



**New South Wales  
Law Reform Commission**

## **Sentencing Question Paper 9**

### **Alternative approaches to criminal offending**

July 2012  
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# Question Paper 9:

## Alternative approaches to criminal offending

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<b>Introduction</b> .....	<b>2</b>
Support for alternative approaches.....	2
Cost-effective sentencing .....	4
<b>Early diversion in NSW and other jurisdictions</b> .....	<b>4</b>
Cautions (NSW).....	4
Conditional cautions (England and Wales).....	5
Adult Diversion Scheme (New Zealand).....	6
Criminal Justice Diversion Program (Victoria) .....	7
<b>Program-based diversion</b> .....	<b>8</b>
Court Referral of Eligible Defendants into Treatment (CREDIT) .....	8
<i>Referral and eligibility</i> .....	8
<i>The program</i> .....	9
<i>Evaluation</i> .....	11
<i>Similar programs in Victoria</i> .....	11
Magistrates Early Referral into Treatment program (MERIT) .....	12
<i>Referral and eligibility</i> .....	13
<i>The treatment program</i> .....	13
<i>Evaluation</i> .....	14
Diversion to a Drug Court treatment program.....	15
<i>Eligibility and exclusions</i> .....	15
<i>The treatment program</i> .....	16
<i>Breach and revocation</i> .....	18
<i>Evaluation</i> .....	18
<i>Expansion</i> .....	19
Pre-trial diversion of certain sexual offenders.....	21
<b>Section 11 adjournment</b> .....	<b>21</b>
<b>Intervention programs under the <i>Criminal Procedure Act 1986</i> (NSW)</b> .....	<b>22</b>
The circle sentencing program .....	24
<i>Eligibility</i> .....	24
<i>Circle sentencing group</i> .....	24
<i>Application</i> .....	25
The forum sentencing program .....	26
<i>Eligibility</i> .....	27
<i>The forum</i> .....	28
<i>Effectiveness</i> .....	28
The traffic offender intervention program.....	29
<i>Eligibility</i> .....	29
<b>Approaches to criminal offending</b> .....	<b>30</b>
Restorative Justice .....	30
Problem-solving approaches to justice .....	31
<i>Specialist problem-solving courts</i> .....	32
<i>Community courts</i> .....	34
<i>Mainstreaming problem-solving approaches to justice</i> .....	38
Expansion of problem-solving approaches in NSW? .....	40
<b>Any other approaches?</b> .....	<b>40</b>

### Introduction

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- 9.1 This question paper considers ways in which offenders or suspects can be dealt with without entering the court system, or if they do, how the courts may divert or defer finalising their matters with a view to aiding their rehabilitation and achieving positive outcomes for the community and victims. While this is not strictly a matter of sentencing law, the diversion and deferral options interact with sentencing laws, and provide an alternative to a number of sentencing options. It is therefore important to consider these issues in this reference and explore ways in which reforms might be made that improve the criminal justice system as a whole.
- 9.2 We will discuss existing provisions in NSW and explore how they might be reformed. We will also examine models in some other jurisdictions.
- 9.3 There are a number of points at which diversion can be considered. A caution may be given (usually by the police or another government agency) to a person who is suspected of committing an offence instead of a formal charge being laid. The person does not enter the criminal justice system and prosecution and sentencing do not occur at all. We will discuss cautions, and other early diversion options, and invite views on whether any changes should be made in NSW.
- 9.4 If a person is charged and prosecution has commenced, diversion and deferral programs can be used at different stages with a focus on assisting rehabilitation. A key part of diversion and deferral is to attempt to connect people with services that will help them to address the direct and indirect causes of their offending.
- 9.5 Some of the options discussed in this paper are based on the concept of “problem-solving justice” and some are based on the concept of “restorative justice”. Once we have described the existing programs, we will discuss these conceptual approaches to criminal justice and examine how programs in NSW could be enhanced or new programs introduced based on these approaches.

### Support for alternative approaches

- 9.6 We have received a number of preliminary submissions that support programs containing elements of deferral and diversion.<sup>1</sup>
- 9.7 The NSW Office of the Director of Public Prosecutions suggested that “[d]iversion should be a readily available option generally for first offenders, the mentally ill and drug dependent persons” and that consideration be given to “providing diversionary options for offenders under 25 on [the] basis of research about cognitive development and maturity”.<sup>2</sup> The Mental Health Coordinating Council similarly strongly supported diversion of offenders with mental illness and/or cognitive or

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1. G Henson, *Preliminary Submission PSE05*, 12; Mental Health Coordinating Council, *Preliminary Submission PSE09*, 2; Crime and Justice Reform Committee, *Preliminary Submission PSE12*, 2; D Shoebridge, *Preliminary Submission PSE 16*, 1; Probation and Parole Officers' Association of NSW, *Preliminary Submission PSE20*, 12.

2. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PSE10*, 7-8.

intellectual disabilities to be diverted out of the criminal justice system, especially for summary offences.<sup>3</sup>

9.8 The Chief Magistrate of the Local Court, stated that:

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.<sup>4</sup>

9.9 The Women’s Advisory Council to Corrective Services NSW suggested that diversion programs should:

- “be adapted to meet local needs and public participation in the development of all options should be encouraged”;
- be developed after “adequate consultation with Aboriginal communities and organisations in the planning and implementation stages”;
- “be available at all stages of the criminal justice process”;
- “not be restricted to minor offences but rather should always be an option”; and
- “not automatically lead to a custodial measure” if a condition is breached.<sup>5</sup>

9.10 The Advisory Council also suggested that prior participation “in a pre-court diversionary program should not preclude future diversion”.<sup>6</sup>

9.11 The Mental Health Coordinating Council emphasised the need for more “specially tailored services” to provide adequately for the “complex needs” of “people with mental illness and/or cognitive/intellectual disability”.<sup>7</sup>

9.12 We have also received preliminary submissions suggesting the creation of specialist courts or court listing arrangements (which are discussed in this Question Paper) that emphasise connecting defendants with social services and resources to assist in their rehabilitation:

- Legal Aid NSW submitted that the Queensland Special Circumstances Court diversion program list should be replicated in NSW;<sup>8</sup>
- The Corrective Services NSW Women’s Advisory Council urged the establishment of a problem solving court or lists to “greatly expand the geographic availability of this diversionary option”;<sup>9</sup> and

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3. Mental Health Coordinating Council, *Preliminary Submission PSE09*, 2; see also NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, Consultation Paper 7 (2010).

4. G Henson, *Preliminary Submission PSE05*, 12.

5. Women’s Advisory Council, Corrective Services NSW, *Preliminary Submission PSE19*, 2.

6. Women’s Advisory Council, Corrective Services NSW, *Preliminary Submission PSE19*, 2.

7. Mental Health Coordinating Council, *Preliminary Submission PSE09*, 2.

8. Legal Aid NSW, *Preliminary Submission PSE18*, 7.

9. Women’s Advisory Council, Corrective Services NSW, *Preliminary Submission PSE19*, 12; see also Women in Prison Advocacy Network, *Preliminary Submission PSE17*, 4-5.



## Sentencing question papers

- The Homeless Persons' Legal Service submitted that the MERIT program should be extended geographically and should be available to offenders with other addictive problems, including alcohol or gambling problems.<sup>10</sup>

### Cost-effective sentencing

- 9.13 In 2010/11, the annual cost of adult correctional services in NSW was \$1.223 billion.<sup>11</sup> The cost per prisoner per day in 2010/11 was \$276, slightly below the national average of \$289.11 per day. This was far in excess of the average cost per offender per day in 2010/11 of \$27.17 for community corrections.<sup>12</sup>
- 9.14 Clearly there is justification for incarceration in serious cases, particularly when the protection of the community requires it. The Corrective Services NSW submission to our review of bail laws in NSW noted that “the daily cost of incarceration for many people on remand is not cost effective, and that this expenditure could be utilised in another way to reduce re-offending/recidivism”.<sup>13</sup> This observation is consistent with an approach known as “justice reinvestment”. Justice reinvestment involves moving funds away from more expensive, often end-of-process, crime control options that have been shown to be less effective (for example incarceration) and supporting more effective programs that target the factors that cause offenders to commit crime.<sup>14</sup> The approach aims, at the least, to be cost neutral once the effects flow through, with less crime and consequently fewer custodial sentences generating the savings in prison costs to fund better ways of controlling crime.
- 9.15 Against this background, we consider whether there are more cost-effective ways of reducing re-offending, and improving outcomes in the criminal justice system.

### Early diversion in NSW and other jurisdictions

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- 9.16 In this section of the paper we consider options for early diversion of offenders, and consider whether there are more effective options for less serious offenders.

### Cautions (NSW)

- 9.17 Police have a well-established discretion in NSW not to charge a person whom they suspect of committing an offence and instead to issue a formal or informal caution. This is the case even when the police have sufficient evidence to charge the

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10. Homeless Persons' Legal Service, *Preliminary Submission PSE07*, 10.

11. NSW Department of Corrective Services, “Facts and Figures” <[www.correctiveservices.nsw.gov.au](http://www.correctiveservices.nsw.gov.au)>.

12. Australia, Productivity Commission, *Report on Government Services 2011* (2012) Table 8A.7.

13. Corrective Services NSW, *Submission BA29*, 2.

14. T Lanning, I Loader and R Muir, *Redesigning Justice: Reducing Crime Through Justice Reinvestment* (2nd ed, Institute for Public Policy Research, 2011) 4.

person. Two examples of formal cautioning are the cannabis cautioning scheme<sup>15</sup> and the cautioning of young offenders.<sup>16</sup>

- 9.18 The NSW model leaves the discretion to caution a person entirely with the police prior to charging. It is possible to redesign the caution system so that police prosecutors play a greater role. An advantage of this approach is that the extra layer of review of the charges by a prosecutor may allow scope for offences of greater seriousness to be dealt with by way of a caution, as occurs under the Adult Diversion Scheme in New Zealand and the “conditional cautioning” system in England and Wales.
- 9.19 There may be options to improve or formalise the operation of police cautions and/or diversion. Below we set out a number of models in other jurisdictions as a basis for discussion. We note that our recent (as yet unreleased) report into diversion for people with cognitive and mental health impairments in the criminal justice system explores and makes recommendations in relation to diversionary options in the context of that demographic group.

### Conditional cautions (England and Wales)

- 9.20 The *Criminal Justice Act 2003* (UK) extends the traditional police discretion to caution by permitting a Crown Prosecutor from the Crown Prosecution Service (a specialist prosecution service which handles all prosecutions) to determine that a person be issued with a “conditional caution”<sup>17</sup> after charge if it is considered the appropriate method of disposal and it is in the public interest.<sup>18</sup> This statutory scheme diverts offenders away from the court system and imprisonment and places an emphasis on reparation for the victim<sup>19</sup> and/or the community, and supports the rehabilitation of offenders.
- 9.21 Crown Prosecutors have the discretion to offer a conditional caution to an adult offender:
- who admits the offence during a formal interview;
  - where there is sufficient evidence to prosecute; and
  - who understands the effect of the caution and agrees to it.<sup>20</sup>

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15. NSW Police Force, “Cannabis Cautioning Scheme”, <[www.police.nsw.gov.au/community\\_issues/drugs/cannabis\\_cautioning\\_scheme](http://www.police.nsw.gov.au/community_issues/drugs/cannabis_cautioning_scheme)>.

16. NSW Department of Attorney General and Justice, “Alternatives in Relation to Arrest, Court and Sentencing”, <[www.lawlink.nsw.gov.au/lawlink/victimsservices/ll\\_vs.nsf/pages/VS\\_arrestalternatives](http://www.lawlink.nsw.gov.au/lawlink/victimsservices/ll_vs.nsf/pages/VS_arrestalternatives)>; and E Moore, *The Use of Police Cautions and Youth Justice Conferences in NSW in 2010*, Crime and Justice Statistics 73 (NSW Bureau of Crime Statistics and Research, 2011) 1.

17. *Criminal Justice Act 2003* (UK) pt 3.

18. Director of Public Prosecutions, *The Director’s Guidance on Conditional Cautioning – Guidance to Police Officers and Crown Prosecutors* (6th ed, 2010) [4.5], [4.9], [4.10].

19. Director of Public Prosecutions, *The Director’s Guidance on Conditional Cautioning – Guidance to Police Officers and Crown Prosecutors* (6th ed, 2010) [5.14].

20. *Criminal Justice Act 2003* (UK) s 23.

## Sentencing question papers

- 9.22 In making determinations, the Crown Prosecutor must consider any views expressed by the victim.
- 9.23 A Crown Prosecutor imposes conditions that are proportionate in the circumstances of each case and that must subscribe to one or more of the objectives of the scheme, namely, rehabilitation, reparation and punishment of the offender. The conditions may include: a fine; attendance (for no more than 20 hours) for treatment of drug or alcohol dependency; attending anger management courses or driver rectification classes; and the performance of unpaid community work.<sup>21</sup>
- 9.24 The imposition of a fine, without a judicial finding of guilt, has given rise to some serious concerns.<sup>22</sup> In the debate leading to the introduction of punitive measures, it was argued that placing the ability to punish in the hands of a prosecutor was wrong in principle and represented a “fundamental transfer of sentencing responsibility from magistrates, perhaps even judges ... to prosecutors”.<sup>23</sup>
- 9.25 Conditional cautions are available for a range of offences, such as common assault, assaulting a police officer, unlawful taking of a motor vehicle, drunk and disorderly behaviour, offences of dishonesty such as theft, handling stolen goods and other fraud offences, damaging property, and possession of a drug consistent with personal use<sup>24</sup> but are not available for indictable-only offences, hate crime, homophobic aggravation or domestic violence.<sup>25</sup>
- 9.26 When a conditional caution is administered, the prosecution is suspended. If the offender breaches the conditions imposed by the Crown Prosecutor without reasonable excuse, criminal proceedings may be reactivated and the caution ceases to have effect.<sup>26</sup>
- 9.27 An offender must make an admission of guilt before a conditional caution is administered.<sup>27</sup> Controversially, the offender’s admission to the offence can be used as evidence in a subsequent prosecution for the offence, should the conditions attached to the caution be breached without reasonable excuse.<sup>28</sup>

### Adult Diversion Scheme (New Zealand)

- 9.28 In New Zealand the Police Prosecution Service administers a similar diversion scheme. Once charges have been laid and the matter is listed in court, the matter is reviewed by police prosecutors who may apply for an adjournment of the matter so

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21. *Criminal Justice Act 2003* (UK) s 22; I Brownlee, “Conditional Cautions and Fair Trial Rights in England and Wales; Form Versus Substance in the Diversionary Agenda?” [2007] *Criminal Law Review* 129, 130.

22. I Brownlee, “Conditional Cautions and Fair Trial rights in England and Wales; Form Versus Substance in the Diversionary Agenda?” [2007] *Criminal Law Review* 129, 130.

23. United Kingdom, *Parliamentary Debates*, House of Commons, 24 October 2006, 141.

24. Director of Public Prosecutions, *The Director’s Guidance on Conditional Cautioning – Guidance to Police Officers and Crown Prosecutors* (6th ed, 2010) 12, Annex A.

25. Director of Public Prosecutions, *The Director’s Guidance on Conditional Cautioning – Guidance to Police Officers and Crown Prosecutors* (6th ed, 2010).

26. *Criminal Justice Act 2003* (UK) s 24.

27. *Criminal Justice Act 2003* (UK) s 23.

28. *Criminal Justice Act 2003* (UK) s 24(2).



that the person can take part in a diversionary program with a view to avoiding a criminal conviction. The scheme operates as an exercise of the prosecution discretion according to police policy guidelines. There is no legislative basis, but the scheme is longstanding.

- 9.29 The offender must accept full responsibility for the offence and indicate or enter a guilty plea.
- 9.30 The prosecutor must make an assessment of the appropriateness of diverting the matter, taking into account both the public interest (including the nature and facts of the offence) and the personal circumstances of the offender.
- 9.31 The offender must accept responsibility for the offence and agree to “diversion agreement conditions” which are designed to target the reasons for the offending and can include alcohol and/or violence prevention counselling, reparation to the victim and/or community work.
- 9.32 If the diversion is successful, the police prosecutor may apply for the matter to be discharged and the offender to be excused from returning to court.<sup>29</sup>

### Criminal Justice Diversion Program (Victoria)

- 9.33 In Victoria, a person who is charged with an offence that is triable summarily and who acknowledges responsibility for the offence may participate in a “Criminal Justice Diversion Program” prior to a plea being entered, provided it appears appropriate to the Magistrates’ Court and provided the prosecution and the accused consent.<sup>30</sup> The matter may be adjourned for up to 12 months to allow for participation in the program,<sup>31</sup> which may require the accused to:
- apologise to the victim;
  - compensate the victim;
  - attend for counselling and/or treatment;
  - perform community work;
  - make a donation to a charity or community organisation; or
  - attend a driving course.<sup>32</sup>
- 9.34 Offences subject to a minimum or fixed sentence or penalty (except for demerit points) and offences involving driving a vehicle under the influence of alcohol or drugs are not eligible for diversion.<sup>33</sup> Upon satisfactory completion of a diversion program no plea is to be entered and the Magistrates’ Court must discharge the

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29. NZ Police, “Adult Diversion Scheme – Diversion Policy” <[www.police.govt.nz/sites/default/files/diversion\\_policy\\_2011.pdf](http://www.police.govt.nz/sites/default/files/diversion_policy_2011.pdf)>.

30. *Criminal Procedure Act 2009* (Vic) s 59(2).

31. *Criminal Procedure Act 2009* (Vic) s 59(2).

32. Magistrates Court of Victoria, *Guide to Court Support and Diversion Services* (2011) 9.

33. *Criminal Procedure Act 2009* (Vic) s 59(1).

accused without any finding of guilt,<sup>34</sup> however demerit points associated with certain traffic offences are still recorded.<sup>35</sup>

### Question 9.1

Should an early diversion program be established in NSW? If so, how should it operate?

## Program-based diversion

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- 9.35 NSW has a number of programs that support diversionary approaches. Their main focus is to case manage the defendant or provide intensive intervention or treatment. They operate under a range of legal bases. In this section we note their operation and ask whether they can be improved.

### Court Referral of Eligible Defendants into Treatment (CREDIT)

- 9.36 The Court Referral of Eligible Defendants into Treatment program (CREDIT) is a scheme available in two Local Courts that aims to reduce re-offending rates by addressing the causes of offending. The program directs defendants with various types of problems that have contributed to offending behaviour into treatment and other services. There is no specific legislative basis; the scheme operates under a general power of the court to adjourn proceedings and grant bail.
- 9.37 The CREDIT program specifically focuses on the defendant's risk of re-offending:
- The risk principle states that offender recidivism can be reduced if the level of treatment services provided to the offender is proportional to the offender's risk of re-offending. This requires two things: identification of an offender's risk of re-offending and matching the level of treatment to the level of risk.<sup>36</sup>
- 9.38 CREDIT was introduced in August 2009 and currently operates in the Local Court at Burwood and Tamworth.<sup>37</sup>

### *Referral and eligibility*

- 9.39 Prior to entering a plea, a referral to CREDIT may occur on the initiative of a defendant, a defendant's solicitor, a magistrate, the police or the staff of some other diversion or intervention programs. There is a two-stage assessment process by CREDIT staff who meet face-to-face with the defendant, first to conduct an initial eligibility assessment; and secondly, to conduct a more comprehensive needs assessment of the defendant's suitability for the program and to identify appropriate goals. The aim is for these assessments to take place before the first appearance at

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34. *Criminal Procedure Act 2009* (Vic) s 59(4).

35. *Criminal Procedure Act 2009* (Vic) s 59(7).

36. Crime Prevention Division, NSW Attorney General's Department, *NSW Credit Program: Court Referral of Eligible Defendants into Treatment* (2009) 8.

37. L Trimboli, *NSW Court Referral of Eligible Defendants into Treatment (CREDIT) Pilot Program: An Evaluation*, Crime and Justice Bulletin No 159 (NSW Bureau of Crime Statistics and Research, 2012) 1.

court, so that the magistrate will be in a position to decide if it is appropriate to adjourn the matter so that the defendant can participate. If the defendant's participation is successful, a final report is provided for the court to take into account in sentencing. If the defendant withdraws, or his or her participation is poor, the program can be terminated on the recommendation of CREDIT staff and the matter will then proceed through the court in the usual way.<sup>38</sup>

- 9.40 After a plea has been entered, only a magistrate can make a referral to the program.<sup>39</sup>
- 9.41 To be eligible for the program a defendant must:
- be an adult with “an identifiable problem” such as “substance abuse, other addictions, mental health problems, unstable housing [or] poor employment history/prospects” which has contributed to offending behaviour;
  - be charged with an offence that may be dealt with in the Local Court;
  - “be motivated to address the problems related to his/her offending behaviour”; and
  - live within a practicable distance of treatment and other services.<sup>40</sup>
- 9.42 Defendants are not eligible for CREDIT if they are remanded or subject to a Corrective Services supervision order or have been charged with or convicted of a sexual offence in the last five years.<sup>41</sup>

### *The program*

- 9.43 If a defendant is found to be eligible, the case is adjourned to allow for a CREDIT assessment to be made. A CREDIT case worker develops an intervention plan in consultation with the defendant and it is presented to the court. The case is then adjourned for two to six months to allow the defendant to participate in the program. Up to three extensions over six months may be granted.<sup>42</sup>

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38. L Trimboli, *NSW Court Referral of Eligible Defendants into Treatment (CREDIT) Pilot Program: An Evaluation*, Crime and Justice Bulletin No 159 (NSW Bureau of Crime Statistics and Research, 2012) 4-6, citing NSW Department of Attorney General and Justice, *Operational Manual: Court Referral of Defendants into Treatment (CREDIT) program* (2011, unpublished).

39. L Trimboli, *NSW Court Referral of Eligible Defendants into Treatment (CREDIT) Pilot Program: An Evaluation*, Crime and Justice Bulletin No 159 (NSW Bureau of Crime Statistics and Research, 2012) 4.

40. L Trimboli, *NSW Court Referral of Eligible Defendants into Treatment (CREDIT) Pilot Program: An Evaluation*, Crime and Justice Bulletin No 159 (NSW Bureau of Crime Statistics and Research, 2012) 4.

41. L Trimboli, *NSW Court Referral of Eligible Defendants into Treatment (CREDIT) Pilot Program: An Evaluation*, Crime and Justice Bulletin No 159 (NSW Bureau of Crime Statistics and Research, 2012) 4, 7.

42. L Trimboli, *NSW Court Referral of Eligible Defendants into Treatment (CREDIT) Pilot Program: An Evaluation*, Crime and Justice Bulletin No 159 (NSW Bureau of Crime Statistics and Research, 2012) 4-6.

## Sentencing question papers

- 9.44 Key characteristics of CREDIT include:<sup>43</sup>
- linking the defendant to a range of services, thereby creating the capacity to address a broad range of issues;
  - variation of the intensity of service response dependent on the defendant's needs and risk of re-offending; and
  - a level of court involvement, which is dependent on the magistrate's discretion.
- 9.45 Participants are able to access services relating to many areas, including:<sup>44</sup>
- accommodation;
  - financial counselling;
  - counselling for gambling;
  - mental health assessment or support;
  - suicide counselling;
  - domestic violence or sexual assault support;
  - drug assessment, treatment or support;
  - alcohol misuse and treatment;
  - education, training or employment; and
  - disability services.
- 9.46 A participant's involvement in the program can be terminated if he or she fails to complete the plan or commits an offence and bail is refused.<sup>45</sup>
- 9.47 An unsuccessful completion of CREDIT or a decision to withdraw means that the matter will proceed through the usual court process but that fact does not give rise to negative consequences at sentencing.<sup>46</sup>
- 9.48 On completion or termination of the program, the case is tried or proceeds to sentencing in accordance with the usual practice of the Local Court. Successful completion of CREDIT is likely to be taken into account at sentencing.<sup>47</sup>

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43. NSW Attorney General's Department, Crime Prevention Division, *NSW Credit Program: Court Referral of Eligible Defendants into Treatment* (2009) 6. See also S Ross, *Evaluation of the Court Integrated Services Program: Final Report* (2009) 21, 61.

44. Crime Prevention Division, *NSW Credit Program: Court Referral of Eligible Defendants into Treatment* (NSW Attorney General's Department, 2009).

45. Crime Prevention Division, *Operational Manual: Court Referral of Eligible Defendants Into Treatment (CREDIT) Program* (Department of Attorney General and Justice, 2011) 16.

46. L Trimboli, *NSW Court Referral of Eligible Defendants into Treatment (CREDIT) Pilot Program: An Evaluation*, Crime and Justice Bulletin No 159 (NSW Bureau of Crime Statistics and Research, 2012) 7.

47. L Trimboli, *NSW Court Referral of Eligible Defendants into Treatment (CREDIT) Pilot Program: An Evaluation*, Crime and Justice Bulletin No 159 (NSW Bureau of Crime Statistics and Research, 2012) 18.

### *Evaluation*

- 9.49 In 2012, the NSW Bureau of Crime Statistics and Research ('BOCSAR') published an evaluation of CREDIT including interviews with participants and stake-holders (including magistrates, registrars, solicitors, police prosecutors and program staff). Another evaluation focusing on the effectiveness of the program in reducing the risk of re-offending is currently under way.<sup>48</sup>
- 9.50 The results of the first evaluation demonstrate that there were high levels of satisfaction among participants and stakeholders, and stakeholders suggested the State-wide implementation of the program.<sup>49</sup>
- 9.51 The BOCSAR evaluation noted that:

Participants reported that participation in the program had improved their physical and mental health, given them a more positive outlook on life, increased their confidence and given their lives structure and direction. The program had taught them different strategies for managing problems. It also taught them to replace destructive behaviours with constructive activities. In addition to being beneficial to themselves, participants believed that the program had concomitant benefits for their families. They reported that their participation in the program had improved their relationships with partners, children and other family members. Furthermore, as a result of the program, defendants had become informed about the types of services available and how to negotiate these services. Thus, if the need arises in the future, either for themselves or a member of their family, they are better equipped to seek treatment or assistance at an earlier stage.<sup>50</sup>

### *Similar programs in Victoria*

- 9.52 The CREDIT program in NSW was partially influenced by Victoria's Court Integrated Services Program ('CISP').<sup>51</sup>
- 9.53 CISP was established in Victoria in November 2006 and began operating in 2007.<sup>52</sup> It provides short term assistance for defendants with health and social needs, addresses the causes of offending through individualised case management and provides access to treatment and community support services in order to reduce the likelihood of re-offending.<sup>53</sup> CISP links defendants to support services including drug

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48. L Trimboli, *NSW Court Referral of Eligible Defendants into Treatment (CREDIT) Pilot Program: An Evaluation*, Crime and Justice Bulletin No 159 (NSW Bureau of Crime Statistics and Research, 2012) 21.

49. L Trimboli, *NSW Court Referral of Eligible Defendants into Treatment (CREDIT) Pilot Program: An Evaluation*, Crime and Justice Bulletin No 159 (NSW Bureau of Crime Statistics and Research, 2012) 21.

50. L Trimboli, *NSW Court Referral of Eligible Defendants into Treatment (CREDIT) Pilot Program: An Evaluation*, Crime and Justice Bulletin No 159 (NSW Bureau of Crime Statistics and Research, 2012) 21.

51. L Trimboli, *NSW Court Referral of Eligible Defendants into Treatment (CREDIT) Pilot Program: An Evaluation*, Crime and Justice Bulletin No 159 (NSW Bureau of Crime Statistics and Research, 2012) 1-2.

52. Victoria, Department of Justice, *Court Integrated Services Program: Tackling the causes of crime*, Executive Summary Evaluation Report (2010) 3.

53. Magistrates Court of Victoria, *Guide to Court Support and Diversion Services* (2011) 5.



and alcohol treatment, crisis accommodation, disability services and mental health services.<sup>54</sup>

- 9.54 CISP is currently available in three Magistrates' Courts prior to sentencing, and regardless of whether a plea has been entered. A defendant must consent to participate in the program.
- 9.55 An evaluation of CISP found that the program reduced re-offending, improved the health of participants and resulted in significant cost savings.<sup>55</sup>
- 9.56 Another similar program in Victoria is the CREDIT/Bail Support Program ('CBSP') which is available at certain Magistrates' Courts<sup>56</sup> irrespective of plea. The program "seeks to increase the likelihood of an accused being granted bail and successfully completing a bail period by linking them into accommodation, providing access to drug treatment, material aid and support according to their assessed needs".<sup>57</sup> The program aims to reduce the risk of re-offending and provide access to drug treatment and rehabilitation programs, mental health and disability supports, accommodation, welfare, legal and other community supports. Defendants are required to commit to treatment and attend case management meetings.<sup>58</sup>

### Question 9.2

Is the Court Referral of Eligible Defendants into Treatment program operating effectively? Should any changes be made?

## Magistrates Early Referral into Treatment program (MERIT)

- 9.57 The Magistrates Early Referral into Treatment program ('MERIT') is a voluntary, pre-plea scheme available in some Local Courts for defendants with drug problems.<sup>59</sup> It was introduced as a pilot in 2000 and has since expanded to many locations in NSW. Similarly to CREDIT, there is no specific legislative basis for the program. Compliance is monitored as a condition of bail.
- 9.58 The program aims to reduce criminal offending associated with drug use and allows voluntary participants to engage in drug treatment and rehabilitation for the purpose of removing or substantially alleviating drug dependency and reducing drug-related crime. While the program's aims are similar to the Drug Court (discussed below), it differs in that it is a voluntary pre-plea scheme available only in the Local Court and targets less serious offending.<sup>60</sup>

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54. Victoria, Department of Justice, *Court Integrated Services Program: Tackling the causes of crime*, Executive Summary Evaluation Report (2010) 3.

55. Victoria, Department of Justice, *Court Integrated Services Program: Tackling the causes of crime*, Executive Summary Evaluation Report (2010) 2.

56. Magistrates Court of Victoria, *Guide to Court Support and Diversion Services* (2011) 7.

57. Magistrates Court of Victoria, *Guide to Court Support and Diversion Services* (2011) 6.

58. Magistrates Court of Victoria, *Guide to Court Support and Diversion Services* (2011) 6-7.

59. Local Court of NSW, *Case Management of Criminal Proceedings in the Local Court* (Practice Note Crim 1, 24 April 2012) [12.1].

60. J Linden, "Magistrates Early Referral into Treatment Program (MERIT)" (2003) 15(5) *Judicial Officers' Bulletin* 33.

*Referral and eligibility*

- 9.59 Defendants may be referred for assessment for MERIT early in the court process by themselves, legal representatives, a magistrate or any other person (for example, health professional, probation and parole officer, family member or friend of the defendant). Referral for assessment may also occur on apprehension by the police.<sup>61</sup>
- 9.60 To be eligible to participate in MERIT the defendant must be a known or suspected adult drug user. In some locations, the MERIT program is also available to offenders with alcohol problems.<sup>62</sup> The defendant must voluntarily agree to participate and be eligible for bail (or not require bail consideration). The program is not available in relation to those who are charged with offences that are strictly indictable, sexual offences or offences involving serious violence. The defendant must not have similar offences pending before a court.<sup>63</sup>
- 9.61 If a defendant is eligible to participate, proceedings are adjourned for the MERIT assessment team to conduct a suitability assessment. If found suitable, the defendant may be placed in the program if the magistrate approves. If the defendant is found to be unsuitable, the matter will proceed in the usual way.<sup>64</sup>

*The treatment program*

- 9.62 On acceptance into the program an individualised treatment plan is devised and a defendant is monitored by the court as a condition of bail.<sup>65</sup> The defendant appears before the court at intervals with a progress report provided to the court.
- 9.63 MERIT treatment plans are generally three months in duration and are determined solely by MERIT caseworkers. They can include medically supervised and home-based detoxification, drug therapy, residential rehabilitation, counselling and psychiatric treatment.<sup>66</sup>
- 9.64 Following the conclusion of the program, a final report will be provided to the court and the defendant will be asked to enter a plea. A defendant's successful engagement in the program can be considered on sentence and may be "a matter of some weight to be taken into account in the defendant's favour".<sup>67</sup> However, the

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61. Local Court of NSW, *Case Management of Criminal Proceedings in the Local Court* (Practice Note Crim 1, 24 April 2012) [12.2].

62. Local Court of NSW, *Case Management of Criminal Proceedings in the Local Court* (Practice Note Crim 1, 24 April 2012) [12.1].

63. Local Court of NSW, *Case Management of Criminal Proceedings in the Local Court* (Practice Note Crim 1, 24 April 2012) [12.4].

64. Local Court of NSW, *Case Management of Criminal Proceedings in the Local Court* (Practice Note Crim 1, 24 April 2012) [12.5].

65. J Linden, Magistrates Early Referral into Treatment Program (MERIT) (2003) 15(5) *Judicial Officers' Bulletin* 33.

66. Local Court of NSW, *Case Management of Criminal Proceedings in the Local Court* (Practice Note Crim 1, 24 April 2012) [12.6].

67. *R v Brown* [2006] NSWCCA 144 [4]. The applicants had complied with and successfully completed a MERIT program over a period of 14 months.

## Sentencing question papers

completion of a MERIT program should not be equated with a period of quasi-custody, such as a full-time residential program in a drug rehabilitation centre.<sup>68</sup>

- 9.65 Minor non-compliance with the treatment plan may simply be noted in interim or final reports to the court. However, the MERIT team must notify the court of a defendant's failure to comply with the program whereupon the magistrate will determine whether the defendant continues in the program or is removed.<sup>69</sup>
- 9.66 On removal or withdrawal from the program the matter will proceed in the usual way and the defendant may enter a plea.<sup>70</sup> Failure to complete MERIT will not adversely affect a defendant's sentence as participation in the scheme is voluntary.<sup>71</sup>

### *Evaluation*

- 9.67 A 2009 NSW BOCSAR study found that successful completion of the MERIT program significantly reduced the number of defendants re-offending within two years.<sup>72</sup>
- 9.68 A 2004 survey of magistrates found high levels of judicial satisfaction with the MERIT program.<sup>73</sup>
- 9.69 A 2003 evaluation of the Lismore MERIT program estimated that every dollar spent on MERIT saved at least \$2.41 on the costs of prison and probation. The estimated potential savings, which included savings on police investigation, hospitalisation and savings from reduced crime, were \$5.54 for every dollar spent.<sup>74</sup>

### **Question 9.3**

Is the Magistrates Early Referral into Treatment program operating effectively? What changes, if any, should be made?

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68. *R v Brown* [2006] NSWCCA 144 [59].

69. Local Court of NSW, *Case Management of Criminal Proceedings in the Local Court* (Practice Note Crim 1, 24 April 2012) [12.7].

70. Local Court of NSW, *Case Management of Criminal Proceedings in the Local Court* (Practice Note Crim 1, 24 April 2012) [12.7].

71. J Linden, "Magistrates Early Referral into Treatment Program (MERIT)" (2003) 15(5) *Judicial Officers' Bulletin* 33.

72. R Lulham, *The Magistrates Early Referral Into Treatment Program Impact of Program Participation on Re-offending by Defendants with a Drug Use Problem*, Crime and Justice Bulletin No 131 (NSW Bureau of Crimes Statistics and Research, 2009) 8-9.

73. L Barnes and P Poletti, *MERIT: Magistrates Early Referral Into Treatment Program – A Survey of Magistrates*, Monograph 24 (Judicial Commission of New South Wales, 2004) 50.

74. L Bartels, *Challenges in Mainstreaming Specialty Courts*, Trends and Issues in Crime and Criminal Justice No 383 (Australian Institute of Criminology, 2009) 3 citing Northern Rivers University Department of Health, *Evaluation of the Lismore MERIT Pilot Program - Final Report* (NSW Attorney General's Department, 2003).

## Diversion to a Drug Court treatment program

- 9.70 The Drug Court of NSW is a specialist court that aims to reduce criminal activity resulting from drug dependency.<sup>75</sup> Under the Drug Court treatment program, drug dependant offenders who would otherwise be highly likely to face sentences of full-time imprisonment are diverted into rehabilitative treatment.<sup>76</sup> The Drug Court has its own Act.<sup>77</sup> It is an example of a problem-solving jurisdiction (see below).
- 9.71 The Drug Court program began in Parramatta in 1999 and has since expanded to a second Drug Court in the Hunter Region. It is anticipated that a third location will open soon in central Sydney.<sup>78</sup>
- 9.72 Between 2004 and 2009, the number of entrants ranged between approximately 130 and 170 per year. Between 40% and 57% of offenders received a non-custodial sentence at the end of the program.<sup>79</sup> As at 2009, about 21% of participants were female and 12% identified as Aboriginal or Torres Strait Islander.<sup>80</sup>
- 9.73 The Drug Court is also involved in the compulsory drug treatment of offenders within prison, however, we have discussed that program in an earlier question paper<sup>81</sup> and will not address it further in this paper.

### *Eligibility and exclusions*

- 9.74 The Local and District Courts within the nominated catchment areas can refer cases to the Drug Court.<sup>82</sup> Reference to the Drug Court is not available for Children's Court matters,<sup>83</sup> although a similar approach was provided by the Youth Drug and Alcohol Court.<sup>84</sup>
- 9.75 The offender's usual place of residence must be within nominated local government areas for each Drug Court.<sup>85</sup> There is also a restriction on the courts which can refer offenders to the Drug Court, again broadly reflecting the areas in which offenders must usually reside.<sup>86</sup>
- 9.76 To be eligible for referral to the Drug Court a person must:

75. NSW Bureau of Crime Statistics and Research, *The New South Wales Drug Court Evaluation: A Process Evaluation* (2002) 1; *Drug Court Act 1998* (NSW) s 3.

76. NSW, *Parliamentary Debates*, Legislative Assembly, 27 October 1998, 9031.

77. *Drug Court Act 1998* (NSW).

78. NSW Drug Court, "About Us – History", <[www.drugcourt.lawlink.nsw.gov.au/drgcrt/dc\\_history.html](http://www.drugcourt.lawlink.nsw.gov.au/drgcrt/dc_history.html)>.

79. NSW Drug Court, *Annual Review 2009*, 8.

80. R Dive and S Tonkin, "Drug Court of NSW" (Speech delivered at the Drug Court of NSW 10th Anniversary Conference, Parramatta, 6 February 2009).

81. NSW Law Reform Commission, *Intermediate Custodial Sentencing Options*, Sentencing Question Paper 6 (2012) [6.2]-[6.16].

82. *Drug Court Act 1998* (NSW) s 6, s 7; *Drug Court Regulation 2010* (NSW) cl 6.

83. *Drug Court Act 1998* (NSW) s 5(1); *Drug Court Regulation 2010* (NSW) cl 4.

84. Children's Court of NSW, *Practice Note for the Youth Drug and Alcohol Court* (Practice Note No 1). The Government has ceased funding the program so that no new referrals are being accepted into the program from 1 July 2012.

85. *Drug Court Act 1998* (NSW) s 5(1); *Drug Court Regulation 2010* (NSW) cl 4(a).

86. *Drug Court Act 1998* (NSW) s 6(1); *Drug Court Regulation 2010* (NSW) cl 6.

## Sentencing question papers

- be charged with an offence;
  - if convicted, be highly likely to serve a sentence of full-time imprisonment;
  - have indicated that he or she intends to plead guilty to the offence;
  - appear to be dependent on prohibited drugs;<sup>87</sup>
  - reside within a nominated catchment area;
  - be at least 18 years of age; and
  - not be suffering from any mental condition that could restrict the person's active participation in a program.<sup>88</sup>
- 9.77 A person is not eligible if charged with a serious drug supply offence that cannot be dealt with summarily or an offence involving violent conduct or sexual assault.<sup>89</sup>
- 9.78 Courts may also refer to police intelligence when judging an offender's eligibility. This intelligence includes information on whether the person has ever been forcibly taken to a psychiatric hospital or whether he or she has been the subject of an apprehended violence order.<sup>90</sup>
- 9.79 The Drug Court has a discretion whether to accept an offender into the program<sup>91</sup> and an offender who is not accepted is sent back to the referring court.<sup>92</sup>

### *The treatment program*

- 9.80 Participants accepted into the Drug Court program are first subject to custodial remand for up to 21 days for detoxification, assessment and development of a treatment plan.<sup>93</sup>
- 9.81 All participants enter custody, even if they are referred to the Drug Court on bail.<sup>94</sup> On completion an offender is returned to the Drug Court, where he or she is required to plead guilty, and sign an undertaking to abide by his or her obligations

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87. *Drug Court Act 1998* (NSW) s 5(1)(d) refers to prohibited drugs within the meaning of the *Drug Misuse and Trafficking Act 1985* (NSW) and any other drugs prescribed by the *Drug Court Regulation 2010* (NSW). As at June 2012, no further drugs had been included in the regulations. *Drug Misuse and Trafficking Act 1985* (NSW) s 3 defines "prohibited drug" as any substance specified in sch 1. It does not include a prohibited plant (in turn defined as a cannabis plant under cultivation or certain other growing plants), but does include cannabis leaf, cannabis oil and cannabis resin.

88. *Drug Court Act 1998* (NSW) s 5(1); *Drug Court Regulation 2010* (NSW) cl 4.

89. *Drug Court Act 1998* (NSW) s 5(2).

90. D Weatherburn, C Jones, L Snowball, and J Hua, *The NSW Drug Court: A Re-evaluation of its Effectiveness*, Crime and Justice Bulletin No 121 (NSW Bureau of Crime Statistics and Research, 2008) 3.

91. *Drug Court Act 1998* (NSW) s 6-7.

92. NSW Department of Attorney General and Justice, "Drug Court of New South Wales", <[www.lawlink.nsw.gov.au/Lawlink/drug\\_court/ll\\_drugcourt.nsf/pages/adrgcrt\\_program#11](http://www.lawlink.nsw.gov.au/Lawlink/drug_court/ll_drugcourt.nsf/pages/adrgcrt_program#11)>.

93. *Drug Court Act 1998* (NSW) s 8A.

94. NSW Department of Attorney General and Justice, "Drug Court of New South Wales" <[www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au)>.



under the program, in order to receive an initial sentence that is suspended.<sup>95</sup> The Court then supervises the participant's rehabilitation process during the period of the suspended sentence.

- 9.82 Treatment plans are individually tailored to the specific needs of participants. Included in each plan are conditions for evidence-based drug treatment, social support and the development of living skills, close judicial supervision and regular drug testing.<sup>96</sup> Treatment plans may also include residential conditions requiring a participant to reside in a rehabilitation centre, or in supported accommodation arranged by the Court.<sup>97</sup>
- 9.83 Each participant's treatment plan comprises of three phases. Each phase has a minimum time frame and specific goals that must be attained before progression to the next phase of the program:
- Phase 1 has a minimum period of three months. Participants are required to reduce drug use, stabilise their physical health, cease criminal activity, submit to drug testing three times a week and report to the Drug Court once a week.
  - Phase 2 also has a minimum term of three months. Participants must remain drug and crime free, and work towards developing life and job skills in order to progress to the next stage. They must submit to drug testing twice weekly and report to the Drug Court fortnightly.
  - Phase 3 has a minimum term of six months. Participants are expected to seek employment and become fiscally responsible. Drug testing continues twice weekly, and participants are required to report to the Drug Court monthly.<sup>98</sup>
- 9.84 The Drug Court Team that manages participants in the program comprises a coalition that includes the Drug Court Judge, a DPP solicitor, a Police Prosecutor, a clinical nurse consultant, Legal Aid solicitors, the Community Compliance Monitoring Group Co-ordinator, and the registrar of the court.<sup>99</sup>
- 9.85 At the conclusion of the offender's treatment plan, either because of graduation or otherwise, the Drug Court must reconsider the initial sentence in light of the offender's participation in the program.<sup>100</sup> Participation in the Drug Court program is not equivalent to imprisonment, nor is it a form of pre-sentence custody that would require a sentence to be backdated.<sup>101</sup> Instead participation in the scheme should be treated the same as when an offender has been on bail for a lengthy period with

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95. *Drug Court Act 1998* (NSW) s 7A; Australian Institute of Criminology, *Australian Responses to Illicit Drugs: Drug Courts* (2010).

96. NSW Department of Attorney General and Justice, "Drug Court of New South Wales", <[www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au)>.

97. NSW Department of Attorney General and Justice, "Drug Court of New South Wales" <[www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au)>.

98. NSW Department of Attorney General and Justice, "Drug Court of New South Wales" <[www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au)>.

99. Drug Court of NSW, "Monitoring compliance with the program" <[www.drugcourt.lawlink.nsw.gov.au/drgcrt/dc\\_program/dc\\_monitoring.html](http://www.drugcourt.lawlink.nsw.gov.au/drgcrt/dc_program/dc_monitoring.html)>.

100. *Drug Court Act 1998* (NSW) s 12.

101. *Bushara v The Queen* [2006] NSWCCA 8; Judicial Commission of NSW, *Sentencing Bench Book* [12-520].

strict conditions.<sup>102</sup> Successful completion of the treatment program will be taken into account in determining the final sentence. If the program is not completed successfully, the participant may be re-sentenced, but the sentence cannot be greater than the initial sentence.<sup>103</sup>

### *Breach and revocation*

9.86 Treatment programs take at least 12 months to complete,<sup>104</sup> unless terminated sooner. During that time the Court can impose sanctions for breach or award privileges for satisfactory compliance.<sup>105</sup> In the second reading speech it was noted that:

the program targets an extremely difficult treatment group – that is, chronic, drug-dependant offenders. For this group, relapse must realistically be expected as part of the recovery process. The program will seek to deal with such lapses within the confines of the program, with exclusion from the program a last resort.<sup>106</sup>

9.87 The Drug Court may terminate the participation of an offender in the program if it is satisfied, on the balance of probabilities, that the offender is unlikely to make any further progress in the program or that the offender's further participation in the program poses an unacceptable risk to the community that he or she may re-offend.<sup>107</sup> Termination will normally occur according to established criteria such as the commission of new offences, continual non-attendance or patterns of positive drug tests.<sup>108</sup> An offender who finds himself or herself unable or unwilling to continue on the program can withdraw in which case the matter is returned to court for the imposition of a final sentence.<sup>109</sup>

### *Evaluation*

9.88 A 2008 evaluation indicated that the NSW Drug Court was more cost effective and more successful at lowering the rate of recidivism than prison.<sup>110</sup>

9.89 In 2008, the total cost of the Drug Court program was estimated at \$16.3m per year. Of this figure some 51% or \$8.4m was attributed to the cost of final imprisonment following participation in the program. If offenders had been imprisoned instead of participating in the program, on the other hand, the cost was estimated at \$18.1m

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102. Judicial Commission of NSW, *Sentencing Bench Book* [12-520].

103. *Drug Court Act 1998* (NSW) s 10(1)(b), s 11, s 12.

104. Australian Institute of Criminology, *Australian Responses to Illicit Drugs: Drug Courts* (2010).

105. *Drug Court Act 1998* (NSW) s 10(1)(a), s 16; Australian Institute of Criminology, *Australian responses to illicit drugs: Drug courts* (2010).

106. NSW, *Parliamentary Debates*, Legislative Assembly, 27 October 1998, 9032.

107. D Weatherburn, C Jones, L Snowball, and J Hua, *The NSW Drug Court: A re-evaluation of its effectiveness*, Crime and Justice Bulletin No 121 (NSW Bureau of Crime Statistics and Research, 2008) 3.

108. NSW, *Parliamentary Debates*, Legislative Assembly, 27 October 1998, 9031.

109. *Drug Court Act 1998* (NSW) s 11(1)(b), s 12.

110. D Weatherburn, C Jones, L Snowball, and J Hua, *The NSW Drug Court: A Re-evaluation of its Effectiveness*, Crime and Justice Bulletin No 121 (NSW Bureau of Crime Statistics and Research, 2008). See also R Dive, "Sentencing Drug Offenders" (Paper presented at Principles, Perspectives and Possibilities Conference, Canberra, 10-12 February 2006).

per year. Hence the program saved the State approximately \$1.7m per year in direct costs,<sup>111</sup> leaving aside the prospective costs of imprisonment associated with re-offending.

- 9.90 In September 2008, BOCSAR released a report evaluating the Drug Court that found its participants were 17% less likely to be convicted of a new offence, 30% less likely to be reconvicted of a violent offence, and 38% less likely to be reconvicted of a drug offence at any point during the follow up period (which averaged at 35 months) when compared with drug dependent offenders who were imprisoned.<sup>112</sup> This results in a potential saving in the costs likely to be incurred by the corrections system into the future in relation to this cohort.

### Expansion

- 9.91 There are at least three ways in which the operation of the Drug Court could be expanded to divert more offenders away from the criminal justice system and with a view to assisting their rehabilitation:

- expand it to cover alcohol and any drugs that are not presently covered<sup>113</sup> (for example, benzodiazepines);<sup>114</sup>
- expand the geographical availability of the program by reference to the usual place of residence of the offender and the location of the referring court; and
- amend the criteria relating to offenders' eligibility for the program.

- 9.92 As discussed above, the program has expanded to the Hunter region and there are plans to open a Drug Court in central Sydney.<sup>115</sup> The question is whether it could be expanded to other areas in the State and also to cover the Sydney metropolitan area in its entirety. While this is a question of resources, there may be cost benefits to be achieved in expanding the program.

- 9.93 In relation to amending the eligibility criteria, it may be possible to refine the "violent conduct" exclusion so that more offenders might become eligible. The courts have interpreted this provision to mean an offence involving violent conduct is excluded from the program if violence is *inherent in the elements of the offence*, not whether any violent conduct was involved in the actual commission of the offence.<sup>116</sup>

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111. Centre for Health Economics Research and Evaluation, *The Cost of NSW Drug Court*, Final Report (2008) 7-8; See also J Hatzistergos, Speech delivered at the NSW Drug Court Conference (Parramatta, 6 February 2009) 3.

112. D Weatherburn, C Jones, L Snowball, and J Hua, *The NSW Drug Court: A Re-evaluation of its Effectiveness*, Crime and Justice Bulletin No 121 (NSW Bureau of Crime Statistics and Research, 2008) 1.

113. Law Society of New South Wales, *Preliminary Submission PSE08*, 7.

114. S Taplin, *The New South Wales Drug Court Evaluation: A Process Evaluation* (New South Wales Bureau of Crime Statistics and Research, 2002) 23.

115. NSW Drug Court, "About Us – History" <[www.drugcourt.lawlink.nsw.gov.au/drgcrt/dc\\_history.html](http://www.drugcourt.lawlink.nsw.gov.au/drgcrt/dc_history.html)>.

116. *Chandler v DPP* (2000) 49 NSWLR 1; *DPP v Ebsworth* (2001) 124 A Crim R 410. The courts have noted that *Drug Court Act 1998* (NSW) s 5(2) refers to a person being "charged with" an "offence involving violent conduct". The current drafting strongly suggests that it is the charge (and thus the elements of the offence charged), not the actual conduct, which is to be considered under the "violent conduct" criterion.

- 9.94 To some extent, this is contrary to the approach that was anticipated by the Government when the Drug Court was first established in the late 1990s. In his second reading speech, the relevant Minister said that the program would deal with “unarmed robberies provided there is no violence”.<sup>117</sup>
- 9.95 This leads to the anomaly that an offence of armed or unarmed robbery involving no actual violence is excluded from the Drug Court program,<sup>118</sup> whereas an offender who commits a break, enter and steal offence remains eligible for the Drug Court program (because the elements of that offence do not include violent conduct) even if there is a substantial level of violent behaviour directed at the victim’s property, such as a “ram raid” that involved the offenders driving a four wheel drive and a fork lift into a hotel in an attempt to steal a safe and an ATM.<sup>119</sup>
- 9.96 In its 2007 report on sentencing of robbery offenders, the Judicial Commission of NSW noted the wide variation in the factual circumstances of robberies, including different kinds of objects being used as a weapon, and the variable role of the offender, including sometimes as a look out who is not seen by the victim. In a random sample study of 346 cases of robbery between 1999 and 2002, the Judicial Commission found that almost two-thirds of the cases involved a threat of violence rather than the use of actual violence. Actual violence was more likely to be used where there were multiple offenders (43.5% of cases compared with 18.5% of lone offenders). The overwhelming majority of cases (91.0%) did not involve physical injury to the victims. There were seven cases involving serious injury to the victim, including “broken bones, concussion and injuries requiring medical treatment”.<sup>120</sup> The Commission noted that the vast majority of offenders (83.5%) had a history of drug and/or alcohol abuse. Seven out of 10 offenders were addicted to drugs and 13.3% were addicted to alcohol.<sup>121</sup> The motivation for committing the robbery was drug related in three-quarters of robberies, the foremost reason being the “need to obtain funds or drugs to support a drug habit” (70.4%).<sup>122</sup>
- 9.97 It appears from the above analysis that many offenders charged with offences such as robbery could benefit from referral to the Drug Court.

### Question 9.4

1. Is the Drug Court operating effectively? Should any changes be made?
2. Should the eligibility criteria be expanded, or refined in relation to the “violent conduct” exclusion?

117. NSW, *Parliamentary Debates*, Legislative Council, 25 November 1998, 10576 (P Whelan).

118. This is because it is an element of the offence of robbery that (i) force used by the offender or (ii) the victim is put into in fear, and both have been held by the courts to amount to “violent conduct”.

119. *DPP v Hilzinger* [2011] NSWCA 106.

120. Judicial Commission of NSW, *Sentencing Robbery Offenders since the Henry Guideline Judgment*, Monograph 30 (2007) [3.5.1]-[3.5.12].

121. Judicial Commission of NSW, *Sentencing Robbery Offenders since the Henry Guideline Judgment*, Monograph 30 (2007) [3.6.9]-[3.6.11].

122. Judicial Commission of NSW, *Sentencing Robbery Offenders since the Henry Guideline Judgment*, Monograph 30 (2007) [3.6.13].

## Pre-trial diversion of certain sexual offenders

- 9.98 Pre-trial diversion is available to certain offenders who are charged with sexually assaulting their own child or step-child or their defacto partners' child.<sup>123</sup> This involves diverting suitable offenders from the criminal justice system into a treatment program available at a facility known as Cedar Cottage in order to address offending behaviour and prevent re-offending.
- 9.99 In order to participate in the two year program, an offender must first plead guilty to the relevant offence(s) and be convicted.<sup>124</sup> Participation is also dependent upon assessment of the offender for suitability and the assessment must take into account the best interests of the child and the spouse or defacto partner's ability and preparedness to participate.<sup>125</sup> No further action will be taken against an offender who successfully completes the program.
- 9.100 An evaluation of the program in 2009 found that "it effectively prevents child sexual abuse and exploitation, ensures that survivors receive adequate support, provides therapeutic and support services for families and children at risk of abuse, and strengthens family relationships".<sup>126</sup>
- 9.101 This is a specialist, and longstanding, service that has been recently evaluated. We include it here for completeness, but will not be reviewing it further.

## Section 11 adjournment

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- 9.102 If a court finds an offender guilty, it may adjourn sentencing for up to 12 months under s 11 of the *Crimes (Sentencing Procedure) Act 1999* (NSW). The adjournment allows an assessment of the offender's capacity and prospects for rehabilitation or participation in an intervention program or allows the offender an opportunity to demonstrate rehabilitation or to participate in an intervention program or for any other purpose the court considers appropriate.
- 9.103 This formalises a process at common law in which it is open for the court to give an offender what was known as a "Griffiths remand" in order to demonstrate rehabilitation.<sup>127</sup>
- 9.104 The offender is required to reappear for sentencing at the end of the adjournment period. The court assesses the offender's progress during the adjournment and may take this into account when sentencing.<sup>128</sup>
- 9.105 There is no statutory qualification or limitation on the offences for which s 11 is available.<sup>129</sup> It can be applied if the court considers that an adjournment will be of

123. *Pre-Trial Diversion of Offenders Act 1985* (NSW) s 3A.

124. *Pre-Trial Diversion of Offenders Act 1985* (NSW) s 24.

125. *Pre-Trial Diversion of Offenders Act 1985* (NSW) s 14.

126. J Goodman-Delahunty, *The NSW Pre-Trial Diversion of Offenders (Child Sexual Assault) Program: An Evaluation of Treatment Outcomes* (2009) 20.

127. See generally *Griffiths v The Queen* (1977) 137 CLR 292.

128. Judicial Commission of NSW, *Sentencing Bench Book* [5-400].

129. *R v Rayment* [2010] NSWCCA 85 [154].



assistance in determining the appropriate sentence.<sup>130</sup> Deferral may be available even where a custodial sentence is inevitable after the adjournment period,<sup>131</sup> although it cannot be used simply to defer sentencing in a more serious matter where the imposition of a *substantial* period of full-time custody is unavoidable.<sup>132</sup>

- 9.106 The court may impose such bail conditions during the period of the s 11 adjournment as it considers appropriate.<sup>133</sup> If bail is breached the matter is governed by the *Bail Act 1978* (NSW).<sup>134</sup> Revocation of a s 11 order involves calling up the offender for sentencing prior to the expiration of the adjournment period.<sup>135</sup>
- 9.107 Section 11 can provide the framework for a number of intervention or treatment options, including the intervention programs under the *Criminal Procedure Act 1986*, which we discuss below.

### Question 9.5

Is deferral of sentencing under s 11 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) working effectively? Should any changes be made?

## Intervention programs under the *Criminal Procedure Act 1986* (NSW)

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- 9.108 In NSW, “intervention programs” provide alternative measures for dealing with offenders, and people accused of an offence, and that are designed to reduce the likelihood of future offending.<sup>136</sup> The *Criminal Procedure Act 1986* (NSW) provides a framework for the legislative recognition and operation of intervention programs.<sup>137</sup> One of the objects of the provisions is “to ensure that such programs apply fairly to all persons who are eligible to participate in them, and that such programs are properly managed and administered”.<sup>138</sup>
- 9.109 If a person admits guilt, or the court finds the person guilty, of certain offences that are summary offences or that can be dealt with summarily,<sup>139</sup> the court may refer a person to an intervention program:<sup>140</sup>

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130. *R v Rayment* [2010] NSWCCA 85 [25].

131. *R v Trindall* (2002) 133 A Crim R 119 [59]; *R v Leahy* [2004] NSWCCA 148 [13]; *R v Rayment* [2010] NSWCCA 85 [22].

132. *R v ABS* [2005] NSWCCA 255 [23]-[32].

133. Judicial Commission of NSW, *Sentencing Bench Book* [5-410].

134. Judicial Commission of NSW, *Sentencing Bench Book* [5-420].

135. I Potas, S Eyland and J Munro, *Successful Completion Rates for Supervised Sentencing Options*, Sentencing Trends and Issues 33 (Bureau of Crime Statistics and Research, 2005) 1.

136. *Criminal Procedure Act 1986* (NSW) s 345.

137. *Criminal Procedure Act 1986* (NSW) ch 7 pt 4.

138. *Criminal Procedure Act 1986* (NSW) s 345(1)(b).

139. *Criminal Procedure Act 1986* (NSW) s 348(1). Various offences are excluded under s 348(2), eg, offences in the nature of malicious wounding, sexual offences, domestic violence, child pornography, firearms and certain drug offences.

140. *Criminal Procedure Act 1986* (NSW) ch 7 pt 4 Note.

- as a condition of a good behaviour bond under s 9, 10 or 12 of the CSPA;
  - as an order when a sentence is deferred under s 11 of the CSPA;<sup>141</sup> or
  - as an order when it dismisses charges without a conviction under s 10(1)(c) of the CSPA.<sup>142</sup>
- 9.110 A court may also refer a person to an intervention program as a condition on a grant of bail or upon the exercise of its power to adjourn proceedings at any time.
- 9.111 However, the intervention programs that are currently recognised by the regulations (circle sentencing, forum sentencing and the traffic offender intervention program) are structured in such a way that the programs are only available once there has been an admission or finding of guilt and before the court reaches a final determination on sentencing.<sup>143</sup> This means that, while the Act generally allows for a court to include an intervention program as part of a sentence, there are no prescribed intervention programs available under the regulations that can be applied as part of a final sentence.
- 9.112 When sentencing an offender, the court must take into account the fact that an offender has been the subject of an intervention order and have regard to anything done by the offender in compliance with an obligation under the order.<sup>144</sup>
- 9.113 Part 8C of the CSPA, which contains general provisions in relation to intervention programs, provides that the court referring an offender to a program must be satisfied that the offender is eligible and a suitable person to participate in the program and resides or intends to reside in an area where the program is available.<sup>145</sup>
- 9.114 These eligibility requirements are repeated in s 95A of the CSPA in relation to participation in an intervention program as a condition of a good behaviour bond, with the additional requirement that the court must be satisfied that participation by the offender in the program “would reduce the likelihood of the offender committing further offences by promoting the treatment or rehabilitation of the offender”.<sup>146</sup> This requirement is set out in the CSPA, not as a general requirement under Part 8C, but as a specific requirement in relation to good behaviour bonds,<sup>147</sup> orders under s 10(1)(c),<sup>148</sup> and adjournments under s 11.<sup>149</sup> Thus there is some degree of duplication of provisions.
- 9.115 An offender is not eligible if he or she has prior convictions for, or is charged with certain categories of offences, including malicious wounding, sexual assault, child

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141. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11(1).

142. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(1)(c).

143. *Criminal Procedure Regulation 2010* (NSW).

144. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 24.

145. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100N.

146. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95A(2)(d).

147. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95A(2)(d).

148. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(2A).

149. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11(2A).

## Sentencing question papers

prostitution or pornography offences, stalking or intimidation, firearms offences and some serious drug offences.<sup>150</sup>

- 9.116 Along with the general requirements that apply to all intervention programs, each program has additional specific eligibility criteria.

### The circle sentencing program

- 9.117 Circle sentencing is an alternative sentencing scheme for adult Aboriginal offenders. A magistrate and community members sit in a circle to discuss the offence and surrounding circumstances before developing a sentence that is tailored to the offender. The program involves local Aboriginal people in the sentencing process with the object of improving the Indigenous community's confidence in the criminal justice system, and of addressing re-offending.
- 9.118 Circle sentencing was first introduced as a trial in the Nowra Local Court area in 2002. The scheme is now available in 12 locations in NSW.

### *Eligibility*

- 9.119 A person is eligible for circle sentencing if he or she:
- is an Aboriginal person;
  - has been assessed as suitable for participation in the program by the Aboriginal Community Justice Group;
  - has agreed to participate; and
  - is likely to be sentenced to a custodial sentence (including home detention, intensive correction order or suspended sentence), a community service order ('CSO') or a good behaviour bond.<sup>151</sup>
- 9.120 When conducting a suitability assessment, the local Aboriginal Community Justice Group must consider the nature of the offence, the association of the offender with any Aboriginal community, the impact of the offence on its victims and that Aboriginal community, the potential benefits of participation in the program to the offender, victims and community, and any other matter it considers relevant.<sup>152</sup>

### *Circle sentencing group*

- 9.121 The sentencing circle or group must include the offender and his or her legal representatives, the prosecutor, presiding Magistrate, Project Officer and at least three Aboriginal persons that belong to the Aboriginal community of which the offender claims to have a close association, as chosen by the Project Officer.<sup>153</sup> The group may also include any victim(s), and a support person for the victim, as well as

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150. *Criminal Procedure Act 1986* (NSW) s 348(2). As at June 2012 there were no further offences excluded by the regulations.

151. *Criminal Procedure Regulation 2010* (NSW) cl 36.

152. *Criminal Procedure Regulation 2010* (NSW) cl 34.

153. *Criminal Procedure Regulation 2010* (NSW) cl 39(1).

any other person chosen by the Project Officer, but only with the consent of the offender and any participating victims.<sup>154</sup>

- 9.122 A victim participating in a circle sentencing group “must be given an opportunity to express his or her views about the offender and the nature of the offence”.<sup>155</sup>
- 9.123 The circle sentencing group functions to:
- determine an appropriate plan for the treatment or rehabilitation of a referred offender;
  - recommend an appropriate sentence for the offender; and
  - provide support or other assistance to the offender in completing the program or an intervention plan arising out of the program and such other functions as may be imposed or conferred on the group by the *Criminal Procedure Regulation 2010* (NSW) or the guidelines.<sup>156</sup>
- 9.124 An offender’s treatment plan may include, but is not limited to, requirements concerning the offender’s conduct, attendance for counselling or other treatment, supervision, residence, involvement in activities, courses, training or employment, or such other matters as the group considers appropriate for the rehabilitation of the offender.<sup>157</sup>
- 9.125 The presiding Magistrate, who is a member of the circle sentencing group, is to preside at the group’s meetings and the group’s decisions are made by majority vote.<sup>158</sup> The group “may require a referred offender to comply with a plan” that includes requirements relating to the conduct and good behaviour of the offender, attendance for counselling or other treatment, the supervision of the offender, residence, association with other persons or attendance at specified locations, involvement in activities, courses, training or employment for the purpose of promoting the re-integration of the offender into the community and other matters to promote the treatment or rehabilitation of the offender.<sup>159</sup>
- 9.126 The referring court may then sentence the offender in accordance with the terms recommended by the circle sentencing group or may impose another sentence.<sup>160</sup>

### *Application*

- 9.127 As at 2008, circle sentencing was most often used for the offences of common assault (almost half of cases), unlicensed driving and breach of an apprehended violence order.<sup>161</sup>

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154. *Criminal Procedure Regulation 2010* (NSW) cl 39(2).

155. *Criminal Procedure Regulation 2010* (NSW) cl 43.

156. *Criminal Procedure Regulation 2010* (NSW) cl 40(1).

157. *Criminal Procedure Regulation 2010* (NSW) cl 40(2).

158. *Criminal Procedure Regulation 2010* (NSW) cl 44.

159. *Criminal Procedure Regulation 2010* (NSW) cl 40(2).

160. *Criminal Procedure Regulation 2010* (NSW) cl 31(1)(h).

161. J Fitzgerald, *Does Circle Sentencing Reduce Aboriginal Offending?* Crime and Justice Bulletin 115 (NSW Bureau of Crime Statistics and Research 2008) 1.

## Sentencing question papers

- 9.128 BOCSAR statistics show that 167 people participated in the circle sentencing program between February 2002 and June 2007.<sup>162</sup> The study concluded that there was no significant difference in the frequency, timing or seriousness of re-offending of Aboriginal people in this group and a group which did not participate in the program. However, it noted that reducing recidivism was not the only aim of circle sentencing and “[i]f it strengthens the informal social controls that exist in Aboriginal communities, circle sentencing may have a crime prevention value that cannot be quantified through immediate changes in the risk of re-offending for individuals”.<sup>163</sup>
- 9.129 It was suggested that the effectiveness of the circle sentencing program in reducing re-offending may be improved by “combining circle sentencing with other programs...[such as] cognitive behavioural therapy, drug and alcohol treatment [or] remedial education”.<sup>164</sup>
- 9.130 A 2008 evaluation of circle sentencing by the NSW Attorney General’s Department found that while the circle sentencing program was achieving its objectives (other than reducing recidivism):
- In most locations the support services available to address related issues such as alcohol and other drug use are not adequate, which it was felt limited the effectiveness of the Circle Sentencing approach.<sup>165</sup>

## The forum sentencing program

- 9.131 Forum sentencing brings together the offender, the victim(s), and any other people affected by the crime at a ‘forum’ with the objective of having the offender make reparations to the victim and community and of learning about the consequences of the offending behaviour.<sup>166</sup>
- 9.132 Forum sentencing is based on restorative justice principles, which have been described as “a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future”.<sup>167</sup> Circle sentencing also incorporates an element of restorative justice.
- 9.133 Forum sentencing commenced as the Community Conferencing for Young Adults Pilot Program in 2005 at Liverpool Local Court and on a north coast Local Court

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162. J Fitzgerald, *Does Circle Sentencing Reduce Aboriginal Offending?* Crime and Justice Bulletin 115 (NSW Bureau of Crime Statistics and Research 2008) 3, 8.

163. J Fitzgerald, *Does Circle Sentencing Reduce Aboriginal Offending?* Crime and Justice Bulletin 115 (NSW Bureau of Crime Statistics and Research 2008) 7.

164. J Fitzgerald, *Does Circle Sentencing Reduce Aboriginal Offending?* Crime and Justice Bulletin 115 (NSW Bureau of Crime Statistics and Research 2008) 7.

165. NSW Attorney General's Department, *Evaluation of Circle Sentencing Program: Report* (2008) 6.

166. NSW, Attorney General and Justice, Lawlink, “Forum Sentencing” (2011) <[http://www.lawlink.nsw.gov.au/lawlink/cpd/ll\\_cpd.nsf/pages/forum\\_index](http://www.lawlink.nsw.gov.au/lawlink/cpd/ll_cpd.nsf/pages/forum_index)>.

167. T Marshall, “The evolution of restorative justice in Britain” (1996) 4(4) *European Journal on Criminal Policy and Research* 21, 37 cited by Standing Committee of Attorneys-General, “Restorative Justice and the Criminal Justice System in Australia and New Zealand: An Overview” <[http://www.scag.gov.au/lawlink/SCAG/ll\\_scag.nsf/pages/scag\\_restorativejustice](http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_restorativejustice)>.

circuit. It is now available in 24 Local Courts<sup>168</sup> and the original age restriction no longer applies.<sup>169</sup>

### *Eligibility*

- 9.134 A person is eligible for forum sentencing if he or she:
- has pleaded guilty or has been found guilty;
  - is likely to receive a sentence of imprisonment;
  - has at no time been convicted of: murder or manslaughter; certain personal violence and drug offences; or of a serious firearms or weapons offence;
  - has been assessed as suitable for the program, and the court considers it likely that the offender will agree to participate in the program.<sup>170</sup>
- 9.135 The Chief Magistrate<sup>171</sup> has noted that the current requirement that it be likely that the person will be required to serve a sentence of imprisonment means that many first offenders will not be eligible for referral.
- 9.136 The Chief Magistrate also observed that, given the necessarily serious nature of the offences referred to forum sentencing (the court must be considering imprisonment), intervention plans proposed in such cases may be viewed as overly lenient. Courts:
- 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.<sup>172</sup>
- 9.137 The Chief Magistrate has, therefore, proposed extending the availability of forum sentencing to cover first time offenders charged with a Table 1 or Table 2 offence,<sup>173</sup> in a manner consistent with the requirements for the circle sentencing program, thereby making the program available to offenders who are likely to receive a CSO or good behaviour bond.
- 9.138 The Criminal Law Committee of the Law Society of NSW cited research which suggests that “reductions in re-offending and other benefits for both victims and offenders” could be achieved by widening the eligibility criteria for forum sentencing to include people found guilty of more serious offences.<sup>174</sup> The research cited from the UK found that restorative justice “may work better with more serious crimes rather than with less serious crimes, contrary to the conventional wisdom”.<sup>175</sup>

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168. NSW Department of Attorney General and Justice, *2010/11 Annual Report*, 49.

169. See *Criminal Procedure Regulation 2010* (NSW) cl 63.

170. *Criminal Procedure Regulation 2010* (NSW) cl 63.

171. G Henson, *Preliminary Submission PSE05*, 12-13.

172. G Henson, *Preliminary Submission PSE05*, 13.

173. See *Criminal Procedure Act 1986* (NSW) s 260.

174. Law Society of NSW, *Preliminary Submission PSE08*, 6.

175. L Sherman and H Strang, *Restorative Justice: The Evidence* (Smith Institute, 2007) 68.



### *The forum*

- 9.139 The forum may be attended by the offender and his or her legal representative and or support person, any relevant victim or a representative and a support person, the forum facilitator, and a police officer responsible for investigating the offence or a representative.<sup>176</sup>
- 9.140 In addition, other people may be invited to attend the forum by the forum facilitator after consultation with the offender and any participating victim. Attendees may include an interpreter, member of the offender's family, or an offender's supervising officer (if subject to a supervised good behaviour bond, CSO or parole).<sup>177</sup>
- 9.141 The members of the forum "may agree to make such recommendations as they think fit about the referred offender"<sup>178</sup> including but not limited to recommending that the offender:
- apologise to any victim orally or in writing;
  - make reparations to any victim or the community;
  - participate in a program aimed at improving that offender's prospects (for example, a counselling program, a drug or alcohol rehabilitation program or an education program);
  - take action directed towards reintegration into the community; and
  - specify the times within which the plan is to be implemented.<sup>179</sup>
- 9.142 A majority of the participants may determine the draft intervention plan, however, the reaching of a consensus is encouraged.<sup>180</sup> Both the offender and the victim(s) have the right to veto the whole of the plan or any recommendation of the plan.<sup>181</sup>
- 9.143 The draft intervention plan, when finalised, is conveyed to the referring court which may approve the plan and make an intervention plan order.<sup>182</sup>

### *Effectiveness*

- 9.144 A BOCSAR study on forum sentencing found that between 1 October 2005 and 19 May 2008, 329 people had participated in forum sentencing. The study concluded that forum sentencing participants were no more or less likely to re-offend than members of a suitably matched control group. It was suggested that, to be able to reduce recidivism, forum sentencing may need to be combined with other programs which target the underlying causes of offending.<sup>183</sup>

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176. *Criminal Procedure Regulation 2010* (NSW) cl 69(1).

177. *Criminal Procedure Regulation 2010* (NSW) cl 69(2).

178. *Criminal Procedure Regulation 2010* (NSW) cl 76(1).

179. *Criminal Procedure Regulation 2010* (NSW) cl 76(2).

180. *Criminal Procedure Regulation 2010* (NSW) cl 76(4).

181. *Criminal Procedure Regulation 2010* (NSW) cl 76(5), (6).

182. *Criminal Procedure Regulation 2010* (NSW) cl 58(1)(f).

183. C Jones, *Does Forum Sentencing Reduce Re-offending?* Crime and Justice Bulletin No 129 (NSW, Bureau of Crime Statistics and Research, 2009) 3, 10, 12.

## The traffic offender intervention program

- 9.145 The traffic offender intervention program is a scheme that has been available in the Local Court since 2008<sup>184</sup> and that aims to provide traffic offenders with the necessary skills and information needed to develop positive attitudes and safer behaviours when driving.<sup>185</sup> Under the scheme magistrates can adjourn matters and refer offenders to an approved traffic course provider.
- 9.146 Most traffic offender programs are run by the NSW Police and Community Youth Club.<sup>186</sup> Before the traffic offender intervention program was formalised as a declared intervention program, traffic offender programs existed in various Local Court areas and received referrals from courts exercising their power of deferral.<sup>187</sup>

### Eligibility

- 9.147 A person is eligible to participate in the traffic offender intervention program if he or she has pleaded guilty to, or has been found guilty of, a traffic offence; has not yet been sentenced; has agreed to participate in the program; and the court considers, given all the circumstances, that the person is suitable for the program.<sup>188</sup>
- 9.148 If the court finds that an offender is eligible and suitable for the traffic offender program it may defer sentencing and make a program participation order referring the person to an approved traffic course.<sup>189</sup>
- 9.149 The participant is required to adhere to the standard requirements of the order as well as any additional conditions of the particular course provider.<sup>190</sup> Before the date set for the deferred sentencing hearing, the course provider reports to the court on the level of compliance of the offender with the program.<sup>191</sup> If the offender fails to comply with the conditions and does not satisfactorily complete the program the matter will be returned to the court.<sup>192</sup>

### Question 9.6

1. Is the current scheme of prescribing specific intervention programs operating effectively? Should any changes be made?
2. Is there scope for extending or improving any of the programs specified under the scheme?

184. *Criminal Procedure Regulation 2005* (NSW) as amended by the *Criminal Procedure Amendment (Traffic Offender Intervention Program) Regulation 2007* (NSW).

185. Local Court of NSW, "Traffic offenders intervention program" <[www.localcourt.lawlink.nsw.gov.au](http://www.localcourt.lawlink.nsw.gov.au)>.

186. Judicial Commission of NSW, *Traffic Offender Intervention Program*, Judicial Information Research System.

187. G Symes, "Overview: TOP since 1992" <[www.trafficoffenders.com.au/Overview.htm](http://www.trafficoffenders.com.au/Overview.htm)>.

188. *Criminal Procedure Regulation 2010* (NSW) cl 91.

189. *Criminal Procedure Regulation 2010* (NSW) cl 93(a).

190. *Criminal Procedure Regulation 2010* (NSW) cl 93(b). See also Local Court of NSW, *Traffic Offender Intervention Program Operational Guidelines* (2011).

191. *Criminal Procedure Regulation 2010* (NSW) cl 93(c).

192. *Criminal Procedure Regulation 2010* (NSW) cl 90(1)(d).

3. Are there any other programs that should be prescribed as intervention programs?

### Approaches to criminal offending

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- 9.150 In this section of the paper we look at some of the philosophies underlying alternative approaches to criminal offending, and consider whether they might provide a basis for new and more effective ways of addressing criminal behaviour.

#### Restorative Justice

- 9.151 In NSW Youth Justice Conferencing, Forum Sentencing and Circle Sentencing are models based on the concept of restorative justice. In addition, the Restorative Justice Unit of Corrective Services also administers a program for victim-offender post-sentence conferences for a wide range of offences. Such a post-sentence conference can only be held if both parties agree to participate and the offender accepts responsibility for the offence.<sup>193</sup>

- 9.152 Restorative justice is considered by its proponents to provide a more effective criminal justice model:

Restorative justice is a way of thinking about what is best for the many connections among crime victims, their offenders and the criminal justice process. Restorative justice advocates suggest that conventional assumptions about these connections may be wrong: that victims should be at the centre rather than excluded from the process, that victims and offenders are not natural enemies, that victims are not primarily retributive in their view of justice, that prison is not necessarily the best way to prevent repeat crime. The erroneous assumptions of conventional justice, the advocates suggest, contribute to rising public dissatisfaction with justice across the common law countries.<sup>194</sup>

- 9.153 The evidence for restorative justice as a means of preventing re-offending is mixed.<sup>195</sup> There is evidence of reductions in re-offending in overseas studies. However, in major BOCSAR reviews the main restorative justice programs in NSW (including forum sentencing and circle sentencing) have not been shown to reduce re-offending.<sup>196</sup> There is, however, evidence that victims, offenders and other

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193. Corrective Services NSW, "Restorative Justice" <[www.correctiveservices.nsw.gov.au/information/restorative-justice](http://www.correctiveservices.nsw.gov.au/information/restorative-justice)>.

194. L Sherman and H Strang, *Restorative Justice: The Evidence* (Smith Institute, 2007) 12.

195. Reviewed in N Smith and D Weatherburn *Youth Justice Conferences versus Children's Court: A Comparison of Re-offending*, Crime and Justice Bulletin 160 (NSW Bureau of Crime Statistics and Research, 2012) 2; see also L Sherman and H Strang, *Restorative Justice: The Evidence* (Smith Institute, 2007).

196. C Jones, *Does Forum Sentencing Reduce Re-offending?* Crime and Justice Bulletin No 129 (NSW Bureau of Crime Statistics and Research, 2009); J Fitzgerald *Does Circle Sentencing Reduce Aboriginal Offending?* Crime and Justice Bulletin 115 (NSW Bureau of Crime Statistics and Research, 2008).

participants respond well to the conferences, and find the experience “satisfying and rewarding”.<sup>197</sup> A recent BOCSAR paper sums the position up as follows:

Research results on the effectiveness of restorative justice practices in reducing the likelihood of re-offending have been mixed. Although some Australian and international studies have indicated that conferencing is more effective than court in reducing youth re-offending, other studies have found no significant effects. Such mixed findings are largely the result of methodological limitations, including an inadequate selection of controls, the use of small sample sizes and inconsistent definitions of re-offending. While the results of these studies suggest that it would be ill-advised for policy makers to rely on conferencing to reduce re-offending, restorative justice initiatives have other desirable features. Victims who are surveyed at the end of a conference tend to be highly satisfied with the process. There is also some evidence that conferencing is a more time-efficient way of disposing of cases in the justice system.<sup>198</sup>

- 9.154 A recent BOCSAR study showed evidence of public support for restorative justice programs in NSW.<sup>199</sup>
- 9.155 We have set out the NSW programs above, and asked about their effectiveness and expansion. Here we ask whether restorative justice should be expanded more generally.

#### Question 9.7

1. Should restorative justice programs be more widely used?
2. Are there any particular restorative justice programs in other jurisdictions that we should be considering?

### Problem-solving approaches to justice

- 9.156 Problem-solving approaches to justice seek to address the underlying reasons why an offender engages in criminal behaviour and to find solutions to the problems offenders face as well as to achieve positive outcomes for victims and the community.<sup>200</sup>
- 9.157 There is a well-documented link between crime, disadvantage and marginalisation, as demonstrated by higher offending rates among those who have drug and alcohol problems, or lower educational levels, or who are unemployed.<sup>201</sup> Repeat offenders,

197. N Smith and D Weatherburn, *Youth Justice Conferences versus Children’s Court: A Comparison of Re-offending*, Crime and Justice Bulletin 160 (NSW Bureau of Crime Statistics and Research, 2012) 2.

198. E Moore, *Restorative Justice Initiatives: Public Opinion and Support in NSW*, Bureau Brief 77 (NSW Bureau of Crime Statistics and Research, 2012) 1.

199. E Moore, *Restorative Justice Initiatives: Public Opinion and Support in NSW*, Bureau Brief 77 (NSW Bureau of Crime Statistics and Research, 2012).

200. Victorian Auditor-General, *Problem-Solving Approaches to Justice*, PP No 24 Session 2010–11 (2011) 2.

201. Victorian Auditor-General, *Problem-Solving Approaches to Justice*, PP No 24 Session 2010–11 (2011) 1.

- who commit the majority of all crimes, are more likely to be from disadvantaged or marginalised backgrounds.<sup>202</sup>
- 9.158 The philosophy underpinning problem-solving justice is that it is not enough to arrest and sentence an offender, but rather, the criminal justice system needs to “try to reduce recidivism, improve public confidence in justice, and prevent crime down the road”.<sup>203</sup> It allows for scope to change offenders’ behaviour, to address local public safety problems and to include communities in the criminal justice system.<sup>204</sup>
- 9.159 According to the United States Bureau of Justice Assistance (a division of the US Department of Justice), research has shown that properly-implemented problem-solving approaches can “decrease recidivism, reduce crime, improve coordination among justice agencies, enhance services to victims, and increase trust in the justice system”.<sup>205</sup>
- 9.160 The concept of problem-solving justice has its origins in the US. Problem-solving approaches are continuing to develop<sup>206</sup> in particular in increasing their reach and in improving the ways in which courts can respond effectively to criminal behaviour. Therapeutic jurisprudence, which “focuses on the law’s impact on emotional life and psychological well-being”,<sup>207</sup> is a particular area of study that has a relevance to problem-solving justice. The goal of therapeutic jurisprudence is to overcome the limitations of the adversarial model traditionally adopted by the criminal justice system, particularly in relation to people with mental health impairments, by focusing on an individual’s needs, psychological functioning and emotional well-being.<sup>208</sup>
- 9.161 While there are some problem-solving approaches in NSW, there is scope to increase the focus of the criminal justice system on problem-solving strategies for low level offending, particularly in light of advances in other jurisdictions.

### *Specialist problem-solving courts*

- 9.162 The first drug court was established in Miami, Florida in 1989,<sup>209</sup> followed by the proliferation of a variety of other problem-solving courts in the US in the 1990s that

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202. Victorian Auditor-General, *Problem-Solving Approaches to Justice*, PP No 24 Session 2010–11 (2011) 1.

203. R Wolfe, *Best Practices: Principles of Problem Solving Justice* (Center for Court Innovation, 2007) 1.

204. G Berman and A Fox, “The Future of Problem-Solving Justice: An International Perspective” (2010) 10 *University of Maryland Law Journal of Race, Religion, Gender and Class* 1, 2-3.

205. US Department of Justice, Bureau of Justice Assistance, Office of Justice Programs, “Community-Based Problem-Solving Criminal Justice Initiative” <[www.bja.gov/ProgramDetails.aspx?Program\\_ID=53](http://www.bja.gov/ProgramDetails.aspx?Program_ID=53)>.

206. Victorian Auditor-General, *Problem-Solving Approaches to Justice*, PP No 24 Session 2010–11 (2011) 2.

207. D Wexler, “Therapeutic Jurisprudence: An Overview” (2000) 17 *Thomas M Cooley Law Review* 125, 125. See also D Wexler and B Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, 1996) xvii.

208. E Zafirakis, “Curbing the “revolving door” phenomenon with mentally impaired offenders: applying a therapeutic jurisprudence lens” (2010) 20 *Journal of Judicial Administration* 81, 84.

209. G Berman and A Fox, “The Future of Problem-Solving Justice: An International Perspective” (2010) 10 *University of Maryland Law Journal of Race, Religion, Gender and Class* 1, 6.

sought to identify and address the causes of crime,<sup>210</sup> including those related to the use of drugs, domestic violence, homelessness and mental health.

- 9.163 The specialist problem-solving court model has been applied internationally, based on the success of the US courts, with a number of specialist problem-solving courts established in various countries, including drug courts, domestic violence courts and mental health courts.
- 9.164 Drug courts in particular have been hailed as “one of the most successful criminal justice innovations in the last 25 years”.<sup>211</sup> An evaluation published in 2011 found that drug courts in the US result in significant reductions in drug relapse and criminal behaviour.<sup>212</sup>
- 9.165 According to the US National Association of Drug Court Professionals there are currently 2,663 drug courts and 1,219 problem-solving courts (including community courts) in operation across the US.<sup>213</sup>
- 9.166 Drug courts are currently operating or planned in a number of countries including Canada, Ireland, Jamaica, Brazil, Cayman Islands, Bermuda, Trinidad, Barbados, New Zealand, Norway, Italy, Macedonia<sup>214</sup> and the UK.<sup>215</sup>
- 9.167 A number of problem-solving courts currently exist in Australia including:<sup>216</sup>
- Drug courts in most Australian states and an alcohol court in the NT.
  - The mental health courts/lists that exist or are planned in other Australian jurisdictions, it being noted that, in NSW, s 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) allows the Local Court to dismiss a charge and discharge a defendant who is developmentally disabled, or suffering from a mental illness or mental condition. The discharge may be unconditional or subject to conditions, which may include treatment or engagement with services. This Commission has explored the possibility of establishing a mental health court/list in a yet to be released report as part of our reference on people with cognitive and mental health impairments in the criminal justice system.<sup>217</sup>

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210. R Wolf, *Best Practices: Principles of Problem Solving Justice* (Center for Court Innovation, 2007) 1.

211. A Fox, *A Tale of Three Cities: Drugs, Courts and Community Justice* (Center for Court Innovation 2010) 2.

212. S Rossman, *The Multi-Site Adult Drug Court Evaluation: Executive Summary* (Urban Institute: Justice Policy Center, 2011) 5 <[www.ncjrs.gov/pdffiles1/nij/grants/237108.pdf](http://www.ncjrs.gov/pdffiles1/nij/grants/237108.pdf)>.

213. National Association of Drug Court Professionals website <[www.nadcp.org/learn/about-nadcp](http://www.nadcp.org/learn/about-nadcp)>.

214. International Association of Drug Treatment Courts <[www.iadtc.law.ecu.edu.au/about/index.html](http://www.iadtc.law.ecu.edu.au/about/index.html)>.

215. G Berman and A Fox, “The Future of Problem-Solving Justice: An International Perspective” (2010) 10 *University of Maryland Law Journal of Race, Religion, Gender and Class* 1.

216. L Richardson, K Thom and B McKenna, “Australian and New Zealand Problem Solving Courts: A Trans Tasman Comparative Perspective”, Power Point Presentation, ANZAPPL Annual Congress Wellington, New Zealand (17-19 November 2011) <[www.law.monash.edu.au](http://www.law.monash.edu.au)>.

217. NSW Law Reform Commission, “People with Cognitive and Mental Health Impairments in the Criminal Justice System” <[www.lawlink.nsw.gov.au/lawlink/lrc/ll\\_lrc.nsf/pages/LRC\\_cref120](http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cref120)>.



- Family violence courts/programs in most Australian states, including NSW.<sup>218</sup>
  - A community court (Neighbourhood Justice Centre) in Victoria, which is discussed under the next subheading.
- 9.168 There are also a number of specialist courts in Australia relating to Indigenous offenders, however not all of these courts are based on problem-solving justice.<sup>219</sup>
- 9.169 In Queensland, a “special circumstances court” was established as part of the Brisbane Magistrates’ Court to hear cases referred to it by magistrates and court liaison officers involving relatively minor charges including drug, theft, property damage and public order offences. Defendants dealt with in that court generally have problems such as homelessness, impaired decision making capacities, mental illness and/or substance abuse. The court provides bail and sentencing options which aim to connect offenders with support services to help them deal with the cause or causes of their behaviour, such as accommodation problems and drug and/or alcohol dependency. Court liaison officers assess the defendants and they are referred to services, supported and monitored.<sup>220</sup>

### *Community courts*

- 9.170 Building on the problem-solving court model,<sup>221</sup> “community courts” were pioneered in the US to expand the focus of the previous models to a broader group of offenders as well as the community at large.<sup>222</sup> There is only one such court currently in existence in Australia, located in Collingwood, Melbourne.
- 9.171 Community courts operate in local communities and focus not only on the needs of the individual offenders, but also on broader strategies that aim to reduce crime and disadvantage in the local community, reducing the costs of criminal justice, increasing accountability of low-level offenders and the efficiency of processing offenders through courts, increasing involvement of the community with courts and community confidence in the criminal justice system and improving perceptions of local safety.<sup>223</sup>

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218. Australian Law Reform Commission, *Family Violence - A National Legal Response* (Report 114, 2010) ch 32.

219. L Richardson, K Thom and B McKenna, “Australian and New Zealand Problem Solving Courts: A Trans Tasman Comparative Perspective”, Presentation, ANZAPPL Annual Congress Wellington, New Zealand (17-19 November 2011) <[www.law.monash.edu.au/centres/calmh/docs/111118-anzappl-richardson-thom-mckenna.pdf](http://www.law.monash.edu.au/centres/calmh/docs/111118-anzappl-richardson-thom-mckenna.pdf)>.

220. Queensland Courts, “Special Circumstances Court Diversion Program” <[www.courts.qld.gov.au/courts/courts-innovation-programs/special-circumstances-court-diversion-program-sccd-p](http://www.courts.qld.gov.au/courts/courts-innovation-programs/special-circumstances-court-diversion-program-sccd-p)>.

221. A Fox, *A Tale of Three Cities: Drugs, Courts and Community Justice* (Center for Court Innovation, 2010) 1.

222. A Fox, *A Tale of Three Cities: Drugs, Courts and Community Justice* (Center for Court Innovation, 2010) 2-3.

223. K Henry and D Kralstein, *Community Courts: The Research Literature: A Review of Findings* (Center for Court Innovation, 2011) 1.

- 9.172 Community courts also incorporate a strong focus on restorative justice and generally focus on low-level offences such as vandalism, prostitution, drug possession and shoplifting.<sup>224</sup>
- 9.173 The first community court was established in New York in 1993. Since that time, the model has spread widely, with many similar community courts being established globally<sup>225</sup> after the early initiatives were shown to produce positive results including reductions in local crime and improvements in community perceptions and attitudes towards courts<sup>226</sup> as well as increased compliance with court orders.<sup>227</sup>
- 9.174 In 2011, there were over 60 community court projects in operation internationally, 33 operating in the US, 17 in South Africa, 13 in England and Wales, and one each in Australia and Canada.<sup>228</sup>
- 9.175 The Neighbourhood Justice Centre ('NJC') in Collingwood is modelled on the Red Hook Community Justice Center, a successful community court located in Brooklyn, New York,<sup>229</sup> which links offenders with a range of on-site services including drug treatment, counselling and job training with an emphasis on offenders "paying back" the community by performing community service work.<sup>230</sup> Similarly, the UK has followed the US lead in establishing community courts that give communities a greater voice in "doing justice" with initiatives including increasing the visibility and impact of community service projects<sup>231</sup> so that communities feel they are getting something back.
- 9.176 Another community court in North Liverpool, England, that opened in 2005, was also modelled on the Red Hook initiative.<sup>232</sup>
- 9.177 The centre in Red Hook incorporates restorative justice as a central concept, as does the Liverpool Community Justice Centre and the NJC.<sup>233</sup>
- 9.178 Legislation relating to the NJC provides that:

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224. S Katz, *Expanding the Community Court Model: Testing Community Court Principles in the Bronx Centralized Courthouse* (Center for Court Innovation, 2009) 1.

225. G Berman and A Fox, "The Future of Problem-Solving Justice: An International Perspective" (2010) 10 *University of Maryland Law Journal of Race, Religion, Gender and Class* 1, 1.

226. K Henry and D Kralstein, *Community Courts: The Research Literature: A Review of Findings*, (Center for Court Innovation, 2011) 3-5.

227. G Berman, *Principles of Community Justice: A Guide for Community Court Planners* (Center for Court Innovation, 2010) 3-4.

228. K Henry and D Kralstein, *Community Courts: The Research Literature: A Review of Findings* (Center for Court Innovation, 2011) 1.

229. Victoria, Neighbourhood Justice Centre, "Our Origins" <[www.neighbourhoodjustice.vic.gov.au/site/page.cfm?u=226](http://www.neighbourhoodjustice.vic.gov.au/site/page.cfm?u=226)>. The NJC was established in 2007 after *Magistrates' Court Act 1989* (Vic) s 4M was inserted to create the Neighbourhood Justice Division of the Magistrates Court.

230. G Berman and A Fox, "From the Benches and Trenches: Justice in Red Hook" (2005) 26(1) *The Justice System Journal*, 78.

231. G Berman and A Fox, "The Future of Problem-Solving Justice: An International Perspective" (2010) 10 *University of Maryland Law Journal of Race, Religion, Gender and Class* 1, 5.

232. Center for Court Innovation, "Centre for Justice Innovation" <[www.courtinnovation.org/project/centre-justice-innovation](http://www.courtinnovation.org/project/centre-justice-innovation)>.

233. Victoria, Neighbourhood Justice Centre, "Our Philosophy: Restorative Justice" <[www.neighbourhoodjustice.vic.gov.au/site/page.cfm?u=230](http://www.neighbourhoodjustice.vic.gov.au/site/page.cfm?u=230)>.

## Sentencing question papers

In assigning a magistrate to the Neighbourhood Justice Division, the Chief Magistrate must have regard to the magistrate's knowledge of, or experience in the application of, the principles of therapeutic jurisprudence and restorative justice.<sup>234</sup>

- 9.179 The NJC “encourages active participation in the justice process for victims, offenders, their families, and the community”<sup>235</sup> and offers voluntary victim-offender restorative justice conferences both prior to and after sentencing.<sup>236</sup>
- 9.180 The NJC is based on a community justice model that is “about restorative justice, problem-solving and working with client, victim and community to get a better justice result for all parties – one where the client is strongly supported to not re-offend”.<sup>237</sup>
- 9.181 The locations of both the NJC in Collingwood and the community court in Red Hook, Brooklyn were chosen because they were densely populated with high rates of disadvantage and crime and significant dependency on community services.<sup>238</sup>
- 9.182 The Red Hook Community Justice Center houses a multi-jurisdictional court, hearing criminal, civil and family cases. Similarly, the NJC court has multiple jurisdictions, although the bulk of the court’s work is constituted by the criminal list, crimes (family violence) list and residential tenancies matters.<sup>239</sup>
- 9.183 The NJC court has a number of pre-sentencing processes that are used to address offenders’ problems and to inform the sentencing process, including the assessment and referral of offenders to the most appropriate services.<sup>240</sup>
- 9.184 If a defendant wishes to enter a not guilty plea then the matter is usually transferred to Melbourne Magistrates’ Court.<sup>241</sup>
- 9.185 The court may.<sup>242</sup>
- seek reports from service providers within the NJC or elsewhere;
  - consider submissions or evidence from the victim of the offence;

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234. *Courts Legislation (Neighbourhood Justice Centre) Act 2006 (Vic)* s 5(a).

235. Victoria, Neighbourhood Justice Centre, “Restorative Justice” <[www.neighbourhoodjustice.vic.gov.au/site/page.cfm?u=309](http://www.neighbourhoodjustice.vic.gov.au/site/page.cfm?u=309)>.

236. Victoria, Neighbourhood Justice Centre, “Restorative Justice Group Conferencing at the Neighbourhood Justice Centre”, brochure <[www.neighbourhoodjustice.vic.gov.au](http://www.neighbourhoodjustice.vic.gov.au)>.

237. D Fanning (Neighbourhood Justice Centre), Speech, Richmond Drug and Health Community Forum (18 November 2011) available from <[www.ydhf.org.au](http://www.ydhf.org.au)>.

238. Auditor-General of NSW, *Auditor-General's Report Performance Audit: Home Detention, Corrective Services NSW* (2010) 11.

239. Victoria, Neighbourhood Justice Centre, *Evaluating the Neighbourhood Justice Centre in Yarra, 2007–2009* (2010) 19.

240. Victoria, Neighbourhood Justice Centre, “Delivering Justice Locally – Strengthening the Yarra Community: Non-Adversarial Justice Conference”, power point presentation (May 2010) available from <[www.aija.org.au](http://www.aija.org.au)>.

241. Victoria, Neighbourhood Justice Centre, “What happens at court?” <[www.neighbourhoodjustice.vic.gov.au/site/page.cfm?u=241](http://www.neighbourhoodjustice.vic.gov.au/site/page.cfm?u=241)>.

242. *Magistrates' Court Act 1989 (Vic)* s 4Q; Victoria, Neighbourhood Justice Centre, “Sentencing” <[www.neighbourhoodjustice.vic.gov.au/site/page.cfm?u=184](http://www.neighbourhoodjustice.vic.gov.au/site/page.cfm?u=184)>.

- adjourn the sentencing proceedings for the purpose of convening a meeting to address “obstacles to a person's progress through the justice system”; or
  - adjourn the sentencing proceedings to allow the defendant to demonstrate a commitment to rehabilitation and address the underlying causes of the offending.
- 9.186 Once the NJC court has determined a sentence, it may defer the starting date to allow for judicial case management so as to track an offender’s progress and to ensure the offender is in a position to undertake and complete the order.<sup>243</sup>
- 9.187 When a “community based sentence” has been imposed and is being completed by the offender under the supervision of Community Correctional Services, regular court reviews at the NJC may be scheduled to track the offender’s progress and compliance with the order.<sup>244</sup>
- 9.188 Apart from dealing with low-level offending, the NJC also engages with the community in crime prevention strategies, community development programs and cultural activities as well as providing services to the community including:<sup>245</sup>
- drug and alcohol counselling;
  - mental health counselling;
  - financial counselling;
  - legal advice and representation;
  - housing support;
  - employment and training support;
  - victims assistance; and
  - mediation.
- 9.189 The NJC has stated that it had been successful in 2007-2009 in:<sup>246</sup>
- reducing re-offending, with recidivism rates down from 41% to 34% and NJC offenders being 14% less likely to re-offend compared to offenders from other courts with the same profile;
  - increasing offender compliance and community work;
  - achieving value for money;

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243. D Fanning (Neighbourhood Justice Centre), Speech, Richmond Drug and Health Community Forum (18 November 2011) available from <[www.ydhf.org.au](http://www.ydhf.org.au)>.

244. Victorian Auditor-General, *Problem-Solving Approaches to Justice*, PP No 24 Session 2010–11 (2011) 5.

245. Victorian Auditor-General, *Problem-Solving Approaches to Justice*, PP No 24 Session 2010–11 (2011) 4.

246. An evaluation covering the period of March 2007 to June 2009 was conducted by a team of researchers from the University of Melbourne, Flinders University, the Brotherhood of St Laurance, the Social Research Centre and PricewaterhouseCoopers: *Evaluating the Neighbourhood Justice Centre in Yarra, 2007–2009* (2010) 29.

## Sentencing question papers

- improving users' experience of the justice system, both in terms of satisfaction and confidence in the justice system; and
  - reducing the crime rate in the local area by 12% (residential burglaries reduced by 26%, motor vehicle theft reduced by 38% and other, mainly commercial burglaries reduced by 20%).
- 9.190 The NJC experience in Melbourne suggests that the community court model has been successful in engaging the local community, with the centre "seen as a community asset by residents".<sup>247</sup>

### *Mainstreaming problem-solving approaches to justice*

- 9.191 The idea of "mainstreaming" problem-solving approaches refers to attempts to expand and adapt aspects of problem-solving courts to general criminal courts,<sup>248</sup> rather than confirming its application to specialist or community courts that only target particular groups of offenders or geographical areas.
- 9.192 The US Bureau of Justice Assistance funded projects in 2005 to "test proven problem-solving justice strategies in a wider variety of settings" outside of problem-solving courts.<sup>249</sup>
- 9.193 One of the funded initiatives was the Bronx Community Solutions ('BCS') project in New York, which is an effort to adapt community court practices to mainstream courts while maintaining the same principles and objectives as community courts.<sup>250</sup> Significantly, mainstreaming the community court model is one of the latest chapters in the development of problem-solving approaches to justice.
- 9.194 Under the initiative, all judges in the Bronx are able to sentence low-level offenders to the BCS program and may either impose a final sentence following conviction or allow a conditional discharge mandating a certain number of days of community service or "social service", which can include drug treatment, mental health counselling<sup>251</sup> or participation in courses in job training, life skills, decision-making and anger management.<sup>252</sup> Judges may nominate a term of imprisonment to be imposed if the program is not complied with.<sup>253</sup>

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247. Victoria, Neighbourhood Justice Centre, *Evaluating the Neighbourhood Justice Centre in Yarra, 2007–2009* (2010).

248. L Bartels, *Challenges in Mainstreaming Specialty Courts*, Trends and Issues in Crime and Criminal Justice No 383 (Australian Institute of Criminology, 2009) 1.

249. US Department of Justice, Bureau of Justice Assistance, Office of Justice Programs, "Community-Based Problem-Solving Criminal Justice Initiative" <[www.bja.gov/ProgramDetails.aspx?Program\\_ID=53](http://www.bja.gov/ProgramDetails.aspx?Program_ID=53)>; Center for Court Innovation, "The Bronx, New York" <[www.courtinnovation.org/research/bronx-new-york](http://www.courtinnovation.org/research/bronx-new-york)>.

250. S Katz, *Expanding the Community Court Model: Testing Community Court Principles in the Bronx Centralized Courthouse* (Center for Court Innovation, 2009) 1.

251. J Lippman, "Achieving Better Outcomes for Litigants in the New York State Courts" (2007) 34 *Fordham Urban Law Journal* 813, 823.

252. S Katz, *Expanding the Community Court Model: Testing Community Court Principles in the Bronx Centralized Courthouse* (Center for Court Innovation, 2009) 3.

253. S Katz, *Expanding the Community Court Model: Testing Community Court Principles in the Bronx Centralized Courthouse* (Center for Court Innovation, 2009) 3.

- 9.195 Once an offender is sentenced to the program, BCS staff determine a specific program, matching the offender's needs to the social services available and assigning offenders to community service work projects in the local community which have been determined in consultation with residents and community groups. Compliance is strictly monitored under the program by BCS staff and information on an offender's progress can be provided to the court.
- 9.196 It has been reported that BCS has reduced the imposition of full time imprisonment as a sanction by a third, and doubled the use of community-based alternatives in the Bronx.<sup>254</sup>
- 9.197 BCS also fosters community engagement by recruiting local residents to serve as members on an advisory board<sup>255</sup> which also includes community leaders, representatives of local social service agencies, high school students, a prosecutor, a defence lawyer and a government representative.<sup>256</sup>
- 9.198 Residents are also able to participate in BCS by volunteering to supervise community service offenders and escort defendants to community-based treatment.<sup>257</sup>
- 9.199 The initiative also involves community outreach and crime prevention strategies.<sup>258</sup>
- 9.200 It has been said that the locally focused community service component of BCS "helps build relationships between the Court and the local community and often gives offenders a greater sense of accomplishment and investment in their work".<sup>259</sup>
- 9.201 In 2010, New Zealand also sought to apply the community court model to a mainstream court in Porirua. The pilot program applied the underlying principles of community courts in a mainstream court:
- community engagement;
  - co-location of services available at the court for general community use;
  - a focus on addressing the underlying causes of offending;
  - making justice relevant to the community; and
  - consistency of judges presiding.<sup>260</sup>

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254. G Berman and A Fox, "The Future of Problem-Solving Justice: An International Perspective" (2010) 10 *University of Maryland Law Journal of Race, Religion, Gender and Class* 1, 12; Center for Court Innovation, "Bronx Community Solutions" <[www.courtinnovation.org/project/bronx-community-solutions](http://www.courtinnovation.org/project/bronx-community-solutions)>.

255. Center for Court Innovation, "Bronx Community Solutions Information sheet" <[www.courtinnovation.org](http://www.courtinnovation.org)>.

256. New York City Criminal Justice Coordinator, Bronx Community Solutions, Center for Court Innovation, *Year Two First Quarter Report* (2006) 7-9.

257. Center for Court Innovation, "Bronx Community Solutions Information sheet" <[www.courtinnovation.org](http://www.courtinnovation.org)>.

258. S Katz, *Expanding the Community Court Model: Testing Community Court Principles in the Bronx Centralized Courthouse* (Center for Court Innovation, 2009) 2.

259. New York City Criminal Justice Coordinator, Bronx Community Solutions, Center for Court Innovation, *Year Two First Quarter Report* (2006) 9.



## Sentencing question papers

- 9.202 By June 2012, aspirations included a community reference group that would encourage continuing dialogue between the judiciary and the local community.<sup>261</sup>
- 9.203 At present there is no program comparable to BCS or the New Zealand initiative available in Australia that attempts to transfer the objectives and strategies employed by community courts to mainstream courts. However, some pre-sentence programs based on problem-solving justice, such as the CREDIT and MERIT programs, have been established with limited availability in some mainstream courts in NSW as well as Victoria, as discussed above.

### Expansion of problem-solving approaches in NSW?

- 9.204 In NSW problem-solving approaches are taken in the Drug Courts, and in programs such as MERIT and CREDIT. These have been evaluated positively to date. In our recent (as yet unreleased) report on diversion of people with cognitive and mental health impairments in the criminal justice system, we have considered a greater use of problem solving approaches in relation to this group, and made a number of recommendations in this context.
- 9.205 The Drug Court and MERIT are targeted specifically at drug-related offending. CREDIT has a broader scope. As noted above, other jurisdictions have programs of even broader eligibility that invite consideration of the potential value in expanding the use of a problem-solving approach in NSW.

#### Question 9.8

1. Should problem-solving approaches to justice be expanded?
2. Should any of the models in other jurisdictions, or any other model, be adopted?

### Any other approaches?

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- 9.206 We have canvassed a range of existing NSW options, and options from other jurisdictions in this paper. We conclude by asking whether there are any other options we should be exploring.

#### Question 9.9

Are there any other diversion, intervention or deferral options that should be considered in this review?

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260. New Zealand, House of Representatives, *Inquiry into the identification, rehabilitation, and care and protection of child offenders*, Report of the Social Services Committee (2012) 25-26; See also J Walker, 'The Porirua District Court and the Community – Working Together: Mainstreaming the Community Justice model', conference paper, Non Adversarial Justice Conference – Melbourne (7 May 2010).

261. New Zealand, House of Representatives, *Inquiry into the identification, rehabilitation, and care and protection of child offenders*, Report of the Social Services Committee (2012) 26.





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