The Shopfront
YOUTH LEGAL CENTRE

NSW Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

7 September 2012

By email

Dear Sir/Madam

Sentencing: Question Paper 8: Structure and hierarchy of sentencing options

The Shopfront Youth Legal Centre welcomes the opportunity to make a submission to this reference.

About the Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under. Established in 1993 and based in Darlinghurst in inner-city Sydney, the Shopfront is a joint project of Mission Australia, the Salvation Army and the law firm Freehills.

The Shopfront's main area of practice is criminal law. Two of our solicitors are accredited specialists in criminal law; one is also an accredited specialist in children's law. Our four solicitors appear almost daily for vulnerable young people in the Local, Children's, District and occasionally Supreme Courts.

The Shopfront's clients come from a range of cultural backgrounds, including a sizeable number of indigenous young people. Common to nearly all of our clients is the experience of homelessness: most have been forced to leave home due to abuse, neglect, domestic violence or extreme family dysfunction. Most of our clients have limited formal education and therefore lack adequate literacy, numeracy and vocational skills. A substantial proportion also have a serious mental health problem or an intellectual disability, often co-existing with a substance abuse problem.

Scope of this submission

Although the Shopfront is a youth legal service, and has expertise in children's matters, the majority of our clients are in fact young adults aged 18 to 25. We therefore have an extensive working knowledge of adult sentencing law and practice. In accordance with the terms of reference, our submission is confined to adult sentencing issues.

Time does not permit us to make a more comprehensive submission. However, we would welcome the opportunity to make further comments or to attend consultations if you consider this would be helpful. In this regard, please do not hesitate to contact me, preferably by email at [redacted]

Yours faithfully

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THE SALVATION ARMY
Mission Australia
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Sentencing: Question Paper 8: The structure and hierarchy of sentencing options

Question 8.1: Hierarchy of sentences

Should the Crimes (Sentencing Procedure) Act 1999 (NSW) set out a hierarchy of sentences to guide the courts? What form should such a hierarchy take?

The *Crimes (Sentencing Procedure)* Act already provides a hierarchy of sorts; at least, this is the way it is commonly understood by practitioners and courts. We do not see the need for a more formal hierarchy of sentencing options.

There is also a danger that a formal hierarchy may result in a loss of flexibility. It may be difficult to place each sentencing option precisely within this hierarchy. For example, a fine is generally thought to be less onerous than a section 9 bond, but for many of our clients a fine is a more onerous sentencing option because of the lack of capacity to pay. Similarly, a community service order may be more onerous than a suspended sentence although it is generally understood to be lower down in the hierarchy.

Question 8.2: The need for flexibility

Should the structure of sentences be made more flexible by:

a. creating a single omnibus community-based sentence with flexible components;

Conflating all community-based sentences into one may pose some problems.

The current range of community-based sentencing options forms a hierarchy of sorts, and the ability to impose one of these options in preference to another allows the court to communicate its views about the severity of the offence. There are also different responses to a breach depending on the nature of the community-based order imposed. We are concerned that a single order allowing for numerous conditions may foster more onerous sentencing outcomes and may also impact adversely on transparency and consistency.

b. creating a sentencing hierarchy but with more flexibility as to components;

As discussed in our response to Question 8.1, we do not believe there is a need for sentencing hierarchy beyond the one that is currently generally understood to exist.

c. allowing the combination of sentences; or

We believe it would be useful if the courts were permitted to impose certain combinations of sentences, particularly a bond in combination with a community service order, or possibly a fine in conjunction with a section 10 bond.

However, there is a potential for net-widening, and this would have to be given careful consideration. We note that it is currently possible to impose a section 9 bond in combination with a fine. Our clients are frequently sentenced to section 9 bonds but rarely is a fine also imposed. This suggests that magistrates have some appreciation of our clients' lack of capacity to pay, and believe that there is little to be achieved by imposing a fine.

d. adopting any other approach?

We do not have any suggestions for alternative approaches.

Question 8.3: Particular sentencing combinations

1 What sentence or sentence component combinations should be available?

We believe this needs careful thought so as to provide flexibility without inappropriate net widening.

In principle we support the combination of:

- A section 9 or section 12 bond combined with a Community Service Order;
- A fine combined with a section 10(1)(a) dismissal or section 10(1)(b) bond;
- A relatively short fixed term of imprisonment followed by a section 9 bond.

2 Should there be limits on combinations with:

a. fines;

In general, we do not support fines being imposed in combination with other sentencing options with a strong punitive element (e.g. imprisonment, CSO).

b. imprisonment; or

We support, in principle, the combination of a fixed term of imprisonment with a bond, as outlined in the Question Paper. This would allow the court to impose a short custodial sentence where it is thought that custody is absolutely necessary for the purposes of punishment or deterrence, or to allow the offender to stabilise and make proper arrangements for their release into the community. This would be followed by a section 9 bond, which would allow the offender to be subject to a longer period of supervision than would be permissible under a parole order. It would also provide much greater flexibility and fairness in the event of a breach.

In general we do not support the combination of imprisonment with other sentencing options whose purpose is primarily punitive (e.g. a fine or a CSO).

c. good behaviour requirements?

We do not support the imposition of a good behaviour requirement in combination with any other sentence, except in the situation where a bond is imposed in conjunction with a fine or CSO.

The Shopfront Youth Legal Centre
September 2012

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By email

Dear Sir/Madam

Sentencing: Question Paper 9: Alternative approaches to criminal offending

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Scope of this submission

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Yours faithfully

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Sentencing: Question Paper 9: Alternative approaches to criminal offending

Question 9.1: Early diversion

Should an early diversion program be established in NSW? If so, how should it operate?

We support, in principle, the establishment of an early diversion program for adults in NSW.

The *Young Offenders Act*, which has been operating for juveniles in NSW since 1998, provides a sound model that could be adapted for adult offenders.

Presumably the scope of offences eligible for diversion under an adult scheme would not be as broad as those currently covered by the *Young Offenders Act*. The scheme would also need to be adapted to recognise that there are differences between juvenile and adult offending, and differences in the way a criminal justice system responds to such offending. However we are of the view that many features of the *Young Offenders Act* (including the system of checks and balances which aim to ensure that diversion is appropriately utilised and that accused persons' rights are protected) could be successfully adapted to adults.

It would be important that a diversionary scheme, with the exception of informal warnings and unconditional cautions, be run by a body independent of the police.

While we support some features of the conditional cautioning system which operates in England and Wales, we are strongly opposed to such a system being run by the police, DPP or any other prosecuting authority. While we have no issue with police administering informal warnings or unconditional cautions (as is currently the case with the *Young Offenders Act* in NSW), we see a real danger in allowing a policing or prosecuting body to impose conditions.

In our submission on *People with cognitive and mental health impairments in the criminal justice system* (Consultation Paper 7: Diversion) we made some comments about the potential for a police cautioning scheme (see our response to Issues 7.1 and 7.2). We note that a pre-court diversion scheme for people with cognitive and mental health impairments has been recommended by the NSWLRC in its recent Report 135 on *People with cognitive and mental health impairments in the criminal justice system: Diversion.*

It would be important for any pre-court diversionary scheme to be accompanied by appropriate funding so that people are diverted to support services when necessary. If the pre-court diversion model requires the person to admit the offence, it is also vital that there be funding for people to obtain legal advice before making admissions and agreeing to participate.

Question 9.2: CREDIT program

Is the Court Referral of Eligible Defendants into Treatment program operating effectively? Should any changes be made?

In our limited experience with the CREDIT Program at Burwood (the only metropolitan Local Court where it currently operates) the program is operating very effectively.

CREDIT helps break down barriers that disadvantaged people often face when seeking access to services. Crucially, CREDIT can provide support at an early stage of criminal proceedings, without the need to enter a plea. In our experience, disadvantaged people are often subject to bail conditions such as residential, reporting and curfew conditions, without the necessary support to enable them to comply. It is not uncommon for these conditions to be breached and for the defendant to be refused bail as a result. These issues have been discussed in some detail in our submission to the NSWLRC's recent reference on bail law. The provision of support via a program such as CREDIT or MERIT greatly assists with bail compliance, and indeed sometimes alleviates the need for courts to impose such prescriptive bail conditions.

In our experience, the CREDIT Program has also assisted the courts by providing evidence of a defendant's capacity for rehabilitation, and gives the court more confidence in imposing non-custodial sentencing options.

We are aware that pre-plea programs such as MERIT and CREDIT are sometimes criticised because they amount to some form of court-imposed sanction on people who have not been found guilty of any offence, and ultimately found not guilty. We respectfully disagree; although some magistrates may strongly encourage defendants towards CREDIT or MERIT, in our experience, participation in these programs is genuinely voluntary. Further, people who are not guilty of any offence frequently have sanctions imposed on them in the form of onerous bail conditions or even remand in custody. As discussed above, a program like CREDIT can manage the risks of "absconding" or re-offending on bail in a more appropriate way by providing support rather than simply imposing sanctions.

Case study: Thomas

Thomas is an 18-year-old man who arrived at court bail refused on charges of committed were larceny and entering inclosed lands.

The court soon discovered that he was a homeless young man who had been living in a friend's car for 9 months. When Thomas was 16 years old his mother, who struggled financially, moved into a bedsit and Thomas was no longer able to live with her. He lived in a boarding house for a short time, but when he became unemployed he soon became homeless because he could no longer able to afford to pay the rent. He was unaware of his entitlement to Centrelink and had never received Centrelink benefits despite his eligibility from the time he was 16 years of age.

Thomas' charges concerned him entering a service station that had closed down, and collecting scrap metal that he planned to sell to afford some basic necessities.

The magistrate decided that the CREDIT program would be of benefit to Thomas.

The CREDIT program addressed a number of criminogenic areas of concern. Firstly, Thomas was referred to the Shopfront Youth Legal Centre to assist with his legal needs. Thomas was also linked in with Don Bosco Youth Refuge, where he was provided with a level of stability that he had not experienced since leaving home. Further, Thomas was provided with support and guidance in completing the relevant Centrelink forms and soon was in receipt of some income. Thomas was also provided with alcohol and other drug counselling and vocational guidance.

The final CREDIT report described his participation in the CREDIT program as excellent. The referrals made by CREDIT enabled the Shopfront Youth Legal Centre to assist Thomas in successfully making an application for a Work and Development Order with the State Debt Recovery Office in order to settle his many fines (largely for travelling on trains without a ticket) that he had accumulated during his period of homelessness.

Case study: Brian

Brian has a background of abuse, neglect, homelessness, substance abuse, and very poor literacy and numeracy skills. He has a lengthy criminal history, including several offences of driving while unlicensed and subsequently driving while disqualified. Traditional criminal justice interventions were not working to prevent Brian from re-offending.

For his most recent charges Brian was referred to the CREDIT program, which organised a referral to a dyslexia clinic. This paved the way to a full psychological assessment which resulted in him being diagnosed with an intellectual disability and receiving more targeted support services than he had previously received.

Brian's problems (and his offending) are by no means over. In our opinion, he will need ongoing support and case management for years to come. However, CREDIT was an important step in identifying and accessing the support he needs to stop offending and live a more fulfilling life.

We would like to see CREDIT rolled out to more Local Courts. We note that the NSWLRC's recent Report 135 on *People with cognitive and mental health impairments in the criminal justice system: Diversion* recommends the roll-out of CREDIT.

We also support the idea of a program tailored to the needs of defendants with cognitive and mental health impairments, which would also facilitate psychological and psychiatric assessments and the development of case plans for orders under section 32 of the *Mental Health (Forensic*

Provisions) Act. We refer to our discussion in our submission on *Young people with cognitive and mental health impairments in the criminal justice system* (see our response to Question 11.21).

We would also like to see a similar program, adapted to the needs of children, available in the Children's Court.

We have one final recommendation about the eligibility criteria for CREDIT. Currently, people who are under the supervision of the Probation and Parole Service are ineligible for CREDIT. We understand this is based on the premise that these people will already be receiving support from Probation and Parole. Regrettably, we have found that this assumption is often misplaced.

In our experience the Probation and Parole service does not always provide adequate support or make appropriate referrals. We believe this is largely due to resource constraints and to a lack of appropriately skilled probation officers (and also partly due to what we see as a shift away from the social work approach previously adopted by Probation and Parole). The case study below illustrates one such situation, which is not an isolated example.

We would recommend that this exclusionary criterion be removed. The level of support a defendant is receiving from Probation and Parole (or from any other agency) could be a relevant factor in a suitability assessment.

Case study: Jamal

Jamal, age 21, has a mild intellectual disability and was placed on a supervised section 9 bond for driving while disqualified. Probation and Parole identified that Jamal had a problem with cannabis and sent him to a group-based alcohol and other drug program. Probation and Parole were apparently unaware of Jamal's intellectual disability, even though there was a comprehensive psychological assessment provided to the sentencing court.

Jamal went to one group counselling session and did not return, partly because he found the group environment very difficult and partly because of difficulties with personal organisation and transport. Probation and Parole breached him for failing to complete the group program, although Jamal had not re-offended and his cannabis problem was not closely linked to his offending.

When Jamal was facing breach proceedings at court, we thought the CREDIT program could be of great benefit to him. At our suggestion, the magistrate deleted the supervision component of the bond (as the court has power to do when dealing with breach proceedings), adjourned the matter for Jamal to complete the CREDIT program, and ultimately took no action on the breach.

Question 9.3: MERIT program

Is the Magistrates Early Referral into Treatment program operating effectively? What changes, if any, should be made?

Many of our comments about the CREDIT program also apply to MERIT. However, as MERIT has been running for several years and is now available at most Local Courts, we have had many more clients participate in MERIT than CREDIT.

In our view, MERIT is a very effective intervention which often succeeds after other attempts at rehabilitation have failed. Strengths of the MERIT program include:

- Because it is available at an early stage of criminal proceedings, without the need to enter a plea, it can be put in place when the time is ripe for a defendant to address their drug-related problems.
- By providing streamlined access to alcohol and other drug services, it helps break down the barriers that people often face in accessing rehabilitation programs.
- We have found that MERIT teams have been able to engage some of the most disadvantaged "difficult" clients whose needs are not always met by other services.
- Significantly, MERIT is based on a harm minimisation approach, and recognises that abstinence from drugs is not an appropriate and achievable goal for everyone.

The main change we would recommend to the MERIT program is that it be made available to people whose primary (or only) drug of dependence is alcohol or prescription drugs. Very often,

offenders will have problems with alcohol and with other drugs. However, there is a significant number of people who abuse only alcohol or prescription drugs, and they would also benefit from a program such as MERIT.

Case study: Nathan

Nathan is a young Aboriginal man who, until he was 18 years of age, had a fairly limited criminal history. At 18, while he was intoxicated and in the company of a cousin, he participated in a break, enter and steal. He was placed on a supervised good behaviour bond and has been performing reasonably well under Probation and Parole supervision.

Unfortunately, Nathan got drunk one night and, again in the company of a friend, painted graffiti on a number of local houses and cars. He was charged with several counts of destroy/damage property. It was apparent to us that, although Probation and Parole had provided him with a reasonable amount of support, Nathan required some more targeted assistance with his alcohol and other drug problems.

Because Nathan had a problem with cannabis as well as alcohol, he was eligible for MERIT and was accepted onto the program. Nathan was able to do the MERIT program while his solicitor was reviewing the evidence and negotiating with the police about which charges Nathan would plead guilty to. Nathan has now completed the MERIT program and is due to be sentenced soon. We are optimistic that his performance on MERIT will help persuade the court to impose a non-custodial sentence and not to revoke his bond.

Case study: Daniel

Daniel is a young man with an intellectual disability and mental health concerns that are both complex and chronic in nature. Daniel's diagnoses include mild intellectual disability, Asperger's disorder, anxiety disorder, depression, substance abuse disorder and "possible emerging psychotic illness". He experienced chronic homelessness for a number of years before moving into a community housing property in March 2011. Daniel has a significant problem with poly-drug abuse and has appeared frequently before the courts for various offences connected to his substance abuse disorder.

For his most recent charges, Daniel was referred to the MERIT program. Despite his intellectual disability and the significant challenges associated with this, the MERIT team managed to engage him and he completed the program. For the first time Daniel accepted that he did in fact have a serious drug problem. He demonstrated a greater motivation to address and access support for his drug and alcohol issues. This has included attending a detoxification program at Gorman House and agree to a referral for further counselling regarding his drug abuse. He did not achieve abstinence but reduced his use to a significant extent. As the MERIT clinician pointed out in her final report, this was very significant for a person like Daniel who faced so many challenges.

The work done by the MERIT team, including the referrals following completion of the program, provided us with the basis for a case plan for an application under section 32 of the *Mental Health (Forensic Provisions) Act*. Daniel's charges were conditionally dismissed under section 32, a result that would have been highly unlikely without the support provided by MERIT.

Question 9.4: Drug Court

1 Is the Drug Court operating effectively? Should any changes be made?

Although we have had comparatively few clients participating in the adult Drug Court (for reasons that will be further explained below) our observations suggest that the Drug Court is working very effectively.

We are unable to comment on whether any changes are needed to the manner in which the program is run; our recommendations are relate to changing the eligibility criteria.

2 Should the eligibility criteria be expanded, or refined in relation to the "violent conduct" exclusion?

We support the roll-out of the Drug Court to other geographical areas. We have worked with a significant number of young adults who would have been excellent candidates for the Drug Court but who do not have the requisite connection with the Western Sydney or Hunter areas. We note there is now some limited Drug Court availability at the Downing Centre, but given the very small number of people it can accommodate, most of our clients are unlikely to gain entry to the program unless it is significantly expanded.

Case study – Mandy

Mandy is a 25-year-old indigenous woman who has been involved in the criminal justice system since she was 14. She has a long history of family conflict and homelessness, having been the victim of child sexual abuse and domestic violence. She also has a long-standing problem with alcohol and other drug abuse, and an emerging mental illness.

From a young age, Mandy turned to drug abuse as a way to cope with the trauma that she experienced. Mandy developed a very lengthy criminal history, including several stints in juvenile detention and adult correctional centres. Her record included shoplifting, break enter and steal, common assault and minor drug offences.

At age 23, Mandy broke into a house while under the influence of alcohol and other drugs. She charged with break and enter with intent to steal, and was refused bail. We made considerable efforts to have her assessed for a residential rehabilitation program, but such assessments are very difficult to facilitate while a person is in custody.

Mandy remained in custody on remand, then she pleaded guilty and received a full-time custodial sentence. Had the Drug Court program been available in her area, we believe it would have provided a realistic and appropriate alternative for the sentencing court.

We also support a broadening of the eligibility criteria to include some offences which are traditionally regarded as "violent" such as robbery (*Crimes Act* section 94) robbery in company (*Crimes Act* section 97(1)) and even less serious cases of armed robbery (*Crimes Act* section 97(1)) where the weapon was not used to assault or to inflict injury upon the victim. We would also support the inclusion of offences such as common assault and assault occasioning actual bodily harm. Robberies in particular are offences commonly committed by people who are dependant on prohibited drugs, in order to fund their drug use. If our clients are any indication, we would comment that most of these offenders are not inherently violent by nature, and the level of actual violence involved in such robberies is often low.

We have had many robbery offenders who would have been ideal candidates for the Drug Court had they been eligible. Of these offenders, some of the young men have been sentenced to terms of imprisonment and referred to the Compulsory Drug Treatment Program, and a few of our female clients have been referred to the Biyani program on a section 11 or section 12 bond. However, a significant number of our clients have missed out on these programs and have received custodial sentences which rarely afford them adequate access to alcohol and other drug programs.

Case study - James

James is a young man of 19 years of age who comes from a background of abuse, neglect and homelessness. He has a mild intellectual disability, severe substance abuse disorder and depression.

His father committed suicide when he was 2 years old. Shortly after this, his mother started a new relationship with a man who physically abused James on a regular basis. To cope with the violence he was experiencing at home, James started drinking alcohol and by age 12, he was smoking cannabis and injecting oxycontin and other drugs on a daily basis. James' drug habit quickly spiralled, as did his mental health problems, and James had various hospital admissions for drug overdoses and self-harm injuries. By age 15, James was involved in the juvenile justice system and had convictions for arson and break, enter and steal. James was kicked out of home at aged 16 and was forced into homelessness, sleeping in parks and staying at refuges.

In the early hours of New Year's Eve, James, whilst in the company of two young people, robbed a man whilst he was walking home. James punched the victim a couple of times in the face, without causing any injuries, and stole his mobile phone. James was heavily intoxicated at the time of the robbery and had used drugs some days prior.

James pleaded guilty to robbery in company and was sentenced to an 18-month suspended sentence. It was his first adult conviction.

Within four weeks of receiving the suspended sentence, James has two sets of new criminal charges. At least one of the new offences took place whilst James was intoxicated. It is possible that James will be found guilty of these new charges and his suspended sentence will be revoked. Given James' circumstances, it is unlikely he will be eligible for an ICO, and his offences render him ineligible for home detention.

We are of the view that, if it were available, a suspended sentence in the context of the Drug Court program would have been more appropriate for James. This would have provided James with better support to manage his substance abuse issues which are a key factor in his offending.

We would also support the expansion of the eligibility criteria to include people whose primary drug of dependence is alcohol or benzodiazepines.

We acknowledge that the expansion of the Drug Court in these ways would be very resource-intensive. However, we believe there is ample evidence of the cost savings (both in dollars and in human terms) that flow from funding the program.

Question 9.5: Section 11 adjournment

Is deferral of sentencing under s 11 of the Crimes (Sentencing Procedure) Act 1999 (NSW) working effectively? Should any changes be made?

We are of the view that section 11 is working effectively and provides a valuable tool for sentencing magistrates and judges.

We would comment that section 11 is occasionally used inappropriately, where the outcome would inevitably have been a section 9 bond. In such cases a lengthy bond is imposed after the period of section 11 remand, so that the offender receives a harsher sanction and a longer period under supervision than is really warranted.

However, in the majority of cases section 11 is used appropriately, in circumstances where a few months' demonstrated rehabilitation can make the difference between a full-time custodial sentence and an alternative such as a suspended sentence.

Question 9.6: Intervention programs under the Criminal Procedure Act

1 Is the current scheme of prescribing specific intervention programs operating effectively? Should any changes be made?

In our view it is preferable for intervention programs to have some legislative backing, to promote them being used more widely and consistently by the courts, and ideally to help ensure the continued funding of such programs. Since the Traffic Offender Program has been prescribed as an intervention program, it appears to us that different Local Courts have been more consistent in making referrals to programs; however, we have no "hard" evidence of this.

2 Is there scope for extending or improving any of the programs specified under the scheme?

While the Traffic Offender Program is beneficial for some offenders, and ultimately serves the needs of the community by promoting road safety, it does not serve the needs of most of our clients, who do not have a licence and (due to the legislative regime of mandatory and cumulative disqualification periods, which will be further discussed in our submission on Question Paper 11) cannot hope to obtain a licence for several years.

Our experience of the Forum Sentencing program has been disappointing. In our view it is soundly based on restorative justice principles, and there is no doubt that a well-run forum can meet the needs of victims, hold the offender accountable for their actions and often get to the root causes of

their offending. The program has the capacity to work well when it is able to draw on the offender's existing support networks.

However, the current Forum Sentencing program is unable to effectively deal with disadvantaged offenders, because it is not resourced to provide services, and the forum sentencing staff and facilitators do not always have the expertise to make appropriate referrals. We also have concerns about whether forum sentencing is being run in a culturally-appropriate way for offenders from Aboriginal and other cultural backgrounds.

There are also real questions about where Forum Sentencing should sit in the sentencing hierarchy. Currently it is aimed at offenders who are likely to receive a custodial sentence.

However, we have often seen forum sentencing referrals made in the case of relatively minor offences (eg graffiti) where the offender has little or no criminal history and where a custodial sentence is most unlikely. Some would suggest that forum sentencing is more appropriately directed at these lower level offenders, to provide some intervention before they become entrenched in the criminal justice system, and by the time a person is facing imprisonment there may be a need for more intensive intervention. However, we are concerned about net-widening, as a forum intervention plan can impose onerous obligations on an offender.

3 Are there any other programs that should be prescribed as intervention programs?

We note that MERIT and CREDIT do not appear to be prescribed as intervention programs by the Regulations. We find this a curious omission.

Question 9.7: Restorative justice

1 Should restorative justice programs be more widely used?

We are in favour of restorative justice programs when they are appropriately run and adequately resourced.

We would support their wider availability, but careful thought needs to be given to the aims of such programs and how they fit into the sentencing process. For example, should a restorative justice process be a sentencing option in itself, should it be a diversionary option (as with conferencing under the *Young Offenders Act*), should it be merely one step in the sentencing process (as with forum sentencing), or should it be an optional procedure following sentence (as with the post-sentence conferences run by the Restorative Justice Unit of Corrective Services)?

We note the comment in paragraph 9.153 of the Question Paper that "the evidence for restorative justice as a means of preventing re-offending is mixed". By way of contrast, we note the reference in paragraphs 9.67 to 9.69 of the question paper about the very positive evaluations of the MERIT program. Not only did MERIT significantly reduce recidivism but also led to substantial cost savings. This illustrates our point that programs are most effective in reducing recidivism when they involve the provision of treatment and support. The unimpressive research findings about recidivism rates after participation in restorative justice programs is reflective of a lack of resources or support to complete intervention plans. We believe that if resources were available to support forum intervention plans we may see the better outcomes in terms of recidivism.

Having said that, we would caution against relying too much on recidivism as a measure of the effectiveness of restorative justice. While reducing re-offending is an important goal of sentencing and diversionary programs, restorative justice also fulfils other important purposes, most notably providing victims with a meaningful opportunity to participate.

2 Are there any particular restorative justice programs in other jurisdictions that we should be considering?

We do not have sufficient knowledge of restorative justice programs in other jurisdictions to comment on this. However, as mentioned earlier in this submission, we believe the *Young Offenders Act* provides a sound model which could be adapted for adult offenders.

Question 9.8: Problem-solving approaches to justice

1 Should problem-solving approaches to justice be expanded?

We support the expansion of problem-solving approaches to criminal justice. It is trite to say that the purposes of sentencing will not be achieved without addressing the social problems that underlie much offending.

Some might argue that it is not the role of the courts to facilitate the provision of social support and services, that more services should be provided before people become involved in the criminal justice system, and that people should not have to be charged with an offence in order to get access to services. However, the reality is that people will inevitably slip through the net. For some people, being involved in the criminal justice system is a motivator for change and may encourage them to engage with services when they were previously reluctant to do so.

There is a risk that too much emphasis on "problem solving" may come at the expense of procedural fairness and may in some cases provide an inappropriate incentive for people to admit guilt in order to access programs. In our view it is still vital that we have a robust criminal justice system that encourages people to defend charges where appropriate. For this reason we favour models such as MERIT and CREDIT which are voluntary and which do not depend on admission of guilt.

2 Should any of the models in other jurisdictions, or any other model, be adopted?

Our Principal Solicitor has visited the Red Hook Community Justice Center in Brooklyn, New York, and was impressed with its apparent success in reducing crime and social problems in its community. In our opinion, this type of model could be successfully replicated here. The choice of appropriate judicial officers and staff, the involvement of the local community, and adequate resourcing would be crucial to the success of such a program.

We have not visited the Neighbourhood Justice Centre in Melbourne, and nor have we visited any similar programs in any other jurisdictions. We are therefore unable to comment on which model would be preferable.

Question 9.9: Any other approaches

Are there any other diversion, intervention or deferral options that should be considered in this review?

At this point we are not offering suggestions for any further programs.

However, we note with disappointment the recent withdrawal of funding for the Youth Drug and Alcohol Court and the Cedar Cottage program for child sex offenders.

Although the Youth Drug and Alcohol Court has not received a thorough evaluation (we understand there are many challenges associated with this), most participants and other stakeholders are of the view that it has been a successful and much needed program.

We note the comments at paragraphs 9.98 to 9.101 of the Question Paper about the Cedar Cottage Program and its positive evaluation. We find it disappointing that an evidence-based program which meets the needs of victims and families as well as offenders has been sacrificed to a wholly punitive approach.

The Shopfront Youth Legal Centre
September 2012

The Shopfront
YOUTH LEGAL CENTRE

NSW Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

7 September 2012

By email

Dear Sir/Madam

Sentencing: Question Paper 10: Ancillary orders

The Shopfront Youth Legal Centre welcomes the opportunity to make a submission to this reference.

About the Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under. Established in 1993 and based in Darlinghurst in inner-city Sydney, the Shopfront is a joint project of Mission Australia, the Salvation Army and the law firm Freehills.

The Shopfront's main area of practice is criminal law. Two of our solicitors are accredited specialists in criminal law; one is also an accredited specialist in children's law. Our four solicitors appear almost daily for vulnerable young people in the Local, Children's, District and occasionally Supreme Courts.

The Shopfront's clients come from a range of cultural backgrounds, including a sizeable number of indigenous young people. Common to nearly all of our clients is the experience of homelessness: most have been forced to leave home due to abuse, neglect, domestic violence or extreme family dysfunction. Most of our clients have limited formal education and therefore lack adequate literacy, numeracy and vocational skills. A substantial proportion also have a serious mental health problem or an intellectual disability, often co-existing with a substance abuse problem.

Scope of this submission

Although the Shopfront is a youth legal service, and has expertise in children's matters, the majority of our clients are in fact young adults aged 18 to 25. We therefore have an extensive working knowledge of adult sentencing law and practice. In accordance with the terms of reference, our submission is confined to adult sentencing issues.

Time does not permit us to make a more comprehensive submission. However, we would welcome the opportunity to make further comments or to attend consultations if you consider this would be helpful. In this regard, please do not hesitate to contact me, preferably by email at [redacted]

Yours faithfully

Jane Sanders
Principal Solicitor

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The Shopfront Youth Legal Centre is a service provided by Freehills in association with Mission Australia and The Salvation Army

THE SALVATION ARMY
Mission Australia
Freehills

Sentencing: Question Paper 10: Ancillary orders

Question 10.1: Compensation orders

Are compensation orders working effectively and should any changes be made to the current arrangements?

We are unable to make a general comment about whether compensation orders are working effectively. Most of our clients have little or no capacity to pay, and compensation orders are not often made against them.

We support the proposition that the court should take into account the amount of any compensation order when making a decision about imposing a fine. We also agree that compensation orders should take precedents over fines in terms of which is paid first.

Under no circumstances do we support the payment of compensation or any monetary amount as a condition of a bond (see our response to question 7.4 in our submission on Question Paper 7). We also have problems with the payment of compensation being made an enforceable condition of a forum sentencing outcome intervention plan.

We do not recommend any changes to current arrangements, except perhaps the provision of greater assistance for victims to pursue civil enforcement of unpaid compensation.

Question 10.2: Driver licence disqualification

1 What changes, if any, should be made to the provisions governing driver licence disqualification or to its operational arrangements?

We see the need for substantial changes in this area. The Shopfront Youth Legal Centre has made numerous submissions and representations in relation to this issue. Extracts from some of our submissions are attached as Appendix A to this submission.

We agree with the comments made in the preliminary submission of Magistrate Claire Farnan, referred to in paragraphs 10.31 to 10.33 of the Question Paper.

We agree with the option proposed in paragraph 10.34, i.e. removing the automatic 3-year disqualification period for a second offence of driving unlicensed (when the offender has not held a licence in the preceding 5 years).

However, this recommendation does not go far enough. The disqualification regime applicable to driving while suspended, unlicensed or disqualified is in urgent need of reform.

We would comment that paragraph 10.27 of the Question Paper is somewhat misleading as to the current state of the law. For a first offence of driving in breach of a fine-default suspension, the automatic minimum disqualification period is 3 months. For all other offences of driving while suspended, cancelled or disqualified, the automatic minimum disqualification is 12 months. For a second or subsequent offence of driving while suspended, cancelled or disqualified, the mandatory minimum disqualification is 2 years. Further, these disqualification periods are *cumulative* upon any existing suspension or disqualification.

In our view the mandatory disqualification periods of 12 months for a first offence and 2 years for a second subsequent offence are too long and should be reduced. However, the greatest evil is in the accumulation of these disqualifications. As far as we are aware, section 25A of the *Road Transport (Driver Licensing) Act* is the only provision in the Road Transport legislation which imposes cumulative disqualifications.

We have observed that these cumulative disqualifications have had a huge impact upon our clients, in a manner that is greatly disproportionate to the severity of the offending. The case studies below illustrate some of the problems that arise. We would emphasise that these case studies (even the apparently extreme case of Vicky) are not isolated examples.

Case study: Vicky

Vicky, aged 25, grew up in a dysfunctional family environment and was in the care of the Department of Community Services during her teens. Vicky was homeless for some years but with the help of an after-care service, has now been able to obtain Department of Housing accommodation.

As a young adolescent Vicky was diagnosed with various mental and developmental disorders. These have continued into adulthood and affect her ability to function in society.

While homeless during her teens, Vicky incurred a large number of fines, mainly for travelling on trains without a valid ticket. These fines were referred to the SDRO, and then to the RTA, which imposed a "customer business restriction". She was told that she would not be able to apply for a licence until her fines were paid in full.

Like many young people in her situation (with or without mental health problems) Vicky felt that she would never be able to pay off her fines, and would never be able to get her licence. She took the risk of driving without a licence, and not surprisingly was soon picked up by police and charged with driving unlicensed.

On her first conviction for driving when never licensed, Vicky received a small fine and no disqualification, but was soon charged with a second offence. Despite Vicky's mental health problems, the magistrate in this case felt that diversion under section 32 of the *Mental Health (Forensic Provisions) Act* was inappropriate for traffic offences. It must be said that the magistrate was prepared to extend Vicky some leniency, adjourning her case in order to give Vicky the opportunity to sort out her fines and apply for a licence.

The Shopfront Youth Legal Centre assisted Vicky in making annulment applications for some of her fines, and to make a time-to-pay arrangement for the others. Unfortunately, due to her poverty, mental health problems, and chaotic lifestyle, Vicky missed a couple of these payments. She also committed another unlicensed driving offence during the adjournment period, which disentitled her to any leniency the magistrate might have contemplated. The magistrate recorded a conviction and Vicky received the mandatory 3-year disqualification.

Since receiving her 3-year disqualification, Vicky has been charged several times with driving while disqualified. The first time, she faced a very understanding magistrate who was prepared to dismiss the charges under section 32 of the *Mental Health (Criminal Procedure) Act*, on condition that she accept psychiatric treatment and psychological counselling.

Unfortunately, the court's patience (and the limits of the discretion available under the mental health legislation) was soon to run out. Just before she turned 21, Vicky was charged with another instance of driving while disqualified. She had driven off to try to avoid the police, and so was also charged with dangerous driving. It is worth noting that this is the only time Vicky has ever been charged with an offence involving dangerous driving; to date, she has never been charged with a drink-driving offence, and has incurred only minor speeding offences.

Vicky was refused bail and spent almost 2 months in custody before being sentenced. She was sentenced to a 9-month prison term with immediate release on parole. This immediate release was granted only because Vicky was lucky enough to strike a very compassionate magistrate – the same one who had previously dealt with her under the mental health legislation. He recognised that keeping Vicky in jail would cause her to lose her housing and jeopardise any potential for rehabilitation.

Vicky spent the next 7 months on parole, and managed to complete it without re-offending. However, she has since been charged with further offences of driving while disqualified. The most recent of these occurred while fleeing a violent domestic situation. She has again been placed on a suspended sentence. Any sort of slip-up, whether driving-related or not, will land her back in jail.

Vicky has now been disqualified from driving until she is well into her fifties. Even if all her habitual traffic offender declarations are quashed, she will still be ineligible for a licence until she is well into her forties. Unless her licence disqualifications can be remitted, it is likely that her 2-year-old daughter will be able to get a licence before Vicky can.

Case study: Nathan

Nathan, aged 22, had a difficult childhood and adolescence. His mum was in and out of jail and his relationship with his dad was not always good. He spent most of his late teens either homeless or living in supported youth accommodation. To his credit, Nathan managed to get his driving licence and purchase a cheap car when he was only 17.

Soon after, he incurred a parking fine which he did not pay. It is unclear whether Nathan was even aware that he had been fined, but just after he turned 18 his licence was suspended. Nathan never received the suspension letter. He had been forced to leave his accommodation, and unable to find a permanent home he could not update the RTA with a new address.

About three months later, Nathan was pulled over by the police. He was told that his licence had been suspended. He was charged with driving while suspended and told not to drive again. Because Nathan was basically living in his car, he felt he could not simply abandon his car by the side of the road and so he continued to drive. He was pulled over by police again later that day and charged with a second count of driving while suspended.

Largely because of his homelessness, Nathan missed his court date. He was convicted of both offences in his absence, and disqualified from driving for a total of 3 years. He had already been off the road for over a year when he came to the Shopfront Youth Legal Centre for advice. We assisted him in having both convictions annulled. This was a long and complicated process because of Nathan's circumstances. The first charge was eventually dismissed because Nathan had been unaware of the suspension of his licence. Nathan pleaded guilty to the second charge of driving while suspended, but recognising that he had already spent such a long period off the road, the Magistrate dismissed the charge under section 10 of the *Crimes (Sentencing Procedure) Act*.

This means that Nathan is no longer disqualified and will be able to apply for his licence again. Nathan was fortunate that he had the self-restraint not to drive during his disqualification, and that he was able to access appropriate legal advice and advocacy.

Case study: Ben

Ben is a young man from a migrant background who grew up in Western Sydney. Like many young people, his ability to drive is central to his identity, and more importantly to his ability to obtain employment. Ben got his learner's licence at 16, and provisional licence at 17. Unfortunately, he incurred some minor traffic fines which he was unable to pay. The fines were referred to the SDRO and his licence was suspended.

Shortly after this, while still 17 years old, Ben was caught driving while suspended and had to appear in the Local Court. He admitted knowing his licence had been suspended, but needed to drive for work and could not pay the fines. He simply did not know what to do. Before going to court, he managed to deal with his fines and to get his licence back. However, despite his age and circumstances, the magistrate recorded a conviction and imposed the automatic 12-month disqualification that the law provided for at the time.

Ben did not have any legal advice about his right to appeal, and did not appeal this conviction. Had he appealed, and been legally represented, it is likely that a District Court judge may have been prepared to deal with him under section 10 of the *Crimes (Sentencing Procedure) Act* or under the *Children (Criminal Proceedings) Act* without any disqualification being imposed.

Several months later, after turning 18, Ben was caught driving while disqualified. In this instance, largely due to the harsh way in which he had been treated by the magistrate on the earlier matter, the magistrate showed him some leniency. Ben was released on a section 10 bond.

Regrettably, Ben was again caught driving while disqualified only one day before the end of his disqualification period. He was a passenger in a car being driven by a friend. The friend double-parked the car for a few minutes, leaving Ben alone. When another driver returned to one of the cars blocked by his friend's car, Ben got into the driver's seat and reversed a few metres in order to let him out. He was spotted immediately, because police officers in the vicinity were familiar with him and knew about his disqualification.

The magistrate dealing with this matter took the view that Ben had already "used up his section 10" and refused to extend any further leniency. Ben is now serving a further 2-year disqualification period, which is severely undermining his ability to maintain employment.

We call for the amendment of section 25A so that disqualifications are not cumulative. At the very least there should be a presumption that the disqualification will commence on the day on which it is imposed, and a discretion for the magistrate to make it cumulative if he or she believes this is warranted.

We also support an upper limit on accumulation of disqualifications, somewhat similar to the restriction on the Local Court's power to accumulate sentences of imprisonment. We are of the view that the total period of disqualification imposed (whether by a court or by automatic operation of law) for licence-related offences should never exceed 3 years.

We support the proposal for a re-licensing scheme as outlined in paragraph 10.35 and 10.36. However, our primary position is that the automatic and cumulative disqualifications for licence-related offences should be reformed, as recommended above.

We are also in support of "good behaviour licences" as proposed in paragraph 10.37, but we believe they should extend to offences other than drink-driving offences.

Additionally, we support the repeal of the Habitual Traffic Offender provisions. Habitual Traffic Offender declarations serve no useful purpose and are at odds with the evidence which suggests that, beyond a certain point, disqualifications have little or no deterrent value.

We are also of the view that automatic or mandatory disqualifications should *not* apply to children, whether they are dealt with in the Children's Court or the Local Court. A court would still have the discretion to impose a disqualification on a child.

Finally, we recommend that *all* children charged with traffic offences should be dealt with in the Children's Court and not the Local Court, for the reasons expressed in Appendix A to this submission and illustrated in the case study of Marco below.

Case study: Marco

Marco, now in his mid-20s, grew up in a household where he witnessed and was subject to serious domestic violence from his stepfather. As a result, he missed significant periods of his schooling, and at age 17 he moved out of the family home to live with his foster grandmother.

Marco was initially unable to obtain a licence because he had insufficient documentary identification to satisfy the Roads and Traffic Authority. His birth certificate bears one surname but his other documentary identification, including school records from 1992 onwards, bore another. By the time he had managed to gather the necessary identification documents, he was already disqualified from driving.

Marco's first two offences of unlicensed driving were committed while he was under 18, and dealt with by the Local Court. Most of Marco's traffic offences were committed near his home or near his foster grandmother's place. Driving was an escape for his during a turbulent period in his life.

By the time he turned 18, Marco was already disqualified from driving until the age of 23. He committed further offences of driving while disqualified at age 18. As a result, Marco ended up being disqualified for a total of 9 years from 2002 to 2011.

Court records show that Marco was unrepresented on every court sentence date, except his last one in 2003. It is worth noting that Legal Aid does not usually provide representation for people appearing in Local Courts for traffic matters. Although aid is available in exceptional circumstances, including where the defendant is under 18, this is not widely known or publicised. Being unrepresented, Marco did not have anyone to assist him to place before the court any submissions about mitigating circumstances or (when he was still a juvenile) about the use of sentencing options under the *Children (Criminal Proceedings) Act*. Nor did Marco have access to any legal advice about his appeal rights (unfortunately he did not become aware of the service provided by the Shopfront Youth Legal Centre until some years later).

Marco's most recent traffic offence was committed in December 2002, and he has demonstrated good behaviour and maturity since that time. In 2008 we sent a petition to the Governor of New

South Wales seeking that Marco's licence disqualifications be remitted. This application highlighted the obstacles faced by Marco in his apprenticeship as a mechanic, and getting to and from work without a licence, as well as the mitigating circumstances surrounding Marco's offences. Unfortunately this application was unsuccessful.

2 Should driver licence disqualification be made available in relation to offences that do not arise under road transport legislation?

We do not support the extension of driver licence disqualifications to other offences. If the primary purpose of licence disqualification is to promote road safety by deterring people from committing traffic offences and by taking dangerous drivers off the road for a period of time, we fail to see how the imposition of licence disqualifications for non-traffic offences would achieve this.

However, if licence disqualification is to be extended in this way, we would support it being available only for offenders found guilty of motor vehicle theft offences (as is the situation in the ACT). The provisions in other jurisdictions, which impose disqualifications for offences where a car is used in the commission of an offence, are too broad. We are concerned that disqualification may be inappropriately used for offences which have a tenuous connection with driving.

Question 10.3: Non-association and place restriction orders

1 Should non-association and place restriction orders be retained?

We do not support the retention of non-association and place restriction orders. In our experience they are rarely imposed, which suggests that the courts do not regard them as necessary or useful. Where they are used, they are likely to be imposed against disadvantaged people such as Aboriginal people and young people, who may have real difficulty complying with such orders and who may find it difficult to seek variation or revocation of the order.

The imposition of non-association and place restriction orders raises real civil liberties issues and, despite the exceptions prescribed by the legislation, it is too broad in its application. We agree with the observation in paragraph 10.46 of the Question Paper that the legislation was ostensibly introduced to deal with gang-related activity, but does not appear to have been used to that effect.

We attach a copy of the submission we made to the Ombudsman in 2004. At that time, the legislation was very new and our main experience of non-association and place restriction conditions was in relation to bail. Our clients still have significant problems with the imposition of non-association and place restriction conditions on bail undertakings (see discussion on this issue in our submission to the NSWLRC on *Bail*).

Case study: Tyrone

Tyrone is a young Aboriginal man who lives with family members near "The Block" at Redfern.

He had no criminal history until age 19, when he was caught attempting to sell a small quantity of drugs to an undercover police officer. Tyrone pleaded guilty to supplying a prohibited drug and was sentenced to a good behaviour bond.

The police applied for a place restriction order banning Tyrone from "The Block", even though this was only metres away from his house. "The Block" is also the home of many members of Redfern's Aboriginal community, including some of Tyrone's relatives, and is the site of the Redfern Community Centre. The Local Court magistrate made the place restriction order and Tyrone had to appeal to the District Court to get it removed.

2 Should any changes be made to the regulation and operation of non-association and place restriction orders?

If non-association and place restriction orders are to be retained, we believe they should only be available where the offender has been convicted of a serious indictable offence, i.e. an offence punishable by imprisonment for 5 years or more. The current threshold of 6 months' imprisonment is too low, and means that an order may be made in relation to trivial offences such as goods in custody.

The Shopfront Youth Legal Centre
September 2012

Sentencing: Question Paper 10: Ancillary orders

Appendix A: extracts from previous submissions in relation to driver licence disqualification and related issues

1 Extract from submission to National Youth Commission Inquiry into Youth Homelessness, June 2007

Young people are particularly affected by the SDRO's power to impose sanctions on driver licences. This happens at an early stage in the enforcement process and is difficult to reverse without paying the fines in full, making several regular repayments, or having the fines annulled.

The situation has improved in recent years, mainly because the SDRO will now lift licence sanctions after six regular payments on a time-to-pay arrangement, instead of waiting until the fines are paid in full. However, many people still believe they will have to pay off their fines in full before becoming eligible for a licence. Even those who know they can have sanctions lifted after 6 regular payments often lack the means or stability to make these payments.

It is common for our clients to feel they will never be able to pay off their fines, and to abandon all hope of getting a licence. In these circumstances they are often tempted to drive unlicensed, incurring further fines and lengthy disqualification periods.

The problem is compounded by the fact that the law imposes draconian penalties (including imprisonment) and lengthy mandatory disqualification periods for driving without a valid licence. For example, a first offence of driving while cancelled, suspended or disqualified incurs a 12-month disqualification, cumulative on any existing disqualification or suspension period. For a second or subsequent offence, the mandatory period increases to 2 years. Driving when never licensed does not incur a mandatory disqualification for a first offence, but for a second offence there is a mandatory three-year disqualification[1].

Magistrates have a limited discretion to dismiss the matter (or impose a bond) without recording a conviction; this means that no disqualification is imposed. Indeed, we have found most magistrates to be reasonably sympathetic towards those who have been charged with driving during a fine-default suspension. Some magistrates will adjourn the matter, allowing the defendant some time to sort out their fines and to get their licence. Then, if the defendant can demonstrate that they have done this, the magistrate will exercise their discretion not to impose a conviction or disqualification.

However, magistrates cannot keep exercising this discretion with repeat offenders. While it might be said that people who chose to drive unlicensed deserve to bear the consequences, we believe that the consequences are disproportionate to the severity of the offending. Once a person is disqualified by the court, there is usually no turning back and it is easy to accumulate years of disqualification. There may also be a "habitual traffic offender declaration" which (unless the magistrate decides to vary or quash it) means an extra 5 years off the road[2].

Imprisonment is also a real risk for disqualified drivers. NSW criminal court statistics show that court appearances for driver licence-related offences increased from 7,641 in 1994 to 18,943 in 2005. The number of people sentenced to imprisonment for such offences rose from 443 to 1027 in the same period[3]. While there could be other factors responsible for this increase, our experience suggests that the fine enforcement regime is a major contributor.

It is worth noting that, for people of licensable age (this means 16 or over, because a learner licence can be obtained at age 16), court proceedings for traffic offences are dealt with in the Local Court. In Local Courts, the Legal Aid Commission does not usually represent defendants on traffic matters, unless they face a real prospect of imprisonment. By the time the real prospect of

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[1] *Road Transport (Driver Licensing) Act* 1999 (NSW), sections 25 and 25A.

[2] *Road Transport (General) Act* 2005 (NSW), sections 198-203.

[3] NSW Bureau of Crime Statistics and Research, summary of criminal court statistics, www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_lc_05

imprisonment arises (usually a second or third drive whilst disqualified charge) it is often too late, even with excellent legal representation, to undo the damage that has already been done.

Of course it is important that drivers are licensed, to ensure that they meet basic competency and safety standards. However, we believe that making it difficult for people to obtain and retain licences is counterproductive, particularly where young and disadvantaged people are concerned. Beyond a certain point, licence suspensions or disqualifications have no deterrent value[4].

2 Extract from submission to Department of Attorney-General and Justice on the *Review of the Young Offenders Act and the Children (Criminal Proceedings) Act* , December 2011

Question 33

Should the Children's Court hear all traffic offences allegedly committed by young people?

Absolutely, yes.

The history of a separate jurisdiction for children and young people alleged to have committed offences has traditionally reflected the acceptance that different principles and practices should apply. It is simplistic to draw the line at traffic offences and argue that they are more "adult like' than other offences. This argument appears artificial when considering that the Children's Court can deal with serious matters such as break, enter and steal, robbery matters or obtain benefit by deception type matters, and the list goes on.

We refer to the comments in the "Context" section of the Consultation Paper that refer to "adolescent brain development" which differentiates adults from young people. The Consultation Paper comments*, "it is now widely accepted that these factors, as well as children's vulnerability, immaturity, and lack of experience more generally, necessitate a different criminal justice response to offending by children*."

We are of the firm view that this applies equally to traffic matters as it does to any other matter. The current process by which children are taken before adult courts (often unrepresented) is inappropriate, disproportionately punitive and arguably in breach of our obligations under CROC.

Although there is provision for the Local Court to exercise the sentencing options under the CCPA, it is our experience that many Local Court magistrates are unaware of, or fail to consider, the provisions of the CCPA. The tendency in the adult jurisdiction is to apply the sentencing principles and options relevant to adults. Children can suffer harsh penalties and lengthy disqualifications which are often inappropriate to their age and circumstances.

Further, children are not always legally represented in the Local Court, even though they should be entitled to Legal Aid. When they are represented, duty solicitors are not always well-versed in the special legislative provisions applying to children.

The comment that the focus of traffic offences is deterrence and public safety as providing some rationale as to why matters are dealt with in the Local Court, ignores the fact that the Children's Court is still able to impose deterrent measures such as disqualification where appropriate. It also ignores the fact that punitive and deterrent sanctions are unlikely to be effective when applied to children and young people.

The comment that *" …since the ability to obtain a licence is a privilege extended to adults, all traffic offenders should be dealt with as adults"* is misconceived. It is adults who extend this "privilege" to young people with full knowledge of developmental difference between adults and children. This is despite what is described in the Consultation Paper as a "higher risk" when children and young people are driving. If the concern is so great, than perhaps there should be reflection on the licensable age. However, we note that there are already a number of restrictions

[4] The NSW Court of Criminal Appeal, in a guideline judgment about high-range drink-driving, referred to research suggesting that the optimal disqualification period is 18 months and above that period the offender will simply ignore the fact of disqualification: *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No. 3 of 2002) [2004] NSWCCA 303*, http://www.austlii.edu.au//cgi-bin/disp.pl/au/cases/nsw/NSWCCA/2004/303.html?query=PCA%20guideline, citing Homel, *Penalties and the Drink Driver: A study of One Thousand Offenders*, ANZJ Crim (1981) 14 (225-241).

placed on learner and provisional drivers, recognising that young drivers generally pose a higher risk to road safety than more mature drivers.

In fact, the acknowledged over-representation of young drivers in traffic offences and accidents suggests that young people who commit traffic offences should be treated differently to adults. Rather than the punitive and deterrent measures which are applied to adult traffic offenders, young people require a rehabilitative approach to assist them to become safer drivers.

We recommend that all traffic offences allegedly committed by juveniles should be dealt with in the Children's Court. Children are less mature and more vulnerable than adults; they also respond less effectively to punitive and deterrent sanctions. They deserve the special protection, and the rehabilitative approach, afforded by the Children's Court.

We also submit that, while the Children's Court should have power to impose licence disqualification, automatic and mandatory disqualifications should *not* apply in the Children's Court.

10 September 2012 Our ref Jane Sanders

Doc no \004576519

NSW Ombudsman
Level 24, 580 George Street
SYDNEY NSW 2000

Attn: Mr Glenn Payton

Review of *Justice Legislation Amendment (Non-Association and Place Restriction) Act*: submission by the Shopfront Youth Legal Centre

Thank you for sending us a copy of your Discussion Paper on the *Justice Legislation Amendment (Non-Association and Place Restriction) Act* ("the Act"). We welcome the opportunity to provide a submission to the review of the Act, and we thank you for allowing us an extension of time.

You will note that we have already provided a preliminary submission, consisting of case studies illustrating non-association and place restriction bail conditions being imposed on young people.

1 The Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under. The Shopfront has been operating since 1993 and is a joint project of Freehills, Mission Australia's Sydney City Mission and the Salvation Army.

The Shopfront represents and advises young people on a range of legal issues, with a particular emphasis on criminal law. The Shopfront is located in Darlinghurst and our primary client base is in the Kings Cross and inner city area. However, we also act for young people in other parts of metropolitan Sydney.

The vast majority of the Shopfront's clients are homeless. Most have been forced to leave home due to abuse, neglect, domestic violence or extreme family dysfunction. Many of our clients have mental health problems, intellectual disabilities, or limited literacy and numeracy.

2 The objectives and the effectiveness of the Act

We would argue that the Act does not meet primary objective, which is to tackle gang-related crime. The Act was based largely on American research about youth gangs, which is of questionable relevance in an Australian context. The incidence of US-style gangs in Australia is very low. Although offences are often committed in groups, these are more likely to be loose associations of peers than gangs with a clearly-defined identity and territory. The criminal gangs that do exist in New South Wales are more organised and sophisticated, and are unlikely to be seriously affected by non-association or place restriction legislation.

There is no evidence that the Act has done anything to break up or weaken criminal gangs. Instead, it appears that the powers in the Act are being used as a way of "cleaning up the streets" and ridding public areas of people who may be an inconvenience or nuisance.

We have observed that the powers in the Act are frequently being used against people who are alleged to have committed minor public order, property and drug offences. The people most affected by the Act are disadvantaged young and indigenous people who commonly associate with their peers in public spaces - often because they have no-one else to support them and nowhere else to go.

We believe that, by creating a new offence of breaching a non-association or place restriction order, the Act has potential to further entrench disadvantaged people in the criminal justice system. This contradicts efforts to reduce the over-representation of disadvantaged and vulnerable people in the criminal justice system, particularly young people and Aboriginal and Torres Strait Islander people.

We acknowledge that negative peer influences and frequenting certain areas may increase the likelihood that a young person will commit offences. However, this problem would be better addressed by providing young people with positive alternatives, rather than imposing coercive measures.

We concede that, where serious and persistent offending is involved, it may be appropriate to impose restrictions on where a person goes and with whom he or she associates. However, we are concerned about the frequent use of the powers in the Act against less serious offenders.

In our view, non-association and place restriction orders breach the human rights to freedom of association and freedom of movement, unless such an order is clearly justified by the circumstances of the alleged offence.

3 Our clients' experience of the Act in practice

Last year we provided your office with some case studies illustrating some typical non-association and place restriction bail conditions imposed on our clients. Since then, similar conditions have been imposed on more of our clients, almost always as a condition of police bail. We continue to be concerned about the inappropriate use of such conditions, and will discuss this issue further below when addressing questions arising from the Discussion Paper.

4 Questions raised by the Discussion Paper

We do not propose to address all the questions raised, but will com ment on issues that are within our direct experience.

Question 1:

Are the new powers conferred by the Act being used by courts, police, Corrective Services, Juvenile Justice?

In our view, the Act has not given police or courts any new powers in relation to bail, bonds, probation and parole.

The only genuinely new power conferred by the Act is the court's power to m ake non-association or place restriction orde rs when sentencing a person for an offence (under *Crimes (Sentencing Procedure) Act* s17A or *Children (Criminal Proceedings) Act* s33D). As the Discussion Paper shows, this option is rarely utilised by courts. None of the Shopfront's clients has had such an order m ade against them.

We have had no direct experience of non- association or place restriction orders being imposed as a condition of parole or leave from a prison or detention centre.

However, m any of our clients have been subject to non-association or place restriction conditions on bail. Although th ese powers existed (and were used by police and courts) before the introduction of the Act, it appears to us that their use has increased since the commencement of the Act.

In particular, police appear to have increased their use of place restriction conditions when setting bail, and m any m agistrates willingly continue such conditions when the matter reaches court. In some areas it appears that police are imposing these conditions system atically against particular types of alleged offenders, without much regard to individual circumstances. Although the Act has not given police any new powers in relation to bail, we believe it has legitim ised the use of such conditions in circum stances where they m ight previously have been considered inappropriate. W e will fu rther discuss the use of bail conditions in our responses to subsequent questions.

Some courts also attach non-associati on or place restriction conditions to good behaviour bonds. For exam ple, a num ber of our clients appearing at Liverpool Local Court have been subject to bonds with conditions restricting them form entering Cabramatta. Conditions of this t ype were already being im posed before the introduction of the Act, and we ar e unable to say whether their use has increased. W e will discuss problem s a ssociated with bond conditions in our response to Question 6.

Question 2:

Training on non-association and place restriction orders

In general, we believe it is desirable that police, judicial officers, probation officers and juvenile justice officers be trained on non-association and place restriction orders. In our view it is im portant for such training to em phasise that, whilst the powers to m ake such orders is very broad, the appropriateness of such orders needs to be very carefully considered.

We suggest it would be useful to develop a set of guidelines to assist officers to decide whether a non-association or place restriction order is appropriate in a particular case and, if so, what conditions should be imposed.

Question 6:

General comments on inappropriate non-association and place restriction orders

We have already provided case studies about conditions which we believe to be inappropriate, and will provide some further examples below.

Non-association and place restriction conditions often impose a serious restriction on the a person's ability to get on with their daily lives. Many of the conditions are arbitrary and are imposed without regard to the needs of the particular offender. Very often, the conditions are out of proportion with the seriousness of the alleged offence (we will discuss this issue further in our responses to Questions 21and 22).

Young people, particularly those who are homeless or otherwise disadvantaged, often find it very difficult to comply with non-association and place restriction conditions. There are a range of legitimate activities which may cause them to fall foul of the condition - including seeking employment, looking for accommodation, using health and welfare services, and socialising with peers or extended family members. Although there are some restrictions on the types of orders that can be imposed, we suggest that this is based on a set of white, middle class, adult assumptions. It does not recognise the extended family relationships of indigenous people, the need for unemployed and homeless young people to access a variety of services, and the types of activities commonly undertaken by young people.

We concede that, if such conditions are imposed as part of a bail undertaking, a defendant may apply to have them varied. However, this is no simple matter for many people. To have a bail variation application listed, it is necessary to submit forms, contact the police officer in charge of the case, etc. Even for young people who have access to legal advice, this can be an onerous process. Some young people do not even realise they can apply to vary their bail conditions, or even get free legal advice, prior to their listed court date.

Many young people therefore do not apply to vary their bail conditions, instead running the risk they will be arrested for breach. Although breach of bail is not an offence in itself, it typically leads to the person being arrested by police and held in custody until they can be brought to court (usually overnight). More often than not, the court will re-release the person on bail or, if the person is willing to plead guilty, impose a non-custodial sentence (unless the alleged offence or breach of bail is very serious). By this time the person has spent some time in custody, often for an offence which would not ultimately be punished by way of a custodial sentence.

Further, we have acted for several clients who have had their bail conditions varied, but have subsequently been arrested for breach of bail because the police did not update their computer system properly (for example, the case of Lisa, discussed in our preliminary submission). At least one of these people has obtained compensation from the police for wrongful arrest.

The attachment of non-association or place restriction conditions to good behaviour bonds (including suspended sentences) can be very problematic. For example, it has been the practice of certain magistrates at Liverpool Local Court to impose a bond or suspended sentence with a condition that an offender not go within a certain distance (1, 2 or 3 km) of Cabramatta Railway Station. Such conditions are usually imposed for drug-related offences such as supply, possession, drug premises offences or drug-related property crime. Typically, such bonds are 12 months or 2 years in duration, but may be as long as 5 years. We have seen conditions of this type imposed upon people with intellectual disabilities who are often unable to comprehend the consequences of breaching the conditions.

Whilst it may be desirable that an offender stay out of Cabramatta to avoid being entrenched in a cycle of drug-related offending, such conditions may impose an unreasonable restriction on a person's ability to obtain accommodation, employment and services, and also to have contact with extended family and community. Further, circumstances change over time and offenders may find themselves stuck with unworkable conditions for the duration of the bond. Unlike bail and Children's Court bonds, adult bonds cannot be varied unless breach proceedings are taken against the offender.

Question 7:

Specific examples of inappropriate non-association and place restriction conditions

In our preliminary submission we provided the case studies of Tran, Lisa, Jimmy and Nicky. These are still relevant, as many of our clients continue to be subject to similar conditions.

In addition we provide the following example:

Jason (in his early 20s) has a record for committing drug offences and was recently charged with a number of property offences, including break enter and steal, and goods in custody. The alleged offences were committed in Kings Cross and, as a condition of his bail, Jason is banned from a large area including kings Cross, Potts Point, Elizabeth Bay, Rushcutters Bay, most of Darlinghurst and most of Woolloomooloo.

Although break enter and steal is a serious offence and may warrant strict bail conditions, the use of a place restriction condition in this instance is questionable. There is no evidence of any intrinsic link between being in Kings Cross and committing such an offence – if Jason wants to break into people's houses, he can do this in any suburb!

More importantly, the conditions imposed are unworkable for Jason, who lives in Woolloomooloo and cannot go to his local shops, railway station, etc without breaching his bail. His bail conditions have been amended to allow him to go to his methadone clinic and legal centre, but the court has so far refused allow a further variation.

Question 8:

How might consideration of issues relating to the use of non-association and place restriction conditions be made more effective?

We refer to our response to Question 2. We believe that a set of guidelines (possibly enacted into the legislation or regulations) would assist police, judicial officers and others to consider all relevant issues.

Question 9:

Comments and suggestions on the use of non-association conditions

In many cases we concede it may be appropriate to restrict co-offenders from associating with each other, especially where they are serious or persistent offenders. However, caution must be exercised when imposing such conditions, particularly in relation to young people. Where young people are concerned, it is often the case that co-offenders will be neighbours, schoolmates, cousins, boyfriends/girlfriends, or the like. It is very difficult, if not impossible, for a young person to cease associating with such a person.

We have also experienced the situation where young couples are arrested for committing offences together, and are prevented from seeing each other by a non-association condition. For example, a 17-year-old client of ours has bail conditions which prohibit her from associating with her 19-year-old boyfriend, despite the fact that their relationship has been ongoing for over two years.

In general, young people do not meet the definition of "spouse" or "de facto partner" as they do not live together (or have not lived together for long enough), even if they have a serious and long-term relationship.

We suggest that young people's intimate relationships should be valued on equal terms with more conventional adult relationships. Apart from cases where there are domestic violence or child protection concerns, we believe that it is generally inappropriate to restrict people from associating with each other if they have an ongoing intimate personal relationship.

Question 11:

Will there be any benefits to amending the definition of "close family" to reflect kinship ties which extend beyond the immediate family?

We believe that such an amendment is essential to take into account the family structures of Aboriginal people. No doubt some police officers and judicial officers will find this problematic, on the grounds that it is difficult for them to assess whether a particular person has significant kinship ties with another person. We suggest that, before making a non-association order against a person of Aboriginal or Torres Strait Islander origin, there be a requirement to consult with an appropriate Aboriginal Liaison Officer as to the person's kinship ties.

This also has relevance to people from other ethnic backgrounds, who often have significant ties with aunts, uncles and cousins.

Question 12:

Comments and suggestions on the use of place restriction conditions generally

We have already commented on this issue in some detail, particularly in our response to Question 6. We will make some further comments and suggestions in our responses to subsequent questions.

Question 13:

Examples of situations where people have been prohibited from accessing support services

Many of our clients have been subject to bail conditions which restrict access to legitimate and necessary services including:

(a) Health centres - eg the Kirketon Road Centre (Kings Cross), the Drug Intervention Service Cabramatta (which operated until July 2003);

(b) Services for injecting drug users – eg needle exchange vans in various areas, the Medically Supervised Injecting Centre (Kings Cross);

(c) Legal services - eg the Shopfront Youth Legal Centre and the Inner City Legal Centre (both in Darlinghurst), the outreach service formerly operated by the Shopfront at the Drug Intervention Service Cabramatta (before its closure in July 2003);

(d) Welfare services – eg the Crossing (a youth support service operated by Mission Australia in Kings Cross), Open Family (Cabramatta).

The case studies of Tran and Nicky (provided in our preliminary submission) and of Jason (in our response to Question 7 above) provide examples of the hardship caused by such conditions.

Not only can these conditions create personal hardship, but they can also have wider public health implications by reducing access to health services (particularly harm minimisation measures for injecting drug users).

Question 14:

Are there any benefits to amending the definition of what a place restriction order can and cannot restrict?

We would like to see the list of what a place restriction order *cannot* restrict broadened to include such places as:

- employment services
- welfare services
- health services
- government agencies such as Centrelink
- community or cultural centres
- public transport routes, stations and stops

habitually used by the defendant.

We would also suggest that a place restri ction order ought not to prevent a person from accessing local services such as shops, banks, etc, in circum stances where they have no realistic alternatives (eg they live in or near a country town and the next town is a significant distance away).

Question 15:

Are there any benefits to imposing blanket place restriction conditions?

We presum e a "blanket" place restricti on condition to m ean a condition that is not specifically designed for a particular offender, but rather is a general condition imposed on a class of offenders to prohibit them from entering a certain area.

In our view, such conditions are a clum sy and arbitrary policing tool, with the potential to cause great injustice. The only possible benefit to im posing blanket place restriction conditions is that they may be easier to police than individually-tailored conditions. However, we believe that this is insuf ficient justif ication for their use.

Question 19:

Comments on w hether Aboriginal and y oung people are more likely to be arrested for allegedly breaching bail conditions

Our experience suggests that Aboriginal and young people are m ore likely to be arrested for alleged breaches of bail.

Firstly, young and indigenous people are m ore likely to have strict conditions imposed on them because of actual or perceived instability. Secondly, they are likely to attract the attention of police b ecause of their appearance, behaviour or their frequent use of public space. Thirdly, they are less likely than non-indigenous adults to seek out legal assistance to vary unreasonable or unworkable bail conditions.

Being arrested for breach of bail is even more likely if the person is hom eless or has a mental or intellectual disability.

Question 20:

Examples of people having breached bail because of lack of understanding of conditions imposed

We do no have any specific exam ples of people who have breached *non-association* or *place restriction* conditions because of lack of understanding. However, som e of our clients have inadvertently breached other types of conditions (eg police reporting, curfews) because they do not understand, or are confused about, the conditions.

We believe there is a high potential for defendants to m isunderstand place restriction conditions, due to their lim ited knowledge of local geography and poor skills at reading m aps (especially if their literacy or English is lim ited, which is often the case for people involved in the criminal justice system).

Question 21:

Are police imposing conditions that are unw arranted by the severity of the alleged offence?

We have observed that police are freque ntly im posing bail conditions that are unwarranted by the seriousness of the alle ged offence. In our experience, it is

relatively common for place restriction conditions to be imposed as a condition of police bail for summary offences.

Some of these offences (eg disobey police direction) are punishable by fine only. Others (eg possess prohibited drug, solicit within view of a dwelling) potentially carry custodial sentences but are usually dealt with by way of fine or other non-custodial sentence. Judicial Commission statistics show that only 1% of offenders are imprisoned for soliciting offences, about 4% for possession of heroin, 5% for possession of cocaine, and 2% for possession of other drugs. The majority of these offences are dealt with by fine, bond or section 10 dismissal.

The case study of Lisa (in our preliminary submission) is an example of a systematic practice adopted by police in relation to street sex workers in the Bankstown area. There is an industrial area on and around Canterbury Road, which has a long tradition of being used for street sex work. Most of this area is not within view of dwellings, churches, schools or hospitals, and it is therefore lawful to solicit for prostitution there.

However, several sex workers have been arrested in the vicinity of the "Christian Life Centre" which used to occupy premises on Canterbury Road, and charged with soliciting within view of a church. Some have been charged with soliciting near a dwelling (even where the nearest dwellings were considerable distance away and now within view) and others with participating in an act of prostitution in a public place. In most cases the bail conditions ban them from several blocks in the area where they work.

In many cases the alleged offender was clearly not guilty of the charge (for example, charges were still being laid for soliciting within view of a church even after the Christian Life Centre vacated its premises in May 2003). However, defendants would plead guilty in order to rid themselves of the restrictive bail conditions, so they could return to pursue their lawful occupation in an area where it is lawful to solicit for prostitution.

If a defendant pleads not guilty, it can take several weeks or months before a hearing date is set. In the meantime, the bail conditions continue unless the magistrate sees fit to vary them (and, in our experience, the magistrates at Bankstown Local Court have generally been reluctant to vary these bail conditions).

The fact that there is such a strong disincentive to defend the charge - even where there appears to be a strong defence – leads to grave injustice. In some cases we have assisted clients to correct this injustice on appeal, by seeking the District Court's leave to withdraw the plea of guilty and re-open the matter. However, it should not be necessary to go to such extreme lengths.

We believe conditions of the kinds imposed on Lisa and Tran (see our preliminary submission and our response to question 22) are out of proportion with the seriousness of the alleged offences. They are unjustified from a civil liberties point of view, even if the person has no difficulty complying with the conditions. It would be ludicrous to expect a middle-class person to be banned from, say, Bondi Beach, just because they were caught drunk-driving, swearing or littering in the area. However, many police officers seem to think it is reasonable to ban disadvantaged people from certain areas for offences of similar gravity.

In our view, offences that are punishable by way of *fine only* should *never* have bail conditions attached (except perhaps in truly exceptional circumstances) but should be brought to court by way of a "no bail" court attendance notice.

We are also of the view that "no bail" CANs or unconditional bail should be used for summary offences generally, unless special circumstances exist (eg it is an offence such as breach AVO, or there is otherwise a risk of violence, intimidation or serious property damage).

Bail conditions should not be imposed as a way of punishing people or deterring "nuisance" type conduct – this function is performed by the court when imposing a penalty for the offence once the person has pleaded (or been found) guilty.

We refer to section 37 of the *Bail Act* which reads in part:

> (1) Bail shall be granted unconditionally unless the authorised officer or court is of the opinion that one or more conditions should be imposed for the purpose of:
>
> (a) promoting effective law enforcement, or
>
> (b) the protection and welfare of any specially affected person, or
>
> (c) the protection and welfare of the community, or
>
> (d) reducing the likelihood of future offences being committed by promoting the treatment or rehabilitation of an accused person.
>
> (2) Conditions shall not be imposed that are any more onerous for the accused person than appear to the authorised officer or court to be required:
>
> (a) by the nature of the offence, or
>
> (b) for the protection and welfare of any specially affected person, or
>
> (c) by the circumstances of the accused person.

Question 22:

Examples of situations where bail conditions are being imposed for offences which could be dealt with by way of fine

We are not sure precisely what is meant by "could be dealt with by way of fine". If this means offences that could be dealt with by way of infringement notice instead of court proceedings, or offences that are punishable by fine only, then the offence of disobeying a police direction is a good example.

The case study of Tran, provided in our preliminary submission, is just one instance of a long-standing and systematic police practice. Typically the police would direct a person to stay out of Cabramatta for 7 days. If the person was found in Cabramatta within the 7-day period, the police would issue another direction in similar terms. If the person was found in Cabramatta again within the next seven days, they would be arrested, charged with disobeying a police direction, and granted bail on the condition that the person not come within a certain radius (typically somewhere between 1km and 3km) of Cabramatta railway station .

If an infringement notice is not appropriate for whatever reason, and court proceedings are necessary, a Field Court Attendance Notice would be appropriate. In our view, arrest and charge are only appropriate where the defendant's conduct is extremely disruptive or violent (in which case they would probably be charged with a more serious offence in any event) or where the police are able to establish the defendant's identity.

Defendants found in Cabramatta while still on bail would invariably be arrested for breach of bail and would spend a night in the police cells before being taken to court the following morning. Most would then plead guilty to the offence and be released with a fine.

The bail conditions imposed are far more onerous than is warranted by the nature of the charge, and we suggest that they are being used inappropriately as a means of punishment and social control. We are gravely concerned that people are spending time in custody (both during the initial arrest and charge process, and after any actual or alleged breach of bail) for an offence which does not carry a custodial penalty.

We are also concerned that defendants often plead guilty to this offence, as a means of getting rid of the bail conditions, in circumstances where the prosecution would have great difficulty proving its case if the matter were defended. The Shopfront has assisted clients to defend several of these cases and in each case, the charge has either been withdrawn by the prosecution or dismissed by the court. One matter was dismissed by the magistrate on the grounds that a blanket 7-day direction was arbitrary and unlawful. Since then, police prosecutors have withdrawn charges for breaching 7-day directions (at least where the defendant pleads not guilty) and the Cabramatta police have modified their direction-giving practices. We understand that police are still issuing directions, but for shorter periods, and are still imposing similar bail conditions. However, we are unable to comment more specifically on current practices because the Shopfront is no longer operating an outreach service in Cabramatta (since the closure of the Drug Intervention Service Cabramatta in July 2003).

We have already provided examples of place restriction bail conditions being imposed for offences which *are most commonly dealt with* by way of fine.

Question 23:

Benefits of not imposing place restriction conditions for minor offences

We believe we have already answered this question in our response to questions 21 and 22. We would add that one benefit of not imposing such conditions for minor offences is the saving of police, court and legal aid resources.

It is important to consider not only the "*benefits* of *not* imposing place restriction conditions", but the *wrongfulness* of imposing such conditions for minor offences.

5 Summary and recommendations

In summary, we have concerns about the way the Act is operating in practice. In particular, we are concerned about the way police are using place restriction bail conditions against people who are alleged to have committed minor offences.

Our main recommendations are:

(a) That s100A of the *Crimes (Sentencing Procedure) Act* be amended so that people cannot be prohibited from associating with significant extended family members or people with whom they have intimate personal relationships, and cannot be prevented from accessing the types of places listed in our response to Question 14.

(b) That guidelines be developed to assist police, judicial officers, corrective services and juvenile justice officers to set appropriate non-association and place restriction conditions.

(c) That the *Bail Act* and/or the *Criminal Procedure Act* be amended to make it mandatory for "no bail" court attendance notices to be used for offences punishable by way of fine only (save in exceptional circumstances) and that there be a presumption that "no bail" court attendance notices (or unconditional bail) be used for summary offences. We also suggest there should be a prohibition on non-association and place restriction bail conditions for summary offences, except those involving personal violence.

(d) That there be restrictions on a court's power to impose a non-association or place restriction order as a condition of a bond. We would suggest that the *Crimes (Sentencing Procedure) Act* and the *Children (Criminal Proceedings) Act* be amended to prohibit the imposition of non-association or place restriction conditions as part of a good behaviour bond. At the very least, the duration of such a condition should be limited to 12 months. Otherwise courts will continue to use bonds as a "back door" way of imposing non-association and place restriction orders longer than the 12 months permitted by *Crimes (Sentencing Procedure) Act* s17A and *Children (Criminal Proceedings) Act* s33D. We also recommend that the *Crimes (Sentencing Procedure) Act* be amended to allow adult bonds to be varied on the application of the offender.

(e) That courts have power to make non-association or place restriction orders only when sentencing a person for an indictable offence (or even a "serious indictable offence" - ie an offence punishable by imprisonment for 5 years or more). Such orders are a serious imposition on a person's liberty, and breaching them can have serious consequences. Therefore we are of the view that they should only be made where a person has committed a relatively serious offence.

Yours faithfully

Jane Sanders
Principal Solicitor

The Shopfront
YOUTH LEGAL CENTRE

NSW Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

7 September 2012

By email

Dear Sir/Madam

Sentencing: Question Paper 11: Special categories of offenders

The Shopfront Youth Legal Centre welcomes the opportunity to make a submission to this reference.

About the Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under. Established in 1993 and based in Darlinghurst in inner-city Sydney, the Shopfront is a joint project of Mission Australia, the Salvation Army and the law firm Freehills.

The Shopfront's main area of practice is criminal law. Two of our solicitors are accredited specialists in criminal law; one is also an accredited specialist in children's law. Our four solicitors appear almost daily for vulnerable young people in the Local, Children's, District and occasionally Supreme Courts.

The Shopfront's clients come from a range of cultural backgrounds, including a sizeable number of indigenous young people. Common to nearly all of our clients is the experience of homelessness: most have been forced to leave home due to abuse, neglect, domestic violence or extreme family dysfunction. Most of our clients have limited formal education and therefore lack adequate literacy, numeracy and vocational skills. A substantial proportion also have a serious mental health problem or an intellectual disability, often co-existing with a substance abuse problem.

Scope of this submission

Although the Shopfront is a youth legal service, and has expertise in children's matters, the majority of our clients are in fact young adults aged 18 to 25. We therefore have an extensive working knowledge of adult sentencing law and practice. In accordance with the terms of reference, our submission is confined to adult sentencing issues.

Time does not permit us to make a more comprehensive submission. However, we would welcome the opportunity to make further comments or to attend consultations if you consider this would be helpful. In this regard, please do not hesitate to contact me, preferably by email at [redacted]

Yours faithfully

Jane Sanders
Principal Solicitor

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The Shopfront Youth Legal Centre is a service provided by Freehills in association with Mission Australia and The Salvation Army

THE SALVATION ARMY
Mission Australia
Freehills

Sentencing: Question Paper 11: Special categories of offenders

Question 11.1: Indigenous offenders

1 How can the current sentencing regime be improved in order to reduce:

a. the incarceration rate of Indigenous people; and

b. the recidivism rate of indigenous offenders?

The over-representation of Aboriginal people in the criminal justice system, including their high rates of incarceration, clearly requires a multi-faceted approach. In recent times there have been calls for the adoption of a justice reinvestment approach to address these problems.

Changes to sentencing law will make little difference unless there are significant improvements in Aboriginal health and well-being, housing, employment and social inclusion, with reforms to policing, bail and other aspects of the criminal justice system.

However, we believe the following changes to the sentencing regime could potentially assist:

Culturally appropriate sentences and programs

We support the more widespread availability of non-custodial sentences, including an expansion of the eligibility and suitability criteria for options such as intensive correction orders, and much more flexibility when dealing with breaches of suspended sentences. These issues have been discussed in our submissions in response to your other Question Papers (see in particular our response to Question Paper 6).

We also support the expansion of programs such as MERIT and CREDIT which, if delivered in a culturally appropriate way, can have a significant impact on imprisonment and recidivism rates. We refer to our submission in response to your Question Paper 9.

We also support an affirmative action strategy to recruit more Aboriginal Probation people into the Probation and Parole service, and other agencies dealing with offenders. There is also a need for enhanced training for non-indigenous workers to ensure they are able to deal with Aboriginal offenders in a culturally appropriate way.

Traffic offences and licence disqualification

In our submission on Question Paper 10, we commented that the current regime of automatic driver licence disqualifications (particularly for offences of driving while unlicensed, suspended, cancelled or disqualified) has a harsh effect on young and disadvantaged people.

Aboriginal people are significantly affected. We understand that the proportion of Aboriginal offenders imprisoned for driving offences is particularly high.

In a speech made by Mick Gooda, the Aboriginal and Torres Strait Islander Social Justice Commissioner, at Government House, Sydney, on 2 May 2012, it was said that “the laws regarding driving offences are the same for all Australians but the impact on Aboriginal and Torres Strait Islander people is profound”.

Mr Gooda went on to say:

> “In 2004, Aboriginal prisoners accounted for sixty-four percent of all prisoners going into jail for a driving offence in Western Australia. Many of the driving offences relate to suspended driving licences, often as a consequence of unpaid fines. However, with no public transport in remote locations, people who have lost their driving licences and stuck between a rock and a hard place when they still have to travel for court attendances, medical appointments, cultural business etc.”

While the statistics may be different, the situation is broadly similar in New South Wales.

As far back as 2003, a paper on *Driving Licences and Aboriginal People* produced by the Aboriginal Justice Advisory Council stated that:

> "Driving licence offences have long been a problem for Aboriginal communities. In 2001 driving licence offences were the third highest offence category for convictions of Aboriginal people after assault offences and disorderly conduct offences. The offence of driving while disqualified accounted for 86% of Aboriginal people who were sentenced to imprisonment for driving licence offences during 2001."

The report also noted:

> "There is a particular problem in re-offending on driving licence offences among those convicted for driving whilst disqualified but a general problem of re-offending in driving and traffic offences generally."

NSW BOCSAR, in its report *Why are indigenous imprisonment rates rising?,* in August 2009, noted that between 2001 and 2008 the adult indigenous imprisonment rate rose by 37% in Australia and 48% in New South Wales.

It was noted that there were increases in the number of indigenous prisoners in custody, both on remand and sentenced, for traffic and motor vehicle regulatory offences. 15% of the total increase in the number of sentenced indigenous prisoners was due to traffic offences. There was also a substantial rise in the proportion of indigenous prisoners serving sentences for "offences against justice procedures" (which includes resisting and hindering police).

BOCSAR said:

> "These results suggest that the substantial increase in the number of indigenous people in prison is due mainly to changes in the criminal justice system's response to offending rather than changes in offending itself."

2 Are there any forms of sentence other than those currently available that might more appropriately address the circumstances of Indigenous people?

No doubt there are other forms of sentence that would more appropriately address the circumstances with indigenous people. We do not have the expertise to suggest what these might be.

As noted above, we believe that changes should be made to existing sentencing options to make them more accessible and appropriate for Aboriginal people.

3 Should the Fernando principles be incorporated in legislation and if so, how should this be achieved and what form should they take?

In principal, we support the incorporation of the Fernando principles into legislation. Apparently the principles are being given inadequate attention by judicial officers, and legislation may help underscore their importance. We do not propose to comment on what form such a legislative statement should take. In our view this needs careful consideration and consultation.

Question 11.2: Offenders with cognitive and mental health impairments

1 Should the Crimes (Sentencing Procedure) Act 1999 (NSW) contain a more general statement directing the court's attention to the special circumstances that arise when sentencing an offender with cognitive or mental health impairments? If yes, what form should these principles take?

In principle, we support the adoption of principles in legislation. As with the adoption of the Fernando principles into legislation, this would require careful consideration and further consultation.

2 In what circumstances, if any, should the courts be required to order a pre-sentence report when considering sentencing offenders with cognitive and mental health impairments to prison?

Ideally, a pre-sentence report should be obtained in every case where the court is considering sentencing an offender to imprisonment.

However, a PSR ought not to be required where it would unreasonably delay proceedings, or where there is already adequate information available to the court.

3 Should courts have the power to order that offenders with cognitive and mental health impairments be detained in facilities other than prison? If so, how should such power be framed?

Yes, definitely, but we are unsure how such a power should be framed or how it would operate in practice.

Section 33 of the *Mental Health (Forensic Provisions) Act* enables a court to order that a mentally ill person be taken to hospital. However, the decision whether or not to detain the person in hospital rests with the medical officers at the hospital, who must decide whether the person meets the criteria for involuntary admission as a "mentally ill person".

4 Do existing sentencing options present problems for people with cognitive and mental health impairments? If so, how should this be addressed?

Existing sentencing options do present problems for people with cognitive and mental health impairments. Imprisonment in particular weighs more heavily on such people and, in many cases, there is a lack of appropriate care and treatment within the prison system. People with cognitive and mental health impairments are often assessed as ineligible for community-based sentences such as CSOs and ICOs, and are more vulnerable to breaching bonds and suspended sentences.

As with Aboriginal offenders, children and members of other disadvantaged groups, we support more flexibility in terms of eligibility criteria and breach procedures. We also support the enhanced training of Probation and Parole officers, prison officers, and other relevant personnel, so that they can appropriately identify and respond to mental health and cognitive impairments.

5 Should any new sentencing options be introduced for people with cognitive and mental health impairments? If yes, what types of sentencing options should be introduced?

Instead of new sentencing options, we support the wider availability of diversionary options. Please see our submission to the NSWLRC on *People with Cognitive and Mental Health Impairments in the Criminal Justice System*, and the NSWLRC's recent Report Number 135 on *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*. In that report the Commission recommends the expansion of sections 32 and 33 of *the Mental Health (Forensic Provisions) Act* to superior courts, its wider availability in the Local Courts, and the roll-out of the CREDIT program. We strongly support these recommendations.

Question 11.3: Women

1 Are existing sentencing and diversionary options appropriate for female offenders?

In our view, existing sentencing and diversionary options are not serving the needs of all female offenders.

Female offenders are of course a diverse group but, as noted in paragraph 11.37 of the Question Paper, women in the criminal justice system generally have more complex needs than men. They have higher rates of substance abuse and are more likely than men to have experienced child abuse, domestic violence and sexual assault. Of course, women are more likely than men to be the primary carers of children.

We are encouraged by the introduction of programs like Biyani and the mothers' and children's program within Corrective Services. However, the availability of these programs is still very limited.

The current sentencing principle in NSW, that hardship to an offender's family is not a relevant factor in sentencing unless it is exceptional, potentially impacts more harshly on women than on men. If the *Crimes (Sentencing Procedure) Act* is to continue to contain a list of factors relevant to sentencing (as it currently does in section 21A) we support the inclusion of hardship to family as a relevant principle. Hardship to family should be taken into account where it is substantial, but not necessarily exceptional.

2 If not, how can the existing options be adapted to better cater for female offenders?

Given the large number of women in the criminal justice system who have experienced abuse, family violence and sexual assault, the needs of female offenders cannot be met without a genuine and sustained effort to address the impact of such violence. Specialised and intensive therapeutic programs are needed, both within and outside custodial settings, to address these issues.

There is also a need for enhanced services to support women who are the primary carers of children, to ensure that children are adequately cared for while their mothers are serving sentences, whether this be in custody or in the community.

3 What additional options should be developed?

We do not offer any suggestions for additional sentencing options. As discussed above, we believe improvements can be made to existing sentencing options.

Question 11.4: Corporations

Are additional sentencing options required in order to achieve the purposes of sentencing in relation to corporations? If yes, what should these options be?

We have no comments to make in relation to sentencing for offences committed by corporations.

Question 11.5: Any other categories

Are there any other categories of offenders that should be considered as part of this review?

Children

Although the terms of reference for this review do not include the sentencing of children, there are some aspects of the *Crimes (Sentencing Procedure) Act*, and of sentencing principles and practice which apply to children. Some of the recommendations made by the NSWLRC in the course of this reference will inevitably impact on children. For example, sections 3A (purposes of sentencing), 21A (aggravating and mitigating factors to be taken into account on sentence) and 44-54 (setting terms of Imprisonment, including non-parole periods) apply to children as they do to adults.

We therefore believe it is important for the Commission to give specific consideration to the potential impact of any of its recommendations on children. We would be happy to provide further submissions, or to attend consultations, on this issue if requested.

Young adults

We also believe that young adult offenders in the 18-to-25 age group are worthy of special consideration. It is now widely accepted that adolescent cognitive development is not complete until the age of 25. This has significant implications when it comes to assessing criminal culpability and rehabilitation prospects. It is also well known that young adults (particularly males, it would seem) are extremely vulnerable to violence (including sexual assault) in the adult prison system.

In our view, rehabilitation should play a major role in the sentencing of this group of offenders, and general deterrence a comparatively minor role, even in the case of serious offences. Alternatives to custodial sentences should be used wherever possible, and judicial officers at all levels should receive education about the latest research on cognitive development and its impact on the behaviour and offending patterns of young people.

Homeless people

Finally, we believe that regard must paid to the needs of offenders who are homeless . Homeless people face particular problems in relation to bail, but these problems often flow on to sentencing. Most people would agree that prisons should not be used to “warehouse” homeless people. However, the reality is that the “last resort” option of imprisonment is often imposed due to a lack of accommodation in the community. In our view, the provision of further resources and programs to assist homeless people to obtain stable housing and to comply with court orders is essential.

The Shopfront Youth Legal Centre
September 2012

The Shopfront
YOUTH LEGAL CENTRE

NSW Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

7 September 2012

By email

Dear Sir/Madam

Sentencing: Question Paper 12: Procedural and jurisdictional aspects

The Shopfront Youth Legal Centre welcomes the opportunity to make a submission to this reference.

About the Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under. Established in 1993 and based in Darlinghurst in inner-city Sydney, the Shopfront is a joint project of Mission Australia, the Salvation Army and the law firm Freehills.

The Shopfront's main area of practice is criminal law. Two of our solicitors are accredited specialists in criminal law; one is also an accredited specialist in children's law. Our four solicitors appear almost daily for vulnerable young people in the Local, Children's, District and occasionally Supreme Courts.

The Shopfront's clients come from a range of cultural backgrounds, including a sizeable number of indigenous young people. Common to nearly all of our clients is the experience of homelessness: most have been forced to leave home due to abuse, neglect, domestic violence or extreme family dysfunction. Most of our clients have limited formal education and therefore lack adequate literacy, numeracy and vocational skills. A substantial proportion also have a serious mental health problem or an intellectual disability, often co-existing with a substance abuse problem.

Scope of this submission

Although the Shopfront is a youth legal service, and has expertise in children's matters, the majority of our clients are in fact young adults aged 18 to 25. We therefore have an extensive working knowledge of adult sentencing law and practice. In accordance with the terms of reference, our submission is confined to adult sentencing issues.

Time does not permit us to make a more comprehensive submission. However, we would welcome the opportunity to make further comments or to attend consultations if you consider this would be helpful. In this regard, please do not hesitate to contact me, preferably by email at [redacted]

Yours faithfully

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The Shopfront Youth Legal Centre is a service provided by Freehills in association with Mission Australia and The Salvation Army

THE SALVATION ARMY
Mission Australia
Freehills

Sentencing: Question Paper 12: Procedural and jurisdictional aspects

Question 12.1: Accessibility of sentencing law - websites

How can information technology be used to improve the accessibility of sentencing law while maintaining judicial independence?

In principle we do not oppose the use of technology and social media in the ways suggested in the Question Paper. However, there is still a risk that only the most "interesting" cases will be broadcast or reported, or that only that snippets of information are communicated (especially when using media such as Twitter). The public would still be left without a sophisticated understanding of the sentencing process.

Question 12.2: Accessibility of sentencing law – publicity orders and searchable databases

Could publicity orders and databases be a useful tool in corporate or other sentencing cases?

We support the improved provision of information via databases. The excellent JIRS service provided by the Judicial Commission could potentially be extended to provide information to the general public. However, to a large extent such a resource would be "preaching to the converted", and is likely to be accessed mainly by people who already have a reasonable understanding of the criminal justice system.

Question 12.3: Procedural reforms – making traditional courts more efficient

What procedural changes should be made to make sentencing more efficient?

We are concerned that procedural measures aimed at increasing efficiency may be of marginal effectiveness, or may achieve efficiency at the expense of justice.

Although we acknowledge that delays can cause stress for both victims and offenders (not to mention frustration for lawyers and other criminal justice personnel) it is vital in the interests of justice that sentencing should be thorough and carefully considered, especially in the superior courts where sentences are potentially very severe.

In our view, the increasing delay in sentence proceedings in the superior courts is due to the increasing complexity of sentencing law and the perceived need for sentencing judges to provide detailed "appeal-proof" reasons. These factors will be discussed in our response to the next question.

There are some sensible measures that could be adopted to smooth the sentencing process, such as the suggestion in the Question Paper about exchange of legal representatives' contact details. We also support better resourcing of court registries and probation and parole officers, so that requests for pre-sentence reports do not go astray (as they sometimes do) and matters are not adjourned due to PSRs being unavailable.

We also agree that searching the court listing database with a view to having all of an accused person's matters joined up is a good idea in principle. However, this is something that should usually be done by a defendant's legal representative in any event.

The other procedural reforms suggested in paragraph 12.40 of the Question Paper are, in our view, unworkable. Many of these suggestions would create unnecessary paperwork and would impose unreasonable demands on busy and under-resourced lawyers, especially in Legal Aid or Aboriginal Legal Service matters. Given the disadvantaged nature of many accused persons, especially those in custody, it is unrealistic to expect that a legal representative will be able to provide details of the evidence proposed to be called in court from their client and other witnesses in advance of the sentence date.

Question 12.4: Procedural reforms – streamlining the assessment process

How can the process of obtaining pre-sentence reports covering all sentencing options be made more efficient?

Apart from ensuring that requests for pre-sentence reports are transmitted from courts in a timely manner (see our response to the previous question), and better resourcing of the Probation and Parole Service, we cannot offer any suggestions for making the process of obtaining pre-sentence reports more efficient.

Indeed, we would caution against too much "efficiency", as it may preclude the Probation and Parole Service from performing a thorough assessment on the offender.

We have appeared in numerous Local Courts where "duty" PSRs are commonly ordered. This involves the matter being stood down until later in the day, or adjourned for a week or two, and the offender spending about half an hour with the duty probation officer at the courthouse. Sometimes these duty reports are useful, but they are of necessity superficial.

In contrast, a full PSR usually requires a six-week adjournment and ideally involves two or three meetings with the offender as well as conversations with other significant people such as employers, family members, health professionals and social workers.

Question 12.5: Procedural reforms – legislative support for oral sentencing remarks

Should oral sentencing remarks be encouraged by legislation with appropriate legislative protections to limit the scope of appeals?

We agree that sentencing law has become unnecessarily complex and it appears to have resulted in an increase in "technical" appeals.

Over the years, in the District Court, we have certainly observed a trend away from ex tempore oral sentencing remarks in favour of detailed reserved judgments.

However, we are not convinced that it is appropriate to legislate to encourage the provision of oral sentencing remarks. In our view, legislative amendments would be better directed at reducing unnecessary complexity by simplifying section 21A and abolishing standard non-parole periods.

Question 12.6: Procedural reforms – determining appeals 'on the papers'

1 Should any change be made in sentence appeals to the test for appellate intervention (from either the Local Court or a higher court)?

We oppose any changes to the test for appellate intervention in sentence appeals from the Local Court to the District Court.

Firstly, the current appeal provisions are an important protection against sentences imposed by magistrates in circumstances which are not always ideal. It must be remembered that Local Court sentencing is generally done quickly, often on busy list days with significant time pressures on magistrates, legal representatives and prosecutors. Additionally, defendants in the Local Court are often unrepresented.

Secondly, we have not seen any evidence that the District Court is clogged with unmeritorious appeals from the Local Court.

We do not offer any comments on appeals to the CCA.

2 Should greater emphasis be given to the existing provision in s 43 of the Crimes (Sentencing Procedure) Act 1999 (NSW), which allows sentencing courts to correct errors on their own motion or at the request of one of the parties without the need for an appeal?

As we understand it, section 43 is very narrow in its application. It allows the correction of a clear sentencing error, e.g. where the magistrate has imposed a section 9 bond for a fine-only offence, or a fine in excess of the maximum penalty. However, as we understand it, section 43 does not

permit sentences to be adjusted on the basis that they are "manifestly excessive" or (to quote from your Question Paper) "unreasonable or plainly unjust".

If a District Court appeal has been lodged, and it is clear that the Local Court has made a sentencing error that is capable of being corrected by section 43, we support the matter being remitted to the Local Court for correction of the error.

3 Should appellate courts be able to determine appeals 'on the papers' if the parties agree?

In principle we have no objection to appeals being determined on the papers if the parties agree. However, in many cases, we would expect that one or both parties would wish to make oral as well as written submissions, and should be afforded the opportunity to do so.

Question 12.7: procedural reforms - bottlenecks

What bottlenecks exit that prevent committal for sentence proceeding as swiftly as possible and how can they be addressed?

In our experience, the main "bottleneck" at committal stage is the delay in the preparation and service of briefs of evidence, particularly where this includes scientific evidence such as fingerprint, DNA or drug analysis. Better resourcing of the DAL laboratories would be of some assistance. However, investigation of serious allegations takes time and it is understandable that there may be delays with the service of briefs.

Based on our experience of the Criminal Case Conferencing Trial, this did not alter the situation significantly because it merely formalised what defence lawyers and DPP prosecutors were already doing informally, i.e. entering into charge negotiations and resolving matters at Local Court stage where possible.

We agree with the Law Society's position that better funding should be provided so that senior DPP lawyers and Crown Prosecutors can be involved at an early stage. The same goes for Legal Aid and Aboriginal Legal Service funding, so the defence can have access to counsel where necessary. Currently, some prosecutors and defence lawyers are understandably uncomfortable about negotiating plea agreements in serious and complex matters without the benefit of more experienced counsel.

There is also a reluctance by some defendants to plead guilty to charges until they are convinced that conviction is absolutely inevitable; sometimes this is not until the first day of the trial. In our view this is just human nature and, apart from offering generous discounts for early pleas of guilty, there is little that can or should be done about this.

Question 12.8: Jurisdictional reforms – specialist judges or a specialist criminal jurisdiction

Should specialisation be introduced to the criminal justice system in any of the following ways:

a. having specialist criminal law judicial officers who are only allocated to criminal matters;

b. establishing a Criminal Division of the District Court;

c. establishing a single specialist Criminal Court incorporating both the District Court and Supreme Court's criminal jurisdictions, modelled on the Crown Court;

d. amending the selection criteria for the appointment of judicial officers;

e. in any other way?

Criminal law is a specialised and increasingly complex field. We do see some attraction in the idea of appointing specialist criminal law judicial officers and/or establishing specialist criminal divisions within existing courts.

However, we are not sure whether specialisation will necessarily bring about greater efficiency, as suggested in paragraph 12.73 of the Question Paper. In our experience, most of the District Court judges who deal with sentence matters are very experienced in criminal law, and are not constantly

rostered in and out of the civil jurisdiction, yet it is still commonplace for delays to occur and for judgments to be reserved.

In the Local and Children's Courts, most (but not all) magistrates come to the bench with a good grasp of criminal law.

In our view, lack of judicial experience in criminal law is more likely to have an impact on the conduct of trials and hearings than sentencing.

Question 12.9: Jurisdictional reforms – guideline judgment systems involving the community

1 Should the comprehensive guideline judgment system in England and Wales be adopted in NSW?

We are not familiar with this system and cannot meaningfully comment on it. At this stage we are not convinced that such a system would be of benefit.

2 Should the current guideline judgement system be expanded by:

a. Allowing specialist research bodies such as the NSW Sentencing Council to have a greater role to play in the formulation of guideline judgements, and if so, how should they be involved?

b. Allowing parties other than the Attorney General to make an application for a guideline judgment, and if so, which parties, and on what basis should they be able to apply for a guideline judgment?

We do not necessarily favour the expansion of the current guideline judgement system. However, if it is to be expanded or enhanced, we see some benefit in allowing input from bodies such as the NSW Sentencing Council or BOCSAR. The availability of sound criminological research, and evidence as to "what works" in terms of criminal justice interventions, may produce better quality guidelines that are not so heavily focused on general deterrence.

In principle we believe that the DPP or Senior Public Defender should be able to apply for a guideline.

3 Should the Chief Magistrate have the power to issue guideline judgments for the Local Court? If so, what procedures should apply?

We believe this idea merits further consideration but do not express a view at this stage.

Question 12.10: Jurisdictional reforms – the Goodyear model in England and Wales

1 Should a sentence indication scheme be reintroduced in NSW?

Our experience of the sentence indication pilot that operated in the 1990s was generally positive. It took away a significant amount of speculation and anxiety for our clients. Having said that, we acknowledge that such a scheme may not necessarily be beneficial for the administration of the criminal justice system as a whole.

2 If so, should it apply in all criminal courts or should it be limited to the Local Court or the higher courts?

If such a scheme were reintroduced it should probably only apply in the superior courts, where the stakes are inevitably higher.

3 Should a guideline judgment be sought from the Court of Criminal Appeal to guide the operation of the scheme?

We are unable to comment on whether a guideline judgement would be of benefit.

4 How could the problems identified with the previous sentence indication pilot scheme in NSW in the 1990s, including overly lenient sentence indications and 'judge shopping,' be overcome?

We are not in a position to offer any practical solutions to these concerns.

Question 12.11: The role of victims in sentencing proceedings

1 Should a court be permitted to give weight to the contents of a family victim impact statement when fixing the sentence for an offence in which the victim was killed?

This is a very sensitive issue which has been the subject of much debate over the years. We do not believe we have anything helpful to add to the arguments that have already been advanced.

2 Should any changes be made to the types of offences for which a victim impact statement can be tendered?

We do not offer any comment on this.

3 Are there any other ways in which victims should be able to take part in the sentencing process which are presently unavailable?

As discussed in our response to Question Paper 9, we support the greater use of restorative justice programs. When appropriately run, these can provide victims with meaningful input into the sentencing process, without giving them an inappropriate level of influence over the final result.

Question 12.12: Other options

Should any other options be considered for the possible reform of the sentencing system?

We do see the need for some reforms to the classification of offences (Table 1, Table 2 and Strictly Indictable) and the re-adjustment of maximum penalties for certain offences.

We also suggest that the parole system is in need of review.

However, these issues are complex and time does not permit us to give them adequate consideration in this submission.

The Shopfront Youth Legal Centre
September 2012