The Shopfront
YOUTH LEGAL CENTRE

NSW Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

24 August 2012

By email

Dear Sir/Madam

Sentencing: Question Paper 7: Non-custodial sentencing options Submission from the Shopfront Youth Legal Centre

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 7: Non-custodial sentencing options

Question 7.1: Community Service Orders

1 Are community service orders working well as a sentencing option and should they be retained?

In general, community service orders work well as a sentencing option and should be retained.

We have observed that the courts' use of community service orders for disadvantaged offenders is very limited and appears to be decreasing.

We understand that there are genuine problems involved in assigning work to people who are unreliable and whose attendance may be sporadic at best. We also acknowledge there may be occupational health and safety issues with people attending work sites while intoxicated or otherwise incapacitated.

However, our work with children, and the operation of the children's CSO scheme, suggests that these challenges can often be overcome if appropriate support is provided.

We would like to see the eligibility and suitability criteria broadened, and more support systems put in place, so that more disadvantaged offenders may participate in the scheme.

2 What changes, if any, should be made to the provisions governing community service orders or to their operational arrangements?

As mentioned above, we would like to see more support systems in place to enable disadvantaged offenders to participate in the CSO scheme.

One way of achieving this would be to allow the court to impose a supervision component on a CSO, or a bond concurrently with a CSO. Where an offender is being sentenced for more than one charge, it is not uncommon for this to be achieved by imposing a bond on one charge and a CSO on another. It would be helpful if this option were available in relation to a single charge, although care would need to be taken to avoid net-widening.

Question 7.2: Section 9 bonds

1 Is the imposition of a good behaviour bond under s 9 of the Crimes (Sentencing Procedure) Act 1999 (NSW) working well as a sentencing option and should s 9 be retained?

In our view, section 9 bonds work very well indeed. They are a very flexible sentencing option which assists with the aim of rehabilitation, while not discarding the need for punishment and deterrence.

2 What changes, if any, should be made to the provisions governing the imposition of good behaviour bonds under s9?

We do not see the need for any changes to the provisions governing the imposition of section 9 bonds.

We note the comment in paragraph 7.28 of the question paper, suggesting it is unclear whether section 9 bonds are available for fine-only offences. In our opinion, this provision is clear and it means that section 9 bonds are only available for imprisonable offences. If further legislative clarification is thought necessary, we would of course support this.

We do not support section 9 bonds being available for fine-only offences. In our view, if a bond is thought to be appropriate for a fine-only offence, it should be imposed under s10. There may be rare cases involving fine-only offences where the court is of the view that the offender requires the rehabilitation opportunity afforded by a bond, but that a conviction is warranted; however, we believe that allowing courts to impose section 9 bonds for fine-only offences would lead to inappropriate net-widening.

Question 7.3: Section 9 bonds

1 Are the general provisions governing good behaviour bonds working well, and should they be retained?

In general, the provisions governing good behaviour bonds are working well and should be retained.

2 What changes, if any, should be made to the general provisions governing good behaviour bonds or to their operational arrangements?

We would suggest that perhaps there should be an upper limit on the length of a section 10 bond that can be imposed for offences with low maximum penalties, and especially for fine-only offences. For example, for an offence of offensive language (which carries a maximum penalty of a $660 fine), in our view it would rarely be appropriate to impose a section 10 bond for longer than six months. Similar considerations would apply to minor public order, public transport, parking and regulatory traffic offences.

We would also support the introduction of a provision allowing the offender or the supervising agency (i.e. Probation and Parole) to apply for variation of the conditions of a bond. Currently the only way for the conditions of a bond to varied is for breach proceedings to be initiated. There is a provision in the *Children (Criminal Proceedings) Act* (s40) providing for variation of Children's Court bonds. In our experience this appears to work well and is not overused or abused.

Question 7.4: Fines

1 Are the provisions relating to fines in the Crimes (Sentencing Procedure) Act 1999 (NSW) working well, and should they be retained?

In our experience, the offender's capacity to pay is often overlooked, even though s6 of the *Fines Act* requires the court to have regard to this.

It may be desirable to have a provision on capacity to pay included in the *Crimes (Sentencing Procedure) Act,* as not all lawyers and judicial officers are familiar with the *Fines Act*.

The regime for enforcement of unpaid fines (governed by the *Fines Act* and administered by the State Debt Recovery Office) is beyond the scope of this reference and has been the subject of a number of previous submissions by the Shopfront Youth Legal Centre.

Under no circumstances would we support the payment of a fine or monetary penalty being made a condition of a bond or other community-based order.

2 Should the provisions relating to fines in the Crimes (Sentencing Procedure) Act 1999 (NSW) be added to or altered in any way?

It may be desirable to have a provision on capacity to pay included in the *Crimes (Sentencing Procedure) Act.*

3 Where a particular offence specifies a term of imprisonment but does not specify a maximum fine, how should the maximum fine be calculated?

We suggest it would be relatively easy to devise a formula for the calculation of maximum fines in proportion to the maximum term of imprisonment.

Question 7.5: Conviction with no other penalty

1 Is the recording of no other penalty under s 10A of the Crimes (Sentencing Procedure) Act 1999 (NSW) working well as a sentencing option and should it be retained?

Section 10A is working well as a sentencing option and should definitely be retained.

It is important to recognise that a conviction in itself may often be a significant penalty.

Given that s10A can be applied to fine-only offences (and not just imprisonable offences, as was the case with the common law rising of the court), when the section was introduced we were concerned about potential net-widening, i.e. that matters more appropriate for s10(1)(a) would be dealt with under s10A. While this sometimes does occur, we have not observed net-widening to be a significant problem, at least in matters involving our clients.

2 What changes, if any, should be made to the provisions governing the recording of no other penalty or to its operational arrangements?

We do not see the need for any changes.

Question 7.6: Non-conviction orders

1 Are non-conviction orders under s10 of the Crimes (Sentencing Procedure) Act 1999 (NSW) working well as a sentencing option and should they be retained?

We are of the view that orders under s10 (both dismissals and bonds) are working well and should be retained. For further comments please see our submission to the NSW Sentencing Council dated 31 August 2009, a copy of which is attached.

2 What changes, if any, should be made to the provisions governing s 10 non-conviction orders or to their operational arrangements?

We do not support any legislative provision which restrains judicial discretion by prohibiting the imposition of s10 orders for certain types of offences.

Please also see our comments at Question 7.3 above about the length of s10 bonds in relation to fine-only offences.

Question 7.7: Non-conviction orders – use with other sentencing options

1 Should it be possible to impose other sentencing options in conjunction with a non-conviction order? If so, which ones?

We are attracted to the idea of a court being able to impose a range of sentencing options without recording a conviction. We note from the question paper that this option exists in some other jurisdictions.

Of course, this option is also available in New South Wales for courts dealing with children's criminal proceedings. Section 14 of the *Children (Criminal Proceedings) Act* gives the court a discretion to record a conviction (and prohibits the recording of a conviction against a child under 16) regardless of the sentencing option imposed. In our experience, this provision works well and allows the court to impose significant sanctions on a child without the lasting stain of a conviction.

The argument against recording a conviction is especially compelling in relation to children (given the primacy of rehabilitation that usually applies when sentencing children). We are of the view that the interests of rehabilitation should also weigh heavily in sentencing certain classes of adult offenders, in particular young adults and those with mental health or cognitive impairments.

If the court were to have discretion to impose a range of sentencing options without recording a conviction, there is of course the potential for net-widening, as it may be tempting for courts to impose more onerous or punitive sentencing options when a s10(1)(a) dismissal or s10(1)(b) bond is more appropriate.

At the very least we suggest that it may be appropriate for a court to be able to impose a fine without conviction, particularly in the case of fine-only offences and/or offences capable of being dealt with by penalty notice or criminal infringement notice. In this regard, we refer to the following comments made in our submission dated 28 September 2007 to the NSW Sentencing Council on *The Effectiveness of Fines as a Sentencing Option:*

> "We agree with the Council's observations about the perils of deemed convictions in the case of matters dealt with by criminal infringement notice.
>
> A related, but distinct, issue is the fact that people who court-elect on infringement notices will, if found guilty of the offence at court, end up with a conviction which would not have ensued if the person had simply paid the infringement notice. This has a disproportionately negative impact on financially disadvantaged people, who often court-elect not because they wish to defend the charge, but because they simply cannot afford to pay the fine.
>
> This is not a significant issue in the Children's Court, where the court has a discretion not to record a conviction, no matter what penalty it imposes. However, many of our young adult clients court-elect on infringement notices because of their incapacity to pay. While their matters are sometimes dealt with under s32 of the *Mental Health (Criminal Procedure) Act* or s10 of the *Crimes (Sentencing Procedure) Act*, they are often dealt with by way of fine (albeit a significantly reduced amount) which carries with it a conviction.
>
> A conviction, even for a minor offence, can have a number of detrimental effects. In the case of some driving offences (for example, a first offence of driving unlicensed when never licensed) a conviction will affect the maximum penalty and mandatory disqualification period for any subsequent offence.
>
> We would therefore like to see the introduction of a further sentencing option in the Local Court: the discretion to impose a fine without recording a conviction. We propose that this discretion would only be available for matters which are capable of being dealt with by infringement notice, so as to avoid net-widening."

In our dealings with young adults (particularly students and those who are just entering the workforce, who are concerned about their future employment prospects) we have observed that the prospect of a conviction is a powerful disincentive to court-elect on penalty notices or criminal infringement notices, even where the person believes they are not guilty of the offence.

We note the reference in paragraph 7.82 of the question paper to other options that may be imposed in conjunction with a non-conviction order. We have no issue with compensation orders, or even fines, being imposed in conjunction with non-conviction orders, subject of course to considerations of capacity to pay. However, we are strongly opposed to the payment of any money, or the performance of unpaid work, being made a condition of a bond. Before the enactment of the *Crimes (Sentencing Procedure) Act*, it was not uncommon for such conditions to be imposed on bonds, and a number of our clients were subject to breach proceedings for no reason other than poverty.

Question 7.8: Other options

1 Should any other non-custodial sentencing options be adopted?

We support the availability of a wide range of non-custodial sentencing options (or alternatives to full-time custody, as discussed in response to question paper 6). However, we have no specific suggestions to offer.

Although this is beyond the scope of this reference, we see a pressing need for more diversionary options and programs such as MERIT, CREDIT, and some sort of program to support defendants with mental health and cognitive impairments who may be eligible for diversion under Section 32 of the *Mental Health (Forensic Provisions) Act*. We have briefly discussed these options in our submissions to the NSWLRC on *People with cognitive and mental health impairments in the criminal justice system* (see in particular our comments on Issue 7.35 in our June 2010 submission on Consultation Paper 7). Such programs have significant advantages because they are available pre-plea or pre-sentence (or in some cases without any plea having to be entered at all). Often by the time an offender reaches the sentencing stage, the problems that have led to their offending have remained unaddressed for some time.

Question 7.9: Other options – fines held in trust

1 Should a fine held in trust be introduced as a sentencing option? If so, how should it be implemented?

While a fine held in trust may well be an appropriate option for offenders with financial resources, such an option would not be appropriate for socially and economically disadvantaged offenders, including those in our client group.

Question 7.10: other options – work and development orders

1 Should work and development orders be adopted as a sentencing option?

We believe the idea of a WDO as a sentencing option is worth exploring. Many of our clients have participated in the WDO scheme as a fine mitigation measure, and we believe this scheme has been very successful.

If WDOs were to be introduced as a sentencing option, there would need to be serious consideration as to where a WDO would sit in the sentencing hierarchy. Currently, a community service order is a serious sentencing option that is a direct alternative to imprisonment. If a WDO were to be accorded a similar status, this may assist more vulnerable offenders who currently are ineligible for CSOs, and may help prevent these people from being imprisoned.

On the other hand, if a WDO were to be lower down the sentencing hierarchy (as an alternative to a fine) care would have to be taken to ensure that the obligations imposed on the offender are not too onerous. In the event of a breach, the only appropriate sanction would be the payment of a fine.

There are also significant questions about how the WDO scheme would be resourced if it were available as a sentencing option. Currently, a WDO application must be made by an "approved organisation" or an enrolled health practitioner. This disadvantages vulnerable offenders without access to such services.

If WDOs were to be adopted as a court-based sentencing option, this should be backed up by government-funded services that are able to supervise WDOs upon referral from the court.

We would also note that many offenders who would be eligible for WDOs, specifically those with mental health problems and cognitive impairments, would also be eligible for diversion under s32 of the *Mental Health (Forensic Provisions) Act*. We would like to see more offenders diverted under s32 before reaching the stage of conviction and sentencing.

2 Alternatively, should the community service order scheme be adapted to incorporate the aspects of the work and development order scheme that assist members of vulnerable groups to address their offending behaviour?

For reasons already expressed in this submission, we support the modification of the community service order scheme to promote the inclusion of vulnerable offenders.

The Shopfront Youth Legal Centre
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