Pasefika Lawyers Collective Conference – Keynote Address

THE NSW CRIMINAL LAW SYSTEM – VARIATIONS ON A THEME? FROM COMMON ORIGINS TO THE NEW SOUTH WALES VERSION OF SENTENCING FOR CRIMINAL OFFENCES: "REFORMS" AND "INNOVATIONS"

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The importance of sentencing

1 A key part of a functioning democracy is public confidence in the administration of justice. This public confidence provides the necessary trust in the system's ability to maintain law and order, uphold rights, and administer justice.

2 Trials by juries or assessors are one way we have sought to build public confidence in our criminal justice systems. The origins of the modern trial by jury dates back to around the 9th century,[2] although various historical restrictions like gender and land ownership meant it was not necessarily a jury of one's peers.[3] With the removal of such restrictions, we have had, for many years, trial by a jury comprised of a (reasonably random) cross-section of the community as the standard mode for trials of serious criminal offences. The capacity for one to be tried by their peers (rather than, say, an old white man in a wig, whose life experience was likely very different to that of the key participants in the trial) allows for civilian participation in the criminal trial. This functions as a key promoter of public confidence in both the process and the outcome.

[1] I acknowledge the invaluable contribution of my tipstaff, Alice Loveday, in the preparation of this speech. I am also grateful to Huggett DCJ for the opportunity to observe the workings of the Walama List firsthand.

[2] Some consider the Frankish Inquest as the start of the modern jury system, although its use can be traced back to the early Greeks and Romans: E. C. Lawrence, 'Development of Trial by Jury' (1902) 14(5) *Green Bag* 239, 239-240.

[3] Honourable Sir Patrick Devlin, *Trial by Jury* (Stevens & Sons Limited, 1956) 17-20.

3 The attraction of trial by jury, famously described by Lord Devlin as "the lamp that shows that freedom lives"[4] is not the subject of this talk. I mention it by way of contrast with the position in relation to sentencing. While the criminal trial is built on an element of public involvement, the sentencing of offenders, on the other hand, at least in Australia and most common law countries, is exclusively left to the judge. (The United States of America stands out as one of the few countries where, in some states, juries can have a substantial role in the sentencing process, particularly in capital cases, where the jury determines whether a convicted defendant should be sentenced to life imprisonment or death.)

4 Sir James Fitzjames Stephen once said that "[the sentence] is to the trial what the bullet is to powder".[5] That is, for all the focus that findings of guilt or non-guilt generally attract, where an offence has been committed, it is, of course, the sentence that does the work. That "work" is protecting the community as well as promoting the other purposes of sentencing, which together might be thought of as reflective of the community's sense of justice. Given this importance, the role of a judge in sentencing and the discretion that is exercised gives rise to the potential for tension between the exercising of that discretion and public expectations around sentencing. This tension has the potential to undermine public confidence in the administration of criminal justice, which, as I have observed, is a central aspect of a functioning democracy.

5 With both politicians and judges cognisant of this tension, sentencing law is regularly responding to these wider social and political developments. How the NSW government and courts have responded to these evolving, and at times conflicting, public expectations is a key element of sentencing and the topic of my talk today.

6 During my time as a practitioner and from my time on the bench, there has been a pull between what are often termed "law-and-order" concerns on the one hand

[4] Ibid 164.
[5] Sir James Fitzjames Stephen, 'The Punishments of Convicts' (1863) VII, *Cornhill Magazine* 189, 190.

and, on the other, (perhaps to a lesser extent) a public desire for offenders to be rehabilitated and for the root causes of crime be addressed. The former concern is generally directed to the perceived leniency of sentences generally, though paradoxically, usually as a result of attention to an individual case. This, in turn, highlights the subsidiary concern of consistency in sentencing. At any given time, there are public (and political) concerns that offenders are "getting away with it," alongside real worries about the failure of our system to rehabilitate offenders, improve recidivism, and lower crime rates.

The early origins of sentencing in NSW

7 Given that colonised Australia started out as a prison, we should know something about punishment and sentencing. But Australia's actual treatment of criminals, as well as public ideas about how to treat them, have always pulled in different directions. As Spigelman CJ once said, "[w]e live in a society which values both justice and mercy",[6] though I would add they are not always different things.

8 The sentence of transportation from England to NSW was, by modern standards, a very harsh response to the crimes for which it was imposed. However, despite the severity of the sentence itself, the colonisation and early settlement of Australia, perhaps unintentionally, can be seen as an exercise in criminal reformation. Economic, family, and social reintegration policies for convicts were critical in the development of white Australia. Emancipated convicts were given free grants of land, animals, and tools, sufficient to enable them to become economically viable settlers, which might be seen as an early form of rehabilitative support.[7]

9 Of course, that form of rehabilitative support suited political objectives at the time. It aided the dispossession of First Nations peoples and contributed to the

[6] The Honourable Chief Justice James Spigelman AC, 'A Guide to Sentencing' (Speech delivered at the launch of publication by the judicial conference of Australia, Sydney, 5 October 2007) 2.
[7] John Braithwaite, 'Crime in a Convict Republic' (2001) 64(1) *Modern Law Review* 11, 27.

destruction of those people and their culture. I will come to consider the continuing effects of this a little bit later.

10 There has also been a "fair go" or anti-hero mentality that has developed in Australian culture. This can be seen in the public obsession with Waltzing Matilda as an unofficial national song – it is the reason (at least indirectly) why the Australian women's football team (currently competing in the World Cup) is called the Matildas. The song tells the story of a "swagman" – or vagabond – who steals a sheep, is confronted by the authorities, and ultimately commits suicide rather than succumb to authority. The song treats theft as acceptable and is distinctly anti-authoritarian. Banjo Paterson wrote the song at a time of intense class conflicts in Australia, where pastoralists secured vast amounts of grazing land, resulting in property crime in the form of stealing livestock being committed by the lower-class swagmen and rural labourers.[8] These acts were understood as a form of social defiance. Through their dominant positions in society, including in criminal justice forums, the pastoralists used the police to attempt to limit this crime and, as a result, police were regarded by the working class as traitors.[9] The glorification of bushranger Ned Kelly is but another example of this phenomenon.

11 While "social bandit" folklore figures are not a uniquely Australian phenomenon (one can think of Robin Hood as an example),[10] the thematic notion of the criminal "anti-hero" has arguably bled into the Australian psyche, and such ideas remain as romantic and rebellious manifestations of a certain kind of Australian identity.[11] This folklore challenges modern assumptions that Australian culture responds negatively to deviance.

12 Notwithstanding the early reintegration of convicts into society, at the time of the establishment of the Supreme Court of NSW in 1824, deterrence and retribution remained the dominant theories of punishment for criminal

[8] Brad West, 'Crime, Suicide, and the Anti-Hero: "Waltzing Matilda" in Australia' (2001) 35 *Journal of Popular Culture* 127, 131.
[9] Ibid.
[10] See Eric J Hobsbawm, *Bandits* (Penguin Books, 1969) 13.
[11] Bruce Tranter and Jed Donoghue, 'Bushrangers: Ned Kelly and Australian Identity' (2008) 44(4) *Journal of Sociology* 373, 386.

offenders.[12] Capital punishment was the most common default sentence for indictable offences, and harsh punishments continued to be handed down. Support for punitive policies continued through the 19th and the first part of the 20th century until the 1960s and 1970s, when public opinion on punishment shifted, and rehabilitation took on significance.[13] This public shift influenced the range of sentencing options available, something I will touch on in more detail a little later on.

NSW sentencing "reforms": limiting judicial discretion

Law and Order Public Opinion

13 The rise of economic rationalism in the Western world in the 1980s was coupled with a push for less leniency and greater consistency in sentencing approaches.[14] The United States of America introduced federal sentencing guidelines in 1984 in response to widely disparate sentencing practices.[15] These were mandatory until struck down as unconstitutional in 2005.[16] The United States might be seen as a particular problem given the spread of that federation across 50 states. But in accordance with a more general trend, in NSW, from around 1986, the public and media climate around the sentencing of offenders in NSW turned a distinctly punitive corner.[17]

14 Sentencing in NSW became a highly politicised issue.[18] In the lead-up to the 1988 state election, the conservatives, running against the incumbent Labor party, promised to "restore truth in sentencing".[19] This push for "truth" was

[12] The Honourable Chief Justice Tom Bathurst AC, 'A History of Sentencing Law since Francis Forbes, 1823' (Speech delivered at the Francis Forbes Society Legal History Tutorials, Sydney, 22 September 2021) 9.
[13] Chris Cunneen et al., *Penal Culture and Hyperincarceration: The Revival of the Prison* (Routledge, 2013) 54; see also Deborah King, 'Changes in Community Corrections: Implications for Staff and Programs' in Heather Strang and Sally-Anne Gerull (eds), *Keeping people out of prisons* (Australian Institute of Criminology, 1991) 101; Hilde Tubex et al., 'Penal Diversity within Australia' (2015) 17(3) *Punishment and Society* 345, 351.
[14] Rick Sarre, 'We get the Crime we Deserve: Exploring the Disconnect in 'Law and Order' Politics' (2011) 18 *James Cook University Law Review* 144, 144.
[15] Michael Tonry, 'Federal Sentencing Reform Since 1984: The Awful as Enemy of the Good' (2015) 44 *Crime and Justice: A Review of Research* 99.
[16] *United States v Booker*, 543 US 220 (2005).
[17] Tubex et al (n 13) 352.
[18] Ibid 352.
[19] Ibid 352.

driven because of the way sentences were being administrated, in particular by parole authorities, where many offenders were being released earlier than their non-parole periods, largely through the use of remissions.[20] Remissions of sentence had been in place since the early 1800s and operated to ameliorate the harshness of imprisonment by allowing prisoners early release from prison for good behaviour.[21] They also assisted in the management of gaols.

15 The public concerns articulated at this time were framed in two related but, importantly, separate concerns. Firstly, there was a concern about consistency in sentencing. Concern as to consistency manifested in a concern as to how sentences were actually being served – that is, the inconsistency in an offender receiving a sentence of 10 years with a non-parole period of 5 years and being out after 3, and also in a more substantive public concern about leniency. Consistency in sentencing is something that is important not only for fairness in the individual case but, more broadly, is critical for the maintenance of the rule of law. The difficulty that was (and is) lost in this debate is that the consistency that is sought is in the application of principle. The result that is seen by the public is often stripped of this nuance, such that all that is seen is a crime and a number. It is beyond the scope of this talk, but both wildly disparate outcomes through unconstrained discretion (perhaps better expressed as unprincipled decision-making) and enforced consistency by limiting discretion erode the institutional integrity of the courts.

16 Media reporting has played a critical role in fanning the flames of public outrage and law-and-order thinking. In particular, in the early stages of this law-and-order turn, the medium of talkback radio was emerging as a powerful demonstration of certain public opinions.[22] While media reporting of crime is an important aspect of open and public justice, the media are there to sell papers or keep listeners (or maybe, now, to get clicks). The newsworthiness

[20] Steven Murray Thomson, 'Crown Appeals Against Inadequacy of Sentence in New South Wales' (PhD Thesis, University of New South Wales, 2010) 177-178.
[21] Janet Chan, 'Decarceration and Imprisonment in New South Wales: A Historical Analysis of Early Release' (1991) 13(2) *University of New South Wales Law Journal* 393, 400.
[22] The Honourable Justice Peter McClellan AM, 'Sentencing in the 21st Century' (Speech delivered at the Crown Prosecutors' Conference, Pokolbin, 10 April 2012) 7.

of a story inevitably means that only the most scandalous, outrageous, or outlier cases are reported and fed to the public,[23] resulting in a potentially warped understanding of sentencing practices. As a result, personal responsibility and punishment have remained dominant public and political voices in NSW and Australia more generally.

Legislative Changes

17 These political and public perceptions, bred and reinforced by the media, have played a significant role in the development of sentencing law in NSW and have also correlated directly with the rise in the NSW prison population.[24] In particular, they have encouraged legislative changes centred around confining judicial discretion which has been targeted as the source of leniency and inconsistency, leading to legislative intervention. The changes have not gone so far as mandatory sentencing, presumably due to parliament's cognisance of the potential for rank injustice in such sentencing constraints.

1989 Reforms

18 In 1989, a new Sentencing Act was introduced with its stated aim to: "promote truth" in the sentencing system in New South Wales.[25] This Act was designed by the government to bring "certainty to sentencing" and make clear to the public (and the offender) when a sentence was to commence and exactly when a prisoner would be eligible for parole.[26]

19 The *Sentencing Act 1989* (NSW) did this by removing the availability of remissions. It also built on changes from a few years earlier, prohibiting the imposition of a non-parole period below three-quarters of the total term of imprisonment unless there were "special circumstances" justifying a departure from the ratio.[27] While it is not difficult in any given case to find "special

[23] See generally, Yvonne Jewkes, *Media and Crime* (Sage, 2004).
[24] Tubex et al (n 13) 352; see also Russell Hogg and David Brown, *Rethinking Law and Order* (Pluto Press, 1998).
[25] *Sentencing Act 1989* (NSW) (repealed) s 3.
[26] New South Wales, *Parliamentary Debates*, Legislative Assembly, 10 May 1989, 7905 (Michael Yabsley).
[27] *Sentencing Act 1989* (NSW) (repealed) s 5.

circumstances", in practice, non-parole periods of half or less became highly likely to attract scrutiny. These legislative changes led to an increase in the number of people in prison and the lengths of sentencings being served in NSW.[28]

2003 Standard NPPs

20 There were further legislative changes to sentencing in NSW in 2003 through the introduction of what is known as the "standard non-parole scheme".[29] The standard non-parole period was introduced as a legislated period which represented the "non-parole period for an offence in the middle range of objective seriousness" before adjustment was made for subjective considerations.[30] The stated aim of the statutory scheme was to, amongst other things, again make sentencing more consistent, more transparent, to guide and structure judicial discretion, and to ensure that community expectations regarding punishments are met.[31]

21 Through the standard non-parole period regime, we can again see efforts by the parliament to curb judicial discretion in order to create greater "certainty" and bolster public confidence in the process. The result of these changes was a significant increase in the length of sentences[32] across a range of serious offences.[33]

22 Initially, the courts endorsed an interpretation of the scheme using the standard non-parole period as a tether, requiring judges to engage in a two-step

[28] Angela Gorta, 'Impact of the Act on the NSW Prison Population' (1992) 3(3) *Current Issues in Criminal Justice* 308; Tubex et al (n 13) 352; Michael Cain and Garth Luke, 'Sentencing Juvenile Offenders and the Sentencing Act 1989' (Monograph Series No 4, Judicial Commission of New South Wales, 1991).
[29] *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW).
[30] *R v Way* (2004) 60 NSWLR 168; [2004] NSWCCA 131, [141].
[31] New South Wales, *Parliamentary Debates,* Legislative Assembly, 23 October 2002, 5813 (The Honourable Ron Debus AM).
[32] New South Wales Law Reform Commission, 'Sentencing Interim Report on Standard Non-parole Periods' (Report No 13, May 2012) 4; see Peter Johnson, 'Reforms to New South Wales Sentencing Law: The Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002' (2003) 6 *TJR* 314, 331.
[33] Patrizia Poletti and Hugh Donnelly, 'The Impact of the Standard Non-Parole Period Sentencing Scheme on Sentencing Patterns in New South Wales' (Monograph Series No 33, Judicial Commission of New South Wales, May 2010).

reasoning process – starting with the standard non-parole period and moving up or down from that point based on the circumstances of the case.[34] Subsequently, our High Court, in the seminal case of *Muldrock v The Queen*,[35] acknowledged that this level of unorthodoxy in the approach to sentencing was not found in the legislation. The High Court confirmed the scheme did not supplant the instinctive synthesis method, thus denying the "determinative significance" of the number set as the "standard non-parole period.[36] In doing so, the Court effectively diminished the role and significance of the standard non-parole period.[37] Parliament subsequently amended the legislation to confirm the High Court's interpretation. The decision, the legislative response, and various other sentencing decisions of the High Court acknowledge the individual nature of the sentencing exercise and the consequent importance of discretion in striving to achieve the impossible balance in the purposes and goals of the sentencing task.[38]

Sentencing statistics

23 In addition to legislative changes in sentencing law, there have been changes such as the access to sentencing statistics. Statistics are now commonly used, though courts have been conscious to emphasise their limitations.[39] They have been described as a "blunt tool",[40] a description which acknowledges the important notion of individualised justice.

Judicial responses

24 Alongside legislative changes, the Supreme Court itself has acknowledged the issues of consistency of principle and publicly perceived leniency in the courts. Institutional legitimacy is, after all, a core concern of the courts. Judges have

[34] See *R v Way* (n 31).
[35] *Muldrock v The Queen* (2011) 244 CLR 120; [2011] HCA 39.
[36] Ibid [32].
[37] *R v Koloamatangi* [2011] NSWCCA 288, [18], [19] (Basten JA).
[38] See e.g., *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25; *Veen v The Queen (No 2)* (1988) 164 CLR 465; [1998] HCA 14.
[39] See *Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45, [53]; *R v Bloomfield* (1998) 44 NSWLR 734, 739; *Wong v The Queen* (2001) 207 CLR 584, 606; [2001] HCA 64.
[40] See e.g., *R v AEM Snr; R v KEM; R v MM* [2002] NSWCCA 58, [113]; *Davidson v R* [2023] NSWCCA 116, [178]*; Kochai v R* [2023] NSWCCA 116, [78].

had to be proactive in their protection of judicial discretion while still responding to the public pressure for consistency and the reduction in perceived excessive leniency.

25 In the mid-1990s, there was a real possibility that the NSW Government would introduce mandatory sentencing regimes or sentencing grids.[41] Some have argued that there was a sense that the courts needed to act so as to discourage parliament from adopting such a strict sentencing approach.[42]

26 The NSW Court of Criminal Appeal, by its own initiative, introduced the concept of the guideline judgment for sentencing certain offences. The first guideline judgment was the case of *R v Jurisic*,[43] a case about dangerous driving causing death handed down in 1998. The matter was heard as an ordinary appeal. The Court of Criminal Appeal took the opportunity to state that it observed a pattern of leniency in the sentences for such offences and expressed a guideline for the range of sentence to be expected for an instance of the offence with particular, relatively common attributes.[44]

27 While consistency was largely stressed by the Court as the key reason for the need for guidelines judgments, the Chief Justice also stated that he was conscious of the disparity between public opinion and judicial sentencing and the relevance of this to the perceived legitimacy of the Court.[45] Spigelman CJ made clear his view that this public concern was sometimes justified.[46]

28 It was only following *R v Jurisic* that the NSW Parliament provided a legislative basis for guideline judgments. That legislation allowed the Attorney General to request the Court of Criminal Appeal consider providing guidelines without the need for a relevant appeal.[47] Since then, further changes have allowed the

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[41] Honourable Justice McClellan (n 22) 8, citing George Zdenkowski, 'Sentencing Trends: Past, Present and Prospective', in Duncan Chappell and Paul Wilson (eds), *Crime and the Criminal Justice System in Australia: 2000 and Beyond* (Butterworths, 2000) 179.
[42] See e.g., Honourable Justice McClellan (n 22) 8.
[43] *R v Jurisic* (1998) 45 NSWLR 209.
[44] Ibid 229-230.
[45] Ibid 221.
[46] Ibid.
[47] *Criminal Procedure (Sentencing Guidelines) Act 1998* (NSW).

New South Wales Director of Public Prosecutions (DPP) and senior public defenders to apply, and allowance has been made for guideline judgments for summary offences.[48]

29 Research has suggested that guideline judgments have served their role in creating more certainty and ameliorating public concerns of undue leniency.[49] However, perhaps unsurprisingly, they have also received criticism as an unwelcoming intrusion on judicial discretion.[50]

30 It is interesting to see the direct engagement of the Court in responding to the public conversation about punitiveness in its practice. The day after the guideline judgment in *R v Jurisic* was handed down, the Chief Justice appeared on television and wrote an article for the Daily Telegraph (a popular tabloid) and made clear to the public that this "new" approach to sentencing was a mechanism to address criticisms of inconsistent and lenient sentences.[51] Some commentators at the time saw the move by the Court as a proactive initiative to "capture the public interest".[52] At the very least, it demonstrates the very real impact public confidence and perceptions about sentencing play in judicial approaches to sentencing.

NSW sentencing "innovations": a shift towards greater options

31 Up until this point, I have painted a history consistent with increased legislative limitations on discretion and increased punitiveness. However, at various points, there has also been public recognition of the need to deal with individuals and their underlying criminogenic factors, resulting in legislative developments expanding the range of sentencing options available. Australian

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[48] *Crimes (Sentencing Procedure) Act 1999* (NSW), ss 36,38, 39.

[49] Patrizia Poletti, 'Impact of the High Range PCA Guideline Judgment on Sentencing Drink Drivers in NSW' (Sentencing Trends and Issues No 35, Judicial Commission of New South Wales, September 2005) 18; Lynne A Barnes and Patrizia Poletti, 'Sentencing Robbery Offenders since the Henry Guideline Judgment' (Research Monograph 30, Judicial Commission of New South Wales, June 2007) 148.

[50] See response by the High Court of Australia in *Wong v The Queen* (n 40) e.g., 608-613.

[51] Kate Warner, 'The Role of Guideline Judgments in the Law and Order Debate in Australia' (2003) 27 *Criminal Law Journal* 8, 10.

[52] Donna Spears, 'Structuring Discretion: Sentencing in the Jurisic Age' (1999) 22(1) *University of New South Wales Law Journal* 295, 300.

research in the last decade has demonstrated that while punitive values remain strong for serious offending, the Australian public generally supports non-punitive alternatives and access to services for low-level offenders.[53]

32 Up until the 1970s, there was a significant gap in the penalties an offender could receive. At one end of the scale, an offender could get a fine or a bond, and then at the other end, they could go to prison, with nothing much in between.

33 As I have already touched on, in the 1960s and 1970s, NSW, along with many jurisdictions around the world, began to take seriously the notion of rehabilitation. This also coincided with a rise in concerns about prison overcrowding and a push to limit the economic impact of imprisonment.[54] These concerns led to a rise in alternative sentencing options.

34 In 1970, weekend detention was introduced.[55] This was a sentence of imprisonment served from Friday night to Sunday afternoon, the idea being that the offender could maintain employment and other pro-social ties to the community. This was later expanded to allow midweek detention.[56] In 1979, community service was introduced.[57] This incorporated the idea of "giving back" by requiring an offender to perform unpaid community work. Then, in 1996, home detention was introduced as another option available to judges.[58] In this regard, even though there was the maintenance of a punitive culture, in particular for serious crimes being reported in the media, there was a consistent push for alternatives to imprisonment.

35 More recently, in response, at least in part, to unfairness arising from the unequal availability of period detention centres, issues with the management of

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[53] See Paul Simpson et al, 'Assessing the Public's View on Prison and Prison Alternatives: Findings from Public Deliberation Research in Three Australian Cities' (2015) 11(2) *Journal of Public Deliberation* 1; Craig Jones and Don Weatherburn, 'Willingness to Pay for Rehabilitation Versus Punishment to Reduce Adult and Juvenile Crime" (2011) 46 *Australian Journal of Social Issues* 9; Lorana Bartels, Robin Fitzgerald and Arie Freiberg, 'Public Opinion on Sentencing and Parole in Australia' (2018) 65(3) *Probation Journal 269*, 277–279.

[54] Thomson (n 20) 164.

[55] *Periodic Detention of Prisoners Act* 1970 (NSW) (repealed).

[56] *Periodic Detention of Prisoners Act* 1981 (NSW) (repealed).

[57] *Community Service Orders Act 1979* (NSW) (repealed).

[58] *Home Detention Act 1996* (NSW) (repealed).

offenders on periodic detention orders, and to create greater flexibility, these non-custodial or partially custodial sentencing options have been replaced with two options, what are now called Community Corrections Orders (CCOs) and Intensive Corrections Orders (ICOs).[59]

36 ICOs are an alternative to full-time custody available for prison sentences of up to three years.[60] Whilst a gaol sentence, an ICO is served entirely in the community (suggesting something of a return to pre "truth in sentencing" days). Conditions can be imposed by judicial officers,[61] offering a degree of flexibility for judicial officers to tailor the conditions to meet the needs of the individual offender. CCOs are a less serious bond that can attach a range of conditions,[62] again allowing judicial officers to tailor conditions to suit the circumstances of the individual offender.

37 When introducing these changes, there was careful focus by the government to emphasise the benefits of options "tackling the causes of offending" and the benefit of community supervision in improving community safety.[63] Research has suggested that the ICO scheme has been somewhat more effective than periodic and home detention orders,[64] and CCOs have resulted in a reduction in the proportion of offenders serving short-term prison sentences.[65]

Practical impacts on day-to-day sentencing

A formalised and complex process

38 The "truth in sentencing" reforms, along with the proliferation of non-custodial options, have drastically altered the way in which sentencing operates in

[59] *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW)
[60] *Crimes (Sentencing Procedure) Act 1998* (NSW) s 7; see also Part 5.
[61] Ibid, Pt 5, Div 5.
[62] Ibid, ss 85, 87, 88, 89, 90.
[63] New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 October 2017, 273 (Mark Speakman SC).
[64] See Clare Ringland and Don Weatherburn, 'The Impact of Intensive Correction Orders on Re-Offending' (Contemporary Issues in Crime and Justice No 176, NSW Bureau of Crime Statistics and Research, December 2013) 1.
[65] Neil Donnelly, 'The Impact of the 2018 NSW Sentencing Reforms on Supervised Community Orders and Short-Term Prison Sentences' (Bureau Brief No 148, NSW Bureau of Crime Statistics and Research, August 2020) 1.

practice in NSW. These reforms have played a role in the sentencing system becoming a highly formalised and increasingly complex process.

39 When I started out as a practitioner, sentencing hearings looked very different. In those days, written submissions were the exception, and sentencing remarks were brief and usually delivered on the day of the hearing. Nowadays, sentencing hearings tend to involve numerous pages of material, detailed written submissions by counsel, reliance on authority, and extensive reference to other decisions relevant for principle or result. Reflective of the increased complexity, at least in the Supreme and District Courts, the judge will commonly reserve judgment before writing and sometimes publishing the remarks, which often run over many pages, including references to authority. These reasons for judgment are vastly different to the remarks on sentence when I started out.

40 While this is good for keeping lawyers busy, it has resulted in a system that is highly technical. While the importance of giving reasons cannot be gainsaid, in an exercise that is not mathematical and where there is a significant range of outcomes, none of which are wrong, there are limits on the extent to which the result can be explained. There is a balance to be struck, but there may be reason to doubt that the offender, the victims of crime, or the community more generally are assisted by 50 pages of legal analysis. People's attention spans are getting shorter, and our judgments are getting longer.

Appeals

41 The increased complexity in sentencing has fed into, and in turn, been fed by, a rise in sentence appeals. The day-to-day work of the NSW Court of Criminal Appeal nowadays involves a large number of sentence appeals, not only from the offender but also appeals from the Crown.

42 Focusing on the rise in Crown appeals, the reasons for the increase are myriad and largely beyond the scope of this talk. However, there are a number of possible reasons for the drastic spike in cases since the 1980s, including not only the increased technicality of the law (and therefore, the potential for legal error but also the establishment of the office of the DPP in 1987 as an

independent prosecuting body, and the rise of the victims' rights movement.[66] Consistent media pressure and public commentary about "inadequate sentences" may have also played a role.[67] Even if not directly influencing prosecutorial decisions, the proliferation of sentencing adequacy debates in public forums has informed the approaches to sentencing not only by lawmakers and judges but also by prosecutors in deciding whether the challenge a decision. As they are designed to do, successful Crown appeals impact not just the individual case but sentences generally. The rise in the willingness of the Crown to appeal has an undoubted effect on the constraints felt by the sentencing judge, or at least many sentencing judges.

Innovative approaches to sentencing in NSW

43 Alongside the increased formality of sentencing, there has been increasing acknowledgment of the limitations of the one-size-fits-all model of traditional sentencing. Within the formal sentencing process, this has been manifest in recognition of the enduring impacts of childhood deprivation impacting an offender's "moral culpability" for their crime.[68] In parallel, there has been a shift towards looking to alternative options that aim to treat, reskill, and reintegrate offenders and this has given way to some innovative approaches to sentencing. I will speak about two such areas of innovation.

The NSW Drug Court

44 The first is the NSW Drug Court.

45 The notion of a drug court is not unique to the Australian jurisdiction. The concept emerged in the United States in the 1980s in response to the problems of drug-related crime and prison overcrowding.[69] The assumption underpinning such an initiative is that where an offender's crime is drug-related, a reduction in drug consumption should reduce involvement in drug-related crime. While

[66] Steve Thompson, 'Behind the Decreasing Rarity of Crown Appeals' (2009) *Law Society Journal* 26, 27.
[67] Ibid.
[68] See *Bugmy v The Queen* (2013) 249 CLR 571; [2013] HCA 37.
[69] Don Weatherburn et al, 'The Long-Term Effect of the NSW Drug Court on Recidivism' (Crime and Justice Bulletin, NSW Bureau of Crime Statistics and Research, September 2020) 2.

there are numerous drug-based courts in the world, including in Samoa, there are marked differences in their operation, and so I hope to shed some light on the NSW approach.

46 Looking then to the NSW Drug Court, it was established in a single local area in 1999 under its own legislative scheme.[70] Described as a "solutions-based court",[71] the Drug Court aims to divert people facing prison for non-violent offences towards a therapeutic program of supervision and treatment to address their underlying drug dependency.[72] The program aims to promote positive reintegration of these offenders into the community, providing practical assistance with housing, income stability, education, employment, relationships, and parenting support.[73]

47 The Drug Court program is a 12-month program with three phases. Once an individual has been accepted into the program and completed a detoxification, the participant is sentenced, but orders are made for that sentence to be suspended. The participant is then released from custody so that they can complete the program in the community.

48 The program is then specifically tailored to the needs of the participant. Compliance with drug abstention is closely monitored, and all participants must undertake regular supervised drug testing. The Drug Court can impose sanctions for non-compliance, including short custodial sanctions.

49 Participants must also appear regularly at Court to report their progress to the judge. Compliance with the program can lead to reduced restrictions. When the program is completed, the Court will then reconsider the offender and determine a final sentence. The initial sentence can be set aside or confirmed, but the Court cannot impose a higher sentence. Where the person has

[70] *Drug Court Act 1998* (NSW).
[71] Roger Dive DCJ, quoted in Lauren Croft, "Unpacking the expansion of the NSW Drug Court to Dubbo" Lawyers Weekly, 1 November 2020.
[72] Drug Court of New South Wales, *Factsheet*.
[73] Drug Court of NSW, *Information Package*.

substantially complied with the program, it is likely that they will serve their final sentence in the community.

50 The recidivism outcomes post-program have not been consistent,[74] but there is evidence of the program working. In 2020, a long-term study found that participation in the program appears to have long-term beneficial effects on the total number of reconvictions.[75] Given this, there is public, political, and judicial support for the system as an alternative to traditional methods of sentencing.[76]

51 There are strict eligibility requirements for access to the Drug Court program. An offender is ineligible if they have been charged with certain serious offences, including offending that involves violent or sexual conduct.[77] The exclusion of certain serious offending does mean that the program is not available to all offenders, demonstrating a deliberate choice by parliament to exclude the types of more serious offenders that breed public outrage and disgust, from accessing more therapeutic models of sentencing. Such line drawing demonstrates a balancing of the public sentiments I have discussed, promoting public confidence in these more innovative programs.

52 An offender must live in a local government area that is covered by the Drug Court program. The Drug Court also has limited places, and where there are more referrals than places available, a randomised ballot is conducted to determine access to the program. These eligibility requirements, driven largely by resources, mean that suitable candidates will miss out, in particular in regional areas which continue to have serious issues with drug abuse. While the recent expansion to the Dubbo Local Court (a regional town in NSW) is a positive step towards expansion,[78] innovative options such as the Drug Court remain largely centralised in Sydney.

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[74] See The Honourable Chief Justice Andrew S Bell, 'Innovative Justice' (2023) 15 *The Judicial Review* 37, 47, referring to K Willis and J Ahmad, 'Intermediate court-based diversion in Australia', National Cannabis Prevention and Information Centre (Sydney, 2009).
[75] Don Weatherburn et al (n 70) 1.
[76] see e.g., New South Wales Government, Drug Court expands to Dubbo, media release, 17 June 2021; The Honourable Chief Justice Bell (n 75) 46-47.
[77] *The Drug Court Act 1998* (NSW), s 5(2).
[78] New South Wales Government (n 77).

Sentencing of First Nations Offenders

53 Another area of significant innovation in NSW is in the sentencing of First Nations offenders.

Over-representation of First Nations Offenders

54 By way of background, the over-representation of First Nations people in Australian gaols is something that has marred Australian history since 1788. First Nations people make up approximately 3% of the NSW population, but in December 2022, First Nations male offenders made up 28.4% of the male prison population, and First Nations women made up 38.1% of the female prison population.[79]

55 As long ago as in 1991, the Royal Commission into Aboriginal Deaths in Custody revealed that many First Nations offenders feel a sense of powerlessness in the Criminal Justice System.[80] First Nations people often find courts culturally alienating. They distrust a system where the proceedings are difficult to understand, and they feel they have a limited role.[81] Such distrust has its roots in the history of invasion, murder, dispossession, and the removal of children from families. The result has been significant structural disadvantage, mistreatment, and intergenerational trauma.

Circle Sentencing

56 In response to these identified challenges, efforts have been made in NSW (and around the country) to develop sentencing procedures that are better tailored to First Nations communities. One such initiative has been the use of circle sentencing practices.

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[79] BOSCAR, *NSW Criminal Justice Aboriginal over-representation* (Quarterly Report, December 2022).

[80] Jenny Blokland, 'Foreword' in Paul Bennett, *Specialist Courts for Sentencing Aboriginal Offenders—Aboriginal Courts in Australia* (Federation Press, 2016) v; see also See Australian Law Reform Commission, *Pathways to Justice — Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report 133, 11 January 2018) [10.32].

[81] Office of Crime Statistics and Research, *Aboriginal (Nunga) Courts—Information Bulletin* (2010) 2.

57 The concept of circle sentencing originated in Canada in 1992 but was introduced in regional NSW in the Local Court (for minor/summary offences) in 2002 on a trial basis.[82] The circle is derived from the notion of a "round table dialogue" whereby authority is shared by the circle participants actively engaging.

58 In NSW, the circle is made up of a magistrate, who, in addition to making sure that the law is applied, ensures the proceedings are conducted fairly and that all the participants are given an opportunity to speak. There are then usually up to four First Nations elders (usually a mix of genders) selected based on their experience with the offender, victim, or the nature of the offences; the offender and their legal representative; a police prosecutor; and, where appropriate, the victim and their support person. Other participants, including family members and the Court's program officer, may also be included.

59 The procedures are less formal than regular court proceedings. Participants around the circle discuss the background of the offender, the offence, the impact of the offence on the victim, how similar crimes have been affecting the community and what can be done to prevent further offending. In addition to actually sentencing the offender, the process aims to consider and address the underlying reasons for that person coming before the Court. While the magistrate retains the ultimate decision regarding the sentence, the members of the circle have input.

60 Circle sentencing has now expanded to operate in 12 Local Courts in NSW.[83] A report in 2020 found that offenders participating in the program were 9.3% less likely to receive a prison sentence and 3.9% less likely to reoffend within

[82] Ivan Potas, Jane Smart and Georgia Brignell, 'Circle Sentencing in New South Wales: A Review and Evaluation' (Research Monograph No 22, Judicial Commission of New South Wales, October 2003) 10.

[83] Steve Yeong and Elizabeth Moore, 'Circle Sentencing, Incarceration and Recidivism' (Crime and Justice Bulletin, NSW Bureau of Crime Statistics and Research, April 2020) 4.

12 months.[84] The process has been found to positively impact the engagement of First Nations people with the criminal justice system.[85]

Youth Koori Court

61 Another initiative has been the establishment of a children's circle sentencing court called the Youth Koori, which has been in operation since 2015.[86] The Koori Court attempts to support the young person through their sentencing and involves the implementation of a structured and supported plan, which is assessed and complied with *prior* to the imposition of the sentence. In doing so, participants have continual engagement with the Court.

62 The procedures, layout and practices of the Court are tailored to be more welcoming for these young First Nations offenders. For example, the Court is adorned with artworks prepared by young people in custody.

63 The program has high levels of support from staff, stakeholders, participants, and family members.[87] The program has been successful not only in achieving short-term outcomes for the participant but also in empowering First Nations communities in the system, thereby helping to rebuild trust.[88]

Walama List

64 Up until recently, circle sentencing processes have only been available in Local Courts and not available for more serious offending. This may accord with the public's acceptance of a rehabilitative focus for minor offending but a more punitive response to more serious offending. However, in early 2022, the Walama List Pilot was introduced in the NSW District Court. The List is available for eligible First Nation offenders and draws on the circle sentencing procedures and also on aspects of the NSW Drug Court.

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[84] Ibid 1.
[85] Potas, Smart and Brignell (n 83) 10.
[86] Children's Court of New South Wales, *Practice Note 11: Youth Koori Court.*
[87] Inside Policy, *An Evaluation of the Youth Koori Court Process: a Final Report Prepared by Inside Policy for the NSW Department of Communities and Justice*, Final Report, 6 June 2022, 7.
[88] Ibid.

65 The Walama List is a court-based initiative with particular work done by Yehia J, with the support of Price J, drawing on her experience of working with and then sentencing indigenous offenders. "Walama" is a Dharug word that means to "come back" or "return".[89] As Yehia J has said, in this context, it "means a coming back to identity, community, culture and a healthy, crime-free life."[90] The Walama List aims to be a therapeutic and holistic approach to sentencing, with specific aims to increase First Nations community participation and confidence in the system.

66 Participation with the Walama List involves a 12-month program. In the early stages of the program, the offender has what is called a "sentencing conversation", where the circumstances of the offending and the offender's background are discussed. Following this, a case plan is developed, and from that point, the offender appears before the Walama List once a month, where their progress is monitored. At the conclusion of the 12 months, the Walama List judge then sentences the offender according to regular sentencing law but taking into account the progress made in the program.

67 The initiative operates within the standard legislative framework and is conducted in accordance with established sentencing principles.[91] This is quite remarkable in that despite the program looking remarkably different to the regular robed sentencing hearing, the principles, sentencing guidelines, and discretionary powers of the Walama List judges are the same as in any other hearing.

68 I have been fortunate to witness the Walama List. The first thing one observes is the informality of the proceedings and the adaptations designed to make the process more personal and culturally sensitive. The mentions begin with a welcome to country, and then everyone (including the judge) introduces themselves and explains why they are there. Participants sit at a round table, and there is direct and personal engagement between the offender and the

[89] The Honourable Justice Dina Yehia, 'Introducing the Walama Pilot at the District Court of NSW' (2021) (33) *Judicial Commission of NSW* 114, 114.
[90] Ibid.
[91] Ibid.

other people. The offender is spoken to directly and is actively involved in the direction of the proceedings and the discussions.

69 There is also the capacity for the proceedings to be fluid. By way of example, when I was witnessing the Walama List earlier this year, one of the participants was listed for their "sentencing conversation", where the prosecutor discusses the offending and the harm it had caused. During the course of the introductions, it became clear that it was not the appropriate time to discuss the offending, and the discussion moved to other areas with no formal adjournment application being made, consistent with a distinctly non-adversarial tone.

70 There is also an understanding in the room that the change for the offender is not an easy task, nor necessarily linear. At times tough conversations are had, but there is also respect, acknowledgment of the challenges the offender faces, and acceptance that change is unlikely without setbacks.

71 That brings me to the incredible investment of the participants at the table. Each of the people around the table, from the judge, the elders, the community corrections officers, social workers, and the prosecutors, all appear to me to approach the Walama List with the common goal of assisting the offender and, by this means, promoting community protection.

72 There is incredible respect for the elders held by the offenders and the other participants. The presiding judges demonstrate great deference to the elders. Such respect recognises the importance of First Nations authority in the decision-making process.

73 The judges themselves are also more engaged with the offender. They do not use technical legal language and even give personal stories or offer more informal remarks about difficulties that might be universal. They present themselves as but one person around a table of persons all there to support the offender to make changes.

74 A formal longitudinal evaluation of the program is due to be completed in March 2031.[92] However, anecdotally, there has been real engagement with the program, and, particularly given the success of other circle sentencing initiatives, there are strong prospects for the program.

75 In a similar vein to the Drug Court, eligibility requirements mean that First Nations offenders charged with sexual assault and other serious violent offences are not eligible. Again, this may demonstrate a balancing of public expectations so as to maintain public support, although the Walama List itself, in dealing with indictable offences, demonstrates something of an increased appetite for rehabilitative and restorative approaches, one that I hope will continue to grow. But the program is limited. It operates only in Sydney. There are currently only 50 places available at any given time, so a ballot system is in place. Again, this means that otherwise eligible offenders are missing out. However, as Yehia J has pointed out, the pilot is the first step towards a well-resourced and independently legislated Walama List.[93] There is hope that the program can be expanded in the future.

Conclusion

76 There is a convenience in traditional sentencing. Where an offender appears for sentence on a single occasion as one of a stream of cases, there is a simplicity in the process. The judicial officer determines facts, applies principle, and determines a result. The sentencer does not spend time during which they come to know the offender. The sentencing of a person who is essentially a stranger is more likely to be primarily defined by their wrongdoing.

77 Programs such as the Walama List and the Drug Court, challenge this simplicity. The judicial officer in those settings cannot remain aloof (or at least as removed from the offender and the nuances of that person's situation as

[92] See Evaluating the Walama List Pilot, Department of Communities and Justice (webpage) <https://www.dcj.nsw.gov.au/about-us/research-strategy/our-research-projects-and partners/evaluating-the-walama-list pilot.html#:~:text=The%20Walama%20List%20pilot%20commenced,Court%20at%20Sydney%20Downing%20Centre>.

[93] The Honourable Justice Yehia (n 90) 114.

traditional models allow or, perhaps more accurately, require). The practical difficulty of expanding programs like the Walama List and the Drug Court is that they require substantial investment. Accordingly, the success and expansion of such programs are contingent on the availability of judicial resources and investment. Of course, any reduction in recidivism, quite apart from the social benefit, also represents a reduction in future caseload. Thus, what might appear to be relatively small percentage reductions may have more far-reaching benefits than initially appears.

78 While the history I have referred to suggests an inevitable ebb and flow in public expectations, it appears likely that, at least with respect to crimes not involving serious violence, the public will support an approach that provides an opportunity for offenders who have had either few opportunities or significant hardship in the past. It also seems likely the public will be satisfied with a process that requires something of the offender and, where successful, protects the community through a reduction in reoffending.

79 Certainly, the experience of judicial officers involved in such programmes has been overwhelmingly positive. Despite what might initially be thought by some as the inconvenience of getting up close to the offender, there is significantly greater satisfaction in the process, as opposed to sentencing at some remove. In what is a reckoning between the state and the offender, it seems to me there is much to be said for a process in which all sides gain a better understanding of the other.

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