

Crime and Justice Reform Committee

Preliminary Submission on Sentencing

The Crime and Justice Reform Committee was established to provide information concerning the efficacy and cost effectiveness of current responses to crime, and the potential for alternative approaches. It does so by making experts in criminology available to parliamentarians, political parties, the media and other interested persons and organisations. This continues to be the function of the Committee.

The Crime and Justice Reform Committee makes the following submission in response to the call for preliminary submissions to the NSW Law Reform Commission's reference into Sentencing.

Background issues

We welcome the government's commitment to reducing re-offending and to using alternative to imprisonment for less serious cases. We note that imprisonment is costly and can be counter-productive, including by making recidivism more likely in some cases.¹

Any revision to sentencing law should continue to emphasise that imprisonment is to be used as a last resort.

We draw the commission's attention to the substantial growth in the imprisonment of women, and especially Indigenous women in NSW in recent years, and urge consideration of the specific issues that arise for them and the need to find alternatives to incarceration that are accessible and responsive to their needs.²

We note too, the work of the NSWLRC in its reference on *People with cognitive and mental health impairments in the criminal justice system*. Given the over-representation of people with cognitive and mental health impairments in the prison system, emphasis needs to be given to finding alternatives to incarceration that offer meaningful support and supervision in the community.

Priority areas

- *Alternatives to imprisonment and extending diversionary schemes*
 - Ensuring that alternatives to imprisonment are available beyond metropolitan areas

¹ See Brown, D (2010) *The Limited benefit of Prison in Controlling Crime Current Issues in Criminal Justice* 22(1) 137 at 141.

² Productivity Commission *'Overcoming Indigenous disadvantage: Key indicators 2011'* 4.133 and associated tables.

- Expanding the range of diversionary options for offenders
- Providing diversion schemes and meaningful, accessible alternatives to incarceration for i) **Indigenous people**, and ii) **people with cognitive and mental health impairments**, since these two groups are especially over-represented in the prison system. MERIT and CREDIT³ may provide useful models of programs that can be used in conjunction with diversion, or alternative sanctions but need to be made more responsive to the needs of specific groups of offenders, as recognised in the Auditor General’s review of the use of MERIT for Aboriginal defendants.⁴
- Suspended sentences should be retained until additional non-custodial sentencing options are developed, since they offer one of few alternatives available outside metropolitan areas. Based on empirical research undertaken by the NSW BOCSAR,⁵ added consideration should be given to placing conditions on their use to ensure that they are used as alternative to incarceration, and not in place of non-custodial options.

➤ *S21A Crimes (Sentencing Procedure) Act 1999 - review or repeal*

It is the preliminary view of the CJRC that this section should be repealed because of its undue complexity.

➤ *Mandatory life sentences for the murder of police officers – should be reviewed.*

There is no evidence that courts of appeal upheld inappropriate sentences for imprisonment in such situations. The imposition of mandatory sentencing in these circumstances can, thus, only result in inappropriate sentences, and an unnecessary diminution of the independent role of the courts in sentencing.

³ We note that an evaluation of CREDIT which is underway by the NSW Bureau of Crime Statistics and Research is due out soon and should be given due consideration.

⁴ The Audit Office of New South Wales *Helping Aboriginal defendants through MERIT* (NSW Attorney General’s Department, NSW Department of Health, NSW Police Force, 2009) <<http://www.audit.nsw.gov.au/publications/reports/performance/2009/merit/merit.pdf>>

⁵ Lia McInnis & Craig Jones ‘Trends in the use of suspended sentences in NS W’ *Bureau Brief* Issue paper no. 47 NSW Bureau of Crime Statistics and Research (May 2010) [http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/BB47.pdf/\\$file/BB47.pdf](http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/BB47.pdf/$file/BB47.pdf)

➤ *s.44 Crimes (Sentencing Procedure) Act 1999 - review.*

The review should re-consider the ratio between non parole periods and the balance of the sentence. Some offenders would be better served by a lesser period in custody and a longer time being supported and supervised in the community; this may be particularly so for vulnerable offenders such as those with cognitive and mental health impairments.

➤ *Discounts for pleas of guilty– review.*

We remain in favour of discounts for guilty pleas and would not want the current level of discount rolled back, but are open to consideration of ways in which the process of determination of discounts could be improved.

➤ *Standard Minimum non-parole periods - review*

Minimum non-parole periods have been associated with longer sentences and increases in the prison population.⁶ Any extension of minimum non-parole periods to additional offences is undesirable as it would undermine the government’s stated intention of reducing the prison population. In light of the High Court’s decision in *Muldrock* it is timely to revisit mandatory non-parole periods and consider recasting them in a manner more consistent with the need for courts to exercise independent judgment in sentencing.

➤ *Sentencing Indigenous offenders – review*

The over-representation of Indigenous offenders in prison has deteriorated⁷ since the RCIADIC. The Fernando principles have had little effect on the sentencing of Indigenous offenders.⁸

⁶ Polletti P and Donnelly, H (2010) *The impact of the standard non-parole period sentencing scheme on sentencing patterns in New South Wales* Research Monograph 33 NSW Judicial Commission.

⁷ Jacqueline Fitzgerald ‘Why are Indigenous imprisonment rates rising?’ (2009) Crime and Justice Statistics Bureau Brief Issue Paper no. 41

⁸ Janet Manuell, *The Fernando Principles: the sentencing of Indigenous offenders in NSW* (for the NSW Sentencing Council 2009).

Other matters

➤ *Grid Sentencing*

Grid sentencing, mentioned in the outline paper, is not an option that we support. US scholarship indicates that sentencing grids have commonly focused narrowly on offence seriousness and the offender's criminal history to the exclusion of other relevant and ethical factors, and have resulted in limiting judicial discretion but the shift of discretion elsewhere such as to police and prosecutors⁹ in ways that are not open to review. Mandatory grid sentencing has been ruled unconstitutional in the US following *United States v. Booker*.¹⁰ Grid sentencing in the US is now increasingly of advisory impact only (see e.g. *Rita v US*),¹¹ and the entire system is currently under review in the Congress.

⁹ Tonry, Michael. 1996. *Sentencing matters*. New York: Oxford Univ. Press.

¹⁰ 543 U.S. 220 (2005).

¹¹ 551 U.S. 338 (2007). See further American Civil Liberties Union Submission to the House of Representatives Committee on the Judiciary Subcommittee on Crime, Terrorism and Homeland Security Hearing on "Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after *U.S. v. Booker*" October 12, 2011

http://www.aclu.org/files/assets/aclu_sentencing_hearing_testimony_10-12-11_final.pdf