



Considering non-custodial sentencing options:

Response to the NSW Sentencing Council's review of the use of non-conviction orders and good behaviour bonds

27 August 2009

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's previous work on Penalty Infringement Notices and Criminal Infringement Notices

In April 2006, The Homeless Persons' Legal Service (HPLS)¹ published its report on the NSW on-the-spot fines system, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW*.² This report was the result of collaborative research with a number of community-based legal centres and related organisations. That research drew on the day-to-day experience of those organisations working with homeless people and other people facing disadvantage, including the advice and casework of the Homeless Persons' Legal Service.

Since the launch of that report, PIAC has been working with the NSW Attorney General's Department and other key NSW government agencies to identify appropriate reforms. Many of the reforms sought were

¹ The Homeless Persons' Legal Service (HPLS) is a joint initiative of PIAC and the Public Interest Law Clearing House (PILCH). It involves direct legal service delivery and public policy research and development work, as well as capacity building for homeless people and the homelessness sector. HPLS is managed by PIAC and the direct legal services are delivered by PILCH members on a *pro bono* basis. PIAC receives core funding for HPLS from the NSW Attorney General, through the NSW Public Purpose Fund.

² Ellena Galtos and Emma Golledge, *Not Such a Fine Thing! Options for Reform of the Management of Fines in NSW* (2006) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/fines_20060404.html>.

legislated in November 2008 in the *Fines (Further Amendment) Act 2008* (NSW). PIAC, through HPLS, continues to work with Government to fully implement these reforms.

On 24 October 2007, PIAC and HPLS issued a media statement in which concern was expressed about the introduction of the Criminal Infringement Notices (CIN) system. In January 2009, PIAC responded to the NSW Ombudsman's review of the impact of the CIN system on Aboriginal and Torres Strait Islander Communities.³ This submission again highlighted the disproportionate negative effect of CIN on vulnerable groups within our community including people from an ATSI background, homeless people, people with an intellectual disability, people with a mental illness, and people from non-English speaking backgrounds.

HPLS Criminal Solicitor Advocate

The position of Solicitor Advocate within the Homeless Persons' Legal Service commenced in January 2008. The purpose of the Solicitor Advocate position is to establish a dedicated point of contact for people who are homeless or at risk of homelessness to access legal representation in minor criminal matters.

The role was established to overcome some of the barriers homeless people face accessing legal services, including: a lack of knowledge of how to navigate the legal system; the need for longer appointment times to obtain instructions; and the capacity to address multiple and complex inter-related legal and non-legal issues, such as mental health and addiction issues.

The title of the position was adopted from those used by organisations such as Legal Aid NSW and the Office Director of Public Prosecutions, where a hybrid position was created for a senior solicitor who would fulfil the role of both solicitor and barrister in short trials and committal proceedings.

The Solicitor Advocate has assisted over 150 clients to date. The Solicitor Advocate represents many clients for whom a non-conviction order and good behaviour bond are a legitimate and sensible outcome.

It is PIAC's experience, especially through the work of the Solicitor Advocate, that the reason the fines system, including CIN, generally creates greater disadvantage for members of vulnerable groups, including homeless people, than for others is because they are highly visible to enforcement officers.

The work of the HPLS Solicitor Advocate informs this submission as does PIAC's work in the area of prisons.

Response to the issues

General comments

PIAC welcomes the opportunity to contribute to the NSW Sentencing Council's examination of the use of non-conviction orders and bonds. PIAC notes that the terms of reference are broad, but restricts its comments in this submission to the terms relevant to its own experience.

PIAC rejects the notion that non-conviction orders and good behaviour bonds are being utilised in a disproportionate manner, or that there should be further restrictions on the ability of magistrates to impose such non-conviction orders and good behaviour bonds. Rather, PIAC submits these sentencing options

³ Julie Hourigan Ruse, *Considering the impact of CIN more broadly: Response to the NSW Ombudsman's review of the impact of Criminal Infringement Notices on Aboriginal and Torres Strait Islander Communities* (2009) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/sub2009013_20090130.html> at 24 August 2009.

should be utilised more and that the range of alternative options should be expanded to include a more extensive matrix of diversionary programs.

Cautions

PIAC and HPLS are strong advocates for the use by enforcement officers of informal warnings and formal cautions in appropriate circumstances as opposed to the issue of a penalty infringement notice or criminal infringement notice.

For example, an offence routinely dealt with pursuant to section 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) is possession of a small quantity of a prohibited drug. PIAC believes that where a person has no prior record this is a just and reasonable outcome.

Where the prohibited drug is cannabis, the offence may be dealt with in accordance with the Cannabis Cautioning Scheme (CCS) that commenced on 3 April 2000 and is operated by the NSW Police Force. The CCS provides for formal cautioning of adult offenders detected for minor cannabis offences. This arose from the NSW Drug Summit recognising that arrest for recreational drug use has not always proven effective. The objective of the CCS is to adopt a more effective approach to minor cannabis offences and allow police to exercise their discretion in appropriate cases and issue a caution. Police are still able to decide instead to formally charge offenders.

A person can only be cautioned twice and cannot be cautioned at all if they have prior convictions for drug offences or offences of violence or sexual assault. The CCS does not apply to those caught supplying cannabis.

The formal police caution warns of the health and legal consequences of cannabis use. The caution notice provides contact telephone numbers for the Alcohol and Drug Information Service (ADIS). ADIS provides a dedicated, confidential service to a cautioned offender that includes information about treatment, counselling and support services.

Persons who receive a second, final, caution are required to contact ADIS for a mandatory education session about their cannabis use.⁴

PIAC submits that the Cannabis Cautioning Scheme should be extended to include other minor drug possession matters.

Recommendation

PIAC recommends that consideration should be given to extending the Cannabis Cautioning Scheme to include other minor drug possession matters.

Diversionsary programs

PIAC, especially through the work of the HPLS Solicitor Advocate, supports the Magistrates Early Referral into Treatment (MERIT) Program.

⁴ Information on the Cannabis Cautioning Scheme sourced from *Cannabis Cautioning Scheme* (2008) NSW Police Force
<http://www.police.nsw.gov.au/community_issues/drugs/related_information/cannabis_cautioning_scheme>
at 21 August 2009.

MERIT is a diversionary program based in local courts. The target client group is adult offenders with illicit drug use problems who are motivated to undertake drug treatment as part of their bail conditions. The MERIT program allows a person to focus on treating their drug problem in isolation from their legal matters.⁵ It is unfortunate that assessment for entry to the MERIT program is restricted only to adults with drug use problems. For young people, a limited number of places for diversionary treatment of offenders are available through the Youth Drug and Alcohol Court. Unlike the MERIT program, it is available to young offenders with a drug or alcohol problem. Both the MERIT program and the Youth Drug and Alcohol Court have restricted geographic areas of availability.

A number of HPLS clients have successfully completed the MERIT program.

One example, a married man with three children, had become homeless after losing his full-time job because of a 10-year heroin addiction. He was facing charges for larceny for property worth approximately \$30,000. The client had made a number of previous attempts to access the MERIT program without success. The pre-sentencing report in the matter was not helpful in regard to alternatives to a custodial sentence because of his heroin use. The client was sentenced to ten months' imprisonment with a non-parole period of four months. The matter went to the District Court on appeal. While on bail for the larceny offence the client was apprehended and charged with goods in custody. HPLS liaised with MERIT and this time the client was assessed as suitable. The client committed to completing the MERIT program and received a glowing report at the conclusion of treatment. As a consequence, the presiding judge placed the client on a suspended sentence for the larceny offence. With respect to the goods in custody charges, the client received a positive pre-sentence report because of his participation in the MERIT program and was ordered to complete a period of community service and pay a fine.

Without the MERIT program this client certainly would have received a custodial sentence for both offences, he would not have received treatment for his heroin addiction and his downward spiral into chronic homelessness would likely have continued on his release from custody. Access to the MERIT program meant that the client was able to address his drug addiction and face a future where he could realistically seek employment and rebuild ties with his children.

PIAC submits that the MERIT program should be extended so that it could be utilised for offenders with other addictive problems, including people with alcohol use problems or gambling problems.

Recommendation

PIAC recommends consideration should be given to extending the Magistrates Early Referral into Treatment Program to include treatment for people with other addictive problems, including alcohol problems or gambling problems.

PIAC also notes the rising rates of imprisonment of women in NSW and is concerned that:

Statistics generated by the NSW Department of Corrective Services Corporate Research, Evaluation and Statistics Branch state that 37.3% of female offenders serve sentences less than three months while 62.9% serve sentences less than six months.⁶

⁵ Information on the Magistrates Early Referral into Treatment Program sourced from *About MERIT* (2008) Lawlink NSW <http://www.lawlink.nsw.gov.au/lawlink/cpd/merit.nsf/pages/merit_aboutus> at 21 August 2009.

⁶ *Women Offenders* (undated) NSW Department of Corrective Services <http://www.dcs.nsw.gov.au/offender_management/offender_services_and_programs/women_offenders.asp> at 25 August 2009.

This imposition of custodial sentences for short periods for women affects the capacity of the correctional system to implement effective programs and services to work with women while incarcerated to reduce levels of recidivism and assist them to reintegrate effectively into their community. There is a serious lack of community-based diversionary programs that are suitable and accessible for women offenders and this impacts on the options available to magistrates when determining sentence. PIAC is concerned that more needs to be done to provide appropriate in-community programs for women offenders to avoid the imposition of short custodial terms that have significantly disruptive impacts not only on the women themselves but also on their families, particularly where the woman (as is often the case) is the primary carer for either her own children or for other family members.

Recommendation

PIAC recommends that priority be given to the establishment and maintenance of effective diversionary options suitable for women offenders to reduce the incidence of imprisonment of women.

Sentences

The *Crimes (Sentencing Procedure) Act 1999* (NSW) (the Act) provides a number of custodial and non-custodial sentencing options. Non-custodial sentencing options, including non-conviction orders and good behaviour bonds, are prescribed in sections 8 to 13 of the Act.

A report published in 2008 by the Judicial Commission of New South Wales states there were 109,932 cases decided in the NSW Local Court.⁷ The distribution of penalty types for offenders sentenced in the NSW Local Court⁸ shows that approximately 35 percent of matters were dealt with through a non-conviction order or a good behaviour bond:

- 18% of offenders received a good behaviour bond pursuant to section 9 of the Act; and
- 16.7% of offenders had their matter dismissed or discharged without conviction pursuant to section 10 of the Act. (Note: 6.2% were dismissed unconditionally and 10.5% were conditionally discharged on a good behaviour bond.)⁹

By far the most utilised sentence in the NSW Local Court was the imposition of a fine, which contributed 48.2 percent of the penalty types.¹⁰

This report concluded that the overall distribution of:

1. the 20 most common offences 'has not changed dramatically since 2002'¹¹; and
2. penalty types had 'remained remarkably stable since 2002'.¹²

Given this apparent stability in the application of all penalty types—custodial and non-custodial—it is difficult to see how an argument can be sustained that non-conviction orders and good behaviour bonds specifically are over-utilised. PIAC submits that non-conviction orders and good behaviour bonds are not being utilised disproportionately when compared with other sanctions.

⁷ Mathew Karpin and Patrizia Poletti, 'Common Offences in the NSW Local Court: 2007' (2008) 37 *Sentencing Trends and Issues* 2, <<http://www.judcom.nsw.gov.au/publications/st/sentencing-trends-and-issues-no-37/st37.pdf>> at 24 August 2009.

⁸ Ibid 5.

⁹ Ibid 5.

¹⁰ Ibid 5.

¹¹ Ibid 18.

¹² Ibid 18.

Non-conviction orders

PIAC is concerned that the benefits of non-conviction orders are seriously undermined by a range of legislative provisions that require a 'guilty with no conviction recorded' order¹³ to be treated as a conviction for a range of purposes. Appendix A provides a list of legislative provisions in NSW law that require an order under section 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSP Act) to be dealt with as a conviction for particular purposes. The list is extensive and covers a broad range of matters.

In addition, PIAC is aware that conviction for a serious offence under section 17 of the *Legal Profession Act 2004* (NSW) (the LPA) is taken to include an order under section 10 of the CSP Act, including such orders made against young people.¹⁴ The effect of this provision is to require a person with a conviction (including an order under section 10 of the CSP Act) in respect of a serious offence to disclose that conviction if they are an associate of a legal practice (this does not apply to current legal practitioners).¹⁵ It also makes it a professional misconduct offence for a legal practitioner within a legal practice to allow a person with such a conviction to be an associate of the legal practice without permission from the Administrative Decisions Tribunal.

The term 'associate' is dealt with in section 7 of the LPA:

7 Terms relating to associates and principals of law practices

- (1) For the purposes of this Act, an associate of a law practice is:
- ...
 - (b) an agent of the law practice who is not an Australian legal practitioner, or
 - (c) an employee of, or person paid in connection with, the law practice who is not an Australian legal practitioner, or
- (2) For the purposes of this Act:
- ...
 - (b) a lay associate of a law practice means an associate of the practice who is not an Australian legal practitioner.
- ...
- (4) For the purposes of this Act, an associate of an Australian lawyer is:
- (a) a person who is a partner, agent or employee of the Australian lawyer, or
 - (b) a person who is an associate of a law practice of which the Australian lawyer is also an associate.

Enquiries of the Law Society of NSW indicate that the term 'associate' is to be broadly construed and includes, for examples, volunteers and members of governance committees (directors and management committee members) of community legal centres.

This provision imposes a significant burden on both the individual and the legal practitioners to go through what could be a lengthy hearing process to obtain such permission. In reality, as far as PIAC is aware very few legal practices ascertain whether or not non-legal 'associates' of their practice disclose whether or not they have a conviction for a serious offence.

PIAC does require this disclosure and is finding that it is difficult to manage the process in terms of timeliness when making decisions about employment and acceptance of students and graduates on

¹³ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10.

¹⁴ *Legal Profession Act 2004* (NSW) s 11.

¹⁵ The term 'serious offence' is defined in section 4 of the *Legal Profession Act 2004* (NSW) as offences that are indictable offences or would have been indictable offences if committed in the NSW jurisdiction.

placement. In addition to the practical implications of this requirement, there are two other matters of concern about this provision and others like it.

Firstly, individuals may not recall the precise nature of orders made against them some time in the past (particularly if the order was made when the person was young) and a section 10 order does not show up on a criminal record check. Second, PIAC (and many other legal practices) oppose discrimination on the basis of prior criminal record on principle, believing that our systems should be focused on rehabilitation of offenders. Clearly, section 10 provides for a mechanism for offenders to be given a second chance, yet there are legislative provisions in NSW that undermine that purpose.

This approach to the treatment of non-conviction orders is inconsistent with both the purpose of the orders and the principle of rehabilitation that ought properly underpin the NSW criminal justice system.

Appendix A: Provisions nullifying the effect of non-conviction orders

The following provisions of NSW legislation provide for orders made under section 10 of the *Crimes (Sentencing Procedure) Act 1999* to be treated as a conviction for certain purposes.

- clause 21 of the *Ambulance Services Regulation 2005* (NSW), dealing with disciplinary action available on conviction;
- section 11 of the *Anzac Memorial (Building) Act 1923* (NSW), dealing with the power to grant compensation orders against a convicted person for damage done;
- section 61 of the *Assisted Reproductive Technology Act 2007* (NSW), dealing with the prohibition of certain persons from carrying on businesses providing assisted reproductive technology services;
- section 4 of the *Bail Act 1978* (NSW), providing the definition of 'conviction' for the purposes of the Act;¹⁶
- Schedule 3 of the *Casino Control Regulation 2001* (NSW), setting with prescribed information in relation to a change in the state of affairs of licensees;
- section 40(4) of the *Co-operatives Act 1992* (NSW), dealing with false statements in loan applications;
- section 23(5) of the *Companion Animals Act 1998* (NSW), dealing with disqualification from owning or being in charge of a dog in a public place; section 48 of the same Act, dealing with when a court can issue an order that a dog be destroyed; and section 94 of the same Act, dealing with double jeopardy;
- section 5 of the *Confiscation of Proceeds of Crime Act 1989* (NSW);
- section 157 of the *Crown Lands Act 1989* (NSW), dealing with the power to grant compensation orders against a convicted person;
- section 32C of the *Education (School Administrative and Support Staff) Act 1987* (NSW), in respect of disciplinary action that may be taken against a convicted person;
- section 63A of the *Fair Trading Act 1987* (NSW), dealing with the power to grant compensation orders against a convicted person;
- clause 35 of the *Fire Brigades Regulation 2008* (NSW), dealing with misconduct finding arising out of conviction;
- section 219 of the *Fisheries Management Act 1994* (NSW), dealing with powers to make orders in respect of blocking the passage of fish; section 220ZG of the same Act, dealing with the power to order a convicted person to restore critical habitat; section 269 of the same Act, dealing with the power to order forfeiture of boats and motor vehicles;
- section 133 of the *Food Act 2003* (NSW), dealing with details of convicted persons to be held on the register of offences to be kept by the Food Authority;
- section 48 of the *Forestry Act 1916* (NSW), dealing with the power to make compensation orders against convicted persons;
- Schedule 3 of the *Gaming Machines Regulation 2002* (NSW), setting with prescribed information in relation to a change in the state of affairs of licensees;
- section 55B of the *Motor Dealers Act 1974* (NSW), dealing with orders that may be made against a convicted person;
- section 5 of the *National Parks and Wildlife Act 1974* (NSW), providing the definition of 'conviction' for the purposes of the Act; section 118E of the same Act dealing with the power to make compensation orders against a convicted person;
- section 34 of the *Parramatta Park Trust Act 2001* (NSW), dealing with the power to make compensation orders against convicted persons;

¹⁶ Applies also to orders under section 33(1)(a) of the *Children (Criminal Proceedings) Act 1987* (NSW).

- section 32 of the *Public Health (Tobacco) Act 2008* (NSW), dealing with probation on selling tobacco products;
- section 48 of the *Public Sector Employment and Management Act 2002* (NSW), in respect of disciplinary action that can be taken against a convicted person;
- section 198 of the *Road Transport (General) Act 2005* (NSW), dealing with the power to declare a person a 'habitual traffic offender'; section 187 of the same Act, dealing with the power to impose a penalty and disqualify a driver on conviction; and section 218 of the same Act, dealing with the power to impound, etc, the vehicle of a convicted person;
- section 16 of the *Security Industry Act 1997* (NSW), in respect of restrictions on being licensed under the Act;
- section 11C of the *Summary Offences Act 1988* (NSW), in respect of prior knife-related offences; and section 30A of the same Act in respect of the power to order payment of compensation by a convicted person;
- section 93K of the *Teaching Service Act 1980* (NSW), in respect of disciplinary action that can be taken against a convicted person;
- section 22K of the *Technical and Further Education Commission Act 1990* (NSW), in respect of disciplinary action that can be taken against a convicted person;
- sections 127S, 127ZI and 127ZR of the *Threatened Species Conservation Act 1995* (NSW), in respect of a conviction for failing to follow a direction to retire biodiversity credits;
- section 18 of the *Tow Truck Industry Act 1998* (NSW), in respect of restrictions on being licensed under the Act;
- section 38 of the *Travel Agents Act 1986* (NSW), in respect of the orders that may be made on conviction;
- Dictionary to the *Victims Support and Rehabilitation Act 1996* (NSW), in respect of the definition of 'conviction'.

The following provisions provide for a potential additional penalty or negative consequence to result from a section 10 order:

- clause 172(2)(c) of the *Poisons and Therapeutic Goods Regulation 2008* (NSW); permitting the suspension or cancellation of a licence or authority in respect of the retail of certain substances; and clause 175 of the same Regulation providing for the prohibition of certain persons from doing things authorised under the Regulation.