ALS Submission to the New South Wales Law Reform Commission

24 January 2013

Provided at the Roundtable on Sentencing, Dubbo NSW 24 January 2013

And responding to the
Commission's review of the *Crimes (Sentencing Procedure) Act 1999* (NSW),
with a particular focus on the NSW Far West region

ONE: HOME DETENTION/ICOS

How can we improve the operation and availability of home detention and ICOs? Could a combined option be considered? How could pre-sentence reports be improved?

ICO is largely unavailable in many towns in the far west or positions are limited. (Similarly its predecessor scheme periodic detention was not available west of Bathurst). This is because either the scheme is not available at all or community service providers are not available and therefore the community work component cannot be met.

It is not available at all outside of a 200km radius of large towns such as Dubbo and Bathurst. However we are told by CCMG Dubbo that about 15% of people assessed in the Dubbo area as otherwise eligible for an ICO are ultimately not suitable because the work component is not available.

These interesting observations come from one of our Bourke solicitors:

> *"..The unavailability of ICO for adults is a bigger issue. The issue is acute in s. 12 revocation proceedings. In a recent judgment, Cogswell DCJ found that lack of alternatives to full time custody may constitute good reasons per 98(3)(b) - the argument is that the rule against taking into account the consequences of revocation per Cooke doesn't apply where there are no alternatives to f/t custody. But I ran a recent argument to that effect before one of our local magistrates (in relation to a juvenile - but the principle is the same) and the argument was rejected. As a result, the child was essentially given a NPP of 6 months when the offence giving rise to the breach was GIC of a small roll of fencing wire.*
>
> *By way of contrast, we recently had a Dubbo matter before Bourke Local Court (LCM Eckhold having disqualified himself) - there was a revocation of a s. 12 Bond and (subject to a suitability assessment) the magistrate indicated that he will deal with the matter by way of ICO - all because he has an address in Dubbo. The offence giving rise to the revocation was a quite serious assault...."*

Suitability for the community service component of ICOs is a very significant obstacle to access to this sentencing option. Ill health, drug and alcohol issues are significant examples. As are restrictions such as the requirement that the offender not have had any AVO's with anyone in the house for the previous 5 years and no domestic violence convictions against such a person.

The general impression of ALS lawyers is that the suitability assessment procedure for this disposition is very strict and many clients simply have no realistic prospect of being found suitable and/or complying with the terms of the order. Sadly some clients prefer jail to an ICO. Our senior

lawyer in Bourke has stressed that widespread availability of ICO will not be a panacea for the lack of sentencing alternatives in the Bourke area as the nature of the regimen may be unsuitable for many clients particularly if the option is not implemented in a culturally appropriate way.

Home Detention is now available (we are informed by Probation and Parole) within 150kms of main western NSW towns. There is therefore still some geographical limitation on availability. However even where it is available positions are limited. The eligibility criteria are strict and in some cases the policy rationale behind the restriction is unclear. Many of the comments immediately above regarding ICO are applicable to this option also.

How could pre-sentence report be improved?

It would be helpful if pre sentence report authors were better trained in identifying and detailing factors relevant to the application of the principles in *R v Fernando* (1992) 72 A Crim R 58. ALS lawyers however generally report that most pre-sentence reports depend on the work put into the report by the author and standards generally are fairly good.

TWO: SUSPENDED SENTENCES

Who is getting them? Are they properly targeted? What is their value/place in the hierarchy (if any)?

Suspended sentences are widely misused in the view of the ALS. Their misuse includes them being imposed when prison is not the appropriate penalty and their length being increased due to the fact the term is to be suspended.

ALS Case Study One

A case study from late 2012 in Cobar illustrates this point. The client was a 14 year old female who had no criminal record when she assaulted police. The police facts recorded as follows:

> *"…OFFENCE 3 – ASSAULT POLICE*
> *Just as police came to the back of the police truck, with the young person AW still in the grasp of Senior Constable S, she has thrashed out again and with her foot has kicked Senior Constable E in her stomach, causing immediate pain to her abdomen region. Senior Constable E received a red mark to her stomach as a result. Senior Constable E did not give permission to the young person AW to kick her. Senior Constable S then conducted a leg sweep which resulted in the young person AW falling to the ground. Senior Constable S and Senior Constable E were able to restrain the young person AW on the ground and placed handcuffs on her. Young person AW was then placed into the back of the police truck and conveyed to Cobar Police Station"*

The young person then later came to be sentenced for these matters and a range of other offences that had occurred before and subsequent to the assault police matter.

She was sentenced as follows:

Event 1
Seq 1 - Assault Officer: Suspended Control Order 16 Months
Seq 2 - Resist Officer: s. 33(1)(e) Probation 12 Months
Seq 3 - Intimidate Officer: Suspended Control Order 9 Months (this related to verbal threats made in the police station to police)

Event 2
Seq 1 - Common Assault: s. 33(1)(e) Probation 12 Months
Seq 2 - Common Assault: s. 33(1)(e) Probation 12 Months
Seq 3 - Common Assault: s. 33(1)(e) Probation 12 Months
Seq 4 - CAVO: s. 33(1)(e) Probation 12 Months

Event 3
Seq 1 - Common Assault: s. 33(1)(b) Bond 12 Months
Seq 2 - CAVO: s. 33(1)(e) Probation 12 Months

Event 4
Seq 1 - Larceny: $150 Fine

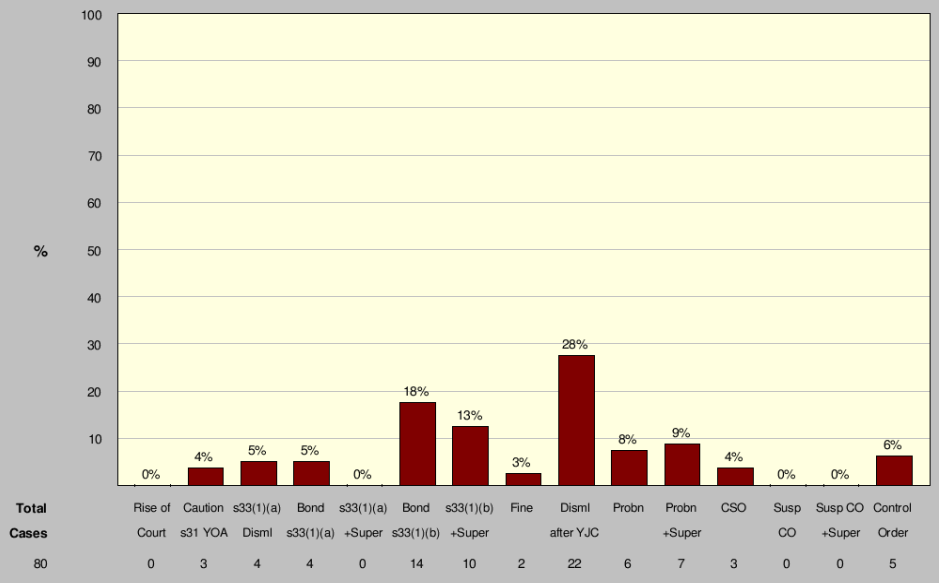
This suspended jail term can be put in the context of the following JIRS statistics to make the point that it seems an inexorable conclusion that the proper 'two stage' process was not followed.

If one assumes it was followed it would be necessary to accept that the Magistrate properly came to a view that the second harshest punishment in the statistical period for children was the appropriate punishment for the assault police. Even compared to adult sentences the assault sentence would be the 7th harshest.

CRIMES ACT 1900 (NSW) **Children's Court - as at Jan 2013**
s.60(1) - assault police officer in execution of duty Sentences from Oct 2008 to Sep 2012

Penalty Type for the Principal Offence

All Offenders

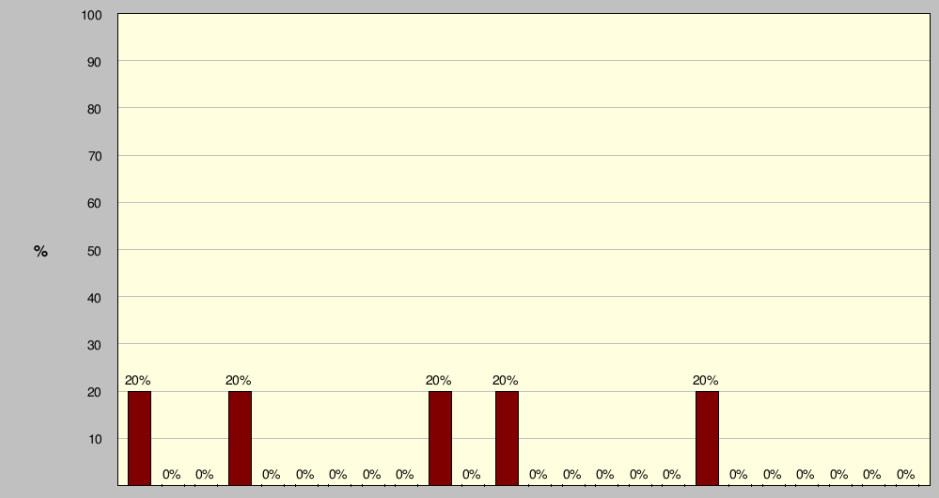


Total Cases	Rise of Court	Caution s31 YOA	s33(1)(a) DismI	Bond s33(1)(a)	s33(1)(a) +Super	Bond s33(1)(b)	s33(1)(b) +Super	Fine	DismI after YJC	Probn	Probn +Super	CSO	Susp CO	Susp CO +Super	Control Order
80	0	3	4	4	0	14	10	2	22	6	7	3	0	0	5

CRIMES ACT 1900 (NSW) **Children's Court - as at Jan 2013**
s.60(1) - assault police officer in execution of duty Sentences from Oct 2008 to Sep 2012

Terms of Control Orders for the Principal Offence

All Offenders



Total Cases	1m	2m	3m	4m	5m	6m	7m	8m	9m	10m	11m	12m	13m	14m	15m	16m	17m	18m	19m	20m	21m	22m	23m	24m
5	1	0	0	1	0	0	0	0	0	1	0	1	0	0	0	0	0	1	0	0	0	0	0	0

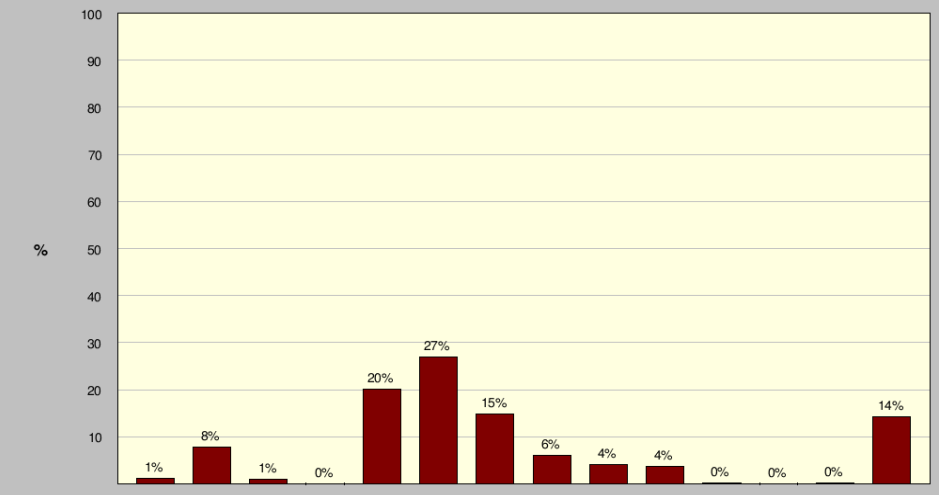
CAUTION: all data rounded upwards eg a term of 5 weeks would be shown in "2m"

CRIMES ACT 1900 (NSW) — **Local Courts - as at Jan 2013**

s.60(1) - assault police officer in execution of duty — Sentences from Oct 2008 to Sep 2012

Penalty Type for the Principal Offence

All Offenders



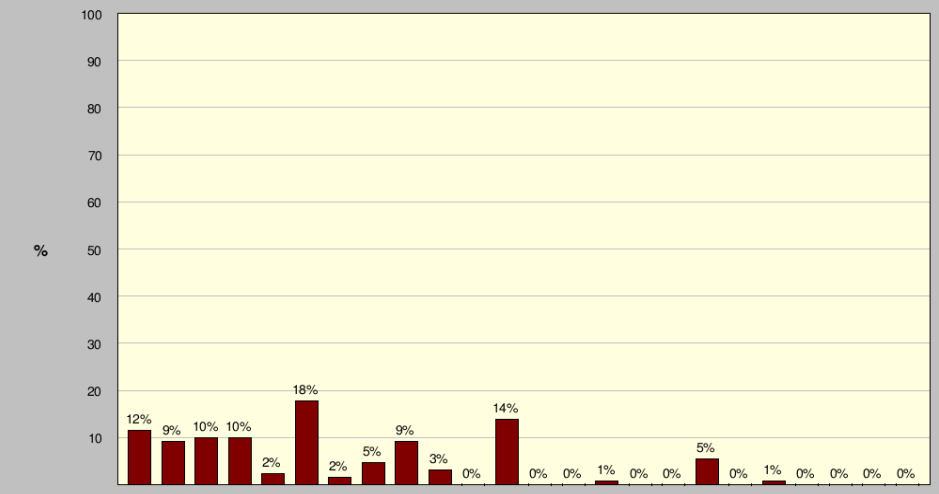
Total Cases	s.10 Dismi	s.10 Bond	s.10A	Rise of Court	Fine Only	s.9 Bond	s.9+ Super	CSO	Susp Sentce	Susp+ Super	ICO	Period Detent	Home Detent	Prison
908	10	70	9	0	182	245	135	55	37	33	1	0	1	130

CRIMES ACT 1900 (NSW) — **Local Courts - as at Jan 2013**

s.60(1) - assault police officer in execution of duty — Sentences from Oct 2008 to Sep 2012

Terms of Sentence for the Principal Offence

All Offenders



Total Cases	1m	2m	3m	4m	5m	6m	7m	8m	9m	10m	11m	12m	13m	14m	15m	16m	17m	18m	19m	20m	21m	22m	23m	24m
	CAUTION: all data rounded upwards eg a term of 5 weeks would be shown in "2m"																							
130	15	12	13	13	3	23	2	6	12	4	0	18	0	0	1	0	0	7	0	1	0	0	0	0

ALS Case Study Two

A further case study from Cobar also demonstrates the misuse of suspended prison terms. The client was in his mid twenties when in November 2010 committed an offence of destroy/damage property. The facts sheet records that one evening he was well intoxicated and was arguing with his girlfriend:

> "*..the accused walked to the window of P's Hair Salon and began kicking the lower glass panel with his right foot. The accused kicked the glass several times until he broke the glass and his foot went through. The accused tugged his foot out of the hole and caused injury, a deep cut, across the top of his right foot, which bled heavily".*

The accused pleaded guilty and was sentenced to an 18 month suspended jail term. (It should be noted that this exceeded the jurisdictional limit of the Local Court at the time which was 12months).

This suspended jail term can be put in the context of the following JIRS statistics to make the point that it seems an inexorable conclusion that the proper 'two stage' process was not followed.

If one assumes it was followed it would be necessary to accept that the Magistrate properly came to a view that by far the harshest punishment in the statistical period was the appropriate punishment.

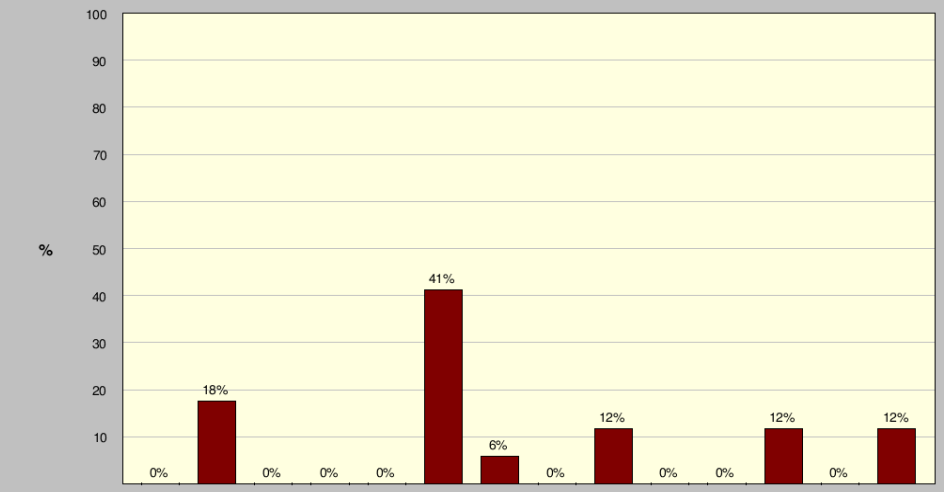
This client subsequently re-offended in the term of the suspended sentence and was sentenced to imprisonment. The bond was revoked and an 18month head sentence imposed for damaging the window. However the latter matter was appealed and the District Court in Dubbo later quashed the revocation prison term on the basis the original sentence was unlawful.

CRIMES ACT 1900 (NSW) **Local Courts - as at Jan 2013**

s.195(1A)(a) - destroy or damage property in company (up to $2,000) Sentences from Dec 2008 to Sep 2012

Penalty Type for the Principal Offence

All Offenders



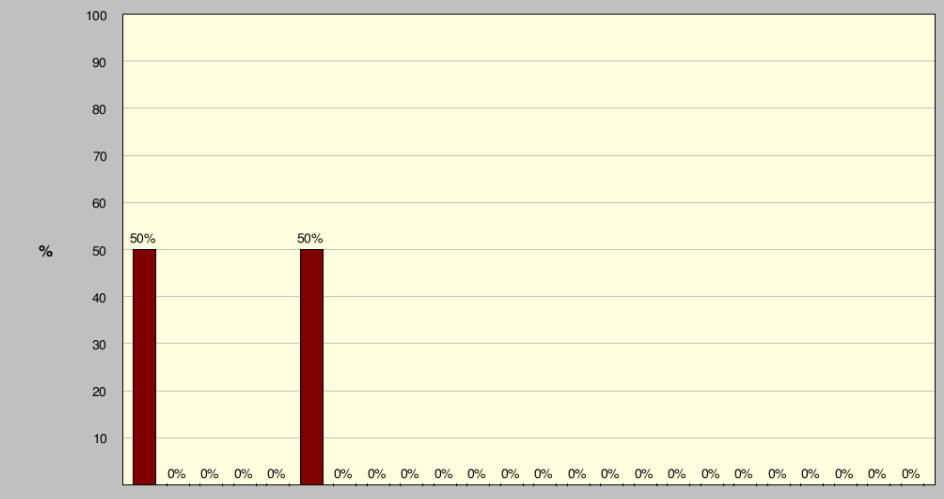
Total Cases	s.10 Dismi	s.10 Bond	s.10A	Rise of Court	Fine Only	s.9 Bond	s.9+ Super	CSO	Susp Sentce	Susp+ Super	ICO	Period Detent	Home Detent	Prison
17	0	3	0	0	0	7	1	0	2	0	0	2	0	2

CRIMES ACT 1900 (NSW) **Local Courts - as at Jan 2013**

s.195(1A)(a) - destroy or damage property in company (up to $2,000) Sentences from Dec 2008 to Sep 2012

Terms of Sentence for the Principal Offence

All Offenders



Total Cases	1m	2m	3m	4m	5m	6m	7m	8m	9m	10m	11m	12m	13m	14m	15m	16m	17m	18m	19m	20m	21m	22m	23m	24m
	CAUTION: all data rounded upwards eg a term of 5 weeks would be shown in "2m"																							
2	1	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

FOUR: CSOS AND BONDS

What is the value and role of these sentences? How could availability of CSO's be improved? Should some combination sentence be considered?

A very large expansion of CSO availability is required to ensure equitable availability. CSO's are not available generally in Bourke, Wilcannia, Wentworth and Balranald. This is either because providers are not available or supervising staff not available. When such options are not available courts tend to "sentence up".

In many places there are very long waiting lists to undertake community service. In Coonamble recently it was reported there was a 6month waiting list to undertake work. Magistrate will often not order community service in such circumstances.

ALS lawyers report from these places that generally clients receive suspended sentences instead. (ALS lawyers in the city report that often a fine in addition to a section 9 bond is the disposition when a client is unsuitable for community service through no fault of their own. It may be that extreme social deprivation leads to a reluctance on behalf of Magistrates in certain places to impose fines).

Often people who are sentenced to CSO in these areas will later be subject to revocation applications because the hours cannot be finished in the requisite time period. In a recent example in Broken Hill a District Court judge refused to revoke and extended the order. Our lawyer discussed the matter with Probation & Parole and it seems clear it would be impossible to complete the sentence because of lack of availability. Even when such an approach is taken the result is still a person being on conditional liberty for a longer period.

The "sentencing up" approach was confirmed by Magistrate Clisdell recently (as reported in the Australian newspaper) when he said:

> *"The facilities, the programs and the sentencing options in the city are vastly different to the sentencing options available to (NSW) country magistrates, particularly in the northwest division," Mr Clisdell said.*
>
> *The magistrate said as well as the normal sentencing options of bonds, jail and community service, diversionary programs and drug and alcohol referral programs were available in the city. In the state's northwest, all that was available to magistrates were the options of dismissal, bonds or jail.*

"In theory, I had community service orders, but they were rarely even approved," he said. "There was no work available. So for sentencing options? A bond or jail. That was it.

"That might explain why there is the impression that jail is more frequently used in (regional) areas, because at the end of the day you don't have any other options. It's extremely frustrating."

The ALS suggests that sentencing law be specifically amended to provide that where a specific sentencing disposition is not available due to geographic issues, that the court must "sentence down" the sentencing hierarchy and impose the next least punitive option.

FIVE: FINES
Are they properly targeted? How could targeting be improved?

It seems often that Magistrates are reluctant to impose fines on our clients perhaps viewing that they will not be paid due to social deprivation issues. The concern of course is that lack of capacity leads to a "sentencing up" approach. Instead of a matter being finalised with a monetary penalty, offenders risk being subject to the consequences of conditional liberty for long periods of time given that bonds are rarely imposed for less than 6 or 9 months.

SIX: DIVERSIONARY OPTIONS
Is the legislative framework working? Are the current options working? Could there be more options?

Section 32 diversions are often more difficult to obtain in remote areas due to lack of services. There are no mental health nurses at most courts.

The ALS lawyers in Bourke estimate there have been no more than 5 youth justice conference referrals from the Bourke Children's Court in the last 2 years. Significant issues are lack of staff to conduct the conferences and client contact being difficult to ensure often matters fall through.

Circle sentencing where available does not always operate effectively. For example in Bourke it appears to be sitting so infrequently that entry into circle is less desirous. In two years the ALS estimates there have been around 9 or 10 referrals. Circle sentencing is not available in Broken Hill or any of the far west circuit courts.

MERIT is not available in many remote courts including Bourke & Wentworth. Even courts close to Dubbo do not have the program including Gilgandra, Warren, Mudgee, Coonabarabran, Peak Hill, Narromine and Nyngan.

SEVEN: IMPRISONMENT

Are there any issues in relation to the setting of the parole and non-parole period?

The Aboriginal Legal Service is concerned that lengthy head sentences with minimal non parole periods are regularly imposed in Dubbo Local Court particularly.

The attached spreadsheet is a print out of all the jail terms imposed in Dubbo Local Court on ALS clients in 2012. (Please note that the recording of information is not standardised).

It can be seen that in the large majority of matters the statutory ratio is upset, often by massive percentages.

The very real concern is that this perhaps does not often reflect a "generous" finding of special circumstances consequent on a reasoned view being taken as to the proportionate "head" sentence. Rather it may reflect a desire for more intensive supervision after the completion of the appropriate period in custody.

Many of our clients in Dubbo sentenced to terms such as 18months to serve 3months, or 8months to serve 1month and if they breach parole they serve lengthy periods in actual custody.

EIGHT: ADDITIONAL COMMENTS

Sentencing for summary Traffic Matters

In 2012 the ALS Dubbo office under took a detailed study of sentencing for the offence of drive while disqualified. A copy is attached.

The report is based on an analysis of 264 people sentenced between 2006 and 2012 in this area. It revealed the following:

- 46 per cent had been given prison sentences. (60 per cent when suspended sentences were taken into account). Compared to the 15% state average.
- More than one-third of the ALS clients in the Dubbo region who received jail terms were sentenced to terms of imprisonment of 12 months, (compared with a 26 per cent state average).
- 17 per cent were sent to jail for 18 months, (compared with only 8 per cent of the general population).
- Clients were on average treated more harshly than people convicted state wide of unquestionably more serious Local Court offences such as dangerous driving causing grievous bodily harm, possession of child pornography, supplying heroin and aggravated indecent assault.

Two ALS Case Studies

Two case studies in relation to the offence of drive while disqualified are illustrative of the use of significant gaol terms for a strictly summary offence and the prohibitive nature of mandatory sentencing in relation to disqualification periods:

Mr. L

Mr L was sentenced in mid 2012 to a total term of 28 months imprisonment with a non-parole period of 23 months gaol for two drive while disqualified offences committed in Nyngan. Those gaol terms were imposed for Mr L's 6th and 7th convictions for driving while disqualified.

Mr L initially became disqualified for driving without a license. He was not a chronic offender in relation to drink driving or dangerous driving. He had one prior conviction for mid-range drink driving and driving recklessly or in a manner dangerous.

The sentences were imposed by two separate Magistrates.

The first sentence was a total term of 16 months with a non-parole period of 8 months. The second sentence was wholly accumulated on the first. A sentence of 20 months was imposed with a non-parole period of 15 months.

The offences themselves were unremarkable: they did not involve erratic or dangerous driving or an attempt to flee or speed away from police upon detection.

Mr L sold his car after the commission of these offences.

The sentences were reduced on appeal to a total of 18 months with a non-parole period of 11 months, effectively reducing the period in custody by 1 year.

Mr L is disqualified until some time after 2031.

Mr. C

Mr C lives in Condoblin and has never held a license. As a result of being convicted for driving without a license for a second and third occasion, he became disqualified for the automatic accumulative 6-year period. Mr C received a 6 month suspended sentence for his first offence of driving while disqualified and was further disqualified.

Some years later, Mr C attended the Local Court to inquire about the expiry of his disqualification period. He was given information suggesting that his disqualification may have expired. Mr C then attended the RTA to confirm whether his disqualification had expired. He was informed that his disqualification period had expired and was issued a license.

Mr C was then prosecuted for a second offence of driving while disqualified. The prosecution was on the basis that Mr C (who identified himself by his mother's surname) was also known by his father's surname in some official records and the RTA records for that name revealed he was still disqualified.

Mr C was sentenced in September 2012 to 12 months gaol with a non-parole period of 9 months for that second offence of driving while disqualified.

Mr C spent almost a month and a half in Wellington gaol before his appeal was heard. He is essentially illiterate, and started learning to read in gaol pending his appeal.

Mr C's sentence was drastically reduced on appeal to a s10(1)(b) bond without conviction and he was released from custody.

Mr C is now still disqualified until sometime in 2022, a length of time that is crippling in its prohibitive effect on employment opportunities and daily life responsibilities.

In the context of these sentences, it is useful to consider what the Court of Criminal Appeal did in the matter of *Felton v R* [2010] NSWCCA 79 in relation to Mr Felton's 17th offence of drive whilst disqualified. An 18-month term of imprisonment was reduced to 6 months, and made partially concurrent with other terms of imprisonment.

Mr Felton had priors which included 18 x take and drive motor vehicle; 16 x drive whilst disqualified; 3 x unlicensed driving; 2 x driving at a speed dangerous; and dangerous driving.

NINE: Specific Suggestions as to Law Reform Emerging from a Western NSW ALS Perspective

1. Sentencing "Down" where an Option Not Available

The ALS suggests that sentencing law be specifically amended to provide that where a specific sentencing disposition is not available due to geographic issues, that the court must "sentence down" the sentencing hierarchy and impose the next least punitive option.

2. Recognition of Aboriginality in Sentencing Legislation

The ALS supports an amendment to the Crimes (Sentencing Procedure) Act to recognise Aboriginality as a factor requiring consideration in sentencing.

This could be modelled on Canadian law where section 718(2)(e) of the Criminal Code states:

> *(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.*

R v Ipeelee [2012] 1 SCR 433 and *R v Gladue* [1999] 1 SCR 688 are important Canadian Supreme Court decisions interpreting this provision.

The ALS believes such an amendment is necessary in light of the development of a line of authority that appears to diminish the application of "Fernando" principles. The most recent example perhaps of this line of authority is *R v Bugmy* [2012] NSWCCA 223. It is also necessary in light of the fact that "Fernando" principles sometimes appear to have little application in the Local Court.

3. Recognition of JIRS Statistics in Sentencing Legislation

The ALS supports an amendment to the Crimes (Sentencing Procedure) Act to recognise judicial statistics and to mandate their consideration when a court is intending to impose imprisonment. This will better ensure that consistency in sentencing is taken into account.

The ALS in the west has had experiences of judicial officers indicating that judicial statistics are 'not very useful' in their opinion.

Stephen Lawrence
Principal Legal Officer (Western Zone)
ABORIGINAL LEGAL SERVICE NSW/ACT LTD