

The Shopfront

YOUTH LEGAL CENTRE

NSW Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

24 August 2012

By email

Dear Sir/Madam

Sentencing: Question Paper 5: Full-time imprisonment Submission from the Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre welcomes the opportunity to make a submission to this reference.

About the Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under. Established in 1993 and based in Darlinghurst in inner-city Sydney, the Shopfront is a joint project of Mission Australia, the Salvation Army and the law firm Freehills.

The Shopfront's main area of practice is criminal law. Two of our solicitors are accredited specialists in criminal law; one is also an accredited specialist in children's law. Our four solicitors appear almost daily for vulnerable young people in the Local, Children's, District and occasionally Supreme Courts.

The Shopfront's clients come from a range of cultural backgrounds, including a sizeable number of indigenous young people. Common to nearly all of our clients is the experience of homelessness: most have been forced to leave home due to abuse, neglect, domestic violence or extreme family dysfunction. Most of our clients have limited formal education and therefore lack adequate literacy, numeracy and vocational skills. A substantial proportion also have a serious mental health problem or an intellectual disability, often co-existing with a substance abuse problem.

Scope of this submission

Although the Shopfront is a youth legal service, and has expertise in children's matters, the majority of our clients are in fact young adults aged 18 to 25. We therefore have an extensive working knowledge of adult sentencing law and practice. In accordance with the terms of reference, our submission is confined to adult sentencing issues.

Time does not permit us to make a more comprehensive submission. However, we would welcome the opportunity to make further comments or to attend consultations if you consider this would be helpful. In this regard, please do not hesitate to contact me, preferably by email at jane.sanders@freehills.com.

Yours faithfully

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The Shopfront Youth Legal Centre is a service provided by Freehills in association with Mission Australia and The Salvation Army



Mission Australia

Freehills

Sentencing: Question Paper 5: Full-time Imprisonment

Question 5.1: The ratio of the non-parole period and balance of term

1 Should the “special circumstances” test under s 44 of the Crimes (Sentencing Procedure) Act 1999 (NSW) be abolished or amended in any way? If so, how?

We are of the view that the “special circumstances” test is appropriate and should be retained. It is vital that judicial officers continue to have the discretion to order relatively short non-parole periods and longer periods under parole supervision in appropriate cases, most commonly where there is a strong interest in rehabilitation and reintegration into the community.

We are mindful that there has been some criticism at appellate level of the readiness of judges to find special circumstances, to the point where there is said to be nothing “special” about many such cases. However, we submit that the apparent proliferation of “special circumstances” findings is a reflection of the composition of the NSW prison population and the very high proportion of disadvantaged offenders. The high prevalence of mental illness, cognitive impairment, long-standing alcohol and other drug dependence, and homelessness among this group means that rehabilitation is an important consideration and an extended period on parole is usually necessary to achieve this.

It may be that the term “special circumstances” could be replaced with something such as “good reasons to depart from the statutory ratio”.

2 Should a single presumptive ratio be retained under s 44 or should a different ratio apply for different types of offences or different types of offender; and, if so, what ratio should apply to different offences or different offenders?

We do not support the retention of a statutory ratio. Instead, we favour the use of judicial discretion to determine the ratio in each case.

If a statutory ratio is to be retained, we strongly oppose the creation of different ratios for different types of offences. We are concerned that the enactment of such ratios could become highly politicised and lead to longer non-parole periods for “unpopular” types of offences, without any evidence base as to the need for, or effectiveness of, such a measure.

Nor do we support the creation of different presumptive ratios for different type of offenders. If such a measure were to be introduced however, we would give qualified support to a different ratio (say 50:50) for offenders aged 25 and under.

Question 5.2: Top-down and bottom-up approaches

1 Should the order of sentencing under s 44 of the Crimes (Sentencing Procedure) Act 1999 (NSW) return to a ‘top down’ approach?

We agree with the NSWLRC’s approach as discussed in paragraph 5.56 of the question paper. In particular we endorse the comment that “a sentence should embody all the purposes of punishment and also reflect proportionality, as a prisoner is liable to serve the whole of the sentence if parole is not granted”. To this we would add “or if parole is breached and the offender is returned to custody”. We therefore favour a return to a “top down” approach.

2 Could a ‘top down’ approach work in the context of standard minimum non-parole periods?

We acknowledge there may be difficulties with a “top down” approach where standard non-parole periods are involved. However, we agree with the NSWLRC’s comment in paragraph 5.58 of the question paper that there is now “less potential conceptual difficulty involved in changing to a top down approach” since the High Court’s decision of *Muldrock*.

In any event, we oppose the retention of standard non-parole periods, for the reasons set out in our submission to the NSWLRC on this topic dated 16 April 2012, a copy of which is attached.

Question 5.3: Short sentences of imprisonment

1 Should sentences of six months or less in duration be abolished? Why?

The Shopfront Youth Legal Centre strongly supports the use of non-custodial alternatives wherever possible, particularly for relatively low-level offending which does not warrant a lengthy custodial sentence. We also agree that sentences of six months or less have little or no value in terms of rehabilitation, and in many cases have the opposite effect by causing significant disruption to offenders’ lives.

However, we do not support the abolition of sentences of six months or less. In our experience, most magistrates (and most District Court judges when dealing with relatively low-level offending) will do their utmost to impose non-custodial options where they are available and appropriate.

In our experience, sentences of six months or less are usually imposed in the following types of situations:

- Where the court is of the view that a custodial sentence is the only adequate response to reflect the criminality of the conduct and to ensure specific and general deterrence. A common example is repeated offences of driving while disqualified. If sentences of six months or less were abolished, we see a real danger of “sentence creep”.
- Where the offender is unsuitable for any non-custodial options because of instability, unreliability and/or repeated breaches of non-custodial sentences such as bonds. Rather than abolishing short sentences, we believe the answer to this problem lies in providing more support (from both within and outside the criminal justice system) for these types of offenders and increasing the availability of targeted programs such as MERIT and CREDIT. Priority should be given to funding more programs like Biyani, which is operated by Corrective Services and provides a residential program for “dual diagnosis” women who would otherwise receive a custodial sentence.
- Back-dated sentences of “time served” following a period of bail refusal. It is commonly acknowledged that rates of bail refusal in NSW are relatively high, and that bail is often refused for offences which, even if proved, would not necessarily warrant a custodial sentence. This is especially common among young people and disadvantaged groups such as Aboriginal people. In such cases it is common practice to impose short sentences of “time served” to reflect the period already spent in custody. If sentences of six months or less were to be abolished, time spent on remand could still be taken into account by the imposition of a more lenient sentence than would otherwise be imposed, for example s 10A, a small fine or a short good behaviour bond. However, a sentence of time served reflects the reality that the person has spent time in custody and is still the preferred option for many judicial officers.
- Where the offender is being sentenced for multiple offences and there is a need to ensure proportionality. An offender may be sentenced for multiple offences, ranging in seriousness from, e.g. break, enter and steal down to goods in custody. For an offence such as break, enter and steal, the court may impose a

head sentence of, say, twelve months. In many cases it would be meaningless to impose non-custodial sentences for the less serious offences, and the court may be of the view that a s10A disposal is excessively lenient. To ensure proportionality, it would often be appropriate to impose sentences of between one and six months for the less serious offences.

2 Should sentences of three months or less in duration be abolished? Why?

For the same reasons expressed above, we also favour the retention of sentences of three months or less.

3 How should any such abolition be implemented and should any exceptions be permitted?

The practical implementation of such abolition would pose challenges, particularly in avoiding “sentence creep”. If such sentences were to be abolished, we would support some exceptions, at least in situations involving the imposition of short sentences concurrently with longer sentences of imprisonment.

4 Should sentences of imprisonment of six months or less continue to be available as fixed terms only or are there reasons for allowing non-parole periods to be set in relation to these sentences?

Sentences of imprisonment of six months or less should not continue to be available as fixed terms only.

There are reasons for allowing non-parole periods to be set in relation to these sentences. As discussed in our response to question 5.1 above, many offenders require a period of supervision to assist with rehabilitation and reintegration into the community. This is the case even with relatively short sentences.

We concede that allowing the setting of a non-parole period for a sentence of three months or less would have little utility, but we support the ability to set a non-parole period for sentences of three to six months. Even if this does not provide for a long period of supervision, it would at least ensure that a prisoner receives some intervention upon (and ideally just before) release, to minimise the likelihood of reoffending and returning to custody. The reality is that many prisoners are released to homelessness and (not surprisingly) soon reoffend and find themselves back in custody.

Allowing a non-parole period to be set for a sentence of three to six months would also help mitigate the injustice faced by an offender who is in breach of a suspended sentence of six months or less. Currently, in such circumstances the offender is required to serve the entire sentence as a fixed term (even if the breach is relatively minor and/or the offender has served nearly all of the suspended sentence without incident, or the offender’s circumstances have changed since the imposition of the suspended sentence).

Question 5.4: Aggregate head sentences and non-parole periods

1 How is the aggregate sentencing model under s 53A of the Crimes (Sentencing Procedure) Act 1999 (NSW) working in practice and should it be amended in any way?

We note that the aggregate sentencing model under s53A is relatively new, and we are unable to offer any comment as to how it is working in practice.

2 Should a court be required to state the individual sentences that would have been imposed if an aggregate sentence had not been imposed by the court?

If an aggregate sentence is being imposed, the court should still be required to state the individual sentences that would have been imposed.

Aggregate sentencing has the potential to cause significant problems in cases where the accused may wish to appeal against one or more, but not all, of the convictions or sentences.

A requirement to state individual sentences would also assist with transparency, and help ensure that adequate regard is given to proportionality and totality.

Question 5.5: Accumulation of sentences and special circumstances

1 Should a court be required to state reasons if the effective sentence does not reflect the special circumstances finding on the individual sentences?

Yes, we strongly support such a requirement.

2 Are there any other options to deal with these cases?

We are unable to suggest any other viable options to deal with these cases.

Question 5.6: Directing release on parole

1 What limit should be applied to the automatic release of offenders to parole on expiry of a non-parole period?

We agree with the comments made by Legal Aid NSW, quoted in paragraph 5.105 of the question paper, that the current three-year limit should be extended to five years. In fact, we would favour automatic release on parole where the *non-parole period* is five years or less, irrespective of the length of the head sentence.

There is some force in the argument that “at the time the sentence is imposed, the court is not in a position to make determinations about the offender’s suitability for release to parole, as the offender’s progress in jail and future circumstances cannot be known”, in 5.107 of the question paper. However, it appears to us that the sentencing judge’s intentions are often thwarted by the State Parole Authority refusing to grant parole at the end of the non-parole period.

Reasons for refusal of parole may vary, but commonly include:

- Lack of available accommodation on release (often, regrettably, due to the failure or inability of the Probation and Parole Service to assist the offender to obtain accommodation).
- Failure to undertake programs in custody. In the case of sex offenders, for example, participation in a sex offender program in custody is usually a prerequisite to the granting of parole; in turn, eligibility for such a program depends on admitting the offence. Those who maintain their innocence are therefore at a disadvantage and may end up serving the entirety of their sentence in custody. There are also those who do not participate in programs simply because such programs are unavailable or inappropriate to the offender’s needs.
- Where the offender has failed to demonstrate good behaviour in custody.

It must be remembered that release on parole is not the same as a remission for good behaviour (which of course was abolished with the “truth in sentencing” legislation some years ago). Release on parole should not be a reward for good behaviour; conversely, refusal of parole should not be a punishment for failure to engage in programs. Parole should be refused or delayed only in exceptional circumstances where an offender’s release poses a significant risk to the community.

For sentences where release on parole is automatic, any serious concerns about the offender’s release can be addressed by an application to the State Parole Authority for a pre-release revocation. While we do not support the widespread use of such a procedure (and, indeed, we are of the view that it is sometimes inappropriately used, in circumstances where the Probation and Parole Service has not adequately planned for the offender’s release and finds itself running out of time to arrange or approve accommodation) we support its availability as a fall-back option in exceptional cases.

Question 5.7: Directing release on parole – Back end home detention

1 Should back end home detention be introduced in NSW?

We believe it is worth exploring the introduction of back end home detention. Such a measure would potentially assist offenders to reintegrate into the community and minimise the likelihood of recidivism.

We do not agree with the justifications advanced for abolishing back end home detention in Victoria, as quoted in paragraph 5.108 of the question paper. However, we do have some concerns about potential sentence creep and this will need to be seriously considered if back end home detention is to be introduced.

We believe that the suggestion advanced by the Standing Committee on Law and Justice, discussed in paragraph 5.113 of the question paper, is worth exploring.

2 If so, how should a person's eligibility and suitability for back end home detention be determined and by whom?

Question 5.8: Local Court's sentencing powers

1 Should the sentencing jurisdictional limits in the Local Court be increased and, if so, by how much?

The sentencing jurisdictional limits in the Local Court should not be increased.

Please see our submission on *increasing sentencing powers of Local Court* to the NSW Sentencing Council dated 27 August 2010 (a copy of which is attached).

In our view, any increase in the Local Court's sentencing jurisdictional limits must be accompanied by the expansion of Table 1 and/or Table 2 to include some offences that are currently strictly indictable. For example, robberies under *Crimes Act* Section 94 (and possibly also under Section 97(1)), and aggravated break, enter and steal offences (where the aggravating factor is that the offender was in company) would be appropriate matters to be finalised in the Local Court if the jurisdictional limit were increased.

2 Should a magistrate be able to refer a sentencing matter to the District Court if satisfied that any sentence imposed in the Local Court would not be commensurate with the seriousness of the offence?

We are opposed to this proposal. The prosecution should continue to have the decision to elect.

Anecdotal evidence suggests that the DPP is using its powers of election sparingly due to resource constraints. If this is the case, we would like to see improved funding for the DPP before contemplating any legislative change.

**The Shopfront Youth Legal Centre
August 2012**