

Your Ref:

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Dear Director

SENTENCING OF CHILD SEXUAL OFFENCES IN QUEENSLAND ISSUES PAPER

The Queensland Law Society (“the Society”) is pleased to take part in the consultation process being undertaken by the Sentencing Advisory Council in relation to the topic of sentencing those who commit sexual offences against children.

The Society’s response to the Issues Paper published by the Council here will reflect similar themes argued by the Society over a significant period of time and across a wide range of subjects, namely:

- (a) That any substantial change to criminal justice policy, including sentencing, should be based on empirical evidence and research rather than political sensitivities in response to the nebulous concept of “public concern”;
- (b) That a fundamental aspect of sentencing, which should not be eroded further, is the individual discretion of judicial officers to reach a just decision in each case by a balancing of factors both for and against the accused.

We refer the Council to the Society’s previous submissions in respect of non-standard parole periods, in which we went to some pains to warn against the dangers of implementing measures to address “public concerns”. As the Council well knows, research over time suggests that public disquiet is usually a function of media reporting, often coming on the back of an unusual case, in circumstances where those expressing disquiet are ignorant of important facts relevant to the case.

The Society is unaware of any genuine basis to think that the sentencing of those who commit sexual offences against children is routinely inadequate, or in need of overhaul. The Society’s view is that sentencing within the criminal justice system works best in circumstances where:

- (a) Both the prosecution and the accused are represented by competent legal representation;
- (b) The sentencing judge has a wide discretion, to be exercised within the parameters set by comparative cases and the relevant legislation.

Having said that, the Society is supportive of any initiatives which focus on the rehabilitation and treatment of offenders. It has long been established, beyond the point of argument nowadays we would suggest, that the mere detention of offenders is both a costly and a particularly inefficient means of rehabilitation and preventing future offending. The Society's long-held view is the government needs to devote more resources to courses which educate offenders with a view to properly addressing their unlawful behaviour. The Society considers this a much better use of resources than the building of prisons, imprisoning people for longer, etc. We recognise though that the political imperative is to appear to be "tough on crime" and that has over many years come at the cost of programs which are likely, in the long run, to have a more lasting positive impact upon offenders and the community at large than simplistic efforts to increase jail terms and increase the number of those being imprisoned.

Turning them to the specific questions posed in the Issues Paper:

Q1:

In addition to the child sexual offences listed in the Terms of Reference, should any other child sexual offences be considered by the Council when responding to the Reference? If so, what offences should be considered and why?

The Society does not suggest that other child sexual offences beyond those listed in the Terms of Reference, should be considered by the Council in responding to this reference.

We would make the point though that the offence of 'possession of child exploitation material' can be properly thought of as falling into a different category. In circumstances where an offender has had no involvement with a child, and their offending is limited for example to viewing images on a computer, there is good reason to consider that type of offending as wholly different to that which involves, or potentially could involve, an actual child being abused by the offender. For some years now, judicial pronouncements on this topic have suggested that offending of this sort nonetheless creates a "market" for the production of films which involve the abuse of children. That is, with respect, an entirely fair proposition where the offender has purchased the images in question. In the Society's view though, it is a harder proposition to maintain where the images are accessed for free, and the offending conduct involves nothing more than simply viewing them and/or saving them on a computer. It should also be noted that the definition of "child exploitation material" extends to both drawings and writing, in the creation of which no children are likely to have been harmed.

The Society also takes this opportunity to note a long existing anomaly in the law which criminalises sodomy for those under 18, whilst other sexual offences carry an age of consent of 16. The Society is unaware of any justification for the distinction, and other states have long ago done away with any age differentiation between sodomy and other sexual offences. It creates the anomalous situation where a boyfriend and girlfriend both aged 17 years of age can have lawful consensual vaginal sex, but commit a serious crime punishable if choosing to have anal sex. It also seemingly discriminates against homosexual activity between 16 and 17 year males.

Q2:

Is there a need for increased guidance to decide whether 'exceptional circumstances' exist and an offender should not be sentenced to an actual term of imprisonment for a sexual offence committed against a child under 16 years?

Q3:

Should specific issues be included or excluded when the court is deciding if 'exceptional

circumstances' exist pursuant to section 9(5)(b) of the Penalties and Sentences Act 1992 (Qld) and the offender does not have to serve an actual term of imprisonment?

The Society does not advocate for increased guidance to judges to decide whether exceptional circumstances exist in a particular case. In our view that term is well understood, and properly applied, by judges on a regular basis. It is considered that the comments of de Jersey CJ in *Arndt v Quick; ex parte AG (Qld)* provides appropriate guidance to courts. We do not agree with the suggestion in the discussion paper that there does not appear to be a consistent approach to how the existence of exceptional circumstances is determined. Where differences arise is in the *application* of the test to different factual circumstances. This is not an inconsistency in how the matter is determined, but is the natural and proper variation in outcomes which arises from judicial discretion considering multiple factors in individual cases.

The Society does not see a need for there to be further inclusion or exclusion of factors giving guidance on “*exceptional circumstances*” pursuant to s.9(5)(b) of the *Penalties & Sentences Act 1992*. Without empirical data suggestive of a significant problem in this area, we consider that the prescription of particular factors in this regard makes the mistake of over-complicating something that is not a problem in practice, and runs the risk of improperly fettering judicial discretion. For example, in some instances a case will be exceptional because of one, and one alone, stand-out feature. In other instances there may be an aggregation of features which, whilst less exceptional in themselves, create a most unusual case when considered in combination. Those sorts of exercises are best left to a judge considering a case on its merits rather than being the subject of legislative prescription.

Q4:

Is the current list of factors in section 9(6) of the Penalties and Sentences Act 1992 (Qld) that the court must consider when sentencing an offender for a sexual offence committed against a child under 16 years appropriate? Should specific factors be either included or excluded?

The Society considers that the current list of factors in s.9(6) of the *Penalties & Sentences Act 1992* is appropriate, and that there is no need for further specific factors to be included or excluded.

Q5:

How can the harm caused, or risked, to the victim in child sexual offences best be communicated to the court?

The means by which a court hears of and understands the harm and detriment caused to a victim by child sexual offences is a complex area.

In the Society's view this is best addressed (initially at least) by the undertaking of objective research surveying victims and their needs, and then considering how their position can best be communicated to the court. There is an obvious role for lawyers and other stakeholders in this process, but that should come after the necessary research is conducted. Any such research would need to ensure that it focuses on proven victims, rather than complainants – a distinction that is not always clearly understood in the debates that attend such issues.

Q6:

What factors related to the seriousness of the offence should be treated as aggravating when sentencing an offender for a child sexual offence? For example, within offence categories (such as rape), what makes one offence more serious than another?

Q7:

What should the most important aggravating factors be in sentencing an offender for a child sexual offence? Should these differ between offences?

Q8:

What factors relevant to the seriousness of the offence should be treated as mitigating when sentencing an offender for a child sexual offence? For example, within offence categories (such as rape), what makes one offence less serious than another?

Q9:

What should the most important mitigating factors be in sentencing an offender for a child sexual offence? Should these differ between offences?

Q10:

What factors or circumstances personal to the offender should be considered by a court as either mitigating or aggravating in sentencing an offender for a child sexual offence?

The Society does not see any need for further enumeration, or any form of weighting (or designation of seriousness) to be given to the various factors which might aggravate or mitigate from the seriousness of a child sexual offence. All of the matters raised in s.2.4 of the Issues Paper are properly matters to be taken into account in this regard. It is the Society's view that such factors are currently taken into account through the judicial discretion exercised by judges in sentencing every day. We see no need to identify certain features as being regarded as more important or deserving of greater weight. Each case will turn on its own facts, and the same factor may be properly given different weight in different cases, for differing reasons.

The case examples cited in Appendix 3 of the Issues Paper adequately demonstrate that. Furthermore, the Court of Appeal serves as a safeguard to ensure that correction can be made where the judicial discretion occasionally miscarries.

Q11:

Are there any factors or circumstances personal to the offender or their circumstances (for example, good character or remorse) that a court should not be able to take into account as mitigating, or only be allowed to take into account if certain criteria are met?

The Society does not suggest that there are any factors personal to the offender or their circumstances which a court should not be able to take into account as mitigating factors. Again, judicial discretion and the good sense and legal skill of Queensland's judges allow these things to be determined case by case. In particular the Society does not support the amendments introduced in New South Wales which specify:

- (a) That good character cannot be regarded as a mitigating factor if the court is satisfied that the factor concerned assisted the offender in committing the offence, and
- (b) That remorse, to be taken into account as a mitigating factor, needs to be demonstrated in some pre-defined way.

In the Society's submission these matters are properly and appropriately addressed regularly by Queensland courts through the use of each judge's sentencing discretion. Good character being used to assist an accused in committing an offence will usually be regarded as an aggravating feature based on a breach of trust. In relation to remorse, courts will generally provide little or no discount in circumstances where the issue of remorse is demonstrated by nothing other than a submission from the bar table. These factors do not need specific prescription by the legislature.

Q12:

Is there a need for additional guidance in sentencing an offender for a child sexual offence? If so, what form should this take?

The Society sees no need for any additional guidance in sentencing an offender to be given to judges, although as always, would be supportive of ongoing judicial education and training in relation to many aspects of criminal behaviour and sentencing, including child sexual abuse. It is submitted that the current resources available to Queensland judges, in the form of legislation, precedents, statistics, appeal decisions and texts are sufficient to ensure that cases are dealt with uniformly, consistently and appropriately.

Q13:

Are there any other approaches to the sentencing of child sexual offences you would like considered?

As already submitted, the Society is supportive of any additional resourcing being given to issues of rehabilitation for offenders in this area. We note with interest the New South Wales Pre-trial Diversion of Offenders Program (Child Sexual Assault) which allows certain offenders who plead guilty to sexually abusing a child in their care to be diverted from the criminal justice system into a two year treatment program. We are unsure of the success, and cost, of that program, but it is something which we would commend to the government for serious examination. The Society considers that targeted and professional education and rehabilitation courses for offenders are more likely to achieve lasting changes of behaviour than mere incarceration.

For many years the treatment program offered to prisoners within correctional facilities has been regarded as "too little too late", and suffer the problem of being attended by those who are doing so simply to become eligible for their recommended parole release.

Conclusion

The Society thanks the Sentencing Advisory Council for this further opportunity to participate in this important area of the criminal justice system, and undertakes to remain actively involved throughout this process and beyond.

For any further information please contact our Policy Solicitor, Ms Binny De Saram on (07) 3842 or

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Yours faithfully

Bruce Doyle

President