CORRECTIVE SERVICES NSW
SUBMISSION TO THE NSW LAW REFORM COMMISSION
REVIEW OF THE *CRIMES (SENTENCING PROCEDURE) ACT 1999*
QUESTION PAPERS 5-7

QUESTION PAPER 5 – FULL-TIME IMPRISONMENT

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?

No answer provided.

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?

No answer provided.

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?

No answer provided.

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

No answer provided.

Short sentences of imprisonment

Question 5.3
1. Should sentences of six months or less in duration be abolished? Why?

As noted by Corrective Services NSW (**CSNSW**) in its preliminary submission to the NSW Law Reform Commission's review of the *Crimes (Sentencing Procedure) Act 1999* (**the CSP Act**), short sentences limit the time available for CSNSW to assist the offender to address their offending behaviour and may cause unnecessary disruption to the offender's employment, accommodation and family relationships. In addition, data extracted from CSNSW's offender database indicates that approximately 30 per cent of prisoners serving custodial terms of 6 months or less, from 6 August 2011 to 7 August 2012, were Indigenous Australians.

CSNSW is concerned that offenders with mental health issues, cognitive impairment and/or substance dependency may receive short sentences where the court has exhausted all other community-based sentencing options and where there are limited custodial alternatives to address their specific complex needs. Data extracted from CSNSW's offender database indicates that, of the offenders with a sentence of six months or less, from 6 August 2011 to 7 August 2012, and for whom an actuarial risk assessment had been completed (approximately 50 per cent of the total):

- 87% had experienced drug and or alcohol abuse issues within the last year
- 58% had documented mental health issues
- 84% were reliant on social assistance
- 60% had less than Grade 10 education.

This data shows that individuals with complex needs have a high representation in the group of offenders that have received short sentences. (Note the response to Question 6.7 below, in which CSNSW suggests the introduction of a new multi-agency community sentencing option for individuals with complex needs to increase custodial sentencing options available to the courts).

CSNSW notes with interest the Scottish introduction of a presumption against sentences of three months or less for low-level offenders and the possibility of extending the presumption beyond three months in the future.[1]

CSNSW is against the abolition of short sentences of imprisonment. However, CSNSW supports the introduction of a presumption against shorter sentences (whether 3 or 6 months) and that the onus should be on the court to demonstrate that alternative sentencing options (such as Section 12 (Suspended Sentences), Intensive Correction Orders and Home Detention Orders) have been considered and discounted before ordering a short custodial sentence as the option of last resort.

CSNSW reiterates its comments on page 6 of its preliminary submission to the NSW Law Reform Commission (**NSW LRC**) where it cautioned against 'net widening' which occurs 'when certain types of new sentences are introduced, meaning that offenders who would have received a sentence lower on the hierarchy of sentences before the introduction of a new sentence, receive a sentence higher on the hierarchy after the new sentence is introduced.'

CSNSW also noted on page 6 of its preliminary submission that it is 'concerned to prevent "sentence creep"; that is, the tendency for magistrates to give longer custodial sentences when previously a sentence of less than six months would have been an option, and also acknowledges that in some cases sentences of less than six months may be required.'

[1] NSW Law Reform Commission, *Sentencing Question Paper 5 – Full-time imprisonment*, June 2012, para 5.69

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

See the above response to Question 5.3.1. CSNSW notes the Scottish model, which has a presumption against sentences of three months or less for low-level offenders.

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

Not applicable. See the above responses to Questions 5.3.1 and 2.

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?

CSNSW does not oppose *per se* the idea of allowing non-parole periods to be set for sentences of imprisonment of six months or less, but reiterates that short terms (whether of incarceration or supervised parole) allow little opportunity for CSNSW to assist the individual to address their offending behaviour. For example, during a supervised parole period of three months, CSNSW would be unable to address an individual's criminogenic needs, but could provide some support and assistance with re-settlement and reintegration needs that are linked to further offending.

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?

No answer provided.

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?

No answer provided.

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?

No answer provided.

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

No answer provided.

Directing release on parole

Question 5.6
What limit should be applied to the automatic release of offenders to parole on expiry of a non-parole period?

The NSW LRC refers to the suggestion made by Legal Aid NSW in its preliminary submission that the three year limit in section 50 should be extended to five years.[2] CSNSW does not support the automatic court-based release on parole being extended to five years.

An offender sentenced to more than three years is required to apply to the State Parole Authority for release on parole. The State Parole Authority usually requires a demonstration that the offender has addressed their offending behaviour during the custodial period. Parole consideration has numerous advantages in assessing and influencing prisoners' suitability for parole release and plans following release. The State Parole Authority also makes recommendations for offenders to attend drug and other rehabilitation programs upon release and for particular conditions to be included on parole orders to assist re-integration into the community and to address issues of community safety.

In addition, CSNSW is able to apply greater motivational leverage to offenders who are released by the State Parole Authority than can be applied to offenders who are serving a fixed term. Any extension of the term of automatic court-based release on parole would decrease the motivational leverage available to CSNSW in the management of offenders in custody in relation to addressing their offending behaviour.

Question 5.7
1. Should back end home detention be introduced in NSW?

CSNSW supports a form of back end home detention being introduced in NSW as a method of transition from custody to the community. It would be preferable that another name be used for such an option to avoid confusion with the existing home detention scheme, but it should retain all the characteristics of home detention, such as electronic monitoring.

The structure and conditions of any form of back end home detention should be carefully considered. In particular, consideration should be given to whether the offender would be released to the community (similar to parole) or whether the offender would be serving a portion of a custodial sentence in the community. This distinction could affect issues such as an offender's access to Centrelink benefits and Medicare services.

[2] NSW Law Reform Commission, *Sentencing Question Paper 5 – Full-time imprisonment*, June 2012, para 5.105

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

CSNSW supports the Standing Committee on Law and Justice's proposal that the court should decide at the time of sentencing on an individual's eligibility for back end home detention and that the suitability of the offender for back end home detention should be assessed at the expiry of the first portion of the sentence. However, CSNSW believes that the State Parole Authority, rather than the courts, should determine the issue of suitability.

CSNSW is well placed to conduct an assessment of an offender's suitability for back end home detention at a time close to the expiry of the first portion of the sentence. CSNSW proposes that a report and recommendation should be made to the State Parole Authority, who would make the decision concerning the release and conditions of release of the offender to a form of back end home detention. Similar processes are already in place for the consideration of parole release by the State Parole Authority. CSNSW believes that these processes are established and successful, and any considerations for back end home detention should follow this model.

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?

Although not a matter for CSNSW, during the initial implementation of the Intensive Correction Order, magistrates raised their concerns with CSNSW about the issue of their jurisdictional limits, which may prevent them from imposing consecutive sentences, including an Intensive Correction Order, that total more than two years.

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?

This is not a matter for CSNSW.

QUESTION PAPER 6 – INTERMEDIATE CUSTODIAL SENTENCING OPTIONS

Compulsory drug treatment detention

Question 6.1
1. Is the compulsory drug treatment order sentence well targeted?

CSNSW believes that the Compulsory Drug Treatment Order (**CDTO**) sentence successfully addresses the target group of persistent drug using offenders. However, there are problems with the current legislative definitions of the eligibility criteria that restrict the number of offenders who enter the program. This is compounded by the restricted referral pathways themselves. These issues will be addressed further in Question 6.1.2 below.

The BOCSAR review (2010)[3] identified substantial success, in that the CDTO program met three of the four objectives of the legislation in relation to engaging, treating and integrating offenders subject to a CDTO.

However, there were methodological restrictions in relation to the small cohort under study at that time. More significantly, the issue of recidivism could not be examined due to the short period of time since the start of the CDTO program. In mid 2011, funds were made available through an Australian Research Council Linkage Grant to study recidivism rates across a number of drug treatment programs, including the Compulsory Drug Treatment Correctional Centre (**CDTCC**). This work has recently started through Deakin University and has a number of research aims, including the effects of perceived coercion and treatment readiness on long-term offending outcomes.

The inter-agency context is dynamic, as evidenced by the fortnightly meetings at the Drug Court with the Senior Judge and courts administration, CDTCC staff, NSW Office of the Director of Public Prosecutions, Justice Health, NSW Police Force and Legal Aid NSW. Processes and practices are constantly under review to provide targeted services and clear communication between agencies to meet the legislative objectives. This is supported and enhanced at a more senior governmental level through the quarterly Taskforce meetings which have produced significant policy changes over time to strengthen the aspects and operation of the CDTO sentence.

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

The most prominent issue with CDTOs, agreed by all partners in this endeavour, is the need to change the front end legislative restrictions in the eligibility criteria for an offender's entry to the CDTO program. The eligibility criteria are viewed as too restrictive in relation to individuals who could benefit from the CDTO program. This includes restrictions relating to the types of offences, sentence length and prior sequences of offending.

In the 2009/2010 financial year, all participating agencies reviewed the legislation and regulations governing the operation of the CDTO in accordance with section 106Z of Part 4A of the *Crimes (Administration of Sentences) Act 1999* (**CAS Act**) with a view to recommending amendments. It is understood that the recommendations from this review are currently with the Criminal Law Review Division of the Department of Attorney General and Justice.

Another issue is that the sentencing and referral pathways for the CDTO need to be broadened. At present, convicted offenders are referred by courts (generally at the District Court level) to the NSW Drug Court for eligibility and suitability assessment. The current recommendations for legislative change include a proposal for this pathway to be extended in certain circumstances to include the State Parole Authority as a referral authority. CSNSW also recommends that the

[3] J Dekker, K O'Brien and N Smith, *An Evaluation of the Compulsory Drug Treatment Program (CDTP)* (NSW Bureau of Crime Statistics and Research, 2010)

legislation be broadened to include a screening and referral process internally through CSNSW to identify individuals who may fit the intended targeted group.

Home detention

Question 6.2
1. Is home detention operating as an effective alternative to imprisonment?

CSNSW believes that home detention is an effective alternative to imprisonment, as evidenced by the high completion rates[4]. However, the effectiveness of home detention is compromised by being under-utilised, even though it is now available throughout NSW.

CSNSW is of the view that there should remain a hierarchy of sanctions available to courts and that this hierarchy should be made explicit to all stakeholders. CSNSW believes that home detention should remain as an intermediate custodial sentencing option. Home detention has a distinct function as the most punitive of the intermediate custodial options available to courts, in its more stringent deprivation of the liberty of the offender. This is partly reflected in the legislative requirement for the court to specify a term of imprisonment and direct that it be served by way of home detention.

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

Given the decline in the rate of home detention orders being made by courts, there is likely to be a number of cases where this option could be used but is not. This may be due to a number of reasons. For example, some courts may not be aware that home detention is now available in all areas of NSW. Further, the fact that the decline in the number of home detention orders has become more pronounced since the introduction of the Intensive Correction Order suggests that there have been adjustments in the use of the sentencing continuum as a result.

Another barrier to the use of home detention orders may be the exclusion of many types of offences from this order[5]. CSNSW believes that the only exclusions should be in relation to “serious sexual assault” and “domestic violence offences against a likely co-resident”. Such an extension of the home detention assessment criteria would help to align home detention with Intensive Correction Order criteria.

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

CSNSW is currently reviewing its administration of home detention orders and Intensive Correction Orders (**ICOs**) to ensure that organisational structures are in place to deliver services throughout NSW, including regional and rural areas, and

[4] NSW Law Reform Commission, *Sentencing Question Paper 6 – Intermediate custodial sentencing options*, June 2012, para 6.21
[5] NSW Law Reform Commission, *Sentencing Question Paper 6 – Intermediate custodial sentencing options*, June 2012, paras 6.22-6.28

taking into account the growth in the number of ICOs and the continued use of home detention.

In general, CSNSW believes that no improvements are required to the post-sentence operation of home detention, but suggests an amendment to the assessment process.

As the assessment processes for home detention orders and ICOs are resource-intensive and have elements in common, CSNSW suggests that it may be useful for the courts to have the option to request a single assessment report for both home detention and an Intensive Correction Order. The court would still be required to consider and then decline the option of an ICO before considering home detention, but would have background information readily available when considering the latter. This may streamline the decision-making process and reduce the number of adjournments.

CSNSW is aware that such an adjustment would require legislative changes. The court would first need to sentence a person to imprisonment and then direct that the sentence be served by way of home detention or ICO, following an assessment conducted by CSNSW. CSNSW would support such a change.

Intensive correction orders

Question 6.3
1. Are intensive correction orders operating as an effective alternative to imprisonment?

As noted by the NSW LRC[6], the ICO is still relatively new and its effectiveness is yet to be fully evaluated.

(a) Current debate - punitive and rehabilitative order

There is a current debate in relation to the punitive versus rehabilitative aspects of the ICO.

In *R v Boughen; R v Cameron* [2012] NSWCCA 17 (27 February 2012), Simpson J decided that the ICO is essentially a rehabilitative order and that where rehabilitation is an irrelevant consideration the use of ICOs is inappropriate.

CSNSW understands that the NSW LRC is of the view that the application of this decision will lead to a decrease in the use of ICOs and an increase in the number of offenders in custody, as its effect is to remove the ICO option for offenders who do not need rehabilitation. The NSW LRC further argues that this decision creates a gap between the ICO and the abolition of periodic detention orders.

CSNSW believes that the second reading speech and the legislation itself support the view that the ICO is both a punitive and a rehabilitative order.

[6] NSW Law Reform Commission, *Sentencing Question Paper 6 – Intermediate custodial sentencing options*, June 2012, para 6.36

Second reading speech

The second reading speech delivered by the former Attorney General, John Hatzistergos, on 30 June 2010, refers to the ICO as a new sentencing option 'designed to reduce an offender's risk of re-offending through the provision of intensive rehabilitation and supervision in the community.'

However, the second reading speech is also very clear that:

- the ICO is a 'sentence of imprisonment';
- offenders can be subjected to a range of 'stringent conditions' including 24 hour monitoring; and
- the ICO is a '*combination* of tailored educational, rehabilitative and other related activities.'

While the second reading speech refers to the ICO as a 'superior sentencing option that directly targets reoffending through the intensive management of offenders in the community,' it also states that the ICO 'is not a soft option; it is reserved for offenders who would otherwise have been sentenced to a term of imprisonment. For offenders, the conditions are stringent and the consequences of non-compliance are significant – the Government makes no apology for this.'

Legislation

The legislation appears to support the view that the ICO is both a punitive and rehabilitative order.

Section 7(1) of the CSP Act states: 'A court that has sentenced an offender to imprisonment for not more than 2 years may make an intensive correction order directing that the sentence be served by way of intensive correction in the community.'

Therefore, the ICO is a sentence of *imprisonment*. A plain English interpretation of the term 'imprisonment' is 'to confine, to deprive one's liberty.' A deprivation of liberty is a fundamentally punitive condition.

Before a court can impose an ICO on an offender, it must request that a suitability assessment be conducted by CSNSW. Section 69 of the CSP Act states that: 'a court is not to refer an offender for such an assessment unless satisfied, having considered all the alternatives, that no sentence other than imprisonment is appropriate and that the sentence is likely to be for a period of no more than 2 years.'

Therefore, an ICO assessment may only be requested if the court has decided that of all the alternative sentencing options, including those which may arguably have more of a 'rehabilitative' slant, a sentence of 'imprisonment' is the only appropriate sentence for that offence.

Under Division 1 of Part 7 of the CAS Act, the NSW State Parole Authority may revoke an ICO. When an ICO is revoked, the offender must be returned to full-time

custody. An ICO can be re-instated, but only after the offender has spent at least one month in full-time custody (section 165).

Section 90 of the CAS Act allows the NSW State Parole Authority to impose a period of up to 7 days' home detention in the case of a breach of an ICO.

The above two points demonstrate that minor and serious breaches of an ICO can be dealt with by way of a further deprivation of an offender's liberty. Arguably, an order that is purely rehabilitative would not, as part of breach action, simply impose further sanctions on an offender's liberty, but would also require the rehabilitative programs and services to be reviewed and adapted if necessary.

Clause 175 of the *Crimes (Administration of Sentences) Regulation 2008* (**CAS Regulation**) lists the mandatory conditions of the ICO. Whilst some of these conditions are indeed rehabilitative, others are explicitly punitive. For example:

- (h) a condition that requires the offender to submit to searches of places or things under his or her immediate control, as directed by a supervisor;
- (j) a condition that requires the offender to submit to breath testing, urinalysis or other medically approved test procedures for detecting alcohol or drug use, as directed by a supervisor;
- (l) a condition that requires the offender to submit to such surveillance or monitoring (including electronic surveillance or monitoring) as a supervisor may direct, and comply with all instructions given by a supervisor in relation to the operation of surveillance or monitoring systems;
- (n) a condition that requires the offender to comply with any direction given by a supervisor that requires the offender to remain at a specified place during specified hours or that otherwise restricts the movements of the offender during specified hours;
- (o) a condition that requires the offender to undertake a minimum of 32 hours of community service work per month, as directed by a supervisor from time to time.

It is interesting that for an order that is alleged to be purely 'rehabilitative', the condition that requires the offender to engage in activities to address the factors associated with his or her offending behaviour is condition (p), the second last condition.

Clause 176 of the CAS Regulation lists the additional conditions that may be imposed by the sentencing court. Section 81 of the CAS Act provides that the Commissioner can, at the time of sentencing or subsequently, recommend to the sentencing court that these additional conditions be imposed. As with the mandatory conditions, these conditions also have both punitive and rehabilitative elements. For example:

- (d) a condition that requires the offender to comply with any direction of a supervisor that the offender not associate with specified persons or persons of a specified description;
- (e) a condition that prohibits the offender consuming alcohol;

- (f) a condition that requires the offender to comply with any direction of a supervisor that the offender must not go to specified places or districts or places or districts of specified kind.

CSNSW's position

Although the ICO has a strong rehabilitative focus, as a sentence of imprisonment it is, arguably, inherently punitive.

CSNSW's operational approach to the ICO has been to develop policies and strategies that allow it to impose conditions (sometimes stringent conditions), in accordance with the mandatory and additional conditions permitted by the legislation, to monitor and supervise offenders to ensure that they comply with those conditions, and to ensure that they engage in appropriate programs to address the causes of their offending behaviour.

For these reasons, the ICO can effectively be viewed as an order that combines both punishment and rehabilitation.

In a letter from the Law Society of NSW to the NSW LRC dated 27 March 2012, the Law Society of NSW made a number of recommendations. One of the recommendations was that the CSP Act be amended to specifically permit a sentence of imprisonment to be served by way of an ICO even when rehabilitation is not required. There may be some merit in considering this recommendation.

(b) For information only: Update on the implementation of the ICO

The NSW LRC refers to four levels of supervision through which CSNSW manages ICOs[7]. This was revised on 5 April 2012 to the following five levels of supervision to meet operational needs and to provide more flexibility in the management of offenders:

ICO level		Face to face contact	Monitoring	Community service work
1	a	Weekly	Electronic monitoring (anklet and Data Collection Unit (DCU)), curfew and scheduling	Work supervised by CSNSW (unless approved by Senior Compliance and Monitoring Officer (SCMO))
	b	Weekly	Electronic monitoring (anklet and DCU) and curfew	Work supervised by CSNSW (unless approved by SCMO)
	c	Weekly	Electronic monitoring (anklet only) and curfew	Work supervised by CSNSW (unless approved by SCMO)
2		Fortnightly	Curfew with no electronic monitoring	Work supervised by CSNSW or at a community agency

[7] NSW Law Reform Commission, *Sentencing Question Paper 6 – Intermediate custodial sentencing options*, June 2012, Table 6.1

3	**Fortnightly**	**No electronic monitoring or curfew**	**Work supervised by CSNSW or at a community agency**
4	**Monthly**	**No electronic monitoring or curfew**	**Work supervised by CSNSW or at a community agency**
5	**Every 6 weeks**	**No electronic monitoring or curfew**	**Work supervised by CSNSW or at a community agency**

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

During the initial implementation of the ICO, magistrates raised concerns with CSNSW regarding the issue of their jurisdictional limits, which may prevent them from imposing consecutive sentences, including an ICO, that total more than two years. This may be perceived as a barrier to the use of the ICO.

In a similar context, if the Commissioner of Corrective Services applies to the sentencing court to extend an ICO under section 86 of the CAS Act, subsection 86(7) provides that the term of the sentence is also extended by the same period. However, such an extension may exceed the two year jurisdictional limit of magistrates. For example, if a magistrate imposes an ICO for a term of 20 months and the offender later breaks his leg and cannot work for 6 months, the Commissioner may grant an exemption from work for 6 months under section 85 of the CAS Act. If the Commissioner applies to the sentencing court to extend the ICO by a period of 6 months under section 86 of the CAS Act to enable the offender to make up for work not completed, the magistrate cannot grant such an extension as it would exceed his or her jurisdictional limit of 24 months.

A further issue is that the mandated 32 hours of community service work as part of the ICO has at times created a barrier to assessing people with substance dependencies and other complex needs as suitable for an ICO. See Question 6.3.3 below for further discussion of this point.

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

CSNSW is currently reviewing its administration of home detention and intensive correction orders to ensure that organisational structures are in place to deliver services throughout NSW, including regional and rural areas, and taking into account the growth in the number of intensive correction orders and the continued provision of home detention.

As noted in Question 6.3.2 above, the mandated 32 hours of community service work as part of the ICO may create a barrier for people with complex needs. CSNSW suggests that if community service work remains a mandatory condition of ICOs, it would be beneficial to design work placements that allow participation by people with complex needs (for example, substance dependencies and mental

health/cognitive impairments). A solution may be to have the flexibility to substitute community service work with treatment programs, residential rehabilitation or attendance at TAFE courses/work-ready programs for a period of time until the offender can safely attend a work site.

In general, CSNSW believes that no improvements to the post-sentence operation of the ICO are necessary, but suggests an amendment to the assessment process.

As the assessment processes for home detention and the ICO are resource-intensive and have elements in common, CSNSW suggests that it may be useful for the courts to have the option to request a single assessment report for both home detention and an ICO. The court would still be required to consider and then decline the option of an ICO before considering home detention, but would have background information readily available when considering the latter. This may streamline the decision making process and reduce the number of adjournments.

CSNSW is aware that such an adjustment would require legislative changes. The court would first be required to sentence a person to imprisonment and then direct that the sentence be served by way of home detention or ICO following an assessment conducted by CSNSW. CSNSW would support such a change.

Suspended sentences

Question 6.4
1. Are suspended sentences operating as an effective alternative to imprisonment?

Despite the concerns raised by the NSW Sentencing Council, CSNSW is of the view that suspended sentences are a useful option in the range of alternatives available to the courts.

The provision of different types of bonds caters to the varying nature of matters and offenders before the courts, permitting the judiciary to use sections 9, 10, 11 and 12 of the CSP Act according to the circumstances. The suspended sentence has the function of bringing the offender one step closer to custody, with the consequence that the courts are likely to have a stringent response to a breach situation. This likely outcome of breach in turn provides added leverage for CSNSW in motivating offenders to meet the conditions of their order.

Further, the removal of the suspended sentence option would force the courts to choose between a lesser penalty option and a higher penalty option, such as home detention or full-time custody. CSNSW wishes to note that higher penalty options are more costly to administer and would therefore have resource implications if they were used in lieu of a suspended sentence.

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

No answer provided.

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

No answer provided.

4. Should greater flexibility be introduced in relation to:
(a) the length of the bond associated with the suspended sentence?

CSNSW notes that one of the limitations of the current suspended sentence is that, based on their assessed risk of re-offending, offenders may be identified as requiring a longer period of time than the length of the suspended sentence in which to work on their criminogenic needs.

However, any significant increase in the length of supervised good behaviour bonds attached to suspended sentences would have resource implications for CSNSW, particularly if CSNSW were required to supervise the individual for the full term of such bonds.

(b) partial suspension of the sentence?

CSNSW supports the partial suspension of sentences, with the possibility of including a 'parole' period in section 12. Such a suspended sentence with a combined non-parole/parole term would give the court discretion as to the consequences of serving a custodial term for breaching an order and would still allow sufficient time for the offender to address their offending in the community, based on their assessed risk of re-offending.

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

If the suspended sentence remains linked to the custodial term, as is currently the case, CSNSW believes it is reasonable to take a period of 'good behaviour' into account, as with parole; for instance, where a person has successfully completed three months of their order before breaching their conditions.

Rising of the court

Question 6.5
1. Should the "rising of the court" continue to be available as a sentencing option?

No answer provided.

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

Not applicable; see above.

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

Not applicable; see above.

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?

CSNSW believes that the maximum terms for home detention (up to 18 months) and the ICO (up to 2 years) should be aligned, at the very least. At present, a person sentenced to an ICO greater than 18 months cannot be considered for home detention if the ICO is revoked, so that the only subsequent alternative is custody. If the maximum terms for home detention and the ICO were aligned, in the event that an ICO is revoked, the State Parole Authority could consider home detention instead of custody.

See also Question 6.6.2 below.

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

CSNSW believes that all custodial alternatives to full-time imprisonment should have a uniform maximum term.

This could be addressed by increasing the maximum statutory periods for home detention and the ICO to three years. In the past, CSNSW has been reticent to extend the imposition of home detention or the ICO for lengthy periods as the effects on the offenders' families or the difficulties of sustaining long periods of community work (in the case of the ICO) may be substantial. However, it would be possible to extend the term of orders by including a parole period at the end. This would mitigate some of the impacts on families or individuals.

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?

No answer provided.

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

No answer provided.

Other options

Question 6.7
What other intermediate custodial sentences should be considered?

As noted in Question 5.3.1 above, CSNSW suggests the introduction of a new community sentencing option to add to the range of alternatives to a short prison

sentence. This initiative would be used to divert individuals with complex needs from custody to appropriate services in the community.

In the case where an offender may be defined as having complex needs or as being 'vulnerable' (using, it is suggested, the definition of 'vulnerable' already used in relation to Work and Development Orders) and the court is considering a custodial sentence of 6 months or less through lack of other custodial options, it could consider making a separate order of the nature of a 'multi-agency intensive community order'. This would be a model similar to the Child Protection Watch Teams, which involves joint case management by agencies such as CSNSW, the NSW Department of Health (mental health and drugs and alcohol), Aging Disability and Home Care (**ADHC**) and Non-Government Organisation (**NGO**) partners, Housing NSW and social housing providers, or any agency identified by the court as relevant to the needs of the offender. This would combine the expertise of the relevant disciplines at a local level, formalising what may already be occurring informally in certain locations, and reducing the likelihood of the individual 'slipping between the cracks' or becoming overwhelmed by numerous interventions by several unconnected agencies.

Such a sentencing option would have resource implications for all involved as the case management of this kind of offender is necessarily resource-intensive and complex. CSNSW envisages that it would administer the order as the primary case manager, in partnership with other agencies, and that as the order would properly be an alternative to custody, breach issues would be dealt with by the State Parole Authority. The order would differ from an ICO by having multi-agency input and being targeted at 'vulnerable' offenders.

Consideration would need to be given to the placing of this order within the sentencing hierarchy and to mechanisms through which agencies other than CSNSW would be obliged to participate. The involvement of other agencies may require legislation. Some of the proven inter-agency processes used by the Compulsory Drug Treatment Order, Drug Court Order and the Child Protection Watch Teams may be useful as initial templates.

Question 6.8
Should further consideration be given to the reintroduction of periodic detention?

CSNSW does not support the reintroduction of periodic detention. CSNSW supported its phasing out because of various limitations and impracticalities. Periodic detention was only available at a limited number of centres and could not be expanded to all of New South Wales. Transport was impractical for offenders without a driver's licence and motor vehicle or access to efficient public transport. Administration costs were relatively high and inflexible. As a result, the availability, assessment, order completion and cost-effectiveness of periodic detention were ongoing concerns.

If so:
(a) what should be the maximum term of a periodic detention order or accumulated periodic detention orders;

Not applicable; see above.

(b) what eligibility criteria should apply;

Not applicable; see above.

(c) how could the problems with the previous system be overcome and its operation improved; and

Not applicable; see above.

(d) could a rehabilitative element be introduced?

Not applicable; see above.

QUESTION PAPER 7 – NON-CUSTODIAL SENTENCING OPTIONS

Community service orders

Question 7.1
1. Are community service orders working well as a sentencing option and should they be retained?

CSNSW believes that community service orders should be retained as the completion rate is high and there are considerable benefits to the community. As noted by the NSW LRC[8], there is an unavoidable lack of community agencies in some rural and remote locations.

CSNSW does not support the introduction of an order that combines a good behaviour bond and a community service order for the same offence. It is arguable that the function of this kind of 'strengthened non-custodial sentence' is already provided by the ICO.

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

No answer provided.

[8] NSW Law Reform Commission, *Sentencing Question Paper 7 – Non-custodial sentencing options*, June 2012, para 7.14

Section 9 bonds

Question 7.2
1. Is the imposition of a good behaviour bond under s 9 of the Crimes (Sentencing Procedure) Act 1999 (NSW) working well as a sentencing option and should s 9 be retained?

CSNSW believes that the section 9 good behaviour bond should be retained. It is the most common form of bond used by the court.

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

CSNSW suggests that to clarify the obligations of the offender in relation to supervised bonds in general, all *supervised bonds* should include a set of standard and consistently worded conditions, beyond the two conditions that already exist. The following conditions are suggested for consideration:

- 'follow all reasonable directions of the CSNSW supervising officer'
- 'attend programs or other interventions, if directed by the CSNSW supervising officer'
- 'live at an approved address, if directed by the CSNSW supervising officer'
- 'obey curfews, if directed by the CSNSW supervising officer'
- 'submit to urinalysis/breath testing, if directed by the CSNSW supervising officer'.

This would serve the function of clarifying for offenders the expectations of supervision and would reduce the confusion that sometimes occurs when breaches of bond are contested.

Good behaviour bonds

Question 7.3
1. Are the general provisions governing good behaviour bonds working well, and should they be retained?

See the response to Question 7.2.2 above.

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

See the response to Question 7.2.2 above.

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?

No answer provided.

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

No answer provided.

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

No answer provided.

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?

No answer provided.

2. What changes, if any, should be made to the provisions governing the recording of no other penalty or to its operational arrangements?

No answer provided.

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?

No answer provided.

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

See above.

Question 7.7
Should it be possible to impose other sentencing options in conjunction with a non-conviction order? If so, which ones?

No answer provided.

Other options

Question 7.8
Should any other non-custodial sentencing options be adopted?

No answer provided.

Question 7.9
Should a fine held in trust be introduced as a sentencing option? If so, how should it be implemented?

No answer provided.

Question 7.10
1. Should work and development orders be adopted as a sentencing option?

CSNSW believes that the Work and Development Order (**WDO**) should not be adopted as a sentencing option.

The WDO was intended to be used as a voluntary exercise on the part of the individual and, as it stands, may not be applied to activities ordered by the court. The WDO scheme, in its current form, gives individuals who incur fine related debts a non-monetary means of satisfying these debts while engaging in relevant and beneficial program activities. The voluntary enrolment in these activities gives the individual, no matter how mentally impaired or economically disadvantaged, a dignified and responsible means of satisfying their fine related debt. The motivation to undertake such positive activities is greatly enhanced by the voluntary basis of their engagement. While undertaking such activities, the individual's impairment or disadvantage may also be addressed in a positive and non-punitive way.

Further, the WDO as it stands is positioned at the 'fines end' of the sentencing continuum and CSNSW supports its position there. Community service orders, good behaviour bonds and fines are separate penalties applied by the courts in various circumstances. When sentencing an offender, the court decides which sentencing options are appropriate. To use the WDO as a sentencing option seems to blur the sentencing hierarchy considerably and impose a sentencing option that is much more severe than a fine. Consequently, this proposal appears to disadvantage people of limited financial means considerably.

In addition, as the WDO scheme became permanent only relatively recently, CSNSW believes that WDOs in their current form should be given more time to become embedded and for operational issues to be resolved before any further amendments are considered.

The NSW LRC[9] notes the possible effects of making WDOs available as a sentencing option on approved practitioners and organisations supervising the WDOs. CSNSW has recently become an approved agency for WDOs, although their operation is currently limited to certain correctional centres and the first pilot is being undertaken. While the impact on staff and the usual operations of CSNSW is yet to be evaluated, initial investigation suggests that the workload may be substantial in a community setting (if significant numbers of offenders take up the option) and will be of an administrative, rather than a supervisory, nature similar to that involved in managing community service orders.

[9] NSW Law Reform Commission, *Sentencing Question Paper 7 – Non-custodial sentencing options*, June 2012, para 7.110

CSNSW understands that the underlying rationale for adopting WDOs as a sentencing option, as noted by the NSW LRC[10], is that it could assist members of vulnerable groups to address their offending behaviour. CSNSW notes that it already manages individuals with complex needs on a range of community orders, which includes assisting them to access appropriate services to meet their needs where such services are available.

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 behaviour?

See the response to Question 7.10.1 above.

In accordance with the suggestion made in the response to Question 6.3.3 above, in relation to ICOs and the issue of community service work requirements being difficult to meet for certain people with complex needs, it would be beneficial to design work placements that allow participation by people with complex needs (for example, substance dependencies and mental health/cognitive impairments). A solution may be to have the flexibility to substitute community service work with treatment programs, residential rehabilitation or attendance at TAFE courses/work-ready programs.

[10] NSW Law Reform Commission, *Sentencing Question Paper 7 – Non-custodial sentencing options*, June 2012, para 7.108