Submission No 43

INQUIRY INTO COMMUNITY BASED SENTENCING OPTIONS FOR RURAL AND REMOTE AREAS AND DISADVANTAGED POPULATIONS

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

Submission on behalf of the NSW Coalition of Aboriginal Legal Services (COALS)

What is COALS?

COALS forms a peak body representing the 6 Aboriginal and Torres Strait Islander Legal Services (ATSILS) in NSW. These Services are:

Kamilaroi Aboriginal Legal Service (head office: Armidale)
Many Rivers Aboriginal Legal Service (head office: Grafton)
Western Aboriginal Legal Service (head office: Dubbo)
Central Southern (Wiradjuri) Aboriginal Legal Service (head office: Wagga Wagga)
South Eastern Aboriginal Legal Service (head office: Nowra)
Sydney Regional Aboriginal Legal Service (head office: Redfern).

COALS has administrative and research capacity. As a result it is able to provide its own administrative servicing as well as being a focal point for the articulation of policy on behalf of NSW ATSILS. It provides policy and legal research support to the regional services, and is in the process of developing an electronic resource centre. COALS is a major point of engagement with Government in the legal and justice arena.

1. What is community based sentencing?

1(a) Apart from good behaviour bonds, community service orders, intensive supervision programs linked to the Drug Court of NSW and the Youth Drug and Alcohol Court of NSW, periodic detention and home detention, what other community based sentences are available in NSW or in other Australian or overseas jurisdictions?

These appear to be the only community based sentences available in NSW. Other community based sentences available in **Western Australia** include (see attached brochures for further details):

- Conditional Release Order (permitting the release of an offender with or without a surety on conditions the court decides are needed to ensure the good behaviour of the offender) with the possibility of a Spent Conviction Order
- Work and Development Order (allowing eligible offenders to perform community service rather than pay a fine)
- Community Based Order (permitting an offender to serve their sentence in the community) with the possibility of a Spent Conviction Order
- Work Release Order (allowing prisoners the opportunity to continue serving the final part of their prison sentence under supervision in the community)

- Release to a prisoner work camp (permitting low-risk offenders and their supervising prison officer to live and work in a host community).

1(b) Do you consider some/all community based sentencing options to be lighter forms of punishment than imprisonment?

Although termed "alternatives" to imprisonment, community based sentencing options are often no less 'harsh' than custodial sentences since the offender's liberty is still *significantly* curtailed and their responsibilities often increased. In the English context, scholar, A. Ashworth notes that many community service orders are significantly more demanding than in previous years.[1]

Increased use of community based sentencing options can also lead to the phenomenon of "net-widening" which may see many offenders sentenced to community service where they would otherwise have been fined or perhaps even discharged. Indeed, this is precisely what scholars have observed taking place in England. In the 10-year period from 1986-1996, the English judiciary relied heavily upon probation and community service orders. During this period, the proportion of adult male offenders granted probation or sentenced to a community service order rose from 14% to 24%.[2] However, this period also saw a significant decline in the use of the fine. Although this may appear encouraging in light of the fact that the penalty for fine defaulting is often imprisonment, increased use of community service orders not only led to net-widening but was also accompanied by increased punitiveness towards those who committed offences of medium and high seriousness and repeat offenders, a phenomenon which led to a steep rise in the prison population in England.[3]

Given that Aboriginal offenders tend to have longer criminal histories than non-Aboriginal offenders,[4] 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.

1(c) What do you see as the advantages and disadvantages of community based sentences in general compared to imprisonment?

The advantages of community based sentences compared to imprisonment include:

- Reduction in unnecessary social control and coercion of offenders (although see comments at **1(b)**)
- Provision of services and assistance to offenders to help address the causes of their offending
- Reduction in recidivism
- Reduction in overall cost of administering the justice system
- Expansion of options currently available to decision-makers.

The disadvantages of community based sentences compared to imprisonment include:

- Net-widening ie situation where the scope of a diversionary program extends beyond those offenders who should benefit from program

[1] A. Ashworth. "The Decline of English Sentencing and Other Stories" in M. Tonry and R. S Frase (eds) *Sentencing and Sanctions in Western Countries*. Oxford University Press, 2001, p. 84.
[2] *Ibid.*
[3] *Ibid.*
[4] See T. Vinson. *Comparisons of the Sentencing of Indigenous and Non-Indigenous Prisoners in New South Wales*. Sydney, Uniya Jesuit Social Justice Centre, 1998, p. 18.

participation to include those defendants who would never have been brought before the traditional criminal justice process in the first place or whose contact with such process would otherwise be minimal (e.g through payment of a fine).

Net-widening is of greater concern in relation to diversionary schemes aimed at the front end of the criminal justice process, such as diversion from arrest and charge. Hence it may be less of an issue in relation to post-conviction sentencing options (however, see comments at **1(b)**).

In order to ensure that community based sentencing options are effective in achieving the above-mentioned advantages, attention must be paid to the key factors and principles that underlie effective diversion. These include:

- Having defined aims and objectives
- Having flexibility to alter the program as required and having a broad perspective on what is considered diversionary
- Employing a casework approach
- Limiting numbers according to capacity
- Availability of a range of activities
- Developing links with education and training institutions
- Setting clear rules and boundaries for clients
- Support from community and mainstream service providers
- Effective, reliable and well-documented referral systems
- Suitable, well-trained staff with well developed community or service development skills
- Physical accessibility and location support of a host organisation with strong links to the community
- Clear lines of responsibility and day to day management of the program and clients.[5]

Cunneen and McDonald[6] have also identified a number of principles for the development of successful diversion programs which may also be useful to consider in any attempts to extend community based sentencing options to Aboriginal communities living in rural and remote NSW.

These principles include:

- Principles underlying the recognition of Aboriginal rights ie recognition of Aboriginal people, the distinct nature of their cultures and their need for self-determination
- Principles underlying program implementation ie realistic view of the effectiveness of a particular program
- Principles underlying successful process ie secure funding, recognition of community limitations, understanding of parameters of program evaluation.

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[5] Aboriginal Justice Advisory Council. *Diverting Aboriginal Adults from the Criminal Justice System: Some Background Issues for Consideration* at http://www.lawlink.nsw.gov.au/ajac.nsf/51bf77d7793e43184a2565e800280584/53ae9085aa38d49bca256d190012f0c7/$FILE/diversion%20paper.pdf (as at 30 May 2005) pp.4-5.

[6] *Id.* p. 5.

1(d) Community based sentences are generally more economical than full-time imprisonment. Should economic reasons be a basis for imposing a community based sentence or making them more widely available?

If it is accepted that community based sentences constitute a significant curtailment of personal liberty such that the sentencing aims of punishment and denunciation are inherently met, the primary concern in relation to the imposition of a community based sentence should be the rehabilitation of the offender so as to minimise the possibility of recidivism. If this aim is achieved, it will lead to other beneficial outcomes such as:

- saving on the cost of full-time imprisonment
- allowing offenders to develop skills that may increase the likelihood of them finding meaningful employment
- decreased recidivism
- greater community saving in keeping offenders out of justice system
- keeping Aboriginal people out of custody in accordance with recommendation 92 of the Royal Commission Into Aboriginal Deaths In Custody (see attached recommendations).

1(e) Can various community based sentencing options be linked in order to tailor them to rural and remote areas or disadvantaged groups?

1(f) Do you have any other issues you wish to discuss about the range of community based sentencing options available in NSW?

The range of community based sentencing options available in NSW is somewhat inadequate in catering for the needs of Aboriginal offenders.

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.

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. (See recommendation 112-116).

2. Disadvantaged populations

2(a) Which disadvantaged groups should the Committee consider as part of its review? What difficulties do they face accessing community based sentencing options and why?

The Committee should most certainly consider the needs of Aboriginal and Torres Strait Islander offenders.

More specifically, the Committee should consider the precise needs of young Aboriginal offenders, female Aboriginal offenders and Aboriginal offenders with a disability.

Research suggests that Aboriginal offenders are underrepresented in all community based sentencing programs.[7] There are many reasons for this underrepresentation. In the first place, underrepresentation of Aboriginal people in community based sentencing programs may be attributed to judicial racism or cultural misunderstanding where, for example, a judge perceives certain behaviour on the part of an Aboriginal offender as indicative of culpability or lack of respect for the criminal justice system, thereby rendering the offender deserving of the (seemingly) more serious punishment of imprisonment.

Secondly, such underrepresentation may be attributed to current community based sentences not being available in the area in which an Aboriginal offender resides.

Thirdly, the difficulty faced by Aboriginal offenders in accessing community based sentences may be due to such sentences not being sufficiently tailored to their needs. Ryan suggests that the violent nature of many offences committed by Aboriginal offenders may preclude them from home detention whilst the lack of infrastructure in rural areas may make community service orders unworkable.[8]

2(b) Do you think it is in the public interest to tailor community based sentencing for disadvantaged populations in NSW? Why/Why not?

It is in the public interest to ensure that all residents of NSW have the opportunity to address difficulties they may face which may lead them to crime in order to prevent recidivism and to permit them to lead a meaningful life. As community based sentencing may facilitate this interest (see advantages outlined above), it is in the public interest that such sentencing be tailored to meet the needs of disadvantaged populations in NSW.

This is of particular relevance to Aboriginal people who, whilst comprising only 1.8% of the population of NSW, comprise 16.1% of the NSW prison population.[9]

Given that a large number of Aboriginal people live outside the Sydney area, it is vital that community based sentencing be extended to rural and remote areas.

Tailoring community based sentencing for the Aboriginal population in NSW would also be a means of addressing Recommendations 92-121 of the Royal Commission into Aboriginal Deaths in Custody which is vital in the prevention of further deaths.

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[7] J. Ryan. "Inquiry on the Increase in Prisoner Population," presentation by John Ryan, MLC to NCOSS "Scales of Justice" Conference, 25 July 2002 at http://www.ncoss.org.au/bookshelf/conference/download/scales_of_justice/john_ryan.pdf at 25 August 2003.

[8] *Ibid.*

[9] B. Lind and S. Eyeland. "The impact of abolishing short-term prison sentences" (2002) 73 *Contemporary Issues in Crime and Justice* 1, p. 2.

It is also in the public interest for NSW to contribute to Australia meeting its international obligations under the International Covenant on Civil and Political Rights (ICCPR) to which Australia is signatory.

Article 7 of the ICCPR states:

"No one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment"

In relation to this Article, Pritchard notes that imprisonment or a disproportionate sentence of imprisonment for a trivial offence can amount to cruel, inhuman or degrading treatment.[10]

Article 10 of the ICCPR states:

"1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

…

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation…"

It may be argued that the imprisonment of Aboriginal offenders is inhuman as it results in such offenders being separated by huge distances from their families and communities. There would seem to be an obligation on the NSW government to ensure that the infrastructure exists to permit Aboriginal offenders to serve their sentence in the community.

Infringement, in a number of Australian jurisdictions, of the above-mentioned Articles in relation to Aboriginal people has caught the attention of the United Nations on several occasions. On 24 March 2000, the Committee which deals with the Convention on the Elimination of Racial Discrimination noted:

"…with grave concern that the rate of incarceration of indigenous people is disproportionately high compared with the general population…The Committee recommends that the State party increase its efforts to seek effective measures to address socio-economic marginalisation, the discriminatory approach to law enforcement and the lack of sufficient diversionary programmes."[11]

2(c) Which community based sentencing options currently available in NSW should be made more available for these groups?

Aboriginal people would benefit from increased availability of all community based sentencing options currently available in NSW. However, those options which permit the greatest rehabilitation such as Community Service Orders would be of most benefit. 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. It may also be culturally inappropriate given the outdoor spirit of many Aboriginal people.

2(d) Are any other types of community based sentences, perhaps used in other jurisdictions particularly suitable for various disadvantaged groups?

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[10] S. Pritchard (ed). *Indigenous Peoples, the United Nations and Human Rights.* Sydney, Federation Press, 1998, p. 52.

[11] Cited in *Id.* p. 57

The Western Australian Work and Development Order, allowing eligible offenders to perform community service rather than pay a fine seems particularly appropriate to Aboriginal offenders in NSW given the high incidence of Aboriginal offenders serving prison sentences as a result of fine defaulting.

The other options of Community Based Order, Work Release Order and Release to a prisoner work camp would also be suitable for Aboriginal offenders as they would prevent them from being moved far from their communities and would also allow for the development of skills of use in future employment.

2(e) Are some community based sentencing options inappropriate for particular disadvantaged groups?

Home detention may be inappropriate in some circumstances. See above at **2(c)**.

2(f) What cost considerations are involved in expanding the availability of community based sentencing options, or tailoring them, for disadvantaged groups?

This ought not be the primary consideration for Government for reasons outlined above (at **1(d)**). It is vital to bear in mind that although expansion of community based sentencing options may require some expenditure in the short-term, in the long-term they will prove much more cost-effective than full-time imprisonment.

2(g) Which of the disadvantages or advantages of the community based sentencing options are particularly relevant to disadvantaged groups?

The phenomenon of net-widening is a disadvantage of particular relevance to Aboriginal people given the high level of interaction between Aboriginal people and police which sets in motion interaction between Aboriginal people and the courts. If the courts, were provided with more workable community based sentencing options, this may simply create another avenue for an increase in the containment of Aboriginal people within the cycle of interaction with the criminal justice system.

The advantages of particular relevance to Aboriginal people include:

- allowing offenders to develop skills that may increase the likelihood of them finding meaningful employment
- decreased recidivism
- keeping Aboriginal people out of custody in accordance with recommendation 92 of the Royal Commission Into Aboriginal Deaths In Custody to prevent further deaths.

It would appear that the above-mentioned advantages outweigh the disadvantage of possible net-widening.

3. Eligibility for community based sentences

3(a) Do the eligibility criteria for the various community based sentencing options unfairly exclude some offenders from disadvantaged groups?

Yes. 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 record is discriminatory. In particular, the criteria for home detention (no serious assault matters) and for periodic detention (never sentenced to imprisonment of 6 months or more) cause concern.

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.

3(b) Existing criteria for eligibility are 'negative' or better described as criteria of exclusion. What are some positive criteria that might be used in relation to disadvantaged groups?

In consideration of the low socio-economic status and high birth rate of Aboriginal people, and bearing in mind the number of Aboriginal children already in out-of-home care, criteria that give special consideration to offenders who are primary carers of children under 16 would be helpful. Other beneficial criteria might be those which recognise a commitment to undertake drug and alcohol rehabilitation on the part of the offender, whether it be at home or in a residential centre.

3(c) Should 'disadvantage' be taken into account by the courts as a factor when determining whether an offender is eligible for a community based sentence?

Yes, especially given the health, employment and housing statistics for Aboriginal people that remain significantly worse than for the rest of the population. The on-going over-representation of Aboriginal people in NSW gaols is a constant reminder that the criminal justice system needs improvement. Support for such an approach is to be found in the recommendations of the Royal Commission into Aboriginal Deaths in Custody.

3(d) Do eligibility criteria need to be tailored to make the various forms of community based sentencing more accessible in rural and remote areas? If so, how?

Yes. There needs to be a cut-off point, (for instance ten (10) years), beyond which, certain matters on an offender's record will not act as an exclusion.

Domestic violence matters should be examined, and if appropriate investigated, to ascertain whether there remains a continuing fear of violence, especially in matters not involving spousal violence. There needs to be some flexibility in the exclusion from home detention of those who have a previous or current apprehended violence order.

4. Types of community based sentences

4(a) Can you comment on the availability of good behaviour bonds in rural and remote areas in NSW?

All types of bonds available under the *Crimes (Sentencing Procedure) Act* (ss9, 10 and 12) are regularly imposed by Magistrates throughout rural and remote areas of the State.

However, COALS has noted an increasing tendency to impose s.12 bonds (suspended sentences) with the consequence that a growing number of clients are at risk of ultimately serving the sentence imposed.

What is not so widely available are all the agencies readily available in the city to facilitate supervision under a bond.

The Probation and Parole Service (PPS) is based in regional centres and visits smaller towns and communities on a regular (weekly or fortnightly) basis. However, there is limited scope for PPS to refer clients to drug and alcohol services, mental health services and programs such as vocational training educational and training programs and anger management programs.

There are several residential rehabilitation programmes operating in rural areas but invariably there is a waiting list and, often, this option is not available to ATSILS clients.

4(b) What obstacles exist to utilising good behaviour bonds in rural and remote areas? What can be done to overcome these obstacles?

See comments at **4(a)**. What can be done to overcome the problem is for the NSW Government to ensure that the agencies and services are in place for these programs to be as readily available in rural and remote areas as they appear to be in the Sydney region.

4(c) Can you comment on the use of good behaviour bonds in relation to disadvantaged groups?

See comments at **4(a)**. COALS wishes to draw particular attention to the apparent increase in use of s.12 bonds in relation to ATSILS clients.

4(d) Should good behaviour bonds be tailored to the requirements of disadvantaged groups so as to increase their use or make them more effective? How can this be achieved?

Yes. Such tailoring could be achieved if the NSW Government invested in agencies and programs which are easily accessible by people in rural and remote communities and particularly disadvantaged groups. In this way, supervised bonds could be tailored to address the specific problem areas of each client.

If, for example, a client suffered from a mental condition, PPS could arrange for the client to consult a psychologist or psychiatrist in order to ascertain the nature of the problem and to arrange a treatment plan.

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 has obtained for court but there is no follow up or treatment plan put in place after a client has received a supervised bond.

In some places PPS conducts anger management programmes but these are by no means available in all towns.

In some of the smaller towns such as Wilcannia and Brewarrina there are virtually none of the above-mentioned services 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.

4(e) Are any of the advantages and disadvantages of good behaviour bonds particularly relevant to offenders from rural and remote areas or offenders from disadvantaged groups?

Yes. If relevant agencies and programs were available in rural and remote areas to deal effectively with the many issues which led to the offending behaviour in the first place, then supervised bonds would be an effective sentencing option in rural and remote communities to reduce the risk of re-offending.

It is COALS' understanding that NSW spends less per capita on early intervention programmes than most other States and Territories in Australia and about one tenth per capita of what is spent in the United Kingdom on these programmes. Spending on mental health services is similarly inadequate by comparison with other jurisdictions in Australia and the United Kingdom.

5. Community service orders

5(a) Can you comment on the availability of CSOs in rural and remote areas?

The availability of CSOs in rural and remote areas is a complex issue due to two main factors : (a) availability of work; and (b) access to the work:

(a) there are many small communities for which CSOs are not available due to lack of providers. In communities where there is a provider, there may nevertheless be problems between individuals and/or organisations which result in a particular placement not being suitable for reasons that beyond the control of the defendant. Where there are no alternative providers, a CSO may cease to be an available sentencing option. In contrast, in larger areas, there may be a number of suitable options. In such areas, if a placement breaks down there may be alternatives which are not available in a small community.

(b) The lack of public transport in rural areas is well known. Even where there is public transport, the cost and poor timetable may result in a defendant not being able to comply with a CSO. The problem is exacerbated by the fact that, often, Aboriginal offenders do not have a driver licence or a motor vehicle. Sometimes, such offenders are compelled to move house in order to obtain a CSO.

5(b) What needs to be done to increase the availability of CSOs in rural and remote areas?

Given cost effectiveness of CSOs in comparison to full-time gaol as well as the positive aspects of allowing an offender to remain in their community, it is imperative that the above problems be overcome. Often, a CSO will be a frame on which a defendant can build and perhaps change their life for the better. In view of this, two means of increasing the availability of CSOs come to mind, namely, the establishment of a **broader range of CSO providers** such as schools, councils, churches and the CDEP, and the **provision of culturally appropriate supervision for Aboriginal offenders**.

5(c) Can you comment on the availability and appropriateness of CSOs for offenders from disadvantaged groups?

As the Committee may be aware, a CSO may only be ordered where the PPS considers the offender suitable for such an order. Many Aboriginal offenders are considered unsuitable for a CSO either because of the offender having a drug and alcohol problem or because the offender does not have stable accommodation. COALS wishes to point out however, that the PPS assessment process is very subjective, with some officers giving Aboriginal offenders the benefit of the doubt and others denying them this for apparent fear of setting Aboriginal offenders up to fail. It can be extremely difficult to argue before a Magistrate that a person, whom the PPS deems unsuitable, should be given the opportunity to serve their sentence by way of a CSO.

The reality is that many Aboriginal offenders commit offences as a result of their drug and alcohol problems and/or their lack of stability. In this way, Aboriginal offenders are apparently punished twice, in being deemed unsuitable for a CSO for the very reasons that they offend and require rehabilitation.

In addition, many Aboriginal offenders receive a disability pension as a result of suffering chronic health problems such as diabetes, heart disease and kidney failure. Such health problems also tend to render Aboriginal offenders unsuitable for a CSO. Where offenders are not suitable for a CSO, they may instead be given a suspended sentence and bond pursuant to s.12 of the *Crimes (Sentencing Procedure) Act*. Breach of the bond in such cases can have disastrous consequences for Aboriginal offenders (see comments above at **5(g)**).

5(d) Can you comment on the courts' use of CSOs in relation to offenders from disadvantaged groups?

The use of CSOs varies with each Magistrate and with each area. However, the most influential person in the process is the Probation officer who assesses an offender's suitability for a CSO.

Perhaps Magistrates and Judges should be given the power presently given to the PPS to make the final determination in relation to an offender's suitability for a CSO. At present s.86(4) of the *Crimes (Sentencing Procedure) Act* states:

> "A court may make a community service order only if an assessment report states that, in the opinion of the person making the assessment, the offender is a suitable person for community service work."

5(e) Do CSOs need to be tailored to meet the needs of disadvantaged groups? If so, how?

Yes. CSOs need to be tailored to meet the needs of Aboriginal people. If so tailored, CSOs can allow for Aboriginal offenders to address any feelings of isolation or dislocation from the community and lack of employment prospects which led them to offending behaviour in the first place. In order to achieve these outcomes, 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.

Another factor to be considered when tailoring CSOs to the needs of Aboriginal offenders is that such offenders often come from disadvantaged and/or dysfunctional households. Practices such as keeping a diary, arranging appointments, following up matters, reminding family members of appointments, budgeting, planning etc are often non-existent and difficult to implement in the households of many Aboriginal offenders. Though they may intend to comply with the requirements of a CSO, some Aboriginal offenders are unable to overcome family pressures or inertia in order to do so. Some consideration should be given to addressing these issues before an Aboriginal offender is either deemed unsuitable for a CSO or an application for revocation is made.

5(f) Are any of the advantages and disadvantages of community service orders particularly relevant to rural and remote areas or offenders from disadvantaged groups?

Advantages of a CSO including the development of work skills, a better work ethic and an increase in self-esteem are invaluable to Aboriginal offenders living in areas of high unemployment. At the very least, as stated above, a CSO may give some structure to life of an Aboriginal offender and even provide them with a reason to wake up each day.

5(g) Do you have any other issues you wish to raise in relation to CSOs?

COALS wishes to draw the Committee's attention to the following issues:

- As sentencing becomes heavier in response to Government wishes, the percentage of persons sentenced to CSOs has decreased by approximately 16%.

- Where an offender is deemed unsuitable for a CSO, the Court does not necessarily consider the 'lighter' option of a s.9 bond. In fact, Butterworths *Criminal Practice and Procedure* states 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 periodic detention. Where home detention is also not available, the client is given a s.12 suspended sentence. Section 12 sentences are a difficult matter for solicitors and may be the worst result for an Aboriginal offender. An Aboriginal offender on a s.12 bond will generally not wish to lodge an appeal as they are content that they are not subject to a sentence of imprisonment. Generally, even where a solicitor strongly advises an Aboriginal offender to appeal a s.12 bond, the offender is unlikely to heed such advice.

  It should also be noted that 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.

6. Drug Court of NSW and the Youth Drug and Alcohol Court

6(a) Would the Drug Court be beneficial in rural and remote areas in NSW?

Yes. To date, the Drug Court has been successful in meeting its original goal of addressing the real problem behind much crime. It has greater powers and more flexibility to assist offenders with drug problems than other criminal courts in NSW. Anecdotal evidence shows that the objectives of the original Drug Court legislation have been successful and there is no reason to believe that it would not be equally successful in rural and remote areas.

6(b) Would it be sufficient to enable all NSW courts to refer defendants to the Drug Court in Parramatta?

No, as the sheer volume of work involved would render Parramatta Drug Court unworkable. Whilst COALS is not in possession of current empirical data, it is aware that vast numbers of criminal offences are drug-based. If *all* drug-based offences dealt with by just one COALS member organisation were transferred to the Parramatta Drug Court, there would be a considerable increase in the current workload of that Court.

6(c) Are suitable treatment programs available in rural and remote areas?

Clearly not. The SRACLS often has recourse to the limited number of drug and alcohol rehabilitation centres in NSW, though often a Magistrates will not be amenable to this option. Even fewer rehabilitation centres are available in rural and remote areas. In addition, transport to the relevant country centres is frequently an impediment to clients receiving treatment. Regarding the 'suitability' of programs in rural and remote areas, it is noted that some such programs are not particularly highly regarded by Local Court Magistrates who have observed many negative results in relation to these programs such as defendants leaving prior to completion.

6(d) What barriers exist for offenders from various disadvantaged groups accessing the Drug Court? How can these barriers be overcome?

In relation to Aboriginal offenders, the barriers which exist to accessing the Drug Court are principally, the discriminatory geographical boundaries of the Parramatta Drug Court and the Children's Drug Court and the exclusionary criteria for admission to Drug Courts set out in the legislation, in particular, criteria pertaining to an offender's criminal history. This latter barrier gives other courts very little discretion to refer defendants to the Drug Court.

Whilst the first barrier may be overcome by establishing more Drug Courts, especially in rural and remote areas, the second barrier may be overcome by legislative amendment.

6(e) Is the Youth Drug and Alcohol Court model appropriate for rural and remote settings?

It has proved to be successful and is accepted as a suitable mechanism for addressing drug addiction in young offenders at its current location. On this basis, one would imagine that it would be equally successful in rural and remote settings.

6(f) Is the Youth Drug and Alcohol Court accessible or suitable for various disadvantaged groups?

The current Youth Drug and Alcohol Court is geographically inaccessible for young Aboriginal offenders living outside of its catchment area.

6(g) Do you have any other issues you wish to raise in relation to the Drug Court?

If there were to be Youth Drug Courts in rural and remote areas, the involvement of respected members of the local Aboriginal communities would be invaluable and would greatly enhance the offender's prospects of success.

7. Periodic Detention

7(a) Can you comment on the availability of periodic detention in rural and remote areas in NSW?

Periodic detention is generally not widely available in rural and remote NSW. In the experience of the Western Aboriginal Legal Service (WALS) for example, periodic detention is limited to Broken Hill and Bathurst where gaols are located. Most Aboriginal offenders do not have the means to travel to prisons which are located far from where they live.

Due to these geographical limitations, periodic detention is generally not considered as an option for anyone west of Orange or outside the city limits of Broken Hill.

The PPS typically deem Aboriginal clients unsuitable for Periodic detention because of the relevant legislative provision to the effect that it ought not to be considered unless the detention facility is reasonably accessible to the defendant.

7(b) How significant is the generally higher level of unemployment in rural and remote areas for the availability or success of periodic detention in such places?

As far as COALS is aware, unemployment is not directly relevant to the availability or success of periodic detention.

7(c) What would be the impact of the availability of periodic detention upon rural and remote areas?

The impact of this would be to provide courts with another sentencing option before they become obliged to proceed to a full-time custodial sentence as well as to reduce the number of offenders in full-time custody.

7(d) Can the requirements of periodic detention be tailored for rural and remote areas? Eg how near to a detainee's home should a periodic detention centre be for a PDO to be considered appropriate?

Yes. They may be so tailored by establishing more detention facilities located within a reasonable distance (200km) from a detainee's home. In addition, 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.

7(e) What services need to be available to support 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. 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.

7(f) Can you comment on the appropriateness of periodic detention for disadvantaged groups?

Periodic detention is an appropriate option for Aboriginal people in so far as it permits them to serve the majority of their sentence outside of full-time custody as well as providing courts with another alternative to sentences of full-time imprisonment.

7(g) Can the eligibility criteria for periodic detention be tailored for disadvantaged groups?

It is essential that the criterion, set out in the discussion paper, that offenders who have **ever** served a sentence of 6 months or more are excluded from the option of periodic detention be revised as it discriminates against Aboriginal people who often have lengthy criminal histories including sentences of full-time imprisonment for 6 months or more.

7(h) What services need to be available to support periodic detention in indigenous communities?

See comments at **7(e)**. Periodic detention facilities should also be rendered more culturally appropriate in the sense that such facilities should provide the opportunity for Aboriginal offenders to get in touch with respected members of the local Aboriginal community in a manner that will permit them to rediscover a sense of belonging and responsibility.

7(i) What needs to be done to make periodic detention appropriate for disadvantaged offenders?

See comments at **7(e)** and **7(f)**.

7(j) Do you have any other issues you wish to raise in relation to periodic detention?

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.

8. Home Detention

8(a) Can you comment on the availability and use of home detention for offenders from rural and remote areas?

Within the region covered by **Many Rivers Aboriginal Legal Service**, home detention is available only to those living in the Newcastle and Hunter Valley areas.

8(b) Is home detention a viable community based sentencing option for rural and remote areas?

Yes, especially as it can be monitored from afar, electronically.

8(c) What would be the impact of the availability of home detention upon rural and remote areas?

Home detention would reduce the number of offenders in full-time custody.

8(d) What modifications could be made to the existing home detention scheme to make it suitable for 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.

8(e) What are the infrastructure needs for home detention in rural and remote areas?

Little other than a land-line telephone in the offender's home.

8(f) Is home detention a suitable community based sentencing option for the various disadvantaged groups?

It is suitable for Aboriginal people, especially where there are children to be cared for. Random urine tests, as presently done, would police the use of alcohol and drugs.

See comments at **2(c)**.

8(g) Can home detention be modified to suit the needs of the various disadvantaged groups without compromising the punitive element of the sentence?

The operation of home detention does suit many Aboriginal people. The principal modifications required are a refining of the exclusion criteria to allow more offenders to take advantage of this sentencing option. Such changes would not detract from the punitive nature of a sentence of home detention.

8(h) Can home detention be adapted for people who have no stable residence at the time of sentencing?

Possibly, by setting a time period within which a suitable residence has to be found by the assessing authorities.

8(i) Are any of the advantages and disadvantages of home detention particularly relevant to rural and remote areas or offenders from disadvantaged groups?

The ability to stay with family in their own country is very relevant to Aboriginal people.

See also comments at **2(c)**.