SENTENCING SERIOUS VIOLENT OFFENDERS

Submission on behalf of Legal Aid NSW to the NSW Sentencing Council

28 June 2011

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 community legal centres.

Our criminal law practice spans all criminal jurisdictions. Our Prisoners Legal Service ("PLS") appears for prisoners at parole hearings, life sentence determinations, segregation appeals and visiting magistrates hearings.

Background

The Attorney General of New South Wales has sought the advice of the Sentencing Council on the most appropriate way of responding to the risks posed by serious violent offenders. The Council has been asked to:

1. Advise on options for sentencing serious violent offenders;
2. Examine and report on existing treatment options for and risk assessment of serious violent offenders;
3. Examine and report on the adequacy of existing post custody management including parole and services available to address the needs of serious violent offenders and to ensure the protection of the community on their release;
4. Advise on options for and the need for post sentence management of serious violent offenders; and
5. Identify the defining characteristics of the cohort of offenders to whom any proposals should apply.

In particular, the Sentencing Council was asked to consider whether a continuing detention or supervision scheme, similar to that which exists under the *Crimes (Serious Sex Offenders) Act 2006*, should be introduced for serious violent offenders.

The Consultation Paper (May 2011) refers to an audit conducted in April 2010 of all serious offenders with convictions for serious violent offences, who were under the management of the Serious Offenders Review Council (SORC). The purpose of the audit was to identify inmates who posed a significant high risk to the community of serious violent offending upon

the expiration of their sentence. The term 'serious offender' is defined in section 3 of the *Crimes (Administration of Sentences) Act* – briefly, it is anyone serving a life sentence, a sentence for murder or an offender who will not become eligible for parole until served 12 years. The audit identified 14 inmates (from 750 serious offenders) who met the criteria.

The responses from Legal Aid NSW are set out below.

Responses to Consultation

Extending sentencing options to include indefinite sentences, disproportionate sentences, habitual offender declarations

It is a fundamental principle of sentencing that a sentence must reflect the objective seriousness of the offence and it must be proportionate to the circumstances of the offender and the offence. The High Court in *Veen's* case confirmed that purely preventative detention is impermissible.

It is not necessary to provide for indefinite or disproportionate sentences or provide for an extended sentence because a person is a habitual offender. Any aggravating factors arising from the facts of the offence (including the fact that it is a repeat offence or was committed while the offender was on bail or parole) are matters which are and have always been taken into account at sentencing.

There does not need to be a scheme whereby the sentence is extended from what otherwise would have been the appropriate sentence. It is submitted that to do so would be contrary to long-established sentencing principles and would erode the sentencing judge's discretion to impose an appropriate sentence in each individual case.

Whether the VOTP Program and parole can provide an effective mechanism for managing serious violent offenders

The Prisoners Legal Service (PLS) appears regularly for inmates in hearings for parole and revocation of parole before the State Parole Authority (SPA). The solicitors in the PLS confirm the comments in paragraph 3.45 of the Consultation Paper, namely, that offenders who are assessed as continuing to present a high risk of violent reoffending are unlikely to be granted parole.

In cases of male violent offenders, the SPA usually will not grant parole unless the offender has satisfactorily completed the intensive Violent Offenders Therapeutic Program (VOTP). Following completion of the program there is also a period of follow-up called 'maintenance' which is done while in custody or as part of parole supervision.

The VOTP program appears to be beneficial in reducing reoffending. There is no VOTP program available for female offenders.

Difficulties can arise when an offender is assessed as ineligible for VOTP or does not have the required security classification and/or gaol location to access the program. In relation to the former, there are strict eligibility criteria including that the offender must have a history of committing one or more violent offences.

The solicitors in the PLS have noted cases where a person serving a sentence for a violent murder is ineligible because there is no history of violence. It is submitted that perhaps the

VOTP should be made available in all cases of extreme violence, regardless of whether or not there is a history of violence.
In relation to accessing the program, the SORC's statutory role, inter alia, is to make recommendations to the Commissioner about a serious offender's security classification and gaol placement. In some cases, the SORC may need to be more proactive in recommending a classification and placement that would facilitate a prisoner's attendance at the VOTP.

Difficulties certainly arise when an otherwise eligible offender refuses to do the program. Fortunately, such a situation does not arise often. These offenders are most likely the ones who would be targeted by a continuing detention or supervision scheme. It should be made very clear to these offenders by the SORC that the prospects of obtaining parole are virtually nil unless they complete the VOTP.

Nevertheless, in such cases, provided there is no recent history of violence in custody, the offender should be released on parole in the final one to two years of their sentence. This would provide monitoring by Probation and Parole and allow appropriate counselling and referrals. It is far better and safer to release a person on parole supervision, albeit relatively short, than to insist that the offender serve the full sentence and then be released without parole supervision.

In our view, the completion of the VOTP program in custody and release on parole supervision work very well together and provide an effective mechanism to reintegrate these offenders into the community.

Community Compliance and Monitoring Groups

The recent introduction of more intensive supervision on parole by the Community Compliance and Monitoring Groups (CCMGs) with electronic monitoring may be considered beneficial. Comments received by PLS solicitors from parolees indicate, however, that the regime goes beyond being intensive supervision. It has been commented that the CCMG is very dictatorial and its unflinching insistence on offenders submitting schedules of their daily movements weeks in advance and not allowing a detour from this, is causing stress and anxiety to some parolees.

Intensive supervision should be reasonable and appropriate. 'Heavy' supervision and unnecessary imposition of rules would in practice be counterproductive and have the unintended effect of leading to breaches of parole supervision resulting in parole being revoked.

Whether there are sufficient violent offenders to justify the imposition of a specific regime

The Consultation Paper refers to an audit done in April 2010 of all serious offenders under the management of SORC, to identify inmates who posed a significant high risk to the community of serious violent offending upon the expiration of their sentence. The audit identified 14 inmates (from 750 'serious offenders') who met the criteria.

Therefore the audit identified 14 inmates from a group of 750 serious offenders out of a total prison population of close to 10,500 persons. It is considered that this is far too small a number of offenders to justify the cost and resources of setting up a specific regime to deal with them.

In addition, it is considered that risk assessment is far from an exact science. Assuming that some offenders will reoffend, the 'law of averages' dictates that not all of the 14 would re-offend and that, at highest, fifty percent might – reducing the target group to 7 offenders.

Further, paragraph 2.3 of the Consultation Paper refers to the group of 14 being 'disparate' and lacking a number of common factors that are present within the cohort of serious sex offenders; this would seem to make it more difficult to mandate what would be an appropriate way of managing the risk in the community and predicting exactly what type of offence is being prevented. This difficulty is compounded by the fact that serious violent offenders present with a range of complex needs (paragraph 2.13).

Therefore it is submitted that the very small size of the group and its disparate nature indicate that the imposition of a specific scheme is not justifiable.

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

Establishing a scheme of continuing detention or supervision is contrary to well established principles of sentencing law. A person should not be detained for crimes that he or she might commit. There is no justification to extend the scheme under the *Crimes (Serious Sex Offenders) Act 2006*, to serious violent offenders, particularly when the identified group is so small and disparate (as noted above).

Therefore it is submitted that a scheme of preventative detention for serious violent offenders not be adopted in NSW.

However, if such a scheme is to be introduced, it is proposed that the offender should be granted parole for the last 12 months of his or her original sentence, on the condition that if parole is breached and revoked, an application will then be made for their continuing detention or supervision. This would not undermine the integrity of the original sentence imposed and would also give the offender the opportunity and incentive to demonstrate compliance with parole conditions and ability to adapt to normal lawful community life.

Financial implications

It is also submitted that there may be some financial and resource implications for Legal Aid NSW, which would be expected to fund legal representation for the respondents to any such applications. Although the number of such applications is likely to be small, the cumulative effect of such changes to the law can have a significant impact on the sustainability of the funding base of Legal Aid NSW.

Conclusion

Thank you for the opportunity to provide comments on the Consultation Paper. Should you have any queries in relation to any aspect of this submission, please contact Will Hutchins, Senior Solicitor, Prisoners Legal Service at William.Hutchins@legalaid.nsw.gov.au or Lalitha Raman, Solicitor, Legal Policy Branch at Lalitha.Raman@legalaid.nsw.gov.au.

Alan Kirkland

Chief Executive Officer