The Public Defenders

20 August 2012

The Hon James Wood AO QC,
NSW Law Reform Commission,
DX 1227
Sydney

Dear Chair,

Re review of the Crimes (Sentencing Procedure) Act 1999 (NSW)

I refer to the above matter, and now provide the Public Defenders' response to the Sentencing Question Papers 5 to 7. I am grateful to Dina Yehia SC, Public Defender, for her assistance in preparing our response.

Chapter 5: Full-Time Imprisonment

Question 5.1
Should the 'special circumstances' test under s 44 of the Crimes (Sentencing Procedure) Act 1999 (NSW) be abolished or amended in any way?
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?

The Public Defenders do not support the abolition of the 'special circumstances' test under s 44. We acknowledge that the Judicial Commission research shows that departure from the statutory norm has become more frequent and pronounced. There are several reasons for this trend, including the principle that accumulation by itself can be a basis for finding special circumstances. It has been noted, for example, that the increase from 80% to 87% of cases involving standard non-parole period offences resulting in periods shorter than three quarters of the head sentence may be explained by the increase in the number of cases involving consecutive sentences, where the sentencing judge has set a relatively short non-parole period (less than 75%) due to accumulation, rather than the standard non-parole statutory scheme.[1]

The argument for repeal seems to be that the 'special circumstances' test is an 'unnecessary and arbitrary' restraint on judicial discretion.[2] We do not think that this argument has substance in view of the fact that special circumstances are found in a majority of cases, tending to suggest that the provision is not a legislative fetter of judicial discretion.

The principles applicable to the setting of the non-parole period of a sentence under s 44 are well settled. A finding of special circumstances is a discretionary finding of fact in

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[1] *The impact of the standard non-parole period sentencing scheme on sentencing patterns in NSW*, P Poletti and H Donnelly, Judicial Commission of NSW, Monograph 33 May 2010.
[2] NSW Law Reform Commission, Sentencing, Report 79 (1996) [8.22]-[8.24].

respect of which the appeal courts are slow to intervene unless the non-parole period is found to be manifestly inadequate or manifestly excessive: *Caristo v R* [2011] NSWCCA 7.

Although special circumstances are found in the majority of cases, the test provides an 'anchoring point' for courts to consider how far they depart from the ratio in any given case. To that extent the 'special circumstance' test provides a degree of consistency in sentencing, the abolition of which could lead to an erosion of consistency.

The Public Defenders raise for discussion the possibility that a different ratio should apply to offenders with a cognitive impairment. In Tasmania the general sentencing ratio is one of a non-parole period of 50% of the head sentence. Consideration should be given, in our view, to a similar ratio in cases where offenders have a cognitive impairment. The needs of such offenders are better served in the community notwithstanding the under resourcing of mental health teams. Although the Forensic Hospital and special intellectual disability wings within Corrections have been extended and upgraded, we are concerned that large numbers of offenders' cognitive impairment needs and are not being met within the prison system.

Question 5.2
Should the order of sentencing under s44 of the Crimes (Sentencing Procedure) Act 1999 (NSW) return to a 'top down' approach?
Could a 'top down' approach work in the context of standard minimum non-parole periods?

In 2002 the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill* was introduced. In the 2nd reading speech the then Attorney General, Bob Debus, explained that the changes to s 44 were a 'necessary consequence' to the introduction of standard minimum non-parole periods':

> *The bill replaces existing section 44 of the principal Act with a new section that requires the sentencing court to set a non-parole period for the sentence before setting the balance of the term of the sentence – that is, the period during which the offender may be released on parole. The balance of the term of the sentence must not exceed one third of the non-parole period for the sentence, unless the court decides there are special circumstances for it being more. Current section 44 requires the court to set the total sentence and then fix the non-parole period. The replacement of the existing section is a necessary consequence of the introduction of the scheme of standard non-parole sentencing. The effect of the proposed s 44 is to maintain, by a different method of calculation, the existing presumptive ratio between the non-parole period of a sentence and the period during which the offender may be released on parole.*

The change seemed to initially cause confusion as judges sentenced offenders in the 'wrong order'. Initially this was regarded as an error: see *R v Mako* [2004] NSWCCA 90, *R v Hansen* [2002] NSWCCA 321, *R v KBM* [2004] NSWCCA 123 at [27]-[30]. The Court of Criminal Appeal came to accept the error as technical only which did not alone justify re-sentencing: *R v Smith* [2005] NSWCCA 19; *R v Cramp* [2004] NSWCCA 264

at [39]; *Itaoui v R* (2005) 158 A Crim R 233 at [17], [18]; *Gonzalez v R* [2006] NSWCCA 4.

In subsequent appeal cases the courts pointed out that the change related to the pronouncement of the sentence only, and that sentencing judges were still required to determine an appropriate total sentence first, then determine the non-parole period.
This is confusing and liable to lead to error. In *Musgrove v R* (2007) 167 A Crim R 424 at [44], Simpson J suggested that a literal application of s.44 as it currently stands could lead to error.

There have been a number of successful appeals where applicants were able to establish that the sentencing judge had first determined the appropriate non-parole period then extended the total sentence to ensure the parole period reflected a finding of special circumstances. In *R v Itaoui* [2005] NSW CCA 415, the Court said:

> *[14] It is submitted on the applicant's behalf that this error led to an injustice as the Judge found special circumstances which led to a longer total sentence being imposed. The argument is that the Judge must have determined the non-parole period first and then, having found special circumstances, extended the balance of the term to reflect that finding.*
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> *[15] Such an argument succeeded in this Court in two related appeals, P [2004] NSWCCA 218 and Tobar (2004) 150 A Crim R 104. It failed in Simon [2005] NSWCCA 123. In Simon it was argued that Judge Coolahan had extended the balance of the term by a finding of special circumstances. In dismissing the appeal, and with the concurrence of the Chief Justice and Justice Studdert, I said:*
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> > *[26] The decision in Tobar followed a decision of this Court in P [2004] NSWCCA 218. The applicant in P was a co-offender of the two applicants in Tobar. The same District Court Judge sentenced all of the applicants. In his reasons for sentencing CP, the applicant in P, the Judge indicated that, in sentencing for one of the two offences before the Court, he started with the standard non-parole period that applied to the offence and then deducted from that figure a specified amount to reflect the fact that the applicant was a juvenile. Having by this mathematical approach determined what the non-parole period should be, the sentencing judge then fixed the balance of the term by finding that there were special circumstances.*
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> > *[27] In those circumstances and with the Judge's reasoning so exposed, this Court had little difficulty in concluding that his Honour had erred in the way that it is argued that Judge Coolahan erred in the present case. However, in respect of the other offence for which CP was sentenced and where the Judge had not exposed his reasoning in determining the non-parole period and the balance of the term, the Court was not prepared to find that the Judge had made the same error.*
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> > *[28] In Tobar the Court concluded that the sentencing judge had determined the non-parole period before deciding upon the balance of the term in respect of each of the applicants then before the Court in the same way as he had done when sentencing CP. The Crown conceded that this error had taken place. The Judge wrongly determined the length of the non-parole period before taking into account the existence of special circumstances.*

In *DPP (NSW) v RHB* [2008] NSW CCA 236, Basten JA (Hislop & Price JJ agreeing) cautioned:

> [18] *The language of s 44 of the Sentencing Procedure Act requires that "the court is first required to set a non-parole period for the sentence": sub-s (1). In terms of pronouncing sentence, it is necessary to take that step first, then identify the balance of the term and thus the resulting sentence. However, it is well-established in terms of principle that the exercise of discretion does not require that the trial judge first determine what is the appropriate period of mandatory imprisonment, with the balance of the term being dictated by the arithmetical step of adding a defined proportion (always absent special circumstances). Rather, the Court must give consideration to the overall effect of the sentence in order to determine whether it is the appropriate sentence for the offence: Hampton (1997-1998) 44 NSWLR 729, 732B-C (Spigelman CJ, Powell JA and Newman J agreeing); Moffitt (1990-1991) 20 NSWLR 114, 116B (Samuels JA). Were it otherwise, a finding of special circumstances might result in a disadvantageous calculation from the perspective of the offender, by extending the sentence period inappropriately. On the other hand, it would also be erroneous to fix the term of the sentence and assess the relevant non-parole period as a proportion of the overall term. The sentencing exercise requires a more nuanced approach, so that the term and the non-parole period are both appropriate in the circumstances, taking into account, in many cases, questions of accumulation, where there are a number of offences, and questions of totality, which may require adjustment of the individual sentences or non-parole periods to achieve an outcome which is not disproportionate to overall criminality.*

The Public Defenders submit that consideration be given to amending s 44 to require the Court to set a total sentence and then to set a minimum term as the period which an offender is not eligible for release on parole.

This 'top down' approach would not create difficulties in the context of the standard minimum non-parole legislative regime. The High Court in *Muldrock v The Queen* (2011) 244 CLR 120 held that the fixing of a non-parole period is one part of the larger task of passing an appropriate sentence and is not to be treated as if it were a necessary starting point or the only important end-point in framing of the sentence: at [17].

The standard minimum non-parole period is relevant, in the same way that the maximum penalty is relevant; as a guidepost. It is one factor to be taken into account amongst the full range of factors in the sentencing exercise. A 'top down' approach to sentencing is less confusing and less liable to lead to error.

Question 5.3

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

Given the importance of public safety in the objectives of sentencing, all sentences should aim to rehabilitate and contain offenders. Many of the solutions to offending behaviour lie outside the prison system, through effective social integration of offenders. Maintaining

stable employment, a home and family relationships are more difficult to achieve inside prison, and it is in the community's interest that the necessary range of treatment and support services be applied.[3]

There is no evidence that short-term gaol sentences are effective in reducing recidivism rates or facilitating rehabilitation. Indeed, offenders are less likely to receive the benefit of rehabilitative programmes within gaols if they are serving short sentences. A short-term gaol sentence could also exacerbate the factors associated with crime as offenders may lose their homes or jobs and become separated from family or community support networks.[4] These concerns are particularly relevant to female prisoners, juveniles and offenders with a cognitive impairment.

Sentences of six months or less do not provide prisoners with any form of supervision on release. Community-based sentencing options offer greater flexibility and support to address and deal with the causes of an offender's behaviour.

In view of these shortcomings, we are of the view that sentences of six months or less are ineffectual in achieving some of the purposes of punishment. However, we recognise the potential problems with abolishing short sentences where there is insufficient resources to provide the required community based programs and the possible effect that this might have on length of sentences by what is referred to as "sentence creep".

The limitations on alternatives to full-time custody include the geographical limits on the operation of the Drug Court, the under-resourcing of Probation and Parole Services and limitations on rehabilitative programmes in regional New South Wales. In the absence of short terms of imprisonment, Courts may be tempted to impose higher sentences in circumstances where alternatives are not available due to geographical and funding limitations.

The Public Defenders are in favour of the implementation of justice reinvestment initiatives. It is only when resources currently spent on incarcerating offenders in prison can be redirected into community-based alternatives that we can effectively tackle the causes of crime.

We do not therefore support, at this stage, abolishing sentences of six months or less. In the absence of properly funded alternatives to full-time imprisonment, we are concerned there may be a degree of "sentence creep". However, we do support consideration being given to a pilot program targeting a group of offenders, such a female offenders. The pilot program should involve the abolition of six-month sentences in circumstances where justice reinvestment strategies are put in place. Such a pilot should be closely monitored to ascertain whether sentence creep is a legitimate concern.

If short prison sentences are retained, we endorse the view that consideration be given to the 'custody plus' scheme raised in the Report of the NSW Sentencing Council on 'Abolishing Prison Sentences of 6 Months or Less" (August 2004). Prison programs could

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[3] *Redesigning Justice*, Institute for Public Policy Research, July 2011.
[4] *ibid.*

be designed to address the needs of short-term prisoners by dividing the programs into workable modules which could be completed in custody and in the community.

Question 5.4
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? Should a court be required to state the individual sentences that would have been imposed if an aggregate sentence had not been imposed?

Section 53A has been in operation In New South Wales since 14 March 2011. There has been insufficient time to empirically assess the manner in which it is working in practice or whether it requires amendment. There has been one decision in the Court of Criminal Appeal where s 53A (1) was relied upon to re-sentence the applicant. In *Rosenstrauss v R* [2012] NSWCCA 25 the Court noted that under s 53A it is not necessary to indicate what the non-parole period would have been for each separate offence had separate sentences been imposed (s44(2C)) but that the Court is required to indicate to the offender, and make a record of, the sentence that would have been imposed for each offence had separate sentences been imposed: per Basten JA at [22].

In *DPP v Felton* [2007] VSCA 65, Kellam AJA at [47] emphasised the importance of transparency in the sentencing process:

> *In my view, to include an unstated element of accumulation in an aggregate sentence does not provide for the transparency required in the sentencing process. It does not enable proper analysis by the community, the offender, or an appellate court of the sentence and in particular of the unidentified component of the aggregate sentence.*

The Public Defenders support the present requirement that a court state the individual sentences that would have been imposed if an aggregate sentence had not been imposed by the court. Our support in this regard is based on the desire to maintain public confidence through transparency in sentencing and to allow appellate courts to discern how the sentencing judge viewed the gravity of the offences committed.

Question 5.5
Should a court be required to state reasons if the effective sentence does not reflect the special circumstances finding on the individual sentences?

In the absence of express reasons for imposing a sentence that does not reflect special circumstances, it might be inferred that a sentencing overlooked the effect of partial accumulation. The failure to reflect special circumstances in the absence of reasons has given rise to numerous appeals: *R v Nightingale* [2005] NSWCCA 147 at [39]-[46], *Dunn v R* [2007] NSWCCA 312 at [40]-[41], *Wakefield v R* [2010] NSWCCA 12 at [26]-[28] and *Barrett v R* [2011] NSWCCA 213 at [29].

In *Rios v R* [2012] NSWCCA 8, the Court upheld an appeal where insufficient reasons were given by the sentencing judge to explain the setting of the statutory ratio in excess of 75%. Adamson J (with whom Bathurst CJ and Simpson J agreed) said:

I consider that although the sentencing judge's reasons were adequate to explain why his Honour did not find 'special circumstances' within the meaning of s44(2) of the Act, they were insufficient to explain why the proportion between the non-parole period and the total sentence was in excess of 75%, thereby leaving open the inference that the sentencing judge overlooked the effect of partial accumulation. Although a period of three months would ordinarily not attract the intervention of the Court, it is of some significance in the instant appeal, since it constitutes the difference between an appropriate sentence where there are no special circumstances found, and one which requires reasons to displace an inference of arithmetical error.

Where a court is required to sentence an offender in relation to several offences, it is required by *Pearce v The Queen* (1998) 194 CLR 610 to consider and state a degree of accumulation of sentences, unless the court imposes an aggregate sentence pursuant to s 53A. In doing so, a court should be required to state reasons if the effective sentence does not reflect a finding of special circumstances or where the effective sentence is in excess of the statutory ratio. The requirement to do so would, in our opinion, reduce the occasions where it might be inferred that a judge overlooked the effect of partial accumulation or where the sentence is potentially infected by arithmetical error.

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

The Public Defenders support the suggestion made by the NSW Legal Aid Commission in its preliminary submission that the three-year limit in s.50 should be extended to five years. Accepting that sentences have been increasing in general, offenders who may have met the criteria for automatic release in the past will no longer do so.

Sentence proceedings ordinarily involve the provision of psychological/psychiatric reports, juvenile justice or pre-sentence reports and other evidence relevant to the subjective circumstances and attributes of an offender that might impact upon a court's assessment of likelihood of re-offending. Indeed, sentencing judges are called upon everyday to make a forecast about the offender's future prospects of rehabilitation. We are of the view that the court is therefore in a position to make determinations about the offender's suitability for release to parole in the event that the current three-year limit is extended to five years.

Question 5.7
Should back end home detention be introduced in NSW?
If so, how should a person's eligibility and suitability for back end home detention be determined and by whom?

South Australia is the only jurisdiction that provides for 'back end' home detention by virtue of s 37A of the Correctional Services Act 1982. We are not aware of any research conducted as to the practical implementation of the provision. We note that s 37A invests an 'absolute' discretion in the Chief Executive Officer to release a prisoner from prison to serve a period of home detention where the prisoner has served at least one half of the

non-parole period and where there is one year or less before the end of the non-parole period.

The Public Defenders see the value in a back end home detention as a way of assisting the reintegration of prisoners into the community and as an incentive for good behaviour whilst in prison. The benefits of such a sentence to an offender and to the community lie in its capacity to provide a staged release into the community, particularly if rehabilitative or employment programs are offered as part of supervision.

There are particular offenders who might benefit from 'back end' home detention. One such category is female prisoners; mothers with a young child/children would benefit from release on a back end home detention order to resume a relationship with that child/children.

Further research and discussion is required to formulate a satisfactory scheme that strikes a balance between sentencing options that encourage rehabilitation and the concept of truth in sentencing. We acknowledge the difficulties involved in requiring a sentencing court to determine at the time of sentence to predict whether or not a prisoner will have a suitable residence in which to serve the home detention component. For a sentencing court to properly make that prediction, the matter would have to come back before the court when the first portion of the offender's sentence is nearly complete.

We recommend that consideration be given to further research and discussion about the introduction of back end home detention in relation to particular categories of offenders whose personal circumstances are such as to constitute good reasons for their release.

Question 5.8
Should the sentencing jurisdictional limits in the Local Court be increased and, if so, by how much?
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?

There are several reasons not to increase the jurisdictional limits of the Local Court at present.

Firstly, there is no guarantee that an increase in the jurisdictional limit will involve prosecutions being taken over by the NSW Office of the Director of Public Prosecutions (DPP). Before any initiative is taken to increase the jurisdictional limit of the Local Court, there should be a requirement that the DPP appear in Table 1 matters.

It remains inappropriate to have police prosecutors appearing in matters involving the police, particularly where there are issues of credibility involving police witnesses in contested hearings; it is important that impartiality be seen to apply with a separate prosecution service from the police force. Further, police prosecutors who are not admitted legal practitioners do not have the same standards of ethical obligations as do legal representatives under legislation.

An increase of jurisdictional limit will invariably involve an increase in the number of sexual assault matters that could be dealt with in the Local Court. These matters require particular knowledge and expertise, more likely held by DPP lawyers.

Secondly, Local Courts already deal with a very large volume of work. Magistrates are over worked and under resourced. Any move to increase the jurisdictional limit of the Local Court has to be accompanied by a realistic increase in the allocation of resources so as to ensure the fair and efficient administration of justice.

Thirdly, although there has been an increasing frequency of indictable matters prosecuted in the Local Court, the prosecutor can elect to have the matter dealt with on indictment if the seriousness of the matter is considered such as to warrant being dealt with in the District Court: s 260 *Criminal Procedure Act*. It does not automatically follow that the jurisdictional limit must be increased so as to adequately sentence offenders. In those cases where the prosecutor believes that the sentencing options are not proportional to the seriousness of the offence, an election can be made.

Fourthly, we are concerned that sentences imposed by the Local Court may increase if the limit is increased. Whilst an offender has a right of appeal to the District Court, if he/she is refused appeal bail, they could remain in custody for significant periods before their appeal is heard. This delay is of particular concern in rural centres where the District Court does not sit permanently.

Fifthly, an appeal from the District Court is to a three-judge Bench of the CCA, whereas an appeal from the local Court is to a single judge Bench of the District Court. It is appropriate that serious matters attracting a maximum sentence above the current jurisdictional level of the Local Court continue to have recourse to the CCA.

The Public Defenders do not support an increase in the jurisdictional limits of the Local Court. Furthermore, in view of the existence of s 260 of the *Criminal Procedure Act* whereby the prosecutor can elect to have a matter dealt with in the District Court and, in the absence of evidence that the jurisdictional limit is inadequate, we do not support an amendment to the legislation allowing a magistrate 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.

Chapter 6: Intermediate Custodial Sentencing Options

Question 6.1
Is the compulsory drug treatment order sentence well targeted?
Are there any improvements that could be made to the operation of compulsory drug treatment orders?

The Public Defenders support the main goals of the compulsory drug treatment scheme. Although the CDTP is coercive, participants felt their participation in the CDTP was

voluntary, which is encouraging evidence that offenders genuinely wanted to change their behaviour.[5]

We are strongly of the view that the program should be urgently expanded to include female offenders and offenders sentenced in regional courts. It is also important that persons with a mental illness, although excluded from this program, have alternative programs available to them to deal with their addiction. We note with interest the background paper observations that the Dutch counterpart program has been expanded to include offenders with psychiatric problems. According to the background paper such offenders are not excluded from the NSW program *per se*, we wonder whether the Dutch program may be a useful blueprint for NSW. We also note that it includes non-drug dependent offenders, and are interested o learn more about this aspect, as well.

Question 6.2
Is home detention operating as an effective alternative to imprisonment?
Are there cases where it could be used but is not? If so what are the barriers?
Are there any improvements that could be made to the operation of home detention?

It is important to gather an understanding of why the option of home detention has declined; whether, for example, there is a falling off of offenders being deemed suitable, a countervailing increase in other non-custodial sentencing options or perhaps a more appropriate targeting of suitable offenders. Without this information, even if only anecdotal, it is impossible to sensibly respond to this situation. Nevertheless we are of the view that home detention orders are retained as an alternative to full-time custody.

Home detention orders can operate as an effective alternative to imprisonment particularly in cases of female offenders and offenders with a cognitive impairment.

We suggest greater flexibility in relation to the list of offences that render an offender ineligible for home detention. For example, an offender should not be automatically ineligible for home detention in cases involving an offence of assault occasioning actual bodily harm, where the victim is not a co-resident.

We are of the view that the maximum duration of home detention orders be increased from 18 months to two years. We disagree that increasing the maximum necessarily involves a re-evaluation of the jurisdictional limit of two years in the Local Court.

Question 6.3
Are intensive correction orders operating as an effective alternative to imprisonment?
Are there cases where they could be used, but are not? If so, what are the barriers?
Are there any improvements that could be made to ICOs?

The Public Defenders support ICOs as an alternative to full-time imprisonment. We are concerned that it is apparently being viewed at an appellate level as a lenient option, not to be regarded in the same way as a custodial sentence, which is not our understanding of

[5] J Dekkar, K O'Brien and N Smith, *An Evaluation of the CDTP* (NSW Bureau of Crime Statistics and Research) 2010 at page viii.

the intention of the Sentencing Council or of the government, when it was introduced. See for instance Simpson J (Hislop and Latham JJ agreeing), referring to Intensive Corrections Orders, in *R v Boughen* [2012] NSWCCA 17 at [111]:

> *... an order that the sentence be served in the community, even with the restrictions it necessarily carries, and any additional restrictions imposed by the sentencing judge (such as abstention from alcohol), is a sentence that has inherent in it a high degree of leniency.*

It may be that, in due course, an appellate view will develop that places ICOs on a higher rung of onerousness, which in our view is where it properly belongs. See for example a slightly more stringent view in *Whelan v R* [2012] NSWCCA 147, where the CCA dismissed a Crown appeal against leniency of sentence where an ICO was imposed for a s. 52A(1)(c) offence [Crimes Act, 1900 (NSW)] of dangerous driving occasioning death. *Per* Schmidt J at [120]:

> *It seems to me that the Crown's submission that an intensive correction order reflects a significant degree of leniency may be accepted, but that still it may not be overlooked that such an order involves a substantial punishment ... .*

Nevertheless it is disheartening to see what may be regarded as a "watering down" of the policy behind the development and introduction of this option. We are of the view that a legislative amendment that re-states that policy (that an ICO is an onerous sentencing option, not to be regarded as significantly more lenient than imprisonment) is required.

We raise the following concerns for consideration in an effort to improve their operation:

1. More flexibility in the assessment process so that offenders are not assessed as unsuitable solely because substance abuse issues might prevent them from undertaking the community service component.
2. ICOs should be available throughout the State;
3. A lack of work in rural areas unfairly discriminates against offenders in regional NSW. Concerted effort should be made to liaise with local Councils and Aboriginal organisations to find work placements;
4. ICOs should be extended to three years to better provide for effective rehabilitation;
5. More flexibility is required in the assessment process as many offenders with mental illness issues, unsuitable housing or drug and alcohol problems are being assessed as unsuitable.

Question 6.4
Are suspended sentences operating as an effective alternative to imprisonment?
Are there cases where suspended sentences could be used, but are not? If so what are the barriers?

The Public Defenders are in favour of retaining suspended sentences. We support an increase in the maximum length to three years and an increase in the maximum period of a bond to five years. We are also of the view that courts should have a wider discretion when addressing a breach of a suspended sentence, particularly if the bond is close to its expiration.

We agree with the submission of the NSW Law Society that the expression 'good reasons to excuse the breach', should be expanded so as to expressly allow the court to take into account matters that go to the nature of the breach, matters preceding and post-dating the breach, and subjective matters that a court considers relevant. We are also of the view that there should be a distinction between breaches caused by non-compliance with a condition of the bond and breaches constituted by re-offending. In relation to breaches caused by further offending, it is suggested that revocation should not be mandatory and that the courts have the power to vary or impose conditions in addition to the option of revocation.[6]

Question 6.5
Should the 'rising of the court' continue to be an available sentencing option?
If so, should the penalty be given a statutory base?
Should the rising of the court retain its link to imprisonment?

The 'rising of the court' is often used where an offender has spent a sufficient period in custody on remand or where an offender is being dealt with in relation to several counts. We support its retention; it is a useful sentencing option for such cases. We do not see the need for a legislative base, or reaffirming its link to imprisonment.

Question 6.6
Should any of the maximum terms for the different sentencing options be changed?

We are of the view that the maximum terms for some of the non-custodial options should be increased; suspended sentences be increased to three years, home detention to two years and ICOs to three years.

We are not in favour of the Local Court's jurisdiction being increased from two to three years. There is a mechanism under the Criminal Procedure Act for an election to be made in cases where the seriousness of the offence warrants the matter being dealt with in the District Court, which operates to address cases where the Local Court jurisdiction is considered inadequate.

In the event that the Local Court jurisdiction is increased, we strongly submit that appropriate additional resources be invested into the Local Court system to deal with the increase in workload and that prosecutions be taken over by the ODPP. Non-practising police prosecutors are not subject to the same ethical rules and obligations as are legal representatives.

Question 6.7
What other intermediate custodial sentences should be considered?

As noted above, we are interested to learn more of the changes to the Dutch counterpart to Drug Courts, particularly as they apply to non-addicted offenders. We wonder if this

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[6] *Suspended Sentences*, Sentencing Council Report December 2011, p 47.

includes other characteristics amenable to treatment that is linked to repeated serious offending behaviour.

Question 6.8
Should further consideration be given to the re-introduction of periodic detention? If so:

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

We do not favour a reintroduction of periodic detention unless it applied to regional areas as well as metropolitan areas, and only if suspended sentences are removed as a sentencing option.

Chapter 7: Non-Custodial Sentencing Options

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

We strongly support the retention of community service work as a sentencing option. Offenders are generally motivated when they have a purpose in which to constructively occupy their time. This is particularly evident in indigenous communities in rural NSW where offenders are given an opportunity, through community service work, to be useful in their community.

Question 7.2/7.3
Is the imposition of a good behaviour bonds under s 9/s10/s12 working well as a sentencing option? What, if any changes should be made?

Section 9 bonds are a useful sentencing option for offenders with a minor record who require some form of guidance and supervision. We are in favour of the retention of s 9 bonds as a sentencing option. The general provisions governing good behaviour bonds are working well and should be retained.

Question 7.4
Are the provisions relating to fines in the Crimes (Sentencing Procedure) Act 1999 (NSW) working well, and should they be retained?
Should the provisions relating to fines in the Crimes (Sentencing Procedure) Act 1999 (NSW) be added to or altered in any way?
Where a particular offence specifies a term of imprisonment but does not specify a maximum fine, how should the maximum fine be calculated?

It is important that a court imposing a fine have regard to the financial circumstances of the offender. Offenders overwhelmingly come from deprived socio-economic backgrounds. Monetary penalties may put a strain on the family unit. However, we accept that fines are a legitimate penalty and should be retained.

Where a particular offence specifies a term of imprisonment but does not specify a maximum fine consideration could be given to the procedure available under *The Crimes Act 1914* (Cth) where the maximum fine in penalty units is calculated by multiplying the maximum sentence for the offence (in months) by five. However, we have no concluded view about this.

Question 7.5
Is the recording of no other penalty under s 10A of the Crimes (Sentencing Procedure) Act 1999 (NSW) working well and should it be retained?
What changes, if any, should be made to the provisions governing the recording of no other penalty or to its operational arrangements?

The public Defenders no first -hand knowledge of the operation of s 10A. However, we recognise that it has some utility as a sentencing option and should therefore be retained.

Question 7.6
Are non-conviction orders under s10 10A of the Crimes (Sentencing Procedure) Act 1999 (NSW) working well as a sentencing option and should they be retained? What if any changes should be made?

S 10 bonds are a useful sentencing option particularly for first time offenders in employment, studying or, for some other reason, would be adversely affected by having a criminal conviction.

There is some substance in the view that courts may be more likely to use a non-conviction order to avoid imposing a mandatory license disqualification. This is particularly so in rural areas where disqualification orders can have disastrous effects on offenders and their families.

We endorse the recommendation of the Sentencing Council with respect to 'good behaviour licenses'.

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

To the extent that courts could make other non-custodial options or ancillary orders in conjunction with a non-conviction order, such a power should be narrowly construed and limited to making compensation orders or undergoing rehabilitative programs.

Questions 7.8 and 7.9

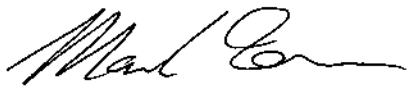
The Public Defenders have no particular view in relation to the possible sentencing option of a "fine in trust".

Question 7.10
Should Work and Development Orders be adopted as a Sentencing Option?

Public Defenders are in favour of this sentencing option.

We are happy to provide further assistance with this reference if required.

Yours faithfully,



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