Police Association of NSW

Sentencing: Law Reform Commission Question Papers 5-7 (2012)

Police Association of New South Wales Submission

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Version Control

Purpose

The purpose of this document is to provide to the LRC the Police Association's response to the Question Papers 5-7 regarding the review of the Crimes (Sentencing Procedure) Act 1999 (NSW).

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Sentencing

The Law Reform Commission has released for public comment a further three question papers relating to the review of the Crimes (Sentencing Procedure) Act 1999 (NSW) ('the Act'). These question papers build on the first four papers released in March 2012, which dealt with some of the most fundamental aspects of sentencing law including its purposes and principles.

The second group of papers (Question Papers 5-7) examines full-time imprisonment and the various other custodial and non-custodial sentencing options and also asks whether there are other sentencing options which could be introduced in addition to the existing options.

In relation to the issues raised in the second group of Question papers, we provide the following comments:

Sentencing
Question Paper 5
Full-time imprisonment

This question paper examines structures of full-time imprisonment, including short terms of imprisonment, reviewing the balance between non-parole and parole periods, and aggregate sentences.

Question 5.1

1. **Should the "special circumstances" test under s44 of the Crimes (Sentencing Procedure) Act 1999 (NSW) be abolished or amended in any way? If so, how?**

Chrissa Loukas (2003) explains that at present, when sentence is fixed, the non-parole period may be reduced because of special circumstances. Some commentators have indicated that 'special circumstances' may no longer be capable of reducing the non-parole period under the new section 44. According to Loukas, this must await appellate clarification.

It must be borne in mind that several of the factors representing special circumstances are of a nature inherently beneficial to the offender (Loukas 2003). Factors such as youth, first time in prison and enhanced capacity for rehabilitation, may well represent an argument for a longer period on parole but should not, have previously been the basis for arriving at an overall sentence otherwise disproportionate to the offence, its circumstances and that of the offender.

In Simpson, Spigelman CJ said: *"The words "special circumstances"…are words of indeterminate reference and will always take their colour from their surroundings. [T]he non-parole period is to be determined by what the sentencing judge concludes that all the circumstances of the case, including the need for rehabilitation, indicate ought [to] be the minimum period of actual incarceration". at [59] p 717*

Peter Johnson (2003) submitted that the better view is that*: "A finding of 'special circumstances' may see such a reduction. Section 54B(3) provides that the reasons for which a court may set a shorter or longer non-parole period 'are only those referred to in s21A'. Section 21A(1)(c) enables matters to be taken into account that are required or permitted to be taken into account under any Act or rule of law. Section 44(2) enables a court to take into account the existence of 'special circumstances' to vary the statutory relationship between the non-parole period and the balance of the term*".[1]

[1] LawLink Attorney General and Justice, Paper written by Chrissa Loukas, Public Defender, July 2003.

In light of the arguments above further research is required in terms of case analysis from relevant stakeholders whether the "special circumstances" test under s44 be abolished or amended.

Question 5.1

2. **Should a single presumptive ratio be retained under s44 or should a different ratio apply for different types of offences or different types of offender; and, if so, what ratio should apply to different offences or different offenders?**

The Crime and Justice Reform Committee makes a valid suggestion when it states, "some offenders would be better served by a lesser period in custody and a longer time being supported and supervised in the community; this may be particularly so for vulnerable offenders such as those with cognitive and mental health impairments."[2] Again, this requires further case analysis from key stakeholders as does the LRC's suggestion to a different test to be met in order to depart from the ratio for particular offences. As LRC quotes, if a tighter test was adopted under s44 which applied to sentences of full-time imprisonment across the board, irrespective of their seriousness, non-parole periods for less serious offences may be increased incidentally and alternatively, if there were different tests for different offences or classes of offenders, the exercise of sentencing discretion may become more complicated and prone to mistakes. The existence of a statutory ratio for all offences and the application of special circumstances allows important judicial discretion to tailor sentences as required, and it should remain.

Question 5.2

1. **Should the order of sentencing under s44 of the Crimes (Sentencing Procedure) Act 1999 (NSW) return to a 'top down' approach?**
2. **Could a 'top down' approach work in the context of standard minimum non-parole periods?**

Of concern is if the order of sentencing under s44 of the Crimes (Sentencing Procedure) Act 1999 (NSW) does return to a 'top down' approach – will this mean that appellate guidance need to be reconfigured across a wide range of sentences? As it stands, sentencing law is now already more than sufficiently complex and it is more than likely that transition between the two sentencing regimes will be accompanied by some level of confusion and errors. This needs to be borne in mind when contemplating changes. The LRC findings though state the Chief Magistrate of the Local Court has suggested that it would be helpful to return to the top down approach in s44 of the Act, as it would assist in the transparency and public understanding of sentencing. Further case analysis and research is required from relevant stakeholders to adequately provide an informed solution to the issue of the "top down" approach.

Question 5.3

1. **Should sentences of six months or less in duration be abolished? Why?**
2. **Should sentences of three months or less in duration be abolished? Why?**
3. **How should any such abolition be implemented and should any exceptions be permitted?**
4. **Should sentences of imprisonment of six months or less continue to be available as fixed terms only or are there reasons for allowing non-parole periods to be set in relation to these sentences?**

Rowena Johns (2002) stated in recent years statutory provisions in New South Wales have been strengthened to reinforce the common law principle that imprisonment should be imposed as a last resort. However, statistics show that the proportion of offenders receiving a sentence of imprisonment has remained stable or grown, depending on the offence, over the past decade. The use of short term

[2] Crime and Justice Reform Committee, Preliminary Submission PSE12, 2003.

sentences of imprisonment is particularly significant, as the majority of prisoners are serving sentences of under 6 months. In November 2001, the Legislative Council's Select Committee on the Increase in Prisoner Population recommended that consideration be given to abolishing prison sentences of 6 months or less, in order to promote alternatives to full-time custody, and to alleviate the financial burden caused by the sharp rise in the prison population in the last 5 years. There is obviously a need to conduct further empirical studies (similar to the following research conducted by the Howard League for Penal Reform) in developing adequate resolutions and adding significantly to criminal justice policies in Australia.

In June 2011, the Howard League for Penal Reform, in collaboration with the Prison Governors' Association (PGA), published the results of the first research commissioned into those serving short prison sentences and those working with them. A central finding of the research, *No Winners: The reality of short term prison sentences* is that many prisoners preferred a short term prison sentence over a community sentence because it is easier to complete while others considered community sentences to be more of a punishment. The research revealed two distinct groups of prisoners: the first-timers and the revolving door prisoners. The research identified clearly distinct attitudes and responses to imprisonment as well as differential needs while in prison. The authoritative research incorporated working with a team of retired prison governors in three adult male prisons holding prisoners serving short prison sentences of 12 months and under. Interviews were conducted with 44 prisoners and 25 prison staff. This primary research was supported by an extensive online survey of PGA members and other key stakeholders.

An imperative observation from the research was (as quoted): *"Community sentences seek to challenge and change people so that they live crime free lives. By contrast, our overcrowded prisons fail to offer lasting solutions to crime or support for victims. Spending all day lounging on a cell bunk, particularly for those on short sentences, is the real 'soft' option. Community programmes can achieve many more positive outcomes than prison as they force people to understand the impact of their actions and do something to repair the damage caused by crime. We are failing victims, taxpayers and the whole community when people opt to go to prison for a short time as an easier option than facing up to their crimes in the community. The challenge is to develop community sentences that are imposed immediately, carried out intensively and help to change lives. The many schemes conducted in delivering effective and successful community sentences show it is possible to have safer communities, less crime and fewer people in prison."*

According to the research findings Prison Governors have known for a long time that short sentences are expensive to administer and have the poorest outcomes in terms of re-offending rates. This research not only highlights that dimension but adds to the collective knowledge by adding the views and opinions of prisoners themselves as well as other stake holders. The net product is a convincing case which argues at best for the abolition of short prison sentences and at worst for a dramatic reduction in their use. The survey responses of both prisoners and prison staff highlight how damaging short prison sentences can be. Many prisoners regard their return to prison as inevitable on the basis that they leave prison 'just the same', or even more disadvantaged, than they were on arrival. The current use of short prison sentences offers no winners: neither prisoners or staff are being equipped with the necessary support and interventions to help break the cycle of reoffending, while communities are having to cope with the frustration and disillusionment that is generated by the consistently high reoffending rates of this population. These research findings are particularly significant and must be borne in mind when considering shorter sentences of imprisonment.

In light of the above findings, if abolishing shorter sentences of imprisonment were to be carried out, the following concerns need to be considered,

- that it would be inequitable to abolish short prison sentences until viable sentencing alternatives are available throughout the state.
- abolishing short prison sentences will adversely impact on the groups of vulnerable groups of persons described, such as indigenous members of the community, those with unresolved drug and alcohol issues, socially disadvantaged and the mentally ill. If the sentencing discretion available to judges and magistrates is constrained through the abolition of short

prison sentences, these groups may potentially face longer periods of imprisonment, rather than benefit from alternatives to full time imprisonment.

- The question of whether there is a lack of sentencing alternatives throughout New South Wales and, in particular, in regional areas, which results in short prison sentences often being the only sentences available.
- The principle of proportionality requires that any sentence that is imposed must be proportionate to the objective gravity of the offence committed. There are situations where applying this sentencing principle would mean that it is appropriate to impose sentences of six months or less.
- Limiting the sentencing options open to magistrates or judges by removing short prison sentences could result in situations where defendants receive prison sentences of longer than six months, just so that a prison sentence can be imposed, where otherwise a shorter sentence of imprisonment would have been appropriate.
- There are many situations where it would be appropriate for short sentences of imprisonment to be imposed. For example, a person may be serving sentences of imprisonment and have new or outstanding charges, where it may be appropriate that these new or outstanding charges are dealt with by short, fixed sentences of imprisonment.
- The abolition of sentences of imprisonment of six months or less will constrain the sentencing discretion available to judges and magistrates.
- The question of whether there'd be any unnecessary constraints on the sentencing discretion of judges and magistrates.
- The question whether there'd be a need for increased funding to services such as the Probation and Parole Service, and the need for an increase in the availability of alternatives to full-time custody in rural and remote areas.
- There is obviously a need and support for initiatives that will reduce the reliance on full time imprisonment. Rather than abolishing sentences of imprisonment of six months or less, would it be preferable to call on additional sentencing alternatives to imprisonment (such as sentencing options that reflect restorative justice principles) to be made available.

Question 5.4

1. **How is the aggregate sentencing model under s53A of the Crimes (Sentencing Procedure) Act 1999 (NSW) working in practice and should it be amended in any way?**
2. **Should a court be required to state the individual sentences that would have been imposed if an aggregate sentence had not been imposed by the court?**

In Pearce v The Queen [1998] HCA 57, [40], McHugh, Hayne and Callinan JJ described the rule against double punishment in the following terms: *To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn. Often those boundaries will be drawn in a way that means that offences overlap. To punish an offender twice if conduct falls in that area of overlap would be to punish offenders according to the accidents of legislative history, rather than according to their just deserts.*

It is important that s53A provides an appropriate balance between the aim of allowing courts to impose a 'bottom line' for the aggregate sentence in a straight-forward way, against the related aim of the courts providing enough detail about the individual sentences. If changes are to occur - it is of course desirable that it be clear and easy for sentencing judges to apply. It should be readily understood by the parties

and other affected people and the public at large. However, sentencing can be a complex process involving a balance of a number of often competing factors therefore over-simplifying sentencing laws need to be considered with caution. In this case - the aggregate sentencing system - has not been in place for a sufficient period of time in order to come to a firm view about whether the provision is operating satisfactorily or should be changed in any way.

Question 5.5

1. **Should a court be required to state reasons if the effective sentence does not reflect the special circumstances finding on the individual sentences?**
2. **Are there any other options to deal with these cases?**

Part 4 Div1 Crimes (Sentencing Procedure) Act 1999 (ss44–54, inclusive) contains provisions for setting terms of imprisonment, including non-parole periods, the conditions relating to parole orders, and fixed terms. Different provisions apply depending on whether the court imposes a sentence for a single offence, multiple offences or whether the offence is in the standard non-parole period. It is important for the court to state reasons if the effective sentence did not reflect the special circumstances found on the individual sentences. Additional research via case analysis is required from relevant stakeholders whether amending s44 would be the best possible option in requiring the court to state its reasons.

Question 5.6

1. **What limit should be applied to the automatic release of offenders to parole on expiry of a non-parole period?**

The LRC makes a significant observation when it states that it might be queried whether courts are able, or should be required to predict an offender's suitability for parole years into the future. Furthermore, it may be argued at the time the sentence is imposed, the court is not in a position to make determinations about the offender's suitability for release to parole, as the offender's progress in gaol and future circumstances cannot be known. Moreover, at the time of sentencing the court is required to take into account the seriousness of the offence as well as the offender's subjective features. The LRC purports that it may be that the current requirement for the Parole Authority to assess an offender's suitability for parole for head sentences greater than three years is more appropriate, as the offender's present circumstances can be taken into account. Additional empirical studies and case analysis is required from relevant key stakeholders to properly form an opinion on this issue. For instance, research can provide an important basis for judges and parole authorities to understand why offenders fail parole. As that understanding develops, sentences, policies, programmes and parole decisions can be adapted in order to reduce the risk of re-offending on parole. Research of this character is of significance to know 'what works' in crime prevention and to assist the targeting of rehabilitation efforts. Furthermore, it assists judges and parole authorities to make more effective decisions when assessing the appropriateness of release on parole at all.

Question 5.7

1. **Should back end home detention be introduced in NSW?**
2. **If so, how should a person's eligibility and suitability for back end home detention be determined and by whom?**

There has not been enough evidence found in the research and practice literature review for greater effectiveness of back-end or even front-end programs. When comparing Australian jurisdictions there seems to be a variance in whether front-end, back-end or both options are available. NSW, NT and up to September 2005 the ACT, operate only front-end HD programs. Queensland operates only a back-end (post-prison) option. Victoria, SA and NZ operate both a back-end and front-end scheme. Home Detention is available for unsentenced offenders in SA and, up to September 2005, in the ACT. One jurisdiction (Victoria) has only been operating an HD program for a short period of time. Two

jurisdictions (NSW and Victoria) operate in limited areas of their states only. Authority for determining the making of a HD order and its conditions varies both for front-end home detention (generally the decision of the sentencing court, although in NZ the court's decision-making role is limited to granting permission to apply for an order to the Parole Board) and for back-end programs. In the latter case, this is generally the responsibility of Parole Boards or their equivalent, except in SA where the Act empowers the Corrective Services Chief Executive Officer to make orders, set conditions, and revoke orders.

Research conducted on Home Detention in New Zealand for the periods 2007-2011 (a combination of front-end and back-end home detention) reveals that home detention is provided as an alternative to a short-term sentence of imprisonment (two years or less) under the Sentencing Act and as such it presents a higher short-term risk to public safety. Home detainees remain in the community and consequently have greater opportunity to commit further offences than those sentenced to a short term of imprisonment. About a fifth of those sentenced to home detention between October 2007 and December 2010 was convicted of an offence that occurred in the term of the sentence but over 80% of these offences related to the administration of the sentence. A very small proportion of offences committed on home detention involved other types of offending. In terms of long term risk to public safety – reoffending by those who have completed a sentence imposed by the court – home detention has significantly lower reconviction and imprisonment rates than a short-term sentence of imprisonment and compares favourably with other non-custodial sentences. The data presented in this review indicates that the home detention sentence has operated very successfully since its introduction in October 2007.[3]

Further empirical studies are required to adequately (such as the New Zealand and Victoria research papers mentioned above) evaluate the arguments for and against and the advantages and disadvantages respectively regarding the proposal in introducing back-end home detention in NSW.

Question 5.8

1. **Should the sentencing jurisdictional limits in the Local Court be increased and, if so, by how much?**
2. **Should a magistrate be able to refer a sentencing matter to the District Court if satisfied that any sentence imposed in the Local Court would not be commensurate with the seriousness of the offence?**

As purported in the NSW Sentencing Council's December 2010 *Examination of the Sentencing Powers of the Local Court Report* support for an increase in the jurisdiction of the local Court, to allow sentences of imprisonment of up to 5 years to be imposed by the Court, was foreshadowed by the Chief Magistrate of the Local Court and by the NSW Police Force (subject to resourcing and a staged implementation).

The NSW Police force supported an increase in the sentencing jurisdiction of the Local Court, subject to the provision of additional funding and of time to prepare for any such change. In this respect, it pointed to the need for lead time to train the additional Police Prosecutors that would be required, the number of which would depend on the nature of any increase in the jurisdiction of the Court. Allowing for the turnover, which sees up to 25 prosecutors leaving the NSW Police Force each year, it was noted that an annual increase of about 40 police prosecutors could be achieved. On the assumption that an increase of about 80 prosecutors would be necessary, at a cost of about $7.5m per year, it was said that this could be accommodated within a two-year time frame. However, the NSW Police Force submitted that a staged implementation would be necessary to ensure a smooth transition. If a quicker implementation was required, then it was suggested that consideration would need to be given to the provision of short term additional funding to increase its training capacity and to an increase in prosecuting allowances to attract applicants. The NSW Police Force noted that an increase in Local Court's sentencing powers would have certain potential ancillary benefits including:

[3] Ministry of Justice, Home Detention, A review of the sentence of home detention 2007-2011, October 2011, www.justice.govt.nz

- A reduction in the number of briefs of evidence that must be prepared for strictly indictable offences, including a potential saving of up to 6000 hours of police time for every 1000 charges moved from the District Court to the Local Court, and

- Since matters are finalized more quickly in the Local Court than in the District Court, there would be a potential reduction in the time it takes for matters to be finalized across the court system. Such a potential reduction it was suggested would benefit victims, witnesses and the police, and could also reduce the size of the remand population.

Traditionally, Police Prosecutors have not made submissions regarding sentencing unless invited by the Bench in very limited circumstances. Should the jurisdictional limit be increased, as it should, it would be appropriate for Police Prosecutors to address on sentence in a greater range of matters.

The likelihood of there being some additional incidental costs, for example in relation to an increase in victims support services and changes to the COPS computer system, was also identified. The NSW Police Force also drew attention, in the course of its submissions, to some anomalies that it suggested were likely to continue if the jurisdiction of the Local Court remained unchanged. They relate to:

- The fact that there have been reported instances of common assault matters, dealt with in the Local Court, receiving sentences in excess of the 12 months jurisdictional limit applicable to such cases;

- The fact that the jurisdictional limit for a common assault is less than for breach of an AVO; and

- The submission that the right of appeal from the Local Court (available as of right to the defendant, both in relation to sentence and conviction) is less restrictive than that applicable in the case of an appeal from the District Court to the Supreme Court (available only by leave or where there is an error of law) and that the introduction of the same precondition would save time and costs.[4]

As noted in the LRC report, there are arguments for and against the proposal. Broadly speaking, any changes to the Local Court's jurisdiction could have significant impacts on sentencing levels and resource implications for corrective services and the criminal justice system. Further case analysis is required and research evidence from key stakeholders to develop an informed judgment regarding sentencing jurisdictional limits in the Local Court.

[4] NSW Sentencing Council, An Examination of the Sentencing Powers of the Local Courts in NSW, A report of the NSW Sentencing Council, December 2010, www.lawlink.nsw.gov.au/sentencingcouncil, Sydney

Sentencing
Question Paper 6
Intermediate custodial sentencing options

This question paper analyses the intermediate custodial alternatives to full-time imprisonment and asks how they can be improved;

- *Compulsory drug treatment detention;*
- *Home detention;*
- *Intensive correction orders;*
- *Suspended sentences; and*
- *Rising of the court.*

It also asks whether there are other intermediate custodial sentencing options (such as periodic detention) which could be introduced in addition to these existing options.

Question 6.1

1. **Is the compulsory drug treatment order sentence well targeted?**
2. **Are there any improvements that could be made to the operation of compulsory drug treatment orders?**

Compulsory drug treatment is a huge field of inquiry and occupies a specialized place. The current systems of treatment are relatively young (some of these will be further discussed in this submission) and practices, principles and research evidence are still developing. Although research evidence is slowly coming to light there does exist a necessity for further empirical evidence to be conducted in order to develop appropriate and adequate solutions as well as contributing to building a body of knowledge that can be used to assist in future practice.

One such paper Hall and Lucke (2010) affirms the NSW Compulsory Drug Treatment Correction Centre (CDTCC) established in 2006 in order to provide a comprehensive program of compulsory rehabilitation for recidivist drug offenders that would treat their drug problems and reduce their recidivism after release (Birgden, 2008). The rationale for this approach was that it would be a more cost-effective approach than imprisonment per se which had failed to affect the drug use and criminality of these offenders (Dekker, O'Brien, & Smith, 2010). A major problem for those establishing the program at the CDTCC was the lack of evidence on the effectiveness of compulsory drug treatment in prison (Birgden, 2008; Dekker et al., 2010). There were no randomised controlled trials of the effectiveness of these programs, no evidence on their cost-effectiveness, and little guidance on how and to whom to provide such treatment. The most relevant evidence came from studies of the effectiveness of voluntary prison-based treatment programs (Aos et al., 2006). The political decision to establish the CDTCC seems to have been made in ignorance of the history of compulsory prison based drug treatment. This approach was introduced in the U.S.A. in the 1930s when the Public Health Service created two prison hospitals for the treatment of opioid dependence in Lexington, Kentucky (1935) and Fort Worth, Texas (1938) (Campbell, Olsen, & Walden, 2008). Civil commitment for drug dependence was also trialed in California and New York in the 1960s (Leukefeld & Tims, 1988).[5]

On the basis of public health and safety, a strong case can be made for providing addiction treatment in prisons, namely, that it may reduce drug use and blood borne virus transmission in prison, and reduce drug use and recidivism after release (Chandler et al., 2009). There is also a strong argument on the basis of human rights that prisoners should have access to the same treatments for their drug problems as other members of the community (Carter & Hall, 2010, in press). Imprisonment also provides an ideal opportunity for a captive population of drug offenders to engage with treatment as a break from the tedium of prison life. Most of the evidence regarding the effectiveness of prison-based drug treatment comes from programs in which prisoners have not been coerced or compelled to enter treatment.

[5] Wayne Hall and Jayne Lucke, Legally coerced treatment for drug using offenders: ethical and policy issues, Crime and Justice Bulletin, Number 144, September 2010.

Another research paper by Astrid Birgden and Luke Grant (in summary) states compulsory treatment law for drug-related offenders is unique in Australia and poses challenges regarding offender rights. Despite this, the authors are of the view that the CDTCC has a reputation amongst defendants and their families as a desirable and therapeutic prison. In terms of entry, while the CDTO does not require consent and cannot be appealed, offenders rarely protest to their legal counsel at the making of a CDTO and almost all offenders found ineligible or unsuitable challenge the outcome (one offender had requested a longer sentence to be eligible but net widening was declined by the sentencing Judge). Dekker at al. (2010) found that 80 of the 95 participants (84%) perceived their admission to the Program as *voluntary* (and any negative affective reactions decreased significantly between sentencing and the baseline interview shortly thereafter and the level maintained itself throughout the Program). In terms of exit, participants can be reluctant to leave the support of the CDTCC participants are increasingly requesting that they not be granted parole but remain on the CDTO for a few further months in order to receive ongoing support in the community. Significant improvements were found in outcome measures of mental and physical health, high scores on treatment readiness and therapeutic alliance, and largely positive comments about the Program with some negative comments regarding non-contact visits, sanctions for breaches, and lack of employment opportunities (Dekker et al., 2010). Compulsory treatment law need not necessarily inhibit action where "...creative thought can many times lead to...a different *application* of the existing law" (Wexler, 1996, p. 184).

In their concluding comments, Astrid Birgden and Luke Grant state it is preferable that offender rehabilitation provides voluntary treatment, serves therapeutic ends, and supports the offender as an autonomous adult. However, the CDTCC was established on the basis of a compulsory treatment law. While compulsory treatment is rejected by therapeutic jurisprudence, therapeutic policy, principles, and practices have been applied at the CDTCC to support the core values of offender freedom and well-being. The unexpected consequence of this approach is that offenders and their families are actively seeking to gain access to a compulsory program. [6]

A report prepared for the Australian National Council on Drugs (2007) by Emma Pritchard, Janette Mugavin and Amy Swan, presents a national perspective of the current operation of compulsory alcohol and/or other drug (AOD) treatment, within the context of existing research evidence, ethical considerations and international practice. The research paper is intended to inform ongoing debate on the place of compulsory treatment in Australia. The main goals of compulsory treatment are twofold: to reduce substance use and thereby improve health and overall quality of life; and to reduce current and future criminal justice involvement. Compulsory treatment programs aim to reduce economic and social costs associated with problematic AOD use: police and court time, incarceration, public health costs and so forth. From these savings, emotional and further economic benefits are expected to ensue to families and communities.

As Pritchard, Mugavin and Swan (2007) put it; compulsory treatment is unique within the broader AOD treatment domain by virtue of its legal origins and context. It involves cross-disciplinary collaboration of a distinctive nature in the treatment of a client group with particular issues associated with and leading to a legal directive to participate in treatment. It can be a controversial field of treatment, impacting as it does on conceptions and experiences of individual rights and State responsibilities. As diversion programs grow and civil commitment legislation is reviewed, the need for practice guidelines becomes more urgent. The writers make a number of recommendations (on a large scale) that could be taken as a comparable example as to how the compulsory drug treatment order sentence could be further targeted and improved in its operations. Some of these considerations to be taken into account include but no means limited to the following:

- Evidence-based practice guidelines for compulsory treatment be developed and informed by existing principles of best practice;
- Processes for establishing evidence-based practice guidelines should incorporate strategies for future dissemination, promotion, development and implementation monitoring;

6 Astrid Birgden and Luke Grant, Establishing a compulsory drug treatment prison: Therapeutic policy, principles, and practices in addressing offender rights and rehabilitation, Australasian Journal of Correctional Staff Development http://www.bfcsa.nsw.gov.au/journal/ajcsd

- Evidence-based practice guidelines be developed and implemented by extensive collaboration and cooperation between Federal, State and Territory governments.

- The development of a national approach to compulsory treatment including policy guidelines for diversion at all stages of criminal justice proceedings and civil commitment. These guidelines should clearly set out the potential place of all compulsory treatment programs from police diversion, through court diversion initiatives and drug courts, to civil commitment of non-offenders; state the intended outcomes of compulsory treatment; be consistent with the mission and goals of existing initiatives and provide a framework for clarification and revision of their objectives and procedures at a local level; be formulated via a systems approach, so that a range of significant factors is considered.

- That national coordination assist to maintain a centralized, integrated data monitoring system for evaluation purposes, conduct rigorous evaluation research in multiple areas; provide a clearing house for research evidence; develop, disseminate, monitor and review principles of best practice; develop and conduct accredited education and training programs; promote community and sector awareness.

- Research in this area consistently exhibits methodological and conceptual weaknesses and these weaknesses have rendered the empirical evidence base as a whole largely inconclusive.

- Evaluations of diversion programs often fail to assess program aims and objectives other than reducing recidivism and drug use. Other commonly stated but rarely evaluated aims include re-integration of drug-using offenders into the community, improvement of health and social functioning, and reductions in court appearances. Standardised indicators of diversion program outcomes are lacing, and there is no consistency in the measurement of outcomes such that cross-program comparisons cannot be reliably made.

- Greater effort be required to build the knowledge base regarding compulsory treatment. This includes collection and analysis of data regarding the nature of treatment(s) that offenders are referred to and subsequent evaluation research to examine: which types of treatment hold the most promise for being effective and cost-effective, and for which groups; the interplay between client motivation, perceived coercion, client characteristics, program components and treatment characteristics; and which models and treatments do magistrates and providers believe to be effective. That the treatment experiences of individuals subject to civil commitment orders be researched.

- There is some evidence that completion of a diversion program, especially a drug court program, is associated in Australia with reductions in both recidivism and drug use. Some research has been conducted in Australia to identify predictors of drug court program compliance and termination; however, data are limited.[7]

Question 6.2

1. **Is home detention operating as an effective alternative to imprisonment?**
2. **Are there cases where it could be used, but is not? If so what are the barriers?**
3. **Are there any improvements that could be made to the operation of home detention?**

Further empirical studies and analysis is required to provide verification whether home detention is an effective and adequate alternative to imprisonment. The most recent research released on the subject is from Victoria. Victoria's home detention program commenced in 2004. At the time of its introduction the government described home detention as a way of diverting low-risk offenders from prison that provided both cost-advantages and increased opportunities for offenders to successfully rehabilitate and

7 Emma Pritchard, Janette Mugavin and Amy Swan, Compulsory treatment in Australia: a discussion paper on the compulsory treatment of individuals dependent on alcohol and/or other drugs. A report prepared for the Australian National Council on Drugs, 2007, www.ancd.org.au

reintegrate into society. At the end of its second year of operation, an evaluation of the program was conducted by the Melbourne Centre for Criminological Research and Evaluation. The 2006 evaluation report ('the report') contained five key findings.

Firstly, the report found that caseload numbers on the home detention program were lower than anticipated. A key reason for this was the low rate of home detention orders (less than one per month) issued by the courts. The report outlined key concerns that had been raised by Magistrates about the use of home detention as a sentencing option. These included: that equating a term of imprisonment to a term of home detention was inequitable and unjust; that defense counsel were unaware of, or unwilling to suggest home detention as a sentencing option; and that Magistrates had difficulty determining the right kind of case that would be appropriate for home detention. Secondly, the report found that breach and revocation rates for home detainees (particularly for post-prison offenders) were low. Thirdly, the report found no evidence of significant risk to family members co-habiting with the home detainee. Fourthly, the report found that recidivism rates for home detainees, when contrasted to comparable low risk prison releasees, were substantially lower than anticipated. Finally, the report identified that the home detention program yielded a cost-benefit returning $1.80 in benefits for each $1 spent on the program.

The report also provided an overview of some of the key issues associated with home detention. Recent media reports have highlighted perceptions in the public domain that home detention is a 'soft punishment'. The profile of home detention has also been raised through its association as a punishment for high profile business people and celebrities who commit offences. About these negative perceptions in the media, Marietta Martinovic, from RMIT University, states: *Despite the fact that in reality the placement of affluent detainees on HDBS [Home Detention Based Sanctions] and serious re-offending by detainees on HDBS are isolated, most members of the community see them as 'the image of HDBS' and compare them with the 'obvious' and widely publicised deprivations of imprisonment. As a result, they perceive these sanctions as 'soft on crime' and maintain little support for them*.

In its 2008 report, the Sentencing Advisory Council commented that the Victorian scheme's conception of home detention as a direct equivalent for imprisonment did not align with sentencers' and victims' expectations. The Council stated, *It would seem that, at least in Victoria, sentencers do not view home detention as a direct equivalent to imprisonment. Media reports following the release of offenders on home detention also suggest that victims have difficulty accepting home detention as an appropriate substitute for a period of full-time imprisonment in some instances.*

The NSW Legislative Council Standing Committee on Law and Justice released a report on community based sentencing options in March 2006. In the report, the Committee noted that, 'generally speaking, home detention would seem to be preferable to and less onerous than, full-time imprisonment'. However, the report also stressed that the Committee had received evidence that home detention is itself 'considered substantially more punitive and intrusive than any other penalty short of full-time custody'. This is partly due to the high level of self-discipline required of detainees participating in home detention. Home detainees interviewed for the Victorian pilot evaluation reported, overall, that serving a sentence of home detention presented some difficulties but was less challenging than the stresses and practical difficulties associated with being in prison. Some of the challenges expressed by detainees were: restrictions on home and recreational activities (especially exercise); uncertainty associated with progression through program stages; and frustration over the role of case workers (e.g. risk management versus case management).

As stated previously, Victoria's home detention program demonstrated that for every dollar spent on the program, $1.80 was saved. These figures included cost savings resulting from diversion from imprisonment and reduced imprisonment due to less recidivism (the program had a one-year predicted reoffending rate of 10 per cent compared with 28 per cent for all prison releasees). The report also identified other potential cost benefits that could not be quantified. These included: reduced parole breach rates; reduced cost of crime (due to decreased recidivism); improved employment outcomes (people on home detention were more likely to find employment than prison releasees generally); and improved family outcomes.

However, George (2006) states that it would be more useful to compare the cost effectiveness of home detention to other community-based programs, rather than imprisonment. She argues that if a person is 'safe enough' to be in their home (where, George says, most violent crimes occur) they are 'safe enough' to be in the community. George (2006) proposes that the only function of the extra layer of surveillance experienced by those in home detention is punishment. The Sentencing Advisory Council compared the recidivism rate of the Victorian home detention program with recidivism rates for offenders discharged from community corrections orders in other Australian jurisdictions. The Council stated: *it would seem that recidivism rates of home detainees in Victoria are relatively low compared to community-based orders more generally, although this does not take into account the potentially different profile of offenders accepted for home detention (that is, low-risk, non-violent offenders who are comparatively better educated, more likely to be employed and have a stable lifestyle) to those likely to be placed on community-based orders*.

Martinovic (2007) undertook a literature review of the impact of home detention on co-residents. She argues that: *although the punishing conditions of home detention are exclusively imposed on detainees, their co-residing family members are also somewhat punitively, albeit unintentionally, affected by them.* She listed five potentially negative effects experienced by co-residents. These were: feeling responsible for assisting the detainee to conform to the order; feeling embarrassed about residing with a home detainee; perceiving that governmental control was being moved into their private home; indirectly experiencing the effects of government surveillance (e.g. being disturbed by monitoring phone calls late at night, ensuring children do not interfere with the surveillance equipment); and experiencing 'under duress' social interaction at home (e.g. coping with a 'pressure cooker' environment in the home, the disruption of family routines due to the detainee's constant presence in the home).

However, Martinovic (2007) also cited some of the beneficial effects of home detention on co-residents. These included that the requirements of home detention ensure that the detainee adopts a pro-social lifestyle (e.g. remaining drug and alcohol free, undergoing rehabilitation and being employed). With the adoption of a pro-social lifestyle, relationships between the detainee and co-residents may improve. She specified that co-residents are more likely to experience positive effects of home detention where the order is of optimal duration and relationships are already supportive.

George (2006) also highlights the impact of home detention on co-residents, particularly women, who are largely the 'sponsors' of home detainees (because home detainees are predominantly men). She suggests that even though co-residents are asked for their 'consent' prior to a home detention order being given, this does not constitute a 'real choice' for women. This is because unless a woman agrees to their family member's home detention, they will stay in prison. George contends that, as women tend to put the needs of others ahead of their own, and they would generally prefer their family member be out of prison, they may feel a sense of obligation. There is additional stress for the co-resident in knowing that the consequences of reporting the detainee for family violence or for breaching their conditions is that their family member will be returned to prison. As co-residents, women also provide unpaid domestic labour in the 'home prison', which would traditionally be performed by prison officers and social workers.[8]

Question 6.3

1. **Are intensive correction orders operating as an effective alternative to imprisonment?**
2. **Are there cases where they could be used, but are not? If so what are the barriers?**
3. **Are there any improvements that could be made to the operation of intensive correction orders?**

From 1 October 2010, Periodic Detention ceased to be a sentencing option in NSW and a new community sentencing option called an Intensive Correction Order (ICO) became available. An ICO is an order of imprisonment for not more than 2 years made by a court, which directs that the sentence is to be served by way of intensive correction in the community. An ICO is served in the community under the strict supervision of Corrective Services NSW (CSNSW) rather than in full-time custody in a correctional centre. As the LRC states, because ICO's are a comparatively recent introduction, there are no comprehensive

8 Parliamentary Library Research Service, Sentencing Legislation Amendment (Abolition of Home Detention) Bill 2011, Number 8, June 2011

statistics or evaluation available regarding its effectiveness. The New South Wales Sentencing Council will report annually on the use of the ICO and will review its operation after five years. In addition, the New South Wales Bureau of Crime Statistics and Research (BOCSAR) will be asked to measure the effectiveness of the order in reducing re-offending. Unless a review is undertaken it is quite early to tell whether the ICO are operating adequately.

Question 6.4

1. **Are suspended sentences operating as an effective alternative to imprisonment?**
2. **Are there cases where suspended sentences could be used, but are not? If so what are the barriers?**
3. **Are there any improvements that could be made to the operation of suspended sentences?**
4. **Should greater flexibility be introduced in relation to:**
    a. **The length of the bond associated with the suspended sentence?**
    b. **Partial suspension of the sentence?**
    c. **Options available to a court if the bond is breached?**

In August 2011, the Police Association of NSW provided feedback to the review of the use of suspended sentences under Section 12 of the Crimes (Sentencing Procedure) Act 1999. At the time feedback was sought from the Police Association's general membership and, in particular, from the Police Prosecutions branch. In its feedback (without repeating the report in its entirety) the Police Association (in summary) is of the view that the proper administration of justice requires that the judiciary have a broad range of sentencing options available. The ability to suspend a full-time custodial sentence and place conditions on an individual is, in appropriate circumstances, a beneficial sentencing outcome. It can provide significant benefits for the individual by providing an opportunity for rehabilitation and the ability to demonstrate a change in behaviour, as well as a benefit for the community with offenders rehabilitating and ceasing to commit offences. Affective rehabilitation should result in significant cost savings associated with the reduction of the prison population and the provision of policing services through a reduction in crime. However, the Police Association does not believe that the use of suspended sentences is useful in the case of recidivist offenders, or where rehabilitation is not a likely outcome, nor is it appropriate for serious offences.

Another significant part of the PANSW Submission suggested that bond associated with the suspended sentence should be permitted to extend well beyond the length of the custodial sentence that had been suspended. Such bonds have proved effective in other Australian States and should be considered in NSW.

As the LRC reports, in NSW suspended sentences were abolished in 1974 and reintroduced in 2000. NSWLRC recommended their reintroduction, on the basis that suspended sentences would be a useful addition to the range of sentencing options available to the courts. Despite being a 'sentence of imprisonment', the offender is allowed to remain in the community, on certain conditions, and the detention is suspended unless and until triggered by a breach of one or more of the conditions. The NSW Court of Criminal Appeal ('NSWCCA') has emphasised that a suspended sentence is 'a significant and effective punishment' despite the suspension of its execution, and has significant general and specific deterrent effects[9]. The NSW Sentencing Council's Background Report contains a comprehensive discussion of the relevant issues involved in the reform of suspended sentences that require review and of which include;

- It has been suggested that the three-step process involved in suspending a sentence is conceptually flawed. The Victorian Sentencing Advisory Council in its report Suspended Sentences Final Report Part 1, noted that: *The community, quite legitimately in our view, questions the logic of a decision that a prison sentence is, and then is not, appropriate*. The

[9] NSW Sentencing Council, Suspended Sentences: A Background Report, NSW Sentencing Council, Sydney 2011, www.lawlink.nsw.gov.au/sentencingcouncil

issue is of some importance in relation to the maintenance of confidence in the criminal justice system.

- BOCSAR noted that the imposition of suspended sentences on offenders who would otherwise have received a non-custodial sanction has potentially serious implications for imprisonment rates over the longer term, because the risk of imprisonment is probably higher for breaching the conditions of a suspended sentence than it is for breaching a good behaviour bond or a CSO. An unintended consequence is that a greater number of offenders may be drawn into the prison population.

- In 2009, BOCSAR undertook a study that considered the effectiveness of suspended sentences in terms of specific deterrence, compared with full-time imprisonment. In its concluding remarks BOCSAR noted that: *Our results provide no evidence to support the contention that offenders given imprisonment are less likely to re-offend than those given a suspended sentence. Indeed, on the face of it, the findings in relation to offenders who have previously been in prison are inconsistent with the deterrence hypothesis. After the prison and suspended sentence samples in this group were matched on key sentencing variables, there was a significant tendency for the prison group to reoffend more quickly on release than the suspended sentence group*.

- BOCSAR also reported that full-time prison sentences are much more expensive to administer than suspended sentences, and therefore, from the vantage point of specific deterrence, suspended sentences are more cost-effective than full time imprisonment.

- In BOCSAR's 2008 study, '*Does a lack of alternatives to custody increase the risk of a prison sentence?'* it found that, when considering all sentences of imprisonment (whether suspended or not), 'offenders in regional and remote areas are less likely to be imprisoned compared with offenders in inner metropolitan areas when other factors are held constant'. BOCSAR suggested that the most likely explanation for this was that courts in regional and remote areas are sensitive to the shortage of community-based sentencing options in these areas and react to this shortage by being more sparing in their use of imprisonment.

- BOCSAR's 2011 paper '*The profile of offenders receiving suspended sentences*', found that in terms of location, there was a slight increase in percentage of offenders in inner metropolitan areas and a decrease in percentage of offenders in outer regional areas, receiving suspended sentences.

- Despite the legislative requirement that prison sentences should be suspended only after determining that no sentence other than imprisonment is appropriate, the evidence tends to suggest that suspended sentences are being used in some cases as substitutes for non-custodial options. This raises a question in relation to the extent to which suspended sentences contribute to 'netwidening' or 'penalty escalation.

- Very many studies have been conducted in relation to the perception of the community in relation to sentencing decisions. In general they have suggested that caution should be exercised in relation to any claimed lack of public confidence in sentencing decisions.

Question 6.5

1. **Should the "rising of the court" continue to be available as a sentencing option?**
2. **If so, should the penalty be given a statutory base?**
3. **Should the "rising of the court" retain its link to imprisonment?**

The court orders the defendant to "remain in court until the next adjournment" (that is, until the next break in the sittings of the court that day). This is a symbolic way of saying that an offender is convicted but no formal sentence is imposed. This order is reserved for the least serious of offences. In his paper Ian MacKinnell (1996) states most judges and magistrates have used this penalty at one time or another and it is traditionally viewed as part of the *armoury of the sentencer*. Moreover, as an analysis of

sentencing statistics, it is a prevalent outcome in relation to multiple counts of dishonesty offences. As MacKinnell puts it, one of the more noteworthy features of this penalty is that so little has been written about it. It is not mentioned in any legislation. ROC is generally regarded as one of the most lenient penalties available to the sentencer. ROC lacks the stigma or personal trauma of detention in a cell that would occur in any longer sentence. ROC is most commonly used for dealing with secondary offences, particularly where the courts must dispose of a large number of counts that constitute a single pattern of offending (such as dishonesty offences involving cheques). This practice is much more common in the Local Courts than in the higher courts. On the other hand, ROC is quite rare as the principal penalty for an offender, especially in the higher courts. While ROC has traditionally been viewed as an appropriate sentence for an offender who has served an adequate time in custody on remand or for a previous sentence quashed on appeal, this is in fact its least common function in the courts.[10] In light of the mentioned judgments above, the use of ROC renders further case analysis from relevant stakeholders in assessing whether it continues to be available as a sentencing option – particularly since the use of the sentence has gone into decline.

Question 6.6

1. **Should any of the maximum terms for the different custodial sentencing options in the Crimes (Sentencing Procedure) Act 1999 (NSW) be changed?**
2. **Should there be a uniform maximum term for all of the custodial alternatives to full-time imprisonment?**
3. **Should the terms of custodial alternatives to full-time imprisonment continue to be tied to the sentence of imprisonment that the court initially determined to be appropriate?**
4. **Should the Local Court's jurisdictional limit be increased for custodial alternatives to full-time imprisonment?**

The questions regarding maximum terms of imprisonment that may be served by way of custodial alternatives require further empirical evidence that can strongly demonstrate the effectiveness of custodial alternatives. There is also a need for a comprehensive case analysis as required along with discussions and collaboration from key stakeholders in assessing what reforms are required of custodial alternatives to sentencing. At present, the prison population in NSW is at a critically high level and there is no statistical support for the increase in the number of inmates in either recidivism rates or the incidence of criminal activity in the State. It's been said that prison should only ever be used as a means of 'last resort.' There are many alternatives to prison and there is also plenty of research to suggest that alternatives to custody can be more successful than prison at enabling people to address their offending behaviour. Not only are there many benefits that are involved in keeping people out of prison in terms of avoiding the damaging influence of imprisonment, but community alternatives are also cheaper, and more effective at reducing offending behaviour. When compared to the many additional costs of imprisonment - inter-generational crime, homelessness, the perpetuation of poverty cycles, separation of families, unemployment, the damage of institutional violence, the exacerbation of mental illness, drug abuse, and related ill health problems - community corrections are cheaper.

A good proportion of the amount currently spent on the NSW prison system would be much better directed to non-custodial options, which have the potential to generate socially and economically beneficial outcomes also. In some instances full-time prison is the best option for a certain offender or crime, but in some cases prison is not necessary. In answer to the question of whether there be a uniform maximum term for all of custodial alternatives - the appropriate type of non-custodial sentence depends on the characteristics of the offender and their crime, the existing legislation and the awareness and appreciation by the magistracy and judiciary of these alternative sentences. There are many people who are suited to non-custodial sentences. Those convicted of less serious crimes who have sentences of six months or less do not have the opportunity when they are in prison to access the rehabilitation and training services that do exist. Also, short term sentences are generally not covered by the Probation and

[10] Ian MacKinnell, Sentenced to the Rising of the Court, Sentencing Trends No 11 (Judicial Commission of NSW, 1996)

Parole Service's post-release supervision programs. According to the Bureau of Crime Statistics and Research the most serious offence for 90% of these prisoners is a theft, a breach of justice order, a minor assault or a driving/traffic offence.

In align with the above - further empirical evidence (is required) in demonstrating the effectiveness to alternatives to full-time imprisonment along with rigorous case analysis and research in evaluating adequately the types of reform required. These could include:

- Whether there should be a consistent maximum length of sentence of two years for all custodial alternatives to full-time custody;
- Whether the maximum length of a suspended sentence ought to be increased to three years in the higher courts, but remain at two years in the Local Court;
- Whether consideration should be given to extending the maximum length of intensive correction orders from two years to three years.

Question 6.7

1. **What other intermediate custodial sentences should be considered?**

Other options for reform of custodial alternative to full-time imprisonment that have not been discussed in this paper and which could be considered include;

Restorative justice (or Forum Sentencing) aims to promote accountability through reconciliation and reconnection to the community. Research here and overseas has shown that restorative justice has;

- Substantially reduced repeat offending for some, but not all, offences. In particular, restorative justice seemed to work best in reducing re-conviction rates for more serious crimes involving personal victims such as violence and, to a lesser extent, property crime.
- Reduced re-conviction rates for some, but not all, offenders. In particular, restorative justice was more effective than prison in reducing re-conviction rates among adult offenders, and gave similar re-conviction rates as prison for young offenders.
- Delivered benefits to the victims where the process involved face-to-face conferences. Benefits included reduced post-traumatic stress symptoms in the short term, and possibly also longer-term health benefits.
- Delivered cost benefits when used as an alternative to conventional criminal justice, and in terms of reduced costs of healthcare for victims.[11]

Electronic Monitoring can be used as a condition of bail or enable early release from prison and can be imposed as a sentence following conviction for an offence. Arguments in favor of electronic monitoring are mainly directed to the fact that these devices would be able to improve the tracking of offenders in remote locations as well as repeat offenders who held a serious risk in addition to removing the onus off the victim.[12]

Members of the PANSW have highlighted technical deficiencies with electronic monitoring. If an expansion of the system is considered it must be accompanied by a robust and transparent evaluation of the technology used and that which is now available.

Early Intervention the Government can launch a number of initiatives in attempts to tackle underlying causes of offending and to steer young offenders for instance away from crime. These could be initiatives which aim to bring together early education, healthcare and family support. There is evidence that early interventions can be effective in reducing anti-social behavior and offending.

Fines can be an appropriate sentence for the majority of minor offences in the Local Court.

Drug Court An evaluation by BOCSAR has show that participants in the NSW Drug Court are significantly less likely to be reconvicted than offenders given imprisonment. Drug Courts could be more cost-

[11] Parliamentary Office of Science and Technology, Alternatives to Custodial Sentencing, Postnote Number 308, May 2008

[12] Police Association of NSW Submission, Inquiry into Domestic violence trends and issues in NSW, September 2011.

effective (in some cases) than prison when it comes to reducing the risk of re-offending among recidivist offenders whose crime is drug related.[13]

A number of diversion programs and or alternative sentencing options are currently available to defendants in the Local Court and utilize the power provided in section 11 of the Act for the Court to defer sentencing for rehabilitation, participation in an intervention program or other purposes. These include:

Magistrate's Early Referral into Treatment (MERIT); this is a drug treatment and rehabilitation program that seeks to enable defendants to break cycles of drug-related crime.

Alcohol MERIT; formerly known as Rural Alcohol Diversion, this alcohol rehabilitation program has recently been expanded to several metropolitan and regional locations and uses the same operational model as MERIT.

Circle Sentencing: this program operates post-plea as an alternative sentencing process for adult indigenous offenders in which community elders are involved and is used for more serious repeat offenders.

Traffic Offender Intervention Program: this is a post-plea program for defendant who have been found guilty of or pleaded guilty to a traffic offence.

Based on recent research regarding the effectiveness of Forum Sentencing and Circle Sentencing (and Youth Conferencing) consideration should be given to more appropriate criteria for eligibility. The marginal improvement in reoffending rates, tied with the decreased emphasis on other sentencing purposes (e.g. retribution and deterrence) concerns members of PANSW.

Question 6.8

Should further consideration be given to the reintroduction of periodic detention? If so:

a. What should be the maximum term of periodic detention order or accumulated periodic detention orders:
b. What eligibility criteria should apply;
c. How could the problems with the previous system be overcome and its operation improved; and
d. Could a rehabilitative element be introduced?

A research paper released by the Australian Institute of Criminology in 2007 stated that a Periodic Detention Order (PDO) is a community based sentencing option available to New South Wales courts that allows an offender to live within the community most of the time, keeping their job and family contacts, while serving a two day a week detention period, for up to three years (McHutchison 2006). As part of a PDO offenders may be required to undertake community service activities. PDOs are considered an important sentencing option for the courts as they can offer more reparative and rehabilitative opportunities than full time incarceration (McHutchison 2006). Not only does full-time incarceration often mean loss of employment, housing, and personal property for the offender, the cost of keeping an offender in prison was estimated to be $240 per day in 2005–06 (SCRGSP 2007).

A study by the NSW Department of Corrective Services analysed how often PDOs in NSW were completed successfully, and identified factors associated with failure to complete the orders (McHutchison 2006). The study found that almost 70 percent of offenders sentenced to periodic detention completed their sentences. Although the rate of completion was lower than the 76 percent for Community Service Orders (CSOs), this was to be expected, as those on a CSO generally have committed less serious offences and/or have less of an offending history, and conditions are not as strict or onerous as a PDO. The following risk factors were found to be associated with non-completion:

- offenders younger than 35 years
- property offences
- robbery offences
- deception offences

[13] Bureau of Crime Statistics and Research, Drug Court re-evaluation, Media Release, 2008.

- prior experience with two or more CSOs
- prior experience of incarceration
- sentenced in local court (although this could be the result of the different types of offences and offenders dealt with by the respective courts)

Young offenders were also less likely to attend for their PDO and slower to complete it. A previous finding that Indigenous offenders were less likely to complete a PDO was not supported by the study. The results indicate that regular monitoring of PDO outcomes and actions to address the risk factors, such as closer mentoring of young offenders would be beneficial.[14]

Although periodic detention ceased during October 2010, its abolition was considered to be a loss to an important component of the sentencing spectrum and some believe lead to the use of full-time imprisonment in circumstances where it was not necessarily the most appropriate approach. As the LRC reports there has been preference from various relevant stakeholder parties that periodic detention be reintroduced with perhaps ICOs retained as an additional sentencing option sitting between periodic detention and community service orders. The option of sentencing an offender to periodic detention enabled the court to punish an offender without the negative effects of full-time imprisonment. The offender could maintain community and family ties by retaining employment and living with their family. It's also believed to be less costly than full-time imprisonment and benefits the community by work performed by periodic detainees.

As the LRC states, during December 2007 the NSW Sentencing Council examined the extent to which periodic detention had been available and used in New South Wales. Additionally, it examined its requirements and administration, particularly in relation to breach proceedings, and gave consideration to its perceived advantages and disadvantages. The Council accepted that periodic detention had been seen to be a valuable sentencing option for those offenders for whom it has been available. However, the lack of its availability throughout the State by reason of resource limitations, and the resulting discriminatory impact, the under utilization of the current facilities, and the absence of meaningful case management for periodic detainees give rise to significant concerns. All these factors along with the consideration of the availability of suitable ICO programs, the maximum term of an ICO and the suitability assessments are all areas that require investigation, analysis and reform from relevant stakeholders.

[14] Australian Institute of Criminology, Results of Periodic Detention Orders, No. 61, 4 September 2007.

Sentencing
Question Paper 7
Non-custodial sentencing options

This question paper analyses the non-custodial alternatives and asks how they can be improved:

- *Community service orders*
- *S9 bonds;*
- *Fines; and*
- *Non-conviction orders.*

It also asks whether there are other non-custodial sentencing options (such as work development orders and fines held in trust) which could be introduced in addition to these existing options.

Question 7.1

1. **Are community service orders working well as a sentencing option and should they be retained?**
2. **What changes, if any, should be made to the provisions governing community service orders or to their operational arrangements?**

Community service orders have been used as an alternative to imprisonment for quite some time due to a number of benefits both to the offender and to society. As the LRC reports (2003), for offenders, community service orders obviate the oppressive and brutalising effects that the prison environment can have on inmates. This sentencing option, while providing a means to punish offenders, also assists their rehabilitation. Some community-based correction programs involve education and training aimed at rehabilitation. Offenders learn new skills that help their re-integration into society and reduce the likelihood of recidivism. Community service orders allow society to reduce prison costs. Moreover, the recipients of the service to be rendered by the offender, such as non-profit organisations, charities, nursing homes, children's homes and community centres, benefit in numerous ways from the penalty. Further, this mode of punishment addresses society's need to attain a sense of justice, especially in cases where the resulting harm transcends an individual victim and affects an entire community. Requiring the offender to perform some service to the community as a penal sanction not only underlines the community's disapproval of the offence, but may also help towards repairing the harm done to society.

A 1997 report released by the ALRC stated that the effectiveness of community service orders as sentencing options depends in large measure on the level of resources committed to their implementation. This has been a major problem in the system of community service orders operating in South Australia. A recent report by the South Australian Juvenile Justice Advisory Committee found that there was frequently not enough work for young offenders and insufficient supervision to ensure compliance with orders. This has been attributed to a number of factors including lack of resources in the Department of Family and Community Services and reluctance by community groups to offer work to young offenders. Another relevant factor is the significant increase in the number of orders handed down. The report also said there was confusion over the respective roles of the police, the Department of Family and Community Services and community groups in the implementation of these orders. The South Australian experience highlights the need for allocation of sufficient resources and a streamlined and co-ordinated approach in the implementation of community service orders for young people. Community based sentencing options need to be better funded, more culturally appropriate and with a greater focus on integration in the community. More programs are needed to assess effectiveness and the outcomes of community based sentencing options.[15]

[15] Australian Law Reform Commission, Seen and heard: priority for children in the legal process, ALRC Report 84, 19 November 1997

Question 7.2

1. **Is the imposition of a good behavior bond under s9 of the Crimes (Sentencing Procedure) Act 1999 (NSW) working well as a sentencing option and should s9 be retained?**
2. **What changes, if any, should be made to the provisions on governing the imposition of good behavior bonds under s9?**

As the LRC reports, s9 of the Act provides that a court may following a conviction, "instead of imposing a sentence of imprisonment" direct an offender to enter into a bond to be of good behaviour for a specified period of not more than five years. Section 9 bonds represent a significant proportion of the sentences imposed by the Local Court. Further case analysis is required from key stakeholders in answer to whether the phrase in s9"[i]nstead of imposing a sentence of imprisonment on an offender" requires that the offence carry a maximum penalty that includes imprisonment, or whether it is open to impose a s 9 bond for any offence.

On a separate issue, the NSW Police Force submitted (to the LRC review regarding Good Behaviour Bonds and Non-Conviction Orders) that a short (for example, 3 or 6 month) sentence of imprisonment, that has been suspended, might not provide sufficient time for a good behaviour bond to take effect, and that a s9 bond would be a more effective order in such cases. The NSW Police Force further submitted that, in such circumstances, the court should be able to impose a good behavior bond that exceeds the length of the suspended sentence.

Question 7.3

1. **Are the general provisions governing good behavior bonds working well, and should they be retained?**
2. **What changes, if any, should be made to the general provisions on governing good behavior bonds or to their operational arrangements?**

The LRC's review regarding Good Behaviour Bonds and Non-Conviction Orders conveyed the majority of submissions did not suggest that either good behaviour bonds or non-conviction orders are being used disproportionately or inappropriately, and considered that both of these sentencing options are necessary to deal with the range of matters that come before the courts.

The range of conditions that may attach to a bond are in theory unlimited and can be tailored to suit the offender. A main advantage of bonds is the flexibility they offer as a sentencing option as well as their deterrent and rehabilitative value. The flexibility of bonds allows the court to order a range of conditions to address offending behavior by providing supervision, and conditions such as counseling and treatment programs. Supervision through community-based orders is relatively successful, with successful completion rates of around 84% (or revocation rates of approximately 16%). Bonds and non-conviction orders are therefore used significantly and the legislation is being used as intended. It is necessary that Magistrates have the discretion to dismiss a charge or to impose a bond without proceeding to conviction. This discretion allows the Court to have regard to the offender's subjective circumstances and ensure a just result in each case.

Organisations such as the Shopfront Youth Legal Centre which provide legal representation for homeless and disadvantaged young people aged 25 and under regularly appear for defendants in criminal matters in the Local, children's and District Courts. The charges faced by their clients vary widely in nature and seriousness and their subjective circumstances also vary; however most are extremely disadvantaged due to homelessness, poverty, a history of abuse or neglect, mental illness and/or intellectual disability. The discretion to dismiss a charge or to impose a bond without proceeding to conviction (under s10) is an essential part of the criminal justice system. It is essential that judicial officers continue to have such a discretion in order to ensure just results in individual cases.

There are other options for reform which may be worth exploring. For example, the LRC suggested that a possible sanction for breach could be the extension of the term of the good behavior bond or a variation of its terms. The suggestion does merit serious consideration. For example, when dealing with a breach that is not completely excusable, but is not of such a high order as to warrant the revocation of

the suspended sentence, it would be useful if the court had the option of making the offender subject to a further period of good behavior. Presumably there would have to be some limits on the number and length of any such extensions.

The Law Society of NSW state that supervised bonds are not available in some rural and remote areas due to a lack of Probation and Parole staff to provide supervision. The Legislative Council Standing Committee on Law and Justice recommended in its 2006 report Community based sentencing options for rural and remote areas and disadvantaged populations that the Department of Corrective Services:

- Identify the areas of NSW where supervised bonds are unavailable due to a lack of Probation and Parole Service resources;
- Take steps to extend supervision or a modified form of supervision to all areas of NSW;
- Work with government and non-government agencies to extend the availability of appropriate and accessible programs to meet offenders' needs in rural and remote areas. In particular, consideration should be given to programs addressing domestic violence, drug and alcohol and driving related offending behavior;
- Work with both government and non-government agencies in the disability services field to identify and develop ways to improve support services to assist offenders with and intellectual disability or a mental illness to comply with the conditions of supervised bonds.

The availability of programs to address domestic violence, substance and alcohol abuse, anger management, driving offences and general life skills are essential because without adequate programs the rehabilitative purpose of the supervised bond is minimal.

Question 7.4

1. **Are the provision relating to fines in the Crimes (Sentencing Procedure) Act 1999 (NSW) working well, and should they be retained?**
2. **Should the provisions relating to fines in the Crimes (Sentencing Procedure) Act 1999 (NSW) be added to or altered in any way?**
3. **Where a particular offence specified a term of imprisonment but does not specify a maximum fine, how should the maximum fine be calculated?**

Fines are an appropriate sentence for the majority of minor offences in the Local Court. There is substantial evidence today that in many cases non-custodial sentences are at least as effective as custodial ones, besides having significant additional advantages. A UK study conducted by Aidan Sammons states that the most frequently used non-custodial sentences (in the UK) are:

- Fines: the offender is required to pay a specified sum of money to the authorities.
- Probation: the offender is required to be supervised and regularly checked for a specific period.
- Reparation & restitution: the offender is required to undertake specified activities to 'repay' either society or his victim for his criminal activities.

According to Sammons a fine is a sum of money an offender is required to pay to the authorities. The amount is generally set by the court but there are usually statutory limits on the size of the fine. According to Caldwell (1965) fines have three principal advantages over other punishments. First, the system is economical: it costs little to administer and generates a source of revenue that can be used to offset the cost of running the judicial system (amongst other things). Second, fines do not stigmatise the offender or their family and they may avoid some of the undesirable effects of imprisonment, such as loss of employment. Third, a fine may be imposed where other punishments are inappropriate, such as when a business, rather than an individual, has broken the law. Walker and Farrington (1981) found that fines led to lower rates of reoffending than probation or a suspended prison sentence and Feldman (1993) suggests that they lead to lower reconvictions rats for first offenders than the alternatives. However, Putwain and Sammons (2002) indentify two potential problems with fines as a judicial sanction:

- They may be paid by the offender's friends or family, thereby lessening their impact on the offender themselves.

- They may be seen as an 'operating cost' of offending. That is, paying fines may be seen as preferable to altering offending behaviour. For example, a company that pollutes the environment may calculate that it is cheaper to pay the fines for pollution than to clean up its act.

In both cases, the imposition of a fine may have minimal impact on future offending. Sammons states there are significant difficulties in evaluating the relative effectiveness of different types of noncustodial sentence. First, many variables influence offending, of which the type of punishment given is only one. Secondly, it is rarely the case that offenders are randomly assigned to different types of sentence. Rather, the sentence given reflects the nature of the offences, the court's assessment of the risk posed by the offender and a variety of judicial priorities including punishment and incapacitation besides the desire to reform the offender. The apparent effectiveness of different sanctions may reflect these decisions, rather than the effect of the punishment itself. That said, large scale reviews have generally found that non-custodial sentences are at least as effective as imprisonment. Gendreau and Goggin (1996) reviewed 105 studies comparing imprisonment and community-based sentences and concluded that there were no differences in recidivism. This being the case, states Sammons, community punishments emerge as superior on economic grounds, at least for non-violent offenders, since they cost substantially less than imprisonment.

Government statistics also support the effectiveness of non-custodial sentences. Recent data put the one year recidivism rate of those sentenced to community-based punishments at 36 per cent compared to 59 per cent for those sentenced to short prison terms (Ministry of Justice, 2008). However, it should also be stressed that the effectiveness of non-custodial sentences depends heavily on the programme content. Where there are concerted efforts to address the factors that underpin offending, recidivism rates are lower. Attention should therefore be given to interventions specifically designed to address these factors, including psychological 'treatments' for crime.[16]

The Sentencing Council's (2006) interim report is a comprehensive report with numerous practical suggestions for law and policy reform. The Report deals both with court imposed fines and penalties incurred following the issue of a penalty notice. The Report conducted an extensive literature review along with approximately 50 consultations, an analysis of 56 submissions, and a survey of magistrates. In the report the Council accepts that the court imposition of fines is an appropriate sentencing option for the majority of minor offences and does not suggest that their use be curtailed, however it did identify a number of problems in relation to the practices and procedures concerning their imposition and enforcement. These included:

- The limited availability of alternative sentencing sanctions which would be more meaningful for poor, vulnerable and disadvantaged offenders, Aboriginal offenders and young offenders, for whom fines can have disproportionately harsh consequences or lead to secondary offending, particularly, acquisitive crime directed towards obtaining the means to meet the fine, as well as deeper contact with the criminal justice system;
- The practical difficulties for magistrates in taking into account the means and capacity of the offender to pay a fine and the impact of that fine upon the offender's dependants, when quantifying the fine, having regard to the paucity of information available and the fact that a significant number of offenders are fined in their absence;
- The inability of magistrates to grant an extension to pay a fine beyond 28 days or to approve a scheme for payment by installments;
- The requirement for the provision of complex financial information where time to pay is sought from court registrars;

[16] Aidan Sammons, Non-custodial sentencing: alternatives to imprisonment, Criminological psychology, psychlotron.org.uk, 2012

- The absence of any consistent system for the provision of meaningful advice or assistance to fine recipients (particularly disadvantaged offenders from the Aboriginal community, the homeless, and those with intellectual and mental disabilities), in relation to their obligations and entitlements concerning the payment of the fine, and the imposition of court costs and victim compensation levies;
- The lack of the capacity in the courts to accept periodic payments or direct debits;
- The substantial default and low recovery rate of fines, attributable in part to their inappropriate imposition on certain classes of offenders, and in part to poor collection of current contact information, with consequent disproportionate enforcement expenses;
- The problems associated with the enforcement process: The State Debt Recovery Office; and
- The mandatory disqualification provisions and the automatic imposition of Habitual Traffic Offender Declarations which have led to 'crushing' periods of disqualification, particularly for young people without qualifications for whom the lack of a licence significantly impacts on their chances of employment, and arguably contains little incentive to refrain from driving.

The Council also noted the absence of reliable and consistent statistics on the part of the Local Court, SDRO and other agencies as to:

> the imposition of fines and penalties;
> the respective default rate;
> offender profiles;
> the reasons for default;
> the impact of the enforcement procedures; and
> their deterrent value,

such that it is difficult to evaluate the net widening effect of any increase in the range of offences for which fines and penalties are available, or the extent to which they may be unfairly or inappropriately imposed. The Report also identifies a number of potential reform options.

Question 7.5

1. **Is the recording of no other penalty under s10A of the Crimes (Sentencing Procedure) Act 1999 (NSW) working well as a sentencing option and should it be retained?**
2. **What changes, if any, should be made to the provisions governing the recording of no other penalty or to its operational arrangements?**

Section 10A, according to the explanatory note to the Bill, has been added for circumstances where a court considers a s10 bond is inappropriate because an offence is not trivial and it is inconvenient to impose any further penalty. In answer to the question whether s10A is working well as a sentencing option requires further rigorous case analysis from key stakeholders in forming a proper response.

Laura Wells (2006) provided the following rationale for the amendment, the circumstances in which the penalty could be used and its relationship with automatic statutory periods of licence disqualification: "*The use of the new option may be appropriate where the offence is not trivial enough to be dismissed under s10 of the Crimes (Sentencing Procedure) Act or where it is inconvenient to impose any further penalty. An example would be when an offender has been sentenced to imprisonment for one or more principal offences, and other minor charges carrying a maximum penalty of a fine are dealt with at the same time. The commonly-imposed penalty of 'imprisonment until the rising of the court' has not been abolished, and remains available in appropriate cases. However, as the penalty is a term of imprisonment (albeit a short one) it must only be imposed in those matters where, having considered all available alternatives, no penalty other than imprisonment is appropriate [Section 5(1) of the Crimes (Sentencing Procedure) Act.]. It should be noted that making an order under the new s10A does not operate to defeat automatic statutory periods of licence disqualification that are imposed upon conviction for certain driving offences.*" [17]

[17] Laura Wells, Judicial Officers' Bulletin entitled "Crimes and Courts Legislation Amendment Act 2006", December 2006.

Question 7.6

1. **Are non-conviction orders under s10 of the Crimes (Sentencing Procedure) Act 1999 (NSW) working well as a sentencing option and should they be retained?**
2. **What changes, if any, should be made to the provisions governing s10 non-conviction orders or to their operational arrangements?**

As mentioned already, the discretion to dismiss a charge or to impose a bond without proceeding to conviction (under section 10 of the Crimes (Sentencing Procedure) Act) is an essential part of the criminal justice system. It is vital that judicial officers continue to have such a discretion in order to ensure a just result in each individual case. In 2007 the three most common offences dealt with by a s10 dismissal were drive unregistered vehicle (18.6%), offensive conduct (17.6%) and negligent driving (16.4%). A study by the Judicial Commission of NSW in 2005 found that since the High Range PCA Guideline Judgment, and the empirical research and educational programs leading up to it, there had been a decline in the use by magistrates of s10 dismissals for high range PCA offences.

As quoted in Judicial Commission of NSW, *Sentencers should be particularly cautious in the use of s10 orders since excessive or inappropriate use can undermine confidence in the administration of justice. Section 10 provides a useful safety valve for ensuring that justice can be served in circumstances where, despite a breach of the law, there are such extenuating circumstances or the matter is so trivial that punishment does not seem appropriate*. The scope for the application of s10 decreases where the offence is objectively serious and general deterrence and denunciation are important factors in sentencing for the offence. It has been held that the dismissal of charges against first offenders in certain circumstances is appropriate. This power reflects the willingness of the legislature and the community to provide first offenders, in certain circumstances, a second chance to maintain a reputation of good character.

The LRC notes that a court may not always be aware of s 10 orders previously imposed on a particular offender. As with any other penalty type, courts are made aware of any previous s 10 orders imposed in relation to an offender by the relevant prosecuting authority at the time of the hearing of the fresh offence. Where the prosecuting authority does not inform the court of the offender's criminal antecedents, the court will not have access to that information and will therefore be unable to take that matter into account. It is therefore important for prosecuting agencies other than NSW Police, to ensure that they have processes in place to report court penalties imposed to NSW Police, so that this information is recorded on the person's criminal history; and so that a copy of the offender's criminal antecedents can be obtained and tendered by the relevant prosecutor in relation to fresh matters. This will ensure that all the relevant information can be made available to the court.

Question 7.7

1. **Should it be possible to impose other sentencing options in conjunction with a non-conviction order? If so, which ones?**

Question 7.8

1. **Should any other non-custodial sentencing options be adopted?**

Other issues that the Law Reform Commission should consider as part of its review is the ability of Courts to combine sentences and increasing the availability of flexible sentencing options eg a community service order and a bond or a section 10 and a fine. Further research is required from relevant stakeholders to further explore how courts can be provided with adequate options and discretions. It is conceivable to create and provide further community-based penalties which, like probation and community service orders, are penalty options in their own right rather than framed as 'alternatives to imprisonment'. Penalty options could focus more on compensation to victims, targeted reparation, community service or attending rehabilitative programs.

The present legislation is somewhat limiting in that an offender cannot receive both a community service order and a bond for the same offence. There are many cases where probation serves the need for rehabilitation but limits reparation, or where community service work serves the need for reparation but limits rehabilitation. To this end the Victorian model of sentencing provides greater scope and flexibility and could be further investigated. Other possibilities include the inclusion of various penalty components

as conditions of bonds or probation. This practice occurs at the present time with the imposition of fines, compensation and bonds but could be administered in a more holistic and integrated manner, with each being a conditions of a single order. Similarly, attendance at specific programs or treatment providers could similarly be conditions.[18]

As Deputy Chief Magistrate of Victoria, Jelena Popovic (2006) puts it *low level offenders whose offences do not warrant a term of imprisonment and who are homeless, poor or mentally impaired regularly provide sentencing dilemmas for magistrates. Some offenders are not able to pay a fine or have lives which are too chaotic to enable them to comply with community corrections orders and suspended sentences, or to undertake to be of good behavior. As a sentencer, I find it more difficult to find an appropriate for sentence persons in this category than determining how to sentence persons who are guilty of serious offending.* The role of the sentencer according to Popovic (2006) at summary level has undergone a metamorphosis over the last 10 to 15 years. It is a more demanding role with increasingly complex matters coming before the courts, and persons with increasingly complex personal circumstances coming before the courts. As mentioned already the Victorian model is worth considering - the Magistrates' Court in Victoria has developed several approaches to provide appropriate outcomes for the persons who appear before it and to assist magistrates to make the best possible decisions. They are categorised as follows:

1. Court based programs
2. Specialised Lists
3. Diversion
4. Specialist Courts
5. Protocols for individual offences

Question 7.9

1. **Should a fine held in trust be introduced as a sentencing option? If so, how should it be implemented?**

The court imposition of fines is an appropriate sentencing option for the majority of minor offences. The question whether a fine held in trust be introduced as a sentencing option requires further research analysis from key stakeholders as there seems to be more arguments against implementing the option particularly in regards to the cohort of low level offenders whose offences do not warrant a term of imprisonment and who are homeless, poor or mentally impaired.

Question 7.10

1. **Should work and development orders be adopted as a sentencing option?**
2. **Alternatively, should the community service order scheme be adapted to incorporate the aspects of the work and development order scheme that assist members of vulnerable groups to address their offending behavior?**

Since its inception, there has been strong stakeholder support for the adoption of work and development orders as a sentencing option. As mentioned already, work and development orders (WDOs) allow people who cannot pay a financial penalty to deal with their fine or penalty notice debt through work, education or treatment. They are available to people who have cognitive or mental health impairments, who are homeless, or who are experiencing acute economic hardship. The WDO scheme has been positively evaluated by the AGJ and provides benefits such as reduced reoffending, reduced costs to government, reduced stress and hopelessness among participants, as well as the positive engagement of participants with constructive activities. The LRC in its Penalty Notices Report, strongly supports the roll-out of WDOs, especially their extension into regional areas, and recommends that the regional network of WDO support teams now being established be enabled to provide advice, not only about WDOs, but also about other mitigation measures.

[18] Probation and Parole Officers' Association of NSW, Preliminary Submission on Sentencing, January 2012.

Further, the LRC recommends a relaxation of the test for admission to the WDO scheme on the basis of acute economic hardship to allow people to apply where they have the support of a practitioner or organisation for a WDO and are in receipt of eligible Centrelink benefits. The LRC also recommend the extension of WDOs so that they are available to prisoners who meet the eligibility criteria. This will allow prisoners to engage in constructive activities while in custody that will have the added benefit of reducing their debt and assisting their reintegration into the community on release. It further recommends the inclusion of Centrelink Mutual Obligation Activities within the scheme.

> *One mental health nurse interviewed as part of an evaluation of the 2008 amendments to the Fines Act by the Department of Attorney General and Justice (AGJ evaluation), said: Engaging around half of our clients in treatment is really hard…When I say 'I could help you get your licence back', all of a sudden we've got engagement…the WDO is the most concrete and effective way of getting compliance with treatment we've seen.*

As mentioned already the LRC's report on Penalty Notices makes a quite comprehensive list of recommendations in support of a further expansion of WDOs. In recognition of the particular problems caused by driver licence sanctions in rural, regional and remote areas, the LRC recommends that the regional network of WDO support teams be provided with the skills and resources not only to promote WDOs, but also to provide information, educational material and referrals in relation to time-to-pay and write-off of penalties. Regarding CSO's the SDRO informed the Commission that since 2003, a total of 1027 CSOs have been issued. Most were voluntary – in other words the client sought a CSO as the most appropriate way to deal with their penalty notice debt. However, since 2010 when WDOs were introduced, no CSOs have been issued because WDOs have proved to be more effective.

Currently, CSOs are only available when civil enforcement action has not been, or is not likely to be, successful in satisfying the fine. Some stakeholders have called for the wider availability of CSOs, and at an earlier stage. The NSW Department of Community Services (Community Services) argued that young people should be able to access CSOs earlier in the fine enforcement process. The HPLS argued that allowing people to enter community service arrangements at an earlier stage would alleviate the crippling impact of fines on low-income earners. However, the report was written before WDOs became a permanent feature of the Fines Act.

WDOs are likely to be more appealing than CSOs for those who qualify since the rates at which penalty notice debt is worked off are more generous. In its submission, the HPLS acknowledged that, to some extent, WDOs have replaced CSOs but continued to call for CSOs to be made available more widely on the basis that only certain groups of people are eligible for WDOs and that even if the recipient is eligible, the making of a WDO is dependent on there being available an eligible organisation to support the application or an appropriate course of treatment.[19]

[19] NSW LRC, Penalty Notices, Report 132, February 2012, www.lawlink.nsw.gov.au/lrc

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