The New South Wales Bar Association

12/101-2

14 May 2013

The Hon J Wood AO QC
Chairperson
New South Wales Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

Dear Judge Wood

Confidential draft report on Sentencing

The New South Wales Bar Association is grateful for the opportunity to comment in relation to the Law Reform Commission's confidential draft report on Sentencing.

The Association has been closely involved in the consultations surrounding this report. The Law Reform Commission is already aware of the Association's position on the major issues and accordingly, our comments below address issues raised by the draft report that require specific submission.

Parity principle

Recommendation 3.2 proposes that the *Criminal Appeal Act 1912* (NSW) 'should be amended to provide that the parity principle, in relation to an appeal by an offender against the severity of a sentence, is not to be applied in a way that would result in a sentence that, in all of the circumstances of the case, would be unjustifiably lenient'.

The term 'unjustifiably lenient' is dangerously imprecise. It could be understood to permit an appeal court to effectively negate the operation of the parity principle on the basis that reducing the sentence on account of parity considerations would produce a sentence that is inappropriate, absent those considerations. That is plainly not the intention of the New South Wales Law Reform Commission (see paragraph 3.55). Preferable terms would be 'manifestly inadequate' or 'outside the range of appropriate sentences'. Less preferable than those alternatives, but preferable to the current formulation, is 'erroneously lenient'.

Confiscation of assets and forfeiture of proceeds of crime

Recommendation 4.4 recommends that a 'revised Crimes (Sentencing) Act should contain a stand-alone provision in the general terms of the current s 24B of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (confiscation of assets, etc) subject to amendment to make it clear that such provision has effect despite any Act or rule of law to the contrary'.

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The Bar Association finds unpersuasive the reasons advanced at paragraphs 4.166-4.172 for this recommendation. The draft report acknowledges at paragraph 4.167 that 'there may be circumstances where the forfeiture of property used in connection with the commission of an offence could impose a degree of extra curial punishment, particularly if there was a substantial difference between the value of that property and the actual or prospective gains from the offence'.

So it is accepted that if, for example, a house is forfeited because a small quantity of drugs was manufactured within it, that 'could' cause 'extra-curial punishment'. Of course, it is not 'extra-curial' because it is the consequence of an order of a court, but it is very difficult to see why it should not be seen as 'punishment' of the offender. Suffering the consequent detriment will further a goal of sentencing (for example, specific deterrence or retribution) and accordingly should be taken into account when determining an appropriate sentence. No doubt, for that reason, the Australian Law Reform Commission recommended that only confiscation orders that neutralise benefits obtained by the commission of the offence should not mitigate the sentence (as noted at paragraph 4.161). Yet the draft report refers to various suggested 'practical' difficulties (at paragraph 4.166) and the desirability of reforming other legislation (at paragraph 4.168) before asserting that 'there is no occasion for altering the current law' (at paragraph 4.169). The fact that 'co-operation' may be taken into account (paragraph 4.169) plainly does not provide an adequate response or address the point of principle.

The New South Wales Law Reform Commission should reconsider its position on this important issue of principle.

Pleas of guilty

Recommendation 5.1 recommends that a sentencing court be required 'to quantify the reduction in penalty given for a guilty plea, unless there are reasons for not doing so which must be recorded by the court in its reasons for sentence'.

There is some ambiguity inherent in this recommendation. The comparable Victorian provision has been understood to require the sentencing court to give a quantified discount for all aspects of the guilty plea, including the impact it has on assessment of remorse. That is undesirable.

The fact of a plea of guilty has significance in purely utilitarian terms, quite apart from subjective considerations such as demonstrated remorse. This utilitarian value of the plea of guilty does not include the remorse which is contended to be reflected in the guilty plea: *Thomson and Houlton* [2000] NSWCCA 309, 49 NSWLR 383, 115 A Crim R 104, Spigelman CJ (Wood CJ at CL, Foster AJA, Grove J, James J agreeing) at [116]–[118]. Spigelman CJ stated at [115]:

> The benefits to the criminal justice system as a whole, which flows from a plea of guilty, particularly an early plea of guilty, are not related to the circumstances of the offence or to the conduct of the offender. Such benefits flow from an act by the offender that is not directly related to any of the multifarious objectives designed to be served by the sentencing process: deterrence, rehabilitation, punishment, etc. Rather, they are a collateral benefits for the efficiency and effectiveness of the criminal justice system as a whole, which require acknowledgment of some character by way of an incentive, so that the benefits will in fact be derived by the system.

Similarly, in *Markarian* [2005] HCA 25, 228 CLR 357 at [74], McHugh J observed:

> Nor is the instinctive synthesis approach inconsistent with awarding a discount for some factor, provided that discount relates to a purpose distinct from a sentencing purpose. The distinction between permissible and impermissible quantification of 'discounts' on a sentence will usually be found in whether the quantification relates to a sentencing purpose rather than some other purpose. So, the quantification of the discount commonly applied for an early plea of guilty or assistance to authorities is offered as an incentive for specific outcomes in the administration of criminal justice and is not related to sentencing purposes.

For these reasons, it is undesirable to quantify any discount by reason of the guilty plea other than in relation to the 'benefits for the efficiency and effectiveness of the criminal justice system as a whole' (the utilitarian value of the plea). The draft report initially focused its attention on this consideration at paragraph 5.31, where it is stated:

> The reduction in penalty *for the utilitarian value of a guilty plea* is the most frequent form of discount in sentencing. Although quantification of the benefit given is not required at common law, the introduction of a legislative requirement to this effect could improve both the transparency and consistency of sentencing for the benefit of all stakeholders, including offenders and victims. [emphasis not in original]

The recommendation should be amended to limit the requirement for quantification to 'the reduction in penalty given for *the utilitarian value of* a guilty plea'.

Suspended Sentences

Recommendation 10.1 recommends the abolition of suspended sentences in the event that Community Detention Orders (CDO's) are introduced. Recommendation 11.1 proposes the introduction of CDO's to replace Home Detention and Intensive Correction Orders, but makes no mention of suspended sentences.

The Bar Association recommends the retention of suspended sentences, regardless of whether CDO's are introduced. Suspended sentences have a number of features that are significantly different from CDO's, and which should be retained:

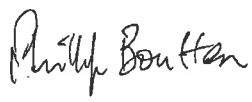
a) A suspended sentence may be imposed by a court without any fetter upon its sentencing discretion: there is no pre-requisite of suitability determined by some other body or person.
b) Revocation of a suspended sentence is dealt with by a court.
c) On revocation, the court decides whether the sentence of imprisonment (now no longer suspended) is to be served by way of full-time imprisonment or an alternative (currently Home Detention or Intensive Correction Order, but could be CDO if they are introduced).
d) After revocation, when an offender has been sentenced to full time custody or an alternative to it, the State Parole Authority deals with any breach of parole or of any condition of the custodial alternative (currently Home Detention or Intensive Correction Order).

New community based orders

Recommendation 13 in the draft report is not necessary. There is no confusion amongst our members as to the difference between a Community Service Order, a section 9 bond, a section 10 bond, a section 10 dismissal and section 10A conviction without penalty. In the Association's view, recommendation 13 is more likely to provoke confusion in relation to available sentencing options than simplify them.

Should you or your officers require any further information, please do not hesitate to contact me or the Association's Executive Director Mr Philip Selth on 9232 4055 or at pselth@nswbar.asn.au.

Yours sincerely



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