



**New South Wales
Law Reform Commission**

Sentencing

Preliminary outline of the review

September 2011
www.lawlink.nsw.gov.au/lrc

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Make a preliminary submission

We seek your views on the issues raised in this paper and on any other matters you think are relevant to the review.

To tell us your views you can send your preliminary submission by:

- Post: GPO Box 5199, Sydney NSW 2001;
- DX: DX 1227 Sydney;
- Email: nsw_lrc@agd.nsw.gov.au.

It would assist us if you could provide an electronic version of your preliminary submission.

If you have questions about the process please email or call (02) 8061 9270.

The closing date for submissions is 31 October 2011.

Use of submissions and confidentiality

We generally publish preliminary submissions on our website and refer to them in our publications.

Please let us know if you do not want us to publish your preliminary submission, or if you want us to treat all or part of it as confidential.

We will endeavour to respect your request, but the law provides some cases where we are required or authorised to disclose information. In particular we may be required to disclose your information under the *Government Information (Public Access) Act*.

In other words, we will do our best to keep your information confidential but we cannot promise to do so, and sometimes the law or the public interest says we must disclose your information to someone else.

About the NSW Law Reform Commission

The Law Reform Commission is an independent statutory body that provides advice to the Government on law reform in response to terms of reference given to us by the Attorney General. We undertake research, consult broadly, and report to the Attorney General with recommendations.

For more information about us, and our processes, see our website:

www.lawlink.nsw.gov.au/lrc

Sentencing: preliminary outline of the review

- 1.1 The Attorney General has asked the NSW Law Reform Commission to review the *Crimes (Sentencing Procedure) Act 1999* (NSW) in the following terms:

Pursuant to section 10 of the *Law Reform Commission Act 1967*, the Law Reform Commission is to review the *Crimes (Sentencing Procedure) Act 1999*. In undertaking this inquiry, the Commission should have regard to:

- 1 current sentencing principles including those contained in the common law
- 2 the need to ensure that sentencing courts are provided with adequate options and discretions
- 3 opportunities to simplify the law, whilst providing a framework that ensures transparency and consistency
- 4 the operation of the standard minimum non-parole scheme; and
- 5 any other related matter.

- 1.2 We are asked to report in October 2012, and to consult closely with the NSW Sentencing Council.

- 1.3 This reference focuses on the principles that apply under the *Crimes (Sentencing Procedure) Act 1999* (NSW) (“the Act”) and the common law in relation to sentencing. It does not extend to the quantum of the maximum penalties prescribed for individual offences, to the special laws that apply to young people under 18 (except where they are dealt with at law rather than under the *Children (Criminal Proceedings) Act 1987* (NSW)), or to the administration of sentences (for instance the operation of the parole system, and the administration of prisons).

- 1.4 In undertaking the reference the Commission notes the Government's commitment to reducing re-offending and to using alternatives to prison for less serious cases.

Background to the review

Prison numbers

- 1.5 There is a trend for the increased use of imprisonment as a sentencing option. Over the last 10 years the prison population in NSW has grown from 7,346 people in full-time custody in June 2000 to 10,057 in June 2011. Over the same period, the imprisonment rate has grown from 151 per 100,000 in 2000, to 178.5 per 100,000 in 2011.¹

1. Figures taken from Australian Bureau of Statistics, *Corrective Services in Australia* for June quarter 2000, and June quarter 2011 (average daily number for that quarter). Figures cover full-time custody (excluding periodic detention) including both prisoners under sentence and unsentenced (on remand).

- 1.6 Prison can be an effective means to incapacitate serious criminals. It may also serve as a personal and general deterrent to the commission of further crime, although the strength of this effect is sometimes doubted. However, it is expensive, and it can undermine rehabilitation efforts, particularly in the case of those whose history of offending is recent, and not particularly serious.
- 1.7 There are community concerns in relation to the overrepresentation of certain groups in the prison population including, although not limited to, Aboriginal People and Torres Strait Islanders and people with cognitive and mental health impairments. Our current reference in relation to People with Cognitive and Mental Health Impairments in the Criminal Justice System overlaps with this new reference in relation to sentencing in this context, and the submissions received and consultations concluded in that review will be taken into account.

Alternatives to prison

- 1.8 Alongside the growth in prison numbers, there has also been a growth in the alternatives to imprisonment, including community-based sentences, and the use of specialist “diversionary” programs.
- 1.9 The most recent has been the replacement of periodic detention with the Intensive Corrections Orders which came about as a result of a Sentencing Council review.
- 1.10 Another recent example has been the Compulsory Drug Treatment Program which operates as a five-stage program, involving, first of all, closed detention in the Compulsory Drug Treatment Correctional Centre, followed by semi-open detention, community custody, parole and, finally, voluntary case management. Other recent examples include the MERIT and CREDIT Programs, circle sentencing, conferencing and other forms of restorative justice.
- 1.11 The availability of suspended sentences, which were reintroduced in 1999, has been under review by the NSW Sentencing Council, which has also been examining sentencing options in relation to those offenders who have been convicted of serious violence offences.
- 1.12 Our review will consider the scope and role of alternatives to prison, the ways in which those sentences could be used more widely to reduce re-offending, as well as appropriate options for particular categories of offenders where there are concerns in relation to the safety of the community.

Judicial discretion and guidance to courts

- 1.13 Since the Act was passed in 1999, Parliament has made a number of amendments that were designed to give greater guidance or direction to sentencing courts. Examples include the introduction of s 21A, which identifies a number of aggravating and mitigating factors that are to be taken into account for sentencing purposes, and the introduction of the standard minimum non-parole period scheme. The legislative regime for guideline judgments has been employed to provide guidance in relation to certain categories of offending or sentencing practice, although there are questions about whether it should be employed more frequently or whether some other approach should be adopted to encourage consistency in relation to sentencing.

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- 1.14 The Judicial Commission of NSW's Sentencing Information System, which allows judicial officers to view sentencing statistics in relation to each offence, has had an impact on sentencing consistency in the past decade, although questions have recently been raised in relation to the reliance of judicial officers on sentencing trends and patterns.
- 1.15 Our terms of reference ask us to look specifically at the standard minimum non-parole period scheme. We will need to consider whether or not this approach should be expanded, to the types of offences that should be included, as well as the procedure to be employed in fixing standard non-parole periods.
- 1.16 The review will look at the appropriate level and source of guidance for sentencing discretion, including the legislative framework, the role and use of guideline judgments, the impact of s 21A of the Act, and the desirability or otherwise of any form of mandatory sentences or of grid sentencing.

Keeping the sentencing system under review and raising public awareness

- 1.17 A key development in the last 10 years has been the establishment of the Sentencing Council, with a range of functions including providing advice to the Attorney General and, importantly, educating the public on sentencing matters. The Council has now delivered reports to the Attorney General on a large number of matters, and it conducts an ongoing review of sentencing trends and practice which is the subject of an annual report. Our review will consider the ways in which the capacity of the Council to perform its functions could be strengthened in the future.

Recent and upcoming Sentencing Council reviews

- 1.18 The Sentencing Council has four current projects which will result in the release of research or background papers within the next three months on the following topics:
- The use of non-conviction orders and good behaviour bonds
 - Sentencing options for serious violent offenders
 - The use of suspended sentences
 - Standard non-parole periods and guideline judgments
- 1.19 Each of these topics comprises significant issues and the Commission will use the reviews of the Sentencing Council as a basis for consultation and for the preparation of its report.
- 1.20 The reports of the Sentencing Council that have been released are available on its website: www.lawlink.nsw.gov.au/sentencingcouncil. Some of these reports have resulted in legislation or other action. Others may need further consideration.

Our processes

- 1.21 The reference is broad. We are asked to report within 12 months, that is, by the end of October 2012. We intend to focus our attention on opportunities to simplify sentencing law, to make its application transparent and consistent. We intend to

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begin the reference by seeking preliminary views of stakeholders and the community on the issues that should be a priority for reform of the sentencing laws.

- 1.22 Over the coming 2-3 months, we intend to consult stakeholders by seeking submissions to address the matters that will be raised in a series of more specific questions papers that we intend to release. These papers will be based on our own research, on Sentencing Council reports and on research conducted in Australia and elsewhere on sentencing.
- 1.23 We also intend to conduct face-to-face consultations with stakeholders on the issues presented.
- 1.24 In order to assist stakeholders in considering the issues at this preliminary stage, we have compiled a list of resources in relation to the various areas covered by the *Crimes (Sentencing Procedure) Act 1999* (NSW) on our website: www.lawlink.nsw.gov.au/lrc.
- 1.25 Against this brief and broad background, the Commission calls for preliminary submissions on the scope and focus of the reference **by 31 October 2011**. We seek views on the issues that we should consider as the major areas for investigation and reform.

We invite submissions in relation to:

- (1) the ways in which sentencing law as a whole can be simplified and made more transparent and consistent;**
- (2) the priority issues in sentencing law that require investigation and reform;**
- (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; and**
- (4) the operation of the standard minimum non-parole period scheme.**



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