NEW SOUTH WALES

The Chief Magistrate of the Local Court

21 October 2011

Hon James Wood AO QC
Chairperson
NSW Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

Dear Chairperson

Preliminary submission – Sentencing

I write in response to your letter of 26 September 2011 inviting my preliminary submission in respect of the NSW Law Reform Commission's review of sentencing law.

I address below each of the areas raised in the Commission's preliminary outline of the review. As indicated in the preliminary outline, some issues raised in the Commission's terms of reference are under consideration by other bodies including the Sentencing Council. Where this is the case, the comments set out in this submission reflect those I have previously made to those bodies.

Comments are also made in relation to other aspects of sentencing that do not arise directly under the *Crimes (Sentencing Procedure) Act* 1999 ('the Act'), but are in my view inextricably linked to how the Act is implemented in the Local Court and the issue of the consistency and transparency of the sentencing process as a whole.

1. Simplification of sentencing law to improve transparency and consistency

(a) Setting terms of imprisonment

In my view, one of the most significant changes that should be made to improve the consistency and transparency when setting sentences of imprisonment is revision of the current 'bottom up' approach set out in section 44 of the Act.

The amendment of the Act in 2002 to introduce standard non-parole periods (SNPPs) for a number of offences when dealt with on indictment had the notable consequence of reversing the 'top down' approach to setting a sentence of imprisonment in s 44, whereby the Court was to first determine the total term of a sentence and then fix the non-parole period. Instead, a 'bottom up' approach was introduced by which the Court is now to first set a non-parole period and then the balance of the term, which is not to exceed one-third of the non-parole period unless a finding of special circumstances is made, in order to arrive at the total term.

At the time of the amendment of the Act, it was said that:

> The replacement of the existing section is a necessary consequence of the introduction of the scheme of standard non-parole sentencing. The effect of proposed section 44 is to maintain, by a different method of calculation, the existing presumptive ratio between the non-parole period of a sentence and the period during which the offender may be released on parole.[1]

The SNPP scheme has no application to offences determined in the Local Court[2] and thus I have no comments to make as to the efficacy or otherwise of the 'bottom up' approach in that context. However, notwithstanding the apparently limited reason for which the section was replaced, s 44 applies to the setting of all sentences of imprisonment and not merely those in which a SNPP applies (which are a small minority of all sentences). As a consequence, difficulties including the following have arisen:

- *Variation of the statutory ratio and findings of special circumstances*: in its present form, s 44 on its face sets out a sequential process that the Court is to follow in setting a sentence of imprisonment. However, if followed literally, the sequential process would have the effect of rendering a finding of special circumstances to vary the ratio between the non-parole period and balance of term ineffective in reducing the period of time spent in custody by an offender.

  The difficulty with applying a strictly sequential approach was articulated by Badgery-Parker J in *R v Moffitt* (1990) 20 NSWLR 114. That case concerned the interpretation of the earlier *Sentencing Act* 1989, in which s 5 provided for a similar approach to the current s 44 in that it referred to "firstly" setting a minimum term and "secondly" setting an additional period during which the offender could be released on parole. His Honour said (at 133-134):

  > ... the section is certainly capable of being construed as meaning... that there must be a strictly sequential approach - whereby the judge is required to set the minimum term before turning his mind to the duration of the additional term. Such an approach presents obvious difficulties in a case where special circumstances call for a ratio of minimum to additional term less than three to one.
  >
  > If the section does demand a strictly sequential approach to the determination of the minimum and additional terms, the minimum being set before attention is given to the length of the additional term, it would seem impossible to achieve the desired relationship between the minimum and additional terms ... by adjustment of the minimum - for that minimum term will, by definition, have been determined by the judge as being the "minimum term of imprisonment that the person must serve for the offence".... It would seem to follow if a sequential approach is demanded that if it is thought appropriate that the additional term exceed one-third of the minimum, that must be achieved by leaving untouched the minimum term already determined, and setting a longer additional term.

  His Honour went on to note the possible unintended punitive effect such an approach may have on an offender whose rehabilitation has been assessed by the sentencing judge as likely to benefit from a longer period of supervision on parole. Accordingly, he concluded that the section:

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[1] The Hon B Debus MLA, Attorney General, Second Reading, *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill* 2002, 23/10/2002

[2] *Crimes (Sentencing Procedure) Act* 1999, s 54D

> ... controls a judicial act, not a process of reasoning leading to such an act; it prescribes a form of sentence to be pronounced, it does not purport to prescribe a mental process.... [T]he sentence must be expressed as comprising first a minimum term and then an additional term; but the section does not necessarily require that the judge apply his mind first to the minimum term and secondly to the additional term.

The approach in *Moffitt* was subsequently approved by the Court of Criminal Appeal in relation to the current s 44 in *R v Way*[3] and *R v P*[4], and must accordingly be regarded as authoritative on the issue. However, the drawing of a somewhat artificial distinction between the Court's process of determining a sentence and its pronouncement of that sentence, particularly in the face of the section's stated requirement that the Court "first...set" the non-parole period, is in not in my view overly helpful in encouraging an approach to sentencing that is transparent and publicly understood.

A return in s 44 to the 'top down' approach whereby the Court firstly determines the total term and then sets the non-parole period is desirable. It would to my mind bring a greater degree of clarity and transparency to the process of setting a term of imprisonment, particularly in instances where a sentencing judicial officer wishes to give effect to a finding of special circumstances.

- *Application of the 'bottom up' approach in the context of the Local Court's jurisdictional limits*: following the Court of Criminal Appeal's decision in *R v Doan* (2000) 50 NSWLR 115, it is well understood that the legislative limits upon the Local Court's sentencing powers[5] are jurisdictional limits rather than maximum penalties that must be reserved for worst case offences. Accordingly,

> ... where the maximum applicable penalty is lower because the charge has been prosecuted within the limited summary jurisdiction of the Local Court, that court should impose a penalty reflecting the objective seriousness of the offence, tempered if appropriate by subjective circumstances, taking care only not to exceed the maximum jurisdictional limit.[6]

It is thus uncontroversial that a magistrate determining a sentence where the objective gravity of the offending conduct is very high may consider that a sentence to the extent of the Court's jurisdictional limit of two years imprisonment is appropriate. However, it is not clear how this principle interacts with s 44.

On a 'bottom up' approach, if the court is first to set the non-parole period in accordance with the language of s 44(1), the magistrate might consider having regard to the principle in *Doan* that a period in custody up to the jurisdictional limit is required to reflect the objective seriousness of the offence, and set a two-year non-parole period. Without the scope to sentence beyond the two-year jurisdictional limit, the sentence that must be imposed is effectively a fixed term of two years imprisonment.[7]

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[3] [2004] NSWCCA 131 at [113]. Note the recent High Court decision in *Muldrock v R* [2011] HCA 39 that *Way* was wrongly decided appears to be confined to the issue of the operation of standard non-parole periods.

[4] [2004] NSWCCA 218 at [26]

[5] See *Criminal Procedure Act* 1986, s 267 (in respect of Table 1 offences) and s 268 (in respect of Table 2 offences)

[6] *R v Doan* (2000) 50 NSWLR 115 at 123 per Grove J (Spigelman CJ and Kirby JJ agreeing)

[7] For a sentence longer than 6 months, a fixed term of imprisonment may be imposed under s 45 of the Act where the Court thinks it appropriate having regard to factors including the nature of the offence, the antecedent character of the offender or any other reason it considers sufficient.

The disadvantage in imposing a fixed term sentence to the extent of the Court's jurisdictional limit is that there will not be a parole period during which the offender is subject to supervision after release.

On a 'top down' approach, a magistrate might likewise consider that a sentence to the jurisdictional limit is appropriate. However, he or she would bear that total sentence in mind when determining what portion should comprise the non-parole period and what portion should comprise the balance of the term, and vary the statutory ratio through a finding of special circumstances if appropriate, before ultimately pronouncing the sentence. The disadvantage of this approach is that the recognition given in *Doan* to the importance of ensuring a penalty is commensurate to the objective seriousness of the offence is lessened through the imposition of a shorter non-parole period.

I am of the view that the transparency of the sentencing process in a situation where a magistrate is imposing a sentence to the Local Court's jurisdictional limit would benefit from a 'top down' approach to sentencing, where it is clear from the outset what total term of imprisonment is being imposed. It may also be desirable for the principle in *Doan* to be legislated to make it clear that a sentence to the maximum jurisdictional limit is not reserved for a 'worst case' offence.

These views are subject to, and should be considered in conjunction with, the resolution of the issue of the availability in the Local Court of maximum penalties that enable sentences to be imposed that adequately reflect the objective seriousness of the offending conduct. This issue is raised further below.

(b) Section 21A

In the Court's experience, the impact of the introduction of s 21A of the Act has been largely positive in providing a useful guide, both for judicial officers and practitioners, as to matters that may be relevant considerations in the sentencing exercise.

The main criticism of the section appears to be that it can create complexity due to the care that must be taken to ensure it is not misapplied. One example is the need to avoid 'double counting' factors through the application of s 21A. For instance, it would be impermissible for a circumstance of aggravation set out in s 21A(2) (such as that "the victim was a police officer...and the offence arose because of the victim's occupation") to be taken into account when the offence for which a person stands to be sentenced already contains the circumstance of aggravation as an element of the offence (such as the assault of a police officer while in the execution of the officer's duty in contravention of s 60 of the *Crimes Act* 1900). Of course, some forms of double counting may not be so clearly apparent, but guidance is available through the decisions of the Court of Criminal Appeal and secondary resources including the distillation of the authorities in the Sentencing Bench Book.

In my view, the section does not of itself invite confusion, as it largely (though not exhaustively) replicates the circumstances of aggravation and mitigation recognised in the common law. While in some instances the Court may receive submissions on sentence addressing the s 21A factors that invite an erroneous approach, from a practical standpoint the section also has utility in providing practitioners with a structure that can lend greater coherence to their submissions on sentence.

2. Priority issues for reform in sentencing law

There are currently several high priority sentencing issues arising in the Local Court:

(a) Jurisdictional limits

In recent years, an increasingly challenging aspect of sentencing in the Local Court has been the preservation of the legitimacy of the sentencing exercise in cases where the appropriate penalty having regard to the objective seriousness of the offending goes beyond the Court's jurisdictional limit.

As the Commission would be aware, the Local Court exercises a broad criminal jurisdiction, including jurisdiction in respect of 'Table' offences for which the Local Court effectively shares jurisdiction with the District Court. The introduction of the Table offences scheme following amendments to the *Criminal Procedure Act* 1986 in 1995 significantly increased the seriousness of the matters that may be dealt with to finality in the Local Court.

Not only did the new regime substantially enlarge the number of indictable offences that could be determined summarily in the Local Court, it also transferred the decision of whether to proceed on indictment from the magistrate to the prosecuting authority or in some cases the defence. The effect has been that prosecuting authorities are increasingly choosing to prosecute matters in the Local Court as an alternative to the more costly and protracted trial and sentence jurisdiction of the District Court. The number of indictable offences finalised in the Local Court has grown by about 33 percent from 53,063 in 1996 to 70,708 in 2008.[8]

As a result, today the Local Court is required to sentence offenders for increasingly serious criminal conduct in circumstances where the *Criminal Procedure Act* continues to provide for a maximum sentence of imprisonment for two years in respect of a Table offence. In some cases, this may lead the sentencing magistrate to conclude that the sentence he or she is able to impose is not commensurate to the objective seriousness of the offending behaviour. Examples of cases drawn from magistrates' experiences that reflect this difficulty are set out at Appendix A. It is of concern in such circumstances that public confidence in the sentencing process may be undermined due to limits that prevent the Court from visibly applying and reinforcing the purposes of sentencing enunciated in s 3A of the Act, including ensuring the adequate punishment of the offender, general and specific deterrence and denunciation of the offending conduct.

I have previously written to the former Attorney General and the Sentencing Council in relation to this issue to propose that consideration be given to increasing the jurisdictional limit upon the Local Court's sentencing powers to a maximum of 5 years' imprisonment for a single offence. Part of the intermediate response to the proposal seems to be predicated on the assumption it will lead to a rise in periods of imprisonment across the jurisdiction. This mistakes the purpose of the recommendation. While an appropriate case may fall into such an outcome, the primary purpose is to enhance the transparency in sentencing against a broader background of jurisdiction than is presently available. To my knowledge, the Council's consideration of this issue is ongoing.

(b) Appeal rights

Another area currently lacking in consistency is that of the appeal rights that lie from decisions of the Local Court under the *Crimes (Appeal and Review) Act* 2001 (the 'Appeal Act'), including in relation to appeals against sentence. These are far broader than those that apply in respect of decisions of any other Court in New South Wales.

I have previously written to the former Attorney General to propose that consideration be given to amending several areas of the Appeal Act. In view of the Commission's present

[8] Data obtained from the NSW Bureau of Crime Statistics and Research

terms of reference, I will restrict my comments to sentence appeals pursuant to section 11, which includes provision for the right of any person who has been sentenced by the Local Court to appeal to the District Court against the sentence. There is no requirement that leave of the appeal court be obtained, or that error on the part of the magistrate be shown, before a sentence appeal may be made. Under s 7, appeals against sentences imposed in the Local Court are made by way of rehearing of evidence given in the original Local Court proceedings and fresh evidence may be given in the appeal.

By contrast, in superior jurisdictions appeals against sentence are based upon error. Under s 5 of the *Criminal Appeal Act* 1912, a person convicted on indictment requires leave of the appeal court to appeal against a sentence. The approach taken is concisely summarised in the Sentencing Bench Book as follows:

> Sentence appeals pursuant to the *Criminal Appeal Act* are not re-hearings. It is not enough that the court consider that had it been in the position of the judge, it would have taken a different course. Before an appeal court can intervene it must establish that the sentencing judge has made an error in the exercise of his or her discretion: *House v The King* (1936) 55 CLR 499 at 505.[9]

The divergence in current approaches to sentence appeals appears to be a residual effect of the historical position of the magistracy of the Courts of Petty Sessions. At that time, magistrates were public servants rather than independent judicial officers and exercised a considerably narrower criminal jurisdiction than the magistrates of the Local Court today. Processes such as the rehearing procedure currently contained in s 7 were necessitated by the fact that the Courts of Petty Sessions did not produce detailed written records of the cases before them, requiring evidence to be reheard in the event of an appeal.

The retention of the current approach under the Appeal Act does not have a cogent basis today. In the years since the inception of the Local Courts under the *Local Courts Act* 1982, the magistracy has developed significantly in legal expertise, as reflected in the Local Court's increasingly complex jurisdiction. Magistrates sit as judges of both fact and law and are often more experienced in relation to Local Court matters than judges. Detailed records are kept that obviate the need for a rehearing of evidence on an appeal.

In my view, consideration should be given to amending the Appeal Act so that the appeal rights that lie from decisions of the Local Court align more closely with those that apply in relation to decisions of superior courts. In particular, appeals against sentence should be limited to sentences that are manifestly excessive or inadequate, and should require the appellant to demonstrate an error on the part of the magistrate.

3. Alternatives to sentences of imprisonment

(a) Suspended sentences

I have written to the Sentencing Council in the course of its current review of suspended sentences and am of the view that reform of this area is highly desirable. Various options for reform have been posed for discussion and of these I favour the phasing out suspended sentences, subject to a holistic assessment being made of other current sentencing options. There are a number of anomalies in the availability and use of alternative custodial sentences such as the newly introduced Intensive Correction Order (ICO) that would benefit from resolution, which I have outlined further below.

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[9] Judicial Commission of NSW, *Sentencing Bench Book* at [70-030]

Difficulties arising from the availability and use of suspended sentences observed in the Local Court include:

- *Process for suspending a sentence and perceptions of suspended sentences*: a suspended sentence first requires a finding that there is no appropriate sentence other than imprisonment but then requires a decision to suspend the sentence. Provided that an offender is of good behaviour, he or she is effectively spared further punishment. Consequently, a suspended sentence appears to be widely perceived by the public and legal practitioners as a more lenient outcome than a non-custodial option such as a community service order (CSO), which imposes an additional burden of completing community service upon the offender.

  Magistrates report receiving sentence submissions from practitioners proposing that a suspended sentence is appropriate in cases where the objective seriousness of the offending is such that a custodial sentence is not within contemplation. Such an approach is usually abandoned should the magistrate query whether the practitioner is submitting to the Court that it should make a finding that no sentence other than one of imprisonment is appropriate. However, it does suggest that the reasoning process for arriving at a decision to suspend a sentence is poorly understood by some.

- *Net widening*: research by the Bureau of Crime Statistics and Research (BOCSAR) in 2010[10] highlights that with the re-introduction of suspended sentences there has been a significant reduction in the imposition of community service orders, particularly in the higher courts. As the authors of the research note, this appears to indicate that on some occasions judicial officers have been "impos[ing] a suspended sentence where they would not have imposed a prison sentence in the absence of this sentencing alternative", with due regard not being given to s 5 of the Act.

  'Net widening' may also occur where the length of a sentence is increased to apparently compensate for the fact it is to be suspended, rather than imposing a shorter sentence that the offender is required to serve in custody. This type of approach by the District Court on appeal is not uncommon.

  For example, in *Durante v R* [2008] NSWDC 350, an offender appealed a sentence imposed in the Local Court of full-time imprisonment for two months. At the submission of his solicitor, the offender was re-sentenced to imprisonment for eight months that was then suspended. The judge commented that he "would normally have [had] little hesitation in dismissing the appeal and confirming the Magistrate's sentence", but found that the increased but suspended sentence would provide the offender with an opportunity "to engage in regular, full time paid employment which may well be a turning point in his life".[11] The offender was given a *Parker* direction[12] and informed that he was exposed to "the risk... that he could end in full time imprisonment for up to eight months, that is four times more than the Magistrate imposed on him, but... on the other hand he could have eight months of freedom".[13]

  It is of concern that such an approach disregards the process for imposing a custodial sentence enunciated in *R v Zamagias,*[14] while also exposing an offender to the

[10] L McInnes & C Jones, 'Trends in the use of suspended sentences in NSW', Issues paper no 47 (May 2010), NSW Bureau of Crime Statistics and Research
[11] *Durante v R* [2008] NSWDC 350 at [9]
[12] See *Parker v DPP* (1992) 28 NSWLR 282
[13] *Durante v R* [2008] NSWDC 350 at [11]
[14] [2002] NSWCCA 17 at [26]-[30]

consequence in the event of a subsequent breach of spending a longer period in custody than if he or she had originally been required to serve the full-time sentence.

- *Breaches*: Section 98(3) of the Act requires that in proceedings for breach of a section 12 good behaviour bond the court must revoke the bond unless is satisfied that (a) the offender's failure to comply with the conditions of the bond was trivial in nature, or (b) there are good reasons for excusing the offender's failure to comply with the conditions of the bond.

  In *DPP (NSW) v Cooke* (2007) 168 A Crim R 379, the Court of Appeal commented that "good reasons" may include "extenuating circumstances of sufficient importance to explain the behaviour giving rise to the breach".[15] However, the Court went on to note that "the determination under s 98(3)(b) should be made bearing firmly in mind that generally a breach of the conditions of the bond will result in the offender serving the sentence that was suspended".[16]

  Notwithstanding the clarity of this statement, there are occasions where it appears that breaches of suspended sentences are not being dealt with according to law. For example, I am aware of a case where an offender who received a suspended sentence in the Local Court was brought before the District Court in relation to a fresh offence. In dealing with the breach of suspended sentence, a direction was sent to the registry to send a letter to the offender cautioning him against further breaches of the still current s 12 bond.

  One possible explanation for a reluctance to revoke s 12 bonds in the event of proceedings for breach is the at times harsh reality that upon revocation the offender will be required to serve the sentence imposed. This is particularly apparent in cases where an offender breaches a bond in the last days of its operation (despite the fact that this circumstance is not relevant to a decision to revoke a bond).

  Section 99(1)(c) provides that upon revocation of a bond, "the order under section 12(1)(a) ceases to have effect in relation to the sentence of imprisonment suspended by the order"; further, the sentencing procedures set out in Part 4 apply, together with s 24 in relation to the setting of a non-parole period. This enables some allowance to be made for the offender's period of compliance with his or her obligations under the bond. Nevertheless, it will not entirely ameliorate the effect of a breach, as an offender will still be required to serve a portion of the original sentence in custody and be subject to parole for the balance of the term. In such situations, the offender may effectively be subject to a sentence in relation to the offence for longer than he or she would have been if the original sentence of imprisonment had been served.

  A breach of suspended sentence may also have a disproportionate effect upon an offender who originally received a fixed sentence of 6 months or less. When dealing with a breach involving an offender who originally received a longer sentence of, for example, 12 months, the court is to fix a non-parole period and in doing so may significantly reduce the non-parole period having regard to matters such as the offender's period of compliance with the bond. This opportunity is not available in the case of an offender originally sentenced to a short fixed term of imprisonment, as a non-parole period is not to be fixed.[17] In the event of a breach, it is thus possible for an

[15] At [16]
[16] At [21]
[17] *Crimes (Sentencing Procedure) Act* 1999, s 46

offender who originally received a shorter sentence to end up spending more time in custody than an offender who originally received a longer sentence.

- *Effective reduction in duration of bond due to appeal process:* in the event of an appeal against sentence to the District Court, the duration of a good behaviour bond under s 12 may in effect be reduced in some cases, due to the operation of provisions in the *Crimes (Appeal and Review) Act* 2001 relating to the stay of execution of sentencing pending determination of appeals.

- *Jurisdictional issues:* difficulties arise in cases in which an offender is to be sentenced in the Local Court for a summary or Table offence where the commission of that offence amounted to a breach of a s 12 bond imposed in the District Court. Section 98 of the Act does not allow the Local Court to deal with such a breach and the practical consequence in such instances is that the Local Court has to defer sentencing until the District Court deals with the breach.

Due to difficulties such as these, I am of the opinion reform to phase out suspended sentences in New South Wales is desirable, provided that sufficient other custodial and non-custodial options are available and able to be utilised effectively. Should that approach not be preferred, I would welcome the opportunity to discuss possibilities for legislative amendment to address the operational concerns I have raised above. However, the latter approach would not cure the conceptual difficulties inherent in the process of imposing a suspended sentence.

(b) Alternative sentences of imprisonment

Overall, the interaction of current custodial sentencing options would benefit from review and rationalisation. The course to be followed when imposing a sentence of imprisonment other than full-time custody varies depending on the alternative being considered. The table set out at Appendix B, which appears in the Local Court Bench Book, provides details of some of the differences that currently exist.

Anomalies between various custodial sentencing options can cause uncertainty amongst offenders and their legal representatives as to the process that the Court will follow when imposing a sentence of imprisonment. In particular, I note:

- *Maximum length:* The maximum length of a home detention order is 18 months, whereas the maximum length of an intensive correction order (ICO) is 2 years. This is despite home detention being higher in the hierarchy of severity of custodial sentences. It would be desirable for a consistent maximum length of sentence of 2 years to be available across all alternative custodial options.

- *Eligibility criteria:* There is a lack of consistency between the categories of offences for which an offender will be ineligible to serve a sentence by way of home detention or ICO. This is notwithstanding that an ICO will typically involve a home detention component, that is, the imposition of a curfew. For example, assault occasioning actual bodily harm is an excluded offence for the purpose of eligibility for home detention, but not for an ICO.[18]

- *Fixing of non-parole period:* The court is required to fix a non-parole period for sentences of imprisonment to be served by way of home detention or full-time custody,

[18] Compare *Crimes (Sentencing Procedure) Act* 1999, s 76 in respect of offences for which home detention is not available (including subs (e) for assault occasioning actual bodily harm) and Div 2 of Part 5 in respect of offences for which an intensive correction order is not available

but is not to do so in respect of ICOs or suspended sentences. In the interests of consistency, it would be desirable for a uniform approach to be taken so that the court is not required to fix a non-parole periods when imposing a custodial alternative to full-time imprisonment, with this being a matter for the State Parole Authority (in the case of an ICO and home detention order) or the court (in the case of a suspended sentence) in the event of a breach.

- *Time of fixing sentence:* When referring an offender for assessment of suitability for serving a sentence by way of ICO, the Court does not impose a sentence of imprisonment. However, it is to be satisfied that no sentence other than imprisonment is appropriate and the sentence is likely to be 2 years or less. By contrast, in the case of home detention, the sentence is fixed prior to the referral of an offender for a suitability assessment. This back end approach is in my view wrong. It also causes considerable practical difficulty in the Local Court, where magistrates move from court to court and may not be available at the court from which assessment for suitability was directed.

- *Hierarchy of custodial sentences:* In escalating order of severity, current custodial sentencing options are suspended sentences, ICOs, home detention and full-time imprisonment. Notwithstanding the approach set out in *R v Zamagias*,[19] if a judicial officer has considered that a more severe custodial option such as home detention may be appropriate but receives an eligibility report indicating the offender is not suitable, the Act does not prevent the judicial officer from proceeding to order that a sentence be served by means of a less severe custodial option such as a suspended sentence. To the contrary, s 12(4) expressly provides that an order suspending the execution of a sentence "may be made after a court has decided not to make a home detention order in relation to the sentence of imprisonment."

  There is potential for 'net widening' to occur as a result, whereby the length of the sentence may be increased to compensate for the possibility of a suspended sentence being imposed in the event of an unsuitable eligibility report. This is particularly so in cases where an ICO is being considered, given that at the point of obtaining a suitability assessment the court has not fixed the length of sentence but has considered that a sentence of imprisonment is appropriate and will likely be up to two years in length.

As is evident from several of the inconsistencies raised above, the efficacy of the ICO as a new custodial sentencing option is a particular area for ongoing observation and assessment. Since their introduction in October 2010, the Local Court has experienced difficulties with ICOs, both in relation to their position within the framework of custodial sentencing options and in practice. Of particular concern are operational issues that may have resulted in an offender who would otherwise appear suitable for an ICO being assessed as unsuitable for reasons such as:

- No work being available in a particular region that the offender could complete in satisfaction of the compulsory work requirement under an ICO; and

- The lack of availability of rehabilitation programs for an offender with an unresolved drug or alcohol problem, notwithstanding that ICOs were "designed to reduce an offender's risk of re-offending through the provision of intensive rehabilitation and supervision in the community"[20]

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[19] Above note 14

[20] The Hon J Hatzistergos MLC, Attorney General, Second Reading, *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Bill* 2010, 22/6/10

A final comment on sentencing options is that there may be a place for a strengthened non-custodial sentence that allows both a community service order and good behaviour bond to be imposed for an offence. This is currently precluded by s 13 of the Act. Such a sentence would, in practical terms, amount to a 'non-custodial ICO' and may be of particular utility in circumstances where a judicial officer is not satisfied that the offending conduct requires a sentence of imprisonment to be imposed, but is of the view that neither a bond or CSO alone will adequately meet the purposes of sentencing set out in s 3A of the Act.

(c) Diversion programs and alternative sentencing options

i. Overview

A number of diversion programs and or alternative sentencing options are currently available to defendants in the Local Court and utilise the power provided in section 11 of the Act for the Court to defer sentencing for rehabilitation, participation in an intervention program or other purposes. These include:

- Magistrate's Early Referral into Treatment (MERIT): this is a drug treatment and rehabilitation program that seeks to enable defendants to break cycles of drug-related crime. The program operates prior to a plea being entered, with proceedings adjourned while the defendant completes a 12-week treatment program. Following participation in the program, the matter proceeds according to the ordinary court process. In the event of the defendant being convicted and sentenced, Local Court Practice Note 5 of 2002 stipulates that successful completion is a "matter of some weight to be taken into account in the defendant's favour" but "unsuccessful completion should not, on sentence, attract any additional penalty."

- Alcohol MERIT: formerly known as Rural Alcohol Diversion, this alcohol rehabilitation program has recently been expanded to several metropolitan and regional locations and uses the same operational model as MERIT.

- Circle Sentencing: this program operates post-plea as an alternative sentencing process for adult Indigenous offenders in which community elders are involved, and is used for more serious repeat offences. Circle Sentencing is a declared intervention program under s 347 of the *Criminal Procedure Act* 1986 and is regulated by Part 6 of the Criminal Procedure Regulation 2010.

- Forum Sentencing: formerly trialled amongst young adult offenders, this is another post-plea program that brings together an offender and victim with a facilitator, police officer and support people to discuss the impact of the offence and formulate an "intervention plan" for the offender. Staged expansion of the program to cover all Local Court locations in the State is planned. Forum Sentencing is another declared intervention program regulated by Part 7 of the Criminal Procedure Regulation 2010.

- Traffic Offender Intervention Program: this is a post-plea program for defendants who have been found guilty of, or pleaded guilty to, a traffic offence. Upon referral of a defendant to an approved traffic course provider, proceedings are adjourned prior to sentencing to allow sufficient time for a traffic course to be completed. Traffic offender programs were formerly available on an ad hoc basis depending on the arrangements made at particular Local Court locations, but the TOIP is now a declared intervention program regulated by Part 8 of the Criminal Procedure Regulation 2010.

- Court Referral of Eligible Defendants Into Treatment (CREDIT): this is a pre-plea program which offers participants access to training, treatment, rehabilitative and social

services across a wide range of areas, with a view to addressing problem areas in participants' lives in order to reduce the rate of re-offending. CREDIT commenced as a two-year trial program in August 2009.

With the exception of the structural approach to Forum Sentencing, I strongly support the continuing availability of programs such as these at the Local Court level, given the opportunity this provides in many cases to address offending behaviour at an earlier stage of involvement in the criminal justice system. Overall, the diversionary programs currently available provide constructive alternatives to the traditional court process and many have a demonstrated therapeutic or rehabilitative value. From a sentencing perspective, successful completion of a program may also be useful in supplying the Court with valuable information to be taken into account at the time of sentencing.

ii. Forum Sentencing

Notwithstanding the above, I am of the view that consideration should be given to a reanalysis of the availability and operation of Forum Sentencing to enhance its prospective value as a rehabilitative sentencing option. I have recently written to the Attorney General to propose that consideration be given to amending current eligibility requirements to enable Forum Sentencing to be made available in relation for first time offenders charged with a Table 1 or Table 2 offence and in a manner consistent with the eligibility requirements of the Circle Sentencing program.

Clause 63 of the Criminal Procedure Regulation 2010 currently provides that a person is eligible for referral to participate in a Forum only if, amongst other requirements:

> ... the court considers that the facts, as found by the court, or as pleaded to by the person, in connection with the offence, together with the person's antecedents and any other information available to the court, indicate that it is likely that the person will be required to serve a sentence of imprisonment

By contrast, the relevant criterion for Circle Sentencing makes the program available to offenders who will likely be sentenced to a community service order or good behaviour bond. As a generalisation, these are reasonably regular outcomes for the majority of Table 1 or Table 2 offences involving first time offenders.

Aside from promoting consistency with Circle Sentencing, a change to eligibility requirements may also address issues such as the following:

- *Efficacy in addressing recidivism:* The efficacy of Forum Sentencing in its present form in reducing recidivism is problematic. A study by BOCSAR in June 2009 found no evidence that Forum Sentencing has had any more effect in reducing re-offending amongst forum participants as against offenders sentenced in accordance with the conventional court process.[21] Conversely, its 2002 evaluation of Youth Justice Conferencing, which utilises a similar format to Forum Sentencing but is generally restricted to first time offenders, showed that re-offending was reduced and delayed amongst young persons who participated in a conference compared with young persons who attended court.[22]

[21] C Jones, 'Does Forum Sentencing reduce re-offending?', *Crime and Justice Bulletin*, No 129 (June 2009)
[22] G Luke and B Lind, 'Reducing Juvenile Crime: Conferencing versus Court', *Crime and Justice Bulletin*, No 69 (April 2002)

This contrast between outcomes suggests support for the notion that use of an alternative sentencing process such as conferencing at a potentially formative stage of an individual's involvement in the criminal justice system may have a greater possibility in deterring engagement in more serious offending behaviour. On present experience, intervention at a stage when an individual has gained familiarity through previous experiences in Court and has a reduced fear of the consequences of a Court appearance does not appear to offer the same opportunity.

- *Practical outcomes:* Magistrates experience a related difficulty arising from the current requirements restricting eligibility for Forum Sentencing to more serious offences insofar as there may be a disjuncture between the objective seriousness of the conduct for which an offender is to be sentenced, and the course of action proposed by an intervention plan.

  The offending conduct and the offender's history might be such that at the time of sentencing, the magistrate is satisfied no sentence other than imprisonment is appropriate pursuant to s 5 of the Act. Indeed, as noted above, the likelihood of a sentence of imprisonment having regard to an offender's prior record is a requirement when considering eligibility for Forum Sentencing.

  Although the Court retains the power to refuse an intervention plan in the event it is perceived as, for example, too lenient, there may be a reluctance to refuse a plan in circumstances where an offender has developed an expectation through participation in the forum process of being dealt with perhaps less strictly than he or she would have been if sentenced in accordance with the traditional court process.

  A magistrate may consequently be reluctant to refer a matter to Forum Sentencing where, notwithstanding its potential eligibility for Forum Sentencing, an offender may end up with a legitimate sense of grievance if the magistrate is unable to agree that it is appropriate to deal with the offender in the manner proposed in an intervention plan.

To address these concerns, consideration should be given to amending the eligibility requirements to enable selection of first time offenders guilty of Table 1 and certain Table 2 offences for involvement in a forum. The question of whether this may produce a reduction in recidivism similar to that obtained to date through Youth Justice Conferencing cannot of course be predicted unless tested over a period of time, but in my view is an option worthy of exploration.

4. Operation of the standard non-parole period scheme

My comments regarding the operation of the standard non-parole period scheme are limited in view of the fact that it does not apply to offences that are dealt with summarily. However, it should be observed that there are several Table offences to which a SNPP applies that may be determined summarily, and in fact are routinely dealt with in the Local Court rather than the District Court.

The following table sets out the standard non-parole periods for the following Table offences finalised in 2010:[23]

[23] Data obtained from the NSW Bureau of Crime Statistics and Research

Offence	Table	SNPP	Matters finalised in Local Court	Matters finalised in Higher Courts
Reckless grievous bodily harm in company (Crimes Act s 35(1))	1	5 yrs	88	44
Reckless grievous bodily harm (Crimes Act s 35(2))	1	4 yrs	407	83
Reckless wounding in company (Crimes Act s 35(3))	1	4 yrs	56	43
Reckless wounding (Crimes Act s 35(4))	1	3 yrs	393	79
Assault police officer (Crimes Act s 60(2))	1	3 yrs	178	8
Aggravated indecent assault (Crimes Act s 61M(1))	1	5 yrs	247	272
Aggravated indecent assault – victim under 16 (Crimes Act s 61M(2))	1	8 yrs	156	124
Causing bushfire (Crimes Act s 203E)	1	5 yrs	88	2
Unauthorised possession/use of prohibited firearm/pistol (Firearms Act 1996 s 7)	2	3 yrs	114	113
Unauthorised possession/use of prohibited weapon (Weapons Prohibition Act 1998 s 7)	2	3 yrs	652	105

In view of the current jurisdictional limit upon the Local Court's sentencing powers, it is not possible for an offender convicted of an offence to which a SNPP would apply in the District Court to receive a sentence in the Local Court that even approaches the prescribed SNPP.

Although it may be argued that an election may be made by the prosecuting authority to proceed on indictment where appropriate, with the result that offences should only remain in the Local Court where they are below the middle of the range of objective seriousness, the practical experience of magistrates is otherwise. Indeed, the frequency with which the majority of these offences are dealt with in the Local Court, as outlined in the table above, militates against such an argument.

The issue of the inadequacy of the Local Court's current sentencing powers particularly in regard to the frequency with which offences that carry a SNPP if dealt with on indictment are being determined in the Local Court has been raised as part of the Sentencing Council's current consideration of the jurisdictional limits applying in the Court.

Thank you for the opportunity to make a preliminary submission to this inquiry. Should you wish, I would be pleased to discuss the above comments or any other sentencing issue with the Commission further.

Yours sincerely,

Judge Graeme Henson
Chief Magistrate

Appendix A

Sample cases heard in the Local Court where there is a concern that the jurisdictional limit is inadequate

1. Reckless grievous bodily harm/wounding

Reckless grievous bodily harm is an offence pursuant to section 35(2) of the *Crimes Act* for which the maximum penalty on indictment is 10 years imprisonment. Reckless wounding is an offence pursuant to section 35(4), for which the maximum penalty on indictment is 7 years imprisonment. Both are Table 1 offences.

There are numerous examples of matters where offenders have been sentenced in respect of these offences but the Court's jurisdictional limit of 2 years imprisonment for a single charge does not appear adequate to reflect the objective seriousness of the offending conduct, including the following:

- Reckless grievous bodily harm: An offender with an extensive criminal record had moved from South Australia to New South Wales and commenced a relationship with a single parent, moving in with her a few months later. She was the victim of the offence.

  Whilst drinking at a hotel one evening the offender became disorderly and the publican contacted the man's partner to collect him. As she was driving him home, he requested that she take him to another hotel. She refused. The offender had a glass bottle in his hand and used it to 'glass' his partner in the face whilst she was driving and in the presence of her children. She required multiple stitches and sustained extensive permanent scarring to her face.

  The offender was sentenced to the Court's jurisdictional limit of 2 years imprisonment for a single offence, although the magistrate was of the opinion that a higher sentence in the range of 3 years would otherwise have been appropriate.

- Reckless grievous bodily harm: An offender who had a history of violent offending followed the victim off a train and attacked him in the car park of the train station. There was no issue of provocation or self-defence. The offender repeatedly punched and kicked the victim, and continued to do so when the victim was lying prone on the ground. The attack only ceased when passers by restrained the offender.

  The victim sustained two broken teeth, a broken jaw and a broken eye socket, requiring dental and facial surgery. He reported ongoing numbness to his face, pain and fear following the attack.

  The magistrate assessed the objective seriousness of the offence as approaching the mid range and formed the view that a sentence of 3 years imprisonment with a non-parole period of 18 months due to special circumstances would have been appropriate. However, due to the Court's jurisdictional limit, the offender was sentenced to 2 years imprisonment.

- Reckless wounding: a 20 year old offender, who was on a section 9 good behaviour bond for affray at the time, attacked the victim after a verbal altercation. Although he was with a group of individuals at the time that he identified to the victim as the "Anna Bay Boys", he was not charged with the aggravated form of the offence of reckless wounding in company.

  The group surrounded the victim. As he attempted to move away, the offender struck the victim on the head with a bottle. The bottle broke and the offender then struck the victim on the neck twice using the jagged edge of the bottle. Friends of the victim attempted to come to his assistance and were also assaulted by the offender and other members of the group.

  The offender was sentenced to two years imprisonment but the sentencing magistrate took the view that the appropriate penalty having regard to the gravity of the conduct exceeded the jurisdictional limit.

- Reckless grievous bodily harm: An offender with a prior history of violent offending was the father of the victim, a 10 year old. The offender beat the child with a thick chain wrapped in plastic because the child had apparently dropped some crockery. The child suffered extensive bruising and abrasions that were indicative of multiple blows.

  Following the offence, the offender abandoned the child and fled to Queensland, where he was arrested.

  The magistrate assessed the objective seriousness of the offence as being in the mid range such that a sentence of 5 years imprisonment would be appropriate. The offender was sentenced to the Court's jurisdictional limit of two years imprisonment.

2. Assault occasioning actual bodily harm

Assault occasioning actual bodily harm is an offence pursuant to section 59 of the *Crimes Act* for which the maximum penalty on indictment is 7 years imprisonment. It is a Table 2 offence. The following is an example of a matter where the Court's jurisdictional limit for a single offence has been assessed as not adequately reflecting the objective gravity of the offending:

- The male offender was an individual with an extensive criminal record who had relocated from Queensland to NSW to move in with his partner, a single parent. She was the victim of the offence. The offender dragged his partner from her home into the street, where he ripped off her clothes and hit her with a belt in front of her children and members of the public.

  The objective seriousness of the offending was assessed as approaching the mid range such that, but for the Court's jurisdictional limit, a sentence of 3 years imprisonment would have been appropriate. The offender was sentenced to the Court's jurisdictional limit of 2 years imprisonment for a single offence.

3. Firearms offences

Unauthorised possession or use of a prohibited firearm or pistol is an offence pursuant to section 7 of the *Firearms Act* for which the maximum penalty on indictment is 14 years imprisonment. Unauthorised possession of a firearm generally is an offence pursuant to section 7A, for which the maximum penalty on indictment is 5 years imprisonment. Both are Table 2 offences.

Several magistrates have reported the typical scenario in which an offender is apprehended, either individually or with a group, whilst driving at night and being in possession of a pistol or sawn-off shotgun. Such cases are frequently being assessed as being of greater objective seriousness than the jurisdictional limit of the Court currently enables the ultimate sentence to reflect.

One magistrate who frequently encounters these matters and has imposed fixed terms of 2 years imprisonment indicated that he is not aware of any instances in which a sentence he has imposed for a firearms offence at the Local Court's jurisdictional limit has been reduced by the District Court on appeal.

4. Break and enter

Breaking, entering and stealing is an offence pursuant to section 112(1) of the *Crimes Act*, for which the maximum penalty on indictment is imprisonment for 14 years. Where the value of the property stolen is $60,000 or less, such an offence may be dealt with as a Table 1 offence.

Several magistrates have provided examples of instances where they have sentenced individuals for multiple counts of break, enter and steal in circumstances where the offender has repeatedly returned to the same victim's home or has targeted a particular class of victim, such as the elderly. One example is the following:

- The offender committed multiple break, enter and steal offences by following a Meals on Wheels van to identify prospective targets, and later returning to the houses carry out the offences. The victims ranged in age between 78 and 87.

  The offender was sentenced to the Court's maximum jurisdictional limit of 5 years for multiple offences. The sentence was upheld on appeal although the sentence was restructured to reduce the non-parole period.

5. Fraud and related offences

Fraud and related offences under Part 4AA of the *Crimes Act* are designated as Table 1 offences. The maximum penalty for fraud when dealt with on indictment is 10 years imprisonment. Other similar recently repealed Table offences include obtain a benefit by deception pursuant to former section 178BA, for which the maximum penalty on indictment was 5 years imprisonment.

Magistrates have reported experiences in dealing with matters where the value of the fraud or benefit had been in the range of $500,000 to over $1 million and the objective seriousness of the conduct has been assessed as exceeding the Court's jurisdictional limit. An example is the following:

- The offender created multiple false restaurant businesses, of which he was supposedly the owner. He made about 15 workers compensation claims for injuries supposedly sustained by him as an employee whilst at work. In each instance he used a false name enabling him to make multiple claims before being detected. Payments obtained from the Workers Compensation Commission totalled approximately $500,000.

  The offender was sentenced to the Court's jurisdictional limit for multiple offences of 5 years. The sentence was upheld on appeal.

6. Larceny

Larceny where the value of the property exceeds $5,000 is a Table 1 offence. Pursuant to section 117 of the *Crimes Act*, the maximum penalty when dealt with on indictment is 5 years imprisonment. An example of a matter where the objective seriousness of the conduct exceeded the Court's jurisdictional limit is the following:

- The offender stole a truck and container from outside a retail store in Sydney. He drove the truck to a farm in the outer suburbs where the contents of the container were unloaded and concealed in a shed. The container contained Sony PlayStations to the value of $460,000.

  The magistrate assessed the appropriate penalty as being in the range of 3 years imprisonment, and imposed the jurisdictional limit of 2 years imprisonment.

Appendix B

Custodial Sentences

Subject to availability for the particular offence. All section references are to the *Crimes (Sentencing Procedure) Act* 1999							
Type of custody	**Maximum length**	**Fix non-parole period?**	**Accumulation of consecutive sentences?**	**Part-heard upon referral for assessment?**	**Who deals with the breach?**	**Length of time for assessment**	**Consequence of breach**
s 12	2 yrs	No	No	No	Court	PSR is optional, it takes 4 wks if in custody, 6 wks if at liberty	If revoked: ICO, home detention or full-time custody
ICO	2 yrs	No (and don't fix term of sentence prior to referral for assessment: s 7(2))	Yes, up to 2 yrs	Yes	Commissioner for Corrective Services/Parole Board	Assessment is required, it takes 4 wks if in custody, 6 wks if at liberty Note: the court cannot simultaneously seek an assessment of suitability for a HDO. An offender who is referred for assessment for an ICO is not to be referred for assessment for a HDO for the same sentence unless the court has determined it will not impose an ICO: s 80(1A)	If revoked: full-time custody
Home detention	18 mths	Yes, if appropriate and total term is longer than 6 mths. Sentence is to be fixed prior to assessment	Yes, up to 18 mths	No, but if found to be unsuitable, may be referred to sentencing magistrate to consider a suspended sentence: s 12(4)	Parole Board	Assessment is required, it takes 6 wks Note: the court cannot simultaneously seek an assessment of suitability for an ICO. An offender who is referred for assessment for an ICO is not to be referred for assessment for a HDO for the same sentence unless the court has determined it will not impose an ICO: s 80(1A)	If revoked: full-time custody
Full-time custody	Cumulative maximum of 5 yrs	Yes, if appropriate and total term is longer than 6 mths.	Yes, up to 5 yrs	No	Parole Board	PSR is optional, it takes 4 wks if in custody, 6 wks if at liberty	If parole is revoked: full-time custody

Type of custody	Commencement of sentence	Ineligibility
s 12	Date of imposition of sentence	Ineligible if accused is subject to a sentence of imprisonment: s 12(2), that is — full-time custody, home detention, ICO or parole
ICO	Between 7 to 21 days after the imposition of sentence unless it is to be served consecutively or partly consecutively	• Ineligible for certain sexual offences: s 66 • Not to be made unless: – the court is satisfied offender is at least 18 yrs old – offender is assessed as suitable – offender has signed undertaking to comply with obligations under the ICO, and – it is appropriate in all the circumstances for the sentence to be served by ICO: s 67 • Not to be made where the ICO would be served concurrently or consecutively (in whole or in part) with another ICO, and the new sentence will end more than 2 yrs after the date of imposition: s 68
Home detention	The sentence commences on the date on which the court imposes the sentence by way of home detention, or the sentence can be backdated to reflect pre-sentence custody, or the sentence can be forward-dated if it is to be served consecutively or partly consecutively	• Not available for certain offences specified in s 76 or for offenders with certain history as specified in s 77 • Not to be made unless: – offender is assessed as suitable – appropriate in all the circumstances for sentence to be served by HDO – persons with whom offender would reside consent in writing, and – offender has signed undertaking to comply with obligations under the HDO: s 78 • Not to be made where the HDO would be served concurrently or consecutively (in whole or in part) with another HDO and the new sentence will end more than 18 mths after the date of imposition: s 79
Full-time custody	The sentence commences on the date on which the Court imposes the sentence, or the sentence can be backdated to reflect pre-sentence custody, or the sentence can be forward-dated if it is to be served consecutively or partly consecutively	N/A