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## SUBMISSION ON THE SENTENCING AND PAROLE REFORM BILL

1. This submission is from the Legislation Advisory Committee (LAC).
2. The LAC was established to provide advice to Government on good legislative practice, legislative proposals, and public law issues. The LAC produces and updates the LAC Guidelines adopted by Cabinet as appropriate benchmarks for legislation.
3. The LAC does not seek to be heard on this submission.

### Sections 86D and 86E

4. Section 86D requires the court to impose life imprisonment where an offender is on a final warning and is being sentenced for a further serious violent offence for which the court would otherwise impose a qualifying sentence. A 25-year minimum non-parole period must also be imposed unless the court considers that would be manifestly unjust. Section 86E requires the court to impose life imprisonment without parole where an offender is on a first warning or a final warning and is being sentenced for murder.

#### *Extent to which policy objective will be achieved*

5. The LAC presumes that the policy objective behind these provisions is to provide enhanced protection for the community against violent offending. The LAC has no comment to make on that objective. However, it considers it unlikely that these provisions will achieve it. Instead, for the reasons identified below, the more likely outcome is greatly increased cost in administering sentences with little positive return for community protection.

6. The approach taken in these provisions assumes that the key indicators of an offender's risk of further serious violence are his or her history of previous serious violent offending and the length of previous sentences imposed. However, the empirical evidence does not appear to support these assumptions. In particular, while an offender's criminal history is a key indicator of general risk, there is little research to indicate that a particular type of criminal history enhances the risk of an offender committing an offence of that type in the future. There is little evidence that offenders specialise in particular types of offending, and even less evidence to suggest that offenders specialise in serious violence.<sup>1</sup> This suggests that an offender's previous history for serious violence is a poor basis for predicting that he or she will commit a further serious violent offence in the future.
7. In addition, the literature does not appear to support the view that an offender who has previously received a sentence of five years imprisonment or more for a serious violent offence is of greater risk of committing a further serious violent offence than an offender who has received a sentence of less than five years imprisonment. For example, the difference between an offender who receives a sentence of five years imprisonment and an offender who receives a sentence of four years imprisonment may simply be that the latter offender pleaded guilty to the offence at an early stage (and therefore received a reduction in sentence to recognise that plea) while the former did not.
8. Finally, research does not support the view that offenders pose a continual risk of reoffending over their lifespan. Instead, it is generally accepted that offending rates decrease as offenders get older.<sup>2</sup> Nevertheless, the proposed provisions will require that offenders be imprisoned for very long periods of time (including indefinitely in some cases), well beyond the peak age of offending and when their risk of reoffending is comparatively low.
9. In addition, the sentence of preventive detention is already available for the small number of offenders whose risk of reoffending justifies indefinite imprisonment. Under that sentence, an offender may be indefinitely detained and cannot be released until he or she has served the minimum non-parole period imposed by the court and the Parole Board is satisfied that he or she will not pose an undue risk to the safety of the community. The use of this sentence has increased substantially since the enactment of the Sentencing Act 2002. It can only be imposed after a specific assessment of an offender's risk has been undertaken with reference to relevant factors. The direct link with a risk assessment is likely to make this sentence a more efficient means of achieving the policy objective than the means proposed in the Bill.

<sup>1</sup> See, for example, Piquero, A.R., Farrington, D.P., Blumstein, A. (2007) *Key Issues in Criminal Career Research: New Analyses of the Cambridge Study in Delinquent Development*. Cambridge University Press, Cambridge; Piquero, A. R. (2000) Frequency, Specialisation, and Violence in Offending Careers. *Journal of Research in Crime and Delinquency*, 37:392.

<sup>2</sup> See, for example, David J Smith (2007) Crime and the Life Course. In Maguire, M., Morgan, R., Reiner, R. *Oxford Handbook of Criminology* (4<sup>th</sup> ed.) Oxford University Press; Sampson, R.J. and Laub, J.H. (2003) Life-Course Desistors? Trajectories of Crimes Among Delinquent Boys Followed to Age 70. *Criminology*: 41: 3.

### *Potential for disproportionate sentences*

10. Even if the approach taken to risk was supported by available evidence and research, the LAC has a further concern about the provisions' focus on risk at the expense of other relevant factors. Such factors include the seriousness of the particular instance of the offence and the culpability of the offender, which are currently central to the sentencing process. The result is likely to be sentences that are unjustifiably disproportionate. For example, a serious violent offence for which a sentence of five years would be justified in light of its seriousness and the offender's culpability may instead attract a sentence of life imprisonment.

### **Section 86C**

11. Section 86C requires the court to order that an offender on a first warning who receives a second qualifying determinate sentence for a serious violent offence must serve that sentence without parole.
12. The concerns identified above in paragraphs 5–10 apply equally to section 86C, albeit to a lesser degree. There are also two other points the LAC wishes to make.
13. First and most substantively, there is an inherent inconsistency between section 86C and the parole framework. Under that framework, an offender's risk to the community is the primary criterion that guides parole decisions – an offender cannot be released on parole unless the Parole Board is satisfied that he or she does not pose an undue risk to community safety. The proposed legislation denies parole altogether, ostensibly on the basis of risk, but in reality on the basis of factors that are only tangentially related to risk. The two approaches therefore sit uneasily together.
14. On a more technical matter, section 86C is silent about the parole arrangements that apply when, in respect of an offender who is already on a first warning, preventive detention is imposed for a further serious violent offence or life imprisonment is imposed for manslaughter. It is assumed that the current arrangements must apply – that is, the court must impose a minimum non-parole period of at least five years imprisonment when imposing preventive detention;<sup>3</sup> and a person sentenced to life imprisonment for manslaughter must serve a non-parole period of 10 years.<sup>4</sup> However, it is not clear that this is the intention, and clarification of the position would be desirable.

### **Listing qualifying serious violent offences**

15. Finally, it should be noted that various pieces of criminal justice legislation have in the past included lists of serious violent offences for different purposes. These lists have always been problematic, primarily because of the inevitable inconsistencies and anomalies that result. In respect of the list provided in section 86A, for example, some immediate questions arise about why it includes:

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<sup>3</sup> Sentencing Act 2002, s 89.

<sup>4</sup> Parole Act 2002, s84(3).

- Attempted murder (s173) but not conspiracy to murder (s175);
  - Injuring with intent to cause grievous bodily harm (s189(1)) but not injuring with intent to injure (s189(2));
  - Acid throwing (s199) but not poisoning with intent (s200);
  - Indecent act on a young person (s134(3)) but not indecent act on a dependant family member under the age of 18 years (s131(3)) or on a person with a significant impairment (s138(4));
  - Robbery (s234) and assault with intent to rob (s236(2)) but not demanding property with menaces (s239(2)).
16. These inconsistencies and anomalies are of particular concern given that, for most of the offences identified above, the same behaviour may satisfy the elements of both the included and excluded offences. Whether an offender is convicted of an included or excluded offence may depend more on initial charging decisions and any charge negotiations between the prosecution and defence as the case progresses than on the offender's actual behaviour at the time the offence was committed. The consequences for the offender of being convicted of an included offence make inconsistencies and anomalies such as these particularly problematic.



Sir Geoffrey Palmer  
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