NSW GOVERNMENT

New South Wales
Law Reform Commission

2014-15

Annual report

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NSW Law Reform Commission: profile

Roles and responsibilities

The NSW Law Reform Commission is an independent statutory body constituted under the *Law Reform Commission Act 1967* (NSW). We provide expert law reform advice to Government through the Attorney General on matters that the Attorney General refers to us.

Services and activities

Our principal service is providing policy advice on law reform matters.

In undertaking this work, we:

- research the law, and the academic and other commentary on it
- conduct or commission empirical research where necessary, and
- consult with stakeholders and the community, and draw on experts in the field.

The outcomes of our projects are contained in formal reports to the Attorney General, which are tabled in Parliament and considered by Government.

Commissioners and staff

As at 30 June 2015, the Commission comprised 8 part-time Commissioners. The positions of Chairperson and full-time Commissioner remained vacant.

The Law Reform and Sentencing Council Secretariat (a division of the Strategy and Policy Unit of the Department of Justice) supports the work of the Commission.

Performance for 2014-15

Measuring performance in terms of quantity, quality and timeliness has been a challenge for law reform commissions and similar bodies. Our performance is currently measured against a range of performance indicators set out below.

Measure	10-11	11-12	12-13	13-14	14-15 Target	14-15 Actual	15-16 Target
Number of consultation papers and reports published	14	14	10	11	10	3	3
Number of consultation events/meetings held	73	37	36	38	40	13	20
Percentage of projects conforming to project planning standards	100%	100%	100%	100%	100%	100%	100%
Percentage of projects meeting timeliness goals	71%	100%	75%	50%	75%	50%	75%
Law Reform Commission mentions in court decisions	17	23	15	22	15	35	20
Number of legislative amendments based on LRC reports	1	0	4	2	4	0	4
Newsalert email subscribers and Twitter followers			220	570	1000	820	1000

Completed references

We completed two references in 2014-15: Encouraging early appropriate guilty pleas and Parole.

Encouraging appropriate early guilty pleas

Commissioners: The Hon Anthony Whealy QC (lead Commissioner), Mr Tim Game SC, The Hon Justice Peter Johnson, Her Honour Deputy Chief Magistrate Jane Mottley, The Hon James Wood AO QC.

Reference received: 1 March 2013, updated 31 July 2013.

Consultation paper: Encouraging Appropriate Early Guilty Pleas: Models for Discussion (Consultation Paper 15) released 4 November 2013.

Report: Encouraging Appropriate Early Guilty Pleas (Report 141), transmitted 17 December 2014, tabled 23 June 2015.

This project has recommended reforms to criminal procedures and professional practices so as to encourage appropriate early guilty pleas in NSW.

We were asked to identify opportunities for legislative and operational reforms to encourage appropriate early pleas of guilty in criminal proceedings for all criminal matters with regard to.

- the organisational capacities and arrangements for the courts, police, prosecution and defence
- the Trial Efficiency Working Group
- developments in Australia and overseas, and
- any related matters.

In 2014-15, we worked with the Commissioners and stakeholders to finalise our recommendations.

We delivered the report to government on 17 December 2014. It was tabled in Parliament on 23 June 2015.

Report 141: Encouraging appropriate early guilty pleas

In our report we considered the evidence for guilty pleas for serious criminal charges tried on indictment. In particular we found that the majority of late guilty pleas (pleas received after an indictable matter has been committed for trial) occur on the day of trial.

The timing of a guilty plea impacts upon the fair and efficient operation of the criminal justice system. Late guilty pleas needlessly expend the resources of the court, police and the prosecution on preparing or facilitating a trial that will not happen. Late guilty pleas also inconvenience witnesses and can cause further trauma for victims, especially where the plea that is accepted is to a lesser charge.

Our report identifies 10 obstacles to early guilty pleas, which highlight the various systemic causes of late guilty pleas. In response, the report proposes a blueprint

for wholesale reform of indictable proceedings in NSW and makes 36 recommendations. The recommendations include:

- **Early charge advice:** Currently, some defendants delay entering a guilty plea because they are expecting the prosecutor to downgrade the charge. Up to 66% of guilty pleas entered on the day of trial have been to a charge different to the charge on the indictment. This means that charge has been varied very late in proceedings. We propose a system of early charge advice involving a Crown or senior prosecutor reviewing the original charge. The prosecutor must certify the charge before Local Court proceedings commence.

- **Early disclosure of the key available evidence:** Delays in a sufficient brief of evidence mean that prosecutors cannot make an accurate charge determination, and defendants may not be able to enter an appropriate guilty plea if they cannot assess the evidence against them. We propose a framework for early disclosure of the evidence to ensure that a sufficient brief is provided to the prosecution and forwarded to the defence.

- **Local Court case management:** Currently, only 1% of indictable matters that pass through the Local Court undergo a committal hearing. We propose that, instead of the current committal process, the Local Court should case manage indictable matters through to early guilty pleas or prepare them for trial in the higher courts.

- **Sentence discounts:** The current common law discount for the utilitarian value of a guilty plea is not consistently applied, and often the maximum discount of 25% is applied to guilty pleas that are entered late but are considered to have been entered at the first available opportunity. Defendants are sometimes not certain that the sentence discount will be applied or what discount would apply to them. We recommend a statutory sentence discount regime where guilty pleas entered in the Local Court would receive a discount of up to 25%, guilty pleas entered at arraignment would receive up to 10% and day of trial pleas only 5%.

Parole

Commissioners: Ms Rhonda Booby, The Hon Harold Sperling QC, The Hon Anthony Whealy QC (Lead Commissioner).

Reference received: 1 March 2013.

Question Paper 1: The design and objectives of the parole system - released 17 September 2013.

Question Paper 2: Membership of the State Parole Authority and Serious Offenders Review Council - released 17 September 2013.

Question Paper 3: Discretionary parole decision making - released 17 September 2013.

Question Paper 4: Reintegration into the community and management on parole - released 13 November 2013.

Question Paper 5: Breach and revocation - released 13 November 2013.

Question Paper 6: Parole for young offenders - released 6 December 2013.

Report: Parole (Report 142) transmitted 26 June 2015

Our project has made recommendations to improve the system of parole in NSW.

We were asked to review the mechanisms and processes for considering and determining parole, having regard to:

- the desirability of providing for an offender's reintegration into the community following a sentence of imprisonment with adequate support and supervision
- the need to provide for a process of fair, robust and independent decision making, including consideration of the respective roles of the courts, State Parole Authority, Serious Offenders Review Council and the Commissioner of Corrective Services
- the needs and interests of the community, victims and offenders, and
- any other related matter.

In 2014-15, we conducted further intensive consultation with key stakeholders on specific reform proposals in the focus areas identified in the question papers. We tested and refined our recommendations collaboratively with stakeholders.

We delivered the report to government on 26 June 2015.

Report 142: Parole

The key purpose of parole is to promote community safety by supervising and supporting the conditional release and re-entry of prisoners into the community, thereby reducing their risk of reoffending.

Our recommendations aim to:

- simplify the legal framework
- simplify and strengthen the operational policy framework
- improve case management in custody, in the community and in the process of transition, and
- develop more options for swift and certain responses to breaches of parole.

More particularly, our recommendations aim to ensure that the focus of the State Parole Authority (SPA), when making a parole decision (to grant, suspend, or revoke parole or impose or alter conditions), is on the safety of community. We generally recommend removing procedures and considerations that detract from this core consideration.

Our approach aims to ensure that SPA's and Corrective Services NSW's resources are directed towards more serious offenders and allow a risk management approach, where lower risk offenders (generally those sentenced to three years imprisonment or less) are released on parole automatically and higher risk offenders (generally those sentenced to more than three years imprisonment) may be kept in custody or managed more intensively.

SPA should make a parole order if it is satisfied that the order is in the interests of community safety after taking into account:

- the risk to community safety of releasing the offender on parole
- whether parole supervision is likely to aid in reducing the possibility of reoffending
- the risk to community safety if the offender is released with little or no period of parole supervision, and
- the extent to which parole conditions can mitigate any risk to the community during the parole period. (Rec 4.1)

We have reviewed the standard parole conditions and recommend two standard conditions – that the parolee must not commit any offence and must accept supervision. Supervision is necessary to ensure that risk to community safety is reduced and managed. In addition, SPA should be able to impose any condition it considers reasonably necessary to:

- manage the risk to community safety of releasing the offender on parole
- take account of the effect of releasing the offender on parole on any victim or victim's family, or
- respond to breaches of parole.

The legislation governing parole should be entirely redrafted to ensure that SPA's decision making process is more clearly and fully set out and that unnecessary powers and rules are removed.

Our recommendations also aim to simplify the procedures around serious offenders and ensure that reports by the Serious Offenders Review Council (SORC) align with the matters that SPA must consider when making a parole decision.

The system for dealing with breaches of parole should manage risk and ensure the parolee's compliance. We therefore recommend a system of graduated sanctions that gives Community Corrections and SPA the ability to manage cases effectively.

Community Corrections officers should have the discretion to handle minor, non-reoffending breaches internally by imposing a curfew, giving a reasonable direction about the offender's behaviour, warning the offender, or noting the breach and taking no further action. Community Corrections officers should only report breaches to SPA if their available responses cannot adequately achieve the system's goals.

SPA should have a range of sanctions, in addition to revoking parole. SPA should be able to use low level sanctions of noting breaches and warning the offender and higher level sanctions of varying or adding conditions to the parole order, electronic monitoring and home detention. SPA should also be able to revoke parole in the absence of breach if it considers that an offender poses a serious and immediate risk to the safety of the community or any individual, or there is a serious and immediate risk that the offender will leave NSW, and these risks cannot be mitigated through reasonable directions from the supervising officer or by adding or varying parole conditions.

Achieving effective in-custody case management has emerged as an important issue. In our view, the main thrust of Corrective Services NSW case management policy is appropriate but its implementation can be improved.

We have concluded that there is scope for improving pre-parole programs that are intended to ease the transition from custody to parole and to help reduce rates of parole breach and reoffending. In particular we have found there is value in introducing a back end home detention scheme that involves transferring some offenders from full time custody to home detention for the final phase of their non-parole period. This would provide a more intensive transition process for appropriate offenders, allowing them to establish strong community supports before they are released on parole. SPA should determine whether an offender can access back end home detention, and it should only be available for a limited period of time.

We recommend that merit based selection processes should be used when appointing members of SPA and SORC and that members should be able to access professional development opportunities and should be subject to peer performance evaluation.

We have also recommended that there should be a separate parole system for young offenders incorporated in the *Children (Criminal Proceedings) Act 1987* (NSW) that would allow the development of a simpler regime managed by the Children's Court, with features appropriate to young offenders.

Priorities for 2015-16

References

Currently, we have one ongoing reference.

Statutory dispute resolution

This project aims at improving legislative provisions dealing with alternative dispute resolution.

Specifically, we are to review the statutory provisions that provide for mediation and other forms of alternative dispute resolution with a view to updating those provisions and, where appropriate, recommending a consistent model or models for dispute resolution in statutory contexts, including court ordered mediation and alternative dispute resolution.

In undertaking this review, we have been asked to have regard to:

- the desirability of just, quick and cheap resolution of disputes through the use of mediation and other forms of dispute resolution in appropriate contexts;
- issues about the use of referral powers (including timing of referrals), confidentiality, status of agreements reached, and proper protections required for the parties, mediators, and others involved in dispute resolution;
- the proper role for legislation, contract and other legal frameworks in establishing frameworks for dispute resolution; and
- any related matters.

We will not be reviewing dispute resolution under the *Commercial Arbitration Act 2010* (NSW) or the *Industrial Relations Act 1996* (NSW).

In April 2014 we also released Consultation Paper 16 - Dispute Resolution: Frameworks in NSW. It provides an overview of the statutory provisions in NSW and asks what provisions are appropriate in the variety of contexts which the existing provisions cover. As at 1 August 2014, we have received 14 submissions in response.

Implementation and Government response

There was no legislative implementation of Commission recommendations in 2014-2015.

On 25 June 2015, the Legislative Council Standing Committee on Law and Justice received a reference to inquire into and report on remedies for the serious invasion of privacy in New South Wales. The motion making the reference noted the Commission's Report 120 - *Invasion of Privacy*.

Implementation action or responses are outstanding on the following recent reports:

- Report 140: *Criminal appeals*
- Report 139: *Sentencing*
- Report 138: *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*
- Report 137: *Security for costs and associated orders*
- Report 136: *Jury directions in criminal trials*
- Report 135: *People with cognitive and mental health impairments in the criminal justice system: Diversion* (The Government, in 2014, convened a cross-agency working group to consider the report's recommendations.)
- Report 132: *Penalty notices* (some aspects were implemented as a result of consultations during its preparation).
- Report 129: *Complicity.*
- Aspects of the privacy reports: Report 127: *Protecting privacy in New South Wales,* Report 126: *Access to personal information,* Report 123: *Privacy principles* and Report 120: *Invasion of privacy.*
- Report 124: *Uniform succession laws: Administration of estates of deceased persons* (all other aspects of succession law having been legislated).
- Report 121: *Emergency medical care and the restricted right to practise*.

People

Commissioners

Ms Rhonda Booby (appointed January 2014 to 30 June 2015)

Mr Timothy Game SC (appointed July 2009 to 30 June 2015)

The Hon Justice Peter Johnson (Deputy Chairperson) (appointed December 2011)

Her Honour Deputy Chief Magistrate Jane Mottley (appointed September 2011 to 30 June 2015)

The Hon Harold Sperling QC (appointed January 2005)

Professor David Weisbrot (appointed July 2011 to 30 June 2015)

The Hon Anthony Whealy QC (appointed August 2013 to 30 June 2015)

The Hon James Wood AO QC (appointed January 2014 to 31 December 2014)