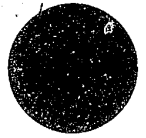


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**A Critical Review
of Periodic Detention
in New South Wales**

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**A CRITICAL REVIEW OF PERIODIC
DETENTION
IN NEW SOUTH WALES**

by

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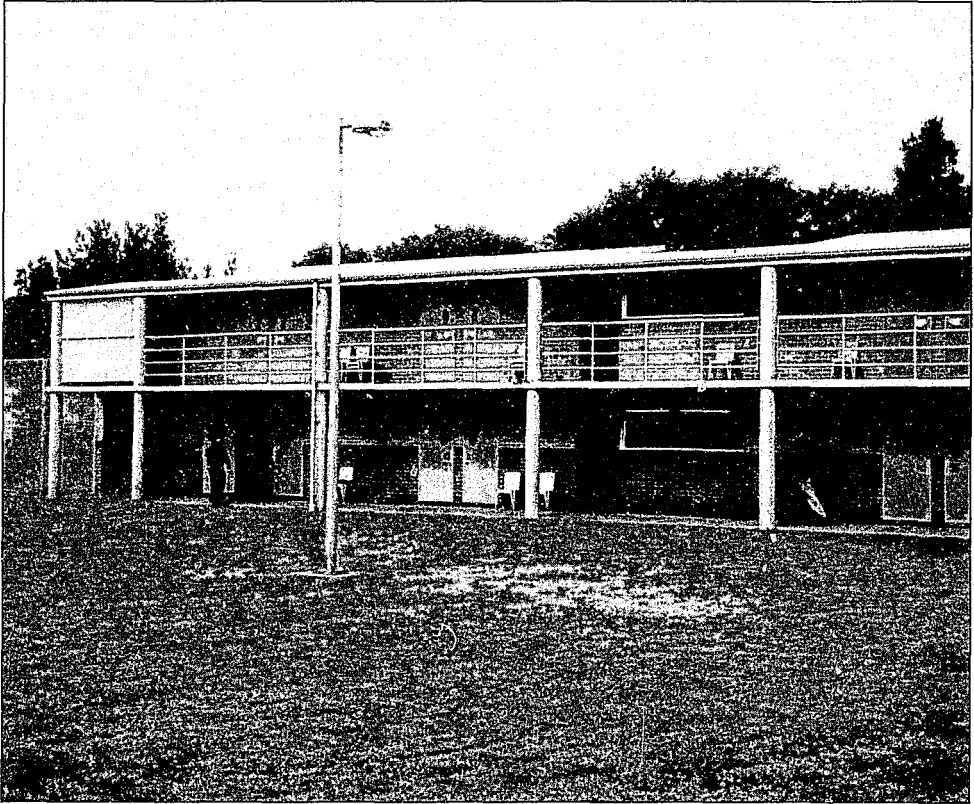
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The views expressed in this paper are purely the views of the authors. Similarly, the Executive Summary represents the views of the Research Director. They do not necessarily represent any official views of the Judicial Commission of New South Wales,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



A view of the Malabar PDC at Long Bay. It has a maximum sleeping capacity of 164 inmates and commenced operations in June 1992.

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EXECUTIVE SUMMARY

This review examines the development and growth of periodic detention as a sentencing option in New South Wales. Periodic detention was introduced by Act of Parliament in 1970 as an alternative to full-time imprisonment in a far more restricted form than presently obtains. Originally it was available only to non-recidivist adult male offenders and the maximum term that could be imposed was 12 months. It was later extended to apply to women. In 1982 the maximum term of periodic detention was increased to 18 months, and in 1990 it was extended again to three years. The sanction involves detaining offenders in custody for two consecutive days of the week, usually the weekend, and permits them to spend the rest of the week at liberty in the community.

In Australia the sanction exists only in New South Wales, other States deciding either to abandon periodic detention, as in Queensland, or not introduce it at all on grounds that it is expensive, difficult to administer, and the fear that it would lead to net-widening.

New Zealand introduced periodic detention in the early 1960s. Designed for young offenders, it was originally a residential programme but was later changed to a non-residential one because of the high costs involved in maintaining the facilities. In New Zealand the maximum term of periodic detention is twelve months. It has been available for adults since 1967, and today there are many more offenders serving periodic detention in that country than there are offenders in prison.

Net-Widening

One of the main concerns of periodic detention is the problem of "net-widening" — that is, the sanction is used in cases where periodic detention is imposed as an alternative to a less severe sanction, such as a community service order or a recognizance with supervision. While the extent of net-widening is difficult to measure and there is some evidence of its continued existence, recent data suggest that in the main, periodic detention is being used as an alternative to imprisonment. An analysis of the proportionate use of various dispositions in the higher and Local courts before and after the introduction of the *Sentencing Act 1989* (25th September, 1989) shows that both periodic detention and community service orders have increased, while imprisonment has decreased.

The Purpose of Periodic Detention

The purpose of periodic detention is not delineated in the legislation, and it has been left to the courts to decide when it is appropriate to impose the sanction. It has only been of recent (1990) date that the Department of Corrective Services has published a statement setting out what it sees as the philosophy and purpose of periodic detention. The central statement asserts that periodic detention is intended—

“To provide a viable and economic alternative to full-time imprisonment, a corrective influence on the offender, with minimal disruption to family and community life.”

The Cost of Periodic Detention

Without including the value of community work performed by periodic detainees and the saving to the community in social welfare benefits paid to the offenders' dependants, periodic detention costs about one-third of that of full-time imprisonment.

Any saving, however, is contingent upon the absence of net-widening, i.e. a term of periodic detention is imposed instead of an equivalent term of full-time imprisonment. Where net-widening occurs periodic detention contributes to, rather than diminishes, the overall cost of corrections.

The cost of corrections could be further reduced by expanding the use of periodic detention to a post-imprisonment or half-way-out option (periodic detention as a re-establishment programme). It is suggested that this could be offered to offenders who: have served at least one half their full-time sentences, have demonstrated acceptable behaviour in gaol, and are considered to be of minimal risk to the community. The problem with such a reform is that it offends the principle of “truth in sentencing” and may therefore not be politically acceptable at this time.

Expansion of Periodic Detention

The growth of periodic detention is traced from its inception in 1971. Periodic detention at its inception was available for adult males only, and since 1978 has also been available for adult females. During the mid 1980s there was a slump in the use of periodic detention which may be attributed to a number of factors including mismanagement, over-crowding, staffing problems and a crisis of confidence in periodic detention on the part of judicial officers. In the late 1980s and early 1990s, the Government invested additional resources into periodic detention in a renewed effort to encourage its use and hold back the rising tide of full-time imprisonment.

A comparison in the use of periodic detention before and after the introduction of the *Sentencing Act* 1989, revealed that there were substantial increases in the proportion of offenders receiving periodic detention. A 64.4% increase was found for offenders sentenced in the Local Courts (measured over two 15 month periods) and a 26.8% increase was found for offenders sentenced in the higher courts (measured over two 21 month periods). An analysis of the length of terms of periodic detention imposed in the higher courts since February 1990 revealed that one in three offenders received sentences greater than 18 months in length.

Characteristics of Detainees

Most periodic detainees were 30 years of age or older, married (either *de jure* or *de facto*), and about half of them lacked formal school qualifications. About one-third had a record of prior imprisonment or served time in a juvenile institution. Only 56% of periodic detainees were in paid employment — a surprising statistic given that one of the rationales of periodic detention is that it enables the employed to stay in employment. Whereas male detainees were sentenced principally for driving offences,

followed by property offences, property offences ranked highest for females followed by drug offences.

Females

There is only one periodic detention centre for females (Merinda Periodic Detention Centre). As a result many women must travel substantial distances to and from the centre. Most females were in the 25-29 years age group, and had primary caregiving responsibilities for children. Only a minority, 24%, were in paid employment and only 12% had progressed beyond School Certificate level with their education.

At Merinda, women's work options were found to be limited, being confined predominantly to stereotypical domestic and caregiving roles. These options need to be broadened if the full potential of periodic detention is to be realised.

The Media

Periodic Detention's image, as projected by the media, suggests that it is poorly administered, that it is a "let-off", that detainees "sit around" doing nothing, that they attend picnics, take employment away from needy members of the community, or simply fail to attend as required and in such circumstances little action, if any, is taken against them. While from time to time such criticisms may be justified, it is important that single instances of abuse should not be taken as representative of the system as a whole.

It is to be acknowledged that the media, in their watch-dog role, serve the purpose of identifying abuses, and bring them to the attention of the public. Where genuine criticisms are identified, the authorities should be prepared to take the appropriate action to overcome the underlying problems. Where however the criticism is unfair or misleading, the Department should be prepared to defend itself and the programme against unjustified criticism. The best protection against adverse publicity is to identify where the system may be failing and take measures to prevent problems before they arise. The appointment of a public relations officer to promote the positive aspects of periodic detention would help provide a more favourable image for periodic detention.

Views of Judicial Officers

A recent survey by the Commission showed that while the majority of judicial officers interviewed by the Commission were favourably disposed to community service orders (73%), only 45% felt similarly about periodic detention. Criticisms included the belief that periodic detainees lacked supervision and meaningful work, and that there were insufficient centres (or places) available for detainees. Since 1990, the Government has sought to redress these problems and several new centres have been opened.

In a number of sentencing decisions of the Court of Criminal Appeal, the view has been expressed that periodic detention involves an act of leniency on the part of the sentencing judge. It has been held that the sanction is not usually suitable for many sex offenders because it does not sufficiently protect the community against the

offender for the duration of the sentence. Further, it has been held the sanction should not be imposed merely because the prisoner may face difficulties in prison (e.g. need to be placed on protection, or requires medical treatment). In some cases the seriousness of the objective circumstances of the offence may render periodic detention inappropriate.

Problems of Measurement

There are difficulties in evaluating the effectiveness of a sanction in terms of recidivism. The term "recidivism" itself is ambiguous (e.g. does it include committing an undetected crime, being caught but not convicted or being re-convicted of another offence, or only of another offence of the same kind). Statistical comparisons of "success" rates for different sentencing options are not helpful because they inevitably involve a bias in the way in which sentencing options are selected and make comparisons of like case impracticable, if not impossible.

For the purposes of this study one measure of "success" was taken to mean successful completion of the periodic detention sentence within a period which did not exceed twice the term of the original sentence.

A Statistical Analysis

A study was undertaken in order to determine what proportion of offenders successfully complete their term of periodic detention. It involved examining 3,219 receptions into periodic detention for the period 1st January, 1988 to 30th June, 1991. A significant proportion of these cases were excluded from the analysis because they were currently serving their sentences. In the end, two groups, those which had successfully completed their sentences and those which had failed to complete their sentences, were examined. A failure rate of 16.4% was calculated by dividing the number of failures (ie 321) by the sum of the number of failures and successes (ie 1956).

In general for females, those most at risk of failure were aged between 21 and 30 years and had committed good order offences. For males, the highest risk of failure were for those under 21 years of age, who were unattached and had committed property or good order offences. The small number of females over 40 years of age and who committed driving offences had a 100% success rate.

It is suggested that the failure rate for women might be decreased significantly if child care facilities were available.

Further analysis of the successful completion cases was undertaken by comparing male offenders sentenced to periodic detention before and after the commencement of the Sentencing Act. It was found that, in general, for both periods those sentenced to shorter sentences (ie 6 months or less) had lower failure rates.

Despite the apparently higher failure rates for those with longer sentences, the post-Sentencing Act detainees completed their sentences in less time than the pre-Sentencing Act detainees. Overall 85% of detainees completed their sentences within one and a half times the term of their sentences.

Absenteeism and Reform

Absenteeism is a perennial problem and, given the nature of periodic detention, it is unrealistic to expect that it can be eliminated altogether. In order to minimise the problem two strategies are advocated.

The first is to ensure that firm and swift action is taken against those who do not have a legitimate excuse for failing to attend in accordance with the terms of their sentence. In this regard sentencers can play their part by supporting, in a proper case and through their punitive powers, the officers who bring detainees before them in breach proceedings. In most cases failure to report where leave of absence has not been granted should lead to the expectation that the offender will forfeit the privilege of continuing in the programme and will be required to serve the balance of the sentence in full-time custody.

The second strategy is to provide incentives to detainees which will encourage their attendance. At present, where offenders fail to turn up on any particular weekend and have a legitimate excuse (e.g. sickness accompanied by a medical certificate) the period missed is added to the end of the sentence. This invites abuse for non-genuine cases and contributes to the period over which the sentence is to run. What is proposed is that detainees should be granted a week of leave to be counted as part of the sentence after several consecutive weeks of attendance with good behaviour.

If introduced, such a system of reward, which could be achieved by simple amendments to ss 20 and 21 of the *Periodic Detention of Prisoners Act 1981*, should not be excessive as this would unduly dilute both the severity and the credibility of the sentence. Equally any reward should not be too unrealistic or remote as this would fail to operate as a viable incentive for encouraging the full co-operation of the detainee. The suggested formula, a conservative one, is that detainees should be given one week off after 5 consecutive weeks of attendance.

The Reform Potential

Insufficient publicity is given to the educational programmes and community service work undertaken by periodic detainees. There is great benefit to be gained by promoting literacy programmes, and attention is now being placed on Drug and Alcohol Counselling, AIDS Awareness Programmes and courses dealing with domestic violence issues.

The community service work performed by detainees is of considerable benefit to the community and it is also claimed to bring about attitudinal changes in offenders. A description of the work performed at one centre (Silverwater Periodic Detention Centre) reveals just how valuable a resource periodic detention can be when it is properly utilized. Projects undertaken include on-going maintenance, cleaning and clearing – such as site clearing, concreting, fencing, maintaining school grounds, washing police cars, painting, forest maintenance, construction of tan bark pathways to permit public access, reclaiming and beautifying natural resources such as the Darling Mill Creek project at North Parramatta, and so on.

To a significant degree, the success and the benefits of each periodic detention centre depend on the competence, imagination and leadership of the governor who administers it. The authors of this report were generally impressed by the calibre of

the governors, by their apparent belief in the value of the sanction as an alternative to imprisonment, and in their commitment to ensuring the success of the periodic detention programme.

Conclusion

In principle, there is considerable scope for expanding the periodic detention scheme. However any expansion of the system should be commensurate with a reduction in the use of full-time imprisonment. With the potential addition of yet another alternative to imprisonment, "Intensive Community Supervision", it is timely to review the relationship of sanctions to one another. The concept of a "penal ladder", where sentences are ranked in an hierarchical order of severity and where adequate criteria for selecting the competing options are clearly specified in legislation, should now be considered by the legislators. The Victorian *Sentencing Act* 1991 provides a useful model to follow.

In summary, periodic detention is a viable option to full-time imprisonment. While it is recognized that it does involve an exercise of leniency, it is misconceived to regard it as a "soft option". It places considerable demands on offenders to ensure that they meet their obligations under the sentence on a weekly basis, and these obligations may endure for many months or years. It does this without removing the offenders' normal domestic and employment commitments, and the usual responsibilities associated with living in a free society. It is considerably cheaper and more humane than imprisonment. It provides better rehabilitation prospects for offenders and, through community work, provides tangible benefits to society.

Ivan Potas

Research Director

Sydney, August 1991.

1.0 INTRODUCTION

This review examines the development and use of periodic detention in New South Wales. It seeks to describe what it is and what it is intended to achieve. Attitudes of the media and the courts toward periodic detention are considered, as are some of the administrative problems that have beset the programme during its relatively short history as part of the sentencing armoury of the courts of New South Wales. In the latter part of the review is an evaluation of the effectiveness of the sanction as measured by the criterion of successful completion.

1.1 The Legislative Scheme

Periodic detention is a relatively new sentencing option. It was introduced in New South Wales by the *Periodic Detention of Prisoners Act 1970*, which was amended on a number of occasions and later replaced by the *Periodic Detention of Prisoners Act 1981*. The latter Act has also been modified.

The power of a court to impose periodic detention is conferred by section 5(1) of the *Periodic Detention of Prisoners Act 1981* (as amended). It provides as follows:

5 (1) Where a person is convicted of an offence and sentenced upon that conviction to imprisonment for a term of not less than 3 months and not more than 3 years, the court by which the person is sentenced may:

- (a) if it is of the opinion that it is appropriate in the circumstances of the case that the person serve his sentence by way of periodic detention; and
- (b) if it is satisfied that:
 - (i) there is accommodation available at a prison for the person to serve the sentence by way of periodic detention; and
 - (ii) travel by the person to and from that prison, for the purpose of serving the sentence by way of periodic detention, could not reasonably be expected to have the effect of imposing undue inconvenience, strain or hardship on the person,
- (c) if it is satisfied that the convicted person is a suitable person to serve the term of imprisonment by way of periodic detention, after:
 - considering a report about the convicted person from a probation and parole officer employed in the Department of Corrective Services or a person authorised in accordance with the regulations; and
 - hearing (if the court thinks necessary) evidence from a probation and parole officer or a person so authorised,

order that the term of imprisonment to which it has sentenced him be served by way of periodic detention.

Over the two decades of its operation, amendments to the legislation have generally been in one direction — that of expanding the availability of periodic detention. Thus the courts have greater capacity than ever before to order periodic detention: first,

because of the increase in the number and holding capacity of periodic detention centres throughout the State; and secondly, because of the gradual broadening in the category of offenders who have become eligible to receive the sanction.

Initially the legislation provided that only certain proclaimed courts (the Supreme Court and Sydney Quarter Sessions) could make a periodic detention order, and only a limited class of offenders were eligible to serve their sentences of imprisonment on consecutive weekends. "Weekend" was defined as commencing at 7.00 p.m. on Friday and ending at 4.30 p.m. the following Sunday, but did not include the weekends during which Easter Sunday or Christmas Day occurred.¹

One of the changes brought about by the *Periodic Detention of Prisoners Act 1981* was to redefine the time spent in custody as the "detention period" rather than the weekend. Henceforth periodic detention would commence at 7.00 p.m. on a day specified by the court and end at 4.30 p.m. on the second day after the day on which the period commenced.² This change made periodic detention available mid-week and thus enabled it to cater for offenders with special work or family commitments on weekends.

When first introduced, periodic detention was restricted to males aged 18 years or older who had not previously served a continuous term of imprisonment of over one month. In 1977 periodic detention was extended to apply to females.³ The 1981 Act expanded the availability of periodic detention to persons who had not served a term of imprisonment of more than six months in the last seven years.⁴ Even this limitation was removed in 1986,⁵ when it was realised that it was anomalous that a person, by reason of his or her antecedents, should be disentitled to the benefits of periodic detention, but not to other less onerous alternatives to imprisonment such as community service orders.⁶

The 1981 Act increased the maximum term of periodic detention from 12 months to 18 months and retained the minimum term of three months. However, remissions were also made available to periodic detainees so that it was not expected that they would be detained for longer. When in September 1989 the *Sentencing Act* commenced, remissions were abolished with the result that the actual time detainees would serve in custody was increased. A further amendment to the legislation in 1990 extended the availability of periodic detention by increasing the maximum possible term of an order to three years. At the same time courts were empowered to direct that terms of periodic detention be served concurrently or cumulatively.⁷ These and other amendments significantly opened the door to the greater use of periodic detention and, together with the considerable rise in imprisonment rates and concern for prison overcrowding over recent years, help to explain the increasing importance of this sanction.

1 *Periodic Detention of Prisoners Act 1970 (NSW)*, s 2.

2 *Periodic Detention of Prisoners Act 1981 (NSW)*, s 4(1).

3 *Periodic Detention (Amendment) Act 1977*.

4 *Periodic Detention of Prisoners Act 1981*.

5 *Periodic Detention of Prisoners (Amendment) Act 1986*.

6 Eg. see A. Gorta, Chief Research Officer at the Department of Corrective Services, *Periodic Detention in NSW: Trends and Issues 1971-1991*, Research Bulletin No 16, NSW Department of Corrective Services, Sydney, August 1991, at 22.

7 *Periodic Detention of Prisoners (Amendment) Act 1989*.

Thus courts exercising criminal jurisdiction in New South Wales can now sentence persons to periodic detention for terms of not less than three months⁸ and not more than three years, provided always that a sentence of imprisonment may be imposed (and would have been imposed but for the availability of periodic detention) and the court is of the opinion that periodic detention "is appropriate in the circumstances".⁹ The legislation does not attempt to specify which offences or types of offenders are "appropriate" for a sentence of periodic detention but instead places the authority for selecting suitable cases in the hands of the sentencing court.

Under normal circumstances periodic detainees are held for a total of 44.5 hours per week until the term of their sentences have expired. Thus periodic detention is significantly more punitive than the next most severe sentencing option, the community service order. However, under the periodic detention programme there is provision for ameliorating the harshness of the obligation to sleep at the centre by allowing the detainee to progress to what is called Stage II periodic detention. This requires the detainee to report to work from 8.00 a.m. to 4.00 p.m. on the two specified days of the week. Stage II was first introduced as a pilot programme at Malabar Periodic Detention Centre in mid 1978, and was given legislative support under s 11 of the *Periodic Detention of Prisoners Act 1981*. The decision to place an offender on Stage II is an administrative one over which judicial officers have no control.

To be eligible for Stage II a detainee must have completed a significant portion of the sentence (usually a minimum of three months or one-third of the sentence), have a good attendance record with no offences committed during Stage I, have an appropriate attitude with an acceptable work record, and be self-directed (able to work with a low level of supervision). Offenders who do not comply with the terms of Stage II are moved back to Stage I.

The advantages of Stage II are that it provides a much needed incentive (and particularly so since the abolition of remissions and the lengthening of the duration of periodic detention) for detainees to cooperate fully with the authorities, display good behaviour and attend on a regular basis. Further, because it is non-residential, Stage II is cost-effective and frees up precious accommodation resources for new arrivals.

As at July 1992 about 26.2% of detainees subject to periodic detention were on Stage II. It is advised that the breach rate for Stage II detainees is between 1% and 2%.

1.2 An Historical Overview

The concept of periodic detention, whereby offenders would be detained on weekends and perform community service work, was first suggested in a speech to Parliament in 1945 by Mr Darby, who was the Liberal Member for Lane Cove.¹⁰ From then on Mr Darby consistently raised the issue in Parliament until the New

⁸ There is one exception to the three months minimum term. Under s 5A of the *Periodic Detention of Prisoners (Domestic Violence) Amendment Act 1982*, periodic detention may be imposed for a domestic violence offence even if the term of imprisonment is less than three months.

⁹ *Periodic Detention of Prisoners Act 1981*, s 5(1).

¹⁰ Discussed in an unpublished paper by C. Hayward entitled, "A Performance Appraisal of the Periodic Detention Scheme in New South Wales from 1970-1990".

South Wales Government eventually decided to "bite the bullet" by passing legislation on periodic detention in 1970. In the same year Queensland introduced periodic detention under the *Weekend Detention Act 1970*, and in the following year Western Australia considered introducing it, but declined to do so on a number of grounds including concerns about net-widening and the economic viability of maintaining a prison for weekend use only.¹¹ Indeed, Queensland's weekend detention programme soon fell into desuetude when it was found to be too difficult to administer, too expensive to run, and too disruptive on other inmates of the prison.

While the concept of periodic detention may have emanated from New South Wales, the first jurisdiction to introduce it was New Zealand on 28 November 1962. The New Zealand scheme was designed specifically to deal with offenders aged between 15 and 21 years. It was envisaged that the option would save young offenders from having a conviction recorded against them, yet at the same time allow them to repay their debt to the community and, where applicable, also allow them to maintain gainful employment.¹² It was originally a residential programme similar to that currently existing in New South Wales, but was later changed to non-residential because of the high cost of providing facilities.

The New Zealand scheme of periodic detention is a pivotal component of its correctional system, with 44 periodic detention centres (the largest holding 300 offenders) catering for approximately 8,000 detainees. The significance of this sentencing option for New Zealand may be appreciated when it is realised that at any one time there are about 5,000 people in full-time custody, 3,000 fewer than those serving periodic detention.

However, there are some fundamental differences between the New Zealand and New South Wales systems of periodic detention. In New Zealand, periodic detention is non-residential, it can only be imposed for a maximum period of twelve months, and an offender is required to serve only between nine and fifteen hours of periodic detention per week. New Zealand also has a system of community service orders but there are some differences between the two options. For example, periodic detainees generally work in parties of ten and are supervised by a paid employee. On the other hand, those sentenced to community service are sentenced in terms of hours with a maximum of two hundred hours. Community service generally calls for offenders to carry out individualised work and tends to be supervised by volunteer members of the community. Thus like the system in New South Wales, periodic detention is seen to be a significantly more punitive disposition than the community service order.

An officer of the Justice Department of New Zealand advises that the cost of periodic detention is in the order of \$2,500 per detainee, while the cost of full-time incarceration ranges between \$24,000 and \$65,000 per annum. Their research shows that periodic detention has a recidivism rate of about 60%, which is about the same as for other sentencing options.

¹¹ Victoria also had provisions for introducing periodic detention but instead introduced attendance centre orders under section 7 of the *Social Welfare Amendment Act 1975* (Vic); see I. Potas, "Alternatives to Imprisonment", in D. Biles (ed.), *Crime and Justice in Australia*, Australian Institute of Criminology, Canberra, 1977, at 119.

¹² D.T. Jenkins, "Periodic Detention Centres in New Zealand" (1969) 15(3) *Probation* 94, at 94, in A. Gorta, op. cit., at 3.

According to one commentator, overseas experience suggests that periodic detention has been viewed as a more severe option in Britain and Europe than it has in Australia, with sentences normally not exceeding 10 weeks.¹³ The Netherlands, Belgium and Germany all use periodic detention schemes in one form or another, with weekend detention only being available for sentences of two weeks or less in the Netherlands and two months or less in Belgium. The sanction is most often applied for motoring offences. Courts in Germany are empowered to order the detention of offenders aged 14-20 years for up to four weekends.¹⁴ It is also interesting to note that, while periodic detention was first conceived with the young offender in mind and continues to be seen as most applicable to such offenders in the overseas jurisdictions, in New South Wales the option has not been available for juvenile offenders.¹⁵

1.3 Punitiveness and Net-widening

Researchers report that some weekend detention routines have proven far more punitive than either prison or probation.¹⁶ In a United States survey, both corrections staff and inmates at one centre expressed the view that periodic detention had more impact and was overall harsher than full-time imprisonment.¹⁷ This opinion was also espoused in other jurisdictions:

Forfeiture of weekend liberty over a period of many months would, we think, place an unduly heavy strain on the offender, in view of the renewed disruption of his life every Friday evening, and the need to re-adjust at frequent intervals to a prison environment . . .¹⁸

Other criminological investigations convey a different series of concerns regarding the use of periodic detention as a true alternative to full-time incarceration. There is growing research suggesting that periodic detention and other alternatives to imprisonment are having a net-widening effect¹⁹ rather than playing a diversionary role in the criminal justice system. The Policy and Planning Unit of the Victorian Office of Corrections has defined a successful diversionary programme as one which:

¹³ P. Prigrove, "Periodic Detention: A Critical Examination" (1973) 6(3) *ANZJ Crim* 147.

¹⁴ P. Cavadino, "The overseas experience of intermittent custody and temporary restriction of liberty" (1985) in A. Gorta, op. cit.

¹⁵ Note, however, that there is a mechanism under the *Children's Detention Act* to utilize periodic detention as a means for releasing children from full-time detention centres.

¹⁶ J. Sussex, "Weekend Detention: an Alternative Concept", R. Shaw & R. Hutchinson, "Periodic Restriction of Liberty", Papers presented to the 17th Cropwood Round-table Conference, December 1984.

¹⁷ E. May, "Weekend Jail: Doing Time on the Installment Plan" (1978) *Corrections Magazine* 28.

¹⁸ Report of the Advisory Council on the Penal System, *Non-Custodial and Semi-Custodial Penalties*, London, H.M.S.O., in Prigrove, op. cit., at 151.

¹⁹ M. Cain and V. Roby, "The Impact of Truth in Sentencing: Part 1 - The Higher Courts", *Sentencing Trends* No 2, Judicial Commission of New South Wales, March 1992; K. Polk, "Deinstitutionalisation: A Description and Assessment" in I. Poias (ed.), *Sentencing in Australia*, Australian Institute of Criminology, Canberra, 1987; J. Chan & G. Zdenkowski, "Just Alternatives - Part II" (1986) 19 *ANZJ Crim* 131 at 136, where the authors cite numerous overseas studies which have found that community corrections programmes were not associated with reduced rates of imprisonment; see also S. Varne, "Saturday Work: A Real Alternative?" 9 *ANZJ Crim* 95, passim. The methodology of Varne's research, however, has been subjected to some scrutiny: M & K. Rook, "Tasmania's Work Order Scheme: A Reply to Varne", 11 *ANZJ Crim* 81.

- provides the most appropriate, effective, efficient sanctions for the use of the criminal justice system;
- *does not lead to a net increase in resources or the total number of people under supervision in the community and in prison . . .*²⁰

If periodic detention is to be categorised as part of the general trend toward community-based corrections²¹, it must be used in cases where full-time imprisonment would otherwise have been imposed, and not to encompass those offenders who, without the existence of the option, would not have been incarcerated. The New South Wales Women in Prison Task Force extended this notion in its final report (1985) to recommend that the NSW Government develop sentencing options that:

- (i) Do not rely for their ultimate enforcement on the continued existence of the prison;
- (ii) Act to effectively divert offenders from the prison;
- (iii) *Are not based on a similar philosophy as that which directs the use of imprisonment, or be required to satisfy the same confused aims as those required of the prison.*²²

Stanley Cohen has identified these "confused aims" as the dual goals of punishment and rehabilitation. In his view, net-widening has occurred through diversionary programmes precisely because both these goals are pursued, and by "making a system appear less harsh, people are encouraged to use it more often".²³

It is of course not only periodic detention that is susceptible to net-widening, as this problem also applies to other alternatives to imprisonment, such as community service orders. For example, a review of the Victorian Attendance Centre programme over a six-month period concluded that it was not being used as an alternative to prison but as an additional independent sanction.²⁴

²⁰ Victorian Office of Corrections, *Diversion – What Works?* Policy and Planning Unit, January 1991, at 1.

²¹ The notion of "community-based corrections" is problematic: it presupposes the existence of a "community" in which a person will be "corrected". Stanley Cohen has demonstrated how the destructuring ideologies of decarceration, diversion and decentralisation are sustained by the rhetoric of community. Yet it is not clear that community is anything more than a nostalgic ideal. The notion that a person will be "corrected" distorts the nature of the process by assuming that the aim of corrections is more than simply punishing the offender: S. Cohen, *Visions of Social Control*, Polity Press, Cambridge, 1985, at 116-126.

On a different note, the Canadian Sentencing Commission has taken the view that all sanctions involve a loss of liberty, which can be expressed by a continuum which runs from **extreme deprivation** (incarceration) to **minimal coercion** (absolute discharge). Hence, "the traditional reference to non-custodial sanctions does not accurately reflect this concept as it sets up a dichotomy between custody and all other sanctions": The Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach*, Report of the Canadian Sentencing Commission, Canadian Government Publishing Centre, Ottawa, 1987, at 347.

²² New South Wales Women in Prison Task Force, *Report of the New South Wales Task Force on Women in Prison*, New South Wales Government Printer, Sydney, 1985, at 133.

²³ S. Cohen, in: Victorian Office of Corrections, op. cit., at 11.

²⁴ R.G. Fox and D. Chaffinger, "Victorian Attendance Centre Orders: An Alternative to Prison?" (1985) 9 *Crim LJ* 3.

Furthermore, there are signs that periodic detention centres are becoming destined to look more and more like prisons. A new package of regulations under the *Periodic Detention of Prisoners Act* is now being drafted mainly to adopt clauses from Prison Regulations regarding the administration and control of detainees.²⁵ Sections of the *Prisons Act 1952* have already been used to segregate "disruptive" detainees, and movement orders under the Act are now being used to validate and authorize detainee movements once the detention period has commenced. Regular search operations are also being conducted at some centres to target drugs and other "contraband" being brought into the centres.²⁶ In a thesis by Chris Hayward, a former employee of the Department of Corrective Services²⁷, this effect of prison stigma on periodic detention centres has been detailed as follows:

Today quite seasoned, repeat offenders who have previously served prison terms in maximum security institutions are receiving P.D.C. sentences. One P.D.C. reports over 50% of detainees are in this category. Certainly the goal of avoiding prison stigma by segregating P.D.C. from hardened offenders is no longer realised.²⁸

Hayward goes on to cite the Weston Report, completed in 1989, which found that a high proportion of periodic detainees are drug users and that this "created an entirely different environment in periodic detention centres in latter years"²⁹. From these findings, she asserts:

This has directly resulted in greater levels of violence, behavioural problems and trafficking. The effect of a high population on the non-using detainees has been adversely commented on.³⁰

It seems that there is evidence that periodic detention centres are also assuming the structural and architectural traits of orthodox penal institutions not traditionally associated with centres:

'Changes in the type of detainees now eligible for Periodic Detention have created special security problems for the centres' which tend not to be constructed along the traditional prison architecture. Most centres have rooms (not cells), windows (not barred), ordinary doors (not steel) and no extensive brick wall or electronic monitoring devices. As a result of increasing incidences of violence associated with drug dependent detainees, recommendations have been made for each centre to have a secured unit i.e. a traditional barred prison cell in which to hold violent detainees, a perimeter fence as a basic obstacle against escape and the

²⁵ Communications with the Director of the Periodic Detention Programme, Mr Steve D'Silva, 26 May 1992.

²⁶ *ibid.*

²⁷ The purpose of this work was to critically examine the criminal sanction of periodic detention as implemented in New South Wales between 1971 and 1990: C. Hayward, "A Performance Appraisal of the Periodic Detention Scheme in New South Wales from 1970-1990", unpublished paper on file with the Commission.

²⁸ *ibid.* Hayward draws on her own experience and verbal communication for these assertions. She goes on to emphasise that in 1970 the then Minister for Justice Mr Maddison described as "part and parcel of this scheme" the concept that no one serving periodic detention would come into contact with former or current full-time prisoners: Hayward, at n72, 73.

²⁹ Weston Report, cited in: Hayward, *ibid.*

³⁰ Hayward, at 11.

introduction of electronic monitoring devices to assist officers — especially those in remote areas. *The P.D.C. architecture is thus steadily moving closer to the highly institutionalised, stigma-filled design that characterises the traditional prison.*³¹

The problem of filtering out suitable candidates for periodic detention has been addressed by the introduction of pre-sentence reports, discussed at 7.3, and it is hoped that this will continue to ensure that periodic detention is used for those whom it will most benefit.

Where a periodic detention centre is adjacent to a prison (such as at Silverwater and Grafton) and there is movement between institutions, there is additional concern that prohibited items may be smuggled between facilities. In these circumstances there will always be the danger that the corrupting influences of the prison system will tarnish, and at worst undermine, the future prospects of the periodic detention programme. For this reason also, it is vital that periodic detainees and full-time prisoners should not be allowed to mingle.

While some degree of security is necessary, and some association with full-time imprisonment is inevitable, it may be desirable that the periodic detention programme actively develop a distinctive philosophy and corporate image distinguishing it from the prison system proper. It should avoid the negative aspects of imprisonment and resist inheriting the worst features of prison culture. Thus recidivists with a long history of prior imprisonment should not be sentenced to periodic detention if to do so is likely to affect detainees who have good prospects for rehabilitation. Equally, only those officers who believe in the objectives of periodic detention, and who can see tangible benefits in the scheme for both the offender and the community, should be permitted to work at the Centre.

The future use of periodic detention as a true alternative to imprisonment is largely dependent on aspects of internal management style, as well as the way in which the judiciary will utilize options and impose sentences. At a later stage we will examine the way in which judicial officers and the Court of Criminal Appeal view periodic detention. For the present it is useful to consider what periodic detention seeks to achieve.

³¹ Hayward, drawing on the Weston Report, 1989.

2.0 THE PURPOSE OF PERIODIC DETENTION

2.1 Stated Aims and Objectives

The Department of Corrective Services has set out its view of periodic detention in an unpublished mission statement entitled "Periodic Detention Centres: Philosophy and Purpose". The purpose is stated to be as follows:

To provide a viable and economic alternative to full time imprisonment, a corrective influence on the offender, with minimal disruption to family and community life.

Curiously, no express reference is made in the statement to the punitive element of periodic detention. However, the punitive element, particularly the retributive and deterrent aspects³², may be implied from the fact that periodic detention is said to be able to provide a viable alternative to full-time imprisonment as well as a corrective influence on the offender. The deterrence factor is purportedly satisfied by what the American administrators and academics have called the "taste of imprisonment".³³

The philosophies and purposes of periodic detention must be clear before an attempt at evaluation is made. The idea that a person sentenced to periodic detention will be able to maintain her or his community ties is echoed in other jurisdictions. A judge in an overseas jurisdiction summed up both this and the cost-saving rationale of periodic detention:

"The weekend sentence lets the man keep his job and support his family... If I send him to prison, that job is most likely not going to wait for him. In the meantime, the state is paying for him in jail and is supporting his family on welfare."³⁴

In a general sense, the central philosophy seems to be rehabilitation, in that maintenance of employment is the most frequently mentioned objective of periodic detention. This undoubtedly stems from the fact that if offenders are employed, they are less likely to return to crime.³⁵ Yet how does this square with the reality in New South Wales, where almost half of the total number of detainees last year were unemployed? It seems that one of the keys to the success of periodic detention is to ensure that basic goals such as these are met so that maximum benefit is derived from the option.

Certainly from a sentencer's point of view, a minimum requirement for the imposition of an order for periodic detention is that the offence itself be sufficiently serious to

32 Modern theories of justice inevitably link the sentencing process to imprisonment and punishment generally: Canadian Sentencing Commission, *op. cit.*, at 114.

33 The statutes establishing periodic confinement in North Carolina and Arkansas both make reference to this phrase: Parisi, at 392. The reality in New South Wales, however, is somewhat different, with 36% of offenders ordered to serve periodic detention having previously spent time in either a juvenile institution or adult gaol: A. Gorta, *Periodic Detention in NSW: Trends and Issues 1971-1991*, Research Bulletin No 16, Department of Corrective Services, Sydney, August 1991, at 7.

34 May, *op. cit.*, at 29.

35 It has been found that stability of employment is one of the most frequently related variables to recidivism: Pritchard, "Stable Predictors of Recidivism: A Summary", (1979) 17 *Criminology* 15, cited in N. Parisi, "Part-time imprisonment: the legal and practical issues of periodic confinement", (1980) 63(8) *Judicature* 385, at 392.

warrant a custodial sentence. A community service order, for example, would not be sufficiently punitive, even though a community service order would equally satisfy the terms of the mission statement.

In addition to the seriousness of the offence itself, the prisoner's antecedents and character will be important factors in considering the appropriateness of periodic detention. However, although a particular prisoner could benefit by an order for periodic detention, there will be cases where the seriousness of the offence itself, or the perceived risk that the offender may present to the community if released to periodic detention, will render such an order inappropriate.³⁶

2.2 The Comparative Costs of Periodic Detention

The Department lists seven points under the "economic alternative to full time imprisonment" rationale for periodic detention. These are:

- reduces costs to the community through diminishing the offender and her/his family's reliance upon the social welfare purse. Also, reduces the loss of tax revenue by permitting the offender to remain in employment.
- provides greater return for capital expenditure.
- provides a sentencing option that can assist in reducing the overcrowding in full-time prisons.
- employs lower cost staffing options commensurate with security status.
- generates lower administrative costs than other imprisonment options.
- requires lower recurrent expenditure than full-time imprisonment.
- utilizes labour to a greater economic and social advantage than other forms of imprisonment.

There is no question that periodic detention is cheaper than full-time imprisonment. It is cheaper to house, feed and supervise periodic detainees than it is for conventional prisoners and it enables those who have employment to continue earning money and maintain themselves and their dependents. Periodic detention is usually not as taxing on family members as full-time imprisonment, and often means that dependents of detainees are less likely to rely on social welfare handouts. Where constructive community work is undertaken by detainees, the value of that work should also be taken into account and set off against the State's financial contribution to the programme.

When estimating the cost of periodic detention, the most common form of analysis is to compare it with the cost of full-time imprisonment. Table 1, containing data derived from the Department of Corrective Services' Annual Report of 1990-91, reveals the costs, excluding office overheads, of imprisoning a person in 1990-91.

³⁶ See for example *Burchell* (1987) 34 A Crim R 148; King, NSW CCA, 20 August 1991, unreported and *Dodd* NSW CCA, 4 March 1991. These cases are discussed below.

Table 1: Daily and Annual Costs of Imprisonment

Security Classification	per annum (\$)	per day (\$)
Maximum Security	31,422	86.03
Medium Security	23,555	64.49
Minimum Security	18,456	50.53
Periodic Detention	8,222	22.51

In round figures, therefore, periodic detention is between two and four times cheaper than full-time imprisonment. When the other economic advantages of periodic detention are also taken into account (eg. value of community service work performed, retaining offenders in employment, reducing the social welfare burden on dependants), there can be no doubt that periodic detention has the potential of saving valuable tax-payer dollars.

Of course, this saving can occur only where those offenders who would otherwise have been sentenced to full-time imprisonment are given the benefit of periodic detention. Conversely, to the extent that net-widening may be taking place, periodic detention would contribute to, rather than diminish, the overall cost of corrections.

Hayward has recently analysed the cost effectiveness of periodic detention in terms of staff to prisoner ratios. She has estimated that there is approximately one prison officer for every two prisoners in full-time custody (2,500 Prison Officers to supervise 5,500 prisoners). This may be compared with a staffing ratio of one officer to 41 periodic detainees (based on 21 prison officers supervising 870 detainees).

2.3 Future Savings – Inmate Re-Establishment Scheme

The authors are aware of a proposal to explore the possibility of expanding the use of periodic detention to those serving short terms (up to two years) of imprisonment as a re-establishment, or half-way-out, option. This would be another way of reducing both overcrowding in gaols and the attendant high cost of imprisonment.

In a prison census conducted in August 1991, there were approximately 5,500 persons in prison, 2,000 of whom were serving sentences of two years or less. As the latter group mainly serve their sentences in medium or minimum security, this represents a cost in the order of \$42 million per annum. If just 25% of this group (500 inmates) demonstrate acceptable behaviour during the first half of their sentences (with a minimum term to be served of three months), and are otherwise considered to present minimal risk to the community, they could be permitted to serve the balance of their sentences on periodic detention.³⁷

Under this regime, unsatisfactory behaviour on periodic detention would mean automatic return to prison. If this programme were implemented, it alone could represent a cost-saving of over six million dollars per annum.³⁸

³⁷ C. Hayward, *op. cit.*

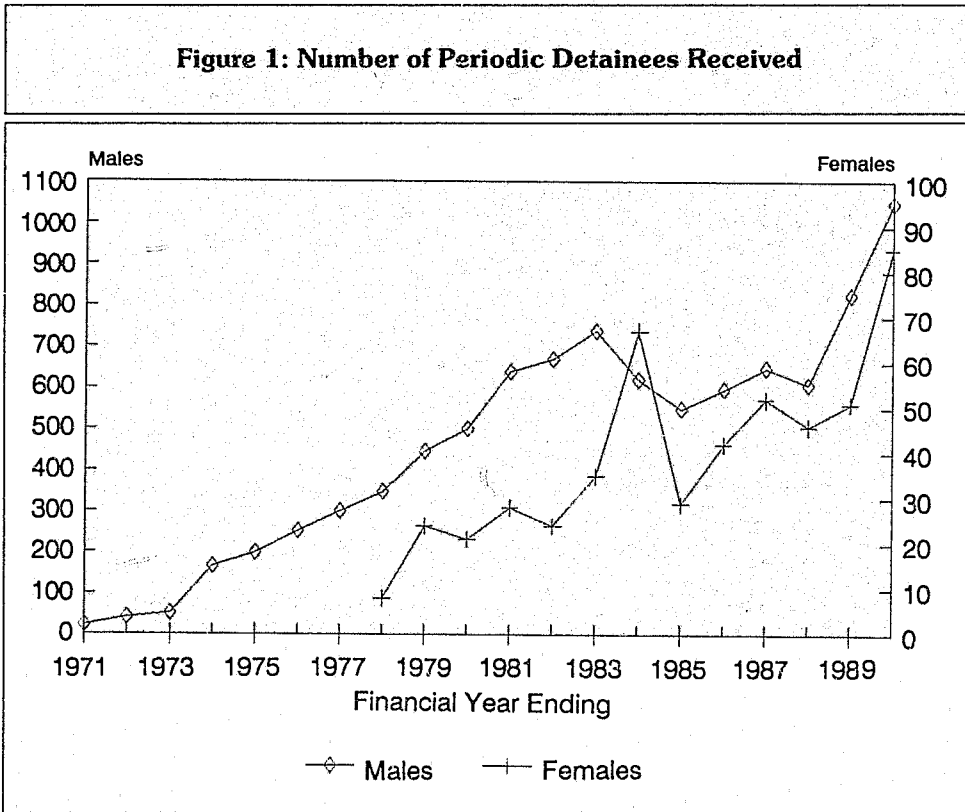
³⁸ *ibid.*

This proposal, already dubbed the Inmate Re-Establishment Scheme, is controversial, as it could be seen to be undermining the "truth in sentencing" principle. It would also have to overcome the hurdle of being labelled an early release scheme. Furthermore, there would be some administrative difficulties and associated costs in ensuring that Inmate Re-Establishment detainees are segregated from other detainees. This form of periodic detention, however, would have the advantage of avoiding the danger of net-widening since only those who are already serving full-time prison sentences would be eligible for the programme. Thus it has the potential to effectively operate as a rear-end diversion scheme, increasing the rate at which people exit the criminal justice system. Furthermore, it could promise to provide real incentives for prisoners to be of good behaviour, promote rehabilitation, reduce prison overcrowding and save money.

3.0 THE USE OF PERIODIC DETENTION

3.1 Growth of Periodic Detention

The following graph illustrates the growth in the use of periodic detention since its inception as a sentencing option in New South Wales.



Caution: in interpreting this graph, note that the scale for males and females differ by a factor of 11 to 1.

(Source: A. Gorta, "Periodic Detention in NSW: Trends and Issues 1971-1991" Research Bulletin No 16, Department of Corrective Services, August 1991, at 4-5)

Of particular significance is the surge in the use of periodic detention in recent years. According to Hayward, the slump between 1984 and 1988 can be attributed to mismanagement on the part of Corrective Services, overcrowding, staffing problems, and a crisis of confidence in periodic detention on the part of judicial officers.³⁹ Since 1989, however, – and even more so since February 1990 – the attempt to restore administrative order, and the Government's preparedness to invest resources into the periodic detention programme in an effort to hold back the rising tide (and cost) of

³⁹ id., at 11.

full-time imprisonment, have contributed significantly to the growth of periodic detention. In August 1990, a task force was set up which soon resulted in each centre being endowed with better equipment and improved clerical support. By late 1991, the concept of the Sessional Supervisor was introduced; the latter's function is to oversee periodic detainees' sentences while they are on Stage II detention.⁴⁰

The number of periodic detention centres has matched this pace of growth in the utilization of the option. The first periodic detention centre was opened at Long Bay in 1971 to accommodate a mere 35 detainees. There are currently 12 periodic detention centres throughout New South Wales located at Long Bay⁴¹, Long Bay (Mid-week), Emu Plains, Silverwater, Silverwater (Mid-week), Parramatta, Campbelltown, Tomago, St Heliers, Windsor, Merinda and Grafton.

The Judicial Commission has conducted two statistical studies examining the comparative use of periodic detention before and after 25 September 1989, the date of commencement of the *Sentencing Act* 1989. The first study examined sentencing patterns in the higher courts of New South Wales⁴², while the second study examined sentencing patterns in the Local Courts⁴³. The data for the studies were derived from the Commission's Sentencing Information System.

3.2 Periodic Detention in the Local Courts

In the 15 months prior to 25 September 1989 there were 585, or 0.5% of the total number of 109,392, sentencing records handed down in the Local Courts which related to an order for periodic detention. Out of a total 116,428 sentencing records in the 15 month period after the *Sentencing Act* came into force, there were 962 periodic detention orders, and this constituted 0.8% of all dispositions imposed during that period by Local Courts. This increase of 377 offenders represented a 64.4% increase in the use of periodic detention orders over the two periods.

Figure 2 presents a comparison of the use of various sentencing options in the Local Courts before and after the introduction of the *Sentencing Act*. It shows that the proportionate use of imprisonment decreased, while periodic detention and community service orders were amongst those dispositions which increased. In addition, it was found that there were negligible changes in offender and offence characteristics in the Local Courts.⁴⁴ Accordingly, this indicates that magistrates are using periodic detention as an alternative to full-time imprisonment. Indeed, having regard to the general distribution of the other sentencing options, there is minimal evidence of net-widening taking place in the Local Courts. Certainly, some of the reduction in the use of fines shown in Figure 2 indicates that there has been an increase in the use of other sentencing options, but considering the kinds of offences which normally attract fines, any suitable dispositions for them are just as likely, if not more likely, to be the less

⁴⁰ Some of the substantive findings of the task force are discussed at 6.3

⁴¹ Two centres, Long Bay Main and Long Bay Annex, were recently combined in a new building and are referred to as the Malabar Periodic Detention Centre.

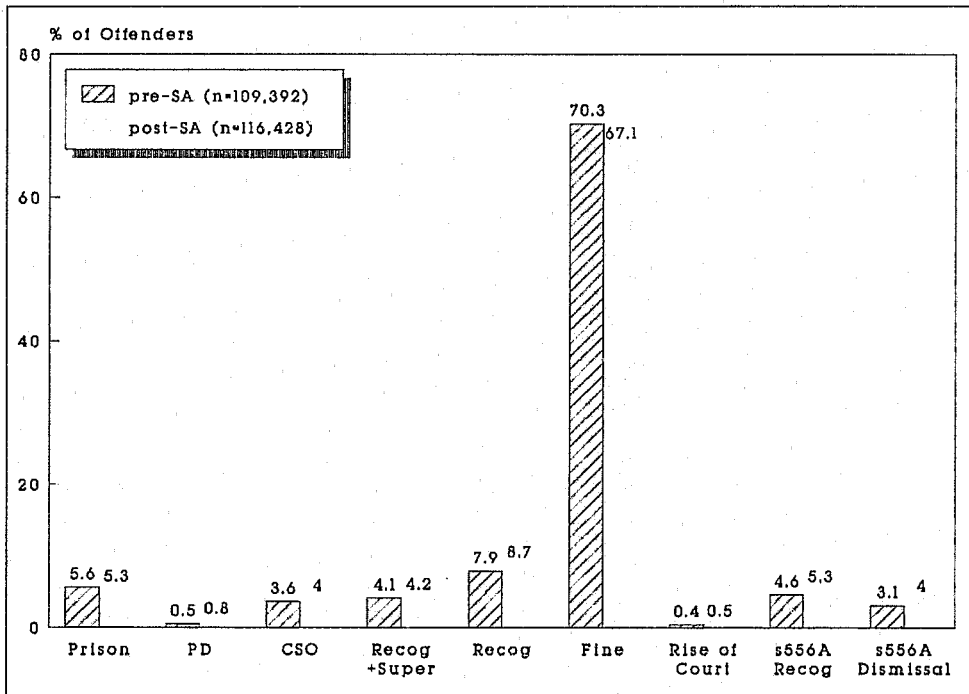
⁴² M. Cain and V. Roby, *The Impact of "Truth in Sentencing": Part 1 - The Higher Courts*, Sentencing Trends, Number 2, Judicial Commission of NSW, March 1992.

⁴³ V. Roby and M. Cain, *The Impact of "Truth in Sentencing": Part 2 - The Local Courts*, Sentencing Trends, Number 3, Judicial Commission of NSW, May 1992.

⁴⁴ *ibid.*

severe penalties, such as unsupervised recognizances and s 556A dispositions rather than the more severe penalties of community service order and periodic detention.

**Figure 2: Sentencing Outcomes by Period
Local Courts – 1/7/88 to 31/12/90**



Although courts always specify the duration of periodic detention when they impose this disposition, this information is not always recorded on the court forms. In fact, prior to 1990 much of these data appear to be absent. However, Table 2 shows the length of terms imposed for the available cases following the commencement of the *Periodic Detention of Prisoners (Amendment) Act 1989* (NSW). It shows that the vast majority of detainees, indeed three in four offenders, received terms of periodic detention of 6 months or less.

**Table 2: Periodic Detention Terms
Local Courts – (11/2/90 – 31/12/90)**

TERM OF PD	%	n
3 mths	18.3	(137)
>3 to 6 mths	57.3	(427)
>6 to 9 mths	12.8	(96)
>9 to 12 mths	8.7	(65)
>12 to 15 mths	1.1	(8)
>15 to 18 mths	1.4	(10)
>18 mths	0.2	(2)
TOTAL	100.0	(745)

Term of PD missing: 0.5%

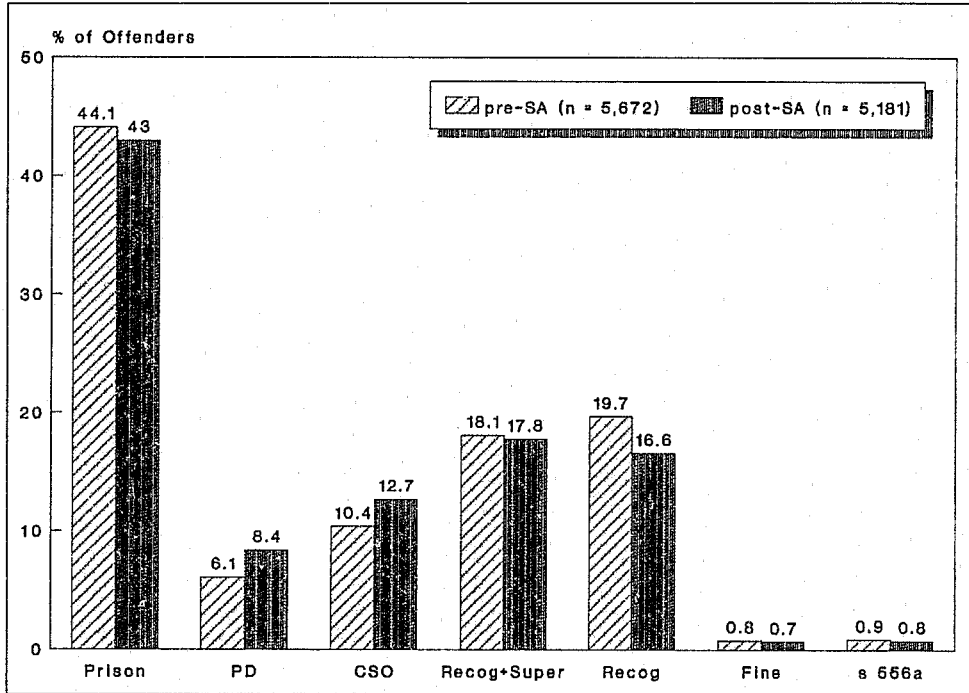
3.3 Periodic Detention in the Higher Courts

Local Courts impose many more periodic detention orders than do the higher courts. This is hardly surprising given the substantially smaller number of offenders appearing in the higher courts. However, having regard to the general patterns of sentencing existing in each jurisdiction, a higher percentage of offenders receive periodic detention orders in the higher courts than in the Local Courts. Again this is not surprising as the higher courts deal with more serious offences.

Figure 3 shows that in the 21 month period prior to the commencement of the *Sentencing Act* 6.1% of offenders in the higher courts received a periodic detention order, and this increased to 8.4% in the 21 month period following the commencement of the *Sentencing Act*. That is, 92 more offenders received a periodic detention order after the commencement of the *Sentencing Act*, an increase of 26.8%.

The data in Figure 3 suggest that some net-widening may be taking place in the higher courts. While the proportionate use of imprisonment has decreased, so has the proportionate use of all other dispositions except community service orders and periodic detention. Thus, it is reasonable to infer that not all of the offenders receiving periodic detention following the commencement of the *Sentencing Act* would have previously received a prison sentence – many may have received a recognizance, fine or s 556A disposition instead.

**Figure 3: Sentencing Outcomes by Period
Higher Courts – 1/1/88 to 30/6/91**



Section 556A includes rising of the court, s 19B *Crimes Act* 1914 (Cth) charge dismissed and s 20 *Crimes Act* (Cth) release by recognizance after imprisonment.

Table 3 reveals changes in the use of periodic detention since the commencement of the *Periodic Detention of Prisoners (Amendment) Act* 1989 which increased the maximum permissible term of periodic detention from 18 months to 36 months. The 8.3% increase in the shorter (six month) orders further suggests the possibility that some offenders could now be given periodic detention in preference to another sanction apart from imprisonment. In addition to the increase in 6 month terms, there was a 38.1% decrease in the proportionate use of 18 month periodic detention terms and 30.4% of offenders received the newly available longer terms.

Table 3: Terms by Period – Higher Courts
(Pre 1/10/88 – 10/2/90, Post 11/2/90 – 30/6/91)

TERM OF PD	Pre		Post	
	%	n	%	n
6 mths	6.9	(18)	15.2	(59)
12 mths	27.7	(72)	27.1	(105)
18 mths	65.4	(170)	27.3	(106)
24 mths	N/A	(0)	15.0	(58)
30 mths	N/A	(0)	5.9	(23)
36 mths	N/A	(0)	9.5	(37)
TOTAL	100.0	(260)	100.0	(388)

Logic and common sense would dictate that the more heinous the offence, the longer the sentence, and hence the less likely that a sentence of imprisonment would be suitable to be served by way of periodic detention. It is therefore surprising that there is such a high proportion of long-term sentences being handed down – about one in three orders in the higher courts exceeding 18 months. One can only assume that although these offences must be serious to attract such long sentences, they are committed by persons with favourable antecedents who do not require “incapacitation”, a principal rationale of full-time imprisonment. Alternatively, the long terms could reflect the failure of some sentencers to apply the equivalence rule⁴⁵ which would have been appropriate had full-time imprisonment been imposed.

Despite some evidence of “net-widening” the results of our analysis suggest that periodic detention and community service orders are helping to keep some offenders out of prison who might otherwise have been incarcerated. To this extent periodic detention does contribute to the goal of diverting offenders from full-time imprisonment.

⁴⁵ See *R v Falzon and Pullen*, per Loveday J discussed at 5.3.

4.0 CHARACTERISTICS OF PERIODIC DETAINEES

4.1 All Detainees

As a result of interviews of periodic detainees carried out by officers of the Department of Corrective Services in 1991, some useful information is available concerning some of the more common characteristics of periodic detainees. The majority of offenders serving periodic detention (66%) were 30 years of age or more, and over half (54%) of the respondents were single at the time, while 39% were married or living in a de facto relationship.⁴⁶ Almost half (48%) the respondents lacked formal school qualifications and 36% reported that they had previously served sentences in either an adult gaol or juvenile institution or both.⁴⁷

The level of education is interesting in that it mirrors the education status of prisoners in full-time incarceration.⁴⁸ However the level of employment amongst the periodic detainees is even more interesting. In 1991, only 56% of periodic detainees were in paid employment⁴⁹ suggesting that one of the primary rationales for periodic detention, that of enabling detainees to remain in employment, is not being realised in a sizeable proportion of cases.

Most male periodic detainees in 1990 had been sentenced for driving and traffic offences (34.3%), with property offenders (22.1%) and assailants (13.4%) being the second and third most frequent categories of offenders respectively.⁵⁰

Among female periodic detainees, offences relating to property were overwhelmingly the most common (38.9%), with drug offenders ranked second (21.2%). Significant numbers of women were also serving periodic detention for assaults (11.8%) and fraud (10.7%).⁵¹

46 Gorta, *Trends and Issues* at 6.

47 *ibid.*

48 Full-time prisoners are disproportionately male, young, unemployed and black. On a national level (the Department of Corrective Services publishes no figures for the education levels of NSW offenders as a distinct variable) about 80 per cent of prisoners have not completed secondary education: D. Brown, "Are we putting too many people in gaol?", in A. Gollan (ed.), *Questions for the Nineties*, Left Book Club, Sydney, 1990, at 82-84. According to Department of Corrective Services data, almost half (48%) of the interviewees in one sample of periodic detainees (594 in all) stated that the last grade they achieved at school was Year 9: H. Stathis and A. Gorta, *Profile of NSW Periodic Detainees, 1991*, Research Bulletin No 15, Department of Corrective Services, June 1991, at 6.

49 *ibid.*

50 *id.*, at 8.

51 *id.*, at 9.

4.2 Female Periodic Detainees

The number of women in prison has been increasing at a rapid rate in recent years, the figure for full-time imprisonment doubling in NSW between 1984 and 1991 alone.⁵² The increase is even higher for women serving periodic detention.⁵³ Many of the women are serving periodic detention for relatively serious offences and many have prior records, including prison terms.⁵⁴

According to a study by Danae Harvey, on 7 September 1991, eleven of the 47 women (23%) who could be expected to attend periodic detention (i.e. those who were not in custody or in the process of being prosecuted under section 25) had no prior record, the other 36 (77%) had previously been sentenced to one or more of the following: a fine, a bond, probation or a community service order and 17 (36%) of these women had been sentenced to a term in prison. The offences for which these women were serving periodic detention include: assault, break enter and steal, supply of a prohibited drug and fraud.

Harvey's research also reveals that transportation problems appear to be the key factors to women's poor attendance rates at NSW's only female periodic detention centre at Merinda. The legislative requirement that travel to and from a centre not impose undue inconvenience or hardship on a prisoner may need closer monitoring. Roslyn McGregor, the Officer-in-Charge of Merinda Periodic Detention Centre, believes that the long periods of time that it takes women to travel to Merinda is one of the chief reasons for absences.⁵⁵ The 24% of detainees who told their probation officer/lawyer that travelling two or more hours to the centre was manageable were probably influenced largely in their responses by the reality that the only alternative was full-time imprisonment.⁵⁶

A number of studies have shown that many women in NSW prisons are impoverished and have minimal educational and employment skills.⁵⁷ Most of them are wholly

⁵² Figures based on daily averages for each year obtained from Dr Angela Gorta of the Research & Statistics Division, NSW Department of Corrective Services. In 1984, the average number of women in full-time imprisonment was 160; by 1991 this figure had reached 324. Indeed, an overall increase on a national level has been occurring in similar proportions over the last decade, see P.W. Eastaer, "Women and Crime: Imprisonment Issues", *Trends and Issues in Crime and Criminal Justice*, No 35, Australian Institute of Criminology, Canberra, May 1992.

⁵³ In 1991, for example, there was an average of 64 women on periodic detention in New South Wales in any given week, up from 13 in 1985. The fact that the use of periodic detention is increasing comparably with full-time imprisonment rates may suggest that periodic detention is being used as a true alternative. However, it may also be argued that a sentencing option is not serving as a true alternative unless there is a corresponding decrease in the prison population. Nevertheless, issues surrounding the sharp increases in women's imprisonment are complex and beyond the scope of this paper. For a more comprehensive discussion on the interconnectedness of various socio-economic factors in determining female imprisonment rates, see the New South Wales Women in Prison Task Force, *op. cit.*, *passim*.

⁵⁴ D. Harvey, "Women in Periodic Detention in New South Wales", unpublished paper dated 28 November 1991, on file with the Commission.

⁵⁵ *ibid.*

⁵⁶ *ibid.*

⁵⁷ M. Cain (ed.), *Growing Up Good*, Sage Publications, London, 1989; P. Carlen, *Women Crime and Poverty*, Open University Press, Milton Keynes, 1988; M. Eaton, *Justice for Women? Family, Court and Social Control*, Open University Press, Milton Keynes, 1986; New South Wales Women in Prison Task Force, *op. cit.*, *passim*.

responsible for young children and have been unable to find paid employment which would adequately support themselves and their children.⁵⁸ Many women are serving time for economic crimes which are direct reactions to the lack of opportunities created by barriers of culture, gender and socio-economic factors. They are often in desperate need of personal counselling, health care and educational and vocational programmes. As a result of the different life situation of women, their experiences of periodic detention and its implications are different from those of men.

Harvey's recent demographic study of female periodic detainees in NSW found that the majority of detainees were in the 25-29 year age group.⁵⁹ Although 72% of the women had primary caregiving responsibilities for children, only 24% were in paid employment. Furthermore, a substantial proportion did not possess formal school qualifications and only 12% of the detainees had progressed beyond School Certificate level.⁶⁰

4.3 Lack of Work Opportunities for Women

As regards to the running of the programme itself, Harvey observed that the theme of community service strongly associated with the periodic detention programme is generally not applicable to female detainees. As is the case with the general female prison population, women serving periodic detention at Merinda are confined to predominantly stereotypical domestic and caregiving roles or else are offered mundane and unsatisfying "work" options. These are presently limited to two choices, namely working in the kitchen of Parklea prison packing the lunches for male prisoners, or performing "community work", which last year included putting the rubber ends on syringes, placing rubber stoppers in bottle caps, or attaching spatulas to the lids of glue containers. Indeed the NSW Task Force on Women in Prison has advocated the application of equal opportunity principles to work programmes in women's prisons. Furthermore, it argued that:

Any anti-discrimination policies and equal opportunity management plans which are developed must be complemented with special programmes designed to encourage women to overcome limitations to the development of their own potential imposed through traditional orientation to so-called "women's work".⁶¹

In its final recommendations, the Task Force called for a review of work opportunities for female offenders with a view to reducing the number of domestic and "token" jobs and increasing the number of "non-domestic" duties being performed by women.⁶²

58 NSW Women in Prison Task Force, at 82-84.

59 Harvey, *op. cit.*

60 *ibid.*

61 New South Wales Women in Prison Task Force, *op. cit.*, at 232.

62 *id.*, at 234.

5.0 ATTITUDES TO PERIODIC DETENTION

5.1 The Media

Retributive public opinion, largely informed by inaccurate media reporting, has long been identified as an obstacle to prison reform.⁶³

It is not encouraging or positive news the media seeks when it comes to prison issues, and the community's demand for information is largely satisfied by the crude condemnation of "evil" wrongdoers.⁶⁴ Grabosky and Wilson, for example, have referred to the following observation made by Mr Justice Nagle, the Royal Commissioner in charge of the inquiry into the NSW prison system:

'The public's occasional interest in prisons and prisoners is largely morbid and usually generated by a sensational treatment of the subject in the press; otherwise it is similarly abysmally ignorant of the whole subject.'⁶⁵

Press coverage of periodic detention in NSW can not be excluded from this general criticism, with every opportunity seemingly being taken to bring the programme into disrepute.

On 12 May 1991, the *Sun Herald* contained an article titled, "Jail Fiasco: 500 fail to serve weekend terms". The article cited Opposition Law and Order spokesperson Peter Anderson claiming that on the weekend of 4-5 May that year, 485 offenders serving their sentences in periodic detention had failed to report to detention centres throughout NSW. Mr Anderson added that the periodic detention centres at Parramatta and Emu Plains had the worst records, with 44% and 61% non-attendance respectively. Pursuing these observations, the Editorial in the same edition of the *Sun Herald* illustrates typically the media's response to sentencing and the justice system:

How morale destroying it must be for the police, who hunt down offenders and bring them to Court, only to see them skiving instead of serving their sentences.

This followed an admission by the then Minister for Corrective Services, Mr Yabsley, that at least 200 offenders sentenced to periodic detention had simply not presented themselves for their sentences. The Minister's statement was reported in the *Sydney Morning Herald (SMH)* under the headline of "200 weekend jail shirkers go scot-free". Mr Yabsley was reported as conceding that it would be too late to take any action against some absconders of periodic detention because deadlines had expired.

⁶³ M. Findlay & R. Hogg, *Understanding Crime and Criminal Justice*, Law Book Company, Sydney, 1988; G. Zdenkowski & D. Brown, *The Prison Struggle: Changing Australia's Prison System*, Penguin, Ringwood, 1982.

⁶⁴ P. Grabosky and P. Wilson, *Journalism and Justice: How Crime is Reported*, Pluto Press, Sydney, 1989, at 73.

⁶⁵ Nagle J, in id., at 72.

The underlying problems of staff and resource shortages at that time were only alluded to by the writer in the final sentence of his article.⁶⁶

Later we shall see that the levels of absenteeism painted by the media are misleading, and disclose an exaggerated or false picture of the degree to which periodic detention is abused.

Another method by which the media denigrates periodic detention is by portraying it as a "soft option". This involves singling out controversial cases, placing emphasis on the retributive aspects of punishment and the heinousness of particular crimes, while dismissing altogether the severity of periodic detention and the overall benefits it can offer the community.

Thus, in a story headed "Killer's light sentence raises query", the *SMH* on 14 September 1990 reported that the State Opposition had called upon the Attorney-General to explain why a murderer, who for reasons of conscience had walked into a police station and confessed to his crime ten years after the event, had been sentenced to three years weekend detention. In that case⁶⁷, the sentencing judge said that while there was a need to deter others from such crimes, the offender in this particular case could become a useful member of the community. He stressed that it was clear that the police could never have connected the defendant with the crime had he not have come forward. Further the offender had experienced guilt and was fully repentant for what he had done. His Honour added that periodic detention had the advantage of not isolating the offender from those who had aided in his rehabilitation. Only three days later (17/9/90), the *SMH* reported a statement made by the Premier of New South Wales that a review of the case was already underway to determine whether an appeal should be lodged against the "leniency" of the sentence. The Premier's commitment to the case was preceded by a letter from the victim's family to the Department of Public Prosecutions requesting an appeal be lodged against the sentence. In their article "Family plea for tougher sentence", the *Daily Telegraph* of 17 September cited the family as stating that they did not "consider this to be appropriate punishment for a homicide. . .".⁶⁸

As witnessed by this case, the media's watch-dog function does have the potential of bringing to the public's attention anomalies in sentencing practice which, according to an appellate tribunal, may be antithetical to the moral sense of the community. However, the media also serves the didactic function of informing and educating the public on matters of sentencing. In the case of periodic detention, the media may lead uninformed members of the public to believe that periodic detention is not a condign punishment of considerable severity. Indeed, press responses to cases such as *Dodd* may lead to mistaken public perceptions about the nature of periodic detention and the conditions under which it occurs.

⁶⁶ Clearly there were problems with the administration of periodic detention and in many ways this adverse publicity was needed in order to identify the crises that were taking place, as well as to consider the future of periodic detention. In this regard the media, as the watch-dog of civil liberties and defective administration, facilitated governmental examination of the operation of periodic detention.

⁶⁷ *Dodd* (NSW CCA, 4 March 1991, unreported).

⁶⁸ *Dodd*'s case is described in more detail below. It will be seen that the Court of Criminal Appeal held that periodic detention was an inappropriate sanction in light of the objective circumstances of that particular offence.

Under the title "Prisoner work no threat to jobs, says department" (*SMH*, 17 January 1992), a spokesperson for the Department of Corrective Services was reported as denying that periodic detention prisoners were taking jobs away from unemployed citizens. As the article correctly points out, the *Periodic Detention of Prisoners Act 1981* (NSW), precludes periodic detainees performing work which would otherwise be carried out by regular employees in the community. The Department's assurances followed concerns by the Water and Maritime Industries Union that periodic detainees were being considered for a pipeline clean-up operation. However, as a spokesperson for the Minister for Justice told the *SMH*, periodic detainees only work one or two days at a time and "only do the kind of work that no-one else does".

On 16 February 1992, a headline in an article published by the *SMH* read: "Jail barbies lure back inmates". The article claimed that periodic detainees were being bribed with shopping expeditions and barbecues in an attempt to encourage regular prison attendance. It was necessary to read the article carefully to see that this headline was totally misleading. Mr Steve D'Silva, the Director of the Periodic Detention Programme, was reported in the press as saying that small numbers of detainees were being used at supermarkets to help load trucks, while the allegations of regular barbecues stemmed from a sausage sizzle lunch.

It should be emphasised that Mr D'Silva conveyed a very different explanation to the authors. He elaborated on the incident by explaining that the detainees had been engaged in hard physical labour cleaning grasslands and rectifying structural faults at the Blue Mountains National Park. As the trip back to the Emu Plains Periodic Detention Centre would have taken some 45 minutes in travel time, it was decided that a portable barbecue would be taken to the work site to enable these detainees to make their own lunch. It was thought appropriate, as Mr D'Silva explained, that detainees "who often did hard work 'out in the scrub'" should receive as nourishing a meal as those who had remained behind at the Centre for reasons of illness. As for the detainees being used to load food trucks, what in fact happened was that an officer had engaged *one detainee* to load tiles and other equipment onto a truck at a local supermarket for tiling work being carried out at the Centre.

In line with the prison system being used as a political "football", the State Opposition suggested that a "blind eye" was being turned when criminals convicted of serious crimes were not turning up for periodic imprisonment (*SMH*, 17/1/92).

This cycle of an Opposition statement on the operation of periodic detention followed by sensationalised press articles is unlikely to abate because periodic detention is such an easy target. It is an easy target because it must rely on the full co-operation of all detainees, that they "surrender" themselves each week to the authorities and submit to the arduous terms of the sentence. Blame is sheeted home for the level of non-compliance without due regard to the reasons for absenteeism, the hardship involved in regular attendance, the difficulties of administering the programme, and also without an attempt to balance the successes and the benefits of the system over conventional imprisonment.

Very often, the media reports only seem to reflect the type of press report issued by the politician/s involved. A recent example of this was the press release on the 3rd of August 1992, in which the Opposition police spokesperson, Peter Anderson, again focused on the issue of absenteeism. This press release triggered a spate of media attention on periodic detention, and again gave the impression that the system was

out of control. ABC Television news (3/8/92) associated the problem with gaol breaks and depicted scenes of maximum security institutions in the background. The following day the *Telegraph Mirror's* article "Inmates 'Thumb Nose' at Curfew" commenced its report with "Hundreds of prisoners on weekend detention are not bothering to report to jail". Similarly the *Sydney Morning Herald's* headline read "Detention scheme a farce claims labor" and, as with other reports, claimed that at least one quarter of the 1300 inmates on periodic detention were "thumbing their noses at the justice system". In most reports there was some attempt at providing the Department with an opportunity to explain the situation (eg that the number of absentees varied from week to week, and that the categories of absentees are in a constant state of flux (see 7.2 Measuring Success), but once again the overall impression left by these articles was that periodic detention was poorly administered.

It is interesting to note that despite the criticisms levelled at the scheme, Mr Anderson was reported as supporting it in principle, because "it was worthwhile and saved money" (*SMH*). Mr Anderson's general criticisms were precipitated by the recent ruling of Hunt CJ at CL in *Nolan*.⁶⁹ His Honour, in construing section 21(2) of the *Periodic Detention of Prisoners Act 1981*, held that a detainee's term cannot be extended under this provision for failure to report where the Director-General has not been satisfied of a sufficient defence to a prosecution if such a prosecution had been initiated. In the past, the Department had relied upon the provisions of section 21 as extending the detention period wherever a prisoner failed to attend. Furthermore, Hunt J relied on *Whan v McConaghy*⁷⁰ to hold that an application to cancel a periodic detention order under section 25 of the legislation cannot be made by the Department of Corrective Services after the period of the sentence has expired. As a result, media reports referred to "hundreds" of detainees not reporting to centres on weekends, and implicitly, the fear that a "legal loophole" (*TM*) would prevent Corrective Services administrators from extending sentences in appropriate cases. As a consequence, according to the *Telegraph Mirror*, at least "33 people" have already been allowed to "walk free".

Nolan points out however, that the Department is not prevented from initiating prosecutions pursuant to section 33 of the Act for failure to report in accordance with the periodic detention order and, if the court is satisfied that the prisoner has a sufficient defence in accordance with section 33(2), it may extend the sentence by one week for each week that the prisoner has failed to attend.

5.2 Judicial Officers

In a survey of judges and magistrates carried out by Bray and Chan for the Judicial Commission in 1989, a majority (73%) of the judicial officers were found to be favourably disposed to the use of community service orders but only 45% had the same attitude towards periodic detention.⁷¹ A common perception was that community service orders guaranteed involvement in fruitful work while periodic detention merely involved "sitting around". Lack of supervision of periodic detainees was cited

⁶⁹ Supreme Court of New South Wales, unreported, 17 July 1992.

⁷⁰ (1984) 153 CLR 631.

⁷¹ R. Bray and J. Chan, *Community Service Orders and Periodic Detention as Sentencing Options: A Survey of Judicial Officers in New South Wales*, Judicial Commission of New South Wales, Monograph No 3, 1991, at 56.

as another source of dissatisfaction with the system.⁷² Some problems regarding the availability of periodic detention centres were also noted but not to a degree that would account *in toto* for its the comparatively rare use.⁷³ There is no doubt that a number of judicial officers are ambivalent about the desirability of using periodic detention. The preceding discussion on media portrayals suggests it has an image problem which can only be improved by tighter administrative control and better public relations on the part of the Department of Corrective Services.

5.3 The Court of Criminal Appeal

Although periodic detention may now be imposed in lieu of imprisonment for up to three years, the Court of Criminal Appeal on a number of occasions has held that periodic detention may be inappropriate because of the seriousness of the offence, or because, in the case of particular offenders, it does not sufficiently protect the community from crime.⁷⁴

Thus in *Burchell* (1987) 34 A Crim R. 148 at 151 the Court of Criminal Appeal held that periodic detention would not usually be suitable for many sex offenders because it does not protect the community sufficiently from the risk of those offenders re-offending for the duration of the sentence. The case involved eight counts of indecent assault committed upon the offender's step-daughter, daughter and niece — all of whom were well under the age of 16 years. At page 151, Hunt J, with whom Carruthers and McInerney JJ agreed, responding to a submission by the Crown that periodic detention in this case was too lenient, said:

I agree . . . that the nature of the offence is relevant . . . The question of whether a sentence should be served by way of periodic detention is certainly not to be determined solely by reference to the character of the prisoner himself, although in most cases that would usually be the primary consideration when this particular question is considered. Periodic detention, for example, would not usually be a suitable way in which a sentence for many sexual offences should be served. Deterrence and punishment are not the only purposes of imprisonment. The community is rightly concerned to see that it is protected against many such offenders. That protection is not afforded by periodic detention.

⁷² *ibid.*

⁷³ A separate but related concern with availability was expressed by the New South Wales Women in Prison Task Force, who observed that only one detention centre existed for female detainees. This means women from rural or outlying regions are excluded from the option. Accordingly, the Task Force recommended that periodic detention be available at country correctional institutions as well "so that the economies of scale do not specifically exclude all women outside the metropolitan area": New South Wales Women in Prison Task Force, *op. cit.*, at 141. The Judicial Commission has also drawn attention to the problem of availability of periodic detention centres in country areas: *op. cit.*, *passim*.

⁷⁴ In the research by Chan and Bray, 48% of the judicial officers interviewed nominated driving offences when asked to cite examples of offences for which periodic detention is a suitable option. Perhaps more interestingly, 27% of magistrates **did not consider the offence type to be a relevant factor** in choosing periodic detention as a sentencing option: R. Bray and J. Chan, *Community Service Orders and Periodic Detention as Sentencing Options: A Survey of Judicial Officers in New South Wales*, Monograph Series No 3, Judicial Commission of New South Wales, April, 1991, at 42-48.

Burchell also decided that the fact that prisoners may be required to serve their prison sentences on protection, or in virtual isolation, while important in fixing the length of the sentence, should not normally indicate that the custody should be served by way of periodic detention.

In *King* (NSW CCA 20 August 1991, unreported) the Crown appealed against sentences imposed upon a paedophile who had pleaded guilty to nine counts of indecent assault on persons under the age of sixteen years, and who were under his authority. For the principal offence, which included taking into account for the purpose of sentencing two additional charges of indecent assault, the sentencing judge had imposed a sentence of two years penal servitude to be served by way of periodic detention. His Honour took into account the fact that the offender had contributed meritoriously to the Little Athletics organisation. A recommendation that he be awarded the Medal of the Order of Australia for his work had been approved by the Queen but withheld after the complaints surfaced. There was also evidence that the offender was a diabetic, that he had vascular problems in his legs, and it was submitted that there were inadequate psychiatric treatment opportunities in prison and that he would become more depressed, and anxious if sent to gaol.

Of significance was the sentencing judge's finding that the offences committed by the offender fell towards the lower side of seriousness of indecent assault cases. However the Court of Criminal Appeal disagreed in this assessment, pointing out that despite the difficulties which the offender would face in prison, the objective features of the case had been given insufficient weight.⁷⁵ In particular, the breaches of trust committed by the respondent amounted to serious matters of aggravation and accordingly the Court allowed the Crown appeal and substituted two years of imprisonment for the original order. As some of the original sentence had already been served, the Court ordered that the balance of the term of periodic detention should be served in full-time custody.

The Court of Criminal Appeal has been careful to distinguish between the eligibility of a particular person for periodic detention, and the suitability of periodic detention as a punishment for the particular crime committed by that person. Certainly the seriousness of the objective circumstances of the offence may render an order for periodic detention inappropriate.

Dodd (NSW CCA, 4 March 1991, unreported) also illustrates this view. In this case the Court of Criminal Appeal substituted a fixed term of 3 years penal servitude where previously the sentence had been ordered to be served by way of periodic detention. The circumstances were unusual in that the offender, accompanied by his solicitor, walked into a police station in Newcastle and confessed to having killed a young woman in Sydney about ten years previously. He had come forward with a written confession because of his feelings of guilt and his desire to pay his debt to society and continue with his life. The objective circumstances of the unpremeditated offence were that he had strangled a woman, who had accompanied him to his flat, when she declined to have sexual intercourse with him. He proceeded to have "sexual intercourse" after she had died, and two days later had attempted to dispose of her

⁷⁵ Similarly in another violent sexual assault case, also called *King* (NSW CCA, 18 July 1991), the Court held that a sentence of 18 months periodic detention was inadequate and a full-time custodial sentence was required having regard to the brutality of the assault and the prior criminal record of the offender.

body by taking it some distance from the flat and setting fire to it. He stated that at the time of the offence he was affected by alcohol or LSD or both, and that he had lost control of himself and had simply grabbed the victim around the throat and held her until she stopped breathing.

The subjective factors revealed that the offender had a troubled background during his teenage years. He had spent two periods in a boys' home but had never been to gaol. He had a history of drug abuse, which continued after the offence, partly it seems, because he was tormented by his feelings of guilt. Eventually he was converted to Christianity, resulting in his rehabilitation and his desire to confess his crime. The sentencing judge also took into account that the offender was contrite, pleaded guilty, and saved the community the expense of a contested trial. Additional weight was given to his voluntary disclosure of the offence which otherwise would have remained undetected. The length of time between the offence and the sentencing proceedings was also regarded as a relevant mitigating factor.

Despite these powerful considerations, including the assessment that the offender was unlikely to re-offend, the Court of Criminal Appeal considered that the sentencing judge had attached too much weight to the subjective circumstances of the offence, and that his Honour had erred by describing the offence as falling towards the lower end of the scale of gravity for manslaughter offences. Accordingly, after referring to the proportionality principle, and observing that the relative importance of the objective and subjective features of a case would vary from case to case, the Court added that:

... there is sometimes a risk that attention to persuasive subjective considerations may cause inadequate weight to be given to the objective circumstances of the case (*R v Rushby* [1977] 1 NSWLR 594). We consider that to have happened here. In our view the requirement of a reasonable proportionality with the circumstances of the crime called for a significant full-time custodial sentence.

In order to ensure that the door for imposing periodic detention in manslaughter cases was not closed the Court elaborated:

We should make it clear that we do not suggest that it could never be proper to order that a sentence for the crime of manslaughter be served by way of periodic detention. There may well be cases of manslaughter where that is an appropriate order. It enables the offender to remain in employment and also minimises disruption to family life. We do not disregard the fact that even part-time custody is a substantial punishment. However in the present case we consider the penalty to be so inadequate as to call for intervention by this Court.

It is clear that some serious offenders will be excluded from the benefit of serving their sentences by way of periodic detention. If, for example, the appropriate sentence is in the order of three years imprisonment and the Court considers that there is a need to incapacitate the offender because of his or her propensity to commit further offences while at large, an order for periodic detention would be inappropriate. Equally, if the sentence is so serious that to order periodic detention would unduly depreciate from the seriousness of the offence, then once again the Court may be justified in denying the offender an order for periodic detention.

Recently, the Court of Criminal Appeal has suggested that periodic detention will not be appropriate in serious cases of fraud. In *R v Falzon and Pullen*⁷⁶, the Crown appealed against two sentences of 3 years periodic detention each imposed by the sentencer Judge Moore. The respondents had each pleaded guilty to six charges of larceny relating to systematic fraud of their employer over a three and a half year period. A total of \$948,402 was involved according to the sentencing judge. Although acknowledging the peculiar subjective factors of the case, as well as the remorse and rehabilitation displayed by the offenders, the Court held that the sentences had been manifestly inadequate in and of themselves, without the added question of whether periodic detention was appropriate in the circumstances.

Section 5(1) of the *Periodic Detention of Prisoners Act 1981* clearly suggests that periodic detention is an alternative mode of serving a full-time prison sentence. Nevertheless, Loveday J stated:

I do not agree that a sentence to be served by way of periodic detention should be regarded as equivalent to a full-time custodial sentence for the same duration. It is true that compliance with a periodic detention order is in law equivalent to serving a full-time custodial sentence. But it is contrary to common sense to regard it in practical terms as being other than less severe than a full-time custodial sentence.

The Court had support for this proposition from the case of *R v Duroux*, where it was put by Lee CJ that periodic detention has "from its very nature a very strong element of leniency built into it".⁷⁷ Loveday J also cited with approval *R v Pangallo*⁷⁸ where it was stated that the option was "outwardly less severe in its denunciation of the crime".

There will be cases where the offence is sufficiently serious to warrant a term of imprisonment, yet the public interest will be satisfied by allowing the offender to serve the sentence by way of periodic detention. In such circumstances, the principle that imprisonment is a sentence of last resort will mean that the less punitive option should be selected. In some cases this may be periodic detention, or a Community Service Order, whilst in other cases it may even be a recognizance of one form or other. It seems that periodic detention will not develop as a true alternative, but indeed as an independent and additional option, if it is not used in precisely the serious types of cases which warrant full-time imprisonment. As Ken Polk has said:

... the [diversionary] programmes are virtually always designed to 'cream' off the 'softest' cases. Most such programmes will not take 'serious' offenders, since they pose too great a 'risk' to the programme. *It is precisely this focus on the less serious offender that facilitates spillage from comparable offenders at less deep points in the justice system.*⁷⁹

⁷⁶ NSW CCA, unreported, 20 February 1992.

⁷⁷ NSW CCA, unreported, 11 April 1991 per Lee CJ, cited in *ibid*.

⁷⁸ (1991) 56 A Crim R 441.

⁷⁹ K. Polk, "Deinstitutionalisation: a description and assessment", in I. Potas (ed.), *Sentencing in Australia: Issues, Policy and Reform*, Proceedings of a Seminar "Sentencing: Problems and Prospects" held at the Australian Institute of Criminology, 18-21 March 1986, Australian Institute of Criminology, Canberra, 1987, at 259.

Based on the terms of the legislation, it is clear that the courts are not permitted to treat periodic detention as a penalty which may be imposed in its own right rather than as an alternative to imprisonment.⁸⁰ The sentencer must first decide what is the appropriate term of imprisonment for the offence and then decide whether or not an order should be made that the sentence be served by way of periodic detention. The danger of considering periodic detention in isolation from full-time imprisonment is that net-widening may occur.⁸¹ There is also the additional concern that if offenders breach the terms of the periodic detention order, they may find themselves receiving full-time prison sentences beyond those justified by the original offence.

⁸⁰ See *Periodic Detention of Prisoners Act 1981*, s 5(1). The statutory provision empowering courts to impose Community Service Orders has a similar rationale. The *Community Service Orders Act 1979*, s 4(1) provides that community service orders may be used "instead of imposing a penalty of imprisonment".

⁸¹ This is one of the factors often identified as being responsible for the failure of front-end diversion schemes to bring about real reductions in the numbers of people under correctional supervision: D. Weatherburn and R. Bray, "Alternative Sanctions, Prison Costs and Prison Overcrowding" (1992) 16 *Crim.L.J.* 20, at 30-31.

6.0 ADMINISTRATION OF PERIODIC DETENTION

6.1 Tardiness in Development

The relative caution with which the judiciary approached the use of periodic detention in its early days⁸² can be attributed in part to a series of crises and problems in periodic detention and in the apparent lack of commitment to the provision of adequate resources to ensure the success of the scheme. In some respects, it is remarkable that periodic detention has survived at all.

6.2 Frustrating Reform

Hayward claims to have identified what she calls the Department of Corrective Services' role in "destabilising" periodic detention. While problems with the periodic detention scheme over the years have been attributed mostly to the Corrective Services' Commission or the prison officers, she argues that the shaping of past policy can be traced to a fairly permanent middle administrative layer within the Department.⁸³ Hayward suggests:

Stable and unrotated middle management within Corrective Services are the group that have largely ignored PDC [Periodic Detention Centres] over the last two decades and have mismanaged all attempts at reform: in particular, they harbour an intense distrust of sentencing authorities and believe that sentencing should not be the sole prerogative of judges and magistrates.⁸⁴

Citing Sallman and Willis, Hayward asserts that this core of middle managers within the Department believed that determining how prisoners serve their sentence should not be the province of the courts, and that Corrective Services knew best how this ought to occur.⁸⁵ Indeed, she suggests that this same group of administrators had worked to by-pass the authority of the courts through a series of Executive release schemes, which ultimately fell into disrepute.⁸⁶ Since 1990, a shake-up within the Department, together with a more structured and focussed philosophy, promises renewed hope and a second chance to prove the true value of periodic detention as a sentencing option.

6.3 Management Review of Periodic Detention

In 1987, the Management Review Report on Periodic Detention Centres was the outcome of an internal review of the first 17 years of the scheme. It was conducted by

82 As early as 1973, the Minister for Justice in NSW commissioned a report on attitudes toward the option largely in response to its lack of utilization. In 1978 Justice Nagle expressed concern at the lack of use of periodic detention: Justice Nagle, *Report of the Royal Commission into New South Wales Prisons*, NSW Government Printer, 1978, at 260-2.

83 Hayward, *op. cit.*

84 P. Sallman and J. Willis, *Criminal Justice in Australia*, Open University Press, Melbourne, 1984, cited in: Hayward.

85 *ibid.*

86 *ibid.*

the Department's own Management Review Unit. Although this report found problems with overcrowding, staff attitudes and the changing profile of detainees, it concluded that the scheme was "generally running well".⁸⁷

However, following a 100 per cent increase in the periodic detention population between March 1988 and June 1990, the programme was once again faced with a crisis.⁸⁸ After initial investigations by the Department, two further reports on periodic detention were prepared in 1989. These reports effectively contradicted each other.

The Day Review Team concerned itself predominantly with cost-cutting measures rather than the substantive management and staffing problems of periodic detention. The staffing formula it arrived at was based on Periodic Detention Centres operating as extensions of prisons. Meetings between Periodic Detention Centre staff and the Department resulted in management putting forward new staffing formulae and the privatization of Periodic Detention Centres was also considered.⁸⁹

The Weston Report recommended the establishment of a Joint Advisory Committee to monitor the scheme and stressed that the present system should be retained with "minor adjustment".⁹⁰ With regard to staffing, the report noted that the effectiveness of the programme should not hinge on a minimum number of staff as the officers under the current arrangement were doing exceptionally well.⁹¹

According to Hayward's analysis, the two essentially contradictory reports have posed dilemmas for the Department's senior management. It seems now that neither set of recommendations will be adopted with the formation of a Departmental Committee which has so far acted independently of both Weston and Day.⁹²

A task force was set up in August 1990 by Corrective Services (as discussed at 3.1) with the object of "resurrecting" the periodic detention programme. It found that there was no single person responsible for the programme, that record-keeping was in disarray, that periodic detention lacked any philosophy or vision, and generally speaking, that the whole system was barely tenable. Speaking of the scheme as recently as June 1992, the Minister for Justice, Mr Terry Griffiths MP, admitted that prior to the drastic overhaul which his Department had undertaken, the scheme had little credibility. He added that:

There was understandable doubt in some sentencers' minds as to whether the intended sanction would ever be applied. In fact, had every prisoner serving a periodic sentence reported when required this time last year, the system did not (sic) have sufficient beds to accommodate them.⁹³

After commenting that the situation had now changed, Mr Griffiths continued:

Periodic Detention Centres are now the responsibility of the Superintendent of the local Correctional Centre and additional accommo-

⁸⁷ *ibid.*

⁸⁸ *ibid.* Note, however, that the counting rules for numbers on periodic detention changed and therefore the conclusion that there was a 100% increase may not be totally accurate.

⁸⁹ *ibid.*

⁹⁰ *ibid.* The Weston Report is also discussed in Gorta, *Trends and Issues*, *op. cit.*, at 15-16.

⁹¹ *ibid.*

⁹² *ibid.*

⁹³ T. Griffiths, "The New South Wales Justice System - Some current issues" (1992) 14(5) *Judicial Officers Bulletin* 35, at 35.

dation has been built. Detainees are now required to undertake meaningful work or educational courses. Breaches of orders are being dealt with and offenders returned to Court for sentencing.

The task force also introduced some significant reforms. The Periodic Detention Centre Review Committee was set up to properly monitor and assess the progress of detainees and to make decisions on whether, if at all, and at what stage detainees should progress to Stage II of the programme. A multimillion dollar capital works project was commenced in 1991 to build new centres and up-grade the standard of accommodation on existing sites. Procedures and operational practices are now moving toward standardisation with the current drafting of a Policy and Procedure manual.

6.4 Overcrowding

At certain times during the history of periodic detention, there has been a shortage of facilities for detainees. The demand for places has often exceeded supply. The centres were full in the late 1970s and in 1978, "no vacancy" bulletins were sent to the courts to inform them of overcrowding. The Department of Corrective Services advised the Chief Justice that plans were in train to establish new centres. Hayward claims that at the time of this advice, the Department had in fact abandoned all such plans and the Bathurst Periodic Detention Centre was closed soon after.⁹⁴

In 1983, a pilot mid-week programme was introduced for 20 periodic detainees who had already qualified for Stage II of the programme. According to Hayward, it was abandoned after 18 months due to its poor management. At the same time, the use of community service orders and imprisonment was increasing.⁹⁵ It is almost certain that many of those being sentenced during 1984-5 were sent to full time imprisonment rather than be sent to "a poorly managed, confused and directionless"⁹⁶ periodic detention centre.

All the centres were filled to capacity again in 1986-7 and a drop in the use of periodic detention by Magistrates' Courts at the time⁹⁷ was paralleled by increased imprisonment rates.⁹⁸

Overcrowding continued into the late 1980s and culminated with the so-called 'Truth in Sentencing' legislation which saw the prison population increase between 20 to 25% within a twenty month period.⁹⁹ This was paralleled by a sharp increase in the numbers of people receiving periodic detention, at least up until the period ending June 1990.¹⁰⁰

94 Hayward, *op. cit.*, at 15.

95 D. Weatherburn and R. Bray, "Non-Custodial Sanctions, Prison Costs and Prison Overcrowding", paper delivered at the AIC conference *Keeping People Out of Prison*, Hobart, March 1990; Figure 3, in Hayward, at 16.

96 *ibid.*

97 *ibid.*

98 Hayward, *op. cit.*

99 See A. Gorta, "Impact of the Sentencing Act 1989 on the NSW Prison Population" (1992) 3(3) *Current Issues in Criminal Justice* 308, at 311; D. Chappell, "Sentencing of Offenders: A Consideration of the Issues of Severity, Consistency and Cost" (1992) 66 ALJ 423, at 429.

100 Gorta, *Trends and Issues*, at 5-6.

6.5 Procedural and Technical Errors

Several technical and procedural problems have arisen with the scheme, which can undoubtedly be tied to the lack of funding and resources devoted to periodic detention in the past.

In 1990, the then Executive Director of the Periodic Detention Centres, Mr Tony Kelly, raised concerns about the methods being used to account for detainees at their initial reception. Apparently, it was not unusual for persons sentenced to periodic detention to report without the appropriate warrant of commitment being made available to the officer in charge of the detention centre.¹⁰¹ After seeking legal advice, which submitted that there was no legal basis for holding a detainee if the Governor of the Centre had not received a Court warrant, Kelly instructed centre administrators to record details for such persons and tell them to attend again the following week, presumably by which time the appropriate authority could be located and obtained.

Such a back-log of warrants undoubtedly affected the statistics on the rate of absenteeism, added to the confusion and uncertainty of who was supposed to attend and doubtless contributed to the general perception that periodic detention was not to be taken seriously.

6.6 Periodic Detention as Part-time Gaol

It is submitted that any attempt to model periodic detention on prisons is misplaced. To do so only invites the spread of the prison culture and the negative aspects that imprisonment entails. The "them-and-us" mentality that separates "screws" from prison inmates should not be replicated in periodic detention. Indeed, the key differences between prisons and periodic detention centre should not only be acknowledged, but be reflected in how they are managed and controlled.

In the first place, there need not be the same emphasis on security in periodic detention centres. It is absurd, for instance, to believe that periodic detainees would seek to dig tunnels, file through steel bars, or assault officers in an endeavour to escape, when they can abscond (i.e. decide not to return to the periodic detention centre) at any time while they are at liberty.¹⁰² Those who require isolation or separation from the community because of their propensity for violence are less likely to be given the benefit of periodic detention. The possibility of serious assaultive behaviour among periodic detainees is also far less likely than it is in the prison context. Similarly, the likelihood of sexual assault is also dramatically decreased since

¹⁰¹ The problem reached a point where the Department designed a form to be completed where the offender presented at the centre without a warrant of commitment. The form served the dual purpose of notifying the Courts and the Executive Director that the person presented at the centre, and also provided the Administrator of the Centre with evidence of the person's willingness to comply with the directions of the sentencing court. The Department advises the authors that this problem has now been fully rectified.

¹⁰² Escape in this context could involve failing to report at a centre without lawful excuse. There have been isolated instances of detainees escaping from the centre, but as a general proposition the issue of security is not as highly prioritised as it is in the context of conventional imprisonment.

periodic detainees maintain their personal relationships during the time they are in the community.¹⁰³

Thus given that there is less tension between detainees themselves, as well as between detainees and prison officers, the need for heightened security in periodic detention centres is minimal. It follows that a more co-operative rather than a coercive model of management is possible, particularly where a balanced system of incentives and sanctions is used.

In this regard also, the use of positive incentives, such as the progression from Stage I to Stage II periodic detention, are most useful devices to encourage the attendance, good behaviour and satisfactory work performance of detainees.

The acceptance that periodic detention is fundamentally different from ordinary imprisonment also requires special skills of the officers who run the programmes. It is important that these officers are favourably disposed to the objectives of periodic detention and are concerned with the rehabilitation of detainees. They should be more than mere guards, and therefore should be carefully selected and trained before they are permitted to participate in the work of the centres. Such people should not automatically be drawn from the ranks of prison officers.

It is, then, perhaps desirable that education in periodic detention's philosophy and purpose be a compulsory core of Corrective Services training. Over time, personalities suited to the programme could be filtered out of the main body of officers, ensuring that centres receive the most supportive staff possible.

6.7 Cancellation of Orders

A periodic detention order may be cancelled a number of ways. If a periodic detainee is convicted of an offence and sentenced to a term of imprisonment of more than one month, the court is required to cancel the order for periodic detention under section 24 of the Act.

Alternatively, the court may make a further order for periodic detention to be served wholly or partly concurrently with, or cumulatively upon another or other sentences. The subsequent order of periodic detention is subject to the proviso that the sum of the terms to be served does not exceed 3 years.¹⁰⁴

If a periodic detainee is convicted of a further offence and sentenced to one month or less imprisonment, or ordered to pay a fine, penalty, sum of money, costs or expenses the court may cancel the order for periodic detention.

Where an order for periodic detention is cancelled, the detainee is required to serve the remainder of the periodic detention order by way of full-time imprisonment. In the

¹⁰³ In the history of the scheme, there has been but one reported instance of sexual assault. The incident occurred at St Heliers in 1991. One of the offenders was sentenced to 1 year 9 months imprisonment while the alleged main perpetrator has been committed for trial.

¹⁰⁴ *Periodic Detention of Prisoners Act 1981*, s 5B.

cases involving imprisonment for subsequent convictions, the terms are to be served concurrently.¹⁰⁵

Where a detainee is sentenced to full-time imprisonment for more than one month, the Department of Corrective Services (in the person of the Governor of the relevant Periodic Detention Centre) will normally request the magistrate to—

- (1) cancel the periodic detention order under section 24(1) and
- (2) direct that a warrant be issued, under section 26(b), for the detention of the detainee for the unexpired balance of the periodic detention order.

An order may be cancelled on application to the issuing court by the person or the Corrective Services Commissioner, whether or not the court is constituted by the same member or members who constituted it when the order was made.¹⁰⁶ The court itself may also cancel the order without application if it appears to the court that there is good reason for doing so.

When an order is cancelled, the detainee is required to serve the remainder of the order by way of full-time imprisonment.

A periodic detainee who fails to report for periodic detention, fails to comply with an order to work or change prisons where the sentence is to be served, escapes or attempts to escape, commits an offence against discipline as specified in the regulations or disobeys an appropriate instruction or direction, is guilty of an offence and liable on conviction to imprisonment for a term not exceeding 12 months or a fine not exceeding 10 penalty units.

In order to maintain the efficacy of periodic detention, it is desirable that the Courts should take a particularly firm stance upon those against whom breach proceedings are brought. It is not unusual for detainees to be given a number of warnings before breach proceedings are commenced, and if the Courts are not prepared to endorse the judgments of officers responsible for the management of the periodic detention programme, the latter's authority will wane and the scheme will flounder.

Our analysis, however, will also examine the reasons for failure to complete the programme. It is by providing careful attention to this particular aspect of periodic detention that informed reform proposals may be advanced.

Other considerations measuring success, some of which have already been considered, are: the costs of the programme vis-a-vis full-time imprisonment, whether it leads to a reduction in the use of imprisonment or simply widens the net of corrections, the attitude of sentencers and detainees to periodic detention, the value of the work performed, if any, both to the community and to the offender, the problems associated with the administration and staffing of the programme, and enforcement issues.

¹⁰⁵ Note a recent ruling of the Supreme Court of New South Wales, which held *inter alia* that breach proceedings under s 25 must be initiated and legally resolved before the expiry of an offender's sentence: *Nolan*, NSW CCA, unreported, 17 July 1992.

¹⁰⁶ *Periodic Detention of Prisoners Act 1981* (NSW), s 25.

7.0 EFFECTIVENESS OF PERIODIC DETENTION

7.1 Some Problems of Measurement

The effectiveness of periodic detention, as indeed the effectiveness of penal measures generally, is often measured in terms of recidivism. For example, we may wish to know what impact the sentence of periodic detention has on the offender's future offending behaviour. Or, again, we may wish to know how recidivism rates compare with similar offenders who were given full-time imprisonment, or who received community service orders.

However, questions concerning effectiveness of penal sanctions are more easily asked than answered. They generally assume that it is possible to match similar groups of offenders who commit similar offences, but who receive dissimilar sanctions, and so determine which of these, in terms of recidivism or rehabilitation, produce the best results.¹⁰⁷

Of course the process of sentencing, if it is working properly, makes the identification of similar cases which have resulted in dissimilar sentences, extremely difficult to identify. Where such disparities can be identified, they provide the grounds for lodging appeals against sentence so that appropriate adjustments can be made.

As a general rule, offenders who commit the most serious offences and/or those who are considered most likely to re-offend are treated more harshly than first offenders who have good prospects for rehabilitation. Put another way, those who are regarded as recidivists often lose the benefit of leniency in sentencing because they are bad risks. Accordingly there is an in-built bias (albeit a justifiable one) in the manner in which many sentencing options are selected. On this view, and in opposition to the theory of special deterrence, one should not always expect that those given heavier penalties, or more severe sentencing options will automatically have lower recidivism rates.¹⁰⁸

¹⁰⁷ Ideally, a thorough evaluation would adopt an "experimental design" methodology whereby offenders committing offences of similar severity would, in the sentencing process, be randomly assigned into experimental groups (those sentenced to periodic detention) and control groups (those sentenced to similar periods of full-time imprisonment, community service orders, or probation). After reviewing the behaviour of each offender in the various groups, an assessment would be made as to which forms of disposal were the most effective, and for which kinds of offenders.

There are, of course, numerous practical and ethical objections to applying such a methodology, and accordingly that approach has not been pursued in this study.

¹⁰⁸ Research in New Zealand by Julie Leibrich illustrates this point. In a study of offenders given community service orders as opposed to those sentenced to (non-residential) periodic detention, she found little difference in recidivist rates. On a direct comparison of the two groups, 38% of those serving community service orders were reconvicted within a year while 59% of periodic detainees were resentenced after that time. However, when the groups were post-stratified according to type of offence committed, previous convictions and so on, it was found that reconviction rates for higher risk offenders did not greatly differ between those given periodic detention and those receiving a community service order. It was clear that recidivist rates varied greatly in relation to factors other than the type of option imposed: J. Leibrich, *Criminal history and reconvictions of two sentence groups: Community Service and Non-Residential Periodic Detention*, Study Series No 11, Planning and Developmental Division, Department of Justice of New Zealand, Wellington, 1984.

In these circumstances one may question whether it is fair or desirable to compare the recidivism rates of offenders receiving more severe sentences with those receiving less severe sentences. Indeed, recidivism may have more to do with the person's character, propensities or attitude, or to situational factors often outside the offender's control, than with the sentence selected.¹⁰⁹ Of course full-time imprisonment reduces the opportunity for an offender to re-offend, and thus must produce lower recidivism rates than periodic detention — at least for the duration of the sentence.

To make matters worse the term "recidivism" itself is problematic and ambiguous. It can mean: the commission of a new offence which comes to the notice of police or other official, a breach of a court order, a further conviction recorded by the courts, or that the offender has re-offended even though the offence has not been detected.

George Mair, commenting on the difficulty of measuring the effectiveness of sentencing options, questions the appropriateness of the rather crude, dichotomous measure which equates re-conviction and no re-conviction with the success or failure of a sanction.¹¹⁰ How does this take into account the impact of police and the prospects of apprehension, prosecution and re-conviction? In Great Britain for example, a study found that 44.2% of those sentenced to do community service work were re-convicted within one year, whereas 33.3% of those who had been released from prison were re-convicted over the same twelve months.¹¹¹ While this would appear to demonstrate that, in terms of deterrence, imprisonment has a better short term impact, the crudity of the measure of recidivism, and the failure to assess other factors, such as the gravity of offences committed, the effectiveness of rehabilitation, the value of community service work to the community, the degree and quality of supervision, the extent to which those who re-offend take steps to avoid detection, and the overall cost of each measure would also need to be considered before the comparative effectiveness of these measures could be determined.

Further, should we attribute failure to a sentencing measure such as periodic detention simply because it has been poorly implemented, or starved of resources, or uses inadequately trained staff? As Mair argues:

Only by studying how a sentence or treatment programme has been put into practice, how well it is meeting its immediate objectives, how it functions in organisational terms can we begin to interpret the meaning of any outcome measures (such as the reconviction rate) which might be used. Such a process evaluation enables us to understand more clearly why a penal measure may be working successfully or — equally important — why it may be failing.¹¹²

¹⁰⁹ A recent Israeli study of 202 adult offenders, all of whom were convicted of serious felonies, found that there was no salient disparity in recidivist rates between half the offenders who were granted probation, and the other half who were imprisoned. The researchers concluded that offender attributes, especially lack of education, were far better predictors of recidivism: B-Z Cohen et al., "The Efficacy of Probation Versus Imprisonment in Reducing Recidivism of Serious Offenders in Israel" (1991) 19 *Journal of Criminal Justice* 263.

¹¹⁰ G. Mair, "What Works — nothing or everything. Measuring the effectiveness of sentences", *Research Bulletin* No. 30 Home Office and Statistics Department, HORPU London, at 3.

¹¹¹ Blackmore, "Does Community Corrections Work?" (1981) *Corrections Magazine*, 15, at 19.

¹¹² *id.*, at 6.

There are a number of areas which require special consideration in order to measure the effectiveness of periodic detention. The primary measure selected here is successful completion of the order. This means that if the detainee completes the term of periodic detention fixed by the court it may be regarded as successful. Most judicial officers (up to 53%) have admitted having no knowledge of the proportion of offenders who successfully completed their periodic detention orders.¹¹³

Thus our approach in the following pages is not one of comparing sentencing measures to find the most effective in terms of recidivism rates. Indeed, as the selection of a sentence is often based on the culpability or degree of criminality of an offender (a retributive concept) the appropriateness of a sanction should not be measured exclusively by reference to recidivism or likely future criminality of the offender.

In conclusion, therefore, one must question the extent to which recidivism should be the guiding light for evaluating a particular sentencing option. Hence our focus is upon a description of the periodic detention programme, its objectives and its perceived strengths and weaknesses.

7.2 Measuring Success

As we have demonstrated¹¹⁴ the media often provide a distorted view of the statistics relating to periodic detention, and particularly in relation to the extent of non-attendance by those subject to periodic detention. This is because the non-attendance is measured by referring to the number of "live warrants" and these are then compared to the population of periodic detainees who are serving their sentences at a particular time. "Live warrants" are made up of all those attending and not attending on a particular week. Non-attenders consist of--

- (1) those for whom breach or disciplinary action for non-attendance is underway;
- (2) those for whom breach or disciplinary action has resulted in a conviction and imprisonment, but the periodic detention centre has not been notified by the court;
- (3) those who have committed a new offence and have been convicted and imprisoned but the periodic detention centre has yet to be notified by the court;
- (4) those for whom authorised leave of absence has been granted;
- (5) those who report on sick leave;
- (6) those on appeal (without obligation to report for periodic detention);
- (7) and all those who are absent without leave (AWOL).

Thus, for example, the attendance statistics for 19 July 1992 showed that there were 1,338 Detainee Warrants. From this figure a total number of 520 detainees or about 4 out of every 10 who were subject to periodic detention were regarded as non-

¹¹³ Bray and Chan, *op. cit.*, at 47. The interviews conducted by these authors revealed that sentencers did not receive regular feedback about success and failure rates, at least not where community service orders and periodic detention were concerned: see at 48.

¹¹⁴ See above at 5.1.

attenders. However on closer analysis, 55 in the non-attendance group were in full-time custody. They therefore should not be counted as non-attenders since they were prevented from attending and were properly accounted for. Another 8 offenders were appellants who — for the time being at least — were not obliged to attend periodic detention. These also should not be counted as non-attenders.

The most significant sub-group of non-attenders — 146 out of the total 520 non-attenders on the books — were those persons against whom breach proceedings (under s 25 of the *Periodic Detention of Prisoners Act 1981*) were in train. This large number can be explained by the fact that there were significant delays, generally in the order of 6 to 8 months and in some instances, over 12 months, in the processing of legal action. An internal audit report suggested that much of this delay could be attributed in the past to the failure of the Legal Branch of the Department to initiate section 25 actions promptly. More recently, the Legal Branch has been allocated additional resources to ensure that s 25 proceedings are initiated and dealt with more expeditiously. The Director of the Periodic Detention Centre programme is now also provided with a monthly report detailing the progress of all s 25 cases.

The Department of Corrective Services is keen to ensure that detainees who are subject to breach proceedings do not stay in this category for too long. One solution might be to periodically allocate a Magistrate (perhaps for a day or two each year) the specific task of dealing with outstanding s 25 breach proceedings.

The effect of keeping s 25 cases “in limbo” for many months means that the number of cases being added to this category keeps accumulating, while good attenders are put on and taken off the books in accordance with the normal throughput of cases. Hence as current attenders are compared with the accumulating stock of s 25 non-attenders a distortion in the ratio of successful and unsuccessful attenders results and provides the false impression that the successful rate for completions is lower than it is. A further distortion occurs when the number of outstanding warrants are assumed to indicate ‘failures’. It should be remembered that until court proceedings are finalised detainees subject to s 25 proceedings have not been proved to be in breach of their orders.

Put simply, the categories and figures for absenteeism on any given week are in a constant state of flux. A detainee that might be in the category of AWOL on one Friday, for instance, may well “transfer” the following week to the status of an absentee for whom authorized leave has been granted if he or she produces a satisfactory medical certificate. And with the court delays discussed above, it is not feasible to calculate true absentee rates for any given week until several weeks, perhaps months, have elapsed.

Finally, in our example, 117 detainees were classified as Absent Without Leave and thus were included in the non-attendance figure of 520. Again the degree of unauthorised absenteeism is overstated because in many cases valid excuses are provided for non-attendance. For example, it is a common occurrence to find that an offender who has failed to report to the periodic detention centre on one weekend, will appear and present a Medical Certificate or offer some other plausible excuse on the following weekend. In these circumstances it is inappropriate to continue to regard such persons as AWOL, at least for the purposes of determining whether they have failed to comply with the terms of their sentence. Where offenders do have legitimate

excuses for not attending, any time lost is not remitted but simply extends the duration over which the sentence will run.¹¹⁵

The Department of Corrective Services, in its annual statistical publication, also groups together the categories of "sick/leave/AWOL" giving the immediate impression that they constitute one homogenous group.¹¹⁶ This is the likely basis for media reports claiming that approximately 500 periodic detainees fail to turn up each week. This adverse publicity could be avoided by the expedient of distinguishing between those in the AWOL category who are absent with cause and those who are absent without cause. If this were done for the attendance figures relating to 19 July 1992, those absent without cause would number only 117 detainees resulting in an absentee rate of 8.7% ($117 \times 100 \div 1338$), instead of the total *non-attendance* rate of 38.9% ($520 \times 100 \div 1338$).

7.3 Historical Reasons for Increased Absenteeism

The criteria for periodic detention were strict at its inception — the maximum sentence that could be served was 12 months and only those who had not served a term of imprisonment previously could qualify. Detainees can now be sentenced for up to three years and the latest statistics reveal that 36 per cent of detainees are recidivists with prior experience of full-time incarceration.¹¹⁷

It is against this background that absenteeism has increased. "Unsuitable" candidates, such as chronic alcoholics and high rate drug users, have also increased absenteeism. Some detainees now face further charges for more serious crimes and there has been evidence in the past of delays in the legal processing of detainees who have unsatisfactory attendance records.

However, as of 4 November 1991, judicial officers receive pre-sentence reports on offenders prior to determining periodic detention as an alternative to full-time imprisonment. This much-needed screening is expected to have the beneficial effect of reducing the risk of "unsuitable" candidates being included in periodic detention.

7.3.1 Incentives for Reduced Absenteeism

Given the history of problems with absenteeism in NSW Periodic Detention Centres, it may be timely to suggest that positive steps be taken to ensure that detainees are provided with *long-term* incentives to attend regularly. It has long been recognized that punishments and sanctions should be combined with positive reinforcements to achieve compliance in any aspect of the legal system¹¹⁸ — in effect, a "carrot and stick" approach. With the abolition of the old system of remissions one useful tool for eliciting the co-operation of detainees disappeared. It would be highly conducive to attendance therefore, if detainees were granted a remission of some significance, say

¹¹⁵ Subject to Nolan, at n 69.

¹¹⁶ Department of Corrective Services, *Inmate Statistics*, Research and Statistics Division, July 1992, at 30.

¹¹⁷ This includes those who had previous experience of juvenile institutions: Stathis and Gorta, *op. cit.*, at 16.

¹¹⁸ M.L. Friendland (ed.), *Sanctions and Rewards in the Legal System*, University of Toronto Press, Toronto, 1989.

one week free after every five weeks of attendance, on the condition that strict criteria are met. The first criterion would be that the detainee attends the Centre on a regular basis. Another would require a high standard of behaviour on the part of the detainee. Any breaches of discipline or absence without prior approval would result in the clock effectively being "reset" and the detainee having to wait at least another 5 weeks before becoming eligible for a weekend of authorised leave. Thus, for example, a person who is given a sentence of 3 months periodic detention would be able to earn 2 weeks off during that time. A twelve-month sentence could attract a maximum of 8 weeks off. Such a system of earned leave would be an efficient and cost-effective way of encouraging compliance with the terms of the order and be likely to result in a drastic reduction in absenteeism.

The timing in between weekends at liberty must be subject to careful consideration. If the scheme is to have any chance at successfully encouraging all detainees to attend, the period must be short enough to be a realistic and worthy goal for them to work toward. At the same time, free weekends should not occur so frequently as to dilute the sentence. It may also be desirable that any such system be a flexible one in order to ensure that it does not interfere with important education programmes and counselling sessions being run at the Centres, some of which will be discussed at 8.2.

7.4 A Statistical Analysis

The present study attempts to overcome some of the difficulties encountered by earlier researchers (see section 7.1). No comparison to another sentencing option (e.g. Community Service Orders or Imprisonment) is attempted. Instead the characteristics of those sentenced to periodic detention have been analysed. The aim of this type of analysis is to determine those most at risk of failure (and conversely those most likely to succeed). This will lead to constructive recommendations intended to minimise failure.

7.4.1 Source of the Data

The Computer Services Division of the Department of Corrective Services supplied in electronic form information regarding 3,219 receptions into periodic detention for the period 1 January, 1988 to 30 June 1991.

For each person received into periodic detention information is collected on some 20 variables. Data were requested from the Computer Services Division on 14 of these variables (including age, sex, sentence length, offence type, etc).¹¹⁹

The 3,219 receptions were separated into 3 groups, based on the information contained in the "Mode of Discharge" field. The 3 groups were labelled: Success, Failure, and Current.

Success Group. A total of 1,667 detainees had valid entries in the Mode of Discharge field which indicated that they had successfully completed their periodic detention order.¹²⁰ Further analysis resulted in 32 cases being deleted because they contained invalid discharge dates, i.e. records which showed detainees being released prior to

¹¹⁹ See Appendix A for a complete list of these variables.

¹²⁰ *ibid* for a complete list of acceptable modes of discharge.

the sentence being completed (in 2 cases the discharge date was prior to the reception/commencement date). This process left 1,635 detainees considered to have successfully completed their sentence.

Failure Group. A total of 321 detainees had valid entries in the Mode of Discharge field which indicated that they had failed to complete their periodic detention order.¹²¹ The overall failure rate of 16.4% can be calculated by dividing the number of failures (ie 321) by the sum of the number of failures and successes (ie 1956).

Current Group. A total of 1,087 records did not have an entry in the Discharge Date and Mode of Discharge fields which indicated that they were currently still serving their sentence of periodic detention.

Excluded Records. A total of 144 records had an entry in the Mode of Discharge field which indicated they should not be included in the present study.¹²²

7.4.2 Characteristics of Successful and Failed Detainees

The Success and Failure Groups were further analysed on the basis of gender. Frequencies were obtained for the age, marital status and type of offence committed for both males and females. The variable for marital status contained six different categories (never married, married but not de facto, de facto married, separated but not divorced, divorced and widowed) which were collapsed into two categories — married and unattached.

The offence types were grouped in general accordance with the 1985 Australian National Classification of Offences (ANCO), Australian Bureau of Statistics. This resulted in five categories of offence as follows:

- 1 Offences against the person (including robbery and extortion),
- 2 Offences against property (including theft and fraud),
- 3 Driving offences,
- 4 Drug offences,
- 5 Good order and other offences.

¹²¹ *ibid* for the complete list of failed modes of discharge.

¹²² *ibid* for the complete list of deleted modes of discharge.

Table 4: Males – age groups

Age	Success Freq	Failure Freq	Failure Rate (%)
Under 21	224	87	28.0
21-30	799	149	15.7
31-40	330	50	13.2
Over 40	185	9	4.6
TOTAL	1538	295	16.1

The failure rate for males in the Under 21 age range is almost double the overall failure rate (see Table 4, above). This is off-set by lower failure rates for the 31-40 and Over 40 age ranges. This suggests that the youngest offenders are most likely to fail and differs from the female population (cf. Table 7).

Table 5: Males – Marital Status (grouped)

• Missing Values Marital Status (Grouped) – SUCCESS = 659; FAILURE = 60

Marital Status	Success Freq	Failure Freq	Failure Rate (%)
Married	316	71	18.3
Unattached	563	164	22.6
TOTAL	879	235	21.1

The failure rate for the Unattached Group is slightly higher than the overall rate (see Table 5, above). A more detailed analysis of Marital Status indicates that this higher proportion is made up mainly of Never Marrieds and Separated not Divorceds. The Never Marrieds are likely to be found predominantly in the Under 21 age range category.

Table 6: Males – Offence Type

● Offences classified according to the 1985 Australian National Classification of Offences, Australian Bureau of Statistics. Offences Against the Person includes Robbery and Extortion; Offences Against Property includes offences involving Theft and Fraud (Division 3 ANCO)

● Missing Values Offence Type – SUCCESS = 1; FAILURE = 0

Offence Group	Total (%)	Success Freq	Failure Freq	Failure Rate (%)
Against Person	372 20.3%	312	60	16.1
Against Property	446 24.3%	342	104	23.3
Driving	668 36.5%	591	77	11.5
Drug	192 10.5%	172	20	10.4
Good Order	154 8.4%	120	34	22.1
Total	1832	1537	295	16.1

The failure rates are highest in Property and Good Order Offences (see Table 6, above). These types of offences are usually committed by younger male offenders.

Table 7: Females – age groups

Age	Success Freq	Failure Freq	Failure Rate (%)
Under 21	12	1	7.7
21-30	40	19	32.2
31-40	30	6	16.7
Over 40	15	0	0.0
TOTAL	97	26	21.1

Table 7 above shows that the failure rate for women in the 21-30 age range (32.2%) is significantly higher than the failure rate for all ages (21.1%). This age group is also the most likely age for having children and the larger number of women who fail may be interpreted as being due to the added responsibilities associated with parenthood. This interpretation cannot however be validated using the data from Corrective Services because information on numbers of dependent children, responsibilities for childcare etc is not collected. The failure rate for the other three age ranges is below the overall failure rate and for the Over 40 group there was a 100% success rate.

Table 8: Females – Marital Status (grouped)

• Missing Values Marital Status (Grouped) – SUCCESS = 43; FAILURE = 8

Marital Status	Success Freq	Failure Freq	Failure Rate (%)
Married	19	6	24.0
Unattached	35	12	25.5
TOTAL	54	18	25.0

There does not appear to be a difference between the marital status of the success and failure groups (see Table 8, above). However a more detailed analysis based on the six categories of marital status information showed that the failure rate for the Never Marrieds and the De facto Marrieds is well above the overall failure rate.

Table 9: Females – Offence Types

- Offences classified according to the 1985 Australian National Classification of Offences, Australian Bureau of Statistics. Offences Against the Person includes Robbery and Extortion; Offences Against Property includes offences involving Theft and Fraud (Division 3 ANCO)

Offence Group	Total (%)	Success Freq	Failure Freq	Failure Rate (%)
Against Person	14 11.4%	12	2	14.3
Against Property	64 52.0%	51	13	20.3
Driving	7 5.7%	7	0	0.0
Drug	24 19.5%	21	3	12.5
Good Order	14 11.4%	6	8	57.1
Total	123	97	26	21.1

The failure rate for Good Order Offences is almost three times the failure rate for all offences (see Table 9, above). However, care should be taken in interpreting the data because of the extremely small sample sizes in many of the categories.

7.4.3 The Overall Picture

The characteristics associated with those who fail to complete their Periodic Detention order differ for males and females.

For females, those most at risk of failure are aged 21 to 30, and have committed Good Order Offences (includes prostitution, consorting, betting etc.). Conversely, females aged over 40 who had committed driving offences had a 100% success rate (very small sample sizes involved). There may be an argument to say that these females fail because at this age they are most likely to have children, adding an obstacle to their ability to attend the Periodic Detention Centre.

For males, those most at risk of failure are aged under 21, have never been married or are separated but not divorced and have committed Property, Good Order or Other offences. These results mirror earlier findings by Dewdney.¹²³

One conclusion to be made is that males and females face different difficulties when it comes to attending periodic detention and that different courses of action need to be taken for the two groups. For example, the failure rate for women might be decreased significantly if child care facilities were available.

7.4.4 Time Served

The 1,635 successful completions were split into two groups representing the pre and the post-Sentencing Act periods. This would allow an accurate analysis of time served for each detainee by taking into account the effect of remissions for the pre-Sentencing Act offenders. Note also that in February 1990 the maximum term of periodic detention was effectively doubled from eighteen months to three years.

The discharge date and length of sentences were compared to ensure that they were valid. As a result of this process and a check of the relevant records 57 cases were re-allocated from the post to the pre-Sentencing Act period because the time served was exactly equal to two thirds of the sentence length in each case and the sentence commencement date and or reception date coincided with the introduction of the *Sentencing Act 1989*.

The time served by all successful detainees, including those who took more than twice the given sentence length to serve their sentence, was calculated as a function of the time required to serve the sentence, and graphs showing the cumulative percentage of detainees for the pre-Sentencing Act and post-Sentencing Act period were constructed. Time served was calculated taking into account the effect of remissions during the pre-Sentencing Act period by subtracting one-third of the sentence from the sentence imposed.

¹²³ M.S. Dewdney, "Periodic detention in NSW - 1973: A Statistical Report", NSW Department of Corrective Services Research and Statistics Division, Publication No 1, 1973.

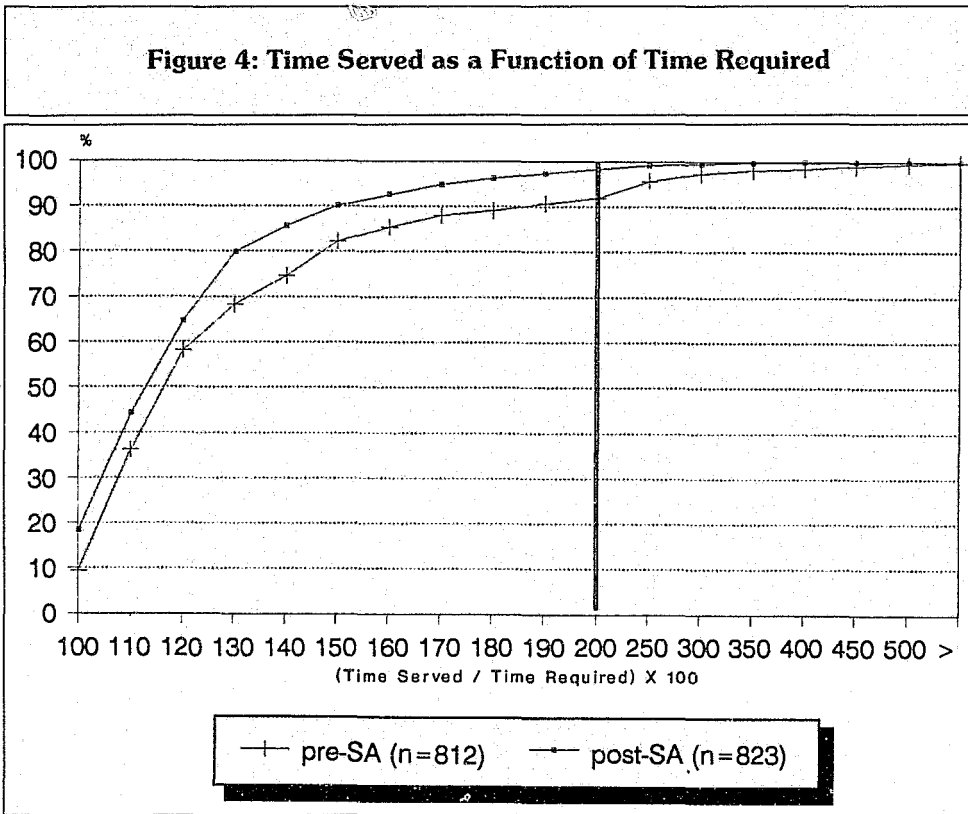


Figure 4 indicates that the post-Sentencing Act detainees are completing their sentences in shorter time than their pre-Sentencing Act counterparts.

7.4.5 ‘True’ Success – Pre- and Post-Sentencing Act

Further analysis was conducted only on those who took less than, or equal to, twice the given sentence length to complete their term. This criterion was arbitrarily selected and the resultant group was labelled ‘true’ success. If the sentence took any longer than this, it was considered an excessive period and suggested that there were such underlying problems that the detainees could be regarded as having failed.

The ‘true’ success group constituted 95.1% (or 1555 cases) of completions and those who took more than twice the given sentence length to serve their sentence 4.9% (or 80 cases) were excluded from the analysis.

The ‘true’ success group was then divided into pre-Sentencing Act cases (747) and post-Sentencing Act detainees (808).

Table 10: Pre Sentencing Act – males only

Length (months)	'True' Success	Failure Freq	Failure Rate %
<3	45	6	11.8
>3 to 6	285	45	13.6
>6 to 9	86	19	18.1
>9 to 12	108	17	13.6
>12 to 15	29	3	9.4
>15 to 18	145	27	15.7
TOTAL	698	117	14.4

Table 10 above shows that sentences longer than 6 months but not exceeding 9 months have a failure rate higher than the overall rate. The lack of variation in failure rate across the various sentence lengths may have been due to the fact that sentences were subject to remissions. The longest sentence that could be imposed was 18 months which, with remissions, could be served in 12 months. This, together with the psychological effect of the remission "carrot", might have had a positive influence on completion rates.

Table 11: Post Sentencing Act – males only

Length (months)	'True' Success	Failure Freq	Failure Rate %
<3	157	23	12.8
>3 to 6	452	75	14.2
>6 to 9	79	34	30.1
>9 to 12	47	29	38.2
>12 to 15	8	4	33.3
>15 to 18	22	9	29.0
>18	0	4	100.0
TOTAL	765	178	18.9

A reliable interpretation of these statistics is difficult because of the time period covered by the data. The Sentencing Act commenced on 25 September 1989 and the data records all receptions up to 30 June 1991, so those sentenced to longer sentences during the post-Sentencing Act period have not had the same opportunity to complete their sentences that the pre-Sentencing Act detainees have had.

Despite this problem, the data in Table 11 above clearly show that the failure rates for sentences greater than 6 months are all significantly higher than the overall rate. The overall failure rate is greater for the post-Sentencing Act period than for the pre-Sentencing Act period. These increases may be due to the loss of remissions but might also be due to such things as the administrators of periodic detention taking more frequent breach and court action because of adverse publicity during this period.

Reliable analysis of the pre-Sentencing Act female group was not possible because of the small numbers in each category.

Table 12: Post Sentencing Act – females only

Length (months)	'True' Success	Failure Freq	Failure Rate %
<3	14	5	26.3
>3 to 6	22	10	31.3
>6 to 9	3	2	40.0
>9 to 12	1	2	66.7
>12 to 15	1	0	0.0
>15 to 18	2	1	33.3
>18	0	1	100.0
TOTAL	43	21	32.8

The overall failure rate is almost double that for males. The bulk of the female failures (i.e. 21 out of 26) occurred during the post-Sentencing Act period. It appears that whatever has caused the higher failure rates during this period (e.g. loss of remissions, enhanced breach procedures etc.) has had an even greater influence on the failure rate for females.

8.0 THE REFORM POTENTIAL OF PERIODIC DETENTION

8.1 Introduction

In its final report entitled *Sentencing*, the Australian Law Reform Commission expressed the view that the main advantage of periodic detention for offenders who warranted custodial sentences was its minimal disruption to family and employment relationships.¹²⁴ Interaction with prisoners and the associated risks of "criminogenic effects" could also be reduced. It also has the advantage of being able to provide educational benefits in a number of areas, such as offering detainees programmes for the development of life skills, numeracy and literacy, work skills, involvement in the Commonwealth Employment Service "Newstart" programme for the long-term unemployed and the like.

8.2 Education

One recent initiative reveals the rehabilitative potential of just one of the programmes. The Mt Druitt College of TAFE's Adult Basic Education (ABE) introduced to periodic detainees from the Windsor Periodic Detention Centre a pilot literacy programme which ran from May 1991 until November 1991. The classes were conducted each Saturday morning at the Centre and focussed on developing the prisoners' reading and writing skills with the object of improving their future vocational opportunities.

In her evaluation of the programme, the Senior Head Teacher of ABE, Ms Liz Renshaw, recounts the progress of one student named Gregory who identified five different literacy areas for development (including effective use of a dictionary and writing business letters) and achieved all his goals. Ms Renshaw concludes that students overwhelmingly responded positively to the programme and that their family and friends had also observed marked changes in their literacy levels. Two of the students have since taken on other TAFE courses upon completing their sentences.

Despite these encouraging results the Judicial Commission has been informed that this major initiative is unlikely to continue. TAFE funded the programme in 1991 but the Superintendent at the Windsor Periodic Detention Centre Mr Robert Macintosh says the programme has been discontinued for 1992 and would not be re-introduced until funds were made available by the Department of Corrective Services. It would appear that the Department gives priority to community service work over purely educational pursuits.

It is worthy to note, however, that the Department of Corrective Services is presently running a variety of pilot education courses which are aimed at reducing recidivism, or at least making offenders reflect upon their situation. Some of the more prominent of these includes an AIDS Awareness Programme. One dealing with domestic violence issues has also been proposed. A 7-week Drug & Alcohol Program at the Long Bay centre has been successful, with 10-20 detainees attending. The counsellor involved has reported successful results and consideration is currently being given to its continuance.

¹²⁴ Australian Law Reform Commission, *Sentencing*, Report No 44, AGPS, Canberra, 1988, at 66-7.

8.3 Community Work

It is unfortunate that the press do not provide publicity for the positive results that are continuously obtained from the Periodic Detention Centre programmes. For example, a status report for the Silverwater Periodic Detention Centre, prepared by Assistant Superintendent Governor Lanham¹²⁵, provides a far more favourable view of the work and achievements of that facility. The report claims that the Centre validates its primary philosophy of providing meaningful work which has a positive effect on periodic detainees and at the same time benefits the community through bringing about attitudinal changes in detainees, as well as achieving cost savings for the community.

The report states that the Silverwater Periodic Detention Centre provided accommodation for 50 detainees on Stage I of their sentences, but at times they have had to accommodate as many as 80. A further 30 detainees are commonly on Stage II of the programme. Staff consist of the Governor and two officers. Another officer is seconded from Silverwater Work Release Programme for eight hours each Saturday and Sunday.

There are a number of projects set out in the report which are described below.

8.3.1 On-going Maintenance

Under "on-going maintenance clearing and cleaning", the report refers to the Cataract Scout Park Activity Centre, Appin, where work carried out over the years has included repair of roads, cutting of grass, site clearing, concrete pours, shed construction and the construction of the camp's chapel.

At the Scout Headquarters in Haberfield, work includes on-going construction of a 60-metre front fence and laying of paving blocks in parking areas.

Silverwater detainees also regularly maintain the Department of Community Services Shelter, they provide work teams to clean and maintain the vehicles of Karanga House — a special school for the handicapped, they maintain the grounds of police stations (at Flemington, Eastwood, Ermington, Auburn, Castle Hill, Riverwood, Fairfield and Granville) and wash police vehicles on a weekly basis. They assist in the maintenance of several other school grounds and buildings, work at the RSPCA shelter at Yagoona, and maintain or assist in maintaining church grounds as well as St John's cemetery.

8.3.2 Short Term Projects

Short term projects have included involvement in the Clean Up Australia Campaign, and the clean up of the Darling Mills Creek in North Parramatta. Following damage caused by a hail storm on 17 March 1990, detainees removed debris from a church and school at Berala, allowing them to be opened for use ahead of schedule. Other short-term projects were undertaken at: the Masonic complex, Mulawa Women's Prison, Norma Parker Centre, Corrective Services Academy, Collaroy Plateau Public

¹²⁵ W.N.G. Lanham, "Silverwater Periodic Detention Centre Status Report 1990-91", prepared for the Director General of the Department of Corrective Services, dated 18 November 1991.

School, Silverwater Works Release, State Sports Centre, and Departmental Residences.

The Silverwater Periodic Detention Centre also created a specialist group of skilled painters, who have painted:

- signs at the Norma Parker Centre
- State Board Silverwater Works Release Centre
- storage containers at the Scout jamboree
- a mural at the Flemington Police Centre Training Counselling Facility

They have re-painted:

- 1st West Epping Scout Hall (and also constructed a fence and barbecue)
- and made signs for the 1st Boronia Scout Hall at Hunters Hill
- the scout water facility at Woolwich
- Earlwood Presbyterian Church
- Hornsby Police – Citizens Youth Club

At the present time, there are also long-term, meaningful projects underway in liaison with:

- National Parks and Wildlife Service
- the Water Board
- Upper Parramatta River Catchment Trust
- Rookwood Cemetery
- schools in the Western Suburbs

8.3.3 Construction

Where detainees possess special skills, an attempt is made to take advantage of these. Thus at St. Patrick's Rugby Club, on land administered by the Strathfield Council, a team of detainees:

- laid concrete
- fixed steel and laid concrete bricks
- formed pathways
- constructed concrete retaining wall and surrounding pathways.

The council expressed its approval of the standard of work carried out by the detainees.

8.3.4 Forestation and Landscaping

Working with the Forestry Commission of New South Wales detainees carried out tasks which included forest maintenance, repotting and nursery duties and construction of a tan bark pathway to permit public access.

Detainees also maintain and mow the Moorebank Hockey Fields to the point where the Secretary of the Hockey Association has been moved to comment that the detainees have "turned these fields into the finest in the State and arguably in the country".

Finally, the Darling Mills Creek project, at North Parramatta, provides an excellent example of the benefit obtained from the work of periodic detainees. The work is being carried out in association with the Parramatta Catchment Trust, and involves reclaiming and beautifying a valuable community resource.

8.3.5 Community Projects

The preceding information is derived from the Status Report of one Periodic Detention Centre. Through the work of periodic detainees other centres may have contributed equally, some more or some less, to the community. Another illustration is the work performed by periodic detainees from Emu Plains. The Waterboard currently provides transport for three Stage II detainees who volunteer each weekend to travel to the township of Yerranderie where they carry out work renovating an historic Courthouse. All tasks are performed under the supervision of a local Ranger, while the Emu Plains Periodic Detention Centre provides stores and bedding to enable the detainees to stay for the weekend.

Female detainees from the Merinda Periodic Detention Centre do some work at children's homes and homes for the aged. From time to time they provide assistance to needy individuals who are referred by Community Aid Centres. The problems with "work" offered to the detainees at Merinda has already been discussed.

In general, the success and the benefits of each centre largely depend on the competence, imagination and leadership of the Governors who administer them. Indeed, the authors of this report have had the privilege of meeting with all the superintendents of the various periodic detention centres throughout the State and were impressed by their belief in the value of the sanction as an alternative to imprisonment and their commitment to ensuring its success. The Silverwater Periodic Detention Centre status report illustrates the enormous potential that the Periodic Detention Centre programme has for benefiting the community. The detainee also benefits, not merely from avoiding full-time imprisonment (and the negative consequences which inevitably flow from such a sanction), but also by utilising skills and in many cases imparting new ones which raise self-confidence and make some detainees better equipped to appreciate, acquire and hold down jobs.

The sanction provides a far more constructive mode of expiation for offences committed than does ordinary imprisonment because it requires detainees to donate their time, their labour and their skills for the benefit of the community at large.

9.0 CONCLUSION

Since its inception just over two decades ago periodic detention has grown to be a viable sentencing alternative to full-time imprisonment. However, it is clear that this growth has not been a smooth one, nor has periodic detention been free from controversy.

Perhaps one of the problems of periodic detention has stemmed from the fact that there has been no clear statement on the part of the legislators as to what it is intended to achieve. Indeed, those responsible in the Department of Corrective Services for administering the system have themselves, until recently, had no clear vision or sense of purpose for periodic detention. Little wonder that the courts themselves have, over the years, been ambivalent towards its use.

This ambivalence has been fuelled partly by a concern that those sentenced to periodic detention are not adequately supervised, that they either remain idle ("sit around" at the detention centre) or else participate in mundane activities which have no value either to the detainee or to the community at large. Doubtless sentencing judges have also been concerned with an image of periodic detention, promoted — often in exaggerated terms — by the news media, suggesting that attendances are not being enforced, and that periodic detention is little more than a "joke" and certainly not the severe penalty that it is intended to be.

Periodic detention, in fact, is anything but a "soft option". It calls upon individual offenders who are subject to this disposition to exercise considerable discipline and self-control by requiring them to surrender themselves each week to the authorities, and then to participate in whatever programmes are offered to them by the centre which they must attend. This may be contrasted with full-time imprisonment where the daily life of inmates is regulated and where individual initiative and the normal responsibilities associated with living in a free society are drastically curtailed.

It is fair to say that the nature and quality of periodic detention programmes will vary from centre to centre. In some cases the work options may be less than satisfactory, either from the detainee's viewpoint or from the community's perspective or from both of these, and it behoves those charged with the administration of these centres to find programmes that will provide a positive outcome for their detainees. In many cases education programmes should be offered, and vocational skills imparted in an effort to build the confidence of the offender and restore him or her as a useful member of society. That periodic detention has potential for achieving positive results has been illustrated in the preceding pages.

Sentencers, when considering the appropriateness of periodic detention, have a number of practical and theoretical considerations they must confront. They must first decide that the offence or offences in respect of which the accused has either pleaded guilty or been convicted, warrants a term of imprisonment. The appropriate term must not exceed three years of imprisonment if periodic detention is to be an option.

The length of the term of periodic detention is governed by the appropriate term of imprisonment that would have been imposed if periodic detention were not an available option. The sentencer falls into error, and net-widening occurs, if a longer term of periodic detention is imposed simply because the sentence is not to be served full-time. The view has been expressed that despite the law it is contrary to common sense that a sentence to be served by way of periodic detention should be regarded as

equivalent to a full-time custodial sentence of the same duration. Nevertheless this is an option that Parliament has made available to the criminal courts, and the exercise of this discretion can be justified on a number of grounds. This includes the application of the principle that imprisonment is a sanction of last resort. If part-time rather than full-time imprisonment can satisfy the requirements of a just sentence, then clearly the more lenient option should be selected. Leniency can be justified on the basis of: humanity; cost; the likelihood of the detainee complying with the requirements of the periodic detention order; the degree of risk to the community and the opportunity afforded to the offender to effect his or her rehabilitation. A further consideration is that periodic detention reduces the attendant risk or exposure of the detainee to bad company and avoids the counter-rehabilitative effects of institutionalisation.

If periodic detention is to continue to grow as a viable sentencing alternative to full-time imprisonment, it is important that the principles which distinguish part-time and full-time sanctions should be clearly defined. Having regard to the legislation and to the principles enunciated by the Court of Criminal Appeal, and to the other matters referred to in this report, it would seem that the following considerations should apply when an order for periodic detention is being contemplated:

1. The first question to be determined is whether a custodial sentence is warranted. (This is determined by application of common law principles of sentencing, including the principle that imprisonment is a sanction of last resort.)
2. If a sentence of imprisonment is not warranted, then the issue of periodic detention does not arise.
3. If a custodial sentence is warranted, the "alternatives to imprisonment", particularly Community Service Orders and Periodic Detention, arise for consideration.
4. If the justice of the matter can be met by the imposition of a Community Service Order, then the more costly and punitive sanctions of Periodic Detention and imprisonment should not be imposed.
5. If a Community Service Order is not sufficiently punitive and the appropriate custodial sentence is within the imprisonment range of 3 months to 3 years, the question arises as to whether the sentence should be ordered to be served by way of periodic detention.
6. The Court may not order periodic detention unless it is satisfied that accommodation is available and that travel to and from the periodic detention centre would not impose undue inconvenience, strain or hardship on the person.
7. The Court must be satisfied that the offender is a suitable person for periodic detention before it can make the order. (In order to assist it in making this decision the Court will have available to it a pre-sentence report.)

It is apparent from decisions of the Court of Criminal Appeal, that certain categories of offenders may be unsuitable for periodic detention (such as some sex offenders) because periodic detention does not afford sufficient protection to the community.

There are other cases where, despite the low risk to the community, the offence itself is so heinous that to extend periodic detention to the perpetrator of such crimes would unduly depreciate the seriousness of the offence. This may be so even though the appropriate term of imprisonment may be less than three years.

In the task of discriminating between sentences which should attract full-time imprisonment only, and those which could be satisfied by an equivalent term of periodic detention, the sentencer is faced with a fine line decision. In the end the decision may turn on the sentencer's evaluation of the moral sense of the community. If, for example, having regard to the facts of a particular case, the sentencer is of the view that a sentence of imprisonment to be served by way of periodic detention would cause considerable community disquiet or alarm if the offender were to be allowed to remain at large, then periodic detention should not be ordered.

The public acceptability of a criminal sanction must surely rest on how well it is administered. In this regard the image of periodic detention as a viable sentencing option is of prime importance. If periodic detention is seen to be an exercise of excessive leniency where detainees sit around and vegetate, where, if they fail to attend the centre in accordance with direction, little action is taken or, if taken, it is taken inexpeditiously, then sentencers using this sanction will be regarded as weakly merciful. In these circumstances the option will lose credibility and its value as an alternative to imprisonment will lose favour. On the other hand, if the option is seen as a sanction of considerable punitiveness (and hence also a deterrent of some significance) and at the same time is regarded as a humane alternative to imprisonment which can save money, provide tangible benefits to the community through the provision of meaningful and productive community service, and possibly also rehabilitate the offender, then a far more positive image of periodic detention will emerge.

The poor image of periodic detention, fostered by the media and to some extent justified by periods of maladministration, inadequate resourcing and poor breach procedures, is now being redressed. The Government seems committed to rectifying the problems which have been identified, additional resources are being made available, the backlog of breach proceedings have all but disappeared, cases are now being dealt with far more expeditiously and detainees at many of the centres are now undertaking meaningful and productive work.

The nature of periodic detention is such that there will always be a problem with absenteeism. In many ways it is the Achilles' heel of periodic detention. The general approach has been to threaten breach proceedings if detainees fail to present themselves at centres in accordance with the obligations under their sentence. The abolition of remissions, and at the same time the potential for imposing terms of periodic detention of up to three years, must increase the likelihood that a significant number of detainees will fail to complete their sentences.

The operation of a "reward" system to supplement the punitive measures for non-compliance is an important, if not essential, ingredient for ensuring that breaches are kept to a minimum and that detainees co-operate with the programmes which are offered to them over the duration of their sentences.

As the system currently operates, the primary incentive or "carrot" is that detainees who demonstrate good behaviour, satisfactory work performance, and most import-

antly, attend on a regular basis, are permitted to enter Stage II or the non-residential phase of periodic detention.

We have also seen that as periodic detention is currently administered, offenders who have a legitimate excuse for not attending upon any particular weekend will have that time added to their sentences. While there may be some debate as to whether leave entitlements are abused, (such as improperly obtaining medical certificates) the fact that detainees must make up for lost time means that they gain little from seeking such leave.

However, if it is acknowledged that periodic detention is an extremely onerous sentence, and that regular attendance demands a degree of discipline that is not always easy to achieve nor expected of offenders, then it may be that some additional incentives ought to be introduced to encourage compliance. It is proposed therefore that detainees who attend and satisfactorily comply with all the requirements of the order for five consecutive weeks should be permitted to have the sixth week off. While this involves the reintroduction of a form of remission, it is not as generous as the previous scheme of remissions. Furthermore, such a scheme would encourage greater co-operation with authorities, provide some relief to offenders and their families, and most importantly, further discourage and reduce absenteeism.

The question remains as to whether the current momentum of reform and expansion can be maintained. If it can, then the future of periodic detention is assured. If it cannot, another alternative will have to be found if those subject to periodic detention, now in the order of some 1300 detainees, are not to be added to the burgeoning prison population of New South Wales.

The sanction of periodic detention has enormous potential as an alternative to imprisonment. In reality that potential has barely been tapped. For example, on the first Sunday of March 1992 there were 1,176 persons in periodic detention centres throughout New South Wales and 6,004 in full-time imprisonment.¹²⁶ As we have seen, New Zealand has more periodic detainees than full-time prisoners, and theoretically, there is no reason to believe that a similar situation could not obtain in New South Wales. For this to occur many more periodic detention centres would have to be established. Certainly in the short term the capital cost of these would be substantial, but in the longer term it would save a great deal of money, and significant benefits could accrue through community service work performed by detainees.

The reformative and educative potential of periodic detention should not be neglected, and imaginative programmes tailored to meet the specific needs of offenders could be developed. It would be possible to develop periodic detention centres which are designed for particular classes of offenders. For example some centres could be dedicated to drink drivers and could develop programmes to meet the needs of such offenders. Similarly some centres could cater for drug addicts.

The expansion of Stage II periodic detention would help contain costs, and a parallel system of periodic detention centres (the Inmate Re-Establishment Scheme), although controversial, could be developed for carefully selected prisoners who have served the

¹²⁶ Australian Prison Trends No. 190 March 1992. Note, however, that this figure includes ACT prisoners serving sentences in NSW prisons.

greater part of their full-time gaol sentences in prison and are soon to become eligible for release on parole. Periodic detention should also be made available to juveniles.¹²⁷

Fundamentally important to this development is the prerequisite that the sanction be used only where full-time custody would have been imposed. The dangers of net-widening may best be contained by providing adequate guidelines to judicial officers as to when periodic detention should or should not be considered. The task is not becoming simpler with the introduction of yet another "alternative to imprisonment" scheme called "Intensive Community Supervision". For the sake of clarity as well as consistency in sentencing it is surely time for the Government to review the sentencing options currently available to the courts, to present them in an hierarchical order of severity, and to present criteria which will assist courts in selecting amongst the plethora of competing dispositions.

¹²⁷ M. Cozens, policy officer of the Office of Juvenile Justice published a discussion paper in April 1992 dealing with the application of periodic detention to young offenders.

APPENDIX A

(1) VARIABLES REQUESTED

The following variables were considered relevant to the present study and were requested from the Computer Services Division of the Department of Corrective Services —

- (1) Name
- (2) Date of birth
- (3) Sex
- (4) Court type (ie Local, District or Supreme/CCA)
- (5) Sentence length (in months)
- (6) Date sentence to commence
- (7) Detention Centre where order is to be served
- (8) Offence
- (9) Concurrent offences
- (10) Date of reception in detention Centre
- (11) Date of discharge
- (12) Mode of discharge
- (13) Aboriginality
- (14) Marital Status

(2) SUCCESS GROUP — DISCHARGE CODES

The following Mode of Discharge entries were considered acceptable¹²⁸ —

- (a) 130 — discharged to police (7)
- (b) 340 — released to parole (3)
- (c) 360 — released to aftercare probation (2)
- (d) 370 — aftercare probation no pps supervision (1)
- (e) 380 — enter recognizance (1)
- (f) 450 — sentence served with remission (359)
- (g) 455 — released to remission and bail (1)
- (h) 460 — sentence served without remission (6)
- (i) 465 — sentence expired (1246)
- (j) 470 — sentence expired and bail (1)
- (k) 530 — discharged whilst in transit (36)
- (l) 998 — PTC discharge prior to gaol being on-line (4)

¹²⁸ Although codes (a) to (d) do not apply to periodic detention, the relevant records contained valid entries in all other fields and are therefore included in the analysis. It has been assumed that these discharge codes were incorrectly applied.

(3) FAILURE GROUP – DISCHARGE CODES

The following Mode of discharge entries were considered to indicate failure –

- (a) 390 – section 26 discharge – PDC (52)
- (b) 520 – escaped from custody (3)
- (c) 810 – AWOL – AWOL PDC (13)
- (d) 815 – AWL – section 25 – PDC (236)
- (e) 820 – AWL – 1st instance warrant (17)

(4) EXCLUDED RECORDS

The following Mode of Discharge entries were considered to indicate that the record should be omitted –

- (a) 110 – acquitted (1)
- (b) 140 – court (result unknown) (3)
- (c) 150 – remand – bail (6)
- (d) 155 – gaol/escort for bail (2)
- (e) 210 – conviction or sentence quashed (3)
- (f) 310 – released on appeal bail (109)
- (g) 315 – appeal upheld PDC sentence imposed (4)
- (h) 510 – offender deceased during sentence (11)
- (i) 620 – release for deportation (1)
- (j) 650 – bail at court (3)
- (k) 670 – transferred to FACS (1)