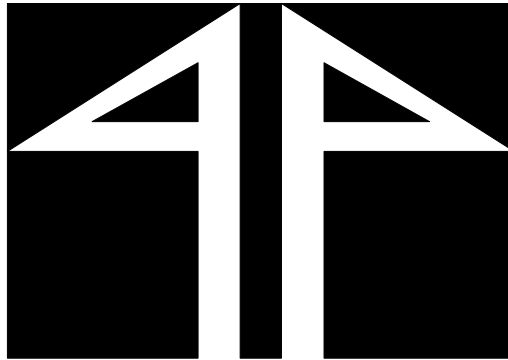


**PROBATION AND PAROLE OFFICERS'
ASSOCIATION OF NEW SOUTH WALES**



**PRELIMINARY SUBMISSION TO
THE NEW SOUTH WALES
LAW REFORM COMMISSION
ON SENTENCING**

January 2012

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PRELIMINARY SUBMISSION ON SENTENCING

The Probation and Parole Officers' Association of NSW (referred to in this document as 'the Association') welcomes the opportunity to make a preliminary submission to the NSW Law Reform Commission's (NSWLRC) *Review of Sentencing*. The submission begins with some introductory comments before addressing the five nominated terms of reference.

1 INTRODUCTORY COMMENTS

1.1 *The Law and Order Debate*

Since Richard Nixon's 1979 declaration of a *War on Crime* and ensuing Presidential election victory, governments in various Anglo (and other advanced) economies have traded handsomely on 'Tough on Crime' rhetoric. Concurrent with these public concerns, population growth, urbanisation and global competition have increased, promoting social phenomena variously described as 'affluenza',¹ moral panic, the rise of intolerance² and the nanny state. Social and economic policy in Australia has tended towards conservative 'tough-minded' rhetoric emphasising social control and electoral re-assurance.³ In a sense, this continues and supports Australians' traditional views of big government and the paternalistic, benevolent state.⁴

Since the 1990s, the law and order debate has tended to generate a singular government response of higher penalties for offences and to pressure the judiciary to impose incarceration more often and with longer sentences.⁵ It has also contributed to justices making increased use of incarceration as a means of incapacitating charged men and women during remand periods.

¹ See Hamilton, C. and Dinniss, R. 2005, *Affluenza: When too much is never enough*, Allen & Unwin, Crows Nest.

² Social commentator Hugh Mackay often coined this phrase during radio interviews to describe the mood on the 1990s.

³ There are obvious parallels between federal political rhetoric on border control and illegal immigration and state political rhetoric on law and order.

⁴ See particularly, Kelly, P. 1992, *The End of Certainty: the Story of the 1980s*, Allen and Unwin, St Leonards, which argues that state paternalism was a platform of 'Old Australia', prior to the de-regulation and industrial changes of the 1980s. While the 1980s saw a narrowing of government functions, through the privatisation and de-regulation, the 1990s and 2000s saw a trend to increased government control in areas such as illegal migration, the environment and justice.

⁵ For an introduction to some aspects of the recent NSW media debate on crime, see, for example, McGovern, A. 2011, 'State of New South Wales: Setting the agenda on crime in NSW', <http://theconversation.edu.au/state-of-nsw-setting-the-agenda-on-crime-in-nsw-225> accessed 12/12/2011 and McGovern, A. 2011, 'Cops, robbers and shock jocks: the media and criminal justice policy', <http://theconversation.edu.au/cops-robbers-and-shock-jocks-the-media-and-criminal-justice-policy-2961> accessed 12/12/2011.

However, the recently elected O'Farrell (Liberal) government has made two important policy statements that potentially alter the direction of the law and order debate. The first, when in Opposition, was to 'end the bedding auction' on criminal sentences. The second was to reduce the prison population and increase the use of community based penalties. The Association welcomes and supports both of these policies, regarding them as critical to redressing the poor social and economic path down which NSW was travelling.

The Association also notes that, while the media continues to promote a simplistic, 'cartoon-logic' approach to crime and punishment, alternate justice approaches and dispute resolution methods have been establishing a presence within the NSW community. The previous (Labor) governments presided over an era of rising prison numbers, a number of authors have recently commented both on the resulting expense of corrections, which now exceeds \$1 billion per annum,⁶ and the higher rates of recidivism for those released from custody.

1.2 Revisions and Amendments to the Governing Legislation

The last major overhaul and revision of crimes sentencing and administration legislation was undertaken last century (1996) by the NSWLRC and resulted in the current *Crimes (Sentencing Procedure) Act 1999* and the *Crimes (Administration of Sentences) Act 1999*.⁷ This codified the principle of 'Truth in Sentencing' whereby the Court became the principal sentencer, setting both non-parole and parole periods. For longer sentences, the State Parole Authority considers release to parole and determines whether the inmate is a suitable candidate. Neither the State Parole Authority nor Corrective Services NSW (CSNSW) are able to release the inmate ahead of the specified dates because of good behaviour, advanced progress, or any form of remission. Nor are they able to extend the specified dates of prospective parole release and completion of sentence.⁸

Since that time a number of amendments to legislation were made by previous successive Labor governments.⁹ These included amendments to the presumptions for and against

⁶ See, for example, the address of NSW Chief Justice Reg Blanch's address to the Legal Aid Conference on 18 June 2010. 'Top judge targets tough jail sentences, *Sydney Morning Herald* 18 June 2010, <http://www.smh.com.au/nsw/top-judge-targets-tough-jail-sentences-20100617-yju3.html> Accessed 18/11/2011.

⁷ NSW Law Reform Commission, 1996, *Discussion Paper 33 – Sentencing*, <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/DP33CHP3> Accessed 18/11/2011.

⁸ In the case of child sex offenders, CSNSW is able to apply for extended custodial and parole orders which lengthen the sentence.

⁹ Kennealy, Reese, Iemma and Carr governments.

bail,¹⁰ the introduction of the '12 month rule',¹¹ and the repeal of Periodic Detention upon introduction of Intensive Corrections Orders¹².

1.3 Economic considerations

As a consequence of the law and order debate and the previous successive (Labor) governments' legislative responses, NSW now has record Police numbers,¹³ record inmate numbers and record expenditure on the justice institutions. While the visible presence of uniformed Police, at overall cost of around \$2.6 billion per annum,¹⁴ plays some role in community perceptions of safety,¹⁵ proportional expenditure on reducing recidivism has waned. The budget for Corrective Services, NSW exceeded \$1 billion during the 2009-2010 fiscal year and continues to rise. Increasing inmate numbers imply ongoing capital commitment to build more correctional centres. This prospect is entrenched by research that indicates that inmates are more likely to re-offend, to become recidivists and return to custody. During the past ten years, CSNSW has neither been able to contain its need for increased budget, nor reduce its cost per inmate. Its overall cost for community corrections programs has risen as has its cost per offender.¹⁶ In conjunction with this its staffing requirements have continued to rise.¹⁷

While the global financial crisis raised some questions about the state's capacity to continue to fund the overall cost of justice, previous labor governments were reluctant to rein in expenditure, prior to the March 2011 state government elections. But the recent sovereign debt problems in Europe and the prospects of a European and possibly world-wide recession suggest that perpetual increases in justice expenditure may be unsustainable because overall state government revenues may not continue to rise proportionately.

¹⁰ A number of these occurred (including arrest and detention upon charge of Breach of Apprehended Violence Order) with the most recent in 2010.

¹¹ An inmate who has been refused parole release by the State Parole Authority and a parolee whose parole has been revoked cannot be re-considered and released to parole within 12 months.

¹² October 2011

¹³ In excess of 13,000 serving Police Officers.

¹⁴ NSW Police 2008/9 Annual Report.

¹⁵ Increased Police numbers also tend to result in higher arrest numbers, though this has not followed in NSW in recent years. Crime statistics indicate a stabilisation of incidence.

¹⁶ For a critique of recent trends in the community offender management in NSW, see Norman, B., Bosley, L. and Baldry, E. 2011, 'Community Base Offender Management NSW: Is NSW adopting the discredited probation and parole model that Americans are abandoning?', *Crime and Justice Reform Fact Sheet*, <http://www.crimeandjustice.org.au/sites/cjrc/files/Community%20Based%20Offender%20Management.pdf> Accessed 18/11/2011.

¹⁷ In response to falling inmate numbers, CNSW recently took steps to reduce its custodial staffing by approximately 300 positions with the closures of Parramatta, Kirkconnell and Berrima Correctional Centres and the opening of the South Coast Correctional Centre. Privatisation of Parklea and Escort and Security Services (2010) also impacted on overall custodial staffing levels.

Perpetual increases in justice expenditure are also undesirable from the point of view of social investment and return. Education and health remain the state's spending priorities, but there are disturbing trends overseas. Since 1999, the USA has been spending more money of corrections than on education. Many regard passing this milestone as confirming the 'sick' state of US society, with economically unsustainable government spending priorities and perpetuation of black and Hispanic inequality.¹⁸ While social order and the rule of law are fundamental tenets in a democratic society, the relative cost of these needs to be borne in mind and evaluated against the benefits of expenditure in such other areas as employment, the environment and sustaining local economies.

1.4 Sentencing Trends

The Commission has recognised the trends of increased use of community based penalties as well as increased use of imprisonment, resulting in a prison population in excess of 10,000 men and women. This Association initially draws a link between legislative changes and rising inmate numbers. This has occurred in both remand¹⁹ and sentenced populations, for men and women,²⁰ indigenous and specific cultural groups. The Association draws the conclusion that changes to bail laws have produced increased inmate numbers, while minimum non-parole periods and 'the twelve month rule' have retained sentenced inmates for longer periods.

1.5 Overseas Trends

It is important to note that both the USA and the United Kingdom have experienced comparable phenomena of rising population, community concerns and prison populations. Some jurisdictions within these countries have decided to reverse the trend of increased use of imprisonment to address crime. This has given rise to a literature on community re-investment or Justice Reinvestment, as it was coined in the US. In the US, at least fourteen States have signed up to the National Justice Reinvestment Initiative (JRI), in doing so embracing a 'data-driven approach' to reducing spending on corrections and reinvesting identified savings in evidence-based strategies designed to increase public safety and hold offenders accountable. States and localities using the justice reinvestment approach collect and analyse data on the drivers of criminal justice populations and costs, identify and implement changes that address costs and achieve better outcomes, and measure both the fiscal and public safety impacts of those changes.²¹

¹⁸ Black and Hispanic communities are over-represented in US arrest, conviction and imprisonment statistics.

¹⁹ For a detailed analysis of rising remand numbers and periods, see Steel, A. 2010, 'Bail in New South Wales', *Crime and Justice Reform Fact Sheet*, <http://www.crimeandjustice.org.au/sites/cjrc/files/Bail%20in%20NSW.pdf> Accessed 18/11/2011.

²⁰ Women in custody has risen at a higher rate compared to men. See DCS published statistics.

²¹ See Hill, C. 2011, *Justice Reinvestment – time for an Australian pilot?* (unpublished) which outlines a brief practical investigation of US Justice Reinvestment so far, including details of expert contacts in the US.

The scope of Justice Reinvestment initiatives includes diverting funding from custody to community-based programs. But it can also include simple strategies to retain offenders within community management. One obvious application would be to reduce the rate of technical parole breaches in NSW (e.g. reincarceration following minor supervision misdemeanours). Some US states are reducing their prison populations simply by reducing the number of parole breaches.

2 SPECIFIED TERMS OF REFERENCE

2.1 Current sentencing principles including those contained in the common law

The two general problems that we face in reviewing sentencing at this time are:

- the ambiguity, confusion and conflict in the stated purposes of sentencing; and
- the conflict between the purposes of punishment and the research that demonstrates that punishment neither deters nor prevents offending.

If we postulate that the main purpose and emphasis of sentencing at the present time is to punish offenders, then research indicates that this present approach does not 'work'.

Section 3A of the Crimes (Sentencing Procedure) Act outlines the purposes of sentencing. These are supplemented by the common law, appeal court judgment guidelines and Australian case law. While the stated purposes of sentencing provided a first articulation of principles, they contain conflicting statements and therefore provide an ambiguous and conflicting model for sentencers.

The philosophical and conceptual issues are seen as threefold:

2.1.1 Conceptual Complexity and Ambiguity

There is no overarching sentencing principle either for crimes generally or for specific types of crime (violent crime, property crime, sex offences etc). Nor is there formal recognition that severity of an offence may be linked to different philosophical positions on sentencing (utilitarian, retributive or consequential). Rather, there is a jumble of competing ambiguous concepts drawn from the common law as well as sentencing legislation. Our research has uncovered at least 22 such concepts relating to the either the philosophical basis or methodology of sentencing. These include 'Vengeance', 'Retribution', 'Punishment', 'Community Protection', 'Denunciation', 'Parsimony', 'Proportionality', 'Objective and Subjective factors', 'Rehabilitation', Restorative Justice', 'Specific and General Deterrence', 'two-tiered Sentencing', 'Sentencers Intuition', 'Instinctive Synthesis', 'Accountability of the Offender', 'Recognising harm done to the Victim', 'discounts for co-operation', 'Just deserts' and 'Remission for evidence of reform' pre sentence.

To make matters worse, the concepts are often defined in terms of each other so that, for example, some of these concepts are subsumed under the heading of 'punishment' while other times punishment is a separate component which must be given regard to in addition to other concepts.

2.1.2 Absence of Useful Methodological Guidelines

There are no clear guidelines, for the most part, in the common law or legislation about how a sentence should be computed. The discussion in the case law and literature appears to revolve around whether sentencing is an 'Instinctive Synthesis' as outlined in the leading case of *R v Willscroft* (1975)VR 292 or whether it should be a 'two-tiered' approach (see for example Traynor and Potas 2002 and Bargaric 1999) which first considers proportionality and the objective factors in outlining the parameters of sentence given the proscription of the legislature, before looking at subjective factors to adjust the sentence.

In reality, it appears that the 'Instinctive Synthesis' view, which is supported by other judicial authority about the absence of logic alone in the sentencing process (see *Veen v The Queen No 2*) (1988) 164 CLR 465, is mainly a recognition that sentencing is too complex to be reduced to a rational sequential process. On the other hand the 'two-tiered' approach appears to add little clarity and it may be argued that it turns one complex and ambiguous process into two such processes.

Some years ago the NSW Criminal Court of Appeal published guidelines for sentencing drink drivers. Initially these provided considerable structure to the sentencing decision for Magistrates, and, in some cases, produced more severe sentencing in the imposition of custodial penalties for mid-range and high-range drink driving matters, particularly for recidivists. However, the appeal Courts subsequently upheld numerous appeals against severity. As a consequence, the appeal process provided a counterbalancing message to the sentencing guidelines and negated their influence.

2.1.3 'Deterrence' and the Behavioural Sciences

There is little or no formal judicial or legislative notice taken of the insights offered by the behavioural sciences in regard to the efficacy or validity of some traditional legal concepts relating to sentencing. It is true that there has been judicial comment on issues like the effectiveness of general deterrence but this does not result changes to the law or give sentencers a firmer basis for prescribing a sentence.

A recent example of this is the judgement of Bathurst CJ in a decision by the NSW Court of Criminal appeal. *Regina v KB,JL and RJB* (2011) NSWCCA 190. Briefly the facts were that three young men who were intoxicated took sexual advantage of two underage but also drunk and consenting teenage girls. In this case, the chief justice affirmed the right of the trial judge to discount the weight to be given to general deterrence because of the circumstances of the case. Presumably he applied the common sense view that other young men in a similar situation would probably not be deterred, even if they had knowledge of penalties applied to others in the past.

However, other authority underlines that general deterrence cannot be ignored, whether it is an actual phenomenon (or not) or simply because the law requires it to be so, given that it is a long held traditional principle. King CJ in *Yardley v Betts* (1979)1 A Crim R 329 at 33 remarked: "the courts must assume, although the evidence is wanting, that the sentences which they impose have the effect of deterring at least some people from committing crime." Further in *R v Wong* (1999)48 NSWLR 340 Spigelman CJ offered the view that at pp 127-128 "(t)here are significant differences of opinion as to the

deterrent effect of sentences... nevertheless, the fact that penalties operate as a deterrent is a **structural assumption** of our criminal justice system. Legislation would be required to change the traditional approach of the courts to this matter” (emphasis added).

The obvious question becomes: ‘If behavioural science methods can verify with reasonable certainty that general deterrence (or any other so called sentencing principle) does not exist, then why should it form part of the law at all?’ Von Hirsch (1985) (as quoted in Bargaric 1999) is clear on this; “there is no evidence that offenders make comparisons regarding the level of punishment for various offences” and it would be surprising if either offenders or the public at large had any realistic idea of maximum or likely penalties for most offences.

Once an offender is sentenced, all modern western correctional services apply an evidence-based approach to the treatment and management of offenders which includes the use of validated assessment tools to assess the risk of re-offending, amongst other things. However, there may be a widespread lack of knowledge amongst the public and the judiciary as well as possible misunderstanding of what a particular sentence will entail. More reliable knowledge of what effects a sentence will actually have on an offender surely would be invaluable in deciding what sentence to impose in the first place. Legislation that incorporates the behavioural sciences in the sentencing process would thus seem indicated.

2.1.4 Revising the Purposes of Sentencing

If the purposes listed in Section 3A of the *Crimes (Sentencing Procedure) Act 1999* were ordered in descending priority,²² commencing with punishment as pre-eminent and ending with recognising the harm done to the victim and the community. However, victims and the community should be the first and predominant concerns of the justice system, followed by compensation and restitution, with punishment as a lesser consideration. If crimes are fundamentally defined by their harm done to a victim or to the community, then repairing the harm done to victims and the community is foremost, with prevention of further offending a very near companion. The current order of purposes thus appears to be the opposite of what it should be. Re-stating the purposes of sentencing in a revised priority order would have profound effects on both pre sentence and sentence processes.

While justices are members of the legal profession and must necessarily exercise the law from the perspective of a legal practitioner, that perspective needs to broaden in a number of areas:

- a) the interests of victims, such as restitution, compensation and possible restoration;
- b) the likely social and economic impacts of the penalty upon victims and their families, offenders and their families, and the broader community;
- c) the likely prospect of reducing the offender’s risk of recidivism.

²² While the legislation does not specify whether or not they are listed in priority order, the Law Reform Commission recommended that they not be listed in priority order (see below for expansion of this point).

At this time, the Association advocates greater use of restorative and restitution options. It retains the policy *dicta* of:

Imprisonment as *the punishment of last resort*, reserved principally for community protection reasons; and

Imprisonment *as punishment, not for punishment*.

2.1.5 The Role of Aggravating and Mitigating Factors

The present focus of the law²³ and legal advocates on aggravating and mitigating factors focuses both attention and resources further away from victims to the question of penalty. The offender's legal representative seeks to minimise the offender's culpability and responsibility in the events and to maximise his/her prospects of resuming a normal, lawful and productive lifestyle. Everyday, the Courts hear how an offender's actions are 'out of character', influenced by intoxication, stress, fatigue, pressure or some other factor(s). Expert testimony is tendered from medical practitioners, psychiatrists, psychologists, counsellors, and other practitioners to attest to the reduced 'capacity and culpability' of the offender. The costs of these referrals are substantial, sometimes enormous but justified, so long as the investment delivers the return of a lesser penalty. It is fair to say that aggravating and mitigating factors generate a substantial micro-economy.

But do victims benefit from the present 'system' as described? What if the role of sentencing was to assess the efforts towards apology, restitution and compensation? Can we contemplate an alternative system where offenders fund restorative conferences rather than psychiatric or psychological consultations to establish a diagnosis or 'state of mind' which influenced the aberrant and harmful behaviour.

The Association advocates repeal of s 21A in favour of victim interests, restoration, reparation, compensation and steps taken to reduce risk of recidivism.

2.1.6 The disjuncture between sentencing practice and maximum penalties

The legislation currently specifies maximum penalties for all offences, emphasizing the seriousness of crimes by periods of imprisonment and fines, yet these maxima are rarely imposed because each offence and each offender is dealt with as an individual case, according to its merits and failings. Magistrates and judges dispose of the vast majority of court matters with fines and bonds, retaining custody as the disposition of last resort. Perhaps it would be better to approach sentencing on the basis of modal outcomes, rather than the worst case. The sentencing database of the Judicial Commission has become such an influence and its role and effects could be augmented.

2.1.7 Principles for Effective Sentencing

While it may not be appropriate or necessary in this preliminary submission to pursue a full philosophical discussion of the theories of punishment, the conceptual complexity of

²³ S 21A *Crimes (Sentencing Procedure) Act 1999*.

sentencing law, which can be related back to theories of punishment, presents an ongoing problem. Put simply, is 'punishment in law' to be regarded as an end in itself or as a means of achieving other utilitarian goals, for example, the idea that through punishment some form of future good may occur? Alternatively, is punishment best viewed as related to retributive theories which "assert that offenders deserve to suffer, and that the institution of punishment should inflict the suffering they deserve"?²⁴

Clear and precise thinking is required by legislators to sort out such conceptual conflicts. Undoubtedly, the community may, in the case of serious violent or sexual offences, regard punishment as retribution as being necessary and justified *for its own sake*, regardless of any other effects post the sentencing process. But for the sake of balance, it should be briefly noted that the majority of citizens view sentencing as a means of pursuing goals relating to doing 'future good' and this point is expanded below. However, the pendulum swing toward 'just deserts' or retributive ideas, has been evident in the significant and disproportionate increases in the prison population since the late 1970s. The counterweight to this trend has been increased advocacy for victim rights and pronounced interest in restorative justice practices.

The stance on punishment is reflected in trends in many western jurisdictions since the publication of the Martinson report in 1974,²⁵ in which the author claimed that the body of research evidence claimed that neither rehabilitative nor custodial programs could be shown to work in reducing recidivism.²⁶ While he later revised his conclusions in favour of the efficacy of probation and parole, many western jurisdictions became disillusioned with forward-looking utilitarian ideas like rehabilitation and deterrence and adopted backward-looking considerations based on the 'objective' seriousness of the offence and the legality of sentencing proportionality. Bargaric sums this up as follows:

“(T)he aim of doing good through the (correctional system) was replaced by the goal of doing justice broadly equated to imposing punishment that was proportionate to the severity of the crime. On this rationale, so long as the punishment fitted the crime...the sentencing system was a ‘success’ irrespective of the indirect consequences stemming from it”.²⁷

This shift in philosophy, which arguably has had enormous costs in human and dollar terms in many western countries, was not, however, the subject of explicit legislation or wholesale shifts in judicial interpretation of sentencing principles. The common law was either left untouched or in some cases, attempts were made to partially codify sentencing principles (see the current NSW sentencing legislation). Permitting such wide discretion by sentencers probably allowed politicians to avoid resolving conflicting concepts. In

²⁴ Bargaric, M. 1999, 'Sentencing: The Road to Nowhere', *Sydney Law Review*, 21 (4) p 3[0].

²⁵ Martinson, R. 1974, 'What works?—Questions and answers about prison reform.' *Public Interest*, 35, pp 22-54.

²⁶ Bargaric 1999, *op cit* p 23.

²⁷ *Ibid* p 5.

democracies whose members were divided about theories of punishment, legislators realised that ambiguity was the best policy, not 'honesty'.²⁸

Perhaps this political minefield is part of the reason why the NSWLRC, when it last considered NSW sentencing law in 1996, in its Proposal 2 recommended that sentencing legislation should specify the purposes of punishment, but declined to recommend that the purposes be placed in a hierarchy.²⁹ The rationale offered was that the goals of sentencing vary and the law needs to be able to cope with this by emphasizing different principles at different times.

However, this approach, in reality, adds to sentencing confusion. An approach which clarifies by specifying overarching sentencing principles for different types or severity of offences is more in line with both community expectations and the needs of sentencers. Indeed, in its discussion on the issue, the NSWLRC acknowledged that "deterrence will generally prove the more important object...for offences such as armed robbery....and offences against children (while) rehabilitation will generally take precedence...in cases involving young offenders, and people with an intellectual disability or a mental illness."³⁰

In a publication designed to explain sentencing to the general public "Judge for Yourself: A Guide To Sentencing In Australia", the Judicial Conference of Australia, being the national representative body for judicial officers, with over 600 members, offer the following explanation under the sub heading 'Balancing the reasons for a sentence':

"The purposes of sentencing may differ for different crimes, depending on their seriousness. For crimes like murder or armed robbery, the major purposes are likely to be punishment and general deterrence. For less serious crimes such as graffiti or malicious damage, the judicial officers might view rehabilitation as the major consideration when imposing the sentence."³¹

As the current NSW legislation does not prioritise the purposes of sentencing and while it is acknowledged that this would not be possible across the whole range of criminal activity, it is considered that some guidance for offences at different levels of seriousness would be valuable in removing the confusion as to the basis for a sentence in a given case and would also accord with community attitudes toward offenders.

As an example, the Commonwealth of Kentucky enacted the *Public Safety and Offender Accountability Act 2011*, which established that the primary objective of sentencing is "maintaining public safety and holding offenders accountable while reducing recidivism and criminal behavior." The aim of the new law was to decrease the state's prison population, reduce incarceration costs, reduce crime and increase public safety. Section KRS 532 of the Act reads:

²⁸ Walker in Bargaric 1999, *op cit*, p 8.

²⁹ NSW Law Reform Commission, 1996, *op. cit.*, p 3.

³⁰ *Ibid*, p 4.

³¹ 'Judge for yourself: A Guide to Sentencing in Australia', Judicial Conference of Australia, www.lawlink.nsw.gov.au/sentencingcouncil Accessed 18/11/2011, p 18.

It is the sentencing policy of the Commonwealth of Kentucky that:

- “(1) The primary objective of sentencing shall be to maintain public safety and hold offenders accountable while reducing recidivism and criminal behavior and improving outcomes for those offenders who are sentenced;
- (2) Reduction of recidivism and criminal behavior is a key measure of the performance of the criminal justice system;
- (3) Sentencing judges shall consider: ...
 - (b) The likely impact of a potential sentence on the reduction of the defendant's potential future criminal behavior.”

A further attempt to impose a sentencing hierarchy is found in s 718 of the 1985 Canadian criminal code. The code states:

“The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just , peaceful and safe society by imposing one or more of the following objectives:”

The code then proceeds to list denunciation, specific and general deterrence, rehabilitation, reparation to victims and the promotion of a sense of responsibility in offenders. Interestingly it then establishes a hierarchy in specific cases but at the more serious end of the criminal spectrum. 718.01 states:

“When a court imposes a sentence that involved the abuse of a person under the age of 18 years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct”.

These examples demonstrate ways in which the purpose of sentencing can be clarified and articulated. As argued elsewhere in this submission, the Association's view is that the purposes of sentencing should be re-prioritised, raising the following principles and interests:

- a) the interests of victims, such as restitution, compensation and possible restoration;
- b) the likely social and economic impacts of the penalty upon victims and their families, offenders and their families, and the broader community;
- c) the likely prospect of reducing the offender's risk of recidivism
- d) the protection of the community.

These principles effectively incorporate the existing principles in s 3A of the *Crimes (Sentencing Procedure) Act 1999*.

The Association further submits that sentencing needs to formally adopt a two-tiered approach to sentencing. In the vast majority of cases before the Local Courts, Magistrates give little or no thought to imposing a custodial penalty. The vast majority of men and women are and can be dealt with by community-based options. The statutory law needs to imitate and promote this practice from the earliest possible point. Similarly, it needs to identify the most heinous offences and deal with these as cases where the principal issue is the length and structure of the custodial sentence, which may include

home detention and parole supervision. This is not to negate that many matters and many offenders whose cases are neither clearly one nor the other, or to minimise the task of defining the criteria by which such decisions can be made. But this proposal can overcome the problem that the criminal law creates in listing a period of imprisonment for the overwhelming majority of crimes.

2.2 The need to ensure that sentencing courts are provided with adequate options and discretions

The Association advocates the predominant use of community based penalties and sanctions to deal with crimes, as occurs at the present time. Bureau of Crime Research and Statistics reports continue to indicate that the vast majority of matters are dealt with using such community based penalties as fines, bonds (including suspended sentences), compensation, probation supervision and community service. A relatively small number of matters result in custodial sentences, but because these matters are generally more serious, they become more controversial and subject to media attention.

It supports the various diversionary and alternate justice programs such as Circle Sentencing, Drug Court, MERIT and CREDIT, though it has some criticisms of the present administrative arrangements where some diversionary programs fall within the Department of the Attorney-General and others within Corrective Services, NSW. It argues in favour of increased victim support, conferencing and restitution programs.

The Association also supports the provisions of s9, s10, s11 and s12 of the Crimes (Sentencing Procedure) Act. It also advocates the continuing use of Home Detention as a means of serving a custodial sentence. The penalty option that evokes extensive criticisms is Intensive Corrections Orders (ICOs).

2.2.1 Intensive Corrections Orders

The Association is critical of ICOs as a sentencing option as they blur the boundaries between probation, community service and home detention; because they are administered in a coercive manner that is contrary to effective practice, outcomes and research; and because, in their current form, they does not provide an *intensive* penalty option.

The effect of discontinuing Periodic Detention and commencing Intensive Corrections Orders has been to create a further delay in the sentencing process because of the procedural requirement for an ICO assessment. The current arrangements dictate that this be completed after the Pre Sentence Report by the CCMG as a separate, sequential and independent process. The introduction of ICOs included sentencing provisions similar to Periodic Detention in that the Court is required to impose a term of imprisonment of not more than two years but make an ICO and direct that the sentence be served by way of intensive correction in the community.

The creation of ICOs blurs the distinction between community and custodial penalties. Periodic Detention was a custodial penalty, albeit periodic. That much was unambiguous. But ICOs are clearly not a custodial penalty, being a combination of community service and community supervision. If electronic monitoring is a condition of the order, the order is barely distinguishable from Home Detention. Without that

element, the supervision program becomes more akin to probation or parole, but without reporting obligations and focused case management. It functions on a coercive premise that directing and controlling offenders in the community are effective means towards completion of orders. While this may be satisfactory as political rhetoric, research contraindicates this approach.

2.2.2 Suspended Sentences

Suspended sentences, until the introduction of the Crimes (Sentencing Procedure) Act 1999, had not been a sentencing option in NSW since 1974, when they were abolished. The *Crimes (Sentencing Procedure) Act 1999*, re-introduced suspended sentences. Under section 12 of the Act, a court that imposes a sentence of imprisonment on an offender for a term of not more than two years may make an order suspending execution of the sentence and directing that the offender be released from custody on condition that the offender enters into a good behaviour bond for a term not exceeding the term of the sentence.

Under section 99 of the Act, if a court revokes the bond for breach of the conditions, the order under section 12 suspending the sentence ceases to have effect and the offender must serve the whole of the original sentence in prison. The court may, however, make an order directing that the sentence of imprisonment to which the bond related (disregarding any part that may have already been served) be served by way of an intensive correction order or home detention.

Suspended sentences may not truly divert offenders from prison, if offenders persistently breach the conditions imposed. If the breach rate is high, suspended sentences may deliver offenders *to prison* rather than divert offenders *from prison*. A major risk with all alternative sentencing options is that sentencing authorities may impose those penalties on offenders who would not otherwise have been given a custodial sentence. While the same or similar number of offenders may be sentenced to prison, a wider circle of lesser offenders are brought within the ambit of the alternative penalties. When a proportion of those offenders breach the terms of their orders, they run the risk of full-time imprisonment.

The balancing argument is to recognize suspended sentences as the form of bond that carries the greatest consequences, compared to s9 and s10 bonds. As such s12 bonds provide sentencers with an alternative to custody in circumstances where they believe that lesser penalty options are inadequate.

2.3 Opportunities to simplify the law, whilst providing a framework that ensures transparency and consistency

This document has already made comment on sections 3A and 21A. The Association has already commented about the ineffectiveness of ICOs and their confusion of the penalty hierarchy elsewhere in this document.

Beyond these, there are considerable opportunities to simplify the law, though simplification can sometimes produce ambiguity rather than clarity. However, it does note that there are obvious legal complexities in dealing with persons nearing the age of 18 years.

The Association will make further submissions at a later time.

2.4 The operation of the standard minimum non parole period

The Commission's introductory material indicates that the introduction of these standard non parole periods has resulted in longer non parole periods. The Association regards this as an unintended and undesirable outcome. Abolition should be considered.

2.5 Any other related matter

2.5.1 Augmenting the Role of the Probation and Parole Officer

One of the most frustrating and perplexing aspects of probation and parole work is the seemingly diminished value that justices place on Pre Sentence reports and the advice of Probation and Parole Officers. Many justices operate from the basis that the Service has read the police facts and criminal history, interviewed the offender, undertaken independent enquiries and assessed him/her. As a consequence, many justices usually follow the direction and assessments of the Pre Sentence Report. This is consistent with the Court's use of other expert testimony in using it to frame the sentencing submission and adjudication. The Court is not bound by the Service's testimony, or any other expert testimony, but the Probation and Parole Service has a prominent role to play, being the agency with the principal task of supervising and guiding offenders in the community.

Some years ago, the Service adopted the policy of not making recommendations as to penalty or 'anything', removing such deferential phrases as, "should the Court be considering probation supervision, it is recommended that ...". Removal of the ability to express recommendations has left a vacuum in the sentencing process and limits the expert testimony of the Probation and Parole Service. If a Magistrate subsequently asks the prosecutor for a submission on penalty, the prosecutor has limited advice from the Probation and Parole Service assessing the person as suitable or unsuitable for various sentencing options. If the policy bridle was removed, then the Pre Sentence Report could make comment and recommendations as to the merits and limitations of community service compared to probation, etc. There are some pitfalls to be avoided, but the overall direction of the proposal is sound.

Neither the prosecutor nor the sentencer should be left in the current position, particularly given the government and the Attorney-General's stated policy to manage more offenders in the community, rather than in custody. Probation and Parole Officers need to have a stronger role in recommending or not recommending community-based sentencing options.

2.5.2 Community-Based Penalties

As stated earlier, the Courts dispose of the vast majority of matters using community-based penalties such as fines and bonds. As a consequence, community-based penalties remain the indispensable backbone of the penalty hierarchy. They afford the best context for reparation, compensation and rehabilitation within the bounds of community safety and tolerance. However, there is a sense in which the present range of community-based

penalties is somewhat under-utilised, as evident in declining CSO work numbers in recent years.

There is a distinct problem of conceiving or describing community-based sentencing options as penalties or punishments. Probation and CSO work contain some elements of punishment, in that a probationer is subject to the supervision and guidance of a Probation and Parole Officer and community service work entails a loss of leisure time. But imprisonment has a far higher degree of punishment and social dislocation. The gap between the punitive effects and impacts of imprisonment and community-based penalties is an obvious feature that reinforces the need for imprisonment to be retained as a last resort.

It is also conceivable to create and provide further community-based penalties which, like probation and community service orders, are penalty options in their own right rather than framed as 'alternatives to imprisonment'. Penalty options could focus more on compensation to victims, targeted reparation, community service or attending rehabilitative programs. The present legislation is somewhat limiting in that an offender cannot receive both a community service order and a bond for the same offence. There are many cases where probation serves the need for rehabilitation but limits reparation, or where community service work serves the need for reparation but limits rehabilitation. To this end the Victorian model of sentencing provides greater scope and flexibility and could be further investigated. Other possibilities include the inclusion of various penalty components as conditions of bonds or probation. This practice occurs at the present time with the imposition of fines, compensation and bonds but could be administered in a more holistic and integrated manner, with each being a condition of a single order. Similarly, attendance at specific programs or treatment providers could similarly be conditions.

As argued earlier, ICOs complicate and confuse the penalty hierarchy and their emphasis on surveillance is not evidence-based. ICOs have not effectively replaced Periodic Detention and could be repealed with little consequence, in favour of retaining the existing or an expanded range of penalty alternatives. Home Detention is a better model of diversion.

A greater emphasis on victim compensation and reparation during the pre sentence period needs to occur and should be recognised when determining penalty. Efforts towards rehabilitation should similarly be regarded favourably.

It is possible to develop specific and separate community-based penalty options for offenders who have obvious problems relating to drug addiction, persistent intoxicated or unlicensed driving, domestic violence, etc. Often offenders with these features are placed on probation for these purposes, but often CSNSW does not offer relevant programs because of a lack of funds or resources.

2.5.3 Short Sentences

About half of all inmates receive sentences of six months or less and this sentencing pattern creates numerous challenges and problems for CSNSW and the broader community. A short sentence limits the period and adverse effects of incarceration but also truncates the available time for the purposes of rehabilitation. Simply, given the

current nature of CNSW custodial operations, such sentences do not afford it enough time to modify deeply ingrained patterns of behaviour. Moreover, the impacts of short sentences endure beyond the term of the sentence, with the loss of housing, disruption to care arrangements for dependents, loss of employment and other community connections. The ongoing burden of a criminal record is another significant factor that limits an offender's social participation.

The problems are further exacerbated by the recent trend for increased numbers of offenders to be remanded in custody. If an offender is remanded in custody for, say, four months, and is then sentenced to six months imprisonment to start from the first day of remand, CSNSW effectively has only two months in which to work with that offender. Moreover, many offenders receive a fixed term of imprisonment where there is no parole period, so CSNSW has no opportunity to work with that offender in the community upon release from custody.

The NSW Sentencing Council has previously recommended that abolition of short prison sentences should be piloted for Aboriginal female offenders throughout NSW, and that such a pilot should be carefully monitored and evaluated.³² The Council noted that data provided by CSNSW on the characteristics and size of the population serving prison sentences of 6 months or less indicated that almost a quarter are Aboriginal. It found that women are serving short sentences primarily for public order offences and fine default, and noted concerns that many of these women serving short prison sentences are unable to access counselling or courses, and that community based sentencing options, in place of short prison sentences, would allow for flexibility in service provision and links to ongoing treatment in order to address underlying issues.

The Association advocates increased community-based sentencing options to replace sentences of less than six months. However, such moves need to be accompanied by measures to prevent 'sentence creep', which is the tendency for magistrates to give longer custodial sentences when previously a sentence of less than six months would have been an option. Sentences of less than six months may be required in certain cases.

It is possible to develop specific and separate community-based penalty options for offenders who have not previously served a term of imprisonment, or are serving short sentences. CSNSW does not presently do this. While increasing the range and availability of offence-based and therapeutic programs within custody, it retains a conservative and risk-averse approach to security and offender management. As a consequence, custody remains predominantly an impoverished and regulated experience with limited rehabilitative opportunities.

CSNSW presently operates a number of residential program centres on its correctional centre environs. It would be feasible to convert these into facilities for offenders who have not previously served a term of imprisonment, or are serving short sentences. It is also conceivable to develop penalty options that minimally expose offenders to the custodial setting without committing them to be confined there. Such options could

³² NSW Sentencing Council 2004, *Abolishing Prison Sentences of Six Months or Less: Final Report*.

include residential treatment, program attendance, community service, etc. Their focus would thus be rehabilitative, rather than custodial.

To overcome the problems and concerns concerning the complete absence or inadequate period of supervision and guidance following release, raised in this section, minimum parole supervision periods of four and six months are proposed for further comment and review.

2.5.4 Net-widening

Local and international research demonstrates that net-widening often occurs when certain types of new sentences are introduced. 'Net-widening' means that offenders, who would have received a sentence lower on the hierarchy of sentences before the introduction of a new sentence, receive a sentence higher on the hierarchy after the new sentence is introduced.

There is some research indicating that the introduction of suspended sentences in NSW – which was also introduced to divert offenders from custody – has resulted in net widening, despite the fact that the legislation requires suspended sentences to be strictly imposed as an alternative to full-time custody.³³ A 2010 BOCSAR study³⁴ also notes that with the re-introduction of suspended sentences there has been a significant reduction in the imposition of community service orders, particularly in the higher courts. As the authors of the research note, this appears to indicate that on some occasions judicial officers have been "impos[ing] a suspended sentence where they would not have imposed a prison sentence in the absence of this sentencing alternative", with due regard not being given to section 5 of the Act.

Net-widening has many harmful effects, including:

- a) offenders are placed higher in the hierarchy of sentences than they would otherwise have been – this both accelerates their path to imprisonment and increases the costs of administering sentences;
- b) the accelerated path to imprisonment can increase, rather than decrease, inmate numbers; and
- c) if the court is assured that the sentence will be served by way of an alternative to imprisonment, there is a tendency to 'inflate' the sentence to 'compensate' for perceived leniency.³⁵

Nonetheless, the harmful effects of net-widening need to be balanced against the benefits it accrues in providing an option that diverts some offenders from custody and provides opportunities for rehabilitation. Without the suspended sentence option, sentencers would have been choosing between a different set of penalties. The literature on net-

³³ Brignall, G. and Poletti, P. 'Suspended Sentences in NSW', Sentencing Trends and Issues, Judicial Commission of NSW, No 29, November 2003.

³⁴ McInnes, L. & Jones, C. 2010, 'Trends in the use of suspended sentences in NSW', *Issues Paper No 47 (May)*, NSW Bureau of Crime Statistics and Research, Sydney.

³⁵ NSW Sentencing Council, *ibid*, at paragraph 6.61.

widening expresses concerns about improper or unintended use of a penalty option and there are various measures that can be deployed to redress and counteract these.

2.5.5 Reducing the inmate numbers

Since growth in inmate numbers³⁶ has largely been in remand inmates, bail strategies and options need to be developed. The NSWLRC's review of bail will also play an important role in clarifying the purposes and operation of bail. The Association believes that the presumptions against bail need to be reviewed as numerous changes to bail presumptions during the recent five to six years have played a significant role in increasing the number of inmate where bail is refused or not met. Bail is often refused to incapacitate an offender and prevent further offending or to allay community fears and media attention. Part of the problem appears to be that, having refused bail and spent time in custody, it becomes more difficult to secure conditional release. The regulated and controlled custodial environment makes phone calls and other simple communications more difficult because it applies maximum security procedures to unsentenced inmates. While the construction and commissioning of the Metropolitan Reception and Remand Centre has provided a large holding centre close to the metropolitan courts, its effectiveness in preventing the escapes comes at a considerable monetary cost and exposes younger, less serious and less entrenched men to more entrenched criminals, thus providing a form of coaching or apprenticeship. One approach to avoid these problems would be to increase the forms of bail custody - lower security, electronic monitoring, etc – or to have smaller, specialised facilities or wings to house younger, less serious and less entrenched men and women.

It is possible to reduce the remand population simply by increasing use of the existing programs,³⁷ but additional bail strategies are also needed to target over-represented populations (eg indigenous, country residents, etc) or vulnerable populations (young offenders, those with intellectual and other disabilities, etc) as well as to provide the Courts with alternatives. These could either be community-based or custody-based and would require additional or re-deployed funding. Probation and Parole Officers could play a role in assessing and developing bail programs. This is a role which has not been undertaken in recent years but has occurred in the past in NSW and occurs in other jurisdictions, such as the United Kingdom, where county probation services have administered bail hostels for decades. As mentioned earlier in this submission, existing COSP centres could be used for such a purpose. One means of incorporating this role would be to expand the duties of Court Duty Probation and Parole Officers to facilitate and co-ordinate referrals to MERIT, Drug Court, etc.

³⁶ The Association acknowledges that the inmate population in NSW has fallen and levelled during the past year, but the trend over the past ten or more years has been one of increase annual.

³⁷ One example is the CSNSW Bugilmah Burube Wullinje Balund-a program located at Tabulum on the Clarence River in northern NSW. This commendable and highly successful program could accommodate much larger numbers. There is scope for CSNSW to develop other facilities and programs for offenders on remand, but fear of adverse media attention on absences and escapes and breaches leads to a risk-averse 'lock-and-key' approach with a disproportionate emphasis on security.

Effective bail support programs require considerable research and planning to define the reasons why bail is refused or not met and what options or factors would influence the Court to grant bail. CSNSW is currently piloting The Bail Support Pathways Program which focuses on providing homeless men and women with accommodation. It is demonstrating some early successes, working on a case-by-case basis with individuals.

While the initial purposes of conditional bail are often to separate the offender from the victim(s) and secure the safety of the victim(s), the longer this occurs the longer the delay in victim compensation, restitution and restoration. The interests of victims can and should be addressed prior to sentence, if and when victims are ready.

The prevalence of short sentences and the problems they present have been discussed earlier in this submission. Home Detention can and should be utilised more for short sentences. It could also be used as a component of a sentence, in much the same way as parole forms a component of a sentence.

There are some measures that have the potential to reduce both unsentenced and sentenced men and women. Shifting the emphasis of managing drug and alcohol problems through the criminal justice system to the health system is one. Targeting drink drivers, disqualified drivers, and other 'low level offenders' who could be sentenced otherwise is another.

2.5.6 Judicial Liaison Unit

To achieve effective changes in sentencing legislation and practice this Association advocates for creating of a Judicial Liaison Unit to better educate and inform justices of the efficacy of programs, strategies and community based penalties. This could operate within the auspices of the Judicial Commission, enhancing its current role.

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