



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: RBG590068

27 March 2012

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

Dear Mr Wood,

R v Boughen; R v Cameron [2012] NSWCCA 17

The Law Society's Criminal Law Committee (Committee) has asked that I write to you about the recent decision of the New South Wales Court of Criminal Appeal in *R v Boughen; R v Cameron* [2012] NSWCCA 17 (27 February 2012), insofar as it affects the sentencing option of permitting a sentence of imprisonment to be served by way of an Intensive Correction Order (ICO) (see in particular paragraphs 108 to 113).

The Committee would like the Commission to consider *Boughen* as part of its review of the law of sentencing. The Committee notes that the review is conducted in the context of the Government's commitment to using alternatives to prison for less serious cases. Failure to deal with the implications of the judgment may lead to a substantial waste of resources.

In *Boughen*, her Honour Justice Simpson (with whom Hislop and Latham JJ agreed) decided that where rehabilitation is an irrelevant consideration, that in itself renders the use of ICOs as inappropriate (see paragraph 110). The application of this decision is likely to result in a decrease in the use of ICOs and an increase in the number of offenders in custody, because the effect is to remove the ICO option for "white collar" offenders and other offenders not in need of rehabilitation. For example, had the sentences in cases such as *R v Dalzell* [2011] NSWSC 454; (2011) 83 ACSR 407 and *R v Bateson* [2011] NSWSC 643 been decided in accordance with *Boughen*, it is doubtful that ICO disposition would have been possible.

The decision in *Boughen* therefore creates (or recognises) a gap between the new ICO sentencing option and the abolition of periodic detention. The anomalous result is that certain offenders not in need of rehabilitation must receive a more severe sentence than those who do have such a need, for substantially the same seriousness of offending. Anomalies of that kind have a tendency to bring the administration of justice into disrepute.

The Committee suggests that consideration be given to the Commission proposing legislative reform with a view to providing a more complete solution to the blanket abolition of periodic detention, including by possible measures such as the following:

- amendment of the ICO provisions in the *Crimes (Sentencing Procedure) Act 1999* (the CSP Act) to permit a gaol sentence to be served by way of an ICO

even when rehabilitation is not required, which would give due recognition to the fact that 32 hours of community service over the maximum period of 2 years, a potential total of 768 hours, is a substantial increase in the maximum number of hours able to be imposed by way of a single community service order, being 500 hours;

- amendment of section 7(2) of the CSP Act to permit a non-parole period to be imposed and for the non-parole period to be served by way of an ICO – this would have the effect of lifting the threshold for ICOs above the current 2 years set out in section 68(1) of the CSP Act and thereby better align that sentencing option with the former periodic detention threshold of 3 years (albeit for a head sentence);
- amendment of section 68(1) of the CSP Act to lift the threshold for sentences able to be served by way of an ICO from 2 years to 3 years (in line with the former periodic detention threshold), which would also lift the potential maximum community service component to a very substantial 1,152 hours over a full three years;
- amendment of section 6 of the CSP Act to allow for an increase in the duration of sentence for which home detention is available, perhaps with additional suitability criteria, such as an absence of the need for rehabilitation and the addition of a community service component;
- revisiting the decision to abolish periodic detention, perhaps with a view to a more limited re-introduction at a single metropolitan location, or a few such locations, to contain costs – if the alternative is full-time custody, offenders may be more willing to travel to facilitate this option.

Yours sincerely,



Justin Dowd
President

cc Attorney General
NSW Bar Association
NSW Sentencing Council