NSW Law Reform Commission – Sentencing Question Papers 5-7

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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 (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 also receives funding from Trade and Investment, Regional Infrastructure and Services NSW for its work on energy and water, and from Allens 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 work in the criminal justice system

PIAC has significant experience in relation to sentencing through its work with the Homeless Persons' Legal Service (HPLS), a joint initiative between PIAC and the Public Interest Law Clearing House (PILCH) NSW. The HPLS Solicitor Advocate represents people who are homeless and charged with minor criminal offences. The role was established in 2008 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 need for greater capacity to address multiple and complex interrelated legal and non-legal problems.

Since commencing in 2008, the HPLS Solicitor Advocate has provided representation in 499 matters, for 329 individual clients.

NSW Law Reform Commission
Sentencing Question Papers 5-7

PIAC welcomes the opportunity to comment on the NSW Law Reform Commission's (the Commission) *Question Papers 5-7* (the Question Papers) relating to the review of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (the Act).

In October 2011, PIAC through its program, HPLS, responded to the NSW Law Reform Commission's sentencing outline paper. HPLS's submission focused on the close relationship between offending, re-offending, incarceration and homelessness. It called on the Commission to recommend:

- additional intermediate sentencing orders for people who are homeless, have a mental illness or a drug/alcohol dependency;
- that suspended sentences as a sentencing option be maintained;
- the expansion of diversionary programs and sentencing options in respect of breaches of suspended sentences.

PIAC also provided comment to the Commission's sentencing Questions Papers 1-4 in June 2012. The submission again focused on the close relationship between offending, re-offending, incarceration and homelessness. The submission called on the Commission to recommend:

- diversion away from the criminal justice system prior to sentencing;
- that the principle of deterrence not be applied to vulnerable communities;
- the principle of rehabilitation be retained as a relevant consideration in sentencing.

PIAC's submission to the Commission's Question Papers 5-7 again focuses on the need to ensure the diversion of people who are homeless and those with a mental illness or chronic disability out of the criminal justice system. This submission calls on the Commission to support the importance of judicial discretion in setting non-parole periods and increase the authority of the court to divert people with complex needs from custodial sentences to therapeutic options. PIAC argues that 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 have a history of alcohol or drug dependency.

Question Paper 5 Full-time Imprisonment

Question 5.1: The ratio of the non-parole period and balance of term and application of special circumstances

PIAC submits that the courts should have flexibility in determining the ratio of the non-parole period and balance of term, taking into account the special circumstances test under s 44 of the Act. PIAC supports the principle set out in earlier Commission reports that restrictions generally should not be imposed on judicial discretion.[1]

[1] See, eg, NSW Law Reform Commission, *Sentencing*, Report No 79 (1996) [8.22]-[8.24].

As detailed in Question Paper 5, the special circumstances in which courts set the parole period as less than three-quarters of the head sentence are varied, but courts frequently take this approach when the offender will require assistance returning to the community because of a problem with drug addiction. The Question Paper refers to the high percentage of sentences that provide for a non-parole period of less than two-thirds of the head sentence. There is no indication that the ratio is inappropriate in relation to the nature of the special circumstances for this group of offenders.

The percentage of sentences attracting the 'special circumstance' provision may relate to the nature of people who are in contact with the criminal justice system. For example, 45 per cent of the HPLS Solicitor Advocate's clients have disclosed that they have a mental illness. This is consistent with other wider studies that found that 'almost half of detainees may have a diagnosable mental disorder at the time of arrest', half this group with no previous diagnosis.[2] This health status and intellectual disability increase the likelihood that offenders will fall into the 'special circumstance' category.

PIAC recommends that the court continue to have the discretion to order a longer period under supervision in the community. Removing this option would be detrimental to HPLS clients who are likely to fall into the large percentage of prisoners who warrant a variation in the ratio of the non-parole period.

There is no evidence that longer periods in custody reduce recidivism. A 2012 study conducted by the NSW Bureau of Crime Statistics and Research found 'increasing the length of stay in prison beyond current levels does not appear to impact on the crime rate'.[3] PIAC believes that special circumstances should remain a consideration in determining the non-parole period of a custodial sentence.

As the case studies below detail, the concept of 'special circumstance' allows the court to take into account the factors that have led a client into homelessness and the interconnecting health problems and intellectual capacity that may have contributed to the offence. The following examples from the work of the HPLS Solicitor Advocate demonstrate how the court appropriately balanced the parole and non-parole periods for offenders in circumstances that were correctly deemed special.

Case Study 1

IS was homeless, substance dependent and had a lengthy history of theft convictions for which he had received custodial sentences. On the most recent charge of theft, he was convicted and sentenced to 12 months imprisonment. The court, taking into account his mental health, lack of stable housing and the program of rehabilitation for substance dependency that he had commenced prior to the current charges, set the non-parole period at six months. The longer parole period was to assist with his rehabilitation.

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2 Lubica Forsyth and Antonette Gaffney, Australian Institute of Criminology, *Mental disorder prevalence at the gateway to the criminal justice system*, Trends & issues in crime and criminal justice no. 438 (2012).

3 Wai-Yin Wan, Steve Moffatt, Craig Jones, and Don Weatherburn, NSW Bureau of Crime Statistics and Research, *The Effect of Arrest and Imprisonment on Crime*, Crime and Justice Bulletin No 158 (2012) 15-16.

Case Study 2

GH was sentenced for serious assault. He had brain damage as a result of a car accident when he was a child and had a mild intellectual disability that was exacerbated by alcohol abuse. Due to the seriousness of the charge, his prior record and further offences occurring in the interim, the Court did not feel that it was appropriate to apply s 32 of the *Mental Health (Forensic Provisions) Act*, but it was clear that GH needed assistance in the community.

The Court took the client's cognitive impairment into account and imposed a seven month term of imprisonment with a non-parole period set at one month. GH had already spent a month in custody by the time of sentence, so he was released on parole following sentence.

PIAC recommends that the application of special circumstances be left to the discretion of the courts. Setting ratios for particular offences could restrict the application of this provision for those it was intended to assist, such as offenders with complex needs.

Recommendation 1

That the NSW Law Reform Commission recommend that special circumstance provisions in the Crimes (Sentencing Procedure) Act 1999 *(NSW) remain as a relevant consideration in determining the ratio of the non-parole period of a custodial sentence for especially vulnerable people, such as those experiencing homelessness.*

Question 5.3: Short sentences of imprisonment

PIAC acknowledges the research undertaken regarding short sentences, which questions the value and effectiveness of sentences of less than six months. For example, a British study in 2009 concluded 'that the majority of community sentences provide similar or better value for money and effectiveness than short-term prison sentences'.[4] However, as Question Paper 5 describes, where an offender cannot access a non-custodial alternative and the court has no option but to set a custodial sentence, removing the judicial discretion to impose a sentence of less than six months could result in 'sentence creep'. Considering the sentencing experience of HPLS, the possibility of clients receiving custodial sentences longer than those they currently receive is a particular concern.

PIAC is of the view that in the absence of comprehensive, flexible, well-resourced intermediate sentencing options, it is necessary to maintain short sentences as a sentencing option because it provides a means to minimise the time that vulnerable individuals spend in 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 generally not available. As a result, unless the offender receives a suspended sentence, a full-time custodial sentence is the only option. The abolition of short sentences would place such disadvantaged and marginalised individuals at an even higher risk of lengthy custodial sentences.

Until all offenders, including those with mental health issues, cognitive disabilities, substance abuse problems and a combination of these problems, can be diverted into non-custodial options,

[4] Matrix Evidence, *Make Justice Work: Are short term prison sentences an efficient and effective use of public resources?* (2009) < http://www.makejusticework.org.uk/wp-content/uploads/are-short-term-prison-sentences-an-efficient-and-effective-use-of-public-resources-MATRIX-Oct-2009.pdf>.

the courts must have the option of imposing short sentences. This is illustrated in the case studies below.

Case Study 3

IH was charged with theft and drug possession. He had a poor record in relation to property offences and had failed to appear when the new charges first came before the court. At the time of sentencing, however, he was in crisis accommodation, taking part in a program to treat his substance dependency and taking steps to obtain housing. Given the new circumstances of the client, the magistrate considered an Intensive Control Order and a Community Service Order, however Corrections NSW assessed him as not suitable. Since IH was also in breach of a s 9 bond, the only option was a custodial sentence. The magistrate imposed a term of imprisonment of less than six months.

Case Study 4

SL is an Indigenous woman who had been convicted of numerous offences of assault and assault police. She had a history of homelessness and alcohol addiction. She was sentenced to six months in prison, which meant that she would lose her public housing accommodation as Housing NSW will only keep a tenancy open for 12 weeks.

The client appealed to the District Court of NSW. By the time the appeal was heard, SL had spent almost three months in custody. The appeal was upheld and good behaviour bonds were imposed on all counts except one. In relation to the charge of assault, SL was sentenced to time served of 2.5 months, which meant she was immediately released.

PIAC supports courts having the option to set short sentences when no non-custodial alternative is available. PIAC submits that offenders from vulnerable groups, if not diverted out of the criminal justice system prior to sentencing, should have appropriate non-custodial options available that seek to respond to their complex needs.

Recommendation 2

That the NSW Law Reform Commission recommend that the option of short sentences be retained as a relevant consideration in sentencing under the Crimes (Sentencing Procedure) Act 1999 (NSW) until non-custodial diversion programs are available for all offenders with complex needs (particularly mental health and cognitive impairment) in NSW.

Question 5.5: Aggregate head sentences and non-parole periods

PIAC supports the proposal in the Question Paper that the court be required to state reasons if the effective sentence does not reflect an individual's special circumstances. The Question Paper notes the concern that in aggregating sentences the consideration of special circumstances can be lost and that this has given rise to appeals to determine the court's sentencing intentions.

HPLS is particularly concerned that a clear explanation is provided to clients that have a cognitive or mental health impairment. The consideration of special circumstances and potential variation of the parole period for accumulated sentences should not be lost in this process. The following case study is an example of how the absence of an explanation has led to an appeal.

Case Study 5

PM suffers from bipolar affective disorder. He had a lengthy record of property offences and was on a s 9 good behaviour bond. He was charged with a new offence of stealing, to which he pleaded guilty and was sentenced. The court revoked the s 9 bond and sentenced PM to six months imprisonment. In relation to the stealing charge the court sentenced PM to nine months imprisonment and set a non-parole period of three months based on his special circumstances. The court then accumulated the sentences without specifying why. The matter is now on appeal.

Recommendation 3

That the NSW Law Reform Commission recommend courts be required to state reasons if the effective sentence does not reflect an individual's special circumstances.

Question Paper 6 Intermediate custodial sentencing options

PIAC 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 court 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 the offender, 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.

Question 6.1: Compulsory drug treatment detention

PIAC encourages the Commission to recommend the continuation and expansion of compulsory drug treatment programs where there is evidence that such a program would be effective in meeting the underlying needs of the offender and undertaken in environments that support a therapeutic approach.

A 2010 paper from the NSW Bureau of Crime Statistics and Research (BOCSAR) reported a meta-analysis study from the US that compared compulsory with non-compulsory treatment, and compulsory programs in detention with those in the community. The results were mixed, but overall the study found little difference in outcomes for people on community treatment orders compared to those receiving treatment through a drug court.[5] A recent report from the UK on drug treatment and reconviction found the length of time the offender was in the treatment program had a positive effect on the rate of reoffending. The referral mechanism – whether self-referred or referred by a court – made no difference to whether an offender was retained in the program.[6]

The BOCSAR report cited above also referred to a 'lack of access to these programs by disadvantaged offenders such as indigenous offenders in Australia', an indicator that the

[5] Wayne Hall, Jayne Lucke, NSW Bureau of Crime Statistics and Research, *Legally coerced treatment for drug using offenders: ethical and policy issues*, Crime and Justice Bulletin No 144 (2010) 4-6.

[6] National Treatment Agency for Substance Misuse, *The impact of drug treatment on reconviction* (2012) <http://www.nta.nhs.uk/publications.aspx>.

programs are not commonly available or well targeted. This is supported by the experience of the HPLS Solicitor Advocate. From January 2010 to December 2011, the HPLS Solicitor Advocate provided court representation to 179 individual clients facing criminal charges. Of these:

- 60 per cent disclosed that they had drug or alcohol dependency; and
- 35 per cent disclosed that they had both a mental illness and drug/alcohol dependency.

As these figures illustrate, the majority of HPLS clients have drug or alcohol dependency yet they are not gaining access to the Drug Court because they are ineligible on one or more grounds, often because they do not reside or did not offend within the catchment area of the Court, or because they have a mental condition that could prevent or restrict participation in the program. Additionally, there are currently no places available for women.

PIAC submits that increased resourcing and changes to the eligibility criteria would provide greater equity of access to those living with untreated drug or alcohol addiction.

Recommendation 4

That the NSW Law Reform Commission recommend that the courts have the authority to order compulsory drug treatment detention, that the program be expanded to more areas, and that eligibility criteria be widened to include:

- *offenders who live, but have not necessarily offended, in the area; and*
- *offenders with a mental illness based on a clinical assessment.*

Question 6.2: Home Detention

PIAC supports the Commission in recommending the retention of home detention as a sentencing option, particularly where an offender has established housing following a history of homelessness and would be at risk of returning to homelessness following a short custodial sentence. Community and public housing will only retain housing for an offender in custody for a period of up to 12 weeks.

'PM', in Case Study 5 above, is an example where, if home detention had been granted, he may have saved his public housing, particularly given the minor nature of the offence. In all likelihood, he will serve a short sentence and be released into homelessness, having lost his public housing and household belongings. Maintaining housing should be a consideration in sentencing for vulnerable members of the community.

Case Study 6

DL was a homeless man with a history of substance dependence. He 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 of the latter charges he would have been in breach of his suspended sentence. At the time the charges were laid he was living in crisis accommodation, and therefore was not eligible for home detention if convicted. DL secured public housing just prior to sentencing, and the court was then able to assess and order that he be sentenced to home detention. The home detention allowed him to continue treatment and maintain his housing.

However, home detention is currently not a sentencing option for most people experiencing homelessness, given their lack of stable or suitable accommodation. For many people experiencing homelessness, the difficulties in accessing private rental accommodation have forced them into a state of dependency on the public housing system, where they may be forced to wait for up to 10 years to obtain stable public housing accommodation.

The other issue that arises in relation to home detention is the restrictions placed on eligibility of offenders because of the type of offence committed. For instance, under s 77(1)(c) of the Act offenders cannot be sentenced to home detention where they are charged with assault occasioning actual bodily harm.

> **Case Study 7**
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> JB was charged with assault occasioning actual bodily harm, which involved minor scratching. Because of the nature of the charge, home detention was not available. The Court imposed a 3 month term of imprisonment but, fortunately, the sentence was suspended. JB had housing and could have lost that housing if a full time custodial sentence had been imposed.

Recommendation 5

That the NSW Law Reform Commission recommend that home detention remain a sentencing option and that maintaining housing for offenders in special circumstances be a consideration in the form of sentencing.

Question 6.3: Intensive correction orders

Although potentially a valuable non-custodial sentencing option, in the experience of HPLS, intensive correction orders (ICO) are not an effective alternative to custody because it is rare that a HPLS client will be found suitable for the program.

The Question Paper explains the process for assessing eligibility for the ICO. There are few statutory exclusions, and a court can only order an ICO if the Commissioner for Corrective Services determines that the offender is suitable. Factors taken into account include criminal history, accommodation, physical and mental health, drug and alcohol dependency – a combination that generally rules out HPLS clients. There is no avenue for the court to question the pre-sentence report or take into account other evidence about suitability.

It is true that these orders are often not appropriate for people who have mental illness, drug/alcohol dependency or other chronic disability, as the onerous requirements often mean that such people have difficulty 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'.[7] 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.

There seems to be a contradiction, however, between the general exclusion of HPLS clients because of the suitability requirements and the recent decision by the NSW Court of Criminal Appeal that noted that this sentencing option was intended to provide intensive rehabilitation.

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[7] Popovic, Jelena, *Meaningless vs Meaningful Sentences: Sentencing the Unsentenceable*, Sentencing Principles, Perspectives and Possibilities (2006) 7-8.

PIAC submits that HPLS clients are most likely to recommit offences because of the underlying causes of their homelessness and that 'intensive rehabilitation' would reduce the likelihood of reoffending – the very purpose described by the Court of Criminal Appeal.[8]

Case Study 8

SI had a long history of substance dependency and offences related to his dependency. He was convicted of theft and received a custodial sentence of six months. At the time of the sentence he had received assistance to treat his substance dependency and was making progress. SI appealed his sentence to the District Court and an application was made for SI to be assessed for an ICO. The application was supported by the presiding Judge. The Corrective Services assessment found SI not suitable because of the history of his substance dependency.

PIAC supports the conclusion of the recent BOCSAR report on intensive correction orders, that 'utilisation and accessibility of ICOs, and the impact of their introduction on the use of other penalties, should be further monitored'.[9] Monitoring should include a wider range of demographic data than that used in the BOCSAR report. PIAC submits that future reports should also include the health and disability characteristics of those who received ISOs.

Recommendation 6

That the NSW Law Reform Commission recommend the continuation of intensive correction orders as a sentencing option, and that eligibility for HPLS clients be made more accessible by:

- *giving the court authority to attempt to resolve or negotiate matters of concern with Corrections NSW if a client is not found suitable;*
- *including in the ICO rehabilitative orders such as medical, psychiatric or psychological treatment;*
- *recommending that Corrections NSW adapt the ICO service to ensure equity of access for people with intellectual and cognitive disability.*

Question 6.4: Suspended sentences

PIAC recommends the retention of suspended sentences. In its preliminary submission to this inquiry, PIAC's homelessness program, HPLS, discussed the need to maintain suspended sentences as a sentencing option, given the absence of comprehensive, flexible, well-resourced intermediate sentencing options. HPLS argued that removing or restricting access to suspended sentences would put homeless people and others who are not found suitable for alternatives to imprisonment such as intensive correction orders, community service orders or home detention, at greater risk of full time imprisonment.

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. Given the often lengthy criminal record of people experiencing homelessness, indicative of the close relationship between criminal offending and homelessness, a suspended sentence

8 *R v Boughen* [2012] NSWCCA 17 [109]-[110].

9 Clare Ringland, NSW Bureau of Crime Statistics and Research, *Intensive correction orders vs other penalties: offender profiles* Crime and Justice Bulletin No 163 (2012) 9-10.

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 disorder.

Case Study 9 and Case Study 10 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.

Case Study 9

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.

Case Study 10

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.

Case Study 11 illustrates the devastating consequences for a client's housing when a suspended sentence is not granted.

Case Study 11

PM pleaded guilty to theft of $9.10 worth of food from a supermarket. He was on a good behaviour bond for stealing a small amount of property from an open house. He had mental health problems and was receiving assistance. The Court imposed an overall sentence of 12 months. This effectively meant that PM would lose his housing and his assistance for his mental health problems. He had completed a good part of the bond so a suspended sentence could have been imposed.

The preliminary submission also argued that the provisions relating to breaches of suspended sentences require reform as they operate in a manner that 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.

As noted above, it is the experience of HPLS that those offenders who have mental illness or drug/alcohol addictions are usually considered to be unsuitable for an intensive correction order. Given the prevalence of mental health and drug and alcohol issues among the homeless population, 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. As noted above, home detention is 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 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 for home detention.

PIAC submits that the court requires more options when responding to breaches of suspended sentences. This includes greater access to purpose designed diversionary options for people with mental illnesses or cognitive impairment.

The following case study provides an example of the dilemma faced by a court when a bond is breached and there is limited access to non-custodial diversionary options.

Case Study 12

MT is transgender. The victim was transphobic and had abused MT on a number of occasions. On one of these occasions MT assaulted the victim and was charged with assault occasioning actual bodily harm. At the time of the assault MT was subject to a suspended sentence for property offences. Despite the issue of provocation and the particular circumstances of MT, which made serving time in a male correctional centre difficult, the s 12 bond was revoked. The court could not take into account the subjective circumstances of the client in deciding the question as to whether or not to revoke the bond. MT was sentenced to a term of imprisonment.

Recommendation 7

That the NSW Law Reform Commission recommend 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 substance dependency, disability, chronic health conditions or mental illness. Replacement of suspended sentences should come into effect only when 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.

Recommendation 8

That the NSW Law Reform Commission recommend that additional, community-based intermediate sentencing dispositions be created for people in special circumstances, including people experiencing homelessness, people with mental illness, disability or chronic health conditions and people with substance dependency. Such dispositions should be flexible and adaptive to the particular capabilities and needs of offenders.

Question Paper 7 Non-custodial sentencing options

Question 7.1: Community service orders

As is the case with intensive correction orders, although they are potentially a valuable non-custodial sentencing option, community service orders (CSO) are not an effective alternative to custody for HPLS clients because it is rare that a client will be found suitable for the program.

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.

In the experience of HPLS, offenders who have mental illness or drug/alcohol disorders are usually considered to be unsuitable for a CSO.

PIAC submits that the process for determining the suitability of offenders for a CSO needs urgent review. Although a CSO is a lesser penalty than an ICO, Corrections NSW applies the same consideration and process to both orders. As a result, most HPLS clients are excluded. The following case studies demonstrate the limits placed on the court regarding CSO's.

Case Study 13

CS pleaded guilty to assault occasioning actual bodily harm. He had no history of violence. The offence occurred more than a year before sentence and the client had no offences during that period. Newtown Mission provided written advice to the court that they were prepared to provide community service for CS, who was willing and able to undertake this community service. Despite this agreement, Corrections NSW found the client was not suitable for a CSO.

Case Study 14

DC pleaded guilty to minor theft charges and all goods were recovered. At this time he had also breached conditions of a bond. At the time of the offence the sentencing report by Corrections NSW found DC suitable for community service. There was a delay in sentencing, and so the pre-sentencing report was reviewed and updated. In that time period there had been no new offences or changes in DCs circumstances. In the updated report, Corrections NSW found him unsuitable for community service and he was give a suspended sentence.

Recommendation 10

That the NSW Law Reform Commission recommend the continuation of community service orders as a sentencing option, and that eligibility for HPLS clients increased by:

- *giving the court authority to attempt to resolve or negotiate matters of concern with Corrections NSW if a client is not found suitable;*
- *recommending that Corrections NSW adapt community service order assessments to ensure equity of access for people with intellectual and cognitive disability.*

Question 7.2: Bonds

Section 9 bonds work particularly well for clients who are homeless and in need of support to meet the underlying needs that give rise to their offending. PIAC recommends the retention of s 9 bonds. The Question Paper notes the high percentage of bonds imposed in the Local Court. As noted earlier in this submission, the use of bonds may simply reflect the characteristics of offenders who appear in the Local Court on charges largely due to their homelessness, mental

health and substance dependency. The following case study demonstrates how a bond can support the path to recovery and safety for people with complex needs.

> **Case Study 15**
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> SP is homeless and slept in a city doorway where there is a CCTV camera in the hope that it would give him some protection from violent attacks. SP was addressing his substance dependency problems and had no record of violence. Another homeless man set up a fruit stall near SP selling fruit late at night and early in the morning. When SP asked him to move, the fruit vendor became abusive, at which point SP punched him a number of times. While the court noted the seriousness of the offence, it applied a s 9 bond for 12 months, taking into account the provocation and SP's progress in rehabilitation.

For many HPLS 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. An example of this is where such clients breach a s 9 good behaviour 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.

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 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.

Recommendation 11

That the NSW Law Reform Commission recommend that s 9 bonds remain a sentencing option, and 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.*
- *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.*
- *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.*

Question 7.3: Good behaviour bonds

PIAC recommends the retention of good behaviour bonds. Good behaviour bonds allow the court to set conditions that support an offender's rehabilitation, health and housing. This aspect of good behaviour bonds is particularly important for HPLS clients. A primary benefit of good behaviour

bonds is the flexible response magistrates can deliver for offenders with complex needs with consistent but minor offences.

PIAC 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 become 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.

PIAC 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. The following case studies illustrate how the successful completion of a s 11 treatment bond can widen the available options for appropriate remedial sentencing. It is of concern that without this option, courts would have little option but to sentence the offender to a period in prison. In particular, s 11 bonds are an important mechanism for homeless clients with lengthy records, who cannot access non-custodial options.

Case Study 16

GC was charged with a number of theft offences. He was initially placed on a s 11 treatment bond and the matter was adjourned for a period of 6 months to allow for a subsequent assessment as to how the treatment progressed. 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 good behaviour 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.

Case Study 17

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 DF up for failure. He 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.

Case Study 18

TA has a history of psychosis and depression, substance dependency and trauma caused by childhood sexual assault from the age of 4 to 16. She had a history of violent offending and the latest charge was for common assault. A custodial sentence was likely. The magistrate took into account the personal circumstances of TA and considered a suspended sentence. Because of TA's history of offending and her underlying health issues, however, a suspended sentence was likely to fail unless it was combined with treatment. TA entered a drug treatment program, which led the court to agree to a section 11 bond and adjourn the matter for three months. If TA has remained engaged with the program and made progress, it is possible that when TA appears before the court in three months, a section 9 good behaviour bond will be applied.

Recommendation 12

That the NSW Law Reform Commission recommend that good behaviour bonds remain a sentencing option, and 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.

Question 7.4: Fines

PIAC submits that fines should be retained as an option for the courts, particularly if he alternative is a custodial sentence. The following case study is an example where the court used a fine to fit the circumstance and nature of the offence while recognising the seriousness of the offence.

Case Study 19

RB had no criminal history. He was observed by police sitting between two men outside a homeless outreach centre. RB agreed to pass a small package of drugs from the supplier on one side to the purchaser on the right. Police charged all men, RB was charged with supplying a small amount of methlamphetamine. RB pleaded guilty. The offence was serious but given the circumstances and RBs lack of criminal record, the magistrate applied a small fine.

However, the accumulation of fines applied to people who are unlikely to pay the fines requires changes to the police practices in issuing fines and more extensive use of payment methods such as Work Development Orders (WDOs), which allow people to clear their fines through unpaid work, courses or treatment.

PIAC notes that the Question Paper refers to recent Commission reports and submissions about penalty notices. There are two recommendations from the HPLS submission to that inquiry that are relevant to this inquiry. The first is to increase the power of the police to issue cautions for all offences where a fine is the only outcome of an offence, that is, there is no possibility of a custodial sentence.

The other is to adopt the Victorian example of a 'special circumstance list' in the local courts where vulnerable people can have a criminal matter and the enforcement of the fine handled at the one time.[10] Eligible offenders with their solicitor or case manager submit an application to the Penalty Enforcement Registration of Infringement Notices Court. A sentencing order is tailored to meet the needs of an offender. For example, a fine may be dismissed if the offender attends a residential rehabilitation unit for a period of time.[11]

Recommendation 13

That the NSW Law Reform Commission recommend that:

- *fines remain an option for courts to apply at a level that reflects the ability to pay and the seriousness of the offence;*
- *courts are able to set in place alternatives to the fine, on application by offenders that meet 'special circumstance' criteria at the time of sentencing, similar to the Victorian special circumstance list;*
- *police have the power to caution a suspect for offences where a fine would be imposed for people who have a mental illness, intellectual disability or cognitive impairment.*

Question 7.5: Conviction with no other penalty

PIAC submits that s10A of the Act can be a useful option for courts to consider in sentencing vulnerable offenders. This is particularly the case where the offence is minor. The following case study from HPLS demonstrates how courts can apply its use.

Case Study 20

EL was a young woman who had recently moved to Sydney from Queensland. She had a number of prior offences in other states that had resulted in a term in prison and a good behaviour bond. She was charged with possessing prescription drugs contrary to the *Poisons and Therapeutic Goods Act*. The court used s 10A to convict without another penalty.

[10] Julie Hourigan Ruse, *Penalty notices: still not a fine thing*, Public Interest Advocacy Centre (2011) <http://www.piac.asn.au/publication/2011/03/penalty-notices-still-not-such-fine-thing-vulnerable-people>.

[11] Suzie Forell & Emily McCarron and Louis Schetzer, *No Home, No Justice? The legal needs of homeless people in NSW*, Law and Justice Foundation of NSW (2005) 260.

Recommendation 14

That the NSW Law Reform Commission recommend that section 10A of the Crimes (Sentencing Procedure) Act 1999 (NSW) be retained.

Question 7.6: Non-conviction orders

PIAC submits that s 10 of the Act that allows the court to discharge an offender without recording a conviction be retained. Although it is used rarely with HPLs clients because most have a lengthy criminal record, there are some clients who have no record and extenuating circumstances where it is appropriate to apply a non-conviction order. The following case study demonstrates circumstances where the court found a s 10 order appropriate.

Case Study 21

MA was in her mid forties and homeless after losing her job and housing. She was living in a disused motel that was fenced and had signs indicating that trespassers would be prosecuted. She had accessed the property through a hole cut in the wire fence. Police were aware of the situation and given MA orders to move on. The order was ignored. The police then charged MA with entering enclosed lands without consent of the owner. The court took into account her previous good record and circumstances and dismissed the charged without recording a conviction.

Recommendation 15

That the NSW Law Reform Commission recommend that courts retain the option to discharge an offender without recording a conviction.

Question 7.10: Work and development orders

PIAC submits that a new non-custodial option, modelled on Work and Development Orders, should be considered as a sentencing option to replace both fines and custodial sentences where appropriate. As noted earlier in this submission, vulnerable and at risk individuals generally find it difficult to access ICOs and CSOs because they are assessed as unsuitable, often because of mental illness, drug or alcohol dependency.

It is important, that if such a measure is introduced as a sentencing option, that these problems are not replicated and that access to it is equitable and does not discriminate against people with mental health issues or substance dependency. The involvement of sentencing reports and Corrections NSW, as is the case with ICOs and CSOs, will simply prolong the duration and cost of cases for minor offences in the local court. It is envisaged that the courts would work with some of the large non-government organisations such as the Salvation Army, St Vincent de Paul Society, Mission Australia or Wesley Mission as service providers for the work, training and treatment programs that an offender would complete to satisfy the order.

Amendments providing for the developing of a new at sentencing order, modelled on WDOs should include:

- allowing the court to not record a conviction on the satisfactory completion of the order;
- that it applies to minor offences where a fine or custodial sentence is a possibility;

- the agreement for an order is between the court and the service provider;
- the decision to grant an order should rest with the court and not Corrections NSW;
- orders should allow offenders with mental health and substance dependency issues to obtain treatment as a condition of an order, and that any infringement of the order result in the matter being returned to court.

PIAC does not recommend that the current WDO scheme be extended to the courts. It is an administrative procedure for the remission of unpaid infringement notices, issued to vulnerable people, administered by the State Debt Recovery Office. Although there is currently a shortage of approved organisations able to provide WDO supervision, the scheme is generally working well.

PIAC submits that a new scheme be introduced, under the control of the courts, which draws on the best features of WDOs.

Recommendation 16

That the NSW Law Reform Commission recommend that a new non-custodial sentencing option, modelled on Work Development Orders, be available as a sentencing option with the following provisions:

- *the court not record a conviction on the satisfactory completion of the order;*
- *application to minor offences where a fine or custodial sentence is a possibility;*
- *the agreement for the order is between the court and the service provider;*
- *the decision to grant an order should rest with the court and not Corrections NSW;*
- *orders should allow offenders with mental health and substance dependency issues to obtain treatment as a condition of the order, and that any infringement of the order result in the matter being returned to court.*