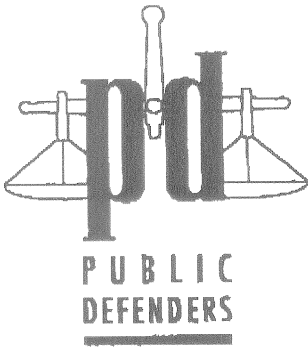


**INQUIRY INTO COMMUNITY BASED SENTENCING
OPTIONS FOR RURAL AND REMOTE AREAS AND
DISADVANTAGED POPULATIONS**

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Date Received: 11/03/2005

Theme:

Summary:



FACSIMILE

DIRECTOR OF STANDING COMMITTEE ON LAW + JUSTICE

Attention: RACHEL SIMPSON

Fax No: 9230 3371

From: PAUL WINCH

Date: 10 Mar 2005

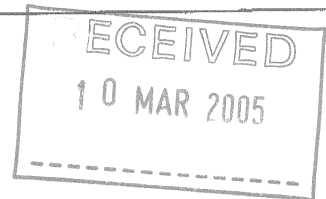
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Contact: P. Winch

on: 92683111

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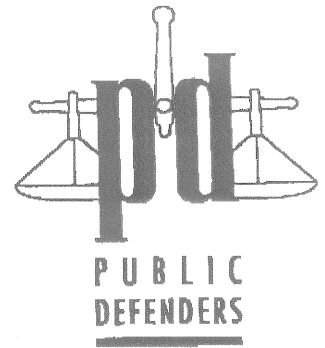
Dear Ms Simpson

Herewith my submission in
 relation to the INQUIRY INTO
COMMUNITY BASED SENTENCING
OPTIONS FOR RURAL + REMOTE
AREAS

My responses follow the
 Discussion Paper format

yours faithfully
 Paul Winch

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9 March 2005

The Hon. Christine Robertson MLC
Committee Chair
Standing Committee on Law and Justice
Legislative Council
Parliament House
SYDNEY NSW 2000

Dear the Honourable Christine Robertson,

**RE: INQUIRY INTO COMMUNITY BASED SENTENCING
OPTIONS FOR RURAL AND REMOTE AREAS AND SPECIAL
NEED/DISADVANTAGED POPULATIONS**

Thank you for your invitation to make a submission to the inquiry. A copy of my submission is attached.

A handwritten signature in black ink that reads 'Paul Winch'. The signature is written in a cursive, slightly slanted style.

PAUL WINCH
Public Defender

What is community based sentencing?

1. Apart from those identified above, what other community based sentences are available in NSW or in other Australian or overseas jurisdictions?

Probation

Probation orders are available as a stand-alone sentence in other Australian jurisdictions. For example, Part 5, Div 1 of the *Penalties and Sentences Act 1992* (Qld) provides for the making of such orders. Pursuant to s92(1)(a), upon making such an order, the offender is released under the supervision of an authorised corrective services officer for the period stated in the order.

Community based orders (CBOs)

Community based orders are non-custodial sentences which allow for punitive and rehabilitative elements to be combined. CBOs are available in Victoria (Part 3, Div 3, *Sentencing Act 1991*) and Western Australia (Part 9, *Sentencing Act 1995*). CBOs in Victoria can only be made with the consent of the offender and have six core conditions (s 37), including that the offender agrees not to commit an imprisonable offence during the period of the order and to obey all lawful instructions and directions of community corrections officers.

The court must also attach at least one of seven program conditions (s 38), which include community service, supervision, assessment and treatment for alcohol use/addiction or any other condition the court considers necessary or desirable.

Under the Western Australian model, all CBOs must contain a supervision requirement (s 65), a program requirement (s 66) or a community service requirement (s 67).

Intensive corrections orders

Queensland and Victoria also have intensive corrections orders (ICOs), which involve the offender, with his or her consent, serving a sentence of up to one year by way of intensive correction in the community for sentences of up to one year (see Part 6, *Penalties and Sentences Act 1992* (Qld) and Part 3, Subdivision 2, *Sentencing Act 1991* (Vic)). ICOs contain general requirements, including that the offender not commit another offence, must report to and receive visits from corrective services officers, and undertake community service (s 114 *Penalties and Sentences Act* (Qld); s 20 *Sentencing Act 1991* (Vic)). Under the Queensland model (s 115), there may also be a number of additional requirements, such as requiring the offender to submit to medical, psychiatric or psychological treatment, make restitution or pay compensation.

Intensive supervision orders

Intensive Supervision Orders (ISOs) are available in Western Australia pursuant to Part 10, *Sentencing Act 1995* (WA). ISOs are similar to the CBO but are subject to more stringent conditions. Supervision conditions are mandatory, and the court may also impose a program component, community service and/or a curfew.

Suspended sentences

Although technically considered and ranked as a custodial sentence, suspended sentences of imprisonment effectively function as a community sentence. In most cases, the offender completes the suspended term of imprisonment within the community without entering into

the correctional system.¹

In Canada, 'conditional sentences' are the equivalent of suspended sentences. These are available for all sentences of less than two years and have a number of compulsory conditions attached, including regular reporting to a criminal justice system supervisor. Other optional conditions, such as restitution, may be added in appropriate circumstances. One key difference between our conception of suspended sentences and the Canadian model, however, is that the latter are considered sentences of imprisonment *being served in the community*, rather than as sentences, the execution of which is suspended. In this respect they are more similar to CBOs. The United Kingdom is also proposing to introduce a similar model of sentencing in 2006/7 under its *Criminal Justice Act 2003*. The new suspended sentence order, for sentences of 28-51 weeks, may include have a number of conditions attached, including supervision, unpaid work, curfew and drug and alcohol treatment.

There are also a wide variety of schemes in place under the Commonwealth *Crimes Act 1914*, including attendance orders and recognizance release orders, and juvenile sentencing legislation across Australia (eg Youth Attendance Orders in Victoria).

2. Do you consider some/all community based sentencing options to be 'lighter' forms of punishment than imprisonment?

Although logic would dictate that a sentence served in a prison facility has by necessity deprivations which cannot (and should not) be replicated in the community setting, it is untrue to say that community based sentencing is in all cases a more lenient form of punishment. After all, offenders serving sentences in the community are still required to meet their day-to-day obligations of work, childcare and paying rent, which those serving a custodial sentence temporarily exempted from doing. It has been suggested that the disruptive effect on family life and the psychological impact of going in and out of custody under periodic detention may make the sentence more onerous than a full-time sentence.² Indeed, there is research which suggests that offenders themselves do not always prefer community sentences to serving a term of imprisonment,³ particularly when the comparison is between a short prison sentence which the offender can get over quickly, and a community sentence which may run for months or years longer.

Even if it is conceded, however, that community sentences are generally more lenient than a custodial sentence, this is consistent with the principle of parsimony which underpins our criminal justice system. There are a number of negative outcomes associated with incarceration, including but not limited to, loss of employment, housing and connection with the community, in addition to the considerable financial cost of housing prisoners (currently approximately \$60-80,000 per prisoner per year). Accordingly, if another form of punishment can meet relevant sentencing objectives such as rehabilitation, denunciation, deterrence and community protection to a similar degree as imprisonment, these are to be

¹ We note your reference to s12 bonds at p5. Suspended sentences can no longer in fact be partly suspended, following amendments in the *Crimes Legislation Amendment Act 2003*.

² Sentencing Advisory Panel (UK), *New Sentences - Criminal Justice Act 2003: The Panel's Advice to the Sentencing Guidelines Council*, 2004, para 163.

³ Wood, P and Grasmick, H, 'Toward the Development of Punishment Equivalencies: Male and Female Inmates Rate the Severity of Alternative Sanctions Compared to Prison' (1999) 16 *Justice Quarterly* 19.

favoured, even if they may be perceived as being somewhat 'lighter'.

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

The key advantage to community sentences is that they enable offenders to retain their ties with the community, and thereby may reduce their further involvement in criminal offending. By keeping offenders out of custody, this reduces their exposure to more hardened elements of the criminal community (the so-called 'university of crime'), while providing additional opportunities to fulfil deterrence, rehabilitation and retribution purposes of sentencing without full-time custody. There have been some international studies which suggest, for example, that offenders who were randomly assigned to perform community service (CSO) have better outcomes (measured in terms of re-arrest rates) than those sentenced to a short term of imprisonment.⁴

There is also the benefit to the offender's family of having him or her remain in the community, particularly the case where the offender has children. Families which are fragmented by periods of custodial imprisonment are less likely to be able to provide a healthy environment for children, and may even increase the future criminality of the offenders' children.

The chief disadvantage of community sentences is the potential for net-widening and penalty escalation, and there are numerous examples of both of these occurring in jurisdictions upon the introduction of new sentencing dispositions. Net-widening occurs when a new sentence is introduced which is intended as a less severe penalty than others already operating in the criminal justice system, and offenders are not only diverted from those more severe sentences, but also from lesser penalties. This occurred for example following the recent re-introduction of suspended sentences in NSW.⁵ Penalty escalation is where the sentencing Judge, whether consciously or not, feels that because s/he is giving the offender the benefit of a 'lesser' sentence, it is appropriate to increase the quantum of that sentence, for example, by imposing a larger fine.

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?

Well-planned and run community sentence programs are not cheap to run, but they are always significantly cheaper than the custodial alternative, when a cost benefit analysis is conducted on day-to-day running expenses. The Department of Corrective Services estimates that maximum security prison costs \$218.71, medium security \$169.35, and minimum security \$172.77 per day. By contrast, an offender managed by community offender services costs a mere \$8 per day.⁶ In addition, there is the considerable capital

⁴ Killias, M, Aebi, M, and Ribcaud, D. 'Does Community Service Rehabilitate better than Short-Term Imprisonment?' (2000) 39(1) *Howard Journal* 40

⁵ Brignell, G, and Poletti, P, 'Suspended Sentences in New South Wales' (No 29, 2003) *Sentencing trends and issues*, Judicial Commission of NSW

⁶ Department of Corrective Services, *Annual Report 2002-2003*. Home detention has elsewhere been estimated

expenditure required every time a new jail is built (which may cost up to \$100 million). NSW has recently reached a record high in prison population – this is not something to be proud of but deplored.

It is trite to note that every dollar spent on building and maintaining jails is taken away from other avenues, not only in the criminal justice system but the State budget overall. Economic reasons should never be the *sole* basis for determining the availability of sentencing dispositions (for example, reintroduction of the dealt penalty would be an unacceptable measure, even if it did save dollars). Nevertheless, it would be naïve not to take this factor into account, and we would therefore strongly advocate the concentration of resources on measures which enable offenders to remain in the community. At the same time, the resources which would otherwise have been used housing full-time prisoners can be better used to community programs which are aimed at both pre-offending circumstances (early intervention) and post-offending rehabilitation.

5. Can various community based sentencing options be linked in order to tailor them to rural and remote areas or disadvantaged groups?

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

Rural and remote areas in NSW

1. Do you think it is in the public interest to tailor community based sentencing for rural and remote areas in NSW? Why/why not?

We agree with the recent recommendation of the NSW Sentencing Council that 'priority should be given to making primary sentencing options such as periodic detention, home detention, community service and probation supervision available throughout NSW.'⁷ We would argue that it is very much in the public interest to provide appropriately developed and tailored options which are suited to rural and remote areas, so that offenders are not discriminated against at sentence by virtue of where they live. Although the vast majority of offenders (like the rest of the population) live in metropolitan areas, offenders who live in remote areas have an equal entitlement for appropriate services to be provided within their area. The fact that other services (health, public transport etc) are in practice already less adequate in remote areas than in the city means that these offenders are already dealing with

as costing \$62 per day. See NSW Sentencing Council Report. *Abolishing Prison Sentences of Six Months or Less*, 2004 (Sentencing Council Report), p93, n365.

⁷ Sentencing Council Report, p4.

the disadvantages imposed upon by their virtue of their location. This problem should not be compounded in the context of community sentences, which, as noted above, can and should be developed in consultation with the community in which they are intended to operate.

There is also anecdotal evidence to suggest that there are cases where offenders receive custodial sentences because of the lack of alternative options available in their community. This in turn creates an additional hardship, because not only are these offenders sent to jail where a metropolitan offender convicted of a similar offence would not be, but the time to be served in custody may be harsher because of the increased distance from family.

Disadvantaged populations

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?

Ideally, the Committee would consider the specific needs of each of the groups listed above, bearing in mind that an offender may face more than one of these areas of disadvantage simultaneously. In addition, the special needs of offenders with mental health problems ought to be considered, simply from the perspective of the sheer prevalence of these offenders – they have been estimated to constitute up to half of all prisoners.

If a particular area of focus were to be chosen, we would suggest that the needs of indigenous (ATSI) offenders require specific attention. The rate of over-representation of ATSI people in the criminal justice system, and especially in custody, has risen since the Wood Royal Commission's Report into Deaths in Custody. In 2003, the imprisonment rate of Aboriginal people was reported as being 16 times higher than the overall NSW rate.⁹ In 1991, when the Wood Royal Commission concluded, ATSI prisoners were just under 8 times more likely to be imprisoned than the general population.¹⁰ The Baker study also found that indigenous offenders as a whole are less likely to receive a non-custodial sentence than non-indigenous offenders in the Local Court, although they are somewhat more likely to receive CSO, and less likely to receive periodic detention, CSO or a recognizance.¹⁰

There are of course differences in indigenous patterns of offending which may account for some of the disproportion in the rate of offending (for example, indigenous offenders are more likely to commit personal violence offences, which are less likely to be considered suitable for community based sentencing)¹¹, but we would suggest that significant

⁹ This finding was based on 2001 figures. See Weatherburn, D, Lind, B, and Hua, J, 'Contact with the New South Wales Court and Prison Systems: The Influence of Age, Indigenous Status and Gender', Crime and Justice Bulletin No 78, Bureau of Crime Statistics and Research, 2003

¹⁰ Baker, J. *The Scope for Reducing Indigenous Imprisonment Rates*, Crime and Justice Bulletin No 55, Bureau of Crime Statistics and Research, 2001, p2, Table 1.

¹¹ Ibid, p4

¹² There is however some recognition of the need for culturally appropriate programs for violent indigenous offenders: Thompson, R, (ed), *Working in Indigenous Perpetrator Programs: Proceedings of a Forum*, Adelaide 4 & 5 August 1999, Ministerial Council for Aboriginal and Torres Strait Islander Affairs, Darwin, 2000.

developments could nevertheless be made in this area, especially by using community sentences instead of short terms of imprisonment. The abolition of prison sentences of less than six months has been recently reviewed,¹² and we do not intend to revisit all the relevant issues here, but it was suggested by Baker that eliminating prison terms of less than six months would achieve a 54% reduction in the number of indigenous persons sentenced to imprisonment.¹³ We would therefore exhort that increasing the availability and use of community sentences for indigenous offenders be considered a matter of the highest priority.

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

We would repeat our earlier comments in relation to remote offenders. It is imperative that a 'one size fits all' approach is not taken in this context. As noted above, Canada and the United Kingdom have or are moving to a model of sentencing whereby the sentencing Judge, who is ideally placed to deal with the offender standing before him or her, is granted significant discretion to tailor sentences for the individual needs of offenders. This is of particular importance for disadvantaged offenders, whose experience of custody will often be harsher than that of the general prison population.

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

Community service, periodic detention and home detention.

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

CSOs will often not be appropriate for older offenders or those with a disability, but we are confident this is adequately taken into consideration at present.

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

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

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

Keeping offenders out of jail will have particular benefits for female offenders, who are

¹² See Sentencing Council Report, referred to above, and Lind, B, and Eyland, *The Impact of Abolishing Short Prison Sentences*, Crime and Justice Bulletin No 73, Bureau of Crime Statistics and Research.

¹³ Baker, p8.

more likely to be the primary (or sole) caregivers for children, and ATSI offenders, who, as referred to above, are vastly overrepresented in the prison system, and whose overrepresentation has doubled since 1991. In addition, many disadvantaged groups will find full-time custody more onerous, for example, the mentally ill or offenders from non-English speaking backgrounds. They should not be doubly punished for their offending behaviour.

Eligibility for community based sentences

1. Do the eligibility criteria for the various community based sentencing options unfairly exclude some offenders from disadvantaged groups?

Section 65A of the *Crimes (Sentencing Procedure) Act 1999* provides that a periodic detention order may not be made for an offender who has previously served imprisonment for more than 6 months by way of full-time detention. The Sentencing Council recently recommended that this restriction be removed.¹⁴ It is arguable that this requirement may unfairly (further) disadvantage indigenous offenders, who are more likely to have previously served a sentence of imprisonment.

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?

There is arguably already power for the courts to take these factors into account pursuant to s21A(1)(c) of the *Crimes (Sentencing Procedure) Act 1999*, which provides that in determining the appropriate sentence for an offence, the court is to take into account, in addition to the aggravating and mitigating factors that are relevant and known to the court, 'any other objective or subjective factor that affects the relative seriousness of the offence.' We would however support stating explicitly that the disadvantage of the offender is a relevant fact for the purposes of sentencing, and especially, when considering a community based sentence, thereby recognizing the fact that disadvantaged groups will generally find jail more onerous and it may therefore be appropriate to reduce their sentence accordingly.

4. 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?

We do not believe that the legislation needs to be amended in this regard, but would suggest that better co-ordination of services and resources is required to ensure that Judges are apprised of the (hopefully, increased) availability of community sentences in remote areas.

Types of community based sentences

2. What obstacles exist to utilising good behaviour bonds in rural and remote areas? What can be done to overcome these obstacles?

We are not in a position on comment on this issue, but presume that there will generally be more limited options for rehabilitation and treatment programs in remote areas and

¹⁴ Sentencing Council Report, p4.

increased resources for such programs should be allocated.

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?

As stated above, there is a tendency in some international jurisdictions to increase judicial discretion when tailoring community sentences to the individual needs of the offender. Although this inevitably runs the risk of increasing sentencing disparity, we would suggest that this to be weighed against disadvantaged groups being discriminated against at sentence.

Community Service Orders

1. Can you comment on the availability of CSOs in rural and remote areas?

We are not in a position to comment in any detail on the availability of CSOs in remote areas or for disadvantaged groups of offenders, but would strongly support the wider use of these forms of disposition, for their emphasis on restorative justice and the increased confidence and skills with which they may equip offenders. In addition, as mentioned above, they may lead to improved outcomes, as compared with short sentences of imprisonment, and as is also noted, they provide a very economical form of sentence.

2. What needs to be done to increase the availability of CSOs in rural and remote areas?

The Discussion Paper cites the Sentencing Council's observation that there is limited community service order work available in some regional areas. Better liaison with local community representatives may give rise to more lateral thinking about the kinds of CSO work to be undertaken which meets the specific requirements of the relevant community.

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

CSOs are of particular benefit for some groups of offenders from disadvantaged groups, due to their ability to increase skills and connection with the community. In this context, we would particularly suggest that ATSI, CALD and young offenders would be ideally suited for community service work.

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

We are not in a position to advise on the details of how CSOs should operate for disadvantaged groups, but would reiterate the need for ensuring that they be appropriately tailored to meet the needs of such offenders.

6. Are any of the advantages and disadvantages of community service orders

particularly relevant to rural and remote areas or offenders from disadvantaged groups?

Offenders from rural and remote areas and juveniles often participate in criminal activity because of boredom due to the lack of alternative (legitimate) activities. If appropriately and creatively crafted, CSOs can provide a means of broadening skills bases and interest, making them particularly beneficial.

Drug Court of New South Wales and the Youth Drug and Alcohol Court

1. Would the Drug Court be beneficial in rural and remote areas in NSW?

There is anecdotal evidence to suggest that there are high levels of drug use in Western NSW (Orange/Cowra) and the Queanbeyan area. We would therefore not rule out the need for the establishment of a rural Drug Court, although it is acknowledged that the expense of running the Drug Court is almost as high as custody (\$144 per day, compared with \$152).¹⁵ One option which may be worth considering is the creation of a traveling Drug Court. We would also suggest that the restriction that the offender reside in the catchment area be removed, and greater use made of video-conferencing facilities for court hearings. If the treatment requires the offender to reside at a specific facility, there is no reason why offenders from remote areas could not travel to such places for the duration of their treatment.

2. Would it be sufficient to enable all NSW courts to refer defendants to the Drug Court in Parramatta?

As stated above, consideration should be given to piloting a traveling Drug Court. In addition, there may need to be greater use of video-conferencing facilities. Judges and magistrates in other areas would doubtless benefit from training and information about the operation of the Drug Court.

4. What barriers exist for offenders from various disadvantaged groups accessing the Drug Court? How can these barriers be overcome?

In a 2002 evaluation of the Drug Court, the Bureau of Crime Statistics and Research found that there was a need for improved services for women, Aboriginal offenders and those with a concurrent psychiatric problem.¹⁶ We are not aware of any moves which have been taken to do so, and would suggest that this is an appropriate matter for review by the Committee.

Periodic detention

2. 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?

¹⁵ Wearherburn, D, Media Release: *NSW Drug Court Evaluation: The Final Reports*, Bureau of Crime Statistics and Research, 2002.

¹⁶ *ibid.*

This is not a significant factor for the *availability* or *success* of periodic detention (PD), but may be used (inappropriately) by Judges as a reason for imposing a full-time sentence of imprisonment. In other words, offenders who are employed may receive the benefit of PD, because of the increased interruption to their lives which would otherwise ensue, even though there is no reason to deprive unemployed offenders of a similar benefit.

3. What would be the impact of the availability of periodic detention upon rural and remote areas?

Offenders who are currently ineligible for PD because of their location would be able to remain within their community, thereby presumably bringing a collateral benefit to the community. There would also be a benefit to the offender's family, who might not otherwise be able to visit the offender in prison regularly due to distance.

5. What services need to be available to support periodic detention in rural and remote areas?

Better mental health facilities.

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

As discussed elsewhere in this submission, all options which increase the likelihood of women and ATSI offenders in particular of staying out of prison (full-time custody) are greatly welcomed by the Public Defenders.

Home detention

We are not in a position to comment on the operation of home detention.

Paul M Wind
10/3/05