Criminal Law Review Division
NEW SOUTH WALES ATTORNEY GENERAL'S DEPARTMENT

2005/CLRD0716

23 September 2005

Ms Michelle Newbery
Principal Council Officer
Standing Committee on Law and Justice
Legislative Council
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Ms Newbery,

Response to questions put to Lloyd Babb by the Standing Committed on Law and Justice in Inquiry into Community based sentencing options on 31 August 2005.

I provide the following responses to questions taken on notice from my appearance before the Law and Justice Committee on Wednesday 31 August 2005.

Question: How could legislation be amended to incorporate programs such as alcohol and drug counselling as a condition of a periodic detention order?

It is important to keep in mind that periodic detention is a sentence of imprisonment and that before a court can sentence an offender to such a sentence they must first have determined that a sentence of imprisonment is the only appropriate sentence that can be imposed. There is allowance for part of that sentence to be served by way of work orders or activities provided by section 84 of the *Crimes (Administration of Sentences) Act 1999*, which applies where an offender has reached Stage 2 of the periodic detention program (having served at least one third of their sentence in Stage 1 requiring overnight attendance).

The *Crimes (Sentencing Procedure) Act* does not provide the court with the power to make an order for counselling as part of a sentence of periodic detention. Such a power would only exist as a condition of a bond in respect to non-custodial sentences imposed pursuant to sections 9,10,11 or 12 of the Act. Alternatively such an order is provided by section 82 in relation to home detention orders, or section 90 in respect of community service orders.

The question of what treatment and counselling is available to inmates is currently a matter for the Department of Corrections. Before contemplating any legislation that would substantially impact on that Department their attitude would need to be sought.

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Question: Submissions to a recent enquiry by the New South Wales Sentencing Council noted concerns about the process of appeals from the Local to the District courts. Can you make some comments on this?

The NSW Sentencing Council referred in its report "*How Best to Promote Consistency in Sentencing in the Local Courts*" to improvements that could be made to the process of appeals between the Local and the District courts in order to achieve greater transparency and consistency of decision making. Some of the recommendations for reform made by the Sentencing Council were:

a) Requiring District Court judges to have regard to the Magistrate's reasons for imposing the sentence;
b) Where an appeal against sentence is successful, the Magistrate should be provided with the Judge's reasons, or, at the least, a transcript of the hearing; and
c) Routinely publishing or otherwise making available all or selected District Court judgments relating to sentencing.

At present sentencing appeals from the Local Court to the District Court are *de novo* and the proposal to require appeal judges to consider the reasons of the Magistrate in determining the sentence on appeal would alter the current policy on such appeals. It is important to note that the difference in the jurisdiction between these courts and an appeal to the Court of Criminal Appeal from the District Court is that, unlike the latter, such an appeal is not a review of the magistrate's decision but a new sentencing process altogether. One of the recommendations covered by the Sentencing Council was that these appeals should be an appeal *stricto sensu*, requiring a review of the original sentence in a similar way to the Court of Criminal Appeal. The Council also considered whether an appeal right should lie directly from the Local Court to the Court of Criminal Appeal for all indictable matters dealt with summarily.

In considering a) above the cost involved in obtaining the transcript of the judgement from the Local Court must be taken into account. Without significant additional resources being provided to the Reporting Services Branch of the Attorney General's Department significant delays in the provision of Local Court transcripts to the District Court would result. In 2002 there were 4,249 sentence appeals to the District Court. At present transcripts of proceedings are required in all-grounds (conviction) appeals that are currently run *de-novo* but on the basis of the evidence given in the Local Court. Delay in the provision of these transcripts is particularly a problem when the appellant is in custody bail refused on the particular matter before the court, or on other matters. In some instances people have finished their sentences before they have been allocated their appeal date, which is most unsatisfactory. Given that in general sentences imposed in the Local Court are shorter than those imposed by the District Court delay is a significant factor to be taken into account.

As to b) and c) however, in my view there is merit to the proposals. The delay factor is not as crucial under this proposal as the appeal has already taken place. I agree that it would be useful to the Magistrate to see the reasons why their original decision had been altered for the purposes of transparency and consistency in sentencing. This could be achieved through the provision of the Judge's reasons and the publishing of selected judgements. This would be desirable and could be achieved administratively, rather than by specific legislation. However, again I consider that there would be significant resource implications for the Reporting Services Branch of the Attorney General's Department.

Yours sincerely

Lloyd Babb
Director