REVIEW OF *CRIMES (SENTENCING PROCEDURE) ACT* 1999 (NSW)

Response to Sentencing Question Papers 5- 7

Submission by Legal Aid NSW

to the

New South Wales Law Reform Commission

August 2012

About Legal Aid NSW

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

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW criminal law practice provides legal assistance and representation in criminal courts at each jurisdictional level throughout the State, including proceedings in Local Courts and Children's Courts, committals, indictable sentences and trials, and appeals as well as the Drug Court. Our specialist criminal law services include the Children's Legal Service, Prisoners' Legal Service and the Drug Court.

Legal Aid NSW welcomes the opportunity to provide these comments. Should you require further information, please contact Samantha Lee, Senior Policy Officer, Legal & Policy Branch at [redacted] or by telephone on [redacted] or Annmarie Lumsden, Executive Director, Strategic Policy Planning and Management Reporting Division at [redacted] or by telephone on [redacted]

The ratio of the non-parole period and balance of term

Question 5.1

1. Should the 'special circumstances' test under s 44 of the Crimes *(Sentencing Procedure) Act 1999* (NSW) be abolished or amended in any way? If so, how?

Legal Aid NSW acknowledges that courts frequently find special circumstances. However, this may be reflective of the population coming before the courts which is significantly more disadvantaged than the general population and therefore, in most cases, attracts the rehabilitative purpose of an extended period of supervision on parole.[1]

Legal Aid NSW supports abolishing the 'special circumstances' test because it is an 'unnecessary and arbitrary restraint on judicial discretion.

2. Should a single presumptive ratio be retained under s 44 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?

Legal Aid NSW is of the view a single presumptive ratio should be retained. The preferred presumptive ratio should be a non-parole period of 50 per cent of the head sentence. This ratio would bring New South Wales in line with other states such as Queensland, Western Australia and Tasmania.

The court should be required to provide reasons for departing from the presumptive ratio.

Top-down and bottom-up approaches

Question 5.2

1. Should the order of sentencing under s.44 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) return to a 'top down' approach?

A top-down approach is preferred because it would bring greater transparency and clarity to the sentencing process. This approach makes clear at the outset the sentence the court has determined is appropriate for the offender.

[1] Baldry, Eileen,*'The Booming Industry: Australian Prisons'*, School of Social Sciences and International Studies, UNSW. October 2008.

2. Could a 'top down' approach work in the context of standard minimum non-parole periods?

As discussed in the Question Paper, the recent case of *Muldrock v The Queen*[2] has lessened the potential conceptual difficulty involved in changing to a 'top down' approach in the context of standard minimum non-parole periods.

Legal Aid NSW notes that in 2011 the Queensland Sentencing Council recommended implementing the 'top down' approach for standard minimum non-parole periods.[3]

Short sentences of imprisonment

Question 5.3

1. Should sentences of six months or less in duration be abolished? Why?

Legal Aid NSW is of the view sentences of six months or less in duration should not be abolished.

A NSW Bureau of Crime Statistics and Research (BOCSAR) report found that abolishing short term sentences would only make a modest impact on the overall prison population, because most prisoners are serving longer term sentences.[4]

However, consistent with the NSW Sentencing Council Report and the submission of the Corrective Services NSW Women's Advisory Council referred to at paragraphs 5.78 and 5.79 of Question Paper 5, the BOCSAR report suggested that abolishing short sentences could have a significant impact on the Aboriginal prison population: Aboriginal people make up just two per cent of the NSW population but constitute about 20 per cent of the prison population serving sentences of six months or less.

However, Legal Aid NSW is persuaded by the arguments against abolishing short sentences set out in Question Paper 5, specifically the concerns about sentence creep and that removal of this sentencing option would fetter judicial discretion.

In particular, if short sentences were to be abolished it could not be assumed those who would have previously been given a short sentence would be given an alternative to full time custody. If a short sentence is no longer an option the court may have no choice but to impose a longer sentence. This would impact on particular groups of offenders who are more likely to receive short sentences namely, Aboriginal people and women.

The examples below illustrate how the option of a short term sentence may be appropriate:

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[2] [2011] HCA 39

[3] Sentencing Advisory Council, Queensland, *Final Report, Minimum Standard Non-parole periods*, Chapter 4, September 2011

[4] NSW Bureau of Crime Statistics, 27 October 2002, Media Release, *The impact of abolishing short term prison sentences*

- A person is charged with a number of offences and is bail refused. After a period of two months in custody, the defendant decides to plead guilty. The court determines that, given the length of time the offender has spent in custody, a short sentence of less than six months, backdated to the date the offender was refused bail, is the appropriate sentence in the circumstances of the case.

- A person is convicted of an offence warrants a sentence of less than six months. The offender's criminal record or personal background is such that the offender would be considered unsuitable for alternatives to full-time imprisonment. Alternatively, the offender lives in rural and remote area where alternatives to full-time imprisonment. In the absence of the option of a sentence of six months or less, a longer term of imprisonment will be imposed.

- A person is due to be released from custody when an old offence is uncovered. The offence is one which warrants a sentence of imprisonment, but not one which should extend time in custody for more than 6 months.

2. Should sentences of 3 months or less in duration be abolished? Why?

Legal Aid NSW is of the view that sentences of 3 months or less in duration should be not be abolished for the reasons given in repose to question 5.3.1.

3. How should any such abolition be implemented and should any exception be permitted?

Not applicable.

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?

Legal Aid NSW is of the view that a non-parole period should be allowed for sentences of six months or less.

In addition, a court should have the discretion to dispense with supervision as a parole condition for sentences of six months or less. Under section 51AA of the *Crimes (Sentencing Procedure) Act* (NSW), supervision is deemed to be a condition of all parole orders unless expressly stated otherwise. This supervision condition allows the Parole Authority to revoke a parole order prior to release and, pursuant to this condition, the Parole Authority often do so if the offender is unable to nominate a place of residence in NSW to the NSW Parole Board. This can occur if the offender is homeless, or intends to reside interstate on release.

Legal Aid NSW suggests that section 51AA of the *Crimes (Sentencing Procedure) Act* (NSW), which deems supervision to be a condition of parole orders unless expressly stated, should be amended to reverse the presumption and provide that parole is unsupervised unless the expressly ordered by the court, at least for a sentence of six months or less.

This would not affect the general condition to be of good behaviour on parole.

Aggregate head sentences and non-parole periods

Question 5.4

1. How is the aggregate sentencing model under s 53A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) working in practice and should it be amended in any way?

It is the experience of Legal Aid NSW that this section 53A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) is rarely used. This may be due to the requirement for the court to indicate the sentence that would have been imposed for each offence. However, given that the section was only introduced in 2011, Legal Aid NSW acknowledges that not enough time has elapsed to properly assess how the section is working in practice.

2. Should a court be required to state the individual sentences that would have been imposed if an aggregate sentence has not been imposed by the court?

Legal Aid NSW reserves comment on the basis that not enough time has elapsed to properly assess how the section is working in practice.

Accumulation of sentences and special circumstances

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?

If the special circumstances test remains, Legal Aid NSW is of the view that the court should be required to state reasons if the effective sentence does not reflect the special circumstances finding on the individual sentences. This allows for greater transparency and clarity of the court's intention in the sentencing process.

2. Are there any other options to deal with these cases?

Legal Aid NSW suggests no other option.

Directing release on parole

Question 5.6

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

Legal Aid NSW confirms its view that the limit of a 3 year head sentence on the court's power to order the release of an offender on parole should be increased to 5 years for the reasons outlined at paragraph 5.105 of Question Paper 5.

The automatic release of offenders to court ordered parole is subject to an appropriate post release plan and arrangements being made by the Parole Authority. The Parole Authority may revoke a parole order prior to an offender's release and will often do so if there are issues relating to an offenders housing, or if the offender intends to reside interstate. This is the case even if a court has decided that it is inappropriate for the person to spend more time in custody.

As discussed in repose to question 5.3.1, Legal Aid NSW is of the view that section 51AA of the *Crimes (Sentencing Procedure) Act* (NSW), which deems supervision to be a condition of parole orders unless expressly stated, should be amended to reverse the presumption and provide that parole is unsupervised unless the expressly ordered by the court.

Question 5.7

1. Should back end home detention be introduced in NSW?

Legal Aid NSW is of the view that back end home detention should be further explored as a sentencing option in NSW.

As well as providing a further sentencing option, back end home detention would appear useful in assisting prisoners reintegrate into the community.

Legal Aid NSW notes that the range of sentencing options is often not available to offenders who live in rural and remote areas. If back end home detention is introduced, resource allocation should ensure that it is available to all offenders wherever they are living in NSW.

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

Legal Aid NSW is of the view that back-end home detention could not co-exist with existing external Temporary Release Programs (TRPs) which permit unsupervised study leave, work release, day leave and weekend leave, subject to strict rules.

The eligibility criteria for TRPs could apply to back-end home detention. The expiry of the non-parole period must be about six months away and an inmate must be a C3 security classification at a minimum. The offence is taken into account but does not make an inmate ineligible. For 'serious offenders', registered victims must be notified that a TRP is being considered and their objection taken into account. A TRP can include offender exclusion zones.

Local Court's sentencing powers

Question 5.8

1. Should the sentencing jurisdictional limits in the Local Court be increased and, if so, by how much?

Legal Aid NSW does not support an increase in the sentencing jurisdictional limit of the Local Court.

Legal Aid NSW is of the view that the disadvantages associated with increasing the jurisdictional limit far outweigh the potential benefits.

Local Court sentence matters are generally dealt with quickly and efficiently, without the need to call witnesses and make detailed legal arguments. However, if a defendant was facing a maximum penalty of up to five years the preparation and complexity of the sentencing exercise would increase. The impact would be a significant increase in the workload of Local Court solicitors and Magistrates.

Defence lawyers would conduct sentence proceedings in the Local Court more formally to ensure a comprehensive presentation of matters in mitigation and protection of appeal rights. There would no doubt be more adjournments to allow defence counsel the time necessary for review of the prosecution brief and preparation of sentence, inevitably leading to an increase in length of proceedings resolved by way of plea of guilty. The need to call witnesses and make detailed legal arguments would significantly increase hearing times for sentence matters.

It is not common practice to brief counsel in the Local Court. If there was an increase in the sentencing jurisdictional limit of the Local Court, Legal Aid NSW would need to consider briefing counsel in the more complex matters, with the associated increase in expenditure. Ensuring the appropriate level of forensic expertise in rural and remote areas of New South Wales would be problematic.

To enable appropriate preparation and presentation of more serious sentence matters in the Local Court a brief of evidence would need to be served, as is the case for such matters currently dealt with in the District Court.

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?

Legal Aid NSW is of the view that a magistrate should not 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.

Under the current legislation, Legal Aid NSW committals solicitors negotiate hundreds of pleas per annum at the committal stage of proceedings. Those negotiations are generally conducted with solicitors from the Office of the DPP and occasionally with Crown Prosecutors. In performing their responsibilities, representatives of the DPP are bound by prosecution guidelines which include amongst other things an obligation to consider the impact of a protracted trial on witnesses, the costs associated with running the matter in the higher courts and the likely sentence which will be imposed in whatever jurisdiction the matter is to be finalised as well as many other matters which concern the public interest.

The Prosecution Guidelines require that a much broader range of matters be considered than simply whether the Local Court has enough sentencing discretion to impose a penalty commensurate with the seriousness of the offence. Legal Aid NSW is of the view that the DPP is better placed to assess the public interest as a whole, than are Local Court Magistrates.

Despite this it has been the experience of our committals solicitors that the DPP will rarely agree to accept pleas that involve matters remaining in the Local Court if it cannot be said that the Local Court has sufficient sentencing discretion to enable it to impose an appropriate penalty.

It is noted that in his Preliminary Submissions, His Honour Judge Henson, Chief Magistrate, referred to a number of cases where the Court's jurisdictional limits left the Court unable to impose a penalty commensurate with objective seriousness. Legal Aid NSW would suggest that these are likely to be exceptional cases rather than cases that indicate that the Prosecution Guidelines are being applied in such a way that courts are routinely faced with the conundrum to which His Honour refers. It could also be the case that those matters were also matters where other factors dictated that it was in the public interest for the matters to proceed summarily. For example if a victim were reluctant to give evidence, the public interest would often dictate that a negotiated summary plea ought to be preferred to a jury trial.

From time to time pleas are negotiated on the basis that strictly indictable charges be terminated upon entry of pleas to Table 1 or Table 2 offences. Sometimes those pleas are negotiated on the basis that the prosecution will elect for the matter to proceed to the District Court and sometimes on the basis that no election will be made. Where no election is to be made it is also common for the basis on which the plea is accepted to be that there is to be no dispute as to facts which would otherwise have been in issue.

The experience of our solicitors has generally been that accused are often reluctant to enter pleas to lesser charges (and accept certain facts as agreed) except if summary jurisdiction can be guaranteed. The proposal to take the ultimate decision from the prosecution could introduce an element of uncertainty which may lead to a smaller number of negotiated pleas.

In entering a plea after summary jurisdiction is offered, an Accused person is also giving up the right to a jury trial. The current system offers incentives for this in the possibility of a lower maximum penalty. The uncertainty which would be created by giving Magistrates the power sought would undermine these incentives.

It is also unclear how the proposal would apply to matters tried summarily following pleas of not guilty. Under the scheme which existed when sections 476 and 496 of the Crimes Act applied, a problem sometimes occurred where summary jurisdiction was offered by a Magistrate, a hearing was then conducted during which the accused gave evidence, and following a finding of guilt the offer was withdrawn. The matter then proceeded as a committal for trial to the District Court where the evidence given by the accused could be used against the accused. This on occasions led to Accused people declining summary jurisdiction in order to reserve their defence.

This problem could perhaps be overcome by simply giving the Local Court power to remit the matter for sentence. In the event that this is the proposal, Legal Aid NSW suggests that an Accused person should have a right of appeal against the finding of guilt to the District Court and that such appeal ought to be determined before the matter proceeds to sentence. Obviously sentence appeals would need to proceed to the Court of Criminal Appeal.

Compulsory drug treatment detention

Question 6.1

1. Is the compulsory drug treatment order sentence well targeted?

Legal Aid NSW is of the view that the compulsory drug treatment order sentence is generally well targeted, subject to two exceptions.

First, this option should be made available to female offenders.

Second, the experience of Legal Aid NSW Drug Court lawyers is that a number of persons are being excluded by virtue of the fact that they do not meet the requirement under section 5A(1)(c) of the *Drug Court Act 1998* (NSW) that the person has been convicted of at least 2 prior offences in the previous five years that resulted in a sentence of imprisonment, community service order or bond. Legal Aid NSW is of the view that section 5A(1)(c) should be amended to allow one offence in the previous five years.

2. Are there any improvement that could be made to the operation of compulsory drug treatment orders?

Legal Aid NSW is concerned that a number of participants are not being granted parole when their non-parole period expires. Although participants have completed the Compulsory Drug Treatment Centre (CDTCC) program, parole is revoked under section 18G of the *Drug Court Act 1998* (NSW) due to no fault issues, such as the offender not having suitable accommodation. The Drug Court should have the power to order that the offender be released on parole when the offender has completed their sentence at the CDTCC.

In addition, there should be greater flexibility in the way in which Parole Authority deals with breaches committed by CDTCC participants. No consideration is given to the length of time and effort the participant has made in attempting to complete the program. A number of participants fail the program due to technicalities.

Home detention

Question 6.2

1. Is home detention operating as an effective alternative to imprisonment?

The figures outlined at paragraph 6.21 and 6.31 in Question Paper 6 suggest home detention is not operating as effectively as it could because of the low number of offenders ordered to serve their sentence by way of home detention.

A 2010 report of the Auditor-General NSW found home detention to be a successful sentencing option:

The outcomes for offenders who complete their home detention sentence look good. In 2008-09 about 80 per cent of home detention sentences were completed. About 64 per cent of offenders who completed their sentence between 2005 and 2007 had not reoffended.[5]

2. Are there cases where it could be used, but is not? If so what are the barriers?

Legal Aid NSW is of the view that there are cases where home detention could be, but is not, used.

Barriers to the use of home detention include:

- A home dentition order is limited to a maximum duration of 18 months
- Home detention is not available in many locations across NSW, and as a consequence, many offenders who might otherwise have been assessed as suitable are sentenced to full time imprisonment
- Suitability assessment practices vary between Corrective Services NSW and Community Compliance Groups (CCG)[6]
- Offenders convicted of AOABH and stalking are excluded from this sentencing option.

3. Are there any improvements that could be made to the operation of home detention?

Legal Aid NSW suggests the following improvements:

- The maximum duration of a home detention should be increased from 18 months to at least 2 years
- Home detention should be made available throughout NSW. No offender should be excluded from this sentencing option because of where he or she resides
- As recommended by the NSW Auditor-General's,[7] the suitability assessment process for home detention should be reviewed
- Offenders convicted of AOABH, stalking and other more serious assault offences should not be excluded from this sentencing option unless they reside with the victim.

Intensive correction orders

[5] Auditor-General NSW, Performance Audit: Home Detention: Corrective Services, Report (2010) 25, 4.
[6] ibid
[7] Ibid, 20.

Question 6.3

1. Are intensive correction orders operating as an effective alternative to imprisonment?

Legal Aid NSW supports the continuation of ICOs but has some concerns with the operation of the orders and availability.

In the experience of Legal Aid NSW a significant number of mandatory core conditions of ICOs are onerous and more often than not set participants up for failure. Many Legal Aid NSW clients are illiterate and live quite unstructured lives which makes adhering to these onerous conditions even more difficult.

The Legal Aid NSW Prisoners Legal Service (PLS) has observed that the supervision imposed on clients with ICOs is often very strict and intrusive. Where a client breaches a condition of an ICO, the Community Compliance and Monitoring Group (CCMG) will submit a breach report to the Parole Authority and request revocation. Such reports are often for relatively minor breaches.

Legal Aid NSW is concerned that the onerous conditions placed on people subject to ICOs coupled with the strict approach to supervision and breaches, has the potential to undermine the overall ICO objective.

In addition, ICOs are not available throughout NSW.

2. Are there cases where they could be used, but are not? If so what are the barriers?

Barriers to the use of ICOs include:

- ICOs are only available as a sentencing option if the sentence is likely to be for no more than two years. Periodic detention was available for sentences of up to three years

- Following referral of the offender for a suitability assessment for an ICO, the reports prepared by the CCMG and are produced to the court without the offender or his or her solicitor having an opportunity to review the recommendation. Where the offender is assessed as 'unsuitable', there is no guarantee of an adjournment to allow the offender and his or her solicitor review of reasons and make alternative arrangements that may make him or her 'suitable' for an ICO. Legal Aid NSW proposes that there be an opportunity for review consistent with the procedure for assessments relating to home detention and community service orders

- ICOs are not available to offenders with little risk of reoffending and no need for rehabilitation (*R v Boughen; R v Cameron [2012] NSW CCA 17 (27 February 2012)*

- Often those who would most benefit from being placed on an ICO are ineligible because of a mental illness or a drug addiction.

3. Are there any improvements that could be made to the operation of intensive correction orders?

Legal Aid NSW has a number of suggestions for improvements that could be made to the operation of ICOs.

Breach and revocation of ICOs

The ultimate sanction for breach of an ICO is revocation. It is the experience of Legal Aid NSW that revocation occurs frequently.

Where the Parole Authority conducts an inquiry into the breach of an ICO the offender should have the opportunity to make a submission. However, it is the experience of the PLS that:

- revocation is conducted in the absence of and without notice to the offender (s.163(5)).

- following revocation, a warrant is issued under s.181, "committing the offender to a correctional centre to serve the remainder of the sentence to which the order relates by way of full-time detention".

- the hearing to reconsider the revocation is not held until after execution of the warrant. This is usually three to four weeks after the warrant is executed and the offender is placed in gaol: see s.173(1A)(b) and (2)(b).

Legal Aid NSW proposes the offender should have notice of possible revocation of the order and be given a right to reply to this notice.

The PLS has observed the most common reason for revocation is failure to adequately comply with supervision conditions and/or failure to complete the 32 hours community service work each month. In some cases there have been reasonable explanations for not complying with a condition, for example, difficulty with public transport or caring for a relative who is unwell.

If the ICO option is to be truly rehabilitative, then it must be more flexible in its approach to breaches of conditions and involve the person subject to the order in the revocation process.

ICOs breaches should be dealt with by the court rather than the Parole Authority, especially given the consequence of a revocation is full-time custody or home detention.

Community service component

The number of community service hours and the timeframe in which they are carried out should a flexible component of the order. In addition, ICO program participation should count towards hours of community service.

ICO and non-parole period

A non-parole period cannot be set in relation to an ICO and the Parole Authority has no power to impose a non-parole period following revocation.

Given that an ICO can be for two years, if the ICO is revoked and the offender is not assessed as suitable for reinstatement or home detention, the balance of sentence will be served as a full time imprisonment. As a result, the offender will potentially serve a lengthy gaol period and be released into the community without the support and supervision of parole.

Legal Aid NSW proposes that parole periods should apply to ICOs, and the court should fix a non-parole period at the time of revocation taking into account the offender's compliance with obligations under the ICO.

Suspended sentences

Question 6.4

1. Are suspended sentences operating as an effective alternative to imprisonment?

Legal Aid NSW is of the view that suspended sentences do operate as an effective alternative to imprisonment. However, Legal Aid NSW acknowledges the interesting and challenging insights provided in the Sentencing Council's report, *Suspended Sentences: Background Report*, December 2011.

The Report notes there has been a significant increase in the use of suspended sentences by both the Local and Higher Courts for a wide range of offences, and that the majority are completed successfully. A high number of those on a suspended sentence do not commit an offence while subject to the order, and those on suspended sentences are less likely to re-offend compared to those sentenced to full-time imprisonment.

However, the also Report notes that suspended sentences may have contributed to 'net-widening'. The Report found that from January – December 2010, of the 578 appeals against the severity of sentence in the District Court by offenders who received at least one suspended sentences, 83.4 per cent (482) were successful.

The evidence in the Report suggests suspended sentences are being used in some cases as a substitute for non-custodial options, in particular, community service orders and good behaviour bonds.

2. Are there cases where suspended sentences could be used, but are not? If so what are the barriers?

No.

3. Are there any improvements that could be made to the operation of suspended sentences?

Improvements could be made to the way courts approach bond breaches. As noted in the Sentencing Council's report, there is a lack of consistency amongst courts as to what constitutes a breach that is 'trivial in nature' and what constitutes 'good reasons'. Please refer to the response to question 6.4.4.c below.

4. Should greater flexibility be introduced in relation to:

a. the length of the bond associated with the suspended sentence?

As representatives of the most disadvantaged people in NSW, Legal Aid NSW is concerned that its economically and socially disadvantaged clients would be susceptible to breaching a lengthy bond and, consequently, is not in favour of a bond that might exceed the term of the sentence.

b. partial suspension of the sentence?

Legal Aid NSW supports the partial suspension of the sentence

c. options available to a court if the bond is breached?

There should be greater flexibility available to the courts if a bond is breached. Legal Aid NSW agrees with the proposals of the NSW Law Society of NSW and the Shopfront Youth Legal Service (see point 4.67: Sentencing Council's *Background Report: Suspended Sentences*, December 2011) summarised at paragraph 6.68 of Question Paper 6

> *broadening the definition of '"good reasons for excusing the breach", allowing the courts a greater range of responses to the breach, and allowing the court to reduce the term of imprisonment to be served following revocation by the amount of time during which the offender complied with the bond or a proportion of this time, or to extend the period of the good behaviour bond or vary its terms.*

Rising of the Court

Question 6.5

1. Should the "rising of the court" continue to be available as a sentencing option?

Legal Aid NSW is of the view that the "rising of the court" continue to be available as a sentencing option.

Although rarely used this option could have utility in dealing with secondary offences, in particular where the court has to deal with multiple counts for a single pattern of offending.[8]

2. If so, should the penalty be given a statutory base?

Introducing a statutory base may increase the awareness of this sentencing option.

3. Should the "rising of the court" retain its link to imprisonment?

Yes.

[8] Judicial Commission, Sentencing Trends: An Analysis of NSW Sentencing Statistics, No.11 1996.

Maximum terms of imprisonment that may be served by way of custodial alternatives

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?

In a recent keynote address, the Chief Justice of New South Wales, the Honourable Bathurst T.J, highlighted the illogical and contradictory aspects of the *Crimes (Sentencing Procedure) Act 1999* (NSW).[9] In particular, His Honour referred to the limits and incongruities applied to custodial alternatives such as suspended sentences, home detention and good behaviour bonds.

Legal Aid NSW agrees with these observations and recommends the NSW Law Reform Commission consider the points outlined in the address.

For suspended sentences, home detention and intensive corrections orders Legal Aid NSW is of the view there should be a consistent maximum length of sentence of two years in the Local Court and three years in the higher courts.

2. Should there be a uniform maximum term for all of the custodial alternatives to full-time imprisonment?

Please refer to the response to question 6.6.1 above.

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?

Legal Aid NSW agrees that the terms of custodial alternatives to full-time imprisonment should continue to be tied to the sentence of imprisonment that the court initially determined to be appropriate and refers to the Honourable T F Bathurst, Chief Justice New South Wales, Keynote address to the Legal Aid Criminal Law Conference 2012.[10]

4. Should the Local Court's jurisdictional limit be increased for custodial alternatives to full-time imprisonment?

Legal Aid NSW is of the view that the Local Court's jurisdictional limit should not be increased for custodial alternatives to full-time imprisonment and refers to the response to question 5.8 above.

[9] The Honourable T F Bathurst, Chief Justice New South Wales, Keynote address to the Legal Aid Criminal Law Conference 2012.
[10] The Honourable T F Bathurst, Chief Justice New South Wales, Keynote address to the Legal Aid Criminal Law Conference 2012.

Other options

Question 6.7

What other intermediate custodial sentences should be considered?

Legal Aid NSW supports reintroducing periodic detention as discussed in response to question 6.8 below.

Consideration should be given to expanding the NSW Drug Court scheme and amending the criteria to allow more offenders to benefit from the program it.

The termination of the Youth Drug Court scheme has left a gap in alternatives to custody for young people who require drug rehabilitation. Legal Aid NSW supports problem solving initiatives for young people with complex needs which bring together resources from other relevant agencies, for example, MERIT for young people.

The piloting stage for new alternatives to custody programs is often lengthy and the roll-out across the State can take considerable time. Legal Aid NSW advocates for a time limit to be placed on the piloting stages, and subject to proper evaluation and satisfactory resourcing, a commitment to rolling-out programs across the State within a set time period.

Question 6.8

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

Legal Aid NSW is of the view that consideration should be given to reintroducing periodic detention.

a. **What should be the maximum term of a periodic detention order or accumulated periodic detention orders;**

The maximum term of a periodic detention order or accumulated periodic detention orders should be three years for the higher courts and two years for the Local Court.

b. **What eligibility criteria should apply;**

Legal Aid NSW is of the view the same criteria should apply as previously, with the exception that periodic detention should be available to offenders who have served more than six months of full-time custody for any one sentences of imprisonment in NSW or elsewhere.

The courts should also have the discretion to make a periodic detention order for offenders who have committed prescribed sexual offences where the court is of the view that the offence falls within the range of lower level offending, for example, lower level possession of child pornography.

c. How could the problems with the previous system be overcome and its operation improved; and

The NSW Sentencing Council, Periodic Detention Report (2007) at pages 162 to165 outlines some of the problems with the now abolished periodic detention system, which should be addressed to improve its operation. These problems include:

- Aboriginal offenders not meeting eligibility criteria because of chronic alcoholism which could not be addressed because periodic detention had no rehabilitation capacity.

- The limited number of periodic detention places available for female offenders. In the North Coast circuit periodic detention was not available for women.[11]

- Some candidates being excluded due to parental obligations.

A study published by the Australian Institute of Criminology noted there should be improved mentoring of young offenders placed on periodic detention orders.[12]

One of the most significant problems with the former periodic detention system was the way in which breaches were dealt with. The regulations required that the Parole Authority revoke the periodic detention following a third breach (arriving late or alcohol or drug affected, or not arriving at all) upon application by the Commissioner for Corrective Services. The Parole Authority could then, on application from the offender, decide to 'authorise' an absence.

However, significant unfairness arose from two areas. First, before an absence could be authorised by the Parole Authority, the offender was required to have completed certain steps relating to obtaining a medical certificate and having called the Department of Corrective Services hotline before he was due to report for periodic detention. No exception was permitted. It was no excuse if the offender was unable to call the hotline if they were in a coma or in hospital sedated.

An offender could apply to return to periodic detention after serving three months in custody following the breach. However, the activation of the breach on application by the Commissioner created some difficulties. If an offender was arrested for a fresh offence and bail refused, the time served in custody for the purpose of applying to return to periodic detention ran from when the Commissioner applied for revocation, which could have been three or four months after the person was first remanded. It was irrelevant if the charge was subsequently dismissed.

d. Could a rehabilitative element be introduced?

If periodic detention was reintroduced a rehabilitative element should be available, including supervision during the non-parole period.

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[11] Point made by Chief Magistrate Judge Henson, see NSW Sentencing Council, Periodic Detention Report (2007) footnote on page 43.

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

Community service orders

Question 7.1

1. Are community service orders working well as a sentencing option and should they be retained?

Legal aid NSW is of the view that community service orders (CSOs) are working well as a sentencing option and should be retained.

However, consideration should be given to the lack of places available to those who are elderly and physically unwell.

2. What changes, if any, should be made to the provisions governing community service orders or to their operational arrangements?

The number of hours of community service an offender is directed to perform should directly related to the length of time which the offender is given to undertake them. as Legal Aid NSW has observed many clients who have struggled to undertake the hours in the time given.

Section 9 bonds

Question 7.2

1. Is the imposition of a good behaviour bond under s 9 of the *Crimes (Sentencing Procedure) Act 199*9 (NSW) working well as a sentencing option and should s 9 be retained?

Legal Aid NSW is of the view that the imposition of a good behaviour bond under section 9 of the *Crimes (Sentencing Procedure) Act 199*9 (NSW) is working well and should be retained.

A section 9 bond is a useful deterrent and a suitable alternative to a custodial sentence. It is a flexible sentencing option that may include a range of conditions and be tailored to the circumstances of the particular case.

If the bond is supervised the Parole Board may decide to terminate it. This provides an additional incentive for the offender to be of good behaviour.

2. What changes, if any, should be made to the provisions governing the imposition of good behaviour bonds under s 9?

The provisions governing the section 9 bonds are satisfactory.

An alternative more structured application of such bonds is contained within section 33 of the *Children (Criminal Proceedings) Act 1987*.

Good Behaviour bonds

Question 7.3

1. Are the general provisions governing good behaviour bonds working well, and should they be retained?

Legal Aid NSW is of the view that the general provisions governing good behaviour bonds are working well and should be retained.

2. What changes, if any, should be made to the provisions governing good behaviour bonds or to their operational arrangements?

Legal Aid NSW notes the discussion at paragraphs 7.40 to 7.43 of Question Paper 7 where the offender appears for sentence in relation to a subsequent offence, and breach of a good behaviour bond is dealt with by a court other than the court that imposed the bond. For example, the sentence proceedings for the subsequent offence are before the District Court and the bond was imposed by the Local Court, or vice versa.

Legal Aid NSW notes that this is further complicated where breach action is taken by the Probation Authority or Juvenile Justice, and the breach proceedings are before the court that imposed the bond.

If the breach is dealt with by a court of superior jurisdiction, the offenders will be subject to higher jurisdictional limits and will be denied the appeal rights available in the Local Court.

Legal Aid NSW supports the arguments in relation to jurisdiction made by the NSW Office of Director of Public Prosecutions and Homeless Person's Legal Service at paragraphs 7.41, 7.42 and 7.43 of Question Paper 7.

Fines

Question 7.4

1. Are the provisions relating to fines in the *Crimes (Sentencing Procedure) Act 1999* (NSW) working well, and should they be retained?

Legal Aid NSW is of the view that, generally, the provisions relating to fines in the *Crimes (Sentencing Procedure) Act 1999* (NSW) are working well and should be retained.

However, Legal Aid NSW is of the view that fines still create significant hardship for people on low incomes and in particular young people, Aboriginal people and the homeless.

While section 6 of the *Fines Act 1996* provides that the court should consider the person's capacity to pay when fixing the amount of the fine, it is the experience of Legal Aid NSW that fines are often imposed that are beyond the person's means.

As noted in a 2011 Indigenous Justice Clearinghouse paper,[13] the main problem with the court based fine system is that courts often do not have complete information about a defendant's income, debts (including unpaid fines), family obligations and community expectations. Legal Aid NSW refers the NSW LRRC to the improvements to the court based system proposed in the paper

2. Should the provisions relating to fines in the *Crimes (Sentencing Procedure) Act 1999* (NSW) be added to or altered in any way?

No.

3. Where a particular offence specifies a term of imprisonment but does not specify a maximum fine, how should the maximum fine be calculated?

Legal Aid NSW does not oppose the method of calculation of a maximum fine set out in paragraph 7.51 of Question Paper 7.

Conviction with no other penalty

Question 7.5

1. Is the recording of no other penalty under s 10A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) working well as a sentencing option and should it be retained?

Legal Aid NSW is of the view that the recording of no other penalty under section 10A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) is working well as a sentencing option and should 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?

Please see response to Question 7.6.

[13] Williams, Mary and Gilbert, Robyn. January 2011. 'Reducing the unintended impacts of fines', Indigenous Justice Clearinghouse, Current Initiatives Paper 2.

Non-conviction orders

Question 7.6

1. Are non-conviction orders under s.10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) working well as a sentencing option and should they be retained?

Legal Aid NSW is of the view that non-conviction orders under section 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) are working well as a sentencing option and should be retained.

2. What changes, if any, should be made to the provisions governing s.10 non-conviction orders or to their operational arrangements?

Legal Aid NSW suggests that the Queensland model is worthy of consideration as an alternative to section 10. Section 12 of the *Penalties and Sentences Act* 1992 (Qld) provides that whenever a court imposes a penalty, it may also consider whether or not to record a conviction. Section 12(2) lists a series of non-exhaustive considerations to be taken into account when considering whether to record the conviction or not.

This approach allows a court to decide whether or not to record a conviction in addition to imposing a fine or a good behaviour bond as well as dismissing the charge. It recognises that the recording of a conviction is a penalty in itself.

The seriousness associated with a court imposing a conviction should not be under estimated. Recording of a conviction is a penalty in itself which can have far reaching effects in terms of employment, obtaining certain licenses, visa applications, civic duties/rights, insurance and credit.[14]

Question 7.7

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

Please see response at Question 7.6.2.

Other options

Question 7.8

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

Legal Aid NSW has welcomed the introduction of work development orders (WDO) as a means of mitigating fine or penalty notice debt.

[14] Tang, A and Brown, L, 'Children's Criminal Records and Convictions', Legal Aid, Children's Legal Service Conference 2010.

Alternative non-custodial sentencing options should be explored.

Question 7.9

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

Legal Aid NSW is of the view that a fine held in trust should not be introduced as a sentencing option.

Question 7.10

1. Should work and development orders be adopted as a sentencing option?

While the introduction of work development orders (WDO) as a means of mitigating fine or penalty notice debt has been welcomed, Legal Aid NSW does not support adopting WDOs as a sentencing option for the reasons set out in paragraphs 7.110 and 7.111 of Question Paper 7.
No.

2. Alternatively, should the community service order scheme be adapted to incorporate the aspects of the work and development order scheme that assist member of vulnerable groups to address their offending behaviour?

Legal Aid NSW agrees that the community service order scheme should be adapted to incorporate the aspects of the work and development order scheme that assist member of vulnerable groups to address their offending behaviour.