PENALTIES RELATING TO SEXUAL ASSAULT OFFENCES IN NEW SOUTH WALES

Volume 1

NSW SENTENCING COUNCIL

August 2008

A report of the NSW Sentencing Council

The views expressed in this report do not necessarily reflect the private or professional views of individual Council members or the views of their individual organisations. A decision of the majority is a decision of the Council, Schedule 1A, clause 12 of the *Crimes (Sentencing Procedure) Act* 1999.

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2. Ms Jennifer Mason became Director General of the Department of Community Services in March 2008. Prior to this appointment, she was the Director General of the Department of Juvenile Justice
3. Ms Penny Musgrave was appointed to the Council on 25 Febuary 2008
4. Ms Laura Wells was appointed to the Council from 12 March 2007 to December 2008
5. Assistant Commissioner Catherine Burn was appointed to the Council from 23 July to 7 December 2007.

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s44 [3.27], [3.38], [3.45], [3.47], [6.24]; **s44(2)** Volume 2 p. 12; **s44(3)** Volume 2 p. 12; **s45** Volume 2 p. 23;
s54A [3.26], [3.31]-[3.38], [3.48], [3.66]; **s54A(2)** [3.28]; **s54B** [1.12], [3.28], [3.36], [3.66]; **s54B(2)** [3.28];
s100J [1.1].

Crimes (Sentencing Procedure) Amendment Act 2007 **Schedule 1** [3.47].

Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002 [1.17].

Criminal Procedure Act 1986 **Schedule 1** [3.42]; **Schedule 1, Table 1** [3.44];
Schedule 1, Table 2 [2.45];
s259 [3.42]; **s267(2)** [3.44], [4.43].

Crimes (Serious Sex Offenders) Act 2006 [1.9], [4.111], [4.112], [6.52];
s6 [6.57]; **s6(2)** [6.58]; **s9(2)** [6.58]; **s14** [6.57]; [**s14(2)** [6.58]; **s17(3)** [6.58].

Evidence Act 1995 **s110** [5.6].

Pre-Trial Diversion of Offenders Act 1985] [2.57]-[2.59];
s30A(3) [2.57].

Summary Offences Act 1988 [1.9], [2.38];
s4 [4.71];
s21G [2.40], [2.42], [2.43], [2.44], [2.46], [4.52], [4.71], [4.95]; Volume 2 p. 2;
s21G(1) [4.28]-[4.29];
s21H [2.40], [2.43], [2.44], [2.46], [4.30], [4.52], [4.95]; Volume 2 p. 2.

Surveillance Devices Act 2007 [2.45]; **s8** [2.45], [4.53].

Commonwealth

Classification (Publications, Films and Computer Games) Act 1995 [4.21].

Crimes Act 1914 [1.9], [2.80];
s16A [5.10]; **s50AB(1)** [2.53]; **s50BA** Table 3 [3.42]; **s50BB** Table 3 [3.42]; **s50BC** Table 3 [3.42]; **s50BD** Table 3 [3.42]; **s50DA** Table 3 [3.42]; **s50DB** Table 3 [3.42].

Criminal Code 1995 [1.9], [2.80], [4.79];
Div 474 SubDivision C [3.9];
s270.7(1)(a) [3.18];
s474.19 [2.5]; **s474.19(1)** [3.9], [4.32]; **s474.20** [2.5], [2.8]; **s474.20(1)** [3.9], [4.32];
s474.22 [4.33]; **s474.25** [4.33];
s474.26 [4.34], [4.54]; **s474.26(2)** [4.34]; **s474.26(3)** [4.34]; **s474.27** [4.54]; **s474.27(1)** [4.34]; **s474.27(2)** [4.34];
s474.27(3) [4.34]; **s474.28(5)** [4.55].

Customs Act 1901 [4.2]; **s233(1)** [4.34]; **s233(3)** [4.34]; **s233 BAB** [4.34].

Australian Capital Territory

Crimes (Sentencing) Act 2005 **s33(1)(m)** [5.10].
Crimes Act 1900 **s65** Table 1 [2.6].

Northern Territory

Sentencing Act 1995 **s5(2)** [5.10]; **s6** [5.11].

Criminal Code 1983 **s125B** Table 1 [2.6].

Victoria

Crimes Act 1958 **s70(1)** Table 1 [2.6], [4.2].

Sentencing Act 1991 **s5(2)(f)** [5.10]; **s5(2BC)** [6.65]; **s6** [5.10], [5.11].

Summary Offences Act 1966 **s41A** [4.69]; **s41B** [4.69]; **s41C** [4.69].

Queensland

Criminal Code [2.52]; **s227A(1)** [4.68]; **s227A(2)** [4.68]; **s227B** [4.68]; **s228D** Table 1 [2.6].

Penalties and Sentences Act 1992 **s9(2)** [5.10].

South Australia

Criminal Law Consolidation Act 1935 **s63A** Table 1 [2.6]; **s74(7)** [2.33].

Criminal Law (Sentencing) Act 1988 **s10(1)(l)** [5.10].

Tasmania

Classification (Publications, Films and Computer games) Enforcement Act 1995 **s74A** [2.6].

Criminal Code Act 1924 **s130c,s337c** [2.6].

United Kingdom

Criminal Justice Act 1988 [4.80].

Protection of Children Act 1978 [2.68], [4.80].

Sexual Offences Act 2003 [2.40], [2.52], [2.56], [2.64], [2.65]-[2.70], [2.76], [4.86]; **s3(1)** [2.68]; **s5** [2.66]; **s6** [2.66]; **s7** [2.66]; **s8** [2.66]; **s9** [2.66]; **s10** [2.66]; **s11** [2.66]; **s12** [2.66]; **s13** [2.66]; **s14** [2.66]; **s15** [2.47], [2.66]; **s25** [2.66]; **s26** [2.66]; **s27** [2.66]; **s28** [2.66]; **s29** [2.66]; **s30** [2.66]; **s31** [2.66]; **s32** [2.66]; **s33** [2.66]; **s34** [2.66]; **s35** [2.66]; **s36** [2.66]; **s37** [2.66]; **s45** [2.67]; **s46** [2.67]; **s47** [2.67]; **s48** [2.67], [4.87]; **s49** [2.67], [4.87]; **s50** [2.67], [4.87]; **s51** [2.67]; **s52** [2.67]; **s53** [2.67]; **s54** [2.67]; **s55** [2.67]; **s56** [2.67]; **s57** [2.67]; **s58** [2.67]; **s59** [2.67]; **s60** [2.67]; **s61** [2.67]; **s62** [2.67]; **s63** [2.67]; **s64** [2.67]; **s65** [2.67]; **s66** [2.67]; **s67** [2.41], [2.67]; **s68** [2.67]; **s69** [2.67]; **s70** [2.67]; **s71** [2.67].

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RECOMMENDATIONS

The Council suggests that consideration be given to the following:

1. Increasing the statutory maximum penalty for indecency offences committed against children (ss 61M, 61N, 61O *Crimes Act 1900* (NSW)) to 10 years.

2. Creating an additional offence, where a s66A *Crimes Act 1900* (NSW) offence is committed in circumstances of aggravation, that would carry a maximum penalty in excess of 25 years.

   In this section circumstances of aggravation would mean circumstances in which;

   a) sexual intercourse by the alleged offender was secured by force or by putting the alleged victim in fear;

   b) at the time of or immediately before or after the commission of the offence the alleged offender intentionally or recklessly inflicted actual bodily harm;

   c) the alleged offender was in the company of another person or persons;

   d) the alleged offender was in a position of authority of the alleged victim;

   e) the alleged victim has a serious intellectual disability;

   f) the alleged offender took advantage of the alleged victim being under the influence of alcohol or a drug in order to commit the offence; or

   g) the presence of the alleged victim being secured by kidnapping.

3. Amending s66C *Crimes Act 1900* (NSW) to consist of a general provision in the following terms:

   a) Any person who has sexual intercourse, attempts to have sexual intercourse or incites a third person to have sexual

intercourse with another person who is of or above the age of 10 years but under the age of 16 years is liable to imprisonment for 14 years.

b) Any person who has sexual intercourse, attempts to have sexual intercourse or incites a third person to have sexual intercourse with a person under the age of 16 years in circumstances of aggravation is liable to imprisonment for a period of 25 years.

In this section circumstances of aggravation mean circumstances in which;

a) sexual intercourse by the alleged offender was secured by force or by putting the alleged victim in fear;

b) at the time of or immediately before or after the commission of the offence the alleged offender intentionally or recklessly inflicted actual bodily harm;

c) the alleged offender was in the company of another person or persons;

d) the alleged offender was in a position of authority of the alleged victim;

e) the alleged victim has a serious intellectual disability;

f) the alleged offender took advantage of the alleged victim being under the influence of alcohol or a drug in order to commit the offence;

g) the presence of the alleged victim being secured by kidnapping.

4. Providing a note to, or amending s66EA *Crimes Act 1900* (NSW) in order that it be made clear that a separate offence has been created by this section, the gravamen of which is the fact that the accused has engaged in a course of persistent sexual abuse of a child, and that the appropriate sentence to be imposed is one that is proportionate to the seriousness of the offence.

5. In addition, include this offence in the Table of Standard Non-Parole Period matters.

6. Including the s112 offence of breaking and entering the premises in which a sexual assault is committed as an aggravating circumstance for the purpose of s61J *Crimes Act 1900* (NSW).

7. Providing for a separate offence in the sexual context, along the lines of that contained in the *Sexual Offences Act 2003* (UK), of voyeurism.

8. Including as an aggravation of an offence of voyeurism the following:

   a) where the offender interfered with the fabric of a building for the purpose of making visual observations of a person in a state of undress; and

   b) where the person observed was a child; and

   c) where the purpose of the filming or the installation or adaptation of the fabric of the building was to commit a s21G offence involving a child.

9. Transferring ss21G and 21H offences from the *Summary Offences Act 1988* (NSW) to the *Crimes Act 1900* (NSW).

10. Increasing the maximum penalty attaching to ss21G and 21H *Summary Offences Act 1988* (NSW) offences to 5 years imprisonment.

11. Adding an offence involving the act of meeting a child, or travelling with the intention of meeting a child, following grooming, where that involved the communication of indecent material or suggestions made to the child to meet for sexual purposes, to s66EB *Crimes Act 1900* (NSW).

12. Considering, at the time of any substantial review of the *Crimes Act 1900* (NSW) introducing a definition of the expression "act of indecency" in the Act as follows:

An act of indecency means an act that:

(i) is of a sexual nature; and

(ii) involves the human body, or bodily actions or functions;

and

(iii) is so unbecoming or offensive that it amounts to a gross breach of ordinary contemporary standards of decency and propriety in the Australian community.

13. Including the s66EA offence (of persistent sexual abuse of a child) in the list of the offences to which the *Pre-Trial Diversion of Offenders Act (1985)* applies, so as to allow a s66EA offender to be eligible for treatment at Cedar Cottage.

14. Including a specific incitement offence in the *Crimes Act* to capture cases where an offender incites one or more persons to commit a sexual offence, that would attract a similar maximum penalty as the relevant substantive offence.

15. Re-structuring the offences currently included in Part 3 Division 10 *Crimes Act 1900* (NSW) so as to provide for 3 separate Divisions, the second of which would be specific to offenders involving the sexual assault of children under the age of 16 years, as follows:

    Division 10 Offences involving the sexual assault of adults, etc

    Division 10A Offences involving the sexual assault of children under the age of 16 years, etc

    Division 10B Sexual servitude

16. Increasing the maximum penalty for s91H(3) *Crimes Act 1900* (NSW) child pornography offences to that of 10 years imprisonment.

17. Increasing the maximum penalty for s91E *Crimes Act 1900* (NSW) child prostitution offence to that of 14 years imprisonment where the child is aged under 14 years.

18. Consideration be given to increasing the maximum penalty for all offences related to child prostitution to reflect the added criminality involved in that form of conduct beyond that which would be captured by an offence charged under s66A and s66C *Crimes Act 1900* (NSW).

19. Increasing the penalties attaching to s73 *Crimes Act 1900* (NSW) special care offences to 14 years where the victim is aged below 18 years.

20. Increasing the penalty for the s80D(2) *Crimes Act 1900* (NSW) aggravated sexual servitude offence to 20 years, consistent with the comparable s270.7(1)(a) Commonwealth Criminal Code offence.

21. In any wholesale review of the *Crimes Act 1900* (NSW), that consideration be given to achieving a greater uniformity in the available maximum sentences sexual offences committed in Australia with those available for comparable Commonwealth offences committed by Australian citizens or residents on children overseas.

22. Monitoring the rates of offending and sentencing patterns for sexual offences not contained in the Table of Standard Non-parole Periods (SNPP), with a view to their possible inclusion in the Table at a later date.

23. Confining the relevant provisions of the SNPP regime to adult offenders.

24. Giving consideration at the time of any wholesale review of the *Crimes (Sentencing Procedure) Act 1999* (NSW) to standardising the SNPPs for sexual (and other) offences within a band of 40-60% of the available maximum penalty, subject to the possibility of individual exceptions, by reference to an assessment of the incidence of offending and special considerations relating thereto.

25. Consulting with the NSW Sentencing Council regarding potential additions to the SNPP scheme, involving the level or levels at which the SNPP might be appropriately set.
26. Giving consideration to the establishment of a transparent mechanism by which a decision is made to include a particular offence in the Table, and by which the relevant SNPP is set.
27. Consulting with the NSW Sentencing Council regarding the identification of sexual offences that might justify an application for a guideline judgment, following its ongoing monitoring of relevant sentencing patterns.

    Amending the maximum penalties in relation to State offences relating to child pornography as follows;

28. Increasing the maximum sentence for a possession offence under s91H(2) *Crimes Act 1900* (NSW) to 10 years imprisonment.
29. Increasing the maximum sentence for the current s21G(I) and s21H *Summary Offences Act 1988* (NSW) offences so as to allow for maximum sentence of 5 years where the object of either offence is a child under the age of 16 years; and, in order to allow for that, to move the offences to the *Crimes Act 1900* (NSW) while including them in the list of offences that can be triable summarily by consent where the offence is relatively trivial;
30. Deleting the artistic purposes defence from s91H *Crimes Act* 1900 (NSW);

    Amendment by way of clarification in relation to certain of the State child pornography offences by:

31. Providing an extended definition of the expression “produce” in relation to the s91H(2) offence
32. Making it clear that material within the definition of child pornography for the purpose of the s91H offence, includes pseudo images of children;

33. Adopting the evidentiary enabling provision concerning the age of a person depicted in material alleged to be child pornography in similar form to that in s474.28(5) Criminal Code (Cth);
34. Seeking a qualitative guideline judgment from the Court of Criminal Appeal, which might take into account the decision in *R v Oliver* [2003] 1 Cr App R 28 and the UK guidelines, in relation to the child pornography offence.
35. A working party be established (comprising the Police and the DPP) to consider whether the concept of possession comprised in the s91H(2) offence can be enlarged so as to respond to those cases where by the time an offender's computer has been seized, the offender has deleted the images.
36. A working party be established (comprising the Commonwealth and State DPPs; Police; Attorney Generals' Departments; and other relevant agencies) to examine the approach that should be taken in cases where an offender is found to have a significant collection of child pornography material, with a view to facilitating the framing of suitable charges, and the presentation of evidence of that material in court, so as to ensure the totality of the offenders conduct is sufficiently addressed by the sentence, while making proper allowance for the OH&S issues involved in relation to Police, Prosecutors and others who have to examine and process the relevant material.
37. Consideration be given to allowing the imposition of conditions requiring any offender who has committed an offence of:
    - possession of child pornography; or
    - serious sexual offending, and who
    - is released on parole or is the subject of an extended supervision order,

a) to refrain from accessing child pornography by electronic or other means;

b) to forthwith make available for full inspection (including removal for forensic examination if so requested) any computer or other electronic equipment owned or used by the offender at any time as required by that offenders; Parole Officer or other officer from the Special Visitation Group or Corrective Services, as the case may be; and

c) to provide the Corrective Services' officer with details of any active electronic communication identification, and service provider, and to report any changes in such details.

38. Amending s21A(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) to preclude a sentencing Court taking into account as mitigating factors within the meaning of the section the previous good general reputation, prior good character and absence of any prior criminal antecedents of an offender who is to be sentenced for a sexual offence involving a child, including a child pornography offence, if and to the extent that any of those considerations have better enabled the offender to commit the offence.

39. Amending s21A so as to exclude such matters being taken into account in accordance with the Common Law.

40. That consideration be given to amendment of the *Crimes (Sentencing Procedure) Act 1999* (NSW) to preclude the fact that a convicted offender by reason of the conviction has, or will, become a person registrable under the *Child Protection (Offender Registration) Act 2000* (NSW) or may become the subject of a prohibition order under the *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW), or the subject of an ESO or CDO under the *Crimes (Serious Sex Offenders) Act 2006* (NSW), from being taken into account in mitigation of sentence.

Chapter 1 Introduction

1. TERMS OF REFERENCE

1.1 The Attorney General's reference to the Sentencing Council, pursuant to s 100J of the *Crimes (Sentencing Procedure) Act 1999*, is to examine whether the penalties currently attaching to sexual offences in New South Wales are appropriate, in accordance with the following terms of reference:

1. Whether or not there are any anomalies or gaps in the current framework of sexual offences and their respective penalties;
2. If so, advise how any perceived anomaly or gap might be addressed;
3. Advise on the use and operation of statutory maximum penalties and standard minimum sentences when sentences are imposed for sexual offences and whether or not statutory maximum penalties and standard minimum sentences are set at appropriate levels;
4. Consider the use of alternative sentence regimes incorporating community protection, such as the schemes used in Canada, the United Kingdom and New Zealand;
5. Consider possible responses to address repeat offending committed by serious sexual offenders; and in particular, whether second and subsequent serious sex offences should attract higher standard minimum and maximum penalties in order to help protect the community. If so, advise what these penalties could be;
6. Advise whether or not "good character" as a mitigating factor has an impact on sentences and sentence length and if so whether there needs to be a legislative response to the operation of this factor; and

7. Advise on whether it is appropriate that the "special circumstance" of sex offenders serving their sentence in protective custody may form the basis of reduced sentences.

1.2 The terms of reference required the Council to report to the Attorney General by 1 June 2008, a date now extended to 4 August 2008. By reason of the amount of work required and the need for the Council to conduct some additional research into the two terms (terms 4 and 5) that call for an examination of different approaches to sentencing, it has not been possible to complete the whole report by that date.

1.3 The Council is, however, able to deliver an Interim Report that deals with the remaining terms of reference (terms 1-3 and 6-7), as well as an analysis of sentencing statistics and trends which would provide a basis for the Report, and a platform against which terms 4 and 5 will be addressed.

1.4 Accordingly, Part One of this Report examines whether there are any anomalies or gaps in the current framework of sexual offences and their respective penalties (term 1); and contains suggestions on how any such anomaly might be addressed (term 2), including whether statutory maximum penalties and standard minimum sentences are set at appropriate levels (term 3). In this respect particular attention is given to offences involving child pornography.

1.5 The Report also contains advice on whether 'good character' as a mitigating factor has an impact on sentences and sentence length and whether there needs to be a legislative response to the operation of this factor (term 6); and whether it is appropriate that the 'special circumstance' of sex offenders serving their sentence in protective custody or making them subject to offender registration or other orders requiring ongoing prohibitions, supervision or detention should provide a basis for mitigation of sentence (term 7).

1.6 Part 2, to be released at a later date, will address the remaining terms of reference, focussing on the use of alternative sentence regimes

incorporating community protection (term 4) and will consider possible responses to address repeat offending committed by serious sexual offenders, and in particular, whether higher standard minimum and maximum penalties are required in those cases (term 5).

1.7 The Council notes that while it has had some regard to the maximum sentences available for comparable offences in other States and Territories, it has not attempted any overall review of the legislation in those States with an eye to identifying conduct which might constitute an offence in those jurisdictions, which would not currently be an offence in New South Wales. Such a review would be outside the terms of reference, and would involve a very substantial task. It could be more profitably undertaken in the context of the kind of general review that was advocated by the Director of Public Prosecutions[1] and that would approximate the comprehensive restructure undertaken in the United Kingdom.

2. METHODOLOGY

1.8 For the purpose of this Reference the Council has invited and received a number of submissions, the details of which are included in Appendix L to this volume.

1.9 It has conducted a review of the relevant legislation, comprised within the *Crimes Act 1900* (NSW), the *Summary Offences Act 1988* (NSW), the *Child Protection (Offenders Registration) Act 2000* (NSW), the *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW), the *Crimes (Serious Sex Offenders) Act 2006* (NSW), the *Crimes Act 1914* (Cth) and the *Criminal Code 1995* (Cth), and, with the assistance of the Judicial Commission of New South Wales, has prepared a statistical analysis of sentencing outcomes for the relevant offences. This is presented in Volume 2 of this report.

1. Submission 12: New South Wales Director of Public Prosecutions.

1.10 Where appropriate, the Council has reviewed a significant body of individual decisions on sentence, although this has mainly concerned decisions delivered in the Supreme Court or Court of Criminal Appeal, since many of the first instance decisions in the District Court and Local Court are not readily available online or in published form. Volume 2 of this report includes summaries of CCA decisions in sexual offence matters where the operation of the standard non-parole period scheme was an issue at appeal. The summaries have been collated from the Council's previous reports on *Sentencing Trends and Practices 2006-2007* and *2005-2006*.

1.11 Meetings and consultations were held with the Office of the Director of Public Prosecutions, the Public Defenders Office, the Department of Corrective Services, representatives of the NSW Parole Authority, the Attorney Generals' Department Aboriginal Programs Unit, and representatives of the Legal Aid Commission, among others. Details are provided in Appendix M of this volume.

1.12 For ease of reference, tables of the relevant offences, detailing their elements, any relevant circumstances of aggravation prescribed by legislation, the statutory maximum penalty, the relevant standard non-parole period where applicable and the percentage that the standard non-parole period represents of the maximum penalty are set out in Appendices A to H to this volume. We have included in Appendices B to E a summary of the circumstances of aggravation and of mitigation which sentencing judges are to take into account pursuant to the *Crimes (Sentencing Procedure) Act 1999* (NSW),[2] and which are also of relevance for judges when considering the provisions of the Act that relate to the standard non-parole period regime.[3]

1.13 This review is undertaken against the background that prior to 1981 there were 11 indictable offences for which provision was made in the *Crimes Act 1900* (NSW), namely: rape, carnal knowledge, attempt

2. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A.
3. In accordance with the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B.

or assault with intent to rape, carnal knowledge of a girl under 10 years, attempt or assault with intent to commit carnal knowledge with a girl under 10 years, carnal knowledge of a girl aged between 10 and 16 years, attempted carnal knowledge, carnal knowledge of an idiot, indecent assault and buggery.

1.14 The *Crimes Act* now creates 69 separate indictable sexual offences.[4] In part this increase has been due to the creation of new offences concerned for example, with grooming, internet pornography, sexual servitude and sex tourism which have become areas of concern either for the State or the Commonwealth. The principal reason for the increase, however, has been due to the division of existing offences to create separate offences, dependent upon the presence of aggravating circumstances such as the age of the victim, or the infliction of actual bodily harm in conjunction with the sexual act, or the commission of the offence in company.

1.15 The result is a complex mosaic of offences and sentences, the complexity of which is increased by the provisions for the existence of standard non-parole periods for some of the offences.[5]

3. STATISTICS

1.16 The statistical analysis, which is contained in a separate volume, needs to be understood in the context of certain limitations on the underlying data.

1.17 Due to the impact of the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW), which introduced standard non-parole periods (SNPPs) for certain offences, the data taken from the Judicial Commission's JIRS database covers different measuring periods depending on the date of the offences which are

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4. The Council has counted as a separate offence all sub-sections of sexual offences listed in the *Crimes Act 1900* (NSW). Incite and attempt offences have been counted as separate offences for the purposes of this analysis. However s 61P Attempt to commit offence under ss 61I-61O, has been counted as one offence only.
5. Pursuant to the *Crimes (Sentencing Procedure) Act 1999* (NSW) div 1A.

taken into account. For the offences in the higher courts to which SNPPs do not apply, the data generally covers the period from October 2000 to September 2007. For the offences to which SNPPs apply, the data generally covers the period from February 2003 to September 2007. The overlap arises by reason of the time which has elapsed between the date of the offence and sentence, either at first instance or upon appeal, since offenders are entitled to be sentenced according to the law in force at the time of the offence.[6]

1.18 Data analysis, and more specifically, the ability to draw conclusions from this process, has been hampered by the limited sample size for most of the offences dealt with in the higher courts, particularly in relation to imprisonment rates. For example, there were over 46 separate sexual offences for which offenders were sentenced to imprisonment during the measuring periods. Restricting analysis to instances where in excess of 10 sentences of imprisonment had been imposed limited the review to 15 offences overall.

1.19 The small number of cases renders statistical analysis deeply problematic and subject to error.[7] In this situation it is virtually impossible to draw any meaningful conclusions about sentencing trends. Only two of the offences[8] reviewed yielded a sample of offenders of sufficient size to minimise the possibility of a handful of outliers giving a misleading impression of trends, and even in those two offences that possibility cannot be eliminated.

1.20 In addition, the JIRS statistics relied upon employ a significant degree of 'rounding up'. For example, it is the Council's understanding

6. Data analysis of offences dealt with the Local Court cover the period January 2003 to September 2007. Standard non-parole periods do not apply in the Local Court.
7. One could go as far as to say that only two of the offences reviewed (s 61I-sexual assault and s 61J-aggravated sexual assault, with 82 and 80 imprisoned offenders, respectively) yielded a sufficient sample size of offenders as to minimise the possibility of a handful of outliers giving a misleading impression of trends and average prison terms, and even in those two offences the possibility could by no means be said to be insignificant.
8. *Crimes Act 1900* (NSW) s 61I-sexual assault and 61J-aggravated sexual assault, with ss 82 and 80 imprisoned offenders, respectively.

that a fine of $1,001 would be rounded up to $2,000 for the purpose of the statistics, which could have a significant impact on average fine levels in the Local Court, particularly where there is a relatively small sample of cases. (It is noted however, that fines are rarely imposed for sexual offences in either the higher courts or the Local Court). Similar rounding up occurs with prison terms, although it is likely to be less problematic, as prison sentences handed down in the higher courts tend to increase by increments of 6 months and 12 months, particularly with longer sentences.

1.21 It is necessary that these data limitations be kept in mind when considering the statistics which are presented in this Report.

Chapter 2

Anomalies And Gaps In The Current Framework Of Sexual Offences Terms 1 & 2

1. INTRODUCTION

2.1 It is convenient to deal with these terms of reference together since they deal respectively with identifying any gaps or anomalies in the current legislative framework creating sexual offences, and with the ways that such gaps or anomalies might be addressed.

2.2 For the purposes of these terms of reference the Council has taken the expression 'gaps' to mean areas of conduct that might properly be the subject of a specific criminal sanction that have not been adequately addressed. The expression 'anomalies' has been taken to mean an irregular deviation from the common order of sentences apparent from a review of the available penalties, to the extent that such an order can be identified.

2.3 In its assessment of these terms of reference the Council has undertaken a comparison of the maximum available sentences for sexual offences (contained within Appendix A) and has reviewed the several submissions which drew attention to possible gaps or anomalies and offered possible solutions that might address those gaps or anomalies. In making this assessment the Council recognises that it has engaged in an exercise that is, to a considerable degree, subjective, and that different minds may well differ in assigning relative levels of seriousness or moral culpability to individual offences. In part, it has relied on judicial observations as to the seriousness of some offences, even though it must be conceded, as the wide range of sentencing outcomes noted in the sentencing statistics show, there is unlikely ever to be a complete judicial consensus in this regard.

2. GAPS AND ANOMALIES

2.4 Subject to the qualifications above, the Council has identified the following possible anomalies and gaps.[9]

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9. Where such anomalies or gaps have been the subject of individual submissions that fact is noted in the footnotes.

Child Pornography-*Crimes Act 1900* (NSW) s 91H

2.5 The maximum penalty for possession of child pornography under the *Crimes Act 1900* (NSW) is imprisonment for 5 years,[10] while the maximum penalty for producing or disseminating child pornography under the Act is imprisonment for 10 years.[11] The maximum penalty for the offences of possessing, controlling, producing, supplying or obtaining child pornography material with the intention of its use through a carriage service under the Commonwealth *Criminal Code* is, in each case, imprisonment for 10 years.[12]

2.6 As Table 1 indicates, the NSW penalty for possession of child pornography is in the lower range of penalties attaching to like offences in other State and Territory jurisdictions.

Table 1: Child pornography possession offences

Jurisdiction	Legislative Provision	Penalty
ACT	s 65 *Crimes Act* 1900	5 years imprisonment and/or 500 Penalty Units
NSW	s 91H(3) *Crimes Act* 1900	5 years imprisonment
NT	s 125B *Criminal Code* 1983	**Individual**-10 years imprisonment **Corporation**-10,000 Penalty Units
QLD	s 228D *Criminal Code Act* 1899	5 years imprisonment
SA	s 63A *Criminal Law Consolidation Act* 1935	**1st offence** - Basic offence -5 years imprisonment Aggravated offence (eg child under 12) - 7 years imprisonment **2nd offence** - Basic offence -7 years imprisonment Aggravated - 10 years imprisonment
TAS	s 74A *Classification (Publications, Films and Computer Games) Enforcement Act* 1995 s130	2 years and/or 200 Penalty Units
	s 130C and 337C *Criminal Code Act* 1924	21 years imprisonment
VIC	s 70(1) *Crimes Act* 1958	5 years imprisonment and/or 600 Penalty Units
WA	s 60(4) *Classification (Publications, Films and Computer Games) Enforcement Act* 1996	5 years imprisonment

10. *Crimes Act 1900* (NSW) s 91H(3).
11. *Crimes Act 1900* (NSW) s 91H(2).
12. *Criminal Code* (Cth) s 474.20 and 474.19.

2.7 It is acknowledged that the Commonwealth offence includes an additional element of the intention that the child pornography material be used in the commission of an offence involving the use of a carriage service, rather than mere possession. Nonetheless, the existence of a difference in the maximum penalty of this size for a possession offence, under the laws of the various States and Territories, gives rise to a possible anomaly that could be beneficially addressed on a national level, given the potential for trade in this material across State boundaries. The Council will address this issue in more detail in Chapter 4 in its consideration of child pornography offences.

Indecency Offences against Children-ss 61M, 61N, 61O *Crimes Act 1900* (NSW)

2.8 Offences of indecency committed against children under the *Crimes Act 1900* (NSW) carry a lower statutory maximum penalty than the 10 year maximum penalty for child pornography offences under the Commonwealth *Criminal Code*.[13] Under the *Crimes Act*, the maximum penalty for indecent assault against a child between 10 and 16 years is imprisonment for seven years;[14] for an act of indecency against a child between 10 and 16 years it is imprisonment for two years [15] and against a child under 10 years it is imprisonment for seven years.[16] The maximum penalty for an act of indecency against a child under 16 years in circumstances of aggravation is imprisonment for 5 years.[17]

2.9 It would appear to be anomalous that an offence, which requires an act of assault committed on or in the presence of a child[18] or an act of indecency with or towards a child[19] should attract lower maximum penalties than those applying to offences involving the

13. *Criminal Code* (Cth) s 474.20.
14. *Crimes Act 1900* (NSW) s 61M(1), (3)(b); against a child under 10 years it is imprisonment for 10 years: s 61M(2).
15. *Crimes Act 1900* (NSW) s 61N(1).
16. *Crimes Act 1900* (NSW) s 61O(2).
17. *Crimes Act 1900* (NSW) s 61O(1).
18. *Crimes Act 1900* (NSW) ss 61L, 61M.
19. *Crimes Act 1900* (NSW) ss 61N, 61O.

filming or videotaping of these activities or the publishing, possessing or dealing with the images produced thereby, which would constitute sexual offences falling within the ambit of the Commonwealth child pornography offences.

Sexual Intercourse with a Child under the age of 10 years- *Crimes Act 1900* (NSW) s 66A

2.10 Sexual intercourse with a child under 10 years,[20] which attracts a maximum penalty of imprisonment of 25 years, is now no longer one of the three most serious offences in the criminal calendar, a position which it held prior to 1981. The offence does not provide for an aggravated form such as the commission of the offence in company and the causing of actual bodily harm to the child. This might make it appear to be a less serious offence than an offence under s 61JA, that of aggravated sexual assault in company perpetrated against an adult, which carries a maximum sentence of natural life imprisonment.

2.11 The Council considers that there is merit in the creation of an additional offence, where a s 66A offence is committed in circumstances of aggravation, that would carry a maximum penalty in excess of 25 years. At present there is no section of this nature applicable only to a child. In this section circumstances of aggravation would mean circumstances in which:

(i) sexual intercourse by the alleged offender was secured by force or by putting the alleged victim in fear;

(ii) at the time of or immediately before or after the commission of the offence the alleged offender intentionally or recklessly inflicted actual bodily harm;

(iii) the alleged offender was in the company of another person or persons;

20. *Crimes Act 1900* (NSW) s 66A.

(iv) the alleged offender was in a position of authority of the alleged victim;

(v) the alleged victim has a serious intellectual disability;

(vi) the alleged offender took advantage of the alleged victim being under the influence of alcohol or a drug in order to commit the offence; or

(vii) the presence of the alleged victim being secured by kidnapping.

Sexual Intercourse against a Child between 14 and 16 years- *Crimes Act 1900* (NSW) s 66C(3)

2.12 The maximum penalty for the offence of sexual assault (sexual intercourse without consent) under the *Crimes Act* (NSW) is imprisonment for fourteen years[21] or 20 years imprisonment if aggravated.[22] The maximum penalty for the offence of sexual intercourse with a child between 10 and 14 years is imprisonment for 16 years[23] or for 20 years if aggravated.[24]

2.13 The offence of sexual intercourse with a child between 14 and 16 years, however, carries a maximum penalty of only ten years imprisonment,[25] and only twelve years imprisonment when the offence is aggravated.[26]

2.14 It has been submitted that an offence committed against a child who lacks the capacity to consent should have the same maximum penalty as that attaching to an equivalent offence committed against an adult without consent, and that s 66C(3) and (4) should be amended accordingly.[27]

21. *Crimes Act 1900* (NSW) s 61I.
22. *Crimes Act 1900* (NSW) s 61J.
23. *Crimes Act 1900* (NSW) s 66C(1).
24. *Crimes Act 1900* (NSW) s 66C(2).
25. *Crimes Act 1900* (NSW) s 66C(3).
26. *Crimes Act 1900* (NSW) s 66C(4).
27. Submission 4: NSW Ombudsman.

2.15 The Ministry of Police also drew attention to the apparent inconsistency between the maximum sentences for offences of sexual intercourse with a child aged between 14 and 16 years of imprisonment for 10 years and where aggravated, for imprisonment for 12 years,[28] and that applicable for sexual intercourse without consent in circumstances of aggravation, of imprisonment for 20 years, where the fact that the victim is under the age of 16 years is itself prescribed as a circumstance of aggravation.[29]

2.16 The solution suggested by the Ministry was to increase the maximum penalty for sexual intercourse with a child between 14 and 16 years from 10 years imprisonment to 14 years imprisonment, or from 12 to 20 years imprisonment if aggravated.[30]

2.17 While an act of sexual intercourse with a child aged 14 to 16 would not seem to preclude a charge under s 61I or under s 61J being preferred in the alternative to one under s 66C, there would seem to be merit in these submissions.

2.18 If an accused was in fact charged under s 61I or s 61J with sexual intercourse without consent rather than under s 66C(3) or (4) in the case of a child under the age of 16 the Crown would, however, be required to prove the absence of consent and the knowledge of that absence by a person who, under s 66C, would be incapable of such consent. This leads to an artificiality since a jury would be required to consider the question of consent on a s 61I or s 61J count but not on a s 66C(3) or (4) count.

2.19 Section 66C could be amended to consist of a general provision in the following terms:

1) Any person who has sexual intercourse, attempts to have sexual intercourse or incites a third person to have sexual intercourse with another person who is of or above the age of 10 years but

28. *Crimes Act 1900* (NSW) s 66C(3), (4).
29. *Crimes Act 1900* (NSW) s 61J.
30. In the circumstances identified in the *Crimes Act 1900* (NSW) s 66C(5).

under the age of 16 years is liable to imprisonment for 14 years, and

2) Any person who has sexual intercourse, attempts to have sexual intercourse or incites a third person to have sexual intercourse with a person under the age of 16 years in circumstances of aggravation is liable to imprisonment for a period of 25 years.

2.20 In this section circumstances of aggravation mean circumstances in which;

a) sexual intercourse by the alleged offender was secured by force or by putting the alleged victim in fear;

b) at the time of or immediately before or after the commission of the offence the alleged offender intentionally or recklessly inflicted actual bodily harm;

c) the alleged offender was in the company of another person or persons;

d) the alleged offender was in a position of authority of the alleged victim;

e) the alleged victim has a serious intellectual disability;

f) the alleged offender took advantage of the alleged victim being under the influence of alcohol or a drug in order to commit the offence; and

g) the presence of the alleged victim being secured by kidnapping.

2.21 The aim of such a section would be to include within its ambit both 'consensual' and non-consensual sex, the maximum sentence for which would be imprisonment for 14 years or 25 years, depending on whether circumstances of aggravation were established. There would be no need for gradations of age for victims aged 10 to 16 years. The age of the victim and the disparity between that age and the age of the perpetrator would be a matter to be taken into consideration on sentence, recognising that the moral culpability of two persons of

similar age engaged in sexual intercourse where one or both is aged under 16 years is less than that involved where the offender is several years older.

2.22 If this course were adopted there would be three major sections:

1) s 66A, which deals with sexual assault of a child under the age of 10 years;
2) s 66C, which deals with sexual intercourse with children between the ages of 10 and 16 years; and
3) s 66EA, which deals with persistent sexual abuse of children.

2.23 There are, of course, additional sections such as procuring and grooming children, child pornography, incest and sexual servitude but the three major areas of transgression would be dealt with using the common incapacity to consent to such behaviour.

2.24 An additional matter requiring consideration arises from the decision of the High Court in *CTM v The Queen*.[31] The effect of this case has been to preserve the *Proudman v Dayman*[32] defence of honest and reasonable mistake as to the age of the child in relation to a charge brought under s 66C(3) of the *Crimes Act 1900* (NSW). Contrary to the conclusion of the Court of Criminal Appeal the High Court held that the repeal of s 77(2) has not shown a legislative intent to preclude this defence. The Sentencing Council is not aware whether it was in fact the legislative intent to achieve that result and makes no comment other then to draw the decision to attention.

Incest-*Crimes Act 1900* (NSW) s 78A

2.25 The maximum penalty for sexual intercourse with a close family member who is or above the age of 16 years is imprisonment for

31. *CTM v The Queen* (2008) 247 ALR 1.
32. *Proudman v Dayman* (1941) 67 CLR 536.

8 years.[33] However, the maximum penalty for an offence under s 66A of sexual intercourse with a child under 10 years is imprisonment for 25 years, and for an offence under s 66C of sexual intercourse with a child between 14 and 16 years is imprisonment for 10 years or 12 years if aggravated.

2.26 This could suggest an insufficient assessment of criminality involved in an offence of incest. However, the Council notes that there is scope for an act of incest to be charged under other provisions in the *Crimes Act*, and consequently is of the view that there is no need for legislative amendment of s 78A.

Persistent Sexual Abuse of a Child and Course of Conduct Offences-*Crimes Act 1900* (NSW) s 66EA

2.27 An inconsistency was suggested to exist between the intention of Parliament in enacting s 66EA and the 'approach taken by the Court of Criminal Appeal to sentencing for the offence'.[34]

2.28 In the Second Reading Speech on the *Crimes Legislation Amendment (Child Sexual Offences) Bill 1998*, the then Attorney, the Hon J W Shaw said:

> I turn now to the specific features of the bill relating to the offence of persistent sexual abuse of a child. The new offence of engaging in persistent sexual abuse of a child is unusual, in that it will sit above, and in addition to, the current sexual offences contained in the *Crimes Act 1900*. A new substantive offence will not be created. Rather, by way of new section 66EA(1), inserted by item[2], the new offence will be constituted when an accused person commits three or more pre-existing offences, within a specified time frame. No existing offences will be abolished as part of the proposal. The new offence will be in addition to them. Honourable members will note that the penalty for the new offence, contained in new section

33. *Crimes Act 1900* (NSW) s 78A.
34. Submission 12: New South Wales Director of Public Prosecutions.

> 66EA(1), will be appropriately severe, that is, penal servitude for 25 years. Put simply, the new offence will be committed if three or more pre-existing sexual offences are committed against a child victim on separate occasions.[35]

2.29 Section 66EA, which carries a maximum sentence of imprisonment for 25 years, has been regarded by courts of criminal appeal both in this State and in South Australia as a procedural one, i.e. that it relieves the complainant of the task of remembering precise dates or circumstances of the occasions to overcome the effect of *S v The Queen*,[36] *R v D*,[37] *R v Fitzgerald*.[38]

2.30 In *R v Manners*,[39] the Court cited with approval[40] the observation of Sully J that

> there was nothing to suggest that the Parliament intended sentencing for a course of conduct that has crystalised into a s 66EA conviction to be more harsh than sentencing for the same course of conduct had it crystalised into convictions for a number of representative offences.[41]

2.31 This has been understood, according to the Director of Public Prosecutions, as resulting in the offender being punished on a similar basis to that which would have been the case had he been convicted of a relevant offence for each established act forming part of the alleged persistent abuse. This, it is argued, overlooks the aggravating fact that the offender has engaged in a persistent pattern of abuse, which would merit additional punishment. It also overlooks the reference in the second reading speech to the observation that the new penalty, namely a maximum of 25 years imprisonment, will be 'appropriately severe'.

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35. New South Wales, *Parliamentary Debates*, Legislative Council, 20 October 1998, 8541-2 (Hon J W Shaw, Attorney General).
36. *S v The Queen* (1989) 168 CLR 266.
37. *R v D* (1997) 69 SASR 413.
38. *R v Fitzgerald* (2004) 59 NSWLR 493.
39. *R v Manners* [2004] NSWCCA 181.
40. *R v Manners* [2004] NSWCCA 181, [21].
41. *R v Fitzgerald* (2004) 59 NSWLR 493, [13].

2.32 The DPP has submitted accordingly that the section should be recast so as to make it clear that the offence of engaging in a course of sexually abusive conduct is a separate offence, the gravamen of which is the persistence of the criminal conduct, which would be more serious than the total of its constituent assaults.

2.33 The South Australian legislation provides for an offence of persistent sexual abuse of a child and renders a person convicted of that offence liable to a term of imprisonment proportionate to the seriousness of the offender's conduct, which may in the most serious of cases be imprisonment for life.[42]

2.34 The Council is of the view that s 66EA of the NSW Act should be amended or a note provided, in order that it be made clear that a separate offence has been created by this section, the gravamen of which is the fact that the accused has engaged in a course of persistent sexual abuse of a child, and that the appropriate sentence to be imposed is one that is proportionate to the seriousness of the offence. This could be achieved by including this offence in the Table of Standard Non-Parole Period matters.

Aggravated Sexual Assault-*Crimes Act 1900* (NSW) s 61J(2): Additional Aggravating Circumstance

2.35 The NSW Ministry of Police submitted that the list of aggravating circumstances contained in the offence of aggravated sexual assault, s 61J(2) should include the circumstance that the sexual assault took place in the victim's dwelling on the basis that the prevalence of this additional circumstance renders the basic offence 'a particularly serious and disturbing crime with a significant impact on victims' as well as the cause of 'considerable fear in the community'.[43]

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42. *Criminal Law Consolidation Act 1935* (SA) s 74(7) states 'A person convicted of persistent sexual abuse of a child is liable to a term of imprisonment proportionate to the seriousness of the offender's conduct which may, in the most serious of cases, be imprisonment for life'.
43. Submission 14: Ministry for Police New South Wales.

2.36 This submission needs to be considered in the light of the fact that:

- an offence under s 61J (aggravated sexual assault) carries a maximum penalty of 20 years imprisonment,
- offences under ss 112(2) and (3) (aggravated and specially aggravated break and enter and commit a serious indictable offence) carry maximum penalties of imprisonment for 20 and 25 years respectively;
- sexual assault is not specified as an aggravating or specially aggravating factor in these offences; and
- the basic s 112(1) offence of break and enter and commit a serious indictable offence (which would include sexual assault) carries a maximum penalty of imprisonment for 14 years.

2.37 It would seem to be appropriate, consistently with the sentences available for the aggravated form of the s 112 offence, to include breaking and entering the premises in which the sexual assault is committed as an aggravating circumstance for the purpose of s 61J.

Voyeurism

2.38 A question arises whether the offence of peeping or prying[44] is now expressed in such archaic terms as to justify its re-expression, and also whether it would not be more appropriately placed in the *Summary Offences Act 1988* (NSW).

2.39 The maximum penalty for the offence of peeping and prying is imprisonment for 3 months. In its current form, the offence may well extend beyond the offender's presence for the purpose of sexual gratification.

2.40 If it is thought desirable that peeping and prying should remain available as a general offence, then the better solution may be to provide for a separate offence in the sexual context, along the lines

44. *Crimes Act 1900* (NSW) s 547C.

of that contained in the *Sexual Offences Act 2003* (UK), of voyeurism, although not confined to the circumstances targeted by that section, or by ss 21G and 21H of the *Summary Offences Act 1988* (NSW), which deal with filming and installing a device to facilitate filming.

2.41 In the UK Act a person commits an offence of voyeurism if:[45]

> (a) for the purpose of obtaining sexual gratification, he observes another person doing a private act, and
>
> (b) he knows that the other person does not consent to being observed for his sexual gratification.
>
> (2) A person commits an offence if-
>
> (a) he operates equipment with the intention of enabling another person to observe, for the purpose of obtaining sexual gratification, a third person (B) doing a private act, and
>
> (b) he knows that B does not consent to his operating equipment with that intention.
>
> (3) A person commits an offence if-
>
> (a) he records another person (B) doing a private act,
>
> (b) he does so with the intention that he or a third person will, for the purpose of obtaining sexual gratification, look at an image of B doing the act, and
>
> (c) he knows that B does not consent to his recording the act with that intention.
>
> (4) A person commits an offence if he instals equipment, or constructs or adapts a structure or part of a structure, with the intention of enabling himself or another person to commit an offence under subsection (1).

45. *Sexual Offences Act 2003* (UK) s 67.

2.42 The Council notes that s 21G is confined to the use of devices to facilitate filming, and does not deal with the case where an offender interferes with the fabric of a building, for example by creating a hole though a wall or ceiling for the purpose of making visual observations of a person in a state of undress. This kind of conduct would, in the Council's opinion, merit attention as an aggravation of an offence of voyeurism.

2.43 The Council considers that it would be appropriate to treat the suggested offence as aggravated where the person observed was a child. Similarly, it would be appropriate to treat the ss 21G and 21H offences as aggravated where the purpose of the filming or the installation or adaptation of the fabric of the building was to commit a s 21G offence involving a child.

2.44 The Council notes that the present location of the ss 21G and 21H offences in the *Summary Offences Act 1988* (NSW) prevents the incorporation of aggravating features as described. Accordingly, it is suggested that the offences be transferred to the *Crimes Act 1900* (NSW).

2.45 The Council notes further that under the *Surveillance Devices Act 2007* (NSW), which commenced on 1 August 2008, the installation, use and maintenance of optical surveillance devices without consent incurs a maximum penalty of 5 years imprisonment and/or 100 penalty units.[46] The offence may also be dealt with summarily (pursuant to Table 2 of the *Criminal Procedure Act 1986* (NSW)), in which case the maximum penalty is 2 years or 100 penalty units.

2.46 In light of these penalties, the Council is of the view if they are to be incorporated into the *Crimes Act 1900* (NSW), that the maximum penalty attaching to ss 21G and 21H should carry a similar penalty of 5 years imprisonment.

46. *Surveillance Devices Act 2007* (NSW) s 8. An offence committed by a corporation incurs a penalty of 500 penalty units.

Grooming-*Crimes Act 1900* (NSW) s 66EB

2.47 A question arises whether it would be desirable to add as an offence under this section, the act of meeting a child, or travelling with the intention of meeting a child following grooming, where that involved the communication of indecent material or suggestions made to the child to meet for sexual purposes, along the lines of the offence for which provision is made in s 15 of the *Sexual Offences Act 2003* (UK).

2.48 The Council is of the view that an offence of this nature should be added to the *Crimes Act*, in the terms described above.

3. ADDITIONAL ISSUES

2.49 Some more general issues were raised in the submissions or otherwise were identified by the Council. They comprise the following:

Act of Indecency and Indecent Assault Generally-*Crimes Act 1900* (NSW) ss 61L, 61M, 61N, 61O

2.50 There is no statutory definition for either of these terms. Both are defined by the common law although in terms that provide a somewhat imprecise description of the type of behaviour that they potentially embrace. The traditional formula defines an indecent act as 'one which right-minded persons would consider to be contrary to community standards of decency'.[47]

2.51 The DPP submitted that 'terms such as act of indecency, indecent assault and aggravated offences do not mean anything to the general community [and] have required considerable judicial interpretation'.[48] On the other hand, offences framed for example in terms such as 'causing a child to watch a sexual act' or 'engaging in sexual activity in the presence of a child', or as is now the case with the *Sexual Offences Act*

47. See, eg, *R v Manson* (Unreported, NSW Court of Criminal Appeal, Gleeson CJ, Clarke JA and Sully J, 17 February 1993).
48. Submission 12: New South Wales Director of Public Prosecutions.

2003 (UK)[49] 'leave no room for doubt as to what the offence entails'.[50]

2.53 The Council notes that the expression 'act of indecency' is defined in a way that would appear to be appropriate in s 50AB(1) of the *Crimes Act 1914* (Cth) as follows:

> An act of indecency means an act that:
>
> (a) is of a sexual nature; and
>
> (b) involves the human body, or bodily actions or functions; and
>
> (c) is so unbecoming or offensive that it amounts to a gross breach of ordinary contemporary standards of decency and propriety in the Australian community.

2.54 The Council considers that there could be merit in achieving a similar definition which would provide greater definition than that given by the common law to this term, although it does not consider it critical that this be done. It could await any project for codification of the criminal law.

Complete review of the current legislative framework

2.55 The New South Wales DPP made a broader submission[51] to the effect that the current legislative framework for sexual offences and their concomitant penalties is 'complicated' and 'premised on concepts that are out of step with modern life' to the point where there should be a complete review of the relevant provisions.

2.56 This submissions falls outside the current terms of reference and the Council considers it inappropriate to do more than bring to attention the concern which has been raised and the comprehensive approach which has been taken in other jurisdictions, as seen for example in the *Sexual Offences Act 2003* (UK).

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49. See also *Criminal Code 1899* (Qld).
50. Submission 12: New South Wales Director of Public Prosecutions.
51. Submission 12: New South Wales Director of Public Prosecutions.

Pre-Trial Diversion of *Offenders Act 1985*

2.57 The *Pre-Trial Diversion of Offenders Act 1985* provides for the establishment of a program administered by the Department of Health, known as Cedar Cottage, for the treatment of a person who commits a child sexual assault offence with or upon that person's child or the child of that person's spouse or de facto partner. An exhaustive list of the offences to which the Act applies is provided[52] but attention has been drawn to the fact that it does not include the offence of persistent sexual abuse of a child under s 66EA of the *Crimes Act 1900* (NSW)[53] or the child pornography offences.

2.58 The Council notes that the specified list of sexual offences in the *Pre-Trial Diversion of Offenders Act 1985* (NSW) is now outdated, and contains a number of sections that have now been repealed. The Council will give further consideration to the possible review of this list when it considers the remaining terms of reference. At this stage while it is noted that a s 66EA offence is a very serious offence, other offences are included in the list which carry the same 25 year maximum penalty.

2.59 As entry into the Cedar Cottage programme depends upon a careful assessment of the offenders' suitability, requires physical separation from the family of the abused child, and is subject to strict compliance with the requirements of the programme, the Council does not see any bar to inclusion of the offence in the list of eligible offences.

Age distinctions

2.60 The NSW Ombudsman submitted that there is 'little justification for having different penalties' depending on the ages of the victims'.[54] The Council does not accept this as a general proposition although it does recognise that there are difficulties in dealing with these offences

52. *Pre-Trial Diversion of Offenders Act 1985* (NSW) s 30A(3).
53. Submission 14: Ministry for Police New South Wales.
54. Submission 4: NSW Ombudsman, 2.

where they are part of a continuing course of conduct which spans a number of years and ages.

2.61 It also recognises that the age brackets can operate in an arbitrary way, and that there is little justification for regarding a sexual assault of a child aged 10 years and 1 month as less serious than one involving a child aged 9 years and 11 months. The artificiality of age distinctions is heightened when it applies to the mid adolescent years given contemporary experience with maturation rates.

2.62 However, the Council recognises that there has to be a determined age of consent, and that there is merit in providing some direction for sentencing judges in relation to circumstances of potential aggravation, including the age of the victim. Moreover, the available sentencing discretion should be able to accommodate cases of the kind mentioned, such that there should be no practical difficulty unless the age of the victim was a factor of relevance for a standard non-parole period.

Introduction of sentencing guidelines

2.63 In conjunction with the proposed review of sexual offences suggested above, the NSW DPP has further suggested that comprehensive sentencing guidelines should be issued to assist the sentencing process as well as to enhance the public understanding and expectations of the system.[55] This suggestion was supported by two further submissions.[56]

2.64 The Council notes in this respect that the Sentencing Guidelines Council has published a comprehensive set of guidelines for the offences contained in the *Sexual Offences Act 2003* (UK).[57] This is further addressed in the next chapter of this Report.

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55. Submission 12: New South Wales Director of Public Prosecutions.
56. Submission 8: New South Wales Council of Civil Liberties; Submission 14: Ministry for Police New South Wales.
57. Sentencing Guidelines Council, *Sexual Offences Act 2003* (UK): Definitive Guideline (2007).

4. COMPARISON WITH OTHER JURISDICTIONS

Sexual Offences Act 2003 (UK)

2.65 The Council has examined the recent *Sexual Offences Act 2003* in force in the United Kingdom with a view to determining if offences contained therein are not addressed in the New South Wales legislation.

2.66 The UK Act in ss 1-3 sets out both the definitions and the penalties for rape, assault by penetration and sexual assault. It contains a number sections dealing exclusively with offences against children, namely rape and other offences against children under 13 years[58] and child sex offences.[59] Sections 25-29 deal exclusively with familial child sex offences and ss 30-37 with offences against persons with mental disorders.

2.67 Exploitation of children, either for the purposes of indecent photography, the production of pornography or prostitution is dealt with under ss 45-60. The Act deals with preparatory offences[60] such as administering a substance with intent[61] and also with incest.[62] General offences of exposure, voyeurism, bestiality, defiling corpses and the use of public lavatories are dealt with in ss 66-71.

2.68 There are some differences in the way that the sexual offences are dealt with under the UK Act, including for example, the definition adopted for a sexual offence[63] and the fact that for offences against children the age differentiations are set at 13 years and 18 years,[64] rather than the NSW differentiations which are variously set at 10, 14 and 16 years.

58. *Sexual Offences Act 2003* (UK) ss 5-8.
59. *Sexual Offences Act 2003* (UK) ss 9-15.
60. *Sexual Offences Act 2003* (UK) ss 61-63.
61. *Sexual Offences Act 2003* (UK) s 61.
62. *Sexual Offences Act 2003* (UK) ss 64-65.
63. *Sexual Offences Act 2003* (UK) s 3(1).
64. The age of a 'child' in the *Protection of Children Act 1978* (UK)has been amended to 18, and defences are provided for in limited cases where the child is 16 or over and the defendant is the child's partner.

2.69 Another difference between the two regimes is that the UK Act defines who is a person in authority by setting out circumstances that would automatically bring an offender within this category. The Council however, is of the view that the NSW approach which leaves it to the jury to determine from the facts before it whether or not an accused had authority over the putative victim is the better course.

2.70 Otherwise the major difference between the two Acts is that the UK Act defines, in a more enhanced way, precisely the kind of conduct which constitutes a relevant offence.

Incitement offences

2.71 A comparison between the UK Act and the *Crimes Act 1900* (NSW) discloses one possible area of deficiency in the NSW Act however, namely that of inciting another to commit sexual intercourse with a child. Incitement to commit an act of indecency is covered by ss 61N and 61O by reason of s 61H(3) of the *Crimes Act 1900* (NSW) but such conduct in relation to other sexual offences is not the subject of any similar provision in the Act.[65]

2.72 In some circumstances it would be possible for the offender to be prosecuted under the grooming provisions of the Act.[66] Otherwise, the only basis for a prosecution would be by way of reliance on the common law, or on the *Crimes Prevention Act 1916* (NSW), which makes it an offence if a person 'incites to, urges, aids, or encourages the commission of crimes'.[67] The maximum penalty for an offence under this section is, however, only imprisonment for 6 months where the offence is prosecuted as a summary offence in the Local Court; or imprisonment for 6 months or 1 penalty unit where the incitement arises in printed or published form.[68] Such prosecutions appear to be rare.

2.73 It is the view of the Council that a specific incitement offence could be included in the *Crimes Act 1900* (NSW) to capture cases where

65. Unless it constitutes a serious indicatable offence to which recruitment to engage in criminal activity under s 35A of the *Crimes Act 1900* (NSW), would apply.
66. *Crimes Act 1900* (NSW) s 66EB.
67. *Crimes Prevention Act 1916* (NSW) s 2.
68. *Crimes Prevention Act 1916* (NSW) ss 3, 4.

an offender incites one or more persons to commit a sexual offence, whether or not carried out.[69] A more appropriate penalty could attach than that imposed by the *Crimes Prevention Act 1916* (NSW), which appears to be a somewhat dated piece of legislation. An amendment of the relevant offence that would add incitement as a relevant act, or that would add a similar provision, applicable to those offences, to that contained in s 61H(3) would resolve that problem.

2.74 Section 61H(3) which is currently confined to the incitement of acts of indecency, is to the following effect:

> For the purposes of this Act, a person who incites another person to an act of indecency, as referred to in section 61N or 61O, is taken to commit an offence on the other person.

2.75 For greater certainty the extended statement of an act of incitement contained in the 1916 Act could be adopted.

Sequestration of offences against children

2.76 The UK Act groups all offences against children. Having regard to the complex structure of Part 3 of the *Crimes Act 1900* (NSW) (Offences against the person), the Council suggests that consideration be given to separating out the offences currently included in Division 10 that relate to children under the age of 16 years.

2.77 This would lead to a restructure as follows:

Division 10	Offences involving the sexual assault of adults, etc
Division 10A	Offences involving the sexual assault of children under the age of 16 years, etc
Division 10B	Sexual servitude

2.78 This would simplify what is currently a complex mosaic of offences providing for gradations in sentence, depending on whether

69. Neither s 351A Crimes Act 1900 (NSW), or s2 Crime prevention Act 1916 (NSW), appear to have been used other than rarely.

the victim is aged under 10 years, under 14 years, under 16 years, over 16 years, or under special care.

2.79 The provisions concerning children contained currently in Division 10A (Sexual Servitude), Division 14A (Procuring for Prostitution) and Division 15 (Child Prostitution and Pornography) could also be moved, although by reason of their lesser complexity and potential extension to other victims they could remain as stand alone Divisions.

Commonwealth legislation

2.80 An examination of the *Criminal Code 1995* (Cth) and the *Crimes Act 1914* (Cth) discloses that the interest of the Commonwealth in relation to child sexual offences lies in:

- The production and dissemination of child pornography via telecommunications services;
- Sexual tourism and sexual servitude;
- Trafficking for sexual services; and
- Sexual assault of persons attached to the United Nations or in the context of war crimes or crimes against humanity.

2.81 The Commonwealth has exclusive jurisdiction under the Constitution to make laws relating to the passage of material over a network. It has proclaimed an extraterritorial criminal jurisdiction which makes behaviour occurring abroad criminal. In relation to sexual servitude and trafficking it has exclusive jurisdiction over migration and in consequence makes criminal the bringing of people into this country for the purpose of sexual servitude or the provision of sexual services.

2.82 The only genuine overlap between New South Wales and the Commonwealth lies in the production and dissemination of child pornography, which the Council examines in Chapter 4.

2.83 While in some cases an offender may be charged in relation to child pornography offences under both State and Federal laws, there is not a lack of harmony save in relation to the difference in the available maximum penalties for possession offences. The legislative concern of the Commonwealth is in the area over which it has exclusive jurisdiction, namely its powers to make laws in respect of offences committed by the use of telecommunications devices, whilst the State is concerned with the production or possession of child pornography within the boundaries of New South Wales.

Other State and Territory laws

2.84 As noted earlier, the Council has not conducted any general review of the criminal laws of the other States and Territories for the purpose of identifying any offences which might be punishable under those laws which are not punishable in NSW. Nor has it conducted any comparative analysis of the relevant maximum penalties for like or similar offences. Such an exercise would be extremely time consuming and in view of the differences in the legislation and sentencing levels between the various jurisdictions, such an exercise was not thought to be profitable.

RECOMMENDATIONS

The Council suggests that consideration be given to:

1. Increasing the statutory maximum penalty for indecency offences committed against children (ss 61M, 61N, 61O *Crimes Act 1900* (NSW)) to 10 years.
2. Creating an additional offence, where a s 66A *Crimes Act 1900* (NSW) offence is committed in circumstances of aggravation, that would carry a maximum penalty in excess of 25 years.

   In this section circumstances of aggravation would mean circumstances in which.

   a) sexual intercourse by the alleged offender was secured by force or by putting the alleged victim in fear;

   b) at the time of or immediately before or after the commission of the offence the alleged offender intentionally or recklessly inflicted actual bodily harm;

   c) the alleged offender was in the company of another person or persons;

   d) the alleged offender was in a position of authority of the alleged victim;

   e) the alleged victim has a serious intellectual disability;

   f) the alleged offender took advantage of the alleged victim being under the influence of alcohol or a drug in order to commit the offence; or

   g) the presence of the alleged victim being secured by kidnapping.
3. Amending s 66C *Crimes Act 1900* (NSW) to consist of a general provision in the following terms:

   a) Any person who has sexual intercourse, attempts to have sexual intercourse or incites a third person to have sexual

intercourse with another person who is of or above the age of 10 years but under the age of 16 years is liable to imprisonment for 14 years; and

b) Any person who has sexual intercourse, attempts to have sexual intercourse or incites a third person to have sexual intercourse with a person under the age of 16 years in circumstances of aggravation is liable to imprisonment for a period of 25 years.

In this section circumstances of aggravation mean circumstances in which;

a) sexual intercourse by the alleged offender was secured by force or by putting the alleged victim in fear;

b) at the time of or immediately before or after the commission of the offence the alleged offender intentionally or recklessly inflicted actual bodily harm;

c) the alleged offender was in the company of another person or persons;

d) the alleged offender was in a position of authority of the alleged victim;

e) the alleged victim has a serious intellectual disability;

f) the alleged offender took advantage of the alleged victim being under the influence of alcohol or a drug in order to commit the offence; or

g) the presence of the alleged victim being secured by kidnapping.

4. Providing a note to, or amending s 66EA *Crimes Act 1900* (NSW) in order that it be made clear that a separate offence has been created by this section, the gravamen of which is the fact that the accused has engaged in a course of persistent sexual abuse of a child, and that the appropriate sentence to

be imposed is one that is proportionate to the seriousness of the offence.

5. In addition, include this offence in the Table of Standard Non-Parole Period matters.
6. Including the s 112 offence of breaking and entering the premises in which a sexual assault is committed as an aggravating circumstance for the purpose of s 61J *Crimes Act 1900* (NSW).
7. Providing for a separate offence in the sexual context, along the lines of that contained in the *Sexual Offences Act 2003* (UK), of voyeurism.
8. Including as an aggravation of an offence of voyeurism the following:
   a) where the offender interfered with the fabric of a building for the purpose of making visual observations of a person in a state of undress; and
   b) where the person observed was a child; and
   c) where the purpose of the filming or the installation or adaptation of the fabric of the building was to commit a s 21G offence involving a child.
9. Transferring ss 21G and 21H offences from the *Summary Offences Act 1988* to the *Crimes Act 1900* (NSW).
10. Increasing the maximum penalty attaching to ss 21G and 21H *Summary Offences Act 1988* (NSW) offences to 5 years imprisonment.
11. Adding an offence involving the act of meeting a child, or travelling with the intention of meeting a child, following grooming, where that involved the communication of indecent material or suggestions made to the child to meet for sexual purposes, to s 66EB *Crimes Act 1900* (NSW).

12. Considering, at the time of any substantial review of the *Crimes Act 1900* (NSW) introducing a definition of the expression 'act of indecency' in the Act as follows:

    An act of indecency means an act that:

    (a) is of a sexual nature; and

    (b) involves the human body, or bodily actions or functions; and

    (c) is so unbecoming or offensive that it amounts to a gross breach of ordinary contemporary standards of decency and propriety in the Australian community.

13. Including the s 66EA offence (of persistent sexual abuse of a child) in the list of the offences to which the *Pre-Trial Diversion of Offenders Act 1985* (NSW) applies, so as to allow a s 66EA offender to be eligible for treatment at Cedar Cottage.

14. Including a specific incitement offence in the *Crimes Act 1900* (NSW) to capture cases where an offender incites one or more persons to commit a sexual offence, that would attract a similar maximum penalty as the relevant substantive offence.

15. Re-structuring the offences currently included in Part 3 Division 10 *Crimes Act 1900* (NSW) so as to provide for 3 separate Divisions, the second of which would be specific to offenders involving the sexual assault of children under the age of 16 years, as follows:

    - Division 10 Offences involving the sexual assault of adults, etc
    - Division 10A Offences involving the sexual assault of children under the age of 16 years, etc
    - Division 10B Sexual servitude

Chapter 3

Statutory Maximum Penalties And Standard Minimum Sentences Term 3

3.1 In this chapter we give consideration to the current maximum penalties for the range of sexual offences and to the standard non-parole periods (SNPPs), included in the Table in Appendix K, in where they are specified by the *Crimes (Sentencing Procedure) Act 1999* (NSW).

3.2 We give separate consideration in Chapter 4 to those offences that deal with child pornography, particularly in the light of the guidelines developed in England and Wales, and in the light of recent concerns as to the seemingly increased subjection of children to sexualised conduct and child pornography.

1. STATUTORY MAXIMUM PENALTIES

Background

3.3 The role of the statutory maximum penalty was summarised in *R v Way* as follows:

> 51 The statutory maximum penalty has been regarded as an expression of the policy of the legislature in providing for the offence (*R v Oliver* (1980) 7 A Crim R 174 at 177; *Gilson v The Queen* (1991) 172 CLR 353 at 364), or as a reflection of the seriousness of that offence as perceived by the public (*R v H* (1980) 3 A Crim R 53 at 65). It has been reserved for the "worst type of case falling within the relevant prohibition": *Regina v Tait* and Bartley (1979) 46 FLR 386, *R v Fernando* [1999] NSWCCA 66 at para 227 and *Ibbs v The Queen* (1987) 163 CLR 447, although the adoption of that phrase is not an occasion for the imposition of a lesser sentence if it is possible to envisage a worse case: *Veen v The Queen* [No 2] (1988) 164 CLR 465 at 478.
>
> 52 Traditionally any intention on the part of the legislature that the offence should attract a heavier sentence has been manifested by an increase in the statutory maximum: *R v Channon* (1988) 38 A Crim R 334; *R v Peel* [1971] 1 NSWLR 247. The courts are expected to recognise and reflect that intention

when sentencing offenders for offences after such amendments are made: *R v Slattery* (1996) 90 A Crim R 519 at 524 and *R v Jurisic* (1998) 45 NSWLR 209 at 227.[70]

3.4 The *Crimes Amendment (Sexual Offences) Act 2003* (NSW) significantly amended the statutory framework for sexual offences in NSW. The Act 'provided for the equal treatment of sexual offences against males and females and increased the penalties for sexual offences against children'.[71] A maximum sentence of natural life for aggravated sexual assault in company[72] was introduced and two offences now carry a maximum penalty of 25 years.[73]

3.5 Undertaking an effective comparison of the statutory maximum sentences applying in other Australian jurisdictions is problematic, since:

- NSW is the one of the only jurisdictions to maintain comprehensive statistics detailing types of penalty and imprisonment levels;
- NSW is the only jurisdiction to apply standard non-parole periods to certain child sexual offences;
- different offence and penalty regimes exist in the other jurisdictions; and
- there is a lack of comparative studies.

3.6 Despite these impediments, the Judicial Commission's recent study of full-time imprisonment[74] found that the introduction of the s 61J aggravated sexual assault offence in 2001, with its statutory maximum of natural life, elevated NSW above the highest penalties in all other comparable jurisdictions.[75]

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70. *R v Way* (2004) 60 NSWLR 168.
71. Explanatory Notes, Crimes Amendment (Sexual Offences) Bill 2003 (NSW).
72. *Crimes Act 1900* (NSW) s 61JA.
73. *Crimes Act 1900* (NSW) s 66A sexual assault of a child under the age of 10; and s 66EA(1) persistent sexual abuse of a child.
74. Indyk, S. and Donnelly, H., 'Full-time Imprisonment in New South Wales and Other Jurisdictions: A National and International Comparison', (Research Monograph 29, Judicial Commission of New South Wales, 2007), 14.

3.7 Furthermore, the proportion of offenders sentenced to full-time imprisonment for sexual assault (at 96%) is higher than in other Australian jurisdictions.[76] The Judicial Commission remarked that the comparison between NSW and other jurisdictions is 'particularly stark', given the imprisonment rate for s 61I sexual assault, which is higher than the combined figures for offences that include aggravated sexual assaults in other States.

Specific Offences

3.8 Generally there appears to be little cause for concern in relation to the maximum penalties for the offences surveyed in this report. The Council has however given consideration to the maximum penalties for the following offences in the light of the submissions received, and its own review of the relevant legislation.

ss 91G, 91H(2) and 91H(3)-Child Pornography

3.9 The NSW Department of Community Services (DoCS) submitted that the maximum penalties for all child pornography offences should be increased to imprisonment for 20 years because of the inherent exploitation and degradation of children involved in the commission of such offences.[77] The increase suggested would result in a maximum sentence that would be twice that applicable under the *Criminal Code 1995* (Cth).[78]

3.10 The Council is of the view, as discussed in Chapter 4,[79] that while the maximum sentence for the offence of possession of child pornography should be increased, an increase in the order of that

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75. The relevant comparable jurisdictions examined include Australian jurisdictions, New Zealand and England. The United States, where each of the 50 States may establish their own penalties, was not included in this comparison.
76. Indyk, S. and Donnelly, H., 'Full-time Imprisonment in New South Wales and Other Jurisdictions: A National and International Comparison', (Research Monograph 29, Judicial Commission of New South Wales, 2007), 15. The definition of sexual assault includes s 61I offences committed on or after 1 February 2003, s 61J and s 61JA offences.
77. Submission 2: New South Wales Department of Community Services, 3.
78. *Criminal Code 1995* (Cth) div 474 sub-div C s 474.19(1) and 474.20(1)-10 years.

suggested by DOCS would not be justified. Rather, an increase in the maximum penalty to that of 10 years imprisonment for a s 91H(3) offence would make the punishment for this offence consistent with the penalty imposed for the broadly comparable Commonwealth offence.

ss 91D to 91 F-Child Prostitution

3.11 DoCS made a similar submission in relation to the child prostitution offences contained in ss 91D to 91F of the *Crimes Act 1900* (NSW). While the Act provides for a maximum penalty of imprisonment for 14 years for the offence of promoting or engaging in acts of child prostitution where the child is under the age of 14 years, compared with a maximum penalty of 10 years where the child is aged between 14 and 18 years[80], it does not provide for a similar increase in penalty for the offence of obtaining a benefit from child prostitution where the child is aged under 14 years.[81]

3.12 This would appear to be an anomaly that calls for attention. Otherwise the Council considers that the maximum penalties for s 91D offences, where the child is under the age of 16 years, should not be less than those that would otherwise apply to the kind of sexual activity with which it is concerned.

3.13 As the maximum sentences for sexual intercourse with a child are 25 years imprisonment where the child is aged under 10 years[82] and 16 years imprisonment currently where the child is aged between 10 and 14 years,[83] it appears that there would be some merit in increasing the available maximum sentences as suggested by DOCS or at least providing for an increase to 14 years imprisonment in the maximum sentence for the s 91E offence where the child is aged under 14 years.

79. At [4.38].
80. *Crimes Act 1900* (NSW) s 91D.
81. Where the maximum sentence is one of imprisonment for 10 years: *Crimes Act 1900* (NSW) s 91E.
82. *Crimes Act 1900* (NSW) s 66A.
83. *Crimes Act 1900* (NSW) s 66C.

3.14 The Council, in Chapter 2, has suggested a general revision of the offences arising under ss 66A and 66C. If adopted, then consideration should be given to increasing the maximum penalty for all offences related to child prostitution to reflect the added criminality involved in that form of conduct beyond that which would be captured by an offence charged under s 66A and s 66C *Crimes Act 1900* (NSW).

s 73-Special Care offences

3.15 DoCS submitted that the penalties attaching to 'special care' offences under s 73 of the *Crimes Act 1900* (NSW), for which there is no defence of consent, should be increased, as they do not reflect the abuse of trust inherent in such offences.[84] For instance, the offence of sexual intercourse with a person aged between 16 and 17 years who is in the special care of the offender (eg teacher/pupil) carries a statutory maximum penalty of imprisonment for 8 years,[85] or for 4 years[86] if the person is aged between 17 and 18 years. However, these penalties are 'well below' the statutory maximum penalty for the offence of sexual assault without consent of imprisonment for 14 years under s 61I.

3.16 The Council is of the view that the penalties attaching to 'special care' offences could be increased as suggested by DoCS, at least where the victim is aged below 18 years of age. However, it is noted that if the maximum penalty for s 73 is increased beyond 8 years, then the penalty for a teacher or step -parent having sexual intercourse with consent of a person aged 16-18 will exceed that imposed for a natural father convicted of incest under s 73.

3.17 This offence highlights the difficulty involved in identifying gaps and anomalies in sentence. Part of the difficulty arises not from the penalty, but in the offences themselves. As discussed in Chapter 2, the Council believes that there is room for offences to be improved through process of looking at the sexual offences Division as a whole, and examining how offences are worded.

84. Submission 2: New South Wales Department of Community Services, 2.
85. *Crimes Act 1900* (NSW) s 73(1).
86. *Crimes Act 1900* (NSW) s 73(2).

ss 80D(2), 80E(2)-Sexual Servitude

3.18 DoCS submitted that the maximum penalties for the offences constituting aggravated sexual servitude[87] in relation to children under the age of 18 years or children with a serious intellectual disability should be increased to imprisonment for 20 years, in line with the maximum penalties attaching to corresponding offences under the *Criminal Code 1995* (Cth).[88]

3.19 The statutory maximum penalty under the New South Wales Act for the offence of causing aggravated sexual servitude is currently imprisonment for 19 years,[89] as it also is for the offence of conducting a business involving sexual servitude (where the victim is under 18 years of age).[90]

3.20 The Council agrees that the penalty for aggravated sexual servitude could be increased to 20 years, bringing the penalty for the State offence into line with the Commonwealth offence.

Sentences Delivered Relative to Statutory Maximum Sentence

3.21 The Council, in volume 2 of this report, has provided an analysis of the JIRS statistics showing the relativity of the sentences delivered to the statutory maximum penalty for sexual offences. In table form they reveal the following median outcomes for all sentences of imprisonment i.e. whether imposed after conviction or following a plea as against the statutory maximum sentences:

87. *Crimes Act 1900* (NSW) s 80D(2). The maximum sentence for the unaggravated offence is imprisonment for 15 years.
88. *Criminal Code 1995* (Cth) s 270.7(1)(a)
89. *Crimes Act 1900* (NSW) s 80D(2).
90. *Crimes Act 1900* (NSW) s 80E(2).

Table 2: Sexual Offences: Median Terms of Imprisonment and Statutory Maximums[91]

Section	Offence	Prison No.	Max	Median	Ratio %
61I	Sexual Assault	82[92]	14Y	5Y	35.7
61I/61P	Attempt to commit sexual assault	14	14Y	4Y	28.6
61J	Aggravated sexual assault	80	20Y	8Y	40.0
61J/61P	Attempt to commit aggravated sexual assault	7	20Y	6Y	30.0
61JA	Aggravated sexual assault in company	12	Life	14Y	N/A
61K(a)	Maliciously inflict ABH w/i to have sexual intercourse	6	20Y	4.50Y	22.5
61K(b)	Threaten to inflict ABH w/i to have sexual intercourse	4	20Y	8Y	40.0
61L	Indecent assault	24	5Y	2Y	40.0
61M(1)	Aggravated indecent assault	29	7Y	3Y	42.9
61M(2)	Aggravated indecent assault with person under the age of 10 years	28	10Y	3Y	30.0
66A	Sexual intercourse with child under the age of 10 years	32	25Y	6Y	24.0
66B	Attempt or assault with intent to have sexual intercourse with child under the age of 10 years	4	25Y	6.25Y	25.0
66C(1)	Sexual intercourse with child between 10 and 14 years	10	16Y	2.50Y	15.6
66C(2)	Aggravated sexual intercourse with child between 10 and 14 years	9	20Y	6Y	30.0
66C(3)	Sexual intercourse with child between 14 and 16 years	20	10Y	2.25Y	22.5
66C(4)	Aggravated sexual intercourse with child between 14 and 16 years	6	12Y	3.50Y	29.2
66EA(1)	Persistent sexual abuse of a child	10	25Y	7Y	28.0
66F(3)	Sexual intercourse with person who has an intellectual disability	7	8Y	3Y	37.5
78A	Incest with a close family member who is above the age of 16 years	3	8Y	3Y	37.5
91D(1)(a)	Cause or induce a child to participate in an act of child prostitution	4	14Y	3.25Y	23.2
91G(1)(a)	Use child under the age of 14 years for pornographic purposes	1	14Y	2.5Y	17.9

91. Information in this table was compiled by the Judicial Commission of New South Wales.
92. There were 82 offenders convicted of this offence however, for one offender the plea is unknown. That offender pleaded not guilty to a s 61J charge but was found guilty in the alternative on s 61I, therefore he has not been assigned to the plea of guilty or the please of not guilty.

3.22 As Table 2 reveals, the median sentence imposed does not rise above 43% of the statutory maximum for any offence, and in case of one offence, is as low as 15.6% of the relevant maximum sentence.

3.23 The Council recognises that this is a relatively crude measure for comparison purposes since it can be expected that the median sentence would be higher for cases disposed of after trial. Moreover in several instances the number of cases involved is small, and those in fact included in the statistics reflect a wide variety of objective and subjective circumstances. As outriders can skew the spread we have not attempted to show the longest or shortest or even average sentences.

Comparison with Commonwealth Offences Involving the Sexual Assault of Children Overseas

3.24 The final observation which the Council makes in relation to the maximum penalties available under the *Crimes Act 1900* (NSW) is to draw attention to the maximum penalties available under the Commonwealth Crimes Act in relation to sexual offences committed by Australian citizens overseas. It can be seen from Table 2 below that some of these offences attract longer maximum sentences than those available for broadly comparable offences under state law. Other Commonwealth offences have no comparable State equivalent.

Table 3: Description of Sexual Offences and Maximum Penalties

Crimes Act 1914 (Cth)	Description	Maximum penalty	Crimes Act 1900 (NSW)	Description	Maximum penalty
50BA	Sexual intercourse with a child under the age of 16 years	17 years	66C(1)[93]	Sexual intercourse with child aged 10-14	16 years
			66C(3)	Sexual intercourse with child aged 14-16	
50BB	Inducing child under 16 to engage in sexual intercourse	17 years	--------		
50BC	Act of indecency with a child under 16	12 years	61O	Act of indecency with / towards person under the age of 10	7 years
			61N(1)	Act of indecency with / towards person under the age of 16	2 years
50BD	Inducing act of indecency with a child under 16	12 years	61O	Inciting person under the age of 10 to an aggravated act of indecency	7 years
			61N(1)	Inciting person under the age of 16 to an act of indecency	2 years
50DA	Benefiting from such offences	17 years	--------		
50DB	Encouraging such offences	7 years	--------		

3.25 In general terms, the Council would consider it appropriate that sexual offences committed in Australia should attract sentences under the laws of the States and Territories that would be equivalent to those imposed for offences committed by Australian citizens or Australian residents on children overseas. Accordingly, it regards the maximum sentences noted above as useful reference points in the event of any future revision being undertaken of the maximum penalties under the *NSW Crimes Act 1900* (NSW). It does not however, see this to be an immediate imperative.

93. The Council notes however that the NSW offence of sexual intercourse with a child under 10 years carries a maximum sentence of 25 years, which is significantly higher than the penalty attaching to the *Crimes Act 1914* (Cth) s 50BA offence, which does not differentiate between the ages as in NSW.

2. STANDARD NON PAROLE PERIODS

Background

3.26 The Council has drawn attention in earlier reports to some of the difficulties which have arisen in relation to the application of s 54A of the *Crimes (Sentencing Procedure) Act 1999* (NSW).[94] Later in this section reference is made to the manner in which individual non-parole periods (NPPs) have been fixed, and to the fact that there are differences across the range of offences, in relation to the ratio which those periods bear to the maximum available sentences.

3.27 The standard non parole period scheme takes its place in the context of an Act which otherwise provides as follows:

> Court to set non-parole period
>
> 1) When sentencing an offender to imprisonment for an offence, the court is first required to set a non-parole period for the sentence (that is, the minimum period for which the offender must be kept in detention in relation to the offence).
>
> 2) The balance of the term of the sentence must not exceed one-third of the non-parole period for the sentence, unless the court decides that there are special circumstances for it being more (in which case the court must make a record of its reasons for that decision).[95]

3.28 It is to be applied in circumstances where:

- The SNPP is to be taken to represent the parole period for an offence in the middle range of objective seriousness for the tabled offence;[96]

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94. See New South Wales Sentencing Council, Report on *Sentencing Trends and Practices 2003-2004* (2004) 10-22; New South Wales Sentencing Council, Report on Sentencing Trends and Practices 2004-2005 (2005) 9-14; New South Wales Sentencing Council, Report on *Sentencing Trends and Practices 2005-2006* (2006) 13-6; New South Wales Sentencing Council, and Report on *Sentencing Trends and Practices 2006-2007* (2007), 25-46.
95. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44.

- The Court is to set that period as the NPP for the relevant offence unless it determines that there are reasons for setting a shorter or longer period; [97] and
- The reasons which the Court may take into account in declining to set a shorter or longer period are confined to those set out in s 21A of the Act, a section which specifies the circumstances of aggravation or mitigation that are relevant for sentencing, but which also has the effect of preserving as relevant, matters that would apply at common law.[98]

The Method by which Appropriate Standard Non Parole Periods are Determined

3.29 The Sentencing Council has not been able to determine the reasons for the setting of the individual SNPPs included in the Table, (Appendix K to this volume) which vary between 21% and 80% of the maximum penalty for all offences, and between 50% and 80% of the maximum penalty for the sexual offences included in that table.

3.30 It understands, however, that the methodology employed has been one that takes into account:

- the seriousness of the offence;
- the maximum penalty for the offence;
- current sentencing trends; and
- community expectations.[99]

The Interpretation of s 54A of the *Crimes (Sentencing Procedure) Act 1999* (NSW)

3.31 The intention of the legislature when introducing s 54A can best be seen from the Second Reading speech where the then Attorney

96. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A(2).
97. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(2).
98. *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 54B and 21A(1).
99. New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5818 (Bob Debus, Attorney General).

General The Hon. Bob Debus said:

> At the outset I wish to make it perfectly clear that the scheme of sentencing being introduced by the Government today is not mandatory sentencing. The scheme being introduced by the Government today provides further structure and guidance to judicial discretion. These reforms are primarily aimed at promoting consistency and transparency in sentencing and also promoting public understanding of the sentencing process. By preserving judicial discretion we ensure that the criminal justice system is able to recognise and access the facts of an individual case. This is the mark of a criminal justice system in a civilised society. By preserving judicial discretion we ensure that when, in an individual case, extenuating circumstances call for consideration of mercy, considerations of mercy may be given.[100]

3.32 The way in which the section should be applied, including the relevance of the maximum penalty, was considered in *R v Way*, where the Court said:

> 53 There is nothing in Division 1A to suggest that the statutory maximum ceases to provide a benchmark, or a reference point, in sentencing, so far as it is a manifestation of legislative intention as to the seriousness of the offence. The focus is, however, likely to shift more towards the standard non-parole periods where they apply, since they may be taken to express a legislative intention as to the minimum periods of actual imprisonment, which are appropriate for the relevant offences.
>
> 54 As will be mentioned later in these reasons, this may well result in some change in the established sentencing pattern for these

100. New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5813 (Bob Debus, Attorney General).

offences, or at least some of them, with an overall increase in the non-parole periods and terms of the sentences.[101]

3.33 The Court decided, at paragraph 71, that the section applied only to prisoners convicted after trial.[102]

3.34 In turning to the meaning of 'in the middle range of objective seriousness' the Court recognised the width of the matters which could be included in this assessment.

> 85 The multiplicity of purposes of sentencing set out in s 3A of the Act, quoted above, do not suggest a narrow perspective as to the range of facts and matters that are to be regarded as "objective" facts and matters which may affect the judgment involved in assessing "seriousness". It is too narrow a perspective to confine attention to the physical acts of the offender and their effects, as those acts or effects could be observed by a bystander. The inquiry which we consider to have been intended is one that would take into account the actus reus, the consequences of the conduct, and those factors that might properly have been said to have impinged on the mens rea of the offender (see for example R Fox and A Freiberg, Sentencing, 2nd ed (1999) South Melbourne, Oxford University Press, at pars 3.506 to 3.510).
>
> 86 Some of the relevant circumstances which can be said "objectively" to affect the "seriousness" of the offence will be personal to the offender at the time of the offence but become relevant because of their causal connection with its commission. This would extend to matters of motivation (for example duress, provocation, robbery to feed a drug addiction), mental state (for example, intention is more serious than recklessness), and mental illness, or intellectual disability, where that is causally related to the commission of the offence, in so far as the offender's capacity to reason, or to appreciate fully the rightness or wrongness of a

101. *R v Way* (2004) 60 NSWLR 168, [53]-[54].
102. *R v Way* (2004) 60 NSWLR 168, [71].

particular act, or to exercise appropriate powers of control has been affected: *Channon v The Queen* (1978) 33 FLR 433 and *R v Engert* (1995) 84 A Crim R 67. Such matters can be classified as circumstances of the offence and not merely circumstances of the offender that might go to the appropriate level of punishment. Other matters which may be said to explain or influence the conduct of the offender or otherwise impinge on her or his moral culpability, for example, youth or prior sexual abuse, are more accurately described as circumstances of the offender and not the offence.

89 That there is a comparison which can properly be made, and which has always been made, in the course of sentencing, between an offence in the abstract, and an individual offence, when assessing the relative seriousness of the latter is inescapable as a matter of logic, and it was something which was adverted to in *Walden v Hensler* (1987) 163 CLR 561 at 577, per Brennan J and (at 595) per Dawson J.

90 In that comparison, it is necessary to reflect the distinction between circumstances which go to the seriousness of the offence considered in a general way, and matters that are more appropriately directed to the objectives of punishment.

91 If that distinction is respected then the spectrum of offences, and the identification of those which fall in the mid range of seriousness can be confined to matters which are directly or causally related to its commission.

100 Before parting from this aspect of the Division, we observe that we do not consider that a midrange offence should be regarded as one that is necessarily “typical” of those that are charged under the relevant provision; nor do we consider that the midrange for the offence should be assumed to occupy a

relatively narrow band within the continuum between the least serious instance and the worst category case.[103]

3.35 The Court observed additionally:

139 In general terms it does appear that in most, if not all of the Table offences the standard non-parole period will exceed the mean non-parole period, both for all offenders and for those who have been sentenced after a plea, as recorded in the Judicial Commission Sentencing Statistics.

140 The impression which might be gained from any such review needs to be treated with care, since the statistics mentioned are for all offenders, and show the non-parole period which was set after adjustment for all relevant mitigating and aggravating circumstances, whereas the standard non-parole periods are intended as starting points for midrange offences after conviction and before adjustment. Additionally, for a number of the offences in the Table, the statistics currently available are, in some instances, based on a numerically small population, while other offences in the Table encompass such a wide variety of circumstances and outcomes that it is difficult to determine where a midrange offence might lie. The statistics are anonymous and, as a result, it is not possible to use them to identify a case which might fall within the mid range, by reference to outcome. Finally, they represent little more than a snapshot for the period selected, and care in relation to their use, in sentencing has been repeatedly expressed, for example *R v Derbas* [2003] NSWCCA 44 and *R v Bloomfield* (1998) 44 NSWLR 734.

141 There was no mention in the Second Reading Speech of any dissatisfaction with the general level of sentencing for the Table offences, or of any intention to increase the time that persons convicted of them should remain in custody. Moreover it is hardly surprising that the standard non-parole periods

103. *R v Way* (2004) 60 NSWLR 168, [85]-[86], [89], [90]-[91], [100].

> specified in the Table are generally longer than those that have been imposed in the past, since they were set as reference points before adjustment for the purely subjective features which almost certainly influenced the outcome of the cases included in the statistics.[104]

3.36 Since *Way's* case[105] there have been a number of appeals in which the SNPP has been the central or significant point of the appeal.[106] Most of the questions of principle which have arisen in relation to the application of the scheme have by now been addressed. For example, in *R v Davies*[107] it was accepted that although s 54B does not apply to sentencing following a plea of guilty, the SNPP can still take its place as a reference point.

> It performs the functions in so far as it specifies the standard non-parole period for a mid range case determined upon trial, before any necessary adjustment which might be made in accordance with the total.

3.37 In *R v Sangalang* Hunt AJA said:

> A sentencing judge should state no more than that he or she has used the standard non-parole period as a reference point or guidepost, and then identify the appropriate non-parole period, describing where significant any particular matters taken into account in doing so. That appropriate non-parole period should never be described as a percentage of the standard non-parole period.[108]

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104. *R v Way* (2004) 60 NSWLR 168, [139]-[141].
105. *R v Way* (2004) 60 NSWLR 168.
106. For the period 22 July 2005 to 28 August 2007, the Court of Criminal Appeal heard 846 appeals. The standard non-parole period was the primary or significant ground of appeal in 105 of those matters.
107. *R v Davies* [2004] NSWCCA 319, [6].
108. *R v Sangalang* [2005] NSWCCA 171, [22]. See also *R v AJP* (2004) 150 A Crim 575; *R v Hung Lo* (2005) 159 A Crim R 71; *R v Stambolis* (2006) 160 A Crim R 510; and *Mulato v The Queen* [2006] NSWCCA 282 where the role of the SNPP and of the maximum penalty as reference points was confirmed.

3.38 The concerns which were primarily identified in the submissions were to the effect that there is no consistency in the ratio between the SNPPs and the maximum sentence for the sexual offences, and that the SNPPs have been set too high having regard to the prior sentencing pattern and the conventional approach taken to the application of s 44 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).[109]

The Offences Subject to the Standard Non Parole Periods Regime

3.39 The table below shows the sexual offences that currently are the subject of the SNPP regime. It also shows the relativity of the specified NPPs to the maximum penalties and their relativity to the NPPs that would be reserved for a worst case (involving a sentence structured so as to provide a non-parole period equal to 75% of the full term and a balance of term equal to 25% of that term).

Table 4: Offences subject to the Standard Non-Parole Period Scheme

Section	Offence	Max Penalty	SNPP	NPP worst case[110] Penalty	SNPP as a % of Max	SNPP as a % of Worst Case
61I	Sexual Assault without consent	14Y	7Y	10Y 6M	50%	66%
61J	Aggravated sexual assault	20Y	10Y	15Y	50%	66%
61JA	Aggravated sexual assault in company	Life	15Y	-	-	-
66A	Sexual intercourse with child under the age of 10 years	25Y	15Y	18Y 9M	60%	80%
61M(2)	Aggravated indecent assault with person under the age of 10 years	10Y	8Y	7Y 6M	80%	120%
61M(1)	Aggravated indecent assault	7Y	5Y	5Y 3M	71%	95%

3.40 It was the divergence in the proportionality of the SNPPs for mid range offences to the maximum penalties and their proximity to

109. Submission 17: Legal Aid New South Wales, 5, Submission 16: Public Defenders Office New South Wales, 4, Submission 8: New South Wales Council for Civil Liberties, 1, Submission 5: The Chief Magistrate of the Local Court; Submission 13: Aboriginal Legal Service (NSW/ACT).

110. These figures represent the worst case, ie, two thirds of the maximum penalty with no finding of special circumstances.

the NPP that could be expected for a worst case that attracted attention in the submissions, to the following offences:

s 66A-Offences of Sexual Intercourse-child under 10 years

3.41 This offence carries a maximum penalty of imprisonment for 25 years. The SNPP is 15 years, which represents 60% of the maximum. If the objective seriousness of a particular offence was found to be in the middle range and there was no adjustment downwards of the NPP for s 21A reasons, then if the balance of the term was set at one-third of the NPP, the prisoner would be sentenced to an overall term of 20 years. That would represent 80% of the maximum sentence and place the sentence into that band of sentences traditionally reserved for the worst possible case.

3.42 In *R v AJP*[111] Simpson J, dealing with an offence under this section, pointed out the disparity between the pre-JIRS statistics, which indicated NPPs ranging between 12 months and 6 years, and the present 15 years.

s 61M (1)-Aggravated Indecent Assault

3.43 This offence carries a maximum sentence of imprisonment for 7 years and a SNPP of 5 years, which represents approximately 71% of the maximum sentence. The Legal Aid Commission submitted that this ratio 'leaves very little room for variation where an offence is seen as in the middle range of seriousness'.[112] The Public Defenders drew attention to the fact that a NPP set in relation to a case at the middle range of 5 years would be only 3 months less than the NPP that could be set for a worst-case s 61M(1) offence or about 95% of the ordinary NPP for a worst case.

3.44 The NSW DPP noted that while a s 61M(1) offence is an indictable offence, it is not a serious indictable offence[113]and can be dealt with summarily under Schedule 1, Table 1 to the *Criminal Procedure Act 1986*

111. *R v AJP* (2004) 150 A Crim R 575, [36].
112. Submission 17: Legal Aid New South Wales, 5.
113. Submission 16: Public Defenders Office New South Wales.

(NSW), in which event the maximum sentence available would be imprisonment for 2 years.[114]

3.45 The NSW DPP also noted that 'it is difficult to see how a non-parole period representing almost three-quarters of the maximum sentence reflects a mid-point in the spectrum of objective seriousness'[115] and additionally observed that the high ratio of the standard non-parole period to the maximum sentence 'would also operate to reduce further the sentencing discretion to set the balance of the term of sentence under s 44 of the *Crimes (Sentencing Procedure) Act 1999'*.[116]

s 61M(2)-Aggravated Indecent Assault, Child under 10 Years

3.46 The Sentencing Council[117] had previously noted the anomaly created by the fact that the 'more serious' offence of aggravated indecent assault of a child under 10 years, which carries a maximum sentence of imprisonment for 10 years,[118] attracted the same SNPP of 5 years as the lesser offence of aggravated indecent assault.[119]

3.47 Recently, the SNPP for a s 61M(2) offence was increased to 8 years.[120] This amendment has, however, had the effect of precluding the setting of an additional term under s 44 of the Act of one third of the NPP, for the simple reason that the resulting sentence would exceed the maximum sentence by eight months. The 8 year SNPP exceeds the two-thirds worst case scenario of 7 years 6 months, by six months.

3.48 The length of the revised SNPP for this offence contrasts with the length and the ratio of SNPPs for 14 other offences specified in the Table to s 54A which carry equivalent or longer maximum penalties than the

114. Submission 12: New South Wales Director of Public Prosecutions, 3, *Criminal Procedure Act 1986* (NSW) s 267(2).
115. Submission 12: New South Wales Director of Public Prosecutions, 4.
116. Submission 12: New South Wales Director of Public Prosecutions, 4.
117. New South Wales Sentencing Council, *Report on Sentencing Trends and Practices 2003-2004* (2004) 16.
118. *Crimes Act 1900* (NSW) s 61M(2).
119. *Crimes Act 1900* (NSW) s 61M(1).
120. *Crimes (Sentencing Procedure) Amendment Act 2007* (NSW) sch 1 [10].

s 61M(2) offence of aggravated indecent assault.[121] The SNPPs for those offences are all less than the 8 years for a s 61M(2) offence, and range between 21%[122] and 50%[123] of the maximum sentence whereas the SNPP for the s 61M(2) offence represents 80% of the maximum sentence.

s 61I-Sexual Intercourse Without Consent

3.49 This offence carries a maximum sentence of imprisonment for 14 years and a SNPP non-parole period of 7 years. An offender whose crime was in the mid range of objective seriousness could be sentenced, absent reasons reducing the NPP, to an overall sentence of imprisonment for 9 years 4 months. That too would be to place him within the band of worst offenders.

Relativity of Non-Parole Periods Set by the Courts to the Standard Non-Parole Periods

Table 5: Sexual Offences SNPP and Median NPP[124]

Sec	Offence	Prison . No	Prison %	SNPP	Median NPP	Ratio %
61I	Sexual Assault	82[125]	93	7	3	42.86
61J	Aggravated sexual assault	80	90	10	3.50	35.00
61JA	Aggravated sexual assault in company	12	100	15	4.75	31.67
61M(1)	Aggravated indecent assault	29	56	5	1.50	30.00
61M(2)	Aggravated indecent assault with person under the age of 10 years	28	82	5	1.50	30.00
66A	Sexual intercourse with child under the age of 10 years	32	80	15	2.50	16.67

121. These are the offences arising under *Crimes Act 1900* (NSW) ss 33, 35(1), 35(2), 35(3), 60(3), 61I, 98, 112(2), 112(3), 154C(1), 154C(2), 154G, 203E and *Firearms Act 1996* (NSW) s 7.
122. Unauthorised possession of a prohibited firearm: *Firearms Act 1996* (NSW) s 7.
123. Sexual Assault without Consent: *Crimes Act 1900* (NSW) s 61I.
124. Information in this table was compiled by the Judicial Commission of New South Wales.
125. There were 82 offenders convicted of this offence however, for one offender the plea is unknown. That offender pleaded not guilty to a s 61J charge but was found guilty in the alternative on s 61I, therefore he has not been assigned to the plea of guilty or the please of not guilty.

Data Limitations

3.50 Non-parole periods for consecutive sentences are not displayed on JIRS. The Judicial Commission has advised the Council that the reasons for this is that the ratio (or relationship) between the non-parole period and the term of sentence for the principal offence almost always understates the ratio between the overall non-parole period and the term of sentence (also known as aggregate or effective sentence). The time actually being served is understated. This derives from the particular approach taken by the sentencing judge in sentencing for multiple offences, for example, declining to set a non-parole period, or imposing a relatively short non-parole period due to accumulation.

3.51 While non-parole periods for consecutive sentences are not displayed on JIRS, ignoring them will bias the results, as they tend to attract longer prison sentences. However, restricting the analysis of non-parole periods to non-consecutive sentences will understate the relationship to the SNPP and average sentences.[126]

3.52 The Council noted in its annual report on sentencing trends and practices for 2003-2004[127] that the SNPPs in the Table were much higher than the median NPPs recorded in JIRS. Table 4 similarly shows that the median NPPs recorded in the updated JIRS statistics continue to fall well below the SNPPs for the sexual offences within the SNPP regime.

3.53 The Council acknowledges, for the reasons set out in the earlier reports, that this kind of statistical comparison is of limited value as an indicator of the appropriateness of the SNPPs for sexual offences in the mid range of seriousness. There are a number of reasons for this including those already mentioned in relation to the table shown in the preceding section showing a comparison between median and maximum sentences. This has added force in the present instance because the JIRS statistics embrace all cases within the sexual offence

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126. Correspondence, Judicial Commission of New South Wales, 21 May 2008.
127. New South Wales Sentencing Council, *Report on Sentencing Trends and Practices 2003-2004* (2004).

SNPP subset, even though the SNPP has a primary relevance for cases disposed of after conviction at trial.

3.54 Additional reasons for caution arise from the circumstances that:

- the JIRS statistics represent the final sentence imposed, taking into account the subjective features of the offender, including the statutory mitigating factors;
- the JIRS statistics are categorised according to the principal offence, but other offence including those on a form one may be reflected in the sentence;
- the JIRS statistics represent the offences imposed over a particular period and may not include recent decisions;
- there can be delay in correcting the statistics where a sentence is altered on appeal;
- there may be a spate of particularly serious offences or of non serious offences which can skew the statistics, and for this reason the Council has extracted, for convenience, from its annual report on sentencing trends and issues for 2005-2006 and 2006-2007 the case summaries which were completed in relation to SNPP sexual offence cases and included them as Chapter 2 to Volume 2.

3.55 The extent of the divergence between the median and average NPPs actually set and the SNPPs apparent from the Table and summaries, does indicate, even allowing for the qualifications mentioned, that there is some cause for concern as to whether, in some cases, the SNPPs have been set too high, and as to whether a more transparent methodology should be adopted in setting the SNPPs in the future.

3.56 In this respect the Council notes that its advice has not been previously sought when the SNPPs have been set or adjusted, although it would be in a position to monitor sentencing trends, to assess the incidence of relevant criminality and to engage in consultation with relevant stakeholders. This could place it in a position to deliver an advice to the Government which might help to overcome some of the objections to the scheme which were noted in the 2003-2004 annual report, and provide a transparent background explaining the reason for selecting particular offences for inclusion in the scheme and for the selected SNPP.

Sexual Offences Not Currently in the Table of Standard Non-Parole Period Offences

3.57 There are a number of sexual offences carrying maximum penalties that are equivalent to, or longer than, those applicable to offences included in the Table of standard non-parole period offences, that have not been included in the scheme. These offences have been set out in Table 6 overpage.

Table 6: Maximum Penalties for Sexual Offences not in the SNPP table

Sec	Offence Description	Max Years	No Cases	Prison No	%*
1K(a)	Maliciously inflict ABH w/i to have sexual intercourse	20	6	6	100
61K(b)	Threaten to inflict ABH w/i to have sexual intercourse	20	5	4	80
66B	Attempt or assault w/i to have sexual intercourse with child under the age of 10 years	25[f]	7	4	57
66C(1)	Sexual intercourse with child between 10 and 14 years	16	17	10	59
66C(2)	Aggravated sexual intercourse with child 10-14 years	20	10	9	90
66C(3)	Sexual intercourse with child between 14 and 16 years	16	17	10	59
66C(4)	Aggravated sexual intercourse with child 14-16 years	12	8	6	75
66D	Attempt or assault w/i to have sexual intercourse with child between 10 and 16 years	20[g]	1	1	100
	Attempt sexual intercourse with child 14-16 years	10	1	1	100
66EA(1)	Persistent sexual abuse of child	25	10	10	100
66F(2)	Sexual intercourse with person who has an intellectual disability by person in authority	10	1	1	100
80A(2)	Sexual assault by forced manipulation	14	1	1	100
91D(1) (a)	Cause or induce a child to participate in an act of child prostitution	14[h]	4	4	100
91E	Obtain benefit from child prostitution	10	1	1	100
91G(1) (a)	Use child under age of 14 years for pornographic purposes	14	3	3	100
91G(2) (b)/ 344A	Attempt to cause or induce a child to participate in an act of prostitution	10	1	1	100
91H(2)	Produce or disseminate child pornography	10	1	0	0

Notes:

f Period covers offences liable to 20 years imprisonment (offences committed before 1 February 2003) and 25 years imprisonment (offences committed on or after 1 February 2003).

g The maximum penalty depends on which offence under s 66C the offender attempted to commit. The case on JIRS relates to an attempted offence against s 66C(3).

h The maximum penalty is 10 years if the child is aged 14 years or above (JIRS is unable to differentiate).

3.58 The Council is of the view that s 66EA (persistent sexual abuse of a child), by virtue of the seriousness of the offence, should be included in the Table of SNPP offences. This would assist in flagging its presence in the *Crimes Act 1900* (NSW)as an offence in its own right rather than as a sum of its parts.

3.59 The Council is of the view that the rates of offending and sentence patterns for the remaining offences should be monitored so that consideration can be given to the possible inclusion of some of them in the Table at a later time. At this stage there would not appear to be a sufficient incidence of offending as to justify their inclusion in the Table, but it is important that there be a continuing review of each of these offences because of the message that their inclusion in the Table would convey.

Juvenile Offenders

3.60 The Department of Juvenile Justice submitted that the SNPP regime should not apply to juvenile offenders because of their developmental stage of maturation,[128] a proposition that would be consistent with the discretion reserved for the sentencing of juveniles which places an emphasis on the importance of rehabilitation.[129]

3.61 The Council is in agreement with this suggestion for the reasons given above, which could usefully be given a specific legislative basis, ie by confining the relevant provisions to adult offenders.

Repeat Offenders

3.62 Another problem brought to notice, where the standard non-parole period is fixed at a high percentage of the maximum penalty, arises in the case of repeat offenders, since the effect may be to preclude a significant increase in the sentence.

128. Submission 15: NSW Department of Juvenile Justice.
129. *R v GDP* (1991) 53 A Crim R 112.

3.63 Aggravated indecent assault[130] is a case in point. The maximum penalty is imprisonment for 7 years and the standard non-parole period is 5 years, which represents 71% of that maximum. A first sentence for such an offence falling within the mid range of objective seriousness, where there were no reasons for departure from the standard non-parole period would be likely to result in the imposition of a sentence of imprisonment for 6 years 8 months with a non-parole period of 5 years.[131] This would leave only 4 months to accommodate an appropriate increase in the non-parole period, and in the balance of the term, for repeat offences of the same kind. This result is magnified in a case involving a victim under 10 where the SNPP represents 80% of the maximum sentence.[132]

3.64 The Council will give further consideration to the approach, which may be appropriate for repeat sexual offenders when it deals with the remaining terms of reference.

Conclusion

3.65 The problems which the submissions and the Council's examination of the sexual offences included in the Tables identify are that:

- there is no consistency in the ratio between the SNPPs and the maximum sentences;
- in some instances the SNPP is set so high as potentially to prevent a sentencing judge, in a mid range case calling for the SNPP to be applied, from setting a balance of term which, in accordance with common practice, would equate to one-third of the NPP; and
- there is a risk that, having set some SNPPs above the 50% proportion of the maximum sentence, some repeat offenders may not receive the increased sentences which the re-offending would justify.

130. *Crimes Act 1900* (NSW) s 61M(1).
131. Assuming the balance of term was fixed at one-third of the NPP.
132. *Crimes Act 1900* (NSW) s 61M(2).

3.66 Together these factors may have given rise to an impression that sections 54A and 54B are not being consistently applied by the courts, or that full weight is not being given to the standard non-parole periods.

3.67 The statistics in Volume 2 do tend to suggest that the sentences imposed, for the range of offences covered, may not fully take into account the maximum penalty or the SNPP. Justice Howie made a similar observation when dealing with an offence of break and enter a dwelling house and commit a serious indictable offence, namely stealing in circumstances of aggravation:

> One of the problems with statistics in cases where the standard non-parole period applies is that they tend to suggest that the standard non-parole period is being largely disregarded. If an offence is within midrange of seriousness and there is no reason to reduce the standard non-parole period, then the appropriate sentence is the standard non-parole period whatever the sentencing statistics might reveal. In respect of an offence where the maximum penalty is 20 years and the standard non-parole period is 5 years, it is surprising that so few persons have received a head sentence exceeding the standard non-parole period. The statistics tend to suggest that the sentences imposed for this offence do not fully take into account either the maximum penalty or the standard non-parole period.[133]

OPTIONS FOR REFORM

Re-setting SNPPs

3.68 The Council is of the view that, as a general principle, the SNPPs for the sexual offences included in the Table should be set consistently within a more narrow band of say 40-60% of the maximum penalty by

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133. *Maxwell v The Queen* (2007) 177 A Crim R 498, [30].

reference to an assessment of the incidence of offending and existing sentencing patterns. The advantages would be as follows:

- such a scheme would leave the present case law concerning sentencing practices intact;
- it would provide consistency in the ratio of the SNPP to the maximum penalty in place of the wide variations which currently exist both within the Table, and in current sentencing outcomes as demonstrated in the JIRS tables;
- it would be of greater efficacy if SNPPs in reality reflected the median range of objective seriousness;
- it would enhance the intention of the legislature that the amendments promote greater consistency and transparency;
- it may provide fewer avenues of appeal and by these means lessen the burden on the Court of Criminal Appeal;
- it would satisfy the legislature's concern regarding repeat offenders and condign punishments; and
- it would overcome the problem noted above in relation to s 61M(2).

3.69 There may be specific offences for which a different approach would be justified, either because of the prevalence or seriousness, although it would remain difficult to reconcile that with the overall objective of the Act in specifying a standard NPP that would be appropriate for offences falling within a mid range of seriousness, and in permitting adjustment upwards or downwards in the light of the s 21A factors.

3.70 Logically similar considerations would apply to the SNPPs for other offences included in the Table, which would then have the effect of overcoming the disparities evident, for example, from the fact that:

- s 61J has a maximum penalty of 20 years imprisonment with SNPP of 10 years while robbery with wounding[134] has a maximum penalty of 25 years and a SNPP of 7 years; and
- s 61I has a maximum penalty of 14 years imprisonment with a SNPP of 7 years, while an offence of unauthorised possession of a firearm[135] has a SNPP of 3 years.

3.71 The Council recognises that any substantial revision of the Table at this stage could have the effect of unsettling current trends in sentencing, and lead to possible inequities in sentencing outcomes for those sentenced prior to any amendment of the Table and those sentenced at a subsequent date. For this reason it recognises that any such revision would need to await a substantial review of the *Sentencing Crimes (Sentencing Procedure) Act 1999* (NSW), for example, one that involved codification. However, it considers it necessary to bring this anomaly to attention so that it can be addressed, if at any time before such a review, it is thought appropriate to add one or more offences to the Table.

Guideline Judgment

3.72 There may also be room for certain offences to be placed before the Supreme Court for a guideline judgment, either because the trend of sentencing suggests that insufficient regard is being given to the SNPP or because of the wide disparity in sentencing outcomes, or because of their high incidence.

134. *Crimes Act 1900* (NSW) s 98.
135. *Firearms Act 1996* (NSW) s 7.

3.73 Some appreciation of the success which guideline judgments have had in terms of consistency can be seen from the Judicial Commission's study into sentencing of dangerous drivers:

> The guidelines have resulted in consistent results or outcomes in the sentencing of offenders convicted of dangerous driving offences under s 52A. In addition, after reading the various judgments in the course of this study, it became apparent that since Jurisic consistency is also evidence in the articulation for the purpose underlying the type and quantum of sentences handed down and in the approach taken by trial judges in sentencing for these offences.[136]

3.74 The Council has considered whether any offences could be considered as possible candidates for guideline judgments in the light of the statistical analysis in Volume 2. It has not thought it necessary to make such a recommendation at this stage although it will continue to monitor sentencing trends in its annual report with a view to identifying any offences which might justify such an application, either because of the incidence of their commission, or apparent significant and inexplicable divergences in sentencing outcomes.

136. Barnes, L., Poletti, P. and Potas, I., 'Sentencing Dangerous Drivers in New South Wales: Impact of the *Jurisic* Guidelines on Sentencing Practice' (Research Monograph 21, Judicial Commission of New South Wales, 2002) 33

RECOMMENDATIONS

The Council suggests that consideration be given to:

16. Increasing the maximum penalty for s 91H(3) *Crimes Act 1900* (NSW) child pornography offences to that of 10 years imprisonment.
17. Increasing the maximum penalty for s 91E *Crimes Act 1900* (NSW) child prostitution offence to that of 14 years imprisonment where the child is aged under 14 years.
18. Consideration be given to increasing the maximum penalty for all offences related to child prostitution to reflect the added criminality involved in that form of conduct beyond that which would be captured by an offence charged under s 66A and s 66C *Crimes Act 1900* (NSW).
19. Increasing the penalties attaching to s 73 *Crimes Act 1900* (NSW) special care offences to 14 years where the victim is aged below 18 years.
20. Increasing the penalty for the s 80D(2) *Crimes Act 1900* (NSW) aggravated sexual servitude offence to 20 years, consistent with the comparable s 270.7(1)(a) Commonwealth Criminal Code offence.
21. In any wholesale review of the *Crimes Act 1900* (NSW), that consideration be given to achieving a greater uniformity in the available maximum sentences sexual offences committed in Australia with those available for comparable Commonwealth offences committed by Australian citizens or residents on children overseas.
22. Monitoring the rates of offending and sentencing patterns for sexual offences not contained in the Table of Standard Non-parole Periods (SNPP), with a view to their possible inclusion in the Table at a later date.

23. Confining the relevant provisions of the SNPP regime to adult offenders.

24. Giving consideration at the time of any wholesale review of the *Crimes (Sentencing Procedure) Act 1999* (NSW) to standardising the SNPPs for sexual (and other) offences within a band of 40-60% of the available maximum penalty, subject to the possibility of individual exceptions, by reference to an assessment of the incidence of offending and special considerations relating thereto.

25. Consulting with the NSW Sentencing Council regarding potential additions to the SNPP scheme, involving the level or levels at which the SNPP might be appropriately set.

26. Giving consideration to the establishment of a transparent mechanism by which a decision is made to include a particular offence in the Table, and by which the relevant SNPP is set.

27. Consulting with the NSW Sentencing Council regarding the identification of sexual offences that might justify an application for a guideline judgment, following its ongoing monitoring of relevant sentencing patterns.

Chapter 4 | Child Pornography

INTRODUCTION

4.1 There has been increasing community concern in relation to the sexualisation of children generally,[137] and in relation to the availability of child pornography in its various forms, including that capable of being accessed, downloaded and transmitted via the internet. That there is a market for this kind of material, and that there is a body of offenders who are interested in the production, dissemination and collection of child pornography, is now unarguable.

4.2 According to the NSW Judicial Commission, between January 2005 to September 2007 seventy-four people were sentenced in the Local Court for the offence of possess child pornography.[138] Eight people were sentenced for the offence of disseminate / produce child pornography[139] in the same period.[140] The Victorian Sentencing Advisory Council[141] recently reported that between 2004-05 and 2006-07, 197 people were sentenced in the Magistrates Court for knowingly possess child pornography.[142] The Commonwealth Department of Public Prosecutions has advised that 32 import / export child pornography offences (under the *Customs Act 1901* (Cth)) were committed between July 2003 to June 2008.[143]

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137. Rush, E., and La Nauze, A., 'Letting Children Be Children-Stopping the Sexualisation of Children in Australia' (Discussion Paper No 93, The Australia Institute, 2006).
138. *Crimes Act 1900* (NSW) s 91H(3).
139. *Crimes Act 1900* (NSW) s 91H(2).
140. The offence is less commonly dealt with in the Higher Courts. Between October 2000 and September 2007 three people were sentenced for use child for pornographic purpose (*Crimes Act 1900* (NSW) s 91G); and one person was sentenced for attempting to commit an offence under this section. Between January 2005 and September 2007, one person was sentenced for produce/ disseminate child pornography (*Crimes Act 1900* (NSW) s 91G) and one person was sentenced for possess child pornography (*Crimes Act 1900* (NSW) s 91H(3)).
141. Sentencing Advisory Council (Victoria), 'Knowingly Possess Child Pornography' (Sentencing Snapshot No 51, 2008) 1.
142. *Crimes Act 1958* (Vic) s 70(1).
143. Email from Karen Twigg, Legal and Practice Management Branch Commonwealth Department of Public Prosecutions to Anna Butler, NSW Sentencing Council, 3 July 2008.

4.3 There is some evidence that:

- these practices are addictive and obsessional;[144]
- those involved constitute a heterogeneous group including a former Crown Prosecutor and Police Officers;[145] and
- the children involved are at risk of being exposed to a variety of forms of sexual invasion (ranging from being required to pose in a sexual context, to participating in acts of indecency, to becoming the subject of indecent assault as well as penetrative sexual assaults, and to being involved in acts of a sado-masochistic kind and of bestiality); and
- the age of the children depicted is reducing.[146]

4.4 The long-term effects for the children who are abused and exploited by those involved in these activities are, at this stage, undetermined. They almost certainly will involve varying degrees of shame, trauma, and loss of self-confidence. Psychological harm is also certainly possible, arising from the actual abuse and it's recording in circumstances that emphasise their powerlessness and degradation.

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144. Taylor, M., 'Child Pornography and the Internet: Challenges and Gaps' (Paper presented at the World Congress Against the Commercial Sexual Exploitation of Children, Yokohama, 17-20 December 2001); Taylor, M., Quayle, E., and Holland, G., 'Child Pornography, the Internet and Offending', *Policy Research*, Summer 2001.
145. Although almost exclusively male, they comprise those who commit contact offences and those who do not, situational offenders whose sexual interest is not primarily focussed on children, and preferential offenders who are only interested in children-Krone, T., 'Child Pornography Sentencing in NSW' (High Tech Crime Brief 08/2005, Australian Institute of Criminology, 2005). The cases involving police and a Crown Prosecutor include: Allard, T., 'Child porn web broken by 70 arrests', *The Sydney Morning Herald* (online), 9 July 2008 http://www.smh.com.au; Bennett, M. 'Ex-policeman/church minister jailed over child porn' Global Report (online), 13 June 2008 http://www.global-report.com; Kennedy, L. 'Child porn swoop nets seven suspects', *The Sydney Morning Herald* (online), 17 December 2007 http://www.smh.com.au; Brown, M., 'Cop guilty of possessing child porn', *The Sydney Morning Herald* (online), 7 November 2008 http://www.smh.com.au Brown, M., 'Cop sentenced for child porn', *The Sydney Morning Herald* (online), 14 November 2008 http://www.smh.com.au; Kontominas, B., 'Pedophile policeman jailed', *The Sydney Morning Herald*, 21 June 2008, 2; Power v DPP (NSW) (Unreported, NSW District Court, 19 July 2007).
146. Taylor, M., Quayle, E., and Holland, G., 'Child Pornography, the Internet and Offending', *Policy Research*, Summer 2001.

Harm may also arise as a result of the knowledge, as they grow older, that such material may remain in circulation and available to a wide variety of observers, to be used for their sexual gratification, on a long-term basis. The existence of such knowledge can also serve to heighten the shame and distress of being exploited when they were young and vulnerable.

4.5 A serious vice arising as a result of the proliferation of this material and its access by a substantial body of offenders, is that it tends to provide encouragement to those who produce such material, entrenching their involvement and encouraging the production of even more gross forms of pornography to satisfy the market. It can even have an effect of normalising the conduct of those who have an interest in it. This is exacerbated by the fact that there is a commercial market for this material, as well as an informal private market for trading between individual collectors, in circumstances where they can hide under a cloak of anonymity. The readiness of collectors to swap images, and the sophistication of those who systematically organise their collections into directories and folders are only likely to fuel demand for this kind of material.

4.6 The technologies that are now available readily permit users or collectors to become producers, via usernet newsgroups, bulletin board systems, internet relay chat groups, the worldwide web[147] and mobile phone technology.[148]

4.7 Responding to this form of criminality is a challenge for law enforcement by reason of the secrecy with which those who produce, disseminate and collect child pornography can operate, and as a result of the increasing array of technologies for its production and recovery through the use of the internet and otherwise. This includes the capacity to morph or juxtapose or pixillate images so as to make it more difficult

147. Taylor, M., Quayle, E., and Holland, G., 'Child Pornography, the Internet and Offending', *Policy Research*, Summer 2001.

148. 'Pensioner convicted in child phone first', ABC News (online), 9 July 2008 http://www.abc.net.au.

to identify the children involved and to trace those responsible. There is also a well-advanced capacity to conceal collected material, through the use of password encryption and other techniques, such as retaining it on a hard drive after deletion but with available technology to recover it at any time.

4.8 While a great deal of the concern in this context relates to the use of the internet, the production, distribution and possession of child pornography is not confined to the use of that vehicle. Similar forms of such pornography are available through traditional methods of photography and print, although they may become less used as the internet evolves and becomes the principal source for offenders who collect material of this kind.

4.9 Of concern is the use to which material is put, and the extent to which it encourages offenders, who find the material normalising, to move on to direct abuse of children themselves.[149] Also of concern in this respect has been the experience seen with groups such as the Orchid Group[150] to use the internet chat room technology for real-time sexual interactions with children. To what extent offenders generally are encouraged by their possessing and viewing of child pornography to move on to contact offences, involving the indecent or sexual assault of children, is probably unascertainable in any reliable way, but at least anecdotally it is not unknown for offenders of the latter kind to be found in possession of child pornography.[151]

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149. It is of interest, for example, that Garry Featherstone, who came to be sentenced for a series of offences involving the direct abuse of children, also had convictions for possession of child pornography: *Featherstone v The Queen* [2008] NSWCCA 71.
150. This group was exposed in 1996 and included members from various countries, including at least one Australian-see discussion in the New South Wales, Royal Commission into the New South Wales Police Service, *Final Report Vol V: The Paedophile Inquiry* (1997) [16.23]-[16.26].
151. See, eg, *R v MAB* [2007] NSWDC 83; *R v MAJW* (2007) 171 A Crim R 407; *R v Hunt* [2005] NSWCCA 210; *Featherstone v The Queen* [2008] NSWCCA 71.

4.10 Further, there are several associations[152] which actively promote sexual involvement with children, on the wholly erroneous assertion that it is for the good of those children to be educated by persons who claim to be sensitive to their 'needs', who are also involved in the exchange of child pornography among their membership. The availability of such material can be a means for the formation of these associations and for the widening of their circle, as well as for grooming and establishing person-to-person contacts.[153]

4.11 The incidence and potential seriousness of offences of this kind involving children is indicated by the number of cases prosecuted in the courts compared to the number of persons of interest recorded by police. This almost certainly represents a very small proportion of the total number of offenders, most of whom will remain undetected.

4.12 A further indication of the prevalence and seriousness of these offences is provided by the series of recent cases tried in the Local Court and the District Court, and by the number of people who have now been charged as a result of Operation Centurion. It is relevant in this respect that currently a number of offenders with convictions for child pornography offences are on the Register of Sexual Offenders, or are registrable persons[154] and disqualified from working with children,[155] or the subject of child protection prohibition orders.[156]

4.13 There are difficulties, in addition to those related to the challenge of detecting offenders whose interest in child pornography is played out in secrecy, in ascertaining the extent of the problem by reference to sentencing databases since they are dependant upon identifying the principal charge that led to the sentence. As a result where child

152. See, eg, North American Man/Boy Love Association (NAMBLA). See New South Wales, Royal Commission into the New South Wales Police Service, Final Report Vol IV: The Paedophile Inquiry (1997) [3.46]-[3.48]; and see *Leonard v The Queen* [2007] NSWCCA 197.
153. *R v Sharpe* [2001] 1 SCR 45.
154. Established under the *Child Protection (Offenders Registration) Act 2000* (NSW).
155. Pursuant to the Commission for Children and *Young People Act 1998* (NSW), s 33B.
156. Pursuant to the *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW).

pornography offences are incidental to the principal charge, or are dealt with on a Form One, their existence may not become apparent from a review of the statistics. This is so even though, in such cases, child pornography may be used by offenders for a number of purposes, such as their own gratification, to arouse the sexual interest of a child, to induce a child to accept sexual contact as normal, or as a trophy of their own abuse of the child depicted.[157]

4.14 Subject to these important qualifications, some statistics in relation to the number of prosecutions, and the sentences imposed, are included in Volume 2 of this Report.

4.15 In this chapter, we make reference to the relevant legislative provisions, identify some anomalies or gaps, and note that, consistently with the approach taken in the United Kingdom, there would be occasion for a guideline judgment to be promulgated, or for a SNPP to be set in relation to one of the offences considered in the chapter.

4.16 We have chosen to deal with child pornography as a separate topic, by reason of the fact that matters of concern overlap the first three terms of reference, and by reason of the further fact that it is a topic of current interest for a society that generally abhors child sexual abuse and child pornography.

LEGISLATION

New South Wales

4.17 For the purposes of the relevant provisions of the *Crimes Act 1900* (NSW), a child is a person under the age of 18 years.[158]

4.18 Three offences of relevance are created:

(i) producing or disseminating child pornography, with a maximum sentence of 10 years imprisonment; [159]

157. Krone, T., 'Child Pornography Sentencing In NSW' (High Tech Crime Brief 08/2005, Australian Institute of Criminology, 2005).
158. *Crimes Act 1900* (NSW) s 91C.
159. *Crimes Act 1900* (NSW) s 91H(2).

(ii) possessing child pornography, with a maximum sentence of five years imprisonment;[160] and

(iii) using or causing or procuring a child, or consenting or allowing a child under the care of the offender, to be used for pornographic purposes, with a maximum sentence of 14 years imprisonment where the child is under the age of 14 years[161] and 10 years imprisonment where the child is of or above that age.[162]

ss 91H(2) and 91H(3) *Crimes Act 1900* (NSW)

4.19 For the purpose of these offences, 'child pornography' means material that depicts or describes, in a manner that would in all the circumstances cause offence to reasonable persons, a person under (or apparently under) the age of 16 years:

(a) engaged in sexual activity, or

(b) in a sexual context, or

(c) as the victim of torture, cruelty or physical abuse (whether or not in a sexual context).

4.20 For the purpose of the disseminate offence (item (i)) that expression is defined to include:

(a) send, supply, exhibit, transmit or communicate it to another person, or

(b) make it available for access by another person, or

(c) enter into any agreement or arrangement to do so.

4.21 The Act makes provision for certain specific defences to charges for these offences. The relevant defences are as follows:

(a) that the defendant did not know, and could not reasonably be expected to have known, that he or she produced, disseminated

160. *Crimes Act 1900* (NSW) s 91H(3).
161. *Crimes Act 1900* (NSW) s 91G(1).
162. *Crimes Act 1900* (NSW) s 91G(2).

or possessed (as the case requires) child pornography, or

(b) that the material concerned was classified (whether before or after the commission of the alleged offence) under the *Classification (Publications, Films and Computer Games) Act 1995* (NSW) of the Commonwealth, other than as refused classification (RC), or

(c) that, having regard to the circumstances in which the material concerned was produced, used or intended to be used, the defendant was acting for a genuine child protection, scientific, medical, legal, artistic or other public benefit purpose and the defendant's conduct was reasonable for that purpose, or

(d) that the defendant was a law enforcement officer acting in the course of his or her official duties, or

(e) that the defendant was acting in the court of his or her official duties in connection with the classification of the material concerned under the *Classification (Publications, Films and Computer Games) Act 1995* (NSW) of the Commonwealth.[163]

4.22 An additional defence exists in relation to a charge of possessing child pornography, namely, that the material concerned came into the defendant's possession unsolicited and the defendant, as soon as he or she became aware of its pornographic nature, took reasonable steps to get rid of it.[164]

s 91G(2)-*Crimes Act 1900* (NSW)

4.23 For the purposes of this section a child is used by a person for pornographic purposes if:

(a) the child is engaged in sexual activity, or

(b) the child is placed in a sexual context, or

(c) the child is subjected to torture, cruelty or physical abuse (whether or not in a sexual context),

163. *Crimes Act 1900* (NSW) s 91H(4).
164. *Crimes Act 1900* (NSW) s 91H(5).

for the purposes of the production of pornographic material by that person.[165]

4.24 Two further offences may be relevant under NSW law, which could be relied upon in appropriate circumstances, as follows:

s 578C(2)-*Crimes Act 1900* (NSW)-Publishing an Indecent Article

4.25 There is a summary offence of publishing an indecent article,[166] for which the maximum penalty, in the case of an individual, is imprisonment for 12 months or 100 penalty units; or for a corporation 200 penalty units (reduced to 50 penalty units where the offence is prosecuted in the Local Court).

4.26 For the purposes of this provision;

"publish" includes:

(a) distribute, disseminate, circulate, deliver, exhibit, lend for gain, exchange, barter, sell, offer for sale, let on hire or offer to let on hire, or

(b) have in possession or custody, or under control, for the purpose of doing an act referred to in paragraph (a), or

(c) print, photograph or make in any other manner (whether of the same or of a different kind or nature) for the purpose of doing such an act.

"record" means a gramophone record or a wire or tape, or a film, and any other thing of the same or of a different kind or nature, on which is recorded a sound or picture and from which, with the aid of a suitable apparatus, the sound or picture can be produced (whether or not it is in a distorted or altered form).

"article" includes any thing:

(a) that contains or embodies matter to be read or looked at, or

165. *Crimes Act 1900* (NSW) s 91G(3).
166. *Crimes Act 1900* (NSW) s 578C(2).

(b) that is to be looked at, or

(c) that is a record, or

(d) that can be used, either alone or as one of a set, for the production or manufacture of any thing referred to in paragraphs (a), (b) or (c),

but it does not include, in summary, the films, publications and computer games that are classified or the subject of an exemption as provided in the section.

4.27 The section further provides that:

- a person cannot be convicted of an offence against this section and section 91H in respect of the same matter.[167]
- For the purposes of this section, an article may be indecent even though part of it is not indecent.[168]
- In any proceedings for an offence under this section in which indecency is in issue, the opinion of an expert as to whether or not an article has any merit in the field of literature, art, medicine or science (and if so, the nature and extent of that merit) is admissible as evidence.[169]

s 21G(1)-*Summary Offences Act 1988* (NSW)-Filming for Indecent Purposes

4.28 It is an offence, subject to a maximum penalty of two years imprisonment or 100 penalty units, to film or attempt to film another person to provide sexual arousal or sexual gratification, whether for himself or herself or for a third person, where the other person:

(a) is in a state of undress, or is engaged in a private act, in circumstances in which a reasonable person would reasonably expect to be afforded privacy, and

167. *Crimes Act 1900* (NSW) s 578C(3A).
168. *Crimes Act 1900* (NSW) s 578C(4).
169. *Crimes Act 1900* (NSW) s 578C(6).

(b) does not consent to being filmed.[170]

4.29 For the purposes of this section:

(a) a person 'films another person' if the person causes one or more images (whether still or moving) of another person to be recorded or transmitted for the purpose of enabling himself or herself, or a third person, to observe those images (whether while the other person is being filmed or later), and

b) a person is 'engaged in a private act' if the person is engaged in using the toilet, showering or bathing, carrying on a sexual act of a kind not ordinarily done in public or any other like activity.

s 21H-*Summary Offences Act 1988* (NSW)-related offence

4.30 A related offence, with a similar maximum penalty, applies where a person installs any device, or constructs or adapts the fabric of any building, vehicle, vessel, tent or temporary structure for the purpose of facilitating the installation or operation of any device, with the intention of enabling that or any other person to commit an offence under the last mentioned section.[171]

s 222 *Children and Young Persons (Care and Protection) Act 1998* (NSW)

A person who causes or allows a child to take part in any employment in the course of which the child's physical or emotional well-being is put at risk is guilty of an offence.

Maximum penalty: 200 penalty units.[172]

4.31 This offence would be committed where the maker of the child pornography employs the child or children involved for monetary or material reward in circumstances that would give rise to a risk to the child's physical or emotional well being.

170. *Summary Offences Act 1988* (NSW) s 21G(1).
171. *Summary Offences Act 1988* (NSW) s 21H.
172. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 222.

Commonwealth

4.32 The available offences in this context include the following:

s 474.19(1) *Criminal Code Act 1995* (Cth)

Offences are committed where a person uses a carriage service to access child pornography material, to cause such material to be transmitted to himself or herself, to transmit such material, to make such material available, or to publish or otherwise distribute such material, with a maximum penalty of 10 years imprisonment.

s 474.20(1) *Criminal Code Act 1995* (Cth)

Offences are committed where a person has possession or control, or produces, supplies or obtains child pornography material with the intention that it be used by that person or by another person in committing an offence of using a carriage service for child pornography material ((i) above), with a maximum penalty of 10 years imprisonment.

4.33 Provision is made for defences in relation to these offences. For example, it is a defence is the conduct is of public benefit, and does not extend beyond what is of public benefit. The question of public benefit is one of fact the evidential burden of which rests on the defendant whose motives are irrelevant. What may qualify as being of public benefit is very limited.

s 474.22 *Criminal Code Act 1995* (Cth)

Use of a carriage service for child abuse material also constitutes an offence. Parallel offences and defences exist in this context to those mentioned in (i) and (ii) above.[173]

173. See *Criminal Code Act 1995* (Cth) ss 474.2, 474.24.

s 474.25 *Criminal Code Act 1995* (Cth)

Offences are committed by internet service providers and internet content hosts who become aware that the service which they provide can be used to access particular material which such person has reasonable grounds to believe is child pornography or child abuse material, where they do not refer details of that material to the Australian Federal Police within a reasonable time after becoming aware of its existence, with a maximum penalty of 100 penalty units.

4.34 Related offences that may also become relevant in this context include those of:

s 474.26 *Criminal Code Act 1995* (Cth)

This relates to the use of a carriage service to transmit a communication to a recipient who is or who the offender believes to be under 16 years of age with the intention of procuring the recipient to engage in or submit to sexual activity with the sender of the communication;[174]

s 474.27(1) *Criminal Code Act 1995* (Cth)

This relates to the use of a carriage service to transmit a communication to a recipient who is or who the sender believes to be under 16 years of age that includes indecent material with the intention of making it easier to procure the recipient to engage in or submit to sexual activity with the sender;[175]

ss 233(1) and 233BAB *Customs Act 1901* (Cth)

This relates to importing or exporting prohibited materials, or unlawfully conveying or having the same in possession,[176] which may include child pornography or child abuse material as defined.[177]

174. With a maximum sentence of 15 years imprisonment, and see the further offences for which provision is made in s 474.26(2) and (3), which carry similar maximum penalties.
175. *Criminal Code Act 1995* (Cth) s 474.27(1), and see the further offences for which provision is made in s 474.27(2), (3).
176. Maximum penalty 10 years.
177. *Customs Act 1901* (Cth) s 233(3).

OBSERVATIONS

4.35 A number of observations can be made in relation to these provisions.

Definitions

4.36 First, while the expression 'disseminate' is defined for the purpose of the s 91H(2) offence, there is no definition included of the word 'produce'. Desirably, that expression should be defined so as to include printing, photographing, manipulating an existing image or making in any manner images constituting 'child pornography' as defined, including pseudo images as well as commissioning their creation.[178] Reference to the wide definition of 'publish' as used in relation to the s 578C offence of publishing indecent articles could assist in this respect.[179]

4.37 Additionally it may be noted that while the expression 'depicts' in the definition of child pornography for the purposes of s 91H and the general definition of 'material' for the purposes of the Division,[180] may be sufficient to embrace pseudo photographs or digitally enhanced or altered images of children, there could be merit in amending the definition sections to make that clear, since pseudo images and real images can have an equally corrupting effect on the viewer, and pseudo images can be traded for commercial gain.[181]

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178. *R v Quick* (2004) 148 A Crim R 51, [15].
179. The Council notes that Boland J held in *Burrows v Commissioner of Police [2001]* NSWIRComm 333 that the sending of an indecent image to one other person over the internet would not, as a matter of law, constitute an act of 'publishing'. The Council would express its respectful disagreement with this conclusion which seemed to have placed relevance on the dictionary meaning of the expression 'publish', at the expense of the specific definition of 'publish' in the section which includes, inter alia, the expressions 'distribute, circulate, deliver …exchange, barter …' each of which would seem to embrace a single act of passing an image or indecent article to another person.
180. *Crimes Act 1900* (NSW) s 91C.
181. Sentencing Advisory Panel (UK), *The Panel's Advice to the Court of Appeal on Offences Involving Child Pornography* (15 August 2002) 9.

Maximum Penalties

4.38 The anomaly previously noted[182] in relation to the difference in the maximum penalty for possession of child pornography under State law (five years) and under Commonwealth law (10 years) can give rise to sentencing difficulties in the Local Court, where the offender is charged with offences under both Acts in relation to the same kinds of material.

4.39 An anomaly can also arise where the offending conduct involved the commission of acts of indecency or indecent assault against the child (with maximum available sentences under State law varying between two years and seven years), their filming or videoing and the subsequent possession, controlling, supplying or obtaining of the material thereby produced, for use through a carriage service (with a maximum available sentence of 10 years under Commonwealth).

4.40 Logically, one might expect at least equivalent maximum sentences to be prescribed for offences committed upon the person or in the presence of a child to those involving possession of pornographic images of these acts.

4.41 Some of the anomalies could be addressed by increasing the maximum penalty under NSW law for possession of child pornography, and for offences of indecent assault of children, and possibly acts of indecency.[183] An increase in the maximum sentence for possession would serve to emphasise the need for denunciation and general deterrence noted in the authorities.[184]

182. Chapter 3 [3.10]; and see *R v Quick* (2004) 148 A Crim R 51, [66]-[69] and the Australian Law Reform Commission in its *Report on Films and Literature Censorship Procedure*, Report No 55 (1991) [5.16] as to the need to make the possession of child pornography an offence.

183. It is noted that the penalties for child pornography offences were recently increased under the *Crimes Amendment (Child Pornography) Act 2004* (NSW), which amended ss 91C and 91G and introduced s 91H. The penalty for s 91G (use child for pornographic purposes) was doubled from 7years to 14 years where the child was under 14 years of age, and from 5 to 10 years where the child was older than 14 years.

184. *R v Jongsma* [2004] VSCA 218, [14]-[15]; *R v Coffey* (2003) 6 VR 543, 552; *R v Jones* (1999) 108 A Crim R 50, [38]-[39]; *Assheton v The Queen* (2002) 132 A Crim R 237; *R v Gent* (2005) 162 A Crim R 29, [65]-[66].

Local Court Jurisdictional Limit

4.42 A practical problem which was identified by the Chief Magistrate[185] relates to the fact that offences of indecent assault and acts of indecency when they apply to children and child pornography offences, are offences to which s 259 and Schedule 1 of the *Criminal Procedure Act 1986* (NSW) apply. Accordingly, where there is no election made to have the matter dealt with on indictment, it remains within the jurisdiction of the Local Court.

4.43 The maximum penalty that may then be imposed is one of two years imprisonment.[186] While the Court must assess the objective seriousness of the offence, having regard to the maximum penalty available for the offence, rather than the maximum penalty available to the Local Court,[187] the fact of that jurisdictional limit may mean that some of these offences will not be appropriately punished. This raises a question as to whether there should be a greater use of the prosecutor's right to elect to proceed on indictment for these offences.

Using a Child for Pornographic Purposes - Defence of 'Genuine Artistic Purpose'

4.44 It may be noted that the defence which exists in relation to the s 91H offence of producing, disseminating or possessing child pornography does not apply in relation to the s 91G offence of using a child for pornographic purposes. Accordingly, a person charged under that section would not seem to be able to assert that, in using or in causing or procuring the child to be so used or in consenting or allowing a child under that person's care to be so used, he or she was acting for a genuine child protection, scientific, medical, legal, artistic or other public benefit purpose, and that the relevant conduct was reasonable for that purpose.

185. Submission 5: The Chief Magistrate of the Local Court.
186. *Criminal Procedure Act 1986* (NSW) s 267(2).
187. *R v Doan* (2000) 50 NSWLR 115.

4.45 It is questionable, in circumstances where it is established that the relevant material depicts a child engaged in sexual activity, in a sexual context, or as the victim of torture, cruelty or physical abuse, and is such that would in all circumstances cause offence to reasonable persons, that a defence to the s 91H offence should be permitted upon the grounds that the defendant was acting for a 'genuine artistic purpose'.

4.46 While the other exceptions referable to the defendant having acted for genuine child protection, scientific, medical, legal or other public benefit purposes are understandable, the Council is concerned that material which would otherwise constitute child pornography and be such as to cause offence to reasonable persons, should then be defensible on the potentially controversial and uncertain ground that the defendant was acting for a 'genuine artistic purpose'. The existence of a defence that turns upon this kind of purpose would seem to overlook the rationale for the offence, which is to protect children against the harm which can flow from being the subject of pornographic images particularly in circumstances where they lack the capacity to consent to being involved in any such activity. The gist of the offence is as much concerned with exploitation of children as it is with the fact that pornographic images are created.

4.47 At the least, the defence would seem to be inappropriate where the images depict children engaged in sexual activity or subject to torture, cruelty or physical abuse, which activities would themselves constitute serious criminal offences. It recommends that this aspect of the defence be reconsidered and, in that respect, suggests that a clear distinction can be drawn in relation to pornography depicting adults and that depicting children.

4.48 In this respect it also draws attention to the observations by Gleeson CJ in *R v Manson*,[188] a case concerned with the prosecution of two offenders for committing acts of indecency with a person under the age of 16 years, the proof of which rested upon the tender of photographs

188. *R v Manson* (Unreported, NSW Court of Criminal Appeal, 17 February 1993).

taken of those acts. The defence case was to the effect that the acts and the taking of the photographs were political or artistic, being for the purpose of making a protest against the abuse of females.

4.49 Gleeson CJ observed in relation to the defence:

> As will appear from what follows, I am of the view that the jury might well have accepted the sincerity of the appellants and the explanation they gave of their purposes in taking these photographs, whilst at the same time convicting them of the offences in question. The fact that conduct is engaged in for political or artistic purposes does not throw around such conduct a kind or cordon sanitaire, producing the result that it cannot be found to be illegal. It is entirely possible that a person might, for political or artistic purposes, take a photograph of an act that a jury regards as an act of indecency.[189]

4.50 It may be noted that if the last mentioned defence is preserved it does leave room for a considerable issue as to whether the defendant was acting for a 'genuine artistic purpose', and whether the relevant conduct was reasonable for that purpose. This would seem to involve a mixed subjective and objective test, and the elasticity of the expression 'artistic purpose' in conjunction with the imprecision of the element contained in the expression 'sexual context', will inevitably lead to debate, and presumably allow expert evidence to be called.

4.51 In that regard, there could be merit, if the defence is maintained, in including a provision, along the lines of that previously mentioned, which applies to the offence of publishing an indecent article, and which would expressly permit the calling of expert evidence as to whether the material has any merit in the relevant fields and, if so, the nature and extent thereof.[190]

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189. *R v Manson* (Unreported, NSW Court of Criminal Appeal, 17 February 1993).
190. *Crimes Act 1900* (NSW) s 578C(6).

Filming for Indecent Purposes

4.52 As noted in Chapter Two, the Council considers that the maximum penalties for the offences of filming for indecent purposes,[191] and installing a device to facilitate filming for indecent purposes[192] should be increased where the subject of the offences is a child. That fact the Council considers should be an act of aggravation, with the consequence that the last two mentioned offences might fit better within the *Crimes Act 1900* (NSW). This would then permit increasing the available maximum where a child was involved.

4.53 It is suggested that the maximum sentence to be applied be consistent with the 5 year maximum contained in the newly commenced *Surveillance Devices Act 2007* (NSW).[193]

A Person Apparently under the Age of 16 Years

4.54 It may be noted that, in the case of those offences which apply where the child includes 'a person apparently under the age of 16 years', as well as a person who is in fact under that age, the *Crimes Act 1900* (NSW) has not adopted an express evidentiary provision of the kind found in the *Criminal Code Act 1995* (Cth).[194]

4.55 That provision permits the jury or a court, when determining the age of a person at a particular time, to treat as admissible evidence:

- the person's appearance;
- medical or other scientific opinion;
- a document that is or appears to be an official or medical record from a country outside Australia; and
- a document that is or appears to be a copy of such a record;[195]

191. *Summary Offences Act 1988* (NSW) s 21G.
192. *Summary Offences Act 1988* (NSW) s 21H.
193. *Surveillance Devices Act 2007* (NSW) s 8 commenced on 1 August 2008.
194. Relevant to *Criminal Code Act 1995* (Cth) ss 474.26 and 474.27 offences.
195. *Criminal Code Act 1995* (Cth) s 474.28(5).

in addition to any other evidence which might be relevant on that issue.

4.56 This could be of significance where the material alleged to be pornographic involves pseudo images of children, and also where the identity of a real child is unknown. Consideration could usefully be given to its adoption in the *Crimes Act 1900* (NSW).

Filming or Photography of Children in Public Places

4.57 NSW has not yet grappled with the problematic activity involving the filming or photography of children in public places, in particular, when involved in sporting or recreational activities that might leave them only partially dressed or in revealing costumes.

4.58 Some councils or sporting organizations have endeavoured to place restrictions on the taking of photographs or videoing or filming children in these settings, as have some schools, dependent either on the consent of the parents of the children or of the relevant organization in control of the location where the children are at the relevant time.

4.59 There are difficulties in formulating suitable legislation which would permit legitimate conduct by parents or relatives who would like to make a record of the activities of those children with whom they have an appropriate relationship, while precluding and punishing paedophiles[196] who may be attracted to such venues in order to film children for the sexual gratification of themselves or other like-minded persons.

4.60 There are also practical difficulties in the detection of conduct of this kind given the proliferation of devices capable of recording such activities, including mobile phones with a camera capacity and concealed digital cameras. Similarly, there are legitimate interests of

196. Such as Robert Dunn whose activities in surreptitiously videoing children in public places were exposed in the New South Wales, Royal Commission into the New South Wales Police Service, *Final Report Vol IV: The Paedophile Inquiry* (1997) [7.2]-[7.92].

the media to be taken into account in the filming of and reporting on organized sporting and recreational activities of children and families.

4.61 There are however some potential risks in leaving this area of activity unregulated, it being an area that may not be fully catered for by the summary offence of filming for indecent purposes, since the image taken may not reach the level of indecency required for a prosecution under that section. Nevertheless, once taken, the image can be digitally manipulated so as to answer the description of child pornography. Even when that does not occur, families may have legitimate concerns about the conduct and motives of strangers who attend these locations and photograph their children.

'Upskirting' Offences

4.62 Equivalent concerns may be entertained in relation to the offensive practice of 'upskirting', involving the videoing by means of a concealed camera up the dress of children or adults, which has on occasions been detected, but which may not be sufficiently covered by the current law.

4.63 The Council notes that in one recent case[197] the accused, a former school teacher, was acquitted of offences charging him with committing an act of indecency towards the girls (the subject of the filming). He was however found guilty of possessing and producing child pornography as a result of his acts in filming up the girls' skirts in public places with a concealed video camera.

4.64 A conviction for the offences of producing or possessing child pornography in those circumstances would turn upon the Court being satisfied, inter alia, that the images produced in that case of the girls' underpants covering their buttocks and genital areas depicted the children in a 'sexual context'. Depending on the nature of the images obtained there could well be a live issue in that regard.

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197. *DPP (NSW) v Drummond* [2008] NSWLC 10.

4.65 The offences of committing an act of indecency towards the girls failed by reason of the finding that, as a matter if law, the element 'towards' required the non-participant victim to be aware of the acts of the accused. The Council has reservations about the correctness of that finding, it being arguable that too much was read into the decisions which were said to support that view.[198] In those cases the awareness of the complainant was a material factor in the surrounding circumstances that were taken into account in determining the initial question whether the offender's act was 'indecent' in that it involved a child.

4.66 The Council considers that it should be sufficient for a conviction for the subject offence if the act is indecent and involves the complainant whether or not the complainant is aware of it. In some circumstances awareness of the act may be an important factor in determining whether it is indecent, but in other cases, the present being one,[199] awareness should not be a necessary element in establishing the offence. If it is in fact an element then it may be necessary to amend the section or to introduce an upskirting section to overcome that problem.

4.67 The Council notes that unauthorized photography and filming of children has been a matter under consideration by the Standing Committee of Attorneys General, which published a Discussion Paper in 2005 concerning questions relating to the taking of unauthorized images of children, the use or publication of unauthorized photographs/ images taken in public places, and the requirement of consent for the use of photographs for particular purposes.[200]

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198. *R v Francis* (1989) 88 Cr App R 127; *Gillard v the Queen* (1999) 105 A Crim R 479; *R v Barrass* (2005) NSWCCA 131.
199. See *R v McIntosh* (Unreported, NSW Court of Criminal Appeal, 26 September 1994) where the filming of the girls concerned was held to be an act of indecency, that being a case where women were aware they were being photographed but did not understand or appreciate what it was the offender was attempting to achieve by his photography. Their involvement in the activity as objects of the filming was enough.
200. Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues*, Discussion Paper (2005). Also see the New South Wales Law Reform Commission, *Invasion of Privacy*, Consultation Paper 1 (2007).

4.68 It has also been the subject of legislative attention in Queensland and Victoria. In Queensland it is an offence to observe or visually record another adult in circumstances where a reasonable person would expect to be afforded privacy without their consent;[201] and where the other person is in a private place or is engaged in a private act; and also an offence to distribute a prohibited visual recording without consent.[202] This legislation is not dependant upon the recording being made for the purpose of sexual arousal or gratification. It is unlikely that these provisions would catch visual recordings made of children playing for example on the beach, or in other public places and at schools or 'upskirting' practices.

4.69 In contrast, Victoria has recently specifically provided that 'upskirting' is an offence. Recent amendments to the *Summary Offences Act 1966* (Vic) specifically provide that it is an offence to intentionally observe[203] or visually capture[204] a person's genital or anal region whether bare or covered with underwear with the aid of a device (such as a mirror or camera) in circumstances where it would be reasonable for that person to expect that his or her genital or anal region could not be observed. It is also an offence to distribute images of another person's genital or anal region.[205] The offences extend to acts committed in public places.

4.70 The Victorian provision would however catch conduct of the kind that involved the surreptitious videotaping of men and young boys urinating and changing in public toilets and change rooms that escaped criminal sanction in the South Australian case of *Phillips v Police*.[206]

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201. *Criminal Code Act 1899* (Qld) s 227A(1) and see also s 227A(2). Which deals with the observation or visual recording of the anal or genital region of another person in circumstances where a reasonable adult would expect to be afforded privacy in relation to that region.
202. *Criminal Code Act 1899* (Qld) s 227B.
203. *Summary Offences Act 1966* (Vic) s 41A-penalty 3 months imprisonment.
204. *Summary Offences Act 1966* (Vic) s 41B-penalty 2 years imprisonment.
205. *Summary Offences Act 1966* (Vic) s 41C-penalty 2 years imprisonment.
206. *Phillips v Police* (1994) 75 A Crim R 480.

4.71 Some cases have been dealt with in NSW by charges of behaving in an offensive manner in a public place,[207] or under the indecent filming provisions previously mentioned,[208] both of which are summary offences.

4.72 The indecent filming provision and the Queensland provision would not necessarily capture an offence of the kind before the court in *Phillips v Police*.[209] Although the activity of using a toilet does constitute a 'private act', the additional element of the offence, requiring the circumstances to be such that 'a reasonable person would expect to be afforded privacy', might not be met in the circumstances of male toilet facilities equipped with urinals. Additionally, the prosecution would need to establish that the filming was for sexual arousal or gratification.

4.73 The Council notes that convictions for these offences may not render the offender liable to a registration requirement under the *Child Protection (Offenders Registration) Act 2000* (NSW),[210] although subject to the prosecution applying for an order[211] and the court being otherwise satisfied of a sufficient degree of risk, the court could order a convicted offender to comply with the reporting conditions of the Act.

4.74 The Council makes no specific recommendation at this stage but notes its concerns in relation to an apparent lacuna in the criminal law which would be best addressed on a uniform national basis.

Possession of Child Pornography

4.75 Finally, the Sentencing Council draws attention to the decision of the NSW Court of Criminal Appeal in *Clark v The Queen*[212] concerning a charge of possession of child pornography. In that case images had been contained on the appellant's computer equipment but had been

207. *Summary Offences Act 1988* (NSW) s 4.
208. *Summary Offences Act 1988* (NSW) s 21G.
209. *Phillips v Police* (1994) 75 A Crim R 480.
210. As defined in *Child Protection (Offenders Registration) Act 2000* (NSW) s 3.
211. Under *Child Protection (Offenders Registration) Act 2000* (NSW) s 3D.
212. *Clark v The Queen* [2008] NSWCCA 122.

deleted by the time that police had executed a search warrant and removed two hard drives. Examination of the hard drives revealed its presence, but there was no evidence that the appellant was aware that the images were still in existence and retrievable by anyone equipped with the knowledge and access to a special program of the kind which is commercially available for the purpose, or that he had such a program.

4.76 It was held, applying the settled approach to the concept of 'possession' established in the context of drug offences[213] and the meaning given to it in the *Crimes Act 1900* (NSW)[214] that the appellant's possession could not be established in the absence of knowledge, on his part, as to the continued existence of the images on the hard drives and of the means to retrieve them. Similar circumstances arose for consideration recently by the Court of Appeal in *Council of the NSW Bar Association v Power*.[215]

4.77 These decisions do have implications for those offenders who, after becoming aware of suspicions of law enforcement officials as to their involvement in child pornography or offences against children, take the step of deleting any such material from their computer, so as to defeat a potential charge of possessing child pornography. It has added significance by reason of the capacity of such persons to use F Drives or USB technology to extract and retain such material away from their computer and then to delete whatever is on this computer.

4.78 The Council considers that this could possibly be addressed by extending the s 91H(2) offence to capture possession of child pornography within a defined period, not exceeding 6 months and possibly imposing an onus on the accused to establish that he did not access or download the images. This would not impact on the s 91H(5) defence that would continue to apply where the material concerned came into the possession of the person charged unsolicited, and that

213. *He Kaw Teh v The Queen* (1985) 157 CLR 523.
214. *Crimes Act 1900* (NSW) s 7.
215. *Council of the NSW Bar Association v Power* [2008] NSWCA 135.

person took reasonable steps to get rid of it as soon as he or she became aware of its pornographic nature.

4.79 The Council has not however, had the advantage of receiving submissions or consulting with the community in relation to this development, nor does it know whether current investigative technology could overcome the circumstances that arose in the case of *Clark*.[216] It will presumably be the subject of ongoing SCAG consideration, particularly having regard to its relevance for offences under the Commonwealth Criminal Code. Accordingly, it prefers not to offer a view as to a solution at this stage. In the meantime, it would be appropriate for the problem to be considered by a working party involving Police and the DPP.

Guideline Judgment

4.80 The Sentencing Advisory Panel and the Sentencing Guidelines Council (UK)[217] have delivered advice, inter alia in relation to the offences concerned with indecent photographs of children arising under the *Protection of Children Act 1978* (UK) and the *Criminal Justice Act 1988* (UK) and in relation to the several offences which concern the abuse of children through prostitution and pornography.

4.81 The original advice of the Panel[218] in relation to indecent photographs of children was requested by the Court of Appeal in *Wild (No 1)*[219] following the earlier decision of that court in *R v Toomer*[220] in which it had set out some general principles applicable to sentences for these offences. That advice was considered by the Court of Appeal in *R*

216. *Clark v The Queen* [2008] NSWCCA 122.
217. Under the *Criminal Justice Act 2003* (UK) the Sentencing Advisory Panel continues to devise draft guidelines and prepare its advice. However, that advice is now presented to a new body, the Sentencing Guidelines Council, which has the power to issue guidelines, rather than to the Court of Criminal Appeal as was the case previously. For further discussion on the inter-relationship of the two bodies, see Ashworth, A. 'English sentencing guidelines in their public and political context' in Freiberg, A. and Gelb, K. (eds), Penal Populism, Sentencing Councils and Sentencing Policy (2008) 112.
218. Sentencing Advisory Panel (UK), The Panel's Advice to the Court of Appeal on Offences Involving Child Pornography (15 August 2002).
219. *R v Wild* (No 1) [2002] 1 Cr App R (S) 37.
220. *R v Toomer* [2001] 2 Cr App R (S) 8.

v Oliver.[221] Reference was made in the advice, and in the decision of the Court, to the typology of images of this kind adopted by the COPINE Project.[222]

4.82 In brief that project, as part of its work, developed 10 levels of severity of this form of material, based on a progression in the degree of sexual victimisation, not all of which levels would fall within an offence of child pornography or indecent photography. The ten levels identified were:[223]

Level 1: Indicative (non erotic/sexualised pictures)

Level 2: Nudist (naked or semi naked in legitimate settings / sources

Level 3: Erotica (surreptitious photographs showing underwear/ nakedness)

Level 4: Posing (deliberate posing suggesting sexual content)

Level 5: Erotic posing (deliberate sexual or provocative poses)

Level 6: Explicit erotic posing (emphasis on genital areas)

Level 7: Explicit sexual activity (explicit activity but not involving an adult)

Level 8: Assault (sexual assault involving adult)

Level 9: Gross assault (penetrative assault involving adult)

Level 10:Sadistic/Bestiality (sexual images involving pain or animal)

4.83 The Court [in *Oliver*] identified that the two primary factors determinative of the seriousness of a particular offence were the nature of the material and the extent of the offender's involvement with it.[224]

221. *R v Oliver* [2003] 1 Cr App R 28 and see *R v Thompson* [2004] 2 Cr App R 16.
222. *Combating Paedophile Information Networks in Europe*. A project of the Department of Applied Psychology, University College Cork, which has also been referred to by sentencing judges in New South Wales.
223. Taylor, M., Quayle, E., and Holland, G., 'Child Pornography, the Internet and Offending', *Policy Research*, Summer 2001.

Derived from the COPINE Project's description of images, it categorised the relevant levels as:

1. Images depicting erotic posing with no sexual activity;
2. Sexual activity between children or solo masturbation by a child;
3. Non-penetrative sexual activity between adults and children;
4. Penetrative sexual activity between children and adults; and
5. Sadism or bestiality.

4.84 Guidelines were promulgated depending on: the amount of the material involved at the various levels; whether it was distributed or shown by the offender to others; whether the offender was actively involved in its production; whether there was a breach of trust or an element of commercial gain; whether the offender had a previous conviction for dealing in child pornography or for abusing children sexually or with violence, and so on.[225]

4.85 The Court identified the specific factors, which it considered capable of aggravating the seriousness of a particular offence, and provided relevant quantitative guidelines.[226]

4.86 In a more recent review,[227] the Sentencing Guidelines Council offered a revision of the 5 levels of seriousness which it had originally proposed and which had been adopted in *Oliver*, concerning the various activities falling within the indecent photography of children offence. This revision took into account the redefinition of the term 'child' to include any person below the age of 18 years, as well as the flow on effect from the creation or redefinition of other offences, arising by reason of the enactment of the *Sexual Offences Act 2003* (UK).

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224. *R v Oliver* [2003] 1 Cr App R 28, [9].
225. *R v Oliver* [2003] 1 Cr App R 2, [14]-[18].
226. *R v Oliver* [2003] 1 Cr App R 28, [20].
227. Sentencing Guidelines Council (UK) *Sexual Offences Act 2003, Definitive Guideline* (2007).

4.87 That review also dealt with the specific offences concerned with the abuse of children through prostitution and pornography, which in general terms embrace:

(a) causing or inciting child prostitution or pornography; [228]

(b) controlling a child prostitute or a child involved in pornography;[229] and

(c) arranging or facilitating child prostitution or pornography.[230]

4.88 In its advice the Panel identified the several aggravating or mitigating factors which it considered to be relevant.

4.89 In response to that advice and following community consultation, the Sentencing Guidelines Council has now issued guidelines in relation to the child pornography offences.[231] The Council identifies the following levels of seriousness (in ascending order) for offences involving pornographic images:

Level 1: Images depicting erotic posing with no sexual activity

Level 2: Non-penetrative sexual activity between children, or solo masturbation by a child

Level 3: Non-penetrative sexual activity between adults and children

Level 4: Penetrative sexual activity involving a child or children, or both children and adults

Level 5: Sadism or penetration of, or by, an animal

4.90 Offences involving any form of sexual penetration of the vagina or anus, or penile penetration of the mouth (except where they involve

228. *Sexual Offences Act 2003* (UK) s 48.
229. *Sexual Offences Act 2003* (UK) s 49.
230. *Sexual Offences Act 2003* (UK) s 50.
231. Sentencing Guidelines Council (UK), *Sexual Offences Act 2003, Definitive Guideline* (2007) 109ff.

sadism or intercourse with an animal, which fall within level 5), should be classified as activity at level 4.[232]

4.91 The Council confirmed that the aggravating and mitigating factors set out in *R v Oliver* remained relevant and are included in the guideline which it set.[233] The promulgated guidelines are contained in Appendix J to this volume.

4.92 The Chief Magistrate[234] in his submission drew attention to the desirability of adopting an objective categorisation of pornographic images and videos to assist in the assessment of the seriousness of the relevant offences discussed in this section of our Report.

4.93 The Council does not consider that this could be achieved satisfactorily by amendment of the relevant sections. However, it is of the view that it would be appropriate for an application to be made for a guideline judgment in which the Court could give consideration to the COPINE Project Scale, the decision in *R v Oliver* and the guidelines promulgated by the Sentencing Guidelines Council.

4.94 In making a recommendation to this effect it recognises that the number of persons prosecuted for this offence although significant, and although involving people holding responsible public offices, may not have reached the point at which a guideline judgment would normally be considered, particularly in the absence of any obvious failure by the courts to regards the offence as serious. More of relevance is the fact that a qualitative judgment identifying relevant gradations of seriousness could assist the courts in imposing sentences. It could also provide guidance for prosecutorial practice in framing indictments or charges where an offender is shown to possess a significant quantity of pornographic material.

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232. Sentencing Guidelines Council (UK), *Sexual Offences Act 2003, Definitive Guideline* (2007) 109.
233. Sentencing Guidelines Council (UK), *Sexual Offences Act 2003, Definitive Guideline* (2007).
234. Submission 5: The Chief Magistrate of the Local Court.

4.95 The Council is of the view that the maximum sentence for possession of child pornography should be increased as discussed in Chapter Two. It also sees advantage in increasing the penalties for the related offences of filming for indecent purposes and installing a device[235] and moving them to the *Crimes Act 1900* (NSW), so as to allow for an aggravating element where the subject of the offence is a child.

4.96 Finally, the Council notes the practice recommended in *R v Thompson*[236] for drafting the indictment in cases where there are a large number of indecent or pornographic photographs, films or videos of children:

> In cases where there are significant numbers of photographs, in addition to the specific counts, the inclusion of a comprehensive count covering the remainder is a practice that should be followed.
>
> The photographs used in the specific counts should, it is practicable, be selected so as to be broadly representative of the images in the comprehensive count. If agreement can then be reached between the parties that (say) five images at level2, 10 at level 3, and two at level 4 represent 500 level 2, 100 level 3 and 200 level 4 images in the comprehensive count of 800 images, the need for the judge to view the entirety of the offending material may be avoided.
>
> Where it is impractical to present the court with specific counts that are agreed to be representative of the comprehensive count there must be available to the court an approximate breakdown of the number of images at each of the levels. This may best be achieved by the prosecution providing the defence with a schedule setting out the information and ensuring that the defence have an opportunity, well in advance of the sentencing hearing, of viewing the images and checking the accuracy of the schedule.

235. *Summary Offences Act 1988* (NSW) ss 21G, 21H.
236. *R v Thompson* [2004] 2 Cr App R 16.

> Each of the specific counts should in accordance with what was stated by this Court in *Oliver* make it clear whether the image in question is a real image or a pseudo-image; the same count should not charge both. As this Court pointed out in Oliver, there may be a significant difference between the two and where there is a dispute, then there should be alternative counts. In the majority of cases there will be no doubt as to whether the image in question should be dealt with either as a real image or a pseudo-image.
>
> Each image charged in a specific count should be identified by reference to its "jpg" or other reference so that it is clear with which image the specific count is dealing.
>
> The estimated age range of the child shown in each of the images should where possible be provided to the Court.[237]

4.97 This might assist in addressing the concerns experienced by Berman DCJ in *R v Saddler*[238] and by the DPP[239] in its submission.

4.98 This is a matter which will need careful consideration by agencies concerned in which the proper consideration is taken of the occupational health and safety issues for personnel involved in the investigation, prosecution and sentencing of those involved in child pornography offences, who can be currently required to individually examine, in some cases, thousands of distressing and deeply disturbing images.

4.99 While theoretically, a large number of separate counts can be included in an indictment, there would seem to be sense in making provision for grouping images of a similar kind, or in a similar format, and providing for representative charges that would permit the imposition of sentences that would reflect the total criminality involved. The recent experiences of offenders being found with vast collections of child pornography in their possession including photographs, videotapes,

237. *R v Thompson* [2004] 2 Cr App R 16, [11].
238. R v Saddler (2008) NSWDC 48.
239. Submission 12: New South Wales Director of Public Prosecutions.

CD disks and so on, and depicting a wide range of activities, would warrant that approach as would an increase in the maximum penalty.

4.100 The Council recommends that a working group be established (comprising the Commonwealth and State DPPs; Police; Attorney Generals' Departments; and other relevant agencies) to examine the approach that should be taken in cases where an offender is found to have a significant collection of child pornography material, with a view to facilitating the framing of suitable charges, and the presentation of evidence of that material in court, so as to ensure the totality of the offenders conduct is sufficiently addressed by the sentence, while making proper allowance for the OH&S issues involved in relation to Police, Prosecutors and others who have to examine and process the relevant material.

Employment of Children for Still Photography or for Entertainment or Exhibition

4.101 The Children's Guardian has provided a submission to the Council in relation to the provisions of the *Children and Young Persons (Care and Protection) Act 1998* ('The Act'), so far as it applies to the employment of children for the purpose of still photography or for entertainment or exhibition, in circumstances where there might be a cross-over into matters the subject of this reference, and of this chapter in particular.

4.102 That submission draws attention to the following matters:

- the relevant provisions of the Act and the *Children and Young Persons (Care and Protection-Child Employment) Regulations 2005* apply only to children under the age of 15 years, a matter that within the context of catwalk clothing exhibitions involving young adolescents, has recently invited consideration of its extension to children aged under 16 years;
- an employer who wishes to engage a child for prescribed activities, relevantly including those constituting still photography or

entertainment or exhibition, in exchange for monetary payment or the provision of some other material benefit is required to hold an employer's authority, unless entitled to an exemption.

- Whether entitled to an exception or not, such an employer must comply with the Code of Practice contained in the Regulations, clause 19 of which provides:

  1. An employer must ensure that no child is cast in a role or situation that is inappropriate to the child, having regard to the child's age, maturity, emotional or psychological development and sensitivity.
  2. An employer must not allow a child:

     a) to be exposed to scenes which are likely to cause distress to the child, or

     (b) to become distressed in order to obtain a more realistic depiction of a particular emotion or reaction.
  3. An employer must not employ a child in any situation in which the child or any other person is naked;

- Although the Children's Guardian has authority to grant a variation of the Code, that will only occur in practice where the Guardian is satisfied that the welfare of the employed child would not be compromised. The only variations that have been sought and granted in relation to sub-clause 3 have related to infants appearing unclothed in advertisements for nappies; no variations have been granted in relation to clauses (1) and (2);

- Contravention of the Code of Practice, by an authorised or exempt employee constitutes an offence, as does the employment of a child for a prescribed activity without an employer's authority, attracting a maximum penalty of 10 penalty units.

- Similarly it is an offence attracting the same maximum penalty for a person to cause or procure a child to be employed knowing

that the child will be employed in contravention of the same provision and for a person having the care of a child who consents or otherwise allows the child to be employed knowing that the child will be employed in contravention of the provision;

- Independently, as noted earlier, irrespective of the existence of an employer's authority or exemption, it is an offence, on this occasion attracting the much larger maximum penalty of 200 penalty units, for a person to cause or allow a child to take part in any form of employment in the course of which the child's physical or emotional well being is put at risk.[240]
- It does not appear that any defence would be available to a person charged under any of the provisions mentioned that the employment involved the creation of a work of art, or that the employer was acting for a genuine artistic purpose.

4.103 The Children's Guardian has suggested that the existence of multiple statutory provisions that may be applicable to the activities of taking photographs of, or filming naked children, some of which give rise to an absolute prohibition and others of which will turn upon the question whether the product is 'indecent' or constitutes 'child pornography' (and in respect of which potential issues or defences concerned with artistic merit, or whether or not the defendant was acting for a 'genuine artistic purpose' may arise) has the potential to attract adverse community reactions, and to lead to contradictory results.

4.104 The Council recognises the force of this observation, which raises several public policy issues which might usefully be the subject of joint consideration by the Attorney General and Minister for Community Services. Otherwise they potentially add weight to the undesirability,

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240. The *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 222 provides that 'A person who causes or allows a child to take part in any employment in the course of which the child's physical or emotional well-being is put at risk is guilty of an offence'.

elsewhere addressed, of maintaining an 'artistic purpose' defence, and raise a question as to whether the existing monetary penalties for the offence are appropriate.

Sexual Offenders on Parole or Subject to Supervision Orders[241]

4.105 The Commissioner of Corrective Services[242] has advised the Council that departmental officers supervising sex offenders on parole and serious sex offenders on extended supervision orders, have brought to his attention a concern that a large portion of these offenders have computers in their homes and have downloaded or installed pornography or are suspected of doing so.

Offenders on parole

4.106 A parolee who possesses child pornography or who grooms or attempts to groom children through a chat-room, or who otherwise commits any of the child pornography offences previously mentioned, commits a criminal offence.

4.107 However ascertaining and proving the commission of such offences is problematic. Whilst the parolee 'must submit to the supervision and guidance of the Probation and Parole Officer assigned to the supervision of the offender for the time being and obey all reasonable directions of that Officer,[243] there is no certainty that this would permit a Parole Officer to access a parolee's home computer and thereby gain evidence that would be admissible in a criminal prosecution.

4.108 The Commissioner submitted that this uncertainty could be overcome if a condition of parole was imposed expressly to allow for such access. It would be more efficient, it was suggested, for the

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241. It is noted that supervision orders are not sentencing per se. However, as they overlap with matters otherwise examined under the Council's terms of reference, it has thought it imperative to make mention of them in this report.
242. Submission 20: NSW Department of Corrective Services.
243. State Parole Authority *Annual Report 2007* (2008) 41.

Department of Corrective Services to supervise an offender's computer usage than to expect this to be done by Police pursuant to warrant. The capacity for supervision, it was argued, could also serve to provide a deterrent to further offending.

4.109 Accordingly, the Commissioner has suggested that the conditions of parole, for any offender who has committed an offence of possession of child pornography or serious sexual offending, include a condition requiring the offender:

(a) to refrain from accessing child pornography by electronic or other means;

(b) to forthwith make available for full inspection (including removal for forensic examination if so requested) any computer or other electronic equipment owned or used by the offender at any time as required by the supervising officer; and

(c) to provide the Probation and Parole Officer,[244] with details of any active electronic communication identification, and service provider, and to report any changes in such details.

4.110 The Council considers that this is a submission that should be given careful consideration, although it is not one that has been the subject of any wider consultation with the community.

Supervision orders

4.111 The Commissioner has also submitted that it would be appropriate for the Supreme Court to make identical conditions applicable to all child sex offenders who are made subject to extended supervision orders under the *Crimes (Serious Sex Offenders) Act 2006* (NSW). This was seen to be particularly important since s 160A of the *Crimes (Administration of Sentences) Act 1999* (NSW) provides that an offender's obligations under a parole order are suspended while the offender is subject to an extended supervision order.

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244. Or in the alternative, the Compliance or Monitoring Officer or the Commissioner's delegate.

4.112 To date a number of extended supervision orders have been issued[245] containing conditions relating to accommodation, treatment, monitoring and other matters; but only one[246] has contained a computer-based restriction, in the following terms:

> The defendant must forthwith make available for full inspection (including removal for forensic examination if so requested any computer or other electronic equipment owned or used by the defendant) at any time as required by the SVG (Special Visitation Group) and/or Corrective Services Officer.

4.113 Most serious sex offenders who have been subject to applications for extended supervision orders to date have no history of computer-based crime due to the age of their convictions-most of which pre-dated the availability of the internet and internet pornography. Nevertheless, computer-based offending was thought by the Commissioner to be likely to feature more prominently among sexual offenders who will be considered for extended supervision orders in the future.

4.114 The extent of the concern which arises in this respect is indicated by the fact that Internet and computer-based pornography are already components of the Static-99 Risk Assessment Tool used by the Department. One of the ten risk factors considered under this tool is 'conviction for non-contact sex offences (exhibitionism, possession of obscene material, obscene telephone calls, voyeurism, exposure, illicit use of the internet, sexual harassment)'. A score of 6 risk factors places an offender in the high-risk category relative to other sex offenders.

Offender registration requirements

4.115 The Council's attention has been drawn to the uncommenced provisions of the *Child Protection (Offenders Registration) Amendment Act 2007* (NSW), which received assent on 13 December 2007. These provisions provide a requirement that registrable persons are to report to police all their active electronic communication identifiers, details

245. Under the *Crimes (Serious Sex Offenders) Act 2006* (NSW).
246. *AG (NSW) v Winters* (2007) 176 A Crim R 249.

of service providers, service type and any changes to these details-including all active email addresses, chat room identities and landline and mobile telephone numbers, and 'any other information prescribed by the regulations'.[247]

4.116 Once the provisions commence it would seem logical for all registrable persons under this Act who are subject to parole supervision or extended supervision orders, to be required to provide these details to their supervising officers as well, and the Council recommends accordingly.

247. See cl 13 of the Bill.

RECOMMENDATIONS

The Council suggests that consideration be given to amending the maximum penalties in relation to State offences relating to child pornography as follows:

28. Increasing the maximum sentence for a possession offence under s 91H(2) *Crimes Act 1900* (NSW) to 10 years imprisonment.

29. Increasing the maximum sentence for the current s 21G(I) and s 21H *Summary Offences Act 1988* (NSW) offences so as to allow for maximum sentence of 5 years where the object of either offence is a child under the age of 16 years; and, in order to allow for that, to move the offences to the *Crimes Act 1900* (NSW) while including them in the list of offences that can be triable summarily by consent where the offence is relatively trivial;

30. Deleting the artistic purposes defence from s 91H *Crimes Act 1900* (NSW);

Amendment by way of clarification in relation to certain of the State child pornography offences by:

31. Providing an extended definition of the expression 'produce' in relation to the s 91H(2) offence;

32. Making it clear that material within the definition of child pornography for the purpose of the s 91H offence, includes pseudo images of children;

33. Adopting the evidentiary enabling provision concerning the age of a person depicted in material alleged to be child pornography in similar form to that in s 474.28(5) *Criminal Code Act 1995* (Cth);

34. Seeking a qualitative guideline judgment from the Court of Criminal Appeal, which might take into account the decision in *R v Oliver* [2003] 1 Cr App R 28 and the UK guidelines, in relation to the child pornography offence.

35. A working party be established (comprising the Police and the DPP) to consider whether the concept of possession comprised in the s 91H(2) offence can be enlarged so as to respond to those cases where by the time an offender's computer has been seized, the offender has deleted the images.

36. A working party be established (comprising the Commonwealth and State DPPs; Police; Attorney Generals' Departments; and other relevant agencies) to examine the approach that should be taken in cases where an offender is found to have a significant collection of child pornography material, with a view to facilitating the framing of suitable charges, and the presentation of evidence of that material in court, so as to ensure the totality of the offenders conduct is sufficiently addressed by the sentence, while making proper allowance for the OH&S issues involved in relation to Police, Prosecutors and others who have to examine and process the relevant material.

37. Consideration be given to allowing the imposition of conditions requiring any offender who has committed an offence of:

    - possession of child pornography; or
    - serious sexual offending, and who

    is released on parole or is the subject of an extended supervision order,

    (a) to refrain from accessing child pornography by electronic or other means;

    (b) to forthwith make available for full inspection (including removal for forensic examination if so requested) any computer or other electronic equipment owned or used by the offender at any time as required by that offenders; Parole Officer or other officer from the Special Visitation Group or Corrective Services, as the case may be; and

    (c) to provide the Corrective Services' officer with details of any active electronic communication identification, and service provider, and to report any changes in such details.

Chapter 5

Good Character And Sentencing Of Sexual Offenders Term 6

1. CHARACTER AS A FACTOR FOR SENTENCING

History

5.1 Professor Kenny in his *Outlines of Criminal Law*[248] gave the origins of the admission at trial of good character as a relic of the Anglo Saxon exculpation by the oath of compurgators.[249] Old devices acquire new uses and evidence of character has long been admissible in respect of both guilt and penalty. Professor Kenny acknowledged the difficulty of the exact scope of such evidence but was of the view that what a witness is attesting to is the general opinion of the character of the accused.[250] Wigmore in the 3rd edition gave a different view, namely that the evidence to which a witness is deposing is that of an accused or prisoner's traits and the sum of those traits which comprises his character, and that good works and community reputation are only ways in which such traits may be evidenced.[251]

5.2 In the development of the trial process, character and alibi were introduced and retained where an accused was precluded from giving evidence on his own behalf.[252] The admission of such evidence tended to mitigate the harshness of the trial.[253]

5.3 Character evidence has been viewed as anomalous and as a departure from the rules regarding the admissibility of hearsay and opinion evidence.

5.4 Whatever the history and the precise nature of such evidence, there is no doubt that it has been admissible at trial as a matter which is relevant to guilt,[254] and at sentence, in respect of all crimes, and it has been given legislative recognition under various statutes both State and Federal.

248. Kenny, C., *Outlines of Criminal Law* (16th ed, 1952).
249. Kenny, C., *Outlines of Criminal Law* (16th ed, 1952).
250. Kenny, C., *Outlines of Criminal Law* (16th ed, 1952).
251. Wigmore, J., Wigmore's Code of the Rules of Evidence in Trials at Law (3rd ed, 1942).
252. See *Melbourne v The Queen* (1999) 198 CLR 1, [97]-[98].
253. *R v Stannard* (1837) 7 Car & P 673, 674-5.
254. *R v Andrews* [1982] 2 NSWLR 116; R v Stalder [1981] 2 NSWLR 9.

5.5 That is the case, even though Gleeson J observed in *R v Levi*

> [T]here is a certain ambiguity about the expression "good character" [in the sentencing context]. Sometimes it refers only to an absence of prior convictions and has a rather negative significance, and sometimes it refers to something more of a positive nature involving or including a history of previous good works and contribution to the community.[255]

Legislative framework

5.6 The *Evidence Act 1995* (NSW), provides:

> (1) The hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced by a defendant to prove (directly or by implication) that the defendant is, either generally or in a particular respect, a person of good character.
>
> (2) If evidence adduced to prove (directly or by implication) that a defendant is generally a person of good character has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not generally a person of good character.
>
> (3) If evidence adduced to prove (directly or by implication) that a defendant is a person of good character in a particular respect has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not a person of good character in that respect.[256]

5.7 As a consequence evidence may be led of character which is of a hearsay nature, opinion evidence, evidence of prior conduct

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255. *R v Levi* (Unreported, NSW Court of Criminal Appeal, 15 May 1997) [5].
256. *Evidence Act 1995* (NSW) s 110.

and antecedent criminal history, as well as evidence going to general reputation.[257]

5.8 By reason of the *Crimes (Sentencing Procedure) Act 1999* (NSW) the Sentencing Court is required to take into account as a possible mitigating factor the fact that the offender does not have any record (or any significant record) of previous convictions,[258] and the fact that he or she was a person of good character.[259]

5.9 While the Act also provides that the fact that the offender has a record of previous convictions (particularly if it includes a record of conviction for serious personal violence offences where the offender is being sentenced for an offence of a similar nature), can be taken into account as an aggravating factor for the purpose of sentencing, this provision has been read down[260] as being relevant, not to increase the objective seriousness of the offence but rather as a factor indicating that retribution, deterrence and protection of society might indicate that a more severe sentence is warranted.[261]

5.10 The consideration of the offender's good character in sentencing is not unique to New South Wales. As the following list indicates, most Australian jurisdictions possess legislation which requires the offender's good character to be taken into account in sentencing:

- Commonwealth-*Crimes Act 1914* s 16A.
- Australian Capital Territory-*Crimes (Sentencing) Act 2005* s 33(1)(m).
- Northern Territory-*Sentencing Act 1995*, s 5(2).
- Queensland-Penalties and *Sentences Act 1992*, s 9(2).
- South Australia-*Criminal Law (Sentencing) Act 1988*, s 10(1)(l).

257. Although McHugh J in *Melbourne v The Queen* (1999) 198 CLR 1, [38] observed that in its strict sense character in the sense of the intrinsic moral quality of a person is to be contrasted with reputation or the public estimation of that person.
258. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(f).
259. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(f).
260. By reason of s 21A(4) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).
261. *R v Johnson* [2004] NSWCCA 76; *R v McNaughton* (2006) 66 NSWLR 566.

- Victoria-*Sentencing Act 1991*, ss 5(2)(f) and 6.

5.11 Similarly to the New South Wales Act, the Commonwealth, Queensland, South Australian and Australian Capital Territory legislation, simply list 'good character' as one of a number of mitigating factors, without elaborating on its meaning or effect. The Victorian and Northern Territory Acts, on the other hand, contain additional provisions which specify the factors to be considered in determining whether an offender is of good character. The sections, which are drafted in identical terms, state that a court must consider (among other things):

(a) the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions of the offender; and

(b) the general reputation of the offender;

(c) any significant contributions made by the offender to the community.[262]

5.12 Character evidence has generally been assessed independently from the offence for which sentence is being considered.[263]

Case law

5.13 In *Ryan v The Queen*[264] the High Court gave consideration to the approach to be adopted by sentencing courts when taking into account evidence of an offender's character for the purpose of sentencing.

5.14 The case concerned a New South Wales Catholic priest who had sexually abused 28 pre-pubescent boys over a period of 20 years. In sentencing the offender to 22 years imprisonment, the trial judge noted the offender's character and reputation, as well as his good works, before stating that such 'unblemished character and reputation are something to be expected of a priest', and concluding that these 'did not entitle the offender to any leniency whatsoever'.

262. *Sentencing Act 1995* (NT) s 6; *Sentencing Act 1991* (Vic) s 6.
263. *Aoun v The Queen* [2007] NSWCCA 292.
264. *Ryan v The Queen* (2001) 206 CLR 267.

5.15 In coming to that conclusion, His Honour placed the offender's good character and reputation within the context of his offending, as evident from his statement:

> How can a man, who showed such a kind and friendly face to adults, but who sexually abused so many young boys in so many ways over such a long period of time, be considered a good man? …I cannot see any good in the prisoner.

5.16 On appeal, the New South Wales Court of Criminal Appeal declined to disturb the trial judge's findings as to the extent, if any, that the prisoner possessed good character, which should have been taken into account as a mitigating factor when sentencing him.

5.17 The offender appealed to the High Court on the ground (among others) that the trial judge had failed to accord him any leniency for his previously unblemished character and reputation, contrary to sentencing principle.

5.18 The issues which the Court had to clarify included the means of ascertaining whether or not the offender was a person of good character, and the weight to be given to such fact where it was established on the evidence.

5.19 McHugh J proposed the following method, which was approved by the other members of the Court and which has been followed in later cases:

> [23] It is necessary to distinguish between the two logically distinct stages concerning the use of character in the sentencing process. First, it is necessary to determine whether the offender is of otherwise good character. When considering this issue, the sentencing judge must not consider the offences for which the prisoner is being sentenced. Because that is so, many sentencing judges refer to the offender's "previous" or "otherwise" good character.

> [24] If an offender's character was determined by reference to the offences for which he or she is being sentenced, he or she would seldom be "of good character." …
>
> [25] Second, if the offender is of otherwise good character, it is necessary to determine the weight that must be given to that mitigating factor. If an offender is of otherwise good character, then the sentencing judge is bound to take that into account in the sentence that he or she imposes. The weight that must be given to the prisoner's otherwise good character will vary according to all of the circumstances.[265]

5.20 McHugh J found that the following circumstances should be considered in deciding what weight should be given to the offender's prior good character:

> [34] First, there were multiple offences involving repeated acts committed over a number of years. They were not isolated incidents which might be said to be out of character. Second, the appellant was, as his counsel conceded before Nield DCJ, leading a double life. Over many years, the appellant was doing "good works" while he was committing grave offences. This contradiction indicates that the appellant's otherwise good character was a minor factor to be weighed. Third, the appellant committed the offences in the course of his priestly duties and it was as a priest that he did the "good works" which are at the heart of his claim of good character. This reduces the weight that ought to be given to his otherwise good character. Fourth, and related to the third point, the offences involved breaches of trust.
>
> [35] Given these circumstances, Gleeson CJ was correct when he said that the appellant was not entitled to significant leniency because of his otherwise good character. However, Nield DCJ gave the appellant no leniency whatsoever for his otherwise good

265. *Ryan v The Queen* (2001) 206 CLR 267, [23]-[25] (McHugh J); [66] (Gummow J), [101]-[102] (Kirby J). Hayne and Callinan JJ did not expressly deal with this point.

> character. He was entitled to some leniency for his otherwise good character. That being so, the Court of Criminal Appeal should have allowed the appeal and re-sentenced the appellant. In re-sentencing the appellant, some weight should be given to the appellant's otherwise good character.[266]

5.21 In the course of his judgment McHugh J explained why character evidence is relevant in the sentencing context. His Honour stated:

> Good character may in some circumstances suggest that the prisoner's actions in committing the offence for which he or she is being sentenced were "out of character" and that he or she is unlikely to reoffend. … Another, but less articulated, reason for considering "good character" in the sentencing context appears to involve the idea that a "morally good" person is less deserving of punishment for a particular offence than a "morally neutral or bad" person who has committed an identical offence.[267]

5.22 The matter was remitted to the New South Wales Court of Criminal Appeal for re-sentencing. In allowing a reduction of the total sentence and the non-parole period by one year, with whose reasoning the rest of the Court agreed, Mason P stated:

> [44] … The adjustment is relatively small having regard to the whole term. It retains the condign stringency of the original sentence imposed by Judge Nield and thereby reflects the seriousness of the criminality appropriately condemned in the remarks of Judge Nield and this Court as earlier constituted.
>
> [45] As the High Court pointed out, the nature and extent of the offences mean that the appellant's "otherwise good character" can only be a small factor to be weighed in his favour. The nature and extent of that good character attracts some leniency, but not significant leniency.[268]

266. *Ryan v The Queen* (2001) 206 CLR 267, [34]-[35].
267. *Ryan v The Queen* (2001) 206 CLR 267, [29]-[30].
268. *R v Ryan* (No 2) [2003] NSWCCA 35, [44]-[45].

5.23 In *Melbourne v The Queen*[269] Kirby J drew attention to the numerous issues which arise in relation to the subject of good character in the context of criminal trials.[270] In the context of its relevance for the issue of guilt, His Honour drew attention to the dubious nature of the assumption that character, whether for good or bad, has a predictive value, and that it refers to a permanent and unchanging pattern of the nature of the individual involved.[271] His Honour observed:

> where a person does not have a stable personality or is exposed to new, special or extraordinary circumstances, the assumption that the person's conduct may be predicated on a previous absence of convictions, or even on a general reputation for, or existence of, good character, is doubtful.[272]

2. SENTENCING AND CHARACTER GENERALLY

5.24 As noted by McHugh J in Ryan, the 'weight that must be given to the offender's good character will depend on all the circumstances of the case',[273] and that 'the nature and circumstances of the offence will be factors of utmost importance'.[274] While the assessment of the weight to be given to evidence of good character involves a subjective evaluation of often competing considerations, in the exercise of the sentencing discretion, several aspects may be noted.

Absence of prior convictions

5.25 There is something of a logical fallacy in the use of an absence of a prior record as an indicator of good character. Standing on its own an absence of prior convictions is generally neutral. As was pointed out by the majority in *R v Falealili*,[275] a person of bad repute may well

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269. *Melbourne v The Queen* (1999) 198 CLR 1.
270. *Melbourne v The Queen* (1999) 198 CLR 1, [90].
271. *Melbourne v The Queen* (1999) 198 CLR 1, [105].
272. See also the observation of McHugh J in *Melbourne v The Queen* (1999) 198 CLR 1, [47].
273. *Ryan v The Queen* (2001) 206 CLR 267, [36].
274. *Ryan v The Queen* (2001) 206 CLR 267, [33].
275. *R v Falealili* [1996] 3 NZLR 664, 667.

have no convictions. The absence of tangible evidence cannot logically be equated with evidence positively enhancing the standing of the offender.[276]

Duration of offending

5.26 Judges will commonly take into account not only the gravity of the offence of which an accused person has been found guilty or to which he has pleaded, but also in the case of a serial offender the time over which such offences have been committed.

5.27 Where there are a number of disparate crimes committed over a period of time against one or more individuals an offender loses the quality of good character at the inception of such a series.[277] If this lies in the distant past then good character becomes a very minor consideration, not only because of the effluxion of time, but also because the offending behaviour can be seen as ingrained or habitual thus negating, to a large extent, any ostensible good works which might be viewed as a screen for such criminal activity.

Use of position

5.28 If an accused has used a position which sustained his entitlement to being a person of otherwise good character, for the purpose of the commission of the offences, then good character whilst being a consideration would normally be given little weight.

5.29 Where a prisoner's education and training has given that person some social position, and at the same time should have precluded the offending conduct for which he has been found guilty or to which he has pleaded, then once again his good character should not normally be given any significant weight.

5.30 A person who has used a familial situation to cloak criminal activities can also hardly claim that situation as mitigation. On the

276. Munday, R., 'What Constitutes Good Character' [1997] *Criminal Law Review* 247.
277. *R v Smith* (2000) 114 A Crim R 8.

other hand, a crime committed many years earlier and followed by a course of exemplary conduct might still permit a person to be regarded of otherwise good character.

The moral worth of the offender

5.31 Aside from the criticism based on the lack of empirical support for the notion that prior good character suggests an unlikelihood of re-offending, and that there is a connection between conduct and character, current sentencing practice in relation to the relevance of the moral worth of an offender has been questioned. McHugh J observed in *Ryan*:

> Walker and Padfield[278] have described as "remarkable": "… cases in which the court is influenced by meritorious conduct which has nothing to do with the offence. Men have had prison terms shortened because they have fought well in a war, given a kidney to a sister, saved a child from drowning or started a youth club. Such cases are interesting because they seem to result from two assumptions: (i) that offenders are being sentenced not for the offence but for their moral worth; and (ii) that moral worth can be calculated by a sort of moral book-keeping, in which spectacular actions count for more than does unobtrusive decency. This can be illustrated by the ambivalent remarks of the [English Court of Appeal] in *Reid* (1982) 4 Cr App Rep (S) 280: 'While this Court would not usually interfere with a sentence because the defendant had committed an act of bravery, we think that if the Recorder had known about this incident it may well be that he would have formed a different view of the appellant: he might have come to the conclusion that the appellant was a much better and more valuable member of society than his criminal activities had led him to suppose.'"[279]

278. Walker, N. and Padfield, N., *Sentencing: Theory, Law and Practice* (2nd ed, 1996) 53-4.
279. *Ryan v The Queen* (2001) 206 CLR 267, [30] (McHugh J).

5.32 While noting the 'remarkable rationale' involved, His Honour observed that at common law, good character was an established mitigating factor in the sentencing process.

Loss of reputation

5.33 The extent to which a sentence is mitigated at times turns upon the offender's reputation, since the concepts of character and reputation are closely intertwined and are often confused.[280] Prominent members of the society who lose their reputations arguably suffer greater damage than those who do not enjoy such reputations.

5.34 However, neither Australian, nor overseas courts give much weight to this argument. In a case dealing with the possession of child pornography Boulton Acting DCJ said in relation to the offender that:

> The reputation which he enjoys, among a wide circle of friends, must be based, at least in part, upon the fact that the offence was committed in secret.[281]

5.35 Corbett J when dealing with a submission concerning the consequence of convictions, in terms of the loss of the reputation of the offender observed *R v Prokofiew*:[282]

> The loss of reputation, income and income potential are a result of their own misconduct. They have brought this upon themselves. This sort of submission seems to come to the fore when the criminal before the Court was formally a pillar of the community, living a life of affluence and privilege. Look at what they have lost. Look at this argument though the other way around. The Court sometimes has before it criminals of a very different socioeconomic past, persons living in poverty, often facing very great challenges, often living lives of quiet desperation. When they resort to crime to alleviate their hardship, they are told it is no excuse, and it is no excuse. The laws against fraud are minimum standards, and they

280. *Melbourne v the Queen* (1999) 198 CLR 1, [33].
281. *Power v DPP* (NSW) (Unreported, NSW District Court, 19 July 2007), [33].
282. *R v Prokofiew* 2005 CarswellOnt 3201 (Ont. Sup. Ct. J.) (WLeC).

> apply to all, the rich and the poor alike. But, just as the Court will not relieve the poor from the burden of punishment for breaching society's codes of minimum standards, neither will the Court go lightly on an affluent criminal because of the loss of wealth and position that follows exposure of criminal behaviour.[283]

5.36 Although an offender's good character may often be linked with good reputation, the loss of reputation arguably, should not bear upon the extent to which the sentence is mitigated.

Double counting

5.37 It is sometimes suggested that the inclusion in s 21A(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) of good character, absence of a record of prior convictions, unlikelihood of reoffending, and good prospects of rehabilitation as separate mitigating factors are so closely related, particularly since the last two mentioned factors may be seen as evidenced by the first mentioned factors, that this may lead to double counting.

5.38 Provided that the assessment of the mitigating factors is kept in context and regarded as relevant factors, which would apply in any event, at common law, there should be no occasion for error on this account. Each is a relevant matter to be taken into account as part of the natural synthesis of all elements both for and against an accused so that a proper sentence may be imposed.

Quantification of any 'discount' for good character

5.39 Rarely if ever do judges attempt to quantify a specific discount for good character, and it is impossible to discern the precise extent to which it mitigates the sentence in the case of any particular offences, including sexual offences. Rather it is included within the matrix of aggravating and mitigating factors that are taken into account in the exercise of the sentencing discretion.

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283. *R v Prokofiew* 2005 CarswellOnt 3201 (Ont. Sup. Ct. J.) (WLeC).

3. GOOD CHARACTER AND SENTENCING FOR SEXUAL OFFENCES

Submissions on good character as a mitigating factor in the sentencing of sexual offenders

5.40 A number of submissions received by the Council were opposed to the inclusion of good character evidence as a circumstance of mitigation when sentencing sexual offenders, particularly where their crimes are committed against children.[284]

5.41 Some submissions opposed the practice on the grounds of relevance. For example, as the NSW Ombudsman emphasized, the number of convictions and the profile of offenders indicate that people of good character can and do commit sexual offences against children; therefore the fact of good character does not of itself prevent such crimes from occurring.[285] This argument was supported by the response from Dr Wilson of the Corrections, Psychological Services New Zealand, who also noted that 'good character' does not prevent sexual offending.[286] Dr Wilson submitted that character strengths become more apparent after conviction, in terms of prison behaviour and engagement in treatment, so that a more appropriate assessment of the impact of 'good character' can be made at the time of parole, and not at the time of sentencing.[287]

5.42 The Chief Magistrate of the Local Court observed that it is somewhat misleading to have regard to the offender's good character when sentencing for these offences, since the fact that their crimes are

284. Submission 4: NSW Ombudsman; Submission 5: The Chief Magistrate of the Local Court; Submission 7: Department of Corrections; Community Probation & Psychological Services (New Zealand); Submission 11: Central and Eastern Sydney Sexual Assault Service and Northern Sydney Sexual Assault Service; Submission 12: New South Wales Director of Public Prosecutions; Submission 14: Ministry for Police New South Wales.
285. Submission 4: NSW Ombudsman, 3.
286. Submission 7: Department of Corrections; Community Probation & Psychological Services (New Zealand), 5.
287. Submission 7: Department of Corrections; Community Probation & Psychological Services (New Zealand), 5.

committed in secret means that it is unlikely that their bad character will have become apparent.

5.43 Most of the submissions that were opposed to the mitigation of sentences in relation to sexual offences, on the basis of the offender's prior good character, were concerned with the extent to which this factor enables such crimes to take place. The Director of Public Prosecutions observed that good character often allows offenders access to their victims, and provides a cover under which such offending can continue.[288] The DPP accordingly submitted that where good character has placed an offender in a position of trust and/or power, this factor should attract a higher and not a lower level of culpability.[289] Similar comments were made by the Northern Sydney Sexual Assault Service as well as by the Ministry for Police.[290]

5.44 Some of the submissions opposed to the inclusion of good character as a mitigating factor noted that the courts give limited credence to the offender's good character when it is weighed against the severity of an offence, particularly one such as child sexual assault, and for that reason questioned whether the situation would be assisted by any legislative reform.[291]

5.45 Other submissions however argued that good character is a legitimate factor, which should mitigate the sentence imposed irrespective of the nature of the offence involved.[292] One of the key reasons cited for this submission was that good character is indicative of

288. Submission 12: New South Wales Director of Public Prosecutions, 12.
289. Submission 12: New South Wales Director of Public Prosecutions, 13.
290. Submission 11: Central and Eastern Sydney Sexual Assault Service and Northern Sydney Sexual Assault Service, 4; Submission 14: Ministry for Police New South Wales, 3.
291. Submission 4: NSW Ombudsman; Submission 12: New South Wales Director of Public Prosecutions; Submission 5: The Chief Magistrate of the Local Court.
292. Submission 8: New South Wales Council of Civil Liberties; Submission 13: Aboriginal Legal Service (NSW/ACT); Submission 16: Public Defenders Office New South Wales; Submission 17: Legal Aid New South Wales.

greater prospects of rehabilitation.[293] Additionally, the Public Defenders argued that it would be unjust for two offenders who committed sexual offences of the same objective gravity to be treated equally and to receive equal sentences, despite one having good character and the other not.[294]

5.46 As we have noted earlier the first of these propositions involves an assumption that has been criticised as dubious. Likely to be of more relevance for rehabilitation in the case of a sexual offender is the deterrent effect of imprisonment, willingness to undertake sexual assault programs, and the fear of the consequence of any repetition of the offender's conduct. The answer to the second proposition is that the offender with prior bad character would be likely to receive a heavier sentence, at least where the remaining evidence indicated poorer prospects of rehabilitation.

Offences against Adults

5.47 There are difficulties in establishing upon a generic basis, particularly by statute, a difference in sentencing principle dependent on the nature of the offence before the Court. To the extent that this might reflect an assessment of the potential seriousness of the offence, and the interests of the community, this can be better reflected by the exercise of sentencing discretion within the parameters set by way of the maximum available sentence, and where applicable, a relevant standard non-parole period. Special circumstances would need to be established to justify any exception to that proposition.

5.48 For this reason the Council has focused its attention on sexual offences against children, rather than sexual offence at large. Where the victim is an adult, we do not see any need for a particular exception to be made in relation to sentencing for good character. The principles previously discussed are adequate for sentencing in such cases.

293. Submission 8: New South Wales Council of Civil Liberties, 6; Submission 12: New South Wales Director of Public Prosecutions, 13; Submission 17: Legal Aid New South Wales, 10.

294. Submission 16: Public Defenders Office New South Wales, 7.

Offences against Children

5.49 The courts have usually given limited weight to the offender's good character in child sexual offence cases,[295] particularly where the offences were committed in the circumstances discussed by Howie J in *R v Kennedy*,[296] and by McHugh and Gummow JJ in *Ryan*,[297] and which therefore warrant limited weight to be given to such evidence.

5.50 The courts have been particularly mindful of not mitigating the sentence of an offender who persistently committed sexual offences against a child in a family setting. In the case of *Hermann v The Queen*[298] Lee J noted that:

> To give an applicant's so-called "previous good character" much weight in such circumstances is to give an appearance that the court is conceding to a parent or a person in loco parentis or within the family unit some right to use a child for sexual pleasure at will.[299]

5.51 An argument against the inclusion of 'good character' among the mitigating factors, in cases of sexual offences against children, rests on the fact that in such cases 'good character' may be the critical factor that enabled the offence to be committed, or repeated. This can be particularly true in the case of grooming offences, as it can where the offender is a close relation or a person in authority, such as a school teacher or carer,[300] or church elder[301] or teaching brother.[302]

295. *Hermann v The Queen* (1988) 37 A Crim R 440. 448; *R v Muldoon* (Unreported, NSW Court of Criminal Appeal, Hunt, Enderby and Grove JJ, 13 December 1990); *R v Petchell* (Unreported, WA Court of Criminal Appeal, Rowland, Franklyn and Walsh JJ, 16 June 1993); *R v DCM* (Unreported, NSW Court of Criminal Appeal, Kirby ACJ, Badgery-Parker J and Loveday AJ, 26 October 1993); *R v Fisher* (Unreported, NSW Court of Criminal Appeal, Finlay, Grove and Levine JJ, 19 July 1994); *Dick v The Queen* (1994) 75 A Crim R 303; *R v Kennedy* [2000] NSWCCA 527; *Ryan v The Queen* (2001) 206 CLR 267; *Featherstone v The Queen* [2008] NSWCCA 71, [70]; *R v Smith* [2007] NSWDC 315.
296. *R v Kennedy* [2000] NSWCCA 527.
297. *Ryan v The Queen* (2001) 206 CLR 267.
298. *Hermann v The Queen* (1988) 37 A Crim R 440.
299. *Hermann v The Queen* (1988) 37 A Crim R 440, 448 (Lee J).
300. *Featherstone v The Queen* [2008] NSWCCA 7; *R v Gent* (2005) 162 A Crim R 29.
301. *Green v The Queen* [2008] NSWCCA 112.
302. *R v Murrin* [2008] NSWDC 29.

5.52 As Hayne J pointed out in *Ryan*, it was because of the offender's good work that adult parishioners allowed their children to spend time with him, thus granting him access to his victims. The fact that they never suspected him of his crimes because of his position was a significant factor in enabling him to continue offending for over 20 years.[303] Similar remarks were made by other members of the Court in *Ryan*, as they have in many other cases where the offender asked for his or her good character to be taken into account when being sentenced for sex offences against children.[304]

5.53 In *R v Gent*[305] the New South Wales Court of Criminal Appeal held that there is no closed category of offences in relation to which courts may give limited weight to the offender's prior good character.[306] The Court consequently exercised its discretion not to mitigate substantially the sentence of an offender charged with possession of child pornography, on the basis that he was a person of prior good character.

5.54 The Court did however draw analogies between this type of offence and child sexual assault offences in that:

> There is a foundation for the approach that less weight should be attached to evidence of prior good character on sentence for offences of importing child pornography. It appears that such offences are committed frequently by persons of otherwise good character. General deterrence has been referred to as the

303. *Ryan v The Queen* (2001) 206 CLR 267, [144] (Hayne J).
304. *Hermann v The Queen* (1988) 37 A Crim R 440, 448; *R v Muldoon* (Unreported, NSW Court of Criminal Appeal, Hunt, Enderby and Grove JJ, 13 December 1990); *R v Petchell* (Unreported, WA Court of Criminal Appeal, Rowland, Franklyn and Walsh JJ, 16 June 1993) 10; *R v DCM* (Unreported, NSW Court of Criminal Appeal, Kirby ACJ, Badgery-Parker J and Loveday AJ, 26 October 1993); *R v Fisher* (Unreported, NSW Court of Criminal Appeal, Finlay, Grove and Levine JJ, 19 July 1994); *Dick v The Queen* (1994) 75 A Crim R 303; *R v Kennedy* [2000] NSWCCA 527; *Ryan v The Queen* (2001) 206 CLR 267.
305. *R v Gent* (2005) 162 A Crim R 29.
306. *R v Gent* (2005) 162 A Crim R 29, [61].

> "paramount consideration" on sentence for this class of offence (*Assheton*). The fact that the offence is, in a sense, committed in secret is also relevant to this issue.[307]

5.55 In the recent decision involving the sentencing of a former Deputy Senior Crown Prosecutor for the possession of child pornography, Acting Judge Boulton noted that the observations of McHugh J in *Ryan* were relevant to the present case.

> They merely confirm my view that whilst the appellant's prior good character whilst impressive in many respects must yield to considerations of general deterrence.[308]

5.56 Of importance for an assessment of the question whether evidence of prior good character should be excluded as a mitigating factor when sentencing offenders for sexual offences involving children, is the incidence of such offending, and the seriousness of the consequences to the victims.

5.57 The ease with which such offences may be committed in relation to children, and the potential immediate and long-term harm to them are obvious. Of critical importance in this respect is the ability of persons in authority, and of those who are in a position to win the confidence of the parents of children, to commit sexual offences against them. This factor tends to place such offences in a special category. Although it cannot be said to be unique, since some aspects of white collar crime and of drug importations (so far as couriers are concerned)[309] are facilitated by the apparent good character and reputation of those involved, it is such that in the Council's opinion (or in the opinion of the majority of the Council) as to be deserving of a special approach.

5.58 It may be accepted that in some circumstances an offender's prior record, standing, reputation and history of positive contributions to the community, may indicate that his or her action were 'out of

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307. *R v Gent* (2005) 162 A Crim R 29, [64].
308. *Power v DPP* (NSW) (Unreported, NSW District Court, 19 July 2007), 34.
309. *R v Leroy* [1984] 2 NSWLR 441, [446]-[447].

character', and therefore unlikely to be repeated once he or she has been taken before the Court.[310] This premise may be true with respect to some offences, however the cases show that it is dangerous to draw such a conclusion where a person has been convicted of repeated child sexual abuse or is found to have paedophilic tendencies, or to have an obsession with child pornography.[311]

5.59 Moreover there is a good deal of empirical research concerning the resistance of sexual offenders to participate in sexual offending rehabilitation programs, and concerning the limited success of those who do participate. In the context of an offence that is driven by strong sexual urges that can be compulsive and that has a known resistance to rehabilitation, the observations by Kirby J concerning the lack of empirical support for the notion that future behaviour can be predicted on the basis of the past[312] stress the dangers of making any estimation of recidivism based on the offender's previous good character.

5.60 For these reasons the Council is of the view that, in the case of sexual offences concerning children, there should be an exception created to s 21A(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), so as to exclude good character and the absence of any record of a prior offence, as a mitigating circumstance where the offender has used these factors to commit the offence.

5.61 Since s 21A(4) would continue to require good character to be taken into account by reason of the common law, it would also be necessary, if this recommendation is accepted, to preclude such features being taken into account, both in accordance with s 21A(3) and at common law.

5.62 In coming to this conclusion, the Council recognises that the absence of a prior record for offences that do not involve any form of sexual assault may remain relevant as a matter which the Court could

310. *Ryan v The Queen* (2001) 206 CLR 267, [29]-[30] (McHugh J).
311. As was the case in *R v Gent* (2005) 162 A Crim R 29 and *R v Jones* (1999) 108 A Crim R 50.
312. *Melbourne v the Queen* (1999) 198 CLR 1, [49].

potentially take into account when assessing the offender's prospects of rehabilitation. However, the Council does not see this as a reason for altering its opinion. The fact of the absence of such a record could properly be taken into account in accordance with current practice, without diminishing the importance of excluding an offender who commits sexual offences against children, from relying on his general reputation or history of good works.

5.63 The remaining matter to be addressed is to determine whether this exclusion of good character as a mitigating factor should apply to all offences involving children, or should be limited, for example, to the more serious offences.

5.64 The Council concludes that there is no good reason to differentiate between specific offences and that the restriction on relying on prior reputation or good character should apply generally to sexual offences concerning children, that is, where the offender has taken advantage of these circumstances to commit the offence. This would not normally be relevant to an offence of possessing child pornography, which is considered elsewhere in this report,[313] since the existence of good character will usually play no part in its commission. For the most part the children involved are unknown to the offender, and in some cases the images may have been discovered by chance. There may be exceptions where the offender has shown child pornography to other children as part of a grooming exercise or for personal gratification.

5.65 The offences of producing child pornography[314] or the offence of using a child for pornographic purposes[315] would however, be caught by the Council's recommendation. As was noted in *R v Gent*,[316] the Sentencing Advisory Panel in the United Kingdom has published guideline advice by way of sentencing guidelines to the Court of

313. See Chapter 4.
314. *Crimes Act 1900* (NSW) s 91H(2).
315. *Crimes Act 1900* (NSW) s 91G(1)(a).
316. *R v Gent* (2005) 162 A Crim R 29, [62].

Appeal, which were accepted,[317] subject to minor modifications.[318] These guidelines suggested that not much weight should be attached to good character for child pornography offences, a view which is consistent with recent decisions in this State concerning persons holding public office who would not have been expected to have engaged in such conduct.

5.66 The Council's approach to character in relation to sexual offences is confined to its relevance in relation to sentencing. It would continue to be appropriate for it to be available as a matter going to guilt where it has an additional relevance for an assessment of the defendant's credibility as a witness.

317. *R v Oliver* [2003] 1 Cr App R 28.
318. *R v Oliver* [2003] 1 Cr App R 28.

RECOMMENDATIONS

The Council recommends that consideration be given to:

38. Amending s 21A(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) to preclude a sentencing Court taking into account as mitigating factors within the meaning of the section the previous good general reputation, prior good character and absence of any prior criminal antecedents of an offender who is to be sentenced for a sexual offence involving a child, including a child pornography offence, if and to the extent that any of those considerations have better enabled the offender to commit the offence.

39. Amending s 21A so as to exclude such matters being taken into account in accordance with the Common Law.

Chapter 6

Protective Custody And Sex Offender Orders

A. PROTECTIVE CUSTODY

1. Background

Legislative Framework

6.1 The *Crimes (Sentencing Procedure) Act 1999* (NSW) does not include protective custody within the list of mitigating factors contained in s 21A(3). However the Act does state that the factors listed in s 21A(3) and (4) are additional to any other factors required or permitted to be taken into account under any Act or rule of law. Consequently, while there is no express legislative basis for reducing a sentence on the basis of protective custody, the courts have often done so for the reasons that will be outlined later in this chapter.

6.2 Under the *Crimes (Administration of Sentences) Act 1999* (NSW) ('the Administration Act') a prisoner may serve his or her sentence in protective custody where association of the inmate with other inmates constitutes, or is likely to constitute, a threat to the personal safety of the inmate.[319]

6.3 Protective custody differs from segregated custody, in that prisoners held in segregation are thought by the Department of Corrective Services, to constitute a threat to other prisoners, while inmates on protection are thought to be at risk from others, generally by virtue of the offence committed, assistance provided to the authorities or some related reason, and must therefore be held in isolation.[320]

6.4 A prisoner may serve his or her sentence in protective custody due to:

- the prisoner's personal request;[321]
- a direction by the Corrective Services Commissioner or the general manager of a correctional centre;[322] or

319. *Crimes (Administration of Sentences) Act 1999* (NSW) s 11(1).
320. *Crimes (Administration of Sentences) Act 1999* (NSW) s 10(1).
321. *R v France* [1999] NSW CCA 428.
322. *Crimes (Administration of Sentences) Act 1999* (NSW) s 11(1), (3).

- a recommendation by the sentencing judge (although such a recommendation does not form part of the formal sentence, and is not binding on the Department or the offender).

6.5 Whether or not a sentence will be served on protection is, accordingly, a matter reserved for an administrative and not a judicial decision.

6.6 The Administration Act states that prisoners held in protective custody must be kept in isolation from all other inmates or in association only with such other inmates as the Commissioner may determine[323] (usually other prisoners on protection). The prisoners are not, by reason of the form of custody in which they are kept, to be deprived of rights or privileges enjoyed by the general prison population, unless specifically determined by the Commissioner, or to suffer any reduction in diet.[324]

Protective Custody Directions

6.7 Where the Commissioner, or the general manager of a correctional centre exercising the Commissioner's powers, directs that a prisoner be placed in protection, such direction must be made in writing.[325]

6.8 Following the direction, and as soon as practicable, the general manager is required to provide the prisoner with information regarding protective custody.[326] The general manager must also submit a report about the direction to the Commissioner within 14 days of the direction having been made, regardless of whether the general manager or the Commissioner himself made the direction.[327] Within 7 days of receiving the report, the Commissioner must give a direction that the initial direction be revoked, confirmed, or confirmed subject to different terms.[328]

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323. *Crimes (Administration of Sentences) Act 1999* (NSW) s 12(1).
324. *Crimes (Administration of Sentences) Act 1999* (NSW) s 12(2).
325. *Crimes (Administration of Sentences) Act 1999* (NSW) s 13.
326. *Crimes (Administration of Sentences) Act 1999* (NSW) s 14.
327. *Crimes (Administration of Sentences) Act 1999* (NSW) s 16(1).
328. *Crimes (Administration of Sentences) Act 1999* (NSW) s 16(2).

6.9 If the Commissioner decides to confirm the direction, the general manager must submit a further report within 3 months after the relevant date, at which time the Commissioner is required to review the direction.[329] The Commissioner may only confirm the direction for 3 months at a time, although provided that the direction is reviewed every 3 months, there is no limit to how many times the direction may be confirmed, or protective custody extended.

6.10 If a confirmation direction would result in the prisoner being in protective custody for longer than 6 months, or having already been in this type of custody for more than 6 months, then the Commissioner must submit a report to the Minister outlining the reasons for the direction.[330] Prisoners subject to a protective custody direction, which exceeds 14 days, may also seek a review of that direction from the Serious Offender Review Council.[331] The Council has the power to suspend the direction, or to order the transfer of the inmate to a different facility.[332]

6.11 Where the prisoner is held in protective custody pursuant to the Commissioner's or general manager's direction, the Commissioner may at any time revoke that direction,[333] If the prisoner personally requested to be placed in protective custody, then the Commissioner must revoke the direction to do so upon the prisoner's written request.[334]

Types of Protective Custody

6.12 Broadly speaking there are two types of protective custody: normal and strict. Prisoners placed in normal protective custody are free to associate with all other prisoners also held in protective custody. Those in strict protective custody are further separated from the prisoners in normal protection, usually because their safety cannot be guaranteed even from other prisoners on protection. Inmates on

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329. *Crimes (Administration of Sentences) Act 1999* (NSW) s 16(3).
330. *Crimes (Administration of Sentences) Act 1999* (NSW) s 18.
331. *Crimes (Administration of Sentences) Act 1999* (NSW) s 19.
332. *Crimes (Administration of Sentences) Act 1999* (NSW) s 20.
333. *Crimes (Administration of Sentences) Act 1999* s 17(2).
334. *Crimes (Administration of Sentences) Act 1999* s 17(3).

strict protection are usually allowed to associate with others on strict protection, although some choose not to and are in effect completely separated from any other prisoners.[335]

6.13 The facilities offered for offenders on protection and those on segregation are often the same, and can at times lead to the exposure of protected inmates to known perpetrators.[336]

6.14 According to the NSW Department of Corrective Services, in October 2007 approximately 20% of the total inmate population (or 1850 of the 9470) were subject to protective custody.[337] The inmates were divided into three groups:[338]

- inmates placed in a Special Management Area (SMAP) who enjoy free association and full access to programs and services offered by the correctional centre;
- inmates placed in a Limited Association Area (PRLA) who have access to programs and services offered by the correction centre, but who are under more restricted association conditions, for example only permitting association with other inmates who are also on protection.
- inmates placed in a Non-Association Area (PRNA) who are accommodated in single cells and are only permitted to associate with other inmates at the discretion of the General Manager, and attend programs and services on a one-to-one basis.

6.15 The Department advised that of the 1850 inmates who were serving their sentences in protective custody in October 2007, 85.51% (1582) were placed in SMAP; 12.22% (226) in PRLA, and 2.27% (42) in

335. Barnes, L., 'Protective Custody and Hardship in Prison' (Sentencing Trends No 21, Judicial Commission of New South Wales, 2001) 4.
336. Heilpern, D., *Fear or Favour: Sexual Assault of Young Prisoners* (1998).
337. Submission 20: NSW Department of Corrective Services, 2.
338. Submission 20: NSW Department of Corrective Services; New South Wales Sentencing Council, *Inquiry into Reductions in Penalties at Sentence* (2008) (forthcoming), 2.

PRNA.[339] The Department has advised that it intends to restructure the system by amalgamating the limiting association and non-association areas.

Types of prisoners in protective custody

6.16 The New South Wales Judicial Commission paper, 'Protective Custody and Hardship in Prison' notes that prisoners are most likely to be placed in protective custody due to:

- the type of crime for which the offender is in custody (child sex offenders, child murderers);
- providing assistance to authorities (usually to police in drug or robbery cases);[340]
- providing information to gaol authorities against another offender(s) for offences committed while in custody;
- the high profile of the offender (as a result of extensive media coverage of the crime and/or the trial, or the status of the offender in the community);
- interpersonal conflict with other offenders;
- physical or mental characteristics which make the offender particularly vulnerable (youth, agedness, physical stature, physical or mental health, sexual orientation); or
- prior occupation or relationship with someone in a law enforcement or criminal justice occupation, police officer, gaol guard, member of the judiciary or executive.[341]

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339. Submission 20: NSW Department of Corrective Services; New South Wales Sentencing Council, *Inquiry into Reductions in Penalties at Sentence* (2008) (forthcoming), 2. Those inmates placed in 'special entry criteria' correctional centres are effectively in Special Management Areas, and have been included in the SMAP figure.
340. Some of whom may be detained pursuant to the special provisions applicable to persons on witness protection.

6.17 Some offenders, additionally, are serving sentence for current offences which would not, of themselves, justify them being placed on protection, but have been placed on protection because of their earlier offences or custodial history.

6.18 Other offenders may be placed in protective custody because they may possess some inherent vulnerability or personal characteristic, which is likely to place them at a disadvantage in the mainstream general population.

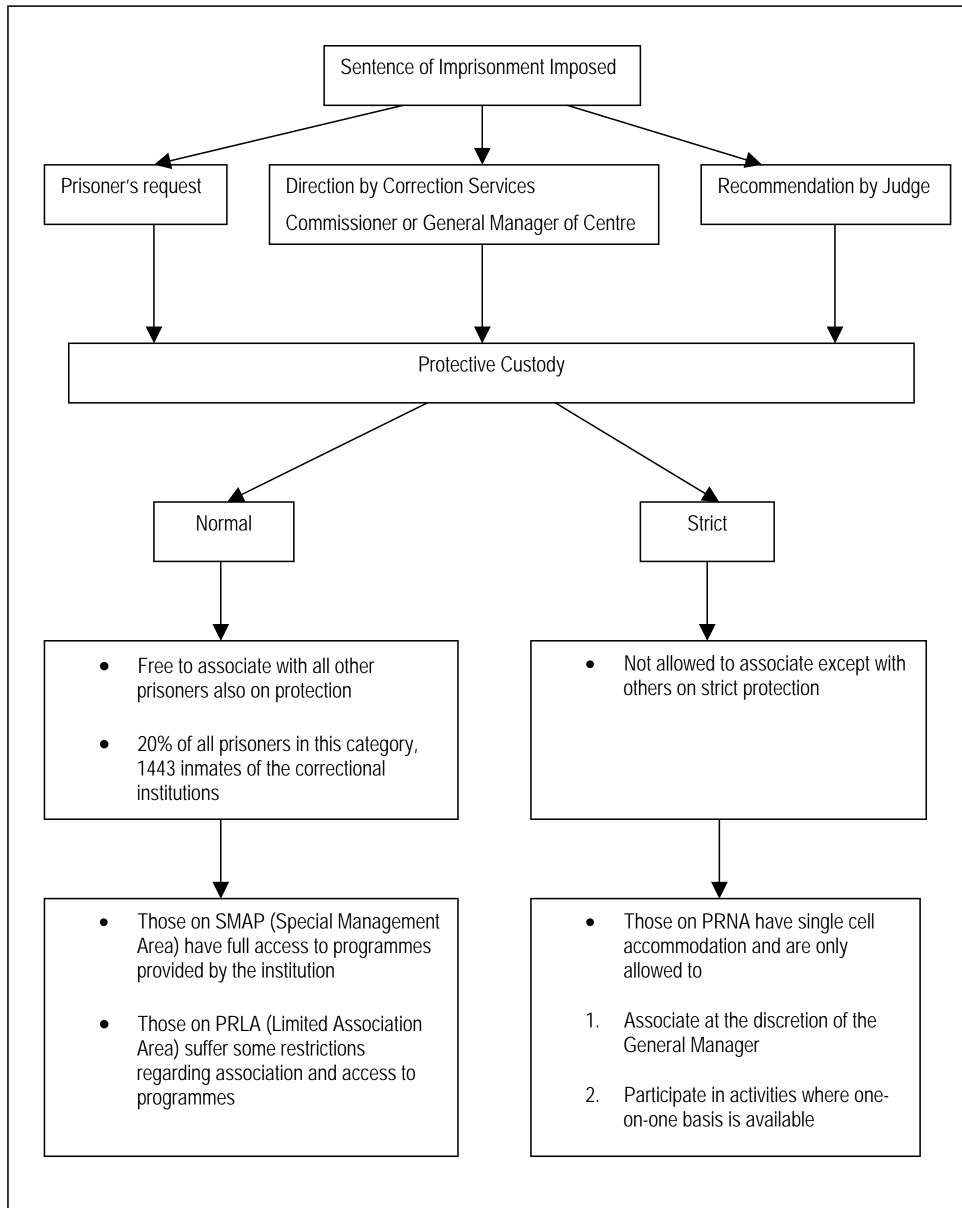
6.19 Offenders who would fall into this group would include, for example:[342]

- first time offenders;
- homosexual and lesbian offenders;
- transgender offenders;
- aboriginal offenders;
- female offenders;
- young offenders;
- older offenders;
- mentally ill or developmentally delayed offenders;
- physically disabled offenders;
- chronically ill offenders; or
- suicidal offenders.

341. Barnes, L., 'Protective Custody and Hardship in Prison' (Sentencing Trends No 21, Judicial Commission of New South Wales, 2001) 5. To this list may be added foreign nationals who have no ties in this country and limited or no English: *R v Huang* (2000) 113 A Crim R 386, [18]-[19].

342. Barnes, L., 'Protective Custody and Hardship in Prison' (Sentencing Trends No 21, Judicial Commission of New South Wales, 2001) 7.

Diagram 1: Pathways through protective custody



2. Protective Custody and Sentencing

6.20 It has often been assumed that serving time in protective custody is more onerous than serving a sentence in the general prison population. The hardship associated with protective custody has commonly been thought to arise from:

- restricted movements due to the more confined space within which prisoners on protection are held;
- less time for recreation and association;
- little or no access to educational or other programs;
- shorter visits due to longer administrative procedures associated with gaining access to protected inmates;
- less opportunity for the offender to have his/her classification reduced; and
- generally more stressful circumstances.

6.21 Courts have on numerous occasions recognised this hardship as a special circumstance when sentencing.[343] Accordingly, sentencing judges have at times reduced the overall sentence to be served. The extent to which a sentence will be modified due to the fact that it will be served in protective custody however varies, especially in recent times when the use of protective custody is rising[344] and now that the nature of it differs significantly from one correctional centre to another.

General principles

6.22 While the Court held in *R v Totten*,[345] that there is a well-entrenched principle that protective custody should be taken into account at sentencing,[346] its relevance will depend on:

343. *R v Burchell* (1987) 34 A Crim R 148; *R v Durocher-Yvon* (2003) 58 NSWLR 581; *AB v The Queen* (1999) 198 CLR 111; *R v Totten* [2003] NSWCCA 207.
344. Barnes, L., 'Protective Custody and Hardship in Prison' (Sentencing Trends No 21, Judicial Commission of New South Wales, 2001) 1.
345. *R v Totten* [2003] NSWCCA 207.
346. *R v Totten* [2003] NSWCCA 207, [44].

- the reasons for the offender being on protection;
- the prospects of the offender remaining in protection;
- the effect of protective custody on the offender's prospects for reform;
- the objective seriousness of the offence; and
- the extent to which general and specific deterrence must be reflected in the non-parole period.[347]

6.23 In *R v Durocher-Yvon*[348] the Court held that the fact that a sentence will be served on protection does not automatically entitle the offender to a shorter sentence.[349] Instead, protective custody is to be regarded as a relevant, though not a deciding factor in sentencing,[350] especially when the crime committed is a heinous one.[351] However, where protective custody warrants a reduction of the sentence, that reduction should refer to the whole of the sentence. There is risk of double counting if an additional reduction of the non-parole period is given through a finding of special circumstances.[352]

6.24 Although protective custody is capable of constituting a 'special circumstance' for the purposes of fixing the non-parole period[353] the courts have held that it does not necessarily follow that it will. Whether or not protective custody will amount to a special circumstance will depend on the facts of each case.[354]

6.25 An issue which has been identified is the fact that if the sentence is likely to be served on protection is taken into account in reducing the sentence, then this necessarily calls for future predictions of how

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347. *R v Wahabzadah* [2001] NSWCCA 253, [19]. See also *R v Totten* [2003] NSWCCA 207, [44].
348. *R v Durocher-Yvon* (2003) 58 NSWLR 581.
349. *R v Durocher-Yvon* (2003) 58 NSWLR 581, [19].
350. *R v Wahabzadah* [2001] NSWCCA 253, [19].
351. *Brown v The Queen* [2006] NSWCCA 395, [62].
352. *R v Durocher-Yvon* (2003) 58 NSWLR 581, [20]. See also *R v S* (2000) 111 A Crim R 225.
353. In accordance with *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44.
354. *Lupton v The Queen* [2003] NSWCCA 200, [25].

onerous the custody will be, and whether or not it will eventuate.[355] As we have earlier observed not only are there different types of protective custody,[356] but the nature of it also varies significantly between different correctional facilities.[357] Consequently, as a number of cases have cautioned, the courts can no longer automatically assume that the prisoner will find prison life more difficult just because he or she is placed on protection.[358]

6.26 In *R v Way* the Court stated:

> now that special arrangements exist for certain classes of prisoners, which do not reflect the harsh conditions, or the degree of isolation and lack of access to programs, that has been the lot in the past, of prisoners on protection, it is important for evidence to be called so that this factor can properly be weighed in the sentencing exercise.[359]

6.27 The Department of Corrective Services has advised that offenders facing sentence often describe the conditions of incarceration which they experienced while on remand, whereas departmental officers giving evidence describe the conditions of protective custody for sentenced offenders. It suggested that the focus on different stages of incarceration accounts for the less favourable conditions of protective custody sometimes described by inmates.[360] For sentencing purposes while some account might be taken of any special hardship by reason of the conditions of detention while on remand, the post-sentence conditions are likely to be of more relevance.

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355. *R v Totten* [2003] NSWCCA 207, [43]. See also *R v Mostyn* (2004) 145 A Crim R 304, [180].
356. Barnes, L., 'Protective Custody and Hardship in Prison' (Sentencing Trends No 21, Judicial Commission of New South Wales, 2001) 4.
357. *R v Scott* [2003] NSWCCA 28, [34].
358. *R v Mostyn* (2004) 145 A Crim R 304, [179]; *R v Manners* [2004] NSWCCA 181, [31], and see *R v Durocher-Yvon* (2003) 58 NSWLR 581; *R v Scott* [2003] NSWCCA 28; and *Featherstone v The Queen* [2008] NSWCCA 71, as examples of cases where the fact of the prisoner being on protection did not lead to any reduction of sentence.
359. *R v Way* [2004] NSWCCA 131, [179].
360. Submission 20: NSW Department of Corrective Services; *Inquiry into Reductions in Penalties at Sentence* (forthcoming) New South Wales Sentencing Council 2008, 5.

Women in protective custody

6.28 In October 2007 there were 53 females being held in protective custody: 51 of these inmates were subject to SMAP, and two were subject to PRNA orders. [361] The centres that do offer protective custody, and not all have this capacity, often do not have adequate resources as the population of female offenders serving sentences on protection is very low compared with the male population in protective custody.

6.29 Consequently, the conditions of protective custody may be particularly onerous for female offenders. For example, at the Silverwater Women's Correctional Centre females on protection have far shorter visiting hours than other inmates.[362] They may also have less time for recreation and social interaction with other prisoners, including those who are also on protection.

6.30 Female inmates who are on protection are likely to have been involved in offences involving the murder or serious assault (physical or sexual) of children, or to have provided assistance to the authorities. In either category they are notoriously at risk of assault by other inmates, and may have to spend lengthy periods in solitary confinement, often under camera surveillance, with a risk of subsequent psychological harm.

6.31 In the recent case of *R v Lindstrom*[363] Rothman J made the following remarks in sentencing the offender to a term of imprisonment which was likely to be served in its entirety in protective custody because of the assistance provided to the authorities in relation to serious drug offences:

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361. Submission 20: NSW Department of Corrective Services, Response to Request for Information from the Sentencing Council New South Wales Sentencing Council 2008, 2.
362. Regular visiting hours at this facility are on both Saturdays and Sundays between the hours of 8.15am-11.45am and 12.45pm-3.15pm. However, for those in protective custody the visiting days are on Monday, Wednesday, Thursday & Fridays between the hours of 8.15am-10.00am. Department of Corrective Services. Website <http://www.dcs.nsw.gov.au//offender_management/offender_ management_in_custody/Correctional_Centres/Silverwater_Women.asp> 24 June 2008.
363. *R v Lindstrom* [2008] NSWSC 198.

> She is currently in solitary confinement. She is in solitary confinement in a male prison. She has no interaction with any other prisoner. Because other prisoners are aware of her presence and that she is a female, she is subject to comments from other prisoners during the day …While she has some visitors, she is denied regular contact with her family, with whom she is close. Weather permitting she is allowed occasional time in a yard slightly bigger than this court room, in which she can take in some sun.
>
> [64] Were this regime imposed for reasons other than her safety, it would amount possibly to a form of torture [364]

3. Protective Custody and Child Sex Offenders

Unfavourable reaction to child sexual offenders in custody

6.32 Even though offenders are placed in protective custody they are not always safe from assaults. It is well established that those who commit sexual offences, or serious assault, on children are regarded with some distaste by those in the general population, and that they are vulnerable to threats, standover activities and assaults.

6.33 In *R v Burchell*[365] Hunt J stated that

> child molesters are subjected to severe physical assaults by the inmates of the regular gaols and they usually are obliged to serve their sentences under heavy protective guard and often in isolation, even from those other inmates on protection.[366]

6.34 A number of cases have doubted the continuing relevance of this observation as a general proposition, now that the use of protective

364. *R v Lindstrom* [2008] NSWSC 198, [63]-[64].
365. *R v Burchell* (1987) 34 A Crim R 148.
366. *R v Burchell* (1987) 34 A Crim R 148, 151.

custody has increased, and changes affected by the Department mean that the conditions are not necessarily more onerous or dangerous.[367]

6.35 However as the case of *R v Totten* indicates, this proposition may still hold true, especially when the offender has committed a sexual offence against a child, but is not housed within a facility such as the MSPC.[368]

6.36 Similarly, while the Judicial Commission's 2001 paper had stated that all persons convicted of child sexual assault are placed in strict protective custody,[369] the Department of Corrective Services has advised that all sex offenders are not placed into protective custody.[370] The Department advised, for example, that of the 1,114 sex offenders in custody in June 2007, only 713 of these inmates were in protective custody.[371]

6.37 The recognition of the failure of protective custody to protect inmates from assaults and even death, led the High Court to uphold a wholly suspended sentence for serious drug offences in *York v The Queen*.[372] In that case the Court recognised that even if the offender was placed in protective custody there was no guarantee that she would be safe from threats to her life. Finding that there was no correctional facility in Queensland that could safely house her, the Court affirmed the trial judge's wholly suspended sentence.

6.38 Assertions of this kind, relating to the safety of inmates in protective custody are, however, strongly refuted by the Department

367. See *R v Scott* [2003] NSWCCA 28, [34]; *R v Totten* [2003] NSWCCA 207, [43]; *R v Mostyn* (2004) 145 A Crim R 304, [179]-[180].
368. *R v Totten* [2003] NSWCCA 207, [52]-[53].
369. Barnes, L., 'Protective Custody and Hardship in Prison' (Sentencing Trends No 21, Judicial Commission of New South Wales, 2001) 7.
370. Submission 20: NSW Department of Corrective Services, Response to Request for Information from the Sentencing Council New South Wales Sentencing Council 2008, 3.
371. Submission 20: NSW Department of Corrective Services, Response to Request for Information from the Sentencing Council New South Wales Sentencing Council 2008, 2.
372. *York v The Queen* (2005) 225 CLR 466.

of Corrective Services. According to the Department, findings[373] to this effect are out of date and no longer relevant. Although the Department conceded the existence of a strong dislike of child sex offenders by mainstream inmates who, if given the opportunity, would severely assault such offenders, it stated that the current strategies, which were designed to deal with inmates on protection, have substantially decreased the incidence of such assaults, so that they currently represent only a small minority of inmate-on-inmate assaults.[374]

The submissions

6.39 A number of submissions favoured treating the fact that an offender is likely to serve a sentence in protective custody as a special circumstance justifying a reduction in the overall length of the sentence, or of the non-parole period.[375] The New South Wales Council of Civil Liberties submitted that protective custody imposes substantial hardship on offenders particularly those sex offenders serving sentences in strict protective custody.[376] The stigma attaching to their convictions, it submitted, places them at a higher risk of injury or death both inside and outside the prison system.[377] Thus, it was asserted protective custody constitutes an appropriate basis for a finding of special circumstance.[378]

6.40 The Public Defenders submitted that providing a discount for the added harshness of protective custody would ensure an overall parity with sentences served in less arduous circumstances.[379] Further, it argued, there is no good policy reason for distinguishing between

373. Barnes, L., 'Protective Custody and Hardship in Prison' (Sentencing Trends No 21, Judicial Commission of New South Wales, 2001).
374. Submission 20: NSW Department of Corrective Services; *Inquiry into Reductions in Penalties at Sentence* (forthcoming) New South Wales Sentencing Council 2008, 3.
375. *R v Oviedo-Portela* (Unreported, NSW Court of Criminal Appeal, Finlay and Abadee JJ, and Loveday AJ, 17 December 1993) 29.
376. Submission 8: New South Wales Council of Civil Liberties, 7.
377. Submission 8: New South Wales Council of Civil Liberties, 7.
378. Submission 8: New South Wales Council of Civil Liberties, 8.
379. Submission 16: Public Defenders Office New South Wales, 7.

sexual offenders and other types of offenders in protective custody.[380] The Aboriginal Legal Service (NSW/ACT) also submitted that it is necessary to ensure that the matter of protective custody does not constitute an additional punishment.[381]

6.41 Other submissions have either rejected the idea that protective custody should be the subject of special treatment in sentencing as an special circumstance,[382] or have doubted its relevance on the basis that individuals respond to protective custody differently, and there is no way of assessing that response at the time of sentencing.[383]

6.42 The Northern Sydney Sexual Assault Service, and the Central and Eastern Sydney Sexual Assault Service, submitted that the fact that offenders are serving their sentences in protective custody should not form a basis for a reduced sentence, since their placement in protection is for their own safety. Treating the matter differently would 'send the message that what happens to them is of greater concern than what happens to their victims'.[384]

6.43 The Office of the Director of Public Prosecutions offered some support for this argument, stating that allowing protective custody to be characterised as a mitigating factor would conflict with the current legislative policy of enacting heavier penalties for sexual offences to reflect the increased seriousness with which society views this form of offending.[385]

6.44 The Department of Juvenile Justice notes that protective custody is not available in juvenile justice centres and therefore the consideration

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380. Submission 16: Public Defenders Office New South Wales, 8.
381. Submission 13: Aboriginal Legal Service (NSW/ACT), 3.
382. Submission 11: Central and Eastern Sydney Sexual Assault Service and Northern Sydney Sexual Assault Service, 5; Submission 14: Ministry for Police New South Wales, 4; Submission 12: New South Wales Director of Public Prosecutions, 13-4.
383. Submission 7: Department of Corrections; Community Probation & Psychological Services (New Zealand), 5.
384. Submission 11: Central and Eastern Sydney Sexual Assault Service and Northern Sydney Sexual Assault Service, 5.
385. Submission 12: New South Wales Director of Public Prosecutions, 13.

of whether this type of custody constitutes a special circumstance is not relevant in terms of juvenile offenders.[386]

Conclusion

6.45 Current sentencing practice appears to address the question of a sentence being served on protection adequately. The level of punishment which is appropriate for a particular offence is set by the length of sentence, and the manner in which sentence is served is not intended to operate as additional punishment. As a matter of principle, if the personal circumstances of the offender, or the conditions in which the offender is required to serve a sentence are more arduous than they would be for general or mainstream prisoners, then that is a factor which may be properly taken into account in determining the sentence.[387]

6.46 However, such circumstances should not be taken into account on the basis of some general assumptions. The Council is satisfied that before any allowance is made, specific evidence should be placed before the Court establishing the circumstances that will make the service of the sentence more arduous. This should take the form of evidence provided by the Department of Corrective Services, or by the offender where relevant personal circumstances are relied upon. The courts have accepted the correctness of this approach in recent times, and the Council does not see that there is any justification for excluding such evidence, or excluding the fact that a sentence may be served on protection, as a circumstance that can properly be taken into account.

6.47 Current sentencing practice may make it strictly unnecessary to do other than leave the matter to common law. The Council, however, recognises that there could be merit in amending the *Crimes (Sentencing Procedure) Act 1999* (NSW) so as to make it clear, as a legislative direction, that such a circumstance is not to be taken into account as a

386. Submission 15: NSW Director for Juvenile Justice, 6.

387. For example ill health which might make a prison sentence more burdensome or have gravely adverse effects can properly be taken into account: *R v L* (Unreported, NSW Court of Criminal Appeal, Gleeson CJ, Badgery-Parker and Hidden JJ, 17 June 1996).

factor reducing the sentence unless positive evidence is called, at the time of sentencing, to establish that the offender is more likely than not to serve the sentence on protection and in more onerous conditions than those experienced by mainstream prisoners.

6.48 The Council is of the view that this requirement should not be confined to cases where the arduousness of the manner in which the sentence is served relates to the fact that it will be served on protection. Logically it should apply to any circumstance where the offender's personal circumstances will render service of the sentence excessively arduous or threaten his or her health in a way that is not common for other prisoners generally.

6.49 In the case of sexual offenders, it is difficult to imagine that those prisoners who are assumed likely to serve their sentences in special management areas or in limited association areas, who have access to programs or services or a reasonable degree of association with other inmates, would qualify for special consideration. Each case would, however, need to depend on its own facts.

6.50 There is a need to acknowledge the possibility that the needs or circumstances of an offender may alter after sentencing, inter alia because of some subsequent dispute or illness that was not anticipated at the time when the sentence was imposed. This should not in the Council's opinion normally provide a basis for appeal.

6.51 The Council is also of the opinion that the conditions of protective custody should more actively be promoted to judicial officers. This could be achieved, for example, through inclusion of the DCS material being provided to judges in the Judicial Commission's Bench Book, and through the provision of judicial education seminars on the subject.

B. SEX OFFENDER ORDERS

6.52 Two issues have recently arisen concerning the relevance, at the time of sentencing offenders convicted of sexual offences, as to whether the Court should take into account:

- the fact that the offender will become a registrable person under the *Child Protection (Offenders Registration) Act 2000* (NSW) and subject to compliance with the obligations and restrictions arising including a bar on being employed in child related employment;[388] and
- the possibility that the offender will subsequently become subject to an order for continuing supervision or detention as a consequence of an application make under the *Crimes (Serious Sex Offenders) Act 2004* (NSW).

Registrable Person

6.53 As a result of the conviction of an offender for a range of offences,[389] he/she may become liable to a registration requirement under the *Child Protection (Offenders Registration) Act 2000* (NSW), and as a result become subject to obligations to report certain information annually to Police, and in the interim, to report any changes in that information and any intention to leave the State or to undertake international travel.

6.54 Additionally, the Commissioner of Police may apply to a Local Court for an order prohibiting a registrable person from engaging in certain specified conduct where there is reasonable cause to believe that such person poses a risk to the lives or sexual safety of children and the making of the order will reduce that risk.[390]

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388. By reason of ss 33B and 33C of the Commission for *Children and Young People Act 1998* (NSW), although subject to any review under that Act
389. As defined in *Child Protection (Offenders Registration) Act 2000* (NSW) s 3.
390. *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 5.

6.55 In *R v KNL*[391] it was argued that the registration requirement would amount to an extra-curial punishment that should be taken into account in reduction of the sentence. At first instance the impact that registration of this conviction would have on the accused was a determining factor leading to a conviction not being recorded. On appeal it was found that there might be cases where registration would lead to extra-curial punishment and that registration could be taken into consideration in sentencing.[392] However, the court observed that it would need to be shown that some penal consequence would arise from registration; in this case no such consequence could be established.

6.56 Further consideration was given to the question of registration in *TMTW v The Queen*[393] where it was accepted that the registration requirement could, in appropriate circumstances, qualify as a circumstance to be taken into account, although the facts of that case were held insufficient to justify the Court's intervention.

Continuing Supervision and Detention Orders

6.57 Pursuant to the *Crimes (Serious Sex Offenders) Act 2004* the Attorney General may apply to the Supreme Court for an extended supervision order (ESO)[394] or a continuing detention order (CDO)[395] against a sex offender who, when the application is made, is in custody (or under supervision in the case of an ESO) while serving a sentence of imprisonment for a serious sex offence or for an offence of a sexual nature.

6.58 Such orders may be made where the offender is assessed to be at a relevantly high risk of committing a further serious sex offence if not kept under supervision or in detention.[396] In the case of an ESO the application cannot be made until the last 6 months of the offender's

391. *R v KNL* (2005) 154 A Crim R 268.
392. *R v KNL* (2005) 154 A Crim R 268, [50].
393. *TMTW v The Queen* [2008] NSWCCA 50.
394. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 6.
395. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 14.
396. *Crimes (Serious Sex Offenders) Act 2006 (NSW)* ss 9(2), 17(3).

current custody or supervision;[397] while in the case of a CDO it cannot be made until the last 6 months of the offenders current custody.[398] The orders may be extended.

6.59 In May 2007 the Serious Sex Offenders Assessment Committee (SSOAC) was established to review those convicted of serious sexual offences. The Committee considers inmates who are approaching their last six months of their custody or supervision and recommends whether an application should be made for either an ESO or CDO. To date, the SSOAC has considered 204 cases and has recommended that applications be made for ESOs or CDOs for 13 of those cases.[399] Eight of those applications have proceeded to the Court. An order was made in every case where an application was made for either an ESO or a CDO, with 2 offenders being subject to extended supervision orders and 6 offenders subject to continuing detention orders.[400]

6.60 The relevance of the possibility of an offender becoming the subject of such an order, for the purposes of the initial sentencing, was considered in *Ghanem v The Queen*.[401] That was a case where the question arose at a time when the offender was to be re-sentenced following a successful appeal. The Court did not consider the offender's circumstances to be such that the impact of the Act fell for determination,[402] although its possible relevance for sentencing was not excluded.

6.61 As a result of these decisions, there is some uncertainty as to whether sex offenders are able to rely in mitigation of initial sentence on the restrictions arising from registration or on the possibility of prohibition orders or of ESOs or CDOs being made at some later date.

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397. *Crimes (Serious Sex Offenders) Act 2006 (NSW)* s 6(2).
398. *Crimes (Serious Sex Offenders) Act 2006 (NSW)* s 14(2).
399. Submission 20: NSW Department of Corrective Services, Tab C.
400. Submission 20: NSW Department of Corrective Services, Tab C.
401. *Ghanem v The Queen* (2008) 180 A Crim R 440.
402. *Ghanem v The Queen* (2008) 180 A Crim R 440, [78].

6.62 The Council is of the view that none of these factors should be available in mitigation of sentence. It is impossible to quantify in any meaningful way at the time of sentencing the future impact of registration upon a person who becomes registrable under the *Child Protection (Offenders Registration) Act 2004* (NSW) (and in particular whether that person would have had any realistic prospects of working with children that may be lost, or whether the fact of being known to Police or of accepting reporting obligations will come as any hardship). Equally it is impossible to determine in any conclusive way whether the offender's circumstances will be such that an Offender Prohibition Order is likely to be make at some future date.

6.63 If anything, it is even more difficult to predict the future level of risk posed by an offender at the time when the initial sentence is imposed, or to reach any firm opinion as to the likelihood of an offender becoming the subject of an ESO or CDO. Particularly is that so having regard to the detailed assessment that is required[403] and to the time that the application can be made to the Court, which will be after the offender has had the opportunity of undergoing specific sexual offender programs and of demonstrating either a positive step towards rehabilitation or a lack of any prospect of change. At the time of sentencing the Court could not have access to the reports and assessments in relation to the offender or to any of the other information that will inform the Court when the application for a relevant order is made.

403. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 9(3).

6.64 Where an ESO or CDO is made it is not intended as additional punishment. Rather its purpose, like that of registration, is to secure the protection of the community from the risk of harm which is posed by sexual offenders. Any such order is capable of being challenged on appeal.

6.65 The Council is accordingly of the view that neither the fact that a sex offender becomes a registrable person after conviction, or might potentially be the subject of an offenders prohibition order, or of an ESO or a CDO, should be taken into account in reduction of the original sentence. It considers that the *Crimes (Sentencing Procedure) Act* 1999 (NSW) should be amended to so provide.[404]

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404. Recent amendments to s 5(2BC) of the *Sentencing Act 1991* (Vic) expressly provide that 'in sentencing an offender a court must not have regard to any consequences that may arise under the *Sex Offenders Registration Act 2004* from the imposition of the sentence'. However, as the *Sentencing Act* does not directly apply to juveniles the Children's Court has raised the possibility that in exceptional circumstances, such consideration might still arise: see Power, P., Research Materials, Children's Court of Victoria, 2 January 2008, 11.91.

RECOMMENDATIONS

40. The Council does not consider it essential to make any specific statutory provisions in relation to the way that protective custody is to be taken into account for sentencing purposes, as current case law adequately deals with that circumstance.

41. Although if any such amendment were to be made to the *Crimes (Sentencing Procedure) Act 1999* (NSW) to cater for that circumstance then it should be one that provides that the fact of the offender being placed on protection or subject to any other matter that might make his or her custody more onerous or more of a threat to his/her health than that experienced by prisoners generally, then it should not be taken into account for sentencing purposes unless positive evidence is called, at the time of sentencing to establish that fact.

42. The Council does however, recommend that consideration be given to amendment of the *Crimes (Sentencing Procedure) Act 1999* (NSW) to preclude the fact that a convicted offender by reason of the conviction has, or will, become a person registrable under the *Child Protection (Offenders Registration) Act 2000* (NSW) or may become the subject of a prohibition order under the *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW), or the subject of an ESO or CDO under the *Crimes (Serious Sex Offenders) Act 2006* (NSW), from being taken into account in mitigation of sentence.

Appendices

Appendix A: Sexual Offences - Overview Of Current Provisions In The *Crimes Act 1900* (NSW)[1]

Sec	Offence Description	Max Years	SNPP Years	Matters in the Higher Court	No of Local Court matters
61I	Sexual assault	14	7	88	0
61I/61P	Attempt to commit sexual assault	14	n/a	16	0
61J[a]	Aggravated sexual assault	20	10	81	0
61J/61P	Attempt to commit aggravated sexual assault	20	n/a	7	0
61J/354	Aid and abet aggravated sexual assault	20	n/a	2	0
61J/346	Accessory before fact to aggravated sexual assault	20	n/a	1	0
61JA[a]	Aggravated sexual assault in company	Life	15	12	0
61JA(c)(i)	Inflict ABH	Life	15	4	0
61JA(c)(ii)	Threaten ABH by weapon	Life	15	1	0
61JA(c)(iii)	Deprive liberty	Life	15	7	0
61K(a)	Intentionally or recklessly inflict ABH w/i to have sexual intercourse	20	n/a	6	0
61K(b)	Threaten to inflict ABH w/i to sex intercourse	20	n/a	5	0

1. This table has been compiled from the material provided by the New South Wales Judicial Commission.

Sec	Offence Description	Max Years	SNPP Years	Matters in the Higher Court	No of Local Court matters
61L	Indecent assault	5	n/a	87	467
61L/61P	Attempt to commit indecent assault	5	n/a	1	0
61M(1)	Aggravated indecent assault	7	5	52	256
61M(1)/ 61P	Attempt to commit aggravated indecent assault	7	n/a	1	0
61M(2)	Aggravated indecent assault with person under the age of 10 years	10	5[e]	34	65
61N(1)	Act of indecency with/towards person under the age of 16 years	2	n/a	7	60
	Incite person under the age of 16 years to an act of indecency	2	n/a	3	11
61N(2)	Act of indecency with/towards person of the age of 16 years or above	1.5	n/a	0	112
	Incite person of the age of 16 years or above to an act of indecency	1.5	n/a	1	1
61O	Aggravated act of indecency with/towards person under the age of 16 years	5	n/a	4	3
	incite person under the age of 16 years to an aggravated act of indecency	5	n/a	1	1
61O(1A)	Aggravated act of indecency with/towards person of the age of 16 years or above	3	n/a	2	1
	Incite an act of indecency with/towards person of the age of 16 years or above	3	n/a	1	0

Sec	Offence Description	Max Years	SNPP Years	Matters in the Higher Court	No of Local Court matters
61O(2)	Aggravated act of indecency with person under the age of 10 years	7	n/a	5	13
	Incite person under the age of 10 years to an aggravated act of indecency	7	n/a	1	4
65A(2)[2]	Sexual intercourse procured by non-violent threat	6	n/a	4	0
66A[a]	Sexual intercourse with child under the age of 10 years	25	15	40	0
66B	Attempt or assault w/i to have sexual intercourse with child under the age of 10 years	25[f]	n/a	7	0
66C(1)	Sexual intercourse with child between 10 and 14 years	16	n/a	17	0
66C(2)	Aggravated sexual intercourse with child between 10 and 14 years	20	n/a	10	0
66C(3)	Sexual intercourse with child between 14 and 16 years	16	n/a	33	25
66C(4)	Aggravated sexual intercourse with child between 14 and 16 years	12	n/a	8	0
66D/ 66C(3)	Attempt or assault w/i to have sexual intercourse with child between 10 and 16 years	20[g]	n/a	1	0
66EA(1)	Persistent sexual abuse of child	25	n/a	10	0
66EB(2)(a)	Procuring child under 14 for unlawful sexual activity	15	n/a	0	0
66EB(2)(b)	Procuring child over 14 for unlawful sexual activity	12	n/a	0	0

[2] Repealed January 2008

Sec	Offence Description	Max Years	SNPP Years	Matters in the Higher Court	No of Local Court matters
66EB(3)(a)	Grooming child under 14 for unlawful sexual activity	14	n/a	0	0
66EB(3)(b)	Grooming child over 14 for unlawful sexual activity	10	n/a	0	0
66F(2)	Sexual intercourse with person who has an intellectual disability by person in authority	10	n/a	1	0
66F(3)	Sexual intercourse with person who has an intellectual disability	8	n/a	13	0
66F(4)	Attempted sexual intercourse with person who has an intellectual disability	10	n/a	0	0
73(1)	Sexual intercourse with child between 16 and 17 years under special care	8	n/a	1	0
73(2)	Sexual intercourse with child between 17 and 18 years under special care	4	n/a	0	0
78A	Incest with a close family member who is above the age of 16 years	8	n/a	3	0
78B	Attempted incest under 78A	2	n/a	0	0
79	Bestiality	14	n/a	0	0
80	Attempted bestiality	5	n/a	0	0
80A(2)	Sexual assault by forced self manipulation	14	n/a	1	0
80A(2A)	Aggravated sexual assault by forced self manipulation	20	n/a	0	0
80D(1)	Causing sexual servitude	15	n/a	0	0

Sec	Offence Description	Max Years	SNPP Years	Matters in the Higher Court	No of Local Court matters
80D(2)	Causing sexual servitude in circumstances of aggravation	19	n/a	0	0
80E(1)	Conduct of business involving sexual servitude	15	n/a	0	0
80E(2)	Conduct of business involving sexual servitude in circumstances of aggravation	19	n/a	0	0
81C	Indecently interferes with a corpse	2	n/a	0	0
91D(1)(a)	Cause or induce a child to participate in an act of child prostitution	14[h]	n/a	4	0
91D(1)(a)	Attempt to induce a child to participate in an act of child prostitution	14	n/a	3	0
91D(1)(b)	Participates as a client with a child in an act of child prostitution	14	n/a	0	0
91E	Obtain benefit from child prostitution	10	n/a	2	0
91F	Operate premises used for child prostitution	7	n/a	2	0
91G(1)(a)[b]	Use child under age of 14 years for pornographic purposes	14	n/a	3	0
91G(1)(b)	Procures a child under the age of 14 years for pornographic purposes	14	n/a	0	0
91G(1)(c)	A carer of a child under the age of 14 consenting to the child being used for pornographic purposes	14	n/a	0	0
91G(2)(a)	Use child above the age of 14 years for pornographic purposes	10	n/a	0	0

Sec	Offence Description	Max Years	SNPP Years	Matters in the Higher Court	No of Local Court matters
91G(2)(b)/ 344A	Attempt to cause or induce a child to participate in an act of prostitution	10	n/a	1	0
91G(2)(c)	A carer of a child above the age of 14 consenting to the child being used for pornographic purposes	10	n/a	0	0
91H(2)	Produce or disseminate child pornography	10	n/a	1	8
91H(3)	Possess child pornography	5	n/a	1	47

Notes:

* Percentage values have been rounded off to the nearest whole number.
a SNPP cases only (offences committed on or after 1 February 2003).
b Each of three cases on JIRS under s 91G (use etc) relates to s 91G(1)(a).
c The case on JIRS under s 91G attempt (use etc) relates to s 91G(2)(b).
d Cases after the repeal of 16G only (sentenced or after 16 January 2003).
e On 1 January 2008, the Crimes (Sentencing Procedure) Amendment Act 2007 increased the standard non-parole period for this offence from 5 years to 8 years. (The SNPP for cases in this study was 5 years).
f Period covers offences liable to 20 years imprisonment (offences committed before 1 February 2003) and 25 years imprisonment (offences committed on or after 1 February 2003).
g The maximum penalty depends on which offence under s 66C the offender attempted to commit. The case on JIRS relates to an attempted offence against s 66C(3).
h The maximum penalty is 10 years if the child is aged 14 years or above (JIRS is unable to differentiate).
i The maximum penalty is 20 years if the aggravated offence is committed against a person who is under 18 years. The case on JIRS relates to a person of or above the age of 18 years.

Appendix B: Non Age-specific Sexual Offences

Table 1: Non Age-specific Sexual Offences – Crimes Act 1900 (NSW)

Section	Offence	Elements of the Offence	Aggravating Factors	Stat Max	SNPP	%
61JA	Aggravated sexual assault in company	Sexual intercourse without consent; Offender(s) know there is no consent; In company.	• Intentionally or recklessly inflict actual bodily harm on victim or other person present/nearby; or • Threaten to inflict actual bodily harm on victim or other person present/nearby; or • Victim deprived of liberty before or after offence	Natural Life	15Y	----
61J(1)/ 61J(2)	Aggravated sexual assault	Sexual intercourse without consent; Offender knows there is no consent; Circumstances of aggravation.	• Intentionally or recklessly inflict actual bodily harm on victim or other person present/nearby; or • Threaten to inflict actual bodily harm on victim or other person present/nearby with offensive weapon or instrument; or • Offender in company; or • Victim under 16; or • Victim under authority of offender; or • Victim has serious physical disability; or • Victim has serious intellectual disability	20Y	10Y	50%

[1] [1] **Note**: The offences are listed in descending order by seriousness, as defined by the statutory maximum penalty.

61K	Assault with intent to have sexual intercourse	Intentionally or recklessly inflict actual bodily harm on victim or other person present/nearby; Threaten to inflict actual bodily harm on victim or other person present/nearby with offensive weapon or instrument Intent to have sexual intercourse		20Y		
80A(2A)/ 80A(1)	Aggravated sexual assault by forced self-manipulation	Compels person to engage in self-manipulation, by means of threat that the other person could not reasonably be expected to resist Circumstances of Aggravation **self-manipulation** means the penetration of the vagina (including a surgically constructed vagina) or anus of any person by an object manipulated by the person, except where the penetration is carried out for proper medical or other proper purposes. **threat** means: (a) threat of physical force, or (b) intimidatory or coercive conduct, or other threat, which does not involve a threat of physical force.	• Intentionally or recklessly inflict actual bodily harm on victim or other person present/nearby; or • Threaten to inflict actual bodily harm on victim or other person present/nearby with offensive weapon or instrument; or • Offender in company; or • Victim is under the age of 16 years, or • Victim under authority of the offender, or • Victim has a serious physical disability, or • Victim has a serious intellectual disability.	20Y		
61I	Sexual Assault	Sexual intercourse without consent; Alleged Offender knows there is no consent		14Y	7Y	50%
80A(2)	Sexual assault by forced self-manipulation	Compels person to engage in self-manipulation, by means of a threat that the other person could not reasonably be expected to resist **self-manipulation** means the penetration of the vagina (including a surgically constructed vagina) or anus of any person by an object manipulated by the person,		14Y		

		except where the penetration is carried out for proper medical or other proper purposes. **threat** means: (a) threat of physical force, or (b) intimidatory or coercive conduct, or other threat, which does not involve a threat of physical force.				
61M(1)/ 61M(3)	Aggravated indecent assault	Assault Act of Indecency on or in presence of victim Circumstances of Aggravation	• Offender in company; or • Victim under 16; or • Victim under authority of offender; or • Victim has serious physical disability; or • Victim has serious intellectual disability	7Y	5Y	71%
61L	Indecent assault	Assault Act of Indecency on or in presence of victim		5Y		
61O(1A)/ 61O(3)	Aggravated act of indecency - alleged victim over 16	Act of Indecency with/towards person 16 or over; or Incite person 16 or over to act of indecency with another Circumstances of Aggravation	• Offender in company; or • Victim under authority of offender; or • Victim has serious physical disability; or • Victim has serious intellectual disability	3Y		
61N(2)	Act of indecency - alleged victim over 16	Act of Indecency with/towards person 16 or over; or Incite person 16 or over to act of indecency with another		18M		

Table 2: Incest - Crimes Act 1900 (NSW)

Section	Offence	Elements of the Offence	Aggravating Factors	Stat Max	SNPP	%
78A(1)	Incest – alleged victim over 16	Sexual intercourse with a close family member who is of or above the age of 16 years **close family member** is a parent, son, daughter, sibling (including a half-brother or half-sister), grandparent or grandchild, being such a family member from birth		8Y		
78B	Attempt Incest	Attempt sexual intercourse with a close family member who is of or above the age of 16 years **close family member** is a parent, son, daughter, sibling (including a half-brother or half-sister), grandparent or grandchild, being such a family member from birth		2Y		

Table 3: Sexual Servitude - Crimes Act 1900 (NSW)

Section	Offence	Elements of the Offence	Aggravating Factors	Stat Max	SNPP	%
80D(1)/ 80D(2)	Aggravated sexual servitude	Cause another person to enter into or remain in sexual servitude and intend to cause, or reckless as to causing, that sexual servitude Circumstances of Aggravation **Sexual servitude** is the condition of a person who provides sexual services and who, because of the use of force or threats: (a) is not free to cease providing sexual services, or (b) is not free to leave the place or area where the person provides sexual services.	• Victim is under the age of 18 years, • Victim has a serious intellectual disability.	19Y		
80E(1)/ 80E(2)	Conduct business involving sexual servitude - Aggravated	Person conduct business involving the sexual servitude of other persons, and who knows about, or is reckless as to, that sexual servitude Circumstances of Aggravation	• Victim is under the age of 18 years, • Victim has a serious intellectual disability.	19Y		
80D(1)	Causing sexual servitude	Cause another person to enter into or remain in sexual servitude and intend to cause, or reckless as to causing, that sexual servitude **Sexual servitude** is the condition of a person who provides sexual services and who, because of the use of force or threats: (a) is not free to cease providing sexual services, or (b) is not free to leave the place or area where the person provides sexual services.		15Y		
80E(1)	Conduct business involving sexual servitude	Person conduct business involving the sexual servitude of other persons, and who knows about, or is reckless as to, that sexual servitude		15Y		

Appendix C: Sexual Offences Against A Child

Table 1: Specific Sexual Offences against a Child – Crimes Act 1900 (NSW)

Section	Offence	Elements of the Offence	Aggravating Factors	Stat Max	SNPP	%
66A	Sexual intercourse – child under 10	Sexual Intercourse - child under 10		25Y	15Y	60%
66B	Attempt sexual intercourse –child under 10	Attempt Sexual Intercourse - child under 10; or Assault with Intent to have sexual intercourse - child under 10		25Y		
66EA(1)	Persistent sexual abuse of a child	On 3 or more separate occasions occurring on separate days during any period, engage in conduct in relation to a particular child that constitutes a sexual offence **child means a person under the age of 18 years.**		25Y		
80A(2A)/ 80A(1)	Aggravated sexual assault by forced self-manipulation	Compels person to engage in self-manipulation, by means of threat that the other person could not reasonably be expected to resist Circumstances of Aggravation	• Intentionally or recklessly inflict actual bodily harm on victim or any other person present/nearby, or • Threaten to inflict actual bodily harm on victim or other person present/nearby with offensive weapon or instrument; or	20Y		

[1] **Note**: The offences are listed in descending order by seriousness, as defined by the statutory maximum penalty.

		self-manipulation means the penetration of the vagina (including a surgically constructed vagina) or anus of any person by an object manipulated by the person, except where the penetration is carried out for proper medical or other proper purposes. **threat** means: (a) threat of physical force, or (b) intimidatory or coercive conduct, or other threat, which does not involve a threat of physical force.	• Offender in company; or • Victim is under the age of 16 years, or • Victim is under the authority of the alleged offender, or • Victim has a serious physical disability, or • Victim has a serious intellectual disability			
66C(2)/ 66C(5)	Aggravated sexual intercourse – child between 10 & 14	Sexual Intercourse - child between 10 and 14 Circumstances of Aggravation	• Intentionally or recklessly inflict actual bodily harm on victim or other person present/nearby; or • Threaten to inflict actual bodily harm on victim or other person present/nearby with offensive weapon or instrument; or • Offender in company; or • Victim under authority; or • Victim has serious physical disability; or • Victim has serious intellectual disability; or • Offender took advantage of victim being under the influence of alcohol or a drug in order to commit the offence	20Y		
66C(2)/ 66D/ 66C(5)	Aggravated attempt/assault with intent to have sexual intercourse – child between 10 & 14	Attempt/Assault with intent to have sexual intercourse - child between 10 and 14 Circumstances of Aggravation	• Intentionally or recklessly inflict actual bodily harm on victim or other person present/nearby; or • Threaten to inflict actual bodily harm on victim or other person present/nearby with offensive weapon or instrument; or • Offender in company; or • Victim under authority; or • Victim has serious physical disability; or	20Y		

			• Victim has serious intellectual disability; or • Offender took advantage of victim being under the influence of alcohol or a drug in order to commit the offence			
61J(1)/ 61J(2)	Aggravated sexual assault	Sexual intercourse without consent; Offender knows there is no consent; Circumstances of aggravation.	• Intentionally or recklessly inflict actual bodily harm on victim or other person present/nearby; or • Threaten to inflict actual bodily harm on victim or other person present/nearby with offensive weapon or instrument; or • Offender in company; or • Victim under 16; or • Victim under authority; or • Victim has serious physical disability; or • Victim has serious intellectual disability	20Y	10Y	50%
66C(1)	Sexual intercourse – child between 10 & 14	Sexual Intercourse - child between 10 and 14		16Y		
66C(1)/ 66D	Attempt/assault with intent to have sexual intercourse – child between 10 & 14	Attempt/Assault with Intent to have sexual intercourse - child between 10 and 14		16Y		
66EB(2)(a)	Procuring Child for Unlawful sexual activity - child under 14	Person over the age of 18 intentionally procure child under 14 for unlawful sexual activity with that child or any other person		15Y		
66C(4)/ 66C(5)	Aggravated sexual intercourse – child	Sexual intercourse - child between 14 and 16 Circumstances of aggravation	• Intentionally or recklessly inflict actual bodily harm on victim or other person present/nearby; or	12Y		

	between 14 & 16		• Threaten to inflict actual bodily harm on victim or other person present/nearby with offensive weapon or instrument; or • Offender in company; or • Victim under authority of offender; or • Victim has serious physical disability; or • Victim has serious intellectual disability; or • Offender took advantage of the victim being under the influence of alcohol or a drug in order to commit the offence			
66C(4)/ 66D/ 66C(5)	Aggravated attempt/assault with intent to have sexual intercourse – child between 14 & 16	Attempt/assault with intent to have sexual intercourse - child between 14 and 16 Circumstances of aggravation	• Intentionally or recklessly inflict actual bodily harm on victim or other person present/nearby; or • Threaten to inflict actual bodily harm on victim or other person present/nearby with offensive weapon or instrument; or • Offender in company; or • Victim under authority of offender; or • Victim has serious physical disability; or • Victim has serious intellectual disability; or • Offender took advantage of the victim being under the influence of alcohol or a drug in order to commit the offence	12Y		
66EB(2)(b)	Procuring child for unlawful sexual activity – child between 14 and 16	Person over the age of 18 intentionally procure child between 14 and 16 for unlawful sexual activity with that child or any other person		12Y		
66EB(3)(a)	Grooming child for unlawful sexual activity – child under 14	Engage in conduct that exposes a child to indecent material or provide a child with an intoxicating substance, with intention of making it easier to procure		12Y		

		the child for unlawful sexual activity with that child or any other person				
66EB(3)(b)	Grooming child for unlawful sexual activity – child between 14 and 16	Engage in conduct that exposes a child to indecent material or provide a child with an intoxicating substance, with intention of making it easier to procure the child for unlawful sexual activity with that or any other person		10Y		
66C(3)	Sexual intercourse – child between 14 & 16	Sexual Intercourse - child between 14 and 16		10Y		
66C(3)/ 66D	Attempt/assault with intent to have sexual intercourse – child between 14 & 16	Attempt/assault with intent to have sexual intercourse - child between 14 and 16		10Y		
61M(2)	Aggravated indecent assault – alleged victim under 10	Assault with act of Indecency on or in presence of alleged victim Victim under 10		10Y	8Y	80%
61M(1)/ 61M(3)	Aggravated indecent assault	Assault with act of indecency on or in presence of alleged victim Circumstances of Aggravation	• Offender in company; or • Victim under 16; or • Victim under authority of offender; or • Victim has serious physical disability; or • Victim has serious intellectual disability	7Y	5Y	71%
61O(2)	Aggravated act of indecency – alleged	Act of Indecency with/towards person under 10; or Incite person under 10 to act of indecency		7Y		

	victim under 10					
61O(1)/ 61O(3)	Aggravated act of indecency - alleged victim under 16	Act of Indecency with/towards person under 16; or Incite person under 16 to act of indecency Circumstances of Aggravation	• Offender in company; or • Victim under authority of offender; or • Victim has serious physical disability; or • Victim has serious intellectual disability	5Y		
61N(1)	Act of indecency - alleged victim under 16	Act of Indecency with/towards person under 16; or Incite person under 16 to act of indecency		2Y		

Appendix D[1] : Intellectual Disability & Special Care

Table 1: Sexual offences where the victim has an Intellectual Disability – Crimes Act 1900 (NSW)

Section	Offence	Elements of the Offence	Aggravating Factors	Stat Max	SNPP	%
61J(1)/ 61J(2)	Aggravated Sexual Assault	Sexual intercourse without consent; Offender knows there is no consent; Circumstances of aggravation.	• Intentionally or recklessly inflict actual bodily harm on victim or other person present/nearby; or • Threaten to inflict actual bodily harm on victim or other person present/nearby with offensive weapon or instrument; or • Offender in company; or • Victim under 16; or • Victim under authority of offender; or • Victim has serious physical disability; or • **Victim has serious intellectual disability**	20Y	10Y	50%
66C(2)/ 66C(5)	Aggravated sexual intercourse – child between 10 & 14	Sexual Intercourse - child between 10 and 14 Circumstances of Aggravation	• Intentionally or recklessly inflict actual bodily harm on victim or other person present/nearby; or • Threaten to inflict actual bodily harm on victim or other person present/nearby with offensive weapon	20Y		

[1] 1 **Note**: The offences are listed in descending order by seriousness, as defined by the statutory maximum penalty.

			or instrument; or • Offender in company; or • Victim under authority; or • Victim has serious physical disability; or • **Victim has serious intellectual disability**; or • Offender took advantage of victim being under the influence of alcohol or a drug in order to commit the offence			
66C(2)/ 66D/ 66C(5)	Aggravated attempt/assault with intent to have sexual intercourse – child between 10 & 14	Attempt/Assault with intent to have sexual intercourse - child between 10 and 14 Circumstances of Aggravation	• Intentionally or recklessly inflict actual bodily harm on victim or other person present/nearby; or • Threaten to inflict actual bodily harm on victim or other person present/nearby with offensive weapon or instrument; or • Offender in company; or • Victim under authority; or • Victim has serious physical disability; or • **Victim has serious intellectual disability**; or • Offender took advantage of victim being under the influence of alcohol or a drug in order to commit the offence	20Y		
80A(2A)/ 80A(1)	Aggravated sexual assault by forced self-manipulation	Compels another person to engage in self-manipulation, by means of a threat that the other person could not reasonably be expected to resist **self-manipulation** means the penetration of the vagina (including a surgically constructed vagina) or anus of any person by an object manipulated by the person, except where the penetration is carried out for proper medical or other proper purposes. **threat** means:	• Intentionally or recklessly inflict actual bodily harm on victim or other person present/nearby; or • Threaten to inflict actual bodily harm on victim or other person present/nearby with offensive weapon or instrument; or • Offender in company; or • Victim is under the age of 16 years, or • Victim under authority of the offender, or • Victim has a serious physical disability, or • **Victim has a serious intellectual disability**.	20Y		

		(a) threat of physical force, or (b) intimidatory or coercive conduct, or other threat, which does not involve a threat of physical force. Circumstances of Aggravation				
66C(4)/ 66C(5)	Aggravated sexual intercourse – child between 14 & 16	Sexual intercourse - child between 14 and 16 Circumstances of aggravation	• Intentionally or recklessly inflict actual bodily harm on victim or other person present/nearby; or • Threaten to inflict actual bodily harm on victim or other person present/nearby with offensive weapon or instrument; or • Offender in company; or • Victim under authority of offender; or • Victim has serious physical disability; or • **Victim has serious intellectual disability**; or • Offender took advantage of the victim being under the influence of alcohol or a drug in order to commit the offence	12Y		
66C(4)/ 66D/ 66C(5)	Aggravated attempt/assault with intent to have sexual intercourse – child between 14 & 16	Attempt/assault with intent to have sexual intercourse - child between 14 and 16 Circumstances of aggravation	• Intentionally or recklessly inflict actual bodily harm on victim or other person present/nearby; or • Threaten to inflict actual bodily harm on victim or other person present/nearby with offensive weapon or instrument; or • Offender in company; or • Victim under authority of offender; or • Victim has serious physical disability; or • **Victim has serious intellectual disability**; or • Offender took advantage of the victim being under the influence of alcohol or a drug in order to commit the offence	12Y		

66F(2)	Sexual intercourse—intellectual disability – victim under authority of offender	Sexual intercourse with victim with intellectual disability and victim is under the authority of the person in connection with any facility or programme providing services to persons who have intellectual disabilities Offender knows of disability		10Y		
66F(2)/ 66F(4)	Attempt Sexual intercourse—intellectual disability – under authority	Sexual intercourse with victim with intellectual disability and victim is under the authority of the person in connection with any facility or programme providing services to persons who have intellectual disabilities Offender knows of disability		10Y		
66F(3)	Sexual intercourse-intellectual disability - intent to take advantage	Sexual intercourse with victim with intellectual disability with intent to take advantage of vulnerability Offender knows of disability		8Y		
66F(3)/ 66F(4)	Attempt Sexual intercourse- intellectual disability - intent to take advantage	Attempt Sexual intercourse Victim has intellectual disability Intention to take advantage of vulnerability Offender knows of disability		8Y		
61M(1)/ 61M(3)	Aggravated indecent assault	Assault with act of indecency on or in presence of victim Circumstances of Aggravation	• Offender in company; or • Victim under 16; or • Victim under authority of offender; or • Victim has serious physical disability; or • **Victim has serious intellectual disability**	7Y	5Y	71%
61O(1)/ 61O(3)	Aggravated act of indecency - alleged	Act of Indecency with/towards person under 16; or Incite person under 16 to act of indecency with another	• Offender in company; or • Victim under authority of offender; or	5Y		

	victim under 16	Circumstances of Aggravation	• Victim has serious physical disability; or • **Victim has serious intellectual disability**			
61O(1A)/ 61O(3)	Aggravated act of indecency - alleged victim over 16	Act of Indecency with/towards person 16 or over; or Incite person 16 or over to act of indecency with another Circumstances of Aggravation	• Offender in company; or • Victim under authority of offender; or • Victim has serious physical disability; or • **Victim has serious intellectual disability**	3Y		

Appendix E: Miscellaneous Sexual Offences - *Crimes Act 1900*

Table 1: Miscellaneous Sexual Offences - Crimes Act 1900 (NSW)

Section	Offence	Elements of the Offence	Aggravating Factors	Stat Max	SNPP	%
79	Bestiality	Commit bestiality with animal		14Y		
80	Attempt Bestiality	Attempt to Commit bestiality with animal		5Y		
547C	Peep or Pry	Without reasonable cause, be in, on or near a building with intent to peep or pry upon another person		3M 2PU		
578C(2)	Publish indecent article - individual	Distribute, disseminate, circulate, deliver, exhibit, lend for gain, exchange, barter, sell, offer for sale, let on hire or offer to let on hire indecent article Have in possession or custody, or under control, for the above purpose Print, photograph or make in any other manner (whether of the same or of a different kind or nature) for the above purpose		12M 100PU		

[1] **Note**: The offences are listed in descending order by seriousness, as defined by the statutory maximum penalty.

578C(2)	Publish indecent article - corporation	Distribute, disseminate, circulate, deliver, exhibit, lend for gain, exchange, barter, sell, offer for sale, let on hire or offer to let on hire indecent article Have in possession or custody, or under control, for the above purpose Print, photograph or make in any other manner (whether of the same or of a different kind or nature) for the above purpose		200PU		

Appendix F[1]: Sexual Offences - *Summary Offences Act* 1988

Table 1: Sexual Offences under the *Summary Offences Act* 1988

Section	Offence	Elements of the Offence	Stat Max
11G	Loitering by convicted child sexual offenders near premises frequented by children	Convicted child sexual offender loitering, without reasonable excuse, in or near: (a) a school, or (b) a public place regularly frequented by children and in which children are present at the time of the loitering,	2Y 100PU
21G(1)	Film for indecent purposes	Film, or attempt to film, another person to provide sexual arousal or sexual gratification, whether for himself or herself or for a third person, where the other person: (a) is in a state of undress, or is engaged in a private act, in circumstances in which a reasonable person would reasonably expect to be afforded privacy, and (b) does not consent to being filmed	2Y 100PU
21H	Install device to facilitate filming for indecent purposes	Install device, or construct or adapt the fabric of any building, vehicle, vessel, tent or temporary structure for the purpose of facilitating the installation or operation of any device, with the intention of enabling that or any other person to commit an offence under section 21G	2Y 100PU
15	Living on earnings of prostitution	Knowingly live, wholly or in part, on the earnings of prostitution of another person	1Y 10PU
17	Allowing premises to be used for prostitution	Owner, occupier or manager, or a person assisting in the management, of any premises held out as being available: (a) for the provision of massage, sauna baths, steam baths or facilities for physical exercise, or (b) for the taking of photographs, or (c) as a photographic studio, or for services of a like nature, knowingly suffers or permits the premises to be used for the purpose of prostitution or of soliciting for prostitution.	1Y 50PU

[1] **Note**: The offences are listed in descending order by seriousness, as defined by the statutory maximum penalty.

5	Obscene Exposure	Wilfully and obscenely expose his or her person in or within view from a public place or a school	6M 10PU
20	Public acts of prostitution	Taking part in an act of prostitution or taking part in an act of prostitution in a vehicle that is: (a) in, or within view from, a school, church, hospital or public place, or (b) within view from a dwelling	6M 10PU
16	Prostitution or soliciting in massage parlours etc	Use, for the purpose of prostitution or of soliciting for prostitution, any premises held out as being available: (a) for the provision of massage, sauna baths, steam baths or facilities for physical exercise, or (b) for the taking of photographs, or (c) as a photographic studio, or for services of a like nature.	3M 5PU
18	Advertising premises used for prostitution	In any manner: (a) publish or cause to be published an advertisement, or (b) erect or cause to be erected any sign, indicating that premises are used or are available for use, or that a person is available, for the purposes of prostitution.	3M 6PU
18A	Advertising for prostitutes	In any manner, publish or cause to be published an advertisement for a prostitute	3M 10PU
19(1)	Soliciting clients by prostitutes – in a road or road related area, near or within view from a dwelling, school, church or hospital	In a road or road related area, near or within view from a dwelling, school, church or hospital, solicit another person for the purpose of prostitution.	3M 6PU
19(2)	Soliciting clients by prostitutes - in a school, church or hospital	In a school, church or hospital, solicit another person for the purpose of prostitution.	3M 6PU
19(3)	Soliciting clients by prostitutes – aggravating circumstance of causing harassment or distress	In or near, or within view from, a dwelling, school, church, hospital or public place, solicit another person, for the purpose of prostitution, in a manner that harasses or distresses the other person.	3M 8PU
19A(1)	Soliciting prostitutes by clients	In a road or road related area, near or within view from a dwelling, school, church or hospital, solicit another person for the purpose of prostitution.	3M 6PU
19A(2)	Soliciting prostitutes by client - in a school, church or hospital	In a school, church or hospital, solicit another person for the purpose of prostitution.	3M 6PU
19A(3)	Soliciting prostitutes by client – aggravating circumstance of causing harassment or	In or near, or within view from, a dwelling, school, church, hospital or public place, solicit another person, for the purpose of prostitution, in	3M 8PU

	distress	a manner that harasses or distresses the other person.	
21D	Minors not permitted in declared sex clubs	A person engaged in the operation of a declared sex club permits a minor to enter or remain in the club.	20PU
21E	Notices to be displayed in sex clubs	The manager of a declared sex club must ensure that there is continually displayed at each entry point to the club a notice that: (a) states that a minor is not permitted to enter the club, and (b) is displayed in such a manner that it would be reasonable to expect that a person entering the club would be alerted to its contents.	20PU

Appendix G[1]: Convicted Sex Offender Provisions

Section	Offence	Act	Stat Max
17	Failure to comply with reporting obligations	Child Protection (Offenders Registration) Act 2000 (NSW)	2Y
18	Furnish false or misleading information	Child Protection (Offenders Registration) Act 2000 (NSW)	2Y
13	Contravention of an order	Child Protection (Offenders Prohibition Orders) Act 2000 (NSW)	2Y
12	Breach of supervision order	Crimes (Serious Sex Offenders) Act 2000 (NSW)	2Y
11G	Convicted child sexual offender loiter near premises frequented by children	Summary Offences Act 2000 (NSW)	2Y

[1] **Note**: The offences are listed in descending order by seriousness, as defined by the statutory maximum penalty.

Appendix H[1]: Sexual Offences - Commonwealth Legislation

Table 1: Sexual Offences – Commonwealth Legislation

Act	Section	Short Title	SMP
Crimes Act 1914 Part IIIA – Child Sex Tourism	50BA(1)	Sexual intercourse with child under 16 (overseas)	17Y
	50BB(1)	Inducing child under 16 to engage in sexual intercourse (overseas)	17Y
	50BC(1)	Sexual conduct involving child under 16 (overseas)	12Y
	50BD(1)	Inducing child under 16 to be involved in sexual conduct	12Y
	50BD(2)	Inducing child under 16 to be present during sexual intercourse	12Y
	50DA(1)	Benefit from Child Sex Tourism	17Y
	50DB(1)	Encourage Child Sex Tourism	17Y
Criminal Code 1995 Division 270	270.6(1)(c) 270.8	Aggravated Sexual Servitude Circumstances of Aggravation: • Offence committed against a person under 18	20Y
	270.6(1)(d)	Sexual Servitude	15Y
	270.6(2)(c) 270.8	Conduct Business involving Sexual Servitude - Aggravated Circumstances of Aggravation: • Offence committed against a person under 18	20Y

[1] **Note**: The offences are listed in descending order by seriousness, as defined by the statutory maximum penalty.

	270.6(2)(d)	Conduct Business involving Sexual Servitude	15Y
	270.7(1)(a) 270.8	Deceptive Recruiting for Sexual Services – Aggravated Circumstances of Aggravation: • Offence committed against a person under 18	9Y
	270.7(1)(b)	Deceptive Recruiting for Sexual Services	7Y
Criminal Code 1995 Division 474 Subdivision C	474.19(1)	Using a carriage service for child pornography material	10Y
	474.20(1)	Possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service	10Y
	474.26	Using a carriage service to procure persons under 16 years of age	15Y
	474.27	Using a carriage service to groom persons under 16 years of age	12Y
	474.27(3)	Using a carriage service to groom persons under 16 years of age with intent	15Y
Customs Act 1901	233BAB(1)(h)	Import Child Pornography	10Y

Appendix I: Section 21a *Crimes (Sentencing Procedure) Act*

Table 1: 21A(2) Aggravating Factors

Section 21A(2)	Aggravating Factors
(a)	The victim was a police officer, emergency services worker, correctional officer, judicial officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work
(b)	The offence involved the actual or threatened use of violence
(c)	The offence involved the actual or threatened use of a weapon
(ca)	The offence involved the actual or threatened use of explosives or a chemical or biological agent
(cb)	The offence involved the offender causing the victim to take, inhale or be affected by a narcotic drug, alcohol or any other intoxicating substance
(d)	The offender has a record of previous convictions (particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences)
(e)	The offence was committed in company
(ea)	The offence was committed in the presence of a child under 18 years of age
(eb)	The offence was committed in the home of the victim or any other person
(f)	The offence involved gratuitous cruelty
(g)	The injury, emotional harm, loss or damage caused by the offence was substantial
(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)
(i)	The offence was committed without regard for public safety
(ia)	The actions of the offender were a risk to national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* of the Commonwealth)

(ib)	The offence involved a grave risk of death to another person or persons
(j)	The offence was committed while the offender was on conditional liberty in relation to an offence or alleged offence
(k)	The offender abused a position of trust or authority in relation to the victim
(l)	The victim was vulnerable, for example, because the victim was very young or very old or had a disability, or because of the victim's occupation (such as a taxi driver, bus driver or other public transport worker, bank teller or service station attendant)
(m)	The offence involved multiple victims or a series of criminal acts
(n)	The offence was part of a planned or organised criminal activity
(o)	The offence was committed for financial gain

Note: s 21A specifically stipulates that "the court is not to have additional regard to any such aggravating factor in sentencing if it is an element of the offence".

Appendix J: Guidelines Promulgated By The Guidelines Advisory Council

Indecent photographs of children

Indecent photographs of children (section 1 of the Protection of Children Act 1978 and section 160 of the Criminal Justice Act 1988, as amended by section 45 of the SOA 2003):

- Taking, making, permitting to take, possessing, possessing with intent to distribute,
- distributing or advertising indecent photographs or pseudo-photographs of children under 18.

Maximum penalty: **5 years** for possession; otherwise **10 years**

Type/nature of activity	Starting points	Sentencing ranges
Offender commissioned or encouraged the production of level 4 or 5 images Offender involved in the production of level 4 or 5 images	6 years custody	4–9 years custody
Level 4 or 5 images shown or distributed	3 years custody	2–5 years custody
Offender involved in the production of, or has traded in, material at levels 1–3	2 years custody	1–4 years custody
Possession of a large quantity of level 4 or 5 material for personal use only Large number of level 3 images shown or distributed	12 months custody	26 weeks–2 years custody

Type/nature of activity	Starting points	Sentencing ranges
Possession of a large quantity of level 3 material for personal use Possession of a small number of images at level 4 or 5 Large number of level 2 images shown or distributed Small number of level 3 images shown or distributed	26 weeks custody	4 weeks–18 months custody
Offender in possession of a large amount of material at level 2 or a small amount at level 3 Offender has shown or distributed material at level 1 or 2 on a limited scale Offender has exchanged images at level 1 or 2 with other collectors, but with no element of financial gain	12 weeks custody	4 weeks–26 weeks custody
Possession of a large amount of level 1 material and/or no more than a small amount of level 2, and the material is for personal use and has not been distributed or shown to others	Community order	An appropriate non-custodial sentence*

- 'Non-custodial sentence' in this context suggests a community order or a fine. In most instances, an offence will have crossed the threshold for a community order. However, in accordance with normal sentencing practice, a court is not precluded from imposing a financial penalty where that is determined to be the appropriate sentence.

Additional aggravating factors	Additional mitigating factors
1. Images shown or distributed to others, especially children 2. Collection is systematically stored or organised, indicating a sophisticated approach to trading or a high level of personal interest 3. Images stored, made available or distributed in such a way that they can be inadvertently accessed by others 4. Use of drugs, alcohol or other substance to facilitate the offence of making or taking 5. Background of intimidation or coercion 6. Threats to prevent victim reporting the activity 7. Threats to disclose victim's activity to friends or relatives 8. Financial or other gain	1. A few images held solely for personal use 2. Images viewed but not stored 3. A few images held solely for personal use and it is established both that the subject is aged 16 or 17 and that he or she was consenting.

Appendix K: Table Of Standard Non-parole Periods

Item No	Offence	Standard non-parole period
1A	Murder—where the victim was a police officer, emergency services worker, correctional officer, judicial officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work	25 years
1B	Murder – where the victim was a child under 18 years of age	25 years
1	Murder—in other cases	20 years
2	Section 26 of the Crimes Act 1900 (conspiracy to murder)	10 years

3	Sections 27, 28, 29 or 30 of the Crimes Act 1900 (attempt to murder)	10 years
4	Section 33 of the Crimes Act 1900 (wounding etc with intent to do bodily harm or resist arrest)	7 years
4A	Section 35 (1) of the Crimes Act 1900 (reckless causing of grievous bodily harm in company)	5 years
4B	Section 35 (2) of the Crimes Act 1900 (reckless causing of grievous bodily harm)	4 years
4C	Section 35 (3) of the Crimes Act 1900 (reckless wounding in company)	4 years
4D	Section 35 (4) of the Crimes Act 1900 (reckless wounding)	3 years
5	Section 60 (2) of the Crimes Act 1900 (assault of police officer occasioning bodily harm)	3 years
6	Section 60 (3) of the Crimes Act 1900 (wounding or inflicting grievous bodily harm on police officer)	5 years
7	**Section 61I of the Crimes Act 1900 (sexual assault)**	**7 years**
8	**Section 61J of the Crimes Act 1900 (aggravated sexual assault)**	**10 years**
9	**Section 61JA of the Crimes Act 1900 (aggravated sexual assault in company)**	**15 years**
9A	**Section 61M (1) of the Crimes Act 1900 (aggravated indecent assault)**	**5 years**

9B	**Section 61M (2) of the Crimes Act 1900 (aggravated indecent assault—child under 10)**	**8 years**[1]
10	**Section 66A of the Crimes Act 1900 (sexual intercourse—child under 10)**	**15 years**
11	Section 98 of the Crimes Act 1900 (robbery with arms etc and wounding)	7 years
12	Section 112 (2) of the Crimes Act 1900 (breaking etc into any house etc and committing serious indictable offence in circumstances of aggravation)	5 years
13	Section 112 (3) of the Crimes Act 1900 (breaking etc into any house etc and committing serious indictable offence in circumstances of special aggravation)	7 years
14	Section 154C (1) of the Crimes Act 1900 (taking motor vehicle or vessel with assault or with occupant on board)	3 years
15	Section 154C (2) of the Crimes Act 1900 (taking motor vehicle or vessel with assault or with occupant on board in circumstances of aggravation)	5 years
15A	Section 154G of the Crimes Act 1900 (organised car or boat rebirthing activities)	4 years

[1] The SNPP was increased to 8 years from 5 years in 2008.

15B	Section 203E of the Crimes Act 1900 (bushfires)	5 years
15C	Section 23 (2) of the Drug Misuse and Trafficking Act 1985 (cultivation, supply or possession of prohibited plants), being an offence that involves not less than the large commercial quantity (if any) specified for the prohibited plant concerned under that Act	10 years
16	Section 24 (2) of the Drug Misuse and Trafficking Act 1985 (manufacture or production of commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug	10 years
17	Section 24 (2) of the Drug Misuse and Trafficking Act 1985 (manufacture or production of commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug	15 years
18	Section 25 (2) of the Drug Misuse and Trafficking Act 1985 (supplying commercial quantity of prohibited drug), being an offence	10 years

	that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug	
19	Section 25 (2) of the Drug Misuse and Trafficking Act 1985 (supplying commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug	15 years
20	Section 7 of the Firearms Act 1996 (unauthorised possession or use of firearms)	3 years
21	Section 51 (1A) or (2A) of the Firearms Act 1996 (unauthorised sale of prohibited firearm or pistol)	10 years
22	Section 51B of the Firearms Act 1996 (unauthorised sale of firearms on an ongoing basis)	10 years
23	Section 51D (2) of the Firearms Act 1996 (unauthorised possession of more than 3 firearms any one of which is a prohibited	10 years
	firearm or pistol)	
24	Section 7 of the Weapons Prohibition Act 1998 (unauthorised possession or use of prohibited weapon)—where the offence is prosecuted on indictment	3 years

Appendix L: Submissions

Submission 1 – Women's Electoral Lobby (NSW)

Submission 2 – New South W ales Department of Community Services

Submission 3 – Professor B. McSherry (Monash University)

Submission 4 – NSW Ombudsman

Submission 5 – The Chief Magistrate of the Local Court

Submission 6 – New Zealand Ministry of Justice

Submission 7 – Department of Corrections; Community Probation & Psychological Services (New Zealand)

Submission 8 – New South Wales Council of Civil Liberties

Submission 9 – Department of Aging Disability and Home Care

Submission 10 – Department of Justice, Government of South Australia

Submission 11 – Central and Eastern Sydney Sexual Assault Service and Northern Sydney Sexual Assault Service

Submission 12 – New South Wales Director of Public Prosecutions

Submission 13 – Aboriginal Legal Service (NSW/ACT)

Submission 14 – Ministry for Police New South Wales

Submission 15 – NSW Department of Juvenile Justice

Submission 16 – Public Defenders Office New South Wales

Submission 17 – Legal Aid New South Wales

Submission 18 – Minister of Justice and Attorney General of Canada

Submission 19 – Bravehearts

Submission 20 – NSW Department of Corrective Services

Submission 21 - NSW Children's Guardian

Appendix M: Consultations

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Sentencing Guidelines Council, UK

Bee Ezete, Sentencing Guidelines Secretariat

Bibliography

BIBLIOGRAPHY

ALLARD, T., 'Child porn web broken by 70 arrests', *The Sydney Morning Herald* (online), 9 July 2008 http://www.smh.com.au

ASHWORTH, Andrew 'English sentencing guidelines in their public and political context' in Freiberg, A. and Gelb, K. (eds), *Penal Populism, Sentencing Councils and Sentencing Policy* (2008) 112

The AUSTRALIAN LAW REFORM COMMISSION, *Report on Films and Literature Censorship Procedure*, Report No 55 (1991)

BARNES, L. 'Protective Custody and Hardship in Prison (Sentencing Trends and Issues No 21, Judicial Commission of New South Wales, 2001)

BARNES, L., POLETTI, P. AND POTAS, I., 'Sentencing Dangerous Drivers in New South Wales: Impact of the *Jurisic* Guidelines on Sentencing Practice' (Research Monograph 21, Judicial Commission of New South Wales, 2002)

BENNETT, M. 'Ex-policeman/church minister jailed over child porn' *Global Report* (online), 13 June 2008, http://www.global-report.com

BRABYN J., 'A Defendant's Good Character in a Criminal Trial' 34 *Hong Kong Law Journal* 581

BROWN, M., 'Cop guilty of possessing child porn', *The Sydney Morning Herald* (online), 7 November 2008, http://www.smh.com.au

BROWN, M., 'Cop sentenced for child porn', *The Sydney Morning Herald* (online), 14 November 2008, http://www.smh.com.au

KENNY, C. S., *Outlines of Criminal Law* (16th ed, 1952)

FOX, R., 'Ryan v The Queen: Paradox and Principle in Sentencing A Paedophilic Priest - Ryan's Case in the High Court' [2002] *Melbourne University Law Review* 8

FRECKELTON I., 'Good Character, Paedophilia and the Purposes of Sentencing: Ryan v The Queen [2001] HCA 21; (2000) 118 A Crim 438' (2001) Vol 8 No. 2 *Psychiatry, Psychology and Law* 202

GREER C., *Sex Crime and the Media: sex offending and the press in a divided society* (2003)

HADAWAY, A., and DONNELLY, H., 'Pre-sentence Custody and Other Constraints on Liberty' (Sentencing Trends and Issues No 32, Judicial Commission of New South Wales, 2005)

HEILPERN, D., *Fear or Favour: Sexual Assault of Young Prisoners* (1998)

INDYK, S. and Donnelly, H., 'Full-time imprisonment in New South Wales and other jurisdictions: A national and international comparison' (Research Monograph 29, Judicial Commission of New South Wales, 2007)

JUDICIAL COMMISSION OF NEW SOUTH WALES, *Sentencing Bench Book* (September 2006)

KENNEDY, L. 'Child porn swoop nets seven suspects', *The Sydney Morning Herald* (online), 17 December 2007 http://www.smh.com.au

KONTOMINAS, B., 'Pedophile policeman jailed', *The Sydney Morning Herald* (Sydney) 21 June 2008, 2

KRONE, T., 'A Typology of Online Child Pornography Offending' (Trends and Issues in Crime and Criminal Justice No 279, Australian Institute of Criminology, 2004)

KRONE, T., 'Combating Online Child Pornography in Australia', in Quayle and Taylor (eds), *Viewing Child Pornography on the Internet: Understanding the Offence, Managing the Offender, Helping the Victims* (2005).

KRONE, T., 'Child Pornography Sentencing in NSW' (High Tech Crime Brief 08/2005, Australian Institute of Criminology, 2005)

LATHAM, Her Honour Judge Megan, 'Criminal Law Update', (2002) 6 *The Judicial Review* 55

LexisNexis, Butterworths, HOWIE, R.N. and JOHNSON, P.A. (Eds), *NSW Criminal Practice and Procedure*

LLYOD-BOSTOCK S., 'The Effects on Lay magistrates of hearing that the defendant is of good character, being left to speculate, or hearing that he has a previous conviction' (2006) *Criminal Law Review* 189

MUNDAY, R. 'What Constitutes Good Character' [1997] *Criminal Law Review* 247

NEW SOUTH WALES, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5813 (Bob Debus, Attorney General)

The NEW SOUTH WALES LAW REFORM COMMISSION, *Sentencing Corporate Offenders*, Report 102 (2003)

The NEW SOUTH WALES LAW REFORM COMMISSION, *Invasion of Privacy,* Consultation Paper 1 (2007)

NEW SOUTH WALES, ROYAL COMMISSION INTO THE NEW SOUTH WALES POLICE SERVICE, *Final Report Vol V: The Paedophile Inquiry* (1997)

NEW SOUTH WALES, ROYAL COMMISSION INTO THE NEW SOUTH WALES POLICE SERVICE, *Final Report Vol IV: The Paedophile Inquiry* (1997)

NEW SOUTH WALES SENTENCING COUNCIL, *Report on Sentencing Trends and Practices 2003-2004* (2004)

NEW SOUTH WALES SENTENCING COUNCIL, *Report on Sentencing Trends and Practices 2004-2005* (2005)

NEW SOUTH WALES SENTENCING COUNCIL, *Report on Sentencing Trends and Practices 2005-2006* (2006)

NEW SOUTH WALES SENTENCING COUNCIL, *Report on Sentencing Trends and Practices 2006-2007* (2007)

'Pensioner convicted in child phone first', *ABC News* (online), 9 July 2008 http://www.abc.net.au

POWER, Magistrate P., *Research materials,* Children's Court of Victoria, 2 January 2008

RUSH, Emma and LA NAUZE, Andrea, 'Letting Children Be Children-Stopping the Sexualisation of Children in Australia' (Discussion Paper No 93, The Australia Institute, 2006)

The SENTENCING ADVISORY COUNCIL (Victoria), 'Knowingly Possess Child Pornography' (Sentencing Snapshot No 51, 2008)

SENTENCING ADVISORY PANEL (UK), *Advice to the Court of Appeal on Offences Involving Child Pornography* (15 August 2002)

SENTENCING GUIDELINES COUNCIL (UK), *Sexual Offences Act 2003: Definitive Guideline* (2007)

STANDING COMMITTEE OF ATTORNEYS GENERAL, *Unauthorized Photographs on the Internet and Ancillary Privacy Issues* (Discussion Paper, 2005)

STATE PAROLE AUTHORITY, *Annual Report 2007* (2008)

TAYLOR, M. 'Child Pornography and the Internet: Challenges and Gaps' (Paper presented at the World Congress Against the Commercial Sexual Exploitation of Children, Yokohama, 17-20 December 2001)

TAYLOR M., QUAYLE, E., and HOLLAND G., 'Child Pornography, The Internet and Offending', *Policy Research*, Summer 2001

WIGMORE J., *Wigmore's Code of the Rules of Evidence in Trials at Law* (3rd ed, 1942)

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