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CRIMES (SENTENCING PROCEDURE) AMENDMENT (STANDARD NON-PAROLE PERIODS) BILL 2013

Second Reading

The Hon. DAVID CLARKE (Parliamentary Secretary) [9.32 p.m.]: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

The Government is pleased to introduce the Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Bill 2013.

The purpose of the bill is to clarify the operation of the standard non-parole period scheme, in accordance with the decision of the High Court in *Muldrock v The Queen*.

Part 4, Division 1A of the Crimes (Sentencing Procedure) Act 1999 sets out a scheme of standard non-parole periods for a number of specified, serious offences.

Standard non-parole periods provide clear guidance on the seriousness with which the Legislature views certain offences. In particular, they indicate to courts what Parliament considers should be the non-parole period for an offence which falls in the middle of the range of seriousness, for the types of offence to which they apply.

They are not the starting point for sentencing an offender, and the High Court in *Muldrock* established that it would be an error for courts to approach them in this way. However, they do establish a second guidepost for courts, in addition to the maximum sentence.

The 2004 case of *R v Way* [2004] NSWCCA 131 was the first major decision of the Court of Criminal Appeal setting out the principles and process to be applied when sentencing offenders for standard non-parole period offences.

In summary, *Way* required courts to take a two-step approach to sentencing in these matters. The first step was to consider whether the offence was in the mid-range of objective seriousness, by comparing it to an abstract mid-range offence, in order to determine whether the standard non-parole period should apply. If the standard non-parole period did apply, the court was required to then determine whether there were reasons for departing from the standard non-parole period.

However, in *Muldrock*, the High Court determined that *Way* had been wrongly decided and set out what it saw as the correct way to approach sentencing for standard non-parole period offences.

The High Court held that courts should not engage in the two-step sentencing approach mandated by *Way*. Further, the Court determined that the standard non-parole period was relevant to sentencing for these offences, whether or not they fall within the mid-range of objective seriousness.

The High Court held that the correct approach was for a court to identify all of the factors relevant to a sentence, including the two legislative guideposts provided by Parliament: the maximum sentence and the standard non-parole period. The court is to then make a judgment as to the appropriate sentence taking into account all the relevant factors of the case. The High Court held that sentencing courts should provide reasons as to why the non-parole period differs from the standard non-parole period, but that it would be an error to engage in the two-step process set out in *Way*.

While the decision in *Muldrock* clarified the role of the standard non-parole period as a guidepost in sentencing, the decision left two significant issues unsettled:

First, the extent to which the subjective factors of an offender may be taken into account in assessing the objective seriousness of a standard non-parole period offence; and second, whether a sentencing court is required or permitted to classify a standard non-parole period offence by reference to its position in a range of objective seriousness.

The NSW Law Reform Commission considered the operation of the scheme following the decision in *Muldrock* in its Interim Report on Standard Non-parole Periods. The Commission recommended that the scheme should be retained, but that legislative amendments should be made to clarify the provisions in accordance with *Muldrock*, and provide guidance on the issues that remain unsettled as a result of the decision. The commission confirmed this recommendation in the recently released Report 139: Sentencing.

This bill implements the Law Reform Commission's recommendation by clarifying a number of aspects of the scheme.

I will now outline each of the amendments in turn.

Item 2 of schedule 1 clarifies section 54A of the Crimes (Sentencing Procedure) Act, which describes what the standard non-parole period is.

The question for the court at this stage is simply "What does the standard non-parole period mean?" The court must give some meaning to the standard non-parole period in each particular case, so that it can be taken into account as a guidepost. This amendment clarifies that the standard non-parole period represents the non-parole period not for the actual offence for which the offender is to be sentenced, but for an offence of the same kind that is in the middle of the range of seriousness, taking into account only the objective factors affecting its relative seriousness.

The amendment arises from the statement of the High Court that: "meaningful content cannot be given to [the concept of an offence in the middle of the range of objective seriousness] by taking into account characteristics of the offender. The objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders".

Since the High Court's decision, there has been uncertainty as to the extent to which the above statement limits the court's ability to consider matters personal to the offender when sentencing for a standard non-parole period offence.

The amendment clarifies that limiting consideration to the objective factors applies only when giving meaning to the hypothetical "middle of the range" offence described in section 54A. It does not prevent courts from taking into consideration all relevant factors, including those personal to the offender, when determining the appropriate sentence under section 54B.

The amendments adopt the language of section 21A of the Crimes (Sentencing Procedure) Act 1999, which refers to "objective or subjective factors that affect the relative seriousness of the offence". There has been extensive consideration in the courts of whether particular factors are objective factors affecting the relative seriousness of an offence, or whether they should be seen as purely personal factors. The amendments ensure that these common law concepts apply to the consideration of objective and subjective factors in the sentencing process.

Item 3 of schedule 1 makes amendments to section 54B of the Act to clarify how courts should consider the standard non-parole period in sentencing. Significantly, at proposed subsection (2), it provides that the standard non-parole period is a matter to be taken into account when determining the appropriate sentence for an offender, as part of the ordinary sentencing process. The amendment clarifies that courts should not avoid the ordinary sentencing practice of assessing the relative seriousness of an offence so as to ensure that the sentence imposed is proportionate to the seriousness of the offence.

Proposed subsections (3), (4) and (5) essentially replicate existing provisions in section 54B which require the court to give reasons for setting a non-parole period that is longer or shorter than the standard non-parole period. Proposed subsection (6) clarifies that a court need not attempt to specify the extent to which the seriousness of the offence at hand differs from the mid-range offence described in section 54A.

Items 1 and 4 of schedule 1 make consequential amendments.

The bill aims to ensure that ordinary sentencing principles are applied when courts sentence an offender for a standard non-parole period offence, with the exception of the additional requirements set out in section 54B. Prior to the decision in Muldrock, a separate sentencing procedure had been developed for standard non-parole period offences, which the High Court considered was not in accordance with ordinary sentencing principles. This led to complexities in applying the scheme and left decisions open to appeal.

This bill makes it clear that, while there are additional requirements for a court sentencing an offender for a standard non-parole period offence, there is no separate sentencing procedure. Language from section 21 A has been used to avoid a new round of jurisprudence interpreting the amendments.

In applying the scheme set out in Division 1A, courts should give meaning to the concept of the standard non-parole period, and should take that into consideration as a second legislative guidepost.

In this way, the Legislature's view of the seriousness of Division 1A offences can be recognised without complex sentencing procedures.

The Law Reform Commission considered that the amendments would not dilute the intended legislative objectives of the standard non-parole period scheme. Those objectives are to promote consistency and transparency in sentencing, and to give proper regard to community expectations. It is not anticipated that the changes will result in an overall reduction in sentencing levels.

The operation of standard non-parole periods will continue to be kept under review by the New South Wales Sentencing Council. The Government will consider the advice of the Sentencing Council and if the scheme's objectives are not being met further reform will be considered.

I commend the bill to the House.