



**New South Wales
Law Reform Commission**

Sentencing Question Paper 8

**The structure and hierarchy
of sentencing options**

July 2012
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8.1 In this Question Paper, we focus on our Terms of Reference that stress the need to:

- identify opportunities to simplify sentencing law, while ensuring transparency and consistency; and
- provide sentencing courts with adequate options and discretions.¹

8.2 We bear in mind that when the Attorney General announced the Terms of Reference, he emphasised that for less serious offences “[w]e need to encourage the use of more non-custodial and community-based sentences as a viable alternative to full-time incarceration”.²

8.3 We will address the broad question of the structure and hierarchy of sentencing options that may be imposed by the courts. In Question Papers 5-7, we dealt with a range of options that are currently available and asked questions about whether they are appropriate, or could be improved, and whether other options should be provided. In this paper, we approach the topic in a different way. We ask: how should sentencing options be structured?

8.4 One of the features of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (‘CSPA’) as currently drafted is that it tends to force courts to choose *one* sentencing option, rather than allowing scope to combine sentencing options that, taken as a whole, could adequately achieve the range of purposes of sentencing:

- adequately punishing the offender;
- providing general and specific deterrence;
- protecting the community from the offender;

1. The full Terms of Reference for the sentencing review and a preliminary outline paper are available at: <www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/pages/LRC_cref130>.

2. G Smith, “Sentencing Laws to be Reviewed” (Media Release, 23 September 2011) 1.

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- promoting the rehabilitation of the offender;
 - making the offender accountable for his or her actions;
 - denouncing the conduct of the offender; and
 - recognising the harm done to the victim of the crime and the community.³
- 8.5 This raises the issue of whether any given sentence can fulfil all these purposes, some of which can potentially point in different directions, and whether more flexibility should be introduced, either within each sentence, or by allowing combinations of sentences, in order to achieve these purposes more effectively.
- 8.6 This issue has a number of interrelated aspects:
- Should legislation specify a hierarchy of sentences, setting out which are more serious than others?
 - Should sentencing options be broadly structured with components or conditions that can be combined in different ways? Or should sentence options be specified at a high level of detail and contain mandatory and optional components?
 - Should there be a strict restriction allowing one sentence only, or should combinations be allowed? If so, what combinations?
- 8.7 In this paper we will look at a number of models from other jurisdictions that answer these questions in quite different ways. The models are outlined broadly at a high level, not in detail. They are intended to provide a basis for discussion.

Current NSW Law

- 8.8 The CSPA does not describe a sentencing hierarchy explicitly. It does, however, require that imprisonment is a sanction of last resort, and that a sentence of imprisonment must be imposed before it can be served by way of a suspended sentence, an intensive correction order ('ICO') or home detention.⁴
- 8.9 The CSPA splits sentences broadly into "custodial" or "non-custodial" categories, but sentence types under the CSPA are described specifically. A distinction is drawn between:
- fines;
 - community service orders ('CSOs');
 - bonds;
 - ICOs;

3. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; See NSW Law Reform Commission, *Purposes of Sentencing*, Sentencing Question Paper 1 (2012).

4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1), s 6(1), s 7(1), s 12(1).

- home detention;
 - suspended sentences;
 - full-time imprisonment.⁵
- 8.10 It is fairly clear in practice that sentencing is approached on the basis of an assumed hierarchy.
- 8.11 However, conditions may be attached to sentences that replicate the effect of other sentences. For example:
- home detention may include a condition of community service;⁶
 - bonds (and therefore suspended sentences) and CSOs may include conditions such as attending community programs that address the offending behaviour.⁷
- 8.12 The effect of the CSPA is that generally no two sentencing options can be combined, even where there is an overlapping element, for example, a community service order compared with a home detention order which can include a requirement to perform community service.⁸ The only exception seems to be that the CSPA does allow a fine to be imposed in addition to a sentence in certain circumstances which we will discuss below. Under the CSPA:
- Full-time imprisonment cannot be combined with any other sentencing option.
 - A CSO cannot be combined with a bond.⁹
 - A suspended sentence cannot include a condition that a person performs community service, because the sentence is suspended upon condition that the offender enters into a bond.¹⁰
 - CSOs, home detention and bonds (including a bond without conviction and a bond under a suspended sentence) cannot include a condition “in the nature of a fine, compensation or otherwise”.¹¹
 - A suspended sentence cannot be passed if the person is subject to some other sentence of imprisonment that is not suspended including the parole period of another sentence.¹²
 - Non-association orders and place restriction orders may not be imposed if the maximum penalty is less than six months’ imprisonment, or if the court

5. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5-17.

6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 82(2)(b).

7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 90(2)(a), s 95A.

8. *Crimes (Administration of Sentences) Regulations 2008* (NSW) cl 200(s) provides that a home detainee, when not otherwise employed, must undertake up to 20 hours of community service work a week as directed by a supervisor.

9. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 13.

10. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 12(1)(b).

11. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 82(1), 90(1), 95.

12. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 12; *R v Edigarov* [2001] NSWCCA 436 [27]-[32].

discharges the offender conditionally or unconditionally under s 10, or finds the person guilty but defers sentencing under s 11.¹³

- 8.13 It is not always clear what combinations are allowed with a fine. If the penalty for an offence specifically includes a fine as a penalty option, a fine can be imposed in addition to a good behaviour bond, but not if the offender is discharged without proceeding to conviction on condition that he or she enter into a bond.¹⁴ A fine may be imposed with a sentence of imprisonment (or an alternative to imprisonment), if the offence specifies that a fine, or imprisonment, *or both* may be imposed.¹⁵
- 8.14 If the penalty for an offence does not include a fine as a penalty option (that is it specifies imprisonment only), a fine of up to \$110,000 may be imposed in addition to any other penalty, but only if the offence is being dealt with on indictment (that is, not in the Local Court, and not if a higher court is dealing with an offence summarily).¹⁶
- 8.15 As discussed in Question Paper 7, both the Chief Magistrate¹⁷ and the Law Society of NSW¹⁸ have questioned the prohibition on directing an offender to enter into a good behaviour bond and making a CSO in relation to the same offence.¹⁹ The Chief Magistrate stated 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. ... 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.²⁰

13. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17A.

14. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 14(1), (3), 10(1)(b). This can be contrasted with the position in Queensland which allows for a number of penalties to be imposed whether or not a conviction is recorded: see our discussion on fines in NSW Law Reform Commission, *Non-custodial Sentencing Options*, Sentencing Question Paper 7 (2012) [7.81].

15. Judicial Commission of NSW, *Sentencing Bench Book*, [6-130].

16. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 15(2), which expresses the maximum fine in terms of 1000 penalty units. Section 17 defines a penalty unit as being equivalent to \$110. Offences that are dealt with summarily generally have a maximum penalty of 2 years imprisonment and/or a fine of 100 penalty units (\$11,000) although there are exceptions: see *Criminal Procedure Act 1986* (NSW) s 267, 268; NSW Sentencing Council, *An Examination of the Sentencing Powers of the Local Court* (2010) [1.09]-[1.10].

17. G Henson, *Preliminary Submission PSE05*, 11.

18. Law Society of NSW, *Preliminary Submission PSE08*, 7.

19. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 13; NSW Law Reform Commission, *Non-custodial Sentencing Options*, Sentencing Question Paper 7 (2012) [7.22].

20. G Henson, *Preliminary Submission PSE05*, 11.

Other jurisdictions

Victoria

- 8.16 Victoria has recently changed its sentencing laws.²¹ It has abolished home detention,²² and restricted the use of suspended sentences to offences that are not “serious” or “significant”.²³
- 8.17 Under Victorian law the sentencing options are now:
- a fine;
 - a community corrections order (‘CCO’); and
 - imprisonment (and suspended imprisonment, in limited cases).²⁴
- 8.18 There are also options for discharge with or without conviction, and some options for deferring sentencing.²⁵
- 8.19 The option of a CCO was introduced in January 2012 and allows multiple conditions to be imposed including: supervision and treatment requirements; association restrictions; residence and place restrictions; bans from certain licensed premises; curfew requirements; and judicial monitoring.²⁶ The CCO replaced a number of different community sentences including: community-based orders (which allowed multiple conditions), intensive correction orders and combined custody and treatment orders. A CCO is now the only community-based sentence permitted.
- 8.20 The maximum term of a CCO is two years if imposed in a lower court. If imposed by the higher courts, the maximum is two years or the same as the maximum prison sentence for the offence, whichever is greater.²⁷
- 8.21 Thus a broad range of restrictions and penalties can be combined to suit the needs of the individual offender and the community.
- 8.22 A CCO can be imposed together with a fine, if a fine is authorised by law, or with a sentence of imprisonment up to three months (though not a suspended sentence).

21. *Sentencing Legislation Amendment (Abolition of Home Detention) Act 2011* (Vic), *Sentencing Further Amendment Act 2011* (Vic); *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic).

22. *Sentencing Legislation Amendment (Abolition of Home Detention) Act 2011* (Vic).

23. *Sentencing Act 1991* (Vic) s 27(2B). Under s 3(1), a “serious offence” includes homicide and other offences of serious violence including rape, as well as kidnapping, armed robbery and sexual assault of a child. A “significant offence” includes recklessly causing serious injury, burglary, arson and trafficking in a commercial or greater quantity of a drug of dependence.

24. *Sentencing Act 1991* (Vic) pt 3, 3A, 3B.

25. *Sentencing Act 1991* (Vic) pt 3B div 2. Note also the availability of Justice Plans for offenders with an intellectual disability: pt 3B div 3.

26. *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic) which inserted *Sentencing Act 1991* (Vic) pt 3A div 4.

27. *Sentencing Act 1991* (Vic) s 38(1).

- 8.23 The Victorian approach is very flexible in building community based sentences and allows the combination of a large number of conditions. However, there is little guidance to the court on what combinations to make in particular circumstances.

Tasmania and Australian Capital Territory

- 8.24 Both the ACT and Tasmania do not specify a sentence hierarchy and there are almost no limits on sentence combinations.
- 8.25 ACT law allows for “combination sentences” of two or more sentencing options. Sentences for an offence punishable by imprisonment may include combinations of full-time detention, periodic detention, a suspended sentence order, good behaviour order, fine, driver licence disqualification, reparation order, non-association order, place restriction order or another penalty “available under any other territory law”. Sentences for an offence punishable by fine may include combinations of good behaviour order, fine, driver licence disqualification, reparation order, non-association order, place restriction order or another penalty “available under any other territory law”.²⁸
- 8.26 The *Crimes (Sentencing) Act 2005* (ACT) gives the following examples of combinations sentences:

The following are examples of sentences that might be imposed on an offender by a court who has been convicted of an offence punishable by imprisonment:

- 1 a sentence of 18 months as follows:
 - a 12-month periodic detention period
 - a fine order directing payment of \$500 by stated instalments
 - a good behaviour order for 6 months (the remainder of the term of the sentence) that includes conditions requiring the offender to undertake 240 hours community service work
- 2 a sentence of 3 years and 6 months as follows:
 - an order for 2 years imprisonment with no nonparole period
 - a 1-year periodic detention period and a concurrent non-association order
 - a good behaviour order for 6 months (the remainder of the term of the sentence) and a concurrent non-association order
- 3 a sentence of 2 years as follows:
 - a 1-year periodic detention period and a concurrent place restriction order

28. *Crimes (Sentencing) Act 2005* (ACT) s 29, s 30.

- a good behaviour order for 1 year (the remainder of the term of the sentence)
- a driver licence disqualification order for all of the sentence.²⁹

8.27 When a Tasmanian court imposes a term of imprisonment, a community service order, a probation order or fine, it may also sentence an offender to one or more further sentencing options, as set out in s 8 of the *Sentencing Act 1997* (Tas):

- In addition to a term of imprisonment, a court may also impose a fine, make a rehabilitation program order, a driving disqualification order or, if the offender is over the age of 18 years, a community service or probation order.³⁰
- In addition to a community service order, a court may also impose a probation order, a fine, a rehabilitation program order or a driving disqualification order.³¹
- In addition to a probation order, a court may also impose a fine, a rehabilitation program order or a driving disqualification order.³²
- In addition to a fine, a court may also make a rehabilitation program order or a driving disqualification order.³³

Western Australia

8.28 WA sentencing legislation specifies a clear sentence hierarchy, allowing a court to impose a sentence from the following list in order of ascending severity:

- impose no sentence;
- conditional release order;
- fine;
- community based order;
- intensive supervision order;
- suspended sentence;
- conditional suspended imprisonment;
- term of imprisonment.³⁴

8.29 The WA legislation further provides that a court must not use a sentencing option in the list unless it is satisfied “that it is not appropriate to use any of the options listed before that option”.³⁵

29. *Crimes (Sentencing Act) 2005* (ACT) s 29.

30. *Sentencing Act 1997* (Tas) s 8(1).

31. *Sentencing Act 1997* (Tas) s 8(2).

32. *Sentencing Act 1997* (Tas) s 8(3).

33. *Sentencing Act 1997* (Tas) s 8(4).

34. *Sentencing Act 1995* (WA) s 39(2).

35. *Sentencing Act 1995* (WA) s 39(3).

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- 8.30 Fines may be imposed along with imprisonment or a community sentence, but only if the offence specifies (similar to NSW law).
- 8.31 Although under WA law only one sentence can be imposed, higher level sentences tend to include the requirements of the lower sentences. For example:
- A conditional release order requires the person not to offend for a period. A similar requirement is a standard condition in a community service order and an intensive supervision order.³⁶
 - A community based order requires one or more of a supervision requirement, a program requirement, or a community service requirement. Similar components apply to intensive supervision orders and conditional suspended imprisonment.³⁷
- 8.32 Consequently, within the hierarchy there is a degree of flexibility as to the components of the sentence. In particular, the combination of programs, supervisions and community service components in the community sentences provide considerable flexibility in crafting an adequate sentence. However, imprisonment cannot be imposed in addition to a community order of any sort.
- 8.33 While the WA approach recognises the seriousness of the offending, it could be argued that a hierarchy tends to measure only the “severity” of sentences and is not useful in other ways.

New Zealand

- 8.34 New Zealand legislation also imposes an explicit hierarchy of sentences, but this is more flexible than WA in that there is no requirement that consideration be given to each sentence in order of severity. Instead, some of the sentences have requirements that must be considered in order to ensure the person is suitable.
- 8.35 The *Sentencing Act 2002* (NZ) sets out the hierarchy:

10A Hierarchy of sentences and orders

- (1) The hierarchy of sentences and orders set out in subsection (2) reflects the relative level of supervision and monitoring of, and restrictions imposed on, an offender under each sentence or order.
- (2) The hierarchy of sentences and orders, from the least restrictive to the most restrictive, is as follows:
 - (a) discharge or order to come up for sentence if called on:
 - (b) sentences of a fine and reparation:
 - (c) community-based sentences of community work and supervision:
 - (d) community-based sentences of intensive supervision and community detention:

36. *Sentencing Act 1995* (WA) s 48, 63, 69.

37. *Sentencing Act 1995* (WA) s 64, 72, 84.

- (e) sentence of home detention:
- (f) sentence of imprisonment.

8.36 Under New Zealand law a fine is available as an alternative to imprisonment, unless precluded specifically by statute.³⁸

8.37 The community-based sentence options include the sentences of:

- community work of between 40 and 400 hours allocated by a probation officer;³⁹
- supervision involving regular reporting to a probation officer and compliance with conditions imposed by the probation officer, plus discretionary special conditions which may include attendance at a program and other special conditions;⁴⁰
- intensive supervision involving regular reporting to a probation officer and compliance with conditions imposed by the probation officer, plus special conditions which may include attendance at a program, other special conditions and judicial monitoring;⁴¹
- community detention requiring compliance with a curfew of up to 84 hours a week for up to six months, which may include submission to electronic monitoring if required by a probation officer.⁴²

8.38 There is also considerable flexibility as to the combination of sentences, including combining different types of community-based sentence and other sentences. Imprisonment, however, cannot be imposed with any other penalty apart from a fine. Sections 19 and 20 deal with possible mixtures of sentences:

19 Permitted combinations of sentences

- (1) No court may impose a combination of sentences of different types on an offender in respect of 1 or more offences except as provided in this section.
- (2) A sentence of reparation may be imposed with any sentence.
- (3) A sentence of a fine may be imposed with any sentence, but may only be imposed with a sentence of imprisonment in respect of a particular offence if authorised by the enactment specifying the offence.
- (4) A sentence of supervision may be combined with any sentence except intensive supervision, home detention, or imprisonment.
- (5) A sentence of community work, subject to section 20(2), may be combined with any sentence except imprisonment.
- (6) A sentence of community detention may be combined with any sentence except home detention or imprisonment.

38. *Sentencing Act 2002* (NZ) s 39.

39. *Sentencing Act 2002* (NZ) s 55-69A.

40. *Sentencing Act 2002* (NZ) s 45-54A.

41. *Sentencing Act 2002* (NZ) s 54B-54L.

42. *Sentencing Act 2002* (NZ) s 69B-69M.

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- (7) A sentence of intensive supervision may be combined with any sentence except supervision, home detention, or imprisonment.
- (8) A sentence of home detention may be combined with a sentence of reparation, a fine, or community work.
- (9) A sentence of imprisonment may be combined with a sentence of reparation or, subject to subsection (3), a fine.

20 Guidance on use of combinations of sentences

- (1) A court may impose a particular combination of sentences on an offender only if satisfied that any of the sentences making up the combination, if imposed alone or in any less restrictive combination, would not be in accordance with—
 - (a) the purpose or purposes for which sentence is imposed; or
 - (b) the application of the principles in section 8 to the particular case.
- (2) A court may only combine a sentence of community work with a sentence of supervision or intensive supervision if satisfied that—
 - (a) a sentence of community work is appropriate; but
 - (b) the offender requires the imposition of standard conditions or any of the special conditions available under a sentence of supervision or intensive supervision to address the causes of his or her offending.

8.39 None of the sentences above corresponds to a traditional bond or recognizance. Instead, the NZ Act provides that the court may convict a person and, instead of imposing sentence, order that he or she appear for sentence if called upon within a period of up to one year.⁴³ This order may be combined with a restitution or reparation order.⁴⁴

8.40 The NZ approach of combining sentences rather than components is very flexible, and provides more guidance about when certain sentences are appropriate, and on how to determine severity.

8.41 This approach provides a clearer hierarchy and may be easier for courts to apply. However, many of the sentences overlap or have minimal difference between them (for example, the supervision and intensive supervision options). Arguably this adds complexity without assisting the courts.

Queensland, South Australia and Northern Territory

8.42 In Queensland, a fine may be imposed in addition to any other penalty⁴⁵ and a probation order and a community service order can both be ordered for the same offence.⁴⁶

43. *Sentencing Act 2002* (NZ) s 11, s 110. This approach would appear to constitute a variation of an order under s 11 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) whereby sentencing can be adjourned for up to 12 months.

44. *Sentencing Act 2002* (NZ) s 110(3).

45. *Penalties and Sentences Act 1992* (Qld) s 45(2).

- 8.43 Legislation in South Australia permits a court to impose a fine and/or community service instead of imprisonment⁴⁷ and to impose a condition requiring community service under a bond.⁴⁸
- 8.44 In the Northern Territory, a Community Based Order involves ongoing supervision by a probation officer and the order may include the performance of community work.⁴⁹

Issues arising

- 8.45 The jurisdictional models discussed above provide a number of quite different approaches to the structure of sentencing law and the question of how to create flexible yet consistent options.

Hierarchy of sentences

- 8.46 Some of the purposes of the hierarchy of sentences and the limits on combinations are to constrain sentences to appropriate levels, and to ensure a level of sentencing consistency. Some of the limitations, for example, those requiring the court to impose a sentence of imprisonment first and then determine that it must be served by way of an ICO or home detention, are intended to prevent net widening and to ensure that some sentences operate as alternatives to imprisonment, rather than as more serious forms of community-based orders.⁵⁰ There are some logical problems with this approach. As we note in Question Paper 6, Justice Basten, when considering the steps involved in imposing a suspended sentence, doubted that courts actually follow the required steps and suggested that there is a real, and not just apparent, incongruity in a court engaging in this type of reasoning process.⁵¹ Specifying a statutory hierarchy may be one way of dealing with this issue.

Question 8.1

Should the *Crimes (Sentencing Procedure) Act 1999* (NSW) set out a hierarchy of sentences to guide the courts? What form should such a hierarchy take?

The need for flexibility

- 8.47 Sentencing law should be structured in a way that can accommodate:

46. *Penalties and Sentences Act 1992* (Qld) s 109.
47. *Criminal Law (Sentencing) Act 1988* (SA) s 18.
48. *Criminal Law (Sentencing) Act 1988* (SA) s 42(1)(d).
49. *Sentencing Act* (NT) pt 3, div 4A.
50. NSW Law Reform Commission, *Intermediate Custodial Sentencing Options*, Sentencing Question Paper 6 (2012) [6.86].
51. *Amado v The Queen* [2011] NSWCCA 197 [5].

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- the need for flexibility and discretion in setting sentences including designing an appropriate sentence to reflect the offending and the offender's circumstances, and to reduce the likelihood of re-offending;
 - the need to provide a regime that is simple, consistent and transparent, so that it is easy for busy courts to apply when passing sentence, and easy for the offender and the public to understand any such sentence and its content.
- 8.48 Arguably the NSW approach is the most complex and limited of the models discussed. If more flexibility were introduced around community based options, it may be possible to craft sentences that reduce the need for imprisonment, while providing a more effective response and better chance of reducing re-offending.
- 8.49 If some further flexibility was introduced to allow NSW courts to combine sentencing options or create more flexible omnibus sentencing options, it may be possible to impose sentences that reflect the seriousness of the offending and that also combine components that fulfil other purposes of sentencing such as rehabilitation and community protection.
- 8.50 There is some support for this approach in our preliminary submissions. The NSW Probation and Parole Officers' Association suggested that greater sentencing flexibility could be achieved through a single order with a choice of conditions available to the court including "various penalty components as conditions of bonds or probation" and greater scope to combine conditions.⁵²
- 8.51 It can be argued that far from representing a 'soft option', the ability to combine community-based sentencing components may help mark the seriousness of the offence while reducing the need for full-time imprisonment. There is a benefit to the community if an offender can be rehabilitated and further offending prevented.
- 8.52 A potential advantage of a single order would be that it could be administered and monitored more efficiently. It would also be consistent with a single process for the sentencing court to seek an assessment report on the eligibility of an offender for community-based sentencing options.⁵³
- 8.53 A potential argument against this option is the loss of transparency and consistency of sentencing outcomes. A single community-based order would be inconsistent with a hierarchy of sentencing options, and may give insufficient guidance to courts on which components might be appropriate, or on how to measure the overall severity of the sentence.
- 8.54 A combination of sentencing orders may also risk an overall penalty that is disproportionate to the offence, particularly if onerous conditions are imposed.

52. Probation and Parole Officers' Association of NSW, *Preliminary Submission PSE20*, 15. The Association also argued that new penalty options could be created and used as part of a community-based order, such as options that "focus more on compensation to victims, targeted reparation, community service or attending rehabilitative programs".

53. We discuss streamlining the assessment process in NSW Law Reform Commission, *Procedural and Jurisdictional Possibilities* (2012) [12.41]-[12.46].

Question 8.2

Should the structure of sentences be made more flexible by:

- a. creating a single omnibus community-based sentence with flexible components;
- b. creating a sentencing hierarchy but with more flexibility as to components;
- c. allowing the combination of sentences; or
- d. adopting any other approach?

Particular sentencing combinations

Combinations with fines

- 8.55 The situation in relation to imposing a fine with another penalty is relatively complex in NSW. It relies on whether a fine is an alternative or additional penalty in relation to the particular offence, and whether the offence is dealt with on indictment. Other jurisdictions have more flexibility.
- 8.56 Imposing a fine in addition to a community order can recognise a punitive component in cases where that is required and appropriate.
- 8.57 Limiting the imposition of fines recognises that it may not be appropriate to impose a financial penalty on an offender in addition to another penalty. The limitation reduces the likelihood that a court will impose a fine that is beyond an offender's means, creating enforcement issues and a further risk of re-offending. The procedures for enforcing or mitigating fines (including entry into a Work and Development Order or the imposition by the State Debt Recovery Office of a Community Service Order)⁵⁴ may create anomalies or complications if they conflict or overlap with the other sentencing options imposed along with the fine.

Combinations with imprisonment

- 8.58 Tasmania and the ACT allow community based sentences to be combined with imprisonment. Victoria allows this, but only with very short sentences.
- 8.59 This combination can allow for a punitive aspect through a period of imprisonment (recognising the seriousness of the offending) combined with a community based period of supervision, or program on release that would have the potential to improve the offender's prospects of rehabilitation.
- 8.60 For example, under the current drafting of the CSPA, an appropriate sentence for an offence might be a three year term of imprisonment, divided into a two year non-parole period followed by a one year parole period. If combinations of sentencing options were available, a court could impose an equally adequate sentence for the offence comprising, for example, a shorter fixed term of full-time imprisonment,

54. NSW Law Reform Commission, *Penalty Notices*, Report 132 (2012) [8.63]-[8.69], [9.31]-[9.74].

followed by a period of home detention and then a supervised bond. The combined sentencing option has the advantage of:

- reducing the length and cost of full-time imprisonment;
- incorporating home detention as a transition back to the community for the offender, while maintaining truth in sentencing because the sentence has been imposed by the court;⁵⁵ and
- encouraging the long-term rehabilitation of the offender under the bond, which could include participation in programs and appropriate supervision and support.

8.61 To give another example, if a court determines that home detention is appropriate, at present there is no scope to add a good behaviour bond at the end of the period of home detention, so the court is forced to impose a period of home detention alone which adequately reflects the seriousness of the offence. If there was more flexibility, an adequate sentence might include home detention for a period to be followed by a bond with rehabilitative conditions. This would deliver an adequate sentence, assist the offender's rehabilitation with a view to reducing recidivism, and may reduce the total cost of the sentence to the community.

8.62 In both these cases, the effect of the sentence is maintained, but the custodial length can be reduced by combining rehabilitative and supervisory options. Further, a breach of a bond in the first example may not necessarily result in the offender serving a further period of imprisonment, compared with the situation at present in which a breach of parole exposes the offender to a serious risk of returning to prison. We noted in Question Paper 5 that the majority of offenders sentenced to full-time imprisonment receive a finding of "special circumstances" which permits them to serve a longer proportion of their sentence on parole, but this also exposes them to a longer period during which the Parole Authority might revoke parole for a breach of the parole conditions.⁵⁶

8.63 On the other hand, such an approach may encourage the use of short terms of imprisonment where currently they are not imposed. It may also be argued that such combinations of sentences represents a far harsher punishment, and makes the person subject to the possibility of resentencing for much longer. In the first example, if the person breaches the bond they may need to be resentenced for the original offence, and may well return to prison. It may also be argued that the level of inconsistency in sentences may be increased as courts combine options in unusual ways.

55. See our discussion in NSW Law Reform Commission, *Full-time Imprisonment*, Sentencing Question Paper 5 (2012) [5.108]-[5.115].

56. NSW Law Reform Commission, *Full-time Imprisonment*, Sentencing Question Paper 5 (2012) [5.24]-[5.39]. See the *Crimes (Administration of Sentences) Act 1999* (NSW) pt 7 div 3 for the power of the Parole Authority to revoke parole. Parole conditions include the "standard conditions" of being of good behaviour, not committing any offence and "adapt[ing] to normal lawful community life", as well as any other conditions imposed by the court and/or the Parole Authority: *Crimes (Administration of Sentences) Act 1999* (NSW) s 128; *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 224.

- 8.64 Arguably a period of supervision on parole is designed to assist the rehabilitation of the offender and to reduce re-offending without the need for other types of supervised orders post-imprisonment.

Combinations with conditions not to re-offend

- 8.65 Other jurisdictions have a variety of approaches to the question of combining conditions not to reoffend with various sentencing options.
- 8.66 In NZ no such condition is imposed and a further offence is dealt with when it arises. In NSW it is a condition of all bonds that the offender “be of good behaviour” during the period of the bond.⁵⁷ Similarly, in the NT a court can release an offender on a bond to “be of good behaviour” for the period of the order.⁵⁸
- 8.67 In Victoria, all community corrections orders carry a condition that the offender is not to commit any offence punishable by imprisonment during the term of the order.⁵⁹ Similarly, in Queensland and WA a person must not commit another offence during the period of probation or a community based order, respectively.⁶⁰ In Tasmania, an offender must not commit any offence punishable by imprisonment during the period of a probation order or a community service order.⁶¹ In the ACT, it is a core condition of all good behaviour orders that the offender not commit any offence punishable by imprisonment during the period of the order.⁶²
- 8.68 On the one hand, a requirement not to offend during the period of the sentence creates an incentive not to offend. The response to breach can be flexible, and need not result in imprisonment. It may allow the punitive components of the sentence to be less severe given the offender has the “bond” hanging over them as an additional penalty.
- 8.69 While some jurisdictions apply this condition as a matter of course, it could be imposed on a discretionary basis either by allowing a bond in combination with other sentences (as proposed by the Chief Magistrate) or by allowing a non-offending component to be imposed as part of the sentence. The additional discretion may make the imposition more flexible.
- 8.70 Combinations of sentences with good behaviour requirements can, however, cause difficulties.⁶³ Breach of such a requirement gives the court an opportunity to resentence. If the offender has completed or undertaken a substantial proportion of another part of the sentence (for example, community service obligations) a new

57. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95(b).

58. *Sentencing Act* (NT) s 13(1)(b).

59. *Sentencing Act 1991* (Vic) s 45(1)(a).

60. *Penalties and Sentences Act 1992* (Qld) s 93(1)(a); *Sentencing Act 1995* (WA) s 62(3).

61. *Sentencing Act 1997* (Tas) s 28, 37.

62. *Crimes (Sentencing) Act 2005* (ACT) s 13(2); *Crimes (Sentence Administration) Act 2005* (ACT) s 86(1)(a).

63. Two particular questions arise in relation to good behaviour bonds: what is involved in the requirement to be of good behaviour; and whether there should be express limitations in relation to the other conditions in *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95(c): see NSW Law Reform Commission, *Non-custodial Sentencing Options*, Sentencing Question Paper 7 (2012) [7.32], [7.35]-[7.36].

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sentence might be very onerous, or the court may have limited flexibility in dealing with the breach. It may be argued that dealing with the offender for the new offence is preferable to reopening the sentencing for the previous offence.

Question 8.3

1. What sentence or sentence component combinations should be available?
2. Should there be limits on combinations with:
 - a. fines;
 - b. imprisonment; or
 - c. good behaviour requirements?



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