The Shopfront
YOUTH LEGAL CENTRE

NSW Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

7 September 2012

By email

Dear Sir/Madam

## Sentencing: Question Paper 11: Special categories of offenders

The Shopfront Youth Legal Centre welcomes the opportunity to make a submission to this reference.

### About the Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under. Established in 1993 and based in Darlinghurst in inner-city Sydney, the Shopfront is a joint project of Mission Australia, the Salvation Army and the law firm Freehills.

The Shopfront's main area of practice is criminal law. Two of our solicitors are accredited specialists in criminal law; one is also an accredited specialist in children's law. Our four solicitors appear almost daily for vulnerable young people in the Local, Children's, District and occasionally Supreme Courts.

The Shopfront's clients come from a range of cultural backgrounds, including a sizeable number of indigenous young people. Common to nearly all of our clients is the experience of homelessness: most have been forced to leave home due to abuse, neglect, domestic violence or extreme family dysfunction. Most of our clients have limited formal education and therefore lack adequate literacy, numeracy and vocational skills. A substantial proportion also have a serious mental health problem or an intellectual disability, often co-existing with a substance abuse problem.

### Scope of this submission

Although the Shopfront is a youth legal service, and has expertise in children's matters, the majority of our clients are in fact young adults aged 18 to 25. We therefore have an extensive working knowledge of adult sentencing law and practice. In accordance with the terms of reference, our submission is confined to adult sentencing issues.

Time does not permit us to make a more comprehensive submission. However, we would welcome the opportunity to make further comments or to attend consultations if you consider this would be helpful. In this regard, please do not hesitate to contact me, preferably by email at jane.sanders@freehills.com

Yours faithfully

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The Shopfront Youth Legal Centre is a service provided by Freehills in association with Mission Australia and The Salvation Army

THE SALVATION ARMY
Mission Australia
Freehills

# Sentencing: Question Paper 11: Special categories of offenders

## Question 11.1: Indigenous offenders

**1 How can the current sentencing regime be improved in order to reduce:**

**a. the incarceration rate of Indigenous people; and**

**b. the recidivism rate of indigenous offenders?**

The over-representation of Aboriginal people in the criminal justice system, including their high rates of incarceration, clearly requires a multi-faceted approach. In recent times there have been calls for the adoption of a justice reinvestment approach to address these problems.

Changes to sentencing law will make little difference unless there are significant improvements in Aboriginal health and well-being, housing, employment and social inclusion, with reforms to policing, bail and other aspects of the criminal justice system.

However, we believe the following changes to the sentencing regime could potentially assist:

### Culturally appropriate sentences and programs

We support the more widespread availability of non-custodial sentences, including an expansion of the eligibility and suitability criteria for options such as intensive correction orders, and much more flexibility when dealing with breaches of suspended sentences. These issues have been discussed in our submissions in response to your other Question Papers (see in particular our response to Question Paper 6).

We also support the expansion of programs such as MERIT and CREDIT which, if delivered in a culturally appropriate way, can have a significant impact on imprisonment and recidivism rates. We refer to our submission in response to your Question Paper 9.

We also support an affirmative action strategy to recruit more Aboriginal Probation people into the Probation and Parole service, and other agencies dealing with offenders. There is also a need for enhanced training for non-indigenous workers to ensure they are able to deal with Aboriginal offenders in a culturally appropriate way.

### Traffic offences and licence disqualification

In our submission on Question Paper 10, we commented that the current regime of automatic driver licence disqualifications (particularly for offences of driving while unlicensed, suspended, cancelled or disqualified) has a harsh effect on young and disadvantaged people.

Aboriginal people are significantly affected. We understand that the proportion of Aboriginal offenders imprisoned for driving offences is particularly high.

In a speech made by Mick Gooda, the Aboriginal and Torres Strait Islander Social Justice Commissioner, at Government House, Sydney, on 2 May 2012, it was said that “the laws regarding driving offences are the same for all Australians but the impact on Aboriginal and Torres Strait Islander people is profound”.

Mr Gooda went on to say:

> “In 2004, Aboriginal prisoners accounted for sixty-four percent of all prisoners going into jail for a driving offence in Western Australia. Many of the driving offences relate to suspended driving licences, often as a consequence of unpaid fines. However, with no public transport in remote locations, people who have lost their driving licences and stuck between a rock and a hard place when they still have to travel for court attendances, medical appointments, cultural business etc.”

While the statistics may be different, the situation is broadly similar in New South Wales.

As far back as 2003, a paper on *Driving Licences and Aboriginal People* produced by the Aboriginal Justice Advisory Council stated that:

> "Driving licence offences have long been a problem for Aboriginal communities. In 2001 driving licence offences were the third highest offence category for convictions of Aboriginal people after assault offences and disorderly conduct offences. The offence of driving while disqualified accounted for 86% of Aboriginal people who were sentenced to imprisonment for driving licence offences during 2001."

The report also noted:

> "There is a particular problem in re-offending on driving licence offences among those convicted for driving whilst disqualified but a general problem of re-offending in driving and traffic offences generally."

NSW BOCSAR, in its report *Why are indigenous imprisonment rates rising?,* in August 2009, noted that between 2001 and 2008 the adult indigenous imprisonment rate rose by 37% in Australia and 48% in New South Wales.

It was noted that there were increases in the number of indigenous prisoners in custody, both on remand and sentenced, for traffic and motor vehicle regulatory offences. 15% of the total increase in the number of sentenced indigenous prisoners was due to traffic offences. There was also a substantial rise in the proportion of indigenous prisoners serving sentences for "offences against justice procedures" (which includes resisting and hindering police).

BOCSAR said:

> "These results suggest that the substantial increase in the number of indigenous people in prison is due mainly to changes in the criminal justice system's response to offending rather than changes in offending itself."

**2 Are there any forms of sentence other than those currently available that might more appropriately address the circumstances of Indigenous people?**

No doubt there are other forms of sentence that would more appropriately address the circumstances with indigenous people. We do not have the expertise to suggest what these might be.

As noted above, we believe that changes should be made to existing sentencing options to make them more accessible and appropriate for Aboriginal people.

**3 Should the Fernando principles be incorporated in legislation and if so, how should this be achieved and what form should they take?**

In principal, we support the incorporation of the Fernando principles into legislation. Apparently the principles are being given inadequate attention by judicial officers, and legislation may help underscore their importance. We do not propose to comment on what form such a legislative statement should take. In our view this needs careful consideration and consultation.

## Question 11.2: Offenders with cognitive and mental health impairments

**1 Should the Crimes (Sentencing Procedure) Act 1999 (NSW) contain a more general statement directing the court's attention to the special circumstances that arise when sentencing an offender with cognitive or mental health impairments? If yes, what form should these principles take?**

In principle, we support the adoption of principles in legislation. As with the adoption of the Fernando principles into legislation, this would require careful consideration and further consultation.

### 2 In what circumstances, if any, should the courts be required to order a pre-sentence report when considering sentencing offenders with cognitive and mental health impairments to prison?

Ideally, a pre-sentence report should be obtained in every case where the court is considering sentencing an offender to imprisonment.

However, a PSR ought not to be required where it would unreasonably delay proceedings, or where there is already adequate information available to the court.

### 3 Should courts have the power to order that offenders with cognitive and mental health impairments be detained in facilities other than prison? If so, how should such power be framed?

Yes, definitely, but we are unsure how such a power should be framed or how it would operate in practice.

Section 33 of the *Mental Health (Forensic Provisions) Act* enables a court to order that a mentally ill person be taken to hospital. However, the decision whether or not to detain the person in hospital rests with the medical officers at the hospital, who must decide whether the person meets the criteria for involuntary admission as a "mentally ill person".

### 4 Do existing sentencing options present problems for people with cognitive and mental health impairments? If so, how should this be addressed?

Existing sentencing options do present problems for people with cognitive and mental health impairments. Imprisonment in particular weighs more heavily on such people and, in many cases, there is a lack of appropriate care and treatment within the prison system. People with cognitive and mental health impairments are often assessed as ineligible for community-based sentences such as CSOs and ICOs, and are more vulnerable to breaching bonds and suspended sentences.

As with Aboriginal offenders, children and members of other disadvantaged groups, we support more flexibility in terms of eligibility criteria and breach procedures. We also support the enhanced training of Probation and Parole officers, prison officers, and other relevant personnel, so that they can appropriately identify and respond to mental health and cognitive impairments.

### 5 Should any new sentencing options be introduced for people with cognitive and mental health impairments? If yes, what types of sentencing options should be introduced?

Instead of new sentencing options, we support the wider availability of diversionary options. Please see our submission to the NSWLRC on *People with Cognitive and Mental Health Impairments in the Criminal Justice System*, and the NSWLRC's recent Report Number 135 on *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*. In that report the Commission recommends the expansion of sections 32 and 33 of *the Mental Health (Forensic Provisions) Act* to superior courts, its wider availability in the Local Courts, and the roll-out of the CREDIT program. We strongly support these recommendations.

## Question 11.3: Women

### 1 Are existing sentencing and diversionary options appropriate for female offenders?

In our view, existing sentencing and diversionary options are not serving the needs of all female offenders.

Female offenders are of course a diverse group but, as noted in paragraph 11.37 of the Question Paper, women in the criminal justice system generally have more complex needs than men. They have higher rates of substance abuse and are more likely than men to have experienced child abuse, domestic violence and sexual assault. Of course, women are more likely than men to be the primary carers of children.

We are encouraged by the introduction of programs like Biyani and the mothers' and children's program within Corrective Services. However, the availability of these programs is still very limited.

The current sentencing principle in NSW, that hardship to an offender's family is not a relevant factor in sentencing unless it is exceptional, potentially impacts more harshly on women than on men. If the *Crimes (Sentencing Procedure) Act* is to continue to contain a list of factors relevant to sentencing (as it currently does in section 21A) we support the inclusion of hardship to family as a relevant principle. Hardship to family should be taken into account where it is substantial, but not necessarily exceptional.

### 2 If not, how can the existing options be adapted to better cater for female offenders?

Given the large number of women in the criminal justice system who have experienced abuse, family violence and sexual assault, the needs of female offenders cannot be met without a genuine and sustained effort to address the impact of such violence. Specialised and intensive therapeutic programs are needed, both within and outside custodial settings, to address these issues.

There is also a need for enhanced services to support women who are the primary carers of children, to ensure that children are adequately cared for while their mothers are serving sentences, whether this be in custody or in the community.

### 3 What additional options should be developed?

We do not offer any suggestions for additional sentencing options. As discussed above, we believe improvements can be made to existing sentencing options.

## Question 11.4: Corporations

### Are additional sentencing options required in order to achieve the purposes of sentencing in relation to corporations? If yes, what should these options be?

We have no comments to make in relation to sentencing for offences committed by corporations.

## Question 11.5: Any other categories

### Are there any other categories of offenders that should be considered as part of this review?

### Children

Although the terms of reference for this review do not include the sentencing of children, there are some aspects of the *Crimes (Sentencing Procedure) Act*, and of sentencing principles and practice which apply to children. Some of the recommendations made by the NSWLRC in the course of this reference will inevitably impact on children. For example, sections 3A (purposes of sentencing), 21A (aggravating and mitigating factors to be taken into account on sentence) and 44-54 (setting terms of Imprisonment, including non-parole periods) apply to children as they do to adults.

We therefore believe it is important for the Commission to give specific consideration to the potential impact of any of its recommendations on children. We would be happy to provide further submissions, or to attend consultations, on this issue if requested.

### Young adults

We also believe that young adult offenders in the 18-to-25 age group are worthy of special consideration. It is now widely accepted that adolescent cognitive development is not complete until the age of 25. This has significant implications when it comes to assessing criminal culpability and rehabilitation prospects. It is also well known that young adults (particularly males, it would seem) are extremely vulnerable to violence (including sexual assault) in the adult prison system.

In our view, rehabilitation should play a major role in the sentencing of this group of offenders, and general deterrence a comparatively minor role, even in the case of serious offences. Alternatives to custodial sentences should be used wherever possible, and judicial officers at all levels should receive education about the latest research on cognitive development and its impact on the behaviour and offending patterns of young people.

## Homeless people

Finally, we believe that regard must paid to the needs of offenders who are homeless . Homeless people face particular problems in relation to bail, but these problems often flow on to sentencing. Most people would agree that prisons should not be used to “warehouse” homeless people. However, the reality is that the “last resort” option of imprisonment is often imposed due to a lack of accommodation in the community. In our view, the provision of further resources and programs to assist homeless people to obtain stable housing and to comply with court orders is essential.

**The Shopfront Youth Legal Centre**
**September 2012**