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SUMMARY OF RECOMMENDATIONS

Recommendation 1
Pre-sentence reports should be given a general legislative base.

Recommendation 2
Legislation should provide that written pre-sentence reports ordered by the court, for which sentencing has been deferred, be made available to the prosecution and defence at least the day before the sentencing hearing.

Recommendation 3
Except in death cases, VIS should be admissible at sentencing hearings, in the discretion of the court and at the victim's option, as an indication of the seriousness of the offence. Section 23C(3) of the *Criminal Procedure Act 1986* (NSW) should be repealed.

Recommendation 4
For the purpose of VIS, the "victim" of an offence should be the person against whom the offence was committed or who was a witness to the act of actual or threatened violence and who has suffered personal harm as a direct result of the offence.

Recommendation 5
The definitions of "family victim", "member of the immediate family" and "primary victim" in s 23A of the *Criminal Procedure Act 1986* (NSW) should be repealed, together with s 23B(b) of the *Criminal Procedure Act 1986* (NSW).

Recommendation 6
VIS should be signed, or otherwise acknowledged as accurate, by their authors before they are received by the sentencing court.

Recommendation 7
VIS must be tendered in writing and verified on oath.

Recommendation 8
VIS should address the physical, psychological, social and financial consequences of the offence on the victim.

Recommendation 9
Authors of VIS should, in principle, always be subject to cross-examination on their contents.

Recommendation 10
In appropriate cases, the court should mark VIS as confidential exhibits or order their non-publication.

Recommendation 11
The *Fines Act 1996* (NSW) should be amended so as to retain sentencing courts' discretion to order time to pay.

Recommendation 12
Fine option orders should be available in New South Wales.

Recommendation 13
The *Fines Act 1996* (NSW) should provide that cancellation of the defaulter's driver's licence or vehicle registration should be a sanction for fine default in all cases, subject to the defaulter being allowed to regain his or her licence or registration upon part-payment of the fine on condition that he or she continue to pay off the fine by instalments.

Recommendation 14
Provision should be made for a charge to be placed on a fine defaulter's property where there is a refined system for registration of interests in the property.

Recommendation 15
Legislation should regulate the use of infringement notices in New South Wales.

Recommendation 16
The term "bond" should replace the term "recognizance" in legislation.

Recommendation 17
The power to impose bonds at common law should be abolished in order that bonds may only be imposed pursuant to a statutory power. An additional statutory power should be created to allow the sentencing court to defer passing a sentence for a period of time in order to assess the offender.

Recommendation 18
The maximum time limit for which a bond can be imposed should be five years.

Recommendation 19
Where a sentencing court attaches an order for compensation or restitution as a condition of a bond, the court should be required to give reasons why this is an appropriate condition in the circumstances of the case, and must be satisfied that the offender will be able to comply with the condition.

Recommendation 20
Suspended sentences should be reintroduced in New South Wales. Appropriate safeguards should be implemented to ensure that injustice does not arise in an individual case where an offender's sentence has been suspended.

Recommendation 21
Sections 24 and 25 of the *Community Service Orders Act 1979* (NSW) should be amended to provide that any court of equal jurisdiction to the supervising court should be able to hear breach proceedings.

Recommendation 22
Breach of a CSO should not constitute a separate offence. Where breach of a CSO has been established and the court chooses to revoke the CSO, the court should re-sentence the offender for the original offence having regard to the work already performed under the CSO.

Recommendation 23
An assigned probation officer should be able to extend the length of a CSO by a maximum of 10 hours for a minor infringement of the order. There should be a right to seek leave to appeal against administrative extension to the court that originally imposed the CSO.

Recommendation 24
Section 5(1) of the *Periodic Detention of Prisoners Act 1981* (NSW) should be amended to make periodic detention generally available for terms of imprisonment of three months or less.

Recommendation 25
Section 5A(1)(c) of the *Periodic Detention of Prisoners Act 1981* (NSW) should be repealed to remove the exception for domestic violence offences for orders of periodic detention of three months or less.

Recommendation 26
Section 25(1) of the *Periodic Detention of Prisoners Act 1981* (NSW) should be amended to make it clear that the court may cancel an order for periodic detention, with or without application, if it appears to the court that there is good reason for doing so.

Recommendation 27
Section 25A(2) of the *Periodic Detention of Prisoners Act 1981* (NSW) should be amended to make it clear that the court may cancel a cumulative order for periodic detention, with or without application, if it appears to the court that there is good reason for doing so.

Recommendation 28
Section 24(1) of the *Periodic Detention of Prisoners Act 1981* (NSW) should be amended to give the court a discretion not to cancel an order for periodic detention upon conviction for another offence if, in the circumstances of the case, the court considers this to be appropriate.

Recommendation 29
Before a court cancels an order for periodic detention, it should be satisfied that proper notice of the proceedings for cancellation has been served on the offender. Time for appeal against cancellation of an order for periodic detention should not begin to run until notice of the proceedings for cancellation has been properly served on the offender.

Recommendation 30
A court should not be able to re-sentence an offender following cancellation of an order for periodic detention unless the offender is present before the court.

Recommendation 31
When revoking an order for periodic detention, a court should have the discretion to impose a term of imprisonment which is less than the unexpired portion of the periodic detention order where the court considers this to be appropriate in the circumstances of the case.

Recommendation 32
When imposing a separate sentence of imprisonment of six months or less following revocation of a periodic detention order, a court should have the discretion to set a minimum term.

Recommendation 33
The *Justices Act 1902* (NSW) and the *Criminal Appeal Act 1912* (NSW) should be amended to confer an express right to seek leave to appeal against cancellation of an order for periodic detention, and against the separate order imposed following cancellation. Where a periodic detention order is cancelled by the Local Court, the defendant should have a right to seek leave to appeal to the District Court. Where a periodic detention order is cancelled by the District Court or by the Supreme Court, the defendant should have a right to seek leave to appeal to the Court of Criminal Appeal.

Recommendation 34
Where an appeal against cancellation of an order for periodic detention is successful, the court upholding the appeal should have a discretion to remould the original sentence of periodic detention where it considers this to be appropriate, taking into account any time served by the periodic detainee in full-time custody following cancellation of the order.

Recommendation 35
The practice of allowing a prisoner serving periodic detention to proceed to Stage II should be discontinued.

Recommendation 36
The *Home Detention Act 1996* (NSW) should be amended to remove constraints on eligibility for home detention beyond the requirement of imprisonment for a term of 18 months or less.

Recommendation 37
The *Home Detention Act 1996* (NSW) should permit the co-residents of a home detainee to withdraw their consent to an order for home detention.

Recommendation 38
The *Home Detention Act 1996* (NSW) should allow an order for home detention to be revoked where there has been a material change in circumstances since the date of imposition of the order. The home detainee, the home detainee's co-residents, or the Probation and Parole Service should be able to make an application to revoke the order.

Recommendation 39
Proceedings for breach of a home detention order or for revocation of an order where there has been a material change in circumstances should be heard by the court which imposed the order. Where the order was imposed by a Local Court, any Local Court should be able to hear the proceedings.

Recommendation 40
Courts should provide reasons for any decision to impose a sentence of imprisonment of six months duration or less, including reasons why a non-custodial sentence is not appropriate.

Recommendation 41
Section 5(2) and (3) of the *Sentencing Act 1989* (NSW) should be repealed.

Recommendation 42
Section 5(1) of the *Sentencing Act 1989* (NSW) should be amended to require the Court to set a sentence, and then to set a minimum term as the period during which the prisoner is not eligible for release on parole.

Recommendation 43
There should be a general legislative presumption in favour of concurrent sentences.

Recommendation 44
When imposing a further sentence during the currency of an existing sentence (or sentences) the court should have the power to specify that the further sentence commence:
at any time before the time the further sentence is imposed;
at the time the further sentence is imposed; or
at any time up to the end of the last expiring minimum term or fixed term of the previous sentence(s),
but no earlier than the commencement of the most recent continuous period of custody.

Recommendation 45
Provisions dealing with multiple sentences should incorporate the provisions in s 26B and 34(2) of the *Correctional Centres Act 1952* (NSW) and in s 447A of the *Crimes Act 1900* (NSW), which should, in turn, be consistent with the procedures set out in the proposed amendments to s 9(3) of the *Sentencing Act 1989* (NSW).

Recommendation 46
Section 444(4)(a) and (b) of the *Crimes Act 1900* (NSW) should be amended to include sentences of imprisonment to be served partly consecutively and partly concurrently.

Recommendation 47
When imposing a life sentence, the court should have the discretion to determine the sentence with a minimum term at the end of which the offender will be eligible to be considered for release on parole.

Recommendation 48
Section 431B of the *Crimes Act 1900* (NSW) should be repealed.

Recommendation 49

Section 13A(9)(a) of the *Sentencing Act 1989* (NSW) should be repealed.

Recommendation 50
Section 13A(5) of the *Sentencing Act 1989* (NSW) should be amended to provide that a minimum term set under the section is to commence on the date which the court, in its discretion, determines, according to the justice of the case.

Recommendation 51
Section 13A(8)(a) of the *Sentencing Act* 1989 (NSW) should be repealed, and s 13A(8)(b) should be amended to allow the Supreme Court to direct that an applicant may not re-apply for a period of up to five years from the making of the instant application.

Recommendation 52
The *Habitual Criminals Act 1957* (NSW) should be repealed.

Recommendation 53
Sections 115 and 443 of the *Crimes Act 1900* (NSW) should be repealed.

Recommendation 54
So much of the *Inebriates Act 1912* (NSW) as relates to sentencing should be repealed.

Recommendation 55
The Parole Board should continue to be chaired by a Judge of the Supreme or District Court, either serving, or retired and still eligible to be appointed as an Acting Judge.

Recommendation 56
No more than eight community members should be appointed to the Parole Board.

Recommendation 57
Members of the Parole Board should be appointed for a fixed term of three years.

Recommendation 58
The Government should institute an inquiry into the composition, role and funding of the Serious Offenders Review Council, with particular reference to co-ordination of its role in relation to the Parole Board.

Recommendation 59
The Serious Offenders Review Council should be chaired by a Judge of the Supreme or District Court, either serving, or retired and still eligible to be appointed as an Acting Judge.

Recommendation 60
A decision of the Parole Board should be a decision supported by a majority of members present at a meeting or review hearing, including that of the Chairperson, unless all other members voting are unanimous. The Chairperson should not be entitled to exercise a casting vote.

Recommendation 61
Submissions from victims to the Parole Board addressing the statutory criteria on which a decision to grant parole is based should be sworn, in writing, and at the Board's discretion, subject to cross-examination.

Recommendation 62
Section 17 of the *Sentencing Act 1989* (NSW) should provide that:
(1) (a) In the case of offenders with a sentence of less than eight years, the Board must make a parole order unless the Board is of the opinion that the prisoner, if released from custody, would be unable to remain law abiding, bearing in mind the protection of the public which is paramount.

(b) In the case of a serious offender or a prisoner with a sentence of eight years or more, the Board must not make a parole order unless the Board is of the opinion that the prisoner, if released from custody, would be able to remain law abiding, bearing in mind the protection of the public which is paramount.

(2) In reaching a decision under (1) (a) or (b) the Board must have regard to:
(a) relevant comments (if any) made by the court when sentencing the prisoner;
(b) the antecedents of the prisoner and any special circumstances of the case;
(c) the position of and consequences to the victim, including the victim's family;
(d) any report prepared for the purpose by or on behalf of the Crown;
(e) other reports as are prescribed by regulations to be furnished to it;
(f) the conduct of the prisoner while in custody, including conduct during previous imprisonment if applicable;
(g) the attitude of the prisoner;
(h) the prisoner's access to rehabilitation programs while in prison;
(i) the prospects for rehabilitation of the prisoner and the re-entry of the person into the community as a law abiding citizen;
(j) the availability of family, departmental and other support; and
(k) any other matter.

Recommendation 63
Except in the case of serious offenders or offenders with a sentence longer than eight years, there should be a presumption in favour of parole.

Recommendation 64
The criteria on which the Parole Board should determine parole should be the ability of the prisoner, if released from custody, to remain law abiding, bearing in mind the protection of the public which is paramount.

Recommendation 65

The *Sentencing Act 1989* (NSW) should specify a comprehensive list of matters to which the Parole Board should have regard when determining whether to make a parole order.

Recommendation 66
The Parole Board should be required to provide a full statement of its reasons for refusing to make a parole order. The Chairperson should deliver the Board's decision, and any member of the Board should also be permitted to deliver his or her reasons when the Board's decision is given.

Recommendation 67
Section 25A(6) of the *Sentencing Act 1989* (NSW) should be repealed.

Recommendation 68
Sections 23 and 41 of the *Sentencing Act 1989* (NSW) should be repealed.

Recommendation 69
Sections 34A and 41A of the *Sentencing Act 1989* (NSW) should be repealed.

Recommendation 70
There should be a right to seek administrative review of a decision of the Parole Board by way of an appeal to the Administrative Law Division of the Supreme Court. Rules of Court should be drawn up to facilitate expeditious and inexpensive access to offenders seeking such review.

Recommendation 71
The Parole Board should be empowered to defer consideration of parole for a period of two years after a refusal to make a parole order. The Board should be required to give reasons for any deferral.

Recommendation 72
Regulations should permit the Parole Board to order a period of supervision longer than three years.

Recommendation 73
Legislation should give courts the discretion to defer determining a sentence pending the referral of the matter to a conference.

Recommendation 74
Where participation of a victim is a component of a conference, the victim must freely consent to taking part in the proceedings, although refusal to take part need not prevent the proceedings taking place.

Recommendation 75
An offender must freely consent to taking part in any conference.

Recommendation 76
An offender must have the opportunity to seek and receive proper legal advice before consenting to take part in a conference.

Recommendation 77
An offender must admit guilt before being able to take part in a conference.

Recommendation 78

There should be a prohibition on the publication of proceedings of any conference, and any disclosures made during such proceedings should be inadmissible in any judicial or quasi-judicial proceedings other than the sentencing hearing to which it relates.

Recommendation 79
Section 438 of the *Crimes Act 1900* (NSW) should be amended to clarify the power of Local Courts to make restitution orders.

Recommendation 80
Section 438 of the *Crimes Act 1900* (NSW) should be amended to give the courts power to order the return of property to its rightful owner at the completion of the proceedings regardless of conviction.

Recommendation 81
The *Confiscation of Proceeds of Crime Act 1989* (NSW) should be amended to allow for partial forfeiture.

Recommendation 82
Statutory provisions relating to sentencing should be consolidated.

Recommendation 83
Statutory provisions relating to sentencing should be consolidated in two separate statutes, a Sentencing Act and a Sentencing Administration Act.

Recommendation 84
Procedural provisions should be removed from the *Crimes Act 1900* (NSW) and placed in the *Criminal Procedure Act 1986* (NSW).

Recommendation 85
Consolidated sentencing legislation should expressly provide a statement of the purposes for which a court may impose a sentence.

Recommendation 86
The terms "penal servitude", "hard labour" and "light labour" should be abolished and legislation should provide only that a "term of imprisonment" be imposed.

Recommendation 87
All distinctions between felonies and misdemeanours should be abolished.

1. INTRODUCTION

- THE COURSE OF THE REFERENCE
- THE COMMISSION'S APPROACH TO REFORM OF SENTENCING LAW
- THE PRACTICAL IMPLICATIONS

THE COURSE OF THE REFERENCE

1.1 On 12 April 1995, the Attorney General, the Hon Jeff Shaw QC, referred the reform of sentencing law to the Law Reform Commission.[1] The terms of reference[2] provide the basis for a comprehensive review of sentencing law in New South Wales. For the purposes of managing such a review, the Commission has divided the reference into three phases:[3]

- The first phase, to which this Report is directed, involves an evaluation of the general principles of sentencing law in New South Wales.

- The second phase will involve a review of the particular problems which arise in sentencing groups of offenders who require special consideration.

- The third phase will involve the review and rationalisation of the maximum penalties prescribed by statute in New South Wales.

1.2 The Commission began work on the first phase of the reference in July 1995. In April 1996 we issued a Discussion Paper on the general principles of sentencing law in New South Wales, entitled *Sentencing* ("DP 33"). We invited submissions on DP 33, particularly on the tentative proposals for reform which we put forward. We received over 50 written and oral submissions, a list of which appears as Appendix A to this Report. In addition, we consulted widely among relevant interest groups. A list of consultations appears as Appendix B to this Report. A public seminar on the Discussion Paper was held on 15 May 1996 in Law Week.

1.3 DP 33, over 500 pages long, contains a detailed consideration of the arguments for and against reform of various aspects of sentencing law in New South Wales. Many of these arguments are not repeated in this Report, especially where the tentative recommendations made received widespread support in the consultation process. For complete understanding of the

1. The background to the reference is outlined in NSW Law Reform Commission, *Sentencing* (Discussion Paper 33, April 1996) ("DP 33") at paras 1.1-1.9.
2. The terms of reference are set out on p iv. For comment on the terms of reference see DP 33 at para 1.10.
3. See DP 33 at paras 1.11-1.20.

Commission's arguments, this Report must, therefore, be read in conjunction with DP 33.

DEVELOPMENTS SINCE DP 33

1.4 In the eight months that have elapsed since the publication of DP 33, several statutes relevant to the Commission's sentencing inquiry have been enacted. They are:

- *Crimes Amendment (Mandatory Life Sentences) Act 1996* which provides for mandatory life sentences in certain cases of murder and of trafficking in commercial quantities of heroin or cocaine. The Act commenced on 30 June 1996.

- *Periodic Detention of Prisoners Amendment Act 1996*, the principal object of which is to provide for the better operation of the periodic detention regime. Among other matters, the Act attempts to provide for the secure identification of prisoners; to ensure greater compliance with periodic detention orders; and to regulate leave requirements and the cancellation of orders of periodic detention. The Act commenced on 27 September 1996.

- *Children (Community Service Orders) Amendment (Maximum Hours) Act 1996* which increases the maximum number of hours which persons may be required to perform under a children's community service order. The Act commenced on 25 November 1996.
- *Prisons Amendment Act 1996* which makes extensive changes to the *Prisons Act 1952*, and replaces outdated penal terminology. The principal Act is renamed the *Correctional Centres Act 1952*, and is so referred to in this Report.[4] The Act commenced on 25 October 1996.

- *Home Detention Act 1996* which establishes an independent legislative basis to provide for home detention as a means of serving a sentence of full-time imprisonment for a term of up to 18 months in certain

4. The Act also replaces references to prisons, prisoners and prison officers with references to correctional centres, inmates and correctional officers respectively. This terminology generally has not been adopted in this Report.

specified cases. The Act received assent on 1 November, and as at 20 December 1996 has not been proclaimed to commence.

- *Fines Act 1996* which consolidates the law relating to fines (including infringement notices) and introduces new enforcement mechanisms designed to reduce the incidence of fine default and ensure the prompt payment of fines. The legislation received Assent on 26 November 1996, and as at 20 December 1996 has not been proclaimed to commence.

1.5 In very recent weeks a further three Acts relevant to the Commission's reference, originally introduced in May 1996 as cognate Bills,[5] have been passed by Parliament, and another Bill introduced:

- Two, the *Victims Rights Act 1996* and the *Victims Compensation Act 1996*, are cognate Acts. The *Victims Rights Act 1996* establishes a statutory charter of rights for victims of crime, establishes a Victims of Crime Bureau and Victims Advisory Board, and gives the courts some discretion to receive victim impact statements at sentencing. The *Victims Compensation Act 1996* repeals the *Victims Compensation Act 1987* (NSW) and establishes a new regime of statutory compensation for victims of crimes of violence. The Acts received Assent on 2 December 1996. Commencement will be on a date to be proclaimed, with the exception of provisions in the *Victims Compensation Act 1996* relating to claims for compensation made in the transitional period, which commenced on Assent.

- *Sentencing Amendment (Parole) Act 1996*,[6] which renames the Offenders Review Board the "Parole Board", and revises Parole Board procedures relating to parole of prisoners who are serious offenders; requires victim and State submissions to be taken into account by the Parole Board when determining parole and by the Serious Offenders Review Council when determining the security classification of

5. Bills for each of these Acts were first introduced into the Legislative Council on 15 May 1996; the *Victims Rights Bill 1996* and the *Victims Compensation Bill* 1996 remained cognate following withdrawal of the *Sentencing Amendment (Parole) Bill 1996* on 17 October 1996.
6. *Sentencing Amendment (Parole) Bill 1996 (No 2)* was introduced on 30 October 1996, replacing in virtually identical terms the *Sentencing Amendment (Parole) Bill 1996*.

offenders; and makes amendments to the composition of the Serious Offenders Review Council and the Parole Board. The Act received Assent on 16 December 1996 and was proclaimed to commence on 20 December 1996.

- *Sentencing Legislation Amendment Bill 1996* which proposes to amend the *Community Service Orders Act 1979* (NSW), the *Children (Community Service Orders) Act 1987* and the *Home Detention Act 1996* (NSW) with respect to civil liability arising from work performed by offenders under those Acts and related matters; and to make changes to the administration of community service orders.

1.6 In formulating the recommendations in this Report, the Commission has taken account, where relevant, of the new legislation.

THE COMMISSION'S APPROACH TO REFORM OF SENTENCING LAW

The necessity for wide judicial discretion in sentencing

1.7 In sentencing an offender, the court aims "to make the punishment fit the crime, and the circumstances of the offender, as nearly as may be".[7] This involves a synthesis of all factors relevant to the offence and to the offender to produce an appropriate sentence.[8] Guidance is provided by the purposes of punishment[9] and by sentencing principles of the broadest kind.[10] The whole exercise presupposes a wide judicial discretion. In DP 33 the Commission argued that the existence of a wide judicial discretion is essential to doing justice in the individual case[11] - a point which the Chief Justices of New South Wales,[12] Victoria[13] and Western Australia,[14] as well as the Lord Chief

7. *Webb v O'Sullivan* [1952] SASR 65 at 66 per Napier CJ. See also *Budget Nursery Pty Ltd v FCT* (1989) 42 A Crim R 81 at 85 (NSW CCA).
8. *R v Williscroft* [1975] VR 292 at 300.
9. See DP 33 at paras 3.2-3.24.
10. See DP 33 at paras 3.25-3.44.
11. DP 33 at para 2.8, quoting G Green, "The Concept of Uniformity in Sentencing" (1996) 70 *Australian Law Journal* 112 at 119-120. Chapter 5 of DP 33 contains a discussion of some of the more important factors relevant to the offence and the offender which the court must take into account in sentencing.
12. Interview with Chief Justice Gleeson, *Lateline* (ABC Television, 28 May 1996).

Justice of England,[15] have recently felt it necessary to assert extra-curially. We, therefore, rejected any approach to the "reform" of sentencing law which would constrain the exercise of judicial discretion either by the codification of common law principles,[16] the creation of sanction hierarchies,[17] or the specification of tariffs (especially for terms of imprisonment) for each offence.[18] The Commission strongly reaffirms this approach, which was supported in many of the submissions which we received[19] and, overwhelmingly, in our consultations.

1.8 The importance which the Commission attaches to doing justice in the individual case does not mean that we are unmindful of the desirability of obtaining consistency in sentencing. While consistency is of particular importance in imposing sentences on co-offenders,[20] the principle is more generally applicable.[21] The significance of a consistent approach to sentencing is undeniable whether the concern is with justice, equity, efficiency, effectiveness or cost benefit.[22] The corollary of this is that like cases (that is similarly circumstanced offenders charged with similar offences) should not be subjected to punishment which reflects unwarranted disparity. The need for such an approach was succinctly identified by Justice Mason in *Lowe v The Queen*:

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13. Interview with Chief Justice Phillips, reported as "We Know Best, Says Top Judge" *The Age*, 28 August 1996 at 1.
14. Chief Justice David Malcolm, "General Framework of Sentencing Principles and the Role of the Court of Appeal", Address to the Law Society of Western Australia, Forum on Sentencing and Criminal Law Issues, 5 August 1996 at 2-3.
15. "Howard's Production Line Justice: Lord Chief Justice Taylor Condemns Minimum Sentences" *The Times*, 23 May 1996 at 20.
16. DP 33 at paras 2.7-2.12.
17. DP 33 at paras 9.9-9.10.
18. DP 33 at paras 6.51-6.66.
19. For example, Law Society of NSW, *Submission* (19 July 1996) at 23; W D T Ward, *Submission* (25 July 1996) at 2, 7; N R Cowdery, *Submission* (17 June 1996) at 2 (Response); M L Sides and Bar Association, *Submission* (24 June 1996) at 4 and 46.
20. See *Lowe v The Queen* (1984) 154 CLR 606; DP 33 at para 3.38.
21. See DP 33 at paras 3.39-3.40.
22. M Tonry, "Sentencing Reform Across Boundaries" in C M V Clarkson and R Morgan (eds), *The Politics of Sentencing Reform* (Clarendon Press, Oxford, 1995) at 268.

> Just as consistency in punishment - a reflection of the notion of equal justice - is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community.[23]

1.9 The reference to "the avoidance and elimination of unjustifiable discrepancy" highlights an issue that has troubled those concerned with sentencing reform both in Australia[24] and overseas[25] - the so-called problem of disparity. It is not any apparent disparity between such sentences which is of concern but rather unjustifiable disparity. This notion raises issues as to the extent of such disparity and its definition. Both are related. Both are controversial. If unwarranted disparity refers to an unacceptable discrepancy

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23. See *Lowe v The Queen* (1984) 154 CLR 606 at 610-611 (although the case was concerned with co-offenders, this statement was intended to be of general application). See also *Griffiths v The Queen* (1977) 137 CLR 293 at 326, 327 per Jacobs J; *R v Oliver* (1980) 7 A Crim R 174 (NSW CCA); *R v Visconti* [1982] 2 NSWLR 104 (CCA).

24. Australian Law Reform Commission, *Sentencing* (ALRC 44, 1988); Victorian Sentencing Committee, *Sentencing: Report of the Victorian Sentencing Committee* (Attorney General's Department, Melbourne, 1988); R Fox, "Controlling Sentencers" (1987) 20 *Australian and New Zealand Journal of Criminology* 218; C Corns, "Destructuring Sentencing Decision-Making in Victoria" (1990) 23 *Australian and New Zealand Journal of Criminology* 145; A Freiberg, "Sentencing Reform in Victoria" in C M V Clarkson and R Morgan (eds), *The Politics of Sentencing Reform* (Clarendon Press, Oxford, 1995); G Zdenkowski, "Sentencing: Problems and Responsibility" in D Chappell and P Wilson (eds), *The Australian Criminal Justice System: The Mid 1980s* (Butterworths, Sydney, 1986).

25. J Hogarth, *Sentencing as a Human Process* (University of Toronto Press, Toronto, 1971); M E Frankel *Criminal Sentencing: Law Without Order* (Hill and Wang, New York, 1973); A Partridge and W B Eldridge (eds), *The Second Circuit Sentencing Study: A Report to the Judges of the Second Circuit* (Federal Judicial Center, New York, 1974); M Tonry and N Morris, "Sentencing Reform in America" in P R Glazebrook (ed), *Reshaping the Criminal Law* (Stevens and Son, London, 1978); A Ashworth, *Sentencing and Penal Policy* (Weidenfeld and Nicholson, London, 1983); C M V Clarkson and R Morgan (eds), *The Politics of Sentencing Reform* (Clarendon Press, Oxford, 1995).

between sentences in "like cases" (that is, those imposed on similar offenders in similar circumstances), the characterisation of "like cases" becomes crucial. As one commentator has observed:

> At one extreme, it could be said that the number of like cases is zero because no case is like any other with the corollary that each case should be given individualised treatment and that there is no such thing as unjustifiable disparity ... this is an opinion which is commonly expressed by members of the judiciary.[26]

1.10 On the other hand, if, as to the Commission seems preferable, it is possible to extract similar features relating to offence and offender which allow the identification of like cases, and a corresponding obligation to treat such cases with the consistency of approach to which Justice Mason refers, two further tasks arise:

- isolating the degree to which such a problem exists; and

- identifying an appropriate legal response to it.

1.11 As to the first, there is some difficulty in establishing empirically the existence of such disparity. There is little Australian research. Those who seek to establish unwarranted disparity must identify systematic and substantial variation in sentences for very similar cases.[27] The evidence relied on is often anecdotal and impressionistic.[28] One recent NSW study claimed

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26. G Zdenkowski, "Sentencing: Problems and Responsibility" in D Chappell and P Wilson (eds), *The Australian Criminal Justice System: The Mid 1980s* (Butterworths, Sydney, 1986) at 218. On this view statistics provide no convincing evidence of sentence disparity: see DP 33 at para 2.17. See also Women Lawyers' Association, *Submission* (17 June 1996) at 3; M L Sides and Bar Association, *Submission* (24 June 1996) at 5. Compare D Weatherburn, *Submission* (16 August 1996) at 2-3. See also critique by D Weatherburn and B Lind of the lack of enthusiasm of the NSW Court of Criminal Appeal for sentencing statistics in *R v MacKenzie* (NSW CCA, No 60448/93, 15 December 1993, unreported): D Weatherburn and B Lind, "Sentencing Disparity, Judge Shopping and Trial Court Delay" (1996) 29 *Australian and New Zealand Journal of Criminology* 147 at 162.
27. See DP 33 at para 2.17.
28. Green at 113-115; Fox at 223. For a summary of Canadian research, see J Roberts, *Empirical Research on Sentencing* (Canadian Sentencing Commission Research Report 3) (Department of Justice, Canada, 1988) at 15-18.

that substantial disparities existed between the sentencing behaviour of two groups of District Court judges.[29] In the Discussion Paper, the Commission took issue with the general inferences of disparity sought to be drawn.[30] In a submission in response, Dr Weatherburn challenged the Commission's analysis of his report.[31] However, the Commission remains of the opinion that it is not possible to draw a reliable conclusion of general disparity, such as that apparently shown in the District Court, from that between two small groups of judges at the extremes of harshness and leniency or to distribute randomly case characteristics other than offence and plea so that relevant matters of importance are ignored.

1.12 The Commission is, of course, aware of the considerable body of literature in other jurisdictions purporting to establish widespread disparities in sentencing practice in relation to the "same case".[32] A multiple response by judicial officers to precisely the same case can, of course, only be tested in a hypothetical situation.[33] When this has been done, substantial disparities have been identified. This has occurred, for example, in sentencing exercises conducted at magistrates' conferences in Australia.[34] Although such evidence

29. D Weatherburn, *Sentence Disparity and Its Impact on the NSW District Criminal Court* (NSW Bureau of Crime Statistics and Research, Report 34, 1994).
30. See DP 33 at para 2.17.
31. D Weatherburn, *Submission* (16 August 1996) at 2-3.
32. J Hogarth, *Sentencing as a Human Process* (University of Toronto Press, Toronto, 1971). See also M E Frankel, *Criminal Sentencing: Law Without Order* (Hill and Wang, New York, 1973); A Partridge and W B Eldridge (eds), *The Second Circuit Sentencing Study: A Report to the Judges of the Second Circuit*, (Federal Judicial Center, New York, 1974); M Tonry and N Morris, "Sentencing Reform in America" in P G Glazebrook (ed), *Reshaping the Criminal Law* (Stevens & Sons, London, 1978) at 434, 437-438.
33. Absent sentencing courts constituted by more than one judicial officer. Although such an approach has been suggested from time to time, it is not regarded as feasible or desirable.
34. See K Anderson, "The Role of the Magistrate in the Sentencing Process" in I Potas (ed), *Sentencing: Problems and Prospects* (AIC and ALRC, Canberra, 1986); N J H Milson, *Submission* (3 July 1996). See also University of Sydney, Institute of Criminology, *Sentencing: Part I, Fitness to Plead* (Proceedings No 1, Government Printer, Sydney, 1967) at 83; University of Sydney, Institute of Criminology, *Sentencing Project: Part II, Probation* (Proceedings No 10, Government Printer, Sydney, 1979); University of

points towards the existence of some disparity, it cannot be inferred that widespread unjustifiable disparity exists. In the Commission's view, unjustifiable disparity is not necessarily established by a different sentencing outcome for similar cases. Our view is fortified by the High Court's comment in *Bugmy v The Queen* that "uniformity cannot be pressed too far".[35]

1.13 Despite the understandably equivocal evidence as to unwarranted disparity, the Commission is prepared to assume that it exists to some degree and that it is appropriate to seek to minimise, if not eliminate, it for the purpose of addressing the question of the appropriate legal, or other, responses to the problem. Reform inquiries have suggested a variety of means of guiding or controlling discretion in attempts to reduce disparity.[36] The Victorian Sentencing Committee recognised criticisms of sentencing disparities resulting from "a subjective and unstructured approach but was unwilling to contemplate recommending the introduction of sentencing grids, guidelines, tariffs or fixed penalties which had been tried in other jurisdictions".[37] Instead, the Committee opted for clearly defined sentencing objectives; identification of mitigating and aggravating factors; the means of determining offence seriousness; the power to hand down guideline sentences; and a sanction hierarchy.[38] The Australian Law Reform Commission adopted a similar approach but did not favour guideline sentences or a sanction hierarchy.[39] In the United States, the experience with sentencing guidelines in various forms has enjoyed mixed success. The experiment with strict, detailed federal guidelines was nothing short of a disaster and attracted virtually unanimous judicial and academic

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Sydney, Institute of Criminology, *Sentencing Project: Part III, Parole of Prisoners Act 1966* (Proceedings No 11, Government Printer, Sydney, 1976); University of Sydney, Institute of Criminology *Sentencing* (Proceedings No 35, Government Printer, Sydney, 1978).

35. *Bugmy v The Queen* (1990) 169 CLR 525 at 538 per Dawson, Toohey and Gaudron JJ. Thus, while offenders may themselves regard "unfairness" in sentencing as related to perceived inconsistency, this needs to be balanced against "a contradictory concern held by most offenders that their case should be looked at in its particular detail and all the mitigating factors allowed for": see D Indermaur, "Offenders' Perceptions of Sentencing" (1994) 29 *Australian Psychologist* 140 at 143.
36. See Fox (1987); Ashworth (1983).
37. A Freiberg, S Ross and D Tait, *Change and Stability in Sentencing: A Victorian Study* (University of Melbourne, 1996) at 232.
38. Freiberg, Ross and Tait at 232.
39. See Australian Law Reform Commission, *Sentencing* (ALRC 44, 1988).

condemnation.[40] The context of sentencing in the United States is very different from that in Australia,[41] and resort to such techniques has been consistently rejected by judicial officers in Australia as inappropriate to the Australian context.[42]

1.14 The Commission has given careful thought to the various suggested techniques for guiding judicial discretion and reducing disparity. We remain convinced that what is important is that courts should adopt a common approach to sentencing having regard to its purposes[43] and to relevant applicable principles of common law and statute.[44] In fixing the quantum of sentence befitting the circumstances of the particular case, courts should have regard to previous cases which are similar in terms of the gravity of the offence and the circumstances of the particular offender in order to provide an indication of the appropriate sentencing range.[45] The quest is not one for identical sentences for like cases. The key concerns, in our view, are consistency of approach and outcomes which are not beyond the acceptable

40. A N Doob, "US Sentencing Commission Guidelines" in C M V Clarkson and R Morgan (eds), *The Politics of Sentencing Reform* (Clarendon Press, Oxford, 1995); M Tonry, "Sentencing Reform Across Boundaries" in C M V Clarkson and R Morgan (eds), *The Politics of Sentencing Reform* (Clarendon Press, Oxford, 1995). See DP 33 at paras 6.51-6.64.

41 See for example Massachusetts Sentencing Commission, *Report to the General Court* (April, 1996). In January 1996, more than 21,000 prisoners were housed in gaols operating at over 140% of design capacity; 40% were sentenced to terms less than 6 months. Minimum mandatory sentences (capable of being departed from with justification) apply, eg 30 days for performing unlicensed television or radio repairs, 10 days selling uncooked lobster, 1 month selling liquor to an intoxicated person, 1 year for trespass in a building by a tramp.

42. See Judicial Officers Survey in Australian Law Reform Commission, *Sentencing of Federal Offenders* (ALRC 15, 1980) Appendix B.

43. N J H Milson, *Submission* (3 July 1996) at 1-2.

44. For the view that this achieves insufficient uniformity in sentencing, see D Weatherburn, "Sentencing Principles and Sentence Choice" (1987) 11 *Criminal Law Journal* 255; D Weatherburn and B Lind, "Sentence Disparity, Judge Shopping and Trial Court Delay" (1996) 29 *Australian and New Zealand Journal of Criminology* 147.

45. See *R v Warfield* (1994) 34 NSWLR 200 at 207 (CCA); *R v Ellis* (1993) 68 A Crim R 449 at 461 (NSW CCA). Consider also *Bugmy v The Queen* (1990) 169 CLR 525. And see DP 33 at paras 5.124-5.125.

range. The Commission agrees with the approach adopted by Justice Hunt in *R v Warfield*:

> What must be looked at is whether the challenged sentence is within the *range* appropriate to the objective gravity of the particular offence and to the subjective circumstances of the particular offender, and not whether it is more severe or more lenient than some other sentence ... which merely forms part of that range.[46]

Whether or not the sentence falls within the appropriate range is, of course, subject to appellate review which may be initiated by either the accused or by the Crown.[47] There is no doubt that appellate review has been a most significant factor in setting guidelines for sentencing courts and reducing inappropriate disparity.

1.15 The ascertainment of the appropriate range will be enhanced in time by two further considerations. There is now available to all sentencing courts, on a comprehensive basis, information about sentencing patterns through the Judicial Commission's Sentencing Information System.[48] Although these patterns do not, and should not, limit sentencing discretion, the Commission considers that the greater use of this information, which will inevitably come with the expansion of the database, will enhance consistency.[49] Further, the Commission is of the view that the articulation of reasons for sentence is a crucial part of the development of a cohesive sentencing jurisprudence. Wide discretion which, properly, allows individualisation and a broad choice of rationales for punishment should be accompanied by accountability. In our view this is best achieved by a clear statement from the sentencing court as to the sentencing rationale chosen, the relevant factors and the reasons for adopting them. This makes the position clear to the offender, improves community and media understanding of the process (including apparent superficial inconsistencies) and provides an unequivocal platform for appellate review.

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46. *R v Warfield* (1994) 34 NSWLR 200 at 207 per Hunt CJ at CL, with whom McInerney and James JJ agreed.
47. DP 33 at paras 6.4-6.9.
48. See DP 33 at paras 6.11-6.20.
49. See DP 33 at para 6.26. The Commission remains concerned at the omission from the statistics of CCA decisions: DP 33 at para 6.17. At present the database is, for many less common offences, too small to provide useful guidance.

The incidence of imprisonment in New South Wales

1.16 In DP 33 the Commission expressed concern about the incidence of imprisonment in New South Wales[50] (which has one of the higher rates of imprisonment in Australia)[51] and of the length of time actually served by convicted persons in prison.[52] In our view, too much use is made of imprisonment at the bottom end of the scale. Although there are, undoubtedly, cases where it is appropriate to sentence an offender to a short term of imprisonment, such cases ought to be exceptional. We therefore recommend that a judicial officer who intends to impose a sentence of full-time imprisonment of six months duration or less must provide reasons justifying the decision to do so, including an explanation of why some other lesser forms of punishment are not appropriate in the circumstances.[53] This recommendation is intended to further the common law principle, recognised in relation to summary matters in s 80AB of the *Justices Act 1902* (NSW), that imprisonment is the punishment of last resort.[54] We hope that its implementation will reduce the incidence of imprisonment in New South

50. DP 33 at para 4.4.
51. DP 33 at para 4.2. In June 1994, 6,409 persons were serving full-time custodial sentences in NSW, more than 1,000 were in maximum security, about 1,000 were in medium security and approximately 4,000 were in minimum security: see New South Wales, Department of Corrective Services, *Annual Report 1993/94* at 3. In June 1995, there were approximately 6,384 persons in full-time custody, of which 1,694 males and 5 females were in maximum security; 1,525 males and 205 females were in medium security; and 2,760 males and 89 females were in minimum security: see New South Wales, Department of Corrective Services, *Annual Report 1994/95* at 4. (The breakdown of the figures was provided to the Commission by the Research and Statistics Unit of the Department of Corrective Services).
52. DP 33 at paras 4.3-4.4, from which it is apparent that it is not easy to account for the length of prison terms in New South Wales.
53. See Recommendation 40.
54. See *Parker v DPP* (1992) 28 NSWLR 282 at 296 per Kirby P (with whom Handley and Sheller JJA agreed).

Wales[55] and result in the greater use of other punishments appropriate in all the circumstances of a particular case.[56]

1.17 At the other end of the scale are serious offences in respect of which some sections of the media mount a continuous campaign for harsher and longer sentences. In doing so, "the popular press has tended to resonate expressions of opinion that are more noteworthy for a simplistic and unequivocal advocacy of retributive punishment than a reflective consideration of the more complicated interaction between justice for the individual and the public good".[57] The Commission does not regard this media litany either as evidence of sentence leniency or as indicative of community concern about the lack of severity of sentences.[58] Our view is reinforced by the almost invariable failure of media reports of court proceedings to achieve practical accuracy. In DP 33, we also pointed out the pitfalls involved in the ascertainment of public perceptions of appropriate sentence ranges.[59] A good illustration is a recent survey by which the Victorian Government is purporting to gauge the views of the average Victorian about appropriate sentences in individual cases.[60] In our view,

55. In 1995, the total of fixed and minimum terms of imprisonment under 6 months duration was 3,408 (or 60% of dispositions) in the Local Court: see New South Wales, Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 1995* Tables 1.10 and 1.11.
56. See Austral News Pty Ltd, *Submission [Telephone]* (19 July 1996); G Fearon, *Submission* (25 August 1996), D Plagaro, *Submission [Telephone]* (7 September 1996). For punishments other than full-time imprisonment, see Chapters 3-7.
57. L Blom-Cooper and T Morris, "The Penalty for Murder: A Myth Exploded" [1996] *Criminal Law Review* 707.
58. See DP 33 at paras 2.22-2.30. See further, A Ashworth and M Hough, "Sentencing and the Climate of Opinion" [1996] *Criminal Law Journal* 776. Submissions tended to agree with this point: eg Law Society of NSW, *Submission* (19 July 1996) at 2; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 2. But see eg Confidential, *Submission* (22 May 1996) at 7-8; W D T Ward, *Submission* (25 July 1996) at 1.
59. DP 33 at paras 2.29-2.30.
60. The survey, "Your Say Your Verdict", was published in the *Herald Sun*, 1 August 1996, at 49-56.

leaving aside all concerns about the lack of authentication of the survey,[61] it seems to require responses to inadequate reports of a small and unrepresentative sample of hypothetical sentencing cases.[62] On any rational basis, it is impossible to accept that any useful conclusions could be drawn from such a survey.

THE PRACTICAL IMPLICATIONS

1.18 While the Commission has developed its arguments in DP 33 and in this Report by reference to principle, it is important to point out the practical implications, in terms of the cost to the community of longer sentences of imprisonment. In 1995-1996, the daily cost of full-time imprisonment per inmate was as follows:[63]

Maximum security	$176.92
Medium security	$143.72
Minimum security	$104.34

It is clear from these figures alone that a regime of heavy sentences must be justified by identifiable and rational considerations of public policy.

1.19 The cost of periodic detention is much lower than that for full-time imprisonment. It is costed by calculation of two-sevenths of the cost of a minimum security inmate.[64] As at November 1996 this is approximately $30

61. Among other things, the survey does not require respondents to identify themselves and allows respondents simply to specify the number of people who participated in completing the survey.
62. See G Green, "The Concept of Uniformity in Sentencing" (1996) 70 *Australian Law Journal* 112 at 116. Compare N J H Milson, *Submission* (3 July 1996) at 1-2.
63. See New South Wales, Department of Corrective Services, *Annual Report 1995/96* Appendix 23. In 1991-1992 the daily cost of maximum security was $120.47, of medium security $112.23 and of minimum security $95.90.
64. Information supplied by Finance Division of Department of Corrective Services, June 1996.

per day. Each year the labour of periodic detainees in work programs contributes approximately $2.5 million value to the NSW community.[65]

1.20 Both full-time and periodic imprisonment also involve substantial costs to the community in terms of capital outlays. In accordance with the Department of Corrective Services' Capital Works Strategic Plan for 1996-2006 which has recently been finalised, the Commission has been advised that an investment program of more than $260 million is planned over this ten year period.[66] The figure does not include any sum for future regional or periodic detention centres.[67]

1.21 The cost of non-custodial sentences is lower still. In 1996 the daily cost per person was calculated as:[68]

Home detention	$ 30.00[69]
Probation and parole supervision	$ 4.00
Community service orders[70]	$ 3.50

On the other side of the balance sheet, the value to the community of the labour of those serving community service orders was estimated to be greater than $15 million in 1995.[71]

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65 S D'Silva, "Sentencing Options: Changes to the Periodic Detention Program" Paper presented at the NSW Bar Association CLE Seminar, 14 October, 1996 at 5.

66. Acting Commissioner L M Sulman, Department of Corrective Services, *Letter* to Commission (1 July 1996), and document "Law Reform Commission Survey" enclosed with letter; and advice to the Commission, 9 December 1996.

67. New periodic detention centres which are to open in 1996 and 1997 have already been budgeted for: see para 6.4 at n 14.

68. Advice from NSW Probation and Parole Service, November 1996. These are based on updated formulae reflecting actual time allocated to different functions of Departmental staff, with the exception of the home detention program which has been costed separately in relation to passage of the *Home Detention Act 1996* (NSW), they are to some extent indicative figures only as Service expenditure is not fully apportioned among programs, and the inclusion of corporate support service overheads is uncertain.

69. Projected to operation of scheme at capacity. In the pilot project, one third of cost was spent on surveillance equipment.

70. Including fine default orders.

71. New South Wales, Department of Corrective Services, *Annual Report 1994/95* at 3.

2.
SOME PROCEDURAL ASPECTS OF THE SENTENCING HEARING

- PRE-SENTENCE REPORTS
- VICTIM IMPACT STATEMENTS

2.1 This Chapter deals with two important aspects of the sentencing hearing. One is the use to be made of pre-sentence reports which, although currently subject to a review by the Probation and Parole Service,[1] has been the subject of comment in some submissions. The other is the question of the admissibility of victim impact statements ("VIS"), a topic which has assumed importance in the context of modern debates about the role, if any, which should be played by victims in the sentencing process.

PRE-SENTENCE REPORTS

Recommendation 1
Pre-sentence reports should be given a general legislative base.

Recommendation 2
Legislation should provide that written pre-sentence reports ordered by the court, for which sentencing has been deferred, be made available to the prosecution and defence at least the day before the sentencing hearing.

Description

2.2 Pre-sentence reports, in either oral or written form, contain information prepared for a court about an offender's social background and other relevant matters in order to assist the court in deciding on an appropriate sentence for that offender.

2.3 In New South Wales pre-sentence reports are provided, at the request of a court, by officers of the Probation and Parole Service under the Court Advice Program. Essentially, they fall into two categories:

1. A component of this review has been J Hickey and C Spangaro, *Judicial Views About Pre-Sentence Reports* (Judicial Commission of New South Wales, Sydney, 1995).

- those prepared during a pre-sentence adjournment, which are written and provide considerable detail;

- those produced at court at short notice, which may be either verbal or in writing and concentrate on the availability of particular sentencing options and the offender's suitability for them.

2.4 The use of pre-sentence reports has developed in New South Wales generally without legislative backing. However, there are specific instances where they are mandated by legislation. The assessment of offender suitability for periodic detention and community service orders involves the consideration of a report by a probation and parole officer and, if necessary, the hearing of evidence from an officer.[2] The *Home Detention Act 1996* (NSW) requires the investigation and preparation of a report concerning the suitability of an offender for home detention,[3] and also sets an open-ended list of factors to be specifically addressed in the report.[4]

Availability of pre-sentence reports

2.5 A pre-sentence report is usually ordered by a court when an offender's legal representative requests one. However, the need for one will depend on the circumstances of the case. In *R v Majors*[5] the Court of Criminal Appeal held that it is for the sentencing court to determine whether it is appropriate to defer sentencing pending the production of a pre-sentence report. The Court doubted the helpfulness of pre-sentence reports in some instances, noting that much of the information contained in pre-sentence reports should have been compiled by the offender's legal representative before the conclusion of the trial:

> It is acknowledged that there are certain matters in respect of which probation officers may be of special assistance, for example, details of previous behaviour by the offender whilst on parole, but the principle remains that except in rare cases, those representing the offender should be in a position to adduce all relevant evidence in mitigation at the conclusion of the trial. Adjournment of the sentencing process to

2. *Periodic Detention of Prisoners Act 1981* (NSW) s 5(1)(c); *Community Service Orders Act 1979* (NSW) s 6(3)(b).
3. Section 10(1).
4. Section 10(2) and (4).
5. (1991) 27 NSWLR 624.

> enable the preparation of a pre-sentence report should be confined to those cases where it is apparent to the judge that there is a clear and legitimate advantage to be obtained by this course.[6]

The Commission agrees with this position and accordingly does not seek to compel the production of pre-sentence reports in cases where they are not already mandated by legislation and the court does not consider that they are necessary in the circumstances of the case.

Legislative base

2.6 While it is possible that the provision of pre-sentence reports can continue without a legislative base, the Commission has come to the conclusion that they should be recognised in legislation so that aspects relating to lodgement can be regulated. The Probation and Parole Officers' Association has proposed that pre-sentence reports be included in sentencing legislation to identify their purpose, namely to assist the court in determining the appropriate penalty, and to establish procedures for the lodging of reports and the lodging of notices of intention to dispute.[7] In making this recommendation, the Commission has no intention to limit or constrain the flexibility that currently exists for the provision of pre-sentence reports.[8] We intend that legislation should provide only for lodgement requirements.

Accessibility and resources

2.7 Two problems have been identified which arise from the fact that pre-sentence reports are not made available a reasonable time before the sentencing hearing. The first is that both prosecution and defence do not have adequate time to consider a report and to challenge statements therein by arranging for further evidence. To remedy this situation one submission proposed that all documents that are to be presented in the sentencing hearing must be exchanged no less than one week before that hearing.[9] Another noted, in commenting on the proposal that victim impact statements be admitted only where they furnish the court with particulars that are not

6. *Majors* at 627 per Carruthers J.
7. Probation and Parole Officers' Association of NSW, *Submission* (31 July 1996) at 8.
8. Concerns that flexibility might be lost are outlined in Hickey and Spangaro at 39.
9. Confidential, *Submission* (22 May 1996) at 2.

already before the court in evidence or in a pre-sentence report, that pre-sentence reports should be made available to the prosecution and victims two weeks before the sentence hearing and that victims should be given the opportunity to correct any material errors or omissions.[10] A survey of judicial officers revealed that the vast majority support the availability of pre-sentence reports to both prosecution and defence at the registry at least two to three days before the sentencing hearing.[11]

2.8 The second problem arising partly from the late provision of pre-sentence reports is that Probation and Parole Service officers are made available to be cross-examined on the contents of their reports whether they are required or not. This availability is threatened by increasing demands placed upon probation and parole officers.[12] The Probation and Parole Officers' Association submitted that part of the value of pre-sentence reports is that their individual authors are available in court to be examined by prosecutors, offenders' representatives and sentencers. This allows for the provision of fuller information where necessary and also allows the opportunity for the court to make an assessment of the adequacy of the report.[13] The Department of Corrective Services, in its submission, warned that the Commission's proposal that the court should provide reasons justifying any decision to impose a sentence of imprisonment of six months duration or less might lead to more frequent calls for pre-sentence reports, leading to even greater demands on the Probation and Parole Service. The increase in availability of periodic detention, community service orders and home detention would place further demands on the Probation and Parole Service. The Probation and Parole Officers' Association noted that proposals to establish early lodgement of pre-sentence reports, so that the parties to a

10. NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 31.
11. Hickey and Spangaro at 37.
12. In recent years there has been a steady increase in the number of reports prepared. In the 1990/1991 financial year the Service prepared 12,700 full and short reports, and in 1994 a total of 16,400. Between 1993 and 1994 the number of reports increased by 1.7% despite a decrease, in the order of 6.4%, in the number of offenders sentenced: Hickey and Spangaro at 4.
13. Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 7.

case could call for an officer's attendance only if necessary, would alleviate some of the demands on officers.[14]

2.9 The position in other Australian jurisdictions varies. Some jurisdictions make provisions for the distribution of pre-sentence reports to the relevant parties, but do not state the time within which this is to be done, and also allow for the challenging of pre-sentence report by cross-examination of the author.[15] In Victoria a pre-sentence report should be filed no later than the time directed by the court and is made available to the prosecutor, the offender's legal representatives and, if so ordered, the offender.[16] A notice of intention to dispute the whole or any part of a pre-sentence report may also be filed.[17] Western Australia and the Northern Territory, which recognise pre-sentence reports generally in legislation, do not appear to make provision for their availability before the hearing or for their challenge.[18] The Victorian legislation most closely approximates the scheme envisaged by the Probation and Parole Officers' Association.

2.10 The problem of lack of adequate notice of the contents of a pre-sentence report can be overcome by expressly providing that pre-sentence reports be made available to the prosecution and defence at least the day before the sentencing hearing. The Commission, in recommending that pre-sentence reports be made available to both prosecution and defence alone, considers that this will be sufficient to allow proper scrutiny of their contents, especially given the confidential nature of much of the information which will be included. The requirement that pre-sentence reports be made available at least the day before the sentencing hearing should be sufficient to allow reasonable consideration to be given to their contents by both prosecution and defence. In addition the Commission, recognising the utility of having the author of a pre-sentence report available to give evidence, urges that sufficient resources be made available to ensure the efficient operation of the Probation and Parole Service.

14. Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 7.
15. *Crimes Act 1900* (ACT) s 456 and 457; *Criminal Law (Sentencing) Act 1988* (SA) s 8(4), (5) and (6).
16. *Sentencing Act 1991* (Vic) s 98.
17. *Sentencing Act 1991* (Vic) s 99.
18. *Sentencing Act 1995* (NT) Part 6 Div 2; *Sentencing Act 1995* (WA) s 20-22.

Contents of pre-sentence reports

2.11 The Commission does not recommend that legislation seek to prescribe the contents of pre-sentence reports. This approach is supported by the Probation and Parole Officers' Association.[19] In Western Australia s 21 of the *Sentencing Act 1995* (WA) leaves discretion in this regard to the courts:

> (1) When ordering a pre-sentence report a court may give instructions as to the issues to be addressed by the report.
>
> (2) In the absence of specific instructions from the court that ordered it, a pre-sentence report is to set out matters about the offender that are, by reason of this Act or sentencing practice, relevant to sentencing the offender ...

2.12 Notwithstanding the presence of specific factors to be taken into account in s 10(2) of the *Home Detention Act 1996* (NSW), such as any criminal record, the likelihood that the offender will re-offend and any dependency on illegal drugs, and similar general provisions in the legislation of some other jurisdictions,[20] the Commission considers that it should be left to the courts to determine what they require from individual pre-sentence reports in coming to their sentencing decision.

VICTIM IMPACT STATEMENTS

Admissibility of VIS

Recommendation 3
Except in death cases, VIS should be admissible at sentencing hearings, in the discretion of the court and at the victim's option, as an indication of the seriousness of the offence. Section 23C(3) of the *Criminal Procedure Act 1986* (NSW) should be repealed.

19. Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 8.
20. *Sentencing Act 1995* (NT) s 106; *Sentencing Act 1991* (Vic) s 97; *Crimes Act 1900* (ACT) s 455.

Recommendation 4
For the purpose of VIS, the "victim" of an offence should be the person against whom the offence was committed or who was a witness to the act of actual or threatened violence and who has suffered personal harm as a direct result of the offence.

Recommendation 5
The definitions of "family victim", "member of the immediate family" and "primary victim" in s 23A of the *Criminal Procedure Act 1986* (NSW) should be repealed, together with s 23B(b) of the *Criminal Procedure Act 1986* (NSW).

Generally

2.13 In the last quarter of a century, much attention has been paid to the question of the role which should be played by victims in the criminal justice system.[21] The 1985 United Nations' *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* provides that: "Victims should be treated with compassion and respect for their dignity".[22] A State does not live up to this standard if it fails to provide victims with assistance and access to support services, or to keep them informed of the progress of "their" case or of the movement of the offender through the courts and correctional system.[23] That failure alienates victims from the criminal justice

21. See DP 33 at paras 11.4-11.13.
22. Art 4, adopted by General Assembly resolution 40/34, 29 November 1985, text in Centre for Human Rights Geneva, *Human Rights: A Compilation of International Instruments* (United Nations, New York, 1988) at 262; New South Wales, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (Sydney, December 1995) Appendix H.
23. See eg Women for Social Justice, *Submission* (29 July 1996) at 4. Consider also C Sumner, M Israel, M O'Connell and R Sarre (eds), *International Victimology: Selected Papers from the 8th International Symposium*, Proceedings of a Symposium held in Adelaide from 21-26 August 1994 (Australian Institute of Criminology No 27, 1996) Section 4; F J Weed, *Certainty of Justice: Reform in the Crime Victim Movement* (Adeline de Gruyter, New York, 1995) Chapter 5.

system.[24] The Commission, therefore, strongly supports the Government's commitment, manifest in the *Victims Rights Act 1996* (NSW), to improve the treatment of victims by the enactment of a Charter of Victims Rights (which will govern the treatment of victims in the administration of the affairs of the State),[25] and by the establishment of a Victims of Crime Bureau[26] and a Victims Advisory Board.[27] In the Commission's view, these measures respond to the real needs of victims.

2.14 As far as sentencing is concerned, the Commission's task is to determine whether victims should be given the opportunity to tender victim impact statements ("VIS") at sentencing hearings. A VIS is, broadly, "a statement containing particulars of any personal harm suffered by a victim as a result of an offence".[28] The admissibility of such statements at common law is somewhat uncertain. In New South Wales, VIS have been admitted in some sexual assault cases where they have been thought to provide the court with information (which it did not otherwise have) of the psychological injury to the victim and hence of the seriousness of the offence.[29] In practice, they have sometimes been found of little use in these cases since they have not adequately addressed the impact of the crime on the victim.[30] VIS have generally been held inadmissible in homicide cases.[31]

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24. D Blakemore, *Submission* (26 June 1996); Manning District Emergency Accommodation Inc, *Submission* (22 July 1996); R Cotterell-Jones, *Submission* (30 July 1996).
25. *Victims Rights Act 1996* (NSW) Part 2. But note that nothing in Part 2 itself creates legal rights: s 8.
26. *Victims Rights Act 1996* (NSW) Part 3.
27. *Victims Rights Act 1996* (NSW) Part 4.
28. *Victims Rights Bill 1996* Sch 2 [1], proposed s 23B *Criminal Procedure Act 1986* (NSW) as originally introduced into Parliament on 15 May 1996 before being amended by the Legislative Council to add that it must be as a "direct" result. See now s 23B *Criminal Procedure Act 1986* (NSW) as inserted by the *Victims Rights Act 1996* (NSW) Sch 2 [1].
29. See esp *R v Church* (NSW SC, No 70134/91, 16 July 1993, Wood J, unreported) at 5, and authorities there cited. See also *R v Bielaczek* (NSW SC, CD70212/90, 19 March 1992, Badgery-Parker J, unreported). And consider *R v Cowan* (NSW CCA, No 60363/88, 15 February 1990, unreported); *R v Nichols* (1991) 57 A Crim R 391 (NSW CCA); *R v PJP* (NSW CCA, No 60025/92, 9 July 1992, unreported); *R v Jones* (1993) 70 A Crim R 449.
30. See *R v Muldoon* (NSW CCA, No 60513/90, 13 December 1990, unreported). Justice Dunford has informed the Commission that, in sexual abuse cases, VIS prepared by psychologists or social workers are often unhelpful and

2.15 In DP 33, while finding the literature on the admissibility of VIS inconclusive,[32] the Commission was persuaded that VIS ought, in principle, to be admissible at sentencing hearings for the purpose of providing the sentencing court with an indication (which it may not otherwise have) of the seriousness of the offence.[33] We agreed with the extra-curial comments of the Chief Justice of the Australian Capital Territory that:

irrelevant since they merely reproduce a collection of findings on the commonly experienced effects of such abuse: *Preliminary Submission* (7 August 1995).

31. *R v De Souza* (NSW SC, No 70105/94, 10 November 1995, Dunford J, unreported); *R v Penn* (1994) 19 MVR 367 at 370 (Vic CCA). Compare two earlier unreported NSW cases which Dunford J distinguishes in *De Souza* at 3 and the approach in a recent Queensland case where the mother of a homicide victim was allowed to read a VIS approved by the Judge (Justice de Jersey): see "Court Allows Mum to Confront Son's Killer" *Courier Mail*, 11 November 1995, at 3.
32. DP 33 at paras 11.32-11.37.
33. DP 33 at paras 11.38-11.43. Some submissions also suggest that sentencing courts can be unaware of the impact of the crime on the victim: see D Blakemore, *Submission* (26 June 1996) at 23-25.

> The assumption may be too lightly made that the sentencing court will be in possession of all relevant information about the effect on the victim, sufficient to enable the court to impose a just and appropriate sentence. This became particularly obvious to me over a number of years when I was required often to sentence on the basis that the offence had had little effect if any on the victim, only to be required later, sometimes years later, to hear an application for compensation by the victim which clearly established that the effect had been almost catastrophic.[34]

2.16 The Commission continues to favour the general admissibility of VIS for the purpose of providing an indication of the seriousness of the offence in question. Our proposal to this effect in DP 33 was supported in nearly all of the submissions on VIS.[35] It is also supported by legislation in several Australian jurisdictions which now provides for the general admissibility of VIS.[36] It follows that the Commission supports Part 6A of the *Criminal Procedure Act 1986* (NSW)[37] to the extent to which it gives the Court a

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34. J Miles, "The Role of the Victim in the Criminal Process: Fairness to the Victim and Fairness to the Accused" (1995) 19 *Criminal Law Journal* 193 at 203.

35. Confidential, *Submission* (22 May 1996) at 40; N R Cowdery, *Submission* (17 June 1996) at 6 (Summary), 16-17 (Response); M Dodson, *Submission* (26 June 1996) at 4 (but with reservations about the value of VIS); NSW Council for Civil Liberties, *Submission* (28 June 1996) at 6; Justice Action, *Submission* (2 July 1996) at 2; J L Swanson, *Submission* (1 July 1996) at 2; Victims Advisory Council, *Submission* (10 July 1996) at 1; Victims Rights and Civil Rights Project, *Submission* (19 July 1996) at 11; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 31 ("planned introduction"); W D T Ward, *Submission* (25 July 1996) at 20; K Marslew, *Consultation* (12 September 1996) (VIS make judges "feel the pain" of victims before sentencing). But see M L Sides and Bar Association, *Submission* (24 June 1996) at 75-76; D Blakemore, *Submission* (26 June 1996) at 20-21.

36. *Crimes Act 1900* (ACT) Part 12 Div 1 (inserted by *Acts Revision (Victims of Crime) Act 1994* (ACT)); *Criminal Law (Sentencing) Act 1988* (SA) s 7; *Sentencing Act 1991* (Vic) Part 6 Div 1A (inserted by *Sentencing (Victim Impact Statement) Act 1994* (Vic)); *Sentencing Act 1995* (WA) s 13 and 24-26. Consider also *Sentencing Act 1995* (NT) s 104(1). The legislation is reviewed in DP 33 at paras 11.22-11.30.

37. Inserted by the *Victims Rights Act 1996* (NSW) Sch 2 [1]. The Commission does not support s 23C(3).

general power to receive VIS in appropriate cases, and subject to the qualifications below.

2.17 In DP 33 the Commission explained and qualified its general support for the admissibility of VIS in five ways:

- first, we proposed a particular definition of victim;
- secondly, we argued that VIS ought not to be admissible in homicide cases;[38]
- thirdly, we proposed that the admissibility of VIS should always be subject to the discretion of the court;
- fourthly, we argued that VIS should only be admissible at the option of the victim; and
- we proposed that VIS should only be admissible where they furnish the court with particulars that are not already before the court.

The definition of "victim"

2.18 "Victim" can be defined in a number of ways.[39] Most expansively, it could refer to any person who suffers loss or harm (not necessarily of a tangible nature) as a result of the criminal offence in question. Such a wide definition of victim for the purposes of VIS would jeopardise the efficiency of the criminal justice system. In DP 33,[40] the Commission considered that the appropriate definition of "victim" is that in the unproclaimed s 447C(6) of the *Crimes Act 1900* (NSW) which defines "victim" as a person who has suffered injury (defined as bodily harm, including pregnancy, mental shock and nervous shock) as a result of the offence, and who is the person against whom the offence was committed, or who was a witness to the act of actual or threatened violence. The definition received some support in

38. See DP 33 at paras 11.51-11.52. The use of "homicide" in DP 33 was not intended in any technical or limiting sense. To avoid any confusion, we refer in this Report simply to "death cases".
39. See DP 33 at para 11.48.
40. DP 33 at para 11.49.

submissions.[41] Section 23A of the *Criminal Procedure Act 1986* (NSW) substantially adopts the s 447C definition, but precisely defines "primary victim" as the person against whom the offence was committed or who witnessed the offence (where it was an act of actual or threatened violence) and who suffered "personal harm" (defined as actual physical bodily harm, mental illness or nervous shock) as a *direct* result of the offence.[42] We are of the view that the qualification "direct" is a reasonable one. It also accords with the approach to the definition of "victim of crime" in s 5 of the *Victims Rights Act 1996* (NSW) for the purposes of that Act. Accordingly we recommend that this be the definition of "victim" in s 23A of the *Criminal Procedure Act 1986* (NSW).

2.19 Submissions which expressly or impliedly argued for a wider definition of "victim" did so in order to enable family and friends of deceased persons ("secondary victims") to tender VIS in death cases.[43] The *Victims Rights Bill 1996* as presented by the Government permitted only primary victims to tender VIS. The Bill was, however, amended in the Legislative Council to create a category of "family victim". Such a person is a member of the immediate family of a primary victim who has died as a direct result of the offence.[44] The Government accepted this amendment and Part 6A of the *Criminal Procedure Act 1986* (NSW) now contains this additional class of victim. For the reasons that we outline below, we consider that this amendment is fundamentally wrong and should be repealed. Before turning to this issue, we note that there was no opposition to our proposal that provision should exist for VIS to be made on behalf of victims who are under some incapacity.[45]

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41. Confidential, *Submission* (22 May 1996) at 41; Victims Rights and Civil Rights Project, *Submission* (19 July 1996) at 11; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 31-32; W D T Ward, *Submission* (25 July 1996) at 21.
42. *Criminal Procedure Act 1986* (NSW) s 23A ("*primary* victim") inserted by the *Victims Rights Act 1996* (NSW) Sch 2 [1].
43. N R Cowdery, *Submission* (17 June 1996) at 6, 7 (Summary), 17-18 (Response); D Blakemore, *Submission* (26 June 1996) at 21-22.
44. *Criminal Procedure Act 1986* (NSW) s 23A ("family victim") and s 23C(3) inserted by the *Victims Rights Act 1996* (NSW) Sch 2 [1].
45. *Criminal Procedure Act 1986* (NSW) s 23E(2) inserted by *Victims Rights Act 1996* (NSW) Sch 2 [1]) is partly directed to this situation. Compare para 2.25. See also Confidential, *Submission* (22 May 1996) at 41.

Death cases

2.20 The Commission's proposal that VIS should be inadmissible in death cases was supported in a substantial majority of submissions,[46] but expressly opposed in others.[47] The Victims Advisory Council is strongly opposed to the proposal.[48]

2.21 The reason behind our proposal is simple. In death cases, the consequence of the offence to the victim (ie death) is already known.[49] A victim impact statement cannot, therefore, supply any information relevant to the effect of the crime on the victim of which the court may be unaware.[50]

2.22 In death cases, victim impact statements could only amount to:

- an attempt to persuade the court to impose a harsher sentence on the accused on the basis that, in some way, the death of person who was, say, young and surrounded by a loving family and friends is more serious than, say, the death of a person who was alone, unhappy or elderly;[51] or
- the provision of a forum for the victim's family and friends to assist in their healing processes.[52]

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46. Confidential, *Submission* (22 May 1996) at 42; NSW Council for Civil Liberties, *Submission* (28 June 1996) at 6; Justice Action, *Submission* (2 July 1996) at 2; Victims Rights and Civil Rights Project, *Submission* (19 July 1996) at 11; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 32-33; District Court, Criminal Law Committee, *Submission* (6 August 1996) at 1.
47. N R Cowdery, *Submission* (17 June 1996) at 7 (Summary), 18 (Response); D Blakemore, *Submission* (26 June 1996) at 21-28.
48. Victims Advisory Council, *Submission* (10 July 1996) at 3; Victims Advisory Council, *Consultation 1* (8 May 1996); Victims Advisory Council, *Consultation 2* (31 July 1996).
49. DP 33 at paras 11.51-11.52.
50. Compare DP 33 at para 11.38.
51. The argument put by the Homicide Victims' Support Group, *Submission* (14 June 1996) at 1, that there is, in this context, a difference between measuring the *value* of a person's life and the *impact* of the crime. ("Don't measure the value - measure the impact") is specious.
52. Argued as one of the purposes of VIS in such cases in Victims Advisory Council, *Consultation 1* (8 May 1996).

2.23 The Commission is of the view that VIS should not be admissible for either of these purposes for the following reasons:

- First, it is unacceptable for the law to express, and the courts to engage in, pure retribution. As Justices Burchett, Miles and O'Loughlin of the Federal Court have recently reminded us: "Vengeance is not to be equated with justice".[53]

- Secondly, it is offensive to fundamental conceptions of equality and justice to value one life over another. This is to derogate from the worth of every life. The point is implicit in what Justices Powell, Brennan, Marshall, Blackmun and Stevens of the United States Supreme Court wrote in *Booth v Maryland*:

  > We are troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Of course, our system of justice does not tolerate such distinctions.[54]

  If it did, the conclusion would follow, by precisely the same reasoning, that the prisoner ought to be able to raise, in mitigation of sentence, the argument that the deceased was a worthless member of society.[55]

- Thirdly, a court applying dispassionate justice is simply an inappropriate forum for addressing the need of victims to express their

53. *R v P* (1992) 39 FCR 276 at 281 (FC).
54. (1987) 482 US 496 at 506 n 8 (holding that admissibility of a VIS at sentencing in a capital murder case violated the constitutional principle prohibiting cruel and unusual punishments). The Supreme Court reaffirmed *Booth v Maryland* in *South Carolina v Gathers* (1989) 490 US 805, before overruling it in *Payne v Tennessee* (1991) 501 US 808. For a criticism of the approach in *Payne*, see R Coyne, "Inflicting *Payne* on Oklahoma: The Use of Victim Impact Evidence During the Sentencing Phase of Capital Cases" (1992) 45 *Oklahoma Law Review* 589. For a defence, see B Douglass, "Oklahoma's Victim Impact Legislation: A New Voice for Victims and Their Families: A Response to Professor Coyne" (1993) 46 *Oklahoma Law Review* 283.
55. Consider *Payne v Tennessee* (1991) 501 US 808 at 859 per Stevens J dissenting (the victim's character, whether good or bad, cannot constitute either an aggravating or mitigating circumstance because the victim is not on trial).

> grief or anger. The Commission is acutely aware of the necessity for the provision (by the State and others) of mechanisms for assisting victims and their families.[56] But the way to do so is not to give victims procedural rights at sentencing hearings. Conferencing schemes hold far greater promise for victims in this respect.[57]

2.24 The Commission is disappointed that submissions from those favouring VIS in death cases failed to answer, or even to address, any of these arguments.[58] And the Commission's further attempts to find reasoned responses to our arguments in consultations were just as unsuccessful. This has reinforced our conclusion that our proposals are right in principle.

2.25 Our proposal was supported by the *Victims Rights Bill 1996*, as originally introduced into Parliament, which adopted, in Schedule 2, a definition of "victim" which did not extend to "secondary victims" in homicide cases.[59] The Bill did not, therefore, authorise secondary victims to make VIS in respect of the harm suffered as a result of the death of the primary victim.[60] As a result of amendments to the Bill proposed in the Legislative Council and accepted by the Government, s 23A of the *Criminal Procedure Act 1986* (NSW) extends the definition to include "family victim", which is the equivalent of "secondary victim". In addition, s 23E(2) of the *Criminal Procedure Act 1986* (NSW) provides that, if a victim is incapable of providing information for or objecting to a VIS, a family member or other representative of the victim may act on behalf of the victim for that purpose.[61] The primary object of this clause seems to be to authorise certain persons to make VIS on behalf of victims who are under some incapacity, or who, it would seem, have died since the offence was committed and are unable to

56. See para 2.13. Some submissions are eloquent testimony of this need: see especially D Blakemore, *Submission* (26 June 1996).
57. See also M L Sides, *Submission* (24 June 1996) at 75. On conferencing, see Chapter 12.
58. See eg Victims Advisory Council, *Submission* (10 July 1996) at 3 and K Marslew, *Submission* (31 July 1996) at 1, both of which simply assert that the Commission's proposal to exclude VIS in death cases would put NSW out of step with changes occurring elsewhere. The Commission has, of course, carefully considered developments elsewhere: see DP 33 at paras 11.4-11.30.
59. Inserted by *Victims Rights Bill 1996* Sch 2 [1].
60. See also N R Cowdery, *Submission* (17 June 1996) at 16 (Response).
61. Inserted by *Victims Rights Act 1996* (NSW) Sch 2 [1].

exercise rights in relation to a VIS;[62] it is difficult to see how the provision can have any sensible effect in relation to deceased victims.[63]

The court's discretion

2.26 In DP 33 the Commission proposed that, because the contents of VIS may be exaggerated, irrelevant or simply prejudicial, the court should have the power in all cases to rule VIS inadmissible.[64] This proposal was supported in submissions.[65] Our recommendation accords with s 23C(1) and (2) of the *Criminal Procedure Act 1986* (NSW) as inserted by the *Victims Rights Act 1996* (NSW),[66] and with the court's general discretion to exclude evidence[67] - especially evidence the probative value of which is outweighed, in criminal trials, by the danger of unfair prejudice.[68] However s 23C(3) of the *Criminal Procedure Act 1986* (NSW) now provides also that a VIS made by a family victim *must* be received by the court, in stark contrast to a VIS made by the primary victim which *may* be received only where the court considers it appropriate to do so. This distinction does not appear to have a rational basis. Furthermore, if the victim is alive, the VIS must be limited to the "personal harm" suffered by the victim as a "direct" result of the crime, a considerably more limited subject matter than "impact" on the family victim: nor can the VIS of the primary victim contain particulars of the impact of the crime on his or her family; nor, of course, can family members of such a victim submit

62. See para 2.19.
63. Note also the potential for conflict between family members with opposing views: see Law Society of NSW, *Submission* (19 July 1996) at 46. See also New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 15 May 1996 at 972 and 980.
64. DP 33 at para 11.59.
65. Confidential, *Submission* (22 May 1996) at 42; N R Cowdery, *Submission* (17 June 1996) at 19 (Response); NSW Council for Civil Liberties, *Submission* (28 June 1996) at 6;. Justice Action, *Submission* (2 July 1996) at 2; Victims Rights and Civil Rights Project, *Submission* (19 July 1996) at 12; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 32; W D T Ward, *Submission* (25 July 1996) at 20.
66. Sch 2 [1]. Section 23E(3) permits a court to receive and consider a VIS only if it complies with the requirements prescribed by or under Part 6 of the *Criminal Procedure Act 1986* (NSW).
67. *Evidence Act 1995* (Cth and NSW) s 135 (although, in view of s 4, this provision does not apply as a matter of course at a sentencing hearing).
68. *Evidence Act 1995* (Cth and NSW) s 136 (although, in view of s 4, this provision does not apply as a matter of course at a sentencing hearing).

VIS. We can see no rational justification for these discriminatory distinctions. It is evident that the terms and effect of the amendments were given inadequate consideration. A number of further points about the legislation may be made. The possibility that as many VIS as there are immediate family members might be produced for compulsory reception is clearly open. Section 23B enables one member of the immediate family to give particulars of the impact of the death on other members of the family who may not agree with that opinion. The court is obliged to receive statements even if there are substantial doubts about their veracity or relevance. The court is directed not to consider that statement in connection with the determination of punishment "unless the court considers that it is appropriate to do so". Since it is clear that the court would not so consider that statement in all events unless it thought it was appropriate, this prohibition adds nothing. The purpose of receiving a VIS is not stated. It is difficult to think of a case where material about the impact of the death upon a family member could be taken into account on sentence without violating the fundamental principles of equal justice to which we have earlier adverted. The implication in s 23C(3) that it might be appropriate to do so is, therefore, an indication that the Parliament does not accept the principle that all lives are of equal value. We cannot think that this was the intention of the amendment but it is difficult to draw any other inference. We are of the firm opinion that the provisions relating to death cases should be repealed.

The victim's option

2.27 Our proposal that it is for the victim to choose whether or not he or she will make a VIS to the sentencing court[69] was supported unanimously in submissions,[70] as was our proposal that no inference (for example, that the offence had little or no impact on the victim) should be drawn from the victim's failure to provide a VIS.[71] Both of these proposals find support in s 23D of the *Criminal Procedure Act 1986* (NSW).[72]

Matters otherwise before the court

2.28 The Discussion Paper, building on legislation in South Australia,[73] proposed that VIS should only be admissible where they furnish the court with particulars that are not already before the court in evidence or in a pre-sentence report.[74] Although this proposal was supported in some submissions,[75] the Commission has decided, on reflection, not to press it. If implemented, it would, potentially, give rise to a great deal of unnecessary argument as to whether VIS (or parts of them) are admissible.[76] In addition, the spirit of Part 6A of the *Criminal Procedure Act 1986* (NSW) would seem

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69. DP 33 at para 11.50. For some of the difficulties which arise where victim participation in the criminal justice system is mandatory, see C Hanna, "No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions" (1996) 109 *Harvard Law Review* 1850.
70. N R Cowdery, *Submission* (17 June 1996) at 7 (Summary), 18 (Response); NSW Council for Civil Liberties, *Submission* (28 June 1996) at 6; D Blakemore, *Submission* (26 June 1996) at 22; Justice Action, *Submission* (2 July 1996) at 2; Victims Advisory Council, *Submission* (10 July 1996) at 2; Victims Rights and Civil Rights Project, *Submission* (19 July 1996) at 11; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 31; W D T Ward, *Submission* (25 July 1996) at 20.
71. N R Cowdery, *Submission* (17 June 1996) at 7 (Summary), 18 (Response); NSW Council for Civil Liberties, *Submission* (28 June 1996) at 6; Justice Action, *Submission* (2 July 1996) at 2; Victims Rights and Civil Rights Project, *Submission* (19 July 1996) at 11. See also M L Sides, *Submission* (24 June 1996) at 75-76.
72. Inserted by *Victims Rights Act 1996* (NSW) Sch 2 [1].
73. *Criminal Law (Sentencing) Act 1988* (SA) s 7(1).
74. DP 33 at paras 11.45-11.47.
75. Confidential, *Submission* (22 May 1996) at 41; Victims Rights and Civil Rights Project, *Submission* (19 July 1996) at 10; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 31.
76. See W D T Ward, *Submission* (25 July 1996) at 21.

to be to permit victims to make VIS irrespective of the material already before the court.[77]

Procedural considerations

2.29 Some legal systems accord victims procedural rights in the criminal justice system. These may include the right to be consulted on, or to veto, the decision to prosecute; the right to be consulted on the acceptance of a plea; the right to make submissions to the sentencing court or parole authorities; and the right to restitution from the offender.[78] In our legal system, victims are not in any sense parties to the criminal proceedings.[79] Nor ought they to be.[80] It is the function of the State to prosecute those accused of crimes. And the State must have control over criminal proceedings.

2.30 The very nature of our legal system means that certain procedural consequences follow. First, it must be the prosecution that tenders VIS at sentencing hearings. The Commission made an express proposal to this effect in DP 33.[81] That proposal was strongly supported in submissions.[82] We do not, however, now make a formal recommendation to this effect since it is implicit in the very nature of our criminal justice system. Secondly, VIS must, in principle, be subject to cross-examination. We make a formal recommendation to this effect simply because the right of cross-examination is a very controversial issue in the case of VIS.[83]

77. N R Cowdery, *Submission* (17 June 1996) at 6 (Summary), 17 (Response). See also D Blakemore, *Submission* (26 June 1996) at 25.
78. See C J Sumner, "Victim Participation in the Criminal Justice System" (1987) 20 *Australia and New Zealand Journal of Criminology* 195.
79. DP 33 at paras 11.1-11.3.
80. See N R Cowdery, *Submission* (17 June 1996) at 19.
81. DP 33 at paras 11.55-11.56.
82. Confidential, *Submission* (22 May 1996) at 41; N R Cowdery, *Submission* (17 June 1996) at 7 (Summary), 18 (Response); Victims Advisory Council, *Submission* (10 July 1996) at 2; Victims Rights and Civil Rights Project, *Submission* (19 July 1996) at 12; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 32; W D T Ward, *Submission* (25 July 1996) at 21.
83. See para 2.35.

2.31 Consideration of the nature of our system has led us to reconsider the proposal which we made in DP 33 that the victim should have the right to request the prosecutor to refrain from presenting the court with details of the injury.[84] We do not persist with this proposal as we agree with the Director of Public Prosecutions[85] and the Victims Advisory Council[86] that the decision as to the material to be presented in relation to the injury (excluding the VIS) should be that of the prosecutor not the victim.

Form of VIS

Recommendation 6
VIS should be signed, or otherwise acknowledged as accurate, by their authors before they are received by the sentencing court.

2.32 The Commission reaffirms this proposal which was made in DP 33[87] and which was strongly supported in submissions.[88]

Authentication of VIS

Recommendation 7
VIS must be tendered in writing and verified on oath.

2.33 With the exception that one submission favoured giving victims the option of making oral VIS,[89] this proposal in DP 33[90] was, again, strongly supported in submissions.[91] The Commission affirms it.

84. DP 33 at para 11.50.
85. N R Cowdery, *Submission* (17 June 1996) at 18 (Response).
86. Victims Advisory Council, *Submission* (10 July 1996) at 2.
87. DP 33 at para 11.54.
88. N R Cowdery, *Submission* (17 June 1996) at 19 (Response) (with the qualification that VIS should *always* be signed); Victims Rights and Civil Rights Project, *Submission* (19 July 1996) at 12; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 32; W D T Ward, *Submission* (25 July 1996) at 20; District Court, Criminal Law Committee, *Submission* (6 August 1996) at 1.

Contents of VIS

Recommendation 8
VIS should address the physical, psychological, social and financial consequences of the offence on the victim.

2.34 This proposal was made in DP 33[92] and the Commission maintains it. It was strongly supported in submissions.[93] With one exception,[94] it was expressly accepted that it is not appropriate for the victim to address the sentence which ought to be imposed.[95]

Cross-examination

Recommendation 9
Authors of VIS should, in principle, always be subject to cross-examination on their contents.

89. D Blakemore, *Submission* (26 June 1996) at 23. Victims Advisory Council, *Submission* (10 July 1996) at 2 left open the possibility that a victim should be able to read in court a written VIS.
90. DP 33 at paras 11.55-11.56.
91. Confidential, *Submission* (22 May 1996) at 41; N R Cowdery, *Submission* (17 June 1996) at 19 (Response); NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 32; W D T Ward, *Submission* (25 July 1996) at 20; Victims Rights and Civil Rights Project, *Submission* (19 July 1996) at 12.
92. DP 33 at paras 11.57-11.58.
93. N R Cowdery, *Submission* (17 June 1996) at 19 (Response) (but with qualifications in homicide cases); Victims Advisory Council, *Submission* (10 July 1996) at 2; Victims Rights and Civil Rights Project, *Submission* (19 July 1996) at 12; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 32; District Court, Criminal Law Committee, *Submission* (6 August 1996) at 1.
94. W D T Ward, *Submission* (25 July 1996) at 21.
95. D Blakemore, *Submission* (26 June 1996) at 25.

2.35 There was very strong support in submissions for the proposal in DP 33[96] that VIS must be subject to cross-examination,[97] the only suggested qualification being that the leave of the court should be required in order to minimise the risk of re-victimisation.[98] In the Commission's view, that risk is avoided by the court's normal discretion to disallow questions in cross-examination which are improper.[99]

Confidentiality

Recommendation 10
In appropriate cases, the court should mark VIS as confidential exhibits or order their non-publication.

2.36 The Director of Public Prosecutions has drawn the Commission's attention to the fact that, on some occasions, copies of VIS have been misused.[100] Clearly, the sensitive nature of material which may be included in VIS requires some provision to be made for the protection of the privacy of their authors and others. It is, therefore, important that, in appropriate cases, the court should either treat VIS as confidential exhibits or order their non-publication. To avoid any doubts, legislation should spell out the power of the courts to do this.

96. DP 33 at para 11.60.
97. Confidential, *Submission* (22 May 1996) at 42; N R Cowdery, *Submission* (17 June 1996) at 7 (Summary), 19 (Response); NSW Council for Civil Liberties, *Submission* (28 June 1996) at 6; D Blakemore, *Submission* (26 June 1996) at 26-27 (with some reservations); Justice Action, *Submission* (2 July 1996) at 2; Victims Rights and Civil Rights Project, *Submission* (19 July 1996) at 12; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 32 (who would extend the right to cross-examine any experts whose opinion forms an annexure to the VIS); Law Society of NSW, *Submission* (19 July 1996) at 46; W D T Ward, *Submission* (25 July 1996) at 20.
98. J L Swanson, *Submission* (1 July 1996) at 2; Victims Advisory Council, *Submission* (10 July 1996) at 3.
99. See *Evidence Act 1995* (Cth and NSW) s 41. See also s 42 (disallowance of leading questions).
100. N R Cowdery, *Submission* (17 June 1996) at 19.

3.
FINES

- INEQUITIES IN COURT-IMPOSED FINES
- FINE ENFORCEMENT AND PENALTIES FOR FINE DEFAULT
- INFRINGEMENT OR PENALTY NOTICES

3.1 The fine is a sentencing option which requires the offender to pay money to the State.[1] Fines may be imposed by a court or by way of an infringement or penalty[2] notice. Courts can impose fines for any summary offence for which a fine is specified as a penalty for that offence[3] and for any indictable offence in addition to, or instead of, any other punishment,[4] including a bond where sentence has been deferred.[5] Fines are also imposed by the police and other agencies through infringement notices. Such notices are traditionally issued for offences of a more regulatory rather than criminal nature, such as parking offences.

3.2 Fines are by far the most utilised sentencing option in New South Wales.[6] They are often the most appropriate means of dealing with minor offences, serving as a salutary reminder that the conduct in question will not be tolerated. Their function is, therefore, essentially deterrent. They are cheap to administer and, incidentally, raise revenue for the State.

3.3 In DP 33 the Commission considered several ways in which the fine system in New South Wales might be improved.[7] Since publication of the Discussion Paper, the *Fines Act 1996* (NSW) has been enacted.[8] This Act consolidates the law relating to fines, in particular, introducing a new system of enforcement mechanisms aimed at reducing the incidence of fine default and ensuring prompt payment of fines.[9] The Commission supports this move towards consolidation and generally endorses the provisions of the Act.

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1. See the definition of "fine" in s 4 of the *Fines Act 1996* (NSW).
2. The *Fines Act 1996* (NSW) uses the expression "penalty notice".
3. Where an indictable offence is dealt with summarily, a fine may be imposed if it is specified as a penalty under the provision empowering the summary court to deal with the matter: see the *Criminal Procedure Act 1986* (NSW) Table I and Table II offences.
4. *Crimes Act 1900* (NSW) s 440AA.
5. *Crimes Act 1900* (NSW) s 440B.
6. For the period 1990-1994, over 50% of persons found guilty at trial in the Local Court and sentenced each year were fined. New South Wales Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 1994* at 16-17. In 1995, 51,447 persons (60% of those found guilty) were fined for principal offences in the Local Court: New South Wales Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 1995* at 16-17.
7. See DP 33 at paras 10.2-10.23.
8. The *Fines Act 1996* (NSW) received Assent on 26 November 1996.
9. *Fines Act 1996* (NSW) Explanatory Note.

3.4 The Commission nevertheless retains some concerns about several aspects of the fine system in New South Wales. These relate to:

- inequities in court-imposed fines;
- fine enforcement and penalties for fine default; and
- regulation and expansion of infringement notices.

INEQUITIES IN COURT-IMPOSED FINES

Recommendation 11
The *Fines Act 1996* (NSW) should be amended so as to retain sentencing courts' discretion to order time to pay.

3.5 A disadvantage of the court-imposed fine is its potentially discriminatory effect on offenders of different financial standing who are required to pay the same amount of money following conviction for offences of similar gravity. The fine system may operate unfairly in two ways. First, a fine for a certain amount of money may represent a much more severe punishment for one offender than for another. Secondly, imposition of a further penalty for fine default may be more likely for an offender who does not have the financial means to pay than for an offender who does. To an extent, these issues reflect endemic social problems which cannot be resolved by simple amendment to the way in which courts impose fines. Moreover, proposals which on their face appear to redress these problems may have consequences which reduce their practical effectiveness.[10]

3.6 Prior to the enactment of the *Fines Act 1996* (NSW), two mechanisms existed to reduce the potential inequities in court-imposed fines. First, the sentencing court was required to take account of the offender's financial

10. See, for example, the day fine, discussed at paras 3.10-3.14.

means in assessing the amount of the fine to be imposed.[11] Secondly, provision existed for the court to allow the offender time to pay.[12] In practice, however, in both fixing an amount and allowing time to pay, it has been submitted that courts generally have not carried out a rigorous examination of an offender's financial status.[13] Even where reference has been expressly made to the details of an offender's financial means by, for example, the offender's legal representative, this has not always been reflected in the final amount imposed by the sentencing court.[14]

3.7 The *Fines Act 1996* (NSW) restates the requirement that an offender's financial means be considered when imposing a fine[15] but abolishes the sentencing court's discretion to allow time to pay.[16] Instead, a fine which is imposed by a court is payable within 28 days from the date of its imposition. The court cannot extend the 28 day time limit.[17] An offender who seeks further time to pay must apply to the registrar of the court which imposed the fine, who has a very general discretion to grant further time to pay or to direct payment of the fine by instalments where it appears expedient to do so.[18] An offender may be required to provide information and supporting documents in relation to the application.[19] There is no right of appeal from the registrar's decision to grant or refuse an application.[20]

11. *Justices Act 1902* (NSW) s 80A; *Crimes Act 1900* (NSW) s 440AB. See also *Budget Nursery Pty Ltd v FCT* (1989) 42 A Crim R 81 (NSW CCA).
12. *Crimes Act 1900* (NSW) s 440AC; *Justices Act 1902* (NSW) s 83(1A).
13. Law Society of NSW, *Submission* (19 July 1996) at 42-43; Legal Aid Commission of NSW, *Consultation* (7 August 1996).
14. Legal Aid Commission of NSW, *Consultation* (7 August 1996).
15. The *Fines Act 1996* (NSW) repeals s 80A of the *Justices Act 1902* (NSW) and s 440AB of the *Crimes Act 1900* (NSW) and replaces them with a similar provision within the *Fines Act 1996* (NSW) requiring consideration by the sentencing court of an offender's means to pay: see *Fines Act 1996* (NSW) s 6, Sch 2.5 [3] and 2.9 [8].
16. *Fines Act 1996* (NSW) s 7(1), and Sch 2.5 [4] repealing *Crimes Act 1900* (NSW) s 440AC, and *Justices Act 1902* (NSW) s 83.
17. *Fines Act 1996* (NSW) s 7(1) and (3). The court does have a discretion under s 7(3)(a) to order payment before 28 days, but must state special reasons for doing so.
18. *Fines Act 1996* (NSW) s 10.
19. *Fines Act 1996* (NSW) s 11(3).
20. *Fines Act 1996* (NSW) s 11(5).

3.8 In the Commission's view, it is unnecessarily arbitrary and bureaucratic to fix a general 28 day time limit for the payment of fines. It is also improper to remove the discretion to order time to pay from the sentencing court and vest it instead in the court registrar, with no opportunity to appeal from the registrar's decision. Moreover, the procedure may have adverse practical repercussions. First, there is the inevitable delay involved in requiring offenders to initiate applications to the registrar rather than have the matter heard at the same time as the sentencing court imposes the fine. Secondly, the incidence of fine default will increase with the arbitrary nature of the time limit. The Commission therefore recommends that these provisions be removed from the *Fines Act 1996* (NSW) and that sentencing courts retain the discretion to order time to pay.

3.9 The Commission has considered two ways in which inequities in court-imposed fines may be reduced, namely:

- the day fine; and
- the fine option order.

The day fine

3.10 Under the day-fine system, the sentencing court determines the amount of the fine to be imposed in an individual case on the basis of a specified number of day-fine units, the amount of each unit being calculated by reference to the offender's daily income.[21] Its object is to provide a more effective means of tailoring the fine to fit the individual offender's income.

3.11 Submissions gave only limited support to the introduction of the day fine.[22] While recognising that the current system may give rise to inequities, the majority of submissions considered that there were inherent difficulties in implementing a day-fine system in New South Wales. For example, problems would arise in trying to formulate a scheme to take account of those who are asset-rich but income-poor.[23] It was also argued that the effect of the system may be to reduce consistency in sentencing in terms of the nature and gravity of the offence, with an additional problem that those with higher incomes may be more likely to be fined than those with lower or no incomes.[24]

3.12 A significant practical objection to the day-fine system was that it would require too much time and money to assess and verify each person's income or financial standing.[25] In response, self-reporting was suggested as a simple mode of assessment.[26] The offender would be required to complete a

21. See DP 33 at paras 10.6-10.7. See Australian Law Reform Commission, *Sentencing: Penalties* (DP 30, 1987) at para 25; H Thornstedt, "The Day Fine System in Sweden" [1975] *Criminal Law Review* 307.
22. Only one submission expressed unqualified support for its introduction: see M Dodson, *Submission* (26 June 1996) at 4, and one considered it *may* be appropriate: see Law Society of NSW, *Submission* (19 July 1996) at 42-43.
23. M L Sides and Bar Association, *Submission* (24 June 1996) at 70.
24. NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 28-29.
25. W D T Ward, *Submission* (25 July 1996) at 19; M L Sides and Bar Association, *Submission* (24 June 1996) at 70.
26. Analogous to self-assessment in taxation returns: Law Society of NSW, *Submission* (19 July 1996) at 43.

standard form as evidence of income, with sanctions available for wilful misstatement of finances. A similar procedure is already used for declaring income in applications for legal aid.[27] A self-reporting procedure may be a relatively efficient way of assessing income. However, it will not always be a true representation of an offender's financial means and may result in white collar criminals being able to conceal their financial position from the courts.

3.13 It is a compelling objection to the court-imposed fine if it operates as a harsher penalty for offenders with fewer resources, with the potential for an increase in the incidence of fine default if offenders are obliged to pay fines which are beyond their financial means. One advantage of the day fine is that it requires the sentencing court to calculate the fine according to a formula which is directly based on the offender's income. Other jurisdictions have expressed approval of the day-fine system, at least in theory, because of this advantage.[28]

3.14 Despite these potential benefits, the Commission has concluded that a day-fine system should not be introduced in New South Wales. The day fine places too great a restriction on the discretion of the sentencing court to impose the sentence which is most appropriate given all the circumstances of an individual case. It may also prove too complex and consequently unworkable in practice, as the experience of other jurisdictions suggests.[29]

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27. Applicants for legal aid must fill in a standard form and, usually, produce some verification of income, such as a pay slip or receipt for social security payment: Legal Aid Commission of NSW, *Consultation* (7 August 1996). The practical implications of this suggestion would need to be considered, for example, assistance for people with literacy or language difficulties would be necessary. Confidentiality of disclosures would also need to be considered. While offenders' privacy is better protected by reliance on written information, it may be breached by disclosure in open court: Law Society of NSW, *Submission* (19 July 1996) at 43.

28. See for example Australian Law Reform Commission, *Sentencing of Federal Offenders* (ALRC 15, 1980) at 235-236; Western Australia, *Report of the Committee of Inquiry into the Rate of Imprisonment*, ("the Dixon Report") (Perth, 1981) at 169; and Great Britain, Advisory Council on the Penal System, *Report on Non-Custodial and Semi-Custodial Penalties* (HMSO, London, 1970) at paras 20-25, quoted in the Dixon Report at 166-169.

29. In the United Kingdom, the "unit-fine system" was introduced in 1991: see *Criminal Justice Act 1991* (UK) s 18. Less than a year after its introduction, the unit fine was abolished: see *Criminal Justice Act 1993* (UK) s 65. It was considered to be over-complicated, mechanistic, and to interfere with the sentencing court's discretion to impose appropriate fines in individual cases:

Moreover, it may be too time-consuming for courts to make an accurate assessment of the offender's financial means.

Fine option orders

Recommendation 12
Fine option orders should be available in New South Wales.

3.15 A fine option order, such as exists in Queensland,[30] permits the offender to apply to the court, at the time of the imposition of a fine or thereafter, for an order that the offender be allowed to work off the fine by way of community service. The number of hours of community service is determined by the court when imposing the fine option order.[31] The application for a fine option order must be supported by a statutory declaration stating the offender's income, assets, and liabilities. The court must consider whether the offender is unable to pay the fine or whether the offender or the offender's family would suffer hardship from paying the fine.[32] If the offender fails to comply with the fine option order, the court has a discretion to revoke the order and reinstate the original fine.[33] The object of this scheme is to provide for an alternative means of payment of a fine for those offenders who have limited financial resources. The Probation and

see House of Commons, Standing Committee B, col 240, June 17, 1993, cited in *Current Law: Statutes Annotated* (Sweet & Maxwell, London, 1993) c 6-119. See also "Editorial: The Good, the Bad, and the Unacceptable" (1993) 143 *New Law Journal* 425, and Lord Justice Taylor, "Howard's Production Line Justice" *The Times*, 23 May 1996 at 20. The day-fine system was also rejected by the Australian Law Reform Commission primarily because it would be unworkable: see ALRC, *Sentencing* (ALRC 44, 1988) at para 114.

30. See *Penalties and Sentences Act 1992* (Qld) Part 4 Div 2.
31. *Penalties and Sentences Act 1992* (Qld) s 66(b).
32. *Penalties and Sentences Act 1992* (Qld) s 58(a).
33. *Penalties and Sentences Act 1992* (Qld) s 74(4)(b) and 78.

Parole Officers' Association NSW submitted that the Commission should consider the adoption of the scheme in New South Wales.[34]

3.16 Currently in New South Wales an offender may apply to work off a fine by way of community service, but only after there has been default in payment,[35] and provided community service is available in the offender's local area. The *Fines Act 1996* (NSW) will also permit fines to be worked off by way of community service in certain circumstances, but only after all other non-custodial sanctions have been exhausted.[36] There is a general power under the *Fines Act 1996* (NSW) to "write off" or cancel unpaid fines where a fine defaulter does not have sufficient means to pay and is not suitable for any of the non-custodial enforcement procedures.[37] It is not clear at this stage how this power is to be exercised.[38] Moreover, it does not appear to assist those fine defaulters who are able to satisfy their fines by community service work but who must first default in payment and undergo all other non-custodial enforcement procedures before community service is made available. Under the fine option order scheme, however, the offender may apply for community service at the time the fine is imposed. We see significant advantages in this procedure. It may reduce inequities by offering offenders with limited finances an alternative means of working off the fine by way of community service. It may avoid hardship in individual cases caused by intermediate sanctions, for example cancellation of a driver's licence.[39] It also has the advantage of being simpler and less time-consuming than the present procedure, which requires the offender to default before alternative options are invoked. Consequently, fine option orders may be more effective in diverting from prison those offenders who do not deliberately default in payment, but who are disorganised and have difficulty understanding the way the system works in order to make an application for time to pay after default. Another advantage of this system is that the application for a fine option order may be heard relatively quickly if the

34. Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 8.
35. *Justices Act 1902* (NSW) s 89C(1); *Community Service Orders Act 1979* (NSW) s 26A.
36. *Fines Act 1996* (NSW) s 58(d) and 78. See para 3.22.
37. *Fines Act 1996* (NSW) s 101(2).
38. The State Debt Recovery Office is to exercise the power to write off fines in accordance with guidelines: see *Fines Act 1996* (NSW) s 101(1) and 120. These guidelines have not yet been promulgated.
39. See paras 3.27-3.32.

offender provides the court with a statutory declaration stating all significant assets and sources of financial income.[40]

3.17 A disadvantage of the fine option order system is that there may be a loss of revenue ordinarily generated from payment of fines, and increased costs in administering community service. This should be balanced, however, against the lower costs of imposing sanctions for fine default if fine option orders are successful in reducing the incidence of fine default. Moreover, application of a strict means test should ensure that only those offenders without the resources to pay are eligible for fine option orders.

3.18 The fine option order system has also been criticised for what is seen as administrative interference with the court's sentence where a court clerk, rather than the court, is empowered to determine applications for fine option orders.[41] For example, fine option orders might be integrated into the new procedures under the *Fines Act 1996* (NSW) by providing for registrars to hear applications for fine option orders in a similar procedure to the determination of applications for further time to pay.[42] This would permit administrative interference with the sentence originally imposed by the court. In the Commission's view, this criticism can be overcome if it is the sentencing court itself which determines whether to allow the fine to be paid off by way of community service, rather than the registrar or a court clerk.

3.19 There would also be practical concerns about the introduction of a fine option order scheme, for example, the availability of sufficient community service placements, and the allocation of resources sufficient to meet the demands of supervising an increased number of community service orders. The suitability of an offender to perform community service work, and the availability of such work in the offender's local area would need to be assessed by the sentencing court in determining whether to grant a fine option order.

3.20 The Commission recommends that fine option orders be introduced in New South Wales. They are an effective means of reducing potential inequities in the fine system. They may reduce the incidence of fine default

40. It would, of course, be in the offender's interests to come to court with such a declaration if it is likely that a fine will be imposed.
41. Australian Law Reform Commission, *Sentencing* (ALRC 44, 1988) at para 115.
42. See para 3.29.

and permit the fine system to operate more efficiently. They may also avoid hardship in individual cases. They are more effective and less severe than the complicated procedures under the *Fines Act 1996* (NSW).

FINE ENFORCEMENT AND PENALTIES FOR FINE DEFAULT

3.21 Fine default has generated much public debate and continues to be a politically sensitive issue.[43] A high incidence of fine default may have a negative impact on the use made of fines as a sentencing option, as well as on public perceptions of the fine as an effective sanction. Non-payment of fines also represents a significant loss of revenue for the State. In DP 33 the Commission considered the penalties which are presently available for non-payment of both court-imposed fines and infringement notices. We noted that although imprisonment remains the final sanction for non-payment of fines in New South Wales, there are now several intermediate penalties for fine defaulters before a term of imprisonment is imposed.[44] We invited submissions on what sanctions should be used for non-payment of fines and, in particular, whether imprisonment should remain the sanction of last resort. Our recommendations take into account matters raised in submissions, in light of the new enforcement procedures under the *Fines Act 1996* (NSW).

Fine enforcement under the Fines Act 1996 (NSW)

3.22 The main object of the *Fines Act 1996* (NSW) is to introduce new enforcement procedures to reduce the incidence of non-payment of fines.[45] The Act is a response to the high incidence of fine default in New South Wales and the steady increase in the number of fine defaulters imprisoned in the last five years despite the introduction of intermediate non-custodial

43. See, for example, Parliament of New South Wales, *Report of the Inquiry Into the Central Industrial Prison Dated August 1988 by His Honour A G Muir QC* (Government Printer, 1988) 3 Volumes, which was an inquiry into the assault of Jamie Partlic while detained in custody as a fine defaulter. For more recent discussion see, for example, R Jochelson, *Fine Default: Enforcing Fine Payment* (NSW Bureau of Crime Statistics and Research, 1995) and media reports such as K Gosman, "Fine Defaulters Go Back to Bay" *Sunday Telegraph* (26 May 1996) at 29.
44. DP 33 at paras 10.9-10.10.
45. See *Fines Bill 1996* Explanatory Note.

measures for dealing with fine default.[46] It aims to provide strict enforcement procedures to ensure that people who are fined can reasonably expect to be punished if they do not pay.[47] Central to these new procedures is the establishment of the State Debt Recovery Registry ("SDRR"). The SDRR will be the primary body responsible for the enforcement of both court-imposed fines and infringement notices (called "penalty notices" in the Act). The Act provides for the following steps to be taken following default in payment of a fine:[48]

46. There was a total increase of 51.5 % in the number of fine defaulters received into custody from the first twelve months to the last twelve months of the period between 1990 and 1995, although the actual prison population of fine defaulters in this period decreased. It has been suggested that this decrease represents a reduction in the average time served by fine defaulters, due to the fine cut-out rate for time spent in prison increasing from $50 to $100 per day. It has also been suggested that the rise in the cut-out rate may have contributed to the increase in fine defaulter prison receptions, as offenders may be more willing to settle their fines by spending a short period in prison. See New South Wales Bureau of Crime Statistics and Research *Key Trends in Crime and Justice, New South Wales 1995* at 49.

47. It was argued by R Jochelson in *Fine Default: Enforcing Fine Payment* (NSW Bureau of Crime Statistics and Research, Sydney, 1995) at 5, that the increase in the prison population of fine defaulters despite the wider availability of alternative penalties indicates that the problem of fine default lies more in an ineffective fine enforcement system rather than in an inability of fine defaulters to pay. Jochelson submitted that the problem of fine default under the existing enforcement procedures may stem from the fact that a large number of fine defaulters do not expect to be punished.

48. See *Fines Act 1996* (NSW) s 58.

- **Enforcement order**
  An enforcement order is made by the SDRR following non-payment of a fine or penalty notice within the time specified for payment.[49] Notice of the enforcement order is served on the fine defaulter stating that enforcement action will be taken unless the fine is paid by the date specified in the notice. In addition to the amount owing under the fine or penalty notice, enforcement costs may be payable by the fine defaulter under the enforcement order.[50]

- **Suspension and cancellation of driver's licence or vehicle registration**
  If payment is not made by the date specified in the enforcement order, any driver's licence held by the fine defaulter is suspended.[51] This sanction applies to fines for traffic and non-traffic offences alike. If the fine is not paid within six months from the time of suspension, the licence is cancelled. If the fine defaulter does not hold a driver's licence but is the registered owner of a vehicle, registration for that vehicle is cancelled.[52]

- **Civil action**
  If the fine defaulter does not have a driver's licence or vehicle registration, or if the fine remains unpaid six months after the licence or registration is suspended, civil action is taken against the fine defaulter. The SDRR may make a property seizure order, an order to garnishee debts, wages or salary owing to the fine defaulter, or may register a charge on land owned by the fine defaulter.

- **Community service order**
  If civil action has not been, or is not likely to be, successful in obtaining payment of the fine, the SDRR may serve a community

49. In relation to penalty notices, a penalty reminder notice is served on the fine defaulter before an enforcement order is made. The penalty reminder notice specifies a date for payment which must be at least 21 days after the notice has been served on the defaulter. If the penalty is not paid by the date specified in the reminder notice, an enforcement order may be made: see *Fines Act 1996* (NSW) Part 3 Div 3 and 4.
50. *Fines Act 1996* (NSW) s 16 and 44.
51. *Fines Act 1996* (NSW) s 66.
52. *Fines Act 1996* (NSW) s 67(1). There does not appear to be any provision to suspend vehicle registration before cancellation.

service order on the fine defaulter. The SDRR has a discretion to write off unpaid fines for fine defaulters who are not suitable to perform work under a community service order and who do not otherwise have the means to pay the fine.[53]

- **Imprisonment**
  If the fine defaulter does not comply with the community service order, the order may be revoked and a warrant of commitment issued for the imprisonment of the fine defaulter. The fine defaulter may apply to serve the term of imprisonment by way of periodic detention.

Imprisonment as a final sanction for fine default

3.23 Both the existing system for fine enforcement and the new procedures under the *Fines Act 1996* (NSW) anticipate that imprisonment will be used as the final sanction for fine default. This is a matter of controversy, at least where the default is not wilful.[54] It is also an expensive means of dealing with fine default in terms of prison costs. In DP 33 the Commission concluded that it is necessary to retain imprisonment as the final sanction in order to provide a sanction against wilful default.[55]

3.24 Submissions generally supported the view that imprisonment is necessary as a final sanction for fine default,[56] primarily for wilful default.[57] One submission proposed that imprisonment should be expressly abolished as a final sanction for non-wilful default.[58] Another suggested that

53. *Fines Act 1996* (NSW) s 101(2). See para 3.16.
54. See, for example, Parliament of New South Wales, *Report of the Inquiry into the Central Industrial Prison Dated August 1988 by His Honour A G Muir QC* (Government Printer, 1988) 3 Volumes; ALRC, *Sentencing* (ALRC 44, 1988) at para 144. See also DP 33 at para 10.8.
55. DP 33 at para 10.12.
56. Confidential, *Submission* (22 May 1996) at 39; W D T Ward, *Submission* (25 July 1996) at 19; D Blakemore, *Submission* (26 June 1996) at 18; Department of Corrective Services, *Submission* (15 July 1996) at 31; M L Sides and Bar Association, *Submission* (24 June 1996) at 70.
57. W D T Ward, *Submission* (25 July 1996) at 19; Department of Corrective Services, *Submission* (15 July 1996) at 31; M L Sides and Bar Association, *Submission* (24 June 1996) at 70.
58. M Dodson, *Submission* (26 June 1996) at 4.

imprisonment should be retained to give offenders the opportunity of choosing to satisfy their fines in this way, but that otherwise imprisonment is an inappropriate sanction for fine default.[59]

3.25 In the Commission's view, it is inappropriate that people should be imprisoned simply because they are not able to pay their fines. However, imprisonment is a necessary sanction against those who wilfully refuse to pay their fines, and we therefore support its retention as the final sanction for fine default. Nonetheless, a wide range of alternative non-custodial penalties should also be available as a means of ensuring that imprisonment is used only as the final sanction. The Commission is also firmly of the view that persons who are fined should not have the option of making the bare election to satisfy or "cut out" their fines by serving a specified term in prison.

59. Law Society of NSW, *Submission* (19 July 1996) at 42.

Alternative sanctions to imprisonment for fine default

3.26 A range of options other than imprisonment has been available in New South Wales for fine defaulters.[60] Similarly, the *Fines Act 1996* (NSW) sets out a series of intermediate actions which can be taken against a fine defaulter to enforce payment before a warrant for commitment is issued.[61] Submissions supported the wider availability of alternative sanctions for fine default as a means of ensuring that imprisonment is used only as the final sanction for wilful default.[62] We here consider three of these options:

- cancellation of driver's licence or vehicle registration;
- placing a charge on the defaulter's property; and
- use of home detention.

60. These include periodic detention, community service, civil enforcement of the debt, and cancellation of drivers' licences or vehicle registration for the non-payment of traffic and parking fines. See generally *Justices Act 1902* (NSW) s 86A-95. See also A Freiberg and R Fox, *Enforcement of Fines and Monetary Penalties: Working Paper* (National Road Transport Commission, Melbourne, November 1994).
61. See para 3.22.
62. W D T Ward, *Submission* (25 July 1996) at 19; Law Society of NSW, *Submission* (19 July 1996) at 42; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 28; Department of Corrective Services, *Submission* (15 July 1996) at 31; M L Sides and Bar Association, *Submission* (24 June 1996) at 70.

Cancellation of driver's licence or vehicle registration

Recommendation 13
The *Fines Act 1996* (NSW) should provide that cancellation of the defaulter's driver's licence or vehicle registration should be a sanction for fine default in all cases, subject to the defaulter being allowed to regain his or her licence or registration upon part-payment of the fine on condition that he or she continue to pay off the fine by instalments.

3.27 Where the person possesses a driver's licence or registered vehicle, fine default in relation to traffic offences is currently dealt with by way of cancellation of the defaulter's driver's licence or vehicle registration.[63] In DP 33 the Commission considered a proposal to extend this procedure to fine default for non-traffic offences. We expressed some doubt about the proposal's effectiveness on the basis that it might simply lead to an increase in the number of people driving while unlicensed or driving unregistered vehicles.[64] However, the *Fines Act 1996* (NSW) has followed this proposal by making general provision for the suspension and cancellation of a fine defaulter's driver's licence and vehicle registration whether the fine relates to a traffic or a non-traffic offence.[65]

3.28 Submissions gave very limited support to expansion of the procedure for cancellation of licences and vehicle registration.[66] Some expressed concern that the cancellation of a person's licence or vehicle registration for fine default may simply result in greater hardship in individual cases than was intended in the original sentence, and may, in fact, be counterproductive

63. *Traffic Act 1909* (NSW) s 18C.
64. DP 33 at para 10.17.
65. *Fines Act 1996* (NSW) s 66 and 67. See para 3.22.
66. Only one submission gave express support to the proposal: see Department of Corrective Services, *Submission* (15 July 1996) at 31. One submission noted that cancellation of a driver's licence was an appropriate penalty in its own right for many offences involving motor vehicles (such as car theft, and "road rage") beyond those for which it is presently available: see N J H Milson, *Submission* (3 July 1996) at 11.

in encouraging defaulters to pay their fines.[67] This is particularly so for the person whose livelihood depends on being able to drive.

3.29 It is not clear to what extent the *Fines Act 1996* (NSW) protects against undue hardship arising from its new procedures for suspension and cancellation of licence and vehicle registration. It makes general provision to allow a fine defaulter to apply to the SDRR for further time to pay at any stage after an enforcement order is made and before a community service order is issued. In granting an application, the SDRR may extend the time for payment of the whole fine, or may allow the fine to be paid by instalments. If the application is granted, any further enforcement action is suspended.[68] It may be possible for a fine defaulter whose licence has been suspended to apply to pay off the fine by instalments in order to avoid cancellation of the licence. However, it does not appear that this will have the effect of lifting the suspension of the defaulter's licence if an order for suspension has already been made.

3.30 The Commission retains some doubts as to whether the new procedures for suspension and cancellation of licences and vehicle registration under the *Fines Act 1996* (NSW) will be successful in enforcing payment of fines. In our view, these procedures could simply promote the use of unregistered vehicles or result in a greater incidence of unlicensed drivers.[69]

3.31 In response to this concern, the Legal Aid Commission suggested that fine defaulters should be allowed to regain their licence or vehicle registration upon part-payment of their fines and on condition that further

67. Legal Aid Commission of NSW, *Submission* (18 July 1996) at 8; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 28.
68. *Fines Act 1996* (NSW) s 100(5).
69. For the year ended June 1995, it was estimated that less than 4% of the driving population of NSW was unlicensed. A 1992 survey established that about 2% of vehicles operating in NSW were unregistered, although 45.6% of these had their registration renewed in one month or less after registration expiry, and 70% were renewed within 90 days: see Roads and Traffic Authority, *Annual Report 1994/95* at 24-25. The *Fines Act 1996* (NSW) provides some protection to third parties in anticipation of defaulters driving whilst unlicensed or driving unregistered vehicles. Section 70 states that a vehicle insurance policy is not terminated by the cancellation of the registration of a vehicle or the suspension or cancellation of a driver's licence under Part 4 Div 3 of the *Fines Act 1996* (NSW).

payments are made by instalments.[70] At present, it seems that the fine must be paid in full before a licence or vehicle registration can be regained.[71] This is inconsistent with the policy for payment of non-traffic offences, which allows for offenders to apply to pay by instalment.[72] Allowing offenders to regain their licences or registration upon part-payment may avoid greater hardship for offenders whose livelihood depends on being able to drive, and may also reduce the incidence of unlicensed drivers or unregistered vehicles.

3.32 On balance, the Commission is of the view that cancellation of a fine defaulter's driver's licence or vehicle registration should be available as a mechanism of fine enforcement regardless of the offence for which the fine was imposed. However, there needs to be greater provision to protect against undue hardship in particular cases, and to mitigate the capricious effects of the law. Allowing offenders to pay by instalments is a sensible safeguard. It may also be more effective in encouraging defaulters to pay the fine rather than to drive while unlicensed. The *Fines Act 1996* (NSW) does not appear to permit a fine defaulter to regain his or her licence and vehicle registration upon part-payment of the fine. The Commission therefore recommends that there should be express statutory provision to allow fine defaulters to regain their licences and registration upon part-payment of their fines, on the condition that they continue to pay off the fines by instalments.

Placing a charge on the defaulter's property

Recommendation 14
Provision should be made for a charge to be placed on a fine defaulter's property where there is a refined system for registration of interests in the property.

70. Legal Aid Commission of NSW, *Submission* (18 July 1996) at 8.
71. See Legal Aid Commission of NSW, *Submission* (18 July 1996) at 8; *Roads and Traffic Officers Policy Manual* at para 4.41.
72. *Justices Act 1902* (NSW) s 83(1A).

3.33 In DP 33 the Commission proposed that a procedure for placing a charge over a fine defaulter's property should be introduced as an additional non-custodial penalty for fine default.[73]

3.34 Submissions generally supported this proposal in so far as it was a preferable sanction to imprisonment.[74] Some expressed reservations as to the practicability of such a procedure, suggesting, for example that it may only be efficient where the defaulter owns a significant asset such as a vehicle or real estate, where a refined system of registration exists for that particular type of property,[75] and where the amount of the unpaid fine would justify the expense of registering the charge.[76] It was also suggested that the overall value of the defaulter's personal property should be taken into account before such a penalty is imposed.[77]

3.35 The *Fines Act 1996* (NSW) has adopted this approach by providing for a charge to be placed over property owned by a fine defaulter.[78] This procedure is restricted by the Act to charges over land in relation to non-payment of fines which exceed $1,000. The charge operates as a proprietary interest and is subject to ordinary legal principles relating to priorities of interests in land.

3.36 The Commission supports this provision as offering an additional alternative sanction to imprisonment for fine default. However, we recommend that the procedure be extended to cover forms of property other than land over which a charge could be placed, provided that there is a refined system of registration of interests in the form of property. For

73. DP 33 at para 10.18.
74. Legal Aid Commission of NSW, *Submission* (18 July 1996) at 18; J L Swanson, *Submission* (1 July 1996) at 2; N R Cowdery, *Submission* (17 June 1996) at 5 and 15. The use of civil enforcement instead of imprisonment wherever possible was supported, on the condition that any dependent children could be adequately provided for: see Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 8. The proposal was expressly rejected by W D T Ward, *Submission* (25 July 1996) at 19.
75. For example, the Land Titles Office and the Register of Encumbered Vehicles would be satisfactory, but registration systems for vessels and aircraft are more cumbersome and therefore less useful: N R Cowdery, *Submission* (17 June 1996) at 15.
76. N R Cowdery, *Submission* (17 June 1996) at 15.
77. Legal Aid Commission of NSW, *Submission* (18 July 1996) at 18.
78. *Fines Act 1996* (NSW) s 74.

example, a charge could be imposed on a motor vehicle belonging to the fine defaulter and placed on the Register of Encumbered Vehicles (REVS). There may be many fine defaulters who do not own land but own a motor vehicle. Extension of this procedure to motor vehicles should ensure the wider availability of this sanction for fine default.

Use of home detention

3.37 The *Home Detention Act 1996* (NSW) will make this non-custodial sanction more widely available in New South Wales.[79] The Commission does not, however, consider home detention to be an appropriate sanction for fine default. The home detention scheme aims to provide close supervision of offenders in an attempt to divert them from the prison system and reduce the risk of recidivism. Fine defaulters, who are likely to be sentenced to very short terms of detention, will not generally benefit from the supervisory and rehabilitative aspects of home detention. In addition, application of the home detention scheme to fine defaulters may simply encourage a culture of non-compliance as fine defaulters take advantage of the scheme to avoid paying their fines.

Other issues in relation to penalties for fine default

3.38 Submissions raised the following additional issues in relation to penalties for fine default:

- provision for retrospective cutting out of fines while in custody; and
- issuing warrants for fine default in respect of traffic offences.

Retrospective cutting out of a fine while in custody

3.39 At present, where fine defaulters are placed in custody for other offences, there is no provision for them to gain credit for that time in custody in satisfaction of their fines unless a warrant of commitment has already been issued and they are aware of the existence of the warrant when in custody. Similarly, the *Fines Act 1996* (NSW) makes no provision to allow fine defaulters to cut out their fines other than pursuant to the issue of a warrant

79. See paras 7.4-7.6.

for commitment by the SDRR.[80] The Law Society of New South Wales submitted that fine defaulters should be given credit for time spent in custody for another offence even where a warrant has not yet been issued for fine default in order to cut out outstanding fines.[81]

3.40 In principle, the Commission does not support the practice of allowing fine defaulters to cut out their fines by electing to spend a specified period of time in prison.[82] Nor can we see any rational basis for allowing them to cut out their fines retrospectively.

Issuing warrants for traffic offence fine default

3.41 The Legal Aid Commission of New South Wales raised a related issue regarding fine defaulters whose drivers' licences or vehicle registration have been cancelled as a result of non-payment of a fine for a traffic offence. It drew attention to the situation that when these fine defaulters are placed in custody for other offences, it is not the practice to issue a warrant of commitment for non-payment of the traffic fine, although no legislative prohibition prevents it.[83] As a consequence, these offenders are not able to cut out their fines while in prison. It was proposed that the law should be amended to ensure that a warrant can be obtained on the application of a person already in custody for non-payment of fines relating to traffic offences.[84]

3.42 It seems that the *Fines Act 1996* (NSW) only permits a warrant to be issued by the SDRR upon revocation of a community service order for fine default.[85] It would appear, therefore, that under the Act a fine defaulter would not be able to apply for a warrant in order to satisfy a fine while serving time in custody for another offence. Again, the Commission can see no reason

80. *Fines Act 1996* (NSW) s 87, 90, 93 and 94. As a limited exception to this, the Act permits a fine defaulter who is subject to a CSO to satisfy the order if he or she is imprisoned during all or any part of the period in which the order is in force: see *Fines Act 1996* (NSW) s 83(1).
81. Law Society of NSW, *Submission* (19 July 1996) at 42.
82. See para 3.25.
83. *Justices Act 1902* (NSW) s 87(4) provides that a warrant of commitment may not be issued in relation to a fine for a traffic offence without an application being made by the offender to an authorised justice.
84. Legal Aid Commission of NSW, *Submission* (18 July 1996) at 8-9.
85. *Fines Act 1996* (NSW) s 86.

why offenders should be able to cut out their fines for time served in custody for other offences. While we recognise that it may often be difficult for fine defaulters to pay their fines after being released from prison, we consider that in these circumstances it is preferable to allow them to pay by instalments or to work off their fines by way of community service.[86]

INFRINGEMENT OR PENALTY NOTICES

Recommendation 15
Legislation should regulate the use of infringement notices in New South Wales.

3.43 Infringement or penalty notices, or "on the spot fines", allow offenders to discharge liability in relation to an offence by payment of a specified sum. They have typically been used for less serious offences of a regulatory rather than criminal nature, such as parking and speeding offences. Their use in Australia has expanded as a result of a number of factors.[87] Recent initiatives in both Australia and overseas have supported the expansion of infringement notices to cover a wider range of offences, including offences which are traditionally seen to be of a more criminal than regulatory nature.[88] These

86. See para 3.16.

87. See R Fox, *Criminal Justice on the Spot, Infringement Penalties in Victoria* (Australian Institute of Criminology, Canberra, 1995) at para 1.1.5.

88. For example, the Penalty Notices Working Party of the Attorney General's Department (NSW) is currently considering expanding the power to impose infringement notices to a wider range of offences, possibly under a single Infringement Act. Since 1986 police in South Australia have had a discretion to issue an expiation (infringement) notice instead of prosecuting possession of small amounts of cannabis: see *Controlled Substances Act 1984* (SA) s 45a, and Fox (1995) at 38-39. The *Expiation of Offences Act 1987* (SA) extended expiation notices to offences under a further 18 Acts. An offence notice scheme with on the spot fines for offences such as indecent exposure and offensive behaviour was proposed for the ACT: see Australian Capital Territory Legislative Assembly, *Report No 1 of the Standing Committee on Legal Affairs: Crimes (Amendment) Bill 1993* (Canberra, 1993). The ALRC recommended an infringement notice scheme for minor offences: ALRC, *Multiculturalism and the Law* (ALRC 57, 1992) at Ch 9. Overseas, the

initiatives recognise the advantages of using infringement notices to divert minor offenders from the court system and from the trauma, stigma and expense usually associated with criminal prosecution.

3.44 In DP 33 we invited comment on the desirability of expanding the use of infringement notices in New South Wales, and of introducing legislation to regulate infringement offences with greater precision.[89] Details of the model legislation drafted by Professor Richard Fox were presented for consideration. The salient features of this legislation include:[90]

- infringement notices should be available for offences triable summarily;

- offenders should be notified that they can elect to go to court to contest the accusation;

- the procedure for disposing of the matter in court should be by way of hand-up brief; and

Contraventions Act 1992 (Can) created a ticketing scheme for minor regulatory offences: see Law Reform Commission of Canada, *Classification of Offences, Working Paper No 54* (LRC, Ottawa, 1986) and Fox (1995) at 255-259.

89. DP 33 at paras 10.19-10.23.

90. DP 33 at para 10.22; R Fox, *Infringement Notices: Time for Reform?* (Australian Institute of Criminology, Trends and Issues, No 50, November 1995) at 6.

- the police and other public authorities who administer the infringement notice scheme should be given a discretion to issue a caution rather than automatically issuing an infringement notice.

3.45 Submissions generally supported the introduction of a single Infringement Act and endorsed Fox's model legislation.[91] Those submissions which cautioned against the use of infringement notices made reference to the particularly detrimental effect that these can have on specific groups of people.[92]

3.46 Submissions gave consideration to the criteria which should govern the classification of offences as infringement offences and the procedures relating to them. It was submitted that legislation should allow for infringement notices to be available for summary offences,[93] or for all offences for which imprisonment is not an available penalty as well as those offences, such as offensive behaviour and possession of a prohibited drug, where a fine is the usual penalty for a first offence.[94] As regards the procedure for hearing the matter where the person elects to contest the infringement notice in court, it was considered unsuitable for the court to dispose of the matter by way of a hand-up brief, as proposed in Fox's model legislation. It was submitted that reliance on written material for the prosecution and the defence to state their case would disadvantage offenders who are illiterate or who have difficulties with English.[95]

3.47 The *Fines Act 1996* (NSW) regulates the infringement notice system to a limited extent. It provides for a uniform procedure for dealing with the enforcement of infringement notices (referred to in the Act as "penalty

91. Law Society of NSW, *Submission* (19 July 1996) at 42; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 29; M L Sides and Bar Association, *Submission* (24 June 1996) at 71.
92. M Dodson, *Submission* (26 June 1996) at 4; M L Sides and Bar Association, *Submission* (24 June 1996) at 72. Strategies for assisting offenders to have access to interpreter services was seen as important: see M L Sides and Bar Association, *Submission* (24 June 1996) at 72.
93. M L Sides and Bar Association, *Submission* (24 June 1996) at 71-72.
94. Law Society of NSW, *Submission* (19 July 1996) at 44. In relation to juvenile offenders, it was submitted that infringement notices should only be available for offences for which imprisonment is not an available penalty.
95. Law Society of NSW, *Submission* (19 July 1996) at 43; M L Sides and Bar Association, *Submission* (24 June 1996) at 72.

notices").[96] It contains a definition of "penalty notice" in terms of a notice issued under the statutory powers listed in Schedule 1 of the Act.[97] These statutory powers do not expand the use of infringement notices to a wider range of offences than currently exists, although there is provision for future expansion through the addition of other powers by regulation. The Act does not appear to prohibit the issue of infringement notices under powers not listed in Schedule 1, but simply does not apply to such infringement notices.[98]

3.48 The Commission recommends that the power to issue infringement notices and the procedures for enforcing them should be regulated by uniform legislation. This could be achieved either by the introduction of a single Infringement Act, or by amending the *Fines Act 1996* (NSW) to prohibit the issue of infringement notices other than in accordance with its provisions.

3.49 Whether to expand the use of infringement notices to cover a wider range of offences involves recognition of certain dangers which the Commission considers are inherent in their use. The dangers we see are the following:

- **Diminution of the moral content of particular offences**
  Expansion of infringement notices to offences which are traditionally regarded as more substantively criminal rather than regulatory in nature may have the effect of diminishing or removing altogether the moral content of these offences, with the consequence that they are trivialised and considered as merely administrative contraventions.

- **A departure from the traditional principles of criminal law**
  The system for infringement notices in New South Wales is an "opt-in" system, whereby a person is deemed to have committed the act for which the penalty is imposed in the event of non-payment of the penalty unless that person takes the affirmative step of electing to dispute the matter in court. The determination of guilt without requiring the prosecution to present evidence before a judicial authority, and on the basis of strict and vicarious liability, represents a departure from the traditional tenets of the criminal justice system. This may have practical consequences for the individual if a record is

96. *Fines Act 1996* (NSW) Part 3.
97. *Fines Act 1996* (NSW) s 20(2).
98. *Fines Act 1996* (NSW) s 20(3).

kept of his or her infringements, which record may be accessed later by the police when referring to antecedents in the sentencing of that person for other offences.[99]

- **Failure to consider each individual case**
  Infringement notices are issued without regard to tailoring the sanction or the amount of the penalty to fit the individual offender's circumstances.

- **Pressure on the individual to pay even if they are innocent**
  People may be more likely to pay the penalties for an infringement notice even if they are not guilty of the offence because they want to avoid the trauma of taking the matter to court, or because they may have to pay a greater penalty and costs if they take the matter to court.
- **Net-widening**
  The ease with which infringement notices may be issued carries with it a risk that they will be used when a police caution would ordinarily have been given, or when the officer issuing the notice is not certain that an offence has been committed but issues a notice anyway. As a result, there may in fact be an increase in the number of people who become involved in the court system in situations where they elect to dispute the matter in court, or where they do not pay their fines. More people may also be imprisoned for failure to pay the fine. This would defeat one of the main purposes of expanding infringement notices which is to divert people from the formal criminal justice system.

- **Victimisation**
  There is a risk that specific groups in the community will be victimised by the police and agencies administering the infringement notice scheme. Such people may feel pressured not to elect to dispute the matter in court and as a consequence will be forced to pay the fine or risk imprisonment for default.

3.50 A majority of Commissioners are nevertheless of the view the infringement notice system should be expanded, in recognition of the benefits to individuals who wish to avoid the trauma of court proceedings, as well as

99. At present, the Roads and Traffic Authority keeps a record of traffic infringements in accordance with Reg 10B of the *Motor Traffic Regulations 1935* (NSW). This record may be referred to if a person appears in court for a traffic offence such as culpable driving.

the economic and administrative advantages of diverting minor offenders from the court system. However, there will need to be careful consideration of the offences to which infringement notices are to apply, in order that expansion is limited to offences which are of a more regulatory character. In dissent, two Commissioners[100] consider that the infringement notice system should not be expanded, on the ground that it carries too great a risk of abuse by authorities and may simply become a vehicle of oppression for particular groups in society, such as young people and Aboriginal people.

3.51 If the infringement notice system is to be expanded, the Commissioners unanimously agree that proper safeguards are needed to minimise the risks of abuse of the system. Such safeguards should include, for example, a provision which stipulates that receipt of an infringement notice should not result in a conviction being recorded for that offence. There should be a discretion not to issue an infringement notice, and guidelines should be established which set out criteria against which this discretion is to be exercised. As well, the agencies responsible for the issue of infringement notices should be properly monitored to guard against abuse and to ensure that infringement notices are not imposed on people who would not ordinarily be punished.

Infringement notices and consolidated sentencing legislation

3.52 The place of legislation regulating the use of infringement notices in any consolidated sentencing legislation will need to be determined.[101] If no amendments are made to the *Fines Act 1996* (NSW), the Commission is of the view that it ought not to be incorporated in consolidating legislation, but the consolidation should contain a cross-reference to the *Fines Act 1996* (NSW). The advantage of retaining the fines legislation in its present form is that the procedures for the enforcement of fines and infringement notices are the same. If there is to be a separate piece of legislation applicable only to infringement notices, that legislation should not be incorporated in

100. Justice John Dowd and Professor Michael Tilbury.
101. See para 14.6. For example, the consolidated *Sentencing Act 1991* (Vic) contains provisions relating to court-imposed fines in Part 3 Div 4, as does the *Sentencing Act 1995* (WA) in Part 8 and the *Penalties and Sentences Act 1992* (Qld) Part 4.

consolidated legislation. The consolidated legislation should, however, contain statutory provisions relating to court-imposed fines.

4.
PROBATION

- TERMINOLOGY
- CONSOLIDATION OF PROBATION ORDERS
- COMMON LAW BONDS
- LEGISLATIVE LIMITATIONS ON CONDITIONS
- REINTRODUCTION OF SUSPENDED SENTENCES

4.1 Probation is a widely used non-custodial sentencing option.[1] Offenders who are placed on probation are set at liberty conditional upon their being of good behaviour. They are usually required to enter into a "bond" or "recognizance", which incorporates certain conditions for their release. If they breach a condition of their bond, they may be called up by the court for re-sentencing. Supervised probation requires an offender to be placed under the supervision of a probation officer.

4.2 The Commission has considered several proposals concerning the operation of probation in New South Wales. These relate to:

- the terms to be used in legislation in referring to probation orders;
- legislative consolidation of the various types of probation orders;
- abolition of the power at common law to order bonds;
- legislative limitations on the conditions to be attached to probation orders; and
- reintroduction of suspended sentences.

1. See DP 33 at paras 9.34-9.64. In 1995 17,438 persons received bonds in the Local Court for principal offences out of a total of 86,263 persons found guilty in the Local Court for that year: see New South Wales Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 1995* at 20-21.

TERMINOLOGY

Recommendation 16
The term "bond" should replace the term "recognizance" in legislation.

4.3 In DP 33 the Commission proposed that the term "bond" should replace the term "recognizance" in legislation.[2] The Commission considered the term "recognizance" to be archaic, and that use of the term "bond"[3] in its stead would improve understanding of the nature of probation.

4.4 The majority of submissions supported the proposal to replace the term "recognizance" with the term "bond".[4] The proposal was opposed by one submission in so far as it was suggested that the term "probation order" should be used instead of the term "bond", at least when a person is subject to supervised probation.[5] It was argued that "probation order" more accurately represents the function of probation and would be better understood by the community than the term "bond".

4.5 The term "bond" is, in the Commission's view, more generally recognised and understood in New South Wales than either "recognizance" or "probation order". The Commission therefore recommends that the term "bond" should replace the term "recognizance" in legislation.

2. DP 33 at para 9.38.
3. The Macquarie Dictionary defines "bond" as "an undertaking by an offender to be of good behaviour for a certain period".
4. Law Society of NSW, *Submission* (19 July 1996) at 33; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 15; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 27; Department of Corrective Services, *Submission* (15 July 1996) at 24; N R Cowdery, *Submission* (17 June 1996) at 13. The proposal was not supported by W D T Ward, *Submission* (25 July 1996) at 17 nor by Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 4.
5. Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 4.

CONSOLIDATION OF PROBATION ORDERS

4.6 At present in New South Wales there are five discrete sources of conditional release, which may or may not involve imposition of a condition requiring supervised probation. These are:

- Section 556A of the *Crimes Act 1900* (NSW),[6] which provides for release without a conviction being recorded even though the offence has been proved. Release may or may not be conditional on the offender entering into a bond to be of good behaviour for a maximum of three years.

- Section 558 of the *Crimes Act 1900* (NSW),[7] under which a conviction is recorded but sentence is deferred on the offender entering into a bond. There is no time limit for the term of the bond.

- Section 432 of the *Crimes Act 1900* (NSW), which provides for an offender to enter into a bond for a maximum of three years following conviction for a misdemeanour for which a term of imprisonment has been imposed.

- Section 554 of the *Crimes Act 1900* (NSW), which provides for a court of summary jurisdiction to impose a bond in addition to, or instead of, a fine or a term of imprisonment. The bond must exceed 12 months but be less than three years.

- Common law bonds, which bind over a person to keep the peace and be of good behaviour, with or without conviction being recorded for an offence. Offenders may be released on a "Griffith's bond" to allow the court to assess their behaviour and capacity for rehabilitation before imposing an appropriate sentence.

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6. Section 556A bonds are widely used in the Local Courts. For the period January 1990 - June 1995, s 556A bonds made up 31% of all bonds ordered in the Local Courts, but only 4% in the higher courts: see I MacKinnell, *The Use of Recognizances* (Judicial Commission of New South Wales, Sentencing Trends No 12, May 1996) at 4-5.
7. Of the five types of bonds, s 558 bonds are the most commonly used by the courts. For the period January 1990 - June 1995, s 558 bonds represented 66% of all bonds ordered by the Local Courts, and 94% of all bonds ordered by the higher courts: I MacKinnell (1996) at 3-4.

4.7 In DP 33 the Commission considered a proposal by the Department of Corrective Services to abolish the existing provisions for imposing probation and to replace them with a new structure for imposing a single order of supervised probation.[8] There would be three types of conditions attached to the order, namely core, additional and program conditions.[9] Breach of one or more of these conditions would result in revocation of the order and re-sentencing for the original offence. There would also be an "Order for Supervision without Conviction" to replace s 556A bonds. The Commission was not persuaded that a consolidated scheme for probation was desirable, and invited comment on the proposal.[10]

4.8 There was only limited support in the submissions for consolidation of probation into a single statutory form.[11] In opposition it was argued that the existing provisions for conditional release are understood and that any changes would lead to unnecessary confusion.[12] Two submissions supported statutory consolidation of probation into two forms which would be equivalent to s 556A bonds and s 558 bonds.[13] Neither supported the Department of Corrective Service's proposal for legislatively based conditions for bonds, arguing that judicial officers already receive guidance on appropriate conditions to impose from Bench Books, as well as from the prosecution and the offender's legal representative.

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8. DP 33 at paras 9.45-9.51.
9. Core conditions would be incorporated into all orders. Additional conditions would be listed in regulations, and a court could choose only from that list any additional conditions which it felt were necessary for a particular offender. Program conditions would also be listed in regulations, but a court could only impose a program condition if such a condition was recommended in a pre-sentence report: see Department of Corrective Services, *Submission* (15 July 1996) at 29.
10. DP 33 at para 9.51.
11. Two submissions supported consolidation in the form of a single supervised probation order as suggested by the Department of the Corrective Services: see Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 7; Department of Corrective Services, *Submission* (15 July 1996) at 28-29.
12. NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 27; M L Sides and Bar Association, *Submission* (24 June 1996) at 65; W D T Ward, *Submission* (25 July 1996) at 18.
13. Law Society of NSW, *Submission* (19 July 1996) at 37-38; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 15-16.

4.9 In light of the submissions, the Commission maintains the view that there is no need to restructure probation orders into a single statutory scheme. We recognise that a consolidated scheme offers certain benefits, such as giving greater simplicity and consistency to this sentencing option, and greater convenience to the administration of probation by the Probation and Parole Service. However, the current range of orders provides courts with a great amount of flexibility to impose the type of order and conditions which are the most appropriate in the circumstances of a particular case. The courts are also familiar with this range of orders. For these reasons, the Commission does not recommend consolidation of the various types of probation orders into a single statutory scheme.

COMMON LAW BONDS

Recommendation 17
The power to impose bonds at common law should be abolished in order that bonds may only be imposed pursuant to a statutory power. An additional statutory power should be created to allow the sentencing court to defer passing a sentence for a period of time in order to assess the offender.

4.10 There is power at common law for courts to impose a bond to be of good behaviour, with or without conviction for an offence. This includes the power to release an offender on a "Griffiths bond"[14] in order to assess the offender's behaviour and capacity for rehabilitation before imposing an appropriate sentence. In DP 33 the Commission expressed the view that the power to order bonds at common law gives rise to unnecessary complexity and uncertainty in the law. We therefore proposed that a bond should only be ordered pursuant to a statutory power.[15] Under this proposal, common law bonds would be abolished and replaced by a statutory power.

14. Also known as a "Griffiths remand": see *Griffiths v The Queen* (1977) 137 CLR 293. See also DP 33 at para 9.44.
15. DP 33 at para 9.53.

4.11 Submissions generally supported the proposal that bonds should only be ordered pursuant to a statutory power.[16]

4.12 In the Commission's view, there is too much complexity and uncertainty surrounding common law bonds. We therefore recommend that bonds should only be imposed pursuant to a statutory power. However, we also recommend that, in addition to the existing statutory provisions, there should be a separate statutory power to embody the Griffith's bond which is currently available at common law. This statutory provision would allow a sentencing court to adjourn sentencing for a stated period to assess the offender's behaviour while on release and subject to appropriate bail conditions.

LEGISLATIVE LIMITATIONS ON CONDITIONS

4.13 Although the Commission has decided against a consolidated scheme with legislatively based conditions for bonds, we consider that it may be desirable to impose certain legislative limitations on the conditions which may be attached to bonds. In particular, we have considered whether there should be consistent time limits on the duration of bonds, and whether there should be a prohibition on making compensation or restitution conditions of a bond.

Time limits on bonds

Recommendation 18
The maximum time limit for which a bond can be imposed should be five years.

16. N R Cowdery, *Submission* (17 June 1996) at 13; J L Swanson, *Submission* (1 July 1996) at 2; Department of Corrective Services, *Submission* (15 July 1996) at 24; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 15-16. One dissenting submission considered that the common law bond should be retained: W D T Ward, *Submission* (25 July 1996) at 17.

4.14 In DP 33 the Commission proposed that there should be a maximum period of five years for all types of bonds.[17] At present, there is considerable variation in the time limits set down for the different types of bonds.[18] The Commission considered that there should be consistency in the maximum period of time during which all bonds may operate, and that five years would be an appropriate maximum time limit. In practice, it appears to be very rare for the courts to impose any type of bond for a term exceeding five years.[19]

4.15 The majority of submissions supported the Commission's proposal for a uniform maximum time limit of five years for all bonds.[20] In others, restricting Local Courts to imposing bonds for a maximum of three years was proposed,[21] as was retaining the current three year maximum limit for s 556A bonds.[22]

4.16 In light of the submissions, the Commission recommends that the maximum time limit for all bonds should be five years. We can see no compelling reason why there should be a different time limit imposed on

17. DP 33 at para 9.54.
18. See para 4.6.
19. In the Local Courts, during the period January 1990 - June 1995, most s 558 bonds without supervision were for a term of one to two years, while the majority of such bonds with supervision were for a term of two to five years. The most common term for both supervised and unsupervised s 558 bonds was two years, while only 30 of the 65,061 bonds ordered under s 558 were for terms exceeding five years. In the higher courts, most s 558 bonds without supervision were for a term of one to three years, while most s 558 bonds with supervision were for terms of two to five years. Only 30 of the 5,012 bonds ordered under s 558 in the higher courts were for terms exceeding five years: see I MacKinnell (1996) at 4.
20. Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 7; W D T Ward, *Submission* (25 July 1996) at 18; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 27; Department of Corrective Services, *Submission* (15 July 1996) at 25; N J H Milson, *Submission* (3 July 1996) at 9; J L Swanson, *Submission* (1 July 1996) at 2; M L Sides and Bar Association, *Submission* (24 June 1996) at 65; N R Cowdery, *Submission* (17 June 1996) at 13. One submission argued that the maximum time limit for all bonds should be three years: Confidential, *Submission* (22 May 1996) at 38.
21. Law Society of NSW, *Submission* (19 July 1996) at 34; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 16.
22. Legal Aid Commission of NSW, *Submission* (18 July 1996) at 16.

bonds issued by the Local Courts, given that this restriction is not presently imposed by the existing legislative provisions. We are also of the opinion that it is preferable to have a uniform time limit for all types of bonds, rather than to maintain the three year time limit for s 556A bonds.

Restitution and compensation

Recommendation 19
Where a sentencing court attaches an order for compensation or restitution as a condition of a bond, the court should be required to give reasons why this is an appropriate condition in the circumstances of the case, and must be satisfied that the offender will be able to comply with the condition.

4.17 The Commission proposed in DP 33 that any order for compensation or restitution to the victim of a crime should not be permitted to be made a condition of a bond, but should instead be a separate and distinct order.[23] At present, it is possible for a court to include payment of compensation or restitution as a condition of a bond.[24] This means that if offenders are not able to pay, they risk being brought before the court for breach of a condition of the bond and re-sentenced for the original offence. The Commission considered that it is unjust for offenders to be re-sentenced and possibly imprisoned because they have not been able to comply with a condition to pay compensation or restitution. Problems may also arise where call up

23. DP 33 at paras 9.55-9.56.
24. The courts have a general power to make an order for restitution of stolen property where a person is convicted of stealing, embezzling or receiving property: see *Crimes Act 1900* (NSW) s 438(1). This power extends to release where no conviction is recorded under s 556A of the *Crimes Act 1900* (NSW): see s 556A(2). The *Victims Compensation Act 1996* (NSW) permits a court to make an order for compensation upon conviction for an offence, including release under s 556A of the *Crimes Act 1900* (NSW): see *Victims Compensation Act 1996* (NSW) s 72 and *Crimes Act 1900* (NSW) s 556A(2).

proceedings for breach of a condition requiring payment of compensation must be stayed because of an offender's intervening bankruptcy.[25]

4.18 The majority of submissions supported the Commission's proposal to preclude payment of compensation or restitution being made a condition of a bond.[26] There was, however, strong opposition to the proposal by the judges of the District Court,[27] who argued that bonds are often imposed instead of a custodial sentence because of the possibility that the offender will be able to pay compensation or restitution to the victim. Two other submissions supported the Commission's proposal in theory, but expressed concern that the courts may be more willing to impose harsher sentences if the power to order payment of compensation or restitution as a condition of a bond is removed.[28]

4.19 In the Commission's view, it is a disadvantage of the present system if offenders end up in custody for breach of a condition to pay compensation or restitution because they lack the financial resources to comply. However, it is also a significant disadvantage of our proposal if removal of the power to

25. See *Re Lattouf* (1994) 52 FCR 147 (FC); *Keogh v DPP* (1995) 133 ALR 681.
26. Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 7; W D T Ward, *Submission* (25 July 1996) at 18; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 27; Department of Corrective Services, *Submission* (15 July 1996) at 25; J L Swanson, *Submission* (1 July 1996) at 2; M L Sides and Bar Association, *Submission* (24 June 1996) at 66; N R Cowdery, *Submission* (17 June 1996) at 13; Confidential, *Submission* (22 May 1996) at 38. Qualified support for the proposal was given by Law Society of NSW, *Submission* (19 July 1996) at 38 and by Legal Aid Commission of NSW, *Submission* (18 July 1996) at 17. The Legal Aid Commission suggested that the proposal could be extended to a general legislative provision that when imposing a condition for a bond, the court must consider the offender's capacity to comply with that condition: see Legal Aid Commission of NSW, *Submission* (18 July 1996) at 16. Indeed, it has been held that sentencing courts should only impose conditions to bonds with which offenders have a reasonable chance of complying: see *R v Crawford* (NSW CCA, No 60143/95, 28 June 1995, unreported). The Commission considers that to reformulate this general principle into a strict legislative requirement would prove to be unworkable in practice.
27. District Court, Criminal Law Committee, *Submission* (6 August 1996) at 2; District Court Judges *Consultation* (14 August 1996). The proposal was also opposed for similar reasons by N J H Milson, *Submission* (3 July 1996) at 9.
28. Law Society of NSW, *Submission* (19 July 1996) at 38; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 17.

order payment of compensation or restitution as a condition of a bond results in the courts imposing harsher sentences. We therefore consider that restitution and compensation should continue to be able to be made conditions of a bond. However, we recommend that where a sentencing court wishes to attach an order for compensation or restitution as a condition to a bond, the court must give reasons why this is an appropriate condition to impose in the particular circumstances, and must be satisfied that the offender will be able to comply with this condition.

REINTRODUCTION OF SUSPENDED SENTENCES

Recommendation 20
Suspended sentences should be reintroduced in New South Wales. Appropriate safeguards should be implemented to ensure that injustice does not arise in an individual case where an offender's sentence has been suspended.

4.20 Courts in New South Wales previously had the power to impose suspended sentences.[29] This involved the court imposing a sentence of imprisonment, and then suspending its operation for a period of time while the offender was released on specified conditions. If the offender breached any of those conditions, he or she might be liable to serve the sentence originally imposed. If no breach occurred, the offender was discharged from the sentence. Suspended sentences in New South Wales were abolished in 1974.[30] In DP 33 the Commission proposed their reintroduction as an additional option in the range of dispositions available to the courts.[31]

4.21 Submissions were divided in their views on the Commission's proposal. Several submissions were strongly supportive of the reintroduction of suspended sentences as an additional non-custodial sentencing option.[32] Other submissions opposed their reintroduction,[33] arguing that suspended

29. Prior to 1974, courts had the power under s 558-562 of the *Crimes Act 1900* to suspend punishment on first conviction. The court would pass sentence but would then suspend execution of the sentence upon the offender entering a recognizance to be of good behaviour: see DP 33 at paras 9.57-9.64.
30. For a detailed discussion of the history of suspended sentences in New South Wales, see DP 33 at paras 9.58-9.60.
31. DP 33 at paras 9.61-9.64.
32. W D T Ward, *Submission* (25 July 1996) at 17; J L Swanson, *Submission* (1 July 1996) at 2; Justice Action, *Submission* (5 August 1996) at 5; NSW Council for Civil Liberties, *Submission* (28 June 1996) at 6; M L Sides and Bar Association, *Submission* (24 June 1996) at 66; Forbes Chambers, *Consultation* (13 August 1996).
33. Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 4-5; Law Society of NSW, *Submission* (19 July 1996) at 34; Legal Aid

sentences may result in net-widening, whereby offenders who would ordinarily receive some lesser sentence such as a fine or a bond would, instead, receive a suspended sentence of imprisonment. As a consequence, instead of diverting offenders from prison who would otherwise be sentenced to full-time custody, suspended sentences may result in placing people in prison for breach of a suspended sentence who would not ordinarily have received a custodial sentence.[34] It was also argued that suspended sentences are not able to take into account the distinction between a trivial and a serious breach, with the result that a trivial breach may result in the offender being placed in custody.[35] It was suggested that if suspended sentences were reintroduced, there would need to be consideration of alternative options to cancellation of the entire order for minor breaches.[36] Other issues for consideration would be whether there would be a minimum term set for the sentence of imprisonment which was suspended,[37] and whether credit would be given for time spent in the community in order to reduce the time to be served in custody if the order is breached.[38] Lastly, it was argued that s 558 bonds provide sufficient flexibility in sentencing offenders without the need for the reintroduction of suspended sentences as well.[39]

4.22 The Commission acknowledges the objections raised in relation to suspended sentences. However, in our view, the advantages of adding suspended sentences to the range of available sentencing options outweigh these objections. Suspended sentences have been said to be 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. In these situations,

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Commission of NSW, *Submission* (18 July 1996) at 17; Department of Corrective Services, *Submission* (15 July 1996) at 25; N R Cowdery, *Submission* (17 June 1996) at 14.

34. Department of Corrective Services, *Submission* (15 July 1996) at 25; Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 5-6; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 17.
35. Law Society of NSW, *Submission* (19 July 1996) at 34.
36. Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 5; Department of Corrective Services, *Submission* (15 July 1996) at 25.
37. N R Cowdery, *Submission* (17 June 1996) at 14.
38. Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 5; Department of Corrective Services, *Submission* (15 July 1996) at 25; N R Cowdery, *Submission* (17 June 1996) at 14.
39. Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 5.

it has been argued that other forms of conditional release are not appropriate, because they do not allow for proper denunciation of the offence through the imposition of a custodial sentence.[40]

4.23 The Commission recognises the concerns which have been expressed as to the way in which suspended sentences would operate in practice, in particular in relation to the consequences which would follow a breach of a bond. However, we consider that appropriate mechanisms for dealing with breaches can be established by legislation. For example, when hearing breach proceedings, the court should be given a discretion not to revoke the suspended sentence where it considers that the breach is trivial or that there are good reasons for excusing the breach. Other strategies for dealing with breaches other than by revocation should be made available, such as extending the term of the bond, or varying a condition of the bond.[41] Where the bond is revoked, there should be provision for the court to reduce the term of the sentence of imprisonment in order to take account of the time spent in the community and any time spent in custody pending determination of the breach proceedings, as well as any other matters which the court considers to be relevant.[42] In order to reduce the risk that short-term sentences of imprisonment are imposed inappropriately to gain access to this sentencing option, sentencers should be required to give reasons why a term of imprisonment of six months or less is more appropriate than a non-custodial sanction in the circumstances of the case.[43] In the Commission's view, if these safeguards are properly implemented, suspended sentences will be a useful non-custodial sentencing option to add to the range of dispositions available to sentencing courts.

40. See J Campbell, "A Sentencer's Lament on the Imminent Death of the Suspended Sentence" [1995] *Criminal Law Review* 293 at 294-295.
41. These options are available to courts in relation to breach proceedings for suspended sentences in South Australia: see *Criminal Law (Sentencing) Act 1988* (SA) s 58(3). It has been suggested that the scheme for suspended sentence in South Australia operates very successfully: Forbes Chambers, *Consultation* (13 August 1996).
42. This option is also provided for in the *Criminal Law (Sentencing) Act 1988* (SA) s 58(4).
43. See Recommendation 40.

5. COMMUNITY SERVICE

- AVAILABILITY
- BREACH PROCEDURES

5.1 The *Community Service Orders Act 1979* (NSW) provides that any person who has committed an offence punishable by imprisonment may be sentenced to community service instead of a term of imprisonment.[1] An offender serving a community service order ("CSO") is required to perform up to 500 hours of community service work or to participate in a development program at an attendance centre.[2] Community service orders punish offenders by placing restrictions on their time and liberty and requiring them to carry out community work. At the same time, CSOs promote rehabilitation by allowing offenders to remain in the community and by addressing, through development programs, factors which have contributed to offending. CSOs are cost-effective because they are relatively cheap to administer, while at the same time providing for offenders to make reparation to the community through unpaid community work. In the 1995-96 period, the approximate cost of administering community service per person per day was $3.50, while the total value of community service work performed by offenders was estimated in excess of $15 million.[3]

5.2 The Commission recognises that community service is a valuable and widely used sentencing option,[4] which has the potential to make a positive contribution to offenders' rehabilitation and education.[5] Despite our general support for the operation of CSOs in New South Wales, we have considered possible reforms to two key areas of community service, namely:

- availability of CSOs; and
- procedures for dealing with breaches of CSOs.

1. *Community Service Orders Act 1979* (NSW) s 4.
2. *Community Service Orders Act 1979* (NSW) s 7. The type of community work undertaken includes bush regeneration projects, rubbish removal, and ground maintenance, as well as provision of services such as painting, cleaning and repairing for pensioners and community groups.
3. Advice from NSW Probation and Parole Service, November 1996.
4. In 1995, 5,122 persons sentenced in the Local Court received a CSO. The majority of these were sentenced to CSOs of 51 to 100 hours' duration: NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 1995* at 18-19. As at 10 November 1996, there were 7,928 persons subject to CSOs: New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 27 November 1996 at 6742.
5. See R Bray and J Chan, *Community Service Orders and Periodic Detention as Sentencing Options: A Survey of Judicial Officers in NSW* (Judicial Commission of NSW, Monograph Series No 2, 1991) at 2.

AVAILABILITY

Offences attracting CSOs

5.3 CSOs are generally available in three circumstances. First, they may be imposed for any offence which is punishable by imprisonment.[6] In this circumstance, they are linked to imprisonment only to the extent that they may be imposed for any offence for which imprisonment is an available penalty. They are not imposed as direct alternatives to imprisonment. This differs from the requirements for imposing periodic detention, whereby the sentencing court must first determine that in all the circumstances of the offence a sentence of imprisonment is appropriate before ordering that the sentence be served by way of periodic detention.[7] Secondly, CSOs may be imposed in principle where Parliament makes them available as the penalty for a particular offence, such as offensive language.[8] Thirdly, they are generally available for fine default prior to imprisonment.[9]

5.4 In DP 33 the Commission considered a two tier model for CSOs which was originally recommended by the Attorney General's Sentencing Review.[10] This would provide for two types of CSOs. The first type would be called a "community work order". It would be of a maximum duration of 300 hours and would be used as a penalty in its own right rather than as an alternative to imprisonment. The second type would continue to be called a community service order. It would be of a maximum duration of 500 hours and would be used as an alternative sanction to imprisonment. The purpose of the two tier system would be to ensure that lengthy CSOs are not imposed on minor offenders in cases where imprisonment is, in all events, an inappropriately harsh penalty.

6. *Community Service Orders Act 1979* (NSW) s 4.
7. See para 6.1.
8. *Summary Offences Act 1988* s 4A(3) and (4).
9. *Community Service Orders Act 1979* (NSW) Part 3, as amended by the *Fines Act 1996* (NSW) Sch 2.4 [5]. See paras 3.16 and 3.22.
10. *Attorney General's Sentencing Review* at 30. See DP 33 at paras 9.29-9.30.

5.5 Submissions generally supported the two-tier system[11] but some expressed reservations on the basis that it may lead to net-widening.[12]

5.6 The Commission is of the view that the two-tier system should not be adopted for the following reasons. First, the model assumes that there is an agreed ranking of offences and appropriate penalties which apply to each type of order. The Commission does not consider that there is an agreed hierarchy enabling sanctions to be ranked according to obvious criteria of severity, let alone an agreed ranking of offences. Secondly, we regard any such ranking (which must necessarily be arbitrary) as an unacceptable fetter on judicial discretion. Thirdly, in any event the Commission considers that the proposal is based on a misconception of what is meant by the term "sanction in its own right", in so far as it assumes that CSOs may only be imposed as direct alternatives to imprisonment rather than simply for offences which are punishable by imprisonment.[13]

Mandatory suitability assessments

5.7 It is a condition to imposing a CSO that the sentencing court has considered an assessment report from the Probation and Parole Service relating to the offender's suitability for community service work.[14] In DP 33

11. Department of Corrective Services, *Submission* (15 July 1996) at 24; N J H Milson, *Submission* (3 July 1996) at 8; J L Swanson, *Submission* (1 July 1996) at 2; NSW Council for Civil Liberties, *Submission* (28 June 1996) at 6; Justice Action, *Submission* (2 July 1996) at 5; M L Sides and Bar Association, *Submission* (24 June 1996) at 64; M Dodson, *Submission* (26 June 1996) at 3; N R Cowdery, *Submission* (17 June 1996) at 12; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 14.
12. Law Society of NSW, *Submission* (19 July 1996) at 37; Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 3; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 26-27.
13. See Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 3.
14. There are three other conditions to imposing a CSO, namely (i) the offence is punishable by imprisonment, (ii) the offender consents to the order, (iii) the sentencing court is satisfied that suitable arrangements exist in the person's local area for community service work to be performed and that suitable work can be provided: see *Community Service Orders Act 1979* (NSW) s 6(1) and (2). Similar conditions exist for CSOs which direct an offender to attend an

the Commission invited submissions on whether mandatory assessment reports should be abolished for CSOs of 50 hours or less.[15] These mandatory reports represent a significant drain on resources in terms of expense and time required for their preparation. The Probation and Parole Service has suggested that assessment reports are unnecessary for short-term orders where the offender is capable of carrying out some form of work and is available to do so on a regular basis.[16]

5.8 There was only limited support for the Probation and Parole Service's suggestion. Those in favour agreed that suitability assessments would rarely be necessary for short-term orders and that their removal would significantly reduce the workload of the Probation and Parole Service.[17] However, the majority of the submissions did not support the suggestion.[18] It was argued in opposition that CSO assessments are desirable in all cases because they assist in identifying matters, such as medical and psychiatric conditions, which make a particular offender unsuitable for community work and which may not be immediately apparent to the sentencing court. Suitability assessments therefore reduce the risk of imposing CSOs on unsuitable offenders and reduce the risk that these offenders may later be faced with more serious consequences for breaching their CSOs. It was argued that in the absence of mandatory assessments for short-term orders, other procedures would need to be implemented to assess suitability. These procedures could include, for example, guidelines for sentencing courts to determine when to impose a CSO or a brief assessment conducted by a senior court official, such as the Clerk of the Local Court.[19] It was also suggested that the sentencing court be

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attendance centre, including the requirement for a suitability report under s 6(3)(b).

15. DP 33 at para 9.26.
16. See also Department of Corrective Services, *Submission* (15 July 1996) at 10.
17. Department of Corrective Services, *Submission* (15 July 1996) at 28; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 27; Confidential, *Submission* (22 May 1996) at 37.
18. W D T Ward, *Submission* (25 July 1996) at 18; Law Society of NSW, *Submission* (19 July 1996) at 37; N J H Milson, *Submission* (3 July 1996) at 8; M L Sides and Bar Association, *Submission* (24 June 1996) at 64. The Probation and Parole Officers' Association agreed that mandatory assessments are necessary for short-term orders but emphasised that more resources are necessary in order for the community service scheme to continue working effectively: Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 6.
19. Law Society of NSW, *Submission* (19 July 1996) at 37.

required to obtain a declaration by the offender that there is no impediment to the offender complying with the order.[20]

5.9 The Commission recognises that CSO assessments represent a drain on resources for the Probation and Parole Service. However, in light of the submissions which we have received, we consider that mandatory assessments should be retained for CSOs of 50 hours or less. There may be matters which make particular offenders unsuitable even for short-term CSOs or unsuitable for particular types of community service work. It is necessary for these matters to be brought to the sentencing court's attention. In the Commission's view, it will not always be sufficient to rely on the offender, the offender's legal representative, or the prosecution to be able to identify and declare these matters to the court. Moreover, the Probation and Parole Service has greater expertise and experience in identifying these matters than would court officials. We note also that, in fact, the number of CSOs of 50 hours or less which are ordered by the courts represent a relatively small percentage of the total CSOs imposed.[21] Abolition of mandatory assessment reports for these orders would therefore not necessarily reduce the workload of the Probation and Parole Service by a significant amount and may in fact incur greater costs associated with breaches by offenders who are unsuitable for community service work. For these reasons, the Commission does not recommend the abolition of mandatory assessment reports for CSOs of 50 hours or less. Instead, we urge that additional resources be made available to the Probation and Parole Service to assist with its demanding workload.

20. Department of Corrective Services, *Submission* (15 July 1996) at 28.
21. For example, of the 5,122 persons sentenced to CSOs in the Local Court in 1995, 11.6% were sentenced to CSOs of 50 hours or less.

BREACH PROCEDURES

The supervising court

Recommendation 21
Sections 24 and 25 of the *Community Service Orders Act 1979* (NSW) should be amended to provide that any court of equal jurisdiction to the supervising court should be able to hear breach proceedings.

5.10 The *Community Service Orders Act 1979* (NSW) currently requires that proceedings for breach of a CSO be heard by the supervising court,[22] which is defined in s 8 of the Act as either the Local Court nearest the offender's residence or otherwise most convenient in the particular circumstances. In DP 33 the Commission considered a suggestion by the Probation and Parole Service that any court of equal jurisdiction to the supervising court should be permitted to hear breach proceedings in respect of a CSO.[23] The original purpose of establishing the supervising court to deal with breaches was to ensure that breach proceedings for CSOs were heard as expeditiously as possible.[24] In practice, however, it does not appear that this objective is being met. Indeed, the requirement that breach proceedings be heard by the supervising court is said frequently to lead to unnecessary delays and inconvenience.[25]

22. *Community Service Orders Act 1979* (NSW) *s* 24.
23. See DP 33 at para 9.32.
24. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 29 November 1979 at 4260.
25. Administrative difficulties arise where, for example, the offender has changed address subsequent to a supervising court being nominated in the community service order. Moreover, it appears that the court nominated as the supervising court is often not the local court nearest to the offender but is instead the one which is the most administratively convenient for the Probation and Parole Service. As a consequence, the supervising court may be some distance from the offender's residence, which can in turn give rise to delays where the offender must be brought before the supervising court for breach proceedings: see I H Pike, *Submission* (10 July 1996) at 3 and Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 3.

5.11 There was unanimous support in submissions for this proposal.[26]

5.12 The Commission therefore recommends that any court of equal jurisdiction to the supervising court should be able to hear breach proceedings in relation to a CSO. We note, in fact, that amendments to the *Community Service Orders Act 1979* (NSW) have very recently been proposed[27] which give substantial effect to this recommendation. The *Sentencing Legislation Amendment Bill 1996* proposes abolition of supervising courts altogether on the ground that they have proved administratively impractical,[28] and provides instead for breach proceedings for CSOs to be heard by the court which originally imposed the order, or an equivalent or superior court.[29] The Commission supports these proposed amendments in so far as they concur with our recommendation to abolish the requirement that breach proceedings be referred to supervising courts. While there is potential for the supervising court to play a significant role in monitoring the progress of offenders if the court has had continuous contact with those offenders for the duration of the community service order, in

26. Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 3-4; W D T Ward, *Submission* (25 July 1996) at 18; Law Society of NSW, *Submission* (19 July 1996) at 37; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 27; Department of Corrective Services, *Submission* (15 July 1996) at 28; I H Pike, *Submission* (10 July 1996) at 3; N J H Milson, *Submission* (3 July 1996) at 9; J L Swanson, *Submission* (1 July 1996) at 2; M L Sides and Bar Association, *Submission* (24 June 1996) at 64.

27. The *Sentencing Legislation Amendment Bill 1996*, which was introduced in the Legislative Assembly on 27 November 1996, makes a number of amendments to the *Community Service Orders Act 1979* (NSW), the *Children (Community Service Orders) Act 1987* (NSW), the *Periodic Detention of Prisoners Act 1981* (NSW), and the *Home Detention Act 1996* (NSW). These amendments relate primarily to the civil liability of organisations for whom offenders perform community service work.

28. See New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 27 November 1996 at 6744.

29. See *Sentencing Legislation Amendment Bill 1996* Sch 1 [2], [7]-[9], [11]-[13]. To the extent that they permit superior courts to hear breach proceedings in addition to courts of equal jurisdiction, these proposed amendments are broader than the Commission's recommendation. On first reading, we cannot see any significant objection to this expansion as an added means of ensuring the efficient administration of CSOs.

practice frequent and unnecessary delays occur in bringing breach proceedings before supervising courts.

A separate offence for breach of a CSO

Recommendation 22
Breach of a CSO should not constitute a separate offence. Where breach of a CSO has been established and the court chooses to revoke the CSO, the court should re-sentence the offender for the original offence having regard to the work already performed under the CSO.

5.13 Presently under s 23(1) of the *Community Service Orders Act 1979* (NSW), breach of a CSO is deemed to be a separate offence. In DP 33 the Commission could see no reason why this should be so, in contrast to breach procedures for other non-custodial sentences such as probation. We proposed instead that upon breach an offender should simply be re-sentenced for the original offence.[30]

5.14 Submissions unanimously agreed that breach of a CSO should not constitute a separate offence.[31]

5.15 The Commission therefore recommends that where breach of a CSO has been established and the court chooses to revoke the CSO, the court

30. DP 33 at para 9.33.

31. N R Cowdery, *Submission* (17 June 1996) at 12; M L Sides and Bar Association, *Submission* (24 June 1996) at 64; NSW Council for Civil Liberties, *Submission* (28 June 1996) at 6; Justice Action, *Submission* (2 July 1996) at 5; J L Swanson, *Submission* (1 July 1996) at 2; Department of Corrective Services, *Submission* (15 July 1996) at 24; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 27; Law Society of NSW, *Submission* (19 July 1996) at 33 and 37; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 15; W D T Ward, *Submission* (25 July 1996) at 17; Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 4.

should re-sentence the offender for the original offence having regard to the work performed under the community service order.

Intermediate strategies for dealing with breach of a CSO

Recommendation 23
An assigned probation officer should be able to extend the length of a CSO by a maximum of 10 hours for a minor infringement of the order. There should be a right to seek leave to appeal against administrative extension to the court that originally imposed the CSO.

5.16 At present, the only options available to a court for dealing with a breach other than by revocation are to impose a fine or to take no action.[32] It was suggested in two submissions that this is unnecessarily restrictive and that there should be a greater range of intermediate options to deal with breach of a CSO.[33] In particular, there should be provision for an administrative power to extend the length of a CSO for minor infringements, such as late attendance at a worksite without reasonable cause or excuse.[34] There could be a maximum number of hours by which the order may be extended, for example a maximum of 10 hours.[35]

5.17 The Commission agrees that there should be intermediate strategies for dealing with a breach of a CSO. An administrative power to extend the term of a CSO may be useful for dealing with minor infringements. It would also

32. *Community Service Orders Act 1979* (NSW), s 25(1)(a), 25(1)(d), 25(4)(a) and 25(4)(c).
33. Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 4; M L Sides and Bar Association, *Submission* (24 June 1996) at 64.
34. Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 4; M L Sides and Bar Association, *Submission* (24 June 1996) at 64.
35. M L Sides and Bar Association, *Submission* (24 June 1996) at 64.

be consistent with the strategies available for dealing with breaches of other types of orders, such as periodic and home detention orders.[36]

5.18 We recommend that the power be exercised in the following way. The probation officer who is assigned to supervise the offender[37] should be able to extend the period served under the CSO for minor infringements. The legislation should specify conduct amounting to a minor infringement, such as arriving late for community service. The power should be strictly limited to extending the CSO by a maximum of 10 hours. If the offender continues to breach the order after it has been extended by a maximum of 10 hours, the offender should be brought before a court. There should be a right to seek leave to appeal against administrative extension of a CSO to the court that originally imposed the CSO. Where a Local Court imposed the CSO, the offender should have a right to seek leave to appeal to any Local Court.

Standard of proof to determine breach

5.19 Breach of a CSO would, on normal principles, be required to be established beyond reasonable doubt. The Probation and Parole Service has suggested that breaches of CSOs should be determined according to the civil standard of proof if a breach is not to constitute a separate criminal offence. It was submitted that this would be consistent with the standard applied by the Parole Board to determine breach of a parole order.[38]

5.20 The majority of submissions opposed this suggestion.[39] The crucial objection was that because breach of a CSO may result in re-sentencing the

36. *Periodic Detention of Prisoners Act 1981* (NSW) s 21; *Home Detention Act 1996* (NSW) s 14.
37. See *Community Service Orders Act 1979* (NSW) s 13.
38. Department of Corrective Services, *Submission* (15 July 1996) at 28. See DP 33 at para 9.32.
39. Law Society of NSW, *Submission* (19 July 1996) at 37; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 15; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 27; N J H Milson, *Submission* (3 July 1996) at 9; M L Sides and Bar Association, *Submission* (24 June 1996) at 65; N R Cowdery, *Submission* (17 June 1996) at 14. There were only two submissions which supported the suggestion to determine breaches according to the civil standard: see Department of

offender to a term of imprisonment, the breach should be required to be proved according to the criminal standard.[40] Any lessening of the standard was contemplated only for breaches which attracted less serious consequences, but not for fundamental breaches resulting in re-sentencing.[41]

5.21 In the Commission's view, there is no compelling reason why, contrary to normal principle, the elements required for breach of a CSO should be established on the civil standard.

Corrective Services, *Submission* (15 July 1996) at 28 and W D T Ward, *Submission* (25 July 1996) at 17.

40. M L Sides and Bar Association, *Submission* (24 June 1996) at 65; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 27; Law Society of NSW, *Submission* (19 July 1996) at 37.

41. N J H Milson, *Submission* (3 July 1996) at 9.

6.
PERIODIC DETENTION

- AVAILABILITY
- NON-ATTENDANCE
- POWERS OF REVOCATION
- STAGE II

6.1 Periodic detention is a sentence of imprisonment which is served for a specified number of days in each week.[1] In New South Wales, where an offender is sentenced to a term of imprisonment which exceeds three months but is less than three years, the sentencing court may order that sentence to be served by way of periodic detention, which generally requires the offender to remain in custody[2] for two consecutive days of each week for the duration of the sentence.[3] An offender serving periodic detention may also be required by the Commissioner for Corrective Services to carry out community work and attend training or counselling.[4] Since DP 33 was issued, the *Periodic Detention of Prisoners Amendment Act 1996* (NSW) has introduced measures designed to tighten up the operation of periodic detention, particularly in regard to non-attendance.[5]

6.2 New South Wales began periodic detention in 1971 as an experiment in alternatives to custodial sanctions.[6] Submissions on periodic detention unanimously supported the retention of this sanction as a valuable sentencing option.[7] Reasons for this support emphasised the flexibility which this sentencing option gives to the courts to impose a custodial sentence, while at the same time permitting offenders to maintain their ties to the community by remaining in employment and living with their families for the greater part of

1. See generally DP 33 Ch 8.
2. At present, periodic detainees who have served a portion of their terms may be placed on Stage II of the periodic detention scheme. Stage II does not require periodic detainees to remain in custody overnight during each detention period: see paras 6.37-6.49.
3. *Periodic Detention of Prisoners Act 1981* (NSW) s 5. Terms of less than three months may be ordered for certain offences: *Periodic Detention of Prisoners Act* 1981 (NSW) s 5A: see paras 6.5-6.7.
4. *Periodic Detention of Prisoners Act 1981* (NSW) s 10.
5. See New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 17 April 1996 at 100-102.
6. Periodic detention was tried but abandoned in Queensland, and recently adopted in the Australian Capital Territory: *Periodic Detention Act 1995* (ACT).
7. W D T Ward, *Submission* (25 July 1996) at 16; Law Society of NSW, *Submission* (19 July 1996) at 29; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 12; Department of Corrective Services, *Submission* (15 July 1996) at 22; N J H Milson, *Submission* (3 July 1996) at 7; M L Sides and Bar Association, *Submission* (24 June 1996) at 58; S Scarlett *Submission* (11 June 1996) at 2; Confidential *Submission* (22 May 1996) at 35.

each week, and contributing to the community through community work.[8] Periodic detention is also a much cheaper sentencing option than full-time imprisonment.[9]

6.3 Despite its advantages, the Commission has identified several problems in the current operation of the periodic detention scheme. These relate broadly to:

- the availability of periodic detention as a sentencing option;
- non-attendance;
- powers of revocation of periodic detention orders; and
- the use of a non-residential component in periodic detention ("Stage II").

8. It is estimated by the Department of Corrective Services that approximately $2.5 million worth of labour is contributed to the community by periodic detainees each year: S D'Silva, "Sentencing Options: Changes to the Periodic Detention Program" Paper presented at the NSW Bar Association CLE Seminar, 14 October 1996 at 5.
9. In 1996, the cost of periodic detention per prisoner per day was estimated at $30. The estimated cost of full-time minimum security prison per prisoner per day was $104.35: see New South Wales, Department of Corrective Services, *Annual Report 1995/96* at Appendix 25.

AVAILABILITY

Access to periodic detention centres

6.4 There are currently eleven periodic detention centres in New South Wales.[10] It was suggested in some submissions that if periodic detention is to be an effective sentencing option, it should be more readily available throughout New South Wales.[11] For example, sentencing options in certain country areas may not include periodic detention, even though a sentencing court in a particular case may consider periodic detention to be the most appropriate sanction.[12] This may have a particularly negative impact on Aboriginal offenders.[13] Several new periodic detention centres are currently under construction with the aim of expanding the availability of periodic detention across the State.[14] Expansion of appropriate correctional centres is subject to resources being made available. Nevertheless, the Commission considers that it is important that the scheme should be more widely available and encourages its continuing expansion to ensure that it may be used effectively as a sentencing option for all offenders[15] throughout New South Wales.

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10. Department of Corrective Services, *Annual Report 1994/95* at Appendix 38; S D'Silva, "Offender Suitability - A Central Issue to the Success of Periodic Detention in New South Wales" (1996) 8 *Judicial Officers Bulletin* at 59.
11. S Scarlett, *Submission* (11 June 1996) at 2; M L Sides and Bar Association, *Submission* (24 June 1996) at 58.
12. See for example *R v Turner [No 1]* (NSW CCA, No 60105/95, 26 July 1995, unreported) which involved a Crown appeal against the leniency of a sentence of community service. The sentencing judge considered that periodic detention was the appropriate sentence to impose, but periodic detention was not readily available in the offender's local area.
13. Issues relating to the sentencing of Aboriginal offenders will be dealt with in the second phase of the Commission's reference on sentencing.
14. New centres or expanded facilities are scheduled to come into operation in the next year in Bathurst, Broken Hill, Tamworth, Tomago and Emu Plains. A mid-week program is scheduled to commence at Campbelltown Periodic Detention Centre in late 1996: Information supplied by S D'Silva, Director of the Periodic Detention Program (16 August 1996). See also Department of Corrective Services, *Annual Report 1994/95* at 6.
15. Female offenders experience particular problems with periodic detention: see I Potas, S Cumines and R Takach, *A Critical Review of Periodic Detention in New South Wales* (Judicial Commission of New South Wales, Monograph Series No 5, 1992) at paras 4.2-4.3; D Harvey, "Women in Periodic Detention

Periodic detention for sentences of three months or less

Recommendation 24
Section 5(1) of the *Periodic Detention of Prisoners Act 1981* (NSW) should be amended to make periodic detention generally available for terms of imprisonment of three months or less.

6.5 At present, periodic detention is restricted to offences for which a term of imprisonment not exceeding three years but greater than three months is imposed.[16] Exceptions are permitted for specific offences.[17] In DP 33 the Commission proposed that the three month limitation should be abolished, making periodic detention available as an alternative to imprisonment for all short-term sentences of less than three months duration.[18]

6.6 Submissions generally supported this proposal.[19] It was opposed by one submission on the ground that it may lead to net-widening, with offenders who now receive CSOs instead receiving short-term orders of periodic detention.[20] Even submissions favouring the proposal warned of

in New South Wales" unpublished paper, 28 November 1991, held at the Judicial Commission of NSW. Issues relating to sentencing of female offenders will be examined in the second phase of the Commission's inquiry.

16. *Periodic Detention of Prisoners Act 1981* (NSW) s 5(1).
17. For offences against the Act itself, for offences against the *Summary Offences Act 1988* (NSW), and for domestic violence offences: *Periodic Detention of Prisoners Act 1981* (NSW) s 5A.
18. See DP 33 at para 8.19.
19. W D T Ward, *Submission* (25 July 1996) at 16; Law Society of NSW, *Submission* (19 July 1996) at 29; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 13-14; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 24; N J H Milson, *Submission* (3 July 1996) at 8; J L Swanson, *Submission* (1 July 1996) at 2; M L Sides and Bar Association, *Submission* (24 June 1996) at 60; N R Cowdery, *Submission* (17 June 1996) at 12.
20. Department of Corrective Services, *Submission* (15 July 1996) at 22.

such a risk.[21] As a means of avoiding this result it was suggested that a sentencing court should be required to justify why it wishes to impose a periodic detention order of less than three months instead of a CSO.[22]

6.7 In the Commission's view, the three month limitation on periodic detention should be removed in order to allow for greater flexibility in the use of periodic detention for short-term sentences of imprisonment where this is appropriate in the circumstances of a particular case. We recognise there may be a perceived risk of net-widening, but consider that sufficient safeguards can be implemented to reduce this risk. One safeguard is already in place, in so far as the sentencing court is required to determine that a term of imprisonment is the appropriate sanction before ordering that it be served by way of periodic detention. An additional safeguard is provided by the Commission's recommendation requiring sentencing courts to give reasons why it is appropriate to impose a term of imprisonment of six months or less instead of a non-custodial sanction.[23]

Short-term orders for domestic violence offences

Recommendation 25
Section 5A(1)(c) of the *Periodic Detention of Prisoners Act 1981* (NSW) should be repealed to remove the exception for domestic violence offences for orders of periodic detention of three months or less.

6.8 The *Periodic Detention of Prisoners Act 1981* (NSW) s 5A provides exceptions to the existing three month limitation on periodic detention. These will be made redundant if the Commission's recommendation for the abolition of the three month restriction for periodic detention is implemented. There is one, however, to which the Commission draws attention.

21. Law Society of NSW, *Submission* (19 July 1996) at 32; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 13-14.
22. Department of Corrective Services, *Submission* (15 July 1996) at 22.
23. See Recommendation 40 and paras 8.2-8.7.

6.9 One of the exceptions under s 5A of the *Periodic Detention of Prisoners Act 1981* permits an offender sentenced to a prison term of three months or less for a domestic violence offence to be ordered to serve that term by way of periodic detention. When it was introduced in 1992 as part of a package of reforms relating to domestic violence, this provision was said to give sentencing courts an additional sentencing option for domestic violence offences.[24] The Commission is concerned that this amounts to legislative endorsement of the particular suitability of periodic detention for domestic violence offenders. Given the special relationship between the victim and the offender in domestic violence offences, the risk that these offenders may seek out their victims even after being sentenced, and the possibility that victims will be less likely to report these offences if they believe that the perpetrators will be at liberty, periodic detention may not, in general, be a suitable sentencing option for such offences. This provision also seems inconsistent with the approach taken towards domestic violence in the new *Home Detention Act 1996* (NSW), which expressly precludes from home detention those offenders who have been convicted of or who are likely to commit a domestic violence offence.[25]

6.10 In the Commission's view, it is inappropriate to make specific reference in the *Periodic Detention of Prisoners Act 1981* (NSW) to the availability of periodic detention for domestic violence offences, particularly as the Act is otherwise silent on the types of offences for which periodic detention is a suitable sanction. We therefore recommend that the exception in s 5A(1)(c) for domestic violence offences for short-term periodic detention orders should be repealed.

NON-ATTENDANCE

6.11 The periodic detention scheme in New South Wales has at times come under attack for high non-attendance rates amongst detainees.[26] To a limited

24. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 9 November 1992 at 2368.
25. *Home Detention Act 1996* (NSW) s 6, 7 and 10. See further at paras 7.9-7.12.
26. See for example, "Jail Fiasco: 500 Fail To Serve Weekend Terms" *Sydney Morning Herald*, 12 May 1991 and "200 Weekend Jail Shirkers Go Scot Free" *Sydney Morning Herald*, 13 August 1990. Similar criticisms have also been made of the periodic detention scheme which was recently introduced in the

extent, these criticisms may have presented a distorted view of the statistics relating to non-attendance.[27] Nevertheless, risks of regular non-attendance and non-attendance without reasonable cause need to be reduced if periodic detention is to be accepted both by the general public and by the judiciary as an effective sentencing option.[28] In DP 33 the Commission invited submissions on the strategies which should be adopted to deal with non-attendance.[29] The use of full-time imprisonment was strongly supported as an appropriate sanction for regular non-attendance.[30] Submissions suggested two other ways of dealing with the problem of non-attendance, namely through appropriate assessments of suitable candidates for periodic detention and efficient administrative responses to non-attendance.

Assessing suitability

6.12 One way in which the risk of non-attendance might be reduced is through a strict screening process to assess suitable candidates for the scheme. There are presently few legislative guidelines for assessing

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ACT: see for example, "Police Slate 'Joke' Detentions" *Canberra Times*, 30 June 1996.

27. See I Potas, S Cumines, and R Takach (1992) at para 7.2. The authors point out that in reporting statistics on non-attendance, the media has taken into account offenders who have not attended because they have been serving terms of full-time custody or who are appealing their sentences and are not obliged to attend during that time. Nevertheless, statistics on attendance rates for 1995 as provided by the Department of Corrective Services would seem to indicate that non-attendance by periodic detainees in Stage I of the periodic detention scheme remains a problem: the highest rate of attendance was 66.9%, in April 1995. The lowest rate of attendance for these offenders was in December 1995, when 53.3% attended. See Department of Corrective Services, *Submission* (12 December 1996) Table 1.
28. See recent criticisms by the media that certain periodic detainees are granted leaves of absence for no reasonable cause: "Time Off Jail To Go Yachting" and "Editorial: Part-time Prison Too Flexible" *Daily Telegraph*, 23 September 1996.
29. See DP 33 at paras 8.8-8.12.
30. W D T Ward, *Submission* (25 July 1996) at 16; Law Society of NSW, *Submission* (19 July 1996) at 31; Department of Corrective Services, *Submission* (15 July 1996) at 23; N J H Milson, *Submission* (3 July 1996) at 8; M L Sides and Bar Association, *Submission* (24 June 1996) at 59; Confidential *Submission* (22 May 1996) at 35-36.

suitability.[31] There are no legislative restrictions on availability in terms of the particular offence involved or the particular offender's antecedents.[32] Originally, periodic detention was only available for offenders who had not previously served a term of imprisonment, but any such restrictions were removed to give sentencing courts the widest discretion to order periodic detention in appropriate cases.[33] It has been submitted that closer consideration of the issue of suitability may be useful in reducing the risk of non-attendance,[34] and that perhaps stricter legislative constraints on the availability of periodic detention for particular offenders should be re-introduced.[35]

6.13 At present, as part of the screening process, the Probation and Parole Service is required to prepare a report as to the suitability of the offender for the sentencing court's consideration.[36] The Service assesses suitability on a case by case basis, rather than according to strict criteria.[37] It considers whether there are any factors which may affect the offender's ability to attend regularly, including the offender's ability to travel, transport costs, medical condition, and employment. Offenders who are chronic alcoholics, high rate drug users, or who have significant psychiatric problems, are often assessed

31. Section 5(1) of the *Periodic Detention of Prisoners Act 1981* (NSW) requires the sentencing court to consider whether there is accommodation available in a periodic detention centre and whether travel to the centre is not reasonably likely to cause undue inconvenience, strain or hardship to the offender. The court must also consider a report from a probation officer as to the suitability of the offender for periodic detention. As to the views of judicial officers: see R Bray and J Chan, *Community Service Orders and Periodic Detention Orders as Sentencing Options: A Survey of Judicial Officers in NSW* (Judicial Commission of New South Wales, Monograph Series No 3, April 1991) at 36-40.
32. This contrasts with the regime established by the *Home Detention Act 1996* (NSW): see Chapter 7.
33. *Periodic Detention of Prisoners Act 1970* (NSW) s 3(2)(c); *Periodic Detention of Prisoners (Amendment Act) 1986* (NSW) s 1.
34. Public Defenders, *Consultation* (8 August 1996).
35. Prison Governors, *Consultation* (12 August 1996).
36. *Periodic Detention of Prisoners Act 1981* (NSW) s 5(1)(c). This appears to have been responsible for better attendance: B Thompson, *Attendance Patterns of Periodic Detainees* (NSW Department of Corrective Services, Research Publication No 28, May 1994) at 3.
37. Information supplied by S D'Silva, Director of the Periodic Detention Program (16 August 1996).

as more suitable for full-time custody. The offender's antecedents are considered but do not necessarily preclude assessment as suitable. Evidence indicates that it is the younger male offender, between 19 to 35 years, serving a short-term order of periodic detention, who is more likely not to attend rather than the older offender serving a longer term.[38] Further empirical research would determine more precisely the common characteristics of those offenders who regularly do not attend.

6.14 Various additional strategies could be used to determine suitability more effectively. Courts could place the onus on offenders to supply evidence of any factor relevant to assessing suitability and their ability to attend regularly,[39] or require the offender to submit to a medical examination. Courts could be required to explain fully the operation, conditions and breach consequences of an order to offenders before periodic detention is imposed,[40] or be satisfied that the offender consents to the imposition of the order. The latter three conditions are imposed on courts in the ACT by the *Periodic Detention Act 1995* (ACT).[41]

6.15 The Commission does not accept that additional legislative guidelines or constraints on the discretion to order periodic detention are necessary.[42] In our view, it is preferable that the scheme remains flexible in order that it may be utilised in any case where the court determines it is an appropriate means of dealing with an offender. There may often be matters which make particular offenders unsuitable for periodic detention, but these should be properly identified in the report prepared by the Probation and Parole Service. Greater awareness of the factors relevant to successful completion of periodic detention will assist courts in the appropriate use of this sanction.[43]

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38. Information supplied by S D'Silva, Director of the Periodic Detention Program (16 August 1996). See also B Thompson, *Attendance Patterns of Periodic Detainees* (NSW Department of Corrective Services, Research Publication No 28, May 1994).
39. See S D'Silva, "Offender Suitability - A Central Issue to the Success of Periodic Detention in New South Wales" (1996) 8(8) *Judicial Officers Bulletin* at 59.
40. Public Defenders, *Consultation* (8 August 1996).
41. See *Periodic Detention Act 1995* (ACT) s 6(1)(c) and (e).
42. This is consistent with our recommendation against strict legislative constraints on the availability of home detention: see Recommendation 36.
43. The Director of the Periodic Detention Program suggests that an important means of ensuring that periodic detention is imposed on suitable offenders is

Administrative action in response to non-attendance

6.16 It has been submitted that some of the difficulties connected with non-attendance may result from delays and inaction on the part of the Department of Corrective Services in dealing with absenteeism.[44] Section 25(3A) of the *Periodic Detention of Prisoners Act 1981* (NSW) permits the Commissioner to apply to the court for cancellation of a periodic detention order if the offender has not attended on three occasions without reasonable excuse. In the past, there have been said to be significant delays of six to 18 months in bringing an application for cancellation of an order.[45] As a consequence, cancellation may not have acted as an effective deterrent against non-attendance because detainees have considered that non-attendance apparently was not punished. It is said that the Department of Corrective Services is now more vigilant and quickly brings action against non-attenders.[46] Furthermore, the *Periodic Detention Amendment Act 1996* (NSW) has introduced additional measures to assist in ensuring that offenders are not absent without a genuinely valid excuse.[47] The sentencing court may now order that the periodic detainee submit to the taking of identifying particulars (to prevent another person attending periodic detention in the offender's place),[48] and the Department may require medical examination to verify an offender's reason for absence.[49]

through further judicial education about the scheme: information supplied by S D'Silva (16 August 1996).

44. M L Sides and Bar Association, *Submission* (24 June 1996) at 58; Law Society of NSW, *Submission* (19 July 1996) at 30; N J H Milson, *Submission* (3 July 1996) at 8; Forbes Chambers, *Consultation* (13 August 1996).
45. Law Society of NSW, *Submission* (19 July 1996) at 30. See also Potas, Cumines, and Takach (1992) at 46.
46. See Department of Corrective Services, *Consultation* (26 July 1996). See also Potas, Cumines and Takach (1992) at 46.
47. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 28 May 1996 at 1552. The *Periodic Detention Amendment Act 1996* commenced on 27 September 1996.
48. *Periodic Detention of Prisoners Act 1981*(NSW) s 5AA.
49. *Periodic Detention of Prisoners Act 1981* (NSW) s 34(1)(e1).

6.17 One submission suggested a supervising role for the courts as a means of dealing with non-attendance.[50] The Department of Corrective Services could be required to report to a supervising Local Court on a weekly basis as to the attendance of periodic detainees. The court could then move to cancel an order on its own motion under s 25. In our view, this falls beyond the normal functions of the courts, as well as being unworkable in practice.

6.18 The Commission considers that the existing system is the most practicable means of dealing with absenteeism. However, we recognise that in order to be effective in reducing the incidence of non-attendance, applications must be brought quickly against those offenders who do not attend without reasonable excuse. We therefore urge that the Department of Corrective Services bring applications for cancellation under s 25(3A) expeditiously.

POWERS OF REVOCATION

6.19 The Commission has identified several problems in relation to the power to revoke an order for periodic detention and the consequences flowing from revocation, namely:

- revocation powers under s 25;
- revocation powers under s 24;
- notice to cancel;
- re-sentencing to full-time imprisonment following revocation;
- right of appeal from cancellation; and
- consequences of successful appeals from cancellation.

Revocation powers under s 25

50. M L Sides and Bar Association, *Submission* (24 June 1996) at 59.

Recommendation 26
Section 25(1) of the *Periodic Detention of Prisoners Act 1981* (NSW) should be amended to make it clear that the court may cancel an order for periodic detention, with or without application, if it appears to the court that there is good reason for doing so.

Recommendation 27
Section 25A(2) of the *Periodic Detention of Prisoners Act 1981* (NSW) should be amended to make it clear that the court may cancel a cumulative order for periodic detention, with or without application, if it appears to the court that there is good reason for doing so.

6.20 The court has power to cancel an order for periodic detention in a number of circumstances, including where an offender has not attended for three detention periods. The Commissioner of Corrective Services or the periodic detainee may apply to the court to cancel the order, or the court itself may simply cancel the order without any application being made.[51] The court's power to grant an application to cancel an order under s 25(1)(a) of the *Periodic Detention of Prisoners Act 1981* (NSW) is ambiguous.[52] While s 25(1)(b) makes it clear that the court may cancel a periodic detention order without application on the ground that it appears to the court that there is good reason for doing so, it is unclear whether the section similarly permits a court to cancel an order on the same ground where an application for cancellation has been made. In DP 33 the Commission proposed that s 25(1) should be amended to make it clear that the court has this power.

6.21 Submissions supported the Commission's proposal.[53] It was argued in one submission that the *Periodic Detention Amendment Act 1996* (NSW) introduces a similar power in respect of cancellation of a cumulative order of periodic detention under s 25A(2), and that this amendment clarifies the powers of the court to allow an application to cancel.[54] In the Commission's

51. *Periodic Detention of Prisoners Act 1981* (NSW) s 25(1).
52. See *R v Roome* (1995) 84 A Crim R 1 (NSW CCA) at 4 per Hunt CJ at CL. See also DP 33 at para 8.12.
53. W D T Ward, *Submission* (25 July 1996) at 16; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 12; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 24; Department of Corrective Services, *Submission* (15 July 1996) at 20; J L Swanson, *Submission* (1 July 1996) at 2; N R Cowdery, *Submission* (17 June 1996) at 11. The Law Society stated that it had no specific view on this proposal: Law Society of NSW, *Submission* (19 July 1996) at 29.
54. Department of Corrective Services *Submission* (15 July 1996) at 20.

view, however, s 25A(2) has no such effect, given that it applies only to cancellation of cumulative orders of periodic detention and simply repeats the wording in s 25(1). Indeed, we consider that s 25A(2) should also be amended to make it clear that a court may cancel a cumulative order for periodic detention upon application by the Commissioner of Corrective Services or the detainee where it appears to the court that there is good reason for doing so.

6.22 The Commission recommends that both s 25(1) and 25A(2) be amended to make it clear that the court can cancel an order for periodic detention and a cumulative order for periodic detention with or without application if it appears to the court that there is good reason for doing so.

Revocation powers under s 24

Recommendation 28
Section 24(1) of the *Periodic Detention of Prisoners Act 1981* (NSW) should be amended to give the court a discretion not to cancel an order for periodic detention upon conviction for another offence if, in the circumstances of the case, the court considers this to be appropriate.

6.23 At present an order for periodic detention must be revoked where the periodic detainee is convicted of another offence while serving the periodic detention order and is sentenced for that second offence to a term of full-time custody exceeding one month.[55] Where the term of full-time custody is less than a month, the court has a discretion to cancel the periodic detention order.[56] It has been suggested that automatic revocation of a periodic detention order following a sentence of full-time imprisonment exceeding one month may be too harsh in certain circumstances.[57] For example, an offender serving a three year periodic detention order subsequently sentenced for a minor offence to a six week term of imprisonment must serve the

55. *Periodic Detention of Prisoners Act 1981* (NSW) s 24(1).
56. *Periodic Detention of Prisoners Act 1981* (NSW) s 24(2).
57. *Attorney General's Sentencing Review 1994* at 28.

remainder of the three year periodic detention order in full-time custody as the order must be automatically revoked. Moreover, the offence for which the offender was subsequently convicted and sentenced to full-time custody may well have been committed before the periodic detention order was imposed, or the offender may have made significant attempts at rehabilitation while serving the periodic detention order. In such circumstances, courts may be reluctant to revoke the periodic detention order.

6.24 The Commission recommends that s 24(1) should be amended to the following effect. When sentencing an offender for a second offence the sentencing court should have the discretion not to revoke the order for periodic detention if, in all the circumstances, it considers this is appropriate. If the court exercises its discretion not to revoke the periodic detention order, the offender would be required to serve the term of full-time imprisonment and the periodic detention order concurrently for the duration of the term of full-time custody. Thereafter the offender should be given credit for the periodic detention periods which are served in full-time custody.[58]

58. See further at paras 6.29-6.31.

Notice to cancel

Recommendation 29
Before a court cancels an order for periodic detention, it should be satisfied that proper notice of the proceedings for cancellation has been served on the offender. Time for appeal against cancellation of an order for periodic detention should not begin to run until notice of the proceedings for cancellation has been properly served on the offender.

Recommendation 30
A court should not be able to re-sentence an offender following cancellation of an order for periodic detention unless the offender is present before the court.

6.25 There is no legislative requirement that the offender be present when a periodic detention order is cancelled, beyond that which requires that written notice of the proposed hearing to cancel is served on the offender by post at the offender's last known address,[59] and that reasonable efforts are made to notify the offender if the Commissioner of Corrective Services intends to tender a certificate of certain particulars in an application for cancellation.[60] It has been suggested that injustice frequently arises as a result of an order for periodic detention being cancelled in the offender's absence.[61] For example, an offender may be denied the opportunity of disputing the accuracy of the information provided by the Department of Corrective Services, or of making

59. *Periodic Detention of Prisoners Regulation 1995* (NSW) cl 46.
60. *Periodic Detention of Prisoners Act 1981* (NSW) s 25(5). As amended by the *Periodic Detention of Prisoners Amendment Act 1996* (NSW) Sch 1 [17], this section permits the Commissioner of Corrective Services simply to send a copy of the certificate by post to the offender's last known address.
61. Legal Aid Commission of NSW, *Submission* (18 July 1996) at 7; Law Society of NSW, *Submission* (19 July 1996) at 30, Legal Aid Commission of NSW, *Submission* (27 September 1996) at 1-3.

submissions in favour of setting a minimum term where the court has not considered this issue.[62] Moreover, if there is a delay of more than three months in arresting the offender after the order is cancelled, the offender may have no right to appeal against the cancellation.[63]

6.26 One solution proposed is that the court should be required to issue a warrant for the offender to be brought before it where the Department of Corrective Services satisfies the court of prima facie grounds for cancelling an order.[64] Cancellation proceedings could then not take place without the offender being present. A similar procedure is already in place in relation to cancellation of CSOs.[65]

6.27 The Commission agrees that the legislation should require greater efforts to be made to ensure an offender's presence at cancellation proceedings. Significant injustices can result from a failure to ensure that the offender has had an opportunity to be heard before re-sentencing him or her to full-time imprisonment. However, the Commission rejects the procedure for obtaining a warrant or summons for cancellation of a CSO as a model for cancellation proceedings in relation to a periodic detention order. There is an important distinction between periodic detention and community service, in so far as periodic detention is a form of incarceration. There may be situations in relation to periodic detention where the Department of Corrective Services needs to act quickly to prevent an offender from fleeing the jurisdiction and escaping imprisonment. In these situations, delays may be caused by a requirement first to obtain a warrant before bringing an application to cancel the periodic detention order. In our view, it is better simply to require that the court which is hearing the cancellation proceedings be satisfied that proper service has been effected on an offender before the proceedings can commence. It should be a matter for the court to determine whether proper service has been effected. In the majority of cases, this will require the court to be satisfied that notice has been served personally on the

62. See Legal Aid Commission of NSW, *Submission* (18 July 1996) at 7; Law Society of NSW, *Submission* (19 July 1996) at 30; Legal Aid Commission of NSW, *Submission* (27 September 1996) at 2. These arguments were recently raised in *Powick v Commissioner of Corrective Services* (NSW CA, No 40730/95, 19 September 1996, unreported).
63. See *Justices Act 1902* (NSW) s 122(1A).
64. Legal Aid Commission of NSW, *Submission* (18 July 1996) at 7; Law Society of NSW, *Submission* (19 July 1996) at 30.
65. *Community Service Orders Act 1979* (NSW) s 23-25.

offender. In exceptional circumstances, the court should have a discretion to determine that service has been properly effected through other means if, for example, the offender is about to flee the jurisdiction. Time for leave to appeal should not begin to run until notice of the cancellation proceedings has been properly served. We recommend that the *Periodic Detention of Prisoners Act 1981* (NSW) be amended to reflect these requirements.

6.28 In relation to re-sentencing the offender following cancellation of the periodic detention order, the Commission agrees that the court should require the offender to be present before a new sentence can be imposed. This will allow the offender to make representations to the court as to why a minimum term should be set for the separate sentence of imprisonment, or why a sentence other than imprisonment should be imposed in the circumstances of the case. We recommend that a provision, similar to s 80AA of the *Justices Act 1902* (NSW), should be introduced to ensure that the offender is not re-sentenced to imprisonment unless the offender is present at the time of re-sentencing.[66]

Re-sentencing to full-time imprisonment following revocation

Recommendation 31
When revoking an order for periodic detention, a court should have the discretion to impose a term of imprisonment which is less than the unexpired portion of the periodic detention order where the court considers this to be appropriate in the circumstances of the case.

Recommendation 32
When imposing a separate sentence of imprisonment of six months or less following revocation of a periodic detention order, a court should have the discretion to set a minimum term.

66. See Legal Aid Commission of NSW, *Submission* (27 September 1996) at 2.

6.29 Where an order for periodic detention is cancelled under s 24 or 25 of the *Periodic Detention of Prisoners Act 1981* (NSW), the offender must usually serve the unexpired portion of that sentence in full-time custody, although the court may direct that the unexpired portion is to consist of a minimum and an additional term, make a parole order, or, on application of the Commissioner, make such other orders as the court considers appropriate.[67] It has been argued that where an order for periodic detention is subsequently converted into a term of full-time imprisonment, the offender may often be required to serve a more severe sentence than was originally intended by the sentencing court.[68] This is because an order for periodic detention is often longer than a sentence of full-time imprisonment would be in similar circumstances, owing to the element of leniency inherent in periodic detention.[69] Therefore, where the order is converted into a term of full-time imprisonment, the offender may be required to serve a substantially longer custodial sentence than would ordinarily have been imposed.

6.30 To overcome this problem, it has been suggested that where an order for periodic detention is revoked and a sentence of imprisonment subsequently imposed, the court which imposes that sentence should have a discretion to re-sentence the offender, taking into account the time spent in periodic detention and allowing the court to impose a shorter term of imprisonment in appropriate cases.[70] The DPP has also suggested that the discretion of the court to set a minimum term for converted sentences of imprisonment following revocation of a periodic detention order should be extended to sentences of six months or less as a means of ensuring that offenders do not spend a substantially longer period in prison than they would normally spend.[71]

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67. *Periodic Detention of Prisoners Act 1981* (NSW) s 27.
68. Office of the Director of Public Prosecutions, *Consultation* (19 August 1996); Forbes Chambers, *Consultation* (13 August 1996).
69. See *R v Sadebath* (1992) 16 MVR 138 (NSW CCA) at 141-142 per Allen J.
70. Forbes Chambers, *Consultation* (13 August 1996).
71. Office of the Director of Public Prosecutions, *Consultation* (19 August 1996). Although the court has a discretion to set a minimum term, if the unexpired portion is less than six months, the offender must spend the entire term in full-time custody: *Periodic Detention of Prisoners Act 1981* (NSW) s 27(4). Section 27(4) has been amended recently by the *Periodic Detention of Prisoners Amendment Act 1996* Sch 1 [21] to give the court an additional

6.31 The Commission supports both these suggestions, which inject flexibility into the system and avoid unjustifiably harsh sentences. We recommend accordingly.

Rights of appeal from cancellation of a periodic detention order

Recommendation 33
The *Justices Act 1902* (NSW) and the *Criminal Appeal Act 1912* (NSW) should be amended to confer an express right to seek leave to appeal against cancellation of an order for periodic detention, and against the separate order imposed following cancellation. Where a periodic detention order is cancelled by the Local Court, the defendant should have a right to seek leave to appeal to the District Court. Where a periodic detention order is cancelled by the District Court or by the Supreme Court, the defendant should have a right to seek leave to appeal to the Court of Criminal Appeal.

6.32 There is no express provision in the *Periodic Detention of Prisoners Act 1981* (NSW) conferring a right of appeal from cancellation of a periodic detention order. It has been held that where a periodic detention order has been cancelled, the offender has a right to appeal against the separate term of imprisonment which is deemed to be imposed following cancellation of the order: where the order is cancelled by the Local Court, an appeal lies to the District Court; where the order is cancelled by the District Court or the Supreme Court, an appeal lies to the Court of Criminal Appeal.[72] Rights of

power to make any order, such as a community service order, it considers appropriate. This provision does not appear to extend the power of the court to impose a term of imprisonment shorter than the unexpired portion of the periodic detention order where the court considers this to be appropriate.

72. *R v Somerville* (1995) 36 NSWLR 184; *R v Mikas* (1996) 85 A Crim R 34 (NSW CCA) at 36-37 per Hunt CJ at CL.

appeal are uncertain.[73] For example, the Court of Criminal Appeal may lack jurisdiction to hear an appeal against cancellation under s 24 of the *Periodic Detention of Prisoners Act 1981* (NSW) where the order was made by the Supreme Court or the District Court.[74] This could result in an offender having no right to appeal in these circumstances.

6.33 In the Commission's view, the existing appeal rights and procedure are unnecessarily complicated. When a periodic detention order is cancelled, an offender should be able to seek leave to appeal on two grounds. First, he or she should have a right to seek leave to appeal against the court's decision to cancel the order for periodic detention. Secondly, he or she should have a right to seek leave to appeal against a separate term of imprisonment which is subsequently imposed, or more particularly against the exercise of the court's discretion to impose a minimum term or any other order which the court considers to be appropriate.[75] The legislation should confer an express right to seek leave to appeal on these two grounds.

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73. The *Periodic Detention of Prisoners Amendment Bill 1995* originally included a provision that sought simply to declare the existing law in relation to rights of appeal following cancellation. In particular, it sought to remove any doubt as to whether there is a right of appeal to the District Court from cancellation by a Local Court: see *Periodic Detention of Prisoners Amendment Bill 1995* Sch 1 [23] and Explanatory Note at 8. The Bill was later amended and this provision has been removed from the *Periodic Detention of Prisoners Amendment Act 1996* for further redrafting: see New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 6 June 1996 at 2704.

74. See *R v Mikas* at 37 per Hunt CJ at CL. The *Criminal Appeal Act 1912* (NSW) s 5 gives the Court of Criminal Appeal jurisdiction to grant leave to appeal against a sentence passed following a conviction on indictment. "Sentence" is defined in s 2 of that Act to include an order made by the court of trial. Under s 24 of the *Periodic Detention of Prisoners Act 1981* (NSW), a periodic detention order must be cancelled if the periodic detainee is subsequently convicted of another offence. The jurisdictional problem arises where the court that cancels the order on conviction for another offence is not the same court that made the periodic detention order. This does not then amount to an order made by the court of trial that imposed the periodic detention order and so does not come within the definition of "sentence" so as to permit the Court of Criminal Appeal to hear an appeal from the cancellation.

75. *Periodic Detention of Prisoners Act 1981* (NSW) s 27(4).

6.34 A straightforward means of conferring a right of appeal is simply to amend s 122 of the *Justices Act 1902* (NSW) and s 5 of the *Criminal Appeal Act 1912* (NSW) to include a provision giving a right to seek leave to appeal against a decision to cancel an order for periodic detention and against the order which is subsequently imposed. As a consequence, where the periodic detention order is cancelled by a Local Court, an appeal will lie to the District Court. Where the periodic detention order is cancelled by the District Court or by the Supreme Court, an appeal will lie to the Court of Criminal Appeal. This solution is preferable to adopting a deeming provision similar to s 26 of the *Community Service Orders Act 1979* (NSW), which deems a right of appeal against the manner in which an offender is dealt with under the *Justices Act 1902* (NSW) and the *Criminal Appeal Act 1912* (NSW). Such a deeming provision may give rise to some uncertainty as to its scope,[76] and is less straightforward than our recommendation.

76. Indeed, there has been some dispute in the past as to the scope of the powers to appeal deemed to exist under s 26 of the *Community Service Orders Act 1979* (NSW): see *R v Gaudry* (1987) 8 NSWLR 503.

Consequences of successful appeals from cancellation

Recommendation 34
Where an appeal against cancellation of an order for periodic detention is successful, the court upholding the appeal should have a discretion to remould the original sentence of periodic detention where it considers this to be appropriate, taking into account any time served by the periodic detainee in full-time custody following cancellation of the order.

6.35 Where a periodic detention order is cancelled, the offender is ordinarily placed in full-time custody.[77] Where an appeal against cancellation is successful, the original periodic detention order is deemed to remain in force, and the offender returns to serving the remainder of that order.[78] There is, however, no legislative provision which allows for the time spent in full-time custody to count towards the term of the periodic detention order.[79] Moreover, the term of the periodic detention order is extended by one week for every detention period not attended during the time the offender is in full-time custody.[80] The result is that where there is a significant delay in hearing the appeal, the offender may be required to serve a sentence of periodic detention which is substantially longer than that originally intended by the sentencing court.[81] This is exacerbated by the fact that a periodic detention order is often longer than a sentence for full-time imprisonment under similar

77. See para 6.29.
78. *R v Mikas* at 47-48 per Hunt CJ at CL.
79. The Department of Corrective Services does in fact have a policy of crediting time spent in full-time custody during the actual detention period (that is, generally, the weekend) to the periodic detention order, but does not give credit for the time spent in custody between detention periods. It does not appear that the Department's existing policy has any legislative base: see *R v Mikas* at 47 per Hunt CJ at CL.
80. *Periodic Detention of Prisoners Act 1981* (NSW) s 21(1).
81. For example, in *R v Mikas,* the defendant had served several months in full-time custody while awaiting the hearing of his appeal against cancellation of the periodic detention order.

circumstances, because of the element of leniency inherent in an order for periodic detention.[82]

6.36 To remedy the possible injustice of an offender serving a disproportionate sentence as a result of the wrongful cancellation of a periodic detention order, it has been proposed that a court upholding an appeal should be given the discretion to remould the original periodic detention order where it believes this to be appropriate in the circumstances of the case.[83] This would allow the court to impose a shorter sentence where offenders have served a substantial time in full-time custody while waiting for their appeals to be heard. The Commission supports this proposal and recommends that the court upholding an appeal have such a discretion.

STAGE II

Recommendation 35
The practice of allowing a prisoner serving periodic detention to proceed to Stage II should be discontinued.

6.37 The periodic detention scheme currently operates in two stages.[84] During Stage I periodic detainees are required to remain in custody for the full duration of each detention period. After serving at least one third or three months (whichever is the greater) of their sentences, periodic detainees who have attended regularly and been of good behaviour may then be eligible for Stage II. Stage II is a non-residential component during which periodic detainees are allowed to return to their homes at night and attend a designated work site during the day for each detention period. Progression to Stage II is not automatic.[85] The decision to place an offender on Stage II is made by the

82. See *R v Sadebath* (1992) 16 MVR 138 at 141-2 per Allen J.
83. See *R v Mikas* at 47 per Hunt CJ at CL.
84. See DP 33 at paras 8.14-8.18.
85. From 1 January 1996 to 30 June 1996, approximately 548 periodic detainees applied for progression to Stage II. Of these, approximately 168 applications

Periodic Detention Review Committee which consists of three to four officers from the Department of Corrective Services. It sits fortnightly to determine eligibility for Stage II, as well as to evaluate the reclassification of offenders from Stage II to Stage I. The committee makes its decisions on a case by case basis, having regard to matters such as satisfactory attendance, disciplinary proceedings, adverse work or behavioural reports, and any special risks which a particular offender faces in custody. To assist in making its decision, the committee may, for example, request reports from departmental officers, conduct an interview by telephone or face to face with the detainee, or seek medical and psychiatric advice. If the Committee decides against progression to Stage II, the reasons for its decision are noted.[86]

6.38 In DP 33 the Commission proposed that Stage II should be abolished. We noted that Stage II is an administrative interference with the sentence handed down by the sentencing court; that it results in a significantly less punitive sentence than that envisaged by the sentencing court; and that it has no clear legislative base.[87] However, the majority of submissions did not support the abolition of Stage II,[88] although it was suggested that it be given a clearer legislative base in view of the apparent ambiguity in the existing legislative provisions.[89]

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were refused: Department of Corrective Services, *Submission* (12 December 1996) at 2.

86. See Charter of the Periodic Detention Review Committee in Department of Corrective Services, *Submission* (12 December 1996) at 4-5.

87. DP 33 at paras 8.15-8.18.

88. See Law Society of NSW, *Submission* (19 July 1996) at 29 and 32; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 12-13; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 24; Department of Corrective Services, *Submission* (15 July 1996) at 20-21, (12 December 1996) at 1-2; N J H Milson, *Submission* (3 July 1996) at 8; M L Sides and Bar Association, *Submission* (24 June 1996) at 58; Forbes Chambers, *Consultation* (8 August 1996). In support of abolition of Stage II were W D T Ward, *Submission* (25 July 1996) at 16; J L Swanson, *Submission* (1 July 1996) at 2; N R Cowdery, *Submission* (17 June 1996) at 11; Confidential, *Submission* (22 May 1996) at 36.

89. Legal Aid Commission of NSW, *Submission* (18 July 1996) at 12; M L Sides and Bar Association, *Submission* (24 June 1996) at 59-60. The Department of Corrective Services did not oppose greater clarification of the legislative base for Stage II, although it believed that this would simply be a declaration of the existing law rather than an amendment to it: Department of Corrective

Arguments in favour of Stage II

6.39 The following are the arguments in favour of retaining Stage II:

- It provides the only incentive for regular attendance and good behaviour in Stage I, especially for longer term orders which can require a high degree of self-discipline to attend every weekend for up to three years.[90]

- It is a good management tool, especially for offenders who may be at risk while residing at a periodic detention centre.[91]

- It is cost-effective, because it frees up accommodation in periodic detention centres.[92]

Services, *Consultation* (26 July 1996); Department of Corrective Services, *Submission* (12 December 1996) at 2. There are indications that when the *Periodic Detention of Prisoners Act 1981* was introduced, Parliament acknowledged the existence of the Stage II program in the legislation: see New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 27 November 1980 at 3902. However, subsequent decisions have suggested that there is no clear legislative basis for Stage II: see for example *R v Hallocoglu* (1992) 29 NSWLR 67 at 74.

90. The Department of Corrective Services has provided comparative figures for attendance rates of periodic detainees on Stage I and Stage II as evidence that Stage II is an incentive to attend: see Department of Corrective Services, *Submission* (12 December 1996) Table 1. According to these figures, the rate of attendance in Stage II is certainly significantly higher than the rate of attendance in Stage I: for example, in January 1995, 59.8% of periodic detainees on Stage I attended, compared with 95.3% of periodic detainees on Stage II who attended. However, given that regular attendance in Stage I is an important factor in the determination of progression to Stage II, it seems likely that the higher rate of attendance in Stage II is attributable to the fact that Stage II consists mostly of those offenders who have attended regularly in Stage I.

91. Information supplied by S D'Silva (19 August 1996).

92. As at 30 June 1996, there were 1,117 periodic detainees on Stage I and 401 periodic detainees on Stage II. If Stage II were discontinued, those 401 periodic detainees would have to be accommodated in periodic detention

- It is not an excessively lenient sentence, and is not comparable with a CSO. On the contrary, it requires a greater number of hours of community service per week than a CSO and requires attendance for community work on specified days with little flexibility to change the required times of attendance.[93]

Arguments against Stage II

6.40 The following are the arguments against Stage II:

- It is inconsistent with the concept of truth in sentencing, because the residential prison term actually served by the offender is significantly less than that set down by the sentencing court.

- Periodic detention may be seen as a significantly more lenient sentence than full-time imprisonment owing to the use of Stage II. This may have a negative effect on public perception of periodic detention as an effective sentencing option. As well, sentencing courts may be discouraged from making use of periodic detention because of a perception that it has become excessively lenient.[94]

- Abandonment of Stage II may encourage greater use of periodic detention by sentencing courts because it will be seen to have a stronger punitive element.

Alternative models for Stage II

centres: see Department of Corrective Services, *Submission* (15 July 1996) at 20; (12 December 1996) at 1.

93. Legal Aid Commission of NSW, *Submission* (18 July 1996) at 12-13; Law Society of NSW, *Submission* (19 July 1996) at 32.

94. Views from members of the judiciary to this effect have been expressed in several cases, for example *R v Potter* (1994) 72 A Crim R 108 (NSW CCA) at 115, and *R v Randall* (NSW CCA, No 60826/93, 19 April 1994, unreported) at 6. The Senior Public Defender also referred to the reluctance of the judiciary to impose orders of periodic detention because they consider that Stage II involves an unacceptable degree of leniency: see M L Sides and Bar Association, *Submission* (24 June 1996) at 60.

6.41 Various alternative models could be adopted for the operation of a Stage II in periodic detention. The Commission here considers three, each of which involves greater legislative control over the progress of offenders.

Setting minimum terms

6.42 The first model is to allow for the sentencing court to set a minimum term when making an order for periodic detention. The minimum term would be equivalent to Stage I of the current scheme. At the expiration of the minimum term, the offender would be eligible to apply for progression to Stage II. This could be determined by a body similar to the existing Periodic Detention Review Committee, with its composition and procedures governed by legislation or regulation. This option would have the advantage of ensuring that the sentence of imprisonment set down by the sentencing court is the minimum period actually served in custody. The sentencing court could impose a longer minimum term where the seriousness of the offence calls for a more punitive sentence. One possible disadvantage of this option is that it may give rise to administrative difficulties. For example, if the length of an offender's sentence is extended due to a leave of absence, adjustment of the length of the minimum term would be necessary.

Discretion to exclude Stage II

6.43 A second option would give a sentencing court, when imposing periodic detention, power to make an order prohibiting a particular offender from progression to Stage II.[95] There could be a legislative presumption against the sentencing court making such an order so as to ensure that offenders are only precluded from eligibility to Stage II where the seriousness of the particular offence or other circumstances requires this. In all other cases, progression to Stage II would not be automatic, but would be determined by a body regulated by legislation.

Legislative regulation of Stage II

6.44 A third option may be to enshrine the existing scheme into legislation. That is, the legislation could spell out that periodic detainees are eligible to apply for progression to Stage II after serving one third or three months of their sentences. Applications would be determined by a committee, regulated by legislation.

Discontinuation of Stage II

95. M L Sides and Bar Association, *Submission* (24 June 1996) at 60.

6.45 After carefully considering the arguments in favour of retaining Stage II which were raised in submissions, the Commission nevertheless recommends that the practice of allowing prisoners serving periodic detention to proceed to Stage II should be discontinued. Our reasons follow.

6.46 First, we consider that the current scheme breaches the concept of truth in sentencing. It amounts to an administrative interference with the sentence imposed by the court, in so far as a committee composed of officers from the Department of Corrective Services may alter the form of the sentence to be served from that which was originally envisaged by the sentencing court.

6.47 Secondly, retention of Stage II in any form adds an excessive amount of leniency to the periodic detention scheme. Periodic detention already has an inherent element of leniency, and to permit offenders to remain outside custody for a portion of their sentence unspecified by the court makes it an even more lenient sentencing option. This undermines public and judicial confidence in a sentence of this nature. We have referred to indications that sentencing courts are reluctant to make use of periodic detention as an alternative to full-time custody because it is not considered to be a sufficiently punitive sanction.[96] As a consequence, more offenders may be sentenced to full-time imprisonment where periodic detention is not seen as an appropriate sanction. This consideration necessarily means that we do not, on balance, accept any of the proposed variations to Stage II. We nevertheless recognise that they have advantages over the existing scheme, in so far as they give a clear legislative base to Stage II and are consistent with the concept of truth in sentencing because they allow for eligibility to Stage II to be determined by the sentencing court.

6.48 Thirdly, we are not convinced that the wording in the existing legislation is sufficient to give Stage II a proper legislative base, whatever may have been the original intention of Parliament.

6.49 The Commission recognises that requiring periodic detainees to be in custody for the full term of their sentence may have repercussions for the resources which are necessary to accommodate those so sentenced, but we do not consider this to be a sufficiently compelling reason to retain Stage II, given its manifest disadvantages. If Stage II is discontinued, periodic detention may be seen by sentencing courts as a more appropriate sanction.

96. See para 6.40.

The Commission urges that sufficient resources be made available to support periodic detention as an effective sentencing option.

7.
HOME DETENTION

- THE HOME DETENTION ACT 1996
- AVAILABILITY OF FRONT-END HOME DETENTION
- REVOCATION OF AN ORDER FOR HOME DETENTION
- BACK-END HOME DETENTION

7.1 Home detention permits an offender to serve part or all of a term of imprisonment in the offender's home, under strict supervision and subject to conditions. Home detention may operate as a "front-end" or a "back-end" scheme. An order for front-end home detention allows an offender to serve the full term of imprisonment at home. In contrast, an order for back-end home detention is available only after an offender has served a portion of his or her sentence in gaol.[1] A pilot scheme for front-end home detention has operated in New South Wales since 1992. There has been no independent legislative basis for this scheme, and offenders have been placed on it pursuant to a s 558 bond.[2] In DP 33 the Commission proposed that legislation should provide for home detention as a sentencing option. Since publication of the Discussion Paper, the *Home Detention Act 1996* (NSW) has been introduced,[3] which accords with the tenor of proposals in DP 33, and gives an independent legislative basis for the front-end home detention scheme. The Commission has considered the *Home Detention Act 1996* (NSW) in light of the submissions which we received on home detention. We have also examined the desirability of establishing a back-end home detention scheme. Accordingly, this Chapter considers the following issues relating to home detention:

- availability of front-end home detention;
- procedures for cancelling an order for front-end home detention; and
- the introduction of legislation for back-end home detention in New South Wales.

THE HOME DETENTION ACT 1996

7.2 The *Home Detention Act 1996* (NSW) allows for certain offenders who are sentenced to terms of imprisonment of 18 months or less to serve their sentences by way of home detention.[4] Offenders on the scheme will be subjected to intensive surveillance by way of electronic monitoring devices,

1. See DP 33 at paras 9.11-9.24.
2. See DP 33 at paras 9.18-9.22.
3. The *Home Detention Act 1996* (NSW) was assented to on 1 November 1996.
4. *Home Detention Act 1996* (NSW) s 5.

visits from supervising officers, and drug and alcohol testing.[5] The legislation provides for conditions to be attached to the order.[6] Serious or repeated breaches of the conditions may result in revocation of the order, requiring the offender to serve the unexpired portion of the fixed or minimum term of the sentence in full-time imprisonment.[7] The main objective of the Act is to reduce the prison population by diverting people from the prison system.[8] Home detention is a less expensive sentencing option than imprisonment, and may also offer a more humane form of punishment.[9] It is not aimed at detaining those offenders who would otherwise be sentenced to a non-custodial sanction or to periodic detention. Rather, it seeks to divert from prison those offenders who do not constitute a threat to public safety or whose crimes do not merit the harshest of sanctions.[10] The scheme is to be reviewed after 18 months to ensure that it is fulfilling these objectives.[11]

7.3 The Commission endorses the aim of the *Home Detention Act 1996* (NSW) and generally agrees with the provisions in the Act.

AVAILABILITY OF FRONT-END HOME DETENTION

An alternative to imprisonment

5. See New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 20 June 1996 at 3386.
6. *Home Detention Act 1996* (NSW) s 13. The Act provides for standard conditions which must be applied to any order for home detention, and additional conditions which may be applied. The standard conditions will be prescribed by regulations which have not yet been promulgated.
7. *Home Detention Act 1996* (NSW) s 16(1).
8. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 20 June 1996 at 3385.
9. Particularly for people who are typically vulnerable to abuse or hardship in the prison environment, such as young offenders, Aborigines, and people with an intellectual disability or who are seriously ill. The Commission will consider sentencing in relation to specific categories of offenders in the second phase of this reference.
10. *Home Detention Act 1996* (NSW) s 4(2). See also New South Wales, *Parliamentary Debates* (*Hansard)* Legislative Assembly, 20 June 1996 at 3385.
11. *Home Detention Act 1996* (NSW) s 28.

7.4 The legislation provides that home detention is only available after the sentencing court has imposed a term of imprisonment of 18 months or less.[12] By providing that offenders are not to be diverted to home detention who would otherwise be sentenced to other non-custodial sanctions or to periodic detention,[13] the Act implicitly ranks home detention above periodic detention in terms of severity of punishment.

7.5 Submissions agreed that front-end home detention should only be available as an alternative to a sentence of imprisonment.[14] Given its highly intrusive nature, the fact that the offender's home is effectively converted into a prison, the expense of administering this sentencing option in comparison with other non-custodial options,[15] and possible risks of net-widening, the submissions supported the imposition of a custodial sentence as a pre-condition to the availability of the home detention scheme. Two suggestions were made to reduce the risk that orders for home detention are imposed on offenders who would ordinarily receive non-custodial sentences. First, it was submitted that imposition of a term of imprisonment be carried out at a separate stage and by a separate sentencing officer from conversion to home detention.[16] However, the Commission considers that this proposal is wrong in principle, would be unworkable in practice, and would significantly delay

12. *Home Detention Act 1996* (NSW) s 5.
13. *Home Detention Act 1996* (NSW) s 4(2).
14. N R Cowdery, *Submission* (17 June 1996) at 12; NSW Council for Civil Liberties, *Submission* (28 June 1996) at 5; Justice Action, *Submission* (2 July 1996) at 5; N J H Milson, *Submission* (3 July 1996) at 8; Department of Corrective Services, *Submission* (15 July 1996) at 27; Victims Rights and Civil Rights Project, *Submission* (19 July 1996) at 7; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 25; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 14; Law Society of NSW, *Submission* (19 July 1996) at 36; Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 3.
15. The cost of administering home detention under the pilot scheme in 1995 was estimated at $25 per person per day, and is estimated at $30 when the scheme provided for in the Act is fully operational. In 1996 the cost of administering a CSO was approximately $3.50 per person per day, and the cost of probation $4 per person per day. See para 1.21. The cost of keeping a person in minimum security prison in 1996 was $104.34 per day, and the cost of periodic detention per person per day for that period was $30: Department of Corrective Services, *Annual Report 1995/96*, Appendix 23.
16. Victims Rights and Civil Rights Project, *Submission* (19 July 1996) at 8; Justice Action, *Submission* (2 July 1996) at 1.

the sentencing process. Secondly, it was submitted that a body such as the Judicial Commission should monitor the impact of home detention on the total prison population. If there is a significant increase in the home detainee population without any corresponding decrease in the prison population, this may be an indication that home detention is not being used as a genuine alternative to imprisonment.[17]

7.6 The Commission supports the restriction on the availability of home detention as a strict alternative to imprisonment contained in the Act. We also support the proposal that the home detention scheme be closely monitored to ensure that it is genuinely diverting offenders from prison. In fact, the legislation provides for the scheme to be reviewed 18 months after its commencement.[18] The Commission encourages any such review of the scheme to consider whether there has been a significant change in the prison population in view of the total home detainee population. This should provide some indication as to whether home detention is being used as a strict alternative to imprisonment. A further safeguard against the perceived risk of net-widening is provided for by the Commission's recommendation that sentencing courts be required to give reasons justifying the imposition of a term of imprisonment of six months or less.[19]

7.7 We note also that, in addition to being an alternative sentence to imprisonment, it would be very useful if home detention were available for remanding people on bail.

17. Victims Rights and Civil Rights Project, *Submission* (19 July 1996) at 7; Justice Action, *Letter to Attorney General* (3 August 1996) at 1-2.
18. *Home Detention Act 1996* (NSW) s 28.
19. See Recommendation 40. It has been suggested that the requirement to give reasons for short-term sentences of imprisonment may place too great a burden on sentencers who wish to impose an order for home detention. Sentencers would be required to give reasons justifying the imposition of a custodial sentence as well as be required to consider an assessment report as to the offender's suitability to home detention: see Department of Corrective Services, *Submission* (15 July 1996) at 4. In the Commission's view, however, these requirements are important safeguards to ensuring that home detention is not used inappropriately. To the extent that they place any additional burdens on sentencers, the requirements are necessary to ensure that reasoned consideration is given as to whether home detention is genuinely being used as an alternative to imprisonment.

Legislative constraints on eligibility

Recommendation 36
The *Home Detention Act 1996* (NSW) should be amended to remove constraints on eligibility for home detention beyond the requirement of imprisonment for a term of 18 months or less.

7.8 The *Home Detention Act 1996* (NSW) places constraints on eligibility for home detention. The Commission is concerned that these constraints place too great a restriction on its availability which may influence how effectively the scheme operates to divert offenders from prison.

7.9 Sections 6 and 7 of the *Home Detention Act 1996* (NSW) set out criteria for automatic exclusion from the home detention scheme. Matters in s 6 relate to the type of offence for which the offender is being sentenced. This provision prohibits a home detention order from being imposed for certain offences, for the most part offences involving acts or threats of violence, such as murder, armed robbery, sexual assault, and domestic violence offences. Similarly, s 7 excludes from the scheme an offender who has in the past been convicted of certain offences, such as murder, sexual assault, or a domestic violence offence. These restrictions reflect legislative policy to limit the availability of home detention to minor non-violent offenders and to give paramountcy to public safety.[20] The Commission supports the legislative intention to avoid imposing home detention in situations which may pose a risk to public safety, including situations of domestic violence. However, we are concerned that the legislature has chosen to restrict eligibility by way of strict criteria for automatic exclusion, rather than leaving a higher degree of flexibility to impose home detention where it is considered appropriate in the circumstances of a particular case. For example, the Act prohibits a home detention order from being made for an offender who is convicted of manslaughter.[21] Manslaughter covers a wide range of unlawful killing, with varying degrees of culpability. As a result, people convicted of manslaughter may receive sentences ranging from long

20. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 20 June 1996 at 3385.
21. *Home Detention Act 1996* (NSW) s 6(a).

terms of imprisonment to immediate release on a bond.[22] There is arguably no reason automatically to exclude these offenders from home detention when it is an appropriate sanction in the circumstances of their case.

7.10 Most submissions proposed that home detention should, at the least, be available for any offence in the Local Court where imprisonment would otherwise be imposed.[23] Two submissions expressly proposed that home detention should also be available in the higher courts except where there is a risk to public safety or where the gravity of the offence demands a prison sentence.[24] The Probation and Parole Officers' Association maintained that there should be no offence which automatically disqualifies an offender from eligibility for home detention since there may be objective and subjective factors in any case which will make such an order possible.[25] Other submissions did not specify in what circumstances an order for home detention should be made, except to the extent that it should only be available as an alternative to a term of imprisonment.[26]

7.11 In the Commission's view, it is preferable to keep the criteria for availability of home detention wide rather than impose legislative constraints on eligibility. This would make the legislation for home detention more consistent with the legislative framework for other sentencing options such as

22. For example, in New South Wales from 1990 to 1993, of the 126 offenders who were sentenced for manslaughter, 88.1% received custodial sentences, two were sentenced to periodic detention, and 11.9% received non-custodial sentences: see H Donnelly, S Cumines and A Wilczynski, *Sentenced Homicides in New South Wales 1990-1993, A Legal and Sociological Study* (Judicial Commission of New South Wales, Monograph Series No 10, June 1995) at 89.
23. Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 3; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 25; N J H Milson, *Submission* (3 July 1996) at 8; M L Sides and Bar Association, *Submission* (24 June 1996) at 62.
24. M L Sides and Bar Association, *Submission* (24 June 1996) at 62; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 25.
25. Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 6.
26. Law Society of NSW, *Submission* (19 July 1996) at 36; Justice Action, *Submission* (2 July 1996) at 5; NSW Council for Civil Liberties, *Submission* (28 June 1996) at 5. Home detention as an alternative to imprisonment for offences of first instance was also proposed: Legal Aid Commission of NSW, *Submission* (18 July 1996) at 14.

periodic detention and CSOs, which do not set out criteria for automatic exclusion. The general principles of sentencing, including proportionality and deterrence, provide the same safeguards against endangering the public and trivialising the offence as do legislative constraints, while at the same time allowing greater flexibility to meet the demands of individual cases. Sections 6 and 7 constitute an unnecessary fetter on judicial discretion. We therefore recommend that the Act should be amended to remove any specific constraints on eligibility for home detention beyond the requirement that the offender be sentenced first to a term of imprisonment.

Assessing suitability

7.12 An order for home detention may only be imposed if the offender, who is otherwise eligible, has been assessed as suitable for home detention.[27] The assessment is based on a report by the Probation and Parole Service, addressing matters set out in s 10. Submissions have identified several issues potentially relevant to suitability. Two matters, in particular, are worthy of consideration, the suitability of an offender's residence for home detention, and the impact of an order for home detention on an offender's family.

Suitability of proposed residence

7.13 The Commission noted in DP 33 that home detention may be of limited effectiveness if it is unavailable to offenders with no permanent residence or whose residence is unsuitable.[28] Several submissions expressed concern that poorer offenders may be excluded from the home detention scheme if consideration is given to the suitability of an offender's residence.[29] Moreover differences in the quality of offenders' housing may mean that home detention is a harsher punishment for some offenders than for others.[30]

27. *Home Detention Act 1996* (NSW) s 8(4). The court retains a discretion under s 8(5) to refuse to make an order for home detention despite the contents of the assessment report.
28. DP 33 at para 9.15.
29. Legal Aid Commission of NSW, *Submission* (18 July 1996) at 14; M L Sides and Bar Association, *Submission* (24 June 1996) at 62; Victims Rights and Civil Rights Project, *Submission* (19 July 1996) at 8. See also Justice Action, *Letter to Attorney General* (3 August 1996) at 3.
30. English studies on the effectiveness of home detention have noted that the quality of housing can affect offenders' attitudes towards home detention.

It was submitted that, rather than excluding an offender from the scheme where his or her residence is not properly equipped to allow for effective monitoring, proper equipment, such as a telephone, should be installed for the duration of the sentence at the State's expense.[31] It was also suggested that where an offender does not have a fixed place of residence, adequate accommodation should be provided for the term of the home detention order.[32]

7.14 The *Home Detention Act 1996* (NSW) requires the assessing officer to consider the suitability of the offender's proposed residence for home detention when assessing the suitability of the offender for the home detention scheme.[33] In theory, an offender without a permanent place of residence or with a residence inappropriately equipped for proper monitoring may therefore be assessed as unsuitable for home detention. However, the Act also requires that if a particular offender is homeless, all reasonable efforts must be made by the Probation and Parole Service to find suitable accommodation for the duration of the home detention order.[34] This provision goes some way in reducing the risk that impoverished offenders will be excluded from the scheme, although it may be that these offenders will nevertheless be excluded if they are unable to find accommodation which is suitably equipped for monitoring. The Commission considers that it is a significant disadvantage of the home detention scheme if it operates in a discriminatory fashion so as to exclude poor offenders. For this reason, in addition to a legislative requirement that reasonable efforts be made to find accommodation for homeless offenders, the Commission urges consideration be given to allocating resources to equip offenders' homes so as to make them suitable for home detention. This may often require no more than installation

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While most offenders who were surveyed reported that they preferred home detention to prison, some offenders who were confined to sub-standard living conditions said that they would rather be in prison: see G Mair and C Nee, *Electronic Monitoring: The Trials and Their Results* (Home Office Research Studies, HMSO, London, 1990) at 56, and M Nellis, "The Electronic Monitoring of Offenders" (1991) 31 *British Journal of Criminology* 165 at 173.

31. M L Sides and Bar Association, *Submission* (24 June 1996) at 62.
32. NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 26; Justice Action, *Letter to Attorney General* (3 August 1996) at 3.
33. *Home Detention Act* 1996 (NSW) s 10(2)(d).
34. *Home Detention Act 1996* (NSW) s 10(5).

of a telephone. The cost of such resources should still be considerably less than the costs of imprisonment.

Impact of home detention on an offender's family

Recommendation 37
The *Home Detention Act 1996* (NSW) should permit the co-residents of a home detainee to withdraw their consent to an order for home detention.

7.15 Home detention may offer advantages for an offender's family as well as for the offender. Family members are able to continue to live in close domestic contact with the offender and in some instances are able to benefit from the financial support which an offender provides through paid employment.[35] However, there is also potential for home detention to have a very negative impact on an offender's family. Most obviously, family members who have been the victims of domestic violence will suffer if the perpetrator is released into their home on a home detention order. Even if there is no risk of domestic violence, family members may suffer significant stresses as a result of living with an offender who is sentenced to home detention. Home detention is cost-effective because it removes offenders from paid prison care and places them instead in the unpaid care of their families. Family members may feel obliged to ensure that the offender complies with the order, and to negotiate between the offender and the supervising officer. Their relationship with the offender may also suffer particular stresses as a result of the severe restrictions and close surveillance imposed on the offender for the duration of the order.[36]

7.16 The potentially negative impact of home detention on an offender's family is anticipated by the *Home Detention Act 1996* (NSW).[37] In assessing the offender's suitability to home detention, the Act requires consideration to be given to the likelihood of domestic violence being committed against the

35. G Fearon, *Submission* (25 August 1996) at 1-3; E G Fearon *Submission* (22 July 1996) at 3.
36. See A Aungles, *The Prison and the Home* (Institute of Criminology Monograph Series No 5, Sydney, 1994) at 201-218. A study of electronic monitoring in England noted that there were several instances where co-residents withdrew their consent allowing offenders to live with them as a result of the strain which the order had placed on their relationships: see G Mair and C Nee (1990) at 57.
37. *Home Detention Act 1996* (NSW) s 10(2)(c), (e) and (f), and s 8(1)(b).

offender's family; whether the offender's co-residents understand and are willing to live in conformity with the requirements of the home detention order; and requires the offender's co-residents to give written consent to the order before the order can be imposed. Lastly, the impact of the home detention scheme on families is to be monitored annually.[38]

7.17 In practice, when assessing suitability under the existing pilot scheme for home detention, the Probation and Parole Service gave close consideration to the possible effects of a home detention order on an offender's family. This often required undertaking separate interviews with family members, observing offenders at home with their families, and researching into any reported history of domestic violence within the family. If the probation officer considered that the relationship between the offender and the offender's family was already strained or unstable, the offender may have been assessed as unsuitable for home detention.[39]

7.18 Several submissions emphasised the importance of considering the effect of home detention on family members before imposing such an order. In particular, they stressed that home detention should never be used in situations where there is a risk of domestic violence.[40] Some submissions suggested that the Act does not go far enough in alleviating the potential stresses which can be placed on family members, and that it should, for example, clearly state that family members should not be used as agents to negotiate between the offender and the supervising officer.[41] It has also been suggested that support services, including financial support, should be available for offenders' co-residents.[42]

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38. The review of the Act which is to be conducted 18 months after the commencement of the scheme is to include a review of the impact of the scheme on families. Following this review, an annual report on the impact of the Act on families is to be tabled in Parliament: *Home Detention Act* (NSW) s 28(4).
39. Information supplied by Probation and Parole Service (2 August 1996).
40. Victims Rights and Civil Rights Project, *Submission* (19 July 1996) at 7; NSW Council for Civil Liberties, *Submission* (28 June 1996) at 5; Justice Action, *Submission* (2 July 1996) at 5.
41. Victims Rights and Civil Rights Project, *Submission* (19 July 1996) at 7.
42. Victims Advisory Council, *Submission* (11 July 1996) at 7; NSW Council for Civil Liberties, *Submission* (28 June 1996) at 5; Justice Action, *Submission* (2 July 1996) at 5. It was also proposed that the money which is saved as a result of diverting offenders from prison to home detention should be used to provide support for home detainees and their families, as well as to provide

7.19 The Commission agrees that the matters listed in the Act for identifying suitable offenders may not, of themselves, be sufficient to ensure that family members do not suffer from the imposition of a home detention order. For example, family members may feel compelled to consent at any cost in order to keep the offender out of gaol. For this reason, the Commission considers that it is important for suitability assessments to be carried out by officers trained to be sensitive to the issues concerning the potentially adverse effects of home detention on family members. The criteria for assessing suitability should remain open-ended, so that assessing officers are able to take account of any matter which is relevant in the circumstances of an individual case. The Commission also considers that it is essential to the success of the home detention scheme that there be a strong emphasis on close personal contact between the supervising officer and the offender, as well as the offender's family. Both the offender and the offender's family will then be able to benefit from the expert services of trained probation officers who are sensitive to the problems that may arise in relation to home detention.

7.20 The previous pilot scheme for home detention had a strong focus on personal contact by probation officers, rather than being simply an electronic monitoring program. The Act does not specify the way in which offenders are to be monitored, although it would appear that there is to be a continued emphasis on close personal contact.[43] The Commission supports the focus on face to face contact in the operation of this sentencing option. With the expansion of the home detention scheme under the new legislation, we also urge the allocation of adequate resources for recruiting and training more supervising officers with the necessary expertise.

7.21 As an additional means of protecting family members from excessive hardship, the Commission recommends an express legislative provision to permit co-residents to withdraw their consent to a home detention order. This may assist family members in situations where they believe they can no longer live with the home detainee. We recognise that this recommendation may be of limited assistance for family members who fear reprisals from the offender if they withdraw consent, or who do not wish the offender to be

more services and compensation to victims of crime: Justice Action, *Letter to Attorney General* (3 August 1996) at 3.

43. See New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 18 September 1996 at 4333.

placed in full-time custody. However, in conjunction with our recommendation that there be power to cancel an order for home detention following a material change in the offender's circumstances,[44] this recommendation should provide some additional assistance to family members who believe that they can no longer live with the home detainee.

44. Recommendation 38.

REVOCATION OF AN ORDER FOR HOME DETENTION

7.22 The *Home Detention Act 1996* (NSW) provides for revocation of an order for home detention where there has been a serious or repeated breach of the conditions of the order,[45] or where the offender is sentenced to imprisonment for another offence.[46] The supervising officer has a duty to apply for revocation in the event of serious or repeated breaches of the order.[47] The Act provides for the Parole Board to hear breach proceedings.[48] The Board may decide to revoke the order or to discipline the offender.[49]

Power to revoke an order where there has been a material change in circumstances

Recommendation 38
The *Home Detention Act 1996* (NSW) should allow an order for home detention to be revoked where there has been a material change in circumstances since the date of imposition of the order. The home detainee, the home detainee's co-residents, or the Probation and Parole Service should be able to make an application to revoke the order.

7.23 The *Home Detention Act 1996* (NSW) provides that an order for home detention may be revoked on two grounds only: for breach of the order; or following the imposition of a term of imprisonment for another offence. The Commission considers, however, that there are other situations, where there has been a material change in the offender's circumstances, which may make

45. *Home Detention Act 1996* (NSW) s 16.
46. *Home Detention Act 1996* (NSW) s 23.
47. *Home Detention Act 1996* (NSW) s 14(2).
48. *Home Detention Act 1996* (NSW) s 15. In the case of an offender who is sentenced to imprisonment for a second offence, the sentencing court exercises any of the powers of the Parole Board conferred by s 16: see s 23.
49. *Home Detention Act 1996* (NSW) s 16(1) and (3).

it desirable to revoke the order even though no breach has occurred. For example, a risk of domestic violence not apparent at the time when the order was imposed may have arisen during the term of the order. In paragraph 7.15 we considered other problems arising from the imposition of a home detention which may make it very difficult for the offender's co-residents to continue to live in compliance with the order. In exceptional situations, offenders themselves may wish to have the order revoked if, for example, they feel that they would prefer imprisonment to being closely monitored at home. The Commission is of the opinion that it is important to have greater flexibility to revoke an order for home detention in these situations than is presently provided for in the *Home Detention Act 1996* (NSW). We therefore recommend that the offender, the offender's co-residents, and the Probation and Parole Service should be able to apply for revocation of a home detention order where there has been a material change in circumstances from the time of the imposition of the order.

Hearing of revocation proceedings

Recommendation 39
Proceedings for breach of a home detention order or for revocation of an order where there has been a material change in circumstances should be heard by the court which imposed the order. Where the order was imposed by a Local Court, any Local Court should be able to hear the proceedings.

7.24 In DP 33 the Commission invited submissions on the appropriate forum to hear breach proceedings in respect of an order for home detention.[50] The *Home Detention Act 1996* (NSW) now provides for such proceedings to be heard by the Parole Board.[51]

7.25 Submissions did not generally favour the Parole Board as an appropriate forum to hear breach proceedings. It was submitted that these proceedings should be heard by the court which originally made the home

50. DP 33 at para 9.22.
51. *Home Detention Act 1996* (NSW) s 15-16.

detention order.[52] Significant delays were forecast if offenders needed to be brought to Sydney for hearings of the Parole Board.[53] It was also argued that as revocation will usually result in the offender being placed in full-time custody, breach proceedings should be heard by a court, rather than by the Parole Board.[54] Another option proposed was to have breaches dealt with by way of a call up procedure in court, giving offenders a greater incentive to conform with the order, as they would face the risk of an increased sentence on call up.[55]

7.26 The Commission agrees that the court which originally imposed the order for home detention should hear breach proceedings in relation to that order. Since revocation will usually result in the offender being placed in full-time imprisonment, the sentencing court is a more appropriate forum than the Parole Board to hear such proceedings. For the same reason, proceedings for revocation of an order where there has been a material change in circumstances[56] should also be heard by the sentencing court which originally imposed the order for home detention. The Commission therefore recommends that the original sentencing court should hear breach proceedings for home detention and proceedings to revoke an order where there has been a material change in circumstances. Where the order for home detention was originally imposed by a Local Court, any Local Court should

52. Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 3; Law Society of NSW, *Submission* (19 July 1996) at 36; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 14; N J H Milson, *Submission* (3 July 1996) at 8; M L Sides and Bar Association, *Submission* (24 June 1996) at 62; N R Cowdery, *Submission* (17 June 1996) at 12. One submission proposed that breaches of a home detention order should be dealt with by the Local or District Court on the same basis as breaches of community service orders are dealt with: NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 26. Those in favour of the suggestion to refer breaches to the Parole Board were W D T Ward, *Submission* (25 July 1996) at 17 and the Department of Corrective Services, *Submission* (15 July 1996) at 27.
53. Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 3.
54. N J H Milson, *Submission* (3 July 1996) at 8; M L Sides and Bar Association, *Submission* (24 June 1996) at 62; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 24.
55. N R Cowdery, *Submission* (17 June 1996) at 12.
56. See Recommendation 38.

be able to hear proceedings for revocation of the order, for the reasons stated in relation to revocation of community service orders.[57]

Notice of revocation

7.27 If Recommendation 39 is not adopted, consideration will need to be given to the powers of the Parole Board under the *Home Detention Act 1996* (NSW) to revoke home detention orders. The Act currently provides that once the Parole Board has revoked the home detention order, notice of the revocation must be served on the offender in a similar way as notice is served following refusal to grant parole.[58] The notice must fix a date for the Board to meet for the purpose of reviewing its decision to revoke the home detention order, at which time the offender is permitted to make representations to the Board in relation to the revocation.[59] The notice of revocation must be accompanied by copies of the reports and documents which were used by the Board in reaching its decision to revoke the home detention order,[60] however, documents are not required to be disclosed to an offender if they endanger or inappropriately identify any other person.[61]

7.28 The power to withhold sensitive information from an offender is similar to the power to withhold information in relation to parole proceedings.[62] The Commission noted concerns about the non-disclosure of relevant material in parole proceedings, in so far as this may amount to a breach of the rules of natural justice, but concluded that the power to withhold information in relation to parole proceedings be retained as a matter of practical necessity. Similarly, in relation to proceedings for revocation of a home detention order, we consider that it may be necessary in some situations to withhold relevant information in order to protect the supplier or the author of that information. We reiterate, however, that this power should only be exercised when absolutely necessary.

57. See paras 5.10-5.12.
58. *Home Detention Act 1996* (NSW) s 17. See *Sentencing Act 1989* (NSW) s 38.
59. *Home Detention Act 1996* (NSW) s 17(2)(b) and 18(2).
60. *Home Detention Act 1996* (NSW) s 17(2)(d).
61. *Home Detention Act 1996* (NSW) s 17(3).
62. See paras 11.44-11.46.

BACK-END HOME DETENTION

7.29 Back-end home detention is available only once an offender has served a portion of his or her sentence in gaol. It may be incorporated as part of parole or as a distinct stage of the sentence. In DP 33 the Commission expressed the view that any order for back-end home detention should be determined by the sentencing court in order to preserve the concept of truth in sentencing.[63] The *Home Detention Act 1996* (NSW) makes no provision for back-end home detention.

7.30 There was general support in submissions for a back-end home detention scheme in New South Wales, however, different forms of operation were envisaged. Prior to giving any scheme a legislative base, a pilot scheme was recommended.[64] The Department of Corrective Services stated that introduction of a back-end home detention scheme should not proceed before the front-end scheme introduced by the Act is properly assessed.[65] Several submissions agreed that the sentencing court should make an order for back-end home detention so as to preserve truth in sentencing and to be consistent with other non-custodial sentences.[66] Another proposed that the Parole Board should determine whether or not to grant an order for back-end home detention, and that for sentences up to five years, the Board should have the power to release an offender to home detention up to twelve months before the expiry of the minimum term.[67] This decision, it was argued, should be made in the light of information about the offender's progress in gaol, and suitability for release, and whether the offender's situation meets any other criteria for suitability for home detention. A court is not in possession of this information at the time of sentencing. It was argued that this would not be contrary to the concept of truth in sentencing if provision were made for the sentencing court to order at the time of sentencing that back-end home detention should not be available in a particular case. Other submissions argued that it may be preferable for the original sentencing court to be

63. DP 33 at para 9.24.
64. Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 6.
65. Department of Corrective Services, *Submission* (15 July 1996) at 27.
66. Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 6; N J H Milson, *Submission* (3 July 1996) at 8; N R Cowdery, *Submission* (17 June 1996) at 12.
67. M L Sides and Bar Association, *Submission* (24 June 1996) at 63.

involved in the decision to grant an order for back-end home detention nearer the time of the proposed release.[68]

7.31 The Commission has concluded that back-end home detention should not be introduced in New South Wales. In our view, it is not possible to formulate a satisfactory scheme for back-end home detention without compromising the concept of truth in sentencing. We maintain our position that in order to preserve truth in sentencing, any order for back-end home detention must be imposed by the sentencing court at the time of sentencing rather than by an administrative decision after the sentence has been imposed. However, we also recognise the force of the argument that it is very difficult for a sentencing court to predict at the time of sentencing whether or not an offender will be suitable for home detention. This would require the sentencing court to predict not only the future behaviour of the offender while serving his or her prison term, but also whether or not there will be a suitable residence in which the offender can serve the home detention order. In our view, the divergence of opinions in the submissions as to the way in which back-end home detention should operate is indicative of the difficulties involved in implementing a satisfactory scheme. We therefore do not recommend the introduction of back-end home detention in New South Wales.

68. Law Society of NSW, *Submission* (19 July 1996) at 36; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 14.

8. SENTENCES OF IMPRISONMENT

- SENTENCES OF IMPRISONMENT OF SIX MONTHS OR LESS
- REMISSIONS
- DETERMINING SENTENCES
- MULTIPLE SENTENCES

8.1 This Chapter considers four issues:

- sentences of imprisonment of six months or less;
- remissions;
- minimum and additional terms, under the *Sentencing Act 1989* (NSW); and
- multiple sentences including aggregate as well as concurrent and cumulative sentences.

SENTENCES OF IMPRISONMENT OF SIX MONTHS OR LESS

Recommendation 40
Courts should provide reasons for any decision to impose a sentence of imprisonment of six months duration or less, including reasons why a non-custodial sentence is not appropriate.

8.2 The common law principle is that imprisonment is a sanction of last resort.[1] Section 80AB of the *Justices Act 1902* (NSW) gives some statutory recognition to this principle by preventing a magistrate from imposing an order involving full-time imprisonment "unless satisfied, having considered all possible alternatives, that no other course is appropriate". The principle has also been recognised more generally by statute in other Australian jurisdictions.[2]

1. *Parker v DPP* (1992) 28 NSWLR 282.
2. *Crimes Act 1914* (Cth) s 17A; *Sentencing Act 1991* (Vic) s 5(4); *Penalties and Sentences Act 1992* (Qld) s 9(2)(a)(i); *Crimes Act 1900* (ACT) s 429C; *Sentencing Act 1995* (WA) s 6(4).

8.3 In DP 33 the Commission argued that greater substance could be given to the principle that imprisonment is the sanction of last resort if offenders who would normally be subject to short terms of imprisonment were diverted from custodial sentences. Accordingly we proposed that courts should provide reasons for any decision to impose a sentence of imprisonment of six months duration or less in the hope that the provision, in conjunction with the common law principle, might encourage courts to use imprisonment more appropriately.[3]

8.4 Several submissions either doubted the effectiveness of the principle that imprisonment is a punishment of last resort or questioned whether that effectiveness could ever be measured or known.[4] Most, nevertheless, supported the Commission's proposal, at least in principle.[5] Some, while supporting the proposal, expressed concern that it may ultimately have little or no effect on the practical outcome of the process.[6]

8.5 The Department of Corrective Services supported the proposal principally because it might reduce the number of

3. DP 33 at paras 3.26-3.34.
4. Confidential, *Submission* (22 May 1996) at 12; M Dodson, *Submission* (26 June 1996) at 2; Department of Corrective Services, *Submission* (15 July 1996) at 5; Law Society of NSW, *Submission* (19 July 1996) at 4.
5. S Odgers, *Submission* (7 June 1996) at 2; N R Cowdery, *Submission* (17 June 1996) at 3; M Dodson, *Submission* (26 June 1996) at 2; NSW Council for Civil Liberties, *Submission* (28 June 1996) at 3; Justice Action, *Submission* (2 July 1996) at 2; Department of Corrective Services, *Submission* (15 July 1996) at 3; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 3; Austral News Pty Ltd, *Submission [Telephone]* (19 July 1996); Law Society of NSW, *Submission* (19 July 1996) at 3; Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 1; D Plagaro, *Submission [Telephone]* (7 September 1996).
6. S Odgers, *Submission* (7 June 1996) at 2; N R Cowdery, *Submission* (17 June 1996) at 3; Law Society of NSW, *Submission* (19 July 1996) at 4.

offenders sentenced to periods in custody,[7] but drew attention to a number of problems which might arise in its application. One was a possible conflict with the aims of the home detention scheme, which is available only when the court has imposed a sentence of imprisonment of 18 months or less.[8] Another was the possibility of a greater demand for pre-sentence reports to aid the courts in assessing the suitability of offenders for various sentencing options.[9]

8.6 Other submissions did not support the Commission's proposal because:

- it might have the effect of increasing custodial sentences beyond six months, because a court might inflate sentences to avoid application of the principle;[10]

- the basis for the proposal was suspect and not capable of demonstration;[11] and

- to impose such requirements would slow down the disposal of cases.[12]

The Commission is of the view that only the first of these objections has real substance. Appellate control will, however,

7. Department of Corrective Services, *Submission* (15 July 1996) at 3-4. A recent study has shown that, in the period 1990-1995, there has been an increase in the number of prisoners commencing shorter sentences, while there has been a decrease in the numbers commencing sentences of more than one year: B Thompson, *Trends in Custodial Sentences in NSW: 1990-1995* (NSW Department of Corrective Services, Research Bulletin No 18, September 1996) at 16.
8. See para 7.2. The Commission does not consider that there is anything in this point.
9. See paras 2.2-2.12.
10. M L Sides and Bar Association, *Submission* (24 June 1996) at 10.
11. J L Swanson, *Submission* (1 July 1996) at 2; N J H Milson, *Submission* (3 July 1996) at 2-3.
12. W D T Ward, *Submission* (25 July 1996) at 2.

ensure that sentences which are inflated simply to evade this requirement will be overturned.

8.7 The Commission has carefully considered the argument that the proposal which we put forward in DP 33 would be practically ineffective and secure only token compliance. In our view this argument is met by requiring that courts not only provide reasons for any decision to impose a sentence of six months or less but also expressly state why a non-custodial sentence is not appropriate.[13] This approach will have the effect of directing the mind of the sentencing court not only to the suitability of imprisonment, but also to the suitability of other sentencing options.

REMISSIONS

8.8 Remissions operate to reduce a sentence of imprisonment so that an offender may be released unconditionally before the date which the sentencing court set for the termination of the sentence. Three types of remissions were available in New South Wales before their abolition in 1989:[14]

- *earned* - those which accrued as a result of the good behaviour (and were forfeited by the misconduct) of the prisoner while in custody;
- *unearned* - those that accrued automatically in accordance with a predetermined rate;
- *windfall* - those attributable to external factors, such as strike action by prison warders or a Royal visit.[15]

13. See S Odgers, *Submission* (7 June 1996) at 2; NSW Council for Civil Liberties, *Submission* (28 June 1996) at 3; Justice Action, *Submission* (2 July 1996) at 2; Department of Corrective Services, *Submission* (15 July 1996) at 4; Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 1.
14. *Sentencing Act 1989* (NSW) Sch 3 [8] (repealing the then *Prisons Act 1952* (NSW) Pt 11).
15. See DP 33 at paras 4.5-4.10, 4.13 and 4.34-4.39.

8.9 Remissions were administratively determined and the courts did not acknowledge them, holding consistently that they should not be taken into account when setting a non-parole period as part of a head sentence.[16] The *Sentencing Act 1989* (NSW) does not instruct courts to take into account the abolition of remissions in determining a sentence. In *R v Maclay*[17] the Court of Criminal Appeal held that courts cannot take into account the likelihood that an offender would have benefited from remissions under the previous system.[18] It has been argued that this approach has led to an increase in the New South Wales prison population since 1989.[19]

8.10 Criticisms of the current position concerning remissions were identified in the Discussion Paper. The main one was that the legislature had failed to take into account the effect of the abolition of remissions on the length of time actually spent in custody. However, proposals to require that the absence of remissions now be taken into account, as in some other Australian jurisdictions,[20] were discounted by the Commission because of the artificiality involved in compensating for an abolition which occurred seven

16. *R v Paivinen* (1985) 158 CLR 489; *Hoare v The Queen* (1989) 167 CLR 348; *R v O'Brien* [1984] 2 NSWLR 112.
17. (1990) 19 NSWLR 112.
18. *R v Maclay* (1990) 19 NSWLR 112 at 122-124. See also *Hoare v The Queen* (1989) 167 CLR 348; and *R v Moffitt* (1990) 20 NSWLR 114 at 127 per Badgery-Parker J.
19. Although some caution must be taken in interpreting the statistics as other factors may be involved in prison population increases: DP 33 at paras 4.35-4.36. See also L W Maxfield, *Submission* (4 November 1996) at 1. It should be noted that the overall prison population has been slowly decreasing following a peak in October 1993: B Thompson, *Trends in Custodial Sentences in NSW: 1990-1995* (NSW Department of Corrective Services, Research Bulletin No 18, September 1996) at 6.
20. *Sentencing Act 1991* (Vic) s 10; *Crimes Act 1914* (Cth) s 19AA; *Sentencing Act 1995* (NT) s 58.

years ago, as well as the loss of public confidence which may result from an artificial reduction in the length of prison sentences.[21]

8.11 The Discussion Paper also considered the possible reintroduction of remissions. The Commission decided that, while there could be no reasons (beyond political and economic expediency) for reintroducing unearned remissions, there could be arguments in favour of the reintroduction of earned remissions. The principal reasons identified were that earned remissions provide prisoners with an incentive to good behaviour, education or good works and promote rehabilitation.[22] While leaving the question of the reintroduction of remissions open, the Commission stated that the potential for abuse in a system of administratively determined remissions militated against this course.[23]

8.12 Submissions addressing the possible reintroduction of earned remissions were fairly evenly balanced. Some submissions opposed the reintroduction of earned remissions.[24] Others supported their possible reintroduction essentially for the reasons already alluded to, that remissions act as an incentive to good behaviour and aid rehabilitation of prisoners.[25] On the other hand some argued that

21. DP 33 at para 4.37.
22. These reasons were also argued by the Law Society in a representation to the Minister for Corrective Services: Law Society of New South Wales to the Hon R J Debus MP, 27 November 1995. Time pressures prevented the Law Society from considering the question of the reintroduction of remissions in its submission to the Commission: Law Society of NSW, *Submission* (19 July 1996) at 13.
23. DP 33 at para 4.39.
24. Confidential, *Submission* (22 May 1996) at 13; M L Sides and Bar Association, *Submission* (24 June 1996) at 12-13; N J H Milson, *Submission* (3 July 1996) at 4; Department of Corrective Services, *Submission* (15 July 1996) at 12; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 5.
25. M Dodson, *Submission* (26 June 1996) at 2; NSW Council for Civil Liberties, *Submission* (28 June 1996) at 3; Justice Action, *Submission* (2 July 1996) at 3; L W Maxfield, *Submission* (28 August 1996) at 3, and (4 November 1996) at 1; L McNair, *Submission* (31 March 1996).

there has been no significant increase in management difficulties arising from the loss of remissions.[26] The Department of Corrective Services stated that remissions were not an effective management tool:

> A far more effective management tool is the progressive classification of well behaved inmates from maximum security through medium security to minimum security. The participation of inmates in programs (eg work release) is also a sound management tool, as is a fair and swift system for dealing with prison offences.[27]

This view was strongly supported in consultations with officers from the Department of Corrective Services and Prison Governors.[28]

8.13 Practical objections to the reintroduction of a system of earned remissions were raised by the Department of Corrective Services and Prison Governors. Under the previous regime, both earned and unearned remissions were taken into account at the reception of a prisoner for the purposes of predicting the prisoner's progression through the prison system and letting the prisoner know with some certainty his or her projected release date. In this way "earned" remissions were credited automatically and could only be lost by misbehaviour. In addition, the sheer size of the task of assessing each prisoner individually meant that, in practice, remissions were removed only in exceptional circumstances, with

26. Confidential, *Submission* (22 May 1996) at 14; M L Sides and Bar Association, *Submission* (24 June 1996) at 12.
27. Department of Corrective Services, *Submission* (15 July 1996) at 12.
28. Department of Corrective Services, *Consultation* (26 July 1996); Prison Governors, *Consultation* (12 August 1996). Statistics supplied by the Department indicate that there has been no substantial change in the rates of prison misconduct charges in the period 1988-1995: Department of Corrective Services, *Letter* (13 December 1996).

the vast majority of prisoners subject to no form of assessment as to their entitlement to remissions.[29]

8.14 Other submissions pointed to the inevitable inconsistencies in allocating remissions that would develop in the approaches of the Governors of different correctional centres.[30] It was envisaged that, in some instances, part-time non-demanding forms of prison work might come to attract the same remissions as full-time demanding agricultural or industrial labour,[31] no doubt arising partly from the difficulty involved in providing equal access to activities entitling a prisoner to earn remissions.

8.15 Two of the submissions in favour of remissions proposed that remissions should be in a "simple and easy to understand form" and should be based primarily on "education, training and rehabilitative programs".[32] A consultation with Prison Governors, who opposed the reintroduction of remissions, produced the tentative suggestion that, if remissions were to be reintroduced, an acceptable arrangement might be to offer, say, a remission of one day per month based on clearly ascertainable objective indicators such as successful completion of units within education or training schemes. They did not advocate a scheme whereby remissions would be granted for mere attendance at courses, or on difficult to assess criteria such as good behaviour. The awarding of these limited remissions could be handled in the same way as classification of prisoners, that is, by a management team meeting every six months which would report to the prison governor who would then make a recommendation as to appropriate action. It was also suggested that the remissions would be deducted only at

29. Department of Corrective Services, *Consultation* (26 July 1996); Prison Governors, *Consultation* (12 August 1996).
30. Department of Corrective Services, *Submission* (15 July 1996) at 12; W D T Ward, *Submission* (25 July 1996) at 3.
31. Prison Governors, *Consultation* (12 August 1996).
32. NSW Council for Civil Liberties, *Submission* (28 June 1996) at 3; Justice Action, *Submission* (2 July 1996) at 3. See also L W Maxfield, *Submission* (4 November 1996) at 1-3.

the end of the assessment process and that it should be possible to lose already accumulated remissions by the same process.[33]

8.16 Despite the practical advantages that the ability to earn limited remissions might have, the Commission remains of the opinion that remissions should not be reintroduced in New South Wales. We have taken this position for two main reasons:

- in principle, remissions are in conflict with the principles of truth in sentencing; and

- there is a risk of corruption and abuse arising from the need to assess suitability for remissions.

In any case, the system of classification of prisoners, the availability of day and work release programs, and the assessment of suitability for parole for long-term prisoners[34] already provide what appear to be sufficient incentives for good behaviour.

DETERMINING SENTENCES

Recommendation 41
Section 5(2) and (3) of the *Sentencing Act 1989* (NSW) should be repealed.

33. Prison Governors, *Consultation* (12 August 1996).
34. See paras 11.49-11.63.

Recommendation 42
Section 5(1) of the *Sentencing Act 1989* (NSW) should be amended to require the Court to set a sentence, and then to set a minimum term as the period during which the prisoner is not eligible for release on parole.

8.17 The requirement that a sentence must generally comprise a minimum and additional term was introduced by s 5 of the *Sentencing Act 1989* (NSW). It provides:

> (1) When sentencing a person to imprisonment for an offence, a court is required:
> (a) firstly, to set a minimum term of imprisonment that the person must serve for the offence; and
> (b) secondly, to set an additional term during which the person may be released on parole.
> (2) The additional term must not exceed one-third of the minimum term, unless the court decides there are special circumstances.
> (3) If a court sets an additional term that exceeds one-third of the minimum term, the court is required to state the reason for that decision.
> (4) The minimum and additional terms set for an offence together comprise, for the purposes of any law, the term of the sentence of the court for the offence.

8.18 A prisoner sentenced to full-time imprisonment must, unless a fixed term is set, be sentenced to both a minimum term and an additional term. The minimum term represents the period the prisoner must spend in gaol while the additional term is the period during which the prisoner becomes eligible for release on parole.[35]

8.19 A fixed term may be set under s 6(2) for the following reasons:

35. Release is automatic for sentences of three years or less. For longer sentences release is at the discretion of the Parole Board: see paras 11.49-11.63.

> (a) because of the nature of the offence or the antecedent character of the person; or
> (b) because of other sentences already imposed on the person; or
> (c) for any other reason that the court considers sufficient.

8.20 Consistent with the above provisions, the Court of Criminal Appeal has held that where a sentencing judge imposes:

> ... concurrent sentences of unequal length or cumulative sentences, so that any additional terms upon the shorter or earlier sentences would be of no utility (because the prisoner will still be in custody), it is appropriate in such circumstances for the judge to set a fixed term for the length of what would otherwise have been the appropriate minimum term ... The judge should, however, when giving the reasons pursuant to s 6(3) for setting the fixed term, state expressly that the fixed term is intended to be the equivalent of such a minimum term. It would *not* be appropriate in such circumstances to impose a fixed term for what would otherwise have been the total sentence of the court.[36]

8.21 A fixed term must also be set where the court would otherwise fix a total sentence of six months or less.[37] This means that there is no period during which such short-term prisoners can become eligible for parole.[38]

36. *R v Thomas* (1992) 65 A Crim R 269 at 275-276.
37. *Sentencing Act 1989* (NSW) s 7.
38. The Aboriginal and Torres Strait Islander Social Justice Commissioner expressed concern that no proposal was made to redress the harm caused by this provision: M Dodson, *Submission* (26 June 1996) at 2. Recommendation 40 partly addresses this concern.

Special circumstances

8.22 Section 5(2) acts as a restraint on the judicial discretion to impose a sentence that, in all the circumstances of the case, relates appropriately to the offender and to the crime, by requiring the presence of "special circumstances" before courts can depart from the statutory ratio of minimum to additional terms. This is because the application of the ratio ignores the varied situations which need to be assessed when a sentence is determined,[39] and requires the Court to identify "something about the case that warrants a longer than usual additional term by comparison with the minimum term".[40] This provision has been partly responsible for the increase in the prison population,[41] despite the expressed desire of the Government of the day.

8.23 The Commission proposed the repeal of s 5(2) and (3) in DP 33.[42] This will return to the courts an appropriate discretion, where a fixed sentence is not handed down, to fix the ratio between minimum and additional terms.[43]

8.24 Submissions were generally supportive of the repeal of s 5(2) and (3) and of giving courts the discretion to fix minimum and additional terms.[44] The Commission remains of the opinion that,

39. *R v Close* (1992) 31 NSWLR 743 at 745 per Sheller JA, at 752 per Hunt CJ at CL.
40. *R v Farroukh* (NSW CCA, No 60755/95, 29 March 1996, unreported) at 5 per Gleeson CJ, Levine and Dowd JJ agreeing.
41. DP 33 at paras 4.34-4.36.
42. DP 33 at para 4.41.
43. This may lead to a reduction in time spent in gaol. Nevertheless, in the Commission's view, this is not inappropriate. It will only occur where the Court considers it necessary.
44. S Odgers, *Submission* (7 June 1996) at 2; N R Cowdery, *Submission* (17 June 1996) at 3; NSW Council for Civil Liberties, *Submission* (1 July 1996) at 3; Justice Action, *Submission* (2 July 1996) at 3; J L Swanson, *Submission* (1 July 1996) at 2; N J H Milson, *Submission* (3 July 1996) at 4; Department of Corrective Services, *Submission* (15 July 1996) at 6-7; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 5; Legal Aid

notwithstanding the finding of special circumstances in many cases before the courts,[45] s 5(2) and (3) of the *Sentencing Act 1989* (NSW) constitute an unnecessary and arbitrary restraint on the ability of a court to fix a sentence appropriate to the offence in question, and should be repealed.

Sentencing methodology

8.25 In DP 33 the Commission concluded that the repeal of s 5(2) would require a court initially to determine the sentence appropriate to the offence and the offender before specifying a minimum term, and that this would solve a significant methodological problem identified in respect of s 5(1) of the *Sentencing Act 1989* (NSW).[46] The problem is that, on the face of the legislation, it appears that the minimum term is to be set before the additional term. This approach to sentencing was termed the "bottom up" approach in the second reading speech.[47] It

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Commission of NSW, *Submission* (18 July 1996) at 2; Law Society of NSW, *Submission* (19 July 1996) at 6; District Court, Criminal Law Committee, *Submission* (6 August 1996) at 1. Victims Advisory Council, *Consultation 2* (31 July 1996) did not oppose the proposal.

45. See DP 33 at paras 4.34-4.36. See also W D T Ward, *Submission* (25 July 1996) at Appendix A where, in order to illustrate that courts frequently depart from the fixed ratio, the Chairperson of the Offenders Review Board provided a list of minimum and additional terms of prisoners whose cases were considered by the Offenders Review Board in the week beginning 2 April 1996. This sample showed that of the 85 cases only 19 (22%) had an additional term as one-third of the minimum term. In 11 cases (13%) the additional term was three times more than the minimum term and in 15 cases (17.5%) the additional term was double the minimum term. See also D Weatherburn, *Submission* (16 August 1996) at 5.
46. DP 33 at para 4.23.
47. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 10 May 1989 at 7906. See also P Hidden, "The Sentencing Act: An Historical Overview" (1992) 3 *Current Issues in Criminal Justice* 287 at 291; M Campbell, "Changing Horses" (1992) 3 *Current Issues in Criminal Justice* 298 at 300-301.

differs from the approach taken under the regime before the *Sentencing Act 1989* (NSW), which required the head sentence to be specified, followed by the specification of the component non-parole period (analogous to the minimum term).

8.26 Although the weight of authority favours the view that an appropriate total sentence should be set as a starting point,[48] other authorities have taken different approaches, asserting variously that:

- a minimum term should be set before the additional term;[49]
- a provisional assessment should be made focusing on the minimum term;[50] and
- the court should not be constrained by any particular approach.[51]

8.27 The Commission is of the view that the sentencing court should commence by stating the sentence before proceeding to fix the minimum term during which the prisoner is not eligible for release on parole. The sentence is the total which must, in the circumstances of the case, embody all the purposes of punishment (including denunciation) and also reflect proportionality, because the prisoner is liable to serve the whole of that sentence if, for any reason, parole is not granted.[52] The mere statement of a minimum term and additional term cannot effectively convey all the purposes of punishment. It is only once a head sentence has been set that

48. *R v Radford* (NSW CCA, No 60706/90, 21 August 1991, unreported); *R v Close* (1992) 31 NSWLR 743 at 749 and 758; *R v Gower* (1991) 56 A Crim R 115 at 118; *R v Morgan* (1993) 70 A Crim R 368 at 372.
49. Especially *R v Maclay* (1990) 19 NSWLR 112 at 126, although the issue did not need to be decided in that case.
50. *R v Moffitt* (1990) 20 NSWLR 114 at 118, 121 and 125; *R v Gower* (1991) 56 A Crim R 115 at 118-119 per Priestley JA.
51. *R v Morgan* (1993) 70 A Crim R 368 at 377 per Allen J.
52. *R v Moffitt* (1990) 20 NSWLR 114 at 118 per Samuels JA, at 134 per Badgery-Parker J.

the court can determine the minimum term, that is, the period which the offender must, in justice, serve in gaol.[53] Although the minimum term is determined by reference to the same factors which are relevant to the determination of the total sentence, the factors are not necessarily given the same weight.[54] The High Court has made it clear that the minimum term is not the shortest time required before the offender's prospects of rehabilitation can be properly assessed by a parole authority, but that it is rather:

> ... to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence.[55]

8.28 The mere repeal of s 5(2) and (3) does not solve the methodological problem which we have outlined above.[56] If s 5(1) is to remain and be effective, it should require a court to determine the head sentence and then fix the minimum term as a component of the sentence.[57] The Commission therefore recommends that s 5(1) be amended accordingly.

MULTIPLE SENTENCES

Concurrent and cumulative sentences

53. *Power v The Queen* (1974) 131 CLR 623; *Bugmy v The Queen* (1990) 169 CLR 525 at 536-538; *R v Maclay* (1990) 19 NSWLR 126; *R v Grmusa* [1991] 2 VR 153 at 158; *R v Longshaw* (1993) 114 FLR 423 at 426-428. See also D Weatherburn, "Sentencing Principles and Sentence Choice" in M Findlay and R Hogg (eds), *Understanding Crime and Criminal Justice* (Law Book Co, Sydney, 1988) 255 at 263.
54. See the discussion of the factors relevant to fixing a minimum term in *Bugmy* at 537 per Dawson, Toohey and Gaudron JJ.
55. *Power v The Queen* (1974) 131 CLR 623 at 629. See also *Bugmy v The Queen* (1990) 169 CLR 525 at 531 and 536; *Deakin v The Queen* (1984) 58 ALJR 367.
56. See also DP 33 at para 4.20.
57. See M L Sides and Bar Association, *Submission* (24 June 1996) at 14.

Recommendation 43
There should be a general legislative presumption in favour of concurrent sentences.

8.29 The issue of concurrent and cumulative sentences arises where an offender has committed multiple offences or where the offender, while subject to a sentence for a previous offence, is convicted of a further offence. Concurrent sentences are sentences which commence together, the shorter sentences being subsumed into the longest sentence. A cumulative sentence is one which commences at the termination of a preceding sentence or sentences. In New South Wales there is a presumption in favour of cumulative sentences in cases where a prisoner, who is already serving a sentence, is convicted of an assault or other offence against the person.[58]

8.30 The Commission proposed that there be a general legislative presumption in favour of concurrent sentences[59] on the grounds articulated by the Australian Law Reform Commission that offenders should not be subjected to a penalty that is "excessively severe" having regard to the total criminality of the incident(s) concerned.[60] A presumption in favour of concurrent sentences applies in the Australian Capital Territory,[61] the Northern Territory,[62] Victoria,[63] Queensland[64] and Western Australia.[65]

58. *Crimes Act 1900* (NSW) s 444(3).
59. DP 33 at para 4.49.
60. Australian Law Reform Commission, *Sentencing* (ALRC 44, 1988) at para 66. See also DP 33 at para 4.47.
61. *Crimes Act 1900* (ACT) s 443 (other than sentences imposed for fine default).
62. *Sentencing Act 1995* (NT) s 50.
63. *Sentencing Act 1991* (Vic) s 16 (other than sentences imposed: for fine default; on a prisoner in respect of a prison offence or an escape offence; on a serious sexual offender for a sexual offence or a violent

8.31 The Commission reaffirms the proposal, which was supported in many submissions,[66] that there be a legislative presumption in favour of concurrent sentences. It is noted that, in so recommending, the only reasons for imposing cumulative or partly cumulative sentences will either be because legislation requires it, or, more generally, because a maximum sentence is not available to make the effective total sentence for all the offences long enough to reflect the principle of totality or to denounce separate crimes.

8.32 The chief objection[67] raised against a general legislative presumption in favour of concurrent sentences was that such a provision would lead to sentences being imposed for "criminality" rather than for the particular crime committed,[68] which would breach the principle of proportionality, where one charge is singled out for the longest sentence and this sentence is inflated to reflect the total criminality involved in the commission of all the offences being considered.[69] This criticism is not persuasive in light of the Court of Criminal Appeal's approach to multiple sentences. In

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offence; and on any person for a sexual or violent offence when the offender was on parole for a similar offence: s 16(1A)).

64. *Penalties and Sentences Act 1992* (Qld) s 154.
65. *Sentencing Act 1995* (WA) s 88.
66. NSW Council for Civil Liberties, *Submission* (1 July 1996) at 3; Justice Action, *Submission* (2 July 1996) at 3; Department of Corrective Services, *Submission* (15 July 1996) at 7; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 5; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 3; Law Society of NSW, *Submission* (19 July 1996) at 6; Confidential, *Submission* (22 May 1996) at 15; S Odgers, *Submission* (7 June 1996) at 2; N R Cowdery, *Submission* (17 June 1996) at 4; J L Swanson, *Submission* (1 July 1996) at 2.
67. The Criminal Law Committee of the District Court did not support the proposal on the grounds that there appeared to be little benefit to be derived from incorporating a presumption in favour of concurrent sentences: District Court, Criminal Law Committee, *Submission* (6 August 1996) at 2.
68. W D T Ward, *Submission* (25 July 1996) at 3.
69. M L Sides and Bar Association, *Submission* (24 June 1996) at 15.

particular, it has held that, where there are two or more concurrent sentences, at least one may be longer than would otherwise be the case if it was determined by itself in order that the effective total sentence might reflect the totality of criminality involved in the offending behaviour.[70] In such circumstances the principle of totality must be taken to qualify the principle of proportionality which relates only to the individual sentences.

Imposition of further sentences

Recommendation 44
When imposing a further sentence during the currency of an existing sentence (or sentences) the court should have the power to specify that the further sentence commence:

- **at any time before the time the further sentence is imposed;**

70. *R v Thomas* (1992) 65 A Crim R 269 at 275; *R v Glenister* [1980] 2 NSWLR 597 at 612.

- **at the time the further sentence is imposed; or**

- **at any time up to the end of the last expiring minimum term or fixed term of the previous sentence(s),**

but no earlier than the commencement of the most recent continuous period of custody.

8.33 There are a number of objectives which a law relating to the imposition of further sentences should achieve. One is that such a law should not allow any period between the end of the last expiring minimum term or fixed term of any previous sentence(s) and the commencement of a further sentence during which a prisoner becomes eligible to apply for parole. Another is that the law should allow sufficient weight to be given, where appropriate, to the principle of totality.

8.34 Rules are set out for the operation of cumulative sentences in s 9 of the *Sentencing Act 1989* (NSW). These rules are primarily concerned with avoiding gaps between the end of the last expiring minimum term and the commencement of the further sentence,[71] and, in particular, attempt to address the problems arising from the fact that sentences consist of minimum and additional terms. The rules deal with two categories of cumulative sentences:

- Those imposed where the offender has not completed the minimum term or the longest of the minimum terms already imposed or currently being served. In such cases the cumulative term must presently be imposed at the end of the minimum term or the last expiring minimum term.[72]

- Those imposed where the offender has completed all the minimum terms imposed and is currently serving at least one

71. *R v Astill* (NSW CCA, No 60754/91, 17 July 1992, unreported); *R v Arnold* (1993) 30 NSWLR 73 at 76 per Hunt CJ at CL.
72. *Sentencing Act 1989* (NSW) s 9(1) and 9(2).

additional term. In such cases the cumulative sentence is imposed at the time of sentencing or at an earlier date specified by the court.[73]

Deficiencies in the current scheme

8.35 There are a number of deficiencies which can be identified in the provisions relating to the imposition of cumulative sentences as they currently stand.

8.36 First, the section, on its face, fetters the discretion of the courts in not allowing a further sentence to commence before the end of the minimum term of a previous sentence. Section 9(1) requires that a cumulative sentence imposed during the currency of a minimum term must commence at the end of the last expiring minimum term. Accordingly it has been suggested that this section does not recognise partly cumulative sentences. However, in *R v Elder*[74] the Court of Criminal Appeal held that the provision is concerned solely with the imposition of a wholly cumulative sentence and imposes no fetter upon the discretion of a court to impose a sentence that is partly concurrent and partly cumulative on an existing minimum term. The Commission proposed that, while partly cumulative sentences were already available at common law,[75] they should be recognised in legislation.

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73. *Sentencing Act 1989* (NSW) s 9(3).
74. NSW CCA, No 60452/92, 2 September 1993, unreported. See also *R v Mackenroth* (NSW CCA, No 60096/92, 3 March 1994, unreported).
75. The origin of the common law power is by no means certain: see *R v Hillsley* (1992) 105 ALR 560 at 568-569 per Gallop J. In that case the Federal Court observed that the express repeal of s 447 of the *Crimes Act 1900* (ACT) in 1986 and its replacement by a new s 443 (*Crimes (Amendment) (No 4) Act 1986* (ACT) s 8 and 9), meant that the power to pass partly cumulative and partly concurrent sentences had been removed: *R v Hillsley* at 569 per Gallop J and 562 per Black J. Section 447 of the *Crimes Act 1900* (NSW) was repealed in New South Wales in 1967.

8.37 Submissions were generally supportive of this proposal[76] or did not oppose it.[77] Recommendation 44 would amend s 9 so that a sentencing court may impose a further sentence to commence at any time up to its imposition, or up to the end of the last expiring minimum term or fixed term of the previous sentence(s), whichever is the later. This adequately allows for the imposition of partly cumulative sentences in all cases. There is, therefore, no need for a further express provision recognising partly cumulative sentences.

8.38 Secondly, s 9 does not accommodate fixed terms as possible components of multiple sentences.[78] This failure to accommodate fixed terms means that, when the court imposes a further cumulative sentence on an offender who is serving part of an unexpired additional term concurrently with the remainder of a fixed term from another sentence, the further cumulative sentence must commence on the day on which it is imposed or earlier,[79] thereby cancelling the effect of the previous fixed term sentence.

8.39 In *R v Arnold*[80] both Chief Justice Gleeson and Justice Hunt referred to the desirability of legislative amendment of s 9(3). The Commission proposed that s 9(3) should be amended to allow cumulative sentences to be imposed during the currency of an existing term of imprisonment. Some submissions supported the proposal in general terms.[81] The majority of these also agreed that

76. NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 5; Confidential, *Submission* (22 May 1996) at 15; N R Cowdery, *Submission* (17 June 1996) at 4; J L Swanson, *Submission* (1 July 1996) at 2; Department of Corrective Services, *Submission* (15 July 1996) at 7; W D T Ward, *Submission* (25 July 1996) at 3-4.
77. Legal Aid Commission of NSW, *Submission* (18 July 1996) at 3; Law Society of NSW, *Submission* (19 July 1996) at 7; M L Sides, *Submission* (24 June 1996) at 16.
78. See DP 33 at paras 4.52-4.54.
79. *R v Blanchard* (NSW CCA, No 60420/90, 10 September 1991, unreported); *R v Arnold* (1993) 30 NSWLR 73.
80. (1993) 30 NSWLR 73.
81. Confidential, *Submission* (22 May 1996) at 15; J L Swanson, *Submission* (1 July 1996) at 2; NSW Young Lawyers, Criminal Law

s 9(3) should be amended to apply to fixed terms being served by prisoners.[82]

8.40 Thirdly, when an offender is serving the unexpired portion of an additional term, a further sentence which commences on the day it was imposed or earlier will have the effect of subsuming either the whole or part of the additional term of the previous sentence. Yet the court may not consider this a desirable outcome - as where an offender is sentenced for escaping lawful custody during the unexpired portion of an additional term. This was exemplified by the case of a magistrate who wished to impose a sentence of four months for an assault on a prisoner who was already serving an additional term with four months left to run.[83]

8.41 Fourthly, s 9(1) and (2) of the *Sentencing Act 1989* (NSW) may have the effect of allowing a cumulative sentence to subsume so much of the additional terms of the other sentences as expire before the end of the last imposed sentence. The concern was that a total sentence might result which has a disproportionately large minimum term which must be served in custody and a disproportionately small additional term which may not prove adequate in ensuring that the offender receives sufficient support and supervision upon release into the community on parole.[84] However there is nothing in the law relating to the imposition of multiple sentences to prevent a court from imposing a sentence which would ensure an additional term of appropriate length in the circumstances, especially given the proposed abolition of s 5(2) and (3)[85] and the recognition of partly cumulative sentences.[86]

Proposals for reform

8.42 The deficiencies outlined above show that s 9 of the *Sentencing Act 1989* (NSW) is unduly complex and does not

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Committee, *Submission* (19 July 1996) at 5; W D T Ward, *Submission* (25 July 1996) at 3.

82. J L Swanson did not express a view on the separate question.
83. See DP 33 at para 4.52.
84. Forbes Chambers, *Consultation* (13 August 1996).
85. Recommendation 41.
86. Recommendation 44.

satisfactorily achieve the objectives of ensuring there are no gaps between sentences during which a prisoner may become eligible to apply for release on parole and ensuring that, in appropriate cases, the principle of totality is adequately reflected in the effective sentence. Two possible avenues for reform have presented themselves: the first being the introduction of aggregate sentences; the second being the retention of the system of setting individual sentences for each offence, but with amendments to take into account the criticisms of the current scheme. The latter approach forms the basis for the Commission's recommendation.

8.43 *Aggregate sentences.* An aggregate sentence is a single sentence imposed by a court in relation to a number of offences which would otherwise be subject to separate sentences. Aggregate sentences are generally not available in New South Wales except where the court takes into account outstanding charges in accordance with Part 6 of the *Criminal Procedure Act 1986* (NSW).[87] Section 12 of the *Sentencing Act 1989* (NSW) provides:

> (1) When sentencing a person to more than one term of imprisonment, a court must set minimum and additional terms, or a fixed term, for each sentence.
> (2) A minimum or additional term, or fixed term, set for an offence is not revoked or varied by a later such term set for another offence.

8.44 In the Discussion Paper the Commission did not express a view on the issue of whether aggregate sentences should be introduced, but noted the arguments for and against their introduction.[88]

8.45 Some submissions supported the availability, in certain circumstances, of a power to impose a single sentence for all

87. Although the Court of Criminal Appeal has held that serious offences should be separately charged (and therefore placed outside the scope of the procedure): *R v Morgan* (1993) 70 A Crim R 368.
88. DP 33 at paras 4.42-4.46.

offences.[89] The Senior Public Defender supported a return to the previous system of imposing a head sentence for each offence with an aggregate non-parole period to cover all offences, as part of his proposal to abolish s 5 of the *Sentencing Act 1989* (NSW) in its entirety.[90] The Department of Corrective Services also advocated the adoption of a similar scheme, stating that the advantage of this system is that it would avoid uncertainty in determining the date on which an offender becomes eligible to be considered for parole, as well as the date on which the period of eligibility for parole comes to an end.[91]

8.46 An argument against the introduction of aggregate sentences is the difficulty they create when any of the convictions is subsequently quashed on appeal. However, a problem will always arise in this regard, no matter how the sentence is imposed. In the case of concurrent sentences it is easier to amend the longest remaining sentence when one or more sentences are quashed since the longest sentence can be used to reflect the totality of the criminality involved in the offences. In this way the longest sentence is effectively the aggregate term.[92] Other ways of dealing with the problem in the context of aggregate sentences could include giving the appeal court the power to impose a new non-parole period in the light of the remaining convictions,[93] and remitting the matter to the trial judge for re-sentencing.

8.47 The Commission does not support the general availability of aggregate sentences in New South Wales because it is more consistent with the philosophy underlying s 12 of the *Sentencing*

89. N J H Milson, *Submission* (3 July 1996) at 4; W D T Ward, *Submission* (25 July 1996) at 3; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 5.
90. M L Sides and Bar Association, *Submission* (24 June 1996) at 15.
91. Department of Corrective Services, *Submission* (15 July 1996) at 7.
92. Section 24A of the *Criminal Procedure Act 1986* (NSW) which commenced on 3 December 1996 (inserted by *Criminal Procedure Amendment (Sentences Adjustment) Act 1996*) now makes legislative provision for a court to adjust the date of commencement of a cumulative sentence and to adjust the length of the cumulative sentence on the quashing or variation of an earlier sentence.
93. Department of Corrective Services, *Submission* (15 July 1996) at 7.

Act 1989 (NSW), which embodies the principle of truth in sentencing, that for each offence for which an offender is charged and convicted there is a separate and identifiable sentence (whether subject to a minimum term or not). The court then has the discretion, in light of all the circumstances of the case, to determine whether the sentence should be cumulative, concurrent or partly cumulative and partly concurrent.

8.48 *Individual sentences.* In retaining the system of setting individual sentences the Commission's aim is to impose no fetters on the discretion of the court to fix a further sentence in a manner appropriate in all the circumstances, except in so far as gaps between minimum terms or minimum terms and fixed terms of imprisonment are avoided.

8.49 Some submissions drew attention to a problem which would arise if it were possible to impose a further sentence at any time during the currency of an existing term, that is, a prisoner might become eligible for parole during an additional term before the commencement of the further sentence.[94] The Director of Public Prosecutions suggested that, where cumulative sentences are imposed during the currency of an additional term, an amendment would be necessary to allow the conversion of the appropriate portion of the balance of the additional term into a fixed term.[95]

8.50 The Department of Corrective Services saw a solution to the problem in the adoption of their proposed aggregate sentence period with a single non-parole period for all offences. Under such a scheme it would be possible for the courts to impose a non-parole period (minimum term) on a prisoner currently serving an additional term (as a result of parole not being granted), as part of a new aggregate sentence, consisting of the balance of the previous additional term and a fresh term. If the new aggregate is less than

94. N R Cowdery, *Submission* (17 June 1996) at 4; M L Sides and Bar Association, *Submission* (24 June 1996) at 16; Department of Corrective Services, *Submission* (15 July 1996) at 8; N J H Milson, *Submission* (3 July 1996) at 4-5.
95. N R Cowdery, *Submission* (17 June 1996) at 4.

three years, the prisoner will be released at the end of the new non-parole period; if the new aggregate is more than three years, the prisoner will have to be considered for release by the Parole Board; and if the aggregate is six months or less, the prisoner will not be entitled to release on parole.[96] The Department summarises the proposal as follows:

> each time a court, regardless of the circumstances, wants to impose a sentence that is either partly or wholly cumulative with an existing "sentence period", the court must set a new [non-parole period] in respect of the new aggregate term it has created.[97]

8.51 The Legal Aid Commission was opposed to any amendment to s 9(3) which would permit cumulative sentences to be imposed to commence during the balance of an additional term in the period between the date the cumulative sentence is imposed and the expiration of the additional term, pointing to the fact that a prisoner serving the balance of an additional term could be released at any time up to the end of the sentence. However, the Legal Aid Commission did not oppose any proposal to amend s 9 to allow a court to impose a cumulative sentence on an existing fixed term.[98] In any event, the proposal was never one to permit a sentence to commence at a time later than its imposition where the prisoner was serving only an additional term in custody.

8.52 Having regard to all matters raised in consultations the Commission recommends, with respect to sentences determined under s 9, that it be possible to impose a sentence which commences:

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96. Department of Corrective Services, *Submission* (15 July 1996) at 9-10.
97. Department of Corrective Services, *Submission* (15 July 1996) at 10.
98. Legal Aid Commission of NSW, *Submission* (18 July 1996) at 3-4; Law Society of NSW, *Submission* (19 July 1996) at 7-8. See also Department of Corrective Services, *Submission* (15 July 1996) at 13.

- at any time before the time the further sentence is imposed;
- at the time the further sentence is imposed; or
- at any time up to the end of the last expiring minimum term or fixed term of the previous sentence(s).

This will ensure that there will be no periods of eligibility for parole between the end of the last expiring minimum term or fixed term and the commencement of the further cumulative sentence, and thereby meets the concerns raised with regard to fixed terms in *R v Arnold*.[99] It also allows for the imposition of partly cumulative sentences. However, this recommendation may not allow adequate reflection of the principle of totality in individual cases involving multiple sentences, in as much as an effective total sentence cannot always be fixed when a further sentence is imposed during the remainder of sentence which has a very short minimum term. While the Department of Corrective Services' proposal, that there be an aggregate sentence period with a single non-parole period for all offences, addresses the problem of totality, it must be rejected for the reason stated above.[100] The only answer to this problem is that when a prisoner was previously subject to a long period of eligibility for parole, the minimum term or fixed term of the further sentence will have the effect of reducing or even cancelling the time during which the prisoner is eligible for release on parole. However, in most cases considerable latitude will be possible, subject to the presumption in favour of concurrent sentences, in combining the original and further sentences in a manner which reflects, where appropriate, the totality of the criminality involved in all offences.

8.53 Recommendation 44 also includes the proviso that a further sentence cannot be made to commence at a date earlier than the most recent continuous period of custody. This is to prevent the apparent imposition of a sentence which covers a period during which the prisoner was not actually in custody. While the Commission expects that the general principles relating to the

99. (1993) 30 NSWLR 73.
100. At para 8.47.

backdating of sentences will be followed,[101] it has been decided, for the sake of certainty, to include this requirement as the earliest date before which a further sentence will not be able to commence.

Cumulative sentences, escape from lawful custody and prison offences

Recommendation 45
Provisions dealing with multiple sentences should incorporate the provisions in s 26B and 34(2) of the *Correctional Centres Act 1952* (NSW) and in s 447A of the *Crimes Act 1900* (NSW), which should, in turn, be consistent with the procedures set out in the proposed amendments to s 9(3) of the *Sentencing Act 1989* (NSW).

8.54 Section 447A of the *Crimes Act 1900* (NSW) provides that an escapee shall, in addition to any sentence imposed for the escape, serve "a term equal to that during which he was absent from prison after the escape and before the expiration of the term of his original sentence, whether at the time of his recapture the term of that sentence has or has not expired". Section 34 of the *Correctional Centres Act 1952* (NSW) provides that a sentence imposed upon an escapee shall be "cumulative on all previous sentences imposed by the court or to which the prisoner is subject". Section 26B(1) of the *Correctional Centres Act 1952* (NSW) provides for penalties which may be imposed by a Visiting Justice for prison offences. The option provided by paragraph (e) is "the extension, by a period that does not exceed 28 days of each minimum or fixed term ... to which the prisoner is subject (other than a term which is cumulative and which has not commenced)". Subsections (4) and (5) make provision for a corresponding reduction in additional terms as well as the extension of the minimum term beyond the

101. See *R v Deeble* (NSW CCA, No 60047/91, 19 September 1991, unreported).

whole of the original sentence and even the statutory maximum for the offence which was originally sentenced.

8.55 Although the *Sentencing Act 1989* (NSW) prevails to the extent of any inconsistencies with the above provisions,[102] the Commission proposed, in DP 33, that any revision of provisions for cumulative sentences should make allowance for these sections.[103]

8.56 Two submissions doubted the utility of retaining s 26B and s 34 of the *Correctional Centres Act 1952* (NSW) since the sentences imposed under them are likely to be cumulative under common law principles, but recognised that for policy reasons the Government would be likely to retain them.[104] The Senior Public Defender pointed to the fact that an attempt to incorporate s 26B and s 34 into the *Sentencing Act 1989* (NSW) would involve "incredible complexity".[105] The Commission, however, does not consider that this complexity is apparent. Other submissions supported allowance being made for provisions relating to cumulative sentences contained in the other legislation.[106]

8.57 Consistent with the Commission's view that all legislation relating to sentencing should be contained in the same legislation, we recommend that s 26B and 34(2) of the *Correctional Centres Act 1952* (NSW) and s 447A of the *Crimes Act 1900* (NSW) should be incorporated into the proposed consolidation. The incorporated provisions will be consistent with the proposed s 9(3) so that, for example, s 34(2) should in future provide that a sentence of imprisonment imposed on an escapee should be treated as a

102. *R v Andrews* (NSW CCA, No 60621/91, 28 April 1993, unreported).
103. DP 33 at para 4.57.
104. Legal Aid Commission of NSW, *Submission* (18 July 1996) at 4-5; Law Society of NSW, *Submission* (19 July 1996) at 8.
105. M L Sides and Bar Association, *Submission* (24 June 1996) at 17.
106. W D T Ward, *Submission* (25 July 1996) at 4; Confidential, *Submission* (22 May 1996) at 15; J L Swanson, *Submission* (1 July 1996) at 2; Department of Corrective Services, *Submission* (15 July 1996) at 10.

further sentence in accordance with the proposed amendments to s 9(3) of the *Sentencing Act 1989* (NSW).

Restrictions on imposing cumulative sentences

Recommendation 46
Section 444(4)(a) and (b) of the *Crimes Act 1900* (NSW) should be amended to include sentences of imprisonment to be served partly consecutively and partly concurrently.

8.58 Subsection 444(4) of the *Crimes Act 1900* (NSW) provides:

> Notwithstanding anything in this section, except subsection (5), a magistrate, whether dealing with an offence or offences under section 476 or otherwise, shall not impose, or make an order having the effect of imposing, on any offender:
> (a) more than one sentence of imprisonment of penal servitude to be served consecutively on any other sentence of imprisonment or penal servitude then imposed on, or being served by, the offender; or
> (b) sentences of imprisonment or penal servitude, to be served consecutively, totalling more than three years.

Subsection 444(5) further provides:

> Where a person is serving a sentence of penal servitude or imprisonment at the time of his conviction by a magistrate in respect of 1 or more offences which are committed after the commencement of this subsection and which involved an assault on a prison officer while in the execution of his duty, the magistrate may:
> (a) whether or not the person is being dealt with under section 476;
> (b) whether or not the sentence being served is cumulative on other sentences already served;

> (c) whether or not the person is liable to serve a cumulative sentence or cumulative sentences of penal servitude or imprisonment on the expiration of the sentence being served; and
> (d) if:
> (i) in a case where the person is not liable to serve a cumulative sentence or cumulative sentences on the expiration of the sentence being served-the sentence being served; or
> (ii) in a case where the person is liable to serve a cumulative sentence or cumulative sentences on the expiration of the sentence being served-the last of the sentences to be served,
> was imposed by a Judge,
> direct that the sentence for the offence or for 1 only of the offences, as the case may be, of which the person then stands convicted shall commence, in the case referred to in paragraph (d)(i), at the expiration of the sentence being served or, in the case referred to in paragraph (d)(ii), at the expiration of the last of the sentences to be served.

8.59 The Commission has identified three possible problems with these subsections:

- section 444(4) makes no provisions for partly cumulative sentences;
- there is an ambiguity in s 444(4)(a); and
- section 444(5) covers only assaults against prison officers and does not extend to other offences which a prisoner might commit while in custody.

8.60 *Partly cumulative sentences under s 444(4)*. On their face s 444(4)(a) and (b) deal only with cumulative sentences and do not make provision for partly cumulative sentences. The precursor of the current provision was introduced in 1967[107] by the same Act

107. *Crimes (Amendment) Act 1967* (NSW) s 4(a). The section was amended to its current form by *Crimes and Other Acts (Amendment) Act 1974* (NSW) s 9(g).

which repealed s 447 of the *Crimes Act 1900* (NSW).[108] Section 447 expressly allowed for the imposition of partly cumulative and partly concurrent sentences. It would seem, therefore, that it was not intended that s 444(4) should take into account the possibility of partly cumulative sentences.[109] Since the intention of s 444(4)(a) could be bypassed by allowing the imposition of partly cumulative sentences totalling more than three years, the Commission recommends that s 444(4)(a) and (b) be amended to refer to multiple sentences totalling more than three years.

8.61 *An ambiguity in s 444(4)(a).* The Commission's attention was drawn[110] to an ambiguity in s 444(4)(a) of the *Crimes Act 1900* (NSW). Two interpretations are possible:

- The first focuses on the position of the offender at the date of sentencing, with the result that already expired cumulative terms are not included for the purposes of the paragraph.

- The second focuses on the phrase "or make an order having the effect of imposing" so that all cumulative sentences imposed, including those already expired, are relevant for the purposes of imposing a further cumulative sentence.

8.62 The Commission prefers the second interpretation, in that the object of the section is to limit the power of Local Courts and has been otherwise strictly interpreted.[111] However, the Commission is content to leave the resolution of this issue to the Courts.

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108. *Crimes (Amendment) Act 1967* (NSW) s 4(c).
109. The repeal of s 447 of the *Crimes Act 1900* (ACT) was interpreted by the Federal Court as removing the power to impose partly cumulative and partly concurrent sentences: *R v Hillsley* (1992) 105 ALR 560 at 569 per Gallop J, at 562 per Black J.
110. Department of Corrective Services, *Submission* (15 July 1996) at 13; Legal Aid Commission of NSW, *Consultation* (7 August 1996).
111. See *R v Hayes* [1977] 1 NSWLR 364 which considers s 444(4)(b) of the *Crimes Act 1900* (NSW).

8.63 *Extension of s 444(5).* The Department of Corrective Services submitted that the exception provided by s 444(5) should be extended to include any offence committed by a prisoner.[112] A preliminary submission from the Department had noted an instance in 1995 where a magistrate was prevented by s 444(4)(b) from imposing a cumulative sentence upon a prisoner convicted of possession of drugs while in custody who had three years, seven months and 20 days remaining on a minimum term of four years.[113] The Chairperson of the Offenders Review Board also submitted that the exception should be extended.[114]

8.64 However, submissions generally argued that s 444(5) not be extended.[115] The Senior Public Defender supported this view on the grounds that offences committed while in prison are a serious aggravating factor and will have implications for parole and the liberty of the offender and, therefore, should be dealt with by the District Court.[116] The Commission finds no convincing reasons for the extension of the power of Local Courts with respect to offences committed while in custody.

Cumulative sentences and a right to be released on parole

8.65 Section 24(1) of the *Sentencing Act 1989* (NSW) provides that a court, in sentencing an offender to a minimum and additional term totalling three years or less, must "make an order directing the release of the prisoner on parole at the end of the minimum

112. Department of Corrective Services, *Submission* (15 July 1996) at 13.
113. Department of Corrective Services, *Preliminary Submission* (18 October 1995).
114. W D T Ward, *Submission* (25 July 1996) at 4.
115. N R Cowdery, *Submission* (17 June 1996) at 6; M L Sides and Bar Association, *Submission* (24 June 1996) at 18; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 5; Confidential, *Submission* (22 May 1996) at 15.
116. M L Sides and Bar Association, *Submission* (24 June 1996) at 18.

term".[117] Section 24(4) makes provision for offenders who are sentenced to a term of less than three years in addition to an already imposed sentence of more than three years. In such cases the offenders are not entitled to release on the expiry of the minimum term of the further sentence (whose total term is three years or less), but are entitled to release in accordance with the provisions which apply to the first sentence of more than three years.

8.66 Where an offender is sentenced under such circumstances, it is possible that the first sentence (consisting of a minimum and additional term of more than three years duration) will expire before the minimum term of the further sentence (where the minimum and additional terms are less than three years).[118] In such circumstances the offender is automatically entitled to release on parole since the full term of the original sentence has expired as well as the minimum term of the cumulative sentence. The Commission, while noting suggestions that offenders in such situations should have no right to automatic release at the expiry of the minimum term and that the Parole Board should decide whether release is appropriate in the circumstances, expressed no opinion on the issue in DP 33.

8.67 The Director of Public Prosecutions supported the suggestion from the Attorney General's Sentencing Review that offenders should not have a right to be released in such circumstances, and that the Parole Board should decide whether parole is appropriate in the circumstances,[119] as did most of the submissions which considered the issue.[120] Only one submission supported the

117. Offenders sentenced to a total term of more than three years have a right to release only on the expiry of their sentences, although they are eligible to be considered for release to parole by the Parole Board at the end of their minimum terms: See paras 11.49-11.63.
118. DP 33 at para 4.64.
119. N R Cowdery, *Submission* (17 June 1996) at 6.
120. Department of Corrective Services, *Submission* (15 July 1996) at 14; Confidential, *Submission* (22 May 1996) at 16; W D T Ward, *Submission* (25 July 1996) at 4.

automatic release of a prisoner at the termination of the minimum term of the cumulative sentence.[121]

8.68 The Senior Public Defender urged that there should be flexibility in such circumstances and advocated that a judge imposing a cumulative sentence on top of an already existing sentence of more than three years should be able, where there is, for example, evidence of strong rehabilitation, to direct that the offender be released to parole. Likewise, where the additional offence is serious, or there is no evidence of rehabilitation, the judge may merely order that the offender is entitled to be considered for parole at the end of the newly imposed minimum term.[122]

8.69 The Commission considers it appropriate, where a further sentence of less than three years is imposed during the term of an existing sentence of more than three years, that an offender should only be subject to assessment by the Parole Board for so much of the remainder of the first sentence as stands at the conclusion of the minimum term of the further sentence. The Commission considers that an offender should not remain subject to assessment by the Parole Board in the period beyond the term of the original sentence. This will mean that if the minimum term of a further sentence of less than three years expires after the end of the additional term of the first sentence, an offender will automatically be entitled to release. However, if the minimum term of a further sentence of less than three years expires before the end of the original sentence, and the Parole Board has prevented release on parole during the remainder of the original sentence, the offender will be entitled to release during what then remains of the further sentence.

8.70 The principal reason for the Commission's preferred approach is that to act otherwise would be to undermine the

121. NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 5.
122. M L Sides and Bar Association, *Submission* (24 June 1996) at 18-19.

decisions of the courts with respect to both the original and further sentences. Extending the supervision of the Parole Board beyond the period of the first sentence would go beyond what the first court intended. So too, giving the Parole Board jurisdiction over the second sentence would go beyond the intentions of the second court which would have been aware that a sentence of less than three years does not attract a requirement for assessment by the Parole Board. In any case, the Commission has also recommended that in future there be a presumption in favour of parole for prisoners who are not serious offenders and who are serving sentences of less than eight years, so that the Parole Board will have to provide reasons for the continued detention of a prisoner following the conclusion of that prisoner's minimum term.[123]

123. Recommendation 63. See paras 11.53-11.58.

9.
LIFE SENTENCES

- LIFE SENTENCES WITH MINIMUM TERMS
- MANDATORY LIFE SENTENCES
- RE-DETERMINATIONS UNDER SECTION 13A

9.1 A sentence of life imprisonment is the prescribed maximum penalty for murder[1] and for commercial drug trafficking,[2] although the discretion to impose lesser penalties for these offences is preserved.[3] Since the proclamation of the *Crimes (Life Sentences) Amendment Act 1989* (NSW) on 12 January 1990, a sentence to life imprisonment has meant imprisonment for the period of the prisoner's "natural life".[4] The provisions of the *Sentencing Act 1989* (NSW) generally require that a sentence of imprisonment must comprise a minimum and additional term, but this does not apply to life or other indeterminate sentences.[5] In New South Wales it is not possible for a prisoner to be released from a life sentence under the current provisions except in the exercise of the Royal prerogative.[6]

LIFE SENTENCES WITH MINIMUM TERMS

Recommendation 47
When imposing a life sentence, the court should have the discretion to determine the sentence with a minimum term at the end of which the offender will be eligible to be considered for release on parole.

9.2 Although s 13(c) of the *Sentencing Act 1989* (NSW) does not allow the option of setting a minimum term when a sentence of life imprisonment is imposed, a life sentence consisting of minimum and additional terms is, however, available under s 13A of the *Sentencing Act 1989* (NSW) which provides for the re-determination of life sentences handed down under the previous system.

1. *Crimes Act 1900* (NSW) s 19A.
2. *Drug Misuse and Trafficking Act 1985* (NSW) s 33A.
3. *Crimes Act 1900* (NSW) s 19A(3); *Drug Misuse and Trafficking Act 1985* (NSW) s 33A(2).
4. *Crimes Act 1900* (NSW) s 19A(2); *Drug Misuse and Trafficking Act 1985* (NSW) s 33A(1).
5. *Sentencing Act 1989* (NSW) s 13(c).
6. *Sentencing Act 1989* (NSW) s 25A(6) and 53; *Crimes Act 1900* (NSW) s 19A(6).

9.3 In DP 33 the Commission favoured making generally available sentences which consist of a minimum term and an additional term for the remainder of the offender's life. We considered that a prisoner who would otherwise have been sentenced to natural life might benefit from the possibility of being released on parole at some time.[7] This proposal was generally supported.[8]

9.4 The Senior Public Defender supported the availability of a life sentence as an additional term as being entirely consistent with the concept of truth in sentencing, and in particular as being useful for cases in the worst category of case where it cannot be said there are no prospects of rehabilitation. He noted that in most cases involving s 13A re-determinations of life sentences there had been evidence of significant rehabilitation by offenders, even in cases where it had been said at the initial sentencing that the offender would remain forever a danger to the community.[9] It was, however, suggested that the introduction of life sentences as additional terms must lead to the extension of the availability of s 13A re-determinations to life sentences passed so far under s 19A of the *Crimes Act 1900* (NSW).[10] The Commission sees no reason why this should be inevitable.

9.5 The Department of Corrective Services raised the issue of parole supervision once an offender is released during an additional term of life.[11] At present parole supervision cannot exceed three years,[12] however the Commission now recommends that regulations should permit the Parole Board to order a period of supervision longer than three years.[13] It should be noted that, while parole does not always involve direct and continuing supervision, the offender continues to be subject to revocation of parole

7. DP 33 at paras 4.88-4.89.
8. N R Cowdery, *Submission* (17 June 1996) at 7; Department of Corrective Services, *Submission* (15 July 1996) at 10; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 5; Law Society of NSW, *Submission* (19 July 1996) at 10; W D T Ward, *Submission* (25 July 1996) at 4; Confidential, *Submission* (22 May 1996) at 16; S Odgers, *Submission* (7 June 1996) at 2; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 6.
9. M L Sides and Bar Association, *Submission* (24 June 1996) at 21-22.
10. M L Sides and Bar Association, *Submission* (24 June 1996) at 23.
11. Department of Corrective Services, *Submission* (15 July 1996) at 10.
12. *Sentencing (General) Regulation 1996* (NSW) cl 10(4).
13. Recommendation 72.

throughout the remainder of the sentence for conduct which breaches a term or condition of parole, but which does not necessarily amount to the commission of an offence.

9.6 While the Commission continues to support the substance of the original proposal that judges should have the discretion to impose a minimum term of imprisonment with an additional term of life at the initial sentencing hearing, we have reworded our proposal to accord with Recommendation 42 which states that s 5(1) of the *Sentencing Act 1989* (NSW) should be amended to require the Court to set a sentence, and then to set a minimum term as the period during which the prisoner is not eligible for release on parole. Accordingly we recommend that a court should have the discretion, when imposing a life sentence, to determine the sentence with a minimum term.

MANDATORY LIFE SENTENCES

Recommendation 48
Section 431B of the *Crimes Act 1900* (NSW) should be repealed.

9.7 The *Crimes Amendment (Mandatory Life Sentences) Act 1996* (NSW) received assent on 21 May 1996 and commenced on 30 June 1996. The Act has the effect of inserting into the *Crimes Act 1900* (NSW) s 431B which imposes a mandatory minimum sentence of life imprisonment on offenders convicted of certain offences.

9.8 Section 431B(1) of the *Crimes Act 1900* (NSW) makes provision for mandatory life sentences to be imposed on offenders convicted of murder in certain circumstances:

> A court is to impose a sentence of penal servitude for life on a person who is convicted of murder, if the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence.

9.9 Section 431B(2) deals with offences involving the trafficking of commercial quantities of drugs. A court must impose a sentence of life imprisonment:

> ... if the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence and the court is also satisfied that:
> (a) the offence involved:
> (i) a high degree of planning and organisation, and
> (ii) the use of other people acting at the direction of the person convicted of the offence in the commission of the offence, and
> (b) the person was solely or principally responsible for planning, organising and financing the offence, and
> (c) the heroin or cocaine was of a high degree of purity, and
> (d) the person committed the offence solely for financial reward.

9.10 The final form of the Act differed significantly in some technical aspects from the provisions of the *Crimes Amendment (Mandatory Life Sentences) Bill 1995* which the Commission considered in DP 33. These changes have not affected the Commission's in principle objection to mandatory life sentences.

9.11 In DP 33 the Commission objected to mandatory life sentences in principle as they constitute the most extreme form of mandatory minimum sentence. Mandatory minimum sentences are undesirable because they apply without regard to undoubtedly relevant circumstances of a case with consequent arbitrary and capricious results. Being in effect a sentence passed by Parliament, mandatory minimum sentences remove judicial discretion and amount to an unwarranted intrusion on judicial independence.[14] Objections were also raised on practical grounds. It was considered that mandatory life sentences would adversely affect the efficiency of the criminal justice system in as much as offenders would be less willing to plead guilty to offences which carry a mandatory life sentence.[15]

9.12 Another objection to s 431B is that it requires that the tribunal of fact decide matters which would otherwise be relevant to the sentencing discretion, and which the sentencing court would consider in the normal course of events. This crosses the dividing line between the roles of judge and jury. This is most obvious in respect of s 431B(2) where the specified circumstances of which the court must be satisfied will probably have to be alleged in the indictment and the jury's verdict taken in respect of each.[16] The argument may also be made with less force in respect of s 431B(1) if the tribunal of fact were to be required to determine the level of culpability. If either of the subsections of s 431B is to be retained, it must be made clear that the circumstances outlined are for the sentencing court to consider and determine and do not require proof in the trial and determination by a judge or jury as the tribunal of fact.

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14. See the discussion in New South Wales, Legislative Council, Standing Committee on Law and Justice, *Report on the Crimes Amendment (Mandatory Life Sentences) Bill 1995* (November 1995) at 7-9. See also L Blom-Cooper and T Morris, "The Penalty for Murder: A Myth Exploded" [1996] *Criminal Law Review* 707.
15. DP 33 at para 4.76.
16. See *Kingswell v The Queen* (1985) 159 CLR 264 at 281.

9.13 Even if s 431B merely codifies the existing law, the Commission does not consider that this is desirable in that it may needlessly restrict the ability of the common law of sentencing to develop in ways that might be considered appropriate in future.

9.14 Another objection raised in DP 33 was that the form of s 431B of the *Crimes Act 1900* (NSW) as originally proposed might have been in conflict with Article 37 of the *Convention on the Rights of the Child 1989*, which, at the very least, requires a minimum term to be imposed as part of a life sentence with respect to offenders under the age of 18.[17] Provision is now made in subsection (6) that the section does not apply to a person under the age of 18 at the time of committing the offence.[18]

9.15 In addition to the objections of principle listed above, we also have specific concerns about the utility of various provisions in s 431B:

- Section 431B(1) is strictly unnecessary. It adds nothing to the law as it currently stands, and the discretion to impose a sentence less than life for murder is expressly preserved in any case.[19]

- Section 431B(2), in requiring that the court be satisfied of the listed criteria, will have a considerable impact on the length of trials and will create serious logistical difficulties for the prosecution. It is most unlikely, therefore, that the prosecution will seek to use the provision.

- Although s 431B(5), in stating that nothing in subsection (2) derogates from the court's discretion to impose a sentence of life imprisonment on a person convicted of trafficking in commercial quantities of drugs, has overcome a problem identified with s 431B(2) as originally proposed,[20] it has the effect of rendering the provision useless.

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17. DP 33 at para 4.76.
18. This provision was included in response to the Report of the Standing Committee on Law and Justice: New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 17 April 1996, the Hon J W Shaw QC, Second Reading Speech at 84.
19. *Crimes Act 1900* (NSW) s 431B(3) which preserves s 442.
20. The problem with s 431B(2) as originally proposed was that the gravity of conduct required to satisfy the conditions in s 431B(2) was exceptionally high and that there was a danger that, if the section came to be treated as a code, it might be harder to impose a sentence on an offender whose circumstances did

9.16 The majority of submissions which considered the issue supported the Commission's rejection of mandatory life sentences.[21] Only one submission thought that there were cases where mandatory life sentences should be imposed.[22] In light of the objections in principle to such legislation, and with the support of the overwhelming majority of submissions on the issue, the Commission recommends that s 431B be repealed.

9.17 The Chairman of the Commission is in complete agreement with the other members of the Commission in their rejection of the concept of mandatory sentences as being offensive to the principles of judicial independence and individual justice which are fundamental to the rule of law. However, he is of the view that s 431B does not breach these principles. Section 431B(1) is essentially a restatement of the common law concerning imposition of maximum penalties. In his opinion, legislation of this particular kind does not constitute an inappropriate interference either with judicial independence or judicial discretion, though perhaps its utility might be questioned. The Chairman considers that, accepting that there is a level of public controversy about sentencing policies, even though mostly ill-informed, the express adoption by the Legislature of fundamental principles of justice, as enunciated by the Courts, may well serve a useful purpose. Accordingly, he thinks that, considered alone, s 431B(1) is a justifiable and appropriate provision. However, the Chairman is at one with the other members of the Commission in his concern that legislation of this kind should not operate as a kind of stalking horse for the imposition of mandatory minimum terms, such as has occurred federally and in a number of States in the United States. The Chairman agrees with the other members of the Commission that s 431B(2) creates unnecessary procedural complexities and, for that reason, supports its repeal.

RE-DETERMINATIONS UNDER SECTION 13A

not fall precisely within the requirements but who would otherwise have been deserving of a sentence of life imprisonment: DP 33 at para 4.75.

21. M L Sides and Bar Association, *Submission* (24 June 1996) at 19-20; N R Cowdery, *Submission* (17 June 1996) at 6; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 6; Confidential, *Submission* (22 May 1996) at 16; NSW Council for Civil Liberties, *Submission* (1 July 1996) at 3; Justice Action, *Submission* (2 July 1996) at 3.
22. W D T Ward, *Submission* (25 July 1996) at 4.

9.18 Section 13A of the *Sentencing Act 1989* (NSW) allows prisoners serving "existing life sentences" to apply to have their sentences re-determined by the Supreme Court. An existing life sentence, for the purposes of the section, is essentially a sentence of imprisonment for life other than one imposed under either s 19A of the *Crimes Act 1900* (NSW) or s 33A of the *Drug Misuse and Trafficking Act 1985* (NSW). In practical terms, the section extends to sentences of imprisonment for life handed down before the repeal of s 463 of the *Crimes Act 1900* (NSW) under which release on licence was granted. The number of prisoners eligible to apply for a re-determination of sentence is, therefore, finite. Of the 257 prisoners who were eligible or will become eligible to apply for a determination under s 13A, 164 had received re-determined sentences as at 1 October 1996.[23]

9.19 Prisoners serving existing life sentences must have served at least eight years of their sentence before they are eligible to make an application for re-determination.[24] The Supreme Court may, on such an application, decide to set both a minimum and additional term or decline to determine a minimum and additional term.[25] The sentence comprising the minimum and additional terms, if set by the court, then replaces the original life sentence,[26] and the minimum term is taken to have commenced on the date on which the original sentence commenced or the date on which the prisoner's remand commenced.[27]

Matters to be taken into account when considering applications

Recommendation 49
Section 13A(9)(a) of the *Sentencing Act 1989* (NSW) should be repealed.

23. Data provided by the Office of the Director of Public Prosecutions, 18 October 1996.
24. *Sentencing Act 1989* (NSW) s 13A(3).
25. *Sentencing Act 1989* (NSW) s 13A(4).
26. *Sentencing Act 1989* (NSW) s 13A(6).
27. *Sentencing Act 1989* (NSW) s 13A(5).

9.20 Section 13A(9) sets out factors to which the Supreme Court must have regard when considering an application for re-determination:

> (a) the knowledge of the original sentencing court that a person sentenced to imprisonment for life was eligible to be released on licence under section 463 of the Crimes Act 1900 and of the practice relating to the issue of such licences; and
> (b) any report on the person made by the Review Council and any other relevant reports prepared after sentence (including, for example, reports on the person's rehabilitation), being in either case reports made available to the Supreme Court; and
> (c) any relevant comments made by the original sentencing court when imposing the sentence; and
> (d) the age of the person (at the time the person committed the offence and also at the time the Supreme Court deals with the application),
> and [the Supreme Court] may have regard to any other relevant matter.

9.21 Subsection (9) involves significant difficulties of interpretation,[28] especially paragraph (a), since it is difficult to see what relevance the knowledge of the original sentencing judge of the then relevant release practices could have for a current re-determination.[29] The decision in *R v Crump*[30] shows a lack of uniform interpretation of the paragraph and a strong dissatisfaction with its drafting. The Commission, therefore, proposed the repeal of s 13A(9)(a).

9.22 The repeal of s 13A(9)(d) was also proposed because it referred to a matter which is already relevant to the court's decision.

Section 13A(9)(a)

9.23 The Commission, while recognising the need for s 13A following the repeal of s 463 of the *Crimes Act 1900* (NSW) and the cessation of the release on licence scheme, remains of the opinion that s 13A(9)(a) should be

28. DP 33 at paras 4.84-4.86.
29. See especially comments of Hunt CJ at CL in *R v Purdey* (1992) 65 A Crim R 441 at 444; and *R v Crump* (NSW CCA, No 60080/93, 30 May 1994, unreported) at 9. The High Court refused leave to appeal in the matter of *Crump* because there was no precise counterpart to s 13A of the *Sentencing Act 1989* in other States, the appeal raised no general principle of statutory construction, and the interpretation of s 13A was a problem properly to be resolved by the courts of New South Wales: *Crump v The Queen* (1995) 69 ALJR 570.
30. NSW CCA, No 60080/93, 30 May 1994, unreported.

repealed, given the difficulty involved in its application. It is difficult to make relevant use of the knowledge of the original sentencing court for these reasons:

- For life sentences before 1982, life was the mandatory sentence for murder and this meant that the question of release on licence could never be a consideration for the original sentencing judge.

- For life sentences both before and after 1982, the practice of release on licence is not comparable with the fixing of a sentence with a minimum term at the end of which the prisoner becomes eligible for release on parole.[31]

9.24 In recommending the repeal of s 13A(9)(a), the Commission considers that the provision can be adequately replaced by the fixing of a sentence according to general principles, with the benefit of hindsight, which is what occurs now when any other sentence is re-determined. This includes going back to the level of sentencing at the time of the original imposition where it is possible to do so.[32]

9.25 Several submissions supported the Commission's proposal to repeal s 13A(9)(a).[33] However, two submissions did not support the repeal on the grounds that the expectation of release on licence within a certain time should be taken into account.[34] One suggestion was that s 13A(9)(a) should be amended and retained to remind judges that there was an expectation of release on licence, so that the court would be required to have regard to:

> (a) the knowledge that the person sentenced to imprisonment for life was eligible to be released on licence under section 463 of the

31. *Crump* (NSW CCA) at 12 per Hunt CJ at CL.
32. *R v Shore* (1992) 66 A Crim R 37.
33. N R Cowdery, *Submission* (17 June 1996) at 6; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 5; Confidential, *Submission* (22 May 1996) at 16; Department of Corrective Services, *Submission* (15 July 1996) at 10; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 6; W D T Ward, *Submission* (25 July 1996) at 4.
34. M L Sides and Bar Association, *Submission* (24 June 1996) at 20-21; Law Society of NSW, *Submission* (19 July 1996) at 9.

> Crimes Act 1900 and of the practice relating to the issue of such licences.[35]

We do not endorse this approach because the argument, that release on licence is not comparable with a system of setting a sentence with a minimum term, applies notwithstanding the suggested rewording.

Section 13A(9)(d)

9.26 While most submissions agreed that s 13A(9)(d) did not add anything to the law as it currently stands, some did not support its repeal.[36] The Director of Public Prosecutions did not support the repeal of s 13A(9)(d) on the grounds that the Parliament, in introducing the provision,[37] was "of the opinion that giving legislative imprimatur to the common law practice of having regard to the age of offenders applying for re-determination of their life sentences was the appropriate course of action to take".[38]

9.27 The Commission recognises that, while s 13A(9)(d) does not add to the law as it currently stands, it does nothing to derogate from it. The repeal of s 13A(9)(d) is accordingly not necessary and the Commission makes no recommendation concerning it.

Commencement of minimum terms

Recommendation 50
Section 13A(5) of the *Sentencing Act 1989* (NSW) should be amended to provide that a minimum term set under the section is to commence on the date which the court, in its discretion, determines, according to the justice of the case.

35. Law Society of NSW, *Submission* (19 July 1996) at 9.
36. Legal Aid Commission of NSW, *Submission* (18 July 1996) at 5; Law Society of NSW, *Submission* (19 July 1996) at 9.
37. *Sentencing (Life Sentences) Amendment Act 1993* (NSW).
38. N R Cowdery, *Submission* (17 June 1996) at 7.

9.28 Section 13A(5) of the *Sentencing Act 1989* (NSW) makes the following provision with respect to the commencement of a minimum term which has been set at a re-determination hearing:

> A minimum term set under this section is to commence on the date on which the original sentence commenced or, if the person was remanded in custody for the offence, the date on which the first such remand commenced.

9.29 The Discussion Paper noted Justice Hunt's observation at first instance in *R v Purdey*[39] that the provision, as it stands, is inadequate because it fails to account for situations where a life sentence was imposed upon a prisoner already serving a sentence for another offence.[40] A cumulative sentence, which takes into account the totality of the criminality involved and would normally have been imposed in such a circumstance, under the current system, cannot be imposed by the re-determining judge under s 13A(5) if such a sentence had not been imposed by the original sentencing judge. The Commission proposed the amendment of s 13A(5) to take account of these criticisms.[41]

9.30 While the second option in s 13A(5) assumes that a re-determined sentence should be backdated to cover the period the offender spends in custody prior to sentencing, and judges will usually backdate a sentence in these circumstances, a sentencing judge may exercise a discretion not to.[42] An appeal to the Court of Criminal Appeal in *Purdey*[43] has also highlighted some other problems with s 13A(5) in failing to deal adequately with the issue of backdating sentences. Particular problems were noted with the phrase "remanded in custody for the offence". Two judges held that this phrase only applied where the offender's remand in custody was for the particular offence in question, and not where the offender was already in custody for other

39. (1992) 65 A Crim R 441 at 446.
40. Under the former system, when imposing a sentence of life imprisonment together with other lesser sentences, the courts were merely imposing a life sentence which subsumed the lesser sentences. The question of accumulation was, therefore, irrelevant and the life sentence was taken to have commenced from the date of imposition. However, different considerations must pertain when a sentence less than a natural life sentence is being fixed for the murder.
41. DP 33 at para 4.91.
42. *R v Purdey* (1992) 65 A Crim R 441 at 447.
43. *R v Purdey* (1993) 31 NSWLR 668.

offences.[44] Chief Justice Gleeson further construed s 13A(5) as giving the judge a choice even if the second of the two options could be exercised.[45] Clearly Justice Carruthers[46] did not agree, stating that the second option was exclusive once the criteria were satisfied. He also noted that the Legislature would have enacted a provision similar to s 24(1)(a)(ii) of the *Probation and Parole Act 1983* (NSW) which referred to a person being in custody "by reason of the offence to which the sentence relates" if its intention was that the period in custody relate solely to the particular offence. The interpretation of s 13A(5) is not settled, and submissions were made on this point in addition to those in relation to cumulative sentences which were raised in the Discussion Paper.

9.31 With respect to the matters raised in the Court of Criminal Appeal, the Senior Public Defender submitted that the mandatory commencement date for re-determined sentences should be the date on which a prisoner was arrested for the offence, assuming bail was refused, regardless of there being other offences for which he or she was arrested or for which the offender was already serving a sentence of imprisonment. He also recognised that legislative amendment would be required to take account of situations where sentences were being served in addition to the life term and it was necessary that the principle of totality be taken into account.[47] Another suggestion was that s 13A(5) be redrafted so that the re-determined sentence commences when the offender was remanded in custody for the offence, even if there were other reasons for remand.[48]

9.32 The Commission has concluded that the commencement date should be fixed in the discretion of the sentencing court. In exercising its discretion, the court should have regard, by analogy, to the common law principles relating to the backdating of sentences of imprisonment. Justice Badgery-Parker has said:

> It needs, I think, to be emphasised that, unless there is good reason to the contrary, it is always desirable that a sentencing judge should not

44. *R v Purdey* (1993) 31 NSWLR 668 at 669 per Gleeson CJ, at 671-673 per Mahoney JA.
45. *R v Purdey* (1993) 31 NSWLR 668 at 669 per Gleeson CJ.
46. *R v Purdey* (1993) 31 NSWLR 668 at 676-677 per Carruthers J.
47. M L Sides and Bar Association, *Submission* (24 June 1996) at 23-24.
48. Legal Aid Commission of NSW, *Submission* (18 July 1996) at 6. See also Law Society of NSW, *Submission* (19 July 1996) at 10.

> only take into account pre-sentence custody in determining the sentence to be imposed but should backdate the sentence to the commencement of that pre-sentence custody. ... If for some such reason, a sentencing judge chooses not to backdate a sentence, then it is desirable that he should expressly state that he is not doing so, and should clearly state his reasons for not doing so.[49]

The Commission sees no reason why this principle should not generally apply to s 13A re-determinations and accordingly recommends that s 13A(5) of the *Sentencing Act 1989* (NSW) be amended to provide that a minimum term is to commence on the date which the Court, in its discretion, determines according to the justice of the case.

9.33 The proposed amendment to s 13A(5) allows that, where other sentences are imposed at the same time, or are already being served, the court can, in its discretion, fix the re-determined sentence to be cumulative, concurrent, or partly concurrent with the other sentences and fix the commencement date for the re-determined sentence accordingly.

Restrictions upon application for re-determination of life sentences

Recommendation 51
Section 13A(8)(a) of the *Sentencing Act* 1989 (NSW) should be repealed, and s 13A(8)(b) should be amended to allow the Supreme Court to direct that an applicant may not re-apply for a period of up to five years from the making of the instant application.

9.34 Under s 13A(8) of the *Sentencing Act 1989* (NSW) the Supreme Court has the power to prevent further applications for re-determination of a sentence of life imprisonment:

49. *R v Deeble* (NSW CCA, No 60047/91, 19 September 1991, unreported) at 3.

> If the Supreme Court declines to determine a minimum term and an additional term, the Court may (when making that decision) direct that the person who made the application:
> (a) never re-apply to the Court under this section; or
> (b) not re-apply to the Court under this section for a specified period.

9.35 The effect of an order under s 13A(8)(a) is that the prisoner must serve the remainder of the existing life sentence "for the term of the prisoner's natural life".[50] If the Court declines to make a decision under s 13A(8) the prisoner may not re-apply within a period of two years from the date of the decision. Under s 13A(8C), the Court may direct that a prisoner never re-apply or not re-apply for a period of more than two years only if:

> (a) the person was sentenced for the crime of murder; and
> (b) it is a most serious case of murder and it is in the public interest that the determination be made.

No orders have yet been made under s 13A(8)(a) directing that a prisoner may never re-apply for a determination under s 13A.[51]

9.36 The Discussion Paper[52] noted concerns that s 13A re-determinations would have the practical effect, in some cases, of imposing a heavier penalty than that which was available at the time the offence was committed.[53] This was because under the previous system, the prospect of release on licence meant that, in effect, an "indeterminate" life sentence was imposed, as opposed to what is, in effect, a "natural life" sentence imposed by the declaration that release will never again be considered. However, it was also noted that the possibility of release remains with the Royal prerogative of mercy.[54]

9.37 The Commission, in proposing that s 13A(8)(a), and in turn s 13A(8A), should be repealed and that consequential amendments be made

50. *Sentencing Act 1989* (NSW) s 13A(8A).
51. Data provided by Office of the Director of Public Prosecutions, 18 October 1996. An application for an order was made on 29 November 1996 in *R v Kalajzich*, but has not yet been decided.
52. DP 33 at paras 4.94-4.95.
53. Arguably in breach of Article 15.1 of the *International Covenant on Civil and Political Rights 1966*.
54. *Sentencing Act 1989* (NSW) s 53.

to s 13A(8C) and s 13A(12), was of the view that an order that a prisoner never re-apply for a determinate sentence effectively dismisses any hope of rehabilitation and provides the prisoner with no incentive to reform and amounts effectively to an increase in the severity of the original sentence. The Commission also proposed that s 13A(8)(b) be amended to allow the Supreme Court to direct that an applicant may not re-apply for a period of up to ten years.[55]

9.38 Submissions agreed that s 13A(8)(a) should be repealed so that the court cannot direct that a person never re-apply under s 13A.[56] However, some concern was expressed that the proposed ten year maximum within which an applicant may not re-apply for a re-determination was too long.[57] It was generally felt that a shorter period was more appropriate. The New South Wales Council for Civil Liberties submitted that the period should be no more than two years,[58] while two other submission suggested that the period should be for no more than five years.[59]

9.39 Another submission, in supporting the ten year period, proposed that the time should run from the date of the prisoner's application as it is not uncommon for up to two years to elapse between application and re-determination because of the time it takes the Serious Offenders Review Council to prepare its reports. In the alternative, it was suggested that an eight year period from the date of the determination of the first application

55. DP 33 at para 4.96.

56. NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 6; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 6; Law Society of NSW, *Submission* (19 July 1996) at 10; NSW Council for Civil Liberties, *Submission* (28 June 1996) at 3; Justice Action, *Submission* (2 July 1996) at 3; Department of Corrective Services, *Submission* (15 July 1996) at 11; W D T Ward, *Submission* (25 July 1996) at 4; Confidential, *Submission* (22 May 1996) at 16; N R Cowdery, *Submission* (17 June 1996) at 7; M L Sides and Bar Association, *Submission* (24 June 1996) at 24.

57. Confidential, *Submission* (22 May 1996) at 16; N R Cowdery, *Submission* (17 June 1996) at 7; NSW Council for Civil Liberties, *Submission* (28 June 1996) at 1 and 3; Justice Action, *Submission* (2 July 1996) at 1 and 3; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 7; Law Society of NSW, *Submission* (19 July 1996) at 11.

58. NSW Council for Civil Liberties, *Submission* (28 June 1996) at 3; Justice Action, *Submission* (2 July 1996) at 3.

59. Legal Aid Commission of NSW, *Submission* (18 July 1996) at 6; Law Society of NSW, *Submission* (19 July 1996) at 10.

might be appropriate as being consistent with the requirement that eight years be served before the first application can be made.[60]

9.40 The Commission has received no convincing arguments for the retention of s 13A(8)(a) and, given the practical effect it may have of imposing a natural life sentence where only an indeterminate life sentence was previously available, recommends its repeal as a matter of fundamental principle. The Commission acknowledges the concerns raised as to the length of the proposed period during which a prisoner may not re-apply, and accordingly recommends that s 13A(8)(b) be amended to allow the Supreme Court to direct that an applicant may not re-apply for a period of up to five years from the date of making the instant application.

60. M L Sides and Bar Association, *Submission* (24 June 1996) at 24-25.

10. PROTECTIVE SENTENCES

- INDEFINITE SENTENCES
- ADDITIONAL SENTENCES
- PREVENTIVE DETENTION

10.1 Protective sentences have the claimed purpose of protecting the community from the commission of criminal acts by the incarceration of a potential offender. Protective sentences can be said to lie generally within the sentencing objective of incapacitation.[1] While all sentences of imprisonment involve, to some extent, the protection of the community, the particular characteristic of protective sentences is that they flout the general principle governing sentencing in Australia that a sentence must be proportional to the offence in question and must not be extended merely to protect the community by preventing the recidivism of the offender.[2]

10.2 The most common forms of protective sentences in Australia are:

- indefinite (or indeterminate) sentences;
- additional (fixed) sentences; and
- preventive detention orders.

INDEFINITE SENTENCES

10.3 Indefinite sentences are penalties imposed without a finite termination date. Courts may impose such penalties *ab initio* or as an indefinite extension of a normal fixed sentence. Indefinite sentences are available in all jurisdictions in Australia except for New South Wales and the Australian Capital Territory. Essentially indefinite sentences take two forms: that of an indefinite sentence terminable by executive act;[3] and that of an indefinite sentence terminable by judicial review.[4] DP 33 considered whether such sentences should form part of the law of sentencing in New South Wales, having regard to their prevalence in other jurisdictions.

1. See para 14.12; DP 33 at paras 3.18-3.20 and 4.97.
2. See *Chester v The Queen* (1988) 165 CLR 611 at 618 per Mason CJ, Brennan, Deane, Toohey and Gaudron JJ.
3. For example, *Criminal Code* (WA) s 662(a), repealed by *Sentencing (Consequential Provisions) Act 1995* (WA).
4. *Criminal Law Sentencing Act 1988* (SA) s 22-23; *Penalties and Sentences Act 1992* (Qld) Part 10; *Sentencing Act 1991* (Vic) s 18A-18P; *Sentencing Act 1995* (NT) s 65-78; *Sentencing Act 1995* (WA) s 98-101.

10.4 There are many arguments for and against the provision of indefinite sentences. First, it can be argued that the community is entitled to be protected against those likely to commit crimes involving serious violence. If such greater safety is attainable by means of indefinite sentences, extended imprisonment is justified.[5] However, justice and the common law of sentencing in Australia require that a punishment be proportional to the crime.[6] Although the principle of proportionality does not exclude appropriate exceptions with respect to individual sentences where the principle of totality is involved, proportionality is retained in any case where the sentencing court looks at the sentences as a whole. The High Court has described indeterminate detention as a punishment of a "stark and extraordinary" nature.[7]

10.5 Secondly, it has been suggested that concern about potential injustice arising from the availability of indefinite sentences can be met by imposing them only after careful selection of offenders who are likely to commit violent offences using suitable criteria and imposing requirements for expert evaluations and stringent levels of proof.[8] However, the following criticisms suggest that it may be extremely difficult, if not impossible to satisfy the stringent requirements which would be necessary in imposing such a sentence:[9]

- Selective incapacitation, directed at dangerous offenders, is inevitably problematic, as predictive techniques in this field are notoriously flawed.[10]

5. See D Wood, "Dangerous Offenders and Civil Detention" (1989) 13 *Criminal Law Journal* 324; J Floud and W Young, *Dangerousness and Criminal Justice* (Heinemann, London, 1981) at 180.
6. *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 472 per Mason CJ, Brennan, Dawson, Toohey JJ, at 486 per Wilson J, at 491 per Deane J.
7. *Chester v The Queen* (1988) 165 CLR 611 at 619.
8. For example, N Morris, "Incapacitation with Limits" in A von Hirsch and A Ashworth (eds), *Principled Sentencing* (Northeastern University Press, Boston, 1992). Arguably, current legislation in Australia does not meet the requirements on which Morris insists.
9. See DP 33 at para 4.106.
10. J Parke and B Mason, "The Queen of Hearts in Queensland: A Critique of Part 10 of the Penalties and Sentences Act 1992 (Qld)" (1995) 19 *Criminal Law Journal* 312 at 322.

- It is difficult to prove the criteria as to dangerousness stipulated in existing legislation.

- It is questionable whether the discipline of psychiatry has the relevant expertise in predicting dangerousness. The prediction of dangerousness for the purpose of extending the imprisonment of an offender may not be an appropriate role for psychiatry.[11]

- The procedural safeguards in existing legislation fail to prevent the potential for injustice through predictive error.

It can, therefore, be argued that indefinite sentences, based on flawed predictions, amount to arbitrary imprisonment. Such imprisonment is a violation of human rights and could be said to amount to "cruel and unusual punishment".[12]

10.6 Thirdly, it has been suggested that selective incapacitation is a useful way of more rationally allocating prison resources, by identifying high-rate offenders and targeting them.[13] However, although it is difficult to estimate the actual impact, some commentators have pointed to the serious potential cost implications of indefinite sentences in terms of the prison population.[14]

10.7 Other arguments against indefinite sentences include:

- Indeterminate sentencing legislation has distinct implications for the type of criminal to be imprisoned under it, with it being more likely that those imprisoned will be young, poor, disadvantaged and members of certain racial minorities rather than the more affluent, particularly

11. Parliament of Victoria, Social Development Committee, *Inquiry into Mental Disturbance and Community Safety: Third Report: Response to the Draft Community Protection (Violent Offenders) Bill* (Government Printer, Melbourne, 1992) at 30-38.
12. In *Sillery v The Queen* (1981) 180 CLR 353 at 361-362, Murphy J, *obiter dicta*, questioned the constitutional competence of the Commonwealth Parliament to pass legislation having such an effect.
13. J Q Wilson, "Selective Incapacitation" in A von Hirsch and A Ashworth (eds), *Principled Sentencing* (Northeastern University Press, Boston, 1992).
14. R G Fox, "Victoria Turns to the Right in Sentencing Reform: The Sentencing (Amendment) Act 1993 (Vic)" (1993) 17 *Criminal Law Journal* 394 at 413.

white-collar criminals, who are often more able to show that they will not re-offend.[15]

- Juries may be reluctant to convict when an offender may be subject to such a level of punishment.[16]

10.8 The Commission considers that the arguments against indefinite sentences are compelling and accordingly considers that indefinite sentences should not be introduced in New South Wales. This was supported by submissions which considered the issue.[17] In particular the Department of Corrective Services noted that indefinite sentences are extremely harsh on inmates and stated that, in its experience, "every inmate wants to know with certainty the day when he/she will be released". A benefit of the current system is that it provides a "high level of certainty".[18] Others went on to warn in their submissions that, if indefinite sentences were introduced, they must be accompanied by safeguards which lessen the unfavourable aspects of their impact.[19]

15. J Parke and B Mason, "The Queen of Hearts in Queensland: A Critique of Part 10 of the Penalties and Sentences Act 1992 (Qld)" (1995) 19 *Criminal Law Journal* 312 at 330.
16. Fox at 412.
17. NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 6; Confidential, *Submission* (22 May 1996) at 16; N R Cowdery, *Submission* (17 June 1996) at 9; W D T Ward, *Submission* (25 July 1996) at 4.
18. Department of Corrective Services, *Submission* (15 July 1996) at 14.
19. The Senior Public Defender therefore urged: that consideration be given to imposing indefinite sentences only when prisoners have completed or nearly completed their initial sentences; that such sentences, once imposed, should be periodically reviewed every three to five years; and that the standard of proof required for the imposition of an indefinite sentence should be beyond reasonable doubt and not the "high degree of probability" provided for in s 18B(1) of the *Sentencing Act 1991* (Vic): M L Sides and Bar Association, *Submission* (24 June 1996) at 25-26. The Commission queries the practicability of these suggestions. Another suggested that serious consideration be given to a suggestion reproduced in DP 33, at para 4.81 footnote 171, that offenders sentenced to an indefinite period of detention be subject to a re-determination after five years where a minimum and additional term would be set, similar to the procedure under s 13A of the *Sentencing Act 1989* (NSW): S Odgers, *Submission* (7 June 1996) at 3.

ADDITIONAL SENTENCES

10.9 Legislation allows courts to impose, in certain circumstances, a sentence in addition to the sentence already being imposed on an offender.[20] Such provisions may be found in the *Habitual Criminals Act 1957* (NSW), the *Crimes Act 1900* (NSW) and the *Inebriates Act 1912* (NSW). The Commission considers that in each of these cases repeal is necessary, for the reasons which are outlined at paragraphs 10.19-10.20.

Habitual Criminals Act 1957

Recommendation 52
The *Habitual Criminals Act 1957* (NSW) should be repealed.

10.10 The *Habitual Criminals Act 1957* (NSW) provides that an additional sentence may be imposed on an offender declared to be an "habitual criminal". To pronounce a convicted person an habitual criminal, a court must be satisfied that the person:

- is least 25 years of age; and
- has served, on at least two occasions previously, separate terms of imprisonment as a consequence of convictions for indictable offences (not being indictable offences dealt with summarily without consent).[21]

10.11 Before making such a pronouncement, the court must also be satisfied that "it is expedient with a view to such person's reformation or the prevention of crime that such person should be detained in prison for a substantial time". The pronouncement follows the sentencing for the instant offence and the offender, once declared an habitual offender, must be

20. See DP 33 at paras 4.109-4.119.
21. *Habitual Criminals Act 1957* (NSW) s 4.

sentenced to a concurrent term of at least five and not more than fourteen years.[22]

Additional sentences upon second or third convictions

Recommendation 53
Sections 115 and 443 of the *Crimes Act 1900* (NSW) should be repealed.

Crimes Act 1900 (NSW) s 443

10.12 Section 443 of the *Crimes Act 1900* (NSW) allows for the imposition of an additional sentence on a second or third conviction as follows:

> In every case where, on the conviction of a person of an offence punishable under this Act, it is made to appear to the Judge that the offender has been previously convicted of, and sentenced for, an indictable offence, under this or any former Act, such Judge may sentence him to a term of punishment, in addition to that prescribed for the offence of which he then stands convicted.

Where the offence is a felony, the offender may, on a second conviction, be sentenced to a term of between two and ten years, or, on a third conviction, be sentenced to a term of between three and fourteen years. Where the offence is a misdemeanour, the offender may be sentenced to a term of between six and eighteen months.

Crimes Act 1900 (NSW) s 115

10.13 Section 115 of the *Crimes Act 1900* (NSW) provides for what is in effect an additional offence with a higher statutory maximum penalty. The additional offence is that of committing an offence under s 114 having been previously convicted of any felony or misdemeanour. The maximum penalty under s 115 is ten years imprisonment, as opposed to seven years under s 114.

22. *Habitual Criminals Act 1957* (NSW) s 6; *R v Roberts* [1961] NSWR 681; (1959) 78 WN (NSW) 329.

Inebriates Act 1912

Recommendation 54
So much of the *Inebriates Act 1912* (NSW) as relates to sentencing should be repealed.

10.14 The *Inebriates Act 1912* (NSW) makes provision with respect to inebriates. An inebriate is defined as a "person who habitually uses intoxicating liquor or intoxicating or narcotic drugs to excess".[23] The first part of the Act provides that, on application by certain specified persons, a court, judge or magistrate may, on proof to their satisfaction that a person is an inebriate,[24] make a variety of orders, including that the inebriate enter into a recognizance, that the inebriate be placed in the care and control of another for up to twelve months, or that the inebriate be placed in a prescribed institution for up to twelve months.

10.15 Further provisions are made with respect to inebriates who are convicted of certain offences. Under s 11(1) a court may act in the following circumstances:

> 11(1) Where a person is convicted before a stipendiary magistrate, or on indictment:
> (i) of an offence of which drunkenness is an ingredient; or
> (ii) of assaulting women, cruelty to children, attempted suicide, or wilful damage to property, and it appears that drunkenness was a contributing cause of such offence,
> and on inquiry it appears that the offender is an inebriate ....

When these circumstances are established the court may: sentence the offender according to law; discharge the offender conditionally upon the

23. *Inebriates Act 1912* (NSW) s 2.
24. Subject to the production of a certificate of a legally qualified medical practitioner and corroborative evidence by some person or persons and personal inspection of the inebriate by the court: *Inebriates Act 1912* (NSW) s 3(1)(i) and (ii).

offender entering a recognizance for a period of not less than twelve months; or order that the offender be placed for twelve months in a State institution established under s 13 of the Act.[25] The final order may only be made upon the court determining that the offender is an inebriate in accordance with the requirements set out in s 3(1)(i) and (ii). The period of detention may be extended for further periods not exceeding twelve months each on the order of the Supreme Court or a District Court judge.[26]

10.16 Allowance is made for the release on licence of persons detained in State institutions. The conditions of the licence are specified to be that:

> ... the licensee shall, for a period therein specified, not exceeding twelve months, be of good behaviour and abstain from taking or using any intoxicating liquor or intoxicating or narcotic drugs.[27]

10.17 The Act also deals with repeat offenders:

> Where a person has, after the ninth day of September, one thousand nine hundred and nine, been discharged from a State institution, or released on licence, or discharged under section 11 on recognizances, and within twelve months thereafter has been convicted for an offence of which drunkenness is an ingredient, and has subsequently and during the said twelve months been charged with any offence mentioned in section 11, the court before which he is so charged may, in dealing with him under that section, order him to be placed in a State institution for a period not exceeding three years.[28]

10.18 The Legal Aid Commission[29] and the Law Society[30] have each submitted that the *Inebriates Act 1912* (NSW) should be repealed, both

25. *Inebriates Act 1912* (NSW) s 11(1)(a), (b) and (c).
26. In 1995 an inebriate was ordered to be placed in a licensed institution in accordance with s 3(1) of the *Inebriates Act*. An application to the Administrative Law Division of the Supreme Court revealed that there were no longer adequate facilities for the care of inebriates at the licensed institution. The inebriate was released by Dunford J subject to conditions: *Eller v Medical Superintendent Gladesville Macquarie Hospital* (NSW SC, ALD 30075/96, 5 July 1996, Dunford J, unreported).
27. *Inebriates Act 1912* (NSW) s 14.
28. *Inebriates Act 1912* (NSW) s 16.
29. Legal Aid Commission of NSW, *Submission* (18 July 1996) at 7.
30. Law Society of NSW, *Submission* (19 July 1996) at 11.

because it allows for the administrative detention of a person without criminal conviction and because an "inebriate" offender can be detained by order of a court in a State institution for twelve months at a time subject to extension by the Supreme Court or a District Court judge.

The Commission's views

10.19 The Commission has identified the following reasons for the repeal of all of the provisions above:

- They may take a sentence beyond that which is proportional to the criminality of the offence for which the offender is being sentenced. We particularly note, with respect to the *Inebriates Act 1912* (NSW), that in cases where the principle of proportionality is not offended, the options available to the court would most likely be available to a sentencing court in any case.

- In so far as these pieces of legislation seek to have an effect on an established pattern of behaviour, the Commission considers that such matters should be more appropriately dealt with in ways other than by extending a particular term of imprisonment. This is perhaps most obvious with respect to the *Inebriates Act 1912* (NSW), where proper medical treatment outside the criminal justice system would be more appropriate.
- More generally, the beliefs which underpin the Acts in question are no longer appropriate or are provided for in other ways. For example, the *Habitual Criminals Act 1957* (NSW) was passed in the belief that there was a class of habitual criminals who possessed "criminal qualities inherent or latent in [their] mental constitution".[31]

- The procedures under the Acts are archaic and do not correspond with current practice. For example, the *Inebriates Act 1912* (NSW) and the

31. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 14 March 1957, the Hon W F Sheahan, Second Reading Speech at 4070. The second reading speech for the earlier *Habitual Criminals Act 1905* (NSW) contained references to principles of eugenics and the need to avoid "moral contamination" throughout society: New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 23 August 1905, the Hon C G Wade at 1642.

Habitual Criminals Act 1957 (NSW) both allow for a system of "release on licence" for persons declared under their provisions.[32]

- There has, in recent years, been little use of the provisions under the *Habitual Criminals Act 1957* (NSW), the *Crimes Act 1900* (NSW),[33] and the *Inebriates Act 1912* (NSW). The last reported case to deal with a sentence under the *Habitual Criminals Act 1957* (NSW) was in 1973 when it was noted that the courts in New South Wales had been unwilling to make pronouncements under the Act.[34]

10.20 Submissions which considered the issue supported the Commission's proposal in DP 33 for repeal.[35] The Commission accordingly recommends that the *Habitual Criminals Act 1957* (NSW), s 115 and s 443 of the *Crimes Act 1900* (NSW) and so much of the *Inebriates Act 1912* (NSW) as has a bearing on the sentencing process should be repealed.

PREVENTIVE DETENTION

10.21 Preventive detention is the incarceration of a person for a fixed or indefinite period for the sole purpose of removing that person from the community for some specified reason. Usually that reason is a feared instance or course of criminal conduct, but this is not essential. The exercise of such a power is highly controversial.

10.22 The *Community Protection Act 1994* (NSW) provided expressly for preventive detention. Although originally intended to cover a broader field, it

32. *Inebriates Act 1912* (NSW) s 14; *Habitual Criminals Act 1957* (NSW) s 7(2).
33. DP 33 at para 4.118.
34. *R v Riley* [1973] 2 NSWLR 107 at 112. At that time it was noted that 12 habitual criminals were being detained in New South Wales prisons: at 110.
35. N R Cowdery, *Submission* (17 June 1996) at 8; M L Sides and Bar Association, *Submission* (24 June 1996) at 26; New South Wales Council for Civil Liberties, *Submission* (1 July 1996) at 3; Justice Action, *Submission* (2 July 1996) at 3; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 6; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 7; Law Society of NSW, *Submission* (19 July 1996) at 11; W D T Ward, *Submission* (25 July 1996) at 4; Confidential, *Submission* (22 May 1996) at 17; Department of Corrective Services, *Submission* (15 July 1996) at 11.

was limited to the preventive detention of Gregory Wayne Kable. Despite the narrow scope of the Act, most of its provisions were framed in general terms. Section 5(1) allowed that, on application by the DPP, the Supreme Court could order that a person be detained for a maximum period of six months,[36] if the court was satisfied on reasonable grounds:

> (a) that the person is more likely than not to commit a serious act of violence; and
> (b) that it is appropriate, for the protection of a particular person or persons or the community generally, that the person be held in custody.

10.23 Section 5 further provided that:

> (3) An order under this section may be made against a person:
> (a) whether or not the person is in lawful custody, as a detainee or otherwise; and
> (b) whether or not there are grounds on which the person may be held in lawful custody otherwise than as a detainee.
> (4) More than one application under this section may be made in relation to the same person.

10.24 Under s 15, a detention order could only be made when the Supreme Court was satisfied that the DPP's case had been proved on the balance of probabilities.

10.25 Arguments in favour of the legislation centre largely on the claim that some form of protection for the community against future violent acts is required. Arguments against the legislation include that: it infringes a fundamental human right;[37] the balance of probabilities is insufficient as the standard of proof in relation to the deprivation of liberty; and there are practical problems inherent in the prediction of future violent behaviour. There was also concern that the powers it created might be open to abuse.[38] For these reasons the Commission proposed in DP 33 the repeal of the *Community Protection Act 1994* (NSW).[39]

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36. Prescribed by s 5(2) of the *Community Protection Act 1994* (NSW).
37. Notwithstanding its arguable consistency with international human rights conventions: See *Kable v DPP* (1995) 36 NSWLR 374 at 379 per Mahoney JA.
38. See *Kable v DPP* (1995) 36 NSWLR 374 at 378-379 per Mahoney JA.
39. DP 33 at paras 4.120-4.126.

10.26 Submissions generally supported the repeal of the *Community Protection Act 1994* (NSW),[40] in particular the Director of Public Prosecutions,[41] who drew on the "overwhelming evidence that psychiatrists are very poor predictors of whether a person will re-offend".[42] Writings in the field of psychiatry were cited including an American work which noted that psychiatrists themselves doubt their ability to predict "dangerousness" for the purposes of preventive detention.[43]

10.27 The Victims Advisory Council maintained its support for the *Community Protection Act 1994* (NSW) and advocated its further development, stating that it saw "nothing wrong in passing laws to protect prospective victims of violent crime, in clear cases".[44] The Chairperson of the Offenders Review Board also did not support repeal of the Act.[45]

10.28 Since the release of DP 33 the *Community Protection Act 1994* (NSW) has been declared invalid by the High Court, which held that a determination that a person be detained on the grounds specified in s 5 could not be made by a court which could or does exercise powers under Chapter 3 of the Commonwealth Constitution.[46] Accordingly, no recommendation for the repeal of the *Community Protection Act 1994* (NSW) is now necessary,

40. NSW Council for Civil Liberties, *Submission* (1 July 1996) at 3; Justice Action, *Submission* (2 July 1996) at 3; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996); Legal Aid Commission of NSW, *Submission* (18 July 1996) at 7-8; Law Society of NSW, *Submission* (19 July 1996) at 11-12; Confidential, *Submission* (22 May 1996) at 17; and M L Sides and Bar Association, *Submission* (24 June 1996) at 26 who suggested that, if preventive detention legislation were to be retained, the period of detention should not be indeterminate; there should be regular reviews by the courts; and the standard of proof should be beyond reasonable doubt.
41. Who was empowered by the Act to initiate applications for detention: *Community Protection Act 1994* (NSW) s 5.
42. N R Cowdery, *Submission* (17 June 1996) at 8.
43. G B Leong, J A Silva and R Weinstock, "Dangerousness" in R Rosner (ed), *Principles and Practice of Forensic Psychiatry* (Chapman & Hall, New York, 1994) 432.
44. Victims Advisory Council, *Submission* (10 July 1996) at 4.
45. W D T Ward, *Submission* (25 July 1996) at 4.
46. *Kable v DPP* (1996) 70 ALJR 814.

although the Commission maintains its in principle objections to such legislation.[47]

47. The Commission would, therefore, not support the *Community Protection (Dangerous Offenders) Bill 1996*, a private member's bill, which is currently before Parliament: see New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 31 October 1996 at 5648.

11.
PAROLE

- RETENTION OF PAROLE
- RESPONSIBILITY FOR DETERMINING RELEASE TO PAROLE
- THE INSTITUTIONAL STRUCTURE OF PAROLE
- PAROLE BOARD PROCEDURES
- THE PAROLE DECISION
- REVIEW OF PAROLE BOARD DECISIONS
- RECONSIDERATION AFTER REFUSAL OF PAROLE

11.1 Parole is the discharge of prisoners from custody prior to the expiry of the maximum term of imprisonment imposed by the sentencing court, provided that they agree to abide by certain conditions, with the intention that they serve some portion of their sentence under supervision in the community, subject to recall for misconduct.[1] Parole has been a component of the sentencing of offenders in this State since 1966.[2] Since 1989, parole in New South Wales has been granted and administered by the Offenders Review Board in accordance with the *Sentencing Act 1989* (NSW).[3] Parole is integral to the sentencing of offenders to a term of imprisonment. This Report makes recommendations for some limited changes to the legislation and in relation to procedures of parole.

11.2 This Chapter considers changes to parole contained in the *Sentencing Amendment (Parole) Act 1996* (NSW) which received Assent on 16 December 1996.[4] The main purpose of the Act is to revise procedures by which the parole of serious offenders is considered, specifically in relation to the rights of victims and the Crown to make submissions to the Board, which is renamed the Parole Board.[5] It contains other amendments to procedures

1. S Mackey, "Parole - Background, Machinery and Statistics" in NACRO, *Parole - The Case for Change* (London, 1979), quoted in *The Report of the Royal Commission into New South Wales Prisons* (NSW Government Printer, Sydney, 1978 (the "Nagle Report") at 602.
2. *Parole of Prisoners Act 1966* (NSW). Significant changes to the operation of parole were incorporated in the *Probation and Parole Act 1983* (NSW) which followed upon recommendations concerning prisons and parole made in the Nagle Report, and in A G Muir, *The Report of the Committee Appointed to Review the Parole of Prisoners Act 1966* (NSW Government Printer, Sydney, 1979) (the "Muir Report").
3. *Sentencing Act 1989* (NSW) Part 3, s 14-41.
4. See New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 30 October 1996, the Hon R J Debus, MP, Minister for Corrective Services, Second Reading Speech at 5533-5536. The Bill was originally introduced in May 1996 cognate with the *Victims Rights Bill 1996* and the *Victims Compensation Bill 1996*: see para 1.5. All were withdrawn and this Bill was re-introduced separately as the *Sentencing Amendment (Parole) Bill 1996 (No 2)*. It is based on, but differs in some significant aspects from, the *Sentencing Legislation (Amendment) Bill 1994* introduced by the previous Government which passed the Legislative Council but lapsed when Parliament was dissolved for the 1995 election.
5. In this Report the Commission has used, where possible, "Parole Board", although references to "Offenders Review Board" occur, particularly in relation to the Commission's terms of reference and DP 33.

and to the composition of the Board, and also to that of the Serious Offenders Review Council ("SORC").

RETENTION OF PAROLE

11.3 The threshold question for the Commission is whether parole should remain. Acceptance of the place of parole in the penal system involves a balancing of conflicting and uncertain priorities. Parole reflects the philosophy of rehabilitation, and recognises the advantage to both the community and the individual offender of conditional release from custody occurring in a supervised and supported manner conducive to rehabilitation. It is attended by the ultimately unpredictable risk of recidivism by any particular prisoner, but that risk is balanced by acknowledging the risk of releasing the offender unconditionally and without any support when the full sentence of imprisonment has been served.

11.4 In recent years parole has been the subject of strong criticism in a number of jurisdictions.[6] The procedures by which it is administered have led to questioning of its desirability. Another area of concern has been the way that release to parole at a time determined administratively undermines the sentence and the authority of the court which imposes the term of imprisonment. Thirdly, critics argue that the basis for making decisions about parole is flawed in relation to predicting recidivism and the efficacy of rehabilitation. Empirical evidence evaluating parole fails to provide reliable guidance as to its effectiveness.

11.5 The Commission concluded that parole is a positive aspect of sentencing and is worth retaining. Recent inquiries in other jurisdictions have reached the same conclusion.[7] In the Commission's view, the earlier release

6. See generally DP 33 at paras 7.9-7.14. See also note 7.
7. Australian Law Reform Commission, *Sentencing* (ALRC 44, 1988); Victoria, Attorney General's Department, *Sentencing: Report of the Victorian Sentencing Committee* (Melbourne, 1988); Victoria, Sentencing Alternatives Committee, *Parole and Remissions: Second Report* (1982); Western Australia, Parliament, *Report of the Joint Select Committee on Parole* (Perth, August 1991); Western Australia, *Report of the Committee of Inquiry into the Rate of Imprisonment* (Perth, May 1981); Canada, Report of the Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Canadian Government Publishing Centre, 1987); Great Britain, Parliament,

of offenders into the community, subject to recall for breach of conditions attaching to the release, and with some degree of support and supervision is preferable to unconditional and unsupervised release when the full term of imprisonment has been served. Early release does not absolve an offender from punishment as his or her liberty is conditional upon good behaviour. At any time until the sentence has expired, an offender is liable to have the parole order revoked for breaching a term or condition, not necessarily by the commission of a further criminal offence, and to return to prison to serve the remainder of the sentence. This can act as a powerful incentive to deter re-offending. The Commission is firmly of the view, however, that offenders should only be released when assessed as suitable for parole by reference to criteria which focus on the ability of the offender, if released, to behave lawfully. It must be recognised that inevitably some of those released will re-offend while on parole.

11.6 Submissions endorsed either specifically,[8] or by implication, the Commission's position on parole, on the grounds that returning offenders from either maximum or minimum security conditions to the community in an unstructured environment without the inducement of liberty being conditional on good behaviour is not desirable.[9]

RESPONSIBILITY FOR DETERMINING RELEASE TO PAROLE

11.7 The *Sentencing Act 1989* (NSW) provides a dual regime for determining whether and when a prisoner will be released to parole. The role of the court is first to decide whether to sentence for a fixed term, or impose a

House of Commons, *The Parole System in England and Wales: Report of the Review Committee* (November 1988) (the "Carlisle Report"); Scottish Home and Health Department, *Parole and Related Issues in Scotland: Report of the Review Committee* (Chairman, the Hon Lord Kingriag) (HMSO, Edinburgh, 1989) (Cm 598).

8. M L Sides and Bar Association, *Submission* (24 June 1996) at 51; Department of Corrective Services, *Submission* (15 July 1996) at 17; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 18; W D T Ward, *Submission* (25 July 1996) at 9; Law Society of NSW, *Submission* (19 July 1996) at 25; Academic Forum, *Consultation* (2 August 1996); Legal Aid Commission, *Consultation* (7 August 1996).
9. See M L Sides and Bar Association, *Submission* (24 June 1996) at 51.

sentence which allows for parole.[10] For sentences of greater than six months and less than three years, initial release to parole is automatic at the expiry of the minimum term set by the court.[11] For sentences longer than three years, release occurs at some time after the minimum term has been served, by order of the Parole Board, exercising its discretion in accordance with s 17 of the *Sentencing Act 1989* (NSW). The Parole Board is part of the executive, but is independent of Ministerial or departmental authority. It is a statutory body exercising functions that are quasi-judicial in character. Until the Act was recently amended, it required that the Chairperson be a Judge or retired Judge.[12]

11.8 The Commission's terms of reference require us to consider whether this level of judicial involvement in parole is sufficient.[13] One model has parole as solely a judicial function, with the Judge or Magistrate of the sentencing court responsible for deciding whether and when to release an offender to parole.[14] There are considerable practical problems associated with such an approach, including the demands it would place on limited judicial resources.

11.9 The more fundamental objection to giving judicial officers sole or ultimate responsibility for parole decisions in the Commission's view relates to the nature of parole and its relationship to sentencing as a whole. The *Sentencing Act 1989* (NSW) currently requires that an order for parole be made "having regard to the principle that the public interest is of primary importance" and only when the Board "has sufficient reason to believe ... that the prisoner would be able to adapt to normal lawful community life".[15] The Commission considers that the evaluation, however expressed, should be made by a body on which the public is prominently represented. At the time

10. *Sentencing Act 1989* (NSW) s 5 and 6.
11. *Sentencing Act 1989* (NSW) s 24. Following revocation of a Court-based parole order for breach, any later re-release to parole is at the discretion of the Parole Board: s 25(1)(b).
12. See paras 11.17-11.21.
13. See the terms of reference at p iv.
14. DP 33 at para 7.20. This model was the one proposed by the Mitchell Committee in South Australia, Criminal Law and Penal Methods Reform Committee, *First Report: Sentencing and Corrections* (Government Printer, Adelaide, 1973) paras 7.4ff.
15. *Sentencing Act 1989* (NSW) s 17(1). Cf the Commission's approach to the criteria governing the making of a parole order, paras 11.61- 11.62.

when parole is being considered, a judicial officer alone does not necessarily have any special knowledge or expertise regarding a particular offender. The principles applicable to a parole decision, though similar to, are not the same as, those governing the sentencing decision. Nor should a parole application be an occasion for revisiting the trial or rewriting the sentence. Without appropriate community input, a judicial officer is not in the best position to reflect community considerations which are regarded as crucial to parole decision-making.

11.10 The Commission concluded that a specialist independent and experienced body, with judicial leadership and broad community and relevant institutional and professional input is better placed to make parole decisions where the public interest and public safety are significant issues.[16] Submissions supported this conclusion, again either specifically,[17] or by implication. The Commission sees no reason other than strongly to reassert this position, and furthermore, holds very firmly to the view that there should be no appeal on the merits from the decision of such a body.[18]

Automatic release to parole

11.11 Release of prisoners sentenced to shorter periods of custody constitutes an exception to the discretionary grant of parole. The *Sentencing Act 1989* (NSW) provides that where the total sentence is three years or less, release to parole is automatic at the expiry of the minimum term.[19] This provision is justified by administrative convenience and the allocation of

16. See DP 33 at paras 7.19-7.22.
17. M L Sides and Bar Association, *Submission* (24 June 1996) at 51; Department of Corrective Services, *Submission* (15 July 1996) at 17; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 18-19; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 4; Law Society of NSW, *Submission* (19 July 1996) at 25.
18. Discussed at paras 11.77-11.78.
19. *Sentencing Act 1989* (NSW) s 24 and 25. This approach follows one recommended in both the Nagle Report (which advocated four years as the cut-off point) and the Muir Report (three years), and adopted in the *Probation and Parole Act 1983* (NSW), which provided that prisoners with sentences less than three years would be automatically released to probation at the end of their non-parole period (less applicable remissions). It was also the basis for the reforms to parole in England proposed in the Carlisle Report.

scarce resources, and the fact that offenders so treated are less likely to constitute a threat to the community's safety.[20] The Commission accepts that, in general, release to parole should be automatic for prisoners serving relatively short sentences.[21]

11.12 Fixing the boundary between automatic and discretionary release to parole is a matter for debate. Currently the cut-off point is based on the total length of a sentence. Alternatively, it could be defined by the nature of the offence/s for which the sentence is handed down, or the court being required to determine whether an offender should be released automatically or by the parole authority.[22] To adopt either of these approaches would introduce what the Commission considers to be an undesirable element of inconsistency into the parole process, and an unnecessary complication into the sentencing decision. In many cases, it would also place greater responsibility on the court to make judgments about an offender's suitability for parole possibly quite a long time into the future without more than speculative knowledge of what his or her circumstances will be. This is a responsibility which we argue should be not be exercised by any court.

Setting the limit of automatic parole

11.13 In a sense, any cut-off point is arbitrary. Originally set as the period in which automatic release to probation applied under the *Probation and Parole Act 1983* (NSW) and imported into the *Sentencing Act 1989* (NSW), three years coincided with the maximum sentence that could be imposed by the then Courts of Petty Sessions. Three years remains the maximum sentence Magistrates in Local Courts may impose.[23] Submissions generally regarded this as an acceptable balance between available resources and the

20. Prisoners whose automatic release may be inappropriate can be brought under the Board's jurisdiction by being deemed a "serious offender" under s 59 of the *Correctional Centres Act 1952* (NSW), or the Board may exercise its powers under s 27(2) of the *Sentencing Act 1989* (NSW) to vary terms and conditions of the parole order. Re-release of such prisoners following revocation is at the discretion of the Parole Board: *Sentencing Act 1989* (NSW) s 25(1)(b).
21. District Court Judges, *Consultation* (14 August 1996).
22. See Carlisle Report paras 254-257.
23. A maximum of two years applies to certain indictable offences tried summarily before a Local Court: *Criminal Procedure Act 1986* (NSW) s 33K(2)(a); and a magistrate may not impose consecutive sentences totalling more than three years: *Crimes Act 1900* (NSW) s 444(4)(b).

need for the decision to be a discretionary one in which the public interest is considered.[24] It was argued that the threshold should be set at sentences of five years to enable the Board to concentrate on decisions about release of offenders in which the public has the greatest interest.[25] It was suggested that courts could more frequently exercise their right to impose relevant individual conditions when release to parole at the end of the minimum term will be automatic.[26] A particular need was identified for the Board to consider appropriate conditions for release to parole for offenders who receive a total sentence of three years or less but which has a relatively short minimum term.[27]

11.14 Both the purpose and practical aspects of parole are relevant in setting the length of sentence to which automatic release should apply. For the Board's discretion to be exercised in a meaningful way, the offender needs to be in custody for a period of time sufficient for several things to happen. First there must be time for new considerations to emerge on which a decision can be made. This includes participation in appropriate treatment and educational programs. There must be time to allow for a thorough assessment of the prisoner's suitability for release and the conditions under which it should be made, including an evaluation of the effectiveness of any programs undertaken. There should also be a period on parole of sufficient length both to permit re-integration into the community to occur with the necessary support and supervision, and the possibility of return to prison to operate as an effective deterrent to re-offending.

11.15 The Commission considers that the Parole Board faces a heavy and relentless workload. It is one, however, that is manageable in the light of both the diligence of its members and efficient administrative support. The workload does not appear to the Commission to be so onerous as to demand

24. Department of Corrective Services, *Submission* (15 July 1996) at 17; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 19; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 4-5; Law Society of NSW, *Submission* (19 July 1996) at 25.
25. M L Sides and Bar Association, *Submission* (24 June 1996) at 51; Academic Forum, *Consultation* (2 August 1996).
26. Legal Aid Commission, *Consultation* (7 August 1996).
27. W D T Ward, *Submission* (25 July 1996) at 9. In 1995, for example, a total of 697 offenders received a prison sentence of three years or less where the minimum term was 50% or less than the full sentence: information supplied by the Judicial Commission, 14 August 1996.

an increase in the proportion of prisoners entitled to automatic release to parole. No other arguments advocate raising the threshold. A reasonable period of time has to be available for parole to operate in a credible way. To increase the number and proportion of offenders automatically released[28] without substantial reason may risk undermining confidence in this aspect of the criminal justice system.

THE INSTITUTIONAL STRUCTURE OF PAROLE

Parole Board

11.16 The Commission proposed in DP 33 that the Offenders Review Board be renamed the Parole Board in order to avoid confusion as to its role, and consequentially, as to that of the Serious Offenders Review Council. Renaming the Board had strong support, including from the Offenders Review Board itself and almost all submissions.[29] At the Victims Seminar conducted by the Law Reform Commission in October 1995 the Premier announced the Government's intention to change the name, the mechanics for which are contained in the *Sentencing Amendment (Parole) Act 1996* (NSW).[30] The Commission endorses the name change.

Membership of the Parole Board

28. If the sentence length were raised to five years, the percentage of prisoners automatically released to parole would increase from approximately 75% to 90%: see NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 1991, 1992, 1993, 1994, 1995*, Table 24 (1991), Table 3.9.
29. See N R Cowdery, *Submission* (17 June 1996) at 3; NSW Council for Civil Liberties, *Submission* (28 June 1996) at 1; Department of Corrective Services, *Submission* (15 July 1996) at 15; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 19; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 9; W D T Ward, *Submission* (25 July 1996) at 9; Law Society of NSW, *Submission* (19 July 1996) at 24; Victims Advisory Council, *Submission* (10 July 1996) at 3.
30. *Sentencing Amendment (Parole) Act 1996* (NSW) Sch 1 [1] amending the definition in s 4 *Sentencing Act 1989* (NSW).

Recommendation 55
The Parole Board should continue to be chaired by a Judge of the Supreme or District Court, either serving, or retired and still eligible to be appointed as an Acting Judge.

Recommendation 56
No more than eight community members should be appointed to the Parole Board.

11.17 Membership of the Board[31] is currently set at nine: seven appointed by the Governor; and two ex-officio, namely a police officer nominated by the Commissioner of Police, and an officer of the Probation and Parole Service nominated by the Commissioner of Corrective Services. Three of the appointed members must be judicial officers[32] and four "are to reflect as closely as possible the composition of the community at large".[33] The judicial members are appointed as Chairperson, Alternate Chairperson and Deputy Chairperson, and one attends and presides, with a veto and a casting vote, at all meetings and review hearings conducted by the Board. Meetings and hearings of the Board are therefore constituted by a maximum of seven members. Appointments are for up to three years, with eligibility (if otherwise qualified) for re-appointment.

11.18 The *Sentencing Amendment (Parole) Act 1996* (NSW) alters the composition of the Parole Board in two significant ways. The categories of persons eligible for appointment as judicial members are extended to include any Judge or retired Judge of a New South Wales Court or the Federal Court, any Magistrate or retired Magistrate, and any other person qualified to be appointed as a Judge in New South Wales.[34] The Act also increases the

31. See *Sentencing Act 1989* (NSW) s 45 and Sch 1.
32. A District Court Judge or a retired Supreme or District Court Judge: s 45(2)(a).
33. Section 45(2)(b).
34. *Sentencing Amendment (Parole) Act 1996* (NSW) Sch 1 [22] amending *Sentencing Act 1989* (NSW) s 45. Legal practitioners of at least seven years' standing are qualified for appointment as a Judge in New South Wales:

number of community members from four to a maximum of sixteen,[35] although a meeting of the Board will continue to be constituted by no more than four community members in addition to the judicial member and two ex-officio members. The first of the changes was not explained to the legislature, although the second is intended to overcome the difficulty noted by the Commission in DP 33 that membership constitutes virtually a full-time commitment and this limits the selection of suitable people to sit on the Board.[36] These changes to the composition of the Board are not supported by the Commission.

Judicial members

11.19 The judicial members currently perform a crucial role on the Parole Board. Having regard to the Board's function and status, in DP 33 the Commission endorsed a judicial member acting as Chairperson. Though it is not a judicial forum, the Board's procedures are quasi-judicial and the Chairperson must ensure that they comply with the rules of natural justice, particularly as their deliberations affect the liberty of prisoners.[37] The need for procedural fairness is all the more important since there is, correctly so in the Commission's view, no right of appeal from the decision on the merits. Judicial experience, while not necessarily essential, is very valuable to perform the role. The Commission also considers that both independence from undue influence of the Board's deliberations and public confidence in its decisions are enhanced by an experienced Judge presiding over the Board. Nevertheless, the Board's proceedings should not be conducted in the full adversarial style of a court,[38] and there is a danger that a judge will import into the parole decision elements of the sentencing function which he or she is more accustomed to perform. As we have stated before, determining

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Supreme Court Act 1970 (NSW) s 26(3)(b); *District Court Act 1973* (NSW) s 13(1). The new criteria also apply to judicial membership of the Serious Offenders Review Council: see below para 11.35.

35. *Sentencing Amendment (Parole) Act 1996* (NSW) Sch 1 [18] amending *Sentencing Act 1989* (NSW) s 45(1)(a).
36. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 30 October 1996, the Hon R J Debus, MP, Minister for Corrective Services, Second Reading Speech at 5536. See DP 33 at para 7.56.
37. DP 33 at para 7.58. See *Baba v Parole Board of New South Wales* (1985) 5 NSWLR 338; *Todd v Parole Board of New South Wales* (1986) 6 NSWLR 71. See also *Johns v Release on Licence Board* (1979) 9 NSWLR 103.
38. *Sentencing Act 1989* (NSW) Sch 1 cl 11(4)(b).

release to parole is not a time to review the original sentence, but the decision must be made solely on considerations relevant to the statutory criteria for the making of a parole order. The Chairperson's role is not a purely judicial one.

11.20 The potential for community and ex-officio members of the Board to be subordinate to the judicial member is real. However, the Commission considers that this may be more effectively addressed by procedural measures in relation to members providing reasons for decisions and removing the Chairperson's right to a casting vote, as well as providing more opportunities for professional development for all members. These matters are all considered by the Commission below.[39] In the Commission's view, it is desirable that the judicial member continue to preside over the Parole Board. To have a Chairperson other than an experienced criminal court Judge would weaken the Board's effectiveness and standing.

11.21 It is clear, therefore, that the Commission opposes the amendments contained in the *Sentencing Amendment (Parole) Act 1996* (NSW) redefining those eligible to preside over the Board. Enlarging the categories of those eligible as "judicially qualified" members may dilute the value of judicial oversight of the Board's deliberations, and the public confidence in Board decisions which is said to come from a Judge presiding.[40] Almost without exception, offenders whose parole is considered by the Parole Board would have been sentenced in the District Court or the Supreme Court, and without venturing to comment on the qualifications of others who may be "judicially qualified" as defined in the Act, we recommend that the Chairperson be drawn from these Courts. Furthermore, we reiterate our strongly held view that there would be great advantage in making it the usual practice to draw from the ranks of *serving* rather than retired Judges.[41] The Commission considers that the most resource-effective system would be to appoint one or two District Court Judges on a secondment basis for two or three years, allowing specialist experience to develop and to link the work of the Board more closely with the sentencing Courts.[42] In the event that this course is not

39. See paras 11.65-11.70, 11.38-11.39 and 11.29-11.30, respectively.
40. See DP 33 at para 7.52.
41. See also M L Sides and Bar Association, *Submission* (24 June 1996) at 52-53; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 9; W D T Ward, *Submission* (25 July 1996) at 10.
42. See DP 33 at para 7.52. This view was supported in submissions: M L Sides and Bar Association, *Submission* (24 June 1996) at 52-53; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 20; Legal

possible, the position should be filled only from among the ranks of former District or Supreme Court Judges who are still eligible to be appointed as Acting Judges. We recommend accordingly.

Community members

11.22 That the majority of members of the Parole Board represent the community at large is, in the Commission's view, the best means of recognising the importance of the public interest in the Board's work. Although the existing composition appears to achieve the legislation's intention, DP 33 sought comments on some aspects of community participation on the Board, including the need for criteria such as professional expertise, ethnic background or personal experience in relation to selection of community members and the nature of their participation on the Board.[43]

11.23 Membership reflecting the ethnic and racial composition of the prison population as well as the community at large was advocated, including specifically a member who is an Aborigine.[44] Though there have been members appointed to SORC to represent victims of crime, such a practice for the Parole Board was not supported in submissions. The Commission considers that the perspective of victims is an important element contributing to the public interest in a parole decision, but feels that if the selection of community representatives is sufficiently broad, people with a sense of community and experience (direct or indirect) of victims of crime will appropriately represent and reflect their interests in the parole decision.[45]

11.24 When considering parole decisions, the Board would be likely to benefit from access to professional advice beyond that which can be given by the ex-officio members. The professional and personal expertise of an individual must be relevant considerations when an appointment to the Parole Board is being made. The Commission does not consider, however, that it is

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Aid Commission of NSW, *Submission* (18 July 1996) at 9; Legal Aid Commission, *Consultation* (7 August 1996).

43. DP 33 at paras 7.54-7.57.
44. M L Sides and Bar Association, *Submission* (24 June 1996) at 53; W D T Ward, *Submission* (25 July 1996) at 9; Law Society of NSW, *Submission* (19 July 1996) at 26.
45. See also M L Sides and Bar Association, *Submission* (24 June 1996) at 53; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 20.

necessary to specify in legislation any more detailed requirements in relation to the backgrounds of persons appropriate to be appointed as is the case in some other jurisdictions. With the relatively small number of appointments to be made, and the limited range of persons both suitable and available for appointment at any one time, the Commission considers that it is a matter more conveniently delegated to the Executive to determine the best mix of members who both "reflect as closely as possible the composition of the community at large" and are otherwise capable of carrying out the responsibilities of the position. Where the Board's deliberations could be assisted by expert advice from relevant specialists, this can be sought in individual cases, and should also be a matter addressed generally within a program of professional development for members.[46]

11.25 Increasing the number of community members on the Parole Board while permitting only four to sit at any one hearing as achieved by the *Sentencing Amendment (Parole) Act 1996* (NSW) is designed to overcome the difficulty of finding suitable members of the community willing and able to accept appointment. Using a panel of community members is desirable; however the maximum number of sixteen appears to us to be too great. From observations of the Board in its meetings and review hearings, the Commission considers that effectiveness of community members would be hindered if they were involved as infrequently as only one quarter of the time.[47] More than four members would provide useful administrative flexibility, but too many may lessen the value of the input from each individual community member, prove cumbersome to manage, and may lead to an undesirable inconsistency in Board decisions. On balance, we recommend eight. This will allow the Board some administrative flexibility, for example one alternate for each community member, or two alternating panels.

11.26 Although we appreciate that making appointments of an increased number of community members to the Board may be difficult, the Commission nevertheless emphasises the importance of maintaining the full complement of members at all times to ensure that the fundamental principle of community involvement in parole decision-making is satisfied.

46. See paras 11.29-11.30.
47. See also para 11.27 below for the view of the Department of Corrective Services as to the necessary length of members' terms.

Term of appointment

Recommendation 57
Members of the Parole Board should be appointed for a fixed term of three years.

11.27 Concern was expressed in DP 33 at the potential, remote but not academic, for intrusion on the independence of the Board in undertaking its responsibilities. Appointment for fixed terms of three years was proposed to ensure members could operate without the threat to their autonomy posed by their current appointment for indeterminate terms not exceeding three years.[48] Submissions were divergent on this issue. The fixed term of three years was considered by many as appropriate,[49] and as a sufficient period for members to build up expertise.[50] Alternative term lengths suggested included two years for non-judicial members,[51] and for judicial members the extremes of five years,[52] and one.[53] The flexibility of other than a fixed term was preferred by the current Chairperson in order to take account of the personal circumstances of members.[54]

11.28 The Commission remains of the view that a fixed term is desirable to ensure that the independence of the Board is protected. It is always open for members to retire prior to the end of a fixed period. Our observations and understanding of the duties of members lead us to confirm that three years is the appropriate length for the term. Duties are onerous, and regular renewal of personnel will be invigorating to the body. Too rapid a turnover among

48. *Sentencing Act 1989* (NSW) Sch 1 cl 4. See DP 33 at paras 7.48-7.50.
49. See N R Cowdery, *Submission* (17 June 1996) at 10; M L Sides and Bar Association, *Submission* (24 June 1996) at 52; Department of Corrective Services, *Submission* (15 July 1996) at 15; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 19; Law Society of NSW, *Submission* (19 July 1996) at 24.
50. Department of Corrective Services, *Submission* (15 July 1996) at 15.
51. Legal Aid Commission of NSW, *Submission* (18 July 1996) at 9.
52. As a maximum period for Judges, whether serving or retired: M L Sides and Bar Association, *Submission* (24 June 1996) at 53.
53. Legal Aid Commission of NSW, *Submission* (18 July 1996) at 9.
54. W D T Ward, *Submission* (25 July 1996) at 12.

members is likely to place the quality and consistency of Board decision-making at risk. Accordingly, the Commission recommends that clause 4 of Schedule 1 of the *Sentencing Act 1989* (NSW) be amended to provide that an appointed member holds office for a *fixed* term of three years, rather than a period not exceeding three years. The opportunity for re-appointment of a member otherwise qualified should remain.

Professional development for Parole Board members

11.29 The limited opportunities for induction, training and professional development of Board members was brought to the Commission's attention.[55] Some seminars are conducted and from time to time Board members visit correctional institutions.[56] In the normal course of events, members gain expertise by experience, without any formal preparation for the role.

11.30 There is a growing recognition among members of the quasi-judicial and administrative tribunals which have proliferated in recent times that their functions are better performed with relevant preparation and continuing professional development.[57] The Commission considers that this is an aspect of its operation that the Board should address, by adopting a more systematic approach to preparation of new members for their role, and providing access to relevant professional expertise on an on-going basis. It will be particularly important should the numbers of community members be increased dramatically in accordance with the amended Act,[58] or even with the smaller numbers recommended by the Commission. Opportunities for "learning on the job" will be reduced should numbers increase and attendance be less regular.

55. Confidential, *Submission [Oral]* (31 July 1996).
56. See Offenders Review Board, *Annual Report 1993, 1994, 1995*.
57. For example, professional development and training provided for Social Security Appeals Tribunal Members, NSW Consumer Claims Tribunal Referees, Immigration Review Tribunal Members, and Land and Environment Court Assessors.
58. *Sentencing Act 1989* (NSW) s 45(1)(a): see para 11.18.

Serious Offenders Review Council

Recommendation 58
The Government should institute an inquiry into the composition, role and funding of the Serious Offenders Review Council, with particular reference to co-ordination of its role in relation to the Parole Board.

Recommendation 59
The Serious Offenders Review Council should be chaired by a Judge of the Supreme or District Court, either serving, or retired and still eligible to be appointed as an Acting Judge.

11.31 The Serious Offenders Review Council[59] plays an indirect, but for some offenders pivotal, role in the parole decision. With responsibility for the management of serious offenders as defined,[60] SORC must report to the Parole Board on the prisoner's suitability for release.[61] If the Board rejects this advice, it must refer its written reasons to the Council, which has 21 days to make submissions in return, during which period the Board must delay

59. See generally G Egan, "Independent and Intimate: The Serious Offenders' Review Board" in S-A Gerull and W Lucas (eds), *Serious Violent Offenders: Sentencing, Psychiatry and Law Reform* Proceedings of AIC Conference, Canberra, 29-31 October 1991 (1993) at 159. The Serious Offenders Review Board previously exercised the functions of SORC. See also Serious Offenders Review Council, *Annual Report 1995*.

60. *Correctional Centres Act 1952* (NSW) s 59 and 61: prisoners who are sentenced to penal servitude for life; convicted of murder; sentenced to a term of imprisonment re-determined under *Sentencing Act 1989* (NSW) s 13A; sentenced to a minimum term of 12 years or more; or managed as serious offenders in accordance with decisions made by a sentencing court, the Parole Board or the Commissioner of Corrective Services. As at 31 December 1995 there were 410 prisoners managed as "serious offenders", 12 (2.9%) of whom were female: Serious Offenders Review Council, *Annual Report 1995* at 6-7.

61. *Correctional Centres Act 1952* (NSW) s 62(b).

making a final decision concerning the offender.[62] SORC's report is based on knowledge gained from management of and contact with the prisoner while the sentence is being served. SORC also has responsibility for making recommendations to the Commissioner with respect to the security classification and placement of, and provision of developmental programs for serious offenders.[63] As each of these factors is relevant to the offender's progress towards rehabilitation and preparation for returning to the community as a law abiding person, SORC can directly influence the ability of an offender to satisfy the criteria justifying the making of a parole order.

11.32 The *Sentencing Amendment (Parole) Act 1996* (NSW) changes SORC procedures in two ways. The *Correctional Centres Act 1952* (NSW) is amended to require SORC "to consider the public interest" when exercising its advisory functions concerning classification placement and access to programs in relation to a serious offender.[64] Matters to be taken into account when considering the public interest are enumerated at length.[65] Furthermore, the Council will be restrained from making a recommendation to the Commissioner of Corrective Services on the security classification of a serious offender which, if approved by the Commissioner, would make the person eligible for work release and similar programs, without first giving an opportunity for a victim of the offender to make written (but not oral) submissions.[66] The State is also entitled to make submissions to SORC on such a decision.[67] Finally, the Act amends the *Correctional Centres Act 1952* (NSW) s 61 as to eligibility for judicial membership of the Council.

11.33 Though not central to the Commission's terms of reference, the procedures of SORC have been the subject of comment in some

62. *Sentencing Act 1989* (NSW) s 19A; *Sentencing Amendment (Parole) Act 1996* (NSW) Sch 1 [9] inserting s 22N into the *Sentencing Act 1989* (NSW).
63. *Correctional Centres Act 1952* (NSW) s 62(a).
64. *Sentencing Amendment (Parole) Act 1996* (NSW) Sch 2 [6] inserting s 62(2) and (3) into the *Correctional Centres Act 1952* (NSW).
65. See Recommendation 63 and para 11.53 for the Commission's application of this approach to the duty of the Parole Board.
66. *Sentencing Amendment (Parole) Act 1996* (NSW) Sch 2 [7] inserting s 62A into the *Correctional Centres Act 1952* (NSW).
67. *Correctional Centres Act 1952* (NSW) s 62A(7). The powers of the State can be exercised by any agent of the State.

submissions.[68] SORC is said to be structured inefficiently and to duplicate unnecessarily the role both of the Departmental classification section, and the parole authority. It is said to have caused conflict within the parole process by blocking classification changes and access to pre-release programs which are the means by which an offender can demonstrate to the Parole Board that he or she would be able to adapt to "normal lawful community life". There is some doubt about how effectively it is carrying out its role of "managing" serious offenders, the circumstances in which advice is given to the Board regarding serious offenders, and the timeliness and quality of that advice.

11.34 An independent body responsible for segregation and classification decisions can provide a valuable balance to Departmental concerns.[69] Similarly, it is in the public interest to commit resources to the management of serious offenders in the prison system.[70] However, the Commission recognises there are concerns in relation to SORC's performance of its functions, the allocation of resources by the Government for its operation, its structure, and overlapping responsibilities. It faces problems similar to those of the Board with appointment of community members, who are required to make an onerous commitment to a part-time position. For some time it has operated well below the full complement of community members. Although it has been the subject of a report by the Office of Public Management relatively recently,[71] the Commission recommends that, in the interests of better co-ordination with the Board, a review of SORC is necessary. The review should focus on the necessity for two separate bodies being involved in the parole decision, and the Council's role in relation to functions of the Department and the Parole Board, and investigate the adequacy of resources allocated to SORC.

68. Legal Aid Commission of NSW, *Submission* (18 July 1996) at 4, NSW Council for Civil Liberties, *Submission* (28 June 1996) at 5-6; Confidential, *Submission [Oral]* (31 July 1996); Justice Action, *Submission* (2 July 1996) at 1. The issues were also discussed at Academic Forum, *Consultation* (2 August 1996) and at Legal Aid Commission, *Consultation* (7 August 1996).
69. The Council advises that its involvement has reduced the use of segregation as a disciplinary measure within prisons: Serious Offenders Review Council, *Preliminary Submission* (9 October 1995) at 8.
70. Serious Offenders Review Council, *Preliminary Submission* (9 October 1995) at 8.
71. In 1993. The Commission has been unable to ascertain what, if any, recommendations were made in this document.

Judicial members of SORC

11.35 The *Sentencing Amendment (Parole) Act 1996* (NSW) changes the eligibility for judicial membership of SORC in an identical way to that applying to judicial membership of the Parole Board.[72] SORC will have two members who are "judicially qualified persons", either Judges or retired Judges, Magistrates or retired Magistrates, or persons qualified to be appointed as a Judge. The Commission rejects this provision, for considerations similar to our recommendation concerning the identical changes applying to the Parole Board.[73] The authority and independence of the Council, as well as public confidence in its decision-making process flow from having an experienced Judge as Chairperson. The Commission recommends that eligibility for appointment as a judicial member of SORC be changed so that the criteria for appointment of judicial members to the Serious Offenders Review Council should be the same as for the Parole Board.

PAROLE BOARD PROCEDURES

11.36 In DP 33 the Commission expressed general satisfaction[74] that procedures adopted by the Offenders Review Board when exercising its functions in ordering, monitoring progress on, and revoking parole met the requirements of natural justice.[75] Submissions generally expressed satisfaction with most other procedures, although the powers of the Chairperson were questioned. This issue is addressed below.

11.37 The *Sentencing Amendment (Parole) Act 1996* (NSW) changes procedures of the Parole Board, principally in the way the Board considers parole for serious offenders.[76] The most significant change is the introduction of the opportunity for victims, and also the prisoner, formally to make submissions to be considered by the Board in deciding whether to make a

72. *Sentencing Amendment (Parole) Act 1996* (NSW) Sch 2 [3] amending *Correctional Centres Act 1952* (NSW) s 61.
73. See paras 11.19-11.21.
74. With one reservation relating to s 49 certificates; see paras 11.44-11.46.
75. DP 33 at para 7.58.
76. *Sentencing Amendment (Parole) Act 1996* (NSW) Sch 1 [9] inserting Part 3, Div 2, Subdivision 3 (s 22A-22O) into the *Sentencing Act 1989* (NSW). See below paras 11.54-11.59.

parole order. The Board must also receive submissions from the State concerning release on parole of a serious offender.[77] Other provisions introduce a right for the State to challenge a Board decision to grant or refuse to revoke a parole order, create an offence of misconduct during hearings, and enable the Board to defer consideration of parole in certain circumstances. Amendments relevant to issues of procedure which have been considered by the Commission are discussed in the rest of this Chapter.

Powers of the Chairperson

Recommendation 60
A decision of the Parole Board should be a decision supported by a majority of members present at a meeting or review hearing, including that of the Chairperson, unless all other members voting are unanimous. The Chairperson should not be entitled to exercise a casting vote.

11.38 Concern has been expressed about the extent of power exercisable by the judicial member as Chairperson of the Board.[78] That power can be exercised in important ways. A decision of the Board is one supported by the majority of votes cast, including the vote cast by the presiding judicial member,[79] and in the case of a tied vote, the presiding judicial member has the casting vote.[80] The judicial member also has conduct of review hearings and alone delivers the Board's decision.

77. *Sentencing Amendment (Parole) Act 1996* (NSW) Sch 1 [9], inserting s 22O into *Sentencing Act 1989* (NSW). Subject to regulations, this power will be exercisable by "any agent of the State".
78. Legal Aid Commission of NSW, *Submission* (18 July 1996) at 4 (Questions Arising); Confidential, *Submission [Oral]* (31 July 1996); Legal Aid Commission, *Consultation* (7 August 1996).
79. *Sentencing Act 1989* (NSW) Sch 1 cl 15(1): this gives the judicial member what is in effect a veto.
80. Sch 1 cl 15(3).

11.39 Should the Board members have deeply divergent views on any matter, the requirement that to take effect a decision must have the support of the judicial member and also to permit that member to have a casting vote gives the judicial member what might be seen as excessive weight in a body in which community representation is ostensibly important. The Commission considers that this confers too much power on the Chairperson and, in some circumstances, can potentially result in the views of community and professional representatives being disregarded. The Chairperson should retain a veto, but it cannot be justified in circumstances where every other member exercising a vote on the matter opposes the Chairperson. Nor should the Chairperson be entitled to a casting vote as well. The Commission recommends that the Act should be amended to provide that a decision of the Board should be a decision supported by the votes of a simple majority of members present, provided that the judicial member is one of the majority, unless all other members voting are unanimously opposed to the Chairperson. This recommendation, in conjunction with Recommendations 56 and 67 (the presiding role of the judicial member, and the opportunity for all members to give reasons) recognises the value of judicial oversight of parole decision-making, but confines the judicial member's influence to that strictly necessary to maintain confidence in the procedure.

Submissions from victims

Recommendation 61
Submissions from victims to the Parole Board addressing the statutory criteria on which a decision to grant parole is based should be sworn, in writing, and at the Board's discretion, subject to cross-examination.

11.40 Although it has been the practice of the Offenders Review Board to receive and consider submissions from victims for some time,[81] the *Sentencing Amendment (Parole) Act 1996* (NSW) creates an elaborate and

81. Since early 1996, the Board has been required under *Sentencing Act 1989* (NSW) s 17(1)(c) to consider any report prepared by or on behalf of a victim of an offence committed by a serious offender: *Sentencing (General) Regulation 1996* cl 5(a)(i). This formalised what was already Board practice.

comprehensive procedural scheme in which victims can exercise their right to make a submission to the Board.[82] The names of victims requesting notice of impending consideration of the prisoner by the Parole Board will be recorded on a Victims Register. Persons defined as victims for the purposes of these procedures are victims of the offence for which the prisoner has been sentenced, or a family representative where the victim is dead or under any incapacity. Victims so entitled may make both written and oral submissions, though the latter can be made only with the Board's approval. A victim is entitled to representation when making a submission to a hearing, but may not call or examine witnesses, and may only give evidence on oath, address the Board or otherwise orally adduce evidence with the Board's approval.[83]

11.41 In DP 33 the Commission endorsed the validity of victims making submissions in the parole process in that they potentially constitute matter relevant to the Board's determination whether to make a parole order.[84] As we characterise the Board's duty in Recommendation 62,[85] victims or their representatives are in a position to provide the Board with information not otherwise available on which to assess whether the offender, if released, would be able to remain law abiding. Examples of such information include threats made to harm any person; the victim's fears relating to the offender's behaviour on release; evidence of the circumstances of the crime not on record before the Board; and evidence of the offender's behaviour during the time in custody. Of concern, however, are aspects of procedure regulating the manner in which such submissions are presented to the Board.

11.42 Responses to DP 33 generally supported the Commission's proposals relating to submissions by victims to the Offenders Review Board.[86] A need

82. *Sentencing Amendment (Parole) Act 1996* (NSW) Sch 1 [9] inserting s 22A-22O into the *Sentencing Act 1989* (NSW).
83. *Sentencing Amendment (Parole) Act 1996* (NSW) Sch 1 [36] amending the *Sentencing Act 1989* (NSW) Sch 1 cl 19.
84. DP 33 at paras 11.66-11.70.
85. See para 11.53.
86. N R Cowdery, *Submission* (17 June 1996) at 20; M L Sides and Bar Association, *Submission* (24 June 1996) at 76; NSW Council for Civil Liberties, *Submission* (28 June 1996) at 6; Justice Action, *Submission* (2 July 1996) at 6; D Blakemore, *Submission* (26 June 1996) at 27: Victims Advisory Council, *Submission* (10 July 1996) at 3; Department of Corrective Services, *Submission* (15 July 1996) at 33; Victims Rights and Civil Rights Project, *Submission* (19 July 1996) at 12-13; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 22; W D T Ward, *Submission* (25 July 1996) at

was recognised to place restrictions on the content and circumstances of presentation to ensure the relevance of victims' submissions to the Board's function in making a decision about parole in accordance with the criteria in the Act. The provisions of the Act noted above are sufficient in the Commission's view to ensure that this right will be exercised within the non-adversarial nature of Parole Board proceedings, required by *Sentencing Act 1989* (NSW) Sch 1 cl 11(4)(b), and prevent the hearing becoming a re-trial of the offender,[87] or a re-victimisation of the victim.[88] The procedural mechanism for receiving victims submissions is comprehensively dealt with in the Act, and the Commission makes no recommendation in this regard.

11.43 A contentious issue with victims' submissions is that of the ability to cross-examine the author, particularly where allegations of improper or unlawful behaviour are made. The Board may require any witness, and this would include a victim making an oral submission as contained in the amendments, to be sworn and subject to cross-examination.[89] However, such an approach with a victim would be at odds with the statutory requirement that the Board's proceedings not be conducted in an adversary manner, and so would be unlikely to occur. The Commission recommends that the question of cross-examination remains at the Board's discretion.

Section 49 certificates - withholding information from an offender

11.44 The *Sentencing Act 1989* (NSW) s 49 permits a judicial member of the Board to withhold a copy of a report or document (or any part of it) from a prisoner if, in his or her opinion, provision of the document would adversely affect the security, discipline or good order of a prison or endanger the prisoner or any other person. The prisoner is not entitled to be told whether a certificate has been issued under s 49, although the Commission understands that it is the Board's practice to inform the prisoner's legal

21; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 21.

87. The discretion is also designed to deal with the potential for conflict among victims' representatives: see New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 30 October 1996, the Hon R J Debus, MP, Minister for Corrective Services, Second Reading Speech at 5535.
88. Victims Advisory Council, *Submission* (10 July 1996) at 3.
89. *Sentencing Act 1989* (NSW) Sch 1 cl 16.

representative that a s 49 certificate exists and to indicate briefly the nature of the subject material. The Commission considered that this power may limit procedural fairness for the offender.[90]

11.45 Submissions revealed some disquiet about s 49 in that it did not comply with the rules of natural justice.[91] Proposals included providing for review of a decision to issue a certificate, either by the Ombudsman or a Court,[92] and establishing criteria to restrict further the circumstances in which the certificate could be issued.[93]

11.46 The utility of a provision in the terms of s 49 is obvious, and it was accepted in other submissions as necessary.[94] The Commission recognises that there might be circumstances, such as those outlined in one submission, where the judicial member can be seen to have been over-cautious in withholding information which can legitimately be made available to the prisoner from other sources.[95] However, this does not negate the fact that there will be situations where to reveal information is to place the supplier or author in real danger, or to threaten the administration of justice. The Commission does not consider that s 49 should be amended. However, as it constitutes an incursion on principles of natural justice, we would expect that it will be used only when absolutely necessary.

Revocation procedures

90. DP 33 at para 7.59.
91. See Legal Aid Commission of NSW, *Submission* (18 July 1996) at 6 (Questions Arising) 6; M L Sides and Bar Association, *Submission* (24 June 1996) at 55; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July) at 20; Law Society of NSW, *Submission* (19 July 1996) at 26-27; Academic Forum, *Consultation* (2 August 1996). See also New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 5 December 1996, Speeches of the Hon E Kirkby at 7017 and the Hon I Cohen at 7018 on the *Sentencing Amendment (Parole) Bill 1996 (No 2)*.
92. M L Sides and Bar Association, *Submission* (24 June 1996) at 55.
93. Legal Aid Commission of NSW, *Submission* (18 July 1996) at 6 (Questions Arising).
94. W D T Ward, *Submission* (25 July 1996) at 12; Department of Corrective Services, *Submission* (15 July 1996) at 19.
95. Legal Aid Commission of NSW, *Submission* (18 July 1996) at 6 (Questions Arising).

11.47 When the Board determines that a parole order should be revoked for failure to comply with a condition, the usual procedure is for the offender to be apprehended, returned to custody, and a review hearing arranged within three to four weeks. The offender can only then be released following the Board's formal decision to make another parole order in his or her favour.[96] One submission argued that this process operated unjustly for some offenders where the decision was made on incorrect information, usually that provided to the Board by the Probation and Parole Service. This occurs, for example, when the conditions of parole have been incorrectly recorded and a breach is reported for non-compliance with a non-applicable condition.

11.48 The Board does not always revoke a parole order when it considers that a breach of a term or condition has occurred, preferring to reserve this action for serious breaches. Other measures such as issuing a warning or monitoring the parolee more closely, are used quite frequently. The Commission considers that this is the appropriate approach to take. If the Board has reasonable cause to suspect that a parolee has breached an order and is considering whether to revoke the order, it has the power under s 32(1)(a) and s 33 of the *Sentencing Act 1989* (NSW) to require the person to attend before the Board for the purpose of an inquiry into whether the order should be revoked. The Commission understands that the Board uses this power only rarely.[97]

11.49 The Commission, although mindful of the Board's duty in regard to decisions to revoke parole, accepts that injustice can occur, say, where a mistake has been made over the evidence relied upon, as a result of the Board following its usual procedure when determining to revoke a parole order. Although the Commission recognises that this may occur infrequently,[98] there is scope for a more speedy form of review of a decision to revoke parole to avoid injustice in those cases where it is acting on incorrect information. The Board should make greater use of its powers under s 32(1)(a) and 33. As the Board meets twice weekly in public session, and the Commission does not

96. See *Sentencing Act 1989* (NSW) s 34-40.
97. An inquiry pursuant to s 32 was held on only one occasion in 1995, and twice in 1994: Offenders Review Board, *Annual Report 1995* at 9, *Annual Report 1994* at 10.
98. In 1995, the Board rescinded its decision to revoke parole in 20 cases, out of a total of 501 cases listed for review of the decision to revoke parole: Offenders Review Board, *Annual Report 1995* at 9.

consider that such circumstances will occur often, there does not seem to be any reason for not invoking this course of action more frequently.

THE PAROLE DECISION

11.50 Section 17(1) provides that in assessing a parole application, the Board may not make an order unless it has:

(a) determined that the release of the prisoner is appropriate, having regard to the principle that the public interest is of primary importance; and
(b) considered relevant comments (if any) made by the court when sentencing the prisoner; and
(c) considered any reports required by regulations made for the purposes of this section to be furnished to it; and
(d) taken into account the antecedents of the prisoner and any special circumstances of the case; and
(e) determined that it has sufficient reason to believe that the prisoner, if released from custody, would be able to adapt to normal lawful community life; and
(f) considered any other relevant matter.

11.51 This section indicates the Board's duty in determining parole by an amalgamation of process and principle. It does not establish detailed criteria on which the Board should make a decision, and does not clearly explain the "public interest" which is to have paramountcy. It is difficult for prisoners to know exactly by what criteria their applications will be assessed, and how they have been specifically applied in each case. This hampers attempts to address factors relevant to the decision in their applications and their behaviour in prison. The situation was criticised in several submissions.[99]

11.52 The Commission considers that the legislation combined with the procedures adopted by the Board result in an unsatisfactory situation. We have identified three aspects of the Board's duty in respect of the parole decision about which recommendations are necessary: the presumptions

99. NSW Council for Civil Liberties, *Submission* (28 June 1996) at 5; M L Sides and Bar Association, *Submission* (24 June 1996) at 55; Department of Corrective Services, *Submission* (15 July 1996) at 15; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 9 (Questions Arising); Confidential, *Submission [Oral]* (31 July 1996); Legal Aid Commission, *Consultation* (7 August 1996).

applying to the grant of parole; the statutory expression of the criteria to be applied; and the giving of reasons by the Board for a refusal to make a parole order.

Duty of the Parole Board

Recommendation 62
Section 17 of the *Sentencing Act 1989* (NSW) should provide that:

(1) (a) In the case of offenders with a sentence of less than eight years, the Board must make a parole order unless the Board is of the opinion that the prisoner, if released from custody, would be unable to remain law abiding, bearing in mind the protection of the public which is paramount.

(b) In the case of a serious offender or a prisoner with a sentence of eight years or more, the Board must not make a parole order unless the Board is of the opinion that the prisoner, if released from custody, would be able to remain law abiding, bearing in mind the protection of the public which is paramount.

(2) In reaching a decision under (1) (a) or (b) the Board must have regard to:
- **(a) relevant comments (if any) made by the court when sentencing the prisoner;**
- **(b) the antecedents of the prisoner and any special circumstances of the case;**
- **(c) the position of and consequences to the victim, including the victim's family;**
- **(d) any report prepared for the purpose by or on behalf of the Crown;**

(e) other reports as are prescribed by regulations to be furnished to it;
(f) the conduct of the prisoner while in custody, including conduct during previous imprisonment if applicable;
(g) the attitude of the prisoner;
(h) the prisoner's access to rehabilitation programs while in prison;
(i) the prospects for rehabilitation of the prisoner and the re-entry of the person into the community as a law abiding citizen;
(j) the availability of family, departmental and other support; and
(k) any other matter.

11.53 Section 17 of the *Sentencing Act 1989* (NSW) contains the core of the Board's duty in regard to making parole orders. It contains the operative presumption in regard to the Board's function in determining parole, incorporates the criteria applicable to the decision, and identifies the information to which reference is made. Our recommendation is that s 17 be amended in the manner indicated. It should reflect the presumptions which we consider should apply to the parole decision and clearly state the criteria against which the Board should assess the material before it. The categories of material to which the Board should have regard should, in our view, be explained more fully in the legislation. The effect of this recommendation will be to clarify the statutory obligation of the Board, and in conjunction with Recommendation 66 concerning the giving of reasons, remove uncertainty for offenders and the public about parole decision-making.

Presumptions regarding grant of parole

Recommendation 63
Except in the case of serious offenders or offenders with a sentence longer than eight years, there should be a presumption in favour of parole.

11.54 Section 17(1) says that "the Board may not make a parole order unless" it has "determined that it has sufficient reasons to believe that the prisoner, if released from custody, would be able to adapt to normal, lawful community life". The previous legislation, the *Probation and Parole Act 1983* (NSW) in s 26 provided that "the Board shall make the order unless" it determined that it had "sufficient reason to believe that the prisoner, if released from custody, would not be able to adapt to normal lawful community life". An amendment to the *Probation and Parole Act 1983* (NSW) in 1987 introduced s 26A, applicable only to serious offenders, which required that the Board make a parole order only when it was satisfied release was appropriate. That section was almost identical with s 17(1). In practice, the presumption in s 17(1) of the *Sentencing Act 1989* (NSW) is against the making of a parole order where the Board forms an initial intention to refuse parole and a review hearing is conducted.

11.55 In setting a minimum term, the Court determines the minimum period which, according to the accepted principles of sentencing, the offender must spend in custody.[100] For sentences of three years or less release to parole is automatic. For longer sentences, the court has indicated the intention that part of the full sentence of imprisonment is to be served by way of conditional liberty on parole, but the Act gives the Parole Board discretion to make a parole order in accordance with the Act.

11.56 Where release to parole is at the discretion of the Parole Board, consideration of an application must be made against the criteria established by the legislation. It is not a time to reassess the sentence which should be served. Truth in sentencing would seem to require that an offender be released to parole at the point determined by a sentencing judge, unless to do so would violate the statutory criteria on which the decision should be based. It could be that the presumption may be seriously challenged in any particular

100. *Power v The Queen* (1974) 131 CLR 623.

case by views expressed in the remarks on sentencing, however this is only one of the pieces of information which the Board considers in exercising its discretion. For longer sentences the judge is significantly disadvantaged in determining what the prisoner's situation will be several years into the future. At the time of sentencing, the court cannot predict the offender's personal circumstances and attitudes, access to and experience of rehabilitation programs while in custody, and the particular post release plans which can be made, all of which have an important bearing on the likelihood of recidivism. This view is particularly evident in the remarks on sentencing for prisoners whose life sentences are re-determined under s 13A where minimum and additional terms are set.[101]

11.57 The Commission is of the view that a prisoner should, all things being equal, be released to parole at the expiry of the minimum term. Where the Parole Board intends to refuse parole, the onus, therefore, should be on it to say why.[102]

11.58 However, the Commission considers an exception should be made in the case of serious offenders or offenders with sentences longer than eight years to assess carefully their potential to be of good behaviour and to review post-release plans. Prisoners so classified or subject to sentences of such length will have been convicted of such serious offences that the public interest and public confidence in the administration of the criminal justice system justifies placing the onus on the prisoner to demonstrate that he or she will be able to be appropriately law abiding, bearing in mind that the safety of the community is paramount.[103] The different approach is recognised, by analogy, in procedures in the *Sentencing Amendment (Parole) Act 1996* (NSW) applying to the Board's consideration of parole orders in relation to serious offenders.[104]

11.59 The Commission recommends that the *Sentencing Act 1989* (NSW) clearly reflect these presumptions.

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101. *Sentencing Act 1989* (NSW) s 13A. For example, *R v Dennis* (NSW CCA, No 60274/92, 28 October 1992, unreported).
102. Legal Aid Commission, *Consultation* (7 August 1996); Forbes Chambers, *Consultation* (13 August 1996); District Court Judges, *Consultation* (14 August 1996).
103. Public Defenders, *Consultation* (8 August 1996).
104. *Sentencing Amendment (Parole) Act 1996* (NSW) Sch 1 [9] inserting s 22A-22O into the *Sentencing Act 1989* (NSW).

Applicable criteria

Recommendation 64
The criteria on which the Parole Board should determine parole should be the ability of the prisoner, if released from custody, to remain law abiding, bearing in mind the protection of the public which is paramount.

11.60 Section 17(1) offers inadequate guidance as to the criteria on which to base a decision. Although it establishes the principle that the public interest is of primary importance, it does not clearly elaborate upon the concept which is open ended and thus open to misinterpretation. This is a matter of considerable importance both to the community and to the prisoner. Accordingly the relevant considerations should be spelt out.

11.61 In our view the public interest in this context has a particular meaning. The aspect of the public interest in consideration here is the ability of the prisoner to adapt to a law abiding life in the community following his or her incarceration for a long period. The legislation should state this explicitly. We do not see why, if he or she remains law abiding, it is necessary also to be "normal". The Commission therefore recommends that the term "public interest" be removed from the section, and that it state that the test by which the Board should assess eligibility is the person's ability, if released from custody, to remain law abiding.

11.62 We are also strongly of the view that the legislation should spell out the matter of paramount concern. In relation to the test which the Board must apply, this is the protection of the public. This refers not only to protection from offences which might be committed whilst the offender is on conditional liberty during the remainder of the sentence, but also the protection afforded by rehabilitation of the offender in the long term. The only criterion to which the Board should give consideration is the prisoner's ability to be law abiding while released to conditional liberty on parole. In adopting this standard, the Commission is of the view that the Board should not be concerned with behaviour that may amount to trivial breaches of the

law, but rather to focus on whether the offender's unlawful behaviour is likely to constitute a threat to public safety.

Matters to be considered by the Board

Recommendation 65
The *Sentencing Act 1989* (NSW) should specify a comprehensive list of matters to which the Parole Board should have regard when determining whether to make a parole order.

11.63 The present formulation of s 17(1) enumerates a range of information that the Board is to take into account in considering the decision. The content of the list is appropriate but, in our view, insufficient. The legislation should specify in much greater detail the nature of the information that the Board should consider when making its determination. The Board's assessment should be made by reference to information concerning the offender, the offence, and the likelihood of recidivism. The Board should rely on information about the offender personally, any special circumstances of the offence, remarks of the sentencing court, reports from relevant authorities relating to conduct and attitudes while in custody, evidence of conduct on any previous experience of parole, post-release plans, submissions from victims and the Crown[105] where relevant, and should also be permitted to inform itself on any matter as it thinks fit. We recommend that a comprehensive list of the matters to which the Board should have regard when determining whether to grant parole should be specified in the legislation.

11.64 In making this recommendation, the Commission does not have any concern that at present the Board is not sufficiently informed when determining whether to grant parole. Board procedures ensure that all members of the Board have access to a considerable body of information from all the categories here noted. The Board also complies with its duty to have "considered any other relevant matter" in appropriate cases by seeking information additional to that routinely available. The recommendation is designed only to list extensively in the statute the nature of material to which

105. *Sentencing Act 1989* (NSW) s 22O.

the Board shall have reference. It is in the interest both of the prisoner, and the public that these matters be specified comprehensively in the legislation. The list draws on a provision in the *Sentencing Amendment (Parole) Act 1996* (NSW) which indicates in detail the matters to which SORC must have regard when exercising its advisory functions in relation to serious offenders.[106] The Commission has distinguished between sources or categories of information, and principles or criteria, and used only the former from that model.

Reasons for refusing parole

Recommendation 66
The Parole Board should be required to provide a full statement of its reasons for refusing to make a parole order. The Chairperson should deliver the Board's decision, and any member of the Board should also be permitted to deliver his or her reasons when the Board's decision is given.

11.65 When the Board has determined not to make a parole order, the Chairperson delivers the Board's decision *ex tempore*. The Board's refusal to grant parole is recorded on the Board's file and communicated to the prisoner in accordance with the following formula, with the appropriate items indicated as applicable:

> Reasons:
> Unable to adapt to normal lawful community life;
> Risk of Reoffending;
> Past failure/s on conditional liberty/parole
> Need for further drug and alcohol counselling
> Need for further psychological/psychiatric counselling
> Need for structured post release plan
> Unsatisfactory post release plan
> Inappropriate in the public interest

106. *Sentencing Amendment (Parole) Act 1996* (NSW) Sch 2 [6] inserting s 62(3) into the *Correctional Centres Act 1952* (NSW).

11.66 Procedures adopted by the Board in regard to the giving of reasons for decisions appear to lack procedural fairness. The Board has not formally elaborated on the criteria by which it assesses an application for parole except in as much as the elements in this formula indicate matters that it considers relevant to the decision. Reasons for refusal and the attitudes of the Board members to specific aspects of an application are not necessarily dealt with in detail. The Commission understands that transcripts of the oral decision are not made available to the offender as a matter of course, or expeditiously when requested.[107] Based on the documentary material before the Board and the matters raised within a review hearing in the individual case, the prisoner must extrapolate the particular reasons from the short hand expression of the Board's reasons for refusing parole.

11.67 On the other hand, Prison Governors reported in consultations that from their reception into the correctional system, prisoners are made aware of matters which will generally be taken into consideration by the Parole Board, including their behaviour while in custody.[108] The case management approach practised in prisons and, for serious offenders, management by the Serious Offenders Review Council would be expected to focus on prisoners' parole applications. Prior to a review hearing, the prisoner will receive the short form of reasons for an intention to revoke parole which indicate the general attitude of the Board, and a copy of all material, except documents for which a s 49 certificate has been issued, which is placed before the Board.

11.68 The Commission considers that the form in which the Board's reasons for refusal of parole are recorded do not meet the requirements of natural justice.[109] It is imprecise and superficial and fails to address the individual offender's situation.[110] The proposal in DP 33 that the Board should provide a full statement of reasons for which an order for parole is refused was strongly supported in submissions.[111] The one dissenting view was that the status quo should be maintained.[112]

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107. Legal Aid Commission, *Consultation* (7 August 1996).
108. Prison Governors, *Consultation* (12 August 1996): see *Sentencing (General) Regulation 1996* cl 21, Forms 9 and 10. This view was contended in Legal Aid Commission, *Consultation* (7 August 1996).
109. Use of the formula appears not to have altered since it was criticised on similar grounds by the Nagle Royal Commission: Nagle Report at 606.
110. See DP 33 at para 7.64.
111. N R Cowdery, *Submission* (17 June 1996) at 10; NSW Council for Civil Liberties, *Submission* (28 June 1996) at 5; M L Sides and Bar Association,

11.69 The Commission recommends that the Board be required to deliver a full statement of its reasons for not making a parole order. The reasons should deal with particular aspects of how the application failed to satisfy the Board's criteria, and indicate what matters should be addressed by the prisoner in future applications. The Board's reasons should be delivered by the Chairperson, as now occurs, but should reflect the views of all members of the Board responsible for making the decision. Nothing in the Act should prevent other members of the Board from also delivering his or her reasons to the hearing, whether or not in dissent from the Board's decision. The Commission also recommends that in every case, the reasons for refusal delivered orally should be transcribed, made available to the prisoner promptly and at no cost.

11.70 Two further procedures could complement the Commission's recommendations in regard to the Board's provision of reasons for its decisions. While the Commission does not recommend that it be mandatory for the Board to make a full statement of its reasons for making a parole order, the Commission considers that it is in the public interest for the Board to adopt such a procedure where it considers such a course of action appropriate. *Sentencing (General) Regulation 1996* cl 8 prescribes that notice be given to the prisoner under s 19(b). When the Board notifies the prisoner that it intends to refuse parole and that a review hearing will be conducted, the Board also uses the formula reproduced in paragraph 11.65 above. This was said unfairly to prevent the prisoner from addressing the relevant issues at the subsequent hearing.[113] Notwithstanding the administrative demands that this procedure might entail, the Commission urges consideration by the Board of adopting the practice of stating, in a more meaningful form than currently used, its reasons for intending to refuse parole sufficient to indicate matters on which the offender will need to address the Board in the review hearing.

Release under exceptional circumstances

Submission (24 June 1996) at 55; Department of Corrective Services, *Submission* (15 July 1996) at 15; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 21; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 9; Law Society of NSW, *Submission* (19 July 1996) at 24; Justice Action, *Submission* (2 July 1996) at 2.

112. W D T Ward, *Submission* (25 July 1996) at 12.

113. Legal Aid Commission of NSW, *Submission* (18 July 1996) at 9.

Recommendation 67
Section 25A(6) of the *Sentencing Act 1989* (NSW) should be repealed.

11.71 The *Sentencing Act 1989* (NSW) provides that offenders may be released prior to the expiry of their minimum terms in only very restricted circumstances. In accordance with s 25A, the Parole Board has the discretion to release a prisoner who:

> ... is not otherwise eligible for release on parole, but only if the prisoner is dying or if the Board is satisfied that it is necessary to release the prisoner on parole because of exceptional extenuating circumstances.

This gives little scope for discretionary release of offenders other than when they are eligible for parole.[114] Intended for use on compassionate grounds in the event of a prisoner having a life-threatening medical condition, s 25A gives the Board complete discretion to consider applications from offenders with a determinate sentence. The provision is interpreted very strictly and exercised very rarely.[115] It appears that the prisoner's own health provides the usual grounds for its use. The Commission was made aware of some concern about the Board's interpretation of the section, and in DP 33 sought submissions as to the desirability of amending the circumstances in which the Board could release offenders under this section.

114. Previously offenders who received the indeterminate sentence of "penal servitude for life" expected to be released on licence by executive action, most recently on the advice of the Release on Licence Board: *Crimes Act 1900* (NSW) s 463, repealed by *Prisons (Serious Offenders Review Board) Amendment Act 1989* (NSW) s 5. With the exception of murder and crimes covered by the *Drug Misuse and Trafficking Act 1985* (NSW), crimes which previously attracted a sentence of "life" were made subject to a determinate sentence, with a maximum of 25 years: *Crimes (Life Sentences) Amendment Act 1989* (NSW) s 3.

115. Only five prisoners were released under s 25A in 1994, and one in 1995: Offenders Review Board, *Annual Report 1994* at 10; *Annual Report 1995* at 10.

11.72 Though some common situations give rise to s 25A applications, no formal policies have been developed by the Board as circumstances vary so greatly.[116] The Board grants release if the prisoner is approaching death.[117] Access to medical treatment outside the prison hospital will usually be arranged without the necessity for release to parole. Recognition of an alleged offer of assistance to authorities is considered by the Board more appropriately to be a matter for Ministerial discretion and the Royal prerogative of mercy, rather than release under s 25A. The *Correctional Centres Act 1952* (NSW) s 29 permits the Commissioner for Corrective Services to authorise leave in other circumstances, for example illness of a near relative, which may create a pressing need for the prisoner to be released from custody. In the view of the current Chairperson of the Board, any relaxation of s 25A would attract a flood of applications.[118]

11.73 Most submissions on this issue supported relaxation of the criteria for such early release,[119] considering the Act and the Board's approach unduly inflexible. Alternatively, it was argued that to dilute s 25A would erode the concept of truth in sentencing.[120] The Commission would be reluctant to recommend alteration of the provision without demonstrated need, which has not been shown. The intention of the legislature is clearly that s 25A should be invoked only on rare occasions. There are other avenues for release from custody: temporary release by order of the Commissioner of Corrective Services may be available on compassionate grounds,[121] and the Royal

116. W D T Ward, *Submission* (25 July 1996) at 9-10.
117. In practice, this appears to be confined to cases where life expectancy is six months or less: Legal Aid Commission of NSW, *Submission* (18 July 1996) at 5 (Questions Arising).
118. Although s 25A(4) provides the Board a summary power to avoid dealing with unrealistic applications.
119. See N R Cowdery, *Submission* (17 June 1996) at 11; Confidential, *Submission [Oral]* (31 July 1996); M L Sides and Bar Association, *Submission* (24 June 1996) at 52; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 19; Law Society of NSW, *Submission* (19 July 1996) at 24; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 5 (Questions Arising); Academic Forum, *Consultation* (2 August 1996).
120. Department of Corrective Services, *Submission* (15 July 1996) at 18; W D T Ward, *Submission* (25 July 1996) at 9-10.
121. *Correctional Centres Act 1952* (NSW) s 29(1).

prerogative of mercy remains.[122] The Commission does not consider that the criteria for release under s 25A require amendment.

11.74 Eligibility to apply to the Parole Board for release in exceptional circumstances in accordance with s 25A is not extended to prisoners serving a sentence of imprisonment for life.[123] This restriction was imposed contemporaneously with the introduction of s 19A to the *Crimes Act 1900* (NSW) providing that a person receiving a sentence of life would serve it for the term of his or her natural life.[124] Such prisoners can be released by executive action under the Royal prerogative.

11.75 Although there are only a very small number of prisoners in this class, the Commission recommends that the limitation in s 25A(6) should be repealed and that the right to apply to the Parole Board for release to parole in exceptional extenuating circumstances should be available to them. Although prisoners serving life sentences might apply for the exercise of the Royal prerogative as an alternative to s 25A, the Commission considers that the use of s 25A is preferable.[125] Exercise of the Royal prerogative of mercy is completely discretionary, not subject to any criteria or procedural requirements. In practice, it's use is initiated by the Executive. Life sentence prisoners should be able to take advantage of the Board's established procedures and principles for release under s 25A in exceptional, extenuating circumstances, bearing in mind that the Board will only exercise its power under s 25A *in* exceptional circumstances. Indeed, it is the Commission's intention that in exercising its powers under s 25A in respect of persons serving a sentence of imprisonment for life, the Board will have regard to the fact that under truth in sentencing legislation, a sentence of life means for the term of the prisoner's natural life.

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122. *Sentencing Act 1989* (NSW) s 53; *Correctional Centres Act 1952* (NSW) s 41A.
123. *Sentencing Act 1989* (NSW) s 25A(6).
124. Previously offenders who received the indeterminate sentence "penal servitude for life" were released on licence by executive action pursuant to s 463 of the *Crimes Act 1900* (NSW), on average after 12-14 years in custody: I Potas, *Life Imprisonment in Australia* (Australian Institute of Criminology, Trends and Issues, No 19, August 1989); A Freiberg and D Biles, *The Meaning of 'Life': A Study of Life Sentences in Australia* (AIC, Canberra, 1975) at 53.
125. *Sentencing Act 1989* (NSW) s 53 preserves the Royal prerogative. See also Academic Forum, *Consultation* (2 August 1996).

REVIEW OF PAROLE BOARD DECISIONS

11.76 The terms of reference require the Commission to consider "the benefits that might accrue from the review of the decisions of the Offenders Review Board ... by judicial officers". Currently these decisions are not subject to appeal on the merits. Administrative review is available, although there is some uncertainty as to where that relief should be sought. In DP 33 the Commission proposed that there continue to be no right to an appeal on the merits from Parole Board decisions; that the present s 23 and s 41 of the *Sentencing Act 1989* (NSW) which give limited and seemingly ineffectual rights should be repealed; and that an offender should be able to seek administrative review of a Parole Board decision in the Administrative Law Division of the Supreme Court.[126]

Appeal on the merits

11.77 The Commission expressed the view that appeal on the merits from Parole Board decisions is not appropriate.[127] Submissions, with one exception, supported this position.[128] The Legal Aid Commission argued that, because administrative review alone is an inadequate remedy, review of the Board's decision should be a full appeal on the merits, with, subject to leave, a right of appeal to the District or Supreme Court.[129]

11.78 The Commission confirms its view that decisions of the Parole Board should not be reviewable in another forum. These are different from decisions of criminal or civil courts. They arise from a different procedure and are made on different criteria. The community-dominated Board should remain the forum in which the public interest is determined.

126. See DP 33 at paras 7.67-7.74.
127. DP 33 at paras 7.70-7.72.
128. N R Cowdery, *Submission* (17 June 1996) at 10; M L Sides and Bar Association, *Submission* (24 June 1996) at 56; Department of Corrective Services, *Submission* (15 July 1996) at 16; W D T Ward, *Submission* (25 July 1996) at 13.
129. Legal Aid Commission of NSW, *Submission* (18 July 1996) at 10; Legal Aid Commission, *Consultation* (7 August 1996).

Sentencing Act 1989 (NSW) s 23 and 41

Recommendation 68
Sections 23 and 41 of the *Sentencing Act 1989* (NSW) should be repealed.

Recommendation 69
Sections 34A and 41A of the *Sentencing Act 1989* (NSW) should be repealed.

11.79 The *Sentencing Act 1989* (NSW) gives a limited right to appeal a decision of the Parole Board to refuse to make a parole order in these terms:

> 23(1) If ...
> (b) the prisoner alleges that the decision of the Board was made on information which was false, misleading or irrelevant,
> the prisoner may, in accordance with rules of court, apply to the Court of Criminal Appeal for a direction to be given to the Board as to whether the information was false, misleading or irrelevant and the Court of Criminal Appeal may give such direction with respect to the information as it thinks fit.[130]

Section 41 gives a right expressed in similar terms to a prisoner whose parole order has been revoked. The Court of Criminal Appeal is not concerned with the validity of the Board's decision, or how the Board interpreted or weighed the information.[131]

Crown rights of appeal

11.80 The *Sentencing Amendment (Parole) Act 1996* (NSW) contains provisions which would extend to the Crown a right in similar terms where

130. *Sentencing Act 1989* (NSW) s 23.
131. *McCamley v Offenders Review Board* (NSW CCA, No 60703/93, 9 February 1994, unreported).

the Board has made a decision concerning the grant or revocation of parole in relation to a serious offender.[132] The Attorney General or the Director of Public Prosecutions ("the DPP"), alleging that the Board relied on information that was false, misleading or irrelevant, would be entitled to exercise a right to apply to the Court of Criminal Appeal for directions to be given to the Board. The Attorney General or the DPP would also be able to request the Board to exercise its powers to revoke a parole order on the ground that it was made on information that was false, misleading or irrelevant. Should the Board refuse such a request where there is an allegation on those grounds, the Attorney General or the DPP may apply to the Court of Criminal Appeal for a direction in the same terms as those available to the offender under s 41A.

11.81 In DP 33 the Commission proposed repeal of s 23 and 41 on the ground that the narrowly drawn power, interpreted strictly as it has been by the Court of Criminal Appeal, lacks any real utility.[133] The Crown's right of appeal would suffer the same limitations. It was argued that they should be retained because future judicial interpretation may expand their scope, and given the drawbacks of administrative review noted below, their removal would deny offenders a right to put to the Court the question of falsity of information considered by the Board.[134] However, most submissions agreed with repeal, although the need to preserve a form of administrative review was recognised.[135]

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132. *Sentencing Amendment (Parole) Act 1996* (NSW) Sch 1 [13] and [14] inserting s 34A and 41A into the *Sentencing Act 1989* (NSW). If the Crown makes an application under s 23A within seven days, operation of the parole order is suspended until the application is dealt with or withdrawn: *Sentencing Act 1989* (NSW) s 22L(2) and (3).

133. DP 33 at paras 7.68-7.69. This position has been highlighted in several cases: see *McPherson v Offenders Review Board* (1991) 23 NSWLR 61; *McCamley v Offenders Review Board* (NSW CCA, No 60703/93, 9 February 1994, unreported); *Sneddon v Offenders Review Board* (NSW CCA, No 60297/93, 31 August 1993, unreported); *Seymour v Offenders Review Board* (NSW CCA, No 60250/95, 31 October 1995, unreported); *Offenders Review Board v Cooper* (NSW CCA, No 60271/95, 26 March 1996, unreported); *Field v Offenders Review Board* (NSW CCA No 60155/96, 25 July 1996, unreported).

134. Law Society of NSW, *Submission* (19 July 1996) at 27.

135. N R Cowdery, *Submission* (17 June 1996) at 3, 10; M L Sides and Bar Association, *Submission* (24 June 1996) at 56; Department of Corrective

11.82 The Commission recommends not retaining offenders' rights to appeal in sections 23 and 41. It follows that sections 23A and 41A extending rights to the Crown are of no value and should also be repealed.

Administrative review

Recommendation 70
There should be a right to seek administrative review of a decision of the Parole Board by way of an appeal to the Administrative Law Division of the Supreme Court. Rules of Court should be drawn up to facilitate expeditious and inexpensive access to offenders seeking such review.

11.83 The Parole Board must comply with the rules of natural justice in making its decisions.[136] Should a person who has been refused parole or had a parole order revoked wish to challenge the decision on the grounds that the Board did not comply with those rules, an administrative appeal would lie to the Supreme Court. As the Board can currently be constituted with a serving or retired District Court Judge or retired Supreme Court Judge presiding,[137] the matter would be heard by the Court of Criminal Appeal.[138] The *Sentencing Act 1989* (NSW) requires certain, and the Board adopts other, rigorous procedures in the exercise of its functions so that the opportunity to challenge procedural fairness would be rare.

Services, *Submission* (15 July 1996) at 16; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 21.

136. See DP 33 at para 7.58. See *Baba v Parole Board of New South Wales* (1985) 5 NSWLR 338; *Todd v Parole Board of New South Wales* (1986) 6 NSWLR 71. See also *Johns v Release on Licence Board* (1979) 9 NSWLR 103.

137. But see Recommendation 55 which proposes that a serving Supreme Court Judge should be eligible for appointment.

138. *Supreme Court Act 1970* (NSW) s 48(1)(a)(vii), *Sentencing Act 1989* (NSW) Sch 1 cl 11(5); see *McCamley v Offenders Review Board* at 2 per Hunt CJ at CL.

11.84 The Commission proposed in DP 33 that there should be opportunity for administrative review of the Board's procedures, and for the sake of efficiency, this should be by way of an appeal to the Administrative Law Division of the Supreme Court.[139] Submissions generally were in favour of this proposal.[140] The proposal attracted criticism on grounds both of principle and practicality. Disadvantages of using a civil appeal procedure in relation to the parole process were said to include the costs of filing, awards of costs against an unsuccessful applicant, delay, and a lack of familiarity with the jurisdiction.[141] Objection was also taken to the situation whereby a decision of a Board presided over by a Judge or retired Judge of the Supreme Court would be subject to appeal to a single Judge of the same Court.[142]

11.85 In the absence of review on the merits of Parole Board decisions, access to administrative review is imperative. The Commission recognises the precedent requiring such review to be heard by a court at Supreme Court level when the Chairperson of the Board may be a retired Supreme Court Judge. In practice, a Judge from this Court has not been appointed to the Board. But even if this should occur, it must be remembered that the review would be of the Board's, and not the Judge's, decision. Indeed under our proposal with respect to the powers of the Chairperson, the Judge may not have made the decision. The best use of judicial resources is to be made by the Administrative Law Division hearing such appeals. Rules of Court will need to be drawn up to provide that access to that Division for appeals from a decision of the Parole Board is available, without prejudicial delay, and on the same terms as regards filing fees and costs of proceedings as apply in the Court of Criminal Appeal.

RECONSIDERATION AFTER REFUSAL OF PAROLE

139. DP 33 at para 7.74.
140. N R Cowdery, *Submission* (17 June 1996) at 10; M L Sides and Bar Association, *Submission* (24 June 1996) at 56; Department of Corrective Services, *Submission* (15 July 1996) at 16; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 21; W D T Ward, *Submission* (25 July 1996) at 13; Law Society of NSW, *Submission* (19 July 1996) at 27-28.
141. Law Society of NSW, *Submission* (19 July 1996) at 27; Legal Aid Commission, *Consultation* (7 August 1996).
142. W D T Ward, *Submission* (25 July 1996) at 13.

Recommendation 71
The Parole Board should be empowered to defer consideration of parole for a period of two years after a refusal to make a parole order. The Board should be required to give reasons for any deferral.

11.86 The *Sentencing Act 1989* (NSW) required the Parole Board to reconsider an application for parole from a prisoner within each successive year following a refusal to make a parole order when a prisoner becomes eligible for consideration for release.[143] A similar requirement seemed to apply following revocation of parole, regardless of whether the offender had been apprehended and returned to custody. The Commission proposed some relaxation of each of these requirements, on the grounds that there were certain cases in which the first was needlessly burdensome, and the second seemed in every case unnecessary.

11.87 The *Sentencing Amendment (Parole) Act 1996* (NSW) contains provisions which, in principle, implement the Commission's proposals. The Parole Board may now decline to consider whether to grant parole for up to three years at a time.[144] The Commission proposed deferral for up to two years. The Board is now not required to consider whether to release the person concerned until he or she is returned to the prison system following revocation of the parole order.[145] The first of these powers is not expected to be used frequently,[146] and the second recognises the administrative waste involved in a futile exercise.[147]

11.88 The second power was supported universally in submissions and the Commission unequivocally endorses the changes implemented by the

143. *Sentencing Act 1989* (NSW) s 18(1)(b).
144. *Sentencing Amendment (Parole) Act 1996* (NSW) Sch 1 [4] and [9] inserting s 18(4) and s 22C(4).
145. *Sentencing Amendment (Parole) Act 1996* (NSW) Sch 1 [4] and [9] inserting s 18(3) and s 22C(3).
146. W D T Ward, *Submission* (25 July 1996) at 13-14.
147. Offenders Review Board, *Preliminary Submission* (11 October 1995) at 7; New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 15 May 1996, the Hon J G Shaw QC, Attorney General, Second Reading Speech (*Sentencing Amendment (Parole) Bill 1996*) at 980.

Sentencing Amendment (Parole) Act 1996 (NSW). The first of these powers is more contentious, being criticised as unjust and unnecessary.[148] There is real concern that the likely effect of deferral of parole consideration will be to reduce or thwart the incentive for rehabilitation.[149] However, the Commission is well aware of the anxiety created for some victims when parole is re-considered annually.[150]

11.89 The Commission accepts that the Board is acutely aware of the conflicting priorities operating in relation to this power, and envisages that it will have a very limited operation.[151] Undoubtedly there is potential to dampen significantly the attitude to rehabilitation of a prisoner against whom this power is exercised; as undoubtedly there will be prisoners who must serve several years of their additional term before the Board will make a parole order in their favour. There are other circumstances, for example if a hearing is delayed and occurs some time into the next year, or if the prisoner has indicated that no application for parole will be made, in which case such a power provides for more efficient operation of the Board's business. The Commission accepts that such a power is necessary, but, on balance, recommends that the Board be permitted to defer consideration of parole only for a period of up to two years. The Commission does not expect the Board to use the power often or unjustly. Furthermore, the Board should be required to state in full its reasons when deferring consideration of an application for parole beyond twelve months.

148. M L Sides and Bar Association, *Submission* (24 June 1996) at 56; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 21; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 11; Law Society of NSW, *Submission* (19 July 1996) at 28.
149. Prison Governors, *Consultation* (12 August 1996). See also New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 5 December 1996, Speeches of the Hon R S L Jones at 7017-7018 and the Hon I Cohen at 7018 on the *Sentencing Amendment (Parole) Bill 1996 (No 2)*.
150. Victims Advisory Council, *Submission* (10 July 1996) at 3; Women for Social Justice, *Submission* (29 July 1996) at 4.
151. W D T Ward, *Submission* (25 July 1996) at 13-14.

Supervision in excess of three years

Recommendation 72
Regulations should permit the Parole Board to order a period of supervision longer than three years.

11.90 The Parole Board is currently restricted by Regulation from ordering as a condition of release on parole a period of supervision greater than three years from the date of release.[152] Serious offenders are frequently sentenced to an additional term in excess of three years, and where life sentences have been re-determined under s 13A, an additional term of life can be handed down. It is not uncommon for the sentencing judge to remark that a long period of supervision while on parole is recommended or expected. The Board submitted that it faces a dilemma in cases where it considers that supervision should extend beyond three years.[153]

11.91 The restriction contained in the Regulations is not well known. It recognises the widely held belief that supervision on parole can only be effective for a relatively limited time. The anecdotal evidence is that failure on parole will most likely occur within a relatively short time, and that there are few benefits to be had from supervision extending over a long period of time. The question of resources must also be relevant.

11.92 The public interest in providing for supervision extending beyond three years was accepted in many submissions.[154] However all were concerned that it be exercised only when necessary. The Commission agrees.

152. *Sentencing (General) Regulation 1996* cl 10(4).
153. Offenders Review Board, *Preliminary Submission* (11 October 1995) at 6-7.
154. N R Cowdery, *Submission* (17 June 1996) at 11; M L Sides and Bar Association, *Submission* (24 June 1996) at 57; Department of Corrective Services, *Submission* (15 July 1996) at 16-17; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 21-22; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 11; W D T Ward, *Submission* (25 July 1996) at 14; Victims Advisory Council, *Submission* (10 July 1996) at 4.

11.93 Regulations should be amended to permit the Board to make supervision for more than three years a condition of a parole order. The power should be exercised in accordance with guidelines which include that the prisoner is a "serious offender" as defined by s 59 of the *Correctional Centres Act 1952* (NSW); that the sentencing court has proposed a period of supervision longer than three years, and the Board itself considers that longer supervision is justified; the initial period ordered is three years; and further periods of up to three years can be ordered by the Board following a review of the offender's progress.[155] The Board should be required to state in full its reasons for exercising the power to order supervision beyond three years.

11.94 As the parolee will continue to be subject to revocation for contravening the terms and conditions of the parole order, the purpose of extended supervision must be to provide to those offenders, whose long term incarceration has left them in greater need, an appropriate level of support and assistance so that they can remain law abiding. There is understandable concern that once available, it will be applied to a wider group of offenders than originally intended. The Commission envisages that exercise of the Board's power to order extended supervision will only be necessary in very few instances.

155. See Department of Corrective Services, *Submission* (15 July 1996) at 16-17.

12. CONFERENCING

- THE NATURE OF CONFERENCING
- RESPONSE TO DP 33
- LEGISLATIVE RECOGNITION OF CONFERENCING

THE NATURE OF CONFERENCING

12.1 "Conferencing" describes schemes whereby members of the community become involved in dealing with offenders beyond the normal confines of the criminal justice system. There are many variations of conferencing schemes which have arisen in the past decade; many of them are no more than pilot schemes and are still in a developmental stage.

12.2 Conferencing may occur at one of three stages in the criminal justice system:

- before trial, often as part of a police cautioning power, as a diversion scheme or alternative to prosecution;
- as part of the sentencing process, as an assistance to the court in determining an appropriate sentence; and
- after sentencing, on occasions when victims and offenders desire reconciliation, compensation or some form of future contact.

Submissions on DP 33 considered conferencing schemes as they may occur at any of these stages. The recommendations in this Report relate to conferencing only as part of the sentencing process.

12.3 The Discussion Paper included descriptions of schemes in New South Wales,[1] South Australia,[2] New Zealand,[3] and Canada.[4] Other recent

1. Community Youth Conferences (DP 33 at para 9.84); Community Aid Panels (DP 33 at paras 9.85-9.87); and the Wagga Wagga juvenile cautioning program (DP 33 at paras 9.78-9.82). The Wagga Wagga juvenile cautioning program was terminated in 1994 in favour of the pilot scheme for Community Youth Conferences: See J Bargen, "Kids, Cops, Courts, Conferencing and Children's Rights - A Note on Perspectives" (1996) 2 *Australian Journal of Human Rights* 209 at 220. An evaluation of Community Youth Conferencing in New South Wales was produced in March 1996; it is not for public release but is summarised in New South Wales, Attorney General's Department, *Report of the New South Wales Working Party on Family Group Conferencing and the Juvenile Justice System* (Discussion Paper, September 1996) at 14-17.
2. *Young Offenders Act 1993* (SA): See DP 33 at para 9.83.
3. *Children, Young Persons, and Their Families Act 1989* (NZ): See DP 33 at paras 9.73-9.77.

Australian programs include the Reintegrative Shaming Experiment (RISE) in the Australian Capital Territory;[5] the Cedar Cottage Program, a pre-trial diversion program for child sexual assault offenders in New South Wales which caters for both offenders and their victims;[6] victim-offender mediation in Queensland, originally as a pilot scheme[7] then as a more wide ranging scheme under the Community Justice Program;[8] a non-statutory based scheme, the Juvenile Justice Pilot Project on Group Conferencing, in Victoria;[9] and, in Western Australia, the diversionary conferencing scheme under the *Young Offenders Act 1994* (WA)[10] and mediation between victims and offenders under the *Sentencing Act 1995* (WA).[11] This list is not exhaustive.[12] The New South Wales Government is currently considering a scheme of pre-trial "accountability conferences" involving victims and young offenders.[13]

12.4 There are two general variants of conferencing schemes, namely family group conferences and those involving mediation between offenders and victims. The two groups are not mutually exclusive and many variations occur. For example some schemes involve attendance by victims by

4. Circle sentencing: See DP 33 at paras 9.89-9.91.
5. "Diversionary Conferencing and the Reintegrative Shaming Experiment" (1995) (157) *ACT Law Society Gazette* 41; "Jail Fails, Shaming Tactics Worth Try" *Canberra Times*, 12 June 1995 at 10.
6. Confidential *Submission* (20 June 1996). See also T Vinson, *An Evaluation of the NSW Pre-Trial Diversion of Offenders Program (Child Sexual Assault)* (1992).
7. G R Clarke and I T Davies, "Victim-Offender Mediation in Queensland" (1994) 14 *The Queensland Lawyer* 169.
8. Queensland, Department of Justice and Attorney-General, *An Introduction to Victim-Offender Mediation* (February 1994).
9. Bargen at 225-226.
10. Bargen at 217-219.
11. Sections 27-30.
12. See generally J Hudson, A Morris, G Maxwell, and B Galaway (eds), *Family Group Conferences: Perspectives on Policy and Practice* (Federation Press, Sydney, 1996), which describes family group conferencing schemes in New Zealand, South Australia, Victoria, England and Wales, Canada and the United States.
13. See New South Wales, Attorney General's Department, *Report of the New South Wales Working Party on Family Group Conferencing and the Juvenile Justice System* (Discussion Paper, September 1996); R Morris, "Face-to face Apology" *Daily Telegraph Mirror*, 18 October 1996 at 3.

themselves (as in New Zealand), with a supporter (as in South Australia) or a number of supporters (as in Wagga Wagga and Canada), while others make no provision for attendance by victims (as in the case of Community Aid Panels). Most schemes provide for attendance by supporters of the offender, although Community Aid Panels only allow for this with respect to families of juvenile offenders. Most schemes provide for juveniles only, although some do allow for adult offenders (as in Canada and Community Aid Panels).[14]

12.5 Of the schemes examined in the Discussion Paper, only New Zealand and South Australia have a legislative base (both at the cautioning and sentencing levels), while the Wagga Wagga scheme was based on the police power of cautioning and Community Aid Panels and Canadian circle sentencing are allowed by the courts as part of the sentencing process.

12.6 There are a number of important and positive aspects of conferencing schemes. One of the most positive is their potential to allow greater participation by victims than is traditionally allowed by the criminal justice system. Victim empowerment comes from the opportunity for victims to confront offenders with their account of the impact of the crime, as well as the possibility of reparation and reconciliation. Other positive aspects include that offenders are confronted with an account of the consequences of their action and can take an active role in doing something to make amends. Such an approach is not traditionally available in the criminal justice system.[15]

12.7 Criticisms of conferencing schemes[16] arise largely because of concerns that procedural safeguards and rights which are available under the traditional criminal justice system may not be available under the alternative schemes, which may also be less open to scrutiny, accountability and review. An identifiable and effective community to support both victims and offenders is also considered necessary in most cases for there to be an effective outcome.

RESPONSE TO DP 33

14. See DP 33 at paras 9.65-9.95.
15. See DP 33 at para 9.92.
16. See DP 33 at para 9.93.

12.8 In DP 33, the Commission saw advantages in the greater use of conferencing as an alternative or adjunct to more traditional procedures within the criminal justice system. We therefore invited submissions on how conferencing schemes could be employed to best effect in New South Wales.

12.9 Submissions which considered conferencing generally supported the concept.[17] However, they proposed a variety of approaches depending on their view of the aims of conferencing and its most appropriate form.

12.10 Most submissions supported a focus on both victims and offenders,[18] although some supported a greater focus on offenders, but not to the exclusion of victims.[19] One submission saw the aim of conferencing as being to address victims' needs and victims' losses.[20]

12.11 Regarding the stages of the criminal justice system at which conferencing should be available, some submissions suggested that it should be available at all stages,[21] others suggested that it should be available as a sentencing option.[22] Of those who approved of conferencing as part of a pre-trial diversion scheme, some specifically stated that it should only be available for minor offences.[23]

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17. Although one submission expressed extreme reservations about the utility of conferencing: Confidential, *Submission* (22 May 1996) at 38.
18. M L Sides and Bar Association, *Submission* (24 June 1996) at 66; Victims Advisory Council, *Submission* (10 July 1996); Law Society of NSW, *Submission* (19 July 1996) at 38; Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 6.
19. Youth Justice Coalition, *Submission* (19 June 1996) at 2; N J H Milson, *Submission* (3 July 1996) at 10.
20. D Blakemore, *Submission* (26 June 1996) at 18.
21. Victims Advisory Council, *Submission* (10 July 1996) at 5; Law Society of NSW, *Submission* (19 July 1996) at 39; M L Sides and Bar Association, *Submission* (24 June 1996) at 66-67.
22. For example, as part of the sentencing options under s 33 of the *Children (Criminal Proceedings) Act 1987* (NSW); Youth Justice Coalition, *Submission* (19 June 1996) at 2; as a voluntary non-custodial option: NSW Council for Civil Liberties, *Submission* (28 June 1996) at 5 and Justice Action, *Submission* (2 July 1996) at 5; or as part of a case management option for prisoners subject to parole: Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 6.
23. Law Society of NSW, *Submission* (19 July 1996) at 39; Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 6.

12.12 It was the opinion of most submissions that conferencing, at least at the post-conviction stage, should be available for consideration in relation to all offenders and offence categories,[24] in one case including crimes without direct third party victims such as drug possession and dangerous driving offences.[25] One submission proposed that conferencing be available for repeat or serious young offenders as opposed to first or second offenders who were unlikely to re-offend, but specifically excepted sexual assault and domestic violence offences.[26] Another submission proposed that conferencing be available only with respect to first and second offences of non-violence.[27] Yet another suggested that eligibility for conferencing should not be based too rigidly on criminal history as some offenders who would otherwise benefit, such as Aborigines, may not be able to take part.[28]

12.13 With respect to other criteria for reference to conferencing, a number of submissions agreed that consent was required from at least some of the parties to the proceedings, including victims, offenders and prosecutors.[29] An admission of guilt by the offender was also considered necessary.[30] Suggested safeguards included that consent to participate should only be given after an opportunity to obtain proper legal advice;[31] that material disclosed during conferencing cannot be made public or used at a subsequent trial;[32] that there

24. Law Society of NSW, *Submission* (19 July 1996) at 39; Probation and Parole Officers' Association NSW, *Submission* (31 July 1996) at 6; M L Sides and Bar Association, *Submission* (24 June 1996) at 67; N J H Milson, *Submission* (3 July 1996) at 10.
25. Law Society of NSW, *Submission* (19 July 1996) at 39.
26. Youth Justice Coalition, *Submission* (19 June 1996) at 2.
27. Victims Advisory Council, *Submission* (10 July 1996) at 5.
28. M Dodson, *Submission* (26 June 1996) at 4.
29. Youth Justice Coalition, *Submission* (19 June 1996) at 2 (offender); N J H Milson, *Submission* (3 July 1996) at 10 (prosecution and defence); Law Society of NSW, *Submission* (19 July 1996) at 39 (victim and offender).
30. Youth Justice Coalition, *Submission* (19 June 1996) at 2; Victims Advisory Council, *Submission* (10 July 1996).
31. Law Society of NSW, *Submission* (19 July 1996) at 40; Youth Justice Coalition, *Submission* (19 June 1996) at 2.
32. Youth Justice Coalition, *Submission* (19 June 1996) at 3; M L Sides and Bar Association, *Submission* (24 June 1996) at 67.

should be clear provisions to prevent double jeopardy and abuse of process;[33] and that conferencing should be court referred.[34]

12.14 Most submissions agreed that both victims and offenders should be present at conferencing sessions with various numbers of supporters for both,[35] with one submission urging an appropriately wide definition of family and community with respect to Aboriginal offenders.[36] Several sought specifically to exclude police[37] and lawyers[38] from the process itself, although one submission considered that police could have a greater role in conferencing at the pre-trial cautioning stage[39] and another argued that a police presence was necessary so that participants felt physically safe.[40] The Law Society, while supporting the general concept of conferencing with respect to all offences and all offenders, strongly submitted that the courts should be careful to screen out those who might not be appropriate:

> Victims or offenders who are ill-equipped for such a process (eg victims who are only concerned with vengeance, or offenders who can only see themselves as a victim and not an offender) may not benefit from this process. Conferencing will be particularly difficult for people without good verbal skills, due to language, educational, personality or intellectual difficulties or who are lacking in family or community support.[41]

33. Law Society of NSW, *Submission* (19 July 1996) at 40.
34. N J H Milson, *Submission* (3 July 1996) at 10; Youth Justice Coalition, *Submission* (19 June 1996) at 2; Law Society of NSW, *Submission* (19 July 1996) at 39.
35. Law Society of NSW, *Submission* (19 July 1996) at 40; Youth Justice Coalition, *Submission* (19 June 1996) at 3; M L Sides and Bar Association, *Submission* (24 June 1996) at 68; N J H Milson, *Submission* (3 July 1996) at 10.
36. M Dodson, *Submission* (26 June 1996) at 4.
37. M L Sides and Bar Association, *Submission* (24 June 1996) at 68; Law Society of NSW, *Submission* (19 July 1996) at 40.
38. Law Society of NSW, *Submission* (19 July 1996) at 40; N J H Milson, *Submission* (3 July 1996) at 10.
39. Youth Justice Coalition, *Submission* (19 June 1996) at 3.
40. Police Service, Human Resources Command, Conflict Management, *Consultation* (25 June 1996).
41. Law Society of NSW, *Submission* (19 July 1996) at 38-39.

12.15 Opinion was divided as to what sentencing options should be available to a conference, ranging from all options available at law,[42] to all non-custodial orders,[43] and to a disposition which should not be regarded as a "sentence".[44] Three submissions felt that in at least some instances a sentencing outcome should be recommended back to the referring court.[45] There was also general support for legislative recognition of conferencing.[46]

12.16 Several submissions advocated the involvement of peer community organisations, as opposed to organisations traditionally associated with the criminal justice system or government welfare.[47] Others suggested that some form of specialist agency be set up to administer conferencing in New South Wales.[48] This agency was generally seen as needing to be quite separate from the traditional criminal justice and government welfare agencies. One submission suggested that an existing agency might administer conferencing schemes.[49]

12.17 One submission, which highlighted two schemes - the Traffic Offenders Program which is run by a number of volunteers at the direction of ambulance officers, and Community Aid Panels - stated that they were generally regarded as very successful programs "largely because of their informal and community-based structure".[50] Legislative provisions were

42. M L Sides and Bar Association, *Submission* (24 June 1996) at 68; Law Society of NSW, *Submission* (19 July 1996) at 40.
43. Youth Justice Coalition, *Submission* (19 June 1996) at 3.
44. N J H Milson, *Submission* (3 July 1996) at 10.
45. M L Sides and Bar Association, *Submission* (24 June 1996) at 68; N J H Milson, *Submission* (3 July 1996) at 10; Law Society of NSW, *Submission* (19 July 1996) at 40.
46. Youth Justice Coalition, *Submission* (19 June 1996) at 3; M L Sides and Bar Association, *Submission* (24 June 1996) at 68-69; Victims Advisory Council, *Submission* (10 July 1996) at 5; Law Society of NSW, *Submission* (19 July 1996) at 40.
47. NSW Council for Civil Liberties, *Submission* (28 June 1996) at 5; Justice Action, *Submission* (2 July 1996) at 5; Victims Rights and Civil Rights Project, *Submission* (19 July 1996) at 8.
48. Youth Justice Coalition, *Submission* (19 June 1996) at 4; M L Sides and Bar Association, *Submission* (24 June 1996) at 69; N J H Milson, *Submission* (3 July 1996) at 10.
49. Namely, the court, the Probation and Parole Service or the Department of Juvenile Justice: Law Society of NSW, *Submission* (19 July 1996) at 40.
50. N J H Milson, *Submission* (3 July 1996) at 10.

proposed which could provide some appropriate framework for the operation of the various schemes, in the particular context of the Local Courts:

> Approved Activities
> 1. For the purposes of this Part an approved activity means any one or combination of the following:
> (a) a course of education, training or counselling supervised in a manner approved by the court.
> (b) an unpaid activity which is for the benefit of the community,
> (c) Acts approved by the court relating to reparation or compensation to a person aggrieved by the commission of an offence.
>
> 2. (1) Notwithstanding the provisions of s 78(2) of the Justices Act 1901, where a person is charged before a court with an offence punishable by such court, and the person admits the truth of the information, the court may, with the consent of the prosecutor and the person direct the person to participate in an approved activity.
>
> (2) The court may adjourn the proceedings from time to time for the completion of the approved activity and make such orders for bail as it sees fit.
>
> 3. (1) Where a court is satisfied that a person has participated in an approved activity, the court may
> (a) without finding the offence proved, dismiss the information, or
> (b) find the offence proved and proceed according to law. In fixing any penalty the court shall take into account any approved activity in which the person has participated.
>
> (2) A court may satisfy itself as to a person's participation in an approved activity by any means it considers appropriate.
>
> 4. Where a person does not satisfactorily complete an approved activity directed by the court, the court may deal with the person according to s 78(2) of the Justices Act.[51]

12.18 Similarly, it was suggested during a consultation that the courts could grant an adjournment in the nature of a Griffiths bond[52] to allow conferencing to take place and then be informed of the outcome and sentence accordingly. Such a scheme could be sanctioned by a broad legislative power which does not specify what form the conferencing is to take, but which includes

51. N J H Milson, *Submission* (3 July 1996) at Appendix 2.
52. See paras 4.10-4.12.

necessary procedural protections. The adjournment in such instances would not, of course, be restricted to situations where a non-custodial option is being contemplated, as is the case with Griffiths bonds.[53]

LEGISLATIVE RECOGNITION OF CONFERENCING

Recommendation 73
Legislation should give courts the discretion to defer determining a sentence pending the referral of the matter to a conference.

12.19 The Commission recommends that legislation should allow a court to adjourn a proceeding before sentence in order to refer the matter to a conference. The adjournment would be similar to a Griffiths bond, but would be different in as much as the offender may still be detained in custody during the period of the adjournment. Conferencing could still be conducted, although with some difficulty, despite the offender not being at liberty. The Commission makes no recommendation concerning conferencing before trial or after sentencing.

12.20 The Commission has decided not to specify any particular type of conferencing scheme, because it considers that such schemes will vary according to circumstances and should, therefore, be allowed to evolve over time and take forms suited to different contexts without unnecessary legislative constraint.

12.21 Such a legislative arrangement, as recommended, will have the benefit of providing a clear power to the courts to make references to conferencing and to supervise the outcomes of the process. It will also allow individual conferencing schemes the flexibility to develop, improve and meet the needs of victims, offenders and communities without the constraint which would come from the legislative sanctioning of any particular conferencing schemes. This approach also allows the courts to consider the suitability of individual offenders and different offences for the particular schemes which may be available. The results of any conference would then be reported back

53. Academic Forum, *Consultation* (2 August 1996).

to the referring court to be taken into consideration by that court in its discretion to fix an appropriate penalty for the offence.

Legislative safeguards

12.22 Besides recommending that a legislative base be provided to allow for the development of conferencing schemes, the Commission considers it is essential to build certain procedural safeguards into the proposed legislative scheme, in accordance with some of the suggestions already discussed.

Consent of participants

Recommendation 74
Where participation of a victim is a component of a conference, the victim must freely consent to taking part in the proceedings, although refusal to take part need not prevent the proceedings taking place.

Recommendation 75
An offender must freely consent to taking part in any conference.

12.23 As already noted, several submissions referred to the necessity for victims to be able to choose whether or not to take part in any form of conferencing. In proposing a system of victim-offender mediation, the Northern Territory Law Reform Committee has recently recommended that victims must "freely consent" to taking part in the mediation process.[54] The Committee has not restricted the categories of offence for which conferencing is available, but rather has specified a number of determinants of what cases are appropriate for mediation, including victim consent.[55] While it is unlikely that orders would be made coercing victims to take part, provisions requiring free consent should be made to emphasise the necessity for participants in the process to be willing to participate. While it can be argued that even unwilling participants may ultimately benefit from taking part in the process, the Commission does not consider that people should be compelled (either expressly or impliedly) to take part in such procedures. For the same reasons the Commission also recommends that the offender must freely consent to taking part in any procedure. However, the failure of a victim to agree to participate, should not necessarily prevent a conference taking place. The procedure may still be of benefit to an offender even in absence of the victim or the victim's supporters, in as much as the offender

54. Northern Territory Law Reform Committee, *Mediation and the Criminal Justice System* (Report 17A, 1996) at 19.
55. Northern Territory Law Reform Committee, *Mediation and the Criminal Justice System* (Report 17A, 1996) at 23-24.

may still be able to accept responsibility for the offending behaviour or perhaps strengthen his or her own community links.

Legal advice for offenders

Recommendation 76
An offender must have the opportunity to seek and receive proper legal advice before consenting to take part in a conference.

12.24 To ensure that an offender's consent is free, the offender must be properly informed of the consequences of taking part in a court referred pre-sentencing scheme. Accordingly, an offender must have the opportunity of seeking and receiving proper legal advice before he or she consents to taking part. Legal advice may also be necessary given the requirement that an offender admit guilt before being eligible for such a scheme.

Admission of guilt

Recommendation 77
An offender must admit guilt before being able to take part in a conference.

12.25 As already noted, some submissions suggested that an offender must admit guilt before being able to take part in any conferencing scheme.[56] An admission of guilt should not, however, be confused with an acceptance of responsibility by an offender which may only come about during the conference itself. One benefit of conferencing is that it assists offenders to come to accept responsibility for their offending behaviour. This is different from an admission of guilt, which the Commission considers is necessary so that a conferencing procedure is not used as a vehicle for an offender to deny

56. See para 12.13.

the finding of the court.[57] The Commission accordingly recommends that court referred schemes should only be available for offenders who acknowledge the court's finding that the offence has been proved.

Prohibition on publication of proceedings

Recommendation 78
There should be a prohibition on the publication of proceedings of any conference, and any disclosures made during such proceedings should be inadmissible in any judicial or quasi-judicial proceedings other than the sentencing hearing to which it relates.

12.26 The Commission considers that confidentiality should attach to conferences. This is necessary to ensure complete candour during a conference which is desirable for the conference to be most effective. In the course of a conference strong emotions may be generated, information of a personal nature may be disclosed, and parties may not have immediate access to legal advice. Parties need to be protected against consequences that arise from disclosures made in these circumstances.

12.27 The form of protection provided in other legislative schemes varies. Both Western Australia and South Australia provide only that proceedings of such schemes shall not be published in any way so as to identify the young offender who takes part.[58] The Commission prefers the New Zealand model which prohibits publication of proceedings[59] but also provides that:

57. The Northern Territory Law Reform Committee recommends that a mediation should "not become a process whereby the offender can prove why he or she is not responsible for the offence": Northern Territory Law Reform Committee, *Mediation and the Criminal Justice System* (Report 17A, 1996) at 19.
58. *Young Offenders Act 1993* (SA) s 13; and *Young Offenders Act 1994* (WA) s 40.
59. *Children, Young Persons and Their Families Act 1989* (NZ) s 38, adopted by s 271.

> No evidence shall be admissible in any Court, or before any person acting judicially, of any information, statement, or admission disclosed or made in the course of a family group conference.[60]

We, therefore, recommend that there should be a prohibition on the publication of proceedings of any conference, and any disclosures made during such proceedings should be inadmissible in any judicial or quasi-judicial proceedings other than the sentencing hearing to which they relate.

60. *Children, Young Persons and Their Families Act 1989* (NZ) s 37(1), adopted by s 271.

13. MATTERS ANCILLARY TO SENTENCING

- REPARATION ORDERS
- CONFISCATION ORDERS

REPARATION ORDERS

13.1 Reparation orders fall into two categories:

- orders for restitution; and
- orders for compensation.

13.2 In DP 33 the Commission expressed the view that, while such orders could be said to be consistent with the traditional aims of sentencing and could also take into account some of the interests of victims of crime, reparation was not, of itself, an aim of sentencing and reparation orders were merely ancillary to the sentencing process.[1] The Commission reaffirms this view.

Restitution

Recommendation 79
Section 438 of the *Crimes Act 1900* (NSW) should be amended to clarify the power of Local Courts to make restitution orders.

Recommendation 80
Section 438 of the *Crimes Act 1900* (NSW) should be amended to give the courts power to order the return of property to its rightful owner at the completion of the proceedings regardless of conviction.

13.3 At its simplest level, restitution involves the restoration of an item of property to its rightful owner. Section 438 of the *Crimes Act 1900* (NSW) permits a court to order the restitution to its owner of property stolen, embezzled or received by an offender in contravention of the *Crimes Act*.

1. DP 33 at paras 3.21 and 10.27-10.30.

Under s 438(2) the court has the discretion to order restitution even where a person indicted for an offence has been acquitted.

13.4 There are two issues in respect of s 438. First, it is ambiguous in that it might not extend to Local Courts the power to order restitution in cases of acquittal because of the requirement that the offender be "indicted". Secondly, the section does not entirely cover all circumstances where the accused person in possession of the property belonging to another is acquitted, discharged, or the charge against the person was dismissed. In DP 33 the Commission invited submissions on a suggestion that the section be amended to overcome these problems by requiring only that charges be laid against the offender for the provision to have effect, and giving the courts broader powers to order the return of stolen property.[2]

13.5 Some submissions were generally in support of amending s 438 to clarify the position of the Local Courts.[3] The Law Society endorsed the draft proposal. However, it noted that s 438 does not belong in the *Crimes Act 1900* (NSW) and, recognising the need for courts to be able to restore property to its rightful owner, suggested the provision would be more appropriately placed in the *Criminal Procedure Act 1986* (NSW) with the provisions in Part 11, which allow a court to order the return of property in police custody to its rightful owner. It also proposed that enforcement should be by a process similar to that provided for in Part 11 of the *Criminal Procedure Act 1986* (NSW).[4]

13.6 The Senior Public Defender supported the existing s 438 as "a speedy and effective means of ensuring that the property is returned to its owner" but noted the undesirability of giving the courts power to make restitution orders before a trial or hearing is complete, considering it more appropriate that legislation should permit the making of restitution orders "after the hearing on the question of guilt is completed". However, he also suggested that a

2. DP 33 at para 10.33 citing D Lanham, "Restitution Orders" (1986) 10 *Criminal Law Journal* 394 at 408.
3. Confidential, *Submission* (22 May 1996) at 40; W D T Ward, *Submission* (25 July 1996) at 19.
4. Law Society of NSW, *Submission* (19 July 1996) at 44. Other proposals with respect to enforcement included that a higher penalty be imposed on those who fail to carry out an order: Confidential, *Submission* (22 May 1996); and retention of the current enforcement mechanisms: W D T Ward, *Submission* (25 July 1996) at 19.

return of property by consent of an accused before trial could be appropriate.[5] One other submission also expressed concern about the extremely wide discretion which would be given to the courts by such an amendment.[6]

13.7 The Commission has decided, on balance, to recommend that the power of Local Courts to make restitution orders should be clarified. The Commission has also concluded that the powers of the courts to order the return of property, currently contained in s 438 of the *Crimes Act 1900* (NSW) should be broadened. The draft provision included in the Discussion Paper adopted the commencement of proceedings as the trigger for the courts' power to order restitution. In light of the concerns raised in submissions, yet balancing these with the need for some simple and inexpensive means for rightful owners to recover their property, the Commission recommends that the powers of courts to order restitution be limited to the conclusion of the criminal proceedings relating to the property in question.

Compensation

13.8 Compensation, for the purposes of this Chapter, involves the payment by an offender to a victim of an amount in "compensation for any injury or loss sustained through, or by reason of, the offence" or certain other offences taken into account at sentencing.[7] DP 33 dealt with Part 6 of the *Victims Compensation Act 1987* (NSW) which divides orders for compensation into two categories, namely major offences and minor offences. This division has led to a significant problem in the area of enforcement which was identified by DP 33[8] in that directions for compensation for major offences are enforced by civil means, whereas directions for compensation for minor offences are enforced in accordance with the *Justices Act 1902* (NSW) which allows for the possibility that a person may be committed to prison for failure to pay in accordance with the terms of the order.[9] The Commission therefore proposed that the current provisions for enforcement of compensation orders concerning minor offences in s 65 should be repealed and that the provisions

5. M L Sides and Bar Association, *Submission* (24 June 1996) at 72-73.
6. NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 29.
7. *Victims Compensation Act 1987* (NSW) s 53; *Victims Compensation Act 1996* (NSW) s 71.
8. DP 33 at para 10.41.
9. *Justices Act 1902* (NSW) s 87(1) and (2).

for enforcement of major offences in s 57 be extended to cover minor offences.

13.9 The *Victims Compensation Act 1996* (NSW), which was assented to on 2 December 1996, will repeal the *Victims Compensation Act 1987* (NSW), and will eliminate the distinction between major and minor offences, treating them as one category. The procedure for enforcement of an order for compensation is outlined in s 75 of the 1996 Act. A sum which has been ordered to be paid is treated as a civil judgment. Imprisonment is not a final sanction for failure to pay.

13.10 The 1996 Act makes broadly the same provisions as those relating to major offences under the 1987 Act. Upon conviction of an offender, a court, may, on its own motion, or on application by a victim who has suffered injury or loss or a member of the immediate family of a person whose death has been caused, direct that a sum not exceeding $50,000 be paid out of the property of the offender to any aggrieved person or persons by way of compensation.[10]

13.11 Section 73 of the 1996 Act lists the factors which are to be taken into account in determining what sum should be paid in compensation:

> (a) any behaviour (including past criminal activity), condition, attitude or disposition of the aggrieved person which directly or indirectly contributed to the injury or loss sustained by the aggrieved person,
> (b) any amount which has been paid to the aggrieved person or which the aggrieved person is entitled to be paid by way of damages awarded in civil proceedings in respect of substantially the same facts as those on which the offender was convicted, and
> (c) such other matters as it considers relevant.

13.12 The Commission supports the provisions outlined in s 70-77 of the *Victims Compensation Act 1996* (NSW) in so far as they deal with the concerns addressed by Proposal 35 in the Discussion Paper.[11]

Offender's ability to pay

10. *Victims Compensation Act 1996* (NSW) s 71.
11. See para 13.8; DP 33 at para 10.41.

13.13 Particular importance is attached to considering an offender's ability to pay in cases of compensation to victims in order to achieve full justice between victims and offenders. Full justice may not be achieved because, if such factors are not considered, it will become a completely random matter whether a victim is paid or not.[12] In addition, with respect to individual offenders, an order for an inappropriate amount of compensation might impede their rehabilitation.[13]

13.14 In New South Wales there is no specific requirement that courts consider an offender's ability to pay, yet there is a trend towards the mandating of such considerations in other jurisdictions.[14] The Commission has concluded that the requirement in s 73 of the *Victims Compensation Act 1996* (NSW)[15] that, in determining whether or not to give a direction for compensation and in determining the amount to be paid, a court should have regard to "such other matters as it considers relevant" is sufficient to allow consideration, in appropriate cases, of an offender's ability to pay.

CONFISCATION ORDERS

13.15 DP 33 considered the rationale and effect of confiscation orders under the *Confiscation of Proceeds of Crime Act 1989* (NSW). While most of the issues raised by this legislation fall outside the scope of our reference, confiscation has an ancillary effect upon sentencing, and does raise some issues that are relevant to this Report. We consider, first, the identification of the appropriate role for confiscation orders in the sentencing process; and secondly, partial forfeiture orders.

Relationship to sentencing

12. D R Miers, *Compensation for Criminal Injuries* (Butterworths, London, 1990) at 320.
13. D Lanham, "Criminal Fraud and Compensation Orders" (1986) 10 *Criminal Law Journal* 297 at 313.
14. See *Criminal Justice Act 1972* (Eng) s 1; *Powers of Criminal Courts Act 1973* (Eng) s 35; *Sentencing Act 1991* (Vic) s 86(2); *Criminal Law (Sentencing) Act 1988* (SA) s 13; *Sentencing Act 1995* (WA) s 112(3).
15. Formerly s 55 of the *Victims Compensation Act 1987* (NSW).

13.16 The Discussion Paper raised the issue whether confiscation orders should be seen as part of the sentencing process, or as a civil sanction ancillary to sentencing. The various jurisdictions in Australia and overseas have taken differing views of the issue. In Victoria, a form of integration of confiscation and sentencing has taken place. Section 5(2A) of the *Sentencing Act 1991* (Vic) allows the court to have regard to forfeiture and pecuniary penalty orders when considering sentencing, but only in cases where the forfeiture relates to property used in connection with the commission of the offence,[16] or the pecuniary penalty order relates to benefits in excess of profits derived from the offence.[17] Judicial consideration of confiscation cases in Victoria has been supportive of some form of integration of confiscation and sentencing.[18] The *Proceeds of Crime Act 1987* (Cth), and legislation in several other State jurisdictions,[19] specifically permit the gravity of the offence to be taken into account when considering confiscation. Other jurisdictions leave the question open. New South Wales is the only State explicitly to provide that, in considering the hardship likely to arise for a person convicted of a serious offence, the sentence received is not relevant to the hardship caused by forfeiture.[20]

13.17 The Commission is of the view that sentencing and confiscation are different processes. Confiscation orders are designed to eliminate the ability of offenders to derive benefit from their criminal ventures; as such, forfeiture and pecuniary penalty orders should not be viewed as punitive measures. It is difficult to see how confiscation serves the traditional objectives of punishment, especially when it is considered that the sum of confiscation is determined in relation to property used and acquired in connection with the offence, and not with any retributive or rehabilitative concern.

16. *Sentencing Act 1991* (Vic) s 5(2A)(b).
17. *Sentencing Act 1991* (Vic) s 5(2A)(d).
18. See *R v Allen* (1989) 41 A Crim R 51; *R v Winand* (1994) 73 A Crim R 497; *DPP v Nieves* [1992] 1 VR 257. See also *Crimes (Confiscation of Profits) Act 1986* (Vic) s 5(3), which allows for the passing of sentence to be deferred subject to confiscation proceedings.
19. *Proceeds of Crime Act 1987* (Cth) s 19(4); *Proceeds of Crime Act 1991* (ACT) s 19(4); *Crimes (Confiscation) Act 1991* (Qld) s 23(3).
20. *Confiscation of Proceeds of Crime Act 1989* (NSW) s 18(2).

13.18 Submissions on this issue were generally in favour of keeping sentencing and confiscation separate.[21] Two submissions agreed in stating that confiscation and sentencing should be kept totally separate,[22] but one suggested that the prosecution be required to indicate at the time of sentencing whether confiscation orders will be sought.[23] The rationale of this suggestion is fairness to offenders, by alerting them to ancillary orders which may be pending and not to introduce a mitigating factor in sentencing. The prosecution's failure to indicate that confiscation orders will be sought will not prevent an application for such orders in the future if, for example, new evidence were to arise as to tainted property. The onus will, however, be on the prosecution to show why the action should now proceed.[24] In the Commission's view, while it is generally desirable that the prosecution should indicate that the Crown will seek confiscation orders where this is known at the time of sentencing, there should not be a legislative requirement to this effect.

Partial forfeiture

Recommendation 81
The *Confiscation of Proceeds of Crime Act 1989* (NSW) should be amended to allow for partial forfeiture.

13.19 The *Confiscation of Proceeds of Crime Act 1989* (NSW) has been strongly criticised for its "draconian" effects.[25] While most of the reasons for

21. NSW Council for Civil Liberties, *Submission* (28 June 1996) at 6 suggested that confiscation, compensation and restitution all be integrated into the sentencing process.
22. Law Society of NSW, *Submission* (19 July 1996) at 44-45; N R Cowdery, *Submission* (17 June 1996) at 15-16.
23. Law Society of NSW, *Submission* (19 July 1996) at 44-45.
24. Note also that s 13(3) of the *Confiscation of Proceeds of Crime Act 1989* (NSW) requires that the application be made before the end of the relevant period in relation to the conviction.
25. *R v Galek* (1993) 70 A Crim R 252; *R v Bolger* (1989) 16 NSWLR 115; *DPP v Milienou* (1991) 22 NSWLR 497.

this relate to the wide reach of the legislation,[26] the Commission considers that some reform of the types of orders available would curb some of the legislation's potentially harsh effects.

13.20 Confiscation legislation allows for two kinds of confiscation orders:

- a pecuniary penalty order, which is a financial sanction calculated by reference to the benefits derived from criminal actions; and

- a forfeiture order, which allows the court to forfeit to the State property deemed to be tainted.[27]

These orders are sought independently of the sentencing process by appropriate officers.[28]

13.21 A major difficulty with the legislation is that forfeiture orders operate on an "all or nothing" basis. This was a significant reason for the decision in *R v Bolger*,[29] where it was considered appropriate for some degree of forfeiture to occur, but where it was considered that the confiscation of the entire interest in the property would amount to unjust hardship in all the circumstances of the case.[30]

13.22 In DP 33, the Commission proposed that the *Confiscation of Proceeds of Crime Act 1989* (NSW) allow for partial confiscation orders, to provide for a balance between the need to confiscate proceeds of crime and to

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26. Particularly due to the definition of "tainted property," which includes any property used in, or in connection with, the commission of the offence, and also including property realised or derived, directly or indirectly, in connection with or as a result of the offence. See *Confiscation of Proceeds of Crime Act 1989* (NSW) s 4(1); *R v Hadad* (1989) 16 NSWLR 476; *DPP v Milienou* (1991) 22 NSWLR 489. The broad definition has also contributed to vagueness about the aim of the legislation, it being unclear whether the Act is meant to apply just to "profit" or to benefits, proceeds or any item related to an offence.
27. Restraining orders are also available under s 43 of the Act, but as these usually have effect at the pre-trial or trial stages, they have little relevance to sentencing.
28. Usually the DPP or, in drug cases, the NSW Crime Commission.
29. *R v Bolger* (1989) 16 NSWLR 115 especially at 124.
30. *R v Bolger* at 126-127. See also *R v Galek* (1993) 70 A Crim R 252 per Hunt CJ at CL.

allow for a flexible system that will prevent excessive hardship which would be disproportionate to the circumstances of the case.[31] This would remedy the present position, where, because of the "horrendous hardship" caused by full forfeiture, courts have been obliged not to allow forfeiture orders where arguably they would have been desirable and in the interests of the goals of the legislation. All the submissions received which considered this proposal were in favour of partial forfeiture.[32] Accordingly, we recommend that the *Confiscation of Proceeds of Crime Act 1989* (NSW) be amended to allow for the making of partial confiscation orders.

31. DP 33 at paras 10.56-10.57.
32. NSW Council for Civil Liberties, *Submission* (28 June 1996) at 5; M L Sides and Bar Association, *Submission* (24 June 1996) at 73; N R Cowdery, *Submission* (17 June 1996) at 15; Law Society of NSW, *Submission* (19 July 1996) at 45; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 18; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 29.

14. CONSOLIDATION OF SENTENCING LEGISLATION

- CONSOLIDATION OF SENTENCING LAW
- THE RATIONALE OF SENTENCING
- INCORPORATION OF COMMON LAW PRINCIPLES
- ABOLITION OF ARCHAIC CONCEPTS AND TERMINOLOGY

14.1 The Commission's terms of reference require consideration of the "rationalisation and consolidation of current sentencing provisions".[1] This Chapter addresses four questions:

- Should existing statutory provisions be consolidated?
- Should the consolidation state the purposes of punishment?
- Which, if any, common law principles should be incorporated in any consolidated statute (or statutes)?
- Should archaic concepts and terminology be abolished?

CONSOLIDATION OF SENTENCING LAW

Recommendation 82
Statutory provisions relating to sentencing should be consolidated.

Recommendation 83
Statutory provisions relating to sentencing should be consolidated in two separate statutes, a Sentencing Act and a Sentencing Administration Act.

Recommendation 84
Procedural provisions should be removed from the *Crimes Act 1900* (NSW) and placed in the *Criminal Procedure Act 1986* (NSW).

14.2 Sentencing is based on a mosaic of common law and statute containing principles relating to punishment, the prescription of penalties, and the regulation of procedural aspects of punishment, both custodial and non-custodial. The recent proliferation of legislation[2] has exacerbated the difficulties which already exist. The Commission identifies the problems created by the diverse sources of sentencing law as:

- failure to provide easily accessible reference to the statutory provisions relating to the principles and procedures of sentencing; and
- the consequent risk of error in sentencing decisions.[3]

14.3 To overcome these problems, the Commission proposed in DP 33 that existing statutory provisions relating to sentencing in New South Wales should be brought together into a consolidated form. Legislatures in most Australian jurisdictions have recently adopted consolidated legislation.[4] Submissions strongly supported the proposal in principle.[5]

14.4 It must be emphasised that the consolidation recommended by the Commission is no more than that. The purpose is to collect in an easily accessible legislative form all existing provisions relevant to sentencing. Codification is not proposed. Indeed, the Commission specifically rejects this. The common law principles relating to sentencing remain.

14.5 As to the form of the consolidation, the Commission recommends that there be two statutes, one dealing with sentencing principles and policy, the other dealing with administration of sentences. This follows the Western Australian model of consolidation. It distinguishes all matters relevant to the determination of a sentence and the making of a parole order, which are judicial and quasi-judicial functions respectively, from administration of sentences by the appropriate arm of the executive government. Though it was argued a single statute (but with distinct parts dealing with law and administration) may facilitate subsequent amendment,[6] the Commission's proposal drew no other opposition. Indeed, the Department charged with administration of sentencing options other than fines asserted one act would be unworkable.[7]

14.6 Provisionally, the Commission proposes the arrangement of existing legislation between the two statutes should be as presented in Table 1. The following considerations apply to the Table:

- Provisions relating to enforcement of sentences are included in the sentencing administration category.

- Provisions are listed notwithstanding the Commission recommends their amendment or repeal in this Report.

- Provisions in any Bills currently before Parliament or unproclaimed Acts referred to in this Report are not included.[8]

- Provisions dealing with definitions and objects will need to be allocated as appropriate.

- The position relating to fines remains to be resolved in light of the *Fines Act 1996* (NSW).[9]

- Provisions regarding sentencing in specialist jurisdictions remain in the relevant legislation.[10]

- The *Mental Health (Criminal Procedure) Act 1990* (NSW) and the *Mental Health Act 1990* (NSW) will continue to apply to "forensic patients".

- Procedures relating to appeals are not included in either category. These should be within the Acts relevant to the particular court.[11]

14.7 Implementation of the Commission's recommendations in relation to legislative arrangement of sentencing legislation will require considerable alteration to many statutes. It would be, in the Commission's view, the appropriate time to fulfil the intention of the *Criminal Procedure Act 1986* (NSW) and relocate to it provisions in the *Crimes Act 1900* (NSW) relating to procedure. We recommend accordingly.

14.8 Consolidation should also be used as an opportunity to adopt a style of legislative drafting which makes the Acts readily understood by the community generally, as well as by judicial officers and the legal profession.

This includes abandoning the use of archaic terminology, irrelevant to the criminal justice system of the twenty-first century. The Commission makes recommendations about some aspects of terminology below.[12]

14.9 The form of the consolidation cannot be finally settled until all three phases of this reference have been completed. The Commission's tentative view, which has general support,[13] is that there are both symbolic and practical advantages involved in separating legislative provisions relating to juvenile sentencing,[14] however this is properly a matter for investigation in the second phase. The Commission is firmly of the view that legislation relating to prison administration should remain in a separate statute since prison administration is different from sentencing administration.[15]

Table 1

Statute	Sentencing law	Sentencing Administration
Children (Community Service Orders) Act 1987	Part 2	Parts 3-6
Children (Criminal Proceedings) Act 1987	Part 2 Div 4, Div 5; Part 3 Div 4	Part 3 Div 5
Children (Detention Centres) Act 1987		Whole of Act
Community Service Orders Act 1979	Sections 4-12, 19, 25-26D	Sections 3A, 13-18, 20-24, 26E-27
Correctional Centres Act 1952	Sections 26B(1), (2), (4) & (5), 26D, 26E, 24(2)	Part 10
Crimes Act 1900	Section 19A; Part 12; Sections 476 (7), 476 (7A), 553-555; Part 15	Part 13

Criminal Procedure Act 1986	Part 6	Parts 7,8
Drug Misuse and Trafficking 1985	Sections 33A, 34, 35	
Habitual Criminals Act 1957	Sections 4-6, 9	Sections 8, 10
Justices Act 1902	Sections 80, 80A, 80AA, 80AB, 83,84A-86	Sections 49-50, 82, 86A-97
Periodic Detention of Prisioners Act 1981	Sections 5-5B	Sections 5C-36
Pre-trial Diversion of Offenders act 1985	Whole of Act	
Prisioners (Interstate Transfer) Act 1985	Section 27	
Sentencing Act 1989	Parts 2-4	Parts 3-6
Summary Offenders Act 1988	Sections 10A(2), 10A(3), 10B(2), 10B(3), 33	

[Link to text only version of table 1]

THE RATIONALE OF SENTENCING

Recommendation 85

Consolidated sentencing legislation should expressly provide a statement of the purposes for which a court may impose a sentence.

14.10 In DP 33 the Commission identified and discussed the several aims and objectives of punishment.[16] Reference was made to various legislative statements of the purposes of sentencing recently incorporated in sentencing statutes of other Australian jurisdictions.[17] The issues were:

- whether the proposed Sentencing Act should endorse the objectives of punishment to be determined in accordance with its terms; if so
- which objectives should be recognised; and
- should they be placed in a hierarchy.

14.11 The Commission favoured identifying the purposes of punishment in the consolidated sentencing legislation, without attempting to place them in any hierarchy. Submissions generally supported the proposal to include the purposes in legislation,[18] although some reservations were expressed. Submissions adverted to the unsuccessful attempts to put such notions in legislation in other places;[19] to the dangers of including discredited objectives; and to the contradiction inherent in any proposal not to include common law principles relating to the factors influencing individual sentences.[20] Attempting to place the purposes in a hierarchy was universally rejected.

14.12 In our view the rationales for punishment are:

- **Retribution** - which is the notion that the guilty ought to be accountable for their actions and suffer the punishment which they deserve.[21]
- **Deterrence** -

  specific deterrence which aims to dissuade the offender from committing further crime; and

  general deterrence which aims to dissuade others from committing the crime in question by making them aware of the punishment inflicted upon the offender.[22]

- **Denunciation** - which involves the court making a public statement that behaviour constituting the offence is not to be tolerated by society either in general, or in the specific instance.
- **Rehabilitation** - which relies on the philosophy that the offender's behaviour can be changed by using the opportunity of punishment to address the particular social, psychological, psychiatric or other factors which have influenced the offender to commit the crime.
- **Incapacitation** - which involves preventing a person from committing further offences during the period of incarceration, with community protection as the justification.[23]

14.13 The Commission is of the view that all these purposes are relevant in determining the sentence appropriate to the individual circumstances of the offence and the offender, their weight in any case depending on the

circumstances of that offence and of the offender. The sentence process involves a complex and intricate interplay which emerges as a compromise between these overlapping, "distinct and partly conflicting principles".[24] They represent varying philosophical approaches to sentencing. The Commission is unable to identify from among the objectives a dominant rationale. The importance attached to any particular goal or goals of sentencing will vary, not only with the individual circumstances, but also over time, reflecting changes in society and community perceptions. The legislative statement of the purposes of punishment should not place them in a hierarchy. The legislation should make it clear that no priority is assigned, lest it is unintentionally interpreted to this effect.[25]

INCORPORATION OF COMMON LAW PRINCIPLES

14.14 The other major aspect of consolidation of sentencing law relates to whether the consolidation should incorporate the principles of the common law. In DP 33 the Commission argued strongly that, contrary to the recent trend in sentencing legislation in other jurisdictions,[26] it should not.[27] Overwhelmingly, submissions supported this position.[28]

14.15 The Commission does not support the reduction to statutory form of common law principles relating to sentencing for the following reasons:

- It is likely to stultify development of the law. Consolidation can easily be treated as codification, which has inherent difficulties. Sentencing should remain an individualised exercise of judicial discretion in "making the punishment fit the crime, and the circumstances of the offender, as nearly as may be".[29] Inevitably it would be constrained by literal application of the words and purposes of the statute, thus compromising the desirable flexibility and evolutionary nature of the common law discretion and its ability to adapt to changing societal values.
- The common law of sentencing is not generally in need of restatement. Even if it were, an attempt to "reform" it is likely to fail.[30]
- We are not convinced that recent legislative attempts in other Australian jurisdictions add anything to the common law. An exhaustive list of factors which may be relevant to sentencing for offences and of offenders cannot be drawn up,[31] and any statutory list therefore must permit resort to "any other matter". Of itself, listing can create dangers, for example in relation to whether a matter must

be taken into account in aggravation or in mitigation, or what to do when principles are in conflict, or what conclusion is to be drawn from the order in which factors are listed, or the omission of a factor from the list.

- In practice, statutory listing is likely to make sentencing a more time consuming exercise without clear gain. Counterproductively, it may increase the grounds on which the sentence may be appealed, or encourage judicial officers to comply by using a formula such as "I have considered all the relevant matters".

14.16 Our conclusion is that reducing the common law to statutory form serves no obvious purpose in terms of law reform, and runs the real risk if obfuscating the law. Nor does the Commission consider that the present law contains defects that warrant complete rationalisation and consolidation or codification. Where difficulties exist, the Commission considers that they are better resolved by the development of the common law, free from the constraints of statute.

14.17 In consultations,[32] the Commission sought advice on which, if any, specific factors determining individual sentences were in need of reform. Two emerged consistently. The first, the age of the offender,[33] is appropriately considered in the context of the second phase of the reference. The second was hardship on the offender's family caused by his or her imprisonment.[34] It was suggested that the common law was unduly harsh and that a more acceptable approach is possible under s 16A(2)(p) of the *Crimes Act 1914* (Cth). However, further discussion revealed that, in practice, there is no difference in the treatment of this factor under the *Crimes Act 1914* (Cth) and the common law, and that the common law is inherently more capable of dealing with questions of hardship in a flexible and evolutionary manner than would be any attempted statutory form.[35]

14.18 To the extent that community understanding of sentencing should rest on a greater familiarity with, and understanding of, the principles which apply in determining individual sentences, the Commission does not consider that what must inevitably be imperfect attempts to incorporate those principles in statutory form will achieve that objective. The educative purpose is better achieved by other means.

ABOLITION OF ARCHAIC CONCEPTS AND TERMINOLOGY

14.19 The Commission proposed in DP 33 to abolish archaic distinctions and terminology in legislation concerning criminal offences and punishment.[36] Submissions unanimously agreed.[37]

Penal sentences

Recommendation 86

The terms "penal servitude", "hard labour" and "light labour" should be abolished and legislation should provide only that a "term of imprisonment" be imposed.

14.20 Where a penalty which involves a determinate term of imprisonment is imposed, the court expresses the sentence either as "penal servitude" or "imprisonment". The distinction rests primarily on whether the offence is a felony or a misdemeanour.[38] Sections 432(1) and 554(1) of the *Crimes Act 1900* (NSW) give Courts a discretion to order that an offender sentenced to imprisonment be kept to "hard labour" or "light labour".[39]

14.21 These anachronistic terms are relics of past eras of sentencing.[40] With regard to conditions in which imprisonment is served, they preserve distinctions that are no longer relevant to the administration of a modern correctional system.[41] There is no utility in preserving sentences of penal servitude,[42] particularly in the light of Recommendation 86 to abolish all distinctions between felonies and misdemeanours. The Commission recommends that legislation dealing with the imposition of sentences of imprisonment should provide only that an offender is sentenced to a "term of imprisonment", and the terms "penal servitude" "hard labour", "light labour" should be abolished. It will be necessary to consider the consequential amendment of those Acts under which offences are subject to punishment by imprisonment with hard labour or penal servitude, or Acts which provide for disqualification of members of statutory authorities upon conviction for offences punishable by penal servitude.[43]

Felonies and misdemeanours

Recommendation 87

All distinctions between felonies and misdemeanours should be abolished.

14.22 The *Crimes Act 1900* (NSW) reflects the common law classification of offences as felonies or misdemeanours,[44] broadly, but sometimes inconsistently, according to their "heinousness". A felony is an "offence punishable by penal servitude" (s 9), while s 10 states that an offence attracting no greater punishment than imprisonment, or "the imposition of a fine, in addition to or without imprisonment" shall be treated as a misdemeanour only. These distinctions are carried into other legislation by s 21(1) of the *Interpretation Act 1987* (NSW), which provides that a felony means "an indictable offence that is punishable by penal servitude" and a misdemeanour means "an indictable offence that is not punishable by penal servitude".[45]

14.23 In the past, the consequences of such a distinction related primarily to punishment. A convicted felon was usually subject to the death penalty, later reduced to transportation, and then penal servitude for life;[46] suffered "civil death" and was said to be attainted (with the consequences of loss of right to sue, forfeiture of all the felon's real property to the Crown, and corruption of blood); and was allowed benefit of clergy (a relic of this being the *allocutus*, where offenders are asked whether they have anything to say before sentence is passed).[47] Procedural differences both before and upon trial flowed from the distinction, for example availability of alternative verdicts and requiring the presence of the accused in court during the trial. Offences, both at common law and statute, were constituted by reference to the categorisation, for example compounding, misprision or being an accessory to a felony or misdemeanour.

14.24 Many of the consequences of conviction for felonies and misdemeanour have either been abolished[48] or abandoned. Punishment within the contemporary correctional system does not distinguish between offenders imprisoned for different classes of offences. Some procedural distinctions are preserved by statute,[49] but it has been held that no difference is recognised with regard to procedure and the practice of the criminal law.[50] The most common statutory recognition of the categorisation lies in the disqualifications which apply to persons convicted of a felony from holding public office,[51] most notably membership of the Parliament and its associated entitlements.[52]

14.25 New South Wales is the only jurisdiction which retains the distinction between felonies and misdemeanours. It has been abolished in all places where previously recognised,[53] or was never adopted.[54]

14.26 We consider that there is no rational basis for maintaining the distinction. The terminology is arcane and not readily understood. The concepts are irrelevant to modern criminal law practices, and create unenforceable legal consequences as to the required form of punishment. They have outlived their usefulness. Necessary procedural distinctions have been superseded by reliance on other methods of classification.[55] The Commission recommends that the use of the terms "felony" and "misdemeanour" in legislation should be abandoned, and any distinctions between them should be abolished.

Consequential amendments

14.27 In making Recommendation 87, the Commission advises that the consequences of the mere abolition of distinctions between felonies and misdemeanours will necessitate reconsideration of several aspects of the law.[56] The first issue which must be determined is whether any categorisation of crimes is necessary, and if so, then, on what basis it is to be made.[57] The Commission identifies three areas in which there are potential problems:

- The need either to redraft or repeal criminal provisions which have as an element, the commission of, or intent to commit, a felony or misdemeanour,[58] or being an accessory.[59]
- The need to consider whether, and if so what, civil disabilities should attend conviction for an offence or category of offences. Particular reference is made to the *Felons (Civil Proceedings) Act 1981* (NSW) which sought to reverse the ancient rule of common law which extinguished the legal rights of an attainted felon, and which provides that a prisoner convicted of a felony may institute and maintain civil proceedings, but only with leave of the court.[60]
- The need either to redraft or repeal the provisions of the *Crimes Act 1900* (NSW) s 466, the *Constitution Act 1902* (NSW) s 13A(e), and various other Acts which disqualify persons from holding offices and positions when they have been convicted for commission of a felony or misdemeanour.[61]

14.28 Whether to maintain distinctions between categories of crimes for any of the consequences here noted, the basis on which any distinction is to be

made, and whether to redraft or repeal the various provisions about crimes which now rely on the distinctions between felonies and misdemeanours are matters of policy generally going beyond the Commission's current terms of reference. We raise them as matters to which attention must be given.

FOOTNOTES

1. The Commission's terms of reference are set out at p iv.
2. For example the *Community Service Orders Act* 1979 (NSW); *Periodic Detention of Prisoners Act 1981* (NSW); *Pre-trial Diversion of Offenders Act 1985* (NSW); *Community Protection Act 1994* (NSW); *Home Detention Act 1996* (NSW); *Fines Act 1996* (NSW); *Children (Criminal Proceedings) Act 1987* (NSW); *Children (Community Service Orders) Act 1987* (NSW); and *Children (Detention Centres) Act 1987* (NSW).
3. DP 33 at para 2.2.
4. See *Crimes Act 1914* (Cth) Part 1B; *Crimes Act 1900* (ACT) Part 12 (inserted by *Crimes (Amendment) Act (No 2) 1993* (ACT)); *Penalties and Sentences Act 1992* (Qld); *Criminal Law (Sentencing) Act 1988* (SA); *Sentencing Act 1991* (Vic); *Sentencing Act 1995* (NT); *Sentencing Act 1995* (WA) and *Sentencing Administration Act 1995* (WA).
5. N R Cowdery, *Submission* (17 June 1996) at 1; NSW Council for Civil Liberties, *Submission* (28 June 1996) at 1; S Odgers, *Submission* (7 June 1996) at 1; S Scarlett, *Submission* (11 June 1996) at 1; M L Sides and Bar Association, *Submission* (24 June 1996) at 3; Justice Action, *Submission* (2 July 1996) at 2; Department of Corrective Services, *Submission* (15 July 1996) at 1; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 2; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 8; Law Society of NSW, *Submission* (19 July 1996) at 1; W D T Ward, *Submission* (25 July 1996) at 1.
6. N R Cowdery, *Submission* (17 June 1996) at 1.
7. Department of Corrective Services, *Submission* (15 July 1996) at 1.
8. Note also the *Fines Act 1996* (NSW) repeals provisions in other Acts included in this Table.
9. See para 3.52. The *Fines Act 1996* (NSW) repeals the *Fines and Penalties Act 1901* (NSW).
10. For example, *Environmental Offences and Penalties Act 1989* (NSW) s 9: see D Mossop, *Submission* (19 June 1996) at 1-2; D Mossop, "Sentencing Environmental Offenders in New South Wales" (1996) 13 *Environmental and Planning Law Journal* 423.
11. For example *Criminal Appeal Act 1912* (NSW).
12. Paras 14.19-14.28.

13. S Scarlett, *Submission* (11 June 1996) at 1; M L Sides and Bar Association, *Submission* (24 June 1996) at 3; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 2; W D T Ward, *Submission* (25 July 1996) at 1. But see N R Cowdery, *Submission* (17 June 1996) at 1; S Odgers, *Submission* (7 June 1996) at 1.
14. S Scarlett, Senior Children's Magistrate, *Submission* (11 June 1996) at 1.
15. See Department of Corrective Services, *Submission* (15 July 1996) at 2.
16. DP 33 paras 3.2-3.24. One submission took issue with the Commission's philosophical approach which accepted the primacy of punishment; M W Stevens, *Submission* (26 July 1996).
17. *Crimes Act 1914* (Cth) s 16A(2): *Sentencing Act 1991* (Vic) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 9(1); *Sentencing Act 1995* (NT) s 5(1); *Sentencing Act 1995* (WA) s 6; *Crimes Act 1900* (ACT) s 429A; *Criminal Law (Sentencing) Act 1988* (SA) s 10.
18. N J H Milson, *Submission* (3 July 1996) at 4; Justice Action, *Submission* (2 July 1996) at 2; NSW Council for Civil Liberties, *Submission* (28 June 1996) at 3; N R Cowdery, *Submission* (17 June 1996) at 1; S Odgers, *Submission* (7 June 1996) at 2; Law Society of NSW, *Submission* (19 July 1996) at 3; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 1; Department of Corrective Services, *Submission* (15 July 1996) at 3.
19. Law Society of NSW, *Submission* (19 July 1996) at 3.
20. See M L Sides and Bar Association, *Submission* (24 June 1996) at 7; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 3.
21. This now tends to find expression in the concept of "just deserts": see A von Hirsch, *Doing Justice: The Choice of Punishments* (Hill and Wang, New York, 1976).
22. *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370. See DP 33 paras 3.6-3.8. Although the effectiveness of general deterrence is almost impossible to measure, there are at least some specific offences for which, and offenders for whom, the Courts consider general deterrence important and the sentence given to one offender is designed to deter the commission of the same offence by others: see generally R N Howie and P A Johnson, *Criminal Practice and Procedure NSW* (Butterworths, Sydney, 1989) at para 6155.5; B Schurr, *Criminal Procedure (NSW)* (Law Book Company, Sydney, 1996) at para 24.130. Cf Justice Action, *Submission* (2 July 1996) at 2.
23. Incapacitation should be distinguished from preventive detention: see paras 10.21-10.28.
24. H L A Hart, *Punishment and Responsibility* (Clarendon Press, Oxford, 1968) at 1. See also *R v Engert* (NSW CCA, No 60654/94, 20 November 1995, unreported) at 1-2 per Gleeson CJ.

25. See also S Odgers, *Submission* (7 June 1996) at 1.
26. See *Criminal Law (Sentencing Act) 1988* (SA) especially s 10-11; *Crimes Act 1914* (Cth) especially Part 1B Div 2; *Sentencing Act 1991* (Vic) especially Part 2; *Penalties and Sentences Act 1992* (Qld) especially Part 2; *Crimes Act 1900* (ACT) especially Part 12 Div 1; *Sentencing Act 1995* (NT) especially Part 2; *Sentencing Act 1995* (WA) especially Part 2 Div 1 (to a lesser extent).
27. DP 33 paras 2.7-2.12.
28. N R Cowdery, *Submission* (17 June 1996) at 2; NSW Council for Civil Liberties, *Submission* (28 June 1996) at 1; S Odgers, *Submission* (7 June 1996) at 1; M L Sides and Bar Association, *Submission* (24 June 1996) at 1; Justice Action, *Submission* (2 July 1996) at 2; Department of Corrective Services, *Submission* (15 July 1996) at 2; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 2; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 1; W D T Ward, *Submission* (25 July 1996) at 1. But see District Court Judges, *Consultation* (14 August 1996).
29. *Webb v O'Sullivan* [1952] SASR 65 at 66 per Napier CJ.
30. The Australian Law Reform Commission's attempt to exclude general deterrence from the purposes of punishment proved unworkable in practice due to inappropriate legislative drafting: see Australian Law Reform Commission, *Sentencing* (ALRC 44, 1988) at para 37; and *R v Paull* (1990) 20 NSWLR 427; *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370.
31. DP 33 Chapter 5 identified more than 20 of the most important factors which are taken into account by Courts.
32. See Appendix B.
33. See DP 33 at paras 1.15, 5.43-5.45.
34. See DP 33 at paras 5.111-5.114. See also E G Fearon, *Submission* (22 July 1996).
35. See *R v Adami* (1989) 51 SASR 229; *R v Sinclair* (1990) 51 A Crim R 418.
36. See DP 33 at paras 4.127-4.130. See also New South Wales, Attorney General's Department, *Sentencing Review 1994* (Sydney, June 1994) at 9-10.
37. Confidential, *Submission* (22 May 1996) at 17; N R Cowdery, *Submission* (17 June 1996) at 8; M L Sides and Bar Association, *Submission* (24 June 1996) at para 4.19.1; Department of Corrective Services, *Submission* (15 July 1996) at 11; NSW Young Lawyers, Criminal Law Committee, *Submission* (19 July 1996) at 6; Legal Aid Commission of NSW, *Submission* (18 July 1996) at 8; Law Society of NSW, *Submission* (19 July 1996) at 12; W D T Ward, *Submission* (25 July 1996) at 4; NSW Council for Civil Liberties, *Submission* (28 June 1996) at 3; Justice Action, *Submission* (2 July 1996) at 3.

38. See below paras 14.22-14.26.
39. In respect of s 432(2), the usual case turns on whether the offender is male or female.
40. A Select Committee in 1863 concluded that, "of the various forms which are in force in several prisons, the treadwheel, crank and shot-drill alone appear ... properly to merit this designation of hard labour": P Priestley, *Victorian Prison Lives* (1985) at 124, quoted in C Harding and L Koffman, *Sentencing and the Penal System: Text and Materials* (Sweet & Maxwell, London, 1988) at 25. Penal servitude was substituted when the sentence of transportation was no longer available, in England by the Penal Servitude Acts of 1853 and 1857, in New South Wales in 1853. Until 1974, penal servitude for male offenders meant "hard labour on the roads or other public works ... either in or out of irons": *Crimes Act 1900* (NSW) s 453.
41. Department of Corrective Services, *Submission* (15 July 1996) at 11. See also *R v Farlow* [1980] 2 NSWLR 166 at 169.
42. These were abolished by the *Criminal Justice Act 1948* (Eng) s 1.
43. For example: *Banana Industry Act 1987* (NSW) Sch 1; *Casino Control Act 1992* (NSW) Sch 1; *Noxious Weeds Act 1993* (NSW) Sch 1.
44. Disregarding the further category at common law of treason.
45. See also *Justices Act 1902* (NSW) s 4(2).
46. A court could not sentence an offender convicted of a misdemeanour to death, but could order the offender be whipped or pilloried.
47. See L Waller and C R Williams, *Brett, Waller and Williams Criminal Law Text and Cases* (7th ed, Butterworths, Sydney, 1993) at 39-41.
48. *Felons (Civil Proceedings) Act 1981* (NSW).
49. For example *Crimes Act 1900* (NSW) s 352.
50. *R v McHardie* [1983] 2 NSWLR 733 at 742, 745; but see *R v Hallocoglu* (1992) 29 NSWLR 67 at 71-2 per Hunt CJ at CL.
51. *Crimes Act 1900* (NSW) s 466. See below footnote 61.
52. *Constitution Act 1902* (NSW) s 13A(e).
53. *Criminal Law Act 1967* (Eng) s 1; *Crimes Act 1958* (Vic) s 332B(1), inserted by *Crimes Classification of Offences Act 1981* (Vic) s 2; *Crimes Act 1900* (ACT) s 9, inserted by *Crimes (Amendment) Ordinance 1983* (ACT) s 6; *Criminal Law Consolidation Act 1935* (SA) s 5D, inserted by *Criminal Law Consolidation (Felonies and Misdemeanours) Amendment Act 1994* (SA) s 4.
54. *Crimes Act 1914* (Cth); *Criminal Code* (Tas) s 1. Different distinctions were adopted in other jurisdictions: *Criminal Code* (Qld) s 3(1), s 535; *Criminal Code* (WA) s 3, s 552; *Criminal Code* (NT) s 3.
55. For example *Criminal Procedure Act 1986* (NSW) Part 9A Tables 1 and 2.

56. See, for example, Great Britain, Criminal Law Revision Committee, *Seventh Report: Felonies and Misdemeanours* (Cmnd 2659, 1965); Victoria, Chief Justice's Law Reform Committee, *Abolition of the Distinction Between Felonies and Misdemeanours* (1973); South Australia, Criminal Law and Penal Methods Reform Committee of South Australia (Mitchell Committee), *Fourth Report: The Substantive Criminal Law* (July 1977) at 383-386; M Goode, *The Abolition of Felonies and Misdemeanours: Discussion Paper* (Attorney-General's Department, South Australia, 1994).
57. A method referred to in DP 33, relying on the maximum penalty for an offence, may have unintended and undesirable consequences by including offences in a category of crimes now considered either less or more serious: DP 33 at para 4.128.
58. For example, *Crimes Act 1900* (NSW) s 106, 107, 109, 111-114 and 344A(e).
59. *Crimes Act 1900* (NSW) s 345-351. The common law misdemeanour, misprision of felony has been abolished: *Crimes Act 1900* (NSW) s 316.
60. See DP 33 at para 4.128. In the absence of abolition of all distinctions between felonies and misdemeanours, mere repeal of the Act would not remove any other surviving legal disabilities suffered by convicted felons at common law, and may, in fact, resurrect the position which the High Court held to apply in *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583.
61. For example: *Architects Act 1921* (NSW) s 17; *Dried Fruits Act 1939* (NSW) s 10; *Ethnic Affairs Commission Act 1979* (NSW) s 9; *Heritage Act 1977* (NSW) s 11; *Wild Dog Destruction Act 1921* (NSW) s 3C(1)(d).

APPENDICES

- APPENDIX A: SUBMISSIONS RECEIVED
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APPENDIX A: SUBMISSIONS RECEIVED

1. Mr P Quinn, 22 February 1996
2. Ms L McNair, 31 March 1996
3. Confidential, 22 May 1996
4. Mr Stephen J Odgers, Barrister, 7 June 1996
5. Mr Stephen Scarlett (Senior Children's Magistrate, The Children's Court of New South Wales), 11 June 1996
6. Homicide Victims' Support Group, 14 June 1996
7. Mr Nicholas R Cowdery QC (Director of Public Prosecutions), 17 June 1996
8. Women Lawyers' Association of New South Wales, 17 June 1996
9. Confidential, 20 June 1996
10. Mr David Mossop, 19 June 1996
11. The Youth Justice Coalition, 19 June 1996
12. Mr James McKenzie, 20 June 1996
13. Centre for Indigenous Rights and Critical Legal Enquiry Ltd, 21 June 1996
14. Mr Martin L Sides QC (Senior Public Defender), 24 June 1996
15. Mr Jim Coombs, Barrister, received 25 June 1996
16. Ms Donna Blakemore, 26 June 1996
17. Mr Michael Dodson (Aboriginal and Torres Strait Islander Social Justice Commissioner), 26 June 1996
18. New South Wales Council for Civil Liberties Inc, 28 June 1996
19. Mr J L Swanson (Magistrate, Local Court, Parramatta), 1 July 1996
20. Justice Action, 2 July 1996
21. Mr N J H Milson (Magistrate, Local Court, Parramatta), 3 July 1996
22. Mr I H Pike (The Chief Magistrate of the Local Courts), 10 July 1996
23. Victims Advisory Council, 10 July 1996
24. Mr B Wheeler (Clerk of the Local Court, Burwood), 12 July 1996
25. Department of Corrective Services, 15 July 1996, 12 December 1996
26. His Honour Judge H H Bell, 16 July 1996
27. Legal Aid Commission of New South Wales, 18 July 1996, 27 September 1996
28. Austral News Pty Ltd, (telephone) 19 July 1996
29. NSW Young Lawyers, Criminal Law Committee, 19 July 1996
30. The Law Society of New South Wales, 19 July 1996
31. Mrs E Gail Fearon, 22 July 1996, 2 August 1996
32. Manning District Emergency Accommodation Inc, 22 July 1996
33. Victims Rights and Civil Rights Project, 19 July 1996

34. His Honour W D T Ward RFD ED QC (Chairperson, Offenders Review Board), 25 July 1996
35. Mr M W Stevens, received 29 July 1996
36. Ms Robyn Cotterell-Jones, 30 July 1996
37. Confidential, (oral) 31 July 1996
38. Mr Ken B Marslew (Enough is Enough, Anti-Violence Movement Incorporated), 31 July 1996
39. Probation and Parole Officers' Association New South Wales Inc, 31 July 1996
40. Women for Social Justice, 29 July 1996
41. Justice Action, (Letter to Attorney), 3 August 1996
42. District Court of New South Wales, Criminal Law Committee, 6 August 1996
43. Dr Don Weatherburn (Director, New South Wales Bureau of Crime Statistics and Research), 16 August 1996
44. Mr G Fearon, 25 August 1996
45. Mr L W Maxfield, 28 August 1996, 4 November 1996
46. Mr J S Scrogings, received 3 September 1996
47. Professor Kathy Mack, The Flinders University of South Australia, 5 September 1996
48. Mr D Plagaro, (telephone) 7 September 1996
49. New South Wales Bar Association, adopting the Submission of Martin L Sides QC (Senior Public Defender), 18 September 1996

APPENDIX B: CONSULTATIONS

1. Victims Advisory Council, 8 May 1996
2. Public Seminar, "The Sentencing Discussion Paper", 15 May 1996
3. Police Service, Human Resources Command, Conflict Management, 25 June 1996
4. Department of Corrective Services, 26 July 1996
5. Victims Advisory Council, 31 July 1996
6. Academic Forum, 2 August 1996
7. Legal Aid Commission of New South Wales, 7 August 1996
8. Public Defenders, 8 August 1996
9. Prison Governors, 12 August 1996
10. Forbes Chambers, 13 August 1996
11. District Court Judges, 14 August 1996
12. Office of the Director of Public Prosecutions, 19 August 1996
13. Mr Ken B Marslew, 12 September 1996
14. The Hon R J Debus MP, September 1996

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