Canada, Report 2000: 125–26).

The evidentiary goals of the criminal justice process are to determine whether an offence has been committed and to identify the offender. The process is not an inquiry aimed at understanding the larger context in which abuse took place or uncovering all the evidence about other offences that were committed. Therefore, evidence about conditions in institutions that facilitate abuse may not be relevant for the purposes of a criminal trial ...

Although it is a fact-finding exercise, the criminal justice process has strict rules governing the relevancy of evidence and a narrowly defined scope, which means that it cannot satisfy a desire to paint the overall picture of life at the institution.

Thus while the criminal justice system may provide some accountability in respect of individuals, some of whom may have committed their offences decades prior, it is very limited in its ability to hold institutions or organisations to account. These are entities

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10 Footnotes omitted.

that endure and while their membership or leadership may be transient, their responsibilities are likely to be present and continuing. Chapter 7 of this report presents a more detailed discussion of the criminal liability of organisations, the philosophical ground for holding them responsible and the sanctions that can or should be imposed upon them.

## **Dangerousness, Sex Offenders and Sentencing**

Sex offenders arouse fear, anger and often hatred in the community. Sex offences generally are highly emotive because they deal with deep-seated human drives and passions and because they involve a serious violation of personal integrity. Where they occur in families or are committed by those known to, or loved or respected by, the victim they will be regarded even more seriously because of the abuse of power or betrayal of trust that they involve. Less frequently, but more alarmingly, they create fear of attacks by strangers. Sexual abuse of children is an even more emotive offence because of the victims' vulnerability and defencelessness.

Legislative responses to sex offenders have historically been associated with responses to a broad class of dangerous offenders, including recidivists and violent offenders. Attempts to 'govern the dangerous' have a long history (Pratt, 1997; Brown and Pratt, 2000; McSherry and Keyzer, 2011). Habitual criminal legislation can be found in the United Kingdom in the mid-19th century<sup>11</sup>, while laws in the late 19th century were often concerned with recidivist minor property offenders. The combination of serious offending such as sex offending with repeat offending, either in the past or predicted, has resulted in laws introduced over the past century, many of which have been a response to highly publicised crimes that have caught the public imagination. Such laws tend to come in waves, often as a result of moral panic.

Among the earliest legal responses to dangerous offenders were 'habitual criminal' statutes, primarily directed against petty recidivist offenders, which provided a form of indeterminate sentence in the name of 'public protection' (Freiberg, 2000: 56ff). Most states adopted legislation based on the *Prevention of Crime Act 1908* (UK) and New South Wales reaffirmed its commitment to such laws as recently as 1957 through the *Habitual Criminals Act 1957* (NSW).<sup>12</sup>

Pratt identifies a growing concern with the welfare of children from the 1930s onwards, exemplified in the development of child welfare laws in the United Kingdom, and suggests that this concern may be reflected in measures in the 1940s that were directed at offenders who were considered incapable of controlling their sexual instincts (Pratt, 2000: 44).<sup>13</sup> Sex offenders became embodiments of the 'intransigence of evil' and preventive detention became a strategy for 'managing the monstrous' (Simon, 1998). The term 'sexual psychopath' gained currency, later to be transformed into 'sexual predator'. Preventive detention laws permitted a person to be detained

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11 E.g. *Habitual Criminals Act 1869* (UK).

12 See below Chapter 6.

13 Eg *Criminal Law Consolidation Act 1940* (SA), now *Criminal Law (Sentencing) Act 1988* (SA), ss 23 and 24; *Criminal Law Amendment Act 1945* (Qld), s 18, which was introduced after a 1944 inquiry into sex offences; Finnane, 1997: 104; Freiberg, 2000: 53. The Northern Territory introduced and later repealed a similar provision that was found in the *Criminal Code Act* (NT), s 401.

at the Governor's pleasure if there was medical evidence showing that the person was incapable of controlling their sexual instincts. Some remain in the statute book.<sup>14</sup>

The next wave of measures occurred in the early to mid-1990s in the form of indefinite sentences, which were aimed at an offender's future danger. They were based on an offender's previous serious violent, sexual or drug offending and medical and judicial predictions of future conduct. These laws were infrequently invoked, however, and were symbolic rather than practical responses to offending (Freiberg, 2000: 56).

The most active period of legislative responses to sexual offending came in the early 21st century (McSherry and Keyzer, 2009). Writing of criminal justice policies in the United States since the 1970s, Tonry referred to this period as one of 'anti-crime hysteria of unprecedented duration and intensity' (Tonry, 2009: ix). In Australia, this involved legislation to extend custody beyond the expiration of a sentence, beginning with Queensland's *Dangerous Prisoners (Sex Offenders) Act 2003* (Qld). This statute was the product of the government's concern with the pending release of a particular offender (Robert Fardon) who was considered a serious danger to the community, and in relation to whom it was considered that no existing laws would suffice to protect the community. Almost every other jurisdiction followed suit. These laws have their historical roots in civil commitment laws for sex offenders in the United States, first introduced in the 1930s, which were used to control allegedly dangerous sex offenders by means other than the criminal law, and which generally required some evidence of mental disorder (Janus, 2000).

Sex offender registration provisions were first introduced in New South Wales in 2000 and were emulated across Australia. Sex offender registration and notification laws had a long history in the United States, but gained currency from the mid-1990s with legislation such as Megan's Law in California, which followed the particularly horrific rape and murder of a child, Megan Kanka, by a released sex offender.

The working with children check legislation was also a product of the 2000s, together with a range of measures, including civil preventive orders, mandatory sentencing, presumptive sentences, presumptive non-parole periods, baseline sentences and others, which are discussed in detail in Chapter 6.

A number of theories have been postulated to explain the most recent surge in sex offender legislation. One is based on the concept of the 'risk society' (Beck, 1992) that holds that modern society is less concerned with past actions than with preventing future dangerous conduct. It focuses less on deterrence and mainly on the means for controlling threats and uncertainty, on 'risk, surveillance and security' (Ericson and Haggerty, 1997: 439). Responses to this anxiety can be seen in the development of laws relating to sex offender registration and notification, electronic monitoring and working with children laws (Hebenton and Thomas, 1996a; 1996b; McSherry, 2014: 18). Another theory identifies the growth of 'actuarial justice' that highlights the use of techniques for 'identifying, classifying and managing groups assorted by levels of dangerousness' (Feely and Simon, 1994: 173; McSherry, 2014: 20). At the core of this theory is the contention that there has been a shift from focusing on individuals to

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14 See below Chapter 6.

focusing on groups of offenders who can be managed by reference to actuarial inferences drawn from statistics. Actuarial justice manifests in the use of risk assessment instruments, such as those for indefinite sentences and supervision and detention orders imposed on 'high risk' offenders.<sup>15</sup> The shift from criminal justice as a past-oriented, desert-based system to a preventive, precautionary or anticipatory means of dealing with offenders, from what has been termed a 'post-crime' to a 'pre-crime society', has been noted by a number of commentators (Zedner, 2007; 2009; Weinberg, 2009; McSherry, 2014: 21–23).

It has been argued that these provisions are less about managing or governing the dangerous than they are about managing 'the fear that many members of the public feel, reasonably or not, in relation to particular groups' (McSherry, 2014: 3). Serious doubts have been raised about whether such fears are justified and whether the public policy responses are fair, proportionate, ethical or even constitutional. However, criminal justice policies are not just about the effectiveness of crime control policies, or about the rational calculations by governments and citizens as to 'what works', but are as much concerned with public emotions (Freiberg, 2001). Social problems such as sex offending generate powerful feelings that may not be 'rational' in the scientific sense. However, they express deep-seated fears of violation and anxieties for oneself and one's dependents that manifest in an urge to punish offenders and a desire to cast the fiends or outlaws out of society through various means of social exclusion.

Freiberg writes (2001: 69):

Research into patterns of affect indicates that people tend to have positive feelings towards homogeneity, order, predictability, hierarchy and deference to authority, that is, to the forces of stability. On the other hand they are antagonistic towards plurality, difference, complexity, ambiguity and change, that is, threats to the social order ... It matters not whether those threats (the objects) come from the homeless, the transient, the ambiguous, the unattached, the unpredictable, the disordered or the criminal, the result is the same: anxiety, fear, anger, hostility and an urge to expel.

Sex offenders are particularly demonised in the popular press by epithets such as 'fiends' or 'monsters' and the term 'penal populism' has been coined to describe the way in which politicians tap into public concerns about crime for their political advantage (Pratt, 2007). Often named laws, such as 'Megan's Law' in the United States, are the products of notorious cases, and too often are over-encompassing, insufficiently considered, expensive and ineffective. Commenting on United States laws relating to sex offenders, Wright states (2009: 4):

... [P]olicy makers have chosen to allow sex offender laws to be driven by the demonization of offenders, devastating grief experience by a subset of victims, exaggerated claims by law enforcement, and media depictions of the most extreme and heinous sexual assaults. As a result of this choice, a tremendously

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15 This report does not deal with the problems of determining risk. The scientific validity or otherwise of estimating the risk of further offending is the subject of extensive literature, as are the issues relating to ethical and legal problems in using 'risk' as a criterion for sentencing decisions; see McSherry, Keyzer and Freiberg, 2006: 12ff.

expensive criminal justice apparatus has been created, victims have been deprived of resources that could aid their recovery, and efforts to treat and manage offenders have been undermined.

A dominant factor in the passage of these inefficacious sex offender laws is the impact of the tragic, high-profile, stranger-predator sexual assault. Thirty years' worth of research has shown that sexual victimization occurs primarily in the context of a preexisting relationship.

Fear-based policies tend to relegate due process considerations (McSherry, 2014: 4). Tonry has cautioned that (Tonry, 2004: 6; McSherry, 2014: 5):

Concluding that particular policies or practices are consonant with current sensibilities is ... the beginning but cannot be the end of assessments of their legitimacy. That evaluation needs to take account of basic human rights and moral considerations, whatever the public opinion poll results or prevailing sentiments of a particular day or year.

## **Sentencing and the Criminal Justice System**

### **Sentencing and attrition rates**

The sentencing process sits at the end of a series of decisions: by victims to report a crime; by law enforcement officers to record and investigate it or divert a person to other agencies or to impose sanctions; by prosecutors to take the case to court, and if so, on what and how many charges; by juries and judicial officers, whether to convict or acquit; and finally, by judicial officers as to the nature and extent of the sanction.

Regarding offences generally, a Victorian study found that in 2004–05, Victoria Police recorded 373,917 offences by 155,008 alleged offenders. Of these, 87 per cent were subsequently charged with an offence, 69 per cent proceeded to a court hearing, 58 per cent were adjudicated, 56 per cent were found guilty and sentenced and 8 per cent received a custodial sanction (Sentencing Advisory Council, Victoria, 2007).

Attrition rates for CSA are much higher, primarily due to the very low reporting rate (Australian Law Reform Commission, 2010: Chapter 26; Daly and Bourhours, 2010; Eastwood et al., 2006; Fitzgerald, 2006; Hazlitt et al., 2004; Parkinson et al., 2002; Triggs et al., 2009). Fitzgerald's study of the attrition of sexual offences in the New South Wales criminal justice system found that, of the very low number of sexual offences that are actually reported to the police (7,500 in 2004), only 10 per cent resulted in a guilty finding. Only 15 per cent of alleged offences against children resulted in the commencement of proceedings, and it was less likely that proceedings would commence where the victim was a young child, where the incident was reported more than a decade after it had occurred, where the offender was a stranger and where there were no aggravating circumstances. Of those convicted, 43 per cent received a non-custodial sentence.

The high attrition rate in relation to institutional CSA can also be partly attributed to the long period of time that has elapsed in most cases. The majority of cases involve

events that took place many decades ago<sup>16</sup>, creating problems in obtaining evidence that will be sufficient to support a conviction. A decision not to proceed with some charges may be perceived by some victims as a failure to recognise properly the harm done to them (Newbury, 2014; Law Commission of Canada, 2000: Report: 122).

### **Prosecution and victims**

Victims do not have a formal role – such as those of the Crown or the defendant in the prosecution and sentencing processes – other than through their right to make a victim impact statement (VIS) or through court applications for restitution or compensation. The prosecution’s interests and the victim’s interests are not always identical. In some jurisdictions, prosecutors are required to take the views of victims into consideration in deciding whether it is in the public interest to commence or discontinue a prosecution or agree to plea negotiation. In relation to plea negotiation, in Victoria (Freiberg, 2014: 124):

... it is the policy of the DPP that the concern of victims and their families under the *Victim’s Charter Act 2006* (Vic) be taken into consideration.<sup>17</sup> *Victim’s Charter Act 2006* (Vic) s 9 requires the prosecuting agency to give to victims as soon as is practicable, information relating to the offences charged against the offender; or if no charges are laid, the reason for doing so. If charges are laid, information must be provided in relation to any decision to substantially modify them, or not to proceed with some or all of them or to accept a guilty plea to a lesser charge. Finally, information must be provided in relation to the hearing of the charges – the outcome of the criminal proceedings, including the sentence imposed and whether an appeal is instituted, on what grounds, and the result of any such appeal (Freiberg 2014: 389; see also Flynn, 2012).

The New South Wales Director of Public Prosecutions Guidelines deal specifically with victims (Guideline 19):

Victims, whether witnesses or not, should appropriately and at an early stage of proceedings have explained to them the prosecution process and their role in it. Office of the Director of Public Prosecutions (ODPP) Lawyers are required to make contact with the victim and provide ongoing information about the progress of the case. This should be done by the ODPP Lawyer (and where appropriate by a Crown Prosecutor) directly, rather than through intermediaries (such as ODPP Clerks or Witness Assistance Service officers).

Victims of crime (whether they have requested it or not) should be informed in a timely manner of:

1. charges laid or reasons for not laying charges;
2. any decision to change, modify or not proceed with charges laid and any decision to accept a plea to a less serious charge;
3. the date and place of hearing of any charge laid; and

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16 See below Chapter 4.

17 Director of Public Prosecutions, *Director’s Policy, Director’s Policy as to the Early Resolution of Cases*, Policy No 22, 2012, [22.9].

4. the outcome of proceedings, including appeal proceedings, and sentence imposed.

Where the offence involves sexual violence or results in actual bodily harm, mental illness or nervous shock to the victim, the victim should be consulted before any decision under the second dot point above is made, unless the victim has indicated that he or she does not wish to be consulted or his or her whereabouts cannot be ascertained after reasonable inquiry.

In New South Wales, additional statutory obligations have been created for the prosecution. The *Crimes (Sentencing Procedure) Act 1999* (NSW), s 35A requires the prosecution, in relation to charge bargaining of offences that may be taken into account in sentencing, certify that requisite consultation has taken place with the victim and the police officer in charge of investigating the offences (or if not, explaining why this has not occurred), and that any statement of agreed facts arising from the negotiations tendered to the court constitutes a fair and accurate account of the objective criminality of the offender, having regard to the relevant and provable facts, or has otherwise been settled in accordance with the applicable prosecution guidelines. Additionally, in New South Wales a court cannot take other offences into account unless the prosecution certifies that requisite consultation has taken place with the victim, and any statement of agreed facts arising from the negotiations tendered to the court constitutes a fair and accurate account of the objective criminality of the offender, having regard to the relevant and provable facts, or has otherwise been settled in accordance with the applicable prosecution guidelines (Freiberg, 2014: 150, fn 356).<sup>18</sup>

## Sentencing and prosecution

Where a person has been found guilty, or has pleaded guilty, the sentencing outcome will be circumscribed by the nature and number of charges of which that person has been convicted, which, in historical child sexual abuse cases, will be determined partly by evidentiary and procedural limitations (Shead, 2014). While responsibility for the sentence rests with the judicial officer, prosecutors will limit the court's discretion and influence the sentencing outcome by their decision as to which charges to prosecute and whether to do so summarily or on indictment.<sup>19</sup> Generally, the most serious child sexual assault offences, which carry maximum penalties of 20 years and above which involve penetration, are strictly indictable.<sup>20</sup> However relatively fewer serious indictable offences such as indecent assault, commit act of indecency<sup>21</sup> and possess

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18 *Crimes (Sentencing Procedure) Act 1989* (NSW), s 35A(2).

19 *Liang* (2013) 248 CLR 483 at [34]; see also discussion by the New South Wales Parliamentary Committee on sentencing for CSA regarding the exercise of prosecutorial discretion as to whether to proceed summarily or on indictment in cases of CSA (2014: 36ff).

20 See example offences set out in Table 1 in Chapter 3 Sentencing Factors at p 63.

21 For example, the Chief Magistrate of NSW provided the NSW Parliament Joint Select Committee on Sentencing of Child Sexual Assault Offenders the 2008–12 breakdown between the Local and District Courts of NSW for the basic and aggravated forms of the offences of indecent assault and act of indecency. The breakdown revealed that the Local Court dealt with the majority of cases where those offences were the principal offence committed (2014: 38, Table 7).

child pornography<sup>22</sup> can be dealt with summarily, providing the criminality of the offender can be accommodated within the sentencing limits of a court of summary jurisdiction.<sup>23</sup>

The prosecution and defence may have negotiated the number and gravity of the charges to which the accused will plead guilty and a judge cannot circumvent the prosecutor's decision.<sup>24</sup> The rationale is explained by the High Court in *Liang*<sup>25</sup>:

... the separation of functions does not permit the court to canvass the exercise of the prosecutor's discretion in a case in which it considers a less serious offence to be more appropriate any more than when the court considers a more serious charge to be more appropriate.

The prosecution may also bring before the court an agreed statement of facts that may or may not reflect the true gravity of the criminal conduct (Freiberg, 2014: 108). Although such agreements cannot bind the sentencing judge, it is unusual for a judge to query such agreements. The sentencing discretion will also be limited by the form of the charges and the rules relating to the factual basis of sentencing, which may not be a true reflection of the nature of the offending conduct.

### Charge negotiations generally

Prosecution guidelines influence the degree to which negotiations can reduce the actual number of charged offences. In New South Wales, Guideline 20 of the Prosecution Guidelines<sup>26</sup> allows a prosecutor to agree to discontinue a charge upon the promise of an accused person to plead guilty to another charge if the public interest is satisfied after considering matters, including that 'the alternative charge adequately reflects the essential criminality of the conduct and the plea provides adequate scope for sentencing ...' The Victorian DPP's recently issued policy 'Prosecutorial Discretion' does not make express reference to charge negotiations, but provides that the exercise of the power to discontinue a prosecution must be determined in accordance with the criteria governing the decision to prosecute.<sup>27</sup> In Western Australia, Guideline 75(a) of the Prosecution Guidelines<sup>28</sup> confirms that a prosecutor may agree to an accused pleading guilty to a lesser number of charges 'where the plea reasonably reflects the essential criminality of the conduct and provides an adequate basis for sentencing'. Conversely, a plea will not be accepted if

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22 For example, in New South Wales see Mizzi, Gotsis and Poletti (2010). The authors stated that the majority of child pornography offenders and child pornography offences were dealt with in the Local Court (352 or 80.9 per cent of all offenders and 746 or 76.3 per cent of all offences) in the period from January 2005 until 30 June 2009.

23 For example, the jurisdictional limit of the Local Court in NSW is imprisonment for two years for one offence and five years for two or more offences: *Crimes (Sentencing Procedure) Act 1999*, s 58. Table 8 of the NSW Parliament Joint Select Committee Report sets out the percentage of sentences imposed at the jurisdictional limit of the Local Court for the basic and aggravated forms of indecent assault and act of indecency (2014: 39).

24 *GAS* [2004] HCA 22; (2004) 217 CLR 198.

25 *Liang* [2013] HCA 31; (2013) 248 CLR 483 at [34].

26 Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines* (as at 1 June 2007), Guideline 20.

27 DPP (Vic) Director's Policy Prosecutorial Discretion revised November 2014. [www.opp.vic.gov.au/getattachment/5b830306-a17b-4ada-9078-6982539d44ac/2-The-Prosecutorial-Discretion.aspx](http://www.opp.vic.gov.au/getattachment/5b830306-a17b-4ada-9078-6982539d44ac/2-The-Prosecutorial-Discretion.aspx).

28 Director of Public Prosecutions for Western Australia, *Statement of Prosecution Policy and Guidelines* 2005.



‘to do so would distort the facts disclosed by the available evidence and result in an artificial basis for sentence’ (Guideline 76(a)).

Charge negotiations are also referred to in the prosecution guidelines of Queensland<sup>29</sup>, South Australia<sup>30</sup>, and the Commonwealth.<sup>31</sup> The Tasmanian guidelines do not specifically refer to charge negotiations.<sup>32</sup>

All jurisdictions have an offence of ‘persistent sexual abuse of a child’ or ‘maintaining a sexual relationship with a young person’.<sup>33</sup> The provisions were created to overcome the real problems the prosecution may face in having to prove the ‘particulars’ of an offence, that is, the time, date and place that an offence took place.<sup>34</sup>

### Delay in charging and stay of proceedings

The prosecution may select the charges and frame its case as it thinks fit, but in a case of long delay the accused may seek the procedural remedy of a stay of proceedings. Although the focus of the present study is sentencing, it is necessary to make brief reference to the law relating to stay of proceedings as very long delay is a common feature of institutional abuse cases.<sup>35</sup>

Courts in Australia and other common law jurisdictions have grappled with the appropriate legal test for granting a permanent stay of proceedings on account of delay in charging an accused. In Australia, a permanent stay of proceedings will only be granted where the circumstances are exceptional.<sup>36</sup> A permanent stay will only be justified where there is a fundamental defect going to the root of the trial that is of such a nature that there is nothing that a trial judge can do to prevent its unfair consequences.<sup>37</sup> In *CT*<sup>38</sup>, the New Zealand Supreme Court reviewed the law in Canada, England and Wales, and Australia on the subject. The court set out a number of principles<sup>39</sup>:

- a) Delay between offending and prosecution does not erase criminal liability and the adoption of limitation periods is for Parliament and not the courts. There

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29 Office of the Director of Public Prosecutions (Queensland), *Director’s Guidelines* (as at April 2013), guideline 17.

30 Office of the Director of Public Prosecutions (South Australia), *Prosecution Policy & Guidelines* (no date; ‘currently under review’ as at 20 June 2014).

31 Commonwealth Director of Public Prosecutions, *Prosecution Policy* (as at 4 March 2009), *Guideline No 2 – Charge-Bargaining*; Charge negotiation at 6.14ff.

32 Director of Public Prosecutions Tasmania, *The Role of an Independent Prosecutor and Guidelines for the Exercise of the Discretion to Prosecute*.

33 *Crimes Act 1900* (NSW), s 66EA (persistent sexual abuse); *Crimes Act 1958* (Vic), s 47A (persistent sexual abuse); *Criminal Code* (Qld), s 229B (maintain sexual relationship); *Criminal Law Consolidation Act 1935* (SA), s 50 (persistent sexual exploitation); *Criminal Code* (Tas), s 125A (maintain sexual relationship); *Crimes Act 1958* (Vic), s 47A (persistent sexual abuse); *Criminal Code Act Compilation Act 1913* (WA), s 321A (persistent sexual conduct); *Crimes Act 1900* (ACT), s 56 (maintain sexual relationship); *Criminal Code Act* (NT), s 131A (maintain relationship of a sexual nature).

34 The provisions were enacted across the jurisdictions following the decision of the High Court in *S* (1989) 168 CLR 266; see further below p 190.

35 See also Chapter 5.

36 *Walton v Gardiner* (1993) 177 CLR 378 at 392; *Jago v District Court of New South Wales* (1989) 168 CLR 23; *Glennon* (1992) 173 CLR 592; *Dupas* (2010) 241 CLR 237.

37 *Jago v District Court of NSW* (1989) 168 CLR 23 at 34; *Glennon* (1992) 173 CLR 592 at 605.

38 *CT* [2014] NZSC 155; see also *Jacobi* [2012] SASFC 115, [2012] 114 SASR 227 at [104]; *FJL* [2014] VSCA 57; *Bauer (a Pseudonym)* [2015] VSCA 55.

39 *CT* [2014] NZSC 155 at [32].

is no scope for a presumption that after a particular time memories are too unreliable for the purposes of a criminal trial;

- b) The adequacy or otherwise of the explanation for delay may be relevant to credibility but perceived inadequacy of such explanation of itself is not a ground for a stay, at least in the case of serious crime;
- c) A judge should grant a stay if persuaded that, despite the operation of the burden and standard of proof and the steps which a trial judge must take to mitigate the risk of prejudice, there cannot be a fair trial;
- d) The exercise does not turn on whether the judge is satisfied on the balance of probabilities as to any particular item of alleged prejudice (for instance, that but for the delay there would have been identifiable evidence which would have assisted the defendant). Rather what is required is a judicial evaluation based on assessments of the circumstances as they are at the time of trial and of the likely prejudicial effects of the delay;
- e) Material to such assessments will be the availability (or more commonly, the unavailability) of defence witnesses, relevant documents and independent evidence of whereabouts and activity, the general impact of time on memory, any deterioration in the defendant's physical or mental health (with consequent impact on ability to mount a defence), indeterminacy as to the specifics of the alleged offending (particularly where an isolated act of offending is in issue) and the apparent strength or weakness of the Crown case;
- f) While a defendant facing serious charges will usually have to be able to point to tangible delay-related prejudice, a combination of a very lengthy delay and a weak Crown case may justify a stay;
- g) Judges must approach stay applications on the basis that an evaluative assessment is required of the facts of the case at hand without any presupposition as to what the result should be.

There have been a number of attempts by the English courts to settle the law in that country.<sup>40</sup> *MacKreth*<sup>41</sup> and *Sheikh*<sup>42</sup> both involved the commission of CSA offences in an institutional setting. A stay of proceedings was refused in both cases. Those cases can be contrasted with *Joyson*.<sup>43</sup> The trial judge there refused a stay of proceedings where the offences were allegedly committed 35 years previously at a boarding school and against pupils. The defence submitted that the absence of school records made a fair trial impossible. *Joyson* was convicted of all charges. The Court of Appeal did not overturn the decision refusing to stay proceedings but it did find that the convictions

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40 *Attorney-General's Reference (No 1 of 1990)* [1992] QB 630 (CA) was a leading English authority. See also the extensive discussion in *TBF* [2011] EWCA Crim 726 and *CPS v F* [2011] EWCA Crim 1844 and the numerous cases cited therein. The English Courts initially required the accused to meet a balance of probabilities test, but this threshold was later abandoned.

41 [2009] EWCA Crim 1849. The appellant was convicted on 33 charges all committed between 23 and 27 years before the trial. He had been responsible for a residential care home for teenage girls who were 'in trouble'. The trial judge rejected the appellant's application for a stay on the grounds of abuse of process.

42 [2006] EWCA Crim 2625. The offences occurred when he was aged 30 and a housemaster of a Community Home. The offender unsuccessfully sought a stay of proceedings. He was prosecuted and convicted when he was aged 56.

43 [2008] EWCA Crim 3049.

were unsafe because of the disadvantages suffered by *Joyson* as a consequence of the delay.<sup>44</sup>

Ultimately, each stay application is decided on the peculiar facts of the case and cannot be used as a future precedent. And, as the New Zealand Supreme Court explained, delay by itself is not enough. Ordinarily there is a combination of factors at play. For example in the New South Wales case of *Murray*,<sup>45</sup> the accused, an 81-year-old priest, had been charged with historical offences alleged to have been committed against schoolboys in the 1960s and 1970s. Woods DCJ granted a permanent stay of proceedings essentially on the basis of the accused's serious medical problems. In *TS*<sup>46</sup> the applicant was charged with multiple sexual offences alleged to have occurred in 1973. The New South Court of Criminal Appeal held that the applicant's age (nearly 77 years) and mental and physical health issues gave rise to unacceptable injustice and unfairness, which warranted a permanent stay of the proceedings.<sup>47</sup> Similarly, the Victorian Court of Appeal granted a stay of proceedings for 6 charges in *Bauer (a Pseudonym)*.<sup>48</sup>

### Overcharging and severance

Where repeated abuse by an offender in an institutional context is alleged, the prosecution must be careful not to 'overload' the indictment. This can be a challenge in sexual assault cases where there are multiple charges for each victim, several victims and the prosecution relies upon context and/or tendency evidence in the form of uncharged acts.<sup>49</sup> An 'overloaded indictment' is a term used by the courts to describe a situation where the prosecution has charged so many offences that the accused may be unfairly prejudiced. For example in *Bauer (a Pseudonym)*<sup>50</sup> the prosecution proceeded on an indictment containing 37 offences allegedly committed over 32 years. It also relied upon somewhere between 70 and 90 uncharged sexual acts some of which were used as tendency evidence and others as context evidence.<sup>51</sup> The tendency evidence was also used for 'cross-admissibility' purposes. The court in *Bauer (a Pseudonym)* was highly critical of the manner the prosecution had framed its case.<sup>52</sup> It suggested that more consideration should have been given to severance of some of the counts from the indictment to ensure that the trial was manageable for the jury.<sup>53</sup> In this case, Victorian Court of Appeal stated that the prosecution should have avoided including less serious offences and ruled that the prosecution had not

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44 [2008] EWCA Crim 3049 at [35].

45 [2011] NSWDC 258.

46 *TS* [2014] NSWCCA 174.

47 *TS* [2014] NSWCCA 174 at [65], [70], [77].

48 [2015] VSCA 55 at [32] [93].

49 See s 97 of the *Uniform Evidence Act*; *Velkoski* [2014] VSCA 121; *BJS* [2013] NSWCCA 123. As to the use of context evidence see *DJV* [2008] NSWCCA 272, *KJS* [2014] NSWCCA 27 and *SKA* [2012] NSWCCA 205. Jurisdictions without a *Uniform Evidence Act* follow the common law decision of *HML* (2008) 235 CLR 334.

50 [2015] VSCA 55 at [8].

51 [2015] VSCA 55 at [9].

52 [2015] VSCA 55 at [8].

53 [2015] VSCA 55 at [12].

properly articulated the tendency evidence of the case, which was, in any event, inadmissible.<sup>54</sup>

The issues of severance and the admission and use of tendency evidence are beyond the scope of this report. However, the severance issue partly explains why 31 institutional abuse offenders of the 171 identified in our institutional case study were tried and convicted on more than one occasion.<sup>55</sup>

Sentencing outcomes are therefore heavily influenced by the manner in which the prosecution frames its case, the course of charge negotiations and whether the indictment has been severed. If an accused chooses to plead guilty, further procedural mechanisms can be used in sentencing proceedings, which enable the courts to manage cases with multiple acts and a course of conduct on the part of an offender.

The following discussion focuses upon two important features of the charge settling and sentencing process common to most Australian jurisdictions: the use of a representative charge and rolled-up charges and the practice of taking admitted offences into account.

### Representative charges

Where the prosecution presses a 'representative charge' it reflects or denotes a broader course of conduct of the same type by the offender over a period of time. The term 'representative' is usually used but other terms such as 'specimen' or 'sample' count are sometimes used. Representative charging has developed by case law rather than statute.<sup>56</sup> New South Wales, Victoria and South Australia utilise representative charging. Although the practice of using representative charges can be traced to the common law in the South Australian case of *Reiner*<sup>57</sup>, it does not appear to be part of sentencing law of the Code states of Queensland, Western Australia and Tasmania.<sup>58</sup>

A representative charge excludes any suggestion on the part of the offender that the offence was an isolated occurrence.<sup>59</sup> It also provides the court with a broader understanding of the circumstances of the offending. In *H*<sup>60</sup> sexual offences were routinely committed against the offender's daughter 'over practically the whole of her life.' Gleeson CJ said:<sup>61</sup>

... the background of conduct against which those specific offences occurred

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54 [2015] VSCA 55 at [4] [149], [158], [171] [174] [178].

55 See also Chapter 4.

56 The research of Rowena Johns is acknowledged in the following discussion. There are statutory references to the practice. The note to *Sentencing Act* (Vic), s 9 contains a definition of a representative charge. Section 9(4A) states that 'an aggregate sentence of imprisonment may be imposed in respect of convictions for offences that are the subject of a rolled-up charge or a representative charge'.

57 (1974) 8 SASR 102 at 105; see also *Teremoana* (1990) 54 SASR 30 at 36–38; *Godfrey* (1993) 69 A Crim R 318 at 322; *Liddy* (2002) 84 SASR 231 at [69] and *Humble* [2009] SASC 378 at [11].

58 In *SBL* [1999] 1 VR 706 *Ormiston JA* at [60] cites *Langridge* (1996) 17 WAR 346 as indicating the absence of representative counts in Western Australia and said at [59]: 'There would ... seem to be no recognition of any practice of representative counts in Queensland.' The latter conclusion is supported by *D* [1996] 1 Qd R 363 at 404 and *Rogers* [2013] QCA 192.

59 *Reiner* (1974) 8 SASR 102 at 105; *H* (1980) 3 A Crim R 53 at 59; *D* (unrep, NSWCCA, 22.11.96); *EMC* (unrep, NSWCCA, 21.11.96); *DZ* [2009] VSCA 301 at [9].

60 *H* (1994) 74 A Crim R 41 at [43].

61 *H* (1994) 74 A Crim R 41 at [43].

was a matter properly taken into account by the sentencing judge. These were not isolated offences.

The fact that an offence is not isolated also makes it more difficult for a judge to find the offender was a person of prior good character.<sup>62</sup>

Even where the parties do not conduct the case as a 'representative charge' case, the issue may arise. A court may decline to find on the evidence before it that the offence was isolated.<sup>63</sup> The prosecutor appearing at sentence should ordinarily be in a position to inform the court whether the charge is a single offence or a representative charge and accordingly address the court as to the significance of the charging method on the sentencing outcome.<sup>64</sup> The use of representative charges has continued, notwithstanding the more recent introduction of persistent sexual abuse offences across Australian jurisdictions.<sup>65</sup> There is a difference between the concept of a representative count and persistent/maintaining offences. The former does not require precision in specifying the other conduct alleged, whereas the latter requires a degree of specificity of the time period and the specific offending conduct to enable the court to gauge the offender's criminality. The use of a representative charge at sentence must fit with the fundamental principle that a person should not be punished for a crime for which he or she has not been convicted.<sup>66</sup> A representative charge is not intended to operate as an aggravating feature or to result in extra punishment.<sup>67</sup> This limited use of a representative charge has its critics<sup>68</sup> and in Victoria the courts have had to clarify that a representative charge is not an aggravating matter.

In *SBL*<sup>69</sup>, Batt JA expressed the view that 'the fact that a count is agreed to be a representative, specimen or sample count is an aggravating circumstance'. The Court in *CJK*<sup>70</sup> said it would be desirable to avoid the expression 'aggravation' in the context of sentencing on a representative count but that the use of the term did not necessarily denote error. Warren CJ said:<sup>71</sup>

If ... [the] circumstances render the offence more serious and lead to a higher sentence than would otherwise have been imposed in the absence of the representative nature, then it is not unreasonable or erroneous to observe it

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62 *Hermann* (1988) 37 A Crim R 440 at 448; *Ryan* (2001) 206 CLR 267 at [34].

63 *TU* [2014] NSWCCA 155 at [25]-[28].

64 See for example DPP (Vic) Prosecution Policy 4.7.1 at p 3, which expressly imposes that obligation on prosecutors and addresses the use by a prosecutor of single, rolled-up and representative charges.  
<http://www.opp.vic.gov.au/getattachment/27855e5d-fc4a-432f-a07d-18e0b402eeb7/9-Crown-s-Role-of-Plea-and-Sentence.aspx>.

65 *DZ* [2009] VSCA 301 at [8]-[9] but see *M* [2005] TASSC 14 where Slicer J said at [17]: 'New South Wales now has legislation [s 66EA]...Previously it employed the method of "representative counts"...

66 *EMC* (unrep, NSWCCA, 21.11.96) per Gleeson CJ at 4; *ED* (unrep NSWCCA per Priestly JA at 10).

67 *Holyoak* (1995) 82 A Crim R 502 at 511; *Godfrey* (1993) 69 A Crim R 318 at 322. *EMC* (unrep, NSWCCA, 21.11.96) per Gleeson CJ at p.4, *JCW* (2000) 112 A Crim R 466 per Spigelman CJ at [68].

68 For example, Basten JA in a strong dissent in *Giles* (2009) 198 A Crim R 395 at [67]-[68] stated that the offender's commission of numerous additional offences similar to those charged was relevant to his state of mind in committing the offences charged, and the fact that the charged offences were part of an ongoing course of conduct placed them in the higher range of objective seriousness.

69 [1999] 1 VR 706 at [69].

70 (2009) 22 VR 104 at [66].

71 (2009) 22 VR 104 at [58].

as an aggravating feature, even if only ‘colloquially’.

*Lord*<sup>72</sup> confirmed the position that an offender is to be punished for the offence charged, not for other acts, and the fact that a charge is representative is not an aggravating circumstance. There are cases where judges have erred by attributing too much weight to a representative charge or charges<sup>73</sup> or erred by completely ignoring the circumstance.<sup>74</sup>

In some cases, problems have arisen in establishing conduct to support a representative charge, and it is advisable for the prosecution in accepting a guilty plea to also have an admission from the offender to committing additional offences.<sup>75</sup> If the offender pleads guilty, it is prudent for the prosecution to expressly state in the agreed facts that the charge or charges are representative.

Where an offender pleads not guilty and the prosecution relies upon tendency or propensity evidence at trial (in the form of other offending against the victim), the sentencing court is permitted to find beyond reasonable doubt that the count or counts charged are representative and not isolated. A jury’s verdict only decides the issues joined by the plea to the indictment. It does not decide all facts of possible relevance to sentencing.<sup>76</sup> In *JCW*, a general admission from the offender was found to be insufficient evidence for the court to treat the charge as representative following a trial.<sup>77</sup>

In several institutional sexual abuse cases, the prosecution has used representative charges. The following cases are from New South Wales and Victoria.

Holyoak<sup>78</sup>

The applicant was the supervisor at a Dr Barnardo’s children’s home. He was aged 44 to 47 during the period covered by the offences and 75 when sentenced. He was convicted at trial of two charges of indecent assault against a nine-year-old girl, RMB. At sentence, two further offences of indecent assault against two other victims (a girl, DTF, and a boy, MDB) were taken into account on a Form 1 Schedule. The judge was satisfied that the offences against RMB were ‘representative of countless other similar acts of sexual misconduct’ and, while not relevant as a circumstance of aggravation, they would ‘not attract any component of leniency which would have flowed to him had they been isolated incidents’.<sup>79</sup> Allen J acknowledged that:<sup>80</sup>

In this difficult area ... it is all too easy for a sentencing judge to fail to give effect, although intending to, to the relevant distinction [between denying leniency and adding punishment]. The line can be very thin. There are several

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72 [2013] VSCA 80 at [21].

73 *D* (unrep, NSWCCA, 22.11.96).

74 *H* (1980) 3 A Crim R 53 at 71.

75 *JCW* (2000) 112 A Crim R 466 at [55]–[56].

76 *Cheung* (2001) 209 CLR 1 at [14].

77 *Cheung* (2001) 209 CLR 1 at [14].

78 (1995) 82 A Crim R 502.

79 (1995) 82 A Crim R 502 per Allen J at 511.

80 (1995) 82 A Crim R 502.

passages in his Honour's remarks on sentence which could be understood as indicating an intent to punish the applicant for the offences not charged. I do not so construe them.

However, Allen J (with whom Handley JA agreed) found that the judge incorrectly took into account one of the incidents of further conduct that occurred long after the last of the Form 1 offences<sup>81</sup> and was different in character to the other offences.

Klep<sup>82</sup>

The respondent was a priest in charge of an infirmary at a Catholic college between 1973 and 1979. He pleaded guilty to 14 counts of indecent assault upon 11 adolescent boys in the infirmary. Six of the counts were identified as representative counts. One of these counts represented the same conduct occurring on 'many occasions' with that victim, whereas the other counts represented two or three similar incidents with each of those victims. The total effective sentence was 36 months imprisonment, of which 24 months was suspended for a period of three years. Buchanan JA stated that the suspension of the major part of the sentence 'simply did not reflect the seriousness of the respondent's conduct'.<sup>83</sup> He was re-sentenced to a total effective sentence of five years 10 months with a non-parole period of three years six months.

### **Rolled-up charges**

A rolled-up charge is distinct from a representative charge, although there are parallels. Rolled-up charges are used for practical reasons, often when there are numerous offences of the same type in property and dishonesty cases. Their use appears to be rare in sexual offences because the prosecution is required to identify a separate sexual act for each discrete charge.<sup>84</sup> Unlike conduct reflected in representative charges, the specific occasion of each rolled-up offence, such as a financial transaction, can usually be identified and can be readily charged. Bundling offences into a single charge occurs by agreement with the defence for the purpose of a plea.<sup>85</sup>

As the note to s 9 of the *Sentencing Act 1991* (Vic) makes clear, representative and rolled-up charges should be differentiated:

A representative charge is a charge in an indictment for an offence that is representative of a number of offences of the same type alleged to have been committed by the accused. A rolled-up charge is a charge in an indictment that alleges that the accused has committed more than one offence of the same type between specified dates.

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81 That is, an offence that can be taken into account.

82 [2006] VSCA 98.

83 [2006] VSCA 98 at [14].

84 *Khouzame & Saliba* (1999) 108 A Crim R 170; [1999] NSWCCA 173.

85 *Jones* [2004] VSCA 68 at [13].

An advantage to the offender in a rolled-up charge is that it restricts the maximum penalty to one offence, rather than being applied to a number of discrete offences.<sup>86</sup>

There is also a public interest in encouraging guilty pleas and streamlining the court's workload, as well as making the task of a sentencing judge easier by limiting the number of separate charges for which a sentence is necessary.<sup>87</sup> *Beary*<sup>88</sup> highlighted the fact that the maximum penalty on a rolled-up count is the penalty for the single count. The sentence to be imposed on a rolled-up count is not the sum of the individual sentences that would have been imposed if the rolled-up offences had been presented as individual counts.<sup>89</sup> However, where, as in the case of *Samia* there were only two offences rolled up and the rolled-up count stood to be considered among a number of other individual counts relating to similar offences, a penalty of twice as much for the rolled-up count was not necessarily incorrect.<sup>90</sup> Potential deficiencies with using rolled-up charges were explained by Howie J in the Commonwealth fraud case of *Knight* and<sup>91</sup> Kirby J questioned the use of rolled-up counts in the fraud case of *Walsh v Tattersall*.<sup>92</sup>

Unless a tight rein is kept upon the prosecution practice of rolling up allegedly connected events and presenting them under a single charge, much prejudice can be done to an accused person by the admission of evidence of a generally inculpatory character ... Nowhere is this risk more evident than in cases of alleged sexual misconduct as illustrated by *S v The Queen* (1989) 168 CLR 266.

His Honour concluded:<sup>93</sup>

This Court should adhere to its longstanding insistence that, save for statutory warrant and for the exceptional cases of continuing offences or facts so closely related that they amount to the one activity, separate offences should be the subject of separate charges.

The bulk of rolled-up charges used in New South Wales are in drug cases<sup>94</sup> and fraud cases<sup>95</sup>, usually reflecting many transactions. In Victoria, rolled-up charges are used

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86 *Jones* [2004] VSCA 68 at [13]; *Richard* [2011] NSWSC 866 at [105]; *Glynatsis* [2013] NSWCCA 131 at [66].

87 *Richard* [2011] NSWSC 866 at [106]-[107]; *Jones* [2004] VSCA 68 at [13].

88 *Beary* (2004) 11 VR 151 at [14].

89 *Samia* [2009] VSCA 5.

90 *Samia* [2009] VSCA 5 at [12].

91 [2004] NSWCCA 145 at [27].

92 (1996) 188 CLR 77.

93 (1996) 188 CLR 77 at 112.

94 For example, *Daubney* (unrep, NSWCCA, 6.10.94), where 15 importations over four years became one rolled-up drug importation charge; *Ball* (unrep, NSWCCA, 4.3.98) where 42 counts became four rolled-up counts of supply; *McKellar* [2010] NSWCCA 295 at [65] where an offence of commercial drug supply encompassed 35 separate transactions over four months.

95 For example, *Howe* [2000] NSWCCA 405, where three charges reflected ongoing social security fraud over 12 years; *Martin* [2005] NSWCCA 190, where one fraudulent trustee charge covered offences 'extending over a very lengthy period of time involving 35 transactions': at [26]; *Glynatsis* [2013] NSWCCA 131, where 'numerous' insider trading transactions in a 12-month period were rolled up into nine counts on the indictment; *Donald* [2013] NSWCCA 238, where a fraud charge reflected 30 separate transactions in a two-and-a-half-year period.



mostly in theft cases<sup>96</sup> and fraud cases.<sup>97</sup> No appellate sexual assault cases were found.

### Taking admitted offences into account

All jurisdictions (except South Australia) have legislative provisions allowing a court to 'take into account' other offences when sentencing an offender for a principal offence on an indictment.<sup>98</sup> In South Australia, there is no such legislation, but there is indirect statutory recognition of the practice.<sup>99</sup>

Other offences are listed in a separate document – often referred to as a 'Form' or 'Schedule' – which is filed in court. The effect is that while the court imposes a sentence for the principal offence only, the court takes the other offences on the Schedule into account in determining the appropriate sentence. From the viewpoint of the offender, the procedure is advantageous because the scheduled offences are not the subject of separate sentences and are not regarded as convictions. However, the scheduled offences can be taken into account to increase the penalty that would otherwise be appropriate for the principal offence.<sup>100</sup>

The procedure raises a number of issues including the appropriateness of placing 'serious', unrelated or incomparable offences on a Schedule, the exercise of a court's discretion to decline to accept a Schedule, and the role of the prosecution in consenting to the procedure.

The procedure is derived from a non-statutory practice of the English courts.<sup>101</sup> There are two distinct but consistent rationales for the procedure of taking other offences into account on sentence.<sup>102</sup> First, it promotes the objective of rehabilitation by giving an offender the opportunity to emerge with a 'clean slate' following sentencing for the principal offence. Secondly, there is utilitarian value in the admission of guilt, which saves law enforcement agencies from using resources on further investigation.

The effect of taking into account other offences on sentence is to give them a significantly lower prominence in the sentencing process, affording an obvious advantage and a greater incentive to admit guilt.<sup>103</sup>

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96 For example, *Jones* [2004] VSCA 68; *Beary* (2004) 11 VR 151; *Ralphs* [2004] VSCA 33.

97 For example, *Samia* [2009] VSCA 5; *Cay* [2010] VSCA 292; *Yusuf* [2010] VSCA 266.

98 The research of Prita Supomo is acknowledged in the following discussion: *Crimes Act 1914*, (Cth), s 16BA; *Crimes (Sentencing Procedure) Act 1999* (NSW), ss 31–35A; *Penalties and Sentences Act 1992* (Qld), s 189; *Sentencing Act 1997* (Tas), s 89; *Sentencing Act 1991* (Vic), s 100; *Sentencing Act 1995* (WA), ss 32, 33; *Crimes (Sentencing) Act 2005* (ACT), ss 54–60; *Sentencing Act* (NT), s 107.

99 *Criminal Law (Sentencing Act) 1988* (SA), s 10(1)(b) provides: 'A court, in determining sentence for an offence, should have regard to such of the following matters as are relevant and known to the court: ... (b) other offences (if any) that are to be taken into account'. Section 10(b) formalises and recognises the validity of the pre-existing convention of a court taking into account other offences: *Hunt* (1977) 15 SASR 476; *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146 at [66]; *J* (1992) 59 SASR 145.

100 *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146; *Abbas* [2013] NSWCCA 115 at [11]–[12].

101 *Syres* (1908) 25 TLR 71. See the discussion in *Abbas* [2013] NSWCCA 115 at [11]–[12].

102 *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146 at [62]–[65].

103 *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146 at [66].

The procedure is generally similar across the jurisdictions.<sup>104</sup> A court may take other offences into account when sentencing for a principal offence where: the prosecutor has filed in court a document specifying the other offences to be taken into account; a copy of the document listing the other offences is given to the offender; the prosecution consents to the other offences being taken into account; the DPP and the offender sign the Schedule; the offender admits guilt to the other offences and indicates that he or she wishes the court to take those other offences into account when passing sentence; and the court considers it appropriate to take those other offences into account.

The offender must be asked whether he or she wants the court to take into account the further offences. This is a formality that should not be dispensed with because it is an important safeguard 'to ensure that the offender is aware of what is taking place and consents to procedures that may have a significant impact upon his freedom or the period during which he will remain in custody'.<sup>105</sup> The offender should be informed of each offence taken into account and should expressly admit each offence and that it is desired that each be taken into consideration.<sup>106</sup> The formal procedures set out in the legislation should be followed.<sup>107</sup>

There are differences between jurisdictions. In some, it is a requirement that the offender has been charged with, but not convicted of, the other offences.<sup>108</sup> In other jurisdictions, the offender need not have been charged with those other offences – it is sufficient if the offence is one that the offender is 'believed to have committed'.<sup>109</sup>

Some jurisdictions provide that the procedure may only be applied where the offender is convicted of the principal offence.<sup>110</sup> In others, the procedure can apply where the court dismisses the principal charge or discharges the offender without conviction with respect to the principal offence.<sup>111</sup>

There are some restrictions on the types of offences that may be taken into account on a Schedule. Offences that can't be taken into account are treason, murder, offences punishable with life imprisonment<sup>112</sup>, or offences of a kind where the court has no jurisdiction to impose a penalty.<sup>113</sup>

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104 See legislative provisions as set out in fn 98. In South Australia, the practice is set out in *Reiner* (1974) 8 SASR 102; *Hunt* (1977) 15 SASR 476.

105 *Felton* (2002) 135 A Crim R 328 at [3]; *Brandt* [2004] NSWCCA 3 at [8].

106 *Anderson v DPP* [1978] AC 964.

107 *Tootoo* (2000) 115 A Crim R 90.

108 *Crimes (Sentencing Procedure) Act 1999* (NSW), ss 31–32; *Sentencing Act 1991* (Vic), s 100(1)(a); *Sentencing Act 1995* (NT), s 107(1)(a).

109 *Crimes Act 1914* (Cth), s 16BA(1)(b); *Crimes (Sentencing) Act 2005* (ACT), s 55(1)(c); *Sentencing Act 1997* (Tas), s 89(1)(a); *Penalties and Sentences Act 1992* (Qld), s 189(1)(b).

110 *Crimes Act 1914* (Cth), s 16BA(1); *Sentencing Act 1991* (Vic), s 100(1); *Penalties and Sentences Act 1992* (Qld), s 189(2)(c); *Sentencing Act 1995* (NT), s 107.

111 *Crimes (Sentencing) Act 2005* (ACT), s 55(1)(a) ['convicted or found guilty' of the principal offence]; *Crimes (Sentencing Procedure) Act 1999* (NSW), s 33; *Sentencing Act 1997* (Tas), s 89(1); see ALRC, 2006: Para 6.69.

112 *Sentencing Act 1991* (Vic), s 100(1)(a); *Sentencing Act 1995* (NT), s 107(1); *Crimes (Sentencing) Act 2005* (ACT), s 55(2); *Crimes (Sentencing Procedure) Act 1999* (NSW), s 33(4)(b); *Sentencing Act 1997* (Tas), s 89(3).

113 *Crimes Act 1914* (Cth), s 16BA(3); *Sentencing Act 1991* (Vic), s 100(6); *Sentencing Act 1995* (NT), s 107(6); *Crimes (Sentencing) Act 2005* (ACT), s 57(4); *Crimes (Sentencing Procedure) Act 1999* (NSW), s 33(4); *Sentencing Act 1997* (Tas), s 89(6); *Sentencing Act 1995* (WA), s 32(3); *Hunt* (1977) 15 SASR 493.

The legislation generally stipulates the following consequences of taking other offences into account:

- The court must certify on the Schedule that the other offence(s) has been taken into account.<sup>114</sup>
- No proceedings may be taken or continued in respect of the other offence(s) unless the conviction for the principal offence is quashed or set aside.<sup>115</sup>
- The court is not prevented from taking the other offence(s) into account, when sentencing or re-sentencing the offender for the principal offence, if it subsequently imposes a penalty when sentencing or re-sentencing the offender for the principal offence.<sup>116</sup>
- An admission of guilt for offences taken into account is inadmissible in evidence if proceedings are launched in respect of that offence.<sup>117</sup>
- The offender is not taken to be convicted of the offence(s) taken into account.<sup>118</sup>

In any criminal proceedings where reference is made to an offender's conviction of the principal offence, reference may, however, be made to the fact that other offences were taken into account on sentence.<sup>119</sup> The fact that an offence was taken into account may be proved in the same manner as the conviction for the principal offence.<sup>120</sup>

The position in Western Australia is different in that the legislation states that the offender is 'convicted' of the pending charges and the court may 'sentence' the offender for 'each of the pending charges the offender is convicted of and wants dealt with'.<sup>121</sup> The court thus imposes an actual separate sentence for any scheduled offence(s).<sup>122</sup> A sentence imposed for a pending charge is, for the purposes of

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114 *Crimes Act 1914* (Cth), s 16BA(8); *Sentencing Act 1991* (Vic), s 100(7); *Sentencing Act 1995* (NT), s 107(7); *Crimes (Sentencing) Act 2005* (ACT), s 59(2); *Crimes (Sentencing Procedure) Act 1999* (NSW), s 35(1); *Sentencing Act 1997* (Tas), s 89(7); *Penalties and Sentences Act 1992* (Qld), s 189(4).

115 *Crimes Act 1914* (Cth), s 16BA(8); *Sentencing Act 1991* (Vic), s 100(8); *Sentencing Act 1995* (NT), s 107(8); *Crimes (Sentencing) Act 2005* (ACT), s 59(3); *Crimes (Sentencing Procedure) Act 1999* (NSW), s 35(1); *Sentencing Act 1997* (Tas), s 89(8); *Penalties and Sentences Act 1992* (Qld), s 189(5), (6). See *White* (1981) 28 SASR 9 at 11–12 (offences taken into account cannot found a plea of autrefois convict if the conviction for the principal offence is subsequently quashed. However, if that conviction stands, it would be an abuse of process if the Crown then charges a person with an offence that had been taken into account).

116 *Crimes (Sentencing) Act 2005* (ACT), s 59(4); *Crimes (Sentencing Procedure) Act 1999* (NSW), s 35(2).

117 *Crimes Act 1914* (Cth) s 16BA(9); *Sentencing Act 1991* (Vic) s 100(9); *Sentencing Act 1995* (NT) s 107(9); *Crimes (Sentencing) Act 2005* (ACT) s 59(3); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 35(1); *Sentencing Act 1997* (Tas) s 89(9); *Penalties and Sentences Act 1992* (Qld) s 189(7).

118 *Crimes Act 1914* (Cth) s 16BA(10); *Sentencing Act 1991* (Vic) s 100(10); *Sentencing Act 1995* (NT) s 107(10); *Crimes (Sentencing) Act 2005* (ACT) s 59(6); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 35(4); *Sentencing Act 1997* (Tas) s 89(10); *Penalties and Sentences Act 1992* (Qld) s 189(8).

119 *Crimes Act 1914* (Cth) s 16BA(11); *Sentencing Act 1991* (Vic) s 100(11); *Sentencing Act 1995* (NT) s 107(11); *Crimes (Sentencing) Act 2005* (ACT) s 60; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 35(5); *Sentencing Act 1997* (Tas) s 89(11); *Penalties and Sentences Act 1992* (Qld) s 189(9).

120 *Crimes Act 1914* (Cth) s 16BA(12); *Sentencing Act 1991* (Vic) s 100(12); *Sentencing Act 1995* (NT) s 107(12); *Crimes (Sentencing) Act 2005* (ACT) s 60(4); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 35(6); *Sentencing Act 1997* (Tas) s 89(12); *Penalties and Sentences Act 1992* (Qld) s 189(10).

121 See *Sentencing Act 1995* (WA) s 33.

122 See for example *Maclear* [2008] WASCA 39 at [33]. The procedure allows a superior court to have available to it the maximum penalty available for an offence and is not limited to the summary conviction penalty. The court will

any sentence appeal, taken to be a sentence imposed following conviction on indictment.<sup>123</sup>

New South Wales is unique in that under the provisions, the prosecution must consult with the victim about taking other offences into account on a Schedule, and a filed certificate must affirm that consultation. Section 35A of the *Crimes (Sentencing Procedure) Act 1999* requires the prosecutor to file a certificate verifying consultation with the victim and police in relation to charge negotiations before the court can take other offences into account.<sup>124</sup> The court may require the prosecution to explain the reason for failing to file a certificate when it is required to do so.<sup>125</sup> The legislation applies to matters dealt with on indictment, as well as matters dealt with in the Local Court, where other offences are taken into account on a Schedule.<sup>126</sup>

Under the legislation, the sentence must not exceed the maximum penalty for the principal offence.<sup>127</sup> The court is thus clearly sentencing for the principal offence alone and the focus remains on the principal offence. The other offences are ‘to be taken into account’.<sup>128</sup>

However, the consequence of taking into account the other offences is that the sentence for the principal offence will be heavier than it might otherwise have been.<sup>129</sup> The NSW CCA made clear in a guideline judgment that although a court is sentencing the offender only for the principal offence, it is to take into account the other offences by giving greater weight to personal deterrence and retribution.<sup>130</sup> The focus is upon the appropriate sentence for the principal offence, with a view to increasing it by reason of the scheduled offences.<sup>131</sup> Unless proper weight is given to the scheduled offences, the procedure fails its true purpose.<sup>132</sup> The process can result in a ‘substantial’, ‘heavier’ or ‘significantly longer’ increase to the sentence otherwise appropriate for the principal offence.<sup>133</sup> When a court is required to take into account multiple serious offences, it is required to allow for *the total criminality* revealed by the whole course of the offender’s conduct. However, an offender who adopts the procedure is entitled to expect an additional penalty ‘significantly less’ than would have been imposed had the other offences been prosecuted separately. Otherwise, the legislation would provide no incentive for the use of the procedure, which is

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recognise the offender’s cooperation with the administration of justice: see *Rafferty* [2002] WASCA 321; *Herbert* (2003) 27 WAR 330.

123 *Sentencing Act 1995* (WA) s 33(3).

124 See discussion above ‘Prosecution and victims’.

125 *Crimes (Sentencing Procedure) Act 1999* (NSW), s 35A(5).

126 Clause 7A of the *Crimes (Sentencing Procedure) Regulation 2010*.

127 *Crimes Act 1914* (Cth), s 16BA(4); *Sentencing Act 1991* (Vic), s 100(3); *Penalties and Sentences Act 1992* (Qld), s 189(3); *Sentencing Act 1995* (NT), s 107(3); *Crimes (Sentencing) Act 2005* (ACT), s 57(3); *Crimes (Sentencing Procedure) Act 1999* (NSW), s 33(3); *Sentencing Act 1997* (Tas), s 89(3); *White* (1981) 28 SASR 9 at 11.

128 *Murrell* (1985) 58 ALR 203 at 209.

129 *McAllister* (1982) 30 SASR 493 at 501; *Attorney General’s Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146 at [18]; *Campbell* [2010] ACTCA 20 at [47]–[48].

130 *Attorney General’s Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146 at [35], [39]; *Abbas* [2013] NSWCCA 115 at [22]–[23]; *Barton* (2001) 121 A Crim R 185.

131 *Attorney General’s Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146 at [35], [39]; *Abbas* [2013] NSWCCA 115 at [22]–[23]; *Barton* (2001) 121 A Crim R 185.

132 *Bavadra* [2000] NSWCCA 292 at [31].

133 *White* [1981] 28 SASR 9 at 11–12; *Attorney General’s Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146 at [18]; *Abbas* [2013] NSWCCA 115 at [23].

administratively convenient both to the prosecution and the courts and must therefore be implemented in such a way as to give the offender some benefit.<sup>134</sup>

It has not been the practice in sentencing to identify or quantify any increase in the sentence imposed. It has been suggested that the lack of quantification of any such additional penalty leaves it unclear whether, and if so to what extent, the sentence was increased.<sup>135</sup> Although the NSW CCA in its guideline judgment indicated that ‘it will rarely be appropriate for the sentencing judge to quantify the effect of Form 1 (scheduled) matters’<sup>136</sup>, the majority of the High Court in *Markarian*<sup>137</sup> considered that occasionally ‘it may be useful and certainly not erroneous’ to specify the amount by which the penalty for the principal offence has been increased for other offences taken into account.

There has been judicial concern expressed about the appropriate use of the procedure. The courts have insisted that scheduled offences should generally be of the same kind as the principal offence<sup>138</sup> and of *similar* seriousness to the principal offence.<sup>139</sup> Generally, there is no objection to offences of lesser seriousness being taken into account.<sup>140</sup> ‘Serious offences’, however, should not be listed on a Schedule but rather be separately charged. The courts have taken this position notwithstanding that the legislative provisions state only that offences with a maximum of life imprisonment, murder and treason cannot be included on a Schedule.<sup>141</sup> The essence of the concern is that the maximum sentence available for the principal offence would be insufficient to allow for the total criminality revealed by the whole course of the offender’s conduct.<sup>142</sup> The courts have invoked the public interest in ensuring serious crimes are separately investigated and charged.<sup>143</sup> The statutory power to reject a Schedule according to Spigelman CJ applies:<sup>144</sup> ‘in cases in which, for example, the administration of justice could be brought into disrepute by the court proceeding to sentence a person guilty of a course of criminal conduct on a manifestly inadequate, unduly narrow or artificial basis’ but that in exercising power to reject the Schedule ‘the Court must be constrained, to ensure that the independence of the judicial office in an adversary system is protected.’

In *Abbas*<sup>145</sup>, Bathurst CJ stated that a court should decline to take offences on a Schedule or Form into account where their gravity is far in excess of those for which

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134 *Harris* (2001) 125 A Crim R 27 at [27] citing *Lemene* (2001) 118 A Crim R 131; *Murrell* (1985) 58 ALR 203 at 210–211.

135 *Harris* (2001) 125 A Crim R 27 at [32].

136 *Attorney General’s Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146 at [44].

137 *Markarian* (2005) 228 CLR 357.

138 *Murrell* (1985) 58 ALR 203 at 210–211; *McAllister* (1982) 30 SASR 493; *Morgan* (1993) 70 A Crim R 368; *White* (1981) 28 SASR 493.

139 See ALRC, 2006: [6.80]; *White* (1981) 28 SASR 9 at 11–12; *Murrell* (1985) 58 ALR 203 at 210–211.

140 See ALRC, 2006: [6.80]; *White* (1981) 28 SASR 9 at 11–12; *Murrell* (1985) 58 ALR 203 at 210–211.

141 *Sentencing Act 1991* (Vic) s 100(1)(a); *Sentencing Act 1995* (NT) s 107(1); *Crimes (Sentencing) Act 2005* (ACT) s 55(2); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 33(4)(b); *Sentencing Act 1997* (Tas) s 89(3).

142 *Attorney General’s Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146 at [50]; *J* (1992) 59 SASR 145 at 152.

143 *Morgan* (1993) 70 A Crim R 368.

144 *Attorney General’s Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146 at [50]; *R v J* (1992) 59 SASR 145 at 152.

145 *Abbas & Ors* [2013] NSWCCA 115.

the offender is being sentenced, or when the magnitude of the offences on the Schedule make it impossible to take them into account in sentencing. Neasey J took a similar approach in *Jones*.<sup>146</sup> In *Eedens*<sup>147</sup>, the principal offence on the indictment was sexual intercourse with a child under 10 years.<sup>148</sup> Two further offences were placed on a Schedule.<sup>149</sup> The Court found this was an inappropriate use of the procedure because the sentence for the principal offence could not sufficiently reflect the seriousness of the totality of the applicant's conduct given they were distinct offences against three vulnerable children. The court took a similar line in *SGJ*<sup>150</sup> and it has also held that it is generally inappropriate to place a standard non-parole period for offences on a Schedule, but the practice may be justified where the offender is sentenced for numerous similar offences.<sup>151</sup> A balance must be struck between the number and gravity of charges on an indictment and the number and gravity of charges on a Schedule. The sentencing task will be difficult where the 'number and gravity of the charges on the indictment do not appropriately reflect the total criminality of the whole course of criminal conduct' revealed by the indictment and the offences listed on the Schedule.<sup>152</sup>

It is predominantly a matter for the prosecution to decide what offences are included on a Schedule, to strike a balance between overloading an indictment and ensuring that the indictment adequately reflects the totality of the admitted criminality. However, the prosecution must also have regard to the difficulties the court faces in undertaking the statutory task if the number and gravity of the charges on the indictment do not appropriately reflect the total criminality of the whole course of conduct revealed by the indictment and the Schedule.

The NSW ODPP has amended its Prosecution Guidelines to provide more detailed guidance on the appropriateness of taking other offences into account.<sup>153</sup>

The Australian Law Reform Commission recommended that the prosecution policy of the Commonwealth ODPP be amended to provide more specific guidance as to when it is appropriate for the prosecution to consent to other offences being placed on a Schedule (ALRC, 2006: [6.82]–[6.85]).

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146 (1978) Tas SR 126.

147 *Eedens* [2009] NSWCCA 254.

148 *Crimes Act 1900* (NSW), s 66A.

149 One offence under *Crimes Act 1900* (NSW), s 66A and another under *Crimes Act 1900* (NSW), 66C(1) (sexual intercourse with a child between 10 and 14 years).

150 *SGJ* [2008] NSWCCA 258 at [29].

151 *Eedens* [2009] NSWCCA 254 at [19].

152 *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146 at [57]; *Lemene* (2001) 118 A Crim R 131 at [4]–[5].

153 See Office of Director of Public Prosecutions (NSW), Prosecution Guidelines, Guideline 20, *Charge Negotiation and Agreement: Agreed Statements of Facts: Form 1* Offences such as failure to appear, firearms offences (where there are multiple firearms offences some may be placed on a Form 1), serious offences against police officers, breaches of apprehended domestic violence orders, offences committed while on bail or while on probation/parole, offences in relation to the administration of justice, or traffic offences where the offender has a poor traffic record should not generally be placed on a Form 1. Such a matter should usually proceed on indictment or by summary proceedings so that a conviction is entered for the public record.

## Chapter 2

# Principles and Purposes of Sentencing

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### Purposes of Sentencing

The purposes of sentencing are well established and in all jurisdictions are set out in some form in sentencing statutes.<sup>154</sup> The various justifications – retribution, deterrence, rehabilitation, denunciation and community protection – have been articulated and elaborated in innumerable judgments and in the academic literature. Generally, no one purpose is given greater weight than any other purpose. The High Court has indicated that, in the absence of a legislative direction to the contrary, the concept of proportionality is a ‘fundamental principle’ in sentencing that sets the limits of permissible retribution.<sup>155</sup>

The problems of applying these principles in relation to CSA have been well articulated by the New South Wales Ombudsman in his submission to the New South Wales Parliamentary Committee on Sentencing of CSA (cited in New South Wales Parliament, 2014: 20):

The difficulty of balancing these considerations is exacerbated in the context of sentencing child sex offenders given the seriousness which the community views child sexual 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.

This chapter examines the courts’ application of the general principles and purposes of sentencing to CSA and similar offences as applied to individual offenders, although it does not provide a comprehensive analysis of judicial comments made in the numerous cases of CSA. These remarks predictably and appropriately stress the need for retribution, for specific and general deterrence and for the need to protect the community from such offenders. However, little is said about organisational responsibility or the principles involved in sentencing institutions because there have been no such cases. In Chapter 7, we examine the nature of organisational offending and the sentencing principles that may apply to them upon conviction.

There is little to be learned from rehearsing the general sentencing remarks made by the courts. The communal revulsion against CSA offences has produced a raft of legislative directions to sentencers that require them to consider some purposes more important than others in specified circumstances. This chapter therefore focuses upon the statutory departures from common law principles where the sentencing of sex

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154 Parts of this chapter draw from Freiberg, 2014.

155 *Chester* [1988] HCA 62; (1988) 165 CLR 611 at [20]; *Ryan* [2001] HCA 21; (2001) 206 CLR 267 at [48]; *Veen (No 1)* [1979] HCA 7; (1979) 143 CLR 458; *Veen (No 2)* [1988] HCA 14; (1988) 164 CLR 465. In particular cases, or classes of case, some purposes are given more weight than others.

offenders generally is involved as there are no provisions that relate specifically to CSA in an institutional context.

### **Just deserts/proportionality**

The sentencing statutes of almost all jurisdictions provide that one of the purposes of sentencing is to impose a sentence or order that is just, appropriate or adequate punishment in all of the circumstances of the offence.<sup>156</sup> Imposing a just or proportionate sentence requires a court to consider such matters as the maximum statutory penalty for the offence, the degree of harm caused and the offender's culpability, among other factors.<sup>157</sup> The principle applies not only to individual sentences but also to the totality of the offending.

Underlying the notion of just deserts is that of 'retribution', which expresses society's disapproval of the offender's conduct. It is founded upon the philosophical belief that those who inflict harm on others should themselves suffer. In *Ryan*, McHugh J observed that retribution is an important factor in the sentencing of paedophiles:<sup>158</sup>

In the case of offences by paedophiles, it is currently the most important factor in the sentencing process because their crimes are committed against one of the most vulnerable groups in society and they almost invariably have long-term effects on their victims ... According to current community standards, it is proper that paedophiles should be severely punished for their crimes (footnote omitted).

Proportionality in sentencing is a problematic concept when it comes to determining the proportionate or appropriate sentence for any particular offence or offender. Leaving aside considerations such as deterrence or rehabilitation, which are more amenable to scientific determination, the appropriate level of punishment for any offence based on philosophical grounds is essentially a value judgment, one that tends to be culturally determined. Different jurisdictions will attribute different values to different harms. Chapter 4 describes sentencing standards across Australia with a view to ascertaining the range of sentences imposed for a number of offences of sexual assault. As is evident, there is little consistency between jurisdictions.

A continuing criticism of sentencing for CSA has been that it is too lenient, that it does not reflect the harm done to victims, a criticism that tends to be constant even though sentencing standards differ considerably among Australian jurisdictions. The Victorian Sentencing Advisory Council, in its review of maximum penalties for sexual offences

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156 *Sentencing Act 1991* (Vic) s 5(1)(a) (to punish the offender to an extent and in a manner which is just in all of the circumstances); *Crimes Act 1914* (Cth) s 16A(1) ('In determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence'); *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(a) (to ensure that the offender is adequately punished for the offence in a way that is just and appropriate); *Sentencing Act* (NT) s 5(1)(a) (to punish the offender to an extent or in a way that is just in all the circumstances); *Penalties and Sentences Act 1992* (Qld) s 9(1)(a) (to punish the offender to an extent or in a way that is just in all the circumstances); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(j) (the need to ensure that the defendant is adequately punished for the offence); *Sentencing Act 1995* (WA) s 6(1) (a sentence imposed on an offender must be commensurate with the seriousness of the offence).

157 See below p 61ff.

158 [2001] HCA 21 at [46].



against children under the age of 16, agreed with submissions made to it that current sentencing practices in Victoria failed to reflect the seriousness of the offending behaviour (Sentencing Advisory Council, Victoria, 2009a: 68). One consequence of the lack of public confidence in sentencing, as expressed through relatively low sentencing standards, has been the call for mandatory or presumptive sentences, or for various forms of preventive sentencing. However, it has been argued that reforming sentencing practices may be a better and fairer means of responding to concerns about CSA than introducing laws that depart from basic sentencing principles and possibly infringe the human rights of offenders (McSherry and Keyzer, 2009: 108–111).

There have been a number of statutory departures from the fundamental requirement that the punishment be proportionate to the offence that apply to sex offenders generally (though not to CSA specifically, or CSA in an institutional context).

### **Victoria**

Under the *Sentencing Act 1991* (Vic), s 6D, if the Supreme Court or the County Court in sentencing a serious offender<sup>159</sup> for a relevant offence<sup>160</sup> considers that a sentence of imprisonment is justified, the Court, in determining the length of that sentence (a) must regard the protection of the community from the offender as the principal purpose for which the sentence is imposed; and (b) may, in order to achieve that purpose, *impose a sentence longer than that which is proportionate to the gravity of the offence considered in the light of its objective circumstances.*<sup>161</sup>

### **South Australia**

Under the *Criminal Law (Sentencing) Act 1988* (SA), s 20BA(1)(a), when sentencing a person who is a serious repeat offender<sup>162</sup> for an offence *'the court sentencing the person is not bound to ensure that the sentence it imposes for the offence is proportional to the offence'*.<sup>163</sup> Where a court

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159 A 'serious offender' is defined as 'serious sexual offender'; *Sentencing Act 1991* (Vic), s 6B(3)(c). A 'serious sexual offender' is defined to mean an offender, other than a young offender, (a) who has been convicted of two or more sexual offences for each of which he or she has been sentenced to a term of imprisonment or detention in a youth justice centre; or (ab) who has been convicted of an offence to which clause 1(a)(viii) of Schedule 1 applies [relating to *Crimes Act 1958* (Vic), s 47A(1) persistent sexual abuse of child under 16] for which he or she has been sentenced to a term of imprisonment or detention in a youth justice centre; or (b) who has been convicted of at least one sexual offence and at least one violent offence arising out of the one course of conduct for each of which he or she has been sentenced to a term of imprisonment or detention in a youth justice centre; *Sentencing Act 1991* (Vic), s 6B(2).

160 A 'relevant offence' is defined as a sexual offence or a violent offence in the case of a serious sexual offender: *Sentencing Act 1991* (Vic), s 6(3)(c).

161 Emphasis added in this and following paragraphs to highlight the departures from common law principles.

162 A 'serious repeat offender' is defined as a person (whether as an adult or as a youth) who (a) has committed on at least two separate occasions a serious sexual offence against a person or persons under the age of 14 years (whether or not the same offence on each occasion); and has been convicted of those offences; or *Criminal Law (Sentencing) Act 1988* (SA), s 20B(1)(b)(i) and (ii). A 'serious sexual offence' is defined as an offence against the various provisions of the *Criminal Law Consolidation Act 1935* (SA) relating to rape and other sexual offences, child pornography and related offences and commercial sexual services and related offences, *Criminal Law (Sentencing) Act 1988* (SA), s 20B(b)(i).

163 *Criminal Law (Sentencing) Act 1988* (SA), s 20BA(2) provides that sub-section (1) does not apply if the person satisfies the court that (a) his or her personal circumstances are so exceptional as to outweigh the primary policy of the criminal law of emphasising public safety; and (b) it is, in all the circumstances, not appropriate that he or she be sentenced as a serious repeat offender.

convicts a person of a 'serious offence' and the person is liable, as a result of the conviction, to a declaration that he or she is serious repeat offender, the court must consider whether to make such a declaration and if of the opinion that the person's history of offending warrants a particularly severe sentence in order to protect the community, it should make such a declaration – *Criminal Law (Sentencing) Act 1988* (SA), s 20B(3)(a) and (b).

The courts are generally reluctant to disregard the principle of proportionality. In Victoria, the court must find that the offender would remain a danger to the community beyond what would be a proportionate sentence.<sup>164</sup> The Victorian courts have held that these provisions should only be applied in 'very exceptional cases'.<sup>165</sup> If a court believes that the objective of community protection can be achieved by a proportionate sentence, albeit a long one, then it will not be necessary to impose a disproportionate sentence for this purpose.<sup>166</sup>

In South Australia, the Court of Criminal Appeal has held that if a sentencing court is of the opinion that a sentence imposed in accordance with ordinary sentencing principles can sufficiently protect the community, it need not make a serious repeat offender declaration in order to increase the sentence.<sup>167</sup> Courts are reluctant to predict the future behaviour of offenders because of the limitations of science, their own limited ability in risk assessment and the constraints of the principle of proportionality.<sup>168</sup>

The New South Wales Sentencing Council recommended against introducing provisions such as are found in Victoria and South Australia on the grounds that they add little to the range of sentencing discretion available to judges, particularly in the light of judicial attitudes to disproportionate sentencing. The Council concluded that there were difficulties in relation to the accurate prediction of risk; that offenders in custody who are making good progress in reducing their risk may have received a sentence that was longer than was justified; and that such provisions may discourage guilty pleas (Sentencing Council, New South Wales, 2008, Vol 3: 219).

## Denunciation

Denunciation is a symbolic function of sentencing and relates to the statements made by the judiciary in sentencing that are intended to reaffirm shared values and censure an offender. Kirby J has described it as follows:<sup>169</sup>

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164 *Tutchell* [2006] VSCA 294 at [33]; *Prowse* [2005] VSCA 287; Freiberg 2014: 249.

165 *Connell* [1996] VR 436; *Barnes* [2003] VSCA 156; *DPP v OJA* [2007] VSCA 129; *Curtis (No 2)* [2009] SASC 350; (2009) 105 SASR 411. A study of the use of these provisions between 1994 and 2002 found that longer than proportionate sentences were imposed in only 11 of 553 eligible cases, six of which were overturned on appeal: see Richardson and Freiberg, 2004.

166 *Robertson* (1995) 82 A Crim R 292, 298; *DPP v Papworth* [2005] VSCA 88; *Cass* [2005] VSCA 77; *McIntosh* [2005] VSCA 106.

167 *Bechara* at [47] per Kourakis CJ; Sulan J concurring; Vanstone J dissenting.

168 *Bechara* [2014] SASFC 36 at [44]–[45] per Kourakis CJ.

169 *Ryan* [2001] HCA 21; (2001) 206 CLR 267 at [118]–[120]; *WCB* [2010] VSCA 230 ('The sentence communicates society's condemnation of the offender's conduct. It signifies the recognition by society of the nature and significance of the wrong that has been done to affected members, the assertion of its values, and the public attribution of responsibility for that wrongdoing to the perpetrator'); *DPP v Short* [2006] VSCA 120; *DPP v DJK* [2003] VSCA 109.

A fundamental purpose of the criminal law, and of the sentencing of convicted offenders, is to denounce publicly the unlawful conduct of an offender. This objective requires that a sentence should also communicate society's condemnation of the particular offender's conduct. The sentence represents 'a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law'.<sup>170</sup>

Many denunciatory statements are made in cases of CSA, the prevalence and seriousness of which have for long not been understood or recognised. The courts' statements are intended to be educative in relation to standards of conduct or morality and as to what amounts to criminal conduct. Denunciation is linked to public confidence in the administration of criminal justice: if some crimes are not prosecuted and appropriately sanctioned, the public will lose confidence in the courts and consequently not report offences in the future or may, in some instances, take the law into their own hands through vigilante conduct.

Denunciation also serves to vindicate the victim by recognising the harm caused – both the fact that it occurred and its seriousness.<sup>171</sup> The High Court has recognised the importance of vindication in its decision in *Munda* when it noted:<sup>172</sup>

... the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence.

In the Victorian Court of Appeal, Vincent JA has characterised the denunciatory function of the law as 'social rehabilitation', particularly in the context of CSA. In *DPP v DJK* he wrote:<sup>173</sup>

This notion of social rehabilitation is one that I do not believe has been accorded anything approaching significant recognition as an identifiable underlying concern of the criminal justice system. It seems to me that the process of social and personal recovery which we attempt to achieve in order to ameliorate the consequences of a crime can be impeded or facilitated by the responses of the courts. The imposition of a sentence often constitutes both a practical and ritual completion of a protracted painful period. It signifies the recognition by society of the nature and significance of the wrong that has been done to affected members, the assertion of its values and the public attribution of responsibility for that wrongdoing to the perpetrator. If the balancing of values and considerations represented by the sentence which, of course, must include those factors which militate in favour of mitigation of penalty, is capable of being perceived by a reasonably objective member of the community as just, the process of recovery is more likely to be assisted. If

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170 *M(CA)* [1996] 1 SCR 500 at 558 per Lamer CJ.

171 *DPP v NOP* [2011] TASCRA 15 at [41] per Evans J.

172 [2013] HCA 38 at [54].

173 [2003] VSCA 109 at [18]; see also *DPP v Twomey* [2006] VSCA 90 at [21].

not, there will almost certainly be created a sense of injustice in the community generally that damages the respect in which our criminal justice system is held and which may never be removed. Indeed, from the victim's perspective, an apparent failure of the system to recognise the real significance of what has occurred in the life of that person as a consequence of the commission of the crime may well aggravate the situation.

In *DPP v Twomey* he elaborated<sup>174</sup>:

It is well to bear in mind that the rehabilitation of the victim of sexual abuse may often be more difficult to achieve than that of the perpetrator. Frequently the damage will be profound and a long time will pass before it can be addressed at all. In the meantime, childhood will be destroyed, self-esteem damaged, educational and career opportunities lost and the capacity to form and maintain relationships seriously impaired. The notion to which I have adverted underpins, I believe, such concepts as restorative justice, just punishment, the vindication of rights and the attribution of responsibility based on moral culpability. The vindication of the victim in cases of this kind, in particular, is profoundly important if the criminal justice system is to perform its role properly

Although much has been done in recent years to encourage young persons who have been subjected to inappropriate behaviours to report what has happened, by reason of the presence of a variety of factors it must be anticipated that often the commission of such offences will not be revealed for years and that their eventual disclosure will be both extremely difficult and painful for those offended against, their families and others associated with them.

If the system cannot be seen to have recognised the significance of what has occurred and to have responded appropriately, then its operations will discourage victims from coming forward and indirectly contribute to the concealment of offences. In my view, this cannot be permitted to occur.

The element of vindication emerged as a key finding of the Victorian Parliament's Family and Community Development Committee's report on the handling of child abuse by religious and other non-government organisations (2013). Victims wanted to see consequences for the perpetrator of the offences committed against them and 'vindication from the organisation for the injustice they suffered and acknowledgement that the organisation failed in its duty of care to protect them' (Victoria, Family and Community Development Committee, 2013: xlix). The key aspects of vindication included the imposition of appropriate criminal sanctions, a public acknowledgement of the offender's guilt and an opportunity to air publicly the effects of the crimes upon them, especially when they have been silent for many

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174 [2006] VSCA 90 at [22] – [24].

years, if not decades (Victoria, Family and Community Development Committee, 2013: 463).

## Deterrence

One of the purposes of sentencing is to deter the offender (specific deterrence) or others (general deterrence) from committing offences in the future.<sup>175</sup> Despite ongoing doubts regarding the efficacy of deterrence, it remains a fundamental premise of sentencing and one that is frequently, if ritualistically, invoked. In relation to CSA, Freiberg notes (2014: 255):

General deterrence is frequently invoked in relation to a wide range of offences. Both general and specific deterrence are considered of great importance in relation to crimes involving sexual abuse of children and the fact that the offender is a paedophile or is unlikely to be deterred from further offending by a long sentence is not a ground for moderating the sentence.<sup>176</sup> The [Victorian] Court of Appeal<sup>177</sup> has stressed on numerous occasions that the sentence for such offences must provide such specific and general deterrence as may both dissuade the offender from reoffending and dissuade other deviates from similar offending.<sup>178</sup> The concept that an otherwise appropriate sentence for the commission of a serious sexual offence with a child should be moderated by the offender's paedophilic tendencies can have little if any part to play in the exercise of the sentencing judge's discretion.

The Victoria Sentencing Advisory Council has suggested that deterrence may be more relevant in relation to a class of offender whose actions are perhaps more premeditated or methodical (2009: 36):

Awareness of the maximum penalty may have more relevance as a deterrent for people who commit crimes against children under their care, supervision or authority. As such, offenders often choose particular professions or situations so that they are in a position to access and groom children, they are potentially more likely to be aware of the legal consequences of their actions.

The empirical evidence relating to deterrence shows that it is the certainty of detection and speed of prosecution rather than the severity of the sanctions that have the greatest effect (Sentencing Advisory Council, Victoria, 2011). Yet the likelihood of being detected, prosecuted and convicted for sexual offences is very low if not negligible (Sentencing Advisory Council, Victoria, 2009a).<sup>179</sup>

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175 *Sentencing Act 1991* (Vic), s 5(1)(b); *Crimes (Sentencing) Act 2005* (ACT), s 7(1)(b); *Crimes (Sentencing Procedure) Act 1999* (NSW), s 3A(b); *Sentencing Act* (NT), s 5(1)(c); *Penalties and Sentences Act 1992* (Qld), s 9(1)(c); *Criminal Law (Sentencing) Act 1988* (SA), s 10(i); *Sentencing Act 1997* (Tas), s 3(e)(i).

176 *Ryan* [2001] HCA 21; (2001)206 CLR 267; *DPP v OJA* [2007] VSCA 129; *WCB* [2010] VSCA 230.

177 *WCB* [2010] VSCA 230 at [41].

178 *Sposito* [1993] VicSC 306; *Wakime* [1997] 1 VR 242; *WEF* [1998] 2 VR 385; *DPP v VH* [2004] VSCA 180; (2004) 10 VR 234; *DPP v TDJ* [2009] VSCA 317; *DPP v MJ* [2000] VSCA 66 at [17]; *DPP v DJK* [2003] VSCA 109 at [26] *Di Nardo* [1998] 2 VR 493, 503; *DPP v OJA* [2007] VSCA 129 at [33].

179 See also Chapter 1: (attrition rates).

The courts are aware of the limited effect of deterrence, but feel compelled to act on the basis of its ostensible efficacy. In relation to CSA generally, courts have said that:<sup>180</sup>

Deterrence is an important part of sentencing for an offence such as this. Although reasons for the offending vary, and sometimes the offenders are persons who were themselves sexually abused as children, it seems clear that such offenders are not usually persons who are unable to control their sexual instincts. While acknowledging that the punishment of offenders is only one factor that may limit the incidence of this offence, the courts must proceed on the basis that punishment has a part to play in deterring offenders.

The majority of cases of CSA in institutional contexts are historical and demonstrate that, in these instances, the probability of detection was extremely low. Cases are reported decades after the offences occurred<sup>181</sup> and even then, the process of investigation, prosecution, trial and sentence is slow. The emphasis upon increasing statutory maximum penalties, or attempting to ensure that the sentences imposed are more severe than they may have been in the past, is misplaced unless the criminal justice response to individual and institutional offenders is more rapid and credible.

The need for a more severe sentence based on general deterrence may be partly determined by the prevalence of the offences for which deterrence is sought. Judicial observations regarding the need for deterrence in relation to CSA are generally made in the context of CSA in the general community and, in particular, in domestic contexts. In relation to these offences, there has been a growing awareness of their prevalence and harmful effect on victims. As the Northern Territory Court of Criminal Appeal stated:<sup>182</sup>

Every offence against a child is a serious offence. In 2004, the maximum penalty for the offences of which JO was convicted was increased from 10 to 14 years and sentencing courts must respond accordingly. Sexual assaults against children are abhorrent crimes which cause grave disquiet throughout the community. In recent years the community has come to recognise that these offences are far more prevalent than previously was thought to be the situation. The community has reached a more enlightened understanding of the nature of sexual crimes and the personal violation involved in all such crimes, including those previously regarded as relatively minor offences. The impacts of these types of crimes are now better recognised and understood, particularly the long-term effects upon victims who were children at the time of the offending.

However, it is uncertain whether the alleged increased prevalence of CSA is a reflection of its incidence or of reporting practices. It appears that it is the prevalence of the offences that are coming before the courts that is influencing sentencing practices, as Doyle CJ observed:<sup>183</sup>

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180 *Hitanaya* [2010] NTCCA 3 at [57] citing Doyle CJ in *D* [1997] SASC 6350 at [423].

181 See below p 97.

182 *JO* [2009] NTCCA 4 at [81]; see also *Hitanaya* [2010] NTCCA 3 at [56].

183 *D* [1997] SASC 6350; (1997) 69 SASR 413; see also *Hitanaya* [2010] NTCCA 3 at [55].

It appears that the sexual abuse of children by persons in a position of trust is quite widespread. It may not be occurring more often than it did in the past. It may well be that it is now being detected more often than it was. Be that as it may, the offences that are involved come before the courts with disturbing frequency. It is for those reasons that I consider that the court should increase, to a moderate degree, the level of penalty imposed for such offences.

Estimates of the prevalence of CSA in institutions are few and probably unreliable. If deterrence based on prevalence is a factor in sentencing, then an appropriate factual basis must be established.<sup>184</sup> If the offences were, in fact, historically prevalent, but are not presently so, then increasing a sentence on the ground of general deterrence may not be warranted.

Deterrence depends upon the communication of the sentence to the audience of likely offenders. The mere fact that a court has imposed a sentence does not mean that it will be brought to the attention of the public. Even when reported, it is only the highly unusual cases that are publicised because of the notoriety of the offender or because the sentence is either perceived to be very high or very low. In Victoria, the Court of Appeal has noted the role that reporting of offences should play<sup>185</sup>:

General deterrence will ordinarily occupy a prominent place in the instinctive synthesis in sentencing. But the underlying rationale for its application is that the community will become aware of the sentence imposed for the crime and that it will lead to a greater awareness by the community of the type of sentences imposed for that kind of criminal conduct. Usually, each offender is dealt with in sentencing upon the further assumption that, at the time the crime was committed, the offender was aware of the law and the consequences of its breach.

Obviously, the level of community awareness of the sentences consistently imposed for sexual offences will determine the extent to which those sentences can act as a deterrent to others in the community who are minded to commit similar offences. Regrettably, sexual offences against children, including incest, are amongst the range of commonly occurring crimes which are not generally reported or which receive little attention. Thus to return to our earlier proposition, if sentencing outcomes in these and other commonly committed crimes are not adequately made known to the public at large, general deterrence will lose its authority as a prime principle justifying the imposition of custodial and other punitive measures. When the community labours under the belief that sentences that are imposed are inadequate, a sense of injustice exists that damages the respect in which our criminal justice system is held. The public needs to be made more aware of the full extent of custodial sentences that are handed down on a regular basis in all levels of the legal system. For example, the community must be better informed as to the consistent imposition of custodial penalties that are imposed by all of the courts for offences such as home invasions, violence resulting in injury,

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184 *DPP v Janson* [2011] VSCA 19 at [34].

185 *WCB* [2010] VSCA 230 at [41] – [42].

trafficking in or cultivating drugs of addiction, sexual offences and more serious driving offences. The courts and the media must be able to utilise all technologies that are available so as to achieve a more comprehensive reporting of sentencing for all types of criminal conduct.

The extent to which specific deterrence is, or should be, a relevant factor is problematic in cases of historical CSA in institutional contexts. Where the offence is due to an abuse of power in a specific institutional context, rather than an underlying psychological disorder, then it is unlikely that the offender will reoffend once no longer in an institution (Martin, 1994: 30). However, where the offending is the product of some form of personal pathology that may manifest itself in criminal behaviour independent of context, then specific deterrence remains a relevant factor in sentencing.

Many of the offenders who have been brought to trial, many years after the offences have been committed, are elderly, have physical problems and are no longer working in the settings that conduced to their crimes. Some have successfully rehabilitated, some have not committed any further offences in the years between leaving their institutions and the time when they are charged. In such cases, specific deterrence may be a less relevant factor.

### **Community protection**

The courts commonly state that the protection of the community is the ultimate objective of the criminal law and that all the other purposes of sentencing may be subsumed under this heading. Community protection is specifically identified as one of the purposes of sentencing in most jurisdictions.<sup>186</sup>

Generally, the common law holds that a sentence intended to protect the community should not exceed that which is proportionate to the gravity of the offence.<sup>187</sup> Courts are conscious of their (in)ability to predict future behaviour and are wary of increasing their sentences on the basis of predictions of recidivism.

In its submission to the New South Wales Joint Select Committee on Sentencing of Child Sexual Assault Offenders (2014), the Australian and New Zealand Association for the Treatment of Sexual Abuse argued that sentencing should be based on risk assessment:

Decisions regarding sentencing of child sex offenders should be made based on an individual offender's needs and threat posed to the community, rather than adopting a universal approach that will not necessarily increase safety for the community nor provide effective outcomes for all offenders. The majority of sex offenders will not be assessed as high risk (Helmus and Hanson, 2009), and the needs of such low- or moderate-risk offenders are different from those who are assessed as high risk. Adopting a principle of deterrence through frequent use of incarceration (a 'tough on crime' approach) has been proven

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186 *Sentencing Act 1991* (Vic), s 5(1)(e); *Crimes (Sentencing) Act 2005* (ACT), s 7(1)(c); *Sentencing Act* (NT), s 5(1)(e); *Crimes (Sentencing Procedure) Act 1999* (NSW), s 3A(c); *Penalties and Sentences Act 1992* (Qld), s 3(b); s 9(1)(e); *Criminal Law (Sentencing) Act 1988* (SA), s 10(2)(a) – (e); *Sentencing Act 1997* (Tas), s 3(b).

187 *Veen (No 2)* [1988] HCA 14; *Muldrock* [2011] HCA 39.



ineffective (Seidler, 2010), and in some situations, may actually increase risk of recidivism (Smith, Goggin, and Gendreau, 2002).

Risk assessment of sex offenders is a specialised area, which requires extensive training and supervision. As such, only professionals with the relevant expertise should be utilised to conduct a risk assessment.

To date, no jurisdiction has approached the sentencing task in this manner, except when assessment of risk is one of the predicating factors in the making of a special order.

Statutory provisions relating to serious offenders, including sexual offenders, specifically identify the protection of the community as a factor in their sentencing, and in order to do so, allow sentencers to impose disproportionate sentences, indefinite sentences, supervision or detention orders, or to mandate certain parole periods.

### **Victoria**

Under the *Sentencing Act 1991* (Vic), s 6D, if the Supreme Court or the County Court in sentencing a serious offender for a relevant offence considers that a sentence of imprisonment is justified, the Court, in determining the length of that sentence (a) *must regard the protection of the community from the offender as the principal purpose for which the sentence is imposed*; and (b) may, in order to achieve that purpose, impose a sentence longer than that which is proportionate to the gravity of the offence considered in the light of its objective circumstances.

In Victoria, the effect of *Sentencing Act 1991* (Vic), s 6D(a) has been described as follows<sup>188</sup>:

Since protection of the community is always a relevant consideration in sentencing, the directive in s 6D(a) will ordinarily have little impact on the determination of the appropriate sentence. Its main purpose, we would think, is to make sure that sentencing judges give proper consideration to the question of community protection, and undertake the requisite risk assessment. Seemingly, the only circumstance in which compliance with the directive might directly affect sentence would be where protection of the community required a longer sentence but where mitigating factors called for a shorter sentence. In that circumstance, it would seem, s 6D(a) contemplates that the dictates of protection should take precedence.

### **South Australia**

Under the *Criminal Law (Sentencing) Act 1988* (SA), s 20B(3)(a) and (b), where a court convicts a person of a 'serious offence' and the person is liable, as a result of the conviction, to be the subject of a declaration that he or she is serious repeat offender, the court must consider whether to make such a declaration and *if of the opinion that the person's history of offending warrants*

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188 LD [2009] VSCA 311 at [27] (footnotes omitted).

*a particularly severe sentence in order to protect the community*—should make such a declaration. The consequence of such a declaration is that the sentence need not be proportional to the offence and any non-parole period fixed must be at least four-fifths the length of the sentence.<sup>189</sup>

Under the *Criminal Law (Sentencing) Act 1988* (SA), s 23(5), the Supreme Court, in deciding whether to declare that an offender is incapable or unwilling to control their sexual instincts, must regard the ‘*safety of the community*’ as the paramount consideration.<sup>190</sup> The safety of the community is also the paramount consideration when the Court has to decide whether to discharge the person from the order<sup>191</sup> or revoke a discharge order.<sup>192</sup>

### **Tasmania**

Under the *Sentencing Act 1997* (Tas), s 19(1), an offender who is convicted or brought up for sentence after being convicted may be declared to be a ‘dangerous criminal’ if they have been convicted for a crime involving violence or an element of violence, and has at least once been previously convicted for a crime involving violence or an element of violence, and is over 17 years of age and *the judge is of the opinion that the declaration is warranted for the protection of the community*.<sup>193</sup>

### **Queensland**

Under the *Penalties and Sentences Act 1992* (Qld), s 163(4)(a)–(e), a court, in deciding whether to impose an indefinite prison sentence, must determine whether the offender is a serious danger to the community. In so doing the court must have regard to whether the nature of the offence is exceptional, the offender’s antecedents, age and character, any medical, psychiatric, prison or other relevant report, the risk of serious harm to members of the community if an indefinite sentence were not imposed, *and the need to protect members of the community from the risk of serious harm*.<sup>194</sup>

Under the *Dangerous Prisoners (Sexual Offences) Act 2003* (Qld), s 13, a person who is currently serving a custodial sentence for a serious sex offence<sup>195</sup> may be the subject of an Attorney-General’s application to the Supreme Court for a detention or supervision order. Before making such an order the Court must be satisfied that the offender is a serious danger to the community in the absence of such an order.<sup>196</sup> In deciding whether to make an order *the paramount consideration is the need to ensure adequate protection of*

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189 *Criminal Law (Sentencing) Act 1988* (SA), s 20BA(1)(a) and (b).

190 See below Chapter 6.

191 *Criminal Law (Sentencing) Act 1988* (SA), s 23A(3).

192 *Criminal Law (Sentencing) Act 1988* (SA), Schedule 2, 1(6).

193 See below Chapter 6.

194 See below Chapter 6.

195 Defined to include an offence of a sexual nature committed against children, *Dangerous Prisoners (Sexual Offences) Act 2003* (Qld), Schedule, Dictionary.

196 *Dangerous Prisoners (Sexual Offences) Act 2003* (Qld), s 13(1).

*the community.*<sup>197</sup>

### **Northern Territory**

Under the *Sentencing Act* (NT), s 65(8), a court, in deciding whether to impose an indefinite sentence of imprisonment, must be satisfied that the offender is a serious danger to the community because of the offender's antecedents, character, age, health or mental condition, or the severity of the violent offence or any special circumstances. In determining whether the offender is a serious danger to the community the court must have regard to whether the offence is exceptional, the offender's antecedents, age and character, any medical, psychiatric, prison or other relevant report in relation to the offender, the risk of serious physical harm to members of the community if an indefinite sentence were not imposed, and *the need to protect members of the community from the risk of serious physical harm.*<sup>198</sup>

### **Western Australia**

Under the *Dangerous Sexual Offenders Act 2006* (WA), s 7(1), a person who is under a sentence of imprisonment, wholly or in part for a serious sexual offence<sup>199</sup> may be the subject of an application by the DPP or the Attorney-General in the Supreme Court for a continuing detention order or a supervision order. Before making such an order, the Court must be satisfied that there is an unacceptable risk that, if the person were not subject to such an order, the person would commit a serious sexual offence. *In deciding whether to make an order the paramount consideration is the need to ensure adequate protection of the community.*<sup>200</sup>

### **Rehabilitation**

Rehabilitation or reformation is recognised as an aim of sentencing at common law and by statute.<sup>201</sup> It aims to reduce crime by addressing the underlying causes of the offending behaviour, through treatment, counselling, education, training or other means. It is premised on a belief that the offending behaviour is the product of individual pathology rather than on broader social or environmental factors. Rehabilitation that has already occurred and the prospects of rehabilitation are generally considered to be mitigating factors but not always so in relation to historical CSA.

The possible tensions between the principles of retribution, deterrence and rehabilitation were demonstrated in the Victorian case of *Dunne*.<sup>202</sup> In this case, the

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197 *Dangerous Prisoners (Sexual Offences) Act 2003* (Qld), s 13(6)(a).

198 *Sentencing Act* (NT), s 65(9); see below Chapter 6.

199 Serious sexual offence is defined to include a wide range of offences under Chapter XXXI of the *Criminal Code* (WA); see *Evidence Act 1906* (WA), s 106A; *Dangerous Sexual Offenders Act 2006* (WA), s 3(1).

200 *Dangerous Sexual Offenders Act 2006* (WA), s 17(2); see below Chapter 6.

201 *Sentencing Act 1991* (Vic), s 5(1)(c); *Crimes (Sentencing) Act 2005* (ACT), s 7(1)(d); *Crimes (Sentencing Procedure) Act 1999* (NSW), s 3A(d); *Sentencing Act* (NT), s 5(1)(b); *Penalties and Sentences Act 1992* (Qld), s 9(1)(b); *Criminal Law (Sentencing) Act 1988* (SA), s 10(m); *Sentencing Act 1997* (Tas), s 3(e)(ii).

202 [2003] VSCA 150.

appellant had pleaded guilty to 30 counts of indecent assault and one count of taking part in an act of sexual penetration against a young male over a three-year period some 15 years or so previously. The appellant was a teacher at the religious school where the victim was a pupil. It was submitted on his behalf that there was evidence of rehabilitation, both achieved and prospective, that he had not offended for 15 years, had pleaded guilty, had expressed genuine remorse and had a stable marriage with three children. There was evidence from an eminent forensic psychologist that there was a low risk of offending, though he still required some intervention and treatment.

An argument was advanced on behalf of the appellant that if, under *Sentencing Act 1991* (Vic), 6D(a), the protection of the community from the offender was required to be treated as the principal purpose of sentencing, then that could best be achieved, in this case, by the rehabilitation of the offender. Specific deterrence should play a lesser role. The Court of Appeal rejected this argument on the grounds that while rehabilitation and specific deterrence were relevant factors, they were not the only factors that had to be taken into account in such cases:<sup>203</sup>

The first specific consideration is the argument based on s.6D(a). That argument, if carried to its logical extreme, would result in offenders with good prospective or achieved rehabilitation not being incarcerated at all or at any rate (since the provision relates to imprisonment) for a very short time. Counsel disavowed any such result. In my opinion, s.6D(a) does not in a case such as the present exclude the sentencing purposes that would have been particularly applicable had the provision not been passed, namely, denunciation, general deterrence and just punishment. Counsel appearing for the appellant below had acknowledged that denunciation, just punishment and *general* deterrence had a role to play, and counsel for the appellant before us recognised that, notwithstanding s.6D(a), *general* deterrence had a part to play in the sentencing of the appellant. This must be so, for s.6D pre-supposes a determination under s.5 (which, importantly for present purposes, includes the list of sentencing purposes) that imprisonment is justified and sets out provisions directed to the determination of the length of imprisonment. Further, paragraph (a) of the section makes the protection of the community from the offender the principal, not the sole, purpose for which the sentence is imposed ... As to the submission that his Honour had downgraded rehabilitation whereas s.6D(a) here meant that far greater weight should have been given to it, I do not agree. Imprisonment is a way of protecting the community from an offender who has achieved considerable, but not complete, rehabilitation, and the gravity of these offences, with the breach of trust and abuse of power over a three-year period that they involved, meant that condign punishment in the form of a substantial term of imprisonment was required.

Even in the context of orders whose primary purpose is the protection of the community, such as supervision and detention orders, rehabilitation remains a

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203 *Dunne* [2003] VSCA 150 at [24] per Batt JA.

consideration recognised by statute<sup>204</sup> and the Victoria Sentencing Advisory Council has observed that (Sentencing Advisory Council, Victoria, 2007a: 7; Sentencing Council, New South Wales, 2008, Vol 3: 8):

... the state has a responsibility to manage offenders under these orders in a way that provides opportunities for offenders to access appropriate treatment during their time on the order, rather than simply detaining them or monitoring them for public protection.

### **Victims, restoration and reparation**

Only two Australian jurisdictions expressly provide in their sentencing legislation that one of the purposes of sentencing is to recognise 'the harm done to the victim of the crime and the community'<sup>205</sup>, although most do contain provisions that require a court to take into account the harm caused to the victim or the effect of the crime upon them.

Every jurisdiction has reparation provisions that empower them to make restitution or compensation for injury or loss (see Royal Commission, 2014b).

### **Effectiveness**

The complex interaction between the various and sometimes competing purposes of sentencing, together with use of the sentencing methodology of instinctive synthesis which renders sentencing outcomes somewhat opaque, makes it difficult to determine whether the sentencing purposes and principles discussed above significantly change sentencers' behaviour or have the effect of deterring criminals or protecting the community in themselves.

Despite legislatures' attempts to attenuate the principle of proportionality, Australian courts appear to hold firmly to their fundamental place in approaching the sentencing task. However, it appears that the principle is less influential in the application of post-sentence dispositions, which are not strictly considered to be sentencing orders.<sup>206</sup> As well, despite empirical evidence to the contrary, legislature and the courts maintain a strong belief in the efficacy of individual sanctions as deterrents.

Finally, despite courts' beliefs that they are imposing just, appropriate and proportionate sentences in cases of CSA, public confidence in the courts, at least as portrayed in the media, is lacking<sup>207</sup> and, as will be discussed in Chapter 6, legislatures across the country have acted to restrict judicial discretion, increase sentencing standards and the length of time required to be served in custody, create new orders to supervise and detain offenders after the expiration of their sentences and restrict

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204 *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic), s 2; *Crimes (High Risk Offenders) Act 2006* (NSW), s 3; *Dangerous Sexual Offenders Act 2006* (WA), s 4; *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), s 3; see also Sentencing Council, New South Wales, 2008, Vol 3: 7.

205 *Crimes (Sentencing) Act 2005* (ACT), s 7(1)(g); *Sentencing Act 1997* (Tas), s 3(h).

206 See Chapter 6.

207 Cf discussion in Chapter 6.

their freedom of movement. Changes to sentencing principles alone have not been sufficient to respond to CSA.

## Chapter 3

# Sentencing Factors

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### Introduction

This chapter examines the main factors that courts consider in sentencing. These generally relate to the harm caused by the offence and the culpability of the offender. There are hundreds of factors that may be relevant to a sentence but in this chapter, particular attention is paid to the factors relevant to CSA offences and, where possible, factors relevant to the commission of such offences within an institutional context are examined. They are few in number.

The principal factors examined in this chapter are those relating to the offence, the offender, how the offender responded to the charges, the effect of the crime on the victim, the effect of the sanction on the offender or others and, finally, the operation of the criminal justice system itself.<sup>208</sup>

### The Nature of the Crime

Generally, '[a]n assessment of the gravity of the crime forms the foundation of the sentencing process, against which other factors that affect the sentence must then be considered. The more serious the offence, the less weight may be given to personal mitigating factors' (Freiberg, 2014: 269).

### Maximum penalty

The legislative view of the gravity of an offence is primarily expressed through the statutory maximum penalty.<sup>209</sup> Statutory maximum penalties reflect the level of communal abhorrence at an offence, as well as providing a guide for sentencers as to how to assess the gravity of that offence (Freiberg, 2014: 270).

The maximum penalty represents the legislature's assessment of the seriousness of the offence and for this reason provides a sentencing yardstick.<sup>210</sup> An increase in the maximum penalty for an offence indicates that sentences for that offence should be increased.<sup>211</sup>

Statutory maximum penalties are also designed to deter potential offenders. There is no evidence as to either the general or specific deterrent effect of a maximum penalty, nor whether offenders take into account either the statutory maximum penalty or the sentencing practices of the courts when considering whether to commit an offence

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208 Parts of this chapter are drawn from Freiberg, 2014: Chapters 3 to 6.

209 *Sentencing Act 1991* (Vic), s 5(2)(a); *Sentencing Act* (NT), s 5(2)(a); *Penalties and Sentences Act 1992* (Qld), s 9(2)(b); *Sentencing Act 1995* (WA), s 6(2)(a).

210 *Elias* (2013) 248 CLR 483 at [27]; *Gilson* (1991) 172 CLR 353 at 364; *Markarian* (2005) 228 CLR 357 at [31].

211 *Muldrock* (2011) 244 CLR 120 at [31].

(Sentencing Advisory Council, Victoria, 2009: 35). The maximum penalty also places a legislatively defined ceiling on the amount of punishment that may be imposed upon an offender (Sentencing Advisory Council, Victoria, 2009: 33), although increasingly, the use of indefinite sentences and post-sentence supervision and detention orders has weakened this aspect of what has been termed the principle of legality (Sentencing Advisory Council, Victoria, 2009: 34).

Over the years, community attitudes to offences have changed and these changes are reflected in alterations to statutory maximum penalties, as well as in the creation of new offences and new forms of sanctions or orders, mandatory or presumptive sentences, or mandatory or presumptive minimum sentences.<sup>212</sup> The Commission has charted the history of offences relating to CSA and their maximum penalties (Australian Institute of Criminology, 2013). In *MJR*, Mason P noted that the patterns for sentences had increased and that this:<sup>213</sup>

... has come about in response to greater understanding about the long-term effects of child sexual abuse and incest; as well as by a considered judicial response to changing community attitudes to these crimes.

Similarly, Spigelman CJ observed that CSA offences have:<sup>214</sup>

... come to be regarded as requiring increased sentences ... by reason of a change of community attitudes [or] ... a result of changed objective circumstances, eg an increased prevalence of the offence.

There is a question whether increasing already high maximum penalties makes a significant difference to sentencing practices. Existing maxima are, in most cases, more than sufficient to deal with even the most serious offending, and in cases where there is multiple offending, the theoretical maxima for the combined offences are more than adequate (Sentencing Advisory Council, Victoria, 2009: 41; Victoria, Family and Community Development Committee, 2013: 26). Political responses to public concerns about CSA (and indeed other offences) frequently take the form of ever increasing statutory maxima, even in the face of evidence that existing maxima are rarely, if ever, imposed.

Brignell and Donnelly (2015) have compared statutory maximum penalties for CSA offences across Australia. Table 2 of that study, reproduced below (as Table 1), sets out the current statutory maximum penalties in each jurisdiction where the assault of the child involves an act of sexual penetration.

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212 See below Chapter 6.

213 (2002) 54 NSWLR 368 at [57].

214 *Ibid* at [11].



**Table 1: Statutory maximum penalties for child sexual assault offences**

<b>Jurisdiction</b>	<b>Statutory Maximum</b>
<b>New South Wales – <i>Crimes Act 1900</i></b>	
s 66A(1) (Child under 10) <sup>215</sup>	25 years
s 66A(2) (Child under 10 aggravated)	Life
s 66C(1) (Child between 10 and 14)	16 years
s 66C(2) (Child between 10 and 14 aggravated)	20 years
s 66C(3) (Child between 14 and 16)	10 years

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<sup>215</sup>

The *Crimes Legislation Amendment (Child Sex Offences) Act 2015* (NSW) (to commence on assent) amends the *Crimes Act 1900*, s 66A and *Crimes (Sentencing Procedure) Act 1999* (NSW), Pt 4, Div 1A. It replaces existing offence under s 66A of unlawful sexual intercourse with a child under 10 by removing the distinction between basic and aggravated offences to create one basic offence with a maximum penalty of life imprisonment. It also introduces standard non-parole periods for 13 additional child sex offences.

s 66C(4) (Child between 14 and 16 aggravated) 12 years

s 61J (Aggravated sexual assault where aggravating feature is victim under 16) 20 years

**Victoria – Crimes Act 1958**

s 45(2)(a) (Child under 10, repealed 16 March 2010) 25 years

s 45(2)(a)<sup>216</sup> (Child under 12) 25 years

s 45(2)(c) (Child between 12 and 16) 10 years

s 45(2)(b) (Child between 12 and 16 and under care, supervision or authority of accused) 15 years

s 48 (Child 16 or 17) 10 years

**Queensland – Criminal Code 1899**

s 215(3) (Child under 12) Life

s 215(2) (Child under 16) 14 years

s 215(4) (Child under 16 and under care) Life

**Western Australia – Criminal Code Act 1913**

s 320(2) (Child under 13) 20 years

s 321(2), (7)(a) (Child between 13 and 16) 14 years

s 321(2), (7)(b) (Child between 13 and 16 under care) 20 years

s 321(2), (7)(c) (Offender under 18 and child not under care) 7 years

s 322 (Child over 16 under authority) 10 years

**South Australia – Criminal Law Consolidation Act 1935**

s 49(2) (Unlawful sexual intercourse – under 17) 10 years

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216 Sexual penetration for the purposes of s 45 *Crimes Act 1958* (Vic) includes oral, anal and vaginal penetration: s 35(1).

s 49(1) (Unlawful sexual intercourse – under 14)	Life
s 49(5) (Child under 18 under care/authority)	10 years

New South Wales, Queensland and South Australia have a maximum penalty of life imprisonment for certain sexual offences against children in the lowest age category.<sup>217</sup> Table 1 shows that the younger the child the higher the maximum penalty. Further, some jurisdictions such as New South Wales choose to create several categories based upon age and aggravating circumstances. However, in most jurisdictions, sentencing levels fall far below the statutory maxima.<sup>218</sup>

In some instances, a more effective response than increasing the statutory maximum penalties for offences against children might be to change the thresholds for the application of different maximum penalties. In its report on maximum penalties for offences relating to sexual penetration of a child under 16, the Victorian Sentencing Advisory Council recommended that, rather than changing the already high maximum penalty of 25 years for an offence committed against a child under 10, it would better protect children if the age at which this offence applied were raised to 12 years. (Sentencing Advisory Council, Victoria, 2009). The Victorian Parliament subsequently acted on recommendation.<sup>219</sup>

Increasing the statutory maximum penalty is often the first resort in response to heightened communal concern about an offence following the commission of a particularly egregious crime, or an inadequate sentence, or where there has been intense and sustained media interest in an offence. Although it is expected that current sentencing practices will change to reflect new statutory maxima, they rarely change in proportion to the increase in the maximum penalties, and there is often a considerable gap between the maximum penalty imposed and current statutory maxima (Freiberg, 2014: 271). Some members of the community perceive this response gap or response lag as judicial unresponsiveness to, or a lack of cooperation with, the legislative arm of government, and often call for mandatory or presumptive sentences in order to restrict or remove judicial discretion.

One option that has been considered in relation to the sentencing of recidivist child sexual assault offenders, and in relation to repeat offenders generally, is to increase the maximum penalties for each subsequent offence. Such provisions were common in legislation in previous decades, but have become less so in modern times<sup>220</sup> as it is considered that the high maximum penalties available for serious offences, and the possible cumulative effect of multiple maxima for several offences, provides sufficient scope for sentencers to achieve their sentencing objectives.

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217 Aggravated sexual assault of a child under 10 years (*Crimes Act 1900* (NSW), s 66A(2)); carnal knowledge of a child under 12 (*Criminal Code* (Qld), s 215(3)); sexual intercourse with a child under 14 years (*Criminal Law Consolidation Act 1935* (SA), s 49(1)).

218 See Chapter 4.

219 See *Crimes Act 1958* (Vic), s 45(2)(a).

220 See example, *Crimes Act 1900* (ACT), s 66(1) (offence of using the internet etc to deprave young people: first offence seven years' imprisonment; second or subsequent offence 10 years' imprisonment). Today, they are generally used in the road traffic context.

The New South Wales Sentencing Council has rejected suggestions that providing graduated sentences would be a useful response to repeat sex offences on the grounds that the prior record of a sex offender can already be taken into account in sentencing, subject to the principles of proportionality as articulated in *Veen (No 2)*.<sup>221</sup> In addition, prior offending can provide a basis for applications for extended supervision or detention orders, or indefinite sentences, where these are available (Sentencing Council, New South Wales, 2008, Vol 3: 214).

The statutory maximum penalties for offences relating to CSA make no distinction between various forms of penetration, including penile penetration, digital penetration and other acts of sexual intercourse such as fellatio and cunnilingus. A single offence such as rape may cover various forms of conduct, and in this context, various forms of bodily penetration. This is especially important given that the offence of rape is commonly utilised in child sexual assault prosecutions in Queensland.<sup>222</sup> In *Ibbs*<sup>223</sup>, the High Court rejected the argument that each form of rape should be treated as equally heinous because it was punishable by the same maximum penalty. It held that 'when an offence is defined to include any of several categories of conduct, the heinousness of the conduct in a particular case depends not on the statute defining the offence but on the facts of the case'.<sup>224</sup>

The courts have continued to grapple with the issue of how to treat the relative seriousness of acts that constitute sexual intercourse.<sup>225</sup> Earlier cases suggested that there was a hierarchy of acts<sup>226</sup>, but there is a distinct move away from focusing on the specific act. Digital penetration was generally regarded as less serious than penile penetration, particularly penile-vaginal penetration (Wright, 2007: 88).<sup>227</sup> However, such an observation is not to be treated as a 'proposition of law' and not all acts of penile penetration will necessarily be worse than digital penetration.<sup>228</sup> Ultimately, the objective seriousness of the offence will depend upon all the facts and circumstances<sup>229</sup>, including the duration of the offence and the kind of act committed.<sup>230</sup> The type of intercourse is simply one factor. The court must take into account all the surrounding circumstances of the offence, including the breach of trust and the age of the child. Penile penetration of a child is still regarded as very serious

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221 (1988) 164 CLR 465.

222 See Chapter 4.

223 [1987] HCA 46; (1987) 163 CLR 447. In *Schubert* [1999] VSCA 25 and *Brown* [2002] VSCA 207; (2002) 5 VR 463, the Court has rejected the suggestion that digital rape falls at the lower end of the scale of seriousness and is any less serious than penile rape. The seriousness of both will depend upon the particular circumstances of the case.

224 *Ibbs* [1987] HCA 46 at [4]; (1987) 163 CLR 447.

225 *Crimes Act 1900* (NSW), s 61H.

226 *O'Donnell* (unrep) NSWCCA 1/7/94; see also *Coffey* [1999] VSCA 146; [1999] VR 146 at [29] where Buchanan JA in the Victorian Court of Appeal stated that the offences in that case were not the worst examples of the crimes, for, as the sentencing judge had observed, 'there was no penetration of the body with the exception of very limited and fleeting digital access gained to the anus' alleged by two of the complainants.

227 *MH* [2011] NSWCCA 230 at [37]. The court disapproved the statement of Tobias JA in *Hibberd* (2009) 194 A Crim R 1 at [56] ('the time has come for this court to depart from any prima facie assumption ... that digital sexual intercourse is to be regarded as generally less serious than penile sexual intercourse ...').

228 *MH* [2011] NSWCCA 230 at [39].

229 *RJA* [2014] NSWCCA 137 at [33].

230 *Daley* [2010] NSWCCA 223.

conduct relative to digital penetration.<sup>231</sup> Although it may be useful for a court to draw distinctions between acts constituting sexual penetration, it is wrong to assume that the effect of the crime on the victim somehow corresponds to the type of act committed. The courts have come to accept that even a low level of abuse can lead to lasting and dire consequences for the victim.<sup>232</sup>

In their empirical analysis of sentencing patterns in New South Wales, Hazlitt et al. found that (2004: Para 5.9.1):

... sections involving only penile penetration attract longer sentences than offences encompassing a broader range of offending behaviour. Specifically, the offence of buggery under [*Crimes Act 1900* (NSW), 79 now repealed] was dealt with the most severely – all nine offenders were given a full-time custodial sentence with a median term of sentence of seven years, ranging from two and a half years to the statutory maximum of 14 years. This was followed by offences involving penile vaginal or penile anal penetration (82.8 per cent imprisonment rate with a median of 57 months) and offences involving penile anal penetration or fellatio (86.7 per cent imprisonment rate with a median of 51 months).

### **Culpability and degree of responsibility**

A sentencer is required to consider the offender's culpability and degree of responsibility for the offence<sup>233</sup>, which will include such matters as the degree of planning, or the method used to commit the offence, the offender's motive, their degree of participation and their mental state, among others. Some of the factors relevant to the sentencing of offenders convicted of CSA in an institutional context are discussed below.

### **Effect of mental disorder**

An offender's culpability may be diminished due to the effect of a mental disorder from which they may be suffering. There is no evidence that persons convicted of CSA are necessarily suffering a mental illness, or that the type of offending is the result of an individual psychopathology.

Culpability may be diminished due to an offender's intellectual disability. In *Muldrock*<sup>234</sup>, the offender committed the offence of sexual intercourse (forced fellatio) with a child under 10 years of age under *Crimes Act 1900* (NSW), s 66A. The offence carried a 15-year standard non-parole period. The offender had a significant cognitive impairment or, as described by the High Court, he was 'mentally retarded'. He had been subject to homosexual sexual abuse as a child and he had a prior record for an

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231 *King* [2009] NSWCCA 117 at [36].

232 *Gaven* [2014] NSWDC 189 at [11]; *Harmata* [2013] NSWDC 214 at [63].

233 See example, *Sentencing Act 1991* (Vic), s 5(2)(d); *Sentencing Act* (NT), s 5(2)(c); *Penalties and Sentences Act 1992* (Qld), s 9(2)(d).

234 *Muldrock* (2011) 244 CLR 120 at [54].

offence of indecent treatment of a child less than 16 years. The High Court stated that:

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The principle is well recognised. It applies in sentencing offenders suffering from mental illness, and those with an intellectual handicap. A question will often arise as to the causal relation, if any, between an offender's mental illness and the commission of the offence. Such a question is less likely to arise in sentencing a mentally retarded offender because the lack of capacity to reason, as an ordinary person might, as to the wrongfulness of the conduct will, in most cases, substantially lessen the offender's moral culpability for the offence. The retributive effect and denunciatory aspect of a sentence that is appropriate to a person of ordinary capacity will often be inappropriate to the situation of a mentally retarded offender and to the needs of the community.

There is no evidence that a significant number of institutional CSA offenders suffered from a recognised mental illness. The definition of mental disorder does not include paedophilia, which is not regarded as a psychiatric illness.<sup>236</sup> However, there is a fine line between mental disorder or abnormality and lack of control (Freiberg, 2014: 287).<sup>237</sup>

If an offender does suffer from a mental disorder, this can be taken into account in sentencing in a number of ways that have been encapsulated by the Victorian Court of Appeal in *Verdins*:<sup>238</sup>

1. The condition may reduce the moral culpability of the offending conduct, as distinct from the offender's legal responsibility. Where that is so, the condition affects the punishment that is just in all the circumstances, and denunciation is less likely to be a relevant sentencing objective.<sup>239</sup>
2. The condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.
3. Whether general deterrence should be moderated or eliminated as a sentencing consideration depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both.<sup>240</sup>
4. Whether specific deterrence should be moderated or eliminated as a sentencing consideration likewise depends upon the nature and severity

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235 *Muldrock* (2011) 244 CLR 120 at [54].

236 *Ryan* [2001] HCA 21; (2001) 206 CLR 267 at [4] per McHugh J; cf Kirby J at [136] (if serial offences manifest a common underlying condition such as a 'compulsive sexual syndrome', it might be arguably appropriate to take that condition into account as reducing moral blameworthiness); see also *DPP v EB* [2008] VSCA 127 (psychosexual disorders may not reduce moral culpability).

237 *Steels* (1987) 24 A Crim R 201 (offender suffering from repeated urge or compulsion towards deviant sexual behaviour not considered to be mentally disordered); *Arnold* (1991) 56 A Crim R 63, 71–72 (sexual offender with psychological disturbance short of psychiatric abnormality).

238 [2007] VSCA 102. Cases to a similar effect in other jurisdictions are *Engert* (1995) 84 A Crim R 67; *Yarwood* [2011] QCA 367; *Fahda* [1999] NSWCCA 267 at [40]–[48]; *Lauritsen* [2000] WASCA 203 at [43]–[51]; *Harb* [2001] NSWCCA 249 at [35]–[45]; *Israil* [2002] NSWCCA 255; *Hemsley* [2004] NSWCCA 228 at [33]–[36]; *Courtney* [2007] NSWCCA 195 at [14]–[18]; *Henry* [2007] NSWCCA 90 at [28]; *DPP (Cth) v De La Rosa* [2010] NSWCCA 194; (2010) 79 NSWLR 1 at [177] per McClellan CJ at CL; *Adzioski* [2013] NSWCCA 69; *Startup* [2010] TASSCCA 5.

239 *Muldrock* (2011) 244 CLR 120.

240 See also *Muldrock* (2011) 244 CLR 120 at [54].

of the symptoms of the condition as exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of the sentence or both.

5. The existence of the condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health.
6. Where there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health, this will be a factor tending to mitigate punishment.

### **Prior sexual abuse**

In some cases an offender may argue that their culpability has been reduced because they have been the victim of sexual assault themselves. If it is established that a CSA offender was sexually abused as a child, and that the history of abuse has contributed to the offender's own criminality, this can be taken into account by a sentencing judge as a factor in mitigation of penalty.<sup>241</sup> However, while it is appropriate to take such a circumstance into account, it cannot be regarded as an excuse, notwithstanding the fact that such a link may aid in explaining the reason why the offender committed the offence.<sup>242</sup>

The weight to be given to this circumstance will depend very much on the facts of the individual case and will be subject to wide discretion of the sentencing judge.<sup>243</sup> It will usually only reduce the offender's moral culpability for the acts, notwithstanding that it may also be relevant to the offender's prospects of rehabilitation. In *Cunningham*<sup>244</sup>, the court held that the applicant's history of sexual abuse did not entitle him to mitigation because the psychiatric evidence did not go so far as to suggest that the abuse contributed to his paedophilia or the offences. Furthermore, the offences were committed in breach of a bond for similar prior offences. Similarly, in *Dousha*<sup>245</sup>, the applicant conceded that there was no direct evidence that the single instance of sexual abuse he suffered as a child had in any way contributed to his offending. Indeed, there was evidence to the contrary, as a psychologist who assessed the applicant opined that the incident did not contribute to the applicant's offending. The court held at [47] that '[i]n the absence of any causal connection of that kind (or the issue having any bearing upon the applicant's prospects of rehabilitation)', the incident was not relevant to the sentencing discretion.

### **Vow of celibacy**

A vow of celibacy is not considered a matter of mitigation. The judge in *Fuller*<sup>246</sup> erroneously allowed his personal views on the obligations of Roman Catholic priests to affect the sentencing process. The Court held that the judge's remarks from the

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241 *AGR* (unrep, 24/7/98, NSWCCA) at 13.

242 *Lett* (unrep, 27/3/95, NSWCCA) per Hunt CJ at CL at [5]; *Reynolds* (unrep, 7/12/98, NSWCCA) per Hulme J.

243 *AGR* (unrep, 24/7/98, NSWCCA) at [5].

244 [2006] NSWCCA 176 at [67].

245 [2008] NSWCCA 263 at [47].

246 [2010] NSWCCA 192 at [42].

Bench during proceedings that the vow of chastity by priests was a ‘cruel requirement’ were unnecessary and inappropriate. Although these observations were not repeated in his remarks on sentence, the judge commented that the respondent had the ‘added burden of a vow of celibacy’, and these sentiments would have found their way into his reasoning with respect to the appropriate sentence.

The Catholic Church’s Truth, Justice and Healing Council has stated that ‘obligatory celibacy may also have contributed to abuse in some circumstances, but the courts have not accepted this presumed causal connection (Truth, Justice and Healing Council, 2014: 23).

### **Method of commission: grooming**

The gravity of the crime is greater if it is carefully and deliberately planned and executed. Offences committed in an institutional context are rarely spontaneous or impulsive. ‘The term “predatory” has been used to describe behaviour that involves some degree of premeditation, particularly in the context of sexual offences or where the victim is vulnerable or where there is a relationship of trust (Freiberg, 2014: 313).<sup>247</sup>

In the context of CSA, such predatory behaviour has been referred to as ‘grooming’ which may involve becoming friendly with the child’s family, paying money or giving gifts and holidays, providing alcohol or drugs or pornographic materials – not only in return for involvement in the offence but for the victim’s silence.<sup>248</sup> Institutions may contribute to grooming if they lack proper procedures and fail to provide sufficient oversight of potential offenders (Royal Commission, 2014, Vol 1: 124; Victoria, Family and Community Development Committee, 2013: Chapter 22).

Some jurisdictions have made it an offence to groom for sexual conduct with a child under the age of 16.

### **Commonwealth**

Under the *Criminal Code 1995* (Cth), s 272.15, it is an offence to groom a child to engage in sexual activity outside Australia.<sup>249</sup> The gravamen of the offence is conduct by an adult directed at a child under 16 years, undertaken with the intent of encouraging, enticing, recruiting or inducing (whether by threats, promises or otherwise) that child to engage in sexual activity. Sexual activity is defined in s 474.28(11) to include ‘any’ activity of a sexual or indecent nature and need not involve physical contact between people.<sup>250</sup>

### **Victoria**

Under the *Crimes Act 1958* (Vic), s 49B, it is an offence punishable by a maximum of 10 years’ imprisonment for a person over the age of 18 years to communicate, by words or conduct, with a child under the age of 16 years or

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247 *Scott* [2009] VSCA 20 at [96] per Neave JA; (2009) 22 VR 41.

248 *Beyer* [2011] VSCA 15 at [12].

249 *Director of Public Prosecutions (Cth) v FM* [2013] VSCA 129.

250 *Tector* [2008] NSWCCA 151 at [83].



a person under whose care, supervision or authority<sup>251</sup> (whether or not a response is made to the communication) with the intention of facilitating the child's engagement in or involvement in a sexual offence with that person or another person who is of or over the age of 18 years.

### **Queensland**

Under the *Criminal Code* (Qld), s 218A, it is an offence for an adult to engage in any conduct in relation to a person under the age of 16 years, or a person the adult believes is under the age of 16 years, with intent to (a) facilitate the procurement of the person to engage in a sexual act, either in Queensland or elsewhere; or (b) expose, without legitimate reason, the person to any indecent matter, either in Queensland or elsewhere.

### **New South Wales**

Under the *Crimes Act 1900* (NSW), s 66EB, it is an offence to procure or groom a child under 16 for unlawful sexual activity.

### **Prevalence**

The prevalence of a crime is a factor that may be taken into account in considering the gravity of the offence. Prevalence may justify a heavier sentence on the basis of the need for general deterrence (Freiberg, 2014: 164 and 337).

Determining the prevalence of CSA generally, and CSA in institutions in particular, is difficult, and it has been argued that if sentences are to be increased on that account a proper factual basis must be established (Freiberg, 2014: 164). Although there is a widespread belief that CSA has increased, there is a lack of accurate data about its prevalence and incidence (Victoria, Family and Community Development Committee, 2013: 1; Royal Commission, 2014, Vol 1: 99). The Commission has ordered a paper on the prevalence and incidence of CSA in institutions. Parkinson cites Australian evidence of offending rates for CSA of between 3.7 per cent and 5.41 per cent of Catholic priests, with the Commission, based on its work, estimating higher rates for members of religious orders than for diocesan priests (Parkinson, 2014: 120). Evidence, such as there is, from other jurisdictions indicates that CSA in religious institutions has received a great deal more attention in recent years as a result of media stories and government inquiries that have encouraged victims who had previously not reported their crimes to come forward (Fogler et al., 2008: 330). As at 24 April 2015, the Commission had received 21,711 calls, 10,114 letters and emails and had held 3,167 private sessions with people who have come forward as a result of its work.

Should a heavier sentence be imposed on an offender presently being sentenced for an offence committed in the distant past for general deterrent purposes if there is

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251 For the purposes of this provision, a person who has a child under his or her care, supervision or authority includes, inter alia, a child's teacher, a religious official or spiritual leader (however described and including a lay member) who provides religious care or religious instruction to the child; the child's employer; the child's sports coach and a person employed in, or providing services in, a remand centre, youth residential centre, youth justice centre or prison, who is acting in the course of his or her duty in respect of the child, *Crimes Act 1958* (Vic), s 49B(3).

evidence that its incidence has declined, though at the time of sentencing, its reporting, and the number of trials, has increased? Parkinson has suggested that the incidence of CSA needs to be distinguished from its disclosure, and contends that over the last 15 to 20 years there has been a decline in CSA in churches in Australia due to the effectiveness of child protection policies and educational programs, even though the propensity to commit such offences may be the same (Parkinson, 2014: 125). Cahill assumes that there has been a decline in clerical CSA and writes (2012):

So it is important to ask: why has there been a decline in clerical child sex abuse since the 1980s? ... To me there are eight reasons for the decline: the social visibility given to the issue since about 1983; the better child protection mechanisms that we have in place; the greater vigilance of Catholic parents and church workers; the lessening number of priests over the past four decades; the resignation of many priests from the clerical life; the almost total collapse of the altar boy system; the closure of almost all Catholic boarding schools; and the lessened interaction of Catholic priests with their Catholic schools.

Parkinson adds (2014: 126):

To this might be added that in recent years in Australia the number of religious brothers teaching in all schools, boarding and day schools, has declined as religious communities have aged and not been replaced by younger members. Furthermore, residential children's homes and facilities for troubled youth, once quite common, have all but disappeared.

If there has, in fact, been a decline in the prevalence of institutional CSA over recent years the imposition of more severe sentences in the name of deterrence may not be warranted.

### **Breach of trust**

The fact that a crime involves a breach of trust by an offender has always been regarded as a relevant factor in sentencing and is often treated as an aggravating factor. In *Sposito*<sup>252</sup> Marks J stated:<sup>253</sup>

A society which fails to protect its children from sexual abuse by adults, particularly by those entrusted with their care, is degenerate.

A position of trust may be held by a person in authority within an institution and can be occupied, for example, by teachers and priests. There are innumerable instances of cases of CSA where the breach of trust by a parent, teacher, supervisor, guardian, friend or other person has been identified as an aggravating factor (Victorian Sentencing Manual, Section 9.9.6). In relation to priests, the sentencing remarks of Judge Kellam are typical:<sup>254</sup>

Of most significance in the consideration of the seriousness of these offences

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252 Unreported, Court of Appeal, Victoria, 8 June 1993.

253 Unreported, Court of Appeal, Victoria, 8 June 1993.

254 *O'Donnell* 1995, County Court of Victoria at [25] cited in Victoria, 2013: 160.

is the fact they occurred in circumstances of gross abuse of trust. All of the children in question were in some way associated with you by reason of your position at the time as a priest ...

The material before me demonstrates that quite a number of them were children of devout families and had parents who attended church. Their statements to police establish that the position of parish priest held by you at those times was a respected and, in the circumstances then containing, a powerful one.

You were a person of very considerable authority in their young lives. For instance, if you wished young boys to come and assist you in works around the church or the school, it was apparently common practice for the nuns teaching those children to release them from school to do so. You were entrusted by those children and their parents and, indeed, by the nuns who taught many of the children, to care for them in a spiritual, emotional and pastoral sense. That trust was grievously breached on many occasions.

In *Riddle*, the Victorian Court of Appeal observed<sup>255</sup>:

Over the last few years this community has been required to face and respond to an appalling incidence of child abuse and the frequently terrible consequences which have followed. Those consequences, even in terms of the behaviour of ordinary decent adults interacting with children in the course of their work or social activities, have been profound. Slowly but surely we have come to recognise that many of the perpetrators are people who have taken advantage of powerful positions of trust and dominance, as parents, teachers, members of the clergy or in activity groups of one kind or another, to engage in such behaviours. On occasions they have done this, as here, for many years. Sometimes, due to the age of the victims and the manipulative ability of those who prey upon them, the commission of offences of this kind may not emerge until much later, and not until great damage has been occasioned ...

Abuse of a position of trust or authority is a statutory aggravating factor in New South Wales and the ACT.<sup>256</sup>

While the abuse of trust by an individual offender is a well-recognised sentencing factor, the abuse of trust by the organisations in which they worked, or were employed, is less frequently identified. It is rarely mentioned by the sentencing courts, but in its report on the handling of CSA by religious and other non-government organisations, the Victorian Parliamentary Committee observed (2013: 158):

Religious organisations play a vital role in society, through charitable activities that benefit many vulnerable and disadvantaged people in the community ...

Generally, religious organisations have been accorded great respect, including by people who do not identify with any religion. Traditionally, these organisations have advocated for the maintenance of the highest standards of

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255 [2002] VSCA 153 at [35].

256 *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(2)(k); *Crimes (Sentencing) Act 2005* (ACT), s 33(1)(u).

personal conduct and community values.

Because there is a high level of unquestioning trust in representatives of organisations that provide care for children in a residential, educational, spiritual or social context, there is a great sense of betrayal if that trust is breached by a minister of religion. People also feel betrayed by those in the organisation who were aware of the criminal child abuse and did not act ...

No doubt the general community's trust and blind loyalty towards religious personnel extended to the organisation as a whole, making it easier for the organisation to cover up or be secretive about perpetrators' activities in the interest of protecting the organisation's reputation and its otherwise good works.

In these circumstances, the combination of unquestioning trust, absolute authority and lack of supervision created a high-risk environment. Today, this type of unconstrained engagement between children and representatives of the Catholic Church is less extensive. The Committee considers, however, that the dynamics of these risks is still a critical matter.

The Committee noted that (Victoria, Family and Community Development Committee, 2013: 9):

The betrayal of trust perpetrated at a number of levels of the Church hierarchy is so completely contrary to the stated values of their religion that many parishioners find the betrayal almost impossible to acknowledge.

In its review of the Catholic Church's Towards Understanding response, the Committee noted that CSA in the church involved more than individual failings. There were also a number of institutional factors that conduced to CSA, among which were the (Victoria, Family and Community Development Committee, 2013: 159):

... trusted positions clergy enjoy as guardians and champions of morality, which places them in dependency relationships with vulnerable people.

The research paper<sup>257</sup> indicated that 'the risk of offending is increased when the potential perpetrator encounters a person, who by virtue of his or her subordinate position or emotional state, is vulnerable to exploitation'.

One of the significant conclusions of the research concerned the degree of misplaced trust being put in priests and religious [sic], along with the failure to adequately supervise adult-child interactions and activities. Indeed, an 'almost complete lack of supervision of priests and religious' [sic] was noted, particularly before offences were committed (footnotes omitted).

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257 The Committee was referring to The Australian Catholic Bishops' Conference and the Australian Conference of Leaders of Religious Institutes (1999) Discussion paper: Towards understanding, a study of factors specific to the Catholic Church which might lead to sexual abuse by priests and religious' [sic] at 18.

## Care, supervision and authority

A related, aggravating factor that is commonly statutorily recognised is that the offence was committed against a person who was under the care, supervision or authority of the offender.

### *New South Wales*

*Crimes Act 1900* (NSW), s 61J(2)(e) makes it a circumstance of aggravation in relation to a sexual offence that the alleged victim is under the authority of the alleged offender.<sup>258</sup> The maximum penalty is 20 years' imprisonment. Similar aggravated circumstances apply to all sexual intercourse offences committed against a child under 10, s 66A; the offences of aggravated indecent assault *Crimes Act 1900* (NSW), s 61M(3)(c) (aggravated act of indecency), s 61O(3)(b) (sexual assault of child under 10), s 66A(3)(d); s 66C(5)(d) (sexual intercourse of child aged between 10 and 16).

It is an offence to have sexual intercourse with a person aged between 16 and 18 who is under the special care of the offender, *Crimes Act 1900* (NSW), s 73.

### *Victoria*

*Crimes Act 1958* (Vic), s 49(1) provides that a person must not commit an indecent act with a 16- or 17-year-old child who is under his or her care, supervision or authority.<sup>259</sup> The offence carries a maximum penalty of five years' imprisonment.

*Crimes Act 1958* (Vic), s 45(2)(b) makes it an offence to take part in an act of sexual penetration with a child aged between 12 and 16 if the child was under the care, supervision and authority of the accused. The maximum penalty for this offence is 15 years' imprisonment.

### *Western Australia*

*Criminal Code Act 1913* (WA), s 321(2) and (7)(a) makes it an offence punishable by a maximum prison term of 14 years to sexually penetrate a child of or over the age of 13 and under the age of 16 years. Where the child is under the care, supervision or authority of the offender the maximum penalty is increased to 20 years.<sup>260</sup> A person convicted of indecently dealing with a child who is under their care, supervision or authority is subject to a maximum penalty of 10 years.<sup>261</sup>

There is some evidence that offenders who are convicted of offences relating to the care, supervision or authority of the victim were more likely to receive

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258 A person is under the authority of another person if the person is in the care, or under the supervision or authority of the other person, *Crimes Act 1900* (NSW), s 61H(2).

259 For the purposes of this provision, a person who has a child under his or her care, supervision or authority includes, inter alia, a child's teacher, a minister of religion with pastoral responsibility for the child, the child's employer; the child's sports coach or counsellor and a person employed in, or providing services in, a remand centre, youth residential centre, youth justice centre or prison who is acting in the course of his or her duty in respect of the child, *Crimes Act 1958* (Vic), s 49(3).

260 *Criminal Code Act 1913* (WA), s 321(7)(b).

261 *Criminal Code Act 1913* (WA), s 321(8)(b).

a sentence of full-time custody and to receive a longer sentence (Hazlitt et al., 2004; Sentencing Advisory Council, Victoria, 2009).

## The victim

The effect of the crime on the victim, the victim's age, character and status are all factors relevant to the exercise of the sentencing discretion.<sup>262</sup> In some jurisdictions, it is an aggravating factor that the offence involved multiple victims or a series of criminal acts.<sup>263</sup> Legislation sometimes specifically requires that the court have regard to any personal circumstances of any victim of the offence<sup>264</sup> and injury, loss or damage resulting from the offence<sup>265</sup>, though this was recognised at common law. Legislation permits victim impact statements be made to a court to assist in determining sentence.<sup>266</sup>

### *A presumption of harm*

'Although the effect of the crime on a victim is usually a matter of fact to be determined through evidence adduced at the trial or hearing, via a victim impact statement, or pre-sentence report, or through evidence adduced at sentencing' a court may have regard to the potential effect of a crime on a victim and does not need expert evidence to draw a conclusion (Freiberg, 2014: 331). The current view is that a court is entitled to take into account the well-known effects of child sexual assault even if it has no evidence on the subject.<sup>267</sup>

In relation to sexual offences generally, *Crimes Act 1958* (Vic), s 37B contains a number of guiding principles that are founded upon a presumption of long-term, serious physical and psychological harm.<sup>268</sup> The section states that:

It is the intention of parliament that in interpreting and applying Subdivisions (8A) to (8G), courts are to have regard to the fact that –

- a) there is a high incidence of sexual violence within society; and
- b) sexual offences are significantly under-reported; and
- c) a significant number of sexual offences are committed against women, children and other vulnerable persons, including persons with a cognitive impairment; and
- d) sexual offenders are commonly known to their victims; and

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262 *Crimes Act 1914* (Cth), s 16A(2)(d).

263 *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(2)(m); *Sentencing Act* (NT), s 6A(g).

264 See also *Crimes (Sentencing) Act 2005* (ACT), s 33(1)(d); *Penalties and Sentences Act 1992* (Qld), s 9(4)(c); *Criminal Law (Sentencing) Act 1988* (SA), s 10(1)(d).

265 *Crimes Act 1914* (Cth), s 16A(2)(e); *Sentencing Act* (NT), s 5(2)(d); *Criminal Law (Sentencing) Act 1988* (SA), s 10(1)(e). Under the *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(2)(g), it is an aggravating factor that the injury, emotional harm, loss or damage caused by the offence was substantial, but a mitigating factor if it is not substantial, s 21A(3)(a); see also *Crimes (Sentencing) Act 2005* (ACT), s 33(1)(e); *Penalties and Sentences Act 1992* (Qld), s 9(2)(e); *Sentencing Act* (NT), s 5(2)(d).

266 See below p 83.

267 Cf Muldoon (unrep, 13/12/90, NSWCCA), where the court held that for a sentencer to make a valid assessment of future psychological harm to the child, the Crown would need to adduce evidence from studies on the subject and, if necessary, an individual psychiatric assessment; disapproved in DBW [2007] NSWCCA 236 at [39] per Spigelman CJ.

268 Clarkson [2011] VSCA 157 at [33]; CV [2013] ACTCA 22 at [24]; Cunningham [2006] NSWCCA 176, [53] (NSW); VIM [2005] WASCA 233 at [294]; Tasmania Law Reform Institute, 2012: Para 1.3.6.

- e) sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred.

In relation to sexual offences against young persons, the absolute prohibition against sexual activity serves two purposes:<sup>269</sup>

The first is to protect children from the harms caused by premature sexual activity and – to that end – to protect them from their own immaturity. On behalf of the community, Parliament has decided that those under 16 cannot meaningfully consent to sexual activity, even if subjectively attracted to the idea of participating in such activity. Secondly – and in order to advance the protective purpose – the prohibition is designed to deter those who might contemplate sexual activity with a person under 16 (footnote omitted).

In practice, it may be difficult for the Crown to present specific information about the future psychological impact of a sexual assault on a child where the victim is very young at the time of sentencing. However, as far back as 1993, in *Allpass*, the NSW Court of Criminal Appeal acknowledged that child sexual assault offences are ‘apt to produce’ adverse long-term consequences of a psychological nature ‘even though they may not manifest themselves until sometime in the future’.<sup>270</sup>

The courts have rejected attempts to minimise the long-term psychological effect of a sexual assault. In *King*, the New South Wales Court of Criminal Appeal criticised the sentencing judge’s comment that the offence did not have a ‘major impact’ on the four-year-old child victim. Even where long-term psychological and emotional harm cannot be known at the time of sentencing, a court should take into account the ‘real risk of some harm of more than a transitory nature occurring’ since it is ‘an inherent part of what makes the offence so serious’.<sup>271</sup> In *Mayall*<sup>272</sup>, a suggestion that the effect of the crime on the victims ‘would fall at the lower end of severity’ was rejected. A conclusion as to the effect of the crimes on the victims simply could not be made. The approach of assuming a real risk of psychological harm has been accepted in Victoria for some time. Winneke P said in *Rankin*.<sup>273</sup>

It is commonplace now for courts to take account of the potential impact which sexual abuse is likely to have in moulding the character and personality of its victims. Courts cannot turn a blind eye to the state of knowledge which is available to them and which is now well recognised by the community at large.

The current position as to harm caused by the sexual abuse of a child was summarised by the New South Wales Court of Criminal Appeal in *Gavel*.<sup>274</sup>

This Court has observed that child sex offences have profound and deleterious effects upon victims for many years, if not the whole of their lives: *R v CMB*

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269 Clarkson [2011] VSCA 157 at [26].

270 (1993) 72 A Crim R 561 at 565 applied in *BJH* (unrep, 30/6/98, NSWCCA) and *Enriquez* [2012] NSWCCA 60 at [50].

271 [2009] NSWCCA 117 at [41].

272 [2010] NSWCCA 37 at [47]–[48].

273 [2001] VSCA 158 at [10].

274 [2014] NSWCCA 56 at [110].

[2014] NSWCCA 5 at [92]. Sexual abuse of children will inevitably give rise to psychological damage: *SW v R* [2013] NSWCCA 255 at [52]. In *R v G* [2008] UKHL 37; [2009] 1 AC 92, Baroness Hale of Richmond (at [49]) referred to the 'long term and serious harm, both physical and psychological, which premature sexual activity can do'. The absolute prohibition on sexual activity with a child is intended to protect children from the physical and psychological harm taken to be caused by premature sexual activity: *Clarkson v R* [2011] VSCA 157; 32 VR 361 at 364[3], 368–372 [26]–[39].

Simpson J openly acknowledged in *Tuala*<sup>275</sup> that the judiciary did not have the understanding it now has about the effects of sexual assault:

In the early 1990s, judges had not accumulated the experience of dealing with sexual offences against children that, by 2014, they (regrettably) had. It could scarcely, in 2014, be said that, in order to prove that sexual abuse of children causes substantial damage, the Crown ought to produce 'the results of studies conducted over a significantly broad base and over a significant period of time'. In no small measure, this is because those very studies have been conducted and are not only in the public arena but also in the public (and judicial) consciousness. Such damage is now assumed ...

### ***The effect of the crime on the victim***

The actual effect of the crime on the victim is an important factor in assessing the 'nature and gravity of the offence'. In relation to CSA, the effects of such crimes on victims have come to be better understood and it is said that sentences have increased on that account. In *Franklin*<sup>276</sup>, Hoeben CJ at CL noted that the sentencing judge, in assessing the objective gravity of the offence, took into account the fact that there is now a greater understanding of the long-term effects of child sexual abuse. This increased understanding is reflected in the remarks of the President of the Commission, Justice McClellan, at the opening hearing of the Commission:<sup>277</sup>

What many may consider to be low levels of abuse of boys and girls can have catastrophic consequences for them, leading to a life which is seriously compromised from what might otherwise have been. Both boys and girls are left with a distrust of adults and difficulties with intimacy. Inappropriate touching of boys may leave them with confusion as to their sexual identity. This can result in life long difficulty in relationships which can cause problems in other aspects of their lives. Although the impact on the lives of abused persons has been reported within the academic literature I have no doubt that it is not well understood by the general community. In my role as a judge I have been called upon to review many of the sentences imposed upon people convicted of the sexual abuse of children but I readily acknowledge that, until I began my work with the Commission, I did not adequately appreciate the devastating and long lasting effect which sexual abuse however inflicted can

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275 [2015] NSWCCA 8 at [56].

276 [2013] NSWCCA 122 at [21].

277 Cited by Colefax SC DCJ in *Harmarta* [2013] NSWDC 214 at [61].



have on an individual's life.

The scientific evidence of the long-term effects of CSA is now extensive and convincing (see example, Australian Psychological Society, 2014; Cashmore and Shackel, 2013; Cashmore and Shackel, 2014; Fogler et al., 2008; Isely et al., 2008). In its Interim report, the Commission notes that (Royal Commission, 2014, Vol 1: 7; 115ff):

- There are both short-term and long-term effects, and many may be lifelong.
- Children and adolescents face emotional, physical and social impacts.
- These impacts often extend into adulthood, affect life choices and mental health, and may lead to victims committing suicide.
- The nature and severity of the impacts vary between survivors.
- The impacts extend beyond the immediate victim, affecting parents, colleagues, friends, families and the community.

In relation to the effects of clergy-perpetrated sexual abuse (CPSA), Fogler et al. write (2008: 331):<sup>278</sup>

Research on other forms of sexual abuse and rape demonstrate that sequelae of these types of events can include mood disorders, substance abuse, behavioral dysregulation (including suicidality and self-injurious behavior), dissociation, anxiety, PTSD, and personality disorder ... However, it is important to recognize that there are also unique factors associated with CPSA. In fact, a number of writers have considered the influence of patriarchal religious attitudes ... clerical training and gender socialization in religious communities ... and the idea of survivors feeling 'silenced by God' due to perpetrators' manipulation ... These unique religious-socialization factors may have direct relevance when considering the impact of CPSA.

Isely et al.'s small-scale qualitative study of CPSA found that (2008: 208-209)<sup>279</sup>:

Although the duration of abuse for three of the boys may have included only a single event, all of the victims reported acute disturbances in psychosocial functioning in the immediate aftermath of the initial abusive encounter. All but one reported experiencing intense fear that others would find out what had happened. Seven men reported difficulty remembering portions of the abusive events, and most reported being troubled with some intrusive memories. All reported feelings of low self-esteem and low self-worth. For most, the experience with the priest was their first sexual contact. Most wondered why they were selected, feared that they were somehow attracting men, and five reported questions regarding their sexual identity ...

Participants also reported feeling an immediate burden of personal shame, which for many contributed to problems with destructive anger and rage. Eight of the men recalled intense feelings of shame during and after the abuse, including irrational and deep pervasive guilt for the abuse ...

For all participants, the complex and immediate reactions to the abuse,

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278 References omitted.

279 References omitted.

shaped, in part, by pre-existing psychosocial beliefs and experiences, resulted in the development of a pattern of self-defeating ways of functioning that influenced, in powerful ways, later adolescent development ... All reported chronic intense inner turmoil. New developmental challenges often proved overwhelming as a consequence of enduring self-blame for causing or failing to prevent the abuse and the associated deep shame. The ongoing development of a meaningful personal identity was further undermined by fear that the abuse was evidence of homosexuality, resulting in continuous pressure to guard the secret of the abuse and a relentless fear that others would find out this secret. Their first sexual contact, within the context of both creating a friendship and/or a surrogate father relationship, appears to have created a synergistic effect within their developing adolescence, rupturing the process of crucial interrelational tasks and inducing a series of emotional disruptions that would persist into their adulthood ...

All of the participants experienced intrusive memories, and three reported experiencing flashbacks as adults. Many did not recall feeling depressed or experiencing significant emotional distress before the onset of abuse. All reported symptoms of mood disturbance, such as low self-esteem, poor sleep, suicidal ideation, anger, and detachment from others following the abuse and intensifying in adulthood. All but one reported periods of intense confusion and anger related to the sexual abuse. As adults, seven men continued to experience guilt related to some aspect of the abuse. Expressions of shame were also common ... Six of the participants had periods as adults where they felt frightened about remembering the abuse and/or confronting the abuser. Three struggled with symptoms of dissociation and two reported this as an ongoing and chronic problem ...

Participants' testimonies strongly indicated that sexual abuse by a Catholic priest against a pubescent boy acted as a developmental insult with a high likelihood of compromising social, relational, and intrapsychic functioning in later life. If emotional difficulties were present in the child, the negatively based internalized thoughts and reactions to the abuse insidiously integrated themselves within existing difficulties, solidifying and exacerbating them with the negative effects enduring into adulthood. All nine men reported that the sexual abuse impacted negatively on their adulthood and all reported a belief that some part of them was severely damaged by the abuse. It was not uncommon for them to describe themselves as 'damaged goods' or to disclose feelings that they somehow harbored a core sense of inner 'badness.' All of the men reported feelings of low self-esteem and pervasive feelings of inadequacy that extended into adulthood. Another common theme was a deep sadness about how their lives could have been different given another set of circumstances. A participant who had been abused for six years described his sense of feeling damaged and how it impacted him as an adult: 'It was kind of like I built a wall around myself and I could look out, but nobody could really see me. I didn't want people to really know me' ....

All but one man described feeling ashamed about the abusive past and, as a result, many of those men believed themselves to be essentially unlovable. As

adults, they also believed that people would reject them if they revealed their 'true' self. For many, this sense of having a 'counterfeit identity' shaped a relational style that was avoidant of other people outside of superficial interactions. All reported spending their adult life feeling estranged from other people and actively avoiding relationships with men. Three men struggled with fearful feelings regarding homosexuals and their own sexual identity. The consequences of this combination of core hateful beliefs about the self and self-defeating patterns of relating to others were most painfully witnessed in participants' descriptions of their romantic relationships and relationships with family. Five men reported a history of promiscuous or compulsive sexual activities.

Cashmore and Shackel's review of the effects of CSA states that (2013: 8):<sup>280</sup>

A small number of recent studies on clergy-perpetrated sexual abuse also indicates that boys may be particularly susceptible to abuse of this type and to the effects that play out in adulthood. A large-scale study on abuse allegations in the Catholic Church in the US and a smaller study in Australia on allegations against Anglican clergy found that the majority of these allegations involved male victims. In the US study by the John Jay College Research Team (2004), 81 per cent of the victims were male, and 40 per cent of all victims were males aged 11–14 years. In the Australian study, 75 per cent of the 180 victims in 191 complaints were male ... The average time from the alleged abuse to making a complaint was 25 years for males, and 18 years for females. Neither of these studies was designed to look at the impact of the abuse on the victims, and as Fogler et al. (2008) pointed out, 'our knowledge of the effects of CPSA (clergy-perpetrated sexual abuse) is still in its infancy' (p. 349) ...

There are indications, however, that sexual abuse by clergy and other powerful authority figures may have particularly devastating effects ... Brady (2008) drew strong parallels here with the features of abuse within the family that are deemed particularly damaging and difficult for children to deal with. These include the fact that:

the families of many victims were closely allied with the life of their church – a spiritual family; the abuse tended to occur over an extended period of time, similar to many cases of incest; adults frequently did not believe reports of abuse when alerted to it, which often also occurs in cases of incest; church leaders tried to silence victims to avoid scandal, also a repeated theme in incest; and many victims did not disclose the abuse until adulthood, again similar to many cases of incest (Doyle, 2003, as cited in Brady, 2008, p. 360).

In the same special issue of the *Journal of Child Sexual Abuse*, which was concerned with the trauma of clergy sexual abuse, Fogler et al. (2008) drew together the literature and provided some theoretical foundations for their conclusion that clergy-perpetrated sexual abuse 'can catastrophically alter the

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280 References omitted

trajectory of psychosocial, sexual, and spiritual development’ (p 330). Fogler et al. attributed the damaging impact of sexual abuse by clergy, which commonly occurs around the ages of 11–14 years, to the way in which it undermines the victims’ trust, sense of self, sexual identity, and social and cognitive development ...

Many questions still remain unanswered. For example, we need to better understand the experiences of boy victims of child sexual abuse particularly within the context of institutional cases of child sexual abuse and the impact of such experiences on key areas of victims’ functioning.

Referring specifically to the effects of CSA in organisational contexts, the Victorian Committee stated (2013: xlix):

- Children subjected to criminal abuse in organisations often experience lifelong impacts that include mental health problems, addiction issues, relationship difficulties, issues with anger and difficulties with life skills, education and employment.
- Children who suffer criminal child abuse in organisations can experience specific consequences from being abused by a trusted person in the community, such as the loss of spirituality and having problems with authority.
- There are frequently significant effects on the families of victims criminally abused by personnel in organisations, including the fragmentation of families and the intense guilt felt by parents at not having protected their child.
- The impact on local communities of criminal child abuse in trusted organisations, particularly religious organisations, can be deep and divisive.
- While the actual costs associated with criminal child abuse in organisations are unknown, there are significant economic and social costs associated with child abuse in Victoria.

## Consent

By statute, consent is not a defence to a number of sexual offences against children.<sup>281</sup> As a rule ‘a child’s consent can never, of itself, be a mitigating factor’<sup>282</sup> because the statutory prohibition is founded upon a presumption of harm that arises from premature sexual activity.<sup>283</sup> Consent, in these circumstances, is regarded as ‘apparent’ or ‘ostensible’ rather than meaningful.<sup>284</sup> An offender may seek to prove, on the balance of probabilities, ‘that the sexual activity ... did not have (or is unlikely to have) the harmful impact on the victim which the law presumes it to have’<sup>285</sup> though

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281 For example, *Crimes Act 1958* (Vic), s 45 (sexual penetration of a child under 16); s 47 (indecent act with a child under 16); *Crimes Act 1900* (NSW), s 77 (sexual offences against child under 16).

282 *Clarkson* [2011] VSCA 157 at [4]. This case, decided by a Bench of five judges, contains numerous citations to Victorian decisions, as well as those in other jurisdictions supporting the Court’s decision; see also *Hitanaya* [2010] NTCCA 3 at [34]; *Williams* (1990) 53 SASR 253, 254.

283 On the objectives of the provisions relating to sexual offences, see *Crimes Act 1958* (Vic), ss 37A and 37B. On the harm that can be caused by premature sexual activity, see *Clarkson* [2011] VSCA 157 at [29] ff.

284 *Clarkson* [2011] VSCA 157 at [4].

285 *Clarkson* [2011] VSCA 157 at [52].

it is unlikely to succeed. Independent advice would normally be required<sup>286</sup> (Freiberg, 2014: 333–334).

### Age of the victim

The age of the victim is a relevant statutory matter in the substantive law relating to sexual offending: persons under certain ages cannot consent to certain sexual acts, whether they (ostensibly) consent or not. Offences against children are regarded most seriously, as reflected in the statutory maximum penalties attached to these offences, by statutory provisions that make the youth of the victim an aggravating factor<sup>287</sup> and, in some cases, by the statutory requirement that the offender must serve an actual term of imprisonment.<sup>288</sup> Factors such as abuse of trust are often present in such cases as well, which will aggravate the offence. The Office of the Child Safety Commissioner in Victoria has observed (cited in Sentencing Advisory Council Victoria, 2009: 52):

Society also holds very strongly a view that the younger a child is, the more vulnerable they are given their initial complete reliance on the care and protection of the caring adults in their lives. This reliance on the nurturing and protection of others decreases as the child's developmental age increases and he/she becomes more emotionally and physically mature, moving towards full independence.

A significant age-related factor in sentencing for sexual offences is the discrepancy between the ages of the accused and the victim.<sup>289</sup> 'A marked discrepancy between the ages of the accused and the victim where the former is older than the latter will also be regarded as aggravating the seriousness of the offence if the sentencer takes it as an indication that the offender has used their greater experience to overbear or manipulate the victim'<sup>290</sup> (Freiberg, 2014: 330).

### Victim impact statements

A 'victim impact statement' is a formal statement tendered to the court following the finding of guilt, containing particulars of any injury, loss or damage suffered by the victim as a direct result of the offence or the impact of the offence on the victim<sup>291</sup> (Freiberg, 2014: 181). In Victoria, the definition of 'victim' may include the parent of a child who has been sexually assaulted.<sup>292</sup> One of its purposes is to assist a court in determining sentence. As well as providing information for the court, the victim impact statement plays an important role in providing the victim with 'some form of

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286 *Clarkson* [2011] VSCA 157 at [53].

287 *Crimes (Sentencing Procedure) Act 1999* (NSW), 21A(2)(l) (where the victim is vulnerable, for example because they are very young or have a disability).

288 *Penalties and Sentences Act 1992* (Qld), s 9(5).

289 *Corby* [2010] NSWCCA 146 at [77].

290 *Butler* [1971] VR 892; *Webb* [1971] VR 147; *Beyer* [2011] VSCA 15.

291 *Sentencing Act 1991* (Vic), s 8L(1) and *Children Youth and Families Act 2005* (Vic), s 359(4); see also *Crimes (Sentencing Act) 2005* (ACT), s 47; *Crimes (Sentencing Procedure) Act 1999* (NSW), ss 26–30A; *Sentencing Act* (NT), s 106A; *Criminal Law (Sentencing) Act 1988* (SA), s 7A(1); *Sentencing Act 1997* (Tas), s 81A; *Criminal Offence Victims Act 1995* (Qld), s 14; *Penalties and Sentences Act 1992* (Qld), s 15 (court can receive any information it considers appropriate to enable it to impose a proper sentence); *Sentencing Act 1995* (WA), s 25(1).

292 *Sentencing Act 1991* (Vic), s 8K(2) and (3).

catharsis, vindication and meaningful input in relation to the sentencing decision’ (Freiberg, 2014: 182).

Unlike many instances of CSA, where the victim may still be a young person at the time of sentence, victims of institutional CSA or CPSA are likely to be adults at the time of sentence. The Victorian Committee reported that victims often wanted to ‘receive vindication from the organisation for the injustice they suffered and acknowledgement that the organisation failed in its duty of care to protect them’, wanted an opportunity to restore their lives and to see consequences for the perpetrator, especially those that would ensure that the perpetrator would be prevented from continuing to assault children (Victoria, Family and Community Development Committee, 2013: xlix).

The victim impact statement is usually directed at informing the court about the personal circumstances of the victim, any injury, loss or damage resulting from the offence, and the impact of the offence on the victim. A court will generally be aware of the destructive effects of certain crimes, but if ‘particular harm is to be alleged or relied upon as a circumstance of aggravation, it must be proved in the usual way to the requisite standard of beyond reasonable doubt’ (Freiberg, 2014: 184).<sup>293</sup>

It has been held that considerable caution must be exercised before a VIS can be used to establish an aggravating factor where any of the following difficulties arise: the facts attested to in the statement are in question; the credibility of the victim is in question; the harm asserted goes well beyond that which may be expected<sup>294</sup>, or the contents of the statement are the only evidence of harm.<sup>295</sup>

The statement may take various forms: it may be in writing, by sworn evidence, and in some jurisdictions may include photographs, drawings, poems or other material that relates to the impact of the offence. It may be read aloud by the victim or a person chosen by the victim, or the prosecutor or judge. A copy of the VIS is ordinarily made available to the offender’s legal representative to read. However, an offender is not permitted to retain a copy of the VIS.<sup>296</sup>

Where the victim is still a child at the time of sentence, they may be helped in the preparation of a victim impact statement.

Shackel has argued that ‘there is no specific legislative or policy framework that recognises and facilitates a child victim’s preparation of a VIS’ (Shackel, 2011: 219) and suggests that jurisdictions adopt:

Model Guidelines for the Effective Prosecution of Crimes Against Children promulgated by the International Association of Prosecutors and the International Centre for Criminal Law Reform and Criminal Justice Policy that provide that prosecutors should ‘ensure that the court takes into account the severity of the physical and psychological harm experienced by the child’ in

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293 *Eisenach* [2011] ACTCA 2 at [65]; *Pinder* (1992) 8 WAR 19 at 40; *Allpass* (1993) 72 A Crim R 561, 565; *Slack* [2004] NSWCCA 128 at [58].

294 See example, *RP* [2013] NSWCCA 192.

295 *Tuala* [2015] NSWCCA 8 at [80]-[81].

296 See for example NSW DPP Guideline 19.

sentencing. This may include oral or written victim impact statements. This guideline recognises the role of the prosecutor both as advocate for the child in presentation of the impacts of crime to the sentencing court, and as advocate in furtherance of the public interest in ensuring that such impacts of crime are made known to the court (footnotes omitted).

Some authors have argued that in view of the difficulties faced by victims in the criminal justice process, including the sentencing process and where, despite the use of victim impact statements, they feel that their case has not been adequately presented, counsel should represent them separately (Cossins, 2004; Braun, 2014). Similar schemes operate in some European jurisdictions where the victim is an independent party to proceedings.

## Nature of the Offender

### Prior criminality

‘The offender’s prior criminality has a powerful influence in sentencing. It can increase the statutory powers of the sentencer, the choice of sanction and the weight given to the various purposes of sentencing’ (Freiberg, 2014: 340).

Sex offenders are reputed to be highly recidivist and many in the community, including policymakers, believe that they are likely to continue to offend unless physically, or chemically, constrained. However, the empirical evidence is to the contrary.<sup>297</sup> Lewis et al.’s study of 66 adjudicated studies of CSA in the County Court of Victoria found that while 45 per cent of offenders had a previous criminal record, only 15 per cent had a conviction for a prior sexual offence (Lewis et al., 2013: 8). The CSA data may be misleading as an indication of prior offending, as in many such cases there may be a long history of offending that has not been detected and prosecuted. As a consequence, the offender comes before the court with a clean legal record but an extensive history of criminal conduct. Dunford J put it in these terms in *Smith*:<sup>298</sup>

... a sexual offender who commits a number of offences on young persons over a number of years where those offences go undetected for a long time ... cannot rely on the fact that he has no previous convictions when he comes to be sentenced for those offences.

Where an institution has known about and covered up or concealed such offending, or has otherwise failed to respond appropriately, the criminal liability of the institution itself becomes an issue.<sup>299</sup>

### Common law

Research for this report has revealed a number of instances of persons convicted of CSA in an institutional context who have been sentenced on more than one occasion for CSA-related offences. The database of 171 institutional abuse cases established for

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297 See Chapter 6.

298 (2000) 114 A Crim R 8 at [22].

299 See Chapter 7.

this study and discussed further in Chapter 4 shows that 31 offenders had been sentenced on a previous occasion: 14 in New South Wales<sup>300</sup>, five in South Australia<sup>301</sup>, four in Queensland<sup>302</sup>, four in Victoria<sup>303</sup>, and four in more than one Australian jurisdiction.<sup>304</sup> Two offenders had relevant priors overseas.<sup>305</sup> Additionally, five offenders who had committed sexual offences had been sentenced previously for offences other than child sexual assault.<sup>306</sup>

At common law, an offender's prior criminal history cannot be given such weight as to lead to a penalty disproportionate to the instant offence.<sup>307</sup> The principle of proportionality, in these circumstances, means that the upper limits of a proportionate sentence are set by the objective circumstances of the offence, and do not include prior convictions. However, within the principle of limiting retributivism as articulated in *Veen (No 2)*, extreme recidivism can elevate considerations of specific and general deterrence and community protection.<sup>308</sup> It can indicate that that offender has a propensity to reoffend or has poor prospects of rehabilitation.<sup>309</sup>

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- 300 NSW: BS aka BJS (priest – indecent assault, imprisonment), JG (brother – sexual assault, imprisonment), JSD (priest – sexual assault, imprisonment), PH (scout leader – attempted sexual assault, imprisonment), RE (rector – aggravated indecent assault, imprisonment), RFM (brother and teacher – sexual assault, imprisonment), VGR (priest, imprisonment), FBR (brother – indecent assault, imprisonment), DER (teacher and brother – indecent assault, imprisonment), MGF (scout leader – sexual assault, imprisonment), WK (cult leader – sexual assault, imprisonment), RLS (member of Jehovah's Witness – sexual assault, imprisonment), PL (seminarian – aggravated indecent assault, imprisonment; both matters finalised in Local Court) and JS (brother and principal – indecent assault; suspended sentence; both matters finalised in Local Court).
- 301 South Australia: Brian Morris Bertram Perkins (school bus driver – indecent assault, imprisonment), Mark Christopher Harvey (teacher – persistent sexual exploitation, imprisonment), Raymond Frederick Ayles (priest – indecent assault, imprisonment), Ronald William Hopkins (teacher – sexual assault, imprisonment) and Wilfred Edwin Dennis (priest – sexual assault, imprisonment).
- 302 Queensland: Neville Joseph Creen (priest – aggravated indecent assault; partially suspended sentence), Leslie Maxwell Cunningham (school janitor and sports coach – sexual assault, imprisonment), Luke Euthoimios Margaritis (teacher – unknown, imprisonment) and William Theodore D'Arcy (teacher – indecent assault, imprisonment).
- 303 Victoria: Robert Charles Best (principal – indecent assault, suspended sentence), Gerald Francis Ridsdale (priest – sexual assault, imprisonment; three matters finalised in the higher courts and one in the lower courts), Frank Gerard Klep (priest – sexual assault, imprisonment) and John Maria Beyer (volunteer at boys' home – attempted sexual assault, imprisonment).
- 304 Multiple jurisdictions: Gregory Robert Knight in NT and Qld (teacher – indecent assault, imprisonment), Gregory Victor Joseph Coffey aka Gregory Vincent Coffey in SA and Vic (teacher – indecent assault, suspended sentence), Frank Terrence Keating in Qld and Vic (teacher and brother – unknown, partially suspended sentence) and Alistah Elijah Laishkochav in NSW and Vic (cult leader – aggravated indecent assault, imprisonment).
- 305 Nicholas Daniel Hand (teacher – sexual assault, partially suspended sentence) and David Kramer (teacher – indecent assault, imprisonment).
- 306 Bradley Huntsmore Simpson in Qld (teacher – maintain relationship with child, imprisonment), Troy Darren Porter in Qld (teacher – act of indecency, partially suspended sentence), Barry Douglas Wright in SA (school employee – sexual assault, imprisonment), Danial John Boyce in Vic (teacher – sexual assault, imprisonment) and DM in Vic (teacher – sexual assault, imprisonment).
- 307 *Veen (No 2)* [1988] HCA 14 at [14] per Mason CJ, Brennan, Dawson and Toohey JJ; (1988) 164 CLR 465; see also *Sentencing Act 1995* (WA), s 7(2)(b) (prior criminal record not an aggravating factor); *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(3)(e) (mitigating factor that offender does not have any record (or any significant record) of previous convictions), cf s 21A(2)(d) (aggravating factor that the offender has a record of previous convictions (particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences). Section 21A(2)(d) must, however, be interpreted in a manner consistent with the proportionality principle in *Veen (No 2)* at 477: *McNaughton* (2006) 66 NSWLR 566 at [30]. *Penalties and Sentences Act 1992* (Qld), s 9(8) (in determining the appropriate sentence for an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if the court considers that it can reasonably be treated as such having regard to the nature of the previous conviction and its relevance to the current offence; and the time that has elapsed since the conviction). However, s 9(9) states that the sentence imposed must not be disproportionate to the gravity of the current offence.
- 308 *Saunders* [2010] VSCA 93 at [13]; *DPP v Avci* [2008] VSCA 256 at [38].
- 309 *DPP v Terrick* [2009] VSCA 220; (2009) 24 VR 457.



An offender's past criminal history, character, background, age and personal characteristics are relevant to sentencing. In *Veen (No 2)*, the High Court stated:

The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind.<sup>310</sup>

In addition, prior offending<sup>311</sup> will be taken into account when considering the character and antecedents of the offender. In *Weininger*, the High Court stated this effect as follows:<sup>312</sup>

A person who has been convicted of, or admits to, the commission of other offences will, all other things being equal, ordinarily receive a heavier sentence than a person who has previously led a blameless life. Imposing a sentence heavier than otherwise would have been passed is not to sentence the first person again for offences of which he or she was earlier convicted or to sentence that offender for the offences admitted but not charged. It is to do no more than give effect to the well-established principle (in this case established by statute) that the character and antecedents of the offender are, to the extent that they are relevant and known to the sentencing court, to be taken into account in fixing the sentence to be passed. Taking all aspects, both positive and negative, of an offender's known character and antecedents into account in sentencing for an offence is not to punish the offender again for those earlier matters; it is to take proper account of matters which are relevant to fixing the sentence under consideration.

### ***Statutory consequences of prior offending***

Chapters 2 and 6 identify and discuss in further detail some of the consequences that may follow from a person having a previous conviction for a relevant offence. These consequences include:

- the court's ability to impose a disproportionate sentence
- a requirement that the court regard the protection of the community as the principal purpose for imposing the sentence
- habitual criminal legislation
- dangerous offender legislation

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310 *Veen (No 2)* [1988] HCA 14 at [14]; (1988) 164 CLR 465; see also *DPP v Terrick* [2009] VSCA 220; (2009) 24 VR 457; *Alsop* [2010] VSCA 325; *DPP v Vucko* [2008] VSCA 270.

311 For the purposes of determining the relevance of an offender's antecedents, an admission of past unlawful conduct, which cannot be the subject of present punishment, can be taken into consideration: *TL* [2004] QCA 430; [2005] 1 Qd R 659 (offences committed when the offender was a juvenile).

312 *Weininger* [2003] HCA 14 at [32]; (2003) 212 CLR 629.

- imposition of indefinite sentences
- imposition of a supervision or detention order
- imposition of mandatory sentences
- imposition of mandatory non-parole periods
- presumption of cumulation of sentences
- liability to be found guilty of loitering or similar offence
- liability to be registered as a sex offender
- liability to be prevented from working with children
- liability to be the subject of a civil preventive order.

### **Character**

An offender's character is relevant in sentencing (Freckelton, 2001; Fox, 2002; New South Wales Sentencing Council, 2008, Vol 1: Chapter 5; Warner, 2010).<sup>313</sup> 'Character' generally refers 'to the inherent moral qualities or disposition of a person' and can be contrasted with 'reputation', which refers to 'the public estimation or repute of a person irrespective of that person's inherent qualities'.<sup>314</sup> In determining an offender's character, a court may consider, among other things:<sup>315</sup>

- a) the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions of the offender
- b) the general reputation of the offender
- c) any significant contributions the offender made to the community.

Character has a dual aspect: negatively relating to prior criminal conduct and positively relating to the offender's contribution to the community. Good character may be a mitigating factor if it shows that the instant offence is exceptional or atypical and, therefore, unlikely to need special deterrence, or that the offender can be dealt with through rehabilitative measures.

Good character and reputation are often related, and it is often argued that a person of otherwise impeccable character who is convicted of an offence should be given a more lenient sentence, either because of the lack of previous contact with the criminal justice system, or through loss of reputation (especially in small communities). *Scannell*<sup>316</sup>, a case involving an 88-year-old priest who had committed the offences 45 years earlier, provides an example of how this factor may operate. Priest JA said:

He has no other convictions, and, indeed, was able to rely on evidence attesting to his good character. Since a young man, he has made positive

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313 See *Sentencing Act 1991* (Vic), s 5(2)(f); *Crimes Act 1914* (Cth), s 16A(2)(m) (court required to take offender's character and antecedents into account); *Crimes (Sentencing) Act 2005* (ACT), s 33(1)(m); *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(3)(f) (mitigating factor that offender was a person of good character); *Sentencing Act* (NT), s 6; *Penalties and Sentences Act 1992* (Qld), s 11; *Criminal Law (Sentencing) Act 1988* (SA), s 10(1)(l).

314 *Melbourne* [1999] HCA 32 at [33] per McHugh J; (1999) 198 CLR 1; see also *Braysich* [2011] HCA 14; (2011) 243 CLR 434. It may also relate to the absence of any prior convictions and whether the person has previously engaged in other criminal conduct: *Weininger* [2003] HCA 14 at [24] per Gleeson CJ, McHugh, Gummow and Hayne JJ; (2003) 212 CLR 629.

315 See example, *Sentencing Act 1991* (Vic), s 6; *Sentencing Act* (NT), s 6; *Penalties and Sentences Act 1992* (Qld), s 11.

316 [2014] VSCA 330 at [40]

contributions to the wider community through teaching and his religious vocation, including ministering to the terminally ill and as Chaplain at Kew Cottages. To that extent, the present offence – committed over four decades ago – might be seen as an aberration.

The use of the notion of good character in the sentencing of CSA cases has been criticised as over-emphasising the values of family, community and employment and the importance of rehabilitation while minimising the effect of CSA on the victim (Stevens and Wendt, 2014). For the victim, attempts to separate the crime from the defendant – in the sense that it is claimed that an offender can still be a person of good character despite their offending behaviour – diminishes the vindicatory aspects of the criminal proceedings if the offender is regarded as not being fully responsible for the offence, and is consequently treated more leniently (Stevens and Wendt, 2014: 105–106). As Stevens and Wendt argue:

... good character assists the defendant to feel as though he was, is and will be a good person within the sentencing context, and, consequently, such narratives create contradictions with a guilty conviction of child sexual abuse. Good character constructions sideline the seriousness of such an offence and the impact on victims. Furthermore, the courts of Australia have a role in sentencing to uphold community values and standards, and thus play a censoring role, signifying to the community the ‘wrongfulness’ of crimes. The object – the good character of a convicted child sex offender – potentially deletes the ‘wrongfulness’ message of this crime.

A claim of good character may not be allowed if there is evidence that the offender has been committing a series of undetected offences for a long time.<sup>317</sup> This fact can also be taken into consideration to deny any claim that the instant offence was uncharacteristic or a single unfortunate act in an otherwise blameless life<sup>318</sup>, or it may be regarded as an indication that the offending is habitual rather than opportunistic (Sentencing Council, New South Wales, 2008: 124).

Character can be an aggravating factor if victims, their families and others have trusted the defendant because of the person’s impeccable background, or where the person’s ostensible good character has assisted in the commission of the offence, which is often the case in sexual offences against young victims.<sup>319</sup>

In *Ryan*<sup>320</sup>, it was argued on behalf of a paedophile priest that the offender’s good works in the community could be separated from his sexual offending against young children, a proposition that the majority of the High Court accepted, though the court was divided as to whether the offender’s loss of reputation should be taken into account. The court held that it was an error for a court to state that a person’s

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317 *Hermann* (1988) 37 A Crim R 440, 448 (series of sexual assaults on child over long period); *Hitanaya* [2010] NTCCA 3 (sexual offences over long period).

318 *Fraser* [2004] VSCA 147 at [23].

319 *Longley* (2001) 121 A Crim R 78; *Liddy* (No 2) [2002] SASC 306; (2002) 84 SASR 231; *DPP v Toomey* [2006] VSCA 90; *JAF v Western Australia* [2008] WASCA 231; (2008) 190 A Crim R 124; *Featherstone* [2008] NSWCCA 7 (teacher or carer); *Gent* (2005) 162 A Crim R 29 (teacher or carer); *Green* [2008] NWCCA 112 (church elder); *Murrin* [2008] NSWDC 29 (teaching brother).

320 [2001] HCA 21; (2001) 206 CLR 267.

‘unblemished character and reputation’ in such circumstances did not entitle him to ‘any leniency whatsoever’. On remittal of the case to the New South Wales Court of Criminal Appeal<sup>321</sup>, Mason P, while acknowledging the ‘limited and particular error’ [at 42] detected by the High Court, made a relatively small adjustment to the sentence while retaining the original structure of the original sentence.<sup>322</sup> He was of the view that while it was likely that the community would be protected when the offender was released, it was necessary for the sentence to reflect the seriousness of the criminality, and the offender’s ‘otherwise good character’ could only be a small factor in his favour.<sup>323</sup> Hayne J in *Ryan*<sup>324</sup> considered the ramifications of the testimonials written by parishioners, with awareness of the offending:

Only because the appellant had worked with his adult parishioners in the way he had, was he afforded the trust, respect, and position in the community which were essential to continuing his wrong doing. Viewed in that way, the material which he now says the sentencing judge was bound to treat as mitigating would not go in mitigation of sentence. Indeed, that material could be seen as revealing the extent of the breach of the trust which the appellant was bound to, and did, seek to foster in his parishioners.

Since the decision in *Ryan*, notions of ‘grooming’ have arguably expanded to include grooming of parents and families. Establishing a trustworthy reputation in the community might, thereby, reduce the prospect of suspicion falling on the offender and increase the likelihood of gaining unsupervised access to children.

Two jurisdictions, South Australia and New South Wales have legislated to limit the effect of ostensible good character in sentencing for sexual offences. The New South Wales Parliamentary Committee has supported the retention of the provision as a standalone factor (NSW, 2014: 26).

### **South Australia**

*Criminal Law (Sentencing) Act 1988 (SA)*, s 10(3)(ba) provides that in determining a sentence for an offence a court must not have regard to the good character or lack of previous convictions of the defendant if the offence is a class 1 or class 2 offence within the meaning of the *Child Sex Offenders Registration Act 2006 (SA)*<sup>325</sup> and the court is satisfied that the defendant’s alleged good character or lack of previous convictions was of assistance to the defendant in the commission of the offence.

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321 *Ryan (No 2)* [2003] NSWCCA 35.

322 The original sentence was 16 years with an 11-year minimum, which was made cumulative upon a previous sentence, which made a total of 20 years with a minimum of 15 years. The adjustment was one year less (14-year minimum).

323 The court followed what Franklyn J said in *Petchell* (unrep, WA CCA, 16.6.93) in relation to sexual assaults against children: ‘That ... the offender is of otherwise good character is not without relevance but can have only little weight. The offences are of such a nature that, until brought to light, they generally do not impinge on others and so on their perception of the offender and can co-exist quite comfortably, so far as the offender is concerned, with an otherwise apparent good character’.

324 [2001] HCA 21; (2001) 206 CLR 267 at [144].

325 Various serious offences against children; see Schedule 1.

*Quinn*<sup>326</sup> and *Marikar*<sup>327</sup> were both institutional abuse cases in which character was raised. In *Quinn*, Gray J stated at [32] that the respondent:

... used his apparent good character, including his position as principal of the school, to enable him to be in a position to gain access to each of his victims. Further, the offending involved an ongoing course of conduct extending for more than two years. A number of victims were involved. In these circumstances his prior good record is of little significance.

In *Marikar*, the victim was a 13-year-old girl and the respondent was her 44-year-old diving coach. He had no prior convictions, and the judge found he had been of good character 'for a long time and the offending was 'very uncharacteristic'. Gray J stated at [45]:

The defendant was a first offender with an otherwise excellent reputation. ... The consequences of his offending had had a major impact on his employment and the wellbeing of his family. In these circumstances the Judge was entitled to take the view that a shorter than usual non-parole period was appropriate in the circumstances.

### ***New South Wales***

*Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(5A) provides that in determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence.

There is uncertainty about how this provision helps. In *NLR*<sup>328</sup>, it was held that for s 21A(5A) to apply the Court should make an express finding specific to the offender that good character or lack of previous convictions helped the offender commit the crime. In *O'Brien*, it was held that the sentencing judge, in fixing the total term, erred in taking into account the applicant's good character and lack of previous convictions as a mitigating factor because:<sup>329</sup>

... s 21A(5A) of the Act arguably precluded its being taken into account in that way since his good character appears to have been of assistance to him in the commission of the offences.

*O'Brien* used his position as a responsible and helpful member of the community to befriend the victim's family. Conversely, in *AH*, the court held that the judge should not have applied s 21A(5A).<sup>330</sup> Although the offender's relationship with the victim's mother created a trusting environment in which the offences could be committed, it could not be said that his good character assisted him in the commission of the

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326 [2012] SASCFC 102.

327 [2010] SASCFC 36.

328 [2011] NSWCCA 246.

329 [2013] NSWCCA 197 at [40].

330 AH [2015] NSWCCA 15 at [22].

offences.<sup>331</sup> In *LB*<sup>332</sup>, the offender was a junior rugby league coach who committed offences against one of his players. Bennett DCJ held that s 21A(5A) did not apply:

The question though is whether or not his good character and lack of previous convictions was of assistance to him in the commission of the offence. I am not satisfied that it was. It might be said in the broader context that his exposure to the victim was by reason of his role in junior rugby league, which he could only have had because of good character and lack of prior convictions. It seems to me that the lack of previous convictions and his prior good character in this case were coincidental with the commission of these offences, were of assistance to him for the commission of the offences within the context contemplated by this provision. Accordingly, I propose to allow him the benefit of his good character and his lack of previous convictions. His good character of course reflected in the contribution he has made to the community, both to the junior rugby league and to elderly and infirm people in his community.

### **Middle and old age**

Offenders convicted of CSA in institutional contexts tend to be older than those convicted of offences generally. This is due to a number of factors, including the secrecy surrounding such offences and the reluctance of victims to report their offences to the authorities (Mueller-Johnson and Dhimi, 2010). Such offenders also tend to be older when they commit their offences as they may wait until, or only have the opportunity to commit the offences when, they hold positions of authority.

The Victorian Sentencing Advisory Council's report on sentencing for sexual penetration offences (2009) found that 37.8 per cent of those convicted of sexual penetration of a child under 10 were aged between 45 and 59 years, and 51.7 per cent of those convicted of sexual penetration of a child aged between 10 and 16 years were aged between 30 and 44 years. The Queensland Sentencing Advisory Council's report on sentencing of CSA (2011: 10) found that the average age of such offenders was 37 years, compared to 27 years for other offenders, while 30 per cent were over the age of 45 years.

The age and physical condition of an offender are relevant factors in sentencing.<sup>333</sup> General deterrence<sup>334</sup> may be moderated if it is considered that the public might regard it as unnecessary, unfair or unmerciful to send an elderly person to prison<sup>335</sup>, or if the public understands that the sentence constitutes a sufficient punishment due to the age of the offender. However, general deterrence cannot be completely ignored if it has the effect of unduly diminishing the objective gravity of the offence

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331 AH [2015] NSWCCA 15 at [25].

332 (Unreported District Court, 9 February 2012).

333 The following passages are drawn from Freiberg, 2014: 356. Age is a factor required to be taken into account by statute, see example, *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(3)(j) (offender was not fully aware of the consequences of his or her actions because of ... age ...); *Criminal Law (Sentencing) Act 1988* (SA), s 10(1)(l); *Crimes Act 1914* (Cth), s 16A(2)(m).

334 The deterrent message is directed at the population generally, not just at those of the offender's age; *Gulyas* [2007] WASCA 263.

335 RLP [2009] VSCA 271 at [34]; *Saw* [2004] VSC 117; *Austin* (1996) 87 A Crim R 570, 572.

and justifying an unacceptable, inappropriate or inadequate sentence.<sup>336</sup> The criminological evidence is that older offenders are less likely to commit offences generally than younger ones (Farrington, 1986).

Old age may be accompanied by ill health<sup>337</sup>, though neither is determinative of the quantum of sentence.<sup>338</sup>

Often charges laid late in life relate to events many years before. Even if the offender has prior convictions, the record will frequently show lengthy periods of crime-free behaviour.<sup>339</sup> Where the prosecution relates to past sexual offences that have just come to light, the domestic situation or the defendant's physical capacity may render similar reoffending unlikely.<sup>340</sup> However, the fact that an offender has escaped the consequences of their criminal conduct may counterbalance this fact because, had the offender been convicted and sentenced soon after the offence, they would have spent a longer period in prison in the prime of their life.<sup>341</sup> In terms of public perceptions of justice and considerations of deterrence, it is important that the 'public is aware that people who commit sexual offences against children will be brought to account for their crimes, no matter how much time passes'.<sup>342</sup>

In *Holyoak*<sup>343</sup>, the applicant had been the supervisor of a Dr Barnado's children's home and indecently assaulted three victims. He was 75 at sentence and in good general health. The sentencing judge specifically took into account the fact that the applicant's age meant prison would be more onerous and he would still be at risk of being assaulted by other prisoners while serving his sentence in protection. Allen J said:<sup>344</sup>

So objectively horrendous, however, were the crimes for which the applicant fell to be sentenced, particularly considering the breach of trust which it involved, that I find myself unable to say that ... the severity of the sentences imposed is indicative that his Honour failed to give due weight to the significance of the plaintiff's age.

However, he moderated this statement in observing that<sup>345</sup>:

Horrendous though the offences were, particularly in the light of his betrayal of a position of trust and of authority which made his detection far less likely, I consider that the sentence must reflect more fully than did the sentence

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336 Burnett (1993) 70 A Crim R 469 (sentence of 10 years' imprisonment with a non-parole period of eight years imposed on 64-year-old man with many prior convictions convicted of sexual offences upheld; age only one factor to be taken into account); *Holyoak* (1995) 82 A Crim R 502 (proportionality not irrelevant in case of 75-year-old man convicted of sex offences committed 20 years earlier).

337 Austin (1996) 87 A Crim R 570; Smith (1987) 44 SASR 587, 589.

338 RLP [2009] VSCA 271 at [39] (it is not inappropriate, however, to set a non-parole period that results in the offender spending the whole of their remaining life in custody); see also AMP [2010] VSCA 48.

339 Ridsdale (1995) 78 A Crim R 486 (60-year-old defendant convicted of sexual offences, the last of which was 12 years previously).

340 Iles [2009] VSCA 197.

341 Ellis [2010] SASC 118 at [82]–[83]; 107 SASR 94; Cave [2012] SASCFC 42.

342 Ellis [2010] SASC 118 at [87]; 107 SASR 94.

343 (1995) 82 A Crim R 502.

344 (1995) 82 A Crim R 502 at 508.

345 (1995) 82 A Crim R 502 at 513.

imposed by his Honour the especially crushing nature of a sentence imposed at his advanced age (cf *R v Yates* 1985 VR 41).

## Effect of the Sanction

### Hardship to the offender

A sanction for a crime is generally intended to impose hardship. Hardship that exceeds the usual incident of the sanction is generally accepted as a relevant factor in sentencing, whether it is due to illness or to the conditions of confinement.<sup>346</sup> However, how and by whom hardship should be taken into account is uncertain. It may be a matter for the courts, for the executive government in the exercise of its functions in respect of the administration of correctional services, or it may be relevant as an exercise of clemency.

### Ill health

The mental and physical health of an offender is relevant in arriving at an appropriate sentence.<sup>347</sup> It has bearing upon both the length and type of sanction, but not so as to leave an impression that illness excuses from punishment. Sentencing courts take into account mitigating circumstances that make imprisonment more burdensome for offenders, including health considerations.<sup>348</sup> King CJ related in *Smith* the general principles relating to the relevance of ill health<sup>349</sup>:

The state of health of an offender is always relevant to the consideration of the appropriate sentence for the offender. The courts, however, must be cautious as to the influence which they allow this factor to have upon the sentencing process. Ill health cannot be allowed to become a licence to commit crime, nor can offenders generally expect to escape punishment because of the condition of their health. It is the responsibility of the Correctional Services authorities to provide appropriate care and treatment for sick prisoners. Generally speaking ill health will be a factor tending to mitigate punishment only when it appears that imprisonment will be a greater burden on the offender by reason of his state of health or when there is a serious risk of imprisonment having a gravely adverse effect on the offender's health.

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346 *Sellen* (1991) 57 A Crim R 313, 318; *York* [2005] HCA 60 at [23]; (2005) 225 CLR 466; *Tsiaras* [1996] 1 VR 398; *Smith* (1987) 44 SASR 587, 589; *Perez-Vargas* (1986) 8 NSWLR 559, 563; *Cohen (No 2)* [2007] WASCA 279; *Houghton* [2006] WASCA 143; (2006) 32 WAR 260; see also *Crimes (Sentencing) Act 2005* (ACT), s 33(1)(r); *Penalties and Sentences Act 1992* (Qld), s 9(6); *Criminal Law (Sentencing) Act 1988* (SA), s 10(1)(l); see Australian Law Reform Commission, 2006: Para 6.114ff (recommending that federal sentencing legislation should expressly recognise as a sentencing factor the likely impact of a particular sentence on the offender, including that the offender's circumstances may result in imprisonment having an unusually severe impact on them).

347 *Van Boxel* [2005] VSCA 175 at [30]; (2005) 11 VR 258. In some cases it may be relevant to a decision whether or not to proceed with the charges at all; *Murray* [2011] NSWDC 258 (permanent stay of proceedings regarding a fitness to plead hearing granted in relation to 81-year-old priest suffering from numerous and severe medical conditions for offences committed in the 1960s and 1970s).

348 *Bailey* (unrep, 3.6.88, NSWCCA) (adult sexual assault); *Ral* [2012] QCA 34 (child sexual offences); *Quinn* [2012] SASCFC 102 at [38] (child sexual offences).

349 (1987) 44 SASR 587 at 589. *Smith* was approved by the High Court in *Bailey v DPP* (1988) 62 ALJR 319 (adult sexual assault); *Muldock* (2011) 244 CLR 120 at [19] (child sexual offences); see also *Vachalec* [1981] 1 NSWLR 351 at 353.



Factors that a court may take into account include the need for medical treatment, the degree of hardship in prison, and the likelihood of an offender's reasonable needs being met in prison. The correctional authorities can adequately manage most conditions without the need for mitigating an otherwise appropriate sentence.<sup>350</sup>

In *Scannell*<sup>351</sup>, an 88-year-old priest had been convicted of CSA against a 12-year-old boy some 40 years earlier. The Court imposed a two-year sentence with a 12-month non-parole period. On appeal, the sentence was reduced to 15 months' imprisonment, 10 months of which was suspended for two years, partly on the ground of the offender's ill health. Priest JA stated:<sup>352</sup>

Imprisonment will be extremely burdensome for the applicant. He is a frail, elderly man, who has suffered from hypertension; ischaemic heart disease requiring surgery; previous bowel cancer; and osteoarthritis. He is fitted with a pacemaker, and his cardiologist has offered the opinion that incarceration will increase his risk of stroke or heart attack. Psychological opinion indicates that the applicant has suffered severe anxiety and depression, and suggests that the likelihood of further psychological deterioration will be exacerbated by imprisonment.

Ill health does not necessarily mean that a prison sentence should not be imposed, or that the sentence should be less than the circumstances of the case would otherwise require. In *L*<sup>353</sup>, the offender had committed sexual offences on three girls but was 'plagued by health problems including heart disease, renal stones and osteoporosis'. The sentencing judge deferred sentence upon the respondent entering a recognisance for five years. Although the Crown appeal was dismissed, the CCA found 'the available medical evidence did not justify the decision to refrain from imposing a custodial sentence.' The Court exercised the residual discretion not to intervene.

### ***Protective custody and isolation***

Sex offenders may be held in protective custody because they may be attacked or ostracised. There are various forms of protective custody, depending on the level of association with other prisoners (Sentencing Council, New South Wales, 2008: 143). In her report on protective custody in New South Wales in 2001, Barnes reported that 27 per cent of prisoners in protective custody had been convicted of CSA offences (Barnes, 2001). In October 2007, that proportion was estimated to be 20 per cent of the total inmate population (Sentencing Council, New South Wales, 2008: 143).

In some jurisdictions, it had been assumed that conditions in protective custody were more onerous than those in the mainstream prison and some allowance was made for this in sentence through, for example, a reduction in the head sentence or non-parole period (Hazlitt et al., 2004: 4). However, over recent years, this assumption has been questioned and courts now require evidence of the kind of hardship that may be

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350 Badanjak [2004] NSWCCA 395 at [11].

351 [2014] VSCA 330.

352 [2014] VSCA 330 at [41].

353 Unreported, NSWCCA, 29.5.96.

caused by the conditions of custody<sup>354</sup> (Sentencing Council, New South Wales, 2008: 155).

Where the offender is likely to need physical isolation in prison because of the danger of other prisoners expressing their distaste for the crimes committed by the person,<sup>355</sup> courts are less likely to make a downward adjustment to sentence, regarding it ultimately as the duty of the correctional authorities to ensure the safety of those in their custody.<sup>356</sup> While it is not wrong for the reality of this risk to be taken into account in mitigation of penalty, it should not ordinarily be permitted to define whether a custodial sentence should be imposed, or to produce a more lenient sentence than the gravity of the crime warrants (Sentencing Council, New South Wales, 2008: Chapter 6).

### **Indirect consequences of conviction**

A convicted person may be subject to public opprobrium or stigma, a consequence that will vary from person to person and offence to offence. Most offenders who have been convicted of CSA in an institutional context have not been convicted previously and are likely to have had a high reputation in the community as a result of their status. The effect of a conviction on their reputation and how much regard should be paid to that in sentencing has been the subject of conflicting views in the High Court.

In *Ryan*<sup>357</sup> Kirby J was of the view that the ‘additional opprobrium, adverse publicity, public humiliation and personal, social and family stress’ suffered by the paedophile priest could be taken into account by reducing the sentence due to the added elements of shame and isolation to the offender and his family.<sup>358</sup> Callinan J was also of the view that a sentencing court should not ignore the fact that because persons who occupied offices of some prominence might attract much greater ‘vilification, adverse publicity, public humiliation, and personal, social and family stress than a crime by a person not so circumstanced’. To ignore this factor would be as unjust to a prominent person as it would be to ignore the disadvantages peculiar to a person holding a menial position.<sup>359</sup> McHugh, J, however, was less convinced, regarding it as inequitable to favour the powerful and well known over the lesser known. He also saw practical difficulties measuring the degree of opprobrium or stigma in each case and in doing so at a time, possibly many years in the future when the offender who may have committed very serious offences, would be released back into the community. He also considered it to be paradoxical that the worse the crime, and the greater the

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354 Clinton [2009] NSWCCA 276.

355 It is not uncommon for offenders against children to be subjected to severe assaults by other prisoners; they are thus usually obliged to serve their sentences in protective settings within the prison system, often largely in isolation; see for example, Gooley (1996) 66 SASR 380 (sexual offender beaten by other prisoners while in custody and it was likely that he would have to serve his term of 30 months in protective custody; ‘small’ allowance made).

356 Burchell (1987) 34 A Crim R 148, 151 (sex offender originally sentenced to periodic detention because of fears for his safety).

357 Ryan [2001] HCA 21; (2001) 206 CLR 267.

358 Ryan [2001] HCA 21 at [123]; (2001) 206 CLR 267.

359 Ryan [2001] HCA 21; at [177]; (2001) 206 CLR 267.

stigma, the greater the reduction might have to be.<sup>360</sup> Hayne J disagreed with Kirby and Callinan JJ.<sup>361</sup>

In *Klep*<sup>362</sup>, a case that also concerned a paedophile priest, Nettle JA acknowledged that the indirect consequences of conviction were a relevant factor, but one to which minimal weight would be given:

... much of the sentencing judge's analysis appears to me to be informed by the notion that the respondent has already been substantially punished by reason that he has been denied the faculties of a priest and is now likely to be defrocked. In the result, it appears to me that the judge may have imposed an effective sentence and a minimum term of imprisonment very considerably less than that which otherwise she might have. No doubt it is a relevant consideration that a prisoner may have suffered loss of office or profession or trade as a result of his or her offending: that is one of the factors to be borne in mind in determining the level of punishment to be imposed. Equally there can be no doubt that such a loss of office cannot be treated as a substitute for the punishment which the law requires.<sup>363</sup>

## System Considerations

### Confessions

In cases of sexual assault generally, and CSA in particular, the person apprehended, charged or convicted of an offence may admit to offences of which the law enforcement authorities may have had no knowledge and which it is unlikely that they would ever have discovered and prosecuted. In such cases, the offender may receive a reduction in sentence above that which they may receive for pleading guilty on the grounds that such conduct may facilitate the course of justice, reduce the need for specific deterrence, indicate genuine remorse, increase the prospects of rehabilitation and encourage others to act similarly.<sup>364</sup> In *Ryan*, Kirby J stated<sup>365</sup>:

Unless persons such as the appellant are encouraged to bring unreported cases to notice, the likelihood is that, in the great majority of instances, such crimes will not be reported. They will therefore go unpunished. Accordingly,

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360 *Ryan* [2001] HCA 21; at 152]–[55]; (2001) 206 CLR 267.

361 In *Liddy (No 2)* [2002] SASC 306; (2002) 84 SASR 231 the Court of Appeal of South Australia considered the various remarks in *Ryan* but did not take into account any stigma that may have attached to the conviction of a magistrate convicted of sexual offences against children.

362 [2006] VSCA 98.

363 *Klep* [2006] VSCA 98 at [18].

364 *Dodd* (1991) 57 A Crim R 349, 351–2 (confession to offences otherwise unknown merits leniency); *Doran* [2005] VSCA 271 at [14]; *FAJ* [2011] VSCA 137 at [33]; *SJ* [2012] VSCA 237; *DPP v CPD* [2009] VSCA 114; (2009) 22 VR 533; see also *Sentencing Act 1989* (SA), s 10(1)(h) (court should have regard to 'the degree to which the defendant has co-operated in the investigation of the offence'). In *Simpson* [2004] SASC 307; (2004) 89 SASR 515 the court held that a volunteered confession of offences of which the police may not have been aware may be a mitigatory factor under this provision.

365 [2001] HCA 21 at [94]; (2001) 206 CLR 267; see also *CLP* [2008] VSCA 113 at [22]; *Ellis* [1986] 6 NSWLR 603, 604; *Brazel* [2005] VSCA 56 at [21]; *DTR* [2005] VSCA 291; *DPP v OJA* [2007] VSCA 129. In *Spiteri* [2011] VSCA 33 at [35], Kyrrou JA suggested that the making of admissions that facilitate the course of justice, particularly matters that would ordinarily remain undetected, provide a separate basis for a discount to that afforded by a guilty plea: see also *BF* [2007] VSCA 217 at [53]; *Pajic* [2009] VSCA 53 at [15]–[16]; (2009) 23 VR 527.

both from the point of view of society and of the victims of crime, there are strong reasons of policy why the law should encourage offenders to make full confessions. It should certainly not discourage them. Encouraging a full confession may also be an important first step in securing help for, and counselling of, the offender. This is, likewise, one of the objects of criminal punishment and that of judicial sentencing.

## Delay

Long delays between committing an offence or offences and the prosecution, conviction and sentencing of an offender are common in cases of CSA. This is often due to the reluctance of victims to report the offences committed against them because they are embarrassed, ashamed or scared, or because the offender has coerced their silence (Royal Commission, 2014, Vol 1: 159). Chapter 4 sets out empirical and quantitative information for 171 institutional cases, including a calculation of the period between the date of the principal offence and the date of sentence. It is not necessary to detail all the results here. Suffice to state that nearly 80 per cent of offenders in the NSW sample of 84 cases were sentenced more than 10 years after the date of the principal offence; 54.4 per cent were sentenced more than 20 years later; and 38 per cent more than 25 years later.

These findings indicate that delay is more acute in institutional abuse cases than CSA generally. Hazlitt et al.'s general study of sentencing of CSA in New South Wales found that 37.9 per cent of offenders were sentenced more than 10 years after the offence occurred; 28.9 per cent were sentenced more than 15 years later; 18.2 per cent were sentenced more than 20 years later; and 9.4 per cent were sentenced more than 25 years later (Hazlitt et al., 2004: 26). The mean period of delay between the date of the offence and sentence was 9.6 years; the median period between the date of the offence and the reporting to police was 4.9 years and the longest delay was around 40 years. Male victims of CSA take longer to report their abuse than female victims (John Jay College, 2004; Parkinson et al., 2012). The Commission has found that the average length of time between offending and reporting of those who gave evidence in private sessions was 22 years (Royal Commission, 2014, Vol 1: 6).

The relevance of delay lies in its effects rather than its causes.<sup>366</sup> There is no automatic right to a discount in sentence due to delay.<sup>367</sup> Delay can influence the sentence in a number of ways, some aggravating, and some mitigating.

Where there is no evidence of the offender suffering detriment in the intervening years, it has been said in relation to a child sex offender that rather than spending his years in an 'emotional hell',

... the offender may have gone through the years untroubled by his offences, lacking any remorse in respect of them and feeling confident that they will never come to light because the victim never would be prepared to talk about them, his confidence increasing as the years went by with his victim remaining silent – the offender enjoying over the many years unwarranted acceptance

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366 *Merrett* [2007] VSCA 1; (2007) 14 VR 392; *Reilly* [2010] VSCA 278.

367 *Clarkson*; *EJA* [2011] VSCA 157 at [138]; *Nikodjevic* [2004] VSCA 22 at [21].

by his associates in his respectable and stable lifestyle.<sup>368</sup>

Delay may be an aggravating factor where the victims have been adversely affected by the offence in the intervening period, and have had to wait a very long time to have the wrongdoing against them recognised and punished.<sup>369</sup>

On the other hand, delay may be mitigating if there is evidence that in the years between the offending and sentencing the offender has not committed any further offences<sup>370</sup>, has desisted voluntarily<sup>371</sup>, has undergone rehabilitation and has shown genuine remorse for his offending.<sup>372</sup>

Delay might also be related to other possibly mitigating factors such as the offender's age.<sup>373</sup> An older offender might be in poor health and more likely to be adversely affected by serving a prison sentence.<sup>374</sup> He may be less likely to reoffend and, therefore, will be less likely to require specific deterrence. The protection of the community is also likely to get less weight as a factor in such cases. In some cases, a very long delay might mean that for these reasons the offender may not be brought to justice and victims' desire for justice may remain unsatisfied. In *Murray*<sup>375</sup>, the accused, an 81-year-old priest, had been charged with offences alleged to have been committed in the 1960s and 1970s. Due to extensive and serious medical problems, Woods DCJ granted a permanent stay of proceedings. His Honour said in relation to the victims, that<sup>376</sup>:

The possible satisfaction of complainants which may arise from the pursuit of charges against an alleged offender is a legitimate consideration in the criminal law generally. Although crimes are charged and prosecuted by the State, it is a relevant consideration that the victim of a crime should be able to see justice done, and his or her legitimate complaints vindicated by public Court process. Personal feelings of anger may not be allowed to govern criminal process, but they should not be ignored by prosecuting authorities and the Courts.

However, sometimes satisfaction of a victim by Court process may simply not be possible. Accused persons may disappear and cannot be found, no matter how diligently police search. A complainant may die. Key witnesses, upon whom a prosecution might depend, may die, disappear, or remember nothing. Here, there was delay of decades in the bringing forward of complaints and the laying of charges. The counts on the indictments derive from the 1960s and 1970s, a time before many of the members of any potential jury in a special hearing would have been born.

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368 *Holyoak* (1995) 82 A Crim R 502, 508–509 cited in *Liddy (No 2)* [2002] SASC 306; (2002) 84 SASR 231.

369 *Kovac* [2006] VSCA 229 at [28] per Neave JA.

370 *Kovac* [2006] VSCA 229 at [38] per Neave JA; *DPP v Coffey* [1999] VSCA 146.

371 *DPP v Coffey* [1999] VSCA 146.

372 Victorian Sentencing Manual, Para 31.4.4; *Dunne* [2003] VSCA 150; *Better* [2003] VSCA 71; *CVP* [2002] VSCA 193; *MWH* [2001] VSCA 196; *DPP v Coffey* [1999] VSCA 146.

373 See above p 91

374 *Beyer* [2011] VSCA 15; *MWH* [2001] VSCA 196; see above p 93.

375 [2011] NSWDC 258.

376 [2011] NSWDC 258 at [44]–[46].

Delay, long delay, in child sexual assault cases is quite understandable. The courts recognise it as likely in many cases even of entirely true and valid complaints, for a variety of human reasons. Yet even blameless delay has consequences. Here, it means that the accused has become a very ill man in his eighties, afflicted by multiple major illnesses to the point where he is in all likelihood close to death. In this case, my view is that the possible satisfaction of complainants by the continuation of this Court process, although a factor to be considered, is greatly outweighed by the fact of the lamentable medical condition to which the accused has now fallen. If the charges had been laid during the twentieth century, rather than the twenty-first, it would have been a very different situation.

### ***Delay and sentencing standards***

Delay between the date of the offence and sentencing is relevant in respect of the sentencing standards that apply. If the standards are those applicable at the time of the offending, they are likely to be lower than the standards at the time of sentencing because of the changing communal attitudes and growing understanding of the effects of CSA on victims.<sup>377</sup>

Chapter 4 shows that institutional abuse cases are characterised by a lengthy delay between the date of the offence and the date of conviction. It is commonplace for offenders to be charged and convicted of offences that are repealed or have been subject to substantial increases in the maximum penalties.

The sentencing issue can be reduced to a single question: Where there has been long delay between the offence and the date of conviction, should a court sentence the offender by reference to sentencing principles and practices as they existed when the offence was committed or by reference to sentencing patterns and principles applicable at the time sentencing? This question is particularly pertinent where standards have increased in severity.

The question has not come directly before the High Court of Australia. In *Radenkovic*<sup>378</sup>, a case that concerned re-sentencing following a successful appeal where the relevant law had changed adversely to the accused, Mason CJ and McHugh J stated:

... considerations of justice and equity ordinarily require that the convicted person be re-sentenced according to the law as it stood at the time when he was initially sentenced, particularly when that law was more favourable to him than the law as it existed at the hearing of the appeal. The convicted person had an entitlement when he was sentenced by the sentencing judge to a sentence imposed in conformity with the requirements of the law as it then stood.

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377 See above p 78.

378 [1990] HCA 54; (1990) 170 CLR 62. The Court later held in *Elliott* (2007) 234 CLR 38 at [36] that the phrase 'sentence is warranted in law', which appears in s 6(3) *Criminal Appeal Act*, assumes no change in the relevant law between the imposition of the sentence and the determination of the appeal against it. See also *Green* [2006] NTCCA 22; (2006) 19 NTLR 1.

This approach for determining appeals – according to the law as it stood – has been held to apply where there has been a substantial delay between the date of the offence and sentencing. The relevant law at the time of the offence is taken to mean the maximum penalties and sentencing standards as they stood at that time, ignoring any subsequent changes in communal or judicial attitudes towards the offence and sentencing aims and principles.<sup>379</sup>

In 1998, the South Australian Court of Criminal Appeal held in *Major*<sup>380</sup> that although ‘sentencing tariffs have increased significantly over recent years the offender had to be sentenced in accordance with the sentencing environment as it existed at the time of the commission of the offence’. In a later case, the Court concluded that a harsher standard of sentencing for CSA offences, set in a 1997 decision, should not apply to offences that occurred before that decision.<sup>381</sup> Doyle CJ observed that to do so would amount to a retrospective change in the sentencing approach, which, although open to the court, requires good grounds.<sup>382</sup>

The application of the common law principle to historical CSA cases was determined in New South Wales in 2002 by a specially constituted five-judge Bench in *MJR*.<sup>383</sup> The Court held that where, by reason of delay, an offender is exposed to a harsher punishment and sentencing regime than that which existed at the time of the offence, and if an authentic and credible body of statistical material exists that can reconstruct what would have been done previously, then a sentence should be imposed that reflects the applicable statutory maxima and sentencing patterns.<sup>384</sup>

*MJR*<sup>385</sup> requires a sentencing court dealing with an old offence to replicate – as best it can – the sentencing practice of the period when the offence was committed, where sentencing practice has moved adversely to the accused. The court in *MJR*<sup>386</sup> held that in the absence of reliable statistical material, the court must take a non-statistical approach, as described by Howie J in *Moon*:<sup>387</sup>

When sentencing an offender for offences committed many years earlier and where no sentencing range current at the time of offending can be established, the Court will by approaching the sentencing task in this way effectively sentence the offender in accordance with *the policy of the legislature current at the time of offending and consistently with the approach adopted by sentencing courts at that time* [emphasis added].

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379 Shore (1992) 66 A Crim R 37; *MJR* [2002] NSWCCA 129; (2002) 54 NSWLR 368 overruling *PLV* (2001) 51 NSWLR 736); *Magnuson* [2013] NSWCCA 50; *MPB* [2013] NSWCCA 213.

380 (1998) 70 SASR 498.

381 *Kench* (2005) 152 A Crim R 294 at [27], applying *Liddy (No 2)* (2002) 135 A Crim R 468.

382 *Kench* (2005) 152 A Crim R 294 at [27].

383 (2002) 54 NSWLR 368 (Spigelman CJ, Grove J, Sully J and Newman AJ; Mason P strongly dissenting); overruling *PLV* [2001] NSWCCA 282; (2001) 51 NSWLR 736.

384 *MJR* (2002) 54 NSWLR 368 per Spigelman CJ at [31]. The remarks concerning credible statistics were made by Sully J at [104] with reference to *Shore* (1992) 66 A Crim R 37. Grove J at [71] and Newman AJ agreed with Spigelman CJ and Sully J.

385 (2002) 54 NSWLR 368.

386 *MJR* (2002) 54 NSWLR 368 per Sully J at [107] with whom the other members of the Court generally agreed.

387 (2000) 117 A Crim R 497 at 511; see *MJR* (2002) 54 NSWLR 368 at [31]; *LIS* [2015] NSWCCA 47 at [16]–[18].

Both *MJR* and *Moon* have been consistently applied in New South Wales courts.<sup>388</sup>

The Queensland Court of Appeal has also held that a court ought to apply sentencing practices as at the date of the commission of the offence.<sup>389</sup> Generally, the Victorian Courts have followed the approach in *MJR*.<sup>390</sup> The position in Victoria is affected by *Sentencing Act 1991* (Vic), s 5(2)(b), which requires the sentencing judge to have regard to ‘current sentencing practices’. It has been established that this expression refers to practices at the time of sentence.<sup>391</sup> However, sentencing standards at the date of the offence remain relevant and the statutory position is moderated by the principle of equal justice, which requires that the offender not receive a substantially higher sentence than another who committed similar offences at or about the same time.<sup>392</sup> The ascertainment of current sentencing practices will ordinarily require an examination of aggregate sentencing statistics as well as recent comparable sentencing decisions both at first instance and on appeal.<sup>393</sup>

The Northern Territory Court of Criminal Appeal has also accepted as a ‘general principle’ that the applicable sentencing standards are, as far as is reasonably practicable, those that existed at the time of the commission of the offence, subject to three qualifications: that the principle is not an inflexible rule; that it can only be applied if it is reasonably practicable to do so, and that some changes in the statutory sentencing regime may complicate the applicable law.<sup>394</sup>

### **Rationale**

The common law principle is based on a notion of fairness – that the law should not be applied retrospectively. According to Spigelman CJ in *MJR*, a rule that permits a court to sentence according to current practices as opposed to past practices is ‘out of keeping’ with statutory provisions that prohibit taking into account an increase in a penalty for an offence retrospectively.<sup>395</sup> A presumption against retrospectivity should be adopted by analogy.<sup>396</sup> Basten JA in *MPB* described the rule as reflecting the general

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388 Lozanovski [2006] NSWCCA 143 at [15]; *MPB* [2013] NSWCCA 213 at [83]–[84]; *PWB* [2011] NSWCCA 84 at [75]; *AJB* [2007] NSWCCA 51 at [11].

389 *Wruck* [2013] QCA 39; cf *Pham* [1996] QCA 3 (holding that, in the case of child sexual offences, exceptional circumstances must be shown to exist before considering a non-custodial sentence. However, at the time of the applicant’s offences (1982–1983) there was no practice according with this approach). *Wruck* effectively overruled *Pham*.

390 *R L* [2009] VSCA 95 at [59].

391 *Stalio* (2012) 223 A Crim R 261; *AMP* [2010] VSCA 48.

392 *Stalio* at [54].

393 *DPP v CPD* [2009] VSCA 114 at [71]; *DPP v Dowie* [2009] VSCA 154 at [24].

394 *Green* [2006] NTCCA 22; (2006) 19 NTLR 1 at [46]–[47]; *Stuart* [2010] NTCCA 16 at [63]; *MK* [2005] NTCCA 13; *GPR* [2007] NTCCA 12.

395 *Crimes (Sentencing Procedure) Act 1999* (NSW), s 19(1); *Acts Interpretation Act 1954* (Qld), s 20C; *Criminal Code* (Qld), s 11; *Sentencing Act 1991* (Vic), s 114(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 27(2); *Crimes Act 1914* (Cth), s 4K. Conversely it is usual for jurisdictions to enact a provision to the effect if a provision of an Act reduces the sentence, or the maximum or minimum sentence, for an offence, the reduction extends to offences committed before the commencement of the provision; see *Penalties and Sentences Act 1992* (Qld), s 180(2); *Crimes (Sentencing Procedure) Act 1999* (NSW), s 19(2); *Sentencing Act 1991* (Vic), s 114(2).

396 *MJR* (2002) 54 NSWLR 368 at [29]; see *Samuels v Songaila* (1977) 16 SASR 397.



law principle based on a presumption against adverse effects operating retrospectively.<sup>397</sup>

### ***Scope of the rule***

The terms ‘sentencing practice’ and ‘sentencing pattern’ are imprecise.<sup>398</sup> They appear to encompass statutory provisions, common law principles and underlying policies and practices. The term ‘practices’ includes the application of principles as revealed by sentencing outcomes.<sup>399</sup> A sentencing practice such as fixing a non-parole period is to be distinguished from ‘executive practices’ in relation to remission of a sentence.<sup>400</sup>

How much of current law – both statute and common law – should be applied in a historic sexual offence case is unclear. Generally, in the case of a specific statutory provision the issue will be one of statutory interpretation<sup>401</sup> and the application of specific transitional provisions.

### ***Applying changes in the common law***

Sentencing practice changes in both directions.<sup>402</sup> The common law rule requires that generally the offender is ‘entitled to the benefit of a change in sentencing practice which led to lower than previous sentences, but would not be subject to a higher level of sentence when practice had changed in that direction.’<sup>403</sup>

The Victorian Court of Appeal held in *Stalio*<sup>404</sup> that the offender was ‘entitled to the potential benefit of all ... aspects of sentencing practice’. This included a utilitarian discount for his plea (which did not exist at the time of his offending) and attributing contemporary weight to his mental illness rather than the limited weight the factor would have been given had he been sentenced at a time proximate to his offences. The court made clear that practices that did not exist at the time of the offence should not be ignored:<sup>405</sup>

He is to be given the benefit of amplified procedural options under the current legislation and the potential benefit of current concepts bearing on his culpability and other relevant factors ... The Sentencing Act contemplates that the practice to which regard ‘must’ be had is current practice in respect of all such matters, and not the practice pertaining at the date of the offence. The breadth and protean nature of the concept of current sentencing practices strongly favours the view that it was not intended the concept be regarded as frozen in time at the date of the offending in issue.

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397 [2013] NSWCCA 213 at [11].

398 *MPB* [2013] NSWCCA 213 at [9].

399 *MPB* [2013] NSWCCA 213 at [9].

400 *AJB* [2007] NSWCCA 51; 169 A Crim R 32 at [31]; *Rosenstrauss* [2012] NSWCCA 25 at [7]-[9]; *Magnuson* [2013] NSWCCA 50 at [84]-[88].

401 *MPB* [2013] NSWCCA 213 at [11].

402 (2002) 54 NSWLR 368 at [11].

403 *MJR* (2002) 54 NSWLR 368 at [13] per Spigelman CJ quoting submission of counsel. The proposition was accepted.

404 (2012) 223 A Crim R 261 at [20].

405 (2012) 223 A Crim R 261 at [23]-[25].

On the other hand, it is unlikely that a court could or would assess the objective seriousness of child sexual assault by reference to outdated views about it and sexual assault generally. Examples of these outdated approaches found in the case law include sentencing considerations such as the child consented<sup>406</sup>, the offender (who taught the 13-year-old victim) was ‘a weakling who succumbed to his eroticism’<sup>407</sup>, the offence was ‘non-violent’<sup>408</sup>, the child’s ‘cooperation and participation was not wholly induced by fear or by having been overborne’<sup>409</sup>, the child was a willing participant<sup>410</sup>, or not without ‘promiscuous sexual experience’<sup>411</sup>, the complainant did not make a complaint<sup>412</sup>, ‘the crime was not an attack upon a resisting or protesting child’<sup>413</sup> and the offender ‘did not realise that he was doing anything wrong let alone criminal.’<sup>414</sup> The last case involved carnal knowledge of a five-year-old girl on an Aboriginal reserve.<sup>415</sup>

Sentencing considerations that have come to be regarded as aggravating factors present real difficulties for the courts in historical cases. The most obvious example is the now universal acceptance of the psychological harm caused by child sexual assault. The fact that an offender groomed the victim was not generally recognised as a matter of aggravation at least before 1985.<sup>416</sup> Past practice focused primarily on the nature of the act committed and factors such as breach of trust.<sup>417</sup> It is arguable that sentencing according to past practice would require a court to ignore or minimise the fact that the offender groomed the victim. It is a clear example of sentencing law moving adversely to offenders, but the sentencing process might be regarded as

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- 406 Michael John Hill (aka Michael James Grant) (unrep) NSWCCA No 52 of 1979 11 July 1979 per Street CJ at p 3.
- 407 Bakker (Ian John) CCA: VIC 27 February 1978 per Gillard J extracted in R Carter (1985) Australian Sentencing Digest Part IV at p 175.
- 408 Balmer (James Gordon) CCA: NSW 325/81 27 Aug 1982 summarised in R Carter (1985) Australian Sentencing Digest Part IV at p 209.
- 409 Graham Eversley Rowlands (unrep) NSWCCA No 196 of 1982 16 Dec 1982 Street CJ at p. 2
- 410 Michael John Hill (aka Michael James Grant) (unrep) NSWCCA No 52 of 1979 11 July 1979 per Street CJ at p 3; Coulton (Harold) CCA: VIC 7 Feb 1980 summarised in R Carter (1985) Australian Sentencing Digest Part IV at p 201. The offences involved seven boys and all except one were described as ‘willing participants’.
- 411 Butler [1971] VicRp 109; [1971] VR 892 (19 July 1971) found at <http://www.austlii.edu.au/au/cases/vic/VicRp/1971/109.html>. The Court held that the sentences imposed for buggery offences committed against two girls both ‘aged about 12’ were inadequate. Winneke CJ, who delivered the judgment of the Court (Winneke CJ Starke and Crockett JJ) said: ‘The material before the Court discloses, in our opinion, several circumstances of a mitigating nature which, no doubt, had considerable influence with the learned trial judge. The prosecutrices unfortunately could justifiably be regarded as neglected and wayward girls of loose moral character, and at least in the case of the younger, by no means without promiscuous sexual experience ... There was moreover no suggestion that the girls were not fully co-operative with the respondent in his actions with them.’
- 412 Colin William Babbage (unrep) NSWCCA No 234 of 1979. The Court said at p 8 ‘... there are factors in the present case which, so far as concerns the objective circumstances, tend to diminish the degree of criminality of which the appellant was guilty, included amongst these being the absence of any evidence of complaint by the complainant and her earlier intimate behaviour with the appellant during that evening.’
- 413 Michael Wayne Kelly (unrep) NSWCCA No 28 of 1978 22 June 1978. The quoted text is from the sentencing judge Cantor J extracted in the CCA judgment at p 2.
- 414 Michael Wayne Kelly (unrep) NSWCCA No 28 of 1978 22 June 1978 per Street CJ at p 5.
- 415 Michael Wayne Kelly (unrep) NSWCCA No 28 of 1978 22 June 1978 per Street CJ at p 5 Street CJ said ‘[the] conduct was, according to the evidence accepted by His Honour, not inconsistent with other conduct of a similar character apparently encountered not infrequently within the aboriginal reserve where he had been brought up, and it was conduct of a type which apparently does not attract opprobrium within that group.’
- 416 See R Carter (1985) Australian Sentencing Digest. The publication at Part IV pp 95-232 contains summaries of several appellate cases for sexual offences across Australia for the period 1970-1983. Grooming is not referred to as an aggravating factor in any of the cases collected.
- 417 See R Carter (1985) Australian Sentencing Digest Part IV at pp 95 -232 and *Williams* [1975] 1 WLR 292.

artificial if a court ignores or minimises such behaviour. Even if a court disregards outdated approaches to child sexual assault it must nevertheless sentence according to past standards. Berman DCJ SC, sitting in the District Court of NSW, put the view in *Gaven*<sup>418</sup> that ‘to sentence the offender according to standards which existed in the late 1980s is to perpetuate the errors that were made by sentencing Courts at that time.’

The court in *Magnuson*<sup>419</sup> held that the judge erred by applying the common law at the time of sentence and by adopting a post-*Pearce* approach to totality and accumulation that was not appropriate to the relevant offending period.<sup>420</sup> According to the Court in *Magnuson*<sup>421</sup>, *Pearce* was a later development that resulted in a lengthening of sentences, both with regard to sexual offences and offences generally. *Pearce* had ‘led to more focus upon accumulation and partial accumulation when sentencing for more than one offence’ and ‘the approach to questions of cumulation and concurrence was more lax’ before the decision in 1998.<sup>422</sup>

An example of the application of a specific statute can be found in the application of *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(5A), which provides that an offender’s good character or lack of previous convictions is not to be taken into account as a mitigating factor for a child sexual offence if the court is satisfied that the factor concerned was of assistance to the offender in committing the crime.<sup>423</sup> Section 21A(5A) has effect despite any Act or rule of law to the contrary.<sup>424</sup> It would apply to a historic sexual offence because of the operation of the transitional provisions in Schedule 2 of the Act, which provide that *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(5A) applies to sentencing for sexual assault offences that predated the commencement of the Act.

### ***Overly lenient sentences***

Where a court sentences according to sentencing practices that existed at the time of offending a very lenient sentence may be imposed. In *C; ex parte A-G (Qld)*<sup>425</sup>, the respondent, a Catholic priest, pleaded guilty to 34 counts of indecent dealing committed against 20 children between 1973 and 1981. He was sentenced in 2003 to three and a half years’ imprisonment suspended after 14 months. The prosecution appealed against the inadequacy of the sentence, seeking to have the suspension removed. The Court dismissed the appeal on the ground that these were the then current sentencing practices, insufficient as they might appear to the modern eye.

### ***The difficulty of identifying past sentencing patterns***

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418 [2014] NSWDC 189 at [13].

419 [2013] NSWCCA 50.

420 *Pearce* (1998) 194 CLR 610 McHugh, Hayne and Callinan JJ said at [45]: ‘A judge sentencing an offender for more than one offence must fix an appropriate sentence for each offence and then consider questions of cumulation or concurrence, as well, of course, as questions of totality’; see further below at p 107.

421 [2013] NSWCCA 50 at [117]; applied in *LJS* [2015] NSWCCA 47 at [16]-[18].

422 [2013] NSWCCA 50 per Button J at [117] and [143].

423 See above p 90.

424 *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(5B).

425 [2003] QCA 510.

When an appellant asserts that he or she was not sentenced according to past practices, the court will usually attempt to establish those practices. The onus is on an offender who contends that sentencing practice has moved adversely since the crime was committed to establish what the sentencing practice was at the time of the offence.<sup>426</sup> Evidentiary materials that can be used to discharge this onus include sentencing statistics, individual sentencing decisions and judicial recollections.<sup>427</sup>

On some occasions, the court has concluded on the basis of the information before it that it is not possible to discern an established tariff.<sup>428</sup> In other cases, it has held that the offender has not been sentenced according to past practices and intervened on that basis.<sup>429</sup> In *Magnuson*<sup>430</sup>, it held in 2013 that a sentencing pattern for sexual offences committed against children in the late 1970s and early 1980s could be established. This was founded upon five sources of information: sentencing statistics, decisions of the Court of Criminal Appeal, general increases in sentences for serious offences, maximum penalties and judicial memory. The use of judicial memory was doubted in the latter case of *MPB*<sup>431</sup> on the basis that it is apt to be unreliable and inequitable in application.<sup>432</sup> It is generally acknowledged in all jurisdictions that the principle in *MJR* of applying sentencing patterns is difficult to apply due to the challenge of obtaining a clear and comprehensive picture of earlier sentencing patterns and practices.<sup>433</sup> Garling J observed in *MPB*<sup>434</sup>:

... as experience shows, such sources need to be considered with some care because of inherent difficulties with them. For example, are the cited cases truly representative of those decided over the period, or else how is it that the statistical tables or analyses provided take into account, and identify, the wide variations in objective criminality and subjective circumstances? Statistical tables of sentencing outcomes are always to be treated with care.

Where statistical material is not helpful, the court must sentence in accordance with legislative policy current at the time of the offence and be consistent with the approach adopted by sentencing courts at that time.<sup>435</sup> The primary guide then becomes the maximum penalty and the range of criminality encompassed by the offence charged. These at least allow the Court to assess where the particular offence falls along the spectrum of conduct encapsulated in the offence.

### ***Sentencing guideline for historic cases in England and Wales***

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426 Scott [2011] NSWCCA 221 at [52].

427 Scott [2011] NSWCCA 221 at [53].

428 It has been held on numerous occasions that no reliable statistical data are available EGC [2005] NSWCCA 392; Dousha [2008] NSWCCA 263; PWB [2011] NSWCCA 84 where RS Hulme J could not derive, from the summary or the cases, any sentencing pattern for the offending.

429 Dunn [2004] NSWCCA 346 (judge erred by sentencing according to current child sexual assault sentencing patterns rather than those at the time of offending).

430 [2013] NSWCCA 50.

431 [2013] NSWCCA 213 at [89].

432 [2013] NSWCCA 213 at [89]–[92].

433 *MPB* [2013] NSWCCA 213 at [31].

434 [2013] NSWCCA 213 at [83].

435 Moon (2000) 117 A Crim R 497 at 511.

The Sentencing Council for England and Wales has published a sentencing guideline<sup>436</sup> that takes the opposite approach to that adopted by Australian appellate courts. Clause 1 of Annex B provides that (Sentencing Guidelines Council, UK, 2013):

The offender must be sentenced in accordance with the sentencing regime applicable at the *date of sentence* (emphasis in original).

However, the sentence is limited to the maximum sentence available at the time the crime was committed and if the maximum sentence has been reduced, the lower maximum is applicable.<sup>437</sup> Clauses 4 and 5 of the guideline require the court to assess the crime by referencing contemporary views of child sexual assault and not to determine the likely sentence that would have been imposed at the date of the offence:

4. The seriousness of the offence, assessed by the culpability of the offender and the harm caused or intended, is the main consideration for the court. The court should not seek to establish the likely sentence had the offender been convicted shortly after the date of the offence.

5. When assessing the culpability of the offender, the court should have regard to relevant culpability factors set out in any applicable guideline.

In *Rolf Harris*<sup>438</sup>, the court applied the guideline for historical offences.

There is little doubt that sentencing an offender for historic sexual offences is one of the most complex sentencing tasks. Sentencing according to past practice has posed substantial difficulties for the courts, both in terms of accessing reliable statistics and applying the law as it stood at the time of the offence(s). Just how much past law should be applied in a given case appears to differ between jurisdictions. The cases cited above show that courts in New South Wales have interpreted the rule much more literally than other Australian jurisdictions.

## Concurrent and Cumulative Sentences and Totality

The majority of those sentenced for offences relating to CSA are sentenced for more than one offence. The Victorian Sentencing Advisory Council's study of maximum penalties for sexual penetration with a child under 16 found that between July 2006 and June 2008, the average number of charges per case was at least two; for sexual penetration of a child under 10 the average number of charges was 2.5, and for sexual penetration of a child aged between 10 and 16, it was 2.7. When all sexual offences were included, the average number of offences was 9.8 for sexual penetration and 8.9 in relation to sexual penetration of a child under 10 (Sentencing Advisory Council, Victoria, 2009: 46).

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436 *Coroners and Justice Act 2009* (UK), s 125(1) provides that a Court is to follow a sentencing guideline that is relevant to the offender's case unless the court is satisfied that it would be contrary to the interests of justice to do so.

437 Clause 2. Article 7(1) of the European Convention of Human Rights prohibits the imposition of a heavier penalty than one applicable at the time the offence was committed. See also *H and others* [2011] EWCA Crim 2753 at [16].

438 *Rolf Harris*, sentencing remarks of Mr Justice Sweeney 4 July 2014 <http://www.judiciary.gov.uk/wp-content/uploads/2014/07/sentencing-remarks-mr-j-sweeney-r-v-harris1.pdf>

Charging for multiple offences may occur in relation to offences committed at the same time or offences committed at different times that are sentenced simultaneously. Courts may also have to consider offences for which the person has been sentenced in another jurisdiction, or offences committed at an earlier time but which were not prosecuted and which have become known, and circumstances in which the offender has already served time for other offences committed at that earlier time.

The challenge for sentencers is made even more difficult by the lack of clear guidelines about when sentences should be concurrent, cumulative or partially concurrent, by the generally vague principles relating to the principle of totality and the constraints of the charge laid.<sup>439</sup>

### **Concurrent sentences**

In most jurisdictions, there is a presumption that jail sentences must be served concurrently.<sup>440</sup> In Victoria, this is subject to an exception in relation to ‘serious sex offenders’ in which case the term of imprisonment ‘must, unless otherwise directed by the court, be served cumulatively on any uncompleted sentence or sentences of imprisonment imposed on that offender – whether before or at the same time as that term’.<sup>441</sup>

The courts have been reluctant to lay down rules as to when concurrent or consecutive sentences may be appropriate.<sup>442</sup> In *Attorney-General v Tichy*, Wells J stated:<sup>443</sup>

It is both impracticable and undesirable to attempt to lay down comprehensive principles according to which a sentencing judge may determine, in every case, whether sentences should be ordered to be served concurrently or consecutively. According to an inflexible Draconian logic, all sentences should be consecutive, because every offence, as a separate case of criminal liability, would justify the exaction of a separate penalty. But such a logic could never hold. When an accused is on trial it is part of the procedural privilege to which he is entitled that he should be made aware of precisely what charges he is to meet. But the practice and principles of sentencing owe little to such procedure; what is fitting is that a convicted prisoner should be sentenced, not simply and indiscriminately for every act that can be singled out and brought within the compass of a technically identifiable conviction, but for what, viewing the circumstances broadly and reasonably, can be characterised as his criminal conduct. Sometimes, a single act of criminal conduct will comprise two or more technically identified crimes. Sometimes, two or more technically identified crimes will comprise two or more courses of criminal conduct that, reasonably characterized, are really separate invasions of the community’s

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439 For example, where they are representative charges, charges taken into account or broad based charges such as ‘maintaining a sexual relationship’; see above pp 34ff.

440 See example, *Sentencing Act 1991* (Vic), s 16(1).

441 *Sentencing Act 1991* (Vic), s 6E.

442 Franklin [2013] NSWCCA 122; Cayhadi [2007] NSWCCA 1; Jarrold [2010] NSWCCA 69.

443 (1982) 30 SASR 84, 92–93.

right to peace and order, notwithstanding that they are historically interdependent; the courses of criminal conduct may coincide with the technical offences or they may not. Sometimes, the process of characterization rests upon an analysis of fact and degree leading to two possible answers, each of which, in the hands of the trial judge, could be made to work justice. The practice of imposing either concurrent or consecutive sentences cannot avoid creating anomalies, or apparent anomalies, from time to time.

The principles and practices relating to consecutive and concurrent sentencing are closely related to the charging practices of the Crown and to the law relating to double punishment. Where 'a number of serious offences are committed in a course of a single incident, a separate count should generally be laid for each offence if such conduct is to be taken into account'.<sup>444</sup> In laying the charges and in making orders for cumulation, care must be taken to ensure that the offender is not subjected to double punishment.<sup>445</sup> In *Pearce*, the High Court stated<sup>446</sup>:

To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn. Often those boundaries will be drawn in a way that means that offences overlap. To punish an offender twice if conduct falls in that area of overlap would be to punish offenders according to the accidents of legislative history, rather than according to their just deserts.

The presumption of concurrency will generally prevail when more than one offence arising out of the same facts, or a connected series of facts, is charged on the same indictment, so that the crimes can be said to be part of one continuing episode. Cumulation or partial cumulation may be appropriate in respect of sentences between indictments, but may also apply to sentences within the same indictment. Even where principle or statute indicates that a cumulative sentence should be expected, sentencers need not impose wholly cumulative sentences where the result would be to offend against the principle of totality, which provides the overarching framework, or one that will impose upon the prisoner a 'crushing sentence'.

Although the courts are reluctant to lay down binding principles relating to cumulation and concurrency, some patterns and practices can be discerned. However, much will depend upon the nature and number of the charges, the exercise of prosecutorial discretion, the number of victims, and the length of time over which the offending occurred.

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444 *King* [2007] VSCA 38 at [7]; see also *De Simoni* [1981] HCA 31; (1981) 147 CLR 383; *Newman* [1997] 1 VR 146.

445 *Pearce* [1998] HCA 57; (1998) 194 CLR 610 at [43]–[45]; *King* [2007] VSCA 38 at [7].

446 [1998] HCA 57; (1998) 194 CLR 610 at [40] per McHugh, Hayne and Callinan JJ; see also *Johnson* [2004] HCA 15; (2004) 205 ALR 346.

Concurrent sentences may be appropriate where multiple counts arise from substantially the same act, circumstances or series of occurrences.<sup>447</sup> The so-called 'continuing episode' or 'one transaction' rule provides no simple guide. It is only one factor to be taken into account in arriving at a proportionate sentence<sup>448</sup> and is thus closely connected to the totality principle. In these circumstances, the totality principle can be a two-edged sword, in that while it may be used to ensure that the total effective sentence is not disproportionately high, it may also apply to ensure that totally concurrent sentences are not disproportionately low, inadequately reflecting the offender's total criminality.

Repetitious behaviour over a confined span of time, particularly involving the same offence or the same victim, may be sufficient to allow the presumption of concurrency to continue.<sup>449</sup> In *O'Rourke*<sup>450</sup>, a case that also involved a number of sexual and other assaults over a short period of time, orders for concurrency were overturned on a Crown appeal because they undervalued the gravity of the offender's conduct and impact of that conduct upon the victim. Thus, where the rape is:<sup>451</sup>

... but one component of an aggregation of acts which together contributed to the debasement and humiliation of the complainant over a significant period of time during which the respondent was well aware of her resistance and distress ... [it was] quite inappropriate for the learned sentencing judge to regard the threats to kill, both the indecent assaults and the ongoing infliction of injury as being so linked to the act of rape as to warrant the punishment imposed for those offences being made wholly concurrent with the penalty imposed for rape.

However, the court in *O'Rourke* was reluctant to lay down any general rule<sup>452</sup>:

... it should not be thought that we are expressing the view that it is an immutable principle of sentencing that, where an offender has been found guilty of committing a series of sexual or violent acts on the same victim during the same episode, he or she is always bound wholly or partially to cumulate the penalties. There is not, in our view, any such principle of sentencing. Each case must depend upon its own facts. There may be, and indeed sometimes are, cases where because of the penalties already imposed the sentencer refrains from directing further cumulation lest there be imposed a crushing

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447 In South Australia, *Criminal Law (Sentencing) Act 1988* (SA), s 10(1)(c) provides that in sentencing, a court should have regard to whether 'the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character'. However, this may be treated as being either an aggravating or mitigating circumstance, depending upon the circumstances of the particular case: *Simpson* [2004] SAS 307; (2004) 89 SASR 515 at [62] per Gray J; see also *Crimes (Sentencing) Act 2005* (ACT), s 33(1)(c).

448 See *Miller* [2005] WASCA 53; (2005) 30 WAR 38 at [17] per Steytler P (the so-called rule is not a rule at all but merely a guideline or a principle); see also *Royer* [2009] WASCA 139 at [21] per Owen JA and [153] per Buss JA; *Ruich* [2006] WASCA 241 at [19]–[20]; *Faithfull* [2004] WASCA 39 at [25]–[28]; *Miller* (2005) 30 WAR 38 at [14]–[17]; *Worthington* [2005] WASCA 72 at [20]–[27]; *Amoore* [2008] WASCA 65 at [14]; *Woodley* [2008] WASCA 92 at [24]–[25]; *Lawrie* [2009] WASCA 45 at [10].

449 *DPP v Grabovac* [1998] 1 VR 664.

450 [1997] 1 VR 246; applied in *O'Brien* [1997] 2 VR 714; *Carroll* [2011] NTCAA 6.

451 [1997] 1 VR 246, 252; followed in *GJ* [2008] VSCA 222 at [77] (degree of cumulation may be necessary in a case of multiple sexual offences even though they may have been committed during a single course of conduct).

452 [1997] 1 VR 246, 253.



sentence or a sentence which offends against the principle of totality. Furthermore there are circumstances where the acts giving rise to discrete convictions are so closely related and interdependent that it can reasonably be said of them that they arise out of the one transaction and do call for concurrency.

The New South Wales Court of Criminal Appeal reached a similar conclusion in *Franklin*<sup>453</sup>, where the court found that concurrent sentences were not appropriate in a case where two offenders committed a number of sexual acts upon a 14-year-old victim under the appellant's care. The acts occurred over a short period. The Court held that 'some degree of accumulation was necessary to address the additional criminality reflected in these acts, in order for the totality of the criminality evidenced by the offences to be properly reflected'.<sup>454</sup> The Court cited Spigelman CJ in *MMK* where he stated that<sup>455</sup>:

In some cases the fact that a sentence for a particular offence is to be served completely concurrently with another sentence for a different offence will result in a sentence that is erroneously inadequate because it does not reflect the totality of the criminality for which the offender was to be punished for the two acts of offending ... This may be so even if the two offences arise from the same precise criminal act ... The same principle has been applied to sexual assault offences arising from a single incident of sexual assault.<sup>456</sup>

### **Cumulation**

Cumulation of sentences can be justified on a number of grounds relating to the purposes of sentencing. An offender's criminality is greater by reasons of committing more offences than fewer.<sup>457</sup> Serial and multiple offenders may require heavier sentences for the purposes of specific and general deterrence as they signal to offenders that offences cannot be committed with impunity.<sup>458</sup> The principles of concurrency and cumulation are not well understood by the community. Although there is no general rule that determines whether courts ought to impose sentences concurrently or cumulatively, some degree of cumulation may be required to maintain public confidence in the criminal justice system.<sup>459</sup> In some cases, a failure 'to accumulate, at least partially, may well be seen as a failure to acknowledge the harm done to ... individual victims.'<sup>460</sup> It may create a perception that courts are not effectively punishing offenders for offences beyond the first two or three in a series or an episode. However, total cumulation is not the normal rule.<sup>461</sup>

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453 [2013] NSWCCA 122.

454 *Harris* [2007] NSWCCA 130 at [46].

455 [2006] NSWCCA 272 at [13].

456 *Gorman* [2002] NSWCCA 516.

457 *Harris* [2007] NSWCCA 130.

458 *Harris* [2007] NSWCCA 130; *Mungomery* [2004] NSWCCA 450 at [25].

459 *Harris* [2007] NSWCCA 130 at [46] citing *Wheeler* [2000] NSWCCA 34 at [36]–[37] per Sully J.

460 *Wilson* [2005] NSWCCA 219 at [38] per Simpson J.

461 *VN* [2006] VSCA 111; (2006) 15 VR 113 at [144]; *Fuller-Cust* [2002] VSCA 168; (2002) 6 VR 496 at [144]; *Jongsma* [2004] VSCA 218 at [20] per Batt JA.

Other than when required by statute, cumulative jail terms will be appropriate where the separate sentences of imprisonment (whether arising out of multiple counts in the one presentment or, more likely, a number of different presentments) can be seen as two or more separate incursions into criminal conduct. They may also be appropriate where sentences on different counts represent separate episodes, transactions or incidents 'which ought to be recognised' and where 'the offending arises out of one episode or incident but involves violence or injury to separate victims raised in separate counts'.<sup>462</sup> Cumulation, or partial cumulation, recognises, through the sentencing process, the individuality of each victim and the harm caused to him or her.<sup>463</sup> It ensures that victims are not reduced to 'meaningless statistics'.<sup>464</sup> Where there are a series of offences, over a period of time, which, though related, involve different victims, and where the offences are similar but committed far apart in time, the courts may consider some degree of cumulation to be appropriate. The length of the total effective sentence may exceed the highest maximum penalty for one offence<sup>465</sup>:

... there is no principle that no matter how many offences are committed, how long the period over which they are committed, or how much is involved cumulative sentences exceeding the maximum permissible for a single offence should never be imposed. It is necessary to ensure that the punishment imposed is proportionate to the total criminality, and it is permissible to achieve this by requiring some sentences to be cumulative upon others.

### **Totality**

The strict logic of sentencing appears to demand that unconnected offences be punished cumulatively, despite each of the individual prison terms being within an appropriate range. However, strict logic is tempered by the principle of totality, which is the product of two other principles – namely proportionality and mercy.

The most commonly cited statement of the totality principle is that of Thomas, who wrote that (1979: 56–57)<sup>466</sup>:

The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences to review the aggregate sentence and consider whether the aggregate sentence is 'just and appropriate'.

The principle of totality is distinct from the principles of concurrency, though they are related. It applies whenever an offender may be subject to more than one sentence, whether passed on different counts of the same indictment or information or on

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462 *Wilkins* (1988) 38 A Crim R 445.

463 *Wilkins* (1988) 38 A Crim R 445; *DPP (Vic) v Towle* [2008] VSC 101 at [25].

464 *DPP v Solomon* [2002] VSCA 106 at [19] per Winneke P; *DPP (Vic) v Towle* [2008] VSC 101 at [25].

465 See *Lovell* [2012] QCA 43 at [64] citing *Cook*; *ex parte Attorney-General (Qld)* [1997] QCA 14; see also *Johnson* [2004] HCA 15; (2004) 205 ALR 346 at [3] per Gleeson CJ; *Attorney-General v Tichy* (1982) 30 SASR 84, 92–93.

466 See also *Mill* [1988] HCA 70; (1988) 166 CLR 59; *Piacentino* [2007] VSCA 49; (2007) 15 VR 501 at [32] per Eames JA; *Contin* [2012] VSCA 247 at [41]; *Hankin* [2009] NTCCA 11; (2009) NTLR 110 at [83].

different indictments. The concurrency principles hold generally that concurrent sentences may be appropriate where multiple counts arise from substantially the same act, circumstances or series of occurrences, where there is some temporal link or some similarity of offence. Totality applies regardless of time or space and is concerned with the overall appropriateness of a number of possibly unconnected criminal events.

Totality is related to the principle that a sentence should not ‘crush’ an offender by destroying any reasonable expectation of a useful life after release (Freiberg, 2014: 795–6).

In the case of CSA, it is not uncommon for offenders to be sentenced at different times for offences that were brought to light over time but that might have occurred at the same time or over longer periods. In some cases, the offender might still be in custody, in others they might have completed their sentence and be back in the community. In *Mill*, the High Court held that ‘where an offender had previously served time in custody and had later pleaded guilty to other similar offences, the proper approach was to consider what would have been the likely head sentence and non-parole period if the appellant had been sentenced for all of the offences at the one time’.<sup>467</sup> However, this general principle has been problematic when the courts convict an offender on several occasions over a number of years for offences that span a long period.

For example, in *Wright*<sup>468</sup>, the offender, a leader in the St John’s Ambulance service, had been convicted at various times of 41 counts against 18 victims over a 20-year period. Some were representative counts. He had previously been sentenced in 1994, 1998 and 2000 for similar offences. The offences for which he was most recently sentenced occurred in the same period as offences for which he had previously been sentenced. His counsel noted the potential injustice when a person who has committed offences in the distant past risks facing prosecutions in later years when other victims come forward.<sup>469</sup> Subsequent sentences for these offences would recognise the harm caused to these victims, but may result in disproportionate punishment. In this case, Wright’s appeal against his sentence on the grounds of totality, namely that the previous sentences should have been taken into consideration as the offences for which he was being sentenced occurred at the same time as the offences for which he had been previously sentenced, was unsuccessful. The Court of Appeal did not consider that the sentence imposed was manifestly excessive in all the circumstances.

Similar concerns arose in *Glennon (No 3)*<sup>470</sup> in 1999, when a court convicted and sentenced the appellant, a priest, after several trials for numerous offences committed between 1973 and 1991. He was serving long sentences when he was again convicted of multiple offences, and as a result of the new sentences, he faced 28 years in jail. The Court of Appeal held that this was outside the range of appropriate

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467 (1988) 166 CLR 59 at 66; see *Wright* [2009] VSCA 29 at [45].

468 [2009] VSCA 29.

469 [2009] VSCA 29 at [21].

470 [2005] VSCA 262.

sentences for the total criminality involved in all the offending since 1991. The sentence was reduced by three years.

*Ridsdale*, another priest, had spent 20 years in jail after two trials with total sentences of 25 years. He would be 84 when the sentence would be complete.<sup>471</sup> In sentencing him to an additional three years for offences committed at the same time as those for which he had been previously convicted, Rozenes CJ took into account the principle of totality, the need to avoid a crushing sentence and the fact that he would be 88 when the present sentence expired. Rozenes CJ recognised the fact that some in the community might believe that this was too lenient a sentence, but considered that the principle of totality demanded some moderation of the sentence.

Totality also applies to ‘multi-jurisdictional offences disconnected in time’,<sup>472</sup> so that a court may take into account offences and sentences committed in other jurisdictions, whether or not they are of the same nature or committed at around the same time.<sup>473</sup> In *Kramer*<sup>474</sup>, the offender had served a sentence in the United States and had been returned to Australia for sentence for other offences, all of a sexual nature. Although the periods of offending were 15 years apart, Bourke J felt ‘obliged’ to moderate his sentence in light of time served in the United States to meet the totality principle.

There is evidence that the greater the number of offences, the longer the total effective sentence, and that the totality principle operates to increase sentence lengths. In Victoria, the average number of (all) charges per case between 2006–07 and 2007–08 for the principal offence of sexual penetration of a child under the care, supervision or authority of an offender was 10.9, and for sexual penetration of a child under 10 it was 9.5. The average total effective sentence for the former offences was 5.8 years for two or three offences; 8.8 years for four or five offences; 9.1 years for 10 to 19 offences; and 11.5 years for 20 or more offences. For the offence of sexual penetration of a child under 10, it was 3.3 years for one offence; 4.5 years for four or five offences; eight years for 10 to 19 offences; and 14.6 years for 20 or more (Sentencing Advisory Council Victoria, 2009: 47).

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471 [2014] VCC 285.

472 *Morgan* [2013] VSCA 33 at [81]; cf *Frugtniet* [1999] VSCA 58; [1999] 2 VR 297; *Mann* [2005] VSCA 141; *Tsang v DPP (Cth)* [2011] VSCA 336.

473 *Todd* [1982] 2 NSWLR 517; *Regina* [2004] NTCCA 9; (2004) 149 A Crim R 583; *Morgan* [2013] VSCA 33.

474 [2014] VCC 24/7/13.

## Chapter 4

# Sentencing Standards

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### Introduction

The substantive criminal law relating to CSA and sentencing law are almost exclusively a matter for the states and territories. Other than Commonwealth offences, there is no requirement for state and territory courts to achieve numerically equivalent sentencing outcomes. The respective parliaments of each jurisdiction have enacted specific sentencing legislation and have created their own offence provisions (Australian Institute of Criminology, 2013). Substantial differences exist between Australian jurisdictions in the manner in which offences are cast<sup>475</sup> and the prescribed maximum penalties. Considerable differences also exist in sentencing outcomes between jurisdictions and few studies have examined sentencing for child sexual assault (see Hazlitt et al., 2004; Sentencing Advisory Council, Queensland, 2012; Sentencing Advisory Council, Victoria, 2009; 2009a; Judicial Commission of New South Wales, 2013). Even fewer have compared sentencing standards across Australian jurisdictions and none has examined CSA in an institutional context.

Sentencing standards between jurisdictions also vary for the range of offences, not only CSA. Some jurisdictions are generally more punitive and some vary in the relative ranking of offence seriousness. In each jurisdiction, sentencing for CSA must be understood within the context of that jurisdiction's general sentencing practices. A jurisdiction that hands down relatively lenient sentences for CSA offences is also likely to be less severe about other offences against the person (Sentencing Advisory Council, Tasmania, 2013). This may be due to generally lower crime rates, reduced need for deterrence, or that the penal culture or climate in that jurisdiction is different to others. Penal values or cultures also change over time, reflecting population changes, crime rates, media interest in crime and punishment, and the political complexion of the government in power.

Shorter sentences, lower custody rates, or imprisonment rates generally, do not necessarily mean that crime rates will consequently increase or that the community is at greater risk than a community with higher imprisonment rates. The evidence of a relationship between sentence lengths, imprisonment rates and public safety is scant.

### Shortcomings of offence classification systems

Attempts have been made to compare sentencing levels across Australia using generic classification systems. Brignell and Donnelly (2015) observed substantial technical

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475 For example, Tasmania does not have a separate offence for sexual intercourse with a child under 10. The relevant offence is sexual intercourse with a child under 17, which encompasses a far wider range of behaviours than the more specific offence.

difficulties in comparing child sexual offences across Australian jurisdictions. The *Australian and New Zealand Standard Offence Classification* (ANZSOC) system divides all Australian and New Zealand criminal offences into 'Divisions'. Within each Division, 'Subdivisions' exist, and they are further divided into 'Groups'.<sup>476</sup> ANZSOC is also not a satisfactory tool for measuring sentencing levels within a specific jurisdiction or across jurisdictions because the Subdivisions typically include several offences with a wide range of seriousness. Vast differences also exist in maximum penalties for offences within the groups (Brignell and Donnelly, 2015: 6). Consequently, the utility of any median sentence calculated using an ANZSOC Subdivision is limited. This applies whether it is a median for a non-parole period or a head sentence. Laws for non-parole periods vary widely: they can be discretionary, presumptive or mandatory. Sentencing practices also differ, particularly in relation to imposing sentences for multiple offences. For example, Tasmanian courts tend to impose a 'global sentence' rather than a separate sentence for each offence, which may then be ordered to be served concurrently, cumulatively or partly concurrently and partly cumulatively.

### **Past child sexual assault studies**

In order to provide a context for sentencing practices in institutional abuse cases, it is necessary to take into account the way the courts generally treat and determine CSA cases. Institutional abuse cases cannot be viewed in isolation. They form part of the larger picture of CSA. There are relatively few empirical sentencing studies of CSA in Australia. The following discussion summarises the findings of a number of recent studies of Australian sentencing standards.<sup>477</sup>

### **Sentencing factors relating to CSA**

Other studies of Australian sentencing standards for child sexual assault include institutional cases. Relatively few statistical studies have attempted to determine the factors that relate to sentence type or length in the context of CSA. No study has examined CSA in an institutional context.

#### ***Judicial Commission of NSW 1997***

In this study, the authors examined all the sentencing outcomes of child sexual assault cases finalised in the District Court of NSW in 1994. It consisted of 501 alleged offenders of whom 326 were convicted of at least one charge. Of that group, the principal offence (defined as the offence that attracted the most severe penalty) was a sexual offence in 319 cases (Gallagher et al. 1997: 11–13). Given that many institutional abuse cases are also historic sexual offences this study is particularly significant in explaining sentencing levels.

The study was based on all specific child sexual assault offences contained in the *Crimes Act 1900* (NSW) at that time, as well as general sexual assault offences in that Act that have provisions for assaults against children. The analysis covered repealed

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476 Australian Bureau of Statistics, *Australian and New Zealand Standard Offence Classification* (ANZSOC), 2011, 3rd ed, cat No 1234.0, ABS, Canberra.

477 These studies vary in quality and scope and no attempt has been made to critically review their methodology here.

and current offences. The study also examined the relationship between the victim and offender.

Only three of the 319 offenders were female and the median age for offenders was 35 years at the time of the offence (Gallagher et al., 1997: 13). The authors classified the offenders into the following categories: natural father (43.3 per cent); non-biological father (31.3 per cent); mother (1.5 per cent); teacher (2.2 per cent); grandfather (5.2 per cent); uncle (4.5 per cent); brother (0.7 per cent); mother's boyfriend (0.7 per cent); family friend (4.5 per cent); and friend/known to victim (6 per cent) (Gallagher et al., 1997: 34).

Of the victims, 72 per cent were female. The median age of the victim at the commencement of the abuse was nine years for females and 10 years for males (Gallagher et al., 1997: 24–25). The duration and pattern of abuse differed according to sex of the victim: female victims were more likely to have suffered prolonged assaults (41 per cent) compared with males (28 per cent) (Gallagher et al., 1997: 28).

The median length of time between committing the offence and arrest was six years (Gallagher et al., 1997: 13).

The study reported that offenders who were authority figures received longer sentences when this relationship was an element of the offence, noting that such offences carry higher maximum penalties. Of offenders, 5.4 per cent were in a relationship of non-familial authority to the victim, although the specific nature of that relationship is not specified. Of the 134 offences prosecuted under sections for which a relationship of authority was an element, only three (2.2 per cent) were teachers (Gallagher et al., 1997: 34).

Furthermore, the offenders included three ministers of religion sentenced for a total of nine proven offences (one committed five offences and had 41 matters taken into account on a Schedule/Form) (Gallagher et al., 1997: 14). The victims of the offences committed by the ministers were all male. The study also notes that other offenders were priests or religious authorities, but at the dates of those offences the 'in authority' offences were not operative. In one case, the minister was not practising at the time of the offence (Gallagher et al., 1997: 34). The sample also included five teachers sentenced for 11 proven offences; although only one taught the victim involved. However, five offenders were, or had been, teachers of victims, although their occupations were not coded as 'teacher' at the time of the offence. Five teachers (of whom three were teachers of the alleged victims) were acquitted or subject to no further proceedings (Gallagher et al., 1997: 26).

The study reports that more than half of the offenders (56 per cent) were sentenced to full-time imprisonment for the principal offence. Apart from full-time imprisonment, the other most common penalties imposed included periodic detention (13.2 per cent); common law or s 558 bonds (15 per cent); and community service orders (11.6 per cent) (Gallagher et al., 1997: 17).

Full-time custodial sentences were imposed in 84 per cent of cases where the principal offence involved penile penetration of the vagina or anus; in 66 per cent of cases where the principal offence involved digital penetration; in 62 per cent and 65 per

cent of cases where the offender performed or received fellatio, respectively; in 75 per cent of cases where the offender performed cunnilingus on the victim; in 39 per cent of cases where the principal offence involved masturbation of the victim or offender; and in 30 per cent of 'touching' offence cases (Gallagher et al., 1997: 18).

Of the cases in which a prison term was imposed for the principal offence, the median length of the minimum or fixed term imposed was: 42 months for penile vaginal penetration; 30 months for penile anal penetration; 21 months for digital vaginal penetration; 45 months for digital anal penetration;<sup>478</sup> 18 months for fellatio/cunnilingus on the victim or fellatio on the offender; 12 months for masturbation on the victim and nine months for masturbation on the offender; and 12 months for touching the victim with hands or penis (Gallagher et al., 1997: 19).

For offences in which the child was younger than 10, the study reported the following median full term sentences: for carnal knowledge of a girl under 10 contrary to s 67 *Crimes Act 1900* (NSW) (repealed), 78 months; for homosexual intercourse with a male under 10 contrary to s 78H (still in force at the time of the study), 65 months; for sexual intercourse with a child under 10 contrary to s 66A, 60 months; and for aggravated sexual assault where the victim was under 16 and under authority contrary to s 61J(2)(d) and (e), 36 months. The study also reported (at 47) median full term sentences for the following offences where there was a special relationship between the offender and victim: for incest contrary to s 78A *Crimes Act 1900* (NSW) (repealed), 48 months; for carnal knowledge by a teacher, father or stepfather of a daughter or female pupil contrary to s 73 (still in force at the time of the study), 74 months; for sexual intercourse with a person under 16 and under authority contrary to s 61D (rep), 56 months; and for sexual intercourse with a child aged between 10 and 16 and under authority contrary to s 66C(2), 66 months (Gallagher et al., 1997: 42).

Although the majority of offenders who committed crimes against more than one victim were dealt with in a single trial (amounting to 158 offences), 43 offences were dealt with in multiple trials of which only six had a guilty outcome (Gallagher et al., 1997: 20).

#### ***Judicial Commission of NSW 2004***

This study analysed the sentences imposed on 467 offenders convicted of CSA in the District Court of NSW from 2000–02. The analysis was based on data for the principal offence (the offence for which the most severe penalty was imposed). The authors observed that, generally, sentences for CSA had increased. This was partly attributable to changing community attitudes (Hazlitt, Poletti and Donnelly, 2004: vii).

The study collated offences into three general categories based on the seriousness of the offence: sexual intercourse/penetration (comprising 59.5 per cent of cases); indecent assault (37 per cent) and act of indecency (3.4 per cent) (Hazlitt et al., 2004: 22–23). Variables analysed in the data include offence(s), age(s) and gender of the victim(s), but the offender's relationship to the victim(s) and specific nature of the conduct were not available for analysis.

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<sup>478</sup> There was only one instance of this offence.



The study reported delays between offending and prosecution of more than 10 years (37.9 per cent), 15 years (28.9 per cent), 20 years (18.2 per cent), and 25 years (9.4 per cent). The median period between the date of offence and date of sentence was 4.9 years and the mean period was 9.6 years.

Offenders were overwhelmingly male with only two females in the sample of 467 offenders. The median age of offenders was 34 years at the time of the offence (Hazlitt et al., 2004: 26). Regarding the victim characteristics, 73.4 per cent were female and the median age was 11 years for female victims and 12 years for male victims (Hazlitt et al., 2004: 24–25).

The courts imposed a full-time custodial sentence in 65.1 per cent of cases and 83.1 per cent of cases if the figures for periodic detention and suspended sentences were included as a form of imprisonment (Hazlitt et al., 2004: 27). The authors note that the disparity between these figures and the figure of 56 per cent found in an earlier study (Gallagher et al., 1997) can be partly explained by the effect of the *Criminal Procedure (Indictable Offences) Act 1995* (NSW), which removed less serious cases to the Local Court, thereby increasing the custody rate for offences in the District Court. The authors also cite the introduction of suspended sentences under the *Crimes (Sentencing Procedure) Act 1999* (NSW) as another factor.

A jail sentence was imposed for sexual intercourse/penetration in 82.7 per cent of cases with a median term of 48 months; for indecent assault in 41 per cent of cases with a median term of 30 months; and for act of indecency in 18.8 per cent of cases with a median term of nine months (Hazlitt et al., 2004: 29).

Of the subjective circumstances of the offenders, the age of the offender was the best predictor of whether the sentence involved full-time custody. Juvenile offenders comprised 6.9 per cent of the sample and were less likely than adult offenders to receive a full-time custodial sentence (28.1 per cent compared to 67.8 per cent) (Hazlitt et al., 2004: 32). Offenders who had prior convictions for sexual assault were more likely to receive a full-time custodial sentence than those without such prior convictions (77.3 per cent versus 62.8 per cent) (Hazlitt et al., 2004). This finding was later confirmed by Faller et al., (2006). Offenders who had offences taken into account on a Form 1 (22.3 per cent of offenders) were more likely to be imprisoned (81.7 per cent versus 60.3 per cent) (Hazlitt et al., 2004). Those who had offences taken into account on a Form 1 were more likely to receive longer prison sentences (54 months versus 39 months) (Hazlitt et al., 2004). Offenders convicted of offences against children younger than 10 were more likely to be sentenced to full-time custody and to be sentenced to longer terms of imprisonment

Offenders who were in a position of authority received a more severe sentence if they were prosecuted under sections in which this factor was an element of the offence rather than an aggravating factor (Hazlitt et al., 2004: 43).

### ***Sentencing Advisory Council, Victoria 2009***

This study examined sentences imposed in the County Court and Supreme Court of Victoria between July 2006 and June 2008 (Sentencing Advisory Council, Victoria,

2009a). The offences examined were sexual penetration of a child aged between 10 and 16; sexual penetration of a child aged under 10; incest and rape.

The most common offence was sexual penetration with a child aged 10 to 16 years. The study reported 475 charges in 179 cases. Of those cases, 43 per cent received a total effective prison sentence; 6.7 per cent received a partly suspended sentence; 20.1 per cent received a wholly suspended sentence; 19 per cent received a community-based order and 7.8 per cent received an adjourned undertaking. The average total effective jail sentence was 4.2 years.

There were 420 charges in relation to 94 cases of incest. 91.9 per cent of cases received a total effective sentence of imprisonment with the remainder receiving a wholly or partly suspended sentence. The average total effective sentence of imprisonment was 7.7 years.

There were 58 charges in relation to 23 cases of sexual penetration with a child aged 10 to 16 years under the care, authority or supervision of the offender. Of those, 65.2 per cent received a total effective prison sentence; 21.7 per cent received a partly suspended sentence; and 13 per cent received a wholly suspended sentence. The average total effective prison sentence was 8.8 years.

There were 110 charges in relation to 44 cases of sexual penetration with a child aged under 10. Of those cases, 88.6 per cent received a total effective prison sentence, with the remainder receiving a wholly or partly suspended sentence or an adjourned undertaking. The average total effective sentence of imprisonment was 6.7 years.

There were 244 charges relating to 114 cases of rape. Of those, 86.8 per cent received a total effective prison sentence, with the remainder receiving a wholly or partly suspended sentence or an adjourned undertaking. The average total effective sentence of imprisonment was 7.6 years.

### ***Sentencing Advisory Council, Queensland 2012***

This study reviewed the sentences imposed on offenders aged 17 years and older from 2006 to 2010 convicted of unlawful sodomy (2 per cent); indecent treatment of a child under 16 (47 per cent); unlawful carnal knowledge (12 per cent); maintaining a sexual relationship with a child (7 per cent); rape (31 per cent); and attempted rape (1 per cent). It analysed this data to review current sentencing practices for child sexual offences (Queensland Sentencing Advisory Council, 2012: 32). The study included both District Court and higher court data. The analysis was based on the most serious offence for which the offender was convicted, as determined by the Australian Bureau of Statistics (ABS) 2009 National Offence Index.

The study reported the following proportions of offenders who were sentenced to imprisonment or a partially suspended sentence: rape (97.9 per cent); attempted rape (94.7 per cent); maintaining a sexual relationship with a child (97.1 per cent); unlawful sodomy (65.7 per cent); indecent treatment of a child (52.4 per cent); and unlawful carnal knowledge (25 per cent), (Queensland Sentencing Advisory Council, 2012: 33). The longest mean prison terms were imposed when the principal offence was rape (6.5 years); maintaining a sexual relationship with a child (six years); or unlawful sodomy (six years). Sentences for rape and attempted rape did not distinguish

between offences committed against children and those committed against adults, as this information was not included in Queensland courts' data. The shortest mean prison terms imposed were for offenders with a principal offence of indecent treatment of a child under 16 (one year) and unlawful carnal knowledge (one year) (Queensland Sentencing Advisory Council, 2012: 34).

### ***Sentencing Advisory Council, Tasmania 2013***

This study reports the length and type of sentences for sex offences imposed by the Tasmanian Supreme Court from the period 1978-2011, with data divided into three decade-long intervals within that period.

The majority of sex offences in Tasmania are contained in the *Criminal Code Act 1924* (Tas). The study reports the following median prison terms for 2001 to 2011: for rape contrary to s 185 of the Code, 36 months; for sexual intercourse with a young person (under the age of 17) contrary to s 124, three months; for aggravated indecent assault contrary to s 127A, six months; for indecent assault contrary to s 127, three months (Sentencing Advisory Council, Tasmania, 2013: 4–10).

The study reports (at p 6) that sentences for rape declined over the period 2001–11, but notes that the sample size for this offence is too small for statistical tests of significance to be valid. In any event, this apparent decline may be due to the introduction of the offence of maintaining a sexual relationship with a young person in s 125A of the Code (Sentencing Advisory Council, Tasmania, 2013: 6).<sup>479</sup> The authors also note that the proportion of custodial sentences for offences of sexual intercourse with a young person has increased from 38.71 per cent in the period 1990–2000 to 72.97 per cent in 2001–11.

### **Ascertaining current sentencing levels**

Parliaments regularly repeal, re-enact and increase maximum penalties for sexual offences. This makes it difficult to establish current sentencing levels for CSA in Australia because median sentences are sometimes extracted from a small number of cases. New South Wales is a good illustration of the problem.

#### ***New South Wales***

In order to ascertain current sentencing levels for child sexual assault in New South Wales reference must be made to standard non-parole periods introduced in February 2003. A standard non-parole period represents the non-parole period for an offence in the middle of the range of objective seriousness for an offence.

Poletti and Donnelly (2010) examined the effect of standard non-parole periods on sentencing levels generally in New South Wales over a seven-year period. The study compared sentences imposed on offenders 'pre' and 'post' the introduction of standard non-parole periods in February 2003. The authors found that following the introduction of a 15-year standard non-parole period for the offence of sexual intercourse with a child under 10 under s 66A *Crimes Act 1900* (NSW) (as it then stood) the median full-term or head sentence increased by 60 per cent and the median non-

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479 See below at p 190 for further discussion of sentencing for this offence.

parole period increased by 41.7 per cent. This was the largest increase of any other standard non-parole period offence. Similarly for aggravated indecent assault under s 61M *Crimes Act 1900* (NSW), following the introduction of a five-year standard non-parole period the median full term increased by 51.1 per cent and the median non-parole period increased by 50 per cent. The authors found the differences in the duration of sentences imposed before and after the introduction of a standard non-parole period were statistically significant for these two offences. For the offence of sexual intercourse without consent in circumstances of aggravation found in s 61J of the *Crimes Act*, the median full term increased by 20.8 per cent and the median non-parole period increased by 12.5 per cent. However, the difference was not statistically significant. The study concluded that the greater the proportion of the standard non-parole period to the maximum penalty, the greater the increase in the sentences imposed.

The role and status of standard non-parole periods in New South Wales was significantly altered by the High Court decision in *Muldrock*<sup>480</sup>, in which the Court held that the decision of *Way*<sup>481</sup> was wrongly decided. *Way*'s case had been the leading authority for nearly seven years on the question of how to apply the standard non-period provisions. The High Court said *Way* and decisions that followed it impermissibly applied a two-stage approach to sentencing. Further, the Court in *Way* attributed what the High Court described as 'primary' and 'determinative significance' to the standard non-parole period.<sup>482</sup> After *Muldrock*, standard non-parole periods had a diminished role and courts only used them as a legislative guidepost (Donnelly, 2012; Hulme, 2012).<sup>483</sup> It is not clear whether the decision immediately resulted in the imposition of lower sentences for standard non-parole period offences. Sufficient time needs to elapse before undertaking a valid before and after comparison to examine sentencing levels. In 2013, the Judicial Commission of NSW supplied the Sentencing Council of New South Wales data for pre- and post-*Muldrock* sentencing levels, which included child sexual assault offences.<sup>484</sup> The following paragraphs set out the sentencing data for two CSA offences before and after *Muldrock*. It is perhaps too early to ascertain whether *Muldrock* has resulted in a fall in sentencing patterns.

### ***Sexual intercourse with a child under 10 under s 66A Crimes Act 1900 (NSW):***

The data in the case of an offence of sexual intercourse with a child under 10 was separated before (s 66A *Crimes Act 1900* (NSW) (old)) and after 1 January 2009, when the offence was divided into s 66A(1) (basic) and s 66A(2) (aggravated). After that date, both offences had a standard non-parole period of 15 years, but the offence under 66A(2) carried a maximum penalty of life imprisonment.

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480 (2011) 244 CLR 120; decided on 5 October 2011.

481 (2004) 60 NSWLR 168.

482 (2011) 244 CLR 120 at [26], [32].

483 See also discussion in Judicial Commission of NSW *Sentencing Bench Book* at [7-895].

484 Standard non-parole periods, *Sexual offences against children. An interim report by the NSW Sentencing Council* November 2013. The report was first published on the Council's website sometime in October 2014). [http://www.sentencingcouncil.justice.nsw.gov.au/agdbasev7wr/\\_assets/sentencing/m445001/771002/snpp sexual offences interim report.pdf](http://www.sentencingcouncil.justice.nsw.gov.au/agdbasev7wr/_assets/sentencing/m445001/771002/snpp%20sexual%20offences%20interim%20report.pdf). The figures were republished in the final report (Sentencing Council, NSW, 2013a).

There were 25 cases between 5 October 2008 and 4 October 2011, for which s 66A (old) offence was the principal offence. All adult offenders were sentenced to full-time imprisonment. The median overall sentence was 120 months and the median non-parole period or fixed term was 84 months. There were six cases for which a s 66A (old) offence was the principal offence *after* the decision in *Muldrock* between 5 October 2011 and 31 March 2013. All were sentenced to full-time imprisonment. The median overall sentence was 135 months and the median non-parole period or fixed term was 92 months.

Section 66A commenced in its current form on 1 January 2009. Following the re-enactment of s 66A, between 5 October 2008 and 4 October 2011, in six pre-*Muldrock* cases the basic form under s 66A(1) was the principal offence. All were sentenced to full-time imprisonment and two (33.3 per cent) had Form 1 matters taken into account. The median overall sentence was 72 months and the median non-parole period, or fixed term, was 42 months. Between 5 October 2011 and 31 March 2013, *after* the decision in *Muldrock*, in 10 cases a s 66A(1) offence was the principal offence. All were sentenced to full-time imprisonment and five (50 per cent) had Form 1 matters taken into account. The median overall sentence was 73.5 months and the median non-parole period, or fixed term, was 42 months.

Between 5 October 2008 and 4 October 2011, in three cases a s 66A(2) offence was the principal offence. All were sentenced to full-time imprisonment and none had Form 1 matters taken into account. The median overall sentence was 112 months and the median non-parole period, or fixed term, was 70 months. Between 5 October 2011 and 31 March 2013, *after* the decision in *Muldrock* and following the re-enactment of s 66A, in 15 cases a s 66A(2) offence was the principal offence. All were sentenced to full-time imprisonment and six (40 per cent) had Form 1 matters taken into account. The median overall sentence was 144 months and the median non-parole period, or fixed term, was 96 months.

#### ***Indecent assault before and after Muldrock***

Between 5 October 2008 and 4 October 2011, in 47 cases a s 61M(1) *Crimes Act 1900* (NSW) offence was the principal offence. Of those, 35 (74.5 per cent) were sentenced to full-time imprisonment. Seven (20 per cent) had Form 1 matters taken into account. The median overall sentence was 36 months and the median non-parole period, or fixed term, was 21 months.

Between 5 October 2011 and 31 March 2013, *after* the decision in *Muldrock*, in 12 cases for which a s 61M(1) offence was the principal offence, nine (75 per cent) were sentenced to full-time imprisonment. One (11.1 per cent) had Form 1 matters taken into account. The median overall sentence was 36 months and the median non-parole period, or fixed term, was 18 months.

#### ***Aggravated indecent assault before and after Muldrock***

Between 5 October 2008 and 4 October 2011, in 26 cases for which a s 61M(2) *Crimes Act 1900* (NSW) offence was the principal offence, 21 (80.8 per cent) were sentenced to full-time imprisonment. Five (23.8 per cent) had Form 1 matters taken into account.

The median overall sentence was 36 months and the median non-parole period or fixed term was 18 months.

Between 5 October 2008 and 4 October 2011, after the decision in *Muldrock*, in 21 cases for which a s 61M(2) offence was the principal offence, 12 (57.1 per cent) were sentenced to full-time imprisonment. Six (50 per cent) had Form 1 matters taken into account. The median overall sentence was 36 months and the median non-parole period or fixed term was 22 months.

Overall, from the small numbers available, it would appear that the High Court's decision in *Muldrock* did not significantly alter sentencing patterns for these offences.

### **Comparative sentencing studies for child sexual assault**

Brignell and Donnelly (2015) examined the statutory schemes and sentencing levels across Australian jurisdictions for a range of offences, including sexual assault and child sexual assault. The study followed previous studies conducted by the Judicial Commission of New South Wales (Indyk and Donnelly, 2007; Indyk and Donnelly, 2007a). The authors compared statutory maximum penalties for child sexual assault, full-time imprisonment rates and the median head sentences over a five- to seven-year period. They matched particular crimes between jurisdictions and focused on cases dealt with on indictment in the County Court of Victoria, the District Court of New South Wales and the District Court of Queensland. The study sourced data from QGIS, the Victorian Sentencing Advisory Council and the Judicial Commission of New South Wales' Judicial Information Research System (JIRS). The availability of data for specific offences enabled targeted sentencing comparisons between these states.<sup>485</sup>

Brignell and Donnelly found that New South Wales had the highest custody rate<sup>486</sup> for sexual assault offences (as defined) committed against a child under 10. The overall custody rate was 89 per cent; Victoria's rate was 74 per cent; and Queensland's 70 per cent. However, when partially suspended sentences were included, the rate of imprisonment rose to 94.2 per cent in Queensland.

Table B.2 of Appendix B of the study, extracted below (as Table 2), shows median head sentences across the eastern seaboard for sexual intercourse with a child aged under 10 years.

**Table 2: Offenders sentenced to full-time imprisonment for sexual assault of child under 10**

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485 However, it should be noted that charging practices vary between jurisdictions. In Queensland, it is common practice to charge an offender with the offence of rape under s 349 *Criminal Code 1898* (Qld), s 349, which carries a maximum penalty of life imprisonment, in child sexual assault cases. Over a six-year period, Brignell and Donnelly (2015) found that 120 offenders were sentenced for rape in circumstances where the victim was under 10 years of age. The common aggravating circumstances found in child sexual assault offences are taken into account as aggravating features of the rape charge. The study used these cases for the purposes of comparison.

486 The custody rate is the proportion of persons sentenced for an offence who were sentenced to imprisonment.

Jurisdiction	Section	Date range	Number sentenced	Number imprisoned	Custody rate %	Median principal offence head sentence (months and years)
NSW	s 66A <sup>487</sup>	1.7.06–30.6.13	173	154	89.0	84 (7 years)
Vic	s 45(1)(a) <sup>488</sup>	2007/8–2011/12	71	54	74 (76.2) <sup>489</sup>	48 (4 years)
Qld	s 349 (rape)	1.7.07–30.6.13	120	84 (113) <sup>490</sup>	70.0 (94.2) <sup>491</sup>	72 (6 years)

New South Wales had the highest median head sentence for full-time imprisonment of 84 months and Queensland had a median head sentence of 72 months.

In Victoria, the median head sentence for individual charges of CSA on a child under 10 was 48 months. The median total effective sentence for these cases<sup>492</sup> was 6.25 years, the longest sentence was 16.5 years and the least severe sentence was 0.25 years. The median non-parole period for these cases was four years, the longest was 14 years and the shortest was 0.67 years.

The head sentence is not equivalent to the time that an offender might serve. In almost every case, a non-parole period will be set, which will be lower than the head sentence, although there is no guarantee that an offender will be released when the non-parole period expires.

In Victoria, between July 2008 and June 2013, there were 32 cases of sexual penetration with a child aged 10–12 under the care, supervision or authority of the offender (relating to 111 charges). Of these offenders, 78 per cent received a custodial sentence; 6.2 per cent received a partly suspended sentence; and 12.5 per cent received a wholly suspended sentence (Sentencing Advisory Council, Victoria, SACStat).<sup>493</sup> The median total effective sentence was five years, the longest sentence of imprisonment imposed was 14.5 years and the shortest was three years. The median non-parole period was three years, the longest, 11 years and the shortest was 1.17 years.

487 This group includes those offenders charged under ss 66A(1), (2) and s 66A as it stood prior to amendment by the *Crimes Amendment (Sexual Offences) Act 2008* (NSW), (effective 1 January 2009), when s 66A was divided into a simple and aggravated form of the offence (ss 66A(1) and (2)).

488 Section 45(2)(a) was amended to increase the minimum age of the victim for this offence from 10 to 12 years. The new age range of under 12 years applies for offences committed on or after 16 March 2010. The data includes both cases before and after the legislation was amended. There was only one case that was sentenced under the new version of the legislation (sexual penetration of a child under 12 years) during the data period. It is not known whether the victim in that case was under 10 or between 10 and 12 years.

489 Including partly suspended sentences.

490 Including partly suspended sentences.

491 Including partly suspended sentences.

492 Each case may contain numerous individual charges.

493 See [http://www.sentencingcouncil.vic.gov.au/sacstat/higher\\_courts/hc\\_index.html#INDEX\\_C](http://www.sentencingcouncil.vic.gov.au/sacstat/higher_courts/hc_index.html#INDEX_C).

## Sentencing standards for persistent abuse/maintaining a sexual relationship

It is difficult to make a valid comparison of sentencing levels in each jurisdiction for the offence of persistent abuse/maintaining a sexual relationship with a child because the offence is rarely charged in New South Wales. The number of cases between jurisdictions varies greatly. For example, over a seven-year period between 2007 and 2014, there were only 16 cases in New South Wales compared with 302 cases in Queensland.<sup>494</sup>

SACStat's higher courts database shows that between July 2008 and June 2013, there were 43 cases of persistent sexual abuse of a child under 16 relating to 53 charges.<sup>495</sup> A custodial sentence was imposed in 97.7 per cent of cases. The median total effective sentence for this offence was 7.25 years, the longest sentence was 13.5 years and the shortest was 2.5 years.<sup>496</sup> The median non-parole period was 5.33 years, the longest was 11.5 years, and the shortest was 0.83 years.<sup>497</sup>

Between July 2007 and June 2014, NSW Judicial Commission statistics for the offence of persistent sexual abuse show 16 cases, all of which resulted in full-time imprisonment. The median head sentence was 10 years. The 80 per cent range for the distribution of prison sentences fell between five years and 14 years. These figures should be treated with caution given the small number of cases.<sup>498</sup>

The Queensland Sentencing Advisory Council (2012: 34 and 36) found that between 2006 and 2010, the average jail term for maintaining a sexual relationship with a child was six years.<sup>499</sup> Between 2001 and 2010, more than 95 per cent of offenders received a jail sentence. During this period, the number of offenders pleading guilty to the offence fell. This may have been due to the 2003 increase in the statutory maximum penalty (to life imprisonment) and the high sentence range outlined in case law at the time.

Queensland Sentencing Information Service (QSI) statistics show that between September 2007 and August 2014, 302 offenders were convicted under the *Criminal Code* (Qld) of maintaining a sexual relationship with a child. Of those, 72 per cent (218) were sentenced to imprisonment; 26 per cent (78) received a partially suspended sentence; and 2 per cent received a wholly suspended sentence. In Queensland, partially suspended sentences are regarded as a custodial sentence because the offender is required to serve time in prison. The custodial sentence rate for the above period is, therefore, 98 per cent. The figure is very close to the Queensland Sentencing Advisory Council's analysis of sentences for the period of 2006–10, which show that 97.1 per cent of offenders received a custodial sentence.<sup>500</sup> QSI statistics reveal that

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494 See further below .p 190.

495 [http://www.sentencingcouncil.vic.gov.au/sacstat/higher\\_courts/HC\\_6231\\_47A\\_1.html](http://www.sentencingcouncil.vic.gov.au/sacstat/higher_courts/HC_6231_47A_1.html)

496 [http://www.sentencingcouncil.vic.gov.au/sacstat/higher\\_courts/HC\\_6231\\_47A\\_1.html](http://www.sentencingcouncil.vic.gov.au/sacstat/higher_courts/HC_6231_47A_1.html)

497 The new 'baseline' sentence for this offence is 10 years, see p 196.

498 See also discussion at p.190.

499 See Table 6, average sentence lengths for reference offences by selected most serious penalty outcomes, Queensland courts, 2006–10 at 34.

500 See Queensland 2012 Figure 1 at 33.



the median head sentence for the offence was seven years and that 80 per cent of the prison sentences ranged between four and 12 years.

The Sentencing Advisory Council, Tasmania (2013) analysed sentencing data for the offence of maintaining a sexual relationship with a young person under the age of 17<sup>501</sup> during the periods 1995–2000 and 2001–11. The data revealed that, with one exception, a custodial sentence was imposed in every case.<sup>502</sup> The exception was for the period 2001–11, when 97.2 per cent of (107) offenders who committed one count received a custodial sentence.

The sentencing data for the offence was classified according to whether the offender committed one, two, three to four, or five or more counts. Median head sentences were calculated for each of these categories, and for the data periods 1995–2000 and 2000–11. As stated earlier, in Tasmania a court can impose a global sentence for two or more offences without specifying a sentence for each offence. For the period 1995–2000, the median sentence for a single count was 18 months. That figure rose to 30 months when two counts were committed.<sup>503</sup> For the period 2001–11, the median sentence was 21 months for one count, 30 months for two counts, 48 months for three to four counts, and 72 months when five or more counts were committed.<sup>504</sup> The Council noted that the offence of maintaining a sexual relationship may have replaced rape as the preferred charge in serious rape cases (Sentencing Advisory Council, Tasmania, 2013: 6).<sup>505</sup>

## The Institutional CSA Sentencing Study

### The database

In order to obtain a more detailed and nuanced understanding of the ways in which common law principles and statutes are applied to sentencing of CSA in an institutional context, a sentencing database containing 171 cases was established.<sup>506</sup> The database was contained in two Excel spreadsheets: one with 93 NSW cases and another with 78 cases from the remaining Australian jurisdictions. A third spreadsheet of 102 cases was created, which contained cases where it could not be conclusively established (using official records) that they were in fact institutional abuse cases. These were put aside for the purposes of analysis below. The Royal Commission was

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501 Section 125A *Criminal Code* (Tas).

502 Custodial order includes fully suspended sentences and ‘custody in the community’ (which includes periodic detention and intensive correction orders). See Table 3 at p 7 accessible at [http://stors.tas.gov.au/au-7-0023-00302\\_1](http://stors.tas.gov.au/au-7-0023-00302_1)

503 Median sentences were not calculated for the 1995–2000 period for the three to four counts or five or more counts categories, presumably because there was insufficient data to do so.

504 See Table 3 at p 7.

505 On the sentencing considerations relevant to sentencing for these offences, see *DPP v DZ* [2009] VSCA 301; *DPP v DDJ* (2009) 22 VR 444; *King* [2013] ACTCA 29; *Langbein* [2008] NSWCCA 38; (2008) 181 A Crim R 378; *Pilling* (2010) 108 SASR 114; *Manners* [2004] NSWCCA 181; *D* (1997) 69 SASR 413; *ARS v R* [2011] NSWCCA 266; *M* (2005) 154 A Crim R 475; *Hitanaya* [2010] NTCCA 3; *Namarnyilk* [2013] NTCCA 17; *SAG* (2004) 147 A Crim R 301; *WAM* [2011] QCA 316; *BBY* [2011] QCA 69; *KMB* [2010] WASCA 212; *Cummins (A Pseudonym)* [2013] VSCA 352; see also Queensland Sentencing Advisory Council, 2012: 52.

506 See Database File. The authors would like to acknowledge the work of Judicial Commission of NSW staff in assisting in identifying institutional abuse cases, particularly Ryan Schmidt, Patrizia Poletti, Sarah-Jane Frydman and Alexandra McPherson.

supplied with all three Excel spreadsheets. A number of sentencing variables and surrounding factors were collected, where available. These include: type of institution; offender's age; court; sentence date; principal offence; offence date (first date where more than one); plea; whether a Form 1/ (referred to in some jurisdictions as a Schedule) was taken into account; penalty imposed; head sentence and non-parole period for the principal offence; number of offences; overall head sentence and non-parole period (where applicable); the offending period; the offender's occupation; the victim/victims' relationship to the offender; whether grooming occurred; whether the offence was an isolated incident; whether the charge was a representative count; form of conduct of principal offence; the victim's age; offender's prior record; whether the court applied past sentencing practice; and, finally, the institution's response to offending (if any).

### **Collection issues**

In compiling the database, the authors faced the same difficulty as the Murphy Commission in Ireland in obtaining a representative sample of cases. Her Honour Judge Yvonne Murphy explained that the Irish Commission was able to overcome the problem by employing a statistician to create a representative sample of child sexual assault cases specifically involving priests (Murphy, 2013). However, the breadth of the Australian Royal Commission's terms of reference did not permit a narrowing to sexual abuse committed by one order within one Church.

There is no list of institutional abuse cases because 'institutional abuse' is not a variable collected by Australian courts. The offender's occupation was collected in New South Wales court statistics until 2008. In any event, it does not disclose the critical fact of the victim's relationship to the offender. Consequently, locating relevant institutional abuse sentencing cases has been especially difficult. A variety of sources was used to identify these cases. The authors first requested the Commission provide a list of known cases. The Commission helpfully provided a list of cases, but more were needed. Cases were also identified using various internet sites and reports as a starting point. That information was then corroborated using an official record, such as the sentencing judgment, an appellate judgment, a court record (only in the case of NSW), sentencing data from JIRS and data from the QGIS. The number of cases varies greatly between jurisdictions. For example, since the authors had access to court records in New South Wales far more cases have been identified in that state.

### **Analysis**

Given the manner in which the cases were identified they cannot be described as a 'representative' or 'random' sample in the way statisticians use those terms in the technical sense. At best, they are a collection of institutional abuse cases drawn from many sources and compiled to reveal the dynamics of abuse. The judgments in these cases provide an insight into the sentencing principles that are applied in institutional abuse cases, the factual circumstances such as grooming, and the institution's response to the offending.

Appendix A contains a list of tables for 25 Victorian, 31 Queensland and 16 South Australian cases where a first instance and/or appellate judgment was located. A short

summary of the cases identified in each jurisdiction is provided and a more detailed analysis of New South Wales cases follows.

### **Victoria**

In Victoria, 27 cases were identified, and in 25 of them the authors were able to locate a first instance and/or appellate judgment. The offenders included nine teachers and four Catholic priests, one of whom (Gerald Ridsdale) was convicted and sentenced on four separate occasions. In almost all cases, the offending conduct occurred over a number of years. It was common to find a significant time gap between the last offence and the sentencing of the offender. The sentences ranged from being wholly suspended to 18 years in jail. Many of the clergy cases are discussed in detail in the Victorian Parliamentary Report (Victoria, Family and Community Development Committee, 2013).

### **South Australia**

In South Australia, 16 cases were identified with first instance and/or appeal judgments. In nine of those cases, the offending occurred in the 1980s or earlier. In eight of those cases, the offending spanned a period of years. The sentences imposed ranged from a suspended sentence to a head sentence of 18 years.

### **Queensland**

In Queensland, 31 cases were identified with first instance and or appeal judgments. Of the 31 cases, 15 offenders were teachers and 11 were priests. In 16 cases, the offending occurred over a period of years. Typically, the courts dealt with the offenders many years later. The sentences ranged from a suspended sentence to a head sentence of 10 years.

### **Western Australia**

In Western Australia, two cases were identified: *Dick*<sup>507</sup> and *Longley*<sup>508</sup>. In the first case, the offender was one of the Roman Catholic Church's Christian Brothers. He was in charge of a dormitory of what was described as a 'junior orphanage.'<sup>509</sup> He admitted to the offences 30 years after they were committed by way of a written confession. There were 10 offences of indecent dealing committed against a boy aged 8–10 between 1960–5. The applicant was in his early 30s at the time of the offending, but aged 67 at the time of sentencing. The judge imposed an effective head sentence of 3.5 years, which was upheld on appeal.<sup>510</sup>

*Longley*<sup>511</sup> involved offences committed against six children over a 20-year period. Most of the offences occurred in the 1960s at boarding schools where the offender

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507 (1994) 75 A Crim R 303.

508 *Longley* [2001] WASCA 71.

509 (1994) 75 A Crim R 303 at 305.

510 (1994) 75 A Crim R 303 at 305 at 306.

511 *Longley* [2001] WASCA 71.

was a teacher. He was sentenced to six years' imprisonment, which was upheld on appeal.

### **Tasmania**

The well-known Tasmanian case of *Randell*<sup>512</sup> was identified. The offender was a Test cricket umpire who also worked as a primary school teacher. He was convicted of 15 counts of indecently assaulting nine girls aged 11–12 while teaching at a Catholic primary school. The sentencing judge, Underwood J, described the offender as a serious paedophile who used his pupils as 'sexual playthings' and sentenced him to four years' imprisonment.

### **New South Wales**

In NSW, 93 cases were identified. The Local Court dealt with nine and the remainder went before the District Court. A quantitative analysis was undertaken of 84 New South Wales institutional child sexual assault cases finalised in the District Court of NSW.<sup>513</sup>

A number of important qualifications must be made in relation to this analysis. First, these cases are not a representative sample of all institutional child sexual abuse cases in New South Wales. Secondly, the sample was not randomly selected and the procedure used for identifying cases undoubtedly resulted in a degree of selection bias. The 84 cases were compiled from a variety of sources, which themselves had inbuilt biases. The sources used were:

- a list of names, which the Royal Commission provided
- JIRS – searches were conducted in the Court of Criminal Appeal summaries (spanning 1990–2014) and judgments from the Court of Criminal Appeal and District Court. Search terms used to identify institutional abuse cases included combining 'sexual assault' with 'teacher', 'coach', 'scout', 'priest', 'school', 'church' and the names of leading cases.
- Internet – Google searches were conducted for specific offenders and using general terms. Some internet sites are dedicated to reporting institutional child sexual abuse offenders. These include Broken Rites, Mako, Clergy Abuse and Deception. On many sites, lists of offenders were created and maintained for a special class of offenders, such as religious organisations or specific religious orders. Other internet information used to identify cases included media reports of court proceedings.
- Court data – This information was searched by occupation and then the data were corroborated with court documents such as judgments, media reports or relevant internet sites. The occupation field was only available for cases finalised before 2008, after which time it was no longer collected. The occupation entered was that at the time of arrest and not at the time of the offence. It was often missing. Relevant occupations investigated included

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512 *Randell* [1999] TASSC 78 (similar fact ruling) and see *The Age* report of May 1 2002 after the offender's release from prison. <http://www.theage.com.au/articles/2002/04/30/1019441369055.html>

513 The authors had access to sentencing data held by the Judicial Commission of New South Wales and limited access to the Director of Public Prosecutions (NSW) CASES database.

teacher, priest, clergy, chaplain, youth worker, welfare worker and childcare worker. Occupation by itself is not enough. The Director of Public Prosecutions (NSW) CASES database was used to confirm whether approximately 45 cases for which there was limited court information were in fact institutional abuse cases.

Additional cases were also identified while investigating these cases, mainly through media and news reports on the internet.

### **Results**

The following analysis is based on 84 child sexual assault cases finalised in the District Court of NSW. Sentences imposed at first instance were adjusted to take into account successful appeals. The sentence imposed following re-sentencing was used for the purpose of analysis and the first instance sentence was put to one side. The rationale is that the appellate court re-sentences following the identification of first instance error by the judge. It would be misleading to use sentences in the analysis that had been infected by error. Each case has been identified as institutional abuse. The relationship between the offender and the victim was the basis for identifying cases as institutional abuse. The relationship was verified from sources including District Court and Court of Criminal Appeal judgments, remarks on sentence, agreed facts and other material available at the DPP on CASES. However, in a small number of cases, internet sites were the only source. Some cases that were likely to be institutional abuse but could not be verified were not included.

In the analysis, 72 distinct offenders are represented, including 12 offenders who were sentenced on two separate occasions. Each finalisation is counted as a separate case.

The earliest sentence was imposed on 31 March 1989 and the latest sentence on 23 January 2015. Around half (51.2 per cent) of the offenders were sentenced before 2003.

Three-quarters (75 per cent) of the offenders pleaded guilty while one-quarter (25 per cent) pleaded not guilty.

### ***The institutions***

Almost three-quarters (72.6 per cent) of offenders were involved with religious organisations, with the Catholic order accounting for more than half (53.6 per cent) of the cases. In general terms, schools (44 per cent) and churches (34.5 per cent) figured prominently. The types of institutions represented in the analysis were:

- Catholic schools – 24 cases (28.6 per cent)
- Catholic Church (including Catholic-run homes) – 21 cases (25.0 per cent)
- Anglican schools – 1 case (1.2 per cent)
- Anglican Church (including Anglican run homes) – six cases (7.1 per cent)
- Uniting schools – three cases (3.6 per cent)
- Presbyterian schools – one case (1.2 per cent)

- Jehovah Witnesses – two cases (2.4 per cent)
- Cult/sect – three cases (3.6 per cent)
- Public school – one case (1.2 per cent)
- Schools, unspecified – seven cases (8.3 per cent)
- YMCA – two cases (2.4 per cent)
- Sporting clubs – five cases (6 per cent)
- Scouting clubs – five cases (6 per cent)
- Creative arts organisations – two cases (2.4 per cent)
- Hospitals – one case (1.2 per cent).

***The relationship between offender and victim***

Given the types of institutions specified above it is unsurprising that school teachers (including brothers) and priests make up a large proportion of the cases (44 per cent and 27.4 per cent respectively). Victims of priests and other people associated with the church included altar boys, servers, parishioners and pupils from schools and homes connected with the church. School pupils were the victims of teachers, dormitory masters and other school staff. The types of relationships between the offender and victim were:

- School teacher/dormitory master (including teaching priests/brothers) – 37 cases (44 per cent)
- Other school staff – two cases (2.4 per cent)
- Priests (excluding teaching priests) – 23 cases (27.4 per cent)
- Other people associated with the church – four cases (4.8 per cent)
- Cult/sect leader – three cases (3.6 per cent)
- Scout leader – five cases (6.0 per cent)
- Sporting coach – 5 cases (6.0 per cent);
- Childcare worker – two cases (2.4 per cent)
- Creative arts teacher – two cases (2.4 per cent)
- Hospital worker – one case (1.2 per cent).

### ***The offences***

The vast majority (90.5 per cent) of offenders were sentenced for multiple offences. The number of offences ranged from one to 67 and the median was six offences.<sup>514</sup> In total, offenders were convicted of 707 offences.

Around three in 10 offenders (28.6 per cent) also had other matters taken into account on a Form 1(s).<sup>515</sup> The number of matters ranged from one to 61 and the median was seven matters.<sup>516</sup> In total, offenders admitted guilt to 337 further offences.

Overall, 91.7 per cent of offenders were sentenced for multiple offences and/or for further offences on a Form 1 (including 30.3 per cent of offenders with both).

The principal offence in each case was selected for analysis.<sup>517</sup> The seriousness of each offence has been categorised as involving 'sexual intercourse/penetration', 'indecent assault' or an 'act of indecency'.<sup>518</sup> The following table shows, for each offence category, the sections of the *Crimes Act 1900* (NSW) that were represented, the statutory maximum penalty for each offence and the number of cases in the analysis.

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514 The number of offences included all kinds of offences, although in every case they were overwhelmingly, if not all, child sexual assault offences.

515 Previously referred to as a Form 2. In some cases, the offender had several Form 1s.

516 Overwhelmingly, the matters on the Form 1(s) were child sexual assault offences.

517 The principal offence was selected.

518 The definition of sexual intercourse/penetration in force at the time of the offence determined how the offence was categorised.

**Table 3: Frequency of offences (principal offence only) by category of offence**

<b>Category of offence and Section</b>	<b>Offence description</b>	<b>Maximum penalty</b>	<b>Number of cases</b>
Sexual intercourse/penetration			
61D(1) rep	Sexual assault category 3 – sexual intercourse without consent	10 years	3
61D(1)/61F rep	Attempt sexual assault category 3 – sexual intercourse without consent	10 years	1
61D(1A) rep	Sexual assault category 3 – sexual intercourse without consent with child under 16 years and under authority	12 years	3
61J	Aggravated sexual assault	20 years	2
63 rep	Rape	Life	1
66A old	Sexual intercourse – child under 10 years	20 years	2
66A(2)	Aggravated sexual intercourse – child under 10 years	Life	1
66C(2) old	Sexual intercourse – child between 10 and 16 years under authority	10 years	4
78K rep	Homosexual intercourse with male between 10 and 18 years	10 years	10
78N rep	Homosexual intercourse by teacher, etc with male between 10 and 18 years	14 years	2
79 old	Buggery	14 years	10
Total sexual intercourse/penetration			39
Proportion of all cases			46.4%
Indecent assault			
61E(1) rep	Sexual assault category 4 – indecent assault	6 years	10
61E(1A) rep	Sexual assault category 4 – indecent assault with child under 16 years and under authority	6 years	6
61M(1)	Aggravated indecent assault	7 years	5
61M(2) old	Aggravated indecent assault – child under 10 years	10 years	2
76 rep	Indecent assault on female	6 years	2
81 rep	Indecent assault on male	5 years	16
Total indecent assault			41



Proportion of all cases		48.8%	
Act of indecency			
61E(2) rep	Sexual assault category 4 – act of indecency or incite to an act of indecency with child under 16 years	2 years	1
78Q(1) rep	Act of gross indecency with male under 18 years	2 years	2
81A rep	Act of indecency by male with male	2 years	1
Total act of indecency		4	
Proportion of all cases		4.8%	
<b>Total number of cases</b>		<b>84</b>	

The four most common offences, accounting for 54.8 per cent of cases, were:

- indecent assault on male: s 81 repealed – 16 cases (19 per cent)
- sexual assault category 4 – indecent assault: s 61E(1) repealed – 10 cases (11.9 per cent)
- sexual intercourse – child between 10 and 16 years under authority: s 66C(2) old – 10 cases (11.9 per cent)
- buggery: s 79 old – 10 cases (11.9 per cent).

When aggregated by category of offence, most of the offences involved ‘indecent assault’ (41 cases or 48.8 per cent) or ‘sexual intercourse/penetration’ (39 cases or 46.4 per cent). The remainder (four cases or 4.8 per cent) involved an ‘act of indecency’.

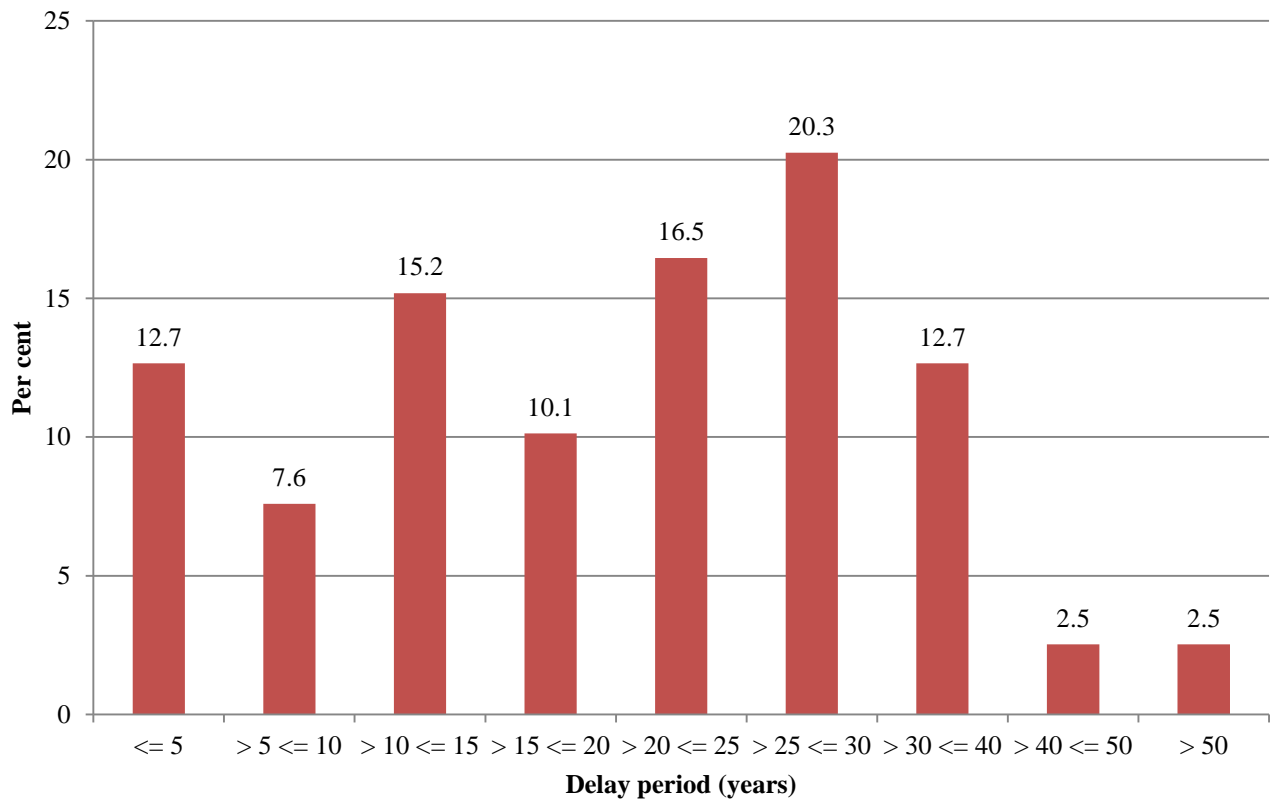
#### ***The period between the offence and sentence date (delay)***

The shortest period from the date of the offence to the date of sentence was 294 days (almost 10 months) and the longest period was 51.7 years. The mean and median delay period was 20.1 years and 21 years respectively.<sup>519</sup> As can be seen from Figure 1, many offences were finalised long after they occurred:

- 79.7 per cent of offenders were sentenced more than 10 years later
- 64.6 per cent of offenders were sentenced more than 15 years later
- 54.4 per cent of offenders were sentenced more than 20 years later
- 38 per cent of offenders were sentenced more than 25 years later
- 17.7 per cent of offenders were sentenced more than 30 years later.

<sup>519</sup> The earliest date in a date range was selected as the date of the offence. The first day of the month (or year) was used in cases where only the month (or year) of the offence date was known. The date of the offence was missing in five cases.

**Figure 1: Period between offence date and sentence date**



Delay Period (years)	N	%	cum %
<=5	10	12.7	12.7
> 5 <= 10	6	7.6	20.3
> 10 <= 15	12	15.2	35.4
> 15 <= 20	8	10.1	45.6
> 20 <= 25	13	16.5	62.0
> 25 <= 30	16	20.3	82.3
> 30 <= 40	10	12.7	94.9
> 40 <= 50	2	2.5	97.5
> 50	2	2.5	100.0
	79	100.0	

***Age of offenders***

At the time of the offence

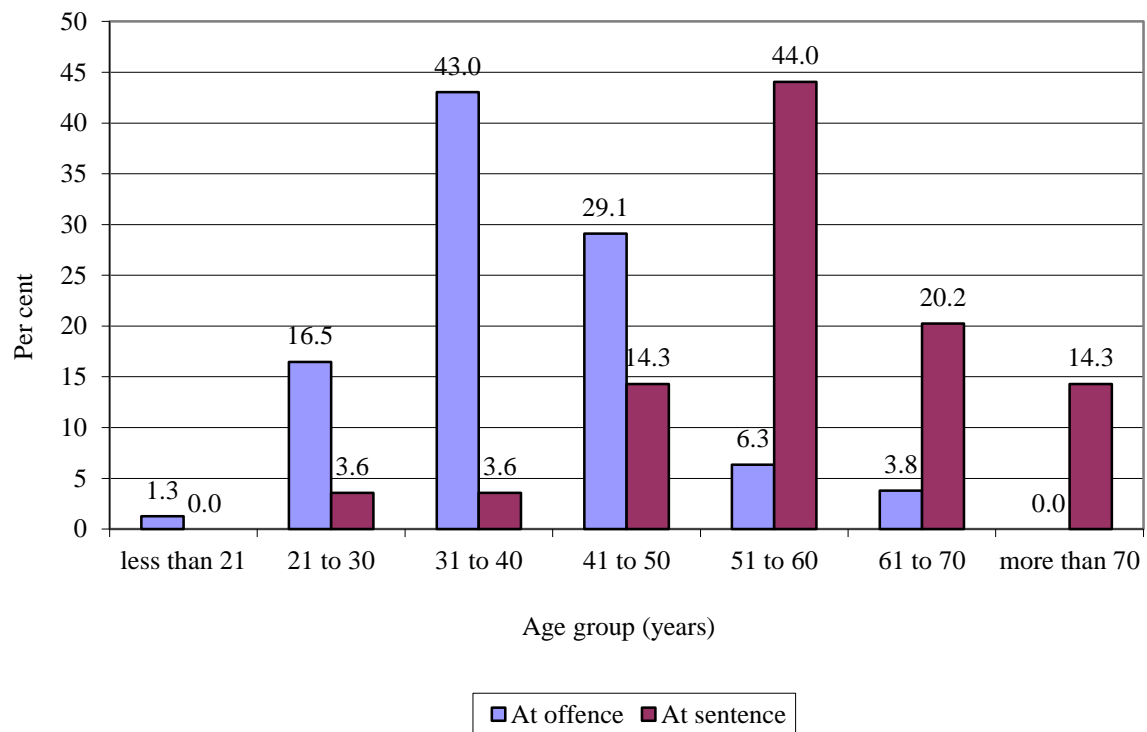
The mean and median age of offenders at the time of the offence was 38.9 years and 37.9 years respectively. The youngest offender was 18.6 years and the oldest was aged 63.5.<sup>520</sup>

At the time of sentence

As shown above, many offenders are considerably older by the time they are sentenced. The mean and median age of offenders at the time of the sentence was 58.5 years and 57.4 years respectively. The youngest offender was aged 26.2 and the oldest was aged 84.4.

Figure 2 compares the age distribution of offenders at the time of the offence and the time of sentencing.

**Figure 2: Age of offenders**



Age group (years)	At offence		At sentence	
	N	%	N	%
less than 21	1	1.3	0	0.0
21 to 30	13	16.5	3	3.6
31 to 40	34	43.0	3	3.6
41 to 50	23	29.1	12	14.3
51 to 60	5	6.3	37	44.0
61 to 70	3	3.8	17	20.2
more than 70	0	0.0	12	14.3
	79	100.0	84	100.0

520 Ibid.

## ***Sentencing patterns***

### Types of penalties

The types of penalties imposed for the principal offence were:

- full-time imprisonment – 63 offenders (75 per cent)
- periodic detention – four offenders (4.8 per cent)
- suspended sentence – nine offenders (10.7 per cent)
- community service order – one offender (1.2 per cent)
- bond/recognition – seven offenders (8.3 per cent).

When examined by category of offence, sexual intercourse/penetration offenders were significantly more likely to be given full-time imprisonment (97.4 per cent) compared with indecent assault (56.1 per cent) and act of indecency (50.0 per cent) offenders.

### Terms of full-time imprisonment

The full term of full-time imprisonment for the principal offence ranged from eight months to 151 months. The median full term was 60 months and the middle 50 per cent range was 30 months to 72 months.

As noted above, most offenders were sentenced for multiple offences. Of the 63 offenders given full-time imprisonment, 60 had multiple offences and 40 were given consecutive or partially consecutive sentences.<sup>521</sup>

After taking into account consecutive sentences, the overall full term for these 63 offenders ranged from eight months to 240 months. The median overall full term was 72 months and the middle 50 per cent range was 36 months to 120 months. The overall non-parole period ranged from eight months to 166 months. The median overall non-parole period was 42 months and the middle 50 per cent range was 18 months to 72 months.

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521 Including seven offenders who were given an aggregate sentence pursuant to s 53A of the *Crimes (Sentencing Procedure) Act 1999*.

**Table 4: Terms of full-time imprisonment by category of offence**

<b>Full-time imprisonment</b>	<b>Act of indecency</b>	<b>Indecent assault</b>	<b>Sexual intercourse/penetration</b>	<b>Overall</b>
n	2	23	38	63
rate	50.0%	56.1%	97.4%	75.0%
<b>Sentence for principal offence (months)</b>				
full term				
median	9	30	72	60
range	9	8– 84	27–151	8–151
middle 50% range	n/a	24–36	60–84	30–72
<b>Overall sentence (months)</b>				
full term				
median	12	36	93	72
range	9–15	8–120	27–240	8–240
middle 50% range	n/a	24–54	65–128	36–120
non-parole period/fixed term				
median	9	18	57	42
range	9	8–80	15–166	8–166
middle 50% range	n/a	12–36	36–86	18–72

Table 4 compares the terms of full-time imprisonment by category of offence. Clearly, offenders convicted of sexual intercourse/penetration offences received the longest terms:

- median full term for the principal offence – 72 months
- median overall full term – 93 months
- median overall non-parole period – 57 months.

By comparison, offenders convicted of indecent assault received shorter terms:

- median full term for the principal offence – 30 months
- median overall full term – 36 months
- median overall non-parole period – 18 months.

Both offenders convicted of an act of indecency received a fixed term of imprisonment of nine months for the principal offence. The one offender with multiple offences received an overall sentence of 15 months with a non-parole period of nine months.

## Chapter 5

# Perceptions of Child Sexual Abuse Offences, Sentencing and Sanctions

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### Introduction

Extensive research has shown that, when asked simplistic, abstract questions about their attitudes to sentencing, the majority of people will respond that sentencing is 'too lenient'. This result has been found consistently across many Western countries over the last 40 years. Indeed, it has been suggested that 'one of the leitmotifs of public attitudes to criminal justice is the desire for a harsher response to crime' (Roberts and Hough, 2005: 13). However, studies that have delved more deeply into people's responses have found that this result must be heavily qualified. Indeed, people's punitive beliefs have been shown to be strongly linked with the myths and misconceptions that held about crime and justice.

Generally, studies have shown that people have extensive misconceptions about the nature and extent of crime, about court outcomes and about the use of imprisonment and parole (Gelb, 2006). Consistent results from many studies show that people tend to perceive crime to be constantly increasing, particularly violent crimes, and they over-estimate the percentage of offenders who reoffend. For sexual offences, the myths and misconceptions are perhaps even more pronounced, and public opinion about sex offenders – and appropriate criminal justice responses– is among the most punitive.

While there is now a lot of research on public opinion about sentencing in general, the literature that examines public opinion on the sentencing of sex offenders is less well developed (Brown, 1999: 240). Indeed, it has recently been suggested (Payne et al., 2010: 582) that:

[W]ith the exception of a handful of researchers who have contributed a significant amount of research on the topic, sex offenders have historically been ignored by criminologists. The underlying assumption seems to have been that sex offenders are 'different' from other offenders and beyond the scope of criminological research (citations omitted).

This chapter examines research on perceptions of sentencing of sex offenders.<sup>522</sup> As public perceptions have been closely linked with public policy in this area, the

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522 Initially, Google Scholar was used to review the literature for this chapter. The following search terms were entered: 'public opinion sex offenders', 'public opinion sentencing', 'public opinion sex offender sentencing', 'public opinion child sexual abuse' and 'public opinion church sexual abuse'. The word 'perceptions' was then substituted for 'opinion' in subsequent searches. These searches provided an initial selection of publications across a wide range of academic journals. A second stage of searching involved gathering information on relevant material from the reference lists of the first round of publications. This process continued until the major publications – those cited most often in the literature – were uncovered. In addition, the publication *Criminological Highlights Special Issue: Sex Offenders and*

discussion will include an examination of perceptions of specific policy responses to sexual offending (such as sex offender registration and notification laws). In order to understand the concerns that underlie public perceptions of sentencing and policy responses in this area, this chapter also presents a review of public perceptions of the seriousness of sexual offending and considers some of the underlying drivers of people's perceptions, including the myths and misconceptions that prevail about sex offenders themselves.

The discussion begins with an overview of possibly the only existing survey of the public's perceptions of child sexual abuse specifically by members of the clergy.

## Suing the Pope

As part of its response to various child sexual abuse scandals in the 1990s, Irish Catholic bishops commissioned research under the auspices of the Royal College of Surgeons in Ireland to examine, among other issues, the effects on the general public of CSA perpetrated by members of the clergy. A national telephone survey of 1,081 randomly selected adults was undertaken in 2002, lasting about four months. About halfway through the survey, BBC2 aired a documentary. *Suing the Pope* dealt in detail with specific complaints made to Church authorities about a particular priest and the Church's (mis)handling of the complaints.

The researchers took the opportunity to treat the airing of the documentary as a 'natural experiment'; about 600 respondents had been surveyed prior to the documentary and about 481 were surveyed afterwards, giving them the opportunity to examine the effect of the screening on people's beliefs about child sexual abuse by clergy (Breen et al., 2009: 78).

Of the 22 attitudinal measures, 14 showed statistically significant<sup>523</sup> differences following the screening of the documentary. Measured on a five-point Likert scale (with 1 = strongly disagree and 5 = strongly agree), the greatest changes in the mean level of agreement with statements were found for overall satisfaction with the Church (mean decreased from 3.21 to 2.73, indicating more disagreement); satisfaction with priests (mean decreased from 3.45 to 3.05); and trust in the Church to deal with problems with its clergy (mean decreased from 2.96 to 2.57). Thus, respondents on average were not satisfied with the Church or with its priests and did not trust the Church to deal with problems with its clergy (Breen et al., 2009: 85).

Even greater disagreement was seen for statements on the issue of the Church dealing with CSA. The mean response to the statement that *the Catholic Church's current response to the sexual abuse of children by priests is adequate* was only 2.10 prior to the documentary and dropped even further to 1.93 afterwards. *The Catholic Church is dealing with the problem of sexual abuse directly* shifted from 2.21 prior to the screening to 2.14 afterwards, although the change was not statistically significant.

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*Society's Responses to Them* from the University of Toronto's Centre for Criminology and Sociolegal Studies was perused to identify any further relevant articles.

523 'Statistical significance' means that any observed effects are unlikely to have happened by chance or through sampling error.



Regardless, both of these show high levels of dissatisfaction among the respondents (Breen et al., 2009: 84).

Perhaps most interesting in terms of the institutional nature of the abuse, are the findings on attribution of responsibility. Prior to the screening, 11.7 per cent of respondents held the Church hierarchy responsible for the occurrence of the abuse, while 76.2 per cent held the abuser himself responsible. However, after the documentary, this shifted substantially: 21.8 per cent held the Church hierarchy responsible, while the proportion holding the individual alone accountable fell to 60.5 per cent. The authors see this as a 'watershed' in terms of public understanding of responsibility for child sexual abuse by members of the clergy (Breen et al., 2009: 88).

A similar shift was seen in people's perceptions of responsibility for the management of CSA by priests. Although 41.8 per cent originally saw the Church hierarchy as responsible for managing child sexual abuse, after the documentary, this fell to 36.2 per cent, while 52.8 per cent saw this responsibility as lying with some 'other' group. The authors suggest that it is 'no great leap' to suggest that this perhaps refers to the police or the health authorities (Breen et al., 2009: 90).

This survey clearly shows that child sexual abuse by members of the clergy has had a substantial negative impact on people's perceptions of the trustworthiness of the Church. In addition, the data show that, while ultimate responsibility for the abuse is still placed with the offender, a large part of that responsibility is also laid at the feet of the Church itself and its hierarchy. As Breen et al. (2009: 91) conclude:

the public recognises clearly that no organisation can be a law unto itself, and that in the matter of child sexual abuse there is no place for self-regulation.

## **Perceptions of Sentencing for Sexual Offences**

Sex offenders are arguably one of the most vilified and hated groups in contemporary society – often more stigmatised and punished than homicide offenders. Indeed, Caputo and Brodsky (2004, cited in Griffin and West, 2006: 7) found that individuals would be angrier if a child molester moved into the neighbourhood than if a murderer moved into the same house.

Given the widely held perception of sex offenders as 'the lowest of the low' (Griffin and West, 2006), it is useful to consider public perceptions of how these offenders ought to be sentenced and to assess possible drivers of these perceptions.

Compared with the research on public opinion towards sentencing and the criminal justice system generally, there is far less research in Australia<sup>524</sup> or internationally that specifically examines perceptions of sentencing for sexual offences. This section reviews this body of research.

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524 This gap is now being addressed. A national study began in early 2014 will examine jurors' attitudes to the sentencing of sex offenders. The study aims 'to provide informed public opinion for policymakers and judges on matters relevant to sentencing to counter the effects of mass-media reactions to crime which call for more severe sentences and which purport to be representative of community sentiment' (Bartels, Warner and Zdenkowski, 2014: 1).

## Judicial perceptions of sex offenders

Almost all of the research on perceptions of sex offenders has involved studies of samples of the general public or specific samples such as university students. Academic studies of judicial attitudes to sex offenders are rare.<sup>525</sup>

Nhan et al. (2012) attempted to shed light on how judges manage the conflict between administering impartial justice and responding to the community's (and their own) feelings about sexual offending. Their study is valuable in its contribution to understanding judges' perceptions of sex offenders outside the context of specific cases.

Using face-to-face interviews of 11 judges and one sexual offender specialist in California and Texas, Nhan, Polzer and Ferguson explored judicial attitudes and perceptions of the most significant problems in dealing with sex offenders. They found that judges consistently focused on sexual offending against children, rarely discussing other crimes such as statutory rape (Nhan et al., 2012: 824). The language judges used highlighted the extreme harm caused by sexual offending, and the severe punishment warranted. For example, one Californian judge noted that 'we purposely use *predator* because it connotes something bad versus *offender*' (Nhan et al., 2012: 828). Another stated that sex offenders are 'more dangerous than hitmen' (Nhan et al., 2012: 830–31).

Judges perceived sexual offenders as being fundamentally different from other offenders, resulting in 'a friction between the core principles of law, namely its fairness "on the books", and the realistic implementation "in action".' For example, (Nhan et al., 2012: 828):

**Q:** Do you consider sex offenders different than other offenders?

**CA judge:** As a prosecutor, you're going to find that there is a rhyme or reason why people commit crime. Murderers, I can understand why they did it. Even when people beat their wives, I can understand. When you deal with sexual offenders, they're wired differently. It's an impulse control problem. It's very violent, rape, sexual assault. Sex offenders are more dangerous than hitmen. It's more personal. They have demons that they can't control. They're true predators.

The biggest concern among judges was the possibility of reoffending following sentencing and the consequences of failing to protect the public. As one Texas judge suggested: 'the Scout motto is "*Be prepared*". When we talk about this type of stuff, the motto is: "*Be paranoid*"' (Nhan et al., 2012: 833). While judges are theoretically impartial, in the highly emotive domain of sexual offending, it is clearly difficult for them to remain above the fray.

Bumby and Maddox (1999) used a 45-item survey of 42 trial judges in the Midwestern United States to assess judicial attitudes towards sex offenders, their sentencing and

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<sup>525</sup> Attitudes of individual judges may also be garnered from published remarks made during the course of sentencing sexual offence cases. Some discussion of relevant sentencing remarks is presented in Chapter 3 of this report.

treatment, knowledge of victims' issues, and opinions about various policy responses. Responses were gathered via a 4-point Likert scale that measured agreement or disagreement with a series of statements.

Overall, Bumby and Maddox (1999) found that judges exhibited a 'deficit' in their knowledge of offender-related issues, specifically about the dynamics of sexual offending, where judicial perceptions were found to 'differ from those of most professionals in the field of sexual offender management' (Bumby and Maddox, 1999: 308). In particular, many of the judges believed in a causal relationship between sexual offending and factors such as childhood victimisation, mental illness and substance abuse. They believed that sexual offences are typically unplanned and impulsive, and that deviant sexual fantasies are harmless. Finally, many failed to appreciate the heterogeneity of sex offenders.

Responses about the sentencing of sex offenders revealed the importance of both retributive and rehabilitative approaches. Most judges (80.5 per cent) believed that treatment should be mandatory for all sex offenders, while 90.5 per cent agreed that treatment is able to reduce recidivism rates. Perhaps contradicting this belief, however, almost one-third (31.7 per cent) of judges believed that no effective sex offender treatment exists. Only a small proportion (7.3 per cent) agreed that the legal system is too tough on sex offenders, while almost half (41.4 per cent) believed that sentences for sex offenders are not long enough (Bumby and Maddox, 1999: 310). Finally, significant support (85.3 per cent) was found among the judges for sex offender registration and community notification (70 per cent) (Bumby and Maddox, 1999: 311).

Although the judges in this study were supportive of treatment for sex offenders, their responses suggest a more retributive approach, emphasising community protection and punishment. The primary importance of protecting the public is clear from both these studies of judicial perceptions of sex offenders.

### **Informed public judgment on sentencing for sexual offences**

Reports of public perceptions of sentencing for sexual offences tend to be drawn from the mass media or public inquiries, and are often anecdotal and unscientific. The New South Wales Parliamentary Committee inquiring into sentencing for CSA, for example, reported on the views of the relatively small number of people and organisations that made submissions to it. The inquiry identified a number of issues: the inconsistency and inadequacy of sentences imposed for CSA; the failure of the courts to meet 'community expectations' for sentencing such offenders; and the belief that judicial officers were 'out of touch' with the community and were in need of more education (New South Wales Parliament, 2014: 68–72).

In contrast to this limited approach to gauging public opinion is the robust and detailed research led by the University of Tasmania. Taking the innovative approach of using real jurors in real criminal trials, the seminal and unique Australian study of the perceptions of Tasmanian jurors (Warner et al., 2011) showed that they recommended the same or a more lenient sentence than the judge in the majority of cases heard. Having heard all the information presented to the judge, most of the time the jurors came to the same conclusions as the judge in terms of sentencing: there

was a high overall level of satisfaction with judicial sentencing among jurors, with 90 per cent of jurors rating the judge’s sentence as *very appropriate* or *fairly appropriate*. The level of satisfaction, however, varied across the different types of crime. Table 5 shows that jurors were least satisfied with sentences for sexual offences and drug offences, but reported higher levels of satisfaction with sentences imposed for property offences and violent offences (Warner et al., 2011: 3).

**Table 5: Level of satisfaction with judicial sentencing decisions (%)**

	<b>Sex</b>	<b>Violence</b>	<b>Drugs</b>	<b>Property</b>	<b>Culpable driving</b>
Very appropriate	35.6	50.3	35.1	56.5	66.7
Fairly appropriate	52.2	41.7	47.9	36.2	33.3
Fairly inappropriate	8.9	6.0	17.0	5.8	0.0
Very inappropriate	3.3	2.0	0.0	1.4	0.0

Source: Warner et al. (2011: 3)

Jurors’ perceptions of sentencing in general were also coloured by the nature of the offence, even after being informed of the judge’s sentence and receiving a booklet with information about the criminal justice system. For sexual offences, 70 per cent of the jurors thought that sentences generally were too lenient. For violent offences, this figure dropped slightly to 66 per cent; with 49 per cent for drug offences; and 46 per cent for property offences, in which less than half the jurors believed that sentences were generally too lenient (Warner et al. 2011: 4).

To test if jurors’ opinions differed for different types of sex offences, the sex offence trials were classified as rape and aggravated sexual assault (nine trials), child sexual assault (eight trials), or consensual sex with a teenager (five trials). The child sexual assault trials involved victims aged 13 or younger, as well as sexual offences committed against pubescent teenagers by a person in authority (such as father, uncle, carer or priest).

Table 6 compares the juror’s suggested sentence with the judge’s actual sentence. The data show that jurors’ perceptions of the adequacy of sentences for the child sexual assault trials were very different than for other types of sex offences. For child sexual assault trials, jurors were far more likely to nominate a more severe sentence than that imposed by the judge. Conversely, jurors in child sexual assault cases were far less likely to nominate a less severe sentence than the judge (Sentencing Advisory Council, Tasmania, 2013: 33). Similarly, only 26 per cent of respondents felt that the judge’s actual sentence in child sexual assault cases was *very appropriate*, compared with 38 per cent of rape and aggravated sexual assault cases and 46 per cent of consensual teenage sex cases (Sentencing Advisory Council, Tasmania 2013: 34).

Clearly, then, sexual offences against children are seen as qualitatively different from those against other victims.

**Table 6: Comparison of juror’s suggested sentence with judge’s actual sentence (%)**

	<b>Rape</b>	<b>Child sexual assault</b>	<b>Consensual sex with a teenager</b>
Less severe	61	39	50
Same severity	8	0	6
More severe	32	62	44

*Source: Sentencing Advisory Council, Tasmania (2013: 33)*

In order to understand the reasons for their responses, jurors from three trials within each of the three sex offence categories participated in an in-depth interview. For jurors in trials involving consensual sex, most recommended a more lenient sentence than the judge and were concerned with the effect of imprisonment on the offender. Interviewees felt that the gravity of the offence did not require a term of imprisonment. For those serving in rape and aggravated sexual assault trials, respondents were also likely to prefer a more lenient sentence than the judge and to feel that the sentence was appropriate. Again, interviewees expressed some concern for the offender and for the effect of the crime on his family. In the child sexual assault cases, respondents were more likely to regard the sentence as being too lenient and less likely to say that it was appropriate. One of the interviewees explained the belief underlying these responses: the lenient sentence failed to send a message to people in similar positions. That is, there was insufficient denunciation of the offending behaviour and not enough emphasis on general deterrence (Sentencing Advisory Council, Tasmania, 2013: 35–36).

Sexual offences against children seem to be considered differently than those against adults. In cases of consensual teenage sex and sexual offending against an adult, jurors expressed some degree of empathy or concern for the offender. This was not apparent in child sexual assault cases, however, with the main concern seemingly about denouncing the behaviour and deterring others.

While it remains unproven why this difference exists, it is likely a function of the perceptions of the harm caused by the different types of sexual offences. In an attempt to explain these differences, a follow-up national study on perceptions of sex offence sentencing began in 2014. One of the aims of the national survey is to identify the factors that affect people’s perceptions of offence seriousness. The focus is on understanding the attitudes that underlie people’s perceptions of sex offending as ‘no other form of offending appears to provoke greater public condemnation and dissatisfaction with sentencing’ (Bartels, Warner and Zdenkowski, 2014: 1).

Lovegrove (2007) used a different approach in his study of perceptions of sentencing, but had the same aim of measuring informed public judgment rather than top-of-the-head public opinion. Lovegrove (2007) examined perceptions of sentencing across a range of case studies by having four experienced County Court judges present information on sentencing principles and various sentencing options to 471 respondents in workplaces across Victoria. Each judge then presented the facts of an actual case they had sentenced. Each case involved a brief vignette describing a serious offence – armed robbery, rape, intentionally causing serious injury and theft

– but each also had potentially strong mitigating factors, such as intellectual disability. The aim of the study was to compare actual sentences imposed with the sentences preferred by the respondents to examine how respondents treated various mitigating factors.

While child sexual assault cases were not included in this study, the results illuminate how respondents perceive at least one kind of sexual offence: the rape of an adult female.

Lovegrove's (2007) results showed that respondents preferred more lenient sentences than the actual sentence imposed for the armed robbery, rape and theft cases. For the rape case, the final sentence for the case (following a Court of Appeal decision) was a non-parole period of six years (the original sentence was 7.5 years). For research participants, on the other hand, the median sentence was a 4.9-year non-parole period, in combination with participation in a treatment program. Almost two-thirds (63 per cent) of respondents chose a sentence less than that the courts imposed (Lovegrove, 2007: 776).

Lovegrove (2007: 776–78) concludes that judges are not more lenient than the community, that the community does not speak with one voice on sentencing issues, that people do consider mitigating factors as well as factors indicating the seriousness of the offence, and that the community does not have particularly firm views as to what is an appropriate sentence for a particular kind of offence. Finally, he suggests that the populist view of judges as lenient is not correct, and that moves toward harsher sentencing may not represent the public's sense of justice (Lovegrove, 2007: 779).

Lovegrove (2011) used the same research to examine public perceptions of mitigating factors in the various scenarios. Of primary relevance here is the sexual offence scenario. The rape case was described to participants as follows (Lovegrove, 2011: 43):

Multiple rapes at knifepoint of a young woman, at night, by a neighbour who broke into her home. Before the offender left he apologised and asked her for a date. This young adult male had a drinking problem and was drunk at the time; he was of low intellectual capacity, but was able to do menial work. Although he had priors for car theft, he was not regarded as antisocial. The victim suffered severe and continuing psychological trauma.

Despite the serious nature of the offence, respondents saw a number of important mitigating factors in the rape case. Factors seen as mitigating culpability included the offender's low intellectual capacity, his drunkenness at the time of the offence, his youth, his apology to the victim at the time of the offence and his immediate confession to police. Mitigating factors linked to the offender's prospects of rehabilitation included his immediate remorse, shame and embarrassment about his behaviour, his need for treatment and the fact that it was his first offence. Imprisonment was seen as particularly onerous for this offender, given his low intellectual ability and his particular susceptibility to negative influences (Lovegrove, 2011: 46–50). Lovegrove suggests that members of the public adopt a similar

approach to mitigation as do judges, weighing a range of factors that speak to culpability, rehabilitation and the need for mercy (Lovegrove, 2011: 53).

Both the Tasmanian and the Victorian studies show that respondents' views of sentencing for sex offences are nuanced, in that they vary according to the type of offence presented and the detailed circumstances of each case.

On behalf of the Sentencing Council for England and Wales, NatCen Social Research (Nicholls et al., 2012) undertook one of the most detailed analyses of perceptions of sentencing of sex offenders. The aim of the research was to inform the Council's review of guidelines for sentencing sexual offences. Following a review of existing literature, the authors adopted a qualitative approach to provide a deeper understanding of perceptions of sexual offences, with a focus on a broader range of offences than had typically been examined in previous research.

In interviewing members of the public and victim/survivors of sexual offences and their families, the stated aims of the research (Nicholls et al., 2012: 5–6) were to:

- map awareness of the various sanctions for sexual offences that are available
- understand what are considered to be appropriate sanctions and sentences for a range of sexual offences, the reasons for this and the relative gravity of sexual offences against each other and in comparison to other offences
- identify the range of aggravating and mitigating factors that influenced the nature of participants' responses to the appropriate type and length of sentence, including which factors are more or less important when considering the sentence
- discuss the purpose of sentencing sexual offences
- describe the experiences of people affected by sexual offences and the seriousness and harm of the offence
- where relevant, understand their experience of the sentencing process and the personal impact of the sentence.

To assess public perceptions of sentencing, 12 focus groups were convened, involving 82 people across England and Wales. Participants in these groups discussed general perceptions of sentencing of sexual offences, and were asked to impose sentence (and provide the reasons for their chosen sentences) for at least two of seven vignettes. A range of offences was discussed in the vignettes, including rape, sexual assault of an adult, sexual assault of a child, sexual grooming of a teenager, voyeurism, administering a substance with intent, and possession of indecent images. In order to provide a control for perceived seriousness of the offences and people's levels of punitiveness more generally, sentencing for these sexual offences was compared with two comparator offences: grievous bodily harm and intent to supply class A drugs (Nicholls et al., 2012: 8–9).

To assess perceptions of people with direct experience of sexual offences, 46 victim/survivors or their parent/guardians were included in the study. The perceptions of this group were collected via in-depth interviews (Nicholls et al., 2012: 10–11).

Among the many, detailed findings of the report, both the public and the victim/survivors held a number of views about sentencing of sexual offences. The



primary focus for both groups was that sentences should reflect the harm and seriousness of a sexual offence. They believed sentences should not be unduly shortened due to custodial sentences being served partially in the community<sup>526</sup> or, for the victim/survivor group, due to sentences being served concurrently.

For members of the public, the harm associated with sexual offences was perceived to be immediate (physical harm) or broader societal harm, such as fear of crime. For victim/survivors, however, the nature of the harm arising from sexual offences was perceived to be more long-term, including not just physical injuries, but also psychological distress or post-traumatic stress disorder, an inability to work or form relationships, or a perceived need to move homes or employment following an offender's release. Participants in the research described the aftermath of a sexual offence as a 'life sentence' for the victim/survivor and the wide circle of other people who are harmed, such as parents of children who have been abused (Nicholls et al., 2012: 21–22).

Reflecting the life-long impact of sexual offences, some victim/survivors suggested that rape could warrant a life sentence for the offender, while sexual assault could warrant a slightly lesser sentence than rape in order to be proportionate. Preparatory offences such as grooming were also perceived as serious and particularly insidious, as grooming might lead to victim/survivors feeling that they had somehow consented in some way to the offence.

Participants in the focus groups identified the primary purposes of sentencing of sexual offences as public protection, punishment, acknowledgement of the harm and seriousness of the offence, and providing treatment and rehabilitation. Some participants suggested that sentences should be used to denounce sexual offending, thereby deterring sexual offending (Nicholls et al., 2012: 27–28).

Participants of both the focus groups and the interviews identified a number of factors that would aggravate a sexual offence. Factors such as premeditation, repeat offending, offending against vulnerable victims, use of violence such as torture and abduction, use of weapons, transmitting illness or producing images of the offence were all agreed to be aggravating factors that should increase the length of a custodial sentence. The absence of any of these factors, however, was not seen to be mitigating. The only identified mitigating factor was the mental capacity of the offender, potentially affecting only the nature of the custodial sentence (emphasising treatment), rather than the duration. Youth was not seen as a mitigating factor, with participants strongly suggesting that young sexual offenders should not be sentenced differently than adults (Nicholls et al., 2012: 48–57).

Participants of the focus groups also discussed a number of vignettes that involved different types of sex offences. For these members of the community, rape was considered the most serious sexual offence, only slightly less serious than murder. Sentences for sexual assault of an adult were slightly less than those suggested for

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526 Throughout the United Kingdom, determinate custodial sentences are normally served partially in the community 'on licence', meaning that terms of imprisonment typically involve only half the sentence being served in custody, while the other half is spent in the community (<https://www.gov.uk/types-of-prison-sentence/determinate-prison-sentences-fixed-length-of-time>).

rape, while sexual assault of a child was considered more serious than sexual assault of an adult, with longer custodial sentences warranted (Nicholls et al., 2012: 32–36).

Much debate ensued about the two ‘preparatory’ offences – administering a substance with intent and grooming. For some, these offences were perceived to be less serious, as a contact offence had not occurred. For others, however, it was the intent that was important, regardless of whether the offence had been completed. These vignettes thus highlighted the particular complexities around perceptions of preparatory offences (Nicholls et al., 2012: 36–39).

The possession of indecent images – particularly those involving children – was deemed serious, although participants tended to accept mitigating factors (such as a first-time offender) for these offences to a greater extent than for others. Similarly, voyeurism involving children was viewed as a serious offence, although mitigating factors were also accepted for this offence, such that, for example, voyeurism against an adult by a first-time offender would not necessarily require a prison sentence (Nicholls et al., 2012: 40–43).

The two comparator offences also illustrated the complex nature of people’s perceptions. Although rape was perceived to be a more serious offence than either drug dealing or grievous bodily harm, changes to the vignettes led to changes in people’s perceptions. For example, heroin addiction was perceived to ‘destroy lives’ and, therefore, selling heroin was considered to be almost as serious as rape. Grievous bodily harm between two people who knew each other was considered less serious than rape or sexual assault, but was perceived as almost as serious as rape if it was a random attack by a stranger. As rape and sexual assault were perceived to be more ‘intimate’ offences, they were seen to constitute a higher degree of violation of the victim/survivor than the other forms of violence (Nicholls et al., 2012: 44).

The suggested sentences imposed by participants in the focus groups reflected these variations in perceptions of seriousness, with longer custodial sentences imposed for the offences perceived as the most serious. Thus, sentences for the rape vignette and the sexual assault against a child vignette ranged from 10 to 20 years, with six to 10 years imposed for the adult sexual assault vignette. Reflecting the complexity of perceptions of preparatory offences, sentences ranged from one to 20 years, with four to 15 years commonly preferred. Significant variation in sentences was also seen for the exploitation offence, although the most common sentence for this was 10 years. Voyeurism most commonly attracted a sentence of five years (Nicholls et al., 2012: 32–43).

This study shows some consistent themes within a general diversity of perceptions of sentencing for sexual offences. The primary theme to emerge is that the characteristics of the offender and the victim have a significant effect on people’s perceptions. Thus, offences against children were felt to be particularly serious, perhaps due to the long-term nature of the harm, the wide circle of people affected by the offence and the particular vulnerability of the victim/survivor. Repeated offending was also identified as warranting a particularly long custodial sentence.

The great advantage of this research was its use of small group discussions to elicit nuanced and detailed information about perceptions of sentencing for sexual

offences. While the small sample size means the results are not necessarily generalisable, the richness of the findings make it a valuable complement to the quantitative research that is more typical of this field of study.

### **Perceptions of sentencing: Seriousness of sexual offences**

While the Nicholls et al. (2012) study of perceptions of sex offence sentencing included a component examining perceptions of offence seriousness, their study was not able to examine offence seriousness in great detail. The only study to date to have done so used detailed group discussions to identify nuanced differences in people's attitudes. The Victorian Sentencing Advisory Council attempted to identify the factors underlying people's perceptions of the seriousness of offences. Undertaking a series of community panels where people were provided with information on sentencing before being asked to rank and discuss the seriousness of various offences, the Council's report shows the complexities of people's judgments.

During 14 community panels held in both metropolitan and regional Victoria, 244 people discussed a short vignette for each of 40 offences and ranked them according to their perceived seriousness. Offences were grouped into five categories (Sentencing Advisory Council, Victoria, 2012: 23):

- offences causing or risking death
- offences causing or risking injury
- sexual offences
- offences involving loss of or damage to property
- drug and other offences.

The eight vignettes for the sexual offences represented the following offences (Sentencing Advisory Council, Victoria, 2012: 76):

- sexual penetration with a child aged under 12
- sexual penetration with a child aged 12 to 16
- sexual penetration with a child aged 12 to 16 under the care, supervision or authority of the offender
- indecent act with a child aged under 16
- produce child pornography
- rape
- attempted rape
- indecent assault.

Each of the 40 offences was described by way of a vignette that provided information on the legal elements of the offence, based on three dimensions of seriousness: the culpability of the offender (including his mental state and conduct); the circumstances of the offence (including information on the victim, the offender and the nature of the offence); and the consequences of the offence (including the nature of the harm caused).

Analysis of the vignette rankings shows substantial agreement across all respondents about the seriousness of the sex offences – more so than for any other offence categories. Looking at individual vignettes, the results show that participants agreed

that offences against the person involving a high level of harm (death or serious injury) and culpability (intention or knowledge) and sexual offences involving coerced sexual penetration and child victims were the most serious offences (Sentencing Advisory Council, Victoria, 2012: 41).

However, for some offences there was disagreement about the seriousness of the offence, with a wide range of rankings given. Offences without broad agreement included incomplete offences, unintentional fatal or serious injury offences, offences risking or threatening harm and drug trafficking offences. Interestingly, some of the sexual offences attracted broad disagreement as well, including those where the victim in the vignette was 15 years of age ('sexual penetration with a child aged 12 to 16' and 'sexual penetration with a child aged 12 to 16 under the care, supervision or authority of the offender').

A principal components analysis<sup>527</sup> attempted to identify the common factors underlying the vignette rankings. For sexual offences against children, there seemed to be three key factors that led to their position at the very top of the seriousness scale (Sentencing Advisory Council, Victoria, 2012: 46):

- the age of the victim, with a younger victim (under 12) being seen as involving greater harm and culpability
- the abuse of trust and power that is involved in sexual offences against children
- the wide-reaching and long-lasting harm that results from sexual offences against children.

Sexual offences – particularly those against children – elicited strong feelings of revulsion and disgust among respondents. For example, one participant reportedly said (Sentencing Advisory Council, Victoria, 2012: 55):

You need to have a scale higher than 10 for anything sexual against children.

For the relevant sexual offences (those not specifying a 12- to 16-year-old victim), the victim was nominated as an eight year old. The Council's analysis shows that the victim's age had the greatest effect on perceptions of seriousness, via assessments of the offender's culpability and the harm caused by the offence – respondents ranked the harm and culpability of these offences the same as for offences involving intentional death and serious injury. Indeed, many respondents reported that the impact of a sexual offence against a child was akin to a sort of 'death' (Sentencing Advisory Council, Victoria, 2012: 56).

This research provides important evidence of the reasons underlying people's perceptions of the seriousness of sexual offences against children: that they cause especially great harm and that they involve a higher level of culpability due to the abuse of trust and power that they involve. This is especially relevant in the context of institutional CSA.

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527 Principal components analysis is a statistical technique used to reduce a large number of separate measures into a smaller number by grouping those measures that, according to the analysis, share some common underlying factors or themes.

Other studies have examined various aspects of offence seriousness to identify the role of specific factors in people's perceptions. Surveying 404 undergraduate students, Maynard and Wiederman (1997) provided eight vignettes to study perceptions of CSA. While the nature of the sample precludes generalising the results more broadly, the study nonetheless provides some insight into the kinds of factors that affect people's perceptions.

The vignettes varied both the age and sex of the victim and the sex of the adult. Specifically, vignettes included either a seven-year-old victim or a 15-year-old victim. Respondents were asked to rate, on a nine-point scale, the extent to which the incident constituted child sexual abuse, the degree of responsibility they attributed to the adult in the scenario, and the degree of blame they attributed to the adult.

Respondents considered the scenarios involving the abuse of a 15 year old to be significantly less abusive (that is, less likely to be considered an example of child sexual abuse) than those involving the younger child. Similar perceptions were found for the sex of the child: when the adult and the child were of opposite sex, the offence was seen as less abusive. The adult was seen as less responsible and less blameworthy with the 15-year-old victim than with the seven-year-old victim (Maynard and Wiederman, 1997: 838). Nonetheless, blame for the adult was high across all scenarios, with all respondents perceiving the actions to be instances of child sexual abuse.

As with the findings of the Victorian Sentencing Advisory Council (2012), the age of the victim played a key role in people's perceptions of the harm involved in sexual abuse against children. The finding of greater perceived abusiveness in same-sex offences is illuminating in the context of institutional CSA, adding another dimension to understandings of the harm caused to its victims.

Considering variation in perceptions based instead on the age of the offender, Rogers and Ferguson (2011) examined the purposes of sentencing of sex offenders to measure people's preferences in terms of punishment versus rehabilitation. They framed their study within a discussion of the heightened public punitiveness toward sex offenders, as well as the proliferation of specific legislation around sex offenders (such as community notification and registration) that sees them treated as a 'special case', receiving sanctions to which other types of offenders are not subjected. They apply Spencer's definition of people who exist 'outside the law' to sex offenders (2009: cited in Rogers and Ferguson, 2011: 397):

Sex offenders in Western nations fit Giorgio Agamben's definition of homo sacer, originally an ancient Roman concept. Homo sacer exists in a space outside the law, where he can be treated in ways that would otherwise be illegal. This arrangement allows society to maintain a sense of order and preservation of moral values.

This 'outsider' status, according to the authors, has contributed to the proliferation of policies and legislation both specific and unique to sex offenders.

Rogers and Ferguson (2011) aimed to test whether attitudes toward sex offenders of different ages (children, adolescents and adults) would reflect a stronger preference for punishment than for a matched set of non-sex offenders. Using 355 undergraduate

psychology students, the researchers presented each participant with two brief crime vignettes – a sexual offence (fondling) and a matched non-sexual offence (hitting)<sup>528</sup> – all with a six-year-old victim, portrayed as the cousin of the offender, whose age varied from seven to 27 (Rogers and Ferguson, 2011: 401). Once again, the nature of the sample means that the results are not generalisable, but they are indicative.

Respondents were more punitive toward sex offenders than non-sex offenders, regardless of the age of the offender. In addition, attitudes became more punitive as the offender's age increased, for both sex offenders and non-sex offenders. While the authors suggest that respondents may have perceived the sexual offence to be more serious, they also posit that the stereotypical image of sex offenders might lead to a response that is more emotional than rational, leading to greater punitiveness on the basis of emotions such as fear and anger, rather than on the basis of rational analysis of the evidence. That is, the public view of sex offenders may constitute a 'moral panic' (Rogers and Ferguson, 2011: 407).

### **Perceptions of sentencing: The value of treatment**

In a representative study in England, Brown (1999) surveyed 312 people about their thoughts on the treatment of sex offenders in their community. Although the sample size is small, it is representative. In addition, while the study provides only simple descriptive data on people's opinions, it is useful to ascertain people's perceptions of the value of treatment for sex offenders.

Slightly more than half of the sample (51 per cent) thought that treatment was a 'good' idea, with most respondents suggesting that sex offenders should 'always' (30 per cent) or 'sometimes' (33 per cent) receive treatment and 14 per cent saying that they should 'usually' receive treatment. A minority (13 per cent) responded that sex offenders should 'never' receive treatment for their offending. Of those who favoured treatment for sex offenders, slightly more than half (51 per cent) believed that treatment should occur in both prison and the community, while just under half (45 per cent) preferred treatment in prison only. Thus while respondents were generally in favour of treatment, they tended to prefer treatment to occur within an institutional situation, during which time the public would be protected (Brown, 1999: 243).

Respondents were asked about the sentencing option of attending a treatment program only. Most respondents (81 per cent) thought that this type of sentence would be a soft option and that sex offenders would see it as a soft option. While 88 per cent saw a treatment-only sentence as unacceptable, 89 per cent felt that treatment would be acceptable if there were also a punitive component. Finally, people did not believe that treatment could prevent reoffending: 4 per cent thought that treatment would 'usually' be effective, 60 per cent thought treatment could

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528 Offences were 'matched' in the sense that the non-sexual offence was chosen to be as equivalent as possible to the sexual offence in terms of perceived severity. Using previous research on perceptions of crime seriousness, Rogers and Ferguson (2011: 401) chose two offences that were both contact offences and that had both garnered similar ratings of severity in previous research. The researchers varied only the nature of the offence to create a matched pair – the sexual offence involving fondling and the non-sexual offence involving hitting. The age of both the victim and the offender were the same in each pairing.

'sometimes' be effective and 25 per cent thought that treatment could 'never' be effective in preventing reoffending (Brown 1999: 244). In reality, the research evidence points to the effectiveness of sex offender treatment programs, both within an institutional setting and, even more so, in the community (see Gelb, 2007 for an overview of the literature on the treatment of sex offenders).

### **Perceptions of sentencing: Myths and misconceptions**

Sexual offences arguably elicit greater public fear and condemnation than any other type of crime. In recognition of the serious nature of sexual offences and the fear that they incite, there have been numerous legislative responses specific to both sexual offences and sex offenders. In the United States, the response over the past two decades has included approaches such as sex offender registration, community notification, civil commitment, residence restrictions, enhanced sentencing guidelines and electronic monitoring (Levenson et al. 2007: 138). In Australia, legislation has been enacted to allow the continuing detention in prison or supervision in the community of sex offenders after their sentences have been completed, as well as sex offender registration and 'serious sexual offender' provisions.<sup>529</sup> While there is little evidence of the effectiveness of such approaches in reducing recidivism following sentencing, such legislative responses have proven popular among politicians wishing to allay community fears of 'sexual predators'. It has been suggested (Quinn et al., 2004: 217–18) that sexual offences garner such negative public response because:

Societal reactions to sex offenses emerge from a complex interaction of the typical citizen's felt need for safety, political pressure to meet these needs through easily understood legislation, increasingly sensational media news coverage, distorted reports of re-offense rates, and the venting of parental anxieties for their children in a world perceived as ever more dangerous and unpredictable.

Three theoretical models have been proposed for the retributive policy preferences typically seen in relation to sexual offending.<sup>530</sup> According to Pickett et al. (2013), the three models may be described as follows:

- 1) The victim-oriented concerns model that focuses on common concerns that victims tend to be young females who are permanently damaged by their victimisation (Jenkins, 1998; Lynch, 2002: cited in Pickett et al., 2013: 731). This model points to a 'just deserts' approach underlying punitive attitudes towards sex offenders.
- 2) The sex offender stereotypes model that identifies the common beliefs about offenders as monstrous 'others' – evil, predatory strangers who show no remorse and cannot be rehabilitated (Quinn et al., 2004; Spencer, 2009).
- 3) The risk-management concerns model that emphasizes concerns about increasing rates of sexual offending (Simon, 1998). This model builds on

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529 See Chapter 6.

530 While these models have tended to be presented individually – essentially as competing – there is little reason that they could not instead be complementary.

a utilitarian approach underlying punitive attitudes that depends on deterrence and incapacitation as the appropriate response to sexual offending.

Pickett et al., (2013) used data from a large online survey of adults in the United States to test the ability of each of these theories to predict punitive attitudes towards sex offenders. A subset of the total pool of survey participants was randomly invited to participate in the survey, with 537 completing the questionnaire. While this is not a representative sample as respondents self-selected into the main online survey, it has a strong methodological approach and explicitly tests a number of theoretical explanations for punitive attitudes that have received scant attention in the field.

Looking at support for punitive sex crime laws, regression analysis shows that each of the three theoretical models significantly predicted people's preferences at least to some extent. The strongest relationships were found for items measuring people's sex offender stereotypes, particularly items about the 'unreformable' nature of sex offenders and their 'immoral' character. From the victims-oriented concerns model, relative harm to victims was the strongest predictor of support for punitive sex crime laws (Pickett et al., 2013: 745). The three strongest predictors of punitiveness toward sex offenders<sup>531</sup> were the beliefs that they are unreformable and immoral and the perception that sexual offence victims suffer to a greater degree than other types of victims (Pickett et al., 2013: 748).

Analysis of public support for sex offender treatment shows similar results, with sex offender stereotypes once again being by far the strongest predictor of attitudes. Risk-management attitudes were not significant predictors in the full model.

The role of sex offender stereotypes was also considered by Mancini and Mears (2010), but with a focus on the most extreme form of punishment: the death penalty. In a robust example of a quantitative approach that includes a sizeable sample and a sophisticated methodological approach, Mancini and Mears (2010) examined public preferences for the death penalty for sex offenders. Using data from a 1991 telephone poll of 1,101 United States residents, the authors examined attitudes toward using the death penalty for murder, rape of an adult and sexual abuse of a child. While the age of the dataset means that the results are not necessarily generalisable to contemporary attitudes, the researchers' purpose was to examine attitudes prior to the vast expansion of punitive sex offender policies in the United States that began during the 1990s.

Mancini and Mears (2010: 961) found that support for the death penalty varied by the type of offence discussed. While 79 per cent of respondents supported the death penalty for murder, only 27 per cent were in favour of this sentence for raping an adult. This figure increased to slightly more than half (51 per cent) for sexual abuse of a child.

The authors then examined the factors that could predict support for the death penalty for each offence. For murder, people who were white, less well-educated,

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531 Belief that sex offenders are unreformable:  $\beta = .313$ ; belief that sex offenders are immoral:  $\beta = .215$ ; perception that sexual offence victims suffer to a greater degree than other types of victims:  $\beta = .197$ .



fundamentalist Protestants and political conservatives were more likely to support the death penalty for convicted murderers. For the two sexual offences, the only statistically significant predictor was education, with less-educated respondents more supportive of the death penalty. Thus, while social and economic factors predicted differences in support for the death penalty for murder, these divides did not exist for sexual offences (Mancini and Mears, 2010: 964).

In a full logistic regression model<sup>532</sup>, support for the death penalty for rapists was strongly predicted by respondents' views about sexual offences and offenders: a belief that sex offenders are highly likely to reoffend increased by more than three-fold the odds of supporting the death penalty, while a belief that courts are not preventing sexual offences almost doubled the odds. Fear of sexual assault and a belief that sexual offences had increased did not significantly predict support for the death penalty for rape, nor did victimisation as a child or adult. Interestingly, knowing someone else who had been sexually victimised actually decreased support for the death penalty by one-third. The same factors were found to predict support for the death penalty for sexual offences against children, although a belief that sex offenders will inevitably reoffend had an even larger impact on support for the death penalty, increasing the odds almost five-fold (Mancini and Mears, 2010: 964–65). The authors conclude that a belief in the inevitability of sexual reoffending is a key determinant of support for the death penalty for sex offenders, with greater support in the case of offences against children possibly reflecting a more protective approach to child victims, due to their particular vulnerability.

This study is important in that it uses a robust approach with a good size random sample and differentiates between sexual offences against adults and children. Respondents' beliefs about sex offenders – that they are highly likely to reoffend following sentencing – was the strongest predictor of support for the death penalty for sex offenders against both children and adults. This is a key finding because a large body of evidence consistently shows that, even considering low reporting rates of sexual offences, sex offenders have lower recidivism rates (defined in the research literature as reoffending following sentencing)<sup>533</sup> than other offenders (see Gelb, 2007 for an overview of the literature on recidivism of sex offenders, which is further discussed in Chapter 6 of this report). Mancini and Mears (2010) thus demonstrate the important role that this misconception plays in attitudes toward sex offenders.

Given the strength of sex offender stereotypes in predicting punitive attitudes to sex offenders, it is useful to examine the nature of such myths and misconceptions in more detail.

Several myths that are firmly entrenched in the public mind underlie the rhetoric around responses to sexual offending, but they bear little relationship to the evidence

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532 Logistic regression is a statistical technique that measures the independent influence of multiple predictors on a dichotomous outcome (such as a yes/no response). Logistic regression analysis provides the odds of the outcome variable having one of the two possible responses following a one-unit increase in a predictor variable.

533 The subtlety of this definition is important. In the research literature, recidivism rates measure the proportion of offenders who go on to commit further crimes *after they have already been sentenced* for an earlier crime. This is conceptually and practically different from a meaning of reoffending that denotes *repeated* offending over time. Thus a sex offender may have committed repeated offending – multiple offences over a given period – without being a recidivist; that is, the offender may not have reoffended after being sentenced by a court.

around sex offenders, their characteristics and their responses to treatment. There are three main myths around this issue:

- 1) Sex offenders inevitably reoffend, even after they have been sentenced for a sexual offence.
- 2) Sex offenders represent the worst kind of 'stranger danger'.
- 3) Sex offenders are sick people who are not able to stop their offending.

In contrast to these myths, the evidence shows that the typical sex offender is not as people might imagine:

- 1) Recidivism rates for sex offenders are typically lower than for non-sexual violent offenders or property offenders. Even with the lower rates of reporting of sexual offences, meta-analyses have shown that reoffending following sentencing among sex offenders is low (see further Chapter 6 of this report).
- 2) Victimization studies and self-report studies have shown that most sexual offences are committed by people known to the victim, with many being family members. 'Stranger danger' is not the reality in the vast majority of sexual offences (see, for example, Australian Bureau of Statistics (2004: 49), showing that only 6.3 per cent of child sexual assault offenders in an Australian sample were *not* known to their victims).
- 3) Most sex offenders are not mentally ill and do not meet diagnostic criteria for having a mental illness (a diagnosis of paraphilia or paedophilia). Instead, most sexual offences are committed by ordinary men in the context of everyday relationships. Treatment for sex offenders – especially treatment in a community setting – has proven effective in reducing sexual reoffending (see Gelb, 2007 for a full discussion of this evidence).

Brown et al. (2008) is one of only a few studies examining public attitudes to sex offenders in the United Kingdom in order to analyse the link between such myths about sex offenders and people's perceptions of them. Using both quantitative and qualitative analysis of responses from a sample of 979 participants, they found that respondents significantly overestimate the percentage of sex offenders who are reconvicted of another sexual offence within a year, with women and respondents from lower socio-economic classes erring most on this assessment. Many respondents also believed that sex offenders cannot be rehabilitated; as one respondent wrote (Brown et al., 2008: 266):

I believe that sex offenders have a character defect that will cause them to reoffend as soon as they think they can get away with it. The only sure way to control them is to keep them behind bars until they die.

The authors suggest that these misconceptions contribute to 'feelings of fear, anger, insecurity and antipathy towards sex offenders' (Brown et al., 2008: 264). They point to the work of Gavin (2005), who argues that there is a dominant narrative of the child sex offender that is deeply embedded in the public mind: a narrative of sex offenders as typically older, male strangers who prey on young girls and are innately evil and irredeemable – a media-created narrative that feeds on the emotional responses of

the community and policymakers. For example, Cheit (2003) examined media distortions in an analysis of newspaper coverage over one year of specific child molestation cases in Providence, Rhode Island, to show that the press exaggerates 'stranger danger' and under-reports intra-familial child sexual offence cases. The most 'newsworthy' stories were those that contained some element of the unusual, bizarre, incredible or heinous (Cheit, 2003: 616).

Berry et al. (2012: 572) explain the role of the media in creating public perceptions of sexual offences against children as follows:

The research evidence in this review suggests that in the area of serious crimes against children the media, and in particular the tabloid press, can create climates of opinion which can constrain politicians' ability to locate and implement appropriate criminal justice policy. Instead politicians may be pressured to enact policies which placate sections of the media, rather than ones which research evidence suggest are actually likely to be effective.

Examining three months of coverage of child sexual offences in broadsheet, tabloid and regional newspapers in the United Kingdom, as well as television news coverage, Berry et al. (2012) linked media coverage with people's perceptions of the adequacy of sentencing for child sexual offences and the use of indeterminate sentences for these offences. They found that a small number of high profile crimes tend to gather significant media attention, with information about the rationale for sentencing being ignored in favour of criticism of the judiciary. This consistent and critical editorial line – particularly in the tabloid press – manifests in 'a steady drumbeat of criticism' of sentencing and judges, as well as demands for both tougher sentences and legislation (Berry et al., 2012: 587).

Misconceptions about sex offenders contribute to community fear and ultimately to especially punitive attitudes towards them. As Marteaché (2012: 161) notes:

It [sexual offending] is a topic about which the public tends to have strong opinions but very little knowledge, and an area where public outcry – often based on short-term, emotional responses to high-profile crimes – has had an important impact on criminal policies.

Myths and stereotypes can also function to affect perceptions of the seriousness of specific types of sexual offences. For example, Clark (2007) reports on her study of 61 men and women in Victoria that required them to evaluate the seriousness of, and impose a sentence on, hypothetical cases involving 'classic' rape scenarios (reflecting common understandings of rape, such as being perpetrated by a stranger with a female victim who resisted strongly and then reported the crime to police immediately afterward) and those involving 'non-classic' scenarios, involving offenders known to the victim (such as ex-partners or boyfriends), with a victim who resisted less and did not report the crime immediately, or who had been out drinking and was wearing a short skirt. The aim of the study was to examine the role of rape stereotypes in people's perceptions of the seriousness of the offence.

Clark's research shows that respondents nominated factors that reflect classical understandings of rape (such as rape by a stranger) as aggravating, while those that

challenged stereotypical notions of rape, (such as rape by an acquaintance) as mitigating the level of offence seriousness. Perhaps related to this, respondents attributed less blame and responsibility to offenders in the non-classic scenarios than in the classic ones. Finally, while imprisonment was the preferred sentence for all scenarios, the proportion of participants who imposed a prison sentence, and the length of the term imposed, were consistently higher in cases that reflected classical rape scenarios than in those that challenged the stereotype (Clark, 2007: 22–23).

The author concludes that rape myths ‘can function directly to influence perceptions of offence seriousness, blame and responsibility and sentencing appropriateness’ and calls for a shift in attitudes to rape both among community members and within the judiciary (Clark, 2007: 24).

These common beliefs about the ‘stranger danger’ of compulsive, persistent and irredeemable sex offenders fuel public fear. Research has clearly shown that most people learn about crime and criminal justice from the media (Gelb, 2006), and it is clear that the media – in combination with punitive and populist political rhetoric – contribute to creating and reinforcing these common myths and misconceptions.

Fedoroff and Moran (1997) have examined more extensive myths and misconceptions about sex offenders. They identify nine separate myths: that sex offenders are all socially deprived men; sex offenders are the result of childhood abuse; sex offenders shouldn’t masturbate; sex offenders have too much testosterone; sex offenders can’t be cured; sex offenders always lie to stay out of treatment; sex offenders are sex maniacs; public notification of sex offender releases protects the community; and sex offenders are all the same. Reviewing these myths, the authors suggest that ‘even intuitively obvious “facts” often turn out to reflect more about what we want to believe than about what is true’ (Fedoroff and Moran, 1997: 264).

In order to examine the place of such myths in people’s minds, Levenson et al. (2007) examined the perceptions of 193 members of the public in Florida to determine the accuracy of public perceptions about the dangers that sex offenders pose. The researchers hypothesised that people would subscribe to these myths, which would affect their perceptions of the value and effectiveness of community protection policies and practice. While the sample size is once again small, the results are important in that they link misconceptions with people’s opinions.

In addition to being asked about their familiarity with local community notification policies and practices and the kind of information that should be disclosed as part of notification practices, respondents were asked about their perceptions of sex offenders and appropriate sentences for them. They were asked 11 questions to determine the accuracy of their knowledge, and answers were on a scale from zero to 100 per cent in increments of 10 per cent. For example, participants were asked ‘*What percentage of child molesters reoffend?*’ and then had to choose the percentage that best indicated their belief. Participants were then asked how much they agreed with five statements, with ratings on a Likert scale of 1 to 5, with 1 being *not true at all* and 5 being *completely true*. Finally, participants were asked for their thoughts on appropriate sentencing, treatment and probation for sex offenders (Levenson et al., 2007: 145–146).

Participants held substantially inaccurate views about sex offenders. Participants believed that sex offenders have high recidivism rates (around 75 per cent, when the evidence suggests the rate to be around 14 per cent over five years); that treatment cannot prevent recidivism (when it is actually quite successful); that most sex offenders are either mentally ill or had been abused as children (when this is not the case) and that rates of sexual offending are rising (when they have instead been falling in the United States since the 1990s). Respondents knew that many offenders know their victims, but they overestimated the number of sexual assaults committed by strangers.

In terms of sentencing, participants supported tough sentencing laws and long periods of community supervision, but also believed that treatment should be provided to sex offenders.

Levenson et al. (2007) conclude that these widespread misconceptions about sex offenders – especially about high recidivism rates and ‘stranger danger’ – perpetuate the development of increasingly punitive policies. They pay particular heed to the dangers of adopting a one-size-fits-all approach that captures low-risk, non-violent offenders into the punitive net.

In a survey on similar issues, Schiavone et al. (2008) collected data via an online survey of 127 people recruited from a nationwide community message board ([www.craigslist.org](http://www.craigslist.org)) covering 15 states in the United States. The aim of the study was to explore public perceptions about sex offenders and sexual abuse and to identify perceptions that may be particularly distorted.

The authors point out a number of common beliefs about sex offenders. These include high recidivism rates, scepticism about the viability of treatment programs to bring enduring change to offenders’ behaviour, and a perception that the typical sex offender is a predatory child sex offender lurking around playgrounds (Schiavone et al., 2008: 292).

Survey results show that respondents were fairly well informed about many of the statements presented. The authors point out, however, that there were three questions that were ‘overwhelmingly but erroneously endorsed as true’: the perception that most sex offenders reoffend (98 per cent); that juvenile sex offenders were typically abused as children and grow up to be adult offenders (84 per cent); and that sex offender treatment is ineffective (66 per cent) (Schiavone et al., 2008: 299). Across all 24 questions combined, there were no significant differences between men and women, victims and non-victims, parents and non-parents, or younger and older adults (Schiavone et al., 2008: 303).

Finally, Schiavone et al. (2008) suggest that their findings have important implications for reintegrating sex offenders back into society. The misconception that most sex offenders reoffend and that treatment for sex offenders is ineffective lies at the very heart of some of the most common sex offender policies, such as registration, notification and housing restriction policies – despite the fact that there is little evidence to support their effectiveness (Schiavone et al., 2008: 305).

Quinn et al. (2010) also examined the relationship between the myths surrounding sexual offending and the punitive policies implemented to address it. They suggest (Quinn et al., 2010: 217):

The extremity of sexual predation's consequences, and the vulnerable status of its most publicized (ie, child) victims are critical to the popular (and hence political) power and meaning of sex offender laws and the perpetuation of stereotypical beliefs about them.

Quinn et al. (2010) note that several key myths underlie the political and community response to sex offending. Critical to public perception of sex offenders is the belief that all sex offenders are the same: they are all predatory, psychopathic individuals, who cannot be redeemed and who will inevitably reoffend, even after sentencing. The evidence, however, tells a different story. Sex offenders are typically not mentally ill, do respond to treatment and tend to have low recidivism rates. However, as Quinn et al. (2010: 227) conclude:

Neither reoffense rates nor treatment efficacy data provide grounds for public perceptions of sex offenses in modern America. These perceptions meet primarily the needs of politicians seeking simplistic solutions and the sensationalistic media that generate them.

This is a key point in the literature on criminal justice and public responses to sex offenders: the facts about sex offences and the people who commit them have little influence on either perceptions of sex offenders or policy development in this area. Instead, it is political and media imperatives that drive both public perceptions of sex offenders and the policies that are developed.

In addition to their effect on policy development, myths and misconceptions about sexual offending may also influence jury decisions, especially in the case of child sexual abuse. In the first Australian research to examine people's perceptions of factors that can influence jury outcomes, Cossins et al. (2009) surveyed 659 jury-eligible people (comprising members of the public and undergraduate psychology students) about children's memory, reliability, suggestibility and responses to sexual abuse in order to identify where misconceptions have the potential to influence court outcomes.

The survey included 20 questions that measured three broad categories of misconceptions: six items measured misconceptions about children's typical reactions to sexual abuse; five items measured perceptions of typical offence or offender characteristics; and nine measured people's views on children's susceptibility to suggestion and ability to provide reliable testimony. Respondents used a six-point Likert scale ranging from strongly disagree to strongly agree, and responses were categorised as correct, uncertain or incorrect (Cossins et al., 2009: 439).

The authors found substantial misconceptions about the nature of child sexual abuse and children's responses to it. Respondents were least accurate in their perceptions of children's ability to be reliable in their reports, with an average of one-third of the questions (three out of nine) being answered correctly. Questions about typical offence and offender characteristics were answered correctly an average of 40 per cent of the time (two out of five questions), while the most accurate

perceptions were held for questions about children's typical reactions to child sexual abuse, although on average respondents were still able to answer only 50 per cent of the questions (three out of six) correctly (Cossins et al., 2009: 441).

The researchers conclude that there is a lack of a sound understanding of the nature of child sexual abuse and children's responses to it. They express concern that these misconceptions will affect a juror's ability to evaluate appropriately both the veracity of a child's testimony and the child's credibility in court, and suggest that jurors would benefit from the evidence of an expert witness with specialised knowledge about child development and the effects of child sexual abuse on children (Cossins et al., 2009: 448).

All of these studies highlight the prevalence of myths and misconceptions about sex offenders. These myths influence people's perceptions of how sex offenders should be dealt with by the criminal justice system, which in turn plays a role in the development of punitive (and not necessarily effective; see further Chapter 6 of this report) legislative responses. Therefore, the implications of these myths and misconceptions are wide-ranging for both the criminal justice system and the broader community.

## **Perceptions of Sex Offender Policies**

Studies of perceptions of sex offender policy responses have often focused on perceptions of sex offender registries, community notification schemes and residence restrictions for sex offenders. Other studies have considered the 'collateral consequences' of such sex offender policies, such as offenders' difficulties in finding housing, felon disenfranchisement and reoffending. Many of these studies, however, use small samples and focus specifically on policies and laws of a single state.

### **Perceptions of residence restrictions**

Levenson et al. (2012) found evidence of the contradictory nature of people's perceptions of sex offender policies. In a face-to-face survey of 255 respondents in Ohio that compared people's perceptions of residence restrictions for sex offenders with such a policy for drunk drivers, the authors examined whether residence restrictions are seen as punishment and whether such views are specific to sex offenders.

The results show that respondents felt that residence restrictions represented additional punishment, for both sex offenders (39 per cent) and drunk drivers (55 per cent), although more people were likely to see such restrictions as punitive for the latter group. People who believed that most sex offenders would reoffend were significantly less likely to see residence restrictions as additional punishment. While a minority of respondents believed that residence restrictions would be effective in reducing crime for either of the two groups, about half agreed that laws that protect the community should be enforced, even in the absence of empirical evidence as to their effectiveness (Levenson et al., 2012: 145–46).

Levenson et al. (2012) suggest that misconceptions about high recidivism rates and the failure of treatment for sex offenders influence people's acceptance of punitive policies for sex offenders. In contrast, the prevalence of drunk driving might lead to a more sympathetic approach to policy in this area, as people might see themselves caught in a similar situation. In addition, drunk driving has attracted a public health and treatment approach to its prevention, in contrast to sex offending, which has been tackled purely in a criminal justice frame (Levenson et al., 2012: 149–51).

In another examination of residency restrictions for sex offenders, Anderson et al. (2013) examined public opinion on the appropriate distance for exclusion measures as part of a broader telephone survey on social wellbeing indicators among 1,811 adults in Nebraska. They began by asking closed-ended questions based on Nebraska law allowing a maximum exclusion zone of 500 feet (about 150 metres). About 60 per cent of respondents agreed that '*500 feet is not enough*', with about 31 per cent agreeing that '*500 feet is about right*'. Only a tiny proportion felt that 500 feet was too much (2.6 per cent), or that there should be no housing restrictions at all (2.8 per cent) (Anderson et al., 2013: 9).

For respondents who felt that 500 feet was insufficient, further open-ended questions were used to gauge preferred distances. Most of these respondents felt that the appropriate distance, while more than 500 feet – was less than one mile (about 1.7 kilometres) (56.3 per cent), with only about 16 per cent preferring an exclusionary zone of more than one mile. A small proportion (2.7 per cent) responded in a way that called upon the notion of 'not in my backyard', while 2.1 per cent preferred a solution to sexual offending that involved jail, death, and/or castration. People who were young, married or had young children were more likely to support larger exclusionary zones, while those with more education and those living in an urban environment were less likely to support them (Anderson et al., 2013: 10).

### **Perceptions of registration and community notification**

In a study in the United Kingdom, 1,004 randomly selected adults participated in a telephone survey about 'naming and shaming' laws for convicted sex offenders. The poll, conducted by MORI on behalf of *The News of the World*, asked respondents for their perceptions of a range of sex offender policy approaches. Results show that respondents were fairly evenly split in their beliefs about the effectiveness of the government's sex offenders register, designed to help police monitor where sex offenders are living: 41 per cent believed the register was *very effective* or *fairly effective*, while 44 per cent believed it was *not very effective* or *not at all effective*. In response to a series of statements about sex offenders, results were more clearly punitive (MORI, 2000):

- 67 per cent agreed that people who are imprisoned for a serious child sexual offence should never be released.
- 58 per cent agreed that convicted paedophiles should be publicly named.
- 76 per cent agreed that local people should know if a convicted paedophile is in their neighbourhood.



- 95 per cent agreed that courts should be able to impose residence and contact restrictions on those convicted of child sexual offences to keep them away from their victims.
- 93 per cent agreed that convicted sex offenders should have to register with the sex offenders register within 72 hours, rather than the 14 days stipulated.
- 84 per cent agreed that the penalty for failing to comply with the sex offenders register should be increased from six months' to five years' imprisonment.
- 82 per cent either strongly supported or tended to support the introduction of Sarah's Law, allowing people to request information about those in their neighbourhood who might pose a risk to their children.

Despite these punitive responses, MORI poll respondents were also somewhat tolerant of sex offenders. Responses were evenly split on whether criminals who have served their sentences are entitled to have their human rights protected, regardless of the seriousness of their crimes, with 43 per cent agreeing that they are entitled and 46 per cent disagreeing. When asked about the newspapers' recent publication of names and photographs of people convicted of child sexual offences, 38 per cent felt that the media were right to adopt this approach but more than half (51 per cent) felt that it was the wrong thing to do. Finally, people expressed concern about the actions of vigilantes in attacking child sex offenders: only 11 per cent sympathised with the vigilantes and agreed with their actions, while 73 per cent sympathised with them but disagreed with their actions. In addition, 14 per cent reported that they did not sympathise with the vigilantes and did not support their actions (MORI, 2000).

This poll, although using relatively simplistic questions to measure top-of-the-head opinion, is valuable in that it shows how conflicted people's responses to child sex offenders can be. On the one hand, respondents were supportive of punitive sentencing, monitoring and notification laws. On the other, when asked about the specific instance of newspaper naming and shaming practices, respondents were not supportive of this punitive approach. This may be yet another example of people's punitive responses to more abstract questions becoming softened once presented with specific instances of the issue at hand – a phenomenon seen in many studies of public opinion on crime and justice issues (see Gelb, 2006 for an overview of the literature in this area).

In a similar vein, Mears et al. (2008) examined data from a national telephone survey of 425 adults in the United States to explore people's attitudes toward sexual offences, focusing on offences against children and child pornography in particular. They note that a review of the policy landscape in this area suggests that people 'overwhelmingly endorse' punitive responses to sexual offences and oppose treatment of sex offenders due to the supposedly intractable nature of their desires. However, there is little established evidence to support this view (Mears et al., 2008: 533). The authors thus set out to determine if people do actually endorse punitive sex offender policies.

The survey results show that respondents overwhelmingly endorsed the policy of making convicted sex offenders' names and addresses public, with 92 per cent supporting the use of registries. Restricting where sex offenders can live was supported by 76 per cent of respondents, while 94 per cent felt that incarceration was

the most appropriate response for sexual assault or rape of an adult, and 46 per cent said it was the most appropriate response for indecent exposure to an adult. The authors suggest that the most common policies for dealing with sex offenders – registries, residency restrictions and the use of incarceration – ‘appear broadly to converge with public opinion’ (Mears et al., 2008: 546).

Views on the most appropriate punishment for offenders convicted of sexual offences against children were similarly punitive. Almost all of the respondents (97 per cent) preferred prison to probation, community-based treatment, or a fine for the sexual assault or rape of a person aged 17 or younger. For indecent exposure to a child, 80 per cent preferred prison rather than probation (6 per cent), community-based treatment (13 per cent) or a fine (2 per cent). Prison was preferred by 89 per cent of respondents for distributing child pornography (with 6 per cent preferring community-based treatment and 4 per cent probation), while 68 per cent chose this sanction for people convicted of accessing child pornography (with 15 per cent choosing community-based treatment, 11 per cent probation and 7 per cent a fine). Looking at factors predicting preferences for punishment for accessing child pornography offences in particular, the authors found that males, whites, the less educated, the less wealthy, and those who were more concerned about crime were all more likely to endorse more severe punishments for accessing child pornography (Mears et al., 2008: 547–48).

However, coinciding with punitive views about criminal justice responses to sex offenders, slightly more than half (51.7 per cent) of respondents were also willing to pay extra taxes for sex offender treatment: 22 per cent supported a tax increase of \$25; 14 per cent supported an increase of \$50; 2 per cent supported an increase of \$75; and 13 per cent supported an increase of \$100 (Mears et al., 2008: 550).

Mears et al. (2008) conclude that respondents’ support for prison as the primary criminal justice response to sexual offending may be founded on the many myths and misconceptions that exist around sex offenders: that they invariably reoffend and cannot be treated effectively and that sexual offence rates are increasing (Mears et al., 2008: 553). They conclude with a call for further research to ‘unpack’ the ideas that underlie people’s opinions on sentencing of sex offenders.

In a study that focused on perceptions of the potentially negative consequences of a particular sex offender policy, rather than perceptions of the potential crime prevention outcomes of these policies, Mancini (2013) adopted a strong research design by using a large, random sample, as well as a sophisticated methodological approach. In a 2005 national random telephone poll of 1,006 Americans, Mancini (2013) examined public opinion about the negative collateral consequences of sex offender registration, in particular the problem of offender harassment and its implications for successful re-entry. Mancini hypothesised that people who believe that sex offenders cannot be reformed, and those who have actually made use of sex offender registries, will be less concerned about the possible negative consequences of registration (Mancini, 2013: 9).

Mancini (2013: 15) found that a ‘nontrivial minority’ (almost 40 per cent) of respondents were somewhat or very concerned about offender harassment.

However, almost three-quarters (73 per cent) felt that sex offender rehabilitation to the extent that they no longer threatened children was not possible, and 85 per cent believed that sex offenders were less amenable to rehabilitation compared with other serious offenders. The author turns these statistics around to show that 27 per cent believed that rehabilitation was possible, while 15 per cent said that it was as likely to be successful for sex offenders as for other offenders. Results of a logistic regression analysis show that a history of having searched a sex offender registry predicted lower levels of concern about negative collateral consequences, as did a belief that sex offenders could not be completely rehabilitated (Mancini, 2013: 16). That is, people who made use of registries and who felt that treatment would be ineffective were less concerned about the potential negative impacts registries might have on offenders.

In a study that examined perceptions of the potential negative consequences of sex offender policies and their potential crime prevention outcomes, Schiavone and Jeglic (2009) used a self-selected but national sample to explore public perceptions of sex offender registration and notification and residence restrictions. They did this to consider issues such as reintegration, stigma, vigilantism, offender rights and the consequences (intended or otherwise) of these policies.

Using an internet-based community messaging board, the authors surveyed 115 people across 15 major cities in the United States. They found that respondents supported community notification and sex offender registration (under Megan's Law)<sup>534</sup> for high-risk (89 per cent) and moderate-risk (82 per cent) offenders, with 51 per cent supporting this policy for low-risk offenders as well. Fully 20 per cent supported the use of community notification and registration even for those sex offenders classified as no-risk. Most (80 per cent) felt that such laws are constitutional, while 75 per cent believed they did not violate sex offenders' right to privacy (although 37 per cent felt that sex offenders did not have any rights) (Schiavone and Jeglic, 2009: 687).

Respondents also believed that community notification and registration laws were effective in reducing reoffending. Table 7 shows the proportion of respondents who agreed or strongly agreed with a number of statements about Megan's Law and residence restriction policies. The first three items pertain to community notification and sex offender registration. The data show that the majority of respondents believed that these policies are effective in preventing offending and keeping the community safe. The second three items focus on residence restrictions. Respondents were substantially more dubious about the effectiveness of these policies in preventing offending (Schiavone and Jeglic, 2009: 688).

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534 The informal name given to laws that require law enforcement authorities to notify the public about registered sex offenders living in their communities. It was named after Megan Kanka, a child raped and murdered in California by an offender who had previously been convicted of sexual offences and who lived in the same street as the victim.

**Table 7: Perceptions of Megan’s Law and residence restrictions**

	Percentage agree	Percentage strongly agree
Communities are safer when they know where sex offenders live	43	22
Registration and notification helps to prevent offending	44	10
It is fair for communities to know about a sex offender’s risk level	41	50
Residence restrictions are successful in limiting sex offenders’ access to children	25	5
Residence restrictions help sex offenders to prevent reoffending	30	7
If sex offenders really wanted to reoffend they would be able to do so despite residence restrictions	28	60

Source: Schiavone and Jeglic (2009: 688)

Schiavone and Jeglic (2009) query why people support a policy they believe won’t effectively reduce sexual offending. They suggest that these contradictory attitudes may be driven more by emotion – typically fuelled by media representations of sex offenders as a homogeneous group of predators against unknown children – than by empirical research. The authors conclude that ‘it is critical that the media should be enlisted as a partner dispelling inaccuracies and myths regarding sex offenders and sex offender policies to ensure a smoother and more successful sex offender reintegration into society’ (Schiavone and Jeglic, 2009: 691).

Illustrating the emotive nature of sex offending, Kernsmith et al. (2009) examined the relationship between fear of various types of sex offenders and support for sex offender registration. Using a more robust approach and a larger sample than Schiavone and Jeglic (2009), they undertook a random telephone survey of 733 adults in Michigan to examine their perceptions of a variety of sex offenders, such as incest offenders, ‘pedophiles’ and date rape offenders. Fully 80.6 per cent of respondents reported that they would be ‘somewhat’ or ‘very’ afraid of a person who sexually abused a child in the neighbourhood. Almost all respondents supported sex offender registration for those whose victims were children (97 per cent), while 65.1 per cent supported registration for the offender in a statutory rape scenario (Kernsmith et al., 2009: 294).

Examining correlations between level of fear of each type of offender and support for registration for that type of offender, Kernsmith et al. (2009) showed statistically significant positive relationships between fear and support for registration. Subsequent regression analysis revealed that the relationship between fear and support remained even after controlling for gender and race. That is, people who reported being afraid of offenders were more likely to support registration

requirements for them. This finding held for both men and women and across all races in the sample.

The Kernsmith et al., (2009) study illustrates the relationship (statistically significant in their study) between people's fear and their support for policies such as sex offender registration. They also illustrate the dangers of collapsing all types of sex offenders into a single category, as public perceptions vary significantly when people are asked questions that are more specific about different types of sex offenders.

Concerns with overly broad laws and placing unfair restrictions on some offenders were expressed in a unique study of the perceptions of sex offenders in Western Australia. Day et al. (2014) interviewed 22 professionals about their views of the effectiveness of Western Australia's sex offender registration laws and its newly implemented (as of October 2012) community notification laws.

Participants viewed the sex offender register as a useful reminder to offenders that they were being monitored. They also saw it as a symbolic statement of the seriousness with which sex offences are considered. However, they saw the 15-year mandatory registration provision as overly punitive, and believed greater flexibility in registration duration was important. Many expressed concern that the criteria for being on the register was too inclusive, resulting in a lack of scope for differentiating between minor and more serious offences (Day et al., 2014: 174–75).

Most participants perceived community notification far less favourably, struggling to see how it could benefit the community. They saw notification as detrimental to rehabilitation, with the stigma attaching to the scheme potentially deterring victims from reporting crimes and offenders from seeking help (Day et al., 2014: 176).

This study was small and localised, but it contributes to the literature by speaking to those people who are at the coalface of working with sex offenders to reduce the likelihood of reoffending.

Taken together, these studies show that people tend to be supportive of residence restrictions, community notification and registration policies for sex offenders. At the same time, however, people acknowledge the potentially limited effectiveness of these policy responses in reducing sexual offending. Such duality is characteristic of perceptions of sex offenders.

## **Summary**

Evidence on perceptions of sex offenders points to highly punitive attitudes towards sex offenders in general, and child sex offenders in particular. Arguably, the primary explanation for perceiving sex offenders (and child sex offenders) differently from other offenders is the prevalence of various myths and misconceptions about their characteristics and their amenability to treatment. A secondary component that may be founded in these misconceptions is the emotional response that sex offenders, and child sex offenders in particular, elicit – fear, disgust and contempt – that allows them to be treated as a special case, different to other offenders.

Simon (1998) suggests that the current approach to sex offenders reflects the 'new penology' that sees crime as a problem of managing high-risk categories and subpopulations, into which sex offenders clearly fall. He concludes (Simon, 1998: 467):

Behind the superficially consistent object of sex offender, a distinctly new and far more pessimistic vision has emerged. Sex offenders are the embodiment not of psychopathology, with the potential for diagnostic and treatment knowledge to provide better controls over such offenders, but of the monstrous and the limits of science to know or change people.

This new penology – not so new now, in the second decade of the 21st century – has caught many hundreds of thousands of offenders in its net, with little evidence that this approach has helped reduce the number of victims of sexual offences.

## Chapter 6

# Ancillary Orders and Special Provisions for Sex Offenders

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### Introduction

Fear of habitual or dangerous offenders, especially sex offenders, has produced a range of statutory provisions intended to protect the community from them.<sup>535</sup> No specific provisions exist for offenders convicted of CSA in institutional contexts; accordingly, this chapter examines the range of legislative provisions and orders that may be available in relation to sexual offenders generally.

Chapter 2 examined legislative provisions that changed the basic sentencing principles about proportionality, community protection and deterrence of dangerous offenders to enable courts to disregard the common law limits of proportionality and to require them to regard the protection of the community as the paramount consideration when making certain decisions. Chapter 5 surveyed studies of public views and attitudes to sex offenders and offences, demonstrating that many of these views are based on misconceptions of the nature of offenders and the efficacy or otherwise of treatment programs and offender registration and notification laws. It suggested that many of the laws enacted to deal with sex offenders were based on emotional rather than empirical grounds.

This chapter examines legislative measures that allow for preventive detention through indefinite sentences, extended supervision and detention orders, mandatory, minimum and presumptive sentences, cumulative sentences, restrictions on parole and a number of orders intended to restrict the movement and activities of this group of offenders. The number and variety of laws aimed at dangerous offenders<sup>536</sup>, and judicial reactions to them, reflect an ongoing discourse, and often a tension between the legislative and judicial branches of government. The former tends to respond quickly and possibly impulsively to egregious instances of sexual offending and to media-fuelled demands to act decisively, swiftly and severely. The latter are more concerned with maintaining long-standing principles of sentencing, defending the importance of judicial sentencing discretion, as well as the human rights of offenders and victims. In particular, courts are conscious of the fundamental principle of proportionality that limits the use that can be made of preventive detention. That principle provides the context within which these laws operate and has coloured the

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535 See Chapter 1. For a review of dangerous offender laws as they stood at 1997 see Figgis and Simpson, 1997 and as at 2006 see McSherry, Keyzer and Freiberg, 2006.

536 The New South Wales Parliamentary Committee that reported on the sentencing of CSA offenders commented that in New South Wales there were overlapping provisions in relation to such offenders and a multiplicity of offences. It suggested that the government review all offences and other provisions relevant to CSA offences and offenders to consolidate and simplify the legal framework (New South Wales Parliament, 2014: 17).

views of the courts in their interpretation and application of the various ancillary orders and special provisions.

A survey conducted for this report<sup>537</sup> on the use of many of these orders and provisions reveals that most are infrequently used. Their purpose appears to be more related to the goal of assuaging public concern than with reducing crime. These laws have been rarely evaluated in Australia, though there have been more evaluations in the United States. As the legal and social environments in the United States differ from Australia, these studies need to be treated with caution.

## Reoffending following sentencing

The term 'recidivism' is operationalised in the research literature in a variety of ways, typically, relating to charges, convictions or prison terms. However, regardless of how it is measured, 'recidivism' is consistently defined as reoffending *following a sentence*. It is, therefore, not the same as 'repeated' offending, in which an offender commits repeated, multiple instances of the offence over time.

Sex offender recidivism studies are hampered by the low reporting rates for sexual offences generally. Child sexual offences also have especially high rates of attrition through the criminal justice system. The impact of substantial delays in reporting child sexual offences – perhaps especially in cases of institutional offending – may impose some sort of 'limit' on the probability of recidivism of older offenders, with sentencing taking place many decades after the offence. Estimates of recidivism rates are thus likely to be conservative, under-counting offending by an unknown amount. Nonetheless, the accumulation of evidence provides a 'reasonable, if conservative' estimate of sex offender recidivism (Lievore, 2004: 37).

A large body of evidence uses sophisticated methodologies such as meta-analysis to examine sex offender recidivism over time. Despite the common view that all sex offenders will inevitably reoffend, the evidence debunks this myth. Research based on official reports of offending and self-reports of offenders consistently shows that sex offenders typically have lower rates of recidivism than other kinds of offenders, and that these rates vary for different sub-groups of sex offender.<sup>538</sup> For example, a Canadian meta-analysis<sup>539</sup> of 95 studies examining recidivism rates over five to six years for more than 31,000 sex offenders found that the recidivism rate for sexual offences was 13.7 per cent (Hanson and Morton-Bourgon, 2004: 8). This rate is widely cited in the research literature as the best estimate of sex offender recidivism.<sup>540</sup>

Similar rates have been found in the few Australian studies of sex offender recidivism. As these studies have typically involved small sample sizes, their results should be

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537 Through notices to produce information issued by the Commission. We thank the various government agencies for their cooperation in producing this information.

538 See Gelb, 2007, for a more detailed overview of the literature on this issue.

539 Meta-analysis is an especially strong form of analysis. Essentially, it involves identifying a number of studies in a particular area (typically those with the most robust methodologies), pooling the data across all the studies and examining the results across all the research.

540 The meta-analytical work of Hanson and colleagues has been called 'the best insight on recidivism rates to date' (Mercado, 2011: 11).



approached with caution. Nonetheless, the results are consistent with larger studies in the international literature.

As part of the National Initiative to Combat Sexual Assault, the Commonwealth Office of the Status of Women commissioned the Australian Institute of Criminology to provide an overview of Australian and international research on sexual, violent and general recidivism among sex offenders. The study examined the rates of recidivism and the key characteristics of male offenders who sexually assault adult women.

Examining the findings of 17 studies both in Australia and internationally, Lievore concluded that the studies clearly indicate a low base rate for sexual recidivism. A number of studies reported rates below 10 per cent, with few studies reporting rates higher than 20 per cent (Lievore, 2004: 29).

In an early Australian study measuring sex offender recidivism, Broadhurst and Maller (1992) examined the recidivism of 560 sex offenders released from Western Australian prisons over the period 1975–87, following them for up to 12 years. Overall, 8.4 per cent had returned to prison for a further sexual offence, with higher rates found for Indigenous offenders (11.6 per cent) than for non-Indigenous offenders (5.5 per cent) (Broadhurst and Maller, 1992: 61). A slightly higher recidivism rate was found in a more recent Western Australian (2002) study, which examined 2,165 male sex offenders who had been referred to the Sex Offender Treatment Unit between 1987 and 2000. By the end of the seventh year of follow-up, 10.7 per cent of released sex offenders had been arrested for a sexual offence, 16.8 per cent had been arrested for a violent offence, and 49.7 per cent had been arrested for any criminal offence (Greenberg et al., 2002: 113).

Corrective Services NSW examined data for all inmates discharged from prison in 1990–91 over a two-year follow-up period to measure recidivism rates for any offence. Men who were initially imprisoned for a sexual offence had the lowest recidivism rate for any kind of offence of all offender types (11 per cent), although the recidivism rate for sex offenders against adults was 16 per cent, compared with 7 per cent for those whose victims were children. The highest recidivism rates were for property offenders (47 per cent) and assault (35 per cent) (Thompson, 1995: 17). While the short follow-up period of this study means that its findings are likely to be conservative estimates, they are nonetheless broadly consistent with findings from international research with longer follow-up periods. Indeed, a 15-year follow-up study of people convicted in New South Wales in 1994 found the lowest rate of general reoffending for those convicted of sexual assault and related offences (42 per cent convicted of any form of offending within 15 years) and the third lowest reconviction rate for homologous reoffending (10 per cent convicted of sexual offending). That is, 10 per cent of people convicted of sexual assault and related offences in 1994 were reconvicted of sexual assault and related offences within 15 years (Holmes, 2012: 3–4).

A 2002 study of reconviction and reimprisonment rates for prisoners released between 1995 and 1998 in New Zealand found similar results to the Australian studies: sex offenders released from prison were far less likely (30 per cent) to be reconvicted for any offence within two years than was the sample as a whole (73 per cent). For

the minority of sex offenders who were reconvicted within two years, the most common offence was a traffic offence (17 per cent were reconvicted for a traffic violation within two years, compared to 9.4 per cent reconvicted for a violent offence). Only 3.5 per cent of all sex offenders were reconvicted for a sex offence within two years of release, rising to 6.7 per cent within five years (Spier, 2002: 13). Although these recidivism rates are somewhat lower than those reported in other studies, the central tenet of the finding is consistent with much research: that sex offenders are much less likely to be reconvicted for a subsequent sexual offence than for a non-violent offence and tend not to specialise in their offending behaviour.

Both Australian and international research have shown the importance of assessing recidivism rates separately for different kinds of sex offender. Arguably, the strongest study on this issue is the meta-analysis undertaken by Harris and Hanson (2004), who examined 10 sub-samples from studies in Canada, the United States, and England and Wales, with a total of 4,724 adult male offenders released from prison or from community sentences. Recidivism rates were based on both charges and convictions, with definitions varying across the studies.

The analysis focused on rates of sexual recidivism over five, 10 and 15 years. The highest rates of recidivism were found for the extra-familial child molesters whose victims were boys, while the lowest rates were found for the incest offenders. The table below presents a summary of the findings. These data are particularly useful as they examine recidivism rates across a variety of factors relevant to CSA in institutional settings, including the relationship of the offender to the victim, the age and sex of the victim, and the age and criminal history of the offender.

**Table 8: Sexual recidivism (%) across time and samples**

<b>Sub-group</b>	<b>5 years</b>	<b>10 years</b>	<b>15 years</b>
All sex offenders	14	20	24
Rapists	14	21	24
Extended incest child molesters	6	9	13
'Girl victim' child molesters	9	13	16
'Boy victim' child molesters	23	28	35
Offenders without prior sexual conviction	10	15	19
Offenders with prior sexual conviction	25	32	37
Offenders over age 50 at release	7	11	12
Offenders less than age 50 at release	15	21	26

*Source: Harris and Hanson (2004: 8)*

This meta-analysis is consistent with other research and suggests that younger offenders, offenders who have a prior sexual conviction, and extra-familial offenders who target boys, represent more 'high-risk' types than other kinds of sex offender. The research also illustrates the importance of length of follow-up period for measuring recidivism, as rates continued to increase up to 15 years after release.

The findings that might be of greatest relevance to institutional CSA are the data on recidivism rates for sexual offences among older offenders. Table 8 shows that, for offenders aged over 50 at the time of release from prison, rates of sexual offence recidivism are low: 7 per cent after five years, 11 per cent after 10 years and 12 per cent after 15 years. This report's own study of sentencing outcomes for institutional CSA offences showed that, while the mean age of offenders at the time of the offence was 38.9 years, the mean age at the time of sentencing was 58.5 years (Chapter 4: 136). The significant delay between offence and sentencing suggests that rates of reoffending after sentencing for institutional offenders should be broadly comparable to the data shown in Table 8 for offenders aged over 50 at the time of their release.<sup>541</sup>

In Australia, a study by Smallbone and Wortley highlights the value of differentiating among various kinds of child sex offender. While their study of 182 men who had been imprisoned in Queensland for sexual offences against children involved a relatively small sample size, it is nonetheless extremely valuable in that it captured detailed information on the characteristics of the offenders, as well as information on offences both known and unknown to the police.

Participants completed a 386-item self-report questionnaire, including items on their prior convictions for sexual, violent and property offences. Overall, 61.6 per cent of offenders reported at least one prior conviction for any kind of offence. Just over one in five (21.3 per cent) had a prior conviction for a sexual offence, 22.8 per cent had a prior conviction for a violent offence and 39 per cent had previously been convicted of a property offence (Smallbone and Wortley, 2000).

In addition, the researchers categorised their participants on the basis of the nature of their offending: intra-familial sex offenders, extra-familial sex offenders, mixed-type offenders (offending against children both within and outside their families) and deniers (those who denied the offences for which they had been convicted).

Statistically significant differences were found among the groups in the proportions reporting prior convictions for different offence types. Of those offenders with

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541 It is also plausible that a variation exists in rates of sexual offence recidivism depending on the duration of the delay between offence and sentencing. That is, offenders who are sentenced in the years immediately following their offending might have different recidivism rates than those for whom there is a significant delay between offence and sentencing. No studies examine the role of delay on recidivism, making it impossible to know whether institutional offenders should be directly compared with other types of sexual offenders, as they are often sentenced many decades after their crimes. In addition, while it may be argued that any assessment of reoffending for institutional offenders is meaningless in the context of this delay, an understanding of the chances of reoffending remains central to sentencing. Existing recidivism research thus provides valuable information on the ways in which recidivism rates vary by characteristics of both the offender and the victim.

previous convictions, their first conviction was four times more likely to be non-sexual (82 per cent) than sexual (18 per cent) (Smallbone and Wortley, 2000: 18).

Table 9 shows how the prevalence of previous convictions varied across different offence types and for different types of offenders. Overall, offenders were more likely to report having a previous conviction for a property offence than for a sexual offence. A prior conviction for a sexual offence was least common among intra-familial offenders (one in 10 offenders), while just under one-third of extra-familial offenders reported a previous sexual offence conviction. Mixed-type offenders had the highest rates of previous sexual offence convictions, with more than four in 10 such offenders reporting a history of sexual offending (Smallbone and Wortley, 2000: 18). The lower rates for intra-familial offenders may be a function of differential reporting for the various kinds of offences, but the possibility that offences committed by family members are particularly under-reported has not been examined in the research literature.

**Table 9: Offenders (%) with previous property, violent, sexual and any convictions**

Previous convictions	Intra-familial	Extra-familial	Mixed type	Denier
Property	36.5	30.5	44.8	41.7
Violent	16.4	18.6	27.6	41.7
Sexual	10.8	30.5	41.1	25.0
Any offences	61.6	61.0	69.0	58.3

*Source: Smallbone and Wortley (2000: 18)*

Such studies are helpful in that they illustrate differences within the child sex offender category. Treating child sex offenders as a single, homogeneous group masks important differences that may have implications for clinical responses to their behaviour and for the development of criminal justice policies.

As well as showing that sex offenders are not a homogeneous group – that different kinds of child sex offender have different patterns of reoffending – the authors also suggest that child sex offenders are not specialist offenders; instead, there appears to be ‘considerable versatility’ in their criminal careers (Smallbone and Wortley, 2000: 20).

In order to compare recidivism rates for different types of sex offender, Hanson and Bussière (1998) examined recidivism for child molesters and for rapists separately. In their meta-analysis of 61 studies and 28,972 sex offenders, the researchers found that the overall four- to five-year recidivism rate for sexual offences was 13.4 per cent (based on 23,393 offenders). However, this rate varied according to the type of offender: for child molesters, the sexual offence recidivism rate was 12.7 per cent (based on 9,603 offenders), while for rapists, it was 18.9 per cent (based on 1,839 offenders).

Similar variations in recidivism rates were found in Canadian studies of men the court had referred to a sexual behaviours clinic for assessment between 1982 and 1992. Firestone and colleagues (1998; 1999; 2000) examined recidivism rates over a 12-year follow-up period for sexual offences, violent offences (sexual and non-sexual) and any

offences. They found substantial differences in recidivism rates among different types of sex offender.

The data in Table 10 show higher rates of sexual offence recidivism among rapists and extra-familial child molesters, with substantially lower rates among incest offenders. Similar patterns held for violent offending and any offending, with the lowest rates among incest offenders and the highest among rapists (Gelb, 2007: 27; drawn from Firestone et al., 1998; Firestone et al., 1999; Firestone et al., 2000). Again, the lower recidivism rates for incest may be a function of differential reporting for the various kinds of offences.

**Table 10: Recidivism rates (%) for sub-groups of sex offender, by type of offending**

Type of reoffending	Rapists	Incest offenders	Extra-familial child molesters
Sexual	16	6	15
Violent	26	12	20
Any offending	53	27	42

Source: Gelb (2007: 27); drawn from Firestone et al. (1998; 1999; 2000)

As with the Smallbone and Wortley (2000) research, the work of Firestone and colleagues (1998; 1999; 2000) shows not only the substantial variation in recidivism rates among different types of sex offender, but also that homologous reoffending is far less prevalent than other types of reoffending.

Across all these recidivism studies, two consistent results have emerged: that sex offenders have low rates of sexual offence recidivism following sentencing; and that substantially different recidivism rates, and patterns and precursors of offending are found for different kinds of sex offender. While acknowledging that estimates of recidivism rates need to be treated as conservative due to low reporting rates, the observed variation has implications for risk assessment and treatment. It also highlights the theoretical and policy dangers of seeing sex offenders as a homogeneous and coherent group, when in fact the evidence suggests that this is not the case (Soothill et al., 2000: 56).

## Habitual Criminal Legislation

Habitual criminal laws are among the oldest forms of legislative response to repeat or dangerous offenders. A number of Australian jurisdictions introduced these laws in the early 20th century, mostly aimed at repeat offenders who had not necessarily been convicted of serious offences (Morris, 1951; Daunton-Fear, 1972).<sup>542</sup> The laws

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542 See example, *Habitual Criminals Act 1905* (NSW); *Indeterminate Sentences Act 1907* (Vic); *Criminal Code Amendment Act 1911* (WA), s 9; *Crimes Act 1914* (Cth), s 17; *Criminal Law Amendment Act 1917* (SA), s 7.

were infrequently invoked and most were repealed in the latter part of that century (Freiberg, 2000: 56–57). Only one remains on the statute book.

### **New South Wales**

Under the *Habitual Criminals Act 1957* (NSW), s 6(1) and (2) a judge may pronounce a person to be an habitual criminal where that person is of or above the age of 25, has been convicted on indictment and has at least twice previously served separate terms of imprisonment as a consequence of convictions of indictable offences. The judge must be satisfied that ‘it is expedient with a view to such person’s reformation or the prevention of crime that such a person should be detained in prison for a substantial time’.

In such a case the judge must pass a sentence of imprisonment upon the person for a period of no less than five years or more than 14 years such sentence to be served concurrently with sentence being currently served.<sup>543</sup>

Should the habitual criminal be reformed during their period of incarceration, the person may be released by the Governor on licence.<sup>544</sup>

This legislation has fallen into disuse apart from one instance of its use in 2001.<sup>545</sup> In 1996, the New South Wales Law Reform Commission recommended its abolition (New South Wales Law Reform Commission, 1996) and this call was repeated by the New South Wales Sentencing Council in 2008 and 2012, when it recommended its repeal on the grounds that the law is archaic, disproportionate and a blunt instrument that would not provide a suitable pathway or incentive for rehabilitation. It also noted that better methods for dealing with serious recidivist offenders can be found in the legislation for post-sentence supervision and detention orders (Sentencing Council, New South Wales, 2008, Vol 3: 218; Sentencing Council, New South Wales, 2012: 41ff).

In response to a Commission request for information, the New South Wales government reported that as at September 2014, no one was being held under this Act and no orders had been made in the past decade.

## **Persons Incapable of Controlling Sexual Instincts**

More specific provisions aimed at sexual offenders, also of a relatively archaic nature, are found in South Australia and Queensland.<sup>546</sup>

### **South Australia**

Under the *Criminal Law (Sentencing) Act 1988* (SA), s 23 where a person has been convicted of a relevant offence,<sup>547</sup> the Attorney-General may apply to the

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543 *Habitual Criminals Act 1957* (NSW), s 6(1) and (2).

544 *Habitual Criminals Act 1957* (NSW), s 7.

545 *Strong* [2005] HCA 30.

546 The original statute was the *Criminal Law Consolidation Act 1935* (SA), s 77a upon which the *Criminal Law Amendment Act 1945* (Qld), s 18 was modelled, see *Pollentine v Bleije* [2014] HCA 30 at [57] per Gageler J.

547 Generally, sexual offences under Part 3, Divisions 11, 11A and 13 of the *Criminal Law Consolidation Act 1935* (SA), or the offence of indecent behaviour and gross indecency under the *Summary Offences Act 1953* (SA), s 23, or ‘any other offence where the evidence indicates that the defendant may be incapable of controlling, or unwilling to control, his or her sexual instincts’; or an offence of failing to comply with reporting obligations, see generally *Criminal Law (Sentencing) Act 1988* (SA), s 23(1).

Supreme Court for an order that the person be kept in custody until further order.<sup>548</sup> In determining whether to make such an order the Supreme Court must obtain medical reports as to the mental condition of the defendant and as to whether the person is incapable of controlling, or unwilling to control, his or her sexual instincts.<sup>549</sup> If an application is successful the court may order that the person be detained in custody until further order, which may be made in addition to, or instead of a sentence of imprisonment.<sup>550</sup> A person held under these provisions must be reviewed at least once every 12 months.<sup>551</sup> The DPP or the person may apply to the Supreme Court for the release on licence of a person detained under these provisions and the Court is required to regard the protection of the community as the paramount consideration in determining an application.<sup>552</sup>

If a person has been released on licence by the Supreme Court the DPP may apply to the Court for a cancellation of the licence and the Court is required to regard the protection of the community as the paramount consideration in determining an application.<sup>553</sup>

In response to the Commission's request for information, the South Australian government reported that at October 2014, four orders were current for persons convicted of CSA offences. Between 2004 and 2014, 26 applications were made under these provisions, 17 of which related to CSA, and five were granted. In that period, one person was discharged from the order.

South Australian courts regard such an order as a serious deprivation of liberty and a task not to approach lightly. Even though the main rationale for the provision is to protect the community from offenders deemed to be incapable or unwilling to control their sexual instincts, the order is one of preventive detention and is an exception to the common law principle of proportionality. If the protection of the community can be achieved through other means, such as a long prison sentence, such an order will not be made.<sup>554</sup>

### **Queensland**

Under the *Criminal Law Amendment Act 1945* (Qld), s 18(1) a person who has been found guilty of an offence of a sexual nature<sup>555</sup> committed upon or in

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548 *Criminal Law (Sentencing) Act 1988* (SA), s 23(3).

549 *Criminal Law (Sentencing) Act 1988* (SA), s 23(3). Defined as where there is a significant risk that the person would, given an opportunity to commit a relevant offence, fail to exercise appropriate control of his or her sexual instincts, *Criminal Law (Sentencing) Act 1988* (SA), s 23(1).

550 *Criminal Law (Sentencing) Act 1988* (SA), s 23(6).

551 *Criminal Law (Sentencing) Act 1988* (SA), s 23(9).

552 *Criminal Law (Sentencing) Act 1988* (SA), s 24(1b).

553 *Criminal Law (Sentencing) Act 1988* (SA), Schedule 2, 1(6). For a discussion of the practical difficulties of managing these orders, see McSherry, Keyzer and Freiberg, 2006: Chapter 6.

554 *Westwood* [2014] SASC 139; *England* [2003] SASC 321; (2003) 86 SASR 273; *England* [2004] SASC 20; (2004) 87 SASR 411; *England* [2004] SASC 254; (2004) 89 SASR 316; *Wichen* [2005] SASC 323; (2005) 92 SASR 528; *Armfield* [2005] SASC 108; (2005) 155 A Crim R 99; *Whyte* [2006] SASC 56; *Ainsworth* [2008] SASC 67; (2008) 100 SASR 238; *Warsap* (2011) 111 SASR 232; *Spurr* [2008] SASC 336; (1985) 41 SASR 52.

555 Defined as including 'any offence constituted wholly or partly by an act whereby the offender has exhibited a failure to exercise proper control over the offender's sexual instincts and any offence in the circumstances associated with the

relation to a child under the age of 16 may be liable to be detained indefinitely in an institution<sup>556</sup> at the Governor's pleasure if a judge of the Supreme Court is of the opinion that the person is incapable of exercising proper control over their sexual instincts.<sup>557</sup> The judge is required to obtain reports from two medical practitioners as to the offender's mental condition and as to whether that condition is such that the offender is incapable of exercising proper control over the offender's sexual instincts.<sup>558</sup> The court may make such an order in addition to, or in lieu of, imposing any other sentence.<sup>559</sup>

Where an offender is already in custody in relation to an offence of a sexual nature, and two medical practitioners are of the view that the person is incapable of exercising proper control over their sexual instincts, and that such incapacity is capable of being cured by continued treatment and for the purposes of such treatment that person should be detained in an institution after their sentence expires, they may report to the Attorney-General who may cause an application to be made to the Supreme Court.<sup>560</sup>

A person detained under these provisions must be examined at least once every three months.<sup>561</sup>

In response to the Commission's request for information, the Queensland government reported that between 2004 and 2014, no orders had been made under these provisions but at least three people were being detained in relation to CSA offences.<sup>562</sup>

In *Pollentine v Bleije*<sup>563</sup>, the High Court unanimously held that this Act was constitutionally valid. It was not repugnant to, or incompatible with, the institutional integrity of state courts because the impugned decision was whether to release the person, not whether to order their detention, and that was a decision the political branch of government could make according to criteria that were amenable to judicial review.

## Dangerous Criminal Declaration

The last of the older style preventive detention legislation is found in the *Sentencing Act 1997* (Tas), s 19 whose origins lie in the *Criminal Code 1924* (Tas), s 392. Tasmanian

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committal whereof the offender has exhibited a failure to exercise such proper control over the offender's sexual instincts, and includes an assault of a sexual nature', *Criminal Law Amendment Act 1945* (Qld), s 2A(1).

556 An institution may be a corrective services facility or any other prescribed institution.

557 *Criminal Law Amendment Act 1945* (Qld), s 18. The decision to release a person is made by the Governor in Council, not by a court; in effect by the Attorney-General and Minister for Justice. On the difficulties that arise from construing the predicate conditions, see *Pollentine v Bleije* [2014] HCA 30 [23]–[31].

558 The legislation does not apply to those capable of controlling their instincts but who choose not to, nor to those who are incapable of being cured.

559 *Criminal Law Amendment Act 1945* (Qld), s 18(3).

560 *Criminal Law Amendment Act 1945* (Qld), s18(4).

561 *Criminal Law Amendment Act 1945* (Qld), s 18(8).

562 Two of these persons were appellants in the case of *Pollentine v Bleije* [2014] HCA 30. Pollentine has been held in custody since 1984. Radan was sentenced to three years' imprisonment, which was followed by detention under these provisions.

563 [2014] HCA 30.



law does not provide for indefinite sentences nor for post-sentence detention in the same form as other jurisdictions, so these provisions are the only means by which sex offenders deemed to be dangerous can be indefinitely detained.

### **Tasmania**

Under the *Sentencing Act 1997* (Tas), s 19(1), an offender who is convicted or brought up for sentence after being convicted may be declared to be a ‘dangerous criminal’ if they have been convicted for a crime involving violence or an element of violence, if they have at least once been previously convicted for a crime involving violence or an element of violence, are over 17 years of age and the judge is of the opinion that the declaration is warranted for the protection of the community.<sup>564</sup>

In determining whether to declare an offender a dangerous criminal a judge may have regard to the nature and circumstances of the crime, the offender’s antecedents or character, any medical or other opinion and any other matter that the judge considers relevant.<sup>565</sup>

A dangerous criminal declaration is made in addition to any prisons sentence for the crime of which the offender is convicted.<sup>566</sup> An offender may apply to the Supreme Court for a discharge of the declaration and the court must make an order discharging the declaration if the court is satisfied that the declaration is no longer warranted for the protection of the public.<sup>567</sup> The offender must be reviewed every two years. A discharge is unconditional – the offender is not subject to supervision or monitoring.<sup>568</sup>

The making of a declaration requires a court to assess the risk that the offender poses to the community, and if there is a real likelihood that the offences contemplated will be grave risk, a declaration may be made.<sup>569</sup> The orders under these provisions are regarded as being exceptional as they are contrary to the fundamental principle of proportionality.<sup>570</sup>

In response to the Commission’s request for information, the Tasmanian government reported that between 2004 and 2014, there were five applications for dangerous criminal declarations, of which two were granted, two refused and one withdrawn. There are currently seven declarations in force, of which five relate to sex offenders.<sup>571</sup>

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564 *Sentencing Act 1997* (Tas), s 19(1).

565 *Sentencing Act 1997* (Tas), s 19(2).

566 *Sentencing Act 1997* (Tas), s 19(3).

567 *Sentencing Act 1997* (Tas), s 20(2) and (3). The onus of proving that the declaration is no longer needed to protect the public lies on the offender, *Read* [1997] TASSC 85; *Bell v DPP* [2011] TASSC 61.

568 *IRS* [2013] TASSC 66.

569 *Read* [1994] TASSC 21; *McCrosen* [1991] TASSC 1; *DPP v Phillips* [2006] TASSC 81.

570 *Minney* [2003] TASSC 64; *Chester* [1988] HCA 62.

571 Information provided to the Tasmanian Sentencing Advisory Council.

## Indefinite Sentences

The first of the 'modern' forms of indefinite sentences appeared in the early to mid-1990s and are currently in force in four jurisdictions: Victoria, Queensland, Western Australia and the Northern Territory.

An indefinite sentence is a sentence that can be imposed by a court at the time that the sentence is first imposed. It allows a court to order that the person be imprisoned for a specified or 'nominal' time after which that sentence may be reviewed and further imprisonment ordered. It is a form of preventive detention.

In *Moffatt*, the Victorian Court of Appeal outlined its broad approach to the legislation. Winneke P observed:<sup>572</sup>

It cannot be denied that the concept of preventive detention is at odds with the fundamental sentencing principle that a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender. (See *Veen v The Queen* [No 1] (1979) 143 CLR 458 at 469; *Veen v The Queen* [No 2] (1987–8) 164 CLR 465 at 472.) ... [I]t is, in my view, the clear intent of the legislation that the power should be exercised sparingly and only in the exceptional case where the nature of the offence viewed in the context of the offender's past history and/or criminal disposition compels the court to the conclusion that the offender is a serious danger to the community.

In *McGarry*, Kirby J expanded on the reasons why such provisions are exceptional<sup>573</sup>:

In part, the reason why the system of criminal justice treats an order of indefinite imprisonment as a serious and extraordinary step, derives from the respect which the law accords to individual liberty and the need for very clear authority, both of law and of fact, to deprive a person of liberty, particularly indefinitely. In part, this approach rests upon the indisputable feature of almost all criminal sentencing in Australia that limits the sentence imposed to one that is proportionate to the offence of which the person has been convicted. In part, it reflects a tendency to recoil from preventive detention that involves punishing a person 'not for something that he has done but because of something it is feared he might do.' In part, it represents a realistic acknowledgment of the limitations experienced by judicial officers, parole officers and everyone else in predicting dangerousness accurately and estimating what people will do in the future.

### Victoria

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572 [1998] 2 VR 229, 234; see also comments of Hayne JA that 'the power to impose an indefinite sentence is one that will fall to be exercised in few (perhaps very few) cases', at 255. Judicial authority about using preventive detention generally is consistent with the views expressed by Winneke P; see *Chester* [1988] HCA 62; (1988) 165 CLR 611 (re provisions in the Western Australian *Criminal Code* authorising the detention of habitual criminals during the Governor's pleasure); *Lowndes* [1999] HCA 29; (1999) 195 CLR 665 at [11]; *Thompson* [1999] HCA 43; (1999) 165 ALR 219 at [6] and [19] per Kirby J; *Davies* [2005] VSCA 90; (2005) 11 VR 314 (application for an indefinite sentence under s 18A refused); *Garlett* [2000] WASCA 72; *Wayman* [2001] WASCA 326; *Buckley* [2006] HCA 7; (2006) 224 ALR 416.

573 [2001] HCA 62 at [61].

Under the *Sentencing Act 1991* (Vic), s 18A, any person over the age of 21 convicted of a ‘serious offence’<sup>574</sup> may be sentenced to an indefinite term of imprisonment.<sup>575</sup> The court must be satisfied that the offender is a ‘serious danger to the community’<sup>576</sup>, and in so deciding must take into account the person’s character, past history, age, health or mental condition, the exceptional nature and gravity of the offence and any special circumstances.<sup>577</sup>

In imposing an indefinite sentence a court is required to impose a nominal sentence, which is equal to a non-parole period, after which a court is required to review the sentence.<sup>578</sup> Reviews are thereafter required at three yearly intervals.<sup>579</sup> An offender must be discharged if the court is satisfied to a high degree of probability that the offender is not still a serious danger to the community.<sup>580</sup>

In 2013, four indefinite sentences had been imposed, all of which partly related to sexual offences against adult victims.

In response to the Commission’s request for information, the Victorian government reported that between 2004 and 2014 no orders had been made. However, it reported that one order in relation to offences against children imposed in 1996 was discharged in 2007. It was followed by a five-year integration order, which was in turn replaced by a supervision order in 2012.

### **Queensland**

Under the *Penalties and Sentences Act 1992* (Qld), s 163, a person convicted of a ‘qualifying offence’<sup>581</sup> may be sentenced to an indefinite sentence of imprisonment.<sup>582</sup> The court must be satisfied that the offender has not been referred to the Mental Health Court and that the offender is a serious danger to the community because of their antecedents, character, age, health or mental condition, the severity of the qualifying offence and any special circumstances.<sup>583</sup>

In determining whether the offender is a serious danger to the community, the court must have regard to whether the nature of the offence is exceptional, the offender’s antecedents, age and character, any medical, psychiatric, prison or other relevant report, the risk of serious harm to members of the community if an indefinite sentence were not imposed and the need to protect

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574 A serious offence includes rape, assault with intent to rape, sexual penetration of a child up to the age of 16, other sexual acts with children under 16.

575 *Sentencing Act 1991* (Vic), s 18A(6).

576 *Sentencing Act 1991* (Vic), s 18B(1).

577 *Sentencing Act 1991* (Vic), s 18B(1)(a)–(c), 2(a).

578 *Sentencing Act 1991* (Vic), s 18A(2) and (3).

579 *Sentencing Act 1991* (Vic), s 18H(1)(b).

580 *Sentencing Act 1991* (Vic), s 18M.

581 A qualifying offence includes indecent treatment of children under 16, carnal knowledge of children under 16; procuring of young persons, maintaining a sexual relationship with a child, among others, *Penalties and Sentences Act 1992* (Qld), Schedule 2.

582 *Penalties and Sentences Act 1992* (Qld), s 163(1).

583 *Penalties and Sentences Act 1992* (Qld), s 163(3).

members of the community from the risk of serious harm.<sup>584</sup>

In imposing an indefinite sentence the court must state the term of imprisonment that it would have imposed had it not imposed an indefinite sentence, referred to as the nominal sentence.<sup>585</sup> A review must take place after 50 per cent of the nominal sentence has been served.<sup>586</sup> An offender will be discharged from the order imposing an indefinite sentence if the court is satisfied that the offender is not still a serious danger to the community, in which case the court must impose a finite sentence for the offence for which the indefinite sentence was imposed, which must not be less than the nominal sentence.<sup>587</sup>

In response to the Commission's request for information, the Queensland government reported that between 2004 and 2014 eight applications had been made, none of which related to CSA. Two orders were ongoing.

### **Western Australia**

Under the *Sentencing Act 1995* (WA), s 98, if a person is convicted of an indictable offence in a superior court and is sentenced to a term of imprisonment, the court may, in addition to imposing a term of imprisonment for the offence (the nominal term), order the offender to be imprisoned indefinitely.<sup>588</sup> Such an order can only be made if the court is satisfied on the balance of probabilities that when the offender would otherwise be released from custody in respect of the nominal sentence, or any other term, that they would be a danger to society, or part of it, because of one or more of the following factors: the exceptional seriousness of the offence; the risk that the offender will commit other indictable offences; the character of the offender, in particular any psychological, psychiatric or medical condition affecting the offender, or the number and seriousness of other offences of which the offender has been convicted; or any other exceptional circumstances. In making such an order, the court may take into account any evidence it thinks fit.<sup>589</sup>

An offender sentenced to indefinite imprisonment may be released on parole by the Governor. The prisoner must be reviewed one year after the sentence has begun and then every three years.<sup>590</sup>

In response to the Commission's request for information, the Western Australian government reported that between 2004 and 2014, two orders were made under these provisions, but none related to a CSA.

### **Northern Territory**

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584 *Penalties and Sentences Act 1992* (Qld), s 163(4)(a)-(e).

585 *Penalties and Sentences Act 1992* (Qld), s 163(2).

586 *Penalties and Sentences Act 1992* (Qld), s 171(2)(c).

587 *Penalties and Sentences Act 1992* (Qld), s 173(1) and (3).

588 *Sentencing Act 1995* (WA), s 98(1).

589 *Sentencing Act 1995* (WA), s 98(2) and (3).

590 *Sentence Administration Act 2003* (WA), s 12A(5).

Under the *Sentencing Act* (NT), s 65, if a person is convicted of a violent offence or an offence of having sexual intercourse or gross indecency involving a child under 16 years, or sexual intercourse or gross indecency involving a child under 16 years under special care or sexual intercourse and gross indecency without consent, the Supreme Court may sentence the offender to an indefinite term of imprisonment.<sup>591</sup> The Court must fix a nominal sentence equal to the period that it would have fixed had it not imposed an indefinite sentence.<sup>592</sup>

The Court cannot impose an indefinite sentence unless it is satisfied that the offender is a serious danger to the community because of the offender's antecedents, character, age, health or mental condition, or the severity of the violent offence or any special circumstances.<sup>593</sup> In determining whether the offender is a serious danger to the community, the court must have regard to whether the offence is exceptional, the offender's antecedents, age and character, any medical, psychiatric, prison or other relevant report in relation to the offender, the risk of serious physical harm to members of the community if an indefinite sentence were not imposed, and the need to protect members of the community from the risk of serious physical harm.<sup>594</sup>

The offender must be reviewed not later than six months after they have served 50 per cent of the nominal term and at intervals of no more than two years thereafter.<sup>595</sup>

An offender will be discharged from the order imposing an indefinite sentence if the court is satisfied that the offender is not still a serious danger to the community, in which case the court must impose a finite sentence for the offence for which the indefinite sentence was imposed, which must not be less than the nominal sentence.<sup>596</sup>

In response to the Commission's request for information, the Northern Territory government reported that two applications were made under these provisions between 2004 and 2014. One person was still in custody. In the other case, the court quashed the order and the person was transferred to Queensland to face other charges.

The New South Wales Sentencing Council recommended against introducing indefinite sentences in NSW, stating that (Sentencing Council, New South Wales, 2008, Vol 3: 220):

The problem with both indefinite sentencing and disproportionate sentencing, however, lies in the difficulty in predicting the degree of an offender's risk of offending, at the time of sentencing, and in knowing whether he or she will participate in sex offender programs, or seek release on parole. As a

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591 *Sentencing Act* (NT), s 65(1) and (2).

592 *Sentencing Act* (NT), s 65(5).

593 *Sentencing Act* (NT), s 65(8).

594 *Sentencing Act* (NT), s 65(9).

595 *Sentencing Act* (NT), s 72(1).

596 *Sentencing Act* (NT), s 74).

consequence, given their significant consequences, and the general objections to indefinite sentences based on proportionality and finality principles, it is likely that there would be some judicial reluctance for their use.

In relation to both indefinite sentences and supervision and detention orders<sup>597</sup> the New South Wales Sentencing Council summarised the objections to these forms of sanctions, although it did not necessarily agree with all of them (Sentencing Council, New South Wales, 2008, Vol 3: 12–16):<sup>598</sup>

- It rests upon predicted future criminal conduct and assumptions about dangerousness that cannot be predicted with any certainty.
- It breaches the principles of parsimony, proportionality and finality, and is inconsistent with the use of imprisonment as a last resort
- It punishes a person who has been identified as offending in the past, for what he or she might do rather than what he or she has done. In addition, to the extent that the person is detained for longer than is proportional to the offence, it amounts to a civil judicial commitment of that person to a prison in circumstances that do not conform with the like commitment of those with mental illness to an institution focused on their care.
- Incarceration on the sole basis of risk of future offending breaks the link between crime and punishment that underpins the criminal justice system.
- Extended detention or supervision may in fact diminish community safety by placing offenders in an environment, and exposing them to associations with delinquent peers, that might worsen their behaviour and increase their ill feelings towards the community.
- It amounts to inflicting double punishment or retrospective punishment on a person who has completed a sentence proportional to the offence of which he or she was convicted, by reference to the criterion of his or her past criminal conduct, which has been the subject of judicial orders that have been spent.
- Whether it takes the form of indefinite detention, or continuing detention or extended supervision, its potential duration is uncertain, contrary to truth in sentencing principles that call for a precise sentence and specific parole release eligibility date.
- It has a potentially discriminating effect, since the difficulties of diagnosing the risk of reoffending will tend to focus on marginalised community members or those with particular personality disorders, and hence risk, amounting to punishment on the basis of status.
- Since it is impossible to guarantee a crime-free society, extreme measures such as preventive detention cannot be justified.
- The state is not entitled to force a person to undergo therapy to stop him or her from choosing to be 'bad' and suffer the punishment – especially when the person has already been punished for his or her past offending, and that forced therapy can be counter productive.

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597 See below p 184.

598 Footnotes omitted; see also McSherry, Keyzer and Freiberg, 2006, Chapter 6, for a discussion of policy issues raised by preventive detention schemes.

- It destroys the function of the maximum penalty, which the legislature has selected to mark the limits of judicial sentencing discretion for specific offences, and to that extent it undermines the community consensus as to the limits on the state's power to deal with offenders.
- The application of preventive detention for one class of offenders is discriminatory. In addition, its acceptance for one form of offending may lead to its eventual widening to other forms of offending, with a relaxation of the preconditions for its use. For example, it could be used to respond to nuisance type offences, or even be misused for purposes other than community protection.
- In terms of sexual offenders, there is no evidentiary support for the underlying assumption that they are typified by a different set of risk factors than those seen in other offenders, or as a class have higher rates of recidivism; there is an insufficiently large group to justify the existence of a preventive detention regime; and preventive detention is a time consuming, ad hoc and administratively cumbersome way of dealing with this group, the cost of which would be better directed to rehabilitation and post-release support.
- Legislation of this kind is a short-term politically expedient response to a group of offenders for whom the criminal justice, corrections and mental health systems have failed, rather than a considered response to the problem of a small number of dangerous individuals.

## Supervision and Detention Orders

Supervision and detention orders represent the next wave of preventive orders and were introduced in the mid-2000s in four jurisdictions: Victoria, Queensland, New South Wales and Western Australia (McSherry, Keyzer and Freiberg, 2006: Chapter 4). They are orders intended to provide enhanced protection of the community by requiring offenders who have served custodial sentences for certain offences, including sexual offences, and who present an unacceptable risk of harm to the community, to be closely supervised or detained in custody. Another often overlooked purpose of such legislation is to aid the treatment and rehabilitation of such offenders<sup>599</sup>. It has been argued that psychiatric or psychological treatment can be an effective means of protecting the community (Sentencing Council, New South Wales, 2008, Vol 3: 10; McSherry 2014: 77ff). Generally, a court may not have regard to the fact that an offender is subject to a supervision or detention order in determining the sentence<sup>600</sup> (Sentencing Council, New South Wales, 2008, Vol 3: 160).

Constitutional challenges to supervision and detention orders have been unsuccessful<sup>601</sup>, though the United Nations Human Rights Committee has found that the detention regimes violate human rights as enshrined in the International Covenant on Civil and Political Rights (Keyzer, 2011).

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599 *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic), s 2; *Crimes (High Risk Offenders) Act 2006* (NSW), s 3; *Dangerous Sexual Offenders Act 2006* (WA), s 4; *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), s 3.

600 *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic), s 5(2DB).

601 *Fardon v Attorney-General* (Qld) [2004] HCA 46.

The Courts have imposed supervision and detention orders far more frequently than indefinite sentences. This may be due to the heightened sensitivity of enforcement authorities and the courts to the extent and seriousness of sex offending. It could also be that it is more practical, and possibly more legitimate and reliable, to assess the risk of future offending closer to the time of release than when a possibly very long sentence is imposed.

### **Victoria**

Under the *Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)*, a person who is over the age of 18, and is in custody for a relevant offence<sup>602</sup> may be the subject of an application by the Director of Public Prosecutions for a supervision or detention order. Under a supervision order, an offender will be supervised under conditions in the community, while under a detention order the offender stays in custody.

A court may make a supervision order only if it is satisfied that the offender poses an unacceptable risk of committing a relevant offence if a supervision order is not made and the offender is in the community.<sup>603</sup> An offender may pose an unacceptable risk even if the likelihood that they will commit a relevant offence is less than a likelihood of ‘more likely than not’.<sup>604</sup>

In determining whether the offender is likely to commit a relevant offence the Supreme Court must have regard to any assessment report filed in the court or any other report or evidence given or anything else the court considers appropriate.<sup>605</sup>

The maximum duration of an order is three years but is subject to review.<sup>606</sup>

In response to the Commission’s request for information, the Victorian government reported that between 2004 and 2014, 164 applications for supervision orders were made, 116 of which related to CSA offences, and 112 of which were granted. In October 2014, 82 orders were in force and 31 had been discharged. The most frequent orders were for five years and 10 years, with a range from two years to the maximum of 15 years. The table below sets out the frequency of the length of the orders:

**Table 11: Victoria: Length of supervision orders**

<b>Length of supervision order</b>	<b>Number of orders imposed</b>
2 years	3
3 years	12
4 years	8

602 Which includes offences of rape, incest, sexual penetration of a child under 16, assault with intent to rape and other sexual offences (*Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)*, s 4.

603 *Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)*, s 9(1).

604 *Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)*, s 9(5).

605 *Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)*, s 7(3).

606 *Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)*, ss 40 and 65.



5 years	20
6 years	10
7 years	2
8 years	15
9 years	1
10 years	20
12 years	1
15 years	9

Five applications were made for detention orders for three offenders, two of which related to CSA offences. No detention orders were made in respect of the CSA offences.

### ***New South Wales***

Under the *Crimes (High Risk Offenders) Act 2006 (NSW)*<sup>607</sup>, a person who is in custody for a serious sex offence<sup>608</sup> may be the subject of an application for an extended supervision order or a continuing detention order, if the Supreme Court is satisfied to a high degree of probability that the offender poses an unacceptable risk of committing a serious sex offence if he or she is not kept under supervision.<sup>609</sup>

In determining whether to make an order, the court must have regard to such matters as the safety of the community; various reports of experts and corrections; the results of any statistical or other assessment as to the likelihood of persons with histories and characteristics similar to those of the offender committing a further serious sex offence; any treatment or rehabilitation programs in which the offender has participated; the willingness of the offender to participate in any such programs; the level of the offender's participation in any such programs; the level of the offender's compliance with any obligations to which he or she is or has been subject while on release on parole or while subject to an earlier extended supervision order; the offender's criminal history; the views of the sentencing court at the time the sentence of imprisonment was imposed; and any other information that is available as to the likelihood that the offender will in future commit offences of a sexual nature.<sup>610</sup>

The maximum duration of an order is five years, subject to further

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607 The predecessor of which was the *Crimes (Serious Offenders) Act 2006 (NSW)*. This Act only applied to high-risk sex offenders, but the 2009 Act extended that category of dangerous offenders to high-risk violent offenders.

608 Which includes a number of sexual offences against children; *Crimes (High Risk Offenders) Act 2006 (NSW)*, s 5(1) referring to *Crimes Act 1900 (NSW)*, Part 3, Division 10.

609 *Crimes (High Risk Offenders) Act 2006 (NSW)*, s 5B(2).

610 *Crimes (High Risk Offenders) Act 2006 (NSW)*, s 9(3).

application.<sup>611</sup>

In response to the Commission's request for information, the New South Wales government reported that between 2004 and 2014, 85 applications were made for continuing detention or extended supervision orders, of which 69 related to CSA offences. The majority of the applications were for supervision orders. As at September 2014, 41 extended supervision orders were still in force in relation to child sex offenders, but no continuing detention orders. Overall, during that period, some 51 child sex offenders had been subject to an extended supervision order and seven child sex offenders to a continuing detention order. Most extended supervision orders are either for the maximum period of five years or three years, with very small numbers of orders for two or four years.

### **Western Australia**

Under the *Dangerous Sex Offenders Act 2006* (WA), a person who is under a sentence of imprisonment, wholly or in part for a serious sexual offence<sup>612</sup> may be the subject of an application by the DPP or the Attorney-General in the Supreme Court for a continuing detention order or a supervision order. Before making such an order, the Court must be satisfied that there is an unacceptable risk that, if the person were not subject to such an order, the person would commit a serious sexual offence.<sup>613</sup> In deciding whether to make an order the paramount consideration is the need to ensure adequate protection of the community.<sup>614</sup>

In determining whether the person is a serious danger to the community the court must have regard to any psychiatric reports; any other medical, psychiatric, psychological, or other assessment relating to the person; information indicating whether or not the person has a propensity to commit serious sexual offences in the future; whether or not there is any pattern of offending behaviour on the part of the person; any efforts by the person to address the cause or causes of the person's offending behaviour, including whether the person has participated in any rehabilitation program; whether or not the person's participation in any rehabilitation program has had a positive effect on the person; the person's antecedents and criminal record; the risk that, if the person were not subject to a continuing detention order or a supervision order, the person would commit a serious sexual offence; and the need to protect members of the community from that risk.<sup>615</sup>

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611 *Crimes (High Risk Offenders) Act 2006* (NSW), s 18. The expiry date of an extended supervision order is extended to take into account any period during which an offender is in custody.

612 Serious sexual offence is defined to include a wide range of offences under Chapter XXXI of the *Criminal Code* (WA); see *Evidence Act 1906* (WA), s 106A; *Dangerous Sexual Offenders Act 2006* (WA), s 3(1).

613 *Dangerous Sexual Offenders Act 2006* (WA), s 7(1).

614 *Dangerous Sexual Offenders Act 2006* (WA), s 17(2).

615 *Dangerous Sexual Offenders Act 2006* (WA), s 7(3).

The order is of indefinite duration until rescinded by the Court.<sup>616</sup>

In response to the Commission’s request for information, the Western Australian government reported that between 2004 and 2014, 56 applications were made under these provisions, of which 42 related to CSA. The courts denied just two applications. Currently, 18 offenders are subject to a continuing detention order of which 15 relate to CSA; 25 are currently under supervision, of which 20 relate to a CSA. In 12 cases, a continuing detention order has been rescinded and replaced by a supervision order. Of the supervision orders in force as at September 2014, five had been in effect for 10 years, eight for five years, and a small number for two, four, seven and eight years. Two supervision orders were completed.

The ODPP’s 2013–14 Annual Report provides the following summary of applications under the *Dangerous Sexual Offenders Act 2006 (WA)* (2014:26-27):

**Table 12: Western Australia – applications under the *Dangerous Sexual Offenders Act 2006 (WA)***

	2006–07	2007–08	2008–09	2009–10	2010–11	2011–12	2012–13	2013–14
New applications	13	4	8	5	9	4	5	7
Applications pending at year end	9	3	5	2	2	4	3	4
Offenders subject to ongoing orders	3	12	16	24	30	32	37	41

The ODPP reported that at 30 June 2014, 17 offenders were subject to continuing detention orders and 24 offenders were subject to supervision orders.

### **Queensland**

Under the *Dangerous Prisoners (Sexual Offences) Act 2003 (Qld)*, a person who is currently serving a custodial sentence for a serious sex offence<sup>617</sup> may be the subject of an application to the Supreme Court by the Attorney-General for a detention or supervision order.<sup>618</sup> Before making such an order the Court must be satisfied that the offender is a serious danger to the community in the absence of such an order.<sup>619</sup> A person is a serious danger to the community if there is an unacceptable risk that he or she will commit a serious sexual

616 *Dangerous Sexual Offenders Act 2006 (WA)*, s 17(1)(a) and s 25.

617 Defined to include an offence of a sexual nature committed against children, *Dangerous Prisoners (Sexual Offences) Act 2003 (Qld)*, Schedule, Dictionary.

618 *Dangerous Prisoners (Sexual Offences) Act 2003 (Qld)*, s 13.

619 *Dangerous Prisoners (Sexual Offences) Act 2003 (Qld)*, s 13(1).

offence if released from custody without such an order being made.<sup>620</sup>

In deciding whether to make an order the paramount consideration is the need to ensure adequate protection of the community.<sup>621</sup> In deciding whether the prisoner is a serious danger to the community the court must have regard to any psychiatric reports; any other medical, psychiatric, psychological, or other assessment relating to the person; information indicating whether or not the person has a propensity to commit serious sexual offences in the future; whether or not there is any pattern of offending behaviour on the part of the person; any efforts by the person to address the cause or causes of the person's offending behaviour, including whether the person has participated in any rehabilitation program; whether or not the person's participation in any rehabilitation program has had a positive effect on the person; the person's antecedents and criminal record; the risk that the person would commit a serious sexual offence if released into the community; and the need to protect members of the community from that risk.<sup>622</sup>

A continuing detention order is indefinite until rescinded.<sup>623</sup>

In 2013, the *Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013* (Qld) amended the *Criminal Law Amendment Act 1945* (Qld) to empower the Attorney-General to declare that a person subject to a continuing detention order or a supervision order under the *Dangerous Prisoners (Sexual Offences) Act 2003* (Qld) could be detained if the Attorney-General were satisfied that the detention of the person was 'in the public interest'. The Queensland Court of Appeal held that those provisions were invalid as being repugnant to, or incompatible with, the institutional integrity of the Supreme Court.<sup>624</sup>

In response to the Commission's request for information, the Queensland government reported that between 2004 and 2014, 157 applications were made under these provisions, of which 95 were in relation to CSA offences. At September 2014, 81 supervision orders had been made and 67 orders were still current. Six orders were completed, five offenders were transferred to continuing detention orders and three offenders were deceased. Of those orders, 49 were for 10 years, 15 for five years, eight for 15 years and two for 20 years, with the remainder for periods no less than three years.

## Special Statutory Provisions for Sexual Offenders

The traditional distribution of sentencing authority created a system in which legislatures set the maximum statutory penalty and courts sentence within that limit. The introduction of indefinite sentences and continuing detention and extended

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620 *Dangerous Prisoners (Sexual Offences) Act 2003* (Qld), s 13(2).

621 *Dangerous Prisoners (Sexual Offences) Act 2003* (Qld), s 13(6)(a).

622 *Dangerous Prisoners (Sexual Offences) Act 2003* (Qld), s 13(4).

623 *Dangerous Prisoners (Sexual Offences) Act 2003* (Qld), s 14.

624 *Attorney-General (Qld) v Lawrence* [2013] QCA 364.

supervision orders, discussed above, has weakened the limiting role of the statutory maximum sentence.

A number of legislative provisions that limit judicial discretion within the maximum penalty, either by mandating or presuming a head sentence or the non-parole period, limit the ability of a court to impose what it might consider to be the appropriate sentence for the individual before it. Attempts to increase sentence lengths, either by increasing the length of the head sentence or the time served in custody, are frequent.

The difficulties of proving allegations of multiple offences committed possibly many decades earlier against children have resulted in the enactment of offences intended to facilitate the conviction of accused persons in such circumstances.

### **Persistent sexual abuse/maintaining a sexual relationship**

All jurisdictions have an offence of 'persistent sexual abuse of a child' or 'maintaining a sexual relationship with a young person'. These provisions were created to overcome the problems that the prosecution might face in having to prove the 'particulars' of an offence, that is, the time, date and place that an offence took place.<sup>625</sup> Such particulars can be very difficult to establish in trials involving child sexual offences where the child complainant was subjected to multiple repetitive assaults over a prolonged period, often long in the past, and is unable to specify with particularity the dates when any one act occurred (Shead, 2014: 60). In all jurisdictions, the sanction of the Director of Public Prosecutions or the Attorney-General is required.

Generally, the provisions allow the prosecution to establish the offence when the accused has committed three or more unlawful sexual acts on separate occasions during a particular period, without having to specify the dates or the exact circumstances of the alleged occasions.

#### ***New South Wales***

Under the *Crimes Act 1900* (NSW), s 66EA(1), a person who, on three or more occasions occurring on separate days during any period, engages in conduct in relation to a particular child that constitutes a sexual offence<sup>626</sup> is guilty of an offence punishable by a maximum term of imprisonment of 25 years.

#### ***Victoria***

Under the *Crimes Act 1958* (Vic), s 47A, a person who persistently sexually abuses a child under the age of 16 is guilty of an offence punishable by a maximum term of imprisonment of 25 years.

#### ***Queensland***

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625 The provisions were enacted across the jurisdictions following the High Court's decision in *S* (1989) 168 CLR 266 (holding that a failure to particularise individual acts of sexual assault resulted in unacceptable uncertainty in defending the charges, as well as problems of duplicity and ambiguity).

626 Defined in *Crimes Act 1900* (NSW), s 66EA(12).

Under the *Criminal Code 1899* (Qld), s 229B(1), a person who maintains an unlawful sexual relationship with a child under the prescribed age<sup>627</sup> is guilty of an offence punishable by a maximum term of life imprisonment.

### **South Australia**

Under the *Criminal Law Consolidation Act 1935* (SA), s 50, an adult person who, over a period of not less than three days, commits more than one act of sexual exploitation of a particular child under the prescribed age<sup>628</sup> is guilty of an offence punishable by a maximum term of life imprisonment.

### **Tasmania**

Under the *Criminal Code Act 1924* (Tas), s 125A(2), a person who maintains a sexual relationship with a young person who is under the age of 17 years, and to whom he or she is not married, is guilty of a crime punishable by a maximum term of imprisonment of 21 years.<sup>629</sup>

### **Western Australia**

Under the *Criminal Code Act 1913* (WA), s 321A, a person who persistently engages in sexual conduct with a child under 16 on three or more occasions, each of which is on a different day, is guilty of an offence punishable by a maximum term of imprisonment of 20 years.

### **Australian Capital Territory**

Under the *Crimes Act 1900* (ACT), s 56, an adult person who maintains a sexual relationship with a person under the age of 16 is guilty of an offence punishable by a maximum term of imprisonment of seven years.<sup>630</sup>

### **Northern Territory**

Under the *Criminal Code* (NT), s 131A, an adult who maintains a relationship of a sexual nature with a child under the age of 16 years is guilty of a crime and liable to imprisonment for seven years.<sup>631</sup>

The offence provisions cover a wide number of sexual acts. It is generally immaterial whether the conduct is of the same nature or constitutes the same offence on each occasion. The occasions of sexual conduct in the one charge may thus be comprised

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627 18 years or 16 years depending upon the circumstances, *Criminal Code 1899* (Qld), s 229B(10).

628 The prescribed age is 17 years, however, where the adult is in a 'position of authority' in relation to the child – including a teacher, religious official, spiritual leader, or a person employed in a correctional institution or training centre – the prescribed age is 18 years, *Criminal Law Consolidation Act 1935* (SA), s 50(7)(8).

629 For criticisms of the term 'maintaining a sexual relationship' see Tasmanian Law Reform Institute, 2012 (on the ground that it implies a 'relationship' between the parties rather than the abuse of one party by another).

630 However, the maximum penalty is life imprisonment where the person is found to have committed an offence of a particular sexual nature during the period of the relationship. If a person committed another sexual offence during the same period, punishable by less than 14 years' imprisonment, the maximum penalty is 14 years' imprisonment; or if punishable by more than 14 years' imprisonment, then the maximum penalty is life: *Crimes Act 1900* (ACT), s 56(5)–(6).

631 However, the maximum penalty is life imprisonment where the person is found to have committed an offence of a particular sexual nature during the period of the relationship. If a person committed an offence of a sexual nature punishable by 7–20 years' imprisonment in the same period, the maximum penalty is 20 years' imprisonment; or if the offender committed an offence against s 192(8) or 192B, or an offence of a sexual nature punishable by more than 20 years' imprisonment the maximum penalty is life imprisonment, *Criminal Code Act* (NT), s 131A(2)(4).

of offences carrying heavy maximum penalties, such as aggravated sexual intercourse, as well as offences carrying lesser maximum penalties, such as indecent assault.<sup>632</sup> It is also not necessary to specify the dates or prove the exact circumstances of the occasions.<sup>633</sup> However, the charge must specify with reasonable particularity the relevant period of conduct and the nature of the offences.<sup>634</sup> In Victoria, it is not necessary to prove an act with the same degree of specificity as to date, time, place, circumstance or occasion as would be required if the accused were charged with a substantive offence.<sup>635</sup>

The provisions have been the subject of judicial criticism. The main concern is that in order to ensure a fair trial, an accused person should be entitled to the highest degree of particularity concerning a criminal charge and to be fully apprised of the particular act, thing or matter alleged.<sup>636</sup> In allowing the prosecution to prove the offence without specifying the date or exact circumstances of the occasions, the provisions are said to place an accused person in a position of significant forensic disadvantage compared with a person charged with a particular sexual offence.<sup>637</sup>

The High Court has held that a jury must be satisfied that there were three separate occasions of sexual abuse and be satisfied about the same three occasions.<sup>638</sup> Although it is not necessary for the prosecution to prove the dates or ‘exact circumstances’ of the acts said to constitute the offence, the prosecution must nevertheless ‘prove the circumstances or occurrences surrounding each of the acts in sufficient detail to identify each “occasion” ’.<sup>639</sup> There must still be ‘some degree of specificity as to date, time, place, circumstance or occasion of each relevant act’.<sup>640</sup>

Sentencing for persistent sexual abuse has generally concerned individuals in the context of family violence, but a few cases have occurred in an institutional context, all of which were schools.<sup>641</sup> The significant aggravating factors in these cases were the grave breaches of trust that arose from the student-teacher relationship and the

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632 See, for example, *Crimes Act 1900* (NSW), s 66EA(5).

633 *Crimes Act 1900* (NSW), s 66EA(4); *Crimes Act 1958* (Vic), s 47A(3); *Criminal Code Act 1913* (WA), s 321A(5); *Criminal Code Act 1924* (Tas), s 125A(4).

634 *Crimes Act 1900* (NSW), s 66EA(4)–(5); see also *Criminal Code Act 1913* (WA), s 321A(5); *Criminal Code Act 1924* (Tas), s 125A(6); *Criminal Law Consolidation Act 1935* (SA), s 50(4).

635 *Crimes Act 1958* (Vic), s 47A(2A)–(3); see also *Criminal Code 1899* (Qld), s 229B(4); *Criminal Law Consolidation Act 1935* (SA), s 50(4).

636 *KRM* (2001) 206 CLR 221 at [15].

637 *ARS* [2011] NSWCCA 266 at [35]–[37].

638 *KRM* (2001) 206 CLR 221 at 227 (considering the previous Victorian legislation); *KBT* (1997) 191 CLR 417 (considering the previous Queensland legislation); see also *CAZ* [2012] 1 Qd R 440 (on the difficulties of determining for the purposes of sentencing which were the relevant sexual acts that were proved beyond reasonable doubt); *ARS* [2011] NSWCCA 266 at [35].

639 *KRM* (2001) 206 CLR 221 at 227.

640 *KRM* (2001) 206 CLR 221 at 245–46. See *ARS* [2011] NSWCCA 266; *SLJ* [(2010) 24 VR 372; *PDW* (2009) 25 NTLR 72 at 80. Queensland and South Australia have consequently enacted provisions that focus more on the ‘course of conduct’ rather than the separate sexual acts comprising the relationship, see Chapman, 2006: 41–45; *C, G* (2013) 117 SASR 162 at [84].

641 *Hitanaya* [2010] NTCCA 3 (offender was the victim’s dance teacher and pastoral care group leader, five years’ imprisonment); *Margaritis* [2013] QCA 401 (teacher, four years’ imprisonment); *Howell* (2007) 16 VR 349; (2007) 173 A Crim R 40; [2007] VSCA 119 (female teacher’s aide, three years’ imprisonment, non-parole period 20 months); *Tulloch* (2013) 277 FLR 313; [2013] NTCCA 6; (female teacher’s aide, four years’ imprisonment, suspended after one year six months’ imprisonment); *D* [2009] WASCA 155 (physical education teacher and coach of local soccer team, five years’ imprisonment); *Schneider* [2008] QCA 25 (teacher, five years’ imprisonment, 12 months non-parole period).

abuse of the position of care and responsibility. In none of the cases did the sentencing remarks refer to any institutional involvement, complicity, concealment or negligence in relation to the offences.

The Australian Law Reform Commission has noted that the persistent sexual abuse provisions are in practice rarely used (ALRC, 2010: Para 25.56). It found the provisions have not effectively overcome the need to particularise offences, which was why they were introduced. In New South Wales, the under-utilisation was attributed to factors such as the Court of Criminal Appeal's reading down of the nature and purpose of the provision; failure of the provision to sufficiently relieve the burden on the complainant to particularise offences; and the requirement that the Director of Public Prosecutions approve the laying of the charge (ALRC, 2010: Paras 25.60–61). The Commission concluded that the provisions appear to be under-utilised 'in part due to the limits of current legislative formulations, and factors related to judicial interpretation and the exercise of prosecutorial discretion' (ALRC, 2010: Para 25.65).

### **Mandatory sentences**

Judicial discretion has long been a cornerstone of Australian sentencing policy. It enables the courts to impose sentences that they consider to be appropriate in light of all the circumstances of the offence and offender. Mandatory or presumptive sentencing imposes a significant or complete constraint on judicial discretion, and has been introduced in many jurisdictions for a number of offences, generally being justified on the grounds of its deterrent value.

Despite judicial misgivings relating to the operation of mandatory sentencing, it has been held to be constitutional.<sup>642</sup> The criminological evidence is that mandatory sentences are not as effective as deterrents, do not reduce crime rates and generally operate in such a way that discriminates against certain minority groups. In terms of consistency, rather than leniency of sentences, mandatory sentencing has the effect of treating unlike cases as like, creating a form of unfairness analogous to the situation where there is too much discretion and where like cases are treated differently (Law Council of Australia, 2014; Sentencing Advisory Council, Victoria, 2008; New South Wales Parliament, 2014: 73–83). There are various forms of mandatory sentencing, some relating to the head sentence, some to the non-parole period and some to the use of imprisonment, which are directed at sex offenders.

### **Queensland**

Under the *Penalties and Sentences Act 1992* (Qld), s 161E, an offender who is convicted of a repeat<sup>643</sup> serious child sex offence<sup>644</sup> is liable to mandatory

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642 *Magaming* [2013] HCA 40; *Karim* [2013] NSWCCA 23.

643 A conviction of a repeat serious child sex offence occurs when the offender is convicted of a serious child sex offence when an adult, and when the offender committed that repeat offence, they had been convicted of another serious child sex offence when an adult, *Penalties and Sentences Act 1992* (Qld), s 161E(1).

644 Defined as including carnal knowledge with or of children under 16; incest, maintaining a sexual relationship with a child, rape, sexual assaults, *Penalties and Sentences Act 1992* (Qld), Schedule 1A.



imprisonment for life, which cannot be mitigated or varied under any law.<sup>645</sup>

In response to the Commission's request for information, the Queensland government reported that no life sentences have been imposed under this provision.

Under the *Penalties and Sentences Act 1992* (Qld), s 9(4), in sentencing an offence of a sexual nature<sup>646</sup> committed against a child under the age of 16, the court must order that the offender must serve an actual term of imprisonment, unless there are exceptional circumstances.<sup>647</sup> In determining whether there are exceptional circumstances, a court may have regard to the closeness in age between the offender and the child.<sup>648</sup> In sentencing in such cases, the court must primarily have regard to factors such as the effect of the offence on the child; and the age of the child; and the nature of the offence, including, for example, any physical harm or the threat of physical harm to the child or another; and the need to protect the child, or other children, from the risk of the offender reoffending, as well as factors relating to the offender.<sup>649</sup>

### **Northern Territory**

Under the *Sentencing Act* (NT), s 78F, where a court finds an offender guilty of a sexual offence<sup>650</sup>, the court must record a conviction and must order that the offender serve a term of actual imprisonment or a term of imprisonment that is suspended partly, but not wholly.<sup>651</sup>

### **Mandatory non-parole periods**

#### **South Australia**

Under the *Criminal Law (Sentencing) Act 1988* (SA), s 20B, where a court convicts a person of a 'serious offence' and the person is liable, as a result of the conviction, to be the subject of a declaration that he or she is a serious repeat offender, the court must consider whether to make such a declaration, and if the court is of the opinion that the person's history of offending warrants a particularly severe sentence in order to protect the community, it should make such a declaration.<sup>652</sup> The consequence of such a declaration is that the sentence need not be proportional to the offence and any non-parole period

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645 *Penalties and Sentences Act 1992* (Qld), s 161E(2).

646 Defined as including 'any offence constituted wholly or partly by an act whereby the offender has exhibited a failure to exercise proper control over the offender's sexual instincts and any offence in the circumstances associated with the committal whereof the offender has exhibited a failure to exercise such proper control over the offender's sexual instincts, and includes an assault of a sexual nature', *Criminal Law Amendment Act 1945* (Qld), s 2A(1).

647 *Penalties and Sentences Act 1992* (Qld), s 9(4).

648 *Penalties and Sentences Act 1992* (Qld), 9(5).

649 *Penalties and Sentences Act 1992* (Qld), s 9(6)(a)–(d).

650 Defined to include a range of sexual offences including offences against children, such as sexual intercourse or gross indecency with a child under 16, *Criminal Code Act* (NT), s 127; sexual relationship with a child, *Criminal Code Act* (NT), s 131A; indecent dealing with a child, *Criminal Code Act* (NT), s 132; see *Penalties and Sentences Act* (NT), s 3.

651 *Sentencing Act* (NT), s 78F. The actual term of imprisonment may be as short as 'the rising of the court', *White v Brown* (2003) 13 NTLR 50.

652 *Criminal Law (Sentencing) Act 1988* (SA), s 20B(3)(a) and (b).

fixed must be at least four-fifths the length of the sentence.<sup>653</sup>

### **Northern Territory**

Under the *Sentencing Act* (NT), s 55, where a person is sentenced to be imprisoned for an offence of sexual intercourse and gross indecency under *Criminal Code Act* (NT), s 192(3), and the sentence is not suspended in whole or in part, the court must fix a non-parole period of not less than 70 per cent of the period of imprisonment that the offender must serve.

### **Victoria**

Under the *Sentencing Act 1991* (Vic), s 11A, where a person has been sentenced for an offence to which a baseline sentence has been imposed<sup>654</sup>, if the sentence imposed is a prison term of 20 years or more, the non-parole period must be at least 70 per cent of that term or 60 per cent if the term is less than 20 years.<sup>655</sup>

## **Mandatory parole cancellation**

### **Victoria**

Under the *Corrections Act 1986* (Vic), s 77 if a person who has been released on parole in respect of sexual offence<sup>656</sup> is convicted, while on parole of a sexual offence or a violent offence that was committed during the parole period, the prisoner's parole is taken to be cancelled on that conviction.<sup>657</sup>

## **Presumptive sentences**

### **Victoria**

Under the *Sentencing Act 1991* (Vic), s 5A<sup>658</sup>, where an offence has been designated as a 'baseline' offence, a court is required to impose a sentence that should be for the period specified by Parliament that is intended to be the median sentence for that offence. In determining the median sentence, the court may take into account a number of factors including the plea of guilty and other mitigating or aggravating factors.

Six offences have been identified as baseline offences, of which three are sexual offences. They are murder (baseline 25 years); incest offences (10 years if the victim was under 18 at the time of the offence); sexual penetration of a child under 12 (10 years); persistent sexual abuse of a child under 16 (10 years); culpable driving (10 years); and trafficking a commercial quantity or

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653 *Criminal Law (Sentencing) Act 1988* (SA), s 20BA(1)(a) and (b).

654 See below this page.

655 *Sentencing Act 1991* (Vic), s 11A(4).

656 Defined to include an offence listed in Schedule 1 of the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic), *Corrections Act 1986* (Vic), s 77(9).

657 *Corrections Act 1986* (Vic), s 77(6).

658 These provisions came into effect on 1 November 2014; see *Sentencing Amendment (Baseline Sentences) Act 2014* (Vic).

a drug or drugs of dependence (14 years) (see Sentencing Advisory Council, Victoria, 2014).

## Presumptive (standard) non-parole periods

### *New South Wales*

Under the *Crimes (Sentencing Procedure) Act 1999* (NSW), s 54B, a standard non-parole period (SNPP) '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'.<sup>659</sup> The SNPP represents the non-parole period for an offence that, taking into account only the objective factors affecting its relative seriousness, falls into the middle range of seriousness for that offence.<sup>660</sup>

In relation to CSA offences the relevant non-parole periods are:

- *Crimes Act 1900* (NSW), s 61J (aggravated sexual assault): 10 years
- *Crimes Act 1900* (NSW), s 66A (sexual intercourse with child under 10): 15 years
- *Crimes Act 1900* (NSW), s 61M(1) (aggravated indecent assault): five years<sup>661</sup>
- *Crimes Act 1900* (NSW), s 61M(2) (aggravated indecent assault): eight years<sup>662</sup>
- *Crimes Act 1900* (NSW), s 61I (sexual assault): seven years
- *Crimes Act 1900* (NSW), s 61JA (aggravated sexual assault in company): 15 years.

Standard non-parole periods (SNPP) were introduced in New South Wales in 2003 with the intention of increasing consistency and transparency in sentencing and providing further guidance and structure for sentencing judges (Sentencing Council, New South Wales, 2013: 3). Implicitly, one purpose was to increase the severity of sentencing for some offences. SNPPs vary between 21 per cent and 80 per cent of the maximum penalty for all offences they cover, and between 50 per cent and 80 per cent of the maximum penalty for sexual offences (Sentencing Council, New South Wales, 2008: 48). Their introduction and implementation generated extensive litigation<sup>663</sup> culminating in an appeal to the High Court, which ruled that SNPPs did not provide a fixed starting point for sentencers, but were only one factor to be taken into account when sentencing through the process of instinctive or intuitive synthesis.<sup>664</sup>

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659 *Crimes (Sentencing Procedure) Act 1999* (NSW), s 54B(2).

660 *Crimes (Sentencing Procedure) Act 1999* (NSW), s 54A(2).

661 The Sentencing Council, NSW, recommended that the maximum penalty for this offence be increased to eight years and the SNPP reduced to four years (Sentencing Council, NSW, 2013: x).

662 The Sentencing Council, NSW, recommended that the maximum penalty for this offence be increased to 12 years and the SNPP reduced to six years (Sentencing Council, NSW, 2013: x).

663 *Way* [2004] NSWCCA 131.

664 *Muldrock* [2011] HCA 39.

The Sentencing Council of New South Wales observed on the basis of Judicial Commission statistics that post-*Muldrock* sentencing levels for child sexual assault offences continued to rise (Sentencing Council, New South Wales, 2014).

In its review of maximum penalties and SNPPs, the Sentencing Council of New South Wales concluded that:

- there was no consistency in the ratio between the SNPPs and the maximum sentences
- in some instances, the SNPP is set so high as to potentially prevent a sentencing judge, in a mid-range case calling for the SNPP to be applied, from setting a balance of term which, in accordance with common practice, would equate to one-third of the NPP
- there is a risk that, having set some SNPPs above the 50 per cent proportion of the maximum sentence, some repeat offenders may not receive the increased sentences that the reoffending would justify (Sentencing Council, New South Wales, 2008: 63).

In its most recent report on SNPPs, the Sentencing Council recommended that eight more sexual offences against children be included in the SNPP scheme because they have very high maximum penalties, and the victims are particularly vulnerable and at special risk of serious ongoing harm (Sentencing Council, New South Wales, 2013a: viii).<sup>665</sup> The Council also recommended changing the process of setting SNPPs so that each offence would use a common starting point of 37.5 per cent of the maximum penalty, with a maximum of 50 per cent. The Council said regard must be given to the special need for deterrence; the need to recognise the exceptional harm that the offence may cause; the potential vulnerability of victims; the extent to which the offence may involve a breach of trust or abuse of authority; and the sentencing statistics and practice. This includes relevant appellate guidance as to appropriate sentencing for the offence (Sentencing Council, New South Wales, 2013: ix). The New South Wales Parliamentary Committee favoured retaining the SNPP scheme, but was concerned with some internal inconsistencies and the absence of serious CSA offences. It supported expanding the scheme and recommended an increase in the maximum penalties for some offences (New South Wales Parliament, 2014: 28–36).

### **Presumptive cumulation of sentences**

Sentencers generally have discretion about whether to order sentences for multiple offences to run concurrently, cumulatively or partly concurrently.<sup>666</sup> One means of

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665 The offences were *Crimes Act 1900* (NSW), s 66B (attempt or assault with intent to have sexual intercourse with a child under 10 years; proposed SNPP 10 years); s 66C(1) (sexual intercourse with a child 10–14 years; proposed SNPP seven years); s 66C(2) (sexual intercourse with a child 10–14 years, aggravated offence; proposed SNPP nine years); s 66C(4) (sexual intercourse with a child 14–16 years, aggravated offence; proposed SNPP five years); s 91G(1) (use (or allow) a child under 14 years to produce child abuse material; proposed SNPP six years); s 66EB (procuring or grooming a child under 16 years for unlawful sexual activity; proposed SNPP six and five years); s 91D (promoting or engaging in acts of child prostitution (for a child under 14 years only); proposed SNPP six years); s 91E (obtaining benefit from child prostitution (for a child under 14 years only) proposed SNPP six years); see Sentencing Council, NSW, 2014: 3.

666 See above Chapter 4.

increasing sentence lengths is to require courts to impose cumulative sentences, or to create a rebuttable presumption that this will occur.

### **Victoria**

Under the *Sentencing Act 1991* (Vic), Part 2A, where a serious sexual offender<sup>667</sup> convicted of a sexual offence<sup>668</sup> or a violent offence is being sentenced for a later offence, the term of imprisonment imposed must, unless otherwise directed by the court, be served cumulatively on any uncompleted sentence or sentences already imposed, whether before or at the same time as that term.<sup>669</sup>

In *MCL*<sup>670</sup>, the High Court stated, in respect of these provisions:

The need for judges not to compress sentences is especially important where the accused person is a 'serious sexual offender' within the meaning of s 16(3A) of the Sentencing Act, and similar provisions. Section 16(3A) gives effect to a legislative policy that serious offenders are to be treated differently from other offenders. It was plainly intended to have more than a formal effect, which is the effect it would frequently have if its operation was subject to the full effect of the totality principle. Given the terms of s 16(3A), the scope for applying the totality principle must be more limited than in cases not falling within that section. The evident object of the section is to make sentences to which it applies operate cumulatively rather than concurrently. The section gives the judge a discretion to direct otherwise. But the object of the section would be compromised and probably defeated in most cases if the ordinary application of the totality principle was a sufficient ground to liven the discretion. Since the relationship between s 16(3A) and the totality principle does not arise in this appeal, it is enough to say that sentencing judges need to be astute not to undermine the legislative policy inherent in s 16(3A) by applying the totality principle to the sentences as if that section (or s 6E which

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667 A 'serious sexual offender' is defined in *Sentencing Act 1991* (Vic), s 6B(2) to mean 'an offender (other than a young person) – (a) who has been convicted of two or more sexual offences for each of which he or she has been sentenced to a term of imprisonment or detention in a youth justice centre; or (ab) who has been convicted of an offence to which clause 1(a)(viii) of Schedule 1 applies for which he or she has been sentenced to a term of imprisonment or detention in a youth justice centre; or (b) who has been convicted of at least one sexual offence and at least one violent offence arising out of the one course of conduct for each of which he or she has been sentenced to a term of imprisonment or detention in a youth justice centre'. To fall within these provisions, the person must have been convicted at any time in the past, or in the current trial; see *Cowburn* (1994) 74 A Crim R 385; *Robertson* (1995) 82 A Crim R 292; *Lomax* [1998] 1 VR 551. These custodial sentences need not have been actually served in a custodial setting since, under the *Sentencing Act 1991* (Vic), they could have been served in the community as a suspended sentence. The fact that the qualifying convictions are relatively minor, were committed when the offender was a youth, or are stale, does not prevent the status of 'serious sexual offender' from accruing. The status is automatic and permanent. Where a person is convicted of three or more of the relevant offences, the relevant sentencing consequences are only applicable to the third and subsequent offences, with the first two merely qualifying the offender for status as a serious offender.

668 A 'sexual offence' is defined in s 6B(1) and clause 1 of Schedule 1 to include offences against a number of *Crimes Act 1958* (Vic) provisions, as well as offences of conspiracy, incitement or attempt to commit those offences; see *Robertson* (1995) 82 A Crim R 292; *Milne* (1995) 78 A Crim R 133; *Swingler* [1996] 1 VR 257; *Wakime* [1997] 1 VR 242; *Dowlan* [1998] 1 VR 123; *Lomax* [1998] 1 VR 551.

669 *Sentencing Act 1991* (Vic), s 6E.

670 [2000] HCA 46 at [76] per McHugh, Gummow and Hayne JJ; (2000) 203 CLR 452 approved in *DPP v Wightley* [2011] VSCA 74 at [34]; *DPP v HPW* [2011] VSCA 88 at [86]; *MP* [2011] VSCA 78; *Pettiford* [2011] VSCA 96; Tate JA (dissenting); *EDM* [2010] VSCA 308; *AMP* [2010] VSCA 48; *SJ* [2012] VSCA 237.

replaced it) was not on the statute book.

The courts are, therefore, required to balance the principles of proportionality, totality and the protection of the community. In Victoria, they tend to do so by ordering no cumulation or partial cumulation.

## Guideline Judgments

The plethora of statutory interventions designed to increase the severity of sentences, provide specific and general deterrence and protect the community, has produced both a curial and legislative procedure intended to place the courts more centrally in the sentencing policymaking process. Guideline judgments were introduced to allow appellate courts to deliver judgments that, while not binding on lower courts, provided more sentencing guidance than the traditional appellate decisions. These are generally concerned with issues of error in relation to the instant case before the court, although they may articulate sentencing principles and indicate sentencing standards.

Although there is no authoritative definition of a guideline judgment, in *Wong*, Gleeson CJ observed that<sup>671</sup>:

They cover a variety of methods adopted by appellate courts for the purpose of giving guidance to primary judges charged with the exercise of judicial discretion ... Those methods range from statements of general principle, to more specific indications of particular factors to be taken into account or given particular weight, and sometimes to indications of the kind of outcome that might be expected in a certain kind of case, other than in exceptional circumstances.

Most jurisdictions have some statutory provisions that allow an appellate court to make a guideline judgment.<sup>672</sup> Appellate courts issued guideline judgments prior to the existence of any legislative authority when they saw the need to deal with problems such as inconsistency and systemic excessive leniency. The New South Wales Court of Criminal Appeal issued eight such judgments between 1998 and 2004, though none dealt with sexual offences. However, the High Court of Australia's disapproval of guideline judgments<sup>673</sup> due to its dislike of any system of sentencing that unduly fetters a court's discretion, particularly prospectively, has meant that this form of judicial guidance is now rarely used. The High Court had particular reservations about numerical guidelines. In contrast, in December 2014, the Victorian Court of Appeal delivered Victoria's first guideline judgment concerning the principles to apply when imposing a community correction order.<sup>674</sup> It provided no numerical guidance, but the judgment and guideline contained an extensive discussion of the

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671 [2001] HCA 64 at [5].

672 *Sentencing Act 1991* (Vic), s 6AB; *Crimes (Sentencing Procedure) Act 1999* (NSW), ss 37 and 37A; *Penalties and Sentences Act 1992* (Qld), Pt 2A; *Sentencing Act 1995* (WA), s 143; *Criminal Law (Sentencing Act) 1988* (SA), s 29A.

673 *Wong* [2001] HCA 64; see also *Markarian* [2005] HCA 25.

674 *Boulton* [2014] VSCA 342.

types of cases that might warrant a community correction order and the conditions that might be attached.

Some other common law jurisdictions have no such reservations regarding their use. In the United Kingdom, the courts and/or sentencing panels or councils have been issuing sentencing guidelines in some form for decades. Currently, under the *Coroners and Justice Act 2009* (UK), the Sentencing Guidelines Council may produce definitive guidelines that a court must follow unless the court is satisfied that it would be contrary to the interests of justice to do so.<sup>675</sup> In 2013, the Council issued an extensive Definitive Guideline for Sexual Offences covering 51 offences. The guidelines specify offence ranges and, within each offence, different categories that reflect different degrees of seriousness. Each category has a starting point from which a judge can calculate a provisional sentence (Sentencing Guidelines Council, 2013: 7; Ashworth and Roberts, 2013).

The ever-increasing number of restrictions on judicial discretion imposed by legislatures has led to renewed calls for the use of guideline judgments in Australia. In 2008, in its report on penalties relating to sexual assault offences in New South Wales, the Sentencing Council considered whether any offences should be considered as possible candidates for a guideline judgment in view of divergences in sentencing outcomes. However, it decided not to make a recommendation at that time (2008: 67). In 2009, the Victorian Sentencing Advisory Council suggested that the Victorian Court of Appeal provide further guidance to sentencing judges for offences relating to sexual penetration of a child under 16, an offence that encompasses a wide range of offending (Sentencing Advisory Council, Victoria, 2009: 68). In 2013, the New South Wales Law Reform Commission, in its report on sentencing, recommended reintroducing guideline judgments because the system 'has proved valuable in encouraging greater consistency in sentencing, in correcting inappropriate levels of sentencing and in giving guidance to courts, both in providing numerical ranges and in stating overarching principles' (New South Wales Law Reform Commission, 2013: xxiii). In its submission to the New South Wales Parliamentary inquiry into sentencing for sex offences, the ODPP strongly supported the New South Wales Law Reform Commission's recommendation for guideline judgments informed by the work of the Sentencing Council (Office of the Director of Public Prosecutions, 2014: 3). The Parliamentary Committee itself recommended that the NSW Attorney-General New South Wales consider applying for a guideline judgment or judgments for CSA offending (New South Wales Parliament, 2014: 83–88). The Committee saw a useful role for the New South Wales Sentencing Council in the guideline judgment process.

## Loitering Offences

A person who has been found guilty of a sexual offence may have their movements restricted by force of the optional conditions attached to the various forms of community-based orders<sup>676</sup> or parole orders that operate in most Australian

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675 *Coroners and Justice Act 2009* (UK), s 125(1).

676 See example, *Crimes (Sentencing Procedure) Act 1999* (NSW), s 17A; *Sentencing Act 1991* (Vic), Division 4.

jurisdictions. In addition, statutory provisions make it a criminal offence for an offender to be loitering in prescribed areas without a reasonable excuse.

### **Victoria**

Under the *Crimes Act 1958* (Vic), s 60B, it is an offence for a person who has been previously convicted of a sexual offence to be found loitering without reasonable excuse in or near a school, a children's services centre or an education and care service premises, or a public place frequented by children and in which children are present at the time of the loitering.<sup>677</sup>

If the person had previously been sentenced as a serious sexual offender for a sexual offence or a violent offence, the offence is indictable and carries a maximum penalty of five years' imprisonment. If the person has not been so sentenced, the offence is a summary one with a maximum penalty of two years.<sup>678</sup>

### **New South Wales**

Under the *Summary Offences Act 1988* (NSW), s 11G, it is an offence for a convicted child sexual offender to loiter, without reasonable excuse, in or near premises such as a school or a public place regularly frequented by children and in which children are present at the time of loitering.

The maximum penalty is two years' imprisonment.

### **Northern Territory**

Under the *Summary Offences Act* (NT), s 47AC, it is an offence for a person who has been found guilty of a sexual offence to loiter or idle, without reasonable excuse, in or near a school, kindergarten or childcare centre or a public place regularly frequented by children and in which children are present at the time of loitering.

The maximum penalty is 12 months imprisonment.

### **South Australia**

Under the *Summary Offences Act 1953* (SA), s 18 if a police officer has reasonable grounds to suspect that a person who is loitering in a public place is of a prescribed class, which includes a person who is subject to a paedophile restraining order under Part 4 Division 7 of the *Summary Procedure Act 1921* (SA), the officer may request that the person state the reason why he or she is in that place.<sup>679</sup> If the person refused or fails to state a satisfactory reason, the person is guilty of an offence punishable by a maximum penalty of

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677 *Crimes Act 1958* (Vic), s 60B(2).

678 Between July 2011 and June 2014, 59 cases involving 89 charges went before the Magistrates' Court. Of those, 49.2 per cent resulted in a prison sentence, 45 per cent of which ranged between six and 18 months, and 15.3 per cent resulted in a fine: SACStats, Victoria, [http://www.sentencingcouncil.vic.gov.au/sacstat/magistrates\\_court/6231\\_60B\\_2.html](http://www.sentencingcouncil.vic.gov.au/sacstat/magistrates_court/6231_60B_2.html).

679 *Summary Offences Act 1953* (SA), s 18(2).



three months' imprisonment.<sup>680</sup>

### **Tasmania**

Under the *Police Offences Act 1937* (Tas), s 7A(2), a person who has been found guilty of a sexual offence must not, without reasonable excuse, loiter near children.

The maximum penalty is two years' imprisonment.

## **Civil Preventive Orders**

As well as the criminal offences restricting the movement of offenders, a court can make a number of civil orders aimed at preventing offenders from engaging in certain forms of otherwise legal conduct that may pose a risk to the lives or sexual safety of children.

### **New South Wales**

Under the *Child Protection (Offender Prohibition Orders) Act 2004* (NSW), the Commissioner of Police may apply to the Local Court for an order prohibiting a registrable person<sup>681</sup> from engaging in specified conduct.<sup>682</sup> The Local Court may make a child protection prohibition order prohibiting a person from engaging in conduct specified in the order if it is satisfied that the person is a registrable person and that, on the balance of probabilities (a) there is reasonable cause to believe, having regard to the nature and pattern of conduct of the person, that the person poses a risk to the lives or sexual safety of one or more children, or children generally, and (b) the making of the order will reduce that risk.<sup>683</sup>

A prohibition order may prohibit the person from associating with or making contact with specified persons or kinds of persons, being in specified locations or kinds of locations, engaging in specified behaviour or being a worker of a specified kind.<sup>684</sup>

Contravention of a prohibition order is an offence punishable by a maximum

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680 *Summary Offences Act 1953* (SA), s 18(3) and (5).

681 Defined as a person sentenced in respect of a registrable offence, *Child Protection (Offenders Registration) Act 2000* (NSW); *Child Protection (Offender Prohibition Orders) Act 2004* (NSW), s 3.

682 *Child Protection (Offender Prohibition Orders) Act 2004* (NSW), s 4(1).

683 *Child Protection (Offender Prohibition Orders) Act 2004* (NSW), s 5(1). The court must consider a range of matters in determining whether to make an order: the seriousness of each offence with regard to which the offender is a registrable person; the period of time since those offences were committed; the age of the person when those offences were committed; the age of each victim of the offences when they were committed; the difference in age between the person and each victim; the person's present age; the seriousness of the person's total criminal record; the effect of the order sought on the person compared with the level of risk that a further registrable offence may be committed; the extent that they relate to the conduct sought to be prohibited; the circumstances of the person, including their accommodation, employment needs and integration into the community and, in the case of a young person, their education needs; see *Child Protection (Offender Prohibition Orders) Act 2004* (NSW), s 5(3).

684 *Child Protection (Offender Prohibition Orders) Act 2004* (NSW), s 8.

penalty of five years' imprisonment.<sup>685</sup>

On application by the Commissioner of Police, the Local Court may make a contact prohibition order that prohibits the registrable person from contacting any victim of the registrable offence who is specified in the order, or any person who was a co-offender in relation to that offence.<sup>686</sup> Contravention of this order is an offence punishable by a maximum penalty of 12 months' imprisonment.<sup>687</sup>

## **Queensland**

Under the *Child Protection (Offender Prohibition Order) Act 2008* (Qld), the Commissioner of the Police Service may apply to a court for an offender prohibition order if the Commissioner believes on reasonable grounds that the person is a relevant sexual offender<sup>688</sup> and has recently engaged in concerning conduct.<sup>689</sup>

An offender prohibition order may prohibit the person from associating with stated persons or types of persons, being in stated locations or types of locations, residing at a stated residence or residences or types of residences, engaging in stated behaviour or being in stated employment or types of employment, paid or voluntary, that is likely to bring them into contact with children.<sup>690</sup>

Failure to comply with an offender prohibition order is an offence punishable by a maximum penalty of two years' imprisonment.<sup>691</sup>

In response to the Commission's request for information, the Queensland government reported that to September 2014, 26 applications had been made for offender prohibition orders, all of which related to CSA, and the courts granted all of them. Of those orders, 15 were current, and the majority were for five years.

A Crime and Corruption Commission review of the operation of the *Child Protection (Offender Prohibition Order) Act 2008* (Qld) reported that 22 applications had been made for orders, and 17 final orders had been made between 2008 and 2013 (Queensland, Crime and Corruption Commission, 2014: 14). The Commission noted that while the number of orders may appear low, 'it is difficult to say either that the Act has been underused, or that it has been used *as often as it could have been*'

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685 *Child Protection (Offender Prohibition Orders) Act 2004* (NSW), s 13.

686 *Child Protection (Offender Prohibition Orders) Act 2004* (NSW), s 16A.

687 *Child Protection (Offender Prohibition Orders) Act 2004* (NSW), s 16G.

688 Defined as a person who is not subject to a supervision order or interim supervision order under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) or a forensic order, and who is a reportable offender under the *Child Protection (Offender Reporting) Act 2004* (Qld), *Child Protection (Offender Prohibition Order) Act 2008* (Qld), Schedule, Dictionary.

689 Defined as conduct the nature or pattern of which poses a risk to the lives or sexual safety of one or more children, or children generally, *Child Protection (Offender Prohibition Order) Act 2008* (Qld), s 6(3); see Queensland, Crime and Corruption Commission, 2014: 7; 22ff.

690 *Child Protection (Offender Prohibition Order) Act 2008* (Qld), s 6(1).

691 *Child Protection (Offender Prohibition Order) Act 2008* (Qld), s 38(1).

(Queensland, Crime and Corruption Commission, 2014: 14; emphasis in original).<sup>692</sup> It noted that police often opted to use tools other than this order to deal with offenders at high risk of reoffending (Queensland Crime and Corruption Commission, 2014: 19).

### ***Australian Capital Territory***

Under the *Crimes (Child Sex Offenders) Act 2005* (ACT), the ACT chief police officer may apply to the Magistrates Court for a prohibition order for a person if he or she believes on reasonable grounds that the person is a registrable offender and the person has engaged in conduct the nature or pattern of which poses a risk to the lives or sexual safety of one more children generally and that prohibiting the conduct will reduce the risk.<sup>693</sup>

A prohibition order may prohibit the person from associating with, or otherwise contacting stated people or a stated kind of person, being in stated places or a stated kind of place, being in stated employment, or a stated kind of employment, whether paid or voluntary, that is likely to bring the person into contact with children.<sup>694</sup>

It is an offence to contravene a prohibition order without a reasonable excuse, punishable by imprisonment for a maximum term of five years' imprisonment.<sup>695</sup>

In response to the Commission's request for information, the ACT government reported that one order has been made under these provisions.

### ***Northern Territory***

Under the *Child Protection (Offender Reporting and Registration) Act* (NT), the Commissioner of Police may apply to a court for a child protection order.<sup>696</sup> A court may make such an order if it is satisfied that the person is a reportable offender and, on the balance of probabilities, that there is reasonable cause to believe, having regard to the nature and pattern of conduct of the person, that the person poses a risk to the lives or sexual safety of one or more children or children generally; and the making of the order may reduce that risk.<sup>697</sup>

A child protection prohibition order may prohibit the person from associating with, or otherwise contacting specified persons or specified kinds of person, being in specified locations or specified kinds of locations, or being in specified

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692 The Commission reported that the use of similar orders in other jurisdictions was: 0 per 100 reportable offenders in the ACT; 0.6 in Queensland; 0.7 in Western Australia; 1.1 in the Northern Territory; and 1.6 in NSW: Queensland, Crime and Corruption Commission, 2014: 15. The Commission noted that there were 4,346 offenders on the child protection register at the time (2014: 3).

693 *Crimes (Child Sex Offenders) Act 2005* (ACT), s 132B.

694 *Crimes (Child Sex Offenders) Act 2005* (ACT), s 132F.

695 *Crimes (Child Sex Offenders) Act 2005* (ACT), s 132Z(1).

696 *Child Protection (Offender Reporting and Registration) Act* (NT), s 71.

697 *Child Protection (Offender Reporting and Registration) Act* (NT), s 72(1).

employment or employment of a specified kind.<sup>698</sup>

It is an offence to fail to comply with a prohibition without a reasonable excuse punishable by a maximum penalty of five years' imprisonment.<sup>699</sup>

In response to the Commission's request for information, the Northern Territory government reported that up to September 2014, eight applications had been made for child protection orders, all relating to CSA, of which six were granted. All of the orders were for five years.

### **Western Australia**

Under the *Community Protection (Offender Reporting) Act 2004* (WA), the Commissioner of Police may apply to a court for a protection order prohibiting a reportable offender from engaging in specified behaviour or requiring that person to comply with the orders of the Commissioner that he or she undergo assessment by a medical practitioner, a psychiatrist, a psychologist or a social worker, or more than one of them, and, if necessary, undergo appropriate treatment.<sup>700</sup>

A court may make a protection order if it is satisfied that the person is a reportable offender and poses a risk to the lives or sexual safety of one or more children, or children generally, and the making of the order will reduce that risk.<sup>701</sup>

A protection order may prohibit the person from associating with or making other contact with specified persons or kinds of persons; being in specified locations or kinds of location; residing at a specified place; travelling out of Australia without permission; consuming or using alcohol, drugs or other specified substances; being in specified employment or employment of a specified kind.<sup>702</sup>

It is an offence to fail to comply with a protection order, punishable by a maximum of two years' imprisonment.<sup>703</sup>

In response to the Commission's request for information, the Western Australian government reported that to October 2014, 54 applications had been made for community protection orders, all relating to CSA, of which the courts granted 30.

### **South Australia**

Under the *Summary Procedure Act 1921* (SA), a court may, on a complaint by a police officer, make a paedophile restraining order against a person who is required to comply with a reporting obligation under the *Child Sex Offenders Registration Act 2006* (SA), or has been found loitering near children or using

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698 *Child Protection (Offender Reporting and Registration) Act* (NT), s 73(1).

699 *Child Protection (Offender Reporting and Registration) Act* (NT), s 83(1).

700 *Community Protection (Offender Reporting) Act 2004* (WA), s 87(1) and 94A.

701 *Community Protection (Offender Reporting) Act 2004* (WA), s 90(1)(a) and (b).

702 *Community Protection (Offender Reporting) Act 2004* (WA), s 93(1).

703 *Community Protection (Offender Reporting) Act 2004* (WA), s 101(1).

the internet to communicate with children whom the defendant believed to be children (other than children or persons with whom the defendant has some good reason to communicate) on at least two occasions, and the court has reason to think that the defendant may, unless restrained, again so loiter or use the internet.<sup>704</sup>

A paedophile restraining order may restrain the offender from loitering near children at or in the vicinity of a specified place or class of places, or in specified circumstances, or near children in any circumstances; or from using the internet, or using it in a specified manner, or owning, possessing or using a computer or other device that can access the internet.<sup>705</sup>

On a complaint by a police officer, or a child or the guardian of a child, a court may make a child protection restraining order if the defendant is an adult who is residing with a child under the age of 17 and the defendant has been convicted within the preceding 10 years of a prescribed offence<sup>706</sup>, or has been subject to a restraining order and the court is satisfied that as a consequence of the child's contact or residence with the defendant the child is at risk of sexual, physical, psychological or emotional abuse, or neglect, or engaging in or being exposed to conduct that is an offence under Part 5 of the *Controlled Substances Act 1984* (SA).<sup>707</sup>

A child protection restraining order may impose such restraints on the defendant that are necessary or desirable to protect the child from any apprehended risk.<sup>708</sup>

It is an offence to contravene or fail to comply with a restraining order punishable by a maximum term of imprisonment of two years.<sup>709</sup>

In response to the Commission's request for information, the South Australian government reported that to October 2014, 100 applications had been made for paedophile restraining orders, of which 59 related to CSA. Of those, 55 had been granted and 42 were current. Orders vary in length from less than one year to more than 11 years, with two years being the most frequently imposed order, while orders of one year and five years were also common.

Under the *Criminal Law (Sentencing) Act 1988* (SA), s 19A(3), if a court finds a person guilty of a sexual offence,<sup>710</sup> or on sentencing a person for a sexual offence, it must consider whether or not to issue a restraining order and if it determines that an order should not be issued, give reasons for that determination.

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704 *Summary Procedure Act 1921* (SA), s 99AA(a1) and (1).

705 *Summary Procedure Act 1921* (SA), 99AA(2).

706 Defined as a child sexual offence or an offence against Part 5 of the *Controlled Substances Act 1984* (SA), *Summary Procedure Act 1921* (SA), 99AAC(8)

707 Offences relating to controlled drugs, precursors and plants.

708 *Summary Procedure Act 1921* (SA), s 99AAC(5)(a).

709 *Summary Procedure Act 1921* (SA), 99I(1).

710 Sexual offence is defined to mean rape, or compelled sexual manipulation, or indecent assault, or any offence involving unlawful sexual intercourse or an act of gross indecency, or incest or any offence involving sexual exploitation or abuse of a child, *Criminal Law (Sentencing) Act 1988* (SA), s 19A(4).

Under the *Child Sex Offenders Registration Act 2006* (SA), s 66JA(1) the Magistrates Court may, on the application of the Commissioner of Police, make a control order relating to a registrable offender if it is satisfied on the balance of probabilities that the offender poses a risk to the safety and wellbeing of any child or children and the making of the order will reduce the risk.

A control order may prohibit or restrict any conduct, including associating with or communicating with specified person or persons of a specified class; or being present at, or being in the vicinity of specified places or premises; undertaking specified employment or other conduct of a kind specified in the order.<sup>711</sup> An order may remain in force for five years.<sup>712</sup> It is an offence punishable by imprisonment of up to five years to contravene or fail to comply with a control order.<sup>713</sup>

### **Effectiveness of movement restrictions**

While Australia's use of movement restrictions for sex offenders has focused primarily on preventing offenders loitering near children, there is no research on its effectiveness in preventing reoffending. There is, however, limited research from the United States on an analogous approach to prevention: using residency restrictions for sex offenders.

While American residency restrictions are more stringent than Australia's movement restrictions, they are, arguably, analogous. Residency restrictions and movement restrictions share the same essential objective: to reduce the likelihood of future sexual offending by reducing opportunities for sex offenders to come into contact with children. That is, they both aim to reduce opportunities for offending by increasing the distance between known offenders and potential victims.

Residency restrictions generally prevent sex offenders from living within a specified distance of areas where children congregate. The particulars of the legislation vary from jurisdiction to jurisdiction, but distance restrictions are commonly 500 feet (about 150 metres), 1,000 feet (about 305 metres) or 2,500 feet (about 760 metres).

Residency restriction laws are based on the assumption that sex offenders select their victims from the pool of people in the area in which they live. The logic behind this approach suggests that recidivism can be reduced by placing some distance between offenders and potential targets. In the United States, 30 states and thousands of cities have implemented some form of residency restriction for registered sex offenders (Yoder, 2014).

While sex offender residency restrictions haven't been introduced in Australia, the proliferation of this policy across the United States means that the limited research on their impact has been undertaken in that country. Although there is 'little research on the efficacy of residency restrictions in reducing recidivism among registered sex

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711 *Child Sex Offenders Registration Act 2006* (SA), s 66JB.

712 *Child Sex Offenders Registration Act 2006* (SA), s 66JD.

713 *Child Sex Offenders Registration Act 2006* (SA), s 66JF.

offenders' (Huebner et al., 2013: 5), existing research clearly demonstrates that residency restrictions do not reduce reoffending.

One of the strongest pieces of work on the effectiveness of residency restrictions in reducing recidivism among registered sex offenders is an evaluation of programs in Michigan and Missouri (Huebner et al., 2013). The study methodology was particularly strong, using a quasi-experimental design to compare reoffending outcomes for three groups: sex offenders registered prior to the residency restriction laws; those registered after the laws came into effect; and a control group of non-sexual offenders selected on the basis of propensity score matching to enable comparisons of offenders with similar risk of recidivism. The sample in Michigan included 1,703 sex offenders matched with 1,703 non-sex offenders, while the sample for Missouri included 2,265 sex offenders matched with 2,224 non-sex offenders. Using multivariate modelling and proportional hazards analysis, outcome measures of recidivism included new arrests, technical violations and return to prison, as well as time to reoffending. Collateral consequences of residency restrictions were also measured, via in-depth interviews with both types of offender: 95 parolees in Michigan and 98 probationers and parolees in Missouri (Huebner et al., 2013: 7–8). The strong research design, using both quantitative and qualitative methods, and the large sample sizes, make this a valuable and informative study.

The Michigan laws prohibit sex offenders from residing, loitering or working within 1,000 feet (about 305 metres) of school property, while a parole condition for all sex offenders bars them from being within 500 feet of a daycare centre. Missouri laws are similar, with additional restrictions applying to public parks with playground equipment and public swimming pools. Both states apply their residency restrictions to all registered sex offenders (Huebner et al., 2013: 6).

Analysis of patterns of recidivism show that recidivism rates increased slightly among sex offenders following implementation of residency restrictions in Michigan. While technical violations did not change and reconviction rates increased slightly, but not statistically significantly (from 2.5 per cent to 5.5 per cent), rates of re-arrest rose statistically significantly, from 14.4 per cent to 17.5 per cent. Rates of sexual offence reoffending increased from 0.4 per cent to 0.8 per cent, but the number of incidents was so small that they precluded statistical analysis (Huebner et al., 2013: 50).

For non-sex offenders, the only statistically significant change from the pre-implementation to the post-implementation period was a decrease in technical violations, from 13.4 per cent to 8.8 per cent. Although the remaining changes were not statistically significant, they are of interest in that both reconviction and re-arrest also increased for the non-sex offender group. Notably, however, rates of re-arrest were substantially higher for non-sex offenders (21.2 per cent pre-implementation and 25.5 per cent afterwards) than for sex offenders (14.4 per cent prior and 17.5 per cent afterwards) (Huebner et al., 2013: 50).

In contrast, the reverse was seen in Missouri. For sex offenders, following the introduction of residency restrictions, technical violations fell from 28 per cent to 17 per cent, although reconviction and sex offence reoffending barely changed. For

non-sex offenders a very similar pattern was seen, with a decrease in technical violations from 38 per cent to 17 per cent (Huebner et al., 2013: 50).

Multivariate analyses found no statistically significant decreases or increases in two-year recidivism outcomes (reconviction or re-arrest) for the Michigan sex offender cohort, when controlling for demographic and criminal history factors. For non-sex offenders, introduction of the residency restrictions resulted in a significant decrease in the likelihood of technical violations. For both sex and non-sex offenders in Missouri, the likelihood of a technical violation also decreased following introduction of the residency restrictions. Again, no differences were seen in reconviction (Huebner et al., 2013: 51–52).

In Michigan, sex offenders in the post-implementation period took longer to be rearrested than those in the pre-implementation cohort, but they were reconvicted more quickly. In Missouri, sex offenders were slower to be reconvicted under the residency restrictions and were slower to have technical violations as well (Huebner et al., 2013: 53).

The qualitative interviews found that all offenders had trouble in finding housing and employment. However, the 141 sex offenders faced additional challenges due to the residency restrictions. These included an inability to live with supportive family (80 per cent reported housing challenges and 47 per cent lived in an undesirable location or transitional housing) or find suitable employment (87 per cent reported employment challenges) – the laws prohibit offenders from working in fields such as construction or delivery services. Some offenders reported limitations on time spent with their own children, causing problems with childcare and school activities (Huebner et al., 2013: 58–62).

Many of the sex offenders interviewed (38 per cent) believed that including all sex offenders in a single high-risk category was problematic. They noted the ‘blanket nature’ of the legislation, preferring a more individualised approach to risk assessment. By adopting a one-size-fits-all approach, some offenders felt the restrictions meant that they were being punished disproportionately for their offences. For example, one offender noted that other felons do not face the same residency restrictions, leading to a situation where ‘Charles Manson is a nicer person than a sex offender’ (Huebner et al., 2013: 64). Another suggested that sex offenders were effectively a ‘leper colony’ and wondered: ‘Do we need a whole new constitution for us?’ (Huebner et al., 2013: 64).

In a few instances, offenders thought that the restrictions might be helpful by providing boundaries, but these responses were uncommon: only 14 per cent thought that the laws acted as a deterrent to further offending (Huebner et al., 2013: 63).

Huebner and colleagues (2013) conclude that residency restrictions do not affect recidivism rates, whether measuring any offence or a sexual offence specifically, although there were some small reductions in technical violations. Finally, they close their report with a number of policy recommendations (Huebner et al., 2013: 72–78). As residency restrictions tend to cover all sex offenders, regardless of the type of offence they committed or the risk they present, the researchers recommend using risk assessment tools to identify those offenders most at risk of reoffending. In



addition to better-targeted restrictions, the authors suggest that restrictions should not remain in force for the offender's lifetime, but should be modified based on risk, behaviour and compliance. The main thrust of their recommendations on this issue is the need to develop public policy appropriate to specific risk – to see sex offenders as a heterogeneous group, not as a single 'type'.

Other recommendations involve providing better housing services and options for sex offenders, as well as developing re-entry programs designed for sex offenders and the additional challenges they face.

While this research focuses on two American states, its findings are generalisable more broadly and provide strong evidence of the lack of effectiveness of sex offender residency restrictions, as well as potentially negative, unintended consequences.

The findings of this study corroborate those in Minnesota, where Duwe and colleagues' also found residency that restrictions didn't affect sex offence recidivism.

Duwe et al. (2008) examined the offence patterns of every sex offender released from Minnesota correctional facilities between 1990 and 2002, who was subsequently sentenced to imprisonment for a new sexual offence prior to 2006. The researchers used a variety of sources to measure the residential proximity of the offenders to the location of the offence and the location of the first contact with the victim. They also examined the means first contact was made. As the aim of residency restrictions is to reduce contact between sex offenders and children, the focus of the analysis was on offences involving child victims.

The 28 offenders who established direct victim contact within one mile of their residence were most likely to target an adult female stranger. Of the 16 cases involving child victims, none were aided by close proximity to a school, daycare centre or park; they were most likely to entice their victims with some sort of ruse, such as an offer to use the offender's telephone or paying the victim to clean the offender's home (Duwe et al., 2008: 498).

Of the three cases in which the offender established contact with the victim at a possible prohibited area, two were a park and the other was a school. In two of these cases, the offender lived more than 10 miles (about 16 kilometres) away from the first contact location. In the third case, the victim was an adult. The authors conclude that, therefore, 'none of the 224 incidents of sex offender recidivism fit the criteria of a known offender making contact with a child victim at a location within any of the distances typically covered by residential restriction laws' (Duwe et al., 2008: 498).

In a small but important study of sex offenders in Florida, Levenson and Cotter (2005) examined the negative consequences of residency restrictions. In their survey of 135 sex offenders drawn at random from two outpatient counselling centres, the researchers examined the effect of residency restrictions on reintegration. Almost half (44 per cent) of the respondents reported that they had been unable to live with supportive family members due to the residency restrictions (the '1,000-foot rule') in their jurisdiction, while 25 per cent had been unable to return to their home after release from prison. In addition, 48 per cent had suffered financially and 60 per cent had suffered emotionally (Levenson and Cotter, 2005: 173).

Lack of support due to distance from family and networks is an important issue. In isolating sex offenders, valuable pro-social support is cut off, hampering efforts at reintegration. As one offender commented: 'What helps me is having support people around ... Isolating me is not helpful' (Levenson and Cotter, 2005: 173).

The majority of respondents felt that the residency restrictions had no effect on their risk of reoffending: if a person wanted to reoffend, the restrictions would not prevent it. Indeed, many noted that they had been careful not to offend close to their homes (Levenson and Cotter, 2005: 174).

In her further study of 109 sex offenders in treatment in Florida, Levenson (2008) examined additional concerns such as access to employment and support services. She found that 57 per cent were further from employment opportunities, 41 per cent were further from mental health treatment and social services, and 63 per cent were further from family support (Levenson, 2008: 159).

While these studies are small and cover just one jurisdiction, they add to the limited body of evidence by presenting offenders' views of the impact of residency restrictions on their ability to reintegrate successfully.

But as a police chief in the United States has noted, 'nobody really cares if sex offenders are inconvenienced, relegated to underemployment, or limited to fewer and poorer housing choices' (Casady, 2009: 18). To make more of the research evidence and present a stronger case that residency restrictions are ineffective, Casady (2009: 18) recommends:

Rather than dwelling on the impacts of restrictions on the wellbeing of offenders, focus should be directed at this consistent finding: These laws have unintended side effects that will make matters worse for the community. *Worse* means less safe. We will be less safe when parole officers have difficulty monitoring sex offenders spread across the rural landscape. We will be less safe when we lose track of three times the number of offenders whose whereabouts are presently unknown. We will be less safe when more sex offenders are itinerant, unemployed, homeless, and wandering without social, familial, and economic bonds. We will be less safe when sex offenders are living alone – or with other sex offenders – rather than with a parent or a spouse or in a halfway house or a residential treatment facility. We will be less safe when more sex offenders lie about where they are living. They will still be there; we just will not know it anymore.

Finally, we may be less safe if we allow the few remaining areas that are outside restricted zones to become the places where most all of the registered sex offenders must live by necessity. The net effect of residency restrictions is to force more and more sex offenders into smaller and smaller areas. A critical mass of high-risk offenders congregated together in a trailer park by the fairgrounds or an apartment complex by the highway is not a good arrangement.

Casady's words present a fine summary of the research evidence on the inability of residency restrictions to reduce reoffending.

Due partly to a lack of evidence for their effectiveness, some jurisdictions have started loosening their residency restriction laws. In Colorado, a federal Circuit Court judge ruled in 2013 that the City of Englewood's sex offender residency restriction law was unconstitutional as it conflicted with the state's existing system for managing and reintegrating sex offenders (Yoder, 2014). The California Court of Appeals ruled in 2010 that the parole condition of Proposition 83 (Jessica's Law) preventing individuals convicted of sex offences from living within 2,000 feet (about 610 metres) of any school or park was also unconstitutional. It ruled that, among other concerns, the law was overly broad in its application (Lobanov-Rostovsky and Hansen, 2014: 25). In fact, the California Sex Offender Management Board (2011: 1) has suggested:

Based on all that is known about sex offender recidivism and about the nature of most sex offenses involving children, there is no evidence that residence restrictions are related to preventing or deterring sex crimes against children. To the contrary, the evidence strongly suggests that residence restrictions are likely to have the unintended effect of increasing the likelihood of sexual reoffense.

A number of other states are also reviewing or repealing their sex offender residency restriction laws (Yoder, 2014).

The evidence strongly suggests that not only are residency restrictions unlikely to reduce the risk of recidivism among sex offenders, they may have the reverse result when the isolating effect of such restrictions hampers offenders' reintegration efforts. Given that Australian movement restrictions are analogous to residency restrictions in their desire to keep offenders separated from their potential victims, it is probable that the evidence of the ineffectiveness of residence restrictions applies more broadly to movement restrictions as well. That is, the movement restrictions found in various Australian jurisdictions are likely to be ineffective in reducing sexual reoffending.

## **Forfeiture of Property**

Numerous statutory provisions permit the forfeiture of property such as computers used in child exploitation, child pornography or similar offences. The wide scope of confiscation legislation raises the question of whether real property used in connection with child sexual assault can be forfeited.

Legislation in every jurisdiction empowers courts to order the forfeiture of 'tainted property', that is, property that was used, or was intended by the defendant to be used in, or in connection with, the commission of the offence; or that was likely to be used, or intended to be used in, or in connection with the future commission of certain offences, or that was substantially derived or realised, directly or indirectly, from such property; or that was derived by anyone from the commission of the offence.<sup>714</sup>

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714 See example, *Confiscation Act 1997* (Vic); *Proceeds of Crime Act 2002* (Cth); *Confiscation of Criminal Assets Act 2003* (ACT); *Confiscation of Proceeds of Crime Act 1989* (NSW); *Criminal Assets Recovery Act 1990* (NSW); *Criminal Property Forfeiture Act* (NT); *Misuse of Drugs Act* (NT); *Criminal Proceeds Confiscation Act 2002* (Qld); *Criminal Assets Confiscation Act 2005* (SA); *Crimes (Confiscation of Profits) Act 1993* (Tas); *Criminal Property Confiscation Act 2000* (WA).

The phrase ‘used in connection with the commission of the offence’ is a broad one. In *Chalmers* the Victorian Court of Appeal<sup>715</sup> considered the authorities on the meaning of the phrase ‘used in connection with the commission of the offence’ in the *Confiscation Act 1997* (Vic) and provided the following propositions that were distilled from the often conflicting authorities:<sup>716</sup>

The word ‘used’ should be given its ordinary meaning of ‘employed, or made use of, for a particular end or purpose’.<sup>717</sup>

The statutory phrase is of wide scope. The inclusion of the words ‘in connection with’ was plainly intended to extend the scope of the definition of ‘tainted property’ beyond circumstances where the property could be said to have been ‘used in the commission of’ the offence.<sup>718</sup>

Whether there is a connection between the use of the property and the commission of the crime is a question of fact and degree.<sup>719</sup> It is not necessary for it to be established that there was a ‘substantial’ connection, or that the crime could not have been committed without using the property.<sup>720</sup>

The nature, extent and significance of the use of the property in connection with the commission of the crime will be matters which go to the Court’s discretion whether or not to order forfeiture of the property.<sup>721</sup>

Very often, the decisive issue will be whether the relevant property can be said to have been ‘used’,<sup>722</sup> since ‘use’ is (by definition) employment for a purpose. Once it is concluded that the offender ‘used’ the property at or around the time of the commission of the offence, it will usually follow that there was the requisite connection between the use of the property and the commission of the offence. Put differently, if the offender (or some other person) ‘employed or made use of’ the property for a purpose associated with the offending, then it would follow that the property was ‘used in connection with the commission’ of the offence ...

Express statutory provision apart,<sup>723</sup> the mere fact that an act is done in or on a particular property will ordinarily not suffice to bring that property within the definition.<sup>724</sup> That is because, as a matter of ordinary language, this could

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715 [2011] VSCA 436, per Maxwell P, Redlich JA and Kyrou AJA; see also *DPP v Moran* [2012] VSCA 154 per Warren CJ, Buchanan AP and Beach AJA.

716 [2011] VSCA 436 at [77]–[86]. Footnotes have been renumbered and reformatted and some paragraphs omitted.

717 *Rintel* (1991) 3 WAR 527, 529, 542; *White* [2010] WASCA 47; (2010) 41 WAR 249, 257 [27]; *White* [2011] HCA 20, [21].

718 *Taylor* (1991) 55 SASR 462, 471; *Hadad* (1989) 16 NSWLR 476, 481D; *George* [2008] SASC 330; (2008) 102 SASR 246, 261 [57].

719 *Taylor* (1991) 55 SASR 462, 472; *DPP (NSW) v King* [2000] NSWSC 394; (2000) 49 NSWLR 727, 731 [15] (O’Keefe J) (‘King’); *George* [2008] SASC 330; (2008) 102 SASR 246, 261 [57].

720 *Taylor* (1991) 55 SASR 462, 466, 471–2; *George* [2008] SASC 330; (2008) 102 SASR, 246, 262 [62]; *Hadad* (1989) 16 NSWLR 476, 482E; *Rintel* (1991) 3 WAR 527, 531.

721 *Hadad* (1989) 16 NSWLR 476, 481–2; *Rintel* (1991) 3 WAR 527, 530.

722 *White* [2010] WASCA 47; (2010) 41 WAR 249, 258–9 [37]–[39].

723 Under s 146(1)(c) of the *Criminal Property Confiscation Act 2000* (WA), property is ‘crime-used’ if ‘any act ... was done ... in or on the property’ in connection with the commission of a relevant offence: see *White* [2010] WASCA 47; (2010) 41 WAR 249, 254 [15]–[16] and *White* [2011] HCA 20, [33].

724 *Rintel* (1991) 3 WAR 527, 542–3; *George* [2008] SASC 330; (2008) 102 SASR 246, 263 [76]–[77]; *White* [2010] WASCA 47; (2010) 41 WAR 249, 257–8 [27]–[31].

not be characterised as a ‘use’ of the property.<sup>725</sup>

It is only when the property, or its features or attributes, has been turned to advantage by the offender, or enlisted for the offender’s purpose, that it will be possible to say that the property has been ‘used’ ...

Conduct after an offence is completed may also constitute a use of property in connection with the commission of the offence.<sup>726</sup> ...

Whether there has been a relevant use will depend upon the property in question and the precise way it was used. As the same property can be put to different uses, the determination of whether there is a connection between the particular use of the property and the commission of the offence will involve questions of fact and degree that need to be determined in a commonsense manner.

The relatively wide scope of such provisions raises the possibility that where a person has committed sexual offences on property owned by an institution or organisation such as a church, voluntary group or educational institution, that property may be forfeited to the Crown. These laws have been invoked in a few cases.

In *DPP (NSW) v King*<sup>727</sup> the DPP applied for a forfeiture order under *Confiscation of Proceeds of Crime Act 1989* (NSW), s 43 of the proceeds of the sale of a boat in which the owner had committed aggravated indecent assault against a minor. The DPP argued that the boat had been used ‘in connection with’ the commission of the offence, though not used ‘in the commission of the offence’. It argued that because the offences were committed on the vessel that was sufficient nexus for the property to be considered ‘tainted’ for the purposes of the Act.

The Court held that merely being the place where the offence was committed was not sufficient to taint property, but that the ‘activity connected with the relevant crime must have involved the utilisation or employment of the property with the aim or purpose of committing or furthering the commission of the crime in question’.<sup>728</sup> In this case, the Court rescinded the forfeiture order.

In contrast, in *DPP v Garner*<sup>729</sup> a houseboat used in connection with committing a number of sexual assaults on young males was forfeited. The judge ruled that the houseboat had been used to provide the victims ‘with a pleasurable environment and exciting activities’ and that the use of the boat was not ‘a mere incident of the crimes or as providing a locus for them but as an efficient tool of seduction of the boys’.<sup>730</sup> Similarly in *DPP (WA) v Farley*<sup>731</sup> the premises in which sexual offences were committed against young boys had been used as a place to undertake activities ‘to

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725 *White* [2011] HCA 20, [21].

726 *Hadad* (1989) 16 NSWLR 476, 482–3; *White* [2010] WASCA 47; (2010) 41 WAR 249, 259 [39].

727 [2000] NSWSC 394.

728 [2000] NSWSC 394 at [33].

729 Unreported, 26 April 1999, Victorian County Court, per Kelly J.

730 Cited in *DPP v Garner* [2000] NSWSC 394 at [22].

731 Unreported, 17 September 1996, Supreme Court of Western Australia per Heenan J.

which boys are naturally drawn such as fixing bicycle chains, doing woodwork and tying knots' with a view to gradually seducing them.<sup>732</sup>

Where the Court has discretion whether to issue a forfeiture order, other matters must be considered. Among the factors a Court will take into account in determining whether to make an order include:<sup>733</sup>

... the value of the subject property, the nature and gravity of the offence, the use made of the property, the degree of the offender's involvement, the offender's antecedents, the value of any other property confiscated and the penalty imposed, the nature of the offender's interest in the property, ... the utility of the property to the offender, the length of ownership of the property, the extent to which the property was connected with the commission of the offence, the fact that forfeiture is intended as a deterrent, the interest of innocent parties in the property and the extent (if any) to which the retention of the property might bear on the offender's rehabilitation.

... what also must be borne in mind is the question of proportionality, that is to say, would forfeiture of the property be sufficiently proportionate to the nature and gravity of the offence having regard also to the sentence imposed on the offender ... The final question which the judge must ask is, having regard to the foregoing matters which are relevant on the particular facts of the case, would it be fair or cause unacceptable hardship to order forfeiture?

A property liable to be forfeited may belong to a third party who may not be party to the offence or may not have knowledge of it. Confiscation legislation usually contains provisions that allow an 'innocent' owner, or person with an interest in the property, to plead their lack of knowledge as a defence and so exempt their interest in the property from being forfeited.

## Sex Offender Registration and Community Notification

Every jurisdiction has established a sex offender registration scheme to try to prevent reoffending by those convicted of prescribed sexual offences.<sup>734</sup> The legislation requires certain offenders who commit sexual offences to keep police informed of their whereabouts and other personal details for a period of time. This is designed to

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732 Cited in *DPP v Garner* [2000] NSWSC 394 at [30]. There are a few cases of this kind elsewhere. There is a report of an application in Manitoba, Canada, for the forfeiture of the house of a person who had sexually assaulted a 12-year-old girl. It was claimed that the house was used to groom the victim and was liable to be civilly forfeited under the provisions of the *Criminal Property Forfeiture Act*. The outcome of the proceedings are not known; see CBC News, Manitoba, *Motion to Dismiss Filed in Sex Assault Case*, <http://www.cbc.ca/news/canada/manitoba/motion-to-dismiss-filed-in-sex-assault-case-1.992085>

733 *Winand* (1994) 73 A Crim R 497, 500–01; see also *DPP v Tran* [2004] VSC 218; *DPP v Gyurcsik* [2007] VSC 424; (2007) 178 A Crim R 153; *DPP v Nikolaou* [2008] VSC 111; (2008) 183 A Crim R 133; *Kinealy v DPP* [2013] VSC 67; *DPP (Vic) v Cini* [2013] VSCA 103.

734 See *Sex Offenders Registration Act 2004* (Vic); *Child Protection (Offenders Registration) Act 2000* (NSW); *Crimes (Child Sex Offenders) Act 2005* (ACT); *Child Protection (Offender Reporting and Registration) Act* (NT); *Child Protection (Offender Reporting) Act 2004* (Qld); *Child Sex Offenders Registration Act 2006* (SA); *Community Protection (Offender Reporting) Act 2005* (Tas); *Community Protection (Offender Reporting) Act 2004* (WA). The details of the legislation in each jurisdiction have been set out in an Australian Institute of Family Studies document prepared at the Royal Commission's request. It can be found at <http://aifs.gov.au/institute/pubs/carc/3b.html>; see also New South Wales Parliament, 2014: 11 and Chapter 6.

reduce the likelihood that they will reoffend and to aid the investigation and prosecution of any future offences they may commit. It also aims to prevent registered sex offenders working in child-related employment.

Generally, registration is not considered punitive, nor is it part of the sentence imposed. It is not dealt with in this Report, though we do make observations about its effectiveness.

One jurisdiction has introduced a community notification scheme in Australia.<sup>735</sup>

### **Western Australia**

Under the *Community Protection (Offender Reporting) Act 2004* (WA), the Commissioner of Police may publish the details of certain offenders if the Commissioner is satisfied that the person has failed to comply with any of his or her reporting obligations, or has provided information that is false or misleading and whose whereabouts are not known to the Commissioner.<sup>736</sup>

### **Effectiveness of sex offender registration and community notification**

The vast majority of research into the effectiveness of sex offender registration has been undertaken in the United States, where registration and community notification laws have developed hand in hand. From the early days of the federal *Jacob Wetterling Crimes Against Children Act 1994* that mandated registration of sex offenders, through the amendments to that act in 1996 with Megan's Law that added community notification provisions, more and more American states have implemented specific laws for sex offenders. By 2000, all states had implemented sex offender registration and community notification laws (Jones and Newburn, 2013: 445). Other amendments followed. In 2003, the *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Act* mandated that all states maintain a website with sex offender information, while the 2005 *Children's Safety and Violent Crime Reduction Act* expanded the reach of existing notification systems. Finally, the *Wetterling Act* was repealed and replaced by the *Adam Walsh Child Protection and Notification Act 2006*. This once again broadened the types of sex offender subject to registration and notification, and enhanced enforcement of the laws (Jones and Newburn, 2013: 445). Under this Act, states are required to classify offenders into three 'tiers' based on their offence, rather than on any individualised and empirically-based risk assessment, with registration and notification lasting from 15 years to life, depending on the crime committed. The laws apply to sex offenders as young as 14, to offenders convicted of less serious (misdemeanor) crimes and to offenders convicted of non-contact sexual offences, as well as contact offences (Letourneau et al., 2010: 437). If the states do not comply with these laws, they face the possible withdrawal of federal funding.

The United Kingdom has followed the United States to some degree, although it has proceeded far more cautiously. The *Sex Offenders Act 1997* (UK) required that

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735 The New South Wales Parliamentary Committee did not recommend that New South Wales follow the Western Australian example in the absence of a detailed evaluation of that program (New South Wales Parliament, 2014: 135–36).

736 *Community Protection (Offender Reporting) Act 2004* (WA), Part 5A (ss 85A–85M).

offenders who had been convicted of certain sexual offences register by notifying the police of their name and address, including any subsequent related changes. Thus, not all sex offenders were drawn into the legislative requirements. Unlike many jurisdictions in the United States, where registration can last a lifetime, in the United Kingdom the registration is variable depending on the nature of the offence and the original sentence length. It may be as short as five years or as long as a lifetime (Jones and Newburn, 2013: 447–48).

Originally, the public was excluded from accessing the register. However, the high-profile murder of a child in 2000 led to the introduction of Sarah's Law, which included a pilot scheme that allowed some public access to the sex offender register. Access is granted to those who 'need to know', (such as a single parent requesting information about a new partner) and following a request for information where there are concerns about a named individual. The scheme under Sarah's Law was implemented across all police forces in England and Wales in 2011 (Jones and Newburn, 2013: 450).

The full system of English registration and notification laws has only been in place a short time and thus has not received much research attention. A Home Office process evaluation of the pilot scheme found that only a small number of enquiries were made, with applicants believing that the scheme contributed to general levels of alertness about risks to children. While people who received information understood the need for confidentiality and disclosure restrictions, they expressed challenges in keeping the information to themselves, but did not report any serious or damaging breaches. While offenders themselves initially reported anxiety about the possible negative effects of the release of information, this declined over the course of the pilot. In terms of impact on offender behaviour, the registered sex offenders who were interviewed reported no changes in behaviour. The evaluators concluded that long-term monitoring of the scheme would be needed, especially concerning compliance (Kemshall et al., 2010: ii). It remains to be seen whether the fully implemented system now in place has any effect on changing offenders' behaviour and thus reducing sexual offence recidivism.

With its large general population and long history of registration requirements, the United States now has a significant number of registered sex offenders. As of June 2014, the 50 states and the District of Columbia, as well as the five territories of the United States (American Samoa, Guam, Northern Mariana Islands, Puerto Rico and the US Virgin Islands) reported a total of 774,600 registered sex offenders. This is a rate of 248 registered sex offenders per 100,000 total population (National Center for Missing and Exploited Children, Sex Offender Tracking Team, 2014).

A small number of American studies of the effectiveness of sex offender registration and notification stand out as particularly strong methodologically, and all draw the same conclusion: registration and notification are not effective strategies for reducing sexual offending.

In the earliest study, Schram and Milloy (1995) compared sexual recidivism (both arrest and conviction) for 90 offenders released from prison in Washington state following the implementation of community notification laws with a matched sample



of 90 offenders released prior to the implementation of these laws. Offenders were matched on the number of convictions for sexual offences and on the age of their victims (child versus adult), on the basis that these two factors have been linked to the likelihood of recidivism. The groups were also comparable on age and race (Schram and Milloy, 1995: 6).

Using a life table method of survival analysis to calculate the probability of recidivism during each time interval, the researchers found that there were no significant differences in the rates of sexual or non-sexual recidivism between the notification (19 per cent sexual recidivism) and pre-notification (22 per cent sexual recidivism) groups after 54 months (Schram and Milloy, 1995: 17). However, differences appeared in the time to reoffending: offenders subject to community notification were rearrested more quickly (median time to failure of 25.1 months) than those without notification (median time to failure of 61.7 months) (Schram and Milloy, 1995: 18). The authors conclude that 'community notification had little effect on recidivism' (Schram and Milloy, 1995: 20).

While the Schram and Milloy (1995) study involved only a small number of offenders and was undertaken at a time when crime rates generally were far higher than they are today, their study is valuable because of its strong methodology. The use of a pre- and post-implementation design with a matched sample of offenders for comparison, and a sophisticated analytical technique, makes this research worthy of close attention.

Freeman (2012) found almost identical results using a quasi-experimental design to examine the relationship between community notification and sex offender rearrest in the state of New York. Freeman was able to take advantage of a natural experiment in her work: New York's sex offender registration laws came into effect in 1996 and applied to all sex offenders, regardless of when their crimes were committed. However, a federal lawsuit that year established that community notification could not be applied to offenders whose crimes were committed prior to the enactment of the legislation on 21 January 1996. Thus, two distinct groups were created: sex offenders who had committed their crimes prior to the legislation and who were thus not subject to community notification laws, and sex offenders who committed their crimes on or after the legislation came into force (Freeman, 2012: 541).

Freeman (2012) included a number of variables in her survival analysis to control for other factors that might have influenced reoffending rates, including offender demographics, criminal history and victim characteristics such as age, gender and number of victims. In order to take into account the length of time each offender was in the community and thus at risk of reoffending, Cox regressions were used, with a total possible follow-up period of 8.2 years (Freeman, 2012: 547–50).

Comparing 10,592 sex offenders who were subject to community notification with 6,573 who were not, Freeman (2012) found small differences in reoffending rates, with 5.2 per cent of the notification group rearrested for a sexual offence within five years and 4.4 per cent of the comparison group rearrested for a sexual offence within five years. Cox regression analyses showed that sex offenders under notification statutes were rearrested twice as quickly for a sexual offence and 47 per cent more

quickly for a non-sexual offence, when controlling for other variables that may influence reoffending (Freeman, 2012: 551–53).

The results of this study might suggest that notification laws are achieving what was intended, identifying sex offenders at high risk of sexual recidivism and allowing closer monitoring and better identification by law enforcement and the community, resulting in faster rearrest. However, the authors suggest, it is also possible that community notification is reducing offenders' ability to reintegrate successfully, leading to greater recidivism and faster reoffending than for those not subject to notification laws. While the authors suggest that the higher rates of rearrest might be due to increased monitoring, they note that prior research 'supports the conclusion that the results of the current study are more likely due to the aggregation of stressors related to sexual reoffending and the stigma experienced as a result of community notification' (Freeman, 2012: 560).

Letourneau et al. (2010) reached the same conclusion. Using a sample of 6,064 men convicted in South Carolina of at least one sexual offence between 1990 and 2004, Letourneau et al. (2010) analysed data over an average follow-up period of 8.4 years to examine both new sexual offence charges and new sexual offence convictions. Over this period, 8 per cent of offenders faced new charges while 5 per cent of offenders were convicted of new sexual offences.

Using Cox relative risks models to estimate the hazard or risk of reoffending allowed the authors to control for each offender's time at risk, based on the dates of their release from prison. A number of covariates were included in the models, such as offender age and race, victim age, and prior convictions, as well as registration status, which was the key independent variable (predictor) of interest (Letourneau et al., 2010: 442–46).

Analyses showed that offenders convicted of sexual offences against minors were less likely to be charged with a new sexual offence than were those with other types of convictions (hazard ratio = 0.63). Offender registration status did not influence the risk of new charges for sexual offences (Letourneau et al., 2010: 449). These findings held across a number of models for different types of reoffending and for convictions as well as charges.

Thus, registration status at the time of recidivism was not associated with the risk of sexual reoffending or with the time to reoffending. The authors present a number of possible explanations for their findings. They suggest that sex offender registration and notification is based on faulty logic that assumes high rates of recidivism for sex offenders – as base recidivism rates are so low, these policies may not be able to reduce reoffending any further. Alternatively, these policies might be effective for some offenders, but by casting too wide a net the effects might be masked. Either way, the authors conclude that there is now 'mounting evidence that SORN [sex offender registration and notification] is an ineffective method for managing sex offenders in the community' (Letourneau et al., 2010: 454). They warn that broad notification 'might dilute the public's ability to determine who truly presents the greatest threat to a community, because all offenders listed on the registry appear to be equally dangerous' (Letourneau et al., 2010: 455).

It is possible that sex offender registration and notification laws have not been effective due to the very low base rate of the behaviour (repeat sexual offending) that they are trying to prevent. For example, in a study of more than 38,000 people released from prison in 15 American states in 1994, Miethe et al. (2006) found that serial rapists and child molesters were rare in the sample, with three-year sexual recidivism rates of 7 per cent for rapists and 8 per cent for child molesters. Despite this rarity, the authors note that community notification and registration schemes are designed to target repeat sex offenders. They conclude that 'it seems somewhat unlikely that registration and notification policies will decrease sexual victimisation' (Miethe et al., 2006: 225). Indeed, the focus on sex offenders may lull the community into a false sense of security: the burglar, robber or drug addict is no less likely to commit a sexual offence than is the convicted sex offender (Simon, 2000: 280).

Ronken and Lincoln (2001) considered a different approach to community notification in Australia in the 1990s. *The Australian Paedophile and Sex Offender Index* (Coddington, 1997) was a private publication of journalist Deborah Coddington, who had previously published an analogous version in New Zealand. The Index, based on newspaper accounts, is an alphabetical listing of 650 convicted child sex offenders (including some photographs), as well as a short description of the offence and a summary of the disposition. Coddington also called for tougher punishment and vilification of all sex offenders (Ronken and Lincoln, 2001: 239).

Negative reactions to the Index were common, although commentators were not always able to articulate their objections. The publication was said to be biased, based on vengeance and totally lacking mercy, with some suggesting that it did nothing to promote discussion and development of sensible responses. However, supporters suggested that the issue would benefit from greater public exposure, that it would illuminate the hidden nature of the offences and that victims would benefit from public naming of perpetrators (Ronken and Lincoln, 2001: 243).

In the end, Ronken and Lincoln (2001) conclude that 'naming and shaming' is likely to have three negative consequences: unintentionally identifying the victim and possibly revictimising him or her; causing a 'punishment frenzy' in the community; and distorting rational discussion in this area. For the authors, notification – public or private – 'signals a state retreat from protection against sex offenders', nullifying the rehabilitative effects of treatment and escalating public fear (Ronken and Lincoln, 2001: 250).

Thus the research evidence shows that sex offender registration and notification schemes, in treating all sex offenders alike, and not considering individual risk assessments, widens the net of sex offenders under various monitoring and reporting requirements. This net widening effect 'compromises the capacity of registration and notification systems to effectively discriminate between those who pose a substantial risk to society and those who pose minimal risk' and diverts attention and resources away from the management of genuinely high-risk offenders (Harris et al., 2010: 515). Such lessons may be usefully applied in other jurisdictions as they seek to implement sex offender registration and notification schemes. For example, following Western Australia's passing of legislation to allow public disclosure of information about convicted sex offenders, Whitting et al. (2014) advocate a more nuanced

understanding of what works, for whom, and under which circumstances. 'Identifying the conditions under which community notification is and is not effective will allow these measures to be more targeted, maximizing the use of limited resources' (Whitting et al., 2014: 255).

The National Alliance to End Sexual Violence (2014) neatly summarises challenges associated with wide-reaching registration and notification schemes:

However, over-inclusive public notification can actually be harmful to public safety by diluting the ability to identify the most dangerous offenders and by disrupting the stability of low-risk offenders in ways that may increase their risk of reoffense. Therefore, NAESV believes that internet disclosure and community notification should be limited to those offenders who pose the highest risk of reoffense

Public resources are limited, so those resources allocated for the management of convicted sex offenders should primarily be directed to those at highest risk of reoffense. Highest risk can most accurately be assessed through the application of evidence-based actuarial risk-assessment tools. This assessment should occur prior to sentencing.

The risk of reoffense cannot be accurately determined by the seriousness of the charge for which a sex offender was convicted, as numerous factors can lead to offenders being charged or convicted of lesser crimes than what actually occurred.

Reflecting the difficult nature of sex offender management, Vess et al. (2014) conclude that managing known sex offenders is 'a highly controversial, emotion-laden, and risky undertaking' and call for further large-scale, well-designed research on the impact of sex offender registration, its collateral consequences for offenders and their families, and its associated costs (Vess et al., 2014: 332).

## **Working With Children**

A person who has been convicted of certain offences may be prevented from working with children. Such legislation aims to protect children from sexual or physical harm by ensuring that those entrusted with their care have their suitability to do so checked by a government body.<sup>737</sup> The Royal Commission has published an Issues Paper and is dealing with this aspect of CSA separately.<sup>738</sup>

## **Effectiveness Generally**

There are no comprehensive studies of the general strategy of preventive detention, indefinite sentences and the swathe of laws that seek to extend the custody of sex

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737 See *Working with Children Act 2005* (Vic); *Child Protection (Working with Children) Act 2012* (NSW); *Care and Protection of Children Act* (NT); *Commission for Children and Young People and Child Guardian Act 2000* (Qld); *Children's Protection (Miscellaneous) Amendment Act 2005* (SA); *Working with Children (Criminal Record Checking) Act 2004* (WA);

738 See Royal Commission, 2013; Royal Commission, 2014, Vol 1: Chapter 4.

offenders and restrict their activities and movements. Studies of individual measures tend to conclude that there is no evidence that they reduce crime in a cost-effective manner, or that it is very difficult to reach a conclusion as to their effectiveness. The difficulties of measuring what has not occurred, nor may not occur, namely, the crimes that a purported dangerous offender has been prevented or deterred from committing due the legal interventions, and their cost, are patent.

It is easier to measure the cost of such measures, although it has not been done in Australia. In his review of sexual offender commitment laws in the United States, La Fond identifies a number of costs incurred in implementing sexually violent predator laws. These include the cost of new bureaucracies, clinical evaluations, litigation, facilities, staff, treatment and supervision in the community (La Fond, 2011). He notes the experience in the United States of commitment rates far exceeding release rates, with the result that the population of sex offenders held under these provisions has rapidly increased. The same phenomenon is evident in Australia in relation to post-sentence supervision and detention laws, albeit the scale is much smaller. La Fond concludes (La Fond, 2011: 60):

We do not know if these are the most dangerous offenders among those eligible for civil commitment. We do not know how many sex crimes they would have committed if released at the end of their prison term or how many crimes they would have committed if they had been subjected to appropriate community supervision and treatment. We do know that there is no end in sight to the exploding costs associated with SVP [sexual violent predator] laws and that states, now in dire financial situations, will have to spend money on these laws rather than other more critical needs ...

Predictably, the American SVP experiment has been an abysmal and costly failure. Other countries should learn from our terrible mistakes.

## Chapter 7

### Institutional Offending: The Limits of the Law

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#### Individuals and Organisations

The criminal law is primarily concerned with the responsibility of the individual or individuals accused of committing offences and the preceding chapters have analysed the law and practice of sentencing as it applied to individual offenders. However, because the criminal trial centres on the guilt or innocence of the accused it rarely addresses the broader causes of offending behaviour. It is neither intended to, nor capable of doing so. These inquiries are reserved for coronial inquests, commissions of inquiry or scholarly research.<sup>739</sup>

The power to sentence is contingent upon the conviction, or finding of guilt, of the perpetrator. Sentencing of offenders for CSA focuses on individuals rather than institutions or organisations. Typically, prosecutions focus on the primary offence rather than offences concerned with secondary forms of participation or accessorial responsibility before, during or after the offence. In addition, few, if any, offences hold institutions directly or vicariously responsible for the commission of CSA offences by their members, employees or associated persons.

The criminal law has encountered significant difficulties in applying principles of corporate criminal responsibility in other contexts, such as occupational health and safety and environmental law, let alone in relation to CSA. However, the Letters Patent require the Commission to consider the role of institutions where CSA has occurred, and their activities that have 'created, facilitated, increased, or in any way contributed to, (whether by act or omission) the risk of child sexual abuse or the circumstances or conditions giving rise to that risk' (Letters Patent, 2013: Para (m)(ii)).

The broad terms of the Letters Patent invite a review of the current limits of the criminal law and sentencing. While retributive and denunciatory outcomes may vindicate the harm done to those already victimised, they do little to protect future victims. In addition, while the terms of reference of this report do not extend to consideration of the substantive criminal law, some observations about the failings of the criminal law are necessary to ensure that crime and punishment are appropriately linked and that institutions are appropriately held to account in the future. The suggestions made in this chapter regarding possible approaches to institutional responsibility and the creation of new offences can be prospective only and will not directly assist those who have been harmed in the past. However, it is unlikely that CSA will disappear as a form of offending. It is important that the criminal law adjust to enable it to respond effectively to the future harms that will inevitably occur. Although the criminal law may be sparingly used in the future, due to the difficulties of proof and the conceptual problems that inhere in organisational responsibility, the

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739 We are grateful to Brent Fisse, Harry Glasbeek and Eamonn Moran QC for their helpful comments on earlier drafts of this chapter.

proposed offences, and sanctions, should be valuable because of the moral statement they will make about what the community considers to be right and wrong. The criminal law plays a vital symbolic role in marking the boundaries of acceptable and unacceptable behaviour, whether it be of individuals or organisations.

The individualistic orientation of the criminal trial and sentencing tends to produce explanations for offending behaviour grounded in the individual offender's motivations or pathologies. Where they take place in an institutional context, they are frequently rationalised as being aberrational or isolated instances of bad behaviour: the offender is characterised as a 'rotten apple' in an otherwise healthy 'barrel' (John Jay College, 2011: 16). Offenders may be diagnosed as having a personality or mental disorder and the behaviour as being 'out of character'. Yet, as the Victorian Parliament's Family and Community Development Committee's report on the handling of CSA by religious and other non-government organisations concluded, there 'is no typical offender of criminal child abuse, and many child sex offenders often appear as regular community members with good intentions' (Victoria, Family and Community Development Committee, 2013: 123). The John Jay College report also observed that:

The priests who engaged in abuse of minors were not found, on the basis of their developmental histories or their psychological characteristics, to be statistically distinguishable from other priests who did not have allegations of sexual abuse against minors (2011: 2).

Pathologising offenders is a convenient way of diverting attention from the systemic forces that produce crime. Any strategy, whether it be public or private, that focuses solely upon excising sick or deviant offenders from an institution that purports to be 'healthy' is likely to be ineffective in addressing the causes of crime if it ignores the underlying influences that have shaped or contributed to an offender's conduct. As the John Jay College inquiry into priestly sexual abuse observed, attributing the causes of CSA in the Catholic Church to individual factors such as celibacy<sup>740</sup> or homosexuality fails to recognise 'the organisational and institutional contributions to the root of the problem' (John Jay College, 2011: 16).

Institutions themselves may be criminogenic<sup>741</sup> or may contribute to offending indirectly. The Commission has noted: 'It is apparent that perpetrators are more likely to offend when an institution lacks the appropriate culture and is not managed with the protection of children as a high priority' (Royal Commission, 2014, Vol 1: 8). The Commission's own analysis of the environmental factors that might encourage or influence the criminal behaviour of opportunistic offenders identifies factors such as lack of supervision or weak or non-existent organisational controls on access to children (Royal Commission, 2014, Vol 1: 123). The John Jay College report identified 'organizational, psychological and situational factors' as contributing to the vulnerability of individual priests (John Jay College, 2011: 2) and the Victorian

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740 In a summary of its responses to the work of the Commission, the Catholic Church notes that obligatory celibacy may have contributed to abuse in some circumstances (Truth, Justice and Healing Council, 2014: 23; see also Parkinson, 2014: 124–27 suggesting that celibacy is not a contributing factor).

741 That is, likely to cause or produce criminal behaviour.

Parliament's report observed that children subjected to CSA were less likely to be protected in religious organisations than any other group.

The Victorian Family and Community Development Committee noted that minimal information was available regarding the prevalence and incidence of CSA in non-government organisations, including religious organisations, out-of-home care services, early education services and schools, childcare organisations, youth services and recreational and sporting organisations (Victoria, Family and Community Development Committee, 2013: 120). This lack of accurate data, it noted, has 'implications for the development of evidence-based interventions and preventative frameworks in non-government organisations' (Victoria, Family and Community Development Committee, 2013: 123). The Commission has provided some further information about institutional abuse. It has reported that, from information collected in 1,476 private sessions held between 7 May 2013 and 30 April 2014, abuse was reported to have taken place in 1,719 different institutions, of which 60.2 per cent were faith-based and 68.1 per cent of the faith-based institutions were Catholic (Royal Commission, Interim Report, Vol 1, 2014: Appendix C).

## **Organisational Responsibility for CSA**

If institutions or organisations are directly or indirectly responsible for criminal behaviour such as CSA, then the law should hold them to account. Historically, attempts to ascribe criminal responsibility to organisations have been difficult (Logan, 2003; Clough and Mulhern, 2002). Holding them to account for CSA, either civilly or criminally, has been rendered even more difficult due to the uncertain legal status of various faith-based organisations or institutions.

However, from an organisational perspective, the most important issues relate to the institution's or organisation's responsibility for the individual offender's conduct. Institutions and organisations are either vicariously, or, more importantly, directly, responsible for failing to protect victims from the activities of the offender, for their conduct in not reporting an offender to the authorities, or for not changing their rules, practices or culture in response to the knowledge gained about prior offending.

To date, much of the literature on organisational responsibility has been concerned with distinctions between an organisation's vicarious or direct responsibility for the acts of individuals working for it or is associated with it, and individual and collective fault. The debate is often complicated by situations in which the act of an individual within, or associated with, the organisation has committed a criminal act in a situation outside the scope of his or her authority. However, for present purposes, these legal distinctions, historic and important as they are, overlook the fundamental principle that should underpin the legal and moral foundation of holding organisations responsible for the harm they have caused, namely that:

... liability could be imposed on a risk-creator when another acts within the created risk's ambit and inflicts injury, even if the harm-doing actor was self-interestedly abusing an opportunity furnished by the organization to which she belonged ...



... [P]ersons who originate risky situations to satisfy their own goals should be held to account for regrettable outcomes if they do not exercise their knowledge of, and power over, the organization in a reasonable manner ... It is the *omission* to minimize the risk that makes [an organization] potentially liable (Glasbeek, forthcoming 2016).

This approach, based on the principles of negligence, suggests that the basic issue for the law relating to CSA is that of risk management and the attribution of liability, whether it be civil or criminal, for the creation, management and response to risk where it has materialised in harm to a child.

## Individual or Organisational Responsibility?

There is considerable philosophical and jurisprudential debate about the desirability of holding organisations to account and the difficulties of sanctioning organisations (Fisse and Braithwaite, 1993). Individuals are more readily identifiable and the traditional purposes of sentencing, and the sentences themselves, are more readily understandable and applicable to individuals. However, focusing primarily, if not exclusively on individuals minimises the collective dimensions of organisational or institutional action, not only in relation to corporate intention or corporate policy but, more relevantly, to the extent of collective negligence, namely a 'failure to meet the standard of care expected of an organisation in the same type of situation' (Beaton-Wells and Fisse, 2011: 215).

The need to look beyond individual offenders to the institutional environment in which they committed their crimes has been the subject of a number of judicial remarks. Some judges do so obliquely, as Bourke J did in relation to a religious school:

It is not my role to make judgment upon the response of the school authorities. In short, irate parents forced some action.<sup>742</sup>

Some are more outspoken. In *Ridsdale*, a recidivist Catholic priest was sentenced in the County Court of Victoria by Chief Judge Rozenes, who endorsed the remarks of the sentencing judge, White J, to the effect that<sup>743</sup>:

The Catholic church cannot escape criticism in view of its lack of action on complaints being made as to your conduct, the constant moving of you from parish to parish providing you with more opportunity for your predatory conduct and its failure to show adequate compassion for a number of your victims.

In a similar vein, Hampel J, in sentencing a parish priest for CSA offences, stated<sup>744</sup>:

Although you are not to be punished for the institutional response, what happened next was scandalous, no less so because, as is now abundantly clear, this boy was not the only victim of clerical abuse in the Melbourne

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742 *Kramer* [2014] VCC 24/7/13.

743 [2014] VCC 285 at [35].

744 *Walker* [2013] VCC 12 at [5].

archdiocese, nor the only victim whose welfare was ignored whilst the church took active steps to protect the priest and itself. Although not a single step was taken by the church to protect the victim, to offer him counseling or support, or to report the complaint of sexual abuse by one of its ordained priests of a child in his pastoral care to the police, you were warned a complaint had been made and shortly thereafter transferred to a nearby parish.

She went on to observe:<sup>745</sup>

You come before the court, at 64, as a very different man from the one who offended against these two boys. By your mid 30s you had taken leave from priestly duties, although you have not been removed from the priesthood, or defrocked. It is in my view remarkable that the church hierarchy has not taken any steps to formally strip you of your priesthood, not after you admitted your sexual misconduct, not after you were charged, not after you indicated your intention to plead guilty. This is not something that adds to the seriousness of your offending, or bears on the sentence to be imposed upon you, but it is a matter I hope the Royal Commission and the other inquiries currently running in to institutional responses to sexual abuse of children will consider.

To the victim, against whom the offences were committed decades ago, she said<sup>746</sup>:

You may have been powerless when the offences were committed on you, but by telling your stories, you have shown that you are not powerless now. The church may not have protected you when it should have, but the response of the criminal justice system I hope, will encourage other victims of past sexual abuse to trust that their complaints will be heard and investigated and lead to those who have sexually abused children being held accountable.

The failure of Anglo-American law to respond adequately to criminal activity within churches, corporations and families has been remarked upon:

Each institution has afforded a measure of immunity from prosecution, in effect establishing criminal law sanctuaries that, under ideal circumstances, self-regulate effectively without intrusion by government, but in less benign circumstances serve as criminogenic refuges (Logan, 2003: 322).

In light of the evidence of the extensive nature of institutional abuse in both the commercial and religious spheres, the need to erode or destroy the historical sanctuaries that the law has provided is patent and urgent.<sup>747</sup>

This concluding chapter examines the existing law relating to organisational criminal responsibility and suggests some reforms that could be implemented to render institutions involved in CSA subject to the criminal law.

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745 *Walker* [2013] VCC 12 at [5].

746 *Walker* [2013] VCC 12 at [19].

747 Logan argues that the Catholic Church's response to allegations of sexual abuse by the clergy shows traces of mediaeval sanctuary, a place where the church could show mercy, shield itself from civil authority and apply its own [canon] laws (2003: 330); see also Parkinson, 2014: 129 (on the weakness of the arguments regarding the application of canon law) Royal Commission, Case Study 14 (on canon law procedures).

## The Civil Law

The Commission is undertaking a separate review of civil litigation as a means of redress for victims.<sup>748</sup> This report does not address these issues other than where there is overlap between the legal problems that arise in the civil and criminal justice systems in responding to CSA in an institutional context, problems such as the legal status of organisations, and issues of vicarious and direct liability of organisations for the acts of others and their own conduct.

In Australia, attempts under civil law to obtain redress against educational or other institutional bodies for the criminal acts of their employees have generally proved fruitless.<sup>749</sup> In *New South Wales v Lepore*<sup>750</sup>, the High Court left open the question of whether an education authority, in this case, the state of New South Wales, could be held vicariously liable for the sexual abuse of a school pupil by a school teacher.<sup>751</sup> It held, however, that the state had not breached a non-delegable duty of care to its students (Wangmann, 2004; Thompson, 2012). Although there were multiple and differing judgments, the overall effect of the case was to severely restrict avenues of redress against institutions for CSA in Australia.

The courts of Canada and the United Kingdom have been far less restrictive in their approach to civil redress and have decided that if there is a risk of CSA, and that harm occurs, then the organisation must be held responsible for that harm.<sup>752</sup> In particular, Canadian courts, and more recently, courts in the United Kingdom, have recognised the fact that employers' placement of employees in positions of power and trust that can be abused brings with it legal responsibilities.<sup>753</sup>

The major differences between the Australian and UK and Canadian courts centre on a number of key issues that are relevant to the possible development of a number of possible offences, discussed below, that could be created to hold organisations criminally responsible for CSA. These issues include:

- *The legal status of the institution or organisation sought to be held liable:* Many religious organisations are not formal legal entities that can be sued. In Australia, the Catholic Church cannot be sued because it does not have a legal entity. Although numerous property trusts are attached to religious orders and

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748 See Issues Paper No 5: *Civil Litigation*; Consultation Paper, *Redress and Civil Litigation*, 2015.

749 We are indebted to Ms Judy Courtin, PhD candidate, Monash University, for drawing many of these issues to our attention.

750 (2003) 212 CLR 511.

751 Gleeson CJ, Gaudron and Kirby JJ held that the school authorities could be held vicariously liable for the sexual crimes of its employees; Gummow, Hayne and Callinan JJ held to the contrary. Compare with the statement of the Salvation Army to the Royal Commission in relation to its responsibility for CSA in its children's homes. It stated that it 'accepts that it is liable for the conduct of those individuals who abused the children. This is because we accept that our policies and practices at that time were not sufficient to protect children in those homes from perpetrators of child sexual abuse' (Royal Commission, 2014, Vol 1: 65; Royal Commission, 2015: 212ff).

752 The Victorian Parliament's Family and Community Development Committee Report (2013) has recommended that the law be changed so that organisations have a legal duty, directly and vicariously, to take reasonable care to prevent criminal child abuse: Recommendation 24.4.

753 *Bazley v Curry* [1999] 2 SCR 534; *Jacobi v Griffiths* [1999] 2 SCR 570; *Maga (by his Litigation Friend, the Official Solicitor) v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] 1 WLR 1441; Wangmann, 2004. Hamilton, 2014: 416 identifies a trend in the United States courts to finding employers liable for an employee's sexual abuse of a minor; see also Royal Commission, 2015: Chapter 10.3)

to the dioceses and archdioceses, some of which may be recognised in legislation, the orders or dioceses themselves appear to have no formal legal structure that can sue or be sued for these purposes.<sup>754</sup>

- *Whether a religious or government organisation can be held vicariously liable for the intentional acts of another:* Two issues arise in this context. The first is that there must be an employment relationship between the organisation and the person who committed the offence, and secondly, the act must be committed within the course or scope of employment.

In relation to the first issue, differences of opinion exist as to whether priests are in an employment relationship with an archdiocese. Although canon and common law are to the effect that a priest holds an ‘office’ rather than a position as an employee of the bishop or diocese, recent decisions in the United Kingdom have held that, although there were differences between the employment of priests and employees of other organisations, the role of the priest was sufficiently akin to that of an employment relationship as to be able to form the basis for the vicarious liability of a bishop or a particular diocesan trust.<sup>755</sup>

In relation to the second issue – whether the act was committed in the course or scope of employment – this test has traditionally been construed narrowly in the civil law (Royal Commission, 2015: 211ff). In 1999, in *Bazley v Curry*<sup>756</sup>, the Supreme Court of Canada reframed this test to consider the employment relationship more broadly. Rather than being constrained by the form of words historically invoked, McLachlin J reframed the test for vicarious responsibility as being ‘whether the employer’s enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm’. Similarly, in a series of cases including *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church*<sup>757</sup>, courts in the United Kingdom have held that the primary consideration for the attribution of vicarious liability was whether there was ‘a material increase in the risk of harm occurring in the sense that the employment significantly contributed to the occurrence of the harm’.<sup>758</sup> In *Various Claimants*, Lord Phillips stated

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754 *Trustees of the Roman Catholic Church v Ellis and Another* [2007] NSWCA 117. The Catholic Church has submitted to the Commission that legislation should be introduced requiring all unincorporated associations that appoint or supervise people working with children establish an incorporated entity able to be sued (Truth, Justice and Healing Council, 2014: 30); see also Royal Commission, 2015: 220ff. However, it should be noted that in the United Kingdom, successful civil suits were instituted against the trustees of the various diocesan trusts. It is also worth noting that some of the earliest forms of corporations were corporations solely created by churches to hold assets to ensure that persons holding office in a diocese for the time being could not lay claim to the assets.

755 *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938; *The Catholic Child Welfare Society and others (Appellants) v Various Claimants (FC) and the Institute of the Brothers of the Christina Schools and others (Respondents)* [2012] UKSC 56.

756 [1999] 2 SCR 534 at [41]; see also *Jacobi v Griffiths* 1999] 2 SCR 570.

757 [2010] EWCA Civ 256.

758 *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256 at [53] per Lord Neuberger MR citing *Jacobi v Griffiths* [1999] 2 SCR 570; (1999) 174 DLR (4th) 71 [79]; see also *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938; *The Catholic Child Welfare Society and others (Appellants) v Various Claimants (FC) and the Institute of the Brothers of the Christina Schools and others (Respondents)* [2012] UKSC 56.

that:<sup>759</sup>

Vicarious liability is imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link.

- *Whether an institution can be held directly responsible for breaching a duty of care to the children who have been sexually assaulted by their employees:* In the civil law this is referred to as a ‘non-delegable duty’, that is, a personal duty on the organisation to prevent harm. In *Lepore*, six of the seven judges held that even where a non-delegable duty of care may exist, a school authority is not liable to its students in cases of child sexual assault where an intentional criminal act is committed.<sup>760</sup>

Wangmann is highly critical of the High Court’s approach in *Lepore*, and particularly of its understanding of the responsibility of organisations to persons in their care. She observes (Wangmann, 2004: 195):

There is a tendency within the various decisions of the High Court to retain the conception of institutional child sexual assault as ‘antithetical’ to the role of a teacher. There are references to the extent to which such behaviour is ‘foreign’ to the role of a teacher and to this being ‘obviously inconsistent’ with, ‘inimical’ to, and the ‘antithesis’ of the role entrusted to a teacher. This language is suggestive of the popular conception of the teacher offender within a ‘rotten apple’ framework – that is, the teacher offender as a predatory paedophile. Arguably, this is the classic way in which some things that occur frequently are treated as aberrational or beyond the experience of key players in the legal system (footnotes omitted).

Both Wangmann (2004) and Hall (2000) argue that if effective responses to institutional CSA are to be developed, it is necessary to move from an understanding of institutions as merely places where CSA may occur (what they term ‘honey pots’)<sup>761</sup> to places where the institution is itself criminogenic, a ‘crucible’ for crime.

The ‘honey pot’ theory holds that offenders are drawn to institutions because of the opportunities they provide for their offending behaviour. Thus, offenders may volunteer to work in organisations where children congregate, such as sporting organisations, scouts, children’s homes or institutions, ambulance cadets and the like,

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759 *The Catholic Child Welfare Society and others (Appellants) v Various Claimants (FC) and the Institute of the Brothers of the Christina Schools and others (Respondents)* [2012] UKSC 56 at [86].

760 In the United States, employers can be held liable for their negligent acts in placing children at risk and negligence may be found in an institution’s failure to institute or follow child protection policies (Hamilton, 2014: 416).

761 This refers to the fact that some offenders specifically choose their profession or organisation to gain access to victims; see John Jay College, 2011:17 citing Wortley and Smallbone, 2006; Colton et al., 2010. Sullivan and Beech, 2004 reported in their study of institutional perpetrators that 15 per cent of the professional perpetrators chose their occupation so that that they could sexually abuse children and another 41.5 per cent said that it was part of their motivation; see also Parkinson, 2014: 119.

or seek employment, for example in schools.<sup>762</sup> In these contexts, the offender can develop relationships of trust with the children and their families; grooming the victims over a long period and diverting or allaying suspicions. In contrast, the institutional responsibility theory holds that the holding a position of authority or trust as a teacher or a priest creates a responsibility on the institution in which the offender works or operates to those under its care.

## The Limits of the Criminal Law

Tort law is primarily aimed at compensating victims of wrongful actions, although it may have punitive and deterrent elements. However, the criminal law has historically been regarded as being predominantly retributive. Conviction of a crime carries with it serious consequences and attendant social stigma. The severe sanctions that may be imposed as a consequence of conviction mean that a number of procedural safeguards, such as requiring proof beyond reasonable doubt and the availability of the privilege against self-incrimination, apply to protect the rights of an accused person.

The criminal law may attribute responsibility in a number of ways. An individual may be found guilty of an offence as a principal offender; as a person who incites, aids, abets, counsels or procures an offence; as an accessory to an offence; as party to a joint criminal enterprise; as a conspirator or as a person who conceals an offence for a benefit; or an accessory after the fact. There are two broad models of organisational criminal liability: the derivative model and the direct liability model. The derivative model, based on concepts of the vicarious liability of a person for the acts of another, draws from civil law principles, whereas the direct liability model looks at the organisation as a separate entity with an ability to act and make decisions independently of its employees.

All cases that are the subject of this report are cases of individual primary responsibility. The perpetrator has been sentenced because he or she<sup>763</sup> has committed a sexual assault. There have only been three priests charged with the offence of concealing child sex offences.<sup>764</sup>

The relationship between individual and institutional or organisational criminal liability is complex and has been of concern in areas such as occupational health and safety, corporate misconduct, industrial relations, cartel conduct, consumer protection and human rights. As has been observed in relation to corporations:

The key conceptual problem of corporate criminal liability is forging a coherent link between the corpus of criminal law – which has been developed in the

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762 See example, *Beyer* [2011] VSCA 15; *Franklin* [2008] VSCA 249; *Wright* [2009] VSCA 27.

763 There has not been a female defendant to date.

764 See also judicial comments in *Sharwood*, Unreported, 10 November, 2006, where the court noted the church's failure to report offences to the police. In March 2015, Adelaide Archbishop Philip Wilson was charged with concealing child sexual abuse arising from activities in 1976, when it is alleged that he had failed to bring to the attention of police a conversation that he had with a priest who had committed such offences; see <http://www.abc.net.au/news/2015-03-17/philip-wilson-archbishop-charged-concealing-child-sex-abuse/6325326>. The priest was later convicted and sentenced for offences committed between 1989 and 1991.

context of natural persons, and to reflect the psychology of human beings – and the realities of the corporate form, which is a complex fabric of human actors, on one hand, and corporate hierarchies, structures, policies and attitudes on the other. (Allens Arthur Robinson, 2008: Para 1.1).

Organisational responsibility is problematic because organisations can take various legal forms or may not be legally constituted at all. They may take the form of unincorporated associations, companies, firms, trades unions, public authorities, partnerships and others. Where they are legally constituted and although they act through human beings, they are regarded as entities separate and distinct from the individuals who work in them in whatever capacity. Corporate blameworthiness should be distinguished from the individual responsibility of actors within the organisation.

There are a number of reasons for taking legal action against organisations rather than, or in addition to, individuals. Individuals may come and go within an organisation. They may die, be dismissed or transferred out of the jurisdiction of the country where the offence took place, or to areas within the country where the offending may continue. This was a common response of the Catholic Church when sexual abuse was reported to it (Morris, 2014: 302–03). The Australian Catholic Church has acknowledged that:

... in some cases, those in positions of authority concealed or covered up what they knew of the facts, moved perpetrators to another place, thereby enabling them to offend again, or failed to report matters to the police when they should have (Truth, Justice and Healing Council, 2014: 3).<sup>765</sup>

Fisse and Braithwaite have argued that ‘corporations have the capacity but not the will to deliver clearly defined accountability for law breaking; courts of law, obversely, may have the will but not the capacity’ (Fisse and Braithwaite, 1993: 15). Giving the courts this capacity may be best achieved by attributing fault directly to an organisation for its culpable omissions or failures to act. Gobert and Punch write (2003: 38–9):

A company has its own distinctive goals, its own distinctive culture, and its own distinctive personality. It is an independent organic entity, and, as such, should be responsible in its own right, directly and not derivatively, for the criminal consequences that arise out of the way that its business is conducted ... What is needed is a theory of criminal liability that captures the distinctive nature of corporate fault ... Typically, the company’s fault will lie in its failure to have put into place protective mechanisms that would have prevented harm from occurring. It is for this failure that the company bears responsibility for the

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765 See also Royal Commission Case Study No 13, the Marist Brothers, which showed that a teacher who had been the subject of allegations of sexual abuse made by 48 different people over many years had been sent to Canada for treatment and had to be extradited from the United States to face charges; see also Truth, Justice and Healing Council, 2014: 19; *Ridsdale* [2014] VCC 285 (offender transferred between parishes); *McArdle*, Unreported, 8 October 2002, Brisbane District Court (offender transferred twice after offences reported to bishop); *Murrin (NSW)* (offender transferred to Rome); *Wright Qld* (transfer to another parish); *Kramer Vic* (employer offered to pay for offender’s return to Israel after some limited admissions); *Dowlan Vic* (transfer to another place); *Walker Vic* (transfer to another parish). The unreported cases are drawn from the database described in Chapter 4.

harm. Recognising that corporate crimes are more often crimes of omission than commission reinforces the poverty of derivative theories of corporate liability that attribute the offences of individuals to a company. While it may be feasible to link wrongful acts to particular actors, it is often impossible to determine who should have done something that was not done. The obligation to put into place systems that would avert crime is collective and the failure to do so is a reflection of the way that the company has chosen to conduct its business.

In the United States, the then Deputy Attorney General Paul McNulty issued a memorandum in 2006 setting out the principles relating to the federal prosecution of business organisations (McNulty, 2006: 4). Although directed at business organisations, its principles can be readily adapted to institutions where CSA has occurred. It recognises the systemic nature of offending and the importance of institutional complicity in offending and its responses to it. The memorandum states that prosecutors must consider the following factors in deciding whether to prosecute or negotiate plea agreements:

- the nature and seriousness of the offence, including the risk of harm to the public
- the pervasiveness of the wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management
- the corporation's history of similar, including prior criminal, civil and regulatory enforcement action against it
- the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents
- the existence and adequacy of the corporation's pre-existing compliance program
- the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies
- collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and the impact on the public arising from the prosecution
- the adequacy of the prosecution of individuals responsible for the corporation's malfeasance
- the adequacy of remedies such as civil or regulatory enforcement actions.

In that country, the institutional nature of criminal conduct has been recognised in other ways. Attempts have been made to invoke the *Racketeer Influenced and Corrupt Organizations Act 1970*, which provides for both civil and criminal sanctions and can be used against individuals and enterprises. Although the Act was originally aimed at organised crime and RICO-type Acts are in force in 31 states, the terms 'racketeering' and 'enterprise' have been broadly defined (Russell, 2003) and now include sex crimes against children as predicate acts (Russell, 2003: 887; see also Morris, 2014). RICO remedies include sanctions such as corporate reorganisation and injunctive relief, which can affect the future activities of the enterprise.



In Australia, the criminal law relating to organisational responsibility for offences committed by persons connected to an organisation or by an organisation itself in relation to CSA is inadequate to the task of holding organisations to account. This is due to problems in attributing the acts of members of organisations to the organisation itself, and the difficulties of determining the nature of corporate fault.

It is notable that when it reviewed offences and sentences for sexual offences in 2008, the Sentencing Council of New South Wales identified a number of gaps or omissions in the criminal law, but made no mention of institutional criminal responsibility for sexual assault. Nor did it discuss the problems of holding organisations criminally responsible for failing to react to such actions or failing to disclose them. The Commission's work has identified these gaps in the law. With sufficient will and legislative creativity the criminal law can be amended so that, in the future, the blame for CSA committed within institutional contexts does not fall solely on the individual who committed it, but can also be attributed to those who ignored, condoned or permitted it to happen, or were wilfully blind to it. Parkinson observes of the Catholic Church's response to CSA:

The Church in Australia ... has claimed to be on a learning curve, along with the rest of society ... but what has become clear through a variety of accounts over recent years is just how much the Church leadership, and in particular bishops or leaders of religious orders, did know about some of these offenders (Parkinson, 2014: 128).

In their December 2014 report on its responses to the Commission's inquiries, the authors acknowledged that a factor contributing to CSA in the Church might have been that:

Church institutions and their leaders, over many decades, seemed to turn a blind eye, either instinctively or deliberately, to the abuse happening within their diocese or religious order, protecting the institution rather than caring for the child (Truth Justice Healing Council, 2014: 23).

There are few, if any, precedents for such reforms. Reform of the civil law relating to institutional responsibility for CSA has proved difficult enough (Royal Commission, 2014a; Royal Commission, 2015). Reform of the criminal law is likely to be even more difficult, given the possibly severe sanctions that may be imposed upon institutions not normally considered to be 'criminal' and the stigma that may be associated with them.

However, not all responses to institutional crime need to be purely punitive. An alternative to both the criminal law and purely civil redress may be a civil penalty regime, similar to that found in corporations and consumer protection laws. Another approach is to adopt a broader view of the role and purposes of the criminal law. Under this approach, the principal purpose of attributing criminal responsibility to institutions for CSA would not be to seek retribution for the behaviour that contributed to, facilitated or failed to respond adequately to criminal conduct,<sup>766</sup> but rather to find the means to induce compliance with the law in the future. The aim of

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766 Although retribution would not be an irrelevant purpose.

this strategy would be to harness an organisation's ability to transform itself and to use the law to require it to do so through appropriately designed sanctions.<sup>767</sup>

The common law has proved inadequate to dealing with organisational responsibility or corporate crime (Clough, 2007: 268). At the state level, few provisions exist similar to those in the *Criminal Code Act 1995* (Cth), Division 12, Part 2.5 that create general principles of corporate liability and none apply to CSA. However, Part 2.5 itself has been rejected as unsuitable in a number of contexts, including federal corporations and competition and consumer laws. If state or territory laws are to respond adequately to CSA in an institutional context they must be created specifically for that purpose and must take account of the disparate organisational structures of those bodies, their decision-making structures and their capacity to respond to the sanctions that may be imposed. The tests used to determine organisational liability must also be workable.

The following analysis identifies four elements central to developing a system of organisational or institutional criminal responsibility in the context of CSA:

1. the definition of an organisation
2. the persons for whom the organisation may be responsible
3. the nature of organisational criminal liability
4. the sanctions that can be imposed upon organisations.

It then proposes a number of offences that might be created to develop new forms of organisational liability for CSA.

## 1. Definition of an Organisation

The first requirement is to identify the body that can be held liable for committing a crime. Historically, these have been limited to bodies that are formally recognised or constituted by the law, such as corporations or other commercial entities. Unincorporated associations, which do not have a separate legal personality, are not usually included in legislation that ascribes corporate liability. However, there is no reason why a wider range of entities should not be held responsible for the criminal conduct of those associated with them if those entities have some continuing and separate identity, albeit one that does not fit comfortably within existing commercial legal taxonomies.<sup>768</sup>

A number of examples exist of how legal liability may attach to organisations other than corporations. The Canadian *Criminal Code 1985* (Can), s 2, for example, extends the meaning of organisation to mean:

- h) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or
- i) an association of persons that

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767 See below p 248.

768 Cf with the difficulties that arise in holding such organisations to account under the civil law, Royal Commission, 2015: 220ff.

- (i) is created for a common purpose
- (ii) has an operational structure
- (iii) holds itself out to the public as an association of persons.

The Tasmanian Law Reform Institute endorsed this definition in its report on the Criminal Liability of Organisations (TLRI 2007, Recommendation 3).

An example of how the definition of an ‘organisation’ can be expanded beyond the traditional definitions can be found in *Crimes Act 1958 (Vic)*, s 49C(1)<sup>769</sup>, where, for the purposes of the offence of failing to protect a child from a sexual offence, a ‘relevant organisation’ is defined as meaning:

- (a) an organisation that exercises care, supervision or authority over children, whether as part of its primary functions or otherwise and includes but is not limited to (i) a church and (ii) a religious body; and (iii) a school; and (iv) an education and care service within the meaning of the Education and Care Services National Law (Victoria); and (v) a children’s service within the meaning of the Children’s Services Act 1996; and (vi) an out of home care service within the meaning of the Children, Youth and Families Act 2005; and (vii) a hospital; and (viii) a government department; and (ix) a government agency; and (x) a municipal council; and (xi) a public sector body; and (xii) a sporting group; and (xiii) a youth organisation; and (xiv) a charity or benevolent organisation; or (b) an organisation that, in accordance with an agreement or arrangement with an organisation referred to in paragraph (a), is required to or permitted to engage in activities associated with the care, supervision or authority over children exercised by the organisation referred to in paragraph (a).

Both these definitions are sufficiently extensive to include many of the organisations and institutions in which CSA took place.

The Letters Patent establishing the Commission have adopted an extensive definition of ‘institution’, namely:

- ... any public or private body, agency, association, club, institution, organisation or other entity or group of entities of any kind (whether incorporated or unincorporated), and however described and;
- (i) includes, for example, an entity or group of entities (including an entity or group of entities that no longer exists) that provides, or has at any time provided, activities, facilities, programs or services of any kind that provide the means through which adults have contact with children, including through their families.

The *Crimes Act 1900 (ACT)*, s 49A, for the purposes of the offence of industrial manslaughter, extends the scope of liability for this offence to employers<sup>770</sup>,

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769 Inserted by the *Crimes Amendment (Protection of Children) Act 2014 (Vic)* (to commence on proclamation or on 1 July 2015 if that does not occur).

770 An employment relationship will exist if the worker is engaged as a worker or agent of the employer. A worker may be an employee, independent contractor, outworker, apprentice or trainee or a volunteer. An agent is a person engaged by a person to provide services to that person in relation to which that person has control or would have had control apart from an agreement between that person and the agent.

governments or government entities. Governments or government entities that have responsibility for the care of children, as many do, should not be able to claim Crown immunity.

Thus, it would appear that there is sufficient legal precedent to define an organisation in such a way as to include those that are not presently considered organisations for other purposes, for example under the civil law for compensation, and would be wide enough to overcome an Ellis-type defence.<sup>771</sup>

## 2. Persons for Whom the Organisation may be Responsible

Existing criminal provisions, such as those in the *Criminal Code 1995* (Cth) that refer to the physical elements of a crime (the actus reus), apply generally to the acts of ‘an employee or agent or person acting in the actual or apparent scope of their authority’ to the organisation, while the fault elements refer to ‘high managerial agents’ or directors.<sup>772</sup>

In the civil law context, the employment status of those convicted of CSA has been problematic. The employment status of the clergy is ambiguous. It appears that Anglican and Catholic clergy hold an office in the Church, but the Church does not employ them, even though the Church may be responsible for such matters as taxation and insurance.<sup>773</sup> In addition, in many cases of CSA within an institutional context, the persons who commit the offence are not formally employees or agents and their actions cannot readily be described as being within the scope of their actual or apparent authority. However, the Canadian and United Kingdom cases discussed above provide considerable scope for providing a different understanding of the meaning of actions that may be considered to be within the scope of actual or apparent authority. These could form the basis of a statutory provision, requiring instead, a test along the lines that there is a relevant relationship if there was ‘a material increase in the risk of harm occurring in the sense that the employment significantly contributed to the occurrence of the harm’.<sup>774</sup>

The Letters Patent point to a broadening of the scope of those who might be considered liable by referring to an ‘official of an institution’ rather than an employee or agent and the expanded definition of ‘employee’ in the *Crimes Act 1900* (ACT) also provides a precedent for the grounds of liability.

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771 *Trustees of the Roman Catholic Church v Ellis and Another* [2007] NSWCA 117. For a view of the need for redress from the point of view of the unsuccessful plaintiffs in this case see Ellis and Ellis, 2014.

772 This has been defined as meaning a representative of the organisation, or group of such persons (such as the board of directors of a body corporate) with duties of such responsibility that his, or her or their conduct may fairly be assumed to represent the organisation’s policy, *Criminal Code* (Cth), s 12.3.

773 A similar ambiguity is evident in the relationship between police officers and the police force. In the latter case, at common law, members of the police force are not employees in the strict sense but are independent office holders exercising original authority in the execution of their duties, though senior officers are now generally employed on contract (Carabetta, 2003). There is some question as to whether they in fact enjoy a dual status.

774 *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256 at [53] per Lord Neuberger MR citing *Jacobi v Griffiths* [1999] 2 SCR 570; (1999) 174 DLR (4th) 71 [79]; see also *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938; *The Catholic Child Welfare Society and others (Appellants) v Various Claimants (FC) and the Institute of the Brothers of the Christina Schools and others (Respondents)* [2012] UKSC 56.

The TLRI has suggested that the terms 'employee, agent or officer' should be replaced by the term 'representative', which could extend to contractors or persons who can be generally described as doing the work of an organisation (TLRI, 2007: 44). The Canadian *Criminal Code* (1985), s 2, defines a representative in respect of an organisation as meaning a 'director, partner, employee, member, agent or contractor of the organization' that also has the effect of expanding the category of person for whom an organisation may be responsible.

The *Crimes Act 1958* (Vic), s 49C(1) defines a person 'associated with an organisation' for the purposes of the offence of failing to protect a child from a sexual offence as including, but not limited to 'a person who is an officer, office holder, employee, manager, owner, volunteer, contractor or agent of the organisation but does not include a person solely because the person receives services from the organisation'.

There would thus appear to be scope to extend or replace the traditional notions of vicarious liability to include persons who are not employees or agents of the organisation but who are more broadly associated with it or may be deemed to represent it.

### **3. Organisational Criminal Liability**

There are two broad models of organisational criminal liability: the derivative model and the direct liability model. The derivative model, based on concepts of the vicarious liability of a person for the acts of another, draws from civil law principles, whereas the direct liability model looks at the organisation as a separate entity with an ability to act and make decisions independently of its employees.

At common law, a crime usually has two elements, a physical element or actus reus and a fault or mental element, the mens rea. Both have to be proved beyond a reasonable doubt for there to be a conviction.

#### **Direct responsibility**

The difficulties of holding an institution criminally liable under provisions that might hold it vicariously or directly responsible for the intentional acts of its employees or agents are apparent in the very few prosecutions of organisations under state or federal law. However, a number of conceptual approaches may result in institutions being directly liable and they might be procedurally practical and politically defensible. These can be found in offences based on negligence relating to failing to protect persons in care or failing to disclose offences. So, rather than attempting to employ the doctrine of vicarious responsibility to attribute the acts of an employee or agent to an organisation, it would be preferable to hold an organisation directly responsible for failing to act reasonably in the circumstances. This approach has been proposed by Colvin who has argued that it is the negligence of the organisation that should create the necessary connection not the scope of employment (1995: 1; Beaton-Wells and Fisse, 2011: 243). He states:

There is ... no place for requirements relating to the scope of employment or authority in the model of corporate liability based directly on corporate

negligence. Corporate negligence itself provides the necessary connection between the defendant corporation and the conduct for which it is liable. The test of reasonable foreseeability identifies the harms against which a corporation must take safeguards. If there is a foreseeable risk that unjustifiable harm may occur as a result of a corporation's operations, the corporation should be under a duty to guard against that risk and be potentially liable for breach of that duty. It is immaterial whether or not the harm occurs when a corporate representative is acting within the scope of her employment or authority. Indeed, it is immaterial whether or not the conduct elements of the offense can be assigned to any individual. It is sufficient that they occur.

The justification for this attribution of responsibility lies in the fact that an organisation may have a greater capacity to prevent the commission of an offence than an individual and that, where the organisation is itself 'criminogenic', blame should be directed 'not at individual actors but rather toward an institutional set-up from which the standards of organisational performance expected are higher than those expected of any personnel' (Fisse and Braithwaite, 1993: 30).

What follows are proposed offences that attempt to avoid the fruitless historical distinctions between direct and vicarious responsibility, but which focus on an organisation's duty to 'ensure that reasonable care is taken', as well as its duty to take reasonable care (Royal Commission, 2015: 214).<sup>775</sup>

#### ***A new offence: being negligently responsible for the commission of a CSA offence***

The following formulation, based on the *Criminal Code* (Cth), s 12.4(3), would create an offence of being negligently responsible for the commission of an offence. This offence is based on a prior conviction of a CSA offence but, in addition to the conviction of the individual, it seeks to hold the organisation responsible as well.

1. Where a person has been convicted of an offence of child sexual assault<sup>776</sup> and that person is associated<sup>777</sup> with that organisation/institution;<sup>778</sup> and
2. the organisation/institution has provided inadequate corporate management, control or supervision of the conduct of one or more of the persons associated with the organisation/institution;<sup>779</sup> or

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775 Referring to *Leighton Contractors Pty Ltd v Fox (Leighton)* (2009) 240 CLR 1.

776 Defined in a relevant Schedule.

777 A person associated with an organisation includes, but is not limited to, a person who is an officer, office holder, employee, manager, owner, volunteer, contractor or agent of the organisation, but does not include a person solely because the person receives services from the organisation, *Crimes Act 1958* (Vic), s 49C(1).

778 The definition of an institution is 'any public or private body, agency, association, club, institution, organisation or other entity or group of entities of any kind (whether incorporated or unincorporated), and however described'.

779 Examples of this type of conduct may include failure to provide adequate training for teachers or inadequate supervision; (*Murrin NSW*; Marist teacher inadequately supervised, Database); *Wright Qld*: lack of organizational support in role of a parish priest, Database); failure to provide counselling or therapy or to ensure that such counselling or therapy was in fact undertaken; *Wright Qld*: (absence of facilities or system to provide treatment or counseling, Database).

3. failed to provide adequate systems for conveying relevant information to one or more of the persons associated with the organisation/institution<sup>780</sup>

that organisation/institution is guilty of the offence of permitting/causing a child sexual assault.

An organisation/institution may be guilty of an offence if its conduct fails to meet the requisite standards specified in (2) and (3) when viewed as a whole.

The 'requisite standard' is that there has been a great falling short of the standard of care that a reasonable organisation/institution would exercise in the circumstances that the conduct merits criminal punishment.<sup>781</sup>

Although the predicate offence in this case is an intentional act (CSA), the organisation's direct responsibility is based on failing to meet the requisite standards expected of a reasonable organisation in the circumstances.

Another formulation of this offence might read as follows:

An organisation commits an offence if:

- a) a person associated<sup>782</sup> with the organisation<sup>783</sup> is convicted of an offence of child sexual assault;<sup>784</sup> and
- b) the organisation was negligent as to whether that person would commit an offence of child sexual assault against a child; and
- c) the commission of the offence mentioned in paragraph (a) was substantially attributable to the negligent conduct covered by paragraph (b).

An organisation is negligent if its conduct involves:

- a) such a great falling short of the standard of care that a reasonable

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780 A civil law analogy to this provision can be found in the case of *S v Corporation of the Synod of the Diocese of Brisbane* [2001] QSC 473, where by a civil jury upheld a negligence claim in which the claimant argued that the corporation had 'failed to create and maintain proper systems in place to take care of boarders and that the headmaster had failed to recognise and act on complaints and that other employees had failed to sufficiently voice their concerns', Royal Commission, 2015: 210.

781 See *Criminal Code* (Cth), ss 12.4(1) and 5.5. This criminal conception of negligence differs from the civil law of negligence that requires duty, breach and damage. The question of what the standard of care is for the proposed offences is provided for in the suggested legislation; cf Royal Commission, 2015: 207ff. Under the civil law of negligence, the defendant must owe the claimant a duty of care that requires reasonable foreseeability of the risk of harm. Under these provisions the negligence relates to the organisation's conduct relating to the person associated with the organisation rather than to the foreseeability of the harm caused to the victim of the crime. Another approach to holding an organisation liable in negligence for the acts of others can be found in the *Criminal Code 1985* (Canada), s 22.1(b) that provides that 'In respect of an offence that requires the prosecution to prove negligence, an organization is party to the offence if (b) the senior officer who is responsible for the aspect of the organization's activities that is relevant to the offence departs – or the senior officers, collectively, depart markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence.'

782 A person associated with an organisation includes, but is not limited to, a person who is an officer, office holder, employee, manager, owner, volunteer, contractor or agent of the organisation, but does not include a person solely because the person receives services from the organisation, *Crimes Act 1958* (Vic), s 49C(1).

783 The definition of an institution is 'any public or private body, agency, association, club, institution, organisation or other entity or group of entities of any kind (whether incorporated or unincorporated), and however described'.

784 Defined in a relevant Schedule.

organisation would exercise in the circumstances; and

b) such a high risk that an offence of child sexual assault may occur;

that the conduct merits criminal punishment for the offence.<sup>785</sup>

In his evidence to the Royal Commission, Cardinal George Pell drew an unfortunate analogy between the Church and a trucking company, arguing that a trucking company should not be held responsible for acts of drivers who might commit offences on the road. He said:<sup>786</sup>

If the truck driver picks up some lady and then molests her, I don't think it's appropriate – because it is contrary to the policy – for the ownership, the leadership of that company to be held responsible.

Some viewed the analogy as inappropriate or even ludicrous (and insulting to truck drivers). In fact, the United Kingdom Law Commission anticipated a similar situation in 1996 (cited in Clough, 2007: 296–7):

... a truck driver causes death by dangerous driving in the course of his or her employment. This would not, of itself, involve a management failure. If, however, it was found that the death occurred because the driver was over-tired due to the requirement to work excessive hours, this could be due to a management failure for which the company could be liable, assuming that failure fell far short of what would be reasonably expected in the circumstances.

So, while it may be contrary to the stated policy of an organisation for an employee to drive dangerously, or molest a passenger, if it can be shown that there has been an organisational failure to respond to previous instances that may have come to its attention, then there may be good grounds, based on negligence, upon which to hold that organisation responsible.

### **Criminal liability for failure to protect**

Another negligence-based response that holds an organisation directly responsible for CSA committed in an institutional context is one based on a duty to protect a child.<sup>787</sup> Two legislatures have enacted laws that deal with specific risks to children.

#### ***South Australia***

Under the *Criminal Law Consolidation Act 1935 (SA)*, s 14, it is an offence for a

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785 These standards will apply to offences committed after the introduction of any such provisions. Older standards, pre-dating the offences will, therefore, not be relevant, cf Royal Commission, 2015: 209 (historical standards apply to determine what precautions a reasonable person would have taken at the time of the alleged negligence).

786 Royal Commission transcript, 21 August 2014, C4509.

787 A number of cases exist in the Database that were compiled by the authors (see Chapter 4) of individual and organisational failures to protect. Such failures may involve failure to take seriously, or to respond to a contemporaneous complaint of sexual assault (eg *Egan NSW*: complaint by child to a nun, which was referred to a senior nun was not believed and the child was disciplined for making the complaint; *Sutton NSW*: no action on complaint; *Evans NSW*: no action on complaint; *Lyons Vic*: no action by school authorities when conduct disclosed); allowing an offender who had served a sentence of imprisonment for a CSA to return to the ministry where further offending occurred (Dennis, South Australia, Database).



person who has a duty of care<sup>788</sup> to a child and who was, or ought to have been, aware that there was an appreciable risk that serious harm would be caused to the victim by an unlawful act, to fail to take steps that he or she could reasonably be expected to have taken in the circumstances to protect the victim from harm. The defendant's failure must, in the circumstances, be so serious that a criminal penalty is warranted. If the victim suffers serious harm, the maximum penalty is imprisonment for five years.

### **Victoria**

Under the *Children, Youth and Families Act 2005* (Vic), s 49(3) (and its predecessor legislation), it is an offence for a person who has a duty of care to a child to intentionally fail to act that has resulted, or appears to have resulted, in significant harm to the child's physical development or health. The maximum penalty for the offence is 50 penalty units or imprisonment for not more than 12 months.<sup>789</sup>

As a result of the Victorian Parliament's Family and Community Development Committee Report, a new section was enacted in 2014 in the *Crimes Act 1958* (Vic) that makes it a criminal offence for a person in authority to fail to protect a child from a sexual offence.

Section 49C(2) of the *Crimes Act 1958* (Vic) provides that a person who:

- a) by reason of the position he or she occupies within a relevant organisation<sup>790</sup>, has the power or responsibility to reduce or remove a substantial risk that a relevant child will become the victim of a sexual offence committed by a person of or over the age of 18 years who is associated with the relevant organisation<sup>791</sup>; and
- b) knows that there is a substantial risk that that person will commit a sexual offence against a relevant child –

must not negligently fail to reduce or remove that risk.

The maximum penalty for the offence is five years' imprisonment.

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788 A person has a duty of care if they have assumed responsibility for the victim's care, *Criminal Law Consolidation Act 1935* (SA), s 14(3).

789 This provision is rarely used, with only 15 recorded alleged offences between 1 July 2000 and 30 June 2010 (Victoria, Parliamentary Library, 2014: 8).

790 A relevant organisation means (a) an organisation that exercises care, supervision or authority over children, whether as part of its primary functions or otherwise and includes but is not limited to (i) a church and (ii) a religious body; and (iii) a school; and (iv) an education and care service within the meaning of the *Education and Care Services National Law* (Victoria); and (v) a children's service within the meaning of the *Children's Services Act 1996*; and (vi) an out of home care service within the meaning of the *Children, Youth and Families Act 2005*; and (vii) a hospital; and (viii) a government department; and (ix) a government agency; and (x) a municipal council; and (xi) a public sector body; and (xii) a sporting group; and (xiii) a youth organisation; and (xiv) a charity or benevolent organisation; or (b) an organisation that, in accordance with an agreement or arrangement with an organisation referred to in paragraph (a), is required to or permitted to engage in activities associated with the care, supervision or authority over children exercised by the organisation referred to in paragraph (a).

791 A person associated with an organisation includes, but is not limited to a person who is an officer, office holder, employee, manager, owner, volunteer, contractor or agent of the organisation but does not include a person solely because the person receives services from the organisation, *Crimes Act 1958* (Vic), s 49C(1).

Section 49C(3) provides that a person negligently fails to reduce or remove a risk if that failure involves a great falling short of the standard of care that a reasonable person would exercise in the circumstances.

The Victorian provision applies only to individuals, not to the organisation itself, though, as the then Victorian Attorney-General stated in his second reading speech, 'One of the key aims of this offence is to promote cultural change in how organisations deal with the risk of sexual abuse of children under their care, supervision or authority' (Victoria, Hansard, 26 March 2014: 914). It would not be difficult to create direct organisational responsibility for a failure to protect a child by extending such offences to organisations or institutions that have a duty of care to a child and that negligently fail to protect that child. This offence could be cast along the following lines:

***A new offence: negligently failing to remove a risk of child sexual assault***

An organisation commits an offence if:

- (a) it exercises care, supervision or authority over children; and
- (b) a person associated with the organisation commits<sup>792</sup> a sexual offence against a child over which it exercises care, supervision or authority; and
- (c) the organisation is negligent as to whether that person would commit a sexual offence against such a child.

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792 The term used here is 'commit' an offence rather than 'is convicted of an offence' to cover those situations where the alleged offender may have died or is out of the jurisdiction.

An organisation negligently fails to reduce or remove a risk if that failure involves a great falling short of the standard of care that a reasonable organisation would exercise in the circumstances.

### **Reactive organisational fault**

One of the Commission's Terms of Reference relates to institutional responses to reports or information about allegations, incidents or risks of CSA. The Commission is primarily concerned with examining how to develop effective institutional responses in the future in the light of past experience, and identifying obstacles to effective responses (Royal Commission, 2014, Vol 1: 165). Although the criminal law cannot be the primary public policy response, it can function as an exhortatory or denunciatory tool that may reinforce the responsibility of organisations to act once offending conduct, or the risk of it, has been exposed.

Thus, the behaviour of an organisation once it has become aware of offending conduct by its staff could provide an independent basis of culpability and criminal liability. The concept of reactive corporate fault has been defined as an 'unreasonable corporate failure to devise and undertake satisfactory preventive or corrective measures in response to the commission, by the personnel acting on behalf of the organization, of the actus reus of the offence' (Fisse, 1983: 1183ff; Fisse and Braithwaite, 1993: 48–49; Clough and Mulhern, 2002:143). Such behaviour may take the form of failing, or delaying reporting an offence to the authorities<sup>793</sup>, actively covering up known offending (Morris, 2014: 305), recklessly allowing possible offending conduct, or failing to create or maintain effective communication or compliance programs.

More than two decades ago, Fisse comprehensively described a model of reactive corporate fault that focused upon the element of corporate unresponsiveness to its own actions or the actions of others for whom it has responsibility (Fisse, 1991). He justified making reactive fault an independent basis of organisational liability on two grounds: first that it identified an organisation's response to having committed an offence as being a more important factor than its behaviour at the time of committing an offence, and secondly that it would be easier for enforcement authorities to prove that fault at or before the commission of the external elements of the offence (Fisse, 1991: 285). More pertinently and presciently, in light of the mounting evidence of organisations' failures to react to reports of CSA and the public outrage that has resulted in the establishment of a number of commissions of inquiry around world, he cited the 'strength of communal attitudes of resentment toward corporations that stonewall or otherwise fail to react diligently when their attention is drawn to problems of unjustified harm-causing or risk-taking' as a justification for this form of organisational culpability (Fisse, 1991: 285).

An offence based upon organisational reactive fault would be difficult to frame, but it would require proof of:

- (a) the commission of an offence by a person associated with the organisation (though not necessarily that the person had been convicted of an offence);

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793 See discussion below p 244 regarding offences relating to failing to disclose.

- (b) knowledge or recklessness as to the commission of the offence by the organisation or high managerial agent; and
- (c) unreasonable organisational failure to devise and undertake satisfactory preventive or corrective measures in response to the commission of the offence by the person associated with the organisation.

### **Criminal liability for concealing offences**

The Commission has noted a number of cases in which persons in authority had failed to report suspected abuse to law enforcement authorities<sup>794</sup> and the Truth, Justice and Healing Council of the Catholic Church has acknowledged that some Church leaders concealed what they knew of sexual abuse, moved perpetrators from diocese to diocese or overseas and failed to report offences to the police (Truth, Justice and Healing Council, 2014: 21).

Most jurisdictions have provisions requiring reports be made if a specified person has reasonable grounds to believe that a child is being sexually abused. These mandatory reporting laws are usually restricted to health professionals, individuals working in educational institutions, police officers, childcare staff, public servants who work with children and persons who hold management positions in organisations that provide services to children (Australian Institute of Criminology, 2013; Mathews, 2014). Both the Cummins inquiry and the Victorian Parliamentary inquiry recommended that the mandatory reporting requirements be extended to religious personnel (Victoria, Parliamentary Library, 2014: 10).

A number of general provisions also exist that make it an offence to conceal an offence. Some are conditional on the person concealing in return for a benefit, which limits their application.<sup>795</sup> However, two Australian jurisdictions have specific offences dealing with CSA:

#### ***Northern Territory***

Under the *Care and Protection of Children Act* (NT), s 26, it is an offence for a person who believes, on reasonable grounds, that a child has suffered or is likely to suffer harm or exploitation, or that a child under the age of 14 years has been or is likely to be a victim of a sexual offence, or has been or is likely to be a victim of an offence under *Criminal Code* (NT), s 128<sup>796</sup> to fail to report this fact to a police officer or the CEO of the department administering the Act.

#### ***Victoria***

Under the *Crimes Act 1958* (Vic), s 327(2), it is an offence to fail to disclose a sexual offence committed against a child under the age of 16. Subject to subsections (5) and (7), a person of or over the age of 18 years (whether in

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794 See example, Case Study 6, Diocese of Toowoomba Primary School, in which the former Bishop of Toowoomba had admitted to failing to report suspected abuse to the police; see also Truth, Justice and Healing Council, 2014: 17; Ayles, South Australia (failure by the Anglican Church to report offences when the evidence of offending came to light, Database).

795 See example, *Crimes Act 1958* (Vic), s 326(1); *Crimes Act 1900* (NSW), s 316(1) in relation to serious indictable offences.

796 Offences relating to sexual intercourse with, or gross indecency on a child under the age of 16.

Victoria or elsewhere) who has information that leads the person to form a reasonable belief that a sexual offence has been committed in Victoria against a child under the age of 16 years by another person of or over the age of 18 years must disclose that information to the Victorian police as soon as is practicable, unless the person has a reasonable excuse<sup>797</sup> for not doing so.

It is not a reasonable excuse to fail to comply with the legislation that the person is concerned with the perceived interests of the person reasonably believed to have committed, or have been involved in, the sexual offence or any organisation.<sup>798</sup>

The maximum penalty for this offence is three years' imprisonment.<sup>799</sup>

This offence could also be adapted so that the term 'a person' could refer to an organisation or institution.

### **Ireland**

Following the revelations of a number of inquiries into sexual abuse of children in the Catholic Church in Ireland, the Parliament passed the *Criminal Justice (Withholding of Information against Children and Vulnerable Adults) Act 2012* (Ireland). Under this Act, it is an offence for a person who knows or believes that an offence<sup>800</sup> has been committed by another person against a child and has information that they know might be of material assistance in securing the apprehension, prosecution or conviction of that person for that offence to fail, without reasonable excuse, to disclose that information to the police. The legislation provides that there is no exemption in relation to information obtained in confession.<sup>801</sup>

### **Direct responsibility for the acts of another person**

Conceptually, the most difficult means of holding an organisation or institution directly responsible would be to attempt to attribute the acts of the primary offender to the organisation on the basis that the organisation expressly, tacitly or impliedly authorised or permitted the commission of the offence.<sup>802</sup> This approach is an adaption of the *Criminal Code 1995* (Cth), Part 2.5, which provides that corporations may be found guilty of any offence and that the requisite mens rea can be attributed to a corporation if it expressly, tacitly or impliedly authorised or permitted the commission of the offence. An employee, agent or officer of a body corporate acting

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797 Section 327(3) *Crimes Act 1958* (Vic) provides that (a) A person has a reasonable excuse if he or she fears on reasonable grounds for the safety of any person (other than the person reasonably believed to have committed, or to have been involved in, the sexual offence) were the person to disclose the information to police (irrespective of whether the fear arises because of the fact of disclosure or the information disclosed) and the failure to disclose the information to police is a reasonable response in the circumstances; or (b) the person believes on reasonable grounds that the information has already been disclosed to police by another person and the first mentioned person has no further information.

798 Section 327(4)(a) and (b) *Crimes Act 1958* (Vic). The 'interest' includes reputation, legal liability and financial status, and an 'organisation' includes a body corporate or an unincorporated body or association, whether the body or association is based in or outside Australia or is part of a larger organisation, Section 327(1) *Crimes Act 1958* (Vic).

799 This provision is rarely used. Both the Victorian Sentencing Advisory Council's SACStat databases for the higher courts and the Magistrates' Court fail to show sufficient cases to register on the website.

800 The legislation specifies a number of serious offences to which this provision applies.

801 See (Victoria, Parliamentary Library, 2014: 21). In a number of United States jurisdictions, the confessional exemption has been rejected from mandatory reporting laws (Hamilton, 2014: 409–10).

802 *Criminal Code 1995* (Cth), s 12.3(2).

within the actual or apparent scope of his or her employment or authority must commit the physical elements of an offence.<sup>803</sup>

Authorisation or permission can be proved in four ways:<sup>804</sup> These are:

- a) where the body corporate's board of directors intentionally, knowingly, or recklessly carried out the relevant conduct, or expressly, tacitly, or impliedly authorised or permitted the commission of the offence
- b) where a high managerial agent of the body corporate intentionally, knowingly, or recklessly engaged in the relevant conduct, or expressly, tacitly, or impliedly authorised or permitted the commission of the offence
- c) where a corporate culture existed within the corporation that directed, encouraged, tolerated or led to non-compliance with the relevant provision
- d) where the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

Sub-sections (a) and (b) probably have less application to the institutions involved in CSA as there is unlikely to be a board of directors or high managerial agent<sup>805</sup> with sufficient control over an organisation. However, what may be of relevance in the first two heads of fault is that a board, or high managerial agent 'tacitly, or impliedly authorised or permitted the commission of the offence'. This is a lower and more diffuse standard but one that more readily describes the conduct of institutions that knew of CSA, or were aware of allegations of CSA and did nothing about them, or actively avoided formal legal investigations that may have halted such behaviour. Clough argues that a prosecution is more likely to be successful on the basis of 'tacit or implied authority' or situations where permission may be inferred, for example where the offending conduct was tolerated (Clough, 2007: 281).

More relevant in the context of CSA within an institutional context are the two grounds of liability that are based on the concept of a 'corporate culture'. Corporate culture is defined as including attitudes, policies, rules or a course of conduct within the body corporate generally or in part of the body corporate in which the relevant activity takes place.<sup>806</sup> It is a concept that was intended to cover situations where there is a disparity between an organisation's written or formal rules and its practices and where those practices resulted in non-compliance with the law. Clough (2005: 119) writes:

This 'corporate personality' or 'corporate culture' is seen both formally, in the

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803 See above p 237 regarding the means of expanding this provision.

804 *Criminal Code 1995* (Cth), s 12(3)(2).

805 This is defined as meaning a representative of the organisation, or group of such persons (such as the board of directors of a body corporate) with duties of such responsibility that his or her or their conduct may fairly be assumed to represent the organisation's policy, *Criminal Code* (Cth), s 12.3.

806 *Criminal Code* (Cth), 12.3(6).

company's policies and procedures, but also informally. It is a dynamic process with the corporate culture affecting the actions of individuals, and the actions of individuals affecting the corporate personality. Corporate culture may exist independently of individual employees or officers and may continue to exist despite changes in personnel ...

In the Catholic Church, the 'corporate culture' that may have contributed to CSA within its ranks has been described as 'clericalism', identified as 'approaches or practices involving ordained ministry geared to power over others, not service to others' (Truth, Justice and Healing Council, 2014: 23; see also Parkinson, 2014: 129–30).

However, the concept of corporate culture has been criticised as being unworkable as a basis for holding organisations to account. There are problems in proving the existence of a culture, difficulties in applying it to organisations that may be widely dispersed and which have fragmented management structures and varying sub-cultures<sup>807</sup>, and the danger that 'official' cultures may not reflect day-to-day 'views, attitudes, habits and proclivities' within an organisation (Beaton-Wells and Fisse, 2011: 232). It is probably for these reasons that Part 2.5 has been excluded from operating in the *Corporations Act 2001* (Cth) and the *Competition and Consumer Act 2010* (Cth).

Very few of the existing provisions for organisational responsibility have been tested in the courts. The concepts that have been created are novel and because their reach is potentially broad, have been resisted by the corporate world and even by governments that might be held accountable for their negligent acts under such laws.<sup>808</sup>

### ***A new offence: Institutional child sexual abuse***

Because of the difficulties of applying existing criminal law principles to CSA committed in an institutional context, a new offence might be created that takes into account the analogies suggested by the civil law cases relating to CSA. It might take this form:

An organisation commits an offence if:

1. A person associated<sup>809</sup> with the organisation<sup>810</sup> is convicted of an offence of child sexual assault;<sup>811</sup> and
  - a) the organisation, or a high managerial agent of the organisation, recklessly authorised or permitted the commission of that offence by

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807 Evidence of Chief Justice Gleeson to the Senate Legal and Constitutional Committee on the *Criminal Code Bill 1994* and *Crimes Amendment Bill 1994* cited in Allens Arthur Robinson 2008: 13).

808 Eg in response to the *Crimes (Industrial Manslaughter) Act 2003* (ACT), which applied the principles of the Commonwealth Criminal Code to the offence of manslaughter, the Commonwealth government legislated to exempt its employers and employees from its provisions: Sarre, 2010: 7).

809 The definition of 'associated with' would be similar to that in the *Crimes Act 1958* (Vic), s 49C(1).

810 The definition of an institution is 'any public or private body, agency, association, club, institution, organisation or other entity or group of entities of any kind (whether incorporated or unincorporated), and however described'.

811 Defined in a relevant Schedule.

that person.

2. The means by which such authorisation or permission may be established include proving that the managing body of the institution or a high managerial agent:<sup>812</sup>
  - a) expressly, tacitly, or impliedly authorised or permitted the commission of the offence; or
  - b) a corporate culture existed that tolerated or led to the commission of the CSA offence; or
  - c) failed to create and maintain a corporate culture that would not tolerate or lead to the commission of the CSA offence.

It is a defence to such an offence for the organisation to show that it had adequate corporate management, control or supervision of the conduct of one or more of the persons associated with the organisation; or provided corporate management, control or supervision of the conduct of one or more of the persons associated with the organisation.

There are a number of legislative provisions that provide for a defence of corporate reasonable precautions and due diligence<sup>813</sup> and while it is appropriate to exonerate an organisation that can demonstrate that it has not been negligent, Beaton-Wells and Fisse (2011: 234ff) argue that a defence of corporate reasonable precautions and due diligence may be too easy to establish. Corporations may put in place compliance programs that appear to be credible, but lack operational substance and have no effect on the behaviour of the members of the organisation (Edelman et al., 2011). Secondly, corporations may too readily and easily argue that they were the victims of rogue behaviour. Their suggested reforms to the defence of corporate reasonable precautions and due diligence would require an organisation to rebut a presumption that 'conduct of the kind alleged would not have occurred, or would have been unlikely to occur, if reasonable precautions had been taken and due diligence had been exercised' and to establish that it did in fact take reasonable precautions and exercise due diligence to prevent the commission of the conduct alleged (Beaton-Wells and Fisse, 2011: 237). The defence would have both the evidentiary and persuasive burden of proof.

#### **4. Sanctions that can be Imposed upon Organisations**

The final component of a comprehensive system of institutional responsibility for CSA is the development or application of a range of sanctions that are appropriate and effective for organisations that have been involved in CSA. Chapter 2 presented a discussion of traditional aims of the criminal law as they apply to individuals and some apply equally to organisations.

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812 See *Criminal Code 1995* (Cth), s 12.3.

813 See example, *Competition and Consumer Act 2010* (Cth), ss 44ZZO; 152EO; *Banking Act 1959* (Cth), s 6B; *Proceeds of Crime Act 2002* (Cth), s 4: see generally Beaton-Wells and Fisse, 2011: 234ff.



## **Retribution, denunciation and organisations**

Fisse and Braithwaite (1993: 44ff) and Beaton-Wells and Fisse (2011: 218) have argued that retributive and denunciatory theories are as applicable to organisations as they are to individuals. Organisations, they suggest, are responsible agents that can be blamed for their corporate actions, and in fact may be more responsible than individuals if a number of actors have made decisions. If it can be proved that they have been culpable due to negligence or their corporate culture, and that by their actions they have harmed society, then the imposition of some form of sanction, even by way of community service or corporate probation rather than imprisonment or fine, can provide a moral justification for ascribing blame. While issues of proportionality may be problematic in the absence of traditional criminal sanctions such as imprisonment, and while the imposition of fines upon not-for-profit organisations may have spill over effects upon members of such organisations who may have contributed their time and money to the organisation, other sanctions such as corporate probation, punitive injunctions or community service, together with the public denunciation of the conduct, the recording of a conviction against their name, together with any adverse publicity that may attach, may comprise a significant element of punishment.<sup>814</sup>

## **Deterrence: individuals and organisations**

In the institutional or organisational context there is an argument that targeting individuals is more appropriate than targeting the organisation itself, partly because it may be easier to identify one individual out of many who may have contributed to the offending behaviour and partly because individual responsibility, and the sanctions that may follow, are more readily understood by jurors and the public.

However, focusing upon organisational responsibility has a number of advantages in terms of deterrence and organisational change. It recognises that the organisation itself, its culture, policies and practices may have been criminogenic, and it is these cultures, policies and practices that must change if the behaviour of individuals in that organisation is to change (Beaton-Wells and Fisse, 2011: 217). This approach also recognises that individuals may be transient and expendable (Fisse and Braithwaite, 1993: 39). Offenders may be scapegoated while the organisation remains unreformed. However, focusing upon offending individuals, who might be transferred overseas or to other organisational units, or given safe harbour or hidden within a large institution, may be ineffective.

By contrast, corporate liability provides an incentive for management to undertake responsive organisational change whatever the proximity or remoteness of that management's connection with the events giving rise to prosecution (Fisse and Braithwaite, 1993: 40).

Organisations cannot be imprisoned, and even for individuals, imprisonment is only partially effective as a deterrent (Sentencing Advisory Council, Victoria, 2011). Imposing fines on not-for-profit institutions that may not be able to pay, and which

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814 See below p 250ff.

only enriches the state, is likely to be ineffective as a deterrent, as well as depriving the institution of the means of implementing organisational change.

Institutions, as well as individuals, are deterrable in the sense that they have a collective interest that they wish to protect. In relation to the institutions that are involved in CSA, their interests may not be economic, but rather reputational and the threat of sanctions should be catalyst for internal reform. Accordingly, deterrence of organisational misconduct is more likely to be achieved through sanctions that impose social stigma, such as adverse publicity, and through sanctions such as probation orders or punitive injunctions that require internal managerial reform.<sup>815</sup>

The criminological and regulatory literature that has examined pure deterrence-based approaches to organisational compliance has concluded that they are generally ineffective in achieving their purposes (Sentencing Advisory Council, Victoria, 2012). Oded (2013, 27 & 47) writes<sup>816</sup>:

The deterrence-based enforcement approach hinges upon the rationality of agents, thereby perceiving the role of enforcement systems as a mechanism ensuring that amoral regulatees find it in their best interests to obey the law. The 'by the book' approach seeks to coerce compliance through an optimal combination of detection and sanctioning that produces just the right level of deterrence. As such, the deterrence-based enforcement approach endorses a confrontational style of enforcement, under which would-be violators may anticipate that they will be detected and sanctioned in a manner that makes law-breaking undesirable from a private perspective ...

... a practical implication of the deterrence-based enforcement approach requires a prudent evaluation of its weaknesses. Such weaknesses include: the high cost of enforcement associated with the regulatory 'cat-and-mouse' game endorsed by this approach; the potential alienation of regulatees; challenges involved in determining the optimal probability of detection and sanctions; and the inability to cope with the bounded rationality of regulatees.

Oded argues that a preferable approach is what has been termed a 'cooperative-enforcement' model that focuses upon the offender's normative commitment to the law (in this case, organisations such as schools, churches and social organisations), while still retaining some coercive elements. Underpinning this approach, which probably has more application in the not-for-profit sector than it does in the corporate sector, regards regulatees as generally law-abiding persons who comply with the law because it the right thing to, not just because it is the law (Oded, 2013: 50). In contrast to business corporations, which might be motivated by the prospect of financial gain, the criminal conduct of institutions in the present context is likely to be the product of organisational incompetence, institutional defensiveness, poor communication or a refusal or failure to recognise the true nature and effect of the conduct on victims. This approach does not build on an, economic 'rational actor' model but on an understanding of the various motivations and abilities of actors to comply, or not,

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815 See further below p 251ff.

816 Footnotes omitted.

while still maintaining some degree of coercion in recognition of the fact that not all offenders are necessarily well-motivated or committed to societal norms and laws (Oded, 2013, Chapter 3).

A cooperative enforcement model builds on the desire of organisations to change and provides the legal means by which that change can be facilitated, guided or imposed. 'Behaviour change' rather than 'deterrence' is a better description of this approach that draws more from the regulatory than the criminological literature.

### **Sanctions and organisational change**

An organisation or institution cannot be imprisoned. The most frequently imposed criminal sanction for an organisation, the fine, will usually be inappropriate in relation to institutions involved in CSA. They may not have the resources to pay a fine of any significance, but even if they do, it would be preferable to direct those funds towards compensating victims than to adding to the consolidated revenue (Clough and Mulhern, 2002: 206).

In sanctioning organisations, it is necessary to move beyond the traditional sanctions to find those that can address the institutional failings that contributed to the offending behaviour of individuals within that organisation and move the focus from personal reform to organisational change. There are numerous precedents for these in the regulatory sphere where corporations are more likely to be subject to the criminal or quasi-criminal law and these may be adapted to the present context, but they are also applicable in the sentencing arena. Writing of the Sentencing Guidelines for Organizations created by the United States Federal Sentencing Commission, the then Chair of the Commission, Judge Diana Murphy stated:

Punishment is thus not the ultimate purpose of the organizational guidelines ... Rather, their ultimate purpose is the promotion of good corporate citizenship through encouraging implementation of effective compliance programs, which – it is hoped, will prevent crime (cited in Logan 2003: 358).

There are a number of existing sanctions that involve some form of court or government supervision, organisational change or reparation to the community. These include probation orders<sup>817</sup>, supervisory intervention orders<sup>818</sup>, community service orders<sup>819</sup> and enforceable undertakings.

#### **Probation orders**

Probation orders are orders that require a person or organisation that has been found guilty of an offence to be placed under the supervision of a specified person or the court, and to agree to, and meet, specified conditions. They have a long history in the criminal law but in recent years, in the regulatory context, special forms of probationary orders have been developed that are designed to ensure that the person does not engage in the contravening conduct, similar conduct or related conduct

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817 See example, *Competition and Consumer Act 2010* (Cth), s 86(2)(b).

818 See example, *Transport Act 1983* (Vic), s 230C; *Heavy Vehicle Road Transport Act 2009* (Tas), s 112.

819 See example, *Competition and Consumer Act 2010* (Cth), s 86C(4).

during the period of the order. Such orders are more likely to lead to organisational change than would pecuniary penalties.

Examples of probation orders can be found in the *Competition and Consumer Act 2010* (Cth), s 86C and the *Australian Securities and Investment Act 2001* (Cth), s 12GLA (Beaton-Wells and Fisse, 2011: 455). Such orders may include:

- a) an order directing the person to establish a compliance program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the contravening conduct, similar conduct or related conduct
- b) an order directing the person to establish an education and training program designed to ensure their awareness of the responsibilities and obligations in relation to the contravening conduct, similar conduct or related conduct
- c) an order directing the person to revise the internal operations of the person's business that lead to the person engaging in the contravening conduct.

The nature of compliance programs is discussed further below.

### ***Supervisory intervention orders***

A supervisory intervention order is a sanction that has been developed to deal with systematic or persistent offenders in the transport industry, but it could be adapted to institutions with a history of offending. These 'supervisory intervention orders'<sup>820</sup> may require a person to:

- appoint or remove staff from particular activities or positions
- train and supervise staff
- obtain expert advice about maintaining appropriate compliance
- install monitoring, compliance, managerial or operational equipment
- implement monitoring, compliance, managerial or operational practices, systems or procedures
- conduct specified monitoring, compliance, managerial or operational practices, systems or procedures subject to the direction of a specified authority or person
- furnish compliance reports
- appoint a person to have certain compliance responsibilities.

One feature of some of these statutes is that the cost of implementing these orders falls on the defendant. Compliance reports may be made public at a frequency and in a form that the court directs. The reports relate to the performance of the person in complying with the law, the requirements of the order, the things done by the person

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820 See example, Heavy Vehicle National Law (NSW), s 601 (and cognate provisions in other jurisdictions); *Dangerous Goods (Road Transport) Act 2009* (ACT), s 133; *Transport (Compliance and Miscellaneous) Act 1983* (Vic), s 230C; *Transport (Safety Schemes Compliance and Enforcement) Act 2014* (Vic), s 110.

to ensure that failures to comply do not continue and the results of those things having been done.<sup>821</sup>

### **Community service orders**

A community service order is a court order requiring a person (or a corporation) found guilty or convicted of an offence to perform unpaid community work or to undertake a project for the benefit of the community. It is regarded as a tangible way in which offenders can make amends for the harm they have caused (Beaton-Wells and Fisse, 2011: 457). Under the *Competition and Consumer Act 2010* (Cth), ss 86(2)(a) and (4), community service can take any form provided that it relates to the conduct and is for the benefit of the community or a section of the community. This can be regarded as a form of restorative justice if an organisation involved in CSA were to be required to give something back to the community that it has harmed.

### **Enforceable undertakings**

An enforceable undertaking is not a sentence or an order of a court in the commonly understood sense. It is a promise enforceable by a court in relation to a contravention, or alleged contravention, of a law (Freiberg, 2014: 918).<sup>822</sup> It may be regarded as a substitute for formal court action, but can be designed as an order of a court following a finding of guilt or a conviction.<sup>823</sup>

The primary purpose of an enforceable undertaking is to encourage or ensure compliance. Its conditions may include engaging consultants, developing and implementing systematic approaches to managing risks, arranging for independent audits, setting up internal compliance plans and reporting back to the enforcement authority, publishing apologies, performing community services, compensating victims or their families and funding or facilitating research, among others.

Although enforceable undertakings have been used primarily in commercial contexts and environmental law, there is no reason why they could not be used in other contexts and by criminal prosecutors as well as by regulatory authorities. The enforceable undertaking is a flexible and relatively open-ended sanction that provides scope for creativity in the use of responsive and possibly effective sanctions to deal with organisational offending, and because it does not require a prosecution, finding of guilt or a conviction, it may provide an effective compromise between civil and criminal proceedings. Further, because enforceable undertakings are public documents<sup>824</sup>, the parties can be held accountable and the outcomes are available for public scrutiny and subject to any associated publicity, adverse or otherwise. They

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821 See example, *Transport (Safety Schemes Compliance and Enforcement) Act 2014* (Vic), s 110(1).

822 See example, *Competition and Consumer Act 2010* (Cth), s 87B; *Australian Securities and Investments Act 2001* (Cth), s 93AA(1). In the United States, a similar device is the 'deferred prosecution agreement' (Cunningham, 2014). Similar agreements were introduced into United Kingdom law in 2014: *Crimes and Courts Act 2013* (UK), Schedule 17. In the United Kingdom, such agreements only apply to organisations and their terms are similar to those of Australian law.

823 For example, *Occupational Health and Safety Act 2004* (Vic), s 137(1); *Protection of the Environment Operations Act 1997* (NSW), s 253A.

824 They are posted on agency websites: see example, ACCC Enforceable Undertakings Register, <http://registers.accc.gov.au/content/index.phtml/itemId/6029>; Environment Protection Agency, New South Wales, <http://www.epa.nsw.gov.au/prpoeo/enforceableundertakings.htm>.

may also serve deterrent and restorative purposes and avoid the uncertainty, cost and possible trauma of a trial (Cunningham, 2014: 20).

### ***Compliance programs***

A feature of probation orders, enforceable undertakings, and in some form implied in other supervisory orders, is a condition relating to compliance programs (Beaton-Wells and Fisse, 2011: Chapter 12).<sup>825</sup> The purpose of such programs is to ensure that persons within an organisation are made aware of their responsibilities and obligations in respect of the contravening conduct.

Compliance programs may require that an organisation implement education and training programs, revisions of its internal operations, appointment of qualified staff or consultants, risk assessments, complaints handling systems and like programs. Most of these programs are oriented towards commercial organisations, but generic standards for such programs, such as the Australian Standard AS 3806–2006, *Compliance Programs*, have been widely adopted by industry.

Different forms of compliance programs would be required for institutions found guilty of offences relating to CSA. These would need to be primarily focused on addressing the organisational failures that rendered them unsafe for children. They would need to address the systemic issues the Commission identified in relation to organisational failure such as:

1. the adequacy of policies and practices in preventing, reporting and responding to CSA<sup>826</sup>
2. the recruitment and induction of staff working with children<sup>827</sup>
3. the training and supervision of staff working with children<sup>828</sup>
4. elements of a child-safe organisation relating to childcare.<sup>829</sup>

A number of jurisdictions have published documents that provide frameworks and checklists intended to help organisations to create child-safe environments<sup>830</sup>. A *National Framework for Creating Safe Environments for Children: Guidelines for Building the Capacity for Child Safe Organisations*<sup>831</sup> also exists. It identifies policies, procedures, practices and strategies that can contribute to a child-safe environment. Such a framework, or similar document, could provide the basis for an appropriate compliance standard or program that could be required as part of a probation order, supervision order or enforceable undertaking.

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825 See example, *Competition and Consumer Act 2010* (Cth), s 86(4).

826 See Case Study No 1: 38.

827 See Case Study No 2: 121.

828 See Case Study No 2: 121.

829 See Case Study No 2: 121.

830 These are listed in Royal Commission, Issues Paper No 3: *Child Safe Institutions*.

831 This document recognises the different capacities of organisations noting that it 'takes into account the scope of community services, encompassing large government organisations and non government organisations with substantial infrastructure; organisations which rely upon volunteers for their survival; and private (for profit) providers. The governance of some organisations resides with management committees and advisory bodies whose members are volunteers and therefore included within the scope of the Schedule.'

The National Framework covers:

- systems to ensure adaptation, innovation and continuous improvement
- governance and culture
  - a child-safe policy
  - risk management
  - a code of conduct
  - privacy and data protection
- participation and empowerment of children
  - enabling and promoting participation of children
  - inclusive and empowering language
  - strategies to reduce the potential for undiscovered or ongoing harm
- human resource management
  - recruitment and selection practices that acknowledge the importance of child safety
  - job descriptions/duty statements
  - staff support, supervision and performance management
  - complaints management and disciplinary proceedings
- education and training
  - awareness and understanding of child abuse and organisational responsibilities
  - support for organisations in building, maintaining and strengthening child-safe capacity.

Compliance programs are not a panacea for organisational misconduct. Experience in the corporate environment shows that compliance programs or undertakings may be only ostensibly complied with and the challenge is to ensure that any changes in organisational processes and structures have the effect of actually changing the behaviour of those within the organisation.<sup>832</sup> There is a danger that organisational changes made in the face of court orders will be merely superficial and symbolic and have no effect upon the members of the organisation, serving only to convince the courts that formal compliance has occurred (Edelman et al., 2011).

Thus, many precedents exist for applying creative organisational sanctions that can be imposed upon institutions that have been criminally responsible for their failure to protect children from CSA, or from any of their activities that might have ‘created, facilitated, increased, or in any way contributed to, (whether by act or omission) the risk of child sexual abuse or the circumstances or conditions giving rise to that risk’

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832 For example, the Commission’s Case Study No. 6, relating to the Diocese of Toowoomba Primary School, showed that the chief executive officer of the school had put in place policies and procedures to deal with allegations of abuse. Staff had also been trained and a government agency had reviewed these policies and procedures. Yet the individuals who received the complaints did not deal with them in accordance with the policies; see also Truth, Justice and Healing Council, 2014: 17.

(Letters Patent). Judicious and creative adaptation of existing measures can provide a more responsive, effective and publicly acceptable response to organisational offending.

## **Public Attitudes to Corporate Crime**

No studies specifically examine public perceptions of institutional CSA to identify perceptions of seriousness of such crimes or people's preferred criminal justice responses. However, there is a small body of literature on public attitudes to crimes of the powerful – 'white collar' crime generally or corporate crime more specifically.

Arguably, corporate crime may well be analogous to the crimes committed by people in authority in institutional contexts. Some of the key issues are evident in both arenas: wrongdoing by the individual within the context of the organisation; the responsibility of the organisation to respond to individual criminal behaviour; and the difficulty of pursuing criminal justice responses to organisational offending.

This section examines some of the studies on perceptions of corporate crime to assist in understanding how people might respond were institutions to be held accountable for CSA crimes.

### **'Bad Guys' – public responses to corporate crime**

The crimes of the powerful have become the subject of greater public concern in recent decades. Specific high-profile crimes, such as the financial frauds committed by Enron, drew significant media attention and created widespread concern about an emerging corporate crime wave (Unnever et al., 2008).

Cullen et al. (2009) suggest that, since the 1970s, in the United States 'social and political events coalesced to create a movement against upper-world criminality. As its prevalence and the magnitude of its harm were publicised, the public became aware of white-collar crime and critical of offenders in white collars' (Cullen et al., 2009: 38). High-profile offenders came to be seen not as respected members of the business community, but as 'bad guys' whose 'crimes reflect inordinate greed and a disturbing lack of concern for victims' (Cullen et al., 2009: 31).

Unnever et al. (2008) summarise the findings from early studies in the 1980s, noting that 'regardless of the research design, the public displayed a surprising willingness to sanction corporate crime, especially when the harm was perceived as high' (Unnever et al., 2008: 166).

In one of these early studies of responses to corporate versus individual wrongdoing, Hans and Ermann (1989) used an experimental design, presenting 202 sociology students with a scenario involving harm to workers that varied only the identity of the central actor: either a corporation or an individual caused the harm. Participants were asked to act as jurors to decide the case in civil court.

The research showed that people applied a higher standard of responsibility to the corporation: for identical actions, the corporation was judged to be more reckless and more morally wrong. Based on the perceived recklessness of the corporation,



respondent preferences for sanctions were harsher, with higher civil and criminal penalties preferred. The average award against the Jones Corporation was more than twice that against Mr Jones, while the Jones Corporation was much more likely to be seen as guilty of criminal negligence (Hans and Ermann, 1989: 157–58).

The authors conclude that ‘public unwillingness to sanction corporate misbehavior is a myth’ (Hans and Ermann, 1989: 163). The differential treatment, according to Hans and Ermann (2009: 164), is likely due to the corporation being seen as ‘less regretful and more likely to engage in similar harmful actions in the future, indicating the need for stronger sanctions to deter behavior’. The different standards applied to corporations and individuals suggests that corporate wrongdoing may well be seen as ‘a conceptually distinct form of criminal conduct’ (Almond, 2009: 157).

While this study involved a small sample, is now somewhat dated and applied to a worker injury scenario, it is nonetheless informative for understanding possible public responses to holding legally responsible those institutions within which CSA occurs. The experimental design is strong, and there is nothing to suggest that people’s attitudes would have become more lenient over time. On the contrary: the significant media, legislative and criminal justice attention drawn to all forms of sexual abuse over the past two decades has likely served only to harden attitudes about the responsibility of organisations for wrongdoing within their ranks.

Evidence of the persistence of support for holding corporations responsible may be found in a study that examined public concern about work-related fatalities. Following the introduction of the *Corporate Manslaughter and Corporate Homicide Act 2007* in England and Wales, there was a notable shift in the law’s response to cases where the activities of a corporate body caused a death. Historically, these cases were dealt with as regulatory health and safety cases. The new law, however, was designed to ‘properly reflect the gravity and seriousness’ of such incidents by allowing prosecution for corporate homicide (Almond, 2009: 146). In arguing for such a law, the Home Office noted the symbolic and communicative value of treating these cases as serious criminal offences and differentiating them from lesser, regulatory breaches. ‘By holding corporate offenders guilty of a manslaughter offence, the argument goes, the legal system is able to reflect adequately the normative importance that the public attaches to these cases, and address the concerns and fears that work-related fatality cases can provoke’ (Almond, 2009: 146).

Almond (2009) suggests that it is the harmfulness of the offending that dictates perceived seriousness of corporate offending, while street crime is more typically rated in terms of its wrongfulness. In the case of fatalities, the degree of harm is obviously extreme. In the case of institutional CSA too, the level of harm is also extremely high, particularly in the context of breach of trust.<sup>833</sup> If harmfulness is indeed the primary determinant of perceptions of the seriousness of corporate offending, then it is likely that people will be supportive of holding accountable those institutions within which CSA takes place.

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833 For more details on people’s perceptions of the seriousness of various sexual offences, see the discussion of research undertaken by the Victorian Sentencing Advisory Council (2012), discussed in Chapter 5.

Almond (2009) adds to an understanding of the seriousness of institutional CSA by noting the importance of mens rea. Many regulatory corporate offences lack a pure mens rea element, instead usually involving strict liability or negligence. However, if orthodox mens rea were present, people might be likely to consider the behaviour to be more serious (Almond, 2009: 157).

This point has particular relevance for cases of institutional CSA where the organisation itself, having been informed of the offending in some fashion, seeks to cover up the incident(s). The institution moves from possibly being vicariously responsible for the acts of its agents to being primarily responsible for its own actions in failing to provide a safe environment for persons in its care or for failing to respond or report. The subjective culpability of the institution is thus key in determining the seriousness of the offence.

While none of these studies directly involves perceptions of institutional CSA, they are analogous, and allow the conclusion to be drawn that the public would be supportive of assigning responsibility to the institutions in which CSA occurs.

## Appendix A

### Queensland

	NAME	INSTITUTION	OFFENDER OCCUPATION	VICTIM'S RELATIONSHIP TO OFFENDER	OFFENDING PERIOD	OVERALL SENTENCE	JUDGMENT CITATION/ SENTENCE DATE
1	Amanda Thompson	School (secondary)	Teacher	Pupil	2003–05	7 years 6 months	QDC (Unreported, Devereaux AJ, 12 December 2008)
2	Barry Greaves	Church	Priest	Not stated	2 years	Partially susp sent, 3 years to be susp after 9 months, balance of sentence susp for 3 years thereafter	QDC (Unreported, Trafford-Walker J, 24 April 2009)
3	Bradley Simpson	School (primary)	Teacher	Pupil	1986; 'more recently'	12 years	QDC (Unreported, Dick J, 14 April 2005)
4	Christopher Firman	Church	Assistant Chaplain; teacher (religious education)	Pupil	1999 (some months)	1 year 6 months, npp 10 months	QDC (Unreported, Clare J, 2 September 2010)

5	Christopher Klemm	School	Teacher; boarding house master	Pupil; boarder	1985–88	Partially susp sent, 5 years to be susp after 15 months	QDC (Unreported, Richards J, 4 November 2010)
6	David Trudgian	Athletics	Coach/mentor	Trainee/mentee (not formal coach relationship)	Not stated	Susp sent 18 months, op period 3 years	QDC (Unreported, Botting J, 18 August 2011)
7	Frank Keating	Church School	Teacher; sports master	Pupils	1981–82	Partially susp sent, 3 years to be susp after 6 months, op period of 5 years	QDC (Unreported, Wylie J, 30 October 2003)
8	Garry Smith	Swimming	Swimming instructor	Pupil	Not stated (isolated incident)	Partially susp sent, 12 months susp after 4 months, op period 2 years	QDC (Unreported, Butler J, 28 April 2014)
9	Gerard Bynes	School (primary)	Teacher; Student Protection Officer	Pupil	2007–08	10 years, npp 8 years	[2011] QCA 40

10	Glenn Sagers	School (secondary)	Teacher	Pupil	2013 (2 months)	Partially susp sent, 18 months susp after 3 months, op period 2 years	QDC (Unreported, Harrison J, 21 May 2014)
11	Graham Wickson	Air cadets; martial arts	Cadet leader; martial arts instructor	Cadets; martial arts pupils	1974–78	4 years	[2007] QCA 104
12	Gregory Knight	School	Teacher (Music)	Pupil	1981–84	3 years	[2006] QCA 301
13	John O'Connell	School (secondary)	Teacher	Former pupil; current housemate	2000 (isolated)	Partially susp sent, 12 months susp after 3 months, op period 2 years	QDC (Unreported, McGinness J, 6 July 2012)
14	Leo Wright	Catholic Church	Priest	Parishioners	1969–70 (2 months); 1977 (isolated)	3 years	[1996] QCA 104
15	Leslie Cunningham	School (primary); football club	Janitor; team assistant	Pupils; team members	1971–77	Susp sent, 4 years, op period 5 years	QDC (Unreported, Dick J, 25 July 2008)
16	Luke Margaritis	School (secondary)	Teacher	Pupil	Not stated (isolated incident)	12 months (cumulative upon existing 4-year sentence)	QDC (Unreported, Butler J, 19 February 2014)

17	Michael Reis	Church	Priest	Parishioners; nieces	'Some years' prior–1999	Partially susp sent, 18 months to be susp after 6 months; 2 year op period	QDC (Unreported, O'Brien J, 6 November 2008)
18	Michael Mcardle	Catholic Church	Priest	Altar boy	1965–66; 1966; 1972–74; 1976– 78; 1986–87	6 years, npp 2 years	[2004] QCA 7
19	Michael Vock	School (primary)	Principal; teacher	Pupil; family friend and relative	1987–99	9 years, npp 3 years	QDC (Unreported, Smith J, 18 March 2014)
20	Murray Moffat	Church	Priest	Parishioner	2 years	Partially susp sent, 18 months susp after 3 months, op period 3 years	QDC (Unreported, Bradley J, 26 August 2010)
21	Neville Creen	Catholic Church; School	Priest; assistant at school	Daughter of parishioners	1973–81	Partially susp sent, 3 years 6 months, susp after 14 months, op period 4 years	[2003] QCA 510

22	Neville Creen	Catholic Church	Priest; assistant at school	Daughter of parishoners	Not stated	Susp sentence 2 years, op period of 2 years	QDC (Unreported, Boulton J, 4 November 2004)
23	Nicholas Hand	School (secondary)	Teacher	Pupil (same school but different class)	2.5 months	Partially susp sent, 3 years to be susp after 255 days	QDC (Unreported, Howell J, 16 January 2009)
24	Paul Wruck	Catholic Church	Volunteer counsellor	Received counselling	1982–83	Partially susp sent, 18 months susp after 4 months, op period 18 months	[2014] QCA 39
25	Paul McLachlan	Catholic Church (media office)	Priest; Catholic media officer	Parishioner	1975 (isolated)	3 years 8 months	QDC (Unreported, Brabazon J, 6 October 2000)
26	Robert Sharwood	Anglican Church (St Matthews Parish)	Assistant Curate	Music student at Church	1974–76	Partially susp sent, 2 years 9 months, susp after 12 months, op period 2 years 9 months	QDC (Unreported, Kingham J, 10 November 2006)

27	Steven Quick	School (Childers)	Teacher	Former pupil	2004 (isolated)	Susp sent 18 months, op period 2 years	[2006] QCA 477
28	Terrence Keleher	Catholic Church	Priest	Parishioner	1977 (2 incidents over 1 month)	2 years 6 months, npp 8 months	QDC (Unreported, Hoath J, 21 March 2000)
29	Tristan Enosa	Anglican Church (Saibai Island)	Priest	Niece of parishioner	2009 (isolated)	Susp sent, 6 months, op period 3 years	QSC (Unreported, Jones J, 13 April 2011)
30	Troy Porter	School (Primary)	Teacher	Pupil	2007–08	Partially susp sent, 2 years susp after 248 days, op period 3 years	[2009] QCA 353
31	William D'Arcy	School (Primary)	Teacher	Pupils	1971 (8 months)	6 months (cumulative upon existing sentence of 10 years 6 months)	[2005] QCA 292



## South Australia

	NAME	INSTITUTION	OFFENDER'S OCCUPATION	VICTIM'S RELATIONSHIP TO OFFENDER	OFFENDING PERIOD	OVERALL SENTENCE	JUDGMENT AVAILABLE?
1	Andrew Dawson-Ryan	Church of England (Boys Society)	Society leader	Society members	1972–88	18 years, npp 10 years	SADC (Unreported, Barrett J, 12 March 2009)
2	Barry Wright	School (Secondary) (Adelaide High School)	IT worker (treated as a teacher)	Pupil	30/11/2009	12 months, npp 5 months	SADC (Unreported, Cuthbertson J, 31 May 2011)
3	Brian Perkins	Catholic Church; School (St Anne's Special School in Marion)	Volunteer bus driver	Pupil	1987–91	10 years, npp 6 years 6 months	[2004] SASC 53
4	Charles Barnett	Catholic Church	Priest	Not stated (appear to be altar boys/parishioners)	1977–94 (although each offence is years apart and no course of offending is suggested)	6 years 6 months, npp 4 months	SADC (Unreported, Rice J, 5 August 2010)
5	David Bonython-Wright	Department of Community Welfare	Youth worker	Attended youth centre	1985	10 years, npp 6 years	[2013] SASCFC 87

6	Fiasz Marikar	Diving	Diving coach	Diving pupil	2008–09 (6 weeks)	Susp sent 5 years, npp 2 years, susp upon entering 3-year bond	[2010] SASCFC 36
7	Gregory Coffey	Catholic Church (Salesians) (Port Pirie)	Teacher	Pupil	Not stated	Susp sent 12 months, susp upon entering 2-year bond	SADC (Unreported, Ward J, 21 February 1972)
8	James Moar	School (secondary); army barracks (Hampstead)	Teacher; school counsellor; St John Ambulance trainer at barracks	Pupil; cadet	1968–74; 1989–94; 1997	Limiting term (licence to continue living in nursing home) 21 years	SADC (Unreported, Chivell J, 24 April 2014)
9	Malcolm Fox	School	Teacher	Pupil	1984 (4 months)	Susp sent 4 years, npp 2 years, susp upon entering 3-year bond	SADC (Unreported, Barrett J, 31 August 2011)
10	Mark Harvey	School (primary)	Teacher; carer (before/after-school program)	Pupil (attended before/after-school program)	Not stated	2 years (served cumulatively on existing sentence, giving total head sentence of 8 years), npp 3 years 3 months	SADC (Unreported, Boylan J, 27 June 2014)

11	Peter Derrick	School (primary) (Athelstone Primary)	Carer (Before/After-School Program)	Pupil (attended before/after-school program)	1993–98	1993–98 Supervision under Pt8A Criminal Law Consolidation Act	[2010] SADC 31
12	Raymond Ayles	Anglican Church	Priest	Parishioner	1971–75	4 years, npp 2 years	[2007] SASC 82
13	Ronald Hopkins	School (Catholic)	Teacher; Principal	Pupil	Not stated	10 years, npp 7 years	SASC (Unreported, Perry J, 19 September 2006)
14	Simon Bennett	Basketball (North Adelaide Rockets)	Basketball Coach	Team Member	1996	9 years, npp 4 years 6 months	SADC (Unreported, Lovell J, 29 March 2010)
15	Thomas Quinn	School (Primary)	Principal	Pupil	1983–85	14 years, npp 5 years	[2012] SASCF 102
16	Wilfred Dennis	Anglican Church (St Barbara's at Parafield Gardens)	Priest	Youth Group Members	1970s	9 years, npp 6 years (extending existing 12-month npp by 5 years)	SADC (Unreported, Rice J, 2 February 2011)

## Victoria

	NAME	INSTITUTION	OFFENDER'S OCCUPATION	VICTIM'S RELATIONSHIP TO OFFENDER	OFFENDING PERIOD	OVERALL SENTENCE
1	Craig Beaumont	School	Teacher	Pupil	1988–89	Wholly susp sentence 12 months
2	Danial Boyce	School (secondary)	Teacher	Pupil	2008	3 years, npp 1 year 6 months
3	David Kramer	School (primary) (Yeshiva Centre Primary School)	Teacher	Pupil	1990–91	3 years 4 months, npp 1 yr 6 months
4	Dennis Batty	School (primary); basketball team	Teacher; coach	Pupils; team members	Not stated	4 years 4 months, npp 3 years 3 months
5	Dennis Stewart	School	Teacher	Pupil	2011 (11 months)	2 years 3 months, npp 1 yr 6 months
6	DM	School (secondary)	Teacher	Pupil	1993–95	7 years, npp 5 years
7	Edward Dowlan	Catholic Church (Christian Brothers)/ School	Teacher; Religious Brother	Pupil	1971–82	9 years 8 months, npp 6 years
8	Frank Klep	Catholic Church; Salesian Catholic College	Priest; in charge of infirmary	Pupil	1970s (5 years)	Partially susp sentence, 36 months. 24 months to be susp for a period of 3 years
9	Gerald Ridsdale	Catholic Church	Priest	Altar boys/ parishioners	1961–0	8 years, npp 5 years

10	Gerald Ridsdale	Catholic Church			1974–78	Partially susp sent 2 years 3 months, susp after 3 months
11	Gerald Ridsdale	Catholic Church	Priest	Altar boys	1961–82	18 years, npp 15 years
12	Gerald Ridsdale	Catholic Church			1970–87	13 years, npp 7 years
13	Gregory Gorton	School (secondary) (Gippsland Grammar)	Teacher	Pupil	2013 (isolated)	2 years 6 months, npp 1 year
14	Gregory Coffey	Roman Catholic College/School	Teacher; basketball coach	Pupil	1976–77	Susp sentence 2 years 6 months
15	James Scannell	Catholic Church	Priest	Altar Boy	1970	2 years, npp 1 year
16	James Jennings	Catholic Church; boarding school	Priest; in charge of dorm	Pupils/boarders	1964–67	Partially susp sentence 3 years, susp after 6 months, op period 3 years
17	John Beyer	Salvation Army (Bayswater Boys' Home); Tally-Ho Boys' Home	Volunteer at boys' homes; basketball coach	Residents	1973–85	9 years 4 months, npp 6 years
18	Michael Aulsebrook	School (Catholic – Salesian Brothers)	Teacher; Salesian Brother; dorm master	Pupil	1983 (7 months)	Partially susp sentence 24 months, susp after 9 months for a period of 2 years
19	Robert Best	Catholic Church; Christian Brothers School (primary)	Principal	Pupil	1971–74	14 years 9 months, npp 11 years 3 months*

20	Robert Best	Catholic Church; Christian Brothers School (primary)	Principal	Pupils	Not stated	Partially susp sent, 2 years susp after 1 year, op period 3 years
21	Ross Barnett	Pony club	Riding instructor	Pupil; employee	1986–88	7 years, npp 5 years
22	Russell Walker aka Vears	Catholic Church	Priest	Altar Boy	1976 ('some years')	5 years, npp 3 years
23	Stephen Barr	Basketball Team	Coach	Team member	1997 (5 months)	Partially susp sentence 24 months, susp after 3 months
24	Yolanda Lyons	School (Secondary)	Teacher	Pupil	1985–86	Wholly susp sentence 3 years, op period of 3 years
25	Andrew Beaumont	School	Teacher	Pupil	2008 (2 months)	4 years 6 months, npp 3 years

Cases excluded because no judgment available: Watson, Rapson, Dobbs, Cargeeg, Trotter, Pearson, Ruth, Ellis, Bradley, Jenkins, Buckley, Sokolowski, Willemson.

\*Sentencing information taken from p192 (Part C) of the Report of the Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations.

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