The Shopfront

YOUTH LEGAL CENTRE

NSW Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

31 October 2011

Dear Sir/Madam

Sentencing: preliminary submission from the Shopfront Youth Legal Centre

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

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 employs 4 solicitors (3.1 full-time equivalent), 2 legal assistants, a paralegal (0.4 full-time equivalent) and a social worker. We are also assisted by a number of volunteers. Two of our solicitors are accredited specialists in criminal law; one is also a specialist accredited in children's law.

The Shopfront represents young people in criminal matters, mainly in the Local, Children's and District Courts. We prioritise those young people who are the most vulnerable, including those in need of more intensive support and continuity of representation than the Legal Aid system can provide.

The Shopfront also assists clients to pursue victims' compensation claims and deal with unpaid fines. We also provide advice and referrals on a range of legal issues including family law, child welfare, administrative and civil matters.

The Shopfront's clients come from a range of cultural backgrounds, including a sizeable number of indigenous young people. Common to most 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. Moreover, 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

This is a preliminary submission only and as such it will be brief.

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 in the 18 to 25 year age group. We therefore have an extensive working knowledge of the *Crimes (Sentencing Procedure) Act* 1999.

We note that the Act was introduced following a comprehensive reference on sentencing conducted by the NSWLRC. In general, we are of the view that the Act is well-drafted and works well in practice.

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Our main concerns are about provisions that have been added to the Act since it was originally enacted, including section 21A and the standard non-parole period provisions. We also have some concerns about suspended sentences.

We attach copies of our submissions to the NSW Sentencing Council on the following issues:

- Non-conviction orders and good behaviour bonds (August 2009)
- Suspended sentences (July 2011)

We also refer to our recent submissions to the NSWLRC about:

- Penalty notices (March 2009 and December 2010)
- People with cognitive and mental health impairments in the criminal justice system (June 2010)
- Young people with cognitive and mental health impairments in the criminal justice system (March 2011)
- Bail (July 2011)

Although none of the above submissions to the NSWLRC relates to sentencing *per se*, they have relevance insofar as they discuss the difficulties faced in achieving appropriate sentencing outcomes for people with cognitive and mental health impairments, the negative impact of fines on disadvantaged people, and the interaction between bail and sentencing.

Further comments

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 sincerely

Jane Sanders
Principal Solicitor
Shopfront Youth Legal Centre

[redacted]

1 The ways in which sentencing law as a whole can be simplified and made more transparent and consistent

1.1 Simplification

It is of course desirable that sentencing law be clear and easy for sentencing judges to apply. It should be readily understood by the parties (especially the accused), other affected people (especially victims) and the public at large.

However, sentencing can be a complex process involving balancing a number of often competing factors. We would therefore caution against attempts to over-simplify or "dumb down" sentencing laws.

We are of the view that the *Crimes (Sentencing Procedure) Act* is, in general, a well-drafted and easily understood piece of legislation.

However, sentencing has been overly complicated by provisions such as standard non-parole periods, the requirement for an artificial two-stage process in some cases, and requirements to specify sentence discounts in mathematical terms. A return to the "instinctive synthesis" approach would be preferable (as endorsed by the High Court in *Makarian v The Queen* (2005) 228 CLR 357).

We also suggest that section 21A has unnecessarily complicated the sentencing process, without bringing any real benefits. Most of the factors listed in s21A were already well-established by the common law, and generally well-understood by advocates and judicial officers. Appeal judgments relating to s21A tend to show that the section has created confusion and double-counting in both aggravating and mitigating factors.

1.2 Transparency

We understand "transparency" to mean that judicial officers' sentencing decisions are readily understood, not only by the affected parties but by the public at large. This would include the provision of clearly-expressed reasons, which would be made available to the public in appropriate cases. Public education about criminal justice and sentencing is also important .

Unfortunately the aim of transparency, in terms of reasons for sentencing decisions being made clear to the general public, can be somewhat undermined by inaccurate and sensationalist media reporting.

Public Confidence in the NSW Criminal Justice System (August 2008), a bulletin published by the NSW Bureau of Crime Statistics and Research (BOCSAR), expressed the view that the media are largely responsible for misconceptions about crime in large sections of the public.

This was further identified in a BOCSAR media release accompanying the release of its *Sentencing Snapshots* (25 September 2011) stating that "the courts are much tougher on offenders than people think".

The Director of the Bureau, Dr Don Weatherburn attributes the misconceptions of the public to "sensationalist media reporting" which influences the public to form the view that the courts are lenient towards serious offenders. He further comments that "some journalists make no distinction between minor and serious forms of a particular offence and/or pay no attention whatsoever to whether the sentence is for a first-time or a repeat offender."

1.3 Consistency

Firstly, what is meant by "consistency"?

It does not mean treating everyone in the same manner. Such a practice would be offensive to many first principles of sentencing. A general pursuit towards "consistency" is desirable in so far as like offenders are treated in a like manner, but the legislature and

the judiciary must exercise caution against espousing principles that would encourage or even permit unlike offenders to be treated alike.

In our view, a desirable level of consistency is best achieved through a robust appeal process, and the provision of resources to assist judicial officers in reaching decisions (for example, JIRS statistics, and widely-available judgments and case summaries).

Mandatory sentencing

Mandatory sentencing is sometimes said to promote consistency, but it may in fact do the opposite by requiring *unlike* offenders and offences to be treated in a like manner. It offends against the principle that "if justice is not individual, it is nothing" as referred to in *Kable v DPP* (1995) 36 NSWLR 374 at 394 by Mahoney JA.

Guideline judgments

It appears that by and large, some degree of consistency between like offenders is achieved through guideline judgments. Our concern, however, is that the cost of this consistency may be too high, as sentence tariffs have been pushed up and there is perhaps less scope for extending leniency to those who deserve it.

A report from the Judicial Commission of New South Wales, *Sentencing Trends for Armed Robbery and Robbery in Company: The Impact of the Guideline* in *R v Henry [1999] NSWCCA 111* (February 2003) includes among its findings:

- The rate for full-time custodial sentences increased by 4.2% from pre *Henry* to post *Henry* (from 81% to 85.2%).
- The proportion of offenders who received other types of custodial penalties rose by 2.6% from pre *Henry* to post *Henry* (from 7.2% to 9.8%).
- The increase in some form of custodial penalty was at the cost of a reduction in non-custodial penalties, such as the use of community service orders (from 7.2% pre *Henry* to 2.8% post *Henry*), and bonds/recognisances (from 4.3% pre *Henry* to 2.1% post *Henry*).
- In terms of the range of sentences imposed, 'when the cases clustering around the 80% range were examined, a narrowing of the bandwidth for both head sentences and non-parole periods was evident. Head sentences went from 24-78 months pre *Henry* to 32-72 months post *Henry*, while non-parole periods went from 9-48 months pre *Henry* to 12-45 months post *Henry*'. This suggests that sentences became more "consistent" after Henry.

A shift to harsher penalties resulting from guideline judgments is further exemplified for High Range Prescribed Concentration of Alcohol (HRPCA) offences when a guideline judgment was delivered on 8 September 2004 by the NSW Court of Criminal Appeal.

A study assessing the impact of the guideline judgment on sentencing patterns was published by the Judicial Commission of NSW *'Impact of the High Range PCA Guideline Judgment on Sentencing Drink Drivers in NSW'* (September 2005). The findings of the study were that there was a significant increase in the severity of penalties after the guideline judgment was delivered.

The main findings in relation to the severity of penalties included:

- The use of s10 orders significantly decreased from 10.3% in the equivalent time period in 2003 to 5.6% pre-guideline to 2.2% post-guideline.
- Overall, there was a substantial fall in less severe penalties including s 9 and s 10 orders and fines, while there was a significant increase in more severe penalties.
- The application of community service orders increased from 4.4% in the equivalent time period in 2003 to 5.4% pre-guideline to 10.5% post-guideline. Similarly, the application of s12 suspended sentence also increased from 3.8% in the equivalent time period in 2003 to 4.2% pre-guideline to 10.4% post-guideline.

- Sentences of full-time custody increased from 2.2% in the equivalent time period in 2003 to 2.9% pre-guideline to 6% post-guideline.

Standard non-parole periods

Standard non-parole periods were apparently introduced in an attempt to achieve consistency, but there is no evidence that they have achieved this purpose. Instead there has been a general increase in sentencing tariffs for most standard non-parole period offences. It also appears that there has been a raft of appeals due to the fact that the provisions are complex and often misapplied.

A study undertaken by the Judicial Commission NSW '*The impact of the standard non-parole period sentencing scheme on sentencing patterns in New South Wales*' (Monograph 33, May 2010) compared patterns of sentencing before and after the standard non-parole period legislation was introduced on 1 February 2003.

Overall, the study found that while standard non-parole periods have had the effect of creating greater uniformity and consistency in sentencing, they have also increased sentencing tariffs in relation to the severity of penalties imposed and length of sentences for custodial sentences. The study also found the rate of severity appeals for a first instance sentence has risen for some offences and decreased for other offences.

The recent High Court decision of *Muldrock v The Queen* [2011] HCA 39 is said to have resolved some of the problems with the application of standard non-parole periods, but to our mind it is also evidence of the confusion and error which the scheme has caused.

It would be our submission that the standard non-parole period scheme be abolished.

2 The priority issues in sentencing law that require investigation and reform

2.1 Reducing rates of full-time imprisonment

It is now widely accepted that the rate of imprisonment in NSW is unacceptably high, and that prisons have to some extent have become a dumping ground for vulnerable people who are inadequately cared for in the community. Priority should be given to ensuring that imprisonment is reserved for those cases where it is really necessary in the interests of community protection, rehabilitation or (possibly) deterrence.

It is well known that recidivism rates among former prisoners are very high. In a study by Eileen Baldry et al in 2003, it was found that 36% of the NSW and Victorian prisoners surveyed were back in custody within 9 months of their release[1]. This is hardly surprising, given the rates of homelessness and other social problems that confront prisoners upon release[2].

According to a 2010 article by the Australian Prisons Project, *Key moments in Penal Culture in NSW 1970 – present*[3], the Australian Institute of Criminology in 2008 found that the national average recidivism rate (measured by the percentage of prisoners released in 2002-03 who returned to prison within two years) was 38.4%, compared with a rate of 43.5% for NSW.

As a service working with young adults who are homeless (and who typically suffer from mental health problems, unresolved trauma, intellectual disabilities and/ or substance abuse problems) we have observed at first hand the problem of the "revolving door".

We accept that the provision of adequate housing, health and social support services is beyond the Commission's terms of reference. However, the provision of realistic,

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[1] Baldry, E., & Maplestone, P. (2003) *Prisoners' post-release homelessness and lack of social integration*, Current Issues in Criminal Justice15(2): 155-169.

[2] These issues are also examined at length in Baldry's research, ibid. See also, for example, *Recidivism and the role of social factors post-release* at http://www.sydneyshove.org/Social_Factors_Post_Release.pdf

[3] http://www.app.unsw.edu.au/section-2-major-themes-decade-0#2000s; see also Payne, J.' *Recidivism in Australia : findings and future research*, Australian institute of Criminology, Research and Public Policy Series No. 80 (2007), http://www.aic.gov.au/documents/0/6/B/%7B06BA8B79-E747-413E-A263-72FA37E42F6F%7Drpp80.pdf

accessible and effective sentencing options, and the relegation of prison so that it is *truly* a last resort, is within the scope of this reference.

In our view, for our client group at least, increased rates of imprisonment are partly due to a knock-on effect from increased rates of bail refusal. If bail is refused, it is more difficult to access appropriate support services and to demonstrate capacity for rehabilitation. For those who are refused bail, a custodial sentence is often seen as the only realistic option. We are hopeful that the Commission's current reference on bail will assist in dealing with this problem.

2.2 Purposes and principles of sentencing

The stated purposes of sentencing are currently set out in s3A of the *Crimes (Sentencing Procedure) Act*. Although these purposes have their origins in long-established common law tradition, and ought not to be discarded lightly, we believe it is time for a robust debate about whether these purposes are still serving the community well, and about how these purposes should be given practical effect.

We believe it is useful for the Act to spell out the purposes of sentencing. However, it may be necessary to provide some legislative guidance as to how these purposes are to be achieved. There may also be need for guidance on the relative weight to be given to each of these purposes.

Old assumptions, for example that harsh sentences are necessary and effective in achieving general deterrence, must be questioned.

Questioning general deterrence

In our view, there is a need to explode the myth that imprisonment is effective in achieving specific and general deterrence. If general deterrence is to continue to be given significant weight, and if imprisonment is thought to achieve this objective, this should be supported by evidence that prison is an effective general deterrent. Current evidence suggests that it may not be.

The NSW Law Reform Commission's *Discussion Paper 33 (1996) – Sentencing*, in section 3 entitled 'Purposes and Principles of Sentencing Law' states that the justification for deterrence has been questioned on four grounds:

1. There is doubt about the extent to which, empirically, punishment actually prevents the commission of future offences.
2. Assuming that punishment does deter, it is argued that it is the threat of detection and resulting punishment (in some form), rather than the level of punishment, which deters the offender. If so, then it follows that a positive deterrent response (for example, by setting higher penalties) achieves little or nothing in terms of the incidence of crime.
3. Accounting for deterrence, particularly general deterrence, in setting punishment can be seen as unjustly punishing the offender for what others might do, as opposed to what the offender has in fact done ("scapegoating").
4. There is considerable doubt as to the efficacy of the communication of the penalties to the wider audience upon which the general deterrence depends.

His Honour Judge John Nicholson SC, in a recent paper entitled *Sentencing – Good Bad Indifferent*[4], states that in order for general deterrence to be effective "the deterrent message must reach the would-be offender. He must know about it". Nicholson SC further explains that the courts' promotion of the policy "do not commit a crime or you will

[4] Paper presented by District Court Judge John Nicholson SC at a recent CLE conference (18 September 2011) – Available online at http://criminalcle.net.au/attachments/Sentencing_Good_Bad__Indifferent.pdf.

be punished" by using the weighting of general deterrence in sentencing is a "media disaster" and "unfair".[5]

In Nicholson's view, the principles of general and specific deterrence have "been incorporated into sentencing dogma without a skerrick of evidence or research". It is, in our view, an unusual theory that potential offenders have either knowledge of sentencing trends or the time to coolly contemplate those judgments, when undertaking a decision to commit a crime.

Ultimately, as Nicholson suggests, general deterrence competes with the notion that justice is individual and can lead to disproportionate sentences.

The questionable effectiveness of general deterrence has been acknowledged by judicial officers in superior courts[6]. However, in *R v Wong* (1999) 48 NSWLR 340 at [127], Spigelman CJ (as he then was) said:

> "There are significant differences of opinion as to the deterrent effect of sentences, particularly, the deterrent effect of marginal changes in sentence. Nevertheless, the fact that penalties operate as a deterrent is a structural assumption of our criminal justice system. Legislation would be required to change the traditional approach of the courts to this matter."

In our submission it is timely that this "structural assumption" be challenged and that legislation be enacted to change the traditional approach to general deterrence.

Rehabilitation and young offenders

The tension between rehabilitation and general deterrence is particularly apparent in cases of young offenders (by this we mean children and young adults) who commit serious offences.

While the *Children (Criminal Proceedings) Act* is not within the Commission's terms of reference, this reference does encompass children dealt with "according to law" under the *Crimes (Sentencing Procedure) Act*.

Traditionally, rehabilitation has been of primary importance when sentencing young offenders, particularly children but also young adults.

The case most often cited in support of the primacy of rehabilitation is *R v GDP* (1991) 53 A Crim R 112. In this case, the Court of Criminal Appeal adopted the approach taken in previous cases and held that the sentencing principles to be applied to children are different from those to be applied to adults. The court reiterated the importance of rehabilitation while saying that general deterrence should not be completely ignored.

Many subsequent cases have followed this approach[7]. Some authorities have made it clear that the consideration of rehabilitation is no less important where a very serious crime has been committed, and that the rehabilitation principle is not restricted to non-violent crimes[8].

However, more recently, a line of authority has emerged to the effect that where children "behave as adults" or engage in "grave adult behaviour", specific and general deterrence will carry considerable weight and may prevail over rehabilitation.

We acknowledge that, where an offence has involved significant planning or other hallmarks of adult cognitive development, a young person may lose some of the leniency to which they might otherwise be entitled. However, we are concerned that the concept of

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[5] D. Brown, 'The Limited Benefit of Prison in Controlling Crime', Contemporary Comment, *Current Issues in Criminal Justice*, Vol 22 No 1, July 2010, 461-473

[6] See, for example, commentary in NSW Judicial Commission *Sentencing Bench Book* at para [2-240]

[7] For example, *R v XYJ* (unreported, NSWCCA, 15 June 1992), *R v DAR* (unreported, NSWCCA, 2 November 1997), *R v LO* [1999] NSWCCA 291, *R v Hearne* (2001) 124 A Crim R 451, *R v TVC* [2002] NSWCCA 325, *R v JDB* [2005] NSWCCA 102, *R v GS* [2006] NSWCCA 410.

[8] See *R v Whitfield* [2001] NSWSC 876, *R v SK; R v OZ* [2001] NSWCCA 492.

"adult offences" or "adult behaviour" has been inappropriately extended to refer to serious or violent offences in general, even those which bear the hallmarks of impulsive adolescent-type behaviour.

In our view, this reasoning can lead to outcomes that are unjust and even absurd. For example, in *R v KT* [2007] NSWSC 83 the sentencing judge held that, while throwing rocks at a car was juvenile behaviour, what followed (hitting the victim, causing him to fall and incur a fatal head injury) could not be categorised as such and was conduct that called for a strong element of punishment and general deterrence. KT's severity appeal was dismissed by the Court of Criminal Appeal (see *KT v R* [2008] NSWCCA 51). The majority held that the sentencing judge did not err in his approach. However, McClellan CJ at CL, in dissent (with whom we respectfully agree) remarked that it was difficult to dissociate the act of throwing eggs and the subsequent assault of the victim, and that both could be categorised of the acts of an immature person.

The paper *Youth as a mitigating factor: to what extent does the principle survive?* (2007) by Dina Yehia SC of the Public Defenders contains a good discussion of the divergent lines of authority. There is also some relevant discussion in the paper *Children and the High and Supreme Courts* 2007 – 2008 (2008) by Andrew Haesler SC (as he then was)[9].

In our view, there is a need for legislative action to strengthen the principle of rehabilitation as it applies to young people. Although all courts (not just the Children's Court) must have regard to the principles of s6 of the *Children (Criminal Proceedings) Act*, there may be a need to strengthen these principles, and perhaps to provide a more explicit statement as to the primacy of rehabilitation and the limited role of general and specific deterrence. We also see a need for a strong statement of principle in the *Crimes (Sentencing Procedure) Act* so that rehabilitation is also given appropriate weight for young adult offenders.

2.3 Maintaining judicial discretion

In our view, judicial discretion is key to ensuring just and appropriate sentencing outcomes.

It is of course appropriate for judicial officers to be guided in the exercise of their discretion, by legislative principle and case law (possibly including guideline judgments).

Priority should be given to resisting any attempt to fetter judicial discretion, and to restoring judicial discretion in areas where it has been removed or restricted.

From our perspective, one of the most troubling restrictions on judicial discretion lies in the ancillary orders that may be made following conviction for traffic offences. The existing regime of mandatory disqualifications, especially in relation to offences of driving while unlicensed, suspended, cancelled or disqualified, leads to harsh and often absurd results. It is not uncommon for disadvantaged people, especially those in Aboriginal communities, to accumulate disqualifications of 20 years or more, and to lose hope of ever obtaining a driving licence[10]. Although this regime is set out in the *Road Transport* legislation and not in the *Crimes (Sentencing Procedure) Act*, we urge the Commission to consider this issue if possible. The lack of discretion in respect of disqualifications can distort the sentencing process: for example, it causes some magistrates to resort to the use of section 10 in situations where it is not otherwise warranted.

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[9] Both papers are available on the Public Defenders' website at http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_papersbypublicdefenders

[10] For further discussion of the impact of licence disqualifications, please refer to our submissions to the NSWLRC on *Penalty Notices*, particularly our preliminary submission (March 2009).

3 Any sentencing options in addition to those that currently exist that could be provided as an alternative to imprisonment, either generally, or in relation to particular categories of offenders

The *Crimes (Sentencing Procedure) Act* offers a number of alternatives to imprisonment. We do not see a compelling need for *new* sentencing options, but there is definitely a need for existing options to be made more available.

Eligibility criteria

The availability of some non-custodial options is limited by factors such as:

- offence type (e.g. certain types of offences disqualify an offender from home detention, intensive correction orders or forum sentencing; violent offences render an offender ineligible for the adult Drug Court program);
- criminal history;
- sentence length (suspended sentences and ICOs can only be imposed in relation to sentences of 2 years or less, home detention in relation to sentences of 18 months or less);
- the offender's place of residence (e.g. the Drug Court catchment areas are very limited; sentencing options such as home detention and ICOs are not available in certain regional areas).

We would support a review of these eligibility criteria which, in our view, are too restrictive. Of course there will be cost implications, but this must of course be considered in the light of the high costs (both financial and social) of full-time imprisonment. We acknowledge that there are also political reasons for certain types of offenders being excluded from some sentencing options; we suggest some strong leadership may be required to overcome these obstacles.

Practical availability of sentencing options

There is also a problem with the practical availability of non-custodial options, especially in regional areas and for disadvantaged populations[11]. While options such as bonds and community service are theoretically available all over the state, in practice there is a lack of support services, supervision and community work in some areas, which makes these sentencing options either unavailable in a practical sense or doomed to fail due to lack of adequate support or supervision.

Additionally, access to non-custodial sentencing options is often denied to the most vulnerable offenders, for example those who are homeless, or those who have an intellectual disability or a mental illness. This is especially so in the case of intensive correction orders, which were introduced with the aim of providing offenders with intensive support to assist with their rehabilitation. In our short experience of the ICO scheme, it appears that the people who could most benefit from an ICO are the least likely to be assessed as suitable.

Instability, whether it be homelessness, mental illness or substance dependence, will often render an offender unsuitable for an ICO. We understand that this is partly because an offender on an ICO must be able to perform community service work; we understand that Corrective Services is giving this issue some serious consideration, with a view to modifying the ICO scheme so that the community service requirements can be deferred for offenders who are in need of intensive rehabilitation.

The ICO assessment process is very rigorous and imposes what we regard to be unreasonable obligations on vulnerable people. For example, one of our clients who has mental health problems was required by the officer performing the ICO assessment to

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[11] For a discussion of these problems and possible solutions, see final report of NSW Legislative Council Standing Committee on Law an Justice Inquiry into *Community based sentencing options for rural and remote areas and disadvantaged populations*, 30 March 2006

obtain his own psychiatric assessment report – something that is not easy to do, given that community mental health services do not generally provide forensic assessment reports, and the cost of independent psychiatric assessments is very high. From what we hear, this is a systemic problem and not an isolated example.

Many offenders will be sentenced to imprisonment largely because they have no stable accommodation and support in the community. This is especially likely to be the case for offenders with a mental illness, a cognitive impairment or a substance abuse problem. Priority should be given to funding more programs like Biyani, which is a residential program for dual diagnosis women who would otherwise receive a custodial sentence.

Suspended sentences

Suspended sentences have been the subject of some debate over the years, and have indeed been abolished and re-introduced.

With some reservations, we favour the retention of suspended sentences as an alternative to full-time custody. However, we have some concerns about the way suspended sentences currently operate. Please see the attached copy of our recent submission to the Sentencing Council.

Drug Court and diversionary programs

We support the roll-out of the adult Drug Court to all parts of NSW.

We also suggest that consideration be given to extending the eligibility criteria to those who have committed certain types of violent offences (e.g. certain types of robberies; less serious assaults) and those who are dependent on alcohol. We note that the Youth Drug and Alcohol Court program includes these categories of offenders.

We also support the expansion of diversionary programs such as MERIT and CREDIT. Our experience with MERIT is quite extensive and generally very positive. Many of our clients have availed themselves of the MERIT program (and a smaller number have participated in CREDIT, which is still a pilot program) and have gained access to rehabilitation and support services which are not always readily accessible within the community.

Although MERIT and CREDIT are not sentencing options, as they are generally offered before a plea is entered, they generally enhance an offender's rehabilitation prospects, reduce the risk of recidivism, and help provide the Local Court with a realistic alternative to full-time imprisonment.

We also refer the Commission to our submissions on *People with cognitive and mental health impairments in the criminal justice system* (June 2010) and *Young people with cognitive and mental health impairments in the criminal justice system* (March 2011), in which we recommended the establishment of a MERIT or CREDIT type program for persons with cognitive and mental health impairments.

4 Operation of the standard minimum non-parole period scheme.

Please see the above comments about the standard non-parole period scheme.

The Shopfront Youth Legal Centre
October 2011

James Wood AO QC
Chairperson
New South Wales Sentencing Council
GPO Box 6
SYDNEY NSW 2001

31 August 2009

By fax: 8061 9835 (original by post)

Dear Sir

Non-conviction orders and good behaviour bonds

Thank you for the opportunity to comment on this issue. We regret that time does not permit us to make a more comprehensive submission.

The Shopfront Youth Legal Centre provides legal representation for homeless and disadvantaged young people aged 25 and under. For 16 years, our solicitors have regularly appeared for defendants in criminal matters in the Local, Children's and District Courts. The charges faced by our clients vary widely in nature and seriousness. Our clients' subjective circumstances also vary; however, most are extremely disadvantaged due to homelessness, poverty, a history of abuse or neglect, mental illness and/or intellectual disability.

The discretion to dismiss a charge or to impose a bond without proceeding to conviction (under section 10 of the *Crimes (Sentencing Procedure) Act*) is an essential part of our criminal justice system. It is vital that judicial officers continue to have such a discretion in order to ensure a just result in each individual case.

If there are types of offences for which the use of section 10 appears to be disproportionately high, we suggest that there may be good reasons for this. Such offences may include:

(a) Offences which the community regards as inherently trivial, and for which the lasting stain of a conviction vastly outweighs the criminality of the conduct. For example, there is a widely-held view in our community that personal use and possession of drugs is primarily a health issue and that such conduct should no longer be criminalised. While magistrates must apply the law and put aside their personal views, they must also strive to reflect community attitudes and expectations when sentencing offenders.

(b) Offences which are disproportionately committed by disadvantaged people (or at least offences for which disadvantaged people are disproportionately apprehended and charged), such as offensive language and goods in custody. In many such cases an offender's subjective circumstances will be so compelling as to merit the application of section 10.

(c) Offences where there is excessive legislative restraint on judicial discretion. For example, traffic offences where there are lengthy mandatory disqualification periods imposed by statute. In many cases this leaves the magistrate with a stark choice: convict the offender and impose the mandatory disqualification period (causing great personal hardship and often a loss of livelihood) or apply section 10. In many such cases, the application of section 10 is the only way to achieve a just outcome. If magistrates were permitted more flexibility in setting disqualification periods, we suggest that this would not be the case.

The Shopfront has acted for hundreds of young people on charges of driving while unlicensed or suspended, usually due to fine default, which is in most cases a direct consequence of poverty. This is, of course, an issue well known to the Sentencing Council following its extensive work on fines. Instead of imposing the mandatory 12-month disqualification, a magistrate will often adjourn the matter, give the offender the chance to sort out his or her fines and to obtain a licence, and then deal with the matter under section 10. In our view, this is entirely appropriate in the interests of justice, in the interests of the rehabilitation of young offenders, and ultimately in the interests of road safety.

The fact that the mandatory disqualification period for a first offence of driving in breach of a fine-default suspension has now been reduced from 12 months to 3 months may well lead to a reduction in the use of section 10.

We do not support any further limitation being placed on a judicial officer's discretion to apply section 10. Any such limitation would compromise the courts' ability to deliver justice.

Finally, this submission is based on the assumption that the sentencing regime in the Children's Court (which is of course entirely different to that of the Local Court) is outside the terms of reference of this review. If this is not the case, we be would grateful if you would let us know so that we may have the opportunity to make a further submission.

Please do not hesitate to contact us if you require further information, or if you wish to discuss any issues arising from this submission.

Yours sincerely

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Jane Irwin
Senior Associate
Shopfront Youth Legal Centre

The Chairperson
NSW Sentencing Council
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SYDNEY NSW 2001

3 August 2011

Suspended Sentences - submission from the Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre welcomes the opportunity to make a submission to the NSW Sentencing Council in relation to suspended sentences.

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 assists young people with a range of legal issues, but our main area of expertise is in criminal law. Our solicitors appear for clients in the Local, Children's and District Courts on a daily basis. Two of our solicitors are accredited specialists in criminal law; one is also an accredited specialist in children's law.

The Shopfront's clients come from a range of cultural backgrounds, including a sizeable number of indigenous young people. Common to most 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. Moreover, 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

In this submission we will focus on a few key issues that have had a significant impact on our client group.

We note that juvenile offenders are not referred to in either the terms of reference or the consultation paper. However, we are not certain that juveniles were intended to be excluded from this discussion, so we will be making some comments about the use of suspended sentences in the Children's Court.

Our primary recommendations are:

1 That suspended sentences be abolished as a sentencing option in the *Children (Criminal Proceedings) Act*;

2 That, if suspended sentences are to be retained for adults, changes should be made to the breach and revocation provisions to provide for more flexibility when dealing with a breach. These changes may include broadening the definition of "good reasons to excuse the breach"; allowing the court to extend the term of the bond as an alternative to revocation; and allowing credit for "street time" when imposing sentence following revocation.

Use of suspended sentences and net-widening

Our resources do not permit us to carefully analyse the statistics on the use of suspended sentences. However, the statistics sited in your consultation paper suggest that suspended sentences may have had a net-widening effect, at least in the Local Court.

It appears that a significant number of offenders who might otherwise have received section 9 bonds or community service orders have instead received suspended sentences.

Our experience is consistent with this picture. A significant number of our clients have received suspended sentences in circumstances where, in our view, a custodial sentence would not otherwise have been imposed. Based on our experience of sentencing patterns before the re-introduction of suspended sentences, we are of the view that, had a suspended sentence been unavailable, many of these offenders would have received a bond or a community service order.

We acknowledge that the decrease in CSOs may be due to factors independent of the net-widening effect of suspended sentences. Over the years we have observed that the suitability criteria for CSOs, as assessed by the Probation and Parole service, have significantly tightened. For our clients, CSOs are now exceptionally rare. While a significant proportion of our client group has always been outside the CSO suitability criteria (for example, they are homeless or have mental health or substance abuse issues which make them too unreliable), in the past a reasonable number of our clients have been sentenced to, and have successfully completed, CSOs. We also observed a similar trend in relation to suitability for periodic detention, prior to the abolition of this sentencing option last year. We are yet to have a client assessed as suitable for an intensive correction order.

Of course there are many matters where a suspended sentence is imposed as a genuine alternative to full-time imprisonment. However, in our experience the court often seems to lengthen the duration of the sentence, perhaps to compensate for the fact that it is being suspended. If the suspended sentence is later revoked, this results in the offender spending a longer period in custody than is warranted by the offence.

There are practical problems with appealing against suspended sentences, at least as far as young and disadvantaged people are concerned. Young people (including young adults as well as juveniles) do not usually wish to appeal against suspended sentences, even if advised by their solicitors that the sentence appears to be excessive.

Typically a young person (especially if they have a mental illness or cognitive impairment, or a history of homelessness) is relieved that their court proceedings have been finalised and that they are not in custody. They often over-estimate their capacity to comply with a suspended sentence and are confident they will not breach it. Sadly, the reality is often different and they end up facing breach proceedings after the time to appeal the original sentence has expired.

A relatively small number of our clients have appealed against the imposition of suspended sentences. Some of these appeals have met with comments from the bench along the lines of “Why is your client appealing this? Is she saying she is going to breach it?”. We respectfully suggest that this is not an appropriate manner in which to approach an appeal of this type.

Breach and revocation of suspended sentences

In our view, the court does not have sufficient flexibility when dealing with a breach of a suspended sentence.

We acknowledge that, if suspended sentences are to be retained as a sentencing option, their integrity must be maintained by ensuring that a breach has real consequences. If the court were given a very broad discretion in dealing with a breach, it would be little different to a section 9 bond. However, we are of the view that the court’s discretion ought to be broader than it currently is.

Limited discretion available to court when dealing with a breach

Currently the court must revoke a suspended sentence and impose a term of imprisonment (which could include an ICO or home detention) unless satisfied that the breach is trivial or there are good reasons to excuse the breach (*Crimes (Sentencing Procedure) Act* sections 98, 99).

As a consequence of the judgement of Howie JA in the Court of Appeal decision in *Director of Public Prosecutions v Cooke & Anor* [2007] NSWCA 2 at 22, "good reasons to excuse the breach" is interpreted in a restrictive way. The court has little room to consider the extent of the offender's compliance with the bond or the fact that the consequences of revocation may greatly outweigh the severity of the breach. For example, a person who re-offends a few days before the expiry of their suspended sentence will have the suspended sentence revoked unless the offence is extremely trivial (e.g. offensive conduct) or there are compelling reasons to explain the fresh offence (e.g. a sudden onset of mental illness).

We note that section 24 of the *Crimes (Sentencing Procedure) Act* requires a court when dealing with a breach of bond to take into account anything done by the offender in compliance with the offender's obligations under the bond.

Although this section ostensibly applies to re-sentencing following the breach of a section 12 bond, there is little room for its operation in practice. If the duration of the suspended sentence is more than 6 months, it can be (and often is) taken into account when setting the length of the non-parole period. However, for sentences of 6 months or less (which are not uncommon, especially in the Local and Children's Courts), there is no ability to set a non-parole period.

Limited sentencing options following revocation

While an intensive correction order or home detention is theoretically available following revocation of a suspended sentence, in practice these sentencing options are not widely available. Firstly, there are offence-based exclusions (e.g. *Crimes (Sentencing Procedure) Act* section 76 lists a number of offences, including assault occasioning actual bodily harm, which render an offender ineligible for home detention). Secondly, the availability of these options (especially home detention) in rural, regional and remote areas is limited. Thirdly, the suitability assessment process is very rigorous and generally excludes people with serious mental health problems, unresolved substance abuse problems, or unstable housing. Ironically, these are the people who could most benefit from an ICO and who should be kept out of custody wherever possible.

The situation is even worse for juveniles, for whom home detention and ICOs are not available. See our discussion below regarding juveniles and suspended sentences.

Credit for "street time"

A possible way of addressing these problems, and alleviating some of the unfairness that currently exists, would be to give the offender credit for "street time" when dealing with a breach.

In other words, a suspended sentence would operate in a similar way to a parole order (or a sentence of periodic detention or an ICO). In the event of a breach, the offender would only be required to serve the unexpired portion of the sentence. Of course, if the breach was constituted by a fresh offence, the court would still have the option of imposing a further custodial sentence for the fresh offence.

A suspended sentence has often been likened to a "sword of Damocles" hanging over the offender's head. To quote from Fraser CJ and Cote J of the Alberta Court of Appeal in *R v Brady* (1998) ABCA 7 (quoted by Howie J in *R v Tolley* [2004] NSWCCA 165 at 22), credit for "street time" would mean that:

> "[W]ith each passing day of the sentence, the 'sword' shrinks until it finally becomes a butter knife".

In our view, this is as it should be. All other things being equal, a breach of a suspended sentence soon after it is imposed is qualitatively different from a breach towards the very end of the good behaviour bond period. Further, even a "butter knife" can hurt: deprivation of liberty in the form of a custodial sentence, even if shorter because of street time, is a significant penalty.

We note that the NSW Law Reform Commission, in its report on Sentencing (which recommended the re-introduction of suspended sentences), recommended:

> "Where the bond is revoked, there should be provision for the court to reduce the term of the sentence of imprisonment to take account of the time spent in the community and any time spent in custody pending determination of the breach proceedings, as well as any other matters which the court considers to be relevant."[1]

Lengthening or varying bond as a sanction for breach

There are other options for reform which may be worth exploring. For example, the NSW Law Reform Commission suggested that a possible sanction for breach could be the extension of the term of the good behaviour bond or a variation of its terms[2]. (NSWLRC Report 79, *Sentencing*, para 4.23 at page 93).

In our view this suggestion merits serious consideration. For example, when dealing with a breach that is not completely excusable, but is not of such a high order as to warrant the revocation of the suspended sentence, it would be useful if the court had the option of making the offender subject to a further period of good behaviour. Presumably there would have to be some limits on the number and length of any such extensions.

The impact of suspended sentences on children

As you are aware, suspended sentences for adults were reintroduced with enactment of the *Crimes (Sentencing Procedure) Act* 1999.

Suspended sentences for children were introduced in 2000, with the insertion of parallel provisions into the *Children (Criminal Proceedings) Act*[3].

We note that the reintroduction of suspended sentences for adults was recommended by the NSW Law Reform Commission in its reference on sentencing. However, this reference, and its recommendations, did not encompass the sentencing of juveniles.

The sentencing of juveniles was the subject of a separate reference on "Young offenders" which reported in 2005. As far as we are aware, the report of this reference did not recommend the introduction of suspended sentences for juveniles.

The replication of the adult provisions into the *Children (Criminal Proceedings) Act* without any modification has caused serious problems for juvenile offenders.

Case study – Troy

Troy is a young man who has been involved with the juvenile justice system since the age of 13. He has grown up in a dysfunctional household with inconsistent parenting, family conflict and, at times, physical violence.

Over the years Troy has been charged with numerous offences such as shoplifting, breaking into cars, common assault and minor property damage. These offences were relatively minor and, for a juvenile, would rarely attract a custodial sentence. After a while, police stopped considering diverting Troy under the *Young Offenders Act*, as he has "used up all his cautions" and was thought to have too long a criminal history for youth justice conferencing to be appropriate.

[1] NSWLRC Report 79, *Sentencing*, para 4.23 at pp93-94.

[2] Ibid, para 4.23 at p93

[3] Crimes Legislation Amendment Act 2000

At age 16, Troy was charged with "use telecommunications service to menace/harass/ offend", a Commonwealth offence with a maximum penalty of 3 years' imprisonment. He had sent an offensive Facebook message to a police officer who had arrested him (and according to Troy, seriously mistreated him) a few weeks previously.

Troy pleaded guilty and was sentenced to a 6-month suspended sentence under section 33(1B) of the *Children (Criminal Proceedings) Act*. Troy did not wish to appeal against the suspended sentence (and, given his criminal history, it was questionable whether an appeal would have been successful).

Troy responded well to Juvenile Justice supervision and did not re-offend for almost 6 months – by far the longest break in his offending history since he first came to the notice of the juvenile justice system.

Two days before the expiry of the suspended sentence, Troy was charged with shoplifting after he tried to steal some soft drink. This was an impulsive act motivated by thirst and the fact that he had no income at the time.

Troy pleaded guilty to shoplifting. His solicitor argued that the suspended sentence should not be revoked as there were good reasons to excuse the breach or, alternatively, the breach was trivial (as it involved and impulsive and unsuccessful attempt to steal a very small amount of property).

Troy's solicitor submitted that "good reasons to excuse the breach" included the fact that the breach was committed only two days before the expiry of the suspended sentence, and that the consequences of revocation (a 6-month full-time custodial sentence) greatly outweighed the severity of the breach.

Troy's solicitor noted that, for children, there is no intermediate option of periodic or home detention; a revocation of a suspended sentence automatically results in a full time custodial sentence. On this basis she submitted that the *Cooke's* case should be distinguished, as Howie J's decision partly turned on the fact that periodic detention and home detention were available as alternatives to full-time custody following the revocation of a suspended sentence.

Although this sort of submission has been accepted by some Children's Court magistrates, the magistrate on this occasion was not persuaded, and Troy served a full 6 months in juvenile detention.

It is trite to say that children are different to adults and that there are good reasons why they should be treated differently in the criminal justice system. The principles set out in section 6 of the *Children (Criminal Proceedings) Act* reflect this.

There are good reasons why suspended sentences are inappropriate for children. Their relative lack of maturity means that children cannot always comprehend the potential consequences of breaching a suspended sentence. A young person may understand when told by the magistrate "If you breach this order, I will have to send you to detention for 6 months", but it is another thing for a child to be able to apply this in practice. Immaturity, impulsivity and a lack of agency over their lives make children more vulnerable than adults to breaching a suspended sentence, either by re-offending or by failing to comply with conditions.

The lack of flexibility following a breach of a suspended sentence is an even greater problem for children than it is for adults. During the developmental phase of adolescence, a young person's circumstances can change quite significantly in a short period of time. When dealing with juvenile offenders, a court at all times needs to have flexibility in its choice of sentencing options.

We submit that the available range of children's sentencing options, combined with diversionary options under the *Young Offenders Act*, is sufficient without the need for suspended sentences.

Conclusion

We would be happy to be involved in further discussions or consultations on this issue. In this regard please do not hesitate to contact me.

Yours sincerely

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