

Crimes (Sentencing Procedure) Act 1999 (NSW): Major areas for Investigation and Reform

1. The ways in which sentencing law as a whole can be simplified and made more transparent and consistent.		
Act reference	Section/s	Comment
Part 3: Division 1: Aggravating, mitigating and other factors in sentencing	s.21A	<p>The provisions of s. 21A are confusing, as they overlap with the common law principles of sentencing. The section is often viewed as a checklist for judges and there is a risk of double counting or errors being made during sentencing. Legal Aid NSW recommends that the section either be simplified, or if simplification is not possible, that it be omitted from the Act.</p> <p>The Judicial Commission of NSW has made a number of observations about this section, in particular s.21A (2). The Judicial Commission notes that the section requires "<i>a great degree of care akin to surgery</i>"¹ and as a result the section has been misapplied on a regular basis and is "<i>one of the major sources of sentencing errors</i>".²</p> <p>Justice Howie also criticised the section and its application in case law. Justice Howie's criticisms include: the section is often treated as a "separate and discrete part of the Act"; there is often double counting when it comes to aggravating factors; judges erroneously independently identify aggravating features when the Crown has failed to identify such factors, and guideline judgements often overlap with section 21A.³</p>

¹ Judicial Commission NSW, 'Sentencing Procedures Generally', http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/section_21a.html#p11-020

² Ibid.

³ Cited on Ibid 8.

2. Priority issues in sentencing law that require investigation and reform.		
Act reference	Section/s	Comment
Part 2: Divisions 2 & 3 – Custodial and Non-custodial sentences	ss.5-20	<p>Part 2: Divisions 2 & 3 of the Act are critical to the whole sentencing process as it assists and directs the court as to who is to be incarcerated and who isn't. With the New South Wales prison population on the rise sentencing alternatives would help to ease the burden on an already stressed corrections system. An exploration of further sentencing alternatives would be welcome especially for those who are marginalised i.e. persons with a disability, mental illness and those from an Aboriginal background. Outlined below are the areas that Legal Aid NSW would like to see investigated regarding Division 1 and 2 of the Act:</p> <ul style="list-style-type: none"> • There are currently no alternatives to full time custody for persons sentenced to imprisonment for more than 2 years, previously periodic detention was available to those receiving a sentence of 3 years or less. In 2010, periodic detention was replaced with Intensive Correction Orders (ICOs), but ICOs are only available to those ordered to serve a maximum term of 2 years. The lack of sentencing alternatives for those receiving a sentence of 3 years or less means that many offenders who have committed what would be considered low level offences are required to serve a prison sentence. A prison sentence for low level offenders removes a person from their family, employment and community resources and exposes them to high level offenders making them increasingly vulnerable to recidivism. Intensive Correction Orders were developed as a result of the key recommendations of the NSW Sentencing Council's 'Review of Periodic Detention' published in December 2007. Contrary to the Sentencing Council's ICO recommendations, the <i>Crimes (Sentencing Procedure) Act 1999</i> contains a significant number of mandatory core conditions for offenders on ICOs that may prove to be too onerous on those subject to the orders and set them up for failure. • The ICO procedure could be improved by allowing a sentence to be set when the ICO assessment referral is made. Under current procedure assessors do not know if they are assessing a person for a 6 month ICO or a 20 month order. The length of the order is a relevant factor when considering the rehabilitation and housing needs of the participant.

2. Priority issues in sentencing law that require investigation and reform.		
Act reference	Section/s	Comment
Part 2: Divisions 2 & 3 – Custodial and Non-custodial sentences (Cont.)	ss.5-20	There is some confusion between ICOs and Home Detention Orders. It needs to be made clear how the use of Home Detention Orders and ICOs differ. It would be worthwhile examining why the eligibility criteria are so different to ICOs and whether it is necessary. Suitability for home detention should be considered prior to imposition of sentence not after as is currently the case. At the point of referral for assessment the court could give an "indication" of the sentence it is proposing to impose, the same could be done with ICOs. Consideration may also be given to extending home detention for those sentenced to 2 years imprisonment and reviewing the eligibility criteria e.g. why is AOABH excluded?
Part 2: Division 2: Compulsory drug treatment detention	s.5A	<p>Consideration should be given to expanding the Drug Court scheme and amending the criteria for inclusion in the program to allow more offenders who would benefit from the program to be included. An expansion of the Drug Court scheme would assist in meeting the Government's commitment to reducing re-offending by providing alternatives to prison for less serious cases.</p> <p>In a June 2011 press release the Attorney General, the Hon. Greg Smith SC MP, stated, <i>"The expansion of the Drug Court is a key component of the Coalition Government's plan to reduce recidivism by increasing prisoner access to rehabilitation programs"</i>.⁴ Legal Aid NSW welcomes the Minister's commitment to the Drug Court, and would like to see the Program expanded to rural areas and the criteria amended to open the Program up to more offenders who would benefit from it.</p>

⁴ The Hon. Greg Smith SC MP, Attorney General, Minister for Justice, 'NSW Drug Court Wins Prime Minister's Award. Issued: Friday 4 June 2011.

2. Priority issues in sentencing law that require investigation and reform.		
Act reference	Section/s	Comment
Part1:Preliminary-Purpose of Sentencing	s.3A(b)	<p>The impact of sentencing on general deterrence is a contentious issue, but one that would benefit from exploration through this review. A number of studies by the Australian Institute of Criminology and the NSW Bureau of Crime Statistics call into question the impact of sentencing on general deterrence of crime.</p> <p>A recent Criminal Law Journal article by Mirko Bagaric from Deakin University and Theo Alexander from the Victorian Bar examines the relevance of general deterrence to the sentencing calculus and the efficacy of punishment to deter offenders.⁵ The article concludes that the empirical evidence markedly suggests that a change in sentencing legislation has little effect on general deterrence and the practice of harsher sentences to discourage offenders from committing crime is not only futile but <i>"has no positive social effects"</i>.⁶The Judicial Commission NSW also questions the impact of general deterrence. The Commission makes reference to a Canadian study that reviewed empirical research in several countries on deterrence and found that crimes levels are not affected by the severity of a sentence.⁷ Similar findings have also been made by the NSW Bureau of Crime Statistics outlined in various published reports including: 'A deterrent effect of capital punishment: A review of the research evidence' (2004); The impact of increased drink-driving penalties on recidivism rates in NSW (2004); Does prohibition deter cannabis use? (2001).</p>
Part 2: Division 2: Compulsory drug treatment detention (Cont.)	s.5A	<p>In September 2008 the NSW Bureau of Crimes Statistics and Research released a report evaluating the NSW Drug Court.⁸ The evaluation found, inter alia, that those who participated in the Drug Court Program <i>"were less likely to be reconvicted than offenders given conventional sanctions (mostly imprisonment)"</i> and <i>"were 17 per cent less likely to be reconvicted for any offence, 30 per cent less likely to be reconvicted for a violent offence and 38 per cent less likely to be reconvicted for a drug offence at any point during the follow-up period"</i>.⁹The Report also recommends expanding the Program and making it adaptable to rural locations where resources required for it to operate effectively are scarce.¹⁰</p>

⁵ Bagaric, Mirko and Alexander, Theo. 2011. '(Marginal) General deterrence doesn't work- and what it means for sentencing' No.35, Criminal Law Journal 269

⁶ Ibid at pg 283.

⁷ Von Hirsh et al, *Criminal deterrence and sentence severity*, Hart Publishing, Oxford, 1999 cited on NSW Judicial Commission website.

⁸ Weatherburn, Don; Jones, Craig; Snowball, Lucy; Hua, Jiuzhao, September 2008, 'The NSW Drug Court: A re-evaluation of its effectiveness, NSW Bureau of Crimes Statistics and Research.

⁹ Ibid at pg 1.

2. Priority issues in sentencing law that require investigation and reform.		
Act reference	Section/s	Comment
Sentencing and the indigenous population	All relevant sections	<p>In 2009 - 2010, Indigenous clients made up 9.1 per cent of case and in-house duty service work provided by Legal Aid NSW. Indigenous people continue to be one of the four priority groups of Legal Aid NSW.</p> <p>The NSW Bureau of Crime Statistics and Research (BOCSAR) 2009 report on New South Wales Indigenous offenders found that between 2001 and 2008 its Indigenous prison population increased by 56.4%.¹¹ The increase was attributed to an increase in the proportion of Indigenous offenders given a prison sentence and the length of the prison terms imposed, rather than an increase in the conviction rates. This study was noted in the Indigenous Justice Clearinghouse, Brief, March 2010¹². The article states that the BOCSAR study suggests <i>"the substantial increase in the number of Indigenous people in prison is due mainly to changes in the criminal justice system's response to offending, with a greater impact on the Indigenous prison population than on the non-Indigenous prison population"</i>.</p> <p>Many of the alternatives to sentencing are not always available in rural and remote areas, which would have a significant impact on the Indigenous population.</p> <p>Legal Aid NSW recommends that any review of the <i>Crimes (Sentencing and Procedure) Act 1999</i> considers the impact of the Act on the Indigenous population and how the Act could be improved to reduce the number of Indigenous persons incarcerated.</p>

¹⁰ Ibid at pg 13.

¹¹ Fitzgerald J 2009. Why are Indigenous imprisonment rates rising? Crime and Justice Statistics Bureau Brief no.41, NSW Bureau of Crime Statistics and Research.

¹² Anthony, Thalia, 'Sentencing Indigenous Offenders, Brief 7, March 2010, Indigenous Justice Clearinghouse.

2. Priority issues in sentencing law that require investigation and reform.		
Act reference	Section/s	Comment
Part 3: Division 2: Victim Impact statement	ss.26-30A	In May 2011, the Attorney General requested submissions on the use of 'Family Victim Impact Statements (VIS) and Sentencing in Homicide Cases'. Legal Aid NSW put forward a submission outlining its objection to the proposal to allow these VIS to be considered in sentencing. The proposal was opposed for the following reasons: (1) upon sentencing the court does take into consideration the impact of a crime on a victim's family and the community, (2) any fact finding based on a victim impact statement would be unjust as the person would not normally be available for cross-examination, (3) it could have a detrimental impact on the victim's family if they were cross-examined regarding the statement, (4) there are ethical considerations regarding whether it is appropriate that sentencing for a homicide offence could differ depending on whether a family member does or does not provide a VIS.
Part 4: Division 1: Setting Terms of Imprisonment	s.53A	Legal Aid NSW recommends the review consider the complexities with aggregate sentencing, as judges are still burdened with needing to specify individual sentences where the only sentence which the offender and the community is interested in is the overall sentence for the overall criminality.

3. Any sentencing options in addition to those that currently exist that could be provided as an alternative to imprisonment, either generally, or in relation to particular categories of offenders.

Act reference	Section/s	Comment
Part 2: Divisions 2 & 3 – Custodial and Non-custodial sentences	ss.5-20	<ul style="list-style-type: none"> • Legal Aid NSW recommends the review consider whether sentences of less than 6 months should be abolished. Although under s.5(1) & (2) of the <i>Crimes (Sentencing Procedure) Act 1999</i> a court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives that a sentence of imprisonment is appropriate, and must provide reasons. But Legal Aid NSW is concerned there are still too many offenders who end up receiving a sentence of imprisonment for minor offences. Legal Aid NSW is concerned that it is often the most vulnerable and marginalised offenders who may receive such sentences i.e. those offenders who have either exhausted all alternatives options, live in a rural areas where rehabilitation services are limited or have a mental illness and there is a lack of treatment available. • Legal Aid NSW recommends that the review consider whether a Special Circumstances Court should be opened in New South Wales. In 2006 the Queensland Government launched the Special Circumstances Court. This specialist court hears cases referred to it by other Magistrates or Court Liaison Officers and hears cases involving persons charged with relatively minor offences, where those persons are judged to have 'special circumstances' including impaired decision making capacity, homelessness, the presence of a mental illness and/or substance abuse issues. Such cases are most commonly disposed of via discharges and adjournments, usually with treatment and welfare conditions attached, and through the cooperation of relevant social workers who will refer defendants to local social support agencies.¹³ • Legal Aid NSW recommends that the review consider allowing referral of persons charged with offences which will proceed to trial/sentence in the District Court to participate in MERIT or CREDIT type rehabilitation programs whilst on bail and/or after pleading guilty under s11.

¹³ For an overview of the Special Circumstances Court see Queensland Criminal Justice Centre website <http://www.qcjc.com.au/practice/econtent/1/2/143>

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Act reference	Section/s	Comment
Part 2: Divisions 2 & 3 – Custodial and Non-custodial sentences	ss.5-20	<ul style="list-style-type: none"> • Legal Aid NSW recommends a review of the eligibility criteria of the Compulsory Drug Treatment Program. Currently an offender must have 2 previous sentences in the past five years in order to be eligible. This tends to exclude many who would otherwise be suitable and would benefit from the program. • Legal Aid NSW recommends that the review consider providing Courts with greater discretion to assist offenders with no prior criminal record, as this would reduce re-offending and promote the rehabilitation of offenders.
Part 4: Division 1: Setting terms of imprisonment-making of parole orders.	s.50	<ul style="list-style-type: none"> • Legal Aid NSW recommends the sentencing review examine the option of increasing from 3 years to 5 years the making of parole orders by court. Although sentences have been increasing in general, s.50 of the Act has not changed in response to such increases. This has resulted in persons no longer meeting the criteria for automatic parole for offence which may have met the criteria in the past. • Legal Aid NSW recommends the review consider amendments to allow parole to be reviewed after a short time i.e. 2 to 3 months. In addition, legislation could impose an obligation on the Department of Corrective Services to locate appropriate accommodation for prisoners eligible for release to parole. Legal Aid NSW has found that many of our clients are unable to arrange suitable accommodation pending parole, and that it is often quite burdensome for a person who has been in jail for years to make such arrangements.

4. Operation of the standard minimum non-parole period scheme.		
Act Reference	Section/s	Comment
Part 4: Division 1A: Standard Non-Parole Periods	54A-54D	<p>Legal Aid NSW is concerned about the lack of consistency and transparency regarding the standard non-parole period set for offences outlined in the Table: SNPP in Division 1A Part 4 and their relationship to the maximum penalties for the offences. The Table has been amended five times since its introduction, with new offences being added without any logical explanation as to why such offences were included.</p> <p>The recent High Court decision in <i>Muldrock v The Queen</i> [2011] HCA 39 (5 October 2011) has highlighted the schemes complexity and how difficult it has been for the judiciary applying the scheme. Although the Muldrock case will significantly assist in clarifying sentencing principles and alleviate most of the concerns surrounding the SNPP scheme, the scheme still needs to be reviewed with an option to abolish the scheme if it is found to detract from the principles underlying it.</p> <p>The SNPP scheme is complex and confusing, and it would be worth investigating whether the scheme has achieved its intended reforms. In 2002, the then Attorney General, the Honourable Bob Debus stated the scheme is primarily <i>"aimed at promoting consistency and transparency in sentencing and also promoting public understanding of the sentencing process"</i>.¹⁴</p> <p>In 2010 the Judicial Commission of NSW released a report on the impact of the SNPP on sentencing patterns. The Report found that the statutory scheme had generally resulted in a greater consistency in sentencing, but noted <i>"it is not possible to conclude that the statutory scheme has only resulted in a benign form of consistency or uniformity whereby like cases are being treated alike and dissimilar cases differently"</i>.¹⁵ The Report also confirmed the scheme has resulted in an <i>"increase in the severity of penalties imposed and the duration of sentences of full-time imprisonment"</i>.¹⁶</p>

¹⁴ The Hon. Bob Debus, Attorney General, Second Reading Speech, Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill, Legislative Assembly, Hansard 23 October 2002, pp.5813

¹⁵ Judicial Commission of NSW, The impact of the Standard Non-Parole Period on Sentencing Patterns in NSW, Monograph 33 – May 2010 page 60.

¹⁶ Ibid at pg 60.