New South Wales Sentencing Council
Sentencing Serious Violent Offenders - Consultation Paper
May 2011
Submission of the Office of the Director of Public Prosecutions (ODPP)

In this submission we have answered the questions touching on sentencing and reform to sentencing laws, we do not have appropriate expertise in assessment or treatment of offenders and have not commented on these aspects.

At the outset we note the Department of Corrective Services (DCS) audit of potential high risk violent offenders and that only 14 inmates currently potentially would fall into this category. We are of the view that NSW sentencing law adequately addresses any ongoing risk to the community posed by offenders, and that as far as possible finality should be the objective of the sentencing proceedings. The audit suggests that these 14 prisoners may fall through a crack, and the present law would not provide the community with adequate protection. In these exceptional cases it may be appropriate for legislation to be developed to extend the scope of indeterminate sentencing and the ability for the Parole Board to supervise the offender beyond the limit of the sentence.

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 ?

No, the work done to identify the cohort by the DCS shows how disparate is the group.

Q4 How should serious violent offenders be identified, if not part of a single cohort ?

We note that other jurisdictions appear to have formulated tests that enable such offenders to be indentified. In formulating any test care is needed to ensure that it only applies to exceptional cases.

We note that the only way that this Office would be in a position to identify serious violent offenders at the time of sentence would be by reference to the offence committed, criminal antecedents and to a limited extent from psychiatric material presented to the court at sentence.

Q6 How can serious violent offenders with complex needs (a) best be identified ? (b) best be managed ?

In our view DCS is in the best position to identify and manage serious violent offenders while sentences are being served. We note that in the DCS audit the following factors were taken into consideration by the specialist team of forensic psychologists:

1. the nature of the offences
2. the inmate's history of violent offending
3. the inmate's institutional history
4. the results of psychometric assessments relevant to the risk of violent re-offending
5. the inmate's treatment history and
6. the inmate's suitability for treatment

Of these factors only 1 and 2 and possibly 3 and 4 would in the ordinary course be available to the prosecution at the time of sentence. Moreover these factors may differ quite significantly over the course of a lengthy sentence.

Legislation dealing with the supervision of serious offenders upon release from custody – whether they are serious violent or serious sex offenders – should not be introduced in a vacuum without the necessary support systems and funding for them. Supervision requires reporting and monitory obligations, accommodation and employment arrangements, treatment obligations, disclosure obligations (involving waiving rights to confidentiality), review provisions, and general obligations (such as non-association or contact, not consuming alcohol/drugs). There are those who would consider the existing serious sex offender legislation fails to properly address the proper workings of such a post-release plan, particularly in the area of the implementation and funding of treatment obligations. Continuing psychiatric and/or psychological treatment for these offenders, as would be the case for serious violent offenders, is essential. To expect long term inmates to be able to fund this necessary treatment, let alone organise it, is unrealistic. Centres providing this treatment which are appropriately located, staffed (and providing security for staff) and government funded need to be established. In other words, a properly funded post-release scheme needs to be in place before legislation is passed requiring observance to it, rather than the other way round. If it is the case, as the audit suggests, there are 14 high right violent offenders the cost of funding would not be great.

Q7 Is the current legislative framework in NSW sufficiently equipped to deal with serious violent offenders?
Yes.
Is the framework effectively used ?
Yes.
Are there issues with the current framework ?
No.

Q8 Does the Habitual Criminals Act have the potential to be useful in dealing with serious violent offenders?

The Habitual Criminals Act 1957 would need substantial modification to be useful in this regard. The term and the notion of being declared a habitual criminal is archaic. The concurrent sentence up to a maximum of 14 years is out of step with sentencing practices and requirements. However it does provide for some precedent and framework for release on licence before or at the expiration of the prison term.

In our view there is no utility in the Act continuing in its current form, and if other legislative options are considered this Act should be repealed.

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?

We do not support the extension of life sentences to other offences, even in limited circumstances, except to the extent suggested in our answer to question 18.

We query whether there is any utility in the offences under the Piracy Punishment Act 1902 (NSW) remaining in force.

Q11 Should there be some extension of graduated sentencing laws or should more use be made of those that currently exist ? 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?

We do not support extension of graduated sentencing laws.

If there were to be legislation allowing for continued detention or extended supervision then an option to consider would be to extend the Serious Sex Offenders legislation to accommodate violent offenders. But it may be preferable to pass different legislation to encapsulate the exceptional nature of extended supervision or continued detention for serious violent offenders.

Q13 Is there scope for the Parole Authority to effectively supervise serious violent offenders within the current parole provisions?

Yes, the availability of electronic monitoring and other surveillance provides scope for effective supervision by the Parole Authority on the basis that we are talking about very few offenders. We are concerned however that

supervision in the community is preferable to continuing detention and that any scheme is adequately resourced to maintain this monitoring and treatment.

Q15 Should legislation be introduced that would permit the making of Personal Restriction orders in relation to serious violent offenders that would be directed to ensuring community safety to supplement Parole Release conditions or that would endure the expiry of the sentence. If yes what should be provided in this respect ?

Yes, but see our answer to question 18.

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

No. We consider that release on licence and ongoing supervision in the community is preferable to continuing detention. If the offender breaches the conditions of their release, then that may be an offence that is punishable by further imprisonment.

Q18 Should models of indeterminate sentencing as practiced in other jurisdictions be considered for serious violent offenders ?

We note with interest developments in comparable jurisdictions in the areas of indeterminate and/or disproportionate sentencing, but as we have already submitted in our view the need to introduce a new form of sentencing that may apply to a significant number of not easily defined offenders has not been demonstrated.

On the basis of the audit conducted by DCS the only provision that may have some utility in NSW would be akin to the section 18B of the *Sentencing Act 1991 (Victoria)* or section 163 of the *Penalties and Sentences Act 1992 (Qld).* The provision could apply to similar categories of offences as in those states however in NSW it would not be necessary to make this option available for any offences where a life sentence is already available. The question of violence should be addressed by the Court at the time of the initial sentence and be subject to separate consideration by the Court (or by the Parole Board with a right of appeal to the Supreme Court) towards the end of their sentence.

In our view the above sort of provision should catch most offenders who pose an exceptional risk to the community that is readily identifiable from the circumstances of the offence(s) for which they are being sentenced. We are concerned that there may be other offenders who, during the course of their sentence are identified by DCS as posing an exceptional risk.

For those identified post sentence our preference would be for a process similar to the serious sex offenders regime where once DCS or the Parole Board identify the offender has posing a risk and form the view it would be highly desirable for the offender to be released on licence for a period (including the rest of their life) then the Attorney General should make an application to the Supreme Court for an extended supervision order. An offence should be created for breach of the order that carries a further prison sentence.

Office of the Director of Public Prosecutions
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