THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Criminal Law Committee

Response to question papers

Sentencing: Question Papers 5–7

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New South Wales Law Reform Commission

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Introduction

The NSW Young Lawyers Criminal Law Committee ("the Committee") refers to Question Papers 5 to 7 produced by the New South Wales Law Reform Commission in response to the terms of reference referred by the Attorney-General on the review of the *Sentencing Act* ("the Sentencing Act") on 21 September 2011.

NSW Young Lawyers, a division of the Law Society of NSW, is made up of legal practitioners and law students, who are under the age of 36 or in their first five years of practice. Our membership is made up of some 13,000 members.

The Young Lawyers Criminal Law Committee provides education to the legal profession and wider community on current and future developments in the criminal law, and identifies and submits on issues in need of law reform.

Question Paper 5 – Full-time imprisonment

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

5.1 Should the "special circumstances" test under s 44 of the Sentencing Act be abolished or amended in any way? If so, how?

"Special" circumstances are found in most cases. Despite the inaccuracy of the term as it stands, it is the experience of Committee members that the discretion inherent in findings of special circumstances are often the basis on which judicial officers dispense appropriate individual sentences. On the other hand, respect for the law and the transparency of justice are not encouraged by the artificial nature of this exercise.

5.2 Should a single presumptive ratio be retained under s 44 or should a different ratio apply for different types of offences or different types of offender; and, if so, what ratio should apply to different offences or different offenders?

If a presumptive ratio is retained, it should be a single ratio.

Increasing transparency is not the same as increasing justice (for either victims or offenders). As mentioned above, the "standard" ratio is departed from on a regular basis. The use of many respective ratios for various offences, rather than a single or no guidepost, will not assist a judicial officer perform the sentencing task in the individual case. In particular, basing a ratio (by whatever criteria) on a category of offences has no regard to the culpability of a person committing an offence in that category.

Further, while having a ratio tailored to the offence may create a starting point, this guidance could be subsumed by the complexity of applying such a regime. By way of illustration, consider the daunting task a judge would face in determining, having regard also to the principle of parity, the sentence structure for diverse offences committed by different offenders, where each offence and offender required a different ratio to be considered.

Top-down and bottom-up approaches

5.2. Should the order of sentencing under s 44 of the Sentencing Act return to a 'top down' approach?

No, but s 44 should be amended.

In general, the Committee is of the view that the correct approach is to determine the time to be spent in full-time imprisonment according to the usual sentencing considerations, and then to determine the period of parole needed for the offender to reintegrate into the community. But, recognising that circumstances can differ dramatically, the Committee supports wide judicial discretion in sentencing.

The Committee endorses the approach taken by all other Australian jurisdictions; to leave the order of sentencing to the discretion of the sentencing judge.[1] This approach has been discussed in the context of sentencing reform in NSW in the past,[2] where judicial support for removing this particular sentencing constraint was noted.[3]

The Committee recommends that s 44 be amended to reflect a more flexible approach. The neutral language of s 65(2) of the ACT Act, "The court must set a period (a nonparole period) during which the offender is not eligible to be released on parole" is a reasonable model. As an addendum, since s 44(1) relates only to pronouncement, not the judicial reasoning process, this might be a red herring.

5.3. Could a 'top down' approach work in the context of standard minimum nonparole periods?

No.

Short sentences of imprisonment

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

No.

Abolition of short sentences may decrease the prison population, save costs[7] and reduce the negative effects of short sentences on housing, employment and community connections. It may, in some cases, encourage the use of non-custodial or community based sentences.[8] But the Committee is not convinced that adequate measures are available to prevent the phenomena of 'sentence creep'.[9]

There will be cases where an offender is clearly not suitable for non-or-part-custodial alternatives or where there are no feasible non-or-part-custodial sentences available.[10] And certain groups, such as Indigenous females, are disproportionately the subjects of short sentences.[11] In these cases, if a sentencing judge has determined, as he or she must, that a sentence of imprisonment is the only option, the offender will receive a sentence of six months, as no other option than full-time imprisonment is available and no shorter sentence is possible. If the outcome of the abolition of short sentences is not a positive one, already-marginalised groups will feel it unequally.

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1 *Crimes (Sentencing) Act 2005* (ACT) s 65; *Sentencing Act 1995* (NT) s 53; *Penalties and Sentences Act 1992* (Qld) pt 9 div 3; *Criminal Law Sentencing Act 1988* (SA) s 32; *Sentencing Act 1997* (Tas) s17; *Sentencing Act 1991* (Vic) s 11; *Sentencing Act 1995* (WA) s 89.
2 New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996) 8.26.
3 *R v Morgan* (1993) 70 A Crim R 368, 377(Allen J).
7 Tasmanian Law Reform Institute, *Sentencing,* Final Report No 11 (2008) 3.2.7, referring to B Lind and S Eyland, 'The impact of abolishing short prison sentences' (2002) 73 *Crimes and Justice Bulletin* 1.
8 G Smith, "Sentencing Laws to be Reviewed" (Media Release, 23 September 2011) 1.
9 NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less* (2004) [4.1], [4.4].
10 P Wright, "Impact of Abolishing Short Prison Sentences", *Institute of Criminology Seminar*, 18 March 2004, 3.
11 Corrective Services NSW Women's Advisory Council, *Preliminary Submission PSE19*, 8.

Because the possible benefits of the abolition of short sentences are great, but the consequences unexplored, the Committee suggests evaluating the measure though a pilot program (as recommended by the NSW Sentencing Council in 2004).[12] In the meantime, the Committee errs on the side of providing judicial officers with more, and not less, discretion in the sentencing process.

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

Possibly – subject to the success of a pilot program (see the Committee's response to 5.3).

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

See the Committee's response to 5.3.

If a scheme is to be implemented, the Western Australian model should be followed, which preserves certain circumstances as exceptions.

5.6. Should sentences of imprisonment of six months or less continue to be available as fixed terms only or are there reasons for allowing non-parole periods to be set in relation to these sentences?

Six months or less is generally considered by prison authorities an insufficient length of time to assess the eligibility of an offender for parole.[13] The Committee does not recommend reform in this area.

12 NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less* (2004) 13.
13 NSW, *Parliamentary Debates (Hansard)*, Legislative Assembly, 20 September 1966, 973.

Aggregate head sentences and non-parole periods

5.4. How is the aggregate sentencing model under s 53A of the Sentencing Act working in practice and should it be amended in any way?

Section 53A of the Sentencing Act is being utilised by courts where the offending involved conduct of the same type on each occasion and was part of a single course of conduct.[14]

There have been very few sentence appeals relating to s 53A. Where s 53A has arisen on appeal, this has predominately been in the context of the CCA determining that the circumstances call for an aggregate sentence and, as a consequence, imposing one in lieu of the sentencing judge's sentence.

In addition, most controversy surrounding s 53A in the CCA has related to the transitional provisions of the *Crimes (Sentencing Procedure) Amendment Act 2010*.[15] A number of aggregate sentences have incorrectly been imposed both in lower courts and by the CCA.[16]

The Committee is of the view that the aggregate sentencing model is useful in the sentencing process. But at this early stage the Committee is unable to conclusively state whether the provision requires amendment in any way.

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

Yes.

As the provision stands, a sentencing judge is required to state the individual sentences that would have been imposed. This is in line with the approach outlined in *Pearce v R* (1998) 194 CLR 610 with respect to sentencing for multiple offences. Without a requirement to state the individual sentences that would have been imposed, there is a risk that the sentencing judge will fall into error.

The Committee's view is that stating the individual sentences that would have been imposed is necessary to ensure that the aggregate sentence adequately reflects the totality of the criminal behaviour.[17] While this creates complexity for sentencing judges, it is the experience of the Committee that failure to articulate individual sentences invariably creates difficulty in sentencing appeals for practitioners and appellate judges.

[14] See, eg, *Jaturawong v R* [2011] NSWCCA 168.
[15] Contained in Clause 62, Schedule 2, *Crimes (Sentencing Procedure) Act 1999*.
[16] See, eg, *Rosenstrauss v R* [2012] NSWCCA 25; *R v AB* [2011] NSWCCA 229; *R v AB (No 2)* [2011] NSWCCA 256; *Jaturawong v R* [2011] NSWCCA 168.
[17] *Mill v R* (1988) 166 CLR 59; *Pearce v R* (1998) 194 CLR 610.

Accumulation of sentences and special circumstances

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

Yes, but only if the presumptive ratio regime is retained.

The Committee proposes enactment of a provision similar to s 44(2) of the Sentencing Act in terms that would:

- assist in identifying the intention of the sentencing judge with respect to a finding of special circumstances and its impact on the overall sentence;[18] and
- assist in identifying oversight of the practical effect of accumulation.[19]

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

The CCA provides adequate oversight.

Directing release on parole

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

The three year limit in s 50 should remain.

The Committee is not convinced that a sentencing court is adequately equipped to predict an offender's suitability for release on parole beyond the current period. It is the function of parole boards to make evaluations of prisoners and take into account additional factors not available to the sentencing court, such as the effect of long-term incarceration on the individual prisoner.

The enumeration of specific offences for which automatic release is not available is a poor substitute for the expertise of the parole board.

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

The Committee does not support back end home detention where a person has completed his or her full time sentence and either been assessed as suitable for parole or automatically released.

However, given the many social benefits back end home detention is capable of, the Committee is amenable to its introduction for offenders who have been assessed as not suitable for parole. But as this initiative would come with the same "sentence creep" concerns identified at 5.3 (applying, of course, to higher barriers to parole) it should be introduced and evaluated as a pilot program only.

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[18] *Maglis v R* [2010] NSWCCA 247.
[19] See, eg, *Kalache v R* [2011] NSWCCA 210; *Wakefield v R* [2010] NSWCCA 12.
[25] Ibid at p.2.

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

An offender should be assessed as a suitable candidate for back end home detention using the same method as they are assessed for front end home detention: a risk assessment on an offender should be carried out, the consent of future co-residents should be obtained, and appropriate accommodation should be found.[25] The offender should be allowed to tender material in support of his or her application. If resources or legal assistance are needed, they should be made available.[26]

The Committee proposes that the parole board is the appropriate body to make decisions regarding back end home detention. Board officers would be better equipped to assess the suitability of an offender for home detention as an alternative to parole due to their acquaintance with offenders both within and outside the prison system.[27] If a pilot program is successful, Corrective Services will need further funding to administer the program.

Local Court's sentencing powers

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

No.

The Committee would only be in favour of an increased maximum for the Local Court if there were evidence that the current maximum jurisdiction is frequently being identified as limiting the Local Court from imposing the sentence it thinks is appropriate. The Committee is not aware of any such evidence.

5.8.2 Should a magistrate be able to refer a sentencing matter to the District Court if satisfied that any sentence imposed in the Local Court would not be commensurate with the seriousness of the offence?

No. This is (and should appropriately remain) the responsibility of the Director for Public Prosecutions.

[26] Ibid at p.3.
[27] New South Wales Law Reform Commission, *Report 79 – Sentencing*, 1996 at 7.31.

Question Paper 6: Intermediate custodial sentencing options

As a general proposition, the Committee is in favour of increasing the intermediate custodial sentencing options available to sentencing courts.

Compulsory drug treatment detention

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

Yes, but its scope could be broader.

While the Committee agrees with the position of Legal Aid that the program could be made available to offenders with no criminal record, the program must be targeted at those with who are most likely to benefit. But as a priority the program should be available to female offenders. If funding becomes available, in the absence of research suggesting that the program would be ineffective, the program should be available to more offenders.

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

Aside from asking that the program be more broadly available as and when budgetary constraints permit, the Committee has no specific suggestions for improvements.

Home detention

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

The Committee gratefully adopts the position of the Law Society in response to this question.

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

The Committee gratefully adopts the position of the Law Society in response to this question.

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

Yes.

The Chief Magistrate has submitted that there is an unnecessary incongruity between the offences for which home detention and intensive correction orders (ICOs) may be imposed. There is also, with one exception, no obvious reason for the difference between the maximum terms of imprisonment under which the various custodial options can be considered. The exception is that the Committee has a doubt as to whether an offender could be expected to observe a sentence of home detention significantly beyond the current maximum of 18 months. The temptation to engage in more normal activities when in such proximity to them would be great, and living conditions could become an issue.

This is something that warrants further investigation, perhaps by examining comparable schemes in different jurisdictions.

But in the absence of any research or significant cost implications, the Committee is of the view that the maximum should be aligned for all the options and that differences in what offences ICOs and home detention are available for be removed unless there is a clear reason for distinction in relation to particular offences.

The Committee has noted that, anecdotally, the reason for the reduction in offenders being sentenced to home detention may be that it is often difficult to convince a court that a home detention order is appropriate. Home detention is generally seen as a "soft option" in circumstances where an offender has committed an offence justifying a term of imprisonment.

This trend is likely to continue with the recent introduction of ICOS. The Committee accepts that the court should be slow to regard home detention as appropriate, but does not believe that this is a justification for the removal of home detention as a sentencing option as in some cases it is a manifestly appropriate option.

Finally, subject to satisfactory evidence that it is sustainable sentence for an offender to abide by over the required period of time, home detention should be increased to a maximum of 3 years

Intensive correction orders

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

Given that ICOs have only been available as an alternative to full-time imprisonment since late 2010, it is difficult form a view as to how effective they have been. The Committee anticipates that the Sentencing Council's review of the ICO provisions in 2015/2016 ought be determinative on this issue.

However, it is the experience of the Committee that ICOs appear to be operating as an effective alternative to imprisonment. This is supported by the statistics. Given that there were 97 ICOs made in June 2012 and that a total of 886 offenders were at that time being supervised for ICOs, it is clear that they are being used widely.[28] Judicial officers are demonstrating a willingness to impose ICOs as an intermediate custodial sentencing option and this could be interpreted to reflect a degree of optimism from the bench.

The most recent statistics for successful completion of ICOs warrants this initial optimism. In the months of April, May and June 2012 respectively; 86%, 85% and 91% of offenders completed their ICO successfully.[29] These statistics indicate offenders' willingness to comply with the stringent conditions attached to ICOs. It also reflects an improvement on the first statistics were made available by Corrective Services, which showed that between October 2011 and December 2011, 120 (61.4%) ICOs were completed successfully and 67 (38.1%) were revoked.[30]

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

Yes. The sexual offence exemption is potentially too broad.

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[28] Corrective Services NSW, *Offender Population Report*, week ending 15 July 2012, 3-4.
[29] Ibid, weeks ending 24 June 2012 and 20 May 2012.
[30] Rosemary Caruana, Assistant Commissioner Community Offender Management, *Intensive Correction Orders 12 Months On*, District Court of NSW Annual Conference 2012.

Prescribed sexual offences exclude offenders from being eligible for an ICO. The underlying policy rationale behind s 66(1) of the Sentencing Act is unimpeachable. But the spectrum of offending behaviour that can satisfy the definition of "prescribed sexual offence" is vast, and there is scope for its amendment. There might be cases that fall at the very bottom of the range for an offence under Division 10 of Part 3 of the *Crimes Act 1900* for which an ICO is an appropriate sentence. The Committee suggests revising s 66(2) to preclude only the most serious offences under Division 10 Part 3 from being eligible for an ICO.

In June 2012, 175 ICO Assessments were prepared but only 97 ICOs were in fact made.[31] This suggests that a large proportion of offenders were assessed as unsuitable. This would appear to reflect Corrective Services' careful application of the factors prescribed by s 70 of the Sentencing Act. The Committee endorses this provision and the way it has been applied, as it is paramount that ICOs only be offered to those who have a reasonable prospect of completing them successfully. It is nevertheless important that the assessment criteria are not excessively stringent. For these reasons, the Committee supports Corrective Services' revision of their initial "zero-tolerance" policy to persons with drug and alcohol problems and/or mental problems.[32] The Committee would also support gradual further relaxation of the assessment criteria to facilitate the rehabilitation of offenders with alcohol and other drug issues.

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

Yes. In particular, ICOs ought be extended to maximum of 3 years duration.

The Committee has formed the view that a 3-year maximum is desirable in principle as it would allow a greater number of offenders to participate in what appears to be a highly effective program. But it is conceded that the practical effect may be to place considerable strain on Corrective Services' resources. Further funding is necessary.

The mandatory condition that offenders are not permitted to leave NSW whilst completing an ICO raises an issue for persons who live and/or work near State or Territory borders, such as Albury, Tweed Heads, Queanbeyan and so forth. The Committee propose that reg 175(d) of the *Crimes (Administration of Sentences) Regulation 2008* be modified to permit a sentencing court to allow an offender to dwell or work or visit certain local government area of an adjacent State or Territory as be necessary. This would help offenders avoid technical breaches in situations where this jurisdictional restraint (and subsequent requirement to obtain permission from the Commissioner) could be easily overlooked.

[31] Op-cit, Corrective Services NSW.
[32] Op-cit, Rosemary Caruana.

Suspended sentences

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

Yes.

Suspended sentences are an effective and useful sentencing tool provided that judicial officers are adhering to the three-step process in imposing them. The rationale behind suspended sentences is well foundedand provides adequate denunciation and deterrence whilst having proper regard to an offender's subjective circumstances. That suspended sentences contribute towards reducing the prison population and allow offenders to potentially avoid a first experience in custody is to be commended.

The Committee stresses, however, that it is critical that the three-step process is not elided and that suspended sentences are not used in a net-widening fashion. This was discussed at some length in the Committee's Response to Consultation Paper: Suspended Sentences in August 2011.[33] Ultimately the Committee was concerned with the proportional statistical increase in the use of suspended sentences and submitted that the process must not be circumvented to achieve particular outcomes.

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

In NSW suspended sentences are available for all types of offenders and for all classes of offences.[34] Although jurisdictions such as Victoria have restricted the number of offences for which suspended sentences are available, the Committee is of the view that the two year statutory maximum precludes the most serious offences from being eligible for suspended sentences. It is also the view of the Committee that increasing the maximum to three years is an incremental adjustment that would not undesirably extend the ambit of suspended sentences and would be in accordance with the Committee's other recommendations in relation to the Local Court jurisdiction and ICOs.

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

The Committee submits that community service ought be able to be imposed as a condition of a s 12 bond. This would have the effect of attenuating any community concerns about the leniency of suspended sentences by imposing a punitive element, as opposed to the mere stipulation not to offend the criminal law within a particular time period.

Whether a person has previously received a suspended sentence and, if so, how recently is a factor the sentencing judge will consider in any event and need not be legislatively articulated.

6.4.4. Should greater flexibility be introduced in relation to:

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

Yes.

Section 12(1)(b) should be amended to allow an offender to enter into a good behaviour bond for a term not exceeding 5 years.

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[33] NSW Young Lawyers, *Criminal Law Committee Response to Consultation Paper: Suspended Sentences* (12 August 2011), 7.
[34] NSW Sentencing Council, *Suspended Sentences: A Background Report* (2011) [2.10].

b. partial suspension of the sentence?

No.

After considerable reflection on this proposal, the Committee is of the view that if an offender satisfies the elements of the three-step process, he or she ought be given the full benefit of a suspended sentence. Whilst allowing for partial suspension would give judicial officers greater discretion, the issues pertaining to courts getting around the statutory ratios through imposing partially suspended sentences and the difficulties for an offender if the first part of the sentence is suspended. The consideration of whether to partially suspend a sentence adds further difficulty to what is already a complicated and finely balanced process, and this could vitiate against consistency in the sentencing process.

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

Section 98(3) of the Sentencing Act provides courts with an appropriate degree of discretion in responding to breaches of s 12 bonds.

If the Committee's proposal to extend the length of the bond of good behaviour attaching to a suspended sentence to a maximum of 5 years is adopted, the breach provisions ought be amended to vary the statutory nexus in s 44(2) of the Sentencing Act. This would be necessary to allow a court to take into account the amount of time that has elapsed between the imposition of the bond and its breach. This could be achieved by making an amendment to s 44 to specifically allow the court to take such a period of time into account when fixing the non-parole period.

Rising of the court

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

No.

The Question Paper has identified the court's preference in recent years to back-date custodial sentences to take into account previous custody.[35] In circumstances where the "rising of the court" might otherwise be used, the Committee considers that the back-dating approach is to be preferred, as it more accurately reflects the full time spent in custody, both in court statistics and the person's criminal history.

While the "rising of the court" has otherwise been more commonly used for secondary offences in Local Courts, this use has also gone into decline alongside the option to impose an aggregate sentence of imprisonment under s 53A of the Act, as noted in the Question Paper.[36] In circumstances where a custodial penalty is not required, the court retains the power to issue an order under s 10A of the Act to convict a person but impose no further penalty.[37]

In these circumstances, the Committee considers that the declining relevance of this sentencing option should be taken into account in proposed law reform.

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

Not applicable.

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

Not applicable.

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[35] *Wiggins v The Queen* [2010] NSWCCA 30, [2]-[8].
[36] Sentencing Act s 53A.
[37] Sentencing Act s 10.

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

6.6.1. Should any of the maximum terms for the different custodial sentencing options in the Sentencing Act be changed?

Periodic detention orders ("PDOs"), ICOs and suspended sentences should be available for three years. Home detention should be available for three years *in theory*, subject to further investigation of feasibility.

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

See response to question 6.6.1.

6.6.3. Should the terms of custodial alternatives to full-time imprisonment continue to be tied to the sentence of imprisonment that the court initially determined to be appropriate?

Yes.

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

Yes, to three years.

Other options

6.7. What other intermediate custodial sentences should be considered?

The Committee, the Law Society and others have consistently argued that PDOs ought to be reintroduced. Their absence leaves a gap in the hierarchy of sentencing options available. It is important for a sentencing judge to be able to account for the varying subjective and objective factors relevant to each individual offender when imposing a sentence and have at his or her disposal the greatest possible amount of intermediate options.[38]

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

Yes.

PDOs provide a flexible sentencing option that allows courts to impose custodial sentences while offenders can maintain normal life activities. Alternatives that were introduced in lieu of periodic detention orders have not adequately filled the void because of the decision in *R v Boughen; R v Cameron* [2012] NSWCCA 17 that ICOs are not suitable for persons with a low risk of re-offending and no need for rehabilitation. The Committee anticipates that PDOs will be used in limited numbers as they are complemented by the availability of ICOs.

[38] *R v Anderson* (1987) 32 A Crim R 146 at 154.

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

Three years.

b. what eligibility criteria should apply;

The criteria that formally governed PDOs should apply, with the following exception.

Offenders should still be eligible for a PDO where they have previously served a sentence of full-time imprisonment of six months or more. This unnecessarily restricts the court from considering relevant factors such as when the earlier sentence was imposed and an offender's rehabilitation progress. On a more fundamental level, the rule lacks a reason for being.

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

Wider Availability

Previously issues arose where offenders in country areas suffered more serve penalties due to limited access to endorsed periodic detention centres. This could be reduced through the conversion of existing full time correctional services centres to include periodic detention facilities. Priority should be given to conversions of centres that ensure availability of PDOs to offenders living in rural and remote communities, and for female and Indigenous offenders. Transportation services should be made available to assist offenders attending the centres. There will be, of course, increased costs, but, for what it is worth, the Committee is of the view that the fair administration of justice should be given what resources it requires. In addition, PDOs are cheaper to administer than full-time imprisonment.

Completion Rates

If a detainee should breach conditions or fail to comply with the PDO, for example by accruing two consecutive unauthorised absences, the Parole Authority must have the power to require the offender to serve the balance of their sentence in full-time custody, home detention or revert the offender from Stage 2 to Stage 1 of the program. This should be strictly enforced in order to create a deterrence effect. There should also be a mechanism in place for an offender to appeal the decision of the Parole Authority in order to ensure a fair and just exercise of power.

d. could a rehabilitative element be introduced?

Yes, but not to the extent that it is a *purpose* of the option.

Rehabilitation is an important purpose of the sentencing discretion.[39] This could generally be addressed in PDOs if Stage 2 of the program was expanded to prominently include counselling; educational; and vocational and life skill courses in addition to more traditional community service work. Most importantly, the Department of Corrective Services should be in a position to adequately administer the rehabilitative elements with support through funding and guidance in conducting such programs.

But to prevent an interpretation of the order similar to that given to ICOs in the case of *R v Boughen*, rehabilitation should not be legislatively articulated as a specific purpose of the order. If it really must be stated, then it should only be one of a number of alternate purposes.

[39] *R v Cimone* (2001) 121 A Crim R 433 at [19].

Question Paper 7: Non-custodial sentencing options

Community service orders

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

Community Service Orders ("CSOs") should be retained.

The Committee is of the view that more sentencing options allow the court to exercise its discretion appropriately to the offender.

CSOs are a useful non-custodial alternative that can appropriately fill the gap between bonds and fine and custodial sentences, particularly for those from a low socio-economic background for whom a fine may not be appropriate. But the CSO statistics are moderately disheartening and indicate that use of CSOs is not as widespread as it could be.

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

The proposal to remove the obstacle to combining CSOs with s 9 bonds at sentence has merit in that it provides a further non-custodial sentencing option. On the other hand, the Committee has concerns that CSOs already involve a significant obligation of compliance and that it may often be inappropriate to re-sentence an offender under a breach of a s 9 bond when they have been complying with a CSO. It is also already open to the court to impose additional conditions to a CSO.

The Committee supports the continued expansion of the availability of community service work to rural and regional areas so that all courts and offenders have the benefit of CSOs as a sentencing option.

It is the view of the Committee that CSOs impose serious obligations and restrictions on an offender and as such should remain available only in relation to offences punishable by imprisonment.

Section 9 bonds

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

Yes, s 9 bonds should be retained.

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

The Committee supports legislative clarification of whether s 9 bonds are only available for offences punishable by imprisonment. It is the view of the Committee that s 9(1) strongly indicates a legislative intention to restrict the availability of s 9 bonds to this category of offences. But there seems to be little reason for this restriction in relation to what is a relatively lenient sentencing

option. (There is particular concern within the Committee that s 9 bonds be clearly available for low-range PCA offences.)

Good behaviour bonds

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

The general provisions governing good behaviour bonds are working well and should be retained.

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

The consent element in s 97 of the Sentencing Act ought to be retained as it impresses upon the offender the importance of his or her compliance. Further, sentences that rely on self-monitoring are not realistic without consent.

But in relation to the requirement of the consent of the offender to be called before a superior court for a breach of bond, the Committee is in agreement with the DPP proposal that this should be removed. The court of superior jurisdiction should be limited in imposing a penalty for the breach of bond, so that a penalty is imposed of no greater severity than could have been imposed by the Local Court.

Further, and similarly, if the Local Court is dealing with another charge against an offender it should have exclusive power to deal with the breach of bond imposed by a higher court. This would ensure one court is more likely to deal with all of an offender's matters.

The HPLS has submitted that legislative guidance should be provided to courts, so that in the event of a breach the courts should take into consideration the particular circumstances and needs of the offender. Courts already take into account the objective and subjective factors of the offender and the offence as part of sentencing. There does not need to be further legislative guidance in this area, but if there is it should be limited to a statutory definition of "good behaviour".

Fines

7.4.1. Are the provisions relating to fines in the Sentencing Act working well, and should they be retained?

Yes, the provisions should be retained.

7.4.2. Should the provisions relating to fines in the Sentencing Act be added to or altered in any way?

The general provisions should be changed only to alter the maximum amounts of fines so that maximum fines imposed reflect the seriousness of the conduct or offence.

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

The maximum fine should be calculated with reference to the maximum sentence applicable to the offence. The fine should be expressed as an amount of penalty units per month of applicable sentence. NSW should follow the Commonwealth practice of multiplying the maximum sentence for the offence in months by five.

Conviction with no other penalty

7.5.1. Is the recording of no other penalty under s 10A of the Sentencing Act working well as a sentencing option and should it be retained?

Yes, s 10A should be retained.

The Committee is of the view that s 10A of the Act should be retained. The consistent increase in the use of s 10A orders in the Local Court[40] illustrates the value of having an additional sentencing option at the court's disposal, one that can be used in cases where a charge is deserving of a conviction but no other punishment.[41]

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

None.

Non-conviction orders

7.6.1. Are non-conviction orders under s 10 of the Sentencing Act working well as a sentencing option and should they be retained?

Yes.

7.6.2. What changes, if any, should be made to the provisions governing s 10 nonconviction orders or to their operational arrangements?

The Committee does not believe reform is needed in this area.

7.7. Should it be possible to impose other sentencing options in conjunction with a nonconviction order? If so, which ones?

Yes.

The Committee supports a broader set of non-custodial sentencing options and ancillary orders being made available when imposing non-conviction orders. The Committee endorses the approach adopted by other Australian jurisdictions, in particular by the ACT. That Territory enables the court to make any ancillary order that it could have made if it had convicted the offender of the offence, such as restitution, compensation, costs, forfeiture, destruction and disqualification or loss or suspension of a licence or privilege.[42] If more intermediate options were available to fill the "gap" between the offence and the non-conviction[43], it is likely that more non-conviction orders would be granted and the order would not be perceived as a "soft" option.

This scheme would need to be carefully worked out, and mindful that expanding the scope of s 10 orders should not lead to an erosion of the criminal records system.

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[40] Question Paper 7, 7.59.
[41] *R v Wilhelm* [2010] NSWSC 378, [36] (Howie J).
[42] *Crimes (Sentencing) Act 2005* (ACT) s 18
[43] For discussion of consequences of convictions see *R v Ingrassia* (1997) 41 NSWLR 447, 449.

Other options

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

The Committee reiterates its support of increasing the number of non-custodial sentences available, but has not considered any further proposals aside from those explicitly raised by these Question Papers

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

The Committee supports the introduction of fines held in trust as a sentencing option.

The Committee is mindful of administrative issues relating to the implementation of a fine in trust scheme and takes the following positions on those issues:

- In respect of whether it is appropriate that third parties be allowed to make payments on behalf of the offender, the Committee considers that the offender should pay fines in trust. However, provision for third party contributions may be appropriate when such payments only supplement the offenders own payments and do not relieve the offender entirely of the financial obligation to pay, and do not deny the moral pressure on the offender where a third party financially contributes to the fine in trust.
- The Committee considers it inappropriate to forfeit a fine in trust in response to a s10 no-conviction order.
- The Committee supports the exclusion of fines in trust as a sentencing option in offences of certain circumstances such as fraud or larceny where the property or funds has not been returned in full to the victims.

Work and development orders

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

No.

As the orders currently operate persons not associated with the court system can impose them. This means persons that do not have business before a court can benefit from work and development orders. Meaning the scope and benefits of the orders would be reduced should such orders be only available as a sentencing option.

In addition, adopting work and development orders as a sentencing option would place further burdens on probation and parole services to supervise the orders. The current operation of the orders mean that other services can assist with administering the benefits of the orders.

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

Consideration should be given to expanding the application of CSO to include options similar to those available under work and development orders (WDO). Evidence demonstrates CSOs have significant rehabilitative advantages and reductions in recidivism rates.[48] However, when expanding CSOs care should be taken to avoid impinging on the availability and effectiveness of work and development orders.

Currently CSOs are most commonly employed as a sentence where the offence carries a penalty that includes a term of imprisonment. On rare occasions CSO orders have been made where the maximum sentence includes a fine. Given the successful application of WDOs and specifically the benefits associated with such orders for vulnerable persons it will prove worthwhile if these benefits can be afforded to persons before the court where a fine not be deemed appropriate due to the offenders subjective circumstances. Effectively, courts should have the power to more readily exercise their discretion by imposing CSOs on offenders who may not be in a position to meet the demands of a fine.

The scope of CSO should be modified to include a wider variety of counselling; educational; and vocational and life skill course options.

[48] Sue Rex and Loraine Gelsthorpe, 'The Role of Community Service in Reducing Offending: Evaluating Pathfinder Projects in the UK' (2002) 41(4) *The Howard Journal* 311, 315.

If you have any questions in relation to the matters raised in this submission, please contact:

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Yours faithfully,

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