



**Submission to the NSW Law Reform Commission
Review of Sentencing
Question Papers 5-7**

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(Author: Julie Zezovska)

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New South Wales Law Reform Commission
GPO Box 5199
Sydney NSW 2001
E: nsw_lrc@agd.nsw.gov.au

Submission to the NSW Law Reform Commission Review of Sentencing – Question Papers 5-7

The Women in Prison Advocacy Network (WIPAN) welcomes the opportunity to make a submission in response to the NSW Law Reform Commissions' Question Papers 5-7 reviewing the *Crimes (Sentencing Procedure) Act 1999* (NSW).

About WIPAN

WIPAN is an advocacy-based not-for profit organisation managed and directed by a group of professional women dedicated to improving the status, wellbeing and prospects of women involved in the Australian criminal justice system by campaigning to raise awareness of the social, cultural, economic, and political inequalities that exist for these women. WIPAN also takes a grassroots approach to addressing these injustices by operating a voluntary post-release mentoring program that seeks to enhance the opportunities of female ex-prisoners by increasing their social capital, supporting their community reintegration, encouraging their autonomy, and learning from their lived experience. It is through this engagement with women with lived experience that WIPAN gains an invaluable insight into the inequalities facing women both inside the correctional system and in the wider community upon release. WIPAN aims to empower these women and involve them in the organisations' work by seeking their input on submissions, articles or other documents produced, as well as encouraging them to actively participate in current debates surrounding the policies and laws that may affect them. A number of additional support strategies are also in place, such as our *Self Help Guide for Women Prisoners* (2011, 2nd ed.), and a regular Newsletter, featuring contributions from women prisoners that assist in the empowerment of women in the criminal justice system.

The Trades Hall
Level 6, Suite 4
377 Sussex St
Sydney NSW
2000

PO Box 345
Broadway NSW
2007

02 80 11 0699
02 80 11 0690
info@wipan.net.au

Outline of WIPAN's Submission

In the past year WIPAN has made a number of submissions to the NSW Law Reform Commission ("the Commission") in response to its' review of NSW sentencing legislation.

The core point that WIPAN wished to raise in its preliminary submissions was to urge the Commission to consider sentencing principles and practices as they specifically relate to women in the criminal justice system, as well as to actively engage these women in the process of the review.

Similarly, this submission argues in favour of a gender-responsive approach to the review of sentencing to address the issues specifically concerning women. Furthermore, it stresses the need for the Commission to consult women currently involved in the criminal justice system and those with prior lived experience when conducting further evaluations.

In the following submission general comments relating to a key issue from each of the three question papers will be presented in order to emphasize how NSW sentencing practices specifically impact on women.

Part 1 will focus on full-time imprisonment, primarily on the issues surrounding the use of short-term sentences. Part 2 will discuss intermediate custodial sentencing options, specifically those that address the rehabilitative needs of offenders struggling with a drug dependency. Finally, Part 3 will concentrate on non-custodial sentencing options such as Work and Development Orders (WDO) and Community Service Orders (CSO).

We look forward to discussing further with you the review of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and intend to submit our comments on the final group of question papers at a later date.

Yours sincerely,

Kat Armstrong
Director
Women in Prison Advocacy Network, (WIPAN)

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Part 1 – Short Sentences¹

Less women and girls commit crime than men and boys, with the crimes committed by females typically falling into the category of non-violent offences. In fact, between 1999 and 2009, the most common offence committed by women in NSW was shoplifting (15%), followed by non-domestic assault (9%), fraud (7%), and drug use/possession (7%).² As a result of this gendered crime trend there are significantly less women than men serving lengthy sentences in custody for serious offences, seeing women currently comprise 7% of the overall prisoner population in NSW.³ Corrective Services NSW (CSNSW) offers the following profile of women's sentence lengths:

The majority of female offenders are either serving short sentences of less than three months or are on remand...Statistics generated by the Corrective Services Corporate NSW Research, Evaluation and Statistics Branch state that 37.3% of female offenders serve sentences less than three months while 62.9% serve sentences less than six months.⁴

According to further research by CSNSW, the average number of women in full-time custody on any given day in 2010/11 was 725.⁵ Yet, this figure does not provide an accurate account of the actual number of women who flow in and out of the criminal justice system each year.⁶ For instance, a total of 1,283 un-sentenced women were received into NSW correctional centers during 2010/11⁷ and approximately 1,600 women prisoners were released back into the community throughout 2011; nearly half of which were released from remand. The reasoning behind their release was either

¹ In response to NSWLRC Question Paper 5, Question 5.3

² Corrective Services NSW, Inmate Census 30th June 2010

³ Corrective Services NSW 2012, 'Facts and Figures', Corporate Research, Evaluation and Statistics, 12th edn, March 2012

⁴ Corrective Services NSW, <www.correctiveservices.nsw.gov.au>

⁵ Corrective Services NSW 2012, 'Female Offenders: A Statistical Profile', Corporate Research, Evaluation and Statistics, 4th edn, December 2012

⁶ See Baldry, E, 2010. 'Women in Transition: From prison to ...', *Current Issues in Criminal Justice*, 22(2): 1-15

⁷ Corrective Services NSW 2012, 'Female Offenders: A Statistical Profile', Corporate Research, Evaluation and Statistics, 4th edn, December 2012

they were found not guilty, did not receive a custodial sentence, or the period of the sentence matched the period already spent incarcerated.

Considering the large number of women regularly re-entering the criminal justice system, it is not surprising that NSW has the highest recidivism rate for women in Australia, with 41.1% of female prisoners having previously served a sentence in full-time custody.⁸ Through our mentoring program, WIPAN aims to improve the prospects of women ex-prisoners upon their release and reduce their level of reoffending. Of the 31 women who engaged with the WIPAN mentoring pilot program, 93% were classified as recidivists based on their repeat offending behaviour prior to entering the program.⁹ However, of the 20 women who stayed in the program for longer than 2 months, only one returned to prison during the pilot period.¹⁰ This evidence suggests that by providing women with positive guidance and support networks they are better equipped with the knowledge and skills to remain out of the criminal justice system.

Research by CSNSW indicates community-based sentences are appropriate penalties for female offenders, as 85.2% of women sentenced to a community-based order in 2010/11 managed to successfully complete their order.¹¹ Unfortunately, the overall number of women receiving community-based orders has decreased in the last 5 years, from 2729 in 2006/07 to 2493 in 2010/11.¹² This is despite the fact that women are generally characterised as a 'low risk, high needs' group of offenders.

A specific issue WIPAN seeks to have redressed is the overrepresentation of vulnerable groups of women in full-time custody. These issues will be discussed at further length in our final submission paper, however it is imperative to briefly note some of our concerns. In 2012 Aboriginal and Torres Strait Islander female offenders currently account for 30.2% of the total NSW female prisoner population, many of whom are

⁸ Corrective Services NSW, Inmate Census, 30th June 2010

⁹ Refer to the WIPAN Mentoring Pilot Program Report (forthcoming, September 2012)

¹⁰ Note: The one woman who returned to prison was a unique case, as she had served *nine* previous custodial sentences with less than two months in the community in between, before reoffending and returning to prison. This time she completed the mentoring program and remained in the community for *14 months* before reoffending and being sentenced. On returning to prison, the mentee initiated and resumed contact with WIPAN and now has a postal mentoring relationship.

¹¹ Corrective Services NSW 2012, 'Female Offenders: A Statistical Profile', Corporate Research, Evaluation and Statistics, 4th edn, December 2012

¹² Ibid

serving short-term sentences.¹³ As outlined in the Commission's question paper, the NSW Sentencing Council previously recommended a trial period in which short-term sentences would be temporarily abolished for Indigenous female offenders in an attempt to reduce the number of Indigenous women regularly coming into contact with the criminal justice system. This is to address the fact that many Aboriginal and Torres Strait Islander women receive short-term custodial sentences as opposed to community-based sentences because they are deemed ineligible based on the selection criteria, or there is simply a lack of appropriate programs available in their geographical location. In a similar vein, the prevalence of mental health issues, cognitive impairments, and/or drug dependencies among incarcerated women also suggests the Sentencing Council's recommendation deserves urgent and serious consideration.

If Australian prison authorities are in general consensus that six months is not a long enough period of time to assess an offenders' parole potential¹⁴, WIPAN questions whether sentencing an offender to such a short term of imprisonment can be justified since these sentences do not serve any tangible rehabilitative purpose, have not proven to deter offenders from reoffending, and have minimum incapacitative effects. Thus, it is in WIPAN's informed opinion that short terms of imprisonment should be abolished, as they do not adequately achieve the purposes of punishment and ultimately infringe on the rehabilitation prospects of female offenders. The lack of rehabilitative focus highlights the inappropriateness of custodial orders for women, especially in view of the significant impact and disruption to a person's life, and where they may be the carer of young children.

Therefore, WIPAN supports a justice reinvestment model that builds community capacity, and provides for community-based interventions that specifically cater to their complex needs. Furthermore, alternative sentencing options should seek to address the underlying issues related to women's unique criminal pathways, as well as to incorporate educational and employment training aimed at up-skilling women so that they may reach their full potential as productive members of the community. There is also a need for these programs to be available in various locations across the state, as

¹³ Corrective Services NSW 2012, 'Facts and Figures', Corporate Research, Evaluation and Statistics, 12th edn, March 2012

¹⁴ See NSWLRC Question Paper 5, p. 15

women may be less inclined to relocate due to their parental or other care-giving responsibilities.

Other arguments in favour of abolishing short-term sentences and advocating justice reinvestment are those that emphasise the potential cost-effective benefits for the state. For instance, the cost of supervising a community-based offender (\$24.48 per day) is a fraction of the cost to detain an offender in secure custody (\$209.29 per day).¹⁵ However, over and above these financial costs are the considerable social costs of imprisoning vulnerable women, many of whom are mothers and primary caregivers of dependent children who must then be placed into state care.

Despite claims that spending less than six months detained in prison is one of the less punitive sentencing options available to convicted women, the reality remains that even these interim periods in custody have the potential to seriously disrupt the already troubled lives of these women. In fact, evidence suggests a short prison sentence may result in a number of detrimental consequences, including a negative impact on the woman's ability to maintain stable employment, secure affordable housing, and continue a positive relationship with her children, family and support networks post-release. In fact, three quarters of WIPAN's mentees were mothers, yet none of which were living with their children upon release. This is heavily related to the fact that, like many ex-prisoners, 38% of mentees were released into transitional accommodation, while the majority (66%) were on the waiting list for NSW Housing.¹⁶ These issues will be discussed further in upcoming submissions.

WIPAN recognises the genuine possibility that by abolishing short-term sentences in their entirety, women may experience the negative effects of 'sentence creep', that is, they may receive longer, harsher custodial sentences due to the lack of readily available community-based alternatives in their geographical region. WIPAN also acknowledges research on the sentencing practices of other Australian states (such as Western Australia) which has concluded abolishing short-term sentences did not significantly reduce imprisonment rates or improve recidivism rates for offenders overall.¹⁷ However,

¹⁵ Corrective Services NSW 2012, 'Facts and Figures', Corporate Research, Evaluation and Statistics, 12th edn, March 2012

¹⁶ See WIPAN Mentoring Pilot Project Report (forthcoming, September 2012)

¹⁷ Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Discussion Paper, Project 94 (2005) 96

this is not to suggest that a tailor-made, gender-responsive approach to sentencing options in NSW might not benefit women. By diverting them from the correctional system, allowing them to serve their sentence whilst remaining in the community, their lives are improved for the benefit of all in the community.

Exceptions of course may exist in special circumstances where offenders may not have access to non-custodial sentences, or who have simply not responded positively to previous community-based orders. Ideally, short-term sentences should be abolished and alternative rehabilitative, intervention, diversionary programs should be made more readily available to all offenders statewide.

Recommendation 1:

WIPAN recommends a trial period where all short terms of full-time imprisonment, for women in NSW, should be abolished as a sentencing option, and that they be replaced with more readily available, alternative community-based sentencing options.

Part 2 – Drug Rehabilitation Programs¹⁸

The criminal justice pathways of women are complex, multifaceted and often a result of the cumulative effects of repeat exposure to violence (including sexual) and trauma, mental health issues, and/or homelessness. A female offenders' criminality is also strongly associated with an illicit drug and/or alcohol dependency, far more so than it is for male offenders. This is generally because women are more inclined to use drugs and alcohol as a form of self-medication or coping mechanism for the psychological and emotional distress correlated with their historical trauma.

The woman who engaged in the WIPAN Mentoring Pilot Program post-release provided valuable insight into some of the obstacles they struggle to overcome on a daily basis. Following is a brief summary, however a detailed analysis and discussion of these findings can be found in WIPAN's upcoming evaluation report of its pilot program.¹⁹

All WIPAN mentees reported that their criminal convictions were related to a substance abuse problem; while over half (60%) said they had never had any direct rehabilitative treatment to address their dependency. Nearly all mentees had experienced some form of trauma or victimisation, such as being involved with an abusive intimate partner or growing up in a violent home, with approximately 59% having experienced childhood sexual assault. In addition to this, an alarming 83% of these women have been previously diagnosed with a mental health disorder, 55% with chronic hepatitis, and 52% with other serious physical issues. These statistics demonstrate how vulnerable the women cycling in and out of the criminal justice system truly are. Given the most common serious offence for women in full-time custody during 2010 was an illicit drug offence (23.7%)²⁰, WIPAN strongly believes that additional policies and programs are required to help women address their drug and/or alcohol addictions in order to keep them in the community and not a prison environment.

¹⁸ In response to NSWLRC Question Paper 6, Question 6.1

¹⁹ See WIPAN Mentoring Pilot Program Report (forthcoming, September 2012)

²⁰ Corrective Services NSW 2012, 'Female Offenders: A Statistical Profile', Corporate Research, Evaluation and Statistics, 4th edn, December 2012; Corrective Services NSW, Inmate Census, 30th June 2010

As an alternative to full-time imprisonment, Compulsory Drug Treatment Detention (CDTD) offers offenders with an illicit drug dependency serving a non-parole period of at least 18-months an opportunity to receive intensive rehabilitative treatment within the Parklea treatment centre, and upon successful completion of stages 1 and 2, the chance to carry out the remainder of their Compulsory Drug Treatment Order (CDTO) under supervision within the community. To be eligible to receive this treatment the offender must have a long-term drug dependency, been convicted of at least two other offences in the last five years (which resulted in a sentence of imprisonment, a community service order, or a bond), be able to establish that their offending is related to their drug dependency, and that they have a high risk of recidivism. The offender cannot have a serious mental illness, condition or disorder that is likely to result in violence or restrict their participation in the program. Additionally, the offender can only be male. The rehabilitative prospects of women in the criminal justice system who are struggling with a drug dependency are therefore restricted. This is of particular concern given womens' offending is more likely related to illicit drugs than that of men.

The fact that there are no equivalent programs Australia-wide stresses the need for a similar program cater for the gender-specific needs of drug dependent female offenders. A pilot program for female offenders who are drug dependent should be trialed in NSW. The CDTD eligibility criteria also needs to be altered to ensure women with multiple diagnoses of substance dependency and a mental health issue or cognitive impairment are not refused treatment.

Recommendation 2:

- (a) WIPAN recommends a rehabilitation program be introduced for women as an alternative sentencing option, a program that specifically addresses the drug and alcohol dependency issues experienced by women in the criminal justice system.*
- (b) Drug courts should be extended and facilitated in most criminal courts throughout NSW. It should not depend on the location of where the offender resides as to whether the offender is able to access Drug Court. The expense long term will be far more cost effective than if it is not made available.*

Part 3 – Work and Development Orders²¹

Work and Development Orders (WDO) are an effective way of allowing vulnerable individuals to pay off their fines or penalty notice debts through non-financial means that are also beneficial to the offender in that they address their specific needs. The most substantial aspect of WDOs is that they are available to individuals suffering from a mental illness, intellectual disability and/or cognitive impairment, as well as those experiencing homelessness, acute economic hardship, and/or serious drug and alcohol addiction. In some, if not most of these cases, the prospect of paying off any of these fines, is very unlikely, let alone possible to engage in and maintain meaningful employment. For example, persons who have serious and ongoing mental health issues often remain on the disability support pension, which ensures their income will never change and thus their opportunities are always limited. Accordingly, a WDO may require the person to complete an educational, vocational or life skills course, undergo treatment for a medical, mental health or drug and alcohol dependency issue, or carry out unpaid work for an approved organization.

As an approved WDO organisation, WIPAN allows women who have incurred a fine to perform unpaid work in an office environment in order to reduce their fines or penalty notice debts with the State Debt Recovery Office. These tasks are varied and may involve the women undertaking data entry, reception duties, filing documents, and various other administrative or clerical tasks. WIPAN believes WDOs provide vulnerable women with an opportunity to gain useful skills and experience that may later assist them in obtaining employment.

An evaluation conducted by the NSW Attorney General's Department's in 2011 suggests WDOs are working effectively in their current form and were found to:

- reduce re-offending;
- engage offenders with appropriate services that they may not have otherwise engaged in;
- reduce stress, anxiety and hopelessness;
- promote agency, self-esteem and self-efficiency;
- build skills and an incentive to work; and

²¹ In response to NSWLRC Question Paper 7, Question 7.10

- reduce costs to government in terms of enforcement, offending behavior welfare dependency, mental health problems and substance abuse problems.²²

Similarly, a Community Service Order (CSO) requires the person to perform a predetermined number of hours of community service work under supervision of Community Offender Services. This non-custodial sentencing option gives the person the opportunity to actively engage with their local community and make a positive contribution. According to CSNSW, the women who were undertaking community-based orders in 2010/11, 22.7% were completing reparation orders—that is, community service orders or fine defaults.²³ As discussed in Part 1, the majority of women (85.2%) who receive community-based orders successfully complete them, however each year fewer women are being sentenced to community-based orders.²⁴

It is important to note, unlike WDOs, CSOs do not specifically aim to help vulnerable individuals address the issues surrounding their offending behavior, which is why some have suggested WDOs be adopted as a separate sentencing option available to the court instead of through the State Debt Recovery Office. WIPAN has reservations about this, since it may result in offenders experiencing similar administrative issues as those currently effecting CSOs. An alternative option posed in the Commission’s Question Paper is that CSOs adopt some aspects of WDOs in order for the community service work to specifically address the person’s offending behavior. This appears to be a more appropriate and beneficial solution for women who have incurred fines or penalty debt notices.

Recommendation 3:

WIPAN recommends that Work Development Orders (WDO) be retained in their current form rather than be introduced as a separate sentencing option. WIPAN agrees it would be beneficial if aspects of WDOs are integrated into Community Service Orders (CSO) so that they may address the specific needs of vulnerable offenders. However, it is important to ensure the power to award and administer these orders be held by the court and the WDO service provider, for problems might be encountered if the probation and parole authorities are given administrative power.

²² Department of Attorney General and Justice, 2011, ‘A fairer fine system for disadvantaged people: An evaluation of time to pay, cautions, internal review and the work and development order scheme’, May 2011, p. 7

²³ Corrective Services NSW 2012, ‘Female Offenders: A Statistical Profile’, Corporate Research, Evaluation and Statistics, 4th edn, December 2012

²⁴ Ibid

Case Study

*Earlier this year a female ex-prisoner named Lisa ** requested that WIPAN (and namely its director, Kat Armstrong) provide support for her during an upcoming sentencing hearing. First incarcerated at the age of 19, for a trespass and steal offence, Lisa 47, has spent the majority of her adult life cycling in and out of prison serving a number of short and mid-term custodial sentences in relation to property offences. For the current offence, Lisa had been in custody on remand, (with bail refused) for approximately 6 months. During her more recent sentencing hearing, where it was expected for her to get a further custodial sentence, Kat Armstrong gave verbal evidence to the court, (providing reasons to the court as to why community-based sentencing options, as opposed to full-time imprisonment, would be far more beneficial in Lisa's circumstances, when the latter had failed to rehabilitate or deter her many times in the past, and further suggested the WIPAN mentoring project as a possible option). Having taken the evidence given into consideration, the magistrate advised that he would try something different than he originally intended and released Lisa on a "Griffith Remand" for a period of 6 months. Strict conditions were imposed as part of the "Griffith Remand" period, including strict supervision of a parole officer, attend a drug and alcohol rehabilitation program to address the illicit substance dependencies, and also the magistrate directed Lisa to enter the WIPAN Mentoring Program, in order to strengthen her pro-social community support networks.*

This particular case study highlights a number of key issues that relate to the Commissions' discussion questions addressed above. Firstly, it demonstrates the negative or ineffective consequences short-term custodial sentences can have for women. Cases such as this prove that short periods of time spent in prison do not successfully deter repeat offenders from re-offending upon release, since they do not address the underlying issues behind their criminality (such as previous experience of violence), nor do they serve a genuine rehabilitative purpose. As a result, a large number of vulnerable women become trapped in an ongoing cycle of trauma, substance abuse, homelessness, and criminal behavior.

Secondly, Lisa's case stresses the need for drug rehabilitation programs that specifically cater to the needs of women and to be readily available in a variety of locations across NSW. For example, sentencing options such as Compulsory Drug Treatment Detention (CDTD) would be suitable for Lisa, due to her long-term drug dependency, prior convictions, and high risk of recidivism. However, the CDTD as it currently exists is not available for women.

Similarly, this case provides a good argument in favour of increasing the use of community-based orders as alternatives to prison for female offenders. Unlike full-time incarceration, community-based orders allow women to serve their sentence with minimal disruption to their employment, housing, family and community ties, whilst giving something back to the community and at a far lesser pecuniary cost to the public. As recommended in Part 3, CSOs should incorporate aspects of WDOs so that vulnerable women such as Lisa may have the opportunity to address the underlying issues associated with their offending, rather than penalising them further and still not getting a positive result.

** Not her real name