

# Homeless Persons' Legal Service

Legal help for the homeless and those at risk of homelessness  
A joint initiative of the Public Interest Advocacy Centre Ltd  
and the Public Interest Law Clearing House Inc



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## **COMMENTS ON THE NSW SENTENCING COUNCIL SUSPENDED SENTENCES CONSULTATION PAPER**

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# Introduction

## Homeless Persons' Legal Service

The Homeless Persons' Legal Service (**HPLS**) is a joint initiative of the Public Interest Advocacy Centre (**PIAC**) and the Public Interest Law Clearing House (**PILCH**) NSW. Since 2004, HPLS has provided free legal advice and representation to over 5,000 people who are homeless or at risk of homelessness.<sup>1</sup>

The HPLS Solicitor Advocate provides court representation for people who are homeless and charged with minor criminal offences. The position 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 problems.

From 1 January 2010 to 30 June 2011, the HPLS Solicitor Advocate provided court representation to 104 individual clients.<sup>2</sup> Of these:

- 53 per cent disclosed that they had a mental illness;
- 62 per cent disclosed that they had drug or alcohol dependency;
- 76 per cent said that they had either a mental illness or drug/alcohol dependency;
- 38 per cent disclosed that they had both a mental illness and drug/alcohol dependency;
- 45 per cent indicated that they had previously been in prison.

The work of the HPLS Solicitor Advocate informs this submission.

## The relationship between homelessness and prison

The close relationship between offending, re-offending, incarceration and homelessness has been identified in several studies over the last ten years. A 2003 study of 194 ex-prisoners in NSW and 145 ex-prisoners in Victoria estimated that over half of the NSW participants experienced episodes of homelessness in the nine months following release from prison.<sup>3</sup> This is further supported by the case work data from HPLS.

HPLS is concerned that full-time custody heightens the risk of homelessness upon release, or entrenches a person's existing vulnerability to homelessness. The need to maintain suspended sentences as a sentencing option while expanding intermediate sentencing options, and particularly those options which have therapeutic and remedial outcomes, assists to keep homeless people out of the prison system and contributes to breaking the vicious cycle between prison and homelessness.

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<sup>1</sup> Further information about PIAC, PILCH NSW and HPLS is provided as Appendix A to this document.

<sup>2</sup> Over this period the HPLS Solicitor Advocate completed 135 client files for these 104 individual clients. Several of these clients returned to the HPLS Solicitor Advocate with additional criminal charges arising in separate circumstances.

<sup>3</sup> Baldry, E, McDonnell, D, Maplestone, P and M (2003), *Ex-prisoners and Accommodation: What Bearing do Different Forms of Housing Have on Social Reintegration for Ex-prisoners? Final Report*, Australian Housing and Urban Research Institute, Melbourne, 2003, i, 12. See also Forell, Suzie, McCarron, Emily and Schetzer, Louis (2005), *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Law and Justice Foundation of NSW, Sydney, 269; NSW Homelessness Community Alliance (2011), 'Homelessness and the justice system', *Policy statement*, Sydney.

## Executive summary and recommendations

This submission is made by the Homeless Persons' Legal Service in response to the Consultation Paper prepared by the NSW Sentencing Council.

In this submission, HPLS comments on the following issues raised in the Consultation Paper:

- 7. Do the current provisions relating to breaches of suspended sentences require reform? If yes, how? Should the discretion available to a court when addressing a breach of a suspended sentence be widened?
- 8. Is there a disparity between courts in relation to the availability of, and confidence in intermediate sentencing options? If yes, please indicate:
  - (a) the nature of the disparity; and
  - (b) the nature of the reforms that you consider would address this disparity.
- 9. Are reforms required to intermediate sentencing orders? If yes, how should intermediate sentencing orders be reformed?
- 11. Other comments

HPLS is of the view that in the absence of comprehensive, flexible, well-resourced intermediate sentencing options, it is necessary to maintain suspended sentences as a sentencing option because it provides a means to keep vulnerable individuals out of the prison system. For offenders who are homeless, with a history of alcohol or drug abuse, mental illness, or chronic disability, intermediate sentencing options, such as community service orders, intensive correction orders and home detention, are not available. As a result, a suspended sentence is usually the only sentencing alternative to a full-time custodial sentence for a person who is homeless. The abolition of suspended sentences would place such disadvantaged and marginalised individuals at an even higher risk of custodial sentences.

HPLS submits that additional intermediate sentencing orders should be available for people who are homeless, have a mental illness or have drug/alcohol dependency. Such orders need to have considerable flexibility as to the amount of supervision and treatment, and need to be adaptable to the capabilities and needs of offenders, and need to be accompanied by appropriate support services. In addition, intermediate sentencing options need to have a greater emphasis on therapeutic and remedial outcomes.

HPLS submits that current provisions relating to breaches of suspended sentences operate in a manner which places people who are experiencing or at risk of homelessness at a higher risk of being sentenced to a full-time custodial sentence than others in the community. HPLS submits that there is a need for an expansion of diversionary programs and sentencing options in respect of breaches of suspended sentences.

HPLS makes the following recommendations:

1. *That s 98(3) of the Crimes (Sentencing Procedure) Act 1999 (NSW) be amended to allow a court to vary the s 12 good behaviour bond, rather than automatically revoke the bond.*
2. *That s 99(1)(c) of the Crimes (Sentencing Procedure) Act 1999 (NSW) be amended to allow the court to have other remedial or intermediate sentencing options available when it revokes a s 12 good behaviour bond, so that a term of imprisonment is not the automatic default sentencing option in the event of a breach of a s 12 good behaviour bond.*
3. *That suspended sentences not be abolished or phased out until there is a significant expansion of intermediate sentencing options for people who are homeless, have a history of drug or alcohol abuse, disability, chronic health conditions or mental illness. Replacement of suspended sentences*

*should not come into effect until the necessary resources, staffing and processes have been put in place by courts and correctional services to support the alternatives, and that the alternatives have been extensively evaluated as to their therapeutic and remedial value.*

*4. That additional, community-based intermediate sentencing dispositions be created for people in special circumstances, including homelessness, people with mental illness, disability or chronic health conditions and people with drug or alcohol dependency. Such dispositions should be flexible and adaptive to the particular capabilities and needs of offenders.*

*5. That the availability of sentencing options involving a deferral of sentence subject to the offender undertaking a program of treatment or intervention (such as the s 11 Treatment Bonds) be expanded and adequately resourced.*

*6. That the availability of the Magistrates Early Referral into Treatment (MERIT) Program be expanded across New South Wales, and to include treatment for people with other addictive problems, including alcohol and gambling.*

*7. That where there is a breach of a s 9 good behaviour bond, legislative guidance is provided for the courts to consider the special circumstances of the offender in deciding whether the bond should be varied rather than revoked. Such special circumstances should include whether the offender is homeless, has a mental illness or chronic disability, or drug/alcohol dependency.*

## Response to questions in the Options Paper

### **Question 7: Do the current provisions relating to breaches of suspended sentences require reform? If yes, how? Should the discretion available to a court when addressing a breach of a suspended sentence be widened?**

HPLS submits that current provisions relating to breaches of suspended sentences require reform as they operate in a manner which places people who are experiencing or at risk of homelessness at a disproportionately higher risk of being sentenced to a full-time custodial sentence than others in the community.

Under the *Crimes (Sentencing Procedure) Act 1999* (NSW) ('the Act'), where a s 12 bond for a suspended sentence is breached, the court effectively has three options under s 99: impose an intensive corrections order, sentence the offender to home detention, or sentence the offender to full-time custody.

Under s 67 of the Act, an intensive corrections order may not be made unless: (a) the offender is assessed as being suitable for serving a sentence by way of intensive correction in the community; and (b) such an order is appropriate in the circumstances.

It is the experience of HPLS that those offenders who have mental illness or drug/alcohol disorders are usually considered to be unsuitable for an intensive corrections order. Given the prevalence of mental health and drug and alcohol issues among the homeless population (see below), this means that homeless people will be more likely to be deemed ineligible for an intensive corrections order where a suspended sentence has been breached.

The second option is home detention. The *Home Detention Act 1996* (NSW) allows some people who are sentenced to imprisonment of 18 months or less to serve their sentences by way of home detention. Offenders on home detention are electronically monitored, visited by supervising officers, and are tested frequently for drugs and alcohol. It is a less expensive sentencing option than imprisonment and seeks to divert from prison those offenders who do not constitute a threat to public safety or whose crimes do not merit the harshest of sanctions. However, home detention is currently not a sentencing option for people experiencing homelessness, given their lack of stable or suitable accommodation.

As a result, a homeless person who breaches a s 12 bond (suspended sentence) is more likely to be imprisoned. The dire shortage of social housing compounds this problem and the current structure of crisis accommodation is not geared to provide the support required by home detention.

HPLS Case Study 1 demonstrates the need for an expansion of diversionary programs and sentencing options, particularly in respect of breaches of suspended sentences.

#### HPLS Case Study 1

*DL is a homeless man with a history of drug disorder, who had been in rehabilitation prior to receiving a suspended sentence for resisting arrest. He was subsequently charged with possessing a prohibited drug, resisting arrest and possessing goods in custody. If convicted, he would be in breach of his suspended sentence. He was living in crisis accommodation at the time the charges were laid and his previous record meant he would probably get a prison sentence. Without a home, DL would be ineligible for home detention.*

*Just days before his court appearance, DL secured an offer of public housing. That enabled him to be assessed for home detention and the court made orders that he serve his sentence accordingly. If such housing had not been made available to DL, the Magistrate would have had little option but to sentence him to a period of full-time custody.*

## **1. Recommendation**

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HPLS recommends that s 98(3) of the Crimes (Sentencing Procedure) Act 1999 (NSW) be amended to allow a court to vary the s 12 good behaviour bond, rather than automatically revoke the bond.

## **2. Recommendation**

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HPLS recommends that s 99(1)(c) of the Crimes (Sentencing Procedure) Act 1999 (NSW) be amended to allow the court to have other remedial or intermediate sentencing options available when it revokes a s 12 good behaviour bond, so that full-time custody is not the automatic default sentencing option in the event of a breach of a s 12 good behaviour bond.

**Question 8: Is there a disparity between courts in relation to the availability of, and confidence in intermediate sentencing options? If yes, please indicate:**

- (a) the nature of the disparity; and**
- (b) the nature of the reforms that you consider would address this disparity.**

### **Homelessness, mental illness and drug/alcohol addiction**

In its 2003 study into the legal needs of homeless people in NSW, the Law and Justice Foundation of NSW reported that mental health, alcohol and drug issues, dual diagnosis and other complex needs are prevalent among the homeless population, particularly those who are entrenched in homelessness.<sup>4</sup> In their 1998 study of 210 homeless people in emergency hostels in inner Sydney, Hodder, Tenson and Buhrich reported that 75 per cent of their sample had either mental health problems, drug use disorder or alcohol disorder. Forty-eight per cent of the sample had a drug use disorder and 55 per cent reported an alcohol disorder.<sup>5</sup> A 2003 study involving 403 homeless young people in Melbourne aged 12-20 found that 26 per cent of those surveyed reported a level of psychological distress indicative of a psychiatric disorder.<sup>6</sup> Most recently, in their study of 4,291 homeless people in Melbourne, released in 2011, Johnson and Chamberlain found that 31 per cent of their sample had a mental illness (not including any form of alcohol or drug disorder).<sup>7</sup>

The prevalence of mental illness and drug/alcohol disorder among homeless people interacting with the criminal justice system is reflected in the casework of the HPLS Solicitor Advocate. Using a recent sample group, from January 2010 to June 2011, the HPLS Solicitor Advocate provided court representation to 104 individual clients facing criminal charges.<sup>8</sup> Of these:

- 53 per cent disclosed that they had a mental illness;

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<sup>4</sup> Forell, Suzie, McCarron, Emily and Schetzer, Louis (2005), *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Law and Justice Foundation of NSW, Sydney, at 124.

<sup>5</sup> Hodder, T., Tesson, M. and Buhrich, N., *Down and Out in Sydney: Prevalence of Mental Disorders, Disability and Health Service Use Among Homeless People in Inner Sydney*, Sydney, Sydney City Mission, 1998, 19-25.

<sup>6</sup> Rossiter, B., Mallett, S., Myers, P. and Rosenthal, D. (2003) *Living Well? Homeless Young People in Melbourne*, Melbourne, Australian Research Centre in Sex, Health and Society, at 17.

<sup>7</sup> Johnson, G. and Chamberlain, C. (2011), 'Are the Homeless Mentally Ill?', *Australian Journal of Social Issues*, Autumn 2011, at 35.

<sup>8</sup> As indicated above, the HPLS Solicitor Advocate completed 135 client files for these 104 individual clients. Several clients returned to the HPLS with additional criminal charges arising in separate circumstances.

- 62 per cent disclosed that they had drug or alcohol dependency;
- 38 per cent disclosed that they had both a mental illness and drug/alcohol dependency;
- 76 per cent had either a mental illness or drug/alcohol dependency.

### **Homeless people facing barriers to intermediate sentencing options**

The Law and Justice Foundation of NSW observed that the range of symptoms experienced by people with a mental illness or addictions may impair a person's capacity to identify legal issues, obtain legal assistance, and to comprehend verbal and written information provided.<sup>9</sup> These symptoms may also impair their ability to be assessed as suitable for intermediate sentencing options. Current sentencing options are often not appropriate for offenders who have mental illness, serious drug dependency or other disabilities. The three types of rehabilitative orders available in lieu of imprisonment are:

- community service order;
- intensive correction order; and
- home detention order.

These orders are often not appropriate for people who have mental illness, drug/alcohol dependency or other chronic disability, as the onerous requirements of these respective dispositions often mean that such people are incapable of complying with the terms of the order. Moreover, using these dispositions in the sentencing of offenders with such characteristics may be "setting them up to fail".<sup>10</sup> For these offenders, where the circumstances of the breaches involved should not warrant a term of imprisonment, there are significant sentencing dilemmas presented for judicial officers.

Under s 86 of the Act, a community service order may not be made unless the following conditions are met:

- the offender is assessed as being suitable for community service work,;
- such an order is appropriate in the circumstances;
- and suitable arrangements exist in the area in which the offender resides for the offender to perform community service work.

Section 67 of the Act states similar requirements for an offender to be sentenced to an intensive correction order.

In the experience of HPLS, offenders who have mental illness or drug/alcohol disorders are usually considered to be unsuitable for a community service order or an intensive corrections order. As a result, a suspended sentence under s 12 of the Act is often the only sentencing option short of full-time custody available to a significant proportion of homeless offenders who have mental illness or drug/alcohol disorders.

HPLS Case Studies 2, 3 and 4 illustrate that, for offenders who are homeless and who have a history of drug/alcohol abuse or mental illness, intermediate sentencing options such as community service orders, and in one case, even options such as a s 9 good behaviour bond, are not available in practice, meaning that a suspended sentence is the only sentencing alternative to a term of full-time custody.

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<sup>9</sup> See n 3 above, 124.

<sup>10</sup> Popovic, Jelena (2006), 'Meaningless vs Meaningful Sentences: Sentencing the Unsentenceable', *Sentencing Principles, Perspectives and Possibilities*, Jelena Popovic, Deputy Chief Magistrate, Victoria, Canberra, February 2006, 7-8.

### HPLS Case Study 2

*SJ was charged with theft of two laptop computers. He had a long criminal record and a history of drug abuse. Given his drug history, he was not considered suitable for a community service order.*

*His prior offending was such that he could not get a s 9 good behaviour bond. Therefore, the only alternative was to place him on a s 12 suspended sentence.*

### HPLS Case Study 3

*DT was charged with theft from person. The client had a long history of offending and drug abuse. His drug abuse meant that DT was not considered suitable for a community service order, nor was he eligible for a good behaviour bond, given his criminal history.*

*He was thus given a 12 month suspended sentence.*

### HPLS Case Study 4

*PB was charged with assault occasioning actual bodily harm and armed with intent to commit an indictable offence. The matter commenced as an application under s 32 of the Mental Health (Forensic Provisions) Act 1990 (NSW) due to the client having a documented history of mental health. However, the Magistrate refused the application on the basis of the seriousness of the offences and the fact that the monitoring period of 6 months under the Act was not sufficient. Due to the client's mental health problems and drug use, he was not eligible for a community service order.*

*The Magistrate therefore placed him on a four-month s 12 bond (suspended sentence) for the armed with intent charge, and a two-year s 9 bond for the assault occasioning actual bodily harm.*

The intention of suspended sentences is to demonstrate that the offence is sufficiently serious to warrant a prison term but allows judges and magistrates to suspend the term of imprisonment where they see no useful purpose in incarcerating the offender.<sup>11</sup> However, in the experience of HPLS, the absence of a suitable intermediate sentencing option for an offender who is homeless and has a history of drug abuse, suspended sentences are used in matters where the circumstances would not necessarily warrant a full-time custodial term. An example of this is illustrated in HPLS Case Study 5:

### HPLS Case Study 5

*JB was charged with assault upon his partner. While on bail he committed further assault offences, although the facts indicated that these assaults were not serious. JB's drug abuse meant that he was not suitable for a community service order, although this would have been the ideal intermediate sentencing option. He pleaded guilty to the second set of charges and was given a 12 month suspended sentence.*

Intermediate sentencing options may also not be available to those offenders who have a physical disability or chronic illness/condition. Where disadvantage is compounded, such as homelessness, chronic health conditions and a history of drug abuse, as in HPLS Case Study 6, often the only sentencing option, other than full-time custody, is a suspended sentence.

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<sup>11</sup> See paragraph 2.4, Suspended Sentences Consultation Paper June 2011, Sentencing Council of NSW.



### HPLS Case Study 6

*AL was a homeless man with a long history of drug offences, most of which were fairly minor. He appeared before the Local Court on a further drug charge, however this charge resulted in him breaching two good behaviour bonds.*

*Due to his homelessness, an arthritic condition where he had to use a walking stick and drug use, he was not eligible for community service and the Magistrate would not impose further section 9 bonds. The only available option, other than full time custody, was a suspended sentence.*

HPLS submits that, in the absence of adequate intermediate sentencing options for homeless people, people with a history of mental illness, drug and/or alcohol abuse and people with physical disability or chronic health problems, the abolition of suspended sentences would place such disadvantaged and marginalised individuals at an even higher risk of full-time custodial sentences.

### **3. Recommendation**

*HPLS recommends that suspended sentences not be abolished or phased out until there is a significant expansion of intermediate sentencing options for people who are homeless, have a history of drug or alcohol abuse, disability, chronic health conditions or mental illness.*

*Replacement of suspended sentences should not come into effect until the necessary resources, staffing and processes have been put in place by courts and correctional services to support the alternatives, and that the alternatives have been extensively evaluated as to their therapeutic and remedial value.*

## **Question 9: Are reforms required to intermediate sentencing orders? If yes, how should intermediate sentencing orders be reformed?**

Based on the discussion above, HPLS submits that additional intermediate sentencing orders should be made available for people who are homeless, have a mental illness or have drug/alcohol dependency. Such orders need to have considerable flexibility as to the amount of supervision and treatment, with any special conditions being optional for the judicial officer to impose, so that the order can be appropriately tailored to the individual. Moreover, such orders need to be adapted to the capabilities and needs of offenders, and should be cognisant of the difficulties confronted by homeless people to attend appointments for such reasons as lack of money for public transport, lack of possessions and records that could serve as reminders of appointments and instability in accommodation arrangements.

HPLS also submits that greater use needs to be made of the s 11 Treatment Bond. Under s 11 of the Act, where a court finds a person guilty of an offence, it may adjourn the matter –

- for the purpose of assessing the offender's capacity and prospects for rehabilitation; or
- for the purpose of allowing the offender to demonstrate that rehabilitation has taken place; or
- for the purpose of assessing the offender's capacity and prospects for participation in an intervention program; or
- for the purpose of allowing the offender to participate in an intervention program; or
- for any other purpose the court considers appropriate in the circumstances.

Several HPLS clients have successfully completed their treatment bonds, and subsequently became eligible for more remedial and therapeutic sentencing outcomes when their charges returned to court. However, it is the experience of the HPLS Solicitor Advocate that the courts are often unwilling to defer a matter under s 11 to allow the offender to participate in an intervention

and treatment program, as it requires the matter to come back before the court for sentence in light of the assessment report from the treatment bond.

HPLS submits that there needs to be greater use of intervention and treatment options under section 11 of the Act, given that these can ultimately result in more flexible and therapeutic sentencing options for offenders with a history of alcohol or drug dependency. HPLS Case Studies 7 and 8 illustrate how the successful completion of a s 11 treatment bond can widen the available options for appropriate remedial sentencing.

#### HPLS Case Study 7

*GC was charged with a number of theft offences. He was initially placed on a s 11 Crimes (Sentencing Procedure) Act Treatment Bond 1999 (NSW), where the matter was then adjourned to allow for a subsequent assessment as to how the treatment progressed. The charges were adjourned for a period of 6 months.*

*In the interim the client committed further offences of stealing. When the matter returned to Court for sentence, the Probation and Parole report yet again stated that he was not suitable for a community service order, due to drug use.*

*The Magistrate placed him on further s 9 bonds, for two reasons:*

- 1. Despite further offending, the client had gone reasonably well on his drug treatment program.*
- 2. The Magistrate was of the view that placing the client on a s 12 suspended sentence was setting him up to fail. That is, given his history, there was a good chance he would offend again and would be in breach of a section 12 bond which would result in an automatic term of imprisonment.*

*The Court would have imposed a community service order if it could, but could not due to the report from Probation and Parole. The Court was of the view that a s 12 bond for stealing offences was harsh, thus it took a more meaningful and remedial option.*

#### HPLS Case Study 8

*DF was charged with supply prohibited drug, theft and a further possess prohibited drug charge. The client was homeless and had a drug history. He was thus ineligible for a community service order.*

*The Magistrate was loath to impose a suspended sentence because it was setting him up for failure. DF was placed on a s 11 treatment bond. When the matter returns to Court and if he has no further offending, there is a reasonable prospect that a s 9 good behaviour bond may be imposed.*

HPLS submits that intermediate sentencing options need to have a greater emphasis on therapeutic and remedial outcomes, and to be more flexible and tailored to the particular needs of the offender, particularly those who are homeless, have a mental illness or a history of alcohol or drug dependency.

According to the Deputy Chief Magistrate of Victoria, for some offenders with alcohol or drug dependency, treatment or assistance may still be required but a deferral of sentencing is not appropriate. Sentencing dispositions with a mandated treatment for a short time, but not necessitating a return to court or any undertaking of good behaviour may be more appropriate in some circumstances. Such dispositions would facilitate addressing the needs of the offender without being punitive.<sup>12</sup>

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<sup>12</sup> See n 8 above, 25.

An example of an effective treatment program is the Magistrates Early Referral into Treatment (MERIT) Program, which operates as a diversionary program in Local Courts. HPLS strongly supports the MERIT program and a number of HPLS clients have successfully completed the MERIT program. 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.

#### HPLS Case Study 9

*MT is a married man with three children. He became homeless after losing his full-time job because of a 10-year heroin addiction. He was facing charges of 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 10 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 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.*

#### HPLS Case Study 10

*NT was firstly charged with stealing a number of LCD screens. He was sentenced in the Local Court to 10 months' imprisonment. He appealed to the District Court on the ground of severity. Prior to appeal, he commenced the MERIT program.*

*He had not completed the program when his matter came on for appeal but the Judge imposed a suspended sentence instead of full-time custody. Prior to the appeal, he committed further offences (being possession of jewellery which he tried to pawn). After the appeal on the previous charges, he completed the MERIT program.*

*When these matters came before the Magistrate, she ordered a Pre-Sentence Report from Probation and Parole. Due to the fact that he had completed the MERIT program, he was found to be eligible for a community service order and was sentenced to community service. This case is interesting in that it indicates that if the client can show that he is dealing with his drug habit, then a community service order may be applied.*

It is unfortunate that assessment for entry to the MERIT program is restricted only to adults with drug use problems. In addition, the MERIT program has restricted geographic areas of availability.

HPLS submits that the MERIT program should be extended so that it could be used for offenders with other addictive problems, including people with alcohol use problems or gambling problems. In addition, HPLS submits that the program should be better resourced so that it is not restricted to particular geographic areas of availability.

#### **4. Recommendation**

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*HPLS recommends that additional, community-based intermediate sentencing dispositions be created for people in special circumstances, including homelessness, people with mental illness, disability or chronic health conditions and people with drug or alcohol dependency. Such dispositions should be flexible and adaptive to the particular capabilities and needs of offenders.*

#### **5. Recommendation**

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*HPLS recommends that the availability of sentencing options involving a deferral of sentence subject to the offender undertaking a program of treatment or intervention (such as the s 11 Treatment Bonds) be expanded and adequately resourced.*

#### **6. Recommendation**

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*HPLS recommends that the availability of the Magistrates Early Referral into Treatment (MERIT) Program be expanded across New South Wales, and to include treatment for people with other addictive problems, including alcohol and gambling.*

### **Question 11: Other comments**

HPLS also submits that for many of its clients, graduation through the sentencing hierarchy is much quicker by virtue of the fact that current intermediate sentencing options are not appropriate or suitable, given the high prevalence of mental illness, drug or alcohol dependency, as indicated above. An example of this is where such clients breach a s 9 good behavior bond. Usually, the next option in the sentencing hierarchy would be a community service order. However, as such clients are usually not assessed as suitable for a community service order under s 86, there is a risk that such offenders inappropriately receive a suspended sentence, given the nature of the offending involved.

As indicated above, the intention of suspended sentences is to demonstrate that the offence is sufficiently serious to warrant a prison term but allows Judges and Magistrates to suspend the term of imprisonment where they see no useful purpose in incarcerating the offender. However, the first and initial assessment in imposing a suspended sentence is that the seriousness of the offence warrants a term of imprisonment. It is submitted that for many offences committed by HPLS clients, which entail a breach of a s 9 good behaviour bond, the seriousness of the offences does not warrant a term of imprisonment.

#### ***HPLS Case Study 11***

*AL was charged with possess cannabis. He was placed on a s 9 bond, which he subsequently breached after again being charged with possess cannabis. The Magistrate revoked the s 9 bond and placed AL on a 6 month suspended sentence.*

*AL subsequently breached the suspended sentence and received a sentence of 6 months Periodic Detention.*

HPLS submits that the Act should provide legislative guidance to Courts that in the event that a s 9 good behaviour bond is breached, they should take into consideration the particular circumstances and needs of the offender in determining whether the bond should be varied or revoked. Such circumstances should include whether the offender is suitable for any appropriate intermediate sentencing options.

## **7. Recommendation**

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*HPLS recommends that where there is a breach of a s 9 good behaviour bond, legislative guidance is provided for the courts to consider the special circumstances of the offender in deciding whether the bond should be varied rather than revoked. Such special circumstances should include whether the offender is homeless, has a mental illness or chronic disability, or drug/alcohol dependency.*

## **Conclusion**

HPLS welcomes the opportunity to provide comments on the Sentencing Council's Consultation Paper regarding suspended sentences.

HPLS is of the view that in the absence of comprehensive, flexible, well-resourced intermediate sentencing options, it is necessary to maintain suspended sentences as a sentencing option because it provides a mechanism to keep vulnerable individuals out of the prison system. For offenders who are homeless, with a history of alcohol or drug abuse, mental illness, or chronic disability, intermediate sentencing options such as community service orders, intensive correction orders and home detention are not available. As a result, a suspended sentence is the only sentencing alternative to a sentence of full-time custody. The abolition of suspended sentences would place such disadvantaged and marginalised individuals at an even higher risk of custodial sentences.

HPLS submits that additional intermediate sentencing orders should be available for people who are homeless, have a mental illness or have drug/alcohol dependency. Such orders need to have considerable flexibility as to the amount of supervision and treatment, with any special conditions being optional for the judicial officer to impose, so that the order can be appropriately tailored to the individual. Moreover, such orders need to be adapted to the capabilities and needs of offenders, and should be cognisant of the difficulties confronted by homeless people to attend appointments.

HPLS also submits that greater use needs to be made of the s 11 Treatment Bond.

HPLS submits that intermediate sentencing options need to have a greater emphasis on therapeutic and remedial outcomes, and to be more flexible and tailored to the particular needs of the offender, particularly those who are homeless, have a mental illness or a history of alcohol or drug dependency. Specifically, HPLS submits that the MERIT program should be extended so that it could be used for offenders with other addictive problems, and that the program should be further resourced so that it is not restricted to particular geographic areas of availability.

HPLS submits that current provisions relating to breaches of suspended sentences require reform as they operate in a manner which places people who are experiencing risk of homelessness at a higher risk of being sentenced to a full-time prison sentence than others in the community. HPLS submits that there is a need for an expansion of diversionary programs and sentencing options in respect of breaches of suspended sentences.

HPLS notes that some research identifies a close association between incarceration and homelessness. In a 2003 study of 194 ex-prisoners in NSW and 145 ex-prisoners in Victoria, it was estimated that over half of the NSW participants experienced episodes of homelessness in the nine months following release from prison.<sup>13</sup> In 2005, the Law and Justice Foundation of NSW concluded that ex-prisoners were disproportionately represented in the NSW homeless population.<sup>14</sup> The case work data from HPLS indicate that from January 2010 to June 2011, 45 per cent of the clients of the HPLS Solicitor Advocate indicated that they had previously been in prison.

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<sup>13</sup> See n 2 above.

<sup>14</sup> See n 3 above, 269.

HPLS submits that full-time custody heightens the risk of homelessness upon release, or entrenches a person's existing vulnerability to homelessness. The need to maintain suspended sentences as a sentencing option while expanding intermediate sentencing options, and particularly those options which have therapeutic and remedial outcomes, assists to keep homeless people out of the prison system and contributes to breaking the vicious cycle between prison and homelessness.

# Appendix A

## 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 (then) 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 receives funding from Industry & Investment NSW for its work on energy and water, and from Allens Arthur Robinson for the Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

## The Public Interest Law Clearing House

The Public Interest Law Clearing House (PILCH) NSW was established in 1992 by the Law Society of New South Wales, the Public Interest Advocacy Centre and the private legal profession to respond to the growing incidence of unmet legal needs within the community. Underlying the establishment of PILCH is the commitment from lawyers that the provision of legal services on a *pro bono publico* ('for the public good') basis is intrinsic to legal professional responsibility.

The aims of PILCH are:

- to identify matters of public interest that warrant legal assistance *pro bono publico*;
- to identify the legal needs of non-profit organisations;
- to match disadvantaged and under-represented individuals, groups and non-profit organisations with a need for otherwise unavailable legal assistance with PILCH member firms and barristers;
- to utilise the diverse skills and resources of lawyers in a broad range of public interest matters;
- to expand the participation of private practitioners in the law reform process;
- to seek the integration of *pro bono* work with legal practice;

- to encourage co-operation between private practitioners and public interest lawyers: and
- to establish/coordinate public interest projects which seek systemic reform.

PILCH provides services to community organisations and individuals for free. It is a membership-based organisation with members including small, medium and large private law firms, corporate law departments, individual barristers, barristers' chambers, law schools, accounting firms, Legal Aid NSW, the Law Society of NSW, the NSW Bar Association, and PIAC.

### **Homeless Persons Legal Service**

HPLS provides free legal advice and ongoing representation to people who are homeless or at risk of homelessness. It operates ten clinics on a roster basis at welfare agencies in the greater Sydney area. The clinics are hosted by the following welfare agencies:

- Edward Eagar Lodge (Wesley Mission);
- Matthew Talbot Hostel (St Vincent de Paul Society);
- Newtown Mission in Partnership with Newtown Neighbourhood Centre;
- Norman Andrews House (Uniting Care);
- Parramatta Mission (Uniting Church);
- Streetlevel Mission (Salvation Army);
- The Station, Vincentian House (St Vincent de Paul Society);
- Vincentian Village (St Vincent de Paul Society);
- Wayside Chapel (Uniting Church); and
- Women's and Girls' Emergency Centre.