

## LEGAL STUDIES

### Crime: Assess the efficiency and effectiveness of legal measures in the criminal justice system in achieving justice for child sex offenders.

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In the criminal justice system, a variety of legal measures, such as **law reform**, **courts**, and **sentencing options**, are in place, in an attempt to provide justice for the individual and society. Many arising contemporary issues and conflicting values however reduce the effectiveness of these legal measures, often causing difficulty for the criminal justice system to enable justice. Child sex offenders – the sentencing and conviction of them has been the root of much recent controversy. The issues surrounding the treatment of child sex offenders in the CJS is a clear example of how legal measures that are in place to provide justice for these criminals, are sometimes reduced in effectiveness, often due to its inability to thoroughly reflect and balance the views of the individual and society.

Sentencing child sex offenders has always been a controversial issue within society as the sensitive issue of balancing and reflecting the needs of community and the individuals involved (victim and accused) has caused many clashes and challenges within in CJS. **Law reform** is one of the many forms of legal measures established to safeguard individual rights and provide justice for the society. It has been stated that from the point of 'creation' and 'repeal', that sexual assault has been one of the most legislated areas of criminal law<sup>i</sup> however the effectiveness and efficiency of law reform, as a legal measure in providing justice for the individual and society can be questioned.

Governing the treatment of child sex offenders in the CJS today, is a range of legislation however these pieces of legislation have been redefined, reconsidered and revaluated within the past decade, moulded greatly to justly reflect society's shifting values. Recent evidence has also shown that due to a significant, harsher change in community's attitudes towards child sex offenders, the courts have recognised and correspondingly increased the penalties.<sup>ii</sup> A gradual change in the legislation surrounding child sexual assault has been evident in the CJS. Initially the Crimes (child assault) amendment act 1985 abandoned carnal knowledge and widened the definition of "sexual assault", whilst the Crimes amendment (sexual offences) act 2003 created maximum penalties for child sex offenders and removed the legal fiction of "underage consent". The Child protection (offenders' prohibition orders) act 2004 is also evidence of a rapid change to the CJS. This legislation introduced the registration and prohibition of sex offenders, reflecting the tougher, less tolerant view of society towards sex offenders. The changing legislation is evidence of the effectiveness of the legal measure, law reform, in providing justice for society as it has and continues to thoroughly reflect society's views and values.

Although the CJS has moved to reflect society's values by introducing tougher sanctions, simultaneously the CJS has also provided a protection of individual rights and maintained equality in the CJS. Law reform has also proved to be an effective legal measure in governing the treatment of child sex offenders, for the individuals involved. The improvement of such laws as the Crimes (Sentencing procedure) act 1999, section 21A which have introduced the consideration of aggravating and mitigating factors when sentencing and the introduction of maximum penalties ("more is required than that the case be regarded as a very serious one before the maximum penalty should be imposed")<sup>iii</sup> which benefits the individuals involved.

The effectiveness of Law reform, in providing justice for the individual is somewhat questionable as seen in the Dennis Ferguson case. Governments, who hold the power to introduce "extraordinary legislation", <sup>iv</sup>can often threaten individual rights, favouring the community values more, causing an imbalance between the desires of the individual and society. In the Dennis Ferguson case, the government introduced a controversial law due to their concern that "his (Ferguson) return to Ryde might provoke violent protests", clearly favouring the community values above individual rights. The new legislation introduced under the Housing Amendment (Registrable Persons) Act 2009 enabled

housing authorities to force paedophiles to move from public housing and terminate their tenancy without providing alternative accommodation. This shows how law reform, as a legal measure is often limited in providing justice as it fails to effectively balance the rights of the individual (privacy) and society (protection).

Hence, as law reform is successful in providing a balance between the individual and society, reflecting society's values (constant changes adapting to society's views), protecting individual rights and allowing for opportunities for review (susceptible to change and scrutiny), it is a moderately effective legal measure in dealing with child sex offenders, yet its efficiency is somewhat questionable as the accessibility, resource efficiency, and enforceability of law reform is uncertain.

In order to balance and guard the rights of the individual (victim and accused) and society in the CJS, the **court system** itself is another legal measure which attempts to provide justice. **Specialist courts** and other aspects of the court system such as the introduction of **Victim Impact Statements** (VIS) and chances for appeal, in the criminal process are an example of how the Australian legal system aims to enable justice. Some of the processes established in the court system and the specialist courts, set aside to deal with the sensitive issue of child sexual offenders are often limited in its efficiency and effectiveness.

Many aspects of the criminal court process itself have been established to balance the rights of the individual and society. The court process can be relatively inefficient due to the cost and lengthy time period of the trials, with 37.9% of cases committed almost 10 years prior to sentencing, 38.5 years being the longest period before sentencing and 94 days being the shortest time period between the offence and sentencing.<sup>v</sup> The courts however can also be viewed as effective in providing justice for the society and individual on the basis of providing opportunities for appeal, with 57.4% of appeals regarding child sexual assault being successful.<sup>vi</sup>

For the individuals involved in child sexual assault cases, the CJS has introduced Victim Impact Statements to attempt to make the process and experience of giving statements easier for the victims involved, providing equality and a protection of individual rights to some degree, acquiring justice for the individual. Victim impact statements, used particularly in sensitive cases such as child sexual assault were introduced in 2003, added to the Crimes (Sentencing procedure) act 1999<sup>vii</sup>. VIS provide assistance and equality for the victim by allowing them to read their statements in courts prior to sentencing. The use of VIS in courts is effective as it allows an assessment of the impacts and consequences of the crime on the victim. Victim Impact Statements are also an efficient part of the court system as it is not a lengthy or expensive process.

The establishment of specialist courts such as the Child Sexual Assault court in 2003 is an example of how the courts in the CJS aim to provide justice for the individual. The Child Sexual Assault court which aims to provide justice and equality for the victim by creating a child-friendly environment, training judicial officers, use of CCTV and pre-recorded evidence, intended to be less traumatic for children, providing equality and accessibility. Although aimed to provide justice for the individual, specialist courts such as the Child Sexual Assault court are limited in effectiveness and efficiency. A special report by the Australian Institute of Criminology, called "The Experiences of Child Complaints of Abuse in the Criminal Justice System",<sup>viii</sup> presented a series of findings of how the specialist court can be ineffective in protecting individual rights, and inefficient. The report found that there was an average wait of 18.2 months between reporting and trial, during which the victims suffered from psychological effects. This highlights the resource inefficiency of the specialist court, limiting justice. It was also found that the use of CCTV, to minimise the trauma of seeing the accused, was limited and ineffective. In QLD, 43% of children were refused use of CCTV at trial, only made available for "special witnesses" under the legislation. CCTV usage was left to the discretion of the court not the child's choice, limiting the courts ability in providing equality. Other aspects of the court process in child sexual assault cases, such as cross examination have been found to be abusive, despite legislation such as section 41 of the Evidence Act 1995. The report found that an overwhelming number of children were accused of lying, intimidated or not treated with "respect, dignity, care or humanity".<sup>ix</sup>

It can be seen that courts, as a legal measure are often limited in effectiveness and efficiency. The courts, established to deliver justice for the individuals involved in child sexual assault cases and the general public, is only moderately effective in providing justice.

For the individuals involved in child sexual assault court cases, the courts often fail to successfully provide equality (CCTV is reduced in effectiveness... 43% of children refused CCTV), however they are sometimes only slightly effective in protecting individual rights through Victim Impact Statements (provide justice for victims of child sexual assault by allowing them to express the consequences of the crime).

The courts aim at balancing the needs of the individual and society. In the criminal process, the CJS also aims to provide justice for the society by providing opportunities for appeal (57% of appeals regarding child sexual assault being successful) and review (through the Christine Eastwood report, new government initiatives such as the 'Specialist Child Sexual Assault Jurisdiction Pilot' have been announced, march 2003, recommending changes). The courts however are ineffective in providing justice to the fullest extent for society and the individual as the courts are not resource efficient. The process is often lengthy and costly. These factors, some providing justice and others limiting it, result in the courts, as a legal measure not providing justice to the fullest extent.

In the CJS, a range of differing **sentencing options** are available, as a legal measure in an attempt to balance the rights of the individual and community. In child sexual assault cases, these varying sentencing options have been made available to reflect the continuously changing values of society. For example, maximum penalties were introduced to provide justice for the accused, after it was discovered that from 2000 to 2002, the figure of 65.1% of child sex offenders receiving a full time custodial sentence had increased to 83.1%.<sup>x</sup> The array of sentencing options such as standard non-parole periods, rehabilitation, list of mitigating/aggravating factors and post sentencing are evidence of how the CJS aims to provide justice for the individual and society; however these legal measures are limited in their effectiveness and efficiency.

**Standard minimum sentences**, introduced under the Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2000, a sentencing option available to judges sentencing child sex offenders, involves the courts imposing standard non-parole periods <sup>x</sup>for serious offences dealt within the district/supreme court. Minimum sentencing is significant in creating structure for judicial discretion and promoting consistency in the CJS. This sentencing option is also effective in providing justice for society as it reflects the values of the community, adapting to the general public's view that child sexual assault is a serious offence, deserving harsh punishments. Standard minimum sentencing is also effective in providing justice as it allows for opportunities for enforcement and balances the rights of the individual and society, by establishing minimum sentences that are standard, avoiding discrimination within the CJS.

Under the Crimes (Sentencing Procedure) Act 1999, section 21A, a list of **aggravating and mitigating factors** was established, to be taken into account when determining the appropriate sentence for offenders, either reducing or increasing sentences. The aggravating and mitigating factors, creates flexibility within the criminal process, allowing for differing sentencing alternatives. <sup>xii</sup> These mitigating and aggravating factors are effective in providing justice for the accused as they protect individual rights and provide equality by fitting the appropriate sentence to each individual case, taking circumstances into consideration, perhaps even lessening the sentence originally imposed. In the case R v Ryan 2001, Ryan achieved justice as he received a reduced sentence from 11yrs to 10yrs due to his work as a priest, which was a mitigating factor. It may be argued however that the mitigating and aggravating factors are ineffective in providing justice for the victim and community, as it might result in a lesser sentence. Generally however aggravating and mitigating factors are effective as it is most likely to impose the appropriate sentence, balancing the rights and views of both the individual and society.

Another sentencing option available for child sexual offenders is **post sentencing**. Under the Child Protection (Offenders Registration) Act 2000, the legislation requires serious offenders to inform police of their residential address, employment, motor vehicles etc. Post sentencing, a way to continuously monitor serious offenders once released back into the community, may continue for a time period ranging from 7 years to lifetime<sup>xiii</sup>, depending on the serious nature of the offence and the discretion of the judge. Post sentencing, a highly effective legal measure for the community in terms of protection and a reflection of values (reflecting the serious nature of child sexual assault), is successful in providing justice for society, however for the individual, whose rights and privacy is often violated, post sentencing is not considered to be effective. Overall post sentencing is not resource efficient as it involves continual monitoring and reporting of sex offenders, however its effectiveness and ability to protect society is beyond doubt.

Although faced with many limitations and challenges, the legal measures governing child sex offenders within the CJS has been reasonably effective and efficient in providing justice by balancing the rights and values of the individual and society. Overall through the various legal measures of law reform, the court process and sentencing options, the CJS somewhat achieves effectiveness and efficiency for child sex offenders.

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- <sup>i</sup> “Sentencing offenders charged with child sexual assault”-Graham Hazzlit ; judicial commission of NSW 2004
- <sup>ii</sup> “Sentencing for child sexual assault with particular emphasis on the law of NSW”- Ivan Potas 2006
- <sup>iii</sup> Veen (No 2) 1988 164 CLR 465
- <sup>iv</sup> Andrew Clennel, Brisbane Times sept23rd 2009.
- <sup>v</sup> “Child Sexual offences: an update on initiatives in the criminal justice system”- Rowena Jones
- <sup>vi</sup> “Sentencing for child sexual assault with particular emphasis on the law of NSW”- Ivan Potas 2006
- <sup>vii</sup> VIS were highly praised and supported by VOCAL .
- <sup>viii</sup> No.250, “The Experiences of Child Complaints Abuse in the Criminal Justice System”- Christine Eastwood. The trends and issues in crime and criminal justice, Australian institute of criminology.
- <sup>ix</sup> “The Experiences of Child Complaints Abuse in the Criminal Justice System”- Christine Eastwood. The trends and issues in crime and criminal justice, Australian institute of criminology.
- <sup>x</sup> “Sentencing offenders Convicted of Child Sexual Assault”- Judicial commission of NSW, 2000
- <sup>xi</sup> Minimum periods for which an offender should be kept in prison.
- <sup>xii</sup> Some of the aggravating factors listed in the act include substantial emotional harm inflicted as a result of the crime, an abuse of trust, the victim’s vulnerability or if the offender had any previous convictions.
- <sup>xiii</sup> Child Protection (Offenders Registration) Act 2000 , s 14.