FIREBOMBS AND FERGUSON

A review of hate crime laws as applied to child sex offenders

ALLAN ARDILL and BEN WARDLE

Few crimes evoke as much passion as child sexual abuse. For this reason sentencing poses particular challenges as courts grapple with additional media and community scrutiny. Here the concern is how the law should treat those who have committed crimes against a child sex offender or against a person believed to be a child sex offender. In this pointed area of law it is argued that the New South Wales sentencing provisions applied in the recent case of *Dunn v R* struck the balance correctly. In reaching this conclusion the article responds to the arguments made by Gail Mason in her work 'Prejudice and Paedophilia in Hate Crime Laws: *Dunn v R*' on the same topic in this issue, and adds one or two extra ideas for reflection.[1]

At first glance this argument is appealing because anything undermining anti-vilification and anti-discrimination laws deserves criticism. However, a more considered view is that the inclusion of paedophiles as a protected group in a case applying a sentencing statute does not undermine anti-vilification or anti-discrimination laws. Instead it enhances them.

By way of background *Dunn v R* was a case applying a sentencing statute aimed at so-called 'standardised sentencing'.[2] The NSW Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill was drafted in the wake of the widely reported Bilal Skaf and Mohamed Ghanem crimes.[3] It was a political compromise because the then Coalition opposition sought mandatory sentencing laws.[4] The Bill included s 21A(2)(h) which is now a point of contention between Mason and our 'response' below.

A central plank in Mason's article is that a 'group of people' under s 21A(2)(h) should be confined to those mentioned in parenthesis. The actual provision reads:

> **21A Aggravating, mitigating and other factors in sentencing**
>
> (1) General
>
> In determining the appropriate sentence for an offence, the court is to take into account the following matters:
>
> (a) the aggravating factors referred to in subsection (2)
>
> ...
>
> (2) Aggravating factors
>
> The aggravating factors to be taken into account in determining the appropriate sentence for an offence are as follows:
>
> ...
>
> (h) the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability),
>
> ...

On its plain and ordinary meaning, the expression 'such as' suggests an open-ended category.[5] The provision was clearly intended to be inclusive rather than exhaustive. Therefore *Dunn v R* got this right and held:

> [32] Applying s 21A(2)(h) to those facts, it is clear that the offences come fairly and squarely within it. The offence was motivated by a hatred or prejudice against Mr Arja solely because the applicant believed him to be a member of a particular group, ie paedophiles. *The examples given in parentheses are merely that, ie examples, they do not comprise an exhaustive list of the groups envisaged by the subsection.*[6]

This fits with the New South Wales Law Reform Commission Report 79 (1996) which said among other things that attempts to seek consistency in sentencing should be subject to the overriding principle of judicial discretion.[7]

Another plank in the argument in Mason's work is the author's assertion that a 'group of people' under s 21A(2)(h) should be confined to '[g]roups that are the historical objects of unjustified prejudice and its violent manifestations.' It is argued this:

> interpretation would be more in keeping with the ideals of those who advocate for hate crime laws on the grounds that they are capable of making a positive contribution to the promotion of tolerance and respect for such groups.

By restricting protection to historical groups new or emerging subjects of prejudice are excluded. Our view is that any fetter on judicial discretion would be a limitation on measures aimed at addressing prejudice.

In fact, a key objective of the introduction of s 21A(2)(h) was to facilitate judicial discretion. Yet another point made in Mason's article is the claim that an inclusive reading of s 21A(2)(h) risks opening the floodgates: 'the Court of Criminal Appeal may have left the door open for s 21A(2)(h) to apply to *any* group (lawyers, politicians, teachers, greenies, rapists perhaps?)'. Any risk of opening the floodgates is mediated by the greater good of curbing violence. It is important that s 21A(2)(h) can apply to any group where there is violence against a person based on their 'membership' of that group. This gives greater scope for sentencing to deter violence.

Mason also argues 'it makes little practical sense to extend coverage of s 21A(2)(h) to paedophiles as a group.' Condemnation of paedophiles:

> cannot be equated with intolerance and bias that is directed towards, for example, members of Jewish, Asian, disabled, gay or lesbian communities. In short, holding or expressing negative attitudes towards adults who sexually abuse

REFERENCES

1. Adding in the conclusion: 'The decision in *Dunn* does nothing to advance the fight against ingrained and unjustified manifestations of prejudice. ... On the contrary, it lends support to opponents of hate crime law who argue that there is no sound basis upon which to draw a coherent line between those groups that should be protected and those that should not.'

2. The original 1999 Act was arguably the then government's attempt to implement the recommendations of the 1996 NSW Law Reform Commission Report 79 (1996) – Sentencing, which noted the need for judicial discretion to be tempered by 'consistency in sentencing' (see section 1.8 of the report citing *Lowe v The Queen* (1984) 154 CLR 606 at 610–611).

3. *R v Skaf, Ghanem and Hajeid* [2004] NSWCCA 74 (7 April 2004).

4. This was the view of the minor parties and independents. See New South Wales, *Parliamentary Debates*, Legislative Council, 20 November 2002, 7062, and 21 November 2002, 7291.

5. A statute should be read as a whole and given its plain and ordinary meaning.

6. Justice Hoeben (with whom Handley AJA & Smart AJ agreed) in *Dunn v Regina* [2007] NSWCCA 312), emphasis added.

7. Paragraph 1.8.

children does not fit within contemporary understandings of prejudice.

Granted Mason does concede '[t]his is not to say, of course, that vigilantism against paedophiles is warranted.' However, there are 'practical' reasons to include paedophiles in s 21A(2)(h). The Ferguson case is a good example.

Ferguson served a 14 year jail term ending in 2003 having been convicted of numerous sexual offences against children. In 2005 he was arrested and held in custody on two charges of indecent dealing with children. Before his case was heard in full there was a concerted media campaign against him.[8] So serious was this campaign, together with the weakness of the case against him, he was granted a permanent stay of proceedings.[9] Justice Botting also ruled that the case against Ferguson relied on weak evidence, and indeed, there was some evidence suggesting that another person might be responsible for the crimes in that case.[10]

Upon his release in 2008 under 24-hour police supervision, Ferguson was pursued and vilified by Queensland media and forced to relocate several times. Each time he was 'found' he was harassed by vigilantes in a number of communities urged on by the media. After Botting J's decision was overturned in the Supreme Court a warrant was issued for the arrest of Ferguson.[11] He was granted bail pending leave to appeal to the High Court.[12] That same day the television news on all channels showed file footage of Ferguson describing him, amongst other things as a notorious convicted paedophile.

In the heat of the media hysteria Queensland Premier Anna Bligh introduced amendments to the *Criminal Code* providing for 'judge only' trials and 'majority verdicts'.[13] Arguably these changes brought Queensland into line with other states. When the case was ultimately heard under the new procedures, before a judge sitting without a jury, the case against Ferguson was so weak he was found not guilty.[14]

Ferguson was released again under 24-hour supervision. After being driven out from a number of Queensland residences due to prejudice, hate and threats of violence, Ferguson now finds the same types of hysterical intolerance in New South Wales. This has included threats to his life, media stunts with offensive banners, placing a coffin on his doorstep, daily abuse, and violent skirmishes around his home. Most alarmingly police were called when a petrol bomb was located outside Ferguson's residence. Ferguson has not committed a crime and is not facing any charges. It is worth considering what effect *Dunn v R* would have had if the petrol bomb had exploded.

While there is merit in the author's view that condemnation of people who engage in sexual activity with children is warranted, it does not follow they should be subject to violence and fall outside s 21A(2)(h). Indeed, a 'practical benefit' of s 21A(2)(h) as it was applied in *Dunn v R* is that it can deter violence against a person merely accused of a sexual offence against children. Section 21A(2)(h) explicitly refers to groups 'to which the offender believed the victim belonged.' In other words the section applies whether or not the person actually 'belongs' to the group. In *Dunn v R* the court accepted that Mr Arja had not committed any sexual offence against children. As both *Ferguson* and *Dunn* show, people who are not guilty of a sexual offence against children may be victims of hate crimes.

Lastly, we would add two further points.

A troubling aspect of both *Dunn v R* and Mason's article is the confusion between paedophilia and sexual abuse. This misunderstanding stereotypes all child sex offenders as psychologically disordered. It confuses the terms 'paedophile' and 'sex offender', with 'paedophile' incorrectly used as a generic term for all child sex offenders.[15] These terms are not synonyms as a child molester does not necessarily have paedophilia or any other psychosexual disorder.[16] Paedophilia is a psychological disorder in which an adult experiences a sexual interest in prepubescent children, and most child sex offenders do not have paedophilia. While there was evidence that Dunn believed Arja was a child molester, this does not mean that Dunn believed Arja had paedophilia. The confusion between paedophilia and sexual abuse demonstrates the misconceptions and stereotypes surrounding child sex offenders, and indicates that child sex offenders are already subject to prejudice.

Furthermore, as Barnes notes, the hysteria around sex offenders masks a greater risk to children, the 'individual who presents as a decent law-abiding family man.'[17] The hysteria surrounding Ferguson was also disproportionate given the paucity of media and community attention to the increasingly pervasive, yet subtle 'corporate sexploitation' in terms of the sexualisation of virtually all children.[18] The prevalence of sexual abuse is likely to remain covert in a climate where attention is diverted away from the sexualisation of all children and away from the far more frequent incidence of familial sexual abuse. In other words, when public attention is fixed hysterically on the rarer 'monster paedophile' it obscures other threats to children and overstates the nature of the risk posed by offenders such as Ferguson.[19]

Conclusion

At first glance the argument in 'Prejudice and Paedophilia in Hate Crime Laws: *Dunn v R*' is appealing because anything that undermines anti-vilification and anti-discrimination laws deserves criticism. However, on reflection the inclusion of paedophiles as a protected group does not undermine anti-vilification or anti-discrimination laws. Instead, the decision in *Dunn v R* should be welcomed as a good result with the potential to urge less violence in our society.

ALLAN ARDILL and **BEN WARDLE** teach law at Griffith University.

8. ABC Television, *Media Hunt a Monster*, Media Watch, 14 July 2008, <abc.net.au/mediawatch/transcripts/s2303501.htm> at 21 July 2008.

9. *R v Ferguson* [2008] QDC 136.

10. This fact was recognised in the later case of *R v Ferguson* [2009] QDC 158.

11. *R v Ferguson; ex parte A-G (Qld)* [2008] QCA 227.

12. Leave was refused on 13 February 2009, *Ferguson v R* [2009] HCA Trans 16.

13. Approved by Cabinet 18 August 2008. See ss 614 & 615 *Criminal Code* (Qld) 1899.

14. *R v Ferguson* [2009] QDC 09-049 (6 March 2009), per Wolfe CJ.

15. Karen Gelb, *Recidivism of Sex Offenders* Research Paper (2007), 19.

16. Stephen Smallbone and Richard Wortley, *Child sexual abuse in Queensland: Offender characteristics and modus operandi* (2000), 34.

17. Greg Barns, 'Name-and-shame proponents must not have their way over convicted paedophile Dennis Ferguson', Opinion, *The Australian* (Sydney), <theaustralian.news.com.au/business/story/0,28124,26091006-17044,00.html> at 18 September 2009.

18. See further: 'Consuming Kids: The commercialization of Childhood', Transcript, *Media Education Foundation*, 20–22 <mediaed.org/assets/products/134/transcript_134.pdf> at 28 October 2009.

19. Trish McCulloch and Lynn Kelly, 'Working with sex offenders in context: which way forward?' (2007) 54(1) *Probation Journal* 7, 9–11.

Author Response

It is a mistake to assume that harsher penalties curb violence or that 'anything' that contributes to its reduction is to be welcomed. Even if the imposition of heavier sentences was capable of deterrence, it is important to remember that the current penchant for increasingly punitive forms of punishment comes at a social cost, not the least of which is the massive problem of rising imprisonment rates.

The imposition of heavier sentences upon offenders always demands justification. There is a large body of Australian and international jurisprudence that seeks to justify the heavier penalties imposed by hate crime laws via principles of proportionality and social policy. Hate crime laws are said to be worse than other crimes because they attack the core identities of racial, religious, sexual, disabled and other minorities. Ultimately, hate crime is said to undermine values of diversity and equality which are the backbone of a multicultural society. They can be understood as an extension of anti-discrimination and equal opportunity principles into the criminal domain.

Vigilantism such as we have seen in the recent Ferguson case is deplorable. However, the question we should ask is whether we need aggravated sentencing provisions to tackle the problem. What purpose would harsher punishment serve in such a case? Do we wish to send the message that crimes against 'paedophiles' (to use the language of the NSW Court of Criminal Appeal) are worse than crimes against those who are not paedophiles (because this is the message that hate crime laws send)? In attaching extra punishment to the element of prejudice, such laws seek to challenge established hierarchies of power and thereby assist minority groups in their struggle for equality. Whether or not we agree with the ambitious social objectives embodied in hate crime laws — and many of us approach these laws with a hearty scepticism — we can at least see that the heavier sentences they impose are backed by carefully considered justifications (see *Sentencing for Offences Motivated by Hatred or Prejudice*, Sentencing Advisory Council Victoria, 2009). Can we say the same about the Court of Criminal Appeal's interpretation of s 21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) in *Dunn v R*?

GAIL MASON