Submission of the

NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES

to the

NSW Sentencing Council's

review of

Penalties for sexual assault offences

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draft 2

1. Executive Summary

In summary, the New South Wales Council for Civil Liberties (**CCL**) makes the following submissions:

1. CCL opposes the use of standard minimum and statutory maximum sentences in relation to sexual assault offences. In view of the range of offenders and criminal behaviours covered by sexual assault offences, CCL believes it is crucial that the court has a wide discretion to impose sentences that fit the crime - from the most serious offence to the least serious.
2. CCL does not believe that recidivism statistics justify the general use of community protection orders for risk management purposes in relation to sex offenders. The purpose of any scheme of control orders that is imposed should be treatment and rehabilitation.
3. CCL considers that good character should be retained as a mitigating factor in sexual assault cases.
4. CCL believes that the need to serve a sentence in protective custody constitutes an appropriate basis for a finding of special circumstances.
5. CCL notes that rates of imprisonment for sexual assault in NSW have risen to the point where they are the highest in the country and that recidivism rates for sexual offences, both in NSW and around the world, are low relative to other offences.[1] Overall imprisonment rates for sexual assault have risen to 95% while full time prison sentences have been imposed in 100% of aggravated sexual assault cases under the current regime.[2]
6. In the wider community however, recidivism rates among sex offenders continue to be widely over-estimated and imprisonment rates under-estimated. CCL therefore believes it would be in the interests of justice for government to ensure that the community has better access to clear, accurate and comprehensible information on these issues.

[1] Lievore "Recidivism of sexual assault offenders: Rates risk factors and treatment efficacy" (2004), Australian Institute of Criminology.
[2] Judicial Commission of NSW "Sentencing Trends and Issues: Trends in the use of full time imprisonment 2006-2007" (November 2007) p 5.

2. Statutory maximum and standard minimum penalties

7. CCL opposes the expanded use of statutory maximum penalties and standard minimum penalties. The sentencing process cannot and should not be reduced to a sequence of mathematical additions and deductions from a fictional "average" of objective seriousness.[3]

8. Standard minimum and statutory maximum sentencing systems operate effectively as a statutory presumption, which can significantly fetter a court's discretion to impose an appropriate sentence in the particular circumstances of the case.

9. While the aim of ensuring consistency in sentencing for similar crimes is important, it appears that the practical result of standard sentences is to significantly raise rates of imprisonment across all categories of sexual offences.[4]

10. Standard sentences tend to be formulated with particular (extremely serious) cases in mind and cannot adequately anticipate the range of factual circumstances that will come before the courts, particularly in a complex area such as sexual assault.

2.1 A better approach to consistency

11. While consistency in sentencing for offences that are genuinely alike is a laudable goal, CCL believes it can better achieved by:

    - Ensuring judges provide thorough reasons for their sentencing decisions, so that these reasons can be applied by judges making decisions in similar cases;
    - Ensuring judges have access to the best possible information regarding sentences and reasons for sentence in other cases so that they are able to ensure their sentences are consistent or adequately distinguished; and
    - Appropriate use of guideline judgments by the courts.

[3] See *Wong v R; Leung v R* (2001) 207 CLR 584: '[T]o attempt some statistical analysis of sentences for an offence which encompasses a very wide range of conduct and criminality (as the offence now under consideration does) is fraught with danger, especially if the number of examples is small. It pretends to mathematical accuracy of analysis where accuracy is not possible' (para [66] per Gaudron, Gummow and Hayne JJ).

[4] Judicial Commission of NSW "Sentencing Trends and Issues: Trends in the use of full time imprisonment 2006-2007" (November 2007).

3. Alternative sentence regimes

3.1 Reasons for orders

3.1.1 Punitive orders

12. CCL opposes the use of control orders as a punitive measure in relation to any class of offender.

3.1.2 Recidivism and risk management

13. CCL does not believe that documented recidivism rates among persons convicted of sexual assaults justify the use of control orders for risk management purposes. Rates of re-offending among sex offenders generally are low both in absolute terms and relative to community perceptions.[5] One study of more than 1,000 sex offenders released in 1992 and 1993 from determinate sentences of imprisonment of four years or longer found that only five per cent had been reconvicted of a further sexual offence.[6] A second study of 174 sex offenders released in the 1990s found that 4.3 per cent of the sample had been convicted of a further sexual crime within four years of their release.[7] Another meta-analysis of 61 recidivism studies with over 23,000 subjects from six countries for up to twenty years after release also found a relatively low recidivism rate of 13% among sexual offenders.[8]

14. Importantly recidivism rates vary significantly between different sexual offences, and policy should not be made on the assumption that all sex offenders are at equal risk of re-offending.[9]

15. In CCL's view, recidivism rates do not justify the general use of control orders as a risk management tool in relation to individuals convicted of sexual crimes, the vast majority of whom never re-offend.

3.2 Conditions for making orders

16. If control orders are to be used, the following principles should be observed:

[5] Lievore "Recidivism of sexual assault offenders: Rates risk factors and treatment efficacy" (2004), Australian Institute of Criminology.
[6] "Sexual reconviction for sexual offenders discharged from prison in England and Wales" (2001) 41 B.J.Crim. 285.
[7] R. Hood, S. Shute, M. Feilzer and A. Wilcox, "Sex offenders emerging from long-term imprisonment" (2002) 42 B.J.Crim. 317.
[8] Hanson & Bussière "Predicting relapse: A meta-analysis of sexual offender recidivism studies" (1998) *Journal of Consulting and Clinical Studies,* vol. 66, no. 2, pp. 348–62. (found an overall recidivism rate of 13).
[9] Lievore "Recidivism of sexual assault offenders: Rates risk factors and treatment efficacy" (2004), Australian Institute of Criminology.

- The primary aim of control orders should be rehabilitation and treatment, *not* punishment. Orders should be accompanied by a treatment and rehabilitation plan and clearly specify any behaviour the recipient is prohibited from engaging in and obligations he or she must fulfil.
- A control order should only be imposed by a court. The court must be satisfied on reasonable evidence that there is a real and unacceptable risk the individual offender will re-offend.
- Orders should not be imposed on anyone who has not been convicted of a serious sexual offence. Sexual offence control orders should not be used in relation to violent non-sexual offences in the way that schedule 5 of the UK Act permits.
- An order should only be imposed where the court is satisfied that an offender subject to the order will have access to social services and treatment programs necessary to maximise their chances of rehabilitation.
- Orders should not be of indefinite duration and should be subject to regular review.
- Orders must be appelable and subject to ongoing court supervision and review.
- Service providers involved in supervising or providing treatment and rehabilitation to offenders subject to an order should be required to provide the court with progress reports, to allow for informed decisions on review as to whether continuation of an order is appropriate.
- Breach of an order should be dealt with under the courts' general power to deal with contempt and should not constitute a separate offence.
- Orders should not be imposed on juvenile offenders.

17. CCL opposes the use of sex offender notification schemes either alone or in conjunction with control orders.

4. Good character as a mitigating factor

18. CCL's submits that good character remains an appropriate mitigating consideration in relevant cases. Any legislative response should not prevent courts from considering good character.

4.1 The relevance of character

19. In general good character is considered to be relevant as a mitigating factor in criminal sentencing on the basis that it is indicative of greater prospects of rehabilitation. In *Ryan v The Queen* the High Court found that the common law requires a court to take previous good character into account when sentencing for sexual assault offences. However, the effect of this mitigating factor on sentence length is modest in many cases[10] for the reasons considered below.

20. It has sometimes been suggested that good character is not relevant to sexual assault cases because good character does not reflect chances of rehabilitation in these cases. While attention is often focused on the habitual offenders considered to have limited prospects of rehabilitation, sexual assault covers a wide range of offences and offenders, and some offenders have much better rehabilitative prospects than others.[11]

4.2 Good character as an aggravating factor

21. In some cases previous good character will effectively contribute to the aggravating circumstances taken into account by a court, particularly in instances where previous good character allowed the offender to obtain the position of trust necessary to commit the offence. The fact the offender abused a position of trust and authority in relation to the victim will be taken into account as an aggravating factor at common law and under: s 21A(2)(k) of the *Crimes (Sentencing Procedure) Act*. The defendant's previous good character will usually be integral to the position of trust and authority they held and will operate as an aggravating factor in these cases.

4.3 Balancing the significance of good character

22. In our view the requirement to consider a defendant's previous good character is appropriately balanced by the requirement to consider whether the offender abused a position of trust and authority obtained through their previous good character. Permitting good character to operate as a mitigating factor allows Courts to sentence appropriately in cases where an offender's good character is in fact indicative of improved prospects of rehabilitation while still punishing more harshly those who abuse the positions their previous good character allowed them to obtain.

[10] For example the 1 year reduction in the 15 year maximum sentence given in *Ryan*'s case
[11] Lievore "Recidivism of sexual assault offenders: Rates risk factors and treatment efficacy" (2004), Australian Institute of Criminology.

5. Special circumstances and protective custody

5.1 Use of protective custody

23. One of the most common reasons for the use of protective custody is because individuals fear violence at the hands of other inmates because of they are in custody for a sex offence.[12]

24. It is important to distinguish between normal protection and strict protection. The higher the level of protection the smaller the range of people the inmate is able to associate with. Most sex offenders are subject to strict protection.

5.2 Additional hardship in protective custody

25. Protective custody imposes substantial additional hardship on offenders, particularly those serving sentences in strict protective custody. Once placed in *strict* protective custody offenders are assumed to be child sex-offenders or informers and face a stigma which places them at risk of serious injury[13] or death both inside and outside the prison system.

26. Courts in Australia[14] and England[15] have long recognised that the requirement to serve a sentence in protective or strict protective custody imposes more onerous conditions than those faced by inmates in the general prison community. The extra hardship involved in protective custody is also given legislative acknowledgement in the time limits imposed by the legislation on periods to be served in protection.[16] It has been noted by courts that protective custody involves "a degree of isolation, removal of freedoms and privileges available to other inmates and other forms of hardship".[17] The judicial commission has stated that "the constant threat of, or actual, violence, labelling and isolation, and the restrictive nature of protective custody can have an immense impact on the mental and physical health of offenders held in protective custody".[18]

[12] *R v Meskers* (1991) NSWCCA (13/6/91 unreported)
[13] eg *Rv Blanche* (1994) NSWCCA (28/9/94 unreported; *R v Watson* [1999] NSWCCA 227; *R v Carter* (1997) NSWCCA (unreported 29/10/97)
[14] *AB v The Queen* [1999] HCA 46 per Kirby J at [105]; *R v Inge* (1999) 73 ALJR 1,563 at 58.
[15] *R v Davies and Gorman* (1978) 68 Cr App R 319 at 322; *R v Lowe* (1977) 66 Cr App R 122.
[16] *Crimes (Administration of Sentences) Act 1999* (NSW) ss 13, 14 & 17
[17] R *v Rogers* (1996) NSWCCA (unreported, 21/6/96).
[18] Judicial Commission of NSW "Sentencing Trends: Protective custody and hardship in prison" (2001).

5.2.1 Special circumstances & protective custody

27. In recognition of the additional hardship associated with strict protection courts have been willing to take the need for protection into account as "special circumstances" when sentencing. This adjustment of sentences and non-parole periods is an important mechanism for ensuring that offenders are not punished more harshly just because for some reason they are more vulnerable than the rest of the prison population.

28. This additional hardship applies to all offenders serving sentences in protective custody. This includes not only sex offenders, but also police informers and many vulnerable groups such as the disabled, the mentally ill, the very young and old, and aboriginal offenders.

29. It is important to remember that both international and Australian municipal law provide that offenders are sent to gaol *as* punishment and not *for* punishment.[19] Inmates should not be exposed to additional hardship in gaol because they are a member of a vulnerable group or have committed a particular offence.

30. Removing the allowance for the additional hardship of protective custody would amount to effective discrimination against these vulnerable groups. Removing the consideration only for sexual offences would amount to an arbitrarily additional punishment imposed on those sex offenders who are too vulnerable to serve their sentence in the general prison population.

Protective custody, particularly strict protective custody should continue to be regarded as a special circumstance in sentencing. Removing this mechanism would amount to discrimination through the imposition of harsher punishments on prisoners who for any reason are too vulnerable to serve their sentence in the general prison population.

[19] Rule 57, United Nations Standard Minimum Rules for the Treatment of Prisoners (UN Standards); cited *R v Attie* [2000] NSWCCA 70 at [6]; Judicial Commission of NSW "Sentencing Trends: Protective custody and hardship in prison" (2001).