THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Criminal Law Committee

Response to consultation paper

Sentencing: prelimary outline of the review

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New South Wales Law Reform Commission
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Introduction

The NSW Young Lawyers Criminal Law Committee ("the Committee") refers to the consultation paper ("the Paper") produced by the New South Wales Law Reform Commission in response to the terms of reference referred by the Attorney-General on the review of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("the Sentencing Act").

NSW Young Lawyers, a Division of the Law Society of NSW, is made up of legal practitioners and law students who are under the age of 36 or in their first 5 years of practice. Our membership is made up of some 13,000 members.

The Young Lawyers Criminal Law Committee provides education to the legal profession and wider community on current and future developments in the criminal law, and identifies and submits on issues in need of law reform.

The ways in which sentencing law as a whole can be simplified and made more transparent and consistent

Priorities

A question is posed by the Paper about the ways in which sentencing law can be "simplified and made more transparent and consistent". It is assumed here that what is under consideration is legislative reform – clearly, the most simple model is that in which there is no prescription at all. However, by way of paradigm, it is helpful to preface our comments by pointing out the following:

1. More consistent sentencing, by definition, requires the law to be more prescriptive.
2. The more prescriptive the law is, in general, the less simple it is. And
3. The more transparency the system requires, the more a judicial officer is required to state of their reasons (again, in contrast to simplicity), and transparency generally requires at least some form of prescription.

Accordingly, to a degree the three objectives embodied in the question posed by the NSWLRC are *competing* objectives.

The Committee suggests that the review ought to settle an order of priorities between these goals (if none has already been set) rather than pursuing the three very worthy goals inconsistently throughout the review process.

Sources of complication

The Committee is of the view that the main complicating factors in sentencing law have arisen from legislation designed (at least ostensibly) to make sentences more consistent – usually, more consistently punitive. It is comparatively rare that

the legislature intervenes in order actively to reduce sentences, or to force courts to focus on rehabilitation at the expense of retribution.

It has also been an unfortunate feature of successive Governments that unusual, singular, examples of criminality have resulted in ad-hoc additions to the sentencing regime, although there may not have been any objective evidence that amendment was necessary. Not infrequently, important amendments have been pushed through with unreasonably short consultation periods of two weeks.

The very large body of appellate law surrounding s21A, and Standard Non-Parole Period ("SNPP") sentences supports these observations; the courts have been left in many cases to attempt to clarify and incorporate imperfect legislative models more than ought reasonably to be necessary.

The Committee therefore supports an incremental, evidence-based approach to amendments to sentencing law. The legislature ought to approach each amendment to sentencing legislation with slow caution (in contrast to the approach exhibited in the recent past).

If the law is to retain prescriptive lists of factors for courts to consider (such as s21A or SNPP's), changes or additions to those lists ought to be on the basis of more than individual case examples. It follows that the Committee is of the view that funding ongoing, consultative reviews by independent non-partisan bodies, such as the Sentencing Council and the NSWLRC are to be encouraged.

Priority issues, and alternatives to full-time imprisonment

Alternatives to full-time custody require appropriate focus upon the kinds of offenders to which they are directed. The Committee is aware of a number of classes of offenders who do not appropriately fit into *any* of the current alternatives to fulltime custody, typically because of drug or mental health problems. The consequence is that the offenders are either incarcerated or have conditions imposed that are inadequate to achieve the purposes of sentencing.

Take as an example the class of persons who would previously have received Periodic Detention. It would be well-known that the abolition of Periodic Detention was not widely supported by the legal profession and Intensive Corrections Orders ("ICO's") represent, at best, an incomplete replacement.

ICO's are in fact an appropriate and adapted alternative to imprisonment which the Committee supports, but they have limited availability and are poorly adapted to any person who is already unsuitable for a Community Service Order. The Committee is of the view that the reduced availability of Periodic Detention as an alternative to full-time custody will lead to an expansion in the use of suspended sentences at one end, and fulltime custody at the other (typically known as

"sentence creep"). This is in addition to the trends already noted by the NSW Bureau of Crime Statistics and Research. The issue is significant and ought be a line of further inquiry by the Commission.

Similar arguments can be made in relation to the availability of diversionary or alternative schemes such as the Drug Court, which is well-adapted to reducing recidivism and promoting rehabilitation. Their limited availability would appear to be primarily the result of funding decisions, but a long-term review of the benefits of avoiding the future cost of incarceration may well establish this to be a false economy.

As specific fields of inquiry, the Committee suggests:

- **Should the availability of Intensive Correction Orders be extended from two years to three?**
- **Should Periodic Detention be reintroduced to strengthen intermediate sentencing options?**
- **To what extent would greater statewide availability of intermediate orders such as home detention, often unavailable in non-metropolitan areas, lessen the court's dependence on suspended sentences?**
- **Can funding of diversionary and other rehabilitative schemes reduce the long-term cost per offender, when measured over the life of that offender, and if so is there any reason not to take a longer-term approach to funding?**

Section 21A, SNPPs and guideline judgments

Section 21A of the Sentencing Act sets out the factors to which a judicial officer is to have regard. The tabled standard non-parole periods ("SNPPs") suggest what sentence is appropriate for a 'mid-range' offence. By the same means as maximum penalties, these measures appropriately reflect the legitimate expectations of the community in sentencing persons convicted of various offences.

However, the Committee believes that sentencing is, and should be, a judicial value judgment based on consideration of *all* relevant factors, having regard, of course, to the maximum penalty. This position was endorsed by the High Court in *Muldrock v The Queen* [2011] HCA 39 (at [26]). *Hili v The Queen* [2010] HCA 45 had earlier followed similar principles in rejecting another restrictive norm of sentencing.

Too strong a tether on the ability of a sentence to reflect the circumstances of the case will inevitably lead to injustices. As indicated above, the Committee is of the view that the increasingly prescriptive approach taken to these provisions has resulted in courts taking a narrower view of the legislation than intended, in order to overcome injustice.

The Committee suggests the following areas for investigation:

- **What effect have *Hili* and *Muldrock* had on the use of sentencing statistics, maximum penalties and SNPPs in sentencing (for offences both inside and outside the midrange)?**
- **Section 21A and the SNPPs are complex in their application and consequently produce disproportionate complex and burdensome workloads for practitioners – can their operation be simplified?**
- **If the complexity of section 21A and the SNPPs lead to higher costs for government agencies and NGO's, such as Legal Aid, the Aboriginal Legal Service and the Office of the Director of Public Prosecutions, should consideration be given to increasing funding of those organisations accordingly?**
- **Does the requirement that a sentence of less than six months be served without the benefit of parole (pursuant to s46 of the Sentencing Act) require reconsideration?**

Mandatory sentencing

The Committee does not support the introduction of further mandatory sentences.

NSW has few mandatory minimum sentences, restricted to crimes such as murder and certain trafficking offences (s 61 *Crimes (Sentencing Procedure) Act 1999* (NSW)). Even these are not 'true' mandatory minimum sentences, as they are subject to particular findings of culpability and gravity.

The only mandatory minimum sentence in the full sense of the term is the mandatory life sentence for knowing murder of a police officer (s 19B *Crimes Act 1900* (NSW)), introduced in 2011.

Mandatory sentencing for more mundane offences has not enjoyed a particularly popular or effective history in New South Wales. More than a century ago, Parliament enacted (against the recommendation of the Law Reform Commission) a comprehensive set of mandatory minimum sentences as the *Criminal Law Amendment Act 1883* (NSW), in response to public dissatisfaction with the perceived inconsistency of sentencing. The new regime swiftly became a fiasco because many sentences were unable to accommodate the circumstances of the offence, and were fundamentally unjust. Instances of unconscionable mandatory sentences were decried by judicial officers, by the media and *Sydney Morning Herald*, and, most importantly, by the public. Minimum mandatory sentencing was repealed in 1884, after only one year.

The Committee is of the view that NSW ought to heed the warning rendered by the scheme in 1883. Nothing has changed to suggest that the community would be more receptive to mandatory sentences now, if they were fully informed of the circumstances leading to a sentence.

The Committee thanks you for the opportunity to comment. We note that the Outline paper indicates face-to-face consultations will take place with stakeholders; NSW Young Lawyers would welcome any invitation to expand upon this or any subsequent submission in relation to the issues raised.

If you have any questions in relation to the matters raised in this submission, please contact:

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The primary authors of this submission were **Alexander Edwards** and **Thomas Spohr**.

Yours faithfully,

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