The Shopfront
YOUTH LEGAL CENTRE

NSW Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

24 August 2012

By email

Dear Sir/Madam

Sentencing: Question Paper 5: Full-time imprisonment
Submission from the Shopfront Youth Legal Centre

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

About the Shopfront Youth Legal Centre

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

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

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

Scope of this submission

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

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

Yours faithfully

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

THE SALVATION ARMY
Mission Australia
Freehills

Sentencing: Question Paper 5: Full-time Imprisonment

Question 5.1: The ratio of the non-parole period and balance of term

1 Should the "special circumstances" test under s 44 of the Crimes (Sentencing Procedure) Act 1999 (NSW) be abolished or amended in any way? If so, how?

We are of the view that the "special circumstances" test is appropriate and should be retained. It is vital that judicial officers continue to have the discretion to order relatively short non-parole periods and longer periods under parole supervision in appropriate cases, most commonly where there is a strong interest in rehabilitation and reintegration into the community.

We are mindful that there has been some criticism at appellate level of the readiness of judges to find special circumstances, to the point where there is said to be nothing "special" about many such cases. However, we submit that the apparent proliferation of "special circumstances" findings is a reflection of the composition of the NSW prison population and the very high proportion of disadvantaged offenders. The high prevalence of mental illness, cognitive impairment, long-standing alcohol and other drug dependence, and homelessness among this group means that rehabilitation is an important consideration and an extended period on parole is usually necessary to achieve this.

It may be that the term "special circumstances" could be replaced with something such as "good reasons to depart from the statutory ratio".

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

We do not support the retention of a statutory ratio. Instead, we favour the use of judicial discretion to determine the ratio in each case.

If a statutory ratio is to be retained, we strongly oppose the creation of different ratios for different types of offences. We are concerned that the enactment of such ratios could become highly politicised and lead to longer non-parole periods for "unpopular" types of offences, without any evidence base as to the need for, or effectiveness of, such a measure.

Nor do we support the creation of different presumptive ratios for different type of offenders. If such a measure were to be introduced however, we would give qualified support to a different ratio (say 50:50) for offenders aged 25 and under.

Question 5.2: Top-down and bottom-up approaches

1 Should the order of sentencing under s 44 of the Crimes (Sentencing Procedure) Act 1999 (NSW) return to a 'top down' approach?

We agree with the NSWLRC's approach as discussed in paragraph 5.56 of the question paper. In particular we endorse the comment that "a sentence should embody all the purposes of punishment and also reflect proportionality, as a prisoner is liable to serve the whole of the sentence if parole is not granted". To this we would add "or if parole is breached and the offender is returned to custody". We therefore favour a return to a "top down" approach.

2 Could a 'top down' approach work in the context of standard minimum non-parole periods?

We acknowledge there may be difficulties with a "top down" approach where standard non-parole periods are involved. However, we agree with the NSWLRC's comment in paragraph 5.58 of the question paper that there is now "less potential conceptual difficulty involved in changing to a top down approach" since the High Court's decision of *Muldrock*.

In any event, we oppose the retention of standard non-parole periods, for the reasons set out in our submission to the NSWLRC on this topic dated 16 April 2012, a copy of which is attached.

Question 5.3: Short sentences of imprisonment

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

The Shopfront Youth Legal Centre strongly supports the use of non-custodial alternatives wherever possible, particularly for relatively low-level offending which does not warrant a lengthy custodial sentence. We also agree that sentences of six months or less have little or no value in terms of rehabilitation, and in many cases have the opposite effect by causing significant disruption to offenders' lives.

However, we not support the abolition of sentences of six months or less. In our experience, most magistrates (and most District Court judges when dealing with relatively low-level offending) will do their utmost to impose non-custodial options where they are available and appropriate.

In our experience, sentences of six months or less are usually imposed in the following types of situations:

- Where the court is of the view that a custodial sentence is the only adequate response to reflect the criminality of the conduct and to ensure specific and general deterrence. A common example is repeated offences of driving while disqualified. If sentences of six months or less were abolished, we see a real danger of "sentence creep".
- Where the offender is unsuitable for any non-custodial options because of instability, unreliability and/or repeated breaches of non-custodial sentences such as bonds. Rather than abolishing short sentences, we believe the answer to this problem lies in providing more support (from both within and outside the criminal justice system) for these types of offenders and increasing the availability of targeted programs such as MERIT and CREDIT. Priority should be given to funding more programs like Biyani, which is operated by Corrective Services and provides a residential program for "dual diagnosis" women who would otherwise receive a custodial sentence.
- Back-dated sentences of "time served" following a period of bail refusal. It is commonly acknowledged that rates of bail refusal in NSW are relatively high, and that bail is often refused for offences which, even if proved, would not necessarily warrant a custodial sentence. This is especially common among young people and disadvantaged groups such as Aboriginal people. In such cases it is common practice to impose short sentences of "time served" to reflect the period already spent in custody. If sentences of six months or less were to be abolished, time spent on remand could still be taken into account by the imposition of a more lenient sentence than would otherwise be imposed, for example s 10A, a small fine or a short good behaviour bond. However, a sentence of time served reflects the reality that the person has spent time in custody and is still the preferred option for many judicial officers.
- Where the offender is being sentenced for multiple offences and there is a need to ensure proportionality. An offender may be sentenced for multiple offences, ranging in seriousness from, e.g. break, enter and steal down to goods in custody. For an offence such as break, enter and steal, the court may impose a

head sentence of, say, twelve months. In many cases it would be meaningless to impose non-custodial sentences for the less serious offences, and the court may be of the view that a s10A disposal is excessively lenient. To ensure proportionality, it would often be appropriate to impose sentences of between one and six months for the less serious offences.

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

For the same reasons expressed above, we also favour the retention of sentences of three months or less.

3 How should any such abolition be implemented and should any exceptions be permitted?

The practical implementation of such abolition would pose challenges, particularly in avoiding "sentence creep". If such sentences were to be abolished, we would support some exceptions, at least in situations involving the imposition of short sentences concurrently with longer sentences of imprisonment.

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

Sentences of imprisonment of six months or less should not continue to be available as fixed terms only.

There are reasons for allowing non-parole periods to be set in relation to these sentences. As discussed in our response to question 5.1 above, many offenders require a period of supervision to assist with rehabilitation and reintegration into the community. This is the case even with relatively short sentences.

We concede that allowing the setting of a non-parole period for a sentence of three months or less would have little utility, but we support the ability to set a non-parole period for sentences of three to six months. Even if this does not provide for a long period of supervision, it would at least ensure that a prisoner receives some intervention upon (and ideally just before) release, to minimise the likelihood of reoffending and returning to custody. The reality is that many prisoners are released to homelessness and (not surprisingly) soon reoffend and find themselves back in custody.

Allowing a non-parole period to be set for a sentence of three to six months would also help mitigate the injustice faced by an offender who is in breach of a suspended sentence of six months or less. Currently, in such circumstances the offender is required to serve the entire sentence as a fixed term (even if the breach is relatively minor and/or the offender has served nearly all of the suspended sentence without incident, or the offender's circumstances have changed since the imposition of the suspended sentence).

Question 5.4: Aggregate head sentences and non-parole periods

1 How is the aggregate sentencing model under s 53A of the Crimes (Sentencing Procedure) Act 1999 (NSW) working in practice and should it be amended in any way?

We note that the aggregate sentencing model under s53A is relatively new, and we are unable to offer any comment as to how it is working in practice.

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

If an aggregate sentence is being imposed, the court should still be required to state the individual sentences that would have been imposed.

Aggregate sentencing has the potential to cause significant problems in cases where the accused may wish to appeal against one or more, but not all, of the convictions or sentences.

A requirement to state individual sentences would also assist with transparency, and help ensure that adequate regard is given to proportionality and totality.

Question 5.5: Accumulation of sentences and special circumstances

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

Yes, we strongly support such a requirement.

2 Are there any other options to deal with these cases?

We are unable to suggest any other viable options to deal with these cases.

Question 5.6: Directing release on parole

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

We agree with the comments made by Legal Aid NSW, quoted in paragraph 5.105 of the question paper, that the current three-year limit should be extended to five years. In fact, we would favour automatic release on parole where the *non-parole period* is five years or less, irrespective of the length of the head sentence.

There is some force in the argument that "at the time the sentence is imposed, the court is not in a position to make determinations about the offender's suitability for release to parole, as the offender's progress in jail and future circumstances cannot be known", in 5.107 of the question paper. However, it appears to us that the sentencing judge's intentions are often thwarted by the State Parole Authority refusing to grant parole at the end of the non-parole period.

Reasons for refusal of parole may vary, but commonly include:

- Lack of available accommodation on release (often, regrettably, due to the failure or inability of the Probation and Parole Service to assist the offender to obtain accommodation).
- Failure to undertake programs in custody. In the case of sex offenders, for example, participation in a sex offender program in custody is usually a prerequisite to the granting of parole; in turn, eligibility for such a program depends on admitting the offence. Those who maintain their innocence are therefore at a disadvantage and may end up serving the entirety of their sentence in custody. There are also those who do not participate in programs simply because such programs are unavailable or inappropriate to the offender's needs.
- Where the offender has failed to demonstrate good behaviour in custody.

It must be remembered that release on parole is not the same as a remission for good behaviour (which of course was abolished with the "truth in sentencing" legislation some years ago). Release on parole should not be a reward for good behaviour; conversely, refusal of parole should not be a punishment for failure to engage in programs. Parole should be refused or delayed only in exceptional circumstances where an offender's release poses a significant risk to the community.

For sentences where release on parole is automatic, any serious concerns about the offender's release can be addressed by an application to the State Parole Authority for a pre-release revocation. While we do not support the widespread use of such a procedure (and, indeed, we are of the view that it is sometimes inappropriately used, in circumstances where the Probation and Parole Service has not adequately planned for the offender's release and finds itself running out of time to arrange or approve accommodation) we support its availability as a fall-back option in exceptional cases.

Question 5.7: Directing release on parole – Back end home detention

1 Should back end home detention be introduced in NSW?

We believe it is worth exploring the introduction of back end home detention. Such a measure would potentially assist offenders to reintegrate into the community and minimise the likelihood of recidivism.

We do not agree with the justifications advanced for abolishing back end home detention in Victoria, as quoted in paragraph 5.108 of the question paper. However, we do have some concerns about potential sentence creep and this will need to be seriously considered if back end home detention is to be introduced.

We believe that the suggestion advanced by the Standing Committee on Law and Justice, discussed in paragraph 5.113 of the question paper, is worth exploring.

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

Question 5.8: Local Court's sentencing powers

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

The sentencing jurisdictional limits in the Local Court should not be increased.

Please see our submission on *increasing sentencing powers of Local Court* to the NSW Sentencing Council dated 27 August 2010 (a copy of which is attached).

In our view, any increase in the Local Court's sentencing jurisdictional limits must be accompanied by the expansion of Table 1 and/or Table 2 to include some offences that are currently strictly indictable. For example, robberies under *Crimes Act* Section 94 (and possibly also under Section 97(1)), and aggravated break, enter and steal offences (where the aggravating factor is that the offender was in company) would be appropriate matters to be finalised in the Local Court if the jurisdictional limit were increased.

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

We are opposed to this proposal. The prosecution should continue to have the decision to elect.

Anecdotal evidence suggests that the DPP is using its powers of election sparingly due to resource constraints. If this is the case, we would like to see improved funding for the DPP before contemplating any legislative change.

The Shopfront Youth Legal Centre
August 2012

Jerrold Cripps QC
Chairperson
NSW Sentencing Council
GPO Box 6
SYDNEY NSW 2001

27 August 2010

Dear Sir

Increasing sentencing powers of Local Court

Thank you for your letter dated 30 July 2010 inviting us to comment on the merits of increasing the sentencing power of the Local Court.

In relation to paragraph (b) (increasing the maximum property value for break and enter offences that may be dealt with summarily), we support this proposal and understand that it has already been implemented.

In relation to paragraph (a) (increasing the maximum term of imprisonment that may be imposed in respect of a single offence), we can see arguments for and against this proposal. We are of the view that such a proposal should not be implemented without careful consideration.

In our view, any increase in the Local Court's sentencing powers must be accompanied by the expansion of Table 1 and/or Table 2 to include some offences that are currently strictly indictable.

The Shopfront Youth Legal Centre routinely acts for young adults charged with offences such as robbery or assault with intent to rob (*Crimes Act* s94), robbery in company (*Crimes Act* s97(1)) and aggravated break, enter and steal, with the only aggravating factor being that the offender was in company (*Crimes Act* s112(2)).

The gravity of these offences varies widely, depending on the factual circumstances of each case. Some of these offences involve relatively low criminality and would be suitable for disposition by the Local Court. For example:

- Aggravated break enter and steal: two eighteen-year-olds breaking into an unattended shop and stealing a small sum of money.
- Assault with intent to rob: attempting to snatch $20 from a person who had just withdrawn cash from an ATM, pushing the victim in the process.

An examination of JIRS sentencing statistics shows that:

- Only 2% of offenders sentenced in a superior court for robbery (*Crimes Act* s94) received a sentence of imprisonment exceeding 5 years, with the median sentence being 2½ years. For offences of assault with intent to rob, a similar picture emerges.
- For offenders sentenced by superior courts for robbery armed or in company (*Crimes Act* s97(1)), about 15% received sentences in excess of 5 years' imprisonment, with the median sentence being 3½ years.

- For aggravated break enter and steal, 8% of offenders received sentences in excess of 5 years' imprisonment, with the median sentence being 3 years.

The statistics would suggest that many such offences could be appropriately dealt with summarily if the sentencing power of the Local Court were increased to 5 years' imprisonment. There are no doubt many other strictly indictable offences to which this would also apply.

Finally, we trust that you are not currently considering any proposals to increase the sentencing jurisdiction of the Children's Court. If such a proposal is being considered, please let us know so we may have to opportunity to make further comment.

We regret that time does not permit us to provide more a detailed submission, but we thank you again for the opportunity to comment. We would welcome the opportunity to comment on future reviews undertaken by the Sentencing Council on other topics.

Yours faithfully

Jane Sanders
Principal Solicitor
Shopfront Youth Legal Centre
[redacted]

NSW Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

16 April 2012

Dear Sir / Madam

Standard minimum non-parole periods: 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

Due to time constraints, this submission will be very brief.

The Shopfront represents many young adults who have committed offences which are subject to the standard non-parole period provisions, particularly aggravated break enter and steal and offences involving wounding or inflicting grievous bodily harm.

It is our view that the standard non-parole period scheme be abolished, for the reasons outlined in the attached submission.

We are of the view that sentencing legislation, guideline judgments, common law and the existence of a transparent appeal process provides adequate guidance for judicial officers in the exercise of their sentencing discretion.

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 [redacted].

Yours sincerely

Jane Sanders
Principal Solicitor
Shopfront Youth Legal Centre
[redacted]

Standard minimum non-parole periods: submission to NSWLRC

1 Concerns about standard non-parole periods

1.1 Unnecessary complexity

The available evidence suggests that there has been a raft of appeals due to the fact that the Standard Minimum Non-Parole Period (***SNPP***) provisions are complex and often misapplied[1].

Of particular concern is the tendency of some judges to apply artificial and convoluted reasoning in order to justify departure from or adherence to the relevant SNPP.

The recent High Court decision of *Muldrock v The Queen* [2011] HCA 39 (***Muldrock***) is said to have resolved some of the problems with the application of standard non-parole periods, having clarified that SNPPs are not always the starting point of the sentencing process[2]. However, to our mind *Muldrock* is also evidence of the confusion and error the scheme has itself caused.

1.2 Difficulty in assessing objective seriousness

The requirement that judges consider whether an offence falls within, above or below the mid-range of objective seriousness is problematic. A single offence can often have multiple factors (subjective and objective) bearing upon its commission, making an assessment of "objective seriousness" difficult to arrive at without vastly simplifying the nature of the offence.

Indeed, for offences which do not carry SNPPs, the Court of Criminal Appeal has emphasised that the court must not consider the objective seriousness of the offence in isolation when conducting the sentencing exercise.[3]

For some of the most common SNPP offences, such as the offence of aggravated break and enter and commit serious indictable offence, the concept of "mid-range objective seriousness" is virtually meaningless. Such an offence can involve so many different serious indictable offences and so many different aggravating factors – ranging from, for example, two young people breaking into a tuckshop and stealing food, to a full-scale home invasion involving weapons and serious physical or sexual assaults upon the occupants.

Further to the consideration of objective seriousness, *Muldrock's* revision of the earlier decision by the Court of Criminal Appeal in *R v Way* (2004) NSWLR 168 (***Way***) has caused confusion regarding the ability of the court to consider matters personal to a defendant or a class of defendant. Under *Way*, "some" of the relevant circumstances in determining objective seriousness could be personal to the offender, provided they became relevant by causal connection to the commission of the offence.[4]

The court held in *Muldrock* that "The objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders. It is to be determined wholly by reference to the nature of the offending".[5]

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[1] See discussion in of NSW Sentencing Council's background report on standard non-parole periods, November 2011, at pp17-18

[2] *Muldrock v The Queen* [2011] HCA 39

[3] *Sivell v R* [2009] NSWCCA 286 at [2]-[5]; *R v Field* [2011] NSWCCA 13 at [49]

[4] Ibid at [86]

[5] Above n 2 at [27]

1.3 Transparency in sentencing

Transparency in sentencing is generally seen as desirable. 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. In our view, the complex and often convoluted reasoning discussed above is at odds with transparency in sentencing.

In our view, a member of the general public is unlikely to understand the significance of "objective seriousness" in the context of a SNPP sentencing exercise. They are also unlikely to comprehend why, in assessing "objective seriousness", the court could once consider an offender's personal circumstances, but can no longer. It is easy to see how this misunderstanding could lead to significant confusion and mistrust of the criminal justice system.

1.4 Consistency in sentencing

Standard non-parole periods (SNPPs) were apparently introduced in an attempt to achieve appropriate consistency, but the evidence is questionable as to whether this purpose has been achieved.

In particular, the study undertaken by the Judicial Commission '*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 in District and Supreme Courts before and after the standard non-parole period legislation was introduced on 1 February 2003.

Whilst the study found that standard non-parole periods have had the effect of creating greater uniformity and consistency in sentencing, it was unable to determine whether such consistency reflected like cases being treated alike, or whether all cases, dissimilar or not, were being "treated uniformly in order to comply with the statutory scheme".[6]

1.5 Constraint on judicial discretion

We submit that SNPP provisions have had the effect of constraining judicial discretion in sentencing, and reflect a moving away from the principle that judges be accorded flexibility in taking into account all relevant considerations and sentencing principles in each individual case.

We refer to the comment by Spigelman CJ in *R v Whyte* (2002) 55 NSWLR 252 at 147, "*The maintenance of a broad judicial discretion is essential to ensure that all of the wide variations of circumstances of the offence and offender are taken into account. Sentences must be individualised*."

1.6 Increase in sentencing tariffs for SNPP offences

Of particular concern is the findings by the Judicial Commission in its 2010 study[7], which found that SNPPs have increased sentencing tariffs in relation to certain classes of SNPP offences. We submit that a general increase in sentencing tariffs is not a desirable outcome, unless there was previously a demonstrated pattern of unreasonably lenient sentencing.

2 Preference for guideline judgments over SNPPs

If it is considered that sentencing courts require more guidance than the general common law affords, we submit that the use of guideline judgments is preferable to SNPPs.

[6] Patrizia Poletti, Hugh Donnelly, 'The impact of the standard non-parole period sentencing scheme on sentencing patterns in New South Wales', (Research Monograph 33, Judicial Commission of NSW, 10 April 2012) p4

[7] Ibid, p61

Guideline judgments provide guidance to judicial officers and appear to have improved consistency in sentencing, without unduly interfering with judicial discretion. For example, research showed that the guideline judgment relating to driving with a high-range prescribed concentration of alcohol (HRPCA) evened out the treatment of HRPCA offenders when sentenced by different courts in different regions across NSW [8].

Unlike SNPPs, guideline judgments do not depend on the artificial and difficult exercise of assessing "mid-range objective seriousness".

The Shopfront Youth Legal Centre has acted for large numbers of young adults sentenced for armed robbery and robbery in company, to which the ***Henry***[9] guideline applies. As previously mentioned, we have also acted for significant numbers of offenders being sentenced for SNPP offences. In our experience, guideline judgments provide appropriate guidance for the court, without unnecessary rigidity or complexity.

3 Conclusion

We are of the view that standard non-parole periods are not necessary in order to guide judicial discretion and promote consistency in sentencing. The numerous appeals to the Court of Criminal Appeal, and the recent high court decision in ***Muldrock***, have demonstrated that there is much uncertainty around the SNPP provisions.

We submit that the SNPP provisions in the *Crimes (Sentencing Procedure) Act 1999* should be repealed. We are of the view that the existing sentencing framework and principles reflected in legislation and in common law, combined with guideline judgments, provide ample guidance to judicial officers and address any concerns about consistency in sentencing.

The Shopfront Youth Legal Centre
April 2012

[8] Patrizia Poletti, 'Sentencing Trends and Issues: Impact of the High Range PCA Guideline Judgment on Sentencing Drink Drivers in NSW' (10 April 2012) Judicial Commission of NSW: http://www.judcom.nsw.gov.au/publications/st/st35/st35.pdf
[9] *R v Henry* (1999) 46 NSWLR 346

The Shopfront
YOUTH LEGAL CENTRE

NSW Law Reform Commission
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SYDNEY NSW 2001

24 August 2012

By email

Dear Sir/Madam

Sentencing: Question Paper 6: Intermediate custodial sentencing options
Submission from the Shopfront Youth Legal Centre

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

About the Shopfront Youth Legal Centre

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

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

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Scope of this submission

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

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

Yours faithfully

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Principal Solicitor

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

Sentencing: Question Paper 6: Intermediate custodial sentencing options

Question 6.1: Compulsory Drug Treatment Detention

1 Is the compulsory drug treatment order sentence well targeted?

In our view, this program is well targeted. It appropriately focuses on serious and repeat offenders who have long-term problems with drug dependence. These offenders would almost inevitably be receiving custodial sentences, and many of them are not eligible for the Drug Court program. It is desirable that these offenders spend their time in custody in a productive manner, which assists with their rehabilitation and ultimately is of benefit to the community.

We would also like to see a drug rehabilitation sentencing option available for offenders serving shorter non-parole periods, although we acknowledge that the treatment program currently provided at the Compulsory Drug Treatment Correctional Centre probably requires 18 months to achieve its therapeutic goals.

We would support the expansion of the Drug Court program, including its geographical coverage and its application to other offences such as robbery. Although participation in a rehabilitation program can be imposed as a condition of a s9 bond, s11 bond or suspended sentence, the reality is that drug rehabilitation and treatment programs can be very difficult to access without the structure and support afforded by programs such as the Drug Court, MERIT or the Compulsory Drug Treatment Correctional Centre. We know this through extensive experience of working with vulnerable young adults who are dependent on alcohol and other drugs.

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

Some of our clients have participated in the Compulsory Drug Treatment Program and, from our perspective, the program appears to be working well. There may well be improvements that could be made, but we are not in a position to comment on this.

Question 6.2: Home Detention

1 Is home detention operating as an effective alternative to imprisonment?

Home detention is not operating as an effective alternative to imprisonment for our client group.

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

We are of the view that there are cases where home detention could be effectively used but is not.

There are several barriers including:

- There is an upper limit on sentence length of 18 months, which is arguably too short and which we would like to see extended.
- There are offence-based exclusions, some of which we believe to be inappropriate (*Crimes (Sentencing Procedure) Act* s76 lists a number of offences, including assault occasioning actual bodily harm, which render an offender ineligible for home detention).
- The availability of home detention in rural, regional and remote areas is limited.
- The suitability assessment process is very rigorous and generally excludes people with serious mental health problems, unresolved substance abuse problems, or unstable housing. [Ironically, homelessness is not usually the main barrier for our clients.]

We note from the discussion at paragraph 6.21 of the question paper that the number of home detention orders imposed has declined significantly (although completion rates were high). This may reflect a better targeting of home detention and a more rigorous assessment process so as not to set offenders up to fail. However, we are of the view that more could be done to support offenders to access and to complete home detention.

Assistance with the provision of stable accommodation is one such measure. Thinking more creatively about what constitutes a "home" is also recommended – for example, several years ago we had a client who successfully completed a sentence of home detention in a refuge.

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

Given the very low number of our clients who have been sentenced to home detention, we are not in a position to comment on practical operation of the program.

Question 6.3: Intensive Correction Orders

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

In our view, intensive correction orders are not operating as an effective alternative to imprisonment. ICOs were ostensibly introduced to assist with the rehabilitation of offenders by providing supervision and support (which was largely absent from the periodic detention scheme) and to keep vulnerable offenders (e.g. those with mental health problems) out of custody where possible.

In our experience, the people at whom ICOs are ostensibly aimed, and who would potentially most benefit from an ICO, are least likely to be assessed as suitable.

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

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 believe 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 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.] This particular offender, who had demonstrated good progress towards rehabilitation while on bail but still struggled with cannabis use and depression, would have been an ideal candidate for an ICO; this was not just our opinion but was also the view of the sentencing magistrate. Unfortunately he was assessed as unsuitable and ultimately received a full-time custodial sentence.

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

There are improvements that could be made to the operation of intensive correction orders.

Given the very small number of our clients who have been sentenced to ICOs, we are not in a position to comment on practical improvements that could be made to their operation.

In general terms, we would comment that more flexibility (for example, in terms of when and how the community service component is performed) would assist disadvantaged offenders, including those who need to spend some time in a mental health facility or drug rehabilitation centre, to be eligible for ICOs and to complete the orders.

Question 6.4: Suspended Sentences

1 Are suspended sentences operating as an effective alternative to imprisonment?

Suspended sentences are operating as an effective alternative to imprisonment in certain ways but there are still improvements that could be made.

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 and about net-widening from section 9 bonds, particularly in the Local Court. Please see the attached copy of our submission to the Sentencing Council dated 3 August 2011.

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

In our experience, courts are generally very willing to impose suspended sentences and, unlike ICOs and home detention, the eligibility criteria are not unduly restrictive.

However, we are of the view that suspended sentences may be appropriate for sentences of longer than two years and would propose that an increased upper limit (of perhaps three years) be considered for matters being dealt with in superior courts.

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

In our view there are a number of improvements that could be made, particularly in relation to breaches. We refer to our attached submission to the Sentencing Council.

4 Should greater flexibility be introduced in relation to:

(a) **The length of the bond associated with the suspended sentence?**

(b) **Partial suspension of the sentence?**

(c) **Options available to a court if the bond is breached?**

Greater flexibility should be introduced in relation to (a) and (c), and possibly also (b).

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.

Again, we refer you to the attached copy of our submission to the Sentencing Council.

Question 6.5: Rising of the Court

1 Should the “rising of the court” continue to be available as a sentencing option?

In our views it is not necessary to have “rising of the court” continue to be available as a sentencing option. Section 10A allows a conviction to be recorded with no further punishment being imposed. It adequately fulfils the purpose that used to be served by the “rising of the court.”

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

In our view, s10A is tantamount to a statutory "rising of the court".

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

We do not see why it should be necessary for the "rising of the court" to retain its link to imprisonment.

Question 6.6: Maximum terms of imprisonment that may be served by way of custodial alternatives

1 Should any of the maximum terms for the different custodial sentencing options in the Crimes (Sentencing Procedure) Act 1999 (NSW) be changed?

In our view the maximum term for home detention should be increased to two years to bring it into line with suspended sentences and ICOs.

Consideration should also be given to increasing the maximum term for suspended sentences, ICOs and home detention to three years (in superior courts only; we favour the retention of the current Local Court jurisdictional limit of two years).

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

We acknowledge that not all sentencing options are alike and there may be good reasons for different maximum terms.

However, we support a uniform maximum term where possible. It would promote consistency and would make the sentencing regime easier to understand. It would also ensure that the full range of intermediate options is available following revocation of a suspended sentence (currently, home detention is not available following revocation of a suspended sentence of 18-24 months' duration).

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

Yes, we believe this is important to avoid net-widening.

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

The Local Court's jurisdictional limit should *not* be increased for custodial alternatives to full-time imprisonment.

Question 6.7: Other options: intermediate custodial sentences

1 What other intermediate custodial sentences should be considered?

Consideration should be given to bringing back periodic detention, especially if deterrence and punishment are still to be important objectives of sentencing. See further comments below.

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

(a) **What should be the maximum term of a periodic detention order or accumulated periodic detention orders?**

We are of the view that a maximum term of a periodic detention should be three years (possibly with an upper limit of five years for accumulated orders).

(b) **What eligibility criteria should apply?**

We believe that the eligibility criteria should be broad and without offence-based exclusions.

We are strongly opposed to the eligibility restriction that was previously in s65A of the *Crimes (Sentencing Procedure) Act*, which made offenders who had previously served more than 6 months full-time imprisonment ineligible for periodic detention. Although ostensibly aimed at stopping "hardened criminals" from being sentenced to periodic detention (and possibly contaminating other less serious offenders), this excluded many vulnerable offenders who could not be described as "hardened criminals" and who would have been suitable for periodic detention.

(c) **How could the problems with the previous system be overcome and its operation improved?**

If periodic detention is to be re-introduced, we would support more flexibility in relation to breaches and revocation of periodic detention orders. Of course, in order to maintain the integrity of periodic detention as a serious sentencing option, we acknowledge that there must be rigorous conditions as to attendance, discipline and the like.

However, the regime for dealing with breaches by the State Parole Authority was harsh and lacked flexibility. In our experience, many offenders had their periodic detention revoked where the circumstances did not warrant such drastic action, and did not have recourse to any appeal rights.

We would also suggest that more supervision and support should be available to periodic detainees so that disadvantaged people are more readily able to participate and comply with their obligations.

(d) **Could a rehabilitative element be introduced?**

A rehabilitative element could and should be introduced. There will be some offenders who do not require this, but for those who need it, the sentencing court should have the option of imposing supervision as part of a periodic detention order, in the same way as supervision is an option for a bond or suspended sentence.

The Shopfront Youth Legal Centre
August 2012

The Shopfront

YOUTH LEGAL CENTRE

The Chairperson
NSW Sentencing Council
GPO Box 6
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.

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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.

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[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.

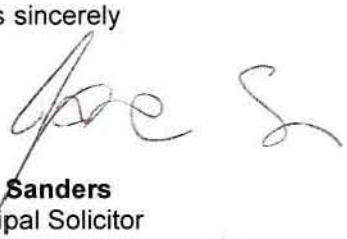
The lack of flexibility following a breach of a suspended sentence is an even greater problem for children than it is for adults. During the developmental phase of adolescence, a young person's circumstances can change quite significantly in a short period of time. When dealing with juvenile offenders,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



Jane Sanders
Principal Solicitor
Shopfront Youth Legal Centre
[redacted]

The Shopfront
YOUTH LEGAL CENTRE

NSW Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

24 August 2012

By email

Dear Sir/Madam

Sentencing: Question Paper 7: Non-custodial sentencing options Submission from the Shopfront Youth Legal Centre

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

About the Shopfront Youth Legal Centre

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

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

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

Scope of this submission

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

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

Yours faithfully

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

THE SALVATION ARMY
Mission Australia
Freehills

Sentencing: Question Paper 7: Non-custodial sentencing options

Question 7.1: Community Service Orders

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

In general, community service orders work well as a sentencing option and should be retained.

We have observed that the courts' use of community service orders for disadvantaged offenders is very limited and appears to be decreasing.

We understand that there are genuine problems involved in assigning work to people who are unreliable and whose attendance may be sporadic at best. We also acknowledge there may be occupational health and safety issues with people attending work sites while intoxicated or otherwise incapacitated.

However, our work with children, and the operation of the children's CSO scheme, suggests that these challenges can often be overcome if appropriate support is provided.

We would like to see the eligibility and suitability criteria broadened, and more support systems put in place, so that more disadvantaged offenders may participate in the scheme.

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

As mentioned above, we would like to see more support systems in place to enable disadvantaged offenders to participate in the CSO scheme.

One way of achieving this would be to allow the court to impose a supervision component on a CSO, or a bond concurrently with a CSO. Where an offender is being sentenced for more than one charge, it is not uncommon for this to be achieved by imposing a bond on one charge and a CSO on another. It would be helpful if this option were available in relation to a single charge, although care would need to be taken to avoid net-widening.

Question 7.2: Section 9 bonds

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

In our view, section 9 bonds work very well indeed. They are a very flexible sentencing option which assists with the aim of rehabilitation, while not discarding the need for punishment and deterrence.

2 What changes, if any, should be made to the provisions governing the imposition of good behaviour bonds under s9?

We do not see the need for any changes to the provisions governing the imposition of section 9 bonds.

We note the comment in paragraph 7.28 of the question paper, suggesting it is unclear whether section 9 bonds are available for fine-only offences. In our opinion, this provision is clear and it means that section 9 bonds are only available for imprisonable offences. If further legislative clarification is thought necessary, we would of course support this.

We do not support section 9 bonds being available for fine-only offences. In our view, if a bond is thought to be appropriate for a fine-only offence, it should be imposed under s10. There may be rare cases involving fine-only offences where the court is of the view that the offender requires the rehabilitation opportunity afforded by a bond, but that a conviction is warranted; however, we believe that allowing courts to impose section 9 bonds for fine-only offences would lead to inappropriate net-widening.

Question 7.3: Section 9 bonds

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

In general, the provisions governing good behaviour bonds are working well and should be retained.

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

We would suggest that perhaps there should be an upper limit on the length of a section 10 bond that can be imposed for offences with low maximum penalties, and especially for fine-only offences. For example, for an offence of offensive language (which carries a maximum penalty of a $660 fine), in our view it would rarely be appropriate to impose a section 10 bond for longer than six months. Similar considerations would apply to minor public order, public transport, parking and regulatory traffic offences.

We would also support the introduction of a provision allowing the offender or the supervising agency (i.e. Probation and Parole) to apply for variation of the conditions of a bond. Currently the only way for the conditions of a bond to varied is for breach proceedings to be initiated. There is a provision in the *Children (Criminal Proceedings) Act* (s40) providing for variation of Children's Court bonds. In our experience this appears to work well and is not overused or abused.

Question 7.4: Fines

1 Are the provisions relating to fines in the Crimes (Sentencing Procedure) Act 1999 (NSW) working well, and should they be retained?

In our experience, the offender's capacity to pay is often overlooked, even though s6 of the *Fines Act* requires the court to have regard to this.

It may be desirable to have a provision on capacity to pay included in the *Crimes (Sentencing Procedure) Act,* as not all lawyers and judicial officers are familiar with the *Fines Act*.

The regime for enforcement of unpaid fines (governed by the *Fines Act* and administered by the State Debt Recovery Office) is beyond the scope of this reference and has been the subject of a number of previous submissions by the Shopfront Youth Legal Centre.

Under no circumstances would we support the payment of a fine or monetary penalty being made a condition of a bond or other community-based order.

2 Should the provisions relating to fines in the Crimes (Sentencing Procedure) Act 1999 (NSW) be added to or altered in any way?

It may be desirable to have a provision on capacity to pay included in the *Crimes (Sentencing Procedure) Act.*

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

We suggest it would be relatively easy to devise a formula for the calculation of maximum fines in proportion to the maximum term of imprisonment.

Question 7.5: Conviction with no other penalty

1 Is the recording of no other penalty under s 10A of the Crimes (Sentencing Procedure) Act 1999 (NSW) working well as a sentencing option and should it be retained?

Section 10A is working well as a sentencing option and should definitely be retained.

It is important to recognise that a conviction in itself may often be a significant penalty.

Given that s10A can be applied to fine-only offences (and not just imprisonable offences, as was the case with the common law rising of the court), when the section was introduced we were concerned about potential net-widening, i.e. that matters more appropriate for s10(1)(a) would be dealt with under s10A. While this sometimes does occur, we have not observed net-widening to be a significant problem, at least in matters involving our clients.

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

We do not see the need for any changes.

Question 7.6: Non-conviction orders

1 Are non-conviction orders under s10 of the Crimes (Sentencing Procedure) Act 1999 (NSW) working well as a sentencing option and should they be retained?

We are of the view that orders under s10 (both dismissals and bonds) are working well and should be retained. For further comments please see our submission to the NSW Sentencing Council dated 31 August 2009, a copy of which is attached.

2 What changes, if any, should be made to the provisions governing s 10 non-conviction orders or to their operational arrangements?

We do not support any legislative provision which restrains judicial discretion by prohibiting the imposition of s10 orders for certain types of offences.

Please also see our comments at Question 7.3 above about the length of s10 bonds in relation to fine-only offences.

Question 7.7: Non-conviction orders – use with other sentencing options

1 Should it be possible to impose other sentencing options in conjunction with a non-conviction order? If so, which ones?

We are attracted to the idea of a court being able to impose a range of sentencing options without recording a conviction. We note from the question paper that this option exists in some other jurisdictions.

Of course, this option is also available in New South Wales for courts dealing with children's criminal proceedings. Section 14 of the *Children (Criminal Proceedings) Act* gives the court a discretion to record a conviction (and prohibits the recording of a conviction against a child under 16) regardless of the sentencing option imposed. In our experience, this provision works well and allows the court to impose significant sanctions on a child without the lasting stain of a conviction.

The argument against recording a conviction is especially compelling in relation to children (given the primacy of rehabilitation that usually applies when sentencing children). We are of the view that the interests of rehabilitation should also weigh heavily in sentencing certain classes of adult offenders, in particular young adults and those with mental health or cognitive impairments.

If the court were to have discretion to impose a range of sentencing options without recording a conviction, there is of course the potential for net-widening, as it may be tempting for courts to impose more onerous or punitive sentencing options when a s10(1)(a) dismissal or s10(1)(b) bond is more appropriate.

At the very least we suggest that it may be appropriate for a court to be able to impose a fine without conviction, particularly in the case of fine-only offences and/or offences capable of being dealt with by penalty notice or criminal infringement notice. In this regard, we refer to the following comments made in our submission dated 28 September 2007 to the NSW Sentencing Council on *The Effectiveness of Fines as a Sentencing Option:*

> "We agree with the Council's observations about the perils of deemed convictions in the case of matters dealt with by criminal infringement notice.
>
> A related, but distinct, issue is the fact that people who court-elect on infringement notices will, if found guilty of the offence at court, end up with a conviction which would not have ensued if the person had simply paid the infringement notice. This has a disproportionately negative impact on financially disadvantaged people, who often court-elect not because they wish to defend the charge, but because they simply cannot afford to pay the fine.
>
> This is not a significant issue in the Children's Court, where the court has a discretion not to record a conviction, no matter what penalty it imposes. However, many of our young adult clients court-elect on infringement notices because of their incapacity to pay. While their matters are sometimes dealt with under s32 of the *Mental Health (Criminal Procedure) Act* or s10 of the *Crimes (Sentencing Procedure) Act*, they are often dealt with by way of fine (albeit a significantly reduced amount) which carries with it a conviction.
>
> A conviction, even for a minor offence, can have a number of detrimental effects. In the case of some driving offences (for example, a first offence of driving unlicensed when never licensed) a conviction will affect the maximum penalty and mandatory disqualification period for any subsequent offence.
>
> We would therefore like to see the introduction of a further sentencing option in the Local Court: the discretion to impose a fine without recording a conviction. We propose that this discretion would only be available for matters which are capable of being dealt with by infringement notice, so as to avoid net-widening."

In our dealings with young adults (particularly students and those who are just entering the workforce, who are concerned about their future employment prospects) we have observed that the prospect of a conviction is a powerful disincentive to court-elect on penalty notices or criminal infringement notices, even where the person believes they are not guilty of the offence.

We note the reference in paragraph 7.82 of the question paper to other options that may be imposed in conjunction with a non-conviction order. We have no issue with compensation orders, or even fines, being imposed in conjunction with non-conviction orders, subject of course to considerations of capacity to pay. However, we are strongly opposed to the payment of any money, or the performance of unpaid work, being made a condition of a bond. Before the enactment of the *Crimes (Sentencing Procedure) Act*, it was not uncommon for such conditions to be imposed on bonds, and a number of our clients were subject to breach proceedings for no reason other than poverty.

Question 7.8: Other options

1 Should any other non-custodial sentencing options be adopted?

We support the availability of a wide range of non-custodial sentencing options (or alternatives to full-time custody, as discussed in response to question paper 6). However, we have no specific suggestions to offer.

Although this is beyond the scope of this reference, we see a pressing need for more diversionary options and programs such as MERIT, CREDIT, and some sort of program to support defendants with mental health and cognitive impairments who may be eligible for diversion under Section 32 of the *Mental Health (Forensic Provisions) Act*. We have briefly discussed these options in our submissions to the NSWLRC on *People with cognitive and mental health impairments in the criminal justice system* (see in particular our comments on Issue 7.35 in our June 2010 submission on Consultation Paper 7). Such programs have significant advantages because they are available pre-plea or pre-sentence (or in some cases without any plea having to be entered at all). Often by the time an offender reaches the sentencing stage, the problems that have led to their offending have remained unaddressed for some time.

Question 7.9: Other options – fines held in trust

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

While a fine held in trust may well be an appropriate option for offenders with financial resources, such an option would not be appropriate for socially and economically disadvantaged offenders, including those in our client group.

Question 7.10: other options – work and development orders

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

We believe the idea of a WDO as a sentencing option is worth exploring. Many of our clients have participated in the WDO scheme as a fine mitigation measure, and we believe this scheme has been very successful.

If WDOs were to be introduced as a sentencing option, there would need to be serious consideration as to where a WDO would sit in the sentencing hierarchy. Currently, a community service order is a serious sentencing option that is a direct alternative to imprisonment. If a WDO were to be accorded a similar status, this may assist more vulnerable offenders who currently are ineligible for CSOs, and may help prevent these people from being imprisoned.

On the other hand, if a WDO were to be lower down the sentencing hierarchy (as an alternative to a fine) care would have to be taken to ensure that the obligations imposed on the offender are not too onerous. In the event of a breach, the only appropriate sanction would be the payment of a fine.

There are also significant questions about how the WDO scheme would be resourced if it were available as a sentencing option. Currently, a WDO application must be made by an "approved organisation" or an enrolled health practitioner. This disadvantages vulnerable offenders without access to such services.

If WDOs were to be adopted as a court-based sentencing option, this should be backed up by government-funded services that are able to supervise WDOs upon referral from the court.

We would also note that many offenders who would be eligible for WDOs, specifically those with mental health problems and cognitive impairments, would also be eligible for diversion under s32 of the *Mental Health (Forensic Provisions) Act*. We would like to see more offenders diverted under s32 before reaching the stage of conviction and sentencing.

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

For reasons already expressed in this submission, we support the modification of the community service order scheme to promote the inclusion of vulnerable offenders.

The Shopfront Youth Legal Centre
August 2012

The Shopfront
YOUTH LEGAL CENTRE

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

31 August 2009

By email

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

Jane Sanders
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Shopfront Youth Legal Centre
[redacted]

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