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## REPORTS OF THE COURSE

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### GROUP 1

#### ENHANCEMENT OF COMMUNITY-BASED ALTERNATIVES TO INCARCERATION AT THE PRE-SENTENCING STAGE

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### I. INTRODUCTION

Following the general discussion, our group's responsibility was to ascertain the types of community-based alternatives to incarceration which can be undertaken at the pre-sentencing stage of the criminal process and analyse their features. The discussion group composed of seven participants representing the following countries, (Haiti, Japan, Palestine, South Africa and Saint Vincent). The group would like to express its sincere gratitude to visiting experts, Mr. Stephan Vaughan from Australia and Professor Tony Peters from Belgium for their contribution that guided us during the group work. Their input, which led us with a clear point of view, to reach our goal in the group discussions, is appreciated.

The group held considerable discussions in relation to all aspects of alternatives to incarceration available at the pre-sentencing stage in the participating countries.

Following further consultation it was concluded that some measures used by the police and prosecutors in the participating countries to divert people from the traditional criminal justice system process, cannot be considered as community-based alternatives to incarceration.<sup>1</sup> However for certain participating countries such as Haiti and St Vincent those current measures can be considered as a bridge towards the future implementation and use of community-based alternatives to incarceration at the pre-sentencing stage as there are no exclusive community-based alternative approaches in plan at this stage. Based upon these issues a decision was taken to only examine penal mediation and diversion programmes, which often involves a community-based intervention as community-based alternatives to incarceration for the purpose of this paper. Full details of the available non-custodial measures in each group member's country are set out in chapter II.

To further clarify the purpose and direction of this paper, we offer the following definitions that are applicable to our discussions and recommendations.

#### A. Penal Mediation

Any process whereby the victim and the offender are able, if they freely consent, to participate actively in the resolution of matters by providing agreed upon compensation for damages and suffering arising from the crime through the assistance of an impartial third party (mediator). The process is designed to take the interest of the victim, offender and the community into consideration. It provides a

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<sup>1</sup> See Table 1, chapter II.

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timely reminder to an offender that he/she has to respect the law, thereby enhancing the procedure and the outcomes of the criminal justice system.

Detailed discussion took place in an attempt to adequately define Diversion. Three definitions were considered as follows

**B. Diversion**

Definition 1: *(Used by Australia in its National Illicit Drug Diversion Programme)*

Diversion is a process that provides an alternative to criminal justice sanctions to modify individual behaviour. It involves a graduated series of interventions appropriate and proportionate to the seriousness and circumstances of the offence and the personal circumstances of the offender.

Definition 2: *(USA Federal Judicial Center 1994)*

Diversion is the official halting or suspension of legal proceeding against a criminal defendant or juvenile after a recorded justice system entry, and possible referral of that person to a treatment or care programme administrated by a non-justice agency or private agency.

Definition 3: *(Detailed in the South African Criminal Justice System)*

Diversion is a procedure by which people are referred away from the criminal justice system, in order to deal with him/her in a developmental and strength-based manner, which allows the person to take responsibility for his/her actions and make restitution to the victim and the community.

Following further discussions, for the purpose of this paper the following definition has been developed to describe the use of community-based alternatives to incarceration at the pre-sentencing stage:

Diversion is a process, which provides an alternative to criminal justice sanctions to facilitate rehabilitation of an individual through various dispositions and may include assessment, education, treatment, developmental programmes and restitution. It involves a graduated series of interventions appropriate and proportionate to the seriousness and circumstances of the offence, and the personal circumstances of the offender.

**II. AVAILABLE NON-CUSTODIAL MEASURES – INCLUDING COMMUNITY-BASED  
ALTERNATIVES TO INCARCERATION**

The group discussed at length the non-custodial measures presently practiced in each member's countries, to enable a comparative study of the various judicial systems and to pinpoint the similarities and differences in those systems.

**Table 1. Available Non-custodial Measures Including Community-Based Alternatives**

No.	Pre-sentencing stage	Haiti	Japan	Palestine	South Africa	St. Vincent	Australia	Belgium
1.	Admonition/warnings	⊙	⊙	⊙	⊙	○	⊙	⊙
2.	Suspension of prosecution with referral to programmes*	×	×	○	⊙	×	○	○
3.	Suspension of prosecution without referral to programmes	×	⊙	▲	×	○	×	⊙
4.	Disposal of petty offence	⊙	⊙	×	×	△	⊙	⊙
5.	Fine (or other economic sanctions & monetary penalties)	⊙	⊙	⊙	×	×	⊙	○
6.	Treatment order*	×	×	○	×	▲	⊙	○
7.	Other type of diversion program*	×	×	⊙	×	×	⊙	○
8.	Bail <sup>2</sup>	▲	⊙	⊙	⊙	⊙	⊙	▲

\* Community-based alternatives    ⊙ Widely used    ▲ Rarely used    △ Occasionally used  
 ○ Sometimes used    × Not available

**A. Haiti**

In Haiti whilst there are four types of non-custodial measures, at the current time there are no community-based alternatives to incarceration available at the pre-sentencing stage of the criminal justice system.

1. Admonitions/Warnings

Admonitions/warnings are mostly used for traffic violations, for instance if an individual commits a minor traffic violation it will be at the discretion of the police officer to warn or reprimand that person.

2. Fines

Fines are usually used also for major traffic violations. Fines are paid at the tax department, and a driver must take his/her receipt to the motor vehicles' headquarters and retrieve their driver's license, which is normally seized at the time of the alleged violation. A problem with this system is that once you've been issued a ticket there are no avenues to protest against it, you just have to pay. Fines are also used for illegal use of government seals or stationery. The police will fine you as prescribed by the law.

3. Disposal of Petty Offences

Disposal of petty offences is strictly at the discretion of the police commissioner. If an arrest was made and it involves petty offences such as: stalking, threats or slapping someone, the commissioner, after a brief investigation, decides that the case was not serious enough for judicial proceedings then he has the power to dismiss the case, but if the victim is dissatisfied with the outcome he/she can always take it to court.

<sup>2</sup> Bail is a disposition available to both the police and/or the judiciary to ensure the appearance of an alleged offender in court at a future time by the imposition of various conditions as the presiding authority sees fit.

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4. Bail

Bail is a proceeding that is not widely used in Haiti. The participant from Haiti is only aware of two cases where bail has been granted to the defendant. The system is different from other countries. If you are well known and you own a house, have a business or are working in a reputable place and surrender your passport, bail will be granted to you without paying any money, unlike regular procedures.

**B. Japan**

In Japan, most offenders can utilize non-custodial measures at the pre-sentencing stage. However, there is no community-based alternative to incarceration.

1. Admonition/Warnings

Police officers often warn the offender and finish the case. Theft cases where the value of the stolen property is quite low are the typical cases where admonition/warnings can be applied.

2. Administrative Fine for Traffic Infraction

Offenders who commit a minor traffic violation and pay the administrative fine issued can escape further criminal procedures.

3. Disposal of Petty Offences

The following case types, designated by each district public prosecutor, are reported to a public prosecutor on a monthly basis without formal referral. This referral system is based on article 246 provision of the Code of Criminal Procedure.

- (i) An adult who has no criminal record for the same kind of crime, an adult who is not a habitual offender
- (ii) An offence designated by a public prosecutor (larceny, an offence related to stolen property, fraud, embezzlement, gambling, assault), in cases, where the offence is found to be minor, where it is obvious that a suspect needs no punishment.

4. Suspension of Prosecution

In Japan, a public prosecutor has wide discretion to drop cases even when there is enough evidence to prosecute (CCP248). In 2001, 842,106 persons (38.6% of the total number charged) received a suspension of prosecution.

5. Summary Proceedings

The prosecutor can utilize the summary procedure only when the offender deserves a fine not exceeding 500,000 yen, admits guilt and has no objection to that procedure. In this procedure, the offender can be released without trial. In 2001, 41.8% of the total cases referred to public prosecutors were prosecuted in a summary manner.

6. Bail

Bail is a system, which attempts to prevent the defendant absconding through the threat of the confiscation of bail money.

**C. Palestine**

In Palestine, some community-based alternatives are available, however these are limited.

1. Admonition/Warnings

These are widely used by the police and the law enforcement agencies in Palestine in cases concerning traffic violations, neighbourhood outrages<sup>3</sup> and Juvenile offences.

2. Suspension of Prosecution With Referrals to Programmes

These are used only in cases of drug abuse and juvenile offences. Drug users go to specially designed programmes whilst juveniles take courses in Juvenile training institutes.

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<sup>3</sup> Families get involved in neighbourhood outrage that can include hundreds of people and mostly there is no use of arms or weapons.

3. Suspension of Prosecution Without Referral to Programmes

This process is used for neighbourhood outrages with a reconciliation agreement between the parties being facilitated.

4. Fine

Police widely use fines in traffic offences. Fines are also widely used by Municipal Inspectors dealing with municipal law violations. With most of these fines, the offender can decide not to pay the fine and defend the matter in court if they wish.

5. Treatment Order

Police and the prosecution sometimes use this alternative to send mentally ill offenders to health treatment. In some cases of traffic accidents, police transfer offenders to treatment programmes where they may receive psychological treatment or attend a government run-driving course.

6. Bail

Bail is widely used by the law enforcement authorities dealing with neighbourhood outrages, juvenile offenders, and female offenders. Bail is also an alternative used in the case of fatal road traffic accidents.

7. Other Types of Diversion Programme

Over the past 30 years, Palestine has lived under occupation and the Palestinian restorative justice system has partly replaced the law enforcement authorities and the court system as the judiciary has been unable to function effectively. In many cases, especially neighbourhood outrages, the law enforcement authorities have to use the assistance of the restorative justice system to deal with these outrages.

**D. South Africa**

There are a number of community-based alternatives to incarceration available at the pre-sentencing stage in South Africa.

1. Admonition/Warnings

These options are widely used by the police for minor traffic violations and offences involving minor threats to a person.

2. Pre-Trial Services

The aim of the Pre-Trial Services is to enable courts to make more informed bail decisions. Pre-Trial Services (PTS) is a system whereby relevant information is collected and verified by a probation officer prior to an accused first appearance in court.

PTS do not take away the discretion of the magistrate to make a bail decision however it provides the court with more information. Its most obvious impact has been on the profile of prisoners awaiting trial in that it reduces the number of accused persons who remain in prison, as they cannot afford to pay bail. This programme has also helped to ensure that:

- Dangerous accused are less likely to be released on bail;
- Petty offenders are released on warning or on affordable bail;
- All accused persons are closely supervised, reducing the likelihood of witness intimidation and court delays due to failure to appear; and
- Decrease the number of prisoners held in prisons awaiting trial

If no pre-trial services were available in South Africa, this would lead to a doubling of the offenders held in prison awaiting trial.

3. Bail

This option is widely used by police for summary offences and also by the judiciary pending the commencement of proceedings.

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**E. St. Vincent**

In St. Vincent, there are some non-custodial measures and no community-based alternatives to incarceration in use at the pre-sentencing stage.

1. Admonition/Warning

Due to the number of offences and the limited resources available to a very small police force, a policy was implemented by the police not to prosecute offenders for less serious offences such as threats, insulting language and common assault. The complainants in these matters are usually advised by the police to seek their remedies in the civil courts. In the mean time the offenders are located and warned by the police to desist from such unlawful behaviour.

The Director of Public Prosecutions (DPP) has statutory powers to *nolle prosequi* or to discontinue a criminal matter (indictable or non-indictable) at any stage before and during the trial, even if there appears to be sufficient evidence for a conviction. In practice, however, this power is usually exercised when the converse is true.

2. Suspension of Prosecution without Referral Programme

Ninety Nine percent of all summary matters are laid before the Magistrate's Court in the name of the Commissioner of Police. He/she therefore has an inherent discretionary power to prosecute or not to prosecute a particular offender.

3. Fines

A ticketing system for certain types of traffic violations existed in St. Vincent and the Grenadines about twenty years ago, but this proved to be administratively unworkable, hence it was discontinued and is no longer available.

4. Treatment

Treatment without prosecution is given to a very limited class of offenders. These are persons with previous mental health history whom the police suspected of not being in control of their mental faculty during the commission of a minor offence or offences. The police take them to the Mental Health Center for treatment.

5. Bail

Police have a statutory discretionary power to grant station-bail to an accused person charged for any summary offence, and this power is usually exercised.

Section 43 of the Criminal Procedure Code of St. Vincent and the Grenadines gives the Court discretionary power to grant bail to an accused person for any type of offence, except murder and treason. This may be exercised with or without certain specified conditions attached.

**F. Conclusion**

A study of non-custodial measures being practiced by these five countries reveals that in each country some non-custodial measures are available except the degree of availability varies.

The most common measures are admonition/warnings, which makes it possible to release the petty offender from the criminal procedure at the earliest stage. Fines are also widely used measures particularly for traffic offenders. In each country, there are prosecutors or police executives who are authorized to decide to prosecute or drop some cases, though there are differences as to which point in the process this power is exercised.

The practice of bail varies considerably between each country. However, the idea that offenders who are considered a low risk of absconding should be released is accepted in almost every country.

In this way, existing non-custodial measures are utilized in each country. However, in many countries, these measures are simply a release from criminal procedure without an offender being involved in a programme of care and/or rehabilitation. These traditional non-custodial measures have both advantages and disadvantages, some of which are impossible to ignore. It is clear that

consideration needs to be given to ways of introducing or enhancing other alternative means of community based sanctions that do not involve incarceration

Before discussing the community-based alternatives, it is necessary to elaborate on the advantages and disadvantages of the traditional non-custodial measures.

### **III. ADVANTAGES AND DISADVANTAGES OF USING NON-CUSTODIAL MEASURES AT THE PRE-SENTENCING STAGE:**

We believe that some of the advantages and disadvantages of using non-custodial measures at the pre-sentencing stage will affect all stages of the criminal justice system. A number of perceived advantages and disadvantages of non-custodial measures among the participating countries were identified.

#### **A. Advantages**

##### **1. Reducing Prison Populations and the Proper Care of Remaining Offenders**

Currently, most participating countries face the problem of overcrowding in prisons. The term “prison” can be defined as: “all publicly financed institutions where persons are deprived of their liberty. These institutions could include but are not limited to penal, correctional, or psychiatric facilities.”<sup>4</sup>

An over-crowded prison can adversely affect the mental well being of its inmates, which can ultimately lead to violent unrest and even death. Over-crowding causes problems not only for the inmates but for the prison staff as well, problems such as managing and supervising the daily activities of each inmate, potential health risks and preventing the spread of contagious diseases. It is therefore no coincidence that the spread of HIV/AIDS through homosexual activity is so prevalent in some of the institutions of participating countries.

Non-custodial measures at the pre-sentencing stage could be a means of reducing prison population and assist in solving many problems caused by over crowding in prisons.

##### **2. Lower Cost as Compared to Incarceration**

Evidence demonstrates that adopting non-custodial measures at an early stage of the criminal justice system are far more cost effective than incarceration, particularly in developing countries. Whilst acknowledging the necessity for prison facilities, it is also argued that funding allocated to the maintenance of prisons would be better used if diverted to much more important areas such as health or education thus creating more benefit for the general public.

##### **3. Avoiding Stigma Versus the Stigma of a Criminal Conviction**

Custodial sentences often lead to the stigmatization of offenders and indeed their families. Whilst it is acknowledged that arrest also stigmatizes a person, research evidence demonstrates that non-custodial interventions, particularly at the pre-sentencing stage, lessen the stigma attached to offenders through the traditional criminal justice processes.

##### **4. Avoidance of Escalation in Deviant Behaviour**

The evidence is clear that the introduction of offenders to penal institutions increases their knowledge of avoiding detection for crimes committed and also of procedures used by police to combat crime. The use of non-custodial measures at an early stage of the criminal justice system is relevant to assist in the prevention of escalation in deviant behaviour of offenders.

##### **5. Timely Bail and Diversion will Assist to Maintain Family Linkage, Employment and Social Status**

Long periods of incarceration may lead to job loses and weaken family ties. One may argue that losing his/her job or weakening the family ties is the offender’s own fault. However, all of us deny the idea that depriving the offender of jobs or family ties can be justified as a discipline, because such conduct may only negatively affect his/her rehabilitation and reintegration into society.

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<sup>4</sup> Palestinian Prison-Police rules and regulations. 1993

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The imposition of non-custodial measures offers an offender the opportunity to maintain family links and continue with gainful employment. These measures also maintain a person's social status.

6. Some Measures take the Victims Interests into Consideration

Most victims of minor offences such as theft are not interested in severe punishments for offenders if they can recover the damages caused. Non-custodial measures provide offenders with the opportunity to compensate and reconcile with victims. This opportunity is particularly important when considering restorative justice initiatives.

7. Possible Contribution by the Offender to the Community

If an offender is incarcerated, he/she will normally be dismissed from his/her job, which results in a loss of contribution to society provided by the offender's labour. This can also impose a further burden on the social welfare system if an offender has a family that requires support. Non-custodial measures are attractive purely from an economic and social point of view.

A different argument however is often put forward from some people who believe that many offenders are jobless at the time of their arrest and are not making a financial contribution to society anyway, so it does not make any difference whether he/she is incarcerated or not.

**B. Disadvantages**

1. Risk of Recidivism

It can be argued that non-custodial interventions provide offenders with more opportunities for recidivism. It is acknowledged that whilst incarcerated an offender has less chance to commit crime, however if the offender is released without any rehabilitation or education programmes being provided, the chance of that offender's recidivism is likely to be high.

2. Fear in the Society

Non-custodial interventions may create a sense of insecurity among a community where crimes are prevalent due to commonly held perceptions that all offenders are dangerous and to allow them to mix in society is a risk. This is not supported by the available data and what people forget is that offenders who are imprisoned eventually return to the community at some time anyway, often having learnt more criminal skills whilst they are in prison.

3. Diversion is Often Perceived as a Soft Option

Diversion is often perceived as a soft option and it can lead to a decreasing trust of the criminal justice system. The criminal justice system is based on national trust and legal professionals have an obligation to prove that they and the system are worthy of nationwide trust. Many people believe that early release of offenders is contrary to the best interests of justice and they support tougher penalties even though evidence shows that this does not impact on offending or recidivism rates.

4. Decreasing both the General and Individual Deterrent Effect of Punishment

Many people believe that long periods of incarceration are necessary to make an offender realize the seriousness of the offence and to release the offender at an early stage without a trial may decrease the effect of the deterrent. It is also a public perception that non-custodial sentences lead offenders to hold the judicial system in contempt and to commit more crime.

5. Risk of Revenge by the Family Members of Victims

Some members of the public, particularly victims and their family members may see community-based alternatives to incarceration as a soft option. This may lead to a risk of retribution or revenge from a family when faced with the results of a serious crime.

**IV. PENAL MEDIATION IN THE PRE-SENTENCING STAGE**

In the last decades the lack of attention given to victims of crime has entered the debate on punishment. This interest in victimology has affected the public and judicial reaction to crime. In western European countries recent legislative changes to penal mediation reflects this new approach.<sup>5</sup>

Similarly, the interest of the victim as well as the importance of community involvement is stressed by the United Nations Standard Minimum Rules.<sup>6</sup>

### **A. Using Mediation in Different Fields**

For many observers, mediation is seen as a viable alternative to the traditional formal justice system as it involves real communication between people affected by a crime rather than sterile conversation between lawyers in a courtroom environment. Mediation involves the use of independent persons to assist an aggrieved party to find a compromise in a civilized manner. Some examples of the use of mediation over the last decades involve diplomats negotiating their country's position through a third party such as a United Nations' envoy rather than resorting to warfare.

Mediation is now commonly used in family disputes involving family break up and divorce. It is used to counsel people to prepare them for changes in their roles, duties and opportunities resulting from family disruption. Intervention specialists, family counsellors and therapists are used as mediators in this role.

The act of mediation involves community action and conflict resolution and is a method of ensuring that communication is ongoing and the problems in question are resolved. A further example is its common usage to deal with labour conflicts and improvements to working conditions.

In relation to the criminal justice system, mediation is already an integral part of the juvenile justice system in many countries. Mediation in adult matters is gaining popularity; victim-offender mediation involves community volunteers and criminal justice caseworkers interacting with both offenders and victims to reach a mutual resolution.

Institutional mediation is another example of conflict avoidance and resolution involving students and staff of an institution such as a school or university.

### **B. Penal Mediation in Belgium**

This paper provides an opportunity for a brief examination of penal mediation as used in Belgium. A two-year trial of penal mediation, which involves an informal arrangement, negotiated between the police and the offender, in one region in Belgium. Following the success of this trial, legislation was introduced to formalize this practice. To ensure the success of this initiative, the capacity of the judicial system required reinforcement and this was supported by the allocation of new resources to provide new positions and functions. This programme-support resulted in acceptance of the initiative by prosecutors, and resulted in training, treatment, community service and mediation at the level of the prosecutorial service becoming available options.

In the pre-sentencing stage, penal mediation is seen as a way of diversion. Penal mediation is an effective diversionary tool which aims to restore peace to the affected parties and provide agreed compensation for damage and suffering caused to the victim. It involves compromise and requires all parties to engage in finding solutions to the problem at hand. Penal mediation in the pre-sentencing stage represents a model where victim-offender mediation becomes a legitimate part of the criminal justice procedure. The ability to reach an agreement between victim and offender impacts on the outcome of criminal proceedings as proceedings are permanently stayed resulting in cost savings for the community and the restoration of the community peace.

### **C. Aims of the Law on Penal Mediation**

Penal mediation is designed to take the interest of the victim, offender and the community into consideration. It provides a timely reminder to an offender that he/she has to respect the law, thereby enhancing the procedure and the outcomes of the criminal justice system.

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<sup>5</sup> The victim is also represented in the European Rules on community sanctions and measures (1992) in the preamble. (Reparation for the harm) (Safeguarding the interest of victims) (Rule 30 – responsibility to the community in general and the victims in particular).

<sup>6</sup> UN standard minimum rules for non-custodial measures (1990) e. g. Rule 1.2 and Rule 8.1.

#### **D. Characteristics of Penal Mediation in Belgium**

The decision to mediate a case in Belgium was previously only available to a judge, however with the introduction of penal mediation this authority was extended to include prosecutors. Penal mediation was further refined when prosecutors transferred this authority to the police for specific cases that fit within clearly defined guidelines. These guidelines were defined by a steering committee, which meets every month and issues a public report annually. The committee comprises of prosecutors, police, representatives of the bar association, victims of crimes, and offenders representatives.

Penal mediation is used for serious crimes that required a high degree of community involvement and interaction and using this intervention police have an opportunity to intercede in the criminal justice system by means of an informal arrangement with the offender. If the offender agrees to this arrangement, victims are then invited to participate. Any agreement reached is the equivalent of a civil settlement and no further proceedings can be taken. If a successful outcome is reached, police inform the prosecutorial service of the result, however if penal mediation is not successful the prosecutor can make further attempts to mediate or to prosecute or even to dismiss the matter. Penal mediation is generally informal but may take the shape of a formal agreement in which case charges will be formally dismissed.

#### **E. Advantages and Disadvantages**

##### **Advantages**

Penal mediation provides real advantages to the community in terms of cost savings associated with formal investigation and court procedures. It also reduces the number of cases being tried before a court of law together with the enormous stress on victims and stigmatization of the offenders.

##### **Disadvantages**

A perceived disadvantage of this process is the lack of initial engagement of the victim, which could theoretically lessen regard for his/her rights.

Due to lack of knowledge, there may also be a perception from the public that penal mediation is a soft option to harsher penalties.

#### **F. How to Apply Penal Mediation to Other Countries**

It is important to remember that initially this project, in common with many other projects, faced a low expectation of a successful outcome from all the parties. In reality, the success of penal mediation brought together a number of parties resulting in a successful intervention. The success of the trial phase led to full implementation throughout Belgium following appropriate legislative changes.

In any country, a proposal to change the legal system requires an inclusive process to be developed leading to an initial, fully evaluated trial programme. The evaluation will provide information on the strengths and weaknesses of the trial, allowing the trial project to be enhanced with a view to ensuring the full implementation of such initiative.

In all of the participating countries, penal mediation is not practiced as it is described in the Belgium case. In Japan, prosecutors often encourage offenders of minor offences to apologize and make restitution to the victim by having an attorney act as an intermediary, and make a decision of whether to prosecute or not considering the results. In practice, this serves a similar function to penal mediation in Belgium. In Palestine, mediation is commonly used in family disputes involving family break-up and divorce.

### **V. EXPLORATION OF DIVERSION**

Diversion programmes are considered as alternatives to the criminal justice process. The offender is offered assistance in counselling, medical services, education and vocational training instead of being prosecuted.

### **A. Belgium**

In Belgium, this approach is mostly used to arrive at a simple agreement between offenders and victims to provide restitution or compensation for the harm caused in cases of minor offences. These settlements can take the form of informal agreements thus precluding the necessity of invoking the criminal justice process or they can be formal written agreements, which are considered civil settlements of the cases.

There are victim oriented diversion projects at the level of the local police. In cases of minor offences causing harm and/or damage, police officers can request the offenders to take full responsibility for their actions and arrange settlements with the victims, based on direct or indirect communication between the offenders and victims. Where agreements are successfully reached no further steps will be taken. Following a successful agreement being made, police inform the prosecutorial service of the result of these settlements.

### **B. Australia**

Similar to other countries, in Australia opportunities for community based alternatives to the criminal justice system, also called diversion, occur throughout the criminal justice process. These opportunities are available at the following stages:

#### 1. Pre-Arrest

When an offence is first detected, a police officer may use his/her discretion to admonish or warn an offender without laying a charge and this completes the matter. This disposition is often applied to juveniles who are warned by a senior police officer in the presence of the juvenile's parents. In relation to certain drug offences such as the possession of small quantities of cannabis, some jurisdictions will issue a cautioning notice, which also contains a health warning.

#### 2. Pre-Trial

When a charge is made, before the matter is heard at court there are a number of intervention points. In Australia, all offenders are entitled to bail except if they are charged with murder, treason or major drug trafficking offences. At this stage conditions can be placed on a bail undertaking that may include attendance at assessment and treatment centers. "On the spot" infringement notices which consist of a fine are used as an administrative tool to avoid overburdening the court system for a variety of offences including traffic matters, liquor licensing matters and various other summary offences.

Particular types of drug courts that refer offenders to treatment at the charging stage and before a plea is taken are in use in some jurisdictions. A prosecutor also has the capacity to withdraw a matter and refer an offender to treatment facilities rather than pursue a prosecution. Under these circumstances, prosecutors would agree not to take the matter to court as long as the helping intervention process is completed successfully. The prosecutor would act in the belief that the community good is best served by the offender entering into a helping situation, rather than the judicial process

#### 3. Pre-Sentence

Drug Courts are an example of pre-sentence community-based alternatives where an offender is sent to treatment after pleading guilty to possession or use of drugs but before sentence is passed. A magistrate or judge can use adjournments, assessments and other means to delay or stop proceedings prior to sentencing while the offender is assessed or treated. The defence lawyer can initiate the process. Some diversion systems allow for no conviction to be recorded if the person successfully completes the programme. Sanctions can be built in for non-compliance. A current Australian example is a pilot programme being run through the New South Wales rural center of Griffith.

### **C. South Africa**

In South Africa, diversion programmes essentially try to prevent people who have offended from being imprisoned by providing alternatives to prosecution and conviction. Diversion from the criminal justice system has a dual function: It prevents further exposure to negative influences of the criminal justice process and attempts to prevent further offending by providing a variety of alternative options.

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The existence of diversion programmes in South Africa dates as far back as 1990 where stakeholders were mainly concerned about the number of children being convicted for petty offences.

The National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) a non-governmental, community based organisation in partnership with Correctional services, Welfare and Justice Departments are spearheading the diversion programmes for offenders. The prosecutorial department refers young people who committed petty offences to diversion programmes presented by NICRO.

1. The Child Justice Bill

The Child Justice Bill was recently passed in the South African Parliament and is expected to be brought into effect quite soon. Firstly, the Bill provided for the referral of children to diversion, to ensure that children's rights are protected, and that they are not coerced into opting for diversion. The condition of administration for Diversion programmes is defined in the law as follows; with the existence of sufficient evidence to prosecute, the child, with a full understanding of his/her rights, admits the offence. Also it is necessary to get the consent of his/her parents or guardian. The Law regulates the minimum standards applicable to diversion and diversion options:

- (i) No child may be excluded from a diversion programme owing to an inability to pay any fee required for such programme.
- (ii) A child of ten years or over may be required to perform community service as an element of diversion, with due consideration for the child's age and development.
- (iii) Diversion options must:
  - Promote the dignity and well-being of the child, and the development of his or her sense of self-worth and ability to contribute to society.
  - Not be exploitative, harmful or hazardous to a child's physical or mental health.
  - Be appropriate to the age and maturity of the child; and
  - Not interfere with the child's schooling.
- (iv) Diversion options are as follows: life skills include a restorative justice element which aims to heal relationships, the relationship with the victim, and an element which seeks to ensure that the child understands the impact of his or her behaviour on others. It includes victims of the offence, and may include compensation or restitution; and
- (v) Be presented in a location reasonably accessible to children; and children who cannot afford transport in order to attend a selected diversion programme should, as far as is reasonably possible, be provided with the means to do so.

2. Current Diversion Programmes

Today, diversion programmes are primarily used for juvenile offenders although adults occasionally benefit from this service. Most participants are between 14 and 18 years old, although some are older or younger. Upon the completion of a number of hours, this organisation must submit a report to the court regarding the number of hours performed, which would imply that the order would have been executed. Amongst others, NICRO has developed a five-structured diversion programme.

- (i) Youth Empowerment Scheme (YES): a six-part life skills programme that runs over a period of six weeks. It involves 15 to 25 participants and parents/guardians participate in the first and last sessions.
- (ii) Pre-trial Community Service: In lieu of prosecution, the offender has to perform a number of hours agreed to by all the parties and are monitored by NICRO who has to give reports to the public prosecutor.
- (iii) Victim-Offender Mediation (VOM): Victims and offenders are brought together in an attempt to address the needs of both parties.

- (iv) Family group conferencing: These conferences are similar to mediation in certain instances except that they involve the families of both the victim and the offender in the mediation process. The aim is to come to an agreement with the assistance of a mediator/facilitator. Preventing recidivism and stigmatization is the ultimate goal of this programme.
- (v) The Journey: An intensive and long-term programme that involves an outdoor experience for young people.

Upon completion of a diversion programme, the case is withdrawn. A failure to complete the diversion programme results in the case being referred to the court for prosecution. More than 10,000 children and young people were diverted out of the criminal justice system by way of a wide range of diversion programmes, offered by non-governmental organisation which operates in the nine provinces and in partnership with government departments at the provincial and national level.

#### **D. Advantages and Disadvantages of Diversion Programmes**

Diversion programmes can be applied at police, prosecutorial and sentencing stages of the criminal justice process, however examining diversion programmes in the pre-sentencing stage, some advantages and disadvantages can be pointed out in general. These are particular points besides those mentioned in chapter III.

##### **Advantages**

Offenders can benefit from diversion programmes with its specialized services meeting individual offender's needs, e.g. medical treatment, vocational training or education, to rehabilitate and reintegrate into society. Diversion at the pre-sentencing stage provides early incentives for those who need such special services.

Reduction of the number of offenders in the criminal justice system leads to savings in the cost of detention and the avoidance of an overload of trials. Therefore, the criminal justice system can be focused on more serious crimes, and the speed and quality of justice can be promoted.

Police-stage diversion programmes generally depend on police officer's work and decisions, police workload never reduces, nevertheless, these interventions can reduce the cost of detention, trial and correction.

##### **Disadvantages**

###### **1. Due Process**

Since diversion is only available when suspects or defendants are prepared to admit their guilt, there is a perception that offenders may not be afforded due process, which would apply during a criminal investigation and prosecution. They may have to give up some fundamental rights designed to protect them such as the right to a speedy trial, the right to confront the accusers and the privilege against self-incrimination. In addition, as suspects or defendants are diverted without conviction, they may be forced to cooperate with treatment even though evidence is not sufficient to convict them.

###### **2. Net-Widening**

There is a possibility that diversion programmes might unnecessarily control the offenders who would not have received any control in the normal application of justice. In other words, diversion programmes might run the risk of widening the reach beyond the range of criminal justice.

###### **3. Abuse of Power**

If diversion is operated based on the wide and informal use of discretion by criminal justice officials, abuse and misuse of such powers are serious concerns. Especially, when there is a possibility that the procedure to select targets and give them information regarding diversion might be conducted inappropriately and arbitrarily, which seriously violates the right of suspects or defendants.

#### **E. Target Groups**

Through the experiences from the countries mentioned above, common target groups are those who have committed minor offences, juvenile offenders, first time offenders and drug users. Like other

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community-based alternatives, screening of offenders is important. The criteria of screening are: type of offences, age of offenders, seriousness of the offence, degree of crime and tendency of offenders. Although common criteria exist, it is important to take the individual factors into consideration.

Many juvenile offenders have a low crime tendency and are more suitable for diversion. This conforms to the rationale that juvenile offenders need protection and rehabilitation, rather than punishment. For drug offenders, medical services are especially required for rehabilitation. In this regard, experimental diversion might be started with juvenile offenders or drug offenders to acquire acceptance by the public.

#### **F. Process and Procedure of Diversion Programmes**

Most diversion programmes in the pre-sentencing stage are conditional, offenders are required to keep certain conditions, refrain from criminal activities and participate in rehabilitative programmes. Prior to considering adoption or enhancement of diversion programmes, the following factors need to be taken into account:

- It is necessary to give legislative support to diversion to ensure that the police do not abuse their power.
- Several criteria should be considered for the classification of offenders to permit entry to a diversion programme.
- Offenders should admit the offence and give informed consent, prior to entry to the programme.
- Because non-governmental organisations or agencies are often engaged in the implementation of diversion programmes, it is necessary to ensure the privacy of offenders.
- The offender should be guaranteed the chance to receive legal counselling and advice prior to entry to the diversion programme.
- The offender has the right to stop the diversion programme and to go back to the traditional criminal justice system.

Cooperation among relevant organisations and/or agencies relating to diversion programmes is crucial, in order to monitor and evaluate offenders' compliance with the diversion programme, otherwise the programme may fail. If an offender fails the programme, he/she returns to the criminal justice procedure. When introducing or enhancing a diversion programme, slow steps are appropriate. The public will generally observe the result of any new system carefully to ascertain whether it works or not. As mentioned earlier, juvenile offenders or drug users are appropriate target groups for the initial stage of a diversion programme.

#### **G. Treatment Options**

There are a number of treatment options such as: mediation, medical treatment, community service, life skills, vocational training, and group counselling, etc., in a diversion programme.

### **VI. KEY FACTORS REQUIRED FOR THE SUCCESSFUL ADOPTION OF COMMUNITY-BASED ALTERNATIVES TO INCARCERATION**

It has been clearly identified that increasing prison populations is an issue for the majority of countries. There are a number of key initiatives that need to be addressed to impact on this problem. Such an undertaking involves changes to the criminal justices system and to ensure success will require a partnership between all key stakeholders.

This partnership will need to be initiated and maintained and will involve agencies such as those representing the court system, policing, corrections, social welfare, health, education and including governments both at the national and local level. A number of issues affecting community-based alternatives to incarceration are examined in the following:

#### **A. Legislative Framework**

Whilst the implementation of alternative dispositions in the justice system such as Community-based alternatives may be acceptable through policy decisions in developed countries, to achieve a similar result in developing countries would require legislative introduction or change to ensure the

efficacy and acceptability of such a course of action. To achieve such a change it is necessary to provide a clear evidence-base to politicians, the criminal justice system and the general public. This can only be successful if partnerships are developed which involves the timely exchange of relevant information between stakeholders.

### **B. Political Will**

Law and order issues are always popular with politicians particularly when elections are looming and it is common for political parties to advocate a hard line on crime and the criminal justice system. This approach potentially leads to increased prison populations that result in overcrowding. To address this, requires timely evidence to provide politicians of all persuasions with the knowledge to make informed decisions rather than reverting to populist decision-making, and to convince politicians that indeed community-based alternatives are not a soft option on crime. Ideally, political parties would demonstrate bilateral support for this important initiative.

### **C. Public Opinion and the Role of the Media**

In law and order issues public perceptions of fear and danger from criminal acts often drive political outcomes, however it is also argued that politicians can and do affect the public opinion through the effective use of media. Experience shows that engagement with the media is critical to ensure factual reporting of matters, as if the media is unable to ascertain the facts of a matter, journalistic licence is used as substitute. For any successful initiative in the criminal justice arena experience shows a need for timely research-based facts to be available. This information promulgated through the media will influence public opinion.

It must be recognised that the media is a powerful communication medium which needs to be used to its fullest for the betterment of the community.

### **D. Criminal Justice Practitioners**

Criminal justice policy is a combination of the theoretical and operational philosophies of a number of agencies including the police, prosecutors, judges, prison agencies, community corrections and an increasing number of non-governmental agencies. Successful policies to reduce incarceration requires all key stakeholders to have committed themselves to this aim. Collaboration with and assistance from the judiciary is clearly a necessary prerequisite for any changes to procedure which would enhance the use of community-based sanctions.

As in any proposed policy development, the stakeholders have to be brought together to promote policy discussions, leading to decisions as to the direction in which policy should move. A forum for co-operation and the exchange of information could be things such as seminars arranged for the judges and also exchanges of information and cooperation between different agencies. "Any policy of reducing the use of imprisonment and the length of sentences must win the hearts and minds of the judges."<sup>7</sup> The police and prosecuting authorities often exercise a major filtering influence in the criminal justice system, and efforts to provide criminal justice officials with balanced information about imprisonment must certainly extend to the police and prosecuting authorities, in addition to prison and probation services.

### **E. Capacity Building**

The experience of a number of countries demonstrates that effective programmes in the area of criminal justice, welfare, education and health inevitably require capacity building to both initiate or enhance programmes. The provision of adequate resources, financial, material and human is fundamental to ensure success. Whilst funding is important the initial and ongoing training of staff is a key factor.

### **F. Constructive Crime-Prevention Alternatives**

Crime is an ongoing problem for societies in every country. The community is affected by crime and as such the community must play a role in the prevention of crime. Engagement of communities

<sup>7</sup> Walmsley 2001. reference in III. GETTING THE MEASURES ACCEPTED AND IMPLEMENTED in 121th International Training Course UNAFEI by Tapio Lappi-Seppälä, Finland

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through mass media, campaigns and general education efforts is necessary to influence the acceptance of community-based alternatives to incarceration. Community acceptance and involvement in this type of issue must form part of any crime prevention programme instigated by the government.

**G. Utilization of the Voluntary Sector**

It is recognized that the implementation of community-based alternatives to incarceration is an ongoing need and is a labour-intensive option for the criminal justice system. All governments struggle with prioritising community needs including the provision of an effective criminal justice system in terms of resource allocation. An often under utilized resource, particularly in the criminal justice area, is the community. Whilst governments must have a team of paid workers to undertake supervision, counselling and advisory work for criminal offenders, it is clear that many countries do not take advantage of the available work force in community organisations.

There are a variety of community organisations, many of which operate on a national scale that can provide services on a non-profit fee basis.<sup>8</sup> Optimum utilization of such services can be a cost effective option for the government and may assist by providing vocational training, mediation, medical treatment, community service, group counselling, life skills and other services to support the re-integration of the offender into the community. The voluntary sector has the potential to be a critical partner with government in the implementation of community-based programmes. Experience demonstrates that community-based organisations are also extremely effective innovators in the development and enhancement of community-based alternatives. A strong partnership with government will result in effective outcomes for community-based initiatives.

**VII. RECOMMENDATIONS**

**A. General Recommendations**

We arrived at a common recognition that many countries face problems of increasing prison populations and prison overcrowding.

One of the goals of the criminal justice system is the rehabilitation and reintegration of the offender into society. Prison overcrowding is not desirable as it creates difficulties for the proper implementation of the United Nations Standard Minimum Rules for the treatment of prisoners.

Thus, in order to curb increasing prison population and prison overcrowding, and to promote rehabilitation of offenders and their reintegration into society, the importance of utilizing community-based alternatives to incarceration must be emphasized. Therefore, the police, the prosecution or other agencies dealing with criminal cases should release the offender at the earliest possible stage if they consider that it is not necessary or possible to proceed with the case at that time.

However, the protection of society, the interests of the victim and the credibility of the criminal justice system with the public should never be compromised. The basic human and civil rights of the offenders, subject to community-based alternatives, must also be strictly respected.

Thus, implementation and enhancement of community-based alternatives at the pre-sentencing stage such as diversion programmes must be discussed based upon the following conditions;

- The application of community-based alternatives to incarceration should be implemented based on a clear standard prescribed by the law or other regulations.
- Community based alternatives must only be applied when it is considered that there is no imperative to proceed with the case for the protection of society.
- Crime prevention and the promotion of respect for the law and the rights of victims should correctly be considered in the context of community-based alternatives.

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<sup>8</sup> Zubricki, 2002 "Community-Based Alternatives to Incarceration in Canada" at the 121st International Training Course of the UNAFEI

- Discretion by the judicial or other competent independent authority must be exercised only in accordance with the rule of law and must never be abused.

## **B. Recommendations for each Participating Country**

### 1. Haiti

In the 21st century Haiti's justice system still doesn't have any community-based alternative to incarceration. The non-custodial measures available can only provide part of the answer to our current prison-overcrowding problem, we have opportunities to address this issue at the pre-sentencing stage of the criminal justice system:

- Because our legislature is in the process of reforming and improving the laws, there is a real opportunity to introduce other non-custodial measures, specially community-based alternatives to incarceration.
- Introduction of such measures should acquire commitment by the Executive with the help of the Police to provide educational and awareness programmes for members of the judiciary and the general public.
- A partnership between non-governmental community-based organisations (e.g *Foundation Aristide pour la Democratie en Haiti*, COHADDE, Foundation 30 September, USAID) and the governmental agencies (e.g Office du protecteur des citoyens, secretary of public security, bureau of Social-Affairs, APENA) will be required to design a plan and implement a programme of this nature.
- Special reports, including statistics provided by a credible agency (e.g *institut des statistics et d'informatique*), should be available to the media as part of a public awareness campaign. In order to increase community awareness and gain the public support regarding the issue of prison overcrowding.
- Community-based alternatives (e.g Penal mediation, different types of diversion programmes) can provide a solution to existing problems in Haiti with respect to our culture and social life.
- The study of other countries experiences with community-based alternatives to incarceration provides positive evidence for the value of this type of approach.
- Penal mediation can be used especially in land conflicts.

### 2. Japan

Currently, Japan has no official community-based alternative systems at the pre-sentencing stage; however, the suspension of prosecution is currently actively used on a practical basis. We would like to make the following recommendation for utilizing the suspension of prosecution system as a community-based alternative that facilitates offenders' rehabilitation and reintegration into society.

Set up a mechanism for providing supervision and support to an offender under consideration for suspension of prosecution, by revising the Offenders Rehabilitation Law and other related laws and regulations.

At present, an aftercare service system for discharged offenders based on the Offenders Rehabilitation Law exists; however, this system is not very effective in terms of rehabilitation of offenders. Because, under the current system, whether an offender seeks assistance from a probation office upon suspension of prosecution is totally up to him/her and there is no way to supervise him/her. The only thing a prosecutor currently can do is to encourage an offender, subject to suspension of prosecution, to seek assistance from a probation office.

Therefore, the possible need for setting up a mechanism, with which a prosecutor can refer, when it is deemed necessary, the case to the probation office for rehabilitative programmes for a certain period of time prior to making a decision on suspension of prosecution, should be considered. Rehabilitative

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programmes provided by the probation office should include both aspects of supervision and support. Under this system, cooperation between prosecutor's offices and probation offices should be strengthened and depending on the offender's performance in the rehabilitative programmes, a prosecutor can determine whether the case should be prosecuted or not.

3. Palestine

Currently, Palestine has some community-based alternatives. These alternatives can provide a temporary answer to the transitory current situation of conflict and low number of incarcerated inmates. For enhancing the community-based alternatives in the pre-sentencing stages, some recommendations can be presented:

- Since Palestine is in the process of legislating its own laws, the mission of introducing community-based alternatives to incarceration can be made easily.
- Penal mediation and diversion can provide an appropriate answer to the problem of incarceration in the pre-sentencing stage in Palestine. Especially, when considering the culture and social life of Palestine.
- The law of arbitration (*issued by the Palestinian Legislative Council PLC – May 2000*) can provide a good basement to introduce penal mediation and diversion.
- A partnership must be developed between the official governmental agencies and the non-governmental community-based organisations in the process of adopting community-based alternatives in the pre-sentencing stage.
- Education and awareness programmes to the different players in the justice system. Also, similar programmes to members of the legislature.
- Publish special reports and statistics on the current and the expected situation of the prison population, in an attempt to lobby the public and to increase the public awareness of the incarceration problems.
- The police department must lead the process of adopting community-based alternatives in the pre-sentencing stage.
- Study the experience of other countries that have adopted community-based alternatives.

4. South Africa

There are currently few available community-based alternatives during the pre-sentencing stage in South Africa. Even those that are available are not fully utilized to realize the maximum goal of community-based sanctions as opposed to imprisonment. It is from this background that the following recommendations are made:

- In South Africa, diversion programmes are primarily used for juvenile offenders and are used minimally for adult offenders. Whereas in other countries, these services are available for both young and adult offenders. Initiatives to extend diversionary programmes to include adult offenders are a dire necessity.
- There are a number of offender reintegration services available in South Africa, but these are fairly isolated and mostly do not provide a comprehensive service that begins before sentencing and continues until after release. Therefore efforts should be made for the expansion and continuity of such services.
- The National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) a community-based organisation, currently administers most of the pre-sentence diversionary programmes. Few if any other agencies in our country render such services. Therefore a need exists for Mobilization of Community based organisations to develop and render more diversion

programmes, particularly at the pre-sentencing stage. This will enhance the usage of community-based alternatives by the judiciary, as there will be a variety of agencies available at their disposal.

- Community organisations are an important component for the effective community-based treatment of the offender. Moreover, their importance lies in the fact that they can supplement government efforts. Since the government is unable to meet all the necessary rehabilitation requirements on its own. Community organisations could be sharing government's responsibility towards the treatment of offenders. Therefore, the existing partnership between government agencies and non-governmental organisations should be strengthened.
- As the South African government has embraced the Restorative Justice Approach, a thorough study and possible development of penal mediation could be considered. This would assist to fast track the current delays in the judicial system and alleviate prison overcrowding.
- Lastly, public awareness and education to all sectors of the society including magistrates and politicians regarding the community-based alternatives should be conducted.

##### 5. Saint Vincent and the Grenadines

The contemporary type of diversion as is known in Belgium and Australia is non-existent in Saint Vincent and the Grenadines. At present officials within the judicial system use the traditional type of diversion coupled with the exercise of their discretion where necessary to divert the most deserving cases away from the criminal justice process. Minor offences involving juveniles, the mentally impaired and others which can be classified as trivial are some of the cases which are diverted in this way. Due to the high cost of maintaining an overcrowded prison, there is now an urgent need for the enactment of legislation to take on board community-based sanctions as alternatives to incarceration at all stages of the criminal justice process. For the purposes of this paper the recommendations will focus on diversion at the pre-sentencing stage and are as follows:

- The first hurdle is to convince the politicians and policy makers that incarceration is not the main answer to 'get tough' on crimes. This could be done by comparing the advantages and disadvantages of incarceration and community-based sanctions. Referring to statistics such as those from Finland.
- Representatives of the media must be updated and informed of the proposed system in order to gain their support.
- Public debate will be encouraged on the issue discussing the merits and demerits of incarceration on the one hand and diversions on the other.
- Academics and intellectuals should be drawn into the debate, since they are very influential in the way public opinion is formed.
- A feasibility study must be carried out before implementation. Possibly a pilot programme initiated in order to see the system in action.
- There must be training of officials involved in the justice process; police, prosecutors, judges and magistrates and in other fields such as the social and health services.
- Encourage the development of partnerships between the police and non-governmental agencies such as Marion House and SVG I CARE.
- Guidelines must be issued to police officers in order for them to determine which offenders are eligible for diversion.
- The legal draftsman must ensure that the legislation when enacted must not have a 'net widening' effect (i.e. it must exclude those who would not be prosecuted anyway).