



SUBMISSION TO THE SENTENCING ADVISORY COMMITTEE: SUSPENDED SENTENCES

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About Fitzroy Legal Service

Fitzroy Legal Service (FLS) was Australia's first Community Legal Service. Since it was established in 1972 we have assisted over 70,000 clients through our legal advice clinics, which operate five nights per week.

As well as a night service, we operate a casework practice representing individuals in court. We also have over 170 volunteers actively involved in all areas of our work.

The organisation seeks to work with the local community as well as make a contribution to broader policy debates. Like many other community legal centres we have a long tradition of advocacy on a range of issues and take pride in the ability to work with those who do not have the means to make their voices heard.

The clientele of the legal service is diverse in both cultural and linguistic background, and the range of legal matters that we take on is very broad. The majority of our clients are either on low incomes or in receipt of some form of government benefit. Our casework practice has a primary focus on criminal law and our solicitors are faced with sentencing options on a daily basis. In this regard, FLS values the suspended sentences regime in order to support our clients who present with complex needs. FLS strongly supports the expansion of suspended sentences within the whole hierarchy of sentencing options.

FLS generally supports the draft recommendations of the Sentencing Advisory Committee (SAC) final report on suspended sentences. We address the recommendations below:

1. Mandatory minimum penalty under s 30 RSA 1986

FLS supports the recommendation that mandatory minimum terms of imprisonment for 2nd and subsequent driving whilst suspended or disqualified be abolished. We believe that the judiciary should maintain full sentencing discretion in relation to these offences. FLS anecdotally observes that many of the suspended sentences currently ordered on our clients involve these offences.

Further, pursuant to recommendation 1-2 of the SAC report, FLS supports a comprehensive examination of effective responses to driving offences with a view to maintaining judicial discretion and expanding sentencing options.

We note that the SAC report has indicated that 18.5 per cent of all suspended sentences were in relation to the offence of driving while disqualified. This very high percentage may demonstrate that the judiciary prefer to use their discretion in relation to this offence, as opposed to applying the mandatory term of imprisonment. If this is the case, FLS recommends that the SAC should consider eradicating the concept of mandatory sentencing.

2. Suspended sentences

FLS maintains that suspended sentences are an important disposition and are an appropriate sentencing option in many cases. FLS favours greater flexibility and options in sentencing and therefore supports the retention of suspended sentences in appropriate cases

We support a review of sentencing options generally. We agree with the SAC that no further decision in relation to their status should be made until reforms proposed in this report are undertaken. We commend and encourage the SAC to continue its work in this area.

3. Intensive Correction Orders (ICOs)

FLS commend the SAC in clarifying the placement of ICOs in the sentencing hierarchy and in recasting ICOs as sentencing orders in their own right. This affords legal practitioners and clients more certainty, clarification and understanding of ICOs as a whole.

Whilst FLS broadly supports the SAC recommendations regarding ICOs, we are concerned that expanding the duration of ICOs to 2 years leads to greater potential for non-compliance in what are already difficult to complete orders. We do not support any increase in duration of these orders. However, if the duration of ICOs are to be expanded, FLS submits that this needs to be undertaken by special application of the prosecution to the court. Thereafter, exceptional circumstances need to be demonstrated why a longer ICO period is required.

FLS has noted that clients who have issues related to homelessness, drug and alcohol dependencies, mental health and acquired brain injuries find the current regime too restrictive for effective compliance. Furthermore, FLS solicitors have found it difficult to recommend ICOs unless there are sufficient resources that support clients with complex needs. This includes Corrections staff to be adequately resourced and trained in the diverse needs of the community.

FLS has found that recipients of ICOs generally have legitimate reasons for not being able to meet certain conditions of their orders. In particular, the minimum work hours that form part of an ICO should be able to be varied by an application to the Court below the 12 hour minimum currently provided for section 20(1)(d) of the Sentencing Act 1991 (Vic). This would be appropriate where there are serious chronic health issues that impact upon a client's ability to perform the unpaid community in the future.

Further, FLS believes the punitive measure of the ICO should also be assessed in terms of the practical reality of a person's ability to comply. In the event that a person with complex needs is unable to meet the unpaid community work hours, the duration of the order itself could be considered a punitive measure.

FLS notes that the current core conditions of minimum reporting requirements are overly prescriptive. Certain complex clients may have reduced capacity to comply with the strict time frames of appointments and Corrections should be afforded greater flexibility in determining unacceptable absences and determining the level of reporting appropriate for an individual. FLS supports a regime that promotes compliance, whilst still ensuring the welfare, rehabilitation of the offender and the safety of the community. Therefore, we suggest that separate categories of compliance be adopted in sentencing to promote compliance and also reflect individuals varying capacity to comply with program requirement. The determination of a person's category would be assessed by Corrections at the time of assessment having regard to legitimate health or associated medical conditions, mental health and cognitive abilities.

FLS further proposes that more practical program supports and options should be included in the conditions of the ICOs to encourage rehabilitation and support to the offender. These conditions could include undertaking education courses such as VCE equivalency, computer and other vocational training or meaningful work experience in order to encourage development of life skills and reintegration after the ICO has been completed. This, in turn will impact positively upon the community. We note that this has been a trend in the United States where offenders have undertaken their year 12 equivalent as part of the rehabilitation component of the ICO equivalent.

The powers of the Court in relation to the proposals for breach of ICOs are broader than in the current legislation and reflect the different approaches that Courts already adopt at a practical level.

FLS also commends the SAC's recommendation to broaden the powers to vary or cancel an order to reward good progress. This will benefit meaningful rehabilitation and community engagement as a whole.

Special conditions

FLS is concerned about the suggested prescription of the special conditions. We note that the special conditions outlined on page 7 of the SAC report, (namely the non-association and place restriction conditions) affect fundamental rights and liberties. Therefore the full social and economic impact of their imposition needs to be evaluated before recommending their wide scale use.

Furthermore, FLS does not consider the prescription of the special conditions powers to be consistent with the Charter of Human Rights and Responsibilities - in particular the following basic human rights as enunciated in the Charter:

- freedom of association;
- freedom of movement; and
- protection of families and children.

FLS submits that providing Magistrates with the discretion to impose special conditions such as non-association orders can impinge unfairly upon an individual's civil liberties. Some of the people with whom the non-association orders may apply may be the offender's family and close friends. In such circumstances, this could be an unreasonable order to comply with, and will encroach detrimentally upon an offender's family and personal life. This would also punish the family and friends who arguably are not the subject of the sentencing order.

People who are the subject of ICOs are often very socially isolated and have few support networks. The imposition of restrictions upon a person's movement and association will potentially only reinforce their isolation, disadvantage and subsequent disengagement with society. This could, in turn, lead to re-offending and thereafter further adverse involvement in the criminal justice system. This is damaging not only to the recipients of the ICOs, but also their associates and the community in general.

FLS also notes that the SAC have suggested that the Regional Manager of CCS have the power to impose place restriction (residence) conditions. We note that this delegated authority no longer leaves the discretion to the judiciary, but subsequently becomes an administrative decision.

FLS supports that the current legislation in relation to the courts discretionary powers to attach 'any other condition the court considers necessary or desirable' remain and that no prescriptions in the Sentencing Act are necessary to guide decision makers in the exercise of their discretion.

Finally, FLS is concerned about the practicability and economic viability of enforcing these special conditions. FLS encourages the SAC support funding resources towards rehabilitation measures that will encourage social integration and cohesion rather than punitive measures that may be unworkable in the long-term.

4. Combined Custody and treatment Orders (CCTO) and a New Intensive Correction (Drug & Alcohol) order

FLS agrees that CCTOs should be abolished as FLS understands that they are rarely used by the judiciary and do not meet the rehabilitative needs of clients. FLS submits that people with Drug and Alcohol issues have particular support needs that could be better met with a community based disposition such as CBOs, the revamped ICOs or alternately on parole with additional therapeutic supports. Furthermore, people with drug and alcohol issues will be more likely to be able to comply with ICO or parole conditions provided the Court is able to apply the orders with flexibility, and support as discussed above.

In addition, the parole board is able to consider the overall situation and rehabilitation and welfare of the client in determining the consequences of breach. This is compared to the stricter CCTO where the discretion after breach is less flexible.

FLS notes that the New Intensive Correction (Drug and Alcohol) order further stigmatises drug and alcohol users. FLS suggests that the ICO apply in these cases instead.

In the event that the New Intensive Correction (Drug and Alcohol) order is established, FLS highlights the need to ensure that the support infrastructure be resourced appropriately to address the complex needs of people with drug and alcohol issues.

5. Home Detention

FLS would like to see a review of this disposition to focus on placing a restriction (rather than a prison sentence) on a person who has been sentenced. FLS notes that section 18ZV of the Sentencing Act currently has the practical effect of excluding too many people from this disposition.

FLS agrees with the SAC recommendations that home detention orders should be available for medium to high seriousness offences and low to medium risk/needs offenders. However, this should be assessed on a case-by-case basis.

FLS seeks clarification in the Sentencing Act that the judiciary should have the discretion to order a custodial order by means of Home Detention at the return of a suitability report. Therefore, the judiciary will retain the control and discretion over the eligibility of the offender for Home Detention orders.

Home detention orders are constructive for encouraging offenders to stay connected with their families and friends, hence supporting long-term rehabilitation and reintegration. In recognition of this aim, home detention orders should include more flexibility and mobility for offenders to share household and family duties such as driving the children to school.

However, FLS contends that the duration of home detention orders should **not** increase from 12 to 24 months. This is due to the fact that home detention orders can also put undue pressure on families who are inevitably placed in the 'monitoring' and 'supervision' roles of the family member who is the recipient of the home detention order. The onus should be on the applicant for home detention to demonstrate that this won't cause an increased risk of violence in the home where the applicant seeks to be detained.

6. Period Detention

FLS supports the SAC recommendation to not include periodic detention as a sentencing option.

7. Part Custody Orders

FLS supports the SAC recommendation to not include part custody orders as a sentencing option.

8. Power to fix a non-parole period

FLS agrees that the current discretionary power to fix a non-parole period for sentences of more than 12 months but less than 2 years should be retained.

9. Community Based Orders (CBO)

FLS agrees with the SAC recommendations in relation to CBOs. FLS supports and commends the SAC to reduce the maximum hours to 300 hours.

However, FLS seeks clarification that the SAC not restrict the application of CBOs to the 'low seriousness' category in the sentencing hierarchy. For example, an 18 year old armed robbery offender who has no prior convictions should be able to be eligible for a CBO.

10. Young Adult Offenders

FLS supports and commends the SAC recommendations to apply sentencing options that are sensitive to the needs of young people. FLS seeks confirmation that the "specialist case workers" that are employed to manage young offenders be trained and monitored by Youth Justice. FLS strongly supports the recommendation to set aside specific funding to ensure that specialist case managers are trained appropriately.

FLS seeks to ensure that Corrections will quarantine young offenders from adults in their community work placements.

FLS also seeks confirmation that the treatment of young offenders in the suspended sentences regime will receive appropriate funding and resources in order to support the special needs of young people. Without these resources, it would be ineffective and tokenistic to establish this order.

11. Compliance and breach

FLS agrees with the SAC recommendations in relation to compliance and breach. FLS supports the limitation period of one year provides closure, certainty and finality for clients and commends the SAC in this recommendation.

12. Deferral of Sentencing

FLS submits that in exceptional circumstances, a twelve month deferral should be ordered, however FLS believes that a six month deferral is more appropriate.

In the event that a 12 month deferral period is applied, FLS agrees with the prospect of frequent reviews within this period in order to assist in providing support to a client.

13. Implementation issues

FLS agrees with the SAC recommendations to request the Department of Justice to provide additional resources to improve the pre-sentence assessments and reports to guide the courts in assessing sentencing options. Furthermore, FLS also encourages the Department of Justice to investigate the possibilities of applying recurrent funding to ensure system reforms as recommended by the SAC.

Conclusion

FLS are pleased to have had the chance to take part in this consultation process and thank the SAC for this opportunity. We support and value suspended sentences as they are more likely to meet the complex and diverse needs of our clients. Clients who have mental health issues, acquired brain injuries, victims of family violence and are at risk of homelessness are not able to meet the requirements of reporting and accountability that particularly ICOs in their current form, currently necessitate.

Finally, we reiterate to the SAC to evaluate the reasons why the judiciary choose to order suspended sentences in mandatory sentencing regimes such as the driving whilst disqualified offences. In the event that the SAC have found that the judiciary choose to exercise their discretion in relation to these offences, we suggest that the SAC should consider not having mandatory sentences as a stance in Victoria.