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6 August 2026

The Hon Peter McClellan
NSW Sentencing Council
GPO Box 31
SYDNEY NSW 2001

By email: sentencingcouncil@dcj.nsw.gov.au

Dear Mr McClellan AM KC,

CONSECUTIVE SENTENCES IMPOSED BY THE LOCAL COURT

The Law Society is grateful for the opportunity to provide further feedback to the NSW Sentencing Council on the operation of section 58 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**section 58**) in relation to consecutive sentences imposed by the Local Court.

This submission is informed by the Law Society's Criminal Law and Indigenous Issues Committees. At the outset, we emphasise that this area of law is complex and gives rise to competing considerations. Most of the NSW Sentencing Council's questions have been answered in this submission. We suggest the balance of questions might be better addressed in a workshop or roundtable environment with other legal and community stakeholders so various factual scenarios and possible solutions can be explored. The Law Society remains available for further consultation on this complex area of law and policy.

Question 1: The need for a limitation

a) Should there be a limitation on the Local Court's ability to impose consecutive sentences of imprisonment? Why or why not?

The Law Society strongly supports there being a limitation on the Local Court's ability to impose consecutive sentences of imprisonment. We consider this limitation a necessary safeguard in a high-volume jurisdiction where there is limited time available to hear and determine each matter. In our view, it is appropriate that lengthy, unbroken terms of imprisonment can only be imposed by a higher court with the time and resources to engage in a thorough and formal sentencing hearing. Functionally, the limit plays an important role in safeguarding against the imposition of potentially crushing sentences by the Local Court which, in turn, minimises the risk of offender institutionalisation because of long-term imprisonment for repeated low-level offending.

The limit is also consistent with the limitation on aggregate sentences of imprisonment that may be imposed by the Local Court¹ and provides defendants with certainty about the longest sentence they can receive. We suggest this clarity about the Local Court's sentencing scope may encourage some defendants to enter a plea of guilty at an early stage. If the limit was removed such that the Local Court could impose consecutive sentences

¹ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 53B.

of imprisonment beyond five years, some accused may prefer to plead not guilty and either proceed to a summary hearing in the Local Court or elect for a trial in the District Court, with associated impacts on court resourcing and attendant delays.

If the limit on the Local Court's ability to impose consecutive sentences of imprisonment were removed, we are concerned this may, eventually, contribute to an increase in the length of sentences imposed by the Local Court. Given the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system, any increase in the length of sentences imposed by the Local Court is likely to disproportionately impact Aboriginal and Torres Strait Islander peoples and risk undermining the NSW Government's commitment under the National Agreement on Closing the Gap to reduce incarceration rates.

b) If so, what should the purpose of the limit be?

We consider the key purpose of the limit to be its protective function, ensuring that lengthy, unbroken terms of imprisonment can only be imposed by a higher court. There are also, as set out above, several other factors which support the limit being retained.

Question 2: Circumstances in which the limit applies

Should the limit apply when consecutive sentences of imprisonment are imposed in the same proceedings, when a consecutive sentence is imposed on an offender already serving a term of imprisonment, or both?

Section 58 currently limits the Local Court's scope to impose consecutive sentences of imprisonment when sentencing for multiple offences on a single occasion, and when imposing a new sentence to be served consecutively (or partly concurrently and partly consecutively) with a term of imprisonment imposed on an earlier occasion. In our view, it is correct and appropriate for the limit to apply in both circumstances.

Question 3: Limit on custody or total sentence

Should the limit only restrict periods of continuous custody, or should it limit the length of the total sentence the Local Court can impose?

This is a complex question, with several competing considerations. As noted in our introduction, we suggest the NSW Sentencing Council's consideration may benefit from convening a further roundtable discussion, with stakeholders given the opportunity to workshop different factual scenarios and proposed solutions.

While the Law Society supports retaining the limit, we acknowledge concerns that section 58 can, in some matters, operate to restrict the Local Court's sentencing discretion and contribute to sentencing outcomes that appear inconsistent with community expectations of punishment and statutory sentencing principles. The section is also widely considered complex and confusing, and vulnerable to misinterpretation. Against this background, the Law Society supports exploration of potential reform to the provision, to ensure section 58 is fit-for-purpose, equitable in its operation, and drafted clearly and appropriately to achieve its policy objectives.

We note that some stakeholders have expressed support for a continuous custody model. The difficulty with a strict continuous custody model, as noted in the Consultation Paper, is that a single day spent out of custody would essentially "reset" the five year limit and enable the Local Court to impose a new sentence of up to five years' imprisonment.² This model does not respond to circumstances where offenders have entered and exited custody multiple times for reasons such as breach of bail, revocation of an intensive correction order (ICO) and/or time spent on remand.

² Consultation Paper, p 79-80.

If the NSW Government is intending to reform section 58 and move away from the limit's current application to the total sentence, we cautiously suggest a modified continuous custody model with the following key features:

- Instead of considering whether there is an existing unexpired sentence, the Court would consider whether there is a "previous sentence" (i.e. it does not matter whether the sentence is unexpired at the time of sentence or not).
- The section 58 limit will apply if the "new sentence" is made consecutive (or partly concurrent and partly consecutive) on the "previous sentence".
- "Made consecutive (or partly concurrent and partly consecutive)" is statutorily defined to include circumstances where the new sentence adds directly to the non-parole period of the previous sentence, or time served in custody because of the revocation of an ICO, Recognizance Release Order or parole.

We suggest this model might more effectively and clearly achieve the underlying policy objectives of section 58, while balancing community expectations around sentencing in criminal matters. As noted at the outset, we strongly suggest this proposal be workshopped amongst legal stakeholders to minimise unintended consequences and ensure it is workable in practice.

Question 7: The cap imposed by the limit

Should the 5-year limit in s 58 be increased? Why or why not?

The Law Society does not support the five year limit being increased. As noted above, the section 58 limitation of five years is consistent with the five year limitation on aggregate sentences of imprisonment that may be imposed by the Local Court. In our view, the five year limit provides consistency and certainty in the Local Court's sentencing scope.

The Consultation Paper suggests an increased cap may better reflect the Local Court's modern jurisdiction, including its ability to sentence offenders for Table offences,³ some carrying maximum penalties of up to 20 years.⁴ Respectfully, we do not agree with this rationale. In 2016 and 2018, several strictly indictable offences were re-classified as Table offences, enabling them to be finalised in the Local Court. As noted in the Consultation Paper, the reclassification was intended to expedite the resolution of cases, reduce stress and uncertainty for victims, witnesses and accused persons, and address delays caused by a backlog of cases in the District Court.⁵ The offences were selected because most sentences imposed by the District Court for these offences were for terms of imprisonment within the Local Court's sentencing limit.⁶ We suggest instead that it was clearly understood and accepted by the NSW Government that in bringing these offences within the jurisdiction of the Local Court, they would be subject to the Local Court's statutory limitation on aggregate and consecutive sentences, unless the prosecutor or accused person elected for the matter to proceed in the District Court.

In these circumstances, we do not think it is appropriate to refer to the expansion of the Table offence scheme to support an increase to the Local Court's sentencing scope. Where a Table offence cannot be appropriately sentenced in the Local Court, an election should be properly made. Relevantly, when the NSW Law Reform Commission examined the sufficiency of the Local Court's broader jurisdictional limit in 2013, it concluded that

³ Schedule 1 of the *Criminal Procedure Act 1986* (NSW) sets out indictable offences triable summarily, typically referred to as "Table offences". Table 1 offences are indictable offences that are to be dealt with summarily unless the prosecutor or person charged elects otherwise. Table 2 offences are indictable offences that are to be dealt with summarily unless the prosecutor elects otherwise.

⁴ Consultation Paper, p 82.

⁵ Consultation Paper, p 39.

⁶ Consultation Paper, p 39.

improving prosecutorial practice to ensure appropriate elections were made was preferable to increasing the Court's jurisdiction.⁷

We emphasise, as noted in the Consultation Paper, even if the cap were increased from five years to, for example, seven years or 10 years, there will always be cases that "reach" the limit of the Local Court's sentencing scope and result in situations where there may be a perception that the Local Court cannot adequately sentence the offender. This difficulty cannot ever be resolved by increasing the limit.

Our concerns in relation to removing the limit, as set out in response to Question 1, apply equally in relation to increasing the limit. In particular, we express concern that increasing the five year limit may eventually contribute to an increase in the severity of Local Court sentences, with a disproportionate impact on Aboriginal and Torres Strait Islander offenders due to their existing over-representation in the criminal justice system. We also suggest that increasing the five year limit may result in more offenders pleading not guilty, and either proceeding to summary hearing or electing for a District Court trial, with associated resourcing implications and delays in matter finalisation. It may also increase the number of appeals from the Local Court to District Court in relation to sentences imposed.

Question 8: Exceptions

a) Should the exceptions to s 58 be expanded?

b) If so, what should the exceptions cover?

We deal with the above two questions together. The Law Society suggests that the exceptions to section 58 could be expanded to include:

1. All offences committed while in custody; and
2. Breach apprehended violence order (**AVO**) offences, contrary to section 14 *Crimes (Domestic and Personal Violence) Act 2007* (NSW), where the breach involves the commission of a personal violence offence.

Introducing a broad exception for offences committed in custody may reduce the incidence of section 58 issues, given offences committed in custody necessarily involve an offender already serving an existing sentence and may account for a notable proportion of cases that engage section 58.⁸

We suggest that excluding breach AVO offences, where the breach involves the commission of a personal violence offence, from the operation of section 58 might address community concerns about the Local Court's inability to, in some cases, effectively sentence the offender for such offences, especially in circumstances where this offence is not available for election. We suggest that only breach AVO offences involving the commission of a personal violence offence should be excluded from the operation of section 58, so that less serious and/or technical AVO breaches are not captured.

Question 9: Discretion to commit

a) Should the Local Court have a discretion to commit matters to a higher court of its own motion?

b) If so, in what circumstances should the discretion be exercisable?

We deal with these two questions together. We do not support the Local Court having a discretion to commit matters to a higher court of its own motion. We emphasise, as noted in the Consultation Paper, that this

⁷ Consultation Paper, p 86; NSW Law Reform Commission (July 2013), *Sentencing, Report 139*, at [20.71].

⁸ Consultation Paper, p 83.

discretion was held by the Local Court until 1995, when it was removed due to concerns about its impact on resources, as well as uncertainty amongst the parties about which court would ultimately hear and sentence each matter.⁹

We agree with the view put forward by the Public Defenders, summarised in the Consultation Paper:¹⁰

... the Public Defenders noted that the possibility of summary disposition, along with greater appeal rights from the Local Court to the District Court, provides an incentive for an accused person to enter an early guilty plea. If an accused person knows that a court could commit the matter of its own motion, despite any agreement between the parties, they may be less willing to plead guilty in the Local Court. This might lead to more jury trials, and the loss of the benefits associated with an early guilty plea, including a shorter and less distressing process for accused persons, victims, and witnesses, as well as resource savings for the broader justice system. ...

The Public Defenders submitted that the ability of the parties to make the election decision is now an integral part of the adversarial system, entrenched by the [Early Appropriate Guilty Plea (EAGP)] scheme. In their view, introducing an own motion power to commit a person to the District Court would be contrary to the purposes and procedures of the EAGP scheme.

Thank you for consulting the Law Society on this matter. Inquiries in the first instance may be directed to Jade Fodera, Policy Lawyer, at (02) 9926 0218 or Jade.Fodera@lawsociety.com.au.

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'Ronan MacSweeney', followed by a period.

Ronan MacSweeney
President

⁹ Consultation Paper, p 84.

¹⁰ Consultation Paper, p 84-85.