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The New South Wales Bar Association

5 July 2011

The Hon Jerrold Cripps QC
The New South Wales Sentencing Council
GPO Box 6
SYDNEY NSW 2001

Dear Justice Cripps

Sentencing Serious Violent Offenders

The New South Wales Bar Association (Association) is grateful for the opportunity to comment on the issues raised in the Sentencing Council's Consultation Paper 'Sentencing Serious Violent Offenders'.

The Association supports additional sentencing options and programs to assist serious violent offenders while in custody and thereafter on release to parole. Such moves promote the rehabilitation of offenders and consequently the safety and protection of the community.

The Association opposes any move towards indeterminate or disproportionate sentencing for a number of reasons. Such moves are serious incursions on fundamental sentencing principles. Determinate sentencing provides finality for offenders and victims. Proportionality is the most important principle involved in the exercise of the sentencing discretion. While protection of the community is also an important goal of sentencing, it does not justify prison sentences that are disproportionate to the gravity of the instant offence. It is inconsistent with the foundations of criminal justice and the respect accorded to individual liberty to punish someone, not for what they have done, but for what they might do in the future.

To the extent that preventive detention may be considered legitimate, it should only be imposed in the most extreme cases, and where there is a high degree of certainty that the offender would otherwise pose a serious danger of reoffending. However, as is widely recognised, there are considerable difficulties in accurately predicting dangerousness, through either clinical or actuarial methods. These predictive difficulties would attend an assessment occurring towards the end of the period of imprisonment, as the offender's release date approached. They would be greatly magnified for an assessment at the original sentencing hearing, following the offender's conviction.

The Association opposes any continued use of the *Habitual Criminals Act*. It is based on outmoded 19th century principles of punishment and has no place in a modern penal regime.

The Association strongly opposes any move to increase the categories of offences for which a sentence of life imprisonment would apply. The current list of offences to which life imprisonment can apply contains the most serious offences. Other serious offences of violence (for example, acts done with intent to murder, manslaughter (of which there are admittedly different categories), and wounding or grievous bodily harm with intent) carry maximum penalties of 25 years imprisonment. These maximum penalties should be retained and not increased.

The Association notes the following particular difficulties of any scheme relating to serious violent offenders.

First, trying to define serious violent offences and serious violent offenders is likely to be difficult by reference to objective criteria. The differences in the ways that different jurisdictions have defined offenders for the purposes of their legislation (such as 'dangerous offenders', 'repeat offenders' and 'serious offenders') are evidence of this difficulty. The Association is concerned about potential net widening which could result from any such scheme being introduced.

Second, determining what sentencing and treatment options would be appropriate for such a group is fraught with difficulty, because there is no clear category of serious violent offenders (as noted in the Consultation Paper). 'Serious violent offenders' are a far less homogenous group than, for example, serious sex offenders.

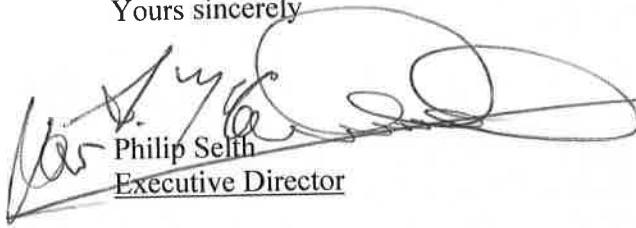
Finally, and related to the previous points, the concept of a scheme for serious violent offenders leads to the question of whether there is a sufficiently large group of offenders to justify the application of a specific sentencing/post sentence regime. The characteristics and conduct of violent offenders are too disparate to enable a sensible single course of treatment to be applied to them. In effect, every individual offender would need his or her own plan.

Current sentencing options and penalties, imposed in accordance with s 3A of the *Crimes (Sentencing Procedure) Act 1999*, in addition to the programs available for offenders in custody, address many of the concerns raised in the Consultation Paper.

As well as the practical difficulties and costs to justice noted above, a move to extend indeterminate, disproportionate and preventive detention would lead to an increase in the prison population, with increased financial costs. The Association considers that these resources would be more fruitfully and appropriately directed to strengthening programs for the treatment, rehabilitation and reintegration of serious violent offenders.

Please do not hesitate to contact Alastair McConnachie on 9229 1756 if there is anything that you would like to discuss

Yours sincerely



Philip Selth
Executive Director