The courts have long recognised the primacy of the principle of general deterrence when sentencing offenders who commit sexual assaults against young children and condign punishment, in the form of heavy custodial sentences, has been expressed to be appropriate in order to protect the young from sexual abuse by adults.

This monograph focuses on some recent developments relating to the law on child sexual assault and analyses sentences handed down to 467 offenders in the NSW District Court between 2000–2002. It gauges the extent to which many of these offences were committed years before they were prosecuted in the courts. It also examines New South Wales Court of Criminal Appeal child sexual assault decisions for the period 2000–2003.

This study does not seek to estimate the prevalence of these notoriously under-reported crimes but focuses on those offenders who are actually brought to justice and punished.

Recent developments in sentencing

The study reports that the courts have recognised a change in community attitude and have correspondingly increased sentences for child sexual assault. Given that many sexual assault offences come to light many years after they were committed, the question arises as to whether offenders should be sentenced according to the sentencing patterns applicable at the time of the offence or at the time of sentencing. This issue has been resolved by the Court of Criminal Appeal holding that when considering a "stale crime" where sentencing practice has moved adversely against an offender, the sentencing pattern at the date of the commission of the offence is the appropriate reference point. If there is no substantial evidence relating to old sentencing practices (and in this respect the provision of bare statistical material may not be a sufficient guide), courts should sentence the offender as best they can in accordance with the policy of the legislature and the approach of the courts at the time of the offence.

Sometimes offenders who commit child sexual assault offences are found to be "otherwise of good character". Good character has long been recognised as a matter to be taken into account in mitigation of sentence. Good character is not as significant in cases of child sexual assault as in other cases because the delay which often occurs before such offences are disclosed enables the conduct to continue. In the context of pastoral abuse the High Court held in *Ryan v The Queen*[1] that the offender was entitled to some leniency on the basis of his work as a priest.

Section 21A of the *Crimes (Sentencing Procedure) Act* 1999 lists the aggravating and mitigating factors relevant to the sentencing of child sexual assault offenders. This section does not materially alter the common law. Generally, matters of aggravation must be

1 (2001) 206 CLR 267.

proved by the Crown beyond reasonable doubt while matters of mitigation must be proved on the balance of probabilities. However in *Weininger v The Queen*[2] the High Court cautioned against taking an overly technical approach to fact finding at sentence by holding that "there is no universal requirement that matters urged in sentencing hearings be either formally proved or admitted".

Although sentencing courts have regard to harm done to the victim, this must be formally proved in evidence. Victim impact statements allow victims to participate in the sentencing process. However the courts have held that the harm done to the victim must be assessed objectively and the weight to be given to victim impact statements is for the court to determine. While the extent of harm to the victim is a relevant factor in sentencing, it must be proved by the Crown beyond reasonable doubt.

Standard non-parole periods have been introduced for a number of offences, including some child sexual assault offences, with standard non-parole penalties ranging from five to 15 years. However in *R v Way*[3] the Court of Criminal Appeal said that this new scheme may result in an increase in the established pattern of sentencing for such offences.

In the past courts have reduced non-parole periods on the basis that child sexual assault offenders would serve all or part of their prison sentences in protection and, as a consequence, suffer hardship. The Court of Criminal Appeal has held that it can no longer be assumed that offenders will spend their time in unduly onerous conditions and has pointed to the difficulty of making predictions about how a particular sentence will be served.

Statistical analysis

The examination of child sexual assault cases in this study (N = 467, all but two were males) was based on an examination of the principal offence, that is, the offence that attracted the most severe penalty imposed on the offender.

About six out of 10 cases (59.5%) fell into the sexual intercourse/penetration category of child sexual assault, with the balance made up of indecent assault cases (37%) and a very small proportion of act of indecency cases (3.4%). A breakdown of these three generic categories is provided at section 5.2 of this study.

This study confirms the proposition that many offences involve a long delay between their commission and prosecution:

- nearly four out of 10 cases (37.9%) were committed over 10 years before sentencing
- nearly two out of 10 cases (18.2%) were committed 20 years before sentencing
- the longest period between offence and sentence was 38.5 years while the shortest was 94 days.

Most victims of child sexual assault were female (73.4%). The median age for female victims was 11 years and for male victims, 12 years. The youngest female victim was one year old and the youngest male victim was two years old.

2 (2003) 212 CLR 629 at [21].
3 [2004] NSWCCA 131 at [142].

The median age of offenders was 34 years at the time of offence (44 years at time of sentence). The age of offenders ranged from 10–80 years.

When the sentences for all 467 cases were analysed it was found that two out of three offenders (65.1%) received full-time custodial sentences. This figure increased to 83.1% when periodic detention and suspended sentences were also counted as imprisonment. Those convicted of offences involving sexual intercourse/penetration were more likely to be given a full-time custodial sentence (82.7%) than those sentenced in other categories of child sexual assault. Further, the median prison sentence for the former category was 48 months compared to 30 months for the indecent assault category and nine months for those sentenced for an act of indecency.

Nearly one-quarter of the offenders (23.7%) received consecutive sentences, a significant increase on that found in an earlier Commission study[4] and largely explicable in terms of the impact of the High Court's decision in *Pearce v The Queen*.[5] The median aggregate sentence was six and a half years and ranged from two and a half years to 30 years imprisonment. The median non-parole period was four and a half years and ranged from 12 months to 22.5 years.

There was a finding of special circumstances under s 44(2) of the *Crimes (Sentencing Procedure) Act* 1999 warranting a parole period greater than one-quarter of the sentence in about eight out of 10 cases (81.3%). Further, four out of 10 offenders sentenced to imprisonment had a non-parole period of 50% or less of the specified term of the sentence.

Child sexual assault cases constituted 10.1% of all conviction and sentence appeals heard by the Court of Criminal Appeal between 2000 and 2003. However the numbers reveal a declining trend over this four-year period from 12.7% to 9.4%. Conviction appeals had a high success rate of 55.9% (about half-and-half resulting in an acquittal or new trial), as did Crown appeals against sentence (58.3%), while sentence severity appeals had a success rate of 44.4%. The Commission is currently undertaking a study analysing the legal basis for successful conviction appeals in child sexual assault and other matters.

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4 P Gallagher, J Hickey and D Ash, *Child Sexual Assault: An Analysis of Matters Determined in the District Court of New South Wales During 1994*, 1997, Research Monograph 15, Judicial Commission of NSW.

5 (1998) 194 CLR 610.