



Family & Community Services

Submission by Family & Community Services on the Review of the Crimes (Sentencing Procedure Act) 1999 NSW Law Reform Commission

1. Introduction

The Department of Family and Community Services (FACS) welcomes the opportunity to comment on the NSW Law Reform Commission's review Crimes (Sentencing Procedure) Act 1999 ('CSPA'). This submission has been prepared from comments provided by divisions within FACS whose client groups this is most relevant to; namely, Ageing, Disability and Home Care (ADHC), Women NSW (WNSW) and Community Services (CS).

Please note that FACS has responded only to those questions where it has a specific comment to make. Further, the FACS submission to the NSW Law Reform Commission for Question Papers 1 – 4, which was provided in June 2012, provides relevant background to this paper.

FACS aims to

- enable each child in NSW to have the best possible start to life
- help vulnerable young people build their capacity for a good future
- improve social and economic outcomes for Aboriginal people
- provide support to vulnerable adults and families so that they can participate fully in community life and
- build strong and inclusive communities.

It is a major provider and funder of specialist services to people with a disability and frail older people in NSW. It aims to improve outcomes and to provide support to people with a disability to live as independently as possible and participate in community life.

ADHC, a division of FACS, operates a range of programs designed to meet the needs of people with intellectual and cognitive disabilities who are involved in the criminal justice system. In particular, the Criminal Justice Program assists people with mild or borderline disabilities associated with a higher level of functioning than those who would normally qualify as ADHC clients. The Program primarily covers clients released from custody, but also includes some custody and pre-custody support.

FACS is also the leading community service agency in NSW and the largest child protection agency in Australia. CS, a division of FACS, works in cooperation with other government and community groups to help build a safer and stronger community for everyone.

The core role of CS is to ensure that children and young people receive a good start in life by providing a range of services and support to them and their families. In addition to taking appropriate child protection measures, the agency provides other services such as prevention and early intervention programs; arranges for appropriate care for children and young people who cannot live safely at home and funds and supports organisations providing out of home care. CS also offers a number of services designed to encourage community development and address issues that lead to family breakdown.

2. General Comments

ADHC has approached the questions primarily with a view to the needs of people with cognitive and mental health impairments who are significantly overrepresented before the courts and in custody. Sentencing Question Paper 11 on special categories of offenders is obviously relevant to the way ADHC has approached the sentencing options papers, however this input does not address the separate questions in that paper.

The UN Convention on the Rights of Persons with Disabilities (UNCRPD) operates with a flexible social definition of disability as a barrier to full social participation. Articles 12 and 13 state that people with a disability have equal rights and recognition under the law and equal access to justice. This means that a person with a disability who has the intention, knowledge and capacity to commit an offence and stand trial should be held criminally responsible.

Article 14 of the UN Convention includes a right to reasonable accommodation when people are deprived of their liberty through legal process in line with the other provisions of the Convention. Consequently a review of sentencing options should take into account how the various aims of sentencing address the needs of impaired offenders without necessarily excusing their responsibility.

Legal definitions of intellectual disability often focuses on those with an IQ of 70 or less who need constant support with major aspects of daily living. In the criminal justice context it is also necessary to recognise people with a disability including borderline intellectual disability, acquired brain injury, mental illness or a combination of these, who are able to live independently but can be at a significantly greater risk of offending because of their level of cognitive or emotional impairment. Where they do offend the principles that underlie sentencing may need to apply to them differently.

ADHC funds and provides residential and support programs for people with cognitive and mental health impairment in contact with the criminal justice system mainly at the point where they are released and seeking to be rehabilitated into the community. The clients of these programs are generally more high functioning than those for whom support and residential services are provided.

There are resource constraints on the availability of these programs. The recent chain of cases leading to the High Court's decision in *Muldrock* and subsequent Court of Criminal Appeal judgment illustrate some of the difficulties courts face in tailoring a sentence that assumes treatment services will be available in the community at some point in the future.

ADHC is moving to the provision of more individualised and person centred support services with a greater emphasis on choice and less emphasis on delivering programs through funded service providers. ADHC would face challenges in adapting these approaches to incorporate the more coercive elements of a sentencing regime. For example there is no express power for ADHC to detain people receiving its services.

Nevertheless ADHC recognises that its input will be important to the development of sentencing programs that meet the needs of impaired offenders. The answers provided to specific questions reflect the way the issues raised are likely to impact on the disability target group.

In terms of comments from CS, as noted in the previous submission, the *Children (Criminal Proceedings) Act 1987* ('CCPA') applies to any court exercising criminal jurisdiction or hearing criminal proceedings in relation to an offence committed by a child (a person under the age of 18 years).

Part 3 (Sentencing Procedures Generally) and Part 4 (Sentencing of Imprisonment) the CSPA apply equally to the Children's Court but subject to the CCPA (section 33G).

The CCPA contains particular provisions which recognise the specific vulnerabilities of children and young people. The Act provides that a person or body acting under the Act must have regard to the principles as outlined in section 6.

CS is strongly of the view that gaol should be the last resort for children and young people, and alternatives to gaol are strongly supported and should not be removed. CS supports alternatives to gaol as outlined in Sentencing Question Paper 6: Intermediate custodial sentencing options (for example home detention and suspended sentences). CS also supports non-custodial sentencing options (for example Community Services Orders, and Section 9 Bonds) as outlined in Sentencing Question Paper 7.

3. Specific questions for Discussion

Question 5.1

- 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?**

No, the special circumstances test should not be abolished because if a child or young person was to be sentenced to gaol, their youth could be a

factor that can be used to advocate special circumstances. It is noted that the 'age of offender' is the 3rd most common 'special circumstance' referred to in the study of special circumstances for armed robbery and robbery in company offences as referred to on page 9 of Question Paper 5.

Women who retaliate against a partner who has been subjecting them to violent assault for many years could also come within the 'special circumstances' test, another reason FACS does not support its abolition.

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?

FACS supports in principle giving the courts power to vary the ratio of non-parole periods for people with cognitive and mental health impairments, so as to ensure opportunities to provide a longer period for supervised rehabilitation in the community. Cognitive impairments that contribute to offending behaviour may be masked at the point of sentencing and only become apparent after a person has commenced a sentence.

Similarly when a woman has been convicted for retaliating after enduring years of violent treatment by the offender this would be a potential ground for varying the ratio and allowing a longer parole period on the basis of extraordinary subjective features, particularly in the absence of a prior criminal record.

Question 5.3

- 1. Should sentences of six months or less in duration be abolished? Why?**
- 2. Should sentences of three months or less in duration be abolished? Why?**
- 3. How should any such abolition be implemented and should any exceptions be permitted?**
- 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?**

From the perspective of people with cognitive and mental health impairments there could be some merit in retaining the option to impose short sentences. Historically people with intellectual disability have been excluded from many correctional rehabilitation programs. While there are indications that the situation is improving, delivery of specialist programs in a custodial environment will always be a challenge. A short sentence

followed by a more lengthy and continuous community program that is not a specific part of a sentence might better meet the needs of some impaired offenders.

Question 5.6

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

FACS agrees with the argument that it is not reasonable for a court to assess the suitability of a person for parole at the time of the original sentence where a person has a treatable mental illness or a cognitive disability that only becomes apparent once they are serving a custodial sentence, or where the availability of treatment on release can be known. However where people with impairments miss out on opportunities for rehabilitation whilst in correction or are found to have an underlying impairment that cannot be addressed by a rehabilitation program, this may justify a restriction on automatic release.

In cases of domestic and family violence where the victim fears for her safety, automatic release may not be appropriate until the security and safety of the victim is confirmed.

Question 5.7

- 1. Should back end home detention be introduced in NSW?**
- 2. If so, how should a person's eligibility and suitability for back end home detention be determined and by whom?**

A further consideration here in relation to pressure on families is that people with cognitive and mental health impairment are often reliant on parents or other family members for accommodation and the additional restrictions related to home detention may add to the already significant demands on carers of accommodating their disabilities.

FACS considers that home detention is clearly inappropriate in many cases of domestic and family violence.'

Question 5.8

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

An advantage of increasing the sentencing jurisdiction from the point of view of people with cognitive and mental health impairment is that the diversionary provisions under sections 32 and 33 of the *Mental Health (Forensic Provisions) Act* would apply to a greater range of offences. However this could also be achieved by allowing the higher courts to exercise these forms of diversion for offences carrying a sentence of more than 10 years.

Question 6.1

- 1. Is the compulsory drug treatment order sentence well targeted?**
- 2. Are there any improvements that could be made to the operation of compulsory drug treatment orders?**

Section 5A(3) of the *Drug Court Act* expressly excludes people from drug treatment orders if they have a mental illness, condition or disorder that is serious or leads to violence and could restrict their effective participation in a treatment program. This exclusion can be seen as inherently discriminatory in the way it singles out a specific class of people who may have behavioural issues.

There are indications that the effect of this provision has been more exclusionary than if a more neutral assessment of potential effectiveness replaced the focus on the person's disability. FACS would have special concerns if the scope of the program was widened as suggested, but the existing exclusion remained.

In the case of domestic and family violence offenders, it is important to ensure that the safety of the victim is the highest priority and taken into consideration when deciding whether a drug treatment order is appropriate.

Question 6.3

- 1. Are intensive correction orders operating as an effective alternative to imprisonment?**
- 2. Are there cases where they could be used, but are not? If so what are the barriers?**
- 3. Are there any improvements that could be made to the operation of intensive correction orders?**

The limitations on eligibility for home detention and intensive correction orders mean that they are less likely to be available for offenders with a disability who also have challenging behaviour. They are less likely to have a stable home environment. Where they live with family, their behaviour may have contributed to a history of domestic violence. Instead of seeking to adapt the home detention regime to meet the special needs of people

with disabilities, it may be more appropriate to look at alternative forms of intensive supervision that can be used as a sentencing option but are designed to meet the needs of people with disabilities who have challenging behaviour.

Sentences served in the community may not be suitable for domestic and family violence offenders. In these circumstances the safety of the victim and any children must first be ensured

Question 6.4

- 1. Are suspended sentences operating as an effective alternative to imprisonment?**
- 2. Are there cases where suspended sentences could be used, but are not? If so what are the barriers?**

While there are limits on the availability of other sentencing options for people with disability as discussed above, FACS would support the retention of suspended sentences, while recognising that they are not an ideal form of sentence for people with cognitive impairments. More detail is provided in the response to question 6.7.

What is being suggested is a sentence that would be served in the community, that requires people to attend services tailored to addressing the disability component in their offending behaviour, that provides appropriate support for offenders to meet the conditions of the sentence, that has realistic sanctions that recognise the difficulty they may have in meeting strict conditions without failing the program, and that provide legal authority for agencies to cooperate and share information on how the offender is performing.

Question 6.5

- 1. Should the “rising of the court” continue to be available as a sentencing option?**
- 2. If so, should the penalty be given a statutory base?**
- 3. Should the “rising of the court” retain its link to imprisonment?**

One effect of retaining the option of sentencing a person who has previously been on remand to the rising of the court, rather than backdating the sentence to cover the period on remand would be to retain the opportunity for sentences to be spent under the current provisions of the *Criminal Records Act 1991* where the period of remand has exceeded six months.

Question 6.6

- 1. Should any of the maximum terms for the different custodial sentencing options in the Crimes (Sentencing Procedure) Act 1999 (NSW) be changed?**
- 2. Should there be a uniform maximum term for all of the custodial alternatives to full-time imprisonment?**
- 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?**
- 4. Should the Local Court's jurisdictional limit be increased for Custodial alternatives to full-time imprisonment?**

The practice of fixing uniform maximum sentences for custodial alternatives may be appropriate for most offenders, but could work to the disadvantage of offenders with disabilities for whom the only rehabilitative forms of sentencing are available in the community.

People with disability would be disadvantaged because the longer they have to spend in prison the less chance they have of accessing rehabilitation programs that are not provided in prison.

Question 6.7

What other intermediate custodial sentences should be considered?

It is time to consider the possibility of introducing a form of optional community sentence which is specifically designed for people with cognitive and mental health impairments. One advantage of such a sentencing option would be that it could provide a legal framework for Police, Corrective Services and FACS to cooperate and share information in a way that is not always supported when other sentencing or diversion options are adapted to deal with this group of offenders.

Question 7.1

- 1. Are community service orders working well as a sentencing option and should they be retained?**
- 2. What changes, if any, should be made to the provisions governing community service orders or to their operational arrangements?**

As with other sentencing options already discussed, people with a disability have limited access to CSOs.

One of the difficulties of CSOs is getting community partners to take on the extra responsibilities and challenges involved in providing work for people with cognitive and mental health impairments. Perhaps the best approach would be to call for further research and development to assess whether this is a realistic option for community organisations.

Question 7.2

- 1. Is the imposition of a good behaviour bond under s 9 of the Crimes (Sentencing Procedure) Act 1999 (NSW) working well as a sentencing option and should s 9 be retained?**
- 2. What changes, if any, should be made to the provisions governing the imposition of good behaviour bonds under s 9?**

The imposition of a good behaviour bond assumes that the offender can take responsibility for their conduct. This makes it a less than ideal option for some offenders with disabilities. Some offenders with disabilities that lead to challenging behaviour would have difficulty in understanding or complying with the terms of a bond. There have been cases where this poses difficulties for FACS staff supporting these offenders, who are not expressly required to report breaches of the bond, and feel to do so voluntarily would damage their therapeutic relationship with a client without resulting in a constructive outcome as the penalty for a breach is either a prison sentence where services are cut off or return to FACS support. Where a condition of a bond includes residing in a FACS residence and complying with treatment, the current provisions in the Act do not provide clear direction on the appropriate action to take where conditions are breached. Because the services FACS provides are clinical and therapeutic rather than punitive, staff may be reluctant to make disclosures that impact on the relationship with the client. A requirement to report breaches could resolve this. The same issue arises in other circumstances where a disabled offender is referred to FACS or another service provider.

Question 7.3

- 1. Are the general provisions governing good behaviour bonds working well, and should they be retained?**
- 2. What changes, if any, should be made to the general provisions governing good behaviour bonds or to their operational arrangements?**

See previous question.

Question 7.6

- 1. Are non-conviction orders under s 10 of the Crimes (Sentencing Procedure) Act 1999 (NSW) working well as a sentencing option and should they be retained?**

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

FACS would support the retention of non-conviction orders in order to maintain a flexible sentencing regime.

Question 7.7

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

There are strong reasons for retaining an option which allows a finding of guilt to be made and recorded, but otherwise does not impose a punishment, for example in relation to spent convictions. Our concern would be that a cognitively impaired offender who was found guilty under section 10, but was required as part of this finding to receive specific services would be being treated differently and unequally to other offenders who benefited from the section.

Question 7.8

Should any other non-custodial sentencing options be adopted?

As with the response to question 6.7, there is scope for exploring the feasibility of a specific non-custodial option for people for whom an impairment was an element in their offending behaviour, but who still should be held criminally responsible.

Question 7.9

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

Given the high rate of dependence of people with disabilities on government benefits and the extra burdens their care places on relatives, FACS would have concerns over the equity of fines held in trust being used as a sentencing option for minor criminal offences. However there may be scope for using it as a response to regulatory offences where fines could be fixed at high rates for businesses and those on higher incomes.

Question 7.10

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

FACS would be concerned that adapting Work and Development orders as a sentencing option would distort the framework in which service providers provide services to people with disabilities, guided as this is by a framework of respect for human rights and individual choice. However, as already discussed, ADHC sees potential in alternative sentencing options tailored to the needs of people with disabilities. This could include adapting community service orders as well as other orders that address more serious offending.