

The Law Society
of New South Wales



Impact of Abolishing Short Prison Sentences

Presentation

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to

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*“No Imprisonment – Mandatory
Imprisonment”*

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INTRODUCTION

Abolishing short sentences of imprisonment. The concept is attractive to criminal lawyers who know that sending someone to prison for a short time will do little, if anything, to stop that person committing further offences when released.

The New South Wales prison population has been growing at an alarming rate for years. Law Society and its Criminal Law Committee would support any proposal that would have the effect of reducing the prison population and stopping people from offending again. Given the range of alternatives to full-time imprisonment, non-custodial alternatives and intervention programs available to courts in New South Wales, it is right to ask why many people in prison are there for a short period of time.

The NSW Bureau of Crime Statistics and Research published a Bulletin in September 2002ⁱ. The Bureau estimated that abolishing sentences of 6 months or less would reduce the total prison population by about 10%. In economic terms, sending someone to prison for a few days or weeks or even a couple of months is not cost-effective. Abolishing short prison terms would allow the savings to be invested in worthwhile programs and supervision for offenders in the community.

One Australian jurisdiction has been brave enough to try it and I can give you some information about what is happening in Western Australia. I can also tell you about the Canadian experience with alternatives to imprisonment. There, since 1995, “conditional sentences” can be served in the community.

Primarily, however, I want to talk about current sentencing options in New South Wales and how best to break the crime cycle of repeat offending.

NEW SOUTH WALES

New South Wales sentencing philosophy is that short sentences of imprisonment should not normally be imposed. Section 5(1) *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that a court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate. Where an offender is sentenced to imprisonment for six months or less, section 5(2) requires the court to give and record reasons for deciding that imprisonment is the only appropriate penalty. The court is also required to give reasons for not allowing the offender to participate in an intervention or other program for treatment or rehabilitation.

However, efforts to implement this philosophy can be frustrated.

Sentencing options and alternatives to full-time imprisonment are neither sufficiently resourced nor available to all eligible offenders throughout the State. The same problems apply to necessary supporting services, such as medical and psychiatric treatment, drug and alcohol treatment, counselling, anger management programs, housing support, education and training opportunities. The Probation and Parole Service struggles to fulfil its reporting, work program and supervision load.

Added to this is the problem of the offender who has already exhausted all alternative options. It is unfortunate, but true, that there will always be situations where a court feels compelled to impose a short prison sentence.

To abolish short prison sentences would limit judicial discretion. If the discretion to impose a sentence of less than 6 months is removed from the sentencing court, and the current geographic and funding limitations on sentencing alternatives and necessary supports persist, the court may well find that it must impose a longer sentence than it believes is appropriate.

This offends the principle that a sentence must be proportional to the offence committed.

WESTERN AUSTRALIA

Since January 1996, Western Australia, the court can only impose prison sentences of 3 months or less in very limited circumstancesⁱⁱ. The Western Australian Department of Justice reports that before 2002, Western Australia was three times more likely than other Australian states to impose a short prison sentence for minor offences. Between 1 July 2002 and 30 June 2003:

- prisoners commenced 1,324 terms of imprisonment of 6 months or less;
- 498 of those terms were for periods of between 8 days and less than a month;
- 778 of the terms of 6 months or less were for default of fines;
- 468 of the terms for fine default were for periods of less than one month;
- 450 sentences were served for driving licence offences.ⁱⁱⁱ

So, despite the prohibition, the initiative does not appear to have been terribly successful. There has been no formal evaluation, so the reasons why the legislation has apparently failed have not been identified.

Nevertheless, as part of its new sentencing legislation passed last year, Western Australia will abolish the option of imposing a prison sentence of six months or less. This will be achieved by amending approximately 72 Acts of Parliament to remove imprisonment of 6 months or less. For some offences, monetary fines will increase; for others, terms of imprisonment will be extended. These changes have not been put into effect yet.

The Western Australian Parliamentary Legislation Committee conducted an inquiry into the impact of the new sentencing legislation. The Committee expressed concern that there had been no evaluation of the impact of the abolition of sentences of 3 months or less and recommended that the removal of sentences of 6 months or less should be proclaimed separately from the remainder of the Bill to ensure proper monitoring of its impact^{iv}.

Submissions to the Legislation Committee inquiry from Aboriginal organisations and communities commented on the negative impact of replacing penalties of imprisonment with fines, noting the increasing incidence of Aboriginal people being imprisoned for fine default.^v The Western Australian Government acknowledges that there were 736 imprisonments for fines default and some 450 sentences for driving licence offences in the period July 2002 to June 2003^{vi}. Under Western Australia's sentencing regime at the time of the Legislation Committee inquiry, the statutory penalty for these offences was imprisonment and there was no option of a community-based sentence.

Anecdotal comments from Western Australian practitioners reinforce concerns that the impact of the legislation finds more people being imprisoned for fine default. Lawyers are also concerned that some magistrates do impose longer sentences than they would otherwise do, because of the prohibition of sentences of less than 3 months. Some magistrates in the North-west of the State also believe that there is great value in being able to impose short sentences. They can operate as a valuable cooling-off period if antagonisms arise between factions in small communities, and they can be useful for drying-out or detoxification periods.

While accepting merit in deferring commencement of the prohibition on 6 month sentences, the Western Australian Government has not committed to an evaluation. It said that the costs of undertaking such an evaluation and the effectiveness of such an evaluation need to be considered. The Western Australian Government has, however, agreed to review that part of the legislation abolishing prison sentences of 6 months, 2 years after it commences.^{vii}

REDUCING THE PRISON POPULATION AND ADDRESSING RECIDIVISM

The Law Society and its Criminal Law Committee have advocated for many years that it would be more effective to invest in practical measures aimed directly at addressing offending behaviour than to allow the prison population to continue to increase.

In its report **New South Wales: "The Convict State"**^{viii}, the Society highlighted its support for:

- Proper regard for the principles and philosophy of sentencing.
- Sensible, widely available alternatives to prison – properly supervised and accountable to the court – for people who commit minor or less serious offences.
- Use of imprisonment as a last resort, focussed on serious offences.
- Government to find an appropriate balance in the use of, and the allocation of resources to, imprisonment and alternatives to imprisonment.

The Law Society agrees that many magistrates and judges may well be frustrated in crafting appropriate alternative sentencing options because there are:

- geographic limitations on the availability of various options - home detention, periodic detention, appropriate work schemes and supervision for community

service, the Drug Court, Circle Sentencing, drug and alcohol treatment and rehabilitation resources, accommodation supports for people with intellectual disabilities, treatment for people with mental illnesses - particularly for Aboriginal offenders, and

- limitations on funding and resources of the Probation and Parole Service restrict the availability of viable programs and necessary supervision.

I would like to highlight the following particular issues about some of the sentencing options currently available in New South Wales:

Home Detention

As at January 2004, only 195 people (156 men and 38 women) were subject to Home Detention Orders. Despite many representations to the Department of Corrective Services, the availability of Home Detention remains restricted to the major residential centres on the east coast of the State: Sydney, the Hunter Valley, the Illawarra and the Central Coast. The Minister for Corrective Services announced last year that rural-based Home Detention would be piloted. However, that will not commence until later this year or early next year. It will operate from Kempsey and take in the State's mid-North Coast.

Home Detention has been available since 1997, following evaluation of a trial program that commenced in 1992. It is very disappointing that, after this length of time, Home Detention is not available across a wider geographic area.

Periodic Detention

The lack of active supervision and ultimate accountability to the court may be compelling reasons why both the community and the court lack confidence in current New South Wales alternative sentencing options.

Of particular concern is the decrease in the use of periodic detention. There are 11 Periodic Detention Centres in New South Wales. In January 1998, 1520 periodic detention orders were current. By 20 October 2002, the number of periodic detention orders had fallen to 831. As at 26 February 2004, only 721 people have periodic detention orders. Revocation procedures are now more stringent, and the compliance rate has risen to 80%.

The Law Society has been concerned about the ability of the Probation and Parole Service to provide sufficient levels of support to periodic detainees. In the Society's view, the level of support should be similar to that provided to people subject to Home Detention Orders. It appears that this may now be starting to happen. The Department noted in its last Annual Report that approximately 55 visits a month are made to periodic detainees, to encourage compliance.

Also of concern are restrictions on the availability of periodic detention to certain offenders. Sections 65A and 65B of the *Crimes (Sentencing Procedure) Act* considerably restrict periodic detention as an option for people who have previously served full time prison for more than 6 months and for people convicted of sexual offences.

These provisions should be removed so that periodic detention is again available as an unrestricted alternative to full time imprisonment, subject to the offender satisfying the court as to suitability, and proper assessment.

Community Service Orders

Community Service Orders should be a valuable sentencing option. With worthwhile programs and appropriate supervision, offenders can learn useful skills as well as provide some reparation to the community. However, the concern persists that there is limited opportunity for offenders to participate in suitable work programs in many rural and regional areas.

Work programs should not only engage an offender in physical activity. The Probation and Parole Service runs programs in conjunction with government and community agencies, and works with local communities with respect to sourcing opportunities for offenders under supervision. Additional resources would enable a greater range of educational and work skills programs to be provided within community based orders.

Diversionsary Schemes and Intervention Programs

The Law Society is of the view that there is an important role for criminal justice diversionsary schemes which can be of varying duration and benefit both offenders and the community. Interventions programs can provide a flexible option and can be utilised at the pre-hearing stage, pre-sentencing or post-sentencing.

The MERIT program, which has a maximum length of three months, has been very successful in the Local Court. Subject to assessment, defendants on bail can be referred to drug rehabilitation programs. MERIT is available at 50 Local Courts. Unfortunately, the Commonwealth has delayed in providing promised funds. This delay caused problems at Gosford and Wyong last month. It was reported in the media that key psychologists and welfare workers had deserted the program fearing that a funding shortfall will sound the program's death knell^{ix}.

The Corrections Health Mental Health Court Liaison Service commenced operation in 2002. The Service provides assessments to assist the court in dealing with people charged with summary offences who have a mental illness or condition. Operating in seven metropolitan and rural courts in NSW, it is in the process of being expanded to include a further seven regional and rural courts. Additionally, Local Area Mental Health Services operate court liaison services in Newcastle, Wollongong and Port Macquarie/Kempsey.

Almost 800 people facing charges were screened during the first 7 months of the project. A total of 64% of the screened population were identified with a serious mental health problem or disorder.

Intensive intervention and support is provided to offenders participating in programs under the *Drug Court Act 1998*. However, its availability is limited to residents of Auburn, Bankstown, Baulkham Hills, Blacktown, Campbelltown, Fairfield, Hawkesbury,

Holroyd, Liverpool, Parramatta or Penrith who are referred by the District Court sitting at Campbelltown, Liverpool, Parramatta or Penrith, and the Local Courts at Bankstown, Blacktown, Burwood, Campbelltown, Fairfield, Liverpool, Parramatta, Penrith, Richmond, Ryde and Windsor. The Government has recently announced the expansion of the Youth Drug Court to include young people from central and eastern Sydney.

The Circle Sentencing Program, which commenced in Nowra, has also been the subject of favourable reports. It is being extended to Dubbo, Brewarrina and Walgett.

The Society's Criminal Law Committee is a member of the Community Justice Conferencing for Young Adult Offenders Working Group, which is preparing for the pilot conferencing scheme to operate from one suburban and one rural locality. This intervention will apply to offenders aged under 25 who are likely to be sentenced to imprisonment if convicted.

The Law Society is of the view that there is a need for the increased availability and use of diversionary schemes and intervention programs in the criminal justice system. It supports changes and enhanced funding that would enable this to occur.

INCREASED RESOURCES FOR THE PROBATION AND PAROLE SERVICE AND OTHER SERVICES

If the number of people serving short prison terms is to reduce, and for there to be any prospect of stopping people from committing crime, there needs to be an increase in the availability of sentencing options and alternatives to imprisonment. This also means that the capacity of the Probation and Parole Service and the range of programs it supervises needs to increase.

In addition to its supervisory and program provision responsibilities, Probation and Parole is the source of pre-sentence assessment and advice to courts to assist in appropriately sentencing offenders. The Service also prepares pre-release reports. Its reporting obligations have steadily increased over recent years, as has the number of offenders the Service is required to supervise.

In January 2004, the Probation and Parole Service prepared:

- 1,734 bail and other pre-sentence reports;
- 38 post-sentence reports (home detention);
- 229 post-release reports (parole).

The total number of people subject to supervision during the month of January 2004 was 16,517.

Department of Corrective Services Budget Estimates 2003-04 project that the Probation and Parole Service will be required to produce 35,000 pre-sentence reports during 2003-04, an increase of 4,000 reports in the year. The Budget Estimates also project that caseload intakes will increase in all categories except community service orders. Further

strain will be placed on the Service as a result of the recent commencement of the *Crimes Legislation Amendment (Parole) Act 2003*.

Issues about funding and staffing levels have led to industrial action over the past 2 years. In May 2002, the Public Service Association imposed work bans and limited the number of court, parole reports and community service order assessments to be prepared by its members. A ban was also imposed on the provision of supplementary parole reports and pre-sentence report updates. In February 2003, the Public Service Association also directed its members that, where resources have not been made available for the completion of outstanding pre-release assessments, the assessments are not to be completed until those funding resources have been made available.

The work bans and limitations on producing court and parole reports and assessments directed by the Public Service Association were of great concern to Law Society members who represent the affected clients. Understaffing and overworking may lead staff to make assessments that are not thorough, comprehensive or reliable. Significant issues may be overlooked or not explored due to insufficient time or resources. Practitioners are concerned that delays in providing reports and assessments may:

- extend the periods in custody for defendants in circumstances where the court is prepared to wait for an assessment;
- see the court impose an alternative penalty that does not require assessment, to the detriment of the defendant.

In March 2003, the Government made a commitment to provide \$7.5 million over 4 years to the Probation and Parole Service for the purpose of supervising parole. The Law Society would like to know whether the community-based resources of the Service will also receive a sufficient injection of funding to enable it to meet its projected workload and allow it to expand to provide new initiatives and services.

It is particularly important that the level of resources should enable the Probation and Parole Service to meet the needs of people under supervision who reside in less populated areas of the State. The Service is an important link between the people it assesses, or who are under its supervision, and community services. This link is can be vital where the person has an intellectual or other disability, or has mental health issues. Commonly, the person is also addicted to drugs and/or alcohol. The PPS is an essential component in assisting offenders to rebuild community ties, manage their lives and re-establish employment.

In the Law Society's view, increasing the funds allocated to the Probation and Parole Service for its community-based operations is an investment that is likely to result in reduced reoffending.

Similarly, other services need to be expanded and properly funded. Services such as:

- drug and alcohol treatment and rehabilitation services,

- ❑ accommodation support for people on bail, for people with intellectual disabilities and people on release from prison.

There must also be treatment and accommodation for people with mental illness, together with educational and work skills programs and employment opportunities for people who have completed their sentences.

ALTERNATIVES TO IMPRISONMENT IN OTHER JURISDICTIONS

While the Law Society does not think that it is appropriate to follow the lead of Western Australia in abolishing short prison sentences, there are some aspects of the State's custody alternatives that might be useful additions for sentencers in New South Wales.

WESTERN AUSTRALIA

The main reason for Western Australia's high imprisonment rate is that short sentences of six to 12 months have been used at up to three times the national average. Other contributing factors include the low use of community orders and it is now the Western Australian Government's goal to shift the focus from imprisonment to community-based sanctions for low-risk short-term offenders^x.

While periodic detention is not available in Western Australia and back-end Home Detention Orders have been removed and replaced by parole with or without conditions, Western Australia is in the process of expanding community-based options, including treatment programs.

Currently, for offences at the lower end of the scale, the court may apply one of the following:

- ❑ Release without sentence;
- ❑ Conditional release order;
- ❑ Fine;
- ❑ Community-based order.

For more serious offences, a conviction must be recorded and the court may impose:

- ❑ An intensive supervision order; or
- ❑ Suspended imprisonment.

Intensive Supervision Orders

Part 10 of the Western Australian *Sentencing Act 1995* provides for the imposition of Intensive Supervision Orders (ISO) by the Court. An ISO provides that, if the offender commits another offence (in Western Australia or elsewhere) while the ISO is in force, the offender may be sentenced again for the offence to which the ISO relates. The Western Australian legislation clearly states that an ISO cannot be imposed without the provision of a pre-sentence report.

Standard obligations under an ISO could include that the offender:

- ❑ must report to a Community Corrections Centre within 72 hours after being released by a Court;
- ❑ must not change address or place of employment without the prior permission of his or her Community Corrections Officer;
- ❑ must not leave the State except with the permission of the Court or Community Corrections;
- ❑ must comply with obligations such as those set out in the Western Australian *Sentence Administration Act 1995* (which include not be in possession of alcohol, drugs etc).

The purpose of the supervision requirement is to allow the offender to be regularly monitored in the community and to receive regular counselling as decided by the Community Corrections for the purpose of either or both:

- ❑ rehabilitating the offender;
- ❑ ensuring the offender complies with any direction given by the Court when imposing the requirement.

The ISO can include either a program requirement and a curfew requirement, or both.

The program requirement is to enable any personal factors which contribute to the offender's criminal behaviour to be assessed and to provide for the offender "to recognise, to take steps to control and, if necessary, to receive appropriate treatment for those factors"^{xi}.

This means that the offender will be required to obey the orders of the Court and Community Corrections to undergo assessment by a medical practitioner, psychiatrist or psychologist, undergo appropriate treatment for abuse of alcohol, drugs or other substances, attend educational, vocational or development programs, reside in a specific place to enable any of the above requirements to be fulfilled or a combination of all of these requirements.

Such requirements provide rehabilitative prospects for an offender.

Conditional Release Orders

As mentioned earlier, for offences at the lower end of the scale, the court may make a Conditional Release Orders.

Section 47 of Western Australia's *Sentencing Act 1995* provides for Conditional Release Orders (CRO). CRO enable a Magistrate to impose any requirements on offenders it decides necessary to ensure the offenders comply. The CRO must not be more than 24 months and the Court may make an order that the offender re-appear before the Court so the Court can ascertain whether the offender has complied.

In New South Wales, section 9 *Crimes (Sentencing Procedure) Act 1999* currently provides for the making of an order directing the offender to enter a good behaviour bond for a specified term which may not exceed 5 years. It may be useful to consider whether sentencers should have an option available similar to CRO.

CRO could be available in situations where there are reasonable grounds to believe that the offender will not re-offend during the time of the CRO and that the offender does not need supervision by the Probation and Parole Service.

The availability of such an option would enable the sentencing court to impose requirements on the offender to secure the good behaviour of the offender. These conditions could be similar to those imposed when an offender is on bail such as non-association orders, or other requirements such as remaining in gainful employment or to re-appear before the Court to ascertain they have been of good behaviour.

This would mean that a CRO would be less lenient than a section 9 bond.

While unlikely that a person who would receive this kind of penalty would ordinarily receive a sentence of imprisonment, it would provide a further option on the sentencing scale prior to imprisonment and an alternative that may be more appropriate for some offenders than a community service order or a section 9 bond.

Canada has also crafted a sentencing option that fits between probation and full-time prison.

CANADA

Section 742 of the Canadian Criminal Code provides for the imposition of “conditional sentences of imprisonment”. Where a court imposes a prison sentence of less than 2 years, the sentence can be served in the community under supervision and subject to conditions. The court must be satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing.

There is a distinction between conditional sentences of imprisonment and suspended sentences with probation. This issue was addressed by the Supreme Court of Canada in *R v Proulx*^{xii}. Their Honours distinguished conditional sentences from probationary measures at paragraph 22:

“The conditional sentence incorporates some elements of non-custodial measures and some others of incarceration. Because it is served in the community, it will generally be more effective than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and community, and the promotion of a sense of responsibility. However, it is also a punitive sanction capable of achieving the objectives of denunciation and deterrence. It is this punitive aspect that distinguishes the conditional sentence from probation...”

The distinction was also made between conditional sentences and suspended sentences with probation. A suspended sentence with probation is primarily a rehabilitative

sentencing tool. However, the Canadian Parliament intended conditional sentences to address both punitive and rehabilitative objectives.

Conditional sentences, for example, generally include punitive conditions that are restrictive of the offender's liberty. Conditions such as house arrest should be the norm not the exception. The issue of net-widening is also addressed in the legislation: the court is required to determine whether the appropriate sentence is either a term of imprisonment or probationary measures. If either of these sentences is appropriate, then a conditional sentence must not be imposed.

CONCLUSION

Concerns have been raised by various organisations over the rapidly increasing prison population in New South Wales. The Law Society would support any proposal that would both reduce the prison population and address recidivism.

Sentencing alternatives and their necessary supporting services must be properly resourced and widely available in the localities where offenders live. These services are the best and most cost-effective options for breaking the crime cycle for repeat offenders. The benefit to the community of reducing the human and social costs of crime is obvious. The corrections system would also be better placed to treat and meet the needs of longer-term prisoners, to prepare them more effectively for their return to the community when they are finally released.

The Law Society fears that, of itself, abolishing short sentences of imprisonment of six months or less will not properly address criminal behaviour. There may be difficulty in persuading victims and the community of the value of the initiative. Professionals in the criminal justice system are also concerned that it would have a net-widening effect and that it would impose an unacceptable fetter on judicial discretion.

The Society advocates for:

- far greater funding for, and wider availability of, programs aimed at preventing crime – with an emphasis on early intervention initiatives;
- far greater funding for, and wider availability of, programs supporting community-based correctional orders, probation, community service orders programs, suspended sentences, home and periodic detention, particularly in rural areas;
- expansion of interventions such as MERIT, Mental Health Court Services, the Drug Courts and Circle Sentencing;
- much more attention and greater resources being devoted to providing educational and work skills programs within community based orders.

ADDENDUM

Summary of Issues Identified by the May 2004 New South Wales Sentencing Council Discussion Paper: *Abolishing Prison Sentences of Six Months or Less*

1. “Sentencing creep” – if short prison sentences are abolished, some offenders will be inappropriately sentenced to longer periods of imprisonment, particularly if funding is not provided for increased alternative programs. Sentencing creep would have cost ramifications and raises issues of proportionality of the sentence to the crime committed.
2. The intention to abolish prison sentences of 6 months or less presupposes that they will be replaced by alternatives to full-time custody but these are not uniformly available throughout NSW. Priority should be given to making presently existing sentencing options available throughout NSW. If such options were made available, it could be expected that there would be a further reduction in the number of short sentences imposed, thereby removing the need to abolish short prison sentences.
3. It would be inequitable to abolish short sentences until viable sentencing alternatives are available state-wide. It is clear that in areas where alternatives are available the rate of imposition of short sentences is lower.
4. The use of periodic detention as an alternative to full-term imprisonment has declined in recent years. s65A *Crimes (Sentencing Procedure) Act 1999* (“the Act”) means periodic detention is not available to those who have previously served terms of 6 months + full-time. This restriction could be removed, resulting in less full-time inmates.
5. If the nexus were broken between full-time imprisonment and alternatives such as suspended sentences, periodic detention and home detention (ie that those are only available once a determination is made that full-time gaol is warranted), this may lead to “net widening”: ie a risk that offenders will be given suspended sentences or periodic or home detention when less severe penalties such as CSO’s or fines would have been appropriate.
6. The abolition of short sentences would mean they’re not available when a person breaches the terms of periodic or home detention or a suspended sentence.
7. S. 5 of the Act could be amended to tighten up the circumstances under which a short sentence could be imposed (eg to restrict them to those offenders who cannot be trusted to comply with non-custodial orders) or to provide that such sentences are automatically suspended (see Annexure F to the Discussion Paper).
8. S. 46 disallows a non-parole period for a short sentence, thereby denying short-term prisoners the benefits of post-release and other programs possibly aggravating the low rehabilitative effectiveness of short sentences. Short

sentences without post-release supervision may exacerbate family and community issues which are often related to offending behaviour.

9. The geographical unavailability of sentencing options is an issue which disproportionately affects aboriginal people, who are most commonly imprisoned because of criminal histories of public order and fine default offences.
10. If short sentences are to be abolished it should not happen before a pilot and evaluation take place (preferably in a rural area with a high indigenous population, targeting aboriginal people).
11. Abolition of short sentences will have particular ramifications for vulnerable sectors of the community, notably indigenous people, juveniles, intellectually disabled and mentally ill people.
12. In WA, instead of short sentences, some maximum penalties were simply increased to more than 6 months, while many offences had the fine amount increased, leading to increased imprisonment of aboriginal offenders for fine default.
13. Options such as the Circle Sentencing pilot should continue to be expanded.
14. Short periods of detention should remain available for juveniles.
15. Many people being given short sentences are intellectually impaired or mentally ill. Abolition of short sentences will adversely affect them – eg what to do if they breach the terms of a CSO? Should diversion programs be available to all with cognitive impairment, rather than just the mentally ill, developmentally disabled or those suffering a mental condition for which treatment is available as presently defined in the *Mental Health (Criminal Procedure) Act 1990*?
16. We should await review of the WA legislation before making any move.
17. It has been suggested that in WA, most of the offences which no longer attract imprisonment were the minor ones that were unenforced, irrelevant and in practice didn't attract prison sentences, while the enhanced maximum penalties now apply to all the offences that in practice used to attract short sentences. This will not result in lower numbers of prisoners and the expected resultant cost saving the abolition of short sentences might otherwise have been expected to be achieved.
18. The UK review of this issue rejected the abolition of short sentences and resulted in the system of "Custody Plus" (ie short prison terms followed by tailored supervision in the community) and "Custody Minus" (ie tailored supervision without the initial period in prison).
19. Electronic monitoring could be considered as an option in lieu of short sentences (not limited to home detention), eg release after a short term or without any term into programs or transition centres.

20. Any abolition should be limited to full-time short sentences.
21. There is a conflict between the policies behind recent legislative amendment restricting the availability of bail and the desire to abolish short sentences, and there is concern that remands may be used (deliberately or otherwise) in a manner amounting to a short sentence.
22. The remand population has increased by 12.2% in the past 6 months following recent amendments to the *Bail Act 1978*. These amendments mean that many repeat offenders will be refused bail, but if short sentences were abolished, convictions for many offences would not result in gaol. In those circumstances bail refusal would be difficult to justify.
23. Abolition should not be entertained or considered for budgetary reasons alone.
24. There must be a preparedness to put funding into alternate programs in anticipation of them leading to savings elsewhere in the justice system.
25. It is undeniable that there are offenders and offences whose circumstances may warrant the imposition of a short sentence.
26. To take away the short term imprisonment option leaves a “yawning chasm” in the sentencing ladder between the last available option (CSO’s) and a sentence of more than 6 months.
27. The Court should be given more rather than fewer sentencing options.

Endnotes:

- i NSW Bureau of Crime Statistics and Research Crimes and Justice Bulletin, Number 73 September 2002: *The impact of abolishing short prison sentences*, Bronwyn Lind and Simon Eyland.
- ii Section 86 *Sentencing Act 1995 (WA)*.
- iii Department of Justice Factsheet “*Reducing short terms of imprisonment*” 2003 at <http://www.justice.wa.gov.au/portal/server.pt>.
- iv Report of the Standing Committee on Legislation in relation to the *Sentencing Legislation Amendment and Appeal Bill 2002* and the *Sentencing Administration Bill 2002* (Report 18, Rec 17) at [http://www.parliament.wa.gov.au/parliament/home.nsf/\(FrameNames\)/Committees](http://www.parliament.wa.gov.au/parliament/home.nsf/(FrameNames)/Committees).
- v Report 18, CH 5, paras 5.20-5.21.
- vi Department of Justice Factsheet “*New sentencing regime for Western Australia*” 2003 at <http://www.justice.wa.gov.au/portal/server.pt>.
- vii Response to Report 18 by the Hon Jim McGinty MLA, Attorney General, on behalf of Western Australian Government, 5 June 2003 at above link.
- viii *New South Wales: “The Convict State” – Challenge to Macquarie Street on sentencing and prison reform*, The Law Society of New South Wales, 31 October 2002 at http://www.lawsociety.com.au/uploads/filelibrary/1036038347908_0.4235124008420785.pdf.
- ix Central Coast Herald, Monday 23 February 2004 *Key staff leave as drug help program awaits funds*, by Jason Gordon.
- x Department of Justice Factsheet “*Reducing Imprisonment Program*” at <http://www.justice.wa.gov.au/portal/server.pt>.
- xi As set out in section 73 *Sentencing Act 1995 (WA)*.
- xii *R v Proulx* 2000 SCC 5. The Attorney General of Canada and the Attorney General for Ontario were present as intervenors.

