

1<sup>st</sup> March 2023

The Hon Peter McClellan AM KC  
Chairperson  
New South Wales Sentencing Council

Via email: [sentencingcouncil@justice.nsw.gov.au](mailto:sentencingcouncil@justice.nsw.gov.au)

Dear The Hon Peter McClellan AM KC

**Preliminary Submission to the New South Wales Sentencing Council – Review of the law of sentencing for firearms, knives, and other weapons offences.**

From Lexie Henderson-Lancett, Author: Master of Research Thesis (2022) *Evidence behind closed doors; have changes to committal proceedings compromised procedural fairness in criminal trials in New South Wales?*

Thank you for the opportunity to respond to the Terms of Reference for review of the law of sentencing for firearms, knives, and other weapons offences. There are eight points listed within the Terms of Reference, however, I shall only deal with those points relevant to the research findings from my Masters' thesis.

*Background:*

To identify if fair procedures existed in NSW during the guilty plea process, I looked at outcomes from guilty pleas. This required analysis of sentencing records. A sample of sentence outcomes was selected from NSW Caselaw records of offenders who had pleaded guilty to an indictable offence at the Local Court, avoided a trial, and sent for sentencing in the District Court. The time-period of the sample covered six months over 2021-2022 and contained 93 cases. Of these, in-depth analysis of 10 was undertaken. I examined the factors that influenced the final penalty and the impact of the sentence discount. The comments provided below pertain to this sample and research.

*Response to the Terms of Reference:*

**2. Provide information on the characteristics of offenders, sentence type and length**

*Characteristics of offenders*

My research concerned offenders who pleaded guilty and waived their rights to a fair trial upheld by the European Convention of Human Rights (ECHR). I examined scholarly literature regarding the process of entering a guilty plea. A body of scholarly work looks to identify if those pleading guilty are making an autonomous decision holding out an autonomous action is the way the guilty plea process can be justified. On the other hand, there is an equally growing body of literature which takes a different perspective advancing a strong argument regarding the capacity of offenders to make their own decision. Peay and Player examined vulnerability of offenders and advanced a description of a representative population:

'Defendants who appear in front of the criminal courts are not a random sample of the population. They disproportionately include those who are rendered vulnerable and disadvantaged in various ways, whether by education, by employment, by birth or by bad luck.'<sup>1</sup>

This description is not dissimilar to my sample of cases. Briefly, of the 10 cases contained in the in-depth analysis seven referred to the principles in *Bugmy*, while in six cases, the principles were applied.<sup>2</sup> Of the whole sample of 93, some 15 cases referred to the *Bugmy* decision when examining subjective circumstances, including indigenous and non-indigenous. Of relevance, offenders of weapons offences were included in the sample group.

This simple measure shows offenders of indictable crimes in NSW are representative of a population comprising some of the most deprived and disadvantaged members of our community. The importance of *Bugmy* in assessing subjective circumstances is discussed below. It is flagged here simply as an indicator that sentencing judges are aware of the disproportional representation in the offender population. My analysis found judicial discretion, extends beyond statutory requirements, permitting sentencing outcomes that address offender characteristics.

- *I would recommend any alteration to penalties for firearms, knives and other weapons offences should have concomitant rehabilitation programs available to support reintegration into the community and reduce recidivism.*

#### *Sentence type*

Recent legislative changes to how penalties are applied impact this section. In 2018 Guilty Plea processes were formalised in NSW introducing a (fixed) sliding scale of sentence discounts for early guilty pleas.<sup>3</sup> Later that year three new penalties were made available in the *Crimes (Sentencing Procedure) Act (1999) NSW*, namely: Intensive Corrections Orders (ICO), Community Corrections Orders (CCO) and Community Release Orders (CRO). Each carries its own requirements and conditions but from my reading of the sample cases, it is apparent that judges are seeking to apply community orders where rehabilitation is seen as offering better outcomes for the offender than incarceration.

- *For the reasons provided above I would not recommend that changes to statutes impede the current judicial decision-making of sentencing orders where reintegration into the community is possible.*

#### *Sentence length*

The maximum penalty for each offence is used by the sentencing judge as a guideline for determining the seriousness of the offence. Of relevance, in my sample of 93, the maximum sentence was not applied on any offender in the sample. Two aspects are found to affect sentence length.

First, is the effect of sentence discounts for pleading guilty. Of the sample, 79 offenders had been given a 25% discount this was deducted in the final orders. The remaining 20 offenders received a lesser sentence discount. All discounts impact the final outcome, either the time to be served in imprisonment, or a community service order. Sentence discounts for guilty pleas have

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<sup>1</sup> Peay, Jill and Elaine Player 'Pleading Guilty: Why Vulnerability Matters (November 2018) 81(6) The Modern Law Review, 929.

<sup>2</sup> *Bugmy v The Queen* (2013) 249 CLR 57

<sup>3</sup> *Crimes (Sentencing Procedure) Act 1999 (NSW) Ss 25D-25F.*

not been mentioned in the Terms of Reference. While I appreciate my research is limited, it does indicate sentence discounts from pleading guilty early are a contributory factor to the final penalty. What is also evident, discounts appear to advantage the offender. Sentencing judges in NSW show an acceptance of the discount reached in the Case Conference. However, they are prepared to alter the amount on recommendation by prosecution or defence or from the outcome from a disputed facts hearing (*R v Hunter* [2021] NSWDC 490). Neither the actual guilty plea decision, nor discount amount, are investigated by the sentencing judge, unlike judicial checking of plea bargaining in America and Canada.

A second factor that influences sentence length, is the subjective circumstances of the individual offender. In the sample analysed, this is by far the most significant factor influencing the final penalty. Subjective mitigating circumstances are discussed below.

- *For the reasons stated, it is my considered opinion that the impact of guilty pleas be considered as part of this review. They are particularly beneficial to disadvantaged offenders, often permitting a sentence focused on rehabilitation and reintegration into the community rather than incarceration.*

### **3.b The mitigating subjective features of offenders:**

Section 21A lists mitigating and aggravating circumstances which are referred to at sentencing. One mitigating factor in consideration of subjective circumstances is the use of the principles in *Bugmy* found to affect moral culpability.<sup>4</sup> This was found to be considered in cases concerning indigenous and non-indigenous within my sample.

From the cases analysed the relevance of third-party reports, particularly psychologist reports, were important. An offender will disclose to a psychologist far more details of their personal background than during a police interview or ERISP. Submission of psychologist reports provide an important source of evidence for considering mitigating subjective features.

The following is one example of the application of subjective circumstance - as one mitigating feature, in reaching the final determination. Having been charged under s 93GA(1) of the Crimes Act, for firing a gun recklessly at a building, an offence that carried a maximum penalty of 14 years, the judge accepted submissions from the solicitor-advocate for *Sequera*. Included was a psychologist report with background information of the offender's childhood and life experiences as a minor that would affect his moral judgment. In reviewing this report Judge Mahoney stated at [30]-[34] (extracts)

'...both his parents were chronic alcoholics and they separated when he was eight years old. Both parents had mental health issue, the mother suffering schizophrenia and his father agoraphobia and anxiety... his father was mentally abusive to him ... he left home at the age of 14 and lived in a number of refuges ... the offender commenced drinking alcohol regularly when he was 12 years old. By 15 years he was consuming alcohol on a daily basis ... he started using marijuana at an early age...' <sup>5</sup>

Balancing subjective circumstances with statutory requirements lead to a finding of 'special circumstances' pursuant to s 44(2) CPSA. The offender's recent background required consideration of rehabilitation as *Sequera* was an illicit drug user. Judge Mahoney stated previous criminal history did not entitle any leniency, however, an early guilty plea entitled

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<sup>4</sup> *Bugmy v The Queen* (2013) 249 CLR 57. Reference was also made to *Bugmy Bar Book* developed by Public Defenders in NSW, <https://www.publicdefenders.nsw.gov.au/barbook>.

<sup>5</sup> *R v Sequera* [2021] NSWDC 573

Sequera to a 25% utilitarian discount. The final penalty was a full-time custodial sentence of four years with an NPP of 18 months, resolved by Judge Mahoney by varying ‘the statutory ratio between non-parole period and head sentence...’ [101] with recommendations of support to reintroduce Sequera into the community on completion of sentence requirements.

In recognising that disadvantage had already affected the life of an indigenous offender, the opportunity to interrupt this cycle became available to Judge Haesler in sentencing *Levell*, a soon to become new father:

[72] When a parent is goaled, there is often a significant disruption in the family and an increased risk to any children. Disruption to a family at a critical time can cause lasting trauma and impact on a child’s future emotional and cognitive processes. Positive experiences as a child can enrich lives. Adverse childhood experiences can have lifelong negative impacts: *Significance of Culture to Wellbeing, Healing and Rehabilitation*; V Edwidge and P Gray, Bugmy Bar Book Project, 2021 at [50]. Levvell was negatively impacted by his removal from his mother as a baby; any prolonged separation from his soon to be born child risks continuing that cycle. <sup>6</sup>

Levell had pleaded guilty and was entitled to a 25% discount. A review of the agreed facts in favour of the offender, and a finding of disadvantage and deprivation in childhood allowed Judge Haesler to sentence Levvell to three years and one month in the form of an ICO to be served with conditions, in the community.

The opportunity for a sentencing judge to provide empathy when applying proportional reasoning where aboriginal offenders are being sentenced is remarkable, as found in Judge Whitford’s decision in *R v JB; R v Norris* [2022] NSWDC 13.

[88] ‘The efforts to date of the law to recognise and address disadvantage and discrimination are pointless, if not also meaningless if there is no capacity in the circumstances revealed in the evidence in the present case to extend leniency and mercy sufficient to address the extent of the disadvantage these women have endured and to support them in the community’s best interests, in continuing the concrete and commendable steps they have respectively made towards rehabilitation since participating in this offending.’

Consideration of individual circumstances in NSW is unique amongst common law countries with indigenous populations, such as in America and Canada. My research revealed consistency in sentencing procedures,<sup>7</sup> with real benefits from judicial awareness of offender characteristics. These two factors result in fair outcomes for the individual and for the community.

- *Crimes tend towards differences, not similarities. It is imperative that judicial discretion remains unfettered by statutory change, and individualised sentencing is retained.*

Lexie Henderson-Lancett



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<sup>6</sup> *R v Levvell* [2021] NSWDC 518.

<sup>7</sup> Judicial Commission of NSW *Sentencing Bench Book* (2006) <https://www.judcom.nsw.gov.au/research-and-sentencing/>