

REVIEW OF PERIODIC DETENTION

NSW SENTENCING COUNCIL

December 2007

A report of the NSW Sentencing Council

The views expressed in this report do not necessarily reflect the private or professional views of individual Council members or the views of their individual organisations. A decision of the majority is a decision of the Council, Schedule 1A, clause 12 of the *Crimes (Sentencing Procedure) Act 1999*.

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Executive Summary

EXECUTIVE SUMMARY

In this report, the NSW Sentencing Council ('the Council') examines the extent to which periodic detention has been available and used in New South Wales in relation to State and Federal offences. Additionally, it examines its requirements and administration, particularly in relation to breach proceedings, and gives consideration to its perceived advantages and disadvantages.

The Council accepts that periodic detention has been seen to be a valuable sentencing option for those offenders for whom it has been available. However, the lack of its availability throughout the State by reason of resource limitations, and the resulting discriminatory impact, the underutilisation of the current facilities, and the absence of meaningful case management for periodic detainees give rise to significant concerns. By reason of those concerns the Council gives consideration, in the Report, to the possibility of its replacement by a Community Corrections Order (CCO).

The essential features of a CCO are that:

- it is a sentence of imprisonment that would be suspended conditionally upon compliance;
- it would have a considerable degree of flexibility, in that it would be subject to conditions such as a curfew or residential requirement, participation in rehabilitation or educational programs, performance of community work and such other requirements as the individual would require;

- breach would be dealt with promptly by the NSW State Parole Authority ('Parole Authority'), which would have the power to give a warning, to vary any of the conditions, or to revoke the CCO and order that the balance of the sentence be served by home detention, or full-time imprisonment;
- provision would exist for reinstatement of a revoked CCO, and for a limited review of relevant decisions of the Parole Authority.

The elements of the CCO are set out in detail in Part 7. Additionally, the sentence would be available only after a positive suitability assessment conducted by a Probation and Parole officer. The minimum term of a CCO would be 6 months and the maximum would be 2 years.

The Council notes that an option of this kind, for which there is precedent in three other Australian States and in New Zealand, has the approval of the three major victims groups, and is not a soft option. The curfew restrictions, the performance requirements and the fact that breach can result in the kind of short sharp shock delivered by periodic detention, render it a sentence of considerable severity. Moreover, it preserves the advantages of the work component of periodic detention and enhances its skilling aspect through the potential requirement for offenders to attend employment related training programs.

As this option is directed to achieving positive outcomes and to reducing re-offending, in accordance with the policy directions contained in the *NSW State Plan*, the *Aboriginal Justice Plan* and in the NSW Government *Two Ways Together* document, a substantial majority of the

Council supports, in principle, its introduction as a replacement for periodic detention.

However, the Council stresses that in order for the proposed CCO scheme to be adopted in place of periodic detention, a number of matters must be guaranteed. These include:

- the provision of transitional or similar centres where offenders on parole or subject to CCOs could reside, and participate in programs aimed at reducing their re-offending;
- the capacity to provide for the supervision, electronic monitoring and surveillance of offenders subject to a CCO, on a State-wide basis;
- the availability of sufficient programs and program providers, and of the specialist staff such as psychologists and counsellors who would deliver the programs, on a State-wide basis;
- the availability of community centres or agencies able to accept offenders for community work, on a State-wide basis;
- the provision of arrangements that would accommodate the need of offenders to travel to the places where they would be required to report in compliance with relevant work and program conditions;
- the provision of stringent pre-sentence suitability assessments;
and

- an enlargement of the resources, and possibly the membership of the Parole Authority, along with the provision of video link capabilities that would enable it to deal with offenders on a State-wide basis.

These requirements are not such that they can be reduced or honoured in passing. Existing experiences in relation to the resource limitations (especially outside the metropolitan areas), the experience with unsupervised sentences, and with sentences that do not match supervision with programs, emphasise how important this is.

In introducing the model, care would also need to be taken to ensure that it is sufficiently understood by judges and magistrates, and does not lead to sentence creep, or to offenders who would currently receive periodic detention being sentenced to short terms of full-time imprisonment or down to simple community service.

Another area that will need to be addressed, if this sentencing option is introduced, is the possibility of offenders and program suppliers or community work providers engaging in the falsification of time sheets or in other dishonest activities designed to avoid performance requirements. As a consequence it would be necessary to develop a system for random checks as well as an effective oversight system to ensure a necessary level of accountability and public confidence in the system.

Finally, if the scheme is adopted as a replacement for periodic detention, the Council recommends that:

- the New South Wales Bureau of Crime Statistics and Research (BOCSAR) collect statistics in relation to its use, and in relation to the rate of re-offending by those who have been the subject of a CCO;
- the Council report annually on the use of the option, and of the extent to which supervision and programs are being provided; and
- that an independent review be conducted within 5 years of the scheme's introduction.

Part 1 Introduction

- Introduction
- Term of Reference
- Methodology
- Community Response

PART 1: INTRODUCTION

INTRODUCTION

1.1 Periodic detention was introduced for the purpose of providing a means of sentencing offenders to imprisonment, while maintaining their work, community and family connections. In the second reading speech for the *Periodic Detention of Prisoners Bill* 1970 the Minister for Justice, Mr Maddison, said:

“The concept of periodic detention contains the punitive elements so essential as a deterrent to the potential law breaker. It recognises the importance of the economic factor of saving and the necessity to avoid burdening the community with unnecessary costs. It takes into consideration the importance of the maintenance of a family environment.”⁶

The then Minister said, additionally:

“I regard this as yet another option in sentencing given to the courts as a measure of last resort before imprisonment is awarded.”⁷

and that:

“...it is part and parcel of this scheme that no person serving a period of detention will be brought into association with people who are serving full terms of imprisonment.”⁸

⁶ *NSW Parliamentary Debates Hansard*, Legislative Assembly, 18 November 1970 at 8041

⁷ *NSW Parliamentary Debates Hansard*, Legislative Assembly, 18 November 1970 at 8045

⁸ *NSW Parliamentary Debates Hansard*, Legislative Assembly, 18 November 1970 at 8044

1.2 Similar observations were made in relation to the objectives of periodic detention, and its perceived success as an alternative sentencing option, when amending legislation was introduced in subsequent years, which initially dealt with it as a stand alone topic, before it took its place in a single Act dealing with sentencing generally.⁹

1.3 The concerns that have been expressed to the effect that periodic detention has not served its intended purposes, that it is not uniformly available across the State, that it is not achieving a deterrent or rehabilitative outcome, that its use is decreasing, that the facilities and staff required for its administration could be put to better use, and that there are preferable options available, have generated this inquiry and are dealt with in this Report. After an examination of its incidents, including its perceived advantages and disadvantages, we give consideration to the feasibility of adopting an alternative sentencing option that would take its place between a community service order and full-time imprisonment. We also give consideration to the question whether, if a decision is made to retain it, the existing scheme could be modified to remove some of the features which have attracted criticism.

⁹ For example, *NSW Parliamentary Debates Hansard*, Legislative Assembly 1 March 1977 at 4600; Legislative Council 8 March 1977 at 4829; Legislative Assembly 27 November 1980 at 3901 and 4 March 1981 at 4456; Legislative Council 24 March 1981 at 4972 and 25 March 1981 at 5138.

TERMS OF REFERENCE

1.4 On 4 June 2007, the Council received terms of reference from the Attorney General *inter alia* in the following terms:

- a) The extent to which periodic detention is used as a sentencing option throughout the State, and the appropriateness and consistency of such use;
- b) The nature of the offences for which periodic detention orders are most commonly made;
- c) The method of enforcement of periodic detention orders, and the appropriateness of such enforcement;
- d) The advantages and disadvantages of periodic detention orders in comparison with other sentencing options;
- e) Whether there are better alternatives to periodic detention orders;
- f) Any modifications which may be made to periodic detention, including combination with other community-based orders; and
- g) The different arrangements for state and federal offenders under periodic detention orders.

1.5 The Council was directed to pay particular regard to the *NSW State Plan*, Priority R2: Reducing re-offending.

1.6 The objective announced in the State Plan was to reduce the proportion of offenders who re-offend within 24 months of being convicted by a Court or after having been dealt with at a conference, by 10 percent by 2016, as reported by BOCSAR. Strategies foreshadowed in this plan include early intervention, extensive community monitoring and more tailored support to help offenders reintegrate into the community. It is in that context that we have been asked to review the effectiveness of periodic detention as a deterrent to re-offending¹⁰, and to consider any alternatives to it that may be more effective.

METHODOLOGY

1.7 The Council commenced work on this reference by inviting submissions from government, legal and community agencies. As the Attorney General had publicly announced that the Council was undertaking a review of the periodic scheme, unsolicited submissions were also received in the course of the Council's investigations.

1.8 Twenty-four submissions were received. A list of the submissions received is at [Appendix A](#).

1.9 Drawing on information supplied by the Department of Corrective Services, 260 letters were sent to community agencies for which periodic detainees perform community service work, inviting their comments on

¹⁰ The Productivity Commission found that the re-offending rate in NSW exceeds the national average, with 43% of prisoners in that State returning to prison within 2 years, as against a national average of 38%: *Report on Government Services* 2006.

the review. The agency response rate exceeded expectations, with 72 responses (both written and verbal) received. A list of the community agency letters received is attached at [Appendix B](#).

1.10 The Council also engaged in extensive face-to-face and phone consultation, including attending a hearing of the NSW State Parole Authority ('Parole Authority') and conducting site inspections at the Metropolitan (Parramatta) and Wollongong Periodic Detention Centres and several community worksites. Additionally Council members held meetings with senior staff members of the NSW Department of Corrective Services, and met with the Bureau of Criminal Statistics and Research (BOCSAR) and the Judicial Commission of NSW. The consultations undertaken are listed at [Appendix C](#).

1.11 A search was undertaken for all articles published in The Sydney Morning Herald and the Daily Telegraph, between 1 September 2002 and 27 September 2007 in relation to the term "periodic detention", so as to measure the community reaction to the use of this sentencing option.

1.12 As the Bibliography shows, a comprehensive literature review and analysis of case law was also conducted.

COMMUNITY RESPONSE

Submission and Consultations

1.13 Community support for periodic detention, emerging from the submissions and consultations, was seen to be heavily dependent upon periodic detention being seen as an essential sentencing buffer between community-based sentencing options and full-time incarceration, and as

a means of providing an initial short sharp shock which might act as a personal deterrent.

1.14 There was strong criticism of current eligibility restrictions (such as the exclusion of those who have previously served 6 months in full-time custody) and of the fact that it is not uniformly available throughout the State. Attention was also drawn to the difficulties in relation to transport and similar circumstances that operate as a practical barrier to service by some offenders who would otherwise be suitable for periodic detention. In some instances these criticisms were linked to support for extension of the scheme so as to make it available for a wider group of offenders including indigenous people, females and people from rural / remote communities. Other criticisms related to its cost, and to the fact that the available facilities are not used on a full time basis, resulting in an ineffective application of resources.

1.15 The community agencies overwhelmingly spoke highly of the periodic detention program, reporting few problems with detainee attitude or with the quality of the work performed. The very favourable reaction to the community service component is a persuasive argument for the retention of this component in any revision of the existing scheme or in any other option which is introduced in its place.

The Media

1.16 In its monograph *Periodic Detention Revisited*, the Judicial Commission of NSW reviewed the reporting of periodic detention by the media and commented that:

“...while the media is good at identifying weaknesses, it fails to provide the community with the more positive aspects of the sanction. The media does not present periodic detention as an onerous, punitive sanction, even when long terms are imposed.”¹¹

1.17 The report did, however, note that media criticisms on periodic detention had moderated in recent years, being more informative in content and less inflammatory in tone.¹²

1.18 This Council’s analysis of the media coverage of periodic detention between 1 September 2002 and 27 September 2007, suggests that the tendency for adverse reporting has continued since the Judicial Commission’s Report. The criticism however has tended to focus on issues such as absenteeism and the appropriateness of periodic detention for certain high profile cases¹³, as opposed to criticism of the sentencing option itself on grounds of leniency.

1.19 Where, in the last 5 years, there has been any outright criticism in the media of periodic detention for its perceived leniency it has not been uncommon for some balance to be provided within the article from a professional or academic commentator.¹⁴

¹¹ Judicial Commission of New South Wales, *Monograph 18: Periodic Detention Revisited*, 1998 at 14

¹² Judicial Commission of New South Wales, *Monograph 18: Periodic Detention Revisited*, 1998 at 14

¹³ For example, see *Weekend jail for cop death* Daily Telegraph, 7 September 2007; *Arsonist’s jail break – Volunteer firefighter’s weekend detention*, Daily Telegraph, 7 December 2004; and *Weekend detention for \$4.7M bank fraud*, Daily Telegraph, 28 January 2005; and *Rules could let Rivkin avoid prison indefinitely*, The Sydney Morning Herald, 20 December 2003

¹⁴ For example, *Libs to turn the screws on prisoners*, The Sydney Morning Herald, 15 February 2003

Parliamentary Debates

1.20 The Judicial Commission noted in 1998 that, when the legislation relating to periodic detention has arisen for debate in Parliament, it has been accepted to be a successful sentencing option, permitting offenders to continue in, or to find, employment and minimising disruption to their families while increasing their prospects of rehabilitation.¹⁵ This has uniformly been the case since introduction of the option in 1971.¹⁶

1.21 A review of Hansard over the last 5 years shows that this acceptance of periodic detention as a useful sentencing option has continued largely unchanged. It has been observed that offenders serving periodic detention and community service orders have performed over \$14.5M in unpaid work across NSW.¹⁷ The pride that offenders take in redressing their wrongs by contributing to the community, and the recognition of these efforts by the community, have been noted in the Legislative Council.¹⁸

1.22 As has been the case with the media, where the scheme has been the subject of criticism by members of the legislature, such criticism has focused on specific faults with the administration and enforcement of

¹⁵ Judicial Commission of New South Wales, *Monograph 18: Periodic Detention Revisited*, 1998

¹⁶ *NSW Parliamentary Debates Hansard*, Legislative Assembly 1 March 1977 at 4600; Legislative Council 8 March 1977 at 4829; Legislative Assembly 27 November 1980 at 3901 and 4 March 1981 at 4456; Legislative Council 24 March 1981 at 4972 and 25 March 1981 at 5138.

¹⁷ For example, *NSW Parliamentary Debates, Hansard*, Legislative Council, 16 March 2004 at 7245, the Honourable J Hatzistergos at 7245. In the Attorney General's speech, he stated in relation to periodic detainees that it 'is estimated that the work they carry out each year is worth more than \$3 million to the community'.

¹⁸ For example, *NSW Parliamentary Debates, Hansard*, Legislative Council, 16 March 2004 at 7245, the Honourable J Hatzistergos at 7245

periodic detention sentences, such as inappropriate liberties being enjoyed by detainees, and absenteeism.¹⁹

The Judiciary

1.23 A decade ago, the Judicial Commission made reference to the views expressed by the courts that periodic detention involved a considerable degree of leniency, quoting from one decision in the Court of Criminal Appeal:

“A sentence of periodic detention has a very strong element of leniency built into it, particularly as a result of the administrative arrangements which were referred to by this court in *Regina v Hallocoglu* [1992] 29 NSWLR 67 at 74 and 75. By virtue of the administrative arrangements which were in place at the time, and which continue today, a prisoner ordered by a court to serve a sentence by way of periodic detention in fact serves only one third of the sentence in that way. The remainder of the sentence is no more punitive than a community service order.”²⁰

1.24 The Commission also observed that the courts did not consider it to be comparable to an equivalent period of full-time custody.²¹ For example, in *Qi v R*²², Smart J stated that he did not regard periodic detention to be “fifty percent as significant as a full-time sentence”; rather it was appreciably less as such sentences were only served for 2 days per week and did not involve actual custody in descending stages.

1.25 However, there now appears to be a general consensus that while a periodic detention order is a more lenient sentence than one involving

¹⁹ For example, *NSW Parliamentary Debates, Hansard*, Legislative Council, 24 September 2002, the Honourable Greg Pearce at 5136

²⁰ Judicial Commission of New South Wales, *Monograph 18: Periodic Detention Revisited*, 1998 at 18 quoting from *R v Randall* NSWCCA (unreported, 19 April 1994)

²¹ Judicial Commission of New South Wales, *Monograph 18: Periodic Detention Revisited*, 1998 at 18

²² (1998) 102 A Crim R 172 at [176]

full-time imprisonment,²³ it is a sentence of inconvenience in that it clearly disturbs the ordinary affairs of the life of the offender and restricts the offender's liberty.²⁴

1.26 When reasons have been provided for the perceived leniency of periodic detention the criticism has tended to focus on the significance of an offender being placed on Stage 2 of the program.²⁵ Neither the view held by the courts that the descending stages of periodic detention render it a lenient sentencing option, nor the criticism of the administrative regime overseeing periodic detention, has changed greatly in the last decade.²⁶

²³ *R v Rivkin* [2004] NSWCCA 7 at [433]

²⁴ *R v Niga* NSWCCA (unreported, 13 April 1994)

²⁵ NSW Law Reform Commission, *Discussion Paper No 33: Sentencing*, Sydney, 1996 at 318-319

²⁶ See for example the concerns expressed by Sully J in *R v Parsons and Poore* [2002] NSWCCA 296 at [6].

Part 2

Periodic Detention as a Sentencing Option

- Periodic Detention Order
- Imposing a Sentence of Periodic Detention
- Administration by the Department of Corrective Services
- Federal Offenders

PART 2: PERIODIC DETENTION AS A SENTENCING OPTION

PERIODIC DETENTION ORDERS

2.1 A periodic detention order is a sentence of imprisonment that requires a person to remain in custody for two days a week for the duration of the sentence,²⁷ although subject to the offender's compliance he or she may be allowed to perform work in the community for part of that period. It is an alternative to full-time imprisonment that may be imposed by a court for eligible offenders sentenced to not more than three years imprisonment.

Availability

2.2 Periodic detention commenced in NSW in 1970 as an alternative to full-time custodial sanctions.²⁸ It is only available in Australia in NSW and the ACT, although the Tasmanian Government is currently considering introducing the scheme in that State.²⁹

²⁷ s6 *Crimes (Sentencing Procedure) Act 1999*

²⁸ *Periodic Detention of Prisoners Act 1970*. This Act was amended in 1972, 1977 and 1978 and later replaced by the *Periodic Detention of Prisoners Act 1981*. A series of amendments were made to the Act between 1982 and 1998, when it was repealed and replaced by the *Crimes (Sentencing Procedure) Act 1999* and the *Crimes (Administration of Sentences) Act 1999*. Subsequent amendments were made by the *Crimes Legislation Amendment (Periodic Detention and Home Detention) Act 2002*.

²⁹ The Tasmanian Legislative Council's Select Committee investigated periodic detention and recommended its adoption in Tasmania in the 1999 *Correctional Services and Sentencing (Wing Committee Report)*. It was also recommended for consideration by the Tasmanian Law Reform Institute, *Issues paper No 2: Sentencing*, 2002. Recent information released by the Australian Bureau of Statistics that Tasmania's prison population has increased almost 70% in the past decade, despite a 40% drop in crime, has led to renewed calls for the introduction of community-based sentencing alternatives such as periodic detention.

2.3 Various forms of periodic detention exist in several other jurisdictions throughout the world, including England,³⁰ Belgium, Canada, Germany,³¹ The Netherlands, Portugal.³² Spain³³ and Switzerland³⁴. Its importance as a sentencing sanction is dwindling, in favour of electronic monitoring and other forms of intensive surveillance across a wide range of community-based sanctions. In part this has been due to the significant security issues involved in the movement of part-time prisoners into and out of institutions. It has also been attributable to concerns that prisoners find it difficult to cope with the combination of work and prison, and to the significant increases in full-time prison numbers that have led to periodic detention beds being absorbed into the mainstream corrections systems. A further impetus for change has been an appreciation that community-based options with an emphasis on rehabilitation and education are likely to be more effective in reducing recidivism. This has led to its replacement in some jurisdictions.³⁵

Sentencing Hierarchy

2.4 Although NSW does not have a strict sentencing hierarchy, legislation and case law provide guidance on the relative severity of the various sentencing options. The Australian Law Reform Commission

³⁰ s183 *Criminal Justice Act 2003* (UK)

³¹ The sanction is used for offenders aged between 14 and 20, and is intended 'to negate the effect of being labelled a criminal with a history of imprisonment.'

³² Sentences of up to 3 months may be served in the form of weekend detention.

³³ In Spain, intermittent sentences may be imposed in two separate circumstances: those who have been sentenced for a minor offence may attend a weekend detention prison (approximately 450 people served their sentence this way in 2001); while those convicted of a minor offence, but who receive a longer sentence, may, after serving most of their sentence, take part in education or work between Monday and Thursday and go into prison overnight. For Friday and the weekend they may return to their family homes.

³⁴ Offenders may serve sentences of between 3 and 12 months by working in the community by day, but spend their nights and usually the weekends in gaol.

³⁵ For example, New Zealand, where periodic detention and community service orders were replaced in 2002 with a simple sentence known as a "community work sentence".

(ALRC)³⁶ has recently suggested that a “broad hierarchy” of the main sentencing options could be understood to escalate as follows:

- Non-conviction bond;
- Conviction bond;
- Fine;
- Community Service and like orders;
- Suspended sentence;
- Sentence with custody component including Home detention and Periodic Detention;
- Full time custody.

IMPOSING A SENTENCE OF PERIODIC DETENTION

2.5 When imposing a sentence of periodic detention, the court must first be satisfied that, having considered all other alternatives, no penalty other than imprisonment is appropriate.³⁷ Secondly, the court must determine the length of the sentence. Finally, it must determine whether that sentence should be suspended or served by way of home detention, periodic detention or full-time custody.³⁸

A three stage process

2.6 In *Douar v R Johnson* J set out the various stages of a decision to impose periodic detention:

“Although the authorities speak of a two-stage process, it is preferable to step back a stage and to identify a three-stage

³⁶ See Australian Law Reform Commission, *Discussion Paper 70: Sentencing of Federal Offenders*, 29 November 2005, at 7.127.

³⁷ s5 *Crimes (Administration of Sentences) Act 1999*

³⁸ *R v Zamagias* [2002] NSWCCA 17 at [25]-[29]

process in passing a sentence of imprisonment to be served by way of periodic detention. Each step requires the Court to consider the objective gravity of the offence balanced against the subjective circumstances of the offender, but it is the first of those considerations that will principally determine which of the available sentencing alternatives the court should adopt: *R v Zamagias* [2002] NSWCCA 17 at [23].

The first question to be asked and answered is whether there are any alternatives to the imposition of a term of imprisonment. Section 5 prohibits a Court from imposing a sentence of imprisonment unless the Court is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate. At this stage in the process, the only consideration is whether a sentence of imprisonment should be imposed, and not the manner in which that sentence of imprisonment is to be served: *Zamagias* at [25].

The second step is reached where the Court has determined that no penalty is appropriate other than a sentence of imprisonment. The Court is next to determine what the term of that sentence should be. This has been regarded as the first step of a two-step approach: *Foster* [2001] NSWCCA 215 at [30]; *Zamagias* at [26]. The determination of the term is to be made without regard to whether the sentence will be immediately served or the manner in which it is to be served. This is because any of the alternatives available in respect of a sentence of imprisonment can only be considered once the sentence has been imposed. It follows that the term of the sentence cannot be influenced by what order might be made after the sentence has been imposed. The sentence cannot be increased because it is to be served by way of periodic detention: *Wegener* [1999] NSWCCA 405 at [22]; *Zamagias* at [26].

The third stage is reached once the length of the sentence of imprisonment has been determined. The Court is then to consider whether any alternative to full-time imprisonment is available in respect of that term and whether any available alternative should be utilised. The availability of an alternative to full-time custody will generally be governed by the length of the term that has been determined, subject to the restrictions or preconditions imposed by the legislature on

a particular sentencing alternative. The appropriateness of an alternative to full-time custody will depend upon a number of factors; one of importance being whether such an alternative would result in a sentence that reflects the objective seriousness of the offence and fulfils the manifold purpose of punishment. The Court in choosing an alternative to full-time custody cannot lose sight of the fact that the more lenient the alternative, the less likely it is to fulfil all the purposes of punishment: *Zamagias* at [28].”³⁹

Restrictions on power to make periodic detention orders

2.7 The primary constraints on making a periodic detention order are set out in Div 2 of Pt 5 of the *Crimes (Sentencing Procedure) Act* 1999.

2.8 Under s66(1) of the Act a periodic detention order may not be made unless the court is satisfied:

- (a) that the offender is of or above the age of 18 years, and
- (b) that the offender is a suitable person to serve the sentence by way of periodic detention, and
- (c) that it is appropriate in all of the circumstances that the sentence be served by way of periodic detention, and
- (d) that there is accommodation available at a periodic detention centre for the offender to serve the sentence by way of periodic detention, and
- (e) that transport arrangements are available for travel by the offender, to and from the periodic detention centre, for the purpose of serving the sentence by way of periodic detention,

³⁹ [2005] NSWCCA 455 at [69]–[72]

being arrangements that will not impose undue inconvenience, strain or hardship on the offender, and

(f) that the offender has signed an undertaking to comply with the offender's obligations under the periodic detention order.

2.9 A periodic detention order cannot be made where:

- The offender has served more than six months by way of full-time imprisonment for any one sentence of imprisonment either in New South Wales or anywhere else;⁴⁰
- The offender is sentenced to imprisonment for more than 3 years;⁴¹
- The offender has committed a "prescribed sexual offence;"⁴² or
- The offender is found to be unsuitable.⁴³

Assessment reports

2.10 In deciding whether or not to make a periodic detention order the court must have regard to:

⁴⁰ s65A *Crimes (Sentencing Procedure) Act 1999*

⁴¹ s6 *Crimes (Sentencing Procedure) Act 1999*

⁴² s65B *Crimes (Sentencing Procedure) Act 1999*. Under this section, a prescribed sexual offence means (a) an offence under Division 10 or 10A of Part 3 of the *Crimes Act 1900*, being: (i) an offence committed on a person under the age of 16 years, or (ii) an offence, committed on a person of any age, the elements of which include sexual intercourse (as defined by s61H of that Act), or (b) an offence that includes the commission, or an intention to commit, an offence referred to in paragraph (a), or (c) an offence that, at the time it was committed, was a prescribed sexual offence within the meaning of this definition, or an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in paragraph (a), (b) or (c)."

⁴³ Under the criteria set out in s66 of the *Crimes (Sentencing Procedure) Act 1999*

- a) The contents of an assessment report on the offender, produced by the Probation and Parole Service; and to
- b) Any other evidence from a Probation and Parole officer, which the court considers relevant⁴⁴.

2.11 The assessment report must evaluate the offender's suitability for periodic detention with reference to the following:

- a) The degree to which the offender is dependant on drugs or alcohol (a major drug or alcohol problem being a factor of unsuitability);
- b) The offender's psychiatric and psychological condition (a major psychiatric or psychological disorder being an indicator of unsuitability);
- c) The offender's medical condition (a medical condition which could prevent the offender from reporting to periodic detention is an indicator of unsuitability);
- d) The offender's criminal record; and
- e) The offender's employment and other personal circumstances.⁴⁵

2.12 Despite the contents of the report, the court may refuse to order periodic detention even though the offender is deemed "suitable". Alternatively, the court may order periodic detention even though the assessment states that the offender is unsuitable. If it departs from a report, the court must inform the offender and make a record of the

⁴⁴ s66(2) *Crimes (Sentencing Procedure) Act 1999*

⁴⁵ Reg 15 *Crimes (Sentencing Procedure) Regulations 2005*

reasons for its decision⁴⁶ although failure to do so does not invalidate the order.

Concurrent and consecutive sentences

2.13 A periodic detention order cannot be made requiring a new sentence to be served concurrently or consecutively (or partly concurrently and partly consecutively) with any existing sentence of periodic detention if the date on which the new sentence would end is more than 3 years after the date on which it was imposed.⁴⁷

Non-parole period

2.14 It has been observed that the court should generally impose a non-parole period where a sentence is to be served by way of periodic detention,⁴⁸ that is, so long as the sentence is one that exceeds 6 months.⁴⁹ The court may, however, decline to set a non-parole period if it appears to the court that it is appropriate to decline to do so:⁵⁰

- Because of the nature of the offence to which the sentence relates or the antecedent character of the offender; or
- Because of any other penalty previously imposed on the offender; or
- For any other reason that the court considers sufficient.

⁴⁶ s66(4) *Crimes (Sentencing Procedure) Act 1999*

⁴⁷ s67(1) *Crimes (Sentencing Procedure) Act 1999*

⁴⁸ *R v Hakim* [2004] NSWCCA 124 and *R v Strahan* [2003] NSWCCA 397

⁴⁹ s46 *Crimes (Sentencing Procedure) Act 1999*

⁵⁰ s45 of the *Crimes (Sentencing Procedure) Act 1999*; see *R v Colin* [2000] NSWCCA 236 and *R v Dickinson* [2005] NSWCCA 284, for examples of cases of periodic detention where it was held that a non-parole period need not be specified.

2.15 Where a non-parole period is set, then since the sentence must be one of 3 years or less,⁵¹ the court must make an order directing the release of the offender on parole at the end of that period.⁵²

Release on Parole

2.16 A periodic detainee will accordingly become eligible for release on parole:

- provided that a non-parole period has been set; and
- that period of the sentence has been served; and
- the offender is not subject to any other sentence.⁵³

2.17 A parole order in relation to an offender whose sentence is ordered to be served by way of periodic detention is subject to standard conditions requiring the offender to be of good behaviour and not to commit any offences, and providing for revocation of the order for breach, or for failure to adapt to a normal community life. It is however, not permissible for a condition to be imposed requiring a periodic detention offender released on parole to be subject to supervision by the Parole Service.⁵⁴

Duration of periodic detention

2.18 Unless it is sooner revoked, a periodic detention order expires at the end of the term of the sentence to which it relates, or when the offender is released on parole, whichever occurs first.⁵⁵

⁵¹ s6 *Crimes (Sentencing Procedure) Act 1999*

⁵² s50 (1) *Crimes (Sentencing Procedure) Act 1999*

⁵³ ss125, 126(2) *Crimes (Administration of Sentences) Act 1999*

⁵⁴ s51(1B) *Crimes (Sentencing Procedure) Act 1999*

⁵⁵ s82 *Crimes (Administration of Sentences) Act 1999*

2.19 Accordingly, when an offender is released on parole, the requirements of the periodic detention order concerning weekend or mid-week detention (Stage 1) or community service (Stage 2) cease. The offender then has the status of an unsupervised parolee serving in the community, the balance of the term of imprisonment that was first imposed. Although theoretically liable to revocation of parole for breach of the parole conditions, in practice that will not occur as breach reports are not sent to the Parole Authority. As the periodic detention order has run its course, the Parole Authority has no authority to revoke that order or to exercise the powers otherwise available to it where a periodic detention order is revoked.

2.20 The position of an offender who receives a sentence to be served by way of periodic detention but for whom the court declines to set a non-parole period, stands in sharp contrast. Such an offender is required to report for weekend or mid-week detention until the term of the sentence expires. Such an offender accordingly remains liable throughout the entire sentence to the possible revocation of the periodic detention order by the Parole Authority, for breach, and to the consequent possibility of being sentenced to full time imprisonment or home detention.

ADMINISTRATION BY THE DEPARTMENT OF CORRECTIVE SERVICES

Service in two stages

2.21 The NSW Department of Corrective Services administers periodic detention as a two-stage program.

- Stage 1 detainees report to a detention centre by 7.00pm on a specified day of the week (usually Friday) and remain in custody at the centre until 4.30pm two days later;⁵⁶
- During Stage 2 detainees do not stay overnight (essentially removing the custodial component of the sentence) but instead undertake supervised community service work each week.

2.22 This regime is repeated every week until the end of the term of the sentence or until the offender is released on parole unless the periodic detention order is sooner revoked.⁵⁷

2.23 The Commissioner of Corrective Services has the power to vary the reporting terms of a periodic detainee's order (with respect to the day, time and place)⁵⁸ and may make an order directing that a detainee participate in certain activities or perform community service work.⁵⁹ More specifically, the Commissioner may make an order exempting an offender from serving the whole or any part of a detention period in a periodic detention centre if the person is subject to an attendance or work order in force in respect of the whole or any part of that exempted period.⁶⁰ However, the variations with respect to days and times during

⁵⁶ Some centres also run midweek programs where attendance is required from Wednesday evening to Friday afternoon.

⁵⁷ s82 *Crimes (Administration of Sentences) Act 1999*

⁵⁸ s85 *Crimes (Administration of Sentences) Act 1999*

⁵⁹ s84 *Crimes (Administration of Sentences) Act 1999*

⁶⁰ s84(4) *Crimes (Administration of Sentences) Act 1999*

which the offender must serve periodic detention, cannot be made so as to vary the number of hours, or detention periods, to which the offender was sentenced.⁶¹

2.24 Under current Departmental guidelines, a detainee will be promoted to Stage 2 only if he or she has demonstrated acceptable behaviour during Stage 1 and has completed either three months or one third of the sentence, whichever is greater. The detainee must accordingly attend at least thirteen consecutive weeks of detention before being considered for promotion to Stage 2. Detainees must fit strict criteria for inclusion in work programs within the community. Assessment is based on their attendance, work ethic and behaviour.⁶² For example, they generally must not have had any absences without leave, have a proven record of good conduct and have demonstrated a capacity to function with minimal supervision.⁶³

2.25 During Stage 1, detainees may be directed to perform work within the Centre or to carry out work under supervision in the community. For that latter purpose they are taken by Corrective Services staff to the worksite. Once in Stage 2, detainees arrange their own transport to and from a specified work site, rather than reporting to a periodic detention centre as is the case for Stage 1 detainees performing work outside the detention centre.

2.26 Examples of community work undertaken by periodic detainees includes:

⁶¹ s85(2) and (3) *Crimes (Administration of Sentences) Act 1999*

⁶² Submission 21: NSW Department of Corrective Services

⁶³ New South Wales Parliament, Legislative Standing Committee on Law and Justice, *Report No 30: Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006

- participating in the annual Clean-Up Australia Campaign;
- working for the Upper Parramatta River Catchment Trust;
- maintaining the Kokoda Track Memorial walkway;
- clearing weeds from national parks;
- maintaining and improving the physical environment of schools;
and
- cleaning and maintaining a vast stretch of the Georges River.

Leave of absence

2.27 The Commissioner of Corrective Services may grant the offender leave of absence for one or more detention periods:

- For health reasons, or
- On compassionate grounds, or
- On the ground that the offender is in custody, or
- For any other reason the Commissioner thinks fit⁶⁴.

2.28 Where the offender has reported late and the Commissioner is satisfied that reasonable excuse exists for that circumstance, then he may grant leave of absence.⁶⁵

2.29 A detainee may appeal the Commissioner's refusal to grant the offender a leave of absence to the Parole Authority.⁶⁶

2.30 If an offender fails to appear for periodic detention, or reports late, the sentence is extended by one week for each such incident.⁶⁷

⁶⁴ s87(1) *Crimes (Administration of Sentences) Act 1999*

⁶⁵ s88 *Crimes (Administration of Sentences) Act 1999*

⁶⁶ s93 *Crimes (Administration of Sentences) Act 1999*

⁶⁷ s89 *Crimes (Administration of Sentences) Act 1999*. However, an offender's sentence may not be extended by more than six weeks - *Crimes (Administration of Sentences) Act*

Exemption from service

2.31 The Commissioner may, for health reasons or on compassionate grounds, order that one or more detention periods yet to be served be regarded as having been served, if he or she is satisfied that the offender is unlikely to be able to serve that period or these periods within a reasonable time.⁶⁸

Breaches and Revocation

2.32 An offender who breaches a periodic detention order, for example, by repeatedly failing to report or refusing to carry out community service work without good reason, or who reports while affected by drugs or alcohol, or who attempts to bring prohibited substances into a detention centre, may have his or her order revoked by the Parole Authority and may then be taken into custody to serve the remainder of the sentence. Additionally, unruly offenders may be transferred to a correctional centre for the remainder of the detention period.⁶⁹

2.33 The Parole Authority, and not the sentencing court, has the authority to revoke a detainee's periodic detention order.⁷⁰ Upon revocation of the order, the Parole Authority may issue a warrant committing the offender to a correctional centre to serve the remainder of the sentence by way of full time custody⁷¹ or may order the person to serve out the rest of the sentence by way of home detention.⁷²

1999, s89(5), subject to exemption being granted by the Commissioner under s90 of the Act.

⁶⁸ s92 *Crimes (Administration of Sentences) Act 1999*

⁶⁹ s86 *Crimes (Administration of Sentences) Act 1999*

⁷⁰ Pursuant to s163 of the *Crimes (Administration of Sentences) Act 1999*

⁷¹ s181 *Crimes (Administration of Sentences) Act 1999*

⁷² s165 *Crimes (Administration of Sentences) Act 1999*

2.34 We deal with the question of enforcement in more detail in Parts 4 & 5 of this Report.

FEDERAL OFFENDERS

2.35 In Part 5 of this Report we discuss the different arrangements that apply to Federal offenders who are sentenced by New South Wales courts to periodic detention. The fact that there is a different regime for enforcement of those orders and the fact that in the other States, periodic detention is not available as a sentencing option for such offenders, although other options may be available, can lead to some lack of cross jurisdictional uniformity in sentencing.

Part 3

The Extent to which Periodic Detention is used in NSW

- Numbers of persons receiving Periodic Detention Orders
- Offences which attract Periodic Detention
- Offender Demographics
- Proclaimed Periodic Detention Centres
- Completion and Release Profile
- Recidivism

PART 3: THE USE OF PERIODIC DETENTION IN NSW

NUMBERS OF PERSONS RECEIVING PERIODIC DETENTION ORDERS

BOCSAR Statistics

3.1 Statistics from BOCSAR indicate that in 2006 the Local Court issued 1115 periodic detention orders, while the Higher Courts imposed 137 such sentences. This compares with over 9000 sentences of full-time imprisonment, 360 home detention orders and 4844 community service orders imposed by NSW courts in the same period.⁷³ In 2006, periodic detention orders comprised 1% of all sentences imposed by the Local Court and 4.7% of all sentences imposed by the Higher Courts.

Judicial Commission analysis

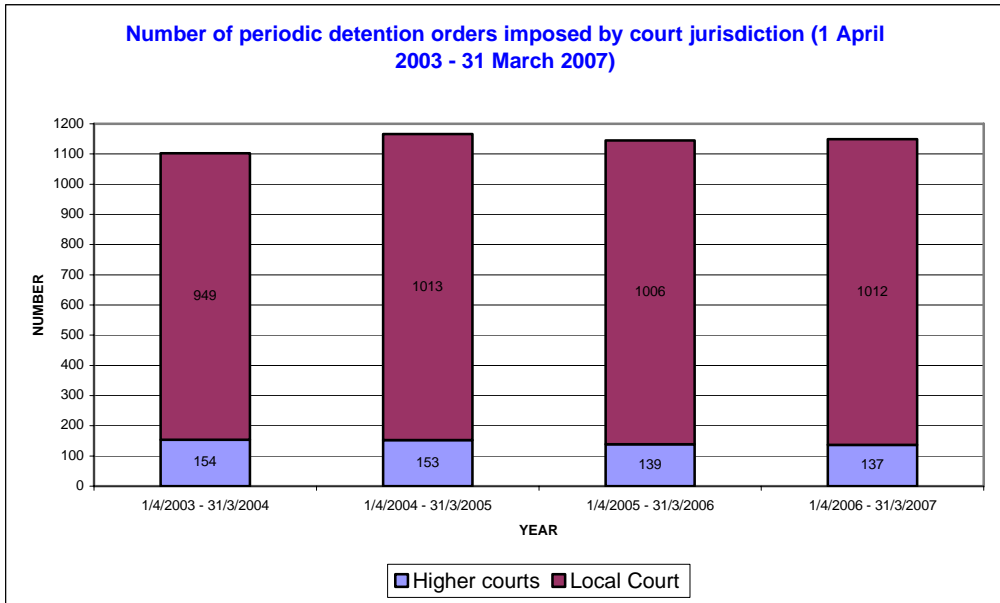
3.2 The analysis provided for the Sentencing Council by the Judicial Commission of New South Wales shows that over the four-year period from 1 April 2003 to 31 March 2007:⁷⁴

- There were 4,563 periodic detention orders imposed by NSW Courts, of which 87.2% (3980) were handed down in the Local Court, while 12.8% (583) were handed down in higher courts.

⁷³ New South Wales Bureau of Crime Statistics and Research (BOCSAR), *NSW Criminal Court Statistics 2006, 2007* see Table 1.7 at 25 and Table 3.7 at 87

⁷⁴ Letter dated 11 October 2007 from the Judicial Commission of New South Wales. The data source for the analysis is the Judicial Commission Sentencing Statistics (JIRS) which are appearance or person-based and relate to the “Principal offence” (or offence that attracts the most serious penalty) for such finalised matters for which an offender is sentenced (as convicted, where corrected on appeal).

Table 1: Number of periodic detention orders imposed by court jurisdiction by year



NSW Department of Corrective Services statistics

3.3 Statistics provided by the NSW Department of Corrective Services⁷⁵ for the 2006 year show the following sentencing profile of those receiving periodic detention.

Table 2: Sentencing profile of those receiving periodic detention: 2006

Sentences < 6 months	23%	82%
6 – 9 months	41%	
9 – 12 months	18%	
12 to 18 months	12%	18%
18 months to 3 years	6%	
Total offenders	925	100%

⁷⁵ Submission 21: NSW Department of Corrective Services, Table 14- There is some discrepancy between the Bureau of Crimes Statistics and Research and the Department statistics on relation to the number of offenders receiving periodic detention.

3.4 An appreciation of this profile, which reveals that a significant majority (82%) of offenders receive periodic detention for 12 months or less, is of some importance in relation to the capacity of the current system to provide meaningful rehabilitation support during the sentence.

3.5 In this regard it is also relevant to note that each weekend of period detention served counts as the equivalent of one week in full-time custody. It is upon that basis and on the assumption that revocation of a periodic detention order by reason of non-compliance will potentially require the offender to serve the balance of the term in full time custody, or on home detention, that such orders are made. This has the significance that a sentence of full time custody underlies every periodic detention order.

Declining use of periodic detention

3.6 It has been asserted that there is a decreasing reliance on periodic detention by the courts.⁷⁶ The *2007 Report on Government Services* estimated that on average, 862 people per day were serving periodic detention orders in NSW and the ACT in 2005-2006 — a decrease of 3.3 per cent from the 2004-2005 average.⁷⁷

3.7 According to a study undertaken by the NSW Department of Corrective Services, the number of offenders commencing periodic detention orders has declined over the past five years, from a peak in

⁷⁶ See Submission 9: Law Society of NSW and Submission 21: NSW Department of Corrective Services

⁷⁷ Steering Committee for the Review of Government Service Provision (SCRGSP), *Report on Government Services 2007*, Productivity Commission, Canberra, 2007 at 7.4

1999-2000 of 1891 commencements to 1184 in 2004-2005.⁷⁸ According to figures supplied to the Council by the NSW Department of Corrective Services, approximately 1300 detainees were serving sentences of periodic detention at any one time during the year 2000. A snapshot taken over one weekend in April 2007 revealed that there were only 765 periodic detainees: of whom 620 were on Stage 1 and 145 were on Stage 2 of the scheme.⁷⁹ One hundred and twenty offenders were absent.⁸⁰ A snapshot taken four months later revealed that 740 detainees were on the scheme, of whom 86 were absent and 8 were in full-time custody.⁸¹

3.8 The Judicial Commission analysis provided to the Council supports the existence of a downward trend in the number of periodic detention orders made over the last 7 years, as indicated by the following table.⁸²

⁷⁸ McHutchison J, *Outcomes for NSW periodic detention orders commenced 2003-2004*, Research Publication, No 48, NSW Department of Corrective Services, 2006 at v

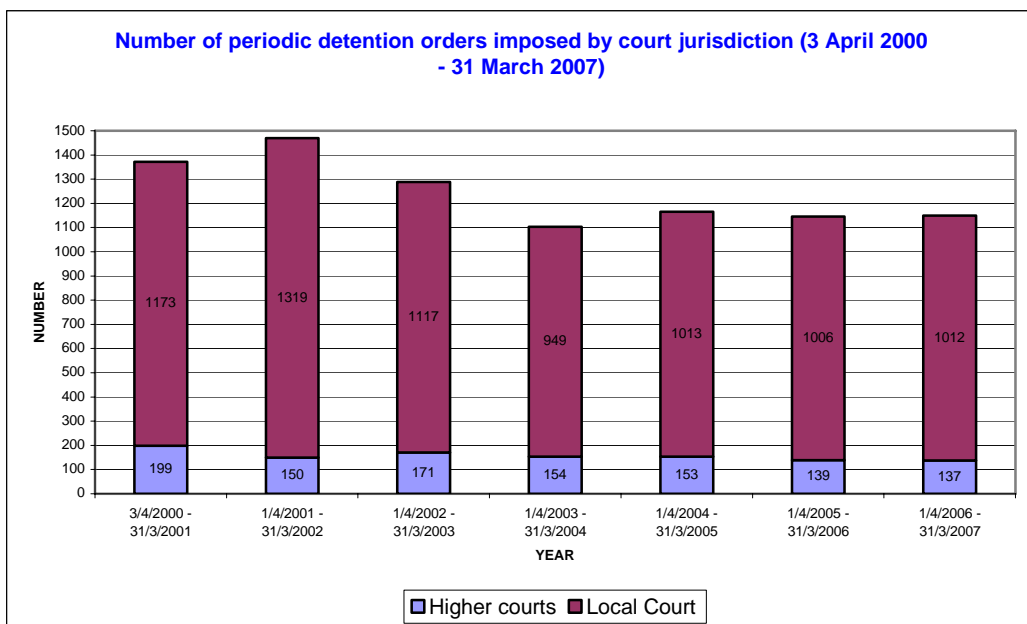
⁷⁹ Statistical data compiled by NSW DCS Corporate Research, Evaluation and Statistics Unit for 15 April 2007.

⁸⁰ These figures do not distinguish between those detainees on approved leave and those who were absent without cause. It should therefore not be regarded as an accurate reflection of the non-attendance rate of periodic detainees.

⁸¹ Statistical data compiled by NSW DCS Corporate Research, Evaluation and Statistics Unit for 5 August 2007. The same point was made by the Law Society of NSW, Submission 9, citing statistics showing a drop in the number of persons subject to periodic detention orders from 1546 in 1997 to 724 in 2006. The Legislative Council Standing Committee on Law and Justice also noted a decline in the use of periodic detention citing the 2005 *Inmate Health Census* as showing the low point for those in periodic detention as 253 in 1982, rising to a high in 1997 of 1546 and dropping to 855 in 2005; as against an increase in the total inmate population from 7966 in 1997 to 9860 in 2005- *Report No 30: Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006 at 6.6.

⁸² It should be noted that the figures do not include any periodic detention orders made in relation to re-sentencing for a breach of justice order, nor any other instances where periodic detention is imposed other than by the court.

Table 3: Number of periodic detention orders imposed by court jurisdiction by year



3.9 Figures extracted from BOCSAR Criminal Court Statistics from 1999 to 2006 show a similar trend in the raw number of orders made over the period reviewed, although the proportion of periodic detention orders to the total number of sentences imposed in the Local Court since 1999 remains fairly constant, reducing from 1.5% in 1999 to 1.0% in 2006.

Use of periodic detention for Federal offenders

3.10 Figures provided by the Commonwealth Director of Public Prosecutions ('Commonwealth DPP')⁸³ indicate that periodic detention is being imposed on federal offenders by NSW courts more frequently than at any time in the last 5 years. According to the Commonwealth DPP, periodic detention was imposed in just over 9% (or 55 matters) of all

⁸³ Supplementary submission 26: Office of the Commonwealth Director of Public Prosecutions

sentences imposed on federal offenders in NSW in 2006-2007. This is an increase of 4% from the 2002-2003 figures (29 matters), and constitutes a slight but steady increase in the use of periodic detention as a sentencing option for federal offenders in NSW over the last 5 years.⁸⁴

3.11 The Council notes that any apparent reduction in the number of orders made per year would not necessarily provide confirmation that courts are imposing sentences other than periodic detention simply because the scheme has fallen out of favour.

3.12 The numbers may have varied because individual offenders sentenced within any given period are not suitable for periodic detention: either because their offence fell below the level of seriousness requiring a 'last resort' sentence of imprisonment to be imposed, or in the alternative, because their offence was deemed of such seriousness that nothing short of full-time incarceration was warranted.

3.13 The tightening of eligibility criteria for periodic detention may also have contributed to a decline in the number of periodic detention orders. A further contributing factor may have been the closure of previously utilised periodic detention centres, such as Campbelltown, Silverwater and Broken Hill, as well as the Grafton Female Periodic Detention Centre.

3.14 Any pattern of reduction in the number of persons actually serving periodic detention at any one time is however, potentially material in

⁸⁴ An exception to this upward trend is seen in the 2004-2005 figures, where the use of periodic detention as a proportion of all sentences imposed on federal offenders in NSW fell slightly to 6.9% (or 42 matters) from 7.4% (or 39 matters) in the previous year.

relation to the cost of maintaining the necessary facilities, and to the question whether they could be put to better use.

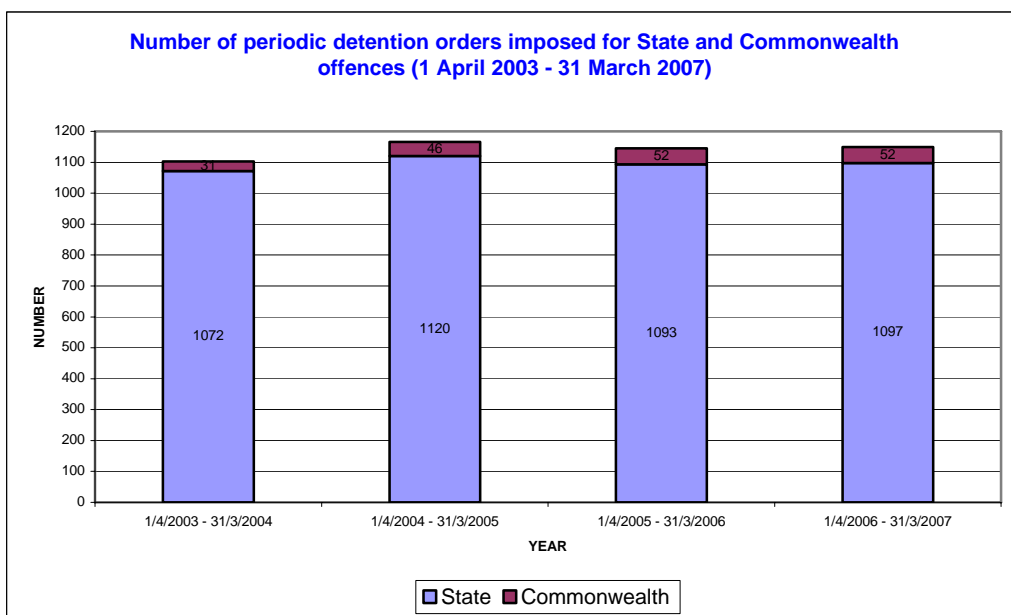
OFFENCES WHICH ATTRACT PERIODIC DETENTION

Analysis

3.15 The analysis of the Judicial Commission for the period previously mentioned revealed the following:

- Offences under NSW State legislation accounted for 96% (4382) of all periodic detention orders made in NSW, and offences under Commonwealth legislation accounted for 4% (181) of such orders.

Table 4: Number of periodic detention orders imposed for State and Commonwealth offences



- The most common State offence for which periodic detention orders were made in the Local Court (24.7%) was drive while

disqualified;⁸⁵ while the offence of drive with high range PCA⁸⁶ was ranked as the second most common offence (8%) for this purpose.

- In the Higher courts the most common State offence for which periodic detention orders were made (19.2%) was supply less than a commercial quantity of a prohibited drug.⁸⁷

Table 5: Most common offences, overall, where periodic detention was imposed (1 Apr 2003 to 31 Mar 2007)

Rank	Offence	Legislation	N	%
1	Drive whilst disqualified	<i>Road Transport (Driver Licensing) Act 1998, s25A(1)(a)</i>	1129	24.7
2	Drive with high range PCA ^(a)	<i>Road Transport (Safety and Traffic Management) Act 1999, s9(4)(a)</i>	363	8.0
3	Assault occasioning actual bodily harm	<i>Crimes Act 1900, s59(1)</i>	283	6.2
4 (tied)	Common assault	<i>Crimes Act 1900, s61</i>	198	4.3
4 (tied)	Supply ^(b) prohibited drug - less than commercial quantity	<i>Drug Misuse and Trafficking Act 1985, s25(1)</i>	198	4.3
6	Drive with middle range PCA	<i>Road Transport (Safety and Traffic Management) Act 1999, s9(3)(a)</i>	180	3.9
7	Malicious wounding or inflict grievous bodily harm	<i>Crimes Act 1900, s35(1)</i>	152	3.3
8	Knowingly contravene apprehended violence order	<i>Crimes Act 1900, s562I repealed^(c)</i>	148	3.2
9	Larceny	<i>Crimes Act 1900, s117</i>	143	3.1
10	Drive vehicle recklessly/furiously or speed/manner dangerous	<i>Road Transport (Safety and Traffic Management) Act 1999, s42(2)</i>	118	2.6
	Total for top 10 offences		2912	63.8
	All remaining offences		1651	36.2
	TOTAL		4563	100.0

Notes: *a* On 8 September 2004 the CCA delivered a guideline judgment for this offence. There were 82 periodic detention orders imposed prior to this date (at a rate of use of 1.3%) and 281 periodic detention orders imposed on or after this date (at a rate of use of 2.8%).
b Includes knowingly take part in supply and deemed supply.
c This offence was repealed on 11 March 2007 and replaced by s562ZG(1) of the *Crimes Act 1900*. None of the 24 sentencing cases prosecuted under the new legislation received a periodic detention order.

⁸⁵ Under s25(1)(a) *Road Transport (Driver Licensing) Act 1998*

⁸⁶ Under s9(4)(a) *Road Transport (Safety and Traffic Management) Act 1999*

⁸⁷ Under s25(1) *Drug Misuse and Trafficking Act 1985*

**Table 6: Most common offences in the higher courts where periodic detention was imposed
(1 Apr 2003 to 31 Mar 2007)**

Rank	Offence	Legislation	N	%
1	Supply ^(a) prohibited drug - less than commercial quantity	<i>Drug Misuse and Trafficking Act 1985, s25(1)</i>	112	19.2
2	Robbery etc, being armed or in company	<i>Crimes Act 1900, s97(1)</i>	43	7.4
3	Malicious wounding or inflict grievous bodily harm	<i>Crimes Act 1900, s35(1)</i>	38	6.5
4 (tied)	Dangerous driving occasioning grievous bodily harm	<i>Crimes Act 1900, S52A(3)</i>	31	5.3
4 (tied)	Aggravated break, enter and commit serious indictable offence	<i>Crimes Act 1900, s112(2)</i>	31	5.3
6	Supply prohibited drug on an ongoing basis	<i>Drug Misuse and Trafficking Act 1985, s25A</i>	30	5.1
7	Dangerous driving occasioning death	<i>Crimes Act 1900, s52A(1)</i>	23	3.9
8	Cultivate ^(b) etc prohibited plant - commercial quantity	<i>Drug Misuse and Trafficking Act 1985, s23(2)</i>	18	3.1
9	Cultivate ^(b) etc prohibited plant - less than commercial quantity	<i>Drug Misuse and Trafficking Act 1985, s23(1)</i>	12	2.1
10 (tied)	Aggravated robbery or steal from the person	<i>Crimes Act 1900, s95</i>	11	1.9
10 (tied)	Assault occasioning actual bodily harm - in company	<i>Crimes Act 1900, s59(2)</i>	11	1.9
10 (tied)	Aggravated robbery or steal from the person	<i>Crimes Act 1900, s95</i>	11	1.9
	Total for top 12 offences		371	63.6
	All remaining offences		212	36.4
	TOTAL		583	100.0

Notes: **a** Includes knowingly take part in supply and deemed supply.
b Includes knowingly take part in cultivate etc.

**Table 7: Most common offences in the Local Court where periodic detention was imposed
(1 Apr 2003 to 31 Mar 2007)**

Rank	Offence	Legislation	N	%
1	Drive whilst disqualified	<i>Road Transport (Driver Licensing) Act 1998, s25A(1)(a)</i>	1129	28.4
2	Drive with high range PCA ^(a)	<i>Road Transport (Safety and Traffic Management) Act 1999, s9(4)(a)</i>	363	9.1
3	Assault occasioning actual bodily harm	<i>Crimes Act 1900, s59(1)</i>	275	6.9
4	Common assault	<i>Crimes Act 1900, s61</i>	197	4.9
5	Drive with middle range PCA	<i>Road Transport (Safety and Traffic Management) Act 1999, s9(3)(a)</i>	180	4.5
6	Knowingly contravene apprehended violence order	<i>Crimes Act 1900, s562I repealed^(b)</i>	148	3.7
7	Larceny	<i>Crimes Act 1900, s117</i>	140	3.5
8	Drive vehicle recklessly/furiously or speed/manner dangerous	<i>Road Transport (Safety and Traffic Management) Act 1999, s42(2)</i>	118	3.0
9	Malicious wounding or inflict grievous bodily harm	<i>Crimes Act 1900, s35(1)</i>	114	2.9
10	Break, enter and commit serious indictable offence	<i>Crimes Act 1900, s112(1)</i>	104	2.6
	Total for top 10 offences		2768	69.5
	All remaining offences		1212	30.5
	TOTAL		3980	100.0

Notes: **a** On 8 September 2004 the CCA delivered a guideline judgment for this offence. There were 82 periodic detention orders imposed prior to this date (at a rate of use of 1.3%) and 281 periodic detention orders imposed on or after this date (at a rate of use of 2.8%).

b This offence was repealed on 11 March 2007 and replaced by s562ZG(1) of the *Crimes Act 1900*. None of the 24 sentencing cases prosecuted under the new legislation received a periodic detention order.

- The most common Commonwealth offence for which periodic detention orders were made (36.5%) was obtaining a financial advantage.⁸⁸

⁸⁸ Under s135.2 *Criminal Code* 1995 (Cth)

**Table 8: Most common Commonwealth offences where periodic detention was imposed
(1 Apr 2003 to 31 Mar 2007)**

Rank	Offence	Legislation	N	%
1	Obtain a financial advantage	<i>Criminal Code Act 1995</i> , s135.2	66	36.5
2	Obtain payment that is not payable	<i>Social Security (Administration) Act 1999</i> , s215	23	12.7
3	Knowingly obtain payment of benefit not payable	<i>Social Security Act 1991</i> , s347 repealed ^(a)	19	10.5
4	General dishonesty	<i>Criminal Code Act 1995</i> , s135.1	12	6.6
5	Obtain a financial advantage by deception	<i>Criminal Code Act 1995</i> , s134.2	10	5.5
6	False representation to obtain benefit from Commonwealth	<i>Crimes Act 1914</i> , s29B repealed ^(b)	9	5.0
7	Defraud the Commonwealth	<i>Crimes Act 1914</i> , s29D repealed ^(b)	4	2.2
8 (tied)	Obtain property by deception	<i>Criminal Code Act 1995</i> , s134.1	3	1.7
8 (tied)	Fail to comply with sentence passed/ order made under s20AB(1)	<i>Crimes Act 1914</i> , s20AC(6)	3	1.7
8 (tied)	Intentionally make false statement in statutory declaration	<i>Statutory Declarations Act 1959</i> , s11	3	1.7
	Total for top 10 Commonwealth offences		152	84.0
	All remaining Commonwealth offences		29	16.0
	TOTAL		181	100.0

Notes: **a** This offence was repealed on 19 March 2000.

b This offence was repealed on 23 May 2001.

Guideline Judgments

3.16 The courts have held that, absent exceptional circumstances, periodic detention is not considered to be an appropriate sentencing option in cases involving the supply of prohibited drugs, due to the importance of general deterrence in such cases.⁸⁹ Similarly, periodic detention is not generally regarded as an appropriate sentence for certain sexual offences. In these cases not only is deterrence and punishment of the offender of significance, but so is the safety of the community.⁹⁰ The guideline judgment for offences of dangerous driving occasioning death or grievous bodily harm⁹¹ where the moral culpability is high, as well as for the aggravated version of these offences, similarly indicates that a sentence of full-time imprisonment would normally be appropriate.⁹² The courts have also observed that in the absence of exceptional circumstances, sentences for offences of armed robbery should involve full time custody.⁹³

3.17 The courts have also made it clear that in the absence of exceptional circumstances, federal offenders who commit fraud upon the social security system should receive sentences of full time imprisonment.⁹⁴

⁸⁹ *Regina v Ha* [2004] NSWCCA 386 at [20]

⁹⁰ *R v Burchell* (1987) 34 A Crim R 148

⁹¹ s52A(1) and (3) *Crimes Act* 1900

⁹² *R v Whyte* (2002) 55 NSWLR 252 at [229] – [231]

⁹³ *R v Roberts* (1994) 73 A Crim R 306 at 308 cited by Spigelman CJ in *R v Henry* (1999) 46 NSWLR 346 at [113] and see *R v Blackman and Walters* [2001] NSWCCA 121 and *R v Govinden* (1999) 106 A Crim R 314

⁹⁴ See for example, *R v Purdon* NSWCCA (unreported, 27 March 1997) and *Winchester v R* (1992) 58 A Crim R 345.

OFFENDER DEMOGRAPHICS

Department of Corrective Services study

3.18 According to a recent study conducted by the NSW Department of Corrective Services, the majority of periodic detainees were male (93.9%), non-Indigenous (87.1%), currently unmarried (63.8%) and employed (57.2%). Thirteen percent of detainees had a medical alert on their file, suggesting that they had been identified as having some degree of health problems. The majority of detainees were aged less than 35 years of age.⁹⁵

Table 9: Demographic profile of offenders sentenced to Periodic Detention 2003-2004

Factors	N	%
Age		
18-24	312	33.7
25-29	185	20.0
30-34	159	17.2
35-39	115	12.4
40+	154	16.6
Gender		
Male	869	93.9
Female	56	6.1
Indigenous status		
Indigenous	78	8.4
Non-indigenous	825	89.2
Not known	22	2.4
Marital Status		
Married	313	33.8
Not married (including those formerly married)	590	63.8
Not known	22	2.4
Employment		
Employed	529	57.2
Not employed	396	42.8
Medical Alert		
Yes	120	13.0
No	805	87.0

⁹⁵ McHutchison J, *Outcomes for NSW periodic detention orders commenced 2003-2004*, Research Publication No 48, NSW Department of Corrective Services, 2006 at 11

Previous sentencing history

3.19 The vast majority of periodic detainees in the Departmental study had never previously served a sentence of periodic detention (87.8%) or full time custody (80.1%). In contrast, just over half of detainees had previously served a Community Service Order (51.6%).⁹⁶

Particular Categories of Offender

Female offenders

3.20 Several submissions drew attention to the limited availability of periodic detention, particularly in regional areas, for female offenders⁹⁷ as did the NSW Legislative Council Standing Committee on Law and Justice report.⁹⁸

3.21 The Inmate Census figures provide some measure of the disproportionate availability of this option for female offenders, in that of the 724 persons subject to periodic detention orders at 30 June 2006, only 60 (8.3%) were female.⁹⁹ This is slightly higher than the 6.1% of female detainees identified in the NSW Department of Corrective Services snapshot study of those detainees who commenced periodic detention in 2003-2004, discussed above.¹⁰⁰

⁹⁶ McHutchison J, *Outcomes for NSW periodic detention orders commenced 2003-2004*, Research Publication No 48, NSW Department of Corrective Services, November 2006 at 11

⁹⁷ For example, Submission 8: Chief Magistrate Judge Henson noted that on the North Coast circuit for example, periodic detention is not available for women. Submission 9: Law Society.

⁹⁸ New South Wales Parliament, Legislative Standing Committee on Law and Justice, *Report No 30: Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006 at 6.122-6.130

⁹⁹ The 30 June 2005 Census shows a similar position in that of the 855 persons subject to periodic detention orders, only 72 (8.49%) were female.

¹⁰⁰ McHutchison J, *Outcomes for NSW periodic detention orders commenced 2003-2004*, Research Publication No 48, NSW Department of Corrective Services, November 2006 at 11

3.22 The Council recognises that there may be other reasons for the disparity suggested from these raw figures considered alone, including differences in the overall proportion of female to male offenders receiving custodial sentences and in the nature of the offence committed. However, it appears likely that the limited number of periodic detention centres (Bathurst, Mannus, Tomago, Wollongong and Norma Parker) catering for women is a significant factor in the limited use of periodic detention for female offenders.

Aboriginal offenders

3.23 One submission noted that Aboriginal offenders constitute a much smaller proportion of the periodic detention population when compared with the overall Aboriginal offender population in correctional facilities.¹⁰¹ The NSW Legislative Council Standing Committee on Law and Justice cited the 2005 Inmate Census figures, which showed that only 6.9% of offenders in periodic detention centres identified as Aboriginal or Torres Strait Islanders while such group comprised 17.1% of all offenders in correctional centres.¹⁰² In contrast with the figures provided for female detainees, this figure is slightly lower than the 8.4% of detainees identified in the NSW Department of Corrective Services snapshot study of detainees who commenced periodic detention in 2003-2004.¹⁰³

¹⁰¹ Submission 8: Chief Magistrate Henson.

¹⁰² New South Wales Parliament, Legislative Standing Committee on Law and Justice, *Report No 30: Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006 at 6.9

¹⁰³ McHutchison J, *Outcomes for NSW periodic detention orders commenced 2003-2004*, Research Publication No 48, NSW Department of Corrective Services, November 2006 at 11

3.24 The Chief Magistrate suggested that this under-representation may be due to the Aboriginal communities' geographical location, as well as the eligibility restrictions which exclude offenders if they have ever served a sentence of full-time custody of six months or longer. The fact that many facilities are not accessible by public transport is also a contributing factor, given that a large proportion of this grouping are unlicensed or disqualified from driving.¹⁰⁴

3.25 The Aboriginal Justice Advisory Council (AJAC) noted the extent to which Aboriginal people are still overrepresented in prisons, and underrepresented in relation to the imposition of periodic detention. Despite the custodial nature of periodic detention, the AJAC submitted that periodic detention should be a necessary option for Aboriginal offenders, since, if applicable, it is preferable to full time custody.¹⁰⁵

3.26 The Judicial Commission specifically included a reference to the suitability of periodic detention as a sentencing option for Aboriginal people in the Equality Before the Law Bench Book,¹⁰⁶ noting its suitability for women with child care responsibilities.

3.27 The principle documents guiding the implementation of Aboriginal justice initiatives in NSW are the 2004 *NSW Aboriginal Justice Plan*¹⁰⁷

¹⁰⁴ For a discussion of the impact of unlicensed driving and other driving-related offences see New South Wales Sentencing Council *The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices, Interim Report*, 2006 at 140ff

¹⁰⁵ Submission 18: NSW Aboriginal Justice Advisory Council. The over-representation of Aboriginal people in the criminal justice system generally was also noted by Submission 13: The New South Wales Council for Civil Liberties.

¹⁰⁶ Judicial Commission of New South Wales, *Equality before the Law*, Bench Book, 2006

¹⁰⁷ NSW Aboriginal Justice Advisory Council, *NSW Aboriginal Justice Plan: Beyond Justice 2004-2014*, 2005

and the 2005 *Two Ways Together: NSW Aboriginal Affairs Plan*.¹⁰⁸ These reports aim to provide some strategic directions for Aboriginal people within the justice system. One of the major aims of the initiatives identified in these documents is to “ensure that criminal justice processes act to reduce offending behaviours to reduce the number of Aboriginal defendants proceeding through the criminal justice system”.¹⁰⁹ AJAC suggested that this potentially opens up the possibility that the Aboriginal community could supervise the community service component of a periodic detention sentence.¹¹⁰ The Council notes that Aboriginal Community Justice Groups have been established throughout the State to support the rollout of Circle Sentencing, and considers that this additional role would potentially fit well with the stated aims and objectives of these groups.

3.28 The importance of addressing offending within the indigenous community, inter alia, by more relevant sentencing practices, is highlighted by the circumstance that although indigenous Australians account for about 2.5% of the Australia population, they account for about 21% of the prison population.¹¹¹

¹⁰⁸ Department of Aboriginal Affairs, *Two Ways Together: NSW Aboriginal Affairs Plan 2003-2012*, 2005

¹⁰⁹ NSW Aboriginal Justice Plan Strategic Directions 3 and 5

¹¹⁰ Submission 18: NSW Aboriginal Justice Advisory Council

¹¹¹ Submission 13: New South Wales Council for Civil Liberties; Submission 18: NSW Aboriginal Justice Advisory Council. It is noted further, that Aboriginal women comprise approximately 34% of the total female inmate population – see *NSW Aboriginal Justice Plan: Beyond Justice*, 2003 at 25. See too Weatherburn D, *Disadvantages, Drugs and Gaol: Re-thinking Indigenous Over-representation in prison*, Keynote address, Conference of the Australasian Society on Alcohol and other Drugs, Cairns Convention Centre, 5-8 November, 2006, Bureau of Crimes Statistics and Research, citing data extracted from the Australian Bureau of Statistics, *Prisoners in Australia*, 2005, Cat. No. 4517.0.

Young Offenders

3.29 Periodic detention is not available for offenders aged below 18 years.¹¹² The Department of Juvenile Justice recommended that the option not be extended to offenders under this age, on the grounds that juveniles would be unlikely to be able to comply with it, being by definition highly impulsive and unable to foresee the consequences of their actions. Moreover, many juveniles would often lack the means to attend a periodic detention centre due to an inability to access reliable transport. This would lead to high breach rates and bring discredit upon the system.

3.30 The NSW Department of Corrective Services snapshot study of detainees who commenced periodic detention in 2003-2004¹¹³ revealed that most are aged below 35 years of age, with the greatest number aged between 18 and 24 years of age.

Culturally and Linguistically Diverse offenders

3.31 The Community Relations Commission noted the comments of the Legislative Council Standing Committee on Law and Justice,¹¹⁴ to the effect that offenders from diverse cultural and linguistic backgrounds

¹¹² s66(1)(a) *Crimes (Sentencing Procedure) Act* 1999

¹¹³ McHutchison J, *Outcomes for NSW periodic detention orders commenced 2003-2004*, Research Publication No 48, NSW Department of Corrective Services, 2006 at 11

¹¹⁴ New South Wales Parliament, Legislative Standing Committee on Law and Justice, *Report No 30: Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006 at 64. The Commission stated further that the language, religious and cultural needs of offenders should be taken into account when determining an appropriate community-based sentence, including periodic detention, in order to provide an offender with the maximum chance of complying with the sentence and beginning a satisfactory rehabilitation process. This includes ensuring that offenders who speak languages other than English fully understand any formal undertaking to comply with the obligations of a periodic detention order. Any education program introduced to the periodic detention scheme aimed at reducing the risk of recidivism must also be accessible to people with low English language proficiency.

need to be taken into account in the context of expanding the availability of community based sentencing options for disadvantaged groups.

3.32 The Commission advised that Probation and Parole Services do on occasions experience difficulty in placing offenders who speak a language other than English in appropriate agencies to serve community service orders,¹¹⁵ because of the limited number of ethno-specific organisations with a capacity to cater for such people.

Offenders in rural and regional areas

3.33 As discussed elsewhere in this report, numerous submissions were critical of the inability of offenders residing in rural and remote areas to access periodic detention,¹¹⁶ noting that significant disadvantages arose due to the limited availability of physical detention centres, limited Probation and Parole services, and inadequate public transport. The Chief Magistrate stated that magistrates find the city-centric approach to sentencing ‘frustrating’,¹¹⁷ while the Chief Justice of the District

¹¹⁵ Submission 12: Community Relations Commission

¹¹⁶ Submission 1: Chief Judge of the District Court, His Honour Justice Blanch; Submission 3: Magistrate Zdenkowski; Submission 4: NCOS; Submission 8: Chief Magistrate of the Local Court, Judge Henson; Submission 9: Law Society of NSW; Submission 12: Community Relations Commission; Submission 15: Office of the Director of Public Prosecutions, NSW; Submission 16: Chief Judge at Common Law, His Honour Justice McClellan; Submission 21: Department of Corrective Services; Submission 23: Supplementary Submission, Department of Corrective Services; Submission 24: Office of the Commonwealth Director of Public Prosecutions. This point has been made in the following reports: New South Wales Sentencing Council, *Abolishing Prison Sentences of 6 months or Less*, 2004 at 4; New South Wales Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Court*, 2003; New South Wales Parliament, Legislative Standing Committee on Law and Justice, *Report No 30: Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006; New South Wales Parliament, Legislative Standing Committee on Law and Justice, *Back-end home detention Inquiry*, June 2005; New South Wales Parliament, Legislative Council Select Committee into the Increase in the Prisoner Population, *Final Report* (Parliamentary Paper No 24), November 2001; and New South Wales Parliament, Legislative Standing Committee on Law and Justice, *Crime Prevention Through Social Support*, 2000.

¹¹⁷ Submission 8: Chief Magistrate of the Local Court, Judge Henson

Court commented that the fact that periodic detention is only selectively available creates a fundamental injustice in sentencing.¹¹⁸

Offenders with intellectual, developmental or physical disabilities and mental health concerns

3.34 Some submissions expressed concern that offenders with intellectual or physical disabilities might experience difficulties in being deemed suitable for a periodic detention order.¹¹⁹ For offenders with intellectual disabilities for example, travel issues, the lack of organisational skills necessary to schedule recurring events, and the inability to perceive periodic detention as a deterrent, are significant barriers to successfully completing an order.¹²⁰ On the other hand, it was suggested that such offenders might benefit from a periodic detention order in that the regularity of a few days in prison can provide a degree of structure for individuals whose offending is associated with a chaotic lifestyle, while the sentence allows them to maintain contact and receive services with their support agencies.¹²¹

3.35 The NSW Department of Corrective Services has advised that offenders with developmental, intellectual or physical disabilities are not automatically precluded from being placed on a periodic detention order, and may be assessed as suitable by the Probation & Parole Service despite these difficulties.¹²² If assessed as suitable, the Department advised that it makes every effort to ensure that the

¹¹⁸ Submission 1: Chief Judge of the District Court, His Honour Justice Blanch

¹¹⁹ Submission 4: NCOSS; Submission 4: NCOSS - NCOSS stated that periodic detention may be potentially traumatic, in that detainees are required to spend time in the cells and yards, and then be returned to one's family for the rest of the week. This may have a negative impact on the person's mental health or drug use.

¹²⁰ Submission 7: Department of Ageing, Disability and Home Care (DADHC)

¹²¹ Submission 7: Department of Ageing, Disability and Home Care (DADHC)

¹²² Consultation, Assistant Commissioner Luke Grant, Metropolitan Periodic Detention Centre, 14 July 2007

offender's accommodation is appropriate for his or her disability,¹²³ and that he or she is matched with suitable community service work.¹²⁴

3.36 The Council was also advised that a mental illness need not preclude an offender undertaking periodic detention if the condition is manageable. To this end, prior to sentencing offenders are required to sign a form stating they are able and willing to serve a sentence of periodic detention.¹²⁵ If however, a detainee is subsequently judged to be affected by a mental illness or the development of self-harm or suicidal ideation, the Parole Authority can revoke a periodic detention order for health reasons.¹²⁶ The Parole Authority has advised that under such circumstances the Authority may make parole orders or impose a sentence of home detention instead of periodic detention. Alternatively, the offender may be transferred into full-time custody to serve the remainder of his or her term.¹²⁷

3.37 Additionally, as previously discussed in this report, the Commissioner of Corrective Services may, for health reasons or on compassionate grounds, order that one or more detention periods yet to be served be regarded as having been served, if he or she is satisfied that

¹²³ It was conceded that the Metropolitan Periodic Detention Centre was not ideally suited to wheelchair-bound detainees, due to the antiquated architecture which limits access. Nonetheless, the department advised that both a vision-impaired detainee and an amputee had been successfully accommodated at the centre. Consultation, Assistant Commissioner Luke Grant, Metropolitan Periodic Detention Centre, 14 July 2007.

¹²⁴ For example, Mr Neil Rogers, Field Officer based at the Metropolitan Periodic Detention Centre, advised that the nursery area at the Centre was ideally suited to offenders with intellectual or developmental disabilities, and provided an alternate worksite for those detainees deemed unsuitable to perform Stage 2 community service work in the outside community, consultation 14 July 2007.

¹²⁵ s66(1)(f) *Crimes (Sentencing Procedure) Act 1999*

¹²⁶ Under s163(1A) *Crimes (Administration of Sentences) Act 1999*

¹²⁷ Consultation, Magistrate Gilmore, NSW State Parole Authority, 11 July 2007

the offender is unlikely to be able to serve that period or these periods within a reasonable time.¹²⁸

Offenders with histories of drug or alcohol abuse

3.38 A history of drug or alcohol use need not preclude an offender undertaking periodic detention if the offender can demonstrate that he or she has not been using these substances for three months.¹²⁹

PROCLAIMED PERIODIC DETENTION CENTRES

3.39 As we have noted elsewhere, the existence of a periodic detention centre within a reasonable distance of the sentencing court and of the offender's main place of residence have a considerable bearing on whether a periodic detention order can be made.

3.40 Periodic detention centres are located at Bathurst, Grafton, Mannus, Parklea, Metropolitan (Parramatta), Tamworth, Tomago and Wollongong. Four centres cater for males only (Grafton, Parklea, Parramatta and Tamworth) while four centres provide for both sexes (Bathurst, Mannus, Tomago and Wollongong). The Norma Parker at Parramatta caters only for women. Outside the Sydney, Newcastle and Wollongong areas, periodic detention centres only operate out of Bathurst, Mannus, Tamworth and Grafton.

3.41 Rather than simply determining whether a detention centre exists in a particular court division to determine the availability of periodic

¹²⁸ s92 *Crimes (Administration of Sentences) Act 1999*

¹²⁹ McHutchison J, *Outcomes for NSW periodic detention orders commenced 2003-2004*, Research Publication No 48, NSW Department of Corrective Services, 2006

¹²⁹ McHutchison J, *Outcomes for NSW periodic detention orders commenced 2003-2004*, Research Publication No 48, NSW Department of Corrective Services, 2006 at 3

detention throughout the State, the Council has previously found it useful to assess how accessible a detention centre might be to offenders. The Council found that many offenders outside metropolitan areas would have to travel hundreds of kilometres to access periodic detention.

3.42 The resulting difficulty in sentencing was confirmed by the Chief Magistrate's submission to this Inquiry, which included a regional breakdown of the availability of various sentencing options across the State. On the North Coast circuit for example, the Chief Magistrate advised that periodic detention is not available for women; and although it technically exists at the Grafton Detention Centre for men, in 95% of the cases that are referred to Probation and Parole, offenders are deemed unsuitable, generally because of "transport difficulties."¹³⁰ Similarly he advised that the Magistrate at Bateman's Bay could only cite 5 instances of having imposed periodic detention over the preceding 18 months due to the fact that the nearest periodic detention centre was some 200km from that location.

COMPLETION AND RELEASE PROFILE

Completion rates

3.43 A periodic detention order is successfully completed when the number of times an offender has attended a periodic detention centre equals the sentence term (or the non parole period), as well as any penalty periods that may have accrued due to unapproved leave.¹³¹

¹³⁰ Submission 1: Chief Magistrate Judge Henson at 2

¹³¹ s89 *Crimes (Administration of Sentences) Act 1999*

3.44 A recent study conducted by the NSW Department of Corrective Services¹³² found that the majority of offenders (67.9%) successfully completed their periodic detention orders. This completion rate was slightly lower than the 76% completion rate for Community Service Orders.¹³³

3.45 Offenders were significantly more likely not to complete a periodic detention order if they:

- were young (under 35 years of age);¹³⁴
- had a medical alert on file;
- were sentenced in the Local Court;
- had Robbery/property/deception as their most serious offence;
- had served two previous community service orders; or
- had previously served two or more episodes of full-time custody.¹³⁵

3.46 Unlike a previous Departmental study which found that indigenous detainees were four times more likely to have unsuccessful outcomes than non-Aboriginal detainees,¹³⁶ no statistical significance was found based on Aboriginal status.

¹³² McHutchison J, *Outcomes for NSW periodic detention orders commenced 2003-2004*, Research Publication No 48, NSW Department of Corrective Services, 2006

¹³³ Potas I, Eyeland S & Munro J, "Successful completion rates for supervised sentencing options", *Sentencing trends and Issues*, Judicial Commission of NSW, 2005

¹³⁴ Age was found to be a relevant factor in whether a periodic detention order was successfully completed: offenders aged 18-24 and 25-29 were significantly more likely to have an unsuccessful outcome than the older age groups. The McHutchison study recommended that these groups be targeted for programs aimed at increasing the likelihood of successful completion of periodic detention orders (McHutchison op.cit at 28)

¹³⁵ McHutchison J, *Outcomes for NSW periodic detention orders commenced 2003-2004*, Research Publication No 48, NSW Department of Corrective Services, 2006 at vi

¹³⁶ Barila A, *Suitability versus circumstance: A longitudinal cohort study with 300 NSW Periodic Detainees*, Research Summary No 1, unpublished findings, Corporate Research Evaluation and Statics, NSW Department of Corrective Services, 1999 cited in McHutchison J, *Outcomes for NSW periodic detention orders commenced 2003-2004*, Research Publication No 48, NSW Department of Corrective Services, 2006 at 26-27

Time taken to complete a periodic detention order

3.47 Offenders who successfully completed their order took a median time of 1.12 times the sentence term to complete their sentence. The older the age group, the more likely they were to complete their sentence quickly. The converse was also true: the younger the age group, the more time was taken to complete the sentence.¹³⁷ Other factors related to the time taken to complete a sentence of periodic detention included: the length of the sentence term,¹³⁸ and the number of prior community service orders.¹³⁹

Release from Stage 2

3.48 Statistics provided by the Department of Corrective Services¹⁴⁰ show that of the total of 790 offenders who were subject to periodic detention and released on parole, or on expiry of their sentence, in 2006-2007, about 38.2% (302) were on Stage 2 at the time of their release. As might be expected, the vast majority of offenders who served an episode of less than three months were released as Stage 1 detainees. Excluding those offenders, 44% of the remaining offenders (680) with episodes of 3 months or more were released from Stage 2.

3.49 These figures potentially raise a question as to the reason for a seemingly low proportion of released offenders being on Stage 2 and being involved in community service. However, little can be drawn from the figures alone, since they speak as at the date of release, and do not

¹³⁷ McHutchison J, *Outcomes for NSW periodic detention orders commenced 2003-2004*, Research Publication No 48, NSW Department of Corrective Services, 2006 at 21

¹³⁸ That is, the longer the sentence term, the longer it took an offender to complete the order.

¹³⁹ Again, the number of prior community service orders significantly affected the time taken to complete a periodic detention order.

¹⁴⁰ Submission 21: NSW Department of Corrective Services

recognise that offenders may move between Stage 1 and 2 or into full-time custody or home detention, during their sentence.

3.50 An additional reason, which we later address, may relate to the time taken for assessment for transfer to Stage 2, which does not begin to run until the detainee has served 13 weeks or 3 months (whichever is the longer), and which may therefore extend the Stage 1 detention by several more weeks.

RECIDIVISM

Re-conviction rates

3.51 A commonly applied test for recidivism is based upon re-offending within two years of completing a sentence. In this regard, one submission¹⁴¹ cited unpublished BOCSAR data to the effect that between 2002 and 2004, 39% of all offenders sentenced to periodic detention had another proven offence within the following two years. That data, it was also asserted, disclosed that 55% of Aboriginal offenders sentenced to periodic detention during the period, had been reconvicted within 2 years, as compared to 38% of non-Aboriginal offenders.

Comparative significance of periodic detention for the risk of re-offending

3.52 A recent BOCSAR study¹⁴² examined adult re-offending rates in NSW in the four years from 2001 to 2004, and found that offenders appearing in court who have served at least one previous periodic

¹⁴¹ Submission 18 NSW Aboriginal Justice Advisory Committee (AJAC)

¹⁴² Snowball L & Weatherburn D, *Indigenous over-representation in prison: The role of offender characteristics*, Crime and Justice Bulletin No 99, BOCSAR, September 2006 at 8

detention sentence were approximately 4.6 times more likely to receive a prison sentence than offenders who had not previously received a sentence of periodic detention. About 1 in 4 of those offenders who had previously received a sentence of periodic detention received a prison sentence, compared with 1 in 17 of those offenders who had not previously received a sentence of periodic detention.

3.53 The Department of Corrective Services additionally drew attention, in its submission,¹⁴³ to the rates of imposition of full-time custody, or placement on a community service order or a periodic detention order, for offenders who had successfully completed periodic detention in 2004-2005. Analysis of the figures supplied would suggest that the recidivism rate for those who successfully complete periodic detention orders is very low, at approximately 15%. Only 7% of those who successfully completed a periodic detention order in the period covered were recorded as subsequently returning to prison, while 8% were recorded as returning to some form of community corrections, such as a community service order or another periodic detention order.

3.54 The disclosed recidivism rate of those on periodic detention would compare favourably with the recidivism rates recorded in the statistics provided, for offenders who had successfully completed a community service order (at approximately 21%); a community-based order generally (at 30%); or a period of full-time imprisonment (at 46%).

3.55 The same submission provided the following information concerning the recidivism rate by category of most serious offence for offenders who had completed periodic detention.

¹⁴³ Submission 21: Department of Corrective Services, p.24 citing unpublished data compiled by the NSW DCS Corporate Research, Evaluation and Statistics Unit.

Table 10: Recidivism rate by category of most serious offence for offenders completing periodic detention during 2004-2005

MOST SERIOUS OFFENCE	N	Rate of return to prison	Rate of return to Community Offender Services /periodic detention	Rate of return to Department of Corrective Services
Homicide	1	0.0	0.0	0.0
Assault	147	14.3	8.2	22.4
Sexual offences	12	0.0	0.0	0.0
Robbery	22	9.1	0.0	9.1
Fraud	69	2.9	2.9	5.8
Stealing/Property	79	6.3	2.5	8.9
Arson/Malicious damage	4	0.0	25.0	25.0
Driving/Traffic Offences	296	8.8	8.4	17.2
Breach of CSO/Bond	13	15.4	7.7	23.1
Breach of AVO	11	9.1	9.1	18.2
Use/Possess Drugs	4	0.0	0.0	0.0
Sell Drugs	57	5.3	5.3	10.5
Make/Import Drugs	8	0.0	25.0	25.0
Other Offences	31	3.2	19.4	22.6
Unclassified	11	9.1	9.1	18.2
Total	765	8.4	7.3	15.7

3.56 At the Sentencing Council's request, BOCSAR compared periodic detention and suspended sentence orders, in terms of their effect on the likelihood of the offender being re-convicted. The data revealed that there was no statistically significant difference between such orders in their impact on the risk of reconviction.¹⁴⁴ The group most likely to be re-convicted within this period were those originally sentenced for break, enter and steal, and other theft offences.

3.57 There are obvious problems in measuring the impact of the service of a sentence of periodic detention as a single factor influencing the risk

¹⁴⁴ Correspondence, Dr Don Weatherburn, Bureau of Crime Statistics and Research (BOCSAR) to Sentencing Council 12 September 2007

of re-offending. A number of other factors come into play, including the facts that:

- there is an inevitable selection bias at the time of the imposition of the sentence – the nature of the offending, and the subjective circumstances of those who receive periodic detention are likely to be significantly different from those attaching to offenders who receive different kinds of sentences;
- variations in the circumstances of offenders post release, including their age, success in obtaining employment, the presence of physical or psychological disabilities, debt levels, marriage and assumption of child caring responsibilities, exposure to substance abuse or unfavourable associations, relationship problems and so on, will each have an effect on the extent to which an offender is or is not rehabilitated;
- the nature and incidence of any re-offending may vary from minor street offences to serious criminality; and may result in a range of sanctions from non-custodial bonds to life imprisonment;
- it is likely that some re-offending will not be detected or successfully prosecuted;

and so on.

3.58 The inherent difficulties in measuring recidivism, and the absence of any single definition of that term, or of any single measurement method, which were recently identified by the Australian Institute of

Criminology¹⁴⁵ highlight the problem in isolating any single factor, such as the nature of the last sentence served, as a predictor of the risk of re-offending.

3.59 In these circumstances the Council has not pursued any attempt to gauge whether the imposition of a sentence of periodic detention is likely to have any different impact on the risk of re-offending, or of its severity or frequency, than any other sentence. It is possible that a longitudinal study inviting those who had completed sentences of periodic detention to rank the factors that they considered most significant in encouraging them to decline from re-offending, or which had led them to re-offend, could throw some light on the impact of this form of sentence. However that would need to be a long-term study; it would be highly subjective; and it could run into a problem so far as it depended on self reporting of undisclosed criminality.

3.60 The most that can be said, (based on information provided by BOCSAR), is that the incidence of re-offending, over a 5 year period following the last sentence, is greater for those who served a sentence of full-time imprisonment; less but equivalent for those who served suspended sentences or periodic detention; and less still for those who were subject to supervised bonds.¹⁴⁶

¹⁴⁵ Australian Institute of Criminology, *Research and Public Policy Series No 80: Recidivism in Australia: findings and future research*, 2007

¹⁴⁶ Discussion with the Director of BOCSAR, Dr Don Weatherburn 24 October 2007. Data supplied by BOCSAR indicates that there is no statistically significant difference between periodic detention and suspended sentence orders in their impact on the risk of reconviction, per correspondence, 12 September 2007

Part 4

Enforcement of Periodic Detention

- Revocation of Periodic Detention
- Review and Reinstatement
- Offences and Consequences of Non Compliance
- Improved Attendance Rates

PART 4: ENFORCEMENT OF PERIODIC DETENTION ORDERS

REVOCATION OF PERIODIC DETENTION

Exercise of the revocation power

4.1 Since 1999, the Parole Authority has had the statutory responsibility for revoking periodic detention orders.¹⁴⁷ This replaced the earlier procedure by which the court imposing the original sentence alone had the power to revoke the order in the event of a breach being proven. As with the current system for Commonwealth offenders, the court required breaches to be made out on the basis of evidence received in formal revocation proceedings, and revocation would occur only when the offender was unable to establish that he or she had a reasonable excuse for the breach in question. The 1999 amendments transferring the revocation power to the Parole Authority were initiated in response to allegations that the court procedure for revocation was unjustifiably time-consuming and dilatory.¹⁴⁸

Revocation practice and procedure

4.2 An offender who:

- fails to comply with the obligations arising under a periodic detention order;
- or who commits an offence while subject to the order,

¹⁴⁷ s163 *Crimes (Administration of Sentences) Act* 1999. This was brought about by amendments to *The Periodic Detention of Prisoners Act* 1981, which effectively stripped the courts of their ability to revoke periodic detention orders.

¹⁴⁸ Submission 21: NSW Department of Corrective Services

is liable to have his or her order revoked by the Parole Authority and may then be taken into custody to serve the remainder of the sentence either in custody or on home detention.

4.3 The revocation may be made on application of the Commissioner of Corrective Services or it may be initiated by the Parole Authority itself.¹⁴⁹ The Parole Authority has jurisdiction to conduct an inquiry where it has reason to suspect that an offender has failed to comply with the obligations arising under a periodic detention order.¹⁵⁰

4.4 The Parole Authority may also revoke a periodic detention order on the application of the offender,¹⁵¹ or on application of the Commissioner if it is satisfied that health or compassionate reasons justify such a course;¹⁵² or where the offender fails to appear before the Parole Authority when called on to do so.¹⁵³

Compulsory revocation

4.5 The Authority must revoke, on the application of the Commissioner, a periodic detention order of an offender who has failed to report to a detention centre where that offender omitted to apply for, or was refused, leave of absence with respect to three (3) or more detention periods and has not had a periodic detention reinstated previously following revocation for 3 failures to report.¹⁵⁴ The Parole Authority

¹⁴⁹ s163 *Crimes (Administration of Sentences) Act 1999*

¹⁵⁰ s162 *Crimes (Administration of Sentences) Act 1999*

¹⁵¹ s163(1)(c) *Crimes (Administration of Sentences) Act 1999*. For example, an application may be brought by an offender who has determined that the original sentence is overly onerous and who prefers that it be replaced by a sentence of either full-time custody or that he or she be considered for home detention – in consultation, the NSW State Parole Authority, 11 July 2007.

¹⁵² s163(1A) *Crimes (Administration of Sentences) Act 1999*

¹⁵³ s163(1)(b) *Crimes (Administration of Sentences) Act 1999*

¹⁵⁴ s163 (2)(a) *Crimes (Administration of Sentences) Act 1999*

must also revoke a periodic detention order if an offender has failed to report for at least one (1) detention period without leave of absence or exemption from the Commissioner and has had a periodic detention previously reinstated following revocation for failure to report for 3 or more detention periods.¹⁵⁵

4.6 The Parole Authority must, additionally, revoke a periodic detention order that has been reinstated if at any time during the remainder of the term of the sentence, the offender is sentenced to a term of imprisonment by way of full-time detention that is to be served consecutively or partly consecutively with the sentence of periodic detention.¹⁵⁶

Refusal to revoke a periodic detention order

4.7 A detainee may bring an appeal to the Parole Authority from any decision of the Commissioner to refuse an application for leave of absence,¹⁵⁷ subject to the appeal being brought within 21 days and subject to the Parole Authority being satisfied that the application is not an abuse of process.

4.8 The Parole Authority may refuse to revoke a periodic detention order if it is satisfied that the offender applied for and ought to have been granted a leave of absence or exemption with respect to one or more detention periods,¹⁵⁸ provided the total number of periods for which there has been a failure to report would be less than three (3).

¹⁵⁵ s163 (2)(b) *Crimes (Administration of Sentences) Act 1999*

¹⁵⁶ s163(1C) *Crimes (Administration of Sentences) Act 1999*

¹⁵⁷ s93 *Crimes (Administration of Sentences) Act 1999*

¹⁵⁸ s163(3) *Crimes (Administration of Sentences) Act 1999*

Parole Authority decision to revoke

4.9 The Parole Authority initially meets in camera¹⁵⁹ to consider whether, on the paper, the case is one requiring revocation, or whether the detainee should be given a warning letter, or called up to appear before it to provide an explanation for the apparent breach. It can receive additional information from Corrective Services at that in camera session.

4.10 A revocation of a periodic detention order may be made whether or not the offender has been called on to appear before the Parole Authority and whether or not the Parole Authority has held an inquiry.¹⁶⁰

Statistics on revocation

4.11 The NSW Department of Corrective Services¹⁶¹ has advised that in 2006-2007, the Parole Authority revoked 491 periodic detention orders.¹⁶² As the table below indicates, of the 399 orders finalised in this period, 12% (48 people) were subsequently reinstated by the Parole Authority, 9% (36 people) were converted into home detention orders and 79% (315 people) were converted into full time custody. The Department has advised that analysis of the figures for 2005-2006 reveals comparable results.

¹⁵⁹ That is, in private - s163(3A) *Crimes (Administration of Sentences) Act 1999*

¹⁶⁰ s163 (4) *Crimes (Administration of Sentences) Act 1999*

¹⁶¹ Submission 21: NSW Department of Corrective Services at 48

¹⁶² The Department has advised that this figure includes revocations that may have arisen in previous years, but which were only actioned during the period in question. Additionally, a significant proportion of offenders (19%) was still at large and had not yet been returned to full-time custody. The Department further advised that some of the 491 offenders may ultimately be returned to periodic detention or home detention after the Parole Authority has reviewed their revocation.

Table 11: Outcomes for Periodic Detention orders revoked by the Parole Authority in 2006-2007 (as at 1 August 2007)

Outcome	N	Total %	Finalised %
Rescinded	49	10%	12%
Ordered to serve Home Detention	34	7%	9%
Returned to full-time imprisonment ¹	316	64%	79%
Sub-total Finalised	399	81%	100%
Still at-large	92	19%	n.a

Reasons for revocation

4.12 According to figures supplied by the NSW Department of Corrective Services¹⁶³ the vast majority of revocations are made because the offender has failed to report for periodic detention on 3 occasions. In 2006, 65% of all revocations were made for this reason.¹⁶⁴ The table below sets out the various reasons for the Parole Authority's decision to revoke periodic detention orders.

Table 12: Reasons for revocation

<u>Periodic Detention – Reasons for Revocation</u>			
<i>Crimes (Administration of Sentences) Act 1999</i>	2004	2005	2006
s163(2)(a) Fail to report (3) occasions	383	382	322
s163(1)(a) Fail to comply with obligations	87	82	72
s163(1A) Application to Commissioner on health/compassionate reasons	9	2	8
s163(2)(b) Fail to report following re-instatement	20	55	55
s163(1)(c) Offender applied for order to be revoked (Home Detention consideration)	33	26	23
s163(1C) Re-instated order – offender sentenced	n/a	1	0
s179(1)(b) Sentenced to more than (1) month imprisonment	18	16	23
s179(1)(a) Revocation of consecutive periodic detention order	n/a	2	0
Total	550	566	503

¹⁶³ Submission 21: NSW Department of Corrective Services at 18

¹⁶⁴ This is consistent with figures provided in recent years: 67% of revocations were made for this reason in 2005, and 69.6% in 2004.

4.13 Analysis reveals that comparatively few revocations are initiated on the application of the detainee: in 2006 only 4.5% of all revocations (23 matters) were made on this ground. Revocations made for health or compassionate reasons on application of the Commissioner for Corrective Services are also rare, with only 18 revocations being made for this reason over a three-year period.

Consequences of a revocation order

4.14 A revocation order takes effect on the day that it is made or on such earlier date, which may be as early as the date of the first non-compliance, as the Parole Authority thinks fit.¹⁶⁵ Upon revocation of a periodic detention order, the Parole Authority may issue a warrant committing the offender to a correctional centre to serve the remainder of the sentence by way of full time custody.¹⁶⁶

4.15 A sentence of periodic detention accordingly carries with it an inherent threat of full-time imprisonment if an offender fails to comply with her or his obligations. Each weekend served in a periodic detention centre counts as the equivalent of one week in full-time custody with the result that revocation, with its requirement for service of the balance of the term in full-time custody, will potentially extend the actual time which the offender spends in custody by a significant period.

4.16 Alternatively, if at the time that a periodic detention order is revoked the remainder of the term of the sentence is 18 months or less, the Parole Authority may order the person to serve out the rest of that

¹⁶⁵ s164 *Crimes (Administration of Sentences) Act 1999*

¹⁶⁶ s181 *Crimes (Administration of Sentences) Act 1999*

sentence by way of home detention.¹⁶⁷ On referring the offender for assessment as to his or her suitability for home detention, the Parole Authority may make a temporary release order which permits the offender to be released from custody pending the receipt of a suitability assessment, and a decision on whether to make a home detention order, although the sentence is extended by any such period of absence.¹⁶⁸

Substitution of home detention or full-time detention

4.17 The Department of Corrective Services¹⁶⁹ has advised that in the 18 months following the legislative amendments which transferred the periodic detention revocation function from the courts to the Parole Authority, there was a backlog of breach of periodic detention revocation matters. This was most evident in the inflated figures for home detention orders subsequently imposed by the Parole Authority. Between 1 January 2001 and 20 June 2002 the Parole Authority imposed 251 home detention orders following revocation of a periodic detention order. In contrast, in 2006-2007 only 66 such orders were made following the revocation of periodic detention orders.

4.18 The Department has further advised that as on 30 June 2007, of the 228 offenders on home detention orders, 33 offenders (or approximately 14%) had been placed on home detention following the revocation of their periodic detention order. As the table overpage indicates, over the past 4 years, between 15-21% of offenders serving home detention have been subject to such orders following the revocation of a periodic detention order.

¹⁶⁷ s165(2) *Crimes (Administration of Sentences) Act 1999*, so long as the offender is not subject to a sentence of full-time imprisonment that is yet to commence.

¹⁶⁸ s165AA *Crimes (Administration of Sentences) Act 1999*

¹⁶⁹ Submission 21: NSW Department of Corrective Services

Table 13: Home Detention Orders imposed by Parole Authority following revocation of periodic Detention Order

Year	Offender Population as at 30 June			Total offenders registered during the past 4 years		
	Total Offenders on Home Detention Orders	Number of Periodic Detention orders revoked resulting in Home Detention	% of Home Detainees who originated from Periodic Detention	Total Offenders on Home Detention Orders	Revocation of Periodic Detention resulting in Home Detention	% of Home Detainees who originated from Periodic Detention
2006-2007	228	33	14%	446	68	15%
2005-2006	195	23	12%	443	65	15%
2004-2005	236	28	12%	449	84	19%
2003-2004	186	32	17%	425	91	21%

REVIEW AND REINSTATEMENT PROCEDURES

Reconsideration of revocation by Parole Authority

4.19 Where the Parole Authority has decided to revoke a periodic detention order it must serve the detainee with a “revocation notice” as soon as practicable after the revocation of the order.¹⁷⁰ The detainee may then apply to the Parole Authority for a review of the revocation order or of the date from which it took effect.¹⁷¹ After reviewing all the reports, documents and other information placed before it, the Parole Authority may determine to rescind the revocation of the periodic detention order or to vary the date from which it is to take effect.¹⁷²

¹⁷⁰ s173(1A)(a) *Crimes (Administration of Sentences) Act 1999*

¹⁷¹ s174 *Crimes (Administration of Sentences) Act 1999*

¹⁷² s175 *Crimes (Administration of Sentences) Act 1999*. The offender may appear before the Authority or place submissions before it.

4.20 The Parole Authority may not however rescind the revocation where the offender failed to apply for or was refused leave of absence with respect to three (3) or more detention periods or where the offender has, after reinstatement, been sentenced to full-time imprisonment.¹⁷³ Nor can it do so where the revocation occurs within the period of 30 days before expiry of the sentence.¹⁷⁴

Reinstatement by the Parole Authority

4.21 The Parole Authority may make an order reinstating a revoked periodic detention order, in respect of the remaining balance of the sentence, on the offender's application.¹⁷⁵ Such an application may not be made until the offender has served since the revocation at least 3 months of the sentence by way of full-time detention.¹⁷⁶ The applicant must state what he or she has done or is doing to ensure that he or she will not fail to comply with the obligations under the periodic detention order in the event that it is reinstated, and the Parole Authority must refer the offender to the Probation and Parole Service for a suitability assessment. The Parole Authority cannot order reinstatement if the offender is subject to a sentence of full-time imprisonment that is yet to commence.¹⁷⁷

4.22 According to figures supplied by the Department of Corrective Services,¹⁷⁸ the Parole Authority reinstated 110 periodic detention

¹⁷³ s175(1A) *Crimes (Administration of Sentences) Act 1999*

¹⁷⁴ s175A *Crimes (Administration of Sentences) Act 1999*

¹⁷⁵ Subject to Part 5 *Crimes (Sentencing Procedure) Act 1999* and pursuant to s 164A(1) *Crimes (Administration of Sentences) Act 1999*

¹⁷⁶ s164A(1A) *Crimes (Administration of Sentences) Act 1999*

¹⁷⁷ s164A(4) *Crimes (Administration of Sentences) Act 1999*

¹⁷⁸ Submission 21: NSW Department of Corrective Services at 18

orders in 2006. This represents a slight increase compared with 2005 figures,¹⁷⁹ and a considerable decrease compared with 2004.¹⁸⁰

Review by the Court

4.23 An offender may apply to the Supreme Court for a review of the Parole Authority's revocation of a periodic detention order, on the basis that the revocation was made on the basis of false, misleading or irrelevant information.¹⁸¹ The Court will only consider such an application if it is satisfied that the application is not an abuse of process and that there appears to be sufficient evidence to support the claim.¹⁸² Additionally a limited right of review on administrative ground law grounds by the court is available. Further consideration is given to these rights of review in Part 8 of this report.

OFFENCES AND CONSEQUENCES OF NON-COMPLIANCE

4.24 Specific offences, punishable by way of a penalty¹⁸³ or by imprisonment¹⁸⁴ or both, apply where a periodic detention offender:

- fails to comply with an attendance order or work order;
- fails to report to a periodic detention centre in accordance with an order varying the centre to which he or she must report;

¹⁷⁹ There were 90 reinstatements in 2005.

¹⁸⁰ There were 90 reinstatements in 2005; and 144 in 2004.

¹⁸¹ s176(1) *Crimes (Administration of Sentences) Act 1999*

¹⁸² s176(3) *Crimes (Administration of Sentences) Act 1999*. The grounds for appeal from the Parole Authority's decision are in the same terms as the repealed s41 *Sentencing Act 1989*.

¹⁸³ Maximum 10 penalty units

¹⁸⁴ For up to twelve months

- disobeys a direction to attend a particular centre for the purpose of undertaking an activity or performing work under an attendance order or work order;
- disobeys any other direction given by an authorised officer for the purpose of enforcing the offender's periodic detention obligations; or
- escapes or attempts to escape from lawful custody¹⁸⁵.

4.25 Additionally where a periodic detention offender commits an offence against discipline he or she is liable to be punished by a caution or reprimand, or by deprivation of specified amenities or privileges for up to 4 detention periods.¹⁸⁶

4.26 There are a number of offences against periodic detention discipline which are defined in the *Crimes (Administration of Sentences) Regulations 2001*.¹⁸⁷

4.27 Together these provisions constitute a comprehensive scheme for the management of offenders serving periodic detention (while in periodic detention centres, while travelling to work sites or attendance centres, and while present at such sites and centres) and for their punishment for the breach of the relevant provisions. As indicated,

¹⁸⁵ s95(1) *Crimes (Administration of Sentences) Act 1999*

¹⁸⁶ s95(2) *Crimes (Administration of Sentences) Act 1999*

¹⁸⁷ See clause 185 of the Regulation which makes a number of the regulatory/disciplinary provisions which are applicable to inmates or which are contained either in Part 2 of the *Crimes (Administration of Sentences) Act 1999*, or in the Regulations, equally applicable to those serving periodic detention; see clauses 174, 176, 178, 179, 183, 184 and 187 of the Regulations; and see also clause 193 and Schedule 3 which identifies the contraventions which are declared to be offences against discipline for the purposes of Division 3 of Part 3 of the Act.

dependent on the nature of the non-compliance or breach, and on the extent to which the conduct is repeated, the offender may be punished by imprisonment, or by fine, or served with a penalty notice, or cautioned, or deprived of privileges, and/or subject to revocation of the periodic detention order with a consequential transfer to full-time detention or home detention, or may have to serve additional penalty periods.

4.28 Finally it may be noted that additional sanctions for compliance exist by reason of provisions that

- operate to extend the sentences of those detainees who fail to appear for periodic detention or who report late,¹⁸⁸ although subject to the grant of an exemption by the Commissioner;¹⁸⁹
- permit the manager of a periodic detention centre to order the transfer of an offender who behaves in such a manner as to disturb the peace and good order of such a centre, to a corrections centre for the remainder of the relevant detention period.¹⁹⁰

IMPROVED ATTENDANCE RATES

4.29 The NSW Department of Corrective Services¹⁹¹ has advised that periodic detention attendance rates have consistently improved since the transfer of the revocation functions from the courts to the Parole Authority, with attendance rates currently being at their highest since 1989. According to the Department, on average approximately 15% of Stage 1 periodic detainees are absent during any one given episode of

¹⁸⁸ s89 *Crimes (Administration of Sentences) Act 1999* – subject to a maximum extension of 6 weeks

¹⁸⁹ s90 *Crimes (Administration of Sentences) Act 1999*

¹⁹⁰ s86 *Crimes (Administration of Sentences) Act 1999*

¹⁹¹ Submission 21: NSW Department of Corrective Services at 17

periodic detention. However, a significant proportion of these detainees are absent for approved reasons such as sick leave. Only a ‘small percentage’ of absent offenders can be classified as being absent without leave. This improved attendance rate has been attributed to improved case management practices, an increased examination of the reasons given for non-attendance (by phone calls to doctor’s offices to verify medical certificates) and random door knocks undertaken by departmental officers.¹⁹² Home visits are made where:

- an offender does not attend the first periodic detention period;
- an offender has acquired two absences without leave.

4.30 The Department has also advised that the Stage 2 attendance averages about 95%.

¹⁹² Home visits are conducted when an offender fails to attend their first periodic detention period, or if an offender has accrued two absences without leave, as per McHutchison J, *Outcomes for NSW periodic detention orders commenced 2003-2004*, Research Publication No 48, NSW Department of Corrective Services, 2006 at 2.

Part 5 **Federal Offenders**

- Introduction
- Incidence of Periodic Detention
- Enforcement
- Anomalies

PART 5: FEDERAL OFFENDERS

INTRODUCTION

5.1 Federal offenders sentenced by New South Wales Courts may receive sentences of periodic detention.¹⁹³ The availability of facilities in the State, which would permit such offenders to serve a sentence of this kind, is secured by way of an arrangement made under s3B of the *Crimes Act 1914* between the Governor General of the Commonwealth of Australia and the Governor of the State of NSW.¹⁹⁴ The prosecution of such offenders may be conducted by either NSW Police Prosecutors, the NSW Director of Public Prosecutions, or the Commonwealth Director of Public Prosecutions.

INCIDENCE OF PERIODIC DETENTION FOR FEDERAL OFFENDERS

5.2 The number of Federal offenders sentenced to periodic detention in consequence of prosecutions conducted by the Commonwealth DPP over the period 1 July 2002 to 30 June 2007 is as follows:¹⁹⁵

01/07/02 – 30/06/03	29
01/07/03 – 30/06/04	39
01/07/04 – 30/06/05	42
01/07/05 – 30/06/06	48
01/07/06 – 30/06/07	55
TOTAL	213

¹⁹³ By reason of s20AB of the *Crimes Act 1914* (Cth)

¹⁹⁴ See also s120 of the *Commonwealth of Australia Constitution Act*. The arrangement which is dated 9 November 1990 and was published in the Commonwealth Gazette on 12 December 1990 provides for the use of the State's facilities and the exercise of the powers and functions of State officers in relation to the "carrying out of" various sentences including periodic detention, although not to their enforcement.

¹⁹⁵ Submission 24: Office of the Commonwealth Director of Public Prosecutions

5.3 The vast majority of these offenders (168 or 79%) were sentenced for Centrelink fraud. By comparison, very many more Federal offenders were sentenced to Community Service orders over the same period as a consequence of prosecutions by the Commonwealth DPP (1598 in total, including 1513 (95%) sentenced for Centrelink fraud).¹⁹⁶

5.4 The Department of Corrective Services has advised that its NSW Inmate Census 2006 revealed that at 30 June 2006 there were 42 offenders serving periodic detention (out of a total of 724 detainees) who had been sentenced for a federal offence.

ENFORCEMENT OF PERIODIC DETENTION ORDERS FOR FEDERAL OFFENDERS

5.5 Periodic detention orders imposed on Federal offenders are administrated by staff of the Periodic Detention Administration attached to the NSW Department of Corrective Services.

5.6 The Sydney office of the Commonwealth DPP is provided with monthly attendance reports. Where a Federal offender has failed to comply with a periodic detention order on 3 occasions, the offender is referred to the Sydney office of the Commonwealth DPP for consideration of breach action.¹⁹⁷

5.7 Breach proceedings are available where there has been a failure to comply with the order “without reasonable cause or excuse”. They are commenced by way of an information prepared by the Commonwealth DPP, and sworn before a magistrate, who then issues a summons for

¹⁹⁶ Submission 24: Office of the Commonwealth Director of Public Prosecutions

¹⁹⁷ Under s20AC of the *Crimes* Act 1914 (Cth) and see Submission 24: Office of the Commonwealth Director of Public Prosecutions

attendance by the offender in the original sentencing court, on a nominated date.¹⁹⁸ In not all cases is prosecution action taken. On occasions a warning letter is sent, for example when the offender was absent by reason of sickness, but failed to provide a medical certificate.

5.8 The Commonwealth DPP advises that it endeavours to process breach matters as expeditiously as possible, indicating that once a summons is issued the proceedings are usually returnable before the sentencing court within 4 to 6 weeks. Thereafter the resolution of the proceedings depends on the workload of the court, and the availability of those involved. Routine matters, it was said, are usually resolved within 8 weeks. In other cases, the proceedings may be adjourned to permit the offender to complete the periodic detention before determining an appropriate penalty. It was acknowledged that defended breach proceedings can take some months to resolve because of the need to prepare a brief of evidence and to fix a hearing date.¹⁹⁹

5.9 Where the court is satisfied that the offender without reasonable cause or excuse failed to comply with the order, then the court may:²⁰⁰

- without prejudice to the continuance of the order, impose a pecuniary penalty not exceeding 10 penalty units;²⁰¹
- revoke the periodic detention order and deal with the offender in any manner in which the offender could have been dealt with for the original offence; or
- take no action.

¹⁹⁸ Submission 24: Office of the Commonwealth Director of Public Prosecutions

¹⁹⁹ Submission 24: Office of the Commonwealth Director of Public Prosecutions

²⁰⁰ s20AC(6) *Crimes Act 1914* (Cth)

²⁰¹ Each penalty unit equates to \$110

5.10 Where the offender is dealt with for the offence in respect of which the order was made, then such rights of appeal exist as would have applied if the court had convicted the offender of the offence and imposed a sentence.²⁰²

5.11 The inability of the courts to deal with breaches of periodic detention order where the offender has a reasonable cause or excuse, such as illness, has operated as a practical fetter on enforcement action.²⁰³ The inability to deal with repeated failures to report for periodic detention where the offender claimed to have been unwell attracted unfavourable publicity in the case of the late Rene Rivkin whose sentence of 9 months periodic detention had been confirmed by the Court of Criminal Appeal.²⁰⁴

5.12 The Australian Law Reform Commission recommended that the *Crimes Act* 1914 be amended so as to allow the court to deal with all breaches of sentencing orders regardless of whether the offender had a reasonable cause or excuse for the breach. This was seen to be fundamental to the legitimacy of the federal criminal justice system, although it was recognised that the fact that the offender could point to a reasonable cause or excuse would continue to be an important consideration in determining the outcome of the breach proceedings.²⁰⁵

5.13 An allied recommendation was made for legislative amendment to permit the court dealing with the breach to vary the original sentencing

²⁰² s20AC(8) *Crimes Act* 1914 (Cth)

²⁰³ Submission 24: Office of the Commonwealth Director of Public Prosecutions

²⁰⁴ *R v Rivkin* (2004) 59 NSWLR 284

²⁰⁵ Australian Law Reform Commission, *Report 103: Same Crime Same Time: Sentencing of Federal Offenders*, 2006 at 17.7

order if satisfied of the breach, in order to tailor the order to the offender's individual circumstances.²⁰⁶

5.14 The requirement that the courts deal with breaches of periodic detention orders rather than administrative bodies such as the Parole Authority which deals with breaches of such orders imposed on State offenders, arises as a consequence of the constitutional requirement that the judicial powers of the Commonwealth be exercised by a court.²⁰⁷

5.15 The Australian Law Reform Commission identified a general dissatisfaction among the stakeholders concerned with the administration and enforcement of federal sentences. This related to a lack of knowledge about how to deal with federal offenders who have breached sentencing orders, to the delays arising when breaches were referred to the Commonwealth Director of Public Prosecutions, and to the cumbersome and resource intensive procedures for dealing with such breaches.²⁰⁸

5.16 The Department of Corrective Services identified the revocation process as involving the following 12 steps:

1. The breach is identified;
2. A letter is sent to the Commonwealth DPP advising of breach;

²⁰⁶ Australian Law Report Commission, *Report 103: Same Crime Same Time: Sentencing of Federal Offenders*, 2006 at 17.16

²⁰⁷ Australian Law Report Commission, *Report 103: Same Crime Same Time: Sentencing of Federal Offenders*, 2006 at 17.18 and 17.23. See also *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270

²⁰⁸ Australian Law Report Commission, *Report 103: Same Crime Same Time: Sentencing of Federal Offenders*, 2006 at 17.20

3. The Commonwealth DPP decides whether to proceed with breach action;
4. If action is to be taken, the DPP sends a summons to the NSW Periodic Detention Administration;
5. The NSW Periodic Detention Administration makes an appointment with Magistrate to have the summons signed.
6. When the Magistrate signs summons, a copy is sent to the court (to list the case) and to the police (to serve the summons);
7. On the summons return date, providing the detainee appears, the matter is either dealt with or adjourned. Most are adjourned;
8. If the detainee fails to appear, an extended summons is issued and the process described above is repeated;
9. If the detainee fails to appear on the extended summons, a warrant is issued;
10. The offender is arrested;
11. The offender appears before the court;
12. The offender is given bail or is re-sentenced or has the sentence overturned.

5.17 The response of the ALRC was to recommend the development by the Office for the Management of Federal offenders, in conjunction with relevant Commonwealth and State authorities, of a protocol determining the procedure to be followed where a Federal offender breaches a sentencing order.²⁰⁹

5.18 So far as this Council can ascertain, neither of the recommendations of the ALRC has at this stage been implemented, although each would appear to be eminently sensible.

5.19 An additional unsatisfactory aspect of the Federal legislation relates to the circumstance that there is no mechanism to revoke a periodic detention order for a Federal offender other than under the provisions of s20AC of the *Crimes Act* 1914. As a consequence where breach proceedings are commenced and the offender cannot be located or served with a summons, the periodic detention order remains in force. In contrast the Parole Authority would have jurisdiction in such a case to revoke the periodic detention order of a State offender and issue a warrant for the offender's arrest.²¹⁰

ANOMALIES

5.20 While the incidents of serving periodic detention are generally the same for State and Federal offenders, there are accordingly distinct and significant differences in the regime for the enforcement of orders made in respect of such offenders. This has been the occasion of dissatisfaction and of potential discrimination, which attracted the criticism of some of

²⁰⁹ Australian Law Report Commission, *Report 103: Same Crime Same Time: Sentencing of Federal Offenders*, 2006 at 7.27

²¹⁰ Submission 24: Office of the Commonwealth Director of Public Prosecutions; and Submission 21: NSW Department of Corrective Services

those who made submissions or engaged in consultations with the Council.²¹¹

5.21 Furthermore the unavailability of periodic detention as a sentencing option in States and Territories other than NSW and the ACT and the existence of alternative options in some of those States, does result in unevenness in sentencing between the States and Territories.

5.22 Some of the unsatisfactory aspects of periodic detention could be resolved if the recommendations of the ALRC previously noted were implemented, or if the courts were permitted to deal with breaches *ex parte* in the absence of the offender upon proof of reasonable attempts to locate and serve the offender.

5.23 Otherwise, while periodic detention remains available as a sentencing option for Federal offenders, the Constitutional requirement for a breach to be dealt with by a court remains as a barrier to prompt administrative enforcement.

5.24 If periodic detention is revoked, it would remove the relevant anomalies so far as it was concerned as a sentencing option. However similar anomalies would arise in relation to any other sentencing option created in its place.

²¹¹ See Submission 3: Magistrate Zdenkowski- Katoomba Local Court; and Submission 13: NSW Council for Civil Liberties; and Submission 14: NSW Public Defenders Office

5.25 This provides added force to the need to implement the recommendations of the ALRC for legislative change and for the adoption of a protocol for the more efficient processing of enforcement action.

5.26 We deal with the recommendations which we consider appropriate in relation to Federal offenders later in this report.²¹²

²¹² See [7.93]

Part 6

The Advantages and Disadvantages of Periodic Detention

PART 6: THE ADVANTAGES AND DISADVANTAGES OF PERIODIC DETENTION ORDERS IN COMPARISON WITH OTHER SENTENCING OPTIONS

ADVANTAGES

6.1 The NSW Law Reform Commission's 1996 *Sentencing Report* noted that the submissions which it received on periodic detention unanimously supported retaining the scheme as a valuable sentencing option. Support for the program was based on:

“the flexibility which this sentencing option gives to the courts to impose a custodial sentence, while at the same time permitting offenders to maintain their ties to the community by remaining in employment and living with their families for the greater part of each week, and contributing to the community through community work. Periodic detention is also a much cheaper sentencing option than full-time imprisonment.”²¹³

6.2 There was solid support expressed in the submissions for the periodic detention scheme, with 18 (of 23) agencies arguing that the scheme's advantages far exceed its limitations.²¹⁴ As was expected, virtually all of the 72 community organisations that contacted the Council urged that

²¹³ New South Wales Law Reform Commission, *Report 79: Sentencing*, 1996 at 6.2. These advantages were cited with approval by Magistrate Gilmore of the NSW State Parole Authority, in consultation 16 July 2007.

²¹⁴ Two submissions were essentially neutral and provided factual information only (Submission 2: Mental Health Review Tribunal and Submission 11: NSW Ombudsman's Office); one was opposed to the extension of periodic detention to juveniles (Submission 5: NSW Department of Juvenile Justice); one favoured the scheme's abolition (Submission 1: Justice Blanch, Chief Judge, District Court) and one favoured its replacement with a form of alternative community-based sentencing option, with no residential/detention component (Submission 21: NSW Department of Corrective Services).

the scheme be retained. Support for its retention²¹⁵ was also expressed by field officers and correctional staff and by periodic detainees themselves.²¹⁶ As we note later, in some instances those who expressed support for retention of the scheme made recommendations for some modifications to make it more widely available.²¹⁷

6.3 We next examine in more detail the advantages of periodic detention which were identified in the submissions and consultations.

Flexible sentencing sanction

6.4 Periodic detention was described in one submission as a useful sentencing option, it being pointed out that the preservation of several options “provides more flexibility for judges to tailor the punishment to the offence committed”.²¹⁸ Another submission asserted that it is a useful and flexible option “where it is appropriate to impose a custodial sentence, but (where) there are factors, for example, work or education commitments, family issues or drug and alcohol rehabilitation commitments that make it desirable that the offender remains within the community”.²¹⁹

²¹⁵ See in particular submission 19: Field officers attached to the Metropolitan PDC-Parramatta

²¹⁶ Visit to Metropolitan Periodic Detention Centre 14 July 2007

²¹⁷ See [8.9]-[8.14]

²¹⁸ Submission 13: NSW Council for Civil Liberties at 2

²¹⁹ Submission 8: Chief Magistrate of the Local Court, Judge Henson. Similar sentiments were expressed by Submission 3: Magistrate Zdenkowski; Submission 4: NCOSS; Submission 14: NSW Public Defenders Office; Submission 18: NSW Aboriginal Justice Advisory Council (AJAC).

Meets the purposes of sentencing

6.5 Periodic detention was seen as fulfilling several of the statutory purposes of sentencing²²⁰, namely:

- to ensure that the offender is punished adequately for the offence;
- to prevent crime by deterring the offender and others from committing the same or similar offences;
- to promote the rehabilitation of the offender;
- to protect the community by limiting the capacity of the offender to re-offend;
- to denounce the conduct of the offender; and
- to promote the restoration of relations between the community, the offender and the victim,²²¹ and hence to be compatible with the principle of restorative justice.

6.6 Several submissions noted that periodic detention serves the purposes of retribution, community denunciation, and restoration,²²² and constitutes “a salutary introduction to the prison system and hopefully a deterrent to future offending.”²²³ The Chief Magistrate suggested that the visibility of the detainees’ involvement in carrying out a sentence at a local level (through the provision of community-based work) was also likely to impact on general deterrence.²²⁴

²²⁰ s3A *Crimes (Sentencing Procedure)* Act 1999

²²¹ See also Australian Law Reform Commission, *Report 103: Same Crime Same Time: Sentencing of Federal Offenders*, 2006.

²²² Submission 13: NSW Council for Civil Liberties, Submission 14: NSW Public Defenders Office, Submission 21: NSW Department of Corrective Services at 19. Consultation with Magistrate Charles Gilmore, NSW State Parole Authority, 16 July 2007

²²³ Submission 18: NSW Aboriginal Justice Advisory Council (AJAC); Submission 13: NSW Council for Civil Liberties

²²⁴ Submission 8: Chief Magistrate Justice Henson at 5

6.7 A belief that imprisonment deters re-offending is premised on the assumption that “the pains of imprisonment, including the loss of freedom, rigidity of prison life, loss of contacts with friends and family and stigmatisation, may convince offenders that prison is a place to which they wish never to return”.²²⁵ Certainly, the detainees with whom Council consulted were vehement in their assertions that periodic detention had taught them a lesson of such magnitude that they would not re-offend.²²⁶

Buffer between full-time imprisonment and community options

6.8 Support for periodic detention in the submissions was heavily dependent upon it being seen as an essential buffer between community-based sentencing options and full-time incarceration. Citing the Nagle Royal Commission into Prisons²²⁷, the Council for Civil Liberties argued that as the deprivation of liberty by imprisonment is the gravest criminal sanction available, “alternatives to imprisonment should be used as extensively as possible, and prisons should be used only as a last resort”.²²⁸ It was suggested that this was a reason for retaining periodic detention, as an option in lieu of full-time incarceration, since its elimination may lead to sentencing creep and to the imposition of an undeservedly severe sentence.

²²⁵ Vieraitis L, Kovandzic T & Marvell T, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data, 1974-2002*, Criminology & Public Policy, Vol 6 No 3 2007 at 589-622 and at 595.

²²⁶ In consultation with Metropolitan Periodic Detention Centre 14 July 2007 and Wollongong Periodic Detention Centre, 22 September 2007

²²⁷ The Hon. Justice J Nagle, *Report of the Royal Commission into New South Wales Prisons*, NSW Government Printer, Sydney, 1978

²²⁸ Submission 13: NSW Council for Civil Liberties. Similar points were made by Submission 14: NSW Public Defenders Office and that offices’ supplementary Submission 22; Submission 9: Law Society of NSW; Submission 15: Office of the Director of Public Prosecutions, NSW; Submission 16: Chief Judge at Common Law, Justice McClellan, NSW Supreme Court; Submission 18: NSW Aboriginal Justice Advisory Committee (AJAC); and Submission 24: Office of the Commonwealth Director of Public Prosecutions.

6.9 The Chief Magistrate noted:

“There are advantages for offenders in remaining in the general community and maintaining their social and economic ties to the community (housing, employment, relationships etc). Full time custody by comparison, entails the possible loss of employment, loss of housing and breakdown of family and personal relationships, all of which pose further problems for an offender’s reintegration after release and their successful reintegration. The offender is also not incarcerated with the larger scale prison population and (exposed to) ‘gaol culture’”²²⁹

6.10 The Public Defenders Office agreed:

“in our experience, the community is best protected by laws which reduce the amount of time that a citizen is removed from society and which by education, training, counselling and support, reduce the risk of re-offending. There is a limited scope for education, training and counselling to be provided while a prisoner is in custody, particularly if his or her sentence is short. Yet, if prisoners are released into the community without adequate preparation and support, the risk of re-offending is significantly increased. There is a real risk that gaol alone makes the community less safe”.²³⁰

6.11 The submission from the Office of the Director of Public Prosecutions observed that “it remains the better option for offenders who have never served full-time custody” and can “achieve a balance between punishment and rehabilitation that might otherwise be lost.”²³¹

6.12 Detainees interviewed at the Metropolitan and Wollongong Periodic Detention Centres stated categorically that periodic detention was preferable to full-time gaol.

²²⁹ Submission 8: Chief Magistrate of the Local Court, Judge Henson

²³⁰ Submission 14: Public Defenders Office at 2

²³¹ Submission 15: Office of the Director of Public Prosecutions, NSW at 2

6.13 The ability to maintain their family connections, to fulfil childcare responsibilities, and to continue employment while serving periodic detention were the dominant reasons why this option was preferred. Avoiding the ‘criminal contamination’ of full-time gaol, commonly regarded as a ‘university of crime’, was acknowledged by the NSW Department of Corrective Services to be an advantage of the periodic detention scheme.²³²

Social Benefits

6.14 According to one field officer:

“...the greatest saving to the community is the fact that the detainee is a solid member of the community for 5 days per week.”²³³

6.15 It has been argued that the evaluation of the effectiveness of a correctional program should be determined not only on the basis of measures of recidivism and completion rates, which are the most commonly utilised performance indicators. Social measures, such as the effectiveness of community reintegration and positive family relationships, it has been suggested, should also be taken into account.²³⁴ Several submissions stated that the elements of the periodic detention scheme that permit offenders to live at home and maintain the support of family and friends while continuing to attend educational

²³² Submission 21: NSW Department of Corrective Services 19. A similar point was made by Submission 18: NSW Aboriginal Justice Advisory Council (AJAC). The avoidance of ‘criminal contamination’ was a key consideration in the establishment of periodic detention when it was first introduced: “...it is part and parcel of this scheme that no person serving a period of detention will be brought into association with people who are serving full terms of imprisonment.” Second reading speech Minister for Justice Mr Maddison, *Periodic Detention of Prisoners Bill* 1970, *NSW Parliamentary Debates Hansard*, Legislative Assembly, at 8041, 18 November 1970

²³³ Submission 17: Field Officer Rogers at 1

²³⁴ Henderson M, *Benchmarking Study of Home Detention Programs in Australia and New Zealand*, Report to the National Corrections Advisory Group, March 2006 at 80.

facilities or to go to work, thereby minimising the financial and social costs upon the general community, constitute its greatest strength.²³⁵

6.16 The Chief Magistrate observed that periodic detention achieves the punishment and deterrent purposes of sentencing without excessive disruption to family life, particularly for offenders with primary child-care responsibilities.²³⁶ This point was also emphasised by detainees during the Council's field visits. On several occasions detainees stated that had any other sentence been imposed they would have lost custody of their children.²³⁷ A recent UK study confirmed the value of the periodic detention scheme in keeping families with dependent children together.²³⁸

Rehabilitative value

6.17 Several submissions and consultations reflected a belief that the periodic detention scheme rehabilitated offenders.²³⁹ The Public Defenders stated that it is "valuable in terms of rehabilitation, at least

²³⁵ Submission 3: Magistrate Zdenkowski; Submission 4: NCOSS; Submission 14 and 22: NSW Public Defenders Office; Submission 9: Law Society of NSW; Submission 10: Prisoner's Aid Association of NSW; Submission 12: Community Relations Commission; Submission 15: Office of the Director of Public Prosecutions, NSW; Submission 17: Field Officer Rogers; Submission 19: Field Officers Attached to the Metropolitan PDC- Parramatta; Submission 21: NSW Department of Corrective Services.

²³⁶ Submission 8: Chief Magistrate, NSW Local Court, Judge Henson at 4

²³⁷ Consultation, Field Officers Attached to the Metropolitan PDC- Parramatta 17 July 2007; Consultation, officers, Wollongong Periodic Detention Centre 22 September 2007

²³⁸ Penfold C, Hunter G & Hough M, *The intermittent custody pilot: a descriptive study*, Home Office Online Report 23/06, London, 2006 at 24 citing The Prison Reform Trust, *Justice for Women: the need for reform*, London, 2000. No Australian study has assessed the value of periodic detention on this specific criterion, although numerous studies have confirmed the detrimental impacts on the family unit of separation from family occasioned by imprisonment, see for example, Woodward R, *Occasional Paper No 10: Families of prisoners: Literature review on issues and difficulties*, Department of Family and Community Services Australian Government, 2003

²³⁹ Submission 10: Prisoners Aid Association of NSW

in avoiding the detrimental social consequences of a full-time removal from broader society.”²⁴⁰

6.18 Numerous community agencies noted the positive attitude of detainees when performing work that helped the community in some way.²⁴¹ Ten respondents reported that detainees had maintained some involvement with the worksite or related agency after their detention period had expired, while in one case, it was reported that a detainee had joined the Board of the agency that had supervised him.²⁴² This ongoing commitment was seen by many agencies as prima facie evidence of the rehabilitative potential of the periodic detention program.²⁴³

6.19 Several respondents²⁴⁴ as well as field officers²⁴⁵ reported that detainees had obtained valuable skills and employment through the community service work performed during Stage 2 of periodic detention.

²⁴⁰ Submission 22: Supplementary: NSW Public Defenders Office. See too Submission 19: Field Officers Attached to the Metropolitan PDC- Parramatta. The NSW Council for Civil Liberties made a similar point: Submission 13

²⁴¹ Berkeley Pioneer Cemetery Restoration Group; Brush Farm Park Preservation Group; Central Tilba Community Based Projects; Clean Up Australia; Finley Pistol Club Inc; Kokoda Track Memorial Walkway Ltd; Norah Head Search and Rescue; Riding for the Disabled Association (NSW)- Cootamundra Centre; Royal Volunteer Coastal Patrol; Royal Volunteer Coastal Patrol- Central Coast Division; South Grafton High School; Southside Uniting Church- Tamworth; St Catherine Laboure Parish- Gympie; and Tumbarumba Pastoral Agricultural & Horticultural Society Inc.

²⁴² Richmond Vale Preservation Co-operative Society Ltd

²⁴³ Similar points have been made in previous evaluations of the periodic detention scheme: see McHutchison J, *Research Publication No 48: Outcomes for NSW periodic detention orders commenced 2003-2004* Department of Corrective Services, 2005; Potas I, Marsic N & Cumines S, *Periodic Detention Revisited*, 1998, Monograph Series No. 18, Judicial Commission of NSW, Sydney, at 10-11; Gorta A, *Periodic Detention in NSW: Trends and Issues 1971-1991*, Department of Corrective Services Research Bulletin No 16, Sydney, 1991 at 5; Potas I, *A Critical Review of Periodic Detention in New South Wales*, Judicial Commission of NSW, Sydney, 1992

²⁴⁴ Central Tilba Community Based Projects; Clean Up Australia; Department of Lands- The Hume & Hovell Walking Track; Girl Guides Association - Northern Inland Region; Hay Tennis Club; Lifeline; Mt Kembla Mining Heritage Inc; Richmond Vale Preservation Co-operative Society Ltd; Royal Volunteer Coastal Patrol; and Royal Volunteer Coastal Patrol- Central Coast Division.

²⁴⁵ Submission 19: Field Officers Attached to the Metropolitan PDC- Parramatta at 5

Cost Effectiveness

6.20 Although several submissions declared that “cost reasons alone do not justify a particular scheme of sentencing,²⁴⁶ the relative affordability of periodic detention, particularly when compared with the cost of full time imprisonment, was seen as a distinct advantage.²⁴⁷ According to the Productivity Commission, the national average cost of incarcerating an offender in open security (which includes periodic detention) is \$183 per day. The national average cost per day for an offender on community corrections is \$10.40 per day.²⁴⁸

6.21 In NSW, the Department of Corrective Services has estimated that Stage 1 Periodic Detention costs \$61.18 per offender per day; while Stage 2 has been assessed as costing \$53.59 per offender per day. These costs are significantly less than that for full-time minimum security custody in NSW, estimated at \$131.95 per day²⁴⁹; they are also less than that for home detention of \$81.70 per offender per day.²⁵⁰

6.22 The NSW Law Reform Commission²⁵¹ the NSW Legislative Council Standing Committee on Law and Justice²⁵² and the Judicial Commission

²⁴⁶ Submission 13: NSW Council for Civil Liberties

²⁴⁷ Submission 9: Law Society of NSW ; Submission 18: NSW Aboriginal Justice Advisory Council (AJAC)

²⁴⁸ Steering Committee for the Review of Government Service Provision (SCRGSP), *Report on Government Services 2007*, Productivity Commission, Canberra, 2007. Note that this estimation is for 2005-2006.

²⁴⁹ The average cost per day for all classifications of full-time security is \$170 per day

²⁵⁰ Submission 21: NSW Department of Corrective Services

²⁵¹ New South Wales Law Reform Commission, *Discussion Paper 33: Sentencing* 1996 at Ch 8

²⁵² New South Wales Parliament, Legislative Standing Committee on Law and Justice, *Report No 30: Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006

of NSW²⁵³ have each concluded that periodic detention is a cost effective option.

6.23 Several submissions made the additional point that the financial benefit that periodic detention created for the wider community was one of the most important features of the scheme.²⁵⁴ The Department of Corrective Services has valued the unpaid community work provided by detainees at approximately \$4 million per year.²⁵⁵ This would seem to be an unduly conservative estimate and less than that suggested to the Council in consultations, or by the actual amount of unpaid labour provided in relation to a wide variety of projects including land care, mowing of public spaces, painting, repairs to schools, rubbish removal, tree planting and propagation, work for National Parks projects and similar valuable activities including, for example, the Riverkeeper program for the restoration of the Georges River and surrounding areas.²⁵⁶ Community respondents placed considerable emphasis on the financial benefits that the program brought both to their agencies and to the wider community. Sixty-six respondents stated they would be adversely affected if the community service component of periodic detention was discontinued.²⁵⁷

²⁵³ Potas I, *Periodic detention revisited 1998*, NSW Judicial Commission, Sydney, 1998

²⁵⁴ Submission 9: Law Society of NSW; Submission 17: Field Officer Rogers; Submission 19: Field Officers Attached to the Metropolitan PDC- Parramatta; Submission 20: Warringah Council

²⁵⁵ Submission 21: NSW Department of Corrective Services - the Department noted however “the same level of community work could be maintained if the requirement for overnight detention were removed.”

²⁵⁶ Submission 19: Field Officers Attached to the Metropolitan PDC- Parramatta

²⁵⁷ Anglican Parish Tumbarumba; Appin and Wilton Anglican Churches; Bathurst District Soccer Club; Berkeley Pioneer Cemetery Restoration Group; Brush Farm Park Preservation Group; Carcoola Children’s Centre; Carenne Public School; Central Tilba Community Based Projects; Chipping Norton Lake Authority; City of Canada Bay Council; Clarence Valley BMX Club; Clean Up Australia; Coldstream Community Preschool; Department of Lands- The Hume & Hovell Walking Track; Dogs NSW; Finley Pistol Club Inc; Georges River Combined Councils Committee Inc; Girl Guides Association- Northern Inland Region; Grafton District Management Team (Grafton Girl

6.24 In addition to the direct financial benefits for community agencies participating in the scheme, periodic detention was also seen to provide a benefit to the community by avoiding the indirect costs of imprisonment. It is obvious that imprisonment will often result in loss of housing, subsequent difficulty in finding employment, transfer of dependants onto welfare benefits and poorer health. These post-release problems commonly lead to re-offending.²⁵⁸ In contrast, periodic detention “prevents strain on the welfare system” associated with gaol, and avoids the consequences prisoners often face when rebuilding their lives after prison.²⁵⁹

6.25 The observation was also made that maintaining employment throughout a period of periodic detention affords detainees the opportunity to meet financial commitments such as rental and mortgage repayments.²⁶⁰ A 1996 UK study confirmed the benefits of intermittent

Guides); Greek Orthodox Archdiocese of Australia-Parish of Sutherland; Hawkesbury Early Childhood Intervention Service; Hay Tennis Club; House of Hospitality-Adamstown; Illawarra Cycle Club; Kellyville High School; Kelso Public School; Kokoda Track Memorial Walkway Ltd; Kootingal Lions Club Inc; Lifeline; Matraville Sports High School; Mermaids Pool Restoration Group; Mt Kembla Mining Heritage Inc; Mt Rankin Landcare Inc; Norah Head Search and Rescue; Our Lady of Christians Catholic Parish- Campbelltown; Plumpton Public School; Quakers Hill Public School; Richmond Vale Preservation Co-operative Society Ltd; Riding for the Disabled Association (NSW)-Cootamundra Centre; Robertson Heritage Railway Station; Rockley Rodeo Committee; Royal Volunteer Coastal Patrol; Royal Volunteer Coastal Patrol- Central Coast Division; Shoalhaven City Council; Sisters of the Good Samaritan of the Order of St Benedict; Soldier & Miners’ Memorial Church- Mt Kembla; South Grafton High School; Southside Uniting Church- Tamworth; St Bedes Catholic Church- Appin; St Catherine Laboure Parish- Gympie; St Dimitrios Greek Orthodox Church; St John’s Anglican Church; St Mathew’s Anglican Cemetery, McGraths Hill; Strathfield City Council; St Vincent de Paul Society- Bankstown; St Vincent de Paul Society- Bathurst; St Vincent de Paul Society- Broken Bay Diocese; Tamworth Dressage Club; The Salvation Army- Australia Eastern Territory; Tumbarumba Fire Station; Tumbarumba Pastoral Agricultural & Horticultural Society Inc; Tumbarumba Pony Club; Tumbarumba Racecourse Trust; Unanderra Scout Group; Wollongong City Council; and the Young Showground Trust Inc.

²⁵⁸ Beyond Bars Alliance, *Fact Sheet 6: Are prisons Cost-Effective?* www.beyondbars.org.au

²⁵⁹ Submission 14: NSW Public Defenders Office at 4

²⁶⁰ Submission 14: NSW Public Defenders Office

custody in this respect.²⁶¹ By contrast homelessness for those leaving full-time custody is a common outcome.²⁶²

6.26 Several submissions noted that remaining in the community and thereby preserving employment also affords detainees the opportunity to repay money obtained through fraud, as well as other debts or fines, thereby facilitating the maintenance, for example, of a drivers license that is increasingly a requirement for finding and remaining in employment.²⁶³ The Council has previously examined the extremely high debt levels of prisoners as part of our inquiry into the effectiveness of fines as a sentencing option.²⁶⁴ Offenders in custody invariably have a history of debt due to unpaid fines or penalty notices and commonly fall into further debt while imprisoned.²⁶⁵ It has also been assessed by one commentator that up to 49 percent of people who commit crime do so to pay off debt.²⁶⁶ Assuming that people on periodic detention take advantage of the opportunity which this option provides to continue in employment, the potential benefits to the community could be significant, both in terms of facilitating the discharge of existing

²⁶¹ Penfold C, Hunter G & Hough M, *The intermittent custody pilot: a descriptive study*, Home Office Online Report 23/06, London, 2006 at 23-24

²⁶² For an Australian discussion of this issue, see Baldry E, McDonnell D, Maplestone P & Peeters M, "Ex-prisoners, accommodation and the state: post-release in Australia" (2006) 39(1) *ANZ Journal of Criminology* 20-33

²⁶³ Submission 8: Chief Magistrate of the Local Court, Judge Henson

²⁶⁴ New South Wales Sentencing Council, *The Effectiveness of Fines as a sentencing option: Court imposed Fines and penalty notices, Interim Report*, 2006 at 35

²⁶⁵ See Stringer A, *Prison and Debt: Does Debt Cause Crime?* Prisoner's Legal Service Inc Queensland 1999; Stringer A, *Women Inside In Debt: The Prison and Debt Project*, CRC Justice Support, Women in Corrections: Staff and Clients Conference, Australian Institute of Criminology / SA Dept of Corrective Services conference, 31 October -1 November 2000; Hyslop D, *Doing Crime to Pay the Fine: Prisoners and Debt, a Reintegration Issue*, New South Wales Department of Corrective Services, 2005; Law and Justice Foundation *The Legal Needs of Prisoners and People Recently Released from Prison Background Paper*, 2005

²⁶⁶ See Stringer A, *Prison and Debt: Does Debt Cause Crime?* Prisoner's Legal Service Inc, Queensland, 1999

commitments, and in avoiding the need of these people to re-offend in order to satisfy outstanding debts.

6.27 The Department of Corrective Services has however cited anecdotal evidence that the rate of full-time employment of periodic detainees is now less than was the case when the scheme was originally introduced.²⁶⁷ If this is correct then one of the perceived advantages of weekend-only detention, namely that of keeping weekdays free for paid employment, is being undermined.

6.28 The Council notes, that fifty-seven percent of the 908 offenders who commenced periodic detention orders during 2003-2004 were recorded as being in employment.²⁶⁸ This rate was virtually identical to the employment rate reported in earlier evaluations conducted into the periodic detention scheme.²⁶⁹ What is currently lacking is a contemporary evaluation, similar to that conducted recently in the UK²⁷⁰, of the rate of employment of offenders entering periodic detention in NSW and of the extent to which they maintain that employment while serving their sentence. It would be helpful to investigate additionally whether periodic detainees in NSW are leaving paid employment immediately prior to commencing periodic detention in the belief that

²⁶⁷ Submission 21: NSW Department of Corrective Services

²⁶⁸ McHutchison J, *Research Publication No. 48: Outcomes for NSW periodic detention orders commenced 2003-2004*, NSW Department of Corrective Services, 2006. This rate compares favourably with the employment status of those in full-time detention, of whom only slightly more than half reported having worked in the six months prior to coming into custody: Butler T & Milner L, *The 2001 New South Wales Inmate Health Survey*, Corrections Health Survey, Sydney, 2003 at 82

²⁶⁹ Gorta A, *Periodic Detention in NSW: Trends and Issues 1971-1991*, Department of Corrective Services Research Bulletin No 16, August 1991 at 5 – reported that 56% of detainees were employed and 2% were studying; Potas I, *A Critical Review of Periodic Detention in New South Wales*, Judicial Commission of NSW, Sydney, 1992, at 2 – assessed the employed population at a “surprising” 56%.

²⁷⁰ Penfold C, Hunter G & Hough M, *The intermittent custody pilot: a descriptive study*, Home Office Online Report 23/06, London, 2006 at 22-23

the scheme would not accommodate both working and custodial hours. In this respect there is a potential concern that periodic detainees will give up employment out of a fear that a full working week, followed by weekend commitment to periodic detention, would effectively preclude family contact or any opportunity for rest or recreation.

Beneficial for vulnerable offenders

6.29 The Aboriginal Justice Advisory Committee noted the rehabilitative potential periodic detention afforded to indigenous offenders who continue to be overrepresented in prisons, since it allows them to remain within their community and not be separated from it for long periods.²⁷¹ It was seen to be particularly appropriate for indigenous women with child care responsibilities.²⁷²

6.30 The Department of Ageing, Disability and Home Care (DADHC) commented that periodic detention can be a useful alternative for detainees who have intellectual disabilities, in that the regularity of a few days in prison can provide a degree of structure for individuals whose offending is associated with chaotic lifestyles. It was seen as a preferable option to full-time incarceration, which leads to such offenders losing contact with the Department. It was also seen as beneficial in reducing opportunistic weekend re-offending.²⁷³

6.31 The Chief Magistrate noted additionally that the scheme was particularly advantageous for those offenders convicted of social security fraud, for whom there is ample authority that only a sentence of

²⁷¹ Submission 18: Aboriginal Justice Advisory Committee (AJAC)

²⁷² Submission 18: AJAC citing the Judicial Commission of New South Wales, *Equality Before the Law*, Bench Book, 2006

²⁷³ Submission 7: NSW Department of Ageing Disability and Home Care (DADHC)

imprisonment is appropriate in all but the most exceptional circumstances.²⁷⁴ By definition most of these offenders come from deprived and disadvantageous backgrounds and are potentially vulnerable if sentenced to full-time imprisonment. The Council of Civil Liberties also referred to the value of periodic detention for indigenous and young adult offenders because of the “flexibility of the courts to assign sentences that promote improvement of skills and circumstance.”²⁷⁵

Public relations benefits

6.32 Public relations benefits, both for the Department of Corrective Services and the Government can arise from detainees being seen to ‘pay back’ the community through undertaking highly visible work projects. Eleven community agencies specifically commented that the scheme promoted goodwill in the community.²⁷⁶ Worksite supervisors and correctional officers expressed the same sentiment during the Council’s field visits. The position of detainees providing work, particularly in areas such as cleaning up and restoring public lands, without cost to the public, can be compared favourably with the absence of any productive effort for the community by those serving full-time custody.

²⁷⁴ e.g. *R v Purdon* NSWCCA (unreported, 27 March 1997); *R v Herrera* NSWCCA (unreported, 6 June 1997); *Evans v R* [2006] NSWCCA 349; See submission 24: Office of the Commonwealth Director of Public Prosecutions

²⁷⁵ Submission 13: NSW Council for Civil Liberties

²⁷⁶ Brush Farm Park Preservation Group; Clean Up Australia; Grafton District Management Team (Grafton Girl Guides); Mermaids Pool Restoration Group; Mt Kembla Mining Heritage Inc; Mt Rankin Landcare Inc; Royal Volunteer Coastal Patrol- Central Coast Division; St Vincent de Paul Society- Broken Bay Diocese; Tumbarumba Fire Station; Tumbarumba Pastoral Agricultural & Horticultural Society Inc; and Wollongong City Council.

DISADVANTAGES

6.33 Several disadvantages of the periodic detention scheme were identified in the submissions and consultations, some of which represent contradictory views to those expressed earlier in this report as being advantageous. They include the following:

Perceptions of leniency

“The public demand for harsher penalties on the one hand and the need for more humane and cost-effective methods for dealing with offenders on the other, is a perennial problem in sentencing, and is a theme most acutely reflected in the discourse on periodic detention.”²⁷⁷

6.34 As we have already observed, there are judicial statements to the effect that periodic detention, most particularly its community component, has been recognised as having “a strong degree of leniency built into it and as being outwardly less severe in its denunciation of the crime” involved.²⁷⁸

6.35 On the other hand there is also recognition by some Judges of the fact that the continuous obligation of complying with a periodic detention order over a lengthy period of time, of the fact that it is a sentence that disturbs the ordinary affairs of the life of the offender and that involves an exposure to a loss of liberty, and of the place and circumstance in which that loss occurs, do mean that it is a salutatory

²⁷⁷ Potas I, Marsic N & Cumines S, *Periodic Detention Revisited*, 1998, Monograph Series No. 18, Judicial Commission of NSW, Sydney, 1998 at 10.

²⁷⁸ Hunt CJ at CL in *R v Hallocoglu* (1992) 63 A Crim R 287 at [292]. (an observation which his Honour regarded as particularly appropriate in consequence of the 1987 amendment to the 1981 Act which he assessed as having reduced the punitive element of the sentence “to a startling degree” at [294]). See also *R v Rivkin* [2004] NSWCCA 7 at [433]; *Douar v R* [2005] NSWCCA 455 at [73]; and *R v Cooke* [2007] NSWCCA 184 at [37].

punishment.²⁷⁹ The Legislative Council Standing Committee on Law and Justice also concluded that it is not a “soft option”.²⁸⁰

6.36 Members of the Parole Authority expressed concern regarding judicial attitudes towards periodic detention, stating that on the whole, judicial officers do not really understand the breach or revocation process, and do not fully appreciate that such a sentence can be converted into a full time sentence. It was suggested, additionally, that poor publicity surrounding the operations of the former legislation and reports of poor attendance had lead to judges and magistrates regarding periodic detention unfavourably.²⁸¹

6.37 The NSW Director of Public Prosecutions recognised that “concerns publicly expressed about periodic detention in some quarters may be undermining the system” but maintained that, notwithstanding such concerns, “the value of periodic detention as a sentencing option is recognised and that attempts should be made to maintain it in some form.”²⁸² Contrary to the views of some submissions that the wrong type of offender is often included in the program,²⁸³ the DPP stated that “it is

²⁷⁹ See for eg *R v Anderson* (1987) 32 A Crim R 146 per Kirby P at [154]; *R v Burnett* (1996) 85 A Crim R 76 at [82] and *R v Niga* NSWCCA (unreported, 13 April 1994)

²⁸⁰ New South Wales Parliament, Legislative Standing Committee on Law and Justice, *Report No 30: Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006 at 153

²⁸¹ Consultation, Chairperson Ian Pike and Magistrate Charles Gilmore, NSW State Parole Authority, 16 July 2007.

²⁸² Submission 15: Office of the Director of Public Prosecutions, NSW

²⁸³ Submission 6: Enough is Enough advocated for more rigorous assessment by the Probation & Parole Service to ensure the suitability of the offender. The Prisoner’s Aid Association of NSW (Submission 10) agreed there was a concern, but argued that criticisms of the scheme’s low compliance rate exposed an issue in terms of the appropriateness of the option used in an individual case, and should not be used against the general merit of the periodic detention scheme.

this Office’s experience that periodic detention is used infrequently and only when there are indicators of strong prospects for rehabilitation.”²⁸⁴

6.38 The extent to which the preliminary assessment and subsequent exercise of the discretionary powers vested in Corrective Services concerning the manner in which the sentence is served, were seen by some as causing problems and as potentially causing concerns as to leniency.²⁸⁵ The Chief Judge at Common Law, Justice McClellan, noted that suitability for a sentence of periodic detention is assessed by Probation and Parole according to their own criteria, with the consequence that its availability is very often determined by administrative factors outside the court’s control. Additionally, the Chief Judge observed that the Commissioner of Corrective Services has significant latitude as to the time and place of reporting, in granting leave and in providing for community work orders in accordance with his own criteria, so that, in practice, there may be significant variations in the actual impact of the sentence between different offenders.²⁸⁶

6.39 The Public Defender’s Office pointed out that if “at present there may be insufficient supervision and monitoring (this) is not due to the faults of periodic detention as a sentencing option. Rather, it reflects the lack of resources being made available to achieve these ends”.²⁸⁷

²⁸⁴ Submission 15: The Office of the Director of Public Prosecutions, NSW at 1

²⁸⁵ Submission 18: AJAC at 2

²⁸⁶ Submission 16: Chief Judge at Common Law, The Hon Justice McClellan

²⁸⁷ Submission 14: NSW Public Defenders Office at 4

Onerous impact on offender and family

6.40 Several submissions drew attention to the impact of periodic detention in relation to employment and family duties.²⁸⁸ The Department of Corrective Services advised that “detainees who are employed full-time have raised issues associated with the adverse impacts of ongoing weekend detention on their capacity to participate in important social, recreational and sporting activities with their children”, suggesting that alternative community-based sanctions could have less of an impact on their dislocation.”²⁸⁹

6.41 The Office of the Public Defender stated:

“Being detained on a weekly basis for one or two nights is an onerous sentence for offenders who are either in employment or who have considerable family or other responsibilities and commitments, such as caring for disabled family members.”

6.42 It noted that a person who works five days per week and then goes into weekend custody has no significant opportunity for relaxation or family time for the duration of that part of the sentence and added:

“This is rarely appreciated by the offender at the time of sentence... Prisoners are often surprised to discover how difficult it is to be engaged in a combination of employment and detention, seven days a week.”²⁹⁰

²⁸⁸ Supplementary submission 22: NSW Public Defenders Office at 1

²⁸⁹ Submission 21: NSW Department of Corrective Services. This view is consistent with the Department’s submission to the Law and Justice Inquiry into Community based sentences, in which it stated that “Reporting to a periodic detention centre at the same time every week, however, places a tremendous strain on detainees, which is increased the longer a detainee is subject to a sentence. There have even been claims by some detainees that they deliberately breached their attendance requirements in order to be committed to full time imprisonment rather than maintain the necessary discipline of weekly attendance.” New South Wales Parliament, Legislative Standing Committee on Law and Justice, *Report No 30: Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006 at 153

²⁹⁰ Submission 22: The NSW Public Defenders Office at 1

6.43 The Council of Social Services of NSW (NCOSS) also noted the NSW Law Reform Commission's comments²⁹¹ as to the "significant dislocation of ordinary life of the typical working person" occasioned by a sentence of periodic detention. It argued that periodic detention is "punitive and comes at a considerable cost to the offender and their family", stating that it is potentially traumatic to spend time in the cells and yards or common areas, and then be returned to one's family for the rest of the week. It was suggested this may have a negative impact on the person's mental health or substance use.²⁹²

Ineffective deterrent

6.44 One submission argued that periodic detention is an ineffective deterrent because detainees are not made aware that the sentence is a privilege which allows them movement within the community to assist in maintaining a lifestyle and still pay a debt to society.²⁹³ Vulnerable people, such as those with intellectual disabilities and mental health issues, were considered unlikely to regard it as a deterrent in any event.²⁹⁴ The NSW Department of Juvenile Justice opposed its application to juvenile offenders, for the reason that their impulsive and erratic behaviour make it extremely unlikely that they would comply with the necessary regime leading to a high rate of breach, and for the further reason that the delivery of programs confined to the 2 day detention period would be unlikely to achieve rehabilitation.²⁹⁵

6.45 The importance placed upon incarceration alone as a deterrent against future re-offending is not generally supported by empirical

²⁹¹ New South Wales Law Reform Commission, *Discussion Paper 33: Sentencing*, 1996

²⁹² Submission 4: NCOSS at 2

²⁹³ Submission 6: Enough is Enough

²⁹⁴ Submission 7: DADHC

²⁹⁵ Submission 5: NSW Department of Juvenile Justice

research.²⁹⁶ Indeed, there is evidence that the experience of prison may in fact increase the likelihood of re-offending post-release.²⁹⁷ As the Department of Corrective Services advised:

“To those who believe that criminal justice sanctions in general or threats in particular are effective punishers or negative reinforcers, we advise they consult the relevant behaviour modification literature or any experimental learning text for supportive evidence....There is none.”²⁹⁸

6.46 Additionally, the Department asserted that there is:

“An increasing body of international western research that shows that incarceration is not more effective than community sanctions in preventing re-offending and treatment programs have been shown to be more effective when delivered in a community setting.”²⁹⁹

6.47 Field officers were also somewhat guarded in their assessment of the deterrent value of periodic detention, noting that the “short sharp

²⁹⁶ see Hough M, Jacobsen J & Millie A, *The Decision to Imprison: Sentencing and the Prison Population*, Prison Reform Trust, London, 2003; New South Wales Sentencing Council *Abolishing Prison Sentences of Six Months or Less: Final Report*, Sydney, 2004; New South Wales Parliament, Legislative Council Select Committee into the Increase in the Prisoner Population, 2001; Submission 21: NSW Department of Corrective Services, citing Smith P, Goggin C & Gendreau P, *The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences*, 2002 at 20

²⁹⁷ Stemen D, *Reconsidering Incarceration: New Directions for Reducing Crime*, Center on Sentencing and Corrections, Vera Institute of Justice, New York, January 2007: Analysts are nearly unanimous in their conclusion that continued growth in incarceration will prevent considerably fewer, if any, crimes – and at substantially greater cost to taxpayers” at 2

²⁹⁸ Submission 21: NSW Department of Corrective Services at 6, citing Smith P, Goggin C & Gendreau P, *The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences*, 2002 at 20.

²⁹⁹ Submission 21: NSW Department of Corrective Services, citing research undertaken by the John Howard Society of Alberta, Canada; the International Community Corrections Association (Washington DC, USA); the Federal Bureau of Prisons (USA); and the Home Office and the Ministry for Justice (UK)

shock” of detention had a limited deterrent effect that was limited to, at most, first time, minor offenders.³⁰⁰

Does not promote rehabilitation

6.48 Several submissions questioned the rehabilitative value of periodic detention as presently administered without a positive commitment to the supply of counselling or programs. For example, the Chief Magistrate observed:

“In an ideal world, one in which there is a commitment to the provision of rehabilitation programmes and those that address aspects of causation it should not be necessary to deal with matters by way of periodic detention in its current format. Although at a point in a sentence of periodic detention there is the potential of conversion to community service this does not always come with involvement in programmes which address issues such as drug and alcohol addiction, gambling addiction, financial mismanagement, domestic violence or general health issues, all of which either separately or in combination contribute to the creation or perpetuation of the environment from which a significant proportion of criminal offending behaviour springs.”

and added:

“the lack of access to long term rehabilitation programs to address underlying aspects of causation of criminality is a potential and often real disadvantage of this sentencing option.”³⁰¹

³⁰⁰ In consultation, Field Officers Attached to the Metropolitan PDC- Parramatta, 14 July 2007

³⁰¹ Submission 8: Chief Magistrate of the Local Court Judge Henson at 5. See also Submission 13: The NSW Council for Civil Liberties, stating that periodic detention “is not on its own appropriate when the offence necessitates greater rehabilitative treatment, as with substance abuse or mental illness-related offences.”

6.49 This criticism of periodic detention is to be understood in the context of the limited programs that can be delivered by reason of the relatively short period of detention involved and the practical problems in funding programs.

6.50 The Department of Corrective Services has advised in this respect that:

“DCS is unable to offer rehabilitation programs for offenders serving a sentence by way of periodic detention (which can be for up to three years). The Department is also unable to offer programs that are intensive enough to change the behaviour of high risk offenders who are serving a sentence of full-time imprisonment for six months or less.”³⁰²

6.51 In a subsequent submission, an officer of the Department reiterated its inability to provide programs to periodic detainees, stating there is:

“...no follow-up after release to allow for referral or connection with community support services. There is also little opportunity to assess or monitor the offenders within their own community context and to address broad issues/offending factors such as housing, employment, relationships, substance abuse, violence, parenting and child protection. At the Pre Sentence report stage these issues/factors are often identified via a Pre Sentence Report assessment, but unless the offender receives an Order for supervision these identified issues/factors may remain unaddressed....there is little or no capacity of case management (and) a sentence of Periodic Detention also does not allow for the involvement of the Probation and Parole Service.”³⁰³

³⁰² Submission 21: NSW Department of Corrective Services at 20. The inconsistency was highlighted by Submission 6: Enough is Enough, which argued that programs are needed to maximise the rehabilitation element of this option, suggested that in some cases, full-time gaol is preferable to periodic detention to “ensure there was a rehabilitative nature to the sentence” while acknowledging that short sentences of 6 or 12 months full-time custody do not work.

³⁰³ Submission 23: Sam Hasham, Special Visitation Unit, Supplementary Submission, NSW Department of Corrective Services at 1

6.52 It was however argued by some that the Department should regard detainees as a captive audience and seize upon the chance to provide such programs during the Stage 1 residential component of the sentence,³⁰⁴ or, if not then, during Stage 2 in the community.

6.53 The Council notes that recommendations to this effect have been made in previous studies on periodic detention, and notes further that the Department had previously undertaken to implement such services. For example, the conduct of educational programs on Saturday evenings was said to be ‘under consideration’ in 1991, and legislative proposals contained in the *Periodic Detention of Prisoners (Amendment) Bill* 1991 foreshadowed the introduction of specific training and educational courses for periodic detainees.³⁰⁵ A pilot literacy program was provided by the Mt Druitt TAFE College in Adult Basic Education (ABE) at the Windsor Periodic Detention Centre each Saturday morning for 6 months until November 1991. The scheme focused on improving literacy and future vocational opportunities, reportedly with considerable success, but was subsequently discontinued due to lack of funds. In its review of periodic detention, the NSW Judicial Commission stated “it would appear that the Department gives priority to community service work over purely educational pursuits.”³⁰⁶

6.54 In a submission to the current Inquiry, the Public Defenders Office drew attention to s84 *Crimes (Administration of Sentences) Act* 1999, which gives the Commissioner of Corrective Services the power to order an offender, serving a sentence of periodic detention, to participate in

³⁰⁴ Field Officers Attached to the Metropolitan PDC- Parramatta, 14 July 2007

³⁰⁵ Gorta A, *Periodic Detention in NSW: Trends and Issues*, Department of Corrective Services Research Bulletin No.16., August 1991 at 18

³⁰⁶ Potas I, *A Critical Review of Periodic Detention in New South Wales*, Judicial Commission of NSW, Sydney, 1992 at 59

training conducive to his or her welfare and for that purpose to direct attendance at a place other than a periodic detention centre. The Office asserted “if more use was made of this power, many of the criticisms presently made about periodic detention could be answered.”³⁰⁷

6.55 The NSW Legislative Council Standing Committee on Law and Justice noted that the “legislation currently does not allow the courts to order a periodic detainee to attend therapeutic or educational programs” and that “none are provided by the Department of Corrective Services for detainees who may wish to attend voluntarily.” Evidence was however given to the Standing Committee:

“There is no reason detainees could not participate in programs in addition to doing community work. Given that periodic detainees are generally towards the lower risk of the likelihood of re-offending and are often there for driving-related offences, some of the programs currently offered by Community Offender Services could be of real benefit.”³⁰⁸

6.56 Reference was made to the Drug and Alcohol Addictions Program, the Relapse Prevention Program and the Sober Driver Program.

6.57 The Standing Committee recommended that the Attorney General, as part of the review of the *Crimes (Sentencing Procedure) Act 1999*, consider an amendment to give a discretion to the courts to order programs designed to reduce the likelihood of recidivism for offenders

³⁰⁷ Submission 14: NSW Public Defenders Office, at 4-5

³⁰⁸ Evidence given by Ms Magrath, Manager of Resources and Executive Services for Community Offender Services and the Secretary of the Probation and Parole Officer's Association of NSW, New South Wales Parliament, Legislative Standing Committee on Law and Justice, *Report No 30: Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006 at 151

serving periodic detention orders.³⁰⁹ The Government response to the Inquiry indicated that consideration would be given to such an amendment, and advised that to facilitate the review, the Department of Corrective Services would provide full details of programs that could be provided to offenders in satisfaction of the recommendation.³¹⁰ The Sentencing Council understands that this review has not yet been completed, and is unaware of any proposed amendments to the *Crimes (Sentencing Procedure) Act 1999* that would encourage the provision of rehabilitation programs to periodic detainees.

6.58 Similar views have been expressed in recent assessments of the Department's rehabilitative program: for example, the NSW Audit Office cautioned that 'there is a risk that the Department releases prisoners who have not addressed their rehabilitation needs.'³¹¹

6.59 In summary, the submissions received were highly critical of the administrative decision not to provide rehabilitative programs to periodic detainees, but did not hold the sentencing scheme itself responsible for this rehabilitative failing. Instead, it was suggested that introducing a more rehabilitative aspect would make periodic detention a more useful sentencing option.³¹²

³⁰⁹ Recommendation 28, New South Wales Parliament, Legislative Standing Committee on Law and Justice, *Report No 30: Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006 at 152

³¹⁰ New South Wales Government, The Hon. Kelly MLC, Minister for Justice, *NSW Government response to the Legislative Council Inquiry - Community-based sentencing options for rural and remote areas and disadvantaged populations*, 21 February 2007 at 15

³¹¹ Audit Office of New South Wales, *Performance Audit Prisoner Rehabilitation: Department of Corrective Services*, May 2006

³¹² New South Wales Parliament, Legislative Standing Committee on Law and Justice, *Report No 30: Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006 at 150ff

6.60 On the other hand, it has also been argued that the original intention of periodic detention was not to rehabilitate per se, but to provide a means of deterring and punishing offenders for whom full-time custody would be excessively harsh while allowing them to maintain their work, community and family ties. This raises the concern that periodic detention is being assessed against rehabilitative criteria that had not been a primary consideration when it was created.

Sentence inflation

6.61 Sentence inflation or sentence creep refers to the circumstances where a sentence is increased to ‘compensate’ for a perceived leniency in the way in which it might otherwise be imposed or served. It has been argued that periodic detention will have this effect where judges regard it as more lenient than full-time imprisonment and make an adjustment accordingly.³¹³

6.62 The Department of Corrective Services’ submission to the Standing Committee on Law and Justice Inquiry provided a hypothetical example of how this might occur:

“There is also a widespread view that courts either do or should increase a sentence of imprisonment to allow for the fact that it will be served by way of periodic detention - for instance, that instead of sentencing an offender to (say) 5 months full-time imprisonment (nominally 152 or 153 days custody), the court instead should “inflate” the sentence to 18 months imprisonment by way of periodic detention, on the basis the offender will then spend 156 nights in custody.”³¹⁴

³¹³ Submission 21: NSW Department of Corrective Services

³¹⁴ New South Wales Parliament, Legislative Standing Committee on Law and Justice, *Report No 30: Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006 at 154

6.63 The sentencing process does not as a matter of principle permit sentence creep or inflation, because of the three-step sentencing process outlined earlier that must be followed. That being said, (and while statistics for one calendar year may not be sufficient data from which solid conclusions should be drawn), a review of BOCSAR's report on *Court Statistics 2006* suggests that, in practise, the average sentence imposed by way of periodic detention is almost always longer than a sentence served by way of full-time imprisonment for a comparable crime.³¹⁵

6.64 It is not to be overlooked that revocation of an order of periodic detention following breach may result in the offender serving the balance of the term by way of full time imprisonment. If the original sentence was inflated to allow for its perceived leniency then an offender, in those circumstances, would be likely to spend many more days in actual custody than was originally contemplated. The potential problem of sentence creep could be overcome if, when making an order for periodic detention, the court limited itself by considering whether the term of periodic detention to be imposed would be excessive if the same term were to be served in full time custody.³¹⁶

Net-widening

6.65 One submission warned that the imposition of undeservedly severe penalties may in fact arise in the absence of proportional sentencing options such as periodic detention."³¹⁷

³¹⁵ New South Wales Bureau of Crime Statistics and Research (BOCSAR), *NSW Criminal Courts Statistics 2006*, Table 1.9, at 33-35

³¹⁶ Potas I, Marsic N & Cumines S, *Periodic Detention Revisited*, Monograph Series No. 18, Judicial Commission of New South Wales, 1998 at xiii.

³¹⁷ Submission 13: NSW Council for Civil Liberties at 2

6.66 The Council notes the Chief Magistrate’s submission indicating that offenders in local courts in Sydney, Newcastle and Wollongong are more than twice as likely to receive a periodic detention sentence when compared with like offenders in country locations.³¹⁸ This is consistent with the Council’s earlier investigations into the accessibility of periodic detention throughout the State, which found that magistrates are sentencing people in rural and country areas, who would otherwise qualify for periodic detention, to full-time detention in the absence of a periodic detention option.³¹⁹

6.67 The Department of Corrective Services similarly noted that the fact that Periodic detention is not uniformly available throughout the State as a sentencing option can lead to “net-widening.”³²⁰

Sentencing inconsistency

6.68 The Chief Magistrate observed that the fact that offenders in the metropolitan areas are more than twice as likely to receive a sentence of periodic detention than offenders in country regions, amounts to a geographic discrimination, which ultimately undermines consistency in sentencing. This, he noted later in his submission, must have an impact on respect for the law and on the potentiality for re-offending.³²¹ The Chief Judge of the District Court, Judge Blanch, likewise noted that the

³¹⁸ Submission 8: NSW Chief Magistrate Henson at 2, citing the findings of the New South Wales Parliament, Legislative Standing Committee on Law and Justice, *Report No 30: Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006 at 160

³¹⁹ New South Wales Sentencing Council, *Abolishing Prison Sentences of 6 months or Less*, 2004, see Committee’s Discussion paper at 31-34; New South Wales Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Court*, 2003 at 58-64

³²⁰ Submission 21: NSW Department of Corrective Services

³²¹ Submission 8: Chief Magistrate of the Local Court at 4

selective availability of periodic detention is its biggest problem and that this creates a fundamental injustice in sentencing.”³²²

6.69 As we noted earlier,³²³ the Chief Judge at Common Law, Hon Justice McClellan, pointed to the potential for a significant variation in the actual impact of sentences of periodic detention between different offenders, arising from the latitude the Commissioner of Corrective Services has in administering such orders.

6.70 Justice McClellan also remarked that, although the custodial element of periodic detention was an essential aspect of such a penalty:

“It is entirely inconsistent with the principle embodied in s5 (of the *Crimes (Sentencing Procedure)* Act 1999) to impose a sentence of periodic detention, knowing that all or part of it may not be served or may be converted to community service.”³²⁴

Administrative and eligibility difficulties

6.71 The Council has earlier in this Report³²⁵ identified a number of administrative and eligibility difficulties with the operation of the periodic detention scheme, which were said to impact upon its effectiveness. Chief among these is the limited availability of the scheme State-wide, due to the limited number of periodic detention centres, and the difficulties of transport which prevent many offenders from receiving this sanction. The eligibility restrictions which exclude offenders based

³²² Submission 1, Chief Judge of the District Court, the Hon Justice Blanch, a point also made by the Hon Justice McClellan in Submission 16.

³²³ At [6.38]

³²⁴ Submission 16: Chief Judge at Common Law, NSW Supreme Court, the Hon Justice McClellan at 2. A similar observation was made by the Chief Judge of the District Court, the Hon Justice Blanch, Submission 1

³²⁵ Part 3

on arbitrary criteria rather than on the merits of the individual case are also of concern.

6.72 Together these factors have been generally seen as a serious disadvantage, leading to unevenness in sentencing. It is a problem that could only be remedied by creating additional periodic detention centres and by providing the staffing required, a development that would involve very substantial capital costs, and ongoing expenditure for facilities which, in some areas, would be likely to be underutilised.

Part 7

Alternative Scheme to Replace Periodic Detention

- Introduction
- Community Correction Orders
- Advantages and Disadvantages of Community Correction Orders
- The Department of Corrective Services Proposal
- Evaluation of the Department of Corrective Services Proposal
- A Community Corrections Order for New South Wales

PART 7: COMMUNITY CORRECTIONS ORDER

INTRODUCTION

7.1 There was some support in the submissions³²⁶ as well as a positive recommendation from the Department of Corrective Services³²⁷ for the introduction of a new form of sentence, which would combine a more intensive form of community supervision with participation in community or educational programs. There is precedent for it in other jurisdictions³²⁸ including those where it has been seen as a valuable intermediate sentencing option replacing periodic detention.

7.2 In this Part we examine this option, the preferable title for which is a “Community Corrections Order” (CCO). In particular we give attention to whether it can be formulated in a way that would preserve the advantages that we have identified in relation to the existing system of periodic detention, and that would not attract its disadvantages.

7.3 Additionally, we give consideration to the questions whether:

- it should replace periodic detention or be an additional sentencing option taking its place between periodic detention and simple community service; and

³²⁶ For example, Submission 1: The Chief Judge of the District Court, Justice Blanch; Submission 3: Magistrate Zdenkowski; Submission 8: The Chief Magistrate of the Local Court Judge Henson; and Submission 9: The Law Society of New South Wales

³²⁷ Submission 21 – NSW Department of Corrective Services. See also supplementary submission 25, and consultations

³²⁸ For example, Queensland, Victoria, and Western Australia all have forms of an intensive community supervision order.

- whether its adoption would give rise to a fresh set of problems.

COMMUNITY CORRECTIONS ORDERS – OTHER JURISDICTIONS

Definition

7.4 An intensive correction order or an intensive supervision order³²⁹ (which we collectively refer to as a “CCO”) is a term of imprisonment, which is ordered to be served in the community, subject to compliance with a number of restrictions or obligations in relation to the conduct of the offender. CCOs were introduced in Australia in the 1990s³³⁰ and have been operating in New Zealand and Europe for considerably longer. In some jurisdictions, they are only available where a conviction is recorded.³³¹ In most instances, it is a precondition that the offender consent to the order.³³²

7.5 The CCO has been described as a community service order with teeth,³³³ because unlike a traditional community service order³³⁴, a breach may result in a court imposing a sentence of full-time custody. The CCO has usually been introduced to ‘fill the gap’ between community service and imprisonment.

³²⁹ In Western Australia they are known as Intensive Supervision orders (ISOs)

³³⁰ The *Sentencing Act* 1991 (Vic); Pt 6 *Penalties and Sentences Act* 1992 (Qld)

³³¹ s111 *Penalties and Sentences Act* 1992 (Qld); s19(1) *Sentencing Act* 1991 (Vic); s45(1) *Sentencing Act* 2002 (NZ)

³³² s117 *Penalties and Sentences Act* 1992 (Qld); s19(2) *Sentencing Act* 1991 (Vic)

³³³ Tasmanian Law Reform Institute, *Issues Paper No 2: Sentencing*, 2002

³³⁴ In all jurisdictions, a simple form of community-service order exists alongside the ICO. For example, in Victoria, Community-Based Orders, introduced under the *Penalties and Sentences Act* 1985, were retained and exist alongside the ICOs. CBOs are non-custodial sentences that may be up to 2 years duration, and can be imposed with or without conviction, when a person has been convicted of an offence punishable by imprisonment or a fine of more than 5 penalty units. The order includes core conditions and at least one program condition, with the selection of program conditions depending on the individual circumstances of the offender and the offence that was committed.

Duration of the order

7.6 In Victoria and Queensland the court may impose a CCO if it sentences an offender to a term of imprisonment of not more than 1 year.³³⁵ In Western Australia and New Zealand the term of a CCO set by the court must be at least 6 months and not more than 24 months.³³⁶

7.7 Under the Victorian and Western Australian schemes the court may not impose a CCO unless it has received a pre-sentence report in relation to the offender.³³⁷

Standard or Core Conditions

7.8 There are a number of standard or core conditions which may be imposed for a CCO in New Zealand, Queensland, Victoria and Western Australia. They include the following:

Good Behaviour

7.9 In each jurisdiction there is a primary condition that the offender does not re-offend during the period of the order,³³⁸ at the pain of being resentenced.

Reporting

7.10 In each jurisdiction there is a condition that the offender report to a community corrections centre or similar place within a certain time after the order comes into force, although the time specified varies.³³⁹

³³⁵ s12 *Penalties and Sentences Act 1992* (Qld); s19(1) *Sentencing Act 1991* (Vic)

³³⁶ s69(6) *Sentencing Act 1995* (WA); s54B(2) *Sentencing Act 2002* (NZ)

³³⁷ s19(1)(b) *Sentencing Act 1991* (Vic); s68 *Sentencing Act 1995* (WA)

³³⁸ In Victoria: s20(1)(a) *Sentencing Act 1991* (Vic); Queensland: ss114(1)(a) and 115(b) *Penalties and Sentences Act 1992* (Qld); Western Australia: s69(1)(a) & s69(4) *Sentencing Act 1995* (WA)

Supervision

7.11 There are also supervision or visitation requirements associated with the order common to all schemes. In Queensland the offender is to report to and receive visits from a corrective services officer at least twice a week for the period of the order.³⁴⁰ In Victoria the offender is to report to or receive visits from a community corrections officer at least twice a week or for such shorter period as is specified by the court,³⁴¹ whereas in Western Australia the offender must contact a community corrections officer at least once in any period of 28 days.³⁴² In New Zealand, the standard conditions require the offender to report to a probation officer at least once a week for the first 3 months of a sentence and thereafter at least once a month for the remainder of the sentence, and additionally as and when required by the probation officer.³⁴³ In New Zealand, unlike Western Australia, the court may not impose a condition that the offender submit to electronic monitoring.³⁴⁴

Association and travel restrictions

7.12 Associated with the supervision requirements are requirements that the offender inform the relevant Corrections Authority or officer of any change of residential address or employment. In Victoria and Queensland this must be done within 2 days after any such change.³⁴⁵ In New Zealand and Western Australia, an offender subject to such an

³³⁹ In Victoria the time period is 2 days s20(1)(b) *Sentencing Act* 1991 (Vic); in Queensland the time that is specified in the actual order s114(1)(b) *Penalties and Sentences Act* 1992 (Qld); in Western Australia and New Zealand it is within 72 hours after being released by the court s70 *Sentencing Act* 1995 (WA); s54F(1)(a) *Sentencing Act* 2002 (NZ)

³⁴⁰ s114(1)(c) *Penalties and Sentences Act* 1992 (Qld)

³⁴¹ s20(1)(c) *Sentencing Act* 1991 (Vic)

³⁴² s71(4) *Sentencing Act* 1995 (WA)

³⁴³ s54F(1)(b) *Sentencing Act* 2002 (NZ)

³⁴⁴ s54I(4)(c) *Sentencing Act* 2002 (NZ)

³⁴⁵ s20(1)(e) *Sentencing Act* 1991 (Vic); s114(1)(g) *Penalties and Sentences Act* 1992 (Qld)

order must not change his or her address and/or employment without prior permission from a probation/corrections officer.³⁴⁶ Additionally in Victoria, Queensland and Western Australia, an offender subject to a CCO may not leave the State where the order was made without the permission of a relevant officer.³⁴⁷

7.13 In New Zealand, the standard conditions include restrictions on residing at a particular address; associating with particular persons or persons of a specific class, and on engaging in particular employment, or occupations, where a probation officer has given a direction to that effect.³⁴⁸

Additional conditions

Curfews

7.14 Curfews may be imposed by the court in some jurisdictions. In Western Australia a curfew may be imposed for up to six months to restrict the movements of offenders when there is a high risk of them re-offending. It may apply for between 2 and 12 hours in any one day, with offenders also being liable to surveillance or electronic monitoring, at the direction of a community corrections officer.³⁴⁹ A person subject to a curfew may only leave the specified place to perform community corrections activities, to attend urgent medical or dental treatment, to avert or minimise a serious risk of death or injury to himself or another person, to obey an order such as a summons, or for a purpose approved

³⁴⁶ s54F(1)(d) *Sentencing Act* 2002 (NZ); s70(b) *Sentencing Act* 1995 (WA)

³⁴⁷ s20(1)(f) *Sentencing Act* 1991 (Vic); s114(1)(h) *Penalties and Sentences Act* 1992 (Qld); s70(c) *Sentencing Act* 1995 (WA)

³⁴⁸ s54F(1)(g) – (i) *Sentencing Act* 2002 (NZ)

³⁴⁹ s75 *Sentencing Act* 1995 (WA)

by a community corrections officer, or at the direction of a community corrections officer.

Other residential requirements

7.15 In Queensland, where an authorised officer directs, the offender must reside at a community residential facility, although for not longer than 7 days at a time.³⁵⁰ In New Zealand the court may also impose special conditions relating to the offender's place of residence.³⁵¹

Counselling and rehabilitative programs

7.16 Counselling and community service components are normally included in such orders.

7.17 In Victoria there is a core condition that the offender attend a community corrections centre for 12 hours a week for the duration of the order or for a shorter period specified in the order.³⁵² Not less than 8 of those 12 hours must be spent performing unpaid community work³⁵³ and the remaining hours, if any, must be spent undergoing counselling or treatment for any specified psychological, psychiatric or drug and alcohol problem.³⁵⁴ The court can attach to an order a special condition that the offender is to attend a specified program, if it is recommended in the pre-sentence report which may be residential or community based. It must be designed to address the factors which have contributed to the offenders' criminal behaviour.³⁵⁵

³⁵⁰ s114(1)(f) *Penalties and Sentences Act 1992* (Qld)

³⁵¹ s54I(3)(a) *Sentencing Act 2002* (NZ)

³⁵² s20(1)(d) *Sentencing Act 1991* (Vic)

³⁵³ s20(1)(d)(i) *Sentencing Act 1991* (Vic)

³⁵⁴ s20(1)(d)(ii) *Sentencing Act 1991* (Vic)

³⁵⁵ s21 *Sentencing Act 1991* (Vic)

7.18 Under the Queensland scheme it is a core condition that the offender participate and successfully perform any community service work,³⁵⁶ and take part in counselling or other programs³⁵⁷ as directed by the court or authorised corrective services officer up to a maximum of 12 hours in any one week.³⁵⁸ Unless the court or corrective services officer otherwise directs, an offender must attend programs for one-third of the time directed and perform community service work for two-thirds of the time directed.³⁵⁹ The CCO may require the offender to submit to medical, psychiatric or psychological treatment.³⁶⁰

7.19 In Western Australia an intensive supervision order may contain programme and community service requirements.³⁶¹ An offender may be ordered by the court to perform between 40 and 240 hours of unpaid community work, at least 12 hours of which must be performed each week.³⁶² Under a programme requirement the offender must obey the orders of a community corrections officer to undergo medical, psychiatric or other treatment, undergo assessment and treatment for substance abuse and attend educational, vocational or personal development programmes and courses.³⁶³

7.20 Under the core requirements of the New Zealand scheme, offenders must take part in any rehabilitative and reintegrative needs assessment as directed by a probation officer.³⁶⁴ Where there is significant risk of further re-offending and conditions additional to the standard conditions

³⁵⁶ s114(1)(e) *Penalties and Sentences Act 1992* (Qld)

³⁵⁷ s114(1)(d) *Penalties and Sentences Act 1992* (Qld)

³⁵⁸ s114(2) *Penalties and Sentences Act 1992* (Qld)

³⁵⁹ s114(2A) *Penalties and Sentences Act 1992* (Qld)

³⁶⁰ s115 *Penalties and Sentences Act 1992* (Qld)

³⁶¹ s72 *Sentencing Act 1995* (WA)

³⁶² s74 *Sentencing Act 1995* (WA)

³⁶³ s73(2) *Sentencing Act 1995* (WA)

³⁶⁴ s54F(1)(j) *Sentencing Act 2002* (NZ)

are required to reduce that risk, a court may impose appropriate conditions relating to attendance at employment related, educational, cultural, medical, psychological, rehabilitative and other programmes, as well as placement in the care of appropriate persons or agencies.³⁶⁵ The court can also impose conditions requiring the offender to take prescription medication, and any other condition the court sees fit.³⁶⁶

Breach Procedures

7.21 In all four of the jurisdictions reviewed³⁶⁷ breach action is a matter for the court.

7.22 Under the Victorian scheme a breach of a CCO without reasonable excuse constitutes an offence. The court which imposed the order may choose to impose a fine, and in addition must either vary or confirm the CCO, or cancel the order and commit the offender to prison for the portion of the term that was unexpired at the time of the offence.³⁶⁸ A distinguishing feature of the scheme lies in the stipulation that if the breach arises because an offender commits another offence punishable by imprisonment while subject to an intensive supervision order, the court must exercise the power to cancel the order and commit the offender to prison unless it is of the opinion that it would be unjust to do so in view of any exceptional circumstances which have arisen since the CCO was made.³⁶⁹

³⁶⁵ ss54G and 54H *Sentencing Act* 2002 (NZ). See also s54I(3)(c)

³⁶⁶ s54I(3) *Sentencing Act* 2002 (NZ)

³⁶⁷ s26 *Sentencing Act* 1991 (Vic); s120 & s127 *Penalties and Sentences Act* 1992 (Qld); s133 *Sentencing Act* 1995 (WA); s54K *Sentencing Act* 2002 (NZ)

³⁶⁸ s26 *Sentencing Act* 1991 (Vic)

³⁶⁹ s26(3B) *Sentencing Act* 1991 (Vic)

7.23 In Queensland a contravention of a CCO similarly constitutes an offence which is punishable by a fine.³⁷⁰ The court may, additionally or alternatively, revoke the order and commit the offender ‘to prison for the portion of the term of imprisonment to which the offender was sentenced that was unexpired on the day the relevant offence was committed.’³⁷¹ The court also has a power to amend or revoke a CCO where it is satisfied that the offender is unable to comply with the order because of a material change in his or her circumstances, or where his or her circumstances were wrongly stated or not accurately presented to the court, or where the offender is no longer willing to comply with the order. It may then resentence the offender.³⁷²

7.24 In Western Australia it is a term of the order that if the offender commits another offence he or she may be sentenced again for the original offence.³⁷³ In such a case the court has powers to confirm, to amend or to cancel the order and sentence the offender for the original offence in any manner that would be available to the court if it had just convicted the offender. Similar powers apply in relation to a breach.³⁷⁴ Additionally, breach of an intensive supervision order without reasonable excuse constitutes an offence attracting a fine of up to \$1000.³⁷⁵

7.25 In New Zealand the court may, on the application of the offender or of a probation officer, remit, suspend or vary any special conditions of a sentence of intensive supervision; impose additional special conditions;

³⁷⁰ s123(1) *Penalties and Sentences Act 1992* (Qld)

³⁷¹ s127(1) *Penalties and Sentences Act 1992* (Qld); and see the additional sanctions available under s125 of the Act.

³⁷² ss120 and 121 *Penalties and Sentences Act 1992* (Qld)

³⁷³ s69(i) *Sentencing Act 1995* (WA)

³⁷⁴ ss130(1) and 133(1) *Sentencing Act 1995* (WA)

³⁷⁵ ss131 and 132 *Sentencing Act 1995* (WA)

or cancel the sentence and substitute another sentence that could have been imposed on the offender at the time when the offender was convicted of the offence for which the sentence was imposed.³⁷⁶ Additional penalties may be imposed for a breach of an ISO without reasonable excuse, including 6 months imprisonment and fines of up to \$1500.³⁷⁷ Such a breach constitutes an offence.³⁷⁸

ADVANTAGES AND DISADVANTAGES OF COMMUNITY CORRECTION ORDERS

Advantages

7.26 The CCO is often presented as sharing many of the advantages commonly associated with home detention and periodic detention.³⁷⁹ For example,

- It permits the courts to impose a sentence of imprisonment which emphasises its seriousness and which has a symbolic value for victims;
- It enables the offender to maintain contact with family, friends and employment;
- It can address the causes of the offending behaviour by providing for frequent contact with a community corrections officer and opportunities for treatment, counselling and education;

³⁷⁶ s54K *Sentencing Act 2002* (NZ)

³⁷⁷ s70A *Sentencing Act 2002* (NZ)

³⁷⁸ s70A *Sentencing Act 2002* (NZ)

³⁷⁹ Tasmanian Law Reform Institute, *Issues Paper No 2: Sentencing*, 2002

- It can include an element of detention in the form of a curfew or other residential restrictions;
- It avoids the contaminatory effects of imprisonment;
- It is cheaper than full-time imprisonment;
- It is compatible with the principles of restorative justice by returning a benefit to the community in the form of work on community projects, while retaining a strong element of punishment; and
- Breach of its conditions can attract significant sanctions including a requirement to serve out the balance of the un-served term in full time custody.

7.27 The NSW Law Society³⁸⁰ identified that the benefit of the CCO lies in its rehabilitative focus. Several submissions suggested that it could be a suitable sentencing option for offenders living in rural and smaller towns where a periodic detention centre is not available, or for offenders who would have to travel long distances to the nearest periodic detention centre. Several other submissions expressed a similar view.³⁸¹

³⁸⁰ Submission 9: NSW Law Society

³⁸¹ For example, Submission 1: The Chief Judge of the District Court, Justice Blanch; Submission 3: Magistrate Zdenkowski; and Submission 8: The Chief Magistrate of the Local Court Judge Henson

Disadvantages

7.28 Some disadvantages have been identified, including:

- The risk of net-widening³⁸²;
- Limitations on the availability of suitable programs which can reduce its value ³⁸³;
- Diminished judicial confidence in the sentencing option may be lacking due to breach rates resulting from insufficient resources and inflexibility;
- Orders which are too short for effective rehabilitation; and
- Undue severity of the order due to inflexible breach conditions.³⁸⁴

7.29 The Law Society³⁸⁵ warned that CCOs require the availability of rehabilitative programs and appropriate community service options that do not currently exist in many rural and remote areas. In order for CCOs to operate effectively in NSW, it said, there would need to be a roll out of uniform rehabilitative and community service options on a State wide basis. Additionally, it cautioned, such orders would have a more limited application than periodic detention if the maximum sentence was one of imprisonment for one year or less.

³⁸²Tominaro J & Kapardis A, 'A Criminological Study of the Use of Intensive Correction Orders in Victoria, Australia' (1996) 40(1) *International Journal of Offender Theory and Comparative Criminology* 63-73.; Freiberg A & Ross S, *Sentencing Reform and Penal Change: The Victorian Experience*, Federation Press, Melbourne, 1999 at 126ff

³⁸³ Pugh R, 'Rurality and Probation Practice' (2007) 54(2) *Probation Journal* 142-156 at 150

³⁸⁴ Popovic J, 'Meaningless vs Meaningful Sentences: Sentencing the Unsentenceable', *Sentencing: Principles, Perspectives & Possibilities Conference*, Canberra, 10-12 February 2006

³⁸⁵ Submission 9: NSW Law Society

THE DEPARTMENT OF CORRECTIVE SERVICES PROPOSAL

Proposal Outline

7.30 The Department of Corrective Services³⁸⁶ supported the introduction of a sentence to be served pursuant to an order requiring intensive correction in the community. It suggested that this order should be named a ‘Community Curfew Order.’ Essentially, the sentence would constitute a sentence of imprisonment taking its place between home detention and community service, and having some of the features of a suspended sentence. Its proposal would see the abolition of periodic detention.

7.31 The order proposed would provide for:

- an element of curfew to replace the current custodial element of periodic detention;
- community work and program participation to allow reparation to the community and to provide an opportunity to address offending or contributory behaviour;
- varied levels of supervision and compliance with conditions to allow an offender to be progressed or regressed depending on his or her behaviour;
- A pronouncement of the sentence as one of imprisonment which would effectively be suspended subject to compliance with the order; and
- Breach proceedings to be heard by the Parole Authority.

³⁸⁶ Submission 21 – NSW Department of Corrective Services

Implementation of the Department of Corrective Services Proposal

7.32 The Department of Corrective Services proposal has given attention to several key elements. They include the following:

Duration of the sentence

7.33 The Department of Corrective Services³⁸⁷ suggested that the maximum sentence under the proposed system be set at 18 months, noting that the stringent requirements proposed for the order may set offenders up for failure if the sentence was any longer. The Department also noted that while a sentence of periodic detention may currently extend for 3 years³⁸⁸, a relatively small proportion of offenders actually receive sentences of this length.³⁸⁹

7.34 As noted later, one of the criticisms of Intensive Corrections Orders is that the orders have not been of sufficient duration to enable effective program delivery.

Imposition of the order

7.35 Under the Department of Corrective Services proposal a court would first determine whether a custodial sentence is warranted. If so, the sentence would then be suspended, or the commencement date delayed, pending assessment by a Probation and Parole officer ('P&P officer')³⁹⁰ of the offender's suitability for an order. The assessment would focus on:

³⁸⁷ Submission 21: NSW Department of Corrective Services

³⁸⁸ s6(1) *Crimes (Sentencing Procedure) Act 1999*

³⁸⁹ Only 6% of the periodic detention population has a sentence of greater than 18 months.

³⁹⁰ The Department of Corrective Services submissions refer to a Community Offender Services officer, however for consistency sake, the Council has used the term Probation and Parole officer (P&P officer) throughout this report.

- the level of risk of the offender in terms of recidivism;
- domestic issues which may require the offender to live away from home;
- community concerns;
- the seriousness of the current offence;
- the resources available in the offender's place of residence;
- the availability of intervention programs; and
- the offender's suitability for community service work.

7.36 While the Department of Corrective Services has suggested that no offences would be automatically excluded from consideration for participation in the scheme, it has also advised that, in the case of convicted sex offenders, only those who fall within the low-moderate risk category³⁹¹ should be referred for a full suitability assessment for possible placement on an order. It noted that Periodic Detention is currently available for a restricted group of sexual and violent offenders.

7.37 If the offender is assessed as suitable for an order, then, so long as the assessment was accepted by the court, it could suspend the sentence for a period of 18 months, contingent on the offender successfully completing the requirements for community work and program participation.

7.38 Under the Department of Corrective Services proposal, the court would set the total number of hours that an offender has to complete by way of community work and/or participation in therapeutic intervention programs, with a minimum requirement of ten hours per week. The Department proposed that the specific detail of the requirements for

³⁹¹ As assessed against the Static 99 psychometric tool

community work and program participation should not be determined by the sentencing court. Rather, it suggested such decisions should be made within the case management process, and subject to potential change over the course of an order as the case manager (normally a P&P officer) identified factors contributing to offending behaviour, that need to be addressed.

Supervision

7.39 The Department of Corrective Services has proposed that there be 3 levels of supervision by a P&P officer of an offender subject to an order as follows:

LEVEL ONE (approximately first third of sentence)	LEVEL TWO (approximately second third of sentence)	LEVEL THREE (approximately final third of sentence)
Curfew – 10 hours (eg at home between 8pm-6am adjustable for work)	Discretionary curfew	No curfew
Work or meet Centrelink criteria	Work or meet Centrelink criteria	Work or meet Centrelink criteria
Community work or therapeutic intervention Minimum: 10 hours/week	Therapeutic programs as required	Therapeutic programs as required

EVALUATION OF THE DEPARTMENT OF CORRECTIVE SERVICES PROPOSAL BY REFERENCE TO COMPARABLE SCHEMES

7.40 The proposed community curfew order sentencing scheme shares many of the features of the schemes in use in the four jurisdictions earlier surveyed. The experience of those jurisdictions provides some insight into the potential benefits and disadvantages of the Department of Corrective Services proposal. This is of some importance, as there is an obvious concern as to whether the community and sentencing judges

would welcome the replacement of periodic detention by the proposed order, or would regard it simply as a variant of a community service order, or of an unsupervised suspended sentence with all of the unsatisfactory aspects which have been identified relating to compliance and enforcement of such options.

Analysis of Existing Schemes

Prevalence of the use of intensive correction orders

7.41 According to Freiberg and Ross in 1999³⁹² this form of order

“... failed to capture the imagination of sentencers and (has) had very little impact on sentencing patterns, constituting between one and 2 percent of all sentences imposed”.

7.42 In 2007, the Sentencing Advisory Council³⁹³ reported that ICOs in Victoria were imposed on 3.0% of offenders sentenced in the higher courts and approximately 2% of offenders sentenced in the Magistrates’ Court during 2006-2007. There was no clear trend for the ICO rate in the higher courts³⁹⁴ over the preceding 7 years. Its use ranged between a low of 2% in 2002-2003 to a high of 3.5% in 2003-2004.³⁹⁵

7.43 According to the Queensland Department of Corrective Services³⁹⁶ the number of ICOs issued as a proportion of all probation orders imposed between 2003-2006 remained fairly steady between 2003 and 2006, ranging from a low of 7.3% in 2003 to a high of 7.97% in 2006. In

³⁹² Freiberg A & Ross S, *Sentencing Reform and Penal Change: The Victorian Experience*, Federation Press, Melbourne, 1999 at 126ff

³⁹³ Fisher G, *Community Sentences in Victoria: A Statistical Profile*, Sentencing Advisory Council, Melbourne, November 2007

³⁹⁴ Data was unavailable for the Magistrates Court.

³⁹⁵ Fisher G, *Community Sentences in Victoria: A Statistical Profile*, Sentencing Advisory Council, Melbourne, November 2007 at 4, Figure 2

³⁹⁶ Queensland Department of Corrective Services, *Annual Report 2005-2006*, Table 11 – Community-based supervision orders as at 30 June 2006

2007 however, the proportion of intensive corrections orders imposed dropped to a low of 5.6%.³⁹⁷ No reason was offered for this relatively dramatic decline which is particularly striking given that home detention ceased to be available in that State as a sentencing option in 2006-2007.

7.44 In Western Australia, the use of intensive supervision orders is increasing, although there is no evidence that they are being issued more frequently than the probation or community service orders that they replaced.³⁹⁸ ISOs have increased by 59.9% since their introduction in 1997,³⁹⁹ and comprised 21% of all community-based orders imposed in 2005, an increase of 8.8% on the preceding year.⁴⁰⁰ This may, in part, be due to a flow-on effect from legislative changes in 2004, which abolished prison sentences of less than six months, widened the category of offences for which community-based sanctions could be imposed, and required that non-custodial options must be considered before imprisonment is imposed.⁴⁰¹

³⁹⁷ Queensland Department of Corrective Services, *Annual Report 2006-2007*, 2006 Table 11 – Community-based supervision orders as at 30 June 2007

³⁹⁸ Auditor General for Western Australia, *Report 3: Implementing and Managing Community Based Sentences*, May 2001 at 5

³⁹⁹ Loh N, Maller M, Fernandez J, Ferrante A & Walsh M, *Crime and Justice Statistics for Western Australia: 2005*, The University of Western Australia Crime Research Centre, March 2007 at 158

⁴⁰⁰ The demographic breakdown of ISO offenders was as follows: 26.4% were Indigenous; 80% were male; 47.2% were aged between 18-25 years; and the most serious offence was offences against the person, at 37.1% - Loh N, Maller M, Fernandez J, Ferrante A & Walsh M, *Crime and Justice Statistics for Western Australia: 2005*, The University of Western Australia Crime Research Centre, March 2007 at 158

⁴⁰¹ Auditor General for Western Australia, *Report 2: Follow-up Performance Examination: Implementing and Managing Community Based Sentences*, May 2005 at 12

Breach rates

7.45 The Sentencing Advisory Council⁴⁰² of Victoria has reported a three-year breach rate⁴⁰³ for ICOs imposed in the higher courts⁴⁰⁴ between 2000-2001 and 2003-2004, of 35%⁴⁰⁵. This compares with a 25.4% breach rate for ordinary community-based orders (CBOs), perhaps reflecting the likelihood that higher risk offenders are placed on ICOs than on the less intensive CBOs. Breach rates for ICOs were reported to have fluctuated considerably over the last 7 years, from a high of 50% in 2000-2001 to a low of 26.3% in 2002-2003.

7.46 The Queensland Department of Corrections reports completion rates of community service orders rather than breach rates. After a period of relative stability, the completion rate of intensive corrections orders dropped from 68.7%⁴⁰⁶ in 2003-2004, to 57% in 2006-2007.⁴⁰⁷ At the same time, the completion rate for community service also fell, to 57.8% in 2006-2007. In contrast, the successful completion rate of home detention was 84.5%, although that form of order was abolished in 2006-2007.⁴⁰⁸ In other words, the breach rate for ICOs increased from 31.3%

⁴⁰² Fisher, G *Community Sentences in Victoria: A Statistical Profile*, Sentencing Advisory Council, Melbourne, November 2007 at 10

⁴⁰³ The data examines breach of a condition of an ICO imposed in the higher courts which has resulted in a court hearing. Breach action may be heard up to three years after the end of the sentence, therefore three-year breach rates were shown.

⁴⁰⁴ Insufficient data were available on breaches for the Magistrates Court. As the vast majority of ICOs are imposed in the Magistrates Court, breach rates cited here may not accurately reflect breach rates for both court levels.

⁴⁰⁵ Males (35.9%) were more likely to breach ICOs than females (28.6%), and the age group most likely to breach was the 25-34 group (41.3%), closely followed by the under 25 year old group (40%). Offenders aged 55 and over were the least likely to breach (0%). Breach rates amongst offenders serving an ICO for 'other offences' (such as offences against justice procedures; public order offences; and weapons offences) were the highest (50%), followed by offences against the person (41.1%).

⁴⁰⁶ Queensland Department of Corrective Services, *Annual Report 2005-2006* Table 12

⁴⁰⁷ Queensland Department of Corrective Services, *Annual Report 2006-2007* Table 12, 79

⁴⁰⁸ Queensland Department of Corrective Services, *Annual Report 2006-2007* at 79, Table 12

to 43%, and the breach rate for community service increased to approximately 42%. In contrast, the breach rate for home detention in 2005-06 (the last year statistics are available) was 15.5%.

7.47 In Western Australia, it has been estimated that less than 50% of all ISOs imposed between 1997 and 2003-04, have been successfully completed⁴⁰⁹ This is a higher breach rate than that of ordinary community service orders (40% of which have been breached in the same period). As with Victoria, this possibly reflects the fact that higher-risk offenders are placed on ISOs compared to ordinary CSOs.

7.48 The Corrections Department of New Zealand⁴¹⁰ reported that during 2005-2006, it managed approximately 65,000 community-based sentences. There were 18,626 formal breach or recall actions commenced during this period, giving an overall breach rate for community-based sentences of 28.6%. Further analysis of the data in the Departmental report reveals an identical breach rate of 26% for offenders on sentences of supervision⁴¹¹ and those serving a community work sentence.⁴¹² In contrast, only 7% of offenders serving a sentence of home detention breached the special conditions imposed upon them under the order.⁴¹³

7.49 Sentences served in the community are usually made so as to give a final chance to offenders to avoid incarceration and to modify their behaviour. The Auditor General for Western Australia cautioned that although higher completion rates are desirable, lower completion rates

⁴⁰⁹ Auditor General for Western Australia, *Report 2: Follow-up Performance Examination: Implementing and Managing Community Based Sentences*, May 2005 at 5

⁴¹⁰ New Zealand Department of Corrections, *Annual Report 2006*, at 79

⁴¹¹ New Zealand Department of Corrections, *Annual Report 2007* at 79. A breach in this jurisdiction refers to a breach of the special conditions attached to various orders.

⁴¹² New Zealand Department of Corrections, *Annual Report 2006-07*, 2007 at 80

⁴¹³ New Zealand Department of Corrections, *Annual Report 2006-07*, 2007 at 80

do not necessarily imply that the case-management itself is failing. The primary responsibility for successfully completing a sentence which is to be served in the community rests with the offenders themselves.⁴¹⁴

7.50 Moreover, calculating successful completion can be difficult. A recorded completion means only that the offender has completed the terms of the order, and has not been breached or revoked: it does not guarantee that an offender is less likely to re-offend. Conversely, although an offender may re-offend during a sentence served in the community, or afterwards, it does not necessarily follow that he or she failed to benefit from the supervision and treatment programs provided.

Outcomes of breach proceedings

7.51 The Sentencing Advisory Council⁴¹⁵ has reported that in Victoria, cancellation of the ICO, followed by an order that the offender serve the remainder of his or her term in full time custody, was the most common outcome of breach proceedings (approximately 40%), taken between 2000-2001 and 2003-2004.⁴¹⁶

7.52 Between 1997 and 2001, the courts in Western Australia have generally responded to breaches of community-based sentences by imposing a sentence of full time imprisonment (31%) or a sentence of suspended imprisonment (15%).⁴¹⁷ The chances of being sentenced to

⁴¹⁴ Auditor General for Western Australia, *Report 2: Follow-up Performance Examination: Implementing and Managing Community Based Sentences*, May 2005 at 12

⁴¹⁵ Fisher G, *Community Sentences in Victoria: A Statistical Profile*, Sentencing Advisory Council, Melbourne, November 2007 at 14

⁴¹⁶ This represented 14% of all ICOs imposed during the relevant period.

⁴¹⁷ Auditor General for Western Australia, *Report 3: Implementing and Managing Community Based Sentences*, May 2001 at 25. Although slightly outdated, this data is the most current statistical information available.

prison were greatly increased if the breach had been caused by further offending, rather than by failure to comply with a condition. Fifty-six percent (56%) of the breaches of ISOs during this period arose because an offender (almost exclusively ‘high risk’ offenders) had re-offended. Seventy-five percent (75%) of high-risk offenders who breached their orders by re-offending subsequently received a prison sentence.⁴¹⁸

Net-widening

7.53 One of the principal advantages claimed for community corrections orders, in all their various forms, is that they are suitable for offenders who are rejected for simple community-service orders on the basis of their high risk of recidivism, and who would have otherwise received short sentences of full-time imprisonment.⁴¹⁹ It is assumed that their availability will allow such offenders to avoid the contaminating and destructive effects of exposure to the prison culture, will allow them to retain their employment and family contact, and will also relieve prison overcrowding.⁴²⁰

7.54 International research suggests that, notwithstanding legislation and caselaw which direct that incarceration is to be imposed as a sanction of last resort, the introduction of sentencing options which are to be served in the community has resulted in net-widening.⁴²¹ Examination of research literature concerning the alternative sanctions

⁴¹⁸ Auditor General for Western Australia, *Report 3: Implementing and Managing Community Based Sentences*, May 2001 at 27

⁴¹⁹ Ministry of Justice Criminal Justice Group, *Review of Community Based Orders in New Zealand* (1999) at 18

⁴²⁰ See for example, The Hon. D. M. Wells, Second Reading Speech, 5 November 1992 (Qld); The Right Hon Helen Clark, Media release: *Effective interventions package launched*, 15 August 2006; Auditor General for Western Australia, *Report 3: Implementing and Managing Community Based Sentences*, May 2001 at 9

⁴²¹ In consultation, Professor Mike Hough, Professor of Social Policy and Director of the Criminal Policy Research Unit, South Bank University, 10/08/07

in Europe, the United States, Canada, Australia and New Zealand shows that such options have not been used uniformly as a substitute for imprisonment. Instead, they have often been employed in the place of lesser, nonincarcerative sentences such as fines.⁴²² This has occurred even where the legislation has prescribed that a sentence to be served in the community can only be imposed on offenders who would otherwise receive a prison sentence.⁴²³

Supervision

7.55 Supervision is an important part of a CCO. Although it was expected that high-risk offenders would be supervised weekly, the Auditor General in Western Australia⁴²⁴ found that between 1997 and 2001, only 41% of such offenders had received this level of supervision, and only 23% were supervised fortnightly. Aboriginal offenders, it was reported, had received less frequent supervision than non-Aboriginal offenders.⁴²⁵

Rehabilitative programs

7.56 The New Zealand experience suggests that care needs to be taken with the introduction of intensive corrections orders to ensure that the key objective of delivering educative or rehabilitative programs is met. This would appear to be the reason behind the several amendments, which have been made in relation to the community-based sentencing options available in that country.

⁴²² Hough M, Jacobson J & Millie A, *The Decision to Imprison: Sentencing and the Prison Population*, Prison Reform Trust, South Bank University, London, 2003 at 61

⁴²³ Spaans E C, 'Community Services in the Netherlands: Its effects on recidivism and net-widening' (1998) 8 *International Criminal Justice Review* 1-14 at 13

⁴²⁴ Auditor General for Western Australia, *Report 3: Implementing and Managing Community Based Sentences*, May 2001 at 35

⁴²⁵ Only 57% of the Aboriginal offenders had received weekly or fortnightly supervision, compared with 73% of the non-Aboriginal offenders.

7.57 Prior to the commencement of the *Sentencing Act 2002* there were four community based sentencing options in New Zealand: periodic detention, community service, community programme and supervision.⁴²⁶ The *Sentencing Act 2002* abolished the sentences of periodic detention, community service and community programme, replacing them with the sentence option known as Community Work.⁴²⁷ The sentence of supervision was retained under the Act, although it was modified to incorporate the care aspect of the abolished Community Programme sentence.

7.58 The recent passage of the *Criminal Justice Reform Act 2007*, created an additional two community-based sentencing options, Community Detention⁴²⁸ and Intensive Supervision⁴²⁹. The additional sentencing options were introduced to ensure that offenders received program assistance integral to reducing recidivism.⁴³⁰

⁴²⁶ Periodic detention involved an offender reporting to a work centre for up to 18 hours per week, for a term not exceeding 12 months. No individual period of detention could exceed 10 hours. Community service involved an offender doing between 20 and 200 hours unpaid work for a community group, under the supervision of a community group sponsor. Community programme sentences involved an offender being placed in the care of an appropriate group or individual, and participating in a programme for a period not exceeding 12 months. Supervision was introduced in 1985, to replace the sentence of probation. It was for a period of between 6 months and 2 years and all offenders sentenced to supervision were subject to standard conditions, such as restrictions relating to the offender's work, residence or associates, and to any special conditions imposed by the court, such as those relating to programmes.

⁴²⁷ Under a Community Work sentence the offender must report to a probation officer who determines the appropriate placement of the offender, ie at a community work centre or another agency, or a combination of both. The sentence can range from a minimum of 40 hours to a maximum of 400 hours.

⁴²⁸ A sentence of Community Detention (not yet in force) is an electronically monitored curfew that requires an offender to remain at a specified address between certain hours, per ss69B - 69M *Sentencing Act 2002* (NZ)

⁴²⁹ A sentence of Intensive Supervision is intended to be a rehabilitative sentence that involves probation officers working closely with offenders to assist them in accessing courses and services in the community, as per ss54B - 54L *Sentencing Act 2002* (NZ)

⁴³⁰ The Right Hon Helen Clark, Media release: *Effective interventions package launched*, 15/08/06; Media Release, Rethinking Crime and Punishment, *Community Sentencing Options Need Further Work*, New Zealand, 25/7/07

7.59 The implementation of the program component of ISOs in Western Australia has been problematic. The Auditor General reported in 2001 that there had been ‘inconsistent and ad hoc’ attempts to secure and contract treatment programs, and “little or no management or coordination of internal and external program providers”.⁴³¹ Waiting times to access programs not infrequently exceeded three months, and the limited availability of popular programs restricted access to those offenders whose orders specifically mandated a program component of that kind. For example, although 60% of offenders had been assessed as having a substance abuse problem, less than half were referred to substance abuse counselling.⁴³²

7.60 It was reported that the lack of a general evaluation of the effectiveness of the treatment programs that were ordered under intensive supervision orders in that State made analysis, as to ‘what works’ to reduce recidivism, difficult.⁴³³ The report noted that the failure to provide the necessary interventions and the appropriate assistance, that would enable offenders to address their offending behaviour, places them at an increased risk of becoming repeat offenders and remaining in contact with the criminal justice system in the long term. Seen to be associated with this risk was the danger that such offenders will graduate to full time prisoner status, which carries with it a considerable financial burden on the State.⁴³⁴

⁴³¹ Auditor General for Western Australia, *Report 3: Implementing and Managing Community Based Sentences*, May 2001 at 7

⁴³² Auditor General for Western Australia, *Report 3: Implementing and Managing Community Based Sentences*, May 2001 at 36 - 37

⁴³³ Auditor General for Western Australia, *Report 3: Implementing and Managing Community Based Sentences*, May 2001

⁴³⁴ Auditor General for Western Australia, *Report 3: Implementing and Managing Community Based Sentences*, May 2001 at 13

Impact on vulnerable communities

7.61 The Deputy Chief Magistrate of Victoria⁴³⁵ has questioned the suitability of intensive corrections orders for vulnerable members of the community, noting that the homeless, poor, seriously drug dependent and mentally impaired often “have lives which are too chaotic to enable them to comply with community corrections orders.” In particular, she observed that “ICO’s, with their mandatory 12 hours per week Community Correction Centre attendance and other onerous program requirements are too difficult for many mentally impaired persons to negotiate.”⁴³⁶ A concern is that offenders may be set up to fail, as “in the event of a breach either by noncompliance or by further offending, the initial charges are to be returned to court and the offender is to be resentenced in respect of them. Mentally impaired persons find it difficult to maintain conditions and to remain offence free.”⁴³⁷

7.62 This is not an argument against the introduction of an intensive or community corrections order. Rather it points to the need for any pre sentence assessment to give particular attention to the presence in the offender of any of these characteristics.

⁴³⁵ Popovic J, ‘Meaningless vs Meaningful Sentences: Sentencing the Unsentenceable’, *Sentencing: Principles, Perspectives & Possibilities Conference*, Canberra, 10-12 February 2006, at 7.

⁴³⁶ Popovic J, ‘Meaningless vs Meaningful Sentences: Sentencing the Unsentenceable’, *Sentencing: Principles, Perspectives & Possibilities Conference*, Canberra, 10-12 February 2006, at 7.

⁴³⁷ Popovic J, ‘Meaningless vs Meaningful Sentences: Sentencing the Unsentenceable’, *Sentencing: Principles, Perspectives & Possibilities Conference*, Canberra, 10-12 February 2006, at 7, 8.

Capacity of community agencies to respond to the requirements of intensive supervision or correction orders

7.63 One commentator⁴³⁸ has raised concerns regarding the increased pressure placed on community agencies situated in regional or rural areas, in seeking to meet the requirements of the intensive correction / supervision model:

“Rural providers often face a dilemma in deciding how best to organize their services. If they centralize them to maintain efficiency and preserve service capability, they incur higher travel costs and run the risk of becoming isolated and distant from the communities they serve. On the other hand, if they localize them, they may find it difficult to respond satisfactorily to some of the specialist demands made upon them, and consequently, rural courts may not be able to utilize the full range of sentencing options. For example, small rural offices operating in areas with a poor infrastructure might find the requirements of Intensive Supervision Orders difficult to meet, or may not be able to assure the court that the necessary activity requirements for, say, education or training can be met locally, or can only be met by severely disrupting an offender’s existing commitments in a way which may be counterproductive to its aims”.

7.64 In Western Australia, it has been reported, the frequent absenteeism, failure to complete the community work assigned and offender apathy has led to a reluctance by some community agencies to offer community work placements or to the placement of exhaustive restrictions on the offenders that they accept.⁴³⁹ Agency criticism was directed to the limited support provided for placements, and to the inadequacy of the screening of offenders so as to ‘weed out’ unsuitable candidates.

⁴³⁸ Pugh R, ‘Rurality and Probation Practice’ (2007) 54(2) *Probation Journal* 142-156 at 150

⁴³⁹ Auditor General for Western Australia, *Report 3: Implementing and Managing Community Based Sentences*, May 2001 at 41

7.65 The Legislative Council Standing Committee on Law and Justice⁴⁴⁰ has previously explored the restricted availability in New South Wales of the agencies that can accept community service placements, noting the particular difficulties which exist in rural areas. The existing barriers included the requirements arising under the *Occupational Health and Safety* Act 2000 which can place too large a strain on some non-profit organisations; concerns in relation to public liability insurance⁴⁴¹, and the significant costs associated with ensuring that offenders are provided with adequate supervision and equipment. The Committee also observed that community attitudes to community service orders were likely to be more negative in rural areas and small communities and that participating agencies may perceive a stigma associated with offering work placements to known offenders.

Judicial and community perceptions

7.66 The Auditor General in Western Australia noted that, while magistrates had expressed general support for community-based sentences, they had also reported some concerns about their implementation, including the fact that⁴⁴²

- The spirit of the order was not always carried out;
- Supervision was not always as thorough as was intended due to the large caseloads and the geographical area that needed to be covered;

⁴⁴⁰ New South Wales Parliament, Legislative Standing Committee on Law and Justice, *Report No 30: Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006 at.73 - 83

⁴⁴¹ Although legislative provisions exist ensuring that any civil liability would assumed by the Crown in place of the agency providing community service placements

⁴⁴² Auditor General for Western Australia, *Report 3: Implementing and Managing Community Based Sentences*, May 2001 at 19

- Breach action was not always firm or timely;
- Community work was difficult to find in some regions;
- Programs may not be suitable or effective; and that
- Information on program outcome was limited.

7.67 There is a risk that some of the negative community perceptions that currently exist in relation to community service orders in NSW, would have a similar flow on effect for a CCO, although that should be capable of being addressed by reference to the fact that it is a sentence of imprisonment, and potentially subject to more stringent sanctions for breach.

7.68 This could also be overcome through the use of sentencing guidelines and by legislation which:

- Establishes the place of such orders in the sentencing hierarchy;⁴⁴³
- Directs that a CCO is only to be imposed in circumstances where the court would otherwise have sentenced the offender to imprisonment;
- Directs that a CCO should not be imposed if the purpose for which the sentence is imposed can be achieved by one of lesser severity; and which

⁴⁴³ For example, s10A *Sentencing Act 2002* (NZ)

- Directs that a CCO should only be imposed where the court is satisfied that it would reduce the likelihood of the offender re-offending through the rehabilitation and reintegrative elements of the sentence.

A COMMUNITY CORRECTIONS ORDER FOR NEW SOUTH WALES

7.69 In this section, we examine the form that a sentencing option of the kind discussed earlier in this Part could take in New South Wales. As noted earlier our preferred title is a Community Corrections Order (CCO). In developing this model we have paid careful regard to the precedents contained in the legislation in force in the other jurisdictions surveyed.

7.70 What is set out in the remainder of this Part is a general framework for a possible sentencing model. Necessarily, if a decision is made in principle for its adoption, further details would need to be provided, in relation to its application, implementation and supervision, of the kind that have been developed for the individual categories of sentence that exist and which are contained in the *Crimes (Administration of Sentences)* Act 1999 and the Regulations under that Act. Their development would require further consultation and input from the Department of Corrective Services and the Parole Authority.

Availability of a Community Corrections Order

7.71 The option should be available generally, i.e. without limitation in relation to specific offences, in circumstances where:

- a) The offender has been convicted of an offence punishable by imprisonment and that conviction is recorded;
- b) A pre-sentence report has been prepared by a P&P officer confirming that the offender is suitable for a community corrections order, and that the facilities and services required for its performance and supervision are available.⁴⁴⁴
- c) The sentencing judge is satisfied that:
 - the case is one requiring a sentence of imprisonment;
 - a CCO would reduce the likelihood of further offending by the offender through the rehabilitative and therapeutic programs that could be provided;
 - the offender is over the age of 18 years;⁴⁴⁵
 - the offender agrees to the terms of the order, and agrees to comply with the order as made;
- d) Proper attention is given to the statutory purposes of sentencing,⁴⁴⁶ and to the other general directions applicable to sentencing either under the Act⁴⁴⁷ or at common law.

7.72 Although restrictions currently exist in relation to the circumstances in which periodic detention and home detention are available, for example excluding from periodic detention those who have

⁴⁴⁴ ss68 and 69 *Crimes (Sentencing Procedure) Act 1999*. This report would need to address the level of the offender's risk of recidivism, the seriousness of the conviction, community concerns, the availability of intervention programs and resources, and the ability of the offender to perform community work.

⁴⁴⁵ In this respect, reference is made to the observations previously made in relation to the fact that periodic detention has not been regarded as serving any beneficial purpose in relation to juvenile offenders.

⁴⁴⁶ Pursuant to s3A *Crimes (Sentencing Procedure) Act 1999*

⁴⁴⁷ For example, ss21A–24 *Crimes (Sentencing Procedure) Act 1999*

previously served a sentence of full-time imprisonment of 6 months or more⁴⁴⁸ and those who are convicted of prescribed sexual offences⁴⁴⁹, we do not envisage that in the present context such restrictions should operate by way of an automatic exclusion.⁴⁵⁰ Rather they should be matters to be taken into account in the suitability assessment, which would parallel that currently required for an offender as a pre-condition to an order for periodic detention or home detention.

7.73 Clearly the option would not be available in relation to offences of murder, or to offences falling within the Standard Non-Parole Periods Scheme, or to serious indictable offences generally, save in exceptional circumstances, because of the proposed maximum duration of the order.

7.74 It is also likely that as a result of the pre-sentence assessment, moderate-high risk sex offenders, repeat domestic violence offenders, and those with serious intellectual or psychological disabilities or obviously chaotic personal circumstances would be excluded.

The Sentence and Order

7.75 The essential elements of the sentence and order are as follows:

- a) The sentence should be one of imprisonment, which the court directs is to be served by way of a CCO;⁴⁵¹

⁴⁴⁸ s65A *Crimes (Sentencing Procedure) Act 1999*

⁴⁴⁹ s65B *Crimes (Sentencing Procedure) Act 1999*

⁴⁵⁰ An even wider list of exclusions applies in the case of home detention under ss76 and 77 of the *Crimes (Sentencing Procedure) Act 1999*

⁴⁵¹ That is, in similar terms to the way in which offenders become the subject of periodic detention or home detention – ss6 and 7 of the *Crimes (Sentencing Procedure) Act 1999*

- b) It should be available as a sentencing option in both the Local Court and in the Higher Courts;
- c) The maximum term should be 2 years, although it is anticipated that in most cases, the sentence would be one of 12 months or less;⁴⁵²
- d) It would take its place in the sentencing hierarchy above a simple community service order and below a home detention order⁴⁵³
- e) The setting of a non-parole period should be prohibited, since the purpose of the sentence is to ensure supervision and program attendance during its full term;
- f) Where there are two or more offences in respect of which CCOs are made, then the maximum period available where the sentences are to be served cumulatively, should be 2 years;⁴⁵⁴
- g) The CCO should be subject to a set of standard conditions and should also be subject to such of the additional performance conditions as the court should determine;
- h) The CCO should expire
 - at the end of the term of the sentence to which it relates;
 - or
 - when it is revoked; or

⁴⁵² 82% of the sentences requiring periodic detention are for 12 months or less

⁴⁵³ Compare with s10A *Sentencing Act* 2002 (NZ)

⁴⁵⁴ Compare with s67 *Crimes (Sentencing Procedure) Act* 1999

- if the offender is sentenced to home detention or full-time imprisonment, as the result of being convicted and sentenced for some other offence,⁴⁵⁵

whichever occurs first;

- i) Before making the CCO the court should explain to the offender, or cause to be explained
 - its purpose and effect,
 - the consequences of non-compliance, and
 - the circumstances in which it may be amended or cancelled.

7.76 Effectively the custodial element of the sentence, apart from any curfew or residential requirements, would be suspended subject to the offender's continued compliance with the CCO.

Conditions

7.77 The CCO should be subject to a set of core or standard conditions, and to such additional performance conditions as the court should determine.

Core conditions

7.78 These should include conditions requiring the offender:

- a) to be of good behaviour during the term of the CCO;

⁴⁵⁵ Compare with s82 *Crimes (Administration of Sentences) Act 1999*

- b) to report to a community corrections centre within 72 hours after being released by the court, or as otherwise ordered;
- c) to notify a Probation and Parole officer of his or her residential address and current employment and to notify such officer of any change in that address or employment within 24 hours;
- d) not to leave the State of NSW without the prior permission of a Probation and Parole officer;
- e) to accept the supervision of community corrections during the term of the CCO as directed by a Probation and Parole officer;
- f) to comply with the requirements of all lawful directions given to the offender under the scheme; and
- g) to permit any Probation and Parole officer to visit the offender's place of residence at any time

Additional performance conditions

7.79 These would be determined according to the needs of each individual case, and would encompass conditions requiring the offender to:

- a) comply with a curfew or any other residential requirement that may be directed;
- b) to perform unpaid community work as directed;

- c) to submit to assessment for, and to participate in, any one or more programs related to the medical, psychological or therapeutic well being of the offender, and/or related to the offender's vocational, cultural, educational and rehabilitative needs;
- d) to submit to surveillance and/or monitoring, including electronic monitoring and testing for substance abuse;
- e) not to undertake certain forms of occupation or employment as specified;
- f) not to associate with certain specified persons or persons of a specified class, or not to attend certain specified places or districts (subject to suitable exceptions, for example where any such conduct occurs pursuant to an order of a court, or is inadvertent and promptly terminated); and
- g) any other condition which the court considers necessary to reduce the likelihood of the offender re-offending or that would assist the offender's compliance with the sentence.

7.80 While it would be appropriate for the court to determine the duration of any curfew or residential commitment, and the number of hours of community work to be performed, it could direct that the offender comply with such of the remaining specific conditions as directed by a Probation and Parole officer, in the course of the case management process.

7.81 This would accord with the general structure for the kind of CCO which has been proposed by the Department of Corrective Services,⁴⁵⁶ and would allow for sufficient flexibility according to the current requirements of the offender, and according to the available facilities or services.

7.82 In general it would seem appropriate that the hours for a curfew or residential requirement be fixed so as to apply overnight, although a specific residential component might also be attached to a therapeutic program which would require attendance a particular Centre during the day. The requirements for the performance of community work could mimic those currently applicable to community work performed during the second Stage of periodic detention.

Variation, Cancellation and Suspension of a Community Corrections Order

7.83 The sentencing court should have power to vary or cancel a CCO, and in the latter case to substitute any other sentence that would have been available to it for the offence on the application of the offender or of the Commissioner for Corrective Services, where:

- by reason of any material alteration in the offender's circumstances since the original sentence was imposed, he or she is unable, or no longer willing, to perform the CCO; or where
- the circumstances of the offender were wrongly stated or were not accurately or completely presented to the sentencing court when the CCO was made.

⁴⁵⁶ See [7.30]-[7.39]

- It is anticipated that an application by an offender would need to be brought before breach, so as to preserve the possibility of the Court imposing a sentence calling for immediate custody and fixing a non-parole period.

7.84 The Commissioner of Corrective Services should have power to suspend a CCO for a period and to grant an extension in relation to that period, or to grant leave of absence in relation to specific program or work requirements, in the case of

- illness preventing the offender complying with the conditions of the CCO; or in the case of
- good cause otherwise being shown, including compassionate grounds, that would justify a temporary suspension and consequent extension of the order, or the grant of leave of absence;

and a general discretion to adjust the relevant requirements so as to permit their performance in some other manner, or at some other times within the currency of the order, or any extension of it, so as to make allowance for the factors mentioned.

7.85 A right of appeal to the Parole Authority could be reserved in relation to decisions made by the Commissioner in the nature of those referred to in the preceding bullet point, although subject to the proviso that any such application should only be considered by the Authority if it is satisfied that the application is made in good faith.⁴⁵⁷

⁴⁵⁷ Compare with s93 *Crimes (Administration of Sentences) Act 1999*

Breach

7.86 Two questions arise for consideration, namely whether

- a breach of a CCO without reasonable excuse should constitute a separate offence; and whether
- the responsibility for dealing with a breach should be vested in the sentencing court or the Parole Authority.

7.87 If the decision is made to create a general offence in relation to a breach, then almost inevitably it will follow that the prosecution of that offence, and any breach action in relation to the sentence giving rise to the community corrections order, would need to be vested in the court.

7.88 The difficulty with that approach, drawing on the experience in relation to periodic detention and community service orders, is that the breach proceedings would be dilatory and subject to an unnecessarily complex and legalistic procedural regime.

7.89 The preferable course would seem to be one that would replicate the current procedure applicable to the breach of periodic detention orders, and to vest the relevant power in the Parole Authority.

7. 90 This would not preclude the creation of specific offences, for example, where an offender fails to comply with a work order or disobeys a direction given by a Probation and Parole officer or engages in the kind of conduct that would currently constitute an offence under the *Crimes (Administration of Sentences) Act 1999*, or the Regulations thereunder by a person subject to a periodic detention, community service or home

detention order.⁴⁵⁸ Nor would it preclude any such conduct being suitably addressed, in an administrative manner by the Department of Community Services, where it is relatively trivial and not of sufficient moment to bring the offender before a court or the Parole Authority.

7.91 The elements of the procedure, accordingly, would include:

- save for sentences imposed for federal offences, assigning the responsibility for dealing with breaches of CCOs to the Parole Authority, in accordance with the current procedure generally applicable to action following the breach of a periodic detention order, which has been outlined earlier in this Report;
- permitting such proceedings to be instituted by the Parole Authority, of its own motion, or on the application of the Commissioner for Corrective Services;
- empowering the Parole Authority, after suitable inquiry to deal with the matter by way of a formal warning, or to confirm, amend or revoke a CCO, and in the latter case to order that the offender serve the balance of the term, calculated from the time of the breach, by way either of home detention or full time imprisonment;
- empowering the Parole Authority to reinstate a revoked CCO, upon good cause being shown;⁴⁵⁹

⁴⁵⁸ For example, ss95-97 *Crimes (Administration of Offences) Act 1999*

⁴⁵⁹ Compare with s164A and ss173-175A *Crimes (Administration of Sentences) Act 1999*

- retaining a limited discretion in the Supreme Court to entertain an appeal, on administrative law grounds, in relation to any decision made by the Parole Authority concerning the revocation of a CCO, or concerning the reinstatement of a revoked order; and
- otherwise retaining the right to have relevant decisions of the Parole Authority referred to the Court, and for the same purpose, as currently apply in relation to periodic detention orders, i.e. where those decisions are shown to have been made on the basis of false or misleading or irrelevant information supplied to the Authority.⁴⁶⁰

7.92 The reservation to the Parole Authority of the primary responsibility for dealing with breaches of CCOs, and for the review of relevant decisions made by the Commissioner for Corrective Services would have two clear advantages:

- First, it would permit of an expeditious response to a breach, thereby strengthening the deterrent effect of the sanctions that would underlie such orders;
- Secondly, it would permit of a greater consistency in the determination of breach proceedings.

7.93 As noted earlier, however, by reason of constitutional limitations, the breach of a CCO where the sentence was imposed in relation to an offence under federal law, would need to be dealt with by a court. There is no alternative to this, although the recommended reforms previously

⁴⁶⁰ Compare with ss176-178 *Crimes (Administration of Sentences) Act 1999*

mentioned, would go some of the way to expediting and simplifying the breach procedure for such cases, if they were implemented. Additionally, the wider flexibility provided through the case management process would allow the Corrections Staff to respond to compliance problems in ways that might avoid the need for formal breach action.

Conversion of Existing Periodic Detention Orders

7.94 If the periodic detention scheme is replaced by the CCO scheme, then provision would need to be made in relation to any periodic detention orders that would have a currency beyond the commencement date of the new regime.

7.95 For those offenders who have been released on parole, such a change would have no practical effect since they are not subject to supervision. For the remaining offenders who are either on Stage 1 or Stage 2 of periodic detention, some transitional arrangements would be required, the most simple of which would be to treat them all, administratively, as being on Stage 2 pending release on parole (where a non-parole period has been set) or expiry of the order.

7.96 A more complex approach would be to provide for their re-sentencing, although this would give rise to some serious questions of principle, not the least of which would relate to that concerning double jeopardy. Alternatively a cut-off date could be set for the making of periodic detention orders, and the existing facilities maintained for the relatively short period that would be required for those subject to current periodic detention orders in order to complete the Stage 1 requirements.

Additional Sentencing Option

7.97 In the foregoing discussion, we have assumed that the CCO Scheme would replace Periodic Detention. While theoretically it could be an additional sentencing option, that would not seem to be appropriate for the reasons that:

- It would require the preservation of existing resources that have been dedicated to Periodic Detention with consequent adverse cost implications;
- It would potentially dilute the resources needed for the CCO option thereby weakening its value; and
- It would unnecessarily complicate the sentencing process and potentially lead to a lack of consistency and to an increase in the incidence of appellate review.

Accordingly, if the proposal is adopted then it should replace periodic detention as a sentencing option.

Part 8

Possible Modifications of the Periodic Detention Scheme

- Limitations of the Current Scheme
- Recommendations for Modification

PART 8: MODIFICATION OF PERIODIC DETENTION

LIMITATIONS OF THE CURRENT SCHEME

8.1 Our examination of the submissions and consultations outlined above, and our consideration of the respective advantages and disadvantages of the periodic detention scheme, have identified a number of current limitations, which would need to be addressed if the scheme is to be retained in any form.

Eligibility criteria

8.2 As we have observed there are eligibility restrictions arising either as a matter of law,⁴⁶¹ or as a matter of practicability of compliance⁴⁶², which narrow the category of persons for whom periodic detention is available.

8.3 The s65A restriction in relation to offenders who have previously served a sentence of full-time imprisonment of six months or more⁴⁶³ was the subject of criticism in several submissions⁴⁶⁴ to the effect that it involved an undue and arbitrary restriction on eligibility, particularly as it is unrelated to the age of the earlier sentence and fails to take into account any intervening crime free period and response to rehabilitation. Suggestions were made that it could be better absorbed in the consideration of the offender's criminal antecedents and subjective

⁴⁶¹ By reason of requirements of ss65A, 65B and 66 *Crimes (Sentencing Procedure) Act* 1999. See also section on eligibility in Parts 2 and 3

⁴⁶² See Parts 3 and 6

⁴⁶³ The s65A restriction introduced in 2002 by the *Crimes Legislation Amendment (Periodic and Home Detention) Act* 2002

⁴⁶⁴ For example, Submission 8: The Chief Magistrate of the Local Court at 2

circumstances, being matters relevant to a determination of the suitability of a sentence of periodic detention.⁴⁶⁵

8.4 The NSW Legislative Council Standing Committee on Law and Justice expressed concerns in relation to the s65A restriction,⁴⁶⁶ and this Council previously recommended its removal.⁴⁶⁷ That recommendation was supported by several submissions to this inquiry.⁴⁶⁸

8.5 The continued application of this section has a particularly harsh impact on Aboriginal offenders, who face additional eligibility difficulties due to the unavailability of periodic detention centres in rural and remote communities, and to the lack of public transport. The existence of chronic problems of alcoholism, which cannot be addressed in a system of periodic detention which does not have a rehabilitation capacity, operates as an additional barrier.⁴⁶⁹

8.6 Female offenders are also currently disadvantaged because of the limited number of periodic detention centres where they can be received, and because of their child minding responsibilities. When periodic detention was first introduced, women were excluded, and it was not until 1977 that the legislation was amended to make them eligible. The Department of Corrective Services has resisted establishing childcare facilities at existing centres because of the fears that are asserted to

⁴⁶⁵ For example, Submission 9: The Law Society of NSW at 2

⁴⁶⁶ New South Wales Parliament, Legislative Standing Committee on Law and Justice, *Report No 30: Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006 at 6.104 to 6.121

⁴⁶⁷ New South Wales Sentencing Council, *Abolishing Prison Sentences of Six Months or Less*, 2004, at 24

⁴⁶⁸ e.g. Submission 21: NSW Department of Corrective Services; Submission 9: The Law Society of NSW

⁴⁶⁹ New South Wales Parliament, Legislative Standing Committee on Law and Justice, *Report No 30: Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006 at 6.104 to 6.121

exist concerning the safety of children at the hands of some offenders. The resulting need to impose a sentence of full-time custody in such a situation has a catch 22 quality in that such a sentence is even less beneficial for the children whose mother is incarcerated. Concerns in relation to the limited availability of periodic detention for female offenders have been expressed in several quarters.⁴⁷⁰

8.7 Some potential male candidates have also been excluded because of weekend employment requirements, or because of their need to mind children over weekends. Again the result is full-time detention, denying them the opportunity to meet their work and family commitments, the existence of which, ironically, denied them periodic detention in the first place.⁴⁷¹

8.8 Otherwise problems with the current system in relation to eligibility were attributed to ineffective pre-sentence screening, and the readiness of some sentencers to impose periodic detention in the face of unfavourable probation and parole reports, thereby setting up some offenders for failure.⁴⁷²

⁴⁷⁰ Submission 8: The Chief Magistrate of the Local Court; Submission 9: The Law Society of NSW; New South Wales Parliament, Legislative Standing Committee on Law and Justice, *Report No 30: Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006 at 6.122 to 6.130

⁴⁷¹ Submission 8: The Chief Magistrate of the Local Court

⁴⁷² Submission 6: Enough is Enough; Submission 15, Office of the Director of Public Prosecutions, NSW

Limited availability of detention centres

8.9 The city-centric emphasis of the scheme and its limited availability in many parts of the State, due to the absence of a periodic detention centres and transport difficulties, do result in an inequality of sentencing and can have a discriminatory effect.⁴⁷³

8.10 Clearly the absence of the necessary physical facilities operates as a practical barrier for many offenders. For some offenders who would potentially be suitable for periodic detention, the option is also excluded because of their difficulty in travelling consistently to a periodic detention centre or in reporting for community service in compliance with the Stage 2 requirements of a periodic detention order. It is the case that periodic detention offenders are responsible for their own transport to such centres or to a designated work site each week. For many, public transport would not be available or convenient, and the costs of otherwise reporting by private transport would be prohibitive. For some the nature of the offence which led to the periodic detention order, or their history of fine default, would in any event be such as to preclude them from driving lawfully to the centre, or if they did it would be such as to expose them to the risk of re-arrest for re-offending.⁴⁷⁴

⁴⁷³ Submission 1: The Chief Judge of the District Court of NSW; Submission 3: Magistrate Zdenkowski, Katoomba Local Court; Submission 8: The Chief Magistrate of the Local Court; Submission 9: The Law Society of NSW; Submission 15, Office of the Director of Public Prosecutions, NSW; Submission 16: The Chief Judge at Common Law. See also New South Wales Parliament, Legislative Standing Committee on Law and Justice, *Report No 30: Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006 at 6.27 and 6.66 to 6.92.

⁴⁷⁴ Submission 8: The Chief Magistrate of the Local Court; Submission 21: NSW Department of Corrective Services. See also New South Wales Parliament, Legislative Standing Committee on Law and Justice, *Report No 30: Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006 at 6.75 to 6.92.

8.11 The Department of Corrective Services gave evidence to the Parliamentary Law and Justice Committee outlining the staffing and operational reasons which inhibited the establishment of any more stand alone periodic detention centres in rural or regional NSW beyond those in Bathurst, Grafton, Mannus, Tamworth, Tomago and Wollongong. In addition it indicated that the conversion of existing full-time beds at existing correctional centres for use by periodic detainees would result in the need for the replacement of full-time beds elsewhere with the consequent significant capital costs.⁴⁷⁵ Other problems would arise from the fact that in some of the more isolated areas, there would need to be a large number of Corrective Service officers on hand to look after a small number of offenders who would only be in custody for 2 days per week.⁴⁷⁶ One suggested solution to the transport problem was for the Department to provide a bus service to collect offenders from different towns, although this would not solve the more fundamental problem of providing detention centres within reasonable reach of the various bus routes.

Stage 2 Periodic Detention

Availability of Community Service

8.12 Another limiting factor that was identified is the need to find sufficient agencies that are prepared to take offenders during the second Stage of the periodic detention order, particularly in rural areas in circumstances where there might be a competition between those who are subject to periodic detention orders and those who are subject to

⁴⁷⁵ New South Wales Parliament, Legislative Standing Committee on Law and Justice, *Report No 30: Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006 at 6.73

⁴⁷⁶ New South Wales Parliament, Legislative Standing Committee on Law and Justice, *Report No 30: Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006 at 6.74

community service orders. As the work involved is unpaid, a careful balance needs to be addressed to ensure that community service does not affect employment by law-abiding members of the community and deprive them of work. Additionally, there needs to be adequate supervision available either through local community committees or through Department of Corrective Services staff. A related problem concerns the need for offenders to arrange their own travel to community work sites, and more often than not to provide any necessary tools or work implements.⁴⁷⁷

8.13 A particular problem was also identified for offenders for whom English is not their primary language, or for whom specific ethnic or religious characteristics limit the availability of suitable community work.⁴⁷⁸

8.14 Unless meaningful community work is provided, there is a risk of this aspect of the sentencing order involving little more than perfunctory compliance with its requirements, and of lessening its credibility with the courts and with the community. For some offenders with physical problems that prevent them carrying out community work, the Stage 2 process is already relatively meaningless since the requirement to attend for such work is not dependent upon an ability to work and can be satisfied by mere attendance.⁴⁷⁹

⁴⁷⁷ Submission 8: The Chief Magistrate of the Local Court

⁴⁷⁸ Submission 12: Community Relations Commission

⁴⁷⁹ Submission 8: The Chief Magistrate of the Local Court, Submission 21: NSW Department of Corrective Services

The Stage 2 assessment process

8.15 Concerns were expressed in relation to the process for assessment to Stage 2, and in particular with the fact that detainees cannot be considered for the upgrade until they have completed the custodial component, and then have to wait for their case to be considered by the Assessment Committee. As that Committee only sits on a monthly basis, the effect of which can be to extend the custodial component by up to six weeks.⁴⁸⁰

Dual supervision

8.16 For some the combination of Stage 2 periodic detainees and those on community service orders on a single work site was of concern, although it was also said to be a means of addressing some of the issues in relation to the provision of equipment and the identification of sufficient projects to fulfil the needs of each program without threatening paid jobs and raising union issues.⁴⁸¹ Some of these concerns related to the fact of divided control; to the differences in the degree of supervision and quality of work expected and in the available disciplinary procedures for lack of commitment or cooperation; and to the greater flexibility allowed to those serving community service orders in relation to absences from attendance.⁴⁸²

⁴⁸⁰ Consultation with Periodic Detainees 14 July 2007; consultations with Field Officers attached to Parramatta Periodic Detention Centre 17 July 2007; consultation with Magistrate Gilmore 16 July 2007

⁴⁸¹ New South Wales Parliament, Legislative Standing Committee on Law and Justice, *Report No 30: Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006 at 6.40 to 6.44

⁴⁸² Consultations with Field Officers attached to Parramatta Periodic Detention Centre 17 July 2007

Absence of rehabilitation programs

8.17 As we have noted earlier, a consistent theme in the submissions and consultations related to the non-availability for those on periodic detention of ongoing case management, of therapeutic or other rehabilitation programs and of services such as psychiatric services and counselling, which are aimed at reducing the likeliness of recidivism.⁴⁸³ In substance this has likened the situation of periodic detainees to that of inmates serving short gaol sentences who are similarly deprived of access to programs.⁴⁸⁴

8.18 Some commentators thought this to be explicable on the basis that the custodial component was intended to be retributive rather than rehabilitative, and that the second stage was intended to serve the objective of making amends to the community as well as being denunciatory. Otherwise, it was seen as a product of the cost involved in extending programs to these offenders, and of the limited time available to include offenders in them.

8.19 The solution suggested in some submissions was to confer a discretion in the sentencing court to order offenders serving periodic detention to attend rehabilitation and vocational programs,⁴⁸⁵ or at least to encourage the Commissioner of Corrective Services to exercise the available power to require attendance at external centres providing such

⁴⁸³ Submission 6: Enough is Enough; Submission 9, The Law Society of NSW; Submission 12: Community Relations Commission; Submission 14: NSW Public Defenders Office; Submission 21: NSW Department of Corrective Services; Submission 23: Sam Hasham, Group Leader Special Visitation Group, NSW Department of Corrective Services. See also consultation with detainees who expressed a need for assistance with alcohol and anger management issues which were unavailable.

⁴⁸⁴ New South Wales Parliament, Legislative Standing Committee on Law and Justice, *Report No 30: Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006 at 6.47

⁴⁸⁵ For example, Submission 9: The Law Society of NSW

programs, in lieu of attending and being detained at a periodic detention centre, so as to address issues relevant to re-offending.⁴⁸⁶

8.20 It may be noted that the non-availability of rehabilitation and education programmes is contrary to the assumption which was made at the time of the introduction of periodic detention in 1971. In the speech introducing the Bill, express reference was made to the importance of there being available a constructive and educational training program for periodic detention offenders.⁴⁸⁷

Suspension of Centrelink benefits

8.21 Concerns were identified in relation to the fact that Centrelink is able to reduce the benefits payable to periodic detainees for the days that they are in custody.⁴⁸⁸ This can result in the detainee's dependents being effectively punished for the crime of the offender where they are reliant on him for maintaining the household and for paying for accommodation and other expenses.⁴⁸⁹ It might also have the effect of rendering the offender ineligible for periodic detention if the reduction in benefits means that he was unable to maintain rental payments, and as a result was at risk of becoming homeless.

⁴⁸⁶ New South Wales Parliament, Legislative Standing Committee on Law and Justice, *Report No 30: Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006 at 6.49 to 6.54

⁴⁸⁷ *NSW Parliamentary Debates Hansard*, Legislative Assembly 17 November 1970 at 7842 and 18 November 1970 at 8041; *Hansard Legislative Council* 24 November 1970 at 8145

⁴⁸⁸ New South Wales Parliament, Legislative Standing Committee on Law and Justice, *Report No 30: Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006 at 6.97 to 6.102

⁴⁸⁹ Submission 12: Community Relations Commission; New South Wales Parliament, Legislative Standing Committee on Law and Justice, *Report No 30: Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006 at 6.97 to 6.102

8.22 The extent to which Centrelink does in fact reduce benefits seems to be somewhat uncertain and inconsistent in its actual application, depending, it would seem, upon the agency being aware of the sentence, and upon local practice. The rationale for any reduction is less than obvious, particularly if, as the Department of Corrective Services asserts, the profile of the typical detainee has as a consequence changed, with a reduction in the number of those continuing in employment.

8.23 The kind of hardship resulting from this policy does little to enhance rehabilitation, or to encourage an offender to approach periodic detention in a positive way.

Failure to complete periodic detention sentence successfully

8.24 One of the criticisms of the current scheme relates to the number of offenders who fail to complete their sentence successfully. One submission suggested that only about 68% of those receiving such sentences do complete them successfully.⁴⁹⁰ If it be the case that there is a significant proportion of offenders who do not complete the program that is not necessarily a sign of failure. It might also be indicative of the more stringent enforcement regime now in place which results in a prompt revocation of the periodic detention order for those who fail to cooperate. One consequence of this is that those who do succeed are likely to have demonstrated the degree of commitment that promises well for the future.

⁴⁹⁰ Submission 13: NSW Council for Civil Liberties. See too McHutchison J, *Outcomes for NSW periodic detention orders commenced 2003-2004*, Research Publication No. 48, New South Wales Department of Corrective Services, 2006

8.25 The reasons for failure are obviously various, including the imposition of the sentence on inappropriate offenders, changes in family circumstances, the pressures of compliance, and the conditions experienced at individual detention centres. The last mentioned factor is worthy of further examination, it being reported, for example, that the success rate for those attending the Manus and Tamus centres exceed 85%.⁴⁹¹

8.26 A favourable comparison in relation to compliance, supervision and the quality of the work performed, between those subject to periodic detention Stage 2 and those subject to simple community service orders was made by the Field officers.⁴⁹² Of particular importance in this respect is the fact that periodic detention offenders, unlike those serving community service orders, have to be alcohol and drug free, and must not take drugs, mobile phones, or substantial amounts of money to worksites.⁴⁹³

8.27 It seems to be generally accepted that amendments to the legislation made in 1999⁴⁹⁴ transferring the revocation power from the courts to the Parole Board (now the Parole Authority) and the changes made to the *Crimes (Administration of Sentences) Act 1999* in 2002⁴⁹⁵ providing for mandatory revocation following 3 consecutive unauthorised absences⁴⁹⁶ have provided a greater incentive to comply.⁴⁹⁷ The transfer

⁴⁹¹ Submission 13: NSW Council for Civil Liberties at 4

⁴⁹² Submission 19: Field Officers Attached to the Metropolitan PDC - Parramatta

⁴⁹³ Consultations with Field Officers attached to Parramatta Periodic Detention Centre 17 July 2007

⁴⁹⁴ *Periodic Detention of Prisoners Amendment Act 1998*

⁴⁹⁵ *Crimes Legislation Amendment (Periodic and Home Detention) Act 2002*

⁴⁹⁶ (and also on the Commissioner's application following 3 non-consecutive unauthorised absences)

⁴⁹⁷ Submission 21: NSW Department of Corrective Services, at 17. See also New South Wales Parliament, Legislative Standing Committee on Law and Justice, *Report No 30*:

of the revocation power to the Parole Authority reduces the time taken for the exercise of the power and it has led to an increase in the number of the orders cancelled or revoked.⁴⁹⁸

8.28 Some problems however remain in relation to the enforcement procedure following breach. They include the fact that it is only in the case of offenders resident in the Sydney, Hunter and Illawarra districts that the Authority can convert the sentence to one of home detention. Otherwise the only real alternatives are full-time imprisonment, or reversion of those on Stage 2 to Stage 1 where that is within the power of the authority.

8.29 Moreover, once an offender has had the sentence upgraded to home detention or full-time imprisonment he has to spend at least 3 months in full-time custody before applying to the Parole Authority for reinstatement of the periodic detention order.⁴⁹⁹

Leave of absence

8.30 A number of practical problems were identified during the consultations in relation to absences of offenders due to pressure from employers to work late on Fridays or to work on Saturdays, or due to illnesses for which offenders had difficulties in obtaining timely or acceptable medical certificates.

Community based sentencing options for rural and remote areas and disadvantaged populations, March 2006 at 6.14

⁴⁹⁸ The courts cancelled 424 orders in 1997-1998, while the Parole Authority made initial determinations to cancel 1126 orders in the 12 months from 1 February 1999 – Submission 21: NSW Department of Corrective Services.

⁴⁹⁹ s164A *Crimes (Administration of Sentences) Act 1999*

8.31 In general it would seem that the discretion to grant occasional leave, on the basis of special and unusual work requirements, for example concrete pours, is rarely exercised with the consequence that the detainee either absents himself and is potentially breached, or he attends the centre and risks losing his job. Particular problems were also mentioned by detainees concerning the stipulated and strictly enforced Friday night reporting time which effectively costs some detainees half a day's work.⁵⁰⁰

8.32 Some problems were identified in relation to the obtaining of leave of absence on illness grounds. They included the difficulties detainees have in securing medical certificates from Doctors who are unprepared to bulk bill, or who are unable to see the detainee in the time needed to obtain and provide a certificate, or who fail to provide certificates of the kind required by the Department, as well as the unpreparedness of the Department to approve an absence unless the certificate is provided before the relevant attendance date. This is compounded by the fact that the Parole Authority also considers that it is unable to excuse a non-attendance unless an appropriate application was made by the detainee to the Department before the attendance date⁵⁰¹.

8.33 On the other hand, the Department made reference, to the difficulties it experiences with detainees who feign illness, who doctor shop, and who obtain certificates for minor illnesses, such as colds or influenza without disclosing to the Doctors the reason why the certificate

⁵⁰⁰ Consultations on 14 July 2007 with staff at Parramatta PDC and periodic detainees at the centre and on work sites.

⁵⁰¹ In consultation with the NSW State Parole Authority on 11 July 2007 and 16 July 2007.

is needed.⁵⁰² Often this involves the Department spending time and effort in following up these certificates, in identifying certificates which appear to have been forged or which are generally inadequate, and in making home visits.

8.34 There is no ready answer to these problems. Inevitably some offenders will manufacture excuses to avoid detention, and some will go so far as to obtain medical certificates by deception or by forgery. The Department must have the capacity to investigate the genuineness of claims for leave, although it should also be prepared to give favourable consideration to these cases where good cause existed for the absence of an application and certificate prior to the relevant detention period.

Right of review

8.35 Elsewhere we have drawn attention to the consequence of breach of a periodic detention order⁵⁰³ and to the differences that apply in relation to State and Federal offenders respectively.⁵⁰⁴

8.36 The limited right to a review of the decisions of the Parole Authority concerning breaches of periodic detention orders, which can lead, *inter alia*, to the sentence resulting in full-time imprisonment has been questioned.⁵⁰⁵

8.37 In particular it has been suggested that the rights of review arising under ss 176 and 177 of the *Crimes (Administration of Sentences) Act* 1999, (the counterparts for which are contained in ss 155 and 156 of the

⁵⁰² In consultation with the NSW Department of Corrective Services on 3 September 2007

⁵⁰³ See Part 4

⁵⁰⁴ See Part 5

⁵⁰⁵ For example, see Submission 14: NSW Public Defenders Office

Act) which were criticised in *Rozynski v Parole Board*⁵⁰⁶ are too narrow. Those rights are confined to cases where the decision of the Parole Authority was shown to be made “on the basis of false, misleading or irrelevant information”. The argument advanced is that there should be a more general right of appeal akin to that applicable to an appeal against sentence⁵⁰⁷, or alternatively akin to that provided by the *Crimes (Appeal and Review) Act 2000*.⁵⁰⁸

8.38 An allied procedural problem was identified by the NSW Director of Public Prosecutions⁵⁰⁹ in a case where, after breach proceedings were instituted, an appeal against a sentence of periodic detention was lodged. The appeal was based upon the emergence of psychological problems and of adverse financial consequences following imposition of the sentences. This led to deferral of the breach proceedings for several months pending determination by the Court of Criminal Appeal of the sentence appeal, which was ultimately unsuccessful.⁵¹⁰ This case was said to provide a justification for the prompt determination by the Parole Authority of the revocation proceedings, without waiting for resolution of the appeal.

8.39 The Council regards this as a matter best left to the discretion of the Parole Authority to be considered in the light of the genuineness of the appeal and the seriousness of the circumstances leading to the revocation.

⁵⁰⁶ [2003] NSWCCA 214

⁵⁰⁷ As conferred by s5(1)(c) *Criminal Appeal Act 1912*

⁵⁰⁸ Part 5

⁵⁰⁹ Submission 15: Office of the Director of Public Prosecutions, NSW

⁵¹⁰ *Assaf v R* [2007] NSWCCA 122

Parole

8.40 Release on parole is potentially available in relation to those on periodic detention so long as their sentence exceeds 6 months and so long as a non-parole period was set. As offenders released on parole are not subject to supervision, and are no longer required to provide community service, release on parole effectively relieves them from any further obligations.⁵¹¹

8.41 As previously noted, the position of such an offender stands in marked contrast to that of a periodic detainee for whom the Court declined to set a non-parole period, and who, as a result, continues to be subject to the periodic detention regime for the entire sentence.

RECOMMENDATIONS FOR MODIFICATION

8.42 If periodic detention is to be maintained rather than replaced, then the following modifications would appear to be appropriate, and should be considered for implementation.

Repeal of s65A

8.43 For the reasons earlier outlined, the Council considers that s65A of the *Crimes (Sentencing Procedure) Act 1999* provides an unnecessary and arbitrary barrier to the imposition of periodic detention for those offenders who are subject to its reach. It would be far preferable for the criminal antecedents to be taken into account as one of the subjective factors to be weighed in determining whether a periodic detention order was an appropriate sentencing option for the individual offender. This

⁵¹¹ s51(1B)(a) *Crimes (Sentencing Procedure) Act 1999*

would allow proper weight to be given to the length of any imprisonment free period of the offender, and to the extent to which rehabilitation had been attempted and either successful for a time, or had failed.

8.44 Although the Council favours its wholesale repeal, it is of the view that if it is to be maintained in a modified form, then the barrier should be confined to those who have served a sentence of full-time imprisonment exceeding 6 months within a period of 5 years preceding the offence for which the offender was appearing for sentence.

Extended availability of periodic detention centres

8.45 Again for the reasons already mentioned, if periodic detention is to be maintained in any form, the Council is of the view that a serious attempt should be made to open up additional facilities, co-located with existing correctional centres, that could cater for more offenders living in rural and remote communities, and for Aboriginal and female offenders.

8.46 While the Council recognises that considerable cost would be involved in any such extension of the scheme, equality of justice requires that all offenders be treated subject to the same rules, and to have similar opportunities. The extension of the existing facilities would go a long way to achieving that objective.

8.47 The concerns expressed in relation to the need to provide additional beds and officers to administer the periodic detention scheme, and to the fact that they would not be utilised or needed for more than two days per week, could be met, at least in part, by ensuring that more offenders, particularly those not in full-time employment, serve their periodic detention on a mid-week basis.

8.48 The Council also sees merit in the Department giving further consideration to the provision of child minding facilities at relevant detention centres for those women who are currently denied the opportunity of periodic detention because of their family responsibilities, and who, as a consequence, face the prospect of receiving a full-time sentence.

Case management and participation in education or rehabilitation

8.49 A potential problem with periodic detention as currently administered is the need for there to be a sufficient range of projects to cater for all who are to be expected to render community service, whether pursuant to a simple community service order or as an incident of periodic detention, in circumstances where little is available as a means of addressing the causes of offending through the provision of rehabilitative or educational programs.

8.50 While the case for the Department of Community Services devoting resources to the provision of rehabilitation and education for all offenders is compelling, we recognise the difficulties of combining this with community service during Stage 2. This gives rise to the possibility of diverting suitable offenders, i.e. those who have particular problems arising out of their mental instability or physical illness, limited educational or vocational training, anger management problems, or histories of substance abuse, domestic violence, or of repeated serious driving offences, away from performing community service to participation, for comparable periods, in suitable counselling, rehabilitation or educational programs.

8.51 The Council considers that the use of such an option, and the provision of suitable rehabilitative or educative facilities in the community, would go some of the way to meeting the existing criticisms of periodic detention that it does not address the causes of offending conduct. It would also assist in ensuring that there are sufficient community service projects available for those offenders who have less of a need for counselling or education. Otherwise there is a risk of community service being overtaxed to the point where the requirement for its performance becomes illusory.

8.52 The Council recognises that there are significant practical impediments to the provision of meaningful rehabilitation programmes for those serving short sentences of periodic detention, or to the provision by the Department of Community Services of too many programs. It is understood that it is rationalising its efforts in this respect with a view to reducing the number of existing programs available for those serving full-time sentences to a more manageable core group of programs, and is also giving consideration to the use of external agencies to assist in their delivery.

8.53 Assuming that such change can be achieved, the Council considers it appropriate, if periodic detention is continued, that attention be given to the development of a case management system for all periodic detention offenders that will at least provide an opportunity for some preliminary exposure to rehabilitation programs which could be further developed, depending on the circumstances of the offender, during Stage 2 or following release on parole.

Assessment for Stage 2

8.54 The Council considers that the present arrangements, precluding assessment for Stage 2, until the custodial component has been completed are counter-productive and contrary to the spirit of the scheme since they effectively extend the custodial component for some offenders beyond that which was contemplated by the legislation. It sees no reason why the assessment process should not commence somewhat earlier, a circumstance that might in fact encourage greater compliance, or why the assessment committee should not sit more often than once per month.

Centrelink Benefits

8.55 As observed earlier, the Council considers that the existence of a power to withhold Centrelink benefits for those days that detainees are in custody, makes little sense, and can be counter-productive to rehabilitation because of the financial disadvantage which it is likely to cause. It considers that it would be appropriate for representations to be made to the Federal Minister either to repeal this authority, or to pay the relevant benefits to the Department of Corrective Services, which might in its discretion pass them on to the detainee.

8.56 The Council recognises that this might present an appearance of inequality of treatment for prisoners serving full-time sentences, and that the policy is presumably based upon an objection to prisoners receiving a “windfall” on those days when their accommodation and meals are provided by the Department of Corrective Services. On the other hand it is likely that the dependents of fulltime prisoners will receive full Centrelink benefits on a different basis. In any event, the position of those in full-time detention is distinguishable from those

serving periodic detention, for several reasons, including the fact that the latter will be expected to maintain their home and families, and will incur some direct financial costs in reporting for detention and may also suffer some loss of earnings.

Revocation of periodic detention orders and their reinstatement

8.57 The Council acknowledges that the vesting in the Parole Authority of the power to revoke a periodic detention order for a failure on the part of the offender to comply with the order⁵¹² is appropriate, and effective in that it provides a mechanism for an immediate response. That the authority should have that power is consistent with the notion that a sentence of full-time imprisonment underlies every periodic detention order, and that the risk of periodic detention being converted to full-time detention should act as a powerful deterrent against breach.

8.58 It similarly accepts that the procedure whereby, upon being notified of a revocation, the detainee is permitted to make a submission to the Parole Authority to reconsider the revocation⁵¹³ is appropriate. However, the Council questions the narrow and somewhat arbitrary restrictions which exist in relation to the offender's capacity to have the revocation of a periodic detention order reconsidered, and also in relation to his or her capacity subsequently to have the original order reinstated.

8.59 First, it is to be observed that when exercising its power to reconsider a revocation decision, the Parole Authority is unable to rescind the revocation where:

⁵¹² s163 *Crimes (Administration of Sentences) Act 1999*

⁵¹³ ss173 to 175A *Crimes (Administration of Sentences) Act 1999*

- the offender has failed to apply for, or been refused, leave of absence with respect to 3 or more detention periods; or
- where the order was revoked upon the application of the offender, “except in such circumstances as are prescribed by the regulations as constituting manifest injustice.”⁵¹⁴

8.60 It is not entirely clear why the discretion of the Parole Authority should be so limited, or why it should not have a general power to reconsider the revocation on its merits, particularly in a case where a reasonable excuse has been provided for a failure to apply for leave of absence.

8.61 Secondly, the Council questions the necessity for the provision requiring an offender, whose periodic detention order has been revoked (and who presumably has failed to have that revocation reconsidered), to wait until he or she has served at least 3 months full-time detention before making an application for reinstatement.⁵¹⁵ There may well be circumstances emerging within that period that would justify an earlier redetermination. The existence of a 3 month qualifying period for the lodgement of the application, which then has to be followed by a reference to the Probation and Parole Service for a suitability assessment, can result in some offenders spending considerably more time in full-time detention than their individual circumstances would warrant.

⁵¹⁴ s175(1A) *Crimes (Administration of Sentences) Act 1999*. The expression “manifest injustice” is defined by clause 219A(3) of the Regulations to relate to those circumstances where it is apparent that the periodic detention order was revoked on the basis of false, misleading or irrelevant information.

⁵¹⁵ s164A *Crime (Administration of Sentences) Act 1999*

8.62 The existence of these limitations on the power of the Parole Authority to revoke a revocation order, or to reinstate a periodic detention order, has a particular significance in the light of the restricted capacity of an offender to approach the court for relief. Two potential avenues for relief are open.

8.63 First, there is a right to apply to the Supreme Court under s176 of the *Crimes (Administration of Sentences) Act 1999*, for a direction to be given to the Parole Authority as to whether the information on the basis of which it *revoked* a periodic detention order was false, misleading or irrelevant.⁵¹⁶ Such an application may only be considered by the Court if it is satisfied that the application is not an abuse of process, and that there appears to be sufficient evidence to support the application.⁵¹⁷

8.64 The limited nature of this application has been noted by the courts.⁵¹⁸ Although the relevant decisions were concerned with cases where there had been a revocation or refusal of parole under earlier legislation, the provisions in question are comparable, and the observations made are equally applicable for the present context.

8.65 In substance they establish that any such application does not constitute an appeal by way of a rehearing from the Parole Authority's decision, and that the relevant provision provides for no relief other than the making of a direction to the Parole Authority that the information upon which it acted was of a particular character. It gives to that direction no consequential effect upon the Parole Authority's decision,

⁵¹⁶ s176(1) *Crimes (Administration of Sentences) Act 1999*

⁵¹⁷ s176(3) *Crimes (Administration of Sentences) Act 1999*

⁵¹⁸ *McPherson v Offenders Review Board* (1991) 23 NSWLR 61; *McCamley v Offenders Review Board* NSWCCA (Unreported, 9 February 1994) and *Kable v Offenders Review Board* NSWCCA (Unreported, 17 February 1994)

although it assumes that, faced with such a direction, the Parole Authority acting fairly and responsibly, would reconsider the matter.⁵¹⁹

8.66 Accordingly the court is not concerned whether the Parole Authority's decision was right or wrong, or whether it correctly interpreted the information before it, or whether it drew the correct inference from it, or whether it gave that information the correct weight. It is also not concerned with any question as to whether the Parole Authority acted upon incorrect principles⁵²⁰, or failed to follow the correct procedure. In substance its only role is to provide to a detainee an opportunity to obtain a direction of the kind contemplated, where sufficient evidence is available as to the existence of further information which may show that the information on which the Parole Authority acted was false, misleading or irrelevant.

8.67 It follows that the s176 application is of limited utility. Moreover, on its face it is confined to a revocation decision and not to a reinstatement decision. While it is at least arguable that an application could be brought following the refusal of an application for reinstatement the section would seem to confine attention to the information on which the Authority acted in relation to the original revocation, rather than that upon which it acted when considering reinstatement. At the reinstatement application, the Parole Authority needs to consider additional information, including any steps taken or being taken to ensure that the applicant will not again fail to comply with the order of reinstated, and the Probation and Parole assessment as to his or her suitability for periodic detention. Any deficiency in the section in this respect could be easily rectified by an amendment of the

⁵¹⁹ *LMS v Parole Board* (1999) 110 A Crim R 172

⁵²⁰ *R v Shishova* NSWCCA (Unreported, 28 September 1994)

section to embrace additionally the case where reinstatement has been refused on the basis of information that is asserted to have been false, misleading or irrelevant.

8.68 The second avenue for redress is potentially somewhat wider. It would seek to invoke the jurisdiction of the Supreme Court to intervene on administrative law grounds, for example by the grant of prerogative relief in the nature of certiorari and/or mandamus to quash the decision of the Parole Authority or to compel its reconsideration of the matter. Again, the extent to which the courts can intervene on administrative law grounds is limited. Significantly, any such review cannot involve a review of the Authority's decision on the merits.⁵²¹ To succeed on administrative law grounds, an applicant needs to establish matters such as a denial of natural justice⁵²² or the existence of real or apprehended bias, or bad faith, or the commission of an error of law on the face of the record, or "Wednesbury" unreasonableness.⁵²³ The limitations of administrative review are well known and need not be addressed further here, beyond the observation that while such a remedy does expand the legal rights of the detainee to some extent beyond a s176 application, the exercise of this remedy is likely to be dilatory and costly, and, as a result, rarely invoked.⁵²⁴

8.69 The Council does not recommend the conferral of any additional right of review or appeal in the courts in relation to decisions of the Parole Authority. The current legislation now has a lengthy history, and

⁵²¹ *Attorney General (NSW) v NSW State Parole Authority* [2006] NSWSC 865

⁵²² e.g. *Baba v Parole Board of NSW* (1986) 5 NSWLR 338 and *Todd v Parole Board* (1986) 6 NSWLR 71

⁵²³ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223

⁵²⁴ The only occasion in which such review has been sought, so far as the Sentencing Council is aware is the unsuccessful application in *Laurent v Parole Board* [2001] NSWSC 729

takes into account the special jurisdiction and knowledge of the Parole Authority (including that of its predecessors) the participation in its decisions of a judicial officer and the inadvisability of transferring a merits review from a specialist administrative body to a Court. The legislation has achieved the objectives recommended by the 1978 Nagle Royal Commission into NSW Prisons, and by the 1979 Muir Committee to review the *Parole of Prisoners* Act 1966, namely to ensure that prisoners were supplied with the information on which relevant decisions were made by the Parole Authority (or Board) and given an adequate opportunity to put their own material forward for consideration.

8.70 The current provisions do satisfy these requirements, and the court has sufficient jurisdiction under s176 of the Act, or by way of administrative law review, to respond to any serious error.

8.71 Where the problem lies, however, it appears to the Council, is in the limitations previously mentioned on the power which is imposed in the Parole Authority in dealing with applications for the reconsideration of a revocation, and in relation to the length of the period which a detainee must serve in full-time custody before applying for reinstatement. It is of the view that consideration should be given to the relaxation of the relevant requirements, so as to allow the Parole Authority a greater flexibility in its consideration and determination of these applications.

Parole Supervision

8.72 Although the Council notes that supervision is not generally provided in relation to any offenders who have been released on parole, and who have received sentences of 3 years or less, it considers that it is

undesirable that there is an absolute barrier to the imposition of a supervision condition in relation to periodic detention offenders. There may well be cases where the sentencing court considers that there is a particular need for their release on parole to be subject to some degree of supervision.

8.73 In the absence of any need for sentencing flexibility in this respect, a question also arises as to whether there is any point in ever setting a non-parole period for an offender sentenced to periodic detention. This is not an unimportant observation since it appears that the majority of those receiving periodic detention sentences exceeding 6 months currently have a non-parole period set. Although a repetition of offending during the non-parole period will attract a separate sentence for any such offence, and will constitute a circumstance of aggravation for the purpose of determining a sentence for the offence entitling those offenders to parole, and the consequent termination of their periodic detention orders, would seem to provide little by way of punishment or deterrence.

8.74 Consideration be given to amending s51(1B) *Crimes (Sentencing Procedure) Act 1999* so as to allow the Court, in appropriate cases, to require that release on parole be subject to supervision; or alternatively that s46 *Crimes (Sentencing Procedure) Act 1999* be amended so as to preclude the Court from setting a non-parole period where it has ordered that a sentence be served by way of periodic detention.

8.75 The Council considers that it would be advisable to relax the existing restrictions on the provision of supervision for those periodic detention offenders who are released on parole, at least in those cases

when the sentencing court stipulates that supervision and / or support should be a condition of parole.⁵²⁵

Variation of the length of the detention component

8.76 The Council gave some consideration to the possibility of reducing the length of the detention component to 4 weekends of periodic detention, or to 4 weeks of full-time detention (equivalent to 14 weeks of weekend detention). The only stated purpose of such a change would be to retain the “short sharp shock” aspect of the sentence, to provide a measure of satisfaction to victims and the community in seeing the offender lose his or her liberty, albeit for a short time, and to serve the punishment and denunciatory purposes of sentencing.

8.77 Although some members of the Council regard the custodial component of periodic detention to be an important element of this sentencing option, there was ultimately little support for any such modification of the scheme. A reduction of the custodial component to 4 weekends would lead to even less of a utilisation of the existing facilities, and the minimal inconvenience involved would be unlikely to satisfy the community or victims, or to make much of an impression on the offender, even if, contrary to the assessment of most commentators, the experience of a short period of imprisonment does have a salutary and deterrent effect.

8.78 A change in the custodial sentence to one of 4 weeks continuous detention would be likely to lead to loss of employment, would involve a

⁵²⁵ It is apparent that Howie J assessed that such a condition was appropriate in *R v Weaver* [2004] NSWSC 727, but subsequently deleted that condition when the provisions of s51(1A) and (1B) of the *Crimes (Administration of Sentences) Act 1999* was brought to his attention.

potentially counterproductive exposure to the gaol culture, and would run into the several unsatisfactory aspects of short term sentences that were identified in the Council's *Report on Abolishing Sentences of Six Months or Less*.

8.79 If the current structure of periodic detention is to be maintained in its essential form, the Council considers that neither of these changes would achieve any improvement. Accordingly no amendment of either kind is recommended.

Part 9

Conclusion

- Arguments in Favour of Retaining Periodic detention
- Arguments in Favour of Replacing Periodic detention with a Community Corrections Order
- The Conclusion of the Council

PART 9: CONCLUSION

SHOULD PERIODIC DETENTION BE REPLACED BY A COMMUNITY CORRECTIONS ORDER

Arguments in favour of retaining periodic detention

9.1 Periodic detention has been seen to be a valuable sentencing option for those offenders for whom it has been available, in that:

- it provides an offender with a wake up call as to what might be the consequences of further offending;
- it has a particular benefit in isolating the offender from the more deleterious consequences of exposure to the influence and culture of those serving full time sentences;
- it allows continuity in employment and family relationships;
- it has an important symbolic significance since it is recognised by the community, and by victims of crime, as involving an actual custodial component;
- in the absence of a sentencing option that has the potential of delivering a clear message to offenders that they are at imminent risk of going into actual custody, there is a risk that they will be sentenced to very short sentences, (with all of the disadvantages attaching to such sentences), so as to receive the short sharp shock that periodic detention has been perceived as delivering; and

- the work aspect has been particularly beneficial for the community, and has also had a tangible value in providing detainees with work experience and skills.

Arguments in favour of replacing periodic detention with a Community Corrections Order

9.2 The fact that it is not uniformly available throughout the State, and is unlikely to be extended beyond its present areas of availability, by reason of the significant resource implications of any such extension, is of particular concern to a majority of the Council. As is the fact that the current facilities are underutilised and that case management does not exist in any meaningful way for periodic detainees.

9.3 The replacement of periodic detention by a Community Corrections Order (CCO) would have significant advantages in that it would:

- be expressed as a term of imprisonment, the suspension of which would be contingent upon the offender successfully complying with the conditions of the Order;
- preserve an element of compulsory detention in relation to the curfew or residential requirements, supported, in appropriate cases, by the restriction of movement and association requirements, and by the monitoring /surveillance requirements;
- require community work and program participation for its full term to allow for reparation to the community, to address the offender's criminogenic and rehabilitation needs and to encourage the acquisition of work skills;

- allow offenders to be progressed through the three proposed stages, as required, depending on their behaviour;
- permit the kind of support that could facilitate the offenders' completion of the sentence;
- provide for a greater flexibility in case management, that could take into account the individual offender's needs, and the local resources, and also address cultural and social factors;
- provide a less expensive option than periodic detention, and permit the savings obtained from the closure of the periodic detention centre to be more usefully applied in the provision of case management, programmes and extended supervision which are not currently available for periodic detainees;
- carry with it sanctions that could be promptly invoked in the event of non compliance, that would be sufficiently flexible to address the seriousness of the breach, (ranging from a caution, through variation of the program requirements, to home detention or full time imprisonment) and that would be capable of consistency in their determination if left to the Parole Authority;
- remove the current inequalities in sentencing referred to earlier in this report, for those whose place of residence or family responsibilities, effectively act as a barrier to periodic detention;
- minimise the disruption and dislocation of an offender's connection with the community by maintaining family or work

commitments for the full term of the sentence (subject to satisfactory performance) and by allowing participation in family events at weekends, without the need for permission;

- allow for supervision for the entire term of the sentence (unlike the current situation where an offender subject to a periodic detention order is unsupervised following release on parole);
- provide an option that would be superior to the current form of suspended sentence, with its limitations as to the conditions that can be imposed, and the problems which are associated with its enforcement, where it becomes necessary for the offender to be called up following breach;
- subject to satisfactory explanation of its purpose and acceptance by the judiciary, lessen the occasion for the imposition of custodial sentences of less than 6 months which have been widely accepted as problematic and counterproductive of rehabilitation;
- permit the devotion of greater attention to reducing the risk of re-offending, with consequent savings to the Corrections System and the community at large;
- provide a form of sentence that would be particularly appropriate for indigenous offenders, being one that could be of positive assistance in reducing their unduly high rate of incarceration and recidivism; and

- encourage greater inter-agency co-operation in so far as approved programs could be provided by the Department of Corrective Services, and by other government agencies and approved non-governmental organisations, thereby bringing a wider range of experience and skills to the Rehabilitation Component.

The conclusion of the Council

9.4 In summary, the Council notes that this option, which has the approval of the three major victims groups, is not a soft option, because of the curfew restrictions, the performance requirements and the fact that breach can result in the kind of short sharp shock delivered by periodic detention. Moreover, it preserves the advantages of the work component of periodic detention and enhances its skilling aspect through the potential requirement for offenders to attend employment related training programs.

9.5 Overall it has the advantage of being directed to positive outcomes and to reducing re-offending. For these reasons a majority of the Council supports in principle its introduction as a replacement for periodic detention.

9.6 A minority of the Council however, favours retention of periodic detention because of its advantages as set out in paragraph 9.1, and because of doubt that the CCO will in practice be available State-wide, for example to those smaller, more isolated communities where home detention is presently not available.

IMPLEMENTATION

9.7 The Council recognises that in order for the proposed CCO scheme to be adopted in place of periodic detention, a number of matters would need to be guaranteed. They include the following:

- the provision of transitional or similar centres where offenders on parole or subject to CCOs could reside, and participate in programs aimed at reducing their re-offending;
- the capacity to provide for the supervision, electronic monitoring and surveillance of offenders subject to a CCO, on a State-wide basis;
- the availability of sufficient programs and program providers, and of the specialist staff such as psychologists and counsellors who would deliver the programs, on a State-wide basis;
- the availability of community centres or agencies able to accept offenders for community work, on a State-wide basis;
- the provision of arrangements that would accommodate the need of offenders to travel to the places where they would be required to report in compliance with relevant work and program conditions;
- the provision of stringent pre-sentence suitability assessments; and

- an enlargement of the resources, and possibly the membership of the Parole Authority, along with the provision of video link capabilities that would enable it to deal with offenders on a State-wide basis.

9.8 Each of these requirements has a potential cost impact which would need to be weighed against the savings arising from the closure of the periodic detention centres, from the allocation of staff to other duties, from the freeing up of the beds in the existing centres which might then become available for those subject to sentences involving full time incarceration, and from an expected longer term reduction in the rate of re-offending and return to prison. They are not requirements that can be reduced or honoured in passing. Existing experiences in relation to the resource limitations (especially outside the metropolitan areas), the experience with unsupervised sentences, and with sentences that do not match supervision with programs, emphasise how important this is.

9.9 The Council is not equipped to undertake any analysis of the costs that would be involved in ensuring the availability of these services across the State. A full cost analysis has not been provided at this stage, by the Department of Corrective Services. Such an analysis would however need to be carried out before the proposal (if accepted in principle) is carried into effect.

9.10 In introducing the model, care would also need to be taken to ensure that it is sufficiently understood by judges and magistrates, and does not lead to sentence creep, or to offenders who would currently receive periodic detention being sentenced up to short terms of full-time imprisonment or down to simple community service.

9.11 In some jurisdictions⁵²⁶ this problem has been averted by abolishing sentences of less than 6 months. An alternative would be to require that the sentencer be satisfied that the case calls not only for a sentence of imprisonment, but additionally that it be one of at least 6 months duration.

9.12 Another area that will need to be addressed, if this sentencing option is introduced, is the possibility of offenders and program suppliers or community work providers engaging in the falsification of time sheets or in other dishonest activities designed to avoid performance requirements. To some extent this may arise as the result of the greater leeway that the option offers, and the necessary reliance on external agencies or program providers. The Independent Commission Against Corruption has previously identified instances where corrupt or inappropriate behaviour has occurred in relation to the administration of community service orders.⁵²⁷ As a consequence it would be necessary to develop a system for random checks as well as an effective oversight system to ensure a necessary level of accountability and public confidence in the system.

⁵²⁶ Western Australia

⁵²⁷ Independent Commission Against Corruption, *Report on Investigation into Case Management and Administration of Community Service Orders*, September 2006

THE STATE PLAN

9.13 Finally we note, that the Terms of Reference specifically directed the Council to give regard to the *NSW State Plan* Priority R2: Reducing re-offending, which states:

“A small proportion of people are known to be responsible for a large proportion of criminal activity. It is therefore crucial that the Government tackles re-offending to improve the effectiveness of the justice system in reducing crime and building safer communities.

Targets

We will reduce the proportion of offenders who re-offend within 24 months of being convicted by a court or having been dealt with at a conference by 10 per cent by 2016.”⁵²⁸

9.14 Of additional relevance to the State Plan are the *Aboriginal Justice Plan*⁵²⁹ and *Two Ways Together*,⁵³⁰ which aim to provide some strategic directions for Aboriginal people within the justice system. One of the major aims of the initiatives identified in these documents is to

“ensure that criminal justice processes act to reduce offending behaviours to reduce the number of Aboriginal defendants proceeding through the criminal justice system”.⁵³¹

9.15 The *State Plan* noted that in the majority of cases, new programs should be funded from existing resources, thus requiring agencies to consider discontinuing activities which do not contribute to the plan.⁵³²

⁵²⁸ New South Wales Government, *State Plan: A new direction for NSW*, Premier's Department, Sydney, 2006 at 29

⁵²⁹ New South Wales Aboriginal Justice Advisory Council, *NSW Aboriginal Justice Plan: Beyond Justice 2004-2014*, 2005

⁵³⁰ Department of Aboriginal Affairs, *Two Ways Together: NSW Aboriginal Affairs Plan 2003-2012*, 2005

⁵³¹ NSW Aboriginal Justice Plan Strategic Directions 3 and 5

⁵³² New South Wales Government, *State Plan: A New Direction for NSW*, Premier's Department, Sydney, 2006 at 8

9.16 The Department of Corrective Services has made an appraisal of its existing activities and the comparative costs of periodic detention and other sentencing options. Taking these into account and making allowance for the benefits of reducing recidivism, it has reached the conclusion that Priority R2 target could be better achieved by abolishing periodic detention, and transferring the freed resources to a combination of the proposed community-based order and other initiatives, which might address the several factors which contribute to a return to prison, including:

- homelessness;
- insufficient support in the community;
- increased drug and alcohol usage;
- being an Aboriginal or Torres Strait Islander; and
- being a women and having debts.⁵³³

9.17 Subject to a detailed cost analysis, and to the capacity of the system to deliver the essential requirements identified above, the majority of the Council considers that the introduction of the proposed option would appear generally to be consistent with the objectives of the State Plan and in particular with the objective of reducing re-offending for all categories of offenders.

9.18 If the scheme is adopted, then the Council considers that it would be appropriate for

- the New South Wales Bureau of Crime Statistics and Research to collect statistics in relation to its use, and in relation to the rate of re-offending by those who have been the subject of a CCO;

⁵³³ See Submission 21 – Department of Corrective Services, p.26

- the Sentencing Council to report annually on the use of the option, and of the extent to which supervision and programs are being provided; and
- for an independent review to be conducted within 5 years of its introduction.

Appendices

- Appendix A: Submissions
- Appendix B: Community Consultation letters
- Appendix C: Consultations

Appendix A

SUBMISSIONS

- The Chief Judge of the District Court of NSW (Submission 1)
- Mental Health Review Tribunal (Submission 2)
- Magistrate Zdenkowski- Katoomba Local Court (Submission 3)
- Council of Social Services New South Wales (Submission 4)
- NSW Department of Juvenile Justice (Submission 5)
- Enough is Enough (Submission 6)
- Department of Ageing, Disability and Home Care (Submission 7)
- The Chief Magistrate of the Local Court (Submission 8)
- The Law Society of NSW (Submission 9)
- Prisoners' Aid Association of New South Wales (Submission 10)
- NSW Ombudsman (Submission 11)
- Community Relations Commission (Submission 12)
- New South Wales Council for Civil Liberties (Submission 13)
- New South Wales Public Defenders Office (Submission 14)

- Office of the Director of Public Prosecutions, NSW (Submission 15)
- The Chief Judge at Common Law (Submission 16)
- Mr Neil Rogers Field Officer Metropolitan PDC: (Submission 17)
- NSW Aboriginal Justice Advisory Council (Submission 18)
- Field Officers Attached to the Metropolitan PDC- (Submission 19)
- Warringah Council (Submission 20)
- NSW Department of Corrective Services (Submission 21)
- NSW Public Defenders Office – Supplementary submission (Submission 22)
- Sam Hasham, Group Leader Special Visitation Group, NSW Department of Corrective Services (Submission 23)
- Office of the Commonwealth Director of Public Prosecutions (Submission 24)
- NSW Department of Corrective Services – supplementary submission (Submission 25)
- Office of the Commonwealth Director of Public Prosecutions – supplementary submission (Submission 26)

Appendix B

COMMUNITY CONSULTATION LETTERS ⁵³⁴

- Anglican Parish Tumbarumba
- Appin and Wilton Anglican Churches
- Bathurst District Soccer Club
- Berkeley Pioneer Cemetery Restoration Group
- Brush Farm Park Preservation Group
- Carcoola Children's Centre
- Carenne Public School
- Central Tilba Community Based Projects
- Chipping Norton Lake Authority
- City of Canada Bay Council
- Clarence Valley BMX Club
- Clean Up Australia
- Coldstream Community Preschool
- Department of Lands- The Hume & Hovell Walking Track
- Dogs NSW
- Finley Pistol Club Inc
- Georges River Combined Councils Committee Inc
- Girl Guides Association- Northern Inland Region
- Grafton District Management Team (Grafton Girl Guides)
- Greek Orthodox Archdiocese of Australia-Parish of Sutherland
- Hawkesbury Early Childhood Intervention Service
- Hay Tennis Club
- House of Hospitality- Adamstown
- Illawarra Cycle Club
- Kellyville High School

⁵³⁴ 260 letters were sent out: 21 were marked Return To Sender. Seventy-two responses (both written and verbal) were received, giving a response rate of just over 30%.

- Kelso Public School
- Kiama Municipal Council
- Kokoda Track Memorial Walkway Ltd
- Kootingal Lions Club Inc
- Lakeside Leisure Centre
- Lifeline
- Matraville Sports High School
- Mermaids Pool Restoration Group
- Mt Kembla Mining Heritage Inc
- Mt Rankin Landcare Inc
- Norah Head Search and Rescue
- North Entrance Surf Life Saving Club
- NSW Police- The Hills District
- Our Lady of Christians Catholic Parish- Campbelltown
- Plumpton Public School
- Quakers Hill public School
- Richmond Vale Preservation Co-operative Society Ltd
- Riding for the Disabled Association (NSW)- Cootamundra Centre
- Robertson Heritage Railway Station
- Rockley Rodeo Committee
- Royal Volunteer Coastal Patrol
- Royal Volunteer Coastal Patrol- Central Coast Division
- Shoalhaven City Council
- Sisters of the Good Samaritan of the Order of St Benedict
- Soldier & Miners' Memorial Church- Mt Kembla
- South Grafton High School
- Southside Uniting Church- Tamworth
- St Bedes Catholic Church- Appin
- St Catherine Laboure Parish- Gympie
- St Dimitrios Greek Orthodox Church
- St John's Anglican Church

- St Mathew's Anglican Cemetery, McGraths Hill
- Strathfield City Council
- St Vincent de Paul Society- Bankstown
- St Vincent de Paul Society- Bathurst
- St Vincent de Paul Society- Broken Bay Diocese
- Tamworth Dressage Club
- The Salvation Army- Australia Eastern Territory
- The Salvation Army- Queanbeyan
- The Tarcutta Progress Association
- Tumbarumba Fire Station
- Tumbarumba Pastoral Agricultural & Horticultural Society Inc
- Tumbarumba Pony Club
- Tumbarumba Racecourse Trust
- Unanderra Scout Group
- Wollongong City Council
- Young Showground Trust Inc

Appendix C

CONSULTATIONS

Mr Rob Allen, Director, International Centre for Prison Studies, King's College, London, UK

Associate Professor Eileen Baldry, University of NSW

Mr Peter Brown, President, The Brush Farm Park Preservation Group

Professor Mike Hough, Director, Institute for Criminal Policy Research (ICPR), King's College, London, UK

Mr Leslie Katz, Senior Policy Officer, NSW Law Reform Commission

Mr Mark Maur, Executive Director, The Sentencing Project, Washington, USA

Mr G David Shellner, The National Institute of Corrections, USA

Centrelink

Ms Debbie Boceski, Multicultural Services Branch, National Support Office, Centrelink

Commonwealth Office of the Director of Public Prosecutions

Ms Jaala Hinchcliffe, Office of the Director of Public Prosecutions (Commonwealth) Head Office, Canberra

Mr Jim Joliffe, Office of the Director of Public Prosecutions (Commonwealth), Sydney Office

[Review of Periodic Detention](#)

Ms Kay Marinos, Office of the Director of Public Prosecutions (Commonwealth), Sydney Office

Ms Penny Musgrave, Office of the Director of Public Prosecutions (Commonwealth), Sydney Office

[NSW Attorney Generals' Department](#)

Brendan Thomas, Assistant Director General, Attorney Generals Department

[NSW Department of Corrective Services](#)

Ms Margaret Anderson, Director, Corporate Legislation and Parliamentary Support Unit, NSW Department of Corrective Services

Ms Rhonda Booby, Welfare Services, NSW Department of Corrective Services

Mr Garnett Byrnes, Department of Corrective Services Field Officer, Parramatta Periodic Detention Centre

Ms Lee Downes, Executive Director, Community Offender Support Services, NSW Department of Corrective Services

Ms Vivian Fahs Special Visitations Group

Mr Luke Grant, Assistant Commissioner, Offender Services & Programs, NSW Department of Corrective Services

Ms Sam Hasham, Group Leader, Special Visitation Group, NSW Department of Corrective Services

Mr Fred James, Department of Corrective Services Field Officer, Parramatta Periodic Detention Centre

Ms Marilyn Johnson, Department of Corrective Services Field Officer, Parramatta Periodic Detention Centre

Mr Bruce McSorily, Duty Officer, Probation & Parole Service, Downing Centre Complex

Mr Des Mussing, Department of Corrective Services Field Officer, Parramatta Periodic Detention Centre

Mr Peter Peters, Assistant Commissioner, Corporate Services, NSW Department of Corrective Services

Mr Jim Poulos, Officer, Wollongong Periodic Detention Centre

Mr Roy Puckering, Assistant Superintendent (Projects), Parramatta Periodic Detention Centre, NSW Department of Corrective Services

Mr Neil Rogers, Department of Corrective Services Field Officer, Parramatta Periodic Detention Centre

Ms Janet Ruecroft, General Manager, Wollongong Periodic Detention Centre

Mr Steve da Silva, Director, Periodic Detention, NSW Department of Corrective Services

Mr Chris Standaloft, Department of Corrective Services Field Officer, Parramatta Periodic Detention Centre

Mr Warren Vedmore, Department of Corrective Services Field Officer, Parramatta Periodic Detention Centre

[Review of Periodic Detention](#)

Mr Warwick, Officer, Parramatta Periodic Detention Centre, NSW Department of Corrective Services

Mr Ron Woodham, Commissioner

Sharon Yarnton, Officer, Wollongong Periodic Detention Centre

Ms Rani Young, Senior Legislation and Policy Officer, Corporate Legislation and Parliamentary Support Unit, NSW Department of Corrective Services

[NSW State Parole Authority](#)

Mr Charles Gilmore, Magistrate

Mr Ian Pike, Chairman

The Council would like to thank the detainees and officers from the Metropolitan (Parramatta) and Wollongong Periodic Detention Centres who generously gave of their time to speak to the Council.

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Bibliography

BIBLIOGRAPHY

AUDIT OFFICE OF NEW SOUTH WALES, *Performance Audit Prisoner Rehabilitation: Department of Corrective Services*, May 2006

AUDITOR GENERAL FOR WESTERN AUSTRALIA, *Report 2: Follow-up Performance Examination: Implementing and Managing Community Based Sentences*, May 2005

AUDITOR GENERAL FOR WESTERN AUSTRALIA, *Report 3: Implementing and Managing Community Based Sentences*, May 2001

AUSTRALIAN BUREAU OF STATISTICS, *Prisoners in Australia*, 2005, Cat. No. 4517.0

AUSTRALIAN INSTITUTE OF CRIMINOLOGY, *Research and Public Policy Series No 80 Recidivism in Australia: findings and future research*, 2007

AUSTRALIAN LAW REFORM COMMISSION, *Discussion Paper 70: Sentencing of Federal Offenders*, 2005

AUSTRALIAN LAW REFORM COMMISSION, *Report 103: Same Crime Same Time: Sentencing of Federal Offenders*, 2006

BALDRY E., MCDONNELL D., MAPLESTONE P. & PEETERS M., "Ex-prisoners, accommodation and the state: post-release in Australia" (2006) 39(1) *ANZ Journal of Criminology* 20-33

BARILA A., *Suitability versus circumstance: A longitudinal cohort study with 300 New South Wales Periodic Detainees*, Research Summary No 1, unpublished findings, Corporate Research Evaluation and Statics, New South Wales Department of Corrective Services, 1999

BEYOND BARS ALLIANCE, *Fact Sheet 6: Are prisons Cost-Effective?* www.beyondbars.org.au

BRADSHAW J, *Community service orders in Otago and Southland: a survey*, 1984

BUTLER T. & MILNER L., *The 2001 New South Wales Inmate Health Survey*, Corrections Health Survey, Sydney, 2003

DAILY TELEGRAPH, *Arsonist's jail break – Volunteer firefighter's weekend detention*, 7 December 2004

DAILY TELEGRAPH, *Weekend detention for \$4.7M bank fraud*, 28 January 2005

DAILY TELEGRAPH, *Weekend jail for cop death*, 7 September 2007

DEPARTMENT OF ABORIGINAL AFFAIRS, *Two Ways Together: NSW Aboriginal Affairs Plan 2003-2012*, 2005

FISHER G., *Community Sentences in Victoria: A Statistical Profile*, Sentencing Advisory Council, Melbourne, November 2007

FREIBERG A. & ROSS S., *Sentencing Reform and Penal Change: The Victorian Experience*, Federation Press, Melbourne, 1999

GORTA A., *Periodic Detention in NSW: Trends and Issues 1971-1991*, Department of Corrective Services Research Bulletin No.16., August 1991

HENDERSON M., *Benchmarking Study of Home Detention Programs in Australia and New Zealand*, Report to the National Corrections Advisory Group, March 2006

HOUGH M., JACOBSON J. & MILLIE A., *The Decision to Imprison: Sentencing and the Prison Population*, Prison Reform trust, London, 2003

HYSLOP D., *Doing Crime to Pay the Fine: Prisoners and Debt, a Reintegration Issue*, New South Wales Department of Corrective Services, 2005

INDEPENDENT COMMISSION AGAINST CORRUPTION, *Report on Investigation into Case Management and Administration of Community Service Orders*, September 2006

JUDICIAL COMMISSION OF NEW SOUTH WALES, *Equality before the Law*, Bench Book, 2006

JUDICIAL COMMISSION OF NEW SOUTH WALES, *Monograph 18: Periodic Detention Revisited*, 1998

LAW AND JUSTICE FOUNDATION OF NEW SOUTH WALES, *The Legal Needs of Prisoners and People Recently Released from Prison Background Paper*, 2005

LOH N., MALLER M., FERNANDEZ J., FERRANTE A. & WALSH M., *Crimes and Justice Statistics for Western Australia: 2005*, The University of Western Australia Crime Research Centre, March 2007

MCHUTCHISON J., *Outcomes for NSW periodic detention orders commenced 2003-2004*, Research Publication, No 48, New South Wales Department of Corrective Services, November 2006

MINISTRY OF JUSTICE CRIMINAL JUSTICE GROUP, *Review of Community Based Orders in New Zealand*, 1999

NEW SOUTH WALES ABORIGINAL JUSTICE ADVISORY COUNCIL, *NSW Aboriginal Justice Plan: Beyond Justice 2004-2014*, 2005

NEW SOUTH WALES BUREAU OF CRIME STATISTICS AND RESEARCH, *NSW Criminal Courts Statistics 2006*, 2007

NEW SOUTH WALES GOVERNMENT, The Hon. Kelly MLC, Minister for Justice, *NSW Government response to the Legislative Council Inquiry - Community-based sentencing options for rural and remote areas and disadvantaged populations*, 21 February 2007

NEW SOUTH WALES GOVERNMENT, *State Plan: A new direction for NSW*, Premier's Department, Sydney, 2006

NSW PARLIAMENTARY DEBATES, HANSARD, Legislative Assembly, 18 November 1970 at 8041; 8044; 8045

NSW PARLIAMENTARY DEBATES, HANSARD, Legislative Assembly, 1 March 1977 at 4600

NSW PARLIAMENTARY DEBATES, HANSARD, Legislative Council 8 March 1977 at 4829; Legislative Assembly 27 November 1980 at 3901 and 4 March 1981 at 4456

NSW PARLIAMENTARY DEBATES, HANSARD Legislative Council 24 March 1981 at 4972 and 25 March 1981 at 5138

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NSW PARLIAMENTARY DEBATES, HANSARD, Legislative Council, 16 March 2004 at 7245, the Honourable J Hatzistergos at 7245

NSW PARLIAMENTARY DEBATES, HANSARD, Legislative Council, 24 September 2002, the Honourable Greg Pearce at 5136

NSW PARLIAMENTARY DEBATES, HANSARD, The Hon. Maddison, 18 Nov 1970, *Periodic Detention of Prisoners Bill* 1970 at 8041

NSW PARLIAMENTARY DEBATES, HANSARD. Legislative Assembly 17 November 1970 at 7842 and 18 November 1970 at 8041

NSW PARLIAMENTARY DEBATES, HANSARD Legislative Council 24 November 1970 at 8145

NEW SOUTH WALES LAW REFORM COMMISSION, *Discussion Paper No 33: Sentencing*, 1996

NEW SOUTH WALES LAW REFORM COMMISSION, *Report 79: Sentencing*, 1996

NEW SOUTH WALES PARLIAMENT, Legislative Standing Committee on Law and Justice, *Report No 30: Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006

NEW SOUTH WALES PARLIAMENT, Legislative Standing Committee on Law and Justice, *Back-end home detention Inquiry*, June 2005

NEW SOUTH WALES PARLIAMENT, Legislative Standing Committee on Law and Justice, *Crime Prevention Through Social Support*, 2000

NEW SOUTH WALES PARLIAMENT, Legislative Council Select Committee into the Increase in the Prisoner Population, *Final Report*, (Parliamentary Paper No 24), November 2001

NEW SOUTH WALES SENTENCING COUNCIL, *The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices, Interim Report*, 2006

NEW SOUTH WALES SENTENCING COUNCIL, *Abolishing Prison Sentences of 6 months or Less*, 2004

NEW SOUTH WALES SENTENCING COUNCIL, *How Best to Promote Consistency in Sentencing in the Local Court*, 2003

NEW ZEALAND DEPARTMENT OF CORRECTIONS, *Annual Report 2006-2007*, 2007

NEW ZEALAND GOVERNMENT, The Right Hon. H. Clark, Media release, *Effective interventions package launched*, 15 August 2006; Media release, *Rethinking Crime and Punishment, Community Sentencing Options Need Further Work*, New Zealand, 25 July 2007

PENFOLD C., HUNTER G. & HOUGH M., *The intermittent custody pilot: a descriptive study*, Home Office Online Report 23/06, London, 2006

POPOVIC J., 'Meaningless v Meaningful Sentences: Sentencing the Unsentenceable', *Sentencing: Principles, Perspectives & Possibilities Conference*, Canberra, 10-12 February 2006

POTAS I., *A Critical Review of Periodic Detention in New South Wales*, Judicial Commission of New South Wales, Sydney, 1992

POTAS I., EYELAND S. & MUNRO J., "Successful completion rates for supervised sentencing options" *Sentencing Trends and Issues*, Judicial Commission of New South Wales, 2005

POTAS I., MARSIC N. & CUMINES S., *Periodic Detention Revisited*, Monograph Series No. 18, Judicial Commission of New South Wales, 1998

PRISON REFORM TRUST, *Justice for Women: the need for reform*, London, 2000

PRODUCTIVITY COMMISSION, *Report on Government Services*, 2006

PUGH R., 'Rurality and Probation Practice' (2007) 54(2) *Probation Journal* 142-156

QUEENSLAND DEPARTMENT OF CORRECTIVE SERVICES, *Annual Report 2005-2006*, 2006

QUEENSLAND DEPARTMENT OF CORRECTIVE SERVICES, *Annual Report 2006-2007*, 2007

QUEENSLAND GOVERNMENT, The Hon. J. Spence MP, Minister for Police and Corrective Services, *Community Corrections: Strengthening community safety* (date unspecified)

SMITH P., GOGGIN C. & GENDREAU P., *The Effects of Prison Sentences and intermediate Sanctions on Recidivism: General Effects and Individual Differences*, 2002

SNOWBALL L. & WEATHERBURN D., *Indigenous over-representation in prison: The role of offender characteristics*, Crime and Justice Bulletin No 99, BOCSAR, September 2006

SPAANS E. C., 'Community Services in the Netherlands: Its effects on recidivism and net-widening' (1998) 8 *International Criminal Justice Review* 1-14

STEERING COMMITTEE FOR THE REVIEW OF GOVERNMENT SERVICE PROVISION (SCRGSP), *Report on Government Services 2007*, Productivity Commission, Canberra, 2007

STEMEN D., *Reconsidering Incarceration: New Directions for Reducing Crime*, Center on Sentencing and Corrections, Vera Institute of Justice, New York, January 2007

STRINGER A., *Women Inside In Debt: The Prison and Debt Project*, CRC Justice Support, Women in Corrections: Staff and Clients Conference, Australian Institute of Criminology / SA Dept of Corrective Services conference, 31 Oct-1 Nov 2000

STRINGER A., *Prison and Debt: Does Debt Cause Crime?* Prisoner's Legal Service Inc, Queensland, 1999

THE SYDNEY MORNING HERALD, *Libs to turn the screws on prisoners*, 15 February 2003

THE SYDNEY MORNING HERALD, *Rules could let Rivkin avoid prison indefinitely*, 20 December 2003

TASMANIAN LAW REFORM INSTITUTE, *Issues Paper No 2: Sentencing*, 2002

TASMANIAN LEGISLATIVE COUNCIL SELECT COMMITTEE, *Correctional Services and Sentencing (Wing Committee Report)*, 1999

The Hon. Justice J. NAGLE, *Report of the Royal Commission into New South Wales Prisons*, NSW Government Printer, Sydney, 1978

TOMINARO J. & KAPARDIS A., 'A Criminological Study of the Use of Intensive Correction Orders in Victoria, Australia' (1996) 40(1) *International Journal of Offender Theory and Comparative Criminology* 63-73

VIERAITIS L., KOVANDZIC T. & MARVELL T., *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data, 1974-2002*, Criminology & Public Policy, Vol 6 No 3, 2007

WEATHERBURN D., *Disadvantages, Drugs and Gaol: Re-thinking Indigenous Over-representation in prison*, Keynote address, Conference of the Australasian Society on Alcohol and other Drugs, Cairns Convention Centre, 5th-8th November, 2006

WOODWARD R., *Occasional Paper No 10: Families of prisoners: Literature review on issues and difficulties* Department of Family and Community Services Australian Government, 2003

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