

Standing Committee on Law and Justice

**Community based
sentencing options for rural
and remote areas and
disadvantaged populations**

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Terms of reference

1. That the Standing Committee on Law and Justice inquire into and report on whether it is appropriate and in the public interest to tailor community based sentencing options for rural remote areas in NSW and for special need/disadvantaged populations, including:
 - (a) The perceived benefits and disadvantages of community based sentencing options including Periodic Detention, Intensive Supervision Programs (Home Detention e.g. Drug Court), Community Supervision Orders.
 - (b) The relationship between different Intensive Supervision Programs – Home Detention and Periodic Detention (Stage 1 and 2).
 - (c) The impact of the availability of Intensive Supervision Programs upon rural and remote communities.
 - (d) The place of Periodic Detention within a spectrum of community based sentencing options utilising intensive supervision.
 - (e) The criteria for eligibility for community based sentencing options.
 - (f) The experience of other jurisdictions in implementing community based sentencing options.
2. Any other related matter.

These terms of reference were referred to the Committee by the Attorney General, on 2 April 2004.

Committee membership

The Hon Christine Robertson MLC Australian Labor Party *Chair*

The Hon David Clarke MLC Liberal Party *Deputy Chair*

The Hon Rick Colless MLC The Nationals

The Hon Greg Donnelly MLC Australian Labor Party

The Hon Amanda Fazio MLC Australian Labor Party

Ms Lee Rhiannon MLC The Greens

Notes

1. Mr Clarke replaced Hon Greg Pearce MLC as Deputy Chair of the Committee on 22 September 2005.
2. Mr Colless replaced Hon Greg Pearce MLC who resigned from the Committee on 22 September 2005.
3. Mr Donnelly replaced Hon Eric Roozendaal MLC who resigned from the Committee on 10 August 2005. Mr Roozendaal had previously replaced the Hon Tony Burke MLC who resigned from the Committee on 24 June 2004.

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Chair's foreword

The Committee welcomed this important Inquiry and has undertaken a comprehensive examination of the terms of reference and the complex issues they raise. I am pleased to present this report to the Legislative Council.

The Committee has recognised the excellent work being undertaken by individuals and organisations across the State, including the Probation and Parole Service, the judiciary and community groups, to implement Government policy in relation to community based sentencing and to support people serving their sentences within the community.

Evidence presented to this Inquiry revealed that there are considerable gaps in the coverage of community based sentencing options throughout the State. It was also shown that disadvantaged offenders are often excluded from community based sentences due to restrictive eligibility criteria or the lack of appropriate support.

The Committee has carefully examined the many varied issues raised during this Inquiry including the operation of suspended sentences, the need for a program component of periodic detention to assist with rehabilitation, access to transport by offenders to undertake community based sentences in rural and remote areas and the complex relationship between unpaid fines and the mandatory disqualification of drivers' licences.

For the benefit of community based sentencing to be felt as widely as possible across New South Wales, and within the offender population, additional resources and innovative solutions are required. The Committee recognises the difficulty in ensuring equitable access to community based sentencing in areas where the offender population is scattered and backup resources are not necessarily available. The difficult home environment of many disadvantaged offenders (eg. Aboriginal offenders and offenders with intellectual disabilities or mental illness) presents an additional barrier.

It is essential, however, that equity of access to community based sentencing options be improved where practicable. The Committee has made a number of recommendations with a view to expanding the availability of community based sentencing options in rural and remote areas and making them more accessible and effective for offenders from such areas and for disadvantaged offenders. The Committee's recommendations are extensive and represent the diversity of information received during this Inquiry. The recommendations should be considered as a whole, rather than in isolation, as many of the issues they address are interlinked.

The Committee is indebted to the people and communities who have participated in this Inquiry by making submissions, attending public forums, hosting site visits or presenting oral evidence. We are grateful for the hospitality shown to us during our visits to rural and remote New South Wales and to the Yetta Dhinnakkal Correctional Centre in particular. It was a privilege to spend time in your communities and to hear your valuable insights. Thank you also to Mr David Daley from Corrections Victoria for the extremely valuable visit the Committee undertook to Victoria.

I would also like to thank the many staff of the Department of Corrective Services from all over New South Wales who appeared as witnesses before the Committee and provided information to assist the Committee's understanding of community based sentencing. I thank Commissioner Ron Woodham for facilitating this participation.

I would like to thank all past and present members of the Committee for their participation in this Inquiry. Thank you also to Rachel Callinan, Rachel Simpson, Pauline Kavanagh, Rebecca Main, Michelle Batterham, Annie Marshall and Dora Oravec of the Secretariat for their hard work.



Hon Christine Robertson MLC

Committee Chair

Executive summary

The Inquiry process

The Inquiry into community based sentencing options for rural and remote areas and disadvantaged populations was referred to the Committee by the Attorney General and commenced in January 2005. The Committee has undertaken a thorough examination of the terms of reference and is pleased to present this report.

In order to seek the views of a wide range of individuals, organisations and government agencies on this important issue the Committee undertook a comprehensive evidence gathering process. The Committee made a public call for submissions and published a discussion paper to assist submission makers. The Committee received a total of 60 submissions. Five days of public hearings were held at Parliament House at which 46 witnesses gave evidence. The Committee also visited the Holy Family Centre at Mt Druitt to meet with members of the local Aboriginal community and representatives of government and non-government agencies working with people serving community based sentences.

The Committee also visited several towns in rural and remote New South Wales to gather further information and to facilitate the participation of people from those areas in the Inquiry. The Committee visited Bourke, Brewarrina, Griffith, Inverell and Bega where it held further public hearings with 40 local witnesses and conducted public forums. The Committee also undertook a site visit to the Yetta Dhinnakkal Correctional Centre at Brewarrina. The Committee found the visits to these rural and remote areas particularly informative and the impressions received there were constructive in the outcome of this report.

The Committee also conducted a site visit to Victoria to meet representatives of Corrections Victoria. The opportunity to examine community based sentencing initiatives being undertaken in another jurisdiction was also a very useful exercise.

Scope of the Inquiry and report

The terms of reference for this Inquiry are broad; encompassing the range of community based sentencing options, as well as focusing on two distinct but related issues – ‘rural and remote areas’ and ‘disadvantaged groups’. The written and oral evidence presented to the Committee revealed a large number of issues and concerns held by members of the legal profession, advocacy and community groups, government agencies and members of the public.

In its report, the Committee has focused on the four primary community based sentences available in NSW: community service orders, bonds (and suspended sentences in particular), periodic detention and home detention. Separate chapters are devoted to each.

The Committee has also undertaken an overall analysis of the availability of community based sentencing options in rural and remote areas. An examination of the issues relating to disadvantaged offenders and the availability of, and/or their ability to access, community based sentencing options is also contained in this report.

This report also includes an examination of whether it is in the public interest to introduce a back-end home detention scheme in NSW.

Community based sentencing options (Chapter 2)

Community based sentences are sentences that are not primarily based in a prison setting but rather are carried out wholly, or to a large extent, in the community. Community based sentences have become widespread in many countries in recent years and represent one of the most important developments in sentencing in the last few decades. Their development is a reaction to factors including the inability of the prison system to rehabilitate the majority of offenders, the rising prison population, the costs associated with housing prisoners and changing community attitudes to punishment for criminal offences.

NSW and other jurisdictions have progressively increased the range of sentencing options available to a court. Where formerly the only punishment available for most crimes was a term of imprisonment in a custodial setting, there is now a range of sentencing options available which, while retaining a punitive and deterrent effect, recognise more specifically the community's interest in the rehabilitation of the offender.

The Committee strongly supports community based sentencing options as a means of both punishment and rehabilitation for appropriate offenders and is of the view that the competing aims of the criminal justice system can be reconciled through community based sentencing options.

The majority of community based sentences are handed down by NSW Local Courts and are administered by the Community Offender Services division of the Department of Corrective Services. The Probation and Parole Service, which is part of the division, plays a substantial role in the administration of community based sentences by preparing suitability assessments and supervising offenders subject to supervised bonds, community service orders and home detention.

Submissions and oral evidence received by the Committee largely supported the concept of community based sentencing with several advantages being identified. The many benefits to the offender and the offender's family of the offender serving a sentence in the community rather than in a full-time custodial setting were highlighted. Other benefits were more global, relating to lowering the prison population, reducing recidivism and cost effectiveness.

However, disadvantages were also identified including the perception that community based sentences are lenient and that offenders serving their sentence outside of a custodial setting pose a risk to the community.

The issue of sentencing has come under considerable review in NSW and other jurisdictions in recent years. The Committee's work follows on from, or coincides with, these reviews including, the NSW Law Reform Commission's long running inquiry into sentencing, the Legislative Council's Select Committee on the Increase in the Prisoner Population, the NSW Sentencing Council's review of abolishing prison sentences of six months or less and two current statutory reviews of the legislation relating to sentencing procedure and the administration of sentences, carried out by the Attorney General and the Minister for Justice respectively.

Availability of community based sentences in rural and remote areas (Chapter 3)

The evidence presented to this Inquiry has revealed considerable gaps in the availability of community based sentences in many rural and remote parts of NSW. Supervised bonds, community service orders, periodic detention and home detention are not available in many parts of the State.

The Committee considers it inequitable that the full range of community based sentencing options are not more widely available throughout the State. This impacts not only on offenders in rural and remote areas, who are therefore more likely to go to gaol than their metropolitan counterparts, but also on their families and the community.

The overwhelming majority of Inquiry participants expressed support for expanding community based sentencing throughout NSW. Representatives of the legal profession, including several local court magistrates, community and advocacy groups, government agencies and members of the public who participated in the Inquiry generally agreed that there is great value in community based sentencing and that the options should be more widely available.

The Committee is of the view that the Government needs to make community based sentencing, particularly in relation to disadvantaged offenders (discussed below), a priority within its sentencing and criminal justice policies.

It is clear that extra resources are required for community based sentencing to be made available in a more equitable distribution. The Committee has recommended that the Government dedicate additional financial and other resources to its community based sentencing program. While substantial funding would have to be outlaid initially to expand these sentencing options, cost savings would result from the reduced number and cost of the prison population and reduced recidivism.

The Committee acknowledges that in some areas there is not and will never be enough demand for various community based sentencing options to warrant spending the money merely to ensure they are available. While the Committee acknowledges that insurmountable practical and economical difficulties will prevent complete coverage, especially in remote areas, the Committee recommends that the Government endeavour, where practical, to make community based sentencing options available in rural and remote areas of NSW.

The expansion of community sentencing options cannot happen in isolation. Other Government agencies apart from the Department of Corrective Services will also be required to extend programs and services that support offenders serving community based sentences. Improved co-ordination of efforts to increase the use of community based sentencing in rural and remote areas, as well as greater involvement of local government, is required. The Committee has recommended that the Government adopt a whole-of-government approach to improve the provision of services and programs to support offenders on community based sentences in rural and remote NSW.

Disadvantaged populations (Chapter 3)

The group most frequently identified as experiencing particular disadvantage in the criminal justice system is Aboriginal offenders. The next most commonly identified groups were offenders with intellectual disabilities or mental health issues and female offenders. The Committee therefore focused its discussion on these three groups.

In order to improve the outcomes for disadvantaged offenders effective measures need to be in place at all stages of the justice system, starting with crime prevention. The Committee's work only examines a small section of this spectrum but acknowledges the context in which its discussion lies.

The lack of availability of the full range of community sentencing options in all parts of NSW impacts disproportionately on disadvantaged groups within the overall offender population. Particular concerns were raised in relation to Aboriginal offenders and female offenders. Where community based

sentences *are* available, disadvantaged offenders face considerable barriers to accessing those options including, restrictive eligibility criteria and the lack of appropriate support services to assist them to complete community based sentences. Offenders with intellectual disabilities or mental health issues were most frequently raised in this regard.

The Committee has formed the view that where possible, community based sentencing options should be tailored to meet the needs of disadvantaged offenders, for whom these sentencing options would have the most significant benefits.

For disadvantaged people, the support required to undertake community based sentences is provided by numerous agencies and the improvement of support services requires a co-ordinated multi-agency approach. These supports include services for housing and health, and more intensive case management from PPS officers. The Committee has therefore recommended that the Government examine ways that a multi-agency approach could be taken to assist disadvantaged people to access community based sentencing options and to maximise the successful completion of such sentences.

The Committee has also recommended that the adequacy of knowledge within the Community Offender Service division of the Department of Corrective Services regarding the needs of disadvantaged offenders, particularly offenders with intellectual disabilities or mental health issues and Aboriginal offenders should be assessed. Consideration should be given to whether specialist officers should be employed, or special training delivered to its officers, to meet this area of need.

Specific issues relating to disadvantaged offenders and the various community based sentencing options are examined in separate chapters of the report.

Community Service Orders (Chapter 4)

Community Service Orders (CSOs) are not uniformly available across NSW, mainly due to the lack of work placements in smaller communities in rural and remote areas. Factors influencing the ability or willingness of organisations to offer work placements include, their capacity to provide supervision, the costs of equipment, OH&S and public liability concerns and community reluctance to participate in the CSO scheme. The Committee has made the following recommendations with the aim of increasing the number of work placements for CSO in rural and remote areas:

- One barrier to smaller organisations taking CSO placements is the fact that they must comply with OH&S requirements in relation to those offenders. Complying with additional OH&S obligations in relation to offenders on CSOs can place a strain on some organisations, while others do not meet OH&S requirements and are therefore not assessed by the Probation and Parole Service to be suitable to accept work placements. The Committee has recommended that the Department of Corrective Services work with the Department of Local Government and WorkCover to assist non-government organisations in rural and remote NSW to comply with the OH&S requirements, or to alleviate the burden of OH&S requirements for CSO placements.
- Some organisations are reluctant to accept CSO placements because of concerns about public liability insurance. Despite the fact that offenders who are engaged in CSO work are fully covered for public liability by the Crown, it appears that some organisations remain concerned about their potential liabilities and are reluctant to participate. The Committee has recommended that the Department of Corrective Services review its public information concerning CSOs and public liability insurance to dispel concerns about liability.

- The Committee has recommended that the Department of Local Government encourage or assist local councils to participate in the CSO scheme.
- A community education program about the CSO scheme and the development of initiatives to recognise and encourage the CSO work undertaken by Community Offender Services in partnership with local councils and other community organisations could be effective in increasing the number of work placements available to offenders. The Committee has recommended that the Department of Corrective Services undertake such initiatives.
- The Committee has recommended that the Department of Corrective Services assist organisations in rural and remote areas with the cost of purchasing equipment for CSO placements, either directly or by facilitating assistance from the local business community. The Committee has also recommended that the Department investigate ways of increasing the involvement of private business in the CSO scheme in rural and remote areas, including seeking consultations with Australian Business Limited and local Chambers of Commerce.

The availability of CSOs for offenders with disabilities has also been examined. The Committee is concerned that offenders with disabilities, particularly intellectual disabilities, are not able to access CSOs as a community based sentencing option. This problem is particularly acute when considering the benefits of this sentencing option for this group of disadvantaged offenders. The Committee is of the view that a specific initiative should be undertaken by the Department of Corrective Services to examine the barriers preventing offenders with disabilities being assessed as suitable for a CSO or for suitable work placements to be identified and a recommendation has been made to this effect.

Bonds and suspended sentences (Chapter 5)

Bonds are the most common type of community based sentence ordered in NSW and supervised bonds in particular were the focus of much discussion among submission makers and witnesses.

While bonds are also the most widely available of the community based sentencing options under review, the Committee was advised that in some rural and remote areas *supervised* bonds are not available due to the lack of PPS staff to provide supervision. The Committee has recommended that the Department of Corrective Services identify the areas where supervised bonds are not available due to a lack of PPS staff and that steps should be taken to extend supervision, or a modified form of supervision, to all areas of NSW.

The Committee is concerned that where supervised bonds are available in rural and remote areas, there is a lack of regular, accessible and appropriate programs and resources to support the rehabilitative purpose of supervised bonds. This undermines the effectiveness of bonds as a sentencing option. The Committee has therefore recommended the expansion of the availability and range of programs available to address offending behaviours.

The Committee has also recommended that the Department of Corrective Services work closely with both government and non-government agencies in the disability services field to identify and develop ways to improve support services to assist offenders with an intellectual disability or a mental illness in complying with the conditions of supervised bonds.

The Committee received considerable evidence at public hearings, forums and through written submissions criticising the operation of suspended sentences. While the criticisms apply to the

operation of suspended sentences in general, the impact of these issues is particularly acute in rural and remote areas and in relation to Aboriginal offenders.

The criticisms include the potential for net-widening and sentence inflation, the fact that the court cannot partially suspend a sentence or impose a longer period of supervision with a shorter term of imprisonment, a reluctance by offenders to appeal lengthy suspended sentences, the impact of mandatory revocation of a bond on breach and the requirement that the court must set parole and non-parole periods at the time of sentencing rather than at the time of breach.

The Committee has made a number of recommendations, including that the Attorney General consider amendments to the legislation relating to suspended sentences, to alleviate the impact of these aspects of the operation of suspended sentences.

Two further issues concerning the operation of bonds and suspended sentences in rural and remote areas and in relation to offenders from disadvantaged groups were also raised during the Inquiry. First, the impact of intensive policing on offenders serving bonds or suspended sentences. Second, the difficulties some offenders have in fully understanding the conditions of a bond. The Committee has made recommendations in relation to these issues.

Periodic detention (Chapter 6)

Periodic detention commenced in NSW in 1971. Currently, there are 10 periodic detention centres that cover the main urban centres on the coastal strip and only three inland centres at Tamworth, Bathurst and Mannus.

The Committee is concerned that offenders in many rural and remote parts of NSW, who may otherwise be suitable for periodic detention, are given sentences of full-time imprisonment due to the lack of periodic detention facilities. The Committee has recommended that existing correctional centres in rural and remote NSW should offer periodic detention beds.

The availability of periodic detention is not only determined by the location of periodic detention centres but also the ability of offenders to consistently travel to the centres. The lack of public transport and financial barriers make travelling to periodic detention centres difficult for many. No single solution can be uniformly applied across the state, however, by tailoring transport solutions to meet the needs of specific locations, greater access to periodic detention can be achieved. The Committee has recommended that the Minister for Justice examine methods of improving transport for offenders to increase access to periodic detention in rural and remote areas.

The Committee has also addressed several other issues relating to the periodic detention scheme:

- The legislation currently does not allow the court to order a periodic detainee to attend therapeutic or educational programs, which undermines the value of periodic detention. The Committee has recommended that the Attorney General consider amending the *Crimes (Sentencing Procedure Act) 1999* (NSW) to give discretion to the courts to order programs designed to reduce the likelihood of recidivism for offenders serving periodic detention.
- The Committee was informed that periodic detainees have their Centrelink payments reduced which places a financial burden on detainees who nonetheless must maintain a home during their time in detention and incur other expenses. The Committee has recommended that the Minister for Justice examine the deduction of Centrelink payments for offenders serving

periodic detention, the impact on periodic detainees in rural and remote areas, the extent to which the deductions could render an offender unsuitable for periodic detention and whether an exemption should be sought.

- S 65A of the *Crimes (Sentencing Procedure Act) 1999* (NSW) provides that a person who has previously served more than six months full-time imprisonment is not eligible for periodic detention. This exclusion disproportionately affects Aboriginal offenders who are more likely to have significant criminal histories than non-Aboriginal offenders and it fails to recognise what may be lengthy periods of rehabilitation. The Committee has recommended that the Attorney General examine s 65A and its impact on Aboriginal offenders, with a view to introducing a time limit on previous offences and enabling an offender's record of compliance with previous orders of the court to be taken into account.
- In rural and remote NSW, only four periodic detention centres cater for female offenders and the number of female periodic detainees is low. It is not clear why the existing female periodic detention places are under-utilised. It may be that the barriers that restrict access for offenders in rural and remote areas generally are further compounded by carer responsibilities for female offenders. The Committee has recommended that the Department of Corrective Services examine the reasons why female participation in periodic detention remains low and identify measures that could be taken to increase their participation.

Home detention (Chapter 7)

Home detention has been available in NSW since a trial program was introduced in 1992, but is only available in the Sydney, Central Coast, Hunter and Illawarra areas. The evidence presented to the Committee reflects general support for home detention and for its expansion. Home detention has considerable success in terms of rehabilitation and recidivism, with a recidivism rate of approximately 12% compared to the overall rate of re-offending among all prisoners, which is over 50%.

The lack of availability of home detention in many parts of NSW places offenders from those areas at a serious disadvantage compared to their metropolitan counterparts. It is inequitable that an offender should be more likely to be sent to gaol because of his or her geographical location. The Committee has concurred with the strident views expressed by many Inquiry participants in this regard. The Committee has therefore recommended that the Government, as a matter of priority, extend the availability of home detention to as many areas of NSW as possible.

The Department advised that it is already examining flexible options to deliver home detention to more parts of the State. The Committee was advised of the Department's proposal for home detention in the Kempsey area and has recommended that the Government adopt the proposal. The Committee has also recommended that the Department continue to explore innovative options to expand home detention, or a modified form, to rural and remote NSW.

The Committee considered several issues relating to the availability and accessibility of home detention for disadvantaged groups:

- The Committee was advised that home detention may not be suitable for some Aboriginal offenders in rural and remote areas because detainees must stay within the home, whereas Aboriginal people have a cultural preference to congregate together, often outdoors. The Committee has recommended that the Department of Corrective Services examine ways of

accommodating the cultural differences of Aboriginal offenders to provide greater access to home detention as an alternative to gaol.

- Offenders who are convicted of certain offences, or who have past convictions for certain offences, are not eligible for home detention. This exclusion is a particular barrier for Aboriginal offenders due to the high conviction rate within the Aboriginal community. The Committee has recommended that the Department undertake an examination of the eligibility criteria for home detention to determine the extent to which the criteria unfairly limits the availability of home detention for Aboriginal offenders and whether the criteria should be modified.
- In order to be eligible for home detention an offender must have a stable residence. The Committee was advised that this requirement effectively excludes many disadvantaged offenders from home detention. The Committee has recommended that the Department examine the provision of assistance to disadvantaged offenders to enable them to meet this criterion.
- The Committee received much evidence relating to the difficulties faced by offenders with mental health issues or intellectual disabilities in relation to home detention. These offenders, who would derive great benefit from serving a term of imprisonment by way of home detention rather than gaol, appear to be the least likely offenders to be considered suitable. The main issues are a lack of a stable home and lack of support to assist them to comply with the conditions. The Committee has recommended that the Department examine ways in which offenders with mental health issues or intellectual disabilities can be supported adequately, such as through the provision of supported accommodation, to enable them to be considered for home detention.
- Concern was expressed about the impact of the lack of home detention in rural and remote areas on female offenders. Home detention has particular benefits for female offenders and their families, particularly pregnant women or women with carer responsibilities, who would otherwise be sentenced to full-time gaol. The Committee has recommended that the Department examine the uptake of home detention by female offenders, with a view to establishing the demand for home detention among female offenders, the barriers faced in accessing home detention and ways to overcome those barriers.

Back-end home detention (Chapter 8)

Two months after the Committee received the terms of reference for the Inquiry into community based sentencing it received terms of reference from the Legislative Council to examine the possible introduction of a back-end home detention scheme in New South Wales. Back-end home detention refers to offenders serving the last portion of their sentence in their home, after having first served part of their term in gaol. In conducting the two inquiries concurrently, it became clear that both terms of reference raised similar issues. The Committee therefore decided it would be more effective if its recommendations in relation to back-end home detention were reported as part of its broader review of community based sentencing.

Most Inquiry participants expressed support for back-end home detention. Submissions highlighted that back-end home detention enables offenders to re-establish family and community links and seek employment. Evidence also indicates that it improves an offender's ability to reintegrate into the community after a period of imprisonment and reduces recidivism.

The Committee considered whether back-end home detention conflicts with the principle of truth-in-sentencing and concluded that concerns about truth-in-sentencing can be overcome by the manner in which a back-end scheme operates and, particularly, the authority that decides whether an offender can proceed to back-end home detention.

The Committee acknowledges that back-end home detention has both benefits and disadvantages. The Committee also acknowledges that home detention, whether back-end or front-end, is not a suitable or preferable option for all offenders. Nonetheless, the Committee is of the view that a back-end home detention scheme would be desirable. The introduction of back-end home detention would usefully add to the range of penalties a court may draw upon when determining the appropriate sentence to fit an offence and the offender.

The Committee has not attempted to define how such a scheme should operate in all respects. This task would involve considerable discussion and research, which would best be undertaken by the Minister for Justice and the Department of Corrective Services. The Committee has instead focused on those elements of a new scheme referred to in the terms of reference and raised in submissions and oral evidence including, the appropriate authority to determine whether an offender can serve the latter portion of his or her sentence on home detention and issues relating to the eligibility and suitability criteria.

The Committee has recommended that a pilot scheme involving a small number of offenders should be conducted. An evaluation of the pilot should then inform the development of the most effective model for a back-end home detention scheme to be implemented across the State.

Related issues (Chapter 9)

During the Inquiry many other issues that relate to community based sentencing or the experiences of rural and remote people, or those from disadvantaged groups, with sentencing were raised. Three stood out for further consideration by the Committee: circle sentencing, the Magistrates Early Referral Into Treatment (MERIT) program and Drug Court diversion programs and an issue concerning unpaid fines and the mandatory disqualification of drivers' licences.

Circle Sentencing, MERIT and the Drug Court are not community based sentencing options. Circle Sentencing is a method of imposing a sentence on an offender, which involves members of the community. MERIT and the Drug Court are diversion programs that can be utilised by the court at the pre-sentence stage to require offenders to undertake treatment programs in the community. All three exist on the continuum of measures available to courts in NSW to enhance the sentencing process to promote better outcomes for offenders. A person sentenced through Circle Sentencing or referred to MERIT or the Drug Court may ultimately incur a community based sentence. In this respect they provide a useful context to other discussion in this report.

Circle Sentencing is an alternative sentencing court for adult Aboriginal offenders, which takes the sentencing process out of the court setting and into the community. The Circle involves a Magistrate, the offender and the victim and their support people, and community members. General support for Circle Sentencing, and for its expansion to other parts of NSW, was expressed during the Inquiry. The Committee notes that not only are community based sentences the most frequent sentence handed down by a Circle, but the purpose of the Circle process and the goals of community based sentencing are similar. Importantly, the community is involved in the administration of justice, which promotes the effective punishment and rehabilitation of offenders. The Committee endorses Circle Sentencing and notes that the Government has a program of expansion underway. The Committee encourages the

Government to continue expanding Circle Sentencing to areas of the State where there are strong Aboriginal communities and offenders with ties to those communities.

MERIT is a 12 week intensive program based in the Local Court that provides the opportunity for adult defendants with drug problems to work towards rehabilitation as part of the bail process. Inquiry participants generally spoke favourably about the MERIT program and some discussed expanding it to other courts and opening it up to young offenders.

The Drug Court provides an opportunity for adult offenders with substance abuse problems to be diverted into treatment rather than imprisonment. The evidence received in respect of the Drug Court was overwhelmingly positive and many Inquiry participants argued for the program to be expanded beyond the western-Sydney catchment area. The Committee has recommended that a trial of the Drug Court should be conducted in a suitable major regional NSW town.

The Committee received a great deal of evidence concerning the relationship between the penalties for unpaid fines and mandatory disqualifications drivers' licences. This issue was raised as a significant concern in the rural and remote areas the Committee visited. Examples were provided of unpaid fines leading to the mandatory disqualification of drivers' licences and subsequent convictions for driving while unlicensed. This situation can escalate to the point where a person is faced with a term of imprisonment, and in many rural and remote areas community based custodial alternatives are not available. A detailed analysis of the law and policy in this area is beyond the scope of this Inquiry. The Committee has therefore collated the information presented to it and has recommended that this issue be comprehensively investigated by an inter-agency review.

Summary of recommendations

- Recommendation 1** 28
That the Minister for Justice examine ways in which relevant community organisations could be assisted to inform their members and the public about the role and nature of community based sentencing.
- Recommendation 2** 45
That the Government make community based sentencing, particularly in relation to the disadvantaged groups examined by the Committee, a priority within its sentencing and criminal justice policies and that, where it may be practically implemented, all community based sentencing options should be made available throughout New South Wales.
- Recommendation 3** 45
That the Minister for Justice undertake research to establish the level of demand for community based sentencing options in rural and remote areas of New South Wales.
- Recommendation 4** 45
That the Government dedicate more financial and other resources to the Community Offender Services division of the Department of Corrective Services to adequately fund community based sentencing programs in New South Wales, including new initiatives and the extension of programs set out in the Committee's other recommendations.
- Recommendation 5** 46
That the Government adopt a whole-of-government approach to improve the provision of services and programs to support offenders on community based sentences in rural and remote New South Wales.
- Recommendation 6** 51
That the Government consider establishing new correctional centres based on the successful Yetta Dhinnakkal Correctional Centre model.
- Recommendation 7** 57
That the Minister for Justice expand the NSW Statewide Community and Court Liaison Service through the use of 'telehealth', 'webcam' technology, or other means, to additional courts in rural and remote New South Wales.
- Recommendation 8** 64
That the Government examine ways that a multi-agency approach could assist disadvantaged offenders to access community based sentencing options and to maximise the successful completion of such sentences and the rehabilitation of the offender.
- Recommendation 9** 64
That the Minister for Justice examine the adequacy of knowledge within the Community Offenders Service division of the Department of Corrective Services regarding the needs of disadvantaged offenders, particularly offenders with intellectual disabilities or mental health issues, and give consideration to employing specialist officers and the delivery of special training to its officers to meet this area of need.
- Recommendation 10** 65
That future initiatives in community based sentencing be accompanied by a comprehensive communication strategy, which includes a range of information channels accessed by people from language backgrounds other than English living in rural and remote areas. That future community based sentencing initiatives in remote areas should be implemented in a way that gives due consideration to the linguistic, cultural and religious background of offenders.

- Recommendation 11** 65
That the Department of Corrective Services develop a strategy to identify and cater for the needs of the growing elderly population in relation to access to, and support to undertake, community based sentences.
- Recommendation 12** 77
That the Department of Corrective Services work with the Department of Local Government and WorkCover to identify ways to assist community and other non-government organisations in rural and remote New South Wales to achieve compliance with occupational health and safety requirements, with a view to increasing the number of Community Service Order work placements.
- Recommendation 13** 78
That the Department of Corrective Services review its current information concerning Community Service Order placements and public liability insurance and the dissemination of that information with a view to dispelling concerns about public liability insurance. A program for making the information accessible to current and prospective Community Service Order placement organisations should be developed. Consideration should also be given to identifying an information contact officer to clarify any queries held by current or prospective Community Service Order placement organisations.
- Recommendation 14** 83
That the Department of Corrective Services continue to investigate and implement ways of providing or arranging transport to work placements for offenders in rural and remote areas as a way of improving access to the Community Service Order scheme.
- Recommendation 15** 87
That the Department of Corrective Services' *Linking Together Program* and any other pilot programs or initiatives such as mobile camps, which are shown to increase access to Community Service Orders for offenders in rural and remote areas, should be extended to other parts of the State.
- Recommendation 16** 87
That the Department of Corrective Services assist organisations in rural and remote areas with the cost of purchasing additional equipment for Community Service Order placements either through the provision of financial assistance or seeking assistance from the local business community with a view to expanding the availability of Community Service Order work placements in such areas.
- Recommendation 17** 89
That the Department of Local Government identify ways in which it can encourage or assist local councils to participate in the Community Service Order scheme, either by taking Community Service Order placements or providing support for community groups to do so.
- Recommendation 18** 91
That the Department of Corrective Services:
- Undertake a community education program about the Community Service Order scheme, including information about public liability and the benefits of the program.
 - Develop an initiative that recognises and encourages the work undertaken by Community Offender Services in partnership with local councils and other community organisations, as a means of increasing the number of work placements available to offenders.
- Recommendation 19** 92
That the Department of Corrective Services investigate ways of increasing the involvement of private business in the Community Service Order scheme in rural and remote areas, including seeking consultations with Australian Business Limited and local Chambers of Commerce.

- Recommendation 20** 98
That the Department of Corrective Services investigate ways to expand the availability of vocational or skills based programs for offenders undertaking Community Service Orders in rural and remote New South Wales.
- Recommendation 21** 101
That the Department of Corrective Services examine ways of increasing access by Aboriginal offenders to culturally appropriate Community Service Order work placements in rural and remote areas including seeking consultations with the Federal Government to examine how the Community Development Employment Projects program can be utilised to create more Community Service Order work placements in rural and remote areas.
- Recommendation 22** 104
That the Department of Corrective Services undertake a specific project to examine the barriers preventing offenders with disabilities being assessed as suitable for a CSO or for suitable work placements to be identified. The provision of assistance and support to enable offenders with disabilities to undertake a Community Service Order should be examined.
- Recommendation 23** 121
That the Department of Corrective Services:
- identify the areas of New South Wales where supervised bonds are unavailable due to a lack of Probation and Parole Service resources.
 - take steps to extend supervision, or a modified form of supervision, to all areas of New South Wales.
 - work with government and non-government agencies to extend the availability of appropriate and accessible programs to meet offenders' needs in rural and remote areas. In particular, consideration should be given to programs addressing domestic violence, drug and alcohol and driving related offending behaviour.
 - work with both government and non-government agencies in the disability services field to identify and develop ways to improve support services to assist offenders with an intellectual disability or a mental illness to comply with the conditions of supervised bonds.
- Recommendation 24** 134
That, as part of the review of the *Crimes (Sentencing Procedure) Act 1999* (NSW) currently being undertaken by the Attorney General's Department, the following issues in relation to s 12 of the Act be considered:
- providing greater discretion to the courts to address a breach of suspended sentence
 - restoring the power of the courts to partially suspend prison sentences
 - granting power to the court to order periods of supervision longer than the term of imprisonment on breach
 - amending the legislation to provide clarification on the consequences of a breach of s 12 and in particular the setting of parole and non-parole periods.
- Recommendation 25** 136
That the Government undertake research to ascertain the outcomes for families and communities subject to intensive policing, with reference to the evidence presented to the Committee regarding the impact of intensive policing on offenders serving supervised bonds in rural and remote areas of New South Wales.
- Recommendation 26** 140
That the Attorney General and the Minister for Justice review the process within their areas of responsibility regarding the provision of information to offenders about their obligations under a bond. The provision of information about bonds and common conditions in plain English and

community languages should also be reviewed. Where improvements can be identified these should be undertaken. Consideration should be given to the feasibility of requiring offenders to attend court or a Probation and Parole Office for a follow up explanation of the requirements of a bond a week after sentencing.

Recommendation 27 **150**

That the Department of Corrective Services:

- undertake a review of the joint periodic detention/Community Service Order worksites with a view to expanding this model across the State, where viable. The review should be undertaken no later than two years after Community Offender Services has taken responsibility for Stage 2 periodic detention.
- research alternative, innovative approaches, to providing community service work for Stage 2 periodic detainees in rural areas.

Recommendation 28 **152**

That the Attorney General, as part of the review of the *Crimes (Sentencing Procedure) Act 1999* (NSW), consider an amendment to give discretion to the courts to order programs designed to reduce the likelihood of recidivism for offenders serving periodic detention orders.

Recommendation 29 **160**

That the Minister for Justice examine the feasibility of creating periodic detention beds in all Correctional Centres in order to meet the needs of both the male and female offender population.

Recommendation 30 **160**

That the Minister for Justice examine methods of improving transport services for offenders to increase access to periodic detention as a sentencing option for offenders in rural and remote areas.

Recommendation 31 **163**

That the Minister for Justice examine the deduction of Centrelink payments for offenders serving periodic detention in New South Wales, including:

- how the deductions impact on periodic detainees, particularly those in rural and remote areas
- the extent to which the deductions could render an offender unsuitable for periodic detention and
- whether an exemption should be sought.

Recommendation 32 **167**

That the Attorney General, as part of the review of the *Crimes (Sentencing Procedure) Act 1999* (NSW), examine the operation s 65A of the Act with particular regard to its impact on Aboriginal offenders, with a view to:

- enabling offenders who have previously served imprisonment for more than six months by way of full-time detention in relation to any one sentence of imprisonment to be considered for periodic detention
- allowing consideration of an offender's compliance record with previous orders of the court when assessing suitability for periodic detention.

Recommendation 33 **169**

That the Minister for Justice examine the reasons why female participation in periodic detention in New South Wales remains low and identify any measures that could be taken, whether administrative or legislative, to increase the participation of female offenders.

Recommendation 34 **199**

That the Government, as a matter of priority, extend the availability of home detention to as many areas of New South Wales as possible, taking into account the following:

- an analysis of the areas of greatest demand should be undertaken and home detention extended first to those areas with the greatest need.
- creative options for extending home detention, or a modified form of home detention, to rural and remote communities should be explored with reference to the experiences of other jurisdictions such as the Northern Territory.
- the Department of Corrective Services should consult widely on any proposal for modifying the existing home detention requirements such as introducing intensive supervision in conjunction with a bond.
- the need for an increase in the resources of the Probation and Parole Service for effective implementation of home detention in rural and remote areas.

Recommendation 35**203**

That the Department of Corrective Services examine ways of increasing the participation of Aboriginal offenders in home detention including:

- accommodating cultural differences to provide greater access to home detention for Aboriginal offenders
- developing information about the nature of home detention and its place as an alternative to full-time custody to increase the level of understanding among Aboriginal communities about this sentencing option.

Recommendation 36**207**

That the Department of Corrective Services undertake a thorough examination of the eligibility criteria for home detention to determine the extent to which the criteria unfairly limits the availability of home detention for Aboriginal offenders compared with non-Aboriginal offenders and whether the criteria should be modified so as to not disadvantage Aboriginal offenders.

Recommendation 37**209**

That the Department of Corrective Services examine ways in which assistance could be provided to disadvantaged offenders to enable them to meet the criteria of a suitable residence. The input of other relevant Government agencies, including in the portfolio areas of health and housing, should be sought.

Recommendation 38**212**

That the Department of Corrective Services examine ways in which offenders with mental health issues or intellectual disabilities can be supported adequately, such as through the provision of supported accommodation, to enable them to be considered for home detention.

Recommendation 39**214**

That the Department of Corrective Services examine the uptake of home detention orders by female offenders to establish the demand for home detention among female offenders in rural and remote areas and metropolitan areas. The examination should seek to identify any barriers faced by female offenders in accessing home detention, such as a lack of family or social support, and identify ways to overcome those barriers.

Recommendation 40**232**

That the Government introduce a back-end home detention scheme without compromising the principle of truth-in-sentencing.

That a pilot scheme involving a small number of offenders should first be conducted by the Department of Corrective Services and evaluated by the Bureau of Crime Statistics and Research. That the results of the evaluation should be used to develop the most effective model for a back-end home detention scheme to be implemented across the State.

Recommendation 41**233**

That, when planning the introduction of a back-end home detention scheme, the Government explore ways of ensuring that the public is provided with sufficient information about the nature

of home detention so as to minimise the perception that back-end home detention is a 'soft option' or poses a danger to the community.

Recommendation 42

233

That the introduction of a new back-end home detention scheme be accompanied by a comprehensive communication strategy, which includes a range of information channels accessible by people from language backgrounds other than English and those living in rural and remote areas.

Recommendation 43

234

That the expansion of the front-end home detention scheme and the introduction of a back-end scheme, as recommended by the Committee, should occur concurrently and that the Government should provide sufficient resources for the introduction of a back-end scheme so as to not divert resources from the current front-end scheme or impede its expansion.

Recommendation 44

243

That the decision whether an offender is eligible for back-end home detention should be made by the court at the time of sentencing. The court should also determine the portion of an offender's sentence to be served on home detention. As with front-end home detention the court should be assisted in this regard by an assessment by the Probation and Parole Service.

That when the first portion of an offender's sentence is due to be completed the decision whether the offender should proceed to back-end home detention should be referred back to the court to be confirmed. At this stage the court can examine the offender's current circumstances, including behaviour whilst in custody and home arrangements, to ensure that the offender is still suitable for home detention.

That consideration should be given to utilising the current classification system used for assessing an offender's eligibility for external leave programs into the back-end home detention scheme.

Recommendation 45

248

That the restrictions on the powers of a sentencing court to make a home detention order for certain offences and offenders with a certain criminal history of the kind contained in Division 2 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should not be included as an element of a back-end home detention scheme.

Recommendation 46

250

That conditions attached to back-end home detention orders be as consistent as possible with the conditions that apply to front-end home detention orders, including provisions for electronic monitoring.

Recommendation 47

254

That the Attorney General examine the feasibility of including the Probation and Parole Service in the Circle Sentencing process.

Recommendation 48

261

That the Attorney General conduct a trial of the New South Wales Drug Court in a suitable major regional New South Wales town with such amendments to the program as are necessary in a regional setting. The Department should ensure that readily available and accessible programs and support services, such as drug and alcohol services and other health services, are available to maximise the success of offenders undertaking the program.

Recommendation 49

269

That the Government undertake a multi-agency project to examine the issues relating to fine default and driver's licences brought before the Committee during this Inquiry and described in this report.

Acronyms

ATSI	Aboriginal and Torres Strait Islander
BOCSAR	NSW Bureau of Crime Statistics and Research
CALD	Culturally and linguistically diverse
CDEP	Community Development Employment Projects
CLRI	Conference of Leaders of Religious Institutes (NSW)
COALS	NSW Coalition of Aboriginal Legal Services
CRC	NSW Community Relations Commission
CSO	Community Service Order
MERIT	Magistrates Early Referral into Treatment
PPS	Probation and Parole Service
SDRO	State Debt Recovery Office
SORC	Serious Offenders Review Council
STMP	Suspect Target Management Process
VOCAL	Victims of Crime Assistance League

Chapter 1 Introduction

This Chapter provides an overview of the inquiry process, including the methods used by the Committee to encourage participation by members of the public, interested organisations and government agencies. It also includes an outline of the report contents.

Terms of reference

- 1.1 The terms of reference for this inquiry, which are reproduced on page v, were referred to the Committee by the Attorney General, the Hon Bob Debus MP, on 2 April 2004.¹ In summary, the Attorney General asked the Committee to examine whether it is appropriate and in the public interest to tailor community based sentencing options for rural and remote areas in NSW and for disadvantaged populations.
- 1.2 The original reporting date for the inquiry was July 2005. Given the complexity and the importance of the issues raised by inquiry participants, the Committee resolved to extend the reporting date to 31 March 2006, and advised the Attorney General accordingly.

Conduct of Inquiry

Discussion paper

- 1.3 The Committee produced a discussion paper in January 2005 to assist submission makers. The paper provided background information about community based sentences and set out more than 60 questions designed to elicit views on a wide range of issues pertaining to community based sentencing. The discussion paper is available from the Committee's website at: www.parliament.nsw.gov.au/lawandjustice.

Submissions

- 1.4 The Committee called for submissions through advertisements in the *Sydney Morning Herald* and various regional newspapers and by writing directly to relevant individuals and organisations. A total of 60 submissions were received. A list of submission makers is provided at Appendix 1 and the submissions have been published on the Committee's website.

Public hearings, meetings and site visits

- 1.5 In order to seek the views of a range of individuals and organisations throughout NSW, the Committee held hearings and conducted site visits and public meetings in Sydney and regional and rural areas. The Committee also undertook a study visit to Victoria. Transcripts of all public hearings and meetings are available on the Committee's website.

¹ Correspondence from the Hon Bob Debus MP, Attorney General to Chair, 2 April 2004

- 1.6** Five public hearings were held in Sydney on 6 June, 30 August, 31 August, 1 September and 27 September 2005, involving witnesses representing government agencies, advocacy and community organisations and legal services. A list of witnesses is set out in Appendix 2.
- 1.7** A Sub-Committee of the Committee conducted a site visit to the Holy Family Centre in Mount Druitt on 27 September 2005.² There the Sub-Committee met with members of the local Aboriginal community and representatives of government and non-government agencies working with people serving community based sentences.
- 1.8** In order to facilitate participation in the Inquiry by people in rural and remote communities, and to learn about the issues faced by people in those areas, the Committee conducted a series of public hearings and meetings in Inverell, Bourke, Brewarrina, Griffith and Bega in June 2005.
- 1.9** A Sub-Committee also undertook a site visit to the Yetta Dhinnakkal Correctional Centre for young Aboriginal offenders, near Brewarrina, on 16 June 2005. There the Committee met with several staff and inmates of this unique facility and was privileged to receive a traditional Aboriginal welcome from the Ngemba and Bundjalung communities, including a smoking ceremony and traditional dances. A report of the sub-committee's visit is set out in Appendix 3.
- 1.10** When considering which places in NSW to visit, the Committee took into account a range of factors including population distribution, recorded crime rates and trends in three offence categories that attract community sentence (assault, break and enter and offensive conduct), the location of minimum security correctional centres and Accessibility/Remoteness Index Australia (ARIA) scores.³
- 1.11** On the basis of this information the Committee concluded that site visits to Bourke, Inverell, Brewarrina, Griffith and Bega would be most beneficial to the Committee's inquiry. These towns represent both remote and regional areas and are populated by significant populations of disadvantaged groups, particularly Aboriginal people.
- 1.12** The terms of reference require the Committee to examine the experience of other jurisdictions in implementing community based sentencing options. During the public hearings several witnesses suggested the Committee investigate Victoria's approach to community based sentencing. The Committee was advised that Victoria had embarked on a reform program known as the Corrections Long Term Management Strategy, to address the rising the imprisonment rate in that State. A key element of this strategy is a greater emphasis on

² At its meeting of 27 September 2005, the Committee resolved to form a sub-committee, under the power conferred by Standing Order 217, for the purposes of the Mount Druitt site visit (see Minutes No 31 in Appendix 6).

³ ARIA scores are based on the road distance from the closest service centres. The Aria classification was developed in 1997 by the then Commonwealth Department of Health and Aged Care, based on a continuous measure of remoteness developed by GISC (National Key Centre for Social Applications of Geographic Information Systems). An ARIA category is allocated on the basis of the average ARIA index score (between 0 and 12) within an area. The higher the score, the more remote the area. For example, Sydney and Newcastle have an ARIA score of 0.00. Wollongong is also considered highly accessible with an ARIA score of 0.451 and Bathurst also highly accessible with a score of 1.336. Bourke is the most remote town in NSW with an ARIA score of 10.752.

community corrections. The Committee undertook a study visit to Melbourne on 25 and 26 October 2005. The Committee wishes to thank the Commissioner of Corrections Victoria, Mr Kelvin Anderson, and officers of his Department, for taking the time to share their knowledge and experience. A report of the study visit can be found at Appendix 4.

Inquiry into back-end home detention

- 1.13** In June 2004, two months after the Committee received the terms of reference for the Inquiry into community based sentencing, terms of reference were received from the House for an inquiry into 'back-end' home detention.⁴ The terms of reference are set out in Appendix 5.
- 1.14** The Committee commenced its Inquiry into back-end home detention in late June 2004. The Committee received 21 submissions and held two public hearings in Sydney on 17 and 18 March 2005, during which 14 witnesses provided evidence. The names of submission makers and witnesses are set out in Appendix 5.
- 1.15** While conducting the two inquiries concurrently, it became clear that both terms of reference raised similar issues. The Committee formed the view that it would be more effective if its recommendations in relation to back-end home detention were reported as part of its broader review of community based sentencing. The Committee therefore tabled a report into back-end home detention in June 2005, which provided an explanation of the Committee's decision and the transcripts from the two public hearings. A copy of this report may be found on the Committee's website. Back-end home detention is examined in Chapter 8 of this report.

Report structure

- 1.16 Chapter 2 Community based sentencing options.** This Chapter provides an overview of community based sentencing and the specific types of sentences examined during this Inquiry. The advantages and disadvantages of community based sentences are also reviewed. By way of background information, relevant sentencing principles, the legislative and administrative framework supporting community based sentences and relevant recent inquiries and reviews are also examined.
- 1.17 Chapter 3 Availability of community based sentencing options in rural and remote areas and for disadvantaged populations.** This Chapter undertakes an overall analysis of the availability of community based sentences in rural and remote areas in NSW and issues of access relating to disadvantaged offenders.
- 1.18 Chapter 4 Community Service Orders.** This Chapter identifies the barriers to the availability of Community Service Order placements in rural and remote areas and considers ways to overcome those barriers. Other issues including the type of work undertaken on a placement and participants' access to treatment and other programs while undertaking a Community Service Order are also considered.

⁴ Legislative Council, New South Wales, *Minutes of Proceedings, No 58*, 2 June 2004, item 3, pp825-826 (the motion was moved by the Hon Greg Pearce MLC).

- 1.19 Chapter 5 Bonds.** This Chapter examines bonds and suspended sentences and the particular issues affecting disadvantaged groups and people in rural and remote areas relating to these sentencing options.
- 1.20 Chapters 6 Periodic Detention.** This Chapter examines the availability of periodic detention, and the barriers to accessing periodic detention, in rural and remote NSW. Specific barriers affecting disadvantaged offenders are considered.
- 1.21 Chapter 7 Home detention.** This Chapter examines home detention and its lack of availability in many parts of rural and remote NSW. Issues of access for disadvantaged groups are also examined.
- 1.22 Chapter 8 Back-end home detention.** This Chapter examines whether it is in the public interest to introduce a back-end home detention scheme in NSW.
- 1.23 Chapter 9 Related issues.** This Chapter examines several additional issues raised by Inquiry participants that relate to the terms of reference. Circle Sentencing, the Magistrates Early Referral Into Treatment program and the Drug Court of New South Wales are examined, as well as an issue concerning fines and mandatory disqualification of driver's licences that is a particular concern in rural and remote areas.

Chapter 2 Community based sentencing options

This chapter provides an overview of community based sentencing and the specific types of sentences examined during this Inquiry. The advantages and disadvantages of community based sentences are also reviewed. By way of background information, relevant sentencing principles, the legislative and administrative framework supporting community based sentences and relevant recent inquiries are also examined.

Sentencing

Rationales for punishment

2.1 The NSW Law Reform Commission, in its 1996 report on sentencing, summarised the rationale for punishment as follows:

- Retribution – the notion that the guilty ought to be accountable for their actions and suffer the punishment, which they deserve.
- Deterrence: specific – which aims to dissuade the offender from committing further crime.
- Deterrence: general – which aims to dissuade others from committing the crime in question by making them aware of the punishment inflicted upon the offender.
- Denunciation – which involves the court making a public statement that behaviour constituting the offence is not to be tolerated by society either in general or in the specific instance.
- Rehabilitation – which relies on the philosophy that the offender's behaviour can be changed by using the opportunity of punishment to address the particular social, psychological, psychiatric or other factors which have influenced the offender to commit the crime.
- Incapacitation – which involves preventing a person from committing further offences during the period of incarceration, with community protection as the justification.⁵

2.2 These rationales are derived from common law and are also reflected in s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which sets out the 'purposes for which a court may impose a sentence on an offender'. The Law Reform Commission believes that not only are these rationales impossible to rank in a hierarchy but they might at times even represent conflicting philosophical approaches.⁶ It has been said that 'the only golden rule is that there is no golden rule' and that the existence of multiple objectives in sentencing permits individual

⁵ NSW Law Reform Commission, Report 79, *Sentencing*, 1996, pp331-332

⁶ NSW Law Reform Commission, Report 79, pp332-333

judges to reflect different penal philosophies, which express the wide range of differing views in the community.⁷

- 2.3 The growth in the range of community based sentencing options available to courts in recent years reflects the growing emphasis that sentencing should seek to rehabilitate rather than just punish an offender. The President of the Probation and Parole Officer's Association referred to the multiple purposes of sentencing and noted that '[I]mprisonment rarely satisfies all these purposes but community based sentences can.'⁸

Imprisonment as a sentence of last resort

- 2.4 When sentencing an offender a court usually has a range of options available to it and must bear in mind a number of sentencing principles when determining which sentence to impose. As community based sentences are sentences that are not primarily based in a prison setting, one of the most important sentencing principles in this context is a fundamental common law principle applicable in NSW that imprisonment should be a sanction of last resort.⁹ This common law principle is also enshrined in the key statute concerning community based sentences in NSW, the *Crimes (Sentencing Procedure Act) 1999* (NSW):

... a court must not sentence an offender to imprisonment unless it is satisfied, having considered *all possible alternatives*, that no penalty other than imprisonment is appropriate [emphasis added].¹⁰

- 2.5 The Committee expresses its general support for the principle that imprisonment should be considered as a last resort. Given that the terms of reference relate specifically to disadvantaged groups, the Committee is particularly mindful of the importance of this principle to disadvantaged groups and offenders in rural and remote areas, where the full range of community based sentences are not available. The Committee notes that judges may have some difficulty complying with this sentencing principle when there is a lack of availability of some forms of sentencing in various parts of NSW or for various disadvantaged offenders.

Sentencing process

- 2.6 By way of background information to the examination of community based sentences in this report, the sentencing process can be broadly summarised as follows:

- The offender is found guilty and a conviction is (generally) recorded.¹¹

⁷ NSW Legislative Council Select Committee on the Increase in Prisoner Population, *Final Report*, November 2001, p5 with reference to the NSW Criminal Court of Appeal in *R v Jurisic* (1998) 45 NSWLR 209 at 221 per Spigelman CJ.

⁸ Mr Peter Harvey, President, Probation and Parole Officers' Association of NSW, Evidence, 30 August 2005, p21

⁹ NSW Law Reform Commission, Report 96, *Sentencing: Aboriginal Offenders*, October 2000, p136

¹⁰ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 5

¹¹ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 10 allows a court to find a person guilty of an offence, without proceeding to conviction. The court can make an order dismissing the charge,

- The court then considers the penalty. Penalties range from a fine, good behaviour bond, community service order, suspended sentence, periodic detention, home detention to full-time custody.
- If the court wants further information a request may be made to the Probation and Parole Service for a pre-sentence report:
 - A pre-sentence report tells the court about the offender and assesses his or her suitability for different types of penalties.
 - For community service orders, supervised bonds and periodic detention, assessments are made and provided to the court *prior* to the sentence being determined. For home detention, the assessment is made *after* the sentence (of imprisonment) has been determined.
 - Some courts have a duty officer from the Probation and Parole Service and the pre-sentence report can be prepared the same day. When there is no duty officer or if a comprehensive report is needed, the case will be adjourned for several weeks so the report can be prepared. Pre-sentence reports are discussed in Chapter 3.
- The court sentences the offender:
 - When determining the appropriate sentence the court is required to take into account a range of aggravating and mitigating factors. This gives the court the ability to determine the appropriate sentence having regard to all the facts of the offence and the offender.¹² The pre-sentence report is also considered where requested.
- After the sentence is handed down:
 - The offender is transferred to a correctional facility¹³ or
 - The Community Offender Services division of the Department of Corrective Services works with offenders on supervised bonds, including suspended sentences, community service orders and home detention.

NSW prison population

2.7 The *2005 NSW Inmate Census* provides the following statistics in relation to the NSW Prison population:

- 9,803 inmates (including periodic detainees) were held in full-time custody
- 666 (6.8%) were women
- 1,680 (17.1%) were Aboriginal
- Of the total Aboriginal inmate population, 1,507 (89.7%) were male and 173 (10.3%) were female.¹⁴

make an order discharging the person on condition they enter into a good behaviour bond or make an order discharging the person on condition they participate in an intervention program.

¹² *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A

¹³ Periodic detainees are required to report to a correctional centre. Periodic detention is discussed in Chapter 6.

- 2.8** In addition, the Department's Annual Report 2004-2005 states that at 30 June 2005, male Aboriginal inmates made up 18.7% (1,555) of the male inmate population in full-time custody and female Aboriginal inmates made up 29.6% (177) of the total female inmate population in full-time custody.¹⁵
- 2.9** The Committee notes that, according to ABS 2001 statistics, while Aboriginal people only form approximately 2.05% of the total population of NSW they constitute 17.1% of the prison population.¹⁶ More recent statistics show that nationally, the total imprisonment rate (prisoners per 100,000 adults) was 155. The rate for Indigenous offenders was 1957 and the rate for non-Indigenous prisoners was 118.¹⁷
- 2.10** The NSW prison population has been growing at an average of 400 inmates a year for the last seven years, and is expected to reach 10,000 inmates by 2010.¹⁸ The Committee notes that the growth in the NSW prison population is part of a national trend, as reported by the Australian Bureau of Statistics:
- Between 2004 and 2005, there was an increase in the number of prisoners in all states and territories except South Australia and the Australian Capital Territory. Tasmania had the highest proportionate increase (23%) followed by Northern Territory (14%) and Western Australia (10%). South Australia and the Australian Capital Territory both declined by 1%.¹⁹
- 2.11** Further, the *rate* of imprisonment is also increasing in most Australian jurisdictions:
- ... the Australian imprisonment rate was 163 prisoners per 100,000 adult population, representing an increase of 3% on the rate of 157 prisoners per 100,000 adult population in 2004. Most states and territories recorded an increase in imprisonment rates between 2004 and 2005.²⁰
- 2.12** The Department of Corrective Services currently operates 33 correctional facilities, with the continuing growth in the prison population driving a large capital works program. In 2004-2005 the Department opened the Mid-North Coast Correctional Centre (500 beds) at Kempsey and the Dillwynia Correctional Centre (200 beds), a women's facility at Berkshire Park. Four further facilities are under construction or in planning phases.²¹

¹⁴ NSW Department of Corrective Service *NSW Inmate Census 2005, Summary of Characteristics*, Statistical Publication, March 2006, pp3-4

¹⁵ NSW Department of Corrective Services, *Annual Report 2004/2005*, p21

¹⁶ Australian Bureau of Statistics, *Population Distribution, Indigenous Australians, 2001*, Publication 4705.0, released 26 February 2002.

¹⁷ Steering Committee for the review of government service provision, Fact Sheet 5, 31 January 2006

¹⁸ Department of Corrective Services, *Annual Report 2004/2005*, p9

¹⁹ Australian Bureau of Statistics, *4517.0: Prisoners in Australia 2005*: www.abs.gov.au (accessed 24 January 2006)

²⁰ ABS, *4517.0: Prisoners in Australia 2005*

²¹ NSW Department of Corrective Services, *Annual Report Highlights 2004/2005*, p2

What is community based sentencing?

2.13 Community based sentences are sentences that are not primarily based in a prison setting but rather are carried out wholly, or to a large extent, in the community. There is a wide range and variation of community based sentences available in jurisdictions in Australia and overseas.

2.14 Community based sentences are commonly divided into two main categories:

1. Custodial sentences that are alternatives to full time imprisonment, including periodic detention and home detention,²² and
2. Non-custodial sentences, such as good behaviour bonds and community service orders.

2.15 Some community based sentences also fall within the category of ‘Intensive Supervision Programs’, referring to the delivery method of intensive case management, monitoring, services and programs. Currently, the only two categories of orders under the Department of Corrective Services’ Intensive Supervision Program are home detention orders and Drug Court orders.²³

2.16 The objectives of community based sentencing options derive from the same general philosophy, summed up in 1994 by the NSW Court of Appeal in *R v Morris* in the following terms:

Throughout the century, Parliaments in the State and in other jurisdictions have progressively increased the range of options available to a court called upon to sentence a person for breach of the criminal law. Where formerly the only punishment available for most crimes was the imposition of a term of imprisonment, however, described, there is now available a range of sentencing options which (while retaining a punitive effect if properly administered) recognise more clearly and more explicitly the community’s interest in the rehabilitation of the offender.²⁴

2.17 Mr Brian Sandland, the Director of Criminal Law with the NSW Legal Aid Commission, discussed the competing aims of the criminal justice system at play in the context of community based sentencing:

It has got to be a bit of both, has it not, in that firstly judges who impose sentences are guided by sentencing principles, some of which relate to deterrence, some of which relate to pure punishment, some of which relate to rehabilitation, and there is a blend of those principles in the sentences that judges impose. The Department of Corrective Services, in dealing with the people moving through its system, have in mind that you do not just lock people up and then expect them, at the end of their sentence, to walk straight back out into the community and adjust. So they have evolved a principle of through care to provide a soft landing for people upon their release. Of course, the Government has to deal with the fact that full-time

²² Periodic detention and home detention are described in the *Crimes (Sentencing Procedure) Act 1999* (NSW), Part 2, Division 2, as ‘alternatives to full time detention’, as distinct from Division 3, which deals with 2 ‘non-custodial alternatives’.

²³ Submission 30, NSW Department of Corrective Services, p4

²⁴ *R v Morris* (unreported, 14 July 1995 NSWCCA) at p4; I Potas et al, *Periodic Detention Revisited*, Monograph Series No 18 1998, Judicial Commission of NSW, 1998, p9

incarceration of offenders is the most costly option. If you can construct alternatives that provide benefits as a whole to the community by reducing recidivism rates, by providing a more humane form of punishments that are less costly than full-time imprisonment, then I guess you are trying to find the balance between all those competing aims of our criminal justice system.²⁵

- 2.18** The NSW Law Reform Commission has noted the importance of community based sentencing in the development of sentencing in the last few decades:

Community-based alternatives to imprisonment, which have become widespread in many countries in recent years, represent one of the most important developments in sentencing in the last few decades. Their development reflects the prison system's failure to rehabilitate offenders, the costs associated with building and maintaining prisons and changing community attitudes to sanctions.²⁶

Community based sentencing options in NSW

- 2.19** The various community based sentencing options that are available in NSW are outlined in this section and are examined in detail in separate chapters of this report. The Committee notes that there was some difference of opinion among inquiry participants as to which sentences could properly be called 'community based' sentences. The Committee has identified the following sentences as community based sentences for the purposes of this Inquiry. During its Inquiry the Committee has focused on adult sentencing options. Sentencing of juvenile offenders has not been examined.

Bonds and suspended sentences

- 2.20** A good behaviour bond, also known simply as a 'bond', is an order of the court requiring that the offender not commit any further offences for a specified period. Depending on the circumstances, an offender can be sentenced to a good behaviour bond for a certain period or a sentence of imprisonment can be suspended for a period of time and the offender placed on a bond of good behaviour. Bonds and suspended sentences are examined in Chapter 4.

Community Service Orders

- 2.21** Offenders sentenced to a community service order are required to perform supervised unpaid work for non-profit or community organisations. Community Service Orders are examined in Chapter 5.

Periodic detention

- 2.22** A court that has sentenced an offender to imprisonment for three years or less may make an order directing that the sentence be served by way of periodic detention. Periodic detention is

²⁵ Mr Brian Sandland, Director, Criminal Law Division, Legal Aid Commission of NSW, Evidence, (Inquiry into BEHD), 17 March 2005, p41

²⁶ NSW Law Reform Commission, Discussion Paper 33, *Sentencing*, 1996, para 9.1

therefore a custodial sentence that requires an offender to remain in custody for two days a week for the duration of the sentence. Periodic detention is examined in Chapter 6.

Home detention

- 2.23** Home detention is a custodial sentence that permits an offender to serve part or all of a term of imprisonment in the offender's home, under strict supervision and subject to certain conditions. A sentence of imprisonment must be passed before an order for home detention can be made. Home detention may operate as a 'front-end' or a 'back-end' scheme. In NSW home detention is currently only a front-end scheme whereby offenders serve the full term of their sentence in their own home. Front-end home detention is examined in Chapter 7. Back-end home detention refers to an offender serving a portion at the end of the sentence in his or her home, after having served the first portion of the sentence in custody.²⁷ Back-end home detention is examined in Chapter 8.

Other relevant court orders

- 2.24** Submissions and evidence taken at hearings also referred to other court orders for their interrelatedness with the community based sentences that are the main focus of this Inquiry. Those orders are outlined below.

Fines

- 2.25** A court-imposed fine is a penalty whereby offenders must pay money to the State as a consequence of their offence.²⁸ A fine may be issued separately or in addition to another penalty. If an offender is unable to pay, a fine default will lead to a fine enforcement order issued by the court and debt collection by the NSW Office of State Revenue. The escalation of penalties from fines to imprisonment and how it impacts on offenders in rural and remote areas is examined in Chapter 9.

Diversion programs

- 2.26** Diversion programs are designed to divert offenders from prison and generally focus on an offender's drug or alcohol problems. These programs are administered by the Attorney General's Department and include the Drug Court, the Magistrates Early Referral into Treatment (MERIT) Program and other specialist programs. The Drug Court and MERIT featured in the comments of many inquiry participants and are examined in Chapter 9.

Circle Sentencing

- 2.27** Circle Sentencing is an alternate sentencing court in a community setting for adult Aboriginal offenders that directly involves local Aboriginal people in the sentencing process. The circle

²⁷ NSW Law Reform Commission, Report 79, p162

²⁸ *Fines Act 1996* (NSW), s 4

includes the Magistrate, the defendant and his or her support people or family members, the victim or a victim's representative, Aboriginal elders from the community and other relevant parties. These members sit in a circle and discuss the offence, offender, background and effect of the offence to develop a sentence that is appropriate for the offender. A key aim of circle sentencing is to make sentencing a more meaningful experience for the offender and to improve the Aboriginal community's confidence in the criminal justice system. Circle Sentencing is examined in Chapter 9.

Use of community based sentencing in NSW

2.28 Statistics in the Department of Corrective Services' Annual Report for 2004-2005 indicate that the number of people serving community based sentences in NSW has remained fairly steady over the past five years, as illustrated by the following table. The Committee notes that over the same period the prison population has been growing at an average of 400 inmates a year (see paragraph 2.10).

Table 2.1 People serving community based sentences in NSW²⁹

	2000-2001	2001-2002	2002-2003	2003-2004	2004-2005
Male	14,807	14,799	14,565	14,262	14,974
Female	2,709	2,621	2,578	2,489	2,638
Unknown	103	66	133	89	64
Total	17,619	17,486	17,276	16,840	17,676

2.29 The Committee notes that the number of people serving community based sentences is approximately double the number of offenders in full-time custody, which, as stated in paragraph 2.7, is currently 9,803.³⁰ This situation accords with national figures, although the Australian Institute of Criminology reports a general decline in the use of 'community corrections' nationally in recent years:

The rate of community corrections in Australia is more than twice as high as the rate of imprisonment, and has been declining in recent years. In the five years to 30 June 2004, the Australia-wide rate of community custody has undergone a steady decrease, from 402.2 per 100,000 adults in 1999-2000, to 331.6 per 100,000 in 2003-2004. Conversely, the rate of imprisonment has increased slightly, from 143.4 to 150.2 prisoners per 100,000 adults over the same period.³¹

²⁹ NSW Department of Corrective Services, *Annual Report 2004/2005*, p35. These statistics include offenders on parole as well as those on probation (supervised bonds and Drug Court orders), community services orders and home detention.

³⁰ Note that this total inmate population includes periodic detainees.

³¹ Australian Institute of Criminology, Crime Facts Info, *No 100: Community Corrections in Australia*, 21 June 2005. 'Community corrections' is defined as comprising non-custodial programs providing either non-custodial sentencing alternatives or post-custodial mechanism for reintegrating prisoners into the community under continued supervision and includes home detention, fines, CSOs,

- 2.30** In terms of the types of community based sentence served, in 2004-2005, 10,568 offenders were on probation, 3,985 were on parole, 4,631 were on community service orders and 192 were on home detention.³²

Eligibility for community based sentencing options³³

- 2.31** The terms of reference require the Committee to examine the criteria for eligibility for community based sentencing options. ‘Eligibility’ refers to the broad range of requirements, mostly legislative, that must be met before a particular sentencing order can be made. These requirements can be ‘objective’ in nature or they can be ‘subjective’.

- 2.32** Objective eligibility requirements relate to the offence for which the person is being sentenced as well as past convictions in some situations. For example, home detention cannot be ordered in relation to certain offences (see paragraph 7.12). Ms Catriona McComish, the Senior Assistant Commissioner of Community Offender Services with the Department of Corrective Services noted that the legislative based eligibility criteria therefore limits the range of offenders eligible:

When you look at the availability of home detention and periodic detention you would have to say that the legislatively based criteria obviously limits the range of offenders who are eligible for these orders. Community-based orders are the only community-based orders where legislation prescribes certain offenders from participating.³⁴

- 2.33** Subjective criteria relate to an individual offender’s personal circumstances and his or her ‘suitability’ to serve a community based sentence. For example, when determining whether an offender is suitable for home detention, subjective factors such as whether the offender has a job and the impact of home detention on the offender’s family are considered (see paragraph 7.22).
- 2.34** Some community based sentences have objective *and* subjective criteria while others, such as bonds and community service orders, have only subjective criteria. The specific eligibility criteria for the various forms of community based sentencing under review are examined in the relevant chapters.
- 2.35** The Committee notes that, apart from the specific legislative provisions concerning eligibility for the various community based sentencing options, the court must also take into account

supervised bonds, parole and bail: Australian Institute of Criminology, Australian Crime, Facts and Figures 2004, pp97-98

³² NSW Department of Corrective Services, *Annual Report Highlights 2004/2005*, p2. Periodic detention is not included in these statistics as it is administered by the Department’s Custodial Services division.

³³ The Committee acknowledges the assistance of Dr Gareth Griffith of the NSW Parliamentary Library Research Service in the preparation of information regarding the criteria for eligibility for community based sentencing options in this section and the relevant parts of the chapters dealing with specific community based sentences.

³⁴ Ms Catriona McComish, Senior Assistant Commissioner, Community Offender Services, NSW Department of Corrective Services, Evidence, 30 August 2005, p3

mitigating and aggravating factors when sentencing. This was highlighted by Judge Derek Price, the Chief Magistrate of NSW, in his evidence to the Committee:

... section 21A of the *Crimes (Sentencing Procedure) Act* sets out what Parliament prescribes as the factors that a court must take into account in sentencing an offender. Section 21A refers to the aggravating, mitigating factors and other factors in sentencing. The court assesses the aggravating and mitigating factors and it then considers what is the appropriate sentence. One must remember that the most important factor in sentencing is the objective seriousness of the offence. It may well be that the objective seriousness of the offence is such that it is inappropriate to sentence a defendant to a community based sentencing option, for example, where somebody is a significant drug trafficker or supplier of drugs. It is usually considered inappropriate to sentence a major supplier of drugs to a community based sentencing option because of the objective seriousness of the offence and the need for general deterrence—that is a factor in sentencing—the need for specific deterrence, and also the major overriding factor remains protection of the community.³⁵

2.36 The Attorney General's Department advised that there are no specific *policies* used by the courts in interpreting an offender's suitability for community based sentencing:

The factors taken into consideration by a court when determining an offender's suitability for these options are contained primarily in the *Crimes (Sentencing Procedure) Act 1999*. There are no specific policies or guidelines used by the courts in interpreting these provisions, with the presiding judicial officer retaining the discretion to determine the appropriate sentence in each case having regard to the relevant legislative provisions, previous case law, and the unique set of circumstances of the particular matter before them. The courts have long observed the importance of judicial discretion in this area.³⁶

2.37 The Committee notes that one of the major concerns or perceived disadvantages of community based sentencing is the potential threat it poses to the community in allowing offenders to remain in the community (discussed further at paragraph **2.95**). As noted above, convictions for certain offences and an offender's antecedents may exclude an offender from some types of community based sentencing. Judge Price advised the Committee that, other than in those certain situations, an offender's prior imprisonment does not result in an automatic exclusion from consideration for a community based sentence - each individual case is considered on its relative merits:

If somebody has committed previous offences that goes to the question of the prospects of rehabilitation, the question of specific deterrence and the need to protect society. It comes into various different factors. It is one of the many factors that are taken into account, but it does not necessarily mean that that person, with the exception to which I referred earlier [periodic detention], will not receive a community based sentence. Only a week ago I had somebody who had only been released about 15 months ago from a full-time term of imprisonment of six months. He was back before me for social security fraud and the pre-sentence report was extremely positive about what effect that term of imprisonment had had on him. It was very positive

³⁵ Judge Derek Price, Chief Magistrate of NSW, Evidence, 6 June 2005, p34

³⁶ Correspondence from Hon Bob Debus MP, Attorney General, to A/Committee Director, 1 June 2005

about the prospects of rehabilitation. That offender received a community service order. So it does not disentitle. Every case depends on its own set of circumstances.³⁷

- 2.38** Mr Brendan Thomas, the Director of the Crime Prevention Division of the Attorney General's Department, argued that community based sentences can in fact be the most appropriate sentence for convictions for violent offences:

Sometimes I think from the front end we look at a violent offender and say, "Well, we should keep this person out of any type of community-based sentencing", but some of these broader, more flexible community approaches can sometimes—not always—get to the heart of people's behaviour and put in place mechanisms that can redress, or at least limit, it in some way.³⁸

- 2.39** Mr Thomas argued that a conviction for a violent offence should not automatically exclude an offender from a community based sentence:

I think by not ruling out violent offences; where we have criteria for community-based options or community programs, not making a specific and blanket exemption for violent offences. People often want to say if you put in place a community-based sentencing option not to make it available for violent offences. I think it would be very valuable in the process as a whole if the Committee could recognise that community-based sentencing options are as valuable for violent offences as for other types of offences. I think if we can get to the bottom of violent offences and redress people's violent behaviour there is a significant benefit to the community. Those programs are dealing with people like that young guy in Nowra and providing effective responses to him. That was two years ago. There is a whole heap of people who are not victims of violent offences and who otherwise might have been if he had not got that type of intervention.³⁹

- 2.40** Several submissions made the general comment that the eligibility criteria for community based sentences ought to be reviewed. For example, Legal Aid NSW suggested that the conditions of eligibility for various community based sentencing options need to be reviewed, arguing that some conditions, particularly in respect of options that have been available for several years, may no longer be relevant or useful.⁴⁰

- 2.41** Other Inquiry participants raised specific issues regarding the eligibility criteria for specific community based sentences in the context of accessibility in rural and remote areas and practical difficulties faced by offenders from disadvantaged groups. The Committee has addressed these issues in the separate chapters of the report dealing with each of the sentences under review.

³⁷ Judge Price, Evidence, 6 June 2005, p35

³⁸ Mr Brendan Thomas, Director, Crime Prevention Division, Attorney General's Department, Evidence, 6 June 2005, p55

³⁹ Mr Thomas, Evidence, 6 June 2005, p55

⁴⁰ Submission 31, Legal Aid NSW, p6

Relationship between community based sentencing options

2.42 In a sense all sentencing options are interrelated. In this regard the Committee refers to the comments of Mr Sandland, with NSW Legal Aid, who referred to the ‘ascending scale in court sentencing options, with the ultimate penalty being one of imprisonment.’⁴¹

2.43 In terms of the escalating degree of ‘seriousness’ or ‘harshness’ of sentencing options, Inquiry participants generally ranked the penalties as follows:

- Fines
- Section 9, 10 and 11 bonds
- Community service orders
- Section 12 bond - suspended sentences
- Periodic detention
- Home detention
- Full-time imprisonment

2.44 The Committee is mindful, however, of the comments of the Law Reform Commission that establishing a legislative hierarchy would be problematic:

The Commission’s tentative view is that we should not attempt to establish a legislative hierarchy of non-custodial sentences, such as exists in Victoria, to determine the cases in which particular non-custodial sentences constitute appropriate punishments. The Commission is of the view that sanction hierarchies constitute unacceptable fetters on judicial discretion in sentencing. In addition, the ranking of non-custodial sentences in terms of their seriousness is extraordinarily difficult. Unlike custodial sentences (where length of sentence is the touchstone of seriousness), there are no obvious or agreed criteria of sentence severity. While it is possible to develop a ranking of seriousness within the boundaries of each non-custodial sanction, it is impossible to determine equivalence between financial and non-financial non-custodial sentences. For example, is a substantial fine more punitive than community service? What if the offender is rich?⁴²

2.45 The Law Reform Commission did note, in a later report that the legislation ‘implicitly’ ranks home detention above periodic detention:

The legislation provides that home detention is only available after the sentencing court has imposed a term of imprisonment of 18 months or less. By providing that offenders are not to be diverted to home detention who would otherwise be sentenced to other non-custodial sanction or to periodic detention, the Act implicitly ranks home detention above periodic detention in terms of severity of punishment.⁴³

⁴¹ Mr Sandland, Evidence, 6 June 2005, p40

⁴² NSW Law Reform Commission, Discussion Paper 33, para 9.10

⁴³ NSW Law Reform Commission, Report 79, p146

- 2.46** The Committee notes that there are also links between the various sentencing options. For example, there is a link between periodic detention and home detention in that if an order for periodic detention is revoked the Parole Authority has the option to order that the remainder of the sentence be served by way of home detention.⁴⁴ This may only occur if the offender meets the legislative eligibility and suitability criteria and the periodic detention order has 18 months or less to run.
- 2.47** In addition, suspended sentences, home detention and periodic detention are linked because, if a suspended sentence is revoked upon a breach, the court can order that the sentence of imprisonment to which the bond relates be served by way of periodic detention or home detention. The impact of this provision in rural and remote areas is examined in Chapter 9.
- 2.48** The Committee heard a great deal of evidence concerning a set of circumstances that particularly affect Aboriginal people in rural and remote areas, where a fine can escalate into more serious penalties. This issue is examined in Chapter 3.

Legislative, judicial and administrative framework

Crimes (Sentencing Procedure) Act 1999 (NSW)

- 2.49** For adult offenders, the key statute relevant to community based sentences is the *Crimes (Sentencing Procedure) Act 1999 (NSW)*. The Act consolidated a number of separate Acts relating to sentencing offenders to set out the rules that are to be applied when a court sentences an offender. The Act outlines the range of penalties that can be imposed by the court, including full-time imprisonment, alternatives to full-time imprisonment (home and periodic detention), non-custodial alternatives (community service orders, good behaviour bonds and suspended sentences) and fines. The Act also reintroduced suspended sentences as a sentencing option and for the first time required courts imposing sentences of imprisonment of six months or less to give reasons for doing so.

Crimes (Administration of Sentencing) Act 1999 (NSW)

- 2.50** The *Crimes (Administration of Sentencing) Act 1999 (NSW)* consolidated a number of existing Acts relating to the administration of sentences to govern the administration of sentences in NSW. It does not govern the length or nature of sentences imposed by the courts. The Act covers the administration of a range of sentences including full-time imprisonment, periodic detention and community service orders. It also deals with issues relating to parole, the management of serious offenders, and the administration of correctional complexes, centres and periodic detention centres.

Regulations

- 2.51** The *Crimes (Sentencing Procedure) Regulation 2005* is made under the *Crimes (Sentencing Procedure) Act 1999 (NSW)* and contains a small number of provisions relating to general sentencing procedures as well as procedures relating to periodic detention, home detention and community service orders.

⁴⁴ *Crimes (Administration of Sentences) Act 1999 (NSW)*, s 165

- 2.52** The Crimes (Administration of Sentences) Regulation 2001 is made under the *Crimes (Administration of Sentencing) Act 1999* (NSW) and is an extensive regulation setting out administrative procedures relating to full-time imprisonment, periodic detention and home detention, including admission procedures, the case management and classification system, correctional centre routines, visits, discipline etc.

NSW Local Court

- 2.53** The majority of community based sentences are handed down by NSW Local Courts. For example, NSW Bureau of Crime Statistics and Research statistics show that in 2004 the Local Court made 288 home detention orders for principal offences compared to 27 orders made by the higher courts.⁴⁵ The Local Court is where all criminal and many civil cases enter the court system and 98% of all criminal and civil cases in NSW are heard to finality in the Local Court.⁴⁶ A magistrate presides over cases heard in the Local Court. The Local Court sits in 158 locations throughout NSW.⁴⁷ Local Courts in remote areas such as Brewarrina sit two days per fortnight.⁴⁸

Department of Corrective Services

- 2.54** The Committee was advised that approximately two thirds of offenders managed by the Department are managed in the community on various kinds of community based supervision orders.⁴⁹ Community based sentences are managed by the **Community Offender Services** division of the Department.⁵⁰
- 2.55** The **Probation and Parole Service** (PPS) is part of Community Offender Services and undertakes the 'majority of work' in the division.⁵¹ The PPS prepares court advice and supervises offenders subject to probation, parole, community service orders and home detention. The PPS also undertakes assessments for suitability for home detention and periodic detention and prepares Community Service Order Work or Program Assessments. The Committee notes that, as well as its work in relation to the community based sentences examined in this report, a substantial part of the work of the PPS is in relation to parole, which is not part of the Committee's Inquiry.
- 2.56** Ms Valda Ruis, A/Senior Assistant Commissioner, Community Offender Services, advised the Committee that the Department is increasingly developing working relationships with

⁴⁵ NSW Bureau of Crime Statistics and Research, *NSW Local Court: Penalty for Principal Offence 2004*, Attorney General's Department, and NSW Bureau of Crime Statistics and Research, *NSW Higher Court: Penalty for Principal Offence 2004*, Attorney General's Department

⁴⁶ www.lawlink.nsw.gov.au/lawlink/local_courts/ll_localcourts.nsf/pages/lc_aboutus (accessed 23 January 2006)

⁴⁷ Submission 7, NSW Local Courts, p3

⁴⁸ Mr Bill Palmer, public forum, Brewarrina, 16 June 2005, p1

⁴⁹ Ms McComish, Evidence, 30 August 2005, p2

⁵⁰ Department of Corrective Services, *Annual Report 2003/2004*, p36

⁵¹ Ms Valda Ruis, A/Senior Assistant Commissioner, Community Offender Services, NSW Department of Corrective Services, Evidence, 6 June 2005, p2

other agencies, both government and non-government, to manage offenders in the community.⁵²

State Parole Authority

- 2.57** The primary function of the State Parole Authority, formerly the Parole Board, is to decide which prisoners are to be released on parole.⁵³ The Parole Authority also sets the conditions of release of prisoners onto parole and determines if and how a parole order should be revoked. The Parole Authority also has functions in relation to community based sentencing as it determines if and how a periodic detention order or home detention order should be revoked, substituted or reinstated.⁵⁴

NSW Sentencing Council

- 2.58** The NSW Sentencing Council is an independent public body established in February 2003 under the *Crimes (Sentencing Procedure) Act 1999* (NSW). The Council consists of ten members, one of whom must be a retired judicial officer. Other members have expertise in law enforcement, criminal law and Aboriginal justice issues. The Council also includes four representatives of the general community. The Council is empowered to advise the Attorney General on a range of issues regarding sentencing, including offences suitable for standard non-parole periods and their proposed length.⁵⁵ The Council is also required to monitor sentencing trends and practices and can be asked to prepare research reports in connection with sentencing. The Council's 2004 report titled *Abolishing Prison Sentences of 6 months or less* is cited throughout this report (see paragraph 2.109).

Advantages and disadvantages of community based sentences

Submissions and oral evidence received by the Committee largely supported the concept of community based sentencing and several advantages were identified. However, some disadvantages or challenges were also identified. An overview of these advantages and disadvantages is provided below. Advantages and disadvantages associated with specific sentencing options are discussed in more detail in the relevant chapters.

Advantages

- 2.59** The main advantages of community based sentencing identified by inquiry participants relate to the many benefits to the offender and the offender's family derived from the offender serving a sentence in the community rather than in a full-time custodial setting. Other benefits

⁵² Ms Ruis, Evidence, 6 June 2005, p3

⁵³ The Parole Authority is constituted by Part 8 of the *Crimes (Administration of Sentences) Act 1999* (NSW). The Parole Board was reconstituted as the NSW State Parole Authority by the *Crimes (Administration of Sentences) Amendment (Parole) Act 2004 No 94* (NSW) which commenced on 10 October 2005.

⁵⁴ NSW Parole Board, *Annual Report 2004*, p2

⁵⁵ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 100J

were more global, relating to lowering the prison population, reducing recidivism and cost effectiveness. Many of the advantages are interrelated.

Reducing prison population

2.60 The role of community based sentencing in reducing the prison population in NSW was cited by several inquiry participants as one of its main advantages. The NSW prison population is discussed earlier in this chapter.

2.61 The Committee notes that only s 12 suspended sentences, periodic detention and home detention directly contribute to lowering the prison population, as they are only available as alternatives for offenders who have been sentenced to periods of full-time imprisonment. As suspended sentences are the most common of these three sentencing options the impact on the prison population is the most significant in relation to this sentencing option (although the effect of mandatory revocation detracts from this to some degree, as discussed in Chapter 5).

Cost effectiveness

2.62 Many inquiry participants noted that community based sentencing options were less expensive to operate than full-time custodial sentences. The Committee was advised that the cost of keeping an offender in full-time custody was approximately \$170 per day,⁵⁶ which compares to the following costs of community based sentences:

The cost per day, based on 2003-04 figures, is as follows:

Home detention: \$64.42

Community Service Orders: \$3.77

Supervisions (including bonds, suspended sentences and parole): \$5.05⁵⁷

2.63 In addition, community based sentences were identified as having a greater economic benefit for the families of offenders than full-time custody because offenders serving community based sentences may be able to maintain or look for employment. This has a flow on effect for the government as an offender's family may therefore not require additional social security support.

2.64 Caution was expressed however that consideration of the economic benefits of community based sentencing options should not outweigh other aspects of sentencing. In this regard the Bankstown City Council stated:

While the economics of community sentencing might be attractive to the government when compared with the incarceration of offenders in a prison setting, we would also ask that these economic benefits be carefully measured and not be seen to necessarily outweigh other key considerations like the appropriateness of the punishment for the

⁵⁶ Mr Gary Moore, Director, NSW Council of Social Services, Evidence, 1 September 2005, p44 and Submission 30, p12

⁵⁷ Answers to questions on notice taken during evidence 6 June 2005, Ms Valda Ruis, A/Senior Assistant Commissioner, Community Offender Services, NSW Department of Corrective Services, Question 3, p1

crime committed or the likelihood of re-offending either during the sentencing period or in the longer term.⁵⁸

Deterrent

- 2.65** Community based sentences, like custodial sentences, also act as a deterrent and in this regard fulfil one of the main principles of sentencing discussed in paragraph 2.1. While generally considered to be less harsh than a full-time custodial sentence, community based sentences can be quite onerous. While they may be perceived as a soft option (discussed at paragraphs 2.86-2.96) they would also contribute to deterring the offender from committing further crime and others from committing crime. The Committee was also advised that a particular strength of community based sentencing is that it has an element of ‘shaming’:

It is my belief that some people can leave the town they committed the crime in and hide their shame therefore I believe that community based options with adequate support from probation and parole and supervision for community service will act as a deterrent and also benefit the communities that the crime are being committed in.⁵⁹

Maintaining contact with families, communities and employment

- 2.66** The single most commonly identified benefit of community based sentencing for offenders is the opportunity to maintain family, social and employment networks which are seen as necessary for effective rehabilitation and reintegration. A community based sentence is also seen as having a far less disruptive impact on family life, particularly when children are involved.

Avoiding deleterious effects of prison

- 2.67** Another of the significant advantages of community based sentencing identified during the Inquiry was that it enables offenders to avoid the deleterious effects of prison. For example, the Public Defenders Office stated:

By keeping offenders out of custody, this reduces their exposure to more hardened elements of the criminal community (the so-called ‘university of crime’), while providing additional opportunities to fulfil deterrence, rehabilitation and retribution purposes of sentencing without full time custody.⁶⁰

- 2.68** The impact of gaol on offenders was the subject of much concern in the rural and remote forums held by the Committee, as evidenced by these quotes from the Brewarrina forum:

That [community service orders] is what it would be better for them to do. I had a bit of an experience with my young fella. Since he was in gaol he came out angrier. He has probably never seen the sun come up yet through sober eyes. He never drank that much until he went into the place and now he drinks a lot more. I do not know what it is. Is it the place that makes them that way or what is it?⁶¹

⁵⁸ Submission 4, Bankstown City Council, p1

⁵⁹ Submission 1, Name suppressed at request of author, p1

⁶⁰ Submission 10, NSW Public Defenders Office, p2

⁶¹ Mr Charlie McHughes, public forum, Brewarrina, 16 June 2005, p2

We know gaol is not the answer to our people's problems. Like Charlie says, some of them go in there and come out 10 times worse than when they went in. It is good that we can have these alternative things in place to try to help our people.⁶²

Yes, they come back a lot angrier. They go in with a little crime and when they come out, they then go back with a greater one, because they get no feed and they do not care. They get it in their head that they are going to gaol and when they go to the court, they are in not given any opportunities to try to get out of it so they say, "I don't give a stuff."⁶³

- 2.69** Sending an offender to gaol for 'minor' crimes was seen as particularly concerning given the experience of imprisonment. For example, one submission maker stated:

As an Indigenous Australia, a 51 year old male, I would like to offer support for community based sentencing options for minor offences. I believe it is not in the best interests of the individual or the community to send people to jail for minor crimes such as unpaid fines. Jails can have an adverse effect of turning petty criminals into hardened criminals due to the contact they have and the system itself.⁶⁴

- 2.70** It was also noted that offenders sentenced to short prison sentences of six months or less do not receive any education or training to address offending behaviour or health issues. In this regard UnitingCare stated:

Short-term imprisonment is particularly problematic. People sentenced to less than six months imprisonment are unable to access rehabilitation and training services, are generally not covered by the probation and parole Service's post-release supervision programs, and are exposed to criminals serving time for more serious offences.⁶⁵

- 2.71** With regard to the merits of prison sentences of six months or less, the Committee refers to the extensive work of the Sentencing Council (discussed further at paragraph 2.109).

Increased chance of rehabilitation and reduced recidivism

- 2.72** The Committee was advised that community based sentencing options increase the chance of an offender successfully rehabilitating, which in turn leads to reduced recidivism. The benefits identified above, including maintaining family, community and employment links and avoiding the effects of prison, all contribute to this end.

- 2.73** The ability for offenders to undertake programs designed to address offending behaviour in the community also contributes to rehabilitation. In this regard, the Department of Corrective Services expressed support for the delivery of behaviour modification programs in the community, stating that 'a significant amount of research shows that behaviour modification programs delivered in the community are more effective than being delivered in custody

⁶² Ms Jenny Barker, public forum, Brewarrina, 16 June 2005, p4

⁶³ Mr McHughes, public forum, Brewarrina, 16 June 2005, p10

⁶⁴ Submission 1, p1

⁶⁵ Submission 13, Uniting Care NSW.ACT, p5

because the environment is there to test how they are going.⁶⁶ This view is also supported by academic research.⁶⁷

Access to services and programs

2.74 The Committee was informed that community based sentences in general allow greater opportunity for offenders to access services and programs needed to address health concerns and their offending behaviour, for example, specialist services including mental health treatment services and programs such as the Sober Driver Program and drug and alcohol programs.

2.75 This benefit is particularly relevant compared to short prison sentences. The Committee was advised that offenders serving prison sentences of six months or less are not provided with any therapeutic services. For example, Mr Howard Brown, the Deputy President of the Victims of Crime Assistance League (VOCAL) stated:

That is one of the reasons why we have advocated for the abolition of prison sentences of less than six months, as we do not believe they have great probative value. You need to bear in mind that with regard to people who are sent to prison, as opposed to being the subject of community-based orders, if they are sent to prison for a period of less than six months they have no entitlement whatsoever to access to programs, such as drug dependency programs, alcohol dependency programs and literacy programs.⁶⁸

2.76 The Committee notes that the ability to access services and programs is one of the areas in which the effectiveness of community based sentences in rural and remote areas is diminished.

Benefits to offender's family

2.77 The Committee heard that community based sentencing in contrast to full-time detention can be beneficial to an offender's family in many ways including:

- The offender can stay with his or her family, which is particularly important when there are children involved.
- If the offender is employed the family is not deprived of the offender's income.
- Childcare responsibilities are not disrupted, which is particularly important for female offenders.
- The family does not have to visit the offender in prison, which can be far away.

Benefits to community

2.78 Benefits of community based sentencing to the community include the social and economic contribution of work performed under community service orders or during periodic

⁶⁶ Ms Ruis, Evidence, 6 June 2005, p4

⁶⁷ Andrews D, Zinger I, Hoge R et al 'Does Correctional Treatment Work? A psychologically informed meta analysis', *Criminology*, 1999, Vol 28, pp369-404

⁶⁸ Mr Howard Brown, Deputy President, Victims of Crime Assistance League, Evidence, 1 September 2005, p4

detention. In 2004-2005, offenders subject to community supervision performed \$12.3 million worth of unpaid community work, including bush regeneration and the clean up and maintenance of schools and other public buildings and facilities.⁶⁹

2.79 As well as making improvements to the local environment, community work also provides an opportunity for offenders to make reparation to the community (which can in turn have a positive impact on the offender). In this regard, Dr Eileen Baldry, a Senior Lecturer with the Faculty of Arts and Social Science at the University of NSW stated:

... there is a great benefit in community sentences that require reparation. Prison is the most removed from a person's offending and it is rare that a prisoner really connects the prison sentence with harm to a person or the consequences of that harm (if it was a crime with a victim) or if a crime against self mainly (eg stemming from drugs etc) prison does not help make the connection. If some form of reparation is required in the community a person more readily connects their offending with harm and with what "punishment" they are having to experience. Conferencing is one way of doing this (ie reintegrative shaming) but so are having to do work for the community and having to face daily in the community the results of their "offending".⁷⁰

2.80 Community based sentences also involve the community in the punishment and rehabilitation of offenders, something that has particular significance in smaller towns. In this regard, community based sentencing enables a community to 'look after its own problems'.⁷¹ The Committee heard evidence from Magistrate Heilpern about the impact of a community sentence in a rural community:

I think community service is a lot more powerful penalty in a country town. People are seen doing the work. It is not really about shaming necessarily, but people know what they are doing. I think it is a very valuable tool in the armoury.⁷²

2.81 Mr Ken Croskell, the General Manager of the Bourke Shire Council, noted that community based sentencing carries the message that the community is 'against their offending behaviour':

Another important point to consider is that there is a need to convince offenders that it is not the law per se that is sentencing them but it is the community which is against their offensive behaviour. Community-based sentencing may well help to get this message across. That is pretty important too.⁷³

2.82 The Committee was also advised that, unlike full-time custodial sentences, community based sentencing does not compound the social disadvantages experienced in some areas of the State. For example the Bankstown City Council stated in its submission that:

⁶⁹ Department of Corrective Services, *Annual Report 2004/2005*, p36

⁷⁰ Answers to questions on notice taken during evidence 6 June 2005, Dr Eileen Baldry, Senior lecturer, Faculty of Arts and Social Sciences, University of NSW, p1

⁷¹ Detective Inspector Denise Godden, Crime Manager, NSW Police, Evidence, 27 June 2005, p13

⁷² Magistrate David Heilpern, Bega Local Court, Evidence, 28 June 2005, p41

⁷³ Mr Ken Croskell, General Manager, Bourke Shire Council, Evidence, 15 June 2005, p9

In areas like Bankstown City, where there are higher than average levels of social disadvantage (often quite localised), the impact of sentencing can be particularly onerous for families and dependants of offenders. In this context, community sentencing options which minimise this impact are certainly favoured.⁷⁴

- 2.83** Mr Brown of VOCAL advised the Committee that, from the perspective of the victim, community based sentencing can have benefits too:

What do victims really want? The principal thing is that you cannot undo the crime that has been done. But as victims one of the things we like to see, and we hope we can achieve, is that the person will take responsibility for what they have done and hopefully will not re-offend. If we can run a system within small communities which publicises to members of the public that these systems do work, they will then see that the recidivism rates are in fact starting to fall, that the person is not re-offending, and then they will see the probative value of having such a system. Obviously, the smaller the community, the greater the publicity in relation to how successful these programs can be. To me, that is the essence of it.⁷⁵

- 2.84** The Committee notes that the wider community also benefits from the improved rehabilitation and reintegration prospects of offenders who undertake community based sentences rather than custodial sentences, as discussed previously.

Disadvantages

- 2.85** Several disadvantages or negative aspects of community based sentencing in general and in relation to specific forms of community based sentencing were also identified. As with the advantages of community based sentencing, many of the disadvantages are related.

Community perception of leniency

- 2.86** The single most commonly identified disadvantage associated with community based sentencing options relates to the perception that they are too lenient. In this regard the Department of Corrective Services noted that the community ‘may perceive community based sentencing to be a lighter form of punishment than imprisonment and therefore an unjust response to the crime’.⁷⁶
- 2.87** The Committee was also advised that the perception of leniency may be more acute in rural and remote areas, particularly where victims and offenders are members of the same small community. Professor Russell Hogg, Adjunct Professor of Criminology with the Institute for Rural Futures at the University of New England in Armidale, identified some of the reasons contributing to a perception of leniency in rural and remote communities:

The great problem is that such penalties are often perceived in the community as ‘getting off’ ... Problems are greater in many rural communities for a number of reasons. The public resources, infrastructure and staff to ensure intensive supervision, the administration of community services and the like are likely to be even more

⁷⁴ Submission 4, p1

⁷⁵ Mr Brown, Evidence, 1 September 2005, p5

⁷⁶ Submission 30, p10

stretched as are necessary support services. The problems with credibility, at least with the community, are often greater. Generally speaking sentencing is subject to more intense community scrutiny including in the local press. In the far more personalised setting of a small community the decision of a court to return an offender to the community, rather than send them off to prison, is often more visible and alarming. The offender cannot melt into the anonymity of the city.⁷⁷

- 2.88** The perception of leniency may also be more acute for victims of crime, as noted by Mrs Patricia Wagstaff:

... the victim could look upon community sentencing as another instance of the law not understanding the trauma they have been forced to live through. To have the offender walking around in the same areas as they must live in could deepen the feelings of frustration, of anger, and resentment, that the crime had been downgraded in the eyes of the law.⁷⁸

- 2.89** A lack of knowledge about community based sentencing was identified as a contributing factor to this perception by Mr Brown, of VOCAL:

... the majority of people have very little understanding of community-based orders, such as periodic detention, home detention, and even the use of section 9 and section 10 bonds, for example. As a result, a lot of people perceive the penalty that has been handed down to the offender as being one of insignificant nature, when in fact they do not really understand how it can have long-term benefits.⁷⁹

- 2.90** The Department also noted that the perception exists because of a lack of awareness of nature of community based sentences as well as the Department's role:

This perception exists because there is a lack of awareness and understanding of what is involved in a community-based order and also of the role and responsibilities of community-based correctional services – in NSW Community Offender Services (COS) – which includes Intensive Supervision Programs. Generally, corrections are perceived to only be responsible for prisons, and so any community-based order is seen as “getting off with a smack on the wrist”.⁸⁰

- 2.91** The Committee notes that compared to full-time custody, community based sentences are lighter forms of punishment. In this regard, Judge Price advised the Committee that it is *a matter of law* that community based sentences are less onerous than full-time imprisonment:

In other words it is a matter of law that community based sentencing options are less onerous than full time custodial terms of imprisonment. Home detention and periodic detention together with suspended sentences are terms of imprisonment. However, the court first determines whether it is appropriate to sentence the offender to a term of imprisonment and then determines whether it is appropriate to either suspend the

⁷⁷ Submission 32, Institute for Rural Futures, p3

⁷⁸ Submission 45, Mrs Patricia Wagstaff, p1

⁷⁹ Mr Brown, Evidence, 1 September 2005, p4

⁸⁰ Submission 30, p

sentence or have the sentence of imprisonment served by way of periodic detention, or, where appropriate, by home detention. It is a matter of law that it is less onerous.⁸¹

- 2.92** While much was made of the perception that community based sentences are lenient, the vast majority of submissions and oral evidence taken during the Inquiry emphasised that some community based sentences, such as home detention, are considerably onerous in themselves and that, in any case, appropriate community based sentences can be selected to ‘fit the crime’.
- 2.93** The Committee has observed that criticisms of community based sentencing compared to custodial sentences based on leniency do not sufficiently take into account the important role that community based options play in offender rehabilitation and restorative justice. The Committee refers to the comment of Mr Sandland of Legal Aid who noted that ‘... if an option that falls into that softer category is one that nevertheless addresses the reasons persons got themselves into trouble in the first place, then it may end up being a more constructive penalty to impose both for the individual and the community.’⁸²
- 2.94** The Committee acknowledges the challenges facing those involved in community based sentencing to overcome the perception that the penalty imposed is insufficient by virtue of it being served in the community. The Committee has addressed this issue in relation to the proposal to introduce back-end home detention in NSW in Chapter 8.
- 2.95** Mr Brown informed the Committee of the role VOCAL plays in educating members of the public and victims of crime about the purpose of community based sentences:
- We go out to communities and explain to them. We go to Rotary Club meetings and Probus meetings and explain to people what is involved in community-based orders and educate those people, because it comes from the perspective of people who they expect to be highly aggrieved. When they hear people who are highly aggrieved speaking well of a system such as this, explaining that the advantages far outweigh any of the disadvantages, that is a way of getting that publicity out there. ...Once they understand it, and the system is demystified for them, they are more open to variations in what they perceive as being right and wrong in relation to penalty.⁸³
- 2.96** The Committee notes the Department’s comment that ‘[r]aising the profile of COS in the general community and increasing awareness of the rigours of community-based sentencing would address this issue.’⁸⁴ The Committee is supportive of endeavours to inform members of the public about the strengths of community based sentencing options and acknowledges the work of VOCAL in this regard. The Committee recommends that the Minister for Justice examine ways in which community organisations could be assisted to inform members of the public and their members about the role and nature of community based sentencing.

⁸¹ Judge Price, Evidence, 6 June 2005, pp30-31 with reference to the NSW Court of Criminal Appeal in *R v Jurisic* (1998) 45 NSWLR 209 in relation to home detention and *R v Falzon and Pullen* (Unreported) 20 February 1992 in relation to periodic detention.

⁸² Mr Sandland, Evidence, 6 June 2005, p40

⁸³ Mr Brown, Evidence, 1 September 2005, p5

⁸⁴ Submission 30, p10

Recommendation 1

That the Minister for Justice examine ways in which relevant community organisations could be assisted to inform their members and the public about the role and nature of community based sentencing.

Inadequacy of services and programs to support offenders

2.97 A further disadvantage of community based sentences identified by Inquiry participants is that, unless offenders serving such sentences are adequately supported, further problems may arise. For example, if offenders do not have sufficient support they may breach their orders and suffer further penalties.

2.98 Dr Baldry, from the University of NSW, expressed concern that a lack of support could mean that an offender serving a community based sentence could be ‘set up to fail’:

We have to be very careful about the kinds of community sentencing that we might give people because the last thing that would be helpful to do would be to set up people to fail which is something that I think needs to be considered very carefully. In giving community sentences it is evident in, for example, Probation and Parole that the problem often faced is that people are not given the capacity and the support to do what they are supposed to do to meet the requirement.⁸⁵

2.99 In addition, the Committee also heard that inadequate support for community based sentencing can mean that it is less credible in the eyes of the community. In this regard, Professor Russell Hogg, Adjunct Professor of Criminology at the University of New England stated:

Resources, infrastructure and community education and understanding are vital if community penalties are to be meaningful, credible and effective. Arguably this is a problem in relation to many community penalties throughout the state. Where caseloads are massive and supervision unreliable or minimal, such penalties are likely to enjoy little credibility with the courts and less with the community. The great problem is that such penalties are often perceived in the community as ‘getting off’.⁸⁶

2.100 The issue of adequate services and programs to support community based sentencing was raised as a particular concern with supervised bonds in rural and remote areas and is discussed in Chapter 5.

Danger to the community

2.101 Several submission makers noted that a disadvantage of community based sentencing compared to full-time imprisonment is that offenders have a greater ability to re-offend as they are not under supervision or surveillance 24 hours a day. The Committee notes that this relates to one of the competing rationales of punishment identified by the Law Reform Commission (set out at paragraph 2.1) – incapacitation. This argument was raised particularly in relation to home detention, as discussed in Chapter 7.

⁸⁵ Dr Baldry, Evidence, 6 June 2005, p23

⁸⁶ Submission 32, p3

Net-widening and sentence inflation

- 2.102** A further perceived disadvantage of community based sentences, or the introduction or expansion of community based sentencing options, is the potential for net-widening and/or sentence inflation (which is sometimes referred to as ‘penalty escalation’ or ‘sentence creep’). The Public Defenders Office summarised this issue succinctly:

The chief disadvantage of community sentences is the potential for net-widening and penalty escalation, and there are numerous examples of both of these occurring in jurisdictions upon the introduction of new sentencing dispositions. Net-widening occurs when a new sentence is introduced which is intended as a less severe penalty than others already operating in the criminal justice system, and offenders are not only diverted from those more severe sentences, but also from lesser penalties. This occurred for example following the recent re-introduction of suspended sentences in NSW. Penalty escalation is where the sentencing Judge, whether consciously or not, feels that because s/he is giving the offender the benefit of a ‘lesser’ sentence, it is appropriate to increase the quantum of that sentence, for example by imposing a larger fine.⁸⁷

- 2.103** Some Inquiry participants commented on the problem of net-widening and/or sentence inflation in relation to community based sentences generally. For example, the Coalition of Aboriginal Legal Services expressed concern that an extension of community based sentences without a mechanism to curb net-widening may have an adverse impact on Aboriginal offenders:

Given that Aboriginal offenders tend to have longer criminal histories than non-Aboriginal offenders, an extension of community based sentences *in the absence* of a mechanism to curb net-widening and the emergence of a sense of a need for increased punitiveness toward those who commit particular or multiple offences, may have an adverse impact upon them.⁸⁸

- 2.104** Net-widening and sentence inflation were also specifically raised in relation to several of the community based sentences examined by this Inquiry. Net-widening is examined further in relation to community service orders (Chapter 4) and suspended sentences (Chapter 5). Sentence inflation was raised as a concern in relation to suspended sentences (Chapter 5) and periodic detention (Chapter 6).

- 2.105** The Committee notes that in its 1996 discussion paper on sentencing, the NSW Law Reform Commission, while acknowledging the potential for net-widening, did not regard the ‘the perceived dangers of net-widening as preventing the development and use of non-custodial options in appropriate cases.’⁸⁹ The Commission also expressed the opinion that judicial education could address any potential for net-widening.

⁸⁷ Submission 10, p3

⁸⁸ Submission 43, NSW Coalition of Aboriginal Legal Services, p3

⁸⁹ NSW Law Reform Commission, Discussion Paper 33, para 9.6

Other inquiries and reviews

2.106 The issue of sentencing has come under considerable review in NSW in recent years. Many Inquiry participants made reference to the reviews briefly described below. Other state and federal inquiries have also touched on issues relating to community based sentencing, such as the 1979 Nagle Royal Commission into NSW Prisons⁹⁰ and the 1988 Muirhead Royal Commission into Aboriginal Deaths in Custody.⁹¹ Where relevant, the work of all of these reviews is examined in further detail throughout this report.

1995 – present: NSW Law Reform Commission - Inquiry into Sentencing

2.107 In 1995 the Law Reform Commission was given terms of reference to inquire into the laws relating to sentencing in NSW. The Commission's work has been conducted in stages with the first stage dealing with the general principles of sentencing (Report 79⁹²), the second stage dealing with sentencing of Aboriginal offenders (Report 96⁹³) and the third stage, which is currently being undertaken, dealing with the law of sentencing as it relates to corporate offenders (Report 102⁹⁴) and young offenders.

1999 – 2001: Select Committee on the Increase in Prisoner Population

2.108 In November 1999 the Legislative Council established a select committee to examine the increase in prisoner population in NSW since 1995. The broad terms of reference included examination of the effectiveness of imprisonment, the use of prison for people remanded in custody awaiting trial or sentence, alternatives to incarceration and post-release policies. Most relevant for this Inquiry, in its final report the Committee recommended that consideration be given to abolishing prison sentences of six months or less in order to promote alternatives to full-time custody and to alleviate the financial burden caused by the rise in the prison population.⁹⁵

2004: NSW Sentencing Council – Abolishing Prison Sentences of Six Months or Less

2.109 In August 2004 the NSW Sentencing Council (see paragraph 2.54) reported on its examination of abolishing prison sentences of six months or less. The report considers a number of problems with short prison sentences, including their limited rehabilitative value. The report also examined concerns raised by abolishing short prison sentences including sentence inflation, whereby offenders who would normally be given a sentence of less than six

⁹⁰ J Nagle, *Royal Commission into New South Wales Prisons*, Report, 1979, NSW Government Publishing Office, Sydney

⁹¹ J Muirhead, *Royal Commission into Aboriginal Deaths in Custody*, Report, 1988, Australian Government Publishing Service, Canberra

⁹² NSW Law Reform Commission, Report 79

⁹³ NSW Law Reform Commission, Report 96

⁹⁴ NSW Law Reform Commission, Report 102, *Sentencing: Corporate Offenders*, June 2003

⁹⁵ Select Committee on the Increase in Prisoner Population, *Final Report*, November 2001

months might be given a longer non-custodial sentence. The Council's primary recommendation is that the Government should consider abolishing short prison sentences but, significantly for this Inquiry, not until primary alternatives to full-time custody are available uniformly throughout NSW.⁹⁶

- 2.110** The Committee expresses support for the recommendations of the Sentencing Council and recognises that its own work follows on from that undertaken by the Council. The problems with short sentences identified by the Council support the need for widely available community based sentencing options. Whether short prison terms are ultimately abolished or not, the Committee considers that the Council's recommendation to make community based sentencing available throughout NSW stands alone.

2005 – Present: Review of the *Crimes (Administration of Sentences) Act 1999* (NSW)

- 2.111** In 2005 the Minister for Justice appointed Ms Irene Moss AO to review the *Crimes (Administration of Sentences) Act 1999* (NSW) pursuant to s 273 of the Act. The purpose of the review is to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. The review is not intended to be a major study or examination of the administration of sentences generally. At the time this report was finalised the review had been completed and the Government was considering the outcomes of the review.

2005 – Present: Review of the *Crimes (Sentencing Procedures) Act 1999* (NSW)

- 2.112** The Criminal Law Review Division of the NSW Attorney General's Department is currently undertaking a review of the *Crimes (Sentencing Procedure) Act 1999* (NSW) as required by s 105 of the Act.⁹⁷ The purpose of the review is to determine whether the policy objectives of the legislation remain valid and whether the terms remain appropriate for securing those objectives. The review is also examining the operation of the standard non-parole provisions in the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW). At the time this report was finalised the review was ongoing, with a discussion paper soon to be released to facilitate further submissions to the review. The review is discussed in Chapter 5 in relation to the operation of suspended sentences.

⁹⁶ The report also recommended that short prison sentences should not be abolished until the Western Australian government evaluates the impact of abolition in that state, there are settled exceptions to abolition and there is a trial of abolition throughout all of NSW for Aboriginal women.

⁹⁷ S 105 requires the Minister to review the Act after it has been in operation for five years.

Chapter 3 **Availability of community based sentencing in rural and remote areas and for disadvantaged populations**

The terms of reference require the Committee to examine whether it is appropriate and in the public interest to tailor community based sentencing options for rural and remote areas and for disadvantaged populations. This chapter undertakes an overall analysis of the availability of community based sentences in rural and remote areas in NSW and for disadvantaged groups. The specific community based sentencing options are examined in detail the following chapters. The Committee notes at the outset of this discussion the cross over between 'rural and remote' and 'disadvantage' in that people in rural and remote areas are generally at a disadvantage compared to people living in metropolitan areas in terms of access to services and socio-economic levels.

Rural and remote areas

3.1 Given that the full range of sentencing options are only available in the Sydney metropolitan area and a small number of large regional centres, the Committee has taken a broad approach to what is meant by 'rural and remote' for the purposes of this Inquiry. In general, the Committee considers that rural areas are those outside urban centres and 'remoteness' can be understood in relation to access to services. Therefore, remote areas include small towns and areas that have limited resources and access to goods and services, as well as limited opportunities for social interaction.

3.2 The Committee was advised that crime rates for most types of crime in rural areas are higher than in the Sydney metropolitan area. For example, the Institute for Rural Futures stated:

Our analysis of recorded crime rates in rural NSW shows that rates for *all* types of crime other than property crime are higher in rural and regional NSW than in the Sydney metropolitan area. In general locality crime rates increased as area population got smaller and more distant from urban centres. In many rural communities crime rates are dramatically higher than the state average. In others crime levels are, on a per capita basis, similar or greater than in the coastal cities.

We found that there were high levels of 'offences against justice procedures' ie for breach of conditional court orders, most commonly apprehended violence orders, but also bail, good behaviour bonds, etc. Such offences are by definition serious and often lead to imprisonment. The findings are relevant to any consideration of the role of community penalties for they raise questions about the effectiveness of court orders and supervision in these settings.⁹⁸

Availability of community based sentencing options in rural and remote areas

3.3 Submissions to this Inquiry clearly identified that currently community based sentencing options are not uniformly available throughout NSW. Many submission makers wrote to

⁹⁸ Submission 32, p1

advise that some or all community based sentencing options were not available in their local area, with most expressing concern about this fact.

- 3.4** The Committee notes that while all forms of community based sentencing options are legislatively available across the State, in that there are no areas of NSW explicitly excluded in legislation, their availability is nonetheless limited by several factors, which are examined in detail below.
- 3.5** In summary, the Committee has been advised that supervised bonds, community service orders, periodic detention and home detention are not available in a number of rural and remote areas. The specific areas in which each of these sentencing options are not available are noted in the separate chapters dealing with each option. The only community based sentence that is available throughout NSW is unsupervised bonds (see Chapter 5).

Use of community based sentencing options in rural and remote areas

- 3.6** Concomitant with their availability, the Committee was informed that community based sentencing options are used more frequently in metropolitan locations than rural and remote locations. The Department of Corrective Services provided the Committee with a breakdown of the penalties imposed by Local Courts in country and metropolitan locations. The table set out below shows the penalties issued by courts to offenders as a percentage of the number of penalised persons resident in metropolitan (61,931) and country (37,656) locations.

Table 3.1 Use of penalties by metropolitan and country locations⁹⁹

Person by location and penalty received	Metropolitan ¹		Country	
	#	%	#	%
Imprisonment	3506	5.7	2534	6.7
Home detention	304	0.5	19	0.05
Periodic Detention	807	1.3	226	0.6
Suspended sentence	2617	4.2	2378	6.3
Community Service Order	2733	4.4	1661	4.4
Bond with supervision	3080	5.0	2480	6.6
Bond without supervision	5880	9.5	3930	10.4
Bond without conviction	7185	11.6	4746	12.6
Fine	31087	50.2	16853	44.8
Licence disqualification	33	0.05	18	0.05
Compensation order made	99	0.2	96	0.3
Rising of the court	212	0.3	141	0.4
No conviction recorded	4388	7.1	2574	6.8
Total	61931	100.0	37656	100.0

Notes: 1. Sydney statistical division plus Newcastle and Wollongong.

⁹⁹ Submission 30, p14. The data was compiled by the NSW Bureau of Crime Statistics and Research, based on the *NSW Local Criminal Courts Statistics 2003*.

3.7 The Department of Corrective Services summarised the table as follows:

The above table highlights that offenders sentenced in country locations are more likely to receive a custodial sentence compared with offenders in the metropolitan area. Where alternatives to imprisonment, such as suspended sentences and bonds, are available in the country areas courts do utilise them. Alternatives such as home detention and periodic detention are not available to the same extent in the country and this could explain the higher rate of imprisonment of country offenders – the rate of country home detention is one-tenth the rate of metropolitan home detention, and the rate of country periodic detention is less than half the rate of metropolitan periodic detention.¹⁰⁰

Impact of lack of availability

3.8 The unavailability of the full range of community based sentencing options in many parts of NSW results in inequitable access to sentencing options for offenders in rural and remote areas. The most significant impact of this is that country offenders have a higher rate of imprisonment than metropolitan offenders. Inconsistency in sentencing and a negative impact on offenders (often compounding existing disadvantage) and their community also result.

Unequal access to sentencing options

3.9 Clearly, the most significant impact of the lack of uniform access to community based sentencing options is that it discriminates against offenders from those areas in which the full range of options are not available.

3.10 This effect of this discrimination is most significant when a full-time custodial sentence has been imposed and there are no available community based alternatives. Table 3.1 shows that a greater number of offenders in country areas received a sentence of imprisonment (6.7%) than those from metropolitan areas (5.7%).¹⁰¹ This issue is examined in further detail in relation to periodic detention (Chapter 6) and home detention (Chapter 7).

3.11 Many Inquiry participants stressed the inequity of sentencing options not being available in rural and remote NSW. For example, Mr Peter Marshall stated that: '[i]n the interest of equity, sentences available in rural and remote NSW should be exactly the same as those in urban areas.'¹⁰² Judge Price, NSW's Chief Magistrate stated:

The unavailability of various community based sentencing options in different locations increases the possibility of disparity in sentencing outcomes. More particularly, full-time custodial sentences may be imposed because other more appropriate options are not available to the Court. The Court acknowledges however that substantial resources will be required to distribute all community based sentencing options equally across the State.¹⁰³

¹⁰⁰ Submission 30, p14

¹⁰¹ Submission 30, p13

¹⁰² Submission 11, Mr Peter Marshall, p3

¹⁰³ Submission 7, p5

- 3.12** The Public Defenders Office noted that services such as health and public transport are already less adequate in remote areas than in the city and the problem should not be compounded by the lack of community based sentences:

We would argue that it is very much in the public interest to provide appropriately developed and tailored options which are suited to rural and remote areas, so that offenders are not discriminated against at sentence by virtue of where they live. Although the vast majority of offenders (like the rest of the population) live in metropolitan areas, offenders who live in remote areas have an equal entitlement for appropriate services to be provided within their area. The fact that other services (health, public transport etc) are in practice already less adequate in remote areas than in the city means that these offenders are already dealing with the disadvantages imposed upon by their virtue of their location. The problem should not be compounded in the context of community sentences ...¹⁰⁴

- 3.13** Magistrate Heilpern stressed that the lack of sentencing options in some areas is unfair to defendants and that the basis for sentencing should be rehabilitation and deterrence, not geographical location:

Firstly, it is unfair to the defendant. After all, I am continually striving in my daily work to be fair to people, and it is simply unfair that a crime committed in Bega has less sentencing options than a crime committed in Manly. It is just wrong. We should have same crime, same time everywhere. That that is not the case means that defendants miss out on the opportunity to have their sentences tailored in the best way for them. That, in my view, is simply unfair. There should not be a geographical basis for sentencing. The basis for sentencing should be rehabilitation, deterrence—all the factors that we have for sentencing, but not geographical location. We all know that prison is an awful place. ... No-one, in my view, should be sentenced to imprisonment if there are sentencing options that are suitable for the person but that are not available because of where they live.¹⁰⁵

- 3.14** The Committee notes that in the case of periodic detention and home detention, both of which are alternatives to imprisonment, the only course of action for the court if they are not available, is to impose a prison term, as explained by Judge Price:

If an option is not available the court has to sentence the person, the offender, having regard to the fact that it is not available. For example, if a court determines that a term of imprisonment is appropriate, having regard to the objectively serious factors and the subjective factors in favour of the defendant, and then obtained a presentence report from the Probation and Parole Service asking whether periodic detention or community service orders are available, and the report states that neither option is available, that person cannot be sentenced down. In that case if periodic detention is not available the offender would be sentenced to full-time custody.¹⁰⁶

- 3.15** Mr Andrew Jaffrey noted that the lack of community based sentencing options in rural and remote areas ‘... has seen imprisonment go from what should be a last-resort to sometimes

¹⁰⁴ Submission 10, pp4-5

¹⁰⁵ Magistrate Heilpern, Evidence, 28 June 2005, p39

¹⁰⁶ Judge Price, Evidence 6 June 2005, p32

becoming the only resort ...¹⁰⁷ Imprisonment as a last resort is examined in paragraphs 2.4-2.5.

Increasing prison population

3.16 The NSW prison population is discussed at paragraphs 2.7-2.12. Several Inquiry participants expressed concern about the rising prison population in NSW and noted that the lack of community based sentencing options in some areas adds to this increase.

3.17 It was also suggested that increased access to community based sentences could stem the increase in the prison population and alleviate the need for new prisons. For example, Ms Moira Magrath, the Secretary of the Probation and Parole Officers' Association of NSW stated:

... the establishment of the Mid North Coast Correctional Centre in the last 12 to 18 months recognised the number of offenders actually living in those areas and the need to "accommodate" them closer to their homes, their people and so forth. If we had made a significant investment in community-based options, we may well have obviated the necessity for the establishment of that particular correctional facility. The opportunity exists to act now. If we read the regional papers, they are all talking about "how we might get a gaol for our area", so the opportunity is there now, before yet another correctional facility is announced in the countryside, to create those community-based options to fill that gap between bonds and gaol.¹⁰⁸

Lack of sentencing options and difficulties faced by magistrates

3.18 A further impact of the lack of uniform availability of community based sentences is that it presents difficulties for magistrates when certain sentencing options are not available to them. Magistrate David Heilpern summarised his experience in rural communities and the 'dearth of sentencing options' available:

I have spent all my life as a sitting magistrate in isolated rural communities. They are characterised by two factors that are immediately apparent to me, and remain apparent to me to this day: first, Aboriginal overrepresentation and the large percentage of young people who appear before the court vis-a-vis city areas; second, the dearth of sentencing options that are available to me in the country. If I sit in the city, and I have done from time to time, I have options such as the Drug Court, the Magistrates Early Referral Into Treatment Program, home detention, periodic detention, sex offender programs, Children's Drug Court, mental health pilots, anger management programs—a whole range of sentencing options that I do not have here, and have never had at any of the courts in which I have sat. ... However, I note that in all places prison is available. I know that that sounds like the bleeding obvious, but it is interesting that at every court in NSW the most draconian measure is available and yet many of those that come below that in the sentencing calendar are not.

... To varying degrees, I have faced the same problems at every court that I sit at in terms of the lack of sentencing options. For example, in some towns on this circuit,

¹⁰⁷ Submission 36, Mr Andrew Jaffrey, p1

¹⁰⁸ Ms Moira Magrath, Manager, Resources and Executive Services, Community Offender Services, Department of Corrective Services and Secretary, Probation and Parole Officers' Association, Evidence, 30 August 2005, p22

there are times when there is no community service available. There are times when there is only periodic detention available at Batemans Bay; and there, there is travel only one way. There is no home detention in any of my circuit here, and effectively no periodic detention for anyone south of Batemans Bay. Of course, there are very limited anger management programs run by Corrective Services or Probation and Parole, and that is a continual frustration as well, particularly in the area of domestic violence.¹⁰⁹

- 3.19** Magistrate Heilpern also noted that in the absence of certain sentencing options magistrates are, at times, faced with the decision whether to ‘sentence up’ or ‘sentence down’:

The fourth area in which there is a problem involves a personal problem, if you like, and that is from the sentencing perspective. I do not think there is a judicial officer in NSW who does not suffer angst over the gruelling process of sentencing people. It is a very hard thing to do. When I say sentencing people, I really mean sentencing people to imprisonment. If, in your everyday life, you are faced with a choice of over sentencing or under sentencing, because that middle range of sentencing options is not available—such as periodic detention, or home detention — then you are faced with the choice: Do I under sentence, or do I over sentence compared with how I would want to sentence?

It is hard enough to try to work out what an appropriate sentence is if you have all the tools in your hands. But, if you have not, it is much more gruelling from a personal perspective to be dealing with sentencing. I should add that this is not just an occasional thing. Today I did the list at Bega, and in the list were about 80 charge matters, about 25 AVOs and about 25 other matters. Of those, I made a specific record that there would have been 11 that I would have sentenced to periodic detention or home detention had it been available here. Of course, with each of those, I then had to make a decision: Do I sentence tougher, or do I sentence lighter than that which I think is really appropriate for the crime?¹¹⁰

Inconsistencies in sentencing

- 3.20** The lack of availability of community based sentences in some areas of NSW also creates inconsistencies in sentencing. In this regard People with Disability Australia stated:

...PWD considers that consistency in sentencing can never be achieved in NSW if people in rural and remote areas are not, to the maximum extent possible, able to receive the same community based penalties as those offenders in major centres and metropolitan NSW who have committed offences of the same degree of seriousness.¹¹¹

- 3.21** Magistrate Heilpern also raised this issue:

The third problem is consistency. It is impossible to compare sentencing in rural and remote areas with sentencing in others areas, because we have different sentencing options available. It is like comparing apples and oranges. Yet there is often criticism

¹⁰⁹ Magistrate Heilpern, Evidence, 28 June 2005, p38

¹¹⁰ Magistrate Heilpern, Evidence, 28 June 2005, pp39

¹¹¹ Submission 29, People with Disability Australia Inc, p9

of the court for not being consistent. Fair enough. But you have to have the same tools if your aim is to have consistency.¹¹²

3.22 In the High Court case of *Lowe v R*, Mason J referred to “consistency in punishment” and summed up the importance of achieving consistency in sentencing as follows:

Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and the community.¹¹³

3.23 The Committee notes that the NSW Sentencing Council’s report *How Best to Promote Consistency in Sentencing in the Local Court* stated that:

In NSW, magistrates in a number of courts are prevented from using particular sentencing options due to geographic limitations on the availability of some of the options and insufficient funding of the Probation and Parole Service, which limit the availability of viable programs and necessary supervision.¹¹⁴

3.24 The Sentencing Council identified two major concerns arising out of the unequal availability of sentencing options:

- the ability to achieve the purposes of sentencing in respect of a given case is adversely affected, which raises equity and fairness issues for the particular offender as well as holding longer term implications for the public at large; and
- the desirability of consistency in approach is undermined because not all magistrates are able to consider the full range of sentencing options.¹¹⁵

Impact on the community and families of offenders

3.25 The lack of availability of community based sentences in some areas means that the community and the families of offenders cannot derive the benefits of community based sentences, which are examined in Chapter 2. Families of offenders sentenced to imprisonment rather than non-custodial alternatives lose that family member, their income may be reduced and they may have to travel great distances to visit the offender.

3.26 Magistrate Heilpern noted the impact on the community in terms of the advantages of community based sentencing in reducing recidivism:

The whole aim of the criminal justice system, from where I sit, is to try to stop people from committing crimes. The best way to do that is to tailor sentences to meet the

¹¹² Magistrate Heilpern, Evidence, 28 June 2005, pp39

¹¹³ *Lowe v R* (1984) 54 ALR 193 at 196

¹¹⁴ NSW Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Court*, Report, June 2004, p59

¹¹⁵ NSW Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Court*, p63

individual's needs from time to time. When I say needs, I mean best suited to ensuring there is a reduction in crime. It is not fair on the community of Bega, for example, that they do not have periodic detention when that would suit offenders best and minimise the risk of them re-offending. The community misses out, on top of the defendant missing out.¹¹⁶

Reasons for lack of availability

- 3.27** In this section the Committee examines the practical, economic and policy reasons that community based sentencing options are not available uniformly across NSW.

Funding

- 3.28** The Committee was advised that, in general, the main impediment to community based sentencing options being more widely available across NSW is funding. The Committee notes that this overarching issue impacts on several of the other factors discussed below.
- 3.29** The Committee received information from a number of witnesses about the need for greater funding and resources to support the work of the Community Offender Services division of the Department of Corrective Services, which manages offenders serving community based sentences (see paragraphs 2.54-2.55). Particular reference was made to the resources of the Probation and Parole Service (PPS) within the division.
- 3.30** Mr Bill Anscombe, Senior Lecturer at Charles Sturt University, described Community Offender Services as 'the forgotten arm of a Department that is dominated by the high cost, high staff, high visibility issues of the institutions'.¹¹⁷
- 3.31** Mr Sandland of Legal Aid expressed the view that an injection of funds to the PPS was required to cover our 'very large State':

It is a resourcing issue. It is bound up with the infrastructure of our State and the fact that it is a very large State and we have big distances to cover. ... it would be very useful if we were able to inject more funds into the Department of Corrective Services and its wing, the Probation and Parole Service, to provide the sorts of sentencing options across the whole State that are available primarily to the highly populated areas along the coastal fringe.¹¹⁸

- 3.32** Ms Magrath, the Secretary of the Probation and Parole Officer's Association and the Manager of Resources and Executive Services for Community Offender Services, described the division as a 'lean machine' and noted the significant budget for community sentences in other jurisdictions:

Community Offender Services operates with a workload model that allocates a number of hours for each offender based on their presenting risk of reoffending, which is measured by an actuarial instrument. But we tailor our level of service

¹¹⁶ Magistrate Heilpern, Evidence, 28 June 2005, pp39

¹¹⁷ Submission 17, Mr Bill Anscombe, p1. Mr Anscombe has 20 years service with the Department of Corrective Services.

¹¹⁸ Mr Sandland, Evidence, 6 June 2005, p41

according to the available budget because we cannot increase the pie. So Community Offender Services within the correctional environment operates as a very lean machine. ... But obviously with more resources we could achieve much more, and it is interesting to note that other jurisdictions have made much more investment in community-based options.

In Victoria and New Zealand, for example, they have had significant budget enhancements—lots and lots and lots of dollars—and as a result have been able to achieve a lot of change, with Victoria effectively stalling the rise in the prison population. ... Similarly, it is our belief that Community Offender Services should be exempt from the budget cuts that operate across the department. So if the department is going over budget and the bean counters suggest that the budget has to take a 10 per cent cut, that is across the board. If you do not have any fat, there is no fat to cut so you start to cut the meat. So that starts to cut into our core service delivery and, again, we are unable to deliver the service because of resource issues. So the answer to the first part of the question is: No, Community Offender Services is not adequately resourced for current operations.¹¹⁹

- 3.33** Several Inquiry participants commented that the cost of expanding community based sentencing options across the State could in some part be offset by the savings made by reducing the number of offenders in full-time custody. For example, the Public Defenders Office stated:

... we would therefore strongly advocate the concentration of resources on measures which enable offenders to remain in the community. At the same time, the resources which would otherwise have been used housing full-time prisoners can be better used to community programs which are aimed at both pre-offending circumstances (early intervention) and post-offending rehabilitation.¹²⁰

- 3.34** NCOSS made a similar point:

It can be assumed that resources currently being spent on putting rural people into full time custody could be diverted to community service order or drug court options. Given that the current cost of a full time prisoner is higher than the associated cost of community based options this could ... deliver both costs savings in the Corrective Services budget and alleviate prison overcrowding.¹²¹

Departmental resources

- 3.35** The lack of sufficient correctional staff in rural and remote areas to supervise offenders was cited as a reason that some community based sentences were not more widely available. For example, Magistrate Toose described the difficulties faced by Probation and Parole officers in making their assessment reports:

There is a distinct shortage of staff for both the Probation and Parole office and the Juvenile Justice office to do assessments at Court which appears to be due to high

¹¹⁹ Ms Magrath, Evidence, 30 August 2005, pp24-25. Ms Magrath gave her evidence in her capacity as the Secretary of the Probation and Parole Officer's Association.

¹²⁰ Submission 10, p4

¹²¹ Submission 8, p2

turnover of staff in those areas, and over commitment of duties for the staff of those agencies.¹²²

- 3.36** Ms Jeffrey, the Area Co-ordinator of Community Offender Services in Dubbo noted that this was also a problem in her area:

I think in the more rural and remote areas ... there are difficulties in attracting and retaining staff. ... That is an impediment, I think, to addressing some of these community based needs.¹²³

- 3.37** The lack of PPS staff and resources in rural and remote areas to supervise detainees was raised in relation to bonds (Chapter 5) and home detention (Chapter 7). In terms of periodic detention, it is the absence of correctional centres or stand-alone periodic detention centres in rural and remote areas and related transport issues that is the most significant obstacle to that sentencing option not being more widely available, as examined in Chapter 6.

Information technology resources

- 3.38** The Committee was informed that, as well as funding and other resource issues, difficulties with the use of information technology arise in rural and remote areas. Magistrate Toose commented on the difficulty accessing appropriate information technology in remote areas:

In remote areas the officers of the relevant agencies appear to be dealing with inadequate administrative back up by way of support staff and effective and efficient IT systems. This is in no way a criticism of the dedicated staff from those agencies who try to do their best with the strained and limited resources that they have. The Probation and Parole staff need to be able to access their data in relation to repeat offenders at court online as well as be able to enter fresh data (be it for former or new clients of that service) directly into their systems from court. Further, they need to be able to scan relevant court documents and other relevant reports such as psych reports or other medical reports into their system. They need to have the ability to produce a report from their system whilst at Court. In remote areas they do not seem to be able to do this.¹²⁴

Lack of support services and programs

- 3.39** One of the most significant impediments to broadening community based sentencing to rural and remote areas identified during the Inquiry, is the lack of availability of services and programs required to support community based sentencing.
- 3.40** Services and programs are used to address behaviour, for example, the *Sober Driver Program*, *Drug and Alcohol Addiction Program* and the *Yindyama La Family Violence Project*. In addition, programs such as the *Pathways to Employment, Education and Training* (PEET) program can improve an offender's employment skills.

¹²² Submission 5, p3

¹²³ Ms Narelle Jeffrey, Area Co-ordinator, Community Offender Services, Probation and Parole Service, Evidence, 15 June 2005, p26

¹²⁴ Submission 5, p3

- 3.41** The Committee heard evidence of a wide range of programs either delivered directly by the Department, delivered by other agencies working in collaboration with Community Offender Services or services delivered by other agencies alone.
- 3.42** Drug and alcohol services were the most commonly identified services lacking in rural and remote areas of NSW.
- 3.43** The Committee was advised that the main difficulty in providing the services required to sustain community based sentencing in rural and remote areas (apart from a general lack of resources) is attracting professional staff.

Community support

- 3.44** The Committee was advised that a lack of community support for community based sentencing options in smaller communities, or an inability for the local community to provide support, may also be relevant. For example, the lack of work placements for community service orders in rural and remote areas is examined in Chapter 4.

Support for community based sentencing options to be expanded

- 3.45** The overwhelming majority of Inquiry participants expressed strong support for community based sentencing in general and for the various options to be made available across the State.
- 3.46** For example, the Probation and Parole Officers Association stated that '[a]ll areas, across the entire state of NSW, would benefit from the enhanced availability of community based punishments'.¹²⁵ Judge Price stated that 'all rural and remote areas in New South Wales would benefit from increased availability of community based sentencing options'.¹²⁶
- 3.47** The Committee notes the views of the Sentencing Council in its report on abolishing short sentences (discussed at paragraph 2.109):

The fact that many alternatives to full-time custody are not available uniformly throughout NSW is a matter of great concern. The Sentencing Council recommends that priority should be given to making primary sentencing options such as periodic detention, home detention, community service and probation supervision available throughout NSW.¹²⁷

- 3.48** Several Inquiry participants expressed support for the Sentencing Council's recommendation. For example, the Public Defenders Office stated that '[w]e agree with the recent recommendation of the NSW Sentencing Council that 'priority should be given to making primary sentencing options available throughout NSW'.¹²⁸

¹²⁵ Submission 41, p3

¹²⁶ Submission 7, p5

¹²⁷ NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less*, Report, 2004, p4

¹²⁸ Submission 10, p4

3.49 The Committee notes that strong support for the expansion of community based sentencing options was heard from organisations representing the disadvantaged groups considered later in this chapter. For example, NCOSS stated:

We are concerned that sentencing policy and practice should ensure that people from rural and remote areas, and other disadvantaged population groups have equal access to positive sentencing options that can contribute to effective rehabilitation.¹²⁹

For the full range of benefits of community based sentencing options to be realized by the offender, their family and society at large, these sentencing options must be effectively resourced across the state, including rural and regional locations. ... NCOSS does not consider it equitable that people living in rural and remote NSW, including Indigenous people be disadvantaged because of locational factors. People should not be put in prison simply because of their geographical isolation.¹³⁰

Increasing availability of community based sentencing in rural and remote areas

3.50 The Committee strongly supports community based sentencing options as a means of both punishment and rehabilitation for appropriate offenders. The benefits of community based sentencing discussed in Chapter 2 include cost effectiveness and reduced recidivism, as well as benefits to the offender, the offender's family and the community. The Committee also notes that community based sentencing options are particularly beneficial to the very offenders – those from 'disadvantaged groups' - that have the most difficulty accessing them. These groups are discussed later in this Chapter.

3.51 Evidence presented to this Inquiry reveals considerable gaps in access to community based sentences in many rural and remote parts of NSW. The Committee considers it inequitable that the full range of community based sentencing options are not uniformly available throughout the State. This impacts not only on offenders in rural and remote areas, who are therefore more likely to go to gaol than their metropolitan counterparts, but also on their family and the community. It also creates difficulties for judicial officers in determining appropriate sentences.

3.52 Overwhelming support was expressed for expanding community based sentencing throughout NSW. Members of the legal profession, community groups and the public who participated in this Inquiry generally agreed that there is great value in community based sentencing. The Committee notes in particular that Judge Price, Chief Magistrate of NSW, stated in his submission that '[i]t is the Court's recommendation that community based sentencing options should be made, so far as possible, available at every court in New South Wales.'¹³¹

3.53 The Committee is of the view that the Government needs to make community based sentencing, particularly in relation to the disadvantaged groups examined by the Committee, a priority within its sentencing and criminal justice policies.

¹²⁹ Submission 8, p1

¹³⁰ Submission 8, p2

¹³¹ Submission 7, p3

- 3.54** It is clear that extra resources are required for community based sentencing to be made available in a more equitable distribution. In order for community based sentencing options to be of value, for sentencing to fulfil its dual purpose of punishment and rehabilitation, additional resources are required.
- 3.55** The Committee recommends that the Government dedicate additional financial and other resources to its community based sentencing program. The Committee notes that while substantial funding would have to be outlaid initially to expand these sentencing options, cost savings would result from the impact on the number and cost of the prison population.
- 3.56** The Department of Corrective Services advised the Committee that other Australian jurisdictions have strengthened their community corrections operation in recent years:

Victoria and other Australian States have developed strategies to greatly strengthen their community corrections operations in order to reduce incarceration and lessen the rates of recidivism of offenders. It should also be noted that in expanding the use of community options and significantly reducing the rate of imprisonment, the Victorian government has adopted a “whole of government” approach.¹³²

The Victorian Government, through their Corrections Long Term Management Strategy (CLTMS) has committed significant resources to strengthen community corrections while adopting a whole of government approach to reducing imprisonment and recidivism rates. This approach is founded on the premise that ‘community corrections play a pivotal role in the criminal justice system by providing a balanced continuum between punishment and rehabilitation ...’¹³³

- 3.57** The Committee undertook a study visit to Victoria to gain a first hand impression of the initiatives undertaken in that jurisdiction with regard to community based sentencing. The Victorian Government chose to limit capital infrastructure investment and invest significant resources in initiatives to divert lower risk offenders from imprisonment and to address recidivism among offenders and prisoners. The Victorian strategy supports a broad whole-of-government approach and is complemented by initiatives in other areas such as crime prevention, police diversion, court based diversion, Juvenile Justice and employment, education and training. The Committee was informed that key achievements are a stabilisation and in the most recent year a decline in recidivism, a significant fall in prison numbers (first time in 12 years), an increase in community service type orders and significant broad net savings as a result of saving over 470 prison beds.
- 3.58** The Committee acknowledges that in some areas there is not and will never be enough demand for various community based sentencing options to warrant spending the money just to ensure they are available. In this regard the Committee acknowledges the comments of the Department of Corrective Services that:

All rural and remote areas in NSW would benefit from the increased availability of community-based sentencing options; however, as noted above, such benefits must be

¹³² Submission 30, p11

¹³³ Office of the Correctional Services Commissioner, Victoria, *Building a responsive corrections system Corrections Long Term Management Strategy - the next five years*, July 2002, State Government Victoria, Department of Justice,

balanced by the resources required to supervise and enforce community-based sentences.¹³⁴

- 3.59** While the Committee acknowledges that insurmountable practical and economical difficulties will prevent a complete coverage, especially in remote areas, the Committee recommends that the Government endeavour, where it may be practically implemented, to make community based sentencing options available in rural and remote areas of NSW.

Recommendation 2

That the Government make community based sentencing, particularly in relation to the disadvantaged groups examined by the Committee, a priority within its sentencing and criminal justice policies and that, where it may be practically implemented, all community based sentencing options should be made available throughout New South Wales.

Recommendation 3

That the Minister for Justice undertake research to establish the level of demand for community based sentencing options in rural and remote areas of New South Wales.

Recommendation 4

That the Government dedicate more financial and other resources to the Community Offender Services division of the Department of Corrective Services to adequately fund community based sentencing programs in New South Wales, including new initiatives and the extension of programs set out in the Committee's other recommendations.

Programs and services in rural and remote areas

- 3.60** The Committee notes that the expansion of community sentencing options cannot happen in isolation. Other agencies will also be required to extend programs and services that support offenders serving community based sentences. The Public Defenders Office advocated better co-ordination of efforts to increase the use of community based sentencing in rural and remote areas as well as greater involvement of local representatives:

Anecdotally, there is a scarcity of readily available community sentencing options in rural and remote areas. In particular, finding appropriate work for community service seems to be an issue. What is probably required in this regard, in addition to increased allocation of resources, is better co-ordination of efforts. What works in metropolitan centres will often be unviable or inappropriate in remote settings. It is in this context that local representatives should be consulted to a greater extent to determine what is feasible and appropriate for their areas, thereby putting the community element back into community sentences not merely at the execution stage, but also in the planning

¹³⁴ Submission 30, p15

process, although this may require greater flexibility in approach than has previously been the case.¹³⁵

Recommendation 5

That the Government adopt a whole-of-government approach to improve the provision of services and programs to support offenders on community based sentences in rural and remote New South Wales.

New community based sentencing options?

3.61 Some submissions identified additional community based sentencing options that could be beneficial in general or with particular reference to rural and remote areas and disadvantaged groups. The Committee has not examined these suggestions in detail as it is of the view that time and resources should be devoted to extending and strengthening existing community based sentences before new options are considered. The suggestions are described briefly below in order to contribute to future discussion.

3.62 Justice Action has suggested mentoring as an additional community based sentencing option:

Justice Action proposes mentoring as an additional CBSO. The suggested mentor program is to have a person trusted by the offender, in a one on one relationship on a daily basis, sometimes live-in, fully paid to give support and guidance. The mentor would be both a role model and a friend. Mentors would ideally have a background or personal experience as clients of the criminal justice system. The mentor program would act as an innovative and alternative crime-fighting option which could be, in particular circumstances, more successful and efficient than re-imprisoning offenders.¹³⁶

3.63 NCOSS also expressed support for mentoring and referred to Justice Action's proposal:

NCOSS considers that an important component of non-custodial sentencing should be mentoring for offenders and we note the work of Justice Action in this area. Mentoring could be developed as a distinct community based sentencing option. Mentoring, if properly resourced could "act as an innovative and alternative crime-fighting option, which could be, in particular circumstances, more successful and efficient than re-imprisoning offenders": Justice Action, 2004, Mentor's handbook.¹³⁷

3.64 Magistrate Toose identified several overseas options for juvenile offenders and 'boot camps' for adults as well as juveniles:

"Boot camps" - There are separate ones for juveniles and adults based on structure, discipline and challenge combined with counselling programs. The programs continue after release from the camps. These may have some success but would need to be located in a remote setting with appropriate programs to address the reoffending together with programs that offered some lifestyle skills and relevant cultural

¹³⁵ Submission 10, p4

¹³⁶ Submission 35, Justice Action, p1

¹³⁷ Submission 8, p2

programs. There would also need to be sufficient support by way of continuing programs upon release. There would need to be camps for female offenders.¹³⁸

3.65 Mr Marshall proposed ‘cross-border co-operation to increase access to community based sentencing options for rural and remote people’:

I believe that cross-border cooperation could reduce the disadvantage to people living in many rural and regional areas of NSW. Offenders living in the Canberra region, for example, should be accessing ACT penalties and programmes. ACT is the only other Australian jurisdiction to have periodic detention, it also has home detention, and it has a broad range of specialist programmes for offenders serving community penalties. These occasionally become temporarily unviable through lack of numbers, a problem which could be offset if offenders in nearby NSW were accessing them. Because of the ACT’s low prison population (Australia’s) lowest, and high community corrections population, it offers a much broader range of specialist programmes and community sentences than one might expect given its population. Similarly, cross-border cooperation with Victorian, Queensland and South Australian corrections departments could reduce disadvantage for offenders in many parts of NSW.¹³⁹

3.66 The Committee notes that the *Crimes (Interstate Transfer of Community Based Sentences) Act 2004* (NSW) commenced on 29 November 2004, enabling community based sentences to be transferred between participating jurisdictions (currently only NSW and the ACT). This scheme commenced in NSW in March 2005 for good behaviour bonds, community service orders, periodic detention and home detention.

Disadvantaged populations

The flexibility of community based sentences and their ability to address the root causes of the offending makes them ideally suited to disadvantaged offenders. The only disadvantage of community based sentencing is that some options are not widely available to disadvantaged offenders.¹⁴⁰

3.67 The terms of reference require the Committee to examine whether it is appropriate and in the public interest to tailor community based sentencing options for ‘disadvantaged populations’. In its Discussion Paper, the Committee sought views on which disadvantaged groups should be considered as part of the Inquiry. Offenders from a range of disadvantaged groups were identified. The point was also made that many offenders fall into more than one group of disadvantage and that common to most offenders who can be described as ‘disadvantaged’ is a low socio-economic status.

3.68 By far the group most frequently identified as experiencing particular disadvantage in the justice system were Aboriginal offenders. The next most commonly identified groups were offenders with intellectual disabilities or mental health issues and female offenders. The Committee has therefore focused its discussion on these three groups. In this chapter the Committee has examined broad issues in relation to access by these groups to community

¹³⁸ Submission 5, p9

¹³⁹ Submission 11, p2

¹⁴⁰ Submission 25, Shopfront Youth Legal Centre, p6

based sentences. Issues that relate to specific community based sentences are examined in the separate sections of this report.

- 3.69** The Committee notes that these three groups of disadvantaged offenders have been raised time and time again, in previous reviews and reports relating to sentencing, the justice system and prisons. For example, both the Law Reform Commission in its ongoing review of sentencing (paragraph 2.107) and the Select Committee on the Increase in Prisoner Population (paragraph 2.108) examined these groups of offenders. The Committee adds its particular focus on community based sentencing to the important work of these past reviews.
- 3.70** Several other 'disadvantaged' groups were also identified including culturally and linguistically diverse offenders, offenders with accommodation difficulties, sole parents and older offenders. Issues relating to these other groups are also briefly canvassed.
- 3.71** The Committee notes that in order to improve the outcomes for offenders from disadvantaged groups effective measures need to be in place at all stages of the justice system, starting with crime prevention. The Committee's work only examines a small section of this spectrum but acknowledges the context in which its discussion lies.

Aboriginal offenders

- 3.72** The group that was raised the most frequently in submissions and in oral evidence as facing particular disadvantage as offenders are Aboriginal offenders. The experience of Aboriginal offenders with community based sentencing raises many issues including their ability to access various community based sentences and the appropriateness of some sentences, such as home detention, for Aboriginal offenders. The issues relating to Aboriginal offenders in rural and remote areas are particularly acute.
- 3.73** The overrepresentation of Aboriginal people in the prison population is a major and longstanding concern in NSW, as it is throughout Australia. As noted in paragraph 2.9, the national rate of imprisonment (per 100,000 adults) for Indigenous offenders was 1,957 while the rate for non-Indigenous prisoners was 118. The Committee was also advised that approximately 16% of offenders serving community based sentences in NSW are ATSI.¹⁴¹
- 3.74** Many submission makers argued for the inclusion of Aboriginal offenders as a specific focus of the Committee's Inquiry. The Public Defenders Office expressed this view with reference to the high rate of imprisonment of Aboriginal people:

If a particular area of focus were to be chosen, we would suggest that the needs of indigenous (ATSI) offenders require specific attention. The rate of overrepresentation of ATSI people in the criminal justice system, and especially in custody, has risen since the Wood Royal Commission's Report into Deaths in Custody. In 2003, the imprisonment rate of Aboriginal people was reported as being 16 times higher than the overall NSW rate. In 1991, when the Wood Royal Commission concluded, ATSI prisoners were just under 8 times more likely to be imprisoned than the general population. The Baker study also found that indigenous offenders as a whole are less likely to receive a non-custodial sentence than non-indigenous

¹⁴¹ Ms Ruis, Evidence, 6 June 2005, p6

offenders in the Local Court, although they are somewhat more likely to receive CSO, and less likely to receive periodic detention, CSO or a recognizance.

There are of course differences in indigenous patterns of offending which may account for some of the disproportion in the rate of offending (for example, indigenous offenders are more likely to commit personal violence offences, which are less likely to be considered suitable for community based sentencing), but we would suggest that significant developments could nevertheless be made in this area, especially by using community sentences instead of short prison terms of imprisonment.We would therefore exhort that increasing the availability and use of community sentences for indigenous offenders be considered a matter of the highest priority.¹⁴²

3.75 Magistrate Heilpern also emphasised the problem of Aboriginal overrepresentation in prisons and the role community based sentencing options could play:

I have not seen up-to-date statistics, but I think I can take it as read that there is an Aboriginal overrepresentation in rural communities, particularly in an isolated one such as this [Bega]. Certainly, in my time out west, there were days when the whole list—say at a town like Narromine or Warren or Nyngan or Bourke or Brewarrina—were only Aboriginal people; there were no other people on the list. There are courts on this circuit and out west where I have never had a white juvenile appear before me, only Aboriginal juveniles.

So the Aboriginal overrepresentation, if you can call it overrepresentation, is extreme. If we as a community are serious about reducing Aboriginal overrepresentation, then there should be most sentencing options where most Aboriginal people are being sentenced, as a percentage of their population. As an example, if say 70 per cent of matters at a court at say Moruya — and I am not saying that is what the figures are, but if they were — involve Aboriginal offenders, in my view that is where you ought to start increasing sentencing options. I would hope that there would be a research project developed to ask: Where are the greatest areas of Aboriginal overrepresentation? Those are the places where we need to start putting our pilots and our other courts.¹⁴³

3.76 The Western Aboriginal Legal Service described how community based sentencing can be beneficial for Aboriginal offenders because of the involvement of the community:

A holistic approach to sentencing is good practice. It is all the more important and necessary for Aboriginal communities due to their cultural norms of dealing with issues such as criminal justice, health, education and employment within their communities in an inclusive and holistic manner. Aboriginal people are disadvantaged for the lack of sentencing options in remote and rural communities. This need not be the case. It is well known that the community based order is far more cost effective than a custodial sentence, on many levels. However, more importantly for the indigenous people of Bourke and Brewarrina, they should be given the opportunity of addressing the issues and dealing with Aboriginal offenders from their community. Government must also allocate the resources to be community to meet the expectations that community based sentencing is a powerful tool for healing and empowerment for Aboriginal people, if given the allocation of resources (programs,

¹⁴² Submission 10, p6

¹⁴³ Magistrate Heilpern, Evidence, 28 June 2005, p39

training and skilled practitioners) needed to make community based sentences a success.

It is commonly known that incarceration does not rehabilitate offenders. However, there is some evidence that programs have an impact on offending behaviour. However, the most important factor of whether an offender continues to reoffend is the support from the local community and family. Support systems need to be in place for people who continually reoffend. For Aboriginal people these support systems come from within their own communities¹⁴⁴

- 3.77** Aboriginal women face particular difficulties within the justice system and accessing to community based sentencing options, as noted by the Sentencing Council in its examination of abolishing short prison sentences:

This group is over-represented in the prison population serving short sentences and it is suggested that non-custodial sentencing alternatives are not being utilised for Aboriginal women.¹⁴⁵

- 3.78** Ms Magrath, of the Probation and Parole Officer's Association also commented on short prison sentences noting that many people serving short prison sentence are Aboriginal:

In NSW about two-thirds or 67 per cent of inmates are serving short-term sentences. They cost about \$190 each a day. Because they are in gaol for less than six months they cannot access the programs that are available in custody because—I suppose it is quite ironic—they are not in gaol for long enough. So they go in, they are temporarily contained, they come out, nothing has changed so they reoffend. They just keep clicking through the turnstiles. This is the population that we most need to target. Many of them are Aboriginal. We have in NSW an embarrassingly large proportion of Aboriginal offenders, in particular Aboriginal women, in custody.¹⁴⁶

- 3.79** Several Inquiry participants drew the Committee's attention to the work of the Royal Commission into Aboriginal Deaths in Custody (RCADC) to support their call for the increased use of community based sentences for Aboriginal offenders. For example, Uniting Care NSW.ACT stated:

Uniting Care NSW.ACT also strongly believes that Aboriginal and Torres Strait Islander people are especially suitable for 'positive screening' in relation to community based sentences. We have already discussed the increasing ATSI prison population in New South Wales and remind the government of its commitments relating to the Royal Commission into Black Deaths in Custody. ATSI people are also likely to benefit from 'restorative' justice' measures due to their stronger community ties and the fact that these measures are consistent with the logic of customary law, being based on a concern to restore community relationships.¹⁴⁷

¹⁴⁴ Submission 43, pp1-2

¹⁴⁵ Abadee AR, 'Abolishing Prison Sentences of Six Months or Less', *Judicial Officer's Bulletin*, March 2005, Vol 17 No 2, p10

¹⁴⁶ Ms Magrath, Evidence, 30 August 2005, p24

¹⁴⁷ Submission 13, p7

- 3.80** Legal Aid noted the potential for community based sentencing to reduce the number of Aboriginal deaths in custody:

Providing community based sentencing options as a real alternative to imprisonment has great potential to reduce the number of deaths of indigenous people in custody, which remains a social justice problem of great concern despite the many years since the Royal Commission into Aboriginal Deaths in Custody and the action which resulted.¹⁴⁸

- 3.81** The Committee notes that the RCADC made a specific recommendation in relation to community based sentencing in rural and remote areas:

That adequate resources be made available to provide support by way of personnel and infrastructure as to ensure that non-custodial options which are made available by legislation are capable of implementation in practice. It is particularly important that such support be provided in rural and remote areas of significant Aboriginal population.¹⁴⁹

- 3.82** The Committee also notes that one example of a successful response to the high rate of incarceration of Aboriginal people, and an innovative approach to offender management, is the Yetta Dhinnakkal Correctional Centre, which the Committee visited during the Inquiry (paragraph 1.9). Yetta Dhinnakkal, which was opened in May 2000 as part of the Government's response to the Royal Commission on Aboriginal Deaths in Custody, targets first time young Aboriginal offenders (18-30 years old) through culturally relevant intensive case management. Yetta Dhinnakkal is a working farming property as well as an educational facility where inmates receive vocational training. Programs, including anger management, domestic violence, alcohol and other drug counselling are also offered. The lower than average re-offending rate amongst the offenders who have passed through the centre demonstrates the success of the initiative.

Recommendation 6

That the Government consider establishing new correctional centres based on the successful Yetta Dhinnakkal Correctional Centre model.

- 3.83** A significant issue facing Aboriginal offenders in relation to community based sentencing that was identified by Inquiry participants is that the eligibility criteria for some offences effectively bar them from participating. This issue was raised most significantly in relation to periodic detention (examined in Chapter 6) and home detention (examined in Chapter 7).
- 3.84** The Committee was also advised that the impact of the lack of availability of community based sentences in rural and remote areas had a significant impact on Aboriginal offenders. This issue is examined in relation to the availability of periodic detention (Chapter 6) and home detention (Chapter 7).

¹⁴⁸ Submission 31, p5

¹⁴⁹ Royal Commission into Aboriginal Deaths In Custody, Recommendation 112

- 3.85** The Committee was advised on several occasions that there are some offenders who, for various reasons, would prefer to be sentenced to a period of imprisonment than a community based sentence. This issue was raised most frequently in relation to Aboriginal offenders in the rural and remote areas the Committee visited in the context of community service orders. This issue is examined in Chapter 4.
- 3.86** Problems encountered by Aboriginal offenders undertaking bonds are examined in Chapter 5 and include issues relating to suspended sentences, a reluctance to appeal lengthy bonds and the impact of intensive policing. A further issue that had a particular impact on Aboriginal offenders in rural and remote areas concerns fines and drivers licence disqualification. This issue is examined in Chapter 9.
- 3.87** One further, overarching, issue that was raised concerned the number of Aboriginal staff within Community Offender Services, and the PPS in particular. It was argued that for the PPS to be more effective with Aboriginal offenders serving community based sentences Aboriginal staff need to be employed. For example, the Western Aboriginal Legal Service stated:

Probation and Parole need to recruit more aboriginal workers from the local community to supervise offenders. Training and support should be given to Aboriginal Probation and Parole officers.¹⁵⁰

- 3.88** The Committee was advised by Ms Magrath that there are few Aboriginal staff with in Community Offenders Services and that they are difficult to recruit:

... there are very few staff of ATSI background in Community Offender Services and this is despite the best efforts to recruit them. Maybe it is an unsavoury occupation to be a Probation and Parole officer, and maybe those people who are qualified to fulfil the role are attracted to other areas. In the past couple of years the introduction of the Aboriginal Client Service Officers who were mentioned earlier, that position has been introduced and seems to have been much more effective, working with Probation and Parole officers. As was mentioned earlier, they do not actually supervise themselves but they work with the officers, assisting the officers, making the links with the communities and in a sense educating the officers as well as participating in some of the group work we do. These positions are located in regional centres across the State and they provide support to all staff within the cluster. ...¹⁵¹

- 3.89** Ms Magrath also expressed the view that suitably trained non-Aboriginal staff could work very effectively with Aboriginal communities:

... we, from an association point of view, do not believe that necessarily Aboriginal staff are the answer, and that non-Aboriginal staff can and do work very effectively in communities when they are suitably qualified, suitably trained, suitably in tune with the communities they are working with. They can achieve a lot in working with those communities. ... I suppose the education is about knowing what is disrespectful and understanding and being aware of some of the cultural mores which operate so that when an offender fails to report ... and the officer's response is, "breach" ...But before we take that step we have a plethora of information about the particular

¹⁵⁰ Submission 43, p1

¹⁵¹ Ms Magrath, Evidence, 30 August 2005, p27

offender and ways of finding the offender because we know that Aunty Elsie lives at Taree even if the offender was living at Mount Druitt. So we need to get in touch with our Taree office and get them to go out and speak to Auntie Elsie or put the word out in the community, "Billy, come home" or "Give us a call, we can work it from here", rather than straight back to court and then when they are apprehended potentially gaol. We need to be doing everything we can to avoid that.¹⁵²

Offenders with intellectual disabilities or mental health issues¹⁵³

3.90 A number of submission makers and witnesses raised the difficulties faced by offenders with intellectual disabilities or mental health issues in accessing community based sentencing options. The difficulties relate to their ability to satisfy eligibility or suitability criteria and the lack of support services to assist them to comply with the requirements of community based sentencing options.

3.91 The Committee was advised that people with intellectual disabilities are overrepresented in the prison population compared to their prevalence in the community. In this regard the Committee notes the comments of Ms Susan Hayes, Associate Professor and Head of the Centre for Behavioural Sciences in the Discipline of Medicine at the University of Sydney:

People with intellectual disabilities are over-represented in the criminal justice system in every Western jurisdiction in which research has been conducted compared with the community prevalence of intellectual disability, which is estimated to be 1-3%. ... In New South Wales, recent figures indicate that about 19-20% of the prison population has an intellectual disability, an increase of nearly 8% since the late 1980s when research was first conducted.¹⁵⁴

3.92 The Public Defenders Office argued that offenders with mental health problems ought to be considered as part of the Inquiry because of their 'sheer prevalence' in the prisoner population:

In addition, the special needs of offenders with mental health problems ought to be considered, simply from the perspective of the sheer prevalence of these offenders – they have been estimated to constitute up to half of all prisoners.¹⁵⁵

3.93 While it is not clear as to the precise numbers of offenders with intellectual disabilities or mental health issues currently serving custodial sentences in NSW it is clear that their numbers

¹⁵² Ms Magrath, Evidence, 30 August 2005, p27

¹⁵³ This discussion does not include offenders who are dealt with under the *Mental Health Act 1990* (NSW), or who fall within s 32 of the *Mental Health (Criminal Procedure) Act 1990* (NSW) which provides a method of diversion for defendants who are suffering from a mental illness (but who are not mentally ill persons in terms of the *Mental Health Act 1990*), are developmentally disabled, or suffering from a mental condition for which treatment is available in a hospital. A magistrate may dismiss a charge and discharge the accused: into the care of a responsible person; or on condition that the accused attend a person or at a place specified by the magistrate for assessment of the accused persons mental condition or treatment or both or unconditionally.

¹⁵⁴ Hayes, S, 'A Review of Non-custodial Interventions with Offenders with Intellectual Disabilities', *Current Issues in Criminal Justice*, Vol 17 Number 1, p69

¹⁵⁵ Submission 10, p5

are significant. The Committee also notes that there are offenders with *undiagnosed* intellectual disabilities and mental illness.

3.94 Several submission makers expressed support for the advantages of community based sentences for this group of offenders. The Committee notes in particular the concerns expressed by several Inquiry participants about the experiences of this particularly vulnerable group of offenders in prison. Community based sentencing options would be particularly beneficial for offenders in this category for this reason alone.

3.95 The Committee was informed that while this group of offenders would particularly benefit from community based sentencing they face considerable difficulties accessing these options. The Committee examines issues in relation to specific sentencing options in the separate chapters of this report while general issues are examined below. The Department of Corrective Services summarised the situation as follows:

Offenders with *mental health* issues have difficulty accessing community-based sentencing options due to lack of mental health treatment facilities and, particularly, due to reluctance of mental health treatment providers to allow offenders to access services. In addition, such offenders have difficulty accessing stable accommodation and stable supported accommodation, which hinders assessments for eligibility for community-based sentencing options.

Intellectually disabled offenders have difficulty accessing community-based sentencing options due a major shortage of interventions to meet the criminogenic needs of such offenders. In addition, such offenders have difficulty accessing stable accommodation and stable supported accommodation, which hinders assessments for eligibility for community-based sentencing options. This sub-population is particularly needy in terms of resources to meet offending needs.¹⁵⁶

3.96 Ms Linda Rogers, with the Intellectual Disability Rights Service, noted the problems offenders with intellectual disabilities have in accessing community based sentencing:

Having an intellectual disability itself means that you are less likely, for example, to have the skills yourself to comply with an appointment or to see your parole officer or to turn up for your community service. You are less likely, for example, to have suitable accommodation for a home detention order. You are less likely to be seen to be able to comply with the conditions of a bond or bail conditions by the mere fact of your intellectual disability.¹⁵⁷

3.97 A major obstacle to this group of offenders successfully undertaking community based sentences is that they require support to meet the suitability criteria of some sentencing options and to comply with the conditions of others. The Committee notes that the discussion of offenders with intellectual disability or mental health issues needs to be seen in the context of the general lack of services and support for people in this group. In this regard the Public Defender, Mr Winch stated:

¹⁵⁶ Submission 30, pp16-17

¹⁵⁷ Ms Linda Rogers, Senior Solicitor, Intellectual Disability Rights Service, Evidence, 30 August 2005, p39

...there is a real need for more support for people suffering mental illnesses and disabilities in rural and remote areas, especially as they interact with the criminal justice system in a broader sense.¹⁵⁸

- 3.98** Mr Brown, the Deputy President of the Victims of Crime Assistance League, noted that if offenders are not given adequate support to undertake their community based sentence they are ‘doomed to fail’ and that this has a flow on effect in terms of the public perception of this form of sentencing:

There are certainly substantial disadvantages—not that I believe they cannot be overcome. Within our prison population we have a very high incidence of people who are either drug or alcohol dependent or who suffer from various forms of mental disability. By placing people under those circumstances into a community-based program, unless those people are completely and adequately supported you are dooming them to failure. By dooming them to failure, the community then looks at the system and says, “This has been a fat lot of use.”¹⁵⁹

- 3.99** Several suggestions were made in relation to making community based sentencing more appropriate and accessible for offenders with intellectual disabilities and mental health issues. NCOSS advocated that ‘... NSW policy and practice must be improved by supporting people with intellectual disability in a way that promotes and supports lawful conduct and by seeking alternatives to the criminal justice system for people with intellectual disabilities.’¹⁶⁰

- 3.100** Mr Winch advocated that community based sentences should be tailored to suit the needs of offenders suffering mental health issues, agreeing with the suggestion that legislation be changed to allow magistrates more discrepancy in what they put in community based sentencing orders:

...there is a need to expand the range and the style of community-based sentences in order to make them available to people suffering from mental illnesses and mental health issues. That is to do with tailoring them and individualising them rather than having the one style of order into which everybody has to fit. That is how I see it has to be dealt with: by allowing a range of individualised dispositions. In general, and it is based on anecdotal evidence, it seems to me that there is a fairly high level of unmet demand in relation to mental health services in regional areas and not just for people that are subject to community-based sentences.¹⁶¹

- 3.101** The Department of Corrective Services indicated that it saw little scope for creating greater access for offenders with mental health issues to community based sentencing options under the current legislative arrangements:

Under existing legislation, greater access to community-based options other than good behaviour bonds is unlikely. For example, intellectually disabled offenders are vulnerable in periodic detention and are therefore likely to be assessed as unsuitable

¹⁵⁸ Mr Paul Winch, Public Defender, NSW Public Defenders Office, Evidence, 30 August 2005, p31

¹⁵⁹ Mr Brown, Evidence, 1 September 2005, p5

¹⁶⁰ Submission 8, p5

¹⁶¹ Mr Winch, Evidence, 30 August 2005, p31

for this option. Similarly, mental illness is a barrier to successful completion of a community service order ...¹⁶²

- 3.102** The Intellectual Disability Rights Service suggested that the officers within Community Offender Services with specific training to work with offenders with an intellectual disability would be desirable:

Officers of Community Offender Services do not have the specialist knowledge and skills to work with offenders with an intellectual disability or to link them with disability services. There should be one officer in each Community Offender Services office (and analogous Juvenile Justice Community Service office) with this training. Additional funds should be given to Community Offenders Services to enable officers to have appropriate amounts of time to spend with offenders with an intellectual disability.¹⁶³

- 3.103** The Committee shares the concerns expressed to it about the experiences of offenders with intellectual disabilities or mental health issues in the criminal justice system and notes that appropriately supported community sentencing options would be beneficial.

- 3.104** The ability of offenders with intellectual disabilities or mental health issues to undertake community service work under a CSO is examined in Chapter 4. The requirement of home detention that an offender have a suitable residence and the way this impacts on offenders with intellectual disabilities or mental health issues is examined in Chapter 7.

- 3.105** The Committee notes that the NSW Statewide Community and Court Liaison Service, which commenced in March 2002, provides specialist mental health advice to 17 local courts. The service provides psychiatric expertise and advice to magistrates when people with mental illness first appear in court to assist the court in identifying the mentally ill or disordered charged with minor offences and diverting them to treatment in lieu of incarceration. The service also enhances the link between community based mental health services, the courts and correctional based mental health services.¹⁶⁴

- 3.106** Judge Price referred to the importance of the service and its expansion in his submission:

A full time Mental Health Liaison Service operates in eight metropolitan courts and nine regional courts. The importance of this service is underlined by the fact that in 2002 some 60% of those persons in custody who were examined by Mental Health Liaison Officers were suffering from mental illness. About 10% were directed from custody and recommendations for treatment were made for others who stayed in remand centres. An increased availability of Mental Health Liaison Officers in regional areas would more readily identify offenders suffering from a mental illness at an early stage and enable magistrates to divert offenders to appropriate treatment. The Service which is provided by Justice Health may be expanded to other regional areas. A

¹⁶² Submission 30, p17

¹⁶³ Submission 24, Intellectual Disability Rights Service, p5

¹⁶⁴ www.justicehealth.nsw.gov.au/services/mental_health.html (accessed 20 March 2006). The service is provided at the following local courts: Blacktown, Burwood, Campbelltown, Central Local, Coffs Harbour, Dubbo, Gosford, Lismore, Liverpool, Manly, Nowra, Parramatta, Penrith, Sutherland, Tamworth, Wagga, Wyong.

‘telehealth’ unit is to be installed at Griffith courthouse to provide an audiovisual link to mental health experts.¹⁶⁵

- 3.107** The Committee acknowledges the importance of the service and concurs with Judge Price’s suggestion that increasing the availability of the service in regional areas would assist in diverting appropriate offenders into treatment. The Committee recommends that the Minister for Justice expand the NSW Statewide Community and Court Liaison Service through the use of ‘telehealth’, ‘webcam’ technology, or other means, to additional courts in rural and remote NSW.

Recommendation 7

That the Minister for Justice expand the NSW Statewide Community and Court Liaison Service through the use of ‘telehealth’, ‘webcam’ technology, or other means, to additional courts in rural and remote New South Wales.

Female offenders

- 3.108** A further group of offenders facing particular disadvantage are female offenders. Female offenders make up approximately 7% of all people in full-time custody in NSW.¹⁶⁶ There has been a 41.6% increase in the proportion of female inmates between 1995 and 2000.¹⁶⁷
- 3.109** The Office for Women noted that ‘... women offenders in general are a disadvantaged group’ and expressed concern about the increase in the number of women prisoners and the rate at which women are being incarcerated.¹⁶⁸
- 3.110** Dr Richard Matthews, the Chief Executive of Justice Health and the A/Deputy Director General for Strategic Development with NSW Health described the characteristics of female inmates and their typical offending profile:

Women make up about 6.2 per cent of the prison population. They are in every way a much more damaged, much more ill group than the men are—very high levels of mental illness; very, very high levels of substance abuse and dependence; very high levels of both physical and sexual abuse as children; and perhaps more abnormalities—10 times higher than the community rates. Hepatitis C positivity is about 60 per cent for women compared to about 1 per cent of adults in the community. In every possible parameter you can think of women who end up in prison are a very sick, very damaged group. ...

I think that particular picture would be painted in every other State and most Western countries. Traditionally, although there has been some change, women commit different kinds of crime to men. Their crimes are mostly those of mental illness and

¹⁶⁵ Submission 7, p6

¹⁶⁶ At 26 June 2005, the Department held 628 women in full-time custody out of a total of 9010 prisoners: Department of Corrective Services, *Annual Report 2004/2005*, p142

¹⁶⁷ Submission 48, Minister for Women, p7

¹⁶⁸ Submission 48, p7

drug dependence; also personality disorder, because they often have quite damaged personalities because of the things that happen to them. Traditionally, they have come to gaol for more minor offences and they have come on multiple occasions for multiple relatively short periods. You do not get many gangsters, armed robbers, et cetera amongst the female population. They are crimes of desperation, in the main.¹⁶⁹

3.111 Uniting Care NSW.ACT noted the problems faced by parents and carers (who are largely women) in detention and the benefits of community based sentencing:

Parents and carers face particular problems in detention, and it is widely agreed that outcomes for children of detainees are severely hampered. Around 60% of women in prison are parents, with 30-40% being sole carers (Beyond Bars 2004b, p4). Alternatives to custody which allow for families to stay together would be beneficial for children of prisoners, as well as for those attempting to address their offending behaviour.¹⁷⁰

3.112 The Country Women's Association of NSW highlighted the benefits of community based sentences for female offenders:

In the case of women offenders, depending on the severity of the offence of courts, any of the alternative sentences would surely be more beneficial to a family as well as to the individual concerned, especially if she is still in a nurturing role. A custodial sentence for women living in rural or remote areas often means the splitting of the family and sometimes even the children becoming dependent on DOCS. The long terms prognosis for such children and society is not a positive one, based on past history.¹⁷¹

3.113 The Committee heard that female offenders face particular barriers to accessing community based sentences even though such sentences would be particularly beneficial to them in relation to the types of offences for which they are convicted and their family responsibilities. The Office for Women summarised the issue as follows:

It is important that the characteristics of women prisoners be taken into account in consideration of community based sentencing options. Most women commit non-violent offences, generally drug related, including property crimes committed to support drug addiction. A significant proportion have mental health issues and are in need of specialist treatment and support and, as outlined above, there is a direct correlation between women's history of physical and sexual abuse, drug use and criminal activity. Yet the availability of community based sentencing options may be effectively denied to women because of an absence of suitable work, alternative child care arrangements are not available, or public transport is inaccessible.¹⁷²

3.114 Issues raised in relation to female offenders and community based sentencing mainly concern the participation rate of female offenders. The low participation rate of female offenders in periodic detention is examined in Chapter 6. The implications of the lack of home detention

¹⁶⁹ Dr Richard Matthews, A/Deputy Director General for Strategic Development, NSW Health, Evidence, 27 September 2005, p5

¹⁷⁰ Submission 13, p7

¹⁷¹ Submission 21, Country Women's Association of NSW, p3

¹⁷² Submission 48, pp7-8

in rural and remote areas for female offenders, including Aboriginal women, and difficulties they face in accessing home detention in general are examined in Chapter 7.

- 3.115** The Committee notes that there are some alternative sentencing models already used by the Department of Corrective Services that specifically adapt elements of various community based options to suit offenders with complex special needs. For example, Ms McComish advised the Committee about Biyani Cottage which provides intensive case management for a small number of female offenders with a dual diagnosis:

... there are some alternative models for community-based sentences—there is certainly at least one—which we have established, which is a diversion for women with dual diagnoses. It is called Biyani Cottage and it is attached to the Long Bay complex. It is not part of a prison; it is not gazetted as a correctional centre but it is on the complex at Long Bay. It is essentially for women who are offenders who have both mental health and/or intellectual disability and drug and alcohol issues, who are greatly overrepresented, particularly in our remand population. They can be sentenced by the court under a bond to, as a condition of the bond, reside at Biyani. It is also used for women in danger of being revoked on breach of parole or, indeed, as preparation for parole.

Community Offender Services runs it It is 24-hour seven-day a week accommodation. It is a very small domestic-style cottage that can only take five women at a time. They have highly complex needs and we apply very intensive case management. The process is to both do a very thorough assessment and case plan and link it in with appropriate rehabilitation services or supported accommodation in the community and in that way divert these people who essentially have major health and social deficits into the community. The average stay is under three months.¹⁷³

- 3.116** The Committee supports the Department in developing models such as Biyani Cottage that cater for the needs of disadvantaged offenders, particularly those facing dual diagnosis.

Other offenders

- 3.117** Submissions and oral evidence identified a number of other disadvantaged groups that face particular issues in relation to the criminal justice system and sentencing. The Committee has canvassed those groups briefly below.

Culturally and linguistically diverse offenders

- 3.118** Another group that can be described as ‘disadvantaged’ in relation to the justice system are culturally and linguistically diverse (CALD) offenders. The Community Relations Commission (CRC) advised the Committee that comprehensive data on the ethnicity of offenders, whether serving custodial or non-custodial sentences, is not available.¹⁷⁴

¹⁷³ Ms McComish, Evidence, 30 August 2005, p5

¹⁷⁴ Mr Stepan Kerkyasharian, Evidence, 1 September 2005, p51 and answers to questions on notice taken during evidence 1 September 2005, Mr Stepan Kerkyasharian AM, Chairperson, NSW Community Relations Commission, Question 1, p1

- 3.119** It does appear, however, that a substantial number of offenders are from non-English speaking backgrounds. The Department of Corrective Services has advised that ‘... the number of offenders from non-English speaking countries on community based orders for the period 1 September 2004 to 30 August 2005 was 8,303.
- 3.120** The main issues raised in relation to CALD offenders and community based sentences are that there is a lack of awareness of community based sentencing options among CALD offenders and that their ability to access appropriate services to support them undertaking community sentencing is limited.
- 3.121** The CRC highlighted the lack of awareness of community based sentencing options among ethnic communities in rural and remote areas, as well as the lack of appropriate support services:

The Commission is aware that there is little understanding of community based sentencing options amongst ethnic communities living in rural and regional NSW. Furthermore, members of ethnic communities living in rural and remote communities can face greater disadvantage due to isolation and the lack of culturally and linguistically appropriate support services in their local area.¹⁷⁵

- 3.122** With regard to services, the CRC also noted that ‘there appears to be few culturally specific drug and alcohol programs to specifically help people on community based sentences from language backgrounds other than English.’¹⁷⁶ In addition, drug and alcohol programs for community based offenders are often not culturally appropriate for people from non-English speaking backgrounds.¹⁷⁷
- 3.123** The Office for Women also noted that CALD offenders may not be aware of the availability of community based sentencing options and CALD women in particular may face difficulties accessing appropriate support services:

The Office for Women is concerned that there may be little understanding of the availability of community based sentencing options amongst communities which are culturally and linguistically diverse. For women of culturally and linguistically diverse backgrounds, difficulties may be exacerbated if they cannot understand their rights or obligations in seeking support services whether as victims of crime or offenders. Further, support services may not be available or may not be delivered in ways which are culturally and linguistically appropriate. Issues for migrant and refugee women, particularly those already suffering from torture or trauma, need to be taken into consideration in the extension of community based sentencing options.¹⁷⁸

¹⁷⁵ Submission 14, Community Relations Commission, p1

¹⁷⁶ Answers to questions on notice taken during evidence 1 September 2005, Mr Kerkyasharian, Question 12, p1

¹⁷⁷ Answers to questions on notice taken during evidence 1 September 2005, Mr Kerkyasharian, Question 12, p2

¹⁷⁸ Submission 48, p8

- 3.124** The Department of Corrective Services acknowledged that ‘culturally and linguistically diverse offenders may experience problems with accessing appropriate interventions in some areas of NSW.’¹⁷⁹ In addition, the Probation and Parole Officers’ Association stated:

... there is a need for offender management programs that are targeted and designed to address the cultural and linguistic requirements of certain diverse groups.¹⁸⁰

- 3.125** The CRC proposed two recommendations to overcome the difficulties faced by CALD offenders:

The Commission recommends, therefore, that future initiatives in community based sentencing are accompanied by a comprehensive communication strategy, which includes a range of information channels accessed by people from language backgrounds other than English living in regional and rural areas.

The Commission recommends also that any future community based sentencing initiatives in remote areas should be implemented in a way that gives due consideration to the language, cultural and religious background of the offender.¹⁸¹

- 3.126** The Public Defenders Office noted that investment in resources to assist CALD offenders is required:

There will be additional staff requirements, for example, translators may be required for dealing with offenders from culturally and linguistically diverse (CALD) backgrounds, but it should be remembered that investment of such resources will ultimately save money due to reduced strain on the prison system.¹⁸²

Sole parents

- 3.127** A number of submission makers identified sole parents as a particular disadvantaged group that would benefit from community based sentencing. For example, the Greater Taree City Council stated:

With the increasing number of sole parents, in less expensive regional areas, community based sentencing options provide suitably flexible means of punishment without the major disruption, of incarceration, to children.¹⁸³

- 3.128** In addition, the Bankstown City Council noted that the family impact of imprisonment is most felt in sole parent situations:

The Inquiry’s discussion paper refers to a number of groups which might be described as ‘disadvantaged populations’. It is suggested that this list might also include sole parent offenders as a particular category. Clearly the family impacts associated with this group of offenders can be extremely onerous, with children bearing a significant burden when standard incarceration options are favoured. It is within these single-

¹⁷⁹ Submission 30, p17

¹⁸⁰ Submission 41, p6

¹⁸¹ Submission 14, p1

¹⁸² Submission 10, p6

¹⁸³ Submission 22, Greater Taree City Council, p2

parent situations that the impact of imprisonment is perhaps most felt in terms of impact on children, carers, and government and community support agencies.¹⁸⁴

- 3.129** The Committee notes that as the majority of sole parents are female, the examination of female offenders in the context of periodic detention (Chapter 6) and home detention (Chapter 7) is relevant to this group of offenders.

Offenders with other accommodation difficulties

- 3.130** Offenders with accommodation difficulties, such as the homeless, were raised as a further disadvantaged group that has difficulty accessing community based sentencing options. For example, the Shopfront Youth Legal Service stated:

We would like to see offenders who are homeless added to the list as a separate category. Homelessness is usually caused by factors beyond the individual's control. For young people, abuse, neglect and family dysfunction are a major cause of homelessness. Homeless people often miss out on community based sentencing options because of actual or perceived instability. They are often assessed as unsuitable for community service and periodic detention. Home detention is not an option for those without a stable residence. In the early stages of proceedings, homeless people are less likely to be released on bail than those with a fixed address. This has a follow on effect and they are more likely to receive full time custodial sentences.¹⁸⁵

- 3.131** Ms Alison Churchill, the Executive Officer of the Community Restorative Centre, noted that homeless people do not receive community based sentences and also stated:

Most courts recognise that most community based sentences require you to be able to follow somebody up, monitor them and get in contact with them if they fail to attend. Without a doubt, homeless people are put on remand and we know that if people are remanded they are more likely to receive a custodial sentence.¹⁸⁶

- 3.132** The Probation and Parole Officers' Association told the Committee that they try to link people without suitable accommodation with appropriate housing, although anecdotally this is difficult due to a lack of available public housing. The Department of Ageing Disability and Home Care also cited resource issues with providing adequate accommodation for people with a disability. The evidence received by the Committee on people, with a disability in relation to community service orders, points to a lack of services and supports for these people and a lack of resources in providing these services.

- 3.133** The Committee examines the requirement that offenders have a suitable residence in order to undertake home detention in Chapter 7.

¹⁸⁴ Submission 4, p3

¹⁸⁵ Submission 25, p5

¹⁸⁶ Ms Alison Churchill, Executive Officer, Community Restorative Centre, Evidence, 31 August 2005, p37

Older offenders

- 3.134** The Committee received sparse information about older offenders, but notes the cautionary comment of the Department of Corrective Services that while at present elderly offenders are few, their numbers are likely to rise:

These offenders are few in number but with the ageing of the general population, numbers in this category are expected to increase and certainly would be much better managed in the community under appropriate levels of supervision than taking up beds in a prison hospital.¹⁸⁷

- 3.135** The Department of Corrective Services also noted that in some cases elderly offenders may be sent to gaol for the wrong reason, including the unavailability of some community based sentences in remote areas:

Older/elderly offenders are at times sent to prison because of the difficulty in finding appropriate community service order work for someone who is physically frail, for whom transport can be a problem and, if from a remote area, for whom home detention is not available.¹⁸⁸

- 3.136** The Committee did not receive sufficient information to examine this group of offenders in detail. It is apparent, however, that in the near future the particular needs of this group of offenders will become increasingly important.

Juvenile offenders

- 3.137** The Committee notes that while it received some submissions and oral evidence regarding offenders under the age of 18, its terms of reference relate to community based sentences that are available to adults. The Committee has therefore not examined the particular issues faced by juvenile offenders in this report and mentions sentencing in relation to juvenile offenders only as it arises incidentally in the discussion of adult offenders.

Increasing access to community based sentencing for disadvantaged groups

- 3.138** It is clear from the evidence presented to the Committee that the lack of availability of the full range of community sentencing options in all parts of NSW impacts disproportionately on certain groups within the overall offender population. Particular concerns have been raised in relation to Aboriginal offenders, offenders with intellectual disabilities or mental health issues and female offenders.
- 3.139** The Committee expresses the general opinion that, where possible, community based sentencing options should be tailored to meet the needs of disadvantaged offenders, for whom these sentencing options would have the most significant benefits.
- 3.140** The Committee notes that the eligibility criteria for some community based sentences unfairly exclude some offenders. These issues are examined in detail in the separate chapters of this report dealing with each of the community based sentences under review.

¹⁸⁷ Submission 30, p17

¹⁸⁸ Submission 30, p17

- 3.141** For disadvantaged people, the support required to undertake community based sentences is provided by numerous agencies and the improvement of support services requires a co-ordinated multi-agency approach. These supports include services for housing and health, and more intensive case management from Probation and Parole Officers.
- 3.142** The Committee recommends that the Government examine ways that a multi-agency approach could be taken to assist disadvantaged people to access community based sentencing options and to maximise the successful completion of such sentences.
- 3.143** The Committee notes that, as stated by the Shopfront Youth Legal Centre, while extending community based sentencing options to disadvantaged groups would be costly, savings in other areas could be made:

Clearly there will be extra costs involved in tailoring community based sentencing options to disadvantaged groups. The level of supervision and support will need to be more intensive and, in some cases, more specialised. This will demand extra personnel, some with specialist skills or qualifications. However, this extra expenditure would no doubt lead to cost savings from fewer breach proceedings and fewer full-time custodial sentences being imposed.¹⁸⁹

Recommendation 8

That the Government examine ways that a multi-agency approach could assist disadvantaged offenders to access community based sentencing options and to maximise the successful completion of such sentences and the rehabilitation of the offender.

- 3.144** The Committee is of the view that the adequacy of knowledge within Community Offender Service regarding the needs of disadvantaged offenders, particularly, offenders with intellectual disabilities or mental health issues should be assessed. Consideration should be given to whether specialist officers should be employed, or special training delivered to its officers, to meet this area of need.
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Recommendation 9

That the Minister for Justice examine the adequacy of knowledge within the Community Offenders Service division of the Department of Corrective Services regarding the needs of disadvantaged offenders, particularly offenders with intellectual disabilities or mental health issues, and give consideration to employing specialist officers and the delivery of special training to its officers to meet this area of need.

- 3.145** The Committee notes that CALD offenders need to be taken into account in the context of expanding the availability of community based sentencing options, or tailoring them for disadvantaged groups. The Committee agrees that information about community based sentencing options in various community languages is essential. The Committee concurs with the recommendations of the Community Relations Commission in this regard.

¹⁸⁹ Submission 25, p6

Recommendation 10

That future initiatives in community based sentencing be accompanied by a comprehensive communication strategy, which includes a range of information channels accessed by people from language backgrounds other than English living in rural and remote areas. That future community based sentencing initiatives in remote areas should be implemented in a way that gives due consideration to the linguistic, cultural and religious background of offenders.

- 3.146** The Committee also notes the increasing needs of older offenders and recommends that the Department of Corrective Services develop a strategy to identify and cater for the needs of the growing older offender population in relation to access to and support to undertake community based sentencing.
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Recommendation 11

That the Department of Corrective Services develop a strategy to identify and cater for the needs of the growing elderly population in relation to access to, and support to undertake, community based sentences.

- 3.147** In its Discussion Paper, the Committee invited views on whether ‘disadvantage’ should be taken into account by the courts as a factor in sentencing. The Public Defenders Office advised that the requirement that the court take into account relevant aggravating and mitigating factors when sentencing already provides a basis for ‘disadvantage’ to be considered:

There is arguably already power for the courts to take these factors into account pursuant to s21A(1)(c) of the *Crimes (Sentencing Procedure) Act 1999*, which provides that in determining the appropriate sentence for an offence, the court is to take into account, in addition to the aggravating and mitigating factors that are relevant and known to the court, ‘any other objective or subjective factor that affects the relative seriousness of the offence’.¹⁹⁰

- 3.148** Nonetheless, the Public Defenders Office expressed support for disadvantage to be explicitly identified as a relevant factor:

We would however, support stating explicitly that the disadvantage of the offender is a relevant fact for the purposes of sentencing, and especially, when considering a community based sentence, thereby recognising the fact that disadvantaged groups will generally find gaol more onerous and it may therefore be appropriate to reduce their sentence accordingly.¹⁹¹

¹⁹⁰ Submission 10, p7

¹⁹¹ Submission 10, p7

- 3.149** In addition, the Shopfront Youth Legal Centre stated that '[w]e believe that social or economic disadvantage should be taken into account when assessing an offender, with a focus on overcoming the barriers created by that disadvantage.'¹⁹²
- 3.150** In the absence of further information supporting the need for social or economic disadvantage to be specifically taken into account when sentencing, the Committee is satisfied that the requirement that the sentencing officer take into account aggravating and mitigating factors allows the flexibility for the court to consider any disadvantages faced by the offender as a result of membership of a particular group.

¹⁹² Submission 25, p7

Chapter 4 Community Service Orders

This Chapter identifies the barriers to the availability of Community Service Order placements in rural and remote areas and considers ways to overcome those barriers. Other issues, including the type of work undertaken on a placement and offenders' access to treatment and other programs while undertaking a Community Service Order, are also considered.

Overview

What is a community service order?

- 4.1** Any person who has committed an offence punishable by imprisonment may instead be sentenced to a Community Service Order (CSO).¹⁹³ A court can order an offender to perform up to 500 hours of unpaid work to benefit the community.
- 4.2** With regard to the hours of work, a sliding scale operates depending on the maximum term of imprisonment for the offence.¹⁹⁴ An offender is required to complete the required number of hours within the relevant maximum period – generally, 12 months for orders of less than 300 hours and 18 months for orders of 300 or more.¹⁹⁵
- 4.3** The court may also impose conditions on the CSO requiring the offender to participate in education, training or group work programs and may require an offender to undergo testing or assessment for alcohol or drug use.¹⁹⁶ The programs are designed to enhance the offender's potential to lead a law-abiding lifestyle.

¹⁹³ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 8. The *Children (Community Services Order) Act 1987* (NSW) deals with persons under the age of 18. CSOs are linked to imprisonment only to the extent that they may be imposed for any offence for which imprisonment is an available penalty. They are not a direct alternative to imprisonment in the way that periodic or home detention may be used. Two exceptions apply to the rule that a CSO can only be made where the relevant offence carries a penalty of imprisonment. These exceptions relate to the offence of offensive language and where fine defaulters are unable to pay: *Summary Offences Act 1988* (NSW), s 4A(3) and *Fines Act 1996* (NSW), s 58(1) and ss 78-86.

¹⁹⁴ *Crimes (Sentencing Procedure) Regulation 2005*, cl 22 provides that the prescribed number of hours is 100 for offences for which the maximum term of imprisonment does not exceed six months; or 200 for offences for which the maximum term of imprisonment exceeds six months but not one year; or 500 for offences for which the maximum term of imprisonment provided by law exceeds one year.

¹⁹⁵ *Crimes (Administration of Sentences) Act 1999* (NSW), s 107

¹⁹⁶ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 90

Community service order work

- 4.4 Offenders serving CSOs perform around \$12 million worth of unpaid community work for 1,600 non-profit organisations.¹⁹⁷ Placements for offenders serving CSOs are mainly provided by community organisations and local councils in liaison with the CSO organiser from the local Probation and Parole Office. While not excluded, very few private businesses provide CSO placements due to the requirement that work be done for the benefit of the community and not normally be done by a paid employee. The potential for greater involvement of local businesses is discussed at 4.114-4.118.
- 4.5 The work undertaken by an offender on a CSO must benefit the community. In performing the work, the offender cannot take the place of any other person who would 'otherwise be employed in that work as a regular employee'.¹⁹⁸
- 4.6 The type of work undertaken during a CSO placement may range from unskilled through to skilled or professional work.¹⁹⁹ The Committee was advised, however, that most placements offer work of a manual nature, such as cleaning and maintaining parks and gardens. As far as is practicable, community service work should not conflict with an offender's religious beliefs, employment or attendance at any educational establishment.²⁰⁰
- 4.7 The Committee received evidence regarding the limited nature of the work available to offenders undertaking CSOs in rural and remote areas, discussed at paragraphs 4.127-4.131.
- 4.8 Information regarding occupational health and safety (OH&S) is provided to all offenders undertaking a CSO at an induction session routinely held at Corrective Services District Offices. The work location and the type of work to be undertaken determines the nature of the OH&S training. The Department of Corrective Services advised that 'a video and standardised operating procedures covering various work undertaken by offenders have been developed and are used in District Offices.'²⁰¹ An agency offering a CSO placement is asked to nominate a person to supervise the offender at the work site. Supervisors are responsible for providing additional specific on-site OH&S training, ensuring equipment is in working order and recording the offender's attendance.²⁰²
- 4.9 All workplaces in NSW are required to comply with the OH&S legislation.²⁰³ However, it is the NSW Government (the Crown) that is liable for any loss or damage caused by an offender

¹⁹⁷ Department of Corrective Services website:
www.dcs.nsw.gov.au/offender_management/offender_management_in_the_community/index.asp#service_orders (accessed 1 March 2005)

¹⁹⁸ *Crimes (Administration of Sentences) Act 1993* (NSW), s 119(1)

¹⁹⁹ NSW Probation & Parole Service, *Community Offender Services Policy and Procedure Manual*, Oct 2004, para 1.7.2

²⁰⁰ *Crimes (Administration of Sentences) Act 1999* (NSW), s 119(2)

²⁰¹ Answers to questions on notice taken during evidence 30 August 2005, Ms Catriona McComish, Senior Assistant Commissioner, Department of Corrective Services, 4 October 2005, Question 2, p2

²⁰² Answers to questions on notice taken during evidence 30 August 2005, Ms McComish, Question 2, p2

²⁰³ *Occupational Health and Safety Act 2000* (NSW) and Occupational Health and Safety Regulation, 2001

or other relevant person engaged in approved CSO work, and for any injuries suffered by a person while performing such tasks.²⁰⁴ Despite this, the Committee was advised that OH&S and public liability insurance concerns were a barrier to many agencies offering CSO placements. This is discussed further at paragraphs 4.41–4.54.

Participation and compliance

- 4.10** In 2004-05, 4,631 offenders were supervised on CSOs, an increase of almost 6% on the previous year. However, the Committee notes that the number of offenders supervised on CSOs had decreased each year for the preceding three years.

Table 4.1 Participation and community service orders²⁰⁵

	2000/01	2001/02	2002/03	2003/04	2004/05
Number supervised	5,225	4,632	4,409	4,375	4,631
% change	-	-11.3%	-4.8%	-0.8%	+5.8%

- 4.11** BOCSAR statistics for ‘Penalty for principle offence 2004’ in the NSW Local Court show that CSOs were used on 4,637 occasions, 1,711 (37%) of these for road traffic and motor vehicle regulatory offences, 770 (17%) for acts intended to cause injury and 540 (12%) for deception and related offences.²⁰⁶
- 4.12** In its analysis of successful completion rates for supervised sentencing options, the Judicial Commission identified that 76.5% of CSOs were successfully completed in 2003-2004. The median length of a CSO was 12 months and ‘little or no difference was observed in the median length of supervised community-based orders and successful completion or revocation of orders.’²⁰⁷ Offenders who successfully completed a CSO had a significantly higher median age than those who had their order revoked.²⁰⁸
- 4.13** If an offender fails, without reasonable excuse, to comply with the terms of a CSO the offender’s assigned officer (generally, their Probation and Parole officer) can apply to the court to have the CSO revoked.²⁰⁹ An *offender* can also apply to have the CSO revoked on the grounds that circumstances have changed since the order was made and it would ‘be in the interests of justice to revoke the order’.²¹⁰ Revocation of the order empowers the court to sentence the offender as if the CSO had never been made.²¹¹

²⁰⁴ *Crimes (Administration of Sentences) Act 1993* (NSW), ss 120-121

²⁰⁵ Department of Corrective Services, *Annual Report 2004-05*, p34

²⁰⁶ NSW Bureau of Crime Statistics and Research *New South Wales Criminal Courts Statistics 2004*, Attorney General’s Department, July 2005, Table 1.7, pp25-27

²⁰⁷ Potas I, Eyland S and Munro J, ‘Successful completion rates for supervised sentencing options’ (2005) 33 *Sentencing Trends & Issues*, Judicial Commission of New South Wales, p8

²⁰⁸ Potas, Eyland and Munro, ‘Successful completion rates for supervised sentencing options’, p12

²⁰⁹ *Crimes (Administration of Sentences) Act 1999*, s 115

²¹⁰ *Crimes (Administration of Sentences) Act 1999*, s 115

²¹¹ *Crimes (Administration of Sentences) Act 1999* (NSW), s 115

4.14 Probation and Parole Service (PPS) staff from Glen Innes and Inverell described how a breach of a CSO might typically occur and the subsequent court action:

In Inverell the police have a very low breach rate. Most of the typical breaches are where the client disappears, loses contact with the service or there is a further offence, which brings them back to court.²¹²

The bottom line in terms of breaching is that if a person does not work for whatever reason, a court document is raised at the local office and laid at the Local Court. The court lists it for hearing. At that stage it is not a warrant; it is a request, a court notice to attend. The person then attends and gives their side of the case and the magistrate will decide to resolve it at that time or adjourn it to allow the person the opportunity to finish. ... They would only come to [the police] at the endpoint if the person had not been found. To find the person the police have to become involved.²¹³

Eligibility and suitability

4.15 There are no specific eligibility criteria for CSOs in the legislation. However, as previously noted, a court can only order a CSO for those offences that would attract a sentence of imprisonment. The Committee also notes that, as with all sentences, the court must take into account aggravating and mitigating factors (as discussed in Chapter 2).

4.16 Before sentencing an offender to undertake a CSO, the court must be satisfied that:

- the offender is a *suitable* person for community service work
- it is appropriate in all of the circumstances that the offender be required to perform community service work
- arrangements exist in the area the offender resides or intends to reside for the offender to perform community service work
- community service work can be provided.²¹⁴

4.17 Before sentencing, the court *may* refer the offender for assessment as to his or her suitability for community service work.²¹⁵ These assessment reports are provided by the PPS and are commonly known as 'pre-sentence reports'. When assessing suitability for a CSO, the PPS is required to investigate and report to the court on the matters listed above.²¹⁶

4.18 A court may, for any reason it considers sufficient, *decline* to make a community service order despite the contents of an assessment report. However, the court is *not permitted* to make an order for a CSO if the assessment report finds the offender to be unsuitable for such a

²¹² Mr Michael Gooda, District Manager, Community Offender Services, Probation and Parole Service, Evidence, 14 June 2005, p29

²¹³ Mr William Flanagan, District Manager, Glen Innes, Probation and Parole Service, Evidence, 14 June 2005, p29

²¹⁴ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 86

²¹⁵ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 88

²¹⁶ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 89

sentence.²¹⁷ The Committee heard evidence regarding the role of the PPS in assessing suitability for CSOs, as discussed at paragraphs 4.120–4.126.

- 4.19** The Committee notes that, unlike some other community based sentencing options, an offender’s antecedents are not an automatic exclusion to obtaining a CSO but rather each case is decided on its merits. Judge Derek Price, Chief Magistrate of NSW, provided the Committee with an example of an offender who was considered suitable for a CSO despite having previously served a term of imprisonment:

Only a week ago I had somebody who had only been released about 15 months ago from a full-time term of imprisonment of six months. He was back before me for social security fraud and the pre-sentence report was extremely positive about what effect that term of imprisonment had had on him. It was very positive about the prospects of rehabilitation. That offender received a community service order. So it does not disentitle. Every case depends on its own set of circumstances.²¹⁸

- 4.20** Mr Christopher Costas, Area Manager of Community Offender Services at Queanbeyan, also advised the Committee that an offender’s previous imprisonment “is of interest to us ... but of more interest to us is how they have performed if they have been on previous community supervision ... that is a better indicator for us in making recommendations than a criminal record in itself.”²¹⁹

Availability of community service orders

- 4.21** The Committee heard evidence from PPS staff, magistrates and representatives of local councils confirming that CSOs are not uniformly available across the state. The main reason identified for CSOs not being available is the lack of work placements in smaller communities in rural and remote areas:

It also depends greatly on the availability of work, because unfortunately in some locations if you do not have a community service agency that can provide work you cannot assess anyone as suitable.²²⁰

At the last I heard, for example, at Bermagui there was no community service work available because they did not have any sites to have people go to. That is a big sentencing option that is removed.²²¹

There have been occasions when we have taken on community service order participants in our outlying villages such as Ashford. So, we do have that capacity but our ability to provide them in the outlying villages is significantly diminished.²²²

²¹⁷ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 86(3) and (4)

²¹⁸ Judge Price, Evidence, 6 June 2005, p35

²¹⁹ Mr Christopher Costas, Area Manager, Community Offender Services, Queanbeyan, Probation and Parole Service, Evidence, 28 June 2005, p22

²²⁰ Mr Michael Neville, District Manager, Griffith, Probation and Parole Service, Evidence, 27 June 2005, p25

²²¹ Magistrate Heilpern, Evidence, 28 June 2005, p41

²²² Mr Paul Henry, General Manager, Inverell Shire Council, Evidence, 14 June 2005, p7

- 4.22** The Committee notes that, in its 2004 report on promoting consistency in sentencing in the Local Court, the NSW Sentencing Council stated that ‘a lack of available work is frequently reported in assessment reports as a factor limiting the suitability of a Community Service Order’.²²³
- 4.23** The Committee was also advised that in areas where some placements are available it may take an offender much longer to complete a CSO. For example, Mr Flanagan the District Manager of the Glen Innes Probation and Parole Office stated:
- What we tend to do is if they fit the criteria we would tend to take them on. What it means for them practically though is that it takes longer to satisfy the court order. If we have two agencies instead of ten, people queue up and work through the hours. That may be an injustice to the client because it stretches it out. We have the capacity to extend the order time.²²⁴
- 4.24** During the Inquiry, several witnesses suggested that the number of CSO placements appear to have declined in recent years. According to the Principal Solicitor of the Western Aboriginal Legal Service, Mr Richard Davies, ‘community service orders do not seem to be as readily used as they used to be...’²²⁵ The District Manager of the Inverell Probation and Parole Office, Mr Michael Gooda also noted an ‘attrition of agencies.’²²⁶
- 4.25** Factors identified as influencing the availability of CSOs include the capacity of organisations to provide supervision, OH&S and public liability concerns and community reluctance to participate in the CSO scheme. These factors are considered in more detail at paragraphs 4.41–4.54.

Advantages and disadvantages of community service orders

- 4.26** The advantages and disadvantages of CSOs identified by Inquiry participants mirror those identified for community based sentencing options generally (set out in Chapter 2). The general advantages and disadvantages in the context of CSOs are summarised below.

Advantages

- 4.27** Evidence and submissions to the Inquiry were almost universally supportive of CSOs as a community based sentencing option. In common with other community based sentencing options, CSOs were seen as having benefits for the offender, the offender’s family and the wider community.
- 4.28** Cost-effectiveness, the value of the community work undertaken and the potential to reduce the prison population were also identified as advantages. The Committee notes that the daily

²²³ NSW Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Courts*, p60

²²⁴ Mr Flanagan, Evidence, 14 June 2005, p26

²²⁵ Mr Richard Davies, Principal Solicitor, Western Aboriginal Legal Service, Evidence, 15 June 2005, p41

²²⁶ Mr Gooda, Evidence, 14 June 2004, p25

cost per offender on a CSO is \$10.73, compared with the daily cost per prisoner of \$186.84 (secure custody) and \$160.97 (minimum security).²²⁷

- 4.29** A high level of support for CSOs amongst community organisations, local councils, government agencies and the general community was revealed in submissions and oral evidence presented to the Committee. For example, Mr Barry Johnston, the Mayor of the Inverell Shire Council stated:

On the issue of CSOs, it is considered to be perhaps the most viable community-based sentencing option that has been used in this area, subject to a number of constraints It certainly offers some positive benefits to the community. It can be seen as a cost-effective means of punishment when compared to custodial sentences, which have all sorts of social effects in later life.²²⁸

- 4.30** The Public Defenders Office noted that CSOs can lead to improved outcomes for offenders:

... would strongly support the wider use of these forms of disposition, for their emphasis on restorative justice and the increased confidence and skills with which they may equip offenders. In addition, as mentioned above, they may lead to improved outcomes, as compared with shorter sentences of imprisonment and as is also noted, they provide a very economical form of sentence.²²⁹

- 4.31** Mr Brian Sandland, Director of Crime at the Legal Aid Commission of NSW observed that undertaking CSO work can enhance an offender's future employment prospects:

I think it is possible that undertaking community service may for some people lead to employment for which they are paid and which they may not have had an opportunity to engage in heavily previously in their lives.²³⁰

- 4.32** The particular effectiveness of CSOs in rural areas was observed by Magistrate David Heilpern:

I think community service is a lot more powerful penalty in a country town. People are seen doing the work. It is not really about shaming necessarily, but people know what they are doing. I think it is a very valuable tool in the armoury.²³¹

Disadvantages

- 4.33** Participants' criticisms of CSOs related mainly to the availability and appropriateness of CSO work placements, rather than disadvantages of CSOs as a community based sentence. These concerns are considered in detail later in this Chapter.

²²⁷ Department of Corrective Services, *Annual Report 2004-05*, Appendix 31

²²⁸ Mr Barry Johnston, Mayor, Inverell Shire Council, Evidence, 14 June 2005, p3

²²⁹ Submission 10, p8

²³⁰ Mr Sandland, Evidence, 6 June 2005, p41

²³¹ Magistrate Heilpern, Evidence, 28 June 2005, p41

4.34 Unlike other community based sentencing options, such as periodic detention and suspended sentences, the Committee did not receive evidence criticising the legislative requirements relating to CSOs. Although some criticism of the assessment of suitability by the PSS was made.

4.35 The Committee did, however, receive some evidence identifying the potential for sentence inflation in rural and remote areas if CSO work placements are not available or accessible. The concept of sentence inflation is explained in Chapter 2. Some concern was raised that an offender may receive a harsher sentence, such as a suspended sentence, when a CSO would have been appropriate in all the circumstances. Ms Su Hely, a solicitor in the Far North West of NSW, provided an example:

This [a CSO] is generally an appropriate option for clients in remote areas, where a full time custodial sentence is not being considered, if they reside 'in town' and have a licence. If a client lives on a rural property and is either an unlicensed or 'disqualified' driver generally they are not considered suitable for this option. ... when the court imposes a s.12 bond **only** because the offender cannot get to town to perform CSO, they are harshly dealt with.²³²

4.36 Similarly, the South Eastern Aboriginal Legal Service stated:

- if a person is not suitable for a CSO then the Court does not necessarily go down a sentence to a section 9 bond. In fact as written in Butterworths Criminal Practice and Procedure at 5-170 "The correct approach is for the court to choose the most appropriate sentence from the available options and if a particular option considered the most appropriate is not available it is not correct to simply choose the next most lenient option" R v T (CCA (NSW), 19 June 1995, unreported): (1995) 2 Crim LN [424]. As a result a Court may in fact also find the client not suitable for P.D. and Home Detention is not generally available, so the client is placed on a section 12 suspended sentence.²³³

4.37 Difficulties experienced by offenders serving suspended sentences in rural and remote areas, including Aboriginal offenders, are examined in Chapter 5.

Barriers to the use of CSOs in rural and remote areas

4.38 The Committee was advised that the main impediments to CSOs being available in all parts of NSW are the lack of work placements in some rural and remote areas and the lack of transport to access the placements that are available. The barriers to organisations providing work placements include difficulties with supervision, OH&S and public liability insurance concerns and community attitudes to CSOs. The barriers were summarised by Mr Costas, the Area Manager of Community Offender Services at Queanbeyan:

From my experiences in the broader area, some agencies are reluctant to take offenders because they are offenders. In smaller communities there is reluctance to take offenders on because they know them, and they are well known in the community. Other reasons for their reluctance are to do with structural reasons, to do

²³² Submission 16, Waterford Ryan, p2

²³³ Submission 42, South Eastern Aboriginal Legal Service, p15

with their inability to supervise effectively. A lot of agencies seem to have concerns about insurance implications, even though we try to allay their concerns in that area, so that there should not be any concern about that. There are a range of reasons, and not necessarily to do with prejudice.²³⁴

Limited places to undertake CSOs in rural and remote areas

4.39 At the outset of this discussion the Committee notes that in rural and particularly remote areas the number of organisations that can possibly offer CSO work placements is small and in some areas non-existent. No strategies or programs, however well intentioned, can overcome this barrier.

4.40 In addition, the Committee was advised that another potential factor contributing to the decline in availability of CSOs in small communities is competing programs such as the Commonwealth's Work for the Dole and Community Development Employment Projects:

There is a problem with small communities such as Brewarrina, Enngonia and Bourke in providing enough work for offenders. Often, they compete with other organisations such as the CDEP (employment program specifically aimed at Aboriginal people). Consequently, CSO's are not always an available option.²³⁵

OH&S concerns

4.41 The *Occupational Health and Safety Act 2000* (NSW) places an obligation on employers and others to ensure the health, safety and welfare of employees and others while at the workplace. This legislation applies to all workplaces in NSW, including organisations taking CSO placements.

4.42 Evidence to the Committee indicated that a barrier to smaller organisations taking CSO placements is the fact that they must comply with OH&S requirements in relation to those offenders. It was suggested that complying with additional OH&S obligations in relation to offenders on CSOs can place a strain on the limited resources of some organisations.

4.43 For example, Mr Joerg Schmidt-Liermann, the Management Executive Officer with Inverell Shire Council indicated that OH&S requirements place a considerable onus on the Council in relation to CSO participants:

We are concerned to ensure compliance with OH&S requirements. That obviously places a considerable onus on Council to ensure that not only CSO participants are properly inducted into the workplace but they are also fully aware of the safe work method statements and the proper procedures for carrying out of that work to ensure

²³⁴ Mr Costas, Evidence, 28 June 2005, p18

²³⁵ Submission 44, Western Aboriginal Legal Service, p4. The CDEP scheme is an Australian Government Indigenous employment program with funding of approximately \$490 million per year. The scheme provides for more than 36,000 participant places through around 280 community organisations across Australia. Participants in the scheme work for their income support benefits. www.dfat.gov.au/facts/indg_business.html (accessed 2 March 2006).

that Council does not wear an unnecessary risk and liability in the event of an unforeseen accident.²³⁶

- 4.44** The Committee was also advised that some organisations do not meet OH&S requirements and are therefore not assessed to be suitable to accept work placements. The Committee was informed that the PPS now completes an OH&S assessment of prospective agencies, which has caused some agencies to be excluded, particularly in small rural communities. In this regard, Mr Gooda, the District Manager of the Inverell Probation and Parole Office stated:

Yes, I would say there has been an attrition of local agencies. We now have to complete an OH&S assessment and quite often in these small outlying areas these community agencies just do not meet the OH&S criteria. So we really have just a handful of agencies left and they are the ones that are able to provide supervision and monitor OH&S.²³⁷

- 4.45** The Committee was not advised as to how many small organisations are rejected due to OH&S requirements and what impact this has on the overall number of CSOs ordered in rural and remote areas. Nor is it clear the extent to which the burden of additional OH&S requirements are preventing organisations from offering CSO placements.

- 4.46** Nonetheless, it appears that some assistance could be provided to organisations interested in taking CSO placements who have concerns about their OH&S obligations. For example, Mr Gooda suggested that ‘...[i]f there was some government funding that might assist the small agencies to have their OH&S requirements met then that would assist’²³⁸

- 4.47** The Committee notes that in many parts of rural and remote NSW the local council is the single largest employer. As one witness to the Inquiry observed, ‘... one of the big advantages of local government - and it depends on the locality - is that it does have a pretty well structured occupational health and safety policy.’²³⁹ The Committee is of the view that local councils have the potential to play a role in assisting community and non-government organisations to achieve compliance with OH&S requirements or to alleviate the burden of OH&S requirements for CSO placements.

- 4.48** The Committee is of the view that WorkCover NSW, responsible for administering OH&S legislation, could also play a role in this regard. The Committee is aware of the collaborative work undertaken by WorkCover NSW, the Local Government and Shires Association and the Municipal and Shire Employees Union to build the capability of local government to systematically manage OH&S.²⁴⁰

²³⁶ Mr Schmidt-Liermann, Management Executive Officer, Inverell Shire Council, Evidence, 14 June, p7

²³⁷ Mr Gooda, Evidence, 14 June 2005, p26

²³⁸ Mr Gooda, Evidence, 14 June 2005, p26

²³⁹ Mr Neville, Evidence, 27 June 2005, p25

²⁴⁰ WorkCover NSW, *CouncilSafe – Building local government industry capability to systematically manage OHS* (2001). A 16 month project involving 19 NSW Councils, 13 of which were in country areas. The program’s primary objective was to assist Local Government in building its capability to systematically manage occupational health, safety and injury management. www.workcover.nsw.gov.au/NR/rdonlyres/379F9F66-9D4D-4F4A-BB5A-E889F44AB41C/0/report_councilsafe_4099.pdf (accessed on 7 March 2006)

- 4.49 The Committee recommends that the Department of Corrective Services work with the Department of Local Government and WorkCover to identify ways to assist community and other non-government organisations in rural and remote NSW to achieve compliance with the OH&S requirements, with a view to increasing the number of CSO work placements.

Recommendation 12

That the Department of Corrective Services work with the Department of Local Government and WorkCover to identify ways to assist community and other non-government organisations in rural and remote New South Wales to achieve compliance with occupational health and safety requirements, with a view to increasing the number of Community Service Order work placements.

Public liability insurance concerns

- 4.50 A related issue concerns public liability insurance. The Committee was advised that some organisations, particularly in rural and remote areas, are reluctant to accept CSO placements because of concerns about public liability insurance. In this regard, Mr Nickle, the District Manager of the Wagga Wagga Probation and Parole Office stated:

One of the real difficulties we have now is liability for either injury to community service workers or damage to community or injury to other people. A number of agencies have been reluctant to accept community service workers for that reason. Sometimes that can have a bigger impact in remote areas. A farmer or somebody used to handling machinery, but who has no formal qualifications, we have to assess as unsuitable because they cannot show us a ticket for using a chainsaw or whatever. This limits the amount of work that might be done. Years ago, we would have put them to work on a ride-on mower or whatever without any difficulty at all. Now, we would have some hesitation in doing that.²⁴¹

- 4.51 The Department of Corrective Services advised that ‘... offenders who are engaged in CSO work are fully covered for public liability. There is legislative provision whereby the Crown assumes civil liability in place of the community agency providing community work’.²⁴² The Committee notes that it is therefore the NSW Government that is liable for any loss or damage caused by an offender or other relevant person engaged in approved CSO work, and for any injuries suffered by a person while performing such tasks.²⁴³
- 4.52 The Department also advised that the *Guide to Agencies and Voluntary Supervisors* makes it clear that the Crown assumes responsibility.²⁴⁴ Despite these assurances, it would appear that some

²⁴¹ Mr Denis Nickle, District Manager, Wagga Wagga, Probation and Parole Office, Evidence, 27 June 2005, p25

²⁴² Answers to questions on notice taken during evidence, Ms McComish, Question 2, p1. The legislation referred to is the *Crimes (Administration of Sentences) Act 1999* (NSW), s 121.

²⁴³ *Crimes (Administration of Sentences) Act 1993* (NSW), ss 120-121

²⁴⁴ Tabled document, Department of Corrective Services Probation and Parole Service, *Community Service Orders Scheme Guide to Agencies and Voluntary Supervisors*, 30 August 2005, p2

organisations remain concerned about their potential liabilities under the CSO scheme. In this regard, Mr Costas, the Area Manager of Community Offender Services in Queanbeyan stated that '[a]lot of agencies seem to have concerns about insurance implications, even though we try to allay their concerns in that area, so that there should not be any concern about that.'²⁴⁵

- 4.53** The Committee notes the concerns of organisations with regard to public liability, although it is not clear whether these concerns are ongoing or have emerged as a consequence of the difficulties experienced by many community organisations in relation to public liability insurance following the collapse of the HIH Insurance Group. Nor is it clear whether the concerns expressed are genuine or are used by some organisations to avoid participation in the CSO scheme (the same point can be made in relation to OH&S concerns).
- 4.54** It appears that the Department of Corrective Services has made information available regarding public liability for CSO placements which should be sufficient to reassure organisations undertaking, or considering undertaking, CSO placements. However, as it also appears that public liability concerns are still held by some organisations, the Committee is of the view that there needs to be a proactive information program to reach all possible CSO placement places to remove the disinformation.

Recommendation 13

That the Department of Corrective Services review its current information concerning Community Service Order placements and public liability insurance and the dissemination of that information with a view to dispelling concerns about public liability insurance. A program for making the information accessible to current and prospective Community Service Order placement organisations should be developed. Consideration should also be given to identifying an information contact officer to clarify any queries held by current or prospective Community Service Order placement organisations.

Supervision and cost of equipment

- 4.55** Evidence presented to the Committee identified the provision of supervision as the single most significant barrier for organisations considering offering CSO placements. Concerns related to the ability of organisations to provide effective supervision and the costs associated with supervision.
- 4.56** The Nambucca Shire Council advised that while CSO offenders have been used to 'good advantage to the community', supervision presents a difficulty and often rests on the shoulders of volunteers:

... Community Based Sentencing Offenders have been used on occasions and to good advantage to the community at the Macksville Showground, the Bowraville Racecourse, Gordon Park Rainforest Walk at Nambucca Heads and assisting with Dune Care at various beaches. The difficulty under the current system however, is supervision. Under the current system this always falls onto the shoulders of

²⁴⁵ Mr Costas, Evidence, 28 June 2005, p18

volunteers (many of them senior) who may have the time and commitment to supervise.²⁴⁶

- 4.57** The Greater Taree City Council stated that many regionally based organisations cannot adequately supervise CSO placements:

Limited resources, often means that community order projects are not always well supervised. Many regionally based community organisations are not equipped, either with the resources or professional staff, to adequately supervise projects on a day to day basis and community orders become on occasions, organisational assistance to complete menial day to day business.²⁴⁷

- 4.58** The Committee was advised that the typical profile of an offender serving a CSO means that particular attention needs to be paid to providing adequate supervision and direction. For example, Mr Johnston also observed that ‘there could be times when that person may not wish to be there and, therefore, they may not necessarily react in the normal way to supervision.’²⁴⁸

- 4.59** The Holy Family Centre at Mount Druitt, to which the Committee undertook a site visit, has supervised ‘thousands’ of CSOs and believes strongly in the benefits of the scheme.²⁴⁹ But, as Director Ms Coral McLean explained, community agencies need support to provide effective supervision for offenders, many of whom have little or no experience of being in a workplace:

... most people who come here to do a CSO have never been in the workplace before. They have no experience of workplace culture and no experience with the responsibilities of caring for resources and equipment. They have no experience of how to use certain tools and no understanding of health and safety issues, responsibility or reporting. They have had no opportunity to learn those skills.²⁵⁰

- 4.60** The direct costs of CSO placements include additional wages for supervisors and equipment for offenders to undertake work. The Committee was also advised that additional wage costs can be incurred if CSOs are carried out on the weekend, as noted by Mr Johnston, the Mayor of the Inverell Shire Council:

Some of the limitations that we see in CSOs are, firstly, the matter of supervision, and our Council has been involved in making available to recipients the opportunity to do CSOs. Our Council has provided work opportunities. Supervision, both in availability and responsibility—particularly availability, because there are times when CSOs are put into effect at weekends when a lot of council staff are not in their normal place of work. There could be the requirement, first of all, to make sure that people are available and there could be a cost penalty for provision of the supervision through overtime requirements and also the supply of vehicles, which are normally housed at weekends and not out on the road.²⁵¹

²⁴⁶ Submission 3, Nambucca Shire Council, p1

²⁴⁷ Submission 22, p1

²⁴⁸ Mr Johnston, Evidence, 14 June 2005, p4

²⁴⁹ Ms Coral McLean, public forum, Mount Druitt, 27 September 2005, p4

²⁵⁰ Ms McLean, public forum, Mount Druitt, 27 September 2005, p4

²⁵¹ Mr Johnston, Evidence, 14 June 2005, p4

4.61 Mr Paul Henry, the General Manager of Inverell Shire Council, advised that the 'limiting factor to the number of work groups that could be taken on would be the number of supervisors that we could encourage from our normal work force to carry out that activity on weekends.'²⁵²

4.62 The Committee heard from Mr Jeffrey McKenzie, Crime Prevention Officer with the Bega Valley Shire Council, that while the Council was supportive of community based sentencing generally and had actively participated in the CSO scheme, they were mindful of additional costs associated with providing personal protective equipment for offenders:

The other issue could be in terms of the special functions that are required associated with kitting out the people, providing the right boots, helmets and jackets and all those sorts of things where there are costs involved. Like many other councils, this council has cost issues that it has to constantly address.²⁵³

4.63 Ms McLean also identified the additional costs incurred by her organisation in order to maintain or replace equipment:

For communities like Holy Family and others who do that too, to make a voluntary commitment to such a big scheme that we have complete confidence and support for is a huge ask. I cannot tell you how many whipper snippers and lawnmowers have been lost because somebody has left of them outside while they came and got a cuppa. They have just disappeared or they did not know how to care for them, put water in them or whatever. Communities like ours cannot afford to continually pay for resources like that. It needs a rethink in terms of responsibilities by government and the wider community to support these people.²⁵⁴

4.64 The Committee was advised that supervision of offenders on a CSO also represents a significant demand on the resources of the PPS, particularly in rural and remote areas. For example, Mr Michael Neville, District Manager of the Griffith Probation and Parole Office advised that:

... supervision is the biggest issue that most services, particularly ours, face in more remote areas - making sure that people are adequately supervised and that they meet the requirements of the community sanction and get the work done.²⁵⁵

4.65 Ways to overcome the challenges of supervising offenders on CSOs in rural and remote areas and providing equipment are discussed in paragraphs 4.84-4.99.

Community attitudes to CSOs

4.66 Submissions and oral evidence presented to the Committee suggests that a further barrier to organisations participating in the CSO scheme is negative perceptions about the scheme and the offenders placed on it. For example, Mr Flanagan stated:

²⁵² Mr Henry, Evidence, 14 June 2005, p2

²⁵³ Mr McKenzie, Evidence, 28 June 2005, p5

²⁵⁴ Ms McLean, public forum, Mount Druitt, 27 September 2005, p4

²⁵⁵ Mr Neville, Evidence, 27 June 2005, p24

... occasionally it is a bit difficult to get volunteers and community agencies to take on certain clients in small communities. They form their perceptions and make their own value judgements and because they are volunteering their time we cannot impose upon them.²⁵⁶

4.67 The Department of Corrective Services noted that the limited number of community agencies that provide community service work in many rural and remote areas of the state may in part be due to ‘... the inherent suspicion in small communities about the reliability and risk to community safety of well-known local offenders.’²⁵⁷

4.68 The Committee also heard that some organisations are reluctant to become involved with the CSO scheme because of what Mr Gooda, the District Manager of the Inverell Probation and Parole Office, described as ‘the stigma in dealing with offenders’.²⁵⁸ Similarly, Mrs Fiona Brown, President of Inverell Chamber of Commerce expressed the view that members of the Chamber may be reluctant to be involved in community sentencing because of a fear of being ‘stigmatised ... and open for the opportunity of further crime’.²⁵⁹

4.69 Mr Flanagan told the Committee that recruiting community organisations in small communities can be a ‘battle’ and a variety of methods are used to counter the resistance to working with offenders:

Sometimes we feel that we are the advocates for the client, which is something we are comfortable doing but it can be a battle. It would be nice if the community perhaps took a bit more ownership of the issue and volunteered a bit more help rather than us knocking on doors. It is quite common for me to have to go through a list of community agencies and just door knock. The answer is to be persistent ... eventually they will give it a go. ... We do practical things like have morning teas and invite people in and ask the magistrate occasionally to speak to raise awareness, put an article in the local paper. The more substantive resistance to working with persons convicted of offences is a tough barrier so perhaps a package of all of those things.²⁶⁰

4.70 The Committee was informed that an important strategy to garner support for the scheme is to maximise the success of placements so that the benefits of the scheme speak for themselves, as Mr Gooda noted:

... if there is a placement made then we usually have it on a trial basis and I try to put the right person in the right job so that it is successful. Once a worker has been successful that agency is more likely to take more workers.²⁶¹

4.71 If an agency has had a negative experience in relation to a CSO in the past, they may be less likely to offer placements in the future, as the Area Coordinator of Dubbo Community Offender Services, Ms Jeffrey, told the Committee:

²⁵⁶ Mr Flanagan, Evidence, 14 June 2005, p25

²⁵⁷ Submission 30, p21

²⁵⁸ Mr Gooda, Evidence, 14 June 2005, p27

²⁵⁹ Mrs Fiona Brown, President, Inverell Chamber of Commerce, Evidence, 14 June 2005, p41

²⁶⁰ Mr Flanagan, Evidence, 14 June 2005, p26

²⁶¹ Mr Gooda, Evidence, 14 June 2005, p28

Unfortunately at times there are some impediments to people being able to fulfil requirements of CSOs because ... there has been some adverse behaviour or performance on previous orders and therefore some agencies are reluctant to continue to offer placements to some people.²⁶²

- 4.72** The Committee recognises that the CSO scheme relies on the generosity and goodwill of organisations providing work placements in order to operate. In rural and remote areas where there are a limited number of prospective organisations, finding work placements presents a significant challenge for the PPS. In addition, an offender in a smaller community is more likely to be known to the community and this can, in some instances, make placements difficult.
- 4.73** During the Inquiry the Committee heard evidence of the hard work and persistence of PPS staff in their efforts to encourage agencies to offer CSOs. The Committee supports the work of the PPS in this regard.

Availability of transport to CSO work placements

- 4.74** Transport difficulties were also cited as a factor in the availability of CSO placements in rural and remote areas. As work placements can be located some distance from where the offender lives their ability to attend their placement regularly and on time depends on reliable transport.
- 4.75** The South Eastern Aboriginal Legal Service cited transport as one of the two main reasons why the availability of CSOs in rural and remote areas is difficult (the other being a lack of placements):

The lack of public transport in rural areas is well known. Even, if there is public transport, the cost and poor timetable may result in a defendant not being able to undertake a CSO. The problem is exacerbated by the fact that often the defendant does not have a licence or a motor vehicle. Often, the CSO is for a traffic offence. Sometimes a person may have to move to obtain a CSO.²⁶³

- 4.76** The Department of Corrective Services included 'major transport issues' in the range of reasons why the number of community agencies that provide community service work in rural and remote areas is limited.²⁶⁴
- 4.77** Ms Ruis, A/Senior Assistant Commissioner of Community Offender Services, identified transport as a problem for offenders in rural and remote areas in relation to all community based sentences:

One of the big problems ... is the issue of transport in rural and remote areas. That is a real problem for our offenders who often do not have licences, they have either been disqualified or cancelled.²⁶⁵

²⁶² Ms Jeffrey, Evidence, 15 June 2005, p27

²⁶³ Submission 42, p13

²⁶⁴ Submission 30, p21

²⁶⁵ Ms Ruis, Evidence, 6 June 2005, p5

- 4.78** The Committee notes that transport is an issue that impacts on the availability of the range of community based sentencing options in rural and remote NSW. This issue was raised most significantly in relation to periodic detention, as discussed in Chapter 6.
- 4.79** The Committee heard evidence of strategies the Department is engaged in that assist in overcoming the difficulties associated with CSOs and transport in rural and remote areas. One example is the *Linking Together Program*, which is a pilot program operating at Inverell, where offenders are transported to the work site and supervised by a person employed by Community Offender Services. This program addresses both transport and supervision issues and is considered in more detail at 4.92.
- 4.80** In addition, the Committee was advised that in remote parts on the state, the Department operates reporting centres rather than requiring an offender to travel to the local PPS office:
- If someone was placed on a CSO at Enngonia and they were a resident of Enngonia then we would place them within that community where possible. We would also then conduct a reporting centre from Enngonia. Our service would go to the community rather than have the expectation for the community to come in to us.²⁶⁶
- 4.81** The Committee notes that the strategies outlined above are examples of ways to alleviate the problems associated with the long distances that must be travelled in rural and remote areas and the lack of public transport. The Committee recognises that no single solution will meet the diverse needs of offenders across the state.
- 4.82** The Committee believes that improved access to the CSO scheme could be achieved with the provision of transport to work placements where possible. The Committee recommends that the Department of Corrective Services continue to investigate and implement ways of providing or arranging transport to work placements for offenders in rural and remote areas as a way of improving access to the CSO scheme.

Recommendation 14

That the Department of Corrective Services continue to investigate and implement ways of providing or arranging transport to work placements for offenders in rural and remote areas as a way of improving access to the Community Service Order scheme.

Expanding the availability of CSOs in rural and remote areas

- 4.83** The barriers to the availability of CSOs in rural and remote areas, which are outlined in the preceding discussion, relate mainly to the lack of work placements. The Committee has addressed some of those concerns, such as OH&S and public liability issues. In this section the Committee examines options for overcoming the substantive barriers to the availability of work placements in rural and remote areas.

²⁶⁶ Ms Jeffrey, Evidence, 15 June 2005, p32

Overcoming issues relating to supervision

4.84 As identified earlier in this Chapter, finding organisations that can supervise offenders on a CSO is a significant challenge to PPS staff in rural and remote areas. The cost of supervision and equipment to provide a CSO placement makes it unviable for many small organisations to take CSO placements.

4.85 The General Manager of the Bourke Shire Council, who advised that supervisory problems led to the Council discontinuing CSO placements, indicated that if someone else provided the supervision, or the Council was resourced to do it, they might revisit their decision:

... when they come they are probably going to need some sort of supervision, which obviously we provide if it is on our jobs. If that was done separately to the Council, if somebody was resourced to do the supervision, that is something we might look at, or if we provide a supervisor, if we get paid for that supervision.²⁶⁷

4.86 Financial assistance to facilitate OH&S compliance (discussed at paragraphs 4.41-4.49) and purchase equipment, could encourage more agencies to offer placements, as Mr Gooda told the Committee:

... If there was some government funding that might assist the small agencies to have their OH&S requirements met then that would assist or if there was some funds that might assist them to buy some lawn mowers or basic tools and equipment, that way they might also be able to participate in the program as well. So government funding in those areas would be well spent.²⁶⁸

4.87 The Committee was informed of various Department of Corrective Services' initiatives that may assist with supervision issues. For example, Ms Ruis advised that the Department is trialling different ways to address the issues concerning supervision in rural and remote areas, such as supervising its own mobile camps and work sites:

... in remote areas, we are trialling putting CSO people with either a mobile camp, which is run through the gaol, or on a work site supervised exclusively by us. Because it is supervised by us, we can assess them as suitable, and we take them in their entirety. That is a very good option for people who are difficult to place.²⁶⁹

4.88 Ms Jeffrey described the mobile camps as one of the innovative approaches taken to offender management in the area:

Locally, what we have endeavoured to do ... was to try to develop a range of innovative approaches to offender management, including the potential for community service offenders to work alongside of mobile prison camp detainees from the Yetta Dhinnakkal facility, which would mean they would then be under the auspices of a Departmental supervisor. The overseer who is already working [with] the mobile prison camp trainees would then also have an element of community-based community service offenders working alongside of them.²⁷⁰

²⁶⁷ Mr Croskell, Evidence, 15 June 2005, pp5-6

²⁶⁸ Mr Gooda, Evidence, 14 June 2005, p28

²⁶⁹ Ms Ruis, Evidence, 6 June 2005, p6

²⁷⁰ Ms Jeffrey, Evidence, 15 June 2005, p27

4.89 Ms Ruis also advised that the Department engages other government agencies in some areas to act as ‘proxies’ to supervise CSOs:

The other thing that we do in the North-West and South-West is we use other agencies to perform supervision roles for us by proxy. For instance, the Griffith area, where I understand the Committee will attend, of community offender services covers as far as Hillston, Hay and up to Ivanhoe; a huge area. So it is impractical and a waste of resources to send a probation and parole officer every week to each location to supervise a CSO. We normally use another government agency that acts as a proxy for us to ensure the person is there. Similarly we provide a service for that Department too. The more examples that our Department has established of working with other government agencies who are really covering the same area, the more effective it has become.²⁷¹

4.90 The Department of Corrective Services stated another measure it proposes undertaking that could increase the availability of CSOs in rural and remote areas is ‘... to join the periodic detention stage 2 and CSO work programs to ensure a consistent and resourceful approach to the supervision of offenders performing community service work in the community.’²⁷² This proposal is examined in relation to periodic detention in Chapter 6.

4.91 The Probation and Parole Officers Association stated, in relation to the availability of CSOs in rural and remote areas that ‘[i]t may be necessary to compensate for the paucity of agency supervisors available in rural and remote areas by introducing new field supervisors.’²⁷³ The Department advised the Committee that field supervisors had been employed on a pilot basis in more remote areas:

In more remote areas COS has employed, on a pilot basis, a CSO field officer based in the community who develops partnerships with agencies and community groups, and is then also available to supervise offenders completing CSOs.²⁷⁴

4.92 The Committee was advised about a relatively new CSO program that does not rely on traditional agencies and their supervisors. The *Linking Together Program* is a pilot program, run by the PPS, which commenced in Inverell in 2003. Under the program, the PPS provides transport to CSO work sites and employs a sessional supervisor. Work sites, tools and other equipment are provided by partnership agencies and are used on a rotational basis every Saturday. The benefits of the program are:

- not relying on community agencies and their capacity to supervise
- addresses transport issues
- a low breach rate
- greater control over the Scheme

²⁷¹ Ms Ruis, Evidence, 6 June 2005, p5

²⁷² Submission 30, p21

²⁷³ Submission 41, p8

²⁷⁴ Submission 30, p21

- ability to place offenders who may otherwise be difficult to place with community organisations
- ability to resolve issues with offenders without resorting to breach proceedings.²⁷⁵

4.93 Mr Gooda, the District Manager of the Inverell Probation and Parole Office, advised the Committee that the total cost of the program on an annual basis is approximately \$8,000.²⁷⁶ Mr Gooda described the program and noted it has a high rate of completion:

We work on a rotation basis and it is every Saturday. We have a very high rate of success or completion. It is good community acceptance of the work that is being done. We have had support particularly from the Department of Housing to buy some materials, and we have had some materials donated from the shire council. They have completed some really good community projects. As I said, it is a pilot program for this service. We employ our own supervisor. I can place most offenders in those agencies. We have a low breach rate, and I think it is a successful program that this service may well move to other centres and I hope so. The only real cost, we are in partnership with other local agencies and they provide the tools and equipment. I provide the transport, which has some implications on my work load, and we use the Departmental motor vehicle to transport them. We employ a sessional supervisor on an hourly rate, and I think because he is employed on Saturdays it is \$39 per hour. So there are some cost implications. Compared to the alternative though it is my belief that they are very reasonable.²⁷⁷

4.94 Mr Gooda highlighted the flexibility of this approach, which enables a suitable supervisor to be engaged:

From time to time problems develop and in the traditional agencies the offenders are sent home, and we would either proceed with breach action or attempt to find another agency. However, with our paid supervisor, I believe we have recruited the right person for the job. There is a degree of flexibility. If problems arise we can talk about issues, and the general pattern is that after things have settled down they return to work and there is no need for a breach. So we have that degree of flexibility that probably we do not have in the traditional agencies.²⁷⁸

4.95 The Committee heard evidence from Mr Flanagan that the Linking Together Program is to be trailed at Tenterfield:

... we are going to trial it next at Tenterfield, which is the small community we reach out to, because there is a degree of opposition to taking on some of our clients out there which we can overcome by employing a supervisor on site.²⁷⁹

²⁷⁵ Mr Gooda, Evidence, 14 June 2005, pp25-26

²⁷⁶ Answers to questions on notice taken during evidence 14 June 2005, Mr Michael Gooda, Department of Corrective Services. The cost of the *Linking Together Program* for staff wages for six months is \$3,549: correspondence to the Committee Secretariat, 7 November 2005.

²⁷⁷ Mr Gooda, Evidence, 14 June 2005, pp25-26

²⁷⁸ Mr Gooda, Evidence, 14 June 2005, pp25-26

²⁷⁹ Mr Flanagan, Evidence, 14 June 2005, p25

- 4.96** The Committee notes that the Department of Corrective Services is making a concerted effort to address issues of supervision for offenders serving a CSO in rural and remote areas. The Committee commends the staff of the PPS for their work on the *Linking Together Program* and their partnership with local community organisations. Innovative models such as the *Linking Together Program* are a practical way to address the range of issues associated with CSOs in rural and remote areas. This approach appears to be a cost effective means of providing placements to offenders, including those who may otherwise be difficult to place.
- 4.97** The Committee notes that the *Linking Together Program* is a pilot and has been operating in Inverell since 2003 (with some expansion to Tenterfield). It is important that the benefits gained from innovative pilot projects are expanded across the State, following evaluation. The Committee therefore recommends that the *Linking Together Program*, as well as any other pilot programs or initiatives such as mobile camps, which are shown to increase access to CSOs for offenders in rural and remote areas, should be extended to other parts of the State.

Recommendation 15

That the Department of Corrective Services' *Linking Together Program* and any other pilot programs or initiatives such as mobile camps, which are shown to increase access to Community Service Orders for offenders in rural and remote areas, should be extended to other parts of the State.

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- 4.98** The Committee notes the concerns expressed by agencies regarding the additional cost of providing equipment for offenders participating in CSOs. These additional costs present a particular challenge for small community organisations in rural and remote areas.
- 4.99** The Committee is of the view that the costs associated with providing equipment to offenders undertaking CSO placements should not be a barrier to small organisations taking work placements. The Department of Corrective Services should assist organisations in rural and remote areas with the cost of purchasing additional equipment for CSO placements either through the provision of financial assistance or seeking assistance from the local business community.

Recommendation 16

That the Department of Corrective Services assist organisations in rural and remote areas with the cost of purchasing additional equipment for Community Service Order placements either through the provision of financial assistance or seeking assistance from the local business community with a view to expanding the availability of Community Service Order work placements in such areas.

Encouraging greater involvement from local councils

- 4.100** The Committee heard evidence that Council support for CSOs is variable. Some offered placements while others were not currently involved but may have done so in the past.

Others, such as Inverell Shire Council, offered placements as well as equipment and transport to assist other community groups to supervise CSO participants:

Council has supported community groups who have undertaken to supervise CSO participants by providing them with equipment, motor vehicles, and there certainly have been costs associated with that. They have not been significant in the past because Council has been carrying out the majority of the supervisory works.²⁸⁰

4.101 In its 2004-05 Annual Report, the Department of Corrective Services described the successful partnership between its Gosford district office and the Wyong and Gosford Shire Councils:

Gosford District Office has been working closely with Wyong Shire Council since 1986 in providing and supervising Community Service Order work. The program now operates six days per week and undertakes a range of projects in the Shire including bush and beach regeneration, litter collections, fencing and other clean up tasks. In 2004/05 more than 10,300 hours of work (1,474 work days) were completed in the Wyong Shire. Gosford District Office has entered into a similar partnership arrangement with Gosford Shire Council, operating six days per week concentrating on bush and beach renewal and rubbish pick up. During the year, approximately 22 tonnes of noxious weed, trees and dead wood were removed from the Foresters Beach area and several tones of rubbish removed from scenic areas in the Gosford Shire.²⁸¹

4.102 Several witnesses expressed the view that some Councils could or should be more supportive of the scheme. For example Mr Alan Perry, the District Manager of the Coonamble Probation and Parole Office, stated that:

Walgett is slowly accepting Community Service workers again after a period where there was a distinct lack of community involvement. The major problem in this area of sentencing is the lack of support from the Local Council ...²⁸²

4.103 The Public Defenders Office called for better liaison with local community representatives:

Better liaison with local community representatives may give rise to more lateral thinking about the kinds of CSO work to be undertaken which meets the specific requirements of the relevant community.²⁸³

4.104 Mr Costas, the Area Manager of Community Offender Services at Queanbeyan, also emphasised the need for active engagement with the local council and the potential benefits of working with the Crime Prevention Officer:

Going out and canvassing is an obvious start; public meetings, perhaps in conjunction with the Council and the Crime Prevention Officer, and calling public meetings to discuss issues. ... My experience is that these positions [crime prevention officer] are

²⁸⁰ Mr Henry, Evidence, 14 June 2005, p8

²⁸¹ Department of Corrective Services, *Annual Report 2004-2005*, p34

²⁸² Submission 20, Mr Alan Perry, p5. In his submission, Mr Perry advised that: "the contents of this submission are based on my own thoughts and experiences and should not be confused [with] or accepted as those of my employer."

²⁸³ Submission 10, p8

very valuable in the broader community. My direct experience is in Queanbeyan, where there is a similar position. We sit on a joint committee and exchange ideas, and the support for initiatives is much more effective with that sort of co-ordinated position.²⁸⁴

- 4.105** It is clear that local councils can play a significant role in relation to increasing the availability of CSO placements in rural and remote areas. Their level of infrastructure and well-developed OH&S policies make them ideal for CSO placements. Councils are also in a position to support other organisations to provide CSO placements through assistance with supervision, provision of equipment and expertise on OH&S and other matters. The Committee encourages the ongoing work of the Department of Corrective Services in engaging local councils in the CSO scheme.
- 4.106** The Committee recommends that the Department of Local Government identify ways in which it can encourage or assist local councils to participate in the CSO scheme, either by taking CSO placements or providing support for community groups to do so. Creative approaches, such making CSO placements directly responsible for ‘tidy town’ competitions, should be examined.

Recommendation 17

That the Department of Local Government identify ways in which it can encourage or assist local councils to participate in the Community Service Order scheme, either by taking Community Service Order placements or providing support for community groups to do so.

Encouraging greater involvement from the community sector

- 4.107** As the preceding discussion illustrates, the success of the CSO scheme, more than any other form of community based sentence, relies heavily on the ability of the PPS to involve community organisations and provide quality placements for offenders on CSOs. This view was expressed by PPS staff throughout the Inquiry, for example:

We are utterly dependent on the community to provide the agencies. My personal view is that the community should take responsibility and be part of the justice system by providing the ability for offenders to perform work in their locations.²⁸⁵

... the community service orders scheme has relied in this area, and in certainly very remote rural areas, on the generosity and goodwill of many workplace agencies.²⁸⁶

- 4.108** The Committee notes that the NSW Sentencing Council, in its 2004 report on promoting consistency in sentencing in the Local Courts, recommended that the Department of

²⁸⁴ Mr Costas, Evidence, 28 June 2005, p18

²⁸⁵ Mr Costas, Evidence, 28 June 2005, p18

²⁸⁶ Ms Jeffrey, Evidence, 15 June 2005, p27

Corrective Services actively develop a strategy to identify new work agencies, for the purpose of increasing the availability of CSOs.²⁸⁷

- 4.109** The Committee was advised that the Department is undertaking work in this area by developing a package of information about community based sentences for probation and parole managers to use when engaging with the community:

There will then be a requirement upon managers to engage with a wide range of groups in the community, both informally and formally. That is something that we see as extremely important if you wish to build the kind of community support for the range of options to manage people in the community.²⁸⁸

- 4.110** A number of Inquiry participants informed the Committee that educating community organisations about the benefits of CSOs and support given was likely to lead to greater involvement. The Committee supports this view and recommends greater education of the community (as well as local councils and private businesses) to build support for the CSO scheme.

- 4.111** The Committee notes, with interest, the work undertaken by Corrections Victoria with regard to their Community Work Partnerships Awards. Corrections Victoria has, for the past seven years, used the annual awards to formally recognise groups and individuals who participate in their Community Work Program. Various award categories recognise the range of partnerships, for example, local council/shire initiative, community project, supervisor/field officer, educational institution, etc.

- 4.112** The Committee was advised that the community response to the awards is very strong in regional areas (although less so in the metropolitan media). The awards ceremony is conducted by a public figure with a high public profile and credibility. The most recent ceremony was conducted by an Australian Olympic Team member who related the teamwork necessary to do well with the Olympic Team with the teamwork aspect of community service work.²⁸⁹

- 4.113** The Committee supports the development of initiatives, such as the Victorian Community Work Partnerships Awards, that recognise and encourage the work undertaken by Community Offender Services in NSW in partnership with local councils and other community organisations, as a means of increasing the number of work placements available to offenders.

²⁸⁷ NSW Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Courts*, p63

²⁸⁸ Ms McComish, Evidence, 30 August 2005, pp10-11

²⁸⁹ Email from Mr David Daley, Director Community Correctional Services, 7 November 2005.

Recommendation 18

That the Department of Corrective Services:

- Undertake a community education program about the Community Service Order scheme, including information about public liability and the benefits of the program.
 - Develop an initiative that recognises and encourages the work undertaken by Community Offender Services in partnership with local councils and other community organisations, as a means of increasing the number of work placements available to offenders.
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Encouraging greater involvement from the business sector

- 4.114** The Committee notes that there are restrictions on the ability of private businesses to provide CSO placements, as Mr Nickle, District Manager of the Wagga Wagga Probation and Parole Office stated:

It is very difficult for a business to provide community service work opportunities because the community work that is done is required to be done for the benefit of the community and not for business ...²⁹⁰

- 4.115** The Committee was advised, however, that there are ways in which private business can support the CSO scheme. For example, Mr Neville, District Manager of the Griffith Probation and Parole Office, stated that businesses can provide support to community groups who take CSO placements:

... One way that the business community in Griffith lends support is by supporting the community groups that actually provide it. They assist by way of providing supervisors. That in itself is an intrinsic way to make sure that things are successful because whilst you may well have a range of community groups that have available work, they do not always have supervisors on call and people do have to take time off work more work often than not.²⁹¹

... we have a local metal manufacturer here ... that provides assistance by way of support for the Riding for the Disabled project locally. They have provided on-the-ground supervision people on the weekends so that we can actually make sure that people get through particular projects.²⁹²

- 4.116** The Committee also heard evidence about a partnership program in Griffith, where the businesses provide supervisors, on a voluntary basis, for the community agency. This program was developed as a result of networks and discussions between business and the local PPS.²⁹³

²⁹⁰ Mr Nickle, Evidence, 27 June 2005, p28

²⁹¹ Mr Neville, Evidence, 27 June 2005, p28

²⁹² Mr Neville, Evidence, 27 June 2005, p29

²⁹³ Mr Neville, Evidence, 27 June 2005, p30

- 4.117** The Committee recognises that there are valid reasons why private business do not commonly offer a CSO placement including the requirement that the work must be for the benefit of the community and that an offender cannot take the place of any other person who would otherwise be employed. However, the Committee believes that local business can assist the CSO scheme in other ways and encourages their involvement where practicable.
- 4.118** The Committee recommends that the Department of Corrective Services seek consultations with Australian Business Limited and local Chambers of Commerce to investigate ways of involving private businesses in the CSO scheme.

Recommendation 19

That the Department of Corrective Services investigate ways of increasing the involvement of private business in the Community Service Order scheme in rural and remote areas, including seeking consultations with Australian Business Limited and local Chambers of Commerce.

Other issues

- 4.119** Three other issues concerning CSOs were raised with the Committee during the Inquiry. First, the fact that the courts are bound by the Probation and Parole Service suitability assessment was criticised by some submission makers and witnesses. Second, the nature of work undertaken on CSOs was also criticised. Third, the ability of offenders serving CSOs to access programs was also raised. These issues are examined in the following section.

Court bound by suitability assessment

- 4.120** As outlined previously, a magistrate or judge can *only* impose a CSO where the PPS assessment finds the offender to be a suitable person for community work. A number of Inquiry participants expressed concern about this requirement. For example, Mr Sean Bogan, a solicitor with the Legal Aid Commission and a member of the Human Rights Committee of the Law Society, expressed concern that the assessments are not directly appealable:

The tendency of Probation and Parole officers to assess individuals with disability or disadvantage as unsuitable for community based sentencing options is magnified by the fact that Probation and Parole assessments are non-appealable. Although a Probation and Parole officer may be cross-examined on the content of his or her assessment, if the Probation and Parole officer remains resolute that the offender is unsuitable for a community service order or a home detention order, the sentencing court still lacks the power to make such an order.²⁹⁴

²⁹⁴ Submission 47, Law Society of NSW, pp8-9

4.121 Mr Gary Pudney, Principal Solicitor, South Eastern Aboriginal Legal Service, suggested that the law should be amended to allow the court more discretion to order a CSO even if it is not supported by the PPS assessment.²⁹⁵

4.122 Magistrate David Heilpern advised the Committee that PPS assessments can in fact be questioned by the magistrates:

I would be cautious about that. The usual reasons that persons are not suitable is because they have messed up orders before and not done them; they will not comply with supervision and attend; or the offence is not a suitable offence. I am sure we do not have need to think too much of sending someone to school to paint the chairs who has been caught selling drugs at the school. There is a range of reasons why people are not suitable and I would be cautious about an approach where it is left totally to the magistrate. Apart from anything else, we do not have to go out there and try to supervise these people. There have been times when I have had a report saying, "This person is not suitable" and I have questioned it; I have spoken to the Probation and Parole officer in court and they have either justified it or agreed to have another look at it, and the person goes and does the community service work. So, for me personally it is not a problem.²⁹⁶

4.123 Mr Babb, Director of the Criminal Law Review Division at the Attorney General's Department expressed concern that if the court had discretion to go against the advice of the PPS it could lead to breaches and a waste of court resources:

From the position of the Attorney General's Department the only points that I would like to raise are that I could envisage that in some instances although the order was initially made people will be breached quite quickly because they were not suitable for work or work could not be found for them and they were ineligible for some reason that may have been the basis for the recommendation against, and if that was the case it would concern me that a prisoner's expectations were raised that they were going to be dealt with in a way other than a custodial sentence, even though they are not suitable for it, and also that the court's resources could be wasted in that it would require a breach to be brought back before the court and a double handling of someone.²⁹⁷

4.124 The Law Reform Commission, in its 1996 report on sentencing, canvassed the abolition of assessment reports for CSOs of 50 hours or less, but recommended against it. The Commission held the view that the PPS have more experience and expertise than court officials in this regard and removing their involvement may in fact result in greater costs through breaches:

... the Probation and Parole Service has greater expertise and experience in identifying (suitability) matters than would court officials ... Abolition of mandatory assessment reports for these orders ... may in fact incur greater costs (for the Probation and

²⁹⁵ Mr Gary Pudney, Principal Solicitor, South Eastern Aboriginal Legal Service, Evidence, 28 June 2005, p30

²⁹⁶ Magistrate Heilpern, Evidence, 28 June 2005, p41

²⁹⁷ Mr Babb, Evidence, 31 August 2005, p23

Parole Service) associated with breaches by offenders who are unsuitable for community service work.²⁹⁸

- 4.125** The Committee notes the concerns raised by some Inquiry participants regarding the inability of a magistrate or judge to order a CSO contrary to the assessment of the PPS. The Committee also notes that both the sentencing officer and the offender's legal representatives have the ability to question the Probation and Parole Officer about his/her finding as to suitability.
- 4.126** The Committee finds the views of the Sentencing Council and Magistrate Heilpern regarding the knowledge and experience of the PPS in assessing suitability to be persuasive. In addition, the Committee acknowledges the potential for the double handling of offenders and consequent waste of the court's resources in the event of breaches of CSOs, as identified by Mr Babb.

Nature of work undertaken on a CSO

- 4.127** Some Inquiry participants were critical of the type of work available to CSO participants, especially the emphasis on manual, unskilled work, which does not assist the person to develop work skills. For example, participants in public forums stated:

We have had them down there but basically only doing gardening and general maintenance and that sort of thing. They do not come out of it with transportable skills. I think we should be looking at that.²⁹⁹

There is a lot of talent among the Aboriginal people. They can do other things. They do not have to be labourers and street sweepers.³⁰⁰

- 4.128** The Greater Taree City Council advised that in some areas community based sentencing is organised 'as a matter of course' and that consequently clients can be mismatched with work:

In regional areas where there is limited access to varied opportunities it is felt that community based sentencing options are organised as a matter of course rather than with positive outcomes in mind. With a limited variety of community work orders available clients are often mismatched with an order that affects no meaning and therefore no change in behaviour.³⁰¹

- 4.129** Magistrate Heilpern identified that for some offenders the 'heavy' nature of the work available may result in an offender being considered to be unsuitable for a CSO:

... there is work available but not light work. There are a lot of people who may be pensioners or have some minor—I was going to say "disability" but that is not really necessarily so—ailment that means they cannot perform heavy duty work. There

²⁹⁸ NSW Law Reform Commission, Report 79, p101

²⁹⁹ Mr Meredith, public forum, Mount Druitt, 27 June 2005, p8

³⁰⁰ Ms Barker, public forum, Brewarrina, 16 June 2005, p24

³⁰¹ Submission 22, p1

seems to be a problem with enough light work being available and so sometimes people miss out on CSOs for that reason.³⁰²

- 4.130** The NSW Coalition of Aboriginal Legal Services (COALS), while generally supporting the idea of CSOs, raised concerns about the lack of opportunity for offenders to gain useful skills:

Solicitors at the Sydney Regional Aboriginal Corporation Legal Service (SRACLS) note that whilst community service orders are an interesting option, the manner in which they are currently effected does not allow much scope for rehabilitation or the acquisition of skills which may assist an offender in gaining meaningful employment at the conclusion of their sentence. This was particularly so in the case of one offender who spent the term of his community service order cutting fabric into smaller pieces.³⁰³

- 4.131** COALS suggested that the establishment of work camps for offenders on CSOs would potentially improve offenders work skills while allowing them to make a meaningful contribution to the community and decrease feelings of isolation or alienation:

COALS believes that the establishment of work camps at which offenders would be assigned to a particular project such as the construction of a house for the benefit of a local community would be more appropriate. It would allow for the offender to develop particular skills which could be of assistance in the offender's search of employment. It would also permit an offender to make a significant contribution to his/her local community, thereby decreasing any sense of isolation or alienation felt by the offender. In addition to benefits to the offender, such an arrangement would also benefit rural and remote communities who may otherwise lack the human and/or material resources for such projects.³⁰⁴

Programs for offenders on a CSO

- 4.132** A court can impose a range of conditions on a CSO including requiring an offender to participate in a development program or undergo testing for alcohol or drug use.³⁰⁵ The legislation limits the number of hours and the number of times per week an offender can be required to participate in development programs.³⁰⁶
- 4.133** The Committee heard evidence of a wide range of programs delivered directly by the Department, or delivered by other agencies working in collaboration with the Department or by other agencies alone. Programs include those addressing offending behaviour, such as the

³⁰² Magistrate Heilpern, Evidence, 28 June 2005, p41

³⁰³ Submission 43, p5

³⁰⁴ Submission 43, pp5-6

³⁰⁵ A court *cannot* order the offender to make a payment, by way of fine, compensation or otherwise. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 90

³⁰⁶ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 90(3) provides that a CSO requiring an offender to participate in development programs: (a) must not require the offender to participate more than three times in any one week, (b) must not require the offender to participate for a total period of more than 15 hours in any one week, and (c) must not specify a total period of less than 20 hours for participation.

Sober Driver Program, and programs designed to assist with an offender's employment prospects such as the *Pathways to Employment, Education and Training* program.

- 4.134** Several Inquiry participants informed the Committee that the availability of programs, such as drug and alcohol programs, in rural and remote areas is limited. This means that offenders in rural and remote areas who are placed on a CSO may not be able to derive the added advantage of attending programs.
- 4.135** A further consequence of the lack of availability of programs is that the option of an 'attendance centre order' is not available. Magistrate Claire Farnan advised the Committee in relation to the Bourke/Brewarrina area that:

One thing that is not available up there specifically is what is called 'attendance centres orders', which are orders requiring a person as part of a CSO to serve part of their hours at an attendance centre, which provides programs which may be directed towards literacy, drug and alcohol rehabilitation or counselling of some sort. Those are not available as part of a CSO at the present time in Bourke ...³⁰⁷

- 4.136** The benefit of offenders being able to discharge some of their CSO hours through attendance at programs was noted by some Inquiry participants, particularly where there is a dearth of CSO placements. For example, the Western Aboriginal Legal Service argued that where CSO work is not available offenders should be able to discharge their CSO hours through attendance at programs:

There is a problem with small communities such as Brewarrina, Enngonia and Bourke in providing enough work for offenders. Often, they compete with other organisations such as the CDEP (employment program specifically aimed at Aboriginal people). Consequently, CSO's are not always an available option. When this is the case, it is vital that CSO's can be carried out as programs. For example the Magistrate or Judge could sentence a person to say 50 hours CSO hours to be undertaken as a program (Domestic Violence or Sober Driver).

Clients in this region are disadvantage for lack of options in this area because of the lack of CSO's available. This is a great injustice and it rarely occurs in the larger towns and cities, as they can access CSO through work programs or educational programs. If a person requires a sentencing option such as a CSO, which is more suitable to the type of offence committed and/or the offenders criminal history, but not full-time custody, then more often than not, there is no other option to deal with the offender by either a suspended sentence or full time custody in Bourke, Brewarrina, Cobar and Nyngan. Certainly one cannot provide work in country areas if work is not available, but one can provide educational programs under the CSO option.³⁰⁸

- 4.137** The Law Society also noted that the courts can order CSO hours be undertaken through programs and that it is therefore essential that programs are available in rural areas:

The Law Society acknowledges that in many parts of rural NSW [CSOs are] available. It is however by no means complete, and further improvement in the level of coverage is required. Furthermore, with the ability of the courts to order that a certain number of hours be completed by undertaking personal development training such as

³⁰⁷ Magistrate Claire Farnan, Local Court, Evidence, 31 August 2005, p39

³⁰⁸ Submission 44, pp4-5

anger management, and drug and alcohol counselling, it is essential to ensure the availability of agencies to deliver these programs. Again, the availability of such programs in rural areas lags behind that in the Sydney, Illawarra and Newcastle areas.³⁰⁹

4.138 The Committee notes that the Law Reform Commission, in its 2001 Report, *Sentencing Aboriginal Offenders*, recommended that the Department of Corrective Services should establish more Attendance Centres in rural areas.³¹⁰ When making this recommendation the Commission noted that there was no reason for limiting this option to Aboriginal offenders and that Attendance Centre orders should be available to all offenders in rural and remote areas.

4.139 Providing programs in rural and remote areas can be challenging due to the need for a ‘critical mass’ of offenders. Magistrate Farnan suggested that one of the reasons attendance centre orders may not be available in Bourke is that ‘Probation and Parole may not have the numbers of people to justify setting up that sort of program in that area.’³¹¹

4.140 Mr Flanagan also raised the issue of numbers of offenders and their distribution over a large geographical area:

You need a certain critical mass of people in a location to get the benefits of group dynamics. If they are disparate and spread throughout the bush, it is hard to do that. Michael and I have tried options. Presently we are looking at doing an Aboriginal men's group, which combines Aboriginal clients from Glen Innes and Inverell meeting at a central point, the Aboriginal Housing Corporation, which has an appropriate premises for us to use. So we try to bus people in to a central point. That is one thing you could try, but it would never reach all of the target clients.³¹²

4.141 Ms Ruis advised the Committee of strategies used by the Department to overcome the difficulties of a dispersed offender population and the lack of transport in rural and remote areas to deliver programs:

We deliver a lot of group-based programs and in the Sydney metropolitan area that works well because people can catch a bus and attend once a week. We have had to tailor them for our rural areas in a few locations in both the north-west and south-west. We condense the program and instead of attending once a week for eight weeks, we do an intensive program over two days and we actually transport the people to a central area, for instance, Lake Cargelligo, or somewhere like that. We get all the neighbouring areas. We arrange transport in the morning and back of an evening. They do their programs in a condensed form in recognition that the retention rate would be, I think, compromised, by asking people to come every week.³¹³

4.142 The Committee notes the work undertaken by the Department to make programs more accessible to offenders in rural and remote areas, in addition to the collaborative work

³⁰⁹ Submission 34, p3

³¹⁰ NSW Law Reform Commission, Report 96, p168

³¹¹ Magistrate Farnan, Evidence, 31 August 2005, p39

³¹² Mr Flanagan, Evidence, 14 June 2005, p29

³¹³ Ms Ruis, Evidence, 6 June 2005, p5

undertaken with agencies such as the Motor Accident Authority (Sober Driver Program) and TAFE (PEET program).

- 4.143** The Committee recognises that the expansion of programs to support CSOs (and other community based sentences) cannot happen in isolation. Other agencies will also be required to extend programs that support offenders serving community based sentences. In addition, a whole-of-government approach to improving the provision of services and programs to support offenders on community based sentences in rural and remote NSW is required.
- 4.144** The Committee is of the opinion that offenders on a CSO who undertake the PEET or other similar vocational/skill based program can gain multiple benefits. For example, obtaining an OH&S qualification may increase the range of CSO placements that an offender can access, as well increasing the offender's future employment prospects.

Recommendation 20

That the Department of Corrective Services investigate ways to expand the availability of vocational or skills based programs for offenders undertaking Community Service Orders in rural and remote New South Wales.

Disadvantaged offenders and CSOs

- 4.145** The benefits of serving a sentence by way of a CSO for disadvantaged offenders were identified by several Inquiry participants. For example, the Public Defenders Office stated:

CSOs are of particular benefit for some groups of offenders from disadvantaged groups, due to their ability to increase skills and connection with the community. In this context, we would particularly suggest that ATSI, CLAD and young offenders would be ideally suited for community service work.³¹⁴

- 4.146** Similarly, the Shopfront Youth Legal Centre stated:

... community service orders are well suited to many disadvantaged groups as they can provide them with meaningful activity and the opportunity to acquire vocational skills. It is regrettable that community service work is not more widely available.³¹⁵

- 4.147** Despite the obvious benefits of CSOs for disadvantaged offenders, the Committee was advised that many such offenders are excluded from the CSO scheme because they are not assessed to be suitable for CSOs or work placements are not available due to the additional support they may require to carry out community service work. Particular issues were raised in relation to Aboriginal offenders and offenders with disabilities.

³¹⁴ Submission 10, p8

³¹⁵ Submission 25, p8

Aboriginal offenders

- 4.148** The Committee was informed of the benefits of serving a sentence by way of a CSO for Aboriginal offenders. For example, the South Eastern Aboriginal Legal Service stated:

In areas of high unemployment a chance at a CSO may lead to employment, a better work ethic, an increase in self esteem. At the very least, ... it may give some structure to a clients week and even a reason to get up each day.³¹⁶

- 4.149** The Conference of Leaders of Religious Institutes (NSW) noted the advantages of CSOs for Aboriginal women but also noted that there are some problems with access:

Community Service Orders (CSOs) offer another means of keeping Indigenous women in their communities and maintaining family unity, thus should be a priority in extension to rural and remote areas, to give offenders in these areas more options. More widespread availability would make CSOs a more realistic possibility for Indigenous women in rural and remote NSW. However there are other issues that would need to be addressed to make the program easier to access. Women with younger than school age children would find it difficult to meet the requirement of a CSO without assistance with childcare. More attention needs to be paid to the provision of childcare as part of a CSO. Also, Community Service Orders need to recognise specific Indigenous cultural issues, including the nature of the work, and rules relating to breaching orders. CSO supervisors need to take see funerals and community events as valid reasons for non-attendance. Inflexibility about absences could see Indigenous people breach their CSOs, and face fines or imprisonment.

Any extension of Community Service Orders to rural and remote areas is contingent on the availability of community work. The Government would have to make sure that infrastructure and opportunities existed to offer meaningful, properly supervised community work. There also needs to be a commitment to provide drug and alcohol rehabilitation as part of a community service sentencing option to address offending behaviour.³¹⁷

- 4.150** COALS called for Aboriginal-specific CSO placements:

CSOs must give Aboriginal offenders the opportunity to undertake work within an Aboriginal organisation. Aboriginal offenders would generally feel far more comfortable in such an environment and would be more likely to complete the required hours.³¹⁸

- 4.151** The Department of Corrective Services noted, in relation to the availability and appropriateness of CSOs for disadvantaged offenders, that the employment of field officers could be extended:

Under existing legislation, and with the provision of the necessary resources, the employment of CSO field officers could be extended to offenders from some disadvantaged groups – eg the employment of local Aboriginal people as links

³¹⁶ Submission 42, p15

³¹⁷ Submission 18, pp7-8

³¹⁸ Submission 43, p13

between Aboriginal communities and CSO agencies (as occurs in the Northern Territory).³¹⁹

- 4.152** As outlined in Chapter 3, the Committee was advised by several Inquiry participants that there are some offenders who, for a range of reasons, would prefer to be sentenced to a period of imprisonment rather than undertake a CSO. For example, the Committee was advised during its public forum in Inverell, that some Aboriginal offenders would prefer not do community service work for historical reasons:

I was sent once to gaol because I would not do community service, because I am Aboriginal and slavery went out years ago ... I would not do community service for no-one. That is slavery.³²⁰

- 4.153** One submission maker who identified himself as Indigenous stated:

We have a saying that some of our people go to jail and come out fat and shining. Everything is laid on in jail and frequently no work is to be done. Some people get very comfortable with this alternative.³²¹

- 4.154** Superintendent Desmond Organ with the Bourke police provided an example of a young Aboriginal man who expressed a preference for gaol rather than a CSO:

I spoke to a young prisoner at Warren police station about a fortnight ago and he reaffirmed that exact situation. ... During the conversation he indicated that that is where he wished to be. He had been caught and convicted at court but he would rather be in there than doing community service or some other course of sentencing but that was seen to be an adverse impact on him. It was easier for him, with more support, to be in gaol.³²²

- 4.155** The Committee heard similar evidence from Ms Jane Adams, an Aboriginal Community Liaison Officer with Inverell Police, with regard to juvenile offenders³²³ and from Mr William Sullivan, an Aboriginal Community Liaison Officer with Bourke police.³²⁴

- 4.156** The Committee acknowledges that some Aboriginal offenders may be unwilling to undertake a CSO for historical reasons. In addition, some offenders may feel more supported during a term of full-time imprisonment rather than undertaking a CSO.

- 4.157** It is hoped that through the recommendations designed to strengthen the CSO scheme, and other community based sentences, to make them more accessible and culturally appropriate for aboriginal offenders, this situation could be somewhat ameliorated. Although the Committee notes that wider issues concerning the social, economic and historical disadvantages faced by Aboriginal people also need to be addressed.

³¹⁹ Submission 30, p21

³²⁰ Ms Vivian Irving, public forum, Inverell, 14 June 2005, p3

³²¹ Submission 1, p1

³²² Superintendent Desmond Organ, NSW Police, Evidence, 15 June 2005, p13

³²³ Ms Jane Adams, Aboriginal Liaison Officer, NSW Police, Evidence, 14 June 2005, p15

³²⁴ Mr William Sullivan, Aboriginal Liaison Officer, NSW Police, Evidence, 15 June 2005, p13

- 4.158** As noted in paragraph 4.40, the Committee was informed that competing programs such as the Community Development Employment Projects (CDEP) may contribute to the declining number of CSO placements. However, the Committee was also informed during its public forums in Brewarrina and Bega that some CDEP programs take CSO work placements themselves rather than compete for work.³²⁵
- 4.159** The NSW Coalition of Aboriginal Legal Services suggested that one way to increase the availability of CSOs in rural and remote areas is to establish ‘... a broader range of CSO providers including the CDEP.’³²⁶ The Committee agrees that the value of CDEPs in providing work for Aboriginal people could be harnessed in relation to CSOs. The Committee recommends that the Minister for Justice seek consultations with the Federal Government to examine how the CDEP program can be utilised to create more CSO work placements in rural and remote areas.

Recommendation 21

That the Department of Corrective Services examine ways of increasing access by Aboriginal offenders to culturally appropriate Community Service Order work placements in rural and remote areas including seeking consultations with the Federal Government to examine how the Community Development Employment Projects program can be utilised to create more Community Service Order work placements in rural and remote areas.

Offenders with disabilities

- 4.160** Several Inquiry participants discussed the availability of CSOs for offenders with disabilities. Comments related to offenders with physical, intellectual and mental health disabilities, although most concerned offenders with intellectual disabilities.
- 4.161** The Committee was advised that CSOs can be beneficial for offenders with disabilities compared to other sentencing options. For example, the Department of Ageing, Disability and Home Care (DADHC) wrote of the benefits of CSOs for offenders with intellectual disabilities:
- Community Service Orders (CSO) may be beneficial to a person with an intellectual disability as it may increase their self-esteem through participation in the work programs. The work program may increase social and vocational skills. A CSO may be a more meaningful consequence than other options. However, the work offered needs to be appropriate to a person with an intellectual disability.³²⁷
- 4.162** In addition, the Committee notes that the Law Reform Commission in its 1996 report, *People with an Intellectual Disability and the Criminal Justice System*, suggested that CSOs and attendance at

³²⁵ Ms Barker, public forum, Brewarrina, 16 June 2005, p4 and Mr Barcham, public forum, Bega, 28 June 2005, p5

³²⁶ Submission 43, p15

³²⁷ Submission 39, NSW Department of Ageing, Disability and Home Care, p3

programs, which provide living skills and work training are the most appropriate placement for offenders with an intellectual disability.³²⁸

4.163 Despite the benefits of CSOs for offenders with disabilities, a number of Inquiry participants spoke of the difficulties faced by such offenders in accessing CSOs and the lack of specific support services to assist them with a CSO, should they receive one.

4.164 The submission of the Law Society of NSW, contained information regarding the experience of one of its members who noted that pre-sentence reports ‘routinely’ assessed offenders with disabilities (and other disadvantaged offenders) as unsuitable for a CSO (and periodic detention):

In my experience, pre-sentence reports by Probation and Parole routinely assess offenders as unsuitable for community service and periodic detention (and home detention in the case of home detention assessments) on the sole basis that the offender suffers from some form of disability. For example, every hearing impaired client that I have represented at Burwood Local Court over the last twelve months has been assessed as unsuitable for community service and periodic detention solely because of their hearing impairment. In each case the assessment report indicated that there were no placements available for hearing impaired persons. Offenders are routinely assessed as unsuitable for either community service or periodic detention wherever they: (1) have a mental illness; (2) haven an intellectual disability; (4) are elderly (and are believed to have potential difficulties with memory retention); (5) have limited English speaking skills or (6) do not have permanent residency.³²⁹

4.165 The Committee was informed that there is a lack of suitable work for offenders with disabilities. For example, Legal Aid NSW noted that ‘offenders with a disability may not be considered suitable for community service orders if appropriate work is not available in their area’.³³⁰ DADHC expressed similar views:

People with an intellectual disability who have come into contact with the criminal justice system do not appear to be considered for the option of a CSO as a community based sentencing options as the level of adequate supervision required is not available in the current CSO programs. In order for this option to be available to a person with an intellectual disability the programs would need to be tailored to suit their needs.³³¹

4.166 The Committee was advised that the main reason why suitable work cannot be found, or that offenders with disabilities are assessed to be unsuitable, is that they require support to undertake work placements. For example, the Intellectual Disability Rights Service identified the support required as a barrier to offenders with an intellectual disability successfully undertaking a CSO and noted that Community Offender Services is not able to provide this support:

³²⁸ NSW Law Reform Commission, Report 80, *People with an Intellectual Disability and the Criminal Justice System*, December 1996, p410

³²⁹ Submission 47, pp7-8

³³⁰ Submission 31, p5

³³¹ Submission 39, p3

People with an intellectual disability may require a higher level of support and supervision to be able to successfully carry out a community service order. The officers of Community Offender Services are too stretched to provide the support required and do not have the skills to work with someone with an intellectual disability. There also may be real problems in finding suitable work for a person with an intellectual disability. These deficiencies are likely to result in many people with an intellectual disability being assessed as not suitable for a community service order.³³²

- 4.167** Mr Paul Winch, Public Defender, suggested that the type of work which could be undertaken under a CSO could be expanded to increase this option for offenders with a disability:

In essence, by enhancing them and by expanding the activities and kinds of orders that are available so that those groups are more easily accommodated so that the kind of work that might be required ought to be more varied than it is presently, as it seems to be fairly much for able-bodied and moderately young and healthy kinds of people. It would seem that it does not need too much imagination to be able to see how those things could be expanded.³³³

- 4.168** Ms Carol Mills, the Deputy Director General of DADHC, suggested that CSO work for offenders with a disability should be guided by the needs of the individual:

DADHC's view is that it would very much depend on the skills, desires and interests of the individual. In our perspective, we take the notion of work very broadly. We may be talking about ... activities that contribute to somebody's wellbeing that may not fall into the conventional definition of work. We have a view that it really should be guided by the needs of the individual rather than any specific category that would be applied because they are on a community based sentence.³³⁴

- 4.169** The NSW Law Reform Commission recommended that:

The NSW Probation and Parole Service should ensure that there are available Community Service Order work options which are suitable for a person with an intellectual disability.³³⁵

- 4.170** Some Inquiry participants argued that if appropriate support services were available offenders with disabilities could undertake CSOs. For example, Ms Linda Rogers, Solicitor, Intellectual Disability Rights Service stated that 'if we provide those supports a person (with a disability) quite clearly would be able to comply with those orders.'³³⁶

- 4.171** Legal Aid NSW noted that financial incentives to cover an employer's training costs may need to be provided to assist offenders with a disability undertaking CSOs:

The imposition of community service orders instead of gaol sentences is dependent on a number of things, including availability of suitable work. One possible way to

³³² Submission 24, p5

³³³ Mr Winch, Evidence, 30 August 2005, p31

³³⁴ Ms Carol Mills, Deputy Director General, Department of Ageing, Disability and Home Care, Evidence, 30 August 2005, p55

³³⁵ NSW Law Reform Commission, Report 80, p409

³³⁶ Ms Rogers, Evidence, 30 August 2005, p42

increase the amount of work available would be to involve government agencies and other employers in providing community service order placements for work which has an appropriate community component but which would not take the place of a permanent employee (and therefore not breach existing legislation). Financial incentives to cover an employer's necessary training costs, where applicable, should also be considered – this might be particularly relevant if the person performing the community service work has particular training needs due to a disability.³³⁷

4.172 The Committee notes that the Law Reform Commission suggested the development of a special offenders' service in the PPS. This service would 'provide specialist supervision and support service for people with an intellectual disability who are serving non-custodial sentences ...'³³⁸

4.173 The Committee is concerned that offenders with disabilities, particularly intellectual disabilities, are not able to access CSOs as a community based sentencing option. This problem is particularly acute when considering the benefits of this sentencing option for this group of disadvantaged offenders. The Committee is of the view that a specific initiative should be undertaken by the Department of Corrective Services to examine the barriers preventing offenders with disabilities being assessed as suitable for a CSO or for suitable work placements to be identified. The provision of assistance and support to enable offenders with disabilities to undertake a CSO should be examined.

Recommendation 22

That the Department of Corrective Services undertake a specific project to examine the barriers preventing offenders with disabilities being assessed as suitable for a CSO or for suitable work placements to be identified. The provision of assistance and support to enable offenders with disabilities to undertake a Community Service Order should be examined.

³³⁷ Submission 21, pp4-5

³³⁸ NSW Law Reform Commission, Report 80, pxxxviii

Chapter 5 Bonds and suspended sentences

In this Chapter the Committee examines bonds and suspended sentences and the particular issues affecting disadvantaged offenders and offenders in rural and remote areas relating to these community based sentencing options.

Overview

What are bonds?

- 5.1** A bond, otherwise known as a ‘good behaviour bond’,³³⁹ requires an offender to be of good behaviour for a set period. There are different types of bonds that can be ordered under various sections of the *Crimes (Sentencing Procedure) Act 1999* (NSW). These are:
- Section 9 - good behaviour bonds
 - Section 10 - dismissal of charges or conditional discharge (with good behaviour bond or intervention program)
 - Section 11 - deferral of sentence for rehabilitation or other purposes
 - Section 12 - suspended sentences (with good behaviour bond)
- 5.2** A bond contains conditions to the effect that the person under the bond will appear before the court if called upon to do so at any time during the period of the bond and will be of good behaviour for the duration of the bond.³⁴⁰ A bond may contain other conditions imposed by the court *other than* conditions relating to community service work or payment of fines or compensation.³⁴¹ Common conditions include that the offender must accept the supervision of the Probation and Parole Service (PPS) and must attend drug and alcohol programs, as directed by the PPS.
- 5.3** Where a court requires an offender to participate in an intervention program as a condition of a bond, the court must be satisfied that the offender meets the eligibility criteria of the program, is a suitable person to participate in the program, the program is available in the area where the offender lives and that participation would reduce the likelihood of re-offending.³⁴² Before a court makes an order requiring an offender to participate in an intervention program, the court may refer the offender to the PPS for assessment as to suitability.³⁴³

³³⁹ Bonds were previously known as a “recognizance” in legislation. Following a recommendation of the NSW Law Reform Commission, (Report 79, *Sentencing* (1996), Recommendation 16), the term “bond” replaced “recognizance”.

³⁴⁰ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 95

³⁴¹ *Crimes (Sentencing Procedure) Act 1999* (NSW), ss 13, 95(c)(ii)

³⁴² *Crimes (Sentencing Procedure) Act 1999* (NSW), s 95A

³⁴³ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 95B

- 5.4 Bonds may be supervised or unsupervised. The range of conditions that may be attached to a bond is, in theory, unlimited and will depend on the individual circumstances of the case before the court. In its submission the Department of Corrective Services advised that, in practice, where conditions are imposed, supervision is nearly always a condition. Also, Probation and Parole officers, when writing pre-sentence reports, may recommend conditions in the event that a bond is ordered.³⁴⁴

Section 9 - good behaviour bond

- 5.5 Under s 9, *following a conviction*, the court may direct an offender to enter into a good behaviour bond for a specified term of up to five years. A s 9 good behaviour bond can be imposed instead of a sentence of imprisonment.³⁴⁵

Section 10 - dismissal of charges and conditional discharge

- 5.6 Under s 10, the court may, after a finding of guilt, *not record a conviction* and, instead, make an order directing that the charge be dismissed, make an order discharging the person on condition they enter into a good behaviour bond for a term not exceeding two years, or make an order discharging the person on condition that the person enter into an agreement to participate in an intervention program.³⁴⁶

Section 11 - deferral of sentence

- 5.7 A court that finds an offender guilty can adjourn proceedings and grant the offender bail for a period of up to 12 months to undertake rehabilitation or participate in an intervention program or other similar purposes. The offender returns to court for sentencing at the completion of their program.³⁴⁷ This type of bond is widely referred to as a Griffith's Remand or Griffith's Bond.³⁴⁸ If the offender successfully completes the program ordered, the court takes this into account when sentencing.

Section 12 - suspended sentence

- 5.8 A suspended sentence is a sentence of imprisonment (of two years or less) that has been imposed but *not executed*. The term of imprisonment is suspended on condition that the offender enters into a bond. The bond can be supervised or unsupervised. It is this type of bond that came under the most scrutiny during this Inquiry and throughout this report will be referred to as a 'suspended sentence'.

³⁴⁴ Submission 30, p4

³⁴⁵ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 9

³⁴⁶ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 10

³⁴⁷ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 11

³⁴⁸ Named after the High Court case of *Griffiths v R* (1977) 137 CLR 293.

- 5.9** Suspended sentences were introduced as a sentencing option in NSW on 3 April 2000 under s 12 of the *Crimes (Sentencing Procedure) Act 1999*.³⁴⁹ The power to impose a suspended sentence exists in every State and Territory as well as in the federal jurisdiction.³⁵⁰
- 5.10** In the hierarchy of penalties available to the court a suspended sentence is considered more severe than a community service order but less severe than imprisonment served by way of periodic detention, home detention or full-time imprisonment.³⁵¹
- 5.11** There are two distinct steps involved in imposing a suspended sentence. First, the court must be satisfied that, having considered all other alternatives, no penalty other than imprisonment is appropriate.³⁵² This requirement is common to all sentences of imprisonment. Once the sentencing option of imprisonment is selected, the court must then determine length of the sentence – this determination is made without considering the manner in which the sentence will be served. Where the term of the sentence is two years or less, the court then decides whether or not the sentence ought to be suspended. In this regard, a suspended sentence is *not* an alternative to imposing a term of imprisonment – the sentence cannot be suspended until the term of imprisonment has been imposed.³⁵³ This two-step process and the potential for ‘sentence inflation’ is discussed further at paragraphs 5.86-5.93.
- 5.12** The term of the suspended sentence cannot exceed the term of the sentence of imprisonment.³⁵⁴ The Committee, however, heard evidence about the potential benefits of ordering a longer period of supervision than the sentence of imprisonment, that is, a longer bond with a shorter term of imprisonment in the case of a breach. This is discussed at paragraphs 5.98-5.102.

Participation

- 5.13** The NSW Bureau of Crime Statistics and Research (BOCSAR) *Criminal Court Statistics for 2004* show that the various types of bonds, including suspended sentences, are widely used in the Local Court for criminal matters.³⁵⁵

³⁴⁹ Prior to 1974, a form of suspended sentence was available but only to offenders who had not been previously convicted of an indictable offence: *Crimes Act 1900* (NSW), ss 562 and 558.

³⁵⁰ For example, *Sentencing Act 1991* (Vic), ss 27, 29, 31 and *Crimes Act 1914* (Cth), s 20(1)(b).

³⁵¹ G Brignell & P Poletti, ‘Suspended Sentences in New South Wales’, *Sentencing Trends and Issues*, No 29, November 2003, Judicial Commission of NSW, p5

³⁵² *Crimes (Sentencing Procedure) Act 1999* (NSW), s 5(1)

³⁵³ *R v Zamagias* [2002] NSWCCA 17 at 25: “...that is because a sentence cannot be suspended until it has been imposed: it is the execution of the sentence that is suspended not its imposition.”

³⁵⁴ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 12(1)(b)

³⁵⁵ The Committee notes, however, that Ms McComish advised that s 10 bonds are ‘very rarely used’: Ms McComish, Evidence, 30 August 2005, p2.

Table 5.1 NSW Criminal Courts Statistics 2004, Local Court, penalty for principal offence³⁵⁶

Type of penalty	Number of occasions used	% of total penalties imposed in the Local Court for criminal offences
Bond without conviction	10,953	9.9%
No conviction recorded	7,267	6.6%
Bond with supervision	5,996	5.4%
Bonds without supervision	10,773	9.8%
Suspended sentence with supervision	2,760	2.5%
Suspended sentence without supervision	2,568	2.3%

- 5.14** Other widely imposed penalties in the Local Courts include fines (56,187 or 51% of total penalties), imprisonment (7,546 or 6.8%) and community service orders (4,637 or 4.2%).
- 5.15** The use of bonds and suspended sentences ranges across all categories of offence from ‘manslaughter and driving causing death’ to ‘road traffic and motor vehicle’ regulatory offences.³⁵⁷ The most common offence in the Local Court where a suspended sentence was imposed (from 3 April 2000 to 31 December 2002) was ‘drive while disqualified’.³⁵⁸

Trends in the use of suspended sentences

- 5.16** The Committee was informed that since the introduction of suspended sentences their use by the courts increasing, but only to a small degree. In this regard the Committee notes that in its 2005 study on trends in the use of suspended sentences, the Judicial Commission of NSW considered almost five years of data from the local and higher courts. The Commission found that while the use of suspended sentences increased over the five-year period the increase was small.³⁵⁹
- 5.17** The Commission concluded that a multitude of subjective and objective features are taken into account when deciding to impose a suspended sentence, including the *lack of availability of alternative penalties*:

... a multitude of factors accounts for the decision to impose a s12 suspended sentence, more so than the offence itself. The results seem to point to factors currently not available in numeric form exerting a greater influence on the decision than even the plea, bail status and the offender’s prior criminal record. For example, the court might give a large consideration to the subjective features of the offence, such as the offender’s ability and willingness to rehabilitate, and hardship factors. The

³⁵⁶ NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2004*, Attorney General’s Department, July 2005, pp26-27

³⁵⁷ NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2004*, pp26-27

³⁵⁸ Brignell & Poletti, ‘Suspended Sentences in New South Wales’, p11

³⁵⁹ P Poletti & S Vignaendra, ‘Trends in the use of s 12 suspended sentences’, *Sentencing Trends and Issues*, No 34, August 2005, Judicial Commission of New South Wales, p20

inappropriateness or lack of availability of other penalties might also impact greatly on the sentencing options.³⁶⁰

- 5.18** This finding supports the evidence heard by the Committee of a perception of an increase in the use of suspended sentences in rural and remote areas where other sentencing options such as periodic and home detention may be unavailable.

Eligibility and suitability criteria

- 5.19** Unlike some other community based sentencing options there are no specific legislative eligibility criteria for bonds. However, when considering whether to order a bond an offender's suitability is considered in some circumstances. A court may refer an offender to the PPS for an assessment as to his/her suitability to participate in a particular intervention program before making any order for a bond.³⁶¹ Also, as discussed in paragraph 2.35, the court can take into account any relevant aggravating or mitigating factors that affect the relative seriousness of the offence.³⁶²

Compliance

- 5.20** In June 2005, the Judicial Commission, working jointly with the Department of Corrective Services, published an analysis of the data on successful completion rates for supervised sentencing options, including bonds and suspended sentences.³⁶³ The successful completion rate for supervised bonds and suspended sentences was 88.9% and 83.8% respectively.³⁶⁴
- 5.21** Overall, the Commission found successful completion rates for supervised community based orders to be relatively high at around 84% (or revocation rates of approximately 16%).³⁶⁵ The type of order and the age of the offender were identified as factors that appeared to influence the successful completion or revocation rates of supervised community based orders. The Commission stressed, however, that 'success should not be judged purely in terms of revocation rates since different orders have differing levels of intensity and strictness of supervision.'³⁶⁶
- 5.22** The Committee heard evidence from a number of witnesses as to why offenders may fail to comply with the conditions of their bond. Reasons include the effect of intensive policing in rural and remote communities and not fully understanding the conditions of a bond. These issues are discussed further at paragraphs 5.137-5.156.

³⁶⁰ Poletti & Vignaendra, 'Trends in the use of s 12 suspended sentences', pp20-21

³⁶¹ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 95B

³⁶² *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A

³⁶³ I Potas, S Eyland & J Munro, 'Successful completion rates for supervised sentencing options', *Sentencing Trends and Issues*, No 33, August 2005, Judicial Commission of New South Wales. The Commission also examined community service orders and home detention orders.

³⁶⁴ Potas, Eyland & Munro, 'Successful completion rates for supervised sentencing options', p7

³⁶⁵ Potas, Eyland & Munro, 'Successful completion rates for supervised sentencing options', p7

³⁶⁶ Potas, Eyland & Munro, 'Successful completion rates for supervised sentencing options', p13

Consequences of a breach of a bond

- 5.23** A breach of a bond is dealt with by the courts (rather than the Parole Authority). If satisfied that an offender has failed to comply with any of the conditions of a bond, a court has a range of options depending on the type of bond:
- In the case of a s 9 good behaviour bond, the court can choose to take no action, vary the conditions, impose further conditions or revoke the bond. If revocation occurs, the offender is subject to be sentenced for the *original offence* (not for the breach itself).³⁶⁷
 - Revocation of a conditional discharge (s 10 bond) can result in the court convicting and sentencing the offender for the *original offence*.³⁶⁸
 - The effect of a revocation of a deferral or Griffith's bond (s 11 bond) is that the offender is called up for sentencing prior to the expiration of the remand period.
- 5.24** When sentencing an offender for the original offence (following revocation of the bond), the court is required to take into account the fact that the offender was subject to the bond and any action done by the offender in compliance with his/her obligations under the bond.³⁶⁹
- 5.25** An offender who breaches a s 12 bond (suspended sentence) is in a *very* different position. If a court is satisfied that an offender has breached the s 12 bond, the revocation of the suspended sentence is *mandatory*, unless the court is satisfied that the failure to comply is 'trivial in nature' or there are 'good reasons for excusing the offender's failure to comply' with the bond.³⁷⁰ Upon revocation, the suspended term of imprisonment is activated. The Committee heard evidence from a number of witnesses of the serious consequences for offenders who breach s 12 bonds as discussed at paragraphs 5.107-5.115.

Advantages and disadvantages of bonds and suspended sentences

- 5.26** Many of the advantages and disadvantages of bonds and suspended sentences identified by inquiry participants are the same as those identified generally for community based sentencing options. Those general advantages and disadvantages are discussed in Chapter 2. The advantages and disadvantages that were particularly emphasised in relation to bonds and suspended sentences are examined in this section.

Advantages

- 5.27** The main advantages or benefits of bonds and suspended sentences that were raised during the Inquiry were their deterrent and rehabilitation value and their flexibility as a sentencing option.

³⁶⁷ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 98(2)

³⁶⁸ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 99(1)(b)

³⁶⁹ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 24 (b)

³⁷⁰ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 98(3)

Deterrence and rehabilitation

- 5.28** As noted previously, a bond can be supervised or unsupervised and the range of conditions that may be attached to a bond is virtually unlimited and will be influenced by the particular circumstances of the offence. The Committee notes that approximately half of all suspended sentences and approximately two-thirds of bonds ordered in the Local Courts in criminal matters are unsupervised (refer to paragraph 5.13).
- 5.29** The Committee was informed that were an offender is required to participate in a program as a condition of a bond, this sentencing option has a particular deterrent value while simultaneously offering opportunities for rehabilitation. In its 2003 report on suspended sentences in NSW the Judicial Commission considered, in some detail, the purpose of suspended sentences. Its analysis of the judicial line of authority in this area noted the balance that must be struck between the competing principles of deterrence and rehabilitation:
- ... it seems that the exercise of the discretion to suspend a sentence of imprisonment must not lose sight of the objective circumstances of the offence. Then there must be a fine balancing of the various purposes of punishment with particular but not always exclusive consideration of the competing principles of rehabilitation (often seeking to justify suspension) and general deterrence (often working against suspension).³⁷¹
- 5.30** In his Second Reading Speech to the Crimes (Sentencing Procedure) Bill 1999, the legislation which introduced suspended sentences, the Attorney General, the Hon Bob Debus MP, described the purpose of suspended sentences as being both rehabilitative and a denunciation of the offender's conduct:
- The primary purpose of suspended sentences is to denote the seriousness of the offence and the consequences of re-offending, whilst at the same time providing [an offender who is subject to this sanction] an opportunity, by good behaviour, to avoid the consequences.³⁷²
- 5.31** The Committee was informed that because programs undertaken as a condition of a bond are carried out in the community this strengthens the likelihood of rehabilitation. In this regard the Department of Corrective Services stated that 'in terms of rehabilitation, interventions carried out in the community can be more effective in reducing recidivism than interventions delivered in a custodial setting'.³⁷³
- 5.32** Mr Richard Davies, Principal Solicitor with the Western Aboriginal Legal Service, identified the potential to achieve long term benefits from rehabilitative programs delivered during the term of a supervised bond:

³⁷¹ Brignell & Poletti, 'Suspended Sentences in New South Wales', p7

³⁷² Legislative Assembly, New South Wales, *Hansard*, 28 October 1999, p2326

³⁷³ Submission 30, p12, citing DA Andrews, I Zinger, RD Hoge, J Bonta, P Gendreau and FT Cullen, 'Does Correctional Treatment Work? A Psychologically Informed Meta-Analysis', *Criminology*, Volume 28, 1990, pp369-404.

Obviously, bonds last for one or two years ... but if the problems are identified and treatment of those problems is commenced during that time, then hopefully that can continue after the end of the bond ... ³⁷⁴

- 5.33** Ms Valda Ruisis, Acting Senior Assistant Commissioner of Community Offender Services with the Department of Corrective Services, described how staff work with offenders on supervised bonds to identify their specific needs and offer assistance with rehabilitation:

What we do with these offenders ... is we develop individual case plans, taking into account the type of offence they have committed, the level of risk they present to the community and the identified needs of the offender. The supervision is directed to ensure that they comply with the order and to assist the offender in developing positive behaviours and skills.³⁷⁵

- 5.34** Mr Christopher Costas, Area Manager of Community Offender Services in Queanbeyan, described some of the programs available to an offender on a supervised bond:

In managing offenders who are on bonds, we rely to a considerable extent on referral to services in the broader community, such as alcohol and other drug services and mental health services. We also participate in a partnership approach to service delivery, and I will mention two examples. First ... is the Staying Home, Leaving Violence pilot program. We are working to try to provide a domestic violence perpetrator program to some offenders referred from the pilot, although they may not yet have been convicted. Second, is in relation to the indigenous community where we are part of a multi-agency committee called CRI, which is the Cultural Reconnections Initiative. That committee has a role in sponsoring the Ancestral Trek, which is available to Aboriginal men, including those on community-based orders.³⁷⁶

- 5.35** The Committee notes that while an unsupervised bond can act as a deterrent, a supervised bond with appropriate programs to address offending behaviour also has the potential to serve a significant rehabilitative function. In particular, the Committee acknowledges the benefits of programs delivered in the community rather than in a custodial setting.

Flexible sentencing option

- 5.36** As noted at the outset of this Chapter there are a number of different bonds that can be ordered and the range of conditions that may be attached to a bond is, in theory, almost limitless. Several inquiry participants emphasised the flexibility of this form of community based sentencing and the ability of the courts to choose a particular bond and tailor conditions to suit the offence.

- 5.37** Ms Jane Sanders, Principal Solicitor with the Shopfront Youth Legal Centre, an organisation that provides a free legal service for homeless and disadvantaged people aged 25 and under identified the flexibility of bonds as a reason for their wide-spread use with young offenders:

Certainly for the young people that we act for, who are disadvantaged and have mental health or drug problems, or whatever, a supervised section 9 bond is a very

³⁷⁴ Mr Davies, Evidence, 15 June 2005, p49

³⁷⁵ Ms Ruisis, Evidence, 6 June 2005, p3

³⁷⁶ Mr Costas, Evidence, 28 June 2005, p16

popular option because it is very flexible. It allows some kind of supervision and support to be put in, provides for conditions to be imposed so they can get treatment, or see a counsellor, or go on methadone, or whatever.³⁷⁷

- 5.38** Mr Lloyd Babb, Director of the Criminal Law Review Division at the Attorney General's Department, expressed the view that the legislation relating to bonds is sufficiently flexible to allow the courts to order a range of conditions to address offending behaviour:

In my opinion there is sufficient flexibility in the current legislative provisions for orders to be made in relation to the attendance of programs such as alcohol and drug counselling. ... A good behaviour bond may contain such conditions as are specified in the order by which the bond is imposed other than conditions requiring the person under the bond to perform community service work or to make a payment, whether in the nature of a fine, compensation or otherwise. So they are extremely flexible provisions and able to be used by the courts.³⁷⁸

- 5.39** An example of an innovative use of this flexibility was provided by Ms Catriona McComish, the Senior Assistant Commissioner of Community Offender Services with the Department of Corrective Services, when she described Biyani Cottage, a facility for female offenders with dual diagnoses, provided under the “umbrella” of a good behaviour bond:

It is called Biyani Cottage and it is attached to the Long Bay complex. It is not part of a prison; it is not gazetted as a correctional centre but it is on the complex at Long Bay. It is essentially for women who are offenders who have both mental health and/or intellectual disability and drug and alcohol issues, who are greatly overrepresented, particularly in our remand population. They can be sentenced by the court under a bond to, as a condition of the bond, reside at Biyani.³⁷⁹

- 5.40** Ms McComish described the intensive and collaborative nature of the service provided:

It is 24-hour seven-day a week accommodation. It is a very small domestic-style cottage that can only take five women at a time. They have highly complex needs and we apply very intensive case management. The process is to both do a very thorough assessment and case plan and link it in with appropriate rehabilitation services or supported accommodation in the community and in that way divert these people who essentially have major health and social deficits into the community. The average stay is under three months.³⁸⁰

- 5.41** The Committee recognises the flexible and adaptable nature of bonds and supports the innovative use of this sentencing option to assist in both punishing and rehabilitating offenders.

³⁷⁷ Ms Jane Sanders, Principal Solicitor, Shopfront Youth Legal Centre, Evidence, 31 August 2005, p49

³⁷⁸ Mr Lloyd Babb, Director, Criminal Law Review Division, Attorney General's Department, Evidence, 31 August 2005, p24

³⁷⁹ Ms McComish, Evidence, 30 August 2005, p6

³⁸⁰ Ms McComish, Evidence, 30 August 2005, p6

Disadvantages

- 5.42 The main general disadvantage or criticism of bonds and suspended sentences raised during the Inquiry is that they are perceived by some to be a soft-option. This issue is discussed below. Many criticisms were also made of the operation of suspended sentences, particularly as it impacts on offenders in rural and remote areas and certain disadvantaged offenders. This issue is explored in detail later in this Chapter.

Community perception of leniency

- 5.43 Evidence received by the Committee in submissions and from hearing and forum participants indicates that bonds and suspended sentences are seen by many as a soft, or lenient, option. While the perception of leniency is common to the other types of community based sentencing (as discussed at paragraphs 2.86-2.96), this is particularly so in the case of suspended sentences.
- 5.44 This may be because there exists a paradox at the very heart of suspended sentences that can be difficult for the community to reconcile. As discussed previously, before a court can order a suspended sentence, it must be satisfied that *no penalty other than imprisonment is appropriate*. Once the penalty of imprisonment is selected and the court has determined the length of the sentence, the court may then decide to suspend the sentence. This apparent contradiction - that is, on the one hand deciding that no penalty other than imprisonment is appropriate and on the other, the decision that the offender should not actually serve that term in prison (unless the bond is breached), has been referred to as a 'penalogical paradox'.³⁸¹
- 5.45 In its 2003 paper on suspended sentences the Judicial Commission of NSW examined how members of the community view suspended sentences. The Commission, referring to an United Kingdom survey, stated that 'despite suspended sentences being ranked second only to full time imprisonment in terms of severity in the sentencing hierarchy, the public perceived suspended sentences as one of the least punitive sanctions, even more lenient than a small fine'.³⁸² The Commission also noted that a report gauging perceptions of severity of community based sentencing options in South Australia found that 'while judicial officers ranked suspended sentences as the next most severe after home detention, victims of crime ranked it as the least severe'.³⁸³
- 5.46 The Committee was advised that the perception that bonds and suspended sentences are lenient sentencing options may be more acute in rural and remote areas. For example, the submission from the Country Women's Association of NSW stated that '... sometimes community service or a bond, especially, appear soft options particularly to people close to the victim, as is likely in small, rural and/or remote communities'.³⁸⁴
- 5.47 Inspector Michael Heap, Inspector of Police at Bourke, expressed the view that in smaller communities the proximity of offender and victim can add to the community perception that bonds are lenient:

³⁸¹ *R v Proulx* [2000] 1 SCR 61

³⁸² Brignell & Poletti, 'Suspended Sentences in New South Wales', p9

³⁸³ Brignell & Poletti, 'Suspended Sentences in New South Wales', p9

³⁸⁴ Submission 21, p4

The courts might not want to send them to gaol, but if they put them on a bond the community, as a whole, regards it as a slap on the wrist and the police cop the brunt. You do your job but the person is still walking the streets. If it was in Sydney, for instance, the victim of the crime would not see the offender next week, but in this town—and other small towns like this—the victim still sees the offender again a week later, and that is the frustrating thing for everybody.³⁸⁵

- 5.48** Mr Stephen Collins, a duty solicitor from Inverell, spoke of the need to address the perception amongst *offenders* that bonds are lenient:

A lot of offenders are very wily customers. A lot of them know the ropes and we have to overcome the perception of the soft option. I am not so much concerned about the community expectation or opinion, but for the clients' opinion we have to try to show that if you want to avoid gaol and if you wish to make yourself available for supervised recognisance or bonds, you have a fair bit of obligation as part of that. There is no point having an alcohol problem unless you want to deal with it. If you want to look at psychiatric issues you want a look at domestic violence issues and try to get the offender to see that it is definitely not a soft option.³⁸⁶

- 5.49** The Committee was advised, however, that bonds and suspended sentences in particular should not categorically be considered a soft option because of the consequences of a breach. In this regard, commentators have described a suspended sentence of imprisonment as ‘hanging over the head of the offender like the sword of Damocles which will fall and activate the sentence should the offender fail to observe the conditions’.³⁸⁷ The Committee notes that other commentators have criticised the metaphor as an exaggeration, stating that:

... even if it [the sentence] could be equated to a sword, it does not hang by a thread, but by a rope. And the *only* way this rope can break is if *the offender himself cuts it*. No one else can do so ... And with each passing day of the sentence, the ‘sword’ shrinks until it finally becomes a butter knife.³⁸⁸

- 5.50** The issue of breach, leading to mandatory revocation, is discussed at paragraphs 5.107-5.115. The Committee acknowledges that the very nature of a suspended sentence can be difficult for a community to reconcile and may contribute to a perception of leniency. In rural and remote areas, where there is an increased likelihood of the offender and the victim/victim’s family coming into contact, this may heighten a perception of leniency.

³⁸⁵ Inspector Michael Heap, Inspector, NSW Police, Evidence, 15 June 2005, p17

³⁸⁶ Mr Stephen Collins, Solicitor, Borthwick and Butler, Evidence, 14 June 2005, pp35-36

³⁸⁷ A Freiberg, *Sentencing Review: Pathways to Justice (2002)*, Department of Justice, Victoria

³⁸⁸ *R v Brady (1998)* ABCA 7 at 46

Availability of bonds and suspended sentences in rural and remote areas

Availability

- 5.51** The Committee was advised that all types of bonds are available as a sentencing option in all courts in NSW. In this regard, Ms McComish with the Department of Corrective Services advised that ‘bonds are available across the state, including suspended sentences’.³⁸⁹
- 5.52** While evidence supported the general availability of bonds and suspended sentences in NSW the Committee was advised that in fact *supervised* bonds are not always available in some areas due to a lack of Probation and Parole staff. For example, evidence from Magistrate Heilpern, referring to his service in towns in Western NSW, indicated that supervised bonds were not always available:
- In many towns that I sat in in western NSW there were no supervised bonds available because Probation and Parole could not service them. What that meant, for example, for a town like Condobolin was that I was faced with the option of fines, unsupervised bonds or imprisonment. There were no other sentencing options available to me there.³⁹⁰
- 5.53** The Committee also notes that the NSW Sentencing Council, in its 2004 discussion paper considering the abolition of short prison sentences, stated that good behaviour bonds ‘are available in most areas. However, some difficulties are experienced due to limited resources, particularly in remote locations.’³⁹¹

Adequacy of resources to support supervised bonds

- 5.54** Inquiry participants also raised a number of concerns about the adequacy of resources to support supervised bonds. Concerns relate to the range and frequency of programs that can be ordered as a condition of a bond in rural and remote areas, transport to attend programs, cultural aspects of programs for Aboriginal offenders and the need for additional support services for disadvantaged groups.
- 5.55** As noted previously, the range of conditions that can be attached to a supervised bond is, in theory, almost unlimited. A common condition of a supervised bond is the requirement that an offender participate in a particular program to address his or her offending behaviour. The Committee was told of the wide range of programs used by the PPS including programs to address domestic violence, substance and alcohol abuse, anger management, driving offences and general life skills.
- 5.56** The Committee was informed that a lack of appropriate and accessible programs to address offending behaviour can undermine the rehabilitative purpose and overall value of a supervised bond or can rule out a supervised bond as a sentencing option altogether.

³⁸⁹ Ms McComish, Evidence, 30 August 2005, p3

³⁹⁰ Magistrate Heilpern, Evidence, 28 June 2005, p38

³⁹¹ NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less*, p64, citing information provided by the Department of Corrective Services.

- 5.57** The Committee was advised that in some rural and remote areas there is a lack of appropriate and accessible programs that can be ordered as part of a supervised bond. Magistrate Fiona Toose, drawing on her experience as a magistrate sitting at Walgett and Lightning Ridge in the Far North West of NSW, described the chronic lack of programs for offenders in these remote communities:

At present there are insufficient full time people on the ground providing programs for offenders. There are a number of agencies in both Walgett and Lightning Ridge that provide programs on anger management and domestic violence. They are not held regularly and there seem to be no effective cohesion between the various agencies to provide a system that probation and parole can link their clients into. Other intervention programs such as Traffic Offender Program are not available at all in this rural area.³⁹²

- 5.58** Magistrate Toose went on to identify the types of programs needed and concluded that without adequate programs the rehabilitative purpose of a supervised bond is negligible:

Programs involving anger management, domestic violence, lifestyle skills, drug and alcohol, sober driver need to be run regularly and need to be taken out to each of the towns in these remote areas, otherwise an order for supervision on a bond really results in no supervision at all and therefore any rehabilitation value of supervision [is] negligible.³⁹³

- 5.59** Ms Sheryn Omeri, Research Solicitor with the NSW Coalition of Aboriginal Legal Services (COALS) also drew attention to the diminished rehabilitative value of a bond where certain programs are unavailable and supervision is limited:

In some of the smaller towns such as Wilcannia and Brewarrina there are virtually none of the above-mentioned services [anger management and programs to address mental health issues] available to clients and supervision is often limited to weekly or fortnightly appointments to see the PPS officer when he or she visits the town. Often, in such circumstances, the issues intended by the court to be addressed through supervision remain unaddressed.³⁹⁴

- 5.60** Similar views were expressed by Ms Su L Hely, a solicitor with a legal firm in Coonamble, which represents clients from remote communities in the Far North West of NSW:

The majority of clients before the court in Far North West NSW are placed on bonds. Many of these bonds are a 'supervised' bond. Walgett, Lightning Ridge and Coonamble townships have significant populations of aboriginal offenders with alcohol and drug dependence issues. More often than not clients also have anger management and relationship management issues. This results in a 'turnstile' recidivism through local courts, if effective rehabilitation is not available.³⁹⁵

- 5.61** Mr Alan Perry, District Manager of Probation and Parole Services at the Coonamble District Office, commented on the general shortage of services available in his area. He also advised

³⁹² Submission 5, p6

³⁹³ Submission 5, p6

³⁹⁴ Submission 43, p14

³⁹⁵ Submission 16, p3

that, where programs are available as part of a supervised bond, they tend to be concentrated in a particular location and lack of money and transport can prevent offenders from attending:

Supervision may include referral to counselling or programme participation in relation to alcohol or drug use/abuse. Domestic violence issues and anger, these can all be addressed if there is access to agencies or people qualified to undertake such duties. There is a current distinct lack of these types of intervention and [they] are usually concentrated in one area and not accessible to other small communities. Mostly it is the lack of money and the availability of community transport which negates some offenders from intervention.³⁹⁶

5.62 Ms Hely also raised transport difficulties in the Far North West, noting that ‘Moree or Brewarrina are the nearest facilities offering “rehabilitation” for offenders. Both locations are hours away and are not accessible by public transport’.³⁹⁷ Magistrate Toose highlighted the lack of public transport as well, stating:

As for the offenders in Goodooga and Collarenebri, there is virtually nothing. For them to access program[s] at either Lightning Ridge or Walgett is difficult, as the only means of “public” transport is the school bus, which may not be running when the programs are, and in any event does not run during school holidays.³⁹⁸

5.63 The Department of Corrective Services acknowledged that ‘[a]ccess to appropriate programs and services can be difficult in remote areas due to gaps in service delivery, so a good behaviour bond needs to reflect the reality of resources available in the area.’³⁹⁹

5.64 Other comments addressed the cultural relativity of programs attached to supervised bonds. For example, Ms Mary Ryan, a solicitor with the Western Aboriginal Legal Service, suggested that, where rehabilitative programs are provided for Aboriginal offenders, the Aboriginal community should administer them and where this is not possible then the Aboriginal community ‘... should have some input into the cultural aspects that need to be included in a program.’⁴⁰⁰ In common with a number of other submission makers, Ms Ryan stressed the need for programs addressing domestic violence and driver education in rural and remote communities.⁴⁰¹

5.65 A number of witnesses raised the particular needs of offenders from disadvantaged groups arguing that specific support services are required to assist them to comply with the conditions of their bonds including participation in rehabilitation programs. These include young offenders, Aboriginal offenders and offenders with an intellectual disability or mental health needs. For example, the Shopfront Youth Legal Centre stated that their clients can find it difficult to comply with a bond due to lifestyle or disability:

³⁹⁶ Submission 20, p5. In his submission, Mr Perry advised that: “the contents of this submission are based on my own thoughts and experiences and should not be confused [with] or accepted as those of my employer.”

³⁹⁷ Submission 16, p3

³⁹⁸ Submission 5, p6

³⁹⁹ Submission 30, pp20-21

⁴⁰⁰ Submission 44, p3

⁴⁰¹ Submission 44, p3

The main problem with bonds is that the conditions may be too difficult for them to comply with. In our experience, offenders from disadvantaged groups often breach bonds because they have a disability, a chaotic lifestyle, rather than because of any re-offending or misconduct on their part.⁴⁰²

- 5.66** Mr Peter McGhee, A/Executive Officer of the Intellectual Disability Rights Service, also identified offenders with a disability as a group needing additional support services. Mr McGhee suggested that specialist officers within Community Offender Services assigned to support offenders with a disability would assist them to comply with their bond:

A tailored option to suit the needs of offenders with an intellectual disability might include the supervision and support of disability services and possibly specialist officers within Community Offender Services ... to enable them to comply with the conditions of the bond. ...

There should be one officer in each Community Offender Services office ... with this training. Additional funds should be given to Community Offender Services to enable officers to have appropriate amounts of time to spend with offenders with an intellectual disability.⁴⁰³

- 5.67** The Shopfront Youth Legal Centre also advocated additional resources for Community Offender Services to enhance the service to offenders with special needs:

We would like to see more resources being provided to the Probation and Parole service so that they are able to provide more intensive supervision, programs and specialist counseling to offenders who have special needs or a high risk of recidivism.⁴⁰⁴

- 5.68** Ms Omeri from COALS identified a lack of resources within the PPS as a barrier to treatment for Aboriginal offenders with mental health issues:

At the moment PPS does little to address mental health issues because it is not resourced to do so and many mental disorders go undiagnosed and untreated. Often there will have been a report which an ATSILS [Aboriginal and Torres Strait Islander Legal Service] has obtained for court but there is no follow up or treatment plan put in place after a client has received a supervised bond.⁴⁰⁵

Committee view

- 5.69** Bonds are a widely used sentencing option in the NSW courts. The Committee is of the view that supervised bonds supported by the full range of appropriate and accessible treatment programs are a sentencing option that fulfils both the deterrent and rehabilitative purposes of sentencing while also allowing an offender to remain in his/her community.

⁴⁰² Submission 25, p8

⁴⁰³ Submission 24, pp4-5

⁴⁰⁴ Submission 25, p7

⁴⁰⁵ Submission 43, p14

- 5.70** Some Inquiry participants, as well as the Sentencing Council, have noted supervised bonds are not available uniformly throughout the State. The Committee did not receive sufficient information to be able to identify the areas where supervised bonds were not available. The Committee is concerned that supervised bonds are not uniformly available across NSW and recommends that the Department of Corrective Services undertake research to identify the areas of NSW where supervised bonds are not available due to a lack of PPS staff to supervise bonds. Steps should be taken to extend supervision, or a modified form of supervision, to all areas of NSW.
- 5.71** The Committee also shares the concerns of many participants in this Inquiry that where supervised bonds are available in rural and remote areas, there is a lack of regular, accessible and appropriate programs and resources needed to support the rehabilitative purpose of supervised bonds. This undermines the effectiveness of bonds as a sentencing option. The Committee notes the particular concerns regarding the needs of young offenders, Aboriginal offenders and offenders with intellectual disabilities or mental illness.
- 5.72** The Committee therefore recommends the expansion of the availability and range of programs available to address offending behaviours. The Committee particularly notes the evidence supporting the need for rehabilitation programs to address domestic violence, drugs, alcohol and driving related offences in rural and remote areas. In addition, the Committee highlights the importance of culturally appropriate programs, particularly in relation to Aboriginal offenders in rural and remote areas.
- 5.73** The Committee also recommends that the Department of Corrective Services work closely with both government and non-government agencies in the disability services field to identify and develop ways to improve support services to assist offenders with an intellectual disability or a mental illness in complying with the conditions of supervised bonds.
- 5.74** The Committee acknowledges that providing uniform access to supervised bonds with the appropriate supporting programs requires the provision of additional resources to Community Offender Services. This issue of funding is addressed in Chapter 3.

Recommendation 23

That the Department of Corrective Services:

- identify the areas of New South Wales where supervised bonds are unavailable due to a lack of Probation and Parole Service resources.
 - take steps to extend supervision, or a modified form of supervision, to all areas of New South Wales.
 - work with government and non-government agencies to extend the availability of appropriate and accessible programs to meet offenders' needs in rural and remote areas. In particular, consideration should be given to programs addressing domestic violence, drug and alcohol and driving related offending behaviour.
 - work with both government and non-government agencies in the disability services field to identify and develop ways to improve support services to assist offenders with an intellectual disability or a mental illness to comply with the conditions of supervised bonds.
-

Suspended sentences

5.75 The Committee received considerable evidence at public hearings, forums and through written submissions criticising the operation of suspended sentences. While the criticisms apply to the operation of suspended sentences in general, the impact of these issues can be particularly acute in rural and remote areas and in relation to offenders from certain disadvantaged groups.

5.76 The criticisms raised in relation to suspended sentences can be summarised as follows:

- The potential net-widening effect.
- The potential for sentence inflation.
- The court cannot partially suspend a sentence.
- The court cannot impose a longer period of supervision with a shorter term of imprisonment.
- A reluctance by offenders to appeal lengthy suspended sentences.
- Mandatory revocation of a bond on breach.
- The court is required to set parole and non-parole periods at the time of sentencing rather than at the time of breach.

5.77 These criticisms, most of which are interrelated, are discussed in the following paragraphs. The Committee's concluding comments regarding suspended sentences, the cumulative effect of these matters and their impact in rural and remote areas and upon disadvantaged offenders follow.

Net-widening

5.78 The concept of net-widening was explained in Chapter 2, where it was identified as one of the disadvantages of community based sentencing in general. Net-widening in the context of suspended sentences describes the situation where a person receives a suspended sentence when a less severe sentence, such as a s 9 bond or a CSO, would be appropriate in all the circumstances.

5.79 The Committee refers for example, to the views of the Public Defenders Office, set out in paragraph 2.102, that net-widening occurred following the re-introduction of suspended sentences in NSW.

5.80 In their 2003 study of suspended sentences in NSW, Brignell and Poletti found that despite the nexus between a sentence of imprisonment and a suspended sentence there is some indication that net-widening has occurred since the introduction of the legislation in 2000:

Despite the fact that the legislation requires suspended sentences to be strictly imposed as an alternative to full-time custody, the statistics tend to suggest that courts sometimes impose suspended sentences in place of less severe penalties, such as community service orders and good behaviour bonds.⁴⁰⁶

5.81 In the High Court case of *Dinsdale v The Queen* Kirby J stressed that suspended sentences should not be misapplied where a non-custodial sentence would be adequate:

Nonetheless, the criticisms [of suspended sentences] draw attention to the need for courts to attend to the precise terms in which the option of suspended sentences of imprisonment is afforded to them *and to avoid any temptation to misapply the option where a non-custodial sentence would suffice* [emphasis added].⁴⁰⁷

5.82 The Committee was advised that net-widening can occur through suspended sentences when there is a lack of alternative penalties. In its 2005 paper on trends in the utilisation of suspended sentences in NSW, the Judicial Commission found that ‘a multitude of factors accounts for the decision to impose a s 12 suspended sentence’ including the ‘lack of availability of other penalties’.⁴⁰⁸

5.83 The Committee heard evidence from Mr Gary Pudney, Principal Solicitor with the South Eastern Aboriginal Legal Service that, in country areas, a magistrate may go ‘up’ to a suspended sentence due to a lack of alternative sentencing options:

The other one I have spoken to country magistrates about is that because they do not have home detention, or weekend detention, they go up to a suspended sentence- because there is no alternative.⁴⁰⁹

⁴⁰⁶ Brignell & Poletti, ‘Suspended Sentences in New South Wales’, p17

⁴⁰⁷ *Dinsdale v The Queen* (2000) 175 ALR 315 at 76

⁴⁰⁸ Poletti & Vignaendra, ‘Trends in the use of s 12 suspended sentences’, p21

⁴⁰⁹ Mr Gary Pudney, Principal Solicitor, South Eastern Aboriginal Legal Service, Evidence, 28 June 2005, p28

- 5.84** Ms Hely, a solicitor with a legal firm in the Far North West of NSW, described circumstances where offenders have received a harsher penalty in the form of a suspended sentence rather than a CSO due to the difficulties of accessing CSO work placements and noted the flow on effect this can have:

In recent months our firm has represented clients placed on s.12 ‘suspended sentences’ because they lived too far from ‘town’ and were unlicensed, not because they were unsuitable [for a CSO]. The issue here is if a client re-offends at a later time and faces sentence, the court may in its discretion assume the s.12 bond was imposed due to the ‘objective criminality’ of the previous offence as opposed to the lack of an available option. This may have the effect of distorting a person’s criminal history. Further to this a s.12 bond is an alternative to full time custody, a community service order is not. So when the court imposes a s.12 bond **only** because the offender cannot get to town to perform CSO, they are harshly dealt with. A person’s ‘bail history’ or ‘fingerprint record’ does not note the reason for the imposition of a particular sentence.⁴¹⁰

- 5.85** A potential consequence of net-widening in relation to suspended sentences is that, instead of diverting offenders from prison who would otherwise serve full-time custody, suspended sentences may, in the event of a breach, place offenders in prison who would not ordinarily have received a custodial sentence. Breach and mandatory revocation of a suspended sentence is discussed further at paragraphs 5.107-5.115.

Sentence inflation

- 5.86** The concept of sentence inflation was also explained in Chapter 2. In the context of suspended sentences, sentence inflation refers to the imposition of a longer suspended sentence to offset the fact that the offender will not go to gaol if the bond is successfully completed.
- 5.87** The Committee notes that the legislation does not allow for sentence inflation. As discussed previously, there are two distinct steps involved in imposing a suspended sentence. First, the court must be satisfied that, having considered all other alternatives, no penalty other than imprisonment is appropriate.⁴¹¹ Once the sentencing option of imprisonment is selected, the court must then determine the length of the sentence and this determination is made without consideration of the manner in which the sentence will be served. This process is designed to protect against sentence inflation.⁴¹²

⁴¹⁰ Submission 16, p3

⁴¹¹ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 5(1)

⁴¹² *R v Zamaqias* [2002] NSWCCA 17 at 26: This is because any of the alternatives available in respect of a sentence of imprisonment can only be considered once the sentence has been imposed, see s 6 (periodic detention order), s 7 (home detention order) and s 12. It follows that the term of the sentence cannot be influenced by what order might be made after the sentence has been imposed. For example it cannot be increased because it is to be served by way of periodic detention ... Nor can the term be reduced because an otherwise appropriate alternative is unavailable ... the fact that a term of a sentence is to be determined without regard to the fact that it is to be suspended is consistent with the approach adopted in other jurisdictions where that sentencing alternative has been available for many years.

5.88 Nonetheless, several Inquiry participants expressed the view that the perceived leniency of suspended sentences does give rise to sentence inflation, which can have a significant impact on offenders. For example, the South Eastern Aboriginal Legal Service highlighted the belief held by some legal practitioners that offenders receive disproportionately long suspended sentences:

... we believe that Magistrates see a section 12 as a far lighter penalty than full-time custody and consciously or unconsciously increase the term of the section 12. If somebody may have received a full-time sentence of say three months they may receive a six months section 12 ... this may be fine when it is imposed but is a monster if breached.⁴¹³

5.89 Mr Robert Tumeth, Principal Solicitor, with the Criminal Law Committee of the Law Society of NSW, also expressed concerns that the judiciary may impose a longer suspended sentence than if the offender was going to serve the sentence full-time:

Finally, another concern with a suspended sentence—and this is a matter for the education of the judiciary—is that courts sometimes will impose a longer suspended sentence period than they would if they were sentencing the person to full-time custody in the first place. It is not meant to be like that. They are meant to first fix how long the person should be in custody and then say whether they will suspend it or not. But I have seen examples of people getting extremely lengthy suspended sentences whereas we believe that if it was to be served full time it would be much shorter.⁴¹⁴

5.90 COALS called sentence inflation in relation to suspended sentences was a ‘grave concern’:

s.12 bonds are generally perceived by the Judiciary as being a more lenient sentence than full-time imprisonment. As a result, the term of a s.12 bond may be longer than a term of imprisonment may have been for the particular offender. This is an issue of grave concern to COALS.⁴¹⁵

5.91 Ms Nadine Miles, with the Sydney Regional Aboriginal Corporation Legal Services, linked the imposition of lengthy suspended sentences with the absence of other sentencing options:

Anecdotally speaking, I think it is the case that since the introduction of section 12 into the sentencing options, ... magistrates and judges tend to rely on the section 12 bond. They offer a person a chance to stay in the community but still have gaol effectively hanging over their head for a significant period of time and a significant lengthy sentence. I think it is unfortunately utilised too much, particularly with young offenders. Young offenders, in particular, seem to receive quite lengthy section 12 bonds. Once a few options are not available to the court, we are straight into a section 12 bond.⁴¹⁶

⁴¹³ Submission 42, p6

⁴¹⁴ Mr Robert Tumeth, Principal Solicitor, Criminal Law Committee, Law Society of NSW, Evidence, 1 September 2005, p22

⁴¹⁵ Submission 43, p18

⁴¹⁶ Ms Nadine Miles, Solicitor, Sydney Regional Aboriginal Corporation Legal Services, Evidence, 30 August 2005, p16

- 5.92** Mr Paul Winch, Public Defender, also noted that judicial officers in non-metropolitan areas may give lengthy bonds where other sentencing options are unavailable:

Part of the problem, I think, that arises out of a lack of alternatives in regional Australia is that the magistrate might well be tempted, and for good motives and good reasons, to give a much longer section 12 bond because it has to appear to be a severe sentence because it is a severe crime rather than he or she might in a metropolitan area, which might be to impose either periodic detention or perhaps home detention or some other kind of detention which would be of shorter duration potentially but of more seriousness.⁴¹⁷

- 5.93** Magistrate Farnan stated that while increasing the length of a sentence because it is being suspended ‘... may be something that psychologically appeals to one’ it is ‘... not something that should happen.’⁴¹⁸ Magistrate Farnan also expressed the opinion that offenders may in fact *receive a shorter* sentence where the court is focusing on the length of supervision:

The difficulty with the section 12 bond and suspended sentence option is that because you have to sentence someone to imprisonment before you can suspend the sentence and because you can suspend the sentence only for the length of the prison sentence sometimes you will give someone a much shorter section 12 bond than if you had given them a section 9 bond because you can only suspend a sentence for the length of the sentence.⁴¹⁹

Abolition of partial suspended sentences

- 5.94** When suspended sentences were reintroduced to NSW in April 2000, a court was able to partially suspend a sentence. When partially suspending a sentence, the usual practice was to order the custodial part of the sentence to be served before the non-custodial part. For example, an offender who received a two year sentence would serve the first six months in full-time custody and be released and placed on a bond for the remaining 18 month period.
- 5.95** The custodial part of the sentence could also be served after the non-custodial part. Although s 12 did not expressly allow for the suspension order to commence at a future date, the NSW Criminal Court of Appeal in the 2001 case of *R v Gamgee* held that ‘the absence of such a provision does not suggest to us that such power is not available.’⁴²⁰ The Court also held that the partial suspension of the initial part of the sentence was allowed. This flexibility allowed the court to enable some event to take place, for example, completion of a pregnancy or of a course of study.
- 5.96** However, following amendments to the legislation in July 2003, it is no longer possible to partially suspend a sentence.⁴²¹ The then Minister for Justice, the Hon John Hatzistergos MLC, stated that the reasons for the abolition of partially suspended sentences were that:

⁴¹⁷ Mr Winch, Evidence, 30 August 2005, p32

⁴¹⁸ Magistrate Farnan, Evidence, 31 August 2005, p40

⁴¹⁹ Magistrate Farnan, Evidence, 31 August 2005, p40

⁴²⁰ *R v Gamgee* (2001) 51 NSWLR 707 at 14

⁴²¹ *Crimes Legislation Amendment Act 2003* (NSW) assented to on 8 July 2003

... to order that an offender go into custody to serve a sentence after an initial period of suspension of the sentence can cause considerable hardship to the offender. It also causes difficulties for the Department of Corrective Services in administering the sentence.⁴²²

- 5.97** The decision to abolish partially suspended sentences has been criticised within the legal profession. The Judicial Commission of NSW, in its 2003 paper on suspended sentences, observed that the 'loss of the ability to partially suspend a sentence of imprisonment ... reduces the flexibility of this sentence'.⁴²³ In its 2004 report on abolishing short prison sentences the NSW Sentencing Council expressed the opinion that the 'partial suspension of the latter half of the sentence would not "cause considerable hardship to the offender" and would bring NSW into line with Federal sentencing law'.⁴²⁴ The Sentencing Council went on to recommend that the power to partially suspend prison sentences be restored.

Inability to order longer periods of supervision

- 5.98** Another limitation of suspended sentences that was raised during the Inquiry relates to the length of the attached good behaviour bond. A court *cannot* order a period of supervision (the bond) that is longer than the term of the sentence.⁴²⁵ In her evidence to the Committee, Magistrate Farnan acknowledged the appeal of being able to order a longer period of supervision:

... you might want to say to someone, "I am going to put you on a bond for 18 months. If you breach the bond you will go to gaol for six months", but you cannot do that.⁴²⁶

- 5.99** In its publication on suspended sentences, the Judicial Commission of NSW canvassed the potential benefits of extending the supervision period beyond the term of the sentence:

In the authors' opinion, it is debateable whether restricting the term of the bond to the length of the period of suspension is a desirable policy. Particularly in relation to short term suspended sentences there would appear to be no good reason for not giving courts power to extend the bond beyond the term of the suspended sentence of imprisonment. Such an extended bond would provide for the possibility of increasing the probationary period and therefore improve the prospects of rehabilitation of the offender as well as provide for increased levels of community protection.⁴²⁷

⁴²² The Hon John Hatzistergos MLC, Second Reading Speech to the Crimes Legislation Amendment Bill (2003): Legislative Council, New South Wales, *Hansard*, 25 June 2003, p2041. Partially suspended sentences may be imposed for Commonwealth offences in NSW but not for State offences.

⁴²³ Brignell & Poletti, 'Suspended Sentences in New South Wales', p8

⁴²⁴ NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less*, p26

⁴²⁵ *Crimes (Sentencing Procedure) Act 1999* (NSW), s12

⁴²⁶ Magistrate Farnan, Evidence, 31 August 2005, p40

⁴²⁷ Brignell & Poletti, 'Suspended Sentences in New South Wales', p7

- 5.100** Mr Tumeth drew the Committee's attention to the operation of suspended sentences in the federal jurisdiction where a longer period of supervision with a shorter period of incarceration can be ordered on breach:

There is also a different way in which the Commonwealth deals with suspended sentence matters as well. For example, they may impose a good behaviour bond—for say 18 months—but they will make it a condition that if the person breaches that bond they will serve a sentence of a fixed term of three, four, five or six months or whatever it is. In other words, the period of incarceration will not necessarily match the period of the bond.⁴²⁸

- 5.101** Mr Collins expressed support for longer periods of supervision with a suspended sentence noting that it may improve the community perception of suspended sentences:

My suggestion with the section 12 bonds is that there should be a difference between the actual sentence that has been imposed and that period of the actual related probation in that, to me, a person who is to receive a suspended sentence generally has exhausted most other non-custodial remedies but, at the same time, probably does not warrant obvious full-time imprisonment. Therefore, perhaps imposing a six-month sentence, which is then suspended on condition that the offender enters into a bond to be of good behaviour for an extended period of time, might just give the community a little bit more security that the suspended sentence is ... a longer period whilst the penalty, if there is a breach, is of a narrower type—for example, a client getting an 18-month suspended sentence is facing a very serious incarceration and it may be that the magistracy may have imposed ... a longer term ... to have him keep the peace for 18 months than to want to really put him in for 18 months.⁴²⁹

- 5.102** Ms Miles acknowledged that currently the only way a magistrate can secure lengthy supervision on a s 12 bond is by giving a lengthy sentence, which may, consciously or unconsciously, result in sentence inflation (as discussed at paragraphs 5.86-5.93):

The idea that the sentence should be lengthy to ensure that there is supervision for an extended period of time—and the only way that the magistrate or judge can secure supervision for an extended period of time is to make the actual sentence quite lengthy—is an unfortunate thing because the offence may indeed be an offence that should attract sentence of say three or four months. But to ensure that the person is given an opportunity they might be put on a section 12 bond for a period of nine or twelve months to ensure that the supervision is for a lengthy time.⁴³⁰

Reluctance to appeal lengthy sentences

- 5.103** The Committee also heard evidence that offenders, particularly young offenders and Aboriginal offenders, who receive a suspended sentence can be reluctant to appeal even if they are given quite lengthy sentences. This reluctance appears to be due either to not fully understanding the consequences of a breach or merely because they are relieved not to be going to gaol.

⁴²⁸ Mr Tumeth, Evidence, 1 September 2005, p22

⁴²⁹ Mr Collins, Evidence, 14 June 2005, p33

⁴³⁰ Ms Miles, Evidence, 30 August 2005, p18

- 5.104** A reluctance on the part of offenders to appeal a suspended sentence was noted by the NSW Criminal Court of Appeal in a 2004 case:

It would not be unusual for an accused person, the subject of a suspended sentence under s 12 of the *Crimes (Sentencing Procedure) Act*, not to appeal. The full implication of such a sentence might not have come home to such a person until faced with the reality of gaol.⁴³¹

- 5.105** Ms Sanders noted the reluctance of her clients to appeal either the actual sentence or the severity of sentence:

I think the difficulty is sometimes ... that people who are given a bond or particularly a suspended sentence often will not appeal even though we think that the length of the bond is much too long or the person should have received a section 9 bond instead of a suspended sentence. The client is often just so glad not to be in gaol they say, "No, I am not going to breach it." They do not bother and then of course they come back to say, "I have breached my bond".⁴³²

- 5.106** The submission from South Eastern Aboriginal Legal Service also expressed the opinion that 'when a client receives a section 12 they are not in custody and nearly all do not appeal the sentence, it doesn't matter that the length of the bond may be excessive'.⁴³³ In addition, the Sydney Regional Aboriginal Corporation Legal Services stated that while clients are advised to appeal inappropriate bonds and suspended sentences they are often uninterested in doing so:

SRACLS solicitors advise clients to appeal bonds and suspended sentences in the same manner as they advise clients to appeal any other sentence which is, in their opinion, inappropriate. In the case of bonds and particularly suspended sentences however, solicitors find that clients are generally so content to have escaped full-time imprisonment that they are not interested in pursuing an appeal even where the solicitor strongly advises them to do so.⁴³⁴

Mandatory revocation

- 5.107** A suspended sentence is a sentence of imprisonment that has been imposed but not executed, the term of imprisonment is 'suspended' unless the conditions of the bond are breached. If the term of the sentence expires without a breach the sentence is completed.
- 5.108** Unlike other bonds, a court has very limited discretion when dealing with breach of a s 12 bond. Once a court is satisfied that an offender has breached the bond, revocation of the bond is *mandatory* unless the court is satisfied that the failure to comply is trivial in nature or there are good reasons for excusing the offender's failure.⁴³⁵

⁴³¹ *R v Graham* [2004] NSWCCA 420 at para 29, per Beazley, JA

⁴³² Ms Sanders, Evidence, 31 August 2005, p53

⁴³³ Submission 42, p6

⁴³⁴ Answers to questions on notice taken during evidence 30 August 2005, Sydney Regional Aboriginal Corporation Legal Service, Question 9, p2

⁴³⁵ *Crimes (Sentencing Procedure) Act 1999* (NSW), s98(3)

- 5.109** Once a court decides to revoke a suspended sentence, the question then arises as to how much time the offender must serve in prison. In other words, does the revocation of a bond under s 12 activate the *whole* of the suspended sentence (so that it commences from the date of revocation) or does it merely activate that part of the sentence that is equivalent to the unexpired period of the bond (or, using the analogy referred to earlier, is a suspended sentence in NSW a sword or a butter knife)?
- 5.110** The Committee was advised that there are differences of opinion on this issue, recent decisions of the NSW Criminal Court of Appeal appear to have settled the matter.⁴³⁶ In the 2004 case of *R v Graham* the Court held that the full term of the sentence runs from the date of the revocation order, that is, the *whole of* the suspended sentence is activated.⁴³⁷ The Committee also notes that the court does have the discretion to back date a sentence and must take into account any time the offender has spent in custody for the offence to which the sentence relates.⁴³⁸
- 5.111** The Committee heard evidence from several witnesses that the consequences of mandatory revocation can be particularly harsh, especially in the case of a breach that occurs at the tail end of the sentence. The situation was described by the Law Society's Mr Tumeth:

... if they breach the bond by committing a further offence during that period of time they are liable to serve the entire period of the sentence—in other words, if they get a sentence of 12 months which is suspended, if they get through 11 months of that bond and then breach it by committing an offence at that time, then the court will, unless there are exceptional circumstances or the offence ... is trivial, they will then go into custody for the 12-month period. There is a concern that a person can, as it were, comply with the order almost through its entirety but then if there is a breach towards the end of it they have to go into custody for the full period of time.⁴³⁹

- 5.112** Mr Pudney also drew the Committee's attention to the potential harshness of mandatory revocation:

... a suspended sentence is a real concern, because the street time does not count. You can really be lumbered. It does not matter how well you go, you could end up lumbered. There is a very small discretion that trivial offences should not trigger a breach of a section 12 bond, but those are very small options.⁴⁴⁰

- 5.113** The Inquiry heard evidence that, of all the community based sentences, suspended sentences were the easiest to 'convert' to a sentence of full-time imprisonment:

While people may think some of these sentencing options are soft options, they are not. Certainly, suspended sentences are often a sudden death as it were to the offender

⁴³⁶ *R v Tolley* [2004] NSWCCA 165 and later, *R v Graham* [2004] NSWCCA 420. The Committee notes that in *Tolley*, Justice Howie criticised the legislation as being "anomalous, odd and inconsistent" (at 22).

⁴³⁷ *R v Graham* [2004] NSWCCA 420

⁴³⁸ *Crimes (Sentencing Procedure) Act 1999* (NSW), s47

⁴³⁹ Mr Tumeth, Evidence, 1 September 2005, p22

⁴⁴⁰ Mr Pudney, Evidence, 28 June 2005, p29

because it has very limited options for avoiding the sentence becoming a full-time prison sentence.⁴⁴¹

- 5.114** The Committee notes that in an attempt to alleviate the potentially harsh consequences of mandatory revocation, the legislation allows a court to direct that the sentence of imprisonment to which the bond relates be served by way of periodic detention or home detention.⁴⁴² This discretion is significant because it gives the court a capacity to grant some relief where a sentence of full-time imprisonment would be inappropriate or unjust. However, in rural and remote areas, where periodic detention and home detention are largely unavailable, a court is unlikely to be able to exercise this discretion. Thus, offenders in rural and remote areas who breach their s 12 bond are more likely to serve a term of full-time imprisonment than their metropolitan counterparts.
- 5.115** The Committee also heard evidence in relation to the intensive policing in rural and remote communities. Intensive policing contributes to an increased likelihood of breach of a bond and revocation. This is discussed further at paragraphs 5.138-5.150.

Parole and non-parole periods

- 5.116** When suspended sentences were first introduced in 2000, the court was required to set the term of the sentence that was suspended at the time the order was made, but was *not* required to set the non-parole period. The non-parole period was set in the event of a breach of the good behaviour bond resulting in the removal of the suspension of the sentence. The court could therefore take into account any changes in the offender's circumstances since the suspended sentence was originally imposed. Following amendments in 2002, however, the non-parole period of a sentence *must* now be fixed at the time the suspended sentence is imposed.⁴⁴³
- 5.117** Comments to the Committee indicate that this development has been received somewhat critically by many in the legal profession because it means that the changing circumstances of an offender cannot be taken into account at the time of a breach. In this regard it has been argued that setting the parole and non-parole periods at the time of sentencing creates a lack of flexibility in the event of a breach.
- 5.118** Mr Tumeth criticised the lack of flexibility and instead supported the setting of both the parole and non-parole periods following a breach:

Another concern is with the way in which a sentence is structured, where courts are fixing non-parole and then parole periods. If the bond is breached, when the court is dealing with the breach they do not have the discretion to interfere with the non-

⁴⁴¹ Mr Davies, Evidence, 15 June 2005, p43

⁴⁴² *Crimes (Sentencing Procedure) Act 1999* (NSW), s 99(2)

⁴⁴³ *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW). The Committee notes that the language of s 12 is ambiguous and problematic in interpretation. A full discussion of the complexities of a breach of s 12 is beyond the scope of this Inquiry. The Committee acknowledges the information provided by Magistrates David Heilpern and George Zdenkowski in their paper: *Breach of Section 12 Bonds, Recent Developments*, Metropolitan, Southern and Northern Conferences 2004/2005.

parole and parole periods. Their hands are tied. In my submission it would be better if the court, when imposing a suspended sentence, did not fix [a] non-parole and parole periods. That way they could at least leave that up to the judge at the time of dealing with the breach to deal with it.⁴⁴⁴

- 5.119** In his evidence to the Committee, Magistrate Roger Prowse described the current breach provisions as a ‘mismatch’ and ‘impenetrable’.⁴⁴⁵ Magistrate Prowse further advised the Committee that, in his opinion, relatively straightforward amendments to the legislation could ‘avoid an enormous amount of angst, an enormous amount of time wasted in the courts’ in addition to reducing the costs associated with appeals.⁴⁴⁶

Committee view

- 5.120** The Committee believes that suspended sentences are a useful addition to the range of community based sentencing options available to the courts. This option enables the court to properly acknowledge the seriousness of an offence by imposing a term of imprisonment while also providing flexibility to suspend the sentence where the circumstances of the offence and the offender warrant suspension. The fact that the sentence of imprisonment is activated upon breach adds to the punishment, deterrent and rehabilitative value of this particular type of bond.
- 5.121** The Committee is concerned, however, about the operation of suspended sentences. The issues examined in the preceding discussion indicate that there are several aspects of the legislation and its operation that could be improved to increase the overall effectiveness of suspended sentences as a community based sentence.
- 5.122** The Committee notes that flexible sentencing options such as suspended sentences are particularly important for offenders in rural and remote areas where other alternatives to full-time imprisonment such as periodic and home detention may not be available. Flexible options are also important for disadvantaged offenders who may have special needs that can be catered for through a suspended sentence with appropriate conditions. For these reasons the Committee has explored possible recommendations to improve the operation of suspended sentences.
- 5.123** The Committee is concerned about the potential net-widening effect of suspended sentences in rural and remote areas where there may be a lack of alternatives such as CSOs. Based on the evidence provided to the Inquiry and the research undertaken by the Judicial Commission, the Committee is persuaded that courts may sometimes impose a suspended sentence in place of a less severe penalty such as a CSO. The extent to which this occurs and the reasons for are not clear. The evidence suggests that the absence of the alternative sentencing options in some rural and remote areas may be a contributing factor.
- 5.124** The impact of net-widening in this context is that while the value of suspended sentences lies in diverting offenders who would otherwise be serving full-time custody *from* prison, they may

⁴⁴⁴ Mr Tumeth, Evidence, 1 September 2005, p22

⁴⁴⁵ Magistrate Roger Prowse, Local Court, Evidence, 1 September 2005, p57

⁴⁴⁶ Magistrate Prowse, Evidence, 1 September 2005, p58

in fact result in placing people who would not ordinarily have received a custodial sentence in prison if the bond is breached.

- 5.125** Many Inquiry participants, including several working in Aboriginal justice, asserted that some judicial officers, consciously or unconsciously, consider a suspended sentence to be a more lenient option and inflate the term of the sentence. As with net-widening the Committee accepts that sentence inflation occurs but notes that the extent of the problem is unclear. The Committee recognises that sentencing involves a synthesis of all factors relevant to the offender and to the offence and necessarily requires the exercise of a wide judicial discretion. For these reasons, it would be difficult to establish conclusive evidence as to the existence of sentence inflation or net-widening with regard to suspended sentences.
- 5.126** The Committee acknowledges the concerns expressed by witnesses regarding the potential consequences of sentence inflation. Not only does it mean offenders receive a longer period of supervision when the legislation envisages that the period of supervision should be the same as the period of the suspended term of imprisonment, but in the case of a breach, the consequences can be particularly harsh.
- 5.127** The Committee notes the challenges facing the courts and the legal profession who work with offenders with regard to appealing lengthy bonds or suspended sentences. Clients who have avoided full-time custody are likely to be reluctant to lodge an appeal against a lengthy bond or suspended sentence even if their solicitor advises them to do so.
- 5.128** The most significant issue raised with the Committee is the impact of the revocation of a suspended sentence upon a breach of the bond. The Committee notes that the breach provisions are unclear but that current judicial thinking supports the view that the whole of the term of imprisonment is activated from the time of the breach. The Committee shares the concerns expressed to it about the particularly harsh impact that this can have on offenders who have already served substantial proportions of their bond.
- 5.129** The Committee notes that the impact of revocation may be exacerbated by the fact that the court is required to set the non-parole period at the time of sentencing and therefore cannot review the non-parole period at the time of a breach. This means that the changing circumstances of the offender, or the amount of the bond served before the breach, cannot be taken into account.
- 5.130** The Committee also notes the intent of the legislature to ameliorate the potential harshness of the revocation of a suspended sentence by allowing the court to direct that the sentence of imprisonment be served by way of periodic or home detention. Offenders in rural and remote areas are generally unable to access these sentencing options and thus are more likely to serve their sentence in full-time custody.
- 5.131** The Committee is aware that the Attorney General's Department is currently reviewing the *Crimes (Sentencing Procedure) Act 1999* (NSW), as noted in paragraph 2.112, and that suspended sentences will be part of that review. Mr Babb of the Department, advised the Committee that breach of s 12 is one of the 'key areas' of the review:

The section 12 suspended sentences is part of the overall review of the Crimes (Sentencing Procedure) Act, and we have received quite a few submissions in relation to it. One of the key areas for more immediate consideration is perhaps breach of

section 12 bonds. Through a number of Court of Criminal Appeal decisions it has become apparent that the provisions as currently structured are difficult to interpret and implement—two decisions are *Regina v Tolley* and *Regina v Graham*. The department, in conjunction with the statutory review, has focused on options for amending section 12 in relation to breaches.⁴⁴⁷

In relation to the breach provisions as set out in section 99 of the *Crimes (Sentencing Procedure) Act*, in relation to section 12 bonds the Criminal Law Review Division is considering an amendment that would require the court, upon breach, to substitute a new sentence rather than implement the sentence that was determined initially by the court.⁴⁴⁸

- 5.132** Mr Babb also advised that consideration is being given to abolishing the requirement to set the non-parole period at the time of fixing a suspended sentence and instead give more flexibility to the court dealing with a breach.⁴⁴⁹
- 5.133** The Committee welcomes the intention of the Attorney General's Department to address the current deficiencies in the *Crimes (Sentencing Procedure) Act 1999* relating to breach of s 12 and the fixing of non-parole periods. The Committee recommends an amendment to the provisions relating to a breach of s 12 to provide clarification of the consequences of a breach and the setting of non-parole periods. The Committee is of the view that greater flexibility should be given to the courts in their response to a breach of a s 12 bond. The Committee also notes the NSW Sentencing Council recommendation that there be wider discretion available to the court when addressing a breach of a suspended sentence.⁴⁵⁰
- 5.134** In addition, the Committee makes two further recommendations to increase the flexibility of suspended sentences. The Committee recommends that consideration be given to allowing the courts to order a suspended sentence with a longer period of supervision than the term of imprisonment.
- 5.135** The Committee is of the opinion that the ability to partially suspend a sentence of imprisonment would contribute to the flexibility of suspended sentences and recommends the restoration of this option. Partial suspension should be sufficiently flexible to allow the court to suspend either the initial or the latter part of the sentence. The Committee notes the benefit this could have for offenders with special needs, such as pregnant women or offenders with scheduled medical procedures. This proposal has the support of the Judicial Commission of NSW and the NSW Sentencing Council, as noted in paragraph 5.97.
- 5.136** The Committee believes that the recommendations set out below, in addition to the recommendations made in relation to expanding periodic detention (Chapter 6) and home detention (Chapter 7) will have a flow on effect in reducing sentence inflation, net-widening and the need for offenders to appeal suspended sentences.

⁴⁴⁷ Mr Babb, Evidence, 31 August 2005, p19

⁴⁴⁸ Mr Babb, Evidence, 31 August 2005, p19

⁴⁴⁹ Mr Babb, Evidence, 31 August 2005, p19

⁴⁵⁰ NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less*, p5

Recommendation 24

That, as part of the review of the *Crimes (Sentencing Procedure) Act 1999* (NSW) currently being undertaken by the Attorney General's Department, the following issues in relation to s 12 of the Act be considered:

- providing greater discretion to the courts to address a breach of suspended sentence
 - restoring the power of the courts to partially suspend prison sentences
 - granting power to the court to order periods of supervision longer than the term of imprisonment on breach
 - amending the legislation to provide clarification on the consequences of a breach of s 12 and in particular the setting of parole and non-parole periods.
-

Related issues

5.137 Two further issues concerning the operation of bonds and suspended sentences in rural and remote areas and in relation to offenders from disadvantaged groups were also raised during the Inquiry. First, the impact of intensive policing on offenders serving bonds or suspended sentences. Second, the difficulties some offenders have in fully understanding the conditions of a bond.

Intensive policing in rural and remote areas

5.138 The Committee heard evidence from a number of witnesses regarding the impact of intensive policing on offenders in rural and remote areas. The following discussion considers how intensive policing impacts on an offender's ability to comply with the conditions of his or her bond. In particular, the impact on Aboriginal offenders is examined.

5.139 The Committee received evidence regarding the higher ratio of police to citizens in smaller country towns. For example, Mr Bill Anscombe, Senior Lecturer in the areas of social work, corrections and child protection at Charles Sturt University, stated that 'in many areas of rural NSW, there is a very significant over-representation of police'.⁴⁵¹

5.140 Mr Davies also commented on the high ratio and noted that the lifestyle of Aboriginal people increased their likelihood of coming into contact with police:

... in the smaller towns, such as those along the river like Wilcannia, Wentworth and Dareton down on the Victorian border, here and Brewarrina, Walgett and some of the other towns further east, the ratio of police to citizen is incredibly much higher than in the suburbs of Sydney and there is a greater exposure - there is greater exposure for Aboriginal people who, culturally, would rather be out and about than inside. I suppose it has been a documented fact that in towns like this the risk of arrest is greater.⁴⁵²

⁴⁵¹ Submission 17, p23

⁴⁵² Mr Davies, Evidence, 15 June 2005, p46

- 5.141** Mr Pudney observed that a difference between policing in a metropolitan area and a small town is that an offender is more likely to be known to the police in a smaller community:

It is easier for a police officer to know someone in Moruya or Bega or Yass who is disqualified than it is for a police officer in Campbelltown to know anyone who is disqualified. There are so many more people in a bigger environment. Most of our charges are because police know the car or the person.⁴⁵³

- 5.142** The issue of police targeting particular offenders was raised with the Committee. For example, Mr Pudney told the Committee that Aboriginal children are targeted:

Whether the means justify the result, people are being targeted and therefore being harassed as they go from A to B. Their only way of avoiding that is generally to move—or keep out of trouble is the other one, but that is often easier said than done. The system does have its consequences, and they do target a lot of young Aboriginal kids in our area.⁴⁵⁴

- 5.143** Inspector Jason Edmunds, with NSW Police at Bega, described the police response to recidivist offenders and the Suspect Target Management Process (STMP):

We have a suspect target management process [STMP], which basically works on the theory that 95 per cent of crime is committed by a small number of offenders, so we target those people. That is having an impact. Week to week, we are meeting to say that so-and-so and so-and-so are committing our crimes, let us fix them, so to speak. When they are detected committing offences and are dealt with, off they go for a few months, while we are concentrating on somebody else, but then they come back out and away we go again. Certainly, the STMP process has had a dramatic impact on our crime.⁴⁵⁵

- 5.144** The Committee notes that Aboriginal offenders in smaller communities have a high rate of convictions for public order type offences. The Sentencing Council, in its discussion paper on abolishing short prison sentences, cited a submission from the Aboriginal Justice Advisory Council, which noted that ‘on a state-wide basis, Aboriginal people are convicted of [public order] offences at a rate of 15 times the rest of the population and, in one Local Government Area, namely Richmond River, Aboriginal people were convicted of these offences at a rate of 96 times the rest of the population’.⁴⁵⁶

- 5.145** Mr Winch, Public Defender, linked intensive policing to the difficulties some offenders experience in complying with their bonds. Mr Winch noted that through zero-tolerance policing suspended sentences can be revoked for relatively minor misdemeanours and the full-term of imprisonment activated:

As the level of policing for the sort of street and nuisance kinds of things gets closer and closer to those so-called zero tolerance kind of approaches to the streets then it can be very difficult for someone to get through a suspended sentence. But those two

⁴⁵³ Mr Pudney, Evidence, 28 June 2005, p27

⁴⁵⁴ Mr Pudney, Evidence, 28 June 2005, p29

⁴⁵⁵ Inspector Jason Edmunds, NSW Police, Evidence, 28 June 2005, p10

⁴⁵⁶ NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less*, p81

things can be inter-related in that you can activate a full-time period of imprisonment for what otherwise would be a fairly minor misdemeanour street crime.⁴⁵⁷

Committee view

- 5.146** Evidence to the Committee indicates that an offender living in a rural or remote area is more likely to be known to police because the population is small and there is often a higher ratio of police to citizens. The Committee was advised that Aboriginal offenders are even more likely to come into contact with police because Aboriginal people make up a significant proportion of the population in many parts of rural and remote NSW and they have a cultural tendency to be outside.
- 5.147** The Committee acknowledges the dual nature of policing in a small community – demonstrated by the police use of the STMP to target recidivist offenders while simultaneously working with communities to address offending behaviour, particularly among young people. The Committee also recognises the legitimate community expectation that the police apprehend offenders. The Committee is concerned, however, that intensive policing in smaller communities unfairly disadvantages offenders.
- 5.148** An offender who lives in an area that is intensively policed, or who is the subject of targeted police intervention, is more likely to be detected if they breach the conditions of their bond. As discussed elsewhere in this Chapter, while the court has considerable discretion following breach of a s 9 bond, this is not true of suspended sentences. A relatively minor public order offence committed by an offender on a suspended sentence may, in fact, trigger a long sentence of full-time imprisonment. This outcome is even more significant when considered in the light of earlier discussions on sentence inflation and the absence of alternatives to full-time imprisonment (such as home detention and periodic detention) for offenders in rural and remote areas.
- 5.149** The Committee encourages the Department of Corrective Services and NSW Police to work collaboratively to promote the rehabilitation of offenders living in rural and remote communities and provide support to offenders on supervised bonds in such areas.
- 5.150** The Committee is also of the view that the research should be undertaken to ascertain the outcomes for families and communities subject to intensive policing, with regard to the evidence presented to the Committee about the impact of intensive policing on offenders serving supervised bonds in rural and remote areas of NSW. The research should be a joint initiative between relevant agencies including the Attorney General's Department and the Bureau of Crime Statistics and Research.

Recommendation 25

That the Government undertake research to ascertain the outcomes for families and communities subject to intensive policing, with reference to the evidence presented to the Committee regarding the impact of intensive policing on offenders serving supervised bonds in rural and remote areas of New South Wales.

⁴⁵⁷ Mr Winch, Evidence, 3 August 2005, p33

Failure to fully understand the conditions of the bond

- 5.151** A further issue that was raised in relation to bonds was the difficulty some offenders have in understanding what the bond means and the conditions attached to it. A lack of understanding can lead to unintentional breaches. Evidence to the Committee identified Aboriginal offenders, particularly young Aboriginal offenders, as a group that are disadvantaged as a result of a failure to fully understand the conditions of their bonds.
- 5.152** The *Crimes (Sentencing Procedure) Act 1999* (NSW) requires a court to take all reasonable steps to explain to offenders their obligations under a bond and the possible consequences if they fail to comply.⁴⁵⁸ The Committee is aware that as well as the courts explaining the conditions of a bond when an offender is sentenced, if the bond is a supervised bond the offender will meet with the PPS to discuss the supervision, and the conditions are discussed at that time.
- 5.153** The Committee heard that, despite these processes, many offenders do not fully comprehend the terms of their bond. Ms Nadine Miles, Solicitor, Sydney Regional Aboriginal Corporation Legal Services, advised that many magistrates and court staff do take the time to make a concerted effort to explain the obligations an offender may have.⁴⁵⁹ Ms Miles acknowledged the challenges that magistrates, solicitors and court staff face:

... people are nervous; people have difficulties with comprehension; Aboriginal people unfortunately have difficulties with hearing. They do not admit to these difficulties readily. I and solicitors that I work with do everything that we can to ensure that our clients understand their obligations.⁴⁶⁰

- 5.154** Failure to fully understand the conditions may be a result of low literacy levels, the reliance of solicitors and court staff on the use of legal terminology and the overall stress associated with the experience of being in court, as highlighted by the following quotes from the Committee's public forum in Brewarrina:

Some of them are pretty poor with their literacy and that. The solicitor just tells them you are on a suspended sentence but they do not give them a piece of paper and they do not read it to them and tell them what they have to do, what guidelines they have to stay between. That is what happens. They go outside but they do not know they are going outside the guidelines.⁴⁶¹

Some are so stressed out that they are going to gaol, and the stress they are under, you have to see it. They are so relieved when they do not go to gaol that they forget what the magistrate said to them, and they do not understand the jargon that is used.⁴⁶²

- 5.155** Ms Jane Saunders, Principal Solicitor at the Shopfront Youth Legal Centre, agreed that generally orders are explained but the offender may not absorb the information given. She stressed the need for reinforcement of the message:

⁴⁵⁸ s 96. The Committee notes that failure to do so does not "invalidate" the bond.

⁴⁵⁹ Ms Miles, Evidence, 30 August 2005, p15

⁴⁶⁰ Ms Miles, Evidence, 30 August 2005, p15

⁴⁶¹ Mr McHughes, public forum, Brewarrina, 16 June 2005, p13

⁴⁶² Ms Barker, public forum, Brewarrina, 16 June 2005, p14

... in my experience magistrates and court staff generally do explain orders to people who have just received them. But often the people are still a bit shell-shocked, or so happy not to be going to gaol that they do not really take it all in. There needs to be constant reinforcement of those obligations to make sure the person understands them.⁴⁶³

- 5.156** Mr Bernard McKinnon, Social Worker and Muralappi Coordinator with the Settlement Neighbourhood Centre in Darlington, described to the Committee his own personal experience and the difficulties that young offenders face when they attend court:

The level is—this is the Children's Court at Bidura—"Yes, Your Honour, mumble, mumble, mumble. Yes, Your Honour". These are the solicitors. I listen because I am there as a support person. They talk to the microphones. They do not talk to the room; they talk only so what they say can be recorded. All of a sudden, the magistrate will bang the desk and the case will be over. Even I sit there thinking, "What just happened?" and I am an experienced, educated man. A young person aged 15, 16 or 17 years will be sitting there absolutely and utterly terrified. I mean it; it is white-knuckle business. The day that I was sentenced to 12 years penal servitude I had to wait two hours before I realised that my sentence was 12 years. I had to ask my father what my sentence was. I did not hear it; I was too terrified.⁴⁶⁴

- 5.157** Mr McKinnon also described the heavy workload of Legal Aid solicitors and the need for a clear explanation of any conditions attached to a court order:

These kids go into court; they have no education and no knowledge of the legal system. They have a Legal Aid lawyer who has 17 cases on that day and 30 cases on his books and who knows that tomorrow more will come in. I have had them say to me, "Barney, can you explain what is going on? I'm out of here" and everybody disappears. I am left holding bail papers and saying, "Listen, young Tom, you're in real bad trouble, mate. You know that you've got to stay with your mum?" I read through it but somebody should be there—a support, court-appointed person—to say, "You've got to go and stay with your Aunt Mabel. You know that. You're not allowed out after 6 o'clock at night. You understand that". They should go through it point by point and make sure—again, I am not trying to be sarcastic—that the light of knowledge lights up in their eyes. When you are talking to them a lot of them—especially young people—will go into submission pose. When their head goes down their brains switch off because they are ashamed—especially in front of a person like me. They do not want me ripping off their head because they have just got into trouble. Down goes their head because I am "Uncle". I have to try to explain it to them. But this is the problem. The court is not interested in whether or not they know. When the magistrate bangs the desk he is finished with them.⁴⁶⁵

- 5.158** Concern was also expressed about offenders from non-English speaking backgrounds. Ms Patricia Giannotto, Public Sector Advisor for the Community Relations Commission, explained that while interpreters relay the conditions of a bond as they are read to an offender, solicitors do not often stay with their clients to ensure they understand the conditions:

⁴⁶³ Ms Jane Saunders, Principal Solicitor, Shopfront Youth Legal Centre, Evidence, 31 August 2005, p50

⁴⁶⁴ Mr Bernard McKinnon, Social Worker & Muralappi Coordinator, Settlement Neighbourhood Centre, Evidence, 1 September 2005, p29

⁴⁶⁵ Mr McKinnon, Evidence, 1 September 2005, pp29-30

In a court situation, the interpreter is provided by the Commission in response to a request from the court through the clerk, effectively for the presiding officer to be able to conduct his or her court in a fair manner. That means that once the court proceedings are finished then that interpreter is not available to follow through. ... our interpreters have advised us when they are called to an assignment that they are asked to go down and interpret for the Clerk of the Court when he or she reads out the conditions of the bond. One issue that the CRC interpreters have raised is that often on those occasions, in fact, about 95 per cent of the time, the solicitor does not stay with the client while this information is being transmitted. So there is actually no other support person for the client there while this is happening.⁴⁶⁶

- 5.159** Ms Giannotto also commented on the lack of translated information available for offenders to explain the conditions related to their court order:

The other thing is there really is no translated information available for the clients or the offenders in regards to their bail or bond conditions. I am not sure how standardised they are and if, in fact, they were standardised and some translated material could be provided in some of the key bigger community languages, then that would be of great assistance.⁴⁶⁷

- 5.160** Magistrate Farnan observed that a significant proportion of the offender population who receive a bond are either not supervised by Probation and Parole (because they are given an unsupervised bond) or never make it to their first appointment:

Where Probation and Parole is involved, I honestly do believe that if a person gets to their first appointment their obligations are, generally speaking, impressed on them at least at that stage, if not before. Some of them do not even get to their first appointment. Where they are not being supervised by Probation and Parole I am afraid I do not have any suggestions. I think many of the court staff do a very good job and are doing their best in plain language to explain to people.⁴⁶⁸

- 5.161** Mr Babb, from the Attorney General's Department, acknowledged that there may be room for improvement in the overall process, but indicated that many offenders will simply not be able to fully comprehend complex information relating to their sentence on the day of sentencing:

It may be a question of process and ensuring that better processes are in place to ensure that that happens. Also, there is simply, I think, a real difficulty. What we are dealing with on the day of sentence is someone who is very nervous and overawed by the whole experience. Immediately upon finding out that they have been given a non-custodial sanction they are no doubt delighted and their mind is elsewhere at the time. I think it could be the case that in lots of instances the explanation is fully and properly given, but if you ask the person shortly after leaving the court they have very little recollection of what was told to them because of the circumstances in which it was passed on. That, no doubt, can create problems. ... So it is a process issue and possibly even a question of whether if the resources were available there could be some follow-up on a day other than the day of sentence because a person, I think, is

⁴⁶⁶ Ms Patricia Giannotto, Public Sector Advisor, Community Relations Commission, Evidence, 1 September 2005, pp53-54

⁴⁶⁷ Ms Giannotto, Evidence, 1 September 2005, p54

⁴⁶⁸ Magistrate Farnan, Evidence, 31 August 2005, p47

very likely to be in a real difficulty in terms of understanding complex information on their day of sentence.⁴⁶⁹

Committee view

- 5.162** The Committee acknowledges the commitment of the judiciary, court staff, solicitors and others to ensuring that offenders understand the requirements of their sentence. It is clear, however, that some offenders, for a range of reasons, do not fully understand their obligations when they receive a bond or suspended sentence. This lack of understanding may lead to a breach of the conditions attached to a bond or suspended sentence.
- 5.163** The Committee recognises that courts can be extremely busy places and attending court can be a traumatic and bewildering experience, particularly for young offenders. The formal nature of the legal language used can further isolate the offender from the sentencing process. Offenders with low levels of literacy are particularly likely to experience difficulties. The Committee is also conscious that an offender who receives a non-custodial sentence may experience a high level of emotion which means they do not fully appreciate the terms or conditions of their bond or suspended sentence at that time.
- 5.164** The evidence presented to the Committee did not clearly identify the extent of this problem or point clearly to a way forward. The problem is one shared by the courts and the PPS as well as the legal profession in representing its clients.
- 5.165** The Committee recommends therefore that the Attorney General and the Minister for Justice review the process within their areas of responsibility regarding the provision of information to offenders about their obligations under a bond. The provision of information about bonds and common conditions in plain English and community languages should also be reviewed. Where improvements can be identified these should be undertaken.

Recommendation 26

That the Attorney General and the Minister for Justice review the process within their areas of responsibility regarding the provision of information to offenders about their obligations under a bond. The provision of information about bonds and common conditions in plain English and community languages should also be reviewed. Where improvements can be identified these should be undertaken. Consideration should be given to the feasibility of requiring offenders to attend court or a Probation and Parole Office for a follow up explanation of the requirements of a bond a week after sentencing.

⁴⁶⁹ Mr Babb, Evidence, 31 August 2005, p25

Chapter 6 Periodic detention

This chapter examines periodic detention and the barriers to accessing periodic detention for offenders in rural and remote areas. Specific barriers affecting Aboriginal offenders and female offenders are also considered.

Overview

What is periodic detention?

- 6.1** Periodic detention is a sentence of imprisonment that requires a detainee to remain in custody for two days a week for the duration of the sentence. Periodic detention operates as a two-stage program.
- 6.2** During Stage 1, detainees report to a detention centre by 7.00 pm on a specified day of the week (usually a Friday) and remain under the custody of the centre until 4.30 pm two days later. Some centres also run midweek programs where attendance is required from Wednesday evening to Friday afternoon.⁴⁷⁰ Detainees must repeat this process every week until they complete their sentence (or, if the sentence is more than six months, the non-parole period of their sentence)⁴⁷¹ or until the detainee has earned promotion to Stage 2. Stage 1 detainees may also perform community service work and are transported between the detention centre and the worksite.
- 6.3** During Stage 2, a detainee does not stay overnight and instead performs two eight-hour periods of supervised community service work each week. Stage 2 is a privilege, which must be earned. To enter Stage 2, a detainee must demonstrate acceptable behaviour during Stage 1 and complete either three months or one third of the sentence, whichever is greater.⁴⁷² Detainees generally must not have had any absences without leave, have a proven record of good conduct and have demonstrated a capacity to function with minimal supervision.⁴⁷³
- 6.4** Periodic detention is commonly referred to as a community based sentence because, for the majority of the week, offenders remain in the community. Also, detainees undertake work in the community, particularly in Stage 2. Periodic detention is, nonetheless, a custodial sentence. In this regard, section 6 of the *Crimes (Sentencing Procedure) Act 1999* refers to *imprisonment* by way of periodic detention as an alternative to full-time detention.

⁴⁷⁰ Mid-week periodic detention is available at Silverwater Periodic Detention Centre (males) and Norma Parker Periodic Detention Centre (females).

⁴⁷¹ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 46

⁴⁷² NSW Department of Corrective Services, *Brochure: Periodic Detention Stage 2, Guide for Detainees*, p2. The Department advised that: “Acceptable behaviour” includes all aspects of a detainee’s behaviour whilst in periodic detention custody, including attendance, good behaviour (eg no instances of possession of drugs or other contraband), urinalysis results, amenability to direction, and performance of work whilst on Stage 1 periodic detention.’: Correspondence from Commissioner of Corrective Services to Chair, 20 March 2006.

⁴⁷³ Submission 30, p3

- 6.5 Periodic detention commenced in NSW in 1971 as an alternative to full-time custodial sanctions.⁴⁷⁴ Periodic detention is only available in NSW and the ACT. No other jurisdiction in Australia currently offers periodic detention as a sentencing option.

Participation and key characteristics of periodic detainees

- 6.6 The NSW Department of Corrective Services *Inmate Census 2005* shows that, at 30 June 2005, 855 persons were subject to periodic detention orders. 783 were male and 72 were female.⁴⁷⁵ The *Inmate Census 2005* shows the overall trend in the use of periodic detention over the past 22 years, starting with a low of 253 in 1982, rising to a high of 1546 in 1997 and dropping to 855 in 2005.⁴⁷⁶ With the total inmate population rising in the same period (from 7966 in 1997 to 9860 in 2005), it is clear that periodic detention is now used much less often as a sentencing option than in the past.⁴⁷⁷
- 6.7 The most common category of offence for male offenders serving periodic detention was driving/traffic offences (38.3%) followed by major assault (13.2%) and drug offences (9.7%). In contrast, the most common offence for female offenders serving periodic detention was fraud (47.2%), followed by drug offences (15.3%) and driving/traffic offences (12.5%).⁴⁷⁸
- 6.8 In its submission to the Inquiry, the Department of Corrective Services notes that offenders sentenced in local courts in metropolitan locations⁴⁷⁹ are more than twice as likely to receive a sentence of periodic detention when compared with offenders in country locations.⁴⁸⁰ The barriers to accessing periodic detention for offenders in rural areas are discussed further in this chapter.
- 6.9 The *Inmate Census 2005* also breaks down the number of Aboriginal and Torres Strait Islander (ATSI) offenders in periodic detention over the same period. In 2005, there were 59 (49 males and 10 females) ATSI periodic detainees - 6.9% of all periodic detainees. In comparison, 1680 or 17.1% of all offenders in Correctional Centres were ATSI offenders.⁴⁸¹ The Committee notes, therefore, that Aboriginal offenders constitute a much smaller percentage of the periodic detention population when compared to the overall Aboriginal offender population in Correctional Centres.

⁴⁷⁴ Periodic detention was introduced under the *Periodic Detention of Prisoners Act 1970* (NSW), which was amended a number of times before being replaced by the *Periodic Detention of Prisoners Act 1981* (NSW). The latter Act was repealed on 3 April 2000, when the *Crimes (Sentencing Procedure) Act 1999* (NSW) and the *Crimes (Administration of Sentences) Act 1999* (NSW) commenced.

⁴⁷⁵ Department of Corrective Services, *NSW Inmate Census 2005, Summary of Characteristics*, p35

⁴⁷⁶ Department of Corrective Services, *NSW Inmate Census 2005, Summary of Characteristics*, p74

⁴⁷⁷ Department of Corrective Services, *NSW Inmate Census 2005, Summary of Characteristics*, p74

⁴⁷⁸ Department of Corrective Services, *NSW Inmate Census 2005, Summary of Characteristics*, p38

⁴⁷⁹ Sydney Statistical Division plus Newcastle and Wollongong: Submission 30, p14

⁴⁸⁰ Penalties issued by courts to offenders as a percentage of the number of penalised persons resident in metropolitan (61,931) and country (37,656) locations: Submission 30, p14

⁴⁸¹ Department of Corrective Services, *NSW Inmate Census 2005, Summary of Characteristics*, p3

- 6.10** The Committee heard evidence of a number of factors that may contribute to the lower percentage of Aboriginal offenders (in comparison to non-Aboriginal offenders) attending periodic detention. These include the locations of periodic detention centres in rural NSW, access to reliable, affordable transport and legislated eligibility criteria. These factors are discussed further in this chapter.

Compliance

- 6.11** A sentence of imprisonment by way of periodic detention means that the offender *must* report to the periodic detention centre every week for the term of the sentence. A failure to report or reporting late can extend the term of the sentence.⁴⁸²
- 6.12** Where an offender breaches a periodic detention order, for example, by repeatedly failing to report (without leave of absence) or refusing to carry out community service work without good reason, the order may be revoked by the Parole Authority and the offender taken into custody to serve the remainder of the sentence of imprisonment. The Parole Authority may, in some circumstances, make an order directing that the offender serve the remainder of the sentence by way of home detention.⁴⁸³ Currently, only offenders in the Sydney, Hunter and Illawarra areas can avail themselves of home detention as a sentencing option, as discussed in Chapter 7.
- 6.13** Legislative amendments in 2002 imposed additional requirements relating to absences from periodic detention. These amendments included mandatory revocation of the periodic detention order for three consecutive unauthorised absences.⁴⁸⁴
- 6.14** At 27 February 2005, the overall attendance rate for periodic detention was 82.2% (656 attendees out of 798 detainees). For Stage 2 detainees, the rate was 95.6% (65 attendees from 68 detainees). By comparison, before the introduction of the legislative amendments, the attendance rate was 75% (February 2002).⁴⁸⁵ Furthermore, the Department of Corrective Services advises that prior to 1995, the attendance rate was frequently less than 60%.⁴⁸⁶ The Committee notes that attendance has improved significantly since the introduction of the legislative amendments in 2002.

⁴⁸² *Crimes (Administration of Sentences) Act 1999* (NSW), s 89

⁴⁸³ *Crimes (Administration of Sentences) Act 1999* (NSW), s 165 provides that if, at the time the Parole Authority revokes a periodic detention order, the remainder of the order to be served is 18 months or less, the Parole Authority can make an order allowing the offender to serve the balance as home detention.

⁴⁸⁴ The Crimes Legislation Amendment (Periodic and Home Detention) Act 2002 (NSW) amended the *Crimes (Administration of Sentences) Act 1999* (NSW) and the *Crimes (Sentencing Procedure) Act 1999* (NSW). The additional requirements included: offenders must advise of unavoidable absences from periodic detention before the commencement of the relevant reporting period; three consecutive unauthorised absences results in mandatory revocation of the order; and on application of the Commissioner, mandatory revocation of the periodic detention order follows three non-consecutive unauthorised absences.

⁴⁸⁵ Submission 30, p8

⁴⁸⁶ Submission 30, p8

Eligibility and suitability criteria

- 6.15** Before a sentence of periodic detention can be imposed the judge must firstly be satisfied that, having considered all possible alternatives, no penalty other than imprisonment is appropriate.⁴⁸⁷ This requirement is common to all custodial sentences. Secondly, if the sentence is one of three years or less, the judge can then consider whether the sentence should be served by way of periodic detention.⁴⁸⁸
- 6.16** Currently, periodic detention is not available as a sentencing option for an offender who has ever served full time imprisonment for more than six months in relation to any one sentence of imprisonment.⁴⁸⁹ This eligibility criterion was inserted by the *Crimes Legislation Amendment (Periodic and Home Detention) Act 2002* (NSW) and commenced on 2 December 2002.⁴⁹⁰ The intention behind the amending Act was to protect the integrity of the periodic detention scheme and improve compliance by excluding ‘unsuitable offenders’ and rectifying ‘the significant “gaol culture” within periodic detention centres’ attributed to the lengthy periods of full-time custody many detainees had previously served.⁴⁹¹
- 6.17** The Committee heard evidence that this exclusion particularly impacts on male Aboriginal offenders. This is discussed further at paragraph 6.104-6.121.
- 6.18** As well as being eligible for periodic detention an offender must be suitable. When considering suitability, the court must be satisfied that:
- the offender is at least 18
 - the offender is a ‘suitable person to serve the sentence by way of periodic detention’
 - periodic detention is appropriate in all the circumstances
 - accommodation is available at a periodic detention centre
 - travel arrangements are available, so as to avoid ‘undue inconvenience, strain or hardship’ on the offender
 - the offender has signed an undertaking to comply with the obligations of the order.⁴⁹²
- 6.19** Generally, the Probation and Parole Service (PPS) is requested to carry out an assessment and make a recommendation as to suitability.⁴⁹³ In her submission to the Inquiry, Magistrate Fiona Toose described the assessment process as follows:

⁴⁸⁷ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 5(1)

⁴⁸⁸ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 6(1)

⁴⁸⁹ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 65A Periodic detention is also not available for certain sexual offences, *Crimes (Sentencing Procedure) Act 1999* (NSW), s 65B

⁴⁹⁰ From 1986 to the amendments in 2002, there was no limitation on periodic detention based on an offender’s antecedents. Before 1986, periodic detention was available to persons who had not served a term of imprisonment of more than six months in the previous seven years.

⁴⁹¹ The Hon Bryce Gaudry, Legislative Assembly, New South Wales, *Hansard*, 28 June 2002, p4218

⁴⁹² *Crimes (Sentencing Procedure) Act 1999* (NSW), s 66(1)

⁴⁹³ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 68 provides that a court *may* refer an offender for assessment for suitability for periodic detention before imposing a sentence of imprisonment.

To be suitable for supervision, community service and/or periodic detention an adult offender must be assessed as such by the Probation and Parole Service. For all options other than home detention this assessment is done prior to the magistrate determining what the sentence will be. The assessment (for options other than home detention) is done either by a duty probation and parole officer at court who provides the Court with a short pre sentence report on the day of sentencing or away from the Court at a time to be arranged by the Probation & Parole Office for the relevant geographical area (to where the adult offender resides) with the offender; the latter option is generally referred to as a “Full pre sentence report” or a “background report”.⁴⁹⁴

- 6.20** The Committee heard evidence from Judge Derek Price, the Chief Magistrate of NSW, that he found the service provided by PPS to be both timely and useful:

We find them very helpful. We have a good relationship with the Probation and Parole service. We have time standards agreements ... for a short pre-sentence report, when you are looking only for periodic detention or community service options, they supply them within three weeks. When you are looking for a full background report they supply it within a period of six weeks, and they are very helpful.⁴⁹⁵

- 6.21** When preparing their assessment reports regarding an offender’s suitability to serve a sentence by way of periodic detention, the PPS is required to consider the following factors: drug or alcohol dependency, psychiatric or psychological condition, medical condition, criminal record, if any and employment and other personal circumstances.⁴⁹⁶

- 6.22** Information supplied by the Department of Corrective Services sets out a number of practical considerations that apply when assessing suitability for periodic detention. These include the type of accommodation available at periodic detention centres, levels of supervision and the availability of medical services. These practical considerations may contribute to an offender being determined to be unsuitable for periodic detention. For example, an offender who requires significant, daily medical attention may be considered unsuitable for periodic detention.⁴⁹⁷

- 6.23** The Committee notes that the sentencing process is not restricted to the criteria outlined in the statutes. In exercise of their discretion, sentencing officers are permitted to bring together the array of relevant factors that reflect the totality of a particular case. An illustration of the relevant factors that may be considered is found in *Overall*, a case involving actual bodily harm causing permanent brain damage:

In arriving at the conclusion that periodic detention is appropriate, I have had regard, inter alia, to the young age of Mr Overall, to the fact that he has not previously offended, and to the fact that a term of imprisonment would terminate the employment which he presently has and retains. I am conscious of the need to punish an offence of this kind and of the necessity that the public appreciation of the gravity

⁴⁹⁴ Submission 5, p2

⁴⁹⁵ Judge Price, Evidence, 6 June 2005, p34

⁴⁹⁶ ‘Circumstances that may render the offender’s regular attendance at a periodic detention centre impracticable being an indicator of unsuitability’: Crimes (Sentencing Procedure) Regulation 2005, cl 15.

⁴⁹⁷ Submission 30, pp7-8

of what was done be properly reinforced. ... Full-time imprisonment would be apt, I think, to destroy Mr Overall's future. To do that would not restore Mr White. In all the circumstances, I concluded that the extended period of periodic detention was the least bad of the courses available.⁴⁹⁸

- 6.24** If a court departs from the PPS recommendation in a suitability assessment report, either by sentencing the offender to periodic detention or declining to do so, the court must advise the offender and make a record of its reasons for doing so.⁴⁹⁹
- 6.25** The Committee heard a great deal of evidence, including evidence from PPS staff in rural areas, that a lack of access to reliable, affordable transport was a common reason for an offender to be considered unsuitable for periodic detention. This is discussed further at paragraph 6.75-6.89.

Availability of periodic detention

- 6.26** In NSW, periodic detention centres are located at Bathurst, Campbelltown, Grafton, Mannus, Parklea, Parramatta, Silverwater, Tamworth, Tomago and Wollongong. Five centres cater for males only (Campbelltown, Grafton, Parklea, Silverwater and Tamworth), one caters for females only (Parramatta), while four centres cater for both sexes (Bathurst, Mannus, Tomago and Wollongong).⁵⁰⁰ The Committee observes that currently periodic detention centres service the main urban centres on the coastal strip and only extend inland to Tamworth, Bathurst and Mannus (located approximately 115km southeast of Wagga Wagga).
- 6.27** The Committee notes that in its discussion paper on the abolition of short prison sentences, the NSW Sentencing Council considered the availability of periodic detention by assessing how *accessible* the detention centre is to offenders rather than simply by whether a detention centre exists in a particular court division.⁵⁰¹ The Council found that many offenders outside metropolitan areas would have to travel distances of several hundred kilometres to access periodic detention. Access to periodic detention for offenders in rural and remote areas is discussed further at paragraph 6.66.

Advantages and disadvantages of periodic detention

- 6.28** In considering the advantages and disadvantages of periodic detention as a sentencing option the Committee has focussed on the impact of periodic detention on rural and remote communities and specific groups of offenders. Other advantages and disadvantages raised by inquiry participants are also included in the following discussion.

⁴⁹⁸ *Overall v R* (1993) NSWCCA 71 (Unreported) Mahoney, AJ at 11-12

⁴⁹⁹ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 66(4)

⁵⁰⁰ Submission 30, p7

⁵⁰¹ NSW Sentencing Council, *Abolishing prison sentences of 6 months or less*, pp130-134

Advantages

6.29 Submissions and evidence to the Inquiry highlighted several advantages or benefits associated with periodic detention as a sentencing option including that it allows the offender to maintain family and community ties, it is less costly than full time imprisonment and it provides benefit to the community through work performed by periodic detainees.

6.30 The NSW Law Reform Commission, in its 1996 discussion paper on sentencing, described the purpose of periodic detention and noted several advantages it has as a sentencing option:

Periodic detention is designed to meet the community's demand for custodial punishment which provides a deterrent not only to the offender but to others who might be tempted to offend. It provides the court with a sentencing option which, while rigorous, is not as drastic as full time imprisonment. The advantages of periodic detention are that: it registers disapproval of the offender's activities without all of the negative effects of full-time imprisonment; the offender's debt to the community can still be paid without having to give up employment; domestic relations can largely be maintained; and it is less costly to the community than full time imprisonment.⁵⁰²

6.31 In its submission the Department of Corrective Services, while agreeing with the Law Reform Commission's views on the benefits of periodic detention, noted that the profile of the offender population has changed and now 'very few of the offenders concerned have full-time employment'.⁵⁰³

Maintaining family and community ties

6.32 Periodic detention provides the courts with the flexibility to impose a custodial sentence while allowing an offender to remain part of the community through employment and living with his or her family. In this way, the punishment and deterrence purposes of sentencing are achieved without excessive disruption to family life.

6.33 In evidence from Magistrate Heilpern, the Committee heard a hypothetical scenario of an offender who continues to breach apprehended violence orders due to his drinking. The Magistrate described how periodic detention as a sentencing option would suit this situation:

Periodic detention [PD] is very effective for persons in those circumstances because they do not lose their job, they do not lose their house, their car or their marriage. They do not lose everything because they are sent to Goulburn—that in itself is an isolation problem because it is so far away and there is no public transport—but instead they spend their weekends away, that is, giving their Friday and Saturday night drinking buddies a bit of a miss, and giving the family unit a chance to have a quiet time on Friday and Saturday nights.⁵⁰⁴

6.34 Mr Tumeth, Principal Solicitor with the Law Society of NSW, also expressed support for periodic detention as a less disruptive sentencing option for offenders and their families:

⁵⁰² NSW Law Reform Commission, Discussion Paper 33, Ch 8

⁵⁰³ Submission 30, p2

⁵⁰⁴ Magistrate Heilpern, Evidence, 28 June 2005, p42

Periodic detention is a custodial sentence and that is only imposed after a court has determined that a sentence ought be served. If you take away that option you are left with either full-time custody or a suspended sentence, and in my experience the court has already gone past the notion of a suspended sentence if they are looking at periodic detention. Periodic detention interferes obviously with a person's ability to do certain things, but full-time custody is far more invasive and dislodges their home life, their work life and everything else.⁵⁰⁵

Cost effectiveness

- 6.35** When considering the cost effectiveness of periodic detention as a sentencing option, the Committee examined costs in comparison to full-time detention. The Department of Corrective Services *Annual Report 2004/05* states the cost per periodic detainee, per day, is \$160.97. This is the same cost as managing a prisoner in an open prison. The cost per prisoner, per day, in a secure prison is \$186.84.⁵⁰⁶
- 6.36** It should be noted that when an offender moves to Stage 2 periodic detention there is no requirement to stay overnight and thus costs are reduced significantly. The cost per offender, per day, in Community Corrections is \$10.73.
- 6.37** The Committee acknowledges that Stage 1 periodic detention is a relatively cost-intensive sentencing option. While it does have similar costs to managing a prisoner in an open prison periodic detainees are only there for two days. Also, the Committee is of the opinion that when other factors are taken into account, including the reduced costs associated with Stage 2 detainees and the value of periodic detainee community work, periodic detention remains a more cost-effective sentencing option than full time imprisonment.

Community work

- 6.38** A further benefit of periodic detention identified by Inquiry participants is the community work performed by detainees. The agencies to which detainees are allocated are usually non-profit organisations that would not be able to pay someone to do the work. These agencies, such as welfare organisations, environmental groups and schools, are usually dependant on the assistance given to them by volunteers.
- 6.39** The Department of Corrective Services *Annual Report 2004-2005* states that in that year, the ten periodic detention centres provided environmental and charity projects to the value of \$3 million. The Commissioner of Corrective Services has made a commitment to continue to provide labour to such projects, examples of which include Clean Up Australia and the Kokoda Track Memorial Walkway.⁵⁰⁷
- 6.40** Ms Ruis, with the Department, described the increasing involvement of Community Offender Services with Stage 2 periodic detainees and the move towards combined Community Service Order (CSO) and periodic detainee work sites:

⁵⁰⁵ Mr Tumeth, Evidence, 1 September 2005, p17

⁵⁰⁶ Department of Corrective Services, *Annual Report 2004/05*, Appendix 31, p137

⁵⁰⁷ Department of Corrective Services, *Annual Report 2004/05*, p33

In July [2005], the second stage is going to come across to ... Community Offender Services, because in the second stage they are working. In the first stage, some do work: They have to go and perform work at work sites. There has not been a provision of programs as such to the first stage because of the fact that they are not there full-time and it has not been a path that has been gone down. However, to occupy time, they are required to perform some work in the community, normally under supervision, stage one, and all stage twos must work in the community. Some of what we are doing with our stage twos, which was quite interesting, is that our community service order offenders are also out in the community doing work and so are periodic detention offenders. So what we have started is joint work sites.

We have three major ones going at the moment. One is at Bathurst, which cleans up Hill End. We work for the National Parks and Wildlife Service there. The second major one is in Campbelltown where we work for the Campbelltown City Council. With any CSO or PD work, we have to make sure that we are not performing work which would ordinarily be done by somebody. It is work which would otherwise not be done because of union issues. We also have a combined site at Wollongong and we are going to continue those sites. That is the trend we are going towards. We do combined sites which are supervised by us. The equipment is provided by us generally doing environmental work and clean-ups. That means that stage ones can come to that also.⁵⁰⁸

- 6.41** The Committee notes that the move towards combined CSO and periodic detainee work sites helps to address issues relating to transport, supervision and provision of equipment raised in relation to CSOs (discussed in Chapter 4). In addition, periodic detainees are able to make some reparation to the wider community through the community work performed.
- 6.42** Magistrate Prowse suggested a modified form of periodic detention that requires offenders to report to their local police station on weekend mornings to undertake community service work locally (after drug and alcohol testing). He suggested that completing periodic detention in this way could assist in overcoming some of the difficulties associated with transport in rural areas, as well as requiring offenders to contribute to the local community:

If I had my way I would change the nature of periodic detention to be a super-CSO. I do not know what the right title is, but you can imagine super-CSOs, where people report to the police station at 7.00 am on Saturday morning and are breath tested—because obviously you are not allowed to go to gaol affected—and drug tested to start with but then on a random basis, and then allocated community service work in an area that is easy to supervise on a low-cost basis. They report back to the police station at six o'clock, four o'clock, or whatever time you want to pick, and then go home in the local community. ... they come back on Sunday morning at 7.00 am, they are breath tested, random drug tested, do the community work and go home on Sunday afternoon... In that way, every major and non-major police station could run a periodic detention super CSO or community-based periodic detention program. That means that the sentencing option would be available right across [the] State, and there would be cost benefits and benefits in having community work done that nobody else does.⁵⁰⁹

⁵⁰⁸ Ms Ruis, Evidence, 6 June 2005, p12

⁵⁰⁹ Magistrate Prowse, Evidence, 1 September 2005, p57

- 6.43** The Committee supports the move towards Stage 1 and Stage 2 periodic detainees participating in community work under the supervision of Community Offender Services at joint periodic detention/CSO worksites. Increased participation in community work enhances periodic detention as a sentencing option and provides an opportunity for offenders to make a meaningful contribution to the community.
- 6.44** The Committee recommends that a review of the joint periodic detention/CSO worksites be undertaken with a view to expanding this model across the state where viable. This review should be undertaken no later than two years after Stage 2 periodic detention has transferred to the Community Offender Services division of the Department of Corrective Services.
- 6.45** The Committee notes Magistrate Prowse's suggestion regarding a modified form of periodic detention that may be suitable for rural areas with a smaller and geographically disparate offender population. The Committee recognises that different approaches may be required to meet the needs of offenders in rural and remote NSW. The Committee recommends that the Department of Corrective Services develop innovative approaches to address the needs of Stage 2 periodic detainees in rural communities where there may be insufficient numbers of offenders to operate a viable joint periodic detention/CSO worksite.

Recommendation 27

That the Department of Corrective Services:

- undertake a review of the joint periodic detention/Community Service Order worksites with a view to expanding this model across the State, where viable. The review should be undertaken no later than two years after Community Offender Services has taken responsibility for Stage 2 periodic detention.
 - research alternative, innovative approaches, to providing community service work for Stage 2 periodic detainees in rural areas.
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Disadvantages

- 6.46** Submissions and evidence to the Inquiry highlighted several disadvantages or challenges associated with periodic detention as a sentencing option, including a lack of rehabilitation, a perception of leniency, the potential for sentence inflation.

Lack of rehabilitation programs while serving a periodic detention order

- 6.47** As currently administered, periodic detention provides the opportunity for some offenders to complete community projects under supervision (mostly during Stage 2) but does not provide access to programs designed to address offending behaviour or health issues. In this regard, the Department of Corrective Services likened Stage 1 periodic detainees to inmates serving short gaol sentences:

Stage one periodic detainees who do not perform community service work attend periodic detention centres for their detention periods and receive no therapeutic programs to address their offending behaviour. In this respect, stage one detainees are in the same position as inmates serving short gaol sentences, who also do not receive

programs to address their offending behaviour. Sentences of 6 months or less full time imprisonment are generally too short for an inmate to complete or benefit from therapeutic programs.⁵¹⁰

- 6.48** Dr Richard Matthews, the Chief Executive of Justice Health, described the primary purpose of periodic detention as being retributive:

Periodic detention has to be seen purely in terms of it being a retribution. Again, there needs to be a kind of fundamental discussion and debate about what prisons and everything are for. If it is all about retribution, then they are highly successful. If it is about rehabilitation and deterrence, then the success is arguable. It depends what you want from them.⁵¹¹

- 6.49** Several participants in the Inquiry advocated that periodic detention could be made more beneficial if detainees could access therapeutic programs. For example, in its submission, the NSW Coalition of Aboriginal Legal Services (COALS) supported the addition of rehabilitation and vocational programs to periodic detention orders:

Periodic detention would be even further enhanced as a sentencing option if it could be combined with rehabilitation programs such as those which permit an offender to seek treatment for any drug or alcohol problems or mental condition from which they may suffer. It may also be enhanced if combined with programs which allow Aboriginal offenders to acquire important life skills such as the finding and maintaining of employment.⁵¹²

- 6.50** Ms Magrath, the Manager of Resources and Executive Services for Community Offender Services and the Secretary of the Probation and Parole Officer's Association of NSW stated that if periodic detention is to be more than merely punitive it should incorporate a program option:

Community Offender Services already provides a range of programs targeting offending behaviour and more are being developed all the time. If periodic detention is to be anything more than merely punitive and just periodically incapacitating to people and if it is to contribute to rehabilitation at all it has to include a program option. I would see that certainly that could be included at stage 1 of periodic detention. There is no reason detainees could not participate in programs in addition to doing community work. Given that periodic detainees are generally towards the lower risk of the likelihood of reoffending and are often there for driving-related offences, some of the programs currently offered by Community Offender Services could be of real benefit. I am thinking of things like the Drug and Alcohol Addictions Program that we have just rolled out. We have also just rolled out a Relapse Prevention Program and Peter ...has been co-ordinating the Sober Driver Program in the community for some time.⁵¹³

⁵¹⁰ Answers to questions on notice taken during evidence on 6 June 2005, Ms Ruis, Question 4, p14 (response provided by Acting Commissioner Ian McLean, 25 July 2005)

⁵¹¹ Dr Richard Matthews, Chief Executive, Justice Health, Evidence, 27 September 2005, p9

⁵¹² Submission 43, pp22-23

⁵¹³ Ms Magrath, Manager, Evidence, 30 August 2005, p23

- 6.51** The Committee also heard from Magistrate Prowse that he would welcome more flexibility in how offenders undertake periodic detention orders including the power to direct offenders to attend drug and alcohol counselling, domestic violence counselling, training at TAFE or undertake literacy courses as part of their order. Magistrate Prowse noted, however, that in many rural areas ‘the drug and alcohol counsellors, the domestic violence counsellors and the community health people’ are unavailable.⁵¹⁴
- 6.52** The Committee notes that the legislation currently does not allow the courts to order a periodic detainee to attend therapeutic or educational programs and that none are provided by the Department of Corrective Services for detainees who may wish to attend voluntarily.⁵¹⁵
- 6.53** The Committee recognises the practical challenges associated with providing rehabilitation and education/life skill programs to offenders serving periodic detention in all rural and remote areas. The chronic shortage of health and other professionals and the small numbers of offenders spread over large geographical areas requires innovative and flexible approaches to program development and delivery. Notwithstanding this, the Committee is of the opinion that a judicial discretion to require offenders serving periodic detention orders to participate in programs designed to reduce the likelihood of recidivism including education/life skill programs can potentially improve the overall usefulness of periodic detention as a sentencing option.
- 6.54** As discussed in paragraph 2.112, the Criminal Law Division of the Attorney General’s Department is currently undertaking a statutory review of the *Crimes (Sentencing Procedure Act) 1999* (NSW). The Committee recommends that this review consider legislative amendments to the Act in order to give discretion to the courts to order programs designed to reduce the likelihood of recidivism for offenders serving periodic detention orders.

Recommendation 28

That the Attorney General, as part of the review of the *Crimes (Sentencing Procedure) Act 1999* (NSW), consider an amendment to give discretion to the courts to order programs designed to reduce the likelihood of recidivism for offenders serving periodic detention orders.

Community perception of leniency

- 6.55** The degree of leniency associated with periodic detention has been the subject of differing opinion. For example, the Committee heard evidence from Judge Price, who cited an example of a 1992 NSW Court of Criminal Appeal decision, which stated that periodic detention has a strong element of leniency built into it.⁵¹⁶ A later 2004 decision of the court held that while

⁵¹⁴ Magistrate Prowse, Evidence, 1 September, p60

⁵¹⁵ The *Crimes (Administration of Sentences) Act 1999* (NSW), s 84(1)(a) provides that the Commissioner may make an order directing an offender to participate in any activity that the Commissioner considers conducive to the offender’s welfare or training.

⁵¹⁶ *R v Falzon and Pullen* NSWCCA 20 February 1992 Loveday, J at 7: “I do not agree that a sentence to be served by way of periodic detention should be regarded as equivalent to a full-time custodial sentence for the same duration. It is true that compliance with a periodic detention order is in law equivalent to serving a full-time custodial sentence. But it is contrary to common sense to regard it

periodic detention was not an entirely soft option, it is “considerably less arduous than full-time custody, since it only requires detention for part of the week and converts to community service before its completion.”⁵¹⁷

- 6.56** Other Inquiry participants argued that periodic detention demands a high level of self-discipline. In its submission to the Inquiry, for example, the Department of Corrective Services states that periodic detention is not a ‘soft option’ and that reporting to a periodic detention centre for a prolonged period places a considerable strain on detainees:

Reporting to a periodic detention centre at the same time every week, however, places a tremendous strain on detainees, which is increased the longer a detainee is subject to a sentence. There have even been claims by some detainees that they deliberately breached their attendance requirements in order to be committed to full time imprisonment rather than maintain the necessary discipline of weekly attendance.⁵¹⁸

- 6.57** The Department provided the example of an offender who receives a sentence of 12 months to be served as periodic detention (nominally, 2 nights x 52 weeks = 104 days imprisonment). If the periodic detention order is revoked, the detainee may receive full time incarceration for the full, unserved portion of their sentence, that is, the full 365 days rather than 104 days.⁵¹⁹ The Committee notes therefore that the consequences of a breach and subsequent revocation of a periodic detention order further supports the view that periodic detention is not necessarily a ‘soft’ option.
- 6.58** As discussed previously, Stage 2 periodic detention is the non-residential component of a sentence, where offenders are required to attend worksites for eight hours per day for every weekend of their sentence. Unauthorised absences can lead to reversion to Stage 1 or revocation of the periodic detention order. The Department distinguishes between the flexibility allowed to those offenders completing a CSO (for example, 12 months to perform sentences less than 300 hours) and the rigid requirement that periodic detainees must attend the worksite every weekend of their sentence.⁵²⁰ This requirement to consistently attend periodic detention every weekend, for the duration of their sentence, further supports the view that periodic detention is not necessarily a lenient sentence.

Sentence inflation

- 6.59** Sentence inflation is the term used to describe the lengthening of a sentence to ‘compensate’ for the perceived leniency in the way the sentence will be served. For example, a sentence of imprisonment served by way of weekend periodic detention may be considered to be more lenient than full time imprisonment.
- 6.60** The Department of Corrective Services stated in its submission that there exists a ‘widespread view’ that the courts increase, or should increase, a sentence of imprisonment if it is to be

in practical terms as being other than less severe than a full-time custodial sentence. It has from its very nature a very strong element of leniency built into it’.

⁵¹⁷ *R v Lentball* [2004] NSWCCA 248 at 33

⁵¹⁸ Submission 30, p5

⁵¹⁹ Submission 30, p11

⁵²⁰ Submission 30, p22

served by way of periodic detention. The Department provided a hypothetical example of how this might work:

There is also a widespread view that courts either do or should increase a sentence of imprisonment to allow for the fact that it will be served by way of periodic detention - for instance, that instead of sentencing an offender to (say) 5 months full-time imprisonment (nominally 152 or 153 days custody), the court instead should “inflate” the sentence to 18 months imprisonment by way of periodic detention, on the basis the offender will then spend 156 nights in custody.⁵²¹

- 6.61** The Committee notes that the sentencing process does not actually permit sentence inflation. The *Crimes (Sentencing Procedure) Act 1999* (NSW) sets out two distinct steps to be followed when imposing a sentence of periodic detention. Firstly, the court must be satisfied that having considered all other alternatives, no penalty other than imprisonment is appropriate.⁵²² This requirement is common to all sentences of imprisonment. Once the sentencing option of imprisonment is selected, the court must then determine the length of the sentence. Where the court has sentenced the offender to imprisonment for not more than three years, the court may then consider making an order directing that the sentence be served by way of periodic detention.⁵²³
- 6.62** The Committee did not receive other evidence relating to sentence inflation and periodic detention. However, the Committee did receive evidence concerning sentence inflation and suspended sentences and this is discussed in Chapter 5.

Barriers to accessing periodic detention

- 6.63** As noted in paragraph 6.8, the rate of periodic detention for offenders in country regions is less than half the rate for offenders in metropolitan areas. The Committee heard evidence about a range of barriers that prevent offenders in rural and remote areas and offenders from certain disadvantaged groups from accessing periodic detention. These barriers include lack of access to affordable and reliable transport, lack of financial resources available to the offender, legislative exclusions that disproportionately impact on Aboriginal offenders and limited periodic detention facilities for female offenders in rural and remote areas.
- 6.64** It should be noted that these barriers are not mutually exclusive, that is, a particular offender may face multiple inter-related barriers. For example, an offender on a low income in a rural area may find it impossible to afford the transport costs associated with attending periodic detention due to the combination of their low income and a prevailing lack of affordable, public transport in many parts of regional and rural NSW.
- 6.65** The Committee is also aware that for offenders in rural and remote communities, in general, the practical barriers to accessing periodic detention are a consequence of complex, inter-related factors exacerbated by broad societal disadvantage in the areas of education, health, employment opportunities, the tyranny of distance and access to transport.

⁵²¹ Submission 30, p11

⁵²² *Crimes (Sentencing Procedure) Act 1999* (NSW), s 5(1)

⁵²³ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 6

Rural and remote areas

- 6.66** In its submission, the Department of Corrective Services identified the ability of an offender to consistently attend periodic detention each week, over the period of his/her sentence, as the single most significant issue for offenders in rural and remote areas.⁵²⁴ Consistent attendance requires personal transport or accessible public transport, the financial resources to afford such transport and a reasonable degree of good personal health. These requirements are often inter-related and are considered in more detail in the following paragraphs.

Geographical location of periodic detention centres

- 6.67** As discussed in paragraph 6.26, periodic detention centres in rural or regional NSW are located in Bathurst, Grafton, Mannus, Tamworth, Tomago and Wollongong. The Committee was informed that the Broken Hill Periodic Detention Centre no longer operates, with the last periodic detainee having completed his sentence on 25 January 2004. The periodic detention centre has since been incorporated into Broken Hill Correctional Centre. The Department of Corrective Services advised that factors such as the lack of transport in far western NSW and the high incidence of alcoholism amongst local Indigenous offenders were pertinent reasons for the closure of the centre.⁵²⁵

- 6.68** The limited number of centres effectively excludes from periodic detention, offenders in large parts of rural NSW or limits access to those with the financial resources to travel long distances. The Committee heard evidence from Magistrate Prowse, of the Goulburn Local Court, who described the lack of availability of periodic detention for offenders in large parts of rural and remote NSW:

For example, Moree does not have access to a periodic detention centre because Tamworth is too far for people who are poor or do not have access to transport; they cannot get there. The same with Inverell, Goulburn, Crookwell, Gundagai, Yass and so many other places around the State.⁵²⁶

- 6.69** In his evidence to the Committee, Judge Price explained the consequences for an offender should periodic detention and other non-custodial sentencing options be unavailable:

If an option is not available the court has to sentence the person, the offender, having regard to the fact that it is not available. For example, if a court determines that a term of imprisonment is appropriate, having regard to the objectively serious factors and the subjective factors in favour of the defendant, and then obtained a presentence report from the Probation and Parole Service asking whether periodic detention or community service orders are available, and the report states that neither option is available, that person cannot be sentenced down. In that case if periodic detention is not available the offender would be sentenced to full-time custody.⁵²⁷

- 6.70** Magistrate Farnan expressed the opinion that periodic detention centres should be attached to every prison to reduce the geographical discrimination against people living in the country:

⁵²⁴ Submission 30, p7

⁵²⁵ Submission 30, p25

⁵²⁶ Magistrate Prowse, Evidence, 1 September 2005, p57

⁵²⁷ Judge Price, Evidence, 6 June 2005, p32

My view is that periodic detention ought to be available to everybody statewide and there should not be any discrimination; there should be centres that are sufficiently proximate to all of the areas where people might need to be sentenced to those sentences. My view is there ought to be periodic detention centres, if possible and if feasible, attached to every prison, and if that were to take place then it would be far less of a problem.⁵²⁸

- 6.71** Mr Richard Davies, the Principal Solicitor of the Western Aboriginal Legal Service raised the possibility of adding periodic detention to the Yetta Dhinnakkal Correctional Facility at Brewarrina, as a means of extending periodic detention to the area for eligible Aboriginal offenders:

Again, it is an option that could be considered if, for example, Yetta Dhinnakkal were to acquire a periodic detention facility and Corrective Services was able to provide transport to and from there, then that might be an option in a community like Brewarrina or Bourke. ... A place like Yetta Dhinnakkal, rather than a place like Bathurst gaol, has the means and the opportunity to provide some constructive input in those weekends of periodic detention—cultural awareness training, some counselling—and it might be a valuable option if it were locally based.⁵²⁹

- 6.72** The NSW Sentencing Council, in its 2004 discussion paper on abolishing short prison sentences, recommended that ‘priority should be given to making primary sentencing options such as periodic detention ... available throughout NSW.’⁵³⁰

- 6.73** The Department of Corrective Services gave evidence that for staffing and operational reasons it is against Departmental policy to build any more ‘stand alone’ periodic detention centres. Therefore, according to Departmental policy, periodic detention centres can only be created where there is existing infrastructure, that is, attached to a correctional centre. In this regard the Department advised that the conversion of existing full-time beds in correctional centres for use by periodic detainees will result in the need for replacement full-time correctional beds elsewhere, which represents a significant capital cost.⁵³¹ Ms McComish stated, in relation to whether it was possible to convert some existing full-time beds into periodic detention beds, that ‘[g]iven the level of demand on full-time beds, the answer is no.’

- 6.74** The Attorney-General, the Hon Bob Debus MP, when questioned about the lack of availability of periodic detention in rural and remote NSW during the 2005 budget estimates process, highlighted the practical difficulties and costs associated with providing periodic detention in very remote areas:

Periodic detention for very remote communities is extremely difficult to implement. The point is that nobody can set up a periodic detention centre in, say, Wilcannia, because there would have to be a very large number of officers of the Department of

⁵²⁸ Magistrate Farnan, Evidence, 31 August 2005, p43

⁵²⁹ Mr Davies, Evidence, 15 June 2005, p42

⁵³⁰ NSW Sentencing Council *Abolishing prison sentences of 6 months or less*, p4

⁵³¹ Submission 30, p7

Corrective Services sitting around looking after a very small number of people who are in for only a couple of days a week.⁵³²

Transport issues

6.75 The geographical location of periodic detention centres in NSW and access to reliable, affordable transport, are significant inter-related factors influencing the practical availability of periodic detention as a sentencing option.

6.76 As noted at paragraph 6.18, the *Crimes (Sentencing Procedure) Act 1999* (NSW) requires the court to be satisfied that transport arrangements that will not cause undue inconvenience, hardship or strain are available to the offender. This assessment is generally made by the PPS in its presentence report. The Committee heard evidence from Mr Gooda, the District Manager of Probation and Parole in Inverell, that most of his clients are assessed as unsuitable for periodic detention due to transport issues:

Most of the offenders I assess are not suitable for weekend detention because of the difficulty to secure reliable and affordable transport. So, they are usually, quite often, assessed as unsuitable for that option in presentence reports.⁵³³

6.77 Transport to periodic detention centres was also raised by Mr Neville, the District Manager of the Probation and Parole Office at Griffith:

I think probably one thing that you need be aware of, and I guess it would have been raised by other witnesses, is the transport issue and access to transport—particularly in respect of some sanctions. Periodic detention is a big one for us, more often than not, possibly due to the nature of the offences quite often, but also the geographic remoteness from the nearest periodic detention centre, which is at Tumbarumba, 350 kilometres away.⁵³⁴

6.78 Evidence to the Inquiry highlights a number of factors that contribute to offenders' transport difficulties in rural areas. These include not having a licence due to disqualification or fine default (the issue of driver's licences is discussed in more detail in Chapter 9), no access to a reliable car and limited public transport. In addition, the Committee notes that driving/traffic offences are the single most common category of offence for male offenders serving periodic detention orders.⁵³⁵

6.79 Mr Collins, a solicitor from Inverell, advised the Committee that in his 27 years as a duty solicitor he has had few clients receiving periodic detention. Mr Collins identified the loss of drivers licence as the primary reason for this:

⁵³² Hon Bob Debus MP, Attorney General, Evidence, Budget Estimates, GPSC 3, 16 September 2005, p11

⁵³³ Mr Gooda, Evidence, 14 June 2005 p22

⁵³⁴ Mr Neville, Evidence, 27 June 2005, p29

⁵³⁵ Department of Corrective Services, *NSW Inmate Census 2005, Summary of Characteristics*, p38

... people have lost their licences under presumably disqualification or fine default, fine default being the predominant one. Therefore they are cancelled drivers, they do not have licences and they cannot attend.⁵³⁶

6.80 COALS, in its submission to the Inquiry, identified transport as an important service needed to support access to periodic detention in rural and remote areas:

The most important service which needs to be available is appropriate transport as many Aboriginal offenders living in rural and remote NSW do not possess motor vehicles or driver licences.⁵³⁷

6.81 In the absence of a driver's licence or access to a car, the availability of public transport becomes an important issue. The Committee repeatedly heard evidence about the lack of public transport to access periodic detention in rural and remote NSW. David Heilpern, Local Magistrate for Batemans Bay, Moruya, Narooma, Began and Eden advised the Committee that a lack of transport was the major reason offenders from his area couldn't access periodic detention:

The major reason that people are not eligible for periodic detention here is because they say that there is no transport available; and that is true. No transport is available. There is a bus that people can catch from Batemans Bay. Corrective Services provides a bus, after some considerable discussion about it, from Batemans Bay to Wollongong, one way, on Friday afternoons. That is it.⁵³⁸

6.82 Mr Flanagan, the District Manager with Glen Innes Probation and Parole described a similar situation based on his experiences:

Our nearest periodic detention centre is at Grafton. Occasionally some clients who live on the eastern side of town can make the physical journey to access periodic detention at Grafton but there is no reliable public transport so it is an onerous burden on the family.⁵³⁹

6.83 In his evidence, Mr Gooda drew attention to the fact that the public transport timetable needs to correspond with the times detainees commence and finish periodic detention and be affordable:

I do not think it corresponds too well with the times they need to be there, and I suspect it is a \$30 to \$40 trip, and then there is the return trip as well. A lot of these offenders are unemployed and that is quite a financial burden.⁵⁴⁰

6.84 The NSW Sentencing Council, in its report on abolishing short prison sentences, examined the uneven distribution of sentencing options in NSW in some detail. In its discussion of periodic detention, the Council questioned the "availability" of periodic detention when an offender may not have the means to travel the vast distances needed:

⁵³⁶ Mr Collins, Evidence, 14 June 2005, p34

⁵³⁷ Submission 43, p22

⁵³⁸ Magistrate Heilpern, Evidence, 28 June 2005, p45

⁵³⁹ Mr Flanagan, Evidence, 14 June 2005, p22

⁵⁴⁰ Mr Gooda, Evidence, 14 June 2005, p22

... an individual may not have the means of travelling to a periodic detention centre, despite it being “available” in the area in question. This particularly applies in the far West area, where there is little public transport, and vast distances to be covered. It is noted that the distance between Bathurst and Broken Hill is slightly less than 1000 kilometres, Tamworth to Walgett is 370 kilometres and a further 200 kilometres from Walgett to Bourke. There is no public transport between these centres.⁵⁴¹

- 6.85** The Committee heard evidence from a number of witnesses about the need to provide access to transport to enable offenders to access periodic detention centres. For example, Judge Price stated that the problems associated with the local of availability of sentencing options may be overcome by, among other things ‘[P]roviding appropriate transportation in instances where sentencing options are subject to the offenders ability to travel.’⁵⁴² A variety of practical suggestions to improve transport were made, as illustrated by the following quotes:

You might be able to leave those big centres, gaols, periodic detention centres where they are but provide public transport from other centres to the gaols so that there is some evening out of sentencing options across the State.⁵⁴³

I can imagine a little periodic detention [PD] bus that starts at Eden on Friday afternoon and picks up people all the way up the coast, and comes back down.⁵⁴⁴

... it may well be that the system could be altered and that offenders in the various towns would go to a police station at a particular time and that a Corrective Services bus would travel from Inverell, Glen Innes, Armidale down to Tamworth, with the sentence starting at, say, five o'clock for each locality; it is just that part of your sentence is being served in a bus or some other means of transportation.⁵⁴⁵

... it is imperative that the Department of Corrective Services provide transport from a central place (such as the local post office) to the relevant detention facility.⁵⁴⁶

- 6.86** As can be seen from the above quotes, witnesses suggested different approaches to meet the specific needs of their particular location.
- 6.87** The Committee notes the benefits of period detention as a sentencing option in comparison to full time imprisonment. Periodic detention provides the courts with a sentencing option that meets the deterrence and punishment purposes of sentencing but is not as drastic as full-time imprisonment. Family relationships can be maintained and detainees with employment are able to keep their jobs. In addition, the work performed during Stage 2 periodic detention allows an offender to make a contribution to his or her community.
- 6.88** The Committee is concerned that offenders in many rural and remote parts of NSW, who may otherwise be suitable for periodic detention, are given sentences of full time imprisonment because of a lack of periodic detention facilities. The Committee notes the recommendation

⁵⁴¹ NSW Sentencing Council *Abolishing prison sentences of 6 months or less*, p63

⁵⁴² Submission 7, p6

⁵⁴³ Mr Sandland, Evidence, 6 June 2005, p42

⁵⁴⁴ Magistrate Heilpern, Evidence, 28 June 2005, p45

⁵⁴⁵ Mr Collins, Evidence, 14 June 2005, p32

⁵⁴⁶ Submission 43, p21

of the NSW Sentencing Council that priority be given to making primary sentencing options such as periodic detention available throughout NSW.⁵⁴⁷

- 6.89** The Committee acknowledges that to provide periodic detention uniformly across NSW would have major funding and resource implications for the Department of Corrective Services. Notwithstanding this, the Committee believes that access to periodic detention as a sentencing option for offenders in rural and remote areas can be improved by expanding the number of existing Correctional Centres in rural and remote areas offering periodic detention beds. The Committee recommends that existing Correctional Centres in rural and remote NSW should offer sufficient periodic detention beds to meet the needs of the male and female offender population those areas.
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Recommendation 29

That the Minister for Justice examine the feasibility of creating periodic detention beds in all Correctional Centres in order to meet the needs of both the male and female offender population.

- 6.90** The Committee recognises that the availability of periodic detention is not only determined by the location of periodic detention centres but also depends on the ability of offenders to consistently travel to the centres, each weekend, for the term of their sentences. The Committee acknowledges that while it is not practical to provide a transport service for every periodic detainee in rural and remote NSW, greater access to periodic detention can be achieved.
- 6.91** The Committee is conscious that no single solution to address the difficulties associated with transport can be uniformly applied across the state. The vast distances to be travelled combined with the geographically diffuse nature and relatively small numbers of offenders in some locations present particular challenges. However, the Committee believes that by tailoring transport solutions to meet the needs of specific locations, greater access to periodic detention can be achieved.
- 6.92** The Committee recommends that the Minister for Justice examine methods of improving transport services for offenders to increase access to periodic detention as a sentencing option for offenders in rural and remote areas.
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Recommendation 30

That the Minister for Justice examine methods of improving transport services for offenders to increase access to periodic detention as a sentencing option for offenders in rural and remote areas.

⁵⁴⁷ NSW Sentencing Council, *Abolishing prison sentences of 6 months or less*, p4

Financial resources of offender and Centrelink payments

6.93 As discussed, the single greatest barrier to accessing periodic detention in rural and remote communities is access to reliable, affordable transport. The financial resources available to an offender can be a significant factor in maintaining reliable personal transport or accessing public transport. It has also been noted that, when assessing suitability, the PPS must be satisfied that ‘appropriate travel arrangements are available, so as to avoid undue inconvenience, strain or hardship’ on the offender.⁵⁴⁸

6.94 While the Committee heard examples of individual offenders who, with the support of family, travelled long distances in order to access periodic detention or who relocated to live with relatives, it was acknowledged that ‘that is not really on if you are an average person’.⁵⁴⁹

6.95 The Committee heard evidence from Magistrate Heilpern that the combination of limited financial resources and expensive transport can effectively exclude offenders on low income from accessing periodic detention:

I do not know how they are meant to get home, because there is no public transport. The buses are private, and very expensive. And I am talking about the people I sentenced to periodic detention, again it is an economic base. If they have money or family support to drive them up there, every weekend, and go and pick them up at the end of the weekend, they can do periodic detention. In the absence of that, they cannot.⁵⁵⁰

6.96 The submission from COALS identified that for many Aboriginal offenders living in rural and remote NSW, the cost of petrol to travel may be prohibitive:

For those offenders who do have access to a motor vehicle and a person to drive them to the detention facility, the cost of petrol for a journey of some 200km would be excessively onerous.⁵⁵¹

6.97 The issue that attracted most comment in relation to the financial resources of offenders and periodic detention related to Centrelink benefits. As mentioned in paragraph 6.31, the Department of Corrective Services stated in its submission to the Inquiry that, with regard to periodic detainees, the offender profile has changed and ‘very few of the offenders concerned have full-time employment.’⁵⁵² It is likely, therefore, that many offenders will either be wholly or partially dependent on some form of Centrelink payment.

6.98 The Committee heard evidence from Centrelink that an offender serving periodic detention will have his or her payments reduced:

The main issue for that group [periodic detainees] is that their payment will be deducted for the days that they are in prison. If they are in for weekend detention they will probably be deducted for two days per fortnight. If they go in Friday night and

⁵⁴⁸ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 66(1)

⁵⁴⁹ Mr Collins, Evidence, 14 June 2005, p34

⁵⁵⁰ Magistrate Heilpern, Evidence, 28 June 2005, p45

⁵⁵¹ Submission 43, p22

⁵⁵² Submission 30, p2

come out Sunday it is considered one day's deduction because they are looking at midnight to midnight. We should be advised when they go into periodic detention and their payments should be reduced accordingly.⁵⁵³

... while a person is in gaol he or she is not entitled to a payment. That can have an impact in a periodic detention environment, because the person is expected to largely live a normal life but, potentially, part of their payment is not payable each fortnight because of the entitlement legislation.⁵⁵⁴

6.99 The Council of Social Service of NSW (NCOSS) stated that, in its opinion, Centrelink's practice of reducing the benefits paid to periodic detainees on a pro rata basis was 'inequitable and counterproductive'.⁵⁵⁵

6.100 The Committee heard from Magistrate Heilpern that a reduction in Centrelink payments caused by attending periodic detention may of itself be sufficient to increase the risk of homelessness and therefore exclude a person who might otherwise be suitable:

I found that out [ie the reduction in Centrelink benefits] because I had a person who was, lo and behold, suitable for periodic detention in Bateman's Bay yet the recommendation was against that. He was a single person who was on a pension or a benefit, and a substantial proportion of his income went on rent and food. Just because he was going to PD did not mean that he did not have to pay rent for those two days, and the recommendation was that he not go to PD because he would end up being homeless if he did.⁵⁵⁶

6.101 The Committee notes that for offenders wholly or partially dependent on Centrelink benefits, a reduction in their benefits to attend periodic detention may place them and/or their family in a position of financial hardship. The Committee is concerned that offenders in rural and remote areas may be disproportionately impacted by a reduction in Centrelink benefits due to the additional costs incurred in travelling long distances to access periodic detention. Furthermore, the Committee is concerned that a reduction in Centrelink payments may increase a person's vulnerability to homelessness and cause a finding of unsuitability for periodic detention in a pre-sentence report.

6.102 The Committee recommends that the Minister for Justice examine the deduction of Centrelink payments for offenders serving periodic detention and in particular consider how any such deductions impact on periodic detainees in rural and remote areas, the extent to which the deductions could render an offender unsuitable for periodic detention and whether an exemption should be sought.

⁵⁵³ Ms Sarah Grasesvski, Project Officer, National Prison Services Stakeholder Relationships Team, Centrelink, Evidence, 6 June 2005, p17

⁵⁵⁴ Mr Robert Williams, Area Manager, Area West, Centrelink, Evidence, 6 June 2005, p15

⁵⁵⁵ Correspondence from Mr Gary Moore, Director, Council of Social Services of NSW (NCOSS), to Committee, 15 September 2005

⁵⁵⁶ Magistrate Heilpern, Evidence, 28 June 2005, p42

Recommendation 31

That the Minister for Justice examine the deduction of Centrelink payments for offenders serving periodic detention in New South Wales, including:

- how the deductions impact on periodic detainees, particularly those in rural and remote areas
 - the extent to which the deductions could render an offender unsuitable for periodic detention and
 - whether an exemption should be sought.
-

Disadvantaged populations

6.103 The Committee notes that certain groups of offenders face particular barriers in accessing periodic detention as a sentencing option. In particular, the Committee received evidence regarding Aboriginal offenders and female offenders. It should be noted that there is significant cross over between rural and remote areas and disadvantaged populations - for example, a significant number of Aboriginal offenders live in remote areas of NSW. Also, an offender can concurrently 'belong' to several different populations identified as disadvantaged.

Section 65A and the impact on Aboriginal offenders

6.104 As previously discussed in this chapter, a person who has ever previously served a sentence of full time imprisonment greater than six months cannot be given periodic detention as a sentencing option. This is widely referred to as the s 65A exclusion and was introduced in December 2002.⁵⁵⁷

6.105 In its submission to the Inquiry the Department of Corrective Services states that the intention behind s 65A was to rectify the growth of a "gaol culture" amongst periodic detainees.⁵⁵⁸ In the Second Reading Speech to the amendment Act, the Government's rationale for the introduction of the s 65A exclusion was explained thus:

The Government believes that periodic detention is not an appropriate sentence for hardened criminals, and that the periodic detention scheme can be improved if unsuitable offenders are excluded from it. New section 65A of the *Crimes (Sentencing Procedure) Act 1999* provides that an offender who has previously served full-time imprisonment for more than 6 months is not eligible for periodic detention.⁵⁵⁹

6.106 The Committee heard evidence that this exclusion disproportionately affects Aboriginal offenders, who are more likely to have significant criminal histories than non-Aboriginal offenders. In addition, s 65A fails to recognise what may be lengthy periods of rehabilitation.

⁵⁵⁷ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 65A

⁵⁵⁸ Submission 30, p8

⁵⁵⁹ Legislative Council, New South Wales, *Hansard*, 24 September 2002, p5139

For example, Mr Pudney, Principal Solicitor with the South Eastern Aboriginal Legal Service advised:

... people are not entitled to periodic detention if they have served a gaol sentence of six months or more. That really cuts out a lot of people. That was brought in in 2002, just turned up in legislation for some reason and it cuts out a lot of people who had trouble 10 or 12 years ago. Six months in gaol is not a long time for a Koori guy; a large percentage have done six months or more. It does not matter how well they have gone in the 20 years since they did that gaol sentence, they do not have the option.⁵⁶⁰

6.107 The Public Defenders Office similarly noted that:

It is arguable that this requirement may unfairly (further) disadvantage indigenous offenders, who are more likely to have previously served a sentence of imprisonment.⁵⁶¹

6.108 The Committee notes that there are many social and historical reasons why Aboriginal people are more likely to have criminal histories than non-Aboriginals. The NSW Sentencing Council, in its 2004 discussion paper on abolishing short prison sentences, notes that a 'major factor which may contribute to the fact that many Aboriginal defendants appear in court with lengthy criminal histories is the way in which Aboriginal communities are policed.'⁵⁶² Policing of Aboriginal communities is discussed in more detail in Chapter 5 in relation to bonds.

6.109 The failure to acknowledge what may be long periods of rehabilitation on the part of an offender was also commented on by Ms Miles, Solicitor, Sydney Regional Aboriginal Corporation Legal Services:

... someone who is sentenced to more than six months full-time custody is deemed to be automatically ineligible for periodic detention. There is no cut-off for that. It is not limited to within the last two years or five years or even 10 years. It is across the board. A person could have been sentenced on only one matter 15 or 20 years ago, they have shown significant rehabilitation but caught themselves up in a situation where they are back before the court today. They are cut out of that particular alternative due to their history.⁵⁶³

6.110 Several inquiry participants suggested an amendment to the eligibility criteria for periodic detention. Ms Miles advised that amendments would be particularly beneficial to Aboriginal offenders who come before the courts with lengthy histories of offending:

It would be of benefit to Indigenous clients, particularly given that they are clients who come before the court with large and unfortunately lengthy histories, to be able to see an amendment to that particular section of the legislation to ensure that there is some time limit or something built in to allow the courts to revisit and utilise that discretion if a person is deemed acceptable but for their previous criminal history.⁵⁶⁴

⁵⁶⁰ Mr Pudney, Evidence, 28 June 2005, p25

⁵⁶¹ Submission 10, p7

⁵⁶² NSW Sentencing Council, *Abolishing prison sentences of 6 months or less*, p80

⁵⁶³ Ms Miles, Evidence, 30 August 2005, p16

⁵⁶⁴ Ms Mills, Evidence, 30 August 2005, p16

- 6.111** The Committee heard evidence from Mr Brian Sandland, the Director of Criminal Law with the NSW Legal Aid Commission, that amending s65A had the potential to increase the availability and utilisation of periodic detention as a sentencing option:

... we may be able to increase the utilisation of sentencing options such as periodic detention, for instance, if you look at the fact that anyone who has served a sentence of six months or more previously is ineligible for periodic detention. The amendment of that provision, for instance, which is contained in 65A and 65B of the *Crimes (Sentencing Procedure) Act*, would lead to greater availability and, perhaps, utilisation of the periodic detention. My recollection is that periodic detention has fallen as a sentencing option across the State and that what has increased is use of the suspended sentence option.⁵⁶⁵

- 6.112** In his evidence to the Committee, Mr Robert Tumeth, Principal Solicitor, Law Society of NSW, stated that the Law Society supported the removal of s 65A as a means of increasing the discretion of the court and in recognition of an individual offender's rehabilitation:

You are referring to section 65A and B, and the society is on record as recommending the abolition of those two parts to that section. I note that the sentencing council made a recommendation to the same effect. We have seen that come up in very practical terms where people have previously, many years ago sometimes, been sentenced to periods of detention of more than six months, which then renders them ineligible later on, no matter what they have achieved in the meantime with their lives, who then come back before the court. We had a case within the last two months where a magistrate did not have a complete criminal history of the offender and he referred the person to periodic detention, only them to be found out by the Department of Corrections that that could not be done. He then had to search around and find something more appropriate in the legislation. But it does happen. It certainly does fetter the discretion of the courts, which was one of the things the society was concerned about. Also, on a practical level, from an individual's point of view, they may change their life in many significant ways but not be free of the criminal system.⁵⁶⁶

- 6.113** As Mr Tumeth noted, in its report on the abolition of short prison sentences, the Sentencing Council also recommended the removal of the restriction imposed by s 65A of the *Crimes (Sentencing Procedure) Act 1999* (NSW).⁵⁶⁷
- 6.114** Mr Lloyd Babb, Director of the Criminal Law Division, Attorney Generals Department, also expressed the opinion that introducing a time restriction to s 65A would 'make the alternative more available, and that would be reasonable in my opinion.'⁵⁶⁸
- 6.115** In its submission to the Inquiry, the Department of Corrective Services also supported a revision of the 'blanket prohibition' imposed by the s 65A exclusion but for different reasons. The Department expressed the opinion that 'an unintended consequence of s 65A is that offenders ineligible for periodic detention are eligible for community service orders,

⁵⁶⁵ Mr Sandland, Evidence, 6 June 2005, p44

⁵⁶⁶ Mr Tumeth, Evidence, 1 September 2005, pp 16-17

⁵⁶⁷ NSW Sentencing Council, *Abolishing prison sentences of 6 months or less*, p4

⁵⁶⁸ Mr Babb, Evidence, 31 August 2005, p20

notwithstanding arguable unsuitability'.⁵⁶⁹ The Department went on to say that rather than a blanket prohibition it may be more useful to look at an offender's compliance and disciplinary records as well as their imprisonment record:

A "gaol culture" is attributable not so much to the length of time an offender has been imprisoned, but in the way an offender has served their sentence. It may be more relevant, instead of a blanket prohibition, to require a suitability assessment report to consider an offender's disciplinary record whilst imprisoned, as well as previous compliance with periodic detention orders, home detention orders and community service orders and make recommendations to the sentencing court in light of both the offender's imprisonment record and his or her compliance in serving past sentences.⁵⁷⁰

- 6.116** The Committee acknowledges that the rationale behind the introduction of s 65A was to improve the integrity and overall compliance of the periodic detention scheme. However, the Committee is of the opinion that the blanket exclusion from periodic detention of all offenders who have ever previously served a sentence of greater than six months by way of full time imprisonment may not be the best way of achieving this aim.
- 6.117** The Committee is concerned that the s 65A exclusion disproportionately affects Aboriginal offenders who may come before a court with a lengthy criminal history. A lengthy criminal record extending back to an offender's adolescent years may be attributable to a combination of factors including the impact of intensive policing, particularly on public order matters, a lack of support services in rural areas and general socio-economic disadvantage.
- 6.118** The Committee believes that s 65A unreasonably disadvantages those members of the offender population who have demonstrated significant rehabilitation by complying with the law for what may be a long period of time. It is the opinion of the Committee that an offender who appears before the court with a criminal history, but who has demonstrated rehabilitation through compliance with the law for an extended period should not be subject to a blanket exclusion from periodic detention as a sentencing option.
- 6.119** The Committee supports the suggestion of the Department of Corrective Services that information regarding an offender's compliance with previous orders of the court, such as periodic and home detention, community service orders or bonds, should be made available to the sentencing court as part of the overall suitability assessment report.
- 6.120** The Committee recommends that the Attorney General examine the provisions of s 65A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) with particular regard to its impact on Aboriginal offenders, with a view to introducing a time limit on previous offences.
- 6.121** In addition, the Committee recommends that an offender's record of compliance with previous orders of the court be taken into account when assessing the suitability of an offender for periodic detention.

⁵⁶⁹ Submission 30, p8

⁵⁷⁰ Submission 30, p9

Recommendation 32

That the Attorney General, as part of the review of the *Crimes (Sentencing Procedure) Act 1999* (NSW), examine the operation s 65A of the Act with particular regard to its impact on Aboriginal offenders, with a view to:

- enabling offenders who have previously served imprisonment for more than six months by way of full-time detention in relation to any one sentence of imprisonment to be considered for periodic detention
 - allowing consideration of an offender's compliance record with previous orders of the court when assessing suitability for periodic detention.
-

Access to periodic detention by female offenders

- 6.122** The Committee received evidence relating to the difficulties faced by female offenders in accessing periodic detention. In rural and remote NSW, only four centres – Bathurst (10 beds), Mannus (6), Tomago (20) and Wollongong (10) - cater for female offenders. The other 120 female offender periodic detention beds are located at Parramatta – 60 beds midweek and 60 beds weekend. Parramatta is the only midweek detention for female offenders. The former Grafton Female Periodic Detention Centre was de-proclaimed on 20 June 2003.⁵⁷¹
- 6.123** The Committee notes that the number of females sentenced to periodic detention is low, both in actual numbers and in comparison to the number of places available. The *Inmate Census 2005* states that at 30 June 2005, there were 72 female periodic detainees, representing 8.4% of the total number of periodic detainees. It is not known how many of these offenders have primary carer responsibilities.
- 6.124** The Department of Corrective Services provided the example of the bed occupancy rate (the percentage of beds being used of the total number available) for Stage 1 periodic detention beds for the week ending 27 February 2005. For female offenders it was 33.1% (55 detainees of a total of 166 beds available). In comparison, for males in the same period it was 81.4% (568 detainees and 698 beds).⁵⁷²
- 6.125** The consequences of limited alternatives to full-time imprisonment for women with carer responsibilities in rural and remote communities was highlighted in the evidence of Mr Tumeth of the Law Society of NSW. Mr Tumeth described a case involving a woman with dependent children found guilty of defrauding Centrelink by obtaining a benefit by deception:

The courts have long said in respect of offences of this nature that the most appropriate penalty is a custodial sentence ... against the backdrop the court had to juggle with the unfortunate personal circumstances of the woman. The court accepted that she had acted out of need rather than greed, that is, to support her children. It accepted also that she did have a mental illness, which affected her ability to think clearly. It accepted that she was truly remorseful and that she had no support for her children and did not know what was to become of them if she was incarcerated.

⁵⁷¹ Submission 30, p24

⁵⁷² Submission 30, p24

... unfortunately, as is the case in many regional areas in New South Wales, Moree does not have the home detention facility or reasonably available periodic detention facility particularly for females. Against that backdrop she received a custodial sentence of 18 months with a non-parole period of nine months.⁵⁷³

- 6.126** Legal Aid NSW called for the expansion of periodic detention to increase the availability of this option for female offenders:

Fewer correctional facilities exist for female offenders compared to male offenders. A need exists for expansion of facilities such as periodic detention for female offenders in more parts of New South Wales. Consideration should be given to establishing periodic detention facilities for women in existing prisons which otherwise deal with male offenders, if this is a cost effective way of meeting this need.⁵⁷⁴

- 6.127** The Committee notes that the NSW Legislative Council Standing Committee on Social Issues in its 1997 report into children of imprisoned parents, recommended that the Department of Corrective Services explore the possibility of introducing childcare facilities at periodic detention centres to improve availability for women.⁵⁷⁵ The Department did not support the recommendation on the grounds that periodic detention centres have a variety of detainees who may present a risk to the safety of children in this environment.⁵⁷⁶

- 6.128** It is not immediately clear from the evidence received by the Committee exactly why the existing female periodic detention beds are under-utilised. The Committee notes, however, that in its submission the Department of Corrective Services states that periodic detention is not suitable for women who have carer responsibilities.⁵⁷⁷ It may be that the barriers that restrict access for offenders in rural and remote areas generally (the location of periodic detention centres, transport, financial resources and overall health of the offender) are further compounded by carer responsibilities for female offenders. It is also noted that there are only 46 periodic detention beds available to female offenders outside Sydney and all are weekend beds.

- 6.129** As an alternative to a sentence of full-time imprisonment, periodic detention has several advantages including the maintenance of family and community ties, the benefits of performing community work and lower imprisonment costs. The Committee believes that for female offenders with dependent children or other carer responsibilities, periodic detention represents a beneficial alternative to full-time imprisonment because it allows the family unit to be maintained while satisfying the purposes of sentencing.

- 6.130** The Committee recommends that research be undertaken by the Department of Corrective Services to determine the reasons why female participation in periodic detention remains low

⁵⁷³ Mr Tumeth, Evidence, 1 September 2005, p13

⁵⁷⁴ Submission 31, p6

⁵⁷⁵ NSW Legislative Council, Standing Committee on Social Issues, Report 12, *A report into Children of Imprisoned Parents*, July 1997, Recommendation 52

⁵⁷⁶ NSW Legislative Council, Select Committee on the Increase in Prisoner Population, *Interim Report :Issues relating to Women*, July 2000, para 689

⁵⁷⁷ Submission 30, p24

and to identify any measures that could be taken, whether administratively or through legislative amendments, to increase the participation of female offenders.

Recommendation 33

That the Minister for Justice examine the reasons why female participation in periodic detention in New South Wales remains low and identify any measures that could be taken, whether administrative or legislative, to increase the participation of female offenders.

Chapter 7 Home detention

This chapter examines home detention and its lack of availability in rural and remote NSW. Issues of access for disadvantaged groups are also examined. The Home Detention Scheme and the advantages and disadvantages of home detention are examined in some detail as they underpin the discussion in Chapter 8 of the proposal to introduce back-end home detention in NSW.

Overview

What is home detention?

- 7.1** Home detention allows an adult offender to serve part or all of a sentence of imprisonment in the offender's home, under supervision. A sentence of full-time imprisonment (of 18 months or less) must be conferred before an order for home detention can be made. Home detainees may be required to perform community service, enter treatment programs and seek and/or maintain employment. Home detention is not available to juvenile offenders.
- 7.2** Home detention can operate as a front-end or a back-end scheme. In NSW home detention is a front-end scheme whereby offenders can be sentenced to serve the full term of their sentence in their home rather than in gaol. Back-end home detention refers to an offender serving the last portion of their sentence in their home, after having served the initial portion in gaol. The proposal to introduce back-end scheme in NSW is examined in Chapter 8.
- 7.3** Home detention was introduced as a sentencing option in NSW as a trial program in June 1992. The Scheme was formalised with the passage of the *Home Detention Act 1996* (NSW), the main objective of which was to 'reduce the prison population by diverting people from the prison system.'⁵⁷⁸ Home detention is administered by the Community Offender Services division of the Department of Corrective Services.⁵⁷⁹ The Department describes home detention as follows:

Home Detention is a key part of the government's strategy to encourage the use of alternatives to full-time custody for less serious offenders. It aims to divert offenders from full time custody, but is not intended to be an alternative to periodic detention, community service or other non-custodial alternatives. Home Detention is substantially more punitive, more intrusive and more costly than any other penalty alternative short of full-time custody.⁵⁸⁰

⁵⁷⁸ Legislative Assembly, New South Wales, *Hansard*, 20 June 1996, p3385. The *Home Detention Act 1996* was later consolidated into Part 6 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

⁵⁷⁹ The administration of home detention orders is governed by the Part 4 of the *Crimes (Administration of Sentences) Act 1999* (NSW) and Chapter 4 of the *Crimes (Administration of Sentences) Regulation 2001*.

⁵⁸⁰ Department of Corrective Services, *Annual Report 2002/2003*, p40

- 7.4 The Home Detention Scheme was reviewed by the Department in 1999, as required by legislation.⁵⁸¹ The review reported on the first 18 months of operation of the Scheme, between February 1997 and August 1998.⁵⁸² The study reported on the overall success of the Scheme and examined the effectiveness of home detention in supervising offenders in the community and the impact on families and friends of detainees. Relevant findings are discussed throughout this Chapter.
- 7.5 The Department advised that its Corporate Research, Evaluation and Statistics Unit is currently undertaking another review of the Scheme.⁵⁸³ At the time of finalising this report the review had not been made publicly available

Participation

- 7.6 In 2004-2005, 453 offenders were admitted to home detention, an increase of 6% from the previous year.⁵⁸⁴

Table 7.1 Home detention orders 1999-2000 to 2004-2005⁵⁸⁵

Home detainees	1999/00	2000/01	2001/02	2002/03	2003/04	2004/05
Case load intake	404	418	439	508	426	453
% change	-	+3.5	+5.0	+15.7	-16.1	+6.3
No. supervised	179	178	175	229	200	192
% change	-	-0.6	-1.7	+30.8	-12.7	-3.5

- 7.7 The Committee notes the relatively small number of offenders participating in home detention compared to the current total prison population, which is approximately 9,000 (see chapter 2). The primary reason raised by Inquiry participants for the small participation rate was the Scheme's unavailability in many parts of NSW, as examined in detail later in this Chapter.
- 7.8 Other reasons were also suggested for the low numbers of participants in home detention. For example, Mr Sandland, the Director of the Criminal Law Division of the Legal Aid

⁵⁸¹ Submission 30, p5

⁵⁸² During the study the Probation and Parole Service assessed 510 convicted offenders for suitability for home detention, of which 366 offenders commenced the Scheme. Of the offenders that did not commence the Scheme, some were assessed to be ineligible or unsuitable and others were assessed as suitable but were otherwise not placed on the scheme: K Heggie, *Review of the NSW Home Detention Scheme*, Research Publication No 41, May 1999, NSW Department of Corrective Services, Executive Summary, ppvii

⁵⁸³ Submission 30, p5

⁵⁸⁴ Department of Corrective Services, *Annual Report 2004/2005*, p33

⁵⁸⁵ Department of Corrective Services, *Annual Report 2003/2004*, p38 and NSW Department of Corrective Services, *Annual Report 2004/2003*, p33

Commission noted that home detention may be perceived as a soft option by the judiciary.⁵⁸⁶ The perception of home detention as a 'soft option' is examined further at paragraphs 7.52-7.58. The Department of Corrective Services also noted the role of judicial discretion in the use of home detention:

Utilisation of Home Detention as a sentencing option is very much subject to judicial officer discretion & preference. When the first 18 months of Home Detention operations were reviewed, wide discrepancies were noted in the extent to which different courts referred offenders, sentenced to terms of full-time custody eligible for service by way of Home Detention, for assessment of suitability. Some magistrates clearly did not see this as an appropriate option for anyone while others seemed to hold a wide range of views about which eligible offenders might be considered for the program. Within the more populous areas this range of utilisation has been manageable because of the number of different courts & magistrates served by each of the Home Detention teams. In less populous areas efficient utilisation of intensive supervision resources will be highly dependent on the views of one or two magistrates.⁵⁸⁷

7.9 A further reason suggested to the Committee is that, due to the onerous nature of home detention and the self-discipline involved, offenders themselves may not wish to undertake this form of sentencing.⁵⁸⁸ During the Inquiry into back-end home detention, the Committee received a submission and heard evidence from Mr Andrew Jaffrey, who was serving his sentence by way of home detention at the time. Mr Jaffrey told the Committee that, if he had the same choice to make again, he may not have elected to participate in home detention:

It is harder than being in gaol in many respects. If I were a single person with no family I think I would have preferred to stay where I was, which was up in Cessnock. ... it is very awkward and embarrassing to have to identify yourself as a person who essentially is a prisoner.⁵⁸⁹

7.10 Mr David Daley, the Director of Community Correctional Services with Corrections Victoria, and who previously established the home detention scheme in Western Australia, discussed the number of inmates in Western Australia who declined to apply for home detention on the basis that the regime would be 'too demanding':

In Western Australia in 2001, the last year I was there, the evidence was that about 40 per cent to 45 per cent of eligible prisoners declined to apply for home detention because they thought the regime would be too demanding. ... partly it was about it being easier here because it is the question of jump, how high, how often and when can I stop versus being at home when it is either, "I have to take responsibility for myself. I have to start to take responsibility for my family relationships" or "I am fearful that I will not be able to meet the curfew demands."⁵⁹⁰

⁵⁸⁶ Mr Sandland, Evidence (Inquiry into BEHD), 17 March 2005, p38

⁵⁸⁷ Answers to questions on notice taken during evidence 30 August, Ms McComish, Question 7, p11

⁵⁸⁸ The offender must sign an undertaking to comply with the offender's obligations under the order: *Crimes (Sentencing Procedure) Act 1999* (NSW), s 78(1)(d).

⁵⁸⁹ Mr Andrew Jaffrey, Evidence (Inquiry into BEHD), 17 March 2005, p5

⁵⁹⁰ Mr David Daley, Director, Community Correctional Services, Corrections Victoria, Evidence, (Inquiry into BEHD), 18 March 2005, p28

Eligibility and suitability criteria

Eligibility

- 7.11** To be eligible for home detention the court must have first imposed a full-time custodial sentence on the offender.⁵⁹¹ Home detention is *not* available as an alternative for offenders who would otherwise receive a non-custodial sentence or periodic detention. In addition, home detention is only available for sentences of less than 18 months.⁵⁹²
- 7.12** Eligibility is also determined by the offence for which the offender has been convicted. A home detention order cannot be made in respect of a sentence of imprisonment for certain offences, including murder, attempted murder, manslaughter, sexual assault, stalking, armed robbery, assault occasioning actual bodily harm, and domestic violence offences against any person with whom it is likely the offender would reside, continue or resume a relationship.⁵⁹³
- 7.13** BOCSAR statistics for 2004 show the types of offences for which home detention was ordered. In the Local Court home detention orders were made on 288 occasions: 128 (44.4%) orders for ‘road traffic and motor vehicle regulatory offences’; 43 (14.9%) for ‘theft and related offences’; 43 (14.9%) for ‘offences against justice procedures, government security and government operations’ and 36 (12.5%) for ‘deception and related offences’.⁵⁹⁴ Consistent with the statutory criteria, home detention is an option for offences in the middle to lower range of seriousness.
- 7.14** In addition, an offender is not eligible if she or he has a *history of convictions* for offences similar to those above.⁵⁹⁵ Also ineligible are offenders who have been subject, within the past five years, to an apprehended violence order that was made for the protection of a person with whom it is likely the offender would reside, continue or resume a relationship, if a home detention order were made.⁵⁹⁶
- 7.15** Offenders who the court considers likely to commit a sexual offence, or any offence involving violence, while on home detention are also ineligible. This is regardless of whether or not the offender has a history of committing that type of offence.⁵⁹⁷
- 7.16** Ms McComish, the Senior Assistant Commissioner, Community Offender Services, with the Department of Corrective Services, noted that the excluded offences ensure that high risk offenders are kept out of the Scheme:

In any offence involving violence, aggravated violence, use of a weapon including armed robbery, sexual offences and capital offences such as murder, those people are

⁵⁹¹ The *Crimes (Sentencing Procedure) Act 1999* (NSW), Part 2, Division 2 describes home detention as an ‘alternative to full-time detention’.

⁵⁹² *Crimes (Sentencing Procedure) Act 1999* (NSW), s 7

⁵⁹³ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 76

⁵⁹⁴ NSW Bureau of Crime Statistics and Research, *NSW Local Court: Penalty for Principal Offence 2004*

⁵⁹⁵ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 77

⁵⁹⁶ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 77(e)

⁵⁹⁷ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 78(6)

prohibited. If there is a domestic violence offence or an apprehended violence order that involves a person who may be part of the accommodation support for the offender and any serious drug offence. That population, by and large, is what we consider to be at highest risk and they are the ones to whom we would most want to provide intensive support, supervision and programs in their transition back to the community.⁵⁹⁸

7.17 The Committee received submissions arguing that the exclusion of certain offences and past convictions prevented some disadvantaged offenders, particularly Aboriginal offenders, from accessing home detention. This issue is examined later in this Chapter.

Suitability

7.18 As well as the eligibility criteria discussed above, the court must be satisfied that other criteria are met that relate to the *suitability* of the offender for home detention.⁵⁹⁹ In this regard the court must be satisfied that the offender is a suitable person to serve his or her sentence on home detention, it is ‘appropriate in all the circumstances’ that the sentence be served on home detention, the persons with whom the offender is likely to live during home detention, or continue or resume a relationship with, has consented to the order, and the offender has signed an undertaking to comply with the obligations of the order.⁶⁰⁰

7.19 To assist the court to determine whether an offender is suitable for home detention, the court can refer the offender for assessment by the Probation and Parole Service (PPS). A home detention order can only be made if the offender is assessed by the PPS to be a ‘suitable person’.⁶⁰¹ The decision to refer an offender for assessment is at the court’s discretion and occurs after a sentence of imprisonment has been imposed.⁶⁰² The assessment process ‘... usually takes 6 weeks, during which time the adult offender may be on bail for that assessment to take place in the community (which is the preferred option for Probation and Parole officers) or in custody.’⁶⁰³

7.20 When preparing a report on an offender’s suitability, the PPS must take into account and address the following criteria:

- criminal record and the likelihood of re-offending
- drug dependency
- likelihood the offender will commit a serious domestic violence offence

⁵⁹⁸ Ms McComish, Evidence (Inquiry into BEHD), 17 March 2005, p8

⁵⁹⁹ *Crimes (Sentencing Procedure) Act 1999* (NSW), Part 6, Division 2

⁶⁰⁰ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 78(1)

⁶⁰¹ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 78(1). Unlike a periodic detention order, an order for home detention cannot be made if the assessment report recommends unsuitability. However, a court can decline to make such an order ‘despite the contents of an assessment report’: s 78(4).

⁶⁰² *Crimes (Sentencing Procedure) Act 1999* (NSW), s 80(1). Referral for assessment will stay execution of the sentence until a determination has been made.

⁶⁰³ Submission 5, p2

- whether employment, residence, study or other activities would inhibit effective monitoring of the order
- whether the persons likely to be living with the offender while the order is in effect understand its requirements
- whether any person living with or near the offender would be placed at risk of harm.⁶⁰⁴
- the likely effect of a home detention order on a child who would be living with the offender.⁶⁰⁵

7.21 The suitability of an offender's residence is an important aspect of this assessment and several Inquiry participants identified this requirement as presenting a considerable barrier for many offenders to access home detention. This issue is examined later in this Chapter.

Supervision

7.22 Home detention falls under the Department of Corrective Services' Intensive Supervision Program.⁶⁰⁶ 'Intensive supervision' refers to the way of delivering intensive case management, monitoring, services and programs.

Conditions

7.23 All home detention orders are subject to 22 standard conditions. The conditions include that the detainee must be of good behaviour, reside only at approved premises and remain at the premises unless engaged in approved activities or faced with immediate danger, accept visits by his or her supervisor, submit to searches and electronic monitoring, not consume alcohol or drugs and engage in personal development or treatment activities as directed.⁶⁰⁷

7.24 Home detention orders may also be subject to additional conditions imposed by the court or by the Parole Authority.⁶⁰⁸ Mr Jaffrey described the additional conditions attached to his order:

I am under all of the standard conditions of the order. I am also under a condition that restricts alcohol being in our house, which means that people coming to the house cannot consume alcohol while they are in the house. My wife cannot drink alcohol whilst she is at home.⁶⁰⁹

⁶⁰⁴ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 81

⁶⁰⁵ *Crimes (Sentencing Procedure) Regulation 2005*, cl 20. A joint investigation is to be carried out for this purpose by officers from the Probation and Parole Service and the Department of Community Services.

⁶⁰⁶ The only other orders under the Intensive Supervision Program are Drug Court orders.

⁶⁰⁷ *Crimes (Administration of Sentences) Regulation 2001*, cl 200

⁶⁰⁸ The Parole Authority is empowered to impose, at any time, additional conditions on an order or vary or revoke any additional conditions imposed by it: *Crimes (Administration of Sentencing) Act 1999* (NSW), s 103.

⁶⁰⁹ Mr Jaffrey, Evidence (Inquiry into BEHD), p2

7.25 Mr Jaffrey also provided the Committee with an insight into the level of drug and alcohol testing that can occur, noting that in the six months between September 2004 and March 2005, he had been breath tested about 65 or 70 times and had six or seven urinalysis tests.⁶¹⁰

7.26 With regard to programs, the Department of Corrective Services advised the Committee that: '[h]ome detention provides an opportunity, through intensive supervision and controlled work and leisure options, to require attendance at evidence-based group-work programs targeted to reduce re-offending.'⁶¹¹

Monitoring

7.27 Home detainees are monitored through face-to-face visits from PPS staff and through electronic means. Detainees are fitted with an electronic bracelet, which enables the PPS to electronically monitor their presence in the home via a telephone system.

7.28 The level of monitoring and supervision is generally divided into four, roughly equal, stages of decreasing intensity. Progress through the stages is subject to performance. Ms Joanne Jousif outlined a detainee's progression through the lessening levels of supervision:

In stage 1, the minimum contact is at a rate of 20 per month, based on an expected average of 5 per week. Of those 20 contacts, 10 are face to face, and the remaining 10 may be by telephone or with employers, family or significant social contacts, therapists or counsellors. Of the face-to-face contacts, at least 8 are at home, 2 are on a weekend and 2 are between the hours of 7.00pm and 7.00am. In stage 2, minimum contacts remain at 20, but face-to-face contacts are reduced to 8. The remaining 12 contacts may be made up as in stage 1, and the same specification applies to numbers of home weekend visits and overnight visits. In stage 3, contacts are reduced to 16 per month, with a minimum of 6 face-to-face, and the remainder are as in previous stages. Of the face-to-face contacts, at least 4 are at home, 1 of a weekend and 1 between 7.00 p.m. and 7.00 a.m. In stage 4, contacts are further reduced to 12 per month, with 4 of those face-to-face, and the remainder are as previously prescribed. ...⁶¹²

7.29 Ms Jousif also explained to the Committee how the electronic monitoring system works:

With electronic monitoring, every time the person leaves the house or the accommodation a call is made to the computer of the officer supervising the detainee to say that the person has left the house, and when they return the same thing happens again. They are wearing a transmitter, and a receiver unit is attached to the phone, so whenever that transmitter leaves the parameters of that receiver unit a signal is sent to the computer, which sends it on to the officer.⁶¹³

The officers are available on a 24-hour basis through a paging service to respond to electronic monitoring alarms or offender-in-crisis situations. The immediate mode of response is usually by phone, but if the matter cannot be resolved electronically within

⁶¹⁰ Mr Jaffrey, Evidence (Inquiry into BEHD), p4

⁶¹¹ Submission 30, p4

⁶¹² Ms Joanne Jousif, Acting Director - Intensive Supervision Programs, Community Offender Services, Department of Corrective Services, Evidence (Inquiry into BEHD), 17 March 2005, pp6-7

⁶¹³ Ms Jousif, Evidence (Inquiry into BEHD), 17 March 2005, p11

a reasonable time, a contact home visit is made. When an offender is released to home detention, electronic monitoring equipment is usually installed on the day of release. Minimum contact levels are set for each stage of the program, but higher levels of contact may be imposed at the initial point, depending on the appropriateness for guiding that particular person.⁶¹⁴

- 7.30** Ms Jousif informed the Committee that the Department carries most of the cost of the electronic monitoring equipment, ‘usually \$5,000 to \$6,000 per detainee’.⁶¹⁵ The cost of electronic monitoring to the detainee is approximately \$1 per day. This cost is incurred when the transmitter makes the call to the central computer.

Compliance

- 7.31** The Department of Corrective Services’ 2004-2005 Annual Report states that 79% of home detention orders (601) were successfully completed in that year.⁶¹⁶ Ms Jousif discussed the nature of breaches during her evidence before the Committee:

... in the 18-month period between 1 January 2001 and 30 June 2002, of the 580 offenders granted a home detention order, 472, which is approximately 81 per cent, completed their home detention order, and 108, or 19 per cent, were revoked. Of the 108 revoked, 7 were revoked due to fresh offences committed during the order. Two hundred and sixty five, or 45.8 per cent, home detainees breached at least one of the home detention conditions during the completion of the order. The most commonly breached condition during the study period was positive urinalysis. Curfew breaches were also common, with 116 home detainees breaching curfew during the completion of the order. The relatively high number of breaches is indicative of the intensity of intervention and supervision by the intensive supervision officers. Of the 265 home detainees issued with official sanctions, which include formal warnings from the officer or the Parole Board, an increase in the intensity of supervision, or an instruction to address drug and alcohol issues through programs, or removal of privileges, et cetera, 109 went on to have the home detention order officially revoked by the Parole Board.⁶¹⁷

- 7.32** Ms Jousif clarified that a ‘breach’ is defined as a breach of a condition of the order, but that this does not necessarily mean the order is revoked if it is only a minor transgression.⁶¹⁸ Mr Jaffrey discussed the meaning of a ‘breach’ in the context of his own home detention order and his appearance before the Committee:

A breach, as it is defined, is a very wide-ranging aspect. For example, today I have to be home by 4.30pm. If my taxi breaks down on the way home, I have no control over that. However, if I am home at 4.31pm, I have breached and that breach is recorded. Whether or not my supervisor decides to take that breach to a further step is up to her and to the intensive supervision team. ... If I am to be home by 4.30pm my

⁶¹⁴ Ms Jousif, Evidence (Inquiry into BEHD), 17 March 2005, p7

⁶¹⁵ Ms Jousif, Evidence (Inquiry into BEHD), 17 March 2005, p11

⁶¹⁶ Department of Corrective Services, *Annual Report 2004/2005*, p33

⁶¹⁷ Ms Jousif, Evidence, (Inquiry into BEHD), 17 March 2005, p6

⁶¹⁸ Ms Jousif, Evidence, (Inquiry into BEHD), 17 March 2005, p12

supervising officer will receive a page on her mobile phone when I enter the house to say that I have returned. If it is after 4.30pm, that is a breach.⁶¹⁹

Advantages and disadvantages of home detention

7.33 In considering the advantages and disadvantages of home detention the Committee has focused on this form of community based custodial sentence compared to full-time imprisonment, which is the sentence that an offender eligible for home detention would otherwise receive.

Advantages

7.34 Submissions to both the Inquiry into community based sentencing and the Inquiry into back-end home detention highlighted several advantages or positive aspects of home detention relating to the offender, the offender's family and the community at large. In summary, those advantages are: reducing the prison population, cost effectiveness compared to imprisonment, improved offender rehabilitation, the offender avoids deleterious effect of prison, reduced recidivism and a positive impact on offender's family.

Reducing prison population

7.35 Many Inquiry participants noted that home detention reduces the prison population (the prison population is examined in Chapter 2). For example, Mr Nicholas Cowdery, the NSW Director of Public Prosecutions (DPP), stated that one of the perceived benefits of home detention is the 'potential reduction in the prison population which would reduce prison overcrowding and reduce associated costs in administering service prisons and prisoners'.⁶²⁰ Mr Cowdery also noted that this could lead to better conditions for the remaining prison population.⁶²¹ The Attorney General's Department also highlighted the benefit of home detention in reducing the prison population and relieving pressure on overcrowded prisons.⁶²²

7.36 The Committee notes, however, that one Inquiry participant, Mr Strutt of Justice Action, was sceptical of the role of home detention in reducing prison numbers:

I would suggest that by moving people out of prison into home detention you are not reducing prison numbers. What you are doing is freeing up a bed so that somebody else who may not have been remanded in custody or who may not have got a full-time sentence will end up with a full-time sentence.⁶²³

7.37 The Committee notes that, given that an offender must first be sentenced to a term of imprisonment before a home detention order can be considered, this form of community based sentence directly contributes to lowering the prison population.

⁶¹⁹ Mr Jaffrey, Evidence (Inquiry into BEHD), 17 March 2005, pp2-3

⁶²⁰ Submission 6, NSW Director of Public Prosecutions (Inquiry into BEHD), p1

⁶²¹ Submission 6 (Inquiry into BEHD), p1

⁶²² Submission 12, NSW Attorney General's Department (Inquiry into BEHD), p1

⁶²³ Mr Michael Strutt, Justice Action, Evidence (Inquiry into BEHD), 18 March 2005, p3

Cost effectiveness

- 7.38** The cost effectiveness of home detention in relation to full-time imprisonment was also identified as a benefit. The Committee notes that the cost of home detention is significantly lower than minimum security, which is the custodial option that most home detainees would receive instead of home detention. The Department of Corrective Services provided the Committee with figures for the cost of home detention compared to minimum security prison:

In 2002-2003 the cost of keeping an inmate in maximum security accommodation was \$218.71 per day; the cost of keeping an inmate in medium security accommodation was \$169.35 per day; and the cost of keeping an inmate in minimum security accommodation was \$172.77 per day. On 30 June 2004 the cost of supervising an offender on home detention was \$61.83 per day.⁶²⁴

- 7.39** A home detainee has the ability to obtain employment and, as noted by the Attorney General's Department, 'prisoners who can obtain employment may do so and their families will not require financial support from the Government.'⁶²⁵

Rehabilitation

- 7.40** Home detention is said to afford offenders better prospects of rehabilitation than full time imprisonment. Reasons for this include that home detention allows offenders to maintain or resume employment, maintain contact with their families and that it lessens the negative effects of imprisonment in a custodial setting. For example, Mr Sandland of Legal Aid noted that home detention has the advantage that offenders can 'maintain links with ... family and hopefully maintain links with the community and employment.'⁶²⁶
- 7.41** The Committee was also advised that offenders on home detention are required to undertake programs that are not required of, or available to, offenders in gaol. In this regard, Mr Jaffrey stated:

You are required on home detention to undertake certain courses, counselling and so forth. That is not something you are required to do in prison. In fact, to be quite honest, it is something that even if you wanted to do most people have trouble getting access to in the first place in prison.⁶²⁷

Avoiding deleterious effect of prison

- 7.42** Several inquiry participants noted that home detention enables an offender to avoid the negative experience of prison. This benefit is common to all community based sentences but is particularly relevant to home detention (and periodic detention) because it is only available in relation to sentences of full-time imprisonment.

⁶²⁴ Submission 14, NSW Department of Corrective Services (Inquiry into BEHD), p6

⁶²⁵ Submission 12 (Inquiry into BEHD), p1

⁶²⁶ Mr Sandland, Evidence (Inquiry into BEHD), 17 March 2005, p38

⁶²⁷ Mr Jaffrey, Evidence (Inquiry into BEHD), 17 March 2005, p7

7.43 For example, the Public Defenders Office advised that the benefits of home detention include ‘limiting the well known deleterious effects of prison.’⁶²⁸ The Attorney General’s Department also noted that home detention ‘eliminates many of the psychological effects of incarceration.’⁶²⁹

7.44 In addition, Sister Myree Harris, the President of the St Vincent de Paul Advisory Committee for the Care of People with Mental Illness, expressed support for home detention for prisoners with intellectual disabilities and mental illness, on the basis that such people are extremely vulnerable and more susceptible to abuse in gaol:

I would believe that people with both intellectual disability and mental illness would be extremely vulnerable within the prison population. Contrary to a lot of popular stereotypes, people with mental illness and people with intellectual disability are often very shy, timid and withdrawn, and in the case of serious mental illness inwardly focused, and are not good at defending themselves at all. They could well be the butt of torment and bullying. They are perfect candidates, in fact. I think the possibility of abuse would be extremely high, yes.⁶³⁰

7.45 Mr Jim Simpson, the Director of the NSW Council for Intellectual Disability, also noted the negative effects of prison for inmates with an intellectual disability:

The disturbing irony of the lack of those options to gaol is, as the Sentencing Council has recently affirmed, that prison has particular negative effects on people with intellectual disabilities, people being particularly impressionable to negative role models in prison, people being vulnerable to physical and sexual abuse, people finding it very hard to readjust, having been in a highly structured environment in prison and then all of a sudden being in an environment with very little structure at all. I know that readjustment can be difficult for all prisoners, but for people with intellectual disabilities it is particularly difficult because an intellectual disability inherently involves a difficulty with adjustment to different life circumstances. So, people with intellectual disabilities are likely to emerge from prison more likely to re-offend than other prisoners.⁶³¹

Reduced recidivism

7.46 A further benefit of home detention identified by inquiry participants is that it has a positive impact on recidivism rates. Closely linked to rehabilitation (discussed at paragraph 7.40-7.41), recidivism refers to repetition of criminal behaviour and is usually measured by a person’s return to prison within two years of release. The Department of Corrective Services provided the Committee with statistics on recidivism rates for offenders who have successfully completed a home detention order, as set out below.

⁶²⁸ Submission 13, (Inquiry into BEHD), p3

⁶²⁹ Submission 12 (Inquiry into BEHD), p1

⁶³⁰ Sister Myree Harris, President, St Vincent de Paul Advisory Committee for the Care of People with Mental Illness, Evidence (Inquiry into BEHD), 17 March 2005, p33

⁶³¹ Mr Jim Simpson, Director, NSW Council for Intellectual Disability, Evidence (Inquiry into BEHD), 17 March 2005, p18

Table 7.2 Return to full time custody within 2 years of discharge from home detention⁶³²

Discharge year	Discharges	Recidivists	Percent
2000	327	40	12.2%
2001	333	40	12.0%
2002	325	41	12.6%
Total	985	121	12.3%

7.47 The Committee notes that the recidivism rate for those discharged from home detention is approximately 12%. The success of home detention in reducing recidivism is put into context when the overall rate of re-offending of all prisoners is over 50%, as explained by Ms McComish:

... something over 50 per cent of prisoners return to custody within two years of release. For those that have had supervision in the community, including home detention orders and community-based orders, the return rate is something more like 26 per cent. So it is a significantly improved rate.⁶³³

Positive impact on offender's family

7.48 A number of submissions to the Inquiry noted the potential benefit of home detention for an offender's family and other household members. For example, the Public Defenders Office advised that the benefits of home detention include support for family, work and access to children.⁶³⁴ The Committee also notes that where an offender is the only income earner in a family, home detention can be particularly beneficial in reducing financial hardship for the offender's family.⁶³⁵

7.49 Mr Daley noted a report by Gibbs and King, which concluded that home detention '... was particularly favourable with families, because it promoted family cohesion and meant fewer visits to prison'.⁶³⁶ Mr Daley also advised in his submission that:

A study by Dodgson and others in the United Kingdom in 2001 also reported positive net benefits for families from home detention. The majority of respondents indicated that home detention made little difference to their relationship with the offender, but 25% stated that the relationship improved and only 4% said it deteriorated. Adverse impacts on time available for recreational activities were reported by some respondents, but overall, the report concluded that the home detention program in the UK had a neutral to slightly positive effect on relationships.⁶³⁷

⁶³² Answers to questions on notice taken during evidence 17 March 2005, NSW Department of Corrective Services (Inquiry into BEHD)

⁶³³ McComish, Evidence (Inquiry into BEHD), 17 March 2005, p3

⁶³⁴ Submission 13 (Inquiry into BEHD), p3

⁶³⁵ Submission 5 (Inquiry into BEHD), p2

⁶³⁶ Submission 15, Corrections Victoria (Inquiry into BEHD), p4

⁶³⁷ Submission 15 (Inquiry into BEHD), p4

- 7.50** The submission from the Bankstown City Council pointed out that home detention may be particularly beneficial for offenders who are also care givers:

Where there are care-giving issues involved – such as with single parent offenders, or those responsible for the care of aged or disabled family members, home detention can be the best sentencing model as far as minimising hardship for the offenders' family.⁶³⁸

Disadvantages

- 7.51** Submissions to both the Inquiry into community based sentencing and the Inquiry into back-end home detention highlighted several disadvantages, or negative aspects, of home detention. In summary, those disadvantages are: the community perception that home detention is a lenient or 'soft' option, the danger to the community through opportunity to re-offend and negative impacts on offender's family.

Community perception of leniency

- 7.52** A disadvantage of home detention identified in submissions and in evidence is that it is more lenient than full time imprisonment and is therefore perceived to be a 'soft' option. While this disadvantage was also identified in relation to other forms of community based sentencing, it was particularly highlighted in relation to home detention because home detention can only be ordered once a full-time custodial sentence is handed down. This perception was noted in the submission from the Department of Public Prosecutions:

Public perception, including victim perception, that the offender is being dealt with too leniently and is not being punished according to the terms of the sentence imposed by the court.⁶³⁹

- 7.53** The Committee notes that, generally speaking, home detention would seem to be preferable to and less onerous than, full-time imprisonment. The courts have specifically stated that home detention is less onerous than full-time detention. In this regard, Judge Price advised that:

In a decision of *Regina v Jurisic (1998) 45 NSWLR 209*, the Court of Criminal Appeal held that home detention should not be equated with full-time incarceration. It was held by the Court of Criminal Appeal to be substantially less onerous than one of full-time custody.⁶⁴⁰

- 7.54** However, the Committee was presented with much evidence that home detention is in itself a very restrictive and difficult form of imprisonment and is considered substantially more punitive and intrusive than any other penalty short of full-time custody. The Committee was advised that home detention requires a high level of self-control. Detainees are required to remain within their residence, unless undertaking approved activities such as work, education, community service, and drug and alcohol treatment programs. Detainees are also required to submit to urine and breath analysis.

⁶³⁸ Submission 4, p3

⁶³⁹ Submission 6 (Inquiry into BEHD), p1

⁶⁴⁰ Judge Price, Evidence, 6 June 2005, p31

7.55 Probation and Parole Officers monitor detainees' compliance with conditions on a 24-hour basis, utilising electronic means and regular face-to-face visits (as discussed in paragraphs 7.27-7.30). Detainees' families can also be placed under stress from the conditions imposed on the detainee. Breaches of conditions result in further penalties, including return to Court. Further offences or unauthorised absences result in imprisonment.

7.56 Mr Brown, the Deputy President of the Victims of Crime Assistance League advised the Committee that a lack of understanding about the onerous nature of home detention means that some people see it as a soft option:

With home detention orders, obviously under some circumstances they are permitted to go to work but within certain hours they must remain within the confines of their own home. That can be particularly frustrating for them and quite onerous because a breach of that will find them back before the court. People do not understand the concept of loss of freedom. The average person does not understand that, and regrettably the media especially have no real concept of that idea; they do not see the onerous nature of completing a home-based order.⁶⁴¹

7.57 The Committee was also advised that the degree of self-discipline required of home detention adds to its difficulty. For example, the Department of Corrective Services stated in its submission that home detention (and periodic detention) is not a soft option and that 'they are both forms of imprisonment that demand a high level of self-discipline from offenders for the entire length of their sentence.'⁶⁴² Mr Sandland of Legal Aid also noted the self-disciplinary aspect of home detention:

It may be treated with some degree of suspicion as a softer option by the judiciary. Yet everything you read about it is that there is a degree of self-discipline involved in being your own gaoler in your own home that makes its onerous in itself, significantly onerous, with the advantage that you are able to maintain links with your family and hopefully maintain links with the community and employment.⁶⁴³

7.58 Mr Daley stated in his submission that public perceptions of home detention as a soft option are not matched by the attitudes or reported experience of offenders:

Verbal feedback from prison officers and home detention staff in WA often commented on prisoners' perceptions that home detention was much more demanding and intrusive than the routine in a minimum security prison. Anecdotal evidence frequently came to light that eligible prisoners who were not confident of their capacity for compliance would choose to stay in prison in order to be free of home detention's strict obligations and the attendant consequences of failure. This creates a dilemma: while the tough reputation of home detention with many offenders could assuage public perceptions to the contrary, that message appears either to have not reached its critics, or not to have been accepted.⁶⁴⁴

⁶⁴¹ Mr Brown, Evidence, 1 September 2005, p4

⁶⁴² Submission 30, p5

⁶⁴³ Mr Sandland, Evidence (Inquiry into BEHD), 17 March 2005, p38

⁶⁴⁴ Submission 15 (Inquiry into BEHD), p3

Danger to community

- 7.59** A further disadvantage of home detention compared to full-time imprisonment, which was identified by several inquiry participants, is that a home detainee could more easily re-offend, thereby posing a danger to the community.⁶⁴⁵ For example, the Attorney General's Department noted that one disadvantage is that '[t]he lack of physical restraint on an offender leaves open the possibility of re-offending before authorities can intervene.'⁶⁴⁶
- 7.60** The Committee notes that, as discussed earlier in this chapter, while an offender is not kept behind bars, electronic monitoring does serve in some way to confine a detainee to his or her home. One submission maker suggested, however, that the electronic devices used to monitor detainees could be 'tampered with'.⁶⁴⁷
- 7.61** Mr Jaffrey acknowledged in his submission that there is the possibility that a home detainee *can* commit offences without coming to the immediate attention of supervisors but that the level of monitoring would make such behaviour risky.⁶⁴⁸
- 7.62** The Committee notes that, while there is greater opportunity for re-offending while on detention than if the offender was in full-time custody, the lower recidivism rates discussed above indicate that home detainees may pose less of a danger to the community than some people fear.

Negative impact on offender's family

- 7.63** Negative as well as positive impacts of home detention on an offender's family were identified during the inquiry. For example, Mrs Wagstaff noted that families of offenders would have the responsibility of containing the offender.⁶⁴⁹ Mr Daley stated that Gibbs and King acknowledged that in many ways sponsors were serving the sentence alongside the detainees and it placed extra responsibilities on them. They also acknowledged the existence of stress and tensions brought on by home detention, and some resentment at the surveillance and supervision expectations, but concluded that the first 18 months of the program could be viewed as a relative success.⁶⁵⁰
- 7.64** Mr Jaffrey provided further information in relation to the impact on the family in his evidence to the Committee:

It has impacts on my family because my little girl often asks me to take her to the park, to the beach or to the swimming pool. I cannot do that. Sometimes my wife feels like a glass of wine but she cannot do that. So there are implications on the

⁶⁴⁵ For example, Submission 12, p1 and Submission 6 (Inquiry into BEHD), p1

⁶⁴⁶ Submission 12 (Inquiry into BEHD), p1

⁶⁴⁷ Submission 2, Mrs Patricia Wagstaff (Inquiry into BEHD), p1

⁶⁴⁸ Submission 18 (Inquiry into BEHD), p7

⁶⁴⁹ Submission 2 (Inquiry into BEHD), p1

⁶⁵⁰ Submission 15 (Inquiry into BEHD), p4

family, but I think as I mentioned in my submission, in contrast to having me not at home and having to come and visit me on the weekends, it is fairly insignificant.⁶⁵¹

7.65 In addition to stresses placed on the family, the potential for domestic violence was also raised as a concern. For example, the DPP noted that a perceived disadvantage of (back-end) home detention is that it may give rise to domestic conflict and other problems in the home if there are no constructive activities for the home detainees in the home.⁶⁵²

7.66 The Committee notes, however, that with regard to domestic violence, the Department of Corrective Services advised that its 1999 Review found that home detention *did not* increase domestic violence:

Following interviews with home detainees and their families, the *Review of the NSW Home Detention Scheme* (Heggie 1999) found that the scheme's "success or failure depends on its ability to remain flexible enough to impose court ordered penalties without imposing undue strain on the families and friends of offenders living with home detention" (p85). It also found that "home detention neither increases nor aggravates the incidences of domestic violence within families living under the imposition of a home detention order" (px) but noted that the suitability assessment for the program requires an assessment of the potential for domestic violence.⁶⁵³

7.67 The Committee notes that as well as the suitability assessment mentioned by the Department, home detention is not available for an offender who has been convicted of domestic violence offences against any person with whom it is likely the offender would reside, continue or resume a relationship, if a home detention order was made.

7.68 Another negative impact on families was noted by the DPP submission which stated that there may be increased financial costs for the families of offenders if the offender is not in paid work.⁶⁵⁴ Mr Daley noted the cost to families in terms of household expenses such as food and electricity would be offset by unemployment benefits if a detainee could not work:

One of the issues that comes up is that an offender is in the house and he is consuming food, power, water and electricity. He just sits there and that is a burden on others. That can be true. I rechecked yesterday with the manager of the home detention unit. She confirmed to me that home detainees in Victoria are receiving unemployment benefits when they are not working. ... In Victoria what we are getting mostly is white collar offenders anyway—driving frauds and gambling-related events. Many of those people are well educated and employed.⁶⁵⁵

7.69 The Committee also heard concern that there may be a 'cost transfer' from the Department of Corrective Services to the offender.⁶⁵⁶ The Committee was advised, however, by Ms Jousif

⁶⁵¹ Mr Jaffrey, Evidence (Inquiry into BEHD), 17 March 2005, p4

⁶⁵² Submission 6 (Inquiry into BEHD), p1

⁶⁵³ Submission 30, p5

⁶⁵⁴ Submission 6 (Inquiry into BEHD), p1

⁶⁵⁵ Mr Daley, Evidence (Inquiry into BEHD), 18 March 2005, p25

⁶⁵⁶ Submission 11, NSW Legal Aid (Inquiry into BEHD), p2

that 'there are not any real costs incurred by the family other than the cost of the electronic monitoring, which on average costs about \$1 a day.'⁶⁵⁷

7.70 A final broad impact of home detention on family members was identified by Justice Action which advised the Committee that (back-end) home detention is a type of 'invasion' by the State:

We are putting it to you clearly that this is a stand that breaches the entitlement of the community to have homes that are free from invasion by the State. That is sacrosanct and it should not be invaded. That sort of invasion is at the cost of families who should be there in support. When you invade that family you are invading the basis of our community.⁶⁵⁸

7.71 The Committee notes that the impact of home detention on a detainee's family is taken into consideration at the assessment stage. In this regard, Mr Jaffrey advised:

The stresses on the family of the offender are also taken into account at the assessment stage and it would appear based on my experience that supervisors are mindful of that impact and aware of the potential for personal relationships between the detainee and their family to sour. I have not seen any evidence in the submissions made to indicate a rise in domestic violence of home detainees and I can only infer that the risk of this occurring is no greater than in the many relationships that exist across the State every day.⁶⁵⁹

Availability of home detention in rural and remote areas

7.72 Statutorily, home detention, like all other community based sentences, is available to all eligible offenders regardless of geographical location. The Committee found that practically, however, its availability is severely limited in rural and remote areas mainly due to a lack of Department of Corrective Service resources to administer home detainees and difficulties created by the isolation of some areas of the State.

Availability

7.73 The Department of Corrective Services advised that home detention is currently only available to offenders in the Sydney, Central Coast, Hunter and Illawarra areas.⁶⁶⁰ After the initial home detention pilot was concluded in 1992 (see paragraph 7.3), the Scheme was only introduced into the areas that it currently operates in.

7.74 The Committee notes therefore that home detention is only available in four major residential centres on the East Coast of the State. Thus it covers only a small portion of the State, albeit some of the most populated areas. The Committee notes that home detention was not available in any of the rural and remote areas that it visited during the Inquiry.

⁶⁵⁷ Ms Jousif, Evidence (Inquiry into BEHD), 17 March 2005, p11

⁶⁵⁸ Mr Collins, Evidence (Inquiry into BEHD), 17 March 2005, p4

⁶⁵⁹ Submission 18 (Inquiry into BEHD), p6

⁶⁶⁰ Submission 30, p6

Impact of limited availability

- 7.75** The main impact of the lack of home detention as a sentencing option in large parts of NSW is that offenders in those areas, who may otherwise be eligible for home detention, are required to serve their term of imprisonment in gaol (unless periodic detention is available and the offender eligible). As discussed in paragraph 7.11, home detention is only available as an *alternative* to full-time imprisonment.
- 7.76** Several Inquiry participants noted that this severely disadvantages offenders from rural and remote areas in comparison to their metropolitan counterparts. As examined in Chapter 3, offenders sentenced in country locations are more likely to receive a custodial sentence compared with offenders sentenced in metropolitan areas. Statistics cited by the Department of Corrective Services indicate that the rate of country home detention is one-tenth the rate of metropolitan home detention.⁶⁶¹
- 7.77** The Committee was also advised that the flow on effects of country offenders serving their sentence in full-time custody are felt by their families. As the Department noted, many country offenders are imprisoned far from their homes and families:

Where intensive supervision is not available, offenders in rural and remote areas may be subjected to imprisonment at a distance from their home. Their experience in custody is likely to be made more difficult by issues related to distance from family members and resultant relative infrequency of visits. This remoteness could be exacerbated for those offenders who are functionally illiterate, for whom the option of maintaining family contact via letters is unlikely to achieve success.⁶⁶²

- 7.78** The Department also referred to the consequences for offenders in terms of rehabilitation:

Additionally, the prospects of a successful transition back into the community from prison is much more difficult when the offender has been located far from community-based resources and programs.⁶⁶³

- 7.79** The Committee notes that the inequitable distribution of home detention impacts significantly on Aboriginal communities in rural and remote areas, as Aboriginal people make up a large proportion of offenders in these parts of the State. Aboriginal offenders and home detention are examined in a separate section below.

Support for extending home detention

- 7.80** Several Inquiry participants expressed dissatisfaction that home detention is not yet available in other parts of the NSW. For example, the Law Society stated that it was ‘... very disappointed that, after more than six years, home detention is not yet available to all eligible offenders no matter where they reside.’⁶⁶⁴

⁶⁶¹ Submission 30, p14

⁶⁶² Submission 30, p6

⁶⁶³ Submission 30, p6

⁶⁶⁴ Submission 3 (Inquiry into BEHD), pp1-2

7.81 Other Inquiry participants expressed frustration and concern that while the prison population has increased the number of offenders on home detention has not. Mr Tumeth, the Principal Solicitor with the NSW Law Society's Criminal Law Committee cited Department of Corrective Services statistics in this regard:

The number of persons serving custodial sentences is continuing to increase. In about May this year the average population was 9,093. The number of persons as at May of this year serving sentences by way of home detention was only 236. ... What we are seeing is an increasing number of people being sentenced to full-time custody but we are not seeing an increase in the number of persons being sentenced to home detention. That is a worrying statistic in itself.⁶⁶⁵

7.82 General support was expressed for expanding home detention to other parts of NSW. For example, Mr Cowdery AM QC, NSW Director of Public Prosecutions, stated that the extension of home detention to areas in which it is currently not available was 'desirable' and noted the problem it presents for Aboriginal offenders:

The extension of front-end home detention to those regional and rural areas outside Sydney in which is currently not available is obviously desirable, so that offenders throughout New South Wales have access to the same sentencing options as are available to those in the main centres. As indigenous offenders are more likely to be located in these areas, the lack of availability of the scheme particularly disadvantages this problem segment of the offender population.⁶⁶⁶

7.83 Mr Collins, a duty solicitor working in the Inverell Local Court also expressed support for trialling a modified form of home detention in rural areas:

Home detention, I believe, is something that really should be trialled extensively in rural areas with the proviso, though, of safeguards, in that there are a lot of people who really should not be kept in a house for 24 hours a day. The effect on families may be very negative. But if home detention could be based on a similar fashion to periodic detention, for example, there would be weekend home detention or weekend home detention with evening curfews during the week, it may just enable a person to keep functioning in the community but, at the same time, have responsibility for the penalties.⁶⁶⁷

7.84 Mr Gooda, the District Manager of the Probation and Parole Office in Inverell also expressed support for home detention being extended to his area:

I think the more options that are available to offenders in the Inverell community the better. Whether it would be successful, I am not sure. I hope it would be trialled. Some groups may have difficulty complying with some requirements of home detention. There are workload implications for the officers who supervise that, but once again, the more options, I think the better it is for the community. So I hope that it eventually does come to regional areas.⁶⁶⁸

⁶⁶⁵ Mr Tumeth, Evidence, 1 September 2005, p20

⁶⁶⁶ Submission 6 (Inquiry into BEHD), pp4-5

⁶⁶⁷ Mr Collins, Evidence, 14 June 2005, p32

⁶⁶⁸ Mr Gooda, Evidence, 14 June 2005, p21

Level of demand

7.85 The Committee notes that there is a strong desire among the legal profession and the community to extend home detention to other, if not all, parts of NSW. While the Committee was not able to ascertain the precise nature of the demand for home detention in parts of NSW where it is presently not available there does seem to be sufficient demand to warrant further investigation.

7.86 In addition, the Committee was advised by the Probation and Parole Association that its research showed that a substantial number of inmates in rural areas would meet the eligibility and suitability criteria for home detention:

This exercise was completed several years ago and what they did was to match the broad criteria for exclusion from home detention, being the length of the proposed sentence of imprisonment over 18 months and the offences which were excluded from home detention consideration—rape, pillage, murder, those sorts of things—and they matched that against the data from the inmate census by postcode. The return of that was a substantial pool of inmates who, on the face of it, against the broad criteria, were potentially suitable for home detention or certainly were candidates for assessment in rural areas. Even though this exercise was done several years ago, nothing has significantly changed in the criminal justice arena to suggest that the results would be any different if we replicated it now.⁶⁶⁹

7.87 The Committee was also advised by Ms McComish of the Department of Corrective Services that the Department has done some work in identifying areas with the greatest need for home detention. As well as the Kempsey area (discussed at paragraph 7.114) the South Coast, the far west from Dubbo and the Central Coast were identified as areas of need:

Some years ago there was an attempt through the home detention area to look at the population spread of offenders across the State and match the profile in terms of the criteria that is demanded by the home detention programs and therefore to be able to focus on where the population need is that we could first expand to, and that is how we came up with the Central Coast in Kempsey. But in terms of the areas of the State where the options are limited, you would have to say that the South Coast is clearly an area, and one of the reasons I would say that is on feedback from the courts. ... The lower South Coast where they do not have any other sentencing options other than either the bonds offered, in which people have been tried on them and it has not worked for various reasons, or full-time custody. The far west from Dubbo we are also clearly limited partly by geography, partly by the lack of other services that are available for the offender population. Indeed, the high-population demand area of the Central Coast is the other region that has been identified.⁶⁷⁰

Barriers to increased availability

7.88 The Committee examined the barriers to extending home detention throughout NSW. The most important issue arising was one of resources, particularly the PPS staff required to administer and monitor home detainees. The level of demand in relation to the level of resources required to operate home detention in rural and remote areas was discussed. The

⁶⁶⁹ Ms McGrath, Evidence, 30 August 2005, p21

⁶⁷⁰ Ms McComish, Evidence, 30 August 2005, p8

second major obstacle appears to be the availability of adequate monitoring technology in some areas of the State. The Department of Corrective Services summarised the situation in its submission as follows:

Under the current restrictions of the home detention legislation, it would be difficult to extend the home detention scheme to remote areas where the case load (given the strict criteria for eligibility) would be scanty and the monitoring systems (electronic) would be unreliable.⁶⁷¹

Resources and level of demand

7.89 In the view of Ms Pauline Wright from the Law Society of NSW, the only impediment to expanding home detention is resources and funding:

As far as I can see the only impediment to it in rural and remote NSW are resources and funding. As I understand it, the Minister for Justice was looking at implementing pilot programs in other rural areas in 2004-05 where it presently is not available, and the Law Society would encourage that to be expanded as soon as possible to make it available to everybody in NSW, not just to people in Sydney and large regional centres because, as we see it, it is an important sentencing tool, particularly in terms of rehabilitation.⁶⁷²

7.90 The Department of Corrective Services advised that the following resources need to be available to support home detention in rural and remote areas:

- Probation and Parole officers trained in home detention supervision, attached to a Probation and Parole Service District Office
- Reliable electronic monitoring equipment that can operate in a remote area
- Reliable telecommunication services
- A sufficiently large population of eligible and suitable offenders with adequate housing
- Supervisor's vehicles and urinalysis/breath testing equipment
- Therapeutic program availability.⁶⁷³

7.91 The District Manager of the Griffith PPS, Mr Nickle, identified the main barrier to implementing home detention in the area as being a lack of staff:

The big difficulty with home detention in an area like this is availability of sufficient staff. You need a 24-hour, seven-days-a-week operation. It would be very difficult to gainfully utilise all the staff all the time, because I very much doubt that there would

⁶⁷¹ Submission 30, p5

⁶⁷² Ms Pauline Wright, Chair Criminal Law Committee, Law Society of NSW, Evidence (Inquiry into BEHD), 18 March 2005, p14

⁶⁷³ Submission 30, p26

be sufficient home detention offenders available to sufficiently utilise the staff that would be needed.⁶⁷⁴

- 7.92** Ms McComish noted that there needs to be a sufficient number of offenders to employ a supervision team or alternatives must be found:

There has been a proposal to extend to further regional NSW. There have been some barriers to that. One of them is in terms of the way in which home detention is conducted and ensuring that you have a sufficient number of offenders to employ the specialised intensive supervision program team. What the Department is considering, and we hope to implement in the new financial year, is an extension of this option for the courts, based at Kempsey. The proposal is that we use the existing Probation and Parole office staff attached to the Kempsey district office with some additional resources where they would carry part of a caseload, the usual caseload in the community, and then people would be trained appropriately, with specialised training, and rostered through to cover a small intensive supervision caseload on home detention.⁶⁷⁵

- 7.93** COALS argued that people other than PPS officers could be employed to undertake assessments in rural and remote areas:

The existing home detention scheme should provide a wider coverage, with assessment duties undertaken by officers other than those employed by the PPS in rural and remote regions. Examples of the type of persons who could be trained to do the assessments are health workers and local government workers.⁶⁷⁶

- 7.94** Queensland Corrective Services advised in relation to its home detention scheme (which operates as a back-end scheme rather than a front-end scheme) that casual staff are recruited in areas with no immediate access to Departmental staff:

Home detention in Queensland is available statewide. In areas where there is no immediate access to a community corrections area office the Department employs casual staff to provide surveillance in the community where the offender resides. The Home Detention program is operated out of individual area offices rather than being centralised. Thus, staff are able to have direct knowledge of an offender in the community in which they live.⁶⁷⁷

- 7.95** Several Inquiry participants argued that the funding required to extend home detention to rural and remote areas would be off-set by the savings made by diverting offenders from full-time custody. Participants in the Inquiry into back-end home detention also argued that the savings made by introducing back-end home detention could be spent on further widening the front-end scheme. For example, Ms Wright argued that the reduction in costs could free up more money which could in turn be spent on further widening the scheme:

... the cost of home detention is significantly less to the State than the cost of having someone in gaol full time—so once you start extending the availability of home

⁶⁷⁴ Mr Nickle, Evidence, 27 June 2005, p24

⁶⁷⁵ Ms McComish, Evidence, 17 March 2005, p15

⁶⁷⁶ Submission 43, p24

⁶⁷⁷ Submission 23, Minister for Police and Corrective Services, Queensland, p5

detention, then I think that there can be an offset of costs and those savings can be directed towards extending the scheme into regional and remote NSW.⁶⁷⁸

- 7.96** Mr Cowdery also supported this view in his submission, suggesting that savings gained from introducing back-end home detention could be ‘quarantined for utilisation in extending the existing front-end home detention scheme’.⁶⁷⁹ Funding issues are examined in Chapter 3.

Monitoring

- 7.97** The 1999 Review of the Home Detention Scheme (see paragraph 7.4) indicated that the practicalities of surveillance were a significant factor in the decision to expand home detention further than the original areas into which it was introduced:

It was initially decided that in order to maintain optimum surveillance coverage the scheme would only be available to offenders in the [Sydney metropolitan, Hunter, Newcastle, Illawarra and Wollongong regions]. It was anticipated that consideration would be given to further expansion into rural and remote areas if the surveillance logistics proved possible.⁶⁸⁰

- 7.98** The Committee was advised of methods of monitoring and surveillance that could be used in rural and remote areas. For example, the Northern Territory Department of Justice advised how it adapts home detention to suit the remote areas where some Aboriginal offenders reside, by confining an offender to an area or ‘outstation’, rather than a particular residence, and by taking a flexible approach to intervention programs:

Not all remote communities have Home Detention generally available, however if time is provided for consultation with the local community council and the recruitment of local surveillance officers, attempts are made to put the program in new places when the need arises. This is feasible where our "bush courts" operate on a bi-monthly or tri-monthly calendar. Such flexibility is necessary to provide access and equity in the availability of court options to remote area offenders/communities.

Consultation with and recruitment of local people is important in implementing a successful program in a new area, as is adapting the program parameters to local requirements. For example, some detainees may reside at an outstation (footnote: a small number of houses on an area of land occupied by a family group remotely situated as a satellite to a larger community), rather than the larger community, in such cases they may be restricted to the outstation rather than a specific residence. Core requirements of the program remain in place, such as restricted movement, alcohol/drug abstinence and testing, regular surveillance etc. Offering intervention programs is made more difficult due to remoteness for this client-group, however not impossible. A flexible approach allows for detainees to attend programs in other localities if a suitable residence is available, the detainee may be permitted to attend an alcohol program or education block training during the order- returning to their normal residence when completed. Travel and alternative surveillance arrangements are put in place for the time they are attending the program.⁶⁸¹

⁶⁷⁸ Ms Wright, Evidence (Inquiry into BEHD), 17 March 2005, p17

⁶⁷⁹ Submission 6 (Inquiry into BEHD), p5

⁶⁸⁰ K Heggie, *Review of the NSW Home Detention Scheme*, p24

⁶⁸¹ Submission 19, Northern Territory Department of Justice, pp1-2

7.99 In the Northern Territory, monitoring and surveillance is also adapted to the requirements of remote locations:

Aboriginal and Regional Community Corrections Officer's monitor detainees in some remote areas. Detainees' telephone the nearest departmental office when requesting permission to leave their house/community. The Community Council is asked to assist in the recruitment of suitable casual surveillance officers. A pool of casual surveillance officers are generally recruited to cover people travelling away from the community and ensure surveillance is not impeded. Partnership arrangements are also implemented with locally stationed Police Officers to provide support for the program, where available.

Electronic surveillance has been used off and on in the Northern Territory. In some remote localities this operated quite well, when the detainee has access to a phone line. Generally though, face-to-face surveillance is the preferred means because of telephone and distance issues. Departmental officers will attend the community on a regular basis, conducting necessary testing or arrange with the police to do so if there are any concerns. Testing is not conducted as regularly as in an urban situation. Home Detention in the Northern Territory has a high success rate with between 80% to 90% of people completing their orders.⁶⁸²

7.100 The Department of Corrective Services noted that although in rural areas where monitoring is difficult, offenders may be assessed as unsuitable for home detention, offenders are able to nominate alternative residences for assessment:

It is also important to note that, in fringe areas, it will likely be impossible to provide the level of direct personal supervision on which Home Detention is based. As the legislative provisions for Home Detention require that our assessment of suitability consider whether the circumstances of an offender's residence would inhibit effective monitoring, there will be frequent instances when offenders in the most remote communities would be assessed as not suitable for Home Detention while resident at that place. Provision already exists for offenders living beyond current supervision areas to nominate an alternative residence for further assessment. However for those who are not able to provide an alternative residence designated beds specific to program detainees could be purchased to be readily available to potential detainees who could not otherwise live with their families.⁶⁸³

Support for home detainees

7.101 Magistrate Toose noted that, as well as electronic monitoring, support is required for home detention to be successful in rural areas:

Home detention to be successful, requires intensive monitoring and supervision, the resources are not there to make it work, even if a tag system could be implemented that did work out there. I think if people were to be left in the community with the tag and without the support, it is unlikely to prevent the re-offending as it is not

⁶⁸² Submission 19, pp1-2

⁶⁸³ Answers to questions on notice taken during evidence 17 March 2005, Department of Corrective Services, p11

addressing the necessary issues. It may make the person easier to locate on re-offending but that would be cold comfort to any victim.⁶⁸⁴

Expansion of home detention

- 7.102** The Department of Corrective Services advised the Committee that it is currently undertaking research and planning into the expansion of home detention to remote areas, including:
- Investigation of models presently operating in other states and countries
 - Examination of suitable technologies
 - Detailed analysis of the human and material resource implications of expansion and budgetary requirements.
- 7.103** The Department is also examining the ‘restrictive nature of the legislative eligibility criteria’ and the use of electronic monitoring and other methods of monitoring.

Kempsey pilot

- 7.104** The Department of Corrective Services has announced a proposal to introduce a limited home detention program in the Kempsey/Port Macquarie area in 2005-2006.⁶⁸⁵ Ms McComish described the Kempsey proposal as a ‘modified’ form of home detention with a focus on Aboriginal offenders:

The other is the proposal of developing a model for home detention in the Kempsey area, which the Government is committed to and which we have done significant research on. This was primarily to provide the opportunity for Aboriginal offenders to have access to elements of the home detention model, which at the moment we do not have. It has tremendous support from the courts up there. Also in terms of the population, it was identified as a population centre where a number of offenders did meet the criteria if we were able to offer the model. It would have to be something of a different model because there would not be sufficient population to have a whole intensive supervision team. So we would be looking at some modification of the way in which the services were provided, emphasising both partnership with local communities and also very primary use of the Aboriginal client service officer that we have based there.⁶⁸⁶

- 7.105** The Kempsey pilot is discussed further below in the context of the experience of Aboriginal offenders with home detention. At the time this report was finalised the Department of Corrective Service advised that ‘no decision had yet been made’ about the proposal.⁶⁸⁷

⁶⁸⁴ Submission 5, p7

⁶⁸⁵ Submission 30, pp15 and 25. See also Department of Corrective Services, *Annual Report 2004/2005*, p35

⁶⁸⁶ Ms McComish, Evidence, 30 August 2005, p5

⁶⁸⁷ Correspondence from Commissioner Ron Woodham, Department of Corrective Services to Chair 20 March 2006

Staffing - Management pilot

- 7.106** The Department advised that '[a] major impediment to expansion of the Home Detention program has been lack of resources and the potential impact on existing staff. A different staffing model is under consideration.'⁶⁸⁸ In this regard, the Department is piloting a new management and reporting structure that will support further expansion of home detention:

Before the Home Detention program can be expanded to rural NSW the management and reporting structure of the program has to be changed. Until now the nine Intensive Supervision Units have reported to a Director who has been located at head Office. A pilot is currently being underway to implement the regionalisation of the program. Four sites have been selected which have commenced the process of devolving management responsibility for Home Detention and the Drug Court to District Managers and Executive Directors of Community Offender Services. The piloting of regionalisation commenced in May 2005 and will last for 6 months. Regionalisation will then expand to encompass the remaining units. The devolution of management responsibility is seen as critical to support further expansion of Home Detention programs.⁶⁸⁹

Intensive supervision attached to a bond

- 7.107** Ms McComish advised the Committee that the Department is also examining the possibility of adapting the intensive supervision elements of home detention and attaching it to a bond, to provide another alternative sentencing option in rural and remote areas:

Because of the limitations placed on home detention—the legislative limitations—if we wish to offer this as an alternative to people in rural and remote areas as a community-based sentencing option what we are looking at is taking elements of the program that apply under the intensive supervision program, which could be incorporated into the range of bonds that the court currently has as set community-based sentencing options. Basically, this is just comparing what strictly applies to a home detention program and what could apply if you applied intensive supervision conditions to a bond. You could incorporate the following elements of home detention: electronic, or indeed as we are now trialling, satellite monitoring for those who are considered to be at a higher risk level and who need that intensive 24-hour, seven-day a week monitoring. You could apply close and intensive case management and you could also provide access to offence-related intervention programs, which are run through Community Offender Services. For a low risk level you could look at the imposition of curfews related to the monitoring.⁶⁹⁰

- 7.108** Ms McComish advised that the proposal utilises existing legislation:

It is taking the elements of the program of intensive supervision—whether that be monitoring by electronic means or whatever or whether it be the intensity of the case management—and saying, “We could apply these in more remote areas as well, given certain circumstances and availability. ... So it is not a new program because, in a

⁶⁸⁸ Answers to questions on notice taken during evidence 17 March 2005, Department of Corrective Services, p8

⁶⁸⁹ Answers to questions on notice taken during evidence, 17 March 2005, Department of Corrective Services, p8

⁶⁹⁰ Ms McComish, Evidence, 30 August 2005, p4

sense, the courts have all these options available under those bonds in terms of the conditions they apply. But at the moment we cannot offer that because we do not have the resources available. ... intensive supervision in this sense would provide for the expansion of community-based options if we were given those kinds of resources. You would apply it within the existing legislation. It is not a new program but the courts could just specify the conditions.⁶⁹¹

7.109 The Committee was advised by the Public Defenders Office of intensive supervision programs in Queensland Victoria and Western Australia:

Queensland and Victoria also have intensive corrections orders (ICOs), which involve the offender, with his or her consent, serving a sentence of up to one year by way of intensive correction in the community for sentences of up to one year (see Part 6, *Penalties and Sentences Act 1992* (Qld) and Part 3, Subdivision 2, *Sentencing Act 1991* (Vic)). ICOs contain general requirements, including that the offender not commit another offence, must report to and receive visits from corrective services officers, and undertake community service (s 114 *Penalties and Sentences Act 1992* (Qld); s 20 *Sentencing Act 1991* (Vic)). Under the Queensland model (s115), there may also be a number of additional requirements, such as requiring the offender to submit to medical, psychiatric or psychological treatment, make restitution or pay compensation.

Intensive Supervision Orders (ISOs) are available in Western Australia pursuant to part 10, *Sentencing Act 1995* (WA). ISOs are similar to the CBO but are subject to more stringent conditions. Supervision conditions are mandatory, and the court may also impose a program component, community service and/or curfew.⁶⁹²

7.110 Mr Tumeth of the Law Society also noted that such a sentencing option has been tried in Western Australia:

The only other thing I am aware of that has not been tried in NSW but has been tried in Western Australia is called an intensive supervision order, or ISO. It is as it sounds. Whilst the person is placed on a bond, they are subject during the currency of that bond, or part of it, to very intense supervision and support by the Department of Probation and Parole. One of the difficulties with the implementation of a program such as that is the resources of the department to carry out the supervising.⁶⁹³

7.111 Ms Magrath, the Secretary of the Probation and Parole Officers Association, discussed the Department's proposal, describing it as a 'bond with teeth':

What we are looking at is something in the nature of a bond with teeth. For instance, if an offender fails to comply with whatever condition, instead of going back to court, or perhaps to the Parole Board, the supervising officer, obviously in consultation with his or her senior officers, could apply a range of sanctions. There is some precedent for this; for instance, with Drug Court orders. We see no reason why such an order could not be developed in legislation. As a person progresses, the reins could be loosened, and in the case of regression, sanctions such as curfews could be applied. We could go as far as having electronic monitoring and adopting a containment-style

⁶⁹¹ Ms McComish, Evidence, 30 August 2005, pp45

⁶⁹² Submission 10, p1

⁶⁹³ Mr Tumeth, Evidence, 1 September 2005, p18

operation, under the ambit of this broad order that we keep referring to as the roll-up order.⁶⁹⁴

Electronic monitoring

- 7.112** In terms of electronic monitoring, the Committee was advised that the Department is examining the introduction of satellite tracking equipment that could be used in rural and remote areas:

In the past two weeks the Department of Corrective Services entered into a contract for satellite tracking we will be using to track high-risk sex offenders released from custody. In regards to whether it can be used statewide, this morning I spoke to the director in charge who said that the satellite system we have would cover the vast majority of the State. The system that we are using is currently being trialled in England which, of course, does not have the remote problems that we have, but he was confident that it would cover the majority of the State. As I said, it is a very recent initiative as yet. We are about to trial it on one person, but we feel there is certain potential for satellite tracking in rural and remote areas.⁶⁹⁵

- 7.113** In addition the Department's Annual Report 2004-2005 states that '[a] research report on Home Detention, completed this year, will provide the basis for a strategy to expand the provisions of intensive supervision including electronic and satellite monitoring of high risk offenders in the community.'⁶⁹⁶ At the time this report was being finalised the Committee was advised that the research report has not yet publicly available and that 'possible expansion of the intensive supervision program has not been decided.'⁶⁹⁷

- 7.114** The Department also advised the Committee in relation to electronic monitoring that:

The use of electronic monitoring had the potential to improve the cost-effectiveness of correctional programs, provide enhanced opportunities for offender rehabilitation and extend the range of sentences available to the courts as well as provide the community and judiciary the confidence to include the more serious type of assaults currently excluded by Home Detention legislation.

One suggestion for the use of electronic monitoring systems within a rural type of system, (presently being considered by Northern Territory) covers remote areas and communities by reporting compliance information to a designated responsible person (or elder) within the community. After initial setup of a computer at the designated person's home (which does not require a telephone line however would require access to power/electricity to keep unit charged) communication would be via radio frequencies received from several units distributed in close proximity of one another within the community (for approximately half kilometre square area 5-6 receiver units would be required).

⁶⁹⁴ Ms Magrath, Evidence, 30 August 2005, p29. Ms Magrath is also the Manager of Resources and Executive Services for Community Offender Services.

⁶⁹⁵ Ms Ruis, Evidence, 5 June 2005, p3

⁶⁹⁶ Department of Corrective Services, *Annual Report 2004/2005*, p36

⁶⁹⁷ Correspondence from Commissioner Ron Woodham, Department of Corrective Services to Chair, 20 March 2006

The receiver units pick up signals from a transmitter unit (s) (anklets) worn by one or any number of offenders in the program. The receiver units are solar powered which means the offenders do not require a phone line. The signals picked by the receiver units are relayed to the computer (a form of a pager system that processes the data) and relates the information to the responsible person who is monitoring the compliance levels of the detainees in the community i.e. whether there is a strap tamper, the removal of a transmitter (anklet), whether the detainee had wandered away from the community at the time required etc.⁶⁹⁸

Committee view

- 7.115** The evidence presented to the Committee reflects general support for home detention as a valuable sentencing option. The Committee notes in particular that home detention has considerable success in terms of rehabilitation and recidivism, with a recidivism rate of approximately 12% compared to the overall rate of re-offending among all prisoners which is over 50% (paragraph 7.47). The Committee does note, however, that there are some areas of concern about the eligibility criteria for home detention and access by certain groups of offenders. These issues are examined in the following section.
- 7.116** The Committee is concerned that the lack of geographical availability of home detention in many parts of NSW is placing offenders from those areas at a serious disadvantage compared to their metropolitan counterparts. It is manifestly unfair that an offender should be more likely to be sent to gaol because of his or her geographical location. The Committee concurs with the strident views expressed by many Inquiry participants in this regard. The Committee recommends, therefore, that the Government, as a matter of priority, extend the availability of home detention to as many areas of NSW as possible (the issue of funding is discussed in Chapter 3).
- 7.117** The Committee notes that the Department is already examining flexible options to deliver home detention to wider parts of the State. The Committee encourages the proposal for home detention in the Kempsey area and recommends that the Government adopt the Department's proposal.
- 7.118** The Committee notes the Department's proposal to combine elements of intensive supervision with a bond. While the Committee welcomes the Department's examination of options that could bring home detention, even in a modified form, to the far reaches of the State, it did not receive sufficient information or comment on this proposal to form a firm view about whether it would be beneficial. The Committee recommends that the Department continue to explore innovative options to expand home detention, or a modified form of home detention, to rural and remote NSW. The Committee also recommends that the Department should consult widely on any proposal for modifying the existing home detention requirements.

⁶⁹⁸ Answers to questions on notice taken during evidence 17 March 2005, Department of Corrective Services, pp9-10

Recommendation 34

That the Government, as a matter of priority, extend the availability of home detention to as many areas of New South Wales as possible, taking into account the following:

- an analysis of the areas of greatest demand should be undertaken and home detention extended first to those areas with the greatest need.
 - creative options for extending home detention, or a modified form of home detention, to rural and remote communities should be explored with reference to the experiences of other jurisdictions such as the Northern Territory.
 - the Department of Corrective Services should consult widely on any proposal for modifying the existing home detention requirements such as introducing intensive supervision in conjunction with a bond.
 - the need for an increase in the resources of the Probation and Parole Service for effective implementation of home detention in rural and remote areas.
-

Home detention and issues relating to disadvantaged groups

7.119 The legislation underpinning the Home Detention Scheme does not specifically exclude offenders from any particular disadvantaged group. As discussed in paragraph 7.11-7.14, exclusions are based on the type of offence committed, previous criminal history and suitability. The Committee was advised, however, that the eligibility and suitability criteria effectively mean that some groups of offenders are unlikely to be given home detention orders, even if they live in an area where home detention is available.

7.120 In this regard, Dr Baldry noted that home detention is limited to a small group of offenders and that an offender's relationship with his or her family is particularly relevant:

My view of home detention is that it is a very limited form of sentencing. It is suitable for a very small proportion of those who go through the courts for many reasons. One is that it requires a very particular level of support from others in the family, and if I refer to my study, for example, more than half of the people in my study did not have a connection with a family and, certainly, probably the rest of the other half, half of them did not have good enough relations with their family to make something like home detention with a family a possibility. It also requires a particular disciplined way of behaving, and that is not necessarily going to be the way in which many people who end up in court are able, at that time, to manage.⁶⁹⁹

7.121 Inquiry participants raised particular issues in relation to Aboriginal offenders, female offenders and offenders with mental health issues or intellectual disabilities. The aspects of the home detention criteria under examination include the exclusion of offenders who have been convicted of certain offences or who have past convictions for certain offences and the requirement that an offender have a suitable residence in which to serve home detention.

⁶⁹⁹ Dr Baldry, Evidence, 6 June 2005, p27

7.122 At the outset of this discussion the Committee notes the views of the Shopfront Youth Legal Centre that home detention can be modified to accommodate disadvantaged offenders without compromising the punitive element of the sentence:

We believe that this is achievable. Even if home detainees are provided with a high level of support, programs and activities, the punitive element of home detention remains intact. The fact is that home detainees have significant restrictions on their liberty and are not free to come and go as they please.⁷⁰⁰

Aboriginal offenders

7.123 An overview of issues in relation to Aboriginal offenders and community based sentencing options is examined in Chapter 3. The Committee was informed of a number of issues relating to Aboriginal offenders and home detention, including:

- The low participation rate of Aboriginal offenders in home detention.
- That the exclusion of certain offences disproportionately affects Aboriginal offenders.
- The unsuitability of home detention in its current form for Aboriginal people in rural and remote areas.

Low participation rate

7.124 The Committee was advised that the number of Aboriginal offenders participating in home detention is considerably lower than non-Aboriginal offenders. The Department of Corrective Services' 1999 Review of the Home Detention Scheme found that Aboriginal offenders were underrepresented, with Aboriginal women constituting only 9% of all women on the program and Aboriginal men constituting 5% of all males on the program. In addition only 13% of all Indigenous offenders who might have been eligible for home detention were placed on home detention.⁷⁰¹

7.125 The following factors contributing to the low participation figures identified by the 1999 Review were also raised by Inquiry participants and are examined in this section:

- Lack of availability of the program in those areas where aboriginal populations are substantial in NSW
- The restricted number of offences eligible for Home Detention court ordered assessment, and
- Cultural and 'kinship' issues may prove to be in conflict with the logistics of Home Detention supervision.⁷⁰²

7.126 While the Committee did not receive any more recent statistics on Aboriginal participation, there was no indication in the evidence presented that the situation had changed. For example,

⁷⁰⁰ Submission 25, p10

⁷⁰¹ K Heggie, *Review of the NSW Home Detention Scheme*, p6

⁷⁰² K Heggie, *Review of the NSW Home Detention Scheme*, p6

Mr Christen, the Manager of the Sydney Regional Aboriginal Corporation Legal Service, advised the Committee that, to his knowledge, only ‘two or three’ Aboriginal offenders have completed periodic or home detention and noted the difficulties faced in terms of suitable accommodation:

In the country areas, as I say, it is pretty hard because of the housing problem; they have got no air-conditioning; they have got no telephones in their house; they have got nowhere to ring up to see if they are home and things like that, so they are going out to make calls or when they get the calls to let them know where they are.⁷⁰³

- 7.127** Mr Pudney, the Principal Solicitor with the South Eastern Aboriginal Legal Service referred to lack of the availability of home detention State-wide and the requirement for a stable lifestyle:

The difficulty with home detention is that it is so specific to areas, it is not statewide. That is the first issue, and that is critical. The second issue is that it needs a certain stability of lifestyle and community involvement that most of our clients do not have. Home detention works really well for someone who has committed fraud or a one-off matter and will never be in trouble again. Generally they have a unit and a wife and they can live that lifestyle. Unless it was somehow broadened so that houses are provided in country areas for people to do home detention in, or some sort of relaxation on the hours or use of community facilities, if they are available, then maybe. At the moment it is just too difficult for our clients.⁷⁰⁴

Appropriateness of home detention for some Aboriginal offenders

- 7.128** In the rural and remote areas the Committee visited during the Inquiry, several local Aboriginal people expressed the view that, in fact, home detention may not be suitable for Aboriginal offenders because of the requirement that detainees be contained within the home.

- 7.129** Several participants in the Committee’s public forum in Brewarrina indicated that they did not support home detention as a community based option for Aboriginal people, particularly young people. For example, Mr McHughes stated:

That is the trouble, not leaving the house. That would be very hard for our community because we all like to talk together, get together and have a yarn. In this community just about everybody knows everyone, so it would be hard for the person who is doing house arrest.⁷⁰⁵

- 7.130** Mr Davies, the Principal Solicitor of the Western Aboriginal Legal Service advised the Committee that home detention may not be culturally appropriate for Aboriginal people:

Home detention, in my belief, has some practical difficulties too, particularly in Aboriginal communities. It requires the offender to be basically housebound for a period of time and I believe there are cultural and practical difficulties in expecting somebody, for example, in Bourke in summer to sit in an un-airconditioned house while out there he sees his cousins and aunties and uncles out in the street.⁷⁰⁶

⁷⁰³ Mr Christian, Evidence, 30 August 2005, p14

⁷⁰⁴ Mr Pudney, Evidence, 28 June 2005, p22

⁷⁰⁵ Mr McHughes, public forum, Brewarrina, 16 June 2005, p26

⁷⁰⁶ Mr Davies, Evidence, 15 June 2005, p39

... I do have some concerns about its suitability in the Aboriginal community because the cultural aspects of Aboriginal people are not people to sit inside. They are outside people and the social pressures in a small Aboriginal settlement, such as the reserve out here at Bourke. As Mr Pearce suggested earlier, if it could be expanded to encompass an area rather than a simple dwelling it may have some scope. The other thing is from my observations Aboriginal people are mobile. They do not necessarily have one place as home except the younger people, who often spend days or weeks living with aunts and uncles, cousins.⁷⁰⁷

- 7.131** NCOSS also noted that cultural and social factors may make home detention culturally inappropriate for Aboriginal offenders:

NCOSS also notes the findings of research into home detention in Queensland that identified a number of cultural and social factors amongst Aboriginal people that may make home detention culturally inappropriate. The Law Reform Commission also expressed a concern with home detention as it affects Aboriginal peoples is that they are more culturally vulnerable to suffer from isolation than are non-Aboriginal people.⁷⁰⁸

- 7.132** Some support was expressed, however, for the benefits of home detention for Aboriginal people. For example, COALS noted that home detention ‘... is suitable for Aboriginal people, especially where there are children to be cared for.’⁷⁰⁹

- 7.133** There does appear to be some misunderstanding, however, about the precise nature of home detention. In this regard Ms Magrath noted that home detainees are able to attend programs or employment outside the home and are thus not always ‘locked up’:

Home detention is perhaps something of a misnomer in that it does not necessarily mean locking in a house. Certainly, that is something we would have to look at for Aboriginal offenders. What it is about is containing activities and whilst you might look at imposing curfews and say that people have to be at home between 8.00 p.m. and 9.00 a.m. or whatever, we would really be encouraging and doing our best to facilitate attendance at programs and engagement with the community. All of the evidence points to engagement with the community as being the lead factor in rehabilitation and reintegration with the community.⁷¹⁰

- 7.134** The Committee also notes that the criticisms cited above do not address the point that home detention is only available as an *alternative* to gaol. In comparison to full-time custody or perhaps even periodic detention, home detention, with its difficulties may be a better alternative.

- 7.135** Nonetheless the Committee notes that the effectiveness of home detention as a sentencing option would be severely undermined if cultural differences were not adequately taken into account when assessing the suitability of a particular Aboriginal offender for home detention. Specifically, the Committee is concerned that Aboriginal offenders who are placed on home detention may be at an increased risk of breaching their conditions.

⁷⁰⁷ Mr Davies, Evidence, 15 June 2005, p42

⁷⁰⁸ Submission 8, p7

⁷⁰⁹ Submission 43, p24

⁷¹⁰ Ms Magrath, Evidence, 30 August 2005, p23

7.136 There does appear to be some scope for accommodating the cultural aspects of Aboriginal people into home detention. Magistrate Heilpern noted that home detention could be creatively modified for Aboriginal communities, citing overseas examples:

For example, in the Solomon Islands the idea of home detention is that the home comes to prison. That means that the family go with the offender and they all live in a village. True, it is fenced in but the family is allowed to come and go. Similarly, ... most southern American States have family detention, as they called it, where whole families are involved. I know it sounds horrible but it keeps the family unit together and it is effectively home detention for the offender because the kids go to school and the wife or husband, whoever is not the custodial person, goes off to work. That works in Papua New Guinea and in many other places. Detention as the concept does not just mean a person is locked in their own home. One could think of pretty imaginative ways of doing it, particularly in Aboriginal communities.⁷¹¹

7.137 The Committee recommends that the Department of Corrective Services examine ways of accommodating the cultural differences between Aboriginal and non-Aboriginal offenders to provide greater access to home detention. The Committee is also of the view that information about the nature of home detention and its place as an alternative to full-time custody should be developed to increase the level of understanding among Aboriginal communities about this sentencing option.

Recommendation 35

That the Department of Corrective Services examine ways of increasing the participation of Aboriginal offenders in home detention including:

- accommodating cultural differences to provide greater access to home detention for Aboriginal offenders
- developing information about the nature of home detention and its place as an alternative to full-time custody to increase the level of understanding among Aboriginal communities about this sentencing option.

Exclusion based on offence committed and criminal record

7.138 As outlined in paragraphs 7.12 and 7.14 offenders who are convicted of certain offences or who have past convictions for certain offences are not eligible for home detention. These exclusions are common to home detention schemes in other Australian jurisdictions, including the Australian Capital Territory and South Australia.⁷¹²

7.139 This mandatory exclusion was criticised by several Inquiry participants both in a general sense and also specifically in relation to its impact on Aboriginal offenders. The following discussion focuses on Aboriginal offenders.

⁷¹¹ Magistrate Heilpern, Evidence, 28 June 2005, p43

⁷¹² Submission 26, Australian Capital Territory Corrective Services, p4 and Submission 52, Minister for Correctional Services, South Australia, p3

7.140 The Committee was informed that this exclusion presents a particular barrier for Aboriginal offenders due to the high incidence of convictions for criminal offences within the Aboriginal community. In this regard the Department of Corrective Services noted that:

The eligibility and suitability criteria for sentences of home detention are quite restrictive. They include offence type, sentence length, stability of accommodation, a suitable domestic environment and the availability of a telephone. These home detention criteria effectively exclude home detention as a sentencing option for many offenders, particularly offenders from rural/remote Aboriginal communities, because of the prevalence of domestic violence and alcohol and solvent abuse in those communities. A whole of government approach is required to address the totality of these factors.⁷¹³

7.141 Mr Trevor Christian, CEO of the Sydney Regional Aboriginal Corporation Legal Service, noted that the exclusion of offenders with past convictions has limited the success of home detention for Aboriginal offenders:

... I do not think there has been a lot of success here in the metropolitan area because a lot of the people that go before the court for home detention, because of their classification and recidivism, are not suitable unless they are first-time offenders.⁷¹⁴

7.142 The Shopfront Youth Legal Centre argued that the exclusion of violent offences operates unfairly against Aboriginal offenders citing contributing factors including violence within the Aboriginal community, alcohol issues, the level of policing (also discussed in Chapter 5), poverty and disadvantage:

Some community based sentences, such as home detention and the Adult Drug Court, exclude offenders who are being sentenced for certain violent offences, or who have prior convictions for offences involving violence. While we do not suggest that violent offences are a trivial matter, we believe that such exclusions operate unfairly against particular groups in the community, such as indigenous offenders. It is an unfortunate fact that many indigenous communities are beset by violence, which is often alcohol related. The level of police contact with residents in these communities is also high. Young people growing up in such an environment are more likely to be convicted of violent offences than their non-Aboriginal peers. In order to break the cycle of violence which is often linked with poverty and disadvantage, the eligibility criteria must be broadened.⁷¹⁵

7.143 COALS argued that the exclusion of Aboriginal people from community based sentencing on the basis of their criminal history is discriminatory and noted the historical factors involved:

Some Aboriginal defendants have extensive criminal records often dating from their adolescent years. Given the well-documented over-representation of Aboriginal people in the criminal justice system and considering that competent legal representation was not available in many rural areas in the period up to 25 years ago, the exclusion of people from community based sentencing options on the basis of matters in their criminal history is discriminatory. In particular, the criteria for home

⁷¹³ Submission 30, p9

⁷¹⁴ Mr Trevor Christian, CEO, Sydney Regional Aboriginal Corporation Legal Service, Evidence, 30 August 2005, p14

⁷¹⁵ Submission 25, p6

detention (no serious assault matters) and for periodic detention (never sentenced to imprisonment of 6 months or more) cause concern.⁷¹⁶

- 7.144** COALS argued that in relation to domestic violence offences personal relationships can change over time:

Domestic violence is tragically frequent within some aboriginal communities. The criteria for home detention that excludes those who have been convicted of assault or are presently under AVOs in relation to any other persons in the house proposed for the home detention is reasonable where there is a continuing risk of violence. However, personal relations amongst Aboriginal extended family groups are complex and can change significantly over time. Another consideration is the serious shortage of suitable housing resulting in the forced over-crowding of many dwellings. One example where the criteria unfairly excludes Aboriginal people is where someone who seeks a home detention order is living in the same house as a cousin whom he was convicted of assaulting some years ago in the context of a wider family dispute that has subsequently been resolved.⁷¹⁷

- 7.145** The Committee notes that the automatic exclusions were examined by the NSW Law Reform Commission in its inquiry into sentencing. In its 1996 report the Commission foreshadowed that the exclusions may have the effect of excluding offenders for whom it may be an appropriate sanction:

The Commission supports the legislative intention to avoid imposing home detention in situations which may pose a risk to public safety, including situations of domestic violence. However, we are concerned that the legislature has chosen to restrict eligibility by way of strict criteria for automatic exclusion, rather than leaving a higher degree of flexibility to impose home detention where it is considered appropriate in the circumstances of a particular case. For example, the Act prohibits a home detention order from being made for an offender who is convicted of manslaughter. Manslaughter covers a wide range of unlawful killing, with varying degrees of culpability. As a result, people convicted of manslaughter may receive sentences ranging from long terms of imprisonment to immediate release on a bond. There is arguably no reason automatically to exclude these offenders from home detention when it is an appropriate sanction in the circumstances of their case.⁷¹⁸

- 7.146** The Commission expressed support for wide criteria to determine eligibility for home detention consistent with other community based sentencing options and noted that the general principles of sentencing taken into account by judicial officers provide safeguards:

In the Commission's view, it is preferable to keep the criteria for availability of home detention wide rather than impose legislative constraints on eligibility. This would make the legislation for home detention more consistent with the legislative framework for other sentencing options such as periodic detention and CSOs, which do not set out criteria for automatic exclusion. The general principles of sentencing, including proportionality and deterrence, provide the same safeguards against endangering the public and trivialising the offence as do legislative constraints, while at the same time allowing greater flexibility to meet the demands of individual cases.

⁷¹⁶ Submission 43, p11

⁷¹⁷ Submission 43, p11

⁷¹⁸ NSW Law Reform Commission, Report 79, pp149-150

Sections 6 and 7 constitute an unnecessary fetter on judicial discretion. We therefore recommend that the Act should be amended to remove any specific constraints on eligibility for home detention beyond the requirement that the offender be sentenced first to a term of imprisonment.⁷¹⁹

- 7.147** The Committee is mindful of the competing sentencing principles including punishment and incapacitation. The Committee considers community safety to be a fundamental aspect of community based sentencing. In this regard the offence for which the offender is being sentenced and an offender's past convictions are relevant to an assessment for suitability for community based sentencing. The Committee does not, however, believe that a mandatory exclusion promotes the aims of the Home Detention Scheme.
- 7.148** The Committee shares the concerns of the Law Reform Commission that the eligibility criteria for home detention excluding certain offences and past convictions may have the effect of preventing some offenders who would be suitable candidates from participating in home detention.
- 7.149** The Department summarised the rationale for extending the eligibility criteria to more serious offenders:

Currently offenders who are assessed as suitable for a Home Detention order are likely to fall into the lower risk groups on terms of risk recidivism due to the eligibility criteria. One rationale is to extend eligibility to more serious offenders has several bases:

- serious assaults is a category in which Aboriginal offenders are over represented;
- the more serious, longer serving offenders may have a greater need for this more intensive monitoring and support if they are to be safely and successfully reintegrated with the community;
- as these offence categories are heavily represented among longer serving inmates a blanket exclusion is likely to seriously reduce the pool of eligible offenders and, therefore, the potential of the proposal to reduce gaol numbers.⁷²⁰

- 7.150** As discussed at paragraph 7.104, the Department is working on the expansion of home detention to the Kempsey area, with a focus on Aboriginal offenders. Ms Ruis of the Department advised that, as part of the proposal the eligibility criteria will be examined:

In our submission we talk about some of the eligibility criteria for home detention reducing the number of indigenous offenders that would be suitable, because some indigenous offenders present with a longer history, or perhaps a history of violence. So there is always a question of eligibility and suitability. Obviously, it was not intentional that we would disadvantage any group. One question we are looking at in piloting regional home detention is: Do we need any adjustments of eligibility criteria to meet the need? There is no point having a program that would exclude many

⁷¹⁹ NSW Law Reform Commission, Report 79, pp149-150

⁷²⁰ Answers to questions on notice taken during evidence 17 March 2005, Department of Corrective Services, p10

people. At the moment, the home detention program eligibility criteria have proved effective where that program is working at the moment, but part of the regional pilot at Kempsey is to see: Do we need to change that? We will find that out fairly quickly.⁷²¹

- 7.151** The Committee encourages the Department in its examination of the eligibility criteria in the context of the Kempsey pilot to determine whether the criteria can be modified so as not to further disadvantage Aboriginal offenders. The Committee recommends that the Department undertake a thorough examination of the eligibility criteria for the Home Detention Scheme to determine whether the criteria can be modified so as to not further disadvantage Aboriginal offenders.

Recommendation 36

That the Department of Corrective Services undertake a thorough examination of the eligibility criteria for home detention to determine the extent to which the criteria unfairly limits the availability of home detention for Aboriginal offenders compared with non-Aboriginal offenders and whether the criteria should be modified so as to not disadvantage Aboriginal offenders.

Requirement that an offender have a suitable residence

- 7.152** As noted in paragraph 7.20, one of the matters the PPS must take into account when making its assessment for the court regarding an offender's suitability for home detention is the suitability of the offender's residence. An offender without a permanent place of residence or with a residence inappropriately equipped for proper monitoring may therefore be assessed as unsuitable for home detention. The Department of Corrective Services advised that '[a] stable residence is the most important criteria in considering suitability for home detention.'⁷²²
- 7.153** The Committee was advised that the general living conditions of many Aboriginal people in rural and remote areas may render some offenders unsuitable for home detention. For example, COALS noted that:

It is important to note that in the case of home detention, this may be a less appropriate option where the particular Aboriginal offender resides in sub-standard housing.⁷²³

- 7.154** The Shopfront Youth Legal Centre argued that home detention can be adapted for people who have no stable residence at the time of sentencing:

We believe that home detention can be adapted this way, and would support the provision of appropriate resources so that this can be achieved. Of course, many people who lack a stable residence also have other problems that would exclude them from home detention in any event (serious mental illness, drug dependency etc.)

⁷²¹ Ms Ruis, Evidence, 6 June 2005, p8

⁷²² Submission 30, p26

⁷²³ Submission 43, p9

However, where lack of housing or access to a telephone is the only barrier, we believe that appropriate assistance should be provided.

Ordinarily, the provision of housing is not the responsibility of the courts or the Department of Corrective Services. However, we suggest that some dedicated funding could be provided, or a memorandum of understanding entered into with the Department of Housing, so that potential home detention candidates could be housed. We would also comment that home detention can be successfully completed even where the offender does not live in a conventional 'home' environment. For example, one of our clients successfully completed a home detention order while he was living in a medium term youth accommodation service.⁷²⁴

- 7.155** The Committee notes that if it appears to the officer preparing the assessment report that the offender is homeless, the PPS has a legislative responsibility to '... in consultation with the offender, make all reasonable efforts to find suitable accommodation.'⁷²⁵ The Committee was advised that Departmental Guidelines contain a broader requirement that the PPS make *all reasonable efforts* to surmount obstacles to suitability where possible (although it was not made clear what 'all reasonable efforts' entailed):

If in the course of assessment, the office uncovers situations which, if uncorrected, would preclude a recommendation of suitability, for example no telephone, unsuitable accommodation, lack of consent by co-residents or employment which cannot be adequately monitored, but the offender otherwise appears suitable, the officer should make *all reasonable efforts* to help the offender achieve a suitable situation.⁷²⁶

- 7.156** The Department of Corrective Services advised the Committee that '[i]t would be extremely difficult to adapt home detention for persons with no stable residence without considerable additional resources.'⁷²⁷

- 7.157** The Law Reform Commission, in its 1996 report on sentencing, noted that home detention '... may be of limited effectiveness if it is unavailable to offenders with no permanent residence or whose residence is considered unsuitable.'⁷²⁸ The Commission also commented on the legislative requirement to assist an offender to find suitable accommodation and recommended that resources should be provided to *equip* an offender's home to make it suitable for home detention:

This provision goes some way in reducing the risk that impoverished offenders will be excluded from the scheme, although it may be that these offenders will nevertheless be excluded if they are unable to find accommodation which is suitably equipped for monitoring. The Commission considers that it is a significant disadvantage of the home detention scheme if it operates in a discriminatory fashion so as to exclude poor offenders. For this reason, in addition to a legislative requirement that reasonable efforts be made to find accommodation for homeless offenders, the Commission

⁷²⁴ Submission 25, p10

⁷²⁵ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 81(3)(a)

⁷²⁶ Correspondence from Commissioner Ron Woodham, Department of Corrective Services, to Chair, 18 May 2005. Probation and Parole Service Policy and Procedures Manual, para 3.3(g)

⁷²⁷ Submission 30, p26

⁷²⁸ NSW Law Reform Commission, Report 79, p152

urges consideration be given to allocating resources to equip offenders' homes so as to make them suitable for home detention. This may often require no more than installation of a telephone. The cost of such resources should still be considerably less than the costs of imprisonment.⁷²⁹

- 7.158** It appears that in other Australian jurisdictions consideration is being given to making home detention more accessible to offenders with special needs. The Committee was informed that in Queensland, where home detention has been available since the late 1980s, the provision of 'supported accommodation' to offenders without a suitable residence is under consideration:

As to whether home detention can be adapted for people who have no stable residence at the time of sentencing, Queensland is currently considering the option of providing supported accommodation to prisoners approved for home detention by community Corrections boards who do not have a suitable residential address.⁷³⁰

- 7.159** Similarly, the ACT, where home detention has been available since 2001, is investigating the provision of supported accommodation for home detainees:

To overcome the obstacle of homelessness amongst offenders who may otherwise have been eligible for home detention, ACT Corrective Services has been investigating the provision of supported accommodation to, among others, persons who are subject to a home detention order. The Home Detention and Operations Unit have been working on the development of a supported accommodation program in the form of a hostel, as an option for offenders for whom lack of accommodation is a significant management issue.⁷³¹

- 7.160** The Committee agrees with the Law Reform Commission that the assistance the PPS can provide to offenders should be extended to providing resources to equip an offender's residence to make it suitable. The Committee notes that the Departments' Guidelines appear to encourage the PPS to provide assistance in this way. The Committee acknowledges that in many cases the level of support or assistance would go well beyond the installation of a telephone. Nonetheless, the Committee recommends that the Department of Corrective Services examine the way in which assistance could be provided to offenders to enable them to meet the criteria of a suitable residence.

Recommendation 37

That the Department of Corrective Services examine ways in which assistance could be provided to disadvantaged offenders to enable them to meet the criteria of a suitable residence. The input of other relevant Government agencies, including in the portfolio areas of health and housing, should be sought.

⁷²⁹ NSW Law Reform Commission, Report 79, p153

⁷³⁰ Submission 23, Minister for Police and Corrective Services, Queensland, p5

⁷³¹ Submission 26, p5

Offenders with mental health issues or intellectual disabilities

- 7.161** The Committee received much evidence relating to the difficulties faced by offenders with mental health issues or intellectual disabilities in relation to home detention. The general profile of these offenders is examined in Chapter 3. It appears that there are very few, if any, offenders with mental health issues or intellectual disabilities currently undertaking home detention. Sister Harris advised the Committee that she was not aware of *any* person with a mental health disability on home detention.⁷³² A similar response was received from Mr Simpson with the NSW Council for Intellectual Disability.⁷³³
- 7.162** The Committee was advised that the main impediment to such offenders undertaking home detention relate to their personal circumstances rendering them ‘unsuitable’. This group of offenders, who arguably would derive the most benefit from serving a term of imprisonment by way of home detention rather than full-time custody, appear to be the least likely group of offenders to be considered suitable for home detention. The main issues are a lack of a suitable home and lack of support to assist them to comply with the conditions of home detention.
- 7.163** The Intellectual Disability Rights Service provided an example of the difficulties faced by offenders with intellectual disabilities:

Home detention is a problematic option for some people with intellectual disability. They may not have the skills to comply with the monitoring requirements and would need help to do so. They may not be accepted by an accommodation service. Some may not have a home or a phone. The offending behaviour of some people can relate to the use of the phone, for example, making prank calls to 000 and they may have difficulty using the telephone without further incident.⁷³⁴

- 7.164** Mr Graeme Fear from the St Vincent de Paul’s Society stated that ‘the major issue is that most people with a mental health problem do not have that safe, secure home environment anyway’.⁷³⁵ Sister Harris, raised a similar problem:

For [back-end] home detention to be appropriate, it would seem necessary for people to have a home. This is taken for granted, I guess, but I would maintain it is not necessarily the case as regards many people with mental illness.⁷³⁶

- 7.165** Mr Fear explained how a lack of appropriate accommodation could result in people released to (back-end) home detention breaching their order and returning to gaol:

The worst case scenario is always the one you have got to look at, that is, that people go out, it fails, they end up wandering away, they end up under the park bench, they end up in a homeless shelter, they end up in acute care services at \$600 a bed a day,

⁷³² Sr Harris, Evidence (Inquiry into BEHD), 17 March 2005, p32

⁷³³ Mr Simpson, Evidence (Inquiry into BEHD), 17 March 2005, p18

⁷³⁴ Submission 24, p5

⁷³⁵ Mr Graeme Fear, Co-ordinator, Mental Health Issues, NSW State Council of St Vincent de Paul Society, Evidence (Inquiry into BEHD), 17 March 2005, p35

⁷³⁶ Sr Harris, Evidence (Inquiry into BEHD), 17 March 2005, p30

and the whole process just rolls over, or they will get out again, they will offend again and they are back in the system and in the cycle.⁷³⁷

- 7.166** In relation to offenders with intellectual disabilities, Mr Simpson, from the NSW Council for Intellectual Disabilities, identified the need for *supported* accommodation:

I think our advocacy has consistently been that there needs to be these community-based accommodation options where people have got the support and the supervision they need within the context of this Committee to help them comply with the conditions of a bond or home detention or whatever, but all too often, when it comes to a probation officer doing a presentence report or the judiciary looking at a matter, they are quite keen to avoid the person going to gaol but their response is, "Look, there just isn't somewhere where we can be satisfied that this person is going to comply with the conditions of a community-based order."⁷³⁸

- 7.167** Sister Harris raised the point that while the set up costs of a model of home detention for intellectually disabled offenders would be considerable, it would still be less than keeping such offenders in jail:

You could justify the funding. These are expensive. If you are going to set up a supported housing group home with 24-hour care or eight-hour care or less, or if you are going to support it by means of an assertive community treatment team, it will be expensive. However, it will be a lot less expensive than keeping them in gaol. And if you were to release people into back-end home detention when they were not ready for it and with inadequate support they would either land back in gaol or back in the psychiatric hospitals, which again are much more expensive than putting these models in place.⁷³⁹

- 7.168** The Committee acknowledges that the element of self-discipline required of home detention may prevent certain offenders with special needs from being assessed as suitable. Evidence presented to the Inquiry also indicates that this type of offender may be less likely to have a suitable home within which to serve home detention. Supported accommodation would be required to enable such offenders to serve their custodial sentence on home detention.

- 7.169** The Committee notes the strong evidence presented that home detention has considerable benefits for offenders with mental health issues and intellectual disabilities compared to full-time custody. It is the Committee's view, therefore, that the eligibility and suitability criteria for serving home detention should be examined to identify ways to enable offenders with mental health issues or intellectual disabilities to be considered for home detention.

- 7.170** As noted previously, the Department of Corrective Services has an obligation to make all reasonable efforts to assist an offender satisfy the criteria regarding suitable accommodation. The Committee recommends that the Department of Corrective Services examine the needs of offenders with mental health issues or intellectual disabilities to identify the nature of the barriers they face and to identify ways of overcoming those barriers.

⁷³⁷ Mr Fear, Evidence (Inquiry into BEHD), p37

⁷³⁸ Mr Simpson, Evidence, 30 August 2005, p35

⁷³⁹ Sr Harris, Evidence (Inquiry into BEHD), 17 March 2005, pp31-32

Recommendation 38

That the Department of Corrective Services examine ways in which offenders with mental health issues or intellectual disabilities can be supported adequately, such as through the provision of supported accommodation, to enable them to be considered for home detention.

Female offenders

- 7.171** During the Inquiry concern was expressed about the implications of the lack of home detention in rural and remote areas on female offenders (an overview of the issues relating to female offenders and community based sentencing is contained in Chapter 3). In this regard, the Law Society noted that pregnant women, new mothers and sole parents may be sentenced to full-time imprisonment in the absence of home detention:

As a consequence of the unavailability of this sentencing option certain classes of offenders who might otherwise have been assessed as suitable, find themselves being sentenced to full time custody. This includes women in the later stages of pregnancy, mothers with a newly born child or a sole parent with young children and with limited family and financial support.⁷⁴⁰

- 7.172** The Conference of Leaders of Religious Institutes (NSW) (CLRI) noted that while home detention has advantages for Aboriginal women they are underrepresented in the Scheme, due to it being unavailable in rural and remote areas:

Home detention offers the particular advantage to Indigenous women of allowing them to stay in their communities and, if they have children, to continue to care for them. One of the reasons for the under representation of Indigenous women in home detention is that the scheme is not operated in rural and remote areas of NSW, which tend to have a higher concentration of Indigenous people. Extension to rural and remote areas could address this access problem.⁷⁴¹

- 7.173** The Office for Women expressed support for increased home detention for women:

The Office for Women supports a wider availability of home detention for women and an extension to rural and remote areas, particularly where women have difficulty in making child care arrangements.⁷⁴²

- 7.174** Other Inquiry participants identified how female offenders may be disadvantaged in relation to home detention even where it is available. For example, Dr Baldry noted that female offenders are disadvantaged because many do not have the support of family members to assist them in undertaking home detention:

Without question there are very serious issues for women in the use of home detention. Most women do not have partners who support them and by far the

⁷⁴⁰ Submission 34, p3

⁷⁴¹ Submission 18, p5

⁷⁴² Submission 48, p4

majority of women, probably 80 per cent, do not have the support of their family. There is much less support for women from families and, supposedly, partners than there is for males in the criminal justice system. Women are specifically disadvantaged in regard to home detention unless that home detention is served with particular support.⁷⁴³

- 7.175** Dr Baldry also noted that because of domestic violence issues, female offenders may be further disadvantaged in their ability undertake home detention:

The other issue for women is that if it is women who are being considered for home detention with a partner, which is unlikely anyway, all the evidence from Rowena Laurie's study, which was into Aboriginal women, and from an unpublished study in Corrective Services some years ago is that the huge number of women who are in relationships who are in prison suffer domestic violence, both physical and sexual violence. Home detention is unlikely to be an option with their partner.⁷⁴⁴

- 7.176** In the context of the difficulties faced by Aboriginal women, CRLI expressed support for engaging local community organisations to support the Department of Corrective Services in managing home detainees:

There are, however, problems both of the suitability of home detention in rural and remote areas, and of tailoring programs for Indigenous access within and outside cities. Home detention is hard to operate effectively in rural and remote areas, as it is difficult for caseworkers to maintain face to face contact with prisoners when their caseload is spread over a large geographical area. Corrective Services has acknowledged the need for a different methods for rural and remote areas, suggesting partnership with local community organisations as a way of managing adequate contact with prisoners. Such a model could potentially work well for Indigenous women, as there could be scope for Indigenous specific organisations to play a part in case management. Rehabilitation could possibly be more effective. Such partnerships should be explored by the committee.⁷⁴⁵

- 7.177** CLRI also noted that housing issues would need to be addressed in order for female Aboriginal offenders to be eligible for home detention:

For many Indigenous people, contact with community and extended family and clan groups is an important part of life. Restriction to the home, and limited contact with wider networks can pose the same problems of isolation as a prison sentence. If home detention were considered an option for an Indigenous woman in a rural or remote area, the Department of Corrective Services may also have to address housing problems. Home detention relies on access to and security of the technology associated with electronic surveillance. Appropriate housing or specialised facilities may need to be provided.⁷⁴⁶

- 7.178** Some evidence was received about the small number of female offenders undertaking home detention. The only statistics presented to the Committee are from the 1999 Review of the

⁷⁴³ Dr Baldry, Evidence, 6 June 2005, p27

⁷⁴⁴ Dr Baldry, Evidence, 6 June 2005, p27

⁷⁴⁵ Submission 18, p5

⁷⁴⁶ Submission 18, p5

Home Detention Scheme (paragraph 7.4) and they show that while the number of women participating in the Scheme at that time was much lower than men,⁷⁴⁷ the overall rate of female participation compared to the total female prison population who may be eligible for home detention is higher than that for men.⁷⁴⁸

- 7.179** While the report noted several factors that may have influenced the gender proportions, including trends in criminal activity, arrest rates and offender knowledge and awareness of home detention, it did not draw any conclusions as to the proportions.⁷⁴⁹ The Review stated that the reasons for women having the highest representation per capita of prison population ‘remains speculative’ and that ‘[f]urther monitoring and analysis is required’.⁷⁵⁰
- 7.180** The Committee notes that home detention appears to be a beneficial sentencing option for female offenders and has particular advantages for pregnant women or women with carer responsibilities. The Committee concurs with the CRLI that home detention also has particular benefits for Aboriginal women. The Committee is therefore concerned that home detention is not more widely available in rural and remote areas.
- 7.181** The Committee recommends that the Department of Corrective Services examine the uptake of home detention orders by female offenders, with a view to establishing the demand for home detention among female offenders both in metropolitan areas and rural and remote areas. The review should explore any barriers faced by female offenders in accessing home detention, such as a lack of family or social support, and identify ways to overcome those barriers.

Recommendation 39

That the Department of Corrective Services examine the uptake of home detention orders by female offenders to establish the demand for home detention among female offenders in rural and remote areas and metropolitan areas. The examination should seek to identify any barriers faced by female offenders in accessing home detention, such as a lack of family or social support, and identify ways to overcome those barriers.

⁷⁴⁷ The Review reported that significantly more men than women participated in the Scheme - of the 366 offenders placed on home detention during the study period, 82% were men and 18% were women, p12

⁷⁴⁸ People placed on home detention constituted 12% of the total prison population who may be eligible for home detention (excluding knowledge of previous criminal history). Women on home detention constitute 23% of female offenders who may be eligible while men on home detention represent 11% of male offenders who may be eligible: K Heggie *Review of the NSW Home Detention Scheme*, p14.

⁷⁴⁹ The report noted that: ‘[t]he gender proportion fluctuated throughout the program’s first 18 months of operation. For example, in April 1997, the gender proportion was 86% men and 14% women. In December 1997, the figure for women had risen to 25.5%. In August 1998, the participation figure for women had decreased to 15%: K Heggie, *Review of the NSW Home Detention Scheme*, p12.

⁷⁵⁰ K Heggie, *Review of the NSW Home Detention Scheme*, p14

Chapter 8 Back-end home detention

As explained in Chapter 1, the Committee had received separate terms of reference to inquire into the introduction of a 'back-end home detention scheme in NSW and resolved to examine those terms of reference within this report. This chapter undertakes that analysis.⁷⁵¹

Overview

What is back-end home detention?

- 8.1** Home detention can operate as a 'front-end' or a 'back-end' scheme, or both. In NSW home detention is currently a 'front-end' scheme whereby offenders can be sentenced to serve the full term of their custodial sentence in their home, rather than serving their time in gaol. The front-end scheme is examined in detail in Chapter 7.
- 8.2** 'Back-end' home detention refers to offenders serving the last portion of their sentence in their home, after having first served part of their term in gaol. At the back-end of a sentence, home detention may be incorporated as a distinct stage of the sentence or as part of parole, depending on how the scheme is established. As with front-end home detention, detainees must comply with many restrictive conditions and are closely monitored. A serious breach of conditions may result in the home detention order being revoked and the detainee returning to gaol to complete his or her sentence.

Consideration of the introduction of back-end home detention in NSW

- 8.3** The introduction of a back-end home detention scheme in NSW has been considered prior to the Committee's Inquiry. For example, the NSW Law Reform Commission explored the possibility of introducing a back-end scheme as part of its sentencing Inquiry (see paragraph 2.107). In its 1996 report, the Commission noted that there was general support in submissions for a back-end detention scheme in NSW, although different forms of operation were proposed.⁷⁵² Nonetheless, the Commission concluded that back-end home detention should not be introduced due to the difficulties of formulating 'a satisfactory scheme for back-end home detention without compromising the concept of truth-in-sentencing'.⁷⁵³ 'Truth-in-sentencing' is examined at paragraph 8.37-8.50.
- 8.4** The Legislative Council's Select Committee on the Increase in Prisoner Population (see paragraph 2.108) also considered back-end home detention during its 1999-2001 inquiry. The

⁷⁵¹ Unless otherwise specified, all references to submissions and hearing evidence in this chapter are references to the submissions made to the Inquiry into back-end home detention and the evidence given during that inquiry, rather than the Inquiry into community based sentencing options. See Appendix 5 for a full list of submission makers and witnesses who gave evidence during the Inquiry into back-end home detention.

⁷⁵² NSW Law Reform Commission, Report 79, para 7.30

⁷⁵³ NSW Law Reform Commission, Report 79, para 7.31

Committee noted the Law Reform Commission's work and concluded that back-end home detention, as a way of reducing the prison population, should be revisited once the current front-end scheme had been assessed.⁷⁵⁴ As identified in Chapter 7, the Department of Corrective Services assessed the front-end scheme in 1999 and a further assessment is currently being undertaken.

Back-end home detention in other jurisdictions

- 8.5** The terms of reference include an examination of the experience of other jurisdictions in implementing back-end home detention schemes. The Committee notes that back-end home detention is available in several Australian and overseas jurisdictions including Queensland, South Australia, Western Australia, Victoria and New Zealand.
- 8.6** The Committee had the benefit of receiving written submissions and oral evidence from Victoria and Queensland.⁷⁵⁵ The experience of various other jurisdictions in relation to specific aspects of back-end home detention schemes was also raised in submissions and in evidence. Where relevant, the experience of other jurisdictions is noted throughout this Chapter.

Advantages and disadvantages of back-end home detention

- 8.7** The terms of reference include consideration of the 'perceived benefits and disadvantages' of back-end home detention.

Advantages

- 8.8** The submissions and oral evidence received by the Committee which addressed the 'benefits' of back-end home detention focused on the advantages of this form of custodial sentence compared to full-time imprisonment. In this regard, the Committee notes that the alternative to an offender serving back-end home detention is to continue to serve the remainder of his or her sentence in full-time custody until eligible for external leave programs or parole.
- 8.9** Many of the benefits and disadvantages of back-end home detention that were identified by Inquiry participants are similar to those identified in relation to the front-end home detention scheme that currently exists in NSW. The benefits are examined in detail in Chapter 7 and, in summary, include that home detention:
- reduces the prison population
 - is cost effective compared to full-time imprisonment in a custodial institution

⁷⁵⁴ Select Committee on the Increase in Prisoner Population, *Final Report*, p104

⁷⁵⁵ Submission 15, Mr David Daley; Submission 20, Queensland Department of Corrective Services; Mr Daley, Director, Community Correctional Services, Corrections Victoria, Evidence, 18 March 2005 (Mr Daley appeared before the Committee as an individual but 'with the support and encouragement' of Corrections Victoria: p19); and Ms Kate Holman, Acting Executive Director, Community Corrections, Queensland Department of Corrective Services, Evidence, 18 March 2005.

- improves an offender's rehabilitation and ability to reintegrate into society
- reduces recidivism
- has a positive impact on an offender's family
- has a positive effect on offenders by maintaining employment, retaining family links and avoiding potential negative experiences in gaol.

8.10 The benefits and disadvantages that particularly relate to home detention at the back-end of an offender's sentence are examined in the following paragraphs.

Improved reintegration after full-time imprisonment

8.11 The main benefit of back-end home detention identified by Inquiry participants is that it can assist an offender to reintegrate back into society after being in gaol. For example, the Department of Corrective Services stated:

The great benefit of back-end home detention is that an inmate on back-end home detention is better prepared for release than is an inmate who has not had the opportunity to live at home full-time prior to release. The better the inmate is prepared for release the more likely is the inmate to lead a lawful existence and not re-offend.⁷⁵⁶

8.12 The Attorney General's Department also noted the reintegration benefits of back-end home detention, particularly the ability for offenders to re-establish relationships with their families:

It can improve the rehabilitation and reintegration of prisoners into society at the end of their sentence. It can enable offenders to re-establish employment and contact with families. This is especially significant for offenders with children.⁷⁵⁷

8.13 Legal Aid NSW described home detention as a 'significant step back into the community':

There has been significant ongoing concern at the increasing prison population and the effectiveness of our gaol system in rehabilitating inmates. The strictness of home detention coupled with the physical placing of prisoners within the family home, or at least in an environment within the community, would provide a significant step back into the community. This support period would cushion the impact as the prisoner moves from a non-parole period to a parole period. In this way the Legal Aid NSW is supportive of back-end home detention.⁷⁵⁸

8.14 A submission received from an inmate at the Metropolitan Medical Transit Centre, which is part of the Long Bay Correctional Complex, advised the Committee that benefits of back-end home detention include that it:

[p]rovides a potential re-introduction of inmates back into the workforce: Given that unemployment and poor education are the predominate contributors to increasing

⁷⁵⁶ Submission 14, NSW Department of Corrective Services, p23

⁷⁵⁷ Submission 12, NSW Attorney General's Department, Criminal Law Review Division, p1

⁷⁵⁸ Submission 11, Legal Aid Commission of New South Wales, pp1-2

recidivism, then having offenders experiencing work as part of the programme contact is a desirable ingredient.⁷⁵⁹

- 8.15** The Office of the Director of Public Prosecutions (DPP) noted serving back-end home detention allows offenders to take responsibility for their own reintegration:

[back-end home detention] encourages offenders to take responsibility for their own re-integration. Offenders may learn new skills and develop self-discipline and organisational skills while on home detention.⁷⁶⁰

- 8.16** Mr David Daley, the Director of Community Correctional Services with Corrections Victoria noted that back-end home detention can play an important role in the ‘transitional management process’:

... I think the real benefit of home detention, particularly in Victoria where it can segue into parole, is that it is part of the whole transitional management process. I think there is abundant international evidence now which says that graduated release into the community by and large works better than simple release cold at either end of sentence. ... I think the other thing which home detention has some strengths at, is that given the intensity of the supervision and the engagement with the offender and with the family at the early stage immediately after sentencing, there are very strong opportunities to really manage that transition process well rather than, for example, through parole where a person might report a couple of times a week and there might be a home visit once a week. In those first few months when there is a lot of testing out and there are people re-familiarising with each other and trying to come to terms with the intensity of the regime, that level of support does seem to be beneficial.⁷⁶¹

- 8.17** In relation to rehabilitation and reintegration into society, the NSW Council for Intellectual Disability asserted that back-end home detention would be particularly beneficial for offenders with an intellectual disability.⁷⁶² Mr Jim Simpson, the Manager of the Council, stated:

Home detention, it would seem to me, in particular back-end home detention, would have great potential to allow for a graduated transition from prison for a person with an intellectual disability, getting the person used to a more stable life in the community and helping the person readjust to that life in the community, while still having some control of the person, and the person being aware that if I do not comply with the rules then I may be sent back to prison. If those controls are not there, we all too often see people, even if support is offered, taking off because they are finding it really hard to adjust to this idea of a more stable lifestyle compared to what they had before they went gaol.⁷⁶³

Incentive for good behaviour in prison

- 8.18** Another benefit of home detention at the back-end of a gaol term is that it can provide motivation for good behaviour in prison and thus contribute to rehabilitation. In this regard,

⁷⁵⁹ Submission 5, Name suppressed at request of author, p2

⁷⁶⁰ Submission 6, NSW Director of Public Prosecutions, p1

⁷⁶¹ Mr Daley, Evidence, 18 March 2005, p21

⁷⁶² Submission 16, NSW Council for Intellectual Disability, p1

⁷⁶³ Mr Simpson, Evidence, 17 March 2005, pp18-19

the Attorney General's Department noted in its submission that back-end home detention 'provides an incentive for offenders to behave whilst in serving time in prison.'⁷⁶⁴

8.19 Similarly, Ms Pauline Wright, Chair of the Criminal Law Committee of the Law Society of NSW stated that some inmates may see back-end home detention as a reward for good behaviour:

... it helps with prisoner rehabilitation in a very clear way if a prisoner thinks that that is a possibility in that sense of a reward. Sometimes life inside a prison is very difficult, particularly for some types of prisoners, and the possibility of serving the rest of your sentence in a less threatening environment could be a real incentive to those prisoners to rehabilitate, and that can work very well.⁷⁶⁵

Disadvantages

8.20 Most of the disadvantages identified by Inquiry participants were disadvantages of home detention in general, and did not relate specifically to home detention at the back-end of a term of imprisonment. Those disadvantages are examined in detail in Chapter 7 and, in summary, include that home detention:

- poses a danger to the community because of the opportunity to re-offend
- is a 'soft' sentencing option
- has a negative impact on an offender's family
- has a 'net-widening' effect and
- may lead to an increase in guilty pleas.

8.21 In addition, some disadvantages specific to home detention at the *back-end* of a sentence were also raised, as discussed below.

Conflict with truth-in-sentencing

8.22 One of the chief criticisms made of back-end home detention during the Inquiry is that it conflicts with the principle of truth-in-sentencing. As this issue is one of the specific terms of reference for this Inquiry it is examined in a separate section below (see paragraph 8.37-8.50).

Potential for increased length of sentences

8.23 The Office of the DPP noted that one perceived disadvantage of back-end home detention is the potential for it to lead to an increase in the length of sentences:

Increased length of sentences if sentencing officers "added on" an amount to the non-parole period of the sentence in anticipation that the last few months of it would be served on home detention. This would produce unfairness if that offender was not ultimately released to home detention.⁷⁶⁶

⁷⁶⁴ Submission 12, p1

⁷⁶⁵ Ms Wright, Evidence, 18 March 2005, p14

⁷⁶⁶ Submission 6, p1

8.24 Legal Aid NSW similarly noted that ‘there is also a view that an intended consequence of combining non-custodial options with custodial options is that it raises a real danger that sentences will in practice become more severe.’⁷⁶⁷

8.25 While it is difficult to predict whether this is likely to occur, the Committee does note that this concern over ‘sentencing creep’ has also been raised in relation to the use of other community based sentences. The Committee has examined this issue in some detail in terms of suspended sentences in Chapter 5.

Discrimination against prisoners not eligible

8.26 Legal Aid NSW noted that another disadvantage of back-end home detention, one common to many forms of community based sentencing, is that it disadvantages those who are not eligible, due to personal circumstances or lack of availability:

The disadvantages of back-end home detention would include a perceived discrimination against a significant portion of the prison population who would otherwise not be eligible for home detention. This group could include those suffering from mental health conditions, indigenous people and socially isolated persons who may otherwise not fulfil the criteria of home detention. Another disadvantage may be the limited opportunities as to the availability of home detention in remote areas of the State leading to an inconsistent treatment of offenders.⁷⁶⁸

Relationship between back-end home detention and external leave programs

8.27 The terms of reference ask the Committee to examine the relationship between back-end home detention and existing external leave programs. External leave programs are run by the Department of Corrective Services and are designed to prepare inmates for their release. Inmates must reach a certain security classification before becoming eligible for external leave and must satisfy other conditions while on leave. External leave programs include:

- *Work Release Stage 1* – Inmates who have achieved the lowest possible security classification may apply for and undertake jobs in the community. Inmates are released from custody each work day and return after work. Inmates are monitored. Inmates are able to go on weekend leave *occasionally*.
- *Work Release Stage 2* – Work Release Stage 1 combined with *weekly* weekend leave.
- *Education Leave Stage 1* – Similar to Work Release Stage 1 except that, instead of going to a place of employment, the inmate goes to a place of education.
- *Education Leave Stage 2* – Similar to Work Release Stage 2.
- *Vocational Training Leave* – Similar to Work Release Stage 1 except that the inmate does not get a wage.

⁷⁶⁷ Submission 11, p2

⁷⁶⁸ Submission 11, p2

- *Life Skills Leave* – Similar to Work Release Stage 1 except that the inmate goes to a community based life skills program which teaches participants how to re-adjust to normal community life, how to prepare meals, clean, budget, etc.
- *Work Experience Leave* – Similar to Work Release Stage 1 except that the inmate does not get a wage.
- *Community Based Projects Leave* – Similar to Work Release Stage 1 except that the inmate does not get a wage.
- *Day Leave* – An inmate is released from prison for the day and must be collected from and returned to the correctional centre by his or her sponsor on the same day.
- *Weekend Leave* – An inmate who has successfully completed three day leaves may apply for weekend leave.⁷⁶⁹

8.28 In general, inmates must progress through various security classification levels in order to become eligible for external leave, as described by the Department of Corrective Services:

... there are separate classification systems for men and women. Classification is based upon factors such as the nature of the offence, the length of sentence, the assessment of the offender's risk and the case plan devised to manage the offender and reduce the risk of re-offending upon release. For male offenders, classification moves through 3 levels within Maximum Security (A), Medium Security (B) to Minimum Security (C). Therefore, in order to be considered for an External Leave Program, an inmate has to have worked his way through the system to a Minimum Security C2 classification. He needs to have addressed his offending behaviour, be in the last 18 months of his earliest release date and have co-operated well with the correctional regime.

For female offenders, the classification system operates significantly differently – there is no standardised objective classification system. All women in prison are assessed to be Category 2 (require constant level of supervision if outside the walls of the prison) and are then moved to Category 3 (it requiring close confinement) or Category 1 (at which point they can be considered for the External Leave Program).⁷⁷⁰

8.29 Ms McComish noted that the classification process is designed to decrease the likelihood of re-offending:

There is a great deal of evidence to show that this kind of structured approach to community reintegration is intended to decrease the likelihood of re-offending by re-establishing relationships with the family and the community, and providing linkages to employment and, if required, ongoing community programs.⁷⁷¹

8.30 The benefits of external leave programs to inmates, their families and the community are described by the Department as follows:

⁷⁶⁹ Submission 14, pp7-11

⁷⁷⁰ Answers to questions on notice taken during evidence 17 March 2005, Department of Corrective Services, question 20

⁷⁷¹ McComish, Evidence, 17 March 2005, pp14-15

External leave programs are extremely beneficial for those inmates who are able to participate in them. An inmate who has participated, for example, in day leave or weekend leave is much better prepared for re-entry into the community than an inmate who goes straight from prison to parole, or straight from prison to full freedom. External leave programs are also extremely beneficial for an inmate's family. The wider community also benefits from external leave programs. Research has shown that an inmate who has participated in work release – the most common form of external leave, apart from day leave and weekend leave – is far less likely to re-offend than an inmate who has not participated in work release.⁷⁷²

- 8.31** In its submission, the Department of Corrective Services compared existing external leave programs and back-end home detention in terms of the amount of time that each allowed offenders in the community:

Whereas under back-end home detention an inmate would be in the community 24 hours per day 7 days per week, under *existing* external leave programs, an inmate can only achieve a maximum time in the community of 24 hours on Sundays, Fridays and Saturdays and about 12 hours on Mondays, Tuesdays, Wednesdays and Thursdays. As explained earlier in this submission, an inmate on work release Stage 2 or education leave Stage 2 must return to a correctional centre on Mondays Tuesdays, Wednesdays and Thursdays.⁷⁷³

- 8.32** The Department also noted the difference between revocation of external leave and current front-end home detention, the latter requiring a decision of the Parole Authority:

... a significant difference between existing external leave programs and home detention is that, whereas the Commissioner or his delegate is able to revoke a local leave permit immediately (and thus bring the inmate back to prison immediately), the Parole Board necessarily takes some time to revoke a home detention order.⁷⁷⁴

- 8.33** In terms of the potential relationship between existing external leave programs and back-end home detention some Inquiry participants advised that the two could 'co-exist'. The Committee notes that the relationship would depend on the way back-end home detention operates and the eligibility criteria. For example, in its submission, the Legal Aid Commission of New South Wales noted that, if the criteria for back-end home detention were based on the offence committed as in the current front-end scheme, some offenders would be eligible for external leave programs but not back-end home detention, while others would be eligible for both:

It is understood that the New South Wales Department of Corrective Services has authority to release inmates on what are called temporary release programs. This permits leave from gaol without a guard for purposes of study leave, work release, day leave and weekend leave. Unlike home detention, the criteria is the security classification as opposed to the offence that led to the conviction. Currently inmates must be a minimum C3 security classification and be around six months from the

⁷⁷² Submission 14, pp3-4 (citing: J McHutchinson, *Working Towards a Better Future: A study into Inmate Employment in the NSW Correctional system*, Research Publication No 34, NSW Department of Corrective Services, November 1995

⁷⁷³ Submission 14, p23

⁷⁷⁴ Submission 14, p24

expiry of the non-parole period. There are strict rules surrounding this release. Home detention is currently not available for offences such as sexual assaults, armed robbery, serious assaults and commercial drug offences. If this were also the case with any back-end home detention, then it would be necessary that existing external leave programs continued. However, in many cases persons who were otherwise able to take advantage of temporary release programs may be eligible for back-end home detention. ...⁷⁷⁵

- 8.34** Some Inquiry participants suggested that there could be a ‘progression’ from existing external leave to back-end home detention. For example, Mr Andrew Jaffrey stated: ‘[o]nce day leaves are completed, weekend leaves are completed and so the progression goes on to a logical conclusion.’⁷⁷⁶ Similarly, the Public Defenders Office suggested that there could be a ‘natural progression’ from existing leave programs to home detention:

There would be an easy fit between day and weekend leave, which I understand are available for persons who achieve a C3 classification, and a home detention scheme. Indeed there seems to be a natural progression from leave to home detention which would allow a supervised and controlled return to the community.⁷⁷⁷

- 8.35** In terms of the possibility of linking existing leave with back-end home detention, the Committee notes the concerns expressed by Mr David Daley of Community Correctional Services Victoria, that linking back-end home detention to other leave or post-release programs can create additional complexity in program structure:

If it is a prelude to other orders, the system has to be designed to ensure compatible program criteria and smooth passage from one order to the other. For example, if a home detainee responds satisfactorily but for any reason has the next stage of the release program (whether parole or some other option) deferred, this can cause considerable practical problems for what to do in those circumstances. This suggests that if home detention has a defined relationship to other types of prison leave or release, there should be a uniform or at least consistent management process that guarantees orderly passage through the system. Placing all relevant release decisions in the hands of one authority is seen as the simplest means of achieving this end.⁷⁷⁸

- 8.36** The Committee notes that there appears to be some scope for utilising the existing classification system used for assessing an offender’s eligibility for external leave programs in a back-end home detention scheme. This issue is examined further later in the Chapter.

Impact of back-end home detention on truth-in-sentencing

- 8.37** The terms of reference include consideration of the impact of back-end home detention on the principle of truth-in-sentencing. ‘Truth-in-sentencing’ refers to the principle whereby the length of time specified by a court for a prison sentence should be the length of time actually served by the offender. Conflicting views were presented to the Committee about whether

⁷⁷⁵ Submission 11, p2

⁷⁷⁶ Submission 18, p10

⁷⁷⁷ Submission 13, p1

⁷⁷⁸ Submission 15, p8

back-end home detention was consistent with this principle and what this meant for the appropriateness of introducing a back-end home detention scheme in NSW.

Truth-in-sentencing

- 8.38** In its submission, the Department of Corrective Services defined the principle of truth-in-sentencing to mean that ‘a sentence imposed by a court is the sentence actually served by an offender.’⁷⁷⁹ In other words, an offender should not be released earlier than the time specified, either through a process of remissions or other ways in which an offender may secure an early release. The Department traced the introduction of the principle to the *Sentencing Act 1989*:

Prior to the commencement of the *Sentencing Act 1989*, inmates in New South Wales received automatic remissions, which effectively reduced both their head sentences and their non-parole periods by about one third each. Moreover, prior to 1989, courts often combined long head sentences with short non-parole periods. The *Sentencing Act 1989* abolished remissions and put a curb on the imposition of long head sentences with short non-parole periods.⁷⁸⁰

- 8.39** The Committee notes that the *Sentencing Act 1989* did not include a free-standing principle that sentences should be ‘truthful’. Rather, Parliament gave effect to the principle of truth-in-sentencing by abolishing automatic remissions for good behaviour and by requiring sentencing courts to state a non-parole period for custodial sentences.⁷⁸¹ The impact of the *Sentencing Act 1989* is further explained by Rowena Johns, as follows:

The *Sentencing Act 1989* (now repealed) introduced a regime that is commonly referred to as ‘truth in sentencing’. One of its major features was the abolition of remissions, which involved the deduction of time from an offender’s sentence for good behaviour. Instead, sentences of imprisonment had to identify the period to be actually served in custody. This was referred to as a ‘fixed term’ if no parole period was specified. Alternatively, the sentence could be divided into a ‘minimum term’ and a period during which the prisoner was eligible for release on parole, known as an ‘additional term’. Where the total sentence was 3 years or less, judges had the authority to direct that an offender be released on parole at the expiration of the minimum term. By contrast, offenders sentenced to over 3 years imprisonment were assessed by the Parole Board for release at the end of the minimum term.⁷⁸²

- 8.40** The Corrective Services Minister at the time, the Hon Michael Yabsley MP, explained the purpose of the reforms as follows:

... the central purpose of this legislation is to restore truth in sentencing. It is designed to bring certainty to sentencing in this State. It is designed to ensure that the public and prisoners know exactly when a sentence shall commence and exactly when a prisoner will be eligible for consideration for parole.⁷⁸³

⁷⁷⁹ Submission 14, p24

⁷⁸⁰ Submission 14, p24

⁷⁸¹ Legislative Council, New South Wales, *Hansard*, 30 November 1999, p3807

⁷⁸² R Johns, *Sentencing Law: a review of developments 1998-2001*, NSW Parliamentary Library Research Service Briefing Paper No 2/02, pp50-51

⁷⁸³ Legislative Assembly, New South Wales, *Hansard*, 10 May 1989, p7910

- 8.41 The Committee also notes that, while the *Sentencing Act 1989* has since been repealed, Parliament has continued to endorse the principle of truth-in-sentencing. The then Attorney-General, the Hon Jeff Shaw MLC, told Parliament in 1999 that ‘truth in sentencing was a decision reached some years ago, and the current Government has not sought to change that fundamental position.’⁷⁸⁴

Impact of back-end home detention on truth-in-sentencing

- 8.42 Several Inquiry participants viewed this term of reference from the perspective that truth-in-sentencing related to the *form* of custody as well as the length of time served. For example, the Office of the Director of Public Prosecutions stated:

If by the principle of “truth in sentencing” is meant that an offender sentenced to a full time custodial sentence must remain in gaol in full time custody for the whole of the fixed term or the whole of the non-parole period, then back-end home detention is self-evidently inconsistent with that concept: it is a form of early release from prison on strict conditions, but these can never equate to the restrictions on liberty entailed in a full time custodial sentence.⁷⁸⁵

- 8.43 Related arguments were made as to whether home detention was a form of custody or not, with most participants stressing that it was. For example, the Public Defenders Office argued that back-end home detention does not impact on the principle of truth-in-sentencing as the offender remains in a custodial situation:

The restriction of liberty would be a continuing punishment. Truth in sentencing would not necessarily be of concern since an offender would remain in a custodial situation albeit at home.⁷⁸⁶

- 8.44 The argument that back-end home detention is a custodial sentence and therefore does not conflict with truth-in-sentencing was also made by Ms Wright from the Law Society:

... home detention is not freedom. Home detention is custody. To say that back-end home detention offends against the principle of truth in sentencing does not make sense. If you see it correctly, as it ought to be seen, as a form of custody you are not shortening a sentence at all by requiring that part of it be served at home. Make no mistake about it, the strictures on a prisoner serving detention at home are quite monitored and quite strict.⁷⁸⁷

- 8.45 The Committee notes that while much of the discussion in submissions and in oral evidence focused on whether or not home detention should properly be considered a form of imprisonment, the principle of truth-in-sentencing relates to ensuring that the offender serves the full length of the non-parole period rather than the manner in which the time is served. The second reading speech to the *Crimes (Sentencing Procedure) Act 1999* is instructive in this regard:

⁷⁸⁴ Legislative Council, New South Wales, *Hansard*, 16 September 1999, p603

⁷⁸⁵ Submission 6, pp1-2

⁷⁸⁶ Submission 13, p3

⁷⁸⁷ Ms Wright, Evidence, 18 March 2005, p15

Detention can be by way of full-time imprisonment, home detention or periodic detention. In the ordinary course of events, the non-parole period will be three-quarters of the term of the sentence unless the court decides there are "special circumstances", in which case it can impose a lesser non-parole period. Crucial changes introduced by the *Sentencing Act 1989* - the abolition of all remissions and that three-quarters of the term must be spent in detention unless there are special circumstances - are in no way changed by this or any other amendment. Truth in sentencing will remain.⁷⁸⁸

- 8.46** In terms of consistency with the principle of truth-in-sentencing, back-end home detention can be compared with existing forms of external leave which are not seen to conflict with the principle. In this regard Mr Brian Sandland, the Director of Criminal Law at the NSW Legal Aid Commission, stated:

If I can answer that question by putting the current arrangements in context, people who are sentenced to a term of imprisonment now may become eligible for study leave, work-related leave, and other forms of leave, depending on their security classification to prepare them for re-entry back into the community. That is not regarded as offending the truth in sentencing concept so to that extent, home detention, back-end home detention also, if it was introduced for those purposes—namely, facilitating a staged re-entry into the community—could be seen as being beneficial, not only for the offender but for the community itself.⁷⁸⁹

- 8.47** Another issue raised in the context of truth-in-sentencing was the relevance of the authority that would determine whether an offender should go on back-end home detention. Mr Sandland suggested that in order to ensure truth-in-sentencing is not infringed, the original sentencing court should determine whether an offender is eligible for back-end home detention at the time of sentencing:

However, to ensure that the truth in sentencing principle remained intact to the extent that it could if you introduced it, I would have thought that perhaps the original sentencing court could give an indication as to whether or not, if this scheme were introduced, it thought that this particular offender for this offence should be considered for back-end home detention. In that way it would be in the contemplation of the court when handing down the original sentence.⁷⁹⁰

- 8.48** Legal Aid's submission to the Committee also noted that the impact of back-end home detention on the principle of truth-in-sentencing was dependant on the manner in which back-end home detention was determined to be part of an offender's sentence:

It is agreed that back-end home detention would impact on the principles of truth in sentencing especially if the sentencing court is not the authority that determines whether an offender may proceed to home detention. The debate that lead to truth in sentencing in essence occurred because the courts consistently held that remissions could not be taken into account when setting the non parole period. This was because the offender had no legally enforceable right to remissions and the courts were not at liberty to extend the non-parole periods by an amount representing the likely discount on sentence which would be obtained through remissions. Clearly if the sentencing

⁷⁸⁸ Legislative Council, New South Wales, *Hansard*, 30 November 1999, p3807

⁷⁸⁹ Mr Sandland, Evidence, 17 March 2005, p39

⁷⁹⁰ Mr Sandland, Evidence, 17 March 2005, p40

court is the appropriate authority to determine whether an offender may proceed to back-end home detention then the principle of truth in sentencing would be maintained. If however, the determining authority was the Parole Board, then this could be seen to be contrary to the concept of truth in sentencing. To help overcome this the sentencing court could at the time of sentencing order that back-end home detention should not be available in a particular case.⁷⁹¹

Committee view

- 8.49** Based on stakeholder submissions and the evidence presented to the Committee during the hearings, the Committee has formed the view that back-end home detention is not necessarily inconsistent with truth-in-sentencing. As truth-in-sentencing applies to parole and non-parole periods of a sentence of imprisonment, rather than the manner of detention, the release of a prisoner to back-end home detention does not of itself infringe the principle.
- 8.50** The Committee notes, however, the point raised by the Legal Aid Commission that the manner in which an offender's eligibility to serve back-end home detention is determined is relevant to truth-in-sentencing. The Committee is required by the terms of reference to consider the appropriate authority to determine whether an offender may proceed to home detention. That examination is undertaken in paragraph 8.79-8.113 and the issue of truth-in-sentencing is taken up in that discussion.

A back-end home detention scheme for NSW?

Success of the current front-end scheme

- 8.51** An examination of whether it is in the public interest to introduce a back-end home detention scheme necessarily includes consideration of the success of the current front-end scheme. In addressing this question the Committee has had the benefit of views expressed to it during its Inquiry into back-end home detention and its Inquiry into community based sentencing options.
- 8.52** The examination of the current front-end home detention scheme in Chapter 6 indicates that there is general support for the scheme. The Department of Corrective Services stated in its submission that home detention as currently operated in NSW is 'a great success'.⁷⁹² There is also a strong desire among Inquiry participants to extend the current scheme to additional geographical areas within NSW and to make it more accessible to people from disadvantaged groups that may not meet the eligibility or suitability criteria because of their personal circumstances or location. The Committee has made several recommendations in this regard.

⁷⁹¹ Submission 11, pp3-4

⁷⁹² Submission 14, p5

Support for a back-end home detention scheme in NSW

8.53 Most submissions made to the Inquiry into back-end home detention expressed support for the introduction of a back-end scheme in NSW. For example, the Public Defender, Mr Paul Winch stated that 'in my view the introduction of a back-end home detention scheme has much to recommend it.'⁷⁹³ Mr Daley stated:

... back-end home detention does have a legitimate place in the offender management spectrum. Some of its alleged shortcomings are misperceived, but most others can be addressed through clarity of purpose and integrity of process.⁷⁹⁴

8.54 The Committee heard evidence from an offender, Mr Andrew Jaffrey, who at that time was serving his sentence by way of front-end home detention. He expressed support for the introduction of a back-end scheme.⁷⁹⁵

8.55 The Committee received submissions from two people whose partners are currently serving custodial sentences. Both expressed support for the introduction of back-end home detention and indicated that their partners would hope to avail themselves of such a scheme if introduced, particularly as they face medical issues that could be addressed while living in the community. For example, one of the submission makers stated:

XXX has served nearly 6 years of his sentence and is due for parole release in November 2006. I reside at XXX where XXX would be able to undertake the home detention programme for the remainder of his sentence. XXX is waiting to donate a kidney to his cousin and is the only compatible donor available. In his current situation it is impossible for him to have the operation due to his being under protective custody and would not be returned to Kirconnel. We feel that if he was accepted into the home detention programme he could donate the kidney and recover at home.⁷⁹⁶

My husband XXX is an inmate at Kirk Connell Correction Centre and has a current classification as a C3 inmate, this means he comes home on a fortnightly basis on the weekend. ... If the option of back-end home detention was available for my husband, I know that this would be a great benefit not only to his health, but to our family; we have 3 children ... We greatly appreciate the program he is on, as he is able to slowly get used to life at home, and to the routine of the community, this has been able to assist the whole family in functioning as a unit again. I feel that back end home detention is a perfect next step to get used to the every day life at home and being a full time parent again. ...We appreciate Law and Justice in looking into this option and feel that for inmates like my husband whom are serving a long term out of the community and who have gone through the rigorous interviews to have been trusted to be classified as a C3, and who have a supportive family unit on the out side, should be able to have the option of serving the back end of their sentence in their home environment.⁷⁹⁷

⁷⁹³ Submission 13, p2. See also Submission 8, Ms Kathryn Aiken and Submission 9, Mrs Katrina Froome.

⁷⁹⁴ Submission 15, p7

⁷⁹⁵ Submission 18, p1 and Mr Jaffrey, Evidence, 17 March 2005

⁷⁹⁶ Submission 50, Name suppressed at request of author (Inquiry into CBS), p1

⁷⁹⁷ Submission 51, Name suppressed at request of author (Inquiry into CBS), pp1-2

- 8.56** The NSW Council for Intellectual Disability expressed support for a back-end home detention scheme for its potential to ‘reduce the particular difficulties that prisoners with intellectual disabilities have in reintegrating into the community in a way that reduces the prospects of recidivism.’⁷⁹⁸
- 8.57** Some participants qualified their support in relation to the way in which back-end home detention would operate. For example, the Law Society of New South Wales expressed support for ‘the introduction of a form of back-end home detention that is exercised by the court that originally sentenced the offender.’⁷⁹⁹ See paragraph 8.79-113 for further discussion of the authority to determine eligibility for back-end home detention.

Opposition to a back-end home detention scheme in NSW

- 8.58** A small number of submissions specifically opposed the introduction of a back-end home detention scheme in NSW. For example, Justice Action opposed back-end home detention on the basis that it would ‘increase the use of imprisonment as a sentencing option’ and that ‘co-opting families into the State’s role as gaoler is divisive and damaging for families’.⁸⁰⁰ The Indigenous Social Justice Association also objected to back-end home detention:

The Indigenous Social Justice Association, Inc. (ISJA) opposes the proposal to introduce home detention on the grounds that it will further skew the NSW justice system against Indigenous Australians; further criminalize Indigenous Communities; increase the number of all peoples subject to detention orders in NSW and is most unlikely to stem the ongoing increases in the NSW gaol population.⁸⁰¹

- 8.59** In addition, the Department of Corrective Services recommended against introducing a back-end home detention scheme in favour of extending existing leave programs. The Department proposed:

... extending existing external leave programs so that eligible and suitable minimum security inmates nearing the end of their non-parole periods may live and work, or live and study, in the community on a 24 hour per day, 7 day per week basis under strict monitoring. In the Department’s view, this proposal has all the benefits of back-end home detention, but unlike back-end home detention, can be implemented without legislative change.⁸⁰²

- 8.60** In summary, the Department’s proposal contains the following elements:
- an extension of its ‘long standing and proven’ external leave programs to create a third stage to be called ‘Stage 3 external leave’
 - an inmate who has shown that he or she can comply with Work Release Stage 2 or Education Leave Stage 2 can progress to Stage 3 to be allowed to go home

⁷⁹⁸ Submission 16, p1

⁷⁹⁹ Submission 3, The Law Society of New South Wales, p1

⁸⁰⁰ Submission 10, Justice Action, p1

⁸⁰¹ Submission 21, Indigenous Social Justice Association Inc, p1

⁸⁰² Submission 14, covering letter

not only every weekend but also on week nights ie 24 hrs per day, 7 days per week

- the inmate would continue to be ‘case managed’ on Stage 3 and would remain subject to electronic monitoring, random physical checks, random telephone checks, random alcohol tests and random urine analysis
- unlike eligibility for front-end home detention, where offenders convicted of certain offences are excluded, eligibility for Stage 3 would be based on an inmate progressing through the offender classification levels, and would therefore be less strict.⁸⁰³

8.61 The Department advised the Committee as to how its proposed Stage 3 differs from back-end home detention:

A Stage 3 external leave program as described in the Department’s submission does not differ significantly in the approach to case management and monitoring from a back-end home detention model such as is applied in other jurisdictions.

The focus of the program is different in that a Stage 3 program assumes that considerable work has been done to establish the offender in the community in Stages 1 and 2 with consequent reduction of risk to the community whereas back-end home detention typically involves a level of monitoring and intervention which would not be required in this proposed model.

A difference is noted in regards to the eligibility criteria which would be required of a back-end home model as compared to the current NSW front end.

It is also markedly different, as noted in the role of the Commissioner – a difference which affects the process of referral, the mechanism or authority for granting the order and the process of revocation.⁸⁰⁴

Committee view

8.62 Support for back-end home detention to be included in the range of community based sentencing options available was expressed by the majority of participants in the Inquiry into back-end home detention. As an alternative to spending the full term of a sentence in prison, the ability to serve the last portion of imprisonment in the home has a number of benefits. Most of the benefits are common to home detention in general, such as reducing the prison population, cost effectiveness and the benefits to the offender in being able to re-establish family and community links and seek employment.

8.63 Submissions highlighted that back-end home detention also improves an offender’s ability to reintegrate into the community after a period of full-time imprisonment. The Committee refers again to the Department of Corrective Services’ statement that:

⁸⁰³ Submission 14. See Appendix 6 for further detail about the Department’s proposal.

⁸⁰⁴ Answers to questions on notice taken during evidence 17 March 2005, Department of Corrective Services, Question 18

the great benefit of back-end home detention is that an inmate on back-end home detention is better prepared for release than is an inmate who has not had the opportunity to live at home full-time prior to release. The better the inmate is prepared for release the more likely is the inmate to lead a lawful existence and not re-offend.⁸⁰⁵

- 8.64** The Committee acknowledges, however, that home detention, whether back-end or front-end, is not a suitable or preferable option for all offenders. The Committee notes in this regard the evidence presented to the Inquiry into community based sentencing about the cultural appropriateness of home detention for Aboriginal people in rural and remote areas (discussed in Chapter 7).
- 8.65** The Committee notes that the objections to back-end home detention by Justice Action and the Indigenous Social Justice Association do not appear to reflect the fact that back-end home detention is a means by which an inmate, who would otherwise remain in custody for the *full term* of his or her sentence, can serve the latter portion of the sentence at home rather than in custody. In this regard, back-end home detention would not increase the use of imprisonment as a sentencing option or increase the overall prison population. Concerns regarding the impact of home detention on Aboriginal offenders are examined in Chapter 7.
- 8.66** The Committee carefully considered the Department of Corrective Services' proposal for an expanded external leave program in lieu of introducing a back-end home detention scheme. For reasons that relate to the Committee's views on the appropriate authority to make decisions regarding an offender's eligibility for back-end home detention, the Committee does not support the Department's proposal. The issue of the appropriate authority is examined in the following section.
- 8.67** The Committee acknowledges the Department's point that legislative change would be required to implement a back-end home detention scheme but does not consider that to be a disincentive to recommending the introduction of a new community based sentencing option that may provide benefits to offenders and the community alike.
- 8.68** The Committee is also of the view that concerns about the impact of back-end home detention on the principle of truth-in-sentencing can be overcome by the manner in which a back-end scheme operates and, particularly, the authority that is designated to make decisions about whether an offender can proceed to back-end home detention.
- 8.69** The Committee acknowledges that back-end home detention has both benefits and potential disadvantages, as has been pointed out in the submissions to this Inquiry and in evidence at the hearings. The Committee is of the view that, with further consideration given to addressing any potential disadvantages (including those discussed in relation to front-end home detention in Chapter 7), a back-end home detention scheme would be desirable, in terms of rehabilitation of offenders, the reintegration of offenders in the community and the to potentially reduce recidivism.
- 8.70** The Committee notes that the introduction of a back-end home detention scheme would add to the range of penalties a court may draw upon when determining the appropriate sentence for an offender. The more options a court has, the better able it is to identify the appropriate

⁸⁰⁵ Submission 14, p23

sentence to fit the offence and the circumstances of the offender. In this regard, back-end home detention would generally be more desirable than full-time imprisonment, but more onerous than front-end home detention.

- 8.71** With regard to the appropriate means of introducing a back-end home detention scheme in NSW, the Committee has taken up the DPP's suggestion that 'a pilot scheme involving a small number of offenders should first be conducted and that BOSCAR or an equivalent organisation should conduct an evaluation of the effectiveness of the pilot scheme'.⁸⁰⁶ The Committee agrees that a pilot scheme should be conducted and evaluated in order to inform the development of the most effective model for a back-end home detention scheme to be implemented across the State.

Recommendation 40

That the Government introduce a back-end home detention scheme without compromising the principle of truth-in-sentencing.

That a pilot scheme involving a small number of offenders should first be conducted by the Department of Corrective Services and evaluated by the Bureau of Crime Statistics and Research.

That the results of the evaluation should be used to develop the most effective model for a back-end home detention scheme to be implemented across the State.

- 8.72** While the Committee has recommended the introduction of a back-end home detention scheme, it has not attempted to define how such a scheme should operate in all respects. Such a task would involve considerable discussion and research, which would best be undertaken by the Minister for Justice and the Department of Corrective Services. The Committee has instead focused on those elements of a new scheme referred to in the terms of reference and raised in submissions and oral evidence. Specific aspects of a new back-end scheme are therefore examined in the following sections, including the appropriate authority to determine whether an offender can serve the latter portion of his or her sentence on home detention and several issues relating to eligibility and suitability criteria.

- 8.73** The Committee refers to the discussion in Chapter 7 about the perception that home detention is a lenient or 'soft' option and is mindful that the introduction of a back-end scheme may be met with similar concerns. Mr Sandland of Legal Aid identified a need to overcome community perceptions that home detention is an 'easy' sentence:

I think what needs to be overcome is a community perception that people have been sentenced to a term of imprisonment and are sitting around at home watching TV, doing it easy. In fact, they would be closely monitored. They would be subject, as I understand it, to the possibility of drug testing, alcohol testing, and they may well have electronic monitoring. They would be given the benefit of programs to try to get them

⁸⁰⁶ Submission 6, p3

into the work force. So their incarceration would be within those limits. It is taking it beyond work release.⁸⁰⁷

- 8.74** The Committee recommends that when planning the introduction of a back-end scheme the Government explore ways of ensuring that the public is provided with sufficient information about the nature of home detention so as to minimise the perception that back-end home detention is a ‘soft option’ or presents a danger to the community.

Recommendation 41

That, when planning the introduction of a back-end home detention scheme, the Government explore ways of ensuring that the public is provided with sufficient information about the nature of home detention so as to minimise the perception that back-end home detention is a ‘soft option’ or poses a danger to the community.

- 8.75** With regard to information about the new scheme, the Committee also notes the comments of the Community Relations Commission, discussed in Chapter 3, concerning the importance of providing information about community based sentencing options in a way that is accessible by people from language backgrounds other than English.

Recommendation 42

That the introduction of a new back-end home detention scheme be accompanied by a comprehensive communication strategy, which includes a range of information channels accessible by people from language backgrounds other than English and those living in rural and remote areas.

- 8.76** With regard to funding, the Committee notes that some Inquiry participants expressed concern that a decision to introduce a back-end scheme would impact on the resources allocated to the current front-end scheme. For example, Ms Wright of the Law Society stated that, if the government were considering introducing back-end home detention, it should not be resourced from existing home detention funding:

... we would not like to see resources pulled away from front-end home detention and put towards back-end home detention. If there were separate resources funding it we would encourage back-end home detention right now, as long as resources were not pulled from front-end home detention.⁸⁰⁸

- 8.77** The question of whether resources should be first directed at expanding the front-end scheme (as examined in chapter 7) or directed at introducing a back-end scheme was also posed. For example, the DPP, stated:

⁸⁰⁷ Mr Sandland, Evidence, 17 March 2005, p40

⁸⁰⁸ Ms Wright, Evidence, 18 March 2005, p14

One difficult related issue which the Committee may care to consider is whether or not priority should be given to extension of front-end home detention to rural and regional areas, rather than the introduction of a back-end home detention scheme. Presumably the introduction of a back-end scheme will divert resources which could otherwise be available for the extension of a front-end scheme, unless extra resources are allocated specifically for the back-end scheme.⁸⁰⁹

- 8.78** The Committee is of the view that the expansion of the front-end scheme and the introduction of a back-end scheme can occur concurrently and encourages the Government to provide sufficient resources to the introduction of a back-end scheme so as to not divert resources from the current front-end scheme or impede its expansion as recommended by the Committee.

Recommendation 43

That the expansion of the front-end home detention scheme and the introduction of a back-end scheme, as recommended by the Committee, should occur concurrently and that the Government should provide sufficient resources for the introduction of a back-end scheme so as to not divert resources from the current front-end scheme or impede its expansion.

Appropriate authority to determine back-end home detention orders

- 8.79** The terms of reference require the Committee to consider the appropriate authority to determine whether an offender may proceed to back-end home detention. Stakeholders submitted various options including the original sentencing court, the Parole Authority, the Serious Offenders Review Council for serious offenders, the Commissioner of Corrective Services or officers of the Department exercising the Commissioner's delegated authority. The Committee notes the various options utilised by other jurisdictions, as set out below.

⁸⁰⁹ Submission 6, pp4-5

Table 8.1 Authority determining back-end home detention in other jurisdictions

Jurisdiction	Authority determining back-end home detention
Queensland	CEO of Department of Corrective Services. ⁸¹⁰ Decisions relating to home detention are made by relevant community corrections boards. ⁸¹¹
South Australia	CEO of Department of Correctional Services ⁸¹²
Victoria	Parole Board ⁸¹³
Western Australia	CEO of Department of Justice ⁸¹⁴
United Kingdom	Probation Service ⁸¹⁵
New Zealand	Parole Board and the Court ⁸¹⁶

Original sentencing court

- 8.80** One of the options raised by Inquiry participants is that the original sentencing court is the appropriate authority to determine whether an order for back-end home detention should be made. This option was supported by the Law Society of NSW, which stated in its submission that ‘the Law Society does support the introduction of a form of back-end home detention that is exercised by the court that originally sentenced the offender.’⁸¹⁷ Ms Wright of the Law Society elaborated on this view in evidence before the Committee:

From our perspective, as a matter of principle we like leaving sentencing decisions to judges. As a matter of principle the sentencing court would be the best person to determine that. ... Although in some cases the judge might be able to make a decision at the time of sentencing and say, "In this case I can see that this prisoner has the potential to rehabilitate and I order that the last 12 months of the sentence be carried out by way of home detention." I can see that that could happen in some cases. I could see that in other cases a judge might say, "The nature of this particular crime and the nature of the lack of remorse of this prisoner would indicate that he should never be allowed to serve any part of his sentence by way of home detention."⁸¹⁸

- 8.81** The DPP’s submission also identified the original sentencing court as the appropriate authority, emphasising the need for transparency:

⁸¹⁰ Submission 12, p3

⁸¹¹ Submission 23 (Inquiry into CBS), p5

⁸¹² Submission 12, p3

⁸¹³ Submission 15, p10

⁸¹⁴ Submission 15, p9

⁸¹⁵ Submission 12, p3

⁸¹⁶ Submission 12, p3

⁸¹⁷ Submission 3, p1

⁸¹⁸ Ms Wright, Evidence, 18 March 2005, p15

In order to maintain public confidence in the administration of justice it is essential that any program of back-end home detention require the original sentencing court to make the decision as to whether or not a prisoner will be released to back-end home detention. Thus the proceedings would be open to the public and the material put forward in support of and in opposition to the application and the reasons for the courts decision would be on the public record. For practical reasons, the matter should be dealt with by the original sentencing judge where s/he is available, but otherwise by another judge of that jurisdiction. The original judge may no longer be on the Bench or may be otherwise engaged. (In the interests of transparency and public confidence, back end home detention should not be an option available administratively.⁸¹⁹

- 8.82** The Committee also notes that the Law Reform Commission, in its 1996 report on sentencing, stated that an order for back-end-home detention would have to be made by a court in order to preserve truth-in-sentencing:

We maintain our position that in order to preserve truth in sentencing, any order for back-end home detention must be imposed by the sentencing court at the time of sentencing rather than by an administrative decision after the sentence has been imposed.⁸²⁰

- 8.83** Several Inquiry participants discussed the difficulties the original sentencing court would have in foreseeing whether an offender who appeared to be a suitable candidate for back-end home detention at the time of sentencing would still be suitable after having served a portion of their sentence in custody. For example, Mr Paul Winch of the Public Defenders Office stated:

The contrast of course is with the decision made by a sentencing judge perhaps a year and a half before, which would not then allow any flexibility. I think that would be one of the potential disadvantages of making it part of the original sentence—a person's family and circumstances could change dramatically over the nine to 12 or whatever months of full-time custody. It might make what seemed like an attractive or good and worthwhile proposition less good and worthwhile. The family could disintegrate or there could be deaths—all sorts of things could happen that would make it entirely inappropriate for the prisoner. There could be no home to be detained in.⁸²¹

- 8.84** This view was shared by the Director of Public Prosecutions, who discussed the practical problems of the original sentencing court making this decision in its submission:

I think there are practical problems with making it the responsibility of the original sentencing court at the time of sentencing, because, as I understand it, it would have to depend to a large extent on the conduct, rehabilitation and so on of the prisoner during the time of serving the sentence. Those sorts of things are virtually impossible to predict at the time of sentencing, so I cannot see that that would be an option.⁸²²

⁸¹⁹ Submission 6, p2

⁸²⁰ NSW Law Reform Commission, Report 79, para 7.31 as cited in Submission 12, p3

⁸²¹ Mr Paul Winch, Public Defender, NSW Public Defenders Office, Evidence, 18 March 2005, pp10-11

⁸²² Mr Cowdery, Evidence, 17 March 2005, p28

- 8.85** In its submission, Legal Aid also commented on the difficulties the original sentencing court would face in determining if an offender should be eligible for back-end home detention:

The most significant difficulty for the sentencing court in determining back-end home detention is that it would not be in a position to make an adequate assessment as to the eligibility of home detention so far away from the prisoner taking up the home detention. The availability and suitability of a home for a prisoner at the time of sentence may not be suitable or available at the time of eligibility of home detention. Further, a court would not be knowledgeable as to how a prisoner has progressed in gaol and in that regard whether the person is still a suitable candidate for a home detention order.⁸²³

- 8.86** The Law Society also discussed the difficult task the sentencing court would face in predicting an offender's future behaviour:

But if you fetter the judges and require them to make that determination at that time, I think it would be difficult for them because there could be those grey areas cases where it is not certain that this person is not going to be able to rehabilitate themselves while in gaol. So then the judge is being called on to predict some behaviour that might change quite dramatically while the person is in gaol. Someone at the time of committing an offence might be in a very, very different mental state to the way they are in six or eight years down the track, after they have been in gaol. They may not be suitable at the time but become suitable later, so to ask a judge to make a call at the beginning as a requirement I think is too onerous on the judge, and I do not think it would be effective.⁸²⁴

- 8.87** The Committee acknowledges the practical difficulty of the original sentencing court assessing an offender's suitability to proceed to back-end home detention at a future time. However, suggestions to overcome this problem, while still placing the power to determine whether an offender proceeds to back-end home detention in the court, were also identified.

- 8.88** One possible method is to refer the matter back to the sentencing court at a later stage, after an offender has served a period of his or her sentence. For example, a possibility considered by Mr Cowdery as being a viable option is that the decision goes back to the same court for assessment based on current facts:

The second is for the matter to come back before the court by which the person was sentenced—not necessarily the same judge but the same court—for assessment of the reports on how the prisoner has fared, the facilities that are available, and so on. Those are the sorts of matters that would be considered. It does give an added element of transparency to the process to bring it back before the court.⁸²⁵

- 8.89** Ms Wright of the Law Society similarly suggested that, in order to take full advantage of the opportunity to rehabilitate prisoners, a process for determining back-end home detention should also be available further down the track for offenders:

⁸²³ Submission 11, p4

⁸²⁴ Ms Wright, Evidence, 18 March 2005, p16

⁸²⁵ Mr Cowdery, Evidence, 17 March 2005, p29

You could find judges making those sorts of decisions at the time of sentencing. But if you are going to take full advantage of the opportunity to rehabilitate prisoners, which is one of the important principles of sentencing and punishment of offenders—ensuring that they are rehabilitated and they come out at the end of the process as useful human beings—then that process should occur or there should be an opportunity for that process to occur down the track after the prisoner has served some of his time and it is closer to the time of proposing to allow the prisoner into home detention.⁸²⁶

- 8.90** A second method was identified by Mr Sandland of Legal Aid who suggested the possibility of the original court indicating at the time of sentencing that a person should be later considered for back-end home detention with the final decision being made at that later stage by, for example, the Parole Authority:

I do not think the court that imposes the sentence, however, will be necessarily able to predict whether the circumstances relating to this offender are appropriate to consider back-end home detention several months or years down the track. So there are ways around that. You either bring the person back to the same court to consider whether or not he or she should be eligible for back-end home detention, or you get some indication from the court at the time that sentence occurs and that person is then perhaps considered by the Parole Board as to their eligibility for back-end home detention. There are a number of ways that you could work the introduction of the scheme that I think would preserve the concept of truth in sentencing.⁸²⁷

NSW Parole Authority

- 8.91** Other Inquiry participants argued that the Parole Authority should be the authority to determine whether an offender is to serve part of their sentence on back-end home detention. For example, Mr Jaffrey provided the following comment in his submission:

Returning the offender to the original sentencing court would be expensive and time-consuming whereas Parole Board decisions are made weekly and often without the inmate being required to attend. In all likelihood if the 'paper trail' was satisfactory an order for BEHD [back-end home detention] would occur by way of course. Leaving aside the difficulties I have already raised in being solely reliant on Corrective Services to provide this information at the exclusion of any other relevant information, for the purposes of this inquiry I submit that with additional resources, the NSW Parole Board (or what will then be the State Parole Authority) should administer a scheme of back-end home detention in this State.⁸²⁸

- 8.92** Legal Aid commented that the Parole Authority may be in a better position to decide whether an offender is suitable and whether or not there is a suitable residence for the offender to carry out back-end home detention:

It would require the sentencing court to predict the future behaviour of a prisoner and also as to whether there is a suitable residence. This would make this a difficult task

⁸²⁶ Ms Wright, Evidence, 18 March 2005, p15

⁸²⁷ Mr Sandland, Evidence, 17 March 2005, p40

⁸²⁸ Submission 18, p15

and in that regard the Parole Board would be better placed to make a determination as to the eligibility of a prisoner for home detention.⁸²⁹

- 8.93** Legal Aid concedes however, that resting the authority to determine eligibility for home detention in the Parole Authority would render it an administrative decision:

There is a significant benefit to having the Parole Board make the decision as to whether an offender may proceed to back-end home detention. It is appreciated, however, this becomes an administrative decision which does affect the principle of truth in sentencing and may be seen to dilute the power of the sentencing court.⁸³⁰

- 8.94** This proposal is similar to the scheme currently operating in Queensland, as explained by Ms Kathryn Holman:

At the time of sentencing a judge may make a parole recommendation, and it is just that: a recommendation for parole. A person may be given quite a large sentence with a low bottom for parole. In the legislation the Boards are not bound by that recommendation. If a Board believes that it has information that was not put before the judge at the time of sentencing that would materially alter the recommendation it is not bound by that recommendation.⁸³¹

- 8.95** The Committee notes that a role for the Parole Authority in determining eligibility for back-end home detention, within the framework set by the sentencing judge, is consistent with the Parole Authority's existing role in relation to release on parole where the sentencing judge sets a non-parole period for the sentence (that is, the minimum period for which the offender must be kept in detention in relation to the offence).⁸³²

Department of Corrective Services

- 8.96** A third option is that the issue be dealt with administratively, through the Department of Corrective Services, with the Commissioner or his delegate having responsibility. Mr Cowdery described this option as follows:

One way of administering such a system is administratively, so that the Commissioner or his delegate, once satisfied of the appropriateness of making such an order from

⁸²⁹ Submission 11, p4

⁸³⁰ Submission 11, p4

⁸³¹ Ms Kathryn Holman, Acting Assistant Director, Community Corrections, Queensland Department of Corrective Services, Evidence, 18 March, p32. The Parole Authority determines eligibility of offenders sentenced to a term of imprisonment of two years or more. Eligibility for post-prison community based release for offenders sentenced to a term of imprisonment of less than two years is determined by the manager of the relevant correctional facility.

⁸³² *Crimes (Sentencing Procedure) Act 1999* (NSW), s 44. For offenders who have been sentenced to a term of imprisonment for three years or less that have a non-parole period, under the *Crimes (Sentencing Procedure) Act 1999* (NSW), s 50, the Court must make an order directing the release of the offender on parole at the end of the non-parole period. For sentences of more than three years, the Parole Authority determines whether the offender should be released to serve the balance of the term of the sentence on parole.

the behaviour of the inmate in prison, from the social circumstances of that person, and so on and so on, should have the power to make the order.⁸³³

- 8.97** Mr Winch, the Public Defender, advised the Committee that he believes back-end home detention should be a decision for the Department of Corrective Services or the Commissioner because it is similar to weekend leave and work release:

My perspective in my submissions to the Committee has been that it fits most nicely, as I see it, alongside and akin to things like weekend leave, work release, that style of diminution of the effect of full-time imprisonment on a prisoner, he or she having served a period of full-time imprisonment. So my thoughts about it are that it would be conveniently and easily administered perhaps by the commissioner or a delegate in the same way that leave presently is and/or a committee within the department. For more serious offenders, it is my belief that the serious offenders review committee could have some impact on decisions such as this for offenders of that kind.⁸³⁴

- 8.98** Mr Winch also highlighted that there is a need for an appeals process if the decisions are to be made by the Department of Corrective Services:

My understanding is that one can appeal—in fact, I am sure that one can appeal—a classification decision. If back-end home detention were to become part of that administrative regime—and perhaps it would and perhaps it would not—there would still be available to the prisoner an appeal as if it were a classification decision. I think it is important that there is such an appeal against decisions made by various committees of that kind.⁸³⁵

- 8.99** Other participants raised strong concerns about the Department or the Commissioner being the authority to make decisions about how offenders serve their sentences. For example, a submission received from an inmate currently at Long Bay's Metropolitan Medical Transient Centre expressed concern about the way the Department managed its existing external leave programs:

It is clear the Department of Corrective Services is incapable of managing the back end programmes it is already responsible for. After all the current failure of the works release programme is testimony to the lack of support the Department gives to pre-release programs.⁸³⁶

- 8.100** The issue of transparency of the decision making process and an appropriate appeals process was raised by other Inquiry participants. For example, Mr Brian Sandland of the Legal Aid Commission expressed concern about decisions concerning back-end home detention being made administratively:

I would be concerned about the prisoner being adequately represented or at least adequately putting forward his or her position in relation to an administrative determination. I would be concerned about the extent to which the administrative decision and the guidelines by which that decision was reached were subject to the

⁸³³ Mr Cowdery, Evidence, 17 March 2005, p25

⁸³⁴ Mr Winch, Evidence, 18 March 2005, p9

⁸³⁵ Mr Winch, Evidence, 18 March 2005, p10

⁸³⁶ Submission 5, Name suppressed at request of author, p3

kind of public focus that is brought to bear when these decisions are made in open court or before a Parole Board where you have a right of appearance and a right of representation. I would be concerned about whether or not there would be an appeal right from an administrative decision and I am not sure who that appeal would be to and how, if it was not properly documented, grounds of appeal would be made out.⁸³⁷

- 8.101** The Attorney General's Department noted in its submission that 'in the event that the switch from full-time imprisonment to home detention is an administrative decision rather than a court decision, transparency in sentencing is reduced.'⁸³⁸ Mr Cowdery also identified that transparency was an issue to consider in relation to placing the decision making power within the Department or the Commissioner:

It really is a value judgement as to how much transparency there should be in the process, and to what extent it should be removed into a neutral path, for example, back before a judge, or a magistrate, or something of that kind. So it is really a question of how much transparency you think there should be, and how much confidence can be placed in the commissioner.⁸³⁹

- 8.102** Mr Cowdery noted, however, that in terms of the administrative route: '...there must be appropriate checks and balances that could be built into the administrative route.'⁸⁴⁰

Serious Offenders Review Council

- 8.103** The Serious Offenders Review Council (SORC) was proposed as the authority to determine whether 'serious offenders' should proceed to back-end home detention. The SORC is an independent statutory body that provides advice and recommendations to the Commissioner of Corrective Services on the management of serious offenders. The SORC also provides reports and advice to the Parole Authority concerning the release on parole of serious offenders.⁸⁴¹

- 8.104** A 'serious offender' is an offender serving a life sentence or whose sentence is such that the offender will not become eligible for release until 12 years have been spent in custody, or whose offence was murder, or who has been required by the Commissioner to be managed as a serious offender.⁸⁴²

- 8.105** The Public Defender, Mr Winch, suggested in his oral evidence to the Committee that serious offenders should not be automatically excluded from back-end home detention in the same way that they are excluded from the front-end scheme. He suggested that, if serious offenders were included, the Serious Offenders Review Council should be considered as the appropriate authority to determine whether they can progress to back-end home detention.⁸⁴³

⁸³⁷ Mr Sandland, Evidence, 17 March 2005, p40

⁸³⁸ Submission 12, p2

⁸³⁹ Mr Cowdery, Evidence, 17 March 2005, p25

⁸⁴⁰ Mr Cowdery, Evidence, 17 March 2005, p29

⁸⁴¹ Submission 14, p13

⁸⁴² *Crimes (Administration of Sentences) Act 1999* (NSW), s 3 and Submission 14, p13. On 30 June 2004 there were 597 serious offenders in NSW Correctional centres.

⁸⁴³ Mr Winch, Evidence, 18 March 2005, p11

8.106 The Committee received no further comments in relation to the SORC being the appropriate authority to determine whether serious offenders should proceed to back-end home detention. Much information was received, however, about broadening the eligibility criteria for back-end home detention to include serious offenders who otherwise meet suitability criteria. This issue is discussed in the following section.

Committee view

8.107 As the Committee concluded earlier in this chapter, insofar as the principle of truth-in-sentencing relates to the form of imprisonment (ie that an offender must serve the full term of his or her sentence *in prison*), back-end home detention does not conflict with the principle, as home detention should correctly be viewed as a form of imprisonment (as it is so described by the *Crimes (Sentencing Procedure) Act 1999* (NSW)). However, truth-in-sentencing does influence the manner in which a back-end home detention scheme should operate.

8.108 Truth-in-sentencing requires that the sentence determined by the court should be the sentence that is actually served. In other words, the parole and non-parole periods should be specified and the full non-parole period should be served in custody. In this regard, in order to preserve the concept of truth-in-sentencing, it is the Committee's view that orders for back-end home detention should initially be determined by the sentencing court. It would then be clear, at the point of sentencing, that serving the latter portion of the non-parole period on home detention was part of the sentence.

8.109 The proposal envisages that after sentencing an offender for a period of full-time imprisonment the court would then consider whether an alternative to full-time imprisonment would be appropriate. In this respect back-end home detention (as well as periodic detention and front-end home detention) could be considered as an option. If the court decided that back-end home detention was appropriate, the court should also determine the portion of an offender's sentence that could be served on home detention. The court should be assisted in this decision by an assessment of the Probation and Parole Service, as occurs with the current front-end home detention scheme.

8.110 It is clear from the concerns raised by several Inquiry participants that it would not be appropriate for the original sentencing court to order that an offender serve the last portion of his or her sentence by way of back-end home detention without some reassessment of suitability before home detention is commenced. As Inquiry participants rightly observed, in the time period leading up to the portion of the sentence to be served at home, an offender's circumstances could so change as to render him or her an unsuitable candidate.

8.111 The Committee has carefully considered which authority should undertake this review. The Committee shares Inquiry participant's concerns about fairness and transparency if the decision were to be made administratively, by the Commissioner of Corrective Services or the Commissioner's delegate. While decisions regarding external leave programs are currently, and appropriately, made administratively, the Committee considers that the nature of back-end home detention – which operates on a 24 hour, 7 day per week basis and can be ordered for a reasonably long length of time – involves the exercise of a considerable power regarding personal liberty that is better placed in a judicial body or quasi-judicial body. Arguably, the use of judicial or quasi-judicial procedures promotes consistency and transparency in decision making, thereby contributing to public confidence in the exercise of public power, particularly in sensitive areas.

- 8.112** It is the Committee's opinion therefore that this power should be vested in either the original sentencing court or the NSW State Parole Authority. When the first portion of the offender's sentence is due to be completed, the decision as to whether the offender should proceed to back-end home detention should be referred back to the court or the Parole Authority to be reviewed. At this stage, the offender's current circumstances, including his or her behaviour whilst in custody and home arrangements, could be assessed to ensure that the offender is still suitable for home detention. Again, an assessment by the Probation and Parole Service would inform this process.
- 8.113** As the Committee noted in paragraph 8.36, there also appears to be some scope for utilising the existing classification system used for assessing an offender's eligibility for external leave programs in a back-end home detention scheme. The Committee recommends that consideration be given to the appropriateness of utilising the current classification system in the back-end home detention scheme.

Recommendation 44

That the decision whether an offender is eligible for back-end home detention should be made by the court at the time of sentencing. The court should also determine the portion of an offender's sentence to be served on home detention. As with front-end home detention the court should be assisted in this regard by an assessment by the Probation and Parole Service.

That when the first portion of an offender's sentence is due to be completed the decision whether the offender should proceed to back-end home detention should be referred back to the court to be confirmed. At this stage the court can examine the offender's current circumstances, including behaviour whilst in custody and home arrangements, to ensure that the offender is still suitable for home detention.

That consideration should be given to utilising the current classification system used for assessing an offender's eligibility for external leave programs into the back-end home detention scheme.

Criteria for eligibility for back-end home detention

- 8.114** The Committee's terms of reference include consideration of the criteria for eligibility for back-end home detention. As an initial point, the Committee agrees with the view expressed by the DPP that strict criteria for the identification of suitable participants for back-end home detention are essential to maintain public confidence in the administration of justice.⁸⁴⁴ As Mr Cowdery stated, strict criteria also have the benefit of 'reducing the potential for the commission of offences by offenders on back-end home detention'.⁸⁴⁵
- 8.115** The discussion of eligibility in submissions to this Inquiry focused mainly on the amount of time that should be served before an offender becomes eligible for back-end home detention

⁸⁴⁴ Submission 6, p2

⁸⁴⁵ Submission 6, p2

and exclusions based on the type of offence committed. The offender's behaviour in custody was also raised. Consistency with the criteria for front-end home detention was also advocated. These issues are discussed in the following subsections.

Consistency with eligibility criteria for front-end home detention

8.116 The evidence received by the Committee generally supported consistency between the criteria for eligibility for front-end home detention and criteria for eligibility for back-end home detention. For example, the Legal Aid submission stated that 'the criteria for eligibility for back-end home detention may need to be as consistent as possible to current legislation involving home detention.'⁸⁴⁶ Similarly, Mr Cowdery expressed the view that:

The same criteria as are currently taken into account by the Department of Corrective Services when preparing an assessment for the courts as to an offender's suitability for front-end home detention would be relevant to this issue ...⁸⁴⁷

8.117 The eligibility and suitability criteria for front-end home detention are examined in Chapter 7. As well as eligibility criteria based on the type of offence committed (discussed in detail later in this Chapter), there are criteria related to the offender's 'suitability' for home detention, which are summarised below:

- likelihood of re-offending
- drug dependency
- likelihood offender will commit a serious domestic violence offence
- whether employment, residence, study or other activities would inhibit effective monitoring of the order
- whether the persons likely to be living with the offender while the order is in effect understand its requirements
- whether any person living with or near the offender would be placed at risk of harm
- the likely effect of a home detention order on a child who would be living with the offender.

8.118 The Committee notes that, while some of these criteria would have to be modified, they are generally applicable to a back-end home detention scheme and so far as possible should be incorporated. The Committee also notes that these criteria are consistent with the criteria for back-end home detention used in Victoria.

Eligibility based on time served

8.119 A range of views were presented to the Committee on the appropriate portion of a sentence that should be served before an offender can proceed to back-end home detention. Some Inquiry participants suggested a *set period* after which the option of back-end home detention could become available. For example, Ms Kathryn Aiken wrote in her submission that back-

⁸⁴⁶ Submission 11, p5

⁸⁴⁷ Submission 6, p2

end home detention should be allowed for all inmates in their final 12 months of imprisonment.⁸⁴⁸

8.120 Other participants suggested that a *percentage* of time served should be the relevant criterion. For example, Mr Winch of the NSW Public Defenders Office suggested back-end home detention should be available to all prisoners after they have served a percentage of their non-parole period.⁸⁴⁹ The Committee notes that this option would better suit the varying length of sentences handed down by the courts than a set period.

8.121 The table below sets out the portion of the original sentence that must be served by means of full-time custody, in various jurisdictions, before an offender can apply for release on back-end home detention. The Committee notes that most jurisdictions use a proportional approach.

Tale 8.2 Portion of sentenced served before eligible for back-end home detention⁸⁵⁰

Jurisdiction	Portion of sentence
Victoria	Prisoners who have completed at least two thirds of their sentence and are eligible for release, or release on parole, in six months or less. ⁸⁵¹
Western Australia	After 12 months in custody, within six months of eligibility for release (whether under a parole order or not). ⁸⁵²
South Australia	Prisoners who have served at least half of their non-parole period. ⁸⁵³
Queensland	Prisoners other than serious offenders, who have completed at least half their sentence of imprisonment. Serious offenders who have completed 80% or 15 years, whichever is less. ⁸⁵⁴
New Zealand	Prisoners are able to be released up to three months earlier than the earliest parole date if they are serving a sentence of more than two years and are eligible for parole. If sentenced for less than two years, the sentencing judge can grant leave to

⁸⁴⁸ Submission 8, p1

⁸⁴⁹ Submission 13, pp1-2

⁸⁵⁰ Submission 6, pp2-3

⁸⁵¹ Submission 15, p7

⁸⁵² *Sentence Administration Act 2003* (WA), s 50. Criteria for CEO-approved parole. Note, Western Australia no longer operates a back-end home detention program *per se* - having replaced it with other options embodied in the *Sentence Administration Act 2003* (WA). These new options, in combination with the abolition of prison sentences of six months or less, and the introduction of CEO-approved parole for shorter sentences meant that the need for home detention was no longer deemed necessary. Some features of home detention, including provision for curfew and electronic monitoring, have been incorporated into other forms of supervision order: Submission 15, p2

⁸⁵³ *Correctional Services Act 1982* (SA), s37A

⁸⁵⁴ *Corrective Services Act 2000* (Qld), s135(2)

⁸⁵⁵ Submission 6, p2

Jurisdiction	Portion of sentence
	apply for back-end home detention. ⁸⁵⁵
United Kingdom	Where a sentence is up to four years imprisonment, back-end home detention is available as the final stage of custodial sentence, subject to risk assessment, and availability of suitable accommodation. ⁸⁵⁶

8.122 The Committee provides as an example the comments made in relation to the Queensland scheme where the percentage of a sentence that must be served in full-time custody depends on whether or not the offender is a ‘serious violent offender’:

In Queensland a sentenced prisoner can apply for a post-prison community-based release order at 50 per cent of their sentence time, unless of course they are a serious violent offender and then they must serve 80 per cent of their sentence until they are eligible to apply for a post-prison order from a board.⁸⁵⁷

8.123 In addition, offenders who are sentenced to a sentence of less than two years may apply for conditional release after they have served two thirds of their sentence:

Those prisoners are able to apply for conditional release at two-thirds of their sentenced time. That determination is made by the general manager of the prison where the prisoner is housed. In making the decision whether or not they will allow the person to be released on conditional release, they look at their institutional conduct and of course the risk to the community. If people are released on conditional release orders, essentially, they are living in the community with the condition hanging over their heads that if they commit an offence during the period of the conditional release order they can be returned to prison and the order can be cancelled. So for prisoners sentenced to under two years it is not determined by a board.⁸⁵⁸

8.124 The Committee notes that it did not receive sufficient information to enable a thorough examination of this issue.

Eligibility based on type of offence and criminal history

8.125 As discussed in Chapter 7, front-end home detention is only available to those convicted of comparatively minor offences. This is due to the fact that the front-end scheme is restricted to sentences of imprisonment of 18 month or less and is not available in relation to convictions for certain violent offences and certain drug related offences.

8.126 Although most of the evidence received by the Committee supported back-end home detention eligibility criteria being as consistent as possible with front-end criteria, a range of opinions were expressed as to whether the exclusions based on the type of offence should also apply in relation to back-end home detention. Arguments centred on the competing objectives of community safety and preparing inmates for their eventual release from prison. In this regard, Mr Sandland of Legal Aid stated:

⁸⁵⁶ Submission 6, p2

⁸⁵⁷ Ms Holman, Evidence, 18 March 2005, p32

⁸⁵⁸ Ms Holman, Evidence, 18 March 2005, pp32-33

Perhaps it might be appropriate to consider whether or not the eligibility criteria could be relaxed in relation to the class of offence that is applicable for home detention. I know that there will always be concerns from the community, and in particular from the Probation and Parole Service, that the community not be placed at threat by people who have committed offences, and who have been found guilty of that and who are considered as eligible for a period of imprisonment, to serve that sentence in the community. On the other hand, they are going to be released from imprisonment at some stage, and it seems as though this may be a more humane and appropriate way of dealing with a larger proportion than those that get the benefit of it at this stage.⁸⁵⁹

- 8.127** Mr Winch from the Public Defenders Office identified the particular benefits of back-end home detention to serious offenders who had served significant custodial sentences:

Home detention could be of particular assistance to offenders at the end of lengthy sentences for serious crimes, as such offenders need assistance to re-integrate into the community.⁸⁶⁰

One of the points I endeavoured to make in my submissions to the Committee was about an extension of the criteria for back-end home detention to include people who have been charged with much more serious offences and who have done much longer in gaol than is presently available to people for front end would or could. ... I believe if the prisoner, after a lengthy sentence, is fortunate enough to still have a family and a home to be detained in and so on, it could be yet another useful way of easing their transition from full-time custody to the community. It could be used in association with the other kinds of education leave, work release and so on as a way of endeavouring to assist their passage.⁸⁶¹

- 8.128** Ms McComish noted that if current restrictions on eligibility for front-end home detention were applied to back-end home detention, 'many offenders who would be most suitable for the type of transitional support programs that you want at the back end would not be eligible to be part of the home detention program.'⁸⁶²
- 8.129** Mr Jaffrey described back-end home detention as an 'ideal stepping stone' between a custodial sentence and a parole period for offenders who have been incarcerated for many years:

I would submit that having a criminal history which precludes participation in front end home detention should not in itself preclude participation in a back end scheme. It has already been highlighted that a gradual reintegration back into the community is an ideal process for offenders, particularly those who have been incarcerated for many years. The parole system itself is effective in some instances but does not offer a high level of monitoring that [back-end home detention] would offer. It would appear to be an ideal 'stepping stone' between a custodial sentence and a parole period.

An inmate for example serving a 7 year term for assault or manslaughter is precluded on both grounds, yet as he approaches the final 12 months of his sentence it may be

⁸⁵⁹ Mr Sandland, Evidence, 17 March 2005, p40

⁸⁶⁰ Submission 13, p2

⁸⁶¹ Mr Winch, Evidence, 18 March 2005, p11

⁸⁶² Ms McComish, Evidence, 17 March 2005, p17

argued that after 6 years in prison, he may be considered ideal for the scheme. This is further extrapolated when considering the offender who kills someone from drink-driving in a one-off incident. Indeed the offence requires severe punishment but to consider this offender as being in the same category as perhaps another is to deride the discretionary principle which underlies most sentencing practices.⁸⁶³

- 8.130** The Committee is mindful of the need to balance community safety with preparing serious offenders for their eventual release into the community. The Committee accepts that, after an extended period of full-time custody, serious offenders are most likely to benefit from a period of closely supervised back-end home detention prior to their release on parole. Evidence from the Department of Corrective Services indicates that offenders who have been sentenced for murder and who are currently participating in external leave programs are successfully completing their programs.

Currently in NSW correctional centres there are 431 persons convicted of murder. Thirteen (13) of the 431 are currently classified as C3 of Cat 1 (in the case of women), this means they are either in the last 12 months of their non-parole period or in fact are already within that period. Their reduction in classification and participation has been recommended by the Serious Offenders Review Council in order to prepare them for release to parole. This classification means that they are assessed as ready to participate in external leave programs. At this time all 13 have had at least one day leave approved and 7 have had at least one weekend leave. Four (4) are participating in work leave. There have been no breaches of these offenders on external leave programs.⁸⁶⁴

- 8.131** The main strength of back-end home detention identified during this Inquiry lies in its ability to assist offenders to reintegrate into the community, as discussed in paragraph 8.11-8.17. It follows therefore that inmates convicted of more serious offences, who would arguably be in greater need of assistance to reintegrate, should not automatically be excluded from back-end home detention. As long as other suitability criteria were met, such as having appropriate accommodation and the consent of family members, the Committee is of the view that back-end home detention should be available for a wider range of sentences than front-end home detention and that no offences should be categorically excluded.

Recommendation 45

That the restrictions on the powers of a sentencing court to make a home detention order for certain offences and offenders with a certain criminal history of the kind contained in Division 2 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should not be included as an element of a back-end home detention scheme.

Offender's rehabilitation and behaviour in full-time custody

- 8.132** Submissions and evidence strongly supported the proposition that an offender's rehabilitation and performance while in custody should be an essential element of the criteria for eligibility for back-end home detention. For example, the DPP stated that eligibility criteria could

⁸⁶³ Submission 18, pp15-16

⁸⁶⁴ Answers to questions on notice taken during evidence 17 March 2005, Ms McComish, p1

include ‘... reports as to the offender’s performance and progress towards rehabilitation whilst in prison.’⁸⁶⁵

8.133 Mr Jaffrey suggested that ‘[o]ffenders should be drug-free, have been without serious incident whilst in custody and have been shown to have made an effort to participate in programs whilst in custody.’⁸⁶⁶ Mrs Katrina Froome suggested in her submission that eligibility should be based on offenders working their way to the lowest possible security classification to be eligible.⁸⁶⁷

8.134 The Public Defenders’ submission noted that eligibility could be linked to the current security classification system or alternatively the parole system:

Eligibility for back-end home detention could be linked to a level of classification such as C3 and the classification committees given responsibility for selection of offenders for the program as is done for the leave schemes.

Alternatively, back-end home detention could be made available to all prisoners once they had served a percentage of their non-parole period. The Parole Board could then be given jurisdiction to place an offender on the scheme ahead of release on parole.⁸⁶⁸

8.135 The Committee agrees that the behaviour of an offender while in gaol is an important consideration when assessing whether an offender’s home detention order should be confirmed. As this is not a relevant factor to be considered in relation to front-end home detention, the Committee makes a specific recommendation that this factor should be taken into account by the relevant authority when deciding whether an order for back-end home detention is reviewed prior to potential release onto back-end home detention (see **Recommendation 44**).

Conditions and monitoring

8.136 Possible conditions of back-end home detention orders do not specifically form part of the Committee’s terms of reference. However, conditions attached to current front-home detention were discussed at length in submissions and evidence to the Inquiry. In light of the evidence received, and consistent with the Committee’s view regarding eligibility criteria for back-end home detention, it is the Committee’s general opinion that conditions attached to back-end home detention orders should be as consistent as possible with current front-end orders, including provisions for electronic monitoring. Depending on the length of a term of back-end home detention, a graduated scale of conditions and monitoring should be developed, using the front-end conditions as a guide.

⁸⁶⁵ Submission 6, p2

⁸⁶⁶ Submission 18, p15

⁸⁶⁷ Submission 9, p2

⁸⁶⁸ Submission 13, p2

Recommendation 46

That conditions attached to back-end home detention orders be as consistent as possible with the conditions that apply to front-end home detention orders, including provisions for electronic monitoring.

Chapter 9 Related issues

In this Chapter several additional issues raised by Inquiry participants that relate to the terms of reference are examined. Circle Sentencing, the Magistrates Early Referral Into Treatment (MERIT) program and the Drug Court of New South Wales are examined because of their interconnectedness with community based sentencing options. The issue of fines and mandatory disqualification of driver's licences is examined because of its particular impact in rural and remote areas and the potential to lead to a custodial sentence.

Circle Sentencing, MERIT and the Drug Court of NSW

- 9.1 The Committee notes at the outset of this discussion that Circle Sentencing, MERIT and the Drug Court are not community based *sentencing options*. Rather, Circle Sentencing is a method of imposing a sentence on an offender, which involves members of the community, and MERIT and the Drug Court are diversion programs that can be utilised by the court at the pre-sentence stage to require offenders to undertake treatment programs in the community.
- 9.2 However, as Circle Sentencing and these diversion programs were raised by a number of submission makers and witnesses, the Committee has determined to canvass issues that relate to them. The Committee also notes that they all exist on the continuum of measures available to courts in NSW to enhance the sentencing process to promote better outcomes for offenders. In addition, a person sentenced through Circle Sentencing or referred to MERIT or the Drug Court may ultimately incur a custodial sentence or a community based sentence. In this respect they provide a useful context to other discussion in this report.

Circle Sentencing

- 9.3 Circle Sentencing is an alternative sentencing court for adult Aboriginal offenders, which takes the sentencing process out of its traditional court setting and into the community. The Circle involves a Magistrate, the offender and the victim and their support people, and community members. The group sits in a circle to discuss the offence and its effects and to identify a sentence that is tailored for the offender and the circumstances of the offence.⁸⁶⁹
- 9.4 The Circle has the full sentencing powers of the Local Court and the penalties imposed must be consistent with the principles and practice of the court. The key aims of Circle Sentencing are to make sentencing a more meaningful experience for the offender and to improve the Aboriginal community's confidence in the criminal justice system.⁸⁷⁰
- 9.5 Circle Sentencing was introduced on a trial basis in Nowra in 2002 and now also operates in Dubbo, Walgett and Brewarrina. The Committee was advised that Circle Sentencing is

⁸⁶⁹ Attorney General's Department of NSW, *Crime Prevention – Circle Sentencing*, 2005 Fact Sheet

⁸⁷⁰ Attorney General's Department of NSW, *Crime Prevention – Circle Sentencing*, 2005 Fact Sheet

expanding to Bourke, Lismore, Armidale, Kempsey and Western Sydney and Mt Druit.⁸⁷¹ The Committee is aware that a comprehensive evaluation of the program will be conducted to measure its outcomes and consideration given to expanding Circle Sentencing to other areas.⁸⁷²

9.6 It has been reported that Circle Sentencing has a high success rate in terms of recidivism. The Judicial Commission of NSW reviewed the first twelve months of the Nowra trial and reported that only one of the 25 offenders were subsequently re-arrested.⁸⁷³ In Dubbo, 80% of offenders who participated were not charged with further offences.⁸⁷⁴

9.7 General support for Circle Sentencing and for its expansion to other parts of NSW was expressed during the Inquiry. For example, Legal Aid advised that Circle Sentencing ‘... has been generally well received by communities where it operates.’⁸⁷⁵

9.8 Circle Sentencing shares some of the aims of community based sentencing in terms of the involvement of the community in the administration of justice. Ms Gail Wallace, the Project Officer for Circle Sentencing with the Attorney General’s Department, stated:

... While still operating in a setting of a court, circle courts allow for greater community participation and are able to incorporate the values and culture of the local Aboriginal community. Circle Sentencing allows communities to reclaim some control over their own social problems; establish mechanisms to solve those problems; the community is directly involved in administration of the justice system and has found a way in which that system can be modified or reformed to meet cultural needs.⁸⁷⁶

9.9 The Committee notes that there may be some carry over from community based sentences to the sentence imposed by the Circle. For example, Ms Wallace noted that:

For instance, if someone is placed on a good behaviour bond by Probation and Parole, there are conditions that the elders will place in the sentencing outcome. For example, that they abstain from alcohol and drug use, and Probation and Parole meets with the offenders and also is involved in the testing as to whether they are indulging in drug and alcohol abuse.⁸⁷⁷

9.10 The Committee also observes that the sentences that can be handed down by the Circle include all those under consideration in this report, with good behaviour bonds, suspended

⁸⁷¹ Attorney General’s Department of NSW, *Crime Prevention – Circle Sentencing*, 2005 Fact Sheet and Hon Bob Debus MP, Attorney General, ‘Nowra Aboriginal Sentencing Program Wins award’, *Media Release*, 9 November 2005.

⁸⁷² Attorney General’s Department of NSW, *Crime Prevention – Circle Sentencing*, 2005 Fact Sheet

⁸⁷³ I Potas, J Smart, G Brignall, B Thomas & R Lawrie, *Circle Sentencing in New South Wales, A review and evaluation*, Monograph 22, 2003, Judicial Commission of NSW and NSW Aboriginal Justice Advisory Council

⁸⁷⁴ Attorney General’s Department of NSW, *Crime Prevention – Circle Sentencing*, 2005 Fact Sheet

⁸⁷⁵ Submission 31, p2

⁸⁷⁶ Ms Gail Wallace, Project Officer, Circle Sentencing, Attorney General’s Department, Evidence, 31 August 2005, p25

⁸⁷⁷ Ms Wallace, Evidence, 31 August 2005, p26

sentences and community service orders being prevalent.⁸⁷⁸ It has been suggested that sentences handed down through Circle Sentencing have an increased likelihood of success. For example, Mr William Flanagan, District Manager, Glen Innes Probation and Parole Office stated:

... I think as a priority issue it would be quite useful for us practitioners to have that process occurring because it allows offenders to engage with their community more substantially, as well as the victim, of course. I suspect that if they came to us on a supervised bond at the end of Circle Sentencing, what we could do would be more substantive if the client had been through that Circle Sentencing journey.⁸⁷⁹

9.11 In addition, Ms Wallace stated:

... if the offender was from Jerrinja I would choose four elders from Jerrinja reserve because it has more impact on the offender when it comes to sitting around in a circle with people they know who they look up to, who they respect, who they trust. It operates in another way as well. When it comes to community sanctions, you can just imagine living down the road from one of the elders who sentenced you. I do not know about you but I would be more likely to behave myself, and that is the type of rippling effect Circle Sentencing has on offenders.⁸⁸⁰

9.12 The availability of community based sentencing options has an impact on the success of Circle Sentencing, as noted by Mr Gerald Moore, Chief Executive Officer and Mr Gary Pudney, Principal Solicitor, South Eastern Aboriginal Legal Service:

The options in Nowra are far greater than in the rest of our region. Periodic detention is only an hour away to Unanderra, so that is available. That has been converted to a male and female facility, so women can go there as well. When Circle Sentencing started, home detention finished at the Shoalhaven River—which cut out half of Nowra, including the Aboriginal communities at South Nowra. As a result of pressure from the magistrate and other people, the boundary for home detention was moved about 15 kilometres south so that it would provide the option for Circle Sentencing. In a way Nowra is lucky in that it does have access to periodic detention, home detention and participation in Circle Sentencing; it also has access to community service because there are a lot of strong local organisations around. That is one of the reasons it has been successful because there are those strong alternatives to gaol and community members have been looking at those as an option. Unfortunately, that is not available south of Nowra, basically.⁸⁸¹

9.13 The 2003 review of Circle Sentencing indicated that the process provides an opportunity for community involvement in the sentence handed down:

The sentences that are developed are clearly developed as a collaboration between the court and the local Aboriginal community, and are increasingly involving the local community resources and elements of local Aboriginal culture. Local Aboriginal

⁸⁷⁸ See for example, Potas et al, *Circle Sentencing in NSW, A review and evaluation*, pp60-62

⁸⁷⁹ Mr Flanagan, Evidence, 14 June 2005, pp23-24

⁸⁸⁰ Ms Wallace, Evidence, 31 August 2005, p27

⁸⁸¹ Mr Pudney, Evidence, 28 June 2005, p23

people are involved in supervising the sentences that circles have developed and the sentences are being crafted in ways to directly benefit local Aboriginal communities.⁸⁸²

- 9.14** Community involvement in the Circle Sentencing process means that appropriate sentences can be identified because the community has an understanding of the offender:

The participation of Aboriginal representative in the sentencing process also enables creative sentencing options to be implemented. This is because members of the community have a unique understanding of the offender's problems and are best placed to assist with a solution after they leave court. Local community members also have a greater understanding of the availability and suitability of local Aboriginal community resources when developing sentences, and in utilising services and resources for sentencing that would otherwise be overlooked, such as local community farms, fishing co-operatives and cultural education programs.⁸⁸³

- 9.15** The Committee notes that the links between Circle Sentencing and community based sentencing options are many. Not only are community based sentences the most frequent sentence handed down by a Circle, but the purpose of the Circle process and the goals of community based sentencing are similar. Importantly, the community is involved in the administration of justice, which promotes the effective punishment and rehabilitation of offenders.
- 9.16** The Committee endorses Circle Sentencing and notes that the Government has a program of expansion underway. The Committee encourages the Government to continue expanding Circle Sentencing to areas of the State where there are viable Aboriginal communities and offenders with ties to those communities. The Committee notes, however, that Circle Sentencing can only be successful where there is a functional group of elders to represent a local community and where there are suitable community sentencing options available.
- 9.17** The Committee was advised that the Probation and Parole Service (PPS) is only involved in Circle Sentencing if the outcome is a community based sentence. In this regard, Mr Christopher Costas, the Area Manager of Community Offender Services in Queanbeyan advised that '... if a final outcome is going to be a community service order, there is a considerable degree of consultation with our office at Nowra and the magistrate and others in the circle.'⁸⁸⁴
- 9.18** The Committee heard a great deal of evidence about the PPS during this Inquiry and considers that there may be some benefit to including the PPS earlier in the Circle Sentencing process. The Committee recommends that the feasibility of including the Probation and Parole Service in the Circle Sentencing process should be examined.
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Recommendation 47

That the Attorney General examine the feasibility of including the Probation and Parole Service in the Circle Sentencing process.

⁸⁸² Potas et al, *Circle Sentencing in NSW, A review and evaluation*, p51

⁸⁸³ Potas et al, *Circle Sentencing in New South Wales, A review and evaluation*, p52

⁸⁸⁴ Mr Costas, Evidence, 28 June 2005, p16

Magistrates Early Referral into Treatment Program

- 9.19** MERIT is a 12 week intensive program based in the Local Court that provides the opportunity for adult defendants with drug problems to work towards rehabilitation as part of the bail process. A defendant attends MERIT before entering a plea and receives targeted drug treatment as a condition of bail. The final hearing and sentencing generally coincide with the completion of the program so the Magistrate can consider the defendant's progress in treatment as part of sentencing.
- 9.20** To be eligible for MERIT a defendant must meet several criteria including being an adult, the offence charged must be related to a serious drug problem but must not involve allegations of sexual assault or matters of significant violence, the defendant must give informed consent and must usually reside in the catchment area.⁸⁸⁵
- 9.21** MERIT aims to reduce crime associated with illicit drug use by engaging defendants with drug problems in intensive drug treatment. As noted by Judge Derek Price, the Chief Magistrate of the Local Court, '[t]he program allows defendants to focus on treating their drug problem in isolation from legal matters. Treatment as a general rule commences prior to pleas being entered and continues until the completion of the program.'⁸⁸⁶
- 9.22** Judge Price also stated that the advantage of MERIT 'is that it enables people who otherwise would not be associated with programs to get assistance' and provided the following examples of programs available through MERIT:
- Examples of the drug treatment programs available include medically supervised and home-based detoxification; methadone and the other pharmacotherapies such as naltrexone, as you can see; residential rehabilitation; and individual and group counselling and psychiatric treatment. It is a 12-week intensive program.⁸⁸⁷
- 9.23** The Committee was advised that 58.8% of finalised cases had successfully completed the program. Judge Price identified that the most common reason for termination or withdrawal is that '... people no longer wish to commit. In other words, they do not continue with the program themselves, or they breach bail conditions. That is another significant reason. Because of their failure to keep with their commitment, which MERIT involves, they then terminate it.'⁸⁸⁸
- 9.24** MERIT began in Lismore in 2000 and is gradually being rolled out across the State. The Attorney General's Department advised that it is currently available in 53 Local Courts covering 75% of finalised Local Court criminal matters in NSW.⁸⁸⁹ The expansion of MERIT to cover 75% of the state within five years was described by Dr Richard Matthews, Deputy Director General, Strategic Development, Chief Executive Officer of Justice Health as 'a pretty reasonable expansion.'⁸⁹⁰

⁸⁸⁵ Local Court Practice Note No 5, Issues 20 August 2002, MERIT Programme, para 8

⁸⁸⁶ Submission 7, p7

⁸⁸⁷ Judge Price, Evidence, 6 June 2005, p36

⁸⁸⁸ Judge Price, Evidence, 6 June 2005, p39

⁸⁸⁹ Submission 37, p3.

⁸⁹⁰ Dr Matthews, Evidence, 27 September 2005, p9

9.25 The Committee was subsequently advised that, as at March 2006, MERIT is now available at 56 local courts across NSW. Most recently, it expanded to Fairfield Local Court in December 2005 and Singleton Local Court in February 2006. MERIT is scheduled to expand to both Waverley and Newtown Local Courts this financial year.⁸⁹¹

9.26 The Director of the Crime Prevention Division of the Attorney General's Department, Mr Brendan Thomas explained the method of identifying places for pilots to be run in regard to MERIT:

It looks at the types of cases that potentially could be accessed through the MERIT program, again looking at the numbers. While ideally we would like to have those options available in every place, in reality we get resources that allow us to put them in certain places. So we try to put them in those places where it will have the biggest impact.⁸⁹²

9.27 The Committee notes the overall support for the MERIT program expressed by Inquiry participants. The main issue concerning MERIT that was raised is that it is not currently available to young offenders. For example, Judge Price expressed the view that MERIT should be made available to offenders aged from 15-18, but indicated that funding is an issue:

Yes, funding is the issue. The Court would like to extend all these programs. We would like to have MERIT across the State but the question is resources and the availability of resources.⁸⁹³

9.28 The Committee was advised that the Attorney General's Department is currently examining the option of extending the program to young people. Mr Thomas advised that rather than expanding the Youth Drug and Alcohol Court to every town, the Department is examining extending MERIT to young people:

If we just keep expanding the court, we will not cover the whole State or the whole need group until we build Youth Drug and Alcohol courts in every particular town, and we do not think that in some of the areas demand would be great enough necessarily for a full-time Youth Drug and Alcohol Court. So we are looking at a number of other options to try to essentially provide the same benefit to people without providing it in such a formally structured infrastructure as the Youth Drug and Alcohol Court because it is just cost prohibitive to expand it in the same way to other places. So one of the things we are looking at now is expanding the MERIT Program to young people so that they can get the same type of access to services that adults get through the MERIT Program. We will probably have to change the nature of the program to cater to young people and the needs of young people.⁸⁹⁴

9.29 The Committee expresses its support for the expansion of MERIT to young people, although notes that it has not included juvenile offenders in its review.

⁸⁹¹ Correspondence from Attorney General's Department to Committee Director, 20 March 2006

⁸⁹² Mr Thomas, Evidence, 6 June 2005, p53

⁸⁹³ Judge Price, Evidence, 6 June 2005, p38

⁸⁹⁴ Mr Thomas, Evidence, 6 June 2005, pp48-49

- 9.30** Another issue raised in relation to MERIT concerns access to the program by Aboriginal offenders due to the exclusion of certain violent offenders. The South Eastern Aboriginal Legal Service's submission noted that 'MERIT referral is not available for defendants who have issues of violence around the offences. This further disadvantages Aboriginal offenders who have a higher rate of offences in violence.'⁸⁹⁵ As the Committee did not receive any other information on this issue it has not examined it further. The Committee notes, however, that similar issues were raised in relation to access to periodic detention, which is discussed in Chapter 6.

Drug Court of New South Wales

- 9.31** The Drug Court provides an opportunity for adult offenders with substance abuse problems to be diverted into treatment rather than imprisonment. The jurisdiction of the Drug Court includes matters heard in both the Local and District Courts. Following initial detoxification while on remand, the person enters a guilty plea, receives a sentence that is suspended and then undergoes treatment to reduce drug dependency and receives intensive supervision by the PPS.
- 9.32** The Drug Court program generally lasts at least twelve months. Participants who have substantially complied with their program 'graduate' from the Drug Court and receive a certificate to recognise their achievement. If a program is terminated earlier than 12 months the Drug Court must reconsider the initial sentence. The Drug Court may set the initial sentence aside and apply another sentence in its place, but cannot increase the initial sentence.
- 9.33** The objectives of the Drug Court are to reduce the drug dependency of eligible persons, to promote the re-integration of such drug dependent persons into the community and to reduce the need for such persons to resort to criminal activity to support their drug dependencies.⁸⁹⁶
- 9.34** Although styled as a court and presided over by a judicial officer, the Drug Court is far removed from the traditional practice and procedure of a criminal court. His Honour Judge Roger Dive, Senior Judge of the NSW Drug Court, cites the Drug Court as an example of a new direction in sentencing which he calls 'therapeutic jurisprudence':

My experiences as a judicial officer, especially of being frequently confronted by the same offenders returning repeatedly to court for new offences, has encouraged me to embrace the new initiatives in the criminal justice system which seek to achieve long term change ... Intensive court based programs such as the Drug Court or the Youth Drug and Alcohol Court have embraced therapeutic jurisprudence, and increasing the ability of the criminal justice system, working in partnership with other key agencies, to intervene at an intense level and protect the community by encouraging, managing and enforcing changes in the offender's life.⁸⁹⁷

⁸⁹⁵ Submission 42, p9

⁸⁹⁶ *Drug Court Act 1998* (NSW), s 3

⁸⁹⁷ Submission 27, p2

- 9.35** The Drug Court commenced as a pilot program in 1999 under the *Drug Court Act 1998* (NSW). It operates out of the Parramatta Court Complex and caters to defendants referred from courts in the western-Sydney catchment area.⁸⁹⁸
- 9.36** The Drug Court program is available to adults who have been charged and are highly likely to be sentenced to full-time imprisonment if convicted, have indicated that they will plead guilty to the offence, are dependent on prohibited drugs, reside within the catchment area, are referred from a court in the catchment area and who are willing to participate. A person is not eligible if he or she is charged with an offence involving violent conduct or certain other offences, or is suffering from a mental condition that could prevent or restrict participation in the program.
- 9.37** Drug Court participants are typically disadvantaged in a variety of senses and those disadvantages sometimes make participation in a highly structured program difficult, as Judge Dive noted:
- Our participants almost universally have appalling childhood abuse, neglect, tragedy and trauma. They struggle with personality disorders, mental illness, HIV, chronic illnesses, lack of education, lack of skills and work history. Their deficits are multigenerational. They have often arrived alone from refugee camps and endured war and violence in their lands of origin. The women have almost universally been abused, experienced domestic violence and are often very sensibly wary of placing trust in anyone. Participants, and often our Aboriginal participants, sometimes struggle greatly with the demands of a structured program and for many planning a day with multiple appointments where there are limited funds and difficult transport links can be a very taxing issue indeed.⁸⁹⁹
- 9.38** The Committee notes that the evidence received in respect of the Drug Court was overwhelmingly positive. For example, Mr Lloyd Babb, Director, Criminal Law Review Division, Attorney General's Department, commented that:
- ... a review of the Drug Court by the Bureau of Crime Statistics and Research was positive. My impression is that it was a very positive program that has flexibility. It is one of the things of which the State can be proud of introducing. It is reasonably innovative within Australia and it seems to have worked very well.⁹⁰⁰
- 9.39** A BOCSAR review in 2002 indicated that participants experienced sustained improvements in health, social functioning and drug use.⁹⁰¹ A further review into the cost-effectiveness of the Drug Court by BOCSAR showed that the Drug Court program, despite having a high drop out rate of around 40% of participants, was more cost-effective than imprisonment in reducing the number of drug offences and as cost-effective as imprisonment in delaying the onset of further re-offending.⁹⁰²

⁸⁹⁸ The Drug Court also has a medical annex at the Metropolitan Remand and Reception Centre.

⁸⁹⁹ Judge Dive, Evidence, 30 August 2005, p56

⁹⁰⁰ Mr Babb, Evidence, 31 August 2005, p20

⁹⁰¹ NSW Bureau of Crime Statistics and Research, *New South Wales Drug Court Evaluation: Health, Well-Being and Participant Satisfaction*, Attorney General's Department, 2002, pvii

⁹⁰² NSW Bureau of Crime Statistics and Research, *New South Wales Drug Court Evaluation: Cost Effectiveness*, Attorney General's Department, ppvi-vii

9.40 There are also indications that the Drug Court program has led to a fall in the number of persons sentenced to imprisonment. Judge Dive advised that, as at 30 August 2005, 46% of participants had achieved a non-custodial sentence.⁹⁰³ This figure is significant given that persons are only eligible for referral to the Drug Court program if they are highly likely to be sentenced to a term of imprisonment if found guilty as charged.

9.41 The Drug Court is limited to accepting referrals from within the western-Sydney catchment area. Even within this limited area, demand for Drug Court places outstrips supply. Judge Dive noted that:

... at current resource levels the Drug Court cannot even accept all of the referrals from its current catchment areas of West and South West of Sydney, and a ballot is undertaken each week to select participants from those referred. The Drug court would certainly support its expansion to enable it to manage more offenders.⁹⁰⁴

9.42 The geographic limitation on referrals to the Drug Court gives rise to some concerns regarding the equity of the current access arrangements. Mr Brian Sandland, Director, Criminal Law Division, NSW Legal Aid Commission noted:

... the fact that the Drug Court is restricted to that south-western area of Sydney remains a matter of concern. If I can quote from our solicitor in charge at Dubbo, "Lack of Drug Court means rural dwellers are not being afforded the same expertise and processes that city dwellers receive. This difference could actually equate to life and death, custody and non-custody outcomes for some clients." Some of our people out there in the field actually see it in those stark terms. It is as important an issue as that.⁹⁰⁵

9.43 Mr Richard Davies, Principal Solicitor with the Western Aboriginal Legal Service, also suggested that the Drug Court should be expanded beyond Sydney:

One of the major issues is the unequal distribution of community-based sentencing options in remote and rural areas of the State. There are sentencing options available to courts in Sydney, Newcastle and Wollongong, which are simply not available out here, some of which I believe would be most beneficial utilitarian sentencing options—some perhaps not so. An example is the Drug Court and the Youth Drug Court. There are clear drug issues in rural and remote communities, not just in the Aboriginal community but generally. That is an option I believe has been available in Sydney for about five years but has not travelled across the sandstone curtain. I believe the options of the Drug Court and the Youth Drug Court would be valuable sentencing options in the community.⁹⁰⁶

9.44 Magistrate David Heilpern, who sits at Batemans Bay, expressed enthusiasm regarding the extension of the Drug Court around the State:

⁹⁰³ Judge Dive, Evidence, 30 August 2005, p59

⁹⁰⁴ Answers to questions on notice taken during evidence 30 August 2005, Judge Roger Dive, Senior Judge, NSW Drug Court, p2

⁹⁰⁵ Mr Sandland, Evidence, 6 June 2005, p44

⁹⁰⁶ Mr Davies, Evidence, 15 June 2005, p39

Across the State we get a lot of pilots. The Drug Court is a really good example. I know MERIT is being wound out statewide. The Drug Court is a really good example. The valuations that I have read make you cheer. It is universally praised as a concept. Well, if it works, let's get it here. That is what I would like to see—an equalisation of sentence.⁹⁰⁷

- 9.45** Mr Paul Winch, Public Defender, suggested that the Drug Court should go on circuit around NSW:

I am mystified why the Drug Court is so geographically constricted. It seems to me that, in the same way as an ordinary Local Court goes on circuit to various places, it is inexplicable that the Drug Court could not, and should not, do something similar. On certain days it could be in a specific country town, on others it could be in a nearby town, and during the third week it could be in a different town altogether. It is my belief that the Drug Court is a very useful tool. While it is very intensive, it seems to have its successes.⁹⁰⁸

- 9.46** There may be some difficulties associated with taking the Drug Court on circuit that do not apply to other courts such as the Local Court. The Committee notes the observation of Ms Catriona McComish, Senior Assistant Commissioner, Community Offender Services, that the Drug Court procedures are a form of intensive supervision akin to periodic detention.⁹⁰⁹

- 9.47** Mr Winch suggested that the Drug Court could overcome the problems of distance by means of video technology:

It would seem to me that the Drug Court could use videoconferencing facilities. You will hear about this in due course. The Drug Court has a regime where people are brought back before it on a fairly regular basis. They are checked up on, spoken to, and encouraged and/or sanctioned, depending on how they are going. It seems to me that much of that could be done, perhaps in conjunction with Probation and Parole officers in the various areas, but the judicial officer would not necessarily have to be there.⁹¹⁰

- 9.48** Judge Dive agreed that it would be feasible for the Drug Court to go on circuit, provided underlying support services were available in local centres across the state on a full-time basis:

... there would be nothing that could not be overcome to have, for example, a Drug Court in a larger centre such as Dubbo, Wagga Wagga or Taree and have the judge or magistrate fly to that centre each fortnight or something like that. All the hard work is done by the day-by-day team that works with the offender on the ground so probation and parole, health services, mental health services would all need to be funded and available.⁹¹¹

⁹⁰⁷ Magistrate Heilpern, Evidence, 28 June 2005, p48

⁹⁰⁸ Mr Winch, Evidence, 30 August 2005, p30

⁹⁰⁹ Ms McComish, Evidence, 30 August 2005, p4

⁹¹⁰ Mr Winch, Evidence, 30 August 2005, p30

⁹¹¹ Judge Dive, Evidence, 30 August 2005, p61

- 9.49 However, given the costs associated with intensive supervision Judge Dive suggested that, if the Drug Court is to be expanded, a trial program should be established in a major regional centre with a reasonable number of possible participants.⁹¹²
- 9.50 The Committee notes that the Drug Court shows positive signs of contributing to the health and wellbeing of drug dependant persons and to the safety and welfare of the broader community. The Drug Court is not strictly speaking a sentencing option, however the Committee is of the view that the intensive supervision available under the Drug Court program is analogous to some community based sentencing options, such as community service orders and supervised bonds. The therapeutic nature of the program distinguishes it from the practice and procedure of traditional criminal courts, at the same time placing a question mark over the use of Drug Court style programs in areas which lack the range of full-time support services upon which the success of the Court depends. Nevertheless, the Committee is optimistic that, with some innovation, the Drug Court program can be exported beyond Western Sydney.
- 9.51 The Committee recommends that the NSW Attorney General's Department conduct a trial of the Drug Court program in a suitable major regional NSW town with amendments to the program as are necessary in such a setting. The Department should ensure that readily available and accessible programs and support services, such as drug and alcohol and other health services, are available to maximise the success of offenders undertaking the program.

Recommendation 48

That the Attorney General conduct a trial of the New South Wales Drug Court in a suitable major regional New South Wales town with such amendments to the program as are necessary in a regional setting. The Department should ensure that readily available and accessible programs and support services, such as drug and alcohol services and other health services, are available to maximise the success of offenders undertaking the program.

Unpaid fines and drivers' licences

- 9.52 Throughout the Inquiry the Committee received a great deal of evidence relating to the relationship between the penalties arising from a failure to pay fines and a person's ability to obtain or hold a valid driver's licence. This issue was raised as a significant concern in the rural and remote areas the Committee visited.
- 9.53 The relationship between fine default, licence cancellation and charges under the roads and traffic legislation is complex. A detailed analysis of the law and policy in this area is beyond the scope of this Inquiry. However, the Committee recognises the significance of this issue for many Inquiry participants and the fact that this situation can escalate to the point where a person is faced with a term of imprisonment, whether community based or not. An overview of the legislation and the issues raised by witnesses and submission makers is set out below.

⁹¹² Judge Dive, Evidence, 30 August 2005, p62

Relevant legislation and background information

- 9.54** A fine is a sanction that requires the offender to pay a monetary penalty to the State. Fines may be imposed by a court or by way of a penalty notice. Fines are the single most common outcome of criminal cases finalised in NSW and were used in 51% (56,187) of matters finalised in criminal matters in the NSW Courts in 2004.⁹¹³ The police, local councils and other agencies also impose fines through penalty or infringement notices.
- 9.55** Imprisonment for fine default has a long history and in the recent past, fine defaulters have constituted a significant proportion of prisoners in NSW. In 1984, BOCSAR published a study, which showed that in 1983, 51.9% of NSW prison receptions were imprisoned for fine default. 70% of those imprisoned were in default of one fine only and 71% gave inability to pay as the major reason for failure to pay. Young people, women and Aborigines were disproportionately over-represented. Almost half were imprisoned for offences which themselves did not allow for a penalty of imprisonment, bearing out the claim that many people were imprisoned not for their original offence but for being poor.⁹¹⁴
- 9.56** Reforms were made to the system in December 1985 including directing the courts to take financial circumstances of the offender into account and making it easier for people to apply for further time to pay.⁹¹⁵
- 9.57** In 1987, a young fine default prisoner was badly assaulted at the then Central Industrial Prison at Long Bay.⁹¹⁶ The NSW Government announced a moratorium on imprisonment for fine default and legislation was passed introducing a scheme of driver's licence cancellation and motor vehicle registration cancellation in place of imprisonment for fine defaulters.
- 9.58** The State Debt Recovery Office (SDRO) administers the scheme and the recovery of fines is dealt with by the *Fines Act 1996*. The procedure for payment of fines imposed by a court is as follows:
- **Payment details:** Fine imposed by a court is payable within 28 days.
 - **Notification of fine:** The person is notified of the fine, the arrangements for payment and the action that may be taken under this Act to enforce the fine.
 - **Time to pay:** A court registrar may allow further time to pay the fine on the application of the person.
 - **Enforcement order:** If the fine is not paid by the due date, a court fine enforcement order may be made. If the person does not pay the amount (including enforcement costs) within 28 days, enforcement action may be taken.

⁹¹³ NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics 2004*, Table 1.7, pp26-27

⁹¹⁴ J Houghton, *Fine Default*, NSW Bureau of Crime Statistics and Research, Attorney General's Department, 1984

⁹¹⁵ *Justices (Penalties and Procedure) Amendment Act 1985* (NSW)

⁹¹⁶ See Parliament of New South Wales, *Report of the Inquiry Into the Central Industrial Prison Dated August 1988 by His Honour A G Muir QC*, Government Printer, 1988, 3 Volumes

- **Withdrawal of enforcement order:** A court fine enforcement order may be withdrawn if an error has been made.⁹¹⁷

9.59 The SDRO is responsible for the collection of outstanding fines and penalties. A court fine enforcement order is an order made by the SDRO for the enforcement of a fine imposed by a court.⁹¹⁸ The following is a summary of the enforcement procedure following the making of a fine enforcement order:

- **Service of fine enforcement order:** Notice of the enforcement order is served on the defaulter and the defaulter is notified that if payment is not made enforcement action will be taken.
- **Driver licence or vehicle registration suspension or cancellation:** If the fine is not paid within the period specified, the RTA suspends any driver licence, and may cancel any vehicle registration, of the defaulter. If the licence of the fine defaulter is suspended and the fine remains unpaid for six months, the RTA cancels the licence.
- **Civil enforcement:** If the defaulter does not have a driver licence or a registered vehicle or the fine remains unpaid after six months, civil action is taken to enforce the fine, namely, a property seizure order, a garnishee order or the registration of a charge on land owned by the fine defaulter.
- **Community service order:** If civil enforcement action is not successful, a CSO is served on the defaulter.
- **Imprisonment if failure to comply with community service order:** If the defaulter does not comply with the CSO, a warrant of commitment is issued to a police officer for the imprisonment of the defaulter (except in the case of children). The defaulter may apply to serve the imprisonment by way of periodic detention.
- **Fine mitigation:** A defaulter may seek further time to pay and the SDRO may write off unpaid fines. Review applications may be made to the Hardship Review Board.⁹¹⁹

Relationship between fine default, licence cancellation and charges under roads and traffic legislation

9.60 The Committee received considerable evidence regarding the relationship between fine default, licence cancellation and charges under the roads and traffic legislation. This evidence can be categorised into three broad areas:

- Young offenders who have multiple unpaid fines, typically for minor public order type offences, are unable to ever obtain a driver's licence.
- Some young people are unable to obtain a driver's licence due to the licence fee structure and/or literacy issues relating to the written test.

⁹¹⁷ *Fines Act 1996* (NSW), s 5

⁹¹⁸ *Fines Act 1996* (NSW), s 12

⁹¹⁹ *Fines Act 1996* (NSW), s 58

- Offenders who have their licence suspended or cancelled due to unpaid fines may subsequently drive while unlicensed and if caught receive mandatory disqualification.

Rural and remote communities

- 9.61** For people living in rural and remote communities, being able to drive is a fundamental necessity in order to live, as highlighted by Magistrate Roger Prowse:

When you are at Mungindi and it is 120 kilometres to Moree and there is no other form of transport, apart from walking or horseback, what do you do? You drive. When you are in Boggabilla and you need to get to Goondiwindi, which is in Queensland, because that is where the only shops are, are you going to walk the 10 to 15 kilometres when it is 38 or 43 degrees, or 4 degrees in winter. No. The people drive. They drive because it is a necessity and unfortunately they make the choice to drive whether they have a licence or not.⁹²⁰

- 9.62** Magistrate Fiona Toose, with the Walgett, Lightning Ridge and Penrith Local Courts, noted the limited deterrence achieved by a fine in rural and remote communities:

In remote areas, the deterrent factor of a fine is minimal for many as they cannot pay it and seldom do. If they have a driver's licence that will ultimately be suspended for non-payment which inevitable leads to further offences of a driving nature for a large number of them. For those who do not have a driver's licence, they simply let their fines accumulate which makes their obtaining a drivers licence at any stage an impossibility; they also would have little or nothing to satisfy any enforcement of the debt by the State Recovery Office by civil means.⁹²¹

- 9.63** Similarly, Magistrate David Heilpern stated:

Fines, particularly in welfare-dependent communities and Aboriginal communities, are next to useless. I am sure you will have received other evidence about the impact of fines on people. Really, what it means is that they lose their licences, they lose their registration, and then if they are tempted to drive the cycle continues and gets worse.⁹²²

Young people

- 9.64** The Committee received considerable evidence regarding the difficulties young people face in obtaining and maintaining a valid driver's licence. Ms Jane Sanders, Principal Solicitor, Shopfront Youth Legal Centre described the difficulties young people from disadvantaged populations face in this regard:

... we have been seeing at our service a dramatic increase in the number of young people who have outstanding fines and who are being charged for some form of unlicensed driving. The two are definitely linked. We find that an enormous number of young people have their licence suspended or are unable to get their licences because they have incurred, largely, railway transit fines when they are young. Often

⁹²⁰ Magistrate Prowse, Evidence, 1 September 2005, p58

⁹²¹ Submission 5, p8

⁹²² Magistrate Heilpern, Evidence, 28 June 2005, p38

they are 15-year-old homeless people sleeping on trains or with no income and a means of support running the risk of travelling on trains without tickets. They are given very hefty fines and they have no means to pay them. They reach the State Debt Recovery Office and then they find that if they have got a licence it is suspended or they cannot get a licence. The provisions in relation to young people, people under 18 with non-traffic fines, have been somewhat amended to make it easier and reduce the hardship on these kids. But there is still an enormous problem.

... The fine system has become a bit more flexible, but still not flexible enough. Very often we run into the situation in which magistrates are forced to imprison people who are not bad drivers, they have not had an accident, they have not driven negligently, drunk, or whatever. They simply have not had a licence and they have driven in breach of a suspension or court disqualification order. It is an enormous problem. The legislative scheme of mandatory disqualifications is very harsh, it is very inflexible.

For some kinds of traffic offences and offenders there is a need for deterrence, and taking their licence away is the ultimate deterrent for many people. But for the disadvantaged people that we are dealing with, particularly young people, licence disqualification is really not a deterrent; in effect, it may have the opposite effect.⁹²³

- 9.65** Mr Pudney, Principal Solicitor, South Eastern Aboriginal Legal Service, also commented on the difficulties faced by young offenders in country towns:

One lad was picked up for not having a front light, not having back light, not wearing a helmet and riding on the footpath. Four individual penalties. As a consequence of those, they could have stopped him from getting a licence because they go to the State Debt Recovery Office with a \$50 fine for each one. What started out as a \$60 penalty becomes a \$110 penalty and multiplied by four it becomes \$440.⁹²⁴

- 9.66** Magistrate Prowse also highlighted the practical difficulties faced by young people on low incomes in rural and remote communities in trying to obtain a driver's licence and noted that the lack of a licence prevents a young person from gaining employment:

But if they cannot read, they have difficulty with reading or they have difficulty paying the nonadjustable fees of the RTA—if you are on a social security income and have to pay \$32 for a test and you fail the test it is \$32 again next time and the next time. Thirty-two dollars out of an income of \$150 is an enormous amount and it usually means that food or other expenditure cannot occur. Yet without a licence they cannot get a job to earn an income and become good and productive members of the community.⁹²⁵

Licence suspension and mandatory disqualification

- 9.67** Magistrate Clare Farnan provided the Committee with a sobering picture of the journey to prison for some offenders who drive while disqualified:

⁹²³ Ms Sanders, Evidence, 31 August 2005, pp47-48

⁹²⁴ Mr Pudney, Evidence, 28 June 2005, p26

⁹²⁵ Magistrate Prowse, Evidence, 1 September 2005, pp58

... I have identified people who I have sent to prison who have ended up there because they did not pay fines for what I would regard as matters that the community would not have been concerned about then, and their driving has been unremarkable, it has not been dangerous, it has not been drunk, it has been unlicensed or disqualified, but they keep on doing it because they feel they have a need to take children to hospital often or to go down to the corner and get a kebab, as the case may be. People keep driving because they do not think they are bad drivers and some of them end up in prison. ...

There is a mandatory three-year disqualification period for your second unlicensed offence, arguably. I think that is the law. There are two issues here. That is one issue. The person who has never had a licence or whose licence has lapsed and is now an unlicensed driver, for their second unlicensed driving offence they get a three-year disqualification. If they continue to drive they are a disqualified driver and there is a mandatory two-year disqualification to add on. If they keep driving and they are disqualified, most people will receive a prison sentence at some point or stage of disqualified driving. They might not get it the first time, they might not get it the second time, they might not even get it the third time. But if they do it a fourth time I would say it is inevitable that they would get a prison sentence. Most would probably get it the second time. That is one group of people.⁹²⁶

9.68 Magistrate Farnan went on to describe the consequences for offenders with unpaid fines:

The other group are people who have unpaid fines. I had a gentleman who had not paid a fine for not voting in a council election. Their driver's licence is suspended and they continue to drive. Obviously that is not something they should do, but they do. If they come before the court for driving whilst suspended, the mandatory minimum disqualification period is 12 months. If they drive again during that period of disqualification the mandatory minimum penalty is a two-year disqualification. Again, they are on that same merry-go-round. Obviously those people should not be driving because they are not licensed drivers, but they do not understand where they are heading and they do not believe they are bad drivers. I suspect their chances of being pulled over in larger communities are lower than their chances of being pulled over in smaller communities because in smaller communities the police know who the unlicensed or disqualified drivers are. In that sense it is more of a problem because the chances of detection are greater, I would imagine, in rural areas.⁹²⁷

9.69 The impact of intensive policing in rural and remote communities is considered in more detail in the context of bonds in Chapter 5.

9.70 Mr Robert Tumeth, Principal Solicitor, Criminal Law Committee, Law Society of NSW questioned the objectives of the current policy with regard to drivers' licences:

I think the Government must decide what it wants to achieve. If its objective is that it will have everybody driving who has a license, the path it has gone down clearly does not work. That is starkly demonstrated in rural and regional New South Wales because of a lack of public transport and also, in many cases, people not having jobs. What happens is you will have a person who is capable physically of driving—and it is surprising the number of people who will come under notice not for the manner of their driving but they will be picked up for an RVT or something like that. Courts

⁹²⁶ Magistrate Farnan, Evidence, 31 August 2005, p45

⁹²⁷ Magistrate Farnan, Evidence, 31 August 2005, p45

traditionally have been disqualifying people and fining them. That in itself is not stopping people from driving. They are still doing it either because, first, they have no means of transport or, second, they do not have the money to use transport such as taxis or things of that nature. So they will still drive.⁹²⁸

Possible solutions

- 9.71** Magistrate Heilpern identified the need to move away from an economic method of enforcement:

I can understand the policy reason why fines are connected to licences and I am sure it leads to greater compliance in some areas where people pay. I know that if I incurred a fine I would pay it so that I did not lose my licence. I just do not know how you draw a distinction between that and communities where the ability to pay the fine is just not there. Some speeding charges carry a fine of \$1,500. For a lot of people in rural communities they will never see that amount of money. That means that for the rest of their life they will not have a licence. I think we need to move somehow from an economic method of enforcement to some other method of enforcement ...⁹²⁹

- 9.72** Other witnesses suggested possible ways to address particular aspects of the relationship between fines and driver's licences. Magistrate Farnan, suggested granting the courts power to bypass the suspension of licences provisions and proceed to ordering a CSO for fine default:

... magistrates have the power to bypass the other enforcement provisions of the fines legislation and go straight to community service. So that, in effect, if a person is clearly never going to be able to pay a fine one can direct that they perform a certain number of community service hours in lieu of the current procedure in New South Wales, which requires that an attempt be made by a bailiff to execute against goods and various other things. The result is that for some people it is many, many years before they can be given the opportunity to do anything to pay off their fines. That seems to me to be a procedure that we could consider introducing here.⁹³⁰

- 9.73** Magistrate Prowse suggested that a 'restricted' type licence could be provided to people in rural and remote communities who have literacy difficulties and are unlikely to pass the RTA written test:

It seems to me that crime rates in the bush could be cut by half if we changed the law and the way of thinking about how Murri and Kooris, but also non-Murri and non-Koori populations get their licences. Many unlicensed people have come before me. When I ask them, "Why haven't you got a licence?" they say, "I can't read." ... The criteria ought to be, "Do you have driving skills?" as opposed to "Can you read?" Is it really important to know that you are supposed to park 10 or 15 metres from a kerb? I agree that sometimes it is. But in country areas, if there were a practical skills-based test, and a skills-based test only, they would get their licences. Therefore they would not be unlicensed; they would have opportunities for jobs and you would not have the compounding effect of unlicensed drivers. ... You can then have a licence that is restricted. You can drive around Boggabilla and go to Goondiwindi and the surrounds, until you get experience. In a year's time, just as you qualify for a licence to

⁹²⁸ Mr Tumeth, Evidence, 1 September 2005, pp21

⁹²⁹ Magistrate Heilpern, Evidence, 28 June 2005, p45

⁹³⁰ Magistrate Farnan, Evidence, 31 August 2005, p46

drive a geared car after 12 months of holding an automatic car licence, it becomes an unrestricted licence; you can drive anywhere.⁹³¹

- 9.74** Magistrate Farnan suggested providing some form of 'incentive' to drivers that are disqualified for long periods if they can show a crime free period:

I think we need to provide those people with some incentive to get back their driver's licence, such as, applying to a court after a certain crime-free period, say, three years and say, "If you can get through three years' disqualification without an offence you can make an application to a court and ask to be given an opportunity to get a driver's licence." Again going back to Western Australia ... after 10 years you can go back to the District Court and say, "Let me have my licence back." It provides some incentive. If I were able to say to someone who was disqualified to 2026, "If you could get through a three or five-year period crime free, you might have some hope of getting your licence back ", it would be a significant improvement on the current situation.⁹³²

- 9.75** Mr Babb, Director, Criminal Law Review Division, Attorney General's Department, expressed support for alternatives to licence suspension for fine default. He also advocated the provision of assistance to specific groups to obtain and maintain their driver's licence:

What I think needs to be looked at are alternatives to licence suspension for fine default and alternatives for specific groups within the community that although they may be good drivers do not have licences, and examples of that are not only—I understand, again anecdotally, that some people through illiteracy find it difficult to get a licence. So really driving is an essential part of most young people's lives; it is something they aspire to; it is something they are likely to do regardless of whether they have got a licence or not, and I think the best thing we could do is work on systems where fine default will not disentitle them from a licence but in some other way we can ensure that fines are paid.⁹³³

Committee view

- 9.76** As noted at the outset of this discussion, the relationship between fine default, licence cancellation and charges under the roads and traffic legislation is complex and a detailed analysis of these issues is beyond the scope of this Inquiry. The Committee acknowledges, however, the level of concern regarding fine default and drivers' licences in rural and remote NSW, evidenced by the volume of submissions and oral evidence received during the Inquiry.
- 9.77** The Committee recognises that achieving fair and equal access to driver's licences is a complex challenge requiring a whole-of-government approach to address underlying issues such as adult literacy, poverty and alcohol abuse.
- 9.78** The Committee notes the practical suggestions made by participants to this Inquiry described in the preceding discussion. The Committee has gathered this information together to highlight the seriousness of this issue for the many people who raised it during this Inquiry. The Committee is of the view that this matter needs to be comprehensively investigated.

⁹³¹ Magistrate Prowse, Evidence, 1 September 2005, p58

⁹³² Magistrate Farnan, Evidence, 31 August 2005, p46

⁹³³ Mr Babb, Evidence, 31 August 2005, p21

- 9.79** The Committee recommends that such an investigation be undertaken in a joint initiative involving relevant agencies including the Attorney General's Department, the Department of Transport, the Roads and Traffic Authority, the Department of Education and Training, the Department of Corrective Services and the State Debt Recovery Office.

Recommendation 49

That the Government undertake a multi-agency project to examine the issues relating to fine default and driver's licences brought before the Committee during this Inquiry and described in this report.

Appendix 1 Submissions

No	Author
1	Name suppressed at request of author
2	Mr Peter HENNESSY, NSW Law Reform Commission
3	Mr Tom PORT, Nambucca Shire Council
4	Mr Richard COLLEY, Bankstown City Council
5	Magistrate Fiona TOOSE, NSW Local Courts
6	Mr David SHERLOCK, NSW Department of Juvenile Justice
7	Chief Justice, Judge Derek PRICE, NSW Local Courts
8	Mr Gary MOORE, NCOSS
9	Mr Brian WILKINSON, Richmond Valley Council
10	Mr Paul WINCH, NSW Public Defenders Office
11	Mr Peter MARSHALL
12	Ms Sharon PAYNE, North Australian Aboriginal Legal Aid Service
13	Mr Justin WHELAN, UnitingCare NSW.ACT
14	Mr Stepan KERKYASHARIAN AM, Community Relations Commission
15	Mr Stephen GOW, Armidale Dumaresq Council
16	Ms Su HELY, Waterford Ryan
17	Mr Bill ANSCOMBE, Charles Sturt University
18	Ms Nadia ROSENMAN, CLRI NSW Social Justice Committee
19	Mr Chris ADEPOYIBI, NT Department of Justice
20	Mr Alan PERRY
21	Mr Colin COAKLEY, Country Women's Association of NSW
22	Ms Laura HENSON, Greater Taree City Council
23	The Hon Judy SPENCE MP, QLD Corrective Services
24	Mr Peter MCGHEE, Intellectual Disability Rights Service
25	Ms Jane SANDERS, Shopfront Youth Legal Centre
26	The Hon Jon STANHOPE MLA, ACT Legislative Assembly
27	Hon Judge Roger DIVE, Drug Court of NSW
28	Professor Chris CUNNEEN, Juvenile Justice Advisory Council of NSW
29	Ms Alanna CLOHESY, People with Disability Australia Inc
30	Commissioner Ron WOODHAM PSM, NSW Department of Corrective Services
31	Ms Lyndsay BROOKER, Legal Aid NSW
32	Professor Russell HOGG, Institute for Rural Futures

No	Author
33	Mr P J DOYLE, Bellingen Shire Council
34	Mr Gordon SALIER, Law Society of NSW
35	Ms Stacy SCHEFF, Justice Action
36	Mr Andrew JAFFREY
37	Mr Laurie GLANFIELD, Attorney General's Department
37a	Mr Laurie GLANFIELD, Attorney General's Department
38	Mr Ian GEDDES, Cater and Blumer Solicitors
39	Mr Brendan O'REILLY, NSW Department of Ageing, Disability and Home Care
40	Clr David J HEDE JP, Bega Valley Shire Council
41	Ms Moira MAGRATH, Probation and Parole Officers' Association of NSW Inc
42	Mr Gary PUDNEY, South Eastern Aboriginal Legal Service
43	Ms Melissa WOOD, NSW Coalition of Aboriginal Legal Services
44	Ms Mary RYAN, Western Aboriginal Legal Service
45	Mrs Patricia WAGSTAFF
46	Mr Terry O'CONNELL, Real Justice
47	Ms Marcia PAYNE, Law Society of NSW
48	The Hon Sandra NORI MP, Minister for Women
49	Mr Baharak SAHEB, Gunnedah Shire Council
50	Name suppressed at request of author
51	Name suppressed at request of author
52	The Hon Terry ROBERTS MLC, Minister for Correctional Services, South Australia
53	The Hon Dr Peter TOYNE MLA, Minister for Justice and Attorney General, Northern Territory
54	Mr Craig HARRIS, Commonwealth Attorney General's Department
55	The Hon Christopher PYNE MP, Parliamentary Secretary to the Minister for Health and Ageing
56	The Hon Dr Brendan NELSON MP, Minister for Education, Science and Training
57	The Hon John D'ORAZIO MLA, Minister for Justice and Small Business, Western Australia
58	Senator the Hon Amanda VANSTONE, Minister for Immigration and Multicultural and Indigenous Affairs
59	The Hon Tim HOLDING MP, Minister for Corrections, Victoria
60	The Hon Carmel TEBBUTT MLA, Minister for Education and Training, NSW

Appendix 2 Witnesses

Date	Name	Organisation	
6 June 2005 Parliament House, Hearing	Mr Brendan THOMAS	Attorney General's Department	
	Ms Sarah GRASEVSKI	Centrelink	
	Ms Inga Kari Anna LIE	Centrelink	
	Mr Robert WILLIAMS	Centrelink	
	Mr Brian SANDLAND	Legal Aid Commission of NSW	
	Mr Phil RUSE	NSW Department of Corrective Services	
	Ms Valda RUSIS	NSW Department of Corrective Services	
	Chief Justice Derek PRICE	NSW Local Courts	
	Dr Eileen BALDRY	University of NSW	
14 June 2005 Inverell, Hearing	Mr Stephen COLLINS	Borwith and Butler	
	Ms Margaret BARNES	Community Programs Inc	
	Ms Fiona BROWN	Inverell Chamber of Commerce	
	Ms Kaylene Estelle STRONG	Inverell Chamber of Commerce	
	Mr Paul HENRY	Inverell Shire Council	
	Clr Barry JOHNSTON	Inverell Shire Council	
	Mr Joerg SCHMIDT-LIERMANN	Inverell Shire Council	
	Ms Jane ADAMS	NSW Police	
	Inspector Dave HARRINGTON	NSW Police	
	Mr William Craig FLANAGAN	Probation and Parole Services	
	Mr Michael GOODA	Probation and Parole Services	
	Public meeting	Ms Jeanette BAUMANN	
		Mr Bruce BONEY	
		Ms Phyliss BROWN	
		Ms Pricilla BROWN	
		Ms Elizabeth CONNORS	
		Mr Merve CONNORS	
		Mr Preston CONNORS	
		Ms Janice CUTMORE	
Ms Renata DE LA CROIX			
Ms Vicky DUNCAN			
Ms Irene GARDINER			
Mr David GERRARD			
Ms Alma GREEN			
Ms Vivian IRVING			
Mr Douglas KIRK			

Date	Name	Organisation
14 June 2005 cont.	Mr Michael KIRK Mr Peter KIRK Mr Peter KIRK Snr Mr David Phillips LEWIS Ms Kathy LOMBO Ms Jo LUBKE Mr Mike LUBKE Mr Bob MERRY Ms Veronica MERRY Ms Kathy NICHOLSON Ms Geraldine PIFI Ms Myrtle SCOBLE Ms Jenell SMITH Ms Deanne TIGHE Ms Laurel TOOMEY	
15 June 2005	Ms Louise Ellen BROWN	Bourke Hospital
Bourke, Hearing	Mr Ken CROSKELL Inspector Michael John HEAP Mr Michael Dwayne JACKSON Inspector Gregory Paul MOORE Superintendent Desmond ORGAN Mr William John SULLIVAN Mr John WADSWORTH Ms Narelle JEFFREY Ms Robin MCLACHLAN Mr R G L DAVIES	Bourke Shire Council NSW Police NSW Police NSW Police NSW Police NSW Police NSW Police Probation and Parole Service Probation and Parole Service Western Aboriginal Legal Services
Public meeting	Mr Darrell BROOKSON Ms Sally BRYANT Mr Keith CARNEY Mr Richard Geoffrey Llewelyn DAVIES Ms Jan DOWNEY Mr Barry EDWARDS Ms Joanne EDWARDS Mr Peter GREENAWAY Ms Margo GRIMES Ms Kerrienne HOWARTH Ms Yvonne HOWARTH Ms Judy JOHNSON Ms Dot MARTIN	

Date	Name	Organisation
15 June 2005 cont.	Mr Gregory Paul MOORE Ms Kate MORRIS Ms Narelle ORCHER Ms Lyn ORD Ms Mary RONAYNE Ms Dawn SMITH Mr Phillip John SULLIVAN Ms Rayleen SUMMERS Mr Jake WOODS Ms Brenda YAGER Mr Grahame YAGER	
16 June 2005 Brewarrina Public meeting	Ms Jeanette BARKER Mr Les DARCY Ms Joyce DOOLE Mr Les DOOLE Mr Ernest A GORDON Mr Charlie MCHUGHES Ms Cynthia A MOORE Mr Bill PALMER Mr Brad STEADMAN	
27 June 2005 Griffith, Hearing Public meeting	Ms Anne GARZOLI Mr Michael Gerard NEVILLE Mr Denis Anthony NICKLE Ms Hannah HALLIBURTON Detective Inspector Denise GODDEN Mr Rodney Maxwell MAGUIRE Mr Troy PIETCH Ms Alice Roseann WATTS Ms Carolyn Jane WHITE Ms Lisa CALDOW Mr Ian CHAUNCEY Ms Karee DRAKE Ms Diane ERICA Ms Hannah HALLIBURTON Ms Kathy LECKERIDGE Mr Steve MEREDITH Mr Elio MINUTO Ms Torcy MITA Ms Marlene NEHME	Griffith City Council NSW Department of Corrective Services NSW Department of Corrective Services NSW Department of Juvenile Justice NSW Police NSW Police NSW Police TAFE NSW – Griffith Institute TAFE NSW – Riverina Institute

Date	Name	Organisation
27 June 2005 cont.	Mr David POLHILL Ms L TAVUA	
28 June 2005 Bega, Hearing	Magistrate David Michael HEILPERN Mr Jeff MCKENZIE Clr William Gregory TAYLOR Mr Christopher George COSTAS Mr Paul Raymond BRUNTON Ms Sarah HANCOCK Inspector Jason Bruce EDMUNDS Mr Gerald Clive MOORE Mr Gary Robert PUDNEY	Bega Local Court Bega Valley Shire Council Bega Valley Shire Council NSW Department of Corrective Services NSW Department of Juvenile Justice NSW Department of Juvenile Justice NSW Police South Eastern Aboriginal Legal Service South Eastern Aboriginal Legal Service
Public meeting	Ms Kerry AVERY Mr Richard BARCHAM Ms Glenda DIXON Aunty Margaret DIXON Mr John EDMUNDS Ms Susie HERBERT Ms Leonie KIRBY Ms Claire LUPTON Mr Jeff MCKENZIE	
29 June 2005 Bega Public meeting	Ms Kerry AVERY Ms Valmai COOPER Mr David DIXON Ms Glenda DIXON Aunty Margaret DIXON Mr Alan HARRISON Mr Jeff MCKENZIE Ms Ellen MUNDY	
30 August 2005 Parliament House Hearing	Ms Sheryn OMERI Ms Judith HARPER Judge Roger DIVE Ms Linda ROGERS Mr Jim SIMPSON Ms Ethel MCALPINE Ms Carol MILLS Ms Joanne JOUSIF Ms Catriona MCCOMISH	Coalition of Aboriginal Legal Services Criminal Justice Support Network Drug Court of NSW Intellectual Disability Rights Service NSW Council for Intellectual Disability NSW Department of Ageing, Disability and Home Care NSW Department of Ageing, Disability and Home Care NSW Department of Corrective Services NSW Department of Corrective Services

Date	Name	Organisation
30 August 2005 cont.	Mr Paul WINCH	NSW Public Defenders Office
	Ms Heidi FORREST	People with Disabilities Australia Inc
	Mr Matthew KEELEY	People with Disabilities Australia Inc
	Mr Peter HARVEY	Probation and Parole Officers' Association of NSW Inc
	Ms Moira MAGRATH	Probation and Parole Officers' Association of NSW Inc
	Mr Trevor CHRISTIAN	Sydney Regional Aboriginal Corporation Legal Service
	Ms Nadine MILES	Sydney Regional Aboriginal Corporation Legal Service
31 August 2005	Mr Lloyd BABB	Attorney General's Department
Parliament	Ms Gail WALLACE	Attorney General's Department
House		
Hearing	Magistrate Clare FARNAN	Bourke Local Court
	Mr Mark DE WEERD	Commonwealth Department of Employment, Science and Training
	Ms Susan SMITH	Commonwealth Department of Employment, Science and Training
	Ms Alison CHURCHILL	Community Restorative Centre
	Mr David MCGRATH	NSW Health
	Mr Terry O'CONNELL OAM	Real Justice
	Ms Jane SANDERS	Shopfront Youth Legal Centre
1 September 2005	Ms Deborah SHARP	Community Justice Centres
Parliament	Ms Gina VIZZA	Community Justice Centres
House		
Hearing	Magistrate Roger PROWSE	Goulburn Local Court
	Ms Marcia PAYNE	Law Society of NSW
	Mr Robert TUMETH	Law Society of NSW
	Ms Patricia GIANNOTTO	NSW Community Relations Commission
	Mr Stepan KERKYASHARIAN AM	NSW Community Relations Commission
	Mr Gary MOORE	NSW Council of Social Services
	Ms Anne MEAGHER	NSW Department of Juvenile Justice
	Mr Bernard MCKINNON	The Settlement Neighbourhood Centre
	Mr Howard W BROWN OAM	Victims of Crime Assistance League
27 Sept 2005		
Parliament	Dr Richard MATTHEWS	NSW Health
House, Hearing		
Mount Druitt	Mr Trevor BATES	
Public meeting	Mr Peter CONFEGGI	
	Mr Ray DOUGLAS	

Date	Name	Organisation
27 Sept 2005 cont.	Mr Derek GLENN	
	Mr Paul HANNA	
	Mr Teddy HART	
	Mr Luke HAWKINS	
	Mr Joe HUROA	
	Mr John MACDONALD	
	Mr Wes MARNE	
	Ms Coral MCLEAN	
	Ms Nance MORGAN	
	Mr Sai OO	
	Ms Margaret PATON	
	Mr Mohamed QUDDAURA	
	Mr Lester RITCHIE	
	Mr Neil SANDALL	
	Mr Stephen SANTUCCI	
	Mr Greg SIMMS	
	Mr Gordon SIMON	
	Mr John STONE	
	Ms Colleen SUTHERLAND	
	Mr Gary WELLSMORE	
	Ms Renate ZUKAUSKAS	

Appendix 3 Sub-Committee visit to Yetta Dhinnikkal Correctional Centre

Sub-Committee visit to the Yetta Dhinnikkal Centre on Thursday 16 June 2005

Present (meeting as a Sub-Committee):

- Ms Robertson (Chair)
- Mr Pearce
- Ms Rhiannon

Comment:

The Sub-Committee arrived at the Yetta Dhinnakkal Centre to a traditional Aboriginal welcome from the Ngemba and Bundjalung communities, including a smoking ceremony and traditional dances.

Mr Clarrie Dries, General Manager of the Yetta Dhinnakkal Centre, took the Sub-Committee on a tour of the 26,000 acre property. The following information was provided by Mr Dries during the tour:

About the Centre:

- In the mid 1990's the Commissioner and Minister Debus sought land in areas such as Cobar to establish a centre like Yetta Dhinnakkal, and in 1999 the Brewarrina site was chosen. It is 70km south of the Brewarrina township.
- The Centre opened in January 1999 and is primarily for young Aboriginal males.
- Yetta Dhinnikkal means "Right Pathway".
- The Centre takes non-violent and non-sexual offenders from 18-30 years old (occasionally Mr Dries may approve older offenders to attend the Centre but they must be in the last 2 years of their sentence)
- The Centre has 27 full time staff plus TAFE teachers and a nurse.
- There are between 50-55 trainees (offenders) at the Centre.
- The Centre is on a working property with cattle and goats.
- Most of the buildings on the property were built by the trainees, except the electricity and plumbing components.

Trainees:

- When trainees first come into the Centre a tele-conference is set up with the trainee, his family or relatives, to work out the reasons why the trainee has offended and then a program is developed to address these issues and continuously reviewed throughout the trainees stay.
- There is a 10 day induction for the trainee where an assessment is completed and advice given to the trainee on what programs would be suitable.
- The staff assess trainees every month on their conduct, work-ethic and behaviour. They talk to the trainees then regress or progress on programs and needs such as counseling, etc.
- Mr Dries advised that the system is not easy and trainees must earn the opportunities.

- After 8 successful weeks the trainees are given a C3 classification which makes them eligible for supervised day leave.
- After 16 successful weeks the trainees are eligible for local sponsored day leave and after 3 successful locally sponsored day leaves they can be eligible for 4 day weekend leave (trainees pay for own travel expenses).
- Family members can come out to the Centre to visit the trainees and the Department of Corrective Services pays for these visits.
- There is monthly and random drug testing and initial drug testing on arrival of the trainees.
- Community elders and families can be involved in mediation if there is a need.
- Trainees make decisions on discipline and new programs for the Centre.
- Mr Dries said that 99% of trainees are successful and 1% do not work out at the Centre.
- Follow and through care is important at the Centre as contact continues after the trainee leaves for between 6-12 months as they are encouraged to call in if they need help after they have left. Mr Dries advised they have enough resources to do this.

Programs run by the Centre:

- Magistrates send offenders the Centre for programs such as drug and alcohol programs, anger management and skills based working programs, including animal husbandry, front end loader and forklift operators course, computers, literacy, numeracy and aboriginal art.
- Programs at the center run from 6am until about 7pm and trainees aim to get 4-5 tickets each (eg heavy machinery license, chainsaw license, etc)
- Aboriginal culture is taught every second weekend
- Community projects the center has been involved in include works at the Dubbo Zoo.
- A current program running for trainees is a 10 day TAFE course in shearing, which was viewed by the Sub-Committee.
- There is also a 6-8 week agricultural or horticultural program that trainees are able to participate in. Mr Dries advised that some have finished Level 2 of this program.
- The Centre teaches trainees to put together resumes, which are then used by trainees to apply for places in the various programs.
- Leisure and sports include touch football (part of local competition), cricket fishing and camping.
- Other programs include first aid and L's for drivers license.
- The Centre also runs mobile camps were about 10 trainees go to work to fulfill their community service orders.
- The trainees donate \$3 of their wages to help put on a fortnightly BBQ and breakfast program for local school children.

Appendix 4 Report of study visit to Corrections Victoria

The Law and Justice Committee⁹³⁴ undertook a one day study visit to Corrections Victoria on Wednesday 26 October 2005 as part of the Inquiry into community based sentencing options.

The Committee undertook the following activities:

- Visited the Sunshine Community Corrections Office to meet staff including operational staff that travelled from regional centres. The Director of Community Correctional Services, Mr David Daley, provided an overview of Community Corrections including the Corrections Long Term Management Strategy (CLTMS). The Committee heard from a number of staff about community initiatives undertaken by their regional offices. In addition, information was provided about the Corrections Audit Program, the Awards Program and the various Corrections' Committees that meet regularly. Committee members had the opportunity to ask questions and discuss specific aspects of Corrections Victoria's operations.
- The Committee met the Commissioner of Corrections Victoria, Mr Kelvin Anderson, and senior members of his staff over a working lunch. Examples of successful cross-government initiatives (both state and federal) led by Corrections Victoria were discussed. These included housing and employment projects. Other areas of discussion included the funding and support for the CLTMS, culturally suitable work sites for Koori offenders, future target populations including youth, offenders with an intellectual disability, mentally ill offenders and women and culturally and linguistically diverse (CALD) offenders. Committee members had the opportunity to raise specific issues of interest and discuss policy and operational details of the work of Corrections Victoria.
- Following lunch, Corrections Victoria arranged for the Committee to visit two Community Corrections work sites. The first site was a Mission Australia site, which runs work for the dole projects as well as being a Registered Training Organisation (RTO) for a range of vocational courses. Committee members met staff of Mission Australia including an employee who had previously completed a community based order (CBO) at the site. The visit provided an opportunity to gain a better understanding of the practical issue that arise when arranging a placement. The local Corrections staff who liaise with Mission Australia were present and explained how they assess offenders before placement, provide basic OHS and first aid training and work closely with the community organisation to ensure the terms of the order are satisfied. Staff of Mission Australia outlined their involvement and how they did not wish to know details of the individuals' offence but preferred to operate on a basis of trust. All persons placed on a CBO are referred to as volunteers. Work is as meaningful as possible and opportunities are available to access other programs run on the site (such as long term counselling and training courses to assist with employment). Staff emphasised the importance of working with their local community and their experience suggested that individual placements for low to medium risk offenders were most effective. This work site was acknowledged as being particularly good for women offenders who wanted to gain administrative work experience in a supportive environment.

⁹³⁴ Ms Christine Robertson (Chair), Mr David Clarke (Deputy Chair), Ms Amanda Fazio, Mr Rick Colless and Mr Greg Donnelly undertook the study visit. Ms Lee Rhiannon was unable to attend. In addition, Ms Beverly Duffy and Ms Pauline Kavanagh of the Committee Secretariat attended.

- The second visit was to a neighbourhood Adult Learning Centre. This site offered a range of work experiences including renovating a building donated by the local council to be used as a Mens' Shed and a community garden growing vegetables that are donated to local community groups. The Adult Learning Centre emphasises the importance of education and encourages CBO participants to undertake practical training, for example, a Certificate 1 in Horticulture. The Centre stressed the importance of the work being meaningful, the need for positive supervision and the availability of flexible hours, especially over the weekend.
- During both work site visits, the Committee had the opportunity to discuss all aspects of the work of the Community Correctional Services with both Corrections staff and the host work site. The Committee was very appreciative of the willingness of all the staff they met on the visit to share their experiences and their commitment to community corrections.

Appendix 5 Inquiry into back-end home detention

Terms of reference

1. That the Standing Committee on Law and Justice inquire into and report on whether it is appropriate and in the public interest to introduce a 'back-end' home detention scheme in New South Wales, including:
 - a) the perceived benefits and disadvantages of back-end home detention,
 - b) the relationship between back-end home detention and existing external leave programs,
 - c) the impact of back-end home detention on the principle of truth-in-sentencing,
 - d) the appropriate authority to determine whether an offender may proceed to back-end home detention,
 - e) the criteria for eligibility for back-end home detention,
 - f) the experience of other jurisdictions in implementing back-end home detention schemes,
 - g) any other related matter.
2. That the Committee report by 7 April 2005.⁹³⁵

⁹³⁵ These terms of reference were referred to the Committee in the House by the Hon Greg Pearce MLC, Legislative Council Minutes of Proceedings No 58, 2 June 2004, pp 327-328. The reporting date was later extended by Resolution of the House to 15 July 2005, Legislative Council, Minutes of Proceedings No 105, 25 May 2005, p1396.

Submissions

No	Author
1.	Ms K McMANUS
2.	Mrs Patricia WAGSTAFF
3.	Mr Gordon SALIER, NSW Law Society
4.	Mr Martin GALLAGHER MP, New Zealand Select Committee on Law and Order
5.	Name suppressed at request of author
6.	Mr N R COWDERY AM QC, NSW Director of Public Prosecutions
7.	Ms Nikki SMITH
8.	Ms Kathryn AIKEN
9.	Mrs Katrina FROOME
10.	Mr Brett COLLINS, Justice Action
11.	Ms Lyndsay BROOKER, NSW Legal Aid
12.	Mr Lloyd BABB, NSW Attorney General's Department
13.	Mr Paul WINCH, NSW Public Defenders Office
14.	Mr Doug BROWN, NSW Department of Corrective Services
15.	Mr David DALEY, Corrections Victoria
16.	Mr Jim SIMPSON, NSW Council for Intellectual Disability
17.	Sr Myree HARRIS RSJ, Coalition for Appropriate Supported Accommodation for People with Disabilities
18.	Name suppressed at request of author
19.	Mr Jared MULLEN, New Zealand Department of Corrections
20.	Ms Kate HOLMAN, QLD Department of Corrective Services
21.	Mr Ray JACKSON, Indigenous Social Justice Association Inc.

Witnesses

Date	Name	Organisation
17 March 2005	Mr NR COWDERY AM QC	NSW Department of Public Prosecutions
Parliament House	Mr Graeme FEAR	St Vincent de Paul Society
	Sr Myree HARRIS RSJ	Coalition for Appropriate Supported Accommodation for People with Disabilities
	Mr Andrew JAFFREY	
	Ms Joanne JOUSIF	NSW Department of Corrective Services
	Ms Catriona MCCOMISH	NSW Department of Corrective Services
	Mr Brian SANDLAND	NSW Legal Aid Commission
	Mr Jim SIMPSON	NSW Council for Intellectual Disability
18 March 2005	Mr Brett COLLINS	Justice Action
Parliament House	Mr David DALEY	Corrections Victoria
	Ms Kate HOLMAN	Qld Department of Corrective Services
	Mr Michael STRUTT	Justice Action
	Mr Paul WINCH	NSW Public Defenders Office
	Ms Pauline WRIGHT	NSW Law Society

Appendix 6 NSW Department of Corrective Services - proposed Stage 3 External Leave⁹³⁶

Outline of proposed Stage 3

This submission proposes that the Department of Corrective Services create a third stage to its existing external leave programs (other than day leave or weekend leave), to be called Stage 3 external leave, so that an inmate who has shown that he or she can comply with work release Stage 2 or education leave Stage 2 is allowed to go home not only every weekend but also on Monday, Tuesday, Wednesday and Thursday nights.

Such an inmate would remain subject to electronic monitoring, random physical checks and random telephone checks. Such an inmate would also remain subject to random alcohol tests and random urinalysis.

Proposed Stage 3 can be introduced without the need for any legislative amendment. The Commissioner's power in section 26(1) is sufficient to enable Stage 3 to be introduced.

Proposed Stage 3 is simply an extension of long-standing and proven external leave programs.

Proposed Stage 3 would apply only to inmates on work release Stage 2 or education leave Stage 2 who demonstrate compliance at that level. If in the future the Department extends Stage 2 to other types of external leave, the Department will also then consider extending Stage 3 to those types of leave.

As noted earlier in this submission, in order for a male inmate to be eligible for external leave programs, the inmate must, among other things, be within 18 months of his earliest possible release date. The Department recognises that, in order to create Stage 3 external leave, in most cases there would have to be more time between the date when an inmate commences external leave and the inmate's earliest possible release date than the current period of 18 months. Accordingly, if the Department creates Stage 3 external leave, the Department will change the current eligibility requirements for external leave generally so that an inmate may become eligible for external leave within 2 years of his earliest possible release date.

Supervision of inmates on proposed Stage 3

As stated above, an inmate on proposed Stage 3 external leave would be subject to electronic monitoring and random alcohol tests and urinalysis.

Moreover, under the Department's case management system and Throughcare strategy, an inmate on proposed Stage 3 external leave would continue to be "case-managed" while on Stage 3 and, indeed, would continue to be "case-managed" when later granted parole. The intensity of case management would depend on the individual circumstances of each inmate and, in particular, if an LSI-R report has been completed, on the content of the LSI-R report.

There is scope also for an inmate on proposed Stage 3 external leave to be subject to intensive community supervision as currently provided by Community Offender Services to home detainees, Drug Court participants, selected parolees and [shortly] participants in the compulsory drug treatment program.

⁹³⁶ Extract of Submission to Inquiry into back-end home detention, Commissioner Ron Woodham, Department of Corrective Services, 23 August 2004, pp20-22

Comparison between eligibility for front-end home detention and eligibility for proposed Stage 3

The initial threshold for front-end home detention is a sentence of imprisonment of no more than 18 months. In addition to this threshold, sections 76 and 77 of the *Crimes (Sentencing Procedure) Act 1999* provide for strict eligibility requirements for front-end home detention.

Section 76 provides that a home detention order may not be made in respect of a sentence for: murder, attempted murder or manslaughter; sexual assault of adults or children or sexual offences involving children; armed robbery; any offence involving the use of a firearm; assault occasioning actual bodily harm, or any more serious assault; stalking or intimidation with the intention of causing the person to fear personal injury; domestic violence against any person with whom it is likely that the offender will reside or continue or resume a relationship if a home detention order were made; and serious drug offences.

Section 77 provides that a home detention order may not be made in respect of an offender who has at any time been convicted of murder, attempted murder or manslaughter, or sexual assault of adults or children or sexual offences involving children. Section 77 also provides that a home detention order may not be made in respect of an offender who has at any time in the last 5 years been convicted of a domestic violence offence against any person with whom it is likely that the offender will reside or continue or resume a relationship if a home detention order were made. Section 77 also provides that a home detention order may not be made in respect of an offender who is (or has at any time within the last 5 years been) subject to an apprehended violence order made for the protection of a person with whom it is likely that the offender will reside or continue or resume a relationship if a home detention order were made.

“Bill’s story”, told earlier in this submission, shows that eligibility requirements for work release are less strict than eligibility requirements for front-end home detention. Bill was an armed robber. On this ground alone he would have been ineligible for front-end home detention. But Bill was eligible for work release, and successfully participated in work release.

The Department is strongly of the view that eligibility requirements for external leave programs need not be as strict as eligibility requirements for front-end home detention. An inmate who is in a position to apply for external leave programs is an inmate who is nearing the end of his or her non-parole period, has successfully participated in programs offered within the correctional system to address his or her offending behaviour, and meets other eligibility requirements (eg has not tested positive for drugs in the previous 6 months).

The big difference between a front-end home detainee and an inmate on an external leave program is that, whereas a front-end home detainee is *commencing* his or her period of imprisonment, an inmate on an external leave program is *successfully completing* his or her period of imprisonment and is approaching parole or full freedom (if the court did not set a parole period).

Appendix 7 Minutes

Meeting No 9, 7 May 2004, Room 1153, Parliament House, 1.00 pm

1. Present

Ms Robertson (Chair)
Mr Burke
Mr Clarke
Ms Rhiannon

2. Apologies

Mr Pearce

3. Minutes

Resolved, on the motion of Mr Burke, that the Minutes of Meeting No 8 be adopted.

4. Correspondence

The Chair tabled the following items of correspondence as per the agenda:

Correspondence received:

1. ...
2. 21 April 2004 – from Hon Bob Debus MP, Attorney General to Chair providing terms of reference for an inquiry into community based sentencing options.

Correspondence sent:

1. 2 April 2004 – from Senior Project Officer to Hon R J Debus MP, Attorney General, forwarding correspondence to Chair from Judge P T Hurst.

5. ...

6. New terms of reference

The Committee considered the receipt of a letter containing terms of reference, dated 2 April 2004, from the Attorney General, the Hon Bob Debus MP, to inquire into and report on the suitability and availability of *community based sentencing options* across the state and whether it is appropriate and in the public interest to tailor community based sentencing options for rural and remote areas in NSW and for special need/disadvantaged populations.

Moved, on the motion of Mr Burke, that the Committee accept the terms of reference.

The Chair tabled a second letter from the Attorney General, the Hon Bob Debus MP, dated 3 May 2004, amending the suggested reporting date of the terms of reference from 7 December 2004 to July 2005.

Moved, on the motion of Ms Rhiannon, that the Committee accept the letter from the Attorney General requesting the extended reporting date.

7. ...

8. Next meeting

The Committee adjourned at 1.35pm *sine die*.

Rachel Callinan
Senior Project Officer

Meeting No 12, 7 December 2004, Room 1153, Parliament House, 12:30 pm

1. Present

Ms Robertson (Chair)
Mr Clarke

Ms Fazio
Mr Pearce
Ms Rhiannon
Mr Roozendaal

2. Minutes

Resolved, on the motion of Ms Fazio, that Minutes of Meeting Nos 10 and 11 be adopted.

3. ...

4. ...

5. ...

6. ...

7. Inquiry into community based sentencing

Resolved, on the motion of Ms Fazio, that the closing date for submissions be Friday 11 March 2005.

Resolved, on the motion of Ms Fazio, that advertisements calling for submissions be placed in the major Sydney and regional papers in late January 2005.

Resolved, on the motion of Ms Fazio, that a press release from the Chair announcing the Inquiry be distributed to the Parliamentary Press Gallery and Media Monitors to coincide with the advertisements.

Resolved, on the motion of Ms Fazio, that the Chair write to interested parties inviting submissions, with Committee members invited to submit names to the Secretariat by 17 December 2004.

Resolved, on the motion of Mr Roozendaal, that the discussion paper be adopted and published in accordance with standing order 226(4) and included with the letter sent inviting submissions and generally be made available to interested parties.

Resolved, on the motion of Mr Roozendaal, that the Secretariat be permitted to correct typographical and grammatical errors in the discussion paper prior to publishing.

8. ...

9. Next meeting

The Committee adjourned at 1.20pm *sine die*.

Rachel Callinan
Director

Meeting No 13, 3 March 2005, Room 1153, Parliament House, 1:00 pm

1. Present

Ms Robertson (Chair)
Mr Clarke
Ms Fazio
Mr Pearce
Ms Rhiannon
Mr Roozendaal

2. Minutes

Resolved, on the motion of Ms Fazio, that the Minutes of Meeting No 12 be adopted.

3. ...

4. ...

5. Inquiry into community based sentencing

The Principal Council Officer updated the Committee on the progress of the inquiry, including the foreshadowed intrastate travel in May and June to three centres for hearings.

6. ...

7. ...

8. Next meeting

The Committee adjourned at 1:30pm to reconvene at 8:45am on Tuesday 15 March 2005.

Rachel Callinan
Director

Meeting No 17, 6 April 2005, Room 1153, Parliament House, 1:00 pm**1. Present**

Ms Robertson (Chair)
Mr Clarke
Ms Fazio
Mr Pearce
Ms Rhiannon
Mr Roozendaal

2. Confirmation of minutes

Resolved, on the motion of Ms Rhiannon, that Meeting No 15 and 16 be confirmed.

3. Correspondence

Chair tabled correspondence:

Correspondence received

1. ...
2. Community based sentencing options Inquiry
 - Submissions Nos 1 to 28

Resolved, on the motion of Mr Pearce, that Submissions No 1 to 26 and No 28 to the Inquiry into community based sentencing be published, with the author of submission number 1's name and address withheld, on request of the author and that Submission No 27 be published, with the letter that is appended to the submission being published subject to permission from the writer of the letter to publish that letter.

4. Proposed meeting, hearing and site visit schedule, May and June 2005

Resolved, on the motion of Ms Rhiannon, that the Committee endorse the proposed meeting, hearing and site visit schedule circulated by the Secretariat, as amended:

- **Monday 6 June 9.30am to 4.00pm**
Community based sentencing options Sydney hearing
- **Tuesday 14 June, Wednesday 15 June & Thursday 16 June**
Community based sentencing options site visits/hearings
- **Monday 27 June, Tuesday 28 June & Wednesday 29 June**
Community based sentencing options site visits/hearings

The Chair briefed the Committee on proposed options for site visits/hearings for the community based sentencing Inquiry.

The Committee deliberated.

Resolved, on the motion of Ms Fazio, that the Committee undertake four site visits/hearings:

- Bega
- Griffith
- Bourke
- Inverell

5. Adjournment

The Committee adjourned at 1:30pm *sine die*.

Rachel Simpson
A/Director

Meeting No 18, 13 May 2005, Room 1153, Parliament House, 10:00 am

1. Present

Ms Robertson (Chair)
Ms Fazio
Mr Pearce
Ms Rhiannon
Mr Roozendaal (from 12 noon)

2. Apologies

Mr Roozendaal (until 12 noon)

3. ...

4. ...

5. Confirmation of minutes

Resolved, on the motion of Mr Pearce, that Meeting No 17 be confirmed.

6. Correspondence

The Chair tabled correspondence received:

Inquiry into community based sentencing

- 17 March 2005, email from Hugh Selby of the Australian National University requesting that the Committee present a paper to the conference on *Sentencing: principles, perspectives and possibilities* at the National Museum of Australia between Friday 10 February 2006 and Sunday 12 February 2006.
- 5 May 2005, from Mr John Feneley, NSW Attorney General's Department, providing information on programs that the Department funds and administers in Inverell, Bourke, Brewarrina, Griffith and Bega
- Submissions No 29 to 37

Resolved, on the motion of Ms Fazio, that Submissions No 29 to 37 be published.

The Chair tabled correspondence sent:

Inquiry into community based sentencing

- 19 April 2005, Secretariat to Mr John Feneley, Assistant Director-General, Attorney General's Department, requesting information on programs and services in relation to site visits.
- 28 April 2005, Chair to participants of back-end home detention Inquiry, advising that the Committee may refer to their submission or evidence in its report on community based sentencing options and inviting participants to add to their submission or evidence in-light of the CBSO terms of reference.
- 6 May 2005, Chair to the Hon John Hatzistergos MLC, Minister for Justice requesting assistance with facilitating a site visit to the Yetta Dhinnakkal Centre in Brewarrina.

7. ...

8. ...

9. **Inquiry into community based sentencing**

Public hearing 6 June 2005 – witness schedule

Resolved, on the motion of Ms Fazio that the Committee endorse the proposed witness list, with the addition of an academic who can provide the Committee with expert assistance interpreting the complex terms of reference for this inquiry.

June site visits itinerary

Resolved, on the motion of Mr Pearce, that the Committee endorse the proposed site visit schedule circulated by the Secretariat, as amended:

- Tuesday 14 June 2005 – Sydney to Inverell
10am to 2.30pm – public hearing
3.30pm to 5.00pm – informal consultation with Indigenous community
Overnight in Inverell
- Wednesday 15 June 2005 – Inverell to Bourke
10.30am to 1.30pm – public hearing
2.30pm to 4.30pm – public forum
Overnight in Bourke
- Thursday 16 June 2005 – Bourke and Brewarrina
Visit Yetta Dhinnakkal Centre
Community consultation
Return to Sydney
- Monday 27 June 2005 – Sydney to Griffith
10am to 1pm – public hearing
2pm to 4pm – public forum
Overnight in Griffith
- Tuesday 28 June 2005 – Griffith to Bega
10am to 1pm – public hearing
2pm to 4 pm – public forum
Overnight in Bega
- Wednesday 29 June 2005 – Bega
Informal Indigenous community consultation
Return to Sydney

Further public hearings

Resolved, on the motion of Ms Fazio, that the Committee hold further public hearings in the last week of August 2005.

Extension of reporting date

Resolved, on the motion of Mr Pearce, that the Committee extend the reporting date for the inquiry into community based sentencing options until Friday 28 October 2005 and that the Chair write to the Attorney General advising him of the Committee's resolution.

Interpretation of term of reference 1(e)

Resolved, on the motion of Ms Fazio, that the Chair write to the Attorney General's Department and the Parliamentary Library Research Service requesting assistance with interpreting term of reference 1(e) relating to the criteria for eligibility for community based sentencing options.

10. **Sentencing: principles, perspectives and possibilities Conference 10-12 February 2006**

Resolved on the motion of Ms Fazio, that the Chair and one other member and the Director of the Committee attend the conference and present a paper reflecting on the community based sentencing options inquiry.

11. ...

12. Adjournment

The Committee adjourned at 11:25pm until 9.30am on Monday 6 June 2005 (community based sentencing inquiry public hearing).

Rachel Simpson
Committee Clerk

Meeting No 19, 6 June 2005, Room 814/815, Parliament House, 10:00 am

1. Present

Ms Robertson (Chair)
Mr Clarke
Ms Fazio
Mr Pearce
Ms Rhiannon
Mr Roozendaal

2. Public hearing – Inquiry into community based sentencing

Witnesses, media and public were admitted.

Ms Valda Ruis, A/Senior Assistant Commissioner, Community Offender Services and Mr Phil Ruse Executive Director, North Western Region, Community Offender Services, NSW Department of Corrective Services were sworn in and examined.

Evidence concluded and witnesses withdrew.

Mr Robert Williams, Area Manager, Area West NSW, Ms Sara Graveski, National Prisoner Servicing Stakeholder Relationships Team, Ms Inga Lie, Manager, Prisoner Servicing Unit, Centrelink were sworn in and examined.

Evidence concluded and the witnesses withdrew.

Dr Eileen Baldry, Senior Lecturer, Faculty of Arts and Social Sciences, University of NSW was sworn in and examined.

Evidence concluded and the witness withdrew.

Judge Derek Price, Chief Magistrate, Local Courts was sworn and examined.

Evidence concluded and the witness withdrew.

Mr Brian Sandland, Director, Criminal Law, Legal Aid Commission NSW was sworn in and examined.

Evidence concluded and the witness withdrew.

Mr Brendan Thomas, Director, Regional and Aboriginal Programs, NSW Attorney General's Department was sworn in and examined.

Evidence concluded and the witness withdrew.

3. Deliberative meeting

Confirmation of minutes

Resolved, on the motion of Ms Fazio, that Meeting No 18 be confirmed.

Transcript and tabled documents

Resolved, on the motion of Mr Roozendaal, that the transcript of the public hearing held on 6 June 2005 be published.

Resolved, on the motion of Ms Fazio, that the documents tendered by witnesses at the hearing on 6 June 2005, be accepted and published, with the first tabled document from Dr Eileen Baldry be confidential and published only subject to permission from the author.

Correspondence

The Chair tabled correspondence.

Inquiry into community based sentencing

Resolved, on the motion of Mr Clarke, that Submissions No 38 to 41 to the Inquiry be published.

Resolved, on the motion of Mr Pearce, that the correspondence from the Commissioner of Corrective Services, enclosing excerpts from the Department's Policy and Procedures Manual in regards to assessment of suitability for community based sentencing options be published.

Resolved, on the motion of Mr Roozendaal, that the NSW Parliament Library's research paper on eligibility criteria for community based sentences be published.

Resolved, on the motion of Ms Fazio, that correspondence from the NSW Attorney General's Department regarding background information on eligibility criteria for community based sentences be published.

Inquiry into community based sentencing - site visits

The Chair briefed the Committee on hearings and consultations for the Inverell, Bourke and Brewarrina site visits.

The Committee deliberated.

Resolved, on the motion of Ms Fazio, that the Committee endorse the proposed witness lists for Bourke and Inverell public hearings.

4. Adjournment

The Committee adjourned at 4:49pm until 10am, 14 June 2005, Inverell RSM Club.

Rachel Simpson
A/Director

Meeting No 20, 14 June 2005, RSM Club, Inverell, 11.05 am, following travel from Sydney at 8.00am

1. Present

Ms Robertson (Chair)
Mr Clarke (via teleconference)
Mr Pearce
Ms Rhiannon
Mr Roozendaal (via teleconference)

2. Apologies

Ms Fazio (due to illness)

3. Inquiry into community based sentencing

Ms Robertson, Mr Pearce and Ms Rhiannon, who had arrived in Inverell from Sydney, were not a duly constituted committee due to lack of a quorum, there being only one Government member present, and therefore had no authority to conduct hearings and take evidence without a quorum. The Members sought advice from the Clerk Assistant-Committees as to a mechanism to proceed with a meeting. The full advice is appended to these Minutes.

The Clerk Assistant advised that, due to the exceptional circumstances and to facilitate the important work of the committee in rural NSW, the Committee form a sub-committee by teleconference at which all members are able to hear and communicate contemporaneously.

Appointment of Sub-Committee

Resolved, on the motion of Ms Rhiannon: that Ms Robertson, Ms Rhiannon and Mr Pearce form a Sub-Committee to undertake site visits to Inverell, Bourke, and Brewarrina between on 14, 15 and 16 June, 2005 under the power

conferred by the Standing Orders and the resolutions of the Committee and that Ms Robertson be Chair of that Sub-Committee, and that:

- all formal committee resolutions relating to such matters as making evidence public await the next meeting of the full committee
- the procedure whereby the Committee met by teleconference not be a precedent for any future committee meetings.

4. **Adjournment**

The Committee adjourned at 11.10am.

Rachel Simpson
A/Director

Meeting No 21, 14 June 2005, RSM Club, Inverell, 10.30 am

1. **Present**

Ms Robertson (Chair)
Mr Pearce
Ms Rhiannon
(Meeting as a Sub-Committee)

2. **Inquiry into community based sentencing**

Public hearing

Witnesses, media and members of the public were admitted.

Clr Barry Johnston, Mayor, Mr Paul Henry, General Manager, and Mr Joerg Schmidt-Liermann, Management Executive Officer, Inverell Shire Council were sworn and examined.

Evidence concluded and the witnesses withdrew.

Police Inspector Dave Harrington and Ms Jane Adams, Aboriginal Community Liaison Officer, Inverell, NSW Police were sworn and examined.

Evidence concluded and the witnesses withdrew.

Mr Michael Gooda, District Manager, Community Offender Services, Probation and Parole Service and Mr Craig Flanagan, District Manager, Glenn Innes, Probation and Parole Service, Department of Corrective Services were sworn and examined.

Evidence concluded and the witnesses withdrew.

Mr Stephen Collins, Solicitor, Borwith & Butler was sworn and examined.

Evidence concluded and the witness withdrew.

Fiona Brown, President and Ms Kaylene Strong, Secretary of Inverell Chamber of Commerce were sworn and examined.

Evidence concluded and the witnesses withdrew.

Ms Margaret Barnes, A/CEO Community Programs Inc, Ex-Tingha Bail Hostel, was sworn and examined.

Evidence concluded and the witness withdrew.

Public meeting

The sub-committee facilitated a public meeting at the Linking Together Centre, South Inverell, with the local community, including the Aboriginal community, to ask their views on community based sentencing options for areas, such as Inverell.

The following people attended:

Jeanette Bauman, Jenell Smith, Kathy Nicholson, Renata De La Croix, Douglas Kirk, Michael Kirk, Elizabeth Connors, Myrtle Scoble, David Phillip Lewis, Peter Kirk, Peter Kirk Senior, Kathy Lombo, Alma Green, Phyliss Brown, Laurel Toomey, Irene Gardiner, Bob Merry, Veronica Merry, Priscilla Brown, Bruce Boney, Geraldine Papi, Mike Lubke, Jo Lubke, Vicky Duncan, David Gerrard, Janice Cutmore, Vivian Irving, Dianne Tighe, Merve Connors, Preston Connors.

3. **Adjournment**

The Sub-Committee adjourned at 4.45pm. Next meeting of the sub-committee is at 10.30am, Wednesday 15 June 2005, Bourke Bowling Club, Bourke.

Rachel Simpson
A/Director

Meeting No 22, 15 June 2005, Bourke Bowling Club, Bourke, 10.30 am

1. **Members present**

Ms Robertson (Chair)
Mr Pearce
Ms Rhiannon
(Meeting as a Sub-Committee)

2. **Inquiry into community based sentencing**

Public hearing

Witnesses, media and members of the public were admitted.

Mr Ken Croskell, General Manager, Bourke Shire Council, was sworn and examined.

Evidence concluded and the witness withdrew.

Superintendent Des Organ, Mr John Wadsworth, Duty Officer, Mr Michael Heap, Crime Manager, Mr Greg Moore, Duty Officer, Mr John Sullivan and Mr Mick Jackson, Aboriginal Community Liaison Officers, NSW Police, were sworn and examined.

Evidence concluded and the witnesses withdrew.

Ms Robyn McLachlan, A/District Manager, Probation and Parole Service and Ms Narelle Jeffrey, Area Manager, Dubbo Region, Probation and Parole Services, Department of Corrective Services, were sworn and examined.

Evidence concluded and the witnesses withdrew.

Ms Louise Brown, Aboriginal Hospital Liaison Officer, Bourke Hospital, was sworn and examined.

Evidence concluded and the witness withdrew.

Mr Richard Davies, Solicitor, Western Aboriginal Legal Service, was sworn and examined.

Evidence concluded and the witnesses withdrew.

Public meeting

The Sub-Committee facilitated a public meeting at the Bourke Bowling Club, Bourke with the local community, including the Aboriginal community, to ask their views on community based sentencing options for areas, such as Bourke.

The following people attended:

Darrell Brookson, Peter Greenaway, Yvonne Howarth, Margo Grimes, Alison Thorne, Kate Morris, Jan Downy, Jeanne Edwards, Lyn Ord, Dot Martin, Narelle Orcher, Phillip Sullivan, Raylene Summers, Brenda Yager, Graheme Yager, Jake Woods, Kerianne Howarth, Judy Johnson, Barry Edwards, Mary Ronayne, Sally Bryant, Ruchard Davies, Dawn Smith, Greg Moore, Keith Carney.

3. Adjournment

The Sub-Committee adjourned at 4.30pm. Next meeting of the sub-committee is at 10.00am, Thursday 16 June 2005 in Brewarrina.

Rachel Simpson
A/Director

Meeting No 23, 16 June 2005, Brewarrina, 10.00 am

1. Present

Ms Robertson (Chair)
Mr Pearce
Ms Rhiannon
(Meeting as a Sub-Committee)

2. Inquiry into community based sentencing

Site visit

The Sub-Committee visited the Department of Corrective Services' Yetta Dhinnikkal Centre at Brewarrina and received a briefing and tour of the Centre from Mr Clarrie Dries, General Manager of the Yetta Dhinnikkal Centre. The sub-committee also talked informally to trainees (offenders) and staff. The Commissioner of the Department of Corrective Services, Mr Rod Woodham also attended.

Public meeting

The Sub-Committee facilitated a public meeting at the Senior Citizens Centre, Brewarrina, with the local community, including the Aboriginal community, to ask their views on community based sentencing options for areas, such as Brewarrina.

The following people attended:

Jeanette Barker, Ernest Gordon, Cynthia Moore, Brad Steadman, Charlie McHughes, Bill Palmer, Les Darcy, Joyce Doole, Les Doole.

3. Adjournment

The Sub-Committee adjourned at 4pm.

Rachel Simpson
A/Director

Meeting No 25, 27 June 2005, Burley Griffin Room, 1 Neville Place, Griffith, 10.15 am

1. Present

Ms Robertson (Chair)
Mr Pearce
Ms Fazio
Ms Rhiannon

2. Apologies

Mr Roozendaal
Mr Clarke

3. Inquiry into community based sentencing

Public hearing

Witnesses, media and members of the public were admitted.

Ms Anne Garzoli, Community and Cultural Services Manager, Griffith City Council was sworn and examined.

Evidence concluded and the witness withdrew.

Police Inspector Denise Godden, Mr Troy Pietch, Aboriginal Community Liaison Officer and Mr Rod Maguire, Youth Liaison Officer, Griffith, NSW Police were sworn and examined.

Evidence concluded and the witnesses withdrew.

Ms Carolyn White, Coordinator, Koori Outreach Options for Learning Program and Ms Alice Watts, Aboriginal Student Support Officer, TAFE were sworn and examined.

Evidence concluded and the witnesses withdrew.

Mr Mike Neville, District Manager, Griffith Probation and Parole Service and Mr Denis Nickle, Area Manager, Wagga Wagga Probation and Parole Service, Department of Corrective Services were sworn and examined.

Evidence concluded and the witnesses withdrew.

Ms Hannah Halliburton, Juvenile Justice Officer was sworn and examined.

Evidence concluded and the witness withdrew.

Public meeting

The Committee facilitated a public meeting at the Burley Griffin Room, Griffith with service providers and community members, including the Aboriginal community, to ask their views on community based sentencing options for rural and remote areas, such as Griffith.

The following people attended:

Lisa Caldwell, Ian Chauncy, Karee Drake, Diane Erika, Hannah Halliburton, Kathy Lockeridge, Elio Minato, Steve Meredith, Torey Mita, Marlene Neheme, David Polhill, L Tavua.

4. Adjournment

The Committee adjourned at 4:30pm until 10:15am, Tuesday 28 June 2005, Supper Room, Bega Town Hall, Zingel Place, Bega.

Rachel Simpson
Director

Meeting No 26, 28 June 2005, Supper Room, Bega Town Hall, Zingel Place, Bega, 10.30 am

1. Present

Ms Robertson (Chair)
Mr Pearce
Ms Fazio
Ms Rhiannon

2. Apologies

Mr Roozendaal
Mr Clarke

3. Inquiry into community based sentencing

Public hearing

Witnesses, media and members of the public were admitted.

Mr William Taylor, Deputy Mayor and Mr Jeff McKenzie, Crime Prevention Officer, Bega Valley Shire Council, were sworn and examined.

Evidence concluded and the witnesses withdrew.

Inspector Edmunds, Bega, NSW Police, was sworn and examined.

Evidence concluded and the witness withdrew.

Mr Chris Costas, Area Manager, Queanbeyan Probation and Parole Service, Department of Corrective Services, was sworn and examined.

Evidence concluded and the witness withdrew.

Mr Gerry Moore, Chief Executive Officer and Mr Gary Pudney, Principal Solicitor, South Eastern Aboriginal Legal Service were sworn and examined.

Evidence concluded and the witnesses withdrew.

Ms Sarah Hancock, Manager, Southern Highlands and Mr Paul Brunton, Juvenile Justice Officer, Bega, Department of Juvenile Justice were sworn and examined.

Evidence concluded and the witnesses withdrew.

Public meeting

The Committee facilitated a public meeting at the Bega Town Hall, Bega with the local community, including the Aboriginal community, to ask their views on community based sentencing options for rural and remote areas, such as Bega. Ms Margaret Dixon performed a Welcome to Country ceremony to welcome the committee to Aboriginal land.

The following people attended:

Susie Herbert, Jeff McKenzie, John Edmunds, Leonie Kirby, Kerry Avery, Margaret Dixon, Glenda Dixon, Richard Barcham, Claire Lupton.

Public hearing

Magistrate Heilpern, Magistrate, Bega Local Court was sworn and examined.

Evidence concluded and the witness withdrew.

4. Adjournment

The Committee adjourned at 5:30pm until 9am, Wednesday 29 June 2005, Supper Room, Bega Town Hall, Zingel Place, Bega.

Rachel Simpson
Director

Meeting No 27, 29 June 2005, Supper Room, Bega Town Hall, Zingel Place, Bega, 9:45 am

1. Present

Ms Robertson (Chair)
Mr Pearce
Ms Fazio
Ms Rhiannon

2. Apologies

Mr Roozendaal
Mr Clarke

3. Inquiry into community based sentencing

Public meeting

The Committee facilitated a public meeting at the Bega Town Hall, Bega, with the local community, including the Aboriginal community, to ask their views on community based sentencing options for rural and remote areas such as Bega. Ms Margaret Dixon performed a *Welcome to Country* ceremony to welcome the committee to Aboriginal land.

The following people attended:

Alan Harrison, David Dixon, Glenda Dixon, Margaret Dixon, Jeff McKenzie, Kerry Avery, Ellen Mundy, Valmai Cooper.

Documents tabled:

- ‘what will happen if I don’t pay my fine?’, Brochure, State Debt Recovery Office
- Community snapshot and community information directory, Bega Valley Shire Council
- ‘Two Ways Together’, NSW Aboriginal Affairs Plan 2003-2012
- Indigenous Community Development Project Report, Sapphire Community Centre.

4. Deliberative meeting

1. Transcript and tabled documents

Resolved, on the motion of Ms Fazio, that the transcript of the public hearings held on 27 June 2005 in Griffith and on 28 June in Bega be published.

Resolved, on the motion of Ms Fazio, that the transcript of the public hearing held on 29 June 2005 in Bega be circulated to the four members present at the hearing on a confidential bases for review and then redistributed to the whole committee.

Resolved, on the motion of Ms Fazio, that the documents tendered by witnesses at the public hearings on 27 June 2005 in Griffith and on 28 June in Bega be accepted and published.

2. Confirmation of minutes

Resolved, on the motion of Ms Fazio, that Meeting No 19 and 24 be confirmed.

Resolved, on the motion of Ms Rhiannon, that Meeting No 20 be confirmed.

3. Confirmation of minutes from Sub-Committee

Resolved, on the motion of Mr Pearce, that Meeting No 21 to 23 of the Sub-Committee from its site visit to Inverell, Bourke and Brewarrina be confirmed.

4. Sub-Committee’s report from Inverell, Bourke and Brewarrina

Resolved, on the motion of Ms Fazio, that the Sub-Committee’s report from Inverell, Bourke and Brewarrina be adopted with amendments and published, subject to editorial changes by the Chair.

Resolved, on the motion of Ms Fazio, that the Secretariat be permitted to correct typographical and grammatical errors if necessary in the Sub-Committee’s report prior to publishing.

5. Correspondence

The Chair tabled the following correspondence.

5.1. Inquiry into community based sentencing options

Correspondence received

- 26 May 2005, from Magistrate Shaughn McCosker, Inverell Local Court, advising due to his schedule he is unable to attend the public hearing held on 14 June 2005 at Inverell.
- 6 June 2005, from the Hon John Hatzistergos MLC, Minister for Corrective Services, in relation to facilitating the committee’s visit to Yetta Dhinnakkal on 16 June 2005.
- 8 June 2005, email from Dr Eileen Baldry, University of NSW, providing information requested from her at the hearing.
- 14 June 2005, from Mr John Feneley, Assistant Director General, Policy and Crime Prevention, Attorney General’s Department, advising Mr Phil Armstrong, R/Clerk of Courts, Bourke, unavailable to be witness at public hearing on 15 June 2005.

Resolved, on the motion of Mr Pearce, to accept and publish submission numbers 42 to 44.

Resolved, on the motion of Ms Fazio, that the Chair write to other State Governments requesting information on their experience implementing community based sentences, particularly in rural and remote areas, and including alternatives to home detention.

5. ...

6. Further public hearings

Resolved, on the motion of Ms Robertson, to hold public hearings in Sydney on Tuesday 30 August, Thursday 1 September and a site visit on Wednesday 31 August 2005.

7. Adjournment

The Committee adjourned at 1pm until 10am, Tuesday 30 August 2005, Room 814/815, Parliament House, Macquarie Street, Sydney.

Rachel Simpson
Director

Meeting No 28, 30 August 2005, Room 814/5, Parliament House, 10.00 am

1. Present

Ms Robertson (Chair)
Mr Pearce (Deputy Chair)
Mr Clarke
Mr Donnelly
Ms Fazio
Ms Rhiannon

2. Inquiry into community based sentencing - Public hearing

Witnesses, media and members of the public were admitted.

Ms Catriona McComish, Senior Assistant Commissioner, Community Offender Services and Ms Joanne Jousif, Director, Intensive Supervision Programs, Department of Corrective Services were sworn and examined.

Ms McComish tabled two documents:

- Community Service Orders Scheme: Guide to agencies and voluntary supervisors
- Core Group Work Interventions July 20.

Evidence concluded and the witnesses withdrew.

Mr Trevor Christian, CEO and Ms Nadine Miles, Deputy Principal Solicitor, Sydney Regional Aboriginal Corporation Legal Service, and Ms Sheryn Omeri, Research Solicitor, Coalition of Aboriginal Legal Services, were sworn and examined.

Evidence concluded and the witnesses withdrew.

Mr Peter Harvey, President and Ms Moira Magrath, Secretary, Probation and Parole Officers' Association of NSW were sworn and examined.

Mr Harvey tabled a copy of his Powerpoint presentation and accompanying information.

Evidence concluded and the witnesses withdrew.

Mr Paul Winch, Public Defender, NSW Public Defenders' Office, was sworn and examined.

Evidence concluded and the witness withdrew.

Ms Heidi Forrest, President and Mr Matthew Keeley, Senior Legal Officer, People with Disability; Ms Linda Rogers, Senior Solicitor and Ms Judy Harper, Project Manager, Criminal Justice Support Network, Intellectual Disability

Rights Service, and Mr Jim Simpson, Senior Advocate, NSW Council for Intellectual Disability, were sworn and examined.

Mr Simpson tabled a document titled 'Criminal justice and indigenous people with cognitive disabilities'.

Evidence concluded and the witnesses withdrew.

Ms Carol Mills, Deputy Director General, Development, Grants and Ageing and Ms Ethel McAlpine, Deputy Director General, Accommodation and Direct Services, Department of Ageing, Disability and Home Care, were sworn and examined.

Evidence concluded and the witnesses withdrew.

His Honour Judge R Dive, Senior Judge of the Drug Court of NSW was sworn and examined.

Judge Dive tabled a document titled 'Evaluation of the Drug Court of NSW'.

Evidence concluded and the witness withdrew.

3. **Adjournment**

The Committee adjourned at 5:00pm until 10.00am Wednesday 31 August 2005, Room 814/5, Parliament House, Sydney.

Beverly Duffy
A/Director

Meeting No 29, 31 August 2005, Room 814/5, Parliament House, 10.00 am

1. **Present**

Ms Robertson (Chair)
Mr Pearce (Deputy Chair)
Mr Clarke
Mr Donnelly
Ms Fazio
Ms Rhiannon

2. **Inquiry into community based sentencing– public hearing**

Witnesses, media and members of the public were admitted.

Mr Terry O'Connell OAM, Director, Real Justice, was sworn and examined.

Evidence concluded and the witness withdrew.

Ms Susan Smith, Branch Manager, Indigenous Education Policy Branch and Mr Mark de Weerd, Director, DEST Action Team, COAG Trial, Department of Employment, Science and Training, were sworn and examined.

Evidence concluded and the witnesses withdrew.

Mr Lloyd Babb, Director, Criminal Law Review Division, Attorney General's Department, was sworn and examined.

Mr Babb tabled a document titled 'Penalties under the *Road Transport (Driver Licensing) Act 1998* in Local Courts as at May 2005'.

Evidence concluded and the witness withdrew.

Ms Gail Wallace, Project Officer, Circle Sentencing, Attorney General's Department, was sworn and examined.

Evidence concluded and the witness withdrew.

Ms Alison Churchill, Executive Officer, Community Restorative Centre, was sworn and examined.

Evidence concluded and the witness withdrew.

Ms Clare Farnan, Magistrate, NSW Local Courts, was sworn and examined.

Evidence concluded and the witness withdrew.

Ms Jane Sanders, Principal Solicitor, Shopfront Youth Legal Centre, was sworn and examined.

Evidence concluded and the witness withdrew.

3. **Adjournment**

The Committee adjourned at 5:00pm until 10:00am Thursday 1 September 2005, Room 814/5, Parliament House, Sydney.

Beverly Duffy
A/Director

Meeting No 30, 1 September 2005, Room 814/5, Parliament House, 10:00 am

1. **Present**

Ms Robertson (Chair)
Mr Pearce (Deputy Chair) (from 4:00pm onwards)
Mr Clarke
Mr Donnelly
Ms Fazio
Ms Rhiannon

2. **Apologies**

Mr Pearce (until 4:00pm)

3. **Inquiry into community based sentencing – public hearing**

Witnesses, media and members of the public were admitted.

Mr Howard W Brown OAM, Deputy President, Victims of Crime Assistance League, was sworn and examined.

Evidence concluded and the witness withdrew.

Mr Robert Tumeth, Solicitor, Criminal Law Committee and Ms Marcie Payne, Solicitor, Human Rights Committee, Law Society of NSW, were sworn and examined.

Ms Payne tabled two documents:

- Submission from the Human Rights Committee, Law Society of NSW
- NSW Aboriginal Justice Plan: Beyond Justice 2004 – 2014.

Evidence concluded and the witnesses withdrew.

Mr Bernard McKinnon, Muralappi Co-ordinator, The Settlement, was sworn and examined.

Evidence concluded and the witness withdrew.

Ms Anne Meagher, Regional Director, Northern Region, Department of Juvenile Justice, was sworn and examined.

Ms Meagher tabled a document titled 'NSW Department of Juvenile Justice: Funding Agreement 1 October 2004 to 30 June 2005'.

Evidence concluded and the witness withdrew.

Mr Gary Moore, Director and Mr Warren Gardiner, Senior Policy Officer, Council of Social Service NSW, were sworn and examined.

Evidence concluded and the witnesses withdrew.

Ms Deborah Sharp, Director, and Ms Gina Vizza, Manager, Policy and Projects, Community Justice Centres, were sworn and examined.

Evidence concluded and the witnesses withdrew.

Mr Stephen Kerkyasharian AM, Chairperson and Ms Patricia Giannotto, Public Sector Advisor, Community Relations Commission, were sworn and examined.

Evidence concluded and the witnesses withdrew.

Mr R Prowse, Magistrate, NSW Local Courts, was sworn and examined.

Evidence concluded and the witness withdrew.

4. **Deliberative meeting**

Confirmation of minutes

Resolved, on the motion of Ms Fazio, that Meeting No 25, 26 and 27 be confirmed.

Inquiry into community based sentencing

Transcript and tabled documents

Resolved, on the motion of Ms Fazio, that the transcripts from the public hearings in Sydney on 30 August 2005, 31 August 2005 and 1 September 2005 be published.

Resolved, on the motion of Ms Fazio, that the transcript from the public meeting in Bega on 29 June 2005 be published, subject to the deletion of the names of certain individuals.

Resolved, on the motion of Ms Fazio, that the documents tendered by witnesses at the public meeting in Bega on 29 June 2005 and the public hearings in Sydney on 30 August 2005, 31 August 2005 and 1 September 2005, be accepted and published.

Resolved, on the motion of Ms Fazio, that one of the documents regarding the Goorie Access program tendered by Ms Payne, NSW Law Society, on 1 September 2005, remain confidential as it includes the names of certain individuals.

Submissions

The Chair tabled the following submissions:

- Submission No 45 – Mrs Patricia Wagstaff
- Submission No 46 – Mr Terry O’Connell, Real Justice

Resolved, on the motion of Mr Pearce, that Submissions No 45 and 46 be published.

Correspondence

The Chair tabled the following correspondence.

Correspondence received

- 4 July 2005, from Mr Peter Rock, National Manager, Multicultural Services Branch, Centrelink, providing response to question taken on notice during hearing 6 June 2005.
- 18 July 2005, from Mr Denis Nickle, District Manager, Wagga Wagga Probation and Parole Service, Department of Corrective Services, providing response to question taken on notice during hearing 27 June 2005.
- 18 July 2005, from Ms Fiona Brown, President, Inverell Chamber of Commerce, providing response to question taken on notice during hearing 14 June 2005.

- 25 July 2005, from Mr Ian McLean, Acting Commissioner, Department of Corrective Services, providing response to questions taken on notice during hearing 6 June 2005.
- 28 July 2005, from Mr Michael Neville, District Manager, Probation and Parole Service, Department of Corrective Services, providing response to question taken on notice during hearing 27 June 2005.
- 29 July 2005, from Ms Carolyn White, KOOL Program Co-ordinator, providing response to question taken on notice during hearing 27 June 2005.
- 2 August 2005, from Mr Brendan Thomas, Director, Attorney General's Department, providing response to question taken on notice during hearing 6 June 2005.
- 23 August 2005, from Sergeant M Bevan, Griffith, providing response to question taken on notice during hearing 27 June 2005.
- 24 August 2005, from Mr Laurie Glanfield, Director General, Attorney General's Department of NSW, providing information about community programs and services relevant to the locations visited by the Committee.
- 29 August 2005, from Magistrate David Heilpern, Local Courts, providing response to question taken on notice during hearing 28 June 2005.
- 29 August 2005, from Mr Craig Harris, Assistant Secretary, Federal Attorney-General's Department, providing information about community programs and services relevant to the locations visited by the Committee.
- 30 August 2005, from Hon Judy Spence MP, Minister for Police and Corrective Services, providing information on Queensland's experience implementing community based sentences.
- 1 September 2005, from Commissioner Ron Woodham, Department of Corrective Services, providing response to questions taken on notice by Probation and Parole officers during the hearings in Bourke, Griffith and Bega.
- 1 September 2005, from Hon Judy Jackson MHA, Attorney-General, Tasmania, providing information on Tasmania's experience implementing community based sentences.

Correspondence sent

- 21 July 2005, to Commissioner K E Moroney, Commissioner, NSW Police requesting information about the Local Area Commands (LAC) relevant to the locations visited by the Committee, including the population base and towns served by the LAC and details about sworn and non-sworn police personnel.
- 25 July 2005, to other State Governments requesting information on their experience implementing community based sentences.
- 26 July 2005, to relevant State and Federal Ministers requesting information about community programs and services relevant to the locations visited by the Committee.

5. Reporting date

Resolved, on the motion of Ms Rhiannon, that the inquiry reporting date be extended until 1 December 2005.

Interstate visit

Resolved, on the motion of Ms Rhiannon, that the Chair prepare a proposal to conduct an interstate visit in accordance with standing order 208 (d) on either 25 and 26 October, or alternatively on 28 and 29 September.

6. ...

7. Adjournment

The Committee adjourned at 5pm *sine die* until 9.30am on 27 September 2005 in Room 1108, Parliament House.

Beverly Duffy
A/Director

Meeting No 31, 27 September 2005, Room 1108, Parliament House, 9.30 am

1. Present

Ms Robertson (Chair)
Mr Clarke (Deputy Chair)
Mr Colless
Mr Donnelly (until 10:00am)
Ms Rhiannon

2. Apologies

Ms Fazio (due to illness)

3. Deliberative meeting

3.1 Appointment of Sub-Committee

The Chair advised that due to illness, Ms Fazio was unable to attend the Committee's public hearing and site visit and that due to a pre-existing appointment, Mr Donnelly was unable to attend the site visit. It was therefore proposed that the Committee form a Sub-Committee for the purposes of conducting the meeting and site visit in Mount Druitt.

Resolved, on the motion of Mr Colless, that under the power conferred by Standing Order 217, Ms Robertson, Ms Rhiannon, Mr Clarke and Mr Colless form a Sub-Committee to undertake the meeting and site visit at the Holy Family Centre at Mt Druitt on 27 September 2005, and that Ms Robertson be Chair of that Sub-Committee.

3.2 In camera meeting

Resolved, on the motion of Mr Colless, that the meeting to be held at the Mercy Family Centre, be held in private with an expectation that the Committee will resolve to publish the transcript of the meeting, unless it is not in the public interest to do so.

4. Public hearing - Inquiry into community based sentencing options

The witness, media and members of the public were admitted.

Dr Richard Matthews, Deputy Director General, NSW Health, CEO Justice Health, was sworn and examined.

Evidence concluded and the witness withdrew.

5. Adjournment

The Committee adjourned at 10.30am until the study visit to Melbourne on Wednesday 26 October 2005.

Beverly Duffy
A/Director

Meeting No 32, 27 September 2005, Holy Family Centre, Mount Druitt, 12.00 pm

1. Present

Ms Robertson (Chair)
Mr Clarke
Mr Colless
Ms Rhiannon
(Meeting as a Sub-Committee)

2. Site visit and meeting - Holy Family Centre, Mt Druitt

The sub-committee facilitated a meeting at the Holy Family Centre, Mt Druitt, with staff from the centre, members of the local Aboriginal community and representatives of several community organisations and government agencies, to seek their views on community based sentencing options for disadvantaged populations.

The following people attended the meeting:

Mr Trevor Bates, Mr Peter Confeggi, Mr Ray Douglas, Mr Derek Glenn, Mr Paul Hanna, Mr Teddy Hart, Mr Luke Hawkins, Mr Joe Huroa, Mr John Macdonald, Mr Wes Marne, Ms Coral McLean, Ms Nance Morgan, Mr Sai Oo, Ms Margaret Paton, Mr Mohamed Quddaura, Mr Lester Ritchie, Mr Neil Sandall, Mr Stephen Santucci, Mr Greg Simms, Mr Gordon Simon, Mr John Stone, Ms Colleen Sutherland, Mr Gary Wellsmore and Ms Renate Zukauskas.

3. Adjournment

The Sub-Committee adjourned at 4.00pm.

Beverly Duffy
A/Director

Meeting No 33, 26 October 2005, Chairman's Lounge, Melbourne Airport, 5.25 pm**1. Present**

Ms Robertson (Chair)
Mr Clarke (Deputy Chair)
Mr Colless
Mr Donnelly
Ms Fazio

2. Apologies

Ms Rhiannon

3. Inquiry into community based sentencing - reporting date

Resolved, on the motion of Mr Colless, that:

- the reporting date for the Inquiry into community based sentencing be Tuesday 28 February 2006
- the Chair write to the Attorney General advising him of the revised reporting date and reiterating the Committee's request for a copy of a departmental Discussion Paper regarding the review of the *Crimes (Sentencing procedure) Act 1999*.

4. Corrections Victoria Study Visit

Resolved, on the motion of Ms Fazio, that the Secretariat draft a letter to the Commissioner of Corrections Victoria, thanking him for facilitating the Committee's study visit on 26 October 2005.

5. ...**6. Adjournment**

The Committee adjourned at 5.30pm.
Beverly Duffy
A/Director

Meeting No 34, 17 November 2005, Room 1153, Parliament House, 1:00 pm**1. Present**

Ms Robertson (Chair)
Mr Clarke (Deputy Chair)
Mr Colless
Mr Donnelly
Ms Fazio
Ms Rhiannon

2. Apologies

None.

3. Minutes

Resolved, on the motion of Ms Fazio, that the Minutes of Meetings No.28, 29, 30, 31, 32 and 33 be adopted.

4. ...**5. Inquiry into community based sentencing****5.1 Publication of transcripts**

Resolved, on the motion of Ms Rhiannon, that in order to better inform all those participating in the inquiry process, the Committee make use of the powers granted under Standing Order 233 (1) and section 4 (2) of the Parliamentary Papers (Supplementary Provisions) Act 1975, to publish the transcript of the public hearing held in Sydney on 27 September 2005 and the transcript of the in camera meeting held at Mt Druitt on 27 September 2005.

5.2 Publication of submissions

Resolved, on the motion of Ms Rhiannon, that in order to better inform all those participating in the inquiry process, the Committee make use of the powers granted under Standing Order 233 (1), and section 4 (2) of the Parliamentary Papers (Supplementary Provisions) Act 1975, to publish submissions no 48 and 49.

5.3 Sub-Committee's report from the Holy Family Centre, Dubbo

Resolved, on the motion of Ms Fazio, that the Committee's report from the Holy Family Centre, Mount Druitt, be adopted.

5.4 Correspondence

The Chair tabled the following correspondence:

Received

Responding to requests for information re community based sentencing:

1. Mr Chris Adepyoyibi, NT Department of Justice
2. Hon Terry Roberts MLC, SA Minister for Correctional Services *Attachment available from Secretariat*
3. Mr Laurie Glanfield, Director General, Attorney General's Department *Attachment available from Secretariat*
4. Hon Michael Atkinson MP, SA Attorney General
5. Hon Dr Peter Toyne MLA, NT Minister for Justice and Attorney General
6. Mr Craig Harris, Assistant Secretary, National Law Enforcement Policy Branch, Commonwealth Attorney-General's Department *Attachment available from Secretariat*
7. Hon Christopher Pyne MP, Parliamentary Secretary to the Commonwealth Minister for Health and Ageing, Hon Tony Abbott MP *Attachment available from Secretariat*
8. Mr Ross Drysdale, Australian Government State Manager, NSW *Attachment available from Secretariat*
9. Hon Brendan Nelson MP, Commonwealth Minister for Education, Science and Training *Attachment available from Secretariat*
10. Hon John D'Orazio MLA, NT Minister for Justice *Attachment available from Secretariat*
11. Sen Amanda Vanstone, Commonwealth Minister for Immigration and Multicultural and Indigenous Affairs
12. Hon Tim Holding MP, VIC Minister for Corrections
13. Sen Kay Patterson, Commonwealth Minister for Family and Community Services
14. Hon Carmel Tebbutt MLC, NSW Minister for Education *Attachment available from Secretariat*

Responding to questions on notice taken during hearings for community based sentencing:

1. Sergeant M Bevan, NSW Police, Griffith LAC
2. Senior Judge JR Dive, Drug Court of NSW
3. Mr Matthew Keeley, Senior Legal Officer, People with Disability
4. Ms Sheryn Omeri, Research Solicitor, Coalition of Aboriginal Legal Services
5. Mr Lloyd Babb, Director, Criminal Law Review Division, NSW Attorney General's Department
6. Ms Susan Smith, Branch Manager, Indigenous Education Police, Commonwealth Department of Education, Science and Training
7. Mr Stephan Kerkyasharian AM, Chairperson, Community Relations Commission
8. Ms Ethel McAlpine, Deputy Director General, NSW Department of Ageing, Disability and Home Care
9. Ms Catriona McComish, Senior Assistant Commissioner, Community Offender Services, NSW Department of Corrective Services
10. Senior Judge JR Dive, Drug Court of NSW
11. Dr Richard Matthews, Deputy Director General, Strategic Development, NSW Health

General

1. Mr Darcy Bolton, NSW Department of Corrective Services, providing information about the battle axe presented to the Committee at Yetta Dhinnakkal
2. Ms Sheryn Omeri, Research Solicitor, Coalition of Aboriginal Legal Services, re issue arising out of answers to questions on notice

Sent

Requesting information re community based sentencing from:

1. Commissioner K E Moroney, NSW Police
2. Hon Dr Peter Toyne MLA, Minister for Justice and Attorney General, NT Corrective Services
3. Hon Reba Meagher MP, NSW Minister for Corrective Services
4. Hon Bob Debus MP, NSW Attorney General
5. Hon John Hatzistergos MLC, NSW Minister for Health
6. Mr David Daley, Director, VIC Community Corrections

General

1. Ms Sheryn Omeri, Research Solicitor, Coalition of Aboriginal Legal Services, re issues arising out of answers to questions on notice

2. Hon Bob Debus MLC, NSW Attorney General, requesting a copy of the discussion paper concerning the review of the *Crimes (Sentencing Procedure) Act 1999*
3. Commissioner Kelvin Anderson, Corrections Victoria, thanking him and his staff for their hospitality during the Committee's visit to Melbourne.

Resolved, on the motion of Ms Rhiannon, that the Secretariat contact those persons who responded to the Committee's request for information regarding community based sentencing to seek their permission to publish their correspondence as submissions.

Resolved, on the motion of Mr Donnelly, that the Secretariat publish on the Committee's web-page the responses to questions on notice tabled at the meeting.

Resolved, on the motion of Ms Fazio, that given the commitment of the House to Indigenous art, the Secretariat seek the urgent advice of the Arts Committee as to whether the battle axe presented to the Committee at Yetta Dhinnakkal will be displayed in the Parliament.

6. ...

7. Adjournment

The Committee adjourned at 1:35pm.

Michael Phillips
Principal Council Officer

Meeting No 35, 27 February 2006, Room 1153, Parliament House, 2:00 pm

1. Present

Ms Robertson (Chair)
Mr Clarke (Deputy Chair)
Mr Colless
Mr Donnelly

2. Apologies

Ms Fazio.

3. Minutes

Resolved, on the motion of Mr Donnelly, that the Minutes of Meeting No. 34 be adopted.

4. Inquiry into community based sentencing

4.1 Correspondence

The Chair tabled the following correspondence:

- 18 November 2005, from Hon Bob Debus MP, NSW Attorney General, granting an extension until Tuesday 28 February 2006 for the report.
- 21 November 2005, from Steven Reynolds, Usher of the Black Rod and Secretary to the Artworks Committee, re display of the Yetta Dhinnakkal Axe.
- 19 August 2005, from Hon Tony Kelly MLC, Minister for Juvenile Justice, providing information on the Department of Juvenile Justice Community Funding Program.
- 25 November 2005, from Mr Neil Shepherd, Director General, NSW Department of Community Services, providing information on projects and services administered by DOCS in Inverell, Bourke, Brewarrina, Griffith and Bega.
- 8 November 2005, from Mr Michael Gooda, District Manager, Inverell Probation and Parole, responding to questions on notice.
- 17 January 2006, from Mr Paul Henry, Inverell Shire Council, responding to questions on notice.

4.2 New reporting date

Resolved, on the motion of Mr Colless, that the Committee write to the Attorney General to seek an extension of the reporting date for the Inquiry into community based sentencing to 31 March 2006.

4.3 Publication of submissions

Resolved, on the motion of Mr Donnelly, that in order to better inform all those participating in the inquiry process, the Committee make use of the powers granted under Standing Order 233(1), and section 4(2) of the *Parliamentary Papers (Supplementary Provisions) Act 1975*, to publish submissions no 50 and 51 with identifying details removed at request of authors.

5. ...

6. Adjournment

The Committee adjourned at 2:18pm until Friday 24 March at 9am.

Rachel Callinan
Director

Minutes No 36, 24 March 2006, Waratah Room, Parliament House, 9:00 am

1. Present

Ms Robertson (Chair)
Mr Clarke (Deputy Chair)
Mr Colless
Mr Donnelly
Ms Fazio
Ms Rhiannon

2. Minutes

Resolved, on the motion of Mr Colless, that the Minutes of Meeting No. 35 be adopted.

3. ...

4. Inquiry into community based sentencing

4.1 Correspondence

Chair tabled the following correspondence:

- 28 February 2006, from Chair to Hon RJ Debus MP, Attorney General, seeking extension of reporting date to 31 March 2006.
- 20 March 2006, from Commissioner Ron Woodham to Chair providing answers to questions asked of Department by Director of Secretariat.

4.2 Consideration of Chair's draft report

The Chair submitted her draft report titled *Community based sentencing options for rural and remote areas and disadvantaged populations, Report 30*, which, having been circulated, was taken as being read.

The Committee proceeded to consider the draft report in detail.

Chapter 1 read.

Resolved, on the motion of Mr Colless, that the words 'site visits,' be deleted from paragraph 1.8 and new paragraph 1.9 be inserted:

A Sub-Committee also undertook a site visit to the Yetta Dhinnakkal Correctional Centre for young Aboriginal offenders, near Brewarrina, on 16 June 2005. There the Committee met with several staff and inmates of this

unique facility and was privileged to receive a traditional Aboriginal welcome from the Ngemba and Bundjalung communities, including a smoking ceremony and traditional dances. A report of the sub-committee's visit is set out in Appendix 3.

Resolved, on the motion of Ms Fazio, that paragraph 1.13 be amended to include the dates that the two public hearings were held.

Resolved, on the motion of Ms Fazio, that Chapter 1, as amended, be adopted.

Chapter 2 read.

Resolved, on the motion of Ms Fazio, that paragraph 2.15 be amended to insert the words 'categories of' after the word 'two' in the second sentence.

Resolved, on the motion of Ms Fazio, that paragraph 2.28 be amended to add the following sentence at the end of the paragraph: 'The Committee notes that over the same period the prison population has been growing at an average of 400 inmates a year.'

Resolved, on the motion of Mr Clarke, that paragraph 2.87 be amended to include the following clause at the end of the first sentence: ' , particularly where victims and offenders are members of the same small community.'

Resolved, on the motion of Mr Donnelly, that Recommendation 1 be adopted.

Resolved, on the motion of Ms Rhiannon, that Chapter 2, as amended, be adopted.

Chapter 3 read.

Resolved, on the motion of Mr Clarke, that paragraph 3.59 and Recommendation 2 be amended to replace the word 'possible' with 'where it may be practically implemented'.

Resolved, on the motion of Mr Clarke, that Recommendation 2, as amended, be adopted.

Resolved, on the motion of Ms Fazio, that Recommendation 3 be adopted.

Resolved, on the motion of Mr Clarke, that Recommendation 4 be adopted.

Resolved, on the motion of Mr Colless, that Recommendation 5 be adopted.

Resolved, on the motion of Ms Rhiannon, that the following paragraph be inserted after paragraph 3.81:

The Committee also notes that one example of a successful response to the high rate of incarceration of Aboriginal people, and an innovative approach to offender management, is the Yetta Dhinnakkal Correctional Centre, which the Committee visited during the Inquiry (paragraph 1.9). Yetta Dhinnakkal, which was opened in May 2000 as part of the Government's response to the Royal Commission on Aboriginal Deaths in Custody, targets first time young Aboriginal offenders (18-30 years old) through culturally relevant intensive case management. Yetta Dhinnakkal is a working farming property as well as an educational facility where inmates receive vocational training. Programs, including anger management, domestic violence, alcohol and other drug counselling are also offered. The lower than average re-offending rate amongst the offenders who have passed through the centre demonstrates the success of the initiative.

Resolved, on the motion of Ms Fazio, that the following recommendation be added after new paragraph 3.82:

Recommendation: That the Government consider establishing new correctional centres based on the successful Yetta Dhinnakkal Correctional Centre model.

Resolved, on the motion of Ms Fazio, that the following paragraphs and recommendation be inserted after paragraph 3.104:

The Committee notes that the NSW Statewide Community and Court Liaison Service, which commenced in March 2002, provides specialist mental health advice to 17 local courts. The service provides psychiatric expertise and advice to magistrates when people with mental illness first appear in court to assist the court in identifying the mentally ill or disordered charged with minor offences and diverting them to treatment in lieu of incarceration. The service also enhances the link between community based mental health services, the courts and correctional based mental health services. (fn: www.justicehealth.nsw.gov.au/services/mental_health.html (accessed 20 March 2006). The service is provided at the following local courts: Blacktown, Burwood, Campbelltown, Central Local, Coffs Harbour, Dubbo, Gosford, Lismore, Liverpool, Manly, Nowra, Parramatta, Penrith, Sutherland, Tamworth, Wagga, Wyong).

Judge Price referred to the importance of the service and its expansion in his submission:

A full time Mental Health Liaison Service operates in eight metropolitan courts and nine regional courts. The importance of this service is underlined by the fact that in 2002 some 60% of those persons in custody who were examined by Mental Health Liaison Officers were suffering from mental illness. About 10% were directed from custody and recommendations for treatment were made for others who stayed in remand centres. An increased availability of Mental Health Liaison Officers in regional areas would more readily identify offenders suffering from a mental illness at an early stage and enable magistrates to divert offenders to appropriate treatment. The Service which is provided by Justice Health may be expanded to other regional areas. A 'telehealth' unit is to be installed at Griffith courthouse to provide an audiovisual link to mental health experts. (fn: Submission 7, p6)

The Committee acknowledges the importance of the service and concurs with Judge Price's suggestion that increasing the availability of the service in regional areas would assist in diverting appropriate offenders into treatment. The Committee recommends that the Minister for Justice expand the NSW Statewide Community and Court Liaison Service through the use of 'telehealth', 'webcam' technology, or other means, to additional courts in rural and remote NSW.

Recommendation: That the Minister for Justice expand the NSW Statewide Community and Court Liaison Service through the use of 'telehealth', 'webcam' technology, or other means, to additional courts in rural and remote NSW.

Resolved, on the motion of Ms Rhiannon, that Recommendation 6 be amended to include at the end of the sentence the words 'and the rehabilitation of the offender'.

Resolved, on the motion of Ms Rhiannon, that Recommendation 6, as amended, be adopted.

Resolved, on the motion of Ms Rhiannon, that Recommendation 7, be amended, to read:

That the Minister for Justice examine the adequacy of knowledge within the Community Offenders Service division of the Department of Corrective Services regarding the needs of disadvantaged offenders, particularly offenders with intellectual disabilities or mental health issues, and give consideration to employing specialist officers and the delivery of special training to its officers to meet this area of need.

Resolved, on the motion of Ms Rhiannon, that Recommendation 7, as amended, be adopted.

Resolved, on the motion of Ms Fazio, that Recommendation 8 be adopted.

Resolved, on the motion of Mr Colless, that Recommendation 9 be adopted.

Resolved, on the motion of Mr Donnelly, that Chapter 3, as amended, be adopted.

Chapter 4 read.

Resolved, on the motion of Ms Rhiannon, that paragraph 4.49 and Recommendation 10 be amended to delete the words 'or to alleviate the burden of OH&S requirements for CSO placements,'.

Resolved, on the motion of Mr Colless, that Recommendation 10, as amended, be adopted.

Resolved, on the motion of Ms Fazio, that Recommendation 11 be adopted.

Resolved, on the motion of Mr Donnelly, that the second sentence of paragraph 4.82 and Recommendation 12 be amended to insert the words 'or arranging' after the word 'providing'.

Resolved, on the motion of Mr Donnelly, that Recommendation 12, as amended, be adopted.

Resolved, on the motion of Ms Rhiannon, that Recommendation 13 be adopted.

Resolved, on the motion of Ms Fazio, that Recommendation 14 be adopted.

Resolved, on the motion of Mr Clarke, that Recommendation 15 be adopted.

Resolved, on the motion of Mr Colless, that Recommendation 16 be adopted.

Resolved, on the motion of Ms Rhiannon, that Recommendation 17 be adopted.

Resolved, on the motion of Ms Fazio, that Recommendation 18 be adopted.

Resolved, on the motion of Ms Rhiannon, that the following paragraphs and recommendation be inserted after paragraph 4.156:

As noted in paragraph 4.40, the Committee was informed that competing programs such as the Community Development Employment Projects (CDEP) may contribute to the declining number of CSO placements. However, the Committee was also informed during its public forums in Brewarrina and Bega that some CDEP programs take CSO work placements themselves rather than compete for work. (fn: Ms Barker, public forum, Brewarrina, 16 June 2005, p4 and Mr Barcham, public forum, Bega, 28 June 2005, p5)

The NSW Coalition of Aboriginal Legal Services suggested that one way to increase the availability of CSOs in rural and remote areas is to establish '... a broader range of CSO providers including the CDEP. (fn: Submission 43, p15) The Committee agrees that the value of CDEPs in providing work for Aboriginal people could be harnessed in relation to CSOs. The Committee recommends that the Minister for Justice seek consultations with the Federal Government to examine how the CDEP program can be utilised to create more CSO work placements in rural and remote areas.

Recommendation: That the Department of Corrective Services examine ways of increasing access by Aboriginal offenders to culturally appropriate Community Service Order work placements in rural and remote areas including seeking consultations with the Federal Government to examine how the Community Development Employment Projects program can be utilised to create more Community Service Order work placements in rural and remote areas.

Resolved, on the motion of Mr Clarke, that Recommendation 19 be adopted.

Resolved, on the motion of Ms Rhiannon, that Chapter 4, as amended, be adopted.

Chapter 5 read.

Resolved, on the motion of Mr Donnelly, that Recommendation 20 be amended to make the second sentence of the first dot point its own paragraph.

Resolved, on the motion of Mr Donnelly, that Recommendation 20, as amended, be adopted.

Mr Clarke moved: That Recommendation 21 be amended to delete the second dot point.

Question put.

Committee divided.

Ayes: Mr Clarke, Mr Colless.

Noes: Ms Robertson, Mr Donnelly, Ms Fazio, Ms Rhiannon.

Question resolved in the negative.

Ms Fazio moved: That Recommendation 21 be adopted.

Committee divided.

Ayes: Ms Robertson, Mr Donnelly, Ms Fazio, Ms Rhiannon.

Noes: Mr Clarke, Mr Colless.

Question resolved, in the affirmative.

Resolved, on the motion of Ms Fazio, that Recommendation 22 be adopted.

Resolved, on the motion of Ms Fazio, that Recommendation 23 be adopted.

Resolved, on the motion of Ms Rhiannon, that Chapter 5, as amended, be adopted.

Chapter 6 read.

Resolved, on the motion of Ms Rhiannon, that Recommendation 24 be adopted.

Resolved, on the motion of Ms Fazio, that Recommendation 25 be adopted.

Resolved, on the motion of Ms Rhiannon, that the following paragraph be inserted after paragraph 6.70:

Mr Richard Davies, the Principal Solicitor of the Western Aboriginal Legal Service raised the possibility of adding periodic detention to the Yetta Dhinnakkal Correctional Facility at Brewarrina, as a means of extending periodic detention to the area for eligible Aboriginal offenders:

Again, it is an option that could be considered if, for example, Yetta Dhinnakkal were to acquire a periodic detention facility and Corrective Services was able to provide transport to and from there, then that might be an option in a community like Brewarrina or Bourke. ... A place like Yetta Dhinnakkal, rather than a place like Bathurst gaol, has the means and the opportunity to provide some constructive input in those weekends of periodic detention—cultural awareness training, some counselling—and it might be a valuable option if it were locally based. (fn: Mr Davies, Evidence, 15 June 2005, p42)

Resolved, on the motion of Mr Donnelly, that Recommendation 26 be adopted.

Resolved, on the motion of Mr Colless, that paragraph 6.91 and Recommendation 27 be amended to add the words 'for offenders' after the word 'services'.

Resolved, on the motion of Mr Colless, that Recommendation 27, as amended, be adopted.

Resolved, on the motion of Ms Fazio, that Recommendation 28 be adopted.

Resolved, on the motion of Ms Rhiannon, that Recommendation 29 be amended to substitute the first dot point with the following: 'enabling offenders who have previously served imprisonment for more than six months by way of full-time detention in relation to any one sentence of imprisonment to be considered for periodic detention'.

Resolved, on the motion of Ms Rhiannon, that Recommendation 29, as amended, be adopted.

Resolved, on the motion of Ms Rhiannon, that Recommendation 30 be adopted.

Resolved, on the motion of Ms Rhiannon, that Chapter 6, as amended, be adopted.

Chapter 7 read.

Resolved, on the motion of Ms Fazio, that Recommendation 31 be adopted.

Resolved, on the motion of Ms Fazio, that the words 'examining ways of' be deleted from Recommendation 32.

Resolved, on the motion of Mr Donnelly, that Recommendation 32, as amended, be adopted.

Resolved, on the motion of Mr Clarke, that Recommendation 33 be adopted.

Resolved, on the motion of Ms Fazio, that Recommendation 34 be adopted.

Resolved, on the motion of Ms Rhiannon, that Recommendation 35 be adopted.

Resolved, on the motion of Mr Colless, that Recommendation 36 be adopted.

Resolved, on the motion of Mr Donnelly, that Chapter 7, as amended, be adopted.

Chapter 8 read.

Resolved, on the motion of Mr Colless, that Recommendation 37 be amended by separating the three sentences into three paragraphs and that the words 'without compromising the principle of truth-in-sentencing' be inserted at the end of the first dot point.

Resolved, on the motion of Ms Fazio, that Recommendation 37, as amended, be adopted.

Resolved, on the motion of Mr Donnelly, that Recommendation 38 be adopted.

Resolved, on the motion of Ms Fazio, that Recommendation 39 be adopted.

Resolved, on the motion of Ms Fazio, that Recommendation 40 be adopted.

Resolved, on the motion of Ms Rhiannon, that Recommendation 41 be adopted.

Resolved, on the motion of Mr Colless, that Recommendation 42 be adopted.

Resolved, on the motion of Ms Fazio, that Recommendation 43 be deleted.

Resolved, on the motion of Mr Donnelly, that Recommendation 43 be adopted.

Resolved, on the motion of Ms Fazio, that Chapter 8, as amended, be adopted.

Chapter 9 read.

Resolved, on the motion of Mr Donnelly, that the following paragraphs and recommendation be inserted after paragraph 9.16:

The Committee was advised that the Probation and Parole Service (PPS) is only involved in Circle Sentencing if the outcome is a community based sentence. In this regard, Mr Christopher Costas, the Area Manager of Community Offender Services in Queanbeyan advised that '... if a final outcome is going to be a community service order, there is a considerable degree of consultation with our office at Nowra and the magistrate and others in the circle.'(fn: Mr Costas, Evidence, 28 June 2005, p16)

The Committee heard a great deal of evidence about the PPS during this Inquiry and considers that there may be some benefit to including the PPS earlier in the Circle Sentencing process. The Committee recommends that the feasibility of including the Probation and Parole Service in the Circle Sentencing process should be examined.

Recommendation: That the Attorney General examine the feasibility of including the Probation and Parole Service in the Circle Sentencing process.

Resolved, on the motion of Mr Clarke, that paragraph 9.24 be substituted with the following:

The Committee was subsequently advised that, as at March 2006, MERIT is now available at 56 local courts across NSW. Most recently, it expanded to Fairfield Local Court in December 2005 and Singleton Local Court in February 2006. MERIT is scheduled to expand to both Waverley and Newtown Local Courts this financial year. (fn: Correspondence from Attorney General's Department to Committee Director, 20 March 2006)

Resolved, on the motion of Ms Fazio, that Recommendation 45 be adopted.

Resolved, on the motion of Mr Donnelly, that Recommendation 46 be adopted.

Resolved, on the motion of Mr Donnelly, that Chapter 9, as amended, be adopted.

Executive summary read.

Resolved, on the motion of Mr Colless, to amend the fifth paragraph on page two of the Executive Summary to make the sentence beginning 'However...' a separate paragraph and delete the word 'some'.

Resolved, on the motion of Mr Colless, that the Executive Summary, as amended, be adopted.

Resolved, on the motion of Ms Fazio, that the report, as amended, be the report of the Committee and be signed by the Chair and presented to the House in accordance with Standing Orders 227(3) and 230(5).

Resolved, on the motion of Ms Fazio, that the Secretariat be permitted to correct any typographical and grammatical errors in the report prior to tabling.

5. Adjournment

The Committee adjourned at 12:00pm until Friday 31 March 2006, at 10:00am.

Rachel Callinan
Director