NSW GOVERNMENT

New South Wales
Law Reform Commission

Annual Report 2011-2012

September 2012
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A year of delivery

The 2011-12 year has been a year of delivery for the NSW Law Reform Commission. The Commission completed 4 references and produced 6 major reports recommending law reforms: cheating at gambling, compensation to relatives, penalty notices, bail, people with mental health and cognitive impairment in the criminal justice system: diversion, and an interim report on sentencing: standard minimum non-parole periods.

The Government has recently introduced legislation to substantially implement the *Cheating at Gambling* report. This will create new offences concerning activity that corrupts a betting outcome including match fixing, tanking, deliberate under-performance, dishonest officiating and similar actions. The Bill is part of a national response to this issue, and NSW has been at the forefront of work to improve the criminal law's response to corruption affecting sports betting.

Our *Bail* review makes major recommendations for reform. In undertaking this review, we found a great deal of stakeholder agreement that the law had significant problems: it is voluminous, unwieldy, hugely complex, and involves too blunt an approach. The remand population of prisons has more than trebled over the last 15 years as the law has made it harder to get bail. We recommend a simpler, more transparent framework for bail decision-making that balances the community and personal interests in freedom against the risk that the person might abscond, commit a further serious offence or harm another person.

Our report on *Diversion* for people with cognitive and mental health impairments is another important contribution to criminal law reform and responds to the Government priorities to promote diversion for this group. We recommend legislative reforms to give police and the courts practical powers to divert people with impairments to programs that may help to prevent their reappearance in court. Just as importantly, we recommend the extension of supporting services for courts and police to better indentify, assess, and case manage individuals, so that the community can have confidence that diversion is actually working.

The Government has initiated whole of government processes to develop responses to our reports on bail and diversion for people with cognitive and mental health impairments.

Our report on *Penalty Notices* builds on earlier work by the Sentencing Council and the Department of Attorney General and Justice in the area. Penalty notices are issued in increasing numbers and are available for more and more offences. Yet there are no principles guiding their use, and some real problems with the systems for enforcement, especially for vulnerable groups. Our recommendations would introduce guidelines for the use of penalty notices and improvements to allow more responsive enforcement for people, such as homeless people, who are simply unable to pay.

In the coming year our major priorities are to complete the reference on people with cognitive and mental health impairments in the criminal justice system, looking at the difficult issues of criminal responsibility and fitness to be tried, and to produce a final report on the reference on the law of sentencing.

We will continue to build strong relationships with stakeholders and the community and improve our process of engagement. Law reform is a process requiring a broad range of voices. Our recommendations are built on the practical wisdom and experience of our stakeholders. I would like to take the opportunity to thank all of those who have made a submission, attended a consultation meeting, or provided us with their views and information in other ways. This is the most vital part of law reform.

I would like to take the opportunity to thank our part-time Commissioners and our expert advisers. We draw particularly on the talents and time of this group. In particular, I would like to acknowledge the work of the Hon Harold Sperling QC, who led the bail reference, and to Professor David Brown, who also worked on bail and whose term ended this year. We are also increasingly asking subject matter experts to join expert panels. I would like to acknowledge particularly Prof Eileen Baldry, Dr Jonathan Phillips, Mr Jim Simpson, and Prof Ian Webster, who form the panel for the cognitive and mental health impairments reference which has met regularly through 2011-12 and continues to meet this year.

The Hon James Wood AO QC

NSW Law Reform Commission: profile

Roles and responsibilities

The NSW Law Reform Commission is an independent statutory body constituted under the *Law Reform Commission Act 1967* (NSW). It provides expert law reform advice to Government through the Attorney General on matters referred to it by the Attorney General.

Services and activities

The NSW Law Reform Commission's principal service is the provision of policy advice on law reform matters. It undertakes work on references provided by the Attorney General.

In undertaking this work the Commission:

- broadly researches the law, and the academic and other commentary on it;
- conducts or commissions empirical research where necessary; and
- consults broadly with stakeholders and the community, and draws on experts in the field.

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

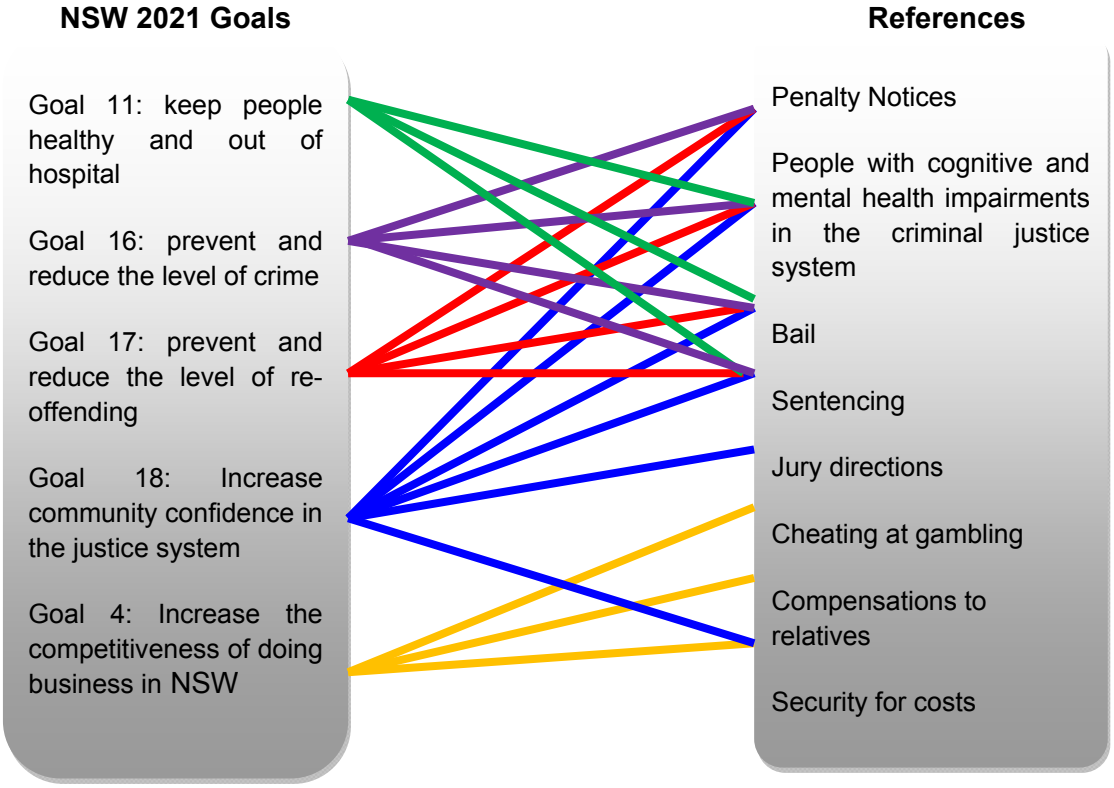
Commissioners and staff

As at 30 June 2012, the Commission comprised a Chairperson, the Hon James Wood AO QC, a full-time Commissioner, Professor Hilary Astor, and a number of part-time Commissioners. A profile of Commissioners during 2011-12 is included below under "People".

A small team of highly-skilled staff supports the work of the Commission. A staff list is included below under "People".

Performance for 2011-12

The role of the NSW Law Reform Commission is to provide law reform advice. In this respect we contribute to a range of Government priorities including the following goals under *NSW 2021: a plan to make NSW number one* as follows:



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

	Actual			11-12		12-13
Measure	**08-09**	**09-10**	**10-11**	**Target**	**Actual**	**Target**
Number of consultation papers and reports published	6	12	14	10	14	10
Number of consultation events/meetings held	21	53	73	70	37	40
Percentage of projects conforming to project planning standards	-	-	100%	100%	100%	100%
Percentage of projects meeting timeliness goals	-	-	71%	75%	100%	80%
Law Reform Commission mentions in court decisions	15	16	17	15	23	15
Number of legislative amendments based on LRC reports	3	3	1	New measure	0	4

A new measure of implementation is included this year – the number of legislative amendment based on NSW Law Reform Commission reports. This measures current activity. A comparatively high target of 4 bills is envisaged; achievement will be dependent on the Government's legislative timetable and priorities.

Completed references

The NSW Law Reform Commission completed four references in 2011/12.

Cheating at gambling

Commissioners: the Hon James Wood AO QC (Lead Commissioner), Mr Timothy Game SC, Prof David Weisbrot AM.

Expert advisors: The Hon Rod Howie QC, Associate Prof Alex Steel.

Reference received: 5 January 2011.

Consultation Paper: March 2011.

Report: August 2011, tabled 26 August 2011.

Sports betting has become a major industry in Australia. Cheating at sports betting, including by match-fixing, undermines the integrity and reputation of the sports in question, can involve significant fraud, and has the potential to cause disruption to a significant economic activity.

This reference asked us to examine the coverage of the criminal law in relation to cheating at gambling, and consider improvements.

Reports 130: Cheating at gambling

We concluded that the criminal law has not kept up to date, and proposed two new sets of sports specific offences.

The first set of offences cover conduct by anybody (including players, match officials and team support people) that "corrupts the betting outcome of an event" with the intention of obtaining a financial advantage from betting.

The conduct of a person "corrupts a betting outcome" if it affects or would be likely to affect the outcome of a bet, and is contrary to the standards of integrity expected by reasonable people.

This covers, for example, spot and match fixing, deliberate underperformance, tanking, disrupting or interfering with the course of the event, and deliberately officiating in a dishonest way. It extends to anybody who fixes the event, or agrees to do so, or persuades another to do so, and also to conduct designed to conceal the existence of any such arrangement.

The second set of offences covers using inside information in connection with a sporting event to bet on that event, as well as providing inside information to others to enable them to bet on the event.

In both cases, we proposed a maximum penalty of 10 years imprisonment, the same penalty as for fraud, recognising the seriousness of activity that can involve the corruption of sporting activities in aid of betting.

We noted that national work was underway in this area following the adoption by the Australian Sports Ministers of the *National Policy on Match-Fixing in Sport*; and

the agreement of the Standing Committee of Attorneys-General to develop a nationally consistent approach to criminal offences relating to match-fixing.

We reviewed the role of sports controlling bodies and wagering agencies in ensuring the integrity of sporting events and gave support to the initiatives underway in Australia and internationally in this respect.

We also examined cheating at gaming in connection with gaming machines and casino type games, and proposed a review to rationalise the range of existing offences including the creation of a new general cheating at gaming offence in the *Crimes Act*.

Finally, we recommended a review to improve NSW's complex regulatory and enforcement arrangements to consider the creation of a single authority to replace the current division of authority between the Office of Liquor Gaming and Racing and the Casino, Liquor and Gaming Authority, and to rationalise the powers of inspectors.

The Government has responded to this report by introducing the *Crimes Amendment (Cheating at Gambling) Bill 2012*, which contains new offences based on our recommendations, amended to ensure consistency with the nationally endorsed match-fixing behaviours (developed by the Standing Committee on law and Justice) and to reflect comments made during consultation.

Compensation to relatives

Commissioners: the Hon James Wood AO QC (Lead Commissioner), Prof Hilary Astor, His Honour Judge Peter Johnstone.

Reference received: 3 November 2010.

Consultation paper: May 2011.

Report: transmitted 10 October 2011, tabled 10 November 2011.

Government response: 11 May 2012.

This reference deals with certain aspects of the law relating to the compensation that dependants of certain victims of wrongful death can recover.

The terms of reference asked us to inquire into the legislation governing the provision of damages, including under the *Compensation to Relatives Act 1897, Law Reform (Miscellaneous Provisions) Act 1944, Dust Diseases Tribunal Act 1989* and *Civil Liability Act 2002,* and to consider whether a principle of assessment of damages, called the *Strikwerda principle,* should be overruled in NSW. This principle operates to reduce the amount that some dependant relatives can recover as compensation for the death of their family member where the death was caused by a dust disease, in particular asbestosis and mesothelioma.

We were asked to consider the merits of abolishing this principle, including any equity issues arising from its possible abolition or retention; whether any economic modelling is required to determine the effect on the liabilities of defendants of any amendment that is recommended; and any other related matters.

Report 131: Compensation to relatives

The Report made recommendations to achieve fairness for the families of deceased dust diseases victims who may be disadvantaged by the existing law when the victims die before completing their actions for damages.

We found that, as a result of a reform passed in 1998, the estate of a person whose death was caused by a dust disease could recover damages for non-economic loss in relation to the pain and suffering and loss of expectation of life provided the victim had commenced proceedings before dying.

However, as a result of earlier High Court authority confirmed in the *Strikwerda* case, such damages must normally be deducted when the damages are calculated in an action by the victim's dependants under the *Compensation to Relatives Act* for their loss of support arising from the death. The principal reform we recommended was to remove that requirement. This would put these dependants in an equivalent position to the dependants of a victim who was able to complete a claim for non-economic loss damages in his or her lifetime and as a consequence was in a position to pass them to dependants.

The application of the current law most affects the dependant families of dust diseases victims who would not be entitled to statutory workers' compensation death benefits, such as DIY renovators, children who play with asbestos and spouses who washed work clothes of asbestos workers. In most other cases the dust disease benefits would provide sufficient compensation for a worker's dependants such that they rarely bring a dependant's claim under the *Compensation to Relatives Act 1897* (NSW).

Having considered the practical difficulties for litigants arising from the often swift progression of asbestos-related diseases between diagnosis and death, we framed a second recommendation that would permit the recovery of damages for non-economic loss by the estate of a deceased dust diseases victim so long as proceedings are commenced no later than 12 months after the victim's death. This would replace the current rule that only permits the estate to recover such damages where the victim had commenced an action in the Dust Diseases Tribunal for damages during his or her lifetime.

Response

The Government responded to the report on 11 May 2012, and indicated it had decided that it would not be appropriate to implement our recommendations. This followed legal and actuarial advice that indicated that to do so would have constituted a material breach of the Asbestos Injuries Compensation Fund (AICF) Funding Agreement. The full response and actuarial and legal advice (ref: DPC12/01448) is available at:

www.dpc.nsw.gov.au/about/accessing_dpc_information/dpc_disclosure_log

The Judicial Commission made extensive use of the analytical material set out in our report, reproducing in its Civil Trial Bench Book our overview of the law of personal injury including rights under workers' compensation legislation, dust disease legislation, motor accident legislation and common law.

Penalty notices

Commissioners: Prof Hilary Astor (Lead Commissioner), the Hon James Wood AO QC, Prof David Weisbrot AM.

Reference received: 5 December 2008.

Consultation Paper: September 2010.

Report: transmitted 15 February 2012; tabled 29 March 2012.

There are around 7,000 offences that can be dealt with by penalty notices in NSW. In the six-year period from 2003-2009, more than 16 million penalty notices were issued, with a face value of approximately $2.4 billion.

The penalty notices reference asked the Commission to consider:

- whether current penalty amounts are commensurate with the objective seriousness of the offences to which they relate;
- the consistency of current penalty amounts for the same or similar offences;
- the formulation of principles and guidelines for determining which offences are suitable for enforcement by penalty notices;
- the formulation of principles and guidelines for a uniform and transparent method of fixing penalty amounts and their adjustment over time;
- whether penalty notices should be issued to children and young people, having regard to their limited earning capacity and the requirement for them to attend school up to the age of 15. If so: (a) whether penalty amounts for children and young people should be set at a rate different to adults; (b) whether children and young people should be subject to a shorter conditional "good behaviour" period following a write-off of their fines; and (c) whether the licence sanction scheme under the *Fines Act 1996* should apply to children and young people; and

whether penalty notices should be issued to people with an intellectual disability or cognitive impairment. While we were able to consider penalty notice offences under road transport legislation administered by the Minister for Roads, the terms of reference indicated that we did not need to consider any potential amendments to these offences as they had already been subject to an extensive review.

The Commission conducted an extensive consultation process. We held 30 formal consultation meetings of various types with more than 170 stakeholders. Fourteen of these meetings were round tables, where representatives from key stakeholder groups were present. We met several times with representatives from the NSW Office of State Revenue and the State Debt Recovery Office. Our research and preliminary consultations demonstrated that different issues arise in relation to penalty notices in regional, rural and remote areas. We therefore visited Kempsey, Lismore and Wollongong, where we talked to representatives of Aboriginal communities, courts, police, non-government organisations, lawyers from Legal Aid NSW and private practice, magistrates and others.

Report 132: Penalty notices

The report contains 72 recommendations to improve the operation of the penalty notice system. The Government is currently considering the recommendations.

We found that penalty notice offences, and the penalties that apply, have developed in ways that are not always consistent and fair.

We identified problems with penalty notices for some vulnerable groups, including young people, homeless people and people with a cognitive or mental health impairment. These groups are identified as being significantly more likely to receive a notice and significantly less likely to be able to pay.

Key recommendations include:

- developing guidelines to govern the kinds of offences that may be dealt with by a penalty notice and the penalties that apply;
- establishing a small Penalty Notice Oversight Agency within the Department of Attorney General and Justice to help to ensure the penalty notice system is fair, consistent and effectively regulated;
- improving mechanisms to allow people to be cautioned in appropriate cases, instead of being issued with a penalty notice, and to review notices that might have been wrongly issued;
- improvements to help people who are struggling to pay penalty notice debts, including the expansion of the successful Work and Development Orders.

Bail

Commissioners: The Hon Hal Sperling QC (Lead Commissioner), Prof Hilary Astor, Prof David Brown, Her Honour Magistrate Jane Mottley, The Hon James Wood AO QC.

Reference received: 8 June 2011.

Questions for discussion: June 2011.

Report: transmitted 11 April 2012, tabled 13 June 2012.

The terms of reference for a review of the *Bail Act 1978* (NSW) asked us to consider:

- whether the Bail Act should include objectives
- what criteria should be taken into account in making a bail determination
- what presumptions should apply to bail determinations and how they should apply
- appropriate responses to breaches of bail
- provisions about repeat bail applications

- whether the *Bail Act* should make special provision for children and young people, Aboriginal people and Torres Strait Islanders, cognitively impaired people and those with a mental illness

- bail laws in other jurisdictions**.**

The Attorney General asked us to report by November 2011. The deadline was later extended to allow us to undertake targeted consultation on draft proposals for reform.

Following the publication of questions for discussion, we embarked on an intensive consultation process with key stakeholders in the criminal justice system and members of the community including judges, magistrates, police, Government departments, legal service providers, practitioners, advocates, academics and specific interest groups.

We received 40 submissions which were comprehensive and of high quality.

We conducted 19 consultation meetings including two roundtables focused on young people and adults. We consulted with the judiciary, legal practitioners (defence and prosecution), community organisations, special interest groups, representatives of victims' groups, as well as the NSW Police Force and relevant Government departments and agencies. These consultations proved invaluable in focusing us on the key issues in the law and in adding depth and detail to the written submissions. We also observed relevant proceedings in a Local Court, Children's Court and Weekend Bail Court.

This is a complex area of law involving consideration of a number of often fundamental and competing principles. Unanimity did not emerge on all points and in all details. There were divergent views about the appropriate way forward in some important areas. Nonetheless, there was a remarkable level of agreement among stakeholders over the key themes and problems with the current law:

- There was overwhelming concern about the growth in the remand population, especially in relation to young people.

- There was unanimity that the *Bail Act* is overly complex and too hard to understand.

- There was broad agreement that the present complex structure of presumptions was undesirable and should go. Defence and prosecution lawyers, and community groups all agreed on this proposition. The Police Association opposed any change to the existing presumptions. The NSW Police Force submission proposed reform, but not abolition, of the presumptions.

- There was broad agreement that the considerations applying to the bail decisions required review. A difference emerged about the level of detail that should be provided, which we sought to balance in our recommendations.

- There was a considerable level of agreement on aligning the considerations applicable to the imposition of conditions with those applying to decisions whether to release at all.

- There was broad, though not universal, agreement that the extent of bail conditions being imposed and the monitoring of compliance with them was

a major issue. There were submissions from NSW Police Force concerning the need for and legitimate role of bail conditions and the need to monitor compliance. However, many other stakeholders considered overuse of conditions and overly intensive monitoring was contributing to unnecessary remands. This was a particular area of concern for those who deal with people young people under 18 years.

- There was widespread concern about the effect of changes which limit the repeat bail applications that can be made, although there was a divergence of views about how best to proceed and the level of reform required.

Report 133: Bail

Given the limited time available for the review, our report focused on the fundamental issues presented by the law of bail, and on the main issues that cause difficulty. In this regard, we made major recommendations on:

- Modernising the language to reflect reality, by replacing the terms "grant bail" and "remand" with the terms "release pending proceedings" and "detain pending proceedings".

- The replacement of the complex structure of presumptions with a single presumption in favour of bail (except in appeal cases), that is, that a person is entitled to be released unless detention is justified by the considerations indentified in our recommendations.

- A new and simplified structure for the considerations that a court should take into account in making bail decisions:
  - the public interest in freedom and in securing justice according to law
  - the interests of the person and of the person's family and associates
  - the risk of the person failing to appear at court
  - the risk of the person interfering with the course of justice
  - the risk of the person committing a seriously harmful offence
  - a history of offending while on bail or parole, and
  - the risk of the person harming, or causing harm to, another person.

- A new vehicle for the conduct requirements which may be imposed when a person is released, replacing the condition that the person enter into a "bail agreement" with a simple conduct direction.

- The reform of conditions and conduct requirements to ensure only those conditions and conduct requirements that are actually required are placed on a person, and that those conditions can then be properly monitored.

- Reform of the procedure for repeat bail applications to ensure that court time is not wasted, but that bail applications which should be brought are not unnecessarily stifled.

Response

The Government has undertaken to examine the report and respond by the end of 2012. The Government has indicated that it:

- is committed to a Bail Act that is simple, consistent and protects the community, and
- favours a 'risk management' approach for bail determinations taking into account risk factors such as a person committing another offence, endangering the public or interfering with witnesses.

Ongoing references: Priorities for 2012-13

The NSW Law Reform Commission has four references that are ongoing. In two of these we have produced reports on an interim basis or in relation to part of the reference.

People with cognitive and mental health impairments in the criminal justice system

Commissioners: Prof Hilary Astor (Lead Commissioner), the Hon Gregory James QC, the Hon Harold Sperling QC, the Hon James Wood AO QC.

Expert Advisory Panel: Prof Eileen Baldry, Dr Jonathan Phillips, Mr Jim Simpson, Prof Ian Webster.

Reference received: 17 September 2007; expanded 7 July 2008.

Consultation papers: May 2010, December 2010.

First report: transmitted 27 June 2012, tabled 22 August 2012.

The terms of reference provide for a general review of the criminal law and procedure as it applies to people with cognitive and mental health impairments. In particular, we are directed to have particular regard to:

- sections 32 and 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW)
- fitness to be tried
- the defence of "mental illness"
- the consequences of being dealt with via the above mechanisms on the operation of Part 10 of the *Crimes (Forensic Procedures) Act 2000* (NSW), and
- sentencing.

Issues to do with cognitive and mental health impairments are among the most difficult concerns for law and policy makers to address. As a progressive, civilised society, we seek to provide adequate care and support services for those who are most vulnerable. People with mental illness and cognitive impairments unquestionably fall into this category.

The purpose of this reference is to examine criminal law and practice governing what happens to people with cognitive or mental health impairments. The law recognises that a defendant's mental state may affect the nature of the criminal justice response that would ordinarily attach to his or her actions. In this review we assess the effectiveness of the operation of the criminal justice system, both in relation to the needs of people with cognitive and mental health impairments and the community. We do so against the background of the current legislative and administrative regime as well as the service context within which the law operates.

Significant achievements in 2011-12 include:

- Transmission of the first report for this review, Report 135, *People with cognitive and mental health impairments in the criminal justice system: Diversion*.

- Completion of our consultation process in relation to diversion, including follow up consultations with key stakeholders. We have conducted 32 consultations involving over 200 stakeholders as part of this review.

- Commencement of work on the second and final report for the review.

Report 135: People with cognitive and mental health impairments in the criminal justice system: Diversion

This report is the first of two reports about people with cognitive and mental health impairments in the criminal justice system.

This report is a comprehensive look at opportunities to enhance diversion at all stages of the criminal justice system for people with cognitive and mental health impairments. This approach reflects the strong and consistent views of stakeholders. It is also consistent with the Government's priorities under the *NSW 2021* plan, particularly to prevent and reduce reoffending and to keep people healthy and out of hospital.

There is strong evidence that people with cognitive and mental health impairments are over-represented throughout the criminal justice system. While most people with a cognitive or mental health impairment do not commit offences, some, especially those who face additional challenges such as family violence, misuse of drugs and alcohol and unstable housing, are at high risk of cycling in and out of the criminal justice system as a result. This is costly for the criminal justice system, the broader services system and the community.

Diversion can assist by minimising contact with the criminal justice system and/or referring defendants to treatment or services that aim to rehabilitate the defendant and reduce reoffending. There may also be potential cost savings associated with diversion, for example reduction in costs of incarceration or hospital readmissions.

We recommend a flexible and responsive approach, in particular:

- state-wide expansion of the Statewide Community and Court Liaison Service or other services that provide for identification, assessment and advice and making assessment services available in relation to defendants with cognitive impairments;

- state-wide expansion of the CREDIT program which identifies the requirements of people with complex needs involved in the criminal justice system, links them to services that address their offending, and case manages their progress and reports to court;.

- providing police with legislative authority to divert people with cognitive and mental health impairments who have committed less serious offences and support to undertake this task;

- strengthening the legislative options available to courts under s 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW), including giving a

clear power for increased court oversight of diversionary program, to ensure that individuals remain connected with the programs they are referred to;

- extension of s 32 and s 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) to the higher courts;

- creating the Court Referral for Integrated Service Provision list, a specialist list to provide intensive judicial supervision and service provision to address needs and reduce reoffending of people with impairments at risk of imprisonment.

This report also canvasses current definitions of cognitive and mental health impairment. Taken as a whole the law lacks a consistent and clear approach to defining cognitive and mental health impairment and this gives rise to unnecessary confusion and complexity. Further, many legal definitions reflect understandings of behavioural science that are no longer current. Taking into account these challenges and the views of stakeholder and experts we recommend two separate definitions of cognitive impairment and of mental health impairment. The primary purpose of these definitions is inclusion in s 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW). We also recommend the use of these definitions in the context of pre-court diversion. We have previously recommended the use of these definitions in a new *Bail Act* and will consider other applications of these definitions as part of our current reference on sentencing.

Priorities in 2012-13

In 2012-13, the Commission intends to conduct further consultations, and produce its second report. Our consultation process will include:

- holding roundtable consultations on key issues, and

- releasing short question papers, where necessary, in relation to areas identified as requiring the benefit of additional submissions from stakeholders.

The Commission expects its second and final report will address:

- the mental impairment defences – the defence of mental illness, substantial impairment and infanticide

- fitness to stand trial and related processes

- the management of forensic patients, and

- dealing with forensic samples collected from people diverted, found unfit to stand trial and not acquitted or found not guilty by reason of mental illness.

We will deal with issues related to the sentencing of people with cognitive and mental health impairments in conjunction with our review of sentencing.

Sentencing

Commissioners: The Hon James Wood AO QC (lead Commissioner), Prof Hilary Astor, Mr Tim Game SC, The Hon Justice Peter Johnson, Her Honour Magistrate Jane Mottley.

[Justice Johnson did not participate as a Commissioner in relation to the interim report, Report 134.]

Reference received: 21 September 2011.

Question Papers: April 2012, June 2012, July 2012.

Interim report: Standard Minimum Non-parole Periods, transmitted 24 May 2012, tabled 22 August 2012.

We received terms of reference from the Attorney General on 21 September 2011 asking us to review the Crimes (Sentencing Procedure) Act 1999 (NSW) (CSPA) having regard to:

- current sentencing principles including those contained in the common law
- the need to ensure that sentencing courts are provided with adequate options and discretions
- opportunities to simplify the law, while providing a framework that ensures transparency and consistency
- the operation of the standard minimum non-parole scheme, and
- any other related matter.

The Attorney General requested that we consult closely with the NSW Sentencing Council during the course of the review. Sentencing Council staff have also provided assistance with research and writing. We have also been fortunate to receive the assistance of two solicitors from the Office of the Director of Public Prosecutions who have been seconded to us for this reference.

Preliminary submissions

We circulated a preliminary outline of the review in September 2011 and received 20 preliminary submissions in response. A preliminary consultation meeting was also held with criminal justice system stakeholders on 24 October 2011 and with the NSW Sentencing Council on 19 October 2011.

Sentencing question papers

We have produced a series of Sentencing Question Papers to elicit submissions on the review. This represents a departure from our normal consultation, and we will assess the outcomes of this process at the end of the project.

- **QP 1: Purposes of sentencing** – addresses the purposes of sentencing contained in s 3A of the CSPA.
- **QP 2: General sentencing principles** – discusses common law sentencing principles.

- **QP 3: Factors to be taken into account on sentence** – analyses the factors to be taken into account on sentence, many of which are currently contained in the list of 'aggravating' and 'mitigating' factors found in s 21A of the CSPA.

- **QP 4: Other discounting factors** – considers other discounting factors on sentence such as a discount for a guilty plea.

- **QP 5: Full-time imprisonment** – examines structures of full-time imprisonment, including short terms of imprisonment, reviewing the balance between non-parole and parole periods, and aggregate sentences.

- **QP 6: Intermediate custodial sentencing options** – analyses the intermediate custodial alternatives to full-time imprisonment (compulsory drug treatment detention; home detention; intensive correction orders; suspended sentences; and rising of the court) and asks how they can be improved. It also asks whether there are other intermediate custodial sentencing options (such as periodic detention) which could be introduced in addition to these existing options.

- **QP 7: Non-custodial sentencing options** – analyses the non-custodial alternatives (community service orders; s 9 bonds; fines; and non-conviction orders) and asks how they can be improved. It also asks whether there are other non-custodial sentencing options (such as work development orders and fines held in trust) which could be introduced in addition to these existing options.

- **QP 8: The structure and hierarchy of sentencing options** – addresses the broad question of the structure and hierarchy of sentencing options that may be imposed by the courts. We ask a series of questions to determine whether: legislation should specify a hierarchy of sentences; the structure of sentences should be made more flexible; and there should be any restrictions on the combination of sentences that are allowed.

- **QP 9: Alternative approaches to criminal offending** – considers ways in which offenders or suspects can be dealt with without entering the court system, or if they do, how the courts may divert or defer finalising their matters with a view to aiding their rehabilitation and achieving positive outcomes for the community and victims.

- **QP 10: Ancillary orders** – considers the orders that are ancillary to sentencing: compensation orders; driver licence disqualification; and non-association and place restriction orders, and asks whether they are currently effective and whether any changes need to be made to integrate them more fully into the structure of sentencing.

- **QP 11: Special categories of offenders** – considers the issues relating to some groups of offenders who may require special consideration either because they are overrepresented in the criminal justice system or because particular sentences affect members of these groups differently when compared with other offenders: Aboriginal and Torres Strait Islander offenders; offenders with cognitive and mental health impairments; women; and corporations.

- **QP 12: Procedural and jurisdictional aspects** – deals with procedural and jurisdictional aspects of sentencing, looking particularly at innovations that could be adopted to simplify the operation of the law and enhance the

transparency and consistency of decision-making. We also look at how technology could be used to make the courts more efficient and accessible.

The first four were released in April 2012 and the next three (QP 5-7) in June 2012. The final five papers (QP 8-12) were released in July 2012.

Report 134: Interim report on standard minimum non-parole periods

Following the High Court's decision in *Muldrock v The Queen* [2011] HCA 39, the Attorney General requested an urgent report on Standard Minimum Non-Parole Periods. A consultation roundtable was held on 30 March 2012 and 11 submissions were received in response to a staff paper that was circulated to a limited number of stakeholders in April 2012. We provided an interim report on Standard Minimum Non-parole Periods to the Attorney General on 24 May 2012, and it was tabled on 23 August 2012.

Priorities for 2012-13

In 2012-13, we intend to conduct further consultation with stakeholders and report to Government by the end of the first quarter of 2013.

Security for costs and associated orders

Commissioners: Prof Hilary Astor (Lead Commissioner), the Hon James Wood AO QC, His Honour Judge Peter Johnstone.

Reference received: 8 December 2009.

Consultation Paper: May 2011.

This reference arose out of a growing awareness of two particular challenges: first, first, at the time the reference was given to the Commission, the courts in New South Wales did not have power to order costs against litigation funders, which has resulted in successful defendants being out of pocket for their legal costs; and secondly, that those bringing public interest proceedings may not have the resources to mount and maintain a court case.

The background to this inquiry is canvassed in a speech made by the then Attorney General in response to a question in Parliament about the Government's efforts to balance the financial interests of litigants in court proceedings. He said that there is “some disquiet about whether the existing approach to security for costs and related orders achieves the right balance between the competing interests of the defendant and plaintiff and, more broadly, whether the current regime is consistent with genuine access to justice”.

The terms of reference ask us to inquire into and report on whether the law and practice relating to security for costs and to associated orders, such as protective costs orders and public interest orders, strike an appropriate balance between protecting a plaintiff's right to pursue a legitimate claim regardless of means and ensuring that a defendant is not unduly exposed to the costs of defending that litigation.

Priorities for 2012-13

In 2012-13, we will undertake a series of roundtable meetings, and other face-to-face consultations. We expect to complete the report by the end of the 2012.

Jury directions

Commissioners: the Hon James Wood AO QC (Lead Commissioner), Prof Hilary Astor, Mr Tim Game SC, Prof Jane Goodman-Delahunty.

Expert advisors: Prof Jill Hunter, Her Honour Judge Gaye Murrell, His Honour Judge Peter Berman, Justice Graham Barr.

Reference received: 16 February 2007.

Consultation paper: December 2008.

This reference is about the instructions that a judge gives to a jury in a criminal trial. It arises in the context of a growing concern in Australia and overseas about the problems associated with jury directions. The Victorian and Queensland Law Reform Commissions have undertaken similar projects. These inquiries were prompted, in part, by the Standing Committee of Attorneys General's (as it then was) consideration of "the feasibility of a review of jury directions and warnings, including areas for improved consistency".

The reference requires the Commission to consider:

- the increasing number and complexity of the directions, warnings and comments required to be given by a judge to a jury
- the timing, manner and methodology adopted by judges in summing up to juries (including the use of model or pattern instructions)
- the ability of jurors to comprehend and apply the instructions given to them by a judge
- whether other assistance should be provided to jurors to supplement the oral summing up, and
- any other related matter.

For most of 2009/10 this reference was on hold due to resource constraints. This reference was accorded a lower priority in 2010-11.

In 2011-12 the Commission focused the reference on

- aids to jury comprehension;
- issues of trial management to assist jury decision-making; and
- some key directions including directions on the standard of proof.

Priorities for 2012-13

The aim is to complete a concise report in 2012 focused on key practical reforms to assist jury trials.

Other issues

Consultation and community engagement

In a number of key references, the consultation activity of the Commission increased significantly. References such as penalty notices and people with mental health and cognitive impairments in the criminal justice system have involved extensive community consultation. In the Bail and Sentencing reference we have used round table discussions extensively.

We continue to learn from the experiences in all our references, and to integrate this experience into our processes.

In 2012-13, we intend to continue to develop our engagement strategy, including further extension of face-to-face community engagement, and use of technology and social media to broaden our base of engagement. We are currently redeveloping our website, with a view to making it more user friendly and inviting.

Implementation and Government response

During 2011-12 no legislative action was taken to implement Law Reform Commission reports.

The Government responded to *Report 131: Compensation to relatives.*

The Government tabled *Report 133: Bail* and indicated that it would respond to the recommendations by the end of 2012.

In 2012-13, at the time of writing, the Government had also:

- tabled Report 134: *People with cognitive and mental health impairment in the criminal system: Diversion* and indicated it had formed a committee to prepare a whole of government response, and
- introduced the *Crime Amendment (Cheating at Gambling) Bill* implementing recommendations of Report 130: *Cheating at gambling.*

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

- Report 132: *Penalty Notices*
- Report 129: *Complicity*
- Aspects of the privacy reports: Report 127: *Protecting privacy in New South Wales,* Report 126: *Access to personal information,* and Report 123: *Privacy Principles,* as well as Report 120: *Invasion of privacy*
- Report 124: *Uniform Succession laws: Administration of estates of deceased persons* (all other aspects of succession law having been actioned)
- Report 121: *Emergency medical care and the restricted right to practise*
- Report 119: *Young people and consent to health care.*
- Report 115: *Company title disputes*

People

Commissioners

Chairperson

The Hon James Wood AO QC (appointed January 2006)

Mr Wood commenced his term as chairperson in January 2006, having previously been a full-time Commissioner with the NSW Law Reform Commission in 1982-1984. He was Chief Judge at Common Law, 1998-2005, having been appointed a Supreme Court Judge in 1984. He was Commissioner of the Royal Commission into Police Corruption, 1994-1997 and Commissioner of the Special Commission of Inquiry into Child Protection Services in NSW, 2007-2008. He has previously been the Inspector, Police Integrity Commission, 2005-2006 and the chairperson, Sentencing Council of NSW, 2006-2009, and is currently the deputy chairperson.

Full-time Commissioner

Emeritus Professor Hilary Astor (appointed March 2010)

Professor Astor commenced as full-time Commissioner in March 2010. She was previously a part-time Commissioner from 1999-2006. Professor Astor joined the Faculty of Law at the University of Sydney in 1986 and most recently held the position of Professor of Dispute Resolution. She was Pro Dean of the Faculty from 1999-2001. Her areas of research interest are dispute resolution, especially mediation, and family law. She was the inaugural Chairperson of the National Alternative Dispute Resolution Advisory Council and a member of the Council of the Australasian Institute of Judicial Administration from 2006-2011.

Part-time Commissioners

Emeritus Professor David Brown (1 July 2011- 30 June 2012)

Mr Timothy Game SC (appointed July 2009)

Professor Jane Goodman-Delahunty (appointed May 2002)

The Hon Greg James QC (appointed January 1999)

The Hon Justice Peter Johnson (appointed 7 December 2011)

His Honour Judge Peter Johnstone (appointed 2 December 2009)

Deputy Chief Magistrate Jane Mottley (appointed 14 September 2011)

Mr Steven O'Connor (28 September 2011-30 June 2012)

The Hon Harold Sperling QC (appointed January 2005)

Professor David Weisbrot (appointed 1 July 2011)

Staff

The Staff of the Commission as at 30 June 2011

Paul McKnight	Executive Director
Marthese Bezzina	Assistant Law Reform Officer
Jenny Davis	Library Assistant *(attached to the LRC from Library Services)*
Robyn Gilbert	Law Reform Project Officer
Ani Luzung	Legal Officer
Julia McLean	Law Reform Project Officer
Maree Marsden	Executive Assistant
Suzanna Mishhawi	Administrative Assistant
Abi Paramaguru	Law Reform Project Officer
Steven Thomson	Specialist Law Reform Officer
Joseph Waugh PSM	Senior Law Reform Officer
Anna Williams	Librarian

Staff movements during the year

The Commission records its thanks to Jacob Campbell, Edward Elliot, Zrinka Lemezina, Bridget O'Keefe, Dara Read, and Ihab Shalback who left the Commission's staff during the year.

Internships

Student interns greatly assist the work of the Commission. They work at the Commission principally as a means of furthering their education, through University placements, and through the Commission's own internship programs during the summer and winter vacations.

Student interns contribute directly to references and have made significant contributions to our research and writing, including to our publications.

The following students had placements at the Commission in 2011-12:

Name	University	Period	Reference
Andrew Berriman	UTS	summer	Security for Costs
Kathleen Carmody	UNSW	summer	CMHI
James Chin	UTS	summer	Sentencing
Michael Forgacs	Sydney	summer	CMHI
Catherine Greentree	Macquarie	summer	CMHI
Katherine McCallum	UNSW	summer	Sentencing
Kate McLaren	Sydney	winter	CMHI
Murray Patten	Macquarie	summer	Sentencing
Vivianne Schwarz	UNSW	winter	Security for Costs
Effie Shorten	Macquarie	winter	Sentencing
Jonathan Hall Spence	Sydney	winter	Sentencing
Kate Worrall	ANU	winter	CMHI

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Attorney General & Justice