NSW Law Reform Commission Sentencing Question Papers 8-12

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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; and
- 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 provides representation for people who are homeless and charged with minor criminal offences. The role was established in 2008 to overcome 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 the multiple and complex interrelated legal and non-legal problems.

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

NSW Law Reform Commission Question Paper 8-12

PIAC welcomes the opportunity to comment on the NSW Law Reform Commission's (the Commission) Sentencing Question Papers 8-12 (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, provided comment to the NSW Law Reform Commission's sentencing outline paper. HPLS's submission focussed on the close relationship between offending, re-offending, incarceration and homelessness. HPLS's submission called on the NSW Law Reform 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; and
- 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; and
- the principle of rehabilitation be retained as a relevant consideration in sentencing.

PIAC's submission to the Commission's Question Papers 5-7, in August 2012, focused 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. It called 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 and remedial options.

This present submission responds to Question Papers 8-12. PIAC notes that the range of questions is very broad and restricts its comments in this submission to those relevant to its own experience.

Question Paper 8 –
The structure and hierarchy of sentencing options

PIAC submits that the experience of offenders who are homeless, suffer from mental illness or cognitive impairment, or have drug or alcohol dependency, must be considered in determining how sentencing options should be structured under the *Crimes (Sentencing Procedure) Act 1999* (NSW) (the Act). PIAC encourages the Commission to recommend that the structure of sentencing options be sufficiently flexible for these offenders to be dealt with appropriately.

In PIAC's experience, intermediate sentencing options are generally not available to offenders who are homeless, suffer from mental illness or cognitive impairment, or have drug or alcohol dependency.[1] 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 where the offender has complex needs.

The following case study is one example that indicates how homelessness, mental illness, disability and drug and alcohol dependency can have a significant impact on whether an intermediate order is awarded:

> **HPLS Case Study 1**
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> AL was homeless man and had 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 that meant he had to use a walking stick, and his 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.

Question 8.1 – Hierarchy of sentences

Should the *Crimes (Sentencing Procedure) Act 1999* (NSW) set out a hierarchy of sentences to guide the courts? What form should such a hierarchy take?

In PIAC's experience, HPLS clients tend to progress quickly through the hierarchy of sentencing options because current intermediate sentencing options are not appropriate or suitable, given the high prevalence of mental illness, and drug or alcohol dependency. An example of this is where clients breach a s 9 good behaviour bond. Usually, the next option in the sentencing hierarchy would be a community service order. However, as HPLS 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 the court that in the event that a s 9 good behaviour bond is breached, it should take into consideration the particular circumstances and needs of the offender in determining whether the bond should be varied or

[1] See PIAC's submission in response to Question Papers 5-7.

revoked. Such circumstances should include whether the offender is suitable for any appropriate intermediate sentencing options.

Accordingly, PIAC believes that if an explicit sentencing hierarchy is adopted in the Act, there should be flexibility for the courts to vary or deviate from the hierarchy based on the circumstances and the needs of the individual offender.

Recommendation 1

That the Crimes (Sentencing Procedure) Act 1999 *(NSW) not prescribe a strict hierarchy of sentences to the Court. However, if a hierarchy is introduced, that Courts be given the flexibility to vary or deviate from the hierarchy based on the circumstances and the needs of offenders from vulnerable groups.*

Question Paper 9 – Alternative approaches to criminal offending

PIAC is strongly supportive of approaches to criminal offending that involve elements of diversion and deferral.

PIAC considers that there is a public interest in reducing recidivism and supports 'justice reinvestment' approaches that move funds away from more expensive, end-of-process crime control options, such as incarceration, towards programs that target the factors that cause offenders to commit crime.

However, it is imperative that community service organisations, which generally are the core service providers of such programs, are adequately resourced.

There is also a need for specially tailored services to meet the complex needs of people with mental illness and intellectual disability. For this reason, we consider that it is important that treatment and care under diversionary programs take a multi-disciplinary and multi-stranded approach.

Question 9.1 – Early diversion

Should an early diversion program be established in NSW? If so, how should it operate?

PIAC strongly supports the establishment of an early diversion program in NSW as a means of preventing people from having to enter the criminal justice system. We consider that this would be particularly appropriate for first-time offenders, young offenders and offenders with cognitive and intellectual disabilities.

PIAC advocates the use by enforcement officers of informal warnings and formal cautions in appropriate circumstances as opposed to the issuing of a penalty infringement notice or criminal infringement notice. PIAC supports the police being encouraged to exercise their discretion not to charge persons they suspect of committing an offence when the person has a mental illness or a cognitive impairment.

In our view, a more formal system of cautions could play an important role in keeping people with mental illness and/or cognitive impairment out of prison.

HPLS was part of the Working Group that drafted the Cautions Guidelines under the *Fines Act 1996* (Cth). The Guidelines provide assistance to enforcement agencies (except NSW Police) when dealing with people who are homeless, have a mental illness or a cognitive impairment. The Guidelines recognise that, for certain categories of people who are highly visible and particularly vulnerable, a caution is a more appropriate mechanism for dealing with a minor offence rather than issuing a penalty notice, which would inevitably introduce the person to the criminal justice system.

The Guidelines place a strong emphasis on cautions only being used where Police could otherwise have taken action for an alleged offence, such as by way of arrest, fine or issuing a court attendance notice. In particular, they should not be used where Police would previously have dealt with the matter informally.

The decision to charge or prosecute

Existing practice and policies of the NSW Police and the Director of Public Prosecutions (DPP) do not give enough emphasis to the importance of diverting people with a mental illness or cognitive impairment or a history of drug or alcohol dependency away from the criminal justice system when exercising the discretion to prosecute or charge an alleged offender.

In the experience of PIAC and HPLS, people are charged even when it is clear from the police facts, custody record and criminal record that they have a history of mental illness or at least are exhibiting symptoms sufficient for it to be noted in the records following the arrest.

There need to be stronger guidelines for the NSW Police and the DPP to encourage them to consider a person's mental illness or cognitive impairment or other relevant factors in deciding whether or not to charge or prosecute an alleged offender.

PIAC has assisted a number of government agencies, including RailCorp and Centrelink, to develop and deliver training modules to enforcement officers and staff working with people who are homeless or have mental illness. Similar training in recognising behaviour and symptoms could be extended to the NSW Police.

PIAC supports the continuation of high-level training on mental illness and cognitive impairment for police officers as part of their core qualification. As PIAC understands, NSW Police is working towards educating a minimum of 10% of all frontline officers by 2015. This education package currently trains police to identify behaviours in the field indicative of mental illness and provides them with tools to deal with the situation, ranging from communication strategies, risk assessment, crisis intervention techniques and knowledge of the current *Mental Health Act 2007* (NSW) and the Memorandum of Understanding between NSW Police, the Ambulance Service and the Department of Health.

PIAC believes that NSW Police should extend this training program to a higher proportion of frontline officers and should implement regular evaluations to monitor the effectiveness of the training.

Currently, there is also a network of 80 "Mental Health Contact Officers" (MHCO) across NSW who ensure the streamlined implementation of the MOU and legislation at local level. However, these MHCOs are not qualified health professionals. PIAC recommends that a mental health liaison officer (such as a trained psychiatric nurse or equivalent) be available on duty at custody

stations. This could be trialled initially in the large stations in Sydney, Newcastle and Wollongong. The officer would have the responsibility for making the decision to divert the offender away from the criminal justice system on the ground of mental illness or cognitive impairment.

Recommendation 2

That the NSW Law Reform Commission propose stronger guidelines for NSW Police and DPP to encourage them to consider a person's mental illness or cognitive impairment in deciding whether or not to charge or prosecute an alleged offender.

Recommendation 3

That the NSW Law Reform Commission recommend that:

- *a higher proportion of frontline Police officers receive high-level training on mental illness and cognitive impairment as part of their core qualification;*
- *that training programs be regularly evaluated; and*
- *that a mental health liaison officer be trialled to assess upon arrest the viability of diversion programs for an offender based on identified mental health issues.*

The Cannabis Cautioning Scheme

An example of a successful cautioning scheme is the Cannabis Cautioning Scheme, which commenced on 3 April 2000 and is operated by NSW Police. This provides for formal cautioning of offenders detected for minor cannabis offences. It allows police to exercise their discretion in appropriate cases and issue a caution. Police are still able to formally charge offenders if warranted.

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

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

A person can only be cautioned twice and cannot be cautioned at all if the offender has prior convictions for drug offences or offences of violence or sexual assault.

PIAC recommends that the Cannabis Cautioning Scheme should be extended to include other minor drug possession matters as in other states and territories of Australia, where diversion programs have extended to the possession and even the misuse of other illicit drugs, alcohol abuse and petrol sniffing.

Recommendation 4

That the NSW Law Reform Commission recommend extending the Cannabis Cautioning Scheme to include other minor drug possession matters.

Question 9.2 – CREDIT program

Is the Court Referral of Eligible Defendants into Treatment (CREDIT) program operating effectively? Should changes be made?

Court Referral of Eligible Defendants into Treatment (CREDIT) is a court-based intervention program involving either voluntary or court-ordered participation by NSW adult defendants. The program was designed to contribute to the NSW Government's target of reducing "the proportion of offenders who re-offend within 24 months of being convicted by a court … by 10 per cent by 2016."[2] In order to meet its overall aim of reducing re-offending, CREDIT seeks to encourage and assist defendants appearing in local courts to engage in education, treatment or rehabilitation programs.

PIAC strongly supports CREDIT as an example of a court-based diversionary approach that seeks to reduce re-offending rates by addressing the causes of re-offending. An evaluation of the pilot program by the NSW Bureau of Crime Statistics and Research (BOCSAR)[3] has shown a high degree of satisfaction amongst both stakeholders and participants.

CREDIT links the defendant to a range of services (including accommodation, financial counselling, mental health support, domestic violence support, education, training, drug treatment, etc), thereby creating the capacity to address a broad range of issues that could be impacting on offending and re-offending. The program is also sufficiently flexible to vary the intensity of the services response in relation to the defendant's needs and risk of re-offending.

The following HPLS case studies illustrate the effectiveness of the CREDIT Program.

HPLS Case Study 2

DTX was referred to HPLS by Newtown Mission in May 2011, charged with assault.

When DTX was waiting at an ATM, an older man in front of him was taking an inordinately long time to obtain money. DTX was in a hurry and therefore told the man to hurry up. The man responded in a verbally aggressive manner. DTX realised that the man was simply playing with the keys on the ATM and again asked him to hurry up. When the man responded in an aggressive tone, DTX grabbed him and pushed him over.

DTX was charged with common assault. He had no criminal record; however, the assault was not minor. DTX disclosed that he had alcohol and anger management problems. Due to the nature of the assault, the Magistrate required DTX to demonstrate to the Court that he was obtaining assistance to resolve his alcohol and anger management issues. He was referred to the CREDIT program and in four months successfully completed the program.

On sentence, a s 10 bond was imposed, largely because the client had undertaken counselling and courses provided by CREDIT.

2 NSW Government *A new direction for NSW: State plan* (2006).

3 Trimboli, L (2012), "NSW Court Referral of Eligible Defendants into Treatment (CREDIT) pilot program: An evaluation" *Crime and Justice Bulletin*, Number 159.

HPLS Case Study 3

KM was charged with theft and use of credit cards. She had a lengthy history of drug abuse and a lengthy criminal record for theft and fraud and had previously served terms of imprisonment.

Subsequent to the offence, KM had commenced a stable relationship and had made serious attempts to get off drugs. At the time of pleading guilty, it was clear that KM faced the real prospect of a further term of imprisonment. Given the change in her circumstances and her attitude, KM was referred to the CREDIT program. A program was developed for KM to obtain financial and drug counselling together with referral to self-development programs.

If KM successfully completes the program it is likely that an alternative to full-time custody may be imposed.

The big drawback of the CREDIT program is its limited availability. It currently operates at only two Local Courts in NSW – Burwood and Tamworth. PIAC supports BOCSAR's recommendation for state-wide implementation of the program.[4]

The program is also currently restricted to adults (aged 18 years or more). PIAC would welcome its expansion to include young offenders (aged 16 years or more), particularly in light of the recent closure of the Youth Drug and Alcohol Court (see PIAC's comments in relation to Question 9.4, later in this submission).

PIAC is also concerned that the CREDIT program is of relatively short duration (around six months). This could result in some clients, particularly those with substance abuse problems, exiting the program before they are ready. PIAC recommends that the program be modified or expanded to allow for ongoing case management for clients with multiple and complex needs following their exit from the program.

Another limitation of the program identified in the BOCSAR evaluation was its limited ability to secure housing for participants. According to the evaluation:

> One of the greatest difficulties in each site was for accommodation-related services. This service type had one of the lowest referral success rates and gives some indication of the difficulties faced by CREDIT staff in securing appropriate accommodation for this client group.[5]

Lack of suitable long-term or temporary accommodation is likely to limit a client's ability to engage with services and hence their ability to successfully complete the CREDIT program. PIAC strongly recommends that the NSW Government establish additional accommodation-related services for clients of CREDIT and adequately resource existing housing services.

4 Ibid 21.
5 Ibid 20.

Recommendation 5

That the NSW Law Reform Commission recommend that:

- *the CREDIT be implemented in Local Courts across NSW.*
- *the CREDIT program be expanded to include young offenders (aged 16 years or more).*
- *the CREDIT program allow for ongoing case management for clients with multiple and complex needs following their exit from the program.*
- *the NSW Government establish additional accommodation-related services for clients of CREDIT and adequately resource existing housing services.*

Question 9.3 – MERIT program

Is the Magistrate's Early Referral into Treatment program (MERIT) operating effectively? What changes, if any, should be made?

The Magistrates Early Referral into Treatment (MERIT) program is a three-month pre-plea diversion scheme based in local courts. It provides the opportunity for adult defendants with substance abuse problems to work, on a voluntary basis, toward rehabilitation as part of the bail process.[6] The aim of the MERIT program is to reduce criminal offending associated with drug use. Importantly, the program is designed to allow defendants to focus on treating drug and related health problems independently from their legal matter.

PIAC supports the MERIT program and considers it to be an effective pre-sentence and diversionary program. A number of HPLS clients have successfully completed the MERIT program. Case studies of two clients are detailed below.

HPLS Case Study 4

AW had become homeless after losing his full-time job because of a heroin addiction. He was facing charges for larceny for property worth approximately $30,000. He had made a number of previous attempts to access the MERIT program without success. He was sentenced to ten months imprisonment with a non-parole period of four months. The matter went to the District Court on appeal.

While on bail for the larceny offence AW was apprehended and charged with goods in custody. HPLS liaised with MERIT and this time AW was assessed as suitable. He committed to completing the MERIT program and received a glowing report at the conclusion of the treatment. As a consequence, the presiding judge placed him 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 AW would have received custodial sentences 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 he was able to address his drug addiction and face a future where he could realistically seek employment and rebuild ties with his children.

6 Lulham, R (2009), The Magistrates Early Referral into Treatment Program, Crime and Justice Bulletin No 131, NSW Bureau of Crime Statistics and Research, 2.

HPLS Case Study 5

NT was 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 and commenced the MERIT program.

NT had not completed the program when the appeal was heard, but the Judge imposed a suspended sentence instead of full-time custody and he completed the MERIT program.

Prior to the appeal, NT committed further offences. 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.

Case study 5 illustrates that if an offender can show he is dealing with his drug habit, then a community service order may be applied. The 2009 BOCSAR evaluation of the MERIT program found that those participating had a 12% reduced offending rate, when compared with a similar group who met the criteria but did not participate.[7]

Currently, MERIT is restricted only to adults with drug use problems. The recent closure of the Youth Drug and Alcohol Court has meant that there is now a significant gap in appropriate diversionary services for young offenders with substance abuse problems. PIAC recommends that the program be expanded to include young offenders (aged 16 or more). As part of this program the Children's Court could have access to case management and court support services similar to CREDIT and MERIT programs.

At present, MERIT is restricted to adult offenders with demonstrable problems with illicit drugs, though in a limited number of locations, MERIT is also available to offenders with alcohol problems. PIAC recommends that MERIT be made available more widely to offenders with alcohol problems, and also to offenders with other addiction problems such as gambling. This is necessary while the CREDIT program, which might otherwise allow offenders with addiction problems a viable diversionary option, has a very limited geographical operation.

PIAC also recommends that the MERIT program needs greater flexibility to meet needs of offenders with cognitive impairments. The program appears to rely on a literacy-based method of treatment, which may not be accessible by these offenders. We note the recent comments of the Criminal Law Committee of the NSW Law Society:

> Acceptance into the program is conditional on the defendant being assessed as suitable by the MERIT case worker and the magistrate and the defendant remaining committed to volunteering for the program. The determination of an appropriate treatment module is a matter solely within the discretion of the MERIT caseworker. While a defendant with a cognitive impairment may be considered both eligible and suitable, they may not ultimately be accepted into the MERIT program as a result of perceived literacy requirements for treatment.[8]

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7 Ibid 1.

8 Dowd, J 2012, Letter to Attorney-General on behalf of Law Society Criminal Law Committee <http://www.lawsociety.com.au/idc/groups/public/documents/internetpolicysubmissions/626831.pdf>

MERIT should also be assessed for linguistic and cultural accessibility for people of refugee and CALD backgrounds who may have limited English.

Recommendation 6

That the NSW Law Reform recommend that the MERIT program:

- *be expanded to include young offenders aged 16 or more.*
- *be made available more widely to offenders with alcohol problems, and also to offenders with other addiction problems such as gambling.*
- *provide greater flexibility to meet the needs of people with low English literacy, such as people with cognitive impairment and people of refugee and CALD background.*

Question 9.4 – Drug Court

Is the Drug Court operating effectively? Should any changes be made?

PIAC supports the continued operation of the Drug Court as an effective means of diverting chronic, drug-dependent offenders away from the criminal justice system into rehabilitative treatment. As the Commission identified, a 2008 evaluation found the Court was more cost effective and more successful at lowering the rate of recidivism than prison.[9] A distinct benefit of the Court is that it has the flexibility to allow for relapse as part of the recovery process.

As noted in PIAC's submission to Question Papers 5-7, however, despite the high incidence of drug and alcohol dependency among the HPLS Solicitor Advocate's clients, none of them has ever been referred 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.[10]

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.

To be eligible to be referred to the Drug Court, applicants must reside in appropriate accommodation. The accommodation is not deemed suitable if it is occupied, or frequented by people who appear to abuse drugs and alcohol or who reasonably appear to engage in criminal activity. Thus the Court may exclude homeless people, who do not, by definition, reside in stable accommodation. PIAC notes that in 2011 a Shared Access Operating Agreement was signed between the Drug Court of NSW and Housing NSW to provide housing and support to participants of the Drug Court Program in Western Sydney (effective until 2013). In the 12 months following the commencement of this Agreement, a total of 11 Drug Court participants have been referred. PIAC recommends that services be extended across the state to offer transitional housing and support to Drug Court participants.

In order to access the Court, the offender's usual place of residence must be within nominated local government areas. PIAC recommends that the Court should be expanded to other locations in NSW and should cover the Sydney metropolitan area in its entirety.

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9 Weatherburn D, Jones, C Snowball, L and Hua, J (2008) "The NSW Drug Court: A Re-evaluation of its Effectiveness" *Crime and Justice Bulletin No. 121*, NSW Bureau of Crime Statistics and Research.

10 Above n 1.

Referrals to the Drug Court are not available for Children's Court matters. PIAC notes that until it was suddenly closed in July 2012, the Youth Drug and Alcohol Court carried out similar functions to the NSW Drug Court. PIAC urges the reconsideration of this decision. PIAC believes that the sudden closure of this Court is at odds with the NSW Government's commitment to rehabilitation of young offenders. PIAC recommends that the NSW Government reconsider its decision to close the Youth Drug and Alcohol Court.

Given the success of the Drug Court to date, expansion should also be considered to cover the abuse of prescription non-prohibited drugs such as benzodiazepines.

Should the eligibility criteria be expanded, or refined in relation to the "violent conduct" exclusion?

PIAC submits that the "violent offender" exclusion for the Drug Court should be refined. Courts have interpreted this provision to mean that someone charged with an offence involving violent conduct is excluded from the program if violence is inherent in the elements of the offence, not whether any violent conduct was involved in the actual commission of the offence. This means that people charged with offences of armed or unarmed violence involving no actual violence are excluded from the Drug Court program, whereas an offender who commits a break, enter and steal is eligible.

This is contrary to the approach that was anticipated by the Government when the Drug Court was first established in the late 1990s. In his second reading speech, the Hon Paul Whelan, then Minister for Police, said that the program would deal with "unarmed robberies provided there is no violence".[11]

Recommendation 7

That the NSW Law Reform Commission recommend that:

- *transitional housing and support services be offered across NSW to Drug Court participants;*
- *the Drug Court be expanded to other locations in NSW and to cover the Sydney metropolitan area in its entirety;*
- *the NSW Government reconsider its decision to close the Youth Drug and Alcohol Court;*
- *given the success of the Drug Court to date, consideration should be given to expansion to cover the abuse of prescription non-prohibited drugs; and*
- *the "violent offender" exclusion for the Drug Court be redefined only to exclude offences where violence has actually occurred.*

Question 9.5 – s11 *Crimes (Sentencing Procedure) Act 1999* (NSW)

Is deferral of sentencing under s 11 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) working effectively? Should any changes be made?

Section 11 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that if a court finds an offender guilty, it may adjourn sentencing for up to 12 months. The adjournment allows an assessment of the offender's capacity and prospects for rehabilitation or participation in an intervention program.

[11] NSW (1998), *Parliamentary Debates,* Legislative Assembly, 27 October 1998, 9031 (Paul Whelan, Minister for Police)

As was discussed in PIAC's submission to Question Papers 5-7, several HPLS clients have successfully completed treatment bonds under s 11 and subsequently became eligible for more remedial and therapeutic sentencing options when their charges returned to court.

However, it has been 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 from the treatment bond.

PIAC submits that there needs to be greater use of intervention and treatment options under s 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 HPLS case studies below illustrate how the successful completion of a s 11 treatment bond can widen the available options for appropriate remedial sentencing.

HPLS Case Study 6

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.

HPLS Case Study 7

DF was charged with supply prohibited drug, theft and a further possess prohibited drug charge. He was homeless and had a history of drug use. 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.

PIAC considers that adjournments, such as orders under s 11 of the Act, should be encouraged as part of the diversionary options available to NSW courts.

Adjournments on bail conditions

When an offender is released under s 11, bail conditions are often imposed. PIAC is concerned that it is often difficult for vulnerable offenders, such as those with a mental illness or cognitive impairment, or substance abuse issues, to comply with the conditions of bail, such as conditions on residence, reporting, etc. A person's capacity to understand the conditions of bail, and the consequences of breach of those conditions, may be affected by their mental illness or cognitive impairment or substance abuse. PIAC is also concerned that if very specific bail conditions are imposed, persons with mental illness or cognitive impairments may, simply by not completing a recommended treatment regime, not only be brought back to the court on a warrant for breach of bail, but also, as a consequence, face a charge under the *Bail Act*.

In the experience of HPLS, there is sometimes conflict in the bail conditions, making it difficult for a person to comply with bail conditions plus comply with obligations imposed by Centrelink and job service provider obligations, community treatment orders, drug and alcohol treatment programs etc.

Recommendation 8

That the NSW Law Reform Commission recommend that in granting bail a court should take into account:

- *the cognitive capacity of the person on bail conditions to understand those conditions and their cognitive capacity to remember and carry out conditions imposed on their bail; and*
- *other legal obligations that the person on bail might be required to carry out that might affect their capacity to comply with bail conditions.*

Question 9.8 – Problem solving approaches to justice

Should problem-solving approaches to justice be expanded?

PIAC is strongly supportive of problem-solving approaches to justice. These approaches seek to reduce re-offending rates through early intervention and the provision of targeted support to defendants with multiple and complex needs. They, therefore, have the potential to address underlying factors that may be contributing to their offending and re-offending.

The informal, flexible and interventionist features of these programs mean that they are better able to involve and support people with complex needs in the legal process.

In particular, problem solving courts

> [focus] on defendants … whose underlying medical and social problems (e.g. homelessness, mental illness, substance abuse) have contributed to recurring contacts with the criminal justice system. The approach seeks to reduce recidivism and improve outcomes for individuals, families, and communities using methods that involve ongoing judicial leadership; the integration of treatment and/or social services with judicial case processing; close monitoring of and immediate response to behaviour; multidisciplinary involvement, and collaboration with community-based and government organizations.[12]

[12] Casey, P.M, Rottman, D.B and Bromage, C.G (2007) *Problem-solving justice toolkit*. National Centre for State Courts <http://www.ncsconline.org/D_Research/Documents/ProbSolvJustTool.pdf>.

PIAC believes that a key factor in the success of such approaches is their use of multidisciplinary teams who provide defendants with assessment, treatment, referral to services such as drug treatment, alcohol treatment, mental health counselling and housing support. In order to effectively implement a multidisciplinary approach, community services, which inevitably form the core of the service providers, must be adequately resourced to meet any additional casework referred by the courts.

Should any of the models in other jurisdictions, or any other model, be adopted?

There are two programs in Victoria that warrant further consideration.

The Neighbourhood Justice Centre (NJC) was established in Collingwood, Melbourne in January 2007[13]. It is Australia's first and only "community justice centre", and provides a range of services to victims, offenders, civil litigants and the local community. The Centre brings together:

- a multi-jurisdictional court;
- support services such as mediation, counseling and mental health assessment, as well as victims assistance, housing, employment, alcohol and other drug support services; and
- community projects.

The Centre couples an explicit emphasis on restorative justice with a problem solving approach that addresses the causes of offending as well as the crime, aiming to lower the crime rate, increase accountability and keep people connected.

The Court Integrated Services Program (CISP) began in November 2006 and operates at three Victorian Magistrates' Court venues. CISP provides short-term assistance with health and social needs with the aim of reducing the likelihood of reoffending. Defendants who have been charged but have not yet been sentenced can be referred to CISP, regardless of whether a plea has been entered. CISP offers a multi-disciplinary team-based to link clients with community support services, including drug and alcohol treatment, crisis accommodation and mental health services. Case management finishes when the defendant is sentenced or discharged (generally within four months)[14].

Both the NJC and CISP have shown positive indications of achieving their client and community outcomes, and reducing reoffending (notwithstanding limitations in available data for the NJC in particular).[15]

Question 9.9 – Other diversion, intervention programs

Are there any other diversion, intervention or deferral options that should be considered in this review?

There are a number of other purpose-designed and supported programs that seek to divert people from the criminal justice system by assisting them to resolve other issues in their lives that have led to the offending behaviour. Some of these are discussed below.

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13 Neighbourhood Justice Centre < http://www.neighbourhoodjustice.vic.gov.au/site/page.cfm>.

14 Court Integrated Services Program, Magistrates Court of Victoria <http://www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions/court-support-services/court-integrated-services-program-cisp>.

15 Victoria (2011), *Problem Solving Approaches to Justice*, Parliamentary Paper No 24 (April 2011) 29.

PIAC reiterates 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. PIAC submits that programs that focus on improving family life and relationships, ensuring access to opportunities through education and employment, building self esteem, improving health outcomes and focusing generally on rehabilitative measures in response to offending behaviour provide a viable alternative to incarceration, and should be supported.

Intensive Supervision Program: Newcastle and Western Sydney

The Intensive Supervision program (ISP) was established in May 2008 by the NSW Department of Juvenile Justice as a four-year pilot project, based on successes with similar multi-systemic therapy in other countries. It is aimed at juveniles aged between 10 and 14 who commit serious or repeat offences, with a particular focus on Indigenous offenders. The program addresses issues such as substance abuse, financial problems, housing needs, family conflict and negative peer pressure, and assists in dealing with underlying problems that the young person is experiencing within their family and their wider community. The Program seeks to empower caregivers to address systemic factors that predispose or maintain offending.

The Program is coordinated by trained clinicians and a team of Aboriginal advisors who advise on cross-cultural issues and monitor the interventions to ensure they are achieving good outcomes. The team also works with the families and schools of the offenders to increase service provision and improve schooling outcomes. In its annual report for the year ending 30 June 2011, Juvenile Justice reported 37 (85%) of the 44 families enrolled successfully completed the program. The program also served families with a Pacific Islands, New Zealand, Asian, South American and European background. An internal review of outcomes for families indicated that 74% of caregivers achieved parenting skills necessary to handle future problems, 80% had improved family relations and 76% had an improved network of support.[16]

According to Bob Debus, former NSW Attorney-General and former Chair of the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs Inquiry into the High Level of Involvement of Indigenous Juveniles and Young Adults in The Criminal Justice System:

> Reports of the program results so far are encouraging. If the final evaluation is favourable, then we are talking about a kind of program that has the possibility, over a generation, of interrupting the long-term cycle of despair and dysfunction. There would be in that case strong social and economic justification for a very large investment to involve hundreds and even thousands of families in locations with high levels of disadvantage. We have to think of the inter-generational costs saved and remember that right now it costs $200,000 and sometimes more to keep a young person in juvenile detention for a year![17]

PIAC notes the statement in 2010 of the then Minister for Juvenile Justice, the Hon. Graham West MP, regarding the ISP:

16 Department of Attorney General and Justice, *Annual Report 2010-2011*, 142-143.

17 Debus, B (2011) "Speech Notes for Institute of Criminology Seminar – Aboriginal Young People and Crime" 7 February, 2011 at <http://www.djj.nsw.gov.au/presentations/Bob%20Debus.pdf>

> Eighty-seven New South Wales families have signed up to the program since May 2008, and 90 per cent have completed it successfully. Preliminary research has shown a 60 per cent drop in offending by young people during the program and 74 per cent during the six months after completing the program. Further, preliminary data collected by the Multisystemic Therapy Institute as of December 2009 shows that 87 per cent of caregivers had acquired the appropriate parenting skills necessary to handle future problems; 78 per cent had improved family relations; and 70 per cent had improved support networks. This demonstrates that the program is working. It also demonstrates that families and communities matter and they hold the key to reducing crime.

The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs delivered a report in 2011, which stated that ISP has achieved success in:

- reducing offending by those young people that complete the program;
- teaching caregivers the appropriate parenting skills necessary to handle future problems; and
- improving family relations and support networks[18].

PIAC supports recommendation 3 from the Standing Committee:

> The Committee recommends the Commonwealth Government continue to fund holistic, intergovernmental services to Indigenous youth and their families and communities, such as Communities for Children Plus, and evaluate their effectiveness in strengthening positive social norms in communities and preventing Indigenous youth engagement with the criminal justice system.[19]

PIAC submits that further information about how the program operates should be made publicly available and be considered by the Commission, as the only information currently available appears to be a brief summary provided by the Juvenile Justice Annual Report. If the program has led to positive outcomes for juveniles and their families, PIAC submits that Juvenile Justice should establish the program in other areas in NSW and that there should be ongoing evaluation to ascertain its long-term effects on participants.

Recommendation 9

That the NSW Law Reform Commission recommend that Juvenile Justice NSW establish and fund other multi-systemic therapy programs in NSW for young people in the criminal justice system. Such programs should be subject to ongoing evaluation to determine the long-term effects on participants.

The Pasifika Support Services project: southwest Sydney

An issue in relation to diversionary programs and Indigenous young people is often the lack of cultural awareness, specificity and involvement, as Indigenous young people may not fare as well in a generalised program as they would in a program that acknowledges and includes elements of their culture and background.

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18 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, "Doing Time - Time For Doing: Indigenous youth in the criminal justice system" (2011) 59-61

19 Ibid 60.

An example of a successful diversionary program that uses the community and culture to assist and support young people is the Pasifika Support Services project, which commenced as a three year pilot project in south-west Sydney in 2005. The program provided an integrated case management service to young people referred by NSW Police, engaging community-based workers and leaders with a Pacific Island background to address need in a broad range of areas, including anger management and alcohol and drug use, conducting mediation with families and communities, and providing assistance in accessing benefits, education, employment and government programs. Evaluations of those who participated in the program found that rates of re-offending were reduced in the short to medium term following participation in the program.[20]

It is unclear whether this project is still operational. Given its success in terms of recidivism, PIAC recommends that it should be redeveloped and used as a best-practice model along with similar Indigenous programs such as the Intensive Supervision Program.

Recommendation 10

That the Pasifika Support Services project be considered by the Commission in this inquiry as a best practice model for the approach to be preferred for culturally appropriate diversionary programs.

Gamarada and Indigenous men's access to justice

The Gamarada Aboriginal Men's Self Healing Program is an example of a local community initiative taking up the issue of healing and life skills. Men's groups have gained increasing support in Indigenous communities and are accepted as a diversionary option and a way for the community to be proactive and address issues common to members caught up in the criminal justice system. These include healing, isolation, capacity to advocate for one's self and family/community, identity, connectedness to culture, mental health, substance use, family violence and wellbeing. Gamarada was one of the pilot projects in PIAC's Mental Health Legal Services Project.

Gamarada—meaning 'comrades' or 'friends' in the Gadigal language—is based in Redfern, in NSW, and is a 10-week group program that incorporates traditional Indigenous culture and healing with holistic self empowerment. Gamarada teaches participants practical skills that develop capacity and strengths in connection with Indigenous spiritual concepts like Dadirri (deep listening and quiet stillness) and anger management or, as it is termed in Gamarada, 'non-reaction' techniques that are applicable to all negative emotions including anger. The program shows participants how they can apply these skills to their own life to manage issues that can lead to despair and crime.

Recommendation 11

That the NSW Law Reform Commission recommend that the NSW Government be proactive in seeking out successful grass-roots community initiatives to improve options for Indigenous people at risk of or in contact with the criminal justice system.

[20] ARTD Consultants (2007) *Evaluation of the NSW Youth Partnership with Pacific Communities 2005-2007*, Sydney ARTD.