

The sentencing and supervision of individuals convicted of sexual offences in Australia

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Abstract

Sexual offending (particularly against children) is a global concern and like much of the western world, the typical response in Australia has become increasingly punitive. Although colonized by the British and retaining many features of the Westminster system, Australian policies have also tended to replicate many North American trends. Our national response to this particular crime features the same widespread moral outrage and condemnation common in other jurisdictions. It has also doubtless been further shaped by the evolution of the internet and comparatively fast adoption of handheld computers and smart phones, as legislators catch up with the many and varied ways that technology has impacted the commission, detection, investigation, and prevention of sexual crime. We provide an overview of the policies and practices in several jurisdictions to illustrate the contemporary Australian criminal justice landscape. We pay particular attention to four states: New South Wales, Victoria, Queensland, and Western Australia and compare and contrast their approaches to people convicted of sexual offenses in the areas of sentencing, risk assessment, civil commitment, community supervision, registration, public notification, and passport control.

Keywords: sexual offending, Australia, legislation, supervision

Sexual offending is a global concern and its treatment and prevention warrants international attention. Given the space constraints of this piece and our emphasis on policy and practice, we provide only a brief account of the nature and extent of sexual crime in Australia. The most recent Personal Safety Survey (PSS) by the Australian Bureau of Statistics (ABS) (ABS, 2017a) indicates that around 11% of women and 5% of men report having been sexually abused before their fifteenth birthday. These rates are comparable with the rest of the Western world. Using the Australian and New Zealand Standard Offence Classification (ANZSOC) the ABS concluded in 2016 that the rate of sexual assault was 95.5 incidents per 100,000 people (or 23,052 reported sexual assaults). This rate was up from 85.6 incidents per 100,000 people (or 18,862 reported sexual assaults) in 2010. Broken down by sex, the rates per 100,000 people were 34.3 for men and 155.4 for women (ABS, 2017b).

US culture is ubiquitous in Australia. Trends in legislation and in our criminal justice processes follow the United States as closely as trends in popular culture. Our criminology and criminal justice students are just as familiar with (and thus poorly informed by) the crime procedural genre of television as their North American counterparts. International readers might be interested (or depressed) to learn that calling 911 (the US emergency telephone number) will redirect to Australia's emergency services (whose telephone number is actually 000) from most mobile phones in this country.

Over the last two decades, Australia has witnessed "campaigns to increase public awareness and

reporting rates, the formation of special police taskforces, changes to rules of evidence, increased penalties and sentences, the establishment of a national offender register, reviews of community notification laws, implementation of wide-reaching employment screening programs, major investments in specialized sex-offender treatment programs, a tightening of parole policies, the introduction of preventative detention legislation, and so on" (Wortley & Smallbone, 2006, p. 2).

Australia is the planet's sixth largest country¹ with a landmass almost as large as that of the USA (7.692 million square kilometres) (www.australia.gov.au). Australia has a relatively low population of just under 25 million people. Most (17 million) of whom live in three eastern seaboard states (New South Wales (NSW), Victoria, and Queensland) and two thirds of those residents live in one of three major cities (Sydney, Melbourne, and Brisbane). Australia is a highly urbanised nation with extremely low population density in remote and very remote areas. It is estimated that less than 3% of the country's population live in such locations (Baxter, Hayes, & Gray, 2011).

This essay includes a description and commentary of the relevant policies regarding sexual crime in Australia. Our contribution includes information gathered from various government websites and conversations with colleagues across the country. Consistent with the population density, resources, and availability of services in each state, we draw most heavily from the work by practitioners in NSW, Victoria, Queensland, and Western Australia (WA).

The description that follows of the Australian experience is presented predominantly in comparison to the laws, policies, and procedures in the US. We certainly do not intend to use the US as the standard from which to measure other jurisdictions, but we find this comparison to be consistent with the geographical concentration of research in North America. Where relevant, we also note the similarities and differences with other Western countries. Our results below are divided into the following areas: sentencing, risk assessment, civil commitment, community supervision, registration and public notification, and passport control.

Sentencing. Maximum custodial sentences for various types of sexual offenses are largely comparable across Australia. Table 1 contains these results for four jurisdictions. Rape of an adult as well as a penetrative sexual offense against a child both carry maximum sentences of 25 years or life. As a general trend, sentences for all crimes of a sexual nature have increased in recent years (Wortley & Smallbone, 2006). In fact, more generally, Australia has become more punitive over time (Tubex et al, 2015). In 2003, for example, Queensland saw the maximum custodial penalty for indecent treatment of a child under 16 years increase from 10 to 14 years and in cases where the victim is a child under the age of 12, the maximum penalty for a contact sexual offense increased from 14 to 20 years in custody (Queensland Sentencing Advisory Council, 2017).

Table 1: Maximum penalties for sexual offences in four Australian states

	QLD	NSW	VIC	WA
Attempted rape	14 years	14 years	10 years	5-7 years
Rape	Life	Life	25 years	14-20 years
Contact sexual offense against a child	Life	Life	25 years	7-20 years
Noncontact sexual offense against a child	20 years	20-25 years	15 years	4-10 years

Possession of child exploitative material	14 years (20 years*)	10 years	10 years	7 years
Production of child exploitative material	20 years (25 years*)	10 years (14 years if child is under 14)	10 years	10 years
Distribution of child exploitative material	14 years (20 years*)	10 years	7 years	10 years
Online grooming of a child under 16	5 years (10 years if child under 12)	12 years (15 years if child under 14)	5-10 years	5 years (10 years if child under 13)

* If anonymizing service or hidden network is used

It is also clear that sexually motivated offenses that do not involve direct contact are now being perceived as much more serious than in the past. For example, in 2009, the language in Western Australia's previous (1996) criminal code was officially revised from "child pornography" to "child exploitative material." This change has continued around the country. The crimes of possession, production, and dissemination of child exploitative material have all had their sentences lengthened. For example, in Victoria, the maximum sentence for possession or production of child exploitative material increased from five years (in 2010) to ten years (in 2017) (Judicial College of Victoria, 2018).

Also of note is the new category of "online grooming of a child" which carries a variable sentence of 5-12 years, depending on the jurisdiction. Its most recent iteration was passed in Victoria in 2014 (*Crimes Amendment (Grooming) Act 2014 (Vic)*). This law was written in response to the recommendations of the "Betrayal of Trust" report (Family and Community Development Committee, 2013). Grooming became formally recognized as an offense that could be conducted in person or online, via interaction through web chat rooms, email, or social media. The key element of the offence captures any form of communication with the expressed intention of facilitating sexual conduct.

Importantly, this newer Victorian legislation is quite a lot broader than that previously passed in New South Wales (in 2011) and Queensland (in 2008). For example, a grooming offense in NSW is "confined to circumstances in which an adult engages in conduct that exposes a child to indecent material or provides the child with an intoxicating substance with the intention of making it easier to procure the child sexual activity" (Victoria State Government, 2017: p2).

Risk Assessment. As it has in much of the west, the development of actuarial risk assessment and evaluation has utterly transformed how individuals convicted (or, in some cases, even *suspected*) of sexual crimes are managed through the criminal justice system. Upon surveying various states we learned that the administration of risk assessment is almost exclusively conducted by psychologists who work in corrections. The Static99-R is the only tool that is used consistently across all of the jurisdictions we contacted, and staff who administer this assessment must be trained. Table 2 presents the additional selection of tools utilized in other states and indicates whether a clinician requires training to administer said tool. Exceptions to the above include that: (1) in NSW, use of the VRS-SO is limited only to psychologists who are working with individuals subject to the High Risk Offender Act and (2) in Victoria, the application of the SVR-20 is reserved only for use with cognitively-impaired persons.

Table 2: Use of actuarial risk assessment tools in four Australian jurisdictions

	QLD	NSW	VIC	WA
Static-99R	Corrections (T)	Corrections (T)	Corrections (T)	-
Stable-2007	Corrections (T)	Corrections	-	-
Acute	Corrections (T)	Corrections	-	-
RSVP	-	Corrections (T)	Corrections (T)	-
VRS-SO	-	Corrections (T)	Corrections	-
VRAG-R	-	Corrections (T)	-	-
Risk Matrix 2000	-	-	Corrections	-

(T) Indicates training is required

An emerging issue in the area of actuarial risk assessment is the extent to which these tools can be usefully applied to Indigenous populations. Despite its geographical remoteness, Australia is also home to a remarkably multicultural population. It has the world's 9th largest immigration population with immigrants making up 26% of its population. According to the 2016 census, Indigenous Australians make up 3.3% of the nation's population, but as in other parts of the west, they are overrepresented in the criminal justice system. Although sexual offending crosses all cultural and geographical boundaries, research indicates that rates of interpersonal violence increase as one moves away from more densely populated capital cities. The Indigenous population has a much greater concentration in the more remote parts of the country (Rayment-McHugh, Smallbone, & Tilley, 2015). The extraordinary population heterogeneity in Australia, and the added complexity of so many remote communities has led to a need for the development of innovative approaches to the treatment, management, and prevention of sexual abuse. The extent to which existing tools are appropriate for use with such a distinct population remains to be seen, but is the focus of ongoing and extensive study.

Civil Commitment. Legislation makes explicit provisions for some kind of indeterminate sentence (beyond the original custodial term) in each of the states we reviewed. For example, in Queensland, the *Dangerous Persons (Sexual Offenses) Act 2003* (QLD) (DPSOA) provides an option for the Attorney-General to petition the court for a "continuing detention order." The object of the DPSOA is to "provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community; and to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation" (DPSOA s 3). As part of the process of obtaining a continuing detention order, if the court is satisfied that "there are reasonable grounds for believing the prisoner is a serious danger to the community" (DPSOA s 8(1)), the court may order that the prisoner must undergo psychiatric assessment by two psychiatrists (DPSOA s 8(2)), assessing their level of risk if released from custody (DPSOA s 11). For the petition to be successful, the court must be satisfied that "there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of such an order" (DPSOA s 13). Those individuals subject to continued detention under the DPSOA are ineligible for parole, but may be released under intensive community supervision. The process for continuing detention in NSW requires the Attorney General to apply to the Supreme Court. For the petition to be successful, the court must be satisfied to a high degree that the offender is likely to commit a further sex offense if he or she is not kept under correctional supervision.

Further south, Victorian Courts can similarly be asked to consider making orders for continued

detention for "offenders who have served custodial sentences for certain sexual offences and who present an unacceptable risk of harm to the community" (*Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 1). It is an important condition in most states that such detention orders be reviewed and renewed annually by the court. For example, in Victoria and Queensland, these orders must be reviewed annually, and each annual review must start within 12 months after the completion of the hearing for the last review. The language of the law in WA (where it is referred to as "preventative detention") specifies that a sex offender may be returned to custody if the court is satisfied that *without* a Continuing Detention Order (CDO) there is an unacceptable risk that the person would commit a serious sexual offense (*Dangerous Sexual Offenders Act 2006* (WA)). In each state the onus is on the Department of Public Prosecutions to satisfy the court (Spiranovic, 2012).

Community Supervision. The laws in Queensland and NSW both provide for intensive community supervision (in Queensland this occurs under the DPSCA, and in NSW it is referred to as an "Extended Supervision Order"). In Queensland, an individual who is recently released from custody and is serving an intensive community supervision order will be subject to any combination of the following menu of requirements:

- a. report to a corrective services officer (CSO) at a stated place and time
- b. receive visits from a CSO
- c. notify CSO of any change of name, place of residence or employment at least two business days before the change happens
- d. be under the supervision of a CSO
- e. comply with a curfew direction (remain at a stated place for stated periods)
- f. comply with a monitoring direction (i.e. wear a stated device, and enable their location to be monitored)
- g. comply with an order to reside only at a place of residence approved by a CSO and live at least 1km (3281 feet) from any schools, children's playgrounds, public parks, or education and care service premises
- h. not leave or stay out of Queensland without the permission of a CSO
- i. not use drugs or alcohol
- j. not gamble
- k. not be in the company of a person under the age of 18; and
- l. not commit an offense of a sexual nature during the period of the order.

As can be seen above, a lot of the provisions of these laws are largely comparable, with what has come to be standard practice in the US and also Canada. Unlike the community notification practices in the US, however, the Australian public is not notified when an individual becomes subject to these rules and restrictions. Furthermore, we have observed anecdotally a shift in emphasis in community supervision across both jurisdictions. In the US, the focus is almost exclusively on monitoring and compliance. Probation could be revoked for breaking curfew by just minutes. In stark contrast, when asked how a broken curfew is managed by community corrections officers in Queensland, the response from various practitioners included the following:

We would frame that as a reminder that you haven't been as vigilant as you need to be.

Our mandate is to reduce risk of sexual offending but we're about so much more than that. Rapport and relationship assists in managing that risk.

We find their redeeming quality and focus on that. The day I can't see the good in someone is the day I have to leave this job.

They might not like what I've said, but I haven't destroyed them.

Another standard element of community supervision in Queensland that differentiated it from the US was a clear emphasis on general physical healthcare and exercise. In the first author's experience with US probation officers and treatment providers a lot of clients struggled to manage their compromised physical health and were severely marginalized by the inaccessibility of affordable healthcare. In contrast, one of the first orders of business upon release from custody in Queensland is ensuring that the individual has a Health Care Card and establishes their client status with community mental health services. Chemical castration is rare but available. Some men take prescription anti-libidinal drugs (that have been recommended by the court and agreed to by the client). The cost of these prescriptions is subsidised, but in order to monitor one of the deleterious side effects of the medication, the state provides regular bone density tests and check-ups free of charge as well as covering the cost of calcium and vitamin D supplements.

Electronic Monitoring. Electronic monitoring that utilizes GPS technology is being used more and more widely across Australia. Most recently, it has also been approved for use on every parolee rather than restricted to only those with sexual offences. As indicated above, adults convicted of child sexual offenses in Queensland who are released from custody *and* subject to DPSOA legislation may be monitored using electronic GPS units. This currently amounts to just under 100 individuals state-wide. In NSW, electronic monitoring is utilized at the discretion of the Supreme Court. It is reserved only for violent sexual offenders who are considered high-risk, and placed on an Extended Supervision Order (ESO). Although every 'dangerous' sex offender in WA is subject to GPS tracking upon release from custody (*Dangerous Sexual Offenders Act 2006 (WA)* s 18(1)(a)), in Victoria it is simply an available option that is ordered at the discretion of the State's Parole Board.

Registration. The concept of a national register and the related but separate component of community notification are often confused as one and the same. The former describes a (state-wide or national) repository that stores identifying details of individuals with a previous conviction for a sexual offense. Such a register contains information available only to law enforcement officers (as initially proposed in the US by the Jacob Wetterling *Crimes Against Children Registration Act 1993*). The latter is community notification (more commonly known as 'Megan's Law') and requires that communities are informed when individuals with sexual offense convictions are released from prison into their communities. Australia provides a good demonstration of how these initiatives are distinct. We have a web-based National Child Offender System (NCOS) that consists of both the Australian National Child Offender Register (ANCOR) and the Managed Person System (MPS) (Napier, Dowling, Morgan, & Talbot, 2018). The ANCOR "allows authorized police officers to record, register, case-manage, and share information about registered persons. It assists police to uphold child protection legislation in their state or territory." The ANCOR is not public, and according to the Australian Criminal Intelligence Commission (ACIC) who oversees the NCOS, "the register is not intended to be punitive in nature, but is implemented to protect the community by reducing the likelihood that an offender will reoffend and to facilitate the investigation and prosecution of any future offenses that they may commit" (ACIC, 2016).

Importantly, the information contained within this register is routinely available to the law enforcement agencies of every jurisdiction allowing cross-border communication, case management, and information sharing (Napier, et al., 2018). Various incarnations of sex offender

registration have been passed in Australian jurisdictions over the past two decades. In 2000, NSW was the first state to introduce a register and most other states followed shortly after, in 2004 (Napier, et al., 2018). This legislation was based primarily upon the 1997 *Sex Offenders Act* passed in the UK. The NSW, Victoria, and Queensland registers are not publicly available and access is restricted to authorized persons who are required to follow strict guidelines set forth by the police commissioner in each jurisdiction.

The Queensland register, for example, contains the identifying details of individuals who have been convicted of sexual or other serious offenses against children. The guiding legislation in Queensland is the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (QLD). Similarly, law enforcement agencies in NSW have access to a register of individuals who have been convicted of the murder or completed (not attempted) contact sexual offense of a child. This register is maintained under the *Child Protection (Offenders Registration) Act 2000* (NSW). The Victorian equivalent is guided by the *Sex Offenders Registration Act 2004* (VIC) and again, access to the register is authorized by the Chief Police Commissioner. It contains the details of anyone whom the court has, at any time, sentenced to a registrable offense including indecent assault with intent to commit rape.

Public Notification. Two Australian jurisdictions have come close in recent years to introducing a publicly available register. The Northern Territory (NT) was on track to become Australia's first jurisdiction with a public register. The legislation proposed a NT Sex Offender Public Website. The proposal included releasing the names, photos, and regional locations of "serious sex offenders." Unlike the various iterations of sex offender registration and Megan's Law in the US, the NT proposal did not intend to report exact residential addresses, locations, or specific places of employment. Ultimately, the plan was never realized.

Soon after, politicians in WA also proposed a publicly available register which was to include an additional list of missing sex offenders. The publicly available version was proposed in WA in 2012 and although almost implemented, the idea was ultimately struck down by 2015. Despite the vocal public support, qualitative studies of law enforcement officers revealed a clear position that a public sex offender register would be "counter-rehabilitative" (Day, Carson, Newton, & Hobbs, 2014). The current incarnation in WA is a semi-public register which has been subject to preliminary evaluation in a series of studies that included interviews of law enforcement professionals.

The Push for a Public Register. Although we do not yet have a publicly available sex offender register in Australia, some commentators argue that it will not be long. Currently, our most vocal proponents for the creation of "Daniel's Law" (named for Daniel Morcombe) are Daniel's parents, Denise and Bruce along with Senator Derryn Hinch (<https://www.danielmorcombe.com.au/blog/-daniel-s-law---public-sex-offender-register-petition>). Hinch is likely best described to international readers as a journalist cut from the same cloth as Fox News' Bill O'Reilly. For decades he was an outspoken investigative journalist and host of a self-titled nightly current affairs program on free to air television in Australia. During each broadcast, he peddled an especially aggressive brand that emphasized his tough-on-crime stance. In 1987 he served a short custodial sentence for contempt, after releasing details about an accused child molester's prior convictions, while the trial was pending (*Hinch & Macquarie Broadcasting Holdings Ltd v Attorney-General (Vic)* (1987) 164 CLR 15). In 2011, he served a period of home detention after breaching suppression orders and naming two men convicted of sexual offenses against children (<https://www.smh.com.au/national/derryn-hinch-guilty-of-breaches-not-sorry-20110603-1fkb1.html>). In 2014, he served another custodial sentence for refusal to pay a fine in relation to breaching a suppression order concerning a high-profile sexual crime against an adult woman

(<https://www.theaustralian.com.au/business/media/emotional-derryn-hinch-released-from-jail-over-contempt>)

To this day, he considers these times in his life to be the "work" of which he is most proud (Hinch, 2017). In 2016, running on a law and order campaign, he became Australia's oldest first term senator elected to the federal Parliament. He represents Victoria and has been a vocal advocate of the Morcombe's and their push for a public registry.

Daniel Morcombe was 13 when he was abducted from a bus stop and murdered in 2003 by twice convicted sex offender, Brett Peter Cowan. Morcombe's fate remained unknown until Cowan led authorities to his body in 2014. Cowan had a long criminal history that involved two prior convictions and custodial sentences for separate and violent sexual assaults against young boys, including abduction, deprivation of liberty, indecent dealing, and grievous bodily harm (*R v Cowan* [2013] QSC 337).

Passport Control. The trend of naming, stigmatizing, and 'othering' sex offenders has evolved in the US with the recent passage of "International Megan's Law." This legislation requires certain registered citizens to have a specific stamp in their passport, thus restricting travel. Australia is closely following suit as the NCOS has now been enhanced to support changes made to the *Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Act 2017* (Cth). This law reflects an effort to deter and prevent sexual tourism, especially in the developing countries of South East Asia (www.dfat.gov.au). The Australian Government Department of Foreign Affairs and Trade provides quite a substantial amount of public information that explains in no uncertain terms that Australians who commit child sex offenses while overseas may be investigated and prosecuted under Australian law. Some senators have recently announced government support for a new initiative that would cancel the passports of "Australian paedophiles." It is curious though unsurprising that no clear definition or operationalization of what constitutes a "paedophile" has been provided, but early descriptions imply that a basic prerequisite would be a conviction of a contact sexual offense against a child. At the time of writing, it was unclear whether there would be an end date to this proposed passport ban which includes a ban on nonessential travel. The broader impact of these initiatives are unknown at this time.

Conclusion

Over the last few decades, Australia's legislative and social response to sexual offending has tended to follow the US most closely. The cultural pendulum in both countries has swung in the direction of increasingly punitive options. There are also, however, a number of distinct differences between our jurisdictions, particularly in the areas of investigation, treatment, and registration. For example, Australia does not utilize polygraphy or plethysmography of any kind. Any treatment costs are usually either subsidized or paid for by the state. Finally, although our registries are managed and maintained by law enforcement, there is no current provision for the public notification of a registered citizen's name, location, or criminal history. Taken together, these three points of divergence illustrate the important differences between the two otherwise fairly similar jurisdictions. As Napier et al. (2018) have recently suggested, Australia provides an ideal location for an empirical investigation of recidivism in the presence of a non public registration and monitoring.

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Footnotes

¹After Russia, Canada, China, USA, and Brazil (www.australia.gov.au)

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