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Tabled, ~~by leave,~~
Mr Martin
Clerk of the Parliaments
21/9/22



CRIMES (SENTENCING PROCEDURE) AMENDMENT BILL 2022
STATEMENT OF PUBLIC INTEREST

Need: Why is the policy needed based on factual evidence and stakeholder input?

The Crimes (Sentencing Procedure) Amendment Bill 2022 (the Bill) gives effect to the NSW Government's commitments to amend the *Crimes (Sentencing Procedure) Act 1999* to:

- a. require courts to sentence offenders according to the sentence patterns and practices that exist at the time of sentencing, rather than at the time an offence was committed; and
- b. ensure that Intensive Correction Orders cannot be imposed for certain sexual offences regardless of when the offences were committed.

In relation to first proposal, under the common law, offenders are sentenced according to the sentencing patterns and practices that existed at the time of the offence, even where those patterns and practices were more lenient than current standards.

In 2018, section 25AA was inserted into the *Crimes (Sentencing Procedure) Act 1999* to require courts to sentence offenders for child sexual offences in accordance with the sentencing patterns and practices that existed at the time of *sentencing*, rather than the time of offending. This implemented a recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse and addressed concerns around historically inadequate sentencing outcomes for child sexual offences.

A 2021 decision of the District Court highlighted the inconsistency between section 25AA and the common law rule, when the court was required to impose more lenient sentences for historical sexual offences committed than for similar offences committed against victims under 16 years of age.

The common law rule is also problematic because it requires courts to try to put themselves in the position of a judge years or even decades earlier, which can be difficult and inefficient. The rule, although never overturned, has been criticised in judicial decisions.

In relation to proposal b, a gap has been identified in the drafting of Labor's 2010 Intensive Correction Orders legislation, with the unintended consequence that an Intensive Correction Order can still be issued instead of a prison sentence for some historical sexual offences committed before 2000. This is because Intensive Correction Orders cannot be issued for "prescribed sexual offences", which is defined in the *Crimes (Sentencing Procedure) Act 1999* by reference to a Division in the *Crimes Act 1900* that did not exist before 2000.

This Bill will ensure Intensive Correction Orders are not available for certain sexual offences, such as sexual assault or child sexual offences, regardless of when the offence was committed.

Objectives: What is the policy's objective couched in terms of the public interest?

The objects of the Bill are:

- a. To provide that all offenders must be sentenced for all offences, not only child sexual offences, in accordance with the sentencing patterns and practices at the time of sentencing, not the time of the offence, subject to a narrow exception for exceptional cases;

- b. To ensure that an Intensive Correction Order cannot be imposed with respect to an offence which is substantially similar to an offence currently defined as a prescribed sexual offence, regardless of when the offence was committed.

Sentencing law is a critical part of our criminal justice system. The Bill will ensure that sentences for historical offences are consistent with current community expectations, and that courts are not compelled to perpetuate past legal errors and inadequate sentencing practices. It will also ensure that offenders are not able to obtain an Intensive Corrections Order for a historical sexual offence by virtue of a gap in the legislation.

Options: What alternative policies and mechanisms were considered in advance of the bill?

Reform of the *Crimes (Sentencing Procedure) Act 1999* can only be achieved through legislative amendment.

Analysis: What were the pros/cons and benefits/costs of each option considered?

Not applicable.

Pathway: What are the timetable and steps for the policy's rollout and who will administer it?

The new provisions will take effect on the date of assent.

Once the provisions take effect, it will be the responsibility of the courts to apply the provisions in the course of sentencing proceedings.

Consultation: Were the views of affected stakeholders sought and considered in making the policy?

In relation to the first proposal, the NSW Government has conducted extensive consultation, involving an initial scoping discussion paper and subsequently a confidential draft bill, with stakeholders including:

- the Heads of Jurisdiction;
- the Law Society of New South Wales;
- the New South Wales Bar Association;
- Legal Aid;
- the Office of the Director of Public Prosecutions;
- the Public Defenders' Office;
- Aboriginal Legal Service (NSW/ACT) Limited;
- NSW Police Force;
- Domestic Violence NSW;
- Women's Legal Services NSW;
- Women's Safety NSW;
- Warringa Baiya Aboriginal Women's Legal Centre;
- Homicide Victim's Support Group;
- Victims of Crime Assistance League; and
- Enough is Enough Anti-Violence Movement.

In relation to the second proposal regarding Intensive Correction Orders, the NSW Government has undertaken confidential consultation, including with:

- the Heads of Jurisdiction;
- the Office of the Director of Public Prosecutions;
- the Public Defenders' Office;

- Legal Aid;
- the Law Society of NSW;
- the New South Wales Bar Association;
- NSW Police Force;
- Judicial Commission of NSW; and
- Corrective Services NSW.

We thank all stakeholders for contributing to this important reform.