The Chief Judge
District Court of NSW

The Hon J Wood AO QC
Chairperson
NSW Law Reform Commission
DX 1227 SYDNEY

11 October, 2011

Dear James,

Sentencing

Thank you for your letter of 26 September (file ref 13.71) relating to the Law Reform Commission's reference focussing on sentencing in New South Wales. I welcome this reference because, in my view, sentencing has become far too complicated and that has led to judges taking more time to impose sentences than is desirable. It has also led to more technical arguments being run in the Court of Criminal Appeal and that again delays the finalisation of the sentencing process. The High Court has repeatedly said that the process of sentencing is by "instinctive synthesis" and that should mean that sentencing is a relatively simple process. It was certainly a simpler process in New South Wales 30 or 40 years ago.

I suggest there are four areas which, if addressed, would simplify the sentencing process. They are as follows:

1. Section 21A of the *Crimes (Sentencing Procedure) Act* 1999 purports to set out the aggravating and mitigating factors to be considered in sentencing. The factors set out in the section are factors that have always been taken into account in sentencing but by setting out a table of factors to be considered, the Act has led to countless arguments before appellate courts as to whether or not the judge has considered some one or more of the factors mentioned. It has also led to arguments about whether there has been double counting. Often judges feel obliged to go through the various factors mentioned as a checklist. The section contemplates there are other matters that may be required or permitted by common law to be taken into account and in fact the section adds nothing to the common law. The repeal of the section could only simplify the sentencing process.

2. Standard non-parole periods: In my view the standard non-parole period provisions should be repealed. In the first place they have led to an increase in gaol sentences far beyond what is appropriate for the protection of the community. There is no doubt they have led to a significant increase in sentences since they were introduced. The concept of standard non-parole periods mirrors to some extent the philosophy behind the grid sentencing practices in the United States of America. In

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many ways there are significant similarities between the American social and political system and ours. There is, however, a significant difference in one area. That difference is the existence of a very significant underclass in United States society made up largely of African Americans and (often illegal) Hispanic immigrants. Moreover, the Social Security system to support those people is not as comprehensive as the system in Australia. In this area the social dynamics are quite different and the American sentencing experience is not one that is relevant in Australia.

The standard non-parole periods which have been put in place in New South Wales are quite irregular and illogical. In the first place the standard non-parole periods bear no consistent relationship to the maximum penalties provided in the *Crimes Act*. For example, under s61M(1) for an offence of aggravated indecent assault the maximum penalty is seven years but for that offence a standard non-parole period of five years is specified. That assumes that every offence is to be regarded as close to the most serious of its kind. Moreover, to provide for a standard non-parole period for an offence that carries seven years is quite illogical when there are many offences which carry 14 or 20 years that do not have a standard non-parole period.

Because the Courts have in the past interpreted the standard non-parole period as mainly referring to a person convicted after a trial, there is an incentive for accused persons to forego their right to trial in order to avoid a standard non-parole period. Because of this I have real concerns that some people may plead guilty when they should not do so. Of course that makes the criminal justice system more efficient but the system's main aim is to achieve justice and if undue pressure causes pleas of guilty, justice may not be well served.

The illogicalities in the standard non-parole period system could be remedied by, for example, only having standard non-parole periods for offences carrying life or 25 years has maximum penalty. I would prefer to see them abolished altogether.

Since drafting this response, the decision of the High Court in *Muldrock* has been given. It will remove many of the difficulties for sentencing judges but the illogicalities of the various standard non-parole periods remain.

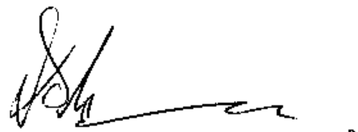
3. The decision of the High Court in *Pearce v R* (1998) 194 CLR 610 introduced another significant complication. As interpreted by the New South Wales Court of Criminal Appeal, it has required judges to impose individual sentences for each of a series of offences. The recent amendment in s53A of the *Crimes (Sentencing Procedure) Act* 1999 has gone part way to overcoming the problems by allowing aggregate sentences of imprisonment and the fixing of a single non-parole period. However, s53A(2) still requires the judge to specify the sentence that would have been imposed for each offence. This still makes the sentencing process for multiple offences more complicated than it need be. When imposing sentences for multiple offences, a significant factor is the totality of the sentence, so that inevitably the fifth sentence for a similar offence will be less than the earlier sentences imposed if it is made cumulative on them. The only reason for having such a provision is in case there is an error in the assessment of sentence concealed in the total sentence. On the other hand, the real question at the end of the day is what is the appropriate sentence for a series of offences and if the error of the sentencing judge is to underestimate or

overestimate that sentence that is something that is readily apparent and it can be properly examined by an appellate court.

4. The *Criminal Appeal Act* 1912 is a statute giving to the Court of Criminal Appeal statutory powers that did not exist at common law. For many years the decisions of the Court of Criminal Appeal focussed on finding errors in the sentencing process which then called for the Court to exercise its own powers to re-sentence. In more recent years there has been a recognition that s6(3) allows the Court to impose another sentence *"if it is of opinion that some other sentence ... should have been passed ..."* In my view, when appellate provisions were introduced in respect of sentences it was only ever envisaged that the function of the appellate court was to decide if the sentence was excessive or manifestly inadequate. If an appellate court reviews a sentence by seeking to find errors in the sentencing process, that is a pointless exercise if the sentence imposed was the appropriate sentence. If an appellate court does this by way of criticising sentencing judges for error in the sentencing process, that can only lead to judges spending more and more time attempting to demonstrate there is no error.

This particular problem is a very significant problem for sentencing judges and undoubtedly leads to unnecessary reserving of decisions in order to avoid errors. The problem could be overcome by the *Criminal Appeal Act* 1912 being amended to make it plain that the only question for the Court of Criminal Appeal is whether the sentence is manifestly excessive or manifestly inadequate and that only if the Court came to such a conclusion could the Court change the sentence.

Yours sincerely,



The Hon Justice R O Blanch
CHIEF JUDGE