

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

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The Honourable Christine Robertson MLC
Chair, Standing Committee on Law and Justice
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Ms Robertson

Inquiry into community based sentencing options for rural and remote areas and disadvantaged populations: Submission from the Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre provides a free legal service for homeless and disadvantaged young people aged 25 and under. The Shopfront was established in 1993 and is a joint project of Freehills, Mission Australia's Sydney City Mission and the Salvation Army.

The Shopfront represents and advises young people on a range of legal issues, with a particular emphasis on criminal law. The vast majority of our clients are homeless, and most have been forced to leave home due to abuse, neglect, domestic violence or extreme family dysfunction. Many of our clients have a serious mental health problem or an intellectual disability. Most have had a very limited or disrupted formal education and lack literacy and numeracy skills.

We have read your discussion paper, and welcome the opportunity to provide a submission to this inquiry.

We are unable to comment to any great extent on issues affecting people in rural and remote areas. However, we are well qualified to comment on the needs of disadvantaged populations, particularly those who are young, homeless or have a mental illness or intellectual disability. We will address the questions raised in your discussion paper that relate directly to our clients.

What is community based sentencing?

Question 1: What other community based sentences are available in NSW or other Australian or overseas jurisdictions?

We are aware of some intervention programs which are not strictly sentencing options, but which often form a component of the sentence eventually imposed.

The Committee would no doubt be aware of the MERIT program which operates at several Local Courts in NSW. Like the Adult Drug Court, the MERIT program is for defendants who are dependent on illicit drugs. However, MERIT deals with less serious offenders who are suitable for release on bail, and it is not necessary to enter a plea of guilty in order to participate in the program. MERIT offers great benefits to offenders and to the community because it provides a co-ordinated approach to drug treatment and rehabilitation.

The Committee would also be aware of the Youth Justice Conferencing scheme, which operates for juvenile offenders. Although this is strictly a diversionary rather than a sentencing option, this does provide a community based alternative to traditional sentencing options for young people who have committed offences. Research has shown that recidivism rates for young offenders who have participated in conferences are lower than for those who are dealt with by courts.¹

A conferencing scheme for young adult offenders (aged 18 to 24) is soon to be piloted in one metropolitan and one rural Local Court. It is based on the Youth Justice Conferencing scheme but,

¹ See Garth Luke & Bronwyn Lind, *Reducing Juvenile Crime: Conferencing versus Court*, Crime & Justice Bulletin No. 69, NSW Bureau of Crime Statistics and Research, April 2002

instead of being a diversionary option, it is a step in the sentencing process. A Magistrate may refer an offender to a conference for certain types of offences where there is a likelihood of a custodial sentence. After the conference has taken place and an intervention plan arrived at, the matter will return to court and the offender will be sentenced, usually to a non-custodial option such as a bond or suspended sentence.

Question 2: Do you consider some/all community based sentencing options to be “lighter” forms of punishment?

Generally, most community based sentencing options are less onerous than imprisonment.

Imprisonment or detention is an extremely harsh form of punishment, particularly for young and disadvantaged people. The conditions inside NSW prisons are harsh and, with overcrowding, appear to be getting worse. Young inmates in particular are vulnerable to physical and sexual assault, and to serious health problems such as hepatitis C.

Although they may be more lenient than imprisonment, most community based sentencing alternatives are not “soft options”. Periodic detention and home detention are both onerous forms of punishment which require enormous amounts of self-discipline. Community service also requires hard work and self-discipline.

A suspended sentence, involving the “sword of Damocles” hanging over one’s head, is a very real form of punishment and cannot be taken lightly. A suspended sentence, or any other form of bond, often involves supervision by Probation and Parole or Juvenile Justice and may also require participation in programs such as residential drug rehabilitation programs. The extent of the intervention involved means that a good behaviour bond can be a significant imposition on an offender’s life, even though its primary aim is to rehabilitate rather than punish.

We would comment that fines, traditionally seen as the most lenient form of punishment, can have an enormous impact on disadvantaged people who lack the means to pay in time. The fine enforcement system, administered by the State Debt Recovery Office, is very rigorous and has the potential to cause serious hardship by taking away access to a driver’s licence, repossessing personal property and garnishing income. Although it is truly a last resort and is rarely imposed, the ultimate sanction for fine default is imprisonment.

Question 3: What do you see as the advantages and disadvantages of community based sentences in general compared to imprisonment?

Community based sentences have many advantages over imprisonment, the primary one being that they are far more likely to achieve the rehabilitation of the offender. Although rehabilitation is only one of the factors relevant to sentencing, it is the primary aim in the case of young offenders. We suggest that it is also paramount where offending has been brought about by factors such as mental illness or substance abuse.

Protection of the community is also an important consideration. While this may be achieved in the short term by imprisoning an offender, it will not be achieved in the long term without genuine rehabilitation. Therefore, except in the case of the most serious and violent offenders, community based sentencing options are preferable in terms of crime prevention and community protection. There is abundant criminological research which shows prison is often a “revolving door”, and which supports our view that community based sentences are more effective than imprisonment in reducing recidivism².

Another important component of sentencing is recognising the harm done to the victim, and where possible, making reparation. Community based options such as conferencing, which are based on the concept of restorative justice, are particularly effective at achieving this. Counselling and personal development programs, which may be imposed as part of a bond or community service order, also have a role to play in this.

We concede that imprisonment is more likely than community based sentences to fulfil the functions of denunciation and deterrence. A sentence of imprisonment sends a message to the community that such conduct will not be tolerated and will bring about harsh punishment. However, in our view, the effectiveness of imprisonment in deterring crime is overrated. Firstly, the general public does not receive a great deal of information about the sentences passed on offenders. Media reporting tends to concentrate on the more “sensational” or unusual cases. Secondly, criminological research shows that the severity of the possible penalty is not significant in deterring crime; the likelihood of apprehension

² See, for example, *Rawnsley, T: Dynamics in Repeat Imprisonment: Utilising Prison Census Data*, Australian Bureau of Statistics, June 2003; NSW Legislative Council Select Committee on the Increase in Prison Population, *Final Report*, November, 2001; Cain, M: *Recidivism of Juvenile Offenders in New South Wales*, Department of Juvenile Justice, 1996

is a much more effective deterrent³. Finally, we would comment that criminal offending is not generally the product of rational choice, but is often committed by disadvantaged people in desperate circumstances. As such, deterrence does not have a major role to play.

Question 4: 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?

Cost is merely one reason for preferring community based sentencing options. However, the main reason for imposing community based options is that they are much more effective than imprisonment, for the reasons outlined in our response to question 3 above.

Disadvantaged populations

Question 1: Which disadvantaged groups should the Committee consider as part of its review? What difficulties do they face accessing community based sentencing options and why?

We believe that all of the groups listed in your discussion paper are genuinely disadvantaged groups who face difficulties in the criminal justice system. The Shopfront Youth Legal Centre is particularly concerned with the needs of young offenders, offenders with a disability and offenders who are homeless.

In relation to young offenders, juveniles are generally disadvantaged because of their youth, lack of maturity and dependence on adults for care and assistance. In general, the Children's Court and the juvenile justice system recognises the special needs of this group and treats young people appropriately. However, there is a disturbing trend emerging in relation to young people who have committed serious offences. Such offenders are being treated in increasingly punitive fashion and less weight is being given to rehabilitation. The recent transformation of Kariong Juvenile Justice Centre into a "juvenile correctional centre" administered by the Department of Corrective Services is an example of this phenomenon⁴.

We would also single out young adults (aged 18 to 25) as a disadvantaged group. The majority of the Shopfront Youth Legal Centre's clients fall into this age group. Although they are legally adults, many people in this age group are still adolescents in terms of their development. They lack the skills and maturity to function as independent adults. They face severe difficulties in the adult criminal justice system which demands a much higher level of maturity and personal responsibility than the juvenile justice system.

In relation to offenders with a disability, we would say that this group should be defined to include offenders with a mental illness and also those with substance abuse problems. Offenders in these categories form a large proportion of the Shopfront's clients. We also have clients with other disabilities such as intellectual disability, brain injury, HIV and hepatitis C. Depending on the nature of the disability and whether it affects their physical or cognitive functioning, these offenders are at a considerable disadvantage.

We would like to see offenders who are homeless added to the list as a separate category.

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

Question 2: Do you think it is in the public interest to tailor community based sentencing for disadvantaged populations in NSW? Why/why not?

For reasons we have already outlined, keeping disadvantaged people out of prison and addressing the root causes of their offending is clearly in the public interest.

³ See, for example, Freeman, K: *Young People and Crime*, Contemporary Issues in Crime No 32, NSW Bureau of Crime Statistics and Research, November 1996; Salmelainen, P: *The Correlates of Youth Offending Frequency: a study of juvenile theft offenders in detention*, NSW Bureau of Crime Statistics and Research, 1995

⁴ This is the subject of a Parliamentary Inquiry currently being conducted by the Select Committee on Juvenile Offenders. A copy of The Shopfront Youth Legal Centre's submission is available on request.

To a certain extent, community based sentencing options are already tailored to disadvantaged people. Good behaviour bonds are a very flexible sentencing option which allow for a variety of conditions to suit the offender's individual circumstances. Programs such as the adult Drug Court and the Youth Drug and Alcohol Court are designed to overcome the special difficulties faced by drug-dependent offenders.

We believe that more could be done to tailor community based sentencing options to offenders with mental illnesses and intellectual disabilities. Although the Local and Children's Courts have special procedures available (dismissing the charges under section 32 or 33 of the *Mental Health (Criminal Procedure) Act*) these are underutilised because mental health issues are inadequate, and the court has no power to compel an agency to provide services. For those who do not get the benefit of a section 32 or 33 dismissal, mainstream sentencing options present a challenge to both the offenders and the authorities who are mandated to supervise them. It is well known that offenders with intellectual disabilities and mental illnesses are over-represented in adult prisons and juvenile detention centres. There is clearly a need to make community based sentencing options more accessible for these people.

Question 3: Which community based sentencing options currently available in NSW should be made more available for these groups?

We believe that community service orders in particular should be made more accessible to disadvantaged offenders. The suitability criteria are strict (and, in our experience, appear to be getting stricter). We acknowledge that the scheme can only operate with the participation and goodwill of community organisations, which do not necessarily have the resources to supervise unreliable or "difficult" offenders. We accept that offenders may be unsuitable for community service if they are unreliable or otherwise incapable of performing the work. However, some offenders appear to be excluded from community service based on factors such as "unresolved drug issues" or part unsatisfactory perform without a thorough assessment of their current circumstances.

We would comment that several of our clients who have been assessed as unsuitable for community service orders are participating in Commonwealth government "work for the dole" programs. While it is beyond the scope of this inquiry to examine Commonwealth government policy, we regard it as unfortunate that people can participate in these schemes without any apparent difficulties, yet be ineligible for community service.

Question 5: Are some community based sentencing options inappropriate for particular disadvantaged groups?

In general, we believe that most community based sentences are suitable for disadvantaged groups, but it is vital that proper support is provided so that offenders are not set up to fail. Periodic detention is a particularly difficult sentencing option for disadvantaged offenders to comply with, as it imposes onerous obligations on the offender without providing any supervision or support from the probation and parole service. It would perhaps assist if periodic detainees were assigned a probation officer to provide supervision and support to assist them to comply with their periodic detention order.

Question 6: What costs considerations are involved in expanding the availability of community based sentencing options, or tailoring them, for disadvantaged groups?

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

Question 7: Which of the disadvantages or advantages of the community based sentencing options are particularly relevant to disadvantaged groups?

We refer to our comments in our response to Question 3 under the heading "What is Community based sentencing?". The flexibility of community based sentences and their ability to address the root cause of the offending makes them ideally suited to disadvantaged offenders.

The only disadvantage of community based sentencing is that some options are not widely available to disadvantaged offenders.

Eligibility for community based sentences

Question 1: Do the eligibility criteria for the various community based sentencing options unfairly exclude some offences from disadvantaged groups?

Some community based sentencing options, such as home detention and the Adult Drug Court, exclude offenders who are being sentenced for certain violent offences, or who have prior convictions for offences involving violence.

While we do not suggest that violent offences are a trivial matter, we believe that such exclusions operate unfairly against particular groups in the community, such as indigenous offenders. It is an unfortunate fact that many indigenous communities are beset by violence, which is often alcohol-related. The level of police contact with residents in these communities is also high. Young people growing up in such an environment are more likely to be convicted of violent offences than their non-Aboriginal peers. In order to break the cycle of violence which is often linked with poverty and disadvantage, the eligibility criteria must be broadened.

In relation to periodic detention, Section 65A of the *Crimes (Sentencing Procedure) Act* provides that an offender is ineligible if he or she has previously served a full time custodial sentence of more than 6 months. In our opinion, this is extremely unfair and potentially discriminates against disadvantaged groups. Disadvantaged people are more likely to receive full-time custodial sentences because of the lack of alternatives available. Denying such offenders the opportunity of periodic detention in the future only compounds their disadvantage.

Question 2: 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?

Perhaps the most positive criterion that can be applied to disadvantaged people is that they are likely to benefit from the rehabilitation opportunities offered by community based sentences. It is also important to recognise that people from disadvantaged backgrounds are often very resilient, but this is often overlooked by those who focus on the dysfunctional aspects of a person’s life.

Question 3: Should “disadvantage” be taken into account by the courts as a factor when determining whether an offender is eligible for a community based sentence?

We believe that social or economic disadvantage should be taken into account when assessing an offender, with a focus on overcoming the barriers created by that disadvantage.

Types of community based sentences – good behaviour bonds

Question 3: Can you comment on the use of good behaviour bonds in relation to disadvantaged groups?

A good behaviour bond is a sentencing option that is very well suited, and is frequently imposed by the courts, for disadvantaged offenders. Bonds provide the flexibility to impose a wide variety of conditions (although, contrary to what is stated in your discussion paper, a fine or compensation cannot be made a condition of a bond, except on Commonwealth matters).

Question 4: 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?

To a large extent, good behaviour bonds are already tailored to the requirements of disadvantaged groups. However, we would like to see more resources being provided to the Probation and Parole service so that they are able to provide more intensive supervision, programs and specialist counselling to offenders who have special needs or a high risk of recidivism.

Question 5: Are any of the advantages and disadvantages of good behaviour bonds particularly relevant to offences from rural or remote areas or offenders from disadvantaged groups?

As previously stated, the main advantage of good behaviour bonds is that they are focused on rehabilitations and can be tailored to suit an offender’s special needs. As far as disadvantaged offenders are concerned, the main problem with bonds is that the conditions may be too difficult for them to comply with. In our experience, offenders from disadvantaged groups often breach bonds because they have a disability, a chaotic lifestyle, rather than because of any re-offending or misconduct on their part.

Types of community based sentences – community service orders

Question 3: Can you comment on the availability and appropriateness of CSOs for offenders from disadvantaged groups?

As previously mentioned (in our answers to Question 3 under the heading of “Disadvantaged populations”), community service orders are not always appropriate for disadvantaged people with unstable lives or significant disabilities. However, community service orders are well suited to many disadvantaged groups as they can provide them with meaningful activity and the opportunity to acquire vocational skills. It is regrettable that community service work is not more widely available.

Question 4: Can you comment on the courts’ use of CSOs in relation to offenders from disadvantaged groups?

As previously stated, we have observed that the courts’ use of community service orders for disadvantaged offenders is very limited. We would like to see the eligibility and suitability criteria broadened, and more support systems put in place, so that more disadvantaged offenders may participate in the scheme.

Question 5: Do CSOs need to be tailored to meet the needs of disadvantaged groups? If so, how?

In our view, CSOs could be better tailored to meet the needs of offenders from disadvantaged groups by the provision of more intensive support and supervision, and by carefully matching the type of community service work to the ability of the individual offender.

Types of community based sentences – Adult Drug Court and Youth Drug and Alcohol Court

Question 4: What barriers exist for offenders from various disadvantaged groups accessing the Drug Court? How can those barriers be overcome?

Two major barriers in relation to the adult Drug Court are the exclusion of offenders whose primary drug of dependence is alcohol, and those with violent charges or records. Both of these exclusions are likely to discriminate against indigenous people, for reasons we have previously outlined. These barriers could be overcome, at least partially, by broadening the eligibility criteria.

Question 6: Is the Youth Drug and Alcohol Court accessible or suitable for various disadvantaged groups?

In our experience, the Youth Drug and Alcohol Court appears to be more accessible than the adult Drug Court to offenders from disadvantaged groups. This is partially because it does not have the same exclusions relating to alcohol and violence. However, we have limited practical experience of the program and cannot comment any further.

Types of community based sentences – periodic detention

Question 6: Can you comment on the appropriateness of periodic detention for disadvantaged groups?

As we have mentioned earlier in the submission, periodic detention is an onerous sentence which requires a high level of self-discipline. It also involves entering a custodial environment where members from some disadvantaged groups (particularly young people or those with a disability) are likely to be extremely vulnerable. However, periodic detention is not always inappropriate for disadvantaged offenders.

Question 7: Can the eligibility criteria for periodic detention be tailored for disadvantaged groups?

We would support a review of the eligibility criteria. In particular, we would recommend the repeal of Section 65A of the *Crimes (Sentencing Procedure) Act*, which makes offenders who have served more than 6 months full-time imprisonment ineligible for periodic detention. Apart from getting rid of this inappropriate exclusion, we do not have any suggestions as to how the eligibility criteria could be tailored to disadvantaged offenders.

What is required is not so much the tailoring of the eligibility criteria, but some modifications to the way in which periodic detention is served, the support services available to periodic detainees, and the manner in which unexplained absences are dealt with.

Question 9: What needs to be done to make periodic detention appropriate for disadvantaged offenders?

In order to maintain the integrity of periodic detention as a serious sentencing option, we acknowledge that there must be rigorous conditions as to attendance, discipline and the like.

However, we would support the re-introduction of more flexibility in relation to breaches and revocation of periodic detention orders. The current regime for dealing with breaches is very harsh and

lacks flexibility, and there is a greater likelihood of offenders having their periodic detention revoked where circumstances do not warrant such drastic action.

We would also suggest that more supervision and support should be available to periodic detainees so that disadvantaged people are more readily able to participate and comply with their obligations.

Types of community based sentences – home detention

Question 6: Is home detention a suitable community based sentencing option for the various disadvantaged groups?

Home detention is a highly appropriate sentencing option for many disadvantaged groups, including those with mobility or transport problems, those who are caring for children or other family members, and those who may be at risk in custody. Although home detention requires self-discipline, and is therefore not appropriate for highly unstable offenders, many disadvantaged offenders are able to participate in home detention because of the level of support and supervision provided by the Probation and Parole service.

Question 7: Can home detention be modified to suit the needs of various disadvantaged groups without compromising the punitive element of the sentence?

We believe that this is achievable. Even if home detainees are provided with a high level of support, programs and activities, the punitive element of home detention remains intact. The fact is that home detainees have significant restrictions on their liberty and are not free to come and go as they please.

Question 8: Can home detention be adapted for people who have no stable residence at the time of sentencing?

We believe that home detention can be adapted in this way, and would support the provision of appropriate resources so that this can be achieved. Of course, many people who lack a stable residence also have other problems that would exclude them from home detention in any event (serious mental illness, drug dependency, etc). However, where lack of housing or access to a telephone is the only barrier, we believe that appropriate assistance should be provided.

Ordinarily, the provision of housing is not the responsibility of the courts or the Department of Corrective Services. However, we suggest that some dedicated funding could be provided, or a memorandum of understanding entered into with the Department of Housing, so that potential home detention candidates could be housed.

We would also comment that home detention can be successfully completed even where the offender does not live in a conventional “home” environment. For example, one of our clients successfully completed a home detention order while he was living in a medium term youth accommodation service.

Conclusion

In summary, we believe that while some community based sentencing options are readily available to offenders from disadvantaged groups, more could be done to ensure that disadvantaged offenders have access to the full range of community based sentencing options.

Community based sentencing options are preferable to imprisonment not only from an economic point of view. They are more likely to address the root causes of offending and to reduce the risk of recidivism.

We would be happy to give evidence to the Inquiry, to discuss any matters arising from this submission, or to provide client case studies if requested. Please feel free to contact Jane Sanders at jane.sanders@freehills.com or by telephone on 9360 1847.

Yours faithfully

Jane Sanders
Principal Solicitor