3 September 2012

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

Dear Chairperson

Submission – Sentencing Question Papers 8 – 12

I write in response to your invitation to make a submission in relation to Question Papers 8 to 12 released in the course of the Commission's review of sentencing.

QP 8 – The structure and hierarchy of sentencing options

I have largely addressed the matters raised in this Question Paper in my previous submissions.

I do not think it is necessary for a hierarchy of sentences to be set out in the *Crimes (Sentencing Procedure) Act 1999* ('the Act'). Although the Act does not expressly provide for a formal sentencing hierarchy, on a commonsense approach it is not possible to carry out the sentencing task unless the severity of a penalty relative to other options is identified. This is evident in case law. For instance, it underpins the process set out in *R v Zamagias* [2002] NSWCCA 17; custodial penalties are explicitly set out "in escalating order of severity" at [29]. It is also usually apparent in what the penalties themselves entail, although there are a few anomalies, such as:

- Upon their introduction, ICOs were marketed and perceived as a more severe custodial option than home detention notwithstanding that they were expressed as being beneath home detention in the 'ladder' of custodial sentences. ICOs were seen as 'home detention plus', on the basis that they contained elements such as compulsory work and program requirements, in addition to restrictions upon liberty such as a curfew and home visits. In practice, it has become clear that depending on how each option is administered, an ICO is lower in the hierarchy of custodial sentences, insofar as work and treatment aspects are also included within a home detention order, while the restrictive components of an ICO are less onerous than a home detention order.

- In previous submissions, I have discussed the frequency with which it seems that parties and practitioners appearing in the Local Court approach a suspended sentence as a more lenient option than a community service order, despite the former being a custodial sentence and the latter being a non-custodial sentence.

QP 9 - Alternative approaches to offending

Cautioning schemes

The Question Paper raises the issue of whether any early diversion programs should be introduced in New South Wales. One possibility I raised with the former Government is the extension of the cannabis cautioning scheme, which has operated since 2000 to divert individuals from the Local Court by giving the police discretion to issue a formal warning to an adult first-time offender found in possession of a small quantity of cannabis.

The current limitation of the cautioning scheme to cannabis alone does not appear consistent with the High Court's decision in *Adams v R* [2008] HCA 15. In that case, the Court indicated that where the penalty is the same, it is not correct to differentiate between various prohibited drugs in terms of their perceived social harm. Accordingly, offences of possession of a small quantity of a prohibited drug are approached on sentencing in the same manner irrespective of the drug concerned.

As a result, many magistrates take the view that to achieve equality before the law when dealing with such offences, an order should be made under s 10 of the Act. Of the approximately 8,000 to 10,000 individuals per year who appear before the Local Court charged with minor drug possession offences, a sizeable minority are dealt with pursuant to the provisions of s 10 or s 10A. If appealed to the District Court, use of s 10 appears to be routine.

One approach to address this issue would be the extension of the cautioning scheme to apply consistently to first-time offenders possessing a small quantity of any prohibited drug, rather than continuing the current differentiation in treatment between those in possession of cannabis and those in possession of another prohibited drug.

Diversion programs

The Magistrates Early Referral Into Treatment (MERIT) and Court Referral of Eligible Defendants Into Treatment (CREDIT) programs are two of the most effective diversion programs available in the Local Court. In light of positive evaluations of both programs to date, consideration of the following areas is desirable:

- **The rollout of CREDIT to other Local Court locations beyond the current two locations.** The extension of the program statewide, specifically in the context of responding to the needs of people with mental health and cognitive impairments, is a recommendation of the Commission in its recent report on that reference. I agree with the recommendation, though I note the prospective benefits of the program for defendants beyond those with mental health and cognitive impairments.

  It may also be desirable for an option to be developed, based on the operational model used by MERIT and CREDIT, which is targeted specifically at defendants with co-morbid mental health or cognitive impairment and a substance abuse issue, in view of the frequency with which there is a correlation between them.[1]

[1] For instance, see Smith N & Trimboli L, NSW Bureau of Crime Statistics and Research, *Contemporary Issues in Crime and Justice*, No 140 (May 2010) 'Comorbid substance and non-substance mental health disorders and re-offending among NSW prisoners'

- **Review of and consistency in relation to the basis upon which an individual should be eligible to access MERIT or CREDIT.** At present, the MERIT operational manual excludes those appearing on charges for "strictly indictable offences, sexual offences or offences involving significant violence" or who "have like offences pending before a Court", although prior convictions for violent or sexual offences are not considered. In practice this can limit the number of individuals eligible for referral to the program. For instance, in locations where Alcohol MERIT is offered, it has been reported that defendants charged with violent offences where intoxication is a factor are not eligible for referral to the program despite it being apparent that the defendant's alcohol use is a significant issue.

  Eligibility requirements for CREDIT are discussed in the Question Paper at [9.42] and vary from MERIT. The exclusion in relation to sexual offences is broader than MERIT, insofar as it extends to those convicted of such an offence within the past five years.

  It should be observed that the purpose of the programs is to provide health, social or other assistance that seeks to address factors leading to offending conduct and thereby reduce an individual's risk of re-offending. However, completion of the program is not a true diversion from the criminal justice system in the sense that the individual is still sentenced at the end of the process. In light of this, it would be desirable to revisit the philosophy that the programs should not be available to more serious offending (provided that issues such as the work health and safety of those operating the programs can be addressed).

<u>Section 11</u>

Deferral of sentencing under section 11 should be removed from the Act. The provision serves no useful purpose. To the extent that it may be appropriate to adjourn proceedings to enable rehabilitation or participation in an intervention program, other sources of power such as s 40 of the *Criminal Procedure Act 1986* are sufficient to achieve that purpose.

The location of the provision within the Act amongst sentencing options appears to be a source of confusion amongst some practitioners. Magistrates report receiving submissions for a matter to be dealt with pursuant to section 11 as if such an order amounts to a finalising outcome.

QP 10 – Ancillary orders

<u>Compensation orders</u>

I do not consider there is any need to change current arrangements in relation to compensation orders. While, as ancillary orders, compensation orders may have a valuable reparative purpose, they should not be viewed as an independent sentencing option that is available as an alternative to another sentence. Such an approach may unfairly disadvantage an offender with limited means to pay a compensation order.

Driver licence disqualification

My comments in relation to driver licence disqualification are subject to the observation that this area cannot be considered solely on the basis of its relationship with sentencing, as it involves broader issues of public policy that are ultimately matters for Government.

The Question Paper raises concerns in relation to mandatory minimum periods of disqualification following conviction for an offence under the road transport legislation, and the fact that a period of mandatory disqualification can only be overcome by disposing of a matter under s 10. I agree this can be problematic in instances where very lengthy periods of disqualification are accrued, but in general terms the required imposition of a minimum period of disqualification has in my observation had the benefit of providing a measure of consistency across matters and therefore a deterrent effect.

I thus do not have difficulty in principle with provision for mandatory minimum periods of licence disqualification, but consider it may be appropriate for there to be some scope for review, particularly in instances of lengthy accumulated periods of disqualification. As licence disqualification is consequent upon conviction, any review is an administrative decision more properly dealt with by the Administrative Decisions Tribunal rather than by application to a court. Indeed, given the volume of matters dealt with in the Local Court that result in the imposition of a disqualification period, any proposal for the Court to be empowered to review and quash periods of disqualification would have a serious impact in view of the postulated reduction in judicial resources available to the Court.

QP 11 – Special categories of offenders

My only comment in relation to this Question Paper is to briefly note the recent report of NSW Legislative Council's Standing Committee on Social Issues into domestic violence trends and issues. It included a recommendation that the Commission consider in the course of this review "the feasibility and desirability of alternative and additional sentencing options for domestic violence offences including referrals to mediation, support services, treatment programs, counselling and educational or rehabilitative programs."[2]

Aside from the more general issue of improving the statewide availability of sentencing options, I am not persuaded there is a need for any additional sentencing options specifically for domestic violence offenders to be introduced. The matters raised in the recommendation are those that to a large degree already fall within the ambit of Corrective Services' administration of sentences in the community and in custody. Upon sentence, a court may include a recommendation an offender be assessed in relation to certain issues that are apparent at the time of sentence, particularly having regard to what is raised in a pre-sentence report. However, the assessment of offender's needs and management of the programs, treatment options and other rehabilitative steps to be undertaken by the offender are then matters that are properly dealt with by Corrective Services.

[2] NSW Legislative Council Standing Committee on Social Issues, Report 46 (August 2012), *Domestic violence trends and issues in New South Wales*, recommendation 84 at p 396

QP 12 – Procedural and jurisdictional aspects

Procedural changes to make sentencing more efficient

Online court

The Question Paper mentions the online court system currently being trialled in committal proceedings at the Downing Centre Local Court, and raises the possibility of using an online court system to improve efficiency in other aspects of the criminal justice process, such as the filing and service of written submissions.

Any such outcome would be dependant on what the online court was used for and the features of the system itself. In the Court's experience of the current trial, the main benefit appears to be the flexibility and convenience the online court affords the parties' legal representatives in preparing for and conducting mentions. Further evaluation is due to occur in October but it was not expected, and there does not appear to have been, any efficiency benefit to the Court in using the system. The time required by a magistrate to conduct a mention online is typically about the same as in the courtroom, and at least the same level of administrative handling is needed. Although the experience may be different if an online court was used in other types of proceedings, the current system has no bearing on the time taken for a matter to proceed to the committal stage. Indeed, many matters referred into the online court are those that are expected to take longer to progress for various reasons, such as to the time taken to obtain forensic test results.

Annulment applications

An area that would benefit from review is the circumstances in which a defendant is entitled to apply for an annulment of conviction or sentence under section 4 of the *Crimes (Appeal and Review) Act 2001*. The provision as currently drafted can in some instances lead to unnecessary delay in finalising matters while also allowing a defendant to have several 'bites at the cherry' in the sentencing process. I have recently written to the Attorney General to propose that consideration be given to a legislative amendment to address this issue.

Section 4 presently allows a defendant to apply for annulment of a conviction or sentence made or imposed by the Local Court where the defendant was not in appearance before the Court when the conviction or sentence was made or imposed. Section 8 goes on to provide the circumstances in which such an application must be granted. These include where, having regard to the circumstances of the case, it is in the interests of justice to do so, resulting in a few scenarios that arise with relative frequency:

- **The defendant was convicted in his or her absence but appears for sentence, then lodges an annulment application in respect of the sentence.** As it is currently framed, the wording of s 4 enables a defendant the opportunity to lodge an annulment application in this situation, effectively amounting to an appeal against sentence.

  Section 4(1) provides:

  > *An application for annulment of a conviction or sentence made or imposed by the Local Court may be made to the Local Court sitting at the place at which the original Local Court proceedings were held:*

(a) by the defendant, or

(b) by the prosecutor,

but may be made by the defendant only if the defendant was not in appearance before the Local Court when the conviction or sentence was made or imposed.

By referring twice to "conviction *or* sentence", the provision does not draw the connection that the orders sought to be annulled are limited to those that were made in the defendant's absence. For instance, where the application is for annulment of a sentence, there is nothing to limit the making of applications to situations where the defendant was not in attendance when the sentence was imposed, as opposed to when the conviction was made.

- **The defendant's non-appearance before the court in the original proceedings was intentional.** A scenario that frequently arises before the Court is where a defendant sends a written plea of guilty to the court, electing to have the matter dealt with in his or her absence. The written notice includes an opportunity for the defendant to set out any matters that he or she requests the Court take into account when determining the punishment to be imposed. The defendant is convicted pursuant to the procedure in s 196 of the *Criminal Procedure Act 1986* and, after the Court considers any material provided by the defendant with the written notice under s 182(2), a penalty is imposed in his or her absence. The defendant is unhappy with the outcome and lodges an application under s 4 on the basis that the annulment is in the interests of justice, despite having nominated to have the matter finalised in this manner.

Ordering pre-sentence reports

I have previously raised the desirability of addressing inconsistencies in the steps involved in sentencing to the various forms of custody that currently complicate the process. Another alternative I have suggested is to refine the custodial options available, such as by consolidating home detention and ICOs. Either approach seems likely to assist in facilitating a more streamlined process of obtaining reports on sentencing options.

From my office's discussions with Corrective Services, it appears unlikely that a single pre-sentence report is a feasible option in matters where a custodial sentence is to be imposed. Such matters would require a two-step process, in which a pre-sentence background report followed by a custodial report in the event an alternative other than full-time imprisonment or a suspended sentence is being contemplated.

Appeals

I do not believe a requirement for specific error to be shown in appeals from the Local Court to the District Court would have either of the effects posited in the Question Paper that, on one hand, the efficient disposal of matters in the Local Court could be hindered by judgments becoming more complex or detailed, or conversely, that the need for error to be shown could lead to the production of judgments that do not adequately identify reasons for sentence.

The giving of reasons is intrinsic to the sentencing process. It is well established in case law that a duty to give reasons applies to lower court decisions, notwithstanding that allowance should appropriately be made for factors such as the giving of reasons ex

tempore without the benefit of a transcript of evidence and the pressures arising from the large volume of cases in the Local Court.[3] The fundamental nature of the requirement to give reasons is well understood, with appellate courts consistently emphasising the importance of sufficient reasons in enabling a party to exercise a right of appeal. For instance, it has been said:

> It is not satisfactory that an appeal court is left to undertake an analysis of exchanges between the bench and counsel during submissions in an attempt to ascertain a magistrate's reasons for determination: *R v Pham* [2005] NSWCCA 94 at para 11; *R v Thompson* (2005) 156 A Crim R 467 at 474–5 (para 32). The provision of concise reasons as required by law will avoid this circumstance occurring. It is necessary that magistrates keep in mind the obligation to provide reasons when determining summary proceedings under s 202 Criminal Procedure Act 1986.[4]

An awareness of the need to give adequate yet concise reasons for decision when giving ex tempore judgments in the context of a voluminous caseload is already the practical reality for all magistrates sitting in the Local Court. It is a matter addressed in the Court's education program, both for those newly appointed to the Bench and for all magistrates, on a regular and ongoing basis. There is no reason why the amendment of appeal mechanisms in the manner I have proposed should result in change that is inconsistent with current practice and understanding of the common law.

An alternate approach in the Question Paper is for greater emphasis to be placed on s 43 of the Act, allowing the court at first instance to correct a sentencing error. From the discussion at [12.61], it is not clear whether it is being proposed that the section should be expanded beyond its current operation, insofar as s 43 does not presently enable a court to reopen proceedings to amend a sentence that is "unreasonable or plainly unjust" if the error in question is not the imposition of a penalty contrary to law or a failure to impose a penalty required by law.[5] If an extension of s 43 beyond the current grounds is within contemplation, one difficulty is that it may create the undesirable situation of a quasi appeal process, in which one judicial officer is called upon to review a sentence imposed another judicial officer of the same court.

To the extent it is contemplated that appeal rights be amended to require the use of s 43 where available before an appeal could be lodged, it seems unlikely such a requirement would have a significant effect upon the level of appeals in view of the limited circumstances in which s 43 operates.

<u>Committal for sentence</u>

This is largely an issue affecting the District Court, but delays in matters committed for sentence may be caused in part by a lack of understanding in relation to the stage at which a plea of guilty can be said to have been entered at the earliest opportunity. It is apparent that an awareness of the approach of the Court of Criminal Appeal in *R v Borkowski* [2009] NSWCCA 102 is limited amongst many practitioners appearing in the Local Court.

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[3] For example, see *Acuthan v Coates* (1986) 6 NSWLR 472 at 479; *Colosimo v Director of Public Prosecutions (NSW)* [2005] NSWSC 854 at [36]; *Neighbourhood Association DP295386 v Forgeron* [2005] NSWCA 150 at [15]

[4] *Director of Public Prosecutions (NSW) v Illawarra Cashmart Pty Limited* [2006] NSWSC 343 at [18] per Johnson J

[5] For example, see *Davis v Director of Public Prosecutions (NSW)* [2011] NSWSC 153

R v Borkowski was a Crown appeal against sentence where the offender had entered pleas of guilty after committal and about 13 months after the offender's arrest, but the sentencing judge allowed a discount of 25% for the utilitarian value of the pleas. The CCA ultimately exercised its discretion not to intervene, but noted at [31]:

> As a matter of general practice, the maximum discount for the utilitarian value of the plea of guilty should be awarded only to those accused persons who plead guilty in the Local Court and continue that plea of guilty in the District Court. There may be a valid reason in the exercise of discretion for awarding the maximum discount where the plea of guilty does not occur until the District Court but that would be exceptional and arise from the peculiar factual situation in a particular case. The amount of the discount cannot depend upon the practice of the particular court based upon its administrative arrangements. It is difficult to see how, in the usual case, a plea of guilty on arraignment could justify a discount of more than about 15 per cent. There was nothing in the present case that justified a discount above that range.

Guideline judgments

I am not persuaded there is a need to change current practice. I do not support the adoption of a sentencing guideline scheme in New South Wales similar to that used in England and Wales. It is difficult to reconcile such a method with the instinctive synthesis approach described by the High Court in *Markarian v The Queen* (2005) 228 CLR 357.

Sentence indications

I do not support the reintroduction of a sentence indication scheme in New South Wales in view of the failure of the previous pilot program.

Thank you for the opportunity to comment on these Question Papers. I look forward to our roundtable meeting next week to discuss the sentencing review further.

Yours sincerely,

Judge Graeme Henson
Chief Magistrate