Crimes (Sentencing Procedure Amendment) Standard Minimum Sentencing Bill 2002

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The Bar Association and Law Society have opposed both the government consultation draft Bill and the opposition's even more draconian proposal.

On 23 October 2002 the government introduced with minor amendments the final form of the Bill into parliament in the Legislative Assembly. It is anticipated that the *Crimes (Sentencing Procedure Amendment) Standard Minimum Sentencing Act* will commence in January 2003.

In his second reading speech, the Attorney General stated that 'the scheme being introduced by the government today provides further guidance and structure to judicial discretion,'[1] not mandatory sentencing.

The government's Bill establishes a new sentencing scheme in the new Division 1A, Part 4, of the *Crimes (Sentencing Procedure) Act 1999*.

Standard non-parole periods

The main features of the Bill are:

1. Standard non-parole periods for a number of specified serious offences: new sec 54A[2]
2. A sentencing court is to set the designated standard non-parole period as the non-parole period for the specified offence, unless a sentencing court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period: new sec 54B.
3. Replacement of the existing sec 44 with a new section requiring a sentencing court to set a non-parole period for the sentence before setting the balance of the term of the sentence. The balance of the term must not exceed one-third of the non-parole period for the sentence unless the court decides there are 'special circumstances for it being more'. The current sec 44 requires the court to set the total sentence and then fix the non-parole period.
4. Establishment of a New South Wales Sentencing Council to advise the attorney general in relation to sentencing matters.

Section 3A - Purposes of sentencing

The Bill inserts a new sec 3A into the Act, which sets out the purposes for which a court may impose a sentence on an offender. These purposes are stated to be:

- to ensure that the offender is adequately punished for the offence;
- to prevent crime by deterring the offender and other persons from committing similar offences;
- to protect the community from the offender;
- to promote the rehabilitation of the offender;
- to make the offender accountable for his or her actions;
- to denounce the conduct of the offender; and
- to recognise the harm done to the victim of the crime and the community

Aggravating, mitigating and other factors in sentencing

The existing sec 21A is replaced by a new sec 21A. The new sec 21A sets out specific aggravating and mitigating factors, to be taken into account by sentencing courts in determining the appropriate sentence for an offence. The court is also required to take into account any other objective or subjective factor that affects the seriousness of the offence: new sec 21A(1)(c).

Some commentators have raised a question as to whether the words 'seriousness of the offence' may encourage a narrow construction. Such a construction would exclude for example such matters as possible effects of sentence on family and hardship of custody, matters that do not go to the 'seriousness of the offence,' but to the proper sentencing of the offender.

The new sec 21A(1) additionally provides that the sentencing court may take into account any other matters that it is required or permitted to take into account under any Act or rule of law.

It appears that if the new sec 21A is given a broad interpretation, it imports no change to the common law.

Of course, where there is uncertainty in the meaning and operation of a statutory provision which affects a person's liberty, one would argue that it is appropriate to adopt the construction of that provision which enhances the liberty of the subject[3].

> 'The mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country'
>
> Winston Churchill, during a debate in the (UK) House of Commons in 1910

The new sec 21A(4) provides that a sentencing court is not to have regard to any aggravating or mitigating factor specified in the section if it would be contrary to any Act or rule of law to do so. This provision makes it clear, for example, that a rule of law such as that expressed in *The Queen v De Simoni*[4] is not affected. In *De Simoni* the High Court held that a sentencing court may not take into account circumstances of aggravation that would have warranted a conviction for a more serious offence for which the offender was not charged. The *De Simoni* principle is further preserved by the operation of the concluding words of proposed new sec 21A(2).[5]

The requirement under new sec 21A for a court to take into account the aggravating and mitigating factors and other matters, applies in sentencing for all offences-not just to offences that are subject to a standard non-parole period.

Setting non-parole period and balance of term of sentence

The existing sec 44 is replaced with a new section. The new section requires the sentencing court to set a non-parole period for the sentence before setting the balance of the term of the sentence. This is known to criminal law practitioners as 'bottom up'

sentencing. At present sec 44 requires the court to set the total sentence and then fix the non-parole period-i.e. 'top down' sentencing. Under the new sec 44 the non-parole period is fixed first. The balance of the term of the sentence must not exceed one third of the non-parole period unless the court decides there are 'special circumstances for it being more'. The new sec 44 seeks to maintain the existing presumptive ratio between non-parole period and parole period.

The return to 'bottom up' sentencing suggests that appellate guidance will have to be re-configured across a wide range of sentences. Sentencing law is now already more than sufficiently complex.

By way of background, sec 5 of the now repealed *Sentencing Act 1989* was replaced by the current *Crimes (Sentencing Procedure) Act 1999*. The 1999 Act, in essence, reversed the way in which sentences were formulated with the requirement that the maximum term be set first. From the second reading speech relating to the introduction of the Act in 1999:

> *The Sentencing Act 1989* tried in sec 5(1) to change the way sentences of imprisonment were imposed by the courts. In theory, a court was required first to set a minimum term which must be served and then to add a period during which the prisoner could be released on parole. In practice, things were not quite so simple. The two-stage sentencing process has been described by the present Chief Justice of New South Wales as 'quite artificial'. The Law Reform Commission was similarly critical, noting:
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> > The mere statement of a minimum term and additional term cannot effectively convey all the purposes of punishment. It is only once a head sentence has been set that the court can determine the minimum term, that is, the period which the offender must, in justice, serve in gaol (pages 179-180).
>
> Clause 44 implements this part of the Law Reform Commission's recommendation'.

The government now seeks to revert to the 'quite artificial' manner of fixing sentences with the new sec 44

A regime of 'bottom up' sentencing existed between 1989 and 1999 in relation to sec 5, *Sentencing Act 1989* (Act now repealed). See *R v Hampton*[6]. The existing regime[7] was reviewed by the Court of Criminal appeal in *R v Carrion*[8] and *R v Simpson*[9]. The new provision is different again from both the 1989 'bottom up' and 1999 'top down' provisions, although it does revert to 'bottom up'.

At present, when sentence is fixed, the non-parole period may be reduced because of special circumstances. Some commentators have indicated that 'special circumstances' may no longer be capable of reducing the non-parole period under the new sec 44. This must await appellate clarification.

An arguable interpretation in relation to 'special circumstances' is that the reasoning in *Hampton* if applied to the new provisions may result in an interpretation leading to either an increase in total sentence or a reduction in the non-parole period. Again, whether that is correct is a matter that must await appellate clarification. Absent a broad interpretation, the effect of the wording of the new sec 44(2) may be that a finding of 'special circumstances' can only increase the total sentence.

It is difficult to imagine the Court of Criminal Appeal adopting an interpretation whereby the existence of 'special circumstances' would result in a longer overall sentence than if those circumstances did not exist at all.

It is to be borne in mind that several of the factors sustained by authority as representing special circumstances are of a nature inherently beneficial to the offender. Factors such as youth, first time in prison and enhanced capacity for rehabilitation, may well represent an argument for a longer period on parole but should not, indeed, have not previously been the basis for arriving at an overall sentence otherwise disproportionate to the offence, its circumstances and that of the offender.

In *Simpson*, Spigelman CJ said:

> The words 'special circumstances'…are words of indeterminate reference and will always take their colour from their surroundings. [T]he non-parole period is to be determined by what the sentencing judge concludes that all the circumstances of the case, including the need for rehabilitation, indicate ought [to] be the minimum period of actual incarceration.[10]

Standard non-parole periods

A new Division 1A (secs 54A - 54D) is inserted into Part 4 of the Act. The new Division provides for standard non-parole periods for a number of serious offences listed in a table. The table of minimum non-parole periods represents substantial increases to the existing mean for each offence.

Standard non-parole periods and the middle range

The new sec 54A provides that the standard non-parole period for an offence is the non-parole period set out opposite the offence in the table. The offences specified in that table include murder, wounding with intent to do bodily harm or resist arrest, certain assault offences involving injury to police officers, certain sexual assault offences, sexual intercourse with a child under 10 years of age, robbery with arms and wounding, certain break and enter offences, car-jacking, certain offences involving commercial quantities of prohibited drugs and unauthorised possession or use of firearms.

The Bill provides in new sec 54A(2) that the standard non-parole period for an offence represents the non-parole period for an offence in the middle of the range of objective seriousness for such an offence. The standard non-parole period provides a reference point or benchmark within the sentencing spectrum for offences that are above or below the middle of the range of objective seriousness for such an offence.[11]

The section, however, gives no guidance to the judiciary as to the ascertaining of the middle range of offences.

In the second reading speech the Attorney General referred, in this context to a sentencing spectrum being well known to sentencing judges and criminal law practitioners. He further clarified the matter by referring to one end of the spectrum being the 'worst type of case falling within the relevant prohibition'[12] and the High Court's observations in *Veen No 2*[13] that this does not mean that' a lesser penalty must be imposed if it be possible to envisage a worse case...'. The Attorney then stated that 'at the other end of the sentencing spectrum lie cases which might be described as the least serious or trivial'[14]

The Attorney General referred to *Ibbs v The Queen*[15], *Thorneloe v Filipowski*[16], *R v White*[17] and *R v Moon*[18], as 'to the need for a sentencing judge to identify where in the spectrum of objective seriousness an offence lies'[19].

Nevertheless, the fact remains that the setting of a specific middle range in this manner is hitherto unknown and unexplored in the criminal law in Australia.

One question raised by some commentators is to what extent new sec 21A(2) factors (aggravating factors) operate in the assessment of the standard minimum-i.e. are some incorporated or

presumed to exist?

Standard non-parole periods unless reasons

The new sec 54B provides that a court sentencing an offender to imprisonment for an offence set out in the table is to set the standard non-parole period as the non-parole period for that offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period. The reasons for which the court may increase or reduce the non-parole period are only matters referred to in proposed sec 21A: new sec 54B(3).

The New South Wales Bar Association stated in its submission to the Attorney General on the consultation draft that in relation to new sec 54B(2), whilst it provides that the sentencing court need not set 'the standard non-parole period as the non-parole period for the offence' where 'the court determines that there are reasons for increasing or reducing the standard non-parole period', it cannot be safely concluded that this gives an unfettered discretion to the sentencing court. Rather, sec 54B(2) is likely to be interpreted as a statutory presumption which significantly fetters the sentencing court's discretion.

The new sec 54B(2) is worded in a slightly different way from the consultation draft, nevertheless the possibility of a 'statutory fetter' interpretation remains valid.

A separate problem raised in relation to the new sec 54B(3) is that it appears to limit the 'reasons' to be taken into account in varying the standard non-parole period to 'only those referred to in sec 21A'. The question asked by some commentators in this regard is whether these 'reasons' are limited to the specified aggravating and mitigating circumstances or extend to the factors referred to in new sec 21A(1). There is currently a proposed amendment in the Legislative Council to remove the words 'are only' and insert 'include'.

New sec 54B(4) record of reasons

The court must make a record of its reasons for increasing or reducing the standard non-parole period. The court must identify in the record of its reasons each factor that it took into account.

It is the observation of many commentators that the requirement for reasons to be given when making such determinations is hardly a novel concept in the criminal law.

In the second reading speech the Attorney General observed that the sentencing process remains one of synthesis of all the relevant factors in the circumstances of the case and that the requirement for a court to identify each factor that it takes into account does not require the court to assign a numerical value to such a factor, 'that is, proposed sec 54B does not require a court to adopt a mathematical or multi-staged approach to sentencing'[20]

The failure of a court to comply with this section does not invalidate the sentence: new sec 54B(5).

New sec 54C record of reasons/non custodial sentence

The new sec 54C requires a court that imposes a non-custodial sentence for an offence set out in the table to make a record of its reasons for doing so. The court must identify in the record of its reasons each mitigating factor that it took into account: new sec 54C(1). The failure of a court to comply with this section does not invalidate the sentence: new sec 54C(2).

Exclusions new sec 54D

Standard non-parole periods do not apply to:

- imprisonment for life
- detention under the *Mental Health (Criminal Procedure) Act 1990.*
- offences for which the offender is sentenced is dealt with summarily[21].

New South Wales Sentencing Council

The Sentencing Council is to have the following functions:

(a) advising and consulting with the minister in relation to offences suitable for standard non-parole periods and their proposed length,

(b) advising and consulting with the minister in relation to offences suitable for guideline judgments and the submissions to be made by the minister on an application for a guideline judgment,

(c) monitoring, and reporting annually to the minister on, sentencing trends and practices, including the operation of standard non-parole periods and guideline judgments,

(d) at the request of the minister, preparing research papers or reports on particular subjects in connection with sentencing.

The Sentencing Council is to consist of 10 members appointed by the minister, of whom:

(a) one is to be a retired judicial officer, and

(b) one is to have expertise or experience in law enforcement, and

(c) three are to have expertise or experience in criminal law or sentencing (including one person who has expertise or experience in the area of prosecution and one person who has expertise or experience in the area of defence) and

(d) one is to be a person who has expertise or experience in Aboriginal justice matters, and

(e) four are to be persons presenting the general community, of whom two are to have expertise or experience in matters associated with victims of crime.

Review

The new sec 106 requires the Attorney General to review the amendments relating to standard non-parole periods 'as soon as possible after the period of two years from the commencement': sec 106(3). A report on the outcome of the review is to be tabled in parliament with 12 months after the end of the period of two years sec 106(4).

Effect of failure to comply with Act

New sec 101A provides that a failure to comply with a provision of the principal Act may be considered by an appeal court in any appeal against sentence even if the Act declares that the failure to comply does not invalidate the sentence. The proposed section ensures that the courts are not relieved of the obligation to comply with the Act with respect to standard non-parole periods or other matters, but protects the validity of any sentence until such time as the matter is considered by an appeal court.

Guideline judgments

In the second reading speech the Attorney General said that 'it is proposed that the guideline judgments already promulgated by the Court of Criminal Appeal should continue to be used by the courts when sentencing for these offences. Guideline judgments will also continue to play an important role with respect to offences that are not part of the standard non-parole period

scheme'[22].

Guideline judgments have been delivered in respect of the following offences:

- Dangerous driving causing death or grievous bodily harm: *R v Jurisic* (1998) 45 NSWLR 209 and *R v Whyte* [2002] NSWCCA 343 (challenges to the constitutional validity of guideline were rejected in *Whyte*.
- Armed robbery: *R v Henry* (1999) 46 NSWLR 346.
- Break, enter and steal: AG Application (No 1) *R v Ponfield* [1999] NSWCCA 435.
- Guilty pleas: *R v Thomson* [2000] 48 NSWLR 383, *R v Sharma* [2002] 54 NSWLR 300 (Sharma is the reconsideration of *Thomson* in the light of reservations expressed by the High Court in relation to guideline judgments in *Wong v The Queen* (2001) 76 ALJR 79).

Consequential amendment re application

The standard non-parole period amendments will not apply to offences committed before the commencement of the amendment.

There is a proposed government amendment of the Bill in the Legislative Council, in relation to new sec 3A (Purposes of sentencing) and new sec 21A (Aggravating, mitigating and other factors in sentencing) to the effect that these particular provisions would apply to sentencing in relation to offences committed prior to the commencement date, in certain circumstances.

Progress of the Bill

At the time of writing, the Bill had been passed by the Legislative Assembly but had not been introduced into the Legislative Council. There is a further proposed government amendment in the Upper House, to add two extra offences to the table of minimum non-parole periods[23]. Although one cannot predict with absolute certainty, it is not anticipated that there will be any other significant additional amendments to the legislation in the Legislative Council.

Conclusion

Both the Bar Association and the Public Defenders have stated that the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentences) Bill 2002* represents an unwarranted departure from fundamental concepts of judicial discretion. Independence of the judiciary has long been reflected in the dispassionate exercise of discretion, including that employed in sentencing, governed by the application of legal principles. Concerns have also been expressed that the legislation seeks to accommodate, rather than address, prevalent misconceptions as to the effectiveness and propriety of long-standing judicial practice in the area of sentencing.

The Chief Justice of NSW the Honourable JJ Spigelman AC stated in January of this year:

> The sentencing of convicted criminals is one of the most important tasks performed by the judiciary. Sentencing engages the interest, and sometimes the passion, of the public at large more than anything else judges do. The public attitude to the way judges impose sentences determines, to a substantial extent, the state of public confidence in the administration of justice.
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> I am concerned that this confidence, and public respect for the judiciary, is diminished by reason of ignorance about what judges actually do in terms of the sentences that are imposed. Plainly there are occasions when a particular sentence attracts criticism and that criticism is reasonably based. What concerns me is that such cases appear to be widely regarded as typical, when they are not.
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> The Chief Justice of Australia, the Honourable A M Gleeson, has recently summarised the result of public opinion polls about sentencing not just in Australia but also in the United Kingdom and North America:
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> > ...when people are asked whether they think the sentences imposed by judges are too lenient, or too severe, or just about right, most say that the sentences are too lenient. However, when they are then given the facts of individual cases, and asked what sentences they themselves would have imposed, a majority come up with sentences that are more lenient than sentences that were actually imposed by judges. The same results have shown up in similar surveys in other countries. When people are questioned in more depth, and are made to think more closely about an issue, their responses change.[24]

The Public Defenders' submission to the Attorney General, opposed the Bill and commended to the government continued support of the present and effective modes of judicial supervision through the Court of Criminal Appeal and the guideline judgments, supplemented by such legislation as was most recently commenced on 15 April 2002 in the form of the amendments to sec 21A of the Crimes (Sentencing Procedure) Act. The amended section represented an effective and near exhaustive list of relevant factors to be considered on sentence. Such a provision, in combination with the guideline judgments, is beneficial and to be built upon in preference to the alternative approach represented by the *Crimes (Sentencing Procedure Amendment) Standard Minimum Sentence (Bill) 2002* which must unavoidably represent a concession to the most insupportable misconceptions as to the reality of the justice system. There is unarguably some disquiet in the community as to the integrity of sentencing processes and principles, often fanned by flawed media analysis disregarding or misrepresenting sound legal principles. An appropriate response is one of education and exposure of the truth of accountable sentencing discretion, as opposed to the prevailing myths of irresponsible sentencing caprice on the part of the courts. This is no easy task.

Neither the government's Bill nor the opposition's much more draconian proposal is the answer.

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1 Second reading speech, Legislative Assembly, 23 October 2002, Hansard.
2 I will be referring to new sections rather than clauses.
3 ***Piper v Corrective Services Commission of NSW*** (1986) 6 NSWLR 352.
4 (1981) 147 CLR 383.
5 Second reading speech, Legislative Assembly, 23 October 2002, Hansard.
6 (1998) 44 NSWLR 729 see also ***R v GDR*** (1994) 35 NSWLR 376.
7 Sec 44 ***Crimes (Sentencing Procedure) Act 1999***
8 (2000) 49 NSWLR 149.
9 (2001) 53 NSWLR 704.
10 At [59]
11 Second Reading Speech, Legislative Assembly, 23 October 2002, Hansard.
12 ***R v Tait and Bartley*** (1979) 46 FLR 386.
13 ***Veen v The Queen (No 2)*** 164 CLR 465.
14 Second reading speech, Legislative Assembly, 23 October 2002, Hansard
15 (1987) 163 CLR 447 at p 451 and 452.
16 (2001) 52 NSWLR 60 at page 69.
17 [2000] NSWCCA 343.
18 [2000] NSWCCA 534.
19 Second reading speech, Legislative Assembly, 23 October 2002, Hansard.
20 Second reading speech, Legislative Assembly, 23 October 2002, Hansard.
21 See also ***R v Doan*** (2000) 50 NSWLR 115
22 Second reading speech, Legislative Assembly, 23.10.02, Hansard.
23 Aggravated indecent assault sec ***61M Crimes Act 1900*** (NSW). Intentionally causing a fire (bushfires) Sec 203E ***Crimes Act 1900*** (NSW).
24 Chief Justice Spigelman's Law Term Address, 30 January 2002. See also, The Honourable AM Gleeson AC, Chief Justice of Australia, 'Valuing courts', ***'Judicial officers' bulletin***, Volume 13 Number 7, August 2001.