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Submission to the Victoria Sentencing Advisory Council in response to 'Maximum penalties for sexual penetration with a child under 16 – Consultation Paper' – sent 1 May 2009.

The Victorian Aboriginal Legal Service Co-operative Limited (VALS) welcomes the opportunity to respond to the Sentencing Advisory Council's Consultation Paper in relation to maximum penalties for sexual penetration with a child under 16. In this submission VALS responds not only to specific Consultation Paper questions, but also to the content of the Consultation Paper more generally.

In particular, in this submission VALS argues that:

- the aim of the maximum penalty to serve as a deterrent is problematic;
- it is dangerous to make assumptions about degree of harm as being in direct relation to the offender's role in the care and supervision of the victim;
- maximum sentences for the offence of taking part in an act of sexual penetration with a child under the age of 16 alone do not reflect the range of offending in each form of the offence; and
- one penalty/maximum sentence should be used in the offence structure to encompass all the relevant offending.

It is important to note that the Indigenous Australian perspective needs to be more broadly considered than the opinion of the VALS. This is especially the case given the over-representation of Indigenous Australians in the criminal justice system and high rate of victimisation of Indigenous Australians in comparison to non-Indigenous Australians. VALS urges the Council to specifically consult with the Indigenous Australian community if it has not already done so.

Purpose of the Maximum Penalty

Deterrence

VALS is interested in the Consultation Paper's consideration of the functions of maximum penalties in a general sense. It is understood that maximum penalties for sexual penetration with a child under 16, as with other maximum penalties, serves as an expression of the seriousness and gravity with which the community views, and the judiciary should view, the offence relative to other offences. The consultation Paper also lists a purpose of a maximum penalty as deterrence:

The statutory maximum penalty is (also) intended to serve as a general deterrent by warning potential offenders about the highest penalty that they will face if they commit such an offence (p.10).

It is mentioned within the consultation paper that it is difficult to quantify whether or not the maximum penalty for an offence has any deterrent effect. VALS agrees with this, and has conducted research that also suggests that the use of other penalties such as minimum and mandatory sentencing hold little deterrent value.

Specifically, VALS' research (2008:24-25) highlighted the following:

The imposition of mandatory minimum sentences has been asserted as a reaction to widespread community concerns regarding the levels of crime and the inadequate sentences for these crimes (Cumaraswamy 2001). As the punitive script prescribes, it is held that the stronger the penalty, the greater the deterrence to the act of the crime.

Looking to the United States and Western Australia, Brown (2001) observes evidence indicating that 'mandatory sentencing does not produce the effects of deterrence, selective incapacitation and crime reduction which are its stated justifications' (2).

Three strikes burglary laws were introduced to Western Australia in 1996. This required a 12 month minimum penalty to third and subsequent offences. In the Northern Territory, mandatory sentencing provisions followed the amendment to the *Sentencing Act* 1995 (NT) and as of 1997, this applied to a broad range of property offences. The courts must impose a 14 day term of imprisonment for a first conviction on a prescribed offence for an adult; a minimum of 90 days imprisonment on a second prescribed offence; and 12 months imprisonment on the third. 28 days of detention must be served for juveniles on a second offence unless ordered to a diversionary program (of which there are few or none in some areas) and a third offence results in attracts a mandatory further 28 days minus the diversion option.

Crime statistics from WA not only provide evidence that the above law failed to achieve a deterrent effect, but additionally revealed a leap in residential burglaries immediately following the introduction of the new laws at a time when the greatest reduction would have been expected (Morgan 2000 in Brown 2001: 7). In sum, these laws have not achieved the effect for which their justification is based, that is, in achieving reduction in crime rates.

Aggravating Factor of Care, Supervision or Authority

What are the advantages and disadvantages of having 'care, supervision or authority' as a statutory aggravating factor for this offence where the victim is between 10 and under 16?

When considering the above question, it is very easy to envisage stories of a young person having their trust betrayed by someone who is positioned to "know better" than to commit such an offence. It is important that the offence itself is looked at rather than the relationship between the offender and the victim when looking at setting maximum penalties. The following discussion outlines assumptions that do not necessarily act to serve the victim or the offender.

Harm

Within two of the maximum penalties that apply to the offence of a person to take part in an act of sexual penetration with a child under the age of 16 [section 45 of the *Crimes Act 1958* (Vic)] there lies a very large assumption. While sexual penetration with a child aged between 10 and under 16 and under the care, supervision or authority of the offender attracts a maximum penalty of 15 years imprisonment where sexual penetration with a child aged between 10 and under 16 and not under the care, supervision or authority of the offender, attracts a maximum penalty of 10 years imprisonment.

The Consultation Paper highlights that one approach to setting a maximum penalty is to consider the seriousness of criminal conduct by reference to the degree of harm caused or risked by offender's actions.¹ The maximum penalties outlined above show a longer sentence where the offender occupies a care, supervisory or authoritative role. By extension it could be argued that there lies an assumption that those who are between the ages of 10 and under 16 and experience sexual penetration by someone who is responsible or holds a position of care for them experiences more harm than does another person of the same age who has the same offence inflicted upon them by someone who is not in the same position of care or authority.

The degree of harm on an individual should not be based on assumptions concerning the relationship dynamic between the parties. While a person in a position of care, supervision or authority should rightfully come under question and scrutiny when there is an act of sexual penetration with a child, it cannot be said that someone with a different relationship with the child is any less responsible for the same act, or is capable of causing a comparable or larger degree of harm.

Harm cannot be measured by the status or label given to describe a relationship of one person with another. Harm is experienced differently by everyone and it is not necessarily the relationship to the offender that is relevant in punishment for the crime. Therefore, a lesser maximum penalty for an offender because they do not hold a position of care, authority or supervision over the victim assumes that because of the lack of this relationship that there is a lesser degree or experience of harm. This assumption is inappropriate as it has the potential to undermine the legitimacy or weight of a victim's account of experience of harm.

In summary, having separate maximum penalties based of the aggravating factor of care, supervision or authority is disadvantageous. The maximum penalty for sexual penetration with a child under the age of 16 should be set as a measure of the offence, not the relationship present between the offender and the victim.

Do the current maximum penalties for the offence of taking part in an act of sexual penetration with a child under the age of 16 appropriately reflect the range of offending in each form of the offence?

Penalties should not only look at maximum sentences as ways of appropriately reflecting the range of offending. The availability of appropriate treatment should also reflect the range of offending applicable in all forms of the offence. This would need to be considered on a case-by-case basis in order to address the causes and contributors to the offending behaviour.

¹ Consultation Paper p.10

As articulated by Cunneen, the fact remains that in their present form:

Prisons do not disappear problems, they disappear human beings...mass incarceration is not ... a solution to the vast array of social problems that are hidden away in a rapidly growing network of prisons and jails ... prisons do not work ... The focus of state policy is rapidly shifting from social welfare to social control (2000: 2-5).

Prison is punishment however incarceration is not a permanent state of being. Rehabilitation needs to at least be attempted through treatment in order to protect the public in the long-term sense.

Offence Structure

If you think that there should be some change to the current offence structure, should there be:

- a. graduated penalties for different statutory aggravating factors?*
- b. one penalty to encompass all the relevant offending?*

In light of earlier discussion, VALS suggests that there should be one penalty/maximum sentence to encompass all relevant offending to allow sentences to be determined on a case-by-case basis.

VALS hopes the above discussion helpful and thanks the Council for the opportunity to comment as part of this consultation process.

References

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