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Legal Aid ACT

Date 18 October 2013

Mr Steve Doszpot
Chair
Standing Committee on Justice and Community Safety
Legislative Assembly of the ACT
Civic Square, London Circuit
CANBERRA ACT 2601

Steve Doszpot

24 OCT 2013

MLA

Dear Sir,

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY SENTENCING INQUIRY



We refer to the invitation to provide a submission for the inquiry into sentencing in the ACT.

Legal Aid ACT appreciates the opportunity to make a submission. We also thank you for providing an extension of time in which to lodge the submission.

Legal Aid ACT is an independent statutory authority established under the Legal Aid Act 1977. It is funded by the Territory and Commonwealth governments to provide legal assistance to disadvantaged people.

The purpose of Legal Aid ACT is to promote a just society in the Australian Capital Territory by:

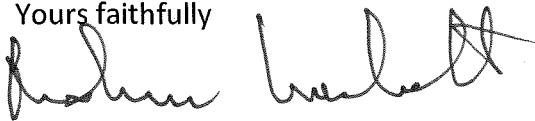
- ensuring that vulnerable and disadvantaged people receive the legal services they need to protect their rights and interests;
- developing an improved community understanding of the law; and
- seeking reform of laws that adversely affect those we assist.

We achieve this purpose by delivering a range of high quality legal aid services through our staff and professional partners in a caring manner that respects diversity and promotes confidence in the legal system.

The terms of reference for the committee's inquiry are extremely broad and wide ranging, and as such Legal Aid ACT will concentrate on those aspects of sentencing law and practice identified in Term of Reference 3. It is in these areas that we have particular experience on a daily basis in the courts, and associated institutions, of the ACT. The Criminal Practice of Legal Aid ACT is responsible for providing representation, duty lawyer services and advice to disadvantaged people who find themselves in the criminal justice system charged with a criminal offence.

We have also given some thought to sentencing options and diversionary programs available in other jurisdictions which might effectively be adapted to this jurisdiction. The approach taken in some other jurisdiction provides a valuable evidential basis upon which reform in the ACT may be based. In this context we have gone to some length and detail to set out the types of provisions that can be found in these jurisdictions, with a view of assisting the role that policy makers will ultimately have should recommendations be legislated. We appreciate the essential link that needs to be established between government policy, the practical operation of the criminal justice system and law reform.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Andrew Crockett', with a stylized flourish at the end.

Andrew Crockett

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STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY SENTENCING INQUIRY

SUBMISSION FROM LEGAL AID ACT

Term of reference 3

In this submission we address reform of a number of interlinked and key areas of the criminal justice system in the ACT. We initially look at the parole procedures and periodic detention, then to practical amendment to the bail provisions. We then go on to address the value and utility of restorative justice, and argue for the establishment of a 'Drug Court'. In the final section of the submission we explore a number of recommendations for reform of the judicial processes – in particular we seek to highlight that the management of mentally ill people is an increasingly visible part of our work and for the court system which requires careful attention.

1. Parole

(a) Court ordered parole for short sentences

Under the current sentencing laws in the ACT, the sentencing court is required to set a non-parole period in relation to sentences of 1 year or more (*Section 65, Crimes (Sentencing) Act 2005*) unless it declines to do so (s.65(4)).

Section 121 of the *Crimes (Sentence Administration) Act* requires that the offender may apply for parole but no earlier than 6 months before the offender's parole eligibility date (set by the sentencing court).

The parole eligibility date is defined in Section 118 of the *Crimes (Sentence Administration) Act* the date on which the non-parole period set by the court ends. It must be assumed that in setting a non-parole period the intention of the sentencing court was that the offender would be released

There is provision to enable an offender to make a 'special parole application', if the offender believes there are exceptional circumstances, at any time before the parole eligibility date.

A parole order will only be made if the offender makes a written application to the Sentence Administration Board for a parole order and the board in exercising its functions under Chapter 7 of the *Crimes (Sentence Administration) Act 2005* makes a parole order.

In our experience the process from the time the application for parole is lodged with the board and the date of the board's determination can take in excess of 3 months. It is not

infrequently the case that the board is only able to hold an inquiry into an application for parole after the parole eligibility date has passed.

In our submission in the case of shorter sentences there may be merit in giving consideration to empowering the sentencing court to make the parole order, and set the parole conditions at the time the offender is sentenced. If the non-parole period set by the sentencing court is relatively short, then one would expect that the court would be armed with sufficient information about an offender's subjective circumstances to fashion suitable parole conditions appropriate to the particular offender.

It is noted that in New South Wales Section 50 of the *Crimes (Sentencing Procedure) Act 1999* provides,

50 Making of parole orders by court (1) *When a court imposes a sentence of imprisonment for a term of 3 years or less, being a sentence that has a non-parole period, the court must make an order directing the release of the offender on parole at the end of the non-parole period.*

(2) *A parole order may be made under this section even though at the time it is made it appears that the offender may not be eligible for release at the end of the non-parole period because of some other sentence to which the offender is subject.*

(3) *The failure of a court to comply with the requirements of this section with respect to a sentence does not invalidate the sentence.*

Section 51 of the *Crimes (Sentencing Procedure) Act 1999* empowers the sentencing court to set the conditions of parole. It provides:

51 Conditions on parole orders

(1) A court may impose such conditions as it considers appropriate on any parole order made by it.

(1A) The conditions of a parole order may include conditions requiring that the offender to whom the order relates be subject to supervision prescribed by the regulations under the *Crimes (Administration of Sentences) Act 1999* during the period specified by or under the order or those regulations.

(1AA) If, in making a parole order, the court does not impose any such conditions in relation to the supervision of the offender, the parole order is, unless the court expressly states that the offender is not to be subject to supervision, taken to include conditions requiring that the offender be subject to supervision prescribed by the regulations under the *Crimes (Administration of Sentences) Act 1999* while released on parole.

(2) The conditions imposed by the court must not be inconsistent with the standard conditions imposed by the regulations under the *Crimes (Administration of Sentences) Act 1999*.

The standard conditions referred to in sub-section (2) prescribed by Regulation 224 of the Crimes (Administration of Sentences) Regulation 2008 are

224 Standard conditions applying to parole

For the purposes of section 128 (1) (a) of the Act, the following are standard conditions of parole:

- (a) the offender must, while on release on parole, be of good behaviour,
- (b) the offender must not, while on release on parole, commit any offence,
- (c) the offender must, while on release on parole, adapt to normal lawful community life.

In such circumstances, release to parole is automatic provided the offender is eligible for release at the relevant time. See Section 126 *Crimes (Administration of Sentences) Act 1999* (NSW).

(b) Cancellation of parole – giving credit for ‘street time’

Section 140 of the *Crimes (Sentence Administration) Act* provides:

Parole—sentence not discharged unless parole completed

(1) An offender is taken, while on parole, to be under the sentence of imprisonment for which the parole was granted and not to have served any period of the imprisonment that remained to be served on the offender's parole release date, unless—

(a) the parole ends without the parole order being cancelled under part 7.4 (Supervising parole); or

(b) the offender is otherwise discharged from the imprisonment.

(2) However, subsection (1) is subject to section 139.

(3) If an offender's parole order in relation to a sentence of imprisonment ends without the order being cancelled, the offender is taken to have served the period of imprisonment that remained to be served on the parole release date and to have been discharged from the imprisonment.

Further, Section 160 of the Act provides:

Parole order—effect of cancellation

- (1) This section applies if an offender's parole order for a sentence of imprisonment is cancelled under part 7.4 (Supervising parole).
- (2) If the parole order is in force immediately before the cancellation, the cancellation ends the parole order.
- (3) On the cancellation of the parole order, the offender is taken not to have served any period (the **remaining period**) of imprisonment for the sentence that remained to be served on the offender's parole release date.
- (4) However, subsection (3) is subject to section 139 (Parole—effect of custody during order).
- (5) The offender must serve the remaining period of the sentence of imprisonment—
 - (a) by full-time detention; and
 - (b) otherwise in accordance with the sentence.

The effect of these provisions is that when a parole order is cancelled the offender is required to serve the whole of the balance of the sentence period regardless of when during the period of parole the breach occurred. It is of course open to the offender once the parole order has been cancelled to reapply to the board for parole. See Section 121(6) *Crimes (Sentence Administration) Act*.

In our submission the current system has the potential to create unfair outcomes if for example the breach of parole occurred late in the period of parole and the offender had otherwise fulfilled his/her parole obligations. A fairer system in our submission would give the offender credit for 'street time' with the consequence that only the balance of the period of parole from the date of the breach to the end of the sentence would be required to be served upon the cancellation of the order.

This is the system in New South Wales where Section 132 of the *Crimes (Administration of Sentences) Act* provides

132 Sentence continues to run while offender on parole

An offender who, while serving a sentence, is released on parole in accordance with the terms of a parole order is taken to continue serving the sentence during the period:

- (a) that begins when the offender is released, and
- (b) that ends when the sentence expires or (if the parole order is sooner revoked) when the parole order is revoked.

Alternatively, the Sentence Administration Board could be given a discretion to determine how much of the balance of the sentence ought to be served having regard to when the breach occurred and the nature of the breach. In this regard we note that Section 77C of the Victorian *Corrections Act 1986* provides,

Power to direct that time on parole is time served

77C. Power to direct that time on parole is time served

The Board may direct that some or all of the period during which a parole order that is cancelled or taken to be cancelled was in force is to be regarded as time served in respect of the prison sentence.

(c) Section 149 Crimes (Sentence Administration) Act 2005

We note that following the decision of His Honour Justice Refshauge in *Blundell v Sentence Administration Board* [2010] ACTSC 151 the legislature amended Sections 150 and 151 of the *Crimes (Sentence Administration) Act* to accord with His Honour's decision.

It seems to us that Section 149 ought also to have been amended to require that the breaching offence be committed while the parole order is in force before the section operates to cancel the parole order.

2. Periodic Detention

In our experience periodic detention is an effective sentencing option for many offenders whose offending behaviour is sufficiently serious to warrant a custodial sentence but for whom a sentence of full time imprisonment would be too severe an outcome.

The program should be sufficiently flexible to enable offenders who are not physically fit or suffering from a medical condition to participate (after all these are not a bar to serving a term of full time imprisonment). An assessment by a corrective services officer that an offender is unsuitable for periodic detention because of a medical condition will usually leave the court with a very serious dilemma.

Periodic detention should be seen as a golden opportunity to have offenders engage in a number of the programs offered by Corrective Services to offenders subject to good behaviour orders such as the Cognitive Self Change Program the Family Violence Program, Anger Management Program, and programs offered by outside agencies such as drug and alcohol programs driver education etc. We believe that Corrective Services may now be offering some of these programs over the weekend but we would see it as an excellent

opportunity to address the multitude of problems that have resulted in the offenders committing offences that have resulted in the imposition of a periodic detention order.

3. Bail

In its March 2013 quarterly report into Corrective Services the Australian Bureau of Statistics noted that together with South Australia the ACT had the highest number of unsentenced prisoners (per 100,000 adult population) in the country at 33 %. It also has the highest proportion of unsentenced prisoners (out of the total prison population). We do not know whether any explanations have been suggested for this phenomenon. We believe however that the current bail legislation may well be part of the reason.

(a) Presumptions against bail

In our submission there should be a review of the Bail Act as a whole, as has recently occurred in New South Wales, and in this jurisdiction such a review should be undertaken with the provisions of the *Human Rights Act* in mind.

The new *Bail Act 2013* (NSW) followed an extensive and comprehensive review of the state's bail laws by the New South Wales Law Reform Commission (Report 133)

In relation to presumptions in relation to bail added over the years to the now repealed *Bail Act 1978* (NSW) the Commission concluded [8.74] and [8.75]:

The current scheme of presumptions, exceptions and exceptional circumstances is unduly complex and restrictive. It is an unwarranted imposition on the discretion of police and the courts. It throws the emphasis onto the offence with which the person is charged or onto prescribed elements in the person's criminal history, instead of allowing a balanced assessment of all the considerations which bear rationally on the question of detention or release. It is voluminous, unwieldy, hugely complex and involves too blunt an approach. The results are frequently anomalous and unjust.

We strongly recommend a uniform presumption in favour of bail (with the sole exception of bail pending appeal against conviction or sentence⁹⁷). That would accord with basic legal principles and concepts enshrined in the criminal justice system, particularly the value of personal liberty and its corollary, the presumption of innocence. The submissions we have received provide overwhelming support for that approach.

In the context of family violence offences the final report of the Australian and New South Wales Law Reform Commissions (*Family Violence – A National Legal Response* (ALRC 114)) also had this to say in relation to presumptions against bail (and specifically in relation to Section 9F of the *Bail Act* (ACT):

10.31 Crimes related to family violence are unlike many other crimes. For one thing, they are more likely to have a history—perhaps a long history—of fear, coercion and control. Where

a crime is committed in the context of family violence, the accused will know the victim; he or she might often want to return to the victim; the victim and the accused may have had children together; the victim and the accused might live in the same home. All these factors suggest that a person who has committed a crime in the context of family violence might, if granted bail, be more likely to see the victim—and so endanger the victim—than a person accused of a crime against a stranger. When granting bail, judicial officers must therefore be alert to the importance of providing for the safety of victims and related children.

10.32 The Commissions do not, however, consider that the safety of women and children is best secured by creating a presumption against bail for all crimes committed in a family violence context. If, as some have submitted, a presumption against bail acts as a disincentive to victims to report family violence crimes, then the presumption might sometimes indirectly undermine the safety of victims. Some victims will also not want alleged offenders incarcerated—this appears to be of particular concern to some Indigenous persons. Furthermore, a presumption against bail for all family violence offences appears to deny unfairly the accused the presumption of innocence.

10.33 A presumption against bail also seems inappropriate for some crimes in a family violence context. Without diminishing the seriousness of any type of breach of a protection order, it would seem that a breach of a contact condition of a protection order that does not involve any family violence, particularly where the protected person invited the contact uncoerced, might not justify a presumption against bail.

10.34 For these reasons, the Commissions do not support presumptions *against* bail for all crimes committed in a family violence context. This is not to say that there should not be a presumption against bail for *some* family violence crimes, such as murder.

10.35 The Commissions note National Legal Aid's submission that the Tasmanian courts' approach to s 12 of the Tasmanian legislation has changed and that fewer alleged offenders are now being detained without good cause. However, in the Commissions' view, and for the reasons outlined above, the Tasmanian legislation does not seem to strike the right balance between protecting victims and giving an accused the presumption of innocence, particularly as it might create a presumption against bail for economic and emotional abuse. The Commissions therefore recommend that it be amended.

10.36 In the Commissions' view, the balance is best struck by generally maintaining a presumption in favour of bail—consistent with the presumption of the accused's innocence—but removing the presumption in favour in certain specific circumstances. The Commissions make no specific recommendation about what those circumstances should be, but suggest that they would include, for example, where an accused has been violent against the victim in the past—as is the case in NSW.

10.37 The Commissions are also somewhat concerned with the ACT provision that provides that police must refuse bail for domestic violence offences 'unless satisfied that the person poses no danger to a protected person while released on bail'—particularly if police do not try to ascertain whether the victim will be in danger, but simply leave the decision to the court. Persons might then be incarcerated unnecessarily in the period between arrest and when the court hears the matter.

Recommendation 10–1 State and territory legislation should not contain presumptions against bail on the grounds only that an alleged crime occurred in a family violence context.

Legal Aid ACT too would strongly urge that consideration be given to removing the presumptions against the granting of bail within the *Bail Act* so that the decision whether or not an alleged offender is to be allowed his or her liberty is determined according to whether there are any unacceptable risks in allowing that person their liberty.

Further, in our submission, the several presumptions against bail within the *Bail Act* offend Section 18(5) of the *Human Rights Act*. The decision by Her honour Justice Penfold in *In the matter of a bail application by Isa Islam* (2010) 4 ACTLR 235 specifically that the presumption against bail contained in Section 9C of the *Bail Act* was incompatible with Section 18(5) of the *Human Rights Act* applies equally to the other presumptions against bail prescribed by Sections 9D and 9E of the *Bail Act*.

In our submission the only legislative provisions which would not offend Section 18(5) of the *Human Rights Act* would be those which allow an authorised officer or a court, taking into account all of the information presented to him or her, including:

- the seriousness of the charges,
- the personal circumstances of the accused, and
- any risk that the accused may
 - not answer bail,
 - commit further offences,
 - endanger the safety of the community or individuals, or
 - interfere with witnesses or evidence

to determine whether it is appropriate for bail to be granted.

(b) Applying for bail

In our submission the current procedures under the *Bail Act* for applying for bail in the ACT is unduly complex and ultimately may operate as a deterrent to remandees applying for bail. In our submission any person remanded in custody ought to have the entitlement to make one application for bail in the Supreme Court. If that application were unsuccessful, then the applicant would then need to show special or exceptional circumstances before being able to make a second application for bail in the Supreme Court.

4. Restorative Justice

There has been growing realisation that often a victim's 'voice' is lost in criminal proceedings.

However, through the use of Restorative Justice, victims can be given an opportunity to express their emotions; acquire answers and information; and feel the sense of closure, recovery and safety.

Arguably, this can dramatically aid in the healing process for the victims, possibly diminishing any resentment or anger that they may feel as a result of the crime. This could be of great value when attempting to restore and maintain community ties, especially in Aboriginal and Indigenous communities.

It is noted that in recent years a number of jurisdictions have introduced forms of restorative justice for young offenders with the objectives of:

- helping to repair the harm to the victim and the community from the offender's behaviour,
- impressing upon the offender the impact of their behaviour on the victim and the community and
- reducing the risk of recidivism by the process including by addressing any matters personal to the offender that may have contributed to the offending behaviour in the first place.

The restorative justice process is similar to that which has been employed in circle sentencing courts for Aboriginal offenders in NSW and the ACT for a number of years.

However so far as we are aware only in New South Wales and Queensland has restorative justice been extended to adult offenders.

(a) Restorative Justice for Adult Offenders

New South Wales Forum Sentencing

Forum sentencing is available to adult offenders appearing in the Local Court subject to selection criteria. They need to be at risk of a custodial sentence. 'Crimes are dealt with in community conference rather than in Court'.

Criteria for eligibility of offenders include being aged between 18 and 24 years, if an offender has admitted their crime, been found guilty, facing the likelihood of a prison sentence, showing a willingness to participate and not being charged with any offences that automatically exclude them from participation in the program. Currently, forum sentencing operates in 13 locations servicing a total of 52 Local Courts.

Forum sentencing brings together the offender, their victim(s) and any other people affected by a crime at a 'forum.' The offender talks about what happened; the victim and others discuss the impact of the crime and everyone contributes to creating a plan to try to repair the harm. The intervention may include some or all of the following,

- A verbal or written apology
- Voluntary work
- Alcohol/drug treatment program
- Compensation
- Educational programs
- Counselling
- Driver education
- Anything else the group feels is appropriate.

Queensland Justice Mediation

The offender may be referred to justice mediation by either the court, police, the prosecutor. The offenders legal representative may also suggest justice mediation however if the court and the prosecutor will need to agree before a case will be referred to justice mediation. Participation in justice mediation is voluntary.

If a case is referred it will generally be adjourned for 3 months to allow the mediation to take place. The mediation takes place at a justice mediation centre with a trained mediator to speak with the parties. Should the parties complete justice mediation (and the matter is currently before the Magistrates Court) normally the prosecution will offer no evidence to the charge and the charge will be dismissed. In some circumstances the prosecution will remain on foot and the completion of Justice Mediation will be taken into account at sentencing.

Justice mediation is available in relation to matters ordinarily heard by the Magistrates Court such as stealing, assault, wilful damage and unlawful use of a motor vehicle. Mediation can also be used for more serious offences if both parties agree and the matter is assessed as suitable.

Justice mediation can take place at any stage of the criminal justice process. It usually occurs before a court hearing or before the sentencing process has commenced.

ACT Crimes (Restorative Justice) Act 2004.

Section 6 of the Act identifies as its objects:

- (a) to enhance the rights of victims of offences by providing restorative justice as a way of empowering victims to make decisions about how to repair the harm done by offences;
- (b) to set up a system of restorative justice that brings together victims, offenders and their personal supporters in a carefully managed, safe environment;
- (c) to ensure that the interests of victims of offences are given high priority in the administration of restorative justice under this Act;

- (d) to enable access to restorative justice at every stage of the criminal justice process without substituting for the criminal justice system or changing the normal process of criminal justice;
- (e) to enable agencies that have a role in the criminal justice system to refer offences for restorative justice.

The objectives and indeed the scheme of the legislation are not dissimilar to those already operating in New South Wales and Queensland. However notwithstanding that the legislation was enacted some 9 years ago, it has only come into operation in relation to young offenders.

In our submission, provided it is properly resourced, restorative justice for adult offenders ought to be implemented without delay as an effective sentencing option and alternative to a custodial sentence.

By 'properly resourced' we mean ensuring that relevant agencies are available and able to address the risk factors and underlying causes of an offender's criminal behaviour, such as drug and alcohol dependency, mental health issues, gambling problems, financial difficulties etc. This we understand was identified by BOCSAR as a problem with the initial pilot scheme for forum sentencing in New South Wales introduced in 2005 BOCSAR Report #129, 13/08/09).

(b) Restorative Justice for Young Offenders.

Restorative justice in one guise or another has been available for many years as a sentencing option for young offenders in most states including New South Wales, Victoria, Queensland, Tasmania and the ACT.

In our experience restorative justice has proved to be an effective sentencing option in the ACT for punishing the offender, addressing the underlying causes and risk factors of criminal behaviour reducing recidivism and equally important providing the victims of crime with a forum to be heard and exploring ways of 'righting the wrong.'

In our submission however it may be time to review the operation of restorative justice for young offenders in the ACT and explore ways in which it may be improved and made more effective.

Section 22 and Table 22 identify who are 'referring entities' and when in the process or in the course of court proceedings those entities may refer an offender to restorative justice.

Once the matter is before the Childrens Court and prior to a plea being entered, the power to decide whether restorative justice will occur effectively lies with the prosecution by operation of the provisions of Section 27 (1) (b) & 27 (2) of the *Crimes (Restorative Justice) Act 2004*. If the prosecution do not agree then the court cannot refer an offender to restorative justice.

Sub-section 27(2) appears to provide that the court may only refer a matter to restorative justice 'on the application of the director of public prosecutions.'

Only once a plea of guilty has been entered (Table 22.4) can the court refer an offender to restorative justice without needing the agreement of the DPP.

In our submission the legislation should be amended to remove any 'veto' the DPP may have over the decision by the court to refer a matter to restorative justice. Referral to restorative justice should be on the application of either the young person or the prosecution, or by the court on its own initiative with the agreement of the young person. The DPP would of course still have the opportunity to voice any opposition to the referral of the matter and the court would need to take such opposition into account in deciding whether or not to make a referral order.

Further in our submission if the restorative justice process is completed to the satisfaction of the court, then the legislation ought to require that the charge be dismissed. In other words there needs to be a 'carrot' to encourage meaningful engagement by young offenders in the process. If offenders come to believe that the outcome will be the same whether or not they participate in restorative justice then the process will lose its effectiveness and in time offenders may choose to opt out altogether.

5. Circle Sentencing

From our experience of representing our clients before the Galambany Court, circle sentencing is an effective way of addressing offending behaviour by members of the Aboriginal and Torres Strait Islander community and meets its objectives of providing culturally relevant and effective sentencing options and providing support services to assist offenders to overcome their offending behaviour.

Term of Reference 4 – Alternative approaches to sentencing in the ACT

There are a number of sentencing options available to sentencing courts in other Australian jurisdictions that in our submission would be worthy of consideration as effective alternatives to full time custodial sentences in the ACT.

There are also several diversionary programs available in other jurisdictions which in our submission would be worthy of consideration for the ACT.

Drug Courts

New South Wales established the first Drug Court in Australia. Now, all jurisdictions except Tasmania and the two Territories have followed. Drug Courts are based on US models, characterised by integrated community-based treatment program. The aim of drug courts is to help the offenders to develop life skills and to stop or decrease harmful drug-use, and decrease recidivism.

In addition to the community based program, the Drug Court also administers compulsory drug treatment orders made by a sentencing court in relation to an offender sentenced to a non-parole period of 18 months or more (see Part 4A *Crimes (Administration of Sentences) Act 1999* (NSW)).

The NSW Drug Court web site describes the program in the following terms,

Each participant's program comprises three phases. Each phase has distinct goals that must be achieved before the participant graduates to the next phase of their program.

- **Phase 1 is the 'initiation' phase** where participants are expected to reduce drug use, stabilise their physical health and cease criminal activity. In this phase, participants are required to undergo drug testing at least three times a week and to report back to the Drug Court once a week.
- **Phase 2 is the 'consolidation' phase** where participants are expected to remain drug-free and crime-free, and develop life and job skills. In this phase, testing for drug use is conducted twice weekly and report back court appearances occur fortnightly.
- **Phase 3 is the 're-integration' phase** where participants are expected to gain or be ready to gain employment, and to be financially responsible. In Phase 3, drug testing is conducted twice weekly and report back court appearances are conducted monthly.

Participants are closely monitored by the court. The Drug Court team meets before court each day to receive reports from treatment providers and Probation Officers, and to discuss those participants who will be appearing that day. In the light of this discussion the Judge then speaks to each participant about his or her progress.

PHASE 1 Initiation and stabilisation	PHASE 2 Consolidation	PHASE 3 Re-integration
Principal goals	Principal goals	Principal goals
• Cease using drugs • Stabilise physical health • Cease criminal activity	• Remain drug free • Remain crime free • Stabilise social and domestic environment • Develop life skills including job skills • Address major life issues • Maintain good health	• Remain drug free and accept a drug free lifestyle • Remain crime free and accept a crime free lifestyle • Stabilise social and domestic environment • Gain employment or be employment ready • Be fiscally responsible
Average duration	Average duration	Average duration
3 months	3 months	6 months
Principal means of achieving goals	Principal means of achieving goals	Principal means of achieving goals
• Commence and fully	• Continue to fully participate in	• Complete all requirements of the

PHASE 1 Initiation and stabilisation	PHASE 2 Consolidation	PHASE 3 Re-integration
- participate in treatment program • Assign Community Compliance Group Officer • Development case management plan • Terminate criminal associations • Commence and fully participate in case management program • Attend court weekly • Submit three drug tests per week • Participate in home visits by Community Compliance Group Officer	- treatment program as updated (as necessary) • Undergo counselling • Complete Life Skills Management Program • Attend court fortnightly • Submit two drug tests per week • Participate in home visits by Community Compliance Group Officer • Participate in educational and/or vocational training courses	- treatment program • Complete counselling • Complete Life Skills Management Program • Attend court monthly • Submit two drug tests per week • Participate in home visits by Community Compliance Group Officer • Participate in educational and/or vocational training courses • Pay or make arrangements to pay outstanding court fines and fees

Because drug court programs are more intensive than other community based sentencing options, and therefore require more resources, they usually target offenders who have a high risk of re-offending, and are used as a last resort before incarceration.

Evaluations of the NSW Drug Court have found that those who remain engaged with the program, or complete the program, have reduced rates of drug-related offending. However, those who were discharged or terminated had a higher recidivism rate than the control group.

Other evaluations, including those of the NSW Youth Drug Court (2004), the Victorian Drug Court, the South East Queensland Drug Court and the North Queensland Drug Court show similar results.

A report of the NSW Drug Court in 2008, conducted by the NSW Bureau of Crime Statistics and Research (BOCSAR), confirmed these initial evaluation findings. Participants who completed the program (compared to a Control Group), were:

- 37% less likely to be reconvicted of any offence at any point during the follow-up period
- 65% less likely to be reconvicted of an offence against the person

- 35% less likely to be reconvicted of a property offence.

Other positive outcomes of drug courts include:

- Reduced levels of drug use and re-offending throughout and following program completion;
- Improved health and well-being for participants;
- Cost savings related to prosecution, law enforcement, courts and prisons;
- Social benefits, such as reduced, long-term drug use, increased employment, education, and family reunification.

In Victoria the Drug Court Division of the Magistrates Court is established under the *Magistrates' Court Act 1989* (Vic) (s 4A) with power to make drug treatment orders under the provisions of the *Sentencing Act 1991* (Vic).

The features of the Victorian drug treatment orders are,

- A drug treatment order can be ordered for defendants with a drug or alcohol problem, if it contributed to the offence.
- The defendant must also plead guilty to the offence and the offence is one within the jurisdiction of the Magistrates' Court and punishable by a term of imprisonment. (s 18Z *Sentencing Act*).
- The Drug Court must be satisfied on the balance of probabilities that the offender is drug or alcohol dependent and their dependency contributed to the commission of the offence. They must also consider that a sentence of imprisonment would otherwise be appropriate and it must not have suspended the sentence in whole or in part.
- The purpose of a drug treatment order is to facilitate the rehabilitation of the offender by providing judicially-supervised, therapeutically-oriented, integrated drug or alcohol treatment and supervision regime. It is also intended to reduce the level of criminal activity associated with drug or alcohol dependency and reduce the offender's health risks associated with drug or alcohol dependency (s 18X *Sentencing Act*)
- A drug treatment order has two parts identified in s 18ZC of the *Sentencing Act*): the treatment and supervision part, and the custodial part. The 'treatment and supervision' part consists of 'core conditions' and 'program conditions' attached to the order and operates for 2 years, or until that part of the order is cancelled. The 'custodial' part consists of the sentence of imprisonment that the Drug Court must impose on the offender under s 18ZD
- The court still has to impose the sentence of imprisonment that it would have, had it not made the drug treatment order (s 18ZD(2)). Consequently if the drug treatment

order is cancelled or breached, the custodial part will usually have to be served by the defendant in prison (s 18ZE *Sentencing Act*)

- The 'core conditions' are outlined in s 18ZF and include requirements such as undergoing treatment for drug and alcohol dependency as specified in the order, or from time to time, by either the Drug Court, or a specified community corrections officer etc. The 'program conditions' are outlined in s 18ZG and include requirement such as submitting to alcohol/drug testing, attending vocational, educational, employment programs as specified in the order, also, not associating with specified persons and a requirement to reside at a specified place for a specified period.
- Under s 18ZJ there can be rewards for complying with the conditions, such as varying the treatment and supervision part of the order, or varying or cancelling the order under s 18ZL (1)(c), (d) or (e). Such variations can include adding or removing program conditions, or altering the frequency of treatment, the degree of supervision or the frequency of drug or alcohol testing.

A very significant proportion of the defendant s appearing before the criminal courts in the ACT suffer from an alcohol or drug addiction that has invariably either directly or indirectly contributed to the commission of the offence.

In our submission the programs and sentencing options currently available may not be adequate to address this underlying cause of criminal behaviour. We would urge that consideration be given to establishing a 'Drug Court' as either a standalone court or a division of the existing courts.

Alternatively the same objectives could be achieved by introducing new sentencing options (such as drug treatment orders or intensive corrections or supervision orders) into the *Crimes (Sentencing) Act* (ACT) to be available to the existing courts and designed to achieve the same ends as a separate drug court.

Intensive correction/supervision orders.

These types of order operate in varying forms in New South Wales, Victoria, Queensland and Western Australia.

Intensive corrections orders (ICO) were introduced into New South Wales to replace periodic detention orders. They are an option available to a sentencing court which has sentenced an offender to a term of up to 2 years imprisonment.

In New South Wales intensive corrections orders (ICO) are a "custodial sentence" referred to in Pt 2 Div 2 *Crimes (Sentencing Procedure) Act* and a direct alternative to a custodial sentence. Corrective Services NSW manages ICOs according to four levels of supervision and conditions. Offenders are progressed, or regressed, through these levels based on their conduct throughout the term of the ICO. A wide range of discretionary conditions may be imposed under an ICO including curfews, electronic monitoring and various levels of contact with Corrective Services. Compulsory conditions include community service work and drug

and alcohol testing. Breaches are dealt with in a way similar to how breached of periodic detention are currently dealt with in the ACT.

It goes without saying that drug courts and intensive corrections/supervision orders require a significantly greater allocation of resources than existing community based orders and would require a commitment and involvement by a wide range of government and private agencies to treat the risk factors and causes of the criminal behaviour for each individual offender. We would expect however that such programs would be less costly in the long term than the cost of full time custody with better prospects of success in reducing recidivism. In our submission such an investment is well worth making.

Term of Reference 5 – Any other relevant matters

Section 334 Crimes Act 1900

We are finding that over time an increasing number of our clients involved in the criminal justice system are suffering from a mental condition or disorder or an intellectual disability which has either played a role in the commission of the offence with which they are charged or otherwise has the effect of reducing the moral culpability of the offender.

Section 334 provides:

Powers of Magistrates Court

(1) This section applies where, in proceedings to which this division applies before the Magistrates Court, that court is satisfied that—

(a) the accused is mentally impaired; and

(b) on an outline of the facts to be alleged in the proceedings, or any other evidence the Magistrates Court considers relevant, it would be appropriate to deal with the person under this division.

(2) If this section applies, the Magistrates Court may by order—

(a) dismiss the charge and require the accused to submit to the jurisdiction of the ACAT to enable the ACAT to make a mental health order; or

(b) dismiss the charge unconditionally.

(3) In determining whether to make an order under subsection (2) (a) or (b), the Magistrates Court shall have regard to—

(a) the nature and seriousness of the mental impairment; and

(b) the period for which the mental impairment is likely to continue; and

(c) the extent to which by reason of the accused's mental impairment the accused is likely to do serious harm to himself or herself or others; and

(d) whether the ACAT could make an order under the Mental Health (Treatment and Care) Act 1994

, section 26 (What ACAT must take into account) or section 27 (ACAT may not order particular drugs etc); and

(e) the seriousness of the alleged offence; and

(f) the antecedents of the accused; and

(g) the effectiveness of any order previously made under subsection (2) (a) or (b), including to the extent to which—

(i) the order assisted the accused to obtain appropriate treatment and care for his or her mental impairment; and

(ii) access to that treatment and care has enabled the accused to modify his or her behaviour, being behaviour of a kind that has previously resulted in the accused having been charged with an offence.

(4) Despite subsection (2), the Magistrates Court may only make an order under that subsection in relation to proceedings with respect to an indictable offence that may be heard and determined summarily with the consent of the director of public prosecutions.

(5) If the Magistrates Court makes an order under subsection (2) (a), the order operates as a stay of proceedings, or of further proceedings, against the accused in relation to the offence.

(6) If the Magistrates Court makes an order under subsection (2), it must not make an order under any of the following provisions of the Crimes (Sentencing) Act 2005

for the offence:

(a) section 13 (Good behaviour orders);

(b) section 17 (Non-conviction orders—general);

(c) section 19 (Reparation orders—losses and expenses generally);

(d) section 20 (Reparation orders—stolen property).

(7) An order under subsection (2) does not constitute a finding that an offence has or has not been committed.

(8) In proceedings to which this section applies, to determine whether an accused has a mental impairment, the Magistrates Court may make any orders it considers appropriate, including the following:

- (a) that the accused submit to the jurisdiction of the ACAT;
- (b) that the proceedings be adjourned;
- (c) that the person be released on bail.

(9) If the Magistrates Court makes an order under subsection (8) (a), the ACAT shall notify the Magistrates Court about each of the matters referred to in subsection (3) (a) to (d).

The jurisdiction under Section 334 of the *Crimes Act* was discussed at some length by His Honour Justice Refshauge in *Nelson v Heil* [2013] ACTSC 11.

His Honour discussed the history of the legislation at [1] *et seq*:

1. In 1994, the ACT Government substantially revised the system of mental health regulation in the ACT following a wide-ranging review by the ACT Mental Health Review Committee.

2. In their Report to the Legislative Assembly of the Australian Capital Territory, *Balancing Rights* (1990), the Review Committee recommended (at 10):

Recommendation 42

In the case of offenders who are mentally dysfunctional and who have been found fit to plead or whose mental illness or condition has not been found relevant to the offence, the Court be empowered to discharge the person or refer the person into the mental health system for care, treatment and protection. Consequently, legislation similar to S32/S33(1) of the NSW Mental Health (Criminal Procedure) 1990 Act [sic] be adopted in the ACT.

3. That recommendation apparently was accepted, for a provision — s 428W — was inserted in the Crimes Act 1900 (ACT) (ACT Crimes Act) by the Crimes (Amendment) Act 1994 (ACT), that provision being similar to s 32 of the Mental Health (Criminal Procedure) Act 1990 (NSW) (which was, in 2008, renamed the Mental Health (Forensic Provisions) Act 1990 (NSW)). In an interesting irony, the New South Wales provision had originally appeared also as s 428W of the Crimes Act 1900 (NSW) (NSW Crimes Act) before being relocated.

4. The Explanatory Statement to the Bill that became the Crimes (Amendment) Act gave no particular explanation of the new ACT section but merely gave a précis of it. The Presentation Speech made some reference to the provision as follows (Australian Capital Territory, Parliamentary Debates, Legislative Assembly, 16 June 1994, 2026, 2257-8 (Terry Connolly, Attorney-General)):

At present if a mentally dysfunctional person comes into contact with the courts it will usually be the Magistrates Court in relation to a summary offence. A Magistrate may conclude that, having regard to the person's mental dysfunction and the minor nature of the alleged offence, it is appropriate that the charge be dismissed and the person be referred to the mental health authorities.

The Bill confers the power to make such orders on Magistrates and ensures they retain the flexibility to make other appropriate orders in these cases. Magistrates will be able to seek advice from the Tribunal as to whether a person is mentally dysfunctional and recommendations as to how the person should be dealt with. The Magistrates Court will be able to refer mentally dysfunctional persons who have been convicted of a summary offence to the Tribunal for the making of a mental health order.

His Honour went on to discuss the relevant principles that applied to a determination under Section 334 and also compare the provision with the equivalent New South Wales provision (Section 23 of *Mental Health (Forensic Provisions) Act 1990* (NSW)).

At [37] His Honour said:

37. As Smart J said, of s 32 of the Mental Health (Criminal Procedure) Act, in *Perry v Forbes* (Unreported, Supreme Court of NSW, Smart J, 21 May 1993) at 8, the provision introduces “a more flexible scheme which recognises the variety of mental states which may exist and ... overcome[s] some of the rigidity which had previously existed” in relation to persons affected by mental impairment who are subject to the criminal law. It should be construed and applied in this context.

38. The section operates whether or not a plea has been entered and, as also noted by Smart J in *Perry v Forbes* at 10, allows “a person to be dealt with in special ways appropriate to their condition and obviates the need for a court to embark upon a full hearing on the merits and to proceed to a conviction.

39. The section is clearly available at every stage of a summary trial and applies in a wide range of circumstances. In addition to being available whether or not a plea has been entered it is, as Campbell J noted of s 32 in *Mackie v Hunt* (1989) 19 NSWLR 130 at 134–5,

also available whether or not a person is fit to plead or not. It is, as the Court there noted, a diversionary measure.

40. Section 334, however, is a little more circumscribed than s 32 for, in particular, the interlocutory options available, as described in *Minister for Corrective Services v Harris* (Unreported, Supreme Court of NSW, Brownie J, 10 July 1987) in respect of s 428W of the NSW Crimes Act (now s 32 of the Mental Health (Forensic Provisions) Act), are somewhat more limited.

41. Nevertheless, it needs to be remembered that while the diversion which the final order mandates may not have the possible custodial effect that proceedings according to law may ultimately require, the conditions under a mental health order may restrict the defendant's freedom of movement and action, as is clear from the content of a psychiatric treatment order set out in s 29 of the Mental Health (Treatment and Care) Act 1994 (ACT). Indeed, when a person is before the ACAT, it may also make a restriction order under s 30 of that Act which permits a person to be detained at a stated place.

42. In *Director of Public Prosecutions v El Mawas* (2006) 66 NSWLR 93 (El Mawas) at 109–10: [79], McColl JA, with whom Spigelman CJ and Handley JA agreed, held that a provision such as s 32 of the Mental Health (Forensic Provisions) Act is available to serious offenders, so long as the Magistrate considers it is more appropriate than the alternative, namely, to proceed according to law.

43. McColl JA in *El Mawas* considered in detail the nature of the exercise that a Magistrate was required to undertake in that case. It is similar under s 334 of the ACT Crimes Act. In particular, her Honour said (at 108; [71]), that the section requires a magistrate to balance the public interest in those charged with a criminal offence facing the full weight of the law against the public interest in treating, or regulating to the greatest extent practical, the conduct of individuals suffering from any of the mental conditions referred to ...

Although Section 334 is not a sentencing option per se it is, as described by Campbell J in *Mackie v Hunt supra* a 'diversionary measure' designed to divert appropriate offenders away for the rigours of the criminal justice system and into treatment and care in one form or another depending on the particular circumstances of the offender.

It is similar to a sentencing option in that its objectives are (1) specific deterrence of the offender and (2) the rehabilitation of the offender through treatment and care.

It will be noted that one of the objectives of the legislature as outlined in the presentation speech by the then Attorney-General and by Smart J in *Perry v Forbes* referred to by Refshauge J at [4] and [37] respectively above was 'flexibility.' In our experience the provision operates inflexibly in practice.

The process by which Section 334 comes to be considered by the Magistrates Court is adversarial. The defendant is required to raise the issue and then 'apply' to the court for an order under sub-section 334(2).

The proceedings thereafter are invariably adversarial.

If sub-section 334(4) applies (and the offence is an indictable offence) the prosecution will invariably apply its 'veto' thereby preventing the court from making a determination under sub-section 334(2). Neither Section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) nor the very similar Section 20BQ of the *Crimes Act 1914* (Cth) (which applies in relation to Commonwealth offences) contain such a veto. The DPP sometimes exercises the veto in relation to a Territory offence while Section 20BQ enables the court to proceed in relation to a related Commonwealth offence. The prosecution are not required to give reasons for the exercise of the 'veto.'

In our submission there can be no good reason for sub-section 334(4) and the exercise by the prosecution of its 'veto' arguably operates to deny a defendant a fair hearing in contravention of Section 21 of the *Human Rights Act 2004*.

Matters under Section 334 usually proceed relying on a report prepared for the court by a psychiatrist employed or engaged by ACT Forensic Mental Health. It is commonly the case that the prosecution will require the attendance of that psychiatrist at court to be cross-examined by the prosecutor in relation to the report and the conclusion reached notwithstanding that the prosecution will not have a report from another psychiatrist expressing a contrary view (we have not yet seen a psychiatrist resile from his or her opinion under cross examination by a prosecutor). As a consequence the proceedings become prolix, discursive and needlessly complex and expensive.

In our submission the provisions and operation of Section 334 are in urgent need of a comprehensive review, and in particular consideration should be given to the following matters.

1. The repeal of sub-section 334(4)
2. Broadening the options available to the court under sub-section 334(2). In this regard we note that both Section 20BQ of the *Crimes Act 1914* (Cth) and Section 32(3) of the *Mental Health (Forensic Provisions) Act 1990* (NSW) permit the court to discharge the defendant on conditions.
3. Proceedings under Section 334 ought to be by way of an inquiry by the court rather than an adversarial proceeding. This is the case in relation to a determination of a defendant's fitness to plead under the provisions of Division 13.2 of the *Crimes Act 1900* (ACT), dispensing with the rules of evidence and permitting the court to have regard to any information it considers relevant and reliable. As is commonly but not universally the practice of the Magistrates Court, the legislation should also make it clear that the court can inform itself by requesting a psychiatric assessment and report in relation to the defendant similar to the provisions of Section 315A of the *Crimes Act* in relation to an investigation of a defendant's fitness to plead.

Appeals from the Magistrates Court

In our submission consideration should be given to replacing the current method of appeal from the Magistrates Court to the Supreme Court (under which the appellant has an onus to establish *appealable error* according to the principles enunciated by the decision of the High Court of Australia in *House v The King* (1936) 55 CLR 499) to an appeal by way of *de novo* hearing. The latter approach has successfully operated in appeals from Local Courts to the District Court of New South Wales for many years.

In our submission the current system, although simplified by the Supreme Court in recent years, is nevertheless cumbersome, time consuming and costly for the courts and appellant. In our view the NSW experience indicates that such an amendment would decrease the work in the Supreme Court in the ACT by encouraging more matters to be dealt with in the summary jurisdiction (rather than election to proceed to the Supreme Court).

A *de novo* appeal, certainly an appeal against sentence, essentially would require the Supreme Court to decide whether the decision in the Magistrates Court was the appropriate one and whether another decision would be more appropriate. It would in effect be a re-hearing. Unlike the current process, in a *de novo* appeal the appropriateness of the decision is determined at the time of the hearing of the appeal.

Apart from the benefit of having an experienced Supreme Court judge look at a sentence afresh, the advantages of *de novo* severity appeals are that they are quick (much quicker than the average duration of appeals under the current system) and do not involve the amount of work and preparation required of the prosecution, the appellant's legal representatives, and the judge, by the present system. In the present system Magistrates and representatives, even on minor and mundane matters, spend additional and considerable court time ensuring that the matter is not exposed to appealable error; this, in our view, has led to a false economy and congestion within the courts.

De novo appeals against conviction could be undertaken on the transcript of the proceedings in the lower court with limited provision for applications for leave to either the appellant or the prosecution to recall witnesses or call further evidence on the hearing of the appeal.

As we understand it, appeals from magistrates are by way of *de novo* hearing, or a variation of it, not only in New South Wales but also in Victoria, Queensland and the Northern Territory. South Australia, Western Australia and we believe Tasmania have *House v The King* type appeals.

