Review of Community-based Sentences in New Zealand

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Executive Summary

This paper examines the development of community-based sentences in New Zealand and their use over the last two decades. The contents also include an overview of

- some previous reports which looked at the imposition of these sentences;
- the degree to which they are cost effective alternatives to imprisonment;
- some comparisons with overseas jurisdictions,
- a range of possible approaches to changing the use of community-based sentences.

The paper is intended to inform the ongoing development of policy advice in the Ministry and elsewhere in the justice sector. The key findings are:

- it is extremely difficult to achieve reductions in the costs of imprisonment through the introduction of community-based sentences;

- the financial benefits of community-based sentences are unclear because, since the Criminal Justice Act 1985,
  (i) some offenders who would previously have gone to prison have received community-based sentences, although
  (ii) some who would otherwise have received monetary penalties have received community-based sentences;

- to date, community-based sentences have not reduced recidivism. The key predictors of recidivism are gender, age, ethnicity, and criminal history, not the sentence itself;

- there are no potential reforms related to community-based sentences that could be expected to readily solve the problem of the rising prison population, or produce significant cost savings to the criminal justice system, particularly in the short term.

Introduction

The aim of this paper is to provide an overview of the use of community-based sentences in New Zealand. These are sentences provided for in Part III of the Criminal Justice Act 1985. They are sentences, other than imprisonment and monetary penalties, that are served in the community. They involve an element of supervision by the Community Probation Service.

In many jurisdictions (including New Zealand) the penalty structure for offences is uniformly stated in terms of the maximum sentence of imprisonment and/or fine that can be imposed for each offence. Community-based sanctions are described in legislation as alternatives to imprisonment and there is limited additional guidance as to their use.

On the international scene the expansion of non-custodial sanctions and community-based sentences resulted from several shifts in penal thinking from the 1960s onwards, towards the view that imprisonment should be the sentence of last resort suitable only for serious offenders who posed a threat to public safety. Some of the assumptions underlying this expansion were:
• that community-based sentences would reduce the use of incarceration and relieve prison overcrowding;
• that they were a more appropriate response to crimes of intermediate and lesser gravity;
• that the costs of corrections budgets would be reduced;
• that community-based sentences would increase the interchangeability of sanctions.

However, a report on the use of imprisonment produced by the Ministry of Justice in June 1998 pointed out that the growth in New Zealand’s prison population had occurred in spite of an increase in the number of community-based sentences created as alternatives to imprisonment. It was suggested that there were some indications that community-based sentences were not always being used as alternatives to imprisonment but as alternatives to each other or to lesser penalties such as a fine. Additionally, there was the point that when community-based sentences were used instead of custodial penalties they were imposed on offenders who would otherwise have received short terms of incarceration, and so there was relatively little impact on prison musters.

Community-based Sentences in New Zealand (including their history)

Section 2 outlines the four New Zealand community-based sentences and their development.

The sentence of periodic detention was introduced in 1962 and has undergone various changes. Currently, periodic detention can be imposed on persons aged 15 years or over who are convicted of an offence punishable by imprisonment. The maximum term is 12 months. An offender receiving this sentence is required to report to a periodic detention work centre for up to 18 hours per week. No individual period of detention can be longer than 10 hours.

Generally, the sentence involves undertaking community work outside of the centre under the supervision of assistant wardens who are part-time employees of the Department of Corrections. It is also possible for periodic detainees to be directed to attend classes or groups. A breach of periodic detention is punishable by imprisonment for up to 3 months or a fine up to a maximum of $1,000.

The sentence of community service came into effect on 1 February 1981. It was the first sentence in New Zealand in which a part of the responsibility for the supervision of an offender was given to the community. It was also the first sentence for which the consent of the offender was to be obtained before its imposition.

An offender convicted of an imprisonable offence may be sentenced to undertake community service for a period of between 20 and 200 hours. The types of service are defined in the Criminal Justice Act 1985 and the hours of work must be performed within 12 months. Any breach of community service is punishable by a fine only, up to a maximum of $500.

The sentence of supervision was introduced in 1985, to replace the sentence of probation. Supervision may be imposed on an offender convicted of any offence punishable by imprisonment. It is to be for a period between 6 months and 2 years and the standard conditions of this sentence place an offender under the ‘supervision’ of a probation officer. One example of a standard condition is the requirement for the offender to report to the designated
officer as and when required. The court can also impose additional conditions designed to reduce the likelihood of further offending. The sentence does not require the offender's consent, although consent is needed for any condition of the sentence involving a specified course of training or education.

An offender subject to supervision who breaches any condition of the sentence is liable to a fine not exceeding $500. The judge may, in addition to or instead of a fine, change the conditions of the supervision sentence.

The sentence of community programme, introduced in 1985 as the sentence of community care, is available for any offence punishable by imprisonment, provided the court, the offender and the sponsor can agree to the terms of a programme. The programme which the offender undergoes must not exceed 6 months if it is residential, or 12 months if it is non-residential. There is no offence of breach of the community programme sentence, although if the conditions of the sentence are not complied with they can be varied, or the sentence can be cancelled and a new sentence imposed.

A probation officer can apply for a review of a sentence of supervision, community service, or periodic detention where the offender has been convicted of a breach of the sentence, or if the offender fails to comply with the sentence in any way. The court may then vary the conditions of the sentence, cancel the sentence, or substitute any other sentence that could have been imposed for the original offence (which includes imprisonment).

In any one case the judge has a broad range of sentences from which to select an appropriate sentence to fit the individual circumstances of the particular offender and the offence or offences under consideration. Within the community programme and supervision sentences there are a wide range of possible terms and conditions that can be applied to offenders. This amounts to a considerable level of judicial discretion in the sentencing process. There are few legislative constraints. Although the courts themselves have indicated in broad terms, through judgements, the type of offender for whom each sentence is appropriate and how the sentences rank in terms of severity, there are no definite and precise statements as to their purposes and the circumstances in which each one is to be applied.

Previous Reviews

Section 3 comprises an overview of policy issues that emerged from previous Department of Justice reports between 1981 and 1993 that looked at community-based sentences. A number of key issues emerged that remain relevant to current practice, such as:

- the costs associated with the increase in the imposition of periodic detention after 1985. Periodic detention was the most costly community-based sentence to administer, and there were also risks of net-widening and fast-tracking offenders to imprisonment if periodic detention was being used more often in cases involving comparatively minor offences. There were potential management issues with the mixing at periodic detention centres of persons convicted of serious offences with those convicted of less serious offences.

- concerns about net-widening and rising costs in the correctional budget in respect of the increase in the imposition of community service. This was because evidence suggested that those sentenced to community service were less likely to be offenders who would otherwise
have been sentenced to imprisonment, and more likely to be those who would otherwise have received fines.

- the apparent failure of community care/programme to be fully incorporated into the New Zealand sentencing regime. The main reasons behind the low usage of the sentence seemed to be directly related to the low number of recommendations for the sentence from probation officers to the judiciary. Factors that may have influenced this low uptake included a lack of resources (including funding); the time involved in organising programmes for offenders; conflicting perceptions of sentence objectives among judges, probation officers and sponsors; and the availability of sponsors.

- the controls placed on how supervision could be used in combination with other sentences. This appeared to be the main reason why supervision was being imposed less often than its predecessor, probation, although it was being imposed on more serious offences and its use was beginning to increase.

- some confusion or at least differences of opinion among probation officers and judges about the principal purpose of each sentence and where they were positioned in terms of a sentencing hierarchy. There was a question as to whether there was a meaningful distinction between community service and periodic detention.

- suggestions that community service and community programme had not reached their full potential in respect of being sentences that could have particular relevance for Mäori offenders.

**Use of Community-based Sentences**

In 1998, a total of 37,348 imprisonable cases resulted in one or more community-based sentences being the most serious sentence imposed. (On 30 June 1998, the number of people in New Zealand serving community-based sentences was 21,442.) By way of comparison, 9,492 cases resulted in a custodial sentence that year (the average annual prison population was 4,800). 32,421 imprisonable cases resulted in a monetary penalty as the most serious sentence imposed.

Key features of the use of community-based sentences in New Zealand were:

- a substantial increase in the use of periodic detention between 1982 and 1998. In 1982 12% of all proved cases for imprisonable offences resulted in a periodic detention sentence compared to 26% in 1998. The number of offenders receiving periodic detention increased from 7,068 to 22,838 in that period. The greater use of this sentence was most notable for offences of low to moderate seriousness. However, there is also evidence that some of the increased use was due to a reduction in the use of imprisonment for certain offences since 1985, and to changes in the types of offender and offences coming before the courts, especially an increase in the number of persistent offenders.

- community service was the next most frequently imposed community-based sentence after periodic detention. Its use increased rapidly in the late 1980s and early 1990s, and the indications are that its use as an alternative to monetary penalties increased and its use as an alternative to imprisonment declined. A slight increase in the use of monetary penalties in the late 1990s has coincided with a reduced use of community service.
• initially, the sentence of supervision was not imposed as often as probation, which it had replaced in 1985. However, its use steadily increased in the 1990s until a levelling off after 1995. The overall increase in the number of offenders sentenced to supervision, especially between 1991 and 1995, can to a significant extent be explained by the rapid increase in the number of domestic and other violent cases prosecuted, combined with an increase in the use of supervision for those offences.

• the sentence of community programme has been, and continues to be, infrequently imposed. The number of cases resulting in community programmes has never exceeded 1.6% of the total imprisonable cases resulting in convictions, and in 1998 there were only 431 cases that resulted in this sentence. Māori offenders receive the sentence of community programme more frequently than non-Māori.

• the level of use of community-based sentences in New Zealand is forecast to increase a little between now and 2003 because of a predicted increase in the number of cases coming before the courts.

### Cost-effectiveness of Community-based Sentences

Section 5 looks at the difficulties determining the cost-effectiveness of the different community-based sentences. These include:

• the extent to which offenders are diverted to community-based sentences from fines or diversion rather than prison, usually called net-widening, so that, although the stated purpose of the community-based sentences is to act as an alternative to imprisonment, the end result of their use is to have relatively little impact on the number of prison sentences imposed.

• the rates of breaches and reviews of community-based sentences and of re-sentencing to more costly sentences. These involve the costs of subsequent imprisonment or alternative sentences incurred as a result of the breaches or reviews (and the associated transaction costs).

• the use of community-based sentences in combination with each other.

• the consideration that savings in the prison system will only be realised when the alternative sanctions reach a threshold of usage that enables some prisons or prison units to be closed down.

• the costs to the wider community from crimes committed while the offender is on a sentence other than a custodial one which would not have happened if the offender had been incapacitated by imprisonment.

A true cost-benefit analysis of the impact of community-based sentences would only be possible if sentences were imposed in accordance with strict guidelines. If this were the case it would be possible to determine the savings or additional costs which might result from changes to the guidelines which, for example, caused all cases of a particular offence type to result in one specific sentence rather than another. However, the range of sentencing options provided by the Criminal Justice Act 1985 deliberately maintained a high degree of judicial discretion. As a result,
any particular sentence imposed is determined on the basis of a very wide range of factors (including aggravating and mitigating circumstances) specific to the individual case rather than by, for example, offence type only. It is not possible, therefore, to assume on the basis of statistical data, what alternative sentences might have been imposed had the sentencing menu been more restricted.

**International Comparisons**

In a brief overview of the use of community sanctions in a number of overseas jurisdictions, presented in section 6, the following generalisations emerged:

- the sentences of supervision (or probation/correction orders) and community service are the most common sentences across the international jurisdictions;
- the sentence of community programme is a unique feature of the New Zealand sentencing regime;
- the sentence of periodic detention is an uncommon sentencing option (only available in New Zealand and two Australian jurisdictions, New South Wales and Australia Capital Territory);
- New Zealand has more community-based sentencing options than the other jurisdictions reviewed, with the exception of England and Wales;
- two Australian jurisdictions (Victoria and Western Australia), and England and Wales have a combination (or community-based) order, combining probation/supervision and unpaid community work;
- the majority of community-based sentencing options have significant control and monitoring regimes combined with elements of rehabilitation/reintegration. There are a minority of options that are predominately based on punitive and retributive sentencing rationales.

**Options for Change**

This section outlines a number of possible ways to address the problem of net-widening, to better match sentences with crime seriousness and with offenders’ needs, and to reduce sentence costs.

These options include:

- sentencing guidelines to influence judicial decisions in respect of community-based sentences. These could take the form of
  (i) a direction that community-based sentences are only to be imposed in circumstances where the court would otherwise have sentenced the offender to imprisonment (if community-based sentences are to be genuine alternatives to imprisonment);
  (ii) legislative presumptions concerning non-custodial sentences based on sets of offence/offending history combinations. One set would be presumed
appropriate for imprisonment, another for one type of community sanction, another for a different community sanction;

(iii) time-units of punishment which can be converted into either terms of imprisonment or community-based sentences (with terms and conditions that are given unit values).

- establishing community-based sentences in their own right, by listing them as specific penalties for particular offences, either on their own or with other penalties.

- developing types of community sentences that are designed to focus more on surveillance and control, providing for incapacitation in community settings. Overseas this has been part of a strategy for diverting offenders from prison without appearing “soft” on crime. A possible consequence is that non-prison bound offenders who are low risk and who neither require nor need this level of control are then placed on these sentences.

- greater integration of community-based sentences. An example of this is to have one community sentence which incorporates all the elements of the current orders. Another approach would be to abolish restrictions on combining community-based sentences. Both of these could involve increasing costs if judges impose many conditions or two or more sentences where before the sentences would have been more limited.

- limiting judicial authority to the choice of prison, fine, or community sentence and leaving the probation service to decide on what features—home detention, intensive supervision, training, treatment (with the offender’s consent), etc—are to be imposed as conditions.

There are arguments for and against these possibilities. Also, at present we are not able to predict the extent to which any of the above changes would impact on the direct costs of sentence administration, on net-widening, and on the treatment needs of offenders. An overriding consideration is that there is no clear statement or agreed understanding as to which sentencing purposes (just deserts, deterrence, incapacitation, rehabilitation, restitution) should apply in which circumstances and which sentences are consistent with those purposes. In practice, the range of possible circumstances will always make it difficult to be precise in this area.

Conclusions

There has been a great deal of ambiguity and variety of expectations underlying the introduction of community-based sentences. Some of these views were that:

- they represented a more humane, constructive, and cheaper alternative to short sentences of imprisonment;

- they introduced a new dimension into the penal system with an emphasis on reparation to the community;

- they were a means of bringing or keeping offenders in close touch with those members of the community most able to provide help and support, and change the outlook of the offender;
they would reduce the frequency and seriousness of the offender’s law-breaking through supervision, advising, treating, providing care, or simply by giving the offender a second chance.

In many jurisdictions (for example Australia, Canada, United States, and some European countries), non-custodial sanctions are being diversified, towards a greater range of these sanctions. This can be seen for example, in the adoption of a greater number of different non-custodial sanctions, in the increased possibilities for adding conditions to existing sanctions, and in the increased possibilities for combining different non-custodial sanctions. In some cases these reforms also involve developing more punitive non-custodial sanctions.

In New Zealand the Criminal Justice Act 1985 gave a new emphasis to community-based sentences as alternatives to imprisonment. Since 1985 there has been a very substantial increase in the use of these sentences, particularly periodic detention and community service, although there has been very low use of the community programme sentence. There has been a decrease in the relative use of imprisonment, particularly for breaches of periodic detention, for offences of low to moderate seriousness, for offenders with previous convictions, and for youth offenders, with these groups now more likely to receive the more serious community-based sentences of periodic detention and supervision than in the 1980s. But there has also been a decrease in the use of monetary penalties for imprisonable offences which can be largely attributed to the imposition of community-based sentences (especially community service), where previously a monetary penalty would have been imposed.

There are a number of concerns about community-based sentences. Perhaps the most frequently cited one is the possibility of net-widening. When it comes to determining whether community-based sentences are being used in New Zealand as alternatives to prison, the evidence is mixed. The prison population continues to rise, although it is likely to have risen more in the absence of community sentences. However, as noted above, some of these sentences have been used for offenders who would otherwise have been fined. In addition, judges have in a high proportion of cases resulting in suspended sentences of imprisonment imposed concurrent community-based sentences. There is clearly a real net-widening risk that if more community sentences become available, they will be used not for those who would otherwise go to prison, but for those who might otherwise have been dealt with by means of an alternative penalty, including a fine.

The argument that community sanctions are less costly than imprisonment is complicated because of the various costs involved. These include the immediate financial costs of administering/enforcing the sentence, and the indirect financial costs resulting from an increase or decrease in crime. There is now a considerable record of the use of community-based sentences from which to draw the lesson that it is extremely difficult to achieve sustainable savings in the prison system through their introduction. The impact on the prison population will be diminished by the fact that such sentences (when they are not net-widening) generally replace only the shorter sentences of imprisonment which are not the major driver of prison musters and so have little effect on the overall size of the prison population. Minor cuts in the number of offenders in prison at any one time will not reduce the number of prison units or the maintenance costs of prisons.

A major difficulty with community sanctions is that of establishing criteria for measuring their degree of success. The criteria could include their cost-effectiveness, the crime prevention effects (recidivism and deterrence), sentence completion rates, the extent to which they reduce the use of custodial sentences without dramatic increases in reoffending, changes in offenders’
attitude or behaviour, or community and victim satisfaction (which could relate to reparation made to the community or victim).

In respect of reconviction/recidivism rates, the available evidence indicates these are related to differences in the gender, age, and criminal histories of those receiving the sentences, rather than the sentences themselves. Overseas evaluations of intensive supervision, community service, and other intermediate sanctions have found that for offenders sentenced to such sanctions that are well-managed these rates do not differ significantly from those of comparable offenders receiving other sentences. In New Zealand, research findings also show that community-based sentences do not reduce recidivism rates once factors such as the criminal history, age and ethnicity of those receiving the sentences are taken into account.

Despite these doubts about how community-based sentences work in practice, it would be going too far to conclude that all community-based sentences are primarily a negative development. There are some other potentially positive benefits, e.g. productive work undertaken for the community by periodic detention or community service projects, and the learning of new skills by offenders. For some types of offenders, some community-based sentences under certain conditions (possibly localised) may keep them from a prison sentence both initially and in the longer-term. We are not yet in a position to state with certainty the exact (quantifiable) relationship of community-based sentences to imprisonment statistics, or to re-offending for that matter.

There are a number of possible changes to the community-based sentence framework which may better target punishment severity to crime seriousness, reduce net-widening, and save costs. However, even if the role and purpose of community-based sentences were clarified and this carried over into their imposition, administration, and enforcement, this alone could not be expected to solve the problem of the rising prison population, or produce significant cost savings to the criminal justice system (particularly in the short-term).
1. Introduction

The aim of this paper is to provide an overview of the use of community-based sentences in New Zealand. These are the sentences covered by and defined in Part III of the Criminal Justice Act 1985, although most of them existed in some manner prior to this legislation. The paper is a follow-up to the review of imprisonment produced by the Ministry of Justice in June 1998. That report pointed out that the growth in New Zealand’s prison population had occurred in spite of an increase in the use of community-based sentences that had been created as alternatives to imprisonment. It was suggested that there were some indications that community-based sentences were not always being used as alternatives to imprisonment but as alternatives to each other or to lesser penalties such as a fine. The point was also made that when community-based sentences were used instead of custodial penalties they were imposed on offenders who would otherwise have received short terms, yet the numbers of short sentence prisoners do not impact on prison musters to nearly the same extent as do the numbers of long term inmates. These issues are looked at in more detail in this review.

Since there have been significant legislative changes leading up to the current situation, this paper presents an historic look at the development of New Zealand’s community-based sentences in addition to a description of the current legal provisions. It describes trends in the imposition of these sentences by the courts, examines their cost-effectiveness, surveys the availability of community-based sentences in other jurisdictions, and looks at possible changes to the current sentencing options. The paper is intended to provide the basis for further analysis of possible law reform in this area.

The term “community-based sentences” is generally used to describe sentences other than imprisonment and monetary penalties that have conditions that are served or performed in the community. They are sentences which involve an element of supervision by the community probation service, rather than being self-regulatory or self-restrictive. They are generally set up to provide an alternative to short-term custodial sentences for offenders. Suspended sentences of imprisonment have not been included under this heading. In the United States there is the classification of intermediate punishments, although that term covers a slightly different range of sentencing options than community-based sentences, referring to all measures that lie between incarceration and what might be termed “regular probation” (which we would classify as a community-based sentence).

Community-based sentences originated in England in the 1820s with probation, whereby some judges, rather than commit an offender to imprisonment, would, if the offence, character, and personal circumstances of the offender justified it, release them into the care of relatives or employers who were held responsible for their conduct. Later, voluntary supervisors became involved and then trained officers came to undertake the work. Official recognition of probation followed in the Probation of First Offenders Act 1887 and the creation of the probation service (the National Association of Probation Officers was formed in 1912).

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2 This was the term used by Morris and Tonry (1990) in Between Prison and Probation. The terminology in that country has changed over the years. In the 1970s they were called community corrections, the assumption behind this language being that they were meant for non-violent offenders who could be rehabilitated through counselling and training. The rehabilitative assumptions were altered in the 1980s and they were viewed as alternatives to incarceration with more emphasis on supervision and monitoring (Petersen and Palumbo, 1997, p83).
Zealand passed its own First Offenders Probation Act in 1886. The Act set out the conditions of probation (which was essentially a conditional suspension of a sentence of imprisonment), the offences for which it was available (the most serious offences were excluded), and made provision for the appointment of police officers or other persons as probation officers. The offenders’ conditions were to report monthly to a probation officer, to keep the officer informed of their place of residence, to have the place and nature of their employment approved by the officer, and other special conditions the court thought appropriate.

The Offenders Probation Act 1920 extended the range of circumstances in which a person might be placed on probation by including every offence punishable by imprisonment and removing its restriction to first offenders. The Criminal Justice Act 1954 confirmed probation as a mainstream disposition of the courts. In 1962 New Zealand introduced the sentence of periodic detention, in 1981 community service came into effect, and in 1985 new legislation provided for community care (now called community programme), and the sentence of supervision was introduced to replace probation.

The expansion of non-custodial sanctions and community-based sentences resulted from several shifts in penal thinking from the 1960s onwards, towards the principle of imprisonment as the sentence of last resort. Supporting developments for this position included empirically-backed criticisms that imprisonment rarely resulted in the reform or rehabilitation of offenders, partly because of the alienating environment of prisons and the coercion involved in participation in correctional treatment programmes. It was asserted that many inmates are not deterred from future offending by their experience of imprisonment and that prisons (through their influence on the state of mind of offenders) may even result in some offenders becoming more involved in crime. Also, imprisonment increasingly came to be viewed as a degrading loss of basic freedoms in an unnatural environment. Problems such as poor physical conditions, overcrowding, rioting, and the plight of mentally disturbed inmates brought negative publicity down upon the prison system.

Partly as a result of the above factors it was argued that imprisonment was a severe punishment suitable only for serious offenders who posed a threat to public safety. It followed that efforts to individualise sentencing so that the punishment fits the offender according to the rationales of sentencing (particularly just deserts) could only work if there was a range of sentencing options, scaled in their severity, available for less serious offenders. Community sanctions could provide such a range.

Another major influence was the increasingly high capital and operating costs to the state of prisons and the rising costs of supporting the dependants of those in custody. These costs increased significantly from the late 1970s as longer prison sentences for violent offenders came to be introduced as part of governments’ law and order campaigns. The social costs of imprisonment have also gained greater recognition, not only in respect of inmates but in terms of the great personal strains placed on family and social relationships.

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4 Webb, 1982, pp159-82.
5 Morris & Tonry 1990, pp23-4; Worrall 1997, p27.
7 Ibid, pp208-9.
8 See for example the Home Office, 1988, para 1.8.
9 Petersen and Palumbo, 1997, p82.
In general, community sanctions came to be seen as a way to reduce the growth of prison accommodation and to provide a continuum of sanctions that met the just deserts concern for proportionality in punishment according to the severity of the offender’s crime.\textsuperscript{11} In terms of sentencing rationales the courts have usually justified the imposition of community-based sentences in terms of just deserts and rehabilitation.

The above developments were all discussed in this country’s Report of the Penal Policy Review Committee 1981,\textsuperscript{12} an extremely influential document in terms of the development of community-based sentences in New Zealand.

There is a great diversity of assumptions underlying the introduction of community-based sentences. The most common assumption is that they will reduce the use of incarceration and relieve prison overcrowding.\textsuperscript{13} The normal justification for the introduction of a new community-based sentence is that to some degree incarceration is being used inappropriately (in terms of just deserts) for less serious offenders, that incarceration has no beneficial behavioural impact on these offenders, and that they could be more appropriately dealt with by community-based sanctions.

The argument that community-based sentences are a more appropriate response to crimes of intermediate and lesser gravity involves a second assumption about these sentences. This is that they are less severe and intrusive punishments and so more humane than imprisonment.\textsuperscript{14} Compared to the harshness, unsuitability, and counter-productiveness of imprisonment, community-based sanctions contribute to a more humane and just penal system. This is sometimes said to be the case no matter what conditions are imposed on an offender given a sentence that involves him or her remaining in the community.\textsuperscript{15}

The third assumption about community-based sentences is that they reduce the costs of corrections budgets by reducing the costs associated with the use of imprisonment. This argument may be based on the differences in the average annual/monthly/daily per-capita cost of keeping an offender in prison and that of an offender serving a sentence in the community, or on the differences between the cost of running custodial centres and the costs of the various community sentences.

Some of the literature that discusses community-based sanctions puts forward the view that the development and implementation of these sanctions also usually assumes that there can be some interchangeability of sanctions. This supposes that a framework can be developed which identifies some custodial and non-custodial punishments of roughly comparable severity which will not result in unwarranted sentence disparities. Once the principle of general equivalence among punishments is accepted, the choice of sanction can then be guided by the intended purposes of the sentences in each individual case. This means that different sentences can be imposed according to the variety of social threats and personal conditions which characterise offenders, and the needs of society. An acceptance of the interchangeability of punishments implies an acceptance that some offenders who commit similarly serious offences and have

\textsuperscript{11} Tonry, 1996, p101.
\textsuperscript{14} Von Hirsch, 1990, p163.
similar criminal records will receive different sanctions and that one offender would receive imprisonment while another would receive a community sentence.  

When examining the implementation of community sanctions, various commentators have identified factors or components that they see as requirements for successful implementation. Three components noted by one author are:

- imprisonment must be accepted as inappropriate for a large number of offences;
- the courts must be convinced that community sanctions confer a real advantage for the offender over and above the perceived advantages of imprisonment;
- the community sanction needs to satisfy the court that the public would not be put at risk by using such a non-custodial sanction.

Another commentator has identified the following conditions which he considers must be met if there is to be increased use of community sanctions (in Canada):

- the presence of well run community sanctions;
- a policy that endorses the use of them;
- legal and administrative procedures that put community sanctions on an equal footing with imprisonment as sentencing choices;
- guidance to decision makers on the appropriate use of community sanctions.

Another requirement for the successful implementation of community sanctions is the need for the enforcement of the sanction and a serious response to any breach of the sanction. There must be a commitment to the enforcement of the sanction and adequate resources and mechanisms must be in place to deal with breaches.

In many jurisdictions (including New Zealand) the penalty structure is uniformly stated in terms of the maximum sentence of imprisonment and/or fine that can be imposed for each offence. Other sanctions then tend to be viewed as alternatives. The consequence of this is that imprisonment is viewed as the pivotal sanction with all other dispositions falling short of total loss of liberty and therefore considered as forms of leniency. It is often suggested that community sentences should not be viewed as alternatives to imprisonment but as sanctions in their own right. More specifically, they should be sanctions that are designated in legislation as appropriate for certain kinds of cases (particularly for the more common offences for which a sizeable number of offenders are currently imprisoned). In other words they should not be add-ons to the system, but should be the presumptive sentence for many offences.

In New Zealand there is limited legislative guidance as to the courts’ use of community-based sentences. The provisions in the Criminal Justice Act 1985 relating to the individual community-based sentences state that each one is available to the court where an offender is convicted of an offence punishable by imprisonment (and in the cases of community service and community

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programme the offender must also consent to the sentence). This of course is a wider criterion than specifying that community-based sentences shall only be imposed in lieu of a sentence of imprisonment that would otherwise have been imposed. There are also some general sentencing provisions in the Act regarding the use of non-custodial sanctions. These are sections 5, 6 and 7 which:

- emphasise the use of imprisonment for violent offenders;
- provide a presumption against imprisonment for property offences punishable by imprisonment of 7 years or less;
- state that the courts are to have regard to the desirability of keeping offenders in the community so far as that is practicable and consonant with promoting the safety of the community.

These directions say virtually nothing about community-based sentences per se and do not indicate which community-based sentence should be imposed in which circumstances, the severity ranking (if there is one) of those sentences, or how the particular length of a community-based sentence is to be determined. This is despite the fact that there is a significant difference for an offender (and for the justice system in terms of administration and cost) between a sentence of 50 hours community service and one of 6 months periodic detention.

The following chapters show that:

- sentencing practices in respect of community-based sentences have changed over the last decade;
- the introduction of an expanded range of community-based sentences has not had the impact on the prison population that was hoped for;
- there have been mixed results generally with community-based sentences (with some reduction in the use of imprisonment but also an increased use of community-based sentences for offences of relatively low seriousness).
2. Community-based Sentences in New Zealand

There are currently four community-based sentences in New Zealand, set out in the Criminal Justice Act 1985:

- periodic detention (ss37-45);
- community service (ss29-36);
- supervision (ss46-52); and
- community programme (ss53-57).

These sentences can be imposed by the District or High Court but not the Youth Court. However, young offenders aged 15 to 16 years can be transferred from the Youth Court to the District Court for sentencing where the Youth Court has entered a conviction. The sentences of community service and periodic detention preceded the Criminal Justice Act 1985. Prior to 1985 New Zealand also had the disposition of probation in the Criminal Justice Act 1954, and community programme was originally named community care when it was introduced in 1985.

Probation

Under the Criminal Justice Act 1954, an offender convicted of an imprisonable offence could, instead of receiving a sentence of imprisonment, be released on probation for a period of at least 1 year and no more than 3 years (s6). The offender was placed under the supervision of a probation officer. The offender's consent was not required. Release on probation was, strictly speaking, an order of the court rather than a sentence. Probation could be combined with a fine, a disqualification from driving order, or a motor vehicle confiscation order (s6(2)). Certain statutory conditions applied in all cases, and the court could impose a wide range of additional conditions, to ensure appropriate supervision by the probation service and guidance and assistance to the offender.

The statutory conditions (s7) were that the offender was to report regularly to the probation officer, to have his or her place of residence and his or her employment approved by the probation officer, to notify the officer of any change of address, to comply with any direction of the officer requiring him or her not to associate with any particular person, or persons of a specified class, and to “be of good behaviour and commit no offence against the law”. The additional conditions to be imposed at the court’s discretion included paying prosecution costs, damages or compensation to the victim, applying for a prohibition order, abstaining from the use of alcohol or drugs, not owning or possessing any specified article (e.g. a car), undergoing a

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21 Although not strictly speaking a community-based sentence, home detention, to the extent that it may involve serving almost all of a term of imprisonment in the community, is very close to being an addition to this number.

23 A period of probation could also be imposed to follow release from a sentence of imprisonment of less than 1 year and for sentences of 4 years or more. In general, in the case of finite sentences of imprisonment of more than one year, the offender on release was on probation for the unexpired term of the sentence.

25 A prohibition order prohibited the supply of liquor to a particular individual by licensed premises. Under the Sale of Liquor Act 1962 there was provision for a person to apply in writing to a court for the issue of a prohibition order against himself for any period up to one year.
specified course of training or education, additional conditions relating to residence, employment, or earnings, and any conditions the court thought necessary for ensuring good conduct or for preventing offending (s8). The probation officer could apply to the court for the remission, suspension, or variation of an additional condition, for the imposition of a new condition or an extension of the term of probation where that was originally less than 3 years, or for a discharge of the probationer (s9).

A breach of any of the conditions of probation was punishable with imprisonment (a maximum term of 3 months) or a fine (s10). The court could also then sentence the probationer for the original offence (s11). Treatment centres to give probationers specialist medical and psychological assistance came into existence from 1968. In 1979/80 over 70% of offenders released on probation were aged 20 years or less. The Criminal Justice Act 1954, and with it the probation order, were repealed by the Criminal Justice Act 1985.

Periodic detention

Periodic detention was first introduced in 1962 in an amendment to the Criminal Justice Act 1954, as a residential measure available for young people aged 15 to 20 years who were convicted of an offence punishable by imprisonment, or liable to be committed to prison for failure to pay a fine imposed by a Magistrate’s Court. It was to be for a maximum term of 12 months. The Act allowed a fair amount of discretion in fixing the times and frequency of attendance at a periodic detention centre, although the sentence usually involved residence at a work centre from Friday evening (7 p.m.) to Sunday morning (11 am), and attendance at the centre for 2 to 4 hours on one evening during the week, for a programme of work and activities under the supervision of resident wardens. It was not available if the offender had previously been sentenced to detention in a detention centre or to borstal training, or incurred a custodial sentence of 1 month or more. Both a probation report and a medical report were required before the sentence could be imposed. A term of probation for up to one year could be ordered to follow periodic detention.

While at the work centre the detainees were to participate in such activities, classes, or groups, or undergo such instruction as the warden considered conducive to that person’s reformation and training. It was intended that much of the work would be done around the centre itself, maintaining the grounds and the buildings, but that offenders would also be involved on outside community work projects to help them develop some sense of obligation to the rest of the community.

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27 The Amendment Act did stipulate that the reporting times and attendance periods were to “avoid interference, so far as practicable, with [the detainee’s] attendance at any educational institution or his work or his genuine religious observances” (s16(6)).
28 Department of Justice, 1973, p7.
29 Under the original 1954 Criminal Justice Act an offender could be sentenced to imprisonment or, if aged under 21 and not less than 17 (or between 15 and 16 in special circumstances), to a term of borstal training in a borstal institution for up to 3 years (reduced to 2 years in 1962). Borstal training was a semi-indeterminate sentence with release being determined by a Borstal Parole Board within the maximum period of 2 years. The institutions (and the sentence) were named after the place in England where such an institution was first established. The emphasis was on reformatory training. The non-custodial sentences at that time were probation and a fine. In 1961 the sentence of detention centre training for 16 to 21 year old males became available. It was a sentence involving detention in an institution for a term of 3 months (which could be remitted by up to 1 month) and was to provide a “short, sharp shock” through a programme of military discipline. Borstal training and detention in a detention centre were abolished in 1975. Probation existed until 1985. See Webb, 1982, pp48-57.
The Minister of Justice described it as being a new type of sentence which would “provide a useful method of dealing with young louts, vandals and the like who may be headed towards a criminal career if not diverted at an early age.” It was intended to fill a gap between the custodial sentences of imprisonment, borstal training, and detention in a detention centre and the alternative non-custodial penalties of a fine or probation. There was some similarity with the attendance centre provisions in the United Kingdom. To begin with, those receiving the sentence were youths whose offences were mainly disorderly behaviour, assault, wilful damage, and fighting, these offenders being the intended target of the legislation as stated by the Minister of Justice. By 1966 there were 4 work centres, for males only. From then on the sentence was subject to numerous modifications.

In 1966 periodic detention became available as a sentence for anybody over 15, and non-residential work centres, involving work in the community on Saturdays, were established for adults. Later, non-residential centres became available for youths, and the distinction between residential and non-residential centres was formalised in legislation in 1975. In some areas non-residential detainees were also required to attend evening programmes (which did not involve manual work) once a week (usually Wednesday) although this never became widespread. In 1974 the first centre for female offenders was opened. Residential periodic detention remained for 15 to 20-year-olds but began to be phased out once it became possible for younger offenders to be sent to non-residential centres. In the 1980 Annual Report of the Department of Justice it was announced that the remaining residential centres would be closed down progressively over the next 5 years. Along with the removal of the upper age limit for those on whom the sentence could be imposed, the 1966 amendments limited the group of offenders excluded from the sentence (i.e. those who had served a previous institutional sentence) to those under 21, and permitted the offender to be placed on probation concurrently with, and not merely subsequently to, periodic detention, although the probation period could still continue for up to one year after the end of the periodic detention. By this time the sentence was being imposed for a greater variety of offences, including burglary and car conversion. The 1975 amendment further reduced the application of the exclusion category to those required to attend at residential centres only. In 1976 provision was made for reporting centres to supplement work centres and the prior requirement for a medical report to be considered by the court was removed (unless the offender requested it).

In the Department of Justice Annual Report for 1974-75 the Secretary stated that:

The sentence was meant for offenders who would otherwise have been sent to prison, and one of its principal objects was to help keep offenders in the community whenever possible. On any Saturday we now have throughout New Zealand over 1200 offenders working in the community as periodic detainees. But many, probably most, of these would not have gone to prison in any event, and would previously have been fined or sentenced to probation. So the sentence is not

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31 Ibid, p1848.
32 The Minister of Justice stated that there were two types of adult offenders in particular for whom periodic detention would be suitable, which justified the raising of the age. These were maintenance defaulters, the majority of whom were “inadequate or feckless rather than deliberate evaders of their obligations”, and some categories of drunken drivers “who are not in any way criminals in the normal sense of that word, yet who undoubtedly need very firm measures against them.” (NZPD vol. 348, 1966, p2687)
33 1975 was also the year in which an amendment to the Criminal Justice Act 1954 abolished both the sentence of detention in a detention centre and borstal training. The Amendment Act also included provisions which introduced corrective training, although these did not come into force until 1981.
being used principally for those for whom it was intended, namely those who would otherwise have gone to prison.35

Periodic detention in its present form in the Criminal Justice Act 1985 is similar to the non-residential periodic detention introduced in 1966 (without the additional Wednesday evening requirement). As recommended in the Penal Policy Review Committee report the 1985 Act largely repeated the provisions in the 1954 Act. The provision which authorised an offender to request a medical examination before a sentence of periodic detention was imposed was deleted. Periodic detention may be imposed upon any offender over the age of 15 who is convicted of an offence punishable by imprisonment. It is for a maximum term of 12 months. The sentence requires the offender to attend a specific periodic detention work centre for up to 18 hours per week for the duration of the sentence, except for public holidays. No individual period of detention can be longer than 10 hours. The centre must be within reasonable distance of the offender’s place of residence. Generally the sentence involves reporting on Saturday to undertake community work, between 8 a.m. and 5 p.m., outside of the centre under the supervision of assistant wardens who are part-time employees of the Department of Corrections, although sometimes the court has specified a shorter day because of an offender’s particular circumstances. In recent years many centres have begun to provide work during the week, to the extent that about half the total periodic detention muster now reports on a weekday. It is also possible for periodic detainees to be directed to attend classes or groups. There are currently 60 periodic detention centres in New Zealand. The detainee is under the legal custody of the warden of the centre during the reporting period (s42).

The community work arranged for the offender must be undertaken:

- at a hospital or educational institution, or at or for the benefit of a charitable institution or organisation; or
- at the home of an old, infirm, or handicapped person or at an institution for such persons; or
- on land owned, leased, occupied, or administered by the Crown or any public body (s60 (2)).

The work undertaken by detainees cannot include tasks normally performed by regular employees of the above organisations (s60(3)) and offenders are not entitled to any remuneration in respect of the work they carry out (s61). There is provision for a limited degree of flexibility in reporting times and days of attendance (s40(2)-(4)) and wardens have a certain amount of discretion to excuse attendance at certain times and may allow a 1 week break after a period of 3 months has been served (s41).

For breaches of periodic detention an offender is liable to a maximum term of imprisonment of 3 months or a maximum fine of $1,000 (s45).

In 1982 the Penal Policy Review Committee summarised the objectives of periodic detention as follows:

It is for those offences where a moderate punitive sanction is indicated, together with some degree of deterrence and denunciation. It also involves the concept of reparation to the community at large and is relatively cheap to administer. [I]t may come to be accepted as an

appropriate penalty for most property offences, especially when used in conjunction with reparation or restitution to the victim. It has little incapacitative effect.36

The courts have generally regarded periodic detention as the most severe sentence available short of a custodial one (see for example R v Tevaga [1991] 1 NZLR 296, 297). In Wijlens v Police ((HC, Auckland AP, 20 June 1994, 17 TCL 39/10) the court stated that:

Considered in its wider context, it is clear that periodic detention was intended as a halfway house between full imprisonment on the one hand and some of the more liberal community-based sentences on the other. Periodic detention still retains a strong punitive element with intermittent confinement and a constant reminder to persons serving the sentence that they have offended against the community and have a debt to repay.37

The Criminal Justice Act 1954 provided for Periodic Detention Work Centre Advisory Committees chaired by magistrates. The other committee members were representatives from the Federation of Labour, the legal profession, the churches, Police, Department of Social Welfare, and the Probation Service. The committees provided advice about staff appointments, the work programmes to be carried out by detainees, and matters of general policy. These committees were the forerunners of the Criminal Justice Advisory Councils established under section 134 of the Criminal Justice Act 1985, which had a far broader range of functions relating to facilities and activities for all offenders serving custodial or community-based sentences. These Councils were abolished in 1993.

The inclusion of rehabilitative programmes into periodic detention is currently being piloted or under development in three areas: a violence prevention programme for Māori offenders in South Auckland; a “Straight Thinking” programme38 in Hamilton; and a programme targeting offenders with driving offences in Christchurch.39

**Community service**

In 1980 an amendment to the Criminal Justice Act 1954 was passed, establishing the sentence of community service. It came into effect on 1 February 1981. The introduction of this sentence had been promised in the Government’s 1978 election manifesto and according to the Minister of Justice’s speech when introducing the legislation in Parliament in 1979, it was in response to “a growing body of opinion that felt that in some instances it is appropriate to exact some form of community service from an offender”.40 It also set out to replace a practice of doubtful legality under which the courts sometimes made community work a condition of probation.41 It

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36 Penal Policy Review Committee, p111. The committee also recommended that the standard practice of periodic detention centres include not only attendance to work for an 8 hour day but also one evening a week in other activities which may benefit offenders (p110). This was not implemented.
37 Hall D/503.
38 A programme based on a cognitive behavioural therapy model which teaches offenders problem-solving skills.
41 Since there were many smaller towns without the facilities to allow a sentence of periodic detention to be imposed, a practice had developed in the courts of placing an offender in such places on probation and ordering, as one of the probation conditions, that the offender do a certain number of hours of community work on some project being carried out by a social service group or organisation. In 1980 around 600 sentences of probation included such a condition. Often the sentence of probation was used simply as a mechanism to impose some kind of community service, with the sentence then being cancelled once the required number of hours of community work had been completed (Report of the Department of Justice to the Statutes Revision Committee on the Criminal Justice Amendment Bill (No 2), 29/4/80). The 1980 legislation creating community service also expressly excluded
was acknowledged that it was similar to an order that already existed in the United Kingdom (since 1972). Community service was distinguished from periodic detention in two respects. Unlike periodic detention, an offender sentenced to community service would not be in the custody, or under the supervision, of a statutory officer, and there was no element of probation involved as there could be with periodic detention. The offender would be free from controls other than those related to carrying out the community service.\(^{42}\) This was essentially saying that community service had less supervision and regulation than periodic detention. It was argued that in appropriate circumstances it could instil in an offender a greater sense of community responsibility.\(^{43}\)

This was the first sentence in New Zealand in which a part of the responsibility for the supervision of an offender was given to people within the community and the only sentence for which the consent of the offender was to be obtained before its imposition. Under this sentence an offender convicted of an imprisonable offence may be sentenced to undertake community service for a period of between 20 and 200 hours. In addition to being satisfied that the sentence is appropriate having regard to the offender's character and personal history and any other relevant circumstances, and that the offender understands the purpose and effect of the sentence and consents to it, the courts must also be satisfied that suitable service is available (s31). There is no requirement that the court consider a pre-sentence report before imposing sentence, although most judges insist on a written community service assessment covering the requirements of the sentence.\(^{44}\) When the 1980 Amendment Act was passed the court was able to impose probation concurrently with community service, but only “if in the special circumstances of the case, the court is satisfied that the offender requires supervision” (s3(2)(b)). This particular provision was not carried over into the 1985 Act.

The hours of work must be performed within 12 months. Within that limitation, the nature of the work and the times at which it is performed are determined by agreement between the offender and the community agency for which the work is done, subject to the approval of the supervising probation officer.

The work must be undertaken:

- at or for a hospital, or at or for a charitable, educational, recreational, or cultural institution or organisation; or
- at or for an institution or organisation for old, infirm, or handicapped persons; or
- on land owned or administered by the Crown or any public body. (s60(1)).

As with periodic detention, those serving a sentence of community service are not to undertake tasks normally performed by regular employees of the above organisations (s60(3)) and offenders are not entitled to any remuneration in respect of the work they carry out (s61).

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\(^{42}\) NZPD, op cit, p4153. At the committee stage of the legislation the main discussion was over whether there was sufficient difference between periodic detention and community service to justify the introduction of the latter as a new sentence. The question was raised whether a preferred alternative would be to amend the existing periodic detention scheme. To further emphasise that there was a distinction the statutes revision committee recommended changes to the original Bill so that the consent of the offender would be required and the minimum sentence time would be reduced from 20 to 8 hours to more clearly define the sentence as being at the lighter end of the sentencing scale. (The minimum was subsequently increased to 20 hours in the Criminal Justice Act 1985.)

\(^{43}\) Ibid, p4155.

\(^{44}\) Information provided by Department of Corrections.
A breach of community service is punishable by a fine only, up to a maximum of $500 (s36).

The Penal Policy Review Committee stated that:

Community service orders constitute a less punitive sentence than periodic detention appropriate to those offences or offenders for whom the latter sentence is not indicated, but who require the impact of personal effort, and the interference with personal liberty which it entails. We see it as having less of a deterrent and denunciatory content than periodic detention, although these elements are present. It has a content of general reparation to the community and in some instances may benefit the victim. It costs little to administer and is also inexpensive in terms of human and social cost. It is flexible and can take advantage of the benefits offered by diverse cultural and ethnic groups. Because of the offender’s direct involvement with community agencies, he or she may be influenced by the good example and work, involving a rehabilitative element in the sentence in some cases. It has no incapacitative effect.45

The courts have viewed community service as ranking below periodic detention in severity, and as particularly appropriate where the gravity of the offence and the public interest do not require a custodial sentence or a sentence of periodic detention, and where there is either no apparent need for continuing supervision by a probation officer, or community service is regarded in the circumstances as having particular rehabilitative value (R v Sajiti [1989] 3 NZLR 53).

Hall’s assessment is that:

The nature of the sentence is such that the criteria for determining the suitability of the sentence arise from the person of the offender and his or her circumstances, with rather less emphasis on the seriousness of the offending. It would appear to be an inappropriate sentence for the aggressive anti-authoritarian individual, or the inadequate excessively dependent person. There must be a measure of motivation and active consent. The sentence is also appropriate in cases where the offender lacks the means to pay a fine.46

**Supervision and community programme**

These two sentences were introduced in the 1985 Criminal Justice Act (with community programme then called community care). They replaced the probation order as provided in the Criminal Justice Act 1954. The two sentences were the result of the report of the 1981 Penal Policy Review Committee. Two of the terms of reference for the committee were to consider the means by which the incidence of imprisonment could be reduced, and to investigate means of increasing the availability of sanctions that kept the offender in the community.47 The Committee believed that the community service order and periodic detention should be retained, but that the current probation order should be replaced by 3 new orders:

- A supervision order which was described as a “penal sanction involving surveillance and control of the offender in the community”. It would closely resemble the probation order in terms of the restrictions and conditions that could be imposed with it and would not require the offender’s consent. The suggested maximum length of the order was 2 years. It would be appropriate for offenders at risk in the community because of their lifestyle or associates and for whom no community-based programme was appropriate or available. It could also be used to ensure the payment of fines or reparation.

45 Penal Policy Review Committee, p112.
46 Hall D/469.
• A treatment order which was described as applicable to those “whom the court feels are in need of medical or similar treatment for an addiction or other problem not warranting formal committal”. The offender’s consent to undergo treatment would be sought and sentence would be deferred pending the outcome. Progress would be monitored by a supervisor of offenders (which was the proposed new name for a probation officer) and in the event of the course of treatment not being completed the offender would be brought back to court to be dealt with on the original offence, or discharged. No maximum length for the order was suggested.

• A community care order described as a means to place the offender “in the care or supervision of an approved person or agency in the community in accordance with a programme developed in conjunction with them by a supervisor of offenders and recommended to the court”. The principal aim of this order would be “to put an offender into a community environment where he will be subject to influences and examples expected to have a beneficial and supportive effect”. The offender’s consent to attend such a programme would be sought. As with the treatment order, sentence would be deferred while the programme was being completed. No maximum length for the order was suggested.\(^{48}\)

These new measures (in particular the “community care order”) represented, in the view of the committee, a further decentralisation of the justice system into the community. They showed an increasing commitment to the idea that anti-social conduct could not be remedied by isolating the offender from society and that, frequently, anti-social or criminal behaviour reflected social pressures brought to bear on, and sometimes aggravating, the personal circumstances of individuals.\(^{49}\) The trend to community-based measures can also be seen as reflecting concern over the financial cost of imprisonment. The probation service was to have a central management role in these new measures and new responsibilities for matching offenders with programmes.

It is often claimed that the Penal Policy Review Committee provided the framework for the Criminal Justice Act 1985. There are good grounds for saying this, although the Act did not follow all the recommendations of the Committee’s report.\(^{50}\)

The Minister of Justice in his introduction of the Criminal Justice Bill in 1983 stated that:

> there have been [in the last 30 years] profound changes in social conditions and outlooks. In particular, there has been a lamentable increase in serious violence, including rape and other serious offending. We have become—and rightly so—much more concerned about the interests of the victims of crime. Again, if we expect offenders to live a law-abiding life we appreciate the need for much greater community involvement in dealing with offenders.

> ………The objectives of the Bill are dominated not just by thoughts of reforming those who break the law but also by the need to protect the community from violent offenders, and to establish a more cost-effective criminal justice system with an increased emphasis on community participation and decision making, and with compensation as an effective sanction of first resort.\(^{51}\)

\(^{48}\) Ibid, paras 319-323.
\(^{49}\) Ibid, paras 93,120, 174.
\(^{50}\) For example, the recommendations that parole be restricted to indeterminate sentences and that preventive detention be abolished.
The Minister's introductory speech also stated that the Bill will allow the courts to impose sentences more relevant to the 1980s and it will allow administrators to use those sentences as vehicles for programmes that will relate to the sources of reoffending.\(^{52}\)

The Bill (Criminal Justice Bill (No 1)) was referred to the Statutes Revision Committee which studied it over the 1983-84 recess, receiving about 40 submissions. The main issues had been considered but the legislation lapsed when parliament was dissolved on 14 June 1984. The Criminal Justice Bill (No 2) was introduced later in the year by the Minister of Justice in the new Government. This Bill was based on the earlier Bill but also took into account the submissions on the No 1 Bill. The No 2 Bill attracted approximately 30 submissions in its select committee stage.

In accordance with the views of successive Governments, the Criminal Justice Act, as it became, contained 4 important sentencing principles in sections 5 to 7:

- offenders convicted of an offence punishable by 5 or more years imprisonment who used serious violence in committing the offence were to be imprisoned unless there were special circumstances;
- in determining the length of imprisonment for such a case the court was to have regard to the need to protect the public;
- offenders convicted of property offences punishable by imprisonment for a term of 7 years or less were not to be imprisoned except in special circumstances;
- When considering sentence the courts were to have regard to the desirability of keeping offenders in the community so far as is practicable and consonant with promoting public safety, and when imposing imprisonment were to make the term as short as those concerns permitted.

The Act introduced a twin-track policy of sentencing – dealing severely by way of imprisonment with people who commit serious offences involving violent or dangerous behaviour, and lowering the level of penal response to those who commit less serious offences, particularly property offences. However, the central directions of the Act, outlined above, were essentially confined to whether a custodial sentence should be imposed or not and did not give much direction about which community-based sentence should be imposed in which circumstances, and the relevant severity of each type of sentence, or indeed what their different aims might be. This is despite the fact that there is a great deal of difference to an offender and to society between a sentence of 9 months of periodic detention and one of 40 hours of community service or 4 months on a community programme.\(^{53}\)

The Act (which came into force on 1 October 1985) abolished probation and introduced the 2 new community-based sentences (rather than orders) of supervision and community care. Supervision was very much as recommended by the PPRC. It had similarities with the probation order but with much of the previous rehabilitative framework stripped from it so that it was more of a surveillance mechanism. The name change was designed to emphasise the penal

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\(^{52}\) Ibid, p4792.

character of the sentence.  Community care aimed to combine the two recommendations for a treatment order and a community care order. In submissions on the Criminal Justice Bills (Nos. 1 and 2) Messrs Young and Cameron expressed their confusion about the nature and purpose of community care and their view that community care should be an additional condition of supervision. The Department of Justice viewed it as distinct because community care required the offender’s consent and was more broadly defined, and less structured and control-orientated, than supervision. It placed more emphasis on developing relevant programmes for offenders.

**Supervision**

When it was introduced in 1985, supervision differed from the previous order of probation in some important respects. Unlike probation, supervision could not be imposed in conjunction with a custodial sentence or any other community-based sentence except periodic detention. Also, there was no provision in relation to supervision similar to that under the previous Act which allowed the payment of damages for injury, compensation for loss suffered through the offence, or court costs to be made a condition of probation. There was also provision under the 1954 Act for payments to be made within such period and by such instalments as might from time to time be directed by the probation officer. This allowed offenders to be prosecuted for a breach of probation if such payments were not made. Under the Criminal Justice Act 1985 it became possible to impose reparation, or compensation (as part of a fine), or court costs on an offender in addition to supervision, but these are separate penalties and cannot be formally linked as conditions of a supervision sentence. Another difference is that the minimum term of supervision is 6 months, compared with 1 year for probation.

The sentence of supervision may be imposed on an offender convicted of any offence punishable by imprisonment. The sentence is to be for a period between 6 months and 2 years and does not require the offender’s consent (s46) unless the court imposes a condition that the offender undertakes a specified course of training or education. The standard conditions of the sentence are broadly similar to those that applied under the 1954 Act when an offender was released on probation. They place an offender under the supervision of a probation officer, which entails reporting to a designated officer as and when required to do so (usually once a week in the initial stages and rarely less frequently than once a month), and obeying any directives from the officer which prohibit residence at a particular address, specified employment, or association with specified persons. The offender is required to notify the probation officer of where they live and work and any related changes (s49).

In addition to the standard conditions, the court can impose additional conditions such as:

- requiring the offender to undertake a specified course of education or training designed to improve work skills or social skills (a condition which requires the offender’s consent);
- conditions relating to the offender’s place of residence, finances, or earnings;
- any other conditions to reduce the likelihood of further offending that the court thinks fit. (s50)

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54 Report of Department of Justice to Statutes Revision Committee on Criminal Justice Bill (No 1) 1983, 1 June 1984, p18.
55 Ibid, pp19-20; and Report of Department of Justice to Statutes Revision Committee on Criminal Justice Bill (No 2), 22 April 1985.
There are no clear guidelines as to what the limits on “other conditions” may be. Under section 51 an offender (or any probation officer) may apply to the court for the remission, suspension, or variation of any conditions imposed by the court.

The courts have usually considered supervision to be appropriate for offenders who warrant some degree of supervision and control but whose offences are not serious enough to warrant periodic detention or a fully custodial sentence. In a case involving sexual offending (R v Accused (CA406/92) [1994] 3 NZLR 157) the Court of Appeal stated that:

In any case where continued therapeutic counselling is desirable, if there is to be any departure from the approach of imprisonment the most likely possibility is a sentence of supervision of up to 2 years, on conditions, under s 46. The supervision of a probation officer is then involved, as is not the case with sentences of community care.

Department of Justice Guidelines for Probation Officers issued shortly after the Criminal Justice Act 1985 came into force stated that community care, community service, and reparation should be perceived as community-based options of first resort, and where an offender is unable or unlikely to comply with the conditions of these sentences or does not consent to their imposition, then periodic detention and supervision can take the role of back-up community-based sentences.

An offender who is subject to a sentence of supervision and who contravenes or fails to comply with any condition of the sentence commits an offence and is liable to a fine not exceeding $500 (s52(1)). There is not the option of imprisonment which was available for breach of probation under the Criminal Justice Act 1954. The judge may, in addition to or instead of sentencing the offender for that offence, do either or both of the following:

- vary any condition of the sentence;
- impose any additional condition (s52(2)).

Although a breach of the supervision sentence by itself does not warrant imprisonment, a probation officer can apply for a review of the sentence where the offender has been convicted of a breach under section 52. The court may then, having regard to a number of considerations, remit, suspend, or vary any conditions of the sentence, or impose any additional condition, cancel the sentence, or substitute any other sentence that could have been imposed for the original offence (which includes imprisonment) (ss64-66).

**Community programme**

The sentence of community programme (termed community care until 1 September 1993) is available for any offence punishable by imprisonment, provided the offender consents. It requires the offender to undergo a programme, which if it is residential must not exceed 6 months and if it is non-residential must not exceed 12 months (s53(1)-(2)). A programme is defined as:

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56 Adams on Criminal Law, ch 3.2.03.
57 Hall D/553.
58 Guidelines for Probation Officers, Department of Justice, (undated), p4.
59 The Penal Policy Review Committee had recommended the same penalties that applied to breach of probation should apply to breach of supervision (para 319).
• attendance on some form of continuing basis at one or more medical, social, therapeutic, educational, or rehabilitative amenities;
• placement within such programmes as Maatua Whangai; 60
• placement in the care of members of an appropriate ethnic group, such as a tribe (iwi), a subtribe (hapu), an extended family (whanau), or marae, or in the care of any particular member or members of any such group, such as an elder (kaumatua);
• placement in the care of members of an appropriate religious group, such as a church or religious order, or in the care of any particular member or members of any such group;
• placement in the care of any other person or persons or of any agency (s2).

The inclusion in the above definition of Māori terms and concepts and a wide range of options within Māori social structures indicates that the sentence was viewed by the legislature as being particularly appropriate for young Māori offenders who may not respond to the forms of discipline provided by more traditional penalties. The Department of Justice report to the select committee considering the Criminal Justice Bill (No 2) recommended this inclusion of Māori terminology in the definition so that the legislation would give the Māori community recognition that it had a contribution to make in assisting the courts to make suitable dispositions, involving alternatives to imprisonment, for Māori offenders. 61 However, the sentence is not limited to placement in an ethnic or cultural group, and can potentially involve any individual or any community group.

The court is not permitted to impose a sentence of community programme until a report on the nature and conditions of the programme available to the offender is given by or through a probation officer (s54). The court, the offender, and the person or agency conducting the programme, known as the sponsor, must all consent to its terms. The Act makes it clear that consent to the imposition of the sentence does not constitute consent to any specific medical or other treatment or surgical procedure that might be part of the programme and that separate consent for such treatment is necessary (s56). The report on the proposed programme may be included in a pre-sentence report, but in practice it is often provided by way of a written contract negotiated between the offender and the sponsor and signed by them. The contract states the name of the sponsor and the programme, the objectives of the programme, the tasks to be undertaken in pursuit of those objectives, and the term of the placement. A community programme may involve no work whatsoever (although it frequently does). 62 The Act does not state who has legal custody or control of the offender as it does with community service and supervision (where the probation officer has a legal supervisory role) or periodic detention (where the offender is in the legal custody of a warden of a periodic detention centre). This is a matter agreed between the court, the offender and the community representative.

The Minister of Justice in introducing the new criminal justice legislation stated that the new sentence of community care was “most likely to be used for members of minority groups and persons in need of some form of treatment”. 63 The courts have frequently considered the sentence of community programme as most appropriate for minor offences because they view it as principally rehabilitative rather than punitive and therefore not able to meet the requirements of punishment and deterrence for more serious offences. The Court of Appeal has stated (in R v

60 These were Māori community structures who received funding from the Departments of Māori Affairs, Social Welfare, and Justice to provide alternatives to the placement of young Māori in social welfare institutions and prisons.
61 Report of Department of Justice to Statutes Revision Committee on Criminal Justice Bill (No 2) 1984, 22/4/ 85, p2.
62 Information provided by Department of Corrections.
Grennell (CA211/88, 12 September 1988)) that “clearly community care is more oriented to rehabilitation of the offender in a supportive setting than to a community-based sentence under which the offender is also required to contribute significantly through serving the community”.64 Hall’s assessment is that:

The objective of the sentence is thus to place the offender into a rehabilitative environment where it is envisaged that he or she will respond positively. With its main thrust being rehabilitative, the sentence would appear to have little if any deterrent or retributive effect.65

Nevertheless, the average seriousness of cases involving non-traffic offences that resulted in a sentence of community programme has been greater throughout the 1990s than for the other community-based sentences,66 and the percentage of cases resulting in community programme that have been for violent offences has been higher than that for cases resulting in periodic detention and community service (although not supervision).67

Unlike the situation with the other three community-based sentences, there is no offence of breach of community programme. The sentence may be varied or cancelled by the court (see section on reviews of sentences below).

Other legislation

As a general rule community-based sentences can be imposed only for offences that are punishable by imprisonment. There are some exceptions to this rule.

- The Transport Amendment Act (No 2) 1988, which came into effect on 11 December 1988, provided for a community-based sentence to be substituted for mandatory disqualification from driving in some cases. This is now covered by s94 of the Land Transport Act 1998.

- Under the Resource Management Act 1991 (s339(4)) the court may sentence an offender to community service for an offence in the Act whether or not that offence is punishable by imprisonment. A similar provision exists in the Crown Minerals Act 1991 (s101(4).

- The Summary Proceedings Act 1957 allows the court to impose a sentence of community service or periodic detention on an offender who defaults on a fine (s88(3)) even though the original offence does not carry a penalty of imprisonment (s88(5)). Section 106E limits the circumstances in which periodic detention may be imposed for a fines default. The judge must be first satisfied that all other methods of enforcing the fine, other than imprisonment, “have been considered or tried and that they are inappropriate or unsuccessful”.

Combined sentences

The Criminal Justice Act 1985 prohibits the imposition “at the same time” of more than one type of community-based sentence for the same or different offences, with the exception of

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64 Hall, D/593.
65 Hall, D/593.
periodic detention and supervision. This permissible combination originates from the ability to impose both periodic detention and probation under the Criminal Justice Act 1954. All community-based sentences may be combined with a fine and/or reparation (s13). The consequence of this is that the amount of an order of reparation can influence the nature and extent of a community penalty imposed contemporaneously.

The original 1985 Act did not allow the imposition of the combined sentences of periodic detention plus supervision and reparation for the same offence. Section 13 only allowed the court when imposing reparation or a fine or both to also impose one kind of community-based sentence (or a custodial sentence). Since section 11 required that the court impose reparation in cases where there had been loss of or damage to property (later, in 1987, to also include cases involving emotional harm to any victim), unless it was inappropriate, this meant that where a court considered that an offence was serious enough to warrant periodic detention, the court had the option of also imposing a sentence of supervision only if reparation was inappropriate. Section 13 was amended in 1993 (Criminal Justice Amendment Act (No 2)) to allow the imposition of reparation or a fine or both in combination with any one kind of community-based sentence or the combination of periodic detention and supervision.

In 1993 the Criminal Justice Amendment Act enabled the courts to impose a community-based sentence cumulative on a sentence of imprisonment of 12 months or less, provided that the duration of the community-based sentences does not exceed 12 months (s39, 30, 47, 55). The Act also directed that a mixed sentence must not be imposed if the court would not have imposed a sentence of imprisonment in the first place, and that the total duration of the combined sentences must not exceed the term of imprisonment that would otherwise have been imposed for that offence (s 8A). The purpose of this power to impose combined sentences was, presumably, in part to encourage the courts to shorten the length of sentences of imprisonment. It is likely that it was also to take into account the fact that offenders serving prison sentences of 12 months or less do not have conditions imposed by District Prisons Boards on their final release date. The new provision enables the same result to be achieved by the courts where they consider it would be helpful for an offender released after a short term of imprisonment to have some sort of supervision as a follow up. In fact when both imprisonment and a community-based sentence are imposed, in about 95% of cases the community-based sentence is supervision (see next section).

In 1993 the Criminal Justice Amendment Act allowed judges to suspend sentences of imprisonment of not less than 6 months and not more than 2 years. Prison sentences can be suspended for up to 2 years (s21A(1)). A suspended sentence can be combined with any one of the community-based sentences or with both periodic detention and supervision (s13(4)).

Where an offender serving a sentence of community programme or community service is subsequently sentenced for another offence to detention of any kind (including periodic detention), the sentence of community programme or of community service is automatically...

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68 This is a restriction that applies where the court may wish to impose a combination for a single offence and where the offender appears for sentence at one time on several different charges. Some judges have interpreted the restriction as not including different sentencing sessions for different offences so that some offenders do end up serving two community-based sentences (other than periodic detention and supervision) concurrently (such as community service and supervision).

69 Hall D/307-1.

70 There is Cabinet approval for a draft bill, a Criminal Justice Amendment Bill (No 7) 1999, which proposes to change the current suspended sentences regime, so that there is no minimum term of imprisonment that can be suspended (the maximum of 2 years remains), and no provision to impose any community-based sentence concurrently with a suspended sentence.
cancelled unless the court orders otherwise (s63(1)). Where an offender serving a sentence of periodic detention or supervision is subsequently sentenced for another offence, the sentence of periodic detention or supervision continues unless the court specifically cancels it, or the subsequent sentence involves corrective training or a prison term of more than 12 months, in which case it is automatically cancelled (s63(2)). Where an offender is subject to a community-based sentence which is cumulative on a term of imprisonment and is subsequently sentenced to a further period of imprisonment, so that the total period of imprisonment exceeds 12 months, the community-based sentence is automatically cancelled (s63(3)).

Reviews of community-based sentences

Section 64 of the Criminal Justice Act provides for a probation officer to apply to the court for a review of any sentence of periodic detention, community service, or supervision where the offender has failed or is unable to comply with any condition or requirement of the sentence. Section 66 prescribes the powers of the court on a review. If the court is satisfied that the ground of the application has been established and, having regard to a number of other considerations, the court may remit, suspend, vary any conditions; or impose any additional condition of the sentence; cancel the sentence; or substitute any other sentence that could have been imposed for the original offence (which includes imprisonment or a different community-based sentence). The exception is where the sentence under review was imposed following a fines default (this only applies to periodic detention and community service). In this latter situation the court may substitute a term of imprisonment for a period not exceeding the maximum term that the offender could have received if imprisonment had been imposed under the Summary Proceedings Act for the fine default (rather than periodic detention or community service) but cannot impose a different community-based sentence or any other new sanction.

The sentence of a community programme may also be varied or cancelled by the court where the offender is unable to comply or has failed to comply with any of the conditions of the sentence, or the programme is no longer available or suitable for the offender, or continuation of the sentence is no longer necessary in the interests of the community or the offender. If the court cancels the sentence it may substitute a new sentence of community programme or any other sentence that could have been imposed for the original offence (s57).

Role of the probation service

The legislative changes bringing about more community involvement with offenders required major shifts in the roles played by the Probation Division of the Department of Justice (now the Community Probation Service of the Department of Corrections). Where once probation was the major domain of probation officers’ work, the alternative sentences introduced in the 1980s (along with new parole provisions) have required an increasing emphasis on community liaison roles rather than work with individual clients, while the range and volume of reports which probation officers supply to courts and other bodies have also expanded. While casework with individual offenders remains an important element of the probation officer’s job, the emphasis has become much less on providing a direct service to clients (which requires a wide range of expertise) and more on linking them with appropriate programmes or treatment services.

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71 Under s88 of the Summary Proceedings Act these are the only 2 community-based sentences that can be imposed on a fines defaulter.
72 Called Community Probation Service from 1 July 1998.
This shift towards greater community involvement in the operation of non-custodial sanctions was set out in the report of the 1981 Penal Policy Review Committee. Among its “guiding principles of penal policy” the committee stated that:

The penal system should make use of appropriate organisations and activities within the community rather than establish parallel services to deal with and support offenders”.

Consistent with this principle, it recommended that the Probation Service should become:

…a co-ordinating and guiding resource link with those who can assist in the supervision and rehabilitation of offenders, acting as “broker” to advise the courts of the services available, and to match the offenders with programmes designed for their support and reform.

In fact, with the new sentence of community service which came into effect on 1 February 1981, the Probation Service was already beginning to change in this direction, with finding and liaising with sponsors becoming a significant part of probation work.

While some of the specific proposals of the Penal Policy Review Committee in respect of the probation service and community sentences were not implemented, the overall direction of the report was reflected in the legislative provisions of the Criminal Justice Act 1985. The scope for community participation in statutory programmes for offenders was greatly increased, and the probation service was made responsible for developing and co-ordinating such participation. The duties of probation officers were set out in s125 of the Act and include major components of community work as well as the administration of sentences.

The Department of Corrections is currently developing Integrated Offender Management (IOM), involving a co-ordinated approach to managing offenders across the prison, community probation, and psychological services, targeted at reducing reoffending. There will as a consequence be more involvement of probation officers in the selection, delivery, and monitoring of programmes for offenders. This will have the greatest impact on the management of the sentences of supervision and community programme. For each offender there will be an assessment process to determine risk of re-offending and criminogenic needs. This will be fed into the pre-sentence report and the development of a sentence plan with needs-based interventions. Probation staff will be involved in the review and revision of sentence plans.

**Children Young Persons and Their Families Act 1989**

As stated at the beginning of this section, community-based sentences are not available for young offenders under 17 years dealt with by the Youth Court. That court may, however, make orders and the range of orders includes a community work order and a supervision order. The community work order is similar to a sentence of community service, requiring the consent of the young person, and involving community work of between 20 and 200 hours to be performed within 12 months. It can be performed under the supervision of a social worker or an approved community organisation (s298).

The supervision order is similar to the sentence of supervision. Young offenders may be placed under the supervision of a social worker or a specified person or organisation for a period of up

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73 Penal Policy Review Committee, para 100, p36.
74 Ibid, para 317, p118.
to 6 months (ss283(k), 304). There are standard conditions that apply to these orders and the court may impose additional conditions which include treatment, or psychiatric or psychological counselling or therapy, subject to the young person’s consent if 16 years or over, or the consent of a parent or guardian in other cases (ss305-306). There is also a supervision with activity order which shares some similarities with elements of the community programme sentence. A young person, with his or her consent, may be placed under the supervision of a person or organisation, on a part-time or full-time residential basis, and be required to undertake a specified programme or activity. The maximum period is 3 months (ss307-308).

Summary

The Criminal Justice Act 1985 provides sentencing courts in New Zealand with a wide range of sentencing options for cases involving imprisonable offences. As set out in the discussion above, each of the community-based sentences, as introduced, was seen as suitable for meeting different offender needs and sentencing objectives, although that has not been specified in legislation. Periodic detention was seen as appropriate for offences requiring a fairly severe degree of punishment short of imprisonment and for offenders in need of discipline. Community service was seen as less demanding than periodic detention for less serious offenders who could provide some service to the community and could be trusted to work with limited supervision alongside community groups. Supervision as a revamped form of probation was seen as being suitable for offenders at some risk of reoffending in the absence of surveillance and control over their lifestyle, and able to assist in ensuring the payment of fines or reparation. Community programme was seen as appropriate for offenders who would respond to a structured and tailored programme in a community environment under the direct guidance and support of an appropriate community sponsor able to exert a positive influence on them. It was seen as having the potential for being particularly useful for young Māori offenders. With the exception perhaps of periodic detention in the way it came to be managed as a sentence, these community-based sentences had a rehabilitative element incorporated in them.

In any one case the judge has a broad range of sentences from which to select an appropriate sentence to fit the individual circumstances of the particular offender and the offence or offences under consideration. Within the community programme and supervision sentences there are a wide range of possible terms and conditions that can be applied to offenders. This amounts to a considerable level of judicial discretion in the sentencing process. There are few constraints as far as the legislation is concerned. Although the courts themselves have indicated in broad terms through judgments the type of offender for whom each sentence is appropriate and how the sentences rank in terms of severity, there are no definite statements as to their purposes and the circumstances in which each one is to be applied. The manner in which the courts have exercised their discretion in respect of community-based sentences is examined later.

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75 This does not necessarily mean that there is no clarity or consistency on the part of judges as to what sentences are appropriate in which circumstances.
3. Previous Reviews of Community-based Sentences

As outlined in section 2, the range and nature of community-based sentences in New Zealand altered substantially with the introduction of community service in 1981 and the provisions for supervision and community care/programme in the Criminal Justice Act 1985. Between 1981 and 1993 the former Department of Justice conducted a number of reviews of the imposition of these sentences and their effectiveness in achieving stated objectives. Some of the key findings of these reviews are discussed below. A fuller description is contained in Appendix 2.

1981

Lee (1981) conducted the first review of community service as a background paper for the Penal Policy Review Committee. It was found that since the introduction of community service there had been a steady increase in its use. The predominant offence category that resulted in community service was offences against property. Approximately 50% of orders involved between 51 and 100 hours community service. 52% of those sentenced to community service also received other sanctions (predominately disqualification from driving and/or probation). Approximately 80% of community service placements were performed “at or for any hospital, or at or for any charitable, educational, cultural or recreational institution or organisation”.

During February and March 1981, nearly a third of all those sentenced to community service were female. This proportion had decreased by July/August to a quarter (25.5%). Approximately 2% of males and 10% of females were taught a new skill in order to carry out their community service. During the first two months of the availability of community service nearly 50% of those sentenced to community service were Maori or Pacific Islanders. Again, this proportion had decreased by July/August to 38%. 40% of offenders sentenced to community service were under 21 years of age.

1984

Community service orders were also examined in Leibrich, Galaway, and Underhill (1984), Community Service Orders in New Zealand, which comprised three research studies. Leibrich analysed the use of community service in the first study. The majority of convictions resulting in community service were for property offences (55%), followed by traffic offences (27%), and offences against the person (16%). An additional sentence of probation, disqualification or fine

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77 Ibid, p5.
78 Legislation allowed for between 8 and 200 hours (amended in 1985 to between 20 and 200 hours).
80 Ibid, pp5-6.
81 Leibrich, 1984, Use of Community Service Orders: Offenders, Offences and Sentence. Methodology consisted of a random sample selected from the population of those sentenced to community service during the first 21 months of its existence (1 February 1981 to 31 October 1982). Data was drawn from the Wanganui Computer database.
was given to just over half (52%) of the group. The average sentence length was 89 hours, with 54% of those sentenced to community service being given between 51 and 100 hours.

The community service group was convicted of more serious offences, when compared to the seriousness ratings of ‘all offences’ generally. Within the ‘all offences’ category less than half (47%) of all offences had a seriousness rating of 70 or more. However, 77% of the community service group offences were rated 70 or more.

The gender and ethnicity of those sentenced to community service were similar to that observed by Lee (1981). One-third of this population was female although only one in seven of all offenders at the time were female. Similarly, 41% of the community service population were Maori whereas 33% of offenders were Maori.

The second study was a survey of the experiences and opinions of people connected with the sentence of community service (Leibrich, Galaway and Underhill, 1984). Interviews were held with samples of judges, probation officers, community sponsors and offenders. One issue to emerge from the survey related to the most appropriate place of community service in the sentencing tariff. There was no consistent view as to where community service should be located. Most respondents felt that community service fell between a fine and periodic detention. However, others felt community service was more appropriately located between periodic detention and prison. Several probation officers expressed the view that community service was a ‘soft option’.

Another issue was whether or not community service was seen (or should be seen) as an alternative to other sentences when others were not considered appropriate, or should be recognised and utilised as a sentence in its own right. The provision of an alternative to custodial sentences was the aim least often seen as being accomplished. The predominant response was that community service was (and should be) viewed as an ‘alternative’ to other non-custodial sentences deemed inappropriate for particular offences/offenders. Key factors in deciding on ‘appropriateness’ were:

- the ability of an offender to pay a fine [if a fine would cause hardship, the recommendation would be for community service];
- the seriousness of the offence [a fine was viewed as more appropriate for less serious offences];
- practical difficulties for the offender in terms of sentence compliance; or
- if periodic detention was unavailable in a particular area.

Positive reasons for choosing community service (for example, the offender had particular abilities that could contribute to the community) were also provided by both probation officers and the judiciary (albeit to a much lesser extent).

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82 Seriousness was determined by a scale that contained seriousness ratings attached to every police-classified offence. These ratings were adopted from a small pilot study by the Police Department which attempted to establish the relative importance/seriousness of all offences for urgency of police clearance. The minimum possible seriousness rating was 13 (a vehicle certification offence); the maximum possible was 98 (murder).
83 Leibrich, 1984, p19. The statistical significance was minimal within the range possible.
84 Ibid, pp10-12 and p22. In terms of the imposition of co-sentences, women were given additional probation proportionately more often than men, and more of them were given longer periods of supervision.
85 Leibrich, Galaway and Underhill, Survey of People Connected with the Community Service Sentence, 1984, p156.
Leibrich, in the third research project undertaken in 1984, examined recidivism in relation to the sentence of community service. In order to provide a comparable context, a sample of persons sentenced to non-residential periodic detention was chosen as a second sentence group. Reconviction was defined as a court appearance resulting in a conviction during the year following the sentence data.

Overall reconviction rates were 38% for the community service group and 59% for the periodic detention group. However, it was not possible to infer that the sentence of community service produced lower reconviction rates than the sentence of periodic detention. This was because reconviction rates varied significantly when the samples were disaggregated. The review suggested that, given the impact of other factors (e.g. previous criminal history, severity of previous sentences, number of previous convictions, age at first conviction, type of offence, seriousness of offence), reconviction rates were unlikely to provide sensitive estimates of the effectiveness of a sentence.

Bradshaw produced a regional examination of the use of the sentence of community service in 1984. The aim of this review was to seek evidence of the extent to which community service was utilised as an alternative to imprisonment in Otago and Southland. Results indicated that community service was imposed on offenders who would have been imprisoned if community service had not been available, particularly female offenders. The community service group had less serious current offences than those sentenced to prison or probation but more serious offences than those sentenced to periodic detention or a fine. In the author’s view this indicated that a ‘hierarchy of penalties’ did not exist:

That is, contrary to what is often assumed, there is no ladder: prison/periodic detention/community service/probation/fine, according to the seriousness of offence, in terms of the maximum penalty.

The examination of non-criminal variables indicated that individuals with dependants were more likely to be sentenced to community service. Unemployed persons were also more likely to receive community service rather than a fine. Overall, Bradshaw’s results indicated that the community-based sentencing options existed as a ‘cluster of sentences’ utilised as alternatives to imprisonment but for different types of offenders. However, the review did not determine any inherent value in the community service sentence that distinguished it from other alternatives to imprisonment.

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89 Ibid, p204. Also discussed in section 5 of this report.
91 The low number of women in the sample may limit Bradshaw’s conclusions. Nine women in 1979 and 1980 had received a custodial sentence. In 1981 six women received community service while no female offender received a custodial sentence.
94 Ibid, p22.
McDonald’s report *Sentencing Under the Criminal Justice Act 1985: The First Six Months* \(^{95}\) indicated that the judiciary did respond to the shift in emphasis, from custodial to community-based sentencing, of the Criminal Justice Act 1985. During the first six months after the Act came into force there was a 3% decrease in the proportion of charges resulting in custodial sentences compared to the period 1 October 1984 to 31 March 1985.

In the first six months there was a 1% increase in the use of periodic detention with 1,092 more charges resulting in that sentence.\(^{96}\) The sentence of community care was imposed in only a small proportion (2%) of charges resulting in conviction and sentencing in the first six months of the new Act. Just over half (54%) of the charges were for property offences. The majority of community care sentences were non-residential (79%) and 64% were for a period of six months or less.

2.6% of police prosecuted cases involving Māori offenders received a community care sentence. This was twice the rate of cases involving non-Māori offenders (1.3%). Approximately 80% of cases that resulted in a sentence of community care involved male offenders compared to 18% for female offenders (in 2% of cases the offender’s gender was unknown). For cases resulting in community care, 61% of the offenders were aged under 25.\(^{97}\)

In the first six months of the Criminal Justice Act 1985 supervision was less likely to be imposed than probation had been previously, as 7% of charges received a supervision sentence compared to 12% of charges that had received probation in the period October 1984 to March 1985.\(^{98}\) The majority of supervision sentences were for offences against property (71%), with offences against the person accounting for 8% of sentences imposed.\(^{99}\) For 44% of charges incurring supervision, this was the only sentence. Additional sentences imposed in conjunction with supervision were periodic detention (37% of the charges), reparation (11%), driving disqualification (11%) and community service (1%).\(^{100}\)

The increase in the imposition of periodic detention was also noted in *The Impact on Sentencing of the Criminal Justice Act 1985* (Spier and Luketina, 1988). The proportion of cases resulting in periodic detention doubled between 1982 (at 6%) and 1987 (at 12%). However, there was no decrease in the proportion of offenders given a custodial sentence over that same period. Nevertheless, the report commented that there was evidence to suggest that periodic detention did provide an alternative to custodial sentences. Analysis revealed that during the years in which the proportion of violent offenders sent to prison dropped, more offenders were sentenced to periodic detention.\(^{101}\)

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\(^{96}\) McDonald, 1986, pp6-10.

\(^{97}\) Ibid, pp14-15.

\(^{98}\) Ibid, p13.

\(^{99}\) Ibid, pp6-7.

\(^{100}\) Traffic offences and drug offences accounted for 8% and 5% of the supervision sentences imposed respectively (p 20).

\(^{101}\) McDonald, 1986, pp7 and19-21.

\(^{102}\) Spier and Luketina, 1988, p166.
A decrease in the frequency of the imposition of supervision (compared to probation) was noted in Spier and Luketina’s review. In each of the years 1983 to 1985 (up to 1 October), 10% of convictions resulted in the offender being placed on probation (exclusive of convictions resulting in probation plus imprisonment which was prohibited as a sentencing option under the new Act), whereas in 1986 the figure for supervision was 8% and in 1987, 9%. Spier and Luketina explained the decrease in the imposition of supervision by reference to the following changes made by the Criminal Justice Act 1985:

- the introduction of the prohibition against the imposition of supervision in conjunction with a custodial sentence or any other community-based sentence except periodic detention (previously, there was no similar restriction on probation);
- the introduction of the sentence of reparation (s 11 required that reparation should be imposed in all cases where there had been loss or damage to property); and
- the introduction of a prohibition against the imposition of periodic detention plus supervision and reparation (s13 allowed reparation to be imposed in combination with only one community-based sentence). This meant that either supervision or periodic detention plus reparation must be imposed where there was loss of or damage to property rather than periodic detention plus supervision.

Spier and Luketina argued that the last two amendments listed above were the most influential. This was because the major contributing factor to the lower use of supervision compared to probation was the less frequent use of supervision in conjunction with periodic detention than was the case with probation. The biggest drop was in the concurrent use of periodic detention and probation/supervision for property offences. At the same time, the number of cases resulting in periodic detention plus compensation/reparation increased significantly.

Despite the lower use of supervision compared to probation, the proportion of all cases which resulted in supervision as the principal sentence (which excluded sentences of supervision given in conjunction with other community-based sentences or with imprisonment) was slightly greater than that for probation.

In 1987 supervision was imposed predominately for offences against property (49.5% of total supervision cases). However, only 13.2% of total offences against property processed by the court in 1987 resulted in the sentence of supervision. The second largest offence category among cases which received supervision was offences against the person (17%), representing 11% of the total cases involving offences against the person. 58% of offenders received a sentence of between 9 months and 1 year.

The low use of community care was again shown in Spier and Luketina’s review. Community care was imposed in only 1% of cases in 1986 and 0.8% of cases in 1987. The authors suggested that the low use of community care reflected either a lack of confidence in the sentence, or

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104 Other differences between the sentences of probation and supervision were a) the minimum term of supervision is only 6 months compared with 1 year for probation, and b) it was possible to attach a wider range of conditions to probation than to supervision, for example conditions relating to the enforcement of some other orders or sentences which may be imposed by the courts (p139).
107 Ibid, pp147 and 150.
insufficient resources within either the community or the Department of Justice to provide and organise community care programmes for offenders.¹⁰⁸

The gender differential was almost identical to that found in McDonald (1986), with 81% of cases in which a sentence of community care was imposed involving male offenders and 18% involving female offenders. Females were marginally more likely to receive community care than males. Nearly 60% of offenders sentenced to community care were under the age of 25.¹⁰⁹

Property offenders and offenders convicted of an offence against the person were the most likely in 1987 to receive a sentence of community care with just under 2% of offenders in each of these categories given this sentence. Of those sentenced to community care, more than 40% were property offenders and 18% were offenders against the person. Māori offenders (at 1.8%) were almost twice as likely to receive a sentence of community care than caucasian offenders (at 1.0%). However, despite the high number of Māori receiving community care a very small number of community care sentences were recorded as Maatua Whangai placements (66 out of 1,861 community care sentences). The majority of community care programmes (1,378) were non-residential.¹¹⁰

Spier and Luketina explored the issue of what sentence would have been imposed if community care had not been introduced. Their analysis indicated that the introduction of community care did not result in any decrease in the proportion of offenders receiving any other sentence except for fines.¹¹¹ No evidence suggested that community care was imposed as an alternative to a custodial sentence or to any other community-based sentence. Rather, if community care was considered a more severe penalty than a fine, then the introduction of community care had resulted in an increase in the severity of the sentences imposed on offenders who would have otherwise received a monetary penalty.¹¹²

Recommendations aimed at increasing the responsiveness of the sentences of community service and community care to Māori, were presented in Jackson’s 1988 research report The Māori and the Criminal Justice System A New Perspective: He Whaipaanga Hou Part 2. The report stated that:

their [the sentences of community service and care] implementation has often caused considerable anger as Māori people see the intent of the legislation frustrated by bureaucratic and judicial insensitivity.

and

probation officers frequently reject community service or care proposals simply because they do not satisfy certain administrative criteria of accountability or appropriate supervision ...¹¹³

¹⁰⁹ Ibid, p134.
¹¹⁰ Ibid, pp132-6. Maatua Whangai programmes involved the placement of young Māori offenders in iwi, hapu or whanau structures instead of social welfare institutions or prisons. The authors comment that one possible explanation for a low recorded placement rate in Maatua Whangai programmes is that placement may have be incorrectly coded under another category (p136).
¹¹¹ Fines decreased from 75.6% (1985) to 71.7% (1986) to 70.5% (1987). In 1986 and 1987 community care was imposed in 1.0% and 0.8% of cases (p138).
¹¹² Spier & Luketina, 1988, p138. The authors commented that the real situation could have been more complicated. For example, the average seriousness of offences could have increased and perhaps without the introduction of community care there would have been an increase in the proportion of offenders imprisoned or there would have been an even greater increase in the proportion of offenders placed on periodic detention.
¹¹³ Jackson, 1988, p245.
1990

Despite the lower likelihood of an offender receiving periodic detention combined with supervision, Asher and O’Neill (1990) in their research project, *Community Involvement with Offenders: A Discussion Paper*\(^{114}\) found there to be a perception that the ability to combine periodic detention with supervision maintained the credibility of the sentence of periodic detention. This was because, while offenders were contributing back to the community through their work projects (reparation), in an environment involving some element of penalty, they were also able to obtain help to address their personal difficulties. Credibility was also maintained by the possible penalty of imprisonment for breach of the sentence, which was not the case with the other community-based sentences.\(^{115}\)

Asher and O’Neill found that, generally, the sentence of periodic detention was viewed as one of the ‘major successes of the penal system’. In addition to its ongoing credibility, described above, periodic detention was considered to ‘run efficiently’ and ‘relatively inexpensively’ (in contrast to prison). However, the respondents did offer two suggestions to expand on the then current format of periodic detention. Firstly, a suggestion was that periodic detention work projects should be conducted on weekdays as well as Saturdays. This was justified on the grounds that ‘many of those undergoing periodic detention are currently unemployed’ and that the availability of periodic detention on more than one day would ‘discourage the build up of criminal subcultures’. Development of the sentence of periodic detention to include ‘social skills training’ and ‘personal growth opportunities’ was the second suggestion presented. Concern was also expressed regarding the number of ‘difficult’ offenders on periodic detention, although this was not discussed in any detail.\(^{116}\)

The issue of whether or not community service was imposed as an alternative to imprisonment was examined. In contrast to Bradshaw’s (1984) conclusions, Asher and O’Neill found that the general perception was that community service was being imposed as an alternative to fines and, therefore, on first offenders or those convicted of minor charges and drink-driving offences. Consequently community service was viewed as a “soft option”, inappropriate for “serious” offenders. Other issues highlighted in this research included:

- duplication between the sentences of community service and periodic detention in that they were seen to be ‘fulfilling the same purpose and having the same effect’;
- community service being regarded [by some] as a ‘cheap and less effective form of periodic detention rather than as a genuine attempt to involve the community’;
- inadequate administration of the sentence. For example, difficulties in identifying sponsors, sponsors hesitant about supervising community service workers in case they were later required to appear in court as witnesses when there was a breach of the sentence, and ‘poor communication between probation officers and sponsors’;
- breach procedures were of concern as the only penalty available was the imposition of a fine not exceeding $500. If community service was being utilised as an alternative to fines, then the breach penalty was considered ‘unworkable’;

\(^{114}\) Methodology consisted of semi-structured interviews with a total of 73 respondents comprising probation officers, District Court Judges, a police Community Liaison Officer and members of various community organisations (p 10).

\(^{115}\) Asher and O’Neill, 1990, p27.

\(^{116}\) Ibid, p27.
some of the judiciary and probation officers interviewed felt that the credibility of community service would be strengthened if it could be combined with supervision.\textsuperscript{117}

Asher and O’Neill’s research identified a number of concerns expressed by probation officers regarding the sentence of supervision. This was despite the probation officers’ view that supervision was the most important sentence administered by the Probation Division because of the sentence’s flexibility and the discretion given to probation officers regarding the type of assistance they could provide. The concerns were:

- the status and effectiveness of the sentence of supervision were being undermined by ‘case-loads, report writing, administrative duties and other responsibilities of probation officers’. These were seen to threaten the adequate supervision of offenders and therefore the credibility of the sentence;

- the inability to combine supervision with community service or to make community work a condition of supervision. This posed practical difficulties for probation officers, especially in rural areas where periodic detention was unavailable. It may also have resulted in lost opportunities to address the various difficulties in offenders’ lives (e.g. alcohol or drug use) when judges sentenced them to community service\textsuperscript{118};

- many probation officers felt that the lack of the option of imprisonment upon breach of supervision weakened the credibility of supervision;

- a perception that the judiciary did not regard supervision as a punitive measure.\textsuperscript{119}

A slightly different perspective was obtained in this research from community sponsors. Sponsors expressed the view that supervision with special conditions attached was preferable to a community care sentence because probation officers retained overall responsibility for offender compliance with the sentence.\textsuperscript{120}

The suggestion that the sentence of community care was not being used as originally intended (i.e. as an alternative to imprisonment) arose again in Asher and O’Neill’s (1990) research. Although their respondents expressed support for the sentence of community care, there was recognition that the sentence was imposed infrequently and the view that, when it was imposed, it was as an alternative to fines. Additionally, respondents felt that community care had involved predominately ‘structured treatment regimes’ rather than the placement of an offender into the care of an individual, whanau, or local group.\textsuperscript{121}

A legislative fault was also cited as limiting the development of the sentence of community care. The six-month time limit imposed on the residential component of a sentence was seen as a major drawback by agencies that provided long-term residential treatment programmes. It resulted in offenders leaving the programme at the end of six months, with the attitude that they had “done their lag”. Other concerns expressed were confusion over the role played by the

\textsuperscript{117} Asher and O’Neill, 1990, pp24-5.
\textsuperscript{118} This issue was discussed in another section of Asher and O’Neill’s (1990) research report. The comment was made that the merits of these criticisms were difficult to assess at that point, and that allowing the combination of community service and supervision could dilute the effectiveness of both sentences, rather than simply overcoming certain problems arising from the present legislation (pp 28-9).
\textsuperscript{120} Ibid, p26.
\textsuperscript{121} Asher and O’Neill, 1990, p23.
probation service in the monitoring of community care, especially when breaches did not constitute an offence, and the uncertain availability of community groups or individuals willing to provide the required care for this sentence to operate effectively.\textsuperscript{122}

1991

The increase in the imposition of periodic detention was again reported by Spier, Luketina and Kettles (1991) in \textit{Changes in the Seriousness of Offending and in the Pattern of Sentencing: 1979 to 1988}.\textsuperscript{123} As periodic detention became a much more frequently utilised sentence, two distinct themes had emerged. Firstly, offenders were sentenced to periodic detention for offences that were less serious on average than those sentenced to community care and supervision,\textsuperscript{124} with the average offence seriousness for cases resulting in periodic detention decreasing by 12% between 1979 and 1988.\textsuperscript{125} The authors comment that this finding “differs from the generally accepted view that periodic detention is the sentence that is next in severity to a custodial sentence”.\textsuperscript{126} This also raised the possibility that some judges were now sentencing offenders to periodic detention relatively early in their offending histories compared to traditional practice. This raised the risk that these offenders could be fast-tracked towards imprisonment by other sentencing judges who would rank a previous sentence of periodic detention as higher in severity and therefore consider that the next sentence should be a custodial one.\textsuperscript{127}

The second theme to emerge from this report was that, despite the decrease in the average seriousness of offences, as the numbers of those sentenced to periodic detention increased, so did the numbers of serious offenders. In 1979 there were 44 offenders who were sentenced to periodic detention after being convicted of an offence with a seriousness rating greater than 200. In 1988 there were 174 offenders in this category who received a sentence of periodic detention.\textsuperscript{128} This reflected one of the principal conclusions of this report, that there had been a significant increase in the seriousness of the offending resulting in convictions between 1979 and 1988. The authors commented that “it is clear that the New Zealand justice system is having to deal with a much higher number of serious offenders than in the past”.\textsuperscript{129}

The seriousness of offences resulting in probation/supervision (as the most severe sentence imposed) was also examined in this report. The key finding was that offenders were, on average, sentenced to supervision for more serious offences than was previously the case for probation. Overall, the average offence seriousness for cases which resulted in probation increased by 22% between 1979 and 1988. The actual number of offenders sentenced to supervision for offences

\textsuperscript{122} Ibid, pp23-4.

\textsuperscript{123} The report presented a seriousness of offence scale developed by the Department of Justice which allowed offences to be grouped according to the degree of seriousness with which they are regarded by the courts. Data for the period 1984 to 1987 were combined and the incarceration rate and average custodial sentence length was calculated for each offence. A seriousness score was initially assigned to all offences that resulted in at least 10 custodial sentences over the four year period mentioned above. This score is the incarceration rate multiplied by the average custodial sentence length. Offences that resulted in at least one custodial sentence, but less than 10 custodial sentences, were grouped with similar offences and the seriousness score was calculated as above with an average score taken over the grouped offences. Examples of offences and their associated seriousness scores are as follows: Disorderly Behaviour, 0.7; Burglary (Value less than $500) by Day, 74; Burglary (Value over $5000) by Day, 168; Kidnap, 680; Manslaughter (Weapon Involved), 1310; Male Rapes Female (Weapon Involved), 2275 (p 19).

\textsuperscript{124} Spier et al, 1991, p35.

\textsuperscript{125} Ibid, p50.

\textsuperscript{126} Ibid, p60.

\textsuperscript{127} Ibid, p52.

\textsuperscript{128} Ibid, p50.

\textsuperscript{129} Ibid, p59.
with seriousness scores of greater than 100 increased by approximately 87% between 1979 and 1988, although numbers were relatively small.\textsuperscript{130}

At every level of offence seriousness there was a decrease in the proportion of convictions resulting in probation/supervision as the most severe sentence between 1979 and 1988, although since the Criminal Justice Act 1985 the proportion of convictions resulting in supervision as the principal sentence was starting to increase.\textsuperscript{131}

Ongoing concern over both the limited development and low imposition of the sentence of community care resulted in the convening of a community care working party by the Department of Justice (Probation Division) in 1991. A number of issues were covered and various recommendations presented.\textsuperscript{132} One recommendation to encourage increased use of community care was an improved focus on the effective marketing of the sentence.\textsuperscript{133}

The incorporation of a module on “Whanau, Hapu, Iwi Development” into training for probation staff was also recommended in order to encourage increased use of community care. The working party was concerned that the ‘original intention’ of community care of strengthening whanau, hapu and iwi links, and the placement of offenders within tribal networks rather than within institutional structures, had not been translated into action.\textsuperscript{134}

The working party examined the appropriateness of changing the name of the sentence of community care and decided in favour of change on the following grounds:

The primary factor influencing our decision was the need to move from a concept to a sentence. The general philosophy of “community care” has become a well utilised concept in a number of fields such as health, aged care and signifies movement from within institutional state operated structures, to care within the community. While the desirability of such devolution is a feature of the current sentence …… it is felt that the name should reflect in some way the specific nature and purpose of the sentence, rather than the philosophy which underpins it.\textsuperscript{135}

The working party was also conscious of the requirement of the Criminal Justice Act 1985 for the offender to undertake a “programme” provided by a community sponsor. The final recommendation, therefore, was for the sentence of “community care” to be re-named “community programme order”\textsuperscript{136}, which was implemented in the Criminal Justice Amendment Act 1993.

Asher and Norris (1991) examined reconviction rates in \textit{Recidivism After Custodial and Community Based Sentences}.\textsuperscript{137} Their figures were drawn from samples of 400 offenders sentenced to each of the sentences in 1989. Reconviction was defined as those who received an additional conviction within 12 months of the original sentencing date. For the sentence of supervision the actual

\textsuperscript{131} Ibid, pp55-7.
\textsuperscript{132} Department of Justice, \textit{Report of the Review of Community Care Working Party}, 1991. These issues included staff development and training, community involvement, community liaison, communication between the various community care parties and standardised contracting with sponsors by Community Corrections.
\textsuperscript{133} Ibid, pp19-20.
\textsuperscript{134} Ibid, p9.
\textsuperscript{135} Ibid, p21.
\textsuperscript{136} Ibid, p21.
\textsuperscript{137} Asher and Norris (1991) \textit{Recidivism after Custodial and Community Based Sentences}, cited a number of methodological limitations to their research. For example, there was no attempt to control for the many selection factors that determine the choice of sentence for a given individual, nor for the environmental factors that affect the likelihood of recidivism. Therefore recidivism figures were to be treated as preliminary.
proportion of the sample reconvicted was 46.5%, for periodic detention it was 54.8%, for community care 53.5%; and for community service 26.8%.

1992

In *Imprisonment as “The Last Resort” The New Zealand Experience* (1992) concern was expressed regarding the increasing use of periodic detention which was the most common community-based sentence imposed in 1991 (61% of all community-based sentences). There were two key reasons for this concern. One was that periodic detention was the most resource intensive community-based sentence. Figures cited indicated that the sentences of supervision, community care and community service cost an average of $1,005 per person per year, while a sentence of periodic detention was costing around $2,522 per person per year.

The second reason for concern was the mixing of persons convicted of serious offences with those convicted of less serious offences. Not only did this introduce a widely disparate offending population into periodic detention centres, which involved potential management difficulties, but the likelihood of fast-tracking offenders to imprisonment increased with the increased use of periodic detention in cases involving comparatively minor offences. This was consistent with the observation of Spier, Luketina & Kettles (1991) above.

A review of the sentence of periodic detention was completed in 1992 (*Review of Periodic Detention Report*, 1992). The purpose of the review was the critical examination of the district management of periodic detention and, consequently, the review focus was predominately operational. However, the general outcome of the review was affirmation of the sentence of periodic detention:

...periodic detention fits in well with the whole range of community based sentences contributing a “hard edge” to the rest of the spectrum of sentences.

Additionally, consultation with correctional staff highlighted ‘widespread agreement’ that periodic detention stood at the punitive end of the scale of community-based sentences; the last resort before imprisonment.

The review team expressed concern about the increase in the imposition of periodic detention since 1985 because of the potential for net-widening, which not only resulted in increased financial costs to the State but also increased ‘human costs’. Both of these costs were incurred when some offenders were ‘dragged’ further into the criminal justice ‘net’ than necessary for the purpose of punishment. The review team argued that this was not in the ‘best interests’ of either the public or the individual offender.

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139 Department of Justice 1992, p8.
140 Ibid, p10.
141 The review project team consisted of four correctional regional representatives, a representative of the Public Service Association and a representative of the New Zealand Association of Periodic Detention Officers.
142 Operational issues explored included staff management policies (recruitment, retention, EEP & Cultural Perspectives Policy, training), management/maintenance of buildings and vehicles, Wet Weather Policy, detainee induction process, absenteeism strategies and the computerisation of periodic detention administrative systems.
144 Ibid, p3.
In order to ‘cap’ the periodic detention muster, the review team proposed the introduction of a maximum limit, at district level, of 300 offenders ‘on muster’ at any given point in time. This would encourage both ‘appropriate sentencing’ and ‘optimum use of resources’. A number of strategies were proposed in order to ensure that the ‘cap’ would not be exceeded. It was envisaged that these strategies would not only slow down the increase in the use of periodic detention, but also facilitate the diversion of offenders convicted of relatively minor offences from periodic detention.

Simultaneously, the review team advocated the introduction of a two tiered system of administering periodic detention in order to increase the credibility of this sentence as an alternative to imprisonment. The two tiered system would increase the intensity of the time served on periodic detention by more serious offenders, in particular property or driving offenders. The proposal centred on court servicing teams highlighting, by way of pre-sentence reports, judicial discretion to ‘specify the number of occasions in each week on which the offender is required to report’ and to get this group of offenders to serve two days each week, for eight hours on each occasion.

The review team briefly discussed a potential new sentencing initiative to be called the “Community Corrections Order”, which would incorporate all current community based sentences. The review team did not support this initiative. It was argued that, in terms of sentencing objectives, a combined order would have ‘little to offer’ compared to what was already available; that the combined order may result in a ‘blurring’ of, or a conflict in, sentencing objectives; and that a combined order could raise the sentencing tariff and ‘fast-track’ offenders to prison because the sentencing alternatives to imprisonment would be drastically reduced.

1993

The Community Corrections Division of the Department of Justice completed a review of the sentence of community service (Community Service Review Report) in 1993. During the early 1990s the community service muster had increased significantly and in 1993 it was projected to be double that of 1991. A number of issues were examined.

The first of these was the cost implications of maintaining the current community service muster and fiscal planning for the projected muster. The review committee identified strategies that managed both current and projected volumes.

The review committee reported concern about the introduction of stand-down [same day] reports. These reports were seen by the respondents as having contributed to the increase in the use of community service. Respondents indicated that the introduction of same day reports

146 Ibid, p12.
147 Ibid, p5.
148 The other two options available to the judiciary are a) to direct the offender to report on one occasion in each week and on such other occasion or occasions in each week as the Warden may from time to time specify [s40(2)(a)(ii)]; and b) to direct the offender to report on such number of occasions in each week as the Warden may from time to time specify [s 40 (2)(a)(iii)].
149 Department of Justice, 1992, pp90-1.
150 Ibid, p94.
152 Department of Justice, 1993, pp13-14.
153 Court Servicing Teams were introduced by the Community Corrections Division to prepare stand-down reports for the court. These reports were prepared on the same day as conviction, to facilitate efficient sentencing (p16).
might also have affected the quality of community service assessments. Additionally, respondents observed that many of those now being referred for the preparation of stand-down reports had been convicted of ‘trifling offences’. This was seen as representing a widening of the criminal justice net. The review team’s recommendation for attempting to curb ‘net-widening’ was that both the Community Corrections and Courts divisions of the Department of Justice devise a strategy for alternative ways of disposing with the non-payment of fines where the original offence was non-imprisonable.\textsuperscript{154}

Two particular issues for the sponsors of community service emerged in the review. Firstly, sponsors were apprehensive about the provision of community service opportunities for those who had been convicted of serious offences. Interestingly, it was the potential for organisational harm (rather than personal risk) that was seen as a problem. Consequently, the review committee stressed the importance of matching the correct sponsor with an appropriate offender.\textsuperscript{155}

The second issue regarding the sponsors of community service was the clarification of their role in providing evidence to the court in not-guilty hearings or disputed applications for review. The review committee commented that it was generally accepted that sponsors were not to be called to give evidence despite recognition that not all breaches/applications could be successfully prosecuted in the absence of the sponsor’s evidence.\textsuperscript{156}

The potential of community service to incorporate cultural dimensions also emerged from the review. The recommendation was that both the Community Corrections division and the Cultural Advisory Unit of the Department of Justice examine the application of community service from the viewpoint of its cultural sensitivity. The purpose of this was to ascertain what changes could be made to produce alternatives consistent with the purpose of the sentence in diverse cultural settings.

Granting remission of sentence, in terms of the number of hours to be served, on the grounds of good behaviour and/or quick completion rates was discussed. Proponents of remission felt that it would provide both encouragement and an incentive for those with sentences of over 100 hours. However, the review team was concerned that net-widening could occur as a result of the judiciary increasing the number of community service hours to be served in consideration of the fact that some of the hours may eventually be remitted. This would increase the potential for the sentence to be abused and, subsequently, lose credibility. The review team concluded that the arguments against remission outweighed the potential benefits.\textsuperscript{157}

The report also raised some legislative issues. These were: the conditions and limitations on additional sentences of community service being imposed concurrently or cumulatively on an offender already serving a sentence of community service; whether the definition of ‘service’ under s60 was too narrow; and the need for the courts to be able to impose community-based sentences rather than imprisonment upon review of a sentence of community service imposed for non-payment of a fine.

\textsuperscript{154} Department of Justice, 1993, p16.
\textsuperscript{155} Community organisations commonly stipulate the ‘type’ of offender that they are/or are not prepared to sponsor for example, no thieves or no sexual offenders (p19).
\textsuperscript{156} Ibid, p19.
\textsuperscript{157} Ibid, pp20-1.
Summary

Although all these reviews took place some years ago, there were a number of issues that emerged from them that remain relevant to current practice, such as:

- the costs associated with the more frequent utilisation of periodic detention since 1985, and the possibility of net-widening;
- concerns about net-widening and rising costs in respect of the steady increase in the use of community service since its introduction in 1981, particularly for offences of relatively low seriousness;
- the failure of community care/programme to become a mainstream sentence;
- the controls placed on how supervision could be used in combination with other sentences (which seemed to be the main reason why this sentence was initially less likely to be imposed than its predecessor, probation);
- some confusion, or at least differences of opinion, among probation officers and judges about the principal purpose of each sentence and where they were positioned in terms of a sentencing hierarchy;
- whether there was a meaningful distinction between community service and periodic detention;
- the suggestion that community service and community programme had not reached their full potential in respect of being sentences that could have particular relevance for Māori offenders.
4. Use of Community-based Sentences

Table 1 below shows the use of community-based sentences (and for comparative purposes the use of custodial sentences and monetary penalties) for all imprisonable cases (traffic and non-traffic) over the period 1988 to 1998.\(^\text{158}\) This excludes cases where all the charges carried a sentence of a fine only. Where more than one sentence was given in a case, only the most serious sentence imposed is included in the figures. The order of sentences from the most to the least serious that is used is custodial sentences, periodic detention, community programme, community service, supervision, then monetary penalties.\(^\text{159}\) Figures on the number of offenders receiving imprisonment or a community-based sentence as a result of non-payment of a monetary penalty are not readily available, and so are not included in this or subsequent tables, unless otherwise stated.

Table 1: Total number of imprisonable cases resulting in imprisonment, a monetary penalty, or a community-based sentence as the most serious sentence, 1988 to 1998\(^\text{160}\)

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<td>34792</td>
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* Fines and reparation.
** Includes combined sentences of periodic detention and supervision.

The number of imprisonable cases resulting in a community-based sentence peaked in 1993 and then showed a slowly decreasing trend until 1998 when there was a significant increase (because of increases in the numbers of periodic detention and community service sentences). The numbers of supervision sentences showed a different trend to the other community-based sentences, increasing in each year after 1991, until 1997 when they levelled out. Community programme cases have shown the most dramatic drop in numbers during the 1990s (the 1998 number being less than half that of 1992 when it was at its highest).

\(^\text{158}\) A case is defined in general terms as all charges against a single offender which share a first or final hearing date in common. For a case involving more than one charge the charge taken to represent the case is the one that resulted in the most serious penalty.


\(^\text{160}\) Source: Criminal Justice Group, Ministry of Justice.
The large decrease in the use of monetary penalties (mainly fines) between 1988 and 1992 would have been partly as a result of the introduction of the Police adult diversion scheme from 1988, with the result that a number of the less serious cases, which most likely would have previously received a fine, were diverted from the court. This would have been a major reason behind a relative increase in the cases resulting in no sentence (discharge with or without conviction). There are likely to have been other influences, such as economic factors and judges’ perceptions of offenders’ ability to pay a fine. The figures also show an increase in the use of periodic detention and community service over the period 1988 to 1993. Data show that those sentences were increasingly being imposed instead of monetary penalties for offences of low to moderate seriousness. This was more so for community service, with the increase in periodic detention mainly resulting from a relative decline in the use of imprisonment and an increase in the number of offenders with a large number of previous cases coming before the courts.

However, over the period 1993 to 1997, there were small increases in the percentage of imprisonable cases resulting in monetary penalties, particularly for offences of lower seriousness, while the use of both periodic detention and community service dropped slightly for these offences. The combined sentences of periodic detention and supervision have made up about 17% of the above sentence outcomes of periodic detention in recent years, although it was as low as 11% in 1992.

The next table shows the percentage of all cases that resulted in each of the community-based sentences over the last decade. The proportions of cases resulting in custodial and monetary penalties are also included for comparative purposes.

### Table 2: The percentage of imprisonable cases resulting in imprisonment, a monetary penalty, or a community-based sentence as the most serious sentence, 1988 to 1998

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Imprisonment</td>
<td>8.8</td>
<td>9.4</td>
<td>10.6</td>
<td>9.8</td>
<td>10.7</td>
<td>10.8</td>
<td>10.0</td>
<td>9.7</td>
<td>10.5</td>
<td>11.1</td>
<td>10.9</td>
</tr>
<tr>
<td>Monetary*</td>
<td>55.4</td>
<td>49.0</td>
<td>45.6</td>
<td>41.1</td>
<td>35.3</td>
<td>34.9</td>
<td>36.4</td>
<td>39.6</td>
<td>39.8</td>
<td>39.3</td>
<td>37.3</td>
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<tr>
<td>Periodic detention**</td>
<td>20.1</td>
<td>24.1</td>
<td>26.2</td>
<td>27.8</td>
<td>28.5</td>
<td>28.1</td>
<td>26.4</td>
<td>24.6</td>
<td>24.2</td>
<td>25.0</td>
<td>26.2</td>
</tr>
<tr>
<td>Community prog</td>
<td>1.0</td>
<td>1.1</td>
<td>1.0</td>
<td>1.3</td>
<td>1.6</td>
<td>1.4</td>
<td>1.2</td>
<td>1.2</td>
<td>0.9</td>
<td>0.6</td>
<td>0.5</td>
</tr>
<tr>
<td>Community service</td>
<td>3.4</td>
<td>5.6</td>
<td>7.4</td>
<td>10.3</td>
<td>12.5</td>
<td>12.0</td>
<td>11.6</td>
<td>10.5</td>
<td>9.8</td>
<td>9.6</td>
<td>10.1</td>
</tr>
<tr>
<td>Supervision</td>
<td>4.8</td>
<td>4.6</td>
<td>3.9</td>
<td>3.5</td>
<td>4.1</td>
<td>5.0</td>
<td>6.3</td>
<td>6.5</td>
<td>6.5</td>
<td>6.4</td>
<td>6.1</td>
</tr>
<tr>
<td><strong>TOTAL COMMUNITY</strong></td>
<td>29.3</td>
<td>35.4</td>
<td>38.5</td>
<td>42.9</td>
<td>46.7</td>
<td>46.5</td>
<td>45.5</td>
<td>42.8</td>
<td>41.4</td>
<td>41.6</td>
<td>42.9</td>
</tr>
</tbody>
</table>

* Fines and reparation.
** Includes combined sentences of periodic detention and supervision.

162 Spier, 1998, p34.
163 Source: Criminal Justice Group, Ministry of Justice.
Table 3 gives the average number of sentenced prison inmates in each of the years 1988 to 1998 and the numbers of people serving each of the community-based sentences at mid-year for each of those years (average annual numbers serving community-based sentences are not available for all these years). These musters include multiple sentences (arising from one or more cases for the same individual) so that one individual could appear in two totals. They also include those re-sentenced to periodic detention, community service, or prison for failing to pay fines, who are not included in the case-based data. Data indicate that about 7% of the periodic detention muster may be composed of fines defaulters and that an estimated 23 to 27% of the community service muster may be made up of fine defaulters.\(^{164}\)

**Table 3:** Average annual muster for custodial sentences and mid-year muster for community-based sentences, 1988 to 1998\(^{165}\)

<table>
<thead>
<tr>
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<th></th>
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</thead>
<tbody>
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<td>3498</td>
<td>3742</td>
<td>4049</td>
<td>3822</td>
<td>3986</td>
<td>4212</td>
<td>4586</td>
<td>4800</td>
<td></td>
</tr>
<tr>
<td>Periodic detention</td>
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<td>8093</td>
<td>7771</td>
<td>6915</td>
<td>6678</td>
<td>7091</td>
<td>7674</td>
</tr>
<tr>
<td>Community prog</td>
<td>440</td>
<td>470</td>
<td>402</td>
<td>595</td>
<td>720</td>
<td>670</td>
<td>623</td>
<td>569</td>
<td>472</td>
<td>320</td>
<td>236</td>
</tr>
<tr>
<td>Community service</td>
<td>2442</td>
<td>3928</td>
<td>4245</td>
<td>6215</td>
<td>8177</td>
<td>7526</td>
<td>7489</td>
<td>7019</td>
<td>6778</td>
<td>6187</td>
<td>6249</td>
</tr>
<tr>
<td>Supervision</td>
<td>5883</td>
<td>6017</td>
<td>5357</td>
<td>4804</td>
<td>4824</td>
<td>5138</td>
<td>5765</td>
<td>7153</td>
<td>7354</td>
<td>7401</td>
<td>7283</td>
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<tr>
<td>TOTAL COMMUNITY</td>
<td>15217</td>
<td>18191</td>
<td>17845</td>
<td>20212</td>
<td>21798</td>
<td>21427</td>
<td>21648</td>
<td>21656</td>
<td>21366</td>
<td>20999</td>
<td>21442</td>
</tr>
</tbody>
</table>

\(^{*}\) Does not include remand inmates

The trends in annual muster levels mirror fairly closely the pattern of growth and decline shown by the number of cases resulting in those sentences. The overall community-based sentences muster peaked in 1992 mainly because of a significant increase in the number serving community service. Community service and community programme musters peaked in 1992. The periodic detention muster peaked in 1991 and the supervision muster has continued increasing since 1991 to reach its highest level in the decade in 1997 (although the 1998 figure was a little lower than the figures in the previous two years).

Table 4 below shows that in 1998 periodic detention was the most frequently imposed community-based sentence for each type of offence except violent offences, where a larger proportion of cases received supervision (either alone or in combination with periodic detention). Periodic detention (including periodic detention and supervision in combination) was imposed in a higher proportion of cases than monetary penalties for violent offences, property offences, and offences against justice. As a proportion of the total number of cases it was most often used for offences against the administration of justice (45% of cases). Community programme was used most often for violent offences (although only in just over 1% of cases), community service most often used for property offences (13% of cases) and supervision (including supervision and periodic detention) for violent offences (27% of cases).

\(^{164}\) Triggs 1998, pp88 and 93.

\(^{165}\) Source: Criminal Justice Group, Ministry of Justice. Community-based sentence musters are figures for 30 June each year.
Offences against justice were the type of convicted imprisonable offence that most frequently received a community-based sentence (over half of the cases), mainly because of the high proportion (45%) that received periodic detention (either alone or in combination with supervision). About 50% of property offences received a community-based sentence. Periodic detention is the community-based sentence used most often for traffic offences and community programme is the one least often used. Fines are used for about 1.2 times as many imprisonable traffic cases than are community-based sentences.

Table 4: Percentage of convicted imprisonable cases by type of offence resulting in each type of sentence, 1998

<table>
<thead>
<tr>
<th>Offence type</th>
<th>Violent</th>
<th>Other against person(a)</th>
<th>Property</th>
<th>Drug</th>
<th>Against justice(b)</th>
<th>Good order(c)</th>
<th>Traffic</th>
</tr>
</thead>
<tbody>
<tr>
<td>Imprisonment</td>
<td>21.0</td>
<td>7.8</td>
<td>13.1</td>
<td>8.3</td>
<td>16.5</td>
<td>3.7</td>
<td>7.3</td>
</tr>
<tr>
<td>Monetary</td>
<td>19.2</td>
<td>36.0</td>
<td>27.3</td>
<td>46.3</td>
<td>9.7</td>
<td>46.6</td>
<td>49.9</td>
</tr>
<tr>
<td>Periodic detention</td>
<td>15.6</td>
<td>17.5</td>
<td>24.8</td>
<td>22.2</td>
<td>41.9</td>
<td>12.9</td>
<td>20.4</td>
</tr>
<tr>
<td>PD &amp; Supervision</td>
<td>10.3</td>
<td>2.4</td>
<td>4.4</td>
<td>4.1</td>
<td>2.8</td>
<td>1.0</td>
<td>3.2</td>
</tr>
<tr>
<td>Community programme</td>
<td>1.1</td>
<td>0.1</td>
<td>0.6</td>
<td>0.2</td>
<td>0.8</td>
<td>0.1</td>
<td>0.4</td>
</tr>
<tr>
<td>Community Service</td>
<td>5.6</td>
<td>5.8</td>
<td>13.0</td>
<td>8.6</td>
<td>3.2</td>
<td>3.7</td>
<td>12.5</td>
</tr>
<tr>
<td>Supervision</td>
<td>16.2</td>
<td>5.5</td>
<td>7.2</td>
<td>4.0</td>
<td>4.9</td>
<td>3.5</td>
<td>3.4</td>
</tr>
<tr>
<td>TOTAL COMMUNITY</td>
<td>48.7</td>
<td>31.3</td>
<td>50.1</td>
<td>39.0</td>
<td>53.6</td>
<td>21.2</td>
<td>40.0</td>
</tr>
<tr>
<td>Other(d)</td>
<td>11.1</td>
<td>24.9</td>
<td>9.5</td>
<td>6.4</td>
<td>20.2</td>
<td>28.5</td>
<td>2.8</td>
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<tr>
<td>Total</td>
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<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Notes:
(a) These are mainly offences of obstructing or resisting police officers or other officials, a number of sexual offences, rioting, various firearm offences, and threatening and intimidation offences.
(b) Offences that are mostly the result of a breach of a sentence, including escape from custody, breach of bail, breach of protection orders, or related to court procedure.
(c) These include disorderly behaviour, carrying offensive weapons, trespassing, and unlawful assembly.
(d) This includes: suspended sentences that are imposed alone; to come up for sentence if called upon; driving disqualifications; and conviction and discharges.

Table 5 below shows that traffic offences (37%) and property offences (27%) accounted for the majority of community-based sentences imposed in 1998. Those two types of offences accounted for the majority of periodic detention sentences. Violent offences accounted for a larger proportion of supervision sentences (34%) and community programme sentences (28%)

166 Source: Criminal Justice Group, Ministry of Justice.
than was the case with the other community-based sentences. Traffic offences accounted for nearly half of the community service sentences imposed in 1998.

Table 5: Percentage of convicted imprisonable cases resulting in a custodial or community-based sentence as the most serious sentence involving each type of offence, 1998

<table>
<thead>
<tr>
<th>Sentence type</th>
<th>Custodial %</th>
<th>Periodic detention %</th>
<th>Community programme %</th>
<th>Community service %</th>
<th>Supervision %</th>
<th>Total community %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Violent</td>
<td>24.4</td>
<td>12.5</td>
<td>28.3</td>
<td>7.0</td>
<td>33.6</td>
<td>48.8</td>
</tr>
<tr>
<td>Other against person</td>
<td>1.3</td>
<td>1.4</td>
<td>0.5</td>
<td>1.0</td>
<td>1.6</td>
<td>1.3</td>
</tr>
<tr>
<td>Property</td>
<td>27.3</td>
<td>25.3</td>
<td>26.9</td>
<td>29.5</td>
<td>26.7</td>
<td>26.5</td>
</tr>
<tr>
<td>Drug</td>
<td>6.6</td>
<td>8.7</td>
<td>3.0</td>
<td>7.4</td>
<td>5.7</td>
<td>7.9</td>
</tr>
<tr>
<td>Against justice</td>
<td>11.1</td>
<td>12.5</td>
<td>11.8</td>
<td>2.3</td>
<td>5.9</td>
<td>9.2</td>
</tr>
<tr>
<td>Good order</td>
<td>1.9</td>
<td>2.9</td>
<td>0.9</td>
<td>2.0</td>
<td>3.1</td>
<td>2.7</td>
</tr>
<tr>
<td>Traffic</td>
<td>26.4</td>
<td>35.6</td>
<td>28.1</td>
<td>49.3</td>
<td>22.1</td>
<td>36.8</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>1.1</td>
<td>1.1</td>
<td>0.5</td>
<td>1.4</td>
<td>1.4</td>
<td>1.2</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>100.0</strong></td>
<td><strong>100.0</strong></td>
<td><strong>100.0</strong></td>
<td><strong>100.0</strong></td>
<td><strong>100.0</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

The above table also shows that the majority of offenders being sentenced to a community-based sentence (ranging from 78% of those on supervision to 51% for community service) have been convicted for a non-traffic offence. Community service stands out as being a sentence being received by nearly equal numbers of traffic and non-traffic offenders.

Table 6 looks at recent trends in the use of community-based sentences for those convicted of imprisonable traffic offences. There was a large increase in the number of cases involving a traffic offence resulting in a community-based sentence between 1988 and 1991. The marked increase may be related to an increase in convictions for serious traffic offences and to the Transport Amendment Act (No 2) 1988 which came into effect on 11 December 1988. This amendment allowed a community-based sentence to be substituted for mandatory disqualification for some traffic offences. After 1991 the number of cases resulting in a community-based sentence steadily decreased until 1998, mostly because convictions for serious traffic offences decreased. The proportion of traffic cases resulting in a community-based sentence has remained reasonably steady at about 40% in recent years.

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167 Source: Criminal Justice Group, Ministry of Justice.
Table 6: Number and percentage of convicted cases involving imprisonable traffic offences resulting in a custodial, community-based, or monetary penalty, 1993 to 1998

<table>
<thead>
<tr>
<th>Sentence Type</th>
<th>1993 No (%)</th>
<th>1994 No (%)</th>
<th>1995 No (%)</th>
<th>1996 No (%)</th>
<th>1997 No (%)</th>
<th>1998 No (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Custodial</td>
<td>2218 (6.9)</td>
<td>1891 (6.1)</td>
<td>1996 (3.9)</td>
<td>2290 (6.7)</td>
<td>2423 (7.3)</td>
<td>2501 (7.3)</td>
</tr>
<tr>
<td>Periodic detention</td>
<td>8723 (26.9)</td>
<td>7850 (25.3)</td>
<td>7709 (22.9)</td>
<td>7663 (22.5)</td>
<td>7585 (22.9)</td>
<td>8137 (23.7)</td>
</tr>
<tr>
<td>Community programme</td>
<td>367 (1.1)</td>
<td>229 (0.7)</td>
<td>228 (0.7)</td>
<td>223 (0.7)</td>
<td>131 (0.4)</td>
<td>121 (0.4)</td>
</tr>
<tr>
<td>Community service</td>
<td>5131 (15.9)</td>
<td>4787 (15.4)</td>
<td>4610 (13.7)</td>
<td>4212 (12.4)</td>
<td>3957 (11.9)</td>
<td>4313 (12.5)</td>
</tr>
<tr>
<td>Supervision</td>
<td>896 (2.8)</td>
<td>1018 (3.3)</td>
<td>1085 (3.2)</td>
<td>1192 (3.5)</td>
<td>1167 (3.5)</td>
<td>1176 (3.4)</td>
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<tr>
<td>Total community</td>
<td>15117 (46.7)</td>
<td>13884 (44.7)</td>
<td>13632 (40.5)</td>
<td>13290 (39.0)</td>
<td>12840 (38.7)</td>
<td>13747 (40.0)</td>
</tr>
<tr>
<td>Monetary</td>
<td>14186 (43.8)</td>
<td>14446 (46.5)</td>
<td>17218 (51.1)</td>
<td>17658 (51.8)</td>
<td>17061 (51.4)</td>
<td>17164 (49.9)</td>
</tr>
</tbody>
</table>

Periodic detention

The 1980s showed a marked shift towards increased use of the sentence of periodic detention. This rapid increase peaked in the early 1990s and then declined as the use of monetary penalties increased. As Table 7 below shows, the percentage of cases for imprisonable offences resulting in a sentence of periodic detention more than doubled over the period 1982 to 1992 (from 11.6% of cases to 28.4%).

Analysis of sentencing data showed that the courts may have been imposing sentences of periodic detention for certain offences which in the past would have been dealt with by a monetary penalty. For example, in 1982 60% of less serious forms of assault were sentenced to a monetary penalty while 15% were given periodic detention. By 1987 47% were given a monetary penalty while 22% of convictions resulted in periodic detention. Recent data show that the greater use of periodic detention was mainly for offenders committing offences of low to moderate seriousness, although much of this change was due to the increased number of previous cases involving convictions of this group of offenders.

Since 1993, when the number of cases resulting in periodic detention as the most serious sentence peaked at 23,287, the number of periodic detention sentences has declined, although the number imposed in 1998 (22,838) was higher than in any other subsequent year.

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169 Source: Criminal Justice Group, Ministry of Justice.
170 Spier and Luketina, 1988, p95.
Table 7: Percentage of convicted imprisonable cases by type of offence resulting in periodic detention, 1982 to 1998

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</thead>
<tbody>
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<td>Violent</td>
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<td>15.5</td>
<td>16.3</td>
<td>17.7</td>
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<td>22.1</td>
<td>26.8</td>
<td>26.9</td>
<td>27.9</td>
<td>27.3</td>
<td>26.5</td>
<td>26.3</td>
<td>24.7</td>
<td>24.4</td>
<td>24.2</td>
<td>25.8</td>
</tr>
<tr>
<td>Other against person</td>
<td>7.0</td>
<td>7.3</td>
<td>9.3</td>
<td>8.5</td>
<td>9.7</td>
<td>11.9</td>
<td>13.8</td>
<td>18.8</td>
<td>19.5</td>
<td>22.2</td>
<td>24.2</td>
<td>23.4</td>
<td>22.0</td>
<td>20.6</td>
<td>16.7</td>
<td>19.3</td>
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<tr>
<td>Property</td>
<td>17.4</td>
<td>19.7</td>
<td>19.5</td>
<td>20.3</td>
<td>21.2</td>
<td>22.6</td>
<td>24.3</td>
<td>26.2</td>
<td>29.5</td>
<td>31.6</td>
<td>31.5</td>
<td>30.7</td>
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<td>27.4</td>
<td>26.6</td>
<td>29.2</td>
<td>29.2</td>
</tr>
<tr>
<td>Drug</td>
<td>5.6</td>
<td>7.1</td>
<td>7.9</td>
<td>7.7</td>
<td>9.2</td>
<td>12.3</td>
<td>14.9</td>
<td>17.1</td>
<td>21.7</td>
<td>23.3</td>
<td>25.4</td>
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<td>23.3</td>
<td>21.8</td>
<td>22.4</td>
<td>21.2</td>
<td>26.2</td>
</tr>
<tr>
<td>Against justice</td>
<td>21.4</td>
<td>24.1</td>
<td>23.9</td>
<td>26.3</td>
<td>28.7</td>
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Note: Cases in this table refer to all charges against a single offender which are finalised on the same day. This will produce a higher number of cases than if cases are defined as charges which share the first or final hearing date. For a case involving more than 1 charge the charge selected is the one that resulted in the most serious penalty.

An increased use of periodic detention followed the promotion of alternatives to imprisonment in the Criminal Justice Act 1985. There were substantial increases for all categories of offending. In 1982, 13% (628) of cases involving a violent offence received periodic detention as the most serious sentence. This peaked at 28% (1,852) in 1991 and then gradually declined to 24% (2,677) in 1997. In 1982, 17% of convictions for property offences resulted in periodic detention. This increased to 32% in 1991, declined to 27% in 1996 and rose to 29% in 1997. There have also been significant proportional increases in the use of periodic detention for offences against justice and drug offences. Some of these increases can be accounted for by changes in the characteristics of offenders. The probability of receiving periodic detention between 1983 and 1995 increased most for breaches of periodic detention and other offences against justice, and for drug offences, less serious violent offences and disorder offences. This has been paralleled by a decrease in the use of imprisonment for these offences. There has also been a decreased use of imprisonment and a greater use of periodic detention for persistent offenders.

In 1982, 28% of convicted imprisonable cases resulting in a sentence of periodic detention were traffic offences compared to 44% of cases in 1991. In 1998 it was 36% (see Table 5). The number of traffic cases awarded a sentence of periodic detention rose from 1,965 in 1982 to 10,328 in 1991. It dropped to 7,585 in 1997 and then rose again to 8,137 in 1998. Periodic detention has accounted for between 23% to 27% of the sentences imposed on convicted imprisonable traffic cases in each of the years 1993 to 1998.

The new community-based sentences of community care and supervision in the Criminal Justice Act 1985 do not appear to have been used as alternatives to periodic detention.

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172 Source: Criminal Justice Group, Ministry of Justice.
173 Triggs, 1999, p78.
Community service

Table 8 shows the proportion of convictions for imprisonable offences, by type of offence, that received a sentence of community service as the most serious sentence, for each of the full years this sentence was in force following its introduction in 1981.

Table 8: Percentage of convicted imprisonable cases by type of offence resulting in community service, 1982 to 1998

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</table>

Note: Cases in this table refer to all charges against a single offender which are finalised on the same day. For a case involving more than 1 charge the charge selected is the one that resulted in the most serious penalty.

There have been significant changes in the imposition of community service in the 1990s compared to the 1980s. The use of this sentence increased markedly from 3% of cases involving imprisonable offences in 1982 (1,840 cases) to 12.4% (9,894 cases) in 1992 after which it has declined to 10% (8,748 cases) in 1998. The total number of such cases resulting in community service as the most serious sentence in 1998 (8,748) was nearly 5 times the number of cases in 1982 (1,840).

There was a particularly large increase in the number of imprisonable cases, notably traffic cases, which resulted in a sentence of community service from 1988 until 1993. The proportion of traffic cases resulting in community service has decreased a little in the last 6 years, with 13% receiving the sentence in 1998, compared to 16% in 1992.

Traffic and property offences have been the two offence categories accounting for the largest proportions of community service sentences and since 1989 they have resulted in about 78% of the total.

Source: Criminal Justice Group, Ministry of Justice.

Its greater use after 1988 for traffic offences generally, which contributed significantly to the overall increase in the number of community service sentences, can be mostly attributed to increases in convictions for serious traffic offences and the Transport Amendment Act (No 2) 1988 which came into effect on 11 December 1988, allowing a community-based sentence to be substituted for mandatory disqualification in some cases.
community service sentences imposed each year (with traffic offences accounting for about half of the total) (see Table 5).

The total number of community service sentences peaked at 9,956 in 1993. Its increased use up until the mid-1990s, both in terms of the number of sentences and as a percentage of cases, occurred within all offence groups. The trend also occurred at all levels of offence seriousness except for the most serious offences, with the largest changes occurring in the lower seriousness categories.

Research has shown a much larger proportion of offences of low seriousness and of offenders with less serious criminal histories (in terms of the number and seriousness of previous convictions, rates of offending and the period of time since previous offence) receiving community service in the 1990s. In terms of offending histories the increase in community service has been most great for offenders with no or only a few previous convictions. As the use of monetary penalties showed the opposite trend through the 80s to the mid-90s, and the increase in this period is much greater than can be explained by the growth in the number of cases, this indicates that community service was mainly being used in place of monetary penalties rather than primarily as an alternative to imprisonment.\textsuperscript{176} The slight decline in sentences of community service in the late 1990s corresponds with an increase in the use of monetary penalties and supervision.

**Community programme**

The sentence of community programme (called community care until 1 September 1993) has not been used as a sentencing option as frequently as was hoped. As Table 9 shows, the proportion of cases given a sentence of community care has declined since the sentence was introduced on 1 October 1985, particularly after 1992. Information on the use of community programme by probation districts shows an uneven geographical distribution.\textsuperscript{177} The infrequent use of community programme may reflect a lack of confidence in the sentence or a lack of resources in both the justice system and the wider community to support the sentence.\textsuperscript{178} There is the time involved in organising a community programme for an offender and reporting to the court on the programme and its conditions, which must precede the sentence. This may in some cases present difficulties in respect of probation officers’ workloads and the avoidance of undue delays in sentencing. Less than 1% of cases involving drug offences and offences against good order resulted in a community programme in each of the last ten years.

\textsuperscript{176} Triggs, 1999, pp89-92.  
\textsuperscript{177} Community Probation, Quarterly Report, Second Quarter 1998/99, p11.  
\textsuperscript{178} Spier and Luketina, 1988, pp132-3.
Table 9: Percentage of imprisonable cases by type of offence resulting in community programme, 1984 to 1998

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Notes:
(a) The sentence of community programme did not become available until 1 October 1985.
(b) Cases in this table refer to all charges against a single offender which are finalised on the same day. For a case involving more than 1 charge the charge selected is the one that resulted in the most serious penalty.

At no point has the use of community programme exceeded 1.6% of the total number of convictions for imprisonable offences (which was the proportion in 1992). In 1998 it was only used in 0.5% of cases (an all time low for any year since 1985 when it was only available for 3 months). The number of cases resulting in this sentence peaked in 1992 at 1,282 and thereafter fell to 431 in 1998. The number in 1998 was the lowest in any full year in which it was available.

Community programme sentences tend to be mainly reserved for offenders who have committed moderately serious offences and who have a previous criminal history. They are much more likely to be imposed for domestic violence offences and other serious offences against the person (mainly violent) than for other offence types. First offenders, and offenders convicted on only one charge or convicted of a very low or very high seriousness offence, are less likely to receive a community programme sentence.\(^{180}\)

There has been a shift in the use of the sentence according to offence groups. The most significant change has been in respect of violent offences which in the last 2 years have accounted for about 28% of community programme sentences compared to between 13% and 15% in 1985 and 1986. This has coincided with a drop in the percentage of community programme sentences where the major offence was a property offence (from 47% in 1986 to 27% in 1998). The average seriousness of cases that result in community programme is greater than for other community-based sentences.\(^{181}\)

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\(^{179}\) Source: Criminal Justice Group, Ministry of Justice.

\(^{180}\) Triggs, 1999, pp94 and 97.

Supervision

The following table traces the use of probation in the early 1980s and then the sentence of supervision which replaced it in 1985.

Table 10: Percentage of imprisonable cases by type of offence resulting in probation/supervision as the most serious sentence, 1982 to 1998

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<td>3.5</td>
</tr>
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<td>1.6</td>
<td>1.4</td>
<td>1.5</td>
<td>1.5</td>
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<td>2.0</td>
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<td>1.7</td>
<td>1.9</td>
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<td>3.4</td>
</tr>
<tr>
<td>Miscellaneous</td>
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<td>3.9</td>
<td>2.8</td>
<td>3.8</td>
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<td>3.9</td>
<td>4.0</td>
<td>4.7</td>
<td>5.3</td>
<td>4.6</td>
</tr>
<tr>
<td>TOTAL CASES</td>
<td>5.0</td>
<td>4.7</td>
<td>4.1</td>
<td>4.2</td>
<td>4.4</td>
<td>4.7</td>
<td>4.8</td>
<td>4.6</td>
<td>3.9</td>
<td>3.7</td>
<td>4.1</td>
<td>5.0</td>
<td>6.3</td>
<td>6.4</td>
<td>6.5</td>
<td>6.4</td>
<td>6.1</td>
</tr>
</tbody>
</table>

Notes:
(a) The Criminal Justice Act 1985 replaced probation with supervision.
(b) Cases in this table refer to all charges against a single offender which are finalised on the same day. For a case involving more than 1 charge the charge selected is the one that resulted in the most serious penalty.

The use of supervision shows a different trend to the other community-based sentences. There was some decline in its proportionate use in the early and mid 1980s following the introduction of community service in 1981. It then increased rapidly in the early 1990s before stabilising in the mid 1990s (peaking in 1996). This pattern of increase in the 1990s occurred for supervision both as a primary sentence and as a second sentence in combination with imprisonment or periodic detention. In total over 9,000 supervision sentences (primary and secondary) were imposed in 1998, compared to about 5,000 in 1986.

Between 1990 and 1995, the proportion of violent offence cases which resulted in supervision as the most serious sentence increased from 7% to 17%. The number of cases went from 410 to 2,022. There has been a slight decline in 1996 (1,908), 1997 (1,863), and 1998 (1,801). Much of the increase was related to the rapid increase in the number of convictions for male assaults female (mostly domestic violence), which result in supervision more frequently than other violent offences, as well as an increase in the use of supervision in these cases. The later stabilisation is partly due to a decreasing number of domestic violence cases.

Violent offences now make the largest contribution to the total number of supervision sentences imposed as the primary sentence, followed by property and traffic offences. However, in 1982

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182 Source: Criminal Justice Group, Ministry of Justice.
property offences accounted for nearly two-thirds (65%) of the cases resulting in probation as the most serious sentence, while violent offences accounted for 10% of the cases resulting in this sentence. In 1988 violent offences accounted for 15% and property offences for 54%. By 1998 only 27% of supervision cases resulted from property offences, and the proportion of violent offences had increased to 34%. There has been a slowly increasing trend in the use of supervision as the most serious sentence for imprisonable traffic offences in the last 7 years, although the proportion is very small (3.4% in 1998).

In each year probation/supervision was used to a significant extent in combination with another sentence (periodic detention, imprisonment except from 1986 to 1992, and community service until 1985). In 1982 probation was the most serious sentence in 3,018 cases and in a further 3,379 cases it was imposed as a secondary sentence. In 1998 it was used as the most serious sentence in 5,360 cases and as a second sentence in 5,051 cases.

**Table 11: Percentage of sentences which received probation/supervision as a second sentence, 1982 to 1998**

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</thead>
<tbody>
<tr>
<td>Imprisonment</td>
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<td>9.9</td>
<td>9.2</td>
<td>8.4</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
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<td>8.7</td>
<td>11.5</td>
<td>13.6</td>
<td>12.6</td>
<td>13.6</td>
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<tr>
<td>Periodic Detention</td>
<td>33.5</td>
<td>31.6</td>
<td>30.2</td>
<td>25.2</td>
<td>15.5</td>
<td>16.1</td>
<td>16.3</td>
<td>14.7</td>
<td>12.7</td>
<td>11.6</td>
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<td>12.7</td>
<td>15.3</td>
<td>17.0</td>
<td>16.8</td>
<td>16.6</td>
<td>16.3</td>
</tr>
<tr>
<td>Community service</td>
<td>26.4</td>
<td>23.4</td>
<td>23.2</td>
<td>14.8</td>
<td>1.43</td>
<td>0.5</td>
<td>0.6</td>
<td>0.2</td>
<td>0.1</td>
<td>0.04</td>
<td>0.1</td>
<td>0.2</td>
<td>0.2</td>
<td>0.1</td>
<td>0.1</td>
<td>0.1</td>
<td>0.1</td>
</tr>
<tr>
<td>Total sentences</td>
<td>5.6</td>
<td>6.1</td>
<td>5.8</td>
<td>4.8</td>
<td>2.6</td>
<td>2.9</td>
<td>3.3</td>
<td>3.5</td>
<td>3.3</td>
<td>3.2</td>
<td>3.6</td>
<td>4.9</td>
<td>5.3</td>
<td>5.5</td>
<td>5.6</td>
<td>5.8</td>
<td></td>
</tr>
</tbody>
</table>

**Notes:**
- The Criminal Justice Act 1985 replaced probation with supervision.
- Probation could be imposed cumulatively to prison sentences up until the introduction of the Criminal Justice Act 1985. Supervision was not able to be imposed cumulatively to imprisonment until the Criminal Justice Amendment Act 1993 came into force on 1 September 1993.
- Under the Criminal Justice Act 1985 supervision may be combined with periodic detention but with no other community-based sentence.
- The combination of community service and probation was allowed under the Criminal Justice Amendment Act 1980 but is not permitted under the Criminal Justice Act 1985. See footnote 62 for why the use of this combination continues in a small number of cases.

**Table 12: Total number of sentences of probation/supervision, 1982 to 1998**

<table>
<thead>
<tr>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Primary Sentence</td>
<td>3018</td>
<td>3012</td>
<td>2828</td>
<td>2855</td>
<td>3165</td>
<td>3565</td>
<td>3765</td>
<td>3682</td>
<td>2946</td>
<td>3113</td>
<td>3232</td>
<td>4178</td>
<td>5308</td>
<td>5476</td>
<td>5521</td>
<td>5360</td>
<td>5360</td>
</tr>
<tr>
<td>Second* Sentence</td>
<td>3379</td>
<td>3952</td>
<td>3994</td>
<td>3307</td>
<td>1862</td>
<td>2217</td>
<td>2571</td>
<td>2807</td>
<td>2521</td>
<td>2702</td>
<td>2509</td>
<td>3012</td>
<td>4134</td>
<td>4518</td>
<td>4680</td>
<td>4689</td>
<td>5051</td>
</tr>
<tr>
<td>Total</td>
<td>6397</td>
<td>6964</td>
<td>6822</td>
<td>6162</td>
<td>5027</td>
<td>5782</td>
<td>6336</td>
<td>6489</td>
<td>5467</td>
<td>5815</td>
<td>5741</td>
<td>7190</td>
<td>9442</td>
<td>9994</td>
<td>10201</td>
<td>10049</td>
<td>10411</td>
</tr>
</tbody>
</table>

*In combination with either periodic detention, imprisonment, or community service.

183 Source: Ibid.
184 Source: Ibid.
The ethnicity of offenders receiving community-based sentences

The table below shows the number of offenders receiving each type of community-based sentence according to their ethnicity. Ethnicity is recorded by the prosecuting authority (mostly the Police) on the basis of self-identification by the offender and entered on the Law Enforcement System. The table only covers non-traffic cases because data on the ethnicity of offenders in traffic cases are frequently not recorded.

Table 13: Imprisonable non-traffic cases resulting in each community-based sentence, by ethnicity of offender, in 1998

<table>
<thead>
<tr>
<th>Sentence imposed</th>
<th>NZ European</th>
<th>Māori</th>
<th>Pacific Peoples</th>
<th>Other</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No</td>
<td>%</td>
<td>No</td>
<td>%</td>
<td>No</td>
</tr>
<tr>
<td>Periodic detention*</td>
<td>5840</td>
<td>41.1</td>
<td>7038</td>
<td>49.6</td>
<td>1164</td>
</tr>
<tr>
<td></td>
<td>152</td>
<td>1.1</td>
<td>14194</td>
<td>100</td>
<td></td>
</tr>
<tr>
<td>Community Programme</td>
<td>47</td>
<td>15.7</td>
<td>215</td>
<td>71.9</td>
<td>35</td>
</tr>
<tr>
<td></td>
<td>2</td>
<td>0.7</td>
<td>299</td>
<td>100</td>
<td></td>
</tr>
<tr>
<td>Community Service</td>
<td>1738</td>
<td>42.7</td>
<td>1914</td>
<td>47.0</td>
<td>359</td>
</tr>
<tr>
<td></td>
<td>64</td>
<td>1.6</td>
<td>4075</td>
<td>100</td>
<td></td>
</tr>
<tr>
<td>Supervision</td>
<td>1752</td>
<td>42.9</td>
<td>1779</td>
<td>43.6</td>
<td>473</td>
</tr>
<tr>
<td></td>
<td>81</td>
<td>2.0</td>
<td>4085</td>
<td>100</td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>9377</td>
<td>41.4</td>
<td>10946</td>
<td>48.3</td>
<td>2031</td>
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<tr>
<td></td>
<td>299</td>
<td>1.3</td>
<td>22653</td>
<td>100</td>
<td></td>
</tr>
</tbody>
</table>

* Includes combined sentences of periodic detention and supervision.

Note: The table excludes cases where the ethnicity of the offender was unknown; and 295 cases where the offender was recorded as being a corporation were excluded from this table.

Nearly three-quarters of the non-traffic cases which resulted in a community programme in 1998 involved Māori offenders (who received nearly 5 times as many sentences of community programme than New Zealand European offenders). There was a slightly higher proportion of periodic detention and community service sentences imposed on Māori offenders than on New Zealand European offenders.

The table below shows the proportion of offenders according to ethnicity that received each type of community-based sentence in that year. Overall, Māori offenders and Pacific peoples offenders had a similar likelihood of being sentenced to a community-based sentence (48% and 47% respectively). These are higher proportions than was the case with European offenders (41%). A relatively high proportion of Māori offenders (31%) were sentenced to periodic detention compared to European and Pacific peoples offenders. Pacific peoples offenders had a higher proportion receiving supervision than either Māori or European offenders.

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185 Source: Ibid.
Table 14: The proportion of offenders by ethnicity receiving a community-based or other type of sentence for imprisonable non-traffic cases, in 1998\textsuperscript{186}

<table>
<thead>
<tr>
<th>Sentence imposed</th>
<th>NZ European</th>
<th>Māori</th>
<th>Pacific Peoples</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Periodic detention*</td>
<td>25.7</td>
<td>30.7</td>
<td>26.9</td>
<td>19.3</td>
</tr>
<tr>
<td>Community programme</td>
<td>0.2</td>
<td>0.9</td>
<td>0.8</td>
<td>0.3</td>
</tr>
<tr>
<td>Community service</td>
<td>7.6</td>
<td>8.3</td>
<td>8.3</td>
<td>8.1</td>
</tr>
<tr>
<td>Supervision</td>
<td>7.7</td>
<td>7.8</td>
<td>10.9</td>
<td>10.3</td>
</tr>
<tr>
<td>Total community-based</td>
<td>41.2</td>
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<td>38.0</td>
</tr>
<tr>
<td>sentences</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Other sentences</td>
<td>58.8</td>
<td>52.3</td>
<td>53.1</td>
<td>62.1</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
</tr>
</tbody>
</table>

* Includes combined sentences of periodic detention and supervision.

Note: The table excludes cases where the ethnicity of the offender was unknown; and 295 cases where the offender was recorded as being a corporation were excluded from this table.

A recent research study has shown that ethnicity is a significant factor in the likelihood of an offender receiving a periodic detention, community programme or community service sentence, even after taking into account other factors, including differences in current and past offending patterns. Māori and Pacific offenders are about twice as likely to receive the sentence of community programme as other offenders, controlling for other variables, and periodic detention and community service are also used relatively more for Māori and Pacific offenders.\textsuperscript{187}

The age and gender of offenders receiving community-based sentences

The following tables show the breakdown of cases receiving community-based sentences in 1998 according to the age and gender of the offenders.

\textsuperscript{186} Ibid.

\textsuperscript{187} Triggs, 1999, p127.
Table 15: Convicted imprisonable cases resulting in a community-based sentence, by age of offender, in 1998

<table>
<thead>
<tr>
<th>Sentence imposed</th>
<th>Under 17</th>
<th>17-19</th>
<th>20-24</th>
<th>25-29</th>
<th>30-39</th>
<th>40+</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No</td>
<td>%</td>
<td>No</td>
<td>%</td>
<td>No</td>
<td>%</td>
<td>No</td>
</tr>
<tr>
<td>Periodic detention</td>
<td>20</td>
<td>0.1</td>
<td>3376</td>
<td>18.0</td>
<td>5278</td>
<td>29.0</td>
<td>3896</td>
</tr>
<tr>
<td>PD &amp; Supervision</td>
<td>13</td>
<td>0.4</td>
<td>689</td>
<td>18.5</td>
<td>887</td>
<td>26.1</td>
<td>715</td>
</tr>
<tr>
<td>Community Programme</td>
<td>6</td>
<td>1.4</td>
<td>129</td>
<td>22.2</td>
<td>79</td>
<td>21.6</td>
<td>65</td>
</tr>
<tr>
<td>Community Service</td>
<td>19</td>
<td>0.2</td>
<td>2150</td>
<td>24.4</td>
<td>1695</td>
<td>20.1</td>
<td>1346</td>
</tr>
<tr>
<td>Supervision</td>
<td>33</td>
<td>0.6</td>
<td>1048</td>
<td>19.8</td>
<td>1068</td>
<td>20.2</td>
<td>990</td>
</tr>
<tr>
<td>TOTAL</td>
<td>91</td>
<td>0.2</td>
<td>7392</td>
<td>19.8</td>
<td>9007</td>
<td>24.2</td>
<td>7012</td>
</tr>
</tbody>
</table>

Offenders aged under 25 years accounted for about 43% to 45% of the cases resulting in each of the sentences of periodic detention and community service (and also imprisonment), for 50% of cases resulting in community programme, and for 40% of the cases resulting in supervision.

Table 16: Convicted imprisonable cases resulting in a community-based sentence, by gender of offender, in 1998

<table>
<thead>
<tr>
<th>Sentence imposed</th>
<th>Male</th>
<th>Female</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No</td>
<td>%</td>
<td>No</td>
</tr>
<tr>
<td>Periodic detention</td>
<td>16942</td>
<td>89.1</td>
<td>2063</td>
</tr>
<tr>
<td>PD &amp; Supervision</td>
<td>3309</td>
<td>89.1</td>
<td>403</td>
</tr>
<tr>
<td>Community programme</td>
<td>332</td>
<td>77.8</td>
<td>95</td>
</tr>
<tr>
<td>Community service</td>
<td>5623</td>
<td>64.6</td>
<td>3085</td>
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<tr>
<td>Supervision</td>
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<td>1164</td>
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<tr>
<td>TOTAL</td>
<td>30351</td>
<td>81.7</td>
<td>6810</td>
</tr>
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</table>

The percentage of community-based sentences imposed in 1998 on female offenders (18%) is much higher than is the case with custodial sentences (7%). Community service is the community-based sentence with the highest proportion of female offenders (35%) and periodic detention has the lowest proportion (11%).

188 Source: Criminal Justice Group, Ministry of Justice.
189 Ibid.
Research shows that female offenders are more likely than males to receive a sentence of community service or community programme and less likely to receive a periodic detention sentence, even taking into account the differences in the type and seriousness of offence committed (the average seriousness of offending committed by women being lower than for men) and in the extent of previous offending (women offenders having on average fewer previous convictions). For one community-based sentence, community service, gender is the most important statistical variable influencing its imposition (although the study could not measure for all factors that might influence sentencing, such as gender differences in the circumstances of the average offender).\textsuperscript{190}

**Combined sentences**

A community-based sentence can be imposed in conjunction with a fine or reparation or both of these, a suspended sentence of imprisonment,\textsuperscript{191} or a driving disqualification, and the sentences of supervision and periodic detention can be combined. Since 1993 the courts have had the power to impose a community-based sentence cumulative on a sentence of imprisonment of 12 months or less.

In 1988 there were 2,536 cases which resulted in a supervision sentence in conjunction with a periodic detention. This had increased to 3,735 cases in 1998. Up until 1990 this combination of sentences was used most frequently for property offences (for more than twice the number of times it was used for violent offences in 1988) followed by traffic offences. From 1994 violent offences account for the highest proportion of cases resulting in these combined sentences followed by traffic and property offences (there was a 44% increase in the number of violent cases receiving this sentence combination between 1993 and 1994).

<table>
<thead>
<tr>
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<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Violent</td>
<td>448</td>
<td>574</td>
<td>520</td>
<td>575</td>
<td>732</td>
<td>931</td>
<td>1343</td>
<td>1268</td>
<td>1183</td>
<td>1129</td>
<td>1141</td>
</tr>
<tr>
<td>Other against person</td>
<td>34</td>
<td>37</td>
<td>27</td>
<td>24</td>
<td>29</td>
<td>33</td>
<td>35</td>
<td>42</td>
<td>33</td>
<td>37</td>
<td>37</td>
</tr>
<tr>
<td>Property</td>
<td>1075</td>
<td>968</td>
<td>803</td>
<td>794</td>
<td>660</td>
<td>696</td>
<td>784</td>
<td>822</td>
<td>790</td>
<td>897</td>
<td>875</td>
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<td>Drug</td>
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<td>128</td>
<td>125</td>
<td>135</td>
<td>163</td>
<td>173</td>
<td>195</td>
<td>209</td>
<td>206</td>
<td>200</td>
<td>310</td>
</tr>
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<td>Against justice</td>
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<td>114</td>
<td>137</td>
<td>117</td>
<td>85</td>
<td>108</td>
<td>114</td>
<td>132</td>
<td>120</td>
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<td>Good order</td>
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<td>59</td>
<td>40</td>
<td>44</td>
<td>43</td>
<td>42</td>
<td>52</td>
<td>51</td>
<td>56</td>
<td>48</td>
<td>49</td>
</tr>
<tr>
<td>Traffic</td>
<td>652</td>
<td>962</td>
<td>822</td>
<td>976</td>
<td>757</td>
<td>932</td>
<td>845</td>
<td>972</td>
<td>1019</td>
<td>1012</td>
<td>1112</td>
</tr>
<tr>
<td>Miscellaneous</td>
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<td>27</td>
<td>27</td>
<td>24</td>
<td>26</td>
<td>36</td>
<td>18</td>
<td>37</td>
<td>23</td>
<td>30</td>
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<tr>
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<td>2869</td>
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<td>2689</td>
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<td>2951</td>
<td>3386</td>
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<td>3496</td>
<td>3735</td>
</tr>
</tbody>
</table>

Figures show that in the years 1994 to 1998 approximately 60% of property charges resulting in a reparation sentence\textsuperscript{193} also had a community-based sentence imposed, most commonly periodic detention.

\textsuperscript{190} Triggs, 1999, p126.

\textsuperscript{191} Although Cabinet has approved draft legislation which will remove the ability to impose any community-based sentence concurrently with a suspended sentence of imprisonment.

\textsuperscript{192} Source: Criminal Justice Group, Ministry of Justice.

\textsuperscript{193} 87% of reparation sentences imposed in 1997 involved property offences. (Spier,1998, p102.)
In each of the years from 1994 (the first full year of their availability) to 1998 between 80% and 89% of offenders who received a suspended sentence also received a community-based sentence. Between 51% and 60% had to serve periodic detention (Table 19).

Table 19: Total number of cases resulting in both a suspended sentence of imprisonment and a community-based sentence, 1994 to 1998\(^{195}\)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Periodic detention &amp; Supervision</td>
<td>421</td>
<td>15.4</td>
<td>601</td>
<td>19.4</td>
<td>526</td>
<td>18.2</td>
<td>720</td>
<td>22.0</td>
<td>829</td>
<td>24.8</td>
</tr>
<tr>
<td>Periodic detention only</td>
<td>981</td>
<td>35.9</td>
<td>1208</td>
<td>39.0</td>
<td>1091</td>
<td>37.7</td>
<td>1220</td>
<td>37.3</td>
<td>1179</td>
<td>35.3</td>
</tr>
<tr>
<td>Supervision only</td>
<td>599</td>
<td>21.9</td>
<td>635</td>
<td>20.5</td>
<td>657</td>
<td>22.7</td>
<td>709</td>
<td>21.7</td>
<td>761</td>
<td>22.8</td>
</tr>
<tr>
<td>Community programme</td>
<td>116</td>
<td>4.2</td>
<td>135</td>
<td>4.4</td>
<td>113</td>
<td>3.9</td>
<td>87</td>
<td>2.7</td>
<td>80</td>
<td>2.4</td>
</tr>
<tr>
<td>Community service</td>
<td>76</td>
<td>2.8</td>
<td>117</td>
<td>3.8</td>
<td>108</td>
<td>3.7</td>
<td>134</td>
<td>4.1</td>
<td>117</td>
<td>3.5</td>
</tr>
<tr>
<td>Total</td>
<td>2193</td>
<td>80.2</td>
<td>2696</td>
<td>86.9</td>
<td>2495</td>
<td>86.2</td>
<td>2870</td>
<td>87.8</td>
<td>2966</td>
<td>88.8</td>
</tr>
<tr>
<td>Total suspended sentences*</td>
<td>2734</td>
<td>100.0</td>
<td>3101</td>
<td>100.0</td>
<td>2893</td>
<td>100.0</td>
<td>3268</td>
<td>100.0</td>
<td>3341</td>
<td>100.0</td>
</tr>
</tbody>
</table>

* Includes suspended sentences combined with a monetary penalty or a driving disqualification as well as suspended sentences with no additional penalty.

The Criminal Justice Amendment Act 1993 amended the principal Act to allow the courts to impose a community-based sentence cumulative on a sentence of imprisonment of 12 months or less. In 1994, the first full year of this provision, it was applied in 761 cases which represented 9% of all cases which resulted in a custodial sentence. In 96% of cases where there was this conjunction of sentences, supervision was the cumulative sentence. In 1998 the 1,383 cases

\(^{194}\) Source: Criminal Justice Group, Ministry of Justice.

\(^{195}\) Source: Ibid.
which had a community-based sentence imposed cumulative to a custodial sentence represented 15% of all cases resulting in a custodial sentence in that year (9,492).

Table 20: Total number of cases resulting in both a custodial sentence and a community-based sentence, 1994 to 1998

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No</td>
<td>%</td>
<td>No</td>
<td>%</td>
<td>No</td>
</tr>
<tr>
<td>Periodic detention</td>
<td>16</td>
<td>2.1</td>
<td>19</td>
<td>1.8</td>
<td>47</td>
</tr>
<tr>
<td>Community programme</td>
<td>15</td>
<td>2.0</td>
<td>26</td>
<td>2.6</td>
<td>24</td>
</tr>
<tr>
<td>Community service</td>
<td>1</td>
<td>0.1</td>
<td>1</td>
<td>0.1</td>
<td>1</td>
</tr>
<tr>
<td>Supervision</td>
<td>729</td>
<td>95.8</td>
<td>961</td>
<td>95.4</td>
<td>1218</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>761</td>
<td>100.0</td>
<td>1007</td>
<td>100.0</td>
<td>1290</td>
</tr>
</tbody>
</table>

Criminal histories of offenders receiving community-based sentences

Recent research has shown that the criminal history of offenders (the number, seriousness and frequency of past convictions; the period since the previous conviction; and the previous sentences imposed) does affect the probability of their receiving different types of community-based sentence (and the probability of receiving imprisonment or a monetary penalty). A higher probability of community service is associated with having a small number of previous cases involving convictions, particularly where the past offending has not been serious and the rate of conviction has been low, or the most recent offence was committed several years ago. Offenders with many previous cases, or moderate to high rates of conviction involving offences of moderate to high seriousness, or with a previous conviction within the past year, have a higher probability of a periodic detention sentence.

The criminal history variables are not, however, with the exception of the previous sentence, generally among the most significant variables in determining sentence. For example, the higher the offender's rate of conviction the higher the probability of the offender receiving supervision but this is of limited significance once account is taken of other factors.

The table below shows the number of previous convicted cases for people convicted and sentenced to a community-based sentence in 1995. A lot of cases will have involved more than one criminal charge.

---

196 Source: Ibid.
197 The total number of charges ever proved against the offender divided by the number of years over which the offending took place.
199 Ibid, p72.
200 Ibid, p128.
Table 21: Number of previous convicted cases for offenders sentenced to a community-based sentence in 1995

<table>
<thead>
<tr>
<th>Number of previous convicted cases</th>
<th>Periodic detention</th>
<th>Community prog</th>
<th>Community service</th>
<th>Supervision</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No</td>
<td>%</td>
<td>No</td>
<td>%</td>
</tr>
<tr>
<td>0</td>
<td>1300</td>
<td>6.7</td>
<td>117</td>
<td>13.2</td>
</tr>
<tr>
<td>1</td>
<td>1432</td>
<td>7.4</td>
<td>101</td>
<td>11.4</td>
</tr>
<tr>
<td>2</td>
<td>1484</td>
<td>7.6</td>
<td>84</td>
<td>9.5</td>
</tr>
<tr>
<td>3-5</td>
<td>4041</td>
<td>20.8</td>
<td>166</td>
<td>18.7</td>
</tr>
<tr>
<td>6-10</td>
<td>4664</td>
<td>24.0</td>
<td>162</td>
<td>18.3</td>
</tr>
<tr>
<td>11-20</td>
<td>4189</td>
<td>21.5</td>
<td>167</td>
<td>18.8</td>
</tr>
<tr>
<td>21-50</td>
<td>2289</td>
<td>11.8</td>
<td>85</td>
<td>9.6</td>
</tr>
<tr>
<td>More than 50</td>
<td>53</td>
<td>0.3</td>
<td>4</td>
<td>0.5</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>19452</td>
<td>100.0</td>
<td>886</td>
<td>100.0</td>
</tr>
<tr>
<td>Average number of previous convicted cases</td>
<td>9.6</td>
<td>8.3</td>
<td>4.4</td>
<td>6.9</td>
</tr>
</tbody>
</table>

The most recent sentence prior to the current case, and also other past sentences, have a significant impact on the probability of what sentence an offender will receive. Previous sentences are the most significant of the criminal history variables. Essentially, the previous sentence increases the risk of the same sentence or a more serious sentence and decreases the risk of a less serious sentence, all other factors being equal.

Table 22: Most recent previous sentence for offenders sentenced to a community-based sentence in 1995

<table>
<thead>
<tr>
<th>Most recent previous sentence</th>
<th>Periodic detention</th>
<th>Community prog</th>
<th>Community service</th>
<th>Supervision</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No</td>
<td>%</td>
<td>No</td>
<td>%</td>
</tr>
<tr>
<td>First offender</td>
<td>1300</td>
<td>6.7</td>
<td>117</td>
<td>13.2</td>
</tr>
<tr>
<td>Custodial</td>
<td>1657</td>
<td>8.5</td>
<td>92</td>
<td>10.4</td>
</tr>
<tr>
<td>Periodic detention</td>
<td>6918</td>
<td>35.6</td>
<td>190</td>
<td>21.4</td>
</tr>
<tr>
<td>Community prog</td>
<td>160</td>
<td>0.8</td>
<td>38</td>
<td>4.3</td>
</tr>
<tr>
<td>Community service</td>
<td>1284</td>
<td>6.6</td>
<td>62</td>
<td>7.0</td>
</tr>
<tr>
<td>Supervision</td>
<td>750</td>
<td>3.9</td>
<td>59</td>
<td>6.7</td>
</tr>
<tr>
<td>Monetary</td>
<td>5605</td>
<td>28.8</td>
<td>224</td>
<td>25.3</td>
</tr>
<tr>
<td>Other</td>
<td>1778</td>
<td>9.1</td>
<td>104</td>
<td>11.7</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>19452</td>
<td>100.0</td>
<td>886</td>
<td>100.0</td>
</tr>
</tbody>
</table>

201 Source: Criminal Justice Group, Ministry of Justice.
203 Source: Criminal Justice Group, Ministry of Justice.
Forecasted use of community-based sentences

In the table below the forecasted numbers of offenders starting community-based sentences over the next five years, if current conditions continue, are presented.

Table 23: Forecasts of annual average number of new starts by sentence for 1999/2000 to 2002/03

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Periodic detention</td>
<td>23,466</td>
<td>23,622</td>
<td>23,781</td>
<td>23,940</td>
</tr>
<tr>
<td>Supervision</td>
<td>10,009</td>
<td>10,084</td>
<td>10,161</td>
<td>10,239</td>
</tr>
<tr>
<td>Community service</td>
<td>10,342</td>
<td>10,327</td>
<td>10,396</td>
<td>10,465</td>
</tr>
<tr>
<td>Community programme</td>
<td>429</td>
<td>432</td>
<td>435</td>
<td>439</td>
</tr>
<tr>
<td>TOTAL</td>
<td>44,246</td>
<td>44,465</td>
<td>44,773</td>
<td>45,083</td>
</tr>
</tbody>
</table>

It has been forecast that the use of periodic detention will stabilise at its present level, based on the reversal in 1997 of the downward trend in its use after 1993, and there being no indication that there will be significant decline in the use of other sentences. The small ongoing increase in the forecasted figures is due to the projected increases in the volume of cases coming before the courts. Between 1995 and 1997 the use of supervision stabilised following the sharp increase between 1993 and 1995 and this level of use is forecast to continue with a small increase due to the increasing volume of cases. The general decreasing trend in the use of community service is predicted to continue, although only very gradually, for the next 2 to 3 years. This is because with the Department of Courts’ new powers and procedures for obtaining payments from fine defaulters it is expected that fewer alternative sentences will be imposed. (It has been estimated that in 1996, 44% of community service new starts were fine defaulters and that in 1997 the proportion was 34%.) It has been predicted that the number of new starts to community programme will gradually stabilise over the next few years. This is on the basis that numbers are already so small, that there will remain a core of support among probation officers and judges for community programmes and that at least some regions are actively promoting the sentence.

A number of changes currently being implemented may impact on the use of community-based sentences and affect the accuracy of these forecasts. For example, more accurate assessments of offenders following the full implementation of Integrated Offender Management (IOM) in the Department of Corrections may change the relative use of the different sentences. Another possibility is that expansion of the Community Wage Scheme may make community service placements more difficult to arrange. Enforcement operations targeting serious traffic or property offences can also have significant flow-on effects on the number of community-based sentences imposed. A significant increase in the issuing of infringement fees because of the new road safety legislation may lead to increasing community-based sentences depending on the extent to which they become subject to fines enforcement procedures.

\[\text{Data from Ministry of Justice forecasts, June 1998.}\]
Summary

On 30 June 1998, the number of people in New Zealand serving community-based sentences was 21,442. In 1998, a total of 37,348 imprisonable cases resulted in one or more community-based sentences being the most serious sentence imposed. By way of comparison, 9,492 imprisonable cases resulted in a custodial sentence that year (the average annual muster was 4,800) and 32,421 imprisonable cases resulted in a monetary penalty as the most serious sentence imposed.

There have been very substantial changes in the use of periodic detention between 1982 and 1998. In 1998, 26% of all proved cases for imprisonable offences resulted in a periodic detention sentence compared to 12% in 1982. The number of offenders receiving periodic detention increased from 7,068 to 22,838 in that period. There has been a greater use of periodic detention in the 1990s compared to the 1980s for offences of low to moderate seriousness. However, other analysis has shown that the increased use is also due to decreased use of imprisonment for certain offences following the change of emphasis in the Criminal Justice Act 1985 to the use of alternatives to imprisonment. Also, around half the increase is due to changes in the type of offences and type of offenders coming before the courts, especially an increase in the number of persistent offenders.

Community service is the next most frequently imposed community-based sentence after periodic detention. Its use increased rapidly in the late 1980s and early 1990s, and the indications are that it is now more widely used as an alternative to monetary penalties and less as an alternative to imprisonment. A slight increase in the use of monetary penalties in the late 1990s has coincided with a reduced use of community service.

Following its introduction in 1985 the sentence of supervision was not imposed as often as probation, which it had replaced. However, its use kept on increasing in the 1990s until a levelling off in 1996 and subsequent years. The overall increase in the number of offenders sentenced to supervision, especially between 1991 and 1995, can to a significant extent be explained by the rapid increase in the number of domestic and other violent cases prosecuted, combined with an increase in the use of supervision for those offences.

The sentence of community programme continues to be infrequently imposed. The number of cases resulting in community programmes has never exceeded 1.6% of the convictions for imprisonable cases. The number of such cases that resulted in a community programme decreased from 780 in 1996 to 431 in 1998. Māori offenders receive the sentence of community programme more frequently than non-Māori. In 1998 for example, community programme was imposed on 215 Māori and 84 non-Māori. However, despite a higher proportion of Maori than non-Māori receiving the community programme sentence, this sentence was imposed on less than 1% of all imprisonable non-traffic cases involving Māori in 1998.

The level of use of community-based sentences in New Zealand is forecast to increase a little between now and 2003 because of a predicted increase in the number of cases coming before the courts. A key question is therefore whether or not this extensive use of community-based sentences represents a cost-effective sentencing practice. This question will be explored in the following chapter.
5. The Cost-effectiveness of Community-based Sentences

A claim often made for community-based sanctions is that, to the extent that they are used as alternatives to imprisonment, they save money, and that the savings achieved equal the difference between the average sentence costs per annum for each offender. The first thing to note in respect of this claim is that different types of community-based sentences are likely to have quite different costs depending on the duration, level of intensity and enforcement of the sentences, as well as on the range of supportive services (including non-government services) provided to control, supervise and support the offenders in their assigned work, programme, or code of behaviour. This will be dependent to some extent on the selection of offenders for the particular sentences.

Fiscal costs

The latest costs for the Department of Corrections associated with community sentences and imprisonment in New Zealand are as follows:

Table 24: Costs of sentences to the Department of Corrections

<table>
<thead>
<tr>
<th>Sentence type</th>
<th>Per annum</th>
<th>Per month</th>
<th>Average sentence months</th>
<th>Average sentence cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Imprisonment (average)</td>
<td>52,935</td>
<td>4,411</td>
<td>11.8</td>
<td>52,050</td>
</tr>
<tr>
<td>Maximum security</td>
<td>71,529</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Medium security</td>
<td>53,677</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Minimum security</td>
<td>52,044</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Periodic detention</td>
<td>2,725</td>
<td>227</td>
<td>6.5</td>
<td>1,476</td>
</tr>
<tr>
<td>Supervision</td>
<td>2,075</td>
<td>173</td>
<td>6.5</td>
<td>1,125</td>
</tr>
<tr>
<td>Community programme</td>
<td>1,364</td>
<td>114</td>
<td>8.3</td>
<td>946</td>
</tr>
<tr>
<td>Community service</td>
<td>1,104</td>
<td>92</td>
<td>3.5</td>
<td>322</td>
</tr>
</tbody>
</table>

In terms of assessing the cost effectiveness of various sentences, however, there are certain considerations that make the average annual costs per offender of community-based sentences not directly comparable with the average annual cost per offender of imprisonment or the cost of one type of community sentence comparable with another. These considerations include:

- the extent to which offenders are diverted to particular community-based sentences from fines or diversion rather than prison (usually called net-widening);

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205 These are the full costs to the Department of Corrections and include Public Prisons Service and Community Probation Service costs plus an allocation of Departmental Head Office and infrastructural costs such as computer and phone systems. Community-based sentence costs are made up of personnel costs 52.9%; operating costs 14.4%; programme costs 6.4%; depreciation 3%; capital charges 1.4%; and Departmental overheads 21.9%. Figures (GST inclusive) are provided by Department of Corrections.
• the rates of breaches and the rates of re-sentencing to more costly sentences;
• the use of community-based sentences in combination with each other; and
• the effect of the different sentences on reoffending.

Net-widening

Net-widening is the term used to describe the phenomenon of increasing the number of people under the control of the correctional system through the introduction of a new sanction. This may occur even though it was the intention that the new sanction should be imposed on some offenders in lieu of a more severe sanction. It is also used to describe increasing the severity of sanctions for offenders. This can happen when a new sanction is introduced to reduce the use of a more severe sanction and instead it reduces to a greater extent the use of a sanction of lesser severity. Often it happens when non-custodial sanctions are introduced to replace imprisonment and they come to be used, instead, as substitutes for more traditional sanctions such as probation or fines. Meanwhile, the use of imprisonment goes on as before.

A hypothetical scenario that would illustrate this effect could start with a situation where 20% of convictions result in a sentence of imprisonment and 80% result in probation. A new sanction of intensive supervision is then introduced as a less severe and less costly alternative to imprisonment for some offenders currently receiving imprisonment. The intended result is to reduce the use of prison sentences by say 10%.

However, research has shown that the introduction of community sanctions as alternatives to imprisonment does not usually bring about the expected reduction in custodial sentences. Instead, to a much greater extent, they become alternatives to other alternatives to custody. In terms of the hypothetical scenario, this means that the percentage of offenders receiving imprisonment decreases to a small extent only and intensive supervision is mostly imposed on offenders who previously received probation, which is a less severe and intrusive disposition than intensive supervision. The net result is therefore an increase in sentence severity due to those probationers now serving intensive supervision. Contrary to the original intention, it is the less severe sanction of probation rather than the more severe one of imprisonment which is mainly diminished by intensive supervision.

This starting point, intended result and actual result are illustrated below:

<table>
<thead>
<tr>
<th>a) Starting point</th>
</tr>
</thead>
<tbody>
<tr>
<td>Imprisonment 20%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>b) Intended result: a reduction in imprisonment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Imprisonment 10%</td>
</tr>
</tbody>
</table>

c) Actual result; a reduction in probation

<table>
<thead>
<tr>
<th></th>
<th>Imprisonment</th>
<th>Intensive supervision</th>
<th>Probation</th>
<th>72%</th>
</tr>
</thead>
<tbody>
<tr>
<td>18%</td>
<td></td>
<td>10%</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The process does not stop here. Although 8% of the offenders who would previously have received probation will be placed under intensive supervision, there is likely to be no real decrease in the overall use of probation. The missing 8% of probationers will be replaced by a selection of those offenders who used to receive a less severe sanction of, say, a fine. The process can continue to have this domino effect in the direction of less severe sanctions so that it eventually involves those offenders who previously were diverted from the correctional system and received no sanction, thus increasing the overall number of people in the correctional system. This can be illustrated as follows:

d) The net widening effect

<table>
<thead>
<tr>
<th></th>
<th>Imprisonment</th>
<th>Intensive supervision</th>
<th>Probation</th>
<th>72%</th>
</tr>
</thead>
<tbody>
<tr>
<td>18%</td>
<td></td>
<td>10%</td>
<td></td>
<td>8%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Expanded use of probation</th>
<th>72% + 8%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Imprisonment 18%</td>
<td>Intensive supervision 10%</td>
<td>Probation 72%</td>
</tr>
<tr>
<td>Former use of Imprisonment 20%</td>
<td>Former use of probation 80%</td>
<td>Fines Reduced by 8%</td>
</tr>
</tbody>
</table>

Two things are happening that were not intended. First, imprisonment rather than one of the new community sanctions continues to be used for crimes that are at an intermediate level. Second, the more severe community sanctions are being used for some of the least serious offences, where they are disproportionately onerous, instead of being imposed, as intended, for offences of medium gravity.

Recent data show that in New Zealand extending the range of community-based sentences did lead to a substantial increase in the use of these sentences. Although imprisonment rates for some offences did decrease, these decreases were much smaller than the overall increases in the use of community-based sentences. In particular, there are indications that community service is now being used where previously (in the 1980s) a monetary penalty would have been imposed. This suggests that net-widening has occurred.\(^7\)

**Breaches of community-based sentences**

Even if savings are made by diverting some offenders from prison to community-based sentences, breaches of community-based sentences reduce the savings to the criminal justice system of those sentences. For example, the net savings in the number of prison beds would be the number of persons diverted, less the number of persons sentenced to imprisonment for breaching the alternative sentence or committing new crimes while not incapacitated by a prison sentence. In New Zealand periodic detention has a breach rate of about 20% (see table below) and in 1997 18% of these cases resulted in imprisonment (in 1988 it was as high as 26%) with an

\(^7\) Triggs, 1999, pp122; 131-3.
average custodial sentence length of 1.9 months. The 1997 prison census revealed 50 inmates whose major offence was breach of periodic detention out of a total of 4,935 sentenced inmates. Breaching the conditions of a supervision sentence or a community service sentence is not an imprisonable offence and there is no offence of breaching community programme. However, a review of these sentences can result in a sentence of imprisonment being imposed.

Where net-widening occurs, breaches can produce a net increase in imprisonment. If 30% of offenders sentenced to a particular community-based sentence are diverted from prison and 70% from fines, diversion, or another community sentence for which imprisonment is not available as a sanction for breach, then the proportion of that 70% who have the sentence revoked and are imprisoned represent a new demand for prison beds, the costs of which may exceed the savings made from the 30% diverted from imprisonment.

The table below shows the trends in convictions for breaches of community-based sentences over the last decade. As noted above, in New Zealand a breach of a community-based sentence can lead to a review of the sentence by the court and the offender can be re-sentenced on the original charge for which the community-based sentence was imposed. This type of breach of sentence resulting in a sentence review rather than a prosecution for breach is not included in the data below.

<table>
<thead>
<tr>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td><strong>Periodic detention</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No of sentences</td>
<td>19070</td>
<td>19885</td>
<td>23336</td>
<td>22608</td>
<td>23387</td>
<td>22131</td>
<td>20854</td>
<td>20584</td>
<td>21110</td>
<td>23015</td>
</tr>
<tr>
<td>No of cases involving a breach</td>
<td>3406</td>
<td>3368</td>
<td>3786</td>
<td>3935</td>
<td>4256</td>
<td>4507</td>
<td>4517</td>
<td>4574</td>
<td>4355</td>
<td>4586</td>
</tr>
<tr>
<td>Breach rate (per 1000 sentences)</td>
<td>179</td>
<td>169</td>
<td>162</td>
<td>174</td>
<td>182</td>
<td>204</td>
<td>217</td>
<td>222</td>
<td>206</td>
<td>199</td>
</tr>
<tr>
<td><strong>Supervision</strong></td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No of sentences</td>
<td>6680</td>
<td>5666</td>
<td>6062</td>
<td>6053</td>
<td>7484</td>
<td>9808</td>
<td>10316</td>
<td>10563</td>
<td>10402</td>
<td>10760</td>
</tr>
<tr>
<td>No of cases involving a breach</td>
<td>462</td>
<td>500</td>
<td>456</td>
<td>520</td>
<td>563</td>
<td>683</td>
<td>657</td>
<td>551</td>
<td>616</td>
<td>589</td>
</tr>
<tr>
<td>Breach rate (per 1000 sentences)</td>
<td>69</td>
<td>88</td>
<td>75</td>
<td>86</td>
<td>75</td>
<td>70</td>
<td>64</td>
<td>52</td>
<td>59</td>
<td>55</td>
</tr>
<tr>
<td><strong>Community service</strong></td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No of sentences</td>
<td>4406</td>
<td>5600</td>
<td>9318</td>
<td>9906</td>
<td>9965</td>
<td>9662</td>
<td>8890</td>
<td>8293</td>
<td>8068</td>
<td>8774</td>
</tr>
<tr>
<td>No of cases involving a breach</td>
<td>100</td>
<td>165</td>
<td>254</td>
<td>341</td>
<td>447</td>
<td>414</td>
<td>399</td>
<td>328</td>
<td>324</td>
<td>276</td>
</tr>
<tr>
<td>Breach rate (per 1000 sentences)</td>
<td>23</td>
<td>29</td>
<td>27</td>
<td>34</td>
<td>45</td>
<td>43</td>
<td>45</td>
<td>40</td>
<td>40</td>
<td>31</td>
</tr>
</tbody>
</table>

Periodic detention is the community-based sentence that has the highest breach rate (over 5 times that of community service and 3½ times that of supervision). This is likely to be because of the different characteristics of the offenders receiving that sentence and the fact that it is closely supervised and breaches will therefore nearly always be detected. It should also be noted that community service is imposed with the consent of the offender and will generally require the employing authority to report any breach in order for it to come to the attention of the system and action to be taken.

Convictions for breach of periodic detention increased substantially over the decade. The increase in the period between 1989 and 1991 is likely to have been partly due to an increase in

210 Source: Criminal Justice Group, Ministry of Justice.
the use of the sentence. The increase in breaches between 1992 and 1996, however, occurs despite the use of periodic detention decreasing, then levelling off. It therefore appears that the proportion of offenders breaching periodic detention increased, or else the likelihood of periodic detention wardens laying informations in court for such breaches increased, or both. In 1997 and 1998 the number of periodic detention sentences increased and the breach rate declined.

As the proportion of offenders who receive imprisonment for breach of periodic detention has declined there has been an increase in the use of periodic detention as the sentence for this offence (in 51% of cases in 1995 compared to 29% of cases in 1983).\textsuperscript{211}

The breach rate for supervision declined from 1993 to 1996, increased in 1997, and then fell again the following year. The number of convictions for breaching community service in 1998 was nearly triple the number in 1989. The increase was most apparent between 1989 and 1993 (as was the breach rate) but decreased over the next 5 years. This pattern is similar to the use of community service as a sentence over the same period except for an increase in the number of sentences in 1998.

The proportion of offenders prosecuted for breach of a particular sentence may tell us as much about the degree of tolerance towards violations or the effectiveness of the mechanisms for dealing with breaches as it does about true compliance with the sentence. With community service it is the community sponsor (“employing authority”) that oversees the offender (although statutory responsibility for overall supervision rests with the community probation service). Some sponsors, at least in the past, have avoided any enforcement role in the event of the offender not fulfilling the sentence requirements and have chosen not to inform the probation service of breaches because they have no wish to appear in court as a witness against the offender.\textsuperscript{212}

**Reviews of community-based sentences**

There are also the costs associated with the community probation service actioning reviews of community-based sentences where there are difficulties over compliance. These are different from actions for breach of sentence. The reviews involve applications to the courts and may result in changes to the conditions of a sentence, cancellation of a sentence, or a new sentence.

**Combined sentences**

The extent to which community-based sentences are used concurrently with each other increases the cost of their imposition. In New Zealand the two community-based sentences of periodic detention and supervision can be imposed concurrently. In 1998 supervision was imposed as the most serious sentence in 5,331 cases. It was imposed in a further 3,735 cases in combination with periodic detention. To add a sentence of supervision to one of periodic detention significantly adds to the cost of the total sentence (see table 24).

\textsuperscript{211} Triggs, 1999, p130.
\textsuperscript{212} Asher and O’Neill, 1990, p25.
Re-offending/Reconvictions

Any full cost effectiveness analysis of the different community and custodial sentences needs to take into account any differential impact that the sentences may have on re-offending. In other words, in terms of later criminality by convicted and sentenced offenders, do community-based sentences diminish or increase crime compared with comparable groups of offenders sentenced to imprisonment or to monetary penalties? If community-based sentences produce higher re-offending rates than is the case with the other sentences, then there is an additional cost involved with community-based sentences.

Reconviction rates provide the only viable means of assessing the effectiveness of particular sentences in preventing re-offending but are limited in their usefulness in making comparisons for two principal reasons. One is that reconviction rates are only an approximate measure of reoffending, since they record only offending that has been successfully detected and prosecuted. The other is that reoffending is influenced more by other factors than by the sentence. Factors closely associated with reconviction are age, gender, ethnicity, and criminal history. Different types of sentences tend to be given to different sorts of offenders with widely different probabilities of reoffending.

The table below is based on a study of reconviction rates for offenders in the two years following the conviction date of their first 1991 proved case or, for offenders sentenced to imprisonment, within two years of their estimated release date. All offenders who had one or more proved cases involving an imprisonable offence in 1991 were included in the data-set (about 77,000 offenders). The figures show the predicted probability of reconviction for each sentence type calculated from a statistical model of reconviction rates, using current and past offending and demographic characteristics of offenders as predictor variables. This is compared with the actual reconviction rate.

Table 26: Actual percentage of offenders reconvicted within two years compared to the percentage predicted, by sentence type, for cases finalised in 1991

<table>
<thead>
<tr>
<th>Sentence Type</th>
<th>Predicted reconviction percent</th>
<th>Actual reconviction percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Imprisonment</td>
<td>83.0</td>
<td>81.8</td>
</tr>
<tr>
<td>Periodic detention</td>
<td>74.4</td>
<td>76.9</td>
</tr>
<tr>
<td>Community care/programme</td>
<td>73.6</td>
<td>69.7</td>
</tr>
<tr>
<td>Community service</td>
<td>50.7</td>
<td>51.8</td>
</tr>
<tr>
<td>Supervision</td>
<td>65.2</td>
<td>66.4</td>
</tr>
<tr>
<td>Monetary penalty</td>
<td>47.7</td>
<td>46.2</td>
</tr>
<tr>
<td>Other sentence</td>
<td>63.2</td>
<td>63.7</td>
</tr>
<tr>
<td>No sentence</td>
<td>55.9</td>
<td>53.4</td>
</tr>
</tbody>
</table>

Reconviction rates for most of the sentences are very close to the rates that were predicted for each group on the basis of the criminal histories of the offenders (e.g. the seriousness and frequency of past convictions) who received that sentence, along with their age, gender, and ethnicity. In other words, the fact that community service had a significantly lower reconviction

214 Triggs, 1999, p142.
rate than the other community-based sentences is accounted for by the type of offenders receiving that sentence rather than the type of sentence per se.

The results of the modelling indicated that the most important variables for predicting recidivism were the criminal history and the demographic group (age, gender, ethnicity) of the offender. None of the sentence types were highly significant predictors of recidivism. Community programme and prison had no significant effect on recidivism rates, relative to monetary penalties, once other factors (such as differences in criminal history and current offending) were taken into account. Periodic detention, community service, and supervision appeared to be associated with an increased risk of recidivism, relative to monetary penalties, although this may mean that people sentenced to those community-based sentences have other characteristics that increased the likelihood of re-offending that could not be measured statistically. Previous sentences of imprisonment or any community-based sentence appeared to increase the risk of recidivism. The model also indicated that the seriousness of the current offence, despite being a key factor in determining which sentence is imposed, has relatively little impact on recidivism following completion of the sentence.\(^{215}\)

The above findings are consistent with a 1984 study of recidivism within one year following the imposition of either a sentence of community service or of periodic detention.\(^{216}\) The analysis found an overall reconviction rate of 38% for the community service group and 59% for the periodic detention group. However, reconviction rates varied significantly when the samples were disaggregated. For example, the highest reconviction rate following a sentence of community service (74%) came from a subgroup who had not received additional probation and who were 17 years old or younger at the time of their first conviction. The lowest rate (25%) came from the group who had not received probation and who were 23 years or more at the time of their first conviction. Similarly, the highest reconviction rate following periodic detention (80%) came from a subgroup who had not received additional probation and who were 17 years or younger at the time of their first conviction. The lowest rate (25%) came from the group who did not receive probation and who were 23 years or more at the time of their first conviction.\(^{217}\)

The study concluded that “reconviction rates depended to a great extent on factors other than the actual sentence”. The analysis showed that when certain of these factors were taken into account when comparing the sentences of community service and periodic detention, in many cases there was no significant difference in the relative reconviction rates. Specifically, there was no difference in the reconviction rates of community service and periodic detention groups when extreme groups were compared – the highest risk group and the lowest group.\(^{218}\)

In the case of moderate risk groups, there was a difference in reconviction rates between the two sentences. However, this did not necessarily mean that those who posed a moderate risk of re-offending would be less likely to be re-convicted if the sentence of community service rather than periodic detention was imposed. A different interpretation was favoured for 3 reasons. Firstly, as reconviction rates varied greatly in relation to factors besides the sentence given, the validity of an apparent difference between sentences was questionable. The second reason was that the variables utilised were not fully inclusive of all factors that may impact on individuals’

\(^{215}\) Ibid, p143-5.
\(^{216}\) Leibrich, 1984.
\(^{217}\) Ibid, p203.
\(^{218}\) Ibid, p204.
reconviction rates. For example, employment, family, and education details were excluded from the analysis. Thirdly, the study did not examine post-sentence circumstances that might have made a difference to reconviction rates.\(^\text{219}\)

The table below shows reconviction rates after one and two years, for sentences imposed in 1995. Reconviction rates for custodial sentences of one year or less are included as a comparison. As already noted, the most important variables for predicting recidivism were the criminal history and the demographic group (age, gender, ethnicity) of the offender. None of the sentence types were highly significant predictors of recidivism.

Table 27: One year and two year reconviction rates for people sentenced in 1995\(^\text{220}\)

<table>
<thead>
<tr>
<th>Sentence</th>
<th>One year reconviction rate</th>
<th>Two year reconviction rate(2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prison for one year or less(^\text{1})</td>
<td>0.63</td>
<td>0.80</td>
</tr>
<tr>
<td>Periodic detention</td>
<td>0.60</td>
<td>0.73</td>
</tr>
<tr>
<td>Community programme</td>
<td>0.47</td>
<td>0.63</td>
</tr>
<tr>
<td>Community service</td>
<td>0.37</td>
<td>0.51</td>
</tr>
<tr>
<td>Supervision</td>
<td>0.45</td>
<td>0.61</td>
</tr>
<tr>
<td>Monetary</td>
<td>0.30</td>
<td>0.41</td>
</tr>
<tr>
<td>Other</td>
<td>0.39</td>
<td>0.51</td>
</tr>
</tbody>
</table>

Note:
\(^{1}\) Recovision rates are within one or two years from the estimated date of release from prison. People given a custodial sentence of longer than one year in 1995 were excluded from the table as in most cases, all or part of the one and two years after the prison sentence was imposed was spent in custody which limits the opportunity for reoffending and hence does not allow a valid comparison with reoffending rates for non-custodial sentence types.

\(^{2}\) Two year reconviction figure excludes data for 6% of cases where there was less than two years between the person’s estimated date of release from prison and when the data on reconvictions were extracted.

**Fast-tracking**

Re-offending increases in significance when it also leads to the fast-tracking of offenders through the range of available penalties towards imprisonment. This arises when there is a general perception among the judiciary that when one type of penalty has been tried on an offender and he or she re-offends, then that penalty has failed and a more severe one must be imposed. In other words, when there is repeat offending, sentences become progressively more severe with each new offence, causing offenders to escalate up the penalty scale. Fast-tracking then occurs when offenders start receiving penalties out of proportion to the gravity of the current offence. Thus, an offender sentenced to community service relatively early in his or her offending history, for a comparatively minor offence, may be sentenced to periodic detention for a subsequent offence of similar severity rather than community service again or a fine, which might have been the penalty if it had been a first offence. A further offence is then punished with imprisonment. In comparison, someone who receives a fine at the early stage may receive community service for the subsequent offending. In reality persistent offenders do not progress step by step up a ladder of sentences since they neither consistently offend at the same level of seriousness, nor offend at a consistently increasing level of seriousness. Rather they will engage in a wide range of offending of varying seriousness and type which will result in a variety of penalties before they end up in prison (unless at any stage they commit an extremely serious offence). Nevertheless,

\(^{219}\) Ibid, p204.

\(^{220}\) Source: Criminal Justice Group, Ministry of Justice.
“fast-tracking” may be the generalised trend, with sentences increasing in severity if offending were to remain at the same level.

Recent research to determine the relative influence of various statistical factors on sentencing does show that the probability of receiving a particular community-based sentence is strongly influenced by the type of any community-based sentence served in the past. The research also shows a degree of escalation taking place with sentencing. That is, the previous sentence increases the risk of the same sentence or a more serious sentence being imposed, all other factors being equal. For example, the probability of receiving a periodic detention sentence is higher if the most recent or previous sentences are periodic detention or community service. Having a previous periodic detention sentence increases the probability of receiving a prison sentence and decreases the probability of a community service sentence or monetary penalty.

If an offender has already served a community service sentence then they are more likely to get periodic detention or supervision or community service again as the next sentence, but less likely to get a monetary penalty. Similarly, once a periodic detention sentence has been served the less serious community service is less likely than periodic detention or imprisonment to be the next sentence, even when the seriousness of the offence and criminal history of the offender are taken into account.

However, it needs to be noted that although the likelihood of imprisonment is relatively higher for offenders whose most recent sentence was periodic detention, the use of imprisonment for this group of offenders has decreased considerably since 1983. In that year 32% of offenders whose last sentence was periodic detention received a custodial sentence as their next sentence and in 1995 this had decreased to 16%. There has also been a decline in the use of imprisonment in general for offenders with several previous convictions. Thus, the impact of fast-tracking has been reduced in practice by a decrease in the use of imprisonment for these offenders.

Other considerations

There are three other considerations that complicate cost comparisons: transaction costs, marginal costs, and costs to the wider community.

The first of these considerations is that, in addition to the additional sentence costs of the net-widening process that shifts those who might have been fined to a community sentence and then shifts some of those to prison because of a breach of sentence, this process creates transaction costs. These are new expenses for prosecutors, the courts, and the probation service in administering each of those violations and transfers.

The second consideration is that imposing a community sentence on an offender who would otherwise have received 6 months or 1 year’s imprisonment does not save the prison system the average cost of an inmate serving six months or a year’s prison sentence. When the marginal costs of 50 to 100 inmates in a prison system of 5,000 inmates (spread over 19 institutions) are compared with the marginal costs of placing that number of offenders in a small programme then the potential cost savings are diminished. Unless the reduction in the number of inmates reaches a level which enables a prison or a prison unit to be closed or not opened, the only

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221 Triggs, 1999.
222 Ibid, p130.
savings from diverting that number will be incremental costs for food, laundry, supplies, and other routine items. The major costs of payroll, administration, debt servicing, maintenance, and depreciation will not be affected to any great extent. In other words, savings in the prison system will only accrue when the alternative sanctions reach a threshold of usage that allows institutional changes in costs of imprisoning.

Third, there are the costs of crimes (often not “cleared” by the police) that will occur if offenders are assigned to a community sentence rather than imprisoned. This specifically relates to crimes committed in the community while the offender is on the sentence rather than recidivism in general, which is discussed above. It is likely that averting crimes through incapacitation produces savings to the larger community not possible with alternative sanctions, although estimates of the level of savings have been contested, particularly in terms of the supposed number of crimes prevented for each inmate confined and the dollar amount that that saves.  

A full cost-effectiveness analysis of community-based sentences would also have to take into account such factors as the benefits of the work done by offenders on periodic detention or community service. A recent Department of Corrections publication states that the estimated value of the work done by detainees is $18 million per annum. There are also the benefits to offenders of attending programmes while on supervision or community programme. These might include the learning of new skills.

**Effects of the availability of community-based sentences on the use of imprisonment**

The evidence available from overseas seems to point to it being unlikely that a sustainable reduction in the prison population can be brought about through expanding community-based sentencing options. Even when such sentences have been specifically designed to reduce imprisonment this appears to be difficult to realise. Studies monitoring imprisonment rates in the United States, Canada, and Britain during the 1970s and 1980s, found that in spite of the development and implementation of a range of alternative community-based sentences, imprisonment rates kept climbing. In the United States and Canada there were also dramatic increases in corrections expenditure and personnel over this period. The explanation for this was that it was because many of those receiving the alternatives would not have gone to prison in the first place and when they were being used as genuine alternatives they were nearly always impacting on the use of the shortest custodial sentences and thus having little impact on prison musters. Both these trends (increasing musters and corrections expenditure) have also shown up in New Zealand.

However, any historical association between a rising prison population or the rate of imprisonment and an expanding system of community sanctions does not mean that the latter provided the means for the former to happen, and certainly does not establish a direct causal link.

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224 Department of Corrections, Corrections News, June 1999, p1.
225 Chan and Zdenkowski 1986, pp136-8. Bottoms (1987) examined trends in sentencing in England and Wales from 1965 to 1985, during which suspended sentences, the community service order and probation with special conditions (including attendance at day centres) were introduced to reduce prison use. Both the prison population and the proportionate use of custody continued to increase. Hylton (1982) has cited Canadian provincial data from 1962 to 1979 to reach similar conclusions.
226 Vass, 1996, p170. The New Zealand prison census in 1997 showed that 63.4% of the population were serving sentences of more than 2 years (p27).
between the two trends. There are likely to be other factors at work which bring about changes in the prison population. Such factors include changes in policing practices (law enforcement), legislation (e.g. penalties), sentencing by the courts (e.g. length of prison sentences or the imposition of imprisonment for particular types of offences), crime rates, and the types and seriousness of offending being dealt with by the courts, the circumstances and criminal histories of offenders being sentenced, and changes to parole eligibility or final release dates for prison inmates. In New Zealand the size of the prison population is particularly sensitive to the number of serious violent offenders prosecuted because they serve by far the longest sentences.

In New Zealand the percentage of convicted imprisonable cases resulting in imprisonment has changed relatively little, fluctuating between 8% and 11% in the period 1982 to 1998. However, the indications are that there has been a relative decrease in the use of imprisonment in that with most offences other than the more serious violent, sexual, and drug dealing offences there was almost twice the likelihood of receiving a prison sentence in 1983 than there was in 1995. This reflects the introduction of presumptions against the use of imprisonment for less serious property offences by the Criminal Justice Act 1985 and the introduction of suspended prison sentences in 1993. This is strong evidence that the availability of community-based sentences has reduced the range of offenders being sentenced to imprisonment.

Nevertheless, the prison population has increased by more than 50% in the last decade (1989-1998). The factors driving the growth of the prison population have been significant increases since 1983 in the average seriousness of cases being prosecuted and in the average number of previous convictions of convicted offenders (fewer first offenders and more very persistent offenders), and increases in sentence lengths for very serious offences. There has been an increasing proportion of violent offenders in the prison population. In particular there has been a significant increase in the length of prison sentences served for serious violent offenders due in no small part to the removal of parole for serious violent offenders and an increase in the minimum non-parole periods for inmates serving life imprisonment and preventive detention. The growth in New Zealand’s prison population is examined in detail in *The Use of Imprisonment in New Zealand* (1998).

**Summary**

There is no evidence to suggest that community-based sentences are generally more or less effective than imprisonment in terms of recidivism, although the specific programme content of any sentence may of course have an impact on recidivism. Therefore, the relative costs of the various sentences become important considerations. While it is the stated purpose of the community-based sentences to act as an alternative to more costly sentences of imprisonment, the overall cost savings from the availability of community-based sentences may be considerably less than what at first appears likely to be the case, for the following reasons:

- the costs of net-widening, whereby many offenders serving community-based sentences would have incurred a fine had those sentences not been available. This involves a loss of fines revenue as well as the costs of administering the community-based sentences;

- to the limited extent that community-based sentences replace the use of imprisonment, this mainly impacts on short terms of imprisonment which have relatively little effect on prison

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numbers. Savings in the prison system will only be realised when the alternative sanctions reach a threshold of usage that either enables some prisons or prison units to be closed down or avoids the need, that would otherwise arise, for extra buildings to be built;

- the costs of fast-tracking offenders towards imprisonment;
- the costs of imprisonment or alternative sentences incurred as a result of breaches of the original community-based sentences (and the associated transaction costs);
- the costs of concurrent sentencing; and
- the costs of crimes committed because the offenders have not been incapacitated by imprisonment.

The points noted above reduce the chances of achieving net cost savings. They also mean that the difficulties in making any calculation of those savings are formidable and would involve making a considerable variety of assumptions. A true cost-benefit analysis of the impact of community-based sentences would only be possible if sentences were imposed in accordance with strict guidelines. If this were the case it would be possible to determine the savings or additional costs which might result from changes to the guidelines which, for example, caused all cases of a particular offence type to result in one specific sentence rather than another. However, the sentencing menu provided by the Criminal Justice Act 1985 was deliberately established to provide the courts with a range of sentencing options, whereby any particular sentence imposed would be determined on the basis of a very wide range of factors (including aggravating and mitigating circumstances) specific to the individual case rather than by, for example, offence type only. It is not possible, therefore, to assume on the basis of statistical data, what alternative sentences might have been imposed had the sentencing menu been more restricted. The high premium placed on judicial discretion in the sentencing process means that an accurate cost-benefit analysis of the impact of community-based sentences is not possible.

There are nevertheless likely to have been some cost savings made in New Zealand in the 1983-95 period as a result of the real decrease in the use of imprisonment (after taking into account the increase in the seriousness of offences and offenders coming before the courts) that followed from a greater use of community-based sentences, even though the majority of those sentences did not replace imprisonment. A crude calculation could be as follows:

- estimated real reduction in imprisonment of 3.7 per 100 cases, averaging 3 months with release after half the sentence equates to $3.7 \times 3/12 \times 0.5 = 0.46 \text{ inmate/years}$. At an average inmate cost of $52,000 per annum this equals a cost decrease of $24,000 per 100 cases;
- estimated real increase in community-based sentences of 14.8 per 100 cases, with an average offender cost of $1,000 equals a cost increase of $14,800;
- estimated real decrease in fines of 15.7 per 100 cases at an average fine of $500 equals a cost increase (revenue loss) of $7,800;
- cost saving equals $1,400 per 100 cases. ($24,000 – 14,800 – 7,800).

This does not take into account costs resulting from breaches and reviews of community-based sentences and subsequent re-sentencing, or the additional costs of any crimes committed whilst the offender was in the community rather than in prison.
6. International Comparisons

In order to provide a comparative context for New Zealand community-based sentencing options, a number of international jurisdictions were examined. The selected jurisdictions were England and Wales, Scotland, Ireland, Australia, Canada, the United States of America, Germany, the Netherlands, and Finland. The detailed description of the community-based sentencing based options in these jurisdictions is contained in Appendix 1. The table below summarises the community-based sentencing options available in the above jurisdictions.

Table 28: Community-based sentences in selected overseas jurisdictions

<table>
<thead>
<tr>
<th>Sentence types</th>
<th>Probation supervise/correction order</th>
<th>Intensive probation, supervision, correction order</th>
<th>Comm service order</th>
<th>Comm based order/combin-ation order</th>
<th>Comm-unity program</th>
<th>Attend-ance/day report centre</th>
<th>Training order</th>
<th>Periodic detention</th>
<th>Curfew orders</th>
<th>Punitive work order</th>
</tr>
</thead>
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²³⁰ Numbers in brackets represent the number of Australian States or Territories which have this sentence available as a sentencing option. The total number of Australian jurisdictions is 9 including the Commonwealth (Federal Government) and Australian Capital Territory.

²³¹ This table reflects the two community-based sentencing options generally available throughout the United States. There are a number of additional options, however, that vary among the different States. California's intermediate sanctions provides an example of possible impositions: short-term 'shock' incarceration in jail/prison (for a period of not more than 60 days); incarceration in a 'boot camp' facility; home detention with electronic monitoring; mandatory community service; restorative justice programmes; work/training/education in a furlough programme; work (in lieu of confinement) in a work release programme; day reporting; mandatory residential or non-residential substance abuse treatment programmes; and mandatory random drug testing.
The table above highlights the following:

- the sentences of supervision (or probation/correction orders) and community service are the most common sentences across the international jurisdictions (see discussion below);
- the sentence of community programme is a unique feature of the New Zealand sentencing regime;
- the sentence of periodic detention is an uncommon sentencing option (only available in New Zealand and 2 Australian jurisdictions, New South Wales and Australia Capital Territory);
- New Zealand has more community-based sentencing options than the other jurisdictions, with the exception of England and Wales;
- two Australian jurisdictions, Victoria and Western Australia, and England and Wales have a combination (or community-based) order;
- the majority of community-based sentencing options have significant control and monitoring regimes combined with elements of rehabilitation/reintegration (the first 7 sentence types in the table). Three options are predominately based on punitive and retributive sentencing rationales (the last 3 sentence types).

**Probation**

As the table above illustrates, a probation type sanction is a commonly available community-based sentencing option across the international jurisdictions. Probation is available in all but two jurisdictions, Finland and the Netherlands. Its overall objective is generally the control and monitoring of an offender in the community. Conditions, which emphasise the prevention of future offending, are applicable (although the options vary in each jurisdiction). The sentencing court generally imposes these conditions and the probation service is responsible for the ongoing sentence administration and offender supervision.

The method by which probation is utilised varies among the jurisdictions. In England and Wales, probation exists as a sentence in its own right and is imposed as an alternative to imprisonment. German use of probation is restricted to concurrent application with a suspended sentence of imprisonment for sentences of up to two years. In the U.S.A it is possible to combine probation with suspended sentences although it remains available as an “intermediate” or community-based sentencing option. Judges may also decide to employ ‘split sentencing’, which is the imposition of a jail term followed by time served on probation. Similarly, the New Zealand judiciary can impose a sentence of supervision cumulative on a term of imprisonment of 12 months or less. Supervision can be imposed concurrently with either a suspended sentence of imprisonment or periodic detention or, as a sentence ‘in its own right’. In Ireland the courts impose probation orders when offenders are discharged conditionally on entering into a recognisance to keep the peace and be of good behaviour. The Canadian judiciary can impose probation in a number of sentencing situations: as part of a conditional discharge; as a condition of a suspended sentence; as part of an intermittent sentence; as a sentence in its own right; or following a prison term of less than 2 years.

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233 However, it is not available for convictions for serious crimes (murder, rape or other serious assaults), other offences that contain a mandatory minimum term of imprisonment or offences where the “3 strikes & you’re out” laws apply.
234 Refer to section 3.
The type of offenders targeted for probation is different among the jurisdictions. Probation in England and Wales is specifically designed to target offenders with a high risk of reoffending. Similarly, Germany targets high-risk offenders, illustrated by the use of probation only in conjunction with a suspended sentence. However, in Australia, probation is considered suitable for an offender who “has not yet manifested a high degree of criminality but who does show signs of personal inability to cope with stress”\textsuperscript{235}, the low to medium risk offender. In both Ireland and the USA the sentence of probation (as distinct from intensive probation/supervision/correction orders) is targeted towards the first-time offender, the non-serious offender and/or the casual offender.

The permitted duration of a sentence of probation in England and Wales, Ireland, and Canada is 3 years whereas in New Zealand, the maximum length is 2 years. For Australia the duration of probation varies across the individual States and Territories, although it is generally between 2 to 5 years. Germany has a discretionary maximum duration for probation, anywhere between 2 to 5 years (for sentences of imprisonment of up to 2 years, subsequently suspended). One commonality in all these jurisdictions is the existence of breach procedures, which allow for the terms of an order to be either modified or revoked. When revoked, the offender is re-sentenced and a sentence of imprisonment is an option available to the court.

**Community service**

The sentence of community service is available in all the selected jurisdictions, albeit in different forms.\textsuperscript{236} In each case the objectives are similar and involve reparation to the community through the performance of unpaid work (direct reparation to the victim can occur in Australia). The appropriate work site locations vary among the jurisdictions, with activity for community (not profit) organisations cited the most frequently. Additional objectives of community service include the punishment of offenders through the deprivation of ‘free time’, and the facilitation of their reintegration back into the community.\textsuperscript{237}

In four jurisdictions, Ireland, England and Wales, Australia, and New Zealand, the decision to impose community service is not dependent, in the first instance, on a decision to imprison. Here, community service is a sentencing option in its own right. Irish courts can impose community service for offences which, in the court’s opinion, would otherwise have received a term of imprisonment.\textsuperscript{238} The English and Welsh courts can impose community service concurrently with curfew orders, or with a fine. It is not possible to combine community service with a prison sentence (including a suspended one) or with a probation order (except as part of a combination order). The Australian States or Territories may impose community service either in substitution for, or in default of, payment of fines. In New Zealand, for an imprisonable offence, community service may also be imposed in lieu of fines, and also for other offences when there has been a fine default.

\textsuperscript{235} Cited in *The Laws of Australia*, 1998, 12.5, chapter 5, section 52.

\textsuperscript{236} For example, as a sentence in it’s own right, as a direct alternative to imprisonment or as a condition to be attached to a probation order.

\textsuperscript{237} Additional common elements among the jurisdictions include the requirement for offender’s to consent to the imposition of community service (except in Tasmania and South Australia) and a maximum number of hours pre-determined by legislation (with a range of 200 to 500 hours among the jurisdictions).

\textsuperscript{238} Community service is regularly imposed for assault, burglary and larceny, car theft, driving offences and malicious damage.
However, the situation is different for both the Finland and Netherlands jurisdictions where the decision to impose community service follows the initial decision to impose an unconditional prison sentence. Finland’s process is that the community service sanction is only imposed as an alternative to imprisonment once the sentencing decision is made applying normal sentencing principles and criteria. If the result is unconditional prison then the court may substitute the sentence with one of community service, if certain requirements are fulfilled. When commuting imprisonment into community service, one day in prison corresponds to one hour of community service (e.g. 2 months of a custodial sentence becomes approximately 60 hours of community service).

Within the Dutch jurisdiction, community service can also only be imposed as a substitute for an unconditional prison sentence of 6 months or less. Additionally, community service can be imposed for a part-suspended-part-unconditional prison sentence when the unconditional component is 6 months or less. Community service cannot be imposed as an alternative to a suspended prison sentence, a fine, or a fine-default detention.

Community service in Canada exists only in the form of a condition attached to a probation order (a maximum of 240 hours is set). This was similar to German sentencing practice until the 1980s when community service was extended as an option for fine defaulters who would have otherwise received imprisonment for non-payment of a fine.

Two interesting divergences from the New Zealand use of community service exist. The first is within the Dutch regime where compliance with community service is monitored by the prosecution service (with assistance from the probation service). This is in contrast to the role of the probation service in New Zealand. The second divergence is that in Australia, where community service is regarded as a severe sanction, there is an increasing move to incorporate educational, counselling, and personal development programmes into community service conditions.

Two States in Australia, Queensland and South Australia, have a stipulation on community service that supervising officials are to avoid providing directions to offenders that would result in conflict with their employment, educational opportunities, family commitments, or religious beliefs. In New Zealand community service must be appropriate to the offender with regard to his or her character and personal history.

**Combination orders**

Two Australian jurisdictions, Victoria and Western Australia, and England and Wales currently have the option of a combination order in their sentencing regimes. Combination orders (combined probation and community service orders) were introduced into England and Wales in 1992. Offenders aged 16 or over are eligible for this sentence, which requires the person to be under the supervision of a probation officer for a specified period between 12 months and 3 years. The key purpose of community service, the performance of unpaid work for a specified number of hours (between 40 and 100) remains. Before the court is able to impose this sentence, the judge must be of the opinion that the order is:

- desirable in the interests of securing the rehabilitation of the offender,
- protecting the public from harm or,
- preventing the commission of further offences.
The combination order is only available for imprisonable offences and cannot be combined with other sentences of probation, community service or imprisonment. However, a combination order can be imposed concurrently with either a curfew or compensation order, or disqualification. It is generally imposed on more serious offences than either probation or a community service order.239

The community-based order was introduced in Victoria in 1985 and became available in Western Australia in 1995. The community-based order was designed to replace three non-custodial sanctions: supervised probation, community service orders and attendance centre orders. The rationale underlying the introduction of community-based orders was to increase judicial flexibility when sentencing.240 This is because the orders are considered suitable for a broad spectrum of offenders and offences (including those who demonstrate a high risk of re-offending). There are two limitations to this ‘broad spectrum’. Firstly, the orders are not available for offenders who have committed crimes of violence or who may present a continuing threat to the community in terms of future serious offending. Secondly, the community-based order is considered unsuitable for offenders who present little or no risk to the community and whose criminal behaviour is sufficiently sanctioned by a fine or a non-supervised order.241

The Victorian courts require the offender’s consent to the imposition of a community-based order, whereas in Western Australia, the offender must only consent to any treatment conditions imposed.242 In Victoria the legislative limit on the duration of community-based orders is that the order cannot exceed 24 months. The total number of hours that may be worked in any seven day period must not exceed 20, unless the offender gives written consent in which case he or she may be able to work up to 40 hours in 7 days. In Western Australia, the duration of a community-based order cannot be less than 6 months. A community service requirement (or condition) of an order cannot exceed 120 hours but must be more than 40 hours. Where more than one community-based order is made, the total number of outstanding hours to be performed must not exceed 240. The minimum number of hours to be worked in any one week is 12.243

A key difference between Victoria/Western Australia, and England and Wales in the introduction of combination/community-based orders is that in Victoria/Western Australia the orders replaced probation and community service. However, in England and Wales, the combination order expanded the sentencing options available.

**Periodic detention**

Periodic detention is available in two Australian jurisdictions, New South Wales244 and Australian Capital Territory. There are two key differences in periodic detention between the Australian jurisdictions and New Zealand. Firstly, in order to impose periodic detention, the Australian judiciary must first decide to impose imprisonment. Once this occurs, the judiciary can progress to determining that the offender can serve their sentence of imprisonment by way of periodic detention. Cancellation of the periodic detention order, therefore, results in imprisonment.245

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241 Ibid, 12.5, chapter 5, section 94.
242 Ibid, 12.5, chapter 5, section 97.
244 New South Wales has 11 periodic detention centres (Judicial Commission of New South Wales, 1998, p2).
245 The Periodic Detention of Prisoners Act 1981 (NSW) and the Periodic Detention Act 1995 (ACT).
The second key difference is that periodic detention is primarily a residential sentence in both Australian jurisdictions (in New Zealand periodic detention is a non-residential sentence). Detainees are required to report to a periodic detention centre for a 48-hour period, usually over a weekend.\textsuperscript{246} While resident at the centre, the detainee may be required to perform work activity suitable to their physical capacity or attend any programme considered conducive to the detainee’s welfare or training.\textsuperscript{247}

However, in New South Wales a detainee can progress from the residential component (Stage I) of the periodic detention sentence to a non-residential component (Stage II).\textsuperscript{248} The progression occurs once the detainee has completed either three months or one-third of their sentence and after the lodgement of an application with a Community Committee.\textsuperscript{249} This committee assesses the detainee’s attitude to work, offences, and eligibility. If accepted the detainee is required to report directly to a nominated work site on each of the 2 days of their weekly detention and is no longer required to stay overnight in a periodic detention centre. If the detainee subsequently fails to attend the nominated work site without prior approval or if they receive an adverse report from the work site supervisor they can be returned to Stage I of the sentence. The objective of Stage II is to provide detainees with an incentive to comply with their order, particularly when the sentence is at the upper end of the scale.\textsuperscript{250}

\textsuperscript{246} A midweek periodic detention scheme is available in some centres.
\textsuperscript{247} The Periodic Detention of Prisoners Act 1981 (NSW) and the Periodic Detention Act 1995 (ACT).
\textsuperscript{248} Stage II is mandated by ss10 and 11 of the Periodic Detention of Prisoners Act 1981 (NSW).
\textsuperscript{249} Community Committees consist of people nominated/appointed by the Commissioner of Corrective Services. The function of the Committee is to make recommendations to the Commissioner as to the nature and extent of the periodic detention work available/permitted and on any other matters raised (s32 Periodic Detention of Prisoners Act 1981 (NSW)).


7. Options for Change

As set out in section 5, there are a number of reasons why community-based sentences may not realise their full potential in terms of being used as genuine alternatives to imprisonment and enabling significant cost-savings to be made to the criminal justice system. Community-based sentences can reduce costs and divert offenders from imprisonment, but these results are not easy to obtain. There are also issues that have been raised in previous reviews of these sentences, regarding the overuse or under-utilisation of particular sentences, some of which relate to how the sentences are managed/administered and others to a lack of clarity and unanimity/consensus among legislators, the judiciary, and the probation service about the principal purpose or rationale of the various sentences.

It would make sense for a sentencing system to be based on rationales or principles that are reflected in community-based sentences that can be distinguished from each other so that there is a logic to using one rather than another and for using a particular one rather than imprisonment. According to the principle of restraint,\textsuperscript{251} sentencers should try and ensure that the least intrusive and least severe sanction consistent with public safety, the seriousness of the offence, and the aims of the sentencing system is imposed in each case. The latter will also usually be consistent with using a less costly sanction ahead of a more costly one. It also makes sense (if rehabilitation is to be a sentencing rationale for particular offending and offender circumstances) to use in appropriate cases the sentence likely to be most effective at rehabilitating the offender. Previous studies have shown that there could have been greater use of community-based sentences at the expense of imprisonment.\textsuperscript{252}

This section sets out issues in respect of the imposition of community-based sentences and possible ways to address them that could lead to improved management of the corrections system. The arguments for and against each response are discussed, although no one or more approaches are being recommended here. To proceed with any one of them would first require greater analysis as they all involve considerable amendment to current sentences and the way they are used.

Reduce net-widening

Community-based sentences seem to be highly vulnerable to net-widening, as discussed in section 5. There are a variety of measures which could be used to minimise this tendency.

Sentencing Guidance

One means commonly put forward to reduce net-widening is the use of sentencing guidelines to indicate when community-based sentences are to be used instead of, on the one hand, a fine or discharge or deferment and, on the other hand, imprisonment.\textsuperscript{253} There could also be guidance regarding the use of one community-based sentence rather than another. The debate about sentencing guidance is essentially over obtaining a balance that ensures that sentences are

\textsuperscript{253} See for example, Tonry, 1996, p103.
imposed according to the intentions of the legislature without unduly circumscribing judicial discretion which enables judges to provide justice in a wide range of individual circumstances. One consideration that complicates this balancing act is that parliaments often do not specify to a high degree how a particular sentence shall be used because the use of generalities and the possibility of achieving a variety of goals assists legislation pass through its various stages.

At present New Zealand legislation provides little sentencing guidance other than, in fairly general terms, when to impose and not impose imprisonment. There is little direction about which community-based sentence should be used in which circumstances, and no directions as to the type of offending that each community-based sentence could be used for (although indications of this have been provided by case law). Possible elaborations in legislation could include:

- having community-based sentences graded in severity;
- a direction to the effect that a community-based sentence is only to be imposed in circumstances where the court would otherwise have sentenced the offender to imprisonment;
- a direction that a particular sentence should not be imposed if the purpose for which the sentence is imposed can be achieved by one of lesser severity;
- a direction that fines be used for most offending of intermediate seriousness unless reasons of public safety or the circumstances of the offender make it inappropriate;
- specifying the kind of offences and offender combinations appropriate for each sentence;
- matching hours or months of community sentences with terms of imprisonment and amounts of fines;
- creating punishment units as the presumptive sentence for offences (so that offences receive a particular number of units rather than a sentence type) into which all sanctions can be converted either singly or in combination (with each sentence assigned a certain number of units depending on the nature and duration/amount of it).

If it is decided that community-based sentences should be limited to replacing sentences of imprisonment, there could be a requirement that in the sentencing process the judge must indicate that the case is one that merits a custodial sentence, but that there are some circumstances which make a community sentence appropriate. The judge would also indicate the term of imprisonment that the community-based sentence is substituting for. It should be noted that there are, in the New Zealand context, these sorts of legislative requirements in respect of the imposition of suspended sentences of imprisonment and yet studies show that only a minority of suspended sentences have been replacing prison sentences, with most being used in place of or in addition to community-based sentences.\(^{254}\)

One of the difficulties encountered overseas with developing guidelines for the use of community sanctions is that there is a perception that community sentencing is too complicated and too individualised to be subjected to general rules. Many judges believe that guidelines are in principle incompatible with mildly to moderately serious crimes for which community-based sentences are most appropriate. While it has proved fairly easy to proportion prison time to crime severity for most serious crimes, more considerations – appropriate treatment conditions, the judge’s reasons for imposing a particular sentence, determining the balance and the effect of different work, restriction-on-liberty, treatment and monetary conditions in combination – are often seen as relevant for less serious offending and are not easy to encapsulate in guidelines.\(^{255}\)


\(^{255}\) Tonry, 1998, p211.
Sentencing guidelines do not remove the need for the sentencing judge to have adequate information about the offender and his or her financial and personal circumstances in order to decide on the applicability to each convicted offender of a fine, or a particular community-based sentence, and they will not stop community-based sentences being used as an alternative to fines for those offenders unable to pay a fine.

**Community-based sentences in their own right**

One reason suggested why community-based sentences may not be used as alternatives to imprisonment is the possibility that judges will tend to see imprisonment and alternatives to imprisonment as serving completely different functions. The factors taken into account in sentencing an offender to incarceration are different from those taken into account in sentencing someone to a community sentence. For example, community sanctions may be seen as never being appropriate for offenders who commit serious violent offences or those who have a very long and serious prior criminal record. A related difficulty is the resistance of those in the justice system to using them for offenders at the higher end of the risk spectrum because of concern over the likely criticism that would follow if they commit a serious crime while participating in the sentence.256

One possibility for reducing this confusion is establishing community-based sentences as sentences in their own right, like fines and imprisonment, instead of having the general provision that a community-based sentence can be used where an offence is punishable by imprisonment. In practice this would involve listing them as specific penalties for particular offences so that, for example, an offence would have listed as a penalty a sentence of periodic detention either as the sole sentence option, or as one of two or more sentencing options which could include a fine and imprisonment and other community-based sentences. In other words the penalty for one offence could be imprisonment for a term not exceeding 5 years or periodic detention; the sentence for another offence could be imprisonment for a term not exceeding 2 years or periodic detention or supervision. The duration of the community-based sentence may or may not be specified. A variation would be that the community-based sentence option would (only) be available for particular offences when this was the first time the offender had committed the offence.

**Restructure the range of community-based sentences**

This approach would involve removing or changing those community-based sentencing options that are most often imposed instead of fines. It would mean developing new community-based sentences or modifying existing ones so that they are more explicitly designed as alternatives to imprisonment, that is, able to deal with more serious offenders. They would be more punitive and have a high degree of control and monitoring. This would not necessarily have to be at the expense of rehabilitation and reintegration, although a tension might exist between these characteristics. There would probably still need to be one community-based sentence for judges to use in cases where the offender is unable to pay a fine.

Such a development would be to follow the example of the US in its development of intermediate sanctions that involve more stringent requirements than standard probation conditions. These sanctions include a variety of intensive supervision probation programmes

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which incorporate elements such as electronic surveillance, daily reporting, drug testing, and curfews. (Many also include mandatory community service.) It should be noted, however, that any benefits of such an approach will not be in terms of reducing reoffending unless the sentence also incorporates programmes designed to address criminogenic needs.

A possible restructure is to combine the two sentences of community programme and supervision. Community programme has tended to be imposed on offenders with a higher risk of reoffending (a frequent rate of previous offending) and whose offences are at the higher end of the scale in terms of seriousness, but is very little used. There are currently less than 300 offenders serving community programme out of a total community-based sentence muster of nearly 22,000. Offenders on community programme comprise only just over 1% of both the male and female community-based sentence musters. Combining it with supervision would be with the aim of increasing the number of serious offenders receiving supervision/community programme.

Both sentences provide for the treatment of addictions or other behavioural problems that an offender might have. Community programme was intended to be a community-orientated rehabilitative sanction in which the offender’s consent is required to the specific terms of a programme drawn up by a probation officer with the agreement of the offender and the person or agency responsible for the programme. The sentence is broadly defined so there is considerable flexibility in developing and specifying relevant programmes for offenders. It is generally used to place offenders in a community environment where they will be subject to influences and examples expected to have a beneficial and supportive effect. It is a less structured and more personalised sentence than supervision with day-to-day supervision provided by community persons. The difficulty of finding individuals or agencies in the community able to provide a suitable programme and ensure the offender maintains a suitable standard of behaviour appears to be one reason behind its limited use.

This option envisages having the elements of the community programme sentence as possible conditions of the supervision sentence with the probation service having a clear responsibility to oversee the sentence. If community programme was incorporated into the sentence of supervision in this way, one of the key elements peculiar to community programme, the community sponsors having responsibility for both the care and control of the offender, would cease. A difficulty with repealing the discrete sentence of community programme is that it is a unique sentence in terms of targeting Māori offenders and setting up a process for placing them in a culturally appropriate setting.

Community service has been viewed as a “soft option” not suitable for serious offenders. There is evidence it is being used as an alternative to fines. One way to change this might be to combine periodic detention and community service, with the probation service being in charge of the sentence. There is already a large overlap in the legislation of the type of service or work offenders may be required to perform and the view has been expressed that the two sentences essentially fulfil the same purpose and have the same effect. Offenders could be allocated work by the probation service, on a periodic detention basis alongside other offenders in work parties, or according to more flexible hours and alongside individuals in the community, but in both cases they would be closely supervised. The type of work could be specified at sentence.

Another option is to combine community programme and community service. Both sentences involve the community in a supervisory role although community programme involves more constant supervision by the community organisation. This option would involve placing the
probation officer in a legal supervisory relationship with the offender on the sentence, as is the
case with community service. It would generally involve some community work.

**Improve the matching of sentences with offenders**

A case can be made for trying to improve the effectiveness of community-based sentences so
that there is reduced reoffending.

**Combine community-based sentences into one**

There is a view that one approach to getting offenders on to the programmes that will most
assist with their rehabilitation, while remaining committed to the view that punishment should
reflect the seriousness of the offending, is to combine the community-based sentences into one
sentence. This would involve having one community sentence with a menu of conditions (that
includes the elements of community service, periodic detention, supervision, community
programme) from which judges can select (and the community probation service can
recommend). This was the proposal in the 1995 UK Green Paper *Strengthening Punishment in the
Community* which was not put into effect. It was also discussed in the 1992 Department of
Justice review of periodic detention. The argument for this option is essentially that it would
provide the courts with greater flexibility in tailoring a sentence to the particular circumstances of
the offender and the offence.

An argument against this proposal is that it could lead to an increase in imprisonment because
courts would only have the one alternative to imprisonment other than a fine and would only try
it once or twice before imposing imprisonment on repeat offenders. This would be in
comparison with trying the full range of community sanctions before imprisoning a repeat
offender. However, the flexibility this change seeks to provide could also be obtained by
removing the limits on the courts’ powers to combine sentences (see next option).

**Abolish restrictions on combining community-based sentences**

A version of the above approach is to abolish restrictions on combining community-based
sentences. Under s13 of the Criminal Justice Act 1985 the only community-based sentences that
can be imposed concurrently are periodic detention and supervision. The option of permitting
other combinations of community-based sentences would give sentencers a greater choice and
flexibility in constructing a sentence to meet the individual circumstances of each case. There are
potential net widening implications with this approach and associated cost increases if judges
regularly imposed two or more community-based sentences where they previously would have
been able to impose only one.

The reason why combinations in general were not permitted in the Act was that it was
considered that different sentences were designed for different types of offender and had
different objectives. For example, an offender who is sufficiently motivated to perform a
sentence of community service will not be in need of any form of supervision beyond the limited
level which is currently an ancillary part of the sentence. In contrast, an offender sentenced to
supervision would be an offender deemed to require a more intensive level of control and
monitoring. Where the court considers that an offender should be under fairly close supervision
in addition to carrying out work in the community, periodic detention can be imposed, involving
as it does supervision during completion of the work requirements, or the combination of periodic detention and supervision where the supervision is required on a more continuous basis.

There is the view that a supervision-community service combination would be suitable for offenders who are candidates for community service but who also have serious social/medical problems, such as alcoholism, drug addiction, domestic violence, psychiatric problems, anger management problems, or other dysfunctional behaviours. These could be addressed by special conditions imposed under a sentence of supervision (for instance a course of education or training). Their offending would be such that periodic detention would be overly punitive, as well as being a more costly option that carries the risk of “contamination” of minor offenders by the more experienced offenders placed on periodic detention. There could also be offenders who would respond to supervision but whose offence warrants the imposition of an additional punishment element short of periodic detention.

The combination of supervision and community service (and that of supervision and community programme) could also be a useful one for offenders otherwise suitable for community service/programme except for the need for some additional monitoring to ensure they complete the sentence. Combinations would generally increase the degrees of sentencing severity, e.g. a combination of supervision and community service would lie between the individual sentences of community service or supervision and periodic detention in terms of punitiveness.

Any broadening of the sentence combinations allowed could be accompanied by sentencing guidelines in legislation to target the imposition of particular combinations in respect of certain circumstances. This would hopefully minimise the risk of net-widening. In the light of previous experience, however, it is not unreasonable to assume that, even with statutory guidelines stipulating that a combination sentence should only be imposed where one sentence would not suffice or where the court would otherwise impose a more severe sanction, there will be occasions when a combination sentence will be used in cases that fall outside the intended range.

**Abolish periodic detention**

This sentence is a sentence with standard features that do not vary according to the needs of offenders and it currently, with few exceptions, has no training or education components to address the criminogenic needs of offenders. It has long been viewed as a major success story for the criminal justice system because it combines elements of punitiveness (involving genuine hardship and inconvenience to the offender) and reparation to the community and permits the offender to remain in employment, which is thought to assist with avoiding future offending. However, it is now an old sentence, remaining largely unchanged in most of its essential features since 1962 (other than the abolition of any residential component). The public shaming aspect of it does not sit well in a modern penal system and may be counter-productive as far as the goal of preventing reoffending is concerned. It is replicated in few other jurisdictions. On the other hand some of the work undertaken by detainees is very constructive and has made important contributions to upgrading community facilities and the sentence is now finally being developed to include training and education elements.
An additional community-based sentence

There is an argument that there is a need to widen the range of community-based sentences available to the courts to better ensure that imprisonment is not used unnecessarily.\(^{257}\) However, it needs to be asked what would be the unique components of any new sentence that sufficiently distinguish it from other sentences, making it more appropriate for certain types of offenders who would have otherwise have received a less suitable sentence. There is also the risk of further net-widening.

Allow the probation service to determine the conditions of community-based sentences

This is an option that would be most appropriate in the event of there being a single community sentence. One approach would be for the courts to impose a sentence and a term which requires the offender to comply with conditions set by the community probation service. It would need to be specified that these conditions would have to be designed to reduce reoffending. Another approach is for the court to impose a fairly broadly defined sentence after the particular terms of it are arranged by the probation service. There would be a need to obtain the consent of the offender in respect of treatment programmes, and provision for variation or cancellation of conditions following an application by either the offender or a probation officer.

Reducing the direct cost of community-based sentences

There are two obvious options which could achieve this. One is to abolish periodic detention (which has already been discussed above in another context). It is the most costly of the community-based sentences and the one most frequently used (involving over 50% of offenders commencing a community-based sentence in 1997/98 and 36% of the total community-based sentence muster at 30 June 1998). Its abolition would generate savings to the extent that offenders were instead sentenced to one of the remaining community-based sentences (subject to different costs relating to breaches and re-sentencing) but there would be the risk that a significant number of offenders who would previously have received periodic detention would be sentenced to imprisonment.

The other option is to prohibit the court from combining any one community-based sentence with another. This would likely mean that many of the types of cases which currently receive combined sentences of periodic detention and supervision would receive periodic detention only and the cost of the additional sentence of supervision would be saved. As discussed above, this would be sacrificing some ability to address the treatment needs of offenders sentenced to periodic detention.

Conclusion

At present we are not able to predict the extent to which each of the above changes would impact on the direct costs of sentence administration, on net-widening, and on the treatment needs of offenders. One reason for this difficulty relates to the division of powers in respect of the application of community sanctions. Authority for the use of them comes from legislation,

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the judiciary orders the sanction in particular cases, and the corrections system must implement and enforce the sanction. The problems with this jurisdictional split are that inadequate legislative guidance for the judiciary may mean that judges do not always impose sentences as parliament intended, or adequate resources for the community corrections system may not be put in place to enable the sentences to be recommended when appropriate, or properly administered once they are imposed by the judiciary (who are often not made aware of these resource difficulties).

An over-riding consideration is that there are no clear statements or understanding as to which sentencing purposes (just deserts, deterrence, incapacitation, rehabilitation, restitution) should apply in which circumstances and which sentences are consistent with those purposes. In practice, the range of possible circumstances will always make it difficult to be precise in this area. There is also no official policy as to how the various community-based sanctions rank in severity. A further consideration is that the Department of Corrections is currently (through Integrated Offender Management) making changes within the current sentencing framework which will affect how the current community-based sentences are managed, and their programme content, to better match them on an individual basis with the re-offending risk and treatment needs of offenders.
8. Conclusions

The starting point for this review was the observation in *The Use of Imprisonment in New Zealand* (1998) that there had been a significant increase in the use of community-based sanctions since 1986, although this had not been accompanied by any overall decrease in the numbers going to prison or in the proportion of offenders being sent to prison. Part of the increase in the community-based sentence musters appeared to be due to their being applied to those who would otherwise have received a fine, or have been diverted. This had the effect of escalating some offenders up the sentencing tariff and widening the net of the criminal justice system to bring more people into the correctional system and ultimately into prison. This review looks at these statements in more depth through a detailed examination of what has been happening with community-based sentences in New Zealand.

In New Zealand there are currently four community-based sentences – periodic detention, supervision, community service, and community programme. The history of these measures (and the same has been the case overseas) shows a great deal of ambiguity and variety of expectations underlying their introduction. To some they were simply a more humane, constructive, and cheaper alternative to short sentences of imprisonment; to others they were introducing into the penal system a new dimension with an emphasis on reparation to the community; others stressed the value of bringing or keeping offenders in close touch with those members of the community most able to provide help and support and change the outlook of the offender. There was the expectation that they would reduce the frequency and seriousness of the offender’s law breaking through supervision, advising, treating, providing care, or simply by giving the offender a second chance. Probation officers trained in the principles and practice of social work were to play a large role in most of these sentences. Their role was seen as a combination of welfare management and law enforcement.

On the international scene the common types of community sentence are probation, supervision, community service, and special forms of education, training, or treatment. In some jurisdictions they are imposed as a condition of suspending a prison sentence, which may or may not be specified, and in others as alternatives to imprisonment. There is considerable variation in the degree of supervision and control of offenders involved. It ranges from intensive supervision to reduce opportunities for recidivism, to ensure the conditions of the sentence are fulfilled and to assist with reintegration into society, through to minimum contacts between the supervisor and the offender, with little attempt to assist the offender in reintegration into the community. Supervision is sometimes exercised by professionals, sometimes by individual or community group volunteers, or a combination of these options.

In many jurisdictions (for example Australia, Canada, United States, various European countries), there is a clear development towards having a greater range of non-custodial sanctions, (although some countries are at a relatively early stage of this process). This can be seen for example, in the adoption of a greater number of different non-custodial sanctions, in the increased possibilities for the adding of conditions to existing sanctions, and in the increased possibilities for combining different non-custodial sanctions. In some cases these reforms also involve developing more punitive non-custodial sanctions.

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In New Zealand the Criminal Justice Act 1985 gave a new emphasis to community-based sentences as alternatives to imprisonment. Since 1985 there has been a very substantial increase in the use of these sentences, particularly periodic detention and community service, although there has been very low use of the community programme sentence (no more than 1.5% of all convictions for imprisonable offences in any one year). At the same time there has been a decrease in the relative use of imprisonment, particularly for breaches of periodic detention, for offences of low to moderate seriousness, for offenders with previous convictions, and for youth offenders, with these groups now more likely to receive the more serious community-based sentences of periodic detention and supervision than in the 1980s. But there has also been a decrease in the use of monetary penalties for imprisonable offences (an absolute decrease of 20% over the period 1983 to 1995). Some of this trend can be accounted for by changes in the type of offenders and offences dealt with by the courts (involving a higher average seriousness of offending and a higher percentage of persistent offenders) but most can be attributed to the imposition of community-based sentences (especially community service), where previously a monetary penalty would have been imposed.

In contrast to the assumed benefits of community-based sanctions, there are a number of concerns about them and obstacles to their successful implementation. Perhaps the most frequently cited concern about the development of community sanctions is the possibility of net-widening. As discussed in section 5, net-widening refers to a situation in which individuals previously not coming under the control of the correctional system now do so simply because, with the existence and expansion of community sanctions, there is a control apparatus available to handle them. It also refers to a sanction being introduced to diminish the use of one that is more severe with the outcome that it instead gets used in lieu of a less severe one. In respect of community-based sentences it means that they get used more for offenders who would not have received imprisonment than for offenders who would otherwise have served a prison term. The Canadian Sentencing Commission noted its concern that intermediate sanctions were often used as additions rather than as alternatives to existing measures.

When it comes to determining whether community-based sentences are being used in New Zealand as alternatives to prison the evidence is mixed. The prison population continues to rise, although it is likely to have risen more in the absence of community sentences. As indicated above, some sentences have been used for offenders who would otherwise have been fined. There is clearly a real net-widening risk that if more community sentences become available, they will increasingly be used not for those who would otherwise go to prison, but for those who might otherwise have been dealt with by means of an alternative penalty including a fine.

The reasons why claims that community-based sentences result in significant cost-savings should be very qualified were discussed in section 5. The argument that community sanctions are less costly than imprisonment is complicated because costs can be variously defined. There are the immediate financial costs of administering/enforcing the sentence, and the indirect financial costs resulting from an increase or decrease in crime. What is generally implied is that the wider use of community sentences would allow the state to administer the enforcement of sanctions more cheaply. However, this depends on the various changes in the rate with which the different sanctions are used. There is now a considerable record of the use of community-based sentences from which to draw the lesson that it is extremely difficult to achieve sustainable savings in the prison system through their introduction. This is mainly because, although community sentences may reduce the number of offenders entering prison, the impact on the

prison population will be lessened by the fact that such sentences (when they are not net-widening) generally replace only the shorter sentences of imprisonment which are not the major driver of prison musters and so have little practical effect on the overall size of the prison population (although reducing numbers entering prison will decrease the workload of prison administration). Minor cuts in the number of offenders in prison at any one time will not reduce the number of prison units or the maintenance costs of prisons, and so make only marginal cost savings in existing prisons which have many relatively fixed costs. There is also the consideration that as community-based sentences replace monetary penalties, then there are additional administrative costs to the corrections system and a reduction in fines revenue.

A major difficulty with community sanctions is that of establishing criteria for the measurement of the success or otherwise of them. Success could be measured by cost-effectiveness, crime prevention effects (recidivism and deterrence), sentence completion rates, the extent to which they reduce the use of custodial sentences without dramatic increases in reoffending, changes in offenders’ attitudes or behaviour, or community and victim satisfaction (which could relate to reparation made to the community or victim). Once one or more of these criteria are selected, there may still be varying levels of acceptability among various sanctions. For example, what is considered an acceptable rate of sentence completion in one sanction may not be acceptable for a different sanction.

The difficulty with reconviction/recidivism rates is that the available evidence indicates they are related to differences in the gender, age, and criminal histories of those receiving the sentences, rather than the sentences themselves. In respect of recidivism rates, robust overseas evaluations of intensive supervision, community service, and other intermediate sanctions have found that for offenders sentenced to such sanctions that are well-managed these rates do not differ significantly from those of comparable offenders receiving other sentences.262 In New Zealand, research findings also show that community-based sentences do not reduce recidivism rates once factors such as the criminal history, age, and ethnicity of those receiving the sentences are taken into account.

Despite these qualifications regarding how community-based sentences work in practice compared to the policy intentions of reducing the role of prisons and adopting a more humane and cost-effective approach to the containment of offenders, it would be going too far to conclude that all community-based sentences are primarily a negative development. For some types of offenders, some community-based sentences under certain conditions (which may be localised) may keep them from a prison sentence both initially and in the longer term. It is probably an over-generalisation to state that community-based sentences will only expand the system of penal control with no real benefit to the criminal justice system. It would be more accurate to say that we are not yet in a position to state with certainty the exact (quantifiable) relationship of community-based sentences to imprisonment statistics, or to offending for that matter. Different studies have cited contradictory evidence and interpretations (which make a range of assumptions about the variables measured) to reach widely divergent conclusions about this relationship.263 The only safe (and limited) conclusion to be drawn is that the operation of community-based sentences is heavily dependent on decisions of the courts and the penal climate in which they operate.

This paper has looked briefly at possible changes to the community-based sentence framework to better target punishment severity to crime seriousness, reduce net-widening, and save costs. Sentencing guidelines could better influence judicial decisions in the use of community

262 Tonry, 1996, p104.
sentences. If community-based sentences are to be genuine alternatives to imprisonment there could be a direction that they are only to be imposed in circumstances where the court would otherwise have sentenced the offender to imprisonment. An alternative is for guidelines to be in the form of presumptions concerning non-custodial sentences based on sets of offence/offending history combinations. One set is presumed appropriate for imprisonment, another for one type of community sanction, another for a different community sanction. Another approach is to have time-units of punishment which can be served by way of a community sentence or imprisonment. There is a potential problem that the many considerations that go into deciding a community sentence for less serious offending will not be easy to convert into guidelines. Also, sentencing guidelines do not remove the need for the sentencing judge to have adequate information about the circumstances of the offence and about the offender and his or her financial and personal circumstances to decide on the applicability to each convicted offender of a fine, or a particular community-based sentence.

There is the possibility of establishing community-based sentences in their own right, by listing them as specific penalties, either on their own or with other penalties, for particular offences. Another response (which has happened overseas) is to develop types of community sentences that are designed to focus more on surveillance and control, providing for incapacitation in community settings. Overseas this has been part of a strategy for diverting offenders from prison without appearing “soft” on crime, which is how some traditional community-based sentences have been viewed. The possible consequence is that non-prison bound offenders who are low-risk and who neither require nor need this level of control are then placed on these sentences. An appropriate mechanism needs to be put in place to ensure that the more restrictive sanctions are used to divert people from prison, rather than in place of less restrictive sentencing options.

In order to better match offenders with community-based sentences the question arises whether community sentences should be more integrated, for example having one community sentence to incorporate all the elements of the current orders. Another approach is to abolish restrictions on combining community-based sentences. Both concepts could involve increased costs if judges impose many conditions or two or more sentences where before the sentences would have been more limited.

The possibility has been raised in the literature of limiting judicial authority to the choice of imprisonment, a fine, or a community sentence, and leaving the probation service to decide on aspects of the community sentence—home detention, intensive supervision, training, treatment (with the offender’s consent), etc.—to be applied as conditions.

Even if the role and purpose of community-based sentences were clarified and this carried over into their imposition, administration, and enforcement, this alone could not be expected to solve the problem of the rising prison population, or produce significant cost savings to the criminal justice system (particularly in the short-term). Whether community-based sentences keep people out of prison, or whether they contribute to the prison population, or widen the net of surveillance and social control, is not a matter that can easily be resolved and explained. There is some evidence that at particular times (which are likely to relate to the life circumstances of convicted offenders amongst other matters) they can end up reducing the use of fines. This has certainly happened in the New Zealand context.

264 Byrne, 1990, p18.
Finally, any proposals to change the community-based sentencing framework need to reflect the fact that the rationale, role, and nature of community penalties are a part of a much larger and complex network of relationships between policy (legislation), decision-making processes (courts), and other criminal justice activities (probation officer functions, police enforcement) in the context of shared or diverse (and changing over time) “world views” of crime and punishment and about the desirability or futility of imprisonment and alternative methods of sanctioning offenders.\textsuperscript{265}

\textsuperscript{265} Vass, 1996, p177.
Appendix 1: International Comparisons

England and Wales

England and Wales have the following community sentences: probation orders, community service orders, combination orders (which combine probation and community service), curfew orders, and supervision orders and attendance centre orders (for younger juvenile offenders), with all but curfew orders supervised by the probation service. Under the Criminal Justice Act 1991, as amended by the 1993 Act, these sentences are subject to the sentencing principles that the severity of the punishment should correspond to the seriousness of the offence to which it relates, taking account of previous convictions or failure to respond to previous sentences. In most cases, community orders are discrete penalties and are not combined with each other in a single sentence, although an individual offender may be subject to a number of concurrent orders for different offences. The principal exception is the combination order (see below) which permits a limited amount of community service to be combined with probation supervision. For offenders sentenced in the Youth Court, the range of community orders available depends on the age of the offender. Probation orders and community service orders are not available for offenders under 16 years. However, a court may impose an attendance centre order from 10 years or a supervision order for offenders aged between 10 and 17. Community service and combination orders are currently only available as penalties for imprisonable offences.

The 1991 Criminal Justice Act states that community penalties can only be imposed where the relevant offences, taking account of previous offences or failure to respond to previous sentences, are “serious enough” for such a sentence but not “so serious” that only custody is justified (ss1, 6 and 29). In other words community sentences are to be used for offences of intermediate seriousness that lie between those where a fine or discharge would be appropriate and those which require custody. Within that band the court is required to select the “most suitable” community order, in which the restrictions on liberty “are commensurate with the seriousness of the offence” (s6(2)).

Probation Order

Probation was officially introduced in England with the passing of the Probation of First Offenders Act in 1887. Courts were enabled to release first offenders to supervision by “probation” officers. This was followed by the Probation of Offenders Act 1907 (and the development of a fledgling probation service) and the Criminal Justice Act 1948 which also introduced prison after-care and attendance centres. The objective of probation supervision was the moral reformation of the offender and the prevention of crime. This is now the probation order which is available for offenders aged 16 or over convicted of any offence other than one for which the penalty is fixed by law. (The juvenile equivalent is a supervision order which may place the offender under the supervision of a probation officer or a local authority social worker).

266 Criminal Justice Act 1991 s6(4).
268 Ibid p5.
270 Maguire, etc., 1997, p1199.
Until the Criminal Justice Act 1991 a probation order was made “instead of sentencing”. This meant that if an offender breached the conditions of the order or committed a further offence he or she would be brought back to court and could be sentenced for the original offence as well as the new one. The 1991 Act made it a sentence of the court. Further offences committed during the life of an order do not in themselves constitute a breach of the order. A probation order is for a period between 6 months and 3 years. It is used mostly for indictable offences. Under the Powers of Criminal Courts Act 1973 the court may make a probation order if it is:

of the opinion that the supervision of the offender by a probation officer is desirable in the interests of:
(a) securing the rehabilitation of the offender;
(b) protecting the public from harm from him or preventing the commission by him of further offences. (s2 Powers of Criminal Courts Act 1973)

Section 2 of the Act also requires the consent of the offender. It is possible to combine a probation order with other community penalties either in the form of a combination order (see below) or separately with, for example, a curfew order. It cannot be combined with a custodial sentence.

The standard conditions of probation are that the offender keep in touch with the probation officer responsible for his or her supervision in accordance with such instructions as he or she may from time to time be given by that officer and notify him or her of any change of address.

In addition to supervision most probation orders include requirements imposed by the court for the purposes of securing the rehabilitation of the offender or protecting the public from harm or preventing further offending. There are also specific additional requirements listed in legislation that may be imposed. Specific requirements may include requirements as to residence, specified activities, attendance at a non-residential probation centre (for up to 60 days), medical treatment, or treatment for drug or alcohol dependency. Probation orders with such requirements are designed to target offenders with a high risk of re-offending. A residence requirement usually obliges the offender to stay in an approved probation hostel for a period which may be equal to or less than the period of the probation order. Probation centres (initially termed day centres) and specified activity requirements to the order were introduced as possible special requirements by the Criminal Justice Act 1982.

A probationer may be brought back to court for:

- a change in, or addition to, the requirements attached to the order;
- a breach of one or more of the requirements;
- a conviction during the currency of the order; or
- a discharging of the order.

In cases of serious or repeated non-compliance with the terms of an order the order may be revoked and the offender re-sentenced. If the original offence was imprisonable, then the court may impose a custodial sentence.

273 Ibid, p259.
276 Ibid, p263.
**Community service order**

The Criminal Justice Act 1972 introduced the community service order as an all-round sentence that would involve reparation to the community, act as an alternative to imprisonment, provide punishment, and rehabilitate offenders. Initially trialed in 6 probation areas it was extended to all areas in 1974. By 1983 it was being imposed on nearly as many offenders as were probation orders although numbers sentenced to community service declined during the 1980s. Numbers rose in the 1990’s.

A community service order may be imposed on an offender aged 16 or over provided the offender consents, the offence is punishable with imprisonment, and the court is satisfied that the offender is a suitable person to perform work under an order. The offender is required to perform unpaid work for a specified number of hours (between 40 and 240) at intervals within 12 months of the date of the order.\(^{277}\)

A community service order may not be combined with a prison sentence, even a suspended one, or with a probation order except as part of a combination order (see below). It may be combined with a fine or a curfew order.\(^ {278}\)

The types of work provided vary, depending on local attitudes and opportunities. Examples are helping the elderly or disabled with gardening, decorating, home repairs, shopping; activities with handicapped or deprived children or making toys or equipment for them; helping people in hospitals or homes for the elderly; nature conservation projects; maintaining camp grounds or churchyards; helping in youth clubs. Most of the activities involve the offenders working with volunteers or paid staff.\(^ {279}\)

While subject to a community service order the offender is required to report to a probation officer to arrange the work and the times for the specified number of hours.\(^ {280}\)

**Combination orders**

The combination order (combining a probation order and a community service order) was introduced in the Criminal Justice Act 1991 (s11) and came into effect on 1 October 1992. It is an order for offenders aged 16 or over, requiring the offender to be under the supervision of a probation officer for a specified period between 12 months and 3 years (as compared with between 6 months and 3 years in the case of a probation order), and to perform unpaid work for a specified number of hours between 40 and 100 (as compared with between 40 and 240 hours in the case of a community service order). The court must be of the opinion that the order is desirable in the interests of securing the rehabilitation of the offender, or of protecting the public from harm, or preventing the commission of further offences. It is only available for imprisonable offences.

The combination order cannot be further combined with probation or community service, or imprisonment. It can be combined with a curfew order, a fine, a compensation order, or

\(^ {277}\) Ibid, pp263-4.
\(^ {278}\) Ibid, p264.
\(^ {279}\) Ibid, p265.
\(^ {280}\) Ibid, p265.
disqualification. It is generally given to more serious offenders than either probation or a community service order alone.\textsuperscript{281}

**Curfew orders**

Curfew orders were included in the Criminal Justice Act 1991 (s12) and have yet to be introduced on a national basis. They require a person to remain for specified periods at a specified place. They were trialed (in the form of electronic monitoring using transmitter bracelets) in 1995/96 and 1996/97 in 3 areas. (They had also been trialed, not very successfully, in 1989/90 although as a way of enforcing bail conditions rather than as a sentence). The results were mixed, with there being a low take-up rate by the courts, although the technology proved reliable (in contrast to the earlier bail study) and the completion rate of 82% in the second year of trials compared favourably with that for probation orders and community service. Indications were that curfew orders were being used at the higher end of community sentences (community service orders and combination orders) and for relatively experienced offenders.\textsuperscript{282}

Orders may specify different places of curfew or different periods on different days but may not last longer than 6 months from the date of the order. They must not involve curfew periods of less than 2 hours or more than 12 hours duration in any one day. They can be imposed on an offender 16 years or over who is convicted of any offence (except where the sentence is fixed in law), although the Crime (Sentences) Act 1997 made curfew orders up to 3 months available for juveniles aged 10 to 15. Curfew orders are not run by the probation service, but by private contractors.

Curfew orders can be combined with a fine, a compensation order, an order for disqualification or forfeiture, or another community sentence. They cannot be combined with either a sentence of imprisonment or a conditional or absolute discharge.\textsuperscript{283}

**Attendance centre orders**

Attendance centre orders were introduced in the 1948 Criminal Justice Act. The orders are only available to those aged 20 or under and do not require the consent of the offender. The maximum number of hours is 36 for those aged 16 to 20 years and 24 hours for those aged under 16. The minimum number of hours is 12 except where an offender is under 14 years and the court is of the opinion that 12 hours would be excessive. There were fewer than 30 senior attendance centres in England and Wales in 1996 dealing with around 1,000 offenders a year, so the order is still not available as an option to all courts. Junior centres are far more common and most attendance centre orders are made in the youth court.

The order seeks to punish through restriction on leisure time; to provide occupation and instruction to assist the development of self-discipline, skills, and interest; and develop social skills through structured activity. Centres are run by the police on behalf of the Home Office and usually open for 3 hours (the maximum hours of attendance on any day) every second Saturday afternoon, with a regime of physical training, first aid, woodwork, car maintenance, etc.

\textsuperscript{281} Ibid, p266.
\textsuperscript{282} Mortimer and May, 1998.
\textsuperscript{283} Walker, 1996, pp266-7; Maguire, 1997, p1215; Mortimer and May, 1998.
Orders are not to be made if the offender has to travel for more than 90 minutes to reach a
centre.284

Supervision orders

When a court passes a suspended sentence of more than 6 months, it may make a suspended
sentence supervision order (SSSO) placing the offender under the supervision of a supervising
officer (who must be a probation officer) for a specified period not exceeding the operational
period of the suspended sentence. This is available in s26 of the Powers of Criminal Courts Act

The requirements are keeping in touch with the supervising officer in accordance with any
instructions he or she may give from time to time, and notifying him or her of any change of
address. No other requirement may be added either by the court or the supervising officer. An
SSSO ceases to have effect if the suspended sentence is activated or if, on the application of the
offender or the supervising officer, the SSSO is discharged.

An SSSO differs from a probation order in 3 important respects:

• it can be made without the offender’s consent;
• the court cannot add any special requirements; and
• breach of a requirement can lead at most to a fine whereas a probationer can be re-sentenced
  for the original offence.

SSSOs were introduced in order that offenders who were dealt with by means of suspended
sentences should not be deprived of the help or guidance which a probation officer might be
able to give. There has been no systematic comparison of the success rate – by any criteria – of
offenders under suspended sentences with and without the order.285

There are also monetary payment supervision orders (MPSO) which can be made in cases of
non-payment or late payment of fines. The supervising officer does not collect the instalments
but is to have an advisory role, with a view to persuading the offender to pay, and may be asked
to report to the court on the offender’s conduct and means. The order ceases as soon as
payment is completed or the offender is dealt with for default. Most of the offenders receiving a
MPSO are young offenders because of the statutory prohibition on imprisoning them for fine
default unless a MPSO has been tried.286

For offenders aged between 10 and 17 the court may impose a supervision order for a period of
up to 3 years. The order may incorporate a variety of specified conditions (such as psychiatric
treatment, educational requirements, night restriction requirements, specified activities, and
resident requirements) and is supervised by social services departments or the probation
service.287

286 Ibid, p270.
287 Ibid, p305.
Sentencing practices

The introduction of the combination order in 1992 has contributed both to an increase in community sentences and to changes in the use of community service and probation. In the magistrates’ courts the use of community sentences (probation order, supervision order, community service orders, attendance centre orders, combination orders, and curfew orders) rose from 21% of indictable offences in 1992 to 29% in 1996. In 1997 some 118,000 people started a community sentence, compared to about 90,000 in 1992. This compares to 81,600 offenders (excluding fine defaulters) sentenced to imprisonment in 1997.

The number starting a probation order in 1997 was 50,700. Some 33% of those orders had an additional requirement. In 1981, almost 9 out of 10 probation orders had no additional requirements; by 1994 this was the case for only three-quarters of probation orders. In the mid 1980s probation centres were the most popular additional requirement, but they have now been overtaken by specified activities. Of the offenders commencing probation in 1994, 5.7% had a probation centre requirement on their order and 13.5% had a specified activity requirement.

The number of probation orders imposed for summary offences has increased from 10% of sentences in 1985 to 30% in 1995 (reflecting the definition of summary offences changing to include more offences of assault and criminal damage and the greater use of police cautioning for minor offenders). In 1993 45% of offenders commencing a probation order had been convicted of indictable offences of dishonesty, including theft, handling stolen goods, and burglaries; 9% had been convicted of violent offences (mostly minor but including occasionally manslaughter or threat to kill). Two-thirds of probationers have records of at least one previous conviction.

In 1997 47,400 offenders started a community service order. There has been a very strong growth in the numbers of combination orders from 1,390 in 1992 to 18,700 offenders in 1997 (with 24% of those orders having an additional requirement). When they were first introduced, the courts used almost half of them (49% in 1993) for offenders with a previous custodial sentence. However, in 1996 and 1997 there was little difference between probation and combination orders in terms of the offender’s previous criminal history. In 1997 some 37% of offenders receiving either order had a previous custodial sentence and 19% had no previous convictions. This compares to 22% of people receiving community service order having had a previous custodial sentence and 34% having no previous conviction.

The number of people starting a Money Payment Supervision Order rose 94% in 1996 to 6,400, having declined each year between 1989 and 1995. This is likely to have been the result of a High Court judgment in January 1996, which ruled that the courts must consider all other methods of enforcing payment of fines before sentencing defaulters to custody. The numbers declined again in 1997 to 4,800.

1993 figures show that the majority of probation orders ran their full course (80% of those for 1 year or less, 59% of those for 2 years and 56% of those for 3 years) a further 8, 17 and 18%

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292 Walker and Padfield, p258.
293 Ibid, p261.
respectively were terminated for good progress. The majority of those given a community service order (48,179) finished after the specified number of hours were completed.

A survey of magistrates’ courts in 1995 showed that those receiving a combination order were more likely to be sentenced for more than one offence and to have previous criminal convictions than those given a community service order. They were more likely to have been charged with a violent offence or a serious motoring offence such as driving while disqualified, whereas a greater proportion of those who received probation and community service orders had committed property offences.295

In 1995 only 0.6% of those aged 18 to 20 years who were sentenced for all offences in the magistrates’ courts received an attendance centre order.

Table
Numbers (thousands) of offenders given community sentences at all courts by type of order296

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<td>128.9</td>
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* Provisional.
** Available since 1 October 1992.

Reconviction rate

For those given probation orders, community service, or combination orders in 1993 the respective 2 year reconviction rates in respect of a standard list offence (these include all indictable and some of the more serious summary offences, but exclude most summary motoring offences and other less serious summary offences such as drunkenness and prostitution) from commencement of the sentence were 60%, 52% and 61% (the reconviction

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rate for all community penalties was 57%). There was some variation for those given probation orders according to the type of requirements. Much of the difference between the reconviction rates can be explained by reference to the characteristics of those sentenced to these orders and similarly with the different rates for different types of probation order. The comparable rate for those discharged from prison was 53%.

The proportion of offenders who were sentenced to custody within 2 years of commencing each type of community penalty in 1993 ranged from 20% for community service to 39% for the probation centre group.297

**Future**

In 1995 the Government produced a Green Paper, *Strengthening Punishment in the Community*. It suggested a single integrated community sentence – designated “the community sentence”—to replace and incorporate all the current orders available in the adult courts: probation orders, community service orders, combination orders, curfew orders, and possibly supervision orders and attendance centre orders. When passing this sentence the court would have discretion to determine the content of the community sentence in terms of restrictions and compulsions considered to be required for individual offenders. The court would have available to it, singly or in combination, all the ingredients of existing community orders. The green paper argued that this change would provide the courts with greater flexibility in the range of or mix of community orders they could make, though this was disputed by some commentators (see comments by Penal Affairs Consortium). One criticism is that this was likely to reduce public understanding of sentences because they could have little idea what a community sentence involved in individual cases. Another, that it would increase the use of prison because there is only one community sentence to try before imprisonment. The paper also proposed that the requirement that offenders provide consent to community sentences be abolished. The idea was subsequently dropped (Home Office, *Protecting the Public*, 1996).

The Crime and Disorder Act 1998, which principally addresses youth offending, created a number of new community orders, to be piloted prior to national implementation in 2000/2001. These included:

- a drug treatment and testing order, available for offenders aged 16 and over, to be imposed for between 6 months and 2 years;
- a reparation order, available for young offenders (aged under 18 years), that will require the offender to complete up to 24 hours reparation either to the victim or to the community;
- an action plan order, available for young offenders, requiring the offender to comply with a supervised three month action plan;
- an anti-social behaviour order for offenders aged 10 and over with a minimum duration of 2 years. This is a civil order for persistent offenders causing alarm, distress or harassment, breach of which is a criminal offence;
- a child safety order which can place a child under 10 under supervision for up to 3 months (or 12 months in exceptional cases) for acts that would be offences but for the age of the person;
- a parenting order requiring a parent or guardian to attend counselling for up to 3 months and imposing requirements for up to 12 months in respect of controlling their child.

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Republic of Ireland

At present the main sanctions available to the Irish courts are imprisonment, probation, community service, and fines. A custodial sentence can be deferred, or suspended in part or in full.

Under the Criminal Justice (Community Service) Act 1983 a community service order can be made where a person has been convicted of an offence for which, in the court’s opinion, the appropriate sentence would otherwise be a term of imprisonment. There is a maximum limit of 240 hours and a minimum of 40 hours. In 1992 the average number of hours stipulated in such orders was 150 hours. They generally require unpaid work involving the maintenance and improvement of property, with an average of 8 to 10 hours served per week. The role of the probation and welfare service officers is to report to the court on whether arrangements can be made for the offender to perform work, to report on the suitability of the offender with regard to community service and to supervise the offender’s work. Failure to comply with the order can result in a fine or the replacement of the order with the prison term that otherwise would have been appropriate. There were 1,745 community service orders made in 1992. The types of offences with regard to which they were most regularly made were assault, burglary and larceny, car theft, driving offences and malicious damage. 36% of orders were made with regard to crimes involving violence.

Apart from the community service order, the Probation Service provides three other alternatives to prison: probation, adjourned supervision, and the intensive probation scheme. Probation orders are made by the courts when offenders are discharged conditionally on entering into a recognisance to keep the peace and be of good behaviour while under the supervision of a Probation Officer for a fixed period, not exceeding 3 years. Additional conditions may also be included, e.g. attendance at a particular treatment centre. A person is usually placed on probation subsequent to a Social Enquiry Report being prepared for the courts in the light of which probation officers make an assessment of the offender’s willingness to change and, therefore, his or her suitability for probation. In 1990 1,322 people were placed on probation.

Under the sentencing option of adjourned supervision, the judge postpones a final penalty decision and requests the Probation Officer to supervise the offender and return to court with regular progress reports. 1,423 offenders were placed on this form of probation in 1990, which is used frequently for quite serious offences.

The intensive probation scheme is run by the probation service along with a board of management which includes representatives from the Congress of Trade Unions, the judiciary, Gardai, and the Irish Youth Foundation. It is designed for serious, persistent offenders. Phase 1 of the scheme is a detailed assessment period. Phase 2 is a 4 month group work programme. Participants get an opportunity to deal with personal problems, to undertake work training courses and to follow through on job opportunities. Phase 3 is a follow-up period in which continuing, individual supervision focusing on areas like employment and training is undertaken with the client. This can go on for varying lengths of time depending on the offender’s needs and the judges view of his or her progress. The scheme has been operating since the early 1990s and referrals come from the circuit courts and from prisoners who get temporary release while participating. In 1996 it was still only operating in Dublin and Cork.298

Scotland

Probation

Under the Criminal Procedure (Scotland) Act 1975, where a person is convicted of an offence (other than an offence for which the sentence is fixed in law), the court may, instead of sentencing him or her, make a probation order. It may do so where it is of the opinion, having regard to the circumstances, including the nature of the offence and the character of the offender, and having obtained a special enquiry report, that it is expedient to do so. A probation order is an order requiring the offender to be under the supervision of an officer of the local authority in the area in which the offender resides, for a period of not less than 6 months nor more than 3 years. A summary court can make an order where the court is satisfied that the person committed the offence but without proceeding to a conviction. A probation order may direct the offender to comply with such requirements as the court considers necessary for securing the good conduct of the offender or for preventing re-offending. Before making a probation order a court should explain to the offender the effect of the order and that if he or she fails to comply with it or commits another offence during the probation period he or she will be liable to be convicted of and sentenced for the original offence. The offender's consent to the terms of the order is required.

Since the Criminal Justice (Scotland) Act 1987, a court may include a requirement for the offender to pay compensation for any personal injury, loss, or damage caused by the offence, when making a probation order. Payment of the compensation must be completed no later than 18 months after the order is imposed or 2 months before the end of the probation period, whichever comes first. Section 7 of the Community Service by Offenders (Scotland) Act 1978 enables the court in making a probation order to require that the offender perform community service, if the offender is of or over the age of 16, has committed an offence punishable with imprisonment, and the conditions for making a community service order have been met (see below). This option does not appear to be widely used in practice, and may not be available as yet in all court districts throughout the country. For breach of a probation order the court may impose a fine, or sentence the offender for the original offence.299

Community service order

In Scotland, after trialing in 4 areas the option of imposing a number of hours of unpaid work for the community as a condition of a probation order, community service was made available by the Community Service by Offenders (Scotland) Act 1978. Section 1 of the Act made community service available where an offender aged 16 or over was convicted of an offence punishable by imprisonment, other than murder. The Act does not state that community service is to be imposed as an alternative to custody. It enables the courts to impose a community service order on an offender “instead of dealing with him in any other way”. Community service is now available as a sentencing option throughout Scotland for the High Court and sheriff courts. As community service involves a considerable outlay of resources in assessing candidates and supervising work, it is not considered to be an appropriate option for trivial offences.300

Prior to an order being imposed the court must obtain a report from the local authority and be satisfied that the offender is suitable for the work and that there is work available. The

300 Ibid, p51.
offender’s consent is required. The minimum number of hours of community service which may be ordered is 40 and the maximum is 240. An order can be made concurrently with or consecutive to another community service order but the total number of hours may not exceed 240. Normally the work must be completed within 12 months although the court has the power to extend this. A community service order may be altered or revoked on the application of the offender or the local authority. The court may vary the number of hours or revoke the order and impose some other sentence. In the event of the offender breaching an order the court may impose a fine and continue the order, revoke the order and sentence him or her again (including to a custodial sentence), or vary the number of hours. In 1991 the enabling legislation was amended to require that the courts impose community service orders only upon offenders who are facing custodial sentences.\(^{301}\)

There are two types of community service placements. Team placements (which comprise about 64% of community service orders) involve small groups of offenders—usually between 4 and 6—who carry out work for disadvantaged members of the public or non-profit community organisations and who are overseen by a supervisor employed by the local community service scheme (social workers employed by local government rather than the probation service). Agency placements involve the offenders providing services to non-profit organisations and they are supervised by staff of the agency.

A community service order may be accompanied by disqualification from driving, caution, forfeiture or a compensation order but not with any other sentence for the same offence. In 1995 it was reported that roughly half of the offenders sentenced to a community service order in Scotland were sentenced in lieu of incarceration. The order was otherwise used as an alternative to other non-custodial sanctions.\(^{302}\)

### Australia

Generally, when a person is found guilty of an offence in an Australian Court, the judge has available a number of sentencing options. The first decision to be made is whether or not a conviction will be recorded. Once this is determined, the courts will ascertain whether the individual should be dealt with by way of monetary penalty, unconditional release order, unsupervised release order, supervised release (intermediate sentences), or imprisonment. Additionally, there are ancillary orders that a Court can attach to various modes of release. Ancillary orders refer to the payment of reparation, restitution, compensation or costs and damages.\(^{303}\) This section discusses unsupervised release order and supervised release.

#### Unsupervised conditional release

This is available in all jurisdictions. It had its origins in ‘bonds’ which have now been abolished in Northern Territory, South Australia, Victoria, and Western Australia. The conditions of

\(^{301}\) Tonry and Hamilton,1995, p83.

\(^{302}\) Ibid, p78.

\(^{303}\) A number of the sentencing options can be ‘mixed’ with the various modes of release. For example, an individual may be found guilty, not have a conviction recorded and be subject to supervised release (intermediate sentences). There are a number of variations both within the sentencing framework and between the different Australian jurisdictions.
release are considered necessary to minimise the risk of further offending. There are four categories of unsupervised conditional release under the different statutory sentencing regimes:

- the immediate release of the offender without recording a conviction upon a plea or finding of guilt. Conditions are imposed upon release, which if breached, will expose the offender to re-sentencing for the original offence;

- the immediate release of the offender upon a finding of guilt without recording a conviction, pursuant to a conditional order adjourning the further hearing of the matter or deferring the imposition of sentence. If the conditions of the adjournment are complied with, the charges will be formally dismissed. Where sentence has been deferred, compliance with the conditions of release will generally result in no sentence being imposed at the termination of the period of deferral. Non-compliance with the conditions may expose the offender to being re-sentenced for the original offence, as well as to further sanctions for the breach;

- conditional release of the offender where a conviction is recorded. Breach of the conditions may render the offender liable to further penalty including recall for sentencing;

- conditional release of the offender following the recording of a conviction, pursuant to an order adjourning the further hearing of the charges or deferring sentence. Breach of the conditions of release may render the offender liable to further sanctions, including sentencing for the original offence.

In most jurisdictions courts have the power to require that offenders enter into a financial bond aimed at securing their compliance with the conditions of their release. It may be supported by sureties. South Australia is the only state that has a statutory limit to the amount which may be fixed by way of recognisance (a bond with conditions i.e. good behaviour for a specified period) or security. In all jurisdictions there are statutory provisions regarding the combining of unsupervised conditional release with other sanctions. For example, Tasmania can combine it with prison, fine, or a community service order; New South Wales, Northern Territory, Queensland, Victoria and Western Australia can combine it with a fine only.

There is provision for both mandatory and optional conditions to be attached to the conditional release order. A mandatory requirement is that the offender be of good behaviour during the term of the order (the bad behaviour must bear some relationship to the original offence). Additional conditions may include: orders for compensation, restitution or reparation (ancillary orders); pecuniary penalties; treatment; reporting to the Police; abstention from alcohol/drugs; surrender of passports; residence; and participation in educational programmes.

It is common to jurisdictions (except Commonwealth and Australian Capital Territory) that courts require an offender to reappear before the court if and when called upon. Non-compliance with conditions exposes the offender to being re-sentenced for the original offence. Courts should explain the purpose and consequences of any orders they propose to make, as well as the consequences of any failure to comply with their conditions. However, failure to provide such explanation will not necessarily invalidate any orders made. Theoretically, orders require the offender’s consent.
Intermediate sentences of supervised release

**Supervised probation**

This is a form of release requiring an offender to be subject to the supervision of, and to obey the reasonable directions of, a probation or community corrections officer. It can be either a conviction or a non-conviction order. It may be attached to conditional release orders with or without conviction upon an offender giving security to be of good behaviour.

Supervised probation is considered suitable for an offender who “has not yet manifested a high degree of criminality but who does show signs of personal inability to cope with stress.” Eligibility requirements are the same as those for unsupervised conditional release (as probation orders are attached as a condition of a conditional release order). Orders depend on offender’s consent to their imposition.

There are a number of standard conditions usually included in all supervised probation orders. These are that:

- the offender not commit further offences during the term of the order;
- the offender comply with all lawful or reasonable instructions of the supervising officer;
- the offender report within a specified time of the making of the order to the relevant supervising authority;
- the offender report to and receive visits as directed by the supervising officer;
- the offender notify the supervising officer within 48 hours of any change of address or employment during the term of the order.

There are specific variations in standard conditions and their applicability among states. In Commonwealth, Australian Capital Territory, and New South Wales conditions are at the courts’ discretion, although most courts use some, if not all.

In Queensland the standard conditions are mandatory. In addition the state has two extra requirements. These are that the offender take part in counselling and satisfactorily attend other programmes as directed by the court or supervising officer and/or that the offender not leave or stay out of Queensland without the supervising officer’s permission.

South Australia has only two mandatory conditions. These are that the offender must comply with all lawful instructions of the supervising officer and that they must report within two working days of the making of the order to the supervising authority. Section 50(1)(a) of the Criminal Law (Sentencing) Act 1988 (SA) also provides that the supervising probation officer may give reasonable directions to the offender with respect to reporting requirements, notification of change of address or employment, obtaining permission to leave the State, residing in any particular place or with any particular person, or taking up or giving up any particular employment.

Generally, the courts have a wide discretion to include in a supervised probation order any other conditions necessary to ensure the future good behaviour of the offender. This may include requirements that the offender: attend for medical, psychological or psychiatric treatment; reside in particular locations or with a particular person; abstain from alcohol or drugs; take part in

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304 The Laws of Australia, 12.5, chapter 5, section 52.
counselling or education programmes; or make reparation, restitution or pay compensation for any personal or property damage resulting from the offence in respect of which the order was imposed. In exercising the discretion to include any other conditions in a supervised probation order, courts should have regard to the efficacy and practicability of any condition imposed.

The maximum time limits on supervised probation orders are generally between 2 and 5 years although in the cases of Australian Capital Territory and New South Wales there is no limit when there is a conviction, and South Australia has a maximum of 12.5 years both with and without a conviction.

In Commonwealth, Australian Capital Territory, Northern Territory, and Tasmania the courts can combine supervised probation orders with other penalties for the same offence (there is no legislative prohibition upon the imposition of a custodial sanction for one offence and a probationary term for another), and can impose both imprisonment and probation for the same offence (commencement of probation occurs once custodial sentence is completed).

**Community service orders**

Community service orders require offenders to make restitution to the community for their criminal conduct by performing unpaid work in the community for a set number of hours. The criteria for work while on a community service order are:

- work should not be of a kind usually performed for a fee/reward on a regular basis;
- work should not involve tasks requiring specialised training i.e. plumbing or electrical work;
- institutional work should be located in places such as hospitals, homes for the elderly;
- work should be for voluntary, non-profit organisations;
- work will vary dependant on offender skill level but will usually be of a manual nature.

In all jurisdictions where community service orders are available, they may be used as a sentence in their own right. In no Australian jurisdiction is the imposition of this penalty still dependent upon a determination that imprisonment should otherwise be imposed. Community service orders can be imposed either in substitution for, or in default of, payment of fines. A substitution order may be imposed either at the time of the original sentence, if it appears that an offender has insufficient means to pay a fine, or if an offender subsequently defaults in payment.

Community service orders are regarded as severe sanctions. It is a penalty that is not to be used where a less intrusive or serious sanction would serve the sentencer's purpose. On the sentencing scale, it is regarded as more severe than supervised probation and only marginally less severe than a custodial sentence.

A number of factors are considered by the court when deciding whether to make a community service order. These include:

- whether the person has a criminal history that exposes them to a real danger of imprisonment;
- whether offenders pose a risk to members of the community. Accordingly, an offence history of crimes of personal violence constitutes a significant barrier to the imposition of a community service order;
• whether offenders have severe psychological problems or physical disorders. However, with
the expansion of the available projects beyond manual labouring in recent years, physical and
mental disability are no longer automatic bars;
• an offender’s drug or alcohol dependence. This is still viewed as indicating a lack of
suitability for this sanction.

There is an increasing move to incorporate educational, counselling, and personal development
programmes as a component of community service. New South Wales, the Northern Territory,
Tasmania, Queensland and South Australia all have a statutory provision which allows for
community service specifically to include participation in approved educational or specified
rehabilitation programmes or provides a very general definition for the term which encompasses
any ‘activity’. The Australian Capital Territory makes provision for unpaid community service
work only. Any other ‘activity’ can not be included in a community service order.

In all jurisdictions, offenders subject to a community service order must report to the supervising
authority within a specified time of the order being imposed. A supervising officer or the court
must notify the offender in writing of their obligations under the order, which may include the
day and time at which they are required to report for work. The statutory obligations of
offenders common to all jurisdiction are to:

• report for work as and when ordered to do so by a supervising officer;
• comply with all reasonable directions of that officer;
• perform the assigned work in a satisfactory manner until the total number of hours imposed
  by the order has been discharged.

Specific requirements relating to an offender’s behaviour while performing the assigned work
under a community service order are generally laid down in subordinate legislation. These
requirements relate to such matters as abstaining from alcohol or drug consumption, refraining
from obscene or threatening behaviour and not damaging property at the work site.

There are variations among the States on the maximum number of hours that can be imposed
(ranging from 208 to 500 hours); the minimum age of offenders (16 or 18); whether or not a
community service order can only be imposed when a conviction is recorded; whether the
consent of the offender is required (it is in all states except Tasmania and South Australia); and
offences to which they cannot apply.

An additional restriction on supervising officials peculiar to Queensland and South Australia, is
that officials are directed to avoid, as far as practicable, giving directions which would produce
conflict with an offender’s employment, education, family commitments, or their religious
beliefs. In New South Wales it is also possible to impose 15 hours per week attendance at an
attendance centre.

**Attendance centre orders**

Attendance centre orders305 are available in the Commonwealth, New South Wales, South
Australian and Victorian jurisdictions. They require an offender to attend an attendance centre
within the community at regular, specified times during the week and weekends. Once there,
offenders engage in personal development, education and other programmes (for example,

305 Ibid, chapter 5, sections 84-88.
employment, financial management, driving education and drug dependency) as directed and provided by the supervising authority.

Attendance centre orders were first introduced in Victoria in 1975. They were originally only available when the court was of the view that a term of imprisonment would otherwise have been appropriate. The problem with this was that it tended to produce an escalation of penalties. Courts threatened imprisonment in order to make available these orders in cases where a probation order or fine would have been equally appropriate.

These problems were overcome in Victoria by the abolition of the attendance centre orders along with probation orders and community service orders and their replacement with a single form of order called the community based order. However, the old orders continue to apply to juvenile offenders under the Children and Young Persons Act 1989 (Victoria). Attendance centre orders as a direct substitution for imprisonment are no longer available in any Australian jurisdiction.

In New South Wales, attendance centre orders can be made in addition to a fine and may be combined with orders to perform unpaid community work under the Community Service Orders Act 1979 (NSW). Attendance centres offer a core programme which is undertaken by all offenders. In addition, other programmes are provided for offenders with special needs in particular areas such as basic literacy and numeracy and basic vocational skills. The legislation further specifies that the court may, when making an attendance centre order, require the offender to undergo testing for alcohol or drug use as directed by the assigned officer. This serves two purposes. First, it enables those who have severe addiction problems and who may, for that reason, be unsuitable for an attendance centre order, to be excluded from this penalty. Secondly, it enables those who are likely to respond to an AC dependency programme to be identified.

In South Australia attendance centre orders imposed under ss39 and 42 of the Criminal Law (Sentencing) Act 1988 (SA) can be combined with other conditions applying to bonds, such as supervised probation orders and community service orders. Section 39(1) refers to the court making orders under that section “without imposing a penalty”, neither a sentence of imprisonment nor a fine could be imposed in conjunction with an attendance order for the same offence. Additionally, s42(5) of the Criminal Law (Sentencing) Act 1988 (SA) provides that any fees which may be required to be paid for undertaking an approved programme are to be borne by an offender, unless relief from payment is given by the programme provider in accordance with conditions imposed by the Attorney-General.

**Community-based orders**

A community based order\(^{306}\) is a multi-faceted non-custodial sanction available only in Victoria and Western Australia. It was first introduced in Victoria in 1985 and became available in Western Australia under the Sentencing Act 1995 (WA).

The community based order was designed to replace 3 non-custodial sanctions: supervised probation, community service orders, and attendance centre orders. It was introduced to allow greater flexibility in sentencing. Community based orders are not considered to be a ‘soft’ sentencing option as they place significant constraints upon an offender’s behaviour and liberty.

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\(^{306}\) Ibid, chapter 5, sections 89-98.
Community based orders’ increased flexibility makes them a suitable disposition for a broad spectrum of offenders (including those who demonstrate a high risk of re-offending) and offences. They are considered unsuitable for offenders who have committed crimes of violence or who may present a continuing threat to the community in terms of future serious offending. Factors such as a history of violent offending, or of committing offences while on bail, or during the term of a previous community based order, would tend to indicate a lack of suitability for this sanction.

Community based orders should not be imposed on offenders who present little or no risk to the community and whose criminal behaviour is sufficiently sanctioned by a fine or a non-supervised order. As provision can be made for offenders to undergo medical treatment or treatment for alcohol or drug dependency, offenders with problems of this nature should not be assessed on this ground alone as unsuitable for this sanction. Factors favouring the imposition of this disposition include stable family relationships and a degree of residential stability.

The offender’s consent to the imposition of a community based order is necessary in Victoria. In Western Australia, the offender must consent only to any treatment conditions imposed. The absence of any general consent requirements may represent an acknowledgement of the apocryphal nature of any consent given by the offender in such circumstances.

In Victoria the time limit on the duration of community based orders is a maximum of 24 months. The total number of hours that may be worked in any seven day period must not exceed 20, unless the offender gives written consent in which case they may be able to work up to 40 hours in 7 days.

In Western Australia, the duration of a community based order cannot be less than 6 months. A community service requirement (a primary requirement, or condition, able to be attached to the community based order) cannot exceed 120 hours but must be more than 40 hours. Where more than one order is made, the total number of outstanding hours to be performed must not exceed 240. The minimum number of hours to be worked in any one week is 12.

In Victoria:

- a court may only make a community based order where the offender has been convicted or found guilty of an offence punishable on conviction by imprisonment or a fine exceeding $500;
- a community based order may be imposed in default of the payment of a fine. An order made under these circumstances contains all the normal core conditions, but the only program condition that may be imposed is that the offender perform unpaid community work, calculated at the rate of 1 hour for each $20 or part therefore unpaid, with a minimum of 8 hours and a maximum of 500;
- community based orders should be used ahead of intensive correction orders and custodial sentences including suspended sentences of imprisonment, but only after a fine or unsupervised order has been discounted;
- ability to impose a prison term of no longer than 3 months in combination with a community based order;
- community based orders can be combined with a fine;
- Victorian Courts have the power to impose community based orders upon offenders convicted of federal offences under s20AB of the Crimes Act 1914 (Cth).
In Western Australia:

- a community based order cannot be imposed when the statutory penalty for the offence is a fine only;
- community based orders can be imposed where an offence is punishable by a fine and/or imprisonment or by imprisonment only;
- community based orders are complete alternatives to imprisonment. The result has been that sentencing courts in that jurisdiction are not empowered to impose terms of imprisonment in combination with community based orders but may combine them with a fine;
- the Court of Criminal Appeal has expressed the view that a court should be slow to make a subsequent community based order when an equivalent order has been breached or where the nature of the offence is such as to call for a deterrent sentence or requires a demonstration of the abhorrence with which the community regards the offence. Examples of equivalent orders would include previous community based orders made under the Sentencing Act 1995 (WA) or other non-custodial supervised orders, such as probation orders, made prior to the commencement of that Act;
- there are no restrictions upon the court’s power to impose community based orders in terms of an offenders suitability or the availability of facilities to accommodate such an order.

Both Victoria and Western Australian community based orders consist of core (mandatory) conditions and programme conditions. To be valid, an order must contain the core conditions and at least one program condition. The core conditions deal with the basic regulatory and administrative aspects of the order (these differ between States).

In Victoria, several programme conditions are provided. The purposes and requirements of the first three major programme conditions (community service, supervision and personal development) are then specified separately. The court has broad discretion to impose any conditions considered desirable in addition to those specified in the statute. The only limitation is that the court cannot impose orders relating to the making of restitution or the payment of compensation, costs or damages as conditions of a community based order.

In Western Australia, the programme conditions are divided into supervision, community service and programme requirements. Programme requirements include the personal development condition and the conditions relating to medical, psychiatric and drug dependency assessment and treatment. There is specific provision for residence requirements to be imposed upon offenders undergoing medical assessment or treatment as part of a community based order.

Supervising officers in Western Australia are directed to avoid, as far as practicable, giving orders to offenders which conflict with their religious or cultural beliefs, or which interfere with their educational, employment or training commitments.

**Intensive correction orders**

Intensive correction orders are a form of sanction available in Queensland, Victoria and Western Australia. Such orders serve both punitive and rehabilitative functions. Rehabilitation is sought through intensive supervision and participation in community work programmes and/or programmes designed to promote personal development and to reduce offending. The punitive aspect of this sanction is provided by the considerable constraints it imposes upon an offender’s
liberty within the community. In the hierarchy of sentences intensive correction orders rank just below imprisonment but they are imposed only after a community based order or community service order has been excluded from consideration.

Victoria and Queensland intensive correction orders are utilised for offenders sentenced to a term of imprisonment of up to 12 months to serve that sentence in the community, but subject to more onerous supervision and program conditions that can be imposed as conditions of either suspended sentences of imprisonment or community based orders. Intensive correction orders can only be imposed where a conviction is recorded.

In these two States, a primary precondition for the imposition of an intensive correction order is that an offender must first be sentenced to a term of imprisonment of 12 months or less. The sentence is only suitable for offenders who would genuinely merit a custodial sentence if this sanction were not available. The correct procedure for imposing this sentence is for the sentencing court to determine first the type and quantum of sentence that should be passed. Only if imprisonment of 12 months or less is selected can the court resort to an intensive correction order. Accordingly, such orders are appropriate for offenders who would otherwise be sentenced to short terms of imprisonment, but whose offending is not so serious that it warrants a significant term of incarceration.

In Western Australia there is no requirement that a term of imprisonment be imposed prior to the making of an intensive correction order. Again, such orders can only be imposed where a conviction is recorded. A court cannot make a spent conviction order when making an intensive supervision order.

In Queensland and Victoria, the duration of intensive correction orders is the term of the prison sentence originally imposed, which cannot exceed 12 months. Accordingly, if an offender is sentenced for more than one offence in the same proceedings, the court may only make an order if the aggregate period of imprisonment imposed for all offences does not exceed 12 months. In Western Australia, an intensive correction order must not be for less than 6 months nor more than 24 months.

Intensive correction orders consist of mandatory core or standard conditions which attach to all orders made and optional conditions which the court may attach to the order.

In Queensland and Victoria, supervision, community service and counselling or personal development conditions are all provided as core conditions which automatically attach to all orders. This also marks the distinction between intensive correction orders and community based orders. The core conditions of intensive correction order also provide a higher level of intervention than the maximum conditions available under community based orders. Additionally, an offender must perform unpaid community service for 8 hours per week and must attend other specific programmes (i.e. counselling, treatment for drug abuse or personal development programmes) for up to 4 hours per week. In Queensland, offenders may also be required to reside at community residential facilities for periods of up to 7 days at a time, if so directed by an authorised supervising officer.

In Western Australia the only mandatory conditions are the supervision requirements. Community service and personal development are provided as optional conditions available to the court in tailoring the sentence to the particular needs of offenders.

The optional conditions that may be attached to an intensive correction order include:
• that the offender attend a prescribed programme (residential or community based) that is
designed to address personal factors which contributed to an offender’s criminal conduct
(Victoria);
• that the offender submit to medical treatment or assessment, or psychiatric treatment or
assessment (Queensland, Western Australian). In Western Australia a treatment condition of
this kind can only be imposed upon the recommendation of a qualified person and with the
informed consent of the offender;
• that restitution or compensation be made for personal injury or loss or destruction
(Queensland). In Western Australia and Victoria these can only be imposed as ancillary
orders in addition to sentence;
• that the offender comply with other conditions that may prevent future offending and which
cause an offender to behave in a socially acceptable manner. These may include restrictions
upon an offender’s social activities and associations, or lifestyle or residence requirements
(Queensland);
• curfew requirements for a maximum period of 6 months (Western Australia);
• that the offender be subject to surveillance requiring him or her to wear a device or to
permit a device or equipment to be installed in their residence (Western Australia);
• community service for a period of at least 40 hours but not more 240 hours. Where a
number of community service orders are in force, the total number of hours outstanding in
aggregate must not exceed 240 hours. The offender must perform at least 12 hours work in
any 7 day period and must satisfactorily perform that work.

Periodic detention

Periodic detention is available in two Australian jurisdictions, New South Wales and Australian
Capital Territory. For both, periodic detention is imposed as an alternative to full time
imprisonment and not as a sentence in its own right. The Periodic Detention of Prisoners Act
1981 (NSW) allows for the imposition of periodic detention when a person is convicted of an
offence and sentenced upon that conviction to a term of imprisonment of not less than 3
months and not more than 3 years (s 5(1)). However, periodic detention can be ordered for
less than 3 months for certain offences including domestic violence offences (s5A). In 1994
periodic detention eligibility was extended to include fine defaulters (s 5C). Overall, periodic
detention is considered appropriate for offenders (aged 18 years or older) who, due to the nature

307 New South Wales has 11 periodic detention centres.
308 The Periodic Detention of Prisoners Act 1981 (NSW) instructs the sentencing judge to first decide whether or
not to sentence an offender to a term of imprisonment before deciding whether the sentence be served by way of
periodic detention. This provision was intended to prevent net-widening. However, the courts appear to have
rejected this two stage method (i.e. decide on the length of imprisonment first, then decide that it should be served
by way of periodic detention) and often inflate the term of imprisonment in order to compensate for the perceived
lenient nature of the order for periodic detention. In effect the courts treat periodic detention as a sentence ‘in its
own right’. This increases the possibility of net-widening because if the sentence of periodic detention is cancelled,
the detainee is required to spend the balance of the term in full time custody. The result is often a much harsher
sentence than may have been warranted by the original offence (Periodic Detention Revisited, p 64).
309 In the NSW High Court the most common offences for which periodic detention is imposed are property, drug
and against the person offences (82.64%). In the NSW Local Court the most common offences are traffic, property
and against the person (80.53%) (Ibid, pp 54 – 55).
310 These include offences against the Periodic Detention of Prisoners Act 1981, offences against the Summary
Offences Act 1988 and offences against s 562I of the Crimes Act 1900.
and circumstances of their offending, may ‘deserve’ to be imprisoned but who do not need continual custody in order to protect the community from harm.\textsuperscript{311}

The sentence of periodic detention is, in the first instance, a residential programme. Once sentenced, detainees are required to report to a periodic detention centre for two days each week, usually from 7.00pm on Friday evening to 4.30pm Sunday afternoon\textsuperscript{312} for the duration specified by the sentencing court.\textsuperscript{313} The maximum number of hours of work that a periodic detainee can perform in any one day is 8 hours (s23(1)). The detainee may be involved in any activity that the Commissioner of Corrective Services considers conducive to the detainee’s welfare/training (s10(1)(a)) or, to perform work suitable to their physical capacity (s 10(1)(b)). Detainees cannot perform any work that would take the place of any other person who would otherwise be employed in that work as a regular employee (s10(2)).

Once a detainee has completed either three months or one-third of their sentence, whichever is greater, an application can be lodged with a Community Committee\textsuperscript{314} for placement onto Stage II of the periodic detention sentence (ss10 and 11).\textsuperscript{315} Stage II is the non-residential component of the sentence, where the detainee is required to report directly to a nominated work site on each of the two days of their weekly detention. The detainee, therefore, is no longer required to stay overnight in a periodic detention centres. Placement into Stage II is not automatic as the Community Committee examines the detainee’s attitude to work, offences and eligibility. If accepted and the detainee subsequently fails to attend work sites without prior approval or if they receive an adverse report from the work site supervisor they can be returned to Stage I of the sentence. The objective of Stage II is to provide detainees with an incentive to comply with their order particularly when the sentence is at the upper end of the scale.\textsuperscript{316}

The New South Wales judiciary cannot impose periodic detention to be either concurrent or cumulative with additional sentences of periodic detention, if the length of time to be served exceeds 3 years. When an order is cancelled the detainee serves any unexpired portion of the original sentence by way of full-time imprisonment (s27(2)(a)). If the detainee has been convicted of additional imprisonable offences while serving periodic detention, then the unexpired portion of the original imprisonment sentence will be served concurrently with the subsequent sentence of imprisonment (s27(2)(b)).

Within the Australian Capital Territory\textsuperscript{317} jurisdiction, the sentence of periodic detention as provided for by the Periodic Detention Act 1995 can only be imposed when the court would have otherwise sentenced the person to a term of imprisonment between 3 and 24 months

\textsuperscript{312} A midweek periodic detention scheme is available at some centres.
\textsuperscript{314} Community Committees consist of people nominated/appointed by the Commissioner of Corrective Services. The functions of the Committee are to make recommendations to the Commissioner as to the nature and extent of the periodic detention work available/ permitted and on any other matters raised (s32).
\textsuperscript{315} The New South Wales Law Reform Committee addressed the issue of Stage II in its report on sentencing and recommended that it be discounted. Arguments against Stage II highlighted were: that Stage II is inconsistent with ‘truth in sentencing’ as a detainee’s progression to Stage II is an administrative, as opposed to a judicial decision; consequently, periodic detention is viewed as overly lenient by both the public and the judiciary; that if Stage II was discontinued it may encourage a greater use of periodic detention as a sentencing option; and, retaining Stage II makes periodic detention too similar to the Community Service Order. The Commission’s recommendation was for legislative change to ensure that detainees would be required to complete 50% or six months of their sentence (whichever is greater) prior to being eligible for Stage II (NSW Law Reform Commission, Report No 79, Sentencing, 1996 cited in Judicial Commission of New South Wales, 1998, pp32-3).
\textsuperscript{316} Ibid, p31-2.
\textsuperscript{317} The Symonston Periodic Detention Centre is the ACT’s only periodic detention centre.
(s4(1)(b)). Consequently, if the sentence of periodic detention is cancelled, imprisonment is imposed. The number of detention periods (or weekends) to be imposed is calculated at the rate of one detention period for each week of the term of imprisonment to which the person would otherwise have been sentenced (s 4 (2)). Consequently, the overall length of periodic detention can vary between 12 and 104 months. If a sentence of periodic detention is combined either concurrently or cumulatively with additional sentences of periodic detention, the total time to be served can not exceed 104 detention periods (or approximately 21 months) (s 9). Offender consent is required before periodic detention can be imposed (s 6(1)(f)).

Unlike New South Wales, the Australian Capital Territory periodic detention regime is solely residential. Detainees (as with New South Wales) are required to report to the Symonston Periodic Detention Centre for two days each week, usually from 7.00pm on Friday evening to 4.30 p.m. Sunday afternoon. Once there, the Director of Corrective Services can direct a detainee to participate in any activity, class, group or undergo any instruction considered conducive to the detainee’s welfare or training. Additionally, work activity can be performed either at the detention centre or at another location. The work activity is required to be suitable to the detainee’s physical capacity (s15(1)). Examples of possible work locations are hospitals; charity organisations; educational institutions; homes for the elderly, infirm, or persons with disabilities; or any other place where the Australian Capital Territory is the owner, occupier or administrator (s15(2)). The Australian Capital Territory jurisdiction contains the identical limitation to activity performed while on periodic detention as New South Wales: that the detainee can not take the place of any person who would otherwise be employed on that work as a regular employee (s15(3)).

**Punitive work orders**

Punitive work orders are only available in the Northern Territory. They were created in 1996 in response to what was perceived to be a community demand for harsher sentencing of property offenders. Punitive work orders are provided in addition to and not in substitution for the already available community service orders.

The Attorney-General (1996) explained the purpose of punitive work orders as (a) requiring offenders to perform ‘hard work’ and (b) requiring that the work be performed in a publicly degrading manner. Offenders undertaking these orders are required to wear a distinctive uniform or label that will identify them to members of the public as punitive work orders recipients. This punishment has been described as stigmatising shaming. The type of work is not specified but projects must be approved by the Minister for Correctional Services.

The order can only be imposed on offenders over the age of 15 years who have committed specified property offences and where imprisonment has been imposed under s78A of the Sentencing Act 1995 (NT). Accordingly, a punitive work order will not be imposed unless the sentencing court decides that, in addition to the mandatory term of imprisonment, such an order is warranted. Because a punitive work order cannot be imposed in substitution for a mandatory

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318 Other stipulations for the sentence are that the court is satisfied periodic detention is appropriate for the individual offender; that appropriate facilities are available at the relevant detention centre; if required, that the offender submits themselves to a medical examination; that the court has received a pre-sentence report; and that the court has explained a number of issues to the offender including the consequences of non-compliance (s6(1)).

319 The Centre opened with 35 beds available. The muster was reached within the first 7 months of operation (Establishment of a Correctional Facility, Department of Corrective Services, 1996).

320 The Laws of Australia, 12.5, chapter 5, sections 120.1 to 120.15.
term of imprisonment and may not be imposed if its effect would be to release the offender from the requirement to actually serve any mandatory term of imprisonment imposed under s78A, it may be that this sanction will be used infrequently. The legislation, however, does not prevent a punitive work order from being imposed in substitution of any term of detention that a court might consider imposing in addition to the mandatory terms specified in s 78A. Further, while it is clear that a punitive work order cannot curtail any mandatory custodial term, the legislation leaves unanswered the question of whether a punitive work order can be undertaken during a term of detention where this would not result in the offender’s release from the requirement to serve the mandatory minimum term.

A punitive work order cannot be imposed unless the sentencing court is notified that arrangements have been made or will be made for the offender to participate in an approved project and the court must obtain a probation officer’s report on the offender and his or her circumstances.

The legislation fixes a mandatory term of 224 hours for punitive work orders. The court has no discretion to order fewer hours but does have discretion as to the time within which those mandatory hours are performed. Additionally, unless the offender consents, he or she cannot be required to undertake a punitive work order for more than 8 hours in any one day. Conditions are placed on the orders.
<table>
<thead>
<tr>
<th></th>
<th>Community Supervision</th>
<th>Alternatives to Imprisonment/Custody</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Australian Capital Territory</strong></td>
<td>Court Ordered Community Service Order &amp; Recognisance with Supervision Conditions (probation)</td>
<td>Bail Supervision &amp; Parole</td>
</tr>
<tr>
<td><strong>New South Wales</strong></td>
<td>Supervision, Community Service, Work Order, Supervised Attendance Centre Order, Fine Substitution</td>
<td>Order excluding imprisonment e.g. bail supervision &amp; Post-Prison Orders e.g. Parole, License, After Care Probation, Partially Suspended Prison Sentences, Pre-release Order</td>
</tr>
<tr>
<td><strong>Northern Territory</strong></td>
<td>Court Ordered Community Service Order, Probation &amp; Fine Default Community Service Order</td>
<td>Bail Supervision &amp; Parole</td>
</tr>
<tr>
<td><strong>Queensland</strong></td>
<td>Probation, Community Service &amp; Intensive Correction</td>
<td>Qld Commonwealth Recognisance, Fine Option, Prison/probation, Parole &amp; Post Prison Home Detention</td>
</tr>
<tr>
<td><strong>South Australia</strong></td>
<td>Probation, Community Service Order &amp; Fine Option Community Service</td>
<td>Parole &amp; Supervised Bail</td>
</tr>
<tr>
<td><strong>Tasmania</strong></td>
<td>Supervision, Community Service (Work Orders) &amp; Fine Substitution (by community service orders)</td>
<td>Wholly or Partially Suspended Prison Sentences</td>
</tr>
<tr>
<td><strong>Victoria</strong></td>
<td>Intensive Correction Orders, Community Based Orders &amp; Community Work Orders</td>
<td>Parole &amp; Fine Default Orders</td>
</tr>
<tr>
<td><strong>Western Australia</strong></td>
<td>Community Based Order (may include supervision, community service programs), Intensive Supervision Order (may include supervision curfew or program) &amp; Community Service Order</td>
<td>Parole, Home Detention (Prison, Bail, Work Release, Work &amp; Development Order)</td>
</tr>
</tbody>
</table>
### Table
Number of offenders by type of detention, by state 1996-97

<table>
<thead>
<tr>
<th>Type of Detention</th>
<th>NSW</th>
<th>Vic</th>
<th>Qld</th>
<th>WA</th>
<th>SA</th>
<th>Tas</th>
<th>ACT</th>
<th>NT</th>
<th>Aust</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Prisons</strong></td>
<td>6,323</td>
<td>2,478</td>
<td>3,563</td>
<td>2,231</td>
<td>1,475</td>
<td>272</td>
<td>143</td>
<td>541</td>
<td>17,026</td>
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<tr>
<td><strong>Community</strong></td>
<td></td>
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<tr>
<td>Supervision</td>
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<td></td>
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<tr>
<td><em>(as defined in Table …)</em></td>
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<td></td>
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<td></td>
<td></td>
<td></td>
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<tr>
<td><strong>Periodic</strong></td>
<td>1,562</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>61</td>
<td>NA</td>
<td>61</td>
<td>1,623</td>
</tr>
<tr>
<td>Detention**</td>
<td></td>
<td></td>
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<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>22,481</td>
<td>9,541</td>
<td>18,888</td>
<td>6,890</td>
<td>8,964</td>
<td>2,037</td>
<td>746</td>
<td>1,780</td>
<td>71,222</td>
</tr>
</tbody>
</table>

**Ratio**

| **Prison: CBS** | 1:2.6 | 1:2.8 | 1:4.2 | 1:2 | 1:5 | 1:6.5 | 1:4.2 | 1:2.2 | 1:3.2 |

NA – Periodic Detention is not available in this State


Note: New Zealand’s ratio of people in prison to people on community based sentences is 1:4.2.

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321 ‘Total’ section includes figures from the excluded category “Community Custody”. Correctional Sanctions recorded in this category are front-end/back-end & bail home detention (NSW, SA, NT), Community Custody Centres (Qld) and Work Outreach Camps (WORC) Program (Qld).

322 (Community Supervision and Periodic Detention.)
Canada

A number of alternatives to imprisonment exist in Canada, the best known (aside from fines and restitution) being probation and the community service order. By far the greatest number of offenders are handled by the provincial jurisdictions who have had a major role in the development of intermediate sanctions.

Probation

This is the most widely imposed sentence in Canada (even exceeding fines), with adult probationers in 1996 numbering about 100,000. It is principally intended to be rehabilitative. The length and conditions of a probation order can be varied to suit the individual needs and circumstances of the offender, up to a maximum of 3 years for adults and 2 years for young offenders (aged 12 to 17 inclusive). Nationally, the median length of adult probation orders is 1 year.

There are 5 ways adult offenders can be on probation:

- as part of a conditional discharge;
- as a condition of a suspended sentence;
- as part of an intermittent sentence;
- as a sentence on its own;
- following a prison term of less than 2 years.

In the last instance, probation begins either at release from prison or at the expiration of parole. In provincial courts, more than 25% of probation orders follow imprisonment.

Most probationers, except in Quebec, report regularly to probation officers who have both a support and an enforcement function. Probation officers may find a programme or agencies for the treatment of drug addiction, the teaching of financial management skills, or education upgrading. They are to offer general guidance intended to prevent reoffending. They are also to monitor compliance with the conditions of the order.

There are 3 mandatory conditions with each probation order: keep the peace and be of good behaviour; appear before the court when required to do so; and notify the court or probation officer of any change of name, address, or employment. The court can also select from a range of other probation conditions, according to the circumstances of the offender. They can include, but are not limited to, the following:

- report as required to a probation officer;
- abstain from drugs and/or alcohol;
- abstain from owning, possessing, or carrying a weapon;
- provide for the support of or care of dependants;
- perform up to 240 hours of community service work;
- participate in a treatment programme (providing the offender agrees);
- restitution to the victim;

323 Cunningham and Griffiths, p212.
324 Ibid, p213.
- non-association with the co-defendants;
- non-association with the victim;
- participation in a victim-offender reconciliation program;
- boundary restrictions and/or curfews.

Also, where available, a probation order may contain the provision that the offender be placed under home confinement and electronically monitored for compliance. Upon request from a probation officer the court may increase or decrease the number of optional conditions, eliminate all optional conditions, or reduce (but not lengthen) the total period of the probation order.\(^\text{325}\)

An adult probationer who, without reasonable excuse, fails or refuses to comply with a condition of probation or commits a new offence, may be charged with breach of probation. It is a hybrid offence and can carry a maximum penalty of 2 years if proceeded with by indictment. There is evidence to suggest that probation officers exercise considerable discretion in deciding whether to intervene and seek to revoke the probationary status of offenders.\(^\text{326}\)

Although probation is widely used, few evaluations have been conducted of its effectiveness in addressing the needs of offenders or reducing their involvement in criminal behaviour.

Probation is also the most common disposition in the youth courts (being the most serious disposition in 48% of cases overall in 1994/95, and in over 50% of both violent and property offences), where it can be imposed on its own or follow a period of custody. Optional conditions include requirements to attend school, seek and maintain employment, or live with parents or another adult the court considers appropriate.

**Community service order**

As noted above, a community service order can be a condition of an adult probation order under the Criminal Code. It generally requires the offender to work for a number of hours in a designated community service programme. The Young Offenders Act 1985 also gives judges in youth courts the option of ordering a young offender to perform work for the community, called a community service order. Such work may be cleaning up litter from parks, or removing graffiti from public buildings or structures. The judge sets the number of hours of work and defines a time period during which the hours need to be completed.\(^\text{327}\)

**Intermittent sentences**

If a prison sentence is 90 days or less, the judge has the option of making it intermittent. This most commonly involves the offender living at home during the week to work or attend school and spending the weekends in prison. During the periods outside prison, the offender is technically on probation and must comply with the conditions of the order. Fine defaulters who go to prison can serve their time intermittently, with the prior approval of the court.\(^\text{328}\)

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\(^\text{325}\) Ibid, p214.
\(^\text{326}\) Ibid, p213.
\(^\text{327}\) Ibid, p316-7.
\(^\text{328}\) Ibid, p219.
Home confinement and electronic monitoring

Electronic monitoring is a way by which some inmates may serve their prison sentences under home confinement. All of the existing programmes are operated by provincial corrections systems (as the federal government decided against the option for federal sentences), although not all provinces use it. Alberta uses home confinement without the electronic monitoring technology, relying on random visits and telephone calls to check on the offender’s presence at home. Individual provinces have evolved their own way of using the technology. It is possible to use electronic monitoring as a condition of probation or for intermittent inmates for the periods when they are not in custody.

Saskatchewan uses electronic monitoring as a front-end sentencing option with the judge placing inmates on it at the time of sentencing. Participation in such electronic monitoring programmes is generally restricted to offenders who have been convicted of less serious, non-violent offences and who have a stable residence and a telephone. The programme may require the offender to pay towards the costs of the equipment and monitoring. Electronic monitoring programmes are designed to be genuine alternatives to imprisonment, that is, in the absence of this option, the offender would have been incarcerated for a term.

In British Columbia it is a back-end option. Electronic monitoring can be recommended by the judge at the time of sentencing an offender to imprisonment, but the final decision remains with corrections officials who release suitable candidates from prison on temporary absences. Newfoundland has been using back-end electronic monitoring since 1994, which involves compliance with a schedule of community programming. This can include anger management, alcohol abuse, and cognitive skills programmes. Home visits are also made, and sobriety can be checked with an alco-meter. Only low risk/low need offenders are eligible and sex offenders and men with records of family violence are excluded. Offenders may be required to sign a consent form to allow victims to be notified of their early return to the community.329

Conditional sentence

This is a new sentencing option available since 1996 which can be used for adult offenders sentenced to less than 2 years in prison. If the judge “is satisfied that serving the sentence in the community would not endanger the safety of the community” then he or she can allow the offender to serve the prison sentence in the community, subject to the supervision of a provincial correctional agent, usually a probation officer. At the same time, the judge imposes a jail term but suspends it as long as the offender fulfils the conditions of the sentence.330

Conditions are imposed which can be added to or reduced by the court over time. In addition to standard conditions such as reporting to a supervisor, the judge can define such additional conditions as:

- abstaining from alcohol or other intoxicants;
- not to own, possess, or carry any weapon;
- providing for the support or care of dependents;
- performing up to 240 hours of community service work;

330 Ibid, p221.
• attending a treatment programme.

Selection of these or other conditions is to be aimed at preventing “a repetition by the offender of the same offence or the commission of other offences.”

The unique aspect of this sentence is that non-compliance with the conditions can result in imprisonment. Once an allegation that a condition has been breached goes to court, the onus is on the offender to establish that this is not true. If the judge is satisfied on the balance of probabilities that a condition has been breached, there are 4 options:

• take no action;
• add or eliminate optional conditions;
• suspend the conditional sentence order and commit the offender to custody to serve a portion of the unexpired sentence, with the conditional sentence resuming when the offender is released from prison;
• terminate the conditional sentence and commit the offender to custody for the remainder of the sentence until released on parole or the discharge date.

Conditional supervision

This is an infrequently used option available in the Young Offenders Act. The court can sentence a young offender to a period of custody not exceeding 3 years. Upon release from custody, the offender is placed on conditional supervision. The two measures combined cannot be longer than 5 years. While out of custody, the offender must comply with conditions chosen by the judge just prior to release.

Conditional supervision is a lot like probation, although closer to the full parole supervision of adults because it can be suspended if a condition is breached. The offender is returned to custody and may or may not be released again.

United States

The individual states of the United States have a narrow range of court-ordered community sanctions which can be imposed. These can be grouped into common types: probation, intensive supervision probation, and other sanctions. By far the most common of these is probation.

Probation

Probation is the major sentence in the United States. It began in 1841 and by 1956 all States had adopted adult and juvenile probation laws. Adult probationers numbered nearly 3.3 million at the end of 1997 (the number of prisoners in custody totalled nearly 1.2 million) up from almost 2 million in 1985 and 1.1 million in 1980. They currently comprise about 58% of all adults under correctional supervision.

Probation is the most common form of criminal sentencing in the United States. It is a court-ordered sanction through which an offender is placed under the control, supervision, and care of
a probation staff member in lieu of imprisonment, so long as the probationer meets certain
standards of conduct. Probation in the United States is administered by hundreds of
independent government agencies, each jurisdiction operating under different laws and many
with widely differing philosophies.

Anyone who is convicted, and many of those arrested, come into contact with the probation
department. Probation officials, operating with a great deal of discretionary authority,
significantly affect most subsequent judicial processing decisions. Their input affects not only
the subsequent liberties offenders will enjoy, but their decisions influence public safety, since
they recommend (within certain legal restraints) which offenders will be released back to their
communities, and judges usually accept their sentence recommendations. The pre-sentence
investigation or report is a critically important document, since over 90% of felony cases in the
United States are eventually resolved through a negotiated plea, and the court’s major decision is
whether imprisonment will be imposed. Probation is usually available as a sentencing option
except for serious crimes such as murder, rape or other serious assaults, or in cases where either
a mandatory minimum term of imprisonment applies, or the offender is liable to ‘three strikes’
type provisions that may apply.

For offenders granted probation, the court decides what conditions will be included in the
probation contract between the offender and the court. In practice, when sentencing an
offender to probation, judges often combine the probation term with a suspended sentence,
under which the judge sentences a defendant to prison or jail and then suspends the sentence in
favour of probation. In this way, the jail or prison term has been legally imposed but is held in
abeyance to be reinstated if the offender fails to abide by the probation conditions.

Judges may also decide to employ what is known as ‘split sentencing’, which is the imposition of
a jail term along with probation. Throughout the United States, probation is combined with a
jail term in 17% of all cases, and 26% of felony cases. However, this varies considerably, with
Minnesota requiring some 60% of persons who do probation (both felons and misdemeanants)
to also do some jail time, while 80% of felons in California who do probation also do some jail
time. The jail time is served first, followed by the period on probation.

The judge will also enumerate what conditions the probationer must abide by in order to remain
in the community. The conditions are usually recommended by the probation officer in the pre-
sentence report. However, the judge may also design them, and judges are free to impose any
terms of probation they deem necessary (including authorizing the probation officer to impose
“such other conditions” as they may deem appropriate).

There are three types of conditions: standard, punitive and treatment conditions. Standard
conditions are imposed on all probationers and include reporting to the officer, notifying of
change of address, remaining “gainfully employed”, and not leaving the jurisdiction without
permission. Punitive conditions increase the intrusiveness of probation, and include fines,
community service, victim restitution, house arrest and drug testing. Treatment conditions are
imposed to force probationers to address a significant problem, such as substance abuse, family
counselling, or vocational training.

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331 A felony is roughly equivalent to an indictable offence in New Zealand; a misdemeanor to a summary offence.
332 Jails hold pre-trial accused, and convicted offenders serving sentences of up to one year. They are generally
administered at county level. Prisons hold convicted offenders serving sentences of more than one year, and are
administered at state or federal level.
333 Also sometimes known as “shock probation” or “shock incarceration”.
The conditions form a contract between the offender and the court, with a probation officer as the enforcer. The Supreme Court has made a number of stipulations about probation conditions, within the broad framework that probation is not “prison without walls”, but rather, a form of conditional liberty. Conditions must serve a *legitimate purpose* (protection of society or rehabilitation of the offender), they must be *clear*, they must be *reasonable*, and they must be *constitutional* (i.e. while probationers do have diminished expectations of certain privileges, they retain basic human freedoms such as religion, speech, and marriage).

Should a defendant violate a probation condition at any time prior to the expiration of his or her term, the court may, after a hearing, continue him or her on probation, with or without extending the term or modifying the conditions, or revoke probation and impose any other sentence that was available at time of the initial sentencing (usually prison or jail). As noted above, a suspended sentence is often imposed along with probation, and on revocation the judge may order the original sentence to be carried out. When a suspended sentence is reinstated, the judge may decide to give credit for probation time already served or may require that the complete original incarceration time be served.

Over the years, the proportion of probationers subject to special conditions has increased, probably as a result of a more punitive public mood and the availability of inexpensive drug testing. More stringent conditions enhance the chances of failure, and this is reflected in statistics which show that while in 1990, 69% of those on probation completed their terms, in 1997, this success rate had dropped to 62%.

Despite this, the failure rate could be much higher. Research has shown that probation conditions are not vigorously enforced, and essentially, as long as they are not rearrested for committing further offences, most offenders are not violated off probation. Thus, it is estimated for example that on any given day, about 10-20% of all adult felony probationers were on “abscond status”. One reason for this may be that because the probation population is so large (see statistics below), even revoking a few percent of them or revoking all those who are rearrested can have a dramatic impact on prison admissions. It is estimated that between 30% and 50% of all prison admissions in the United States are probation and parole failures. It does not therefore appear to make much sense to revoke probation for technical infractions. Though some action is necessary, it may be that prison is not always the best response.

The ideal caseload is thought to be about 30:1. However, it is estimated that the current average caseload in the United States is more like 258:1. This means that in many urban areas, no personal contact between the probation officer and offender may take place beyond the initial meeting. Two-thirds of all probationers in Los Angeles in 1995 were supervised on “automated” caseloads. No services, supervision or personal contacts are provided. Probationers are simply required to send in a preaddressed card once or twice a month reporting on their activities. In many cases, these are very serious offenders convicted of violent offences such as rape, assault, kidnap and robbery.

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334 There was also an increasing percentage going to prison as a result of probation failure—14% in 1990, 18% in 1997. Source: Bureau of Justice Statistics, “Nation’s Probation and Parole Population reached new high last year”. 16 August 1998. (Press release with tables, reproduced at http://www.ojp.usdoj.gov/bjs/.)

335 Petersilia, p.165.

336 Petersilia, p.167.
Intensive Supervision Probation

Intensive supervision probation programmes are community based criminal sanctions that emphasize close monitoring. Some programmes are intended to divert offenders from prison or get them out earlier, while others are conceived of more as enhancements to routine probation. Petersilia and Turner note that “the only common characteristic of ongoing intensive supervision probation programmes is that they are more “intense” than routine supervision in a given jurisdiction.”

They have been adopted in some form in virtually every state. However intensive supervision probation programmes vary from state to state in target population, intake decision-making procedures, and quantity, style, and duration of “intensive supervision”. The key features are often quite different and may include any combination of the following:

- curfew/house arrest (without electronic monitoring);
- curfew/house arrest (with electronic monitoring);
- special conditions established by the judge (e.g. employment, counselling);
- team supervision;
- drug and/or alcohol monitoring;
- community service probation fees;
- split sentences/shock incarceration/community sponsors;
- restitution;
- objective risk/need assessment.

The one common element in this design diversity is an emphasis on the surveillance and control of offenders rather than offender treatment.

Most of these programmes call for some combination of multiple weekly contacts with a supervising officer, unscheduled drug testing, strict enforcement of probation or parole conditions, and requirements to attend treatment, to work, and to perform community service. In Marion County, Oregon intensive supervision probation programmes impose drug testing, mandatory community services, and frequent visits with the probation officer. In most states, these programmes operate within the legislative frameworks of routine probation, with the more onerous conditions being imposed as special conditions of probation. In other states, such as California, intensive supervision probation is quite specifically provided for by legislation. California’s Criminal Code, s8052(e) includes intensive supervision as item (3) in the list of “intermediate sanctions”.

Intensive supervision probation programmes are intended to do two things. Firstly, they are seen as having the potential to reduce prison overcrowding without jeopardizing public safety, and at less cost than prison. Secondly, they are seen as providing more options on the sentencing ‘menu’, because in many jurisdictions, the choice of sanctions has often been imprisonment or probation, with fines being used for only minor infringements.

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338 Defined as “punishment options and sanctions other than simple incarceration in prison or jail or traditional routine probation supervision. Intermediate sanctions may be provided by correctional agencies directly or through community-based public or private correctional service providers...”.

Other sanctions

A wide variety of other sanctions are provided for in the United States. These are usually incorporated under the umbrella of “intermediate sanctions” along with intensive supervision. California’s list of intermediate sanctions provides an impression of the range of possible impositions:

(1) short-term “shock” incarceration in either jail or prison, for a period of not more than 60 days;
(2) incarceration in a “boot camp” facility;
(3) intensive supervision;
(4) home detention with electronic monitoring;
(5) mandatory community service;
(6) restorative justice programmes such as mandatory victim restitution and victim-offender reconciliation;
(7) work, training, or education in a furlough programme;
(8) work, in lieu of confinement, in a work release programme;
(9) day reporting;
(10) mandatory residential or non-residential substance abuse treatment programmes;
(11) mandatory random drug testing;
(12) mother-infant care programmes;
(13) community-based residential programmes offering structure, supervision, drug treatment, alcohol treatment, literacy programming, employment counselling, psychological counselling, or any combination of these and other interventions.

In most states, sanctions such as community service and mandatory random drug testing are mostly used as adjuncts to probation or intensive supervision, and are not used as separate sanctions. Community service, for example, is often used as a way for indigent offenders to provide some sort of victim restitution. On the other hand, programmes such as ‘shock incarceration’ or home detention with electronic monitoring are semi-incarcerative in nature, and therefore perhaps not properly considered community-based sanctions at all. In line with their intent of providing a ‘bridge’ between incarceration and the community, they straddle the line between the two. It should be noted however that the Bureau of Justice Statistics, when accounting for the numbers incarcerated or under community supervision, include offenders under such sanctions within the jail and prison statistics, rather than the community supervision statistics (except in the case of electronically monitored home detention, where this is a condition of parole).

Although the concept of house arrest or home detention has existed for a long time, it was not until the development of electronic monitoring technology that it became seen as a realistic alternative sanction for criminal behaviour. While the number of offenders on electronic house arrest (both as part of alternative to jail programs, and as parole release from prison) had risen from none in the mid 1980s to about 70,000 in the mid 1990s, home incarceration has not proved to be any sort of solution to jail and prison crowding.

339 At least thirty states have “boot camps” which operate as alternatives to conventional prison sentences. Boot camp inmates live in tents or barracks and usually serve shorter sentences than other prisoners, but under conditions designed to ‘shock’ them into changing their behaviour. Prisoners engage in strenuous work and exercise under the guidance of drill-instructors type correctional officers. Many programs also add educational and life-skill course to the regimens. The intent is to learn discipline, teamwork, and respect for authority.

Statistics

Probation was never intended to serve as a major criminal sanction (though its variants increasingly are). It was designed for first-time offenders who were not deeply involved in crime and for whom individualised treatment and casework could make a difference. However, by the end of 1997, more than 3.2 million adult men and women were on probation. The 2.9% increase of about 110,000 people since the end of 1996 was in line with the average annual increase of 3.0% which the United States has seen in the probation population since 1990.

Felony offenders accounted for more than half of these (54%), while just over a quarter had been convicted of a misdemeanour (28%). 14% were on probation for driving while intoxicated or under the influence of alcohol, and 4% for other offences. The rate of probation use per 100,000 adult population varied widely, from Kentucky at 410 probationers per 100,000 adult population, to Delaware with 3,225 per 100,000 adult population. This latter figure equates to 1 in every 31 adults. Texas and California have the highest numbers of probationers.

Table
Number of adults under community supervision or incarcerated 1990-97

<table>
<thead>
<tr>
<th>Year</th>
<th>Total estimated correctional population</th>
<th>Community Supervision</th>
<th>Incarceration</th>
<th>Adults under community supervision as % of total US correctional population</th>
<th>Adults under any correctional supervision as % of all US adult residents</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1990</td>
<td>4348000</td>
<td>2670234</td>
<td>531407</td>
<td>403019</td>
</tr>
<tr>
<td></td>
<td>1991</td>
<td>4535600</td>
<td>2728472</td>
<td>593442</td>
<td>424129</td>
</tr>
<tr>
<td></td>
<td>1992</td>
<td>4762600</td>
<td>2811611</td>
<td>658601</td>
<td>441781</td>
</tr>
<tr>
<td></td>
<td>1993</td>
<td>4944000</td>
<td>2903061</td>
<td>676100</td>
<td>455500</td>
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<td></td>
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<td>5141300</td>
<td>2981022</td>
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<tr>
<td></td>
<td>1995</td>
<td>5335100</td>
<td>3077661</td>
<td>679421</td>
<td>499300</td>
</tr>
<tr>
<td></td>
<td>1996</td>
<td>5473800</td>
<td>3161030</td>
<td>675045</td>
<td>510440</td>
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<td>1997</td>
<td>5690700</td>
<td>3261888</td>
<td>685033</td>
<td>557974</td>
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</table>

Percent change:

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>30.9</td>
<td>22.2</td>
<td>28.9</td>
<td>38.4</td>
<td>59.5</td>
<td>69.5</td>
</tr>
<tr>
<td>Ave annual</td>
<td>3.9</td>
<td>2.9</td>
<td>3.7</td>
<td>4.8</td>
<td>6.9</td>
<td></td>
</tr>
</tbody>
</table>

The table above shows the way in which the overall correctional population of the US has grown. Within this, the population on probation has grown every year since 1990, as has both the jail and prison populations. However, despite these rises, the percentage on community corrections as a proportion of the overall correctional population has fallen slightly, reflecting the greater rate at which the incarcerated population of the US is growing.

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342 It should be noted that this is a rate per 100,000 adult population. If comparisons are to be made with the US imprisonment rate care is needed because these are usually expressed in terms of rate per 100,000 total population.
343 This does not include those attending boot camps, on electronic home detention or other such semi-incarcerative programs. However, it does include those on ISPs.
Table
Community corrections among the States, end of year 1997.

<table>
<thead>
<tr>
<th>10 States with the largest probation populations</th>
<th>Number supervised</th>
<th>10 States with the largest percent increase</th>
<th>Percent increase</th>
<th>10 States with the highest rates of probation supervision</th>
<th>Persons supervised per 100,000 adult state residents</th>
<th>10 States with the lowest rates of supervision</th>
<th>Persons supervised per 100,000 adult state residents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Texas</td>
<td>429093</td>
<td>Nevada</td>
<td>11.7</td>
<td>Delaware</td>
<td>3225</td>
<td>Kentucky</td>
<td>410</td>
</tr>
<tr>
<td>California</td>
<td>304531</td>
<td>Maine</td>
<td>10.7</td>
<td>Washington</td>
<td>3177</td>
<td>West Virginia</td>
<td>438</td>
</tr>
<tr>
<td>Florida</td>
<td>239932</td>
<td>New Hampshire</td>
<td>10.5</td>
<td>Texas</td>
<td>3095</td>
<td>Mississippi</td>
<td>356</td>
</tr>
<tr>
<td>New York</td>
<td>185881</td>
<td>Arizona</td>
<td>10.4</td>
<td>Georgia</td>
<td>2099</td>
<td>New Hampshire</td>
<td>356</td>
</tr>
<tr>
<td>Michigan</td>
<td>154236</td>
<td>Hawaii</td>
<td>9.8</td>
<td>Minnesota</td>
<td>2641</td>
<td>North Dakota</td>
<td>559</td>
</tr>
<tr>
<td>Georgia</td>
<td>148420</td>
<td>Alaska</td>
<td>9.5</td>
<td>Rhode Island</td>
<td>2607</td>
<td>Virginia</td>
<td>589</td>
</tr>
<tr>
<td>Washington</td>
<td>132014</td>
<td>Iowa</td>
<td>9.4</td>
<td>Connecticut</td>
<td>2260</td>
<td>South Dakota</td>
<td>641</td>
</tr>
<tr>
<td>New Jersey</td>
<td>130565</td>
<td>Missouri</td>
<td>9.3</td>
<td>Indiana</td>
<td>2222</td>
<td>Utah</td>
<td>690</td>
</tr>
<tr>
<td>Illinois</td>
<td>119481</td>
<td>Vermont</td>
<td>9.0</td>
<td>New Jersey</td>
<td>2153</td>
<td>Montana</td>
<td>720</td>
</tr>
<tr>
<td>Ohio</td>
<td>118761</td>
<td>Idaho</td>
<td>8.7</td>
<td>Florida</td>
<td>2146</td>
<td>New Mexico</td>
<td>723</td>
</tr>
</tbody>
</table>

Finland

By international standards Finland’s criminal justice system includes relatively few alternatives to imprisonment. Until 1991 there were essentially only 3 sentencing options:

- unconditional imprisonment;
- conditional imprisonment (similar to New Zealand’s suspended sentence, with the threat of imprisonment if further offences are committed during the period of the sentence, which can last up to 3 years, but also involving supervision in the case of young offenders); and
- fines (according to a day-fine system).

A conditional prison sentence can be imposed provided that “the maintenance of general obedience to the law” does not require an unconditional sentence. For younger offenders under 18 there is a presumption in favour of a conditional sentence by a special provision that allows the use of unconditional sentences only if certain extraordinary reasons call for it. In practice this means that the offence is very serious or that the offender has several prior convictions. Since 1976 conditional sentences can be used in combination with a fine. This option was used in 1991 in 37% of all conditional prison sentences for offences against the Penal Code.

In 1991 Finland introduced community service in certain districts on a trial basis. It was extended to cover the whole country in 1994. The duration of the sentence may vary between 20 and 200 hours. It is a sanction that can only be imposed as an alternative to an unconditional prison sentence of up to 8 months (240 days). In order to ensure that community service will really be used in cases when the offender would otherwise have received a prison sentence a two step procedure applies. First the court must make its sentencing decision applying normal sentencing principles and criteria. If the result is unconditional prison then the court may transfer the sentence into community service, if certain requirements are fulfilled.

The prerequisites for sentencing the offender to community service are:

- that the offender gives assent;
- that the sentence for which the offender has been sentenced does not exceed 8 months;
- that the offender is deemed capable of carrying out the order.

In commuting imprisonment into community service, one day in prison corresponds to one hour community service (so 2 months of custodial sentence is commuted into roughly 60 hours of community service). If the conditions of the community service order are violated, the court normally imposes a new unconditional sentence of imprisonment.

The first indications are that generally the new sentence has been applied in the manner intended by the legislators. As the number of community service orders has increased, the number of unconditional prison sentences has declined. In particular, drunk driving offenders have benefited from the new option. In 1996 the average daily number of offenders serving a community service order was about 1,000, compared to about 3,000 inmates.

**Netherlands**

The Dutch Penal Code lists 4 principal penalties in order of severity: unconditional imprisonment, suspended sentence, community service, and fine. All offences may be sentenced with a fine. Sentences of imprisonment of 1 year or less can be completely or partially suspended, and a sentence of between 1 and 3 years can be partially suspended. Since 1983 prosecutors have also been able to resolve criminal cases that carry a maximum prison term of 6 years or less by means of arrangements called “transactions”, whereby the suspect pays a sum of money in order to avoid prosecution. Penal policy since the 1980s has been characterised by the intention to reduce short-term imprisonment and expand the use of alternatives to imprisonment.\(^\text{345}\) In 1995 fines were imposed in 47% of cases resulting in a sentence.\(^\text{346}\)

**Community service orders**

Described as “the performance of unpaid work for the general good”\(^\text{347}\), the community service order was introduced into the Dutch Penal Code as a distinct sentencing option in 1989. It was first used on a trial basis, beginning in 1981, within the existing statutory framework (as a condition of a decision to waive prosecution or to settle a case without a court hearing, or as a condition of a decision to suspend pre-trial detention, to suspend a sentence, to postpone a sentence, or to grant a pardon).\(^\text{348}\)

As a statutory sentence the community service order can only be imposed as a substitute for an unconditional prison sentence of 6 months or less or a part-suspended/part-unconditional prison sentence of which the unconditional part is 6 months or less. It may not be used as an alternative to a suspended prison sentence, a fine, or a fine-default detention and can only be

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\(^\text{347}\) Tak, in Tonry and Hatlestad (ed), 1997, p197.  
\(^\text{348}\) Ibid, p201.
imposed with the consent of the offender at the trial stage. There must be agreement from the accused that he or she is willing to carry out non-remunerated work of a type described in the order. The judge has to state in the sentence the prison sentence for which the community service is a substitute and specify the number of hours work to be carried out, the period within which it must be completed, and the nature of the work. There is a maximum time of 240 hours to be served but no minimum. A community service order of less than 120 hours must be completed within 6 months, an order of 120 hours or more within 12 months. The prosecution service supervises compliance with community service orders, with assistance from the probation service. If the work is not carried out properly (about 10% of all orders) the judge may, at the request of the prosecutor, replace the community service order with the prison term mentioned in the sentence to be served in full or in part. The judge must take into account work that has been properly carried out. In 1992 the number of community service orders imposed numbered 8,585. In 1995 about 14,400 community service orders were imposed.

No offences are excluded by statute from a punishment with a community service order, although given the boundary of the 6 month prison sentence community service operates mainly for mid-level crimes and is seldom ordered for more serious offences unless there are mitigating circumstances.

Community service work must benefit the community. It can be with public bodies like the government or private organisations involved in health care, the environment and the protection of nature, and social and cultural work. To discourage unfair competition with paid workers, regional review committees check that no regular workplaces are being used for community service.

Community service orders have been evaluated twice by the Dutch Ministry of Justice, covering the periods February 1981 to May 1983 and the year 1987. There were strong indications that in some jurisdictions in many cases these orders were not substituting for short term prison sentences as required by statute, but for fines and suspended sentences, although the extent of this was not known. Interviews with members of the judiciary and the prosecution service had the majority admitting that they had no objections to using a community service order instead of a suspended sentence or a heavy fine.

The government aims to have 30,000 community service orders imposed per annum by the year 2000. To achieve that target figure, some restrictions in the Penal Code on the use of these orders will be removed. The offender will be able to consent in writing to the order rather than having to give it in person at the trial (to include those offenders who do not appear for trial), and the order will be able to be imposed as a substitute for a fine as well as for a short term of imprisonment.

**Other community sentences**

In the 1990s new community-based sentences have been introduced by way of experiments on a restricted scale, including training orders, combination orders, and electronic monitoring. A training order requires the offender to learn specific skills or to be confronted with the
consequences of his or her offending for the victim. They are mainly imposed on juvenile and young adult offenders and range from 5 meetings for 40 hours a week for up to 3 months or longer. Long term intensive training orders may be imposed as a separate sentence on adult offenders only. Training orders are usually imposed in combination with a community service order or as a condition attached to a suspended sentence. There are proposals to extend the number of hours for a training order or a combination order to 480 hours, and making a training order a principal penalty on its own. Electronic monitoring can be imposed in lieu of the last part of a prison sentence or in combination with a community service order. The combination of electronic monitoring with a community service order can substitute for imprisonment of between 6 and 12 months. It was introduced on a trial basis in 4 jurisdictions in the Netherlands.\(^{354}\)

In 1993 new community-based sanctions which included an intensive day program and intensive supervision were introduced on a restricted trial basis.

Despite this adoption of further alternatives to imprisonment, the prison population has increased substantially over the last decade. In 1995 there were 26,935 unconditional prison sentences imposed, compared to 20,119, in 1985.\(^{355}\) The number of sentences of a year or longer nearly tripled over this period. In 1997 the imprisonment rate was 78 per 100,000 population,\(^{356}\) compared to 24 per 100,000 population in 1980.\(^{357}\)

**Germany**

In German criminal law the main penalties are day fines and imprisonment (suspended or immediate). Community service and probation are available but not as penalties in their own right. Prison sentences of one year or less regularly require suspension (the Penal Code provides that the court shall suspend the execution of the sentence whenever the offender can be expected to refrain from further offences without a prison experience). Sentences of between 1 and 2 years may be suspended if the offender presents a low risk of recidivism and the particular circumstances of the offence or the offender justify a suspended sentence. Sentences of more than 2 years cannot be suspended. When the court suspends a prison sentence it must set a probationary period of 2 to 5 years and the offender is placed under the supervision of a probation officer. The court can include conditions such as community service, restitution to the victim, payment of a summary fine to the state or a charitable institution, and not associating with particular individuals. If the conditions are not met or the offender commits another crime during the probation period, suspension may be revoked and the original prison sentence served. In 1991 about 70% of all prison sentences were suspended. About one-third of suspended sentences are revoked (usually owing to the commission of a new offence).

In the 1980s community service was introduced as an option for fine defaulters, as a way of working off the fine. Offenders may otherwise receive imprisonment for non-payment of a fine.

Since 1975 Germany has also had an informal sanctioning process for minor offences. The prosecutor proposes dismissal of the case in exchange for the defendant paying a sum of money to the state, the victim, or a charitable organisation. The amount is usually the rough equivalent

\(^{354}\) Ibid, pp14-15.
\(^{356}\) Ibid, p1.
\(^{357}\) Tak in Tonry and Hatlestad (ed), 1997, p194.
to the fine that might have been imposed in the event of a formal conviction. The payment
neither requires a formal admission of guilt nor implies a criminal conviction. This simplified
procedure was extended in 1993 to include suspended sentences of imprisonment of up to 1
year.

In 1989 about 60% of offenders received a fine, 27% conditional dismissal, 8% a suspended
prison sentence, and 5% imprisonment.\textsuperscript{358} The prison population has declined from 56,870 in

\textsuperscript{358} Tonry and Hamilton, 1995, p46.
\textsuperscript{359} Albrecht in Tonry and Hatlestad (ed), 1997, p181.
Appendix 2: Reviews of Community-based Sentences

This appendix details some of the key findings of Department of Justice studies that involved reviews of community-based sentences.

Periodic detention

Information obtained from *Sentencing Under the Criminal Justice Act 1985: The First Six Months* (McDonald, 1986) indicated that the judiciary did respond to the shift in emphasis, from custodial to community-based sentencing, during the first six months after the Criminal Justice Act 1985 came into force. There was a 3% decrease in the use of custodial sentences accompanied by a 1% increase in the use of periodic detention in that period. Under the new legislative regime, 1,092 more convictions resulted in periodic detention. This increase applied only to non-Māori offenders who were 3% more likely to receive this sentence under the new Act. Māori offenders were 1% less likely to receive periodic detention than in the previous period.\(^\text{360}\)

The increase in the imposition of periodic detention was also noted in *The Impact on Sentencing of the Criminal Justice Act 1985* (Spier & Luketina, 1988). The proportion of cases resulting in periodic detention doubled between 1982 (at 6%) and 1987 (at 12%). However, there was no decrease in the proportion of offenders given a custodial sentence over that same period. Nevertheless, the report commented that there was evidence to suggest that periodic detention did provide an alternative to custodial sentences. Analysis revealed an inverse relationship between the proportion of violent offenders given respectively a custodial sentence and a sentence of periodic detention:

That is, during the years in which the proportion of [violent] offenders sent to prison drops, more offenders are sentenced to periodic detention.\(^\text{361}\)

Another observation was that those placed on periodic detention in 1987 were only slightly more likely to breach the conditions of that sentence than were offenders given periodic detention in 1979. Finally, offenders sentenced to periodic detention were also considerably less likely under the new Act to be also placed under the supervision of a probation officer by way of the new sentence of supervision (which replaced probation).\(^\text{362}\)

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\(^{361}\) *The Impact on Sentencing of the Criminal Justice Act 1985*, Spier, P. and Luketina, F., 1988, p166. This was not the case for serious violent offences (defined at that time as those violent offences which carried a maximum penalty of 5 years or more imprisonment). Results showed that for the more serious violent offences, taken as a whole, the percentage of cases resulting in a custodial sentence in 1986 and 1987 was up on the level seen prior to the implementation of the new Act. Increases were recorded for each sub-category of serious violent offence in 1986. In 1987 increases were recorded only for rape and the other serious offences of kidnapping or abduction, manslaughter and attempted murder. For injuring or wounding and robbery the proportion of cases resulting in a custodial sentence fell to a level which was similar to that seen in the years prior to the new Act. There was also a decrease in 1987 in custodial sentencing for aggravated robbery, but not to the extent of bringing the percentage of cases resulting in such a sentence down to the level seen in 1985 (p 99).

\(^{362}\) Ibid, p166.
Despite the lower likelihood of an offender receiving periodic detention combined with supervision, Asher & O’Neill (1990)\textsuperscript{363} in their qualitative research project\textsuperscript{364} found that the ability to combine periodic detention with supervision was perceived to maintain the credibility of the sentence of periodic detention. This was because while offenders were contributing back to the community through their work projects (reparation), in an environment involving some element of penalty, they were also able to access help to address their personal difficulties. Credibility was also maintained by the potential for an offender to receive imprisonment for breach of the sentence, which was not the case with the other community-based sentences.\textsuperscript{365}

Asher and O’Neill (1990) found that, generally, the sentence of periodic detention was viewed as one of the ‘major successes of the penal system’. In addition to its ongoing credibility, described above, periodic detention was considered to ‘run efficiently’ and ‘relatively inexpensively’ (in contrast to prison). However, the respondents did offer two suggestions to expand on the then current format of periodic detention. Firstly, a suggestion was that periodic detention work projects should be conducted on weekdays as well as Saturdays. This was justified on the grounds that ‘many of those undergoing periodic detention are currently unemployed’ and that the availability of periodic detention on more than one day would ‘discourage the build up of criminal subcultures’. Development of the sentence of periodic detention to include ‘social skills training’ and ‘personal growth opportunities’ was the second suggestion presented. Concern was also expressed regarding the number of ‘difficult’ offenders on periodic detention, although this was not discussed in any detail.\textsuperscript{366}

The increase in the imposition of periodic detention was again reported by Spier, Luketina & Kettles (1991) in Changes in the Seriousness of Offending and in the Pattern of Sentencing: 1979 to 1988.\textsuperscript{367} As periodic detention had become a much more frequently utilised sentence, two distinct themes had emerged. Firstly, offenders were sentenced to periodic detention for offences that were less serious on average than those sentenced to community care and supervision (p35), with the average offence seriousness for cases resulting in periodic detention decreasing by 12\% between 1979 and 1988 (p 50). The authors comment that this finding “differs from the generally accepted view that periodic detention is the sentence that is next in severity to a custodial sentence” (p 60). This also raised the possibility that some judges were now sentencing offenders to periodic detention relatively early in their offending histories compared to traditional practice. This raised the risk that these offenders could be fast-tracked towards imprisonment by other sentencing judges who would rank a previous sentence of periodic detention as higher in severity and therefore consider that the next sentence should be a custodial one.\textsuperscript{368}

The second theme to emerge from this report was that as the numbers of those sentenced to periodic detention increased, so did the numbers of serious offenders. In 1979 there were 44 offenders who were sentenced to periodic detention after being convicted of an offence with a seriousness rating greater than 200. In 1988 there were 171 offenders in this category who

\textsuperscript{363} This paper Community Involvement With Offenders: A Discussion Paper, outlines a broad range of sentencing issues.

\textsuperscript{364} Methodology consisted of semi-structured interviews with a total of 73 respondents (comprising 31 individual and small group interviews). Respondents were probation officers, District Court Judges, a police Community Liaison Officer and members of various community organisations. Interviews were conducted between 16 December 1988 and 1 March 1989 (p 10).

\textsuperscript{365} Asher and O’Neill 1990, p27.

\textsuperscript{366} Ibid p27.

\textsuperscript{367} The report presented a seriousness of offence scale developed by the Department of Justice which allowed offences to be grouped according to the degree of seriousness with which they are regarded by the courts.

\textsuperscript{368} Spier et al, 1991, p52.
received a sentence of periodic detention. This is reflective of one of the principal conclusions of this report, that there was a significant increase in the seriousness of the offending resulting in convictions between 1979 and 1988. The authors commented that “it is clear that the New Zealand justice system is having to deal with a much higher number of serious offenders than in the past”.

Both of these themes received further discussion in Imprisonment as “The Last Resort” The New Zealand Experience (1992). Here, concern was expressed regarding the increasing use of periodic detention which was the most common community-based sentence imposed in 1991 (61% of all community-based sentences). There were two key reasons for this concern. One was that periodic detention was the most resource intensive community-based sentence. Figures cited indicated that the sentences of supervision, community care and community service cost an average of $1,005 per person per year, while a sentence of periodic detention was costing around $2,522 per person per year.

The second reason for concern was the mixing of persons convicted of both serious and less serious offences. Not only did this introduce a widely disparate offending population into periodic detention centres which could have posed management difficulties but the potential for fast-tracking offenders to imprisonment increased with the increased use of periodic detention in cases involving comparatively minor offences. This was consistent with the observation of Spier, Luketina and Kettles (1991) above.

The effectiveness of periodic detention in reducing or preventing recidivism was the subject of a report completed in 1991. Asher and Norris (1991) examined reconviction rates, within 12 months of the sentencing dates, of those sentenced to a community-based option in 1989. A population sample of 400 periodic detainees was extracted from the Wanganui Computer System. The proportion of the sample re-convicted was 54.8%. The estimated recidivism was between 49.9% and 59.7% (with 95% confidence).

A comprehensive review of the sentence of periodic detention was completed in 1992 (Review of Periodic Detention Report, 1992) in response to recommendations presented from a previously completed departmental productivity improvement project. The term of reference for the review was the critical examination of the district management of periodic detention and, consequently, the review focus was predominately operational. However, the general outcome of the review was affirmation of the sentence of periodic detention:

…periodic detention fits in well with the whole range of community based sentences contributing a “hard edge” to the rest of the spectrum of sentences.

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369 Ibid, p50.
370 Ibid, p59.
371 Department of Justice, 1992, p8.
373 Asher & Norris (1991) Recidivism after Custodial and Community Based Sentences, cited a number of methodological limitations to their research. For example, there was no attempt to control for the many selection factors that determine the choice of sentence for a given individual, nor for the environmental factors that affect the likelihood of recidivism. Therefore recidivism figures were to be treated as preliminary.
374 The review project team consisted of four correctional regional representatives, a representative of the Public Service Association and a representative of the New Zealand Association of Periodic Detention Officers.
375 Operational issues explored included staff management policies (recruitment, retention, EEP & Cultural Perspectives Policy, training), management/maintenance of buildings and vehicles, Wet Weather Policy, detainee induction process, absenteeism strategies and the computerisation of periodic detention administrative systems.
376 Department of Justice, Review of Periodic Detention Report, 1992, p2.
Additionally, consultation with correctional staff highlighted ‘widespread agreement’ that periodic detention stands at the punitive end of the scale of community-based sentences; the last resort before imprisonment.\textsuperscript{377}

The review team expressed concern about the increase in the imposition of periodic detention since 1985 because of the potential for net-widening, which not only resulted in increased financial costs to the State but also increased ‘human costs’. Both of these sorts of costs were incurred when some offenders were ‘dragged’ further into the criminal justice ‘net’ than necessary for the purpose of punishment. The review team argued that this was not in the ‘best interests’ of either the public or the individual offender.\textsuperscript{378}

In order to ‘cap’ the periodic detention muster, the review team proposed the introduction of a maximum limit, at district level, of 300 offenders ‘on muster’ at any given point in time. This would encourage both ‘appropriate sentencing’ and ‘optimum use of resources’.\textsuperscript{379} A number of strategies were devised and proposed in order to ensure that the ‘cap’ would not be exceeded. These were:

- advising local judges and other district offices that the district sentencing ratio is being exceeded;
- training probation officers to recommend periodic detention sparingly to ensure the sentencing ratio is complied with;
- consultation with the warden each time a probation officer intended to recommend periodic detention;
- application of a stricter criteria to s38 of the Criminal Justice Act 1985. Those not within reasonable distance of a periodic detention centre should not be recommended to be sentenced to periodic detention (and transport should not be offered to detainees);
- the diversion of psychiatric or minor offenders by seeking judicial agreement to consult the probation service before sentencing to periodic detention;
- for District Management to approach the Registrar and Judge to encourage the Court to persist with offenders who are fines defaulters;
- excusing, under s41(3) of the Criminal Justice Act 1985, the detainee from attendance at the PD centre, for sentences of 6 months or more detention (the last two weeks can be excused for good behaviour);
- applying for cancellation for detainees whose circumstances have changed or where the sentence is no longer necessary;
- combining resources if a district has two periodic detention centres and/or shifting boundary lines to create a fair distribution of work;
- the implementation of additional strategies to achieve the 6:4 ratio\textsuperscript{380} of other community-based sentences to periodic detention.

It was envisaged that these strategies would not only slow down the documented increase in the use of periodic detention, but that the strategies would also facilitate the diversion of offenders convicted of relatively minor offences from periodic detention. In conjunction with this

\textsuperscript{377} Ibid, p3.
\textsuperscript{378} Ibid, p4.
\textsuperscript{379} Ibid, p12.
\textsuperscript{380} This ratio was incorporated into the community corrections productivity objectives in approximately 1993/94. The national ratio in 1990/91 was 5:19 (other community-based sentences: periodic detention). In 1992/93 the ratio was 5:68 (other community-based sentences: periodic detention) (Thorburn, P., 1993?, p8).
\textsuperscript{381} Department of Justice, 1992, p13.
approach to the prevention of ‘net-widening’, court servicing teams were also instructed to become more proactive in their court work. This was to occur through the ‘vetting’ of any case where the judiciary indicated that a sentence of periodic detention was under consideration rather than waiting until a pre-sentence report was requested. Simultaneously, the review team advocated the introduction of a two tiered system of administering periodic detention in order to increase the credibility of this sentence as an alternative to imprisonment. The two tiered system would increase the intensity of the time served on periodic detention, thereby increasing the applicability of the sentences to more serious offenders, in particular property or driving offenders. The proposal centred on court servicing teams highlighting, by way of pre-sentence reports, s 40(2)(a)(i) of the Criminal Justice Act 1985. This section allows for judicial discretion to ‘specify the number of occasions in each week on which the offender is required to report’383. The report considered the desired ‘time served’ for this group of offenders was two days each week, for eight hours on each occasion.384

A final point is that the review team briefly discussed a potential new sentencing initiative. This initiative was the establishment of the “Community Corrections Order”, which would incorporate all current community-based sentences. A discussion paper was circulated to staff, however the review team did not support this initiative for the following reasons. Firstly, it was argued that in terms of sentencing objectives, a combined order would have ‘little to offer’ compared to what was already available. Secondly, that the combined order may result in a ‘blurring’ of, or a conflict in, sentencing objectives. Thirdly, a combined order could raise the sentencing tariff and ‘fast-track’ offenders to prison because the sentencing alternatives to imprisonment would be drastically reduced.

Community service

The sentence of community service came into effect on 1 February 1981. Community service was the first sentence in New Zealand in which responsibility for the supervision of an offender was given to people within the community. It was also the only sentence for which the consent of the offender was to be obtained before its imposition (for a fuller description see section 2).

Lee (1981) conducted the first review of community service as a background paper for the Penal Policy Review Committee.386 She found that since the introduction of community service there had been a steady increase in its imposition. The predominant offence category that resulted in community service was offences against property. A conviction for a traffic offence was the second most common offence resulting in community service.387 The length of the orders remained relatively constant with approximately 50% involving between 51 and 100 hours’ community service.388 52% of those sentenced to community service during this period also received other sanctions (predominately disqualification from driving and/or probation).

382 Ibid, p5.
383 The other two options available to the judiciary are a) to direct the offender to report on one occasion in each week and on such other occasion or occasions in each week as the Warden may from time to time specify [s 40(2)(a)(ii)]; and b) to direct the offender to report on such number of occasions in each week as the Warden may from time to time specify [s 40 (2)(a)(iii)].
385 Ibid, p94.
386 Lee A (1981), Community Service Orders, Penal Policy Review Committee Background Papers Vol 1 Study Series No 7, Planning and Development Division: Department of Justice.
388 Legislation allowed for between 8 and 200 hours (amended in 1985 to between 20 and 200 hours).
Approximately 80% of community service placements were performed “at or for any hospital, or at or for any charitable, educational, cultural or recreational institution or organisation”.  

During February and March 1981, nearly a third of all those sentenced to community service were female. However this proportion had decreased by July/August to a quarter (25.5%). Approximately 2% of males and 10% of females were taught a new skill in order to carry out their community service. During the first two months of the availability of community service nearly 50% of those sentenced to community service were Maori or Pacific Islanders. Again, this proportion had decreased by July/August to 38%. The single largest age category of those sentenced to community service was for those under 21 years of age (40%). Lee (1981) also examined the socio-economic status of those sentenced to community service. The range of the scale was 1 to 6, with 1 representing a high socio-economic status. 76% of males on community service were in Levels 5 and 6. However, just over 50% of females did not have a usual occupation and thus could not be allocated to a level.

Community service orders were also examined in Leibrich, Galaway, and Underhill (1984), which comprised three research studies. The demographics relating to people sentenced to community service were examined in the first study (Leibrich, 1984). The majority of those sentenced to community service had pleaded guilty in court (91%) and three quarters of the population had legal representation during court proceedings. The majority of convictions were for property offences, whereas offences against the person accounted for 16% of the community service population during this time. An additional sentence of probation, disqualification or fine was given to just over half (52%) of the group. Probation was jointly imposed in 27% of the cases examined, with the majority of this group receiving probation for a year or less. The average sentence length was 89 hours, with approximately a quarter of the group (24%) being given over 100 hours of community service.

The community service group was convicted of more serious offences, when compared to the seriousness ratings of ‘all offences’ generally. Within the ‘all offences’ category less than half (47%) of all offences had a seriousness rating of 70 or more. However, 77% of the community service group offences were rated 70 or more. Both men and non-Maori were convicted of more serious offences than women and Maori respectively.

The population demographics of those sentenced to community service were similar to those observed by Lee (1981). Females were over-represented in that one-third of this population was female and yet only one in seven offenders at the time were female. Similarly, 41% of the community service population were Maori whereas 33% of offenders were Maori. 58% of the community service population were under 25 years of age which is similar to the proportion of all offenders in that age bracket, although proportionately more of those sentenced to

389 1 of three possible types of service. Lee, p4.
391 Elley & Irving’s socio-economic status scale was utilised (cited in Lee, 1981)
392 Lee, pp5-6.
393 Methodology consisted of a random sample selected from the population of those sentenced to community service during the first 21 months of its existence (1 February 1981 to 31 October 1982). Data was drawn from the Wanganui Computer Database.
394 Seriousness was determined by a scale that contained seriousness ratings attached to every police-classified offence. These ratings were adopted from a small pilot study by the Police Department which attempted to establish the relative importance/seriousness of all offences for urgency of police clearance. The minimum possible seriousness rating was 13 (vehicle certification [or lack of]); the maximum possible was 98 (murder).
395 Leibrich, p19. The statistical significance was minimal within the range possible.
community service were in the 20-29 age range (74%) than was the case with the general population (53% in the 1981 population census).

The second community service study completed in 1984 was a survey of the experiences and opinions of people connected with the sentence of community service (Leibrich, Galaway & Underhill, 1984). Accordingly, structured interviews were held in seven probation districts with a sample of judges (n = 11), probation officers (n = 42), community sponsors (n = 65) and offenders (n = 68). The review objective was to gain a general picture of how the community service sentence regime was operating from the perspective of those who impose, administer, facilitate and receive this sentence. The issues which emerged were primarily operational in focus. Examples include difficulties in identifying a sponsor, the meaning of ‘informed consent’, informing the judge about placements, ongoing communication during the placement and ‘tightening up’ breach regulations.

However, two issues emerged from the survey which are particularly pertinent to the current discussion. The first issue was the determination of the most appropriate place of community service in the sentencing tariff. There was no consistent view as to where community service should be located. Most respondents felt that community service fell between a fine and periodic detention. However, others felt community service was more appropriately located between periodic detention and prison. Several probation officers expressed the view that community service was a ‘soft option’.

The second issue that emerged was whether or not community service was seen [or should be seen] as an alternative to other sentences when others were not considered appropriate, or whether it should be recognised and utilised as a sentence in its own right. The provision of an alternative to custodial sentences was the aim least often seen as being accomplished. The predominant response was that community service was [and should be] viewed as an ‘alternative’ to other non-custodial sentences deemed inappropriate for particular offences/offenders. Key factors considered in determining ‘appropriateness’ were:

- the ability of an offender to pay a fine [if a fine would cause hardship, the recommendation would be for community service];
- the seriousness of the offence [a fine was viewed as more appropriate for less serious offences];
- practical difficulties for the offender in terms of sentence compliance;
- the availability of periodic detention in a particular area.

Positive reasons for choosing community service (for example, the offender had particular abilities that could contribute to the community) were also provided by both probation officers and the judiciary (albeit to a much lesser extent).

An examination of recidivism in relation to the sentence of community service was the third research project undertaken in 1984 (Leibrich, 1984). In order to provide a comparable context, a sample of persons sentenced to non-residential periodic detention was chosen as a second

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396 Ibid, pp10-12 and p22. In terms of the imposition of co-sentences, women were given additional probation proportionately more often than men, and more of them were given longer periods of supervision.

397 Ibid, p32.


399 Ibid, p156.

400 Ibid, p152.

401 Ibid, p152.
sentence group. Reconviction was defined as a court appearance resulting in a conviction during the year following the sentence date.\textsuperscript{402}

Overall reconviction rates of 38\% for the community service group and 59\% for the periodic detention group were identified. However, it was not possible to infer that the sentence of community service produced lower reconviction rates than the sentence of periodic detention. This was because reconviction rates varied significantly when the samples were disaggregated. The review suggested that, given the impact of other factors (e.g. previous criminal history, seriousness of previous sentences, number of previous convictions, age at first conviction, type of offence, seriousness of offence), reconviction rates were unlikely to provide sensitive estimates of the effectiveness of a sentence.\textsuperscript{403}

A regional examination of the use of the sentence of community service was also produced in 1984. The aim of this review was specifically to seek evidence of the extent to which community service was utilised as an alternative to imprisonment in Otago and Southland (Bradshaw, 1984).\textsuperscript{404} Results indicated that community service was imposed on offenders who would have been imprisoned if community service had not been available, particularly female offenders.\textsuperscript{405} The community service group had less serious current offences than those sentenced to prison or probation but more serious offences than those sentenced to periodic detention or a fine.\textsuperscript{406} In the author’s view this indicated that a ‘hierarchy of penalties’ did not exist:

\begin{quote}
That is, contrary to what is often assumed, there is no ladder: prison/periodic detention/community service/probation/fine, according to the seriousness of offence, in terms of the maximum penalty.\textsuperscript{407}
\end{quote}

The examination of non-criminal variables indicated that individuals with dependants were more likely to be sentenced to community service. Unemployed persons were also more likely to receive community service rather than a fine.

Overall, Bradshaw’s (1984) results indicated that the community-based sentencing options existed as a ‘cluster of sentences’ utilised as alternatives to imprisonment but for different types of offenders. However, the review did not determine any inherent value in the community service sentence:

\begin{quote}
Just because it [community service] may be used as an alternative to imprisonment, [this] does not justify its existence unless it has some value over the existing alternatives.\textsuperscript{408}
\end{quote}

There were no recommendations on the future of the sentence of community service presented in the paper.

\textsuperscript{402} The community service sample consisted of every person who had received at least one community service sentence between 1 May 1981 and 31 July 1981 (n = 419). The periodic detention group consisted of one third of all people who had received at least one periodic detention sentence during the same period (n = 459). Any person who had received both a community service and periodic detention sentence during that period was included in the group defined by the first sentence received (p 166).

\textsuperscript{403} Ibid, p204. Also discussed in section 5.

\textsuperscript{404} Bradshaw, J. Community service orders in Otago and Southland: a Survey, 1984. Survey method consisted of the collection and analysis of probation reports completed between 1.2.81 and end of January 1982 (n = 473).

\textsuperscript{405} The low number of women in the sample may limit Bradshaw’s conclusions. Nine women in 1979 and 1980 had received a custodial sentence. In 1981 six women received community service while no female offender received a custodial sentence.

\textsuperscript{406} Bradshaw 1984, pp21-2.

\textsuperscript{407} Ibid, p21.

\textsuperscript{408} Ibid, p22.
Recommendations aimed at increasing the responsiveness of the sentence of community service to and for Maori, were presented in Jackson’s (1988) research report *The Maori and the Criminal Justice System A New Perspective: He Whaipaanga Hou Part 2*. Jackson outlined a strategy designed to increase the positive involvment of the Maori community in the criminal justice system. One area stipulated as requiring change was the operation of both the community service and community care sentences. The goals of these two sentences and of Maori justice were seen to be synonymous in that ‘offenders must redress and be seen to redress the wrong they have done against the good order of society’. However:

> their [the sentences of community service and care] implementation has often caused considerable anger as Maori people see the intent of the legislation frustrated by bureaucratic and judicial insensitivity.

and

> the fact that probation officers frequently reject community service or care proposals simply because they do not satisfy certain administrative criteria of accountability or appropriate supervision clearly needs to be addressed.

The suggested change was that a Maori community liaison adviser should work in consultation with both the supervising probation officer and the designated community group providing the required sponsorship or care for a Maori offender. With training to inform the adviser of administrative requirements, the adviser would then be able to ‘provide input and support for probation officers supervising Maori sentenced to either community service or care’. This role would then result in the ‘melding’ of the cultural requirements of the Maori group involved with the sentence administrative requirements.

The issue of whether or not community service was imposed as an alternative to imprisonment, as discussed previously, was revisited by Asher and O’Neill (1990) in their research on the views of correctional practitioners. However contrary to Bradshaw’s (1984) conclusions, Asher and O’Neill found that the general perception was that community service was being imposed as an alternative to fines and, therefore, on first offenders or those convicted of minor charges and drink-driving offences. Consequently community service was viewed as a “soft option”, inappropriate for “serious” offenders. Other issues highlighted in this research included:

- duplication between the sentences of community service and periodic detention in that they were seen to be ‘fulfilling the same purpose and having the same effect’;
- community service being regarded [by some] as a ‘cheap and less effective form of periodic detention rather than as a genuine attempt to involve the community’;
- community service being characterised by inadequate administration. For example, difficulties in identifying sponsors, sponsors hesitant about supervising community service workers in case they were later required to appear as witnesses (for breach action) and ‘poor communication between probation officers and sponsors’. Respondents felt that unless a

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409 The strategy included reviews of a) s16 of the Criminal Justice Act 1985 that allows an offender appearing for sentence to call witnesses to speak about their cultural background and the way in which it may “relate to the commission of the offence and the positive effects it may have in helping to avoid further offending” (p 244) and b) s134 which provided for the establishment of Criminal Justice Advisory Councils (p 246). Section 134 was repealed in 1993.

410 Jackson, 1988, p245.

highly developed administration system was required to ensure appropriate implementation of the sentence, the sentence would become ‘meaningless’;

- a concern about breach procedures because the only penalty available was the imposition of a fine exceeding $500. If community service was being utilised as an alternative to fines, then the breach penalty was considered ‘unworkable’;
- a view held by some of the judiciary and probation officers that the credibility of community service would be strengthened if it was possible to combine this sentence with supervision.412

No specific recommendations relating to the sentence of community service emerged from this research.413 However, the ongoing need for further evaluation of community-based sanctions in terms of ‘the humanity, costs and effectiveness’ of these options, and the need to see whether they were being used as alternatives to custody or to fines and other non-custodial penalties was stressed.414

In line with this ‘ongoing need’ for evaluation, the Community Corrections division of the Department of Justice completed a comprehensive review of the sentence of community service (Community Service Review Report, 1993). During the early 1990s the community service muster had increased. In 1992 there were 8,177 persons sentenced to community service, an increase of 1,962 from 1991. The muster in 1993 was expected to reach approximately 12,000 people. The significant increase in the community service muster had resulted in a number of issues being examined by the community service review team.

The first of these issues was the cost implications of maintaining the current community service muster and fiscal planning for the projected muster. The terms of reference for the review directed the review committee to develop options for an increase in the volume of community service sentences (Terms of Reference No. 4, p 33). The review committee’s interpretation of this term of reference was to identify strategies that managed both current and projected volume. Strategies presented were:

- the identification of alternative ways of dealing with non payment of fines (rather than community service);
- to improve the ‘gatekeeping’ function of the court servicing teams (to control the numbers of persons sentenced to community service);
- to increase throughput (of offender through the sentence) by increasing the number of hours completed per month, by taking court action sooner and by terminating files at completion of hours;
- to avoid the use of bulk placement of offenders into community service placements, which blurs the distinction between periodic detention and community service;
- community service specialisation by probation officers;
- reallocation of resources from areas of less need to the administration of community service;
- computerisation of all community service records.415

413 The presentation of specific recommendations was not a key focus of the research. Rather, the research objectives were a) the identification of major issues relating to community involvement in the care and supervision of offenders b) indicate problem areas that may need to be addressed by the Department of Justice and, c) indicate questions on which data should be collected in subsequent research projects (p 9).
Two recommendations emerged from this list of strategies: that community service specialisation is desirable, especially in bigger offices and that community service records be included in the client offender management system. These were both approved by the Community Corrections Directorate.

The review reported that there was concern about the introduction of stand-down [same day] reports. These reports were seen by the respondents as having contributed to the increase in the use of community service. Respondents indicated that the introduction of same day reports might also have affected the quality of community service assessments. Additionally, respondents observed that many of those now being referred for the preparation of stand-down reports had been convicted of ‘trifling offences’. This was seen as representing a widening of the criminal justice net. The review team’s recommendation for attempting to curb ‘net-widening’ was that both the Community Corrections and Courts divisions of the Department of Justice devise a strategy for alternative ways of disposing with the non-payment of fines where the original offence was non-imprisonable.

Two particular issues for the sponsors of community service emerged in the review. Firstly, sponsors were apprehensive about the provision of community service opportunities for those who had been convicted of serious offences. Interestingly, it was the potential for organisational harm [rather than personal risk] that was discussed as a problem in the Review Report (1993). Consequently, the review committee stressed the importance of matching the correct sponsor with an appropriate offender. As organisations are vulnerable to inappropriate matching, the sponsors were reliant on Probation Officers to know their distinctive needs and limitations. The recommendation to address this issue was subsequently not approved.

The second issue regarding the sponsors of community service was the clarification of their role in providing evidence to the court in not guilty hearings or disputed applications for review. The review committee commented that it was generally accepted that sponsors were not to be called to give evidence despite recognition that not all breaches/applications could be successfully prosecuted in the absence of the sponsor’s evidence. The Review Committee’s recommendation to clarify this issue, again, was not approved.

The potential of community service to incorporate cultural dimensions also emerged from the review. The review committee commented that the holistic approach provided by ‘some groups, including those identifiably Maori’ provides people ‘with a lifestyle, not simply an opportunity for service’. The recommendation was that both the Community Corrections division and the Cultural Advisory Unit of the Department of Justice examine the imposition of community service from the viewpoint of its cultural sensitivity. The purpose of this was to ascertain what

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416 Ibid, p32. The Directorate was the Divisional Manager and senior staff, with 4 regional managers.
417 Court Servicing Teams were introduced by the Community Corrections Division to prepare stand-down reports for the court. These reports were prepared on the same day as conviction, to facilitate efficient sentencing (p 16).
419 Community organisations commonly stipulate the ‘type’ of offender that they are/or are not prepared to sponsor for example, no thieves or no sexual offenders ( p 19).
420 The recommendation was that if the [then] proposed Criminal Justice Law Reform Bill (introduced in 1992), which provided for a sentence of community service to be imposed following a sentence of imprisonment, was passed, care should be taken in the administration of the community service sentence to preserve its integrity and maintain a sufficient supply of sponsors (p 19).
422 The recommendation was that sponsors be given the option to give evidence in court on a breach or review of sentence, but not be required to do so, and that the Probation Manual be amended accordingly (p 19). As this recommendation was not approved, it remains unclear as to what the situation was regarding calling sponsors to give evidence.
changes could be made to produce alternatives consistent with the purpose of the sentence in diverse cultural settings. This recommendation was approved.\(^{423}\)

Granting remission of sentence, in terms of the number of hours to be served, on the grounds of good behaviour and/or quick completion rates was discussed. Proponents of remission felt that it would provide both encouragement and an incentive for those with sentences of over 100 hours. However the review team were concerned that net-widening could occur as a result of the judiciary increasing the number of community service hours to be served in consideration of the fact that some of the hours may eventually be remitted. This would increase the potential for the sentence to be abused and, subsequently, lose credibility. The review team concluded that the arguments against remission outweighed the potential benefits.\(^{424}\)

Legislative issues raised were: the conditions and limitations on additional sentences of community service being imposed concurrently or cumulatively on an offender already serving a sentence of community service; whether the definition of ‘service’ under s60 was too narrow; and the need for the courts to be able to impose community-based sentences rather than imprisonment upon review of a sentence of community service imposed for non-payment of a fine. In reference to these issues the community service review committee recommended: that the division seek legislative change to s30 of the Criminal Justice Act 1985 in order that the anomalies of overlapping community service sentences be addressed; that Community Corrections district managers report to regional managers any problems in maintaining sufficient sponsors for the community service sentence, so that remedial action could be taken (introducing new categories of sponsors had been suggested); and that s66(3)(d) of the Criminal Justice Act 1985 be further considered with a view to allowing the imposition of community-based options where appropriate in cases of reviewing a community-service sentence for non-payment of a fine.\(^{425}\)

Despite the emergence of the above issues, the key outcome of the review was ‘affirmation’ of the ‘value and popularity’ of the sentence of community service. The review committee offered the following statement in conclusion:

> The hallmark of community service is that it allows for community involvement with offenders, the primary relationship being that between the sponsor and the offender. Once a placement has been made the probation officer’s role is a supportive and monitoring one, with an emphasis on minimal intervention. A key element of the sentence is its flexibility.\(^{426}\)

**Community care/community programme**

The sentence of community care was introduced in the Criminal Justice Act 1985. The Penal Policy Review Committee (1981) recommended the establishment of community care with the principal aim being to place an offender in a community environment (either residential or non-residential). Here, offenders would be subject to influences and example expected to have a beneficial and supportive effect.\(^{427}\) (For a full description of community care refer to section 2.)

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\(^{423}\) Ibid, pp18, 30-1.
\(^{424}\) Ibid, pp20-1.
\(^{425}\) Ibid, pp21-2.
\(^{426}\) Ibid, p29.
\(^{427}\) PPRC, p120.
MacDonald’s (1986) examination of the sentence of community care six months after its introduction found that the new sentence was imposed in only a small proportion of charges resulting in conviction and sentencing (2%). In 71% of those charges resulting in community care, no other sentence was imposed and just over half of the charges (54%) were for property offences. 19% of offenders who received community care were convicted of at least one offence against the person. The majority of community care sentences were non-residential (79%). 64% of all community care sentences were for a period of six months or less.\footnote{428 \textit{MacDonald}, 1986, pp14-15.}

Māori offenders (at 2.6% of cases involving Māori offenders) were twice as likely to receive a community care sentence as non-Māori offenders (at 1.3% of cases involving non-Māori offenders).\footnote{429 Ibid, p12. Cases involving Maori offenders = 10,606 and cases involving non-Maori offenders = 16,853.} Approximately 80% of cases that resulted in a sentence of community care involved male offenders compared to 18% for female offenders (in 2% of cases the offender’s gender was unknown). For cases resulting in community care, 61% of the offenders were aged under 25. However, MacDonald commented that the age and sex of an offender had little effect on the likelihood of a case resulting in a sentence of community care. 1.5% of the 7,404 cases involving female offenders received community care compared with 1.3% of the 39,239 cases involving male offenders. In the cases involving offenders aged from 15 to 39, from 1.3% to 1.6% resulted in the sentence of community care, and in the cases with offenders aged 40 or above, 1% resulted in community care.\footnote{430 Ibid, pp13-14.}

The low use of community care was again evident in Spier and Luketina’s (1988) review, which showed that community care was imposed in only 1% of cases in 1986 and 0.8% of cases in 1987. This decline was seen in relation to most of the offence categories, except for good order offences and offences against the administration of justice for which the imposition of community care slightly increased between 1986 and 1987. The authors suggested that the low use of community care reflected either a lack of confidence in the sentence, or insufficient resources within either the community or the Department of Justice to provide and organise community care programmes for offenders.\footnote{431 \textit{Spier and Luketina}, 1988, pp132-3.}

The gender differential was almost identical as that found by MacDonald (1986), with 81% of cases in which a sentence of community service was imposed involving male offenders and 18% involving female offenders. Females were marginally more likely to receive community care than males. The majority of offenders sentenced to community care were under the age of 25 (58.6%) with the most common age category being between 15 and 19 years.\footnote{432 Ibid, p134.}

Property offenders and offenders convicted of an offence against the person were the most likely in 1987 to receive a sentence of community care with just under 2% of offenders in each of these categories given this sentence. Of those sentenced to community care, more than 40% were property offenders and 18% were offenders against the person. Māori offenders (at 1.8%) were almost twice as likely to receive a sentence of community care than caucasian offenders (at 1.0%). However, despite the high number of Māori receiving community care a very small number of community care sentences were recorded as Maatua Whangai placements (66 out of 1861 community care sentences). The majority of community care programmes were non-residential.\footnote{433 Ibid, pp132-6. Maatua Whangai programmes involved the placement of young Māori offenders in iwi, hapu or whanau structures instead of social welfare institutions and prisons. The authors comment that one possible}
Spier and Luketina (1988) explored the issue of what sentence would have been imposed if community care had not been introduced. Their analysis indicated that the introduction of community care did not result in any decrease in the proportion of offenders receiving any other sentence except for fines. No evidence, therefore, suggested that community care was imposed as an alternative to a custodial sentence or to any other community-based sentence. Rather, if community care was considered a more severe penalty than a fine, then the introduction of community care resulted in an increase in the severity of the sentences imposed on offenders who would have otherwise received a monetary penalty.

The suggestion that the sentence of community care was being used in a way not originally intended (i.e. as an alternative to fines rather than as an alternative to imprisonment) arose again in Asher and O’Neill’s (1990) research. Although their respondents expressed support for the sentence of community care, there was recognition that the sentence was imposed infrequently and the view that when it was imposed, it was as an alternative to fines. Additionally, respondents felt that community care had involved predominately ‘structured treatment regimes’ rather than the placement of an offender into the care of an individual, whanau or local group.

A legislative fault was also cited as limiting the development of the sentence of community care. The six-month time limit imposed on the residential component of a sentence was seen as a major drawback by agencies that provided long-term residential treatment programmes. This limitation could have resulted in offenders leaving the programme at the end of six months, as they may have adopted the attitude that they had “done their lag”. Other concerns expressed regarding the sentence of community care were confusion over the role played by the probation service in the monitoring of community care, especially when breaches were to go to court (because breach behaviour does not constitute an offence) and the uncertain availability of community groups or individuals willing to provide the required care for this sentence to operate effectively.

Ongoing concern over both the limited development and low imposition of the sentence of community care resulted in the convening of a community care working party by the Department of Justice (Probation Division) in 1991. The terms of reference for the working party were as follows: to make recommendations on how community care could be utilised to a greater extent; to complete a reviewed set of manual instructions on the administration of community care; and to investigate and make recommendations on changing the name of “community care”. A number of issues were covered and various recommendations

Explanation for a low recorded placement rate in Maatua Whangai programmes is that placement may have been incorrectly coded under another category (p 136).

Fines decreased from 75.6% (1985) to 71.7% (1986) to 70.5% (1987). In 1986 and 1987 community care was imposed in 1.0% and 0.8% of cases (p 138).

Spier & Luketina, 1988, p138. The authors commented that their analysis could have been superficial, as the real situation is likely to be more complicated. For example, the average seriousness of offences could have increased and perhaps without the introduction of community care there would have been an increase in the proportion of offenders imprisoned or there would have been an even greater increase in the proportion of offenders placed on periodic detention (p 138).


Methodology consisted of two phases. Phase One: In 1990 the Department of Justice circulated a copy of a discussion paper on community care (Young, W., 1990) to staff for comment. Phase Two: Working Party members administered questionnaires to the community, judiciary, probation management and field staff (pp5-6). The size of the various samples was not specified.
presented. Three of these issues are discussed below as examples of the focus of the working party.

One recommendation to encourage increased use of community care was an improved focus on the effective marketing of the sentence. Effective marketing was seen as the primary mechanism through which any increase in the use of community care would occur (the proposed name change, see below, was to be the focus for the marketing initiatives). Four target groups for direct marketing were identified: probation staff, the community, the judiciary, and offenders. The various marketing initiatives included presentations to probation staff at district level, an information pamphlet for sponsors, media releases, convening district hui to disseminate information to potential sponsors, the encouragement of sponsors to provide assistance to the judiciary through both being available in the court and inviting the judiciary to make direct contact with them, and the location of posters in court waiting rooms to encourage offenders to request placement on community care.441

The incorporation of a module on “Whanau, Hapu, Iwi Development” into training for probation staff was also recommended in order to encourage increased use of community care. The working party was concerned that the original intention of community care had not been translated into action. This ‘original intention’ was the strengthening of whanau, hapu and iwi links, and the placement of offenders within tribal networks rather than within institutional structures. The training module would involve training for probation staff in the following areas:

- network liaising (knowledge of resources);
- Maori and Pacific People’s cultural values, protocols and concepts;
- Whanau, Hapu, Iwi Development, including Maatua Whangai;
- negotiation/mediation in a cultural setting;
- the identification of community needs.

This would encourage reinforcement of the ‘original intention’ of community care and increased utilization of the sentence of community care for Maori and Pacific offenders. 442

As already mentioned, the Working Party examined the appropriateness of changing the name of the sentence of community care. The responses obtained from the consultative phase regarding a potential name change fell into three categories: those in favour of a change; those in favour of the status quo; and a group who viewed change as an exercise in semantics with little likelihood of overall benefit as a result. However, the working party did decide that a name change was appropriate on the following grounds:

The primary factor influencing our decision was the need to move from a concept to a sentence. The general philosophy of “community care” has become a well utilised concept in a number of fields such as health, aged care and signifies movement from within institutional state operated structures, to care within the community. While the desirability of such devolution is a feature of the current sentence (as reflected in the policy objectives of the Division) and will remain so, it is felt that the name should reflect in some way the specific nature and purpose of the sentence, rather than the philosophy which underpins it.443

440 These issues included staff development and training, community involvement, community liaison, communication between the various community care parties and standardised contracting with sponsors by Community Corrections.
The working party was also conscious of the requirement of the Criminal Justice Act 1985 for the offender to undertake a “programme” provided by a community sponsor. Both this original requirement and the stated need for an increase in effective marketing (outlined above) were supporting factors for the proposed name change. The final recommendation therefore, was for the sentence of “community care” to be re-named “community programme order”. This recommendation was implemented in the Criminal Justice Amendment Act 1993.

Despite the recommendations of the Community Care Working Group the sentence of community programme continues to be infrequently imposed. Recent Ministry of Justice statistics show that the imposition of community programme has never exceeded 1.6% of the total imprisonable cases convicted, with a decrease in the number of cases that resulted in a community programme between 1996 (780) and 1998 (431). Māori offenders receive the sentence of community programmes more frequently than non-Māori. In 1998 for example, community programme was imposed on 215 Māori and 47 non-Māori. However, despite a higher proportion of Māori than non-Māori receiving the community programme sentence, this sentence was imposed in only 0.9% of all imprisonable non-traffic cases involving Māori in 1998.

The Community Probation Service (CPS) of the Department of Corrections is currently carrying out research into the Community Programme sentence to determine the factors contributing to the decline in the numbers of offenders receiving the sentence and to identify those factors upon which CPS can have an effect. It is intended that the review will shed light on the feasibility of increasing the usage of the Community Programme sentence and the strategies that would be needed to do this. Some preliminary comments from previous findings and from information collected so far are as follows.

The main reason behind the low usage of the sentence seems to be directly related to the low number of recommendations for the sentence from Probation Officers to the judiciary. This is because:

- a sentence of Community Programme cannot be imposed until a report on the programme and conditions is available to the offender and presented to the court by, or through, a Probation Officer. Hence, even though judges can request such a report, they cannot impose the sentence without the report, whereas they can with other sentences.

- in many ways CPS is the link between the judiciary and the community and Probation Officers are the ones required to know whether programmes and sponsors, suitable to the offender, are available. As a result, if a recommendation for a Community Programme report is not made by a Probation Officer, it seems that judges rarely request the report.

There appear to be three, broad, interrelated areas affecting the number of recommendations. The first is resources (including funding, time, skills). There may be a lack of resources for sponsors to provide appropriate programmes. There may be a lack of resources for Probation Officers to create and maintain community links and to assist in the support and development of appropriate programmes, make assessments and match needs with appropriate interventions. Also, existing resources may not be being applied as effectively as possible.

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445 Source: Criminal Justice Group, Ministry of Justice.
446 Information provided by Department of Corrections.
The second area is conflicting perceptions of the sentence. Between judges, CPS, CPS staff and sponsors, and within these groups themselves, there appears to be little shared understanding and acceptance of what the essentials of a Community Programme order are. Due to this and the different expectations that result, it is not as readily recommended as other sentences.

Thirdly, there is an issue regarding the availability of sponsors. The potential pool of sponsors for a Community Programme sentence is immense, ranging from all types of individuals to established community organisations and government agencies. However, resource issues and the constraints arising from the conflicting perceptions of the sentence have the effect of limiting the potential pool of sponsors available in the community. The low number of recommendations of the sentence may be a reflection of the number of sponsors available under the current conditions. With the CPS establishment of clearly defined minimum standards for community-based programmes there may be an increasing gap between what CPS now requires of a programme and sponsor, and the current availability of expertise and focus in the community.

Historically, and currently, the usage of the community programme sentence has been low and the reasons behind this are complex and widespread. It is however doubtful that the potential of the sentence has ever been fully explored. Despite the problems outlined, when it is used the community programme sentence can work very well, and is particularly suited to various groups e.g. young offenders, Māori, and those for whom prison seems likely. In addition, the costs of administration are much less than for the other community-based sentences (except community service).

**Supervision**

MacDonald (1986) in her review of the sentence of supervision six months after its introduction, found that supervision was imposed in 2,182 or 4.3% of criminal cases (involving 5,889 charges). Supervision was less likely to be imposed under the new regime than probation was previously, as 7% of charges resulted in a supervision sentence compared to 12% of charges that had received probation in the period 1 October 1984 to 31 March 1985. The majority of supervision sentences were for offences against property (71%) with offences against the person resulting in 8% of sentences imposed\(^447\). For 44% of charges incurring supervision, this was the only sentence. Additional sentences imposed in conjunction with supervision were periodic detention (37% of the charges), reparation (11%), driving disqualification (11%) and community service (1%).\(^448\)

In cases which resulted in a sentence of supervision, 19% of the offenders were female and 80% were male (gender was unknown for 1% of the cases). Females were more likely to be given a sentence of supervision (1 in every 18 cases involving females) than males (1 in every 22 cases involving male offenders). Younger offenders were also more likely to be involved in cases that

\(^447\) Traffic offences and drug offences accounted for 8% and 5% of the supervision sentences imposed respectively (p 20).

\(^448\) MacDonald (1986) pp7 and19-21. MacDonald notes that the Criminal Justice Act 1985 prescribes against the imposition of supervision and community service sentences concurrently. However, for 46 charges that resulted in a sentence of supervision, a sentence of community service had also been ordered. The 46 charges for which both sentences were given included 26 charges for one individual. The data suggested that sentencing had occurred contrary to legislative requirements however, MacDonald (1986) commented that the data had not been fully investigated (p21).
resulted in at least one sentence of supervision. For offenders aged less than 20 years, 1 in 14 were involved in cases that received supervision. One in 22 of offenders aged between 20 and 29 years and 1 in 37 of offenders aged 30 years and above received a sentence of supervision. Of the cases resulting in supervision, 39% involved Maori offenders.\footnote{61\% of the cases resulting in supervision involved non-Maori offenders (p19).} Both Maori and non-Maori offenders had the same probability (1 in every 14 cases) of incurring a sentence of supervision.\footnote{McDonald, 1986, pp19-20.}

The decrease in the frequency of the imposition of supervision (compared to probation) was again highlighted in Spier and Luketina’s (1988) sentencing review. In each of the years 1983 to 1985 (up to 1 October), 10% of convictions resulted in the offender being placed on probation (exclusive of convictions resulting in probation plus imprisonment which was prohibited as a sentencing option under the new Act), whereas in 1986 the figure for supervision was 8\% and in 1987, 9\%\footnote{Spier and Luketina, 1988, p57-8.}. Spier and Luketina explained the decrease in the imposition of supervision by reference to the following changes made by the Criminal Justice Act 1985:

- the introduction of the prohibition against the imposition of supervision in conjunction with a custodial sentence or any other community-based sentence except periodic detention (previously, there was no similar restriction on probation);
- the introduction of the sentence of reparation (s 11 required that reparation should be imposed in all cases where there had been loss of, or damage to, property); and
- the introduction of a prohibition against the imposition of periodic detention plus supervision and reparation (s13 allowed reparation to be imposed in combination with only one community-based sentence). This meant that either supervision or periodic detention plus reparation must be imposed where there was loss of or damage to property rather than periodic detention plus supervision.

Spier and Luketina (1988) argued that the last two amendments listed above were the most influential.\footnote{Other differences between the sentences of probation and supervision were a) the minimum term of supervision is only 6 months compared with 1 year for probation, and b) it was possible to attach a wider range of conditions to probation than to supervision for example, conditions relating to the enforcement of some other orders or sentences which may be imposed by the courts (p 139).} This was because the major contributing factor to the lower use of supervision compared to probation was the less frequent use of supervision in conjunction with periodic detention than was the case with probation. In the 3 years before the amendments periodic detention was combined with supervision in between 30\% and 33.5\% of all cases resulting in periodic detention. Following 1985, the concurrent sentences of periodic detention and supervision were imposed in only 15.5\% and 16\% of cases resulting in periodic detention in 1986 and 1987 respectively. The biggest drop was in the concurrent use of periodic detention and probation/supervision for property offences. At the same time, the number of cases resulting in periodic detention plus compensation/reparation increased from 377 in 1985 (or 12.8\% of cases resulting in periodic detention) to 1146 (or 23.8\% of such cases) in 1987.\footnote{Spier and Luketina, 1988, pp142-6.}

Despite the lower use of supervision compared to probation, the proportion of all cases which resulted in supervision as the principal sentence (which excluded sentences of supervision given in conjunction with other community-based sentences or with imprisonment) was slightly greater
than that for probation. In 1984 2.7% of all cases resulted in the imposition of probation as the principal sentence. By 1987, 3.2% of all cases resulted in supervision as the principal sentence.\(^{454}\)

In 1987 supervision was imposed predominately for offences against property (49.5% of total supervision cases). However, only 13.2% of total offences against property processed by the court in 1987 resulted in the sentence of supervision. The second largest offence category among cases which received supervision was offences against the person (17%), representing 11% of the total cases involving offences against the person. The most frequent sentence length imposed was between 9 months and 1 year, with 58% of offenders receiving a sentence of this length.\(^{455}\)

The demographics of those sentenced to supervision were similar to those found in MacDonald’s 1986 review. Female offenders (at 7.1%) continued to be more likely to receive supervision than males (at 4.6%). Likewise, young offenders continued to be more likely to receive supervision, with more than two-thirds of offenders who received supervision being under the age of 25 years. In 40% of the cases in which supervision was imposed, the offender was between the ages of 15 and 19 years.\(^{456}\) The ethnic breakdown for those who received supervision was as follows: Caucasian offenders, 53%; Maori offenders, 41%; Pacific Peoples, 5%; Other, 0.6%; Unknown, 0.6%. There was little difference in the likelihood of Maori and Caucasian offenders receiving a sentence of supervision, with 7.9% of cases involving Caucasian offenders and 8.6% of cases involving Maori offenders resulting in this sentence.\(^{457}\)

The seriousness of offences resulting in probation/supervision (as the most severe sentence imposed) was examined by Spier, Luketina & Kettles (1991) in their report *Changes in the Seriousness of Offending and in the Pattern of Sentencing: 1979 to 1988*.\(^{458}\) Their key finding was that offenders were, on average, sentenced to supervision for more serious offences than was previously the case for probation. To illustrate, the average offence seriousness in 1984 for cases which resulted in probation or supervision was 31.2, whereas in 1987 the figure was 36.1. Overall the average offence seriousness increased by 22% between 1979 and 1988. The actual number of offenders sentenced to supervision for offences with seriousness scores of greater than 100 increased by approximately 87% between 1979 and 1988, although numbers were relatively small.\(^{459}\)

The majority of offenders sentenced to supervision were convicted of offences with seriousness scores between 1 and 100. Every seriousness category experienced a decrease in the proportion of convictions resulting in supervision between 1979 and 1988. The decrease was particularly rapid between 1979 and 1981. However, after the introduction of the Criminal Justice Act 1985 there was a slight increase in the proportion of convictions resulting in supervision as the principal sentence.\(^{460}\)

\(^{454}\) Ibid, pp142-3. \\
\(^{455}\) Ibid, pp147 and 150. \\
\(^{456}\) Ibid, p148. \\
\(^{457}\) Ibid, p149. \\
\(^{458}\) Data for the period 1984 to 1987 were combined and the incarceration rate and average custodial sentence length was calculated for each offence. A seriousness score was initially assigned to all offences that resulted in at least 10 custodial sentences over the four year period mentioned above. This score is the incarceration rate multiplied by the average custodial sentence length. Offences that resulted in at least one custodial sentence, but less than 10 custodial sentences, were grouped with similar offences and the seriousness score was calculated as above with an average score taken over the grouped offences. Examples of offences and their associated seriousness scores are as follows: Disorderly Behaviour, 0.7; Burglary (Value less than $500) by Day, 74; Burglary (Value over $5000) by Day, 168; Kidnap, 680; Manslaughter (Weapon Involved), 1310; Male Rapes Female (Weapon Involved), 2275 (p 19). \\
\(^{460}\) Ibid, pp55-7.
Asher and O’Neill’s (1990) research identified a number of concerns expressed by probation officers regarding the sentence of supervision. This was despite the probation officers’ view that supervision was the most important sentence administered by the Probation Division because of its flexibility and the discretion given to probation officers regarding the type of assistance they could provide. The concerns were:

- the status and effectiveness of the sentence of supervision were being undermined by ‘case-loads, report writing, administrative duties and other responsibilities of probation officers’. This was seen to threaten the adequate supervision of offenders and therefore the credibility of the sentence;

- the inability to combine supervision with community service or to make community work a condition of supervision. This posed practical difficulties for probation officers, especially in rural areas where periodic detention was unavailable. It may also have resulted in lost opportunities to address the various difficulties in offenders’ lives (e.g. alcohol or drug use) when judges sentenced them to community service;

- many probation officers felt that the lack of the option of imprisonment upon breach of supervision weakened the credibility of supervision;

- a perception that the judiciary did not regard supervision as a punitive measure.

A slightly different perspective was obtained from community sponsors. Sponsors expressed the view that supervision with special conditions attached was preferable to community care sentences because probation officers retained overall responsibility for offender compliance with the sentence.

Asher and Norris’s (1991) examination of reconviction rates in *Recidivism After Custodial and Community Based Sentences* noted that the sentence of supervision had an estimated recidivism rate of 41.6% to 51.4% (with 95% confidence). This figure was drawn from a sample of 400 offenders sentenced to supervision in 1989. Reconviction was defined as those who received an additional conviction within 12 months of the original sentencing date. The actual proportion reconvicted was 46.5%.

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461 This issue was discussed in another section of Asher and O’Neill’s (1990) research report. The comment was made that the merits of these criticisms were difficult to assess at that point, and that allowing the combination of community service and supervision could dilute the effectiveness of both sentences, rather than simply overcoming certain problems arising from the present legislation (pp 28-9).


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