THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: RBG455223

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The Honourable James Wood AO QC
Acting Chairperson
NSW Sentencing Council
GPO Box 6
SYDNEY NSW 2001

Dear Mr Wood,

Sentencing Serious Violent Offenders

Thank you for the opportunity to provide comment to the Sentencing Council's review into sentencing serious violent offenders.

The Law Society's Criminal Law Committee has reviewed the consultation paper and has responded to the questions raised in the attached submission.

Officers of the Sentencing Council may find it convenient to direct any queries in relation to the submission to the policy lawyer with responsibility for this matter, Rachel Geare, on 9926-0310 or at rachel.geare@lawsociety.com.au.

Yours sincerely,

Stuart Westgarth
President

Consultation 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?

No. The Review[1] found the group of 14 serious violent offenders that were identified to be disparate in its composition. The Committee is of the view that it is not possible to identify who should be included in the cohort either at the initial sentencing stage or while the offender is in custody.

If Yes:

Q2 What are the common characteristics of this single cohort?

The Review found that while there are a number of common factors present within the serious sex offender cohort, the results of the audit conducted by the Department of Corrective Services showed no such common thread amongst the group of 14 serious violent offenders.

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

The area of risk assessment methods is not within the Committee's expertise.

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

The Committee is of the view that there is no way to identify "serious violent offenders" as demonstrated by the findings of the Review and as discussed in Questions 1 and 2 above.

Q5 Are actuarial risk assessment methods or clinical risk assessment methods, or a combination thereof, appropriate as a basis for

(i) use in sentencing; or
(ii) applying a preventative detention scheme.

Actuarial risk assessment methods or clinical risk assessment methods, or a combination thereof, are not an appropriate basis for sentencing or applying a preventative detention scheme.

The consultation paper notes that the limitation of actuarial assessment is that it focuses on the risk posed by a group of offenders rather than that of individuals within that group.

Q6 How can serious violent offenders with complex needs

(a) best be identified?

Serious violent offenders with complex needs can best be identified during their confinement by the Department of Corrective Services.

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[1] *Review of the Crimes (Serious Sex Offender) Act 2006*; Part 3: Serious Violent Offenders, Department of Justice and Attorney General, Criminal Law Review, November 2010

(b) best be managed?

Serious violent offenders with complex needs can best be managed by instituting programs that meet individual needs of inmates whilst in custody and on release on parole.

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

The current legislative framework is sufficiently equipped to deal with serious violent offenders. For instance, offenders who are due for release who fall within the definition of 'mentally ill person' or 'mentally disordered person' under the *Mental Health Act 2007* can be involuntarily detained in a mental health facility if they present a risk of serious harm to themselves or others.

If Yes: Is the framework being effectively used?

Yes.

Are there any issues with the current framework?

No.

If No: How can the current framework be amended to better deal with serious violent offenders?

N/A.

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

The legislation exists and can be relied on by a sentencing judge in the case of a serious violent offender who meets the requirements of the legislation.

Q9 If the legislation does have the potential to be useful in dealing with serious violent offenders, should it be amended in any way to ensure that its provisions are effectively used?

The terminology of the provisions may require updating.

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?

No. The offences that carry an indeterminate sentence are appropriate and should not be extended.

Q11 Should there be some extension of gradated 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?

No, there should not be an extension of gradated sentencing laws.

Legislation should not be introduced to allow for continuing detention or extended supervision orders in relation to serious violent offenders (see further discussion at Question 16).

Q 12 If the answer to Q11 is yes, what form should such legislation take?

N/A.

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

Yes, there is scope for the Parole Authority to effectively supervise serious violent offenders within the current parole provisions.

It would be preferable to meet the needs of serious violent offenders and the community at large through the parole system rather than extending the sentence and denying the offender the opportunity to transit back into the community with supervision.

If yes: Should the provisions of the Crimes (Administration of Sentences) Act 1999 be amended in any way to enable the Parole Authority to effectively supervise serious violent offenders?

Amendments may be required to enable the Parole Authority to provide appropriate post release support and supervision to facilitate the offender's transition back into the community and reduce the risk of recidivism.

Q14 Should the Violent Offender Therapeutic Program be expanded and if so in what respects?

The Committee supports evidence based programs including the Violent Offender Therapeutic Program (VOTP). The eligibility and suitability criteria might need to be expanded to enable an increased number of serious violent offenders the opportunity to participate in the program.

The Committee supports the planned introduction of VOTP for female offenders and a specific program for offenders with cognitive impairments.

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.

No. The Review refers to a case-study which demonstrates how a violent offender order operates in the UK. The Review observes that in the same scenario in NSW the police would be able to apply for an Apprehended Personal Violence Order under the *Crimes (Domestic and Personal Violence) Act 2007* in order to address the risk posed.

The Committee particularly objects to the concept of personal restriction orders that endure the expiry of the sentence.

If yes: What should be provided in this respect?

N/A.

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

Preventative detention should not be adopted in NSW for serious violent offenders. Detaining a person beyond the maximum sentence imposed by the sentencing court offends the fundamental principle of proportionality. The original sentence imposed reflects the synthesis of all of the purposes of sentencing (s 3A *Crimes (Sentencing Procedure) Act 1999*), including punishment, deterrence, denunciation and protection of the community from the offender. Preventative detention undermines the established principle of finality in sentencing (subject to appeals), and has the practical effect of eliminating the relevance of the sentencing judge's decision altogether. Preventative detention amounts to a new punishment beyond that already imposed in accordance with law, in the absence of a new offence or conviction on the basis of an assessment of future offending.

Predicting an offender's future conduct is a notoriously difficult task and the High Court has recognised the unreliability of these predictions (*Fardon v Attorney General for the State of Queensland* (2004) 210 ALR 50 at paras 124-125). In *Fardon*, Justice Kirby comments that predictions of dangerousness are "*... based largely on the opinions of psychiatrists which can only be, at best, an educated or informed "guess" "* (para 125).

The Committee agrees with the objections to any form of preventative detention as canvassed at pages 26-27 of the consultation paper as follows:

- it rests upon prediction of future criminal conduct and upon assumptions as to dangerousness that cannot be predicted with any degree of certainty;
- it breaches the principles of parsimony, proportionality and finality, and is inconsistent with the use of imprisonment as a last resort;
- it has the practical effect of punishing a person who has been identified as having offended in the past, for what he or she might do rather than what he or she has done; and to the extent that the person is detained for a longer period than that which is proportional to the offence, it amounts to a civil judicial commitment of that person to a prison in circumstances that do not conform with the like commitment of those with mental illness to an institution focused on their care;
- incarceration on the sole basis of risk of future offending breaks the link between crime and punishment that underpins the criminal justice system;
- extended detention or supervision may in fact diminish community safety by placing offenders in an environment and exposing them to associations with delinquent peers that might worsen their behaviour and increase their ill feelings towards the community;
- it amounts to the infliction of double punishment or retrospective punishment on a person who has completed a sentence proportional to the offence of which he or she has been convicted, by reference to the criterion of his or her past criminal conduct which has been the subject of judicial orders that have been spent;
- whether it takes the form of indefinite detention, or continuing detention or extended supervision, its potential duration is uncertain, contrary to truth in sentencing principles which call for precision as to the term of the sentence and specification of a parole release eligibility date;
- it has a potentially discriminating effect, since the difficulties in diagnosing the risk of reoffending will tend to focus its application on marginalised members of the community or those with particular types of personality disorders and hence risk amounting to punishment on the basis of status;
- since it is impossible to guarantee a crime-free society, extreme measures such as

preventive detention cannot be justified;

- the State is not entitled to force a person to undergo therapy to stop him or her from choosing to be 'bad' and suffer the punishment; especially when the person already has been punished for his or her past offending, and that forced therapy can be counter productive;
- it destroys the function of the maximum penalty which the legislature has selected to mark the limits of judicial sentencing discretion for specific offences and to that extent it undermines the community consensus as to the limits on the State's power to deal with offenders;
- its acceptance for one form of offending may lead to its eventual widening to other forms of offending with a relaxation of the preconditions for its use.

Q17 Are there programs that should be considered in this review, for the management of serious violent offenders that are not presently available

a) post-sentence?
b) post-custody?

The Committee is not in a position to comment on alternative programs for the management of serious violent offenders.

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

No. The Committee does not support the introduction of indeterminate sentences for serious violent offenders as outlined in Question 16 above.

The Committee notes that the creation and implementation of the indeterminate sentence of imprisonment for public protection (IPP) has been widely criticised in the United Kingdom in relation to the scheme's limited ability to predict risk accurately, its limited ability to reduce risk, limited resources available to achieve those reductions in risk that are possible, and limited Parole Board capacity and risk averse decision making.