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Community Service Orders and Periodic Detention as Sentencing Options

A Survey of Judicial Officers in New South Wales

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Community Service Orders

and

Periodic Detention as Sentencing Options

A Survey of Judicial Officers in NSW

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The views expressed in this paper are purely the views of the authors. They do not necessarily represent any official views of the Judicial Commission of New South Wales, nor are they necessarily shared by the members of staff of the Commission.

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EXECUTIVE SUMMARY

Introduction

The authors of this study interviewed eighteen District Court Judges and twenty-two Magistrates between February and September 1989. Their object was to obtain, as it were, a "judicial eye view" of the use of Community Service Orders (CSOs) and Periodic Detention (PD). In carefully structured interviews judicial officers were asked to express their opinions upon various aspects of CSOs and PD.

What kinds of offences and offenders should attract these dispositions? What attitude do sentencers have towards them and what difficulties do they encounter in their use? Answers to these and multifarious other questions (a list of which is contained in Appendix C) were tape recorded and carefully analysed for the purposes of this report.

SUMMARY OF FINDINGS

The vast majority of judges and magistrates who were interviewed considered that CSOs make a positive contribution to the offender's rehabilitation or education. However not all judicial officers thought CSOs should be used exclusively as an alternative to imprisonment despite the clear legislative directive to do so.

Some Judicial Officers were at least ambivalent in their responses suggesting that sometimes CSOs, but less so PD, were used more appropriately as an alternative to a fine or a bond, rather than an alternative to imprisonment. Such an attitude tends to support a previous finding by Rohan Bray,[1] that these alternatives actually contribute to a net-widening effect.

Principle of Last Resort

There were areas where sentencers were united in their views. Thus they appeared to accept the proposition that imprisonment is a sentence of last resort. This of course does not imply that in a particular case all would agree upon the point at which the sanction of last resort resides. After all, sentencing is a discretionary and human process and there will always be differences of opinion.

Rather, the responses indicate that judicial officers approach their task by accepting the principle that alternatives to imprisonment should be imposed whenever it is responsibly possible, or appropriate, to do so.

Indeed a significant number of those interviewed were so committed to this fundamental principle that they criticised the practice of enshrining it in legislation (see s. 80AB of the *Justices Act*) on the ground that they had always adhered to a "last resort" policy when sentencing offenders.

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1. See Monograph Series No. 1 *The Use of Custodial Sentences and Alternatives to Custody by NSW Magistrates*, Judicial Commission of NSW, 1990.

Many of the typical, and sometimes some of the more unusual responses are quoted verbatim in the study. Indeed to fully appreciate the nuances contained within them they are best left to speak for themselves. Even so, a number of interesting observations can be distilled from the views that were expressed. These include the following:

Community Service Orders

The vast majority of sentencers saw CSOs as an alternative to imprisonment, which makes a positive contribution to the offender's rehabilitation or education.

A substantial proportion also considered that CSOs fulfil the objectives of punishment and deterrence.

About one in three Judicial Officers considered CSOs as an intermediate option between gaol and non-custodial sanctions. Some considered that CSOs could be used as an alternative to fines.

Judges who deal with more serious offences tended to see CSOs as a softer option, than Magistrates. The latter perceived CSOs as a relatively harsh penalty reserved for the more serious offences and for offenders with significant prior records.

Periodic Detention

Most Judicial Officers considered punishment and deterrence as objectives of PD. In contrast to CSOs however, rehabilitation was not regarded as an important objective of PD.

PD was seen by many Judicial Officers as a last chance option to full time imprisonment. Just over one-third of the respondents considered PD was an intermediate sanction between CSOs and full time imprisonment.

Judicial Officers generally appeared to prefer the CSO option to PD. They tended to dislike the latter because of their perception that PD involved "sitting around" and a lack of proper supervision on the part of the authorities.

General Observations

The vast majority of sentencers (about 4 out of 5 respondents) expressed satisfaction with the quality of pre-sentence reports prepared by the Probation and Parole Service.

A number of respondents wanted CSOs and PD to be available in rural areas, to be made available during week days (for those who did not have Monday to Friday employment) and to be available for Commonwealth and interstate offenders.

Other suggestions by individual respondents included raising the maximum quantum of CSOs and PD (a reform since instituted), permitting the imposition of cumulative CSO or PD, power to impose a CSO with a bond for the same offence, and severing the links between CSO and imprisonment, and between PD and imprisonment.

Judicial officers generally, but less so country magistrates, admitted to having little knowledge of what offenders do or what happens to them after they are sentenced to PD or CSOs. To some extent any adverse perceptions of PD and CSOs could be attributed to the effect of "bad press" rather than to direct knowledge of the administration of the relevant programmes.

Many judicial officers also admitted that they did not have a knowledge of breach rates. However, a significant proportion of them commented that such knowledge would not necessarily affect their sentencing practices.

Policy Issues

From the latter observations it is suggested that sentencers may approach the issue of sentencing from opposing philosophies. One group, the utilitarians, may regard the question of effectiveness of PD and CSO as important, and impacting upon the choice of sentence. The other group may approach the question from a retributive (or justice model) perspective, the concern being to determine an appropriate sentence according to established legal criteria. The latter approach does not place significant importance on how that sentence will impact upon the future behaviour of the offender.

A number of policy issues worthy of further considerations were raised in this study. These include:

(i) whether PD should be available in more regions throughout NSW;

(ii) *whether CSOs are being used or should be used strictly as an alternative to imprisonment.* A second kind of CSO is suggested, called "community restitution". This would be a less punitive form of CSO, would not be linked to imprisonment but rather would be an alternative to a fine or a bond;

(iii) whether CSOs (and PD in so far as it is available in other jurisdictions) should be made available to interstate offenders convicted in NSW;

(iv) whether judicial officers should be given further guidance in the use of CSOs and PD.

Ivan Potas
Research Director
April 1991

1. INTRODUCTION

Periodic detention (PD) and community service orders (CSOs) have been available as sentencing options in New South Wales for a number of years.[2] These options were introduced explicitly as alternatives to imprisonment. A recent study has, however, raised considerable doubts as to whether these options are being used by magistrates for cases which would have attracted a gaol sentence in the first place.[3] A survey of the organisers of CSOs in New South Wales reported similar concerns among Probation and Parole officers.[4]

Although the courts receive some general guidance about the use of CSOs and periodic detention from the legislation, there is very little specific legislative direction about the appropriate circumstances for their use. Furthermore, because criminal appeals tend to deal exclusively with serious offences where the length of a full-time custodial sentence is at issue, there has been little opportunity for appellate courts to provide guidance in this area.

Given that the Court of Criminal Appeal does not deal with the issue frequently, the most appropriate source of principles would be the sentencing decisions of the District Court. However, these judgments are generally unreported *de novo* decisions which are rarely disseminated. In the result, judges and magistrates alike are left to rely only on their own intuition or else they may defer to their colleagues for advice. Whatever the case, there is certainly no mechanism in existence for the development of a cogent set of principles in this area of sentencing law.

This study is aimed at understanding the ways in which these sentencing options are perceived by judicial officers. The research questions being posed are:

- what types of offences or offenders are viewed as being appropriate for the use of CSOs and periodic detention?
- what are the attitudes of sentencers towards these sentencing options?
- in the view of the sentencers, are there any ways in which these options could be improved?
- are there any differences in the perception of these options between magistrates and judges, between experienced sentencers and less experienced ones, and between sentencers located in metropolitan Sydney and those located in the country?

This study attempts to identify key issues of relevance to sentencing policy and practice, and present the personal views of judges and magistrates. In many instances, the opinions of sentencers are quite consistent and, accordingly, could form the basis of some underlying principle. On the other hand, some opinions disclose conflicting views. While this might indicate an inconsistency of approach to sentencing, it can, nevertheless, provide a catalyst for discussion and law reform. In addition, sentencers may be introduced to opinions they had never before considered and these views may be valuable to them in helping to formulate a philosophy of the appropriate use of CSOs and PD.

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2. Periodic Detention has been available since 1971; CSOs since 1980.

3. Bray, R (1990) *The use of custodial sentences and alternatives to custody by NSW magistrates*. Judicial Commission of NSW, Monograph Series No. 1.

4. Houghton, G (1991) *Community service orders in NSW: Views of community service organisers*. Report prepared for the Judicial Commission of NSW.

2. RESEARCH METHOD

Forty-five face-to-face interviews were conducted with judges and magistrates in New South Wales between February and September 1989. The sample represented 38% of District Court judges and 19% of the magistrates. A pilot was initially conducted with five magistrates randomly chosen from a list of all magistrates. An additional 22 magistrates were subsequently randomly chosen for interview, 12 of whom were based in the Sydney metropolitan area and 10 based in rural centres. Eighteen District Court judges were interviewed. This was not, however, a random sample as the names of the judges were supplied by the Chief Judge and Acting Chief Judge of the District Court.

All but one interview were tape-recorded and verbatim transcripts of the interviews were prepared. Interviews typically lasted between 45 minutes and one hour, although some were considerably more lengthy. The approach taken was exploratory. Judges and magistrates were given maximum freedom to express their views on the two sentencing options. Their answers were not restricted by pre-designated categories as in surveys utilising questionnaires. This method was adopted because the field was relatively new and unexplored. There was insufficient material available from the literature or case law to allow the construction of fixed categories which would cover the majority of possible responses. Many of the questions also involved complex issues which are not reducible to "tick-a-box" responses. A structured but open-ended interview method allowed sentencers to express themselves in their own language and illustrate their views with examples from their own experience.

For some of the questions asked, the reply was coded "1" or "0" for each of a series of possible responses according to whether the judge or magistrate did or did not make that response. The "possible responses" were themselves established *ex post facto* from the interviews. For example, all members of the sample were asked to nominate the objectives of CSOs. From the transcribed replies to this question, a series of possible responses to the question was established, each corresponding to a certain objective. The next step was to again read through each transcription and code each possible response as either "0" or "1". This provided the data for tables, such as table 3.1, where multiple responses could be made. Other questions were more specific and resulted in a single response. For instance, "How satisfied are you with Probation and Parole reports?" obviously requires a response such as "very satisfied" or "not satisfied" or similar.

Although a wealth of numerical data was generated, this is by no means the only point of interest. A number of quotations from the interviews which best capture the point being expressed have been included. Numerical differences between groups or between the number of people mentioning a certain item should not be over-emphasised as providing a guide to the 'real' or 'correct' views of the judiciary for two reasons. First, the non-random selection of District Court judges may have produced a biased sample of subjects for that group. Secondly, the method of data collection and coding is, to a certain degree, affected by the subjective interpretations of the interviewer or coder: a given response may or may not be considered to fall within a particular response category, depending on that interpretation. There is no reason, however, to suppose that the numerical data are inaccurate: in combination with the verbal extracts, they present a reasonable indication of the views commonly held by sentencers. At the same time, the quotations themselves provide illustrations of the *range* of attitudes held.

2.1 Sample Characteristics

The average number of years on the bench was 8.2 for judges (ranging from two to 16 years) and 10.7 for magistrates (ranging from one to 23 years). Table 2.1 shows a breakdown of the sample by years of judicial experience, with the corresponding breakdown in the population.

These figures indicate that the non-random method of choosing the judges' resulted in a sample which consisted mainly of the more experienced members of the bench.

The random sample of magistrates, on the other hand, provided a reasonably good representation of the population. City based magistrates had an average of 12 years experience on the bench, whilst the rural magistrates interviewed tended to be less experienced, with an average of just over 9 years. This is consistent with the general policy of the Attorney-General's Department to place less experienced magistrates in country areas.

For the purposes of analysing the data in terms of experience, each judge and magistrate was allocated to one of two, equally numbered groups ("more" or "less" experienced) according to whether they fell into the top or bottom half of the years of experience exhibited by their respective sample. For example, a magistrate with 9 years or less experience was classified as "less" experienced, whilst all other magistrates were classified as "more" experienced.

Table 2.1: Years of Experience

	Judges		Magistrates	
Experience on the bench	Sample	Total	Sample	Total
3 years or less	3	23	5	29
4 to 6 years	4	12	4	21
7 to 9 years	3	3	2	8
10 to 12 years	5	5	1	21
13 to 15 years	1	2	2	5
16 to 18 years	2	3	3	9
19 years or more	0	0	5	25
TOTAL	18	48	22	118

3. USE OF COMMUNITY SERVICE ORDERS

3.1 Objectives of CSOs

When asked about the objectives of CSOs, a substantial number of judicial officers (75%) expressed the view that they were an alternative to imprisonment, or at least a method of avoiding gaol (See Table 3.1). Magistrates were more likely to nominate this objective than judges, and the less experienced judges were significantly more likely to express this view than the more experienced ones.

A number of other objectives were also mentioned. Three-quarters saw CSOs as having a "constructive" aspect, having mentioned rehabilitation, education or benefit to the community. A majority (56%) of the judges and almost a third of the magistrates mentioned punishment of the offender as an objective.

Table 3.1: Objectives of CSOs

Objectives	Judges	Magistrates	Total
Alternatives to gaol	12 (67%)	18 (82%)	30 (75%)
Rehabilitation, education, benefit to community	14 (78%)	16 (73%)	30 (75%)
Punishment	10 (56%)	7 (32%)	17 (43%)
Between gaol and bond	6 (33%)	5 (23%)	11 (28%)
Deterrence	5 (28%)	5 (23%)	10 (25%)
Restitution	4 (22%)	4 (18%)	8 (20%)
Denunciation of crime	3 (17%)	0 (0%)	3 (8%)
Decrease cost	0 (0%)	3 (14%)	3 (8%)
Between gaol and fine	0 (0%)	2 (10%)	2 (6%)
Alternative to fine	0 (0%)	1 (5%)	1 (3%)

Note: percentages do not add up to 100% because multiple responses are coded.

Multiple objectives

Almost all judicial officers gave multiple responses to this question. For example, a sentencer would typically state that CSOs were designed to provide an alternative to imprisonment and then proceed to nominate some other aim of the scheme:

> ...primarily to restrict that person's leisure or liberty but not so as to expose [him or her] to a prison situation. A deterrent in that people know why he or she isn't around doing what they normally do, and occasionally you feel that community service just might do some of them some good, by way of exposing them to less fortunate people. (J14)

Positive objectives

Although the punitive and deterrent aims of CSOs were frequently mentioned, the vast majority (78 per cent of judges and 73 per cent of magistrates) saw CSOs as making a positive contribution to the offender's rehabilitation or education. One judge put it this way:[5]

> [CSO] forms another option lying between full time custody and no custody at all. On

5. Two excerpts from magistrates illustrate this point further:

> It's certainly trying to keep people out of the gaol system for a start. It's certainly a tremendous thing for the people who are unemployed and in trouble. It gives them an insight into work and I've had lots of occasions where people have continued to work, even though the community service order is over. It gives them an insight into how to get a job and what work is all about, especially when they have not worked beforehand. I think it opens doors everywhere, really, for the offender and certainly gives him a chance of rehabilitation more than anything else. (M22)

> Sometimes one of the things about a community service order is it gets people out of an environment and into another. Sometimes it will move people into a work ethic. It will give them confidence, it will give contact and sometimes that's important...It's really very important sometimes for this self-confidence thing, people saying that "there's no way I can hold down a job" and you can prove to them sometimes that they can. That's the benefit to the accused. There are benefits obviously to the community; a) it's not costing them money to keep the person in gaol, b) you're getting something done in a community that might otherwise not be done. I think you've got to think about that. (M2)

top of that it has the advantage of getting the person to do something constructive with his time... it's educational in the sense that there is an opportunity given to the offender to get a feeling that he has done something constructive, for example, if someone is sentenced to 12 months in gaol, at the end of the time, he comes out and he says, well, I have done nothing constructive except learn how to commit crimes more efficiently. Whereas if he is sentenced to the community service order and he has been, for example, painting an aged person's home inside, he can get a feeling of satisfaction of looking at a wall and saying well, that's something I achieved today. Now I am not suggesting all offenders do get that satisfaction, but at least it gives them an opportunity to get it and a lot of them do. (J3)

Alternatives to recognizance?

Despite the intention of the legislature that CSOs be used "instead of imposing a penalty of imprisonment"[6], a number of judges were ambivalent about using them in place of gaol. About a third of the judges interviewed regarded CSO as an intermediate penalty between imprisonment and recognizance, although four of these six judges also indicated that CSOs were considered alternatives to imprisonment. The following excerpt from an interview illustrates this ambivalence:[7]

Judge: I don't really equate community service with a gaol sentence. There's a hierarchy as far as I'm concerned. Community Service sits below a gaol sentence.

Interviewer: So how can it be an alternative then?

Judge: That's a good question... I consider whether sentences are a sentence that, which a gaol sentence is mandatory and if not, I then consider community service. I've never actually swapped a gaol sentence for community service or community service for a gaol sentence, except if there's a breach of a community service order - then I don't believe a bond is appropriate; I believe then all one can do is send the person to gaol for the breach of the community service order. So there is an alternative, an operating alternative.

Interviewer: So, really, it's an intermediate penalty, is what you're saying, it's between gaol and bond?

Judge: Yes, on my hierarchy it's between gaol and a bond. (J17)

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6. *Community Service Orders Act* 1979, s. 4(1).

7. Another judge expressed a similar viewpoint:

   ...it's a form of punishment which doesn't take away his liberty with all the attendant risks of bad company, AIDS, serious assault, doesn't take away his livelihood, but is available where no punishment would be unsatisfactory. Add to the fact that doing some work for nothing for other people...It's a very good tool when you don't want to send anybody to jail but you think a bond is not quite right...I regard [community service order] as a less serious punishment than the periodic detention and most of the defence counsel have the same view. They try for community service...first, weekend detention is only when they feel their client ought to go to gaol,I think. So it's about the third rung higher than I suppose a fine. The fine, I find a bit of a problem because they can't, if they're going to be struggling to pay it, which is often the case, you're just wasting your own time and everybody else's. (J15)

Similarly, a number of magistrates appeared to consider CSOs as suitable in circumstances where an offender would not have been imprisoned in the first place. This was expressed in some cases by saying that CSOs were an "option between bond and gaol" (M9). One magistrate from the country was asked what he would do in a situation where CSOs could not be ordered because the offender lived too far away from a major town to be effectively supervised:

> **Interviewer:** When you said that in the small towns you couldn't give CSO, what would you do in those situations? Do you give them a bond or do you send them to gaol?
>
> **Magistrate:** Well...it's a fine line I suppose depending upon the offence. I think it would go half and half you know. Half would fall over the line then and have to serve their sentence and half would go back and get a deferred sentence bond. (M15)

Another rurally based magistrate explained his thinking when confronted with a situation where community service was not available:

> ...if I have a person that I think I might give him a community service order, I think he is worthy of a community service order and the report comes back to say "No, he is not suitable" because he has got a crook leg or he is not suitable because he lives over the border: in that situation, where I thought community service order would have been a viable option, I will take the more lenient course and come back a peg and give him a fine or bond or something like that. (M17)

One judge believed that the public perceived CSOs as a less severe sanction than gaol:

> **Judge:** ...as an option to gaol I see it as coming a long way below gaol.
>
> **Interviewer:** So it's not really an alternative to imprisonment?
>
> **Judge:** Well, it depends on how you, if you can use the term literally, yes, it is an alternative to gaol, but one that you only use where you don't feel that gaol is necessary. I don't think it's publicly perceived as being a very severe punishment. (J1)

Part of the reason for viewing the CSOs as an intermediate penalty between gaol and a recognizance is that the latter is seen to be ineffective. One judge explained his reasoning this way:[8]

> Community Service Order, I think, is a far more available option [than periodic detention] and an alternative to a recognizance. See, you take a recognizance, recog is very good in a lot of cases but if you want to really punish somebody, if you feel a person needs punishment as such to bring it home to him what he did was antisocial, etc., if you get a person who comes from a reasonable background, I don't mean a wealthy background...who is basically a decent sort of a person, what punishment is it to him, if you feel he should be punished, to direct [that] he enter into a recog? All he's got to do is sign a bit of paper. The chances of him coming back before the courts again are probably negligible, so but

8. Another judge explained how CSOs could be used as alternatives to bonds in some cases:

> ...sometimes in practice I tend to approach it from the other side and say well, this is not a person facing gaol, will I give him a bond or will I fine him or will I order him to perform community service? And I suppose in that sense it's an alternative to a bond or a fine because I've ruled gaol out in the first place. (J9)

> you feel he doesn't deserve imprisonment because he's got more going for him in the community point of view that imprisonment, that's not going to do him any good either or the community. But a CSO, it brings it home to him and he probably doesn't need any supervision after the CSO, but...and there's no point in fining him either because he could probably pay the fine quite easily... So I think that's where community service comes into that broad band of middleclass people who are not going to reoffend but you feel by a recog you are letting them off better than a person that goes before a traffic court. (J10)

Alternatives to Fines?

Two magistrates considered CSOs to be somewhere between a fine and imprisonment. One outlined his sentencing technique as follows:[9]

> If I think they should go to gaol that's where I start. If a gaol sentence isn't applicable I start off at the top and say "All right, you shouldn't go to gaol". Then I come down to the next stage, or I miss the next stage, if you like, CSO, and say "Is a fine sufficient?". If I think a fine is not sufficient then I go to the CSO or PD. (M11)

One magistrate saw CSOs as suitable alternatives to fines in certain cases:

> Well, I use it as an alternative to gaol, as perhaps a last chance before the prison door. It's handy when there's a serious offence but the person is unemployed...but can't pay the appropriate fine. Disqualified driving comes to mind very quickly, I regard that as a serious matter. If I was going to fine it would be a heavy fine; often they can't pay that, so a CSO will provide me with an alternative means. (M21)

Sentencers, of course, were aware that it is inappropriate to use CSOs as alternatives to fines. One judge commented:

> Well, I was rapped over the knuckles once by the Probation and Parole people up at [town X] where a chap should have got a fine and he couldn't pay the fine and I used community service. And they were at great pains to tell me that if judges did that they would ruin it, because the Service would be overwhelmed and they wouldn't be able to cope with it. They gave me figures from America where the system had collapsed because the courts were using them as an alternative to fines. (J7)

When questioned about the danger of CSOs being used in cases which did not really deserve a prison sentence, one judge explained that it was unlikely given the role of counsel:

> See, you have to begin to understand the atmosphere of sentencing. He's been convicted. You know the facts. The crown then leads evidence as to whether he has got any prior record. Then counsel for the accused probably calls references to his character and says, "oh yes, he really is a good fellow and he hasn't been in trouble before", and "please don't send him to gaol, Your Honour, you won't achieve anything, and he's well respected

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9. The other magistrate's statement:

> I imagine it is trying to provide an option for cases where imprisonment isn't considered suitable but fine isn't considered enough either, something between the two. People undoubtedly have different views as to how much it fills the gap, in my view it doesn't fill it all that well so I don't use it in relation to adults much. (M7)

> in the community". In other words, from the word "go" after you receive the antecedents, from then on you are subjected to a one-way party by counsel trying to keep him out of gaol. It's always their first object. You don't have the crown in reply saying, oh, this is why he should go to gaol, because nine times out of ten the crown says, oh, it's a matter for Your Honour. The crown plays a very limpid role with few exceptions in the sentencing options. So it's generally a situation where you think, well, this offender is a candidate for a term of imprisonment unless anyone can talk me out of it, and if you are talked out of it, you think it may be appropriate to give him a community service order. (J2)

3.2 Suitability

In the survey we asked judges and magistrates to articulate the circumstances under which CSOs are generally considered suitable sentencing options. Although judicial officers typically do not favour making general statements about sentencing decisions, most were able to give examples of offences or offenders for which the CSO was a suitable or an unsuitable option.

3.2.1 Offences suitable for CSOs

Serious driving offences

Half of the judges and nearly one-third of the magistrates interviewed mentioned culpable driving or other serious driving offences as typical of the categories of offences for which CSOs are generally a suitable option (see Table 1, Appendix A). The following excerpts illustrate the type of cases sentencers had in mind:

> I've also used it, CSO, in culpable driving cases where there's been a conviction or a plea of guilty and...I've regarded it as due to inexperience rather than to reckless, deliberately reckless or dangerous driving...and where there's no question of alcohol involved. (J9)

> [A frequent category of offence is] significantly persistent alcohol related driving offences, coupled with disqualified driving offences where people have just persistently offended and left themselves with little option other than something greater than a fine. So...perhaps the most significant category would be driving offences; I guess major driving offences. (M4)

Any type of offence

Almost half of the magistrates in our sample considered CSOs as appropriate for any kind of offence. This may be contrasted with only the one judge who held the same view. However, the difference was not statistically significant and, in any case, could be explained in terms of the types of offences heard in the Local Court rather than a difference in sentencing policy. Since the cases heard by magistrates generally involve less serious matters, it is not surprising to find an absence of preference for any particular offence. The District Court, by contrast, hears a large number of serious matters where imprisonment would often be seen as the only appropriate penalty. The magistrates who indicated no preference for any offence generally distinguished cases on the basis of offence seriousness or offender characteristics. These responses were typical:

> I can't think of any offence or anybody that I said "Well look, the nature of the offence precludes you". Sometimes it might be apparent for obvious reasons in relation to the person's attitude. (M18)

> I don't really differentiate [between different offences] if there is any offence before me that carries a gaol sentence and the person is in jeopardy of going to gaol. I would consider all those people for community service as a matter of general practice in considering anybody for gaol, other than somebody who's got a record extremely long who's got to go to gaol obviously. I would call for a report and ask them to advise me specifically of all options, so I don't differentiate as far as offences are concerned, unless they are people who have to go in. (M17)

Other offences

Various other types of offences are also considered suitable for CSOs. Four judges (22%) but only one magistrate mentioned minor drug supply as a possible offence. Three judges and two magistrates mentioned break, enter and steal, while others mentioned theft or fraud, assault, minor car theft and even sexual offences as suitable. One judge gave the following examples:[10]

> ...casual partial supply of Indian hemp where it's not a significant quantity... Motor car cases are quite often appropriate I think. Drink driving, culpable driving, dangerous driving. I suppose theft of motor cars sometimes, if it's joy riding anyway, token years as they call it. (J1)

One magistrate believed that certain property offences warranted a departure from the general rule that CSOs should be used only as an alternative to imprisonment:

> I would sometimes use, perhaps, community service where you would think, bearing in mind that community service is supposed to be a last resort before imprisonment - it's a form of custodial sentence, but I think there are some particular types of offences where it is particularly suited as a form of punishment. For example, you might have a young chap in a country town who gets on the drink and with a couple of mates goes into the amenities block at the local park or football oval and smashes it up a house brick and does hundreds...of dollars worth of damage. Well, with an offence like that, he may not have a prior history and you'd probably say "Well it doesn't really deserve a gaol sentence" but it's a very appropriate option in my view to make him put back into the community for...an act of wanton vandalism. (M20).

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10. Some further examples of suitable offences:

> I often consider it in relation to public order type of offences; things such as minor malicious damage, offensive behaviour of the more serious sort, the kinds of things that are serious breaches of good order but low level criminal activity. (M7)

> I would consider [CSOs] for drug offences if the backgrounds of offenders, I suppose where it's indicated to me that they are lacking in employment skills, where the probation officers indicate that it would be of benefit. (M10)

3.2.2 Offences not suitable for CSOs

Judges in our survey seemed to have less difficulty detailing which offences are unsuitable for CSOs than specifying which are suitable. The majority (72%) of the judges ruled out robbery or armed robbery as an offence for which CSOs can be considered (see Table 2, Appendix A). A majority of judges also considered serious drug offences and serious sexual assaults as unsuitable. A number of sentencers also ruled out break, enter and steal, theft, serious fraud, very serious assaults and violent offences in general. Seriousness of the offence was the over-riding factor, as some of the respondents explained:[11]

> ...some people, of course, first offence, they've got to go to gaol because of the objective gravity of what's occurred... Some crimes, by their very nature, which can't, no matter how good the subjective case is, attract a non-custodial option, among things like selling drugs, what we used to call rape, armed robbery... We can reach a stage where it doesn't matter how powerful the subjective case, the objective facts call for, in my opinion, call for full-time imprisonment. (J18)

> I don't often consider [CSO] a proper penalty, not in relation to what is realistically a criminal offence, stealing or minor drug use or whatever it is, even your drink driving matters where the question of something beyond a fine arises. In my view that's a matter for prison or not; it is simply too serious generally to be dealt with by the CSOs. (M7)

The magistrates who failed to nominate any specific offence as particularly suitable to attract a CSO also failed to designate any particular offence type which would particularly exclude the possibility of a CSO.

One magistrate, however, considered that CSOs may be inappropriate for property offenders not so much due to the offence *per se*, but because of the normal characteristics of this type of offender. He mentioned the trustworthiness of property offenders as a barrier to ordering community service:

> I'd say that rarely would you use [CSOs] for anyone who's breaking, entering and stealing or stealing offences; it depends on the circumstances. Some may be a first offender and it is not really a symptom of their attitude but if there's any doubt that they can't be trusted or could be in a position where they can abuse the CSO [they would be unsuitable] (M21)

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11. These views were echoed by other sentencers:

> I suppose people who ... are drug pushers, because the community demands usually they would be ineligible for CSO. If we are going to sentence them, if they come within our jurisdiction, one would usually think in terms of perhaps a full time sentence there, rather than the CSO even in the first instance, someone who is pushing heroin around the town or whatever and apprehended for that. So that would be one case where you wouldn't. (M18)

> I mean there must be some offences [not suitable for CSO], you know, say a very serious grievous bodily harm where, you know, as a result of, say, a fight in a hotel or something someone has 30 or 40 stitches and will be scarred for life as a result of it and the person has some prior record of that sort of thing. (M15)

3.2.3 Offenders suitable for CSOs

Nearly all the sentencers surveyed referred to one or more "subjective factors" which might make the difference between putting an offender in gaol and giving him or her a community service order.

Age and prior record

Half the judges and 23% of the magistrates mentioned young offenders as generally suitable candidates for CSOs (see Table 3, Appendix A).[12] One judge explained the reasoning behind this:

> I think it's worth a punt with young people. I suppose philosophically I take the view that I'd rather give a young person one more chance than he probably deserves than to give him one less chance, whereas that last chance may have just made the difference. See there are a lot of kids, and there are a lot of kids, if you can get them to 24 you're right. You know, they've just got rid of that male aggressiveness or trying to sort themselves out. (J7)

Given the correlation between age and criminal record, it is not surprising that the latter aspect was frequently mentioned. The majority (67%) of judges and more than one-third of the magistrates referred to prior record[13] as a factor which might determine whether an offender would be given a community service order. Of these, eight judges specifically mentioned first offenders or offenders with only a minor or a juvenile record as suitable candidates for CSOs. A number of sentencers argued that if the offender's prior record was not particularly unfavourable, then he or she could be considered for CSOs even if the offence committed was reasonably serious. One judge gave this example:[14]

> ...they have got to be somebody who has got a real chance of rehabilitation or is a one out offence...a person who, say, is convicted of a crime like culpable driving and who hasn't got a prior record for true crime and the offence is nevertheless serious enough that it should involve a prison term. You see, in a culpable driving case if it has caused death and particularly if the person has been driving under the influence, well, that combination will almost invariably call for a sentence in prison, unless for a good reason not to. Now if he was a fellow of otherwise good character but the nature of the degree of the offence was serious, too serious to consider giving him a bond, well then he would be a good candidate for community service orders. (J2)

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12. The difference here is not statistically significant.
13. This might refer to a number of different factors, such as the elapsed time since the last conviction, the seriousness of prior convictions and whether the offender has previously been sentenced to imprisonment. The difference between judges and magistrates is not statistically significant.
14. Two magistrates made a similar point:

    > If a person is only up for, say, one break, enter and steal or a couple, not too many, only a young fellow, no previous matters at all, I would certainly look at a community service order there. (M22)

    > ...obviously you are thinking of sending him to gaol. That would normally indicate that they have some record. Alternatively, if it is a first offence or first or second offence then it is a fairly serious problem. (M2)

Four magistrates mentioned the concept of being "on the borderline", or similar words, of going to gaol, a factor which is probably closely related to the offender's prior record. One magistrate viewed CSOs as particularly appropriate for:

> Someone who has got to the stage where they're probably looking gaol in the eye, but you think aren't quite ready to go there in the sense that it is not really appropriate to perhaps send them there just this time. Give them a chance to, one last chance to, stay out. (M6)

The tendency to consider younger offenders as more suitable for CSO may in some cases be related to the type of offence which they are perceived as likely to commit. The use of community service in this sense has a rehabilitative object with specific relevance to young offenders. As one magistrate put it:

> [CSOs are appropriate for] certainly anything of a vandal nature where, and more particularly a young offender, where you try and get them to appreciate common property, that things have to be maintained, they've got to be renewed and if somebody is vandalising telephones, for example, you have got to try and teach the offender that somebody has to come around and tidy up after them. (M9)

Another magistrate mentioned the possibility that at times it might be "inappropriate to send" young people to gaol and this would be an occasion for ordering community service (M16).

Reform potential

A number of judges (four or 22%) considered evidence of, or potential for rehabilitation or genuine intention to reform as important factors. As one judge pointed out,

> It's generally somebody who is potentially not going to be a recidivist, or has at least some potential for rehabilitation, generally somebody who has not yet been to gaol but who is heading that way. Sometimes it might be someone who has had a bad record but has gone straight for a number of years, and you're trying to find something a bit short of a jail penalty. (J1)

Employment

Being employed or having family responsibilities was sometimes considered a good reason for not putting an offender in gaol. This fact was mentioned by 15% of the sample. The following views were typical:[15] *(see footnote on opposite page)*

> ...there's no hard and fast rule but generally speaking, every now and again you get a tradesman who is a first offender or a man with a job and you think it's essential that he retains that job you can get him to do his community service at weekends. Similar story being the bread winner and paying his mortgage and other commitments. It's generally somebody you want to bring it home to but he's not quite bad enough to put inside. (J14)

> ...even with some of the recidivists that you have appearing before you, you have the feeling that they might be about to turn the corner, it's a gamble... They say we have got a job to go to, the first time I have had a job in [my] life, now if you go to gaol

> you will lose that and you might say, okay, well, how can you preserve that. You preserve it by community service order or a periodic detention. (J10)

By contrast, a slightly greater number (20%) thought that unemployed offenders were particularly suitable. The attraction of CSOs for sentencers seemed to lie in the chance of some rehabilitative effect and/or the amount of time which unemployed people have on their hands:

> It's certainly much easier for a person who's unemployed, for example, to undertake a community service order. If you get a defendant who may be married, or a *de facto*, with a couple of kids and works five and a half days a week and he's really got to fit his community service order in over part of Saturday and all of Sunday, a lot of places, of course, don't have any call for people to work on Saturday afternoon or Sunday... So it is a bit unfortunate that it certainly is more attractive to the unemployed, or attractive to me, particularly if it's a long, you know, if it's 300 hours or something which is going to take some time to complete. It certainly seems easier to say, well, this person is unemployed, or just left school and looking for a job. It can even be, for people like that or unemployed people, some introduction to the work ethic and they might really get something out of it and be able to turn around and say, "Well, now I've done this and it wasn't too bad. I'll apply for a labourer's job somewhere." (M15)

However, it would not necessarily follow from this that the unemployed are treated more favourably than offenders with jobs. As noted earlier, CSO appears to be used frequently in substitution for a sentence other than imprisonment. If there was thought to be a problem in ordering community service for an employed offender, then it is likely that a bond would be given. One could hardly imagine a person going to prison because they were employed and, thus, "unsuitable" for a CSO. Therefore, unemployed offenders might be said to be "suitable for CSO" in the sense that, compared to employed offenders, they would be more likely to receive a CSO rather than a bond.

Other individual factors

One judge mentioned that some offenders were simply unable to cope with prison conditions and a CSO may provide the answer:

> ...in some of the more nuisance crimes where I feel there should be some punishment for not recognising the law or the authority of the community, where I don't think it's desirable that the particular individual should go to gaol because of certain innate personality weaknesses, physical weaknesses...when I think that incarceration would be more difficult for him to tolerate...some people are just understrong. (J6)

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15. These points were elaborated by other respondents as follows:

> ...if a person is in employment and particularly if he has domestic or other financial responsibilities I will, if the quality of the offence and any other subjective matters relating to the offender permit it, prefer to see him in a situation where he can meet his obligations in a way which he would be denied doing if he were given full-time custody.(J12)

> Other persons [who are suitable] are married, say, who have family commitments, that to lock them up would deprive the family of the bread winner, whereas he can remain in the community as the bread winner and pay the penalty by way of community service order and, of course, if that person works in a nine to five, Monday to Friday type position, impose periodic detention. (M9)

3.2.4 Offenders not suitable for CSOs

Judges and magistrates were also asked to nominate any factors which would tend to exclude an offender from receiving CSOs.

Drug or alcohol addiction

Almost half of the magistrates and 28 per cent of the judges in the sample mentioned drug addiction or alcoholism as a factor which would be taken into account (see Table 4, Appendix A). As one judge pointed out,

> The Probation and Parole Service don't assess a person as being suitable if they have problems because of drugs, including alcoholism, and/or if they've got some personality problem that makes it difficult for the organisers of the community service program to work with them. But short of that any person that you're not required to impose a custodial sentence upon is considered to be suitable. (J4)

Reliability or trustworthiness

One in four sentencers referred to the offender's lack of trustworthiness as a factor which could disqualify the offender from being a recipient of CSOs. Magistrates who elaborated on the unsuitability of offenders with drug or alcohol problems sometimes focussed on the lack of reliability which they considered these offenders would exhibit:

> You would be looking at people who wouldn't be suitable because they had some addiction - a heroin addict - one wouldn't suspect you'd have much faith...or hope that they would carry out, the discipline...to attend community service and/or periodic detention... It is the lack of discipline and the unreliability that goes with it... I suppose it is possible to imagine a heroin addict who works regularly and all that and you can say "Yes, he probably will". It begs the imagination a bit. (M9)

Another problem with unreliable CSO clients is that they could affect the viability of the scheme in the eyes of the public:[16]

> If somebody comes across as totally unreliable, cavalier, have no sense of community responsibility or whatever, usually those people can't satisfy the Probation and Parole Service that they would be reliable, have the sufficient attitude and commitment to success with it, because the whole community service work depends on the person's cooperation. You can't have civilians giving their Saturday morning to turn up with the paint brush or lawn mower etc. and every second week the prisoner or the defendant doesn't turn up; the whole system would fall apart. (M18)

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16. A further illustration:

> ...you couldn't rely on [some people] to obey directions and the result of that is that, even though while you are watching them they might be doing things okay and behaving themselves, when you take your eyes off them they are likely to do something silly....[I]f you get community service workers being engaged in the performance of their community service, the people who are cooperating with that system don't want to be inconvenienced by it. They don't deserve that, they need a pat on the back, perhaps, for tolerating community service workers as distinct from some other form of having their work done...but they certainly don't need to be aggravated in any way. (M1)

Judges were mindful of the burden on the Probation and Parole Service if unsuitable offenders were given CSOs:

> ...you've got to be fairly confident, I suppose, that he will respond to a community service order. After all, he is under the supervision of a parole officer. That parole, probation and parole staff are hopelessly overworked. So you can't load them up with some young hooligan who's going to be in breach of his order and they are chasing up all the time. (J2)

Prior Record

One in three sentencers in the sample indicated that recidivists or persistent offenders and those who had previously been given or breached bonds or CSOs were not suitable candidates for another CSO.

Other Factors

Judges and magistrates also mentioned a number of other factors such as violent persons, offenders with mental or physical disabilities, and those with personality problems (see Table 4, Appendix A). One judge mentioned that female offenders were not suitable candidates.

3.3 Quantum

When asked how the number of hours in a community service order was determined, most judges indicated that there was no relationship between the number of hours and the likely length of sentence the offender would have received had he or she been sent to gaol. One judge explained it this way:

> No, no, no, I don't relate it to imprisonment at all... I decide whether or not it's going to be a custodial sentence, I think most judges do this. If I've made the decision, well, it's got to be a custodial sentence, well, that's, community service is out of my mind. On the other hand, if I think, well this is a matter in which community service might be a suitable alternative, then you start thinking about how much is the appropriate number of hours. (J4)

Half of the judges interviewed indicated that they almost always gave the maximum allowable number of hours (i.e. at the time, 300 hours), the reason being that the types of cases which reach the District Court are normally relatively serious (see Table 5, Appendix A). The following is a sample of comments from these judges:

> I reckon nine out of ten I give the maximum...if I've decided to help the person, while I want to try and bring something home to them, I think it's got to be meaningful. If they've got to turn up every weekend for however many days it takes to cut out the community service, they start to think about why they're there. Fifty hours, that sort of thing is ridiculous, nonsense. (J14)

> It's usually 300 with me... I would say 90 per cent of the time. Don't forget...I'm dealing with offences that the range of sentencing is into the 300 hour range. I mean, you might, on appeals from a magistrate, you might vary a magistrate's order and you wouldn't be considering 300 hours, but when you've got an offence which carries a maximum head sentence of, say, five years, no, I think I would probably use 300. I might have given 150 or 100 on odd occasions, but not often. (J7)

Thirty-nine per cent of the judges indicated that the number of hours would depend on the seriousness of the case. They would work from the maximum and scale down accordingly. One described it this way:

> Well I think you just ask yourself how much below the maximum you can reduce it to a particular case, there's no mathematical way of doing it. (J1)

Another judge agreed that there was no precise method of determining the quantum:

> Well, like [the way you] decide the number of years. It's an arbitrary assessment as against a statutory maximum. I make a rough calculation on the 40 hour week, how long would it be, but it's arbitrary in the extreme. (J15)

Another judge elaborated on his method, which, he admitted, was "by the seat of your pants":

> What I do do is I often say, alright, eight hours a day, one day a week, how many weeks will take him to work out?... 50 hours is only six or seven weeks, he'll be finished in seven (weeks) if he works one day a week, eight hours a day... I often think in terms of "I want this to last him three months"... I want to interfere with his recreation for so many months. (J9)

The most common method the magistrates used (50%) to determine the number of hours of community service was to be guided by the *Community Service Orders Regulations*. Regulation 5 sets out the maximum number of hours community service which can be ordered for an offence, that number depending on the maximum term of imprisonment which can be handed down. In arriving at the quantum for community service, these magistrates generally stated that they arrive at an appropriate gaol sentence for the instant case, and then translate this into an equivalent number of hours of community service, according to the regulatory formula.

> Generally speaking, [the quantum] is developed by a ratio from the so many hours for six months and so forth. The Act (sic) itself dictates that and, if you work out what the appropriate prison sentence would be on the subjective features, as if he didn't comply, what you would be sentencing him to prison, then you should really do the sum on the basis of multiplication of the number of hours for the length of time. (M1)

Whilst arriving at the number of hours by the same method, another magistrate thought that the employment status of the offender would also be relevant in the decision:

> The Act (sic)...specified maximum periods and I equate them with the calculation of the maximum term of imprisonment. If it's a maximum, say for a disqualified driver, of six months maximum, a CSO would be 100 hours. If I was going to give him four months if I had sent him to gaol, well, I'd give him, say, 60 hours. I don't know whether others do the same but that's my attitude. Again, I vary that slightly if the chap is working; he would not probably do as many hours as a chap who's unemployed. I have no set figures about that but I do take it into account if he's going to work and doing CSO he probably wouldn't have to do the same number of hours as an unemployed person. (M21)

One magistrate felt that the CSO durations set out in the regulations were not equivalent to the stated prison terms. This magistrate increased the CSO quantum to fit his own perception of the appropriate equivalent prison sentence:

> **Interviewer:** So you generally take the maximum gaol term as a guideline and convert it?
>
> **Magistrate:** I don't regard the alternative, the equivalent, community service hours as being really high insofar as the term in prison is involved, that is, six months as against 100 hours. I would think six months as against 200 hours might be more appropriate, 12 months - 400 hours, 18 months - 600 hours. Seems to me to be a minimum.
>
> **Interviewer:** An equivalent minimum?
>
> **Magistrate:** Well, relate 100 hours to six months imprisonment; there's no sense, to my way of thinking, in that I have no idea how it was ever achieved, the end result there. (M3)

The second most frequent method was to arrive at the appropriate number of hours by evaluating the seriousness of the offence, without recourse to the regulatory formula:[17]

> I don't know; it's playing it by intuition. I don't think I've got any set scale for doing it. If it's in the higher range of, say, a six months penalty it'd most likely be 100 hours. If it's in the lower range of six months penalty I might drop it down to 50 hours or something like that. It's just intuition and bearing on the range of seriousness of the offence in relation to the penalty. (M19)

Some other magistrates were even more flexible in deciding on the quantum:

> I have great difficulty and I tend to pluck a figure out of the air. I always have problems with this...because I don't know whether, how hard they work on them, and that would be a determining factor if I knew more about it. I have great difficulty. That's all I can say. (M12)

> I often ask the probation officer what period they think would be appropriate, because their assessment of what sort of person they are dealing with and the sort of work they will be doing, I think, is important. It is no good giving somebody too much work that is really going to brown them off. I usually ask a probation officer if I have got a period in mind. I might say "I have got 200 hours, what do you think about that Mr Probation Officer?" and he will say "I think that will be good, Your Worship". Or I might say 300 hours, the maximum, and he might say "That might be a little long Your Worship"; because he will only be able to do this one day a week it might last for too long. (M6)

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17. A similar comment by another magistrate:

> Simply look at the seriousness of the offence... one looks at the seriousness of the offence, determines whether it is going to be a heavy penalty or a light one. If it fits into that category of community service order, look at the seriousness of the offence in that light. (M10)

4. EVALUATION OF COMMUNITY SERVICE ORDERS

4.1 General attitude towards Community Service Orders

When asked whether the CSO option has achieved its objectives, about half of the judicial officers said "yes", with magistrates slightly more likely to respond positively. Most of the other judicial officers were unable to give a definite answer because they felt they did not have sufficient information on the operation of the scheme. Only 5% of the respondents thought that CSO has definitely not achieved its objectives (see Table 6, Appendix A).

As an additional indicator of the judicial officers' attitudes towards the CSOs, interviewers made a subjective assessment of each respondent's overall attitude towards the option based on the entire interview (see Table 4.1 below). The assessment was that the majority of the respondents (83% of judges and 64% of magistrates) expressed favourable views towards the CSO option. Only two magistrates and none of the judges expressed negative views. A number of judicial officers (three judges and six magistrates) were, however, ambivalent about the option.

Table 4.1: General attitude towards CSOs

Attitude	Judges	Magistrates	Total
Not favourable	0 (0%)	2 (9%)	2 (5%)
Ambivalent	3 (17%)	6 (27%)	9 (23%)
Favourable	15 (83%)	14 (64%)	29 (73%)
TOTAL	18	22	40

4.2 Assessment procedure

The majority of interviewees (79%) were satisfied with the established procedure for assessing the suitability of offenders for CSOs, although magistrates in the sample were more likely to be satisfied than judges. Only one magistrate and five judges (15% of the whole sample) were not satisfied with the assessment procedure. Two magistrates were ambivalent about it. (see Table 7, Appendix A).

Some judges praised the efficiency of the Probation and Parole Service, with one calling it a "very professional organisation" (J18). One judge who was generally satisfied with the assessment process commented:

> ...I think the only problem I've ever had really is when I've been out in the far west and the probation officer isn't available on the day. Usually something can be done to have the prisoner assessed. I know that sometimes I'm told the prisoner's not suitable for community service on the basis of previous records of drugs and I accept that totally. I must accept totally what the probation officer tells me. But, yes, I'm satisfied with the standard of the reporting. Also satisfied with the efficiency of the Service. (J17)

Eighty-six per cent of magistrates were satisfied with the assessments provided by the Probation and Parole Service (see Table 7, Appendix A). One of them described pre-sentence reports as "excellent". He went on to say that:[18]

> ...they give me everything I want. Very rarely do I have to ask for something else. The probation reports are usually spot on. (M6)

A noticeable difference between city and country based magistrates was that the latter often had a close relationship with the local Probation and Parole Officer(s). A number of country magistrates spoke of the advantages of having local officers and talked favourably of the overall service provided by the officers in their area:

> I have a lot to do with Probation Officers and I have a fair communication with them out of courts. If they've got any problems they'll mention it to me and if I've got any problems I'll mention it to them and I'm very satisfied with them. So, they are usually very good in what they give me, I think. (M19)

> [I'm] happy with the ones I get at [town X] and the other courts I attend up that way. I think the people who prepare them approach the matter objectively from what I can see and I'm happy with the reports. In most country areas they'll have a resident person and, generally speaking, if there is any aspect of the report on a regular basis that you consider mightn't come up to your expectations, that's cured by a simple chat with the probation officer. (M13)

The latter quote also provides an example of the view of some magistrates that the quality of reports varies from officer to officer. As another interviewee put it, more forcefully: "If [the officer] is inexperienced or not good at their job, [the reports are] not worth the paper they're written on" (M16). The most common criticism, however, was that pre-sentence reports are sometimes too long for the purposes of magistrates:

> I think the pre-sentence reports are satisfactory here. I can't fault them actually; apart from sometimes they are a little bit too long and the pressure that is put on the court to deal with cases is absolutely enormous, and there is a time factor. Sometimes if the report extends into three pages, single spaced typing, you take up a fair bit of time that is required to read and absorb what is contained in it. That is one of the factors, but that's not the fault of the Probation and Parole service; it is just a fault of the system because of the inadequacies of time. (M3)

> ...I think written pre-sentence reports tend to give too much information sometimes. A lot of it is already given by the legal representative of the defendant. (M2)

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18. Another favourable opinion from a magistrate:

> I use it extensively. There's not a great deal of variation, they're generally most helpful or, if they can't give us the answers they at least identify the particular problems. I find the professional solicitors use it very extensively and sometimes their addresses are relatively word for word. So, they have the probation officers do their research, but generally they're most welcome by everybody. (M21)

It is of interest to note the heavy reliance which some magistrates placed on the Probation and Parole Service. Section 6(2) of the Act compels the sentencer to obtain a report from a probation officer indicating that work is available and that the person is suitable to perform community service work. Three members of the magistrates' sample indicated a reliance on the Service to the degree where the decision as to the appropriate sentence appeared to be almost totally vested in the probation and parole officer. The following excerpt from one of the interviews illustrates this point:[19]

> **Interviewer:** Are there any particular characteristics...of offenders which make them particularly unsuitable for community service orders?
>
> **Magistrate:** I haven't generally put my mind to that because I rely upon the letter coming back from the probation and parole people to tell me whether or not the person is a suitable person for community service order and if they say they are that, well that is the end of it. (M8)

Whether the legislature intended the Probation and Parole Service to have this much influence over the sentencing discretion may be open to question. On this point, one magistrate expressed the view that "at times sentencers are too quick to hang their hat on the probation and parole report". (M9)

Judges who were satisfied with the assessment procedure generally accepted the fact that the Probation and Parole Service should be supported by the sentencer. One judge put it this way:

> ...the only problem is that anyone who, and I struck this at [town X], a chap who had mucked up on his first attempt at it, the Probation and Parole Service wouldn't have him back. I didn't think gaol was appropriate, so I fined him the maximum and released him on a bond, which had the potential for weakening public respect for community service in the district generally...I suppose it shouldn't be the judge or magistrate who decides that, because it's a terribly difficult scheme to administer I imagine, and if the Courts don't support the Probation and Parole Service, the whole thing will just become unworkable, but that was an unusual case, I think. (J18)

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19. The other two magistrates made these comments:

> **Magistrate:** And then of course we're guided to a large extent by the report from the probation officer because we can't give it without an indication from the probation officer, firstly, if the work is available and, secondly, if the accused person or defendant is a suitable candidate.
>
> **Interviewer:** What sort of things do the probation officers look at when they're looking at suitability?
>
> **Magistrate:** I don't know, because they generally don't tell us that. I think they make that inquiry of the offender. (M13)
>
> **Interviewer:** Are there any particular things which exclude a person from getting CSO?
>
> **Magistrate:** There is. No I don't know what they are - I can look at the Act if I want to know but, as I say, it's not my function if I have that in mind and I ask for a pre-sentence report and they say or that person says he is not eligible for a CSO for this reason or another reason then that's as far as I go with it. That person is the expert as to whether or not it's applicable, it's my decision whether he gets it. So I don't worry whether he should get it or shouldn't. I ask what options are available in the pre-sentence report and I go from there depending on what I'm given. (M11)

Judges who were not satisfied with the assessment procedure thought that the assessment requirement is often "a little bit of a nuisance":

> Well, we can't do it unless we get a certificate from a probation and parole officer that he is, the convicted person is a fit person for it, and that work is available. That's a requirement which I sometimes think is a little bit of a nuisance... because it means that you can't always get that certificate in a hurry. The fact that you ask for it is revealing how you are thinking earlier than you might wish to do so sometimes, and not all solicitors realise that they should have that if they want to put it up to the court as an alternative. I would have thought that in certain areas there must always be work available virtually...The judge ought to be able to assess in some cases that a person would be fit for work. But still the system's worked and I don't think there's been any great difficulties arising from it. (J6)

One judge pointed out that the assessment procedure could be a waste of resources:

> You've got to stand the matter out of the list till you get a report... Well, I think it's duplication. I think the cost to the community is not justified really... If you got legal aid you'd adjourn the case until a week later so that you get such a report, so that barrister has got to come back, the legal representative has got to come, people have got to come back... I go to [town X], a person says "Well what about a CSO?"... you can't get an order, you're only there for a week, so you've got to adjourn the matter back to Sydney, or unless you can get a quick assessment; sometimes you can, sometimes you can't. (J10)

A couple of judges felt that probation and parole officers had simply not got the time or the resources to do a proper job:

> ...unless the probation and parole officer has had...prior knowledge of the person, how could a probation and parole officer in one interview work out how suitable the person is?... I mean basically they haven't got the time. Probation and parole people have to have more time with the subject. The government seems hell bent on reducing the number of probation and parole officers and their capacities, which is perhaps one of the greatest stupidities that's been perpetrated. The result of all that is they are going to spend about eight times as much money by having people go to gaol who might otherwise benefit from community service and supervision. (J14)

4.3 Availability

The vast majority of respondents (83%) had no problems with the availability of community service placement. Only one of the 18 judges and five of the 22 magistrates interviewed have had any difficulties. The magistrates who mentioned the lack of availability generally found it was only unavailable on occasions when the offender lived a substantial distance from a major town:[20]

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20. A more pessimistic view was also expressed:

> There has been the occasional matter [of unavailability] occurring, particularly where people are from remote country areas. They might be living 100 kilometres from the nearest centre where community service would be able to be performed and then they may have transport difficulties and all those types of things associated. But I don't know that there's any answer to it. I don't know that you can take community service...to the people. (M20)

> The difficulty is when you're sentencing somebody in a small town 100 kilometres from the nearest centre where they don't have any facilities for it and the Department doesn't have supervisors; in fact, you can't give a community service those small towns...there may be work there but the Department has no facility for supervising it. I think maybe they could...get it started because they appoint part-time people as supervisors, but they've never, not as far as I understand it, never appointed supervisors other than in towns in which they've got an office. (M15)

One magistrate stated that, in cases where there was no work available immediately, he would adjourn sentencing until such time as work did become available. (M10)

4.4 Type of work

Knowledge of work done

Thirty-one per cent of the sample said they had no knowledge of what recipients of CSOs actually do. Magistrates were more likely to report this lack of knowledge. About a quarter of the sample, however, appeared to have substantial knowledge of the type of work done by CSO clients. Magistrates were almost twice as likely than judges to report this knowledge. A good percentage (44%) of the respondents have some vague idea of the type of work being carried out. Most judges fell into this category (see Table 8, Appendix A).

The magistrates were evenly divided as to whether they had no knowledge (36%), some knowledge (32%) or good knowledge (32%) of the type of work done by CSO recipients. However, it is interesting to note the differences between city and rural magistrates. All twelve of the city based magistrates either had no idea or a vague idea of the type of work done, whilst only 30% of rurally based magistrates had the same lack of knowledge.[21] This finding is commensurate with the close liaison between rural magistrates and the local Probation and Parole Office, which was described earlier.

Type of work preferred

When asked what type of work they would like to see CSO workers perform, most sentencers did not have any particular preference. The most frequently encountered (35%) response is "work which benefits the community" (see Table 9, Appendix A). A number mentioned "physical work" (28 per cent), "work for non-profit or charitable organisations" (20%), "constructive or meaningful work" (18 per cent), or "work which involves helping disadvantaged people" (18 per cent), although it should be stressed that a number of judges and magistrates gave multiple responses. A typical reply to the question of appropriate work went along the following lines:

> ...I would think that working the public areas, public reserves, public hospitals, any area where effective work could be done...cleaning of beaches, for instance, cleaning of river sides - work which is of benefit to the community. (M3).

One judge was quick to point out his dislike of what are reputedly common tasks such as washing police vehicles:

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21. A Fisher Exact Test carried out on the 2x3 contingency table demonstrates a significant association between knowledge and locality ($p<.001$).

> ...I think community service by way of washing police cars or cleaning up the park is plain stupid. It's just a total waste of time. If they can be required to work in and about a hospital or an old person's home, some disadvantaged or underprivileged persons' institution or be required to assist old people or disabled people, but I think a lot of community service is just mindless rubbish...What I don't want to see community service used for is a cheap form of labour to save the government, or the Council, or the Police Department [money], so I think it's a pointless exercise to go and make them do some work that there are already employees available to do. (J14)

A number of judicial officers (18%) would like community service work to be suited to the special skills of the offender:[22]

> I would think that all those skills of the various people appearing before the court could be utilised; not necessarily putting them all down to menial tasks... If that's the skill he can best bring why waste his time on something else? If that's a skill that the community, the type of people who use these community service orders and organisations can use, why not? The same as if it was an accountant, if they needed some professional advice, that person was charged with drink driving or whatever and they had an alcohol problem, they were a good accountant - why shouldn't they go down and spend a few hours looking over their books and giving professional advice? (M18)

A small number of respondents wanted "work which bears some relationship to the offence" (8%), "work carried out in public" (5%), or a wider range of work (5%). An example of the "let the community service fit the crime" suggestion was given by a judge:[23]

> For example...if someone had given community service for malicious damage to property, it may be that he's been spraying graffiti on walls. In that situation I would like to see him given community service cleaning up walls. But he may be given community service doing gardening at an old people's home... Similarly, a person given community service for a driving offence, be it culpable driving or prescribed content of alcohol, if that person could be given community service in the form of assisting in the quadriplegics ward at one of the major hospitals or something like that, where there's some relationship between the community service and the offence, that would be beneficial. But the judges just have no say in what form of community service they get and I suspect, although I can't prove it, that they're given what work is available irrespective of the relationship of it to the offence. (J9)

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22. One judge echoed this sentiment:

> I think it should be basically physical work, but nevertheless I could imagine if you had a middle-aged fellow who was a clerk or accountant or something like that or a librarian that you might find some useful work for him to do helping out with the books for some charitable organisation or setting up a new index in the library or that sort of work. (J2)

23. An almost identical suggestion came from one of the magistrates:

> Well, in the case of vandalists, I'd like to see them clean up all the graffiti and all the damage they do. In the case of drivers, I would like to see them working around hospitals that specialise in disabled and handicapped people. (M5)

Yet another theory was that offenders given community service should be "visible" when performing their allotted tasks:

> I must say that generally speaking, [I prefer] visible tasks that can be observed. This works better in the country than the city doesn't it? But I don't mean put people in the stocks and have people throwing cabbages at them or something. But if a person known to be an offender is seen to be doing the work it achieves the punishment, it achieves the rehabilitation and, best of all, it achieves the community expectation to some extent. So I think it should be visible; I don't mean he should be put in the stocks or pilloried or made a goose, but visible. (M13)

4.5 Completion rate

Knowledge of success rate

When judges and magistrates were asked to estimate the proportion of CSO recipients who completed their orders successfully, about one third indicated that they had no idea. Once again, rural magistrates were significantly more likely[24] to profess some knowledge of breach rates than their city counterparts (100% versus 42%). Almost two-thirds of the respondents estimated that the success rate was quite high or very high. Only two magistrates (5 per cent of all respondents) thought that the success rate was low (see Table 10, Appendix A).

Would knowledge of breach rate change sentencing?

Judicial officers were asked whether they would personally change the way they sentence if the success rate of the CSO option were known to them[25] (see Table 11, Appendix A). Just over half of the respondents (53%) said that knowledge of statistical patterns would not affect the way they sentence, since every case has got to be considered on its own merits, and the sentencer "tend[s] to look at individuals rather than an overall picture" (M20). One judge explained it this way:

> **Interviewer:** If you found that the majority of people didn't comply or didn't finish [their CSOs], would you think twice about using it?
>
> **Judge:** Well, you shouldn't...but you see if a case is worth community service tomorrow morning, I mean, I'm sitting in Sydney at the moment, I've had five failures at Tamworth last week, seven at Armidale the previous week, I say now you're going to go to gaol because those other 12 people let the system down. It would be grossly unfair, wouldn't it? So, I don't really know. (J18)

Another judge said it would only make a difference if the particular offender's breach rate was in question:

> No, I'd still treat each individual as an individual when he or she came before me... [I]f I had somebody whose prior record showed that he didn't act responsibly in fulfilling his community order, he'd breached the order, then that would have an effect of limiting

24. Fisher's Exact Test, one-tailed, $p < .005$.

25. Unfortunately, a number of magistrates were not asked this particular question, therefore comparison is not possible.

> the options I felt were open to him when he came before me again on another offence. The same way as if I get a pre-sentence report which indicates when he was on a recognizance before, he was irresponsible or he was negative or that sort of thing, and I'd say "Well, you know, you've had your chance. This time you'll see what sort of accommodation Her Majesty provides". (J7)

One half of the judges and two of the magistrates who were asked this question did say that consciously or subconsciously, knowledge of breach rates would affect the way they sentence. In some cases this was said to depend on whether the breach rate was extremely high, indicating that CSOs "weren't working". The effectiveness of the administration of the scheme and/or the exercise of their own sentencing discretion might also be material factors affecting the breach rate. If they did affect the rate, then it is unlikely that the option would be used any less; instead, steps would be taken to solve the perceived problem:

> ...I would be looking to find out what is wrong with the system although, having said that, if I kept getting back breach reports of people and it appeared to me from those reports that it was the individual person that was breaking down, what I have to do is not look at whether I use the system, I have to look at the people I'm putting in the system because I'm obviously making a mistake in the type of person I'm putting in there. I will have to do a rethink on my appraisal of the people who are suitable for community service orders or, since they are usually recommended by Probation and Parole, I get [names a probation and parole officer] down and say "Hey, we're putting the wrong sort of people into this system". (M2)

> ...if there is a failure on a large scale it might not be the individuals or the fact that there are a whole lot of individuals with the same fault or similar fault. It might be that somebody who is responsible for the programme itself is really not up to it. There could be a number of reasons for it and I wouldn't think that...a person who is suitable should be denied the opportunity merely for the reason that other people with completely different characteristics, as each of us are, has failed to do what they were asked to do. (M7)

4.6 Legislative constraints

Judges and magistrates were asked if there were any aspects of the present CSOs option they would like improved. The majority did not offer any suggestions. Table 12 in Appendix A shows some of the more frequently encountered suggestions.

Recognizance with CSOs

Although half the judges indicated a desire to have the liberty of ordering both a recognizance and community service order for the same offence, a disposition presently prohibited by s.5 of

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26. The magistrate made a point similar to the judges who advocated this change:

> I sometimes think it would be good if you had an actual condition of a community service order that during the course of it, or even for a period longer than the time it takes to do the community service order, you could direct that they accept the supervision of the Service and some directions as to counselling...Sometimes I will give them, for example, a community service on one charge and a bond on the other with supervision and counselling in that. It may be some advantage if you had that sort of avenue in the community service order. You could say "Look, you have 100 hours which will be completed but, if is completed within a period of 12 months, then for that 12 month period you accept the supervision direct from the Probation and Parole Service particularly the counselling". (M2)

the Act, only one magistrate mentioned this[26] *(see footnote on previous page).* The reasoning behind this suggestion is illustrated in the following examples:

> One of the shortcomings of the community service system is that in respect of one offence you can't marry up a recognizance, you can't defer sentence on a person upon them entering into a recognizance to be of good behaviour for say three years. You might be looking at quite a serious offence, and the CSO on its own is not good enough. You want to have control over this fellow. He really should go to prison, but you might be persuaded, particularly in a person who does not have much of a prior record, you give him the benefit of the deferred sentence but make it for a substantial period, say three years, and then you come around to imposing conditions. Now you can impose as a condition of the deferred sentence that he shall pay by way of fine, that he pay compensation, but you can't make an element of that mixture that he perform community service order because a CSO is said to be in substitution for a period of imprisonment, and I can imagine the case...where an appropriate mixture of sentencing options would be to defer sentence. This would be particularly appropriate to a young, say a fellow in his late teens, early twenties, hasn't quite settled down to life, but he might, he's got some prospects, he might be in employment. (J2)

> If I give him a bond I can't give him community service, I think that just takes away or doesn't equip me well enough. If I can give him a bond and say "You've got to behave yourself in all respects and you've got to do community service", I've got a much tighter hold on him short of sending him to gaol... You see, if I give him a CSO and he doesn't do the community service all I can do is deal with him for the breach. If I give him a bond and he does do CSO and there is some other breach I could still deal with him. Of course, he would get the benefit then he'd be able to say, look, I did behave myself to this extent, I did my community service, so that might help him and that might be an indication to you that it might be worthwhile trying to keep him out, give him some further community service or some other. But it just seems silly that if I want to give him community service he's, I'm finished with him except if he breaches the CSO, he can go back and commit mayhem, I've got no control over him provided he turns up and paints a fence or moves rocks from side to side. (J14)[27]

Increase maximum number of hours

Twenty per cent of the total sample indicated a desire to increase the maximum number of CSO hours from the then maximum of 300. In fact, this reform has since been instituted by an amendment permitting a maximum sentence of 500 hours for offences where the maximum sentence of imprisonment is greater than 12 months.[28]

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27. Despite s. 5 of the Act, it appears that the result desired by this judge may be achieved, in some cases at least, through s. 10(1) which permits a sentencer to "specify...conditions...to be complied with by the person in respect of whom the order is made during such period as the order remains in force". A breach of any condition thus imposed is punishable as a breach of the order by virtue of s. 25.

28. *Community Service Orders (Amendment) Act* 1989.

Commonwealth and interstate offenders

Three judges and two magistrates expressed dissatisfaction with the limitation which existed at the time in relation to the sentencing of Commonwealth offenders. When the interviews were conducted, Commonwealth offenders who were convicted in NSW could not be given a CSO because NSW was not a "participating state" for the purposes of s. 20AB of the *Crimes Act* 1914 (Cth). This problem was remedied as from 12/11/90 and Commonwealth offenders may now be sentenced to a CSO in NSW.

Another jurisdictional problem was mentioned by two magistrates who were working, or had worked, in border towns. The problem arose in sentencing offenders who were resident interstate. Since the NSW Probation and Parole Service has no interstate jurisdiction, any CSO handed down in NSW cannot be enforced in another State. The following description of the situation was presented:

> One of the factors that prevents me giving community service orders is where the defendant lives interstate. Now my circuit is close to the New South Wales - [state X] border... If I have a person from [town just across border] who comes to [NSW town] and commits a drink driving and it is his umpteenth drink drive, he can't be assessed as suitable for community service order because he lives outside New South Wales. Now that might have something to do with the enforcement provisions, but if I put him on a 558 recognizance with supervision by Probation and Parole, they will transfer the supervision to the [state X] Department...there and they will supervise him from...there. So, I really don't know what the reason is...for a person who lives in [town just across the border], who comes into New South Wales on a regular basis and you have already got somebody set up in [NSW town] to coordinate the community service order, I don't know why they can't do it. (M17)

Other Changes

Three judges (but none of the magistrates) mentioned that they would like the sentencer ultimately to decide on the suitability of offenders for CSOs. One judge commented as follows:

> I believe the Act should be amended to make it clear that it is for the judge to decide, not a probation and parole officer, because the judge, having seen the offender and having, having access to other records which may not be available to the probation and parole officer, and because the judge has the ultimate responsibility for sentencing. It's our responsibility and not the...Probation and Parole Service. They shouldn't have anything that amounts in practice to a right of veto as to who gets, who's ordered to perform community service orders. (J9)

Other isolated suggestions include the ability to give cumulative CSOs, raising the maximum CSO hours for juveniles, and changes to breaching procedures. One judge felt the one-month time limit for breach proceedings[29] was unrealistic:

> I have reservations about the provision of the Act which requires a person who is in breach of a CSO to be brought before the court within one month from the termination of the order, I think it is. So if you have a fellow doing, say, 200 hours CSO and he performs well during the early phase and then he plays up towards the end and he becomes unreliable. To get that chap before a court within a month of the order expiring, bearing in mind that no order's going to extend beyond a year, is I think asking a bit much at

29. Community Service Orders Act 1979, s.23 (3)

> present times when you have got such big delays generally, and in theory it's very good, should happen. The way the system works, for want of a better word, now I would feel there must be a few who don't really complete their order satisfactorily and get off scot free. But once again I am guessing, but I think that must be so. (J2)

Two magistrates specifically indicated a preference for severing the link between CSOs and imprisonment:

> I'd prefer to see it as a more available option in the sense that you could consider it for even for a first offender. (M6)

> It should only be used as it stands at the moment as an alternative to gaol. I think that some offences are seen to be so very much offences against the community that it should on occasions be able to be used, not as purely and simply an alternative in those very serious cases where gaol otherwise would be inevitable, and I think of things such as vandalism, malicious damage in particular. I think that if a person throws a rock, say, through the council chambers and that person is a first offender, if you order community service you're not really doing it in accordance with the proper principles; because you're not going to send the person to gaol and so you shouldn't be looking at CSO. But you should be able to use a CSO for that offence. (M13)

Other suggestions for improvement of the scheme were an increase in the resources of the Probation and Parole Service and the introduction of education campaigns to inform the public about CSOs (see Table 12, Appendix A).

4.7 Community Service Orders for fine defaulters

In the pilot interviews, some magistrates expressed concern at the effects of the *Community Service Order (Fine Default) Amendment Act* 1987 on the use of CSOs as a sentencing option. This amendment provides for the automatic creation of a CSO where an offender defaults on a fine. Accordingly, the legislation allows defaulters to cut out fines by doing community service work as opposed to spending time in gaol. There appeared to be a possibility that the automatic allocation of fine defaulters to community service order programmes would detract from resources and the availability of work for "primary" CSO recipients. We asked the sample of magistrates, first, whether they believed the new provisions would have some effect on the administration of the CSO programme and, secondly, whether any such effect would have an impression on their sentencing practice.

As Table 13 in Appendix A indicates, 32% did not know whether the fine default programme would impact on the scheme, a finding consistent with other issues addressed (i.e. type of work, breach rates) where respondents indicated a lack of knowledge. Half of the sample, however, thought that the fine default provisions would have at least some effect on the scheme. The general concern of these respondents was that fine defaulters would take up the time of probation and parole officers who were more properly employed in the supervision of primary CSO recipients:

> Well I don't really know much about the administration of the programme, but, just on its face, with massive fine default that always seems to be with us, it would seem to me that the poor old administrators are going to be really overburdened and I just hope it doesn't affect the administration of the programme. I just hope they are given the staff and the facilities to make it work. (M6)

> I think that the likelihood might be that the number of people who are fine defaulters, if they are the large numbers that I am told about and read in the press and hear about in the various forms of the media, then there will be a lot of people doing a small amount and the supervisors will be flat out coping with the workload. I don't know whether it's worth the exercise. (M1)

On the other hand, one magistrate did not believe that there would be any effect on the administration of CSOs, for the reason that, in his experience, fine defaulters typically failed to turn up for work:

> Well from the information I have received from clerks of the Court [the impact of the fine default scheme] is very little because the fine defaulters are just not answering the community service notices: that is the information I get. It has no effect, no extra work load on community service order. (M9)

One rural magistrate remarked on a policy adopted by the local Probation and Parole office which reduced the impact of the fine default scheme on primary community service order recipients:

> I think that a lot of people who are fined and don't pay their fines don't do their CSO in country areas. I think that's right but I'm not sure because the work is not there. But, however, I do know that the probation officer will make sure that a person sentenced to a specific CSO does it: in other words he'll give priority to that offender rather than an offender who has to do it because he hasn't paid a fine. (M13)

Another reservation which was expressed concerned the paradox of having, on the one hand, a system of primary CSOs in which consent of the offender and an assessment of suitability were mandatory and, on the other hand, a system of fine default CSOs where the sanction was automatic:

> I think it will upset the whole system. At the moment there seems to be a tension, to me, between the proposition that you have a careful pre-sentence assessment and consideration of community service in the ordinary sentencing arrangements and, in the fine default situation, willy nilly that is what everyone gets. Inevitably you must get a proportion of unsuitable people, they must cause a lot of strain within the system. It seems an odd thing to me that in the one case they're assessed, in the other there is no question of assessment. (M7)

Despite the fact that a large number of respondents considered that the fine default CSOs would have some effect on the CSO system as a whole, only four (18%) said that this might have any effect on their sentencing. Three of these magistrates said that use of CSOs as a sentencing option might be affected by a decrease in their availability on account of the fine defaulters. If work and/or adequate supervision were unavailable the sentencer would either not be permitted or be less inclined to hand down a CSO:

> I won't give CSO unless I can be sure the person who is so ordered can undertake the work and can be supervised. (M16)

> In some communities you might find that you have got a lot of people doing fine default community service orders. When you have got somebody who really does deserve a community service order there might not be enough work around and I would hate to

see the situation come up where I get a report back saying "Yes he is suitable in all other ways but we have just run out of community service order work, therefore, we can't recommend community service order". (M17)

One magistrate opined that CSOs for fine defaulters would result in a decrease in the use of *fines* as a sanction. In his opinion, the fine default system was "just a lark" because it was not being enforced; people would take advantage of this by not paying fines at all, in the knowledge that the penalty was unlikely to be enforced.

Interviewer: So fines themselves will become a less useful sentencing option?

Magistrate: Yes, it'll be useless because people will know that there's no follow up and if they don't pay the fine nothing is going to happen to them. So it'll only be the "honest" crook who gets caught because he'll pay not knowing the system, but the really dishonest person will just be laughing. (M11)

5. USE OF PERIODIC DETENTION

Periodic detention is not generally available as a sentencing option in country areas due to the lack of PD centres.[30] For this reason, a number of the magistrates had had no direct experience in sentencing offenders to PD and, therefore, felt that they lacked the knowledge required to comment on certain aspects of PD (e.g. breach rates, determining the quantum). Even so, it was thought appropriate to acquire their views on the objectives of PD and what kinds of offender they believed would be suitable for this sanction.

5.1 Objectives of Periodic Detention

All interviewees were asked to nominate what they perceived to be the objectives of PD. The results are presented in table 5.1. About one-fifth of all judicial officers in the survey thought that the objectives of PD were the same as those of CSO. The responses of these sentencers to the equivalent CSO question have, therefore, been included in table 5.1.

Table 5.1: Objectives of Periodic Detention

Objectives	Judges	Magistrates	Total
Punishment/loss of leisure time	13 (72%)	9 (41%)	22 (55%)
Deterrence	5 (28%)	11 (50%)	16 (40%)
Rehabilitation	7 (39%)	8 (36%)	15 (38%)
Intermediate penalty/ between CSO and gaol	6 (33%)	8 (36%)	14 (35%)
Denunciation	2 (11%)	1 (5%)	3 (8%)
Reduce prison population	0 (0%)	1 (5%)	1 (3%)

Note: percentages do not add up to 100% because multiple responses are coded.

30. The only PD centre outside Sydney metropolitan area is situated at Tomago, near Newcastle

Punishment

The majority of respondents (55%) saw punishment as an objective of PD. A greater proportion of judges (72%) than magistrates (41%) held this opinion, although the difference was not statistically significant. "Punishment" was often expressed in terms of the loss of leisure time on weekends. One judge described it this way:

> ...see, I think it's important that I can affect somebody by stopping him playing golf on the weekend. Or he's a young bloke who can't get his surfboard out and go surfing with his mates, and people up the pub get to know it, they ask where's so and so, "Oh...all his weekends are tied up for the next..." You see, he's got to move away from his home for a start, like just for instance in this district, he's got to go to [X] which is some miles away... He's got to go somewhere, so he's got to get off his backside and he's got to get there somehow or other and it brings it home to his family, they've got to drive him to the train or drive him down there...whereas his community service, he can serve that locally and it doesn't cost him as much money by way of fares to get there. (J14)

Deterrence

Deterrence was mentioned by 40% of the sample. The way in which deterrence is supposed to work was seen by a number of these officers as following what may be called the "clang of the prison gate" principle. It gives the offender a "taste of prison" without the person "being subject to rape or drugs". Two judges gave some indication of the philosophy behind this theory:

> ...sometimes you want to give a person a bit of a shock, a bit of a fright. I once read in the bench that I sat out in the country something a magistrate had left which I think was very appropriate: "A good fright is equal to a hundred lectures". And sometimes giving a person a short period of periodic detention is a good fright. So I think it could be used there as well to really frighten someone. (J17)

> ...you want to give him a taste of what prison is about, because he is a person who is teetering on the brink of serving a substantial period of full-time imprisonment...where you could start to give a person periodic detention rather than say CSO you are looking at the deterrent element, and you want him to see what it's like in prison and do a bit of time in prison to deter him from continuing his private lifestyle. (J3)

In a similar vein, one magistrate thought that the "taste of prison" element made PD especially suitable for young offenders:

> Someone who is reasonably young, has got...an attitudinal problem more than a criminal problem and they need a short, sharp shock [is suitable for PD], because to a degree PD offers a form of protection against sexual assault in gaol, yet you've got that rigid environment and it also imposes on their time on the weekends. (M16)

Rehabilitation

Thirty-eight per cent of the total sample nominated rehabilitation as a goal. This represents a significant decrease in the percentage (75%) who nominated rehabilitation as an objective of CSOs[31] and suggests that rehabilitation was not seen to be as important an objective in the context of PD as it was with CSO. Of those who did nominate rehabilitation, a number considered the

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31. McNemar Change Test, $X^2=9.3$, df=1, $p < .005$.

fact that PD allowed offenders to keep their jobs as a factor which enhanced the rehabilitative potential of the sanction. Accordingly, for these sentencers, it was not so much the sanction itself which was of benefit to the offender, but rather the incidental advantage, *vis-a-vis* a full time custodial sentence, of allowing him or her to retain some degree of freedom in the community. By contrast, it appears that many sentencers believed the performance of community service work itself would have a rehabilitative effect in some cases.

Intermediate penalty

The next most common response (35%) was that PD provided an intermediate sanction between CSO and full time imprisonment. Implicit in this formulation is that PD was seen as a more severe punishment than CSO, as suggested by the frequent reference to punishment as an objective, and that it provides a "last chance" option before imprisonment. PD was used when CSO seemed "too soft an option" and when "you want to hurt" someone "but just short of putting him into gaol". Periodic detention, one judge said, has "got a lot more bite" than a CSO. In fact, there was a substantial gap between a CSO and imprisonment. According to one judge:

> I mean, it's a thin line sometimes between a community service order and periodic detention and a thin line between periodic detention and a full-time imprisonment. There's not a thin line between full-time imprisonment and a community service order. That's quite a wide, thick line there. As to what fits in that thick line I can't really tell you. If you sat in court on a sentencing day perhaps you'd learn. I can't tell you. (J17)

The fact that PD involved a form of deprivation of liberty which was not as pronounced with CSOs was considered a crucial factor in ranking PD above CSOs in the scale of penalties. This is illustrated in the following interchange:

> **Interviewer:** So periodic detention seems to be more onerous than community service orders?
>
> **Magistrate:** You're looking at stepping stones I think. If a person is detained at weekends his freedom is taken away in effect, isn't it? Whereas with a community service order his freedom, I suppose, is limited but not to the same extent and it just seems to be a natural progression and of course it is an alternative to imprisonment. (M3)
>
> **Magistrate:** There are mixed opinions about periodic detention, although it's a punishment and it's a punishment higher than the community service order because you're taking away his liberty. (M22)

Other

Other objectives specified by the respondents include denunciation (8%) and reducing the prison population (3%).

5.2 Suitability

5.2.1 Offence

The PD legislation implies that the option is available for all offences which carry a prison sentence as a possible penalty. The offender must first be sentenced to a period of imprisonment of three months to three years inclusive before being eligible for PD.[32] When asked to nominate

32. Periodic Detention of Prisoners Act 1981 (NSW), s. 5(1).

examples of offences for which PD is a suitable option, slightly more than one-third of the respondents indicated that they would be the same categories of offences as those thought suitable for CSOs (see Table 1, Appendix B).

Driving offences were most frequently nominated by both groups of judicial officers (56% of judges and 41% of magistrates) as appropriate for PD (see Table 1, Appendix B). Other offences mentioned included minor assaults, property and fraud offences, sex and drug offences. Twenty-seven per cent of magistrates did not consider the offence type to be a relevant factor in choosing PD as a sanction.

Thus, there are clearly a large number of sentencers who consider driving offenders as particularly suitable for PD. A reason frequently expressed was that this class of offender is thought to be unsuitable for prison, and PD provided the nearest alternative. This view was reflected by two magistrates who said:

> I'd place more emphasis on periodic detention as being the option for the major traffic offender. Where you have got a feeling a community service order is not going to be enough, particularly if you've got say a culpable drive where you've got a serious injury to somebody and there is an offence where quite clearly...you need something more than someone being required to turn up for a few hours a week or a few hours a day. (M4)

> I certainly don't like to put the traffic offenders in full time in gaol. I think that where it has reached the point that they have to go to gaol I would much prefer to give them periodic detention. (M10)

Interviewees were also asked to nominate any offences which would exclude the offender from receiving PD. One quarter said that their response to the corresponding question in the CSO section would apply here. Taking this into account, the most frequent response over the whole sample (see Table 2, Appendix B) was "violent offences" which included such crimes as armed robbery and serious assault. This category was mentioned by 67% of the judges but by only one magistrate. This difference is probably due to the fact that such serious offences tend not to be dealt with in the Local Court and, therefore, would not be contemplated by magistrates.

Almost one half of the judges mentioned drug offences and sexual assaults as offences which would exclude the offender from receiving PD whilst only two magistrates mentioned drug offences and none nominated sexual assaults. Once again, the less serious nature of Local court offences probably accounted for this difference. The other category mentioned was property offences, although these tended to be confined to break, enter and steal offences. Finally, 23% of the magistrates said that no particular offence would lead to the possibility of PD being excluded as a sentencing option. Again, the severity of the offences dealt with by these sentencers must be kept in mind.

5.2.2 Offender

Employment/domestic status

Table 3, Appendix B shows that, of all the "subjective" or personal factors thought to be relevant to sentencing an offender to PD, the most important appears to be the fact that the offender had a job and a family. One magistrate presented the following view of the ideal candidate for PD:

> I would think the average periodic detention person is a person who has a reliable background, is a family man or a young man with a reliable background and a reliable

> job and therefore you say "Well, you are the ideal person for periodic detention"; that is exactly what it's designed for. (M8)

Over half of the respondents nominated both these aspects as relevant. One judge explained the importance of these factors:[33]

> ...there are cases where you might consider sending someone to gaol for a short period say three or six months but if he does go to gaol, he is going to lose his job, and if he loses his job, he is going to represent a risk to society. So in those circumstances you might well agree to give him periodic detention for say nine months, 12 months or longer, because he can then keep his job and still do time in gaol. That's a very important consideration, particularly if he has got a family to support. (J3)

Employment status and family responsibilities may have a substantial mitigating effect in cases where a gaol term would be otherwise appropriate. This point was elaborated upon by one of the judges:

> ...you see, you get swayed into giving a fellow periodic detention generally by personal factors. The fact that he's got a job. Now if the same fellow you were sentencing had been on, spent most of his time on social services, there is no point in giving him periodic detention... You would give him imprisonment. It's really a discount factor. It's the fellow who should go to prison, who must get a term of imprisonment, but because of personal and family factors you are ultimately persuaded to serve it by way of periodic detention... You're persuaded not to put him in because "Oh, Your Honour, he's in regular employment, he's got a family". "Oh, all right, this time periodic detention, but don't come back. Don't come back again." (J2)

A significantly greater number of sentencers mentioned these factors in relation to PD than was the case with CSO.[34] This would seem consistent with the fact that a CSO requires some form of labour, while PD may simply involve deprivation of freedom without the requirement of work. As will be explained further on, a number of judicial officers see PD as involving nothing more than sitting around and doing nothing. For the unemployed offender, such an environment is not considered to be rehabilitative. Accordingly, although CSO may be appropriate for the unemployed, since it requires active work, when the offence is sufficiently serious so as to invoke the question of PD versus imprisonment, sentencers may see no point in sentencing an unemployed offender to PD. One judge argued that "if you get the real lazy layabout who's got no respect for anybody or anything...he might as well be in gaol" (J12). Another judge asked:

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33. One of the magistrates spoke in a similar fashion:

> Well it would have to be a reasonably serious offence and it would be usually someone who's possibly in full time employment; say a married man with a wife and children. It would be possibly a disaster for him to lose his job and everything like that and he'd be the sort of person who would be very much inclined towards that so that he could pay his debt to society that way. I'd be more inclined to give it to him rather than to some no-hoper, unemployed criminal or something like that. (M19)

34. McNemar Change Test, $X^2=13.1$, df=1, $p < .001$.

> What's the good...of sending a fellow who never works much to periodic detention? You may as well put him in gaol. Why give him half the week or two-sevenths of the week in gaol, if he's only going to loaf about or hang around on social services or something? (J6)[35]

Youth

A greater (though not statistically significant) proportion of magistrates than judges considered young offenders to be suitable, a factor which was frequently cited in conjunction with married and employed offenders. Two magistrates, however, stressed that caution must be exercised before sentencing a young person to PD because of their "impressionability":

> Quite frankly, if a person has never been in gaol before, even periodic detention which isn't full time detention, one considers very seriously how might this periodic detention affect this person because they are going to come into contact with the criminals in gaol even for that short time. They are going to be orientated towards "This is gaol", "I've been in gaol"... Is it going to make them think they are Ned Kelly? Now they have to live up to it, as with some young people it does. Let's face it, they think they're tough all of a sudden because they have been in gaol. (M6)

Prior record

A number of judicial officers mentioned some aspect of the offender's prior record as being a relevant factor. This tended to be expressed in terms of the prior record *per se* or else as some assessment of the likelihood of re-offending. The magistrates who mentioned this aspect said that offenders who had had bonds or CSOs but had never been gaoled were suitable candidates for PD. An example of this approach would be finding an offender suitable for PD where (s)he was seen to have "used up" other options:

> I think you would tend to give weekend detention to a fellow who's a lesser criminal, a person who's probably used up all the other options you can give him so far as fines and bonds are concerned. (M5)

But there would probably be occasions where an offender was viewed as an habitual recidivist and so had "gone beyond" even the option of periodic detention. In these cases the sentencer may feel there was no alternative to full time custody. This was the most frequently cited reason for deciding on unsuitability, being mentioned by 23% of respondents (see Table 4, Appendix B). Nevertheless, a history of prior offending and gaol sentences might be ignored in favour of PD where a significant amount of time had lapsed since the previous offences:

> As I said on one occasion I had a young armed robber who offended previously, but in the two and half years that he'd been on bail in the meantime, he'd straightened himself

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35. One magistrate noted that placing the unemployed in PD may have the effect of denying the option to those who were employed:

> I don't see a great value in periodic detention for the unemployed because you might be filling the system up with unemployed people who have got nothing to do with their time anyhow, and keeping people out who might be working...and it would be terrible if you say "Well, I have got a bloke here who is working, he has got to go to gaol, he has a wife and kids to support, we want to send him in. Oh no, he can't go in because we have got all these unemployed people in there who aren't working anyhow. They would probably benefit more from a shorter sentence of full time duration than interfering with the periodic situation. (M17)

> out, so, and I think he'd been in gaol before, so rather than putting him back into gaol where he'd be mixing with all the wrong crowd again, because it was armed robbery I've got, I couldn't give him a pat on the back and I couldn't give him a bond or even community service, I gave him periodic detention. (J9)

Within the general category of prior record, three judges considered the likelihood of re-offending to be a key factor in deciding whether to give PD. Here the sentencer would consider not only the prior record, but other "subjective" features as well in making an assessment:

> ...well, almost any type of offender [is suitable], provided that person is contrite, doesn't have a long criminal record, and will not go back into the court system after it's over. Now you're going to say, well, how do you know that? But the judge will make out this person is a fool, this is the one-off heroin salesman on a small amount. I've even given periodic detention to serious sex offenders, who, one a school teacher who was a young man and foolish; the other a young boy just 18, and as far as I'm aware that hasn't been set aside on appeal. (J18)

Other

As Table 3, Appendix B reveals, there were a number of other replies to this particular question. Two magistrates said that PD should be available to any offender, one judge suggested that older offenders were suitable. One magistrate considered PD appropriate for drug offenders who would be considered unsuitable for CSO, another spoke of offenders who need "a short, sharp shock" and a third magistrate thought PD appropriate for offenders requiring stricter supervision than exists for CSO.

Table 4, Appendix B indicates that logistical problems, such as people on shift work or with travel problems, may prevent some sentencers from using PD. Four magistrates mentioned the shift worker problem. In these cases it would seem to defeat the purpose of PD to force a person to give up their employment to attend a PD centre at weekends: "You can create severe financial difficulty by taking away the capacity for somebody either to work over the weekend or mind the kids while the other wage earner in the family goes out to work" (M4). Twenty per cent of the sample say that they would exclude drug addicts. One judge had a principle of not using PD for "white-collar" criminals who "go around flogging bogus business schemes or committing offences under the Companies Act, where small people lose large, their life savings and things like that", because they are "just plain crooks" and should go to "real gaol" (J9).

5.2.3 The relationship between periodic detention, imprisonment and community service orders

Although none of the respondents emphasised that the main objective of PD is to provide an alternative to imprisonment, in practice sentencers seemed to use the option for those who, but for the presence of some mitigating circumstances, "really should go to prison". A number of sentencers commented that offenders given PD are more similar to those given prison sentences than those given CSOs. One magistrate explained that he would be:

> ...inclined to give a community service order perhaps in the situation where it was a toss up between a bond and a full-time gaol sentence. Whereas periodic detention to my mind is for an offender who is definitely going for a sentence [of imprisonment]; there's no question of a bond or anything. (M20)

In many sentencers' minds, therefore, periodic detention was really the penultimate sanction before the last resort of full time imprisonment. The decision to use the former rather than the

latter could involve quite an intricate mental process, as one judge described:

> I'd be inclined to use [periodic detention] if I thought the offence was too serious to justify community service and this must always be a subjective evaluation, but there were factors, either in the offence, or in the antecedents, or in the pre-sentence report which caused me to take the view that there was a chance that periodic detention may be sufficient to discourage him from further criminal activity. You know, sometimes, you just look and say, well, he's got to go to gaol and that's it, you know, it's a bank robber, it's a heroin importer, it's a bad rapist, or bad break and enter, or bad armed robbery, or it can even be a very bad driving offence, or a bad assault occasioning grievous bodily harm or, you know, that sort of thing. The options of 556A, 558 with or without fines, community service or periodic detention to me is that area where you think there are good and weighty reasons why at this stage the person shouldn't go to gaol. Now you might be being very optimistic about the future but you take a value judgment that you think in the community's interest it's worth a risk... I think it better if I don't send this person to gaol at this stage. Well, then, you say, well this is too serious for 556A, I really can't use 558, community service, you might hesitate there and you'd probably say to yourself, no, look I can't, I've got to impose some sort of custodial sentence, the minimum I can use to make is a periodic one. (J7)

5.3 Quantum

When judicial officers were asked how they determined the actual length of PD, the majority of judges (72%) replied that they behaved as they would in any other sentencing situation, by determining the length primarily by reference to the seriousness of the offence (Table 5, Appendix B). All the magistrates who were asked this question spoke likewise. It is difficult, however, to articulate exactly how the sentence was derived. One judge asked rhetorically,

> How long is a piece of string? How do you determine the severity of any sentence? You have a feeling about it... It's a very subjective, imprecise matter. One of the obvious factors is what the maximum permissible term is, and I think 12 months of periodic detention is a long time. (J1)

With the maximum term being 18 months (as it was at the time the interviews were conducted), judges thought they didn't have "much to play with anyhow". The usual method was to determine what a prison sentence would be and then direct that it be served by way of PD:

> I've got no guidelines. I suppose one should say that the guideline is that you sentence for the offence, you see, for the time limit that you feel is fit for the offence, then you say it can be served by way of periodic detention. So I don't consciously say, oh, he's only going to be serving two days out of seven a week, therefore I give him more than if I was going to send him to gaol for the whole time. I think in terms of it being a gaol sentence to be served by two days out of seven a week. I'm conscious that the irritation of having to turn up every weekend, it's known to be very annoying. (J6)

Seven of the thirteen magistrates indicated that they followed this method of establishing the quantum. However, some did not make the direct translation, arguing that, for instance, six months PD could in no way be equated to a sentence of six months full time imprisonment. For these magistrates, a longer period of PD was warranted in order to achieve the desired level of punishment:

> I think it is a better option [than CSO] but it is fatally flawed in my view. There is one

> thing that stops it from being more widely used and that is the silly way in which the legislation was framed. It is a nonsense to me that you sentence someone to a term of imprisonment to be served by periodic detention - if I decide that the circumstances of the case call for six months imprisonment and I give a person six months to be served by PD he is in effect getting under two months. That is not what I want; to achieve what I want I have to sentence him to 18 months which will in most cases be a manifestly excessive sentence and that is one thing that puts me off using it but I still use it occasionally but it seems to be nonsensical that it should have been couched in those terms. It would have a far wider deterrent value if that problem didn't exist. (M7)

More than one in four judges admitted that they almost always use the maximum sentence. As one judge explains,

> Well, I usually go for the maximum because if one is that close to gaol I can't really see why it should be reduced from the available maximum. (J18)

None of the magistrates indicated a preference for using the maximum available penalty, no doubt because this would rarely be appropriate given the less severe nature of offences tried in the Local Court.

6. EVALUATION OF PERIODIC DETENTION

6.1 General attitude towards Periodic Detention

Judicial officers did not appear to view PD as favourably as CSOs. While 73 per cent of those interviewed held a "favourable" attitude towards CSOs, only 45% held a favourable attitude towards PD (Table 6, Appendix B). Most of the magistrates who were questioned tended to be ambivalent or negative about the option (75%). While judges seemed more likely to regard PD favourably, a substantial proportion (41%) were either ambivalent or did not like the option. The observed differences between judges and magistrates were not statistically significant.

6.2 Why is Periodic Detention used so infrequently?

Sentencers were asked to explain the statistical trends found in New South Wales where PD has not been used as widely as CSOs; PD has never been used in more than 1% of cases in the Local Court since the Bureau of Crime Statistics began collecting court data in 1974. CSOs, which were first made available in 1980, have been used in more than 3% of Local Court matters in each year since 1984.[36] A number of respondents expressed surprise at this revelation. Table 7, Appendix B contains some explanations offered by the judicial officers.

Availability

One obvious explanation is that because PD is not available in many areas, its use is not as widespread as CSOs. This view is offered by eleven (28%) of the respondents and would certainly be true outside of Sydney and Newcastle where there are simply no PD facilities available. Moreover, Table 8, Appendix B indicates that 24% of the sample had had some problem with accommodation for PD even within the Sydney metropolitan area.

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36. For further details see Bray, *op. cit.*, n. 4.

Seriousness of matters heard

Exactly half of the judges thought that cases heard in the higher courts were generally too serious for non-custodial penalties. One judge summed it up this way:

> Well, they're not designed to be used by higher courts. You don't send somebody to CSO or periodic detention when you are contemplating a sentence of six years... I mean we can't do it. We're restricted in the number of hours and the number of years. (J6)

As this particular quote indicates, the "serious offence" explanation may account for the infrequent use of both PD and CSOs, but it would not explain the relative difference in use between the two sanctions.

Activity and supervision whilst on Periodic Detention

The most frequent reply to this question was that a CSO is more "positive" or required the offender to do something apart from merely "sitting around" on the weekends. This was mentioned by 28% of the judges and 45% of the magistrates. Some judges voiced a disbelief that PD "works" and said that it was not an option that defence counsel frequently asked for on behalf of their clients. One judge admitted that since CSOs became available, he had come to favour them over PD:

> I prefer getting something out of somebody, getting some endeavour out of the person by way of community service rather than just the irritation of having to, every weekend, float over to a gaol. (J6)

Another judge confirmed that PD did not have a good image:

> I did hear some years ago that judges didn't impose the orders for periodic detention because they had heard that it was more or less treated as a bit of a joke, and that the offenders went to prison and did nothing and were as useless. (J4)

A number of the magistrates suggested that PD was "too soft" and involved a number of people sitting around doing nothing or, in the words of one magistrate,"...turning up Friday night half stoned...and they sit around twiddling their thumbs till Sunday and off they go again" (M17). Another magistrate mentioned this in the context of rehabilitation. For this magistrate, CSOs had a better potential for reform:

> ...with weekend detention, because of the comparative shortness of the period of time and the fact that [offenders] don't have something that they can be set to do and to accomplish and to have a set number of hours in which to accomplish it, there is a tendency to be a bit light hearted about it. It is only a matter of filling in time for the weekend as it were. I don't think it's sufficiently rehabilitative. You know, it doesn't have the same element of rehabilitation that repaying to society some compensation for the damage that you have done to them by the commission of the offence. (M1)

Some sentencers were dissatisfied with the way in which PD appeared to be administered. One judge raised the possibility that prison officers (who supervise PD centres) were not appropriately qualified to deal with the type of offender who is sentenced to an alternative option:

> ...perhaps the judges think that the program probably isn't as good, say, as the community service order, or indeed, being under the care and supervision of the Probation and Parole Service, because I think we come to think of the Probation Service as being serviced by fairly well-educated and experienced people, and I think we think in terms of periodic detention, we may be wrong of course, being organised by the dyed-in-the-wool prison officer type. Now, I think that might be the answer to the, that might be...the answer to our reluctance to use it...we think, or I think, in terms of the Probation Service being run by a fairly cultivated people who are doing this with a purpose. They have a vocation in it, whereas I suppose prison officers haven't got a good reputation in this community... [T]hat's being unfair, but that's...our history you know. (J13)

There were also a number of comments about what is perceived as lax supervision with regard to PD. This also contributed to the belief that PD is "too soft":[37]

> I'm not very enamoured of periodic detention, I think if a person's going to go to gaol, well, they ought to go to gaol. I'm not sure that the Corrective Services Department, the Custodial Section, which runs periodic detention has the breadth of vision about activities that the Probation and Parole section have about community service. I don't know what these fellows do on periodic detention, but I suspect it's not much... It doesn't appeal to me as a very viable form of detention. I think CSO serves the same purpose much more effectively and I have yet to be persuaded that their time in periodic detention involves any hardship to them. The only time I've ever seen them as I drive past [a named periodic detention centre], they're all sitting out in the sun having a cigarette... I think it's more trouble than it's worth. I think it should be scrapped... It's not liked by the Corrective Services Department, I don't know what the official policy of that Department is, but I do know what the view of individual senior officers is, and they feel that it's a bit of a waste of time...and I have yet to be persuaded that it really has much of an impact either punitively or deterrently or rehabilitatively on the prisoners. It's just a bit of a pain in the neck for them. It's an inconvenience rather than a punishment. (J12)[37]

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37. Similar comments were made by two magistrates:

> I think...a lot of people see it as too easy an option as against a full-time period in prison. And I know a lot of them are disillusioned by facts and figures that they hear on the grapevine that, you know, arrive on Friday and they really let you go on Saturday because it's all too much bother to keep them on Sunday. (M15)

> I've got strong reservations as to how strictly [periodic detention] is enforced. I don't think that those responsible for them are firm enough on the people, or really that a lot of people treat it as a bit of a joke regrettably and it shouldn't be. And I'm a bit disillusioned about it all...I think it's too easy, too soft. (M12)

Other explanations

Two judges speculated that the reason CSOs were used more often than PD was that sentencers are using CSOs as alternatives to bonds. This is what one of them said:

> ...it may well be that community service is being ordered now in cases which would have been bond cases. So, I think most judges have a disinclination to let somebody walk from the court room who has done something fairly serious merely signing on a piece of paper that they'll be good for the next three years. (J18)

One magistrate considered that the greater flexibility of a CSO was a reason for its greater use. In other words, the times at which a CSO could be worked off were more easily tailored to the offender's lifestyle than PD which, as it stands, can only be served on weekends:

> I think [CSOs] would fit in with a defendant's ability to perform the work easier than periodic detention because it's pretty rigid with the set times. Whereas, for example, on a community service order they could work possibly by a range of selected hours or something. (M19)

Earlier it was noted that PD was generally considered to be more appropriate for employed rather than unemployed offenders.[38] If this is the case, the overrepresentation of the unemployed in the criminal justice system could explain the more substantial use of CSOs. This was alluded to by one of the magistrates:

> I would say most of the offenders who have community service orders applied are unemployed persons and there are not so many employed persons, to which periodic detention is directed, who commit offences likely to send them to gaol... [T]he general philosophy in our bench book says...that periodic detention provides a means of punishment by restricting [the offender's] liberty at weekends while permitting the defendant to remain in employment, in contact with family and community life. Well not too many in a stable environment committed offences which justify a gaol sentence. (M8)

Finally, another view expressed was that community service was normally the first of the alternative options chosen and, having re-offended after that, the only alternative left for the sentencer is full time imprisonment. CSO is thus seen as the usual alternative to imprisonment, with PD effectively "shut out":

> I think that possibly magistrates are turning: whereas before when you had no community service orders and you were looking at gaol the option was periodic detention. I think that option has become community service order. When they come back again I say that you look at the offence and say "Well, you have been given a community service order, you are not going to get a softer option than gaol"... If you get a fellow up for break, enter and steal as a first offender you would give him a community service order, and he is back before you six months later for break, enter and steal. Are you really going to consider periodic detention then? He has clearly shown that, you know, a form of softer option hasn't worked. (M10)

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38. See Section 5.2.2 - 'Offender: Employment/domestic status' and Table 3, Appendix B.

6.3 Assessment procedure

Unlike the situation with CSOs, it is not a requirement for sentencers to obtain special assessment reports when considering PD as a penalty. Often, however, an assessment of suitability for PD is contained in the pre-sentence report. Table 9, Appendix B shows that the majority (83%, including 100% of the magistrates who responded) of judicial officers questioned were generally satisfied with the quality of the pre-sentence reports they received. As expected, the answers received were similar to those obtained in relation to CSOs. Interviewees expressed high praise for the work of the Probation and Parole Service, including comments that its officers were "very professional" (J18) and "remarkably sympathetic people" and that probation and parole reports were "excellent" and "of great assistance" (M8), although there was a complaint that, in the city, it could take four to six weeks to complete a pre-sentence report.

Three of the 12 judges questioned were not always satisfied with the reports. One explained his concerns in this way:

> There are good probation officers and there are some who are not so good. There are people who give good reports and others who give less than good reports. There are some people who, some probation officers who will blindly accept anything that the offender tells them, without checking it out and people who commit offences are not notorious for their frankness and openness. There are others who do take the trouble to check out anything they're told by the prisoner before they commit it to any report for the guidance of the court. It's like any other job you'll get a lot of variation in it...you'll get some people working for the Probation and Parole Service who take a completely subjective view of everything, either for or against the prisoner, when what is needed to assist the court is an objective overview of all the matters which go into the pot when you're considering a sentence. (J12)

Sentencers were not happy with pre-sentence reports which tried to tell them what to do, by recommending a particular form of punishment. One magistrate mentioned this aspect when explaining his favourable view of the service:

> The probation officer always gives me everything I ask for. You only have to ask and they are very willing to help you as best they can. I find that when you ask them to be frank, they are frank. When you say tell me, they tell you. But they are not intrusive, they don't try and say "This is what you should do", they lay it out for you and then if you ask their opinion they will give it to you; but you are never pushed. (M6)

Another magistrate looked to the number of "defaults" (presumably through breaching the order or reoffending whilst on the order) as a criterion for evaluating the quality of probation and parole reports:

> In the main [the reports] prove to be correct in so far as suitability is concerned. Not many persons default, it's the odd one. I'm not sure what to put that down to, whether it is an error of judgment on the part of the probation officer, or whether the person himself just falls down. (M3)

Some of the judges mentioned that they were wary of reports which showed "an overemphasis on a soft approach". However, only one judicial officer stated that he was generally not satisfied with the reports he received.

6.4 Availability

Apart from the fact that PD was not available in most country areas, sentencers generally had little problem finding accommodation for detainees when they needed it. Of those who had used PD at some time, 76% found that there was no problem in finding accommodation. Some mentioned ways in which accommodation problems could be avoided. There are principally two methods. First, the sentencer can stand over the matter for sentence until such time as there is accommodation available or, secondly, (s)he can post date the commencement of the sentence to correspond to a time when accommodation would be available.[39] One of the magistrates described these processes in some detail:

> Very rarely would I ever give a bloke full time just because there is nothing available. I just stand it over or, like I did the other day, I just gave the guy the sentence to start on the fifth of May[40] and he has probably got three weeks between conviction and when he starts, but I couldn't see any point in, for that short period, in adjourning his case making him come back with his legal representatives which would probably cost him money or alternatively, if it is the Legal Aid Commission, costing the public money when the same result is going to happen, so if I can I will say "Okay, I've got a vacancy on fifth of May, that is when you start". (M2)

A further difficulty with availability is the residence of the offender. Periodic Detainees must arrange their own transport to attend the centre; where this may result in undue inconvenience, strain or hardship, PD cannot be ordered.[41] This may present a problem where, as is common, the offender is convicted of a driving offence and would be otherwise suitable for PD. These offenders will frequently have been disqualified from holding a licence as part of the sentence for the offence and, therefore, can't use their cars. This would be problematic for offenders who may "finish work at a certain hour and you're three hours away and you've lost your licence and you can't drive there" (M18). Accordingly, the lack of PD centres and their inaccessibility sometimes seemed to work against the policy, adopted by many sentencers, whereby driving offenders were considered to be most suited to the sanction.

6.5 Completion rate

When asked whether they had any knowledge of the proportion of offenders who successfully completed their PD orders, the majority (53%) of judicial officers admitted they had no such knowledge (Table 10, appendix B). The 53% figure comprised 59% of the magistrates' and 50% of the judges' sample. Of the judges who did make an estimate, all believed that the completion rate was either very high or quite high. Five magistrates made an estimate and of these only one thought that PD had a low completion rate. This particular magistrate said that he recalled seeing a statistic some years previously which indicated a "substantial" non-compliance (M9).

Some sentencers believed that the completion rate would be high because of the threat of full-time imprisonment:

> I have no knowledge whatsoever. I suspect...a very high proportion, because [if there is a breach] you serve a substantial portion of the balance properly adjusted for full-time imprisonment. (J18)

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39. Section 8 of the Act provides that the sentence may commence on a date not earlier than 7 days and not later than 21 days after the date on which the sentence is imposed.

40. The interview was conducted on the 19th of April.

41. *Periodic Detention of Prisoners Act 1981* (NSW): s. 5(1)(b)(ii).

Despite the estimation of high completion rates, some interviewees suspected that there would be more breaches with PD than with CSOs:

> I think you get more and more occasions of defaults in periodic detention than you do in community service... Well, community service can be a bit flexible. If a person has some commitment he can negotiate to go on Day A instead of Day B, but with periodic detention you've got to be there on Friday, rain, hail or shine, and there you stay till Sunday. So there's no flexibility there, and a lot of people just don't turn up... It may have something to do with the class of prisoner, who is ordered the one as distinct from the class who's ordered the other. (J12)

Sentencers admitted that they did not receive regular feedback about failure rates, so their estimates may not be accurate:

> ...if reports mean anything, I'd say an overwhelming majority [complete], because I rarely, very rarely receive a report where a fellow hasn't completed, so unless failures aren't being reported I've got to assume that they've completed. (J14)

In any case, it seems that knowledge of breach rates would not have an effect on the sentencing practices of most of the respondents. Not surprisingly, the results here are similar to those obtained for CSOs. Sixty-eight per cent of those who were asked this question said that this information would not lead them to change their sentencing practices (see Table 11, Appendix B). One judge outlined his reasons for adopting this approach:

> Not as far as I'm concerned because I deal with each individual as that person comes up to me. Say you've got an 80% recidivist rate, it doesn't mean to say that the person before you is going to fall into that class. It's a value judgment of its type. That's a matter I think which is for the legislature to decide with experience whether it's a viable option to have available to courts or not. I don't think it's for sentencing judges to concern themselves with. (J7)

A substantial proportion (31%) of judges (18% of the whole sample) admitted that knowledge of breach rates would have some effect, if only subconsciously, on their sentencing. As one judge remarked, "if the system obviously wasn't working well, you'd have to hesitate to use it" (J8).

Some respondents (14%) said that where the completion rate was extremely low, that fact could lead them to ignore PD as a sentencing option. One magistrate remarked that the threshold point at which a sentencer would cease to use PD could vary from sentencer to sentencer:

> **Interviewer:** Do you think knowledge of breach rates and re-offending rates would have an effect on your use of periodic detention as a sentencing option?
>
> **Magistrate:** Of course it does. What effect is another matter... If 80% of offenders failed some people would never make an order. I doubt if one would get to the situation where you never make an order if it's a sentencing option... You make the order because it's the right option and it is available. (M9)

6.6 Legislative and other constraints

As far as the sentencers were concerned, the most pressing reform was to make PD available in rural New South Wales. Thirty per cent of the sentencers in this survey expressed this view. (see Table 12, Appendix B). As one judge remarked,

> [Periodic detention is] only available in metropolitan areas of Sydney, Newcastle, Wollongong, and as far as I am concerned it should be available in other areas and I think other areas are being deprived of that possibility unfairly... [It happens] every time I go to the country.... There is no reason why they couldn't set aside a part of the gaol, the nearby gaol...well, take for example Bathurst. You have got a gaol there but they do not have a periodic detention centre there. (J3)

A number of rurally based magistrates thought that having PD available would be advantageous simply because it would provide an extra sentencing option and "The more divergence of sentencing you've got the better" (M22). One judge (J16) even suggested using cells at the local police station as PD facilities if there was no prison nearby.

Where PD was not available, judicial officers did not always sentence an offender to full-time imprisonment. One judge explained what he did in the country areas, where there was no PD centre:

> ...well, then, I think you'd have to drop down a bit then. If you'd made the decision: no full-time gaol, you'd have to then say, well, a bond or CSO. (J18)

Similarly, when asked whether he would send an offender to gaol because there was no PD accommodation, another judge replied:

> No, oh no, no, no, and indeed I wouldn't do that. Having made up my mind that the bloke's going to get periodic detention I then wouldn't turn around and say, oh well, there's not a vacancy you've got to go to gaol. (J14)

Two judges also remarked on the fact that PD was less available to female offenders, as there was only one centre available for women (viz. Merinda P.D.C.).

Another suggested reform (mentioned by 23%) to the PD program was to have it available on weekdays, rather than only on weekends. This is provided for by the Act (ss. 7, 9) and, as indicated in the following quote, the Court of Criminal Appeal has recommended that PD be made available in this form. The only barrier to implementing this measure appears to be a lack of resources within the Department of Corrective Services:

> Periodic detention should be available on 7 days per week basis and not merely on Saturday and Sunday, and the Court of Criminal Appeal[42] said the same thing, I'm not being unique on this... You often get situations of people who are shift workers, someone who has got a second job at a club on Saturday and Sunday but he has got no job during the week or he can get off Monday and Tuesday. Why shouldn't Monday and Tuesday be available as the days on which he can do periodic detention?... Well, my argument is that periodic detention should be available on any two days of the week to meet the work requirements of the offender. (J3)

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42. *R v Morris* (NSW Court of Criminal Appeal, Unreported, 23/10/87), per Street CJ.

At the time the interviews were conducted, the maximum period of periodic detention available was 18 months. At the end of 1989 this limit was increased to three years.[43] A reform of this nature was suggested by three of the judges (17%) who were interviewed, but was opposed by eight (44%). One of the opposing judges explained:

> ...it's not feasible [to increase the limit]... You see, if it needs more than 18 months less remissions as it now is, it really probably isn't a periodic detention case, it's a gaol case with a six months full-time minimum period or these days only the six months. (J18)

Another judge thought that long periods of weekend detention were not feasible:

> ...it'd be very hard on a person to have to require them to go in each weekend and then give them their liberty during the week and require them to go in each weekend for 5 years or some lengthy period. I think you'd have a greater failure rate. I just don't think, human nature being what it is, that people could keep up that, that sort of life. (J10)

Other suggested changes included allowing cumulative periods of PD, removing the link between PD and imprisonment and making PD available to Commonwealth offenders (see Table 12, Appendix B).

7. PRISON AS LAST RESORT

The frequently noted concept of using full-time imprisonment as a punishment of "last resort" can be viewed as an important element in the use of both community service orders and periodic detention. Given such a proviso, sentencers would be expected to exhibit a general preference for alternatives to imprisonment, except in cases where the "last resort" stage has been reached. An amendment to the *Justices Act* in 1988[44] instituted the last resort principle for magistrates. This is expressed in the legislation by stating that the magistrate must have "considered all possible alternatives" and have decided that "no other course is appropriate".[45] Whilst this provision applies only to magistrates in NSW, all sentencers are subject to the "last resort" provisions in s. 17A of the *Crimes Act* 1914 (Cth). In order to gain some idea of how these "last resort" provisions may affect sentencing, we asked each judicial officer to give their views of the concept, what they thought of the relevant legislation and how they determined when the last resort stage had been reached.

When asked what they thought of the principle of using imprisonment only as a "last resort" none of the judges interviewed disagreed with it and 39 per cent of the judges explicitly endorsed the principle:

> Judges and magistrates, when they're approaching questions of sentence, should only impose prison sentences if they feel that there's no just alternatives. Of course I think everybody, if you ask them, they'd express it differently - they would be agreed on that, but we differ of course as to what is the proper case to send people to gaol... but I think all would agree with the policy. ... To sentence anybody, ... it's a very nasty occupation, really, very unpleasant. It's very unpleasant, doesn't get any better as you get older either.

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43. *Periodic Detention of Prisoners (Amendment) Act 1989* (NSW).

44. *Justices (Sentencing) Amendment Act* 1988 (NSW).

45. *Justices Act* 1902 (NSW), s80AB (1).

> I think anybody would tell you that, if they were fair dinkum, that nobody likes sending people to gaol. It'd be very peculiar to enjoy that. (J15)
>
> ...I think everybody must, surely, I don't think there'd be any judge who wouldn't think along those lines. ... I've always taken that to be the rule. (J13)

A similar proportion (39%) of judges said that it was the basis of current practice in any case:

> ...of course, that always has been, no judge, even the so-called tough ones, ever use it as a first resort - of course it's a last resort.... What it means I suppose is that you always look for some other alternative if it's responsibly open, and I reckon that you'd get that answer from a hundred percent of judges. (J18)

> ...as far as I know all judges, including myself, deal with it that way. No one likes to send someone to gaol and if there's a practical alternative that's reasonable in the circumstances I think we all take the view, well, we won't send him to gaol. In practice how it's achieved is by looking at the other options first, such as, is this a suitable case for a bond and for a fine? If no, is it a suitable case for community service? If not is it a suitable case for periodic detention? If not, well, there's no alternative. (J9)

Because a large number of magistrates' sentencing decisions are subject to s. 80AB of the *Justices Act*, they were asked to give specific views on this piece of legislation. More than half (60%) stated that this was done in practice in any case. Considering the frequency of this opinion, it was not surprising to find that 64% of the magistrates thought there was no need to enshrine the provision in statute. Some magistrates were particularly vehement in their criticisms of this piece of legislation:

> We always did that in the first place so why they put it in the Act is beyond me. We've always done that. Anyone who didn't wasn't a magistrate as far as I was concerned. It seemed to me a useless bit of legislation. (M22)

> **Magistrate:** I don't know why in the blazes they put that in the *Justices Act* because anyone who is sentencing to imprisonment without looking at all the other alternatives shouldn't be on the bench.
>
> **Interviewer:** My next question is do you think the amendment has made any difference to sentencing?
>
> **Magistrate:** No! Politicians should stick where they belong - in parliament. That is the most useless amendment I have ever seen in my life. (M20)

It was also suggested that the amendment was introduced to dilute the effect of the increase in statutory maximum penalties for certain offences in the cognate *Summary Offences Act* 1988 (NSW):

> ...it is an absurd provision.... Why would anyone sentence someone to gaol if they didn't think it was appropriate? I think it was introduced because of the *Summary Offences Act*; offensive conduct and offensive language now carry imprisonment. Can you ever imagine sending someone to gaol for offensive behaviour or language? They are absurd, those penalties, and shouldn't be in the Act.... You would never contemplate imprisonment and the reason why that section was introduced into the *Justices Act* was purely and simply because of those provisions. (M3)

In contrast to these views, three magistrates believed the amendment could serve as a useful reminder or "mental exercise" when sentencing. For example:

> **Interviewer:** Do you think that particular amendment has made any difference to sentencing practice in the Local Court?
>
> **Magistrate:** Well I hope not, in the sense that I would hope magistrates would always have been observing those criteria. But if magistrates haven't been I would hope it has made a difference in making them observe those criteria; in other words making them think more solidly about the scale of options instead of putting somebody in gaol who shouldn't be put in gaol or letting somebody not go to gaol who should be put in gaol. (M6)

Like the magistrates just mentioned, four of the judges interviewed perceived the "last resort" principle as "stating the obvious" (J2), mere "political grandstanding" (J9), or just a slogan:

> ...it's a mindless slogan. I don't know anybody who doesn't use prison as a last resort, it really doesn't need to be stated. (J14)

Two of these four judges added that they did not see the need to put such a principle in statute.

When the judicial officers were asked to spell out the factors which indicated that the last resort had been reached, their answers indicated a strong tendency to rely on "normal principles of sentencing". Eighty-three per cent of judges and 82% of magistrates said that the seriousness of the offence was important. A substantial number also mentioned the offender's prior record as being significant (56% of judges and 55% of magistrates). Almost half of the sample (45%) indicated that both of these factors were relevant. The following response by a magistrate illustrates this process:

> ...the circumstances of the offence [are relevant]. They can range over quite a degree, an assault could be anything from a little slap to a really severe beating. A person's prior record...where fines, bonds, whatever have been tried and still haven't deterred the person, [there] is obviously a greater need to pay some attention to the deterrent aspect of sentencing and gaol is probably the ultimate deterrent I suppose. I would sort of sift my way through and see, well, you know, can we do it by way of fine? No, because he has got such a long record - a fine is not going to have any effect on him at all. Do we put him on a bond? No, he was on a bond at the time it was committed and he has breached the bond before on something else so, really, bond is not going to achieve anything. Is he eligible for community service order if it is appropriate? No he is not eligible, he said he won't have a bar of it. Alright, well that's out of the way, we haven't got periodic detention [not being in the city]. So we come down to the question of "Well, what do I do then, is it serious enough?" Has he gone far enough down the track to say "Well, gaol is the only option?" You sort of do this mental exercise, not necessarily in that order, but I tend to look at the offence first to see how serious it is and then his antecedents and see whether any other remedies would really work. You are only guessing at the best of times because sometimes they will work and sometimes they won't; it is an educated guess I suppose. (M17)

A number of judges commented that full-time imprisonment was really the only option in a number of cases, because of the seriousness of the offence. In these matters the "last resort" is reached very quickly:

> ...see, you take the Supreme Court judge in a murder situation, once the conviction is removed, they're thinking between pretty narrow parameters, probably 12 years and life imprisonment, aren't they?... Importation, you're a courier for $1.2 million worth of heroin has come into the country, you've brought it in, well, it's a question of how long, it's not a question of if, is it? (J18)

> Oh yes, I think that's obvious enough, but there aren't very many other resorts before you come to the last. There's only fines, deferred sentence, community service, periodic, full sentence, that's about the limit. ...I think everybody does use it as a last resort, but that doesn't mean much when you don't have very many other resorts. If you've only got two, then the second one is the last. If you've only got one, well that's the last as well as being the first.(J1)

Accordingly, it seems that a large number, probably a substantial majority, of judicial officers view the "last resort" concept as a superfluous one in that they disagree with its inclusion on the statute books and, in any case, the "last resort" threshold is established by the normal principles of sentencing. When asked about how a sentencer decides whether to send an offender to gaol or give him or her an alternative sentence, judges typically referred to a variation of the "intuitive synthesis"[46] approach:

> ...I first ask myself, does this person have to go to full-time gaol. That's the first question I usually ask myself. If the answer is yes I don't consider anything else. I tend to then look at the prisoner as a prisoner and determine how long they should stay in custody. But if I say no, this is not a case where a full-time sentence is required, I look at the alternatives. Some cases stick out very clearly as being cases where a recognizance is sufficient. Some cases very clearly present themselves as a case where community service is appropriate. I can't tell you the procedure I use once I've decided an alternative to prison. It's almost instinctive and I think you'd find there'd be great similarity, great correlation between the judges when you do your stats. You'll find there are judges who will on the whole use CSOs for certain types of offences, there are judges who will give periodic detention for, say, other types of offences. You'll find often there'll be correlation between the judges I'm sure. If you don't find the correlation I think there's something wrong with the system...(J17).

> **Interviewer:** How do you decide that a particular case is worth prison?

> **Judge:** By having 40 years of experience behind me... Every now and again we get a line of authority from appellate courts which say that it will only be an exceptional circumstances that a crime of this category is not visited by a prison sentence. But...there's a very wide area that the judges have to operate on their own discretion... Look, I know it might sound like a bit of a cop-out, but courts don't sentence offenders, they sentence themselves, and you know you get a feel for a case, that you put all the ingredients in, the matters of aggravation, the matters of mitigation, the subject of matters, the impact of the offence upon the community, the community attitude to it as reflected by the range of penalties prescribed, the chance of rehabilitation, the interests of the victims...the necessity for this type of crime to be demonstrated to attract a serious penalty. You put all that in and you stir it all up and you'll know at the end of that process whether it's a custodial sentence or not. (J12)[47]

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46. For a striking example of this approach, see *R v Williscroft and Ors* [1975] VR 292.

47. Another judge made a similar point about how he would decide when a person should go to prison:

> On the facts before me... It depends on how I view the facts, how I view the man or woman in front of me and

One judge expressed considerable pessimism that the "last resort" principle could apply in the existing political climate in NSW:

> Well, you have got there the ideal that I agree with, that prison should be used as a last resort, but you have had the public fed prior to the March '88 election with propaganda that the courts and everybody were getting soft on crims. Consequently the media has played up to the fears that everybody has, so that everybody wants sentences to be stronger and tougher, so to talk in terms of prison being a last resort is a nonsense in the light of the political propaganda, the media hype realities of 1989. Sorry. ...maybe, maybe in another 5 years' time things might change... Not only is it not on but I think gaol is going to become more and more the penalty not of first resort, but certainly second and third resort well before last resort, or the threshold of last resort is going to be brought forward. (J4)

Another judge suggested that the "last resort" policy could be achieved in two ways:

> Well, it's achieved on the one hand by educating the sentencers that there are alternatives, achieved on the other hand by persons who represent prisoners putting up to the sentencers the fact that the alternatives are available on the one hand and their clients are prepared to undertake the work or the detention on the other hand. (J17)

This particular judge, a relatively new appointment, emphasised the importance of judicial education. He referred to the seminars on the *Sentencing Act* 1989 organised by the Judicial Commission as beneficial:

> I think there should be more of that. I find sentencing very difficult. When I was first appointed...I think I would have benefited greatly by attending seminars or been given information... The system we had in those days was that the recently appointed judges would go out into a suburban centre with an experienced judge and I think the Chief Judge hopefully felt the experienced judge would guide the recently appointed judge. I certainly received guidance in those days from the more senior judges from whom I sought guidance. There would be judges in this Court who believe they didn't need the guidance or some may be too embarrassed to ask for guidance, or some may believe that it's not appropriate to ask for guidance... So I think the way to overcome that would be to have seminars either by the Judicial Commission or by the Courts themselves and then you'd have a greater consistency of sentence. It's very inefficient and very inconsistent. (J17)

cont.from page 53

what I hear about them and what crime it is and what effect it's had on other people. It's all sort of things and you put it all into a box and you shake it up and out comes pepper and salt...(J6)

8. CONCLUSION

This exploratory survey uncovered a number of important features in the manner in which community service orders and periodic detention are being used as by sentencers in New South Wales.

8.1 Main findings

8.1.1 Appropriate Cases

Community Service Orders

The results of the survey show that the vast majority (75 per cent) of sentencers saw CSO as an alternative to imprisonment which makes a positive contribution to the offender's rehabilitation or education, although a substantial proportion also saw the option as fulfilling the objectives of punishing or deterring offenders. There is evidence to suggest, however, that CSOs were also perceived as a suitable alternative to less severe options such as fines or recognizances: about one-third of the sentencers interviewed considered CSOs as an intermediate option between gaol and bonds, or between gaol and fines, or even as an alternative to fines.

Community service orders were seen as suitable options for culpable driving or other serious driving offences by a substantial proportion (40 per cent) of sentencers, with judges slightly more likely to nominate this category of offence than magistrates. Magistrates were more likely to suggest that there was no particular offence type for which CSOs would be the most appropriate option. A substantial proportion of judges saw CSOs as an inappropriate sanction for serious drug offences such as trafficking, serious sexual assault and especially armed robbery. Magistrates were less likely to exclude categories of offences as unsuitable.

A greater proportion of judges than magistrates considered young offenders and offenders who did not have a significant prior record as suitable candidates for CSOs. Employment status was another important factor; CSOs were seen as appropriate for unemployed offenders because of their educational and rehabilitative features but also suitable for offenders with a job and/or family responsibilities because they would be able to remain in employment and live in the community. Judges would consider giving CSOs to an offender who had a genuine intention to reform or showed potential for rehabilitation. Magistrates were more likely to mention the concept of being on the "borderline" of going to gaol as a material factor in handing down a CSO.

Since judges of the District Court generally deal with more serious offences, they tend to see CSO as a "softer" option for cases where there are special mitigating circumstances against imprisonment. Magistrates, on the other hand, deal with less serious offences. They perceive CSO as a harsher penalty than most and tend to reserve it for the more serious offences and for offenders with significant prior records.

Periodic Detention

The majority (55%) of judicial officers surveyed saw punishment as an objective of PD. Judges were more likely to take this view than magistrates, although this difference was not statistically significant. A substantial proportion (40%) of the sample mentioned deterrence as another objective of PD; the philosophy of giving the offender "a taste of prison" to frighten the offender into "turning straight". Rehabilitation was not seen to be as important an objective in the context of PD as it was with CSOs. Just over one-third of the respondents thought PD provided an intermediate sanction between CSOs and full-time imprisonment; PD was the "last chance" option before full-time imprisonment.

Again, driving offences were most frequently nominated by judicial officers in our survey as appropriate for periodic detention, while violent offences, drug offences and sexual offences were

seen to be inappropriate. Judicial officers placed a greater emphasis on the employment status and/or family situation of the offender when making decisions about PD than with CSOs. Offenders with a job and/or family responsibilities were more likely to be candidates for PD than unemployed offenders. Age and prior record were the other two prime considerations; young offenders and offenders without a lengthy criminal record or prior imprisonment were considered worthy of being given another chance before full-time imprisonment was imposed.

Summary

In summary, periodic detention was more likely to be perceived as an alternative to imprisonment than were community service orders, although sentencers in our survey held a much more favourable view of CSO than periodic detention. There appears to be significant confusion or ambivalence about using CSOs only as an alternative to imprisonment. Although a substantial number of sentencers, especially magistrates, were well aware that community service was to be an alternative to a custodial sentence, at least one in three have indicated in the survey that they actually perceived the CSO option as lying somewhere below imprisonment. Consequently, CSO was seen to be an option somewhat more severe than bonds and fines, but often suitable to replace these latter options. This finding helps explain the results of Bray and other studies which find that an increased use of CSOs did not always lead to a decreased use of imprisonment.

Although the survey showed that CSOs and periodic detention were seen to be applicable to a wide range of offences in the Local Court and some of the less serious offences in the District Court, the prior record, age and employment status of the offender figured more prominently in the sentencer's decision. Sentencers dealing with the more serious cases would tend to see CSOs and periodic detention as applicable only where sufficient mitigating circumstances exist to justify not using imprisonment. Sentencers dealing with less serious cases, however, would tend to see CSO as capable of adding "more of a bite" to their sentences than fines or bonds would.

8.1.2 Attitudes towards CSOs and PD

A large majority (73%) of the judges and magistrates in our sample expressed a generally favourable attitude towards the CSO as a sentencing option. In contrast, only 45% of the respondents expressed a similarly favourable attitude towards PD. One of the reasons for this was a perception that PD did not involve any worthwhile activity, that it merely involved "sitting around" unlike CSOs where some form of constructive work is required. Another source of dissatisfaction was a supposed lack of proper supervision of periodic detainees.

A substantial majority of sentencers were satisfied with the pre-sentence reports prepared by the Probation and Parole Service for the assessment of suitability for both CSOs (78% satisfied) and PD (83%). Relatively few judicial officers encountered problems with the availability of work for CSO recipients. The problem of availability was more noticeable with PD, but not to such an extent as would account for the relatively infrequent use of that option.

8.1.3 Improvements

A number of suggestions were made as to how CSOs and PD might be improved so that they could be used more effectively by sentencers. Sentencers seemed most concerned with a lack of uniformity in the availability of the options. This was especially pronounced with respect to PD; a number of respondents wanted this option to be made available in rural areas and some suggested that it be made available during the week to accommodate those who did not have Monday to Friday employment. The lack of availability of both CSOs and PD for Commonwealth and interstate offenders was pointed out by some sentencers as a further example of non-uniformity in the availability of these options.

On a more technical level, other suggestions included an increase in the maximum permissible quantum of CSOs and PD (a reform which has since been instituted), the ability to impose cumulative CSOs or PD, the power to impose a CSO and a bond for the same offence and the severing of the link between CSOs/PD and imprisonment.

Although the study did not directly address the issue of attendance centre orders,[48] it is interesting to note that only one judge mentioned this option. While it must be conceded that these orders are not readily available in NSW, due to a scarcity of centres, the lack of comment suggests that perhaps more emphasis could be placed on this aspect of CSOs through additional information being provided for sentencers.

8.1.4 Locality, experience, jurisdictional differences

The interviews revealed very few significant differences according to the locality, experience and jurisdiction of the sentencer. While judges and magistrates tended to differ in their choice of particular offences as suitable/unsuitable for CSOs or PD, these differences probably resulted from the different levels of severity of matters heard in the District versus Local Courts. The numerical differences between judges and magistrates with regard to the objectives of CSOs and PD and the suitability of offenders were not statistically significant.

In terms of years of experience on the bench, no statistically significant differences were found for any of the items analysed in the survey. However, it cannot be concluded from this that no differences exist in the population of sentencers; it may be a case of the sample size being too small to detect real differences.

Significant differences were found between the level of knowledge about the work carried out by CSO clients and breach rates according to whether magistrates are based in the country or the city. As a number of the verbal extracts indicate, country magistrates tend to have a closer working relationship with the local Probation and Parole staff, so the results found here are not surprising.

8.2 Discussion of selected issues

8.2.1 Sentencers' perceptions of PD

In section 6.2 it was noted that a number of interviewees were dissatisfied with PD because they believed detainees did nothing whilst detained, that it was treated as "a bit of a joke" and wasn't sufficiently rehabilitative when compared to CSOs which demanded some sort of effort to be expended by the offender. However, if these perceptions are true, they would fly in the face of what the Department of Corrective Services would have the public believe. Section 10(1) of the *Periodic Detention of Prisoners Act* 1981 allows for periodic detainees to participate in activities, attend classes or groups for instruction or perform work either inside or outside the prison. The type of work which may be allocated is outlined in s.10(2). Furthermore, s.11 provides that a periodic detainee who is allocated outside work may be exempted from serving the remainder of the term in prison.

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48. The option of handing down a CSO to be served by way of attendance at an attendance centre was instituted by the *Community Service Orders (Amendment) Act* 1986.

These provisions clearly indicate that there is a mechanism available whereby offenders on PD can participate in CSO type activities. The Department of Corrective Services has provided the following account of work undertaken by periodic detainees:

> As part of a sentence of Periodic Detention there is the requirement that a detainee must work eight hours at specific locations on both Saturdays and Sundays. Detainees carry out work at charitable institutions, schools, churches government institutions, and for the elderly and disadvantaged in the community... During the past year the volume of community work has risen. In addition to this detainees have been involved in the maintenance and building programs at several gaols.[49]

This description certainly paints a picture of periodic detainees which is quite different from the perceptions of the sentencers quoted in this survey. Of course, the existence of a requirement to carry out work when assigned and the actual assignment of work are two different things; there may often be times when no work is available. Unfortunately, the report gives no details about how many detainees are actually given work to do or how much work is actually done, although the above quote suggests that the number is probably not insignificant.

As has been demonstrated in the survey, judicial officers readily admit that they have little knowledge about what offenders do or what happens to them after sentencing. Thus, it would not be surprising if the perception of PD as involving no worthwhile activity was to some extent an incorrect one, as the Department's report suggests. Although this would meet the objections noted earlier, it also tends to blur the distinction between CSOs and PD. If detainees are required to do work in the community from the commencement of their sentence, the "deprivation of liberty" and "clang of the prison gate" aspects of the sanction, which appear to impress a number of sentencers, would be nullified; there would be no real difference between CSO and PD.

Another source of dissatisfaction with PD was a perceived lack of proper supervision of the sanction. These concerns were vindicated in 1990 when figures released/leaked from the Department of Corrective Services indicated that at least 200 people sentenced to PD had not attended as required and had not been prosecuted for breach.[50] This led to media comments that PD was "in effect, optional" and of a need "to restore faith in the system".[51] Given the prominence which judicial officers attach to "community attitudes" in sentencing, figures such as these and the subsequent adverse comments could only serve to decrease the attractiveness of PD as an option.

8.2.2 Sentencers' lack of knowledge of matters post sentence

One of the consistent findings of the interviews was just how little knowledge sentencers seem to possess of what happens to offenders after sentencing, rurally based magistrates excepted. For example, almost half of the judicial officers surveyed could not comment on whether the CSO programme had fulfilled its aims, whatever those aims were thought to be. Also, if the rural magistrates are excluded from the analysis, 38% of the remainder had no idea of what type of work was performed by CSO clients and a further 52% had only a vague idea, while 43% of the remainder don't know about breach rates for CSO. Similarly, approximately half of the judges and city magistrates could not estimate the breach rate for PD.

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49. New South Wales Department of Corrective Services *Annual Report 1988-89*, p. 30.

50. "Weekend jail shirkers to face court", *Sydney Morning Herald*, 14/8/90, p. 6.

51. "Weekend jail if you like", *Sydney Morning Herald*, 14/8/90, p. 10.

These findings could be regarded as a cause for concern, depending on what view is taken of sentencing policy. On one view, the "effectiveness" of a sanction, in terms of reducing recidivism or having a high completion rate for example, is the prime indicator of its efficacy and, therefore, should be a crucial factor in the sentencing decision. Accordingly, the notion that judicial officers could sentence "in a vacuum" with no knowledge of the effectiveness of their decisions would be anathema to this philosophy.

Nevertheless, it is clear that this lack of knowledge is not of great importance to many sentencers. For example, when asked whether knowledge of breach rates would affect their sentencing practice, over half (53% for CSO and 68% for PD) of the respondents said it would not, while less than a third said it would have some effect (32% for CSO and 18% for PD).

Clearly there exists a contrast between two schools of thought on sentencing policy. On the one hand, there is the utilitarian type policy which demands an empirical evaluation of the "effectiveness" of different sanctions. It is this type of thinking which underlies the question commonly asked of a particular sanction: "Does it work?". On the other hand, there is the more legalistic policy which involves the assumption of a legally "correct" sentence for each case and, given that assumption, there exists no need to make an enquiry into the "effectiveness" of the sanction. What the survey data suggest is that most judicial officers adopt the latter view of sentencing, that their interest in the criminal justice system *qua* sentencer ends once the case at hand has been dealt with according to established legal principles.

Having said that, it should be stressed that this was not the view of *all* sentencers. What exists, therefore, is an inconsistency in the approach adopted by different judicial officers. Whether this should be seen as a cause for concern and a matter for debate is an issue which is beyond the scope of the present study.

8.3 Policy Questions

The survey has drawn attention to a number of policy issues which may be conducive to discussion:

- *Whether periodic detention should be available in more regions in New South Wales.* A number of judicial officers clearly thought so, and some saw this as a major flaw of the PD system. However, the survey also shows that very little is known about the effectiveness of PD and the administration of the sanction. This would imply that a systematic evaluation of PD should be carried out and sentencers should be informed of the results.

- *Whether CSOs are being used as intended by the legislature as alternatives to imprisonment.* Sentencers sometimes considered CSOs as a suitable alternative to a bond or a fine. One way of resolving this problem may be the establishment of a new option (e.g. "community restitution") not linked to imprisonment, to be used for fine default, as an alternative to a fine (where the offender cannot pay), an alternative to a bond (where it is felt that a bond is not sufficiently punitive). This new option would have a much lower maximum number of hours available, fifty hours for example. Since the community restitution sentence would not be handed down as an alternative to imprisonment, the punishment for breach would be limited to a sentence less than imprisonment or some nominal term of imprisonment similar to the terms presently served for fine default. For this new option to work, it would need to be run by a properly staffed and funded separate division of the Probation and Parole Service which would assign public work jobs to offenders and ensure compliance with the order. There would be no need for pre-sentence assessment. The advantage of such an option is that it becomes possible to preserve the present CSO option as a true alternative to imprisonment.

* *Whether CSOs (and PD in so far as it is available in other jurisdictions) should be made available to interstate offenders convicted in NSW.* It appears from our survey that the present arrangement for interstate offenders is unsatisfactory from a sentencer's point of view. Arrangements should be made with other states and territories enabling the enforcement of NSW CSOs and PD by the authorities in the offender's home state.

* *Whether judicial officers should be given further guidance in relation to the use of CSOs and PD.* Results of the survey show that there were a wide range of opinions amongst judicial officers regarding the principles and criteria to be used for assessing the suitability of CSOs and PD. There were also a variety of approaches taken to determine the quantum of a CSO or PD for a particular case. Apart from legislative and Court of Criminal Appeal direction, it may be that sentencing seminars on the use of imprisonment and alternatives should be conducted regularly.

APPENDIX A

TableA1
Offences suitable for CSOs

	Judges	Magistrates	Total
Culpabledriving/other serious driving offences	9 (50%)	7 (32%)	16 (40%)
Any offence	1 (6%)	10 (45%)	11 (28%)
Minor drug supply	4 (22%)	1 (5%)	5 (13%)
Break, enter and steal	3 (17%)	2 (9%)	5 (13%)
Theft or fraud	2 (11%)	2 (9%)	4 (10%)
Damage property	0 (0%)	3 (14%)	3 (8%)
Assault	2 (11%)	0 (0%)	2 (5%)
Minor car theft	1 (6%)	0 (0%)	1 (3%)
Sexual offences	1 (6%)	0 (0%)	1 (3%)
Offensive behaviour	0 (0%)	1 (5%)	1 (3%)
Breach bond	0 (0%)	1 (5%)	1 (3%)

Note: percentages do not add up to 100% because multiple responses are coded.

Table A2
Offences not suitable for CSOs

	Judges	Magistrates	Total
Serious drug offences/selling drugs	10 (56%)	5 (23%)	1 (38%)
Armed robbery/robbery	13 (72%)	0 (0%)	13 (33%)
Rape/sexual assualt of children	9 (50%)	0 (0%)	9 (23%)
Offence irrelevant	0 (0%)	10 (45%)	9 (23%)
Break, enter and steal/theft	4 (22%)	3 (14%)	7 (18%)
Violent offences	3 (17%)	1 (5%)	4 (10%)
Serious fraud	3 (17%)	0 (0%)	3 (8%)
Very serious assault	2 (11%)	0 (0%)	2 (5%)
Sex offences	0 (0%)	1 (5%)	1 (3%)

Note: percentages do not add up to 100% because multiple responses are coded.

Table A3
Offenders suitable for CSOs

	Judges	Magistrates	Total
Prior record	12 (67%)	8 (36%)	20 (50%)
Age	9 (50%)	5 (23%)	14 (35%)
Unemployed	4 (22%)	4 (18%)	8 (20%)
Employed/withfamily responsibilities	4 (22%)	2 (9%)	6 (15%)
Shows potential for rehabilitation	4 (22%)	0 (0%)	4 (10%)
Borderline of going to gaol	0 (0%)	4 (18%)	4 (10%)
Can't cope with prison	1 (6%)	1 (5%)	2 (5%)
Any type of offender	0 (0%)	1 (5%)	1 (3%)

Note: percentages do not add up to 100% because multiple responses are coded.

Table A4
Offenders unsuitable for CSOs

	Judges	Magistrates	Total
Drug addict/alcoholic	5 (28%)	10 (46%)	15 (38%)
Prior record	7 (39%)	6 (27%)	13 (33%)
Unreliable offenders	3 (17%)	7 (32%)	10 (25%)
Violent person	3 (17%)	2 (9%)	5 (13%)
Mentally/physically disabled	0 (0%)	3 (14%)	3 (8%)
Female offenders	1 (6%)	0 (0%)	1 (3%)
Has personality problems	1 (6%)	0 (0%)	1 (3%)
No particular type	0 (0%)	1 (5%)	1 (3%)

Note: percentages do not add up to 100% because multiple responses are coded.

Table A5
Method of determining length of CSOs

	Judges	Magistrates	Total
Depends on seriousness	7 (39%)	7 (32%)	14 (35%)
Use penalties set down in regulations	1 (6%)	11 (50%)	12 (30%)
Use 300 hours most of the time	9 (50%)	1 (5%)	10 (25%)
Pluck figure out of the air	0 (0%)	2 (9%)	2 (5%)
Other	1 (6%)	1 (5%)	2 (5%)
TOTAL	18	22	40

Table A6
CSOs achieved its objectives?

	Judges	Magistrates	Total
No	1 (6%)	1 (5%)	2 (5%)
Yes	8 (44%)	11 (50%)	19 (48%)
Don't know	9 (50%)	10 (45%)	19 (48%)
TOTAL	18	22	40

Table A7
Satisfaction with CSOs assessment procedure

	Judges	Magistrates	Total
Satisfied	13 (72%)	18 (86%)	31 (79%)
Not satisfied	5 (28%)	1 (5%)	6 (15%)
Depends/ambivalent	0 (0%)	2 (10%)	2 (5%)
Missing	0	1	1
TOTAL	18	22	40

Table A8
Knowledge of Type of Work Done

	Judges	Magistrates	Total
Don't know	4 (24%)	8 (36%)	12 (31%)
Have some vague idea	10 (59%)	7 (32%)	17 (44%)
Have good knowledge	3 (18%)	7 (32%)	10 (26%)
Missing	1	0	1
Total	18	22	40

Table A9
Type of work preferred

	Judges	Magistrates	Total
Work which benefits the community	5 (28%)	9 (41%)	14 (35%)
Physical work	4 (22%)	7 (32%)	11 (28%)
Work for non-profit organisations	3 (17%)	5 (23%)	8 (20%)
Constructive work/Meaningful work	4 (22%)	3 (14%)	7 (18%)
Work helping the disadvantaged	4 (22%)	3 (14%)	7 (18%)
Work suited to personal skills	3 (11%)	4 (18%)	7 (18%)
Work which bears relationship to offence	1 (6%)	2 (9%)	3 (8%)
Work carried out in public	1 (6%)	1 (5%)	2 (5%)
A wider range of work	2 (11%)	0 (0%)	2 (5%)

Note: percentages do not add up to 100% because multiple responses are coded.

Table A10
CSO success rate

	Judges	Magistrates	Total
Don't Know	6 (33%)	7 (32%)	13 (33%)
Estimate low	0 (0%)	2 (9%)	2 (5%)
Estimate quite high or very high	12 (67%)	13 (59%)	25 (63%)
TOTAL	18	22	40

Table A11
Would knowledge of CSOs breach rate change sentencing?

	Judges	Magistrates	Total
No effect	8 (44%)	10 (63%)	18 (53%)
Depends	1 (6%)	4 (25%)	5 (15%)
Some effect	9 (50%)	2 (13%)	11 (32%)
Missing	0	6	6
TOTAL	18	22	40

Table A12
Suggested legislative and administrative changes for CSOs

	Judges	Magistrates	Total
CSO and bond for the same offence	9 (50%)	1 (5%)	10 (25%)
Increase maximum hours	4 (22%)	4 (18%)	8 (20%)
Problem with Cth offenders	3 (17%)	2 (9%)	5 (1%)
Sentencer to decide on suitability	3 (17%)	0 (0%)	3 (8%)
CSOs not to be tied to imprisonment	0 (0%)	2 (9%)	2 (5%)
Problem with interstate offenders	0 (0%)	2 (9%)	2 (5%)

Note: percentages do not add up to 100% because multiple responses are coded.

Table A13
CSOs for fine defaulters

(i) Perceived effect on administration of CSOs
(magistrates only)

Don't know	7 (32%)
No effect	4 (18%)
Moderate effect	7 (32%)
Substantial effect	4 (18%)
Total	22

(ii) Effect on interviewee's sentencing
(magistrates only)

No effect	18 (82%)
Some effect	4 (18%)
Total	22

APPENDIX B

Table B1
Offences suitable for PD

Offences mentioned	Judges	Magistrates	Total
Driving offences	10 (56%)	9 (41%)	19 (48%)
Same as CSO	6 (33%)	9 (41%)	15 (38%)
Property/fraud offences	3 (17%)	4 (18%)	7 (18%)
Minor assaults	4 (22%)	2 (9%)	6 (15%)
Minor sex offences	4 (22%)	0 (0%)	4 (10%)
Drug offences	1 (6%)	0 (0%)	1 (3%)
Any offence/offence irrelevant	0 (0%)	6 (27%)	6 (15%)

Note: percentages do not add up to 100% because multiple responses are coded.

Table B2
Offences not suitable for PD

Offences mentioned	Judges	Magistrates	Total
Violent offences	12 (67%)	1 (5%)	13 (33%)
Drug offences	8 (44%)	2 (9%)	10 (25%)
Same as CSO	4 (22%)	6 (27%)	10 (25%)
Sexual assault	8 (44%)	0 (0%)	8 (20%)
Property offences	5 (28%)	1 (5%)	6 (15%)
Any offence/offence irrelevant	0 (0%)	5 (23%)	5 (13%)

Note: percentages do not add up to 100% because multiple responses are coded.

Table B3
Offenders suitable for PD

Characteristic	Judges	Magistrates	Total
Offenders with family and/or job	10 (56%)	11 (50%)	21 (53%)
Prior record	10 (56%)	7 (32%)	17 (43%)
Young offenders	4 (22%)	7 (32%)	11 (28%)
Same as CSO	3 (17%)	4 (18%)	7 (18%)
Drug offenders in lieu of CSO	0 (0%)	1 (5%)	1 (3%)
Offenders who need a short, sharp shock	0 (0%)	1 (5%)	1 (3%)
Offenders who need stricter supervision than CSO	0 (0%)	1 (5%)	1 (3%)
Older offenders	1 (6%)	0 (0%)	1 (3%)
Any offender	0 (0%)	2 (9%)	2 (5%)

Note: percentages do not add up to 100% because multiple responses are coded.

Table B4
Offenders not suitable for PD

Characteristic	Judges	Magistrates	Total
Prior Record	4 (22%)	6 (27%)	10 (25%)
Drug addict	3 (8%)	5 (23%)	8 (20%)
Same as CSO	3 (17%)	4 (18%)	7 (18%)
People without jobs or responsibilities/lazy layabouts	2 (11%)	4 (18%)	6 (15%)
Shift workers	0 (0%)	4 (18%)	4 (10%)
People with travel problems	0 (0%)	2 (9%)	2 (5%)
White collar offenders	1 (6%)	0 (0%)	1 (3%)
Violent offenders	1 (6%)	0 (0%)	1 (3%)
Invalids/Mentally Disabled	0 (0%)	1 (5%)	1 (3%)
Any offender	0 (0%)	2 (9%)	2 (5%)

Note: percentages do not add up to 100% because multiple responses are coded.

Table B5
Method of determining length of PD

	Judges	Magistrates	Total
Depends on seriousness	13 (72%)	13 (100%)	26 (84%)
Almost always use maximum	5 (28%)	0 (0%)	5 (16%)
Missing	0	9	9
TOTAL	18	22	40

Table B6
General attitude towards PD

	Judges	Magistrates	Total
Not favourable	3 (18%)	2 (17%)	5 (17%)
Ambivalent	4 (23%)	7 (58%)	11 (38%)
Favourable	10 (59%)	3 (25%)	13 (45%)
Missing	1	10	11
TOTAL	18	22	40

Table B7
Why PD is not used as much as CSOs

	Judges	Magistrates	Total
CSO seen as more positive/ more constructive	5 (28%)	10 (45%)	15 (38%)
PD not available in many areas	6 (33%)	5 (23%)	11 (28%)
Offences too serious in higher courts	9 (50%)	0 (0%)	9 (23%)
CSO used as alternative to bonds	2 (11%)	1 (5%)	3 (8%)
CSO usual alternative to prison	0 (0%)	2 (9%)	2 (5%)
PD run by prison officers	2 (11%)	0 (0%)	2 (5%)
CSO allows more flexible arrangements	0 (0%)	1 (5%)	1 (3%)
There are less offenders suitable for PD than CSO	0 (0%)	1 (5%)	1 (3%)
PD only appropriate for short sentences	0 (0%)	1 (5%)	1 (3%)
Appropriate offenders more unreliable	0 (0%)	1 (5%)	1 (3%)

Note: percentages do not add up to 100% because multiple responses are coded.

Table B8
Satisfied with pre-sentence reports

	Judges	Magistrates	Total
Generally satisfied	8 (67%)	11 (100%)	19 (83%)
Can't generalise	3 (25%)	0 (0%)	3 (13%)
Not satisfied	1 (8%)	0 (0%)	1 (4%)
Missing	6	11	17
TOTAL	18	22	40

Table B9
Availability of PD

	Judges	Magistrates	Total
No problem	15 (88%)	11 (65%)	26 (76%)
Some problem in Sydney	2 (12%)	6 (35%)	8 (24%)
Missing	1	5	6
TOTAL	18	22	40

Table B10
PD completion rate

	Judges	Magistrates	Total
Estimate low	0 (0%)	1 (8%)	1 (3%)
Estimate quite high	4 (22%)	2 (17%)	6 (20%)
Estimate very high	5 (28%)	2 (17%)	7 (23%)
Don't know	9 (50%)	7 (59%)	16 (53%)
Missing	0	10	10
TOTAL	18	22	40

Table B11
Would knowledge of breach rate change sentencing?

	Judges	Magistrates	Total
No effect	10 (63%)	9 (75%)	19 (68%)
Depends/maybe	1 (6%)	3 (25%)	4 (14%)
Yes, some effect	5 (31%)	0 (0%)	5 (18%)
Missing	2	10	12
TOTAL	18	22	40

Table B12
Suggested changes for PD

	Judges	Magistrates	Total
Make PD available in rural areas	6 (33%)	6 (27%)	12 (30%)
Make PD available on weekdays	6 (33%)	3 (14%)	9 (23%)
Increase maximum	3 (17%)	0 (0%)	3 (8%)
Make PD more available to female offenders	2 (11%)	0 (0%)	2 (9%)
Allow cumulative PDs	1 (6%)	0 (0%)	1 (3%)
Remove PD link with imprisonment	0 (0%)	1 (5%)	1 (3%)
Make PD available to Commonwealth offenders	1 (6%)	0 (0%)	1 (3%)

Note: percentages do not add up to 100% because multiple responses are coded.

APPENDIX C

Questions for Judges and Magistrates

Community Service Orders

1. What type of offender do you consider is really suitable for CSOs?
2. What type of offender do you consider is really unsuitable for CSOs?
3. Are you satisfied with pre-sentence reports when it comes to assessing suitability for CSOs? If dissatisfied, for what reasons?
4. What do you consider to be the objectives of CSOs as a sentencing option?
5. Do you think the CSO programme on the whole meets these objectives? If not, in what ways is it failing to do so?
6. (Magistrates only) In what ways, if any, do you think the introduction of CSOs for fine default may affect the administration of the CSO programme as a whole? Would this affect your use of CSOs as a sentencing option?
7. What type of work would you like to see performed by people on CSOs? Do you know if this is the type of work that is actually given to people?
8. Once you have determined that an offender should be given CSO, how do you determine the number of hours that should be served?
9. Can you estimate the percentage of offenders on CSO who successfully complete the order without either breaching the order or re-offending whilst on the order? Do you think that knowledge of breach rates and re-offending rates would have an effect on your use of CSOs as a sentencing option?
10. Has there been any occasion recently when you would have been inclined to give a CSO but could not do so because there was no place available?
11. Apart from those things you've already pointed out, can you think of other ways in which the CSO programme could be improved?

Periodic Detention

12. What type of offender do you consider is really suitable for PD?
13. What type of offender do you consider is really unsuitable for PD?
14. Are you satisfied with pre-sentence reports when it comes to assessing suitability for PD? If dissatisfied, for what reasons?
15. Are there any differences in the objectives of PD as opposed to CSO? If yes, what are those differences?
16. Once you have determined that an offender should be given PD, how do you determine the number of hours that should be served?
17. Can you estimate the percentage of offenders on PD who successfully complete the order without either breaching the order or re-offending whilst on the order? Do you think that knowledge of breach rates and re-offending rates would have an effect on your use of PD as a sentencing option?
18. Has there been any occasion recently when you would have been inclined to give a PD but could not do so because there was no place available?
19. Sentencing statistics indicate that PD is used very rarely in NSW (viz. in less than 1% of Local Court cases). CSOs are used in about three times as many cases. Can you tell me why you think CSOs are used more often?

20. Apart from those things you've already pointed out, can you think of other ways in which the PD programme could be improved?

Prison as a Last Resort

21. What do you think are the most important factors to consider in arriving at the decision that the "last resort" stage has been reached?

22. What are your personal views on legislation such as s. 80AB of the *Justices Act*? Do you think that such legislation would make a difference to sentencing practices?