Research Service

RESPONSE TO REQUEST FOR INFORMATION

Prepared for: Standing Committee on Law and Justice

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Subject: The criteria for eligibility for community based sentencing options

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1. Introduction

The criteria for eligibility for community based sentencing options derive from two sources. There are statutory criteria, some prohibiting non-custodial sentences in certain cases, others requiring the court to have regard to defined issues when making a sentencing decision of a specified kind. These are the general criteria that apply across the board. Added to these statutory criteria are those policy considerations that judges take into account in the exercise of judicial discretion, relating to the factors relevant to the specific case. The criteria for eligibility can be described therefore as primarily statutory but also as non-statutory in nature. The extent and scope of the statutory criteria vary from one community based sentencing option to another. For home detention there is broad array of these criteria, generally restricting the circumstances in which this sentencing option is available to the court, thus leaving relatively little scope for the exercise of discretion. At the other end of the scale is the non-statutory diversionary program offered by the Youth Drug and Alcohol Court.

In most cases the exercise of judicial discretion in this area is guided, if that is the right word, by assessment reports prepared by the Probation and Parole Service. A limitation on research and

inquiry is that these reports are not publicly available. Another is that reported judicial comment is quite rare. Usually the relevant orders will be made at first instance in the lower courts, with the Court of Criminal Appeal tending to deal more with such matters as the revocation of community based orders.

This paper deals with each of the main community based sentencing options, looking first at the relevant statutory scheme, before considering its operation having regard to the policy considerations that apply in each instance. Discussed, either by way of non-custodial sentences, or as alternatives to full-time imprisonment, are:

Alternatives to full-time imprisonment	Periodic detention
	Home detention
Non-custodial alternatives	Community services orders (CSOs)
	Good behaviour bonds
	Diversionary programs – Drug Court

2. Statutory framework

For adult offenders, the major statute in this area is the *Crimes (Sentencing Procedure) Act 1999* (NSW). By section 5(1) of the Act

> 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.

For children, the major statutes are the *Children (Criminal Proceedings) Act 1987* and the *Children (Community Service Orders) Act 1987*. The former stipulates the principle that 'it is desirable, wherever possible, to allow a child to reside in his or her home' (s. 6(d)). Likewise, the *Young Offenders Act 1997* (NSW) includes the principles that 'the least restrictive form of sanction is to be applied against a child' and that 'if it is appropriate in the circumstances, children who are alleged to have committed an offence should be dealt with in their communities in order to assist their reintegration and to sustain family and community ties'.[1] The available penalties for children range from cautions to such diversionary sentencing options as youth justice conferences. Discussed in this paper are good behaviour bonds, community service orders and the alcohol and drug rehabilitation programs associated with the Youth Drug and Alcohol Court.[2]

The objectives of all the 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 a breach of the criminal law. Where formerly the only punishment

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1 *Young Offenders Act 1997* (NSW), s 7(a) and (e).

2 For an overview of the relevant principles and options see – NSW Law Reform Commission, *Sentencing: Young Offenders*, Issues Paper 19, July 2001.

> 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 an offender.[3]

Statistical information on the use of custodial and non-custodial sentencing options is available from the BOCSAR website under the headings 'Penalty for principle offence' and 'Percentage of persons sentenced to prison'.[4]

3. Terminology- eligibility/suitability

Common to most of the community based sentencing options discussed in this paper is the condition that, for an offender to be eligible for any particular order, they must be considered 'suitable'. The words 'eligibility' and 'suitability' are not synonymous. Eligibility refers to the broad range of requirements that must be met for a particular order to be made. These can be 'objective' in nature, as in the case of the requirement that the offender has not committed certain prescribed offences. These eligibility criteria can also be 'subjective' in nature, referring to an individual offender's personal circumstances. These 'subjective' factors relate to what the legislation calls the suitability of the offender and the appropriateness of making an order in the particular case. In this context, therefore, suitability is a sub-category of eligibility, one referring primarily to the subjective factors influencing the exercise of judicial discretion when deciding to make a relevant order.

4. Alternatives to full-time imprisonment - Periodic Detention

4.1 Statutory and administrative scheme: Periodic detention is one alternative to full-time imprisonment. The procedure by which a sentence of periodic detention can be imposed is in two stages: first, by section 5(1) of the *Crimes (Sentencing Procedure) Act 1999*, that no other penalty than imprisonment is appropriate; and then if the sentence is one of 3 years or less whether the sentence should be served by periodic detention.

Also in two stages are the administrative arrangements for an offender's service of their periodic detention:

- Stage 1 – for the first 3 months or the first one-third of the sentence, whichever is greater – attend at the gaol at 7pm on the specified day and remaining custody until 4.30 pm two days later; and
- Stage 2 – attend at designated work sites for two consecutive days from 8 am to 4 pm.

For the courts, the element of leniency in Stage 2 of these administrative arrangements, whereby a detainee may after the first third of their sentence report directly to their workplace, has tended to alter judicial thinking on periodic detention. Earlier statements reflected the view that periodic detention was not a light sentence, involving as it did a significant loss of liberty (*R v Anderson* (1987) 32 A Crim R 146 at 154-5). This view has been revised in recent years. In *R v Potter*

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3 *R v Morris* (unreported, 14 July 1995, NSW CCA) at p 4; I Potas et al, *Periodic Detention Revisited*, Monograph Series No 18 1998, Judicial Commission of NSW, 1998, p 9.

4 http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_court_stats

(1994) 72 A Crim R 108 Carruthers J (Clarke JA and Wood J agreeing) said at 115:

> Statements to the effect that periodic detention is not a light sentence contained in cases such as *R v Anderson*…and *R v Sadebath* (1992) 16 MVR 138…need to be reconsidered in the light of the recent amendments. The service of periodic detention is now significantly less onerous than one served in full-time custody.

Just how lenient is the option of periodic detention has been the subject of differing judicial opinion.[5] Either way, Stage 2 does entail an additional element of leniency, which to compensate for, prison sentences may be increased when they are to be served by way of periodic detention.[6] In *R v Mikas* (1996) 85 A Crim R 34 at 47-48 Hunt CJ at CL commented:

> It is well accepted now that, where it is intended to make an order that a sentence be served by way of periodic detention, the length of the sentence imposed will often be longer than one which would have been appropriate if the sentence were to be served by way of full time custody. This is because of the recognition that periodic detention has a strong degree of leniency built into it and that it is outwardly less severe in its denunciation of the crime.

4.2 Statutory criteria: The court may only make an order for periodic detention where the sentence is 'not more than 3 years'.[7] It is **not** available to offenders

- who have previously served full-time prison terms of over 6 months in relation to any one sentence,[8]
- or in relation to offenders convicted of a prescribed sexual offence.[9]

Note that a periodic detention order cannot be made by the Local Court unless the offender is present.[10] Note, too, that a court can accumulate a sentence of periodic detention but not where

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5 The NSW Court of Criminal Appeal has stated that there is a significant element of leniency in a sentence of periodic detention, with the administrative arrangements making two-thirds of the sentence no more onerous than a CSO (*R v Hallocoglu* (1992) 29 NSWLR 67 at 73-75). However, another bench of the Court of Criminal Appeal refuted that view by reference to the conditions that apply to periodic detention, including the possibility that a periodic detention order may be cancelled and the offender re-sentenced if they fail to attend for more than three consecutive periods (*Burnett* (unreported), NSW CCA, 20 May 1996) - *Crimes (Administration of Sentences) Act 1999* (NSW), s 163. See generally - B Schurr, *Criminal Procedure (NSW)*, LBC Information Services, [28.940]. Note that an order revoking periodic detention is to be made by the Parole Board.

6 I Potas et al, *Periodic Detention Revisited*, Judicial Commission of NSW, 1998, p 26.

7 *Crimes (Sentencing Procedure) Act 1999*(NSW), section 6.

8 *Crimes (Sentencing Procedure) Act 1999*(NSW), section 65A.

9 *Crimes (Sentencing Procedure) Act 1999*(NSW), section 65B. These offences include any offence under Division 10 or 10A of Part 3 of the *Crimes Act 1900* committed on a person under 16, or any such offence, committed on a person of any age, the elements of which include sexual intercourse as defined by section 61H of the *Crimes Act 1900*.

10 *Crimes (Sentencing Procedure) Act 1999* (NSW), s 25(1).

'the date on which the new sentence will end is more than 3 years after the date on which it was imposed'.[11]

By section 66(1) of the *Crimes (Sentencing Procedure) Act 1999* for a court to make a periodic detention order it 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;
- appropriate travel arrangements are available, so as to avoid undue inconvenience, strain or hardship on the offender; and
- the offender has signed an undertaking to comply with the obligations of the order.

By section 66(2) the court is to have regard to an assessment report on the offender, prepared by the Probation and Parole Service in respect to matters set out in section 66(1). When periodic detention orders were first introduced in the early 1970s the Service received no legislative guidance as to the factors to be considered in respect to suitability. This has now changed. The factors to be considered in the assessment report are fleshed out in the Regulations (clause 15), as follows:

- the degree, if any, to which the person is dependent on alcohol or drugs (a major alcohol or drug problem being an indicator of unsuitability);
- the offender's psychiatric or psychological condition (a major psychiatric or psychological disorder being an indicator of unsuitability);
- the person's medial condition (a medical condition that may render the offender unfit to report for periodic detention being an indicator of unsuitability);
- the offender's criminal record, if any (a serious criminal record being an indicator of unsuitability); and
- the offender's employment and other personal circumstances (circumstances that may render the offender's regular attendance at a periodic detention centre impracticable being an indicator of unsuitability).

The Regulation specifies that an offender's suitability for periodic detention 'must' be assessed by reference to these factors. The evidence suggests that these factors largely reflect the prior practice of the Probation and Parole Service. This was outlined in 1996 by Steve D'Silva, then Director of the Periodic Detention Administration Centre, who noted the following factors as influencing an assessment of suitability: travel; medical condition; other involvement with the legal system; employment status and commitments; special problems – alcohol and drugs.[12]

An element of judicial discretion remains in respect to orders for periodic detention, with sections 66(3),(4) of the *Crimes (Sentencing Procedure) Act 1999* making it clear that a court can decline to make such an order despite the recommendation of an assessment report; conversely, the court can make a periodic detention order in individuals cases considered unsuitable by the

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11 *Crimes (Sentencing Procedure) Act 1999* (NSW), s 67.

12 S D'Silva, 'Periodic detention – for which type of offender is it suitable?' (September1996) *Judicial Officers' Bulletin* 59.

assessment report.

4.3 Practical criteria – the Department of Corrective Services: Information supplied to the Committee by the Department of Corrective Services adds that a number of practical considerations apply when assessing suitability for periodic detention. These include the mostly dormitory-style accommodation available at periodic detention centres, the limited supervision, especially at night, and the availability of only limited medical services.

4.4 Criteria – judicial comment: The 'intuitive synthesis' that comprises the sentencing process is not restricted to the criteria outlined in statutes. In the exercise of their discretion, judges can bring together the array of relevant factors that reflect the totality of the particular case. An illustration of the relevant factors that may be considered for the purpose of making a periodic detention order is found in *Overall* (unreported, NSW CCA, 16 December 1993 at 11-12), a case involving actual bodily harm causing permanent brain damage. There Mahoney JA stated:

> 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 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.

4.5. Non-attendance and assessment of suitability – the NSWLRC: A major issue traditionally for periodic detention, one that impacts upon any assessment of suitability, is the high non-attendance rates among detainees. It was in this context that the NSW Law Reform Commission discussed the issue of suitability in its 1996 report on *Sentencing*. Based largely on information supplied by Steve D'Silva (see above), and writing before the legislative changes in 1999, the report commented that the Probation and Parole Service:

> assesses suitability on a case by case basis, rather than according to strict criteria. It considers whether there are any factors which may affect the offender's ability to attend regularly, including the offender's ability to travel, transport costs, medical condition, and employment. Offenders who are chronic alcoholics, high rate drug users, or who have significant psychiatric problems, are often assessed as more suitable for full-time custody. The offender's antecedents are considered but do not necessarily preclude assessment as suitable. Evidence indicates that it is the younger male offender, between 19 and 35 years, serving a short-term of periodic detention, who is more likely not to attend rather than the older offender serving a longer term.[13]

The Law Reform Commission went on to consider additional strategies that could be used to determine suitability more effectively, including the suggestion that

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[13] NSWLRC, Sentencing, Report 79, 1996, pp 118-9.

> Courts could place the onus on offenders to supply evidence of any factor relevant to assessing suitability and their ability to attend regularly….[14]

At that stage, the Law Reform Commission did not accept that additional legislative guidelines or constraints on the discretion to order periodic detention were necessary:

> In our view, it is preferable that the scheme remains flexible in order that it may be utilised in any case where the court determines it is an appropriate means of dealing with an offender.[15]

The revocation of periodic detention orders for non-attendance and on other grounds is dealt with under Part 7 of the *Crimes (Administration of Sentences) Act 1999* (NSW).

4.6 Statistical data: Another window on the operation of the periodic detention scheme is gained from the statistical data published by the Department of Corrective Services. Attached are three Tables from a recent publication – *NSW Inmate Census 2004, Statistical Publication No 26* by Simon Corben.[16] Table 3.6 shows geographical rates of participation in the periodic detention scheme, and Table 3.4 shows the availability of periodic centres in NSW. Most interesting from an eligibility standpoint, if only by inference, is Table 3.3 which shows those offences most likely to attract periodic detention sentences. As of 30 June 2004, of the total of 742 periodic detainees, 683 were male, 59 female. Of the male detainees, the major categories of offences committed by offenders were: driving/traffic (36.2%); drug offences (12.2%); major assault (12%); and fraud (7%). Of the 59 female detainees, the major categories of offences were: fraud (25.4%); drug offences (18.6%); stealing (16.9%); and driving/traffic (15.3%). Table 3.3 suggests that most periodic detention orders are made for offences in the middle to lower categories of seriousness. However, more serious offences were involved, including: attempt murder (2); manslaughter (1); serious sexual assault (4); and robbery with major assault (17).

Further, Table 7.1 shows the overall trend in the use of periodic detention over the past 22 years, starting with a low of 253 in 1982 and rising to a high of 1546 in 1997, afterwards dipping to 742 in 2004. With the total inmate population rising in the same period (from 7966 in 1997 to 9329 in 2004), it is clear that periodic detention is used less often as a sentencing option than in the recent past. Absenteeism may be one factor involved in winding back this program.

Table 7.4 then breaks down the number of Aboriginal and Torres Strait Islander (ATSI) offenders in periodic detention over the same period. In 2004 there were 47 (43 males and 4 females) ATSI periodic detainees, 6.3% of all periodic detainees. Comparing the figures for all inmates in 2004, 1553 or 16.8% were ATSI; comparing the figures for inmates in correctional centres in 2004, 1506 or 17.7% were ATSI. Tables 7.1 and 7.4 are also attached.

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14 Ibid, p 119.

15 Ibid, p 120.

16 The publication is at - http://www.dcs.nsw.gov.au/documents/SP26 NSW Inmate Census 2004.pdf

5. Alternatives to full-time imprisonment - Home detention

5.1. Statutory criteria: Home detention is another alternative to full-time imprisonment. Like periodic detention, it is not available in relation to juvenile offenders. The decision to refer an otherwise eligible offender for a home detention assessment report is at the discretion of the court. The exercise of the discretion is to occur after a sentence of imprisonment has been imposed.[17] The principles and procedures relevant to the exercise of the discretion was discussed by Sully J in *R v Jurisic* (1998) 45 NSWLR 209 at 249-51. Referral for assessment will stay execution of the sentence until a determination has been made.

The court may only make an order for home detention where the sentence is 'not more than 18 months'.[18] An offender is **not** eligible if he or she:

- has committed certain prescribed offences, including murder, manslaughter, sexual assault or sexual offences involving children, armed robbery, offences involving firearms, stalking or intimidation, or a domestic violence offence against a person with whom the offender is likely to reside or continue or resume a relationship;[19]
- has a history of prior convictions, mostly similar to those noted above, but including where the offender has been subject, in the past 5 years, to an apprehended violence order against a person with whom the offender is likely to reside or continue or resume a relationship[20]

Even where there is a lack of such prior convictions, the court is directed not to make a home detention order where it is likely that that the offender will commit any sexual offence or an offence involving violence while the order is in force.[21]

Note that a home detention order cannot be made by the Local Court unless the offender is present.[22] An added requirement is that a court can accumulate a sentence of home detention on an existing sentence of home detention, but not where 'the date on which the new sentence will end is more than 18 months after the date on which it was imposed'.[23] Eligibility for home detention is therefore subject to considerable statutory requirements of a prohibitive kind.

In addition, a 'suitability' test is in place, as is a direction to the court to take all relevant circumstances into account. By section 78(1) of the *Crimes (Sentencing Procedure) Act 1999*

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17 *Crimes (Sentencing Procedure) Act 1999*(NSW), s 80(1). For the principles and procedures relevant to the exercise of the discretion to refer an offender for assessment report see – *R v Jurisic* (1998) 45 NSWLR 209 at 249-51 (Sully J).

18 *Crimes (Sentencing Procedure) Act 1999*(NSW), s 7.

19 *Crimes (Sentencing Procedure) Act 1999*(NSW), s 76.

20 *Crimes (Sentencing Procedure) Act 1999*(NSW), s 77.

21 *Crimes (Sentencing Procedure) Act 1999*(NSW), s 78(6).

22 *Crimes (Sentencing Procedure) Act 1999* (NSW), s 25(1).

23 *Crimes (Sentencing Procedure) Act 1999*(NSW), s 79.

(NSW), to be eligible for a home detention order the court must be satisfied that:

- the offender is a suitable person to serve the sentence by way of home detention; and
- it is appropriate in all of the circumstances that the sentence be served by way of home detention. In particular, the court must be satisfied that the persons with whom the offender is likely to live with during home detention has consented to the order in writing.
- the offender has signed an undertaking agreeing to comply with the obligations of the order.

For the purposes of section 78(1), the court must refer the offender for assessment for home detention[24] and a relevant order can only be made by the court if, in the opinion of the person making the report, the offender is a 'suitable person' for a home detention order.[25] In other words, unlike periodic detention order, an order for home detention cannot be made if the assessment report recommends unsuitability. However, a court can decline, 'for any reason it considers sufficient', to make such an order 'despite the contents of an assessment report'.[26]

When preparing an assessment report on 'suitability' and the totality of the circumstances of the case, as required by section 78(1), the probation and parole officer is directed by section 81 to take into account and address in the report the following criteria:

- criminal record and the 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

Further, the Regulations require the assessment report to take into account and address the likely effect of a home detention order on a child who would be living with the offender. 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.[27]

5.2 Criteria – Department of Corrective Services: The information supplied to the Committee notes that, if an offender is otherwise suitable for home detention, but the recommendation is complicated by such practical considerations as the lack of a phone, unsuitable accommodation, or lack of consent by co-residents or employers, the departmental officer concerned should 'make all reasonable efforts to help the offender achieve a suitable situation'.

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24 *Crimes (Sentencing Procedure) Act 1999*(NSW), s 78(2).

25 *Crimes (Sentencing Procedure) Act 1999*(NSW), s 78(4).

26 *Crimes (Sentencing Procedure) Act 1999*(NSW), s 78(3).

27 *Crimes (Sentencing Procedure) Regulation*, cl 21.

5.3 Criteria – comment by NSW Law Reform Commission: Home detention was one area where the Law Reform Commission recommended in its 1996 report on *Sentencing* a loosening of the statutory eligibility criteria. It commented on the automatic exclusion from the home detention scheme of a wide range of offenders, noting:

> These restrictions reflect legislative policy to limit the availability of home detention to minor non-violent offenders and to give paramountcy to public safety.[28]

While the Law Reform Commission supported this policy, it commented:

> 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.[29]

The Commission went on to make this specific reference to the prescribed offence of manslaughter:

> 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 the case.[30]

Discussing the view submitted to it, the Commission noted that

> The Probation and Parole Officers' Association maintained that there should be no offence which automatically disqualifies an offender from eligibility from home detention since there may be objective and subjective factors in any case which will make such an order possible.[31]

The Commission's view was that 'it is preferable to keep the criteria for availability of home detention wide rather than impose legislative constraints on eligibility'.

5.4 Statistical data: BOCSAR's figures for 'Penalty for principal offence 2003' for the NSW Local Court shows that home detention was used on 324 occasions, 145 (44.8%) of these for 'road traffic and motor vehicle regulatory offences', 45 (13.9%) for 'theft and related offences', and 41 (12.7%) for 'deception and related offences'. In 2003 this sentencing option was only used on 8 occasions by the higher courts. Consistent with the statutory criteria, home detention is an option for offences in the middle to lower range of seriousness.

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28 NSWLRC, Sentencing, Report 79, 1996, p 149.

29 Ibid.

30 Ibid, p 150.

31 Ibid.

6. Non-custodial alternatives - Community service orders

6.1 Statutory scheme: By section 8 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), instead of imposing a sentence of imprisonment on an adult offender, a court may make a community service order (CSO) directing the offender to perform a specified number of hours of community work. The principle is that a CSO can be imposed as an alternative to imprisonment, where the circumstances of the offence would warrant a sentence of imprisonment taking into account the need for general deterrence and the objective seriousness of the offence.[32] Referring to legislative changes in this area, notably the increase in the maximum number of hours from 300 to 500 to which a CSO can apply, Hunt J (as he then was) said in *R v Thompson* (unreported, NSW CCA 060632/1990 at 7-8):

> It is clear, therefore, that the legislature intended community service orders be imposed as an alternative to custodial sentences in an increasing range of cases, including more serious cases, to those which were formerly regarded as appropriate for such orders.

Two exceptions apply to the rule that a community service order can only be made where the relevant offence carries a penalty of a sentence of imprisonment. These exceptions relate to: the offence of offensive language under the *Summary Offences Act 1988* (NSW) s. 4A(3); and where fine defaulters are unable to pay (*Fines Act 1996* (NSW), s 58(1)(d) and ss 78-86).[33]

In the case of adults, the specified hours of community work is not to exceed 500 hours.[34] This arrangement is elaborated upon in the Regulations, where a sliding scale operates depending on the maximum term of imprisonment for the relevant offence.[35]

CSOs are available for child offenders, in which case the maximum number of hours varies from 100 hours for those under 16 years, to a maximum of 250 hours for offences committed by juveniles of 16 or over.[36]

6.2 Statutory criteria: Section 8 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) is made subject to Part 7 of the Act which sets out criteria for the 'suitability' of offenders for community service work. In accordance with section 86(1), for an offender to be eligible for a CSO the court must be satisfied that:

- the offender is a suitable person for community service work. Suitability is to be determined by an assessment conducted by the Probation and Parole Service, in the form

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32 A Bellanto et al, *Sentencing Law NSW, Volume 1*, Butterworths, [03-320.10].

33 B Schurr, *Criminal Procedure (NSW)*, LBC Information Services, [28.660].

34 For children, the number varies from a maximum of 100 hours for those under 16 years, to a maximum of 250 hours for offences committed by juveniles of 16 or over - *Children (Community Service Orders) Act 1987* (NSW), s 13.

35 *Crimes (Sentencing Procedure) Regulation 2000*, cl 23. The computation of hours and various standard conditions applying to community service work are set out in *Crimes (Administration of Sentences) Regulation 2001*, ch 5.

36 *Children (Community Service Orders) Act 1987* (NSW), s 13

of a pre-sentencing report (s 89). A CSO can only be made where the assessment report concludes that the offender is a suitable person (s 86(4)). On the other hand, the court can decline to make a CSO, even where the offender has been judged a suitable person for community service work (s. 86(3)). Thus, while judicial discretion is limited, it remains considerable.

- it is appropriate in all of the circumstances that the offender be required to perform community service work. Again, there is broad scope for the operation of judicial discretion.
- arrangements exist in the area in which the offender resides or intends to reside for the offender to perform community service work and that such work can be provided in accordance with those arrangements. There exists therefore in NSW an availability test.
- the offender has signed an undertaking agreeing to comply with his/her obligations under the CSO.

Note that a community service order cannot be made by the Local Court unless the offender is present.[37] A court may impose consecutive CSOs but the aggregate total of hours remaining to be served and to be imposed may not exceed 500 hours.[38]

By section 90 a court may impose conditions on community service orders, including conditions as to drug and alcohol testing and participation in development programs. Under section 91 a court may recommend that the order be served by way of removal of graffiti.

6.3 Statutory criteria - children: The same recommendation for the removal of graffiti may apply to juveniles, by section 5(1A) of the *Children (Community Service Orders) Act 1987* (NSW). Other conditions for juvenile offenders are set out in section 17 of the same Act, including that community service work be performed in a satisfactory manner. The criteria of eligibility are set out in section 5 where it is said that a court may require a child offender to perform community service work instead of:

- imposing a sentence of imprisonment; or
- committing the child for up to 2 years to the control of the Minister administering the *Children (Detention Centres) Act 1987*.

By section 9 of the *Children (Community Service Orders) Act 1987* (NSW) a CSO is only to be made if:

- the court is notified that arrangements exist for community service work to be carried out in the area the child resides or intends to reside;
- the court is satisfied that the child is a 'suitable person' and is 'sufficiently mature' to undertake community service work; and
- the court is satisfied that community service work can be provided.

In respect to the last two criteria, the court is to decide after considering a report from an assigned officer and, if necessary, hearing evidence from an officer.

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37 *Crimes (Sentencing Procedure) Act 1999* (NSW), s 25(1).

38 *Crimes (Sentencing Procedure) Act 1999* (NSW), s 87.

6.4 Criteria – commentaries on operation of statutory scheme: As to the operation of the statutory scheme for adult offenders, Schurr writes in *Criminal Procedure (NSW)*:

> The assessment of suitability may be in the form of an assessment report and evidence from a probation and parole officer…In some courts, a duty probation officer may be available to prepare a brief report on the same day assessing suitability for community service work.[39]

As to the criteria for suitability, Schurr adds:

> The offender may be assessed as unsuitable for a number of reasons, such as drug addiction and past failures to comply with supervision by the service. In other cases, in non-metropolitan areas, a community service order cannot be imposed because there is no work or supervision available.[40]

Surveying the available research on the making of community service orders in NSW Terese Henning writes:

> Although community service orders are considered to be an appropriate penalty for a wide range of offenders, they are seen to be particularly useful in respect of offenders whose criminal history exposes them to a real danger of imprisonment. Such orders are usually felt to be inappropriate for offenders who may pose a risk to members of the community. Accordingly, an offence history of crimes of personal violence constitutes a significant barrier to an application for a community service order. This sanction is also considered to be inappropriate for offenders with severe psychological problems or physical disorders. However, with the expansion of the available projects beyond manual labouring in recent years, physical and mental disability are no longer automatic bars. An offender's drug or alcohol dependence, however, is still viewed as indicating a lack of suitability for this sanction.[41]

6.5 Criteria - Department of Corrective Services: These observations concur with the information supplied to the Committee by the Department of Corrective Services. Under 'Guidelines for suitability' the document notes that, in addition to the legislative requirements, probation and parole officers should consider:

- the reliability of the offender, that is, the likelihood of the offender completing the CSO. A drug habit may raise concerns about reliability but does not necessarily rule out this option.
- the availability of suitable work in the area or a suitable program.
- the extent to which the offender would present a threat to the community, an agency or to themselves. This is particularly important for individuals with convictions for violent or sexual offences.

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39 B Schurr, *Criminal Procedure (NSW)*, LBC Information Services, [28.660].

40 Ibid.

41 T Henning, 'Non-custodial orders' in *The Laws of Australia*, Volume 12, The Law Book Co, at 12.5[67].

The Department adds that every effort should be made to identify suitable agencies and programs for non-English speaking offenders and those who may be physically or mentally disabled:

> The key issue is the capacity of the offender to perform the work or complete a program. It is discriminatory to assess someone as unsuitable for a CSO because of an inability to communicate in English or due to physical or intellectual disabilities, where these limitations do not affect their ability to complete the Order.

A further eligibility criteria cited by the Department is that only NSW residents can be assessed as suitable for a CSO and only agencies located in NSW can be used for this purpose.

6.6 Criteria - survey of judicial officers: While it is somewhat dated, a survey of judicial officers in NSW conducted in 1991 by the Judicial Commission, broadly supported the above views on criteria for eligibility for CSOs. It was reported that almost half of the magistrates and 28% of the judges in the sample mentioned drug addiction or alcoholism as a factor which would be taken into account. Reliability or trustworthiness were other relevant factors:

> One in four sentencers referred to the offender's lack of trustworthiness as a factor which could disqualify the offender from being a recipient of CSOs. Magistrates who elaborated on the unsuitability of offenders with drug or alcohol problems sometimes focused on the lack of reliability which they considered these offenders would exhibit.[42]

Violence and a prior record were other factors:

> One in three sentencers in the sample indicated that recidivists or persistent offenders and those who had previously been given or breached bonds or CSOs were not suitable candidates for another CSO.[43]

As for 'subjective factors' making offenders suitable for CSOs, half the judges and 23% of the magistrates mentioned young offenders as generally suitable candidates. Again, prior record was a relevant factor in this context - 'A number of sentencers argued that if the offender's prior record was not particularly unfavourable, then he or she could be considered for CSOs even if the offence committed was reasonably serious'.[44] Reform potential and employment were other factors discussed in the survey.

6.7 Criteria – judicial discretion: Generally, CSOs will not apply to more serious offences, including drug trafficking cases. However, such an order may be made in very exceptional circumstances. The case of *R v Thompson* (unreported, NSW CCA 060632/1990) was noted above. It involved a Crown appeal on the ground that a sentence of 500 hours of community service was inadequate. The offender had pleaded guilty to one count of supplying heroin and three lesser matters were also taken into account. By a majority of 2:1 (Studdert and Hunt JJ; Meagher JA dissenting) the Crown appeal was dismissed. For the majority, Hunt J conceded that

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42 R Bray and J Chan, *Community Service Orders and Periodic Detention as Sentencing Options: A Survey of Judicial Officers in NSW*, Judicial Commission of NSW, 1991, p 18.

43 Ibid, p 19.

44 Ibid, p 15.

> I still do not for myself see that drug trafficking cases are appropriate for the imposition of a community service order except in exceptional circumstances. The substantial element of general deterrence which is required would not normally be satisfied by such a punishment.

However, the Court exercised its discretion not to interfere with the sentence, with Studdert J saying he wished to make it clear that 'this conclusion is based exclusively on the facts of this case and ought not to be taken as some general precedent'.[45] Taken into account in the Court's decision to exercise its discretion not to interfere with the sentence imposed were the following factors: a favourable report from the Probation and Parole Officer under whose supervision the offender had been placed when serving the CSO prior to appeal; several impressive reports justifying his continuing progress in rehabilitation; and the offender's voluntary service in an AIDS program during the period since the sentence was imposed.

Similar exceptional circumstances had influenced the sentencing decision at first instance, in particular the measures the offender had taken to rehabilitate himself since his arrest and the fact that he had found work with an employer who submitted a laudatory reference.

By definition, the case is not a guide as to how the courts will normally approach the making of CSOs. It does, however, offer some insight into those policy criteria of eligibility that may be applied in the most difficult and contentious cases. It also underlines the scope of judicial discretion in this context.

6.8 Statistical data: BOCSAR's figures for 'Penalty for principal offence 2003' for the NSW Local Court shows that CSOs were used on 4,419 occasions, 1,524 (34.5%) of these for 'road traffic and motor vehicle regulatory offences' and 719 (16.3%) for 'acts intended to cause injury'. In this last category 718 primary offences related to assault. This can be compared to 12 home detention orders made in 2003 by the Local Court for assault. Generally, reflecting the broad scope of judicial discretion in this area, CSOs are used for offences ranging from 'manslaughter and driving offences causing death' (10) to 'property damage' (120).

7. Non-custodial alternatives – good behaviour bonds

7.1 Statutory criteria: By section 9 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) a court, instead of imposing a sentence of imprisonment, can make an order directing the offender to enter into a good behaviour bond for a specified term. The term cannot exceed 5 years. The making of good behaviour orders is subject to Part 8 of the Act. Note that a good behaviour bond order cannot be made by the Local Court unless the offender is present.[46]

Otherwise, very few criteria of eligibility are attached to good behaviour bonds. Instead, the court is provided with a wide discretion to impose 'conditions' on such bonds, which may include a requirement that the offender participate in an intervention program and to comply with any intervention plans arising out of the program.[47] By section 95A, such a condition can only be

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45 *R v Thompson* (unreported, NSW CCA 060632/1990) at pp 6-7.

46 *Crimes (Sentencing Procedure) Act 1999* (NSW), s 25(1).

47 *Crimes (Sentencing Procedure) Act 1999* (NSW), s 95A(1).

imposed if the court is satisfied that:

- the offender is eligible to participate in the intervention program in accordance with the terms of the program;
- the offender is a suitable person to participate;
- the intervention program is available in the area the offender resides or intends to reside; and
- participation will reduce the likelihood of recidivism by promoting the treatment or rehabilitation of the offender.

For the purposes of section 95A, the court may refer the offender for assessment as to their suitability to participate in an intervention program.[48]

The case law refers mainly to the broad discretion granted to the courts to impose conditions on good behaviour bonds. The discretion must be exercised 'to impose conditions which are reasonably capable of being regarded as related to the purposes for which the function of the authority is being exercised'.[49]

7.2 Statutory criteria - children: The Children's Court may release a young offender subject to their entering a good behaviour bond, with conditions, for a period of two years or less.[50]

7.3 Statistical data: BOCSAR's figures for 'Penalty for principal offence 2003' for the NSW Local Court shows that various types of bonds (with supervision, without supervision or without conviction) are in regular use. Bonds with supervision were used on 5,691 occasions, bonds without supervision on 10,095 occasions, and bonds without conviction on 12,246 occasions. For all three types of bond, their use ranges across all categories of offences, from 'manslaughter and driving causing death' down to public order and traffic offences. The strong inference is that, at the policy level, the eligibility criteria are as broad as judicial discretion permits.

8. Non-custodial alternatives – Drug Court programs and the MERIT program[51]

8.1 Statutory criteria: The Drug Court has Local Court and District Court jurisdiction and operates from the Parramatta Court complex. The *Drug Court Act 1998* and the *Drug Court Regulation 1999* govern the court's operation.

To be eligible for the Drug Court a person must:

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48 *Crimes (Sentencing Procedure) Act 1999* (NSW), s 95B.

49 *Allen Commercial Constructions Pty Ltd v North Sydney Municipal Council* (1970) 123 CLR 490 at 499B. See generally - Schurr, *Criminal Procedure (NSW)*, LBC Information Services, [28.530]

50 *Children (Criminal Proceedings) Act 1987* (NSW), s 33(1)(b) and (1A).

51 This account is drawn from - R Johns, *Drug Offences: An Update on Crime Trends, Diversionary Programs and Drug Prisons*, NSW Parliamentary Library Research Service Briefing Paper No 7/2004, pp 36-42 and pp 43-45.

- be highly likely to be sentenced to full-time imprisonment if convicted;
- have indicated that he or she will plead guilty to the offence;
- be dependent on the use of prohibited drugs;
- reside within the catchment area (specified areas of Western Sydney);
- be referred from a court in the catchment area;
- be 18 years of age or over; and
- be willing to participate.

A person is not eligible if he or she:

- is charged with an offence involving violent conduct;
- is charged with an offence involving sexual assault;
- is charged with a drug supply or manufacturing offence (under Part 2, Division 2 of the *Drug Misuse and Trafficking Act 1985*), unless it is capable of being dealt with summarily in the Local Court; or
- is suffering from a mental condition that could prevent or restrict participation in the program.

8.2 Criteria – judicial comment: Basically, by section 5(2) of the *Drug Court Act 1998* (NSW) a person is not eligible if charged with offences relating to dealing with drugs, any offence involving violent conduct or sexual assault. Several reported cases concern the interpretation of this provision, notably in respect to what constitutes an offence involving violent conduct for the purposes of the Act. As Judge Ian Barnett commented in *R v Humphreys* [2003] NSWDRGC 1 the legislation gives the 'Court a fairly wide discretion in looking at each case', in particular as it does not separately define 'violent conduct'. The Judge concluded that the specific offence in *Humphreys* under section 33B of the *Crimes Act 1900* (Use or possession of weapon to resist arrest) did constitute violent conduct, so as to render the offender an ineligible person. The Court was guided by this passage from the Minister's second reading speech on the Drug Court Bill:

> The Drug Court programme will only deal with offenders who commit certain categories of offences. These offences will be mainly non violent theft offences. All offenders who commit sexual offences, and offences involving violent conduct will not be eligible. The types of offences which will be included are break, enter and steal, fraud, forgery offences, offences involving steal from person, or unarmed robberies, provided there is no violence. Possession and use of prohibited drugs and dealing in quantities of prohibited drugs under the indictable limit.

8.3. Evaluation: The Bureau of Crime Statistics and Research conducted a comprehensive evaluation of the Drug Court, which was published in 2002. The relevant findings on 'process evaluation' were as follows:[52]

- Professional viewpoints of treatment providers did not always accord with the court's directions.
- The obligation for treatment providers to inform the court of participants' breaches could

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52 Stephanie Taplin, *New South Wales Drug Court Evaluation: A Process Evaluation*, 2002; Bronwyn Lind, Don Weatherburn, Shuling Chen et al, *New South Wales Drug Court Evaluation: Cost-Effectiveness*, 2002; Karen Freeman, *New South Wales Drug Court Evaluation: Health, Well-Being and Participant Satisfaction*, 2002.

adversely affect their counselling relationship with participants.

- Some of the study's respondents asserted that there were participants in the program who should have been ineligible under s 5 of the *Drug Court Act 1998* because they had committed an 'offence involving violent conduct'. The authors considered that further legislative clarification may be needed.
- On the other hand, some respondents felt that Aboriginal offenders were being excluded in disproportionate numbers because of a violent offence in their past or because of their 'antecedents', which are a factor under s 7(2) of the *Drug Court Act*.
- The drug treatment services available to women were thought by some respondents to be in need of improvement. Women also comprised the majority of participants who had primary responsibility for childcare, and this could make it difficult for them to fulfill the requirements of the program.

8.4 The MERIT program: While the Drug Court program is designed for offenders who are highly likely to be sentenced to full-time imprisonment, the Magistrates Early Referral Into Treatment (MERIT) program is a non-statutory scheme that seeks to divert less serious offenders who have drug problems from the Local Court into a range of treatment and rehabilitation services. Starting with a pilot program in Lismore in 2000, by February 2004 the MERIT program was available in 50 Local Courts in NSW. Currently, the MERIT program operates in accordance with Local Court Practice Note 5, issued on 20 August 2002.[53]

A distinctive feature of MERIT is that it targets defendants at the pre-plea stage. In other words, before the defendant has entered a plea to the charge, the Magistrate can grant bail on the condition that the defendant complies with the treatment regime. This allows defendants to focus on drug treatment without deciding on a plea. By contrast, the adult Drug Court deals with more serious offenders, who are highly likely to receive a prison sentence. They plead guilty and have their sentence suspended to participate in the program.

To be considered for entry to the MERIT program, a defendant is required to:

- be an adult
- be eligible and suitable for release on bail;
- be charged with offences that can be prosecuted summarily in the Local Court;
- not have outstanding offences for violence or sexual assault;
- have an illicit drug use problem;
- give informed consent to participate; and
- have suitable treatment programs available to him or her.

A policy document released in April 2002 states that:

> The entry criteria are intentionally quite broad. Participants are not required to be 'drug dependent' to enter the program, but should have an illicit drug use 'problem' which is sufficient to justify the significant treatment interventions available through MERIT. So long as the magistrate is prepared to grant bail and the MERIT team is prepared to

53 http://www.lawlink.nsw.gov.au/lawlink/cpd/merit.nsf/vwFiles/MERIT_CourtNote.doc/$file/MERIT_CourtNote.doc

accept the defendant into treatment, the defendant's criminal history is not separately considered in determining eligibility.[54]

A survey by the Judicial Commission of New South Wales, released in April 2004, examined the views of the magistracy on the operation of the MERIT program.[55] Most of the Magistrates surveyed rated the MERIT program highly in terms of their overall satisfaction.[56]

9. Non-custodial alternatives – Youth Drug and Alcohol Court (YDAC) programs[57]

9.1 Non-statutory scheme: The Youth Drug Court pilot program, as it was originally called, started on 31 July 2000. The YDAC diverts young offenders with drug and/or alcohol problems onto a rehabilitation program that combines intensive judicial supervision, drug treatment and case management. It operates within the Children's Court jurisdiction. According to Practice Direction No 23 of the Children's Court of NSW, hearings of the YDAC may be conducted from the Children's Courts in Cobham, Campbelltown, and Bidura as well as any other courts as directed by the Senior Children's Magistrate.

Unlike the adult Drug Court, the YDAC is not governed by its own legislation but procedural guidance is provided by Practice Directions issued by the Senior Children's Magistrate. The YDAC is a pre-sentence program, whereas the Drug Court convicts adult offenders, then suspends their sentences while they undertake the program.

9.2 Non-statutory criteria: As set out in Practice Direction No 23, the main eligibility criteria for attending the YDAC are that the child:

- is aged between 14 and 18, although children under 14 may also be referred;
- has a demonstrable drug and/or alcohol problem;
- is charged with an offence(s) that can be dealt with to finality by the Children's Court (and is not a sex offence);
- is ineligible for a caution or Youth Justice Conference, alternative diversionary programs, under the *Young Offenders Act 1997*;
- pleads guilty to or admits the offence(s), or the referring magistrate and the YDAC magistrate exercise their discretion to refer and accept a child who has pleaded 'not guilty' to some offence(s), where the overall penalty will not alter significantly if the child is found guilty of those defended matters;

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54 http://www.lawlink.nsw.gov.au/lawlink/cpd/merit.nsf/vwFiles/MERIT_PolicyDocument.doc/$file/MERIT_PolicyDocument.doc

55 Lynne Barnes and Patrizia Poletti, *MERIT Magistrates Early Referral into Treatment Program: A Survey of Magistrates*, Judicial Commission of New South Wales, March 2004. Data was based on responses from 59 Magistrates to a survey circulated in August 2003.

56 On a scale from 1 to 5, where 1 represented 'not at all satisfied' and 5 meant 'very satisfied', 48.6% gave the program a score of 5 and 40.5% chose a score of 4: ibid, p 50.

57 For a comprehensive review see - University of NSW, Social Policy Research Centre, *Evaluation of the NSW Youth Drug Court Pilot Program, Final Report - Report prepared for the NSW Attorney General's Department*, March 2004.

- either (a) resides within the areas for accessing court services; (b) has committed the offence within current YDAC boundaries and can demonstrate their identification with that area; or (c) can otherwise demonstrate that they identify with the area within the boundaries.

Young persons can be referred from any NSW Children's Court to the YDAC. Prior to appearing at the YDAC, they will be screened by a Department of Juvenile Justice counsellor to see if they fit the entry criteria. The young persons must agree to participate in the YDAC program while on bail.[58]

9.3 Assessment for suitability: At the applicant's first appearance before the YDAC, the Magistrate determines their legal eligibility. According to Practice Direction No 23, the YDAC Magistrate may exercise their discretion to exclude a child who is otherwise eligible on the grounds that:

- the monthly quota has been reached; or
- the child is eligible for a caution or a Youth Justice Conference; or
- there is no likelihood of a control order being imposed; or
- the child's offence(s) or history of offending is so serious that despite satisfactory completion of the YDAC Program, the child would still be sentenced to a control order.

If the Magistrate finds that the applicant is suitable for the program, the matter is adjourned and the applicant is referred for a comprehensive assessment by the Joint Assessment and Review Team. This involves representatives from the Department of Health, Department of Community Services, Department of Education and Training, and Department of Juvenile Justice evaluating the health, social and welfare needs of the young person and formulating a program plan. If the Magistrate formally accepts the applicant onto the program, sentencing is deferred and the applicant is released on bail and signs an undertaking to comply with the program regimen.

9.4 Program features**:** The program plan is tailored to the individual needs of the young person. Its conditions may include attending a drug or alcohol residential program, having counselling, submitting to urinalysis, or attending educational, vocational and recreational programs. Support persons are assigned to each young person to supervise their progress and assist them to comply with the bail conditions and attain the goals in the program plan. Intensive monitoring is conducted through regular reporting by the young person back to the court, and written reports from their case manager and juvenile justice staff.

9.5 Breach or completion**:** Breaches can be dealt with by reviewing the program plan, increasing supervision or counselling, increasing the time allowed for completion, or ultimately by discharge from the program. Sentencing takes into account the young person's participation in, or successful completion of, the YDAC program. An aftercare component may be incorporated into the sentence, to provide ongoing support for the young person.[59]

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58 'Youth Drug and Alcohol Court, NSW'- http://www.lawlink.nsw.gov.ay/lawlink/drug_court/ll_drugcourt.nsf/pages/ydrgcrt_po

59 R Johns, *Drug Offences: An Update on Crime Trends, Diversionary Programs and Drug Prisons*, NSW Parliamentary Library Research Service Briefing Paper No 7/2004, p 50.

9.6 Evaluation: The University of NSW's Social Policy Research Centre found in its March 2004 report that

> The Court is operating eligibility requirements as originally specified and maintaining a consistent approach to sentencing.[60]

It also found that, in its first 2 years, the YDAC received 164 referrals of young people facing possible custodial sentences for serious offences, of whom 75 (46%) were judged eligible and suitable for intensive case management. Of these, 29 (39%) went on to complete the program to the Court's satisfaction, or to 'graduate'.[61] A further finding was that 'Graduates were less likely to re-offend than those who did not complete the program'.[62]

Generally, it said that the implementation of the program could have run into greater practical difficulties if the participation rate had been 'as high as anticipated at the planning stage'. The report commented:

> In practice, the number of both referrals and acceptances were considerably lower than anticipated, mainly because there were fewer young offenders meeting the eligibility criteria and wishing to participate than was originally estimated.[63]

Among the report's recommendations were that the YDAC program should be established on a legislative basis and that a number of policy issues should be reviewed, including 'program eligibility criteria'.[64]

10. Concluding comments

Community based sentencing options are certainly in regular use. This is especially true of the non-custodial sentencing options, with the growing array of diversionary programs adding to the options available to the courts. It is in these cases that the scope of judicial discretion in establishing policy-based criteria of eligibility is at its broadest. More problematic, although for apparently different reasons, are the alternatives to full-time imprisonment – periodic detention and home detention. For home detention, the strict statutory eligibility requirements limit its application. The question is whether these criteria should be reconsidered? It is probable that practical considerations also play a part in limiting the application of this sentencing option. As for periodic detention, this has declined markedly since the mid to late 1990s. The underlying problem appears to be with non-attendance, although another factor may be the attitudes of magistrates.

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60 University of NSW, Social Policy Research Centre, *Evaluation of the NSW Youth Drug Court Pilot Program, Final Report - Report prepared for the NSW Attorney General's Department*, March 2004, p iv.

61 Ibid, p iii.

62 Ibid, p iv.

63 Ibid, p ii.

64 Ibid, p v.