THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Criminal Law Committee

RESPONSE TO CONSULTATION PAPER: SENTENCING SERIOUS VIOLENT OFFENDERS

26 June 2011

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Introduction

We refer to the consultation paper produced by the New South Wales Sentencing Council in response to the terms of reference referred by the Attorney-General regarding most appropriate way of responding to the risks posed by violent offenders in New South Wales ("the Paper").

NSW Young Lawyers, a Division of the Law Society of NSW, is made up of legal practitioners and law students who are under the age of 36 or in their first 5 years of practice. The Young Lawyers Criminal Law Committee ("the Committee") provides education to the legal profession and wider community on current and future developments in the criminal law, and identifies and submits on issues in need of law reform.

Summary of response

The Committee supports:

- **increased funding for the existing parole and rehabilitation regime and Violent Offenders Therapeutic Programme (VOTP).**

The Committee does <u>not</u> support:

- **the increased availability of life sentences;**
- **a supervision scheme for violent offenders in addition to the systems already existing; or**
- **a preventative detention scheme for violent offenders.**

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Responses to questions

Q1. Can serious violent offenders (that is offenders who pose a significant high risk of violent re-offending following release from prison) be identified as part of a single cohort?

A1. No, they cannot. Serious violent crime is a category that encompasses disparate motives, methods and victims. There is no single pathology that correlates with the risk of re-offending.

Q3. What is the best method for assessing their risk of re-offending?

A3. Actuarial risk assessment is the best of the available methods, but even this is insufficient to be used as a basis to apply for supervision or preventative detention.

At [2.10] of the Consultation Paper, the predictive validity of actuarial assessment is stated as 70-80%. Any scheme contemplated by the Council requiring the deprivation of liberty must consider whether it will adopt the criminal standard of proof as regards reoffending (which an actuarial assessment may not satisfy) or some different or modified burden. The Committee submits it would be a serious decision not to accept the necessity of 'beyond reasonable doubt' as a precondition to the removal of liberty.

It is also necessary to consider that Corrective Services is not the only government agency that conducts assessments of the likelihood of individuals committing acts of violent crime. The NSW Police Force also engages in actuarial risk assessment via its Suspect Targeting Management Plan. For example, some of the risk factors considered by that program in relation to youth offenders are:

- ATSI background;
- gender;
- coming to the attention of police;
- familial offending;
- child notification reports (abuse and / or neglect);
- truancy and school attendance;
- alcohol and other drug use; and
- offending peers.

This is a risk management strategy that aims to prevent crime, rather than create additional offences. Police routinely use these risk factors to make decisions about crime prevention and intervention. It is, however, inconceivable, that a court would consider the facts a person was, for example, Indigenous, male and possessed of a criminal father as reasons to increase a sentence.

Q7: Is the current legislative framework in NSW sufficiently equipped to deal with serious violent offenders?

A7. Yes.

The current legislative regime and its ancillary programs provide a number of tools for dealing with different varieties of offenders likely to recommit serious violent offenders. These include the ability in sentencing to consider the need to protect the community, sentences which reflect the seriousness of the crime, in-community parole supervision and access to the VOTP program, the provisions of the *Mental Health Act 2007*, as well as legislation dealing with Apprehended Personal Violence Orders and Habitual Offenders.

Sentencing and Sentences

A sentencing court is able to consider the protection of the community from the offender when imposing a sentence (s 3A *Crimes (Sentencing Procedure) Act 1989*). This often involves the judicial officer treading a fine line in the consideration of how far previous convictions reflect on the seriousness of the instant offence.[1] This is the nature of the judicial role. Consideration of the offender's antecedent criminal history is a valid and solid ground for increasing the severity of a penalty where it shows, in relation to the present conviction, that the need for deterrence is higher, the moral culpability is greater and the risk to society as a result of the nature of the crime is intolerable. Increasing a sentence because prior offences indicate a risk of re-offending is not a valid sentencing decision.

It should be noted that Parliament has prescribed appropriate penalties for violent offences. For instance, the legislation criminalising particularly violent offences, such as murder and aggravated sexual assault, allows for life sentences in cases where such a penalty is deemed suitable in accordance with sentencing principles. The current legislative framework allows courts to take strong measures to deal with serious violent offenders, when the individual circumstances justify such an approach.

In-community programs

The Paper refers to CSNSW's Community Compliance and Monitoring Groups at [3.46]. The Committee views the developments mentioned as highly desirable steps taken by those best able to assess re-offending risk. The availability of VOTP maintenance programs in-community is also worthy of note. In fact, it would be preferable to divert funds to these programs than to create a stand-alone scheme or legislative reform. However, the risk that must be guarded against is the transformation of these programs into de facto preventative supervision of a more onerous nature.

[1] See, for example, *Veen v The Queen (No 2)* (1998) 164 CLR 465 and *Challis v R* [2008] NSWCCA 210.

Mental Illness

Another group of violent offenders are those with severe and identifiable mental illnesses or conditions that exist beyond their propensity to violence or anti-social behaviour. In those cases, it must also be asked whether the ability to detain mentally disordered persons under the *Mental Health Act 2007* is sufficient (noting the limits imposed by 16(1)(k) and (l) in particular). A person is mentally disordered if:

> the person's behaviour for the time being is so irrational as to justify a conclusion on reasonable grounds that temporary care, treatment or control of the person is necessary:
>
> (a) for the person's own protection from serious physical harm, or
>
> (b) for the protection of others from serious physical harm.

Whilst recognising that this is not strictly referable to legislative provisions, the Committee understands that the standard form used by NSW Police Officers to request assessment of a person under the *Mental Health Act* provides for Police to be notified prior to discharge if a decision is made not to admit for involuntary treatment. However, it should be noted that the number of, and threat posed by, violent offenders with severe mental or emotional disturbances is typically exaggerated.[2]

Apprehended Personal Violence Orders

Further, the *Victims Rights Act* adds another dimension, which may be relevant in the context of 'expressive' serious violent offenders. By informing victims of the impending end of a prisoner's sentence, they are afforded the notice necessary to seek and APVO. In some cases, an APVO may, in and of itself, suitably decrease the risk of re-offending without resorting to a fresh legislative regime.

Habitual Offenders

If prosecutors wish a person with a high of re-offending to be sentenced more severely on that ground, they have the option of introducing an additional sentence under the *Habitual Criminals Act 1957*, as pointed out by the Consultation Paper at [3.15-23]. The Committee notes, however, that 'three-strikes' sentencing legislation does not necessarily reflect the modern view of criminal behaviour, punishment and rehabilitation.

[2] See Margaret Ray and Leanne Craze, *Provisions For Violent Offenders: Perpetuating Myths or Confronting Challenges*, paper presented in proceedings of AIC Conference 29-31 October 1991.

Q10: Should there be an extension of the availability of life sentences, in limited circumstances, to cope with the sentencing of serious violent offenders? If so, how should such a mechanism work? Which offences should be included? Should any such system allow for release on parole in relation to those offences?

A 10. No.

The availability of life sentences should not be extended to cope with the sentencing of serious violent offenders. To increase the maximum sentence, simply in order to attempt to minimise the risk of re-offending, would violate the principle of proportionality in sentencing. As Spigelman J stated in *McNaughton*, "the principle of proportionality requires the upper boundary of a proportionate sentence to be set by the objective circumstances of the offence, which circumstances do not encompass prior convictions".[3] To increase the upper boundary of a sentence without regard to the objective circumstances of the offence represents an improper departure from proportionate sentencing.

Such an approach is also unlikely to be successful in actually coping with the sentencing of serious violent offenders. The problem of serious violent offenders generally lies in their prospects of rehabilitation and risk of re-offending, rather than the objective seriousness of one particular act of violence in itself. Therefore the approach of extending the availability of life sentences would not usefully deal with many violent offenders who may not have committed offences which fall within the worst category of case, and therefore the maximum sentence of life would not be applicable.

The Council should also consider the increased costs, violence and risks associated with the detention of persons imprisoned for life, if life sentences were available for more offences. In the Committee's submission, this method is unlikely to be a useful mechanism.

[3] *R v McNaughton* [2006] NSWCCA 242, [24].

Q 11B: Should legislation be introduced to allow for continuing detention or extended supervision orders in relation to serious violent offenders, similar to the model applicable to serious sex offenders?

A 11B: No.

The CSSOA has attracted local and international criticism. Any similar legislative scheme for continuing detention and extended supervision of serious violent offenders would be subject to the same 12 objections in bullet points on pages 26 and 27 of the Paper.

Further to bullet point 1 and the Committee's previous comments in relation to Question 3, the opinions of psychiatrists or psychologists (even if made close to the date of release and even if assisted by statistical analysis of whether a sample of other offenders with similar attributes have re-offended) can never confidently predict whether a particular offender will re-offend given the unknown situations that the offender will face after release.

In *Fardon*, Kirby J, by reference to the *Crimes (Serious Sex Offenders) Act 2006*, commented in relation to the reliability of prediction of re-offending:

> Experts in law, psychology and criminology have long recognised the unreliability of predictions of criminal dangerousness. [...] Judges of this Court have referred to such unreliability. Even with the procedures and criteria adopted, the Act ultimately deprives people such as the appellant of personal liberty, a most fundamental human right, on a prediction of dangerousness, based largely on the opinions of psychiatrists which can only be, at best, an educated or informed 'guess'.[4]

While His Honour was, of course, speaking in dissent, his judicial comments are applicable to the considerations of legislators and law reformers.

Rehabilitation does not work for all offenders and even the imposition of continuing detention orders and extended supervision orders can never prevent all crime. Offenders can re-offend during or after the orders and the orders do nothing to deter crime by first time offenders. The criminal justice system is better placed to *respond* to crimes which an offender has committed rather than to *predict* crimes which are yet to (and may never) occur.

Further to bullet point 12, the CSSOA already captures a broad range of offenders, from an offender who has committed one unplanned act of indecency on a family member to an offender who has committed several planned aggravated sexual assaults on strangers. There is no justification for expanding the CSSOA or introducing new legislation for other forms of offending which are significantly more disparate (see Answer 1 above).

[4] *Fardon v Attorney-General for the State of Queensland* (2004) 78 ALJR 1519, [124]-[125].

There are three further arguments against introducing continuing detention or extended supervision orders for serious violent offenders.

Disincentive to rehabilitation

Continuing detention orders and extended supervision orders can act as a disincentive to reform. Where the offender knows the exact length of the sentence, the offender has a clear incentive to participate in custodial treatment programs, demonstrate treatment gains and work towards lower security classifications in order to be granted parole before the sentence expires.

Under the CSSOA, an offender arguably has less motivation to reform because the offender can potentially be detained or supervised for an unlimited number of 5 year-long periods after the sentence expires. Prison is a dangerous environment where detainees are encouraged to learn further violent behaviours, and increased sentences only heightens the risk of failure to rehabilitate.

Even if an offender has made some treatment gains during the sentence, the State can still satisfy the low threshold test in ss. 9 and 17 of the CSSOA if the offender poses "an unacceptable risk of committing a serious sex offence". Introducing a similar scheme would not encourage serious violent offenders to reform.

Prejudicial information

While risk assessment is potentially more accurate if more information can be obtained about an offender, that does not outweigh the prejudicial effect on the offender of obtaining and using the information. A sentencing court properly considers only the admissible evidence regarding the subject offence and the offender's prior convictions in order to determine the appropriate sentence.

The CSSOA allows the State to obtain a much broader range of information regarding the offender from various agencies without the offender's knowledge or consent. The information (which can include uncharged acts and uncorroborated admissions) is then admissible under s. 25 of the CSSOA without the offender having the opportunity to object or test its reliability or weight.

The information is then used by the Court when deciding whether or not to make an order under the CSSOA. Introducing a similar scheme for serious violent offenders would cause them similar prejudice.

Legal costs

The CSSOA involves the State and the offender (usually borne by Legal Aid, and therefore the State) incurring significant legal costs.

While it is appropriate that the imposition of such restrictions on liberty are subject to independent determination by a Court, expanding the CSSOA to cover an even broader range of offenders would involve further legal costs and further stretch limited court resources.

In the Committee's view, those funds could arguably be better spent offering custodial treatment programs at all correctional facilities and offering maintenance programs to all serious violent offenders after release, as suggested in the Commitee's response to Q7.

Q16: Should a form of preventative detention be adopted in NSW for serious violent offenders?

A16: No. The comments above in relation to Q11B apply equally, if not more forcefully, to Q16.

The Committee thanks you for the opportunity to comment.

If you have any questions in relation to the matters raised in this submission, please contact:

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The primary authors of this submission were **Emma Bayley**, **Alexander Edwards**, **Joanna Mansfield** and **David Porter**, members of the Committee. The submission was edited by **Andrea Rejante**, also a member of the Committee.

Yours faithfully,

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