THE LAW SOCIETY
OF NEW SOUTH WALES

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Mr Matt Karpin
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Policy, Reform and Legislative Branch
Department of Communities and Justice
GPO Box 31
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By email: Alexandra.Kerr@justice.nsw.gov.au

Dear Mr Karpin,

Review of sentencing practices for historical offences

Thank you for seeking the Law Society's feedback on the discussion paper '*Review of sentencing practices for historical offences*'.

Background to s25AA

At common law, an offender is sentenced with reference to the sentencing patterns and practices that existed at the time of the offending, including in relation to the maximum penalty, non-parole period and the prevailing sentence lengths accepted by the courts at the time of offending.

In 2017, the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) made the following recommendation (Recommendation 76):

> State and territory governments should introduce legislation to provide that sentences for child sexual abuse offences should be set in accordance with the sentencing standards at the time of sentencing instead of at the time of the offending, but the sentence must be limited to the maximum sentence available for the offence at the date when the offence was committed.

The Royal Commission observed that applying historical sentencing practices can result in sentencing outcomes that are not as severe as would be appropriate under contemporary community standards and may prevent courts from considering some aggravating features now recognised by the law.[1]

The Royal Commission found that the historical sentencing standards were made in error, based on misunderstandings of the impact of child sexual abuse on victims.[2] The common law approach was subject to judicial criticism in the context of historical child sexual offences.

[1] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report – Parts VII to X and Appendices* (2017), p308.
[2] Ibid., p320.

In *R v Gaven*,[3] Judge Berman stated that offenders "…benefit from earlier mistakes made by sentencing Courts even where we now know that these earlier decisions were wrong".[4] Judge Berman observed that "It is undeniable that the last thirty years has seen an increase in awareness on the part of the Courts of the harm that sexual offences, particularly against children, can cause".[5]

In 2018, in response to Recommendation 76, the NSW Government passed legislation requiring courts to sentence offenders for child sexual offences in accordance with the sentencing patterns and practices that exist at the time of sentencing, not at the time of the offence. Section 25AA of the *Crimes (Sentencing Procedure) Act 1999* came into effect on 31 August 2018. The statutory requirement that sentences must be imposed in accordance with the maximum penalties and, if applicable, the standard non-parole periods, that existed at the time of the offending was retained (s25AA(2) and (4)). The common law approach continues to apply for all offences other than child sexual offences.

As the discussion paper observes, the common law approach reflects the foundational principle that a person should not be punished for something which was not criminal when they did it or punished more severely than they could have been punished at the time of the offence. We oppose in principle the further dilution of that principle. We note that s25AA preserves the operation of s19 the *Crimes (Sentencing Procedure) Act 1999*, which ensures that there will be no retrospective application of maximum penalties that have increased after the time of the offence.

<u>The review</u>

As noted above, there was a strong public policy argument for the introduction of s25AA for child sexual offences. In our view, in the absence of demonstrated error in historical sentencing practices, this argument does not apply generally to all other offences. We also note that extending s25AA to all offences may lead to an increase in sentence length for a range of offences; an outcome not explored in detail in the discussion paper.

We prefer a more nuanced approach than either requiring the application of the sentencing patterns and practices at the time of the offence, or excluding historical sentencing considerations altogether. We support the Victorian model, which allows both current and past sentencing patterns and practices to be taken into account.

As noted in the discussion paper, under s5(2)(b) of the *Sentencing Act 1991* (Vic), courts must "have regard to" the sentence patterns and practices that exist at the time of sentencing. In *Stalio v The Queen*,[6] the Victorian Court of Appeal expressed the view that the principle of equal justice (that a person should not be sentenced to a substantially higher sentence than an offender who committed a like offence at the same time), requires the court to also have regard to the sentencing practices that existed at the time of the offence.[7] The offender is entitled to the potential benefits of current sentencing practices, including the availability of community based sentencing options, pre-sentence reports, the utilitarian value of the plea of guilty, and considerations arising from an offender's mental illness.[8]

In our view, the administration of justice benefits from the application of judicial discretion in individual cases. The Victorian model facilitates discretion by permitting the court to have

[3] [2014] NSWDC 189.
[4] Ibid., at [12].
[5] Ibid., at [11].
[6] [2012] VSCA 120.
[7] Ibid., at [52]-[53].
[8] Ibid., at [18]-[20].

regard to current sentencing patterns and practices, as well as those that existed at the time of the offence. This would allow the court to take into account all relevant considerations such as previous sentencing patterns if readily available, any change in community standards, and whether or not the accused's conduct caused the delay in prosecution.

The Department has indicated that the discussion paper is the first step in seeking feedback on whether s25AA should be extended to all offences, and we look forward to further engagement on this important issue.

The Law Society contact for this matter is Rachel Geare, Senior Policy Lawyer, who can be reached on (02) 9926 0310 or at rachel.geare@lawsociety.com.au.

Yours sincerely,

Juliana Warner
President