THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Crim:PWrg1404935

13 October 2017

Mr Paul Lynch MP
Shadow Attorney General
100 Moore Street
Liverpool NSW 2170

By email: Liverpool@parliament.nsw.gov.au

Dear Mr ~~Lynch~~ Paul,

Criminal Justice Reforms

I write to you in relation to the current criminal justice reforms that have been introduced into Parliament relating to early guilty pleas, sentencing, parole and high risk offenders.

Below are the Law Society's main comments on the various pieces of legislation for your consideration.

1. Justice Legislation Amendment (Committals and Guilty Pleas) Bill 2017

The Law Society is supportive of criminal case conferencing where it is properly funded and senior prosecutors are involved at an early stage, with the delegation to accept pleas to lesser charges and negotiate in relation to "agreed facts". However, in our view, the effectiveness of case conferencing is dependent upon the retention of a committal framework, full disclosure of the prosecution case, and on Crown prosecutors or other senior lawyers being involved in the process at an early stage.

We are concerned that the Bill, particularly in relation to prosecution disclosure and the abolition of committals, has the potential to create significant delays in the system, increase the number of trials in the District Court and ultimately reduce the number of appropriate early guilty pleas. There is no safeguard in the Bill to require that what the police and prosecution provide an accused person in an initial brief of evidence is sufficient or of a high quality. The legislation does not require any of the brief to be in admissible form.

We are concerned about the lack of any discretion in the statutory sentencing discount provisions, and that injustice and unfairness will result where there is a substantial change in the Crown case or late service of key evidence. We consider that under the proposed sentencing discount model there is limited incentive to plead guilty to a charge once a matter has been committed for trial. If there is to be a statutory sentencing discount scheme, the discounts applied should be 33%/20%/10% to incentivise pleas after committal. If it is left as 25%/10%/5%, it is likely that the vast majority of matters committed for trial will run to trial, which is contrary to the aims of the reforms.

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2. Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill 2017

The Law Society does not support the abolition of suspended sentences and views this decision as a retrograde step. Suspended sentences are an important option for a person who is deemed to be unsuitable for an Intensive Corrections Order (ICO).

We have significant concerns with the inclusion of a presumption that a court must impose a sentence of full time detention or a supervised order if the person is found guilty of a domestic violence offence. This provision is an unnecessary fetter on judicial discretion and reverses the principle of detention as a last resort. We have serious concerns about the potential impact of this presumption on both rates of incarceration and rates of pleas of guilty to domestic violence offences.

We support the increase from two to three years imprisonment for an ICO for two or more offences. However, we are disappointed that the opportunity has not been taken to increase ICOs to three years for a single offence, which would be an effective way to reduce prison numbers. We consider it inappropriate to have wide offence exclusions for ICOs, particularly with the abolition of suspended sentences. If unamended we submit that this will lead to an increase in the number of offenders in full time imprisonment.

We submit that the amendments should apply prospectively in respect of offences committed after the date of commencement of the legislation. In relation to existing sentences, we strongly oppose the approach whereby someone is serving a sentence, the sentencing court is functus officio and then, under the Bill, the person is called back to court to be resentenced. For example, an offender serving a periodic detention order can be arrested for failing to appear to be resentenced. Offenders subject to ICOs and good behaviour bonds in force before the commencement of the legislation should not be subject to any new conditions by future regulations.

We do not support the Parole Authority having the power to impose, vary or revoke additional or further conditions on an ICO on application of the offender or Community Corrections. We submit that the power to deal with these applications should fall to the sentencing court. We query whether the provision raises a separation of powers issue, as it would give the Parole Authority greater power to effectively re-sentence the defendant (as opposed to supporting maintenance of, through compliance with, the original sentence).

3. Parole Legislation Amendment Bill 2017

The Law Society supports the principle of re-integration home detention as provided in the Bill. As noted by the NSW Law Reform Commission, the availability of re-integration home detention for a limited period as a bridge between full time custody and parole will be of great benefit in assisting transition and reducing offending.[1]

We support the Law Reform Commission recommendation that a re-integration home detention scheme should not include any offence based exclusions.[2] The Law Reform Commission noted that it is serious offenders who would benefit most from re-integration home detention.

However, contrary to the Law Reform Commission's recommendation, the Bill contains offence based exclusions. We submit that the Parole Authority should be able to use its discretion, based on the circumstances of the offender's offending and reports from

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[1]NSW Law Reform Commission, Report 142, *Parole*, 2015, para 15.77.
[2]Ibid. Recommendation 15.8, p348.

Community Corrections, to determine whether an offender is suitable for re-integration home detention.

If offence based exclusions are to remain in the Bill, then we submit a "domestic violence offence" should deleted, as this covers a multitude of offences and relationships, and is not in the same category as the other offences (child sexual offences, serious sex offences or a serious violence offences, and terrorism offences).

The Bill enables the Parole Authority to revoke the re-integration home detention order or parole order without specifying the grounds for doing so. We consider that the Parole Authority should be required to state the grounds on which it has revoked the relevant order.

4. Crimes (High Risk Offenders) Amendment Bill 2017

Detaining a person beyond the maximum sentence imposed by the sentencing court offends the fundamental principle of proportionality. Extended Supervision Orders and Continuing Detention Orders are extraordinary measures outside of the judicial sentencing framework. The use of these measures should be limited to those offenders who present only the most serious risk to society.

The Law Society continues to oppose the application of continuing detention for high-risk violent offenders. We maintain our concerns regarding the challenges involved in accurately predicting future behaviour. Predicting an offender's future conduct is a notoriously difficult task and the High Court has recognised the unreliability of these predictions (*Fardon v Attorney General for the State of Queensland* (2004) 210 ALR 50).[3] In *Fardon*, Justice Kirby commented that predictions of dangerousness are "*... based largely on the opinions of psychiatrists which can only be, at best, an educated or informed "guess".*[4]

We are oppose to the removal of the distinction between sex offenders and serious violent offenders in the Bill, particularly given the concerns outlined above regarding the difficulties involved in establishing an offender's future conduct. The fact that a person has committed an offence of a certain nature provides a trigger for an application to be made, that is, it is an indicator to determine the likelihood of future offending. The distinctions between the two types of offenders provide significant safeguards to ensure the 'predictions' as to future offending behaviour are restricted and limited to those which closely reflect the nature of the high risk behaviour already displayed.

We are opposed to the proposed change to the test for making a Continuing Detention Order. The Law Society considers the current tests are adequate and consistent with the objectives of the Act.

Thank you for considering this submission.

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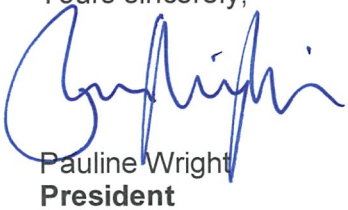
Yours sincerely,



Pauline Wright
President

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[3] *Fardon v Attorney General for the State of Queensland* (2004) 210 ALR 50, 124-125.
[4] Ibid, 125.