9 July 2021

Mr Paul McKnight
Deputy Secretary
Law Reform and Legal Services
NSW Department of Communities and Justice

[redacted]

Dear Mr McKnight

Review of sentencing practices for historical offences

Legal Aid NSW welcomes the opportunity to make a submission to the Department of Communities and Justice in response to the discussion paper, *Review of sentencing practices for historical offences*.

In summary, we oppose the extension of the operation of section 25AA of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**CSP Act**) to all offences. In particular, we strongly oppose the mandatory nature of section 25AA, as it undermines the role of the court and judicial discretion, where all relevant features of the case on sentence are appropriately taken into account.

While the discussion paper usefully sets out the arguments for and against an extension to section 25AA, it does not provide an overriding policy justification for an expansion, apart from referencing decisions of a single District Court Judge.[1] In our view, the adverse consequences of extending section 25AA to all offences would outweigh the perceived benefit of an amendment to address the concern identified by Judge Berman regarding the narrow category of cases involving both adult and child complainants in the same proceeding.[2] The concern identified by Judge Berman in another case[3] could be addressed through a targeted amendment to section 25AA(5)(d) (see further below).

[1] *R v Richardson* (unreported, District Court of NSW, Berman DCJ, 20 October 2020); *R v Cameron (a Pseudonym)* [2018] NSWDC 432; *R v Gaven* [2014] NSWDC 189; *R v Pemble* [2015] NSWDC 168.
[2] *R v Richardson* (unreported, District Court of NSW, Berman DCJ, 20 October 2020).
[3] *R v Cameron (a Pseudonym)* [2018] NSWDC 432.

We reiterate from our previous submissions[4] that the introduction of a requirement that courts must sentence offenders convicted of historical offences according to current sentencing principles would undermine notions of fairness and the principle against retrospectivity of criminal penalty, which is entrenched in both common law and international law.[5] It would also create inconsistency in sentencing for historical offences pre and post reform. In our view, an offender should be sentenced in a way that reflects the community's understanding of the seriousness of the offence at the time of the offending, and the offender's own understanding of the moral culpability of their conduct at the time. Guidance and material from the Court of Criminal Appeal and Public Defenders[6] assist with the task of applying historical sentencing standards.

We are concerned that little to no evidence has been provided to demonstrate that section 25AA is operating as intended. The discussion paper asserts that "[t]he predictable, and intended, consequence of enacting section 25AA was an overall increase in sentences for historical child sexual offences".[7] However, the discussion paper does not cite any sentencing statistics to compare sentencing outcomes before and after the introduction of section 25AA.

In our experience, the operation of section 25AA in relation to child sexual offences has proven to be problematic. There have been significant reforms to sexual assault offending and the maximum penalties for these offences in recent years such that, in our view, it is conceptually flawed to apply current sentencing practices to historical offences.

We note that one of the original reasons for limiting section 25AA to child sexual assault offences was to address the issue of delay in reporting, which was highlighted by the Royal Commission into Institutional Responses to Child Sexual Abuse.[8] Entirely different factors are at play in historical fraud offences which, for example and as the discussion paper acknowledges, mainly involve delayed *detection* rather than delayed reporting.

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[4] Legal Aid NSW submission to the Department of Justice, *Strengthening Child Sexual Abuse Laws in NSW* (October 2017) <https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0006/27681/Strengthening-Child-Sexual-Abuse-Laws-in-NSW-Legal-Aid-NSW-submission-to-the-Department-of-Justice,-October-2017.pdf>; Legal Aid NSW submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice* (October 2016) <https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0017/25604/Legal-Aid-NSW-Submission-to-Royal-Commission-concerning-criminal-justice-isssues.pdf>.

[5] See *International Covenant on Civil and Political Rights* art 15.

[6] The Public Defenders, 'Sentencing Tables Index' (2021) https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/Sentencing%20Tables/Public_Defenders_Sentencing_Tables.aspx.

[7] Department of Communities and Justice, *Review of Sentencing Practices for Historical Offences: Discussion Paper* (2021) 12 [5.14].

[8] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Parts VII - X and Appendices* (20) 319.

Furthermore, contrary to suggestions in the discussion paper, there are many reasons for delayed reporting and prosecution of an offence. It is not always because the offender has deliberately evaded prosecution. In our experience, a significant number of cases involving historical offences relate to offenders who were themselves children at the time of their offending and who have not attempted to avoid prosecution.

The discussion paper has not identified any deficiency in the law or sentencing outcomes in relation to offences other than child sexual offences – by reference to a specific case, offence, or otherwise – to justify the need to extend section 25AA. The discussion paper notes that the introduction of section 25AA followed a marked shift in community attitudes towards child sexual offending, and was intended to ensure that sentences would better align with community standards, an issue which was identified by the Royal Commission into Institutional Responses to Child Sexual Abuse.[9]

While the discussion paper identifies other offences for which community expectations may have shifted, such as domestic violence offences and white collar crimes, no evidence has been provided to demonstrate that there have been unfair sentencing outcomes or that offenders have benefited from lengthy delay, to justify treating these and other offences more seriously now than in the past. Further, a recent National Jury Sentencing Study found that "even in the case of sex offender sentencing, the offences which reportedly cause most community concern, there is considerable alignment between the public and judges with respect to sentencing factors".[10] The findings show that "members of the public are less punitive than commonly assumed… and highlight the need to ensure that sentencing practice and policy are based on actual, rather than presumed, opinion".[11]

It is inevitable that the extension of section 25AA will lead to harsher sentences in the vast majority of offence types. Penalties for very few offence categories have been reduced over the years. The Sentencing Council has reviewed sentencing for homicide, including penalties imposed for domestic violence homicides, and found that the "sentences for homicide are generally appropriate", and that "[j]udicial discretion should be preserved to ensure sentences respond appropriately to individual cases".[12]

The Sentencing Council has also reviewed sentencing for domestic violence offences, and found that "the principles [for sentencing domestic violence offenders] are generally appropriate and nothing in the data generally points to a problem with the

[9] Department of Communities and Justice, *Review of Sentencing Practices for Historical Offences: Discussion Paper* (2021) 4 [4.1], 11 [5.2].
[10] K Warner et al, 'Comparing Legal and Lay Assessments of Relevant Sentencing Factors for Sex Offences in Australia' (2021) 45(1) *Criminal Law Journal* 57, 73.
[11] Ibid 74.
[12] NSW Sentencing Council, *Homicide* (Report, May 2021) 1.

sentencing of [domestic violence] offenders".[13] No evidence has been provided in the discussion paper as to the inadequacy of recent sentences for white collar crime.

We are concerned that wholesale increases in sentences in NSW will lead to longer prison terms and higher incarceration rates, and will have a disproportionate impact on Aboriginal and Torres Strait Islander people and people with disability, groups that are already disproportionately represented in the criminal justice system. Longer sentences will lead to fewer people being eligible for Intensive Correction Orders (**ICOs**), which are only available where the term of imprisonment does not exceed two years for a single offence or three years for multiple offences or multiple ICOs. Exposure to longer periods of imprisonment may also deter pleas of guilty.

We suggest that, before the proposal is progressed, comprehensive modelling be undertaken on the impacts of extending section 25AA to all offences. This should include the impact of the proposal on:

- jail terms and length of prison sentences
- ICOs
- incarceration rates of Aboriginal and Torres Strait Islander people and people with disability, and
- resulting resourcing for justice agencies.

We also consider that a comprehensive analysis of historical sentencing outcomes should be conducted before extending section 25AA to other offences.

If law reform is to be progressed in this area, we suggest that any amendments be confined to addressing the concern identified by Judge Berman in *Cameron (a Pseudonym).*[14] In that case, Judge Berman held that section 25AA does not apply to the offence of buggery because it is not "substantially similar" to any of the other offences nominated in the provision. His Honour commented that it would have been preferable for Parliament to have specified which offences section 25AA would apply to, rather than requiring judges to make individual judgements about what offences are and are not included under section 25AA. We would support further prescription of offences under section 25AA(5)(d).

In the alternative, should broader amendment be supported by Government, the Victorian approach is preferable. In that regime, the court must *have regard to*, rather than must apply, sentencing practices at the time of sentencing, among other factors. As noted by the discussion paper, the Victorian Court of Appeal in *Stalio*[15] stated that equal justice may require a court to consider sentencing practices at the date of an

[13] NSW Sentencing Council, *Sentencing for Domestic Violence Offences* (Report, February 2016) 5.
[14] *R v Cameron (a Pseudonym)* [2018] NSWDC 432.
[15] *Stalio v The Queen* [2012] VSCA 120.

offence, so far as they can be established, and if they demonstrate that a materially lesser sanction would have been imposed for a like offence than current sentencing practice would impose.[16] This factor is relevant to achieving the purposes set out in section 5(1) of the *Sentencing Act 1991* (Vic), and in particular the imposition of punishment to the extent which is just in all the circumstances.[17]

We note that *Stalio* has been qualified in subsequent cases. In *Mush*[18] and *Bradley*,[19] the Victorian Court of Appeal drew attention to those cases where the offender's conduct is the reason they could not be sentenced at the time of the offence.[20] The Court of Appeal in *Mush* stated:

> In respect of the second proposition stated in *Stalio*, the Court in *Bradley* identified a qualification to the application of the principle of equal justice in cases in which the offending occurred decades before the offender is sentenced. The Court considered that, where it was the offender's own conduct which made it impossible for him or her to be sentenced contemporaneously with the offending, the offender may not be entitled to seek to be treated as if his or her criminal responsibility had been established at the time of the offending.[21]

Most importantly, the Victorian approach preserves the discretion of the court to consider the overall circumstances of the case. As explained in *Carter (a Pseudonym)*,[22] past sentencing practice is a sentencing factor which the court attributes specific weight in the circumstances of the case, but there are limits as to how the principle is to be applied:[23]

> The following matters should be noted about the above statement. First, *Lowe* involved parity between co-offenders — where the principle of equality was obviously relevant — and *Stalio* did not. Second, when read as a whole, the decision in *Stalio* does not (as the applicant contends) require a sentencing court when sentencing occurs after a substantial lapse of time from the offending to sentence in accordance with prevailing sentencing practices at about the time of the offending. *Stalio* requires only that 'regard can be had to sentencing practice at the time of offending for the purpose of ascertaining just punishment in accordance with the principle of equal justice'. **The weight to be given to this factor in any given case will depend upon its own circumstances, which will usually involve more than 'simply … the lapse of time'**.[24] [emphasis added]

In our view, the Victorian approach preserves judicial discretion, and is therefore preferable to the mandatory application of sentencing practices at the time of sentencing. A 'one size fits all' approach would be inconsistent with individualised justice and would risk harsh and unfair sentencing outcomes.

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[16] Ibid [9], [52].
[17] Ibid [52].
[18] *Mush v The Queen* [2019] VSCA 307.
[19] *Bradley v The Queen* [2017] VSCA 69.
[20] Hugh Donnelly, *Sentencing According to Current and Past Practices* (2020) 20.
[21] *Mush v The Queen* [2019] VSCA 307 [109].
[22] *Carter (a Pseudonym) v The Queen* [2018] VSCA 88.
[23] Hugh Donnelly, *Sentencing According to Current and Past Practices* (2020) 18.
[24] *Carter (a Pseudonym) v The Queen* [2018] VSCA 88 [55].

Thank you again for the opportunity to make a submission in response to the discussion paper. If you require any further information, please contact Meagan Lee, Senior Law Reform Officer, on [redacted] or [redacted], or at [redacted]

Yours sincerely

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Brendan Thomas
Chief Executive Officer