THE LAW SOCIETY
OF NEW SOUTH WALES

31 October 2011

The Hon James Wood AO QC
Chairperson
New South Wales Law Reform Commission
DX 1227 Sydney

Dear Mr Wood,

NSW Law Reform Commission Sentencing Review – preliminary submission

The Law Society's Criminal Law Committee (Committee) welcomes the review of the *Crimes (Sentencing Procedure) Act 1999*. The Committee notes that the review is conducted in the context of the Government's commitment to reducing re-offending and to using alternatives to prison for less serious cases.

As discussed in the Outline Paper, the prison population in NSW is at a critically high level and has grown from 7,346 people in full-time custody in June 2000, to 10,057 in June 2011. There is no statistical support for this enormous increase in the number of inmates in either recidivism rates or the incidence of criminal activity in the State.

The Outline Paper refers to four current projects that the New South Wales Sentencing Council is conducting:

- The use of non-conviction orders and good behaviour bonds.
- Sentencing options for serious violent offenders.
- The use of suspended sentences.
- Standard non-parole periods and guideline judgments.

The Committee has made submissions to each of these reviews, and copies of the submissions are attached for the Commission's review.

The Committee made submissions to the Commission's review of 'People with Cognitive and Mental Health Impairments in the Criminal Justice System', and notes that the Commission has indicated that the submissions received will be taken into account as part of this review.

The Committee's preliminary submission briefly outlines the issues that the Committee considers should be a priority for reform and investigation. The Committee looks forward to further consultation with the Commission in relation to the review.

Yours sincerely,

per

Stuart Westgarth
President

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General deterrence

The Committee is concerned about the legal fiction that imprisonment creates general deterrence. The concept of general deterrence is a "virtually unchallenged orthodoxy in Australian courts,"[1] and Bargaric and Alexander argue that:

> [t]he reality is that general deterrence, as universally applied, does not work. The overwhelming trends evident in empirical research suggest that higher penalties do not serve as disincentives to crime. The current practice of increasing penalties to give effect to general deterrence has no social utility.[2]

There is substantial research that shows general deterrence does not work, and that higher penalties do not serve as a disincentive to crime. Recent research conducted by the Victorian Sentencing Advisory Council found that:

> "The evidence from empirical studies suggests that the threat of imprisonment generates a small general deterrent effect. However, the research also indicates that increases in the severity of penalties, such as increasing the length of imprisonment, do not produce a corresponding increase in the general deterrent effect.
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> ...
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> The research shows that imprisonment has, at best, no effect on the rate of reoffending and is often criminogenic, resulting in a greater rate of recidivism by imprisoned offenders compared with offenders who received a different sentencing outcome".[3]

Consideration of the application of general deterrence in sentencing would require a review of the purposes of sentencing contained in section 3A of the *Sentencing Procedure Act 1999*.

The Standard Non-Parole Period Scheme

The Committee is of the view that the standard non-parole period scheme should be repealed.

Research by the Judicial Commission of New South Wales has found that:

> ".. the standard non-parole period scheme has led to an increase in the severity of penalties imposed and the duration of sentences of full-time imprisonment. This is, in part, a result of the relatively high levels at which the standard non-parole periods were set for some offences. However, the study also found significant increases in sentences for offences with a proportionately low standard non-parole period to maximum penalty ratio".[4]

It is not clear how the standard non-parole periods in the Table were determined. Section 54A(2) of the *Crimes (Sentencing Procedure) Act 1999* provides that the standard non-parole period "represents the non-parole periods for an offence in the middle of the range of objective seriousness". However the standard non-parole

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[1] '*(Marginal) general deterrence doesn't work – and what it means for Sentencing*', Mirko Bagaric and Theo Alexander, (2011) 35 Crim LJ 269.
[2] Ibid.
[3] *Sentencing Matters. Does Imprisonment Deter? A Review of the Evidence*, Sentencing Advisory Council (Victoria), April 2011, p23.
[4] Judicial Commission of NSW, *The Impact of the Standard Non-Parole Period Sentencing Scheme on Sentencing Patterns in New South Wales* (2010, Research Monograph 33), p60.

period for a number of offences are high relative to the maximum penalty, e.g. the standard non-parole period for a section 61M(2) *Crimes Act 1900* (8 years) is 80% of the maximum penalty (10 years).

Reports by the Australian Productivity Commission show that the increase in the average sentence length and non-parole periods of offences subject to the standard non-parole period scheme have led to an associated increase in prisoner management cost since the scheme commenced in 2003. NSW expenditure on correctional centres was approximately $503 million in 2002-2003[5], increasing to more than $765 million in 2009-2010[6].

The recent High Court decision in *Muldrock v The Queen* [2011] HCA 39 (5 October 2011) has substantially reduced the need for standard non-parole periods.

Section 21A *Crimes (Sentencing Procedure) Act*

Compliance with section 21A has been described as time-consuming, complex and carrying a real risk of error.[7] There have been constant ad hoc amendments to the list of aggravating factors contained in section 21A, with an amendment currently in the Legislative Council (the *Crimes (Sentencing Procedure) Amendment (Children in Vehicles) Bill 2011*).

Justice Howie commented in *Elyard v R* [2006] NSWCCA 43 at [39] that the drafters of section 21A:

> "... have made the task of sentencing courts more difficult, or at least more prone to error (either real or apparent), by what was in my opinion a needless attempt to define relevant factors into categories of aggravation or mitigation and yet apparently without the intention of altering the common law as it was applied to sentencing before the advent of the section. One has only to look back over sentence appeals determined by this court over the last two years to see the impact that this section has had upon the work of this court. And yet, as I pointed out in *R v Tadrosse* [2005] NSWCCA 145, if sentencing judges simply take into account the relevant sentencing factors that were taken into account before the introduction of the section, they will inevitably comply with the section's demands".

The provision is unnecessary and should be repealed.

Indigenous offenders

The Committee is extremely concerned about the over-representation of Indigenous people in custody. Any review of sentencing laws and principles should always consider the impact on the rate of incarceration of Indigenous offenders.

Research by the NSW Bureau of Crime Statistics and Research (BOCSAR) has shown that between 2001 and 2008 the adult Indigenous imprisonment rate rose by 37 percent in Australia and 48 percent in New South Wales.[8] Over the same period

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[5] Steering Committee for the review of Government Service Provision, *Report on Government Services 2004* (Productivity Commission, 2004), vol 1, 7A – Corrective Services attachment, Table 7A.6.

[6] Steering Committee for the review of Government Service Provision, *Report on Government Services 2011* (Productivity Commission, 2011), vol 1, 8A – Corrective Services attachment, Table 8A.8.

[7] NSW Bar Association, *Criminal Justice Policy*, 2007, *p6.*

[8] Bureau of Crime Statistics and Research, *Why are Indigenous Imprisonment Rates Rising?* Issue Paper No. 41, August 2009, p1.

the non-Indigenous rate of imprisonment in NSW rose by only seven percent.[9] Three quarters of the growth is associated with a growth in the number of sentenced Indigenous prisoners. [10]

Of concern is that with the possible exception of offences against justice procedures, it does not appear that the increase in imprisonment is due to increased offending.[11] The results suggest that the substantial increase in the number of Indigenous people in prison is due mainly to changes in the criminal justice system's response to offending rather than changes in offending itself.[12]

Research by BOCSAR suggests that the best way to reduce Indigenous over-representation in the court system is to reduce the rate of Indigenous recidivism through effective rehabilitation programs.[13] Commenting on the findings of research into reducing Indigenous contact with the Court system, the Director of BOCSAR, Dr Weatherburn said that:

> "Programs that combine intensive supervision with treatment have been found to produce an average 16 per cent reduction in reoffending.
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> Given the strong influence that drug and alcohol abuse have on the risk of Indigenous arrest, it would also seem prudent to increase Indigenous access to drug and alcohol treatment."[14]

In a recent paper, His Honour Judge Norrish QC, identifies a number of factors that have contributed to the increase in the number of Aboriginal people in custody for longer sentences of imprisonment as follows:

- "Increasing complexity in sentencing principles and increased codification of the criminal law with resultant increases in statutory maximum penalties.

- Legislative articulation of matters, or principles, which may inhibit sentencing discretion or may direct sentencing practices in a particular direction (e.g. sections 3A, 21A, 44, 54A-D *Crimes (Sentencing Procedure) Act 1999*). These provisions include 'standard non parole periods' (see *R v Way* (2004) 60 NSWLR 168).

- Guideline judgments (i.e. decisions of the New South Wales Court of Criminal Appeal structuring sentencing discretion, e.g. *R v Henry (& Ors)* (1998) 48 NSWLR, *R v Jurisic* (1998) 45 NSWLR 209).

- More limited sentencing options, such as the recent abolition of 'periodic detention' and limited opportunity to serve 'non full time' custodial penalties in the areas of 'home detention' and 'Intensive Correction Orders'".[15]

His Honour noted that these are matters of public policy that are also applicable to non-Indigenous people.[16]

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[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] Ibid, p6.
[13] Bureau of Crime Statistics and Research, *Reducing Indigenous Contact with the Court System*, Media Release, December 2010.
[14] Ibid.
[15] '"*Equal Justice" in Sentencing for Aboriginal People*', a paper for the National Indigenous Legal Conference, 13 August 201, p4.

Periodic detention and ICOS

On 1 October 2010 periodic detention ceased to be a sentencing option in New South Wales. Periodic detention was replaced by a new sentencing option called an Intensive Correction Order (ICO).

Reinstatement of period detention

The abolition of periodic detention has removed an important component of the sentencing spectrum and will inevitably lead to the use of full-time imprisonment in circumstances where it is not necessarily the most appropriate approach. The Committee's strong preference is for periodic detention to be reintroduced, with ICOs retained as an additional sentencing option sitting between periodic detention and community service orders.

While periodic detention as a sentencing option was an alternative to full-time detention it was still a custodial sentence. By its nature it had a very strong element of leniency already built into it and was outwardly less severe in its denunciation of the crime than full-time imprisonment: *R v Hallocoglu* (1992) 29 NSWLR 67 per Hunt CJ at CL at 73. Even so, the continuous obligation of complying with a periodic detention order week in and week out over a very lengthy period of time was, in itself, a salutary punishment: *R v Burnett* (1996) 85 A Crim R 76 per Sheller JA at 82. It was a sentencing option that was recognised by the community and victims as involving an actual custodial component.

The option of sentencing an offender to periodic detention enabled the court to punish an offender without the negative effects of full-time imprisonment. The offender could maintain community and family ties by retaining employment and living with his or her family.

Periodic detention was also less costly than full-time imprisonment and benefitted the community by the work performed by the periodic detainees.

Periodic detention should be reintroduced as a sentencing option in New South Wales.

Problems with ICOs

ICOs share many of the same advantages of periodic detention as a sentencing option in that it enables the offender to maintain contact with family, friends and employment; it avoids the contaminatory effects of imprisonment; it is cheaper than full-time imprisonment, and it benefits the community by the performance of community work while retaining a strong element of punishment. Intensive case management with a rehabilitative focus would be beneficial for many offenders.

However, it is concerning that ICOs are not available across New South Wales especially in rural and remote areas. ICOs require the availability of rehabilitative programs and appropriate community service options that do not currently exist in many rural and remote areas.[17] The lack of availability of suitable programs reduces its value as a sentencing option.

A limitation of periodic detention was its lack of availability throughout the State by reason of resource limitations and the resulting discriminatory impact among

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[16] Ibid, p5.
[17] Standing Committee on Law and Justice, *Community based sentencing options for rural and remote areas and disadvantaged populations*, 30 March 2006, p71

offenders who live in locations where they cannot have an order imposed upon them. The same problem has occurred with ICOs.

An ICO is only available for term of imprisonment of not more than two years. It is the Committee's view that ICOs should be available for a maximum term of three years. This would make the sentence more widely available and permit orders to be of sufficient duration to enable effective rehabilitative or educational program delivery.

The Court may only order a suitably assessed offender to serve the sentence by way of an ICO. This differs from periodic detention where the Court could make a periodic detention order whether or not the offender had been assessed as suitable to serve the sentence by way of periodic detention. Assessments involve a level of subjectivity, and it is not appropriate for a Corrective Services officer to have a greater level of discretion in the sentencing outcome for an offender than a Magistrate. Magistrates should have the discretion to order an ICO whether or not the offender has been assessed as suitable. Committee members have reported that a number of their clients who may have received periodic detention have been assessed as unsuitable for an ICO by Corrective Services e.g. because they have a drug problem.

The availability of suitable programs, the maximum term of an ICO, and the suitability assessments are all areas that require investigation and reform.

Forum Sentencing

The Committee supports forum sentencing; however the current eligibility requirements, in particular the limitations on the types of offences[18] and offenders that can be referred to forum sentencing, attract a limited pool of offenders. Research here and overseas indicates that restorative justice processes such as forum sentencing are more likely to achieve reductions in re-offending and other benefits for both victims and offenders for many of the more serious offences that are excluded from the program.[19]

To be eligible to participate in a forum offenders need to be likely to be required to serve a prison term for the offence[20] and must be assessed as suitable for participation in the program.

Research conducted by BOCSAR shows that offenders dealt with under the forum sentencing scheme are no less likely to re-offend than offenders dealt with in a conventional court proceeding.[21] Commenting on the findings of the research Dr Weatherburn observed that:

> "Many of the individuals referred to Forum Sentencing have substantial criminal records, dating back in many cases to their teenage years.
>
> Entrenched patterns of criminal behaviour are difficult to change without a sustained effort to alter the factors that keep them involved in crime. A

[18] Section 348 *Criminal Procedure Act 1986*

[19] See, Lawrence Sherman and Heather Strang, *Restorative Justice: The Evidence*, The Smith Institute, London, 2007. For a nuanced discussion of the theoretical implications for process and outcomes of situating restorative justice for adults within criminal justice, see Joanna Shapland et al, '*Situating Restorative Justice within Criminal Justice*', 10(4) Theoretical Criminology 505–532

[20] Clause 63(1)(b) *Criminal Procedure Regulation 2010*

[21] Bureau of Crime Statistics and Research, *Does Forum Sentencing reduce re-offending?* Crime and Justice Bulletin No.129, June 2009, p1.

program like Forum Sentencing may work more effectively with offenders that do not have substantial criminal records."[22]

Earlier research by BOCSAR found that victims who participated in conferences were overwhelmingly satisfied with the way their case was dealt with and with the intervention plans agreed to at the conference.[23] Over the next two years Forum Sentencing will be expanding to all NSW locations where the Local Court sits[24] and so measures should be taken to make it as effective as possible.

While Dr Weatherburn's comments should be carefully considered, attention should also be paid to whether offenders participating in forum sentencing are linked to available services and programs as part of their intervention plan, and whether such services are available in the locations in which the program is to be expanded. Limiting this program to offenders without substantial criminal records may be counter-productive, inconsistent with the stated aims of the program, and exclude victims who desire to participate and would benefit from participation in forum sentencing.

Expansion of the Drug Court

An evaluation by BOCSAR has shown that participants in the NSW Drug Court are significantly less likely to be reconvicted than offenders given conventional sanctions (mostly imprisonment)[25]. Dr Weatherburn commented that the research has "...added to a growing body of international evidence that Drug Courts are more cost-effective than prison when it comes to reducing the risk of re-offending among recidivist offenders whose crime is drug related"[26].

The Committee supports the further expansion of the Drug Court. The Committee also supports the expansion of the Drug Court to include alcohol dependent offenders. The expansion of the Drug Court would help to ensure that a greater number of drug and alcohol dependent offenders are offered the most appropriate treatment and rehabilitation which will assist in reducing recidivism.

Fines

The Committee acknowledges that fines are an appropriate sentence for the majority of minor offences in the Local Court. However, the Committee is concerned about excessive fines imposed as a matter of course in the Local Court and would like a review of fines policies.

While section 6 of the *Fines Act 1996* provides that the Court should consider the capacity of a person to pay when fixing the amount of a fine, Committee members report that this is rarely observed.

The most significant problem with the fine enforcement system is the link between non-payment of fines and suspension/refusal of driver licences. Where the unpaid fines are traffic fines, this makes some sense and is perhaps justifiable; however, to

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[22] Bureau of Crime Statistics and Research, *Evaluation of Forum Sentencing*, Media release, 2009.
[23] Bureau of Crime Statistics and Research, *An Evaluation of the NSW Community Conferencing for Young Adults Pilot Program*, 2007, pvii.
[24] Department of Attorney General & Justice website, Forum Sentencing page: http://www.lawlink.nsw.gov.au/forumsentencing
[25] Bureau of Crime Statistics and Research, *The NSW Drug Court: A re-evaluation of its effectiveness*, Crime and Justice Bulletin No 121, September 2008, p1.
[26] Bureau of Crime Statistics and Research, *Drug Court re-evaluation*, Media Release, 2008.

impose licence sanctions for non-traffic fines is illogical and causes a great amount of injustice.

Nearly one quarter of all Indigenous appearances in the NSW Local Court are for road traffic and motor vehicle regulatory offences.[27] Many of these offences are committed by people who have been caught driving a motor vehicle after having had their driving license suspended for non-payment of a fine.[28]

The Committee submits that licence sanctions for non-traffic fines should be abolished.

Other issues that the Law Reform Commission should consider as part of its review

- Review of the principle of "adult offending" as it applies to children being dealt with at law.

  There should be an emphasis on rehabilitation of 16 and 17 years olds regardless of the type of offence they have committed.

- The laws regarding the breach of suspended sentences.

  The Committee supports a more flexible approach to breaches of suspended sentences. Currently there is little discretion available to the Court when a person breaches a section 12 bond. The Court should have a much broader range of options available to deal with an offender who has breached a section 12 bond. This could include a range of sanctions as is currently used in the Drug Court. There should also be a broader scope for no sanction to be imposed when the breach is minor (as opposed to the current test of "trivial") and which do not rely on a finding linked to the failure to comply i.e. the time left on the bond is small.

- The ability of Courts to combine sentences e.g. a community service order and a bond, or a section 10 and a fine.

- The re-introduction of sentence indications.

- Criminal Case Conferencing.

  An emphasis should be placed on funding for the Office of the Director of Public Prosecutions so that Crown Prosecutors can be briefed early.

[27] Bureau of Crime Statistics and Research, *Reducing Indigenous Contact with the Court System*, Issue Paper No. 54, December 2010, p3.
[28] Ibid.