



New South Wales
Law Reform Commission

Annual Report 2013-2014

November 2014
www.lawreform.justice.nsw.gov.au



**New South Wales
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2013-14

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The year in review

This year has been a year of transition for the Commission. After 8 years as Chairperson of the Commission, the Hon James Wood AO QC resigned in January 2014 to take up his role as Chairperson of the State Parole Authority. James Wood's contribution to law reform in NSW has been immense. In the last 4 years alone he has led major projects on Sentencing, Criminal appeals, Complicity Cheating at gambling, Jury directions, and Compensation to relatives. He has presided over a revitalised Law Reform Commission with a focus on strong practical recommendations for reform grounded in thorough research, rigorous analysis, and comprehensive engagement with stakeholders. We will miss Mr Wood as Chairperson but have been fortunate to retain him as a part-time Commissioner.

The Commission continues to undertake major work in key areas of law. Our references on parole and early guilty pleas build on our existing body of recent work in criminal law and procedure. Our reference on statutory dispute resolution brings us into an area of law, (alternative) dispute resolution, that we looked at some time ago in our reference on Community Justice Centres, and invites a look at how modern dispute resolution can be strengthened.

As a Commission we look forward to future challenges.

On behalf of the Commission,



The Hon Anthony Whealy QC
Commissioner

NSW Law Reform Commission: profile

Roles and responsibilities

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

Services and activities

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

In undertaking this work, we:

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

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

Commissioners and staff

As at 30 June 2014, the Commission comprised 8 part-time Commissioners. The positions of Chairperson and full-time Commissioner remained vacant.

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

Performance for 2013-14

The NSW Law Reform Commission provides law reform advice. In doing so, we contribute to a range of Government priorities including the following goals under *NSW 2021: a plan to make NSW number one*:

	16: prevent and reduce the level of crime	17: prevent and reduce the level of re-offending	18: increase community confidence in the justice system	11: keep people healthy and out of hospital	4: increase the competitiveness of doing business in NSW
Sentencing					
Criminal appeals					
Early appropriate guilty pleas					
Parole					
Statutory dispute resolution provisions					

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

Measure	09-10	10-11	11-12	12-13	13-14 Target	13-14 Actual	14-15 Target
Number of consultation papers and reports published	12	14	14	10	10	11	10
Number of consultation events/meetings held	53	73	37	36	40	38	40
Percentage of projects conforming to project planning standards	-	100%	100%	100%	100%	100%	100%
Percentage of projects meeting timeliness goals	-	71%	100%	75%	75%	50%	75%
Law Reform Commission mentions in court decisions	16	17	23	15	15	22	15
Number of legislative amendments based on LRC reports	3	1	0	4	4	2	4
Newsalert email subscribers and Twitter followers				220	500	570	1000

Completed references

We completed two references in 2012-13: sentencing and criminal appeals.

Sentencing

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

[Prof Hilary Astor participated as a Commissioner for the interim report, Report 134; Justice Johnson did not participate in Report 134.]

Reference received: 21 September 2011.

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

Interim report: Standard Minimum Non-parole Periods (Report 134), transmitted 24 May 2012, tabled 22 August 2012.

Final report: Sentencing (Report 139), transmitted 28 July 2013, tabled 12 September 2013.

We received terms of reference from the Attorney General 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 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 and one solicitor from Legal Aid NSW who were seconded to us for this reference.

Report 139: Sentencing

We delivered the final sentencing report to government on 28 July 2013. It was tabled in Parliament on 12 September 2013.

We have recommended a revised Crimes (Sentencing) Act that will simplify NSW's existing sentencing provisions and make them more transparent.

We have revised the purposes of sentencing and recommended that the revised Act identify the most important principles of sentencing. We have also recommended replacing the 22 aggravating and 13 mitigating factors that courts must take into account when sentencing with 6 general factors: the nature,

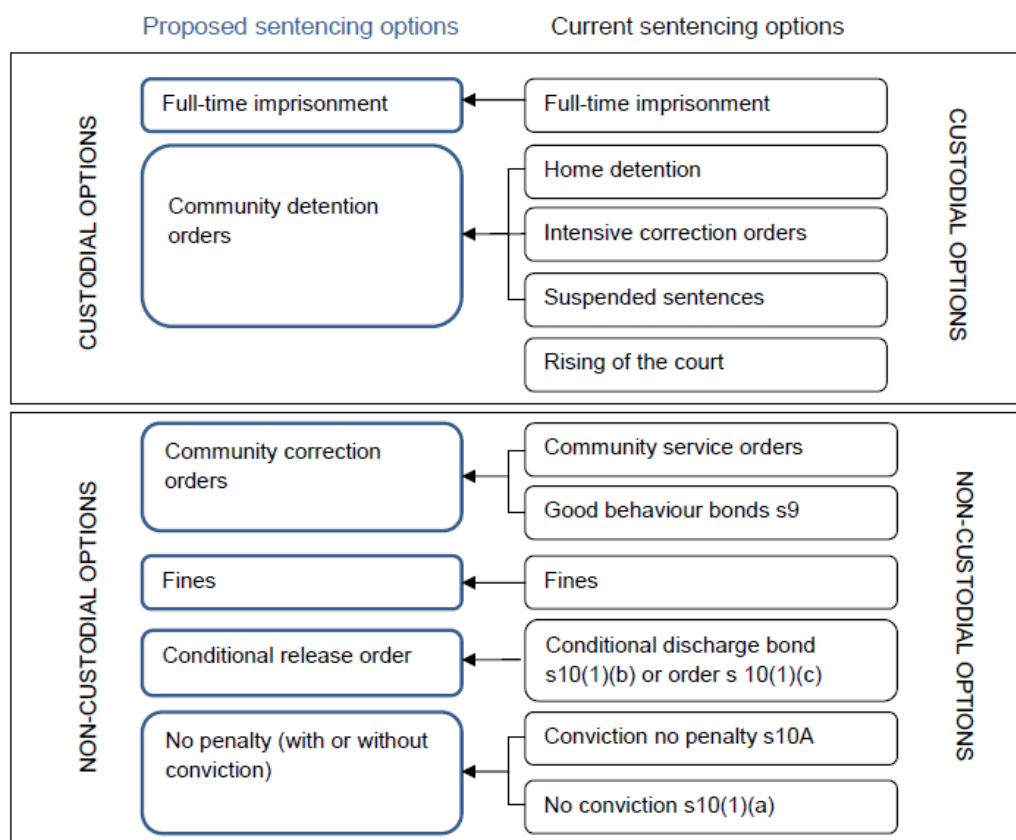
circumstances and seriousness of the offence; the personal circumstances and vulnerability of the victim; the extent of the harm caused; the offender's character, background and offending history; the extent of any remorse shown; and the offender's prospects of rehabilitation.

We recommended improvements to simplify the rules that govern the setting of terms of imprisonment, including:

- § A return to the top down approach which requires the court to set the head sentence first followed by the non-parole period, except where the court imposes a fixed term sentence.
- § The adoption of a presumptive ratio that the non-parole period should be two-thirds of the head sentence.
- § The replacement of the over-used and much criticised "special circumstances" test, so that a court can depart from the ratio only if, having regard to all the purposes of sentencing, it is satisfied that there are good reasons to do so.
- § The preservation and clarification of aggregate sentencing, and the introduction of provisions (as an alternative) to permit a court to accumulate sentences into an overall effective head sentence and then to fix a single non-parole period.

Under our recommendations 4 new flexible sentencing options of increasing intensity will replace the 9 existing sentencing options other than full-time imprisonment and fines (including home detention, intensive correction orders, community service orders and good behaviour bonds):

- § **Community detention order (CDO):** a community-based custodial order which can require offenders to submit to home detention and other restrictions as well as a work and intervention requirement aimed at addressing their offending behaviour (such as community service work, psychological or psychiatric treatment, intervention programs, educational programs, vocational or life skills programs, counselling, drug or other addiction treatment). The State Parole Authority would deal with breaches which would usually lead to the offender serving the rest of the sentence in full-time imprisonment.
- § **Community correction order (CCO):** a community-based non-custodial order that includes an automatic condition that the offender not commit a further offence and optional discretionary conditions concerning supervision, work and program participation and personal restrictions, or entry into an intervention plan. A court would deal with breaches which would result in the offender being resentenced.
- § **Conditional release order (CRO):** a less intensive community-based non-custodial order that courts can impose with or without recording a conviction. It will include an automatic condition that the offender must not commit a further offence and optional conditions concerning supervision and personal restrictions.
- § A "**no penalty**" sentence that can be imposed with or without conviction.



The report also includes a set of back-up recommendations to reform the existing sentencing options: to increase the number of offenders who can be sentenced to the under-used options of home detention, intensive correction orders and community service; to reduce the problems associated with suspended sentences; and to streamline the operation of the non-custodial sentences.

Finally, we recommended changes for the Sentencing Council, including changing its composition to include one person with expertise or experience in legal aid and one person with expertise or experience in law reform, and giving it the specific function of preparing research and advisory reports to assist guideline judgment proceedings in the Court of Criminal Appeal.

Criminal appeals

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

Reference received: 1 March 2013.

Question Paper: July 2013.

Report: transmitted 25 March 2014, tabled 18 June 2014

We received terms of reference from the Attorney General asking us to review current avenues of appeal in all criminal matters, with a view to simplifying and streamlining appeal processes, and consolidating criminal appeal provisions into a single Act.

We released a Question Paper in July 2013 that canvassed the main aspects of the law and areas that could be reformed. From the 17 submissions we received, we developed some initial proposals for reform and conducted roundtable discussions with key stakeholders on our proposals and their workability.

Report 140: Criminal appeals

Criminal appeals is an area of law of considerable importance to the community. A proper system of criminal appeals enables higher courts to review lower court decisions. It aims to correct errors, protect against flaws in procedure and ensure that the law is interpreted and applied consistently across the court system. While the common law did not originally provide for appeals from criminal proceedings, a well regulated system of appeals has come to be regarded as a fundamental feature of the rule of law.

The report covers appeals from decisions in all criminal proceedings in NSW. Criminal appeals are currently governed by two separate pieces of legislation – the *Criminal Appeal Act 1912* (NSW) and the *Crimes (Appeal and Review) Act 2001* (NSW) - which have slowly changed over time. This has resulted in a criminal appeals system which can be at times complicated, inconsistent and outdated. This report was the first comprehensive review of criminal appeals in NSW since the introduction of the appeals system more than a century ago.

The report makes 61 recommendations to improve the current criminal appeals system in NSW. The overarching aim of our review was to consolidate and simplify the law relating to criminal appeals in NSW. We sought to balance finality and efficiency on the one hand, with fairness on the other.

The report's key recommendations include:

- Abolishing the *Criminal Appeal Act 1912* (NSW) and *Crimes (Appeal and Review) Act 2001* (NSW) and replacing them with a consolidated, new Criminal Appeal Act.
- Streamlining the avenues of appeal, so that the Court of Criminal Appeal is the final court of appeal for all criminal matters in NSW.
- Changing the way that the District Court decides appeals from a sentence imposed in the Local Court.
- Modernising and simplifying the grounds on which the Court of Criminal Appeal decides an appeal against a conviction imposed in the District Court or Supreme Court.
- Providing an avenue of appeal to the Court of Criminal Appeal on questions of fact, and not just questions of law, where a person is acquitted of an offence punishable by 15 years imprisonment or more by a District Court or Supreme Court judge sitting without a jury.

Priorities for 2014-15

References

Currently, we have three references that are ongoing. These form our priorities for 2014-15.

Early guilty pleas

Our project aims to recommend reforms to criminal procedures and professional practices so as to encourage appropriate early guilty pleas in NSW.

Specifically, we have been asked to identify opportunities for legislative and operational reforms to encourage appropriate early pleas of guilty in criminal proceedings for all criminal matters with regard to.

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

In early 2013 we received 11 preliminary submissions. Between July and October 2013, we engaged with 15 stakeholder groups, including the NSW Police Force; the Office of the Director of Public Prosecutions (ODPP); Legal Aid NSW and Public Defenders NSW; the Local Court and District Court of NSW; the Law Society of NSW and NSW Bar Association; and local and international academics with expertise in the area. The submissions and consultations were instructive to our research and prompted us to develop our consultation paper *Encouraging appropriate early guilty pleas: Models for discussion* (CP15) in November 2013.

CP15 presented approaches that other jurisdictions had taken to address obstacles to early guilty pleas, and asked stakeholders to comment on what model or models should be adopted in NSW.

We received 13 formal and two informal submissions to CP15. Throughout the course of this reference we have spoken with stakeholders from all -parts of the criminal justice system. This includes defence advocates, prosecutors, police, the Local and District Court, and victims advocates. The key theme of the submissions and consultations was that a significant rethink of the process for cases dealt with on indictment is required.

In total the early guilty pleas reference has received 26 submissions. We have conducted 38 formal consultations, which included in excess of 70 people. The consultations have taken a number of forms including meetings with individuals, roundtables, observations and a workshop between Legal Aid NSW and the Office of the Director of Public Prosecutions.

Our engagement with stakeholders and research has resulted in the development of a blueprint for criminal procedure and professional practice in indictable matters in NSW. Under this blueprint we seek to “front-end” the criminal justice system, so that the elements required for an appropriate early guilty plea are put into place early in proceedings.

In 2014-15, our priority will be to work with the Commissioners and stakeholders to finalise our recommendations to government.

Parole

Our project aims to improve the system of parole in NSW. We have been asked to review the mechanisms and processes for considering and determining parole, having regard to:

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

We released a Scoping Paper inviting preliminary comments on the project in July 2013, followed by six detailed Question Papers in September – December 2013. The Question Papers presented research and analysis on all the issues in the reference and asked stakeholders specific questions about problems and directions for reform. The Question Papers covered:

- the purpose and role of parole, and the design of the parole system
- membership of the State Parole Authority and Serious Offenders Review Council
- the State Parole Authority’s decision making
- in-custody preparation for parole and management of parolees in the community
- breach and revocation, and
- parole for young offenders.

We received 65 written submissions in response to our published papers in 2013-14. We also engaged intensively with key stakeholders at face-to-face consultations, including Corrective Services NSW, the State Parole Authority, Juvenile Justice NSW, legal practitioners, other government organisations, victims of crime and their representatives, offenders, non-government services providers and advocacy groups. In all, we held 30 consultation meetings with stakeholders in 2013-14. A number of these consultations were in Wagga Wagga to ensure that our final report reflects the experience of stakeholders in non-metropolitan areas.

Our engagement with stakeholders and research has highlighted a few key issues. The parole system can work better and more efficiently. The language of the relevant legislation can also be modernised and better aligned with the State Parole Authority's decision making practices. In-custody case management and preparation for parole is another key issue.

In 2014-15, our priority will be further intensive consultation with key stakeholders on specific reform proposals in these focus areas. We will test and refine our recommendations collaboratively with stakeholders and aim to deliver our final report within 2014.

Statutory dispute resolution

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

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

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

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

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

In March and April 2014 we surveyed all agencies with a role in administering the ADR provisions in NSW legislation, to get a picture of how the provisions are used and what issues are encountered. We have received a 100% response rate.

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

Further smaller papers and other consultations are proposed for the second half of 2014. The project will be completed in the first half of 2015.

Engagement

We continue to build our engagement with stakeholders and the community.

In 2013-14, we continued our program of regional consultations by visiting Wagga Wagga to consult stakeholders on our Parole reference. These visits are invaluable to providing a picture of how the law is operating on the ground in NSW as a whole. We will undertake at least one regional visit in 2014-15.

In 2013-4 we continued to build our Twitter presence, and our periodic email newsletter. Our following is growing consistently. Our email newsletter is a short email every 2-4 weeks containing 2-3 items of interest. Following us on Twitter or signing up to our newsletter provides the best ways of keeping abreast of development at the Commission.

In 2014-15, we will continue developing our engagement strategy, including extending face-to-face community engagement, and using technology and social media to broaden our engagement base.

Implementation and Government response

In the reporting year the government passed the following legislation implementing all or part of Law Reform Commission reports:

- § *Mental Health (Forensic Provisions) Amendment Act 2013* implements recommendations from *People with cognitive and mental health impairments in the criminal justice system: criminal responsibility and consequences* (Report 138, 2013) to do with continuing detention of people at the end of their limiting terms who present unacceptable risk of harm
- § *Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act 2013* implements recommendations of our interim and final reports on *Sentencing* (Reports 134 and 139, 2013) to do with the implications of the *Muldock* case, and the simplification of the standard non-parole period regime

We also received a positive response from the government to Report 135 *People with cognitive and mental health impairments in the criminal justice system; diversion*, which can be found on [the project page on our website](#).

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

- § Report 132: *Penalty notices* (some aspects were implemented as a result of consultations during its preparation).
- § Report 129: *Complicity*.
- § Aspects of the privacy reports: Report 127: *Protecting privacy in New South Wales*, Report 126: *Access to personal information*, Report 123: *Privacy principles* and Report 120: *Invasion of privacy*.
- § Report 124: *Uniform succession laws: Administration of estates of deceased persons* (all other aspects of succession law having been legislated).
- § Report 121: *Emergency medical care and the restricted right to practise*.
- § Report 119: *Young people and consent to health care*.

People

Commissioners

Ms Rhonda Booby (appointed January 2014)

Mr Timothy Game SC (appointed July 2009)

The Hon Justice Peter Johnson (appointed December 2011)

Her Honour Deputy Chief Magistrate Jane Mottley (appointed September 2011)

The Hon Harold Sperling QC (appointed January 2005)

Professor David Weisbrot (appointed July 2011)

The Hon Anthony Whealy QC (appointed August 2013)

The Hon James Wood AO QC (appointed January 2014)

Staff

Commission staff as at 30 June 2014

Paul McKnight	Executive Director
Stephanie Button	Policy and Research Officer
Lorien Brien	Administrative Support Assistant
Emily Collet	Assistant Law Reform Officer
Emma Hoiberg	Law Reform Project Officer
Robyn Johansson	Legal Officer
Ani Luzung	Legal Officer
Sallie McLean	Law Reform Project Officer
Maree Marsden	Executive Assistant
Effie Shorten	Assistant Law Reform Officer
Joseph Waugh PSM	Senior Law Reform Officer
Anna Williams	Librarian

Staff movements during the year

We record our thanks to Simon Tutton who worked on secondment at the Commission during the year.

Internships

Student interns greatly assist our work. They work principally to further their education, through university placements, and through our 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 in 2013-14:

Name	University	Period	Reference
Laura Cameron	Macquarie	Summer	Parole
Roisin McCarthy	Sydney	Summer	Early guilty pleas
Gram Morris	La Trobe	Summer	Criminal appeals
Erin Turner-Manners	Macquarie	Summer	Parole
Lara Wilkinson	Bond	Summer	Statutory dispute resolution
Ronan Casey	ANU	Winter	Early guilty pleas
Mitchell Cleaver	Sydney	Winter	Statutory dispute resolution
Sarah Pitney	Sydney	Winter	Parole

Staff of the Commission also worked with the students of the Macquarie University Law School course LAW 599 Legal Governance and Professional Leadership. Students in this course undertook research and presented papers on various issues related to current projects.



Justice
Law Reform
Commission

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