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 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.

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 jane.sanders@freehills.com

Yours faithfully

Jane Sanders
Principal Solicitor

Doc 16178167.21

Mission Australia

Freehills

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
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