The Public Defenders

20 August 2012

The Hon James Wood AO QC,
NSW Law Reform Commission,
DX 1227
Sydney

Dear Chair,

Re review of the Crimes (Sentencing Procedure) Act 1999 (NSW)

I refer to the above matter, in particular to the response by the Public Defenders to the Sentencing Question Papers 1-4, dated 29 May 2012. I am indebted to John Stratton SC, Deputy Senior Public Defender, for preparing our response in my absence on leave.

I would add some further comments to our answer to questions 1.6 and 1.7.

The background observations in the LRC paper to Question 1.6 highlight the recent BOCSAR finding that the risk of arrest or imprisonment is more potent a deterrent than a reflection of general deterrence in sentencing.

The BCSAR report focussed on property and violent crime rates. Its findings accord with the experience and views of many individual Public Defenders. One reports, for example, that he has appeared in Queanbeyan District Court for young ACT offenders who had travelled into NSW to commit certain property offences that happen to attract significantly higher penalties in NSW than in the ACT; a consideration that they were oblivious to, when deciding where to commit their offences. The public Defenders support a diminution of general deterrence for some offenders who presently are made a subject of it, to the point in some circumstances of its complete non-application.

The background observations canvass the possibility of general deterrence being more effective in sentencing offenders for crimes that do not typically have many of the characteristics that tend to render general deterrence less effective, such as so-called white collar criminals, environmental offenders, corporate offenders and non-addicted drug importers.

While we agree with this outcome, it would be appropriate of course for any re-statement of principle of general deterrence to focus on aspects of the offender's relevant state of mind, rather than the class of offence. The common law in NSW has recognised for some twenty years[1] that general deterrence may have little or no application to the sentencing of an offender whose offending behaviour was related to a mental impairment (see for example *Muldrock v The Queen* (2011) 244 CLR 120). In the same fashion, other circumstances may be developed in light of soundly-based knowledge that make the application of the principle inappropriate in light of certain characteristics of the offending behaviour, in particular, drug or alcohol dependency.

[1] since the NSW CCA in *R v Scognamiglio* (1991) 56 ACR 81 adopted the principle from the Victorian CCA cases of *R v Mooney* unreported, Vic CCA 21.6.78 and *R v Anderson* [1981] VR 155.

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The mechanism by which such a changed approach to the application of general deterrence could be achieved may be by a modification of section 3A of the *Crimes (Sentencing Procedure) Act, 1999*. Another possible mechanism to facilitate a change in common law may be a guideline judgement; a re-consideration of the appropriateness of general deterrence would appear to come within the definition of "guideline judgement" in s 36 of that Act.

Yours faithfully,

Mark Ierace SC
Senior Public Defender