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Probation: An Overview

by

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EXECUTIVE SUMMARY

This briefing paper examines the sanction of **probation**, a commonly used sentence in NSW that involves some supervision and control of offenders by the Probation and Parole Service, in combination with programs to assist and rehabilitate them. Traditionally the **purpose** of probation was to ‘advise, assist and befriend’ offenders who were in more need of help than punishment. Today, the Probation and Parole Service balances the role of friend and guide of offenders with the role of controlling and monitoring them to ensure that the orders of the courts are complied with (pp 9-12).

Probation has several **advantages** over imprisonment: it promotes rehabilitation of the offender by maintaining normal family and community contacts; offenders can be required or assisted to undertake treatment programs aimed at preventing further offending; it avoids the negative effects of imprisonment; it costs much less than confining an offender in prison; and it minimises the impact of conviction upon the family of the offender. The **disadvantages** of probation are that it leaves offenders free to re-offend if they are so inclined, although the Probation and Parole Service and sentencing courts are careful to make community safety their main priority. There are measures that can reduce re-offending in some cases, but it is probably inevitable that some offenders on probation will re-offend during their period of conditional liberty (pp 1-2).

Legislative framework: In NSW, probation is not expressly recognised in legislation and its administration does not have a statutory basis. Instead, the court may order that an offender be released on a bond or recognizance with a condition that the offender is to be supervised by the Probation and Parole Service. A ‘recognizance’ or ‘bond’ is an undertaking by the offender to be of good behaviour. The courts can attach a range of conditions to the different kinds of bonds and recognizances. In the event that any conditions of the bond are breached, the offender can be required to appear before the court to be sentenced for the original offence (pp 2-6).

What does probation involve? An offender who is placed on probation is initially assessed to determine how likely he or she is to re-offend, and the level of risk that the offender poses to the community. The offender is assigned to a Probation Officer who will assist the offender to develop positive goals and skills directed to a law-abiding lifestyle, and will monitor the offender’s progress. The probation officer will work with the probationer to analyse why the offending behaviour occurred, and to draw up an individual case plan with the offender to address those areas that incline the offender towards criminal conduct. The plans take into account the needs of the offender, the type of offence, and the offender’s risk level. These factors also determine the level of contact that the offender is to have with the probation officer, in combination with the minimum reporting standards (pp 6-8).

Some statistics: In 1997 the NSW Local, District and Supreme Courts together sentenced 4,842 adults to recognizances with a supervision condition; 4,607 of these sentences were made in the Local Court. The Children’s Court made 1,828 probation orders in 1996/97. As at 30 June 1998 there were 9,786 adult offenders under the probation supervision of the Probation and Parole Service. In the Local Courts, most of the orders for recognizance with

supervision in 1997 were imposed for assaults, break and enters, other larceny offences, property damage, breach of public order, and driving with a high prescribed concentration of alcohol. In 1996-97 in New South Wales, 81% of 'community supervision' sentences were successfully completed and 19% were revoked. This figure covers offenders on community service orders, probation and parole (pp 13-14).

Reforms to the current NSW probation system have been suggested by the Department of Corrective Services and the NSW Law Reform Commission. The Department has proposed that the existing recognizances and bonds should be replaced with a new structure for imposing a single order of supervised probation, to which the courts can attach core, additional and rehabilitation program conditions. The Law Reform Commission considered that the Department's proposed reforms were not essential, but recommended some other changes to make the existing bonds more consistent, and to extend the sentencing options available to the courts (pp 15-17).

The Commonwealth and every State and Territory in Australia provides some form of order to allow conditional release for an offender under the on-going supervision of corrections officers. The statutory basis for these supervised conditional releases varies among the jurisdictions. In the last decade, several States have reshaped their community corrections legislation to replace existing orders with a single consolidated 'community-based order', with the sentencing legislation specifying the mandatory and optional conditions of the order. Other differences among the jurisdictions include the legal consequences of breaching a probation order - in some jurisdictions breach of an order is an offence in itself, carrying its own penalties, while in others, such as NSW, a breach is not a separate offence. An interesting feature of some jurisdictions is a court-ordered period of probation following imprisonment (distinguished from parole in that there is no discretion for a parole authority to approve or refuse release from prison) (pp 17-25).

Recidivism: International research studies have begun to identify the elements of community corrections programs that can reduce offending. The elements of successful programs include: targeting intensive programs at high risk offenders, while those of lower risk receive lower or minimal intervention; using treatments that address characteristics that are directly associated with an individual's criminal behaviour, rather than more general counselling or therapy; and using interventions that are skills based, designed to improve problem solving, social interaction, or self control, and which also include a cognitive component to address attitudes, values and beliefs that support offending behaviour. Few figures are available in New South Wales about the extent to which offenders re-offend during or after a period of probation supervision (pp 25-28).

1. INTRODUCTION

In every Australian State and Territory, there are a number of non-custodial sentencing options available to the courts. Each type of non-custodial sentence involves a different level of control and intervention in the offender's life, ranging from release on a good behaviour bond with no supervision, to home detention with its intensive monitoring and direction of the offender. This briefing paper examines the non-custodial sanction of probation, a commonly used sentence that involves some supervision and control of offenders in combination with programs to assist and rehabilitate them. The briefing paper looks at the nature and use of probation as a sentencing option in New South Wales and other Australian jurisdictions, and at some proposals for changes to the current probation system. This paper concentrates on adult, rather than juvenile, offenders sentenced to probation.

The United Nations has defined 'probation' as 'a method of dealing with specially selected offenders and ... consists of the conditional suspension of punishment while the offender is placed under personal supervision and is given individual guidance or "treatment"'.¹ The term 'probation' is sometimes used to mean the release of offenders into the community conditional upon their being of good behaviour, whether or not the offender is subject to ongoing supervision. This briefing paper looks at probation in its narrower meaning of releasing an offender under the personal supervision of a probation officer, to undergo some form of rehabilitation.²

Probation is a common sentencing option around the world, although it takes many different forms. Part 2.3 of this paper briefly examines how probation is used in Australia, the United Kingdom and the United States. Probation has several advantages over imprisonment which make it popular both with courts and governments. These advantages are:³

- it promotes rehabilitation of the offender by maintaining normal family and community contacts;
- probationers can be required or assisted to undertake treatment programs aimed at preventing further offending;
- it avoids the negative effects of confinement which often severely complicate the reintegration of the offender into the community.
- it costs much less than confining an offender in prison; and
- it minimises the impact of conviction upon family and dependants of the offender.

¹ United Nations, *Probation and Related Measures*, United Nations Department of Social Affairs, New York, 1951, p 4.

² New South Wales Law Reform Commission, *Sentencing*, Discussion Paper 33, April 1996, p 340.

³ Potas I, *The Legal Basis of Probation*, Australian Institute of Criminology, May 1976, p 34.

The disadvantages of probation are that it leaves offenders free to re-offend if they are so inclined, although the Probation and Parole Service and sentencing courts are careful to make community safety their main priority.⁴ There are measures that can reduce re-offending in some cases (see Part 4 of this paper), but it is probably inevitable that some offenders on probation will re-offend during their period of conditional liberty. Probation may therefore sometimes be less popular with the general public than with courts, correctional authorities, and criminologists.

2. PROBATION IN NEW SOUTH WALES

2.1 The legislative framework

The supervision of adult offenders on probation and other community corrections is the responsibility of the Probation and Parole Service. Probation officers supervise, manage and provide assistance to offenders on conditional liberty, including those on bail, probation, community service and parole. The Service's other main function is to provide advice to the courts and parole release authorities in pre-sentence and parole reports. The Service is a division of the Department of Corrective Services. It has a total staff of 600. In 1996/97 it was responsible for supervising or reporting upon over 38, 000 offenders; it provided community-based offender programs from 68 locations across New South Wales.⁵

When a court is sentencing an adult offender, the judge may request that a pre-sentence report be prepared by an officer of the Service. The report provides verified information about the offender's circumstances, an assessment of the offending behaviour, and any additional information relevant to sentencing. The report also includes an assessment of the offender's suitability for a range of community-based sentencing options. When an offender is assessed as suitable for a program run by the Service, a broad case management plan is included in the report.⁶

If a court in New South Wales decides that probation is a suitable sentence for an adult offender, there is no one single 'probation order' available to the sentencing courts - the sentencing option of probation supervision is not recognised in legislation and its

⁴ The NSW Probation and Parole Service's mission includes 'reducing the impact of crime on the community by effectively managing offenders': 'Probation & Parole Service', information pamphlet produced by the Service.

⁵ 'Probation and Parole Service: Facts and Figures', information pamphlet produced by the Service, September 1998.

⁶ Pre-sentence reports are generally well-received by the courts, with a recent Judicial Commission survey finding that the majority of judicial officers and legal representatives expressed a high level of satisfaction with pre-sentence reports: Hickey J and Spangaro C, *Judicial Views About Pre-Sentence Reports*, Judicial Commission of New South Wales, 1995 p 51. Reports were said to be clear and easy to understand, soundly based and independent, although a minority of judicial officers expressed the view that some reports were too sympathetic to offenders, accepting unverified statements or recommending inappropriate sentencing options.

administration does not have a statutory basis.⁷ Instead, the court may order that the person be released on a bond or recognizance with a condition that the offender is to be supervised by the Probation and Parole Service. A 'recognizance' is an undertaking by the offender to be of good behaviour; it is generally interchangeable with the term 'bond'.⁸ The sentencing court may attach such conditions as it sees fit to the bond.

Recognizances and bonds have been described as offering an offender 'the threat of more severe punishment and the hope of avoiding it through good behaviour'.⁹ Sentencing judges or magistrates have a wide discretion as to the conditions that may be attached to a bond. Some common conditions attached to bonds are:¹⁰

- Supervision by the Probation and Parole Service for the period of the bond, a fixed term, or 'as long as it is deemed necessary by the supervision officer'. In the last case, the Probation Officer has the discretion to dispense with reporting conditions and supervision.
- Attending drug or alcohol abuse counselling.
- Residence at a nominated rehabilitation centre.
- Payment of compensation to the victim.
- Directions as to employment and place of residence.
- Restrictions on associates, contact with nominated persons, and movement.

There are several kinds of bonds and recognizances. Depending on the power under which the bond is made, the court may impose penalties in addition to probation supervision, such as a fine, or community service, or a term of imprisonment.¹¹ Most probation supervision

⁷ NSW LRC, Sentencing Discussion Paper, n 2, p 340.

⁸ The New South Wales Law Reform Commission considered that 'recognizance' is an archaic term and that it should be replaced by the term 'bond' in order to improve understanding of the nature of the sentence: New South Wales Law Reform Commission, *Sentencing*, Report 79, December 1996, p 342.

⁹ MacKinnell I, *The Use of Recognizances*, Judicial Commission of New South Wales, Sentencing Trends No 12, May 1996, p 1.

¹⁰ NSW LRC Sentencing Discussion Paper, n 2, pp 342-343. The Commission observed that there are, no doubt, limits to conditions which ought properly to attach to bonds, referring to Warner K, 'The Dam Blockade: Some Issues Relating to Organised Protest and Bail' in Sornarajah M (ed), *The South West Dam Dispute: The Legal and Political Issues*, University of Tasmania, 1983 at 132-144.

¹¹ See NSW LRC Sentencing Discussion paper, n 2, p 343. Note that it is not possible to combine a Community Service Order with a recognizance under s 558 of the *Crimes Act 1900* (NSW), the most common type of recognizance.

conditions are attached to recognizances issued under s 558(2) of the *Crimes Act 1900* (NSW). This provision allows a court to convict a person but defer imposing a sentence, and order the offender's release on a recognizance to be of good behaviour, subject to such terms and conditions as the court sees fit. This is the most common type of bond.¹² There is no maximum time limit on the bond, although courts will always nominate a time period.¹³ It is rare for a recognizance to exceed five years.¹⁴ The most common term for supervised s 558 recognizances in the Local Courts is two years.¹⁵ In the District and Supreme Courts, the most common term for a supervised s 558 recognizance is three years.¹⁶

If the offender complies with the conditions of the bond, he or she can expect that no further sentence will be imposed when the recognizance expires. In the event that any conditions of the bond are breached, the offender can be required to appear before the court to be sentenced for the original offence. Breach of a recognizance is not an offence in itself.

Common law bond: At common law the courts have a power, with or without recording a conviction for an offence, to bind over an offender on a recognizance to be of good behaviour and, in the event that the offender breaches the conditions of the bond, to come up for sentencing if called upon. The bond may be for any length of time. This common law bond is very similar to the statutory recognizance under s 558.¹⁷ The common law power extends to allowing a court to remand an offender for a lengthy period before handing down a sentence, to enable the sentencer to assess the behaviour of the defendant during the adjournment. This form of pre-sentence release, which may include any of the usual probation conditions, is known as a 'Griffiths bond' or 'Griffiths remand'.¹⁸ If the person complies with the conditions of the bond, he or she can expect that a non-custodial sentence will be imposed when the time for sentencing arrives.¹⁹

It is also possible, although not common, for a probation condition to be attached to other types of bonds and recognizances in New South Wales. These include:

¹² For the period January 1990-June 1995, s 558 bonds represented 66% of all bonds ordered by the Local Courts, and 94% of all bonds ordered by the higher courts: MacKinnell, n 9, p 4.

¹³ NSW LRC Sentencing Discussion Paper, n 2, p 344.

¹⁴ MacKinnell, n 9, p 3.

¹⁵ *Ibid*, p 3.

¹⁶ *Ibid*, p 4.

¹⁷ See NSW LRC Sentencing Discussion Paper, n 2, pp 345-6; *Griffiths v The Queen* (1977) 137 CLR 293.

¹⁸ After the decision *Griffiths v The Queen* (1977) 137 CLR 293. See NSW LRC Sentencing Discussion Paper, n 2, pp 345-346.

¹⁹ Schurr B, *Criminal Procedure (NSW)*, LBC Information Services, [28.150]. A Griffiths remand is not a punishment in itself: *R v Tindall* (1994) 74 A Crim R 275.

Conditional discharge: Under s 556A of the *Crimes Act 1900*, where an offence has been proved, a court may dismiss the charge or may conditionally discharge the offender on a bond to be of good behaviour for a specified period (up to three years), and to appear for conviction and sentence when called upon. This provision is often used for first offenders. If the offender complies with the conditions of the bond, no conviction will be recorded. If any conditions of the bond are breached, the offender can be required to appear before the court to be convicted and sentenced for the original offence.²⁰

Imprisonment plus recognizance: Section 432(2) of the *Crimes Act 1900* allows a court, when imposing a sentence of imprisonment for a misdemeanour, to require in addition that the offender enter into a good behaviour bond for a maximum of three years. This provision is not commonly used.²¹

Recognizance in Local Court: Section 554(2) of the *Crimes Act 1900* allows the Local Court to order an offender to enter a recognizance to be of good behaviour for between one and three years in addition to, or instead of, a fine or imprisonment of up to 12 months. This provision is not commonly used.²²

To put a sentence of probation into context as an intermediate non-custodial sanction, the range of non-custodial sentencing options for adult offenders in New South Wales is set out below, roughly in order of increasing intervention in an offender's life:

- *Absolute discharge:* where an offence has been proved, the court may decide simply to dismiss the charges against an offender. There is no conviction and no further consequences for the offender.²³
- *Conditional discharge:* a court may discharge an offender without conviction, on condition that the offender be of good behaviour, and subject to any other conditions that the court sees fit to impose.²⁴
- *Fine:* a court may order that an offender pay a specified amount of money to the State.
- *Compensation or restitution:* a court may order an offender to make restitution or compensation to a victim, as a sentence in itself²⁵ or as a condition of a recognizance.

²⁰ *Crimes Act 1900* s 556B, 558(6).

²¹ NSW LRC Sentencing Discussion Paper, n 2, p 345.

²² *Ibid.*

²³ *Crimes Act 1900* (NSW) s 556A.

²⁴ *Crimes Act 1900* (NSW) s 556A.

²⁵ *Victims Compensation Act 1996* (NSW) s 71.

- *Recognizance without supervision*: where a court convicts an offender, the court may order that the offender be conditionally released on entering into a recognizance to be of good behaviour, and subject to any other conditions that the court sees fit to impose.
- *Recognizance with supervision (Probation)*: a court may order that, as a condition of a recognizance, an offender is to be supervised by the Probation and Parole Service.
- *Community service order*: where a person has been convicted of an offence punishable by imprisonment, the court may, instead of sentencing the offender to imprisonment, make an order requiring the person to perform community service work.²⁶
- *Periodic detention*: where an offender is sentenced to a term of imprisonment of between three months and three years, the sentencing court may order that sentence to be served by way of periodic detention, which generally requires the offender to remain in custody for two consecutive days of each week for the duration of the sentence.²⁷
- *Home detention*: where an offender is sentenced to imprisonment for 18 months or less, the court may order the offender to serve the sentence by way of home detention, if the offender meets certain conditions. Offenders on the scheme are subject to intensive surveillance by way of electronic monitoring devices, visits from supervising officers and drug and alcohol testing.²⁸

2.2 What does probation involve?

When an offender is placed on probation, he or she is initially assessed by the Probation and Parole Service to determine the offender's risk level - that is, both the risk of re-offending, and the risk the offender poses to the community. The assessing officer uses his or her own judgement to gauge the offender's risk level. To assist officers in this process, the Probation and Parole Service is currently evaluating the usefulness of a risk assessment instrument known as a risk/needs inventory. This is in essence a kind of questionnaire used to gather information about factors that have been found, after extensive research, to be significant in predicting whether further offending is likely. Areas investigated by the instrument include the nature of the offender's criminal history, education, employment, financial background,

²⁶ *Community Service Orders Act 1979* (NSW).

²⁷ *Periodic Detention of Offenders Act 1981* (NSW).

²⁸ *Home Detention Act 1996* (NSW). For more information on home detention see H Figgis, *The Home Detention Bill 1996: Commentary and Background*, NSW Parliamentary Library Briefing Paper, No 20/96.

family and marital history, addiction and health problems.²⁹

The offender will be classified as being of high, medium or low risk following assessment, and the Probation and Parole Service will tailor the offender's case management program accordingly. The offender is assigned to a Probation Officer who will assist the offender to develop positive goals and skills directed to a law-abiding lifestyle, and will monitor the offender's progress. The probation officer will work with the probationer to analyse why the offending behaviour occurred, and to draw up a individual case plan with the offender to address those areas that incline the offender towards criminal conduct. The plans take into account the needs of the offender, the type of offence, and the risk to the community. These factors also determine the level of contact that the offender is to have with the probation officer, in combination with the minimum reporting standards.³⁰

The offender can be required to report to the Probation Officer as frequently as the Officer directs, or the Officer may visit the probationer's residence and make enquiries in the community to confirm whether the probationer is meeting the conditions of the order.³¹ It is common for a probation condition to provide that the offender is to report as long as it is deemed necessary by the supervising officer, and that if the officer sees fit then at his or her discretion reporting conditions and supervision can be dispensed with. For example, the recognizance may be for three years but the supervising officer may only consider it necessary that the offender report for 18 months, the offender's progress being such that reporting is no longer required.

Offenders can be required by the sentencing court to attend an Attendance Centre for a specified number of hours a week, or to undertake other specified programs. Attendance Centres offer programs designed to reduce offending behaviour, such as aggression/anger management, domestic violence, drink driving, alcohol and other drugs, and personal development.³² There are also programs that cater specifically to indigenous offenders, such as the Aboriginal Cultural Heritage Program at Albury. In 1996/97 the Department of Corrective Services presented 58 offender training and development programs to offenders on various community-based sentences (including community service, probation and parole).³³ The Probation and Parole Service is endeavouring to involve a variety of community agencies in the provision of community-based correctional services. Funding has been supplied to a number of non-government agencies where an identified gap in service

²⁹ Bidgood D, 'Community Based Orders: Managing Offenders in the Community', *Proctor*, April 1998, 20 p 21. The risk/needs inventory model that is being tested in New South Wales, called the Level of Service Inventory (Revised) (LSIR), was developed in the United States, and has been widely used in the United States, and also in the United Kingdom and some other Australian States.

³⁰ NSW Department of Corrective Services, *Annual Report 1996-97*, p 29

³¹ 'Probation & Parole Service', information pamphlet produced by the Service.

³² NSW Department of Corrective Services, *Annual Report 1996-97*, p 29

³³ *Ibid*, pp 28-29.

provision exists, for example in relation to Vietnamese offenders.³⁴

If an offender breaches the conditions of the recognizance, and the breach is a non-trivial or persistent one, the probation officer will report the breach to the sentencing court, which can call the offender up for sentence. The court can modify the conditions of the recognizance, or revoke the recognizance and sentence the offender for the original offence in respect of which the offender was released on recognizance. The court can only impose on the offender a sentence that is available in respect of the original offence. In contrast, some other Australian jurisdictions provide that breach of a probation order is an offence in itself, carrying its own penalty that can be imposed in addition to, or instead of, a sentence for the original offence. This allows the sentencing court to punish an offender for a blatant breach of a probation order.³⁵

Juveniles: The Children's Court can impose an order for probation on a juvenile offender (a person under the age of 18 years) under the *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1)(e), which allows a court to make an order releasing the juvenile on probation, on such conditions as the Court may determine, for up to two years. A juvenile offender can also be released on a bond to be of good behaviour, subject to conditions ordered by the Court, for up to two years: s 33(1)(b). Both bonds and probation orders can be ordered to be supervised or unsupervised. There is little difference between probation and release on a recognizance, except that probation is a more serious sentence - a juvenile who breaches a probation order has a greater probability of receiving a custodial sentence.³⁶ Juvenile offenders sentenced to probation are supervised by officers of the Department of Juvenile Justice, not by the Probation and Parole Service. The Department of Juvenile Justice runs a range of programs for young offenders designed to deal with the causes of offending behaviour, including intensive counselling, a Sex Offender Program, a Violent Offender Program and a Forensic (Mental Health) Program where offenders are assessed by psychologists.³⁷

³⁴ Fourth Conference of Commonwealth Correctional Administrators, *Australian Overview Paper*, Brisbane, 25-29 November 1996.

³⁵ The penalty for breach of a probation order is usually a fine, although in Tasmania a sentence of three months imprisonment can be imposed: *Sentencing Act 1991* (Vic) s 123; *Penalties and Sentences Act 1992* (Qld) s 123; *Sentencing Act 1995* (WA) s 131; *Sentencing Act 1997* (Tas) s 42.

³⁶ Juvenile Justice Advisory Council of NSW, Green Paper, *Future Directions for Juvenile Justice in NSW*, February 1993, p 159.

³⁷ Department of Juvenile Justice, *1996-97 Annual Report*, p 16. For more information about juveniles in the criminal justice system, see F Manning, *Juvenile Justice in NSW: Overview and Current Issues*, NSW Parliamentary Library Briefing Paper No 9/96.

2.3 Purposes of probation

Traditionally, the aim of probation has been to reform offenders, rather than to punish them:

Probation reflects the ‘welfare’ approach to criminal justice and emphasises the need to treat offenders as individuals. Probation evolved to facilitate those individuals whose offending is regarded as being more the outcome of social disadvantages or disorganisation. They often lack the social, economic, emotional and family supports which protect or prevent them from developing criminal associations and then criminal behaviour. The welfare model regards rehabilitation as the best protection for the community when it is applied to those offenders who have the capacity to be rehabilitated.³⁸

Probation supervision began in the 19th century in the United States and the United Kingdom as an initiative of church-based voluntary groups interested in the reform of criminals. In England and Wales, probation has its origins in the work of police-court temperance missionaries of the late 19th century, who provided informal supervision of offenders at the request of magistrates.³⁹ In the United States, probation developed from the work of a temperance activist in Boston in the 1840s, who persuaded judges to release drunkards, and later some other minor offenders, into his care.⁴⁰

Probation as we know it today thus began with courts using their common law powers to bind over offenders into the care of charitable volunteers. A professional probation service based on statute did not begin to develop until the late nineteenth and early twentieth centuries. These charitable origins have had a strong influence on the nature of probation:

The roots of current probation work practice can be found in the spirit of voluntarism, often underpinned by a strong Christian conviction, which characterised much social work at the turn of the century. The guiding purpose of probation was, as originally conceived, to ‘advise, assist and befriend’ offenders who were in more need of help than punishment. Probation orders were not penalties in themselves, but alternatives to punishment; and the purpose of probation was to give offenders the chance to respond to a bit of straightforward commonsensical advice and guidance.⁴¹

In New South Wales, forms of conditional liberty ‘had been an essential tool in the

³⁸ Tulett J, ‘The Changing Role of Probation in South Australia’, in McKillop S (ed), *Keeping People out of Prison*, Australian Institute of Criminology Conference Proceedings No.11, 1991 p 129.

³⁹ Hamai K, Villé R, Harris R, Hough M, Zvekic U (eds), *Probation Round the World: A Comparative Study*, Routledge, London, 1995, pp 32-34, 102.

⁴⁰ *Ibid*, p 28.

⁴¹ *Ibid*, pp 102-103.

administration of justice from the beginning of the colony'.⁴² Legislation to permit the conditional release on recognizance of first offenders was enacted in all six colonies prior to Federation. Normally there was no supervision, but where there was it was usually undertaken by police officers.⁴³ Probation was given a statutory basis in New South Wales in 1894,⁴⁴ but a professional probation service was not established until 1951, when the Adult Probation Service was established with five officers. This post-war period saw governments around the world begin to take a serious interest in the use of community corrections and the diversion of offenders from prison.

As community-based sentences became an established, important part of the corrections system, some conflicts arose between the welfare-oriented role of 'assisting and befriending' probationers, and the responsibility of probation officers to control their charges and to work with the police and the courts to enforce the law. These conflicts were particularly evident in the United Kingdom, where there were concerns in the 1970s and 1980s that some probation officers had begun to identify themselves too strongly as 'friends' rather than 'supervisors' of probationers.

Since then, however, the focus of probation in the UK has been redirected towards controlling as well as assisting probationers. National Standards were established by the Home Office to set minimum standards relating to the commencement, supervision plan, frequency of contact and enforcement of community sentences.⁴⁵ A recent House of Commons report found that probation services in the UK were succeeding in efforts to balance the role of 'guide, philosopher and friend' of the offender with the role of 'taskmaster and representative with a duty to make sure that the rules the court has laid down are complied with'.⁴⁶ The report found that 'the performance of the probation service has improved since the 1970s, when it appeared to have lost sight of its primary duty to protect society'.⁴⁷ The move towards a more controlling approach in the UK coincided with continuing growth in the number of offenders on probation, and an increase in the

⁴² Hayes F, 'Probation and Parole - Part I: The First 25 Years' in Cullen B, Dowding M and Griffin J, *Corrective Services in New South Wales*, Law Book Company Ltd, 1988. See also Tulett, 'The Changing Role of Probation in South Australia', n 38; Hamai et al, n 39, pp 72-73.

⁴³ Hamai et al, n 39, p 35.

⁴⁴ *First Offenders Probation Act 1894* (NSW)

⁴⁵ *National Standards for the Supervision of Offenders in the Community*, Home Office, 1992 (revised and reissued in 1995).

⁴⁶ United Kingdom House of Commons Select Committee on Home Affairs, *Alternatives to Prison Sentences*, Third Report, 1998, para 106, quoting Lord Bingham, the Lord Chief Justice.

⁴⁷ Select Committee, *Alternatives to Prison Sentences*, n 46, para 109; see also Hamai et al, n 39, p 103.

proportion of probationers who are serious offenders.⁴⁸

The 'welfare' and 'control' approaches can be reconciled to some extent, as Ashworth points out in his account of the changes in probation that have occurred in the United Kingdom:

The new emphasis lies on enforcement of the legal requirements of the order, so as to convince the courts that probation is realistic and demanding... Some officers regretted what they saw as a move towards a more punitive probation order, away from the caring tradition of the service. But this was not the universal reaction. Many probation areas had already developed schemes of this kind... Some have seen in this an irreconcilable conflict between social work and crime control, between the probation officer as helper or counsellor and as authority figure. Yet this may be to overlook the point that, from its inception, probation work has been carried on as part of a court order. Moreover, Harris⁴⁹ goes further and argues that 'the application of social work values is actually dependent on the client accepting the necessity of social control.' It is therefore right that probation practice should involve reminding offenders of their legal obligations as well as offering help with any practical or personal problems... There are those who contend that this movement involves abandoning the traditional concerns of the probation service for treating individuals according to their needs, in favour of an ideology of self-discipline and self-reliance which is, in practice, beyond many of the people placed on probation... It can also be argued that probation's emphasis on obligations and practical help is congruent with a new legalism and with respect for the individual autonomy of offenders, in a way that the previous 'diagnosis and treatment' approach was not... The framework of the probation order is therefore punitive, but its content may be rehabilitative.⁵⁰

The differing 'social work' and 'control' approaches to probation have not caused the same problems in Australian probation services as in the United Kingdom. Probation in Australia evolved in a slightly different direction than its British ancestor - it was seen as a form of penalty in itself, with a rehabilitative purpose, rather than as a replacement for punishment.⁵¹ Australian probation services have taken a more or less pragmatic, non-ideological approach

⁴⁸ Mair G and May C, *Offenders on Probation*, Home Office Research and Statistics Directorate Report, Research Study 167, 1997 p 1. Probation in the UK is the most commonly used community sentence: House of Commons Select Committee, *Alternatives to Prison Sentences*, n 46, para 23. In NSW, in contrast, community service is a marginally more common sentence for adult offenders than probation - see part 2.4 below.

⁴⁹ Harris R, 'Social Work in Society or Punishment in the Community?' in Shaw R and Haines K (eds) *The Criminal Justice System: a Central Role for the Probation Service*, University of Cambridge Institute of Criminology, 1989, p 26.

⁵⁰ Ashworth A, *Sentencing and Criminal Justice*, Weidenfeld and Nicolson, London 1992 pp 261-262.

⁵¹ See Hamai et al, n 39, p 72; Potas, n 3, pp 33-35.

to probation, establishing during the 1960s and 1970s a balance between assisting offenders and controlling them. The punitive aspects of probation were noted by the New South Wales Law Reform Commission in its 1996 sentencing discussion paper:

Supervised probation has the advantages of minimising the harmful effects of imprisonment both on offenders and their dependants, promoting rehabilitation by maintaining community contacts and allowing for remedial intervention in a cost-effective way. It is not a soft option. A person on probation must maintain his or her family and employment obligations, make any agreed restitution and accept the supervision of a probation officer, all with the threat of further sanction. A probation period is almost always longer than the period of imprisonment which may have been imposed for the same offence.⁵²

In the last decade, several Australian jurisdictions have reshaped their community corrections legislation and systems to ensure that these sentences are perceived as a credible and effective sentencing option. These changes have taken two forms. The first is the replacement of existing orders with one streamlined ‘community-based order’, with the sentencing legislation clearly specifying the mandatory and optional conditions of the order.⁵³ The second change has been the introduction of more punitive, intensive kinds of probation, in addition to ‘regular’ probation - such as intensive corrections orders or home detention.

Turning to the United States, probation services in the US tend to take a ‘control’ rather than ‘social work’ approach. Probation systems vary enormously in the United States, across county, city, state and federal governments, so that it is difficult to identify defining characteristics of probation in the United States. Nevertheless, the point has been made that US probation has a correctional orientation geared to law enforcement. ‘American probation early assumed characteristics which distanced it from its original humanitarian mission, rendered it consonant with a cultural character in which caring for criminals was less acceptable than in those continental European countries where social explanations of crime predominated...’⁵⁴ In the United States, probation officers have generally lower status than their British counterparts. Their training varies widely, and may have no connection with social work. They have much higher caseloads, and hence tend to have less individual contact with each offender in their charge. In many jurisdictions probation officers carry guns.⁵⁵

⁵² NSW LRC Sentencing Discussion Paper, n 2, p 341. See also Victorian Sentencing Committee, *Sentencing: Report of the Victorian Sentencing Committee*, vol 1, Victorian Attorney-General’s Department, April 1988, pp 350-352, where the Committee observed that meeting all the requirements of a community based order on top of all the other social, financial and other commitments of daily life can cause extreme hardship to offenders.

⁵³ See the sentencing legislation in Victoria, Western Australia, Queensland and Tasmania, summarised in Part 3 of this briefing paper.

⁵⁴ Hamai et al, n 39, p 30.

⁵⁵ Ibid, pp 30-31.

2.4 Some statistics

As noted in the introduction to this briefing paper, supervised probation on a recognizance is a fairly common sentence, particularly in the Local Courts and the Children's Court. In 1997 the Local, District and Supreme Courts together sentenced 4,842 adults to recognizances with a supervision condition; 4,607 of these sentences were made in the Local Court. The Children's Court made 1,828 probation orders in 1996/97.⁵⁶

The following table sets out the sentencing outcomes for adult offenders of matters proven in 1997, showing the comparative use of probation ('recognizance with supervision') and other sentencing options.⁵⁷

Outcomes for proven matters	Local Court		Higher Courts	
	Number	%	Number	%
Imprisonment	5,881	6.4%	1,588	61.8%
Home detention	71	0.08%	16	0.6%
Periodic detention	1,333	1.4%	246	9.6%
Community service	4,830	5.3%	276	10.8%
Recognizance with supervision	4,607	5%	235	9.2%
Recognizance without supervision	8,135	8.9%	143	5.6%
Recognizance without conviction	6,390	7%	13	0.5%
Fine	53,741	58.7%	10	0.4%
No conviction	5,765	6.3%	15	0.6%
Other	774	0.8%	25	1%
Total proven matters	91,527		2,567	

In the Local Courts, most of the orders for recognizance with supervision in 1997 were imposed for assaults, break and enters, other larceny offences, property damage, breach of

⁵⁶ NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 1997*.

⁵⁷ *Ibid*, pp 14-15, 68-69.

public order, and driving with a high prescribed concentration of alcohol.⁵⁸ In the District and Supreme Courts in 1997, orders for recognizance with supervision were most commonly imposed for assault, robbery, and break and enter.⁵⁹

The number of adult offenders supervised on a probation order has remained fairly steady in New South Wales over the past few years. As at 30 June each year, the number of offenders on probation has been.⁶⁰

1994	1995	1996	1997	1998
9, 954	9, 196	9,853	9, 796	9, 786

Recognizance with supervision as a proportion of total sentences has remained fairly steady in the Local Courts from 1990 to 1998, but decreased slightly in the District and Supreme Courts. For juvenile offenders, probation seems to be declining in popularity as an order: from 1991/92 to 1996/97, probations orders as a percentage of outcomes of charges laid declined from 17.2% to 11.3%.⁶¹

Completion of orders: In 1996-97 in New South Wales, 81% of community supervision sentences (covering offenders on community service orders, probation and parole) were successfully completed; 19% were revoked.⁶²

Costs: How much does it cost to keep an offender on probation? The NSW Council on the Cost of Government has calculated the cost of community-based supervision (which includes probation, community service and parole) as on average \$5.34 per day per adult offender.⁶³ Across other States and Territories the costs of community supervision vary considerably, from \$3.83 per day in Queensland to \$11.62 in the Northern Territory.⁶⁴

2.5 Proposed reforms

⁵⁸ Ibid, pp 14-15.

⁵⁹ Ibid, pp 68-69.

⁶⁰ 'Probation and Parole Service: Facts and Figures', Information pamphlet produced by the Service, September 1998.

⁶¹ Bureau of Crime Statistics and Research, *Criminal Courts Statistics 1997*, n 56, p 46.

⁶² NSW Council on the Cost of Government, *Service Efforts and Accomplishments - Law, Order and Public Safety*, 1998.

⁶³ Ibid.

⁶⁴ Steering Committee for the Review of Commonwealth/State Service Provision, *Report on Government Services*, 1998, vol 1, pp 429, 454.

The Department of Corrective Services has argued that the current system of recognizances should be streamlined by abolishing the existing provisions and replacing them with a new structure for imposing a single order of supervised probation.⁶⁵ There would be three types of conditions attached to the order: core, additional and program conditions. ‘Core’ conditions would relate to accepting supervision and guidance, reporting to the Probation and Parole Service, and being of good behaviour. ‘Additional’ conditions imposed by the courts would include those commonly attached to bonds to address particular aspects of offender behaviour or rehabilitation, such as accepting directions as to residence, associates and treatment. ‘Program’ conditions would relate to specified Probation and Parole Service Offender programs, such as the existing Attendance Centre Program, and the Drug and Alcohol Intervention Program. The Department of Corrective Services also proposed that there be an ‘Order for Supervision without Conviction’ to replace supervised probation attached to bonds now given under s 556A of the Crimes Act.⁶⁶

These proposals if implemented would bring NSW into line with several other Australian jurisdictions, such as Victoria, Queensland, Western Australia and Tasmania, that use a single community-based order with some compulsory and some optional conditions. The orders by which courts may release offenders under probation supervision in each State and Territory are described in Part 3 of this briefing paper.

The NSW Law Reform Commission had doubts about the potential effects of abolishing the existing bonds and replacing them with generalised orders. In its final report, the Commission concluded that there is no need to restructure probation orders into a single statutory scheme.

We recognise that a consolidated scheme offers certain benefits such as giving greater simplicity and consistency to this sentencing option, and greater convenience to the administration of probation by the Probation and Parole Service. However, the current range of orders provides courts with a great amount of flexibility to impose the type of order and conditions which are the most appropriate in the circumstances of a particular case. The courts are also familiar with this range of orders. For these reasons, the Commission does not recommend consolidation of the various types of probation orders into a single statutory scheme.⁶⁷

Nevertheless, the Commission had several recommendations to improve the operation of the conditional release system:

- ***Time limits on bonds:*** At present, there is considerable variation in the time limits

⁶⁵ See Brown R, *Sentencing Review 1994*, NSW Attorney General’s Department, June 1994 pp 34-35; NSW LRC Sentencing Discussion Paper, n 2, pp 346-348.

⁶⁶ Other orders to cover conditional release without supervision, with or without a conviction, would be necessary to complete an order structure complying with this proposal: NSW LRC Sentencing Report, n 8, p 348.

⁶⁷ *Ibid*, p 84.

for different types of bonds.⁶⁸ The NSW Law Reform Commission considered that there should be a uniform maximum time limit of five years for all bonds.⁶⁹

- ***Restrictions on compensation or restitution conditions:*** Currently it is possible for a court to include payment of compensation or restitution to a victim as a condition of a bond. The Commission noted that as a result, if offenders are not able to pay, they risk being brought before the court for breach of a condition of the bond and re-sentenced for the original offence. The Commission considered that it is unjust for offenders to be re-sentenced and possibly imprisoned because they lack the financial resources to comply with a bond. However, the Commission also noted the possibility that some offenders would receive harsher sentences if the option of ordering compensation or restitution as part of a bond was not available to the courts. The Commission recommended that where a sentencing court wishes to attach an order for compensation or restitution as a condition to a bond, the court must give reasons why this is an appropriate condition to impose, and must be satisfied that the offender will be able to comply with this condition.⁷⁰
- ***Statutory power to adjourn sentencing:*** The Commission suggested that the current common law Griffiths bond should be replaced by a statutory power that would allow a sentencing court to adjourn sentencing for a stated period to assess the offender's behaviour while on release and subject to appropriate bail conditions.⁷¹ In the Commission's view, there is too much complexity and uncertainty surrounding common law bonds; to simplify this area, bonds should only be imposed pursuant to statutory power. A statutory provision should therefore be enacted to embody the existing common law Griffiths bond. Common law bonds have been expressly abolished in Victoria and Tasmania.⁷²
- ***Statutory power to suspend a sentence:*** Until 1974, courts in New South Wales had a power to impose a sentence, but suspend its operation for a specified period of time while the offender was released on specified conditions. If no breach occurred, the offender was discharged from the sentence. If the offender breached any of those conditions, he or she might be liable to serve the original sentence. Suspended

⁶⁸ As noted earlier, the time limit for s 556A and s 432 bonds is three years, while for s 558 and common law bonds there is no time limit. Section 554 bonds are for between one and three years.

⁶⁹ NSW LRC Sentencing Report, n 8, pp 86-87. Note that in 1988 the Australian Law Reform Commission recommended a much shorter two year maximum period for conditional releases: *Sentencing*, Report No. 44, AGPS, 1988 p 72.

⁷⁰ NSW LRC Sentencing Report, n 8, pp 88-90.

⁷¹ *Ibid*, pp 85-86.

⁷² *Sentencing Act 1991 (Vic)* s 71; *Sentencing Act 1997 (Tas)* s 101.

sentences were abolished in 1974.⁷³ In its report, the NSW Law Reform Commission considered the arguments for and against suspended sentences, ultimately concluding that the advantages of adding suspended sentences to the range of available sentencing options outweigh the objections.⁷⁴

3. OTHER JURISDICTIONS

Every Australian State and Territory, as well as the Commonwealth Government, provides some form of order to allow conditional release for an offender under the on-going supervision of corrections officers. These orders are described below, along with some figures about the use of these orders in each jurisdiction. It must be noted, however, that these figures are not directly comparable, because each jurisdiction is different in both the nature of the community-based orders available, and in the methods used to collect statistics. For example, the figures may or may not include offenders under interstate or Commonwealth probation orders.

The Australian Bureau of Statistics National Corrective Services Statistics Unit is currently developing standards for a new national community-based corrections collection. This would make it possible to directly compare community corrections statistics for each State and Territory. It is planned that trial figures covering community corrections such as parole, probation, community service, home detention and work release will be produced in June 1999.⁷⁵ National Correctional Indicators are also being developed by the relevant State and Commonwealth authorities for the Council of Australian Governments as part of an annual review of Commonwealth/State service provision.⁷⁶

3.1 Victoria

Probation orders were available to the courts in Victoria until 1986, when probation, attendance centre and community service orders were abolished and replaced by a single order called a **Community Based Order** (CBO).⁷⁷ Where a court convicts an offender, the court may make a CBO of up to two years. A CBO can be combined with a sentence of imprisonment of up to three months. Each CBO must consist of mandatory 'core'

⁷³ The abolition followed a recommendation by the NSW Criminal Law Committee that the common law bond was superior to the suspended sentence system, which was apparently too restricted: see NSW LRC Sentencing Discussion Paper, n 2, pp 352-353, referring to the Criminal Law Committee, *Report of the Criminal Law Committee on Proposed Amendments to the Criminal Law and Procedure*, September 1973, p 15.

⁷⁴ NSW LRC Sentencing Report, n 8, pp 91-94.

⁷⁵ Australian Bureau of Statistics, *Crime and Justice Statistics*, Issue 5, October 1998, p 3.

⁷⁶ NSW Department of Corrective Services Research & Statistics, *Research Program 1998-99*, p 8.

⁷⁷ *Penalties and Sentences Act 1985* (Vic) s 29 (repealed); see now *Sentencing Act 1991* (Vic) s 36-48.

conditions, and at least one optional '*program*' condition. The *core* conditions include: reporting to and receiving visits from a community corrections officer; notifying an officer of change of address; not leaving Victoria without permission; and obeying instructions of the corrections officer. There is a range of available *program* conditions, including supervision by a community corrections officer. The purpose of a supervision condition is 'to allow for the rehabilitation of an offender in the community and the monitoring, surveillance or supervision of an offender who demonstrates a high risk of offending' (s 40). Other possible program conditions include: community service; attending educational or other programs; undergoing assessment and treatment for alcohol or drug addiction; and medical, psychological or psychiatric assessment and treatment. Breaching a community-based order without reasonable excuse is an offence.

There are other community-based sentences to which a supervision condition may be attached:

- **Intensive Correction Order (ICO):** where a court convicts a person of an offence and imposes a sentence of imprisonment of up to one year, the court may order that the sentence be served by way of intensive correction in the community (ss 19-26). The maximum length of the order is one year. It is more punitive than a CBO. Each ICO consists of mandatory 'core' conditions and optional 'special' conditions that may be ordered by the court. The core conditions are the same as those for a CBO, with the addition that the offender must spend at least 8 hours a week performing unpaid community work, and must report to a community corrections officer at least twice a week for the duration of the order. A 'special' condition requires the offender to attend prescribed programs that are designed to address the personal factors that contribute to the offender's criminal behaviour.
- **Combined Custody and Treatment Order (CCTO):** if a person is convicted by a court of an offence and the court is satisfied that drunkenness or drug addiction contributed to the commission of the offence, and is considering sentencing him or her to a term of imprisonment of less than 12 months, the court may impose a sentence of imprisonment of up to 12 months and order that not less than six months of that sentence be served in custody and the balance be served in the community on conditions attached to the order (ss 18Q-18W).

The Community Corrections Officer to whom an offender is assigned for supervision will develop with the offender an Individual Management Plan that aims to encourage offenders to recognise and take responsibility for their offending behaviour, and develop education, social, living and employment skills. Community-based corrections are administered by Community Correctional Services, which is part of CORE, a Service Agency within the Department of Justice that provides a range of custodial and community-based correctional services to the Department. As at 10 December 1998, there were 642 ICOs and 2757 CBOs

with a supervision condition in force in Victoria.⁷⁸

3.2 South Australia

In 1988 the *Criminal Law (Sentencing) Act 1988* (SA) established a system of statutory bonds, to which probation supervision may be attached as a condition. The available bonds for adult offenders are:

- **Suspension of imprisonment:** where a court has imposed a sentence of imprisonment on a defendant, the court may suspend the sentence on condition that the offender enter into a bond to be of good behaviour and to comply with any other conditions of the bond (s 38). If the person complies with the conditions of the bond, the sentence of imprisonment is extinguished when the bond expires.
- **Discharge without sentence:** where a court finds a person guilty, it may discharge the person with or without recording a conviction and without imposing a penalty, on condition that the defendant enter into a bond to be of good behaviour and to comply with any other conditions of the bond (s 39).

The maximum term for bonds is three years. Conditions which may be attached to a bond include: supervision by a probation officer; place of residence; persons with whom the offender is to reside; community service; medical or psychiatric treatment; abstaining from drugs or alcohol; restitution or compensation; and attendance at specified education programs. The sentencing legislation sets certain conditions that apply to every supervision order, such as a requirement that the offender must obey the lawful directions of the probation officer (ss 48, 49).

Community corrections in South Australia are administered by the Department for Correctional Services. Offenders under probation orders are supervised by probation and parole officers located in Community Correctional Centres. The Department emphasises rehabilitation as well as supervision: ‘Staff working with offenders under probation use social work knowledge, values and skills, together with specific skills in assessing offenders, utilising the risk needs instrument to examine offending patterns. Case plans are then developed with the offenders to assist them to take responsibility for their offending behaviour and to overcome that behaviour’.⁷⁹

Offenders are expected to participate in programs and services aimed at reducing offending. The probation and parole services conduct a range of programs such as Cognitive Skills, Domestic Violence, Anger Management, Drug and Alcohol Abuse, and Literacy and Numeracy; they also refer offenders to programs offered by other agencies, such as the

⁷⁸ Information provided by the Office of the Correctional Services Commissioner, Victorian Department of Justice. The figures for community based orders include CBOs combined with imprisonment, Commonwealth bonds, and interstate probation-type orders.

⁷⁹ Department for Correctional Services, *Annual Report 1996/97*

residential programs offered by the Drug and Alcohol Services Council. There were 2040 offenders under probation orders as at 30 June 1998.⁸⁰

3.3 Western Australia

Western Australia reformed its sentencing laws in 1995, aiming to simplify sentences and to provide a greater range of sentencing options. The *Sentencing Act 1995* (WA) provides several methods by which a court can order an offender to be released into the community. The orders by which a court may impose probation-type supervision include:

- **Community Based Order (CBO):** where a person is found guilty of an offence, the court may make a Community Based Order (ss 61-67).⁸¹ A conviction may or may not be recorded against the offender, at the court's discretion. These orders are imposed for between six and 24 months. An order must include at least one of the following elements: *supervision* (regular monitoring and counselling by a community corrections officer); *program requirement* (assessment and appropriate treatment for personal factors which may contribute to the offender's criminal behaviour); and *community service* (unpaid community work).
- **Intensive Supervision Order (ISO):** where a person is convicted of an offence, the court may make an Intensive Supervision Order (ss 68-75). This is similar to a Community Based Order, but it is subject to more stringent conditions. A conviction must be recorded. Supervision of the offender is mandatory, and the court can also order one or more of the following: *program requirement*; *community service*; and *curfew* (a curfew may be imposed for up to six months, applying to between two and twelve hours each day for periods when there is a high risk of the offender offending; the offender may also be subject to electronic monitoring).

Every CBO and ISO contains standard obligations, which include reporting to a community corrections centre when required; notifying change of address; not leaving Western Australia without permission; and complying with the orders of community corrections officers. It has been said that probation supervision under the new CBOs has become more punitive than was traditionally the case in Western Australia.⁸²

Supervision of offenders subject to these orders is carried out by the Community-Based Services Directorate, part of the Offender Management Division of the WA Ministry of Justice. The Directorate supervises offenders on Conditional Release Orders, CBOs, ICOs, work release and parole. As at 30 June 1998 there were 1098 ISOs and 1114 CBOs with

⁸⁰ Department for Correctional Services, *Annual Report 1997/98*.

⁸¹ See also the Sentence Administration Bill 1998 (WA).

⁸² Morgan N, 'Business as Usual or a 'New Utopia'?: Non-Custodial Sentences Under Western Australia's New Sentencing Laws', (1996) 26 *University of Western Australia Law Review* 364 p 379.

supervision conditions issued.⁸³ These numbers can be expected to increase as orders issued under the previous sentencing legislation expire and more offenders are sentenced under the *Sentencing Act 1995*. Many offenders are still serving probation orders issued before the 1995 sentencing reform came into effect.

3.4 Queensland

Under the *Penalties and Sentences Act 1992* (Qld), probation supervision can be imposed by means of the following orders:

- **Probation order:** Where a court finds a person guilty, whether or not it records a conviction, it may make a probation order (ss 90-99). There are two kinds of probation order: 'Probation', where the offender is released immediately to the supervision of an officer; and 'Prison/Probation', where the offender is sentenced to imprisonment for up to six months and at the end of the term of imprisonment the offender is released to supervision for the remainder of the period specified in the probation order. A Probation order is made for between six months and three years; a Prison/Probation order is made for between nine months and three years. Both types of order have specified '*general*' requirements, such as reporting to the appropriate officer, notifying change of address, not leaving Queensland without permission and complying with the directions of officers. An order may contain '*additional*' requirements, including: medical, psychiatric or psychological treatment; complying with conditions that the court considers are necessary to prevent further offending; and making restitution or compensation.
- **Intensive Correction Order (ICO):** where a court convicts an offender and sentences him or her to imprisonment for up to one year, the court may order that the offender serve the sentence in the community by way of an intensive corrections order (s 111-119). All ICOs have specified '*general*' requirements, which include reporting to or receiving visits from an officer at least twice a week for the duration of the order, and performing community service as directed. The sentencing court may attach '*additional*' requirements to the ICO, as for a Probation order.

It is an offence to contravene without reasonable excuse a requirement of a probation order or an ICO. Probation orders in Queensland are administered by QCORR (Queensland Corrections), a newly-created government-owned corporation that provides correctional services to the Queensland Corrective Services Commission. When an offender is placed on probation or an ICO, QCORR carries out

‘a formal case management process involving an initial risk/need assessment from which a plan of intervention and surveillance is devised. This plan attempts to address the causes of the individual’s offending behaviour by assisting the person to

⁸³ Draft summary of Intensive Supervision Orders & Community Based Orders from 1/7/97 to 30/6/98 provided by Policy, Programs & Project Directorate, Offender Management Division, WA Ministry of Justice.

meet relevant goals within certain time frames. The goals can be as diverse as obtaining a driver's licence to developing mechanisms to modify behaviours such as paedophilia. Often a goal is to complete one or more of three core programs provided by Queensland Corrections'.⁸⁴

The three core programs are: the Cognitive Skills Program, which covers self control, critical reasoning, problem solving and perspective taking; the Anger Management Program; and the Substance Abuse Program. QCORR also provides a number of other programs.

As at 30 June 1998 there were 5980 persons on Probation Orders, 351 persons on Prison/Probation Orders, and 135 persons on Intensive Correction Orders.⁸⁵ From 1995-1998 there has been some decline in the number of probation orders, and an increase in ICOs.

3.5 Tasmania

New sentencing legislation in Tasmania, the *Sentencing Act 1997* (Tas), establishes a statutory scheme of 'probation orders' (ss 37-42). The maximum term of probation orders is three years, and they can be combined with imprisonment, community service orders or a fine. Each probation order contains specified '*basic*' conditions, including reporting to a probation officer as required by that officer; not leaving Tasmania without permission, notifying any change of address and complying with reasonable and lawful directions given by a probation officer.

A sentencing court may also order that one or more '*special conditions*' are to be included in a probation order. Special conditions include attendance at education or other programs, assessment and treatment for alcohol or drug dependency, testing for alcohol or drug use; and medical, psychological or psychiatric assessment or treatment. It is an offence to breach a condition of a probation order without a reasonable excuse.

Probation orders in Tasmania are administered by the Community Corrections Service, part of the Tasmanian Department of Justice. As at 30 June 1998 probation supervision was being provided to 749 people.⁸⁶ The Service works with offenders to establish goals and plans for them. It conducts programs, or refers offenders to external programs, that aim to improve the social attitudes and personal circumstances of offenders.

The number of people subject to supervision through orders imposed by the courts has declined over the past 10 years. According to the Tasmanian Department of Justice, this 'reflects a reduction in the length of orders imposed as well as a more targeted approach by

⁸⁴ Bidgood D, 'Community Based Orders: Managing Offenders in the Community', *Proctor*, April 1998, p 20.

⁸⁵ Queensland Corrective Services Commission, *Annual Report 1997/98*, p 53.

⁸⁶ Tasmania Department of Justice *Annual Report 1997-98*.

Community Corrections when recommending supervision in the pre-sentence report process.⁸⁷

3.6 Australian Capital Territory

In the ACT, as in New South Wales, there is no specific legislative scheme for probation supervision. Orders for probation take the form of a supervision condition imposed by the courts as part of a bond or recognizance under the *Crimes Act 1900* (ACT). The relevant recognizances are:

- **Conditional release without conviction:** Section 556 provides that where a charge against a person is proven, the sentencing court may, without proceeding to conviction, direct that the person be discharged on a recognizance to be of good behaviour for a specified period of up to three years. The court may attach conditions to a bond, including a probation supervision condition.
- **Conditional release with conviction:** Under s 556B, where a person is convicted of an offence, the sentencing court may order that the person be released on recognizance to be of good behaviour for a specified period. There is no maximum period. The court may attach conditions, including a probation supervision condition.
- **Post-prison recognizance:** Section 556B also provides that where a person is convicted of an offence, the Court may sentence the person to a term of imprisonment but direct that the person be released on a good behaviour recognizance, either immediately or after the offender has served a specified part of the sentence of imprisonment.
- **Common law bond:** As in NSW, an offender can be released under a common law bond by the courts to appear for sentencing at a later time. The courts may order that the person be supervised by probation officers.

Probation in the ACT is administered by Community Corrections, part of ACT Corrective Services within the Department of Justice and Community Safety. Probation and Parole Officers actively supervise high and medium risk offenders using a case management system. Low risk cases are supervised by way of ‘compliance monitoring’, which means that as long as offenders can provide evidence that they are complying with directions given they are not required to attend for office interviews.⁸⁸ In 1997-98, 648 persons were supervised on probation.⁸⁹

⁸⁷ Tasmania, Department of Justice, *Annual Report 1996-97*.

⁸⁸ ACT Department of Justice and Community Safety, *Annual Report 1997-98*, p 32.

⁸⁹ This figure includes offenders waiting for pre-sentence reports and those released on post-prison recognizances. Information provided by the Community Corrections Unit of ACT Corrective Services.

A range of programs for offenders in community-based corrections is being developed. 'Considerable work has now been undertaken by ACT Corrective Services to identify possible providers of effective programs, including violence and sex offender programs in due course. A tender process with respect to the provision of cognitive/behavioural programs for offenders ... is also underway. In the meantime, forensic psychologists are being used to assess and assist the case management of some high risk offenders.'⁹⁰

3.7 Northern Territory

The Northern Territory has recently introduced new sentencing legislation, the *Sentencing Act 1995* (NT). The new Act allows sentencing courts to release offenders on a bond or suspended sentence subject to such conditions as the court imposes, including an order of supervision. Supervision orders may involve conditions of reporting, residence, education, employment, associates, curfew, counselling, treatment and other conditions the court decides upon.⁹¹ The orders to which a supervision condition may be attached are:

- **Release on bond without conviction** (s 11);
- **Release on bond following conviction** (s 13);
- **Suspended sentence of imprisonment** (s 40).

Community-based orders made by the courts are managed by Community Corrections, an arm of Northern Territory Correctional Services. As at 30 June 1997, there were 330 adult supervision orders in force.⁹² Northern Territory Correctional Services offers a wide range of community-based offender treatment programs. In particular, Community Corrections officers are involved in local community activities aimed at addressing regional law, justice and social issues. Aboriginal Community Corrections officers are employed in Aboriginal communities throughout the Northern Territory.

3.8 Commonwealth

Persons who commit offences against federal legislation are sentenced under the *Crimes Act 1914* (Cth).⁹³ The sentencing options that allow a court to release a person under probation supervision are:

- **Discharge without conviction** (s 19B(d));

⁹⁰ ACT Department of Justice and Community Safety, *Annual Report 1997-98*, p 33.

⁹¹ Northern Territory Correctional Services, *Annual Report 1996/97*, p 88.

⁹² Ibid.

⁹³ It is possible in some circumstances for offenders to be sentenced to community corrections under State or Territory law for a Commonwealth offence: s 20AB.

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- **Conditional release after conviction** (s 20(1)(a))
 - **Post-prison recognizance release** (s 20(1)(b)).

Offenders sentenced to probation under Commonwealth legislation are generally supervised by the community corrections authority of the appropriate State or Territory.

4. PROBATION AND RECIDIVISM

Questions are frequently asked about how effective probation is at preventing re-offending. How often do offenders commit new offences while on probation? How many offenders re-offend after a period on probation has expired? What kinds of supervision and programs have a rehabilitative effect? These are difficult questions to answer. This section sets out some figures on rates for successful completion of probation orders, and then summarises recent research on what measures have some effect on improving recidivism rates for offenders under community-based sentences.

In 1996-97 in New South Wales, 81% of community supervision sentences were successfully completed; 19% of community sentences were revoked.⁹⁴ (This figure covers offenders on community service orders, probation and parole.) A community supervision order can be revoked because the person has re-offended, or because he or she has breached the conditions of the order - for example, by failing to meet reporting requirements, or consuming drugs or alcohol in contravention of the order. It is not possible to tell from the available figures how many offenders on probation commit further offences during the period of probation. Even if it were possible to determine the number of offenders who were charged or convicted for an offence committed during the period of probation, this may under-represent the actual level of re-offending during probation, since many offences never result in charges being laid. A UK survey of probationers reported that 32% of them said that they had committed an offence since beginning their probation order.⁹⁵

There are no currently available figures for New South Wales as to the number of offenders on probation who re-offend after completing a probation order. The Probation and Parole Service is developing an information management system that will collect figures on the recidivism rates of offenders under community corrections. The new system will show when a new correctional sanction is imposed within two years of completing a community supervision or home detention order.⁹⁶

⁹⁴ Council on the Cost of Government, n 62. Across Australia, successful completion rates of community supervision orders ranged from 60.3% in SA to 93.3% in Tasmania (these figures include probation supervision, community service, attendance centre orders, parole and bail supervision): *Report on Government Services*, n 64, pp 422-423, 450.

⁹⁵ Mair, *Offenders on Probation*, n 48, p 53.

⁹⁶ NSW Department of Corrective Services, *Annual Report 1996-97*, p 99, Appendix 45. For recidivism rates of offenders released from full-time custody, see B Thompson, *Recidivism in NSW: General study*, NSW Department of Corrective Services Research Publication No.

A South Australian study of the recidivism rates of Aboriginal offenders found no differences between the recidivism rates of those imprisoned and those placed on community based sanctions.⁹⁷ This should not, however, lead to a blanket conclusion that community corrections have no rehabilitative effect. Numerous studies in different jurisdictions, particularly in North America and the United Kingdom, have revealed that the nature of the supervision and treatment programs that an offender undergoes during the probation order determines whether probation has a rehabilitative effect. In the United Kingdom, according to a recent Home Office report, 'Research has shown that the best of probation practice can substantially reduce reconviction rates but currently the average probation intervention yields no better results than custodial sentences.'⁹⁸ Similarly, a US report found that 'specific types of correctional treatment are associated with lower rates of recidivism. The difficulty appears to be in identifying exactly what characteristics are associated with effective treatment.'⁹⁹ Reported reductions in recidivism rates range from 10% to 50%.

Although there is still much debate about the extent to which community corrections programs can reduce recidivism, international research studies have begun to identify the elements of programs that have succeeded in reducing re-offending.¹⁰⁰ Practices that have commonly been found to contribute to successful outcomes include:

- *Risk classification*: more intensive programs should be targeted at high risk offenders, while those of lower risk should receive lower or minimal intervention.¹⁰¹ Intensive supervision of low-risk offenders tends to be wasteful, and at worst counter-productive.
- *Targeting 'criminogenic' needs*: treatment must address characteristics that are directly associated with an individual's criminal behaviour (known as criminogenic factors). While some of these factors, such as age, gender, and criminal history, cannot be changed, other criminogenic factors can be addressed and improved.

31, May 1995.

⁹⁷ Roeger L, 'The Effectiveness of Criminal Justice Sanctions for Aboriginal Offenders', (1994) 27 *Australian and New Zealand Journal of Criminology* 264.

⁹⁸ Chapman T and Hough M, *Evidence Based Practice: A Guide to Effective Practice*, Home Office, HM Inspectorate of Probation, 1998, 1.1.

⁹⁹ Sherman LW et al, *Preventing Crime: What Works, What Doesn't, What's Promising*, Report to the United States Congress, 1997, 9 - 25.

¹⁰⁰ See generally Goldblatt P and Lewis C (eds), *Reducing Offending: an assessment of research evidence on ways of dealing with offending behaviour*, Home Office Research and Statistics Directorate, Research Study 187, 1998; Sherman et al, *Preventing Crime*, n 99; McGuire J (ed), *What Works: Reducing Reoffending*, John Wiley & Sons Ltd, London, 1995; Chapman and Hough, *Evidence Based Practice*, n 98; Trotter C, 'The Impact of Different Supervision Practices in Community Corrections: Cause for Optimism', (1996) 29 *Australian and New Zealand Journal of Criminology* 29.

¹⁰¹ Goldblatt and Lewis, *Reducing Offending*, n 100, p 103.

These criminogenic factors include anti-social attitudes and values, low level educational and vocational skills, lack of employment, peer associations, poor cognitive and interpersonal skills, and drug or alcohol dependency. Treatments targeted at more general characteristics not directly related to offending, such as depression, anxiety or low self-esteem, are less effective.¹⁰²

- *Appropriate modes of treatment:* The most effective type of interventions are ones which are skills based, designed to improve problem solving, social interaction, or self control, and which also include a cognitive component to address attitudes, values and beliefs that support offending behaviour.¹⁰³ Other social learning methods can be useful, such as pro-social modelling (the probation officer presenting him or herself as a pro-social model or reinforcing pro-social or anti-criminal actions).¹⁰⁴ Employment-related programs, and those addressing vocational, literacy and numeracy skills, are also effective. The most successful programs are multi-modal (using a variety of methods to deal with criminogenic needs).¹⁰⁵
- *Community base* - generally community-based programmes tend to show more positive results.¹⁰⁶
- *Program integrity:* the content and methods of programs should be consistent with their objectives. Programs should be structured, adequately evaluated, properly carried out by trained staff, and of sufficient duration to be effective.
- *Responsivity:* traditionally probation work has involved individual counselling, but research shows that the best results are obtained if teaching styles match offenders' learning styles and abilities. 'Most offenders require active, participatory approaches rather than loose, unstructured or overly didactic methods'.¹⁰⁷

It should be noted that there are problems with using reconviction or re-arrest rates as a measure of rehabilitation success.¹⁰⁸ Such figures may not reflect changes in the seriousness of an offender's law breaking. If, after a probation sentence, an offender commits one or two much less serious offences and then gives up offending, can it be said that probation was a failure? Another problem with recidivism rates arises where probation becomes more punitive and enforcement-oriented, and so is used for more serious offenders who might

¹⁰² Sherman, *Preventing Crime*, n 99, p 9 -23.

¹⁰³ Goldblatt and Lewis, *Reducing Offending*, n 100, p 104.

¹⁰⁴ Trotter, 'The Impact of Different Supervision Practices', n 100.

¹⁰⁵ Chapman and Hough, *Evidence Based Practice*, n 98.

¹⁰⁶ Goldblatt and Lewis, *Reducing Offending*, n 100, p 104.

¹⁰⁷ *Ibid*, p 104.

¹⁰⁸ *Ibid*, pp 89-90.

otherwise have received a sentence of periodic detention, home detention or imprisonment; these higher-risk offenders are more likely to re-offend, which may result in an increase in recidivism rates for probationers.¹⁰⁹

5. CONCLUSION

Probation is a significant and commonly used sentencing option in New South Wales courts, as in other Australian jurisdictions. The Commonwealth and every Australian State and Territory provides a sentencing option that allows the courts to release offenders into the community subject to on-going supervision and monitoring by community corrections officers. The statutory basis for these supervised conditional releases varies between the States. Other differences include the legal consequences of breaching a probation order - in some jurisdictions breach of an order is an offence in itself, carrying its own penalties, while in others, such as New South Wales, a breach is not a separate offence. An interesting feature of some jurisdictions is a court-ordered period of probation following imprisonment (distinguished from parole in that there is no discretion for a parole authority to approve or refuse release from prison).

Although few statistics on recidivism are available for New South Wales, international research has found some promising developments in the rehabilitation of offenders by means of probation programs. Fashions and theories come and go in probation management, as in other criminal justice areas. While in the 1970s it was commonly said that rehabilitation was not effective and 'nothing works', new research has shown that there are some probation practices that under some circumstances can change some offenders' behaviour. These research findings are being incorporated into probation supervision programs in New South Wales and other Australian States and Territories.

The continuing development and evaluation of sophisticated risk assessment instruments will also assist probation officers in determining which offenders are likely to be safely released to the community, and what kinds of treatment or intervention will be most effective in preventing the offender from engaging in criminal behaviour. It can be expected that probation practices will continue to change as more research is undertaken into what works best to rehabilitate offenders. These developments will enhance probation's standing as an exacting but positive sentencing option.

¹⁰⁹

Ashworth, *Sentencing and Criminal Justice*, n 50, p 264.