



# POLICE ASSOCIATION OF NEW SOUTH WALES

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To NSW Sentencing Council

The Attorney General has asked the NSW Sentencing Council to specifically prioritise a report on the sexual assault offences against children, in light of the current Parliamentary Select Committee Inquiry into child sexual assault offences. The Sentencing Council specifically asks:

Question: *What child sexual assault offences should be SNPP offences?*

As the Judicial Commission states: the abhorrence with which the community regards the sexual molestation of young children and the emphasis attached to general deterrence in sentencing offenders is reflected in the judgment in *R v BJW* (2000) 112 A Crim R 1 at[20], where Sheller JA stated:

*“The maximum penalties the legislature has set for [child sexual assault] offences reflect community abhorrence of and concern about adult sexual abuse of children. General deterrence is of great importance in sentencing such offenders and especially so when the offender is in a position of trust to the victim”.*

The case of *R v Fisher* (1989) 40 A Crim R 442 at 445 is also frequently cited:

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

*This court must serve notice upon judges who impose weakly merciful sentences in some cases of sexual assault upon children, that heavy custodial sentences are essential if the courts are to play their proper role in protecting young people from sexual attacks by adults ...”.*

Tampering with children of tender years is a matter of grave concern to the community: R v Evans (unrep, 24/3/88, NSWCCA). The courts have recognised a change in community attitudes to child sexual assault. In R v MJR (2002) 54 NSWLR 368 at [57], Mason P expressed the view that there has been a pattern of increasing sentences for child sexual assault and that this:

*“... 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”.*

It has been well-documented that the sexual abuse of children has a range of very serious consequences for victims. Zwi et al. (2007) list depression, post-traumatic stress disorder, antisocial behaviors, suicidality, eating disorders, alcohol and drug misuse, post-partum depression, parenting difficulties, sexual re-victimisation and sexual dysfunction as some of the manifestations of child sexual abuse among victims (see also Abel & Harlow 2001; Kendall-Tackett, Williams & Finkelhor 2001).

Prentky et al. (1997) examined recidivism rates on 115 child molesters and concluded that:

1. child molesters remain at risk to reoffend long after their discharge, in some cases 15-20 years after discharge;
2. there is a marked underestimation of recidivism rates.

Likewise, a review by the American Psychological Association (2003) concluded that "the research demonstrates that even sexual offenses against children that occurred long ago evince a continuing risk of recidivism by the offender."

Another perspective on the problem is offered by Anna Salter, one of the foremost experts on sex offenders in the USA. She writes the following in her book Predators:

*"The dry research figures only confirm what I have seen over and over in this field: there are a lot of sexual offenses out there and the people who commit them don't get caught very often. When an offender is caught and has a thorough evaluation with a polygraph backup, he will reveal dozens, sometimes hundreds of offenses he was never apprehended for. In an unpublished study by Pamela Van Wyk, 26 offenders in her incarcerated treatment program entered the program admitting an average of 3 victims each. Faced with a polygraph and the necessity of passing it to stay in the treatment program, the next group of 23 men revealed an average of 175 victims each."*

For many in the community, sex offenders are seen as among the most dangerous kinds of offender in terms of both the impact that their offending has on victims' lives and because of concerns about their risk of reoffending. Akin to these concerns, Police Association members aver to the following:

*Child sexual offences have a high rate of recidivism and a near-on predictable pattern of escalation. A SNPP would encourage participation in pre-release programs and allow a greater certainty in parole period for post release programs. This should reduce the risk of recidivism and escalation of offending.*

It is also quite relevant to point out that given that so few sexual offences are ever reported to police, there is a substantial 'dark figure' of this kind of crime. That is, there is a large gap between official counts of the prevalence of sexual offending and the 'real' prevalence of sexual offending. While crime victimisation surveys help to identify some of the offences that do not come to the attention of the police (and thus help to shed light on the dark figure of sexual offending), undoubtedly additional incidents are not reported in such surveys either. It is thus believed impossible to determine precisely the exact prevalence of sexual offending in the community. This problem is exacerbated by the hidden nature of much sexual offending. Research has shown that victims are less likely to report to the police if the offender is known to them. Some of the factors that have been found to contribute to this include fear of retribution, fear of giving evidence and being cross-examined, fear of not being believed, a belief that the incident was not a real crime, or lack of knowledge and access to help (VicHealth, 2006, p.60).<sup>1</sup>

The Police Association agrees with the Sentencing Council's inclusion of the offence of persistent sexual abuse of a child in the list of SNPPs in order to overcome a problem with the courts' treatment of that offence.

Consideration ought to be given also to whether various offences of sexual intercourse with a child between 10 and 16 years, should be added to the table because of the frequency of offending, and the fact that they are strictly indictable offences, attracting maximum penalties similar to existing SNPP offences.

Police Association members expressed the following offences be SNPP offences:

- Sex offences involving persons in authority  
*le when the offender is a person in authority eg school teacher, sport coach and further to that where the POI is a female. Historically I have seen matters where the female offender has received suspended sentences and the circumstances warranted a full custodial for the female offender.*
- Offences committed by parents upon their children  
*le one case involved a father sexually abusing his own children who were 3 and 5 years old. The father admitted the offences and pleaded guilty. He was admitted to the Cedar Cottage pre-trial diversion program (disbanded now). This case highlights serious offending note being punished with custodial sentences.*

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<sup>1</sup> Karen Gelb Dr, Recidivism of Sex Offenders, Research Paper, Sentencing Advisory Council, January 2007.

- Offences involving strangers  
*le case involving a 22 year old male Indian national who was on a student visa and was charged with 4 x Aggravated Indecent Assault and 1 x Aggravated Sexual Assault after following a 14 year old female. The offender received a 15 month supervision order and was reported to the Department of Immigration. Despite the conviction, offender was allowed to remain in the country on the student visa. He is now a permanent resident married to an Indian national whom he brought to Australia. This case dips into another area of non-citizens convicted of sexual offences. There possibly needs to be a separate look at things from the immigration perspective, so that potential residents such as the offender described above are mandatorily deported when a conviction for a sex offence is identified.*
- Child pornography offences  
*le I have come across cases where offenders in possession of several thousand videos/stills not receiving any custodial sentences. One case involved a young male found in possession of 11000 still images, 616 videos and 61 documents found to be child abuse material. The offender received a Section 12 bond. Another example included a middle aged male senior fireman receiving child pornography from a person he met via an adult magazine. He was found with 46 discs containing around 900 images and videos. The offender went to the extent of opening a false post box to receive these items. He received a 300 hour community service order.*

As a point of comparison, the Queensland Sentencing Advisory Council when conducting research in 2011 on minimum standard non-parole periods recommended that the following sexual offences in the Criminal Code which are included in the definition of 'sexual offences', but excluded from the list of SVOs in Schedule 1, should be included as prescribed offences for the purposes of the new SNPP:

- using electronic communication (eg the internet) to procure children under 16 (s218A)
- obscene publications and exhibitions (s 228)
- involving a child in the making of child exploitation material (s 228A)
- making child exploitation material (s 228B)
- distributing child exploitation material (s228C)
- possessing child exploitation material (s 228D)
- permitting a young person or a person with an impairment of the mind to be at a place used for prostitution (s 229L), and
- bestiality (s 211).

As the Sentencing Council puts it, increasingly, there is recognition that these offences are serious and ordinarily warrant an immediate term of imprisonment. The inclusion of child exploitation material offences and all forms of child sexual offences was strongly supported by many members of the community who made submissions to the Queensland Sentencing Advisory Council and also by a number of other stakeholders.

The modified list of offences is different from, and in some respects broader than, the offences in some other SNPP schemes. The list captures most sexual offences against children, a broad range of sexual offences against adults, offences of violence and serious drug offences. Because the way the Council has recommended that the scheme be structured – to apply to offences only attracting a sentence of five years or more – it will automatically target offences at the higher end of offence seriousness.

In summary, all child sexual offences should be SNPP offences, including maintaining a sexual relationship with a child, indecent treatment of a child, sodomy and unlawful carnal knowledge.

It is also vitally important that the Judicial Commission of NSW consistently examines sentencing practices for SNPP offences and monitors their rates of incidence for any new findings. There is a need for sufficient data to enable analysis of offences for the purposes of reporting same. For instance:

Between 1 February 2003 and 31 December 2007, there were 32 cases involving charges under s61M(1) that met the conditions for inclusion in the Judicial Commission's study.

Between 1 February 2003 and 31 December 2007, there were 30 cases involving charges under s66A that met the conditions for inclusion in the Judicial Commission's study.

Between July 2003 and June 2010, there were 96 cases in the District Court where a strictly indictable offence under s66C(1), (2) or (4) was the principal offence prosecuted.

The Police Association thanks the Sentencing Council for the opportunity to respond to its review and looks forward to the release of its final report.

Yours sincerely

A handwritten signature in black ink, appearing to read 'S. Weber', with a long horizontal line extending to the right.

**SCOTT WEBER**  
President