Annie Marshall - RE: Inquiry into community based sentencing options - Responses to questions taken on notice

From: "Sheryn Omeri" <sheryn.omeri@sracls.org>
To: "Michelle Batterham" <Michelle.Batterham@parliament.nsw.gov.au>
Date: 23/09/2005 5:10 PM
Subject: RE: Inquiry into community based sentencing options - Responses to questions taken on notice

Dear Michelle,

Attached, please find the responses of COALS and SRACLS to the questions taken on notice after the Public Hearing on 30 August 2005.

I hope we have got them in on time!

Thank you,

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From: Michelle Batterham [mailto:Michelle.Batterham@parliament.nsw.gov.au]
Sent: Mon 29/08/2005 9:41 AM
To: Sheryn Omeri
Subject: Inquiry into community based sentencing options - revisedquestions

Dear Sheryn

Please find attached the revised questions. As discussed there have been very few changes, the main one is with qu 9, the last dot point was deleted.

Also I have changed my email address as I'm now using my married name. I did ask for a re-direction to be put on my old email but IT accidently deleted it. Would you mind updating your records with the new email.

Many thanks
Michelle

Inquiry into community based sentencing options for rural and remote areas and disadvantaged populations

Responses to questions taken on notice at Public Hearing held Tuesday, 30 August 2005

6. **The Committee has heard that a client's previous conviction for driving and licensing offences may preclude them from being deemed eligible and/or suitable for a community sentence.**

- **Should the eligibility criteria for community based sentences be amended to allow offenders with a prior driving and licensing conviction to serve community sentences?**

  It is clear that if prior driving and licensing convictions have placed an offender in a position where they are deemed unsuitable for community based sentencing options and the only option remaining for the court is a custodial sentence, it is imperative that the eligibility criteria be amended. Imprisonment should always remain the option of last resort and should be reserved for the most serious offences. It is a travesty of justice that offenders are being imprisoned in situations where they drive out of necessity, especially where they live in areas with limited public transport.

- **What can be done to break the cycle of multiple charges, fines and long disqualified periods for driving and licensing offences?**

  Numerous steps may be taken to break the cycle of multiple charges, fines and long disqualified periods for driving and licensing offences.

  In the first place, Parliament could devise a system whereby a court has discretion to restore an offender's license in particular circumstances. That is, where legislation requires a court to impose a mandatory disqualification period, a court may permit the offender to make application (to the court) for restoration of their license at the expiration of a shorter period. The possibility of making such application may depend upon the offender satisfying a particular condition such as, for example, that the offender has not committed any further offences, has completed a sober driving program, has entered into a fine payment arrangement. This would be akin to s.90 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW).

Secondly, Parliament should revisit the automatic powers given to the RTA under the 'habitual offenders' regime to disqualify a person for an additional 5 years, where that person has been brought before the court on more than two occasions for serious driving offences. If this power is not considered by the court and such declaration is not expressly quashed, it is automatically imposed by the RTA at a later date. The offender may not discover that they are the subject of this lengthy disqualification period until much later unless they are proactive in seeking advice. Many Aboriginal offenders are not in a position to be proactive in this way. Any orders made pursuant to the 'habitual offenders' regime ought to emanate exclusively from a court, rather than being the result of an exercise of administrative power.

9. **The Committee has heard previous evidence that offenders are not advised about the appeal process and therefore do not seek an appeal of their sentence through the District Court.**

- **Can you quantify the number of your clients who have appealed their sentence in the past 6 months?**

- **Does your agency advise clients to appeal a bond or suspended sentence to reduce the sentence length?**

All solicitors employed by the Sydney Regional Aboriginal Corporation Legal Services (SRACLS) are aware of their responsibility to speak with their clients once they have been sentenced. Such discussion has the dual aim of allowing the solicitor to explain the sentence imposed upon the client and to advise the client of the possibility of lodging an appeal. The appeal process is thoroughly explained to the client at this stage.

In addition, SRACLS is currently in the process of implementing a policy requiring each solicitor to prepare a file note detailing the advice given to the client in relation to the appeal process and the client's response. Where the solicitor is unable to speak to the client following sentence for reasons beyond the solicitor's control, such as the solicitor being obliged to attend to other clients and the sentenced client being taken to gaol or leaving the courthouse, the solicitor will be required to send a letter to the client informing the client of the appeal process.

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.

12. **The Committee has heard previous evidence that Magistrates may give a section 12 bond to an offender, with a lengthy period in the absence of any alternative community based sentence. In the event of a breach of the bond, the offender is returned to gaol for the entire period of the bond. Can you comment on the use of s.12 bonds?**

The question and comments of The Hon Amanda Fazio (p.16 of the Report of Proceedings) touch on a number of problems which arise in relation to the imposition of section 12 bonds and the related consequences which flow when those bonds are revoked.

Problems relating to the imposition of section 12 bonds

First, the availability of section 12 bonds as an intermediate sentencing option creates the risk that this option will be (inappropriately) used in circumstances where a less severe penalty would constitute a sufficient punishment.

This problem has been referred to as "net widening", and was mentioned by Kirby J in the High Court in a seminal judgment dealing with suspended sentences in Western Australia. In *Dinsdale v The Queen* (2000) 202 CLR 321 at 345, Kirby J referred 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].

The consequences of "net widening" in terms of breach of a section 12 bond are self-evident, and may lead to an injustice in a particular case.

Secondly, there is a risk of so-called "sentence inflation". This refers to the danger that magistrates and judges might *increase* the term of the suspended sentence as a means of off-setting the perceived leniency in the sentence being suspended rather than immediately taking effect.

A combination of "net widening" and "sentence inflation" means that more offenders may be receiving longer section 12 bonds, which in turn may give rise to disproportionate consequences in the event of breach of the bonds.

Reform of provisions relating to breach and revocation

The existing provisions of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) which relate to breach and revocation of section 12 bonds are rigid and inflexible in terms of the options which are available to a court upon revocation of a section 12 bond.

In particular, section 98(3) of the Act mandates that a court *must* revoke a section 12 bond unless the breach was "trivial" or where there are "good reasons for excusing the failure to comply with the bond". If a breach does not fall within one of these categories, the *whole* of the sentence is ordered to take effect.

This is in contrast to the provisions which exist in most other Australian jurisdictions as well as in the UK. These jurisdictions provide the court with greater options and flexibility in dealing with a suspended sentence which has been revoked. For example, an order that *part* of a suspended sentence – rather than the *whole* of the sentence – takes effect in the event of a breach.

See, for example, section 9 of the *Offenders Probation Act* 1913 (SA) and section 147 of the *Penalties and Sentences Act* 1992 (QLD).

Other jurisdictions also provide for a bond which is longer than the term of imprisonment which the offender would be required to serve in the event of a breach. For example, an offender might receive a suspended sentence for 12 months but with a related good behaviour bond for two years. This allows a lengthy period of supervision, but with more proportionate consequences in the event of a breach.

In NSW, the problem is compounded by the fact that the minimum term (or non-parole period) of a sentence must be fixed *at the time that the sentence is imposed*, rather than at the time that a section 12 bond is revoked. This means that there is little scope for the court to take into account the subjective circumstances of the offender in dealing with breach of a section 12 bond.

In short, we would like to see greater flexibility in terms of the options which are available to a court which is dealing with breach of a suspended sentence.

14. Does your organisation participate in circle sentencing? If so, what are the challenges for the program in a metropolitan environment?

At the public hearing held on Tuesday, 30 August 2005, Mr. Christian gave evidence to the effect that currently, circle sentencing does not exist in the Sydney region but that it will soon be piloted at Mt Druitt.

Mr. Christian also outlined to the problems associated with circle sentencing, in particular, the fact that its effectiveness depends on the existence of a strong Aboriginal community capable of encouraging Aboriginal defendants to address their offending behaviour. Mr. Christian gave evidence that the Aboriginal community in Sydney is very divided, comprising Aboriginal people from a variety of language and cultural groups. Mr. Christian also alluded to the absence of a mechanism within the circle sentencing project to address the issue of drug addiction which is a significant factor in Aboriginal offending.

Through this written response, SRACLS wishes to add that Mr. Christian and the Principal Solicitor of SRACLS, Mr. Peter Bugden, travelled to South Australia to observe the Aboriginal courts in that State. As a result of their observation, Messrs Christian and Bugden feel that Aboriginal courts based on the South Australian model would be more effective in the Sydney region than circle sentencing. Upon their return from South Australia, they met with NSW Attorney-General, the Hon. Robert J Debus to suggest that Redfern Court, which closed in May 2005, be converted to an Aboriginal Court. Mr. Debus explained that he preferred to allocate resources to the circle sentencing pilot.

The Sydney Regional Aboriginal Legal Corporation also wishes to pose a question to the Legislative Council Committee on Law and Justice.

In the questions provided to Mr. Christian, Ms. Miles and Ms. Omeri prior to the Public Hearing on Tuesday, 30 August 2005, question 10. stated:

"Do you encourage your clients to plead guilty to an offence? If so, why?"

SRACLS is interested to learn whether the Committee had received evidence that suggested that SRACLS or any other of the 6 Aboriginal Legal Services in NSW encouraged their clients to plead guilty or if not, what prompted this question.

**Response to question 12 above prepared with the assistance of Sydney Regional Aboriginal Corporation Legal Service solicitor, Mr. Julian Schimmel.*