Police Association of NSW

Sentencing: Law Reform Commission Question Papers 8-12 (2012)

Police Association of New South Wales Submission

August 2012

Version Control

Purpose

The purpose of this document is to provide to the LRC's review of the Crimes (Sentencing Procedure) Act 1999 (NSW) the Police Association of New South Wales response to its Question Papers 8-12.

Document Control

Version Number	V 0.1
Release Date	August 2012
Copies	Public
Confidentiality	Non-confidential
Release Restrictions	Nil
File Name	Sentencing: Law Reform Commission Question Papers 8-12 (2012)
File Location	TRIM Police Services-Criminal Procedures-Sentencing
File Reference Number	
Author	Vicki Sokias, Research and Resource Centre
Status (Draft/Out of Draft)	Out of Draft

Sentencing

The Law Reform Commission has released for public comment the third and final group of question papers relating to the review of the Crimes (Sentencing Procedure) Act 1999 (NSW) ('the Act'). The breadth of issues encompassed within Question Papers 8-12 present a significantly huge field of inquiry. Each of the questions put forward raise a multitude of subject matters that with some occupy specialized places. As such many of these questions would benefit from independently being explored more comprehensively in future research projects. These will be indicated in the course of the Association's submission. To mention one example here is the alternatives available to prison which are not being used as often as they probably could be. Alternatives to custody carry with them their own sets of difficulties and challenges, therefore there is a need for more research to be commissioned (in systematic and multiple areas) to identify, develop and enhance these strategies in order to retain the options available in alternatives to prison. Reviewing the issues and barriers associated with why alternatives to prison are less likely to be used is one example – it is vital that there exists reliable and consistent statistics so evaluations can be conducted of the various options with the ensuing aim in further developing, disseminating, monitoring and reviewing best practices. In today's contemporary environment there is a need in contributing to building the knowledge base that will be used to assist the Criminal Justice System in future practice. It is crucial that a whole of government approach is employed to crime control that includes the departments responsible for education, health, housing, social services, employment, policing and corrections. Throughout the Association's submission, national and international research, policies and assessments are explored regarding the questions raised in the Sentencing Papers. With some of the issues arising within the Question Papers (and again these will be demonstrated throughout the course of the submission) there was not a substantial amount of research or reliable statistics available making it difficult to draw firm conclusions. One example included the lack of evaluation in the varied approaches adopted within the jurisdictions concerning a hierarchy of sentences. Furthermore some of the research that was investigated was noted to be dated and in some questions raised there was almost no contemporary comprehensive research or conclusive evidence available therefore making it difficult to substantiate (or any) findings.

The following quote is derived from a discussion paper on compulsory treatment in present-day Australia

> ***In recent years, Australian courts have moved towards a more therapeutic model of jurisprudence. This is evidenced by the emergence of numerous pre-trial, pre-sentence and post-conviction diversionary programs, including drug courts and Indigenous sentencing courts. Therapeutic jurisprudence involves, and requires for success, a large shift in the traditional thinking and approaches of participants in the court, health and corrections systems and of offenders themselves. It requires different professional groups to work as a team, to understand in depth the values, policies, language and procedures of each, and often to share tasks traditionally within a single professional domain. While knowledge and practices are evolving constantly, there is no nationally recognized training, and no systematic means for sharing learning experiences.*** *Source: Emma Pritchard, Janette Mugavin and Amy Swan, Compulsory Treatment in Australia, 2007.*

In relation to the issues raised in the second group of Question papers, we provide the following comments:

Sentencing
Question Paper 8
The structure and hierarchy of sentencing options

This question paper focuses on the Terms of References that stress the need to:

- *Identify opportunities to simplify sentencing law, while ensuring transparency and consistency; and*
- *Provide sentencing courts with adequate options and discretions.*

Question 8.1

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

Setting out a hierarchy of sentences in order to guide the courts does merit serious consideration. As the Police Association states in their submission (regarding Question Papers 1-4), while the goals of sentencing vary the law needs to be able to cope with this by emphasizing different principles at different times. NSW legislation currently, does not prioritise the purposes of sentencing and while it is acknowledged that this would not be possible across the whole range of criminal activity, it is considered that some guidance for offences at different levels of seriousness would be valuable in removing the confusion as to the basis for a sentence in a given case and would also accord with community attitudes toward offenders.[1] This is in line with the LRC's suggestion in allowing (the Crimes Act) scope to combine sentencing options that, taken as a whole, may adequately achieve the range of purposes of sentencing. In many jurisdictions today, Australia, Canada, United States and various European countries, there is a clear development towards having a greater range of non-custodian sanctions. This can be seen for example, in the adoption of a greater number of different non-custodial sanctions, in the increased possibilities for the adding of conditions to existing sanctions, and in the increased possibilities for combining different non-custodial sanctions. In some cases these reforms also involve developing more punitive non-custodial sanctions[2]. As mentioned in the LRC report, the ACT and Tasmania do not specify a sentence hierarchy and there are almost no limits on sentence combinations. WA on the other hand does as does the NZ model. It would be worthwhile to conduct an empirical examination in order to evaluate the effectiveness of each of these states' sentencing legislation particularly in regards to their sentencing options/hierarchies and combinations and whether any or a combination of these options can be adopted to act as an appropriate model for NSW. Hence further research evidence is required in what form should such a hierarchy take if it were to be introduced in NSW.

Question 8.2

Should the structure of sentences be made more flexible by:

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

As the LRC states, the NSW approach is the most complex and limited of the models and there exists a need for flexibility and discretion in setting sentences as well as a need to providing a regime that is simple, consistent and transparent. There does exist an ability of Courts to combine sentences and

[1] Probation and Parole Officers' Association of NSW, Preliminary submission to the New South Wales Law Reform Commission on Sentencing, January 2012

[2] New Zealand Ministry of Justice, Review of community based sentences in New Zealand, 1999.

increase the availability of flexible sentencing options e.g. a community service order and a bond or a section 10 and a fine. Further research is required from key stakeholders to further explore how courts can be provided with adequate options and discretions. It is conceivable to create and provide further community-based penalties which, like probation and community service orders, are penalty options in their own right rather than framed as 'alternatives to imprisonment'. Penalty options could focus more on compensation to victims, targeted reparation, community service or attending rehabilitative programs.

The present legislation is somewhat limiting in that an offender cannot receive both a community service order and a bond for the same offence. There are many cases where probation serves the need for rehabilitation but limits reparation, or where community service work serves the need for reparation but limits rehabilitation. To this end the Victorian model of sentencing provides greater scope and flexibility and could be further investigated. Other possibilities include the inclusion of various penalty components as conditions of bonds or probation. This practice occurs at the present time with the imposition of fines, compensation and bonds but could be administered in a more holistic and integrated manner, with each being a conditions of a single order. Similarly, attendance at specific programs or treatment providers could similarly be conditions.[3] This was discussed further in the Association's response to Question Papers 5-7 (page 27).

Research conducted in Tasmania in 2010 indicated a need for an expanded range of sentencing options particularly in terms of alternatives to imprisonment. Punishment is one of a number of considerations when determining the appropriate sentence for a crime. At one end of the spectrum, there are some crimes which demand severe prison sentences and the removal of the offender from the general community. The sentence of imprisonment serves as a punishment and a deterrent, and to ensure the safety of the community by depriving the offender of his liberty. However, there are circumstances where it is appropriate to expand the range of sentencing options beyond imprisonment and to replace imprisonment as a primary option. Community-based sentences have the potential to benefit not only offenders but also the community, through directing offenders to undertake such programs as community service, employment, training courses and behavior change programs. Community sentencing options are particularly effective for less serious crimes, for young offenders and those who are first offenders, dependent on the type of crime involved. They involve a range of actions, which include an element of punishment and accountability to the community for the crime, but which also are aimed at developing the potential of the individual offender, with the objective of enhancing his or her employment prospects or even keeping the offender in employment and within the community, thereby ensuring further economic consequences, such as foster care and homelessness, are not visited on the community.[4]

Question 8.3

1. **What sentence or sentence component combinations should be available?**
2. **Should there be limits on combinations with:**
    a. **Fines;**
    b. **Imprisonment; or**
    c. **Good behavior requirements?**

Recommending a combination of sentences in some cases can provide a balance of punitive measures, rehabilitation and levels of restriction that match the offender's risk and needs better than a single sentence could. As the LRC states, the situation in relation to imposing a fine with another penalty is relatively complex in NSW. A list of factors when considering combining sentences in a single recommendation (established in New Zealand) could include:

- does the proposed combination create an appropriate balance between rehabilitative and punitive elements

[3] Probation and Parole Officers' Association of NSW, Preliminary Submission on Sentencing, January 2012.
[4] Department of Justice, Breaking the Cycle, Tasmania Corrections Plan 2010-2020, Discussion Paper, January 2010.

- can this balance be achieved by combining less severe sentences (i.e. be careful not to net widen)
- what is the ability of the offender to meet the requirements of each sentence being considered
- are there any existing sentences to be taken into account
- what is the total impact of the combined sentences on the offender, and is this appropriate given their particular circumstances (the offence, assessed needs etc)
- is it appropriate to use any specific provisions relating to the proposed combination

The New Zealand example further states that when combining sentences consideration is given to whether the overall aim is to provide rehabilitation, restrict the offender with a punitive sanction, require the offender to make reparation/compensation, or a mix of the three. An electronically monitored sentence may also be used to support a rehabilitative one (e.g. by restricting the offender's movements immediately prior to, or during, attendance at a rehabilitation programme). Intensive supervision and supervision are considered to be rehabilitative sentences. HD and imprisonment are considered to be punitive sentences, which can also have rehabilitative elements. CD is considered to be a punitive sentence. CW is considered to be a reparation sentence

As Deputy Chief Magistrate of Victoria, Jelena Popovic (2006) puts it *low level offenders whose offences do not warrant a term of imprisonment and who are homeless, poor or mentally impaired regularly provide sentencing dilemmas for magistrates. Some offenders are not able to pay a fine or have lives which are too chaotic to enable them to comply with community corrections orders and suspended sentences, or to undertake to be of good behavior. As a sentencer, I find it more difficult to find an appropriate sentence for persons in this category than determining how to sentence persons who are guilty of serious offending.* The role of the sentencer according to Popovic (2006) at summary level has undergone a metamorphosis over the last 10 to 15 years. It is a more demanding role with increasingly complex matters coming before the courts, and persons with increasingly complex personal circumstances coming before the courts. As mentioned already the Victorian model is worth considering. The Magistrates' Court in Victoria has developed several approaches to provide appropriate outcomes for the persons who appear before it and assist magistrates to make the best possible decisions. They are categorised as follows:

1. Court based programs
2. Specialised Lists
3. Diversion
4. Specialist Courts
5. Protocols for individual offences

Sentencing
Question Paper 9
Alternative approaches to criminal offending

This question paper considers ways in which offenders or suspects can be dealt with without entering the court system, of if they do, how the courts may divert or defer finalizing their matters with a view to aiding their rehabilitation and achieving positive outcomes of 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.

Question 9.1

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

Early diversion programs should be established in NSW. Jurisdictions across Australia are developing alternative processes to reduce the number of (less serious) offenders entering the criminal justice system. As mentioned already, NSW Police have a well-established discretion in NSW not to charge a person whom they suspect of committing an offence and instead issue a formal or informal caution. The LRC makes the suggestion that it may be possible to redesign the caution system so that police prosecutors play a greater role. The LRC also sets out a number of models in other jurisdictions that have either improved or formalized the operation of police cautions and/or diversion. It would be worthwhile therefore to conduct a comprehensive assessment of the similarities and differences of these approaches (both via national and international models) and make conclusive assumptions as to what type of model would fit NSW. In 2003 a report titled, *Early Intervention: Diversion and Youth Conferencing*, commissioned under the Australian Government's National Crime Prevention Program, did provide a national profile of diversionary practices across Australia. Although almost a decade old the report highlights the importance of developing better ways to prevent juvenile crime and recidivism amongst young people. It also examines more cost-effective approaches than incarceration and promotes diversionary schemes with strengthened links to families and communities.

Similar research could be conducted in today's contemporary environment so as to identify and highlight (from the different approaches) models of good practice in the field. The report involved site visits to each state and territory, and in most cases there were at least two such visits. The research established that the concept of diversion is widely used throughout each of the eight Australian jurisdictions, especially in terms of police cautioning and family group conferencing. Both of these approaches to diverting juveniles from formal juvenile justice practices were covered in individual chapters of the report. Consideration was also given to approaches to diverting these young people from pre-trial detention. Finally, a small number of more limited and focused diversion programs in individual states are described. A separate section also was provided to address the particular issue of the implications of diversion for Indigenous juvenile offenders.[5]

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[5] Kenneth Polk, Christine Adler, Damon Muller, Katherine Rechtman, Early Intervention: Diversion Youth Conferencing A national profile and review of current approaches to diverting juveniles from the criminal justice system, ACT, December 2003.

Question 9.2

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

The important point to make here is the fact that the CREDIT program is strongly supported by stakeholders and participants. This was identified in a descriptive analyses performed by BOCSAR in 2012 on the data held in the CREDIT database along with interviews conducted with 122 program participants and 54 stakeholders. The research paper described the key operating characteristics of the program and assessed the satisfaction of participants and key stakeholders. Furthermore, over the two-year pilot period, CREDIT received 719 referrals, conducted 637 assessments and had 451 participants. Most defendants referred for treatment had their referral accepted. Almost all participants interviewed were 'satisfied' or 'very satisfied' with both the support they received from CREDIT staff and with their own progress on the program; 95.9% reported that their life had changed for the better by being on the program. Stakeholders' opinions of the pilot program were positive. Particularly of importance to the LRC's review is BOCSAR's recommendations that included an extension of the program, an enhancement of relevant services, programs and transport options in the catchment areas and clarification of the relationship between CREDIT and other court-based programs.[6]

Question 9.3

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

MERIT commenced as a pilot program in Lismore, in 2000. The program has been evaluated in relation to a number of areas, including:

- Reoffending
- Cost effectiveness
- Legal issues
- Social and health outcomes, and,
- Participants feedback

In terms of Re-offending & sentencing outcomes the data showed that program graduates were less likely than non-graduates to have re-offended at 3 and 12 months after exiting the program, and, that successful completion of the program had a greater impact on drug, theft and property offences than on any other types of offences. It was estimated that there have been likely savings of about $1.28 million in terms of reduced incarceration, police, hospital and criminal activity costs. Relevant to answering the second half of this question as to how MERIT can operate more effectively relates to the key finding from the legal component of the study which considered the role of legislation and suggested that separate legislation to govern the program be developed. Overall, there was a significant decline in drug use by participants interviewed from program entry to program exit, which was sustained at interviews 3-9 months after program exit. There was a significant decline in risk-taking associated with drug use between the entry and exit interviews. Regarding participants' feedback - over 80% of participants interviewed were satisfied with the treatment plan and caseworker support. A majority of graduates interviewed 3-9 months after exiting the program reported maintaining positive changes acquired from the program[7].

[6] Lily Trimboli, NSW Court Referral of Eligible Defendants into Treatment (CREDIT) pilot program: an evaluation, NSW Bureau of Crime Statistics and Research, NSW 2012

[7] Jane Bolitho, Sandra Crawford, Bruce Flaherty, The Magistrates Early Referral into Treatment Program, Evaluation and 'Real World' Challenges, NSW Attorney General's Department, November 2005.

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?**

Drug courts operate in New South Wales, Queensland, South Australian, Victoria and Western Australia, although their formation, process and procedures differ across jurisdictions. The basic idea behind the Drug Court is to tackle the underlying cause of involvement in crime (drug dependence or abuse) by placing drug dependent offenders on a program of coerced treatment. As the LRC reports, the 2008 evaluation indicated the NSW Drug Court has shown that it is more cost-effective than prison in reducing the rate of re-offending among offenders whose crime is drug related. The NSW Drug Court has since undergone significant change designed to improve its cost-effectiveness relative to conventional sanctions. Amongst other things, sanctions for non-compliance with program conditions have been made more flexible, participants are now given formal warnings if they fail to progress, police have a greater role in screening for eligibility and the threshold for program termination has been reduced. The results of the present re-evaluation by BOCSAR and CHERE show that, controlling for other factors, participants in the NSW Drug Court are significantly less likely to be reconvicted than offenders given conventional sanctions (mostly imprisonment).

The economic analysis conducted by CHERE showed that the total cost of the Drug Court program is $16.376 million per annum. The relevant point (in answer to above question) to make here is CHERE also examined the cost of several initiatives undertaken by the Drug Court to improve access to the program and make it more efficient and effective. These initiatives included use of a ballot to reduce the number of applicants required to be assessed for possible placement on the program, allowing Aboriginal and female offenders to re-enter the ballot if rejected on the first round, increasing the number of urine tests conducted to check program compliance and allowing participants on the program to accrue sanctions. Use of the ballot was found to improve the cost-effectiveness of the Drug Court program. The sanction accrual policy substantially reduced the cost of the Drug Court (down $2,465 per participant) and is also likely to have improved the Drug Court's cost-effectiveness. Allowing Aboriginal and female offenders did not improve the Drug Court's cost-effectiveness but nor did it impose any additional cost burden on the Drug Court. The increased urinalysis added substantially to the overall cost of the Drug Court but the data were not available to determine whether its effect on recidivism was positive, negative or neutral.[8]

Whether the eligibility criteria be expanded, or refined in relation to the "violent conduct" exclusion requires further case analysis. The findings (regarding the Drug Court's effectiveness) have added to a growing body of international evidence that Drug Courts are more cost-effective than prison when it comes to reducing the risk of re-offending among recidivist offenders whose crime is drug-related.

Question 9.5

Is deferral of sentencing under s11 of the Crimes (Sentencing Procedure) Act 1999 (NSW) working effectively? Should any changes be made?

Section 11 of the *Crimes (Sentencing Procedure) Act* 1999 was introduced as a replacement for the *Griffiths* remand and provides the court with the power to defer sentencing for rehabilitation, participation in an intervention program or other purposes.

The Judicial Commission of NSW, in RvABS [2005] NSWCCA 255 is a recent example of a case in which the Court of Criminal Appeal found that an s11 order was inappropriate and that disproportionate significance was attached to rehabilitation in the sentencing process. The sentencing judge erred by suggesting that some form of sentence other than full-time custody might well be available at the end of the remand period. Rather, the serious objective criminality of the offences required significant full-time

[8] Don Weatherburn, Craig Jones, Lucy Snowball and Jiuzhao Hua, The NSW Drug Court: A re-evaluation of its effectiveness, Crime and Justice Bulletin, NSW Bureau of Crime Statistics and Research, Number 121, September 2008.

custodial sentences. In light of the noted example and in answer to the question whether any changes are made to the deferral of sentencing under s11 requires further case analysis; the focal point being that s11 be is applied fairly to all eligible persons and that it be appropriately run and administered.

Question 9.5

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

In summary, intervention programs are intended to provide a framework for the recognition and operation of certain alternative measures for those who have committed or are alleged to have committed an offence; such programs should apply fairly to participants and be properly managed and administered, and participation in the programs is intended to reduce the likelihood of future offending. A court may adjourn proceedings to allow the accused person to be assessed for, or to participate in, an intervention program[9]. Three intervention programs have been declared under the Criminal Procedure Regulation 2005: circle sentencing intervention program, forum sentencing program and traffic offender intervention program. The crucial point here is the significance in using evidence-based research to determine the effectiveness of the current intervention programs.

Circle Sentencing As mentioned in the LRC report a 2008 evaluation of circle sentencing by the NSW Attorney General's Department considers whether people who participate in circle sentencing (1) show a reduction in the frequency of their offending, (2) take longer to reoffend and/or (3) reduce the seriousness of their offending. The results suggest that circle sentencing has no effect on any of these outcomes. Circle sentencing participants offended less in the 15 months following their circle. However, the same was also true of Aboriginal people sentenced in a traditional court setting (the control group). After a range of offender and offence characteristics were controlled for, the research found no difference between the circle sentencing group and the control group in time to reoffend. Finally, there was no difference between the circle sentencing group and the control group in the percentage of offenders whose next offence was less serious than the reference offence. As the LRC reports the research identified that *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.* The ineffectiveness of Circle Sentencing in reducing recidivism causes concern as the process itself is more resource intensive than traditional sentencing approaches. It should either be discontinued and resources diverted to more effective sentencing programs such as MERIT, CREDIT and Drug Court. Alternatively it should be bolstered to include better intervention, support services and diversionary programs.

Forum sentencing Research by the NSW Bureau of Crime Statistics and Research suggests that offenders dealt with under the Forum Sentencing scheme are no less likely to re-offend than offenders dealt with in a conventional court proceeding. Earlier research by the Bureau had shown that victims who participate in the Forum Sentencing scheme are generally very satisfied with the process. In (the) second phase of the evaluation, the Bureau compared 264 offenders dealt with by way of a Forum Sentencing Order with a matched comparison group of offenders dealt with in the Local Courts in order to find out whether Forum Sentencing reduced the likelihood or frequency of re-offending; the time to re-offend and the seriousness of re-offending. No evidence emerged from the analyses to suggest that Forum Sentencing participants were less likely to re-offend; committed fewer offences; took longer to offend; or committed less serious offences if they re-offended. Commenting on the findings the Director of the Bureau, Dr Don Weatherburn, said that despite the popularity of restorative justice programs evidence for their effectiveness in reducing recidivism is limited. As the LRC reports 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.

[9] Judicial Commission of New South Wales, Deferral for Rehabilitation or other purposes, October 2009

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?**

As repeated throughout this submission, the importance of research evidence is highlighted in the following quote regarding the effectiveness of restorative justice programs;

> *We need assurance about their effectiveness through the conduct of rigorous evaluation studies, ongoing consultation with all the agencies whose cooperation is essential for the programs' viability and genuine consultation with Aboriginal and ethnic groups who feel especially marginalised in their dealings with government and whose input is essential to the success of the program*

The quote is taken from a report that provides an overview of restorative justice programs in Australia. While a wide range of programs may be broadly labeled 'restorative', the report mainly focuses on programs involving meetings of victims, offenders and communities to discuss and resolve an offence. On a state by state basis, programs are described in terms of their characteristics, implementation and administration, evaluation and relevant publications. While restorative justice programs are generally seen as being most suitable for juvenile offenders, the report also describes the use of conferencing programs for adult offenders in Queensland, Western Australia and the Australian Capital Territory. Other topics covered include the use of restorative programs in the school setting and in the care and protection setting; problems and some solutions in devising and implementing programs, including the question of restorative justice programs in Indigenous communities and ethnic communities; and the effective extension of restorative justice programs. Such reports are worth evaluating when deciding in what ways restorative justice programs can be more widely used.

Restorative justice programs appear to have the support of participants, but their lack of impact on recidivism is of concern. They should either be discontinued and resources diverted to more effective sentencing programs such as MERIT, CREDIT and Drug Court. Alternatively they should be bolstered to include better intervention, support services and diversionary programs.

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?**

As the LRC reports 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. Both NJC and CISP are first such programs in Australian jurisdictions. An audit was conducted regarding whether NJC and CISP were achieving their intended outcomes. It also assessed whether the programs were based on sound evidence and research and whether the department and the court are effectively managing the programs. The initial development of NJC and CISP was based on the best available evidence and research. The report made a number of recommendations in improving the process which can be used as a comparative analysis when adopting and or expanding a NSW model regarding same: The recommendations included:

1. That the Department of Justice when developing problem-solving programs:
    - define clear and measurable objectives and relevant and appropriate performance indicators in funding submissions to support the case for funding and to allow the subsequent assessment of outcomes against objectives.
    - better consult with the Magistrates' Court on the implementation plan including risk identification and mitigation.
2. That the Department of Justice and the Magistrates' Court:
    - better consult with service providers in implementing new programs and in risk management
    - have effective governance arrangements to actively monitor progress supported by timely and comprehensive reporting.

3. That the Magistrates' Court conduct staff exit surveys to assist in developing a long-term resourcing strategy for CISP, particularly to address staff turnover issues.
4. That the Department of Justice and the Magistrates' Court manage service contracts with clearer and more enforceable qualitative and quantitative performance measures.
5. That the Department of Justice evaluate NJC's outcomes in reducing reoffending when sufficient data becomes available.
6. That the Department of Justice present research findings fairly and qualify them when appropriate in reporting publicly or seeking program funding.
7. That the Magistrates' Court record the impact of interventions by problem-solving programs on judiciary decisions
8. That the Department of Justice and the Magistrates' Court give priority to the use of unique identifiers for tracking defendants' contact within the criminal justice system

Question 9.9

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

There may be creative models from overseas that could be further evaluated (e.g. Canada) that may provide inspiration for NSW models. Any new model/s or proposals goes without saying that these require government and non-government (including the local community) agencies having adequate resources and services to address issues such as treatment and counseling for mental and general health issues within communities and families, drug and alcohol dependence, anger management and non punitive strategies to reduce domestic violence.[10]

[10] The New South Wales Bar Association, Preliminary Submission to the New South Wales Law Reform Commission On Sentencing, December 2010.

Sentencing
Question Paper 10
Ancillary Orders

The overarching question for each of these ancillary orders is whether they are currently effective and whether any changes need to be made to integrate them more fully into the structure of sentencing in NSW.

Question 10.1

Are compensation orders working effectively and should any changes be made to the current arrangements?

All Australian states and territories have legislation establishing victims' compensation schemes. In answer to the question whether compensation orders in NSW are working effectively requires further research evidence and comprehensive case analysis conducted (preferably) on all Australian states and territories to capture the shortfalls of these various models and observe whether objectives are being met. For instance as the LRC reports, the New Zealand model has adopted a presumption in favor of reparation. The New Zealand's traditional position no longer applied and the court was now obliged as part of the sentencing process to consider reparation. Queensland makes provision for compensation for loss or injury as one of the orders available at sentencing. South Australia also requires that preference be given to the payment of compensation if the court is considering the imposition of a fine and compensation order. Tasmania has imposed mandatory compensation orders to fulfill the promise of compensating victims of property crime. The orders were made mandatory to ensure a more efficient and speedy process for victims. These provisions (as reported by the LRC) have fallen short of their intended goal with few compensation orders made in cases where there was evidence of loss, and even fewer resulting in compensation actually being paid. As mentioned already, an empirical study conducted on all Australian states and territories will be able to encapsulate these types of practical problems.

To provide an example (on a somewhat smaller scale) research was conducted in Victoria by the Clearinghouse on domestic and family violence victims' entitlements to state funded victim compensation across the nation (Barrett Meyering 2010). The research involved a comparative study of relevant legislation in all eight Australian states and territories. It mapped out major legislative reforms which have taken place in this area over the past decade, including the introduction of special provisions for domestic violence and/or sexual assault victims in some states and territories. While a number of provisions in Victoria's Victims of Crime Assistance Act 1996 were singled out in the study as innovative practice, the research also identified areas for further reform. Although the research focused on women's entitlements to compensation under state funded schemes, the study raised concerns about the recent trend towards debt recovery from offenders in some Australian jurisdictions. The findings are pertinent to questions raised about the place of offender funded compensation within any future Victorian scheme[11].

Question 10.2

1. **What changes, if any, should be made to the provisions governing driver license disqualification or to its operational arrangements?**
2. **Should driver license disqualification be made available in relation to offences that do not arise under road transport legislation?**

License disqualification is a common sanction for traffic offending. Studies have shown the sanction to be effective in reducing recidivism, especially the recidivism of drink drivers. For drink-drivers, disqualification from driving coupled with alcohol treatment programs has been more effective in reducing recidivism than license disqualification alone. While license disqualification has some deterrent effect, its ability to restrain or incapacitate disqualified drivers has been questioned – various studies have estimated the proportion of disqualified drivers who drive illegally to range from 25 percent to 75 percent.

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11 Australian Domestic and Family Violence Clearinghouse, Submission to the Victim of Crime Compensation Review, 22 February 2010.

The Moffat and Poynton study (as mentioned in LRC report) is one of a very few and much needed empirical studies that scrutinizes the effectiveness of license disqualification as a deterrent. In a high risk priority area such as license disqualification, further comparable studies are vital particularly in fostering a body of knowledge that will be relevant to policy makers and law enforcement agencies concerned with the effectiveness of license disqualification and its enforcement. The LRC makes some suggestions in addressing the inflexible operation of the mandatory minimum periods of disqualification in some cases and the making of an option available for offences other than those under road transport legislation. These are all worthy of serious consideration as are empirical studies to back them.

One such study written by Clark and Bobevski in 2008 conducted research on disqualified drivers in Victoria. The research outlines a two phase project into disqualified drivers in Victoria. The first phase of the project comprised a review of the literature related to license disqualification and explored the feasibility of conducting an in-depth study of disqualified drivers in Victoria. The second phase of the project, which resulted from the feasibility study, involved conducting an in-depth investigation into the behaviors and attitudes of disqualified drivers, including contributing family and social influences. Forty disqualified drivers participated in seven focus group discussions and 13 partners/parents of disqualified drivers participated in three separate focus group discussions. The results show that approximately 60% of the driver participants continued to drive during disqualification. The following factors were found to have a key influence on the decision to drive during disqualification:

- negative attitudes towards the sanction;
- denial of the risk of one's own driving behaviors;
- very low perceptions of the risk of detection;
- personal and vicarious experiences of punishment avoidance;
- negative attitudes towards alternatives.

The most common reason provided for the decision to continue driving was to maintain one's employment, although driving for family and social reasons was also commonly reported. Most participants described personal hardships caused by the sanction, with this impact being greatest for those who adhered to the sanction and stopped driving. The majority of partners/parents also reported being negatively affected, as the sanction resulted in extra burdens for them and often created relationship tensions. Many partners/parents expressed concern about their partners'/children's dangerous driving behaviors and the ineffectiveness of the sanctions in deterring illegal driving behaviors. The findings of the study were consistent with previous research. Recommendations were made for further research into Victorian Registration and Licensing data and Victorian crash data to quantify the number of disqualified drivers and the extent of the risk they pose on the road. Recommendations were also made for publicity campaigns to raise the perceived risk of detection, improvements in enforcement (e.g. increased checking of licenses at RBT sites; possible extension of compulsory carriage of license legislation), and the design and implementation of best practice rehabilitation programs[12].

Another study worth noting conducted in West Australia by the Crime Research Centre investigated the key factors that could determine the degree to which the use of license disqualification can be an effective sanction. The study used data obtained from a number of sources - traffic conviction data from the WA Police Service; license suspensions from the Fines Enforcement System; court finalisations and imprisonment records (of disqualified drivers) from the Department of Justice - to analyse the nature and extent of license disqualification in WA. This was supplemented with in-depth information from focus groups about the social and situational circumstances of disqualified drivers and those who drive while disqualified. The research came up with a number of recommendations that are worth considering particularly in light of the provisions and operational arrangements governing license disqualification in NSW. Some of the recommendations of the study that are relevant to disqualification of license included;

- The collection of routine statistics is essential in monitoring the impact of sanctions on various sections of the community. It was recommended that the WA Police Service and the Department

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Belinda Clark and Irene Bobevski, Disqualified Drivers in Victoria: Literature Review and In-depth Focus Group Study, [12] Monash University Accident Research Centre, March 2008.

of Justice maintain regular statistics on the number of license disqualifications arising from traffic offending and non-payment of fines.

- As a matter of course, Indigenous status is recorded in all licensing, traffic conviction, fine enforcement and court records. The Indigenous status of offenders must be recorded so that inequities or systemic biases can be identified and removed.
- That research be conducted to determine the 'true' level of disqualified driving in Western Australia. Improved techniques, such as those used in the Moncton study (Malenfant et al, 2002), should be incorporated into this research.
- Individual issuing authorities make a greater effort to monitor the rate of compliance with payment of fines and pursue methods of increasing payment of fines. It is recommended that such agencies offer a greater range of payment options and introduce more flexible arrangement-to-pay options for some clients. The Fines Enforcement Register is not the state debt collection agency and should not be treated as such.
- Given the significant over-representation of Aboriginal people in fine default and fine suspensions, it is recommended that the appropriateness of fines as an effective sanction for Aboriginal offenders be immediately reviewed. There is an urgent need to develop culturally appropriate sanctions and financial penalties based on an individual's capacity to pay.
- The study made no comment on the impact of license suspension on the lives of Aboriginal people, as no qualitative information was available. However, given the highly discriminatory consequences of fine suspension on Aboriginal people, there is a clear need to undertake further research in this area and explore some of the regional issues associated with Aboriginal fine non-payment and license disqualification.
- It is recommended that, upon disqualification, drivers be supplied with an information pack containing information on the consequences of driving while disqualified. This should include information about the penalties associated with the offence, the insurance implications (to themselves, passengers and other road users) and the crash risks associated with such action.
- It is recommended that measures shown to have reduced the level of disqualified driving in other jurisdictions – specifically, vehicle impoundment, sticker laws and plate confiscation - be trialed in Western Australia.
- It is recommended that two additional strategies - 'curfewed' or partial up-front suspensions and increased opportunities to earn a license back – be trialed as methods of encouraging compliance with license disqualification orders.
- It is recommended that options be explored which encourage compliance with road traffic laws. Raising the perceived risk of detection of unlicensed driving is one way of increasing compliance. This could be achieved through more visible police presence on the road; the introduction of sticker laws; compulsory carriage of licenses, accompanied by well-publicized license checks; and/or more publicity about convictions for driving-while-disqualified offences.
- It is recommended that local research be conducted to explore the road safety risks of disqualified drivers. The outcomes of such research would have immediate practical and policy benefit. For example, findings which suggest that the crash/injury risk of disqualified drivers is higher than that of 'normal' drivers, even during periods of disqualification, would support a strategy of 'tougher and more targeted' policing of disqualification orders. In addition, the research could explore the differential risks associated with different types of disqualified driving (that is, demerit disqualifications, drunk drivers and fine suspensions). Very little is known about the illegal driving patterns and the road safety risks of fine suspended drivers, in particular. Findings may suggest that fine suspended drivers do not pose a significantly higher crash/injury risk than other types of disqualified drivers. Such findings would support a strategy of differential treatment (punishment) of these offenders.
- It is recommended that both the fine enforcement system and the prison system be monitored to ensure that the combined number of fine-defaulters and disqualified drivers entering prison is kept to a minimum. An increase in this statistic may be symptomatic of one or more of the following: net widening of/by the fine enforcement system, reduced compliance in fine-payment or reduced compliance in road traffic laws. In any event, such trends would require further investigation.

- The study found no evidence of research that addressed the effectiveness of license suspension as a fine-enforcement sanction. The study also found a lack of research on the recidivism of fine suspension drivers (especially those suspended for non-traffic related fines) or the road safety risks of this group. Given that the Western Australian FPINE legislation has been in operation for more than eight years and that the number of jurisdictions using or seeking to use license suspension as a fine enforcement action is increasing, research addressing these fundamental issues is now urgently required.[13]

Question 10.2

1. **Should non-association and place restriction orders be retained?**
2. **Should any changes be made to the regulation and operation of non-association and place restriction orders?**

The Justice Legislation Amendment (Non-association & Place Restriction) Act 2001 was introduced as part of the Government's package of anti-gang laws and initiatives. The purpose of the Act is to enable non-association and place restriction conditions to be attached to the grant of bail, parole, custodial leave and home detention. In an effort to best represent the views of operational police, in 2004, the NSW Police Association sought assistance from its members who deal with this legislation on a regular basis and were best placed to identify existing problems with the legislation and comment on its effectiveness. Some of the comments made at the time (in light of the above questions) included:

- While the Act does not limit the circumstances in which non-association and place restriction conditions of bail may be made, it is important the conditions imposed are not unreasonably broad, too onerous or unworkable in practice.
- Does the Act apply to gaol visits by convicted offenders to their criminal friends and associates in gaol on remand or serving a custodial sentence. At times, suspects reveal their ability to visit other well known criminals inside the goal system. Further, a canvass of the phone calls made by the prisoners revealed the ability to make a phone call to a nominated friend who has the ability to dial another number via a conference line so that other criminals can speak with those they are restricted from speaking with. Police say it's frustrating to know that all the good work done by police on the streets is not a deterrent to those inside that have the ability to continue with their criminal enterprises. It appears that the current gaol system allows persons convicted of indictable offences to visit other persons convicted of indictable offence is a breach of the consorting legislation Section 546A.
- As mentioned already, the Act is based on US research. Australian research has shown that US-style gangs are a rarity here. Patterns of crime and criminology are very different, with the incidence of US-style gangs here low. There are very few organized youth gangs. The question needs to be asked is will the Act have much impact on 'gangs' which are highly organized networks with hierarchical structures and an identifiable leadership? Or will the new law target disadvantaged young and indigenous people who commonly associate with their peers in public spaces – often because they have no one else to support them and nowhere else to go? Young people, or people with difficult lives and little social support, may find it very difficult to abide by the orders. They will then be charged with breaching an order – yet another public order offence. They may end up with a penalty including a bond with stricter conditions, a fine, or a custodial sentence (which would guarantee exposure to negative peer influences). Maybe more effort in practical policies should be considered in keeping these disadvantaged young and indigenous people out of the criminal justice and prison systems rather than finding an excuse to introducing them early and keeping them trapped within it.

[13] Anne Ferrante, The Disqualified Driver Study, A study of factors relevant to the use of license disqualification as an effective legal sanction in Western Australia, Crime Research Centre, University of Western Australia, September 2003.

- More research and data needs to be developed in the investigation of criminal gangs in New South Wales with a degree of complexity that is often missing in media coverage. More information is needed to separate what constitutes gangs or organized crime from gangs of youth. Are these youth gangs just friendship groups of kids hanging out mainly in public spaces who occasionally engage in criminal or anti-social behavior? Or are they gangs in the sense that they have membership rituals, hierarchical structure of power and patterns of systematic criminal activities? For instance, the ethnic criminal is often sensationalized by the Australian media, escalating a moral panic that is disproportionate to the problem at hand. There are suburbs in Sydney's west that have become synonymous with 'ethnic' crime, due to a systematic campaign of hysteria by the corporate media in the past six or so years. Figures from the NSW Bureau of Crime Statistics and Research study into trends in recorded crime statistics between 1998 and 2002 indicate that in the local government area of Bankstown for example, the incidence of robbery, assault, break and enter, car theft and stealing all remained stable or declined. The media hysteria about ethnic youth gangs is part of an over-eagerness to ascribe the term 'gang' to almost any grouping of young people in public spaces, who are assumed to be up to no good. Such factors point to the need for further investigation into the issues relating to crime and gangs in Sydney today.

As the LRC reports, the NSW Ombudsman reviewed the operation of non-association and place restriction orders in 2008. The report revealed that the non-association and place restriction orders have been used infrequently and asks whether aspects of the legislation should continue at all. This is worth considering since the legislation is clearly not meeting its objectives. The Report identifies a number of legislative and procedural changes if the legislation does continue - again worth considering.

Sentencing
Question Paper 11
Special categories of offenders

This Question Paper considers the issues relating to some groups of offenders which may require special consideration either because they are overrepresented in the criminal justice system or because particular sentences affect members of these groups differently when compared with other offenders.

Question 11.1

1. **How can the current sentencing regime be improved in order to reduce:**
   a. **the incarceration rate of indigenous people; and**
   b. **the recidivism rate of indigenous offenders?**
2. **Are there any forms of sentence other than those currently available that might more appropriately address the circumstances of indigenous people?**
3. **Should the Fernando principles be incorporated in legislation and if so, how should this be achieved and what form should they take?**

The Council of Australian Governments has identified the overrepresentation of Indigenous prisoners in Australian prisons as an area that requires urgent attention because of the interrelationship between offending behaviours and imprisonment, and other key indicators of Indigenous disadvantage. In her paper, *The Fernando Principles*, (Manuell 2009) considers what steps could be taken by the NSW legislature and/or the NSW courts in an effort to reduce the rates of Indigenous imprisonment in NSW. Consideration is also given to the approaches taken by Tasmania, Victoria and Canada to the sentencing of Indigenous offenders - all worth considering.

The 2009 Productivity Commission Report on indigenous disadvantage revealed that for indigenous men, the rate of imprisonment increased by 27 per cent in the years between 2000 and 2008, and for women, by more than 40 per cent. Indigenous adults are now 13 times more likely than non-indigenous adults to be sent to gaol, and they're much more likely to re-offend.

An article written by Wendy Young and Tammy Solonec discusses the alarming levels of incarceration of indigenous people. According to the article, the problem has not been adequately addressed since the Royal Commission into Aboriginal Deaths in Custody, particularly in a climate in which State and Territory Governments wish to appear 'tough on crime'. This article poses solutions in the form of Justice Reinvestment in which the diversion of funds from prison construction and operation is channelled into anti-recidivism programs in areas with high rates of criminal incidence and offender numbers. Justice Reinvestment programs emerged in high prison population states in the US and have enjoyed successes in helping to reduce detention rates and improve community conditions. This article explores epidemic incarceration, underlying causes, and the financial costs of such issues. It goes to explore the Justice Reinvestment model and its capacity to be applied to the Australian setting, particularly given the geographic differences in high incarceration areas. Using a discussion of programs that have worked in the Australian context, the article concludes that a piloting of Justice Reinvestment programs will build on currently initiated, community programs to more effectively address the issue of Indigenous overrepresentation in Australian prisons.[14]

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[14] Wendy-Rea Young and Tammy Solonec, Epidemic incarceration and justice reinvestment: it's time for change, Indigenous Justice Clearinghouse, Indigenous Law Bulletin 7 (26) Sep/Oct 2011.

Question 11.2

1. **Should the Crimes (Sentencing Procedure) Act 1999 (NSW) contain a more general statement directing the court's attention to the special circumstances that arise when sentencing an offender with cognitive or mental health impairments? If yes, what form should these principles take?**

The LRC correctly states that the representation of people with cognitive and mental health impairments in the criminal justice system is disproportionately high (the details of this data will be further examined in the LRC's yet to be released report on the diversion of people with mental health and cognitive impairments from the criminal justice system). More than 50% of prisoners have an intellectual or psychiatric disability. Most of these people cycle in and out on short sentences or on remand because there a few community services to help them stay out of trouble.[15]. As Justice Sperling's summary of the principles (relevant to sentencing offenders with mental impairments in R v Hemsley,) the Act should consider a more general statement directing the court's attention to special considerations that arise when sentencing an offender with cognitive or mental health impairment. Obviously further case analysis is required in answer to what form should these principles take (particularly with the results from the soon to be released LRC's report on the data analysis of the diversion of people from the criminal justice system).

Question 11.2

2. **In what circumstances, if any, should the courts be required to order a pre-sentence report when considering sentencing offenders with cognitive and mental health impairments to prison?**

As the LRC states, the introduction of pre-sentence reports would have significant resource implications and may not be appropriate or necessary in all cases. The supervision suitability reports being piloted in South Australia is worth considering particularly in evaluating how effective this option has proven to be and if the pilot has successfully demonstrated in fulfilling its aims and objectives.

Question 11.2

3. **Should courts have the power to order that offenders with cognitive and mental health impairments be detained in facilities other than prison? If so, how should such a power be framed?**
4. **Do existing sentencing options present problems for people with cognitive and mental health impairment? If so, how should this be addressed?**
5. **Should any new sentencing options be introduced for people with cognitive and mental health impairments? If yes, what types of sentencing options should be introduced?**

Each of these questions raises a considerable field of inquiry that could benefit from independently being further explored more comprehensively. As mentioned more than 50 per cent of prisoners have an intellectual or psychiatric disability. Most of these people cycle in and out on short sentences or on remand because there are few community services to help them stay out of trouble. Prison, (the most unhelpful place to send a person with these problems) is being used as surrogate therapeutic housing. But prison is not organized to provide a healing environment and many are released in a worse situation than before they entered. Parole officers and courts despair that many sent to psychiatric services

[15] Eileen Baldry, Prison Boom will Prove a Social Bust, Hardened criminals are not filling NSW's prisons – the mentally ill and socially disadvantaged are, Sydney Morning Herald, 18 January 2005.

because they are clearly mentally unwell, return to court within days or even hours. Eventually they are sentenced to prison terms because there is no alternative.

> *"Deinstitutionalization, without adequate community care, has resulted in a new form of institutionalization: homelessness and imprisonment."*
>
> Dr Brian Pezzutti, Chairman NSW Parliamentary committee on Mental Health 2002.

The Productivity Commission reports that NSW spends the least per person of all the state governments on mental health. NSW is also below the average in supporting people with an intellectual, particularly those who have been caught in the criminal justice system. Affordable housing in NSW especially for those with disabilities has slipped further out of reach. Fifty percent of prisoners are homeless within nine months of their release. When this is combined with poor mental or intellectual functioning, most are unable to manage and end up back in prison. NSW has one of the highest rates of recidivism in Australia, with more than 7 per cent in prison having been incarcerated before. NSW is also well below the average in providing supported housing and employment for people with a disability. Most prisoners come from, and go back to, a small number of disadvantaged localities where poor education, unemployment and poor access to services have been generational. These communities already have a heavy load of social problems to deal with without increasing the number of problems to deal with without increasing the number of people returning from prison in need of unavailable housing, health and employment. The fastest-growing group in NSW prisons is Aboriginal women. These women are not the dangerous, violent criminals. Most are on short sentences and have been in and out of detention since their youth, putting a lie to the argument that prison rehabilitates. Women in general are the next fastest-growing group. Seventy per cent of the flow-through prison population – that is, number flowing in and out over a year – are on six-month sentences or less. Most have suffered physical or sexual abuse as a child and domestic violence as adults, and 90 per cent have alcohol or other drug problems. If the women are not supported to overcome these problems they will stay locked in the revolving door of the criminal justice system.[16]

When there's a lack of community services for people with mental illness, they often come to the attention of police. A contradiction arises, because the police feel that their job is to stop in only when action is deemed necessary, usually when someone is in danger or breaking the law. Police do not feel, and rightly so that it is their role to provide psychotherapy, counseling or aid and comfort for the lonely and confused. This is the job of mental health professionals, a group whom police see to some extent as abdicating their responsibilities, more often than not due to lack of funding and availability of positions. Police see the responsibilities thrust upon them as they are – they are being asked to shoulder duties no one else wants or can manage. Police are being tasked with responsibility in an area which is time consuming and which they argue, not a proper police function, except in a first response situation. But when limited or no assistance is obtainable form other agencies, police have little choice but to continue to carry the burden of a lack of effective government policy and lack of funding in mental health services.[17]

During 2006, an alliance of police and healthy industry unions had been warning of safety risks to officers from an increasing number of incidents involving mentally ill people in NSW since 2004. Police responded to more than 18000 incidents involving mentally ill people in the 12 months to July 2005, tying up resources and exposing officers to higher levels of safety risks. It was said at the time that "*Reform of mental health services in NSW is overdue. It is clear that too many high-risk people, with little or no health and other support, are being released into the wider community, often straight into the path of the police. There is a clear role for law enforcement in emergences where people with a mental illness are*

[16] Eileen Baldry, Prison Boom will Prove a Social Bust, Hardened criminals are not filling NSW's prisons – the mentally ill and socially disadvantaged are, Sydney Morning Herald, 18 January 2005

[17] Mark Burgess, Senate Select Committee on Mental Health, Parliament House, Canberra ACT, 10 May 2005, Association News, September 2005.

posing a risk to themselves or others. But as these incidents increase in number and severity and as the mental health systems requires ever-increasing support, police are starting to see blue. Insufficient psychiatric nursing staff, active care crisis team staff, psychiatrists, staff in support accommodation, trained mental health case workers, security staff in mental health facilities, has increased police workload throughout NSW. The public mental health system and the criminal justice system must collaborate so that police officers have several alternatives, not just arrest or hospitalization, when handling mentally ill persons in the community. The government must urgently address this tragedy of the mentally ill, who deserve much better care." (Source: Police Association of NSW Media Release, 5 January 2006).

Question 11.3

1. **Are existing sentencing and diversionary options appropriate for female offenders?**
2. **If not, how can the existing options be adapted to better cater for female offenders?**
3. **What additional options should be developed?**

Diversion requires the provision of a wide-range of viable community-based alternatives to detention. Diversion program should be adequately resourced to ensure they are capable of implementation, particularly in rural and remote areas. Diversion should be adapted to meet local needs and public participation in the development of all options should be encouraged. There should be adequate consultation with Aboriginal communities and organizations in the planning and implementation states. Diversionary options should be available at all stages of the criminal justice process including the point of decision-making by the police, the prosecution or other agencies and tribunals. Diversion should not be restricted to minor offences but rather should always be an option. The decision-maker should be able take into account the circumstances of the offences. The fact that women have previously participated in a pre-court diversionary program should not preclude future diversion. A breach of conditions should not automatically lead to a custodial measure. All law enforcement officials involved in the administration of diversion should be specifically instructed and trained to meet the needs of women. Justice personnel should reflect the diversity of women who come into contact with the system.[18]

As the LRC reports, women are a growing prison population with specific experiences and needs that are not appropriately acknowledged in the present operation of the criminal law and the criminal justice system. In answer to the above questions, the following issues and options could be considered: These options are conveyed via the Women in Prison Advocacy Network (WIPAN) - an all-inclusive organisation aiming to support the diversity of women in the criminal justice system and the community as a whole.

- Indigenous women are particularly overrepresented in the prison population. This is particularly problematic given the cycle of violence, trauma, substance use and disadvantage that characterize the pathways of many women into and then back into the criminal justice system and prison. Regarding this gendered phenomenon, sentencing law needs to consider reducing the use of custodial orders in relation to women. Sentencing women to custodial sentences often only facilitates a continuum of violence, trauma, disadvantage, offending and imprisonment for these women.
- Prison and post-release services must be able to provide appropriate support for women in addressing trauma and mental health issues and substance use issues. These can include

    Trauma and mental health support,
    Support and services to address drug and substance use,
    Positive social support, including through mentoring,

[18] Corrective Services NSW Women's Advisory Council, Preliminary Submission, November 2011.

Support in regaining custody of children,
Safe, appropriate and long-term housing,
Financial support, and
Physical health services.

- A large proportion of women are convicted of minor offences. A large proportion of women have substance use issues linked to trauma and victimization. Consideration needs to be given to the extent to which existing court diversion programs meet the needs of women, including issue of trauma and mental health, and child caring issues, and in turn whether women are being excluded from these programs or are not able to gain as much as men from the programs. These issues are particularly pertinent in relation to the Drug Court and CREDIT. A roll-out of diversionary mechanisms is suggested in order to encourage their accessibility to women in different geographical locations (particularly because women might be less geographically mobile due to caring responsibilities).
- Consideration given to a range of diversionary and pre-conviction options focused on addressing the needs of women prior to sentencing which include peer mentoring, restorative and transformative justice.
- Consideration given to the capacity within sentencing law to proceed without any punishment where women have participated in diversionary and pre-conviction options.
- Consideration given to the lives of women (and their families) beyond the point of sentence to extend to the post-release and how women are being supported in their transition back into community.
- Consideration given to how the practice of sentencing could be accompanied by a strategy for the consistent and thorough practice of identifying and making recommendations for the reform of systemic issues that sentenced individuals experience.
- If the criminal law is going to authorize the detention of individual (and in circumstances where these women have been subject to victimization, trauma and long term disadvantage), consideration to be given to the responsibility of the government and the community to assist them in their return back into the community and consider how this responsibility can be reflected in sentencing law. Unless this is done effectively, one of the main goals of the sentencing law and criminal justice system (rehabilitation) and one of the greatest concerns in society (safety) will not be addressed.[19]
- Consideration be given to the specific issues in relation to sentencing law for women with mental health and cognitive impairments and women from culturally and linguistically diverse backgrounds who have particularly diverse needs and might experience multiple and complex disadvantage.

Question 11.4

Are additional sentencing options required in order to achieve the purposes of sentencing in relation to corporations? If yes, what should these options be?

As the LRC reports, during 2010 there were 102 169 offenders in NSW sentenced by the Local Court of who 1 578 were corporations. The LRC conducted a research report on sentencing corporate offenders and came up with a number of recommendations that are worth considering. In its findings it considers the objectives or purposes of sentencing in relation to corporations which must be borne in mind that a considerable amount of corporate offending takes place in a regulatory context. Ensuring future compliance will, therefore, usually be the overarching concern when sentencing corporate offenders. In

[19] Women in Prison Advocacy Network, Preliminary submissions to the New South Wales Law Reform Commission, Review of Sentencing, January 2012.

this context particular emphasis will be given to the objectives of deterrence and rehabilitation. The deterrent effect of criminal penalties on corporate offenders finds some support in both theoretical and empirical crime literature. There are a number of reasons why the criminal law can deter corporate misconduct. First, the criminal law forces corporations to take steps to avert the risk of punishment when the financial benefits of averting the risk exceed the costs. Secondly, it establishes the ethical and acceptable boundaries of corporate conduct. As mentioned already the results of this study and its recommendations are worth considering (along with key stakeholders concerns) particularly in respect to expanding the range of sentencing options available for corporations being dealt with for breaches of NSW law which currently is quite limited (fines being the main penalty imposed).

Question 11.5

Are there any other categories of offenders that should be considered as part of this review?

While the Internet has brought many positive resources for educational purposes, business use and even entertainment for personal home use it has also brought negative effects as well. Over the past few years the Internet has grown explosively. Compared to only 26 million users in 1995 over 200 million people now communicate online. As the Internet has expanded so has its misuse. So-called cyber-criminals roam the virtual world largely at will committing crimes. Computer criminals are as diverse as the offences they commit. They may be students, terrorists or members of organized crime. For economic crimes such as fraud or stealing information the biggest category is in-house employees who commit over 90% of these offences, according to the 1997 UN Manual on the Prevention and Control of Computer-Related Crime. Cyber-criminals can zoom across international borders undetected hide behind countless "links" or simply vanish leaving no paper trail. They can route communications through or hide criminal evidence in "data havens" countries lacking the laws or expertise to track them down.

> *"The modern thief can steal more with a computer than with a gun. Tomorrow's terrorist may be able to do more damage with a keyboard than with a bomb".*

Source: National Research Council, "Computers at Risk", 1991.

Other categories of offenders that should be considered as part of this review could be those involved in the following;

- Identity theft
- Credit card fraud
- Cyber stalking
- Software piracy
- Pornography
- Unauthorised access

Sentencing
Question Paper 12
Procedural and jurisdictional aspects

This Question Paper deals with procedural and jurisdictional aspects of sentencing, looking particularly at innovations that could be adopted to simplify the operation of the law and enhance the transparency and consistency of decision-making.

Question 12.1

How can information technology be used to improve the accessibility of sentencing law while maintaining judicial independence?

It is quite relevant when the LRC states that strategies to improve public knowledge and relationships with the media are important to improving confidence. There needs to be considered thought (from key stakeholders) as to how the courts can improve levels of public confidence by communicating directly with the public (whether it chooses to do it via the internet, social networking sites, smart phones and other mobile devices). In doing so, it is important to be mindful that, whatever changes might be made, the courts must remain independent of private and political influences in order to discharge their functions effectively. The recent advances in information technology can now provide various and different methods to people by which they can communicate widely and express their views on what government agencies are telling them. All these methods are worth exploring on how best to utilise these information networks with appropriate technological support and resources;

- Broadcasting court proceedings
- Facebook page and videostreaming hearings
- Websites and simplifying the language of Acts and Regulations online
- Twitter could be effective in disseminating short bursts of information widely and quickly
- Courts blog to provide more detailed information

Question 12.2

Could publicity orders and databases be a useful tool in corporate or other sentencing cases?

Publicity orders and databases could be a useful tool in corporate cases as corporations and corporate officers generally place a premium on their good reputation and the potential adverse publicity and consequential effects (ie company's prestige and its customer's attitudes and spending patterns) could very well act as a deterrent against corporate offences. The recent innovation of the NSW Food Authority website of penalty notices is a perfect example of this method.

Question 12.3

What procedural changes should be made to make sentencing more efficient?

The introduction of the 2011 'Online Court' is a step in the right direction in seeking to reduce delays in the sentencing process and in finalising criminal cases. Depending on the success of the pilot program there clearly may be potential for it to expand across to other courts and to other aspects of preliminary or procedural mentions in sentencing matters as well. This is worth considering. The LRC also suggests other ways to improve the internal efficiency of traditional courts in the criminal justice system. These again, are worthy of serious consideration and include some procedural possibilities to reduce delays both at first instance sentencing and on appeal that would involve enforcing or revising relevant court Rules and Practice Notes.

Question 12.4

How can the process of obtaining pre-sentence reports covering all sentencing options be made more efficient?

The Pre-Sentence Report is meant to be a fair comment about an individual regarding why they committed an offence and their background as a person to help the court decide on a fair and effective sentence. The LRC's suggestion (in order to improve and streamline the assessment process) involves the court requesting a single pre-sentence assessment report from one government agency that addresses the offender's eligibility and suitability for all the sentencing options. This would need to be structured very carefully in a way that any practical difficulties that did occur (would be avoided) and the fact that it would place an onerous duty on the government agency that would be responsible for the report and the problems (as a result) it may present.

In a briefing paper by the NSW Parliamentary Research Service (Figgis 1998), pre-sentence reports were noted as being generally well-received by the courts, with a recent Judicial Commission survey finding that the majority of judicial officers and legal representatives expressed a high level of satisfaction with pre-sentence reports. Reports were said to be clear and easy to understand, soundly based and independent, although a minority of judicial officers expressed the view that some reports were too sympathetic to offenders, accepting unverified statements or recommending inappropriate sentencing options.[20]

Question 12.5

Should oral sentencing remarks be encouraged by legislation with appropriate legislative protections to limit the scope of appeals?

Oral sentencing remarks should be encouraged by legislation since (as the LRC reports) "judges are taking more time to impose sentences than is desirable" because sentencing law has become too complicated and technical arguments are being run on appeal. There would still need to be a recording of the relevant findings so that the appellate can review the decision but excessive subtlety and unnecessary discussion of the legal principles could very well be avoided.

Question 12.6

1. **Should any change be made in sentence appeals to the test for appellate intervention (from either the Local Court or a higher court)?**
2. **Should greater emphasis be given to the existing provision in s43 of the Crimes (Sentencing Procedure) Act 1999 (NSW), which allows sentencing courts to correct errors on their own motion or at the request of one of the parties without the need for an appeal?**
3. **Should appellate courts be able to determine appeals 'on the papers' if the parties agree?**

In answering which of the above methods could improve the capacity of the appellate court there needs to be a comprehensive case analysis to determine the best practice. The possibility (for instance) of allowing (if both parties agree), to determine the appeal "on the papers" in chambers without the need for a hearing - this occurred recently in the CCA when a party contended that the Court had not fully determined the grounds of appeal and asked the Court to set aside its earlier orders. For appeals that do

[20] Honor Figgis, Probation: An Overview, NSW Parliamentary Library Research Service, Briefing Paper No 21/98, December 1998.

not involve any new or significant points of law this might become the norm rather than the exception (as the LRC reports). This method seems to have more advantages than disadvantages, though more case analysis would be required.

Question 12.7

What bottlenecks exist that prevent committal for sentence proceeding as swiftly as possible and how can they be addressed?

As the LRC reports, even though the ODPP established a Pre-Trial Unit to deal with this issue, the problem of adequate resourcing remains. The Law Society of NSW suggested that emphasis should be placed on funding for the Office of the Director of Public Prosecutions so that Crown Prosecutors can be briefed early. Also, the issue of less senior solicitors given carriage of new matters who lack the delegated authority to finalise charges leading to stalling is another issue. There needs to be further consultation with key stakeholders in how best to address bottlenecks.

Question 12.8

Should specialisation be introduced to the criminal justice system in any of the following ways:

- **c. having specialist criminal law judicial officers who are only allocated to criminal matters;**
- **d. establishing a Criminal Division of the District Court;**
- **e. establishing a single specialist Criminal Court incorporating both the District Court and Supreme Court's criminal jurisdictions, modeled on the Crown Court;**
- **f. amending the selection criteria for the appointment of judicial officers;**
- **g. in any other way?**

The use of specialist judges (as suggested by the LRC) may very well aid in reducing the numbers of errors made in sentencing as opposed to a newly-appointed judge who has little experience in criminal matters. Establishing a specialist court could also lead to delivering sentences more quickly. Some countries have adopted specialist court systems after recognising the inadequacy of the usual criminal trial method. South Africa and Canada have specialist courts for domestic violence and sexual assault cases, while a network of specialist rape prosecutors in England and Wales has been established.

Cossins (2007) who studied specialisation in detail, says the benefits are numerous. *"If you have specialised judges that are trained in the area and trained to understand the impact of styles and types of cross-examination, trained to intervene in inappropriate modes of cross-examination, and if you have specialist prosecutors then you get at least two groups who know the evidence law because the way it applies in these trials can be quite different compared to other criminal trials. "Then, if you also introduce things likes legal representation for the complainant or at least have an intermediary in court to put counsel questions to the complainant, you've got a way of improving the experience of the complainant, changing the culture within the court room and hopefully producing different outcomes because there's very good data showing the conviction rate is very low*".

Karen Willis, manager at the NSW Rape Crisis Centre, says specialisation results in better outcomes. *"It's not about building new courts; it's not about bricks and mortar. It's about culture within the court. It's about those courts having a priority to do everything they possibly can to decrease the re-traumatisation of the victim. Sexual assault will never be easy on the victim but there should also be training for judges so they understand the laws in relation to sexual assault. There needs to be a lawyer for the complainant. At the moment she is on her own, generally. There's a defence lawyer, the crown has a lawyer and the public prosecutor has a lawyer but nobody has the job of looking after her rights and ensuring due*

process and informing her of what's going on and so on". Ensuring cross-examination is not unduly traumatic for the victim is a persuasive argument for specialisation as far as women's groups are concerned.

Those opposed to the introduction of a Specialist courts believe it would mean victims in regional and rural areas would have to travel long distances often for long periods, separating them from friends and family. In contrast (to) by equipping all District Courts with the knowledge and resources to deal with sexual assault matters, victims are able to go to any of the 32 locations where the court sits around the state (for instance). There needs to be further consultation with key stakeholders regarding the issues of specialisation.

Question 12.9

1. **Should the comprehensive guideline judgment system in England and Wales be adopted in NSW?**

If the comprehensive guideline judgment system in England and Wales is adopted in NSW a concern (that the LRC rightly suggests) would be that courts may be resistant to yet another external body determining sentencing standards and could be seen as another intrusion on judicial independence. On the other hand, the UK Guidelines provide a single source of information for primarily the Judge, but it is available for the other parties and the community that explains the sentencing process and give a clear direction in the sort of penalty that might be expected for the offence. As the ODPP suggests, the amount of detail and work in the creation of the UK Guidelines is daunting but it could be argued the resources utilized in NSW to date on sentencing might be more constructively directed towards the development of a resource like the Guidelines. Further consultation from key stakeholders is required in answer to this question. Whether the UK system sentencing guidelines is adopted in NSW it is imperative that the sentencer be aided via the objective in the promotion of transparency and consistency in sentencing.

Question 12.9

2. Should the current guideline judgment be expanded by:

- **a. allowing specialist research bodies such as the NSW Sentencing Council to have a greater role to play in the formulation of guideline judgments, and if so, how should they be involved?**
- **b. allowing parties other than that Attorney General to make an application for a guideline judgment, and if so, which parties, and on what basis should they be able to apply for a guideline judgment?**

The current guideline judgment could be expanded by allowing specialist research bodies such as the NSW Sentencing Council to have a greater role to play in the formulation of guideline judgments. The Council could undertake public consultations and provide the Court with an expert report summarising public views and presenting statistical data on current sentencing standard for a particular offence, the frequency of the offence, public views on sentencing standards for the offence, approaches in other jurisdictions and so on. It is suggested by the LRC that this model may avoid possible constitutional problems. This is worthy of serious consideration especially if the model is able to promote transparency and consistency within the sentencing process.

Question 12.9

3. Should the Chief Magistrate have the power to issue guideline judgments for the Local Court? If so, what procedures should apply?

In Western Australia, the Chief Magistrate has the power to publish guidelines for courts of summary jurisdiction for the purpose of reducing any disparity in sentences. There needs to be an evaluation conducted on the Western Australia model to consider what and if this would be a fitting model for NSW system. The former NSW Director of Public Prosecutions (as noted in the LRC report) has observed that the PCA guideline judgment has been very useful in bringing a greater degree of consistency in sentencing into being and assisted when determining whether there should be a prosecution appeal against the sentence imposed by the Local Court in a PCA matter. There needs to be further case analysis and sentencing statistics in answer to whether the Chief Magistrate could have the power to issue guideline judgments for the Local Court.

Question 12.10

1. **Should a sentence indication scheme be reintroduced in NSW?**
2. **If so, should it apply in all criminal courts or should it be limited to the Local Court or the higher courts?**
3. **Should guideline judgment be sought from the Criminal Appeal to guide the operation of the scheme?**
4. **How could the problems identified with the previous sentence indication pilot scheme in NSW in the 1990s, including overly lenient sentence indications and 'judge shopping' be overcome?**

A sentence indication pilot scheme was in operation in NSW from 1993 until it became discredited and discontinued in 1996. It was introduced in the District Court in Western Sydney and spread to all District Court sittings in NSW. The Bar Association reported that part of the problem was the selection of particular judges allocated the task of sentence indication. The Bar Association suggested that a solution would be to consider applying for a CCA guideline judgment similar to the model in England and Wales.

As the LRC reports there is also the issue of adequate resourcing for the prosecution and defence to prepare for sentence indication hearings. Whether a sentence indication scheme be reintroduced in NSW requires further research evidence particularly from other states (ie Victoria, Tasmania, ACT and New Zealand) where there is a variety of the schemes being adopted and which have conducted evaluations of the said schemes.

Question 12.11

1. **Should a court be permitted to give weight to the contents of a family victim impact statement when fixing the sentence for an offence in which the victim was killed?**
2. **Should any changes be made to the types of offences for which a victim impact statement can be tendered?**
3. **Are there any other ways in which victims should be able to take part in the sentencing process which are presently available?**

VIS presently serve a number of purposes. They have an informative function in explaining to the court the extent of the impact of the crime on the primary victim's life. In cases not involving death this can contribute to the court's assessment of the seriousness of the offence and play a role in determining the appropriate sentence. VIS also have a therapeutic function in enabling victims to communicate the impact of the crime to the court. Where a family member has died as the result of an act of violence, VIS

provide an opportunity for the family to express their grief and loss, and allow proper public respect to be paid to these feelings. Consultation undertaken by the Victorian Victims Support Agency revealed that:

> *rather than impact directly on sentence, mostly victims wanted the court or the offender to hear about the impact of the crime. For family members of deceased victims, the purpose of the VIS was generally to give the deceased victim a presence or "voice" in the courtroom."*

It is important the criminal justice system take into consideration the impact of crime on victims and their families and support their participation in the criminal justice process. The manner in which victims and their families have this input into the process merits detailed consideration, especially when it concerns such a serious crime as homicide.[21]

There can be a number of concerns and these include;

- Any introduction of family victim impact statements could raise a number of difficult circumstances for courts to manage. These might, for example, include situations where: a homicide victim was not held in high regard by the community, was known to be a violent person and had no family. Would such a person attract a lesser sentence than would be the case had the victim had a loving family who spoke highly of them;
- there are multiply homicide victims victims' families have conflicting views about the appropriateness of giving impact statements; and
- the VIS includes information inconsistent with the facts found in the verdict.
- In addition, the proposal may make sentencing more complex and lengthy. As it opens up the possibility of a higher sentence where the impact is greater, it could lead to an increase in sentence appeals.

Assuming family victim impact statements are to be taken into account, and that the authors of impact statements are to be cross-examined (as in Victoria), victims may face questioning about some very confronting issues such as domestic violence by the victim, possible drug taking and the nature of the relationship between the family member and the victim.

Most homicide incidents in 2007-2008 were domestic homicides involving one or more victims who shared a family or domestic relationship with the offender. Intimate partner homicides comprised the largest proportion of domestic homicides (60%). In the case of child homicides, 69% of victims are killed by a custodial parent. These statistics show that homicide matters are extremely complex and often involve intense family relationships. Allowing family victim impact statements to influence sentencing in such matters may create risk of harm to victims, as well as creating challenging situations for courts to manage.

Question 12.12

Should any other options be considered for the possible reform of the sentencing system?

Other options to be considered for the possible reform of the sentencing system,

- The parole system, including eligibility for parole and breach of parole;
  - expert assessment in assisting with predicting re-offending
  - Types of resources needed to be available within prison system to identify issues with prisoners that need addressing
  - Availability of programs ie drug rehabilitation, sex offender programs, and reports to such programs of prisoners response important for parole decision making

[21] NSW Department of Attorney General and Justice, Background Policy Paper, Family Victim Impact Statements and Sentencing in Homicide Cases, May 2011.

    - Need for a wide range of rehabilitative program options
    - In terms of administrative support, what is required (etc) to properly discharge its duties
- The classification of offences;
- The maximum penalties fixed for offences.[22]
- Studies of public perceptions of sentencing in New South Wales
- Does NSW require a review of Jury Service? The last review conducted took place in 2006 with a number of issues discussed and evaluated. Do these need to be revisited again?

[22] Legal Aid NSW, Family Victim Impact Statement and Sentencing Homicide cases, Department of Attorney General and Justice, May 2011.

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