



# New South Wales Bar Association

**March 2007**

The New South Wales Bar Association advances the following proposals for reform of the New South Wales criminal justice system.

## **1. Funding for the DPP and Legal Aid**

The budget for the Office of the Director of Public Prosecutions is planned to be quietly cut by \$3.5 million just after the election.

An effective DPP is essential for maintaining public confidence in the NSW justice system. Increasing police numbers and opening more jails whilst cutting funding to the DPP will result in longer delays, rushed work and provide an inadequate service to the courts and the public. Excessive demands on prosecutors can also lead to lack of continuity of representation when substitute counsel is required to manage caseloads. Delays and disruptions impact upon the accused, victims and their families and diminish the overall quality of criminal justice.

Similarly, there has also been little real increase in Legal Aid funding for criminal cases over time. The Government needs to inject more funds into the legal aid system to enable appropriate services to be delivered to the socially and financially disadvantaged members of the community.

The Public Defenders Office also requires an equivalent increase in funding and resources to bring greater efficiency to the criminal justice system.

Adequate funding to these agencies would be a demonstration of the Government's commitment to a fair and effective criminal justice system.

The Association calls for the reversal of the planned \$3.5 million budget cuts for the ODPP matched by more equitable funding of defence legal aid.

## **2. Mental health – release of persons found not guilty on the ground of mental illness**

The current procedure whereby the executive arm of government has the final say whether or not forensic patients (persons found not guilty on the ground of mental illness held in mental health facilities) are released should be removed. The responsibility to act or not to act on the recommendation of the Mental Health Review Tribunal should rest with a judicial body. This would strengthen the integrity of the process by ensuring that these decisions are made by an independent court.

Removal of executive discretion over release of forensic patients has been recommended in reviews by the Mental Health Act Implementation Monitoring Committee in 1992, the Burdekin Report in 1993 (Cth) and the NSW Law Reform Commission in 1996. Similarly, the Senate Select Committee on Mental Health also recommended earlier this year: "That responsibility for the decision to release forensic patients is placed routinely with mental health courts or mental health tribunals within each state and territory" (Recommendation 58).

The Bar Association calls for control over the release of people found not guilty on the grounds of mental illness to be placed with the Mental Health Review Tribunal and the judiciary in accordance with long standing Australian recommendations.

### **3. Greater resources to post-release rehabilitation**

Only a very small proportion of the NSW Corrective Services budget is spent on the support and rehabilitation of offenders once they are released into the community. The Auditor-General's report in May 2006, *Prisoner Rehabilitation: Department of Corrective Services*, concluded that the Department of Corrective Services was doing very little to rehabilitate and reintegrate prisoners back into the community.

This is one reason why the recidivism rate for released prisoners is so high (64% of NSW offenders released from prison on parole re-offend within two years of release: NSW Bureau of Crime Statistics and Research, *Risk of re-offending among parolees*, February 2006).

Extensive research from America and Britain concludes that supporting prisoners to re-enter society can significantly break the cycle of re-offending.

The Department of Corrective Services in its response to the Auditor-General's Report acknowledged the importance of the re-integration needs of offenders such as employment, housing and health, but stated that it "has limited capacity to directly provide services to address these areas" (at p 23).

The Bar Association recommends that more funds be allocated to post-release rehabilitation in order to reduce the recidivism rate. Such an approach would reduce the level of crime and the massive public costs of imprisonment for repeat offenders and adopt the method taken in jurisdictions such as Victoria.

### **4. Juries**

The provisions for the reimbursement and/or compensation of jurors and potential jurors who attend for jury service in NSW are manifestly inadequate. The Bar Association calls for adequate financial support to be provided for all our citizens who serve on juries.

The present maximum rate of jurors' pay in NSW of \$568.50 per week is only half the rate of full time adult average weekly earnings in this State of \$1035 per week: Australian Bureau of Statistics - February 2006.

There is a responsibility to citizens to ensure that they do not suffer unreasonable financial hardship when performing this essential function in our justice system. The jury's task is a very onerous one and needs to be supported so that it is as effective as possible. A study of financial hardship caused by long jury service should be undertaken by the Law Reform Commission.

Additionally, if the present inadequate pay for juries continues then juries are likely to become increasingly unrepresentative of the general community. There are increasing numbers of applications for exemption from jury service. Over the last twenty years, as work patterns have changed, these applications for exemption have more often come from the self-employed and from small business owners or their employees who may face financial hardship through serving on a jury. A reasonable rise in jurors' pay will help reduce the rate of these applications.

Jurors are entitled to adequate facilities. The Association is engaging an Occupational Health and Safety consultant to report on the current standard of jury rooms. The results of that report will be provided to the NSW Law Reform Commission for consideration in the course of its current review of jury service.

The Association recommends that jurors' pay be set at average weekly earnings for trials over five days' duration; that jurors have a statutory right to reasonable amenities and refreshment during adjournments to a trial and that jurors injured either at Court or whilst travelling to or from Court should be compensated at least on the same basis as employees under worker's compensation legislation.

## **5. Innocence Panel**

The *Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2006* does not fully implement the recommendations of the Findlay report of September 2003. The current legislation falls short of that in a number of ways including:

- The duty for police to retain biological samples that might permit DNA testing, and the Innocence Panel itself, only have a life of seven to ten years under the sunset clause in the legislation: sections 96 and 97. This means that samples may be intentionally destroyed by police after that time and no-one will be able to make claims to the panel.
- The Panel as presently constituted is a 'toothless tiger'. It really has no inherent powers to investigate whether biological material exists. It is totally reliant on the advice provided by NSW Police. The underlying assumption of the Finlay Report of 2003, which recommended the establishment of the DNA Review Panel, was that the Panel should be able to conduct its own enquiries independent from police.
- The considerations that the Panel must take into account under section 91 in exercising its functions are grossly inadequate. The legislation does not even mention the most important consideration of all – the need to ensure that innocent people are released from jail as soon as possible.
- The criteria for eligibility to apply to the panel are irrationally restrictive. The legislation is principally aimed at persons convicted of offences which carry a sentence of imprisonment of more than 20 years. This creates a presumption against the investigation of many other offences which carry heavy penalties. The legislation also does not apply to people convicted of offences after 18 September 2006. These restrictions are arbitrary and illogical. If a genuine question of innocence of a person in custody arises, it should be able to be investigated no matter how recently the alleged offence was committed.

The Association asks that the *Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2006* be amended to incorporate the above omissions.

## 6. Court Transcripts – District Court

The situation concerning the availability of daily transcripts in the District Court is reaching crisis point.

New South Wales is the only State where it is still possible to be convicted and sentenced to a substantial term of imprisonment without the accused having the benefit of a same day transcript of the evidence at the trial. In every other jurisdiction in Australia daily transcripts are provided in District/County Court criminal trials as a matter of course. It is also possible for civil litigation involving claims for serious personal injury to be conducted in the District Court without a daily transcript.

The Association calls for the compulsory provision of daily transcripts in all District Court criminal cases.

## 7. Criminal Statutes

Criminal statutes in NSW need to be rationalised in order to make the criminal law more accessible and logical. This will enable greater efficiency in trials and decrease costs to the community. The following requirements are proposed:

- Modernise and restructure the *Crimes Act 1900*.
- Remove criminal procedure provisions from the Crimes Act, placing them in the Criminal Procedure Act.
- Remove summary offences from the Crimes Act, placing them in the Summary Offences Act.
- Remove the provisions relating to review of convictions and sentences to a stand-alone Act.
- Remove the domestic violence provisions to a stand-alone Act.
- Abolish all common law offences and replace them with statutory indictable and summary offences as necessary.
- Repeal the *Imperial Acts Application Act 1969* (NSW) as it applies to criminal law, at least with regard to offence-creating provisions.
- Abolish the current property offences in the Crimes Act and replace them with a simple, coherent regime.

## 8. Criminal procedure changes

The Association proposes the following criminal procedure changes.

- Development of procedures for pre-trial rulings.

Procedures should be developed to extend of the ability of prosecution, defence and the court to have evidentiary and procedural issues determined in advance of the trial. The adoption of these procedures would result in smoother and faster criminal trials.

- Greater access by accused to evidence

Section 281D of the *Criminal Procedure Act 1986* limits the access that an accused person and his or her legal representative has to "sensitive evidence". The Association proposes an increase in access would facilitate the administration of justice by allowing the legal practitioner appropriate access to the sensitive evidence, thereby avoiding unnecessary adjournments, saving court time and ensuring the accuracy of transcripts of tapes or other summaries of what is contained within the sensitive evidence

Similarly, s306F of the *Criminal Procedure Act 1986* should be amended to allow for a copy of an audiovisual recording or other recording of a complainant's evidence to be made available to the accused's legal practitioner. Again, the amendment would allow for the copy of the evidence to be retained by the legal practitioner only until such time as the matter is finalised.

- Proceedings held in camera

Section 291 of the *Criminal Procedure Act* should be amended to permit a court, where it is in the interests of justice, to direct that a person may be present notwithstanding that proceedings are to held in camera. The current provision is inflexible – either proceedings are held in camera or in open court. Discretion should be conferred on the court to permit particular persons to be present in the interests of justice notwithstanding that the proceedings are not to be generally open to the public.

- Amend costs in criminal cases provisions

The *Costs in Criminal Cases Act 1967* should be amended to permit a court to grant costs against the prosecution, and particularly where a nolle prosequi (where the prosecutor formally discontinues a prosecution) has been filed after arraignment.

In NSW, the position regarding costs is entirely governed by statute and only in exceptional and defined circumstances will an accused who is acquitted or discharged be entitled to claim costs. The discretion should be removed from the Attorney General's portfolio and reposed in a judicial officer.

The Australian Law Reform Commission has recommended that the prosecution should pay the reasonable costs of an accused who is successful in obtaining a dismissal, acquittal or withdrawal of charges in a criminal proceeding unless the Court is satisfied that in all the circumstances of the case some other order as to costs should be made. These recommendations should be adopted in NSW.

## 9. Sentencing

The Association supports the following sentencing amendments.

- Amend s21A Crimes (Sentencing Procedure) Act to clarify intent

Section 21A of the *Crimes (Sentencing Procedure) Act 1999*, entitled "Aggravating, mitigating and other factors in sentencing", is a cause of concern. Compliance with the mechanics of the section is unduly time-consuming, complex and has a real risk of error.

The Court of Criminal Appeal is seeing large numbers of appeals based on a failure to apply or misapplication of the section by sentencing judges. The factors specified in the provision are commonly used as a checklist, without a proper application of general sentencing principles. The provision is unnecessary. It distorts the sentencing process, is productive of confusion, and has led to many appeals. It should be repealed or at least substantially amended.

- Review the imposition and monitoring of life sentences

A morally defensible system of sentencing serious offenders could be achieved by cases being judicially reviewed after a lengthy period of time (perhaps five years). The court would then be "much better informed on the questions of rehabilitation, their attitude to their crime and the related question of protection of the community"<sup>1</sup>.

A sentencing scheme which, while providing for life sentences, would not allow such a sentence to be imposed until a substantial period of imprisonment has been served. The suggestion involves the notion of an indeterminate sentence, but only where it is obvious the prisoner must serve more than say, five years, and where the sentence will become determinate by the review suggested.

Central to the suggestion is the notion that, at present, judges do not really have sufficient information about the person they are sentencing. A sentence for the term of a prisoner's natural life makes no allowance for any prospect of rehabilitation and leaves a prisoner without hope and therefore with little incentive to behave. The suggested system would enable a judge to consider a realistic sentence in light of the person's conduct and attitude as demonstrated over a substantial period after conviction.