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The Committee is of the view that the standard non-parole period scheme should be repealed.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

THE LAW SOCIETY
OF NEW SOUTH WALES

COPY

Our Ref: RBG570487

Direct Line: 9926 0216

8 August 2011

The Honourable James Wood AO QC
Acting Chairperson
NSW Sentencing Council
GPO Box 6
SYDNEY NSW 2001

Dear Mr Wood,

Suspended sentences

Thank you for the opportunity to comment on the Sentencing Council's consultation paper relating to suspended sentences. The Law Society's Criminal Law Committee (Committee) has considered the questions set out in the consultation paper and provides the following responses:

1. **(a) Should partially suspended sentences be introduced as a sentencing option in NSW?**

   There is no need to reintroduce partially suspended sentences in NSW.

2. **(a) Is reform required in relation to the nature of the conditions that may be attached to a suspended sentence?**

   If the breach and revocation provisions are amended as suggested below, then reform in relation to the nature of the conditions that may be attached to a suspended sentence is not required.

3. **Should the term of imprisonment that may be suspended (currently a maximum of 2 years), be either increased or decreased? If yes, please indicate your reasons.**

   The term of imprisonment that may be suspended should remain at 2 years in the Local Court and should be increased to 3 years for District Court matters. This would allow the District Court a greater flexibility for young and limited record offenders who commit serious offences but may not pose a risk to the community in terms of recidivism.

4. **Should the operational period, or the period for which a term of imprisonment may be suspended (currently also a maximum of 2 years), be either increased or decreased?**

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The operational period should correspond to the maximum sentence that may be suspended; 2 years in the Local Court and, if the Committee's suggestion is adopted, 3 years in the District Court.

5. Should an application for a guideline judgment be made?

No, a guideline judgment is not necessary.

6. Is further legislative guidance required in relation to the factors that make a case inappropriate for suspension?

Further legislative guidance is not required in relation to factors that make a case inappropriate for suspension.

7. Do the current provisions relating to breaches of suepended sentences require reform? If yes, how? Should the discretion available to a court when addressing a breach of a suspended sentence be widened?

Yes, the current lack of flexibility following a breach of a suspended sentence needs to be addressed. Amendments are required to give the Court wider discretion when addressing a breach.

Currently the Court must revoke a suspended sentence if the bond is breached unless the breach was trivial in nature or there are good reasons to excuse the breach (sections 98, 99 *Crimes (Sentencing Procedure) Act 1999*).

The Committee suggests that the reference to 'trivial in nature' is unhelpful in practice and should be deleted.

The Committee submits that 'good reasons for excusing the breach' should be expanded to allow the Court to consider:

- matters that go to the nature of the breach;
- consequences of the breach;
- matters preceding and post-dating the breach;
- the circumstances of the offender, and
- any other subjective matters.

The Committee is of the view that there should be a broad distinction between a breach for non-compliance with a condition of the bond and a breach caused by further offending. A different test should be applied to distinguish between "condition" and "offence" breaches.

- The Court should have the power to deal with a breach of a condition that does not involve further offending by varying, removing or imposing conditions in addition to the option of revocation.

- Although a breach caused by the commission of a further offence is more serious than a "condition" breach, revocation should not be mandatory. The Court should consider the seriousness of the offence, and have the discretion to vary or impose conditions in addition to the option of revocation.

When a bond is revoked, the offender should only be required to serve the portion of the sentence remaining at the time of the breach to account for the

time spent in the community that is offence free. The Court would still have the ability to impose a further custodial sentence if the breach was caused by a fresh offence.

8. **Is there disparity between courts in relation to the availability of, and confidence in, intermediate sentencing options? If yes, please indicate:**

   a) the nature of the disparity; and
   b) the nature of the reforms that you consider would address this disparity.

Yes, due to the slow roll-out of Intensive Correction Orders and the limited availability of home detention state-wide. The availability of these intermediate sentencing options is dependent on proper resourcing.

9. **Are reforms required to intermediate sentencing orders?**

No.

10. **Should NSW adopt a similar approach to Victoria in relation to strengthening available intermediate sentencing orders and gradually phasing out suspended sentences?**

No, suspended sentences should not be abolished. The Committee agrees with the comments made by the NSW Law Reform Commission in its report on Sentencing (which recommended the re-introduction of suspended sentences), that suspended sentences are a 'very useful sentencing option in situations where the seriousness of an offence requires the imposition of a custodial sentence, but where there are strong mitigating circumstances to justify the offender's conditional release'[1].

Yours sincerely,

Stuart Westgarth
President

[1] NSWLRC Report 79 (1996), *Sentencing*, para 4.22.

THE LAW SOCIETY
OF NEW SOUTH WALES

COPY

Our Ref: RBG455223

Direct Line: 9926 0216

1 July 2011

The Honourable James Wood AO QC
Acting Chairperson
NSW Sentencing Council
GPO Box 6
SYDNEY NSW 2001

Dear Mr Wood,

Sentencing Serious Violent Offenders

Thank you for the opportunity to provide comment to the Sentencing Council's review into sentencing serious violent offenders.

The Law Society's Criminal Law Committee has reviewed the consultation paper and has responded to the questions raised in the attached submission.

Officers of the Sentencing Council may find it convenient to direct any queries in relation to the submission to the policy lawyer with responsibility for this matter, Rachel Geare, on 9926-0310 or at rachel.geare@lawsociety.com.au.

Yours sincerely,

Stuart Westgarth
President

Consultation Questions

Q1 Can serious violent offenders (that is offenders who pose a significant high risk of violent re-offending following release from prison) be identified as part of a single cohort?

No. The Review[1] found the group of 14 serious violent offenders that were identified to be disparate in its composition. The Committee is of the view that it is not possible to identify who should be included in the cohort either at the initial sentencing stage or while the offender is in custody.

If Yes:

Q2 What are the common characteristics of this single cohort?

The Review found that while there are a number of common factors present within the serious sex offender cohort, the results of the audit conducted by the Department of Corrective Services showed no such common thread amongst the group of 14 serious violent offenders.

Q3 What is the best method for assessing their risk of re-offending?

The area of risk assessment methods is not within the Committee's expertise.

Q4 How should serious violent offenders be identified, if not as part of a single cohort?

The Committee is of the view that there is no way to identify "serious violent offenders" as demonstrated by the findings of the Review and as discussed in Questions 1 and 2 above.

Q5 Are actuarial risk assessment methods or clinical risk assessment methods, or a combination thereof, appropriate as a basis for

(i) use in sentencing; or
(ii) applying a preventative detention scheme.

Actuarial risk assessment methods or clinical risk assessment methods, or a combination thereof, are not an appropriate basis for sentencing or applying a preventative detention scheme.

The consultation paper notes that the limitation of actuarial assessment is that it focuses on the risk posed by a group of offenders rather than that of individuals within that group.

Q6 How can serious violent offenders with complex needs

(a) best be identified?

Serious violent offenders with complex needs can best be identified during their confinement by the Department of Corrective Services.

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[1] *Review of the Crimes (Serious Sex Offender) Act 2006*; Part 3: Serious Violent Offenders, Department of Justice and Attorney General, Criminal Law Review, November 2010

(b) best be managed?

Serious violent offenders with complex needs can best be managed by instituting programs that meet individual needs of inmates whilst in custody and on release on parole.

Q7 Is the current legislative framework in NSW sufficiently equipped to deal with serious violent offenders?

The current legislative framework is sufficiently equipped to deal with serious violent offenders. For instance, offenders who are due for release who fall within the definition of 'mentally ill person' or 'mentally disordered person' under the *Mental Health Act 2007* can be involuntarily detained in a mental health facility if they present a risk of serious harm to themselves or others.

If Yes: Is the framework being effectively used?

Yes.

Are there any issues with the current framework?

No.

If No: How can the current framework be amended to better deal with serious violent offenders?

N/A.

Q8 Does the Habitual Criminals Act have the potential to be useful in dealing with serious violent offenders?

The legislation exists and can be relied on by a sentencing judge in the case of a serious violent offender who meets the requirements of the legislation.

Q9 If the legislation does have the potential to be useful in dealing with serious violent offenders, should it be amended in any way to ensure that its provisions are effectively used?

The terminology of the provisions may require updating.

Q10 Should there be an extension of the availability of life sentences, in limited circumstances, to cope with the sentencing of serious violent offenders? If so, how should such a mechanism work? Which offences should be included? Should any such system allow for release on parole in relation to those offences?

No. The offences that carry an indeterminate sentence are appropriate and should not be extended.

Q11 Should there be some extension of gradated sentencing laws or should more use be made of those that currently exist? Should legislation be introduced to allow for continuing detention or extended supervision orders in relation to serious violent offenders, similar to the model applicable to serious sex offenders?

No, there should not be an extension of gradated sentencing laws.

Legislation should not be introduced to allow for continuing detention or extended supervision orders in relation to serious violent offenders (see further discussion at Question 16).

Q 12 If the answer to Q11 is yes, what form should such legislation take?

N/A.

Q13 Is there scope for the Parole Authority to effectively supervise serious violent offenders within the current parole provisions?

Yes, there is scope for the Parole Authority to effectively supervise serious violent offenders within the current parole provisions.

It would be preferable to meet the needs of serious violent offenders and the community at large through the parole system rather than extending the sentence and denying the offender the opportunity to transit back into the community with supervision.

If yes: Should the provisions of the Crimes (Administration of Sentences) Act 1999 be amended in any way to enable the Parole Authority to effectively supervise serious violent offenders?

Amendments may be required to enable the Parole Authority to provide appropriate post release support and supervision to facilitate the offender's transition back into the community and reduce the risk of recidivism.

Q14 Should the Violent Offender Therapeutic Program be expanded and if so in what respects?

The Committee supports evidence based programs including the Violent Offender Therapeutic Program (VOTP). The eligibility and suitability criteria might need to be expanded to enable an increased number of serious violent offenders the opportunity to participate in the program.

The Committee supports the planned introduction of VOTP for female offenders and a specific program for offenders with cognitive impairments.

Q15 Should legislation be introduced that would permit the making of Personal Restriction orders in relation to serious violent offenders that would be directed to ensuring community safety to supplement Parole Release conditions or that would endure the expiry of the sentence.

No. The Review refers to a case-study which demonstrates how a violent offender order operates in the UK. The Review observes that in the same scenario in NSW the police would be able to apply for an Apprehended Personal Violence Order under the *Crimes (Domestic and Personal Violence) Act 2007* in order to address the risk posed.

The Committee particularly objects to the concept of personal restriction orders that endure the expiry of the sentence.

If yes: What should be provided in this respect?

N/A.

Q16 Should a form of preventative detention be adopted in NSW for serious violent offenders?

Preventative detention should not be adopted in NSW for serious violent offenders. Detaining a person beyond the maximum sentence imposed by the sentencing court offends the fundamental principle of proportionality. The original sentence imposed reflects the synthesis of all of the purposes of sentencing (s 3A *Crimes (Sentencing Procedure) Act 1999*), including punishment, deterrence, denunciation and protection of the community from the offender. Preventative detention undermines the established principle of finality in sentencing (subject to appeals), and has the practical effect of eliminating the relevance of the sentencing judge's decision altogether. Preventative detention amounts to a new punishment beyond that already imposed in accordance with law, in the absence of a new offence or conviction on the basis of an assessment of future offending.

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 at paras 124-125). In *Fardon*, Justice Kirby comments that predictions of dangerousness are "*... based largely on the opinions of psychiatrists which can only be, at best, an educated or informed "guess" "* (para 125).

The Committee agrees with the objections to any form of preventative detention as canvassed at pages 26-27 of the consultation paper as follows:

- it rests upon prediction of future criminal conduct and upon assumptions as to dangerousness that cannot be predicted with any degree of certainty;
- it breaches the principles of parsimony, proportionality and finality, and is inconsistent with the use of imprisonment as a last resort;
- it has the practical effect of punishing a person who has been identified as having offended in the past, for what he or she might do rather than what he or she has done; and to the extent that the person is detained for a longer period than that which is proportional to the offence, it amounts to a civil judicial commitment of that person to a prison in circumstances that do not conform with the like commitment of those with mental illness to an institution focused on their care;
- incarceration on the sole basis of risk of future offending breaks the link between crime and punishment that underpine the criminal justice system;
- extended detention or supervision may in fact diminish community safety by placing offenders in an environment and exposing them to associations with delinquent peers that might worsen their behaviour and increase their ill feelings towards the community;
- it amounts to the infliction of double punishment or retrospective punishment on a person who has completed a sentence proportional to the offence of which he or she has been convicted, by reference to the criterion of his or her past criminal conduct which has been the subject of judicial orders that have been spent;
- whether it takes the form of indefinite detention, or continuing detention or extended supervision, its potential duration is uncertain, contrary to truth in sentencing principles which call for precision as to the term of the sentence and specification of a parole release eligibility date;
- it has a potentially discriminating effect, since the difficulties in diagnosing the risk of reoffending will tend to focus its application on marginalised members of the community or those with particular types of personality disorders and hence risk amounting to punishment on the basis of status;
- since it is impossible to guarantee a crime-free society, extreme measures such as

preventive detention cannot be justified;

- the State is not entitled to force a person to undergo therapy to stop him or her from choosing to be 'bad' and suffer the punishment; especially when the person already has been punished for his or her past offending, and that forced therapy can be counter productive;
- it destroys the function of the maximum penalty which the legislature has selected to mark the limits of judicial sentencing discretion for specific offences and to that extent it undermines the community consensus as to the limits on the State's power to deal with offenders;
- its acceptance for one form of offending may lead to its eventual widening to other forms of offending with a relaxation of the preconditions for its use.

Q17 Are there programs that should be considered in this review, for the management of serious violent offenders that are not presently available

a) post-sentence?
b) post-custody?

The Committee is not in a position to comment on alternative programs for the management of serious violent offenders.

Q18 Should models of indeterminate sentencing as practiced in other jurisdictions be considered for serious violent offenders?

No. The Committee does not support the introduction of indeterminate sentences for serious violent offenders as outlined in Question 16 above.

The Committee notes that the creation and implementation of the indeterminate sentence of imprisonment for public protection (IPP) has been widely criticised in the United Kingdom in relation to the scheme's limited ability to predict risk accurately, its limited ability to reduce risk, limited resources available to achieve those reductions in risk that are possible, and limited Parole Board capacity and risk averse decision making.

THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: RBGMM1295919(7115)

Direct Line: 9926 0216

8 September 2009

The Hon. James Wood AO QC
Chairperson
The NSW Sentencing Council
GPO Box 6
SYDNEY 2001

Dear Mr Wood,

Re: The use of non-conviction orders and good behaviour bonds

Thank you for inviting the Law Society to comment on the review of the use of non-conviction orders and good behaviour bonds.

The Law Society's Criminal Law Committee (Committee) makes the following comments for your consideration.

1. An analysis of the primary types or categories of offences in which non-conviction orders and bonds are utilised significantly or disproportionately when compared with other sanctions.

Bonds and non-conviction orders are used significantly, but not disproportionately, in relation to other available penalties. The Committee is of the view that the legislation is being used as intended.

As the Judicial Commission has observed, ("Common Offences in the NSW Local Court: 2007" (2008) 37 *Sentencing Trends and Issues*, Judicial Commission of New South Wales, p18) the overall distribution of penalty types has remained extremely stable since 2002:

- Of the 20 most common proven statutory offences in 2007, fines continue to account for almost half of the penalties imposed (48.2%) and represent the most common penalty in the Local Courts by a considerable margin.
- Good behaviour bonds under s 9 accounted for 18.0% of all sentences.
- Dismissals and discharges without conviction under s 10 accounted for 16.7% of all sentences. Of this 16.7%, 6.2% were dismissed unconditionally, and 10.5% of offenders were conditionally discharged on a good behaviour bond.

While there has been an increase in the use of s 9 good behaviour bonds compared to 2002 (from 14.5% of to 18.0%), there has been a decrease in the use of s 10 to unconditionally dismiss the charge (from 7.4% to 6.2%). Although the percentage

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increases are small they account for a large number of individual cases before the Local Court.

Attached and marked "A" is a table showing the distribution of penalties imposed for the 20 most common proven statutory offences in the NSW Local Court in 2007. Bonds and non-conviction orders are used over a wide category of offences and in reasonable proportion when compared to other sanctions. For instance, as a combined percentage s 10 dismissals, s 10 bonds and s 9 bonds accounted for 26.9% of penalties for the offence of possess prohibited drug. However, 66.8% of offenders received a fine for the same offence.

s 10 dismissals and s 10 bonds

It is vital that Magistrates have the discretion to dismiss a charge or to impose a bond without proceeding to conviction. This discretion allows the Court to have regard to the offender's subjective circumstances and ensure a just result in each case.

In 2007 the three most common offences dealt with by a s10 dismissal were drive unregistered vehicle (18.6%), offensive conduct (17.6%), and negligent driving (16.4%). However, it cannot be said that s 10 was used disproportionately for these offences when the imposition of a fine accounts for 78.2%, 65.8% and 78.9% of penalties respectively.

The CCA issued its guideline judgment on sentencing for high range PCA offences in September 2004. The November 2008 Bureau of Crime Statistics and Research (BOCSAR) Bulletin '*The impact of the high range PCA guideline judgment on sentencing for PCA offences in NSW*' reported the following findings:

- High range PCA offences – 71% fall in the use of s10, from 9.3% to 2.7%.
- Mid-range PCA offences – a 30% fall in the use of s10, from 25.5% of cases to 17.9% of cases.
- Low-range PCA offences – a non significant decline in the use of s10, a very slight decline in the standard deviation between courts in the use of s10.

A s 10 bond constituted 32.5% of penalties imposed for low-range PCA. The Committee does not consider that this was an over-utilisation of s 10. Fines remain the most common penalty for low range PCA, imposed in 58.9% of cases. Further, low range PCA attracts an automatic disqualification from holding e driver licence of 6 months and a minimum disqualification period of 3 months (s 188(2)(a) *Road Transport (General) Act 2005*). If the legislature is going to constrain judicial discretion by imposing mandatory periods of disqualification s 10 will be used to avoid the statutory consequences of a conviction.

The Crown has the right of appeal, and the Committee suggests that the number of appeals compared to the number of s 10s imposed suggests that is utilised appropriately. The Committee also notes that is common for Magistrates to ask the prosecution its view regarding the use of s 10.

Section 9 bonds

The three most common offences dealt with by a s 9 bond were assault occasioning actual bodily harm, (44.6%), common assault (40.8%) and assault with intent on certain officers (35.4%). For all three offences there has been an increase in offenders

receiving a s 9 bond since 2002, and a correlative decrease in the less serious penalty of a fine.

2. The extent to which there is consistency among NSW Local Courts in the use of non-conviction orders and bonds in respect of different offence types and categories of offenders.

Attached and marked "B" is data supplied by BOCSAR showing the number of bonds and non-conviction orders imposed by individual Local Courts in NSW in 2007. Whether differences between Courts can be explained by variations within cases could be addressed by further research by BOCSAR.

PCA Offences

The BOCSAR report shows that following the guideline judgment the disparity between courts located inside and outside of Sydney for high range PCA offences has been substantially lessened. The guideline judgment had some incidental effect on reducing the disparity between individual courts in the use of s 10 non-conviction orders for mid range PCA offences, but there was no reduction in the disparity between Sydney and non-Sydney courts.

There was a very small change in the gap between Sydney and non-Sydney courts in the use of s 10 in low-range PCA matters, however the variation remains marked.

The existence of mandatory disqualification periods and the lack of viable alternative transport in country and regional areas, may explain the disparity between the use of s 10s in low-range PCA matters between Sydney and non-Sydney Courts.

Availability of supervised bonds

Supervised bonds are not available in some rural and remote areas due to a lack of Probation and Parole staff to provide supervision. The Legislative Council Standing Committee on Law and Justice recommended in its 2006 report *'Community based sentencing options for rural and remote areas and disadvantaged populations'*, that the Department of Corrective Services:

- identify the areas of New South Wales where supervised bonds are unavailable due to a lack of Probation and Parole Service resources.
- take steps to extend supervision, or a modified form of supervision, to all areas of New South Wales.
- work with government and non-government agencies to extend the availability of appropriate and accessible programs to meet offenders' needs in rural and remote areas. In particular, consideration should be given to programs addressing domestic violence, drug and alcohol and driving related offending behaviour.
- work with both government and non-government agencies in the disability services field to identify and develop ways to improve support services to assist offenders with an intellectual disability or a mental illness to comply with the conditions of supervised bonds.

The Committee supports these recommendations aimed at increasing the availability of supervised bonds in rural and remote areas, and for disadvantaged offenders.

The availability of programs to address domestic violence, substance and alcohol abuse, anger management, driving offences and general life skills, are essential because without adequate programs the rehabilitative purpose of the supervised bond is minimal.

3. An examination of the use across offence categories of non-convictions orders and bonds, the nature of conditions imposed and their enforcement.

Enforcement of bond conditions

In the last ten years it has been the Committee's experience that the frequency with which breaches of bonds are enforced has increased and the conditions attached to a bond are more stringent.

In *DPP V Cooke* [2007] CA 2, the Court emphasised that in the ordinary case the consequence of a breach of bond would be that the bond would be revoked. The Court held that the subjective circumstances of the offender at the time of the proceedings for breach will not be relevant. The proceedings in *Cooke* related to a breach of a s12 bond. However, the flow on effect of *Cooke* has been that Magistrates are more diligent in dealing with breaches of s 9 and s 10 bonds.

Breaches of bonds are regarded seriously by the courts. Where satisfied that an offender appearing before it has failed to comply with the conditions of a s 9 good behaviour bond, the court under s 98 *Crimes (Sentencing Procedure) Act* 1999 may:

- decide to take no action;
- vary the conditions of the bond;
- impose further conditions on the bond; or
- revoke the bond.

If a court revokes a good behaviour bond made under s 9, the court may re-sentence the offender for the original offence: s 99(1)(a) *Crimes (Sentencing Procedure) Act* 1999.

Revocation of a s 10 bond can result in the court convicting and sentencing the offender for the original offence (s 99(1)(b)).

Conditions imposed

Bonds may be supervised or unsupervised. The range of conditions that may attach to a bond are in theory unlimited and can be tailored to suit the offender. A main advantage of bonds is the flexibility they offer as a sentencing option as well as their deterrent and rehabilitative value.

The flexibility of bonds allows the court to order a range of conditions to address offending behaviour by providing supervision, and conditions such as counselling and treatment programs.

4. The identification, and relative frequency, of the reasons behind sentencing decisions by Magistrates in relation to non-conviction orders and bonds.

In deciding whether to make an order under s10, the Court is to have regard to the following factors pursuant to s 10(3):

(a) the person's character, antecedents, age, health and mental condition,
(b) the trivial nature of the offence,

(c) the extenuating circumstances in which the offence was committed,
(d) any other matter that the court thinks proper to consider.

The Court considers whether the offender is suitable for a non-conviction order or a good behaviour bond in accordance with the *Crimes (Sentencing Procedure) Act* 1999 and taking into account all the relevant information before the Court.

The Committee considers that non-conviction orders and bonds are very useful sentencing options for young people, disadvantaged people, people with an intellectual disability and people with mental health problems.

Bonds recognise the seriousness of the offence while providing the offender with the opportunity, by good behaviour, to avoid the consequences. The flexibility of a bond allows the courts to order a range of conditions to address offending behaviour. Bonds meet the deterrent and rehabilitative purposes of sentencing while allowing the offender to remain in the community.

Section 10s are more likely to be used when there is an inappropriate fetter on judicial discretion such as mandatory licence disqualification periods imposed by legislation. For the offences of driving whilst suspended and driving whilst unlicensed, s 10 dismissals and s 10 bonds accounted for 28.4% and 14.2% of penalties respectively. Magistrates have no choice but to convict the offender and impose the mandatory disqualification periods or apply s 10. A lengthy disqualification can have crippling effects, both in terms of an offender's employment and personal responsibilities. Mandatory disqualification periods allow insufficient flexibility to achieve a just outcome, and it is often in the interests of justice to deal with a matter under s 10.

Below is a typical case study provided by a practitioner who works with homeless and disadvantaged young people. The case study highlights the importance of s 10s when judicial discretion is constrained and mandatory periods of disqualification.

> *Ben is 21 and grew up in an unstable household with frequent changes of address. At one stage, during Ben's teens, his entire family was homeless. During this period, Ben spent some time in temporary foster care, some time staying with his Grandmother, and lots of time travelling from one place to the other. Most of the time he could not afford to buy a ticket, and he accrued several hundred dollars worth of fines.*
>
> *Ben's education, and in turn his employment prospects, were badly affected by his homelessness. At 21, after short periods of unskilled and low-paid work, he is still struggling to find a secure job.*
>
> *At 17, Ben would have liked to get his learner's licence, but the RTA told him he couldn't get a licence until he had sorted out his unpaid fines. Even if he had been able to get his Ls, Ben had no-one in his family to teach him to drive, and no means of paying for driving lessons.*
>
> *At 17, Ben was convicted and fined for unlicensed driving. Although he was a juvenile, he appeared in an adult court because it was a traffic offence. He was not legally represented (because he was told that Legal Aid does not usually act for defendants in traffic matters) and had no real opportunity to explain his circumstances to the Magistrate. Nor did the Magistrate explain to him what might happen if he was caught driving unlicensed again.*

At 20, Ben was still without a licence and without much hope of getting one. He borrowed a car to go out looking for work, and was charged with a second offence of unlicensed driving: an offence that carries a mandatory disqualification period of 3 years.

Ben is now legally represented, is sorting out his fines, and is about to go for his Ls. The Magistrate has adjourned his case and has indicated that, if Ben comes back to court with his licence, he may be prepared to impose a section 10 bond so Ben can keep his licence and improve his employment prospects.

5. What is the extent of compliance with conditions imposed on bonds and the rates of re-offending following the imposition of non-conviction orders and bonds?

The successful completion and revocation rates for good behaviour bonds pursuant to s 9 and a conditional discharge bond pursuant to s 10 as an annual average for 2003 – 2004 inclusive was as follows: 88.9% completed successfully, 11.1% revoked ("Successful Completion Rates for Supervised Sentencing Options" (2005) 33 *Sentencing Trends and Issues*, Judicial Commission of New South Wales, p.5).

These figures demonstrate that compliance with the terms of the bond is relatively successful.

6. Whether further limitations should be imposed on the ability of Magistrates to impose non-conviction orders and bonds?

The Committee is completely opposed to further limitations on the discretion of Magistrates to impose non-conviction orders and bonds. The Committee is not aware of any evidence that would justify doing so.

7. Whether offences for which there is a high rate of non-conviction orders and bonds can be adequately addressed within the existing sentencing regime or if other sentencing alternatives are necessary or appropriate.

The Committee is strongly of the view that the Court's use of non-conviction orders and bonds is appropriate. The Committee does not consider that offences for which there is a high rate of non-conviction orders and bonds require to be addressed differently, whether within the existing sentencing regime or otherwise.

8. Any other relevant matter.

It is not clear from the terms of reference whether the review includes the Children's Court. The Committee assumes the review does not apply to the Children's Court, however if this is not correct please notify the Committee.

The Committee does not support a guideline judgment for the use of s10s or for low range PCA.

Yours sincerely,

Joseph Catanzariti
President

"A"

Distribution of penalty types for the most common statutory offences in the NSW Local Court in 2007

Rank	Offence description	s 10 Dism	s 10 Bond	s 10A	ROC	Fine	s 9 Bond	CSO	s 12 Susp	PD	HD	Prison
1	Mid-range PCA	1.5	15.9	0.2	0.0	**63.7**	12.8	3.1	1.3	0.5	0.2	0.9
2	Common assault	4.7	17.5	0.6	0.1	19.7	**40.8**	3.4	5.4	0.7	0.0	7.2
3	Low-range PCA	6.8	**32.5**	0.5	0.0	58.9	1.3	0.1	No term of imprisonment available			
4	Drive whilst disqualified	0.7	3.5	0.2	0.0†	20.1	19.7	**18.4**	**15.0**	**4.6**	**1.5**	**16.3**
5	Larceny	7.2	12.1	0.8	0.2	39.8	20.2	2.2	4.8	0.8	0.1	**11.9**
6	Possess prohibited drug	5.5	9.8	1.6	0.3	**66.8**	11.6	0.5	1.2	0.1	0.0†	2.5
7	Drive whilst suspended	8.9	19.5	0.4	0.0	58.1	9.9	1.9	0.9	0.1	0.0†	0.3
8	Maliciously destroy/damage property	7.1	13.6	1.1	0.4	39.6	27.5	2.9	2.5	0.4	0.0	4.9
9	Never licensed person drive on road	7.2	5.5	0.8	0.0	**77.3**	6.8	1.2	0.7	0.2	0.0†	0.3
10	Assault occasioning actual bodily harm	1.2	8.3	0.2	0.1	11.2	**44.6**	7.5	**10.4**	**2.1**	0.0	**14.6**
11	High-range PCA	0.1	2.6	0.1	0.0†	40.4	28.0	**11.6**	**9.1**	**2.1**	**0.8**	5.2
12	Drive without being licensed	10.9	3.3	1.3	0.0	**81.2**	2.7	0.2	No term of imprisonment available			
13	Knowingly contravene AVO	4.5	6.3	1.8	0.8	20.6	**33.5**	4.3	**10.3**	1.4	0.0†	**16.4**
14	Offensive conduct	**17.6**	8.1	1.5	0.0†	**65.8**	5.7	0.5	0.0	0.0	0.0	0.9
15	Assault with intent on certain officers	2.3	7.9	0.2	0.2	30.8	**35.4**	5.9	6.5	0.8	0.1	9.7
16	Drive unregistered vehicle	**18.5**	0.5	**2.4**	0.0	**78.2**	0.1	0.0	No term of imprisonment available			
17	Negligent driving (not causing death or GBH)	**16.4**	2.8	1.0	0.0	**78.9**	0.7	0.0†	No term of imprisonment available			
18	Offensive language	**11.0**	5.6	1.6	0.1	**81.1**	0.4	0.2	No term of imprisonment available			
19	Goods in custody	2.4	6.4	0.7	0.3	38.9	23.7	3.2	5.7	0.6	0.1	**18.0**
20	Drive recklessly/furiously or dangerous speed/manner	0.3	3.0	0.2	0.0	47.9	21.2	**10.3**	5.2	**2.1**	0.4	**9.5**
All remaining offences		7.4	8.4	1.0	0.2	46.5	17.0	4.8	5.6	1.0	0.3	9.8
Total		6.2	10.5	0.8	0.1	48.2	18.0	4.2	4.4	0.9	0.2	6.5
Total number of cases		6765	11580	882	148	52965	19752	4593	4864	958	231	7194

"B"

NSW Local Courts Statistics 2007

Number of persons found guilty* in NSW Local Courts during 2007and receiving selected penalties as their principle penalty, by Local Court

	Local Courts				
Court	*Bond with supervision*	*Bond without supervision*	*Bond with no conviction*	*No conviction recorded*	*Total principal penalty*
Albion Park	2	15	14	3	135
Albury	154	73	132	29	1340
Armidale	129	33	57	13	530
Ballina	16	64	41	26	564
Balmain	22	89	56	12	718
Balranald	5	10	15	11	92
Bankstown	215	312	408	332	3916
Batemans Bay	24	60	64	24	476
Bathurst	32	66	87	54	827
Bega	25	45	55	16	415
Bellingen	7	6	5	8	110
Belmont	30	126	151	110	958
Bidura Children's	0	0	0	1	1
Blacktown	295	284	391	275	3203
Blayney	0	4	8	2	59
Boggabilla	14	34	29	5	160
Bombala	1	3	2	2	18
Bourke	21	13	7	9	204
Bowral	0	0	0	0	0
Braidwood	0	0	0	0	0
Brewarrina	15	11	2	9	122
Broadmeadow Children's	0	0	0	0	0
Broken Hill	45	69	49	66	636
Burwood	261	505	499	311	4093
Byron Bay	17	79	137	47	830
Camden	31	104	124	15	617
Campbelltown	228	701	416	149	3380
Casino	51	62	46	17	542
Central	52	62	11	10	1197
Cessnock	79	99	67	67	1728
Cobar	12	10	30	22	138
Cobham Children's	0	0	0	0	0
Coffs Harbour	74	74	85	88	1255
Condobolin	19	11	25	5	125
Cooma	8	7	58	41	272
Coonabarabran	7	10	10	7	140
Coonamble	6	21	10	7	142
Cootamundra	27	13	19	14	276
Corowa	14	3	7	3	90
Cowra	33	15	24	19	393
Crookwell	4	9	5	2	27
Deniliquin	5	40	26	8	304
Downing Centre	414	779	701	646	7447
Dubbo	144	60	44	10	850
Dunedoo	0	2	0	0	21
Dungog	1	5	3	1	31

East Maitland	0	0	0	0	0
Eden	5	16	10	6	83
Fairfield	39	54	72	18	674
Finley	14	8	26	3	204
Forbes	30	34	36	18	209
Forster	11	79	49	7	588
Gilgandra	17	12	18	8	102
Glen Innes	49	12	15	4	171
Gloucester	12	6	6	5	61
Gosford	205	191	307	131	2600
Goulburn	71	115	74	228	1552
Grafton	21	97	26	18	604
Grenfell	6	2	3	4	65
Griffith	24	101	100	13	912
Gulgong	2	9	8	1	63
Gundagai	11	10	11	1	113
Gunnedah	18	39	23	11	268
Hay	6	13	10	4	189
Hillston	4	5	4	1	37
Holbrook	4	3	7	2	64
Hornsby	118	116	218	118	1842
Inverell	35	78	97	20	1465
Junee	9	6	2	1	76
Katoomba	32	40	56	1	289
Kempsey	114	23	42	10	831
Kiama	4	9	21	8	103
Kogarah	3	158	77	14	965
Kurri Kurri	19	33	20	26	219
Kyogle	20	15	10	3	120
Lake Cargelligo	4	15	5	3	62
Leeton	18	33	15	7	287
Lidcombe Children's	0	0	0	0	0
Lightning Ridge	13	15	16	6	102
Lismore	141	185	80	38	1383
Lithgow	35	48	47	2	380
Liverpool	135	732	384	183	4561
Lockhart	0	0	0	0	1
Lord Howe Island	0	0	0	0	0
Macksville	27	20	20	17	286
Maclean	11	45	25	13	293
Maitland	49	217	79	27	1276
Manilla	0	0	0	0	0
Manly	66	326	238	185	2218
Milton	11	19	27	5	357
Moama	1	9	10	6	110
Moree	35	125	86	18	841
Moruya	8	27	26	9	166
Moss Vale	20	71	55	39	630
Moulamein	0	1	0	1	4
Mount Druitt	151	350	180	82	2299
Mudgee	11	30	32	12	269
Mullumbimby	4	26	33	3	161
Mungindi	2	7	6	0	35
Murrurundi	0	0	0	0	0
Murwillumbah	12	36	31	13	257
Muswellbrook	38	33	46	7	373

Narooma	10	13	23	10	151
Narrabri	18	34	21	15	237
Narrandera	5	21	16	5	205
Narromine	11	22	21	9	112
Newcastle	148	390	463	385	3637
Newtown	57	263	260	68	1510
North Sydney	30	108	130	51	786
Nowra	50	67	75	26	1252
Nyngan	9	10	13	9	87
Oberon	2	3	10	3	49
Orange	179	100	116	47	904
Parkes	29	38	63	32	286
Parramatta	150	441	448	251	4267
Parramatta Children's	0	0	0	0	0
Peak Hill	3	7	7	5	36
Penrith	168	378	206	62	2730
Picton	3	34	21	6	259
Port Kembla	41	63	48	37	550
Port Macquarie	135	32	77	20	1267
Queanbeyan	26	90	189	73	1013
Quirindi	4	6	9	33	136
Raymond Terrace	112	179	104	96	1062
Redfern	0	0	0	0	0
Richmond	0	0	0	0	0
Ryde	58	138	215	51	1126
Rylstone	0	4	7	2	42
Scone	8	14	12	15	187
Singleton	20	57	24	5	368
St	0	0	0	0	0
Sutherland	134	498	419	372	4008
Tamworth	61	105	102	84	1104
Taree	31	151	55	17	1044
Temora	10	5	9	6	104
Tenterfield	37	7	12	5	117
Toronto	103	182	196	66	1401
Tumbarumba	2	1	5	0	23
Tumut	31	12	28	11	275
Tweed Heads	37	214	197	85	1391
Wagga Wagga	132	187	227	95	1707
Walcha	13	2	7	6	48
Walgett	32	62	28	28	316
Wallsend	0	0	0	0	0
Warialda	2	6	6	2	24
Warren	4	18	19	7	92
Wauchope	17	3	6	0	66
Waverley	79	491	484	149	2766
Wee Waa	6	16	4	11	84
Wellington	34	14	31	13	170
Wentworth	25	34	27	31	311
West Wyalong	12	5	17	16	137
Wilcannia	15	20	2	3	88
Windsor	38	136	141	89	855
Wollongong	224	405	267	257	3802
Woy Woy	37	61	50	56	568
Wyong	98	472	202	220	2447
Yass	25	21	29	13	222

Young	38	17	22	8	341
Total	**6787**	**13299**	**11879**	**6822**	**112744**

* The penalty counts in the data are based on principal offence data. Where a person has been fo of more than one offence, only the most serious penalty is counted in the data.

Source: NSW Bureau of Crime Statistics and Research
Reference: sam09-8144
Please retain this reference number for future correspondence

THE LAW SOCIETY OF NEW SOUTH WALES

COPY

Our ref: MM:ln:1310336
Direct Line: 9926 0310

21 September 2010

The Honourable Jerrold Cripps QC
Chairperson
NSW Sentencing Council
GPO Box 6
Sydney NSW 2001

Via email to sentencingcouncil@agd.nsw.gov.au

Dear Mr Cripps,

Standard Non-Parole Periods for Dangerous Driving Offences

Thank you for your letter dated 5 August 2010. I apologise for the delay in responding.

The Law Society's Criminal Law Committee ('Committee') is opposed to the introduction of Standard Non Parole Periods for dangerous driving offences. The Committee endorses the views of the NSW Bar Association as set out in the Association's submission to the general Standard Non Parole Period Scheme reference.

In relation to new offences, the Committee confirms its view that no offences in any category should be added to the Standard Non Parole Period Scheme until such time as a transparent mechanism by which a decision is made to include a particular offence in the Table by which the relevant SNPP is set is developed, and made public. The Committee also notes that there is a guideline judgment relating to dangerous driving offences which, in the opinion of the Committee, provides sufficient guidance to courts in exercising their sentencing discretion.

Please do not hesitate to contact Lana Nadj, Policy Lawyer, on 9926 0310, in relation to this correspondence.

Yours sincerely

Mary Macken
President

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19 June 2009

The Hon. James Wood AO QC
Chairperson
The NSW Sentencing Council
Box 6 GPO
SYDNEY 2001

Dear Mr Wood,

Re: Review of Standard Non-Parole Period Scheme

Thank you for the opportunity to provide comment to the Sentencing Council's review of aspects of the standard non-parole period scheme.

The Law Society's Criminal Law Committee has had the opportunity to review the submissions made by the NSW Bar Association and fully endorses the contents of those submissions.

The Law Society looks forward to the release of the Sentencing Council's report on this matter.

Yours sincerely,

Joseph Catanzariti
President

09/105

28 May 2009

The Hon James Wood AO QC
Chairperson
NSW Sentencing Council
GPO Box 6
Sydney NSW 2001

Dear Mr Wood

Review of Standard Non-Parole Period Scheme

Thank you for your invitation to comment on the Attorney General's reference to the Sentencing Council of aspects of standard non-parole period (SNPP) scheme.

The second term of reference states that the Sentencing Council is to "[g]ive consideration to standardising the SNPPs for sexual (and other) offences within a band of 40-60% of the available maximum penalty, subject to the possibility of individual exceptions, by reference to an assessment of the incidence of offending and special considerations relating thereto".

The Bar Association strongly opposes any proposal to standardise standard non-parole period for offences within a band of 40-60% of the available maximum penalty.

First, at present the standard non-parole period for some offences is significantly lower than 40% of the available maximum penalty. For example, the standard non-parole period for a s 112(2) *Crimes Act 1900* offence (5 years) is 25% of the available maximum penalty (20 years). The standard non-parole period for a s 33 *Crimes Act 1900* offence (7 years) is 28% of the available maximum penalty (25 years). The Bar Association considers that there is no warrant justification for increasing the standard non-parole period for such offences. There is no reason to believe that inadequate sentences are being imposed for such offences or that the goals of the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* are not being met.

Secondly, it is very difficult to see any reason for ever adopting a standard non-parole period that is greater than 40% of the available maximum penalty. The maximum penalty is usually reserved for the worst case and, even where imposed, it will be usual sentencing practice to impose a non-parole period that is 75% of that maximum penalty. Given that the standard non-parole period "represents the non-parole period for an offence in the middle of the range of objective seriousness" (s 54A(2) *Crimes*

(Sentencing Procedure) Act) 1999, it is impossible to understand why some sexual offences currently have standard non-parole periods that are more than 75% of the available maximum penalty. For example, the standard non-parole period for a s 61M(2) *Crimes Act 1900* offence (8 years) is 80% of the available maximum penalty (10 years). Indeed, given that a worst case offence would be expected to have a non-parole period at most 75% of the available maximum penalty, it is very difficult to see any reason for adopting a standard non-parole period (for a middle range objective seriousness offence) that is greater than 40% of the available maximum penalty.

No clear explanation has ever been provided as to how the various standard non-parole periods in the Table after s 54D of the *Crimes (Sentencing Procedure) Act 1999* were determined. The Bar Association supports "the establishment of a transparent mechanism by which a decision is made to include a particular offence in the Table and by which the relevant SNPP is set" (the fourth term of reference). However, the wildly differing proportions for current SNPPs, already noted, suggests that a view has been taken that offences differ significantly in the weighting given to "objective seriousness" and the manner in which that objective seriousness varies over the range of offences within a particular category. Providing a transparent mechanism by which the relevant SNPP is set will inevitably require a clear articulation of the applicable principles. It is the view of the Association that no new offences should be added to the standard non-parole period regime until such a transparent mechanism is developed and made public.

Whatever the outcome of such a process, the current view of the Association is that consideration should be given to standardising the SNPPs for sexual and other offences within a band of 25-40% of the available maximum penalty.

It should be remembered that s 54B of the *Crimes (Sentencing Procedure) Act 1999* does not prevent a court from imposing a longer non-parole period than the standard non-parole period even for an offence in the middle of the range of objective seriousness. The presence of significant aggravating factors (for example, that the offender has committed similar offences in the past and was on parole for such an offence at the time) would justify a longer non-parole period. Of course, if the objective seriousness of the offence is higher than the middle of the range, that would provide a very good reason for imposing a longer non-parole period than the standard non-parole period.

Finally, the Association considers that there is no compelling reason for a guideline judgment in relation to any sexual offences.

Please do not hesitate to contact me on 9229 1735 or Cindy Penrose, Project Officer on 9229 1739 should you have any queries regarding this matter.

Yours sincerely

Anna Katzmann SC
President